THE ADMINISTRATION OF MUSLIM LAW IN SABAH*

HISTORICAL INTRODUCTION

When William Pryer landed in Sandakan Bay on 11th February, 1878, he carried with him instructions from Baron von Overbeck which remained the guiding rule in the administration of British North Borneo. "It will be your duty," said Overbeck, "to cultivate friendly relations with the native authorities as well as with the people under your control, and any changes you may introduce should be effected gradually and with due regard to the existing customs and habits of the people. Conciliate them and secure their goodwill."[1]

The total population of Sabah at the end of 1970 was 654,943. Of these the Kadazans are the largest racial group consisting of about one-third of the total. The Muslims had arrived in Borneo after the earlier pagan tribes. It was the Malays who spread the faith in North Borneo although they themselves only settled in very small numbers on the west coast rivers. A larger Muslim community comprised of the Bruneis and Kedayans settled on the West Coast. These people had come from Brunei and enjoyed the racial prestige of their connection with a state with an ancient royal house. The largest Muslim group were the Bajaus who were settled on the east coast and in the Kota Belud area on the west. The Ilanuns and the Sulus originally from Southern Philippines also came to settle in North Borneo. Up the eastern rivers there were small scattered villages of Orang Sungei, people of the Dusun stock who had become Muslims. A few other minor Muslim tribes were scattered along the coasts.

The Muslims in British North Borneo before Merdeka were widely dispersed and numbered about 100,000 in all. They had little organization beyond that of the chief who controlled a few riverine villages. Over him was the absentee deputy of the Sultan of Brunei on the west coast or the Sultan of Sulu on the east. The early efforts of the British North Borneo Company in national administration have been thus described[2] :

> "North Borneo was verging on anarchy when the Europeans arrived It was the immemorial custom of the Muslims and the pagans to acknowledge the authority of a headman or chief. The Bajaus did

*The writer acknowledges with thanks the assistance given by Sabah Foundation in the research for this paper.

[1] K.G. Tregonning, *A History of Modern Sabah, 1881–1963*, University of Malaya Press, Kuala Lumpur, 1967, p. 103.

[2] *Ibid.*, p. 107–108.

this in their usual independent way, which meant that they did so only when they wanted to. The Dusun chief was little more than a slightly more powerful headman. In no case was the title hereditary; there was no suggestion of any paramount chief, no leader of the Ilanuns or other tribes; but nevertheless within these limits, such was the social order. This order was on the point of collapse. The east coast villagers had either fled inland, to flee still farther into the immensity of the jungle on the sight of any one else; or had been made captive or had turned pirate.... On the west coast the Pengerans appointed by the Brunei court, when in its prime battened on their river territories, or those parts which they could control, while their slave raids produced chaos in those parts they could not.

The first section of the territory to be free from Sulu was Sandakan Bay, while the Brunei overlords were removed from the Tempasuk area. In both places the newly established Residents endeavoured immediately to work through and strengthen the position of local headman and chief. The positions were still in existence, but the personal tyranny of the oppressors had rendered their authority negligible, few were willing to assume responsibility. The slow process of building up this native authority was to take many years. Prettyman on the west coast instituted a weekly meeting of Bajau, Ilanun and Dusun chiefs, but this was only a partial success. He continued to work through them and shortly before the granting of the Charter he called together all the chiefs along the Tempasuk River to enable him, so he said, "to name the headman in each village according to their nomination. These men are to be responsible for the conduct of their village, and to make reports of any thefts; they are to declare from time to time to their chiefs or to the Resident if there is any particular man for whom they cannot be held responsible. It is I think quite time to try and place some responsibilities on the headmen of the villages. The chiefs were equally shy in their way, but are more ready to assist themselves, now, so let us hope the headmen will do the same, although it will not be an easy matter at the beginning."

On the east coast the local chiefs had maintained their position and authority to a greater degree; for although pirate and slave raids had been fierce, the Sultan of Sulu had not the large retinue of noble followers which had enabled the Brunei monarch to plunge the more populous west coast rivers into anarchy. Pryer managed to win the support of the few chiefs in the then scantily inhabited bay, and with their help worked to spread peace and develop trade.

With the arrival of Treacher and the beginnings of a permanent and extensive system of government, the support of the native authorities was further recognised by the payment to the headmen

of a small salary, in most cases, five dollars a month. Sometimes this seemed a waste of money. "We are trying to govern the native through his headmen" Treacher reported to Dent, "but we find it very difficult to discover headmen of any influence, the population being so spilt up into antagonistic kampungs."[3] At times, in fact, this payment made confusion worse confounded, for on the death of a headman the village would disperse and rebuild in two or more vantage points, each leader claiming to be a headman and each, usually, receiving his five dollars a month. For over twenty years this subsidy was enlarged and extended, until it had reached the stage where any native who cared to build a couple of attap huts and call himself chief of them received government recognition and a monthly five dollar payment. This support for local institutions was not given because of any belief in the theory of indirect rule; the young Governors and the Court of Directors were faced with the task of keeping law and order in a large territory with an inadequate European staff. It was cheaper and it appeared satisfactory in its results, to pay the native chiefs. It was a practical step at overcoming a local difficulty, and not the realization of any theory on native administration."

In 1891 the Village Administration Proclamation (No. 2 of 1891) was enacted. This permitted the Resident or the District Officer under him with the approval of the Governor to appoint headmen. It was provided that any custom of the people as to right of nomination or succession would be respected. The hereditary principle had little support among the natives and the Proclamation merely legalized the practice whereby chiefs and headmen had been appointed after consultation with the local elders. The Proclamation also defined the responsibilities and powers of the appointed headmen. He had to notify the nearest magistrate or police officer of any notorious bad character; any robber or escaped prisoner; any outbreak of disease; or any crime or disturbance. He had to investigate any unnatural death or crime or any suspected offence and hold any suspected person referring him to the nearest magistrate. He had to lead his village in any resistance to attack. He had to allot village land, to supervise house construction and to encourage the villagers to be industrious. He had to suppress slavery. He was given various powers as a minor magistrate and was held responsible for providing food and transport on the written order of the district officer.

The proclamation was revised and amended by proclamations or new ordinances, particularly by the Village Administration Proclamation of

[3]Letter from W. Treacher to A. Dent, 26 May 1882, quoted in Tregonning *ibid.* p. 108.

1913 and the Native Administration Ordinance of 1937. Although the basic spirit and instructions remained the same, some administrative reforms were effected. In 1912 it was decided to divide the native chiefs into grades and to issue them with a special badge and *surat kuasa*. Their numbers were to be gradually reduced as their salaries were increased with the object of securing fewer but more efficient men. Annual meetings of the grade one chiefs were held in 1915, 1916 and 1917 but it then lapsed, to be replaced by the Native Chiefs' Advisory Council in 1935. The chiefs invited were mainly the grade one chiefs with the honorific title of *Orang Kaya Kaya* (O.K.K.). The Council met in 1936, 1937 and in 1941.

One of the major contributions of the native chiefs and headmen to the administration of the country was made through the native courts. From the beginning active participation by the chiefs in the administration of justice had been a feature of the government. Overbeck had laid down the rule that on the bench with the Resident there must always be a chief from the same tribe as the accused, while if the dispute was between people of different tribes, both were to be represented in this way. But quite early the Residents finding that they had too much work to do were allowing a great deal of judicial authority to courts composed of chiefs only.

The Village Administration Proclamation of 1891 empowered headmen to try all cases that involved natives only, except where the crime was murder, kidnapping or a major robbery. It provided that there should be in most cases a minimum of three headmen on the bench and the case should be heard in the presence of both accused and accuser.

In 1913 the whole system of native courts was reorganized by the Village Administration Proclamation, which incorporated the provisions of Proclamation 2 of 1891, 14 of 1903 and 3 of 1904 and Notifications Nos. 124 of 1893, 180 of 1903 and 55 of 1904. It was decreed that a native court should be constituted in every district. It was provided that, subject to any regulations that may be made under the Proclamation, the jurisdiction of the native courts shall extend to the hearing and adjudication of all matters arising exclusively from the breach of laws and customs (religious, sexual or general) of the natives of the districts, provided that no chief or headmen shall at any session, act alone so as to hear and adjudicate as aforesaid. In the case of a sexual offence the court was to be guided by the customs of the woman's race. The right of appeal lay through the District Officer and the Resident. It was also provided that the Imam or Kathi of the District appointed to adjudicate under Mohammadan law in religious, sexual or ceremonial laws shall be deemed to be a chief appointed under the Ordinance.

Provision for the proper observance by Muslims of certain religious and civil customs had been made by the Muhammadan Customs Proclamation, 1902 (Proclamation No. XI of 1902). This provided that it

shall be lawful for the Kathi or Imam of any district to make rules for the proper observance of public worship by Mohammadans and for the levy of fines for any breach of such rules, provided that no such rules shall have effect until they have been approved by the Governor and published in the Gazette. Provision was made for the registration of Muslim marriages, Muslim divorces and annulment of Muslim divorces by the Kathi or Imam. Section 6 provided that the amount to be paid as marriage dowry shall not exceed the sum of eighty dollars in the case of an unmarried woman and forty dollars in the case of a woman who is a widow or who has been previously married. Section 7 provided that the portion of the dowry which is customary to pay to the parents or guardian of any woman on marriage shall in no case exceed one-half of such dowry but nothing in the section shall prevent the enforcement of the Mohammadan custom by which a double dowry can be demanded from any man who has in contravention of native custom obtained a woman in marriage. The Mohammadan Customs Proclamation 1902 was replaced by the Mohammadan Customs Ordinance, 1914, which in turn was repealed and replaced by the Native Administration Ordinance, 1937.

It would appear that in the early days Muslim law was administered in North Borneo separately by the Kathis or Imams, who were however deemed to be chiefs appointed under the Village Administration Ordinance, 1913. Subsequently however the administration of Muslim law came to be absorbed in the village administration and in the native court. In 1937 the Native Administration Ordinance replaced the Village Administration Ordinance, which it was stated, no longer represented the existing practice, and it also incorporated the provisions of the Mohammadan Customs Ordinance. The Ordinance also included provisions –

(a) to enable native authorities to be declared and given such powers as the Governor may think fit;
(b) to amplify the powers of chiefs and headmen;
(c) to set out more clearly the powers of native courts;
(d) to enable the jurisdiction of native courts to be extended.

