

## 'ADAT – A SOURCE OF MALAYSIAN LAW

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The general practice, but not the opinion or notion of a community, as to what a person ought to do can be regarded as custom. It develops according to the location, belief, conscience and general spirit of a society. Custom is an ancient rule of law for a particular locality, and is seen, for instance, in the using of instruments for measuring and weighting.<sup>1</sup>

The principle requirements for a valid custom can be summarised as follows:

- i The custom must be proved to exist and to have been observed by the community at large.
- ii Such custom must be proved to have been observed for a long time and the observance must have been continuous and consistent.
- iii The custom must be legal, obligatory, reasonable and certain.<sup>2</sup>

Custom is of far earlier origin than law. It is not merely that law is of very recent origin, but it has also been based on custom. Historically, custom is unwritten law because it has never been enacted by any legislative authority and promulgated as is the case with present-day legislation. Savigny remarked the oldest law in Rome, the Twelve Decemvirs of 450 B.C, was founded on the understanding and consent of the people without any other apparent basis. A similar characteristic can also be identified in French law before the codification of Napoleonic law. The common law of England, most of which is now embodied in Acts of Parliament or judicial decisions, at one time consisted of a collection of unwritten custom.<sup>3</sup>

According to Austin, custom is merely a positive moral rule because it is neither the creature of the sovereign or state nor judicial decision. However, it can be transmuted into positive law when adopted by courts of justice. This concept seems to run with Savigny's definition of law where he defines law as the outcome of the common consciousness of the people. The basis of the former concept is that a

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<sup>1</sup> Gray R, *The Nature and Sources of the Law*, (2nd ed) p. 285, New York 1921; En. Britanica, p. 821, vol. 13, U.S.A. 1970; Mahmassani S, *Falsafah al-tashri' fil Islam*, (3rd ed) p. 236, Beirut 1961; al-Bakri A.B, *al-Madkhal lidirasat al-qanun wa al-shari'at al-Islamiyah*, pp. 380-381, Iraq 1972.

<sup>2</sup> En. Britanica, p. 926, Chamber's En. p. 406, vol. 8 London 1950; al-Bakri A.B, pp. 382-384; Roy S, *Custom and Customary Law in India*, p. 5, Calcutta 1911.

<sup>3</sup> Mahmassani S, *Falsafah al-tashri' fil Islam*, p. 238, Beirut, 1961; Roy S, *Customs and Customary Law in British India*, pp. 1-2, Calcutta, 1911. Tanaghu U.S.A, *The General Theory of Law (arabic)* pp. 423-426. Alaxandria 1974; Diamond A.S, *Primitiv Law*, pp. 114-115, London, 1971.

rule expressing the customary behaviour of people becomes a legal norm only by recognition on the part of a court of law which applies the rule.<sup>4</sup> Holland took the view that custom was law before it received judicial recognition. To Maine, custom is a conception posterior to that of judgements and the notion of a custom must precede that of judicial sentence and the judgements must affirm a custom or punish its breach.<sup>5</sup> When judicial decisions fashioned upon it are enforced by the power of the state, custom is undoubtedly considered as positive law. Before receiving judicial decision and clothed with legal sanction it is merely a rule of positive morality a rule generally observed by the citizens and subject. Now when judges transmute a custom into a legal rule, the rule which they establish is considered to have been established by the sovereign legislature.<sup>6</sup> In most legal systems custom is a source of law subordinate to statute.<sup>7</sup>

### MALAY CUSTOMARY LAWS

In regard to Malay customary law or Malay '*adat*', the word '*adat*' is, in fact, the original term for Malay customary law. *Prima facie*, '*adat*' is an Arabic word of '*ada*' and has the same meaning with '*urf*'. The term is said to represent unwritten custom and is sometimes held to be equivalent to case law or common law.

This may be so because civil laws are based on recognised local custom and it is a well-known fact that in many tribal and other communities these are regarded as native codes or unwritten law. '*Urf*' is defined by Djurdjani as action or belief in which persons persist with the concurrence of the reasoning powers and which their natural dispositions agree to accept as right.<sup>8</sup>

Looking more closely, the term "custom" and "*adat*" bear the same meaning and significance. Although some western scholars identified '*adat*' as customary law, the local term is more accurate. The significance is apparent from the unique characteristic of the Malay '*adat*' itself. "*Adat*" as perceived by the Malays does not consist solely of the above mentioned principle elements but varies in its use and meaning.

