


Comparison of Kerta Desa Bali and Malaysian Indigenous Court

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Abstract

Introduction: Customary courts are institutions of dispute resolution that are alive and well in customary societies. Indonesia, which is not much different from Malaysia, has a similar culture and has customary courts. Kerta desa Bali is one of Indonesia's customary courts at the village level and in Malaysia there are indigenous court.

Purposes of the Research: This research paper will discuss the comparison of kerta desa Bali courts and Malaysian indigenous court.

Methods of the Research: This research uses a normative juridical approach. The research specification is descriptive analytical, namely by describing and comparing of kerta desa Bali and Malaysian indigenous court which are associated with regulations, legal theories, and community customs. The research stages use primary, secondary, and tertiary legal materials with data collection methods carried out through literature studies.

Results of the Research: Kerta Desa Bali sought to resolve disputes through deliberation and peace, although customary courts were not included in the judicial system, but did not absolutely reject dispute resolution mechanisms through customary courts. Meanwhile, Malaysia emphasizes that there are three judicial systems, namely district courts, sharia courts, and indigenous courts in Sabah and Sarawak, which have structures and according to the customs of the indigenous population.

Keywords: Court; Indigenous; Indonesia; Kerta Desa; Malaysia.

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INTRODUCTION

All laws start from habits and customs that are repeated and obeyed then become an unwritten rule of law. Habits or customs that then have the power of sanctions then apply as customary law. The main concept by *Friedrich Carl Von Savigny* relating to the soul of the nation (*volkgeist*), that the law is not made, but grows, and develops in the soul of the nation (*Das Recht wird nicht gemacht, est und wird mit dem Volke*).¹ Based on the *volkgeist* theory, it can be said that customs and laws cannot be separated. Between the two have a close relationship and play an important role in a state legal system. Customary law which is the culture of the Indonesian nation itself as stated by Cicero that where there is a society there is a law known as the adagium "*Ubi Societas Ibi Ius*".

Indonesia as a legal and plural state has three applicable legal systems, namely the western legal system, customary legal system, and Islamic legal system. Customary law is the oldest law adopted and applied in Indonesia from the three sources of law that apply today. According to Bambang Daru Nograho, customary law as an unwritten legal

¹ La Ode Dedihasriadi and Edy Nurcahyo, "Pancasila Sebagai Volkgeist: Pedoman Penegak Hukum dalam Mewujudkan Integritas Diri dan Keadilan", *Jurnal Magister Hukum Udayana*, no. 1 (2020), <http://ojs.unud.ac.id/index.php/jmhu>.

regulation that develops in society, originates from the nation's culture which is a law that represents the personality of the Indonesian nation.² Before the arrival of the Dutch in Indonesia, the law that applied in the regions of Indonesia was generally unwritten law or what is called customary law.³

After Indonesian independence, customary law is constitutionally affirmed in Article 18 B paragraph (2) of the 1945 Constitution of the Republic of Indonesia (UUD 1945) after several amendments. The state recognizes and respects the unity of customary law communities, which is the juridical basis for the existence of indigenous peoples in Indonesia. The legal and judicial system of the Indonesian state, in addition to being based on the state constitution, is also formed based on the values of Pancasila in order to realize justice for all Indonesian people, which is clearly stated in Pancasila. Customary law has its own place in the national legal framework not only in Indonesia. The position of customary law is also one of the sources of law recognized in Malaysia, precisely in the *Federal Constitution of Malaysia*.⁴ Malaysia also has a classically pluralistic society where Malay customs and customary law are considered important sources of unwritten law. Both have received legal status in the *Federal Constitution* and the constitutions of the states of Sabah and Sarawak. In addition, like the three legal systems in Indonesia, Malaysia also has three sources of applicable law namely written law or national law, Islamic law and customary law or adat.⁵ Indonesia is not much different from Malaysia in that both are countries with similar cultures. As a former British colony, Malaysia has retained the tradition of the English *common law system*. This tradition has continued alongside the introduction of the Islamic legal system by the sharia courts and the customary laws of various indigenous groups. Malaysia is also a multi-ethnic, multicultural and multi-religious country. Its national legal system reflects its heterogeneous society and retains its indigenous culture. When examined closely, the style and history of these two countries are the same, while Indonesia, as a former colony of the Netherlands, adheres more to the *civil law system* tradition which still adopts the Dutch legal system to this day.

One of the indigenous communities that still exists in carrying out the norms and practices of customary law in Indonesia is the Balinese who also have customary courts in their villages. The court is referred to as the *kerta desa* at the village level. Customary justice is a dispute resolution institution that is still alive and thriving in Indonesian customary law communities. In addition to the majority being influenced by Islamic religious law, Indonesia also has a variety of religions that influence its customs. Customary law in the Balinese community is derived from the teachings of Hinduism including aspects of cultural and legal values such as relationships with *hyang widhi wasa*, the environment, and others.⁶ These customary courts have developed in several indigenous communities in Indonesia, including in Balinese traditional villages. Traditional villages in Bali play an important role in the management and development of indigenous life. Village leaders have the right to govern their own territory. The provisions of customary villages are also regulated and recognized in Law Number 6 of 2014 on Villages.