THE NATIVE ADMINISTRATION ORDINANCE, 1937

The Native Administration Ordinance, 1937, dropped the expression "Kathis or Imams" which had been used in the earlier Mohammadan Customs Proclamations and Ordinances and instead referred only to "Imams". "Imam of the District" was defined as the Imam to whom a certificate had been issued by the Resident stating that he is recognised as the Imam of the district by the Mohammadan community thereof. The Imam was given power to register Mohammadan marriages (s. 32), Mohammadan divorces (s. 33) and annulments of Mohammadan divorces (s. 33 (iv)). He was also given power to make rules for the proper observance of public worship by Mohammadans and for the levy of fines for the breach

thereof, provided that no such rules shall have effect until they have been approved by the Governor and published in the Gazette (s. 31). It was provided that the *herian* to be paid on any Mohammadan marriage shall not exceed the sum of eighty dollars in the case of an unmarried woman and forty dollars in the case of a woman who has been previously married (s. 34).

Power was given to the Resident, with the approval of the Governor, to establish within his Residency such native courts as he shall think fit and it was provided that the territorial jurisdiction of each Native Court shall be such as the Resident may direct. The jurisdiction of the Native Courts was provided as follows:—

(a) in cases arising from the breach of any native law or custom in which all the parties were natives, and

(b) in cases arising from the breach of native law or custom, religious, matrimonial or sexual, if the sanction of the District Officer has been obtained to the institution of the proceedings, where one party is a native, and

(c) where two members of the Court are Mohammadans, in cases arising from the breach of Mohammadan law and custom in which all the parties are Mohammadans;

(d) in other cases if jurisdiction is conferred on it by this or any other Ordinance (s. 17).

It was provided that in any matrimonial or sexual case where the parties are of different sex and not of the same race the Native Court shall be guided by the law or custom of the woman's race. (s. 17(ii)).

The Imam of a district could be appointed to be a member of the Native Courts in such district. It was provided that no native court shall have power to adjudicate unless composed of two or more members. In every case arising from the breach of native law or custom at least one member of the court shall belong to the race whose law or custom is alleged to have been broken. Where, however, the case arises from a breach of the Mohammadan law and custom in which all the parties were Mohammadans, at least two members of the court must be Mohammadans. The judgment of the native court shall be that of the majority of the members and where their opinion is equally divided the suit or prosecution shall fail.

All proceedings of a Native Court are subject to scrutiny by the District Officer, who if he considers that such proceedings are irregular, improper or unconscionable may quash or vary the proceedings or direct a rehearing. No sentence of imprisonment inflicted by any Native Court shall have effect unless such sentence has been endorsed by the District Officer. Appeals from the order of the Native Court are heard by the District Officer, from whom there is a further appeal to the Resident, with a final appeal to the Governor.

THE *UNDANG-UNDANG MAHKAMAH ADAT ORANG ISLAM* [*UNDANG-UNDANG* NATIVE COURT]

It appeared that the Native Courts were active and from 1920 onwards some 2000 cases, two-thirds of them on the west coast, were heard annually. Occassionally when a chief appeared with the stature of Pengeran Abbas, whose judgements were acknowledged for nearly thirty years (1884—1913) among a large number of villages in the Padas area or Mohamed Saman in the nineteen thirties, the practice of sending them on circuit was instituted.

At the 1936 Native Chiefs' Conference it was moved by the chief from Beaufort (O.K.K. Mohamed Saman) that the Government should have a book of Muslim customs printed for the guidance of native courts. He had himself written a book based on a list of customs drawn up in 1921 by Haji Omar which the Beaufort natives were still using. The Council unanimously adopted this draft and although the rules have not been printed as a code by the Government, it was sent to the various chiefs for their information and guidance only, in late 1936.

The *Undang-undang* Native Court (reproduced in the Appendix) also called the *Undang-Undang Mahkamah 'Adat Orang Islam* began with an advice to those who sit in judgment in the Native Court that they should dispense justice and equity remembering that as judges they are the vicegerents (*wakil*) of Allah, as is stated in the Holy Quran. They should forget kith and kin and strive to do justice without fear or favour. The matters dealt with in the Undang-undang are as follows:—

Preface	— Duties of the person hearing the case (*Pengadil* or *Kadzi*)
Section 1	— Entering a house without permission.
Section 2	— Entering a house with intent to fight or armed.
Section 3	— Fighting at a wedding ceremony.
Section 4	— Illegal intercourse between two married persons.
Section 5	— Illegal intercourse between a bachelor and a married woman.
Section 6	— Illegal intercourse between a married man and an unmarried girl, also right of the wife and children.
Section 7	— Illegal intercourse between two unmarried persons.
Section 8	— Illegal intercourse where woman become pregnant.
Section 9	— Where there is illegal intercourse and man is too poor to pay *berian.*
Section 10	— Kidnapping a woman.
Section 11	— Interfering with woman who is betrothed to another.
Section 12	— Incest with daughter.
Section 13	— Illegal intercourse with wife's sister.
Section 14	— *Berian* not to exceed $80.00 for unmarried girl and $40.00 for *janda.*

Section 15 – Repudiation of wife by husband – maintenance and division of *harta spencarian.*
Section 16 – Disobedience of wife.
Section 17 – Divorce by three *talak.*
Section 18 – Failure to maintain and desertion..
Section 19 – Husband leaving country.
Section 20 – Assaulting a woman with intent.
Section 21 – Holding breast of woman without consent.
Section 22 – Illegal intercourse with girl under age.
Section 23 – Impersonating the husband.
Section 24 – Alienation of affection.
Section 25 – Pimp or procurer.
Section 26 – Adoption – persuading child to leave adopted parents.
Section 27 – Free mixing between sexes.
Section 28 – Betrothal.
Section 29 – Religious law to be followed in marriage, divorce and inheritance.
Section 30 – Outraging modesty of girl.
Section 31 – Outraging modesty of man.
Section 32 – Punishment for second or subsequent offence.
Section 33 – Offences of children.

The *Undang-Undang* Native Court therefore while advocating that the Muslim law should be followed in matters of marriage, divorce and inheritance, sets out a number of Malay customs relating to sexual offences, betrothal and division of property on divorce. It is interesting to note that the *Undang-Undang* refers to the *'Kadzi'*, a post which appears to have ceased to exist or to be abolished by the time of the enactment of the Native Courts Ordinance, 1937.

THE MUSLIMS ORDINANCE, 1953

The Native Administration Ordinance, 1937 was included in the reprint of the Laws of North Borneo, 1948. It was subsequently amended by the Native Administration (Amendment) Ordinance, 1950 and replaced by the Native Courts Ordinance, 1953. The provisions relating to Muslim worship, the registration of Muslim marriages, divorces and annulment of divorces and the *berian* were removed and re-enacted in a new Muslims Ordinance, 1953. The Native Court was however given jurisdiction in cases arising from the breach of Muslim law and custom in which all the parties are Muslims, but such cases could only be heard where at least two members of the Court are Muslims. The Resident could authorise any *Imam* exercising functions within the territorial jurisdiction of any Native Court to be a member of such court.

The Muslims Ordinance, 1953 in the main re-enacted the provisions of the Native Court Administration Ordinance 1937 relating to the power of the Imam to make rules as to Muslim worship and the registration of Muslim marriages, divorces and annulment of divorces. In regard to *berian*, the Native Administration (Amendment) Ordinance, 1950 had amended the provision to read that the *berian* to be paid on any Mohammadan marriage shall not exceed such sum in the case of an unmarried woman and in the case of a woman who has been previously married as the Governor may prescribe for the area within the Colony in which such marriage is to take place. The Muslims Ordinance, 1953, gave power to the Governor to make rules *inter alia* for prescribing the maximum sum to be payable as *berian* in any district or area on any Muslim marriage in the case of an unmarried woman or a woman who has been previously married.

APPEALS FROM NATIVE COURTS

The provisions for appeal from the Native Courts were amended in 1958 by the Native Courts (Amendment) Ordinance, 1958, which provided that an appeal shall lie from any order of a Native Court to the District Officer of the district in which such Native Court is established. The District Officer may, if he thinks additional evidence to be necessary or that any witness shall be recalled, either take such evidence himself or direct it to be taken by the Native Court and may require the aid of such persons as he shall think fit as assessors to assist him. From the District Officer an appeal may be brought to the Native Court of Appeal (a) as of right on any ground of appeal which involves a question of native law or custom alone; (b) with the leave of the Resident on any ground of appeal which involves a question of fact alone or mixed law and fact or against a sentence of imprisonment. The Native Court of Appeal is composed 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 by the Governor in each case to be a member of the court, with the proviso that no native chief shall sit as a member of the Native Court of Appeal on hearing of any appeal in any matter in which he has a personal interest or if he has been a member of the Native Court from which the appeal was brought. Prior to the exercise of the powers of the Native Court of Appeal, the President may and at the request of any other member of the Court, shall request the Native Court or District Officer to furnish a report in writing amplifying any order upon the case either generally or giving an opinion upon any point arising upon the consideration of the appeal and the Native Court or District Officer shall furnish the report and serve a copy of it upon all parties to the appeal. The Native Court of Appeal may also in its discretion summon and hear witnesses as to the existence of any native or custom affecting the matter for decision and shall record its opinion thereon.