In the first place, it is interesting to put forward an argument made by Minattur;<sup>9</sup>

<sup>4</sup> Campbell R, Austin's Lectures on Jurisprudence, pp. 80, 101, vol. 1, London 1911; Kelsen H, Pure Theory of Law, p. 227, London 1970; Friedmann W, Legal Theory, p. 89, (5th ed.) London 1967; Chember's En. p. 401.

<sup>5</sup> Gray R, The Nature and Sources of Law, p. 297, New York, 1921.

<sup>6</sup> Campbell R, pp. 101-102; Hart H.L.A, The Concept of Law, p. 45, Oxford 1975. cf. Moyer D.S, The Logic of the Law, pp. 264-265, The Hague 1975.

<sup>7</sup> Hart H.L.A. p. 47.

<sup>8</sup> Brill E.J, The En. of Islam, p. 170 vol. 1, Leiden 1960; The En. of Islam, pp. 121-1031, Leydien 1931.

<sup>9</sup> Minattur J, "The Nature of Malay Customary Law," p. 352, No. 2 Mal. L. R. 6, Singapore 1964.

“The only persons who can be expected to have a clear understanding and a proper appraisal of customary law are the traditional leaders of the community. They are interested in maintaining the norms of their community and to them should be entrusted the administration of customary law. They will know how to reinterpret it to keep pace with social changes, changes which their community has accepted as being relevant to it.”

According to Hooker *'adat* can refer to any of the following meanings,<sup>10</sup>

- i Manner, etiquette,
- ii Proper, in the sense of correct,
- iii The natural order,
- iv Law, in the sense of rules of law,
- v Law, in the sense of concept of law.

He also says,<sup>11</sup>

“ . . . . *adat* is a part of the technical legal system of Malaya and, as at present constituted, is contained in statute, law reports and similar documents. At the same time it is part of the general Malay culture in the State. The significance of this is that *adat* exists in a variety of forms. It is not confined just to the law reports but occurs in oral tradition as well.”

A local scholar, Mohd Din Ali, explains the nature of *'adat* as follows:<sup>12</sup>

“The term Malay Custom or *'Adat Melayu* is often confused or misunderstood to mean merely the habit, usage and the tradition of the Malay people. This is largely untrue. Custom was the institution whose laws and usages regulated the social, political and constitutional patterns of the day. These laws are expressed in maxims of great antiquity and respect.”

Having observed some of these statements and explanations regarding the Malay custom one may now conclude that the Malay *'adat* is unique in its nature. *'Adat* at the present time is no longer regarded as purely customary as it was in the past, but has become a part of the Malaysian legal system, though it varies from one state to another.

There are only two systems of *'adat* which are recognised as widely practised amongst the Malays. They are *'Adat Temenggung* and *'Adat Perpatih*. The latter is firmly established in Negri Sembilan and the Naning district in Malacca.<sup>13</sup> The former is well-known to be practised in other parts of the country.

<sup>10</sup> Hooker M.B. *The Personal Laws of Malaysia*, p. 62, Kuala Lumpur, 1976.

<sup>11</sup> Hooker M.B. “*Adat and Islam in Malaya*,” p. 168, *Mal. L.R., Legal Essays*, 1975.

<sup>12</sup> Ali M.D. “*Malay Customary Law/Family*,” p. 34, *Intisari*, vol. 34, No. 2, M.S.R.I, Singapore 1963.

<sup>13</sup> Formerly, Klang, Naning, Jelai, Segamat, Pasir Besar, Johol, Sungai Ujong, Rembau and Jelebu. See, Birch E.W. “*Constitution of the Negri Sembilan*,” p. 9 *J.S.B.R.A.S. No. 46*, 1906; De Jong J.P.E, *Minangkabau and Negri Sembilan*, pp. 148-49, The Hague; Nathan J.B. & R.O. Windstedt, “*Johol Inas, Ulu Muar, Jempul, Gunong Pasir and Terachi*,” pp. 1-2 *P.M.S. Calcutta 1920*; Wilkinson R.J. “*Note on Negri Sembilan*,” pp. 283, 289-290, *P.M.S. 1971*.

