

# TRADITIONAL LEADERSHIP AND ALTERNATIVE DISPUTE RESOLUTION

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# Introduction

- Discussion mainly confined to traditional leadership in the Sarawak local context and within the parameters of the Native Courts in Sarawak
- Introductory understanding of “traditional leadership”
- Definition of “native”
- Constitution of Native Court
- Alternative Dispute Resolutions (ADR)

# Traditional Leadership

- Generally, the term and concept of “traditional leadership” can be referred to as a customary institution or structure, or customary systems or procedures of governance, recognised, utilised or practised by traditional communities.
- In the said structure, traditional leaders are those who rule and govern their societies on the basis of traditional practices and values of their respective societies.
- Traditional leadership is, in some native communities, inherited or passed down, through customary lineage or descent

# Native

- The Sarawak Interpretation Ordinance, 2005 defines the word “native” and lists the respective native races of Sarawak that comes within the said definition viz:
  - Bagatan, Bakong, Bemali, Berawan, Bidayuh or Land Dayak (including Salako, Rara, Jagoi, Singai, Biatah and Bukar-Sadong), Bisaya, Buket or Ukit, Dali, Dusun, Iban or Sea Dayak, Jatti Miriek Kajang (including Sekapan, Kejaman, Lahanan, Punan, Tanjong and Kanowit), Kayan, Kadayan, Kelabit, Kenyah (including Badeng, Sebop and Sipeng), Laki put, Lisum, Logat, Malay, Melanau, Murut or Lun Bawang, Narom, Penan, Sa’ban, Sihan, Tabun, Tagal, Tatau, Tring and Vaie.

# Native Courts

- The Native Courts were constituted by the State of Sarawak under the Native Courts Ordinance 1992 (“Native Courts Ordinance”) pursuant to legislative authority under Item 13 List 11A supplement to the State List for Sabah and Sarawak in the 9th Schedule of the Federal Constitution.
  - The Native Courts comprise of six tiers, namely:
    - (i) Native Court of Appeal (the highest in the hierarchy);
    - (ii) Resident’s Native Court; (iii) District Native Court; (iv) Chief’s Superior Court; (v) Chief’s Court; and (vi) Headman’s Court (the lowest in the hierarchy)
  - Jurisdictions of Native Courts
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# Alternative Dispute Resolution (ADR)

- Alternative Dispute Resolution, or “ADR”, can be described as a mechanism or range of procedures that serves as alternatives to court’s litigation for the resolution of disputes, usually involving the intercession and assistance of a neutral and impartial third party.
- The ADR mechanisms potentially useful for resolving issues include negotiation, conciliation, mediation, arbitration and other hybrids.

# Evolution of Traditional Leadership in Sarawak

- Traditional leadership among the native communities in Sarawak has been in place for centuries.
- However, the form of traditional leadership among the native communities has changed over the years.
- This can be attributed to various factors such as the gradual impact of economic, socio-cultural and political development or influences among the various native communities and modernisation of societies.

## Traits of Past Traditional Leaders

- Commissioned by the gods and recognized by the people through demonstrative acts of bravery.
  - Usually sanctioned by dreams and gained public recognition by ritual celebrations (gawai besai).
  - Recognised as for their prowess and achievements in areas where courage and initiative were prime values.
  - Leading successful war expeditions.
  - Pioneers who ventured forth and opened new land for settlement and farming.
  - For successful trading expeditions, or acumen in esoteric knowledge.
  - Aura about traditional leaders, known for their valour, personal integrity, expertise in customs<sup>8</sup> and culture, and leadership in
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## **Present Traditional Leaders**

- Traditional leadership has changed to accommodate changing socio-economic needs.
  - Now part of the formal structure of government administration in Sarawak.
  - Leaders are now appointed through an administrative process.
  - An individual's prowess in traditionally valued activities is no longer used as a criterion of selection for formal leadership.
  - In fact, many of these traditional activities are either no longer practiced, or have assumed a much less important role in current native society.
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## **Community / Traditional Leaders**

- Since 1973, community or traditional leaders in Sarawak have been appointed by the State government pursuant to the State government Circular Memoranda.
- Temenggong, Pemanca and Penghulu are custodians, interpreters and administrators of customary laws of their respective communities and sit in the Native Courts.
- Ketua Kampung / Tuai Rumah / Tuai Uma are generally to assist the Penghulu and to settle family squabbles or minor disputes in accordance with their respective adats and customary law and sit in the Native Courts.
- The Community Chiefs and Headmen Ordinance, 2004, a Sarawak state ordinance, is not in force as at to date.