CASES ON MUSLIM CUSTOMARY LAW

In the case of *Damrah bin Karim* v. *Tamiah binte Darani* (1960)[4] the facts were that Tamiah was the sister-in-law of Damrah. The parties were Bajaus. As a result of their sexual relations Tamiah gave birth to a girl who died later. Following a complaint from the Imam of Kampong Gayan the two appellants were charged for committing a sexual offence. It was not clear whether the offence was incest or adultery. Both the appellants admitted to having committed adultery and asked to be allowed to marry. Damrah was sentenced to one month's imprisonment and a fine of fifty dollars or in default one month's imprisonment. Tamiah was sentenced to a similar fine and a month's imprisonment. Both were ordered to provide a buffalo as compensation to their kampung. Before the District Officer both appellants argued that as they were found guilty of adultery not incest the sentence of imprisonment was excessive. They also stated that they had asked the Native Court for permission to marry. Having heard expert evidence the District Officer stated that according to Muslim *adat* Damrah could only marry Tamiah if he divorced his wife. He upheld the decision of the lower court. On appeal to the Native Court of Appeal, Smith J. delivering the judgment of the court held that it would meet the justice of the case if the appellant Damrah gave to his wife Ajimah binte Doraman a small buffalo valued at about fifty dollars instead of giving a buffalo to the village. The appellant Tamiah was not required to pay any compensation. To that extent the appeal was allowed and sentence varied. The court appeared to have been swayed by the opinion on the Bajau native custom from O.K.K. Laiman Diki, a member of the court. The judgment appears however to be contrary to the statement in s. 13 of the original *Undang-Undang* Native Court, to which no reference appears to have been made. The Bajau custom would appear to follow the Islamic law more closely, as under Islamic law, a person would be allowed to marry his wife's sister, after he has divorced the wife.

In the case of *Re the application of Sipang bin Logong* (1960)[5] the facts were that Samah binte Gantubang and her stepfather, Lantap bin Gampang, had been convicted of incest. The Native Court refused them permission to marry. Subsequently Sipang bin Longong, the uncle of Samah appealed on behalf of Samah to the District Officer against the refusal of the lower court to permit the parties to marry. Having heard the expert evidence of O.K.K. Abdul Rashid, the District Imam of Kota Belud, the District Officer dismissed the appeal. On appeal to the Native Court of Appeal, the appeal was allowed. Smith J. delivering the judgment of the

[4] *Cases on Native Customary Law in Sabah* (1953–1972) ed. by Tan Sri Datuk Lee Hun Hoe, Kota Kinabalu, 1973, p. 17.

[5] *Ibid* p. 18.

court said, "It is a fact that by native custom a marriage is not permissible between a man and two women who are related as long as one of the women is still married. When the Native Court gave its judgment on the 28th May, 1959 Lantap was still married to Riat binte Adil who is the mother of Samah binte Gantubang. But on the 20th July 1959 Lantap and Riat were divorced – see the Certificate of Muslim divorce. That being so, there is now no obstacle to the marriage of Lantap and Samah for the purpose of legitimizing the child Madis." In this case the Native Court of Appeal appears to have given judgment against the Islamic law for the Holy Quran prohibits marriage with a step-daughter, if a man has consummated a marriage with the mother. The *Undang-Undang* Native Court does not appear to deal specificaly with this case unless "*anaknya*" (his child) in paragraph 12 includes a step-child. However, the District Imam, Kota Belud, appears to have given the correct advice but this was rejected by the Native Court of Appeal.

The case of *Matusin bin Simbi* v. *Kawang binte Abdullah* (1953)[6] did not arise from an appeal from a native court. In that case there was a dispute as to how the estate of the deceased, a Brunei Malay, should be distributed. The deceased had married the respondent, a Muslim woman of Bugis extraction and the couple had lived for forty years with people of Bajau race and custom. They had no children of their own but had adopted two boys and a girl. The appellant was one of the three children of the deceased's sister. The learned trial judge had referred to s. 14 of the Procedure Ordinance, 1926, which provided that claims on intestacy shall be determined by the racial law of the deceased, unless the contrary is expressed in any other Ordinance. In his judgment he stated that it was not easy to decide what was the racial law of the deceased, and that he considered that the justice of the case demanded that the widow should inherit the estate of her husband in accordance with the custom of the people with whom they had been living for the last forty years, that is to say, the Bajaus. He ordered that the whole estate should go to the widow, the respondent. On appeal the Court of Appeal held that the racial law "which should be applied within the meaning of the Procedure Ordinance could only be the Mohammadan law of intestacy, namely the *Hukum Shar'ah*, notwithstanding that he had associated himself with the Bajau race for many years. The *Hukum Shar'ah* must however be applied subject to s. 7 of the Civil Law Ordinance, which enacts that adopted children are to be treated as legitimate children." The Court of Appeal ordered half of the land belonging to the deceased to be given to the widow as *pencharian* and the other half to be divided in accordance with Islamic law.

In *Akiff bin Samat* v. *Abdul Samat bin Noor Mohamed* (1961)[7] it was held by the Native Court of Appeal that the estate of the deceased should

[6] *Ibid* p. 1.

[7] *Ibid* p. 27.

be divided according to Muslim law and custom, subject to entitlement of the adopted children as legitimate children.

AMENDMENTS IN 1961

The Native Administration Ordinance originally contained a definition of native as meaning "any aboriginal inhabitant of the Malay Archipelago, comprising the States of North Borneo, Brunei and Sarawak, the Straits Settlements, the States of the Malay Peninsula, the Netherlands Indies and the Sulu group of the Philippine islands and the children of such an inhabitant by any union with any native or alien". This definition, was omitted in the Native Courts Ordiance, 1937 but in 1959 by the Native Courts (Amendment) Ordinance of that year, it was provided that for the purposes of s. 5 of the Ordinance (which deals with the jurisdiction of the Native Courts) the word "native" shall have the meaning assigned thereto in the Interpretation (Definition of Native) Ordinance and shall further include any person within North Borneo one at least of whose parents was a member of a people indigenous to Brunei, the Federation of Malaya, Singapore, the Cocos-Keeling Island, Indonesia or the Sulu group of the Philippine islands."

The problems of the administration of native law and of Muslim law were discussed at a number of Native Chiefs Conferences and it appeared that the Native Chiefs came to the view that the Native Courts should only exercise jurisdiction over Muslim law in so far as it is embodied in the native law or custom applicable to natives. As a result in 1961 the Native Courts Ordinance was amended to remove from the Native Courts jurisdiction in cases arising from Islamic law in which the parties are not natives. The Native courts would however continue to have jurisdiction in cases arising from any breach of native law or custom in which all the parties are natives and will apply Islamic law in so far as it is the native law or custom of the parties. The Native Courts (Amendment) Ordinance, 1961, was amended firstly by deleting the definition of "Imam" contained in s. 2 thereof, by deleting the provision enabling the Resident to authorize an *Imam* to be a member of a Native Court, by deleting the provision giving jurisdiction to the Native Court in cases arising from the breach of Muslim law and custom in which all the parties are Muslims and consequentially deleting the provision requiring at least two members of the court to be Muslims when dealing with such cases. The Muslims (Amendment) Ordinance, 1961, repealed the provisions giving the Imam of the district power to make rules relating to Muslim worship and giving jurisdiction to the Native courts to deal with offences against such rules.

The effect of these amendments was summarised by Silke J. in the case of *Haji Abdullah bin Damar* v. *Rupah binte Inal* (1966)[8] as follows:—

> "The net effect in the view of this court, is that other than in matters 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 in which the court sits 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 solely from breach of Muslim law and custom."

In that case the appellant had married the respondent in 1928. There was a divorce in 1933. They remarried in 1946 but there was a further divorce in 1964. The question of distribution of *pencharian* following the second divorce came up for determination. The Native Court had made an order of distribution which had been confirmed by the District Officer and the sole ground of appeal was that the order of the distribution made by the Native Court was wrong in that it did not follow Muslim law exclusively. The Native Court of Appeal dismissed the appeal, in effect agreeing that the property was *pencharian* and was properly distributed.

ADMINISTRATION OF ESTATES

Under the Administration of Native and Small Estates Ordinance (Cap. 1) it is provided that when a petition for distribution relates to the estate of a deceased native, the Collector of Land Revenue shall refer the petition to the Native Court constituted under the Native Courts Ordinance, unless in his opinion the estate is of such magnitude that it should be dealt with under the Probate and Administration Ordinance in which event the Collector shall send the record of the case and his finding to the High Court. Section 10 of the Ordinance provided that after the hearing the Collector of Land Revenue (or the Native Court) shall whenever possible make an order for distribution and in making such order shall give effect to any division of the estate agreed on by the beneficiaries and shall, where no such agreement exists, distribute the estate according to the law or custom having the force of law applicable to the deceased. This provision was amended in 1960 by the Intestate Succession Ordinance 1960, which provided that after hearing the application the Collector (or the Native Court) shall, whenever possible, make an order for distribution and in making such order shall give effect to any division of the estate agreed on by any surviving spouse, issue and parents, and shall, where no such agreement exists

(a) in the case of a native or a Muslim distribute the estate according to the law or custom having the force of law applicable to the deceased; and

[8] *Ibid* p. 65.

(b) in any other case, distribute the estate according to the will of the deceased or if there be no will distribute the estate according to the Intestate Succession Ordinance, 1960.

In 1961 the Administration of Native Estates Ordinance was amended in a number of important particulars. Firstly, the definition of "native estate" was amended by deleting therefrom the words "or of a deceased Muslim subject to the jurisdiction of native court under paragraph (c) of sub-section (1) of section (5) of the Native Courts Ordinance". The effect of this is that the Native courts no longer have jurisdiction in cases where the deceased is a Muslim but is not a native of Sabah; such cases will be dealt with by the Collector of Land Revenue. Secondly, s. 10 of the Ordinance had again been amended to provide that after hearing the application the Collector shall whenever possible make an order for distribution and in making such order shall give effect to any division of the estate agreed on by any surviving spouse, issue and parents, and shall, where no such agreement exists, distribute the estate according to the will of the deceased or if there be no will, distribute the estate in accordance with the Intestate Succession Ordinance, 1960. The effect is to make the position with regard to the distribution of the estates of Muslims (who are not natives of Sabah) uncertain for the Intestate Succession Act which originally provided that "the Ordinance shall not apply to the estate of any native or any Muslim subject to the jurisdiction of a Native Court under paragraph (c) of sub-section (1) of section (5) of the Native Courts Ordinance" was itself amended to delete the words "subject to the jurisdiction of a Native court under paragraph (c) of sub-section (1) of section 5 of the Native Courts Ordinance". Thus it is clear that the Intestate Succession Ordinance does not apply to the estate of any Muslim nor does the Ordinance affect any rules of Native law and custom or of Muslim law in respect of the distribution of the estate of any Native or any Muslim. It is not however, clear who can make the distribution order – presumably it is the High Court. Finally the Administration of Native and Small Estates Ordinance was amended to provide that "where an application is referred to the High Court, it shall as far as possible follow the procedure prescribed in sections 7 to 18 inclusive of the Ordinance and shall exercise exclusively in lieu of the Collector, the authority granted therein to the Collector and shall make a distribution order having regard to the provisions of sub-sections (2) and (3) of section 1 of the Wills Ordinance and the law or custom having the force of law applicable to the deceased." Thus provision is made in the case of a deceased native (including a Muslim native) but this provision does not appear to apply to Muslims who are not natives.