### 'ADAT TEMENGGUNG

The term '*Adat Temenggung*' has been loosely interpreted as "the Laws of the Minister for War and Police." It is also known as '*Adat Laut*.'<sup>14</sup> Rules governing '*Adat Temenggung*' are mentioned in various Digests of law which have been compiled from about the fifteenth century to the nineteenth centuries,<sup>15</sup> for example the Pahang Digests of 1595 which were compiled during the reign of Sultan Abdul Ghafur Muhiyuddin Shah. These are a body of law which purport to relate to Pahang, Perak and Johore.<sup>16</sup>

It is strongly believed that '*Adat Temenggung*' which was widely spread in the country, including Brunei, is fundamentally based on *Undang-Undang Melaka*. This is evidenced by the Pahang Digests and the Kedah Digests of 1650 in particular the sections on Port Law, which were compiled when Sultan Rijaluddin Muhammad Shah ruled at Naga.<sup>17</sup> As regards the law of Johore which is also known as "the Malayan Laws of the Principality of Johor," it is believed to be similar to the previous Digests. In fact, it is a translation of the *Undang-Undang Melaka* which was carried out by Logan in 1855. It is called the law of Johore because the last part or section of the law is from Johore.<sup>18</sup>

It was alleged that the Ninety-Nine Laws of Perak, was merely a private record of a Syed family of Perak who were for some time advisors to the Sultan. The laws were very much influenced by the Malaccan law and Islamic law. It is believed that the Ninety-Nine Laws of Perak was not solely the work of an Arab scholar, but, in fact, was a compilation of rules by the said Syed who based his writing on both Malaccan law and Islamic law, as taught orally and modified by local custom.<sup>19</sup> According to Winstedt, copies of the Pahang Digests were found generally in the hands of royalty.<sup>20</sup>

It may now be said that the several texts on '*Adat Temenggung*' are fundamentally based on Malaccan law. However, some modification had been carried out to suit the needs of their communities and administration. The Laws of Malaccan were not all written during the same period but instead resulted from a process of continual growth. Some argued that they were issued by Sultan Muhammad Shah,

<sup>14</sup> Ramsay A.B. "Some Note on Kampong Officials in the Alor Gajah District of Malacca," p. 97, J.M.B.R.A.S, vol. 23, pt. III, 1950; Winstedt R.O. "Old Malay Legal Digest and Malay Customary Law," p. 17; Hooker M.B. (1975) op. cit. p. 144.

<sup>15</sup> Aun W.M. In Introduction to the Malaysian Legal System, p. 9, Kuala Lumpur 1975.

<sup>16</sup> Kemp. J.E. & R.O. Winstedt, "A Malay Legal Miscellany," J.M.R.R.A.S, p. 1 & 3, vol. 25, pt. 2, 1948. Hooker M.B. A Note on the Malay Legal Digest J.B.B.R.A.S, p. 157-158, vol. 41, pt. 1, 1968; Fang L.Y. *Undang-Undang Melaka*, p. 24, Hague, 1976.

<sup>17</sup> Winstedt R.O. "Kedah Law," J.M.B.R.A.S, p. 1, vol. 6, p. 1-2, 1928. The Malays, p. 91; Ibrahim A. Dr. Towards a History of Law in Malaysia and Singapore, p. 17, Singapore, 1970.

<sup>18</sup> Fang L.Y. p. 7; Ibrahim A. Dr. p. 7; Logan J.R. Translation of the Malayan Laws of the Principality of Johor," p. 1, J.I.A.E.A. vol, 1855; cf. Hooker M.B. Readings in Malay Adat Law, p. 56, Singapore, 1970.

<sup>19</sup> Rigby J. The Ninety-Nine Laws of Perak, p. 1 & 5, P.M.S, pt. 2. Kuala Lumpur 1908.

<sup>20</sup> Winstedt R.O. "An Old Minangkabau Legal Digest from Perak," p.2.

and others such as Winstedt admitted that they were drawn up for Sultan Muzaffar Shah, the prince of the former ruler.<sup>21</sup>

Scholars acknowledge the existence of *Undang-Undang Melaka*. The number of Malaccan law manuscripts is great indeed. They were said to be not less than forty four which are, however, not of the same authenticity. Some of them are merely copies of the original.<sup>22</sup> In dealing with the manuscripts Liew Yock Fong divides them into seven groups.<sup>23</sup>

- i Undang-Undang Melaka proper,
- ii The Achehnese version,
- iii The Petani version,
- iv The Muslim and Johore Laws version,
- v The Long version,
- vi The Short version and
- vii The fragmentary one

Based on these seven different groups of manuscripts Malaccan law can be categorised into six different texts;<sup>24</sup>