² Bambang Daru Nugroho, *Hukum Adat Hak Menguasai Negara atas Sumber Daya Alam Kehutanan & Perlindungan terhadap Masyarakat Hukum Adat*, (Bandung: Refika Aditama, 2019), p. 70.

³ Ishaq, *Pengantar Hukum Indonesia*, (Depok: Rajawali Pers, 2019), p. 7.

⁴ Rafidah Malissa Binti Salleh, "Native Law as One of the Sources of Law in Sabah Legal System", *Malaysian Journal of Social Sciences and Humanities*, no. 11 (2021): 399 - 412, <https://doi.org/10.47405/mjssh.v6i11.1138>.

⁵ *Ibid.*

⁶ I Wayan Surpha, *Seputar Desa Pakraman Dan Adat Bali*, (Denpasar: Pustaka Bali Post, 2012), p. 17.

The Regional Regulation on Pakraman Village was later replaced by the term Desa Adat in Bali, as amended in Regional Regulation Number 4 of 2019 on Desa Adat in Bali (hereinafter referred to as Perda Desa Adat In Bali). Customary villages in Bali establish customary courts through what is called “*kerta desa*” whose provisions are also regulated in the Perda Desa Adat In Bali. Customary disputes or cases in Bali are referred to as “*wicara*” Customary cases or *wicara* are still related to the philosophy of *Tri Hita Karana* which contains three causes of happiness namely *parhayangan* (harmonious relationship with God), *pawongan* (harmonious relationship with fellow human beings), and *palemahan* (harmonious relationship with the natural environment).⁷ Malaysia also has an indigenous court which is the court of the indigenous people of Malaysia. This court exists and develops with its customary law in its specific territory, namely in Sabah and Sarawak. For Sabah and Sarawak, customary law is considered as the general law. The provisions of this population are specifically regulated in a provision of the *Laws Of Malaysia Federal Constitution*. The *special position of natives of the States of Sabah and Sarawak* is regulated in the *Federal Constitution* in the provision of *Special position of natives of States of Sabah and Sarawak 161A Laws Of Malaysia Federal Constitution*.

Furthermore, the specific regulation of the indigenous population of Sabah is set out in the provisions of *The Constitution Of The State Of Sabah*. Currently, cases heard in the customary courts originate at the village level while the Sabah courts are specifically regulated in a provision of *The Native Courts Enactment 1992*. This is similar to the *kerta desa* Bali courts in Indonesia which are at the village level. In Malaysian native courts if a person feels that he has an equitable claim or that he has been aggrieved under the practice of customary law, he usually brings his complaint to the Village Head.⁸ Many studies have examined the existence of customary courts, including research conducted by Hazar Kusmayanti, Dede Kania, Dewi Mayaningsih, Muh.Risnain, Galuh Puspaningrum, Akhmad Solihin, and Madiha Dzakiyyah Chairunnisa with a journal entitled, “*Strengthening Aceh's Customary Courts For Enforcement Of Civil Procedure Law In Indonesia*”, which examines the enforcement of customary law in handling various cases and community disputes at the Gampong and Mukim levels, the government through Article 6 of Law Number 44 of 1999 and Article 98 of Law Number 11 of 2006 and its obstacles.⁹ The second research was by Hazar Kusmayanti, Djanuardi, Bambang Daru Nugroho, and Efa Laela Fakhriah with a journal entitled, “*Legal Update Of Civil Procedures Through The Judges' Rules: Review Of Judgments Of Traditional Heritage Court*”, which examines the role of court judges' decisions in resolving customary inheritance law based on legal justice for the reform of civil procedure law in Indonesia.¹⁰ The researcher is then interested in studying by comparing the *customary court kerta desa* Bali in Indonesia and the Malaysian indigenous court.

METHODS OF THE RESEARCH

The approach method applied in writing this research is normative juridical. The normative juridical approach is research that focuses on principles, norms, and legal rules.¹¹

⁷ Detik. Com, “Falsafah Tri Hita Karana: Pengertian dan Penerapannya dalam Kehidupan”, accessed July 6, 2024, <https://www.detik.com/bali/budaya/d-6309757/falsafah-tri-hita-karana-pengertian-dan-penerapannya-dalam-kehidupan>.

⁸ Rafidah Malissa Binti Salleh, *Op.Cit*.

⁹ Hazar Kusmayanti, ed.al., “Strengthening Aceh's Customary Courts For Enforcement Of Civil Procedure Law In Indonesia”, *Journal of Positive School Psychology*, No. 6 (2022): 3405-3411, <https://mail.journalppw.com/index.php/jpsp/article/view/7879/5136>.