## **Native Courts and Traditional ADR**

- Presently, the Native Courts have been the main venue for resolving disputes.
- The system of the Native Courts is rights-based.
- Decision-making power is held by the adjudicators in the Native Courts.
- Native Courts system have become inundated with cases and the challenge of backlog of cases.
- As at 15th July 2024, 1223 cases in the District Native Court and 1825 cases (out of which 1661 are application for native status) in the Resident Court and 118 cases in the Chief's Superior Court, 3111 cases in the Chief's Court and 13 cases in the Headman's Court throughout the state are pending and remain unresolved

## **Native Courts and Traditional ADR**

- Option: alternative traditional dispute resolution practices based on restorative justice, reconciliation and reintegration into the community.
- Given this scenario, court processes are not the best venues for the resolution of disputes.
- ADR cost effective and quicker than the standard legal processes.
- Traditional ADR mechanism could be one of the ways to reduce the burden of too much litigation in the Native Courts.

## **Native Courts and Traditional ADR**

- Could ensure social cohesion and harmonious existence among native communities.
- In the past, traditional leaders played an important role as mediators.
- The mediators would normally be someone who are elderly and is respected in the community.
- The objective of mediation is to reconcile the disputants and reach a consensual resolution of the dispute at the end of the process.

# Conflict Resolution in a Traditional Community

- Eg. Kelabit community

- Restorative justice approach, emphasis on restoration of relationships, and social harmony.
- Example of facilitating alternative dispute resolution in the Kelabit community before a dispute is referred to the Native Court:
  - mekitang (go between),
  - ngubuk (to speak gently),
  - petutup (face to face meeting),
  - pamung (public hearing before appointed elders or the village headman),
  - besara or bicara (court trial).<sup>4</sup>

## **Customary Mediation - Mende of Sierra Leone (Africa)**

- Objective is restoring and mitigating broken relationships, healing whatever wounds the conflict might have caused.
- Elders endeavor to maintain interactive justice (ensuring that everyone is accorded fair treatment and respect, by recognizing all parties to the dispute as equal participants with legitimate concerns).
- A distributive justice (achieving goals in a balanced outcome, or equity in outcome).
- Decision reached in mediation is tailored to produce a win-win outcome.

## **Customary Mediation - *Mende* of Sierra Leone (Africa)**

- Chiefs and elders as mediators regarded as icons of tradition and identity.
- Are perceived as authentic and legitimate mediators in healing community relation.
- Mediator's own image, prestige, standing and credibility may also determine the leverage they enjoy over the adversaries.
- Mediator functions to facilitate communication and dialogue between conflicting parties.

## **Customary Mediation - Mende of Sierra Leone (Africa)**

- Mediator enable parties to listen to each other on a deeper level than their previous hostile attitudes allowed.
- Mediators have to be intuitive and sympathetic both to the individuals and groups in conflict and the conflict environment.
- Should avoid coercion and assertiveness.
- Mediators should exhibit skills (for example, conducting meetings in a friendly atmosphere) at facilitating communication and overcoming deadlocks.

## **Customary Mediation - *Mende* of Sierra Leone (Africa)**

- Mediator seeks to effect a shift from adversarial “winner-takes-all” relations to a more cooperative problem-solving approach.
- Outcome is communally owned and is aimed at consensus building, forgiveness, reconciliation and restoration of order.
- Cases: land disputes, petty crimes such as theft, woman palaver, debts, chieftaincy crises, disputes over inheritance and contracts and many others.