- i The Undang-Undang Melaka,
- ii The Maritime law,
- iii Muslim marriage law,
- iv Muslim law of sale and procedure,
- v The Undang-Undang Negri,
- vi The Undang-Undang Johore

There is some measure of uniformity among the provisions of the various texts which are political as well as legal in nature. All of them contain rules on many unrelated topics. Their contents may be classified as follows;<sup>25</sup>

- i Administrative and Constitutional,
- ii Matrimonial matters,
- iii Rules relating to property,
- iv Criminal law,
- v Torts,
- vi Contract,
- vii Maritime law,
- viii Slave law and
- ix Tribute (Bunga Mas)

<sup>21</sup> Winstedt R.O. *The Malays. A Cultural History* (6th Ed.) London, 1961. op. cit. p. 32, Winstedt R.O. "The Date of the Malacca Legal Code," pp. 31-33, J.R.A.S, 1953.

<sup>22</sup> Liew Yock Fang, p. 9; cf. Hooker M.B. "A Note on the Malayan Legal Digest," pp. 151, 161-162, J.M.B.R.A.S. vol. 41, pt. 1. 1968.

<sup>23</sup> Liew Yock Fang, p. 9.

<sup>24</sup> *Ibid*, p. 31; cf. Hooker M.B. (1970), pp. 51 & 56; Hooker M.B., p. 85.

<sup>25</sup> Hooker M.B. (1970), pp. 52-56; Hooker M.B. (1972), pp. 72-85; Winstedt R.O. "Old Malay Legal Digest and Malay Customary Law", pp. 17 & 27.

The feature of the *Temenggung* system, in general, was organised on the basis of territorial units with the constitutional and judicial authority vested in a group consisting of King (Sultan), Chief Minister (Bendahara), Chief of Police (Temenggung), Harbour Official (Shahbandar) and a few other officials.<sup>26</sup> The term *Temenggung* in Malay patriarchal legal system can be related to the Majapahit legal system. This is clearly observed from the forms of criminal punishment for theft, sexual offences and murder, and also from the post of *Temenggung* and his duties.<sup>27</sup>

It is beyond dispute that '*Adat Temenggung* dealt with both aspects of Public and Private laws,<sup>28</sup> but for various reasons only certain branches of the laws prevailed. First, the introduction of several Charters of Justice beginning with the Charter of Justice of 1807 can be seen as one main reason. The application of English law was extended by the Civil Law Ordinance, 1956. The ordinance has been revised and finally confirmed in its application. It is included in section 3 of the Civil Law Act, 1956, revised in 1972 (Malaysia Act, 1967); However, it did not and does not now affect the application of the personal law. Second, only certain aspects of family law, inheritance and property, i.e. *harta sepencarian*,<sup>29</sup> were recognised and received judicial sanction. In respect of inheritance<sup>30</sup> and family law,<sup>31</sup> the '*adat* is fundamentally based on Islamic law<sup>32</sup> although the latter was modified by local custom.<sup>33</sup> The law is now administered by each state as provided in Schedule Ninth List 11 to the Constitution of Malaysia and in the Administration of Muslim Law Enactment of each state.

It is evident that only certain rules regulating inheritance,<sup>34</sup> particularly on

<sup>26</sup> Winstedt, R.O. *The Malays*, p. 91; Liew Yock Fang, pp. 63 & 65; Hooker M.B. (1972), op. cit. p. 74; Pires T. *The Sumo Oriental*, vol. 2, pp. 241, 261, 264 & 265, Glasgow, 1944. Overbeck H. "Malay Manuscripts," p. 243, J.M.B.R.A.S. vol. 4, 1926.

<sup>27</sup> Wilkinson R.J. *Law*, P.M.S. p. 36 & 45, pt. 1, Kuala Lumpur, 1908. pp. 73 & 100; Selamat Mulja DR. Prof. Undang-Undang Majapahit, p. 12. Djakarta 1967; Brown C.C. "Malay Annals," pp. 113-114, J.M.B.R.A.S. vol. 25, pt. 2 & 3, 1952; Jolly J, *Hindu Law and Custom*; p. 93-4 & 279; Culcutta 1928; Rigby J. pp. 13-14; Winstedt R.O. "Old Malay Legal Digest and Malay Customary Law," pp. 18-19; Diamond A.S. p. 112.

<sup>28</sup> Rigby J. Hooker (1970) pp. 52-6; Fang L.Y. pp. 38, 44-50; Overbeck H. pp. 243-245.