¹⁰ Hazar Kusmayanti, ed.al., “Legal Update of Civil Procedures Through The Judges' Rules: Review Of Judgments Of Traditional Heritage Court”, *Journal of Positive Psychology & Wellbeing*, no. 3, (2021): 1482-1493, <https://mail.journalppw.com/index.php/jppw/article/view/1023>.

¹¹ Soerjono Soekanto and Sri Mahmudji, *Penelitian Hukum Normatif-Suatu Tinjauan Singkat*, (Jakarta: Rajawali Press, 2007), p. 13.

The specification of the research is descriptive analytical, namely by describing thoroughly both written and oral information and the reality studied and studied as a whole.¹² , comparing *kerta desa* Bali in Indonesia and indigenous courts in Malaysia which are associated with regulations, legal theories and customs of local customary society. The stages of research with library research that utilizes primary legal materials, secondary legal materials, and tertiary legal materials. The data collection method was then carried out through literature studies and interviews. The method of data analysis is carried out in a qualitative juridical manner studied around customary law, laws and regulations and their relationship with related regulations, legal theories, and implementation practices without processing diagrammatic or statistical data contained in numbers.¹³

RESULTS AND DISCUSSION

A. History of the *Kerta Desa* Bali and the Malaysian Indigenous Court

1) History of *Kerta Desa* Bali

In post-reform Indonesia, customary courts continue to be used in some villages or regions as a way to resolve disputes. The specific arrangements are contained in several relevant laws and regulations. One of the customary courts in Indonesia is located in a customary village in Bali called *kerta desa*. The history of the existence of *kerta desa* in Bali can be dated back to the time when indigenous peoples emerged in Bali until today. In Indonesia during the Dutch colonial era, there was another institution called *Raad Van Kerta*. This customary institution was a court that had the task of adjudicating cases that occurred in indigenous communities and Hinduism at that time. As explained earlier, the *kerta desa* Bali is influenced by its beliefs, namely Hinduism. In 1,622 there was a castle built called *Puri Kerta Gosa*. The history of its existence is based on the translation of the inscriptions in *Puri Kerta Gosa*. That in the past a Kingdom every year located in the *Balai Kertha Gosa* was often used as a meeting place for subordinate kings throughout Bali. This is where the supreme *sasuhunan* gives direction and decisions based on consideration of circumstances and needs. Similarly, the Dutch, British, Portuguese and Chinese were also welcomed in this hall when they wanted to meet the *sasuhunan*.

After the palace fell due to the *puputan* war against the Dutch on April 28, 1908, the function or use of this hall changed. Until the end of Dutch rule, *Kertha Gosa Hall* became a traditional court hall. The hall was used as a place to settle a case. Every person who has a case of any kind related to customs and religion is heard and decided at *Balai Kertha Gosa*. In this *Balai* there is a golden carved table and six chairs. The chair with lion arms is the seat of the *regent* (king) who acts as the chief judge, while the chair with ox arms is the seat of the priest who at that time acted as a legal expert and advisor to the king in making a decision.¹⁴ The chair symbolizing the dragon is the seat of the *kanca* (clerks). The other parties to the trial, either as defendants or plaintiffs, sit cross-legged on the floor in a polite manner. During the royal era, colonial era and independence era, there were various terms used to process problems at the village level to obtain a good, right and fair decision. Today, the process and adjudication of such cases at the village level is referred to as *kerta desa*. *Kerta desa* is an institution that performs the traditional function of justice. Grammatically the term "*kerta*" means judge. With the addition of "*desa*", "*kerta desa*" means a village judge or

¹² Ronny Hanitijo Soemitro, *Metodologi Penelitian Hukum Dan Jurimetri*, (Jakarta: Ghalia Indonesia, 2019), p. 93.

¹³ *Ibid*, p. 98.

¹⁴ Made Sudjana, *Kerta Desa Di Pesa Pakraman Bali Masih Perlukah?*, (Denpasar: Udayana University Press, 2016), p. 17-18.

village court.¹⁵ In the Dutch colonial era in Indonesia, including in Bali, problem solving in indigenous communities was based on customary law. The application of this customary punishment in Bali to this day is influenced by Hinduism. Including during the independence era, if there is a problem of custom and religion, the Balinese indigenous people also resolve it through customary law. There are various ways to resolve legal cases, which can provide a correct process and provide a fair decision. These include the village peace judge, the village court, the kerta court and *the kerta desa*. In Bali, the term *kerta desa* is currently used as stated in the Bali Customary Village Regulation, which contains regulations regarding customary village courts in Bali.¹⁶