In *Mohamed Arshad bin Rahim* v. *Rimboi binte Ujok* (1963)[9] the Native Court of Appeal held that it is not contrary to native custom and law to dispose of property by will and that the owner of *pencharian* property was at liberty to dispose of such property at the owner's discretion. It might be noted that the Wills Ordinance (as amended in 1961) reads in s. 1(2) and (3) as follows:—

(2) Nothing in this Ordinance shall affect the validity of any will made by any native or Muslim according to native law or custom or Islamic law as the case may be.

(3) Nothing in this Ordinance contained 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."

The Court in *Mohamed Arshad bin Rahim* v. *Rimboi binte Ujok* considered the validity of the will from the point of view of the native custom but did not consider the provisions of the Islamic law. In a recent case, *Awang Bakar bin Awang Dewa* v. *Dayang Jakian binte Awang Ismail*[10] however, 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.

The Native Court also has power to deal with cases of succession and disputes as to property.

In *Ariff bin Samat*, v. *Abdul Samat bin Noor Mohamed* (1971)[11] the facts were that one Hafsah binte Gader died in 1957 leaving certain property. The respondent was her husband. He obtained an order of succession to the deceased's property under Muslim law. The appellant applied for a share in the estate, claiming that he was the natural son of the deceased but the evidence showed that he and his sister, Kumit, were the adopted children of the deceased and the respondent. The Native Court originally excluded the appellant and Kumit from the estate as the court was not satisfied that the respondent and his wife, Hafsah, had adopted the appellant and his sister. On appeal, the District Officer sent back the case to the Native Court with a direction that both the appellant and Kumit be considered for their rightful share in the estate of their deceased foster mother, Hafsah, in accordance with Muslim law and local Muslim *adat*. The Native Court reheard the case and made an order for the division of the lands of the deceased to the respondent, to the appellant and to Kumit, and also to others of the deceased's relatives. The property other than land was divided between the respondent and the other

[9] *Ibid* p. 48.

[10] [1975] 2 M.L.J. p. 256.

[11] Cases on Native Customary Law in Sabah, *op. cit.*, n. 4, p. 128.

relatives. Instead of appealing to the District Officer the appellant appealed direct to the Native Court of Appeal his complaint being that the native court was wrong in giving any share of the estate to the other relatives and in excluding him and Kumit from any share in the moveable property. The Native Court of Appeal held that it could not hear the appeal, as the appellant should have appealed first to the District Officer.

In the case of *Dayang Minah binte Liudin* v. *A. Sapiudin* (1968)[12] the facts were that one Awang Besar owned a piece of land. He had two wives. By his first wife he had two daughters, namely Onai and Piudah. The appellant was the daughter of Onai. By his second wife he had three daughters and a son, Awang Sapiudin. In 1948 the Native Court decided the question of succession in favour of Awang Sapiudin. After the death of Awang Sapiudin, the land was left to his children. The appellant claimed to have rights to the land and it appeared that the Native Court gave judgment in her favour, which was confirmed by the District Officer. The Native Court of Appeal however held that as the question of succession had been decided by the Native Court in 1948 in favour of Awang Sapiudin, the matter was *res judicata* and the lower courts should not have assumed jurisdiction.

In the case of *Ining binte Hassan* v. *Isin bin Hassan* (1969)[13] the appellant was the sister of the respondent. Prior to their father's death the father had indicated the division of his property to his children. In 1948 the Native Court granted succession to a piece of land to the respondent. The appellant was not happy with the share allotted to her and claimed a share in the land given to the respondent. The Native Court in 1966 ordered that she be given a half share in the land. On appeal however the District Officer allowed the appeal on the ground that the matter of succession had been decided in favour of the respondent by the Native Court in 1948 and this decision was upheld by the Native Court of Appeal.

In the case of *Hajat bin Saki* v. *Jaunah binte Sekah* (1971)[14] the appellant claimed a right to land owned by his mother who died in 1951. There was evidence that his mother had sold the land to the respondent in 1941. After her father's death the appellant's mother transferred the land to the respondent. It appeared that the respondent claimed the land in the Native Court in 1954 and she succeeded and the land was transferred to her. In 1969 the Native Court consisting of different members decided that as the court did not know the reasons in the earlier case as to how the respondent was able to claim the *waris* it must be held that the respondent had no right to succeed to the land as she was not the *husbah*. However, on appeal the District Officer allowed the appeal on the ground that the

[12] *Ibid* p. 84.
[13] *Ibid* p. 92.
[14] *Ibid* p. 135.

Native Court was wrong to interfere with the decision of the earlier Native Court, and the decision of the District Officer was upheld by the Native Court of Appeal.

In *Asang bin Lintubun* v. *Yatun bin Datu Bidin* (1967)[15] the facts were that Riyaan informed her father, the respondent, that the appellant had sexual intercourse with her. As a result the respondent approached the appellant's father and they agreed to an engagement for their children, despite the appellant's disagreement. Later the appellant refused to go through with the marriage. The Native Court decided that the appallent must marry Riyaan and pay the dowry. The District Officer upheld the decision of the Native Court. The Court of Appeal held that according to Muslim law the consent of an adult person was necessary to the validity of a marriage. Regardless of the question of public policy, it was contrary to native custom and Muslim law to force a man to marry against his will. The two members of the Native Court of Appeal (other than the President) were of opinion that it was not the native custom to force children to marry against their consent. But it is clear that under customary law the man should be asked to marry the girl and if he refused he should be fined or sent to prison (see paragraph 7 of the *Undang-Undang* Native Court). Here the man appears to have been let off scot free. It may be queried whether the Native Court could apply the pure Islamic law or should rather apply the native law and custom.

The above case was followed in the recent case of *Ahmad bin Sapalu* v. *Jenediah binte Asmaul*[17] 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 the 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 *Tiamsah binte Olod* v. *Kanali bin Gantarum* (1972)[18] the parties were husband and wife. The wife wanted to divorce her husband. The *Imam* told her she would have to return the dowry of $150.00. This she did and in accordance with Muslim custom *(sic)* the *Imam* granted the appellant a divorce. Provision for maintenance of a child of the marriage was made. The parties then entered into an agreement as to the distribution of various properties. Subsequently the husband refused to abide by the agreement. The wife applied to the Native Court which dismissed her application on the ground that a female asking for divorce would have to

[15] *Ibid* p. 76.

[16] [1975] 2 M.L.J. p. 260.

[17] *Cases on Native Customary Law in Sabah op. cit.*, n. 4 at p. 164.

[18] Cases on Native Customary Law in Sabah op. cit. n. 4 at p. 164.

pay back her dowry and had no right to claim for any properties from her husband. This order was confirmed by the District Officer. On appeal, the Native Court of Appeal held that the Native Court was wrong to say that the wife had no right to claim any property from the husband. As far as the *berian* was concerned, the wife must return it to the husband. As to property the wife had a right to claim in respect of the *pencharian*, although she could not claim the husband's *pesaka*. The respondent was therefore ordered to abide by the agreement and give the appellant her share of the property.

AMENDMENTS TO *UNDANG-UNDANG* NATIVE COURT

What appears from the cases to be the effect of the amendments in 1961 is that the Native Courts continued to deal with questions and disputes between Muslim natives, but they dealt with such questions and disputes on the basis of native law and custom and were not required to refer to or apply the Islamic law. It is significant that no reference was made in any of the cases to the *Undang-Undang* Native Court. However the *Undang-Undang* was considered by a committee on customary laws of the *Bumiputra* appointed by the Native Chiefs Conference in 1966. The recommendation of the Committee were as follows:—

Section 1 — *Entering a house without permission.*
— The fine to be increased from $10/- to $50/-.

Section 4 — *Illegal intercourse between a married man and a married woman.*

It had been agreed at the Native Chief's Advisory Council in 1941 that the amount for "*tebus talak*" should not be fixed but should be left to the agreement of the parties.

Section 5. Illegal intercourse between a bachelor and a married woman.

(a) The man to be fined $100/- or a month's imprisonment.
(b) The woman to be fined $80/- or a months's imprisonment.
(c) The man to give under the *adat* 2 to 3 buffaloes because of the shame to the husband and his family. If he cannot pay this *adat* he can be sent to prison at the discretion of the court. The *adat* to be imposed at discretion of husband of the woman.
(d) The woman to pay "*berian*" which was given by the husband at the time of her marriage and to pay *adat* "one buffalo". If she does not pay, she can be sent to imprisonment. The *adat* to be imposed at the discretion of the husband.

Section 6. Illegal intercourse between a married man and an unmarried woman.

(a) The man should be fined $100/- or in default one month's imprisonment.

(b) the woman should be fined $80/- or in default one month's imprisonment.

(c) The man should pay under the "*adat*" to his wife one buffalo, because of the shame to her family.

(d) The man and the woman should be asked to marry and if they refuse, they should be sentenced to imprisonment for 3 months.

In regard to the *berian* and other "*adat*", this is to be left to the father of the girl and to be decided by the Ketua Kampong.

It had earlier been agreed at the Native Chief's Conference in 1941, that the amount for "*tebus talak*" (if the wife asks for a divorce) should not be fixed but should be left to the agreement of the parties.