<sup>29</sup> Teh Rasim v. Neman (1937) 15.1, J.M.B.R.A.S. 18.

<sup>30</sup> Shaik Abdul Latiff v. Shaik Elias Bux (1915) 1 F.M.S.L.R. 204; Re Timah bt Abdullah (1941) 10. M.L.J. 51; cf. Hooker M.B. (1976) p. 90; *The Laws of Stratits Settlements*, Muslim Ordinance, C. 56, S. 27, 1936.

<sup>31</sup> Chulas v. Kolson (1867) Leic. 462; Hawah v. Daud (1968) Leic. 253.

<sup>32</sup> Fang L.Y. pp. 14, 35 & 38; Ibrahim A. Fr. p. 7; Rigby J, p. 5; Winstedt R.O. *The Malays*, p. 65; Kemp. J.E. & R.O. Winstedt, p. 2, De Moubray, *Matriachy in the Malay Peninsular*, p. 5; London 1931; Taylor E.N. "Malay Family Law," J.M.B.R.A.S, p. 4, vol. 15, pt. 1, 1937.

<sup>33</sup> Abdul Rahman v. Eash (1941) M.L.J. 163.

<sup>34</sup> Shafi v. Lijah (1949) 15, M.L.J. 65; The decision of the instant case was criticised, see Hooker M.B. op. cit. pp. 91-94; cf. Maxwell W.E. *The law and Custom of the Malays*, pp. 53-54, Singapore 1885; Taylor E.N. "Inheritance in Negri Sembilan," p. 50, J.M.B.R.A.S, vol. 21, pt. 2, 1948.

jointly-earned property are still governed by the rule of *'adat*. In regard to the jointly-earned property or *harta sepencarian* it may be defined as property jointly acquired by both husband and wife during coverture. This form of property is recognised in all the states of Malaysia.<sup>35</sup> According to Perak State Council Minute, 1907 on divorce it should be divided in the proportion of three shares, one share to the wife and the other two shares to the husband.<sup>36</sup> The rule seems to have been based on a Qur'anic verse which provides the male twice the share of the female.<sup>37</sup> In fact, the rule does not apply to the instant case, if it does, it is misunderstood. In *Teh Rasim v. Neman*,<sup>38</sup> a divorced wife who had actually helped to cultivate land acquired during marriage claimed one-half of the value of the land. It was held that the wife, although she had been found guilty of adultery, had a claim following the ruling made by the Perak State Council. However, claims to such property were denied in the Straits Settlements.<sup>39</sup> A similar decision was also reached in *Bongah v. Mat Din*.<sup>40</sup> On the other hand, it was admitted that the court had no jurisdiction to decide on a claim for subsistence by a divorced Muslim wife.<sup>41</sup>

Property acquired jointly during marriage is some times argued to be *harta sharika*. This is observed in *Wan Mahatan v. Haji Abdul Samat*.<sup>42</sup> The case concerned a divorced wife who claimed one-half of the land on the ground that was her due as *harta sharika* according to Islami law. It was held at first instance that she was entitled to one-half share and the decision was upheld on appeal. It was held immaterial whether the wife had actually worked on the land or no.<sup>43</sup>

The position was for some time uncertain in Selangor. In *Laton v. Ramah*,<sup>44</sup> land was acquired during marriage and registered in the husband's name. Part of the purchase money was provided by the wife. The wife pleaded that the property of the deceased was *harta sharika* according to Shafi'i school and, therefore, claimed one-half of it. Two *Qadis* were inter-viewed and they admitted that the rule of *harta sharika* is part of Islamic law and enforced in Selangor. It was held that the wife was entitled to one-half. This decision was overruled by the Court of Appeal which held that the evidence was improperly admitted and the evidence actually given by the

<sup>35</sup> Hooker M.B. p. 77, Rigby J, p. 39; Kemp. J.E. & R.O. Winstedt, p. 6; Ibrahim A. Dr. Islamic Law in Malaya, p. 229, M.S.R.I, Singapore 1965.

<sup>36</sup> Taylor E.N. "Malay Family Law," p. 70; Winstedt R.O. "Old Malay Digest and Malay Customary Law," p. 28.

<sup>37</sup> al-Qur'an, Hisa v. II; Anderson N, Law Reform in Muslim World, p. 148, London 1976; Coulson N.J. Prof. Succession in the Muslim