2) History of Malaysian Indigenous Court

Customary courts, also known as Malaysian native courts, have been placed under the respective states prior to the formation of the Malaysian federation. The existence of these courts continues until today its existence is recognized under the Federal Constitution of Malaysia.¹⁷ The indigenous people of Malaysia consist of the natives (native person) of peninsular Malaysia and the indigenous people of Sabah and Sarawak. The most important legislation that establishes and protects the special interests of the indigenous people in Malaysia is the *Federal Constitution of Malaysia*. While it affirms that all people are equal before the law, it has some exceptions for the natives, namely allowing measures to protect and advance the special interests of the natives of peninsular Malaysia and the natives of Sabah and Sarawak.¹⁸ The natives of Sabah and Sarawak are regulated under Article 161A subsection (6) *Laws Of Malaysia Federal Constitution* which states that: *a) in relation to Sarawak, a person who is a citizen and either belongs to one of the races specified in Clause (7) as indigenous to the State or is of mixed blood deriving exclusively from those races; and b) in relation to Sabah, a person who is a citizen, is the child or grandchild of a person of a race indigenous to Sabah, and was born (whether on or after Malaysia Day or not) either in Sabah or to a father domiciled in Sabah at the time of the birth.*

The establishment of customary courts in Sabah dates back to the reign of the North Borneo Company in 1882-1941 which officially recognized the position of customary leadership. The courts were located at the village level with a customary law expert at the administrative district level referred to as the "Customary Chief". These duties were continued by Malaysians from the Japanese occupation in World War II and the system was officially continued until 1946 when North Kalimantan became a British Crown Colony. The system has evolved further after the formation of Malaysia in 1963, with the gradual codification of the traditional customary laws of each indigenous community.¹⁹ There are many meanings as to who is indigenous in Malaysia. Who is "indigenous" is defined in Article 41(10) of The Constitution of The State of Sabah as: "In this Article, "Native" means a person who is a citizen, is a child or grandchild of a person indigenous to the State, and was born (whether on or after Malaysia Day or not) either in the State or to a father

¹⁵ I Made Wahyu Chandra Satriana dan Ni Made Liana Dewi, "Kerta Desa as a Customary Judicial Institution in the Settlement of Customary Conflicts Based on Bali Provincial Regulation Number: 4 of 2019", *Journal of Sustainable Development Science*, no. 1 (2019): 1-7, <http://ejournal.undwi.ac.id/index.php/jsds/article/download/790/722>.

¹⁶ Made Sudjana, *Op.Cit.*, p. 19.

¹⁷ Hanna Ambaras Khan, ed.al., "The Challenges In Enforcing Post Divorce Orders Of Native Courts In East Malaysia", *IJUM Law Journal*, no. 1 (2021): 17:35, [https://doi.org/10.31436/iiumlj.v29i\(S1\)](https://doi.org/10.31436/iiumlj.v29i(S1)).

¹⁸ Focus, "Update on Indigenous Peoples of Malaysia", accessed September 12, 2024, <https://www.hurights.or.jp/archives/focus/section3/2019/06/update-on-indigenous-peoples-of-malaysia.html>.

¹⁹ Jikat Binol Darimbang, Jacqueline Pugh-Kitingan, and Gaim James Lunkapis, "The Ritual Origins Of Native Law In Sabah And Future Implications: The Case Of The Kimaragang", *JATI-Journal of Southeast Asian Studies*, no.1 (2023): 105-131, <https://doi.org/10.22452/jati.vol28no1.5>.

domiciled in the State at the time of the birth.” The native court in Sarawak was inaugurated by Rajah Charles Brooke in 1870. The significance of this institution was further emphasized with the passing of the Native Courts Ordinance in 1992 which was ratified by the State Legislative Council. In 1993, the Office of the Chief Registrar was established, an initiative that marked an important step towards improving the operational efficiency of the native court system. The following year saw the appointment of 12 Circuit Contract Judges in 2014, adding to the capacity and accessibility of the courts.

From 2015 onwards there was progress with the completion of the Chief Registrar's Office building currently located in Samarahan City for the Sarawak Native Court which provides a centralized coordination and administration center. The year 2023 holds many transformations for the Sarawak Native Court reflecting an evolution in tune with the changes and aspirations of the community.²⁰ Article 161A subsection (7) of the Laws Of Malaysia Federal Constitution which states in relation to the indigenous people of Sarawak that: “The races to be treated for the purposes of the definition of "native" in Clause (6) as indigenous to Sarawak are the Bukitans, Bisayahs, Dusuns, Sea Dayaks, Land Dayaks, Kadayans, Kalabits, Kayans, Kenyahs (including Sabups and Sipengs), Kajangs (including Sekapans, Kejamans, Lahanans, Punans, Tanjongs and Kanowits), Lugats, Lisums, Malays, Melanos, Muruts, Penans, Sians, Tagals, Tabuns and Ukits.”