Section 7. Bachelor living with spinster.
It was recommended that the fine be increased.

Section 8. Man causing a woman to be pregnant.
It was recommended that the fine be increased.

Section 9. Where man is too poor to pay berian on marriage (after illegal intercourse).
It was agreed that the Ketua kampong should discuss with the parents and relatives of the girl before the marriage, but if the father does not wish to give his consent, the wife can be married with a *wali hakim*.The *berian* should be entered in the register as a debt (*berhutang*).

Section 10. Forcing a girl to elope,
It was recommended that the fine be increased.

Section 12. Incest (Sumbang).
It was agreed that the punishment according to Muslim law should be death but this could not be enforced.

On further discussion it was agreed that the degrees of *Sumbang* should be differentiated as follows:—

First degree — Incest between father and daughter or *vice versa.*
Second degree — Incest between brother and sister of the same parentage.
Third degree — Incest between uncle and niece or *vice versa.*
Fourth degree — Incest between step-father and step-child or *vice versa.*
Fifth degree — Other types of incest so considered by the Native Court.

The punishments recommended were –

(a) For the first and second degrees – the parties to be imprisoned for a maximum of 3 years and to pay to the kampong 2 buffaloes or $1,000/- and fine at the discretion of the Court.

(b) For the third degree – imprisonment for a maximum of 2 years and to pay to the kampong 1 buffalo or $510/-.

(c) For the fourth degree – imprisonment for one year and payment to kampong of 1 buffalo or $300/-.

It was to be left to the discretion of the Court whether to order the parties to leave the kampong.

Section 13 – Illegal intercourse with sister-in-law.
The Committee distinguished three types of such offences.

(a) with the sister of wife of same parentage;
(b) with the sister of wife of same father;
(c) with the sister of wife of same mother.

It was agreed that the punishment should be as follows:–

(1) The man to pay a fine of $300/- or 3 months' imprisonment.
(2) The woman to pay a fine of $200/- or 2 months imprisonment.
(3) The man to be allowed to marry the girl, after he had divorced his wife
(4) If there should be any child, the man has to pay maintenance until it reaches the age of 7 years.

Section 14 – Berian
It was agreed that the berian should be –

(a) $100/- for a girl who has never been married; and
(b) $50/- for a woman who has been married.

Section 18 – Maintenance.
Although the original section referred to the *Mahkamah Kadzi* it was agreed that the matter could be dealt with by the *Imam* or the Native Court. The amount of maintenance unpaid can be ordered to be paid in such amount as the Native Court things fit and if the man does not pay it, he can be sentenced to imprisonment. If he has property, it can be given to the wife, especially if she has a child.

Section 20 – Assault on woman with intent.
It was agreed that the man should be fined $50/- and also as *sogit* to the woman one buffalo. If he does not have a buffalo, the Native Court will assess the value of a buffalo in the place and order him to pay it, and if he fails to do so, he can be sentenced to imprisonment.

If the woman is married, the man is punishable with imprisonment for 3 months and he is ordered to pay one or two buffaloes. If he

cannot give the buffaloes, their value will be assessed and if he cannot pay he can be sentenced to imprisonment.

Section 21 – Holding the breast of a woman or girl.
If the girl is unmarried, the man should be fined $50/- and also ordered to pay *sogit* of 1 buffalo to the girl. If he cannot give the buffalo, the value will be assessed and if he cannot pay the amount, he can be sentenced to imprisonment.
Section 24 – Enticing married woman who is then divorced by husband.
The man is to be fined $50/- and to pay one buffalo. If he cannot give the buffalo, he has to pay the assessed value and if he does not do so, he can be sentenced to imprisonment.

Section 25 – Pimping.
If the woman concerned is unmarried, the pimp may be sentenced to imprisonment for 1½ months or to pay a fine of $150/-.

If the woman concerned is married, the pimp may be sentenced to imprisonment for 3 months or to pay a fine of $300/-.

The two persons involved should also be punished. For example, the man to be fined $100/- if the woman is unmarried and $300/- if the woman is married.

The general effect of these suggested amendments appears to be to emphasise the customary aspect of the law enforced in the Native Courts and to assimilate the position of Muslims to that of the non-Muslims. The law applicable is clearly the customary law. The Islamic law is applied only in so far as it forms the customary law.

This is clearly what was intended by the amendment to the Native Courts Ordinance in 1961, which removed the power of the Native Court to exercise jurisdiction "in cases arising from the breach of Muslim law and custom in which all the parties are Muslims". The question arises who then has jurisdiction in cases arising from the breach of Muslim law. Under the Muslims Ordinance, the Imam has only power to register Muslim marriages, divorces and annulments of divorces and even his power to make rules for the proper observance of public worship was taken away in 1961.

FUTURE ADMINISTRATION OF MUSLIM LAW

There appears to be a gap in the administration of the Muslim law in Sabah and this gap appears to have only been partially filled by the enactment of the Administration of Muslim Law Enactment, 1971. The Enactment provides in Part IX for a number of specific offences, the erection or dedication of mosques without permission, failure to report a marriage or divorce (not strangely enough a failure to report a revocation of divorce), and non-payment of *zakat* or *fitrah*. Failure to maintain a wife or a child is

also an offence under s. 40 of the Enactment. There are also offences in relation to conversion to the Muslim religion not in accordance with the provisions of the Enactment (Part VIII). Part VI also creates duties in relation to the registration of marriages, divorces and annulments or revocations of divorce. Section 36 of the Enactment provides that "no marriage shall be solemnised under this Enactment if the man to be wedded is married to any person other than the other party to the intended marriage except a written consent of the person to whom he is wedded is obtained".

Section 49 provides that "Every person who contravenes any provision of this Enactment or any rules made thereunder shall where no other penalty is provided, be liable to a fine not exceeding five hundred dollars or to imprisonment for a term not exceeding two months or to both."

Section 50 of the Enactment provides that notwithstanding the provisions of any written law to the contrary a Native Court shall have jurisdiction to try an offence under the Enactment or any rules made thereunder and to award the full punishment for any such offence. Any such trial shall be with the aid of two assessors who are Muslims. Prosecutions in respect of such offences may be conducted by any officer of the Majlis Ugama Islam specially authorised in writing by the President of the Majlis.

In 1974 the Administration of Muslim Law Enactment was amended to add three other offences, namely propagating other religious doctrine among Muslims, religious teaching without permission and the teaching of false doctrine (sections 34A–34C). Special provisions were also made for appeals. Notwithstanding anything contained in the Native Courts Ordinance, appeals from any decision or judgment of a Native Court exercising its powers under s. 50 of the Enactment shall lie to a Board of Appeal constituted by the Majlis Ugama Islam. A Board of Appeal is constituted consisting of (a) a Chairman who shall be appointed by the Majlis and who shall be qualified to be a Judge of the High Court; (b) the *Mufti;* and (c) a person to be appointed by the Majlis from among those who are knowledgeable in the native customs of Sabah. An appeal shall lie as of right on any ground of appeal which involves a question of Muslim law alone; and with the leave of the Board of Appeal on any ground of appeal which involves a question of fact alone or mixed law and fact or against a sentence of imprisonment not less than one hundred dollars. The Board of Appeal shall hear the appeal by way of rehearing and may dismiss the appeal, set aside or vary any order, reduce or increase any sentence, punishment or order of compensation or order a rehearing by the same or a differently constituted Native Court.

A further amendment has been made to the Administration of Muslim Law Enactment in 1975 to make it an offence for a person to commit bad behaviour calculated to infringe the purity of Islam as by using language

considered humiliating, by wearing cloths that are not suited to the occasion, by making remarks against the Holy Quran or by acting in a manner to humiliate Islam.

The tendency as seen from the recent amendments is to provide for Muslim offences somewhat on the lines of the legislation in Peninsular Malaysia, although in certain respects the Sabah legislation goes further than the Malayan legislation. There is however no provision for civil jurisdiction in Islamic matters as, for example, proceedings relating to –

(i) bethrothal, marriage, divorce, nullity of marriage or judicial separation;
(ii) dispositions or claims to property arising from any of the matters set out in paragraph (i);
(iii) legitimacy, guardianship or custody of infants;
(iv) division of or claims to *sepencarian* property;
(v) determination of the persons entitled to share to the estate of a deceased Muslim or of the shares to which such persons are respectively entitled;
(vi) wills or deathbed gifts of a deceased Muslim;
(vii) gifts *inter vivos* or settlements made without consideration by Muslims;
(viii) *wakaf* or *nazr*.

The question would arise as to which court should exercise jurisdiction in these matters. In the circumstances of Sabah it would appear expedient and politic to give jurisdiction in these matters to the Native Court, which has been accepted and is respected by the general public. It may be provided generally that the Native Court shall have jurisdiction in cases arising from the breach of Muslim law or the jurisdiction can be specifically conferred on the Native Court to deal with the various matters set out. This would have the advantage of entrusting the judicial function in relation to Muslim matters to a properly constituted court while leaving the functions of registration of marriages, divorces and revocations of divorces to the Imams.

As Islam is now the State religion of Sabah it is but right that steps should be taken to ensure the proper administration of Muslim law in Sabah. Customary practices seem to have taken a strong hold on the Muslims of Sabah and it will be necessary for the Majlis Ugama Islam to decide which of these customs are compatible with Islam and can be retained and which are contrary to the teachings of Islam and therefore should be abandoned. Sabah has the advantage of having a system of popular courts which have been accepted by the natives and efforts

should be made to build up the proper administration of the Muslim law on the basis of these courts.

*Prof. Ahmad Ibrahim

APPENDIX I

UNDANG-UNDANG NATIVE COURT

Nasihat bagi siapa-siapa yang menjadi Mahkamah pengadil didalam Native Court, hendaklah berbuat keadilan dan saksama atas yang mendakwa dengan yang kena dakwa jangan menjatuhkan hukuman kerana didalam marah, dan jangan kerana bersakit hati dendam kepada keduanya melainkan dengan hak sebenarnya.