# Challenges in Traditional Mediation

- ADR has gained traction across the globe.
- Traditional dispute resolution mechanisms has been recognized by the UN.
- United Nations Commission on Legal Empowerment of the Poor 2008; “To improve the state justice systems, reformers should seek out opportunities for strategic interventions that improve the operation of informal or customary justice systems and facilitate the efficient integration of the formal and informal systems.”.

# Challenges in Traditional Mediation

- Traditional dispute resolution processes should adopt a more “communal” rather than the Western “individualistic” approach.
  - Emphasis should be placed on reconciliation and reintegrating the disputing parties back into their communities.
  - ADR is an amicable and viable mechanism for resolving community disputes.
  - But it is not a simple task to perform.
  - ADR can be effective if the community leader is qualified and capable to be<sup>20</sup>a mediator.
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# Challenges in Traditional Mediation

- Mediator's standing in the community as a respected leader is important for the disputing parties to have trust in him.
- A leader should fully understand his role as a conciliator or mediator.
- Is knowledgeable on native customary laws or adat.
- Has the right and positive attitude towards mediation.
- Has the skills and experience to guide him in conducting the process and handling the disputes and the disputants.

# Challenges in Traditional Mediation

- In the event leaders lack competency, skill and knowledge, they should attend refresher training or courses on traditional conflict resolution organised by the relevant department to be established.
- On the part of the disputing parties, their attitude is also important in conciliation or mediation.
- The parties to be open-minded and ready to listen to the opposing party's case.

# Mediation in the Civil Court

- Mediation is now encouraged and practised in the Civil Court for civil cases under Rules of Court 2012 and pursuant to the Court's Practice Directions.
- Success rate of the court-annexed mediation is more than 50%.
- Court assisted mediation, a non-formal and wholly voluntary process involving an impartial third party, a Judge, as the mediator.
- Mediator's role is to facilitate parties in reaching a mutually satisfactory resolution without going through or completing a trial or appeal.
- Upon reaching a settlement, parties generally will enter and receive a consent judgment.

# Proposal for Mediation for Native Courts' Cases

- No provision in the Native Courts Ordinance on ADR.
- Timely to promote ADR in the Native Courts where community or traditional leaders can be appointed to act as mediator.
- Recognition of such traditional dispute resolution practices is often provided for in the constitutions and laws of African countries.
- Eg. in Kenya: “In exercising judicial authority, the courts and tribunals shall be guided by the following principles (.....) (d) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted.” (Constitution of Kenya Article 159(2)(d))

## **Proposal for Mediation for Native Courts' Cases**

- ADR practices and procedures, which are culturally approved and relevant, can be incorporated in the Native Courts Ordinance.
- Mediation can be based on some of the practices of mediation in the civil Court which are appropriate, synthesized or combined with traditional and cultural elements.
- No local guidebook or definitive review of traditional based ADR mechanisms, but can be developed taking into account cultural elements.

## **Proposal for Mediation for Native Courts' Cases**

- Subject matters for mediation: breaches of customs or adat, family matters, marriage and divorce, custody of children, inheritance etc. and matters pertaining to native customary land.
- Mediation can be made compulsory after the filing of cases in the Native Courts, having original jurisdiction, but before any further proceedings and trial on these matters in court.
- If mediation successful, a settlement or consent order can be recorded by the court and enforceable in law.
- If mediation is unsuccessful for any reasons whatsoever, then parties may be at liberty to proceed with further legal proceeding or trial in court.

## **Proposal for Mediation for Native Courts' Cases**

- With the right attitude and improved competence of the traditional leaders, the establishment of proper infrastructures, the cooperation of the native communities and assistance from the relevant authorities, the mediation can be successful in Native Courts.
- A need for the native communities to be informed and educated on the advantages and benefits of mediation as opposed to litigation.

Wise Iban saying applicable to traditional mediation:

**“*Utai besai gaga mit* (Big matter make it small),  
*Utai mit gaga nadai* (Small matter make it nothing).”**

Thank You