B. Kerta Desa Bali System

The practice of dispute resolution in the community is usually carried out by customary courts, which have long been developed. Constitutional recognition has provided direction, space and independence for adat villages.²¹ The provisions of customary villages are also regulated and recognized in the Village Law. Article 1(1) of the Village Law states that: “Villages are villages and customary villages or what are called by other names, hereinafter referred to as Villages, are legal community units that have territorial boundaries that are authorized to regulate and manage government affairs, the interests of the local community based on community initiatives, origin rights, and/or traditional rights that are recognized and respected in the system of government of the Unitary State of the Republic of Indonesia.” The authority of villages and even customary villages is specifically regulated in chapters XII - XIII of the Village Law. The provisions of Article 103 of the Village Law regulate the authority of adat villages, including the settlement of adat disputes. Article 103 letter (d) states: “Settlement of customary disputes based on customary law applicable in the Customary Village in the area that is in line with the principles of human rights by prioritizing deliberative settlement.”

The existence of the Bali Customary Village Regulation is a tangible manifestation of the government's legitimization of the existence of customary law communities as a legal community unit in Bali Province. The definition of a customary village is based on Article 1 point (8) of the Bali Customary Village Regulation which states that: “An adat village is a unit of customary law communities in Bali that has its own territory, position, original structure, traditional rights, property, traditions, manners of community life for generations in the bond of a sacred place (kahyangan tiga or kahyangan desa), duties and authorities and the right to regulate and manage its own household”. Customary courts or customary

²⁰ Official website of Native Court of Sarawak, “About Native Courts of Sarawak”, accessed September 19, 2024, <https://nativecourt.sarawak.gov.my/web/home/index/>.

²¹ Putu Ulandari Sri Lestari and I Gusti Ayu Putri Kartika, “Harmonization of Levy System in Customary Village Referred to Mineral Mining Transporting Activity”, *SASI*, no. 3 (2023): 479 - 494, <https://doi.org/10.47268/sasi.v29i3.1395>.

institutions within the institutions of customary village governance are known as adat courts. The *kerta desa* Bali is one of these customary courts. *Kerta desa* as a customary court in Indonesia is stated in the provisions of the Bali Customary Village Regulation. Article 1 point (18) of the Bali Customary Village Regulation states the purpose of the *kerta desa* institution, that: “*Kerta Desa Adat* is a partner institution of the *Prajuru Desa Adat* that carries out the function of resolving customary cases or *speech* based on customary law applicable in the local *Desa Adat*.” The meaning of adat case or *wicara* itself is then explained in the provisions of Article 1 point (19) of the *Perda Desa Adat* in Bali which states that: “*Perkara Adat* or *Wicara* is any issue of customary law in matters of *parhyangan*, *pawongan*, and *palemahan* either on the basis of a request or dispute.”

Kerta desa in carrying out its duties is based on customary offenses. Hilman Hadikusuma explains that a customary offense is an event or action that disturbs the balance of customary society, and because of a response from other communities, the balance needs to be restored.²² The traditional village in Bali is built for security, order and comfort, and it also serves to transform from *sukerte* to *sukerte*. When problems occur in the customary village area then customary law can apply. Sardjono Jatiman says that the village is a legal entity.²³ The forms of customary disputes or conflicts that often occur in indigenous communities are generally the same, including in Bali, which usually cover various aspects, including economic, political, social, cultural and religious aspects. Customary disputes as legal conflicts that can occur in the field of law, such as those related to land law, family law, marriage, divorce, inheritance, government, including those related to local culture and customs.²⁴

The *kerta desa* is complemented by a leader who manages and who will assist in resolving disputes or customary *speech* that occurs. Article 36 of the Bali Customary Village Regulation also regulates the elements of customary village institutions, especially in the *kerta desa*, which mainly consists of *customary village prajuru* (*bendesa adat*, *patujuh*, *panyarikan*, *patengen*), *customary village krama* (who have commitment, experience, and expertise in the field of customary law), *bendesa adat* (chairman of the *kerta desa* concurrently). The function of the *kerta desa* in general as a customary judicial institution and based on Hindu religious values does not necessarily exist in every village. The provisions of Article 76 to Article 78 of the Bali Customary Village Regulation regulate the existence of a Customary Village Assembly (MDA) which is arranged in stages to resolve customary cases if they cannot be resolved at the customary village level. At the sub-district level it is called *Majelis Alit Desa Pakraman* (MADP), if in the regency there is *Madya Desa Pakraman* (MMPD), while the province is *Majelis Utama Desa Pakraman* (MUDP) and only one.²⁵

Furthermore, the competence of the *kerta desa* is regulated under Article 37 paragraph (1) of the Bali Customary Village Regulation. The provision states that, “the customary *kerta desa*, in collaboration with the customary village prajuru, has the authority to receive, examine, and resolve customary issues in the customary village in accordance with applicable customary law”. If during the dispute resolution process through the *kerta desa* cannot resolve the problem, they must prioritize peace and the principle of cooperation. The form of settlement of customary disputes through the *kerta desa* institution is also regulated

²² Barda Nawawi Arief, *Hukum Pidana Adat*, (Jakarta: Kencana, 2023), p. 35.