Adalah hakikat orang yang sudah naik duduk didalam Member Mahkamah itu, ialah wakil Tuhan Rabbul'Alamin, kerana tersebut di dalam Kuran Al'adzim. Maka pada masa itu, pada hakikatnya tiada kadzi itu berbapa dan tiada beribu tiada bersaudara kaum kerabat saudara dan sahabat dan tiada kiri-kanan dan jangan memilih besar kecil kaya dan miskin, siapa yang salah, salahlah yang benar itu benar juga, walau anaknya sekalipun.

Ada pun pada masa di dalam Mahkamah mulai memeriksa yang mendakwa di hadapan yang kena dakwa serta melarikan saksi-saksi yang berguna di dalam bicara itu. Mulai kadzi memeriksa itu di dalam Court Mahkamah dengan duduk yang tetap apa-apa haribulan, dengan manis air muka dengan selidik satu-satu cakap itu dari awal hingga sampai akhirnya dan mana-mana cakap yang mendakwa itu yang berguna di dalam ini bicara ditandakan seperti ini _____ garis di bawah cakap yang digunakan itu dan jangan dibahas dahulu kepada yang mendakwa itu, tetapi didahulukan sumpah sebelum memeriksa itu, dan jam apabila sudah habis cakapnya serta menyebutkan saksinya dia menyebutkan pengetahuan saksi-saksi satu-satu dan atau apa barang menjadi saksi itu, sudah habis periksaan, maka diambil tandatangan pengaku itu, baharulah kadhi menyatakan kepada yang dakwa, satu tuduhan atasnya dan fasalnya:—

"Engkau, si Anu, kena dakwa berbuat begini, ...; dengan ada saksi-saksi yang tersebut oleh yang mendakwa serta saksi barang ini, ..."

Jika dia jawab mengaku salah sampai tiga kali, maka ambil tandatangan pengakuannya, jikalau tiada mengaku salah sekali-kali maka periksa satu itu

*Professor of Malaysian Law, University of Malaya.

seperti begini pada sekian haribulan, dan jam sekian malam atau siang di tempat anu saksi si-anu. Maka tiada juga mengaku, maka ditilik bodoh bebal dan cerdek pintar kedua serta ditilik ubahnya air muka kedua atau adalah kesalahan dahulu apa casenya. Maka baharulah memanggil saksi yang pertama disumpahkan jika ini saksi cukup umur jika budak tiada disumpahkan, dan ditilik ini saksi adalah berat ringan pada Ugamanya, adalah ianya berapa kali berbuat bohong.

Maka apabila Kadzi sudah (memeriksa) mengetahui hal itu, maka diperiksa kepada saksi itu. Apabila sudah habis periksa satu-satu itu saksi hendaklah disuruh bersual itu dengan yang mendakwa atau yang dakwa seperti diambil tandatangan saksi-saksi itu. Tuan Kadhi boleh membahas satu-satu cakap saksi itu apabila kedapatan ini saksi bohong, terang di dalam itu bicara maka Kadzi membawa itu saksi ke hadapan Tuan Magistrate itu boleh menghukumkan. Apabila sudah selesai periksa dan bahas Tuan Kadzi kepada sekaliannya maka hendaklah diputuskan dengan terkena hukum jikalau terang, dan dibuang hukum perkara itu jikalau tiada terang. Adapun membetulkan hukum itu dengan habis fikiran dan habis pengetahuan iaitu empat perkara:—

(1) Pertama dengan tilik pengaduan yang mendakwa apa-apa cakap salah benarnya.
(2) Kedua dengan perkataan saksi-saksi.
(3) Insab kadzi serta mesyuarat jika ada naib kadzi.
(4) Tawakkul kepada Tuhan Rabul'alamin.

Ada pun Undang-Undang ini bukannya dosanya kepada Tuhan Rabul' alamin, yang dibicarakan dan dihukumkan itu denda-denda itu, iaitu kerana melanggar larangan kerajaan jangan berbuat kejahatan itu, sebab terkena denda-denda atau penjara-penjara itu pulang kepada kerajaan. Ada pun dosanya yang perbuat itu seperti zinah, dan bunting-bunting itu terpulang hukumnya di hadapan kadhi Rabbul Jalil dia boleh minta ampun dan taubat jika diterima atau tidak.

Adat orang Islam Undang-Undang Amaran supaya jangan berbuat kesalahan

1. Di dalam Adat Islam tiada boleh masuk orang punya rumah, mesti lebih dahulu minta izin dengan memberi salam, jika diberi izin bolehlah masuk, jikalau tiada boleh masuk, dikecualikan waran dibawa mata-mata. Jikalau siapa-siapa melanggar ini ialah namanya melanggar Bahasa, apabila orang mengadu hal ini, apabila dibicarakan patut salah terkena denda sampai sepuluh ringgit atau penjara sampai satu bulan, jikalau bukan orang Islam mesti memanggil dahulu.
2. Jika masuknya itu seperti hendak bergaduh maka beratlah kesalahan itu, atau ada membawa senjata, maka bicaranya dihantar kepada Tuan Magistrate, boleh ditangkap masa itu tiada dengan waran, boleh jamin, boleh selesai sebelum mengadu.

3. Siapa-siapa orang bergaduh di masa ramai-ramai orang mengarak mempalai atau di dalam rumah masa mempalai bersanding, maka yang bergaduh itu siapa punya kesalahan itu bila dibicarakan patut terkena denda sampai dua puluh ringgit atau penjara sampai dua bulan dan mengganti jika ada barang-barang yang binasa atau terkena kesalahan keduanya.

4. Jika laki-laki yang ada isteri bersalah dengan isteri orang maka laki-laki itu terkena denda sampai seratus dua puluh ringgit atau penjara sampai duabelas bulan, dan itu perempuan pun terkena denda sampai seratus dua puluh ringgit atau terkena penjara sampai duabelas bulan, dan denda, perempuan itu pulang kepada lakinya menjadi tebus talak sebanyak berian yang dibayarnya sekurang-kurang empat puluh ringgit. Jika perempuan tiada dapat membayar maka tentulah masuk penjara sebanyak lebih dari tebus talak lakinya. Fasal tebus talak lakinya apabila habis penjara perentah, baharulah ia selesai dengan lakinya kerana perentah bukan punya hak itu tebus talak melainkan lakinya punya suka, jikalau laki punya suka biar dia masuk penjara habis perkara haruslah lakinya menjatuhkan talak masa itu, jika ada harta pencarian dibahagi dua, tiada boleh berlaki bini keduanya, boleh tangkap dengan tiada waran masa itu, boleh jamin tiada boleh selesai sudah mengadu.

5. Jika laki-laki bujang bersalah dengan bini orang maka laki-laki itu terkena denda sampai delapan puluh ringgit atau terkena penjara sampai delapan bulan, dan itu perempuan terkena denda sampai seratus dua puluh ringgit atau terkena penjara sampai duabelas bulan, dan denda perempuan, itu pulang kepada lakinya sebanyak berian yang dibayarnya kurang empat puluh ringgit. Jikalau perempuan tiada dapat membayar itu denda tentulah ada kena penjara, sebanyak lebih dari tebus talak lakinya, jikalau lakinya izin biar dia kena penjara. Maka itu perkara sudah habis, maka harus lakinya menjatuhkan talak kepada bininya, tiada ada belanja iddahnya sebab derhaka, jika ada harta pencarian dibahagi mengikut adat di dalam negeri itu, dan boleh tangkap masa itu dengan tiada waran, boleh jamin, tiada boleh selesai jika sudah mengadu.

6. Jikalau laki-laki beristeri, bersalah dengan perempuan bujang, maka itu laki-laki terkena denda sampai dua puluh ringgit atau penjara sampai dua bulan. Dan perempuan kena denda sampai dua puluh ringgit atau terkena penjara sampai dua bulan. Maka disuruh bernikah jika enggan antara kedua siapa-siapa enggan tiada mahu nikah kena denda sampai dua puluh ringgit atau penjara sampai dua bulan lagi. Dan jika sudah mengaku bernikah haruslah si laki-laki itu membayar berian perempuan itu kurang separuh dari mahar, misal jika laki-laki itu ada pembayar juga, jika tiada dapat membayar apa boleh buat, taksir perempuan punya suka, sebut di dalam nikahnya sahaja, jika isteri yang lama itu mengadu meminta adat pemaduan patut dibenarkan bagaimana adat negeri itu. Dan juga jikalau isteri yang lama itu tiada mahu bermadu, seperti mahu minta cerai juga,

maka itu isterinya yang lama kena bayar tebus talak separuh berian yang sudah dibayarnya, jika belum dibayarnya, maka hendaklah si laki-laki itu membayar dengan tunai, utang berian semuanya kemudian baharulah perempuan itu membayar tebus talak separuh dari bilangan berian yang disebut itu. Jikalau ada beranak kecil atau anak besar yang masih lagi belum berumur tujuh tahun mesti fardzu bapanya memberi belanja anaknya, dan apabila anak itu berumur tujuh tahun hendaklah mengikut kesukaan itu anak kepada emaknya atau bapanya. Dan itu anak kecil, maka yang memeliharakan ibunya, jikalau ibunya tiada suka memelihara maka bapanya, jikalau bapanya tiada dapat memelihara maka waris sebelah bapa jika tiada maka waris sebelah ibunya jika tiada maka kadzi empunya ihtiar.

7. Jika laki-laki bujang berambil dengan perempuan bujang, maka haruslah laki-laki itu memberi beriannya dan mesti bernikah, jika tiada mahu bernikah antara keduanya mesti terkena denda sampai dua puluh ringgit atau terkena penjara sampai dua bulan, apabila sudah dibicarakan. Dan si laki-laki itu mesti membayar berian kepada si-perempuan sebanyak maharnya, misal jikalau tiada dapat membayar terkena penjara sebanyak itu berian ditaksir di dalam sepuluh ringgit satu bulan penjaranya, dan mesti bernikah jika tiada mahu bernikah antara keduanya mesti terkena denda sampai dua puluh tinggit atau terkena penjara sampai dua bulan apabila sudah dibicarakan.