²³ Afresius Veren Kueng, Badruddin Nasir, and Budiman, “Sinergitas Antara Pemerintah Desa Dan Tokoh Adat Dalam Mempertahankan Tanah Adat (Studi Kasus Desa Laham Kecamatan Laham Kabupaten Mahakam Ulu)”, *Journal Pemerintahan Integratif*, no. 3 (2019): 296-305, <https://ejournal.pin.or.id/site/?p=1689>.

²⁴ I Nyoman Sirtha, *Aspek Hukum Dalam Konflik Adat Di Bali*, (Denpasar: Udayana University Press, 2008), p. 76.

²⁵ Mita Dwijayanti, “Eksistensi Pengadilan Negeri Dalam Penyelesaian Sengketa Adat Di Bali”, *Res Judicata*, no. 2 (2019): 399-410, <http://dx.doi.org/10.29406/rj.v2i2.1751>.

based on the provisions of Article 37 paragraph (2) and paragraph (3) of the Perda Desa Adat in Bali. That in resolving customary cases as referred to in paragraph (1), the *Kerta Desa Adat* prioritizes peace in accordance with the principle of *druwenang sareng-sareng* and in the event that peace is not achieved as referred to in paragraph (2), the *Kerta Desa Adat* makes decisions in accordance with *Awig-Awig* and or *Pararem* of the Customary Village. If peace is not achieved, the village council is authorized to make a decision in accordance with *awig-awig* or *pararem*. This provision is further emphasized in Article 37 paragraph (3) of the Bali Customary Village Regulation which states that: "In the event that no peace is reached as referred to in paragraph (2), the *Kerta Desa Adat* shall make a decision in accordance with *Awig-Awig* and or *Pararem* Desa Adat." Thus, if the *kerta desa* cannot resolve the issue in this way, they can make a decision based on the traditions and rules of the customary village. If the problem cannot be resolved by the *kerta desa* adat itself, the parties involved can seek the assistance of the Majelis Desa Adat (MDA) in accordance with the hierarchy (Article 37 paragraph (4) of the Perda Desa Adat in Bali). This relates to customary judicial law, which is a rule of customary law that regulates how to act to resolve disputes and or determine legal decisions according to customary law.²⁶ The customary court is an implementation process related to the settlement and decision making.

When the law is absent or unclear, judges must pay attention to legal values and a sense of justice found in the life of the community concerned.²⁷ The existence of judges in this regard is affirmed in Law No. 48 of 2009 concerning Judicial Power (hereinafter referred to as the Judicial Power Law). The provision of Article 24 paragraph (3) of the 1945 Constitution states that, "Other bodies whose functions are related to judicial power shall be regulated by law", thus providing an alternative to the inclusion of customary dispute resolution institutions in the Judicial Power Act.²⁸ This indicates that national law does not absolutely reject the presence of forums or mechanisms for resolving cases or disputes outside the court through customary justice. The authority given to judges to make decisions in deciding cases is emphasized in the provisions of Article 5 paragraph (1) of the Judicial Power Act which states that: "Judges and constitutional judges are obliged to explore, follow, and understand the values of law and a sense of justice that live in society."

Based on this rule of law, the rule of law stipulates that judges must study, follow, and understand the principles of law and a sense of justice that exists in society. Court decisions by judges must not only contain certain articles of relevant laws and regulations, unwritten sources of law are used as the basis for legal principles that exist and develop in society.²⁹ An example of a customary dispute that has been brought to the customary court at the village level in Bali. There was a case in a traditional *village*, namely in Sampalan Traditional Village, Dawan District, Klungkung Regency, Bali Province, which was brought to *the kerta desa court*. There was an issue related to the ownership of customary land that had been certified as belonging to the customary village, which was then sued by the heirs. There was a building whose land belonged to the village and had been certified in the name of the village, and the heirs sued the State Administrative Court (TUN). The heirs sued the National Land Agency (BPN) as the registrar of customary land ownership as stated in the

²⁶ Anita D.A. Kolopaking, *Asas Itikad Baik Dalam Penyelesaian Sengketa Kontrak Melalui Arbitrase*, (Bandung: Alumni, 2016), p. 37.

²⁷ Ratna Luhfitasari, "Upaya Hakim Dalam Menyelesaikan Perkara Perdata Yang Belum Di Atur Dalam Undang-Undang Nasional", *Jurnal de luse*, no.2 (2019): 2655-4348, <https://doi.org/10.36277/.v11i2.343>.

²⁸ Hazar Kusmayanti, ed.al., "Strengthening Aceh's Customary Courts For Enforcement Of Civil Procedure Law In Indonesia", *Op.Cit.*

²⁹ Hazar Kusmayanti, ed.al, *Op.Cit.*

certificate, but the lawsuit was not granted, so the heirs lost in court.³⁰ Customary village land itself consists of land owned or managed by the indigenous community and land owned or managed by the customary village. Everyone does not want disputes or conflicts, but differences in interests cause disputes and disputes in society.³¹ The resolution of customary disputes through the *kerta desa* is basically the same as in national law, where there are parties to the petition, the petitioner and the respondent, or the defendant and the plaintiff. In its current development, if there are still parties who are not satisfied with the decision of the adat court, they can submit a request for re-examination to the district court. Nevertheless, the settlement of disputes or socio-cultural issues in Indonesian society through customary courts still exists and is spread in many places. People still use it as an effort to resolve their legal problems.

C. Malaysian Indigenous Court System

Since the colonial period until today there has been no change in the legal order of Malaysia. This is due to Malaysia's desire to keep the law in accordance with the values that exist and live in society. Malaysian customary law derived from English law contains rules of equality that can be used and as the best solution to overcome legal conflicts that are considered as adjustments to the validity of the law.³² In the *website* of Universitas Islam Indonesia at a *guest lecturer* event entitled "*Adat Law in Malaysia Legal System*" the presentation was delivered by Prof. Farid Sufian bin Shuhaib, professor of Ahmad Ibrahim Kulliyah of Laws, *International Islamic University Malaysia* (IIUM). His main presentation explained the situation of legal pluralism in Malaysia, one of which is the existence of three judicial systems in Malaysia, namely the district court, sharia court, and indigenous customary court which only applies in Sabah and Sarawak. Customary law in Malaysia must be proven by elders, experts or community leaders to provide evidence in court that this is part of customary practice and can be given the force of law by the court.³³

The native courts in Malaysia that are recognized in the constitution of Malaysia are located in the territories of Sabah and Sarawak. The regions of Sabah and Sarawak utilize the common law in the native courts. The jurisdiction that applies between one court and another is different from what applies in Sabah and Sarawak. However, they generally deal with issues in the community such as both parties being indigenous, cases of religion, sexuality, or marriage where one party is indigenous and other cases where jurisdiction is governed by written law. The courts that act as native courts are the customary courts that apply to the people of Sabah and Sarawak.³⁴ These indigenous courts deal with cases involving the laws and customs of indigenous peoples, with all parties subject to those laws and customs. Both Sabah and Sarawak assert that the adat court as an indigenous court has jurisdiction to hear cases relating to the customs of the indigenous people. The courts must rule in accordance with the personal laws of the parties to the dispute as natives. Customary courts are authorized to enforce any order or judgment. The state authorizes

³⁰ Information by Mr. A.A Sayang Suparta, *Kerta Desa* Administrator in Sampalan Traditional Village, Dewan Sub-district, Klungkung Regency, Bali Province.

³¹ I Dewa Ayu Dwi Mayasari and Dewa Gde Rudy, "Eksistensi Hukum Adat Dalam Menjaga Keharmonisan Masyarakat Bali (Penerapan Pararem di Desa Pakraman Jumpai, Kecamatan Klungkung, Kabupaten Klungkung)", *Jurnal KERTHA WICAKSANA: Sarana Komunikasi Dosen dan Mahasiswa*, no. 2, (2021), <https://doi.org/10.22225/kw.15.2.2021.90-98>.

³² Lala Anggina Salsabila, ed.al., "Studi Perbandingan Sistem Peradilan Indonesia Dan Malaysia", *Doktrin: Jurnal Dunia Ilmu Hukum dan Politik*, no.2 (2024): 01-12, <https://doi.org/10.59581/Doktrin-widyakarya.v2i1.1950>.

³³ Website of Universitas Islam Indonesia, "Eksistensi Hukum Adat Dalam Sistem Peradilan di Malaysia", accessed March 6, 2023, <https://www.uui.ac.id/eksistensi-hukum-adat-dalam-sistem-peradilan-di-malaysia/>.

³⁴ Sigit Somadiyono, "Perbandingan Sistem Hukum Antara Indonesia dan Malaysia", *Wajah Hukum*, no. 2 (2020): 414:440, <http://dx.doi.org/10.33087/wjh.v4i2.243>.

customary courts to enforce its orders in all matters. For example the court has no jurisdiction in cases involving Sharia Court matters as such cases fall under the jurisdiction of the Civil Courts.

The customary court structure in Sabah itself has a three-tier structure. The lower level is the Customary Court led by the Ketua Anak Negeri (KAN) assisted by two Kampung Chiefs. The second level is the intermediate court, the District Court, which is led by a District Officer with the assistance of two KAN. Third, the highest level is the District Court of Appeal led by a judge and two District Officials or KAN as assistants. Finally, the District Court is under the Office of Negeri Affairs which is managed by the Ministry of Local Government and Housing. Meanwhile, the Indigenous courts in Sarawak are a six-tier system as follows:³⁵ 1) The lowest court is the Chiefs' Court which is presided over by a chief with the help of two assessors; 2) The Court of Chiefs is at the second level and is presided over by a Penghulu and assisted by two assessors; 3) The High Court of Chiefs presided over by the Temenggong or Pemanca assisted by two assessors or Temenggong and Pemanca with an assessor; 4) A District Native Court presided over by a Judge with the assistance of two assessors; 5) The second highest court is the Resident Native Court presided over by a Resident with two or more assessors and finally, the supreme court; 6) An Indigenous Court of Appeal presided over by a President with two or four assessors.