8. Jika seorang laki-laki bersalah dengan perempuan sampai mengandung bunting zinah, maka hukumnya laki-laki itu terkena denda sampai lima puluh ringgit atau terkena penjara sampai lima bulan maka disuruh bernikah, maka haruslah laki-laki itu membayar beriannya mahar, misal kurang separuh dibayarnya. Dan itu perempuan terkena denda sampai dua puluh lima ringgit atau terkena penjara sampai dua bulan setengah tiada boleh tunggu melainkan patut waran jika difikirkan dia lari, atau disaman Imam Court.

9. Jika seorang laki-laki bersuka-sukaan dengan seorang perempuan menjadi berambil dengan kesukaan keduanya, dan laki-laki itu terlampau miskin tiada daya upaya hendak membayar beriannya dengan harta apa-apa maka hendaklah dinikahkan dengan keridhaan perempuan itu, jikalau pun wali perempuan enggan menjadi wali patut dinikahkan dengan wali hakim menjadi mahar bertempoh di dalam pencarian.

10. Jika seorang laki-laki suka akan perempuan itu tetapi perempuan itu tiada sekali-kali suka akan laki-laki itu menjadi dipaksa oleh laki itu serta ditangkap dibawa ke lain tempat dengan kekerasan maka laki-laki itu terkena denda sampai seratus ringgit atau terkena penjara sampai satu tahun. Dan jika sudah sampai dizinahnya dengan dirogolnya, maka bicara dinaikkan kepada Tuan Magistrate atau sampai kepada Court Tuan Resident, tiadalah Native Court kuasa memutuskan bicara itu melainkan Head Court punya kuasa.

11. Jika seorang laki-laki mengacau perempuan tunang orang bersuka-sukaan maka laki-laki itu terkena denda sampai lima puluh ringgit atau terkena penjara sampai lima bulan, dan perempuan itu terkena denda sampai dua puluh lima ringgit atau terkena penjara sampai dua bulan setengah, dan mana-mana kerugian tunangnya itu seperti mahar atau tanda bertunang atau belanja-belanja waktu berbuat bertunang, itu semuanya mesti perempuan mengembalikan kepada tunangnya itu, jika tiada berbayar dikirakan penjara di dalam sepuluh ringgit satu bulan. Dan laki-laki yang mengacau itu tiada boleh sekali-kali mengambil terus itu perempuan menjadi bininya, jika diambilnya juga patut terkena hukum penjara sahaja sampai tiga bulan keduanya.

12. Jika seorang laki-laki bersalah zinah dengan anaknya iaitu dinamakan sumbang maka di dalam hukum Islam dihukum dengan bunuh mati keduanya. Dan atau sumbang dengan saudaranya, atau dengan anak saudaranya, atau dengan mentuanya, atau dengan ibunya tiri, atau dengan neneknya. Maka sekaliannya itu sumbang yang besar hukumnya patutlah ini perkara diantarakan bicara di hadapan Court Tuan Magistrate itu yang patut apa-apa timbangannya, sebab sekalian yang tersebut itu tiada sekali-kali harus bernikah selama-lamanya patut terkena penjara yang berat. Boleh tangkap dengan tiada waran.

13. Jika seorang laki-laki bersalah dengan iparnya iaitu saudara bininya satu emak satu bapa atau satu emak sahaja, atau satu bapa sahaja, maka laki-laki itu terkena denda sampai tujuh puluh lima ringgit atau terkena penjara sampai tujuh bulan setengah sebab memutus harapan, dan perempuan itu terkena denda sampai tiga puluh lima ringgit atau terkena penjara sampai tiga bulan setengah. Dan itu perempuan tiada boleh dibuatnya bini terus, walaupun diceraikannya bininya itu baharu diambil menjadi bininya, itu tiada boleh di dalam aturan hukum adat jangan sampai orang-orang berbuat sama iparnya tiada boleh tangkap melainkan dengan waran boleh jamin, tiada boleh selesai.

14. Dari hal fasal berkahwin-kahwin nikah. Siapa-siapa orang pun tiada boleh lebih dari delapan puluh ringgit beriannya anak dara dan tiada boleh lebih dari empat puluh ringgit yang sudah janda, dan jika bersuka-sukaan antara keduanya itu tiada peduli, tetapi kemudian hari bila dibicarakan di dalam Mahkamah, tiada lebih dari yang tersebut itu delapan puluh ringgit beriannya anak dara, dan empat puluh ringgit berian janda, fasal adat-adat lain mengikut adat negeri yang sudah terpakai. Maka siapa-siapa orang dengan kekerasan meminta berian lebih dari yang tersebut itu jika sudah dibicarakan terkena denda sampai lima puluh ringgit atau terkena penjara sampai lima bulan, jikalau sama-sama suka membayar lebih tiada jadi salah.

15. Jika laki-laki membuang isteri tiada dengan kesalahan isterinya, maka mesti si laki-laki itu membayar belanja iddah kepada isterinya di dalam tiga kali suci, membayar belanja jika ada anaknya berapa orang, jika ada hutang lakinya mesti bayar tunai. Maka jika ada harta pencarian maka

dibahagi dua separuh pulang kepada bininya dan yang separuh tinggal kepada lakinya. Ada pun belanja iddah atau belanja anak itu apa timbangan Mahkamah kerana mengikut masanya mahal, murah di dalam itu negeri, atau kampung jika murah, mengikut murah, jika mahal mengikut mahal.

16. Jika perempuan ingkar tiada mahu lagi mengikut lakinya dengan tiada kesalahan lakinya apa-apa maka hendaklah perempuan itu terkena hukum membayar tebus talak kepada lakinya sebanyak berian yang dibayar lakinya tiada lebih dari delapan puluh ringgit, atau seberapa yang tersebut di waktu bernikah. Jika si laki-laki itu ada berhutang kepada perempuan, hutang berian atau berhutang harta perempuan, maka wajiblah laki-laki itu membayar hutang itu supaya akan penebus talaknya, dan tiada harus laki-laki membayar belanja iddah. Jikalau ada anaknya itu lagi kecil wajib atas lakinya punya belanja anak sampai umur tujuh tahun, dan itu si laki-laki tiada boleh mengambil itu anak sebelum umurnya tujuh tahun, jikalau perempuan suka memberikan itu anak bolehlah laki-laki itu mengambil. Jikalau sudah umur tujuh tahun ikut suka anak itu sama siapa diikutnya, bapa, emaknya tiada boleh paksa kesukaan itu anak.

17. Jika seorang laki-laki menalak isteri dengan talak tiga tiada ada belanja iddahnya kerana sudah habis jodohnya tiada dapat kembali kepada bininya. Jikalau ada hutang si laki-laki kepada bininya wajiblah si laki-laki itu membayar tunai kepada bini hutang berian atau hutang harta perempuan, jika ada harta pencarian mesti dibahagi mengikut adat negeri, separuh kepada bininya dan separuh kepada lakinya. Tiadalah boleh kembali kepada bininya selamanya melainkan bercina buta baharu boleh. Jika dilanggarnya juga, maka kedua terkena denda sampai dua puluh ringgit atau terkena penjara sampai dua bulan keduanya.

18. Jika si laki-laki ada mempunyai isteri tiada diberi belanja dan tiada dihimpuninya beberapa lama maka apabila perempuan itu mengadu, apabila sudah dibicarakan, maka si laki-laki itu dihukumkan ini-lah kepada perempuannya maka itu laki-laki patut terkena denda sampai sepuluh ringgit atau penjara sampai satu bulan dan jika ada harta itu laki-laki hendaklah diberikan oleh Mahkamah Kadhi kepada perempuan itu, istimewa lagi jika ada anaknya akan belanja kehidupannya.

19. Jika ada si laki-laki itu pergi belayar atau pergi ke mana-mana tiada ada meninggalkan belanja atau harta-harta apa kebun-kebun pun tiada, apabila sampai tiga bulan lamanya jalan darat, dan enam bulan jalan laut, apabila perempuan mengadu, maka patut Kadzi menerima pengaduan itu perempuan mengikut jalan taaluk masa bernikah, maka jatuhlah pasah nikahnya, akan tetapi patutlah juga Kadzi berikhtiar berkirim surat kepada lakinya menyatakan hal isterinya kesusahan, mengadu, tetapi itu surat dikirim kepada ketua di dalam negeri tempat lakinya itu, jikalau tentu tempatnya jikalau tiada tahu tempatnya apa boleh buat jatuh pasah masah bininya mengadu itu. Tetapi hendaklah ditaaluk perempuan apabila lakinya kembali masih di dalam iddah, atau di dalam tiga bulan mesti patut

perempuan mengikut kepada lakinya, tetapi dibenarkan Mahkamah jika perempuan menuntut belanja selama ditinggalkan lakinya, belanja anak jika ada anaknya, dan patut Kadzi menyatakan hal itu perempuan mengadu, kepada sanak saudara itu si laki-laki dan juga sanak saudara si perempuan.

20. Jika seorang laki-laki mendatangi perempuan kerana hendak berbuat jahat maka perempuan tiada suka sampai berteriak, maka apabila dibicarakan laki-laki itu terkena denda sampai dua puluh lima ringgit atau terkena penjara sampai dua bulan setengah jika perempuan bujang, dan jika perempuan berlaki, maka besarlah salah laki-laki itu terkena denda sampai lima puluh ringgit atau terkena penjara sampai lima bulan.

21. Jika seorang laki-laki memegang satu susu badan perempuan bujang, tetapi perempuan itu tiada suka, maka laki-laki itu salah apabila dibicarakan terkena denda sampai sepuluh ringgit atau terkena penjara sampai satu bulan. Jika perempuan itu ada lakinya maka beratlah hukumnya laki-laki itu terkena denda sampai dua puluh ringgit atau terkena penjara sampai dua bulan, terkena keduanya.

22. Jika seorang laki-laki menzinah seorang budak perempuan yang belum cukup umur sampai binasa maka lekas hantar kepada Tuan Magistrate itu, hal ini Native Court tiada sekali-kali kuasa pegang ini bicara kerana ini perkara sangat berat, dan besar salahnya.