The hierarchy and structure of Malaysia's indigenous courts is not much different from other countries. The court structure starts with the court that has the most power. At the bottom of the pyramid of the indigenous court structure is the court of the village chief or village head. As in matrimonial matters, the village chief has the right and power to officiate at marriages and grant divorces to indigenous couples. In most cases, the couple will agree to all the terms. If either of them cannot accept what is decided at the village level, they can apply to the second level of court. At the second level, the village chief has no power/jurisdiction and will no longer interfere, and the court will handle the matter. The village chief is given the power to deal with all matters relating to adat and decide according to adat law.³⁶ In general, the Customary Courts in Sabah and Sarawak have jurisdiction to hear cases:³⁷ a) Cases arising from violations of customary law or customs where all parties are indigenous; b) Cases involving customary law, customs relating to engagement, marriage, divorce, annulment of marriage and legal separation; c) Adoption, guardianship or custody of minors, maintenance of dependents and legitimization; d) Gift or succession by will or interstate; and e) Any other case in which jurisdiction is conferred on the Court under the Act or any written law. In Sabah under the provisions of section 3 of the 1951 Application of Laws Ordinance Sabah has the same position as Sarawak under section 2 of the Sarawak Application of Laws Ordinance. The provision essentially emphasizes that: "In exercising their jurisdiction...all courts shall have regard to the laws and customs of the inhabitants of the State so far as they are not inhuman, unjust or contrary to public policy".

For the indigenous people of Sabah, customary law is not a system based primarily on right or wrong or guilt and punishment. Rather, it is a system for maintaining some sort of balance in the universe. The local people traditionally have a belief in the magical or animistic and believe that everything in the universe is guarded or inhabited by various spirits. The natives believe that these spirits have the power to wreak havoc on humans and

³⁵ Hanna Ambaras Khan, ed.al., *Op.Cit.*

³⁶ *Ibid.*

³⁷ Focus, "Update on Indigenous Peoples of Malaysia", accessed September 12, 2024, <https://www.hurights.or.jp/archives/focus/section3/2019/06/update-on-indigenous-peoples-of-malaysia.html>.

need to be appeased to maintain harmony in the universe. When the universe is disturbed, it is considered to become "hot", and in that State, all kinds of disasters occur, such as epidemics, diseases, poor harvests, and floods. If someone in some way hurts or angers a spirit, it may be necessary to assuage its anger with a payment called *sogit*.³⁸ It was such an issue in Malaysia's native courts when an incident occurred in 2015 in Kota Kinabalu, Sabah. At the time it was a hot topic of conversation where a group of 10 foreign tourists posed naked on Mount Kinabalu. This, of course, violated local customs and they had to pay for the offense in Sabah's customary court or native court. Some angry Sabahans also attributed the recent earthquake on the west coast of the Borneo state that killed 18 people to the allegedly indecent act and wanted the naked Kinabalu tourists. They also have to pay *sogit* to appease the mountain spirits.³⁹ *Sogit* is a folk practice that has been passed down from generation to generation in Sabah. The main purpose of this custom is to calm the situation after something bad happens in the community. The *sogit* ritual with slaughter needs to be carried out to cool things down because *sogit* means cool.⁴⁰

CONCLUSION

The existence of *kerta desa* Bali and Malaysia's indigenous courts illustrates the complexity and differences in recognition of the two countries. The current legal foundation of the *kerta desa* in particular is Regional Regulation Number 4 of 2019 concerning Customary Villages In Bali. Through the *kerta desa* Bali dispute resolution is sought through deliberation and peace, if peace is not achieved then a decision can be issued by the *kerta desa* leader. Although under the provisions of the Indonesian state constitution there is no mention of customary courts in the court structure, Indonesian national law does not absolutely reject the presence of out-of-court dispute resolution mechanisms through customary courts. Meanwhile, Malaysia, with its pluralistic state, confirms that there are three judicial systems in Malaysia, namely the district court, sharia court, and indigenous customary court which only applies in Sabah and Sarawak. Customary courts are explicitly recognized by the state as having a judicial structure, with provisions that follow the customs and beliefs of the indigenous population.

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³⁸ Rafidah Malissa Binti Salleh, *Op.Cit.*

³⁹ *Ibid.*

⁴⁰ Nurul Adawiya Binti Animbok, "Adat Sogit: Sebuah Amalan Kaum Kadazandusun", *Jurnal Borneo Akhailogia (Warisan, Arkeologi & Sejarah)*, no. 1 (2023): 91-104, <https://jurcon.ums.edu.my/ojums/index.php/JBA/>.

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