23. Jika ada laki-laki mencuba hendak menipu perempuan seperti dia menyerupai laki perempuan itu supaya dianya dapat menzinah perempuan itu dan perempuan itu pun menyangka lakinya yang datang menzinah kepadanya maka ini case Native Court tiada kuasa membicarakan, melainkan lekas dihantar kepada Tuan Magistrate. Itu Native Court tiada sekali-kali kuasa membicarakan sebab berat salahnya.

24. Jika seorang laki-laki atau perempuan membujuk, mengacau isteri orang supaya itu perempuan bercerai dengan lakinya, maka itu orang yang membujuk terkena salah patut terkena denda sampai tiga puluh ringgit atau terkena penjara sampai tiga bulan.

25. Jika seorang laki atau perempuan menjadi baruah menemukan,supaya itu perempuan berjahat dengan laki-laki jika perempuan bujang maka itu si baruah terkena denda sampai dua puluh lima ringgit atau terkena penjara sampai dua bulan setengah, jika itu perempuan berlaki bukan bujang, maka beratlah salahnya si baruah itu patut terkena denda sampai lima puluh ringgit atau terkena penjara sampai lima bulan.

26. Jika seorang memeliharakan orang punya anak jika ada buat surat di hadapan Perentah dengan cukup serta mengaku menjadi anak angkatnya serta membayar kepada ibu, bapa itu anak kerugian dan hasil penat dia memelihara. Apabila sudah besar itu anak berumur tujuh tahun atau lebih maka itu anak pulang sendirinya kepada ibu, bapanya maka tiada boleh didakwa itu ibu, bapa itu anak kerana bukan hendak mengambil balik itu anak, apabila ibu bapa itu anak atau kerabatnya membujuk-

bujuk itu supaya kembali itu anak kepadanya, maka patutlah si pembujuk itu terkena dakwa membayar kerugian dan penat orang yang memelihara itu, jikalau tiada terbayar hingga sampai dimasukkan penjara berapa patut kesalahannya.

27. Di dalam hukum Islam tiada dibenarkan bergaul bercampur baur antara laki-laki dengan perempuan apa lagi perempuan yang ada laki walau perempuan bujang bercakap apa lagi malam waima siang kerana perbualan yang tiada ada fasal-fasal itu tiada jadi munafaat itulah puncak fitnah kejahatan wajiblah wali dan kerabat perempuan itu memberi nasihat jangan itu macam, jikalau dia penasihat tiada mahu dengan jawabnya yang kasar, hendaklah dibawa di Mahkamah apabila dibicarakan kerana melanggar Undang-Undang ini, hendaklah si laki-laki itu terkena denda sampai sepuluh ringgit atau terkena penjara sampai satu bulan. Ada pun mulai kejahatan itu mulanya dari mata berbuat perjanjian sudah tetap baharulah berkehendak berjumpa bersembunyi di mana tempat sunyi, dikecualikan muhrimnya yaani yang tiada harus nikah dengan perempuan, jikalau muhrimnya tiada menegahkan hal itu bergaul laki-laki dengan perempuan itu maka dihukumkan muhrimnya itu dayus.

28. Fasal dinamakan aturan bertunang laki-laki itu kepada perempuan yang dinamakan bertunang didalam aturan, adat Negeri dahulu-dahulu begini di sebelah laki-laki itu yang bermaksud hendak berbini, pertama mula-mula bersarang gundi ertinya bertanya kepada orang yang hampir kepada warisnya adakah sudah bertunang atau belum, jika belum bertunang, maka baharulah bapa atau emak si laki-laki itu menyuruh seorang yang kepercayaan bertanya kepada emak, bapa si perempuan itu atau orang pelihara si perempuan itu, jikalau bapa, emaknya tiada ada atau saudaranya apabila sudah mengaku, sudah tentu menerima akan maksud itu, itulah emaknya berjarum. Maka baharulah berjanji apa-apa harinya bertentu, apabila sudah tentu harinya, hendaklah di sebelah laki-laki menyuruh mendatangi sekurang-kurang tiga, empat orang atau lebih yang orang dari sebelah laki-laki datang ke rumah sebelah perempuan, demikian juga sebelah perempuan kurang-kurang tiga, empat orang menyambut orang dari sebelah laki-laki apabila bersetuju berakun-akunan antara penyuruh dengan penyambut itu serta menentukan berapa maharnya atau jika ada tanda bertunang, maka inilah dinamakan sudah bertunang, jikalau, tiada seperti syarat, seperti ini belum dinamakan bertunang.

29. Seperti adat-adat dan aturan patut mesti mengikut adat-adat ugama sendiri, kerana di dalam dunia ini masing-masing memegang ugama sendiri, dengan tiada bercampur kerana jika tiada menurut dan berpegang Undang-Undang itu tiada dinamakan ugama seperti hendak berkahwin nikah tiada dinamai kahwin atau nikah, melainkan satu ugama, dan tiap-tiap ugama itu ada dengan adat undang-undangnya. Seumpama ugama Islam mesti ikut adat Islam iaitu Kuran iaitu Undang-Undang dari Tuhan Rabbul-'alamin yang disampaikan Saidina Jibrail' Alaihi wa-sallam kepada Saidina

Mohammed Sallah'ilahu 'Alaihi wa-sallam. Seperti adat kahwin dan nikah dan cerai dan waris-waris dan tegah, suruh, halal, haram makruh, sunat dan wajib mustahil dan fardhu, mubah sekelian itu diikut oleh yang memegang ugama Islam. Dan jika manusia di dalam dunia ini hidup dengan tiada ada, adat Undang-Undang, tiada dinamakan ugama, jadi seumpama haiwan.

30. Jikalau seorang laki-laki bujang menaiki perempuan bujang maka perempuan tiada menerima kerana tiada suka sebab hal-hal si laki-laki itu tiada bersetuju dengan perempuan itu, maka laki-laki itu terkena kesalahan cuma-cuma seperti memalukan itu perempuan maka jikalau dibicarakan di dalam Native Court laki-laki itu terkena denda sampai sepuluh ringgit atau terkena penjara sampai satu bulan. Dan jikalau sudah sampai dipeluknya atau dipegangnya itu perempuan maka dendanya itu laki-laki sampai dua puluh ringgit atau terkena penjara sampai dua bulan.

31. Jika seorang perempuan menaiki seorang laki-laki kerana hendak dipelukinya dengan tiada kesalahan laki-laki itu, maka jikalau laki-laki itu tiada suka sekali-kali akan perempuan itu, maka hendaklah orang tua atau Imam di dalam kampung itu menyuruh pulang itu perempuan tempatnya, dan jika perempuan itu berbuat kekerasan tiada mahu pulang jikalau laki-laki itu mengadu, apabila dibicarakan perempuan itu terkena denda sampai lima ringgit atau terkena penjara sampai empatbelas hari.

32. Jikalau siapa-siapa sudah berbuat salah dahulunya sampai dua kali bersalahan maka patutlah ditambah dendanya sampai dua kali kerana melanggar hukum mahkamah.

33. Jikalau budak-budak laki-laki dan perempuan berbuat kesalahan yang keji akan sebarang-barang kesalahan yang jahat seumpama akan mengadakan kemaluan ke atas orang-orang akan sebarang perbuatan mendatangkan aib atas lain orang maka itu budak haruslah juga dihukumkan jangan sampai biasa berbuat yang tiada patut bolehlah diajar dengan sebat dengan rotan maka yang patut memukul itu bapanya atau ibunya atau kerabatnya yang hampir kepadanya. Maka enggan bapanya tiada mahu memukul anaknya yang berbuat salah itu maka jatuhlah kesalahan itu atas bapanya apabila dibicarakan patut terkena denda sampai lima ringgit atau terkena penjara empat belas hari kerana oleh sebabnya kurang pengajaran ugama anaknya. Ada pun hukum rotan itu lima rotan sekadar mendatangkan sedikit sakitnya sahaja. Jikalau bapanya menyerahkan kepada seseorang disuruhnya menyebat itu, maka patut Hakim atau Orang Kampung atau Imam kerana dikehendaki yang tahu menimbang rasanya. Adapun tempat menyebat di tapak kakinya kedua.

CASE—NOTES

ELEPHANTS, MONKEYS AND BURGLARS THE PROBLEM OF DEFINING TRADE

International Investment Limited

v.

Comptroller General of Inland Revenue[1]

In the *International Investment* case, the perennial problem of what constitutes a 'trade'[2] showed its ubiquitous head again, this time in the form of whether a single isolated transaction in real property amounted to 'trade' or 'business' under s. 10(1)(a) of the Income Tax Ordinance 1947. Briefly, the facts were as follows. The appellant, a limited company, had as one of its objects the capacity to deal in immoveable property and land development. To finance its business the company negotiated a large bank overdraft. The company then proceeded to purchase six pieces of land with a view to developing them, and started the construction of a six-storey building with a shopping arcade and an hotel on them. The appellant then decided to dispose of the land and building, which was half-completed, to another company in exchange for shares in the latter company. The value of the shares exceeded the value of the property transfered. The appellant argued that this was a capital profit resulting from the reconstruction of its business, the purpose of which was to expand its activities of investment in securities. The Revenue however contended that this was income profit of a trading activity and therefore chargeable under s. 10(1)(a) of the 1947 Ordinance.

The Special Commissoners decided that the company had been engaged in the business of dealing in land and therefore the profits were assessable to tax. The High Court, in dismissing the appeal, found that there was evidence to support the Special Commissioners finding that, although the transaction was isolated, it was carried on with the intention of dealing in property. The appelant brought the matter to the Federal Court.

In dismissing the appeal, Raja Azlan Shah F.J. in the Federal Court pointed out that the question whether or not the company carried on the business of trafficking in land within the income tax statute was a question of law. What the learned judge meant by this is obscure. It is settled that

[1] [1975] 2 M.L.J. 208.

[2] "Trade' here is used interchangeably with 'business' although under the Income Tax Act 1967 the word 'business' is given a wider import as to include "trade and every manufacture, adventure or concern in the nature of trade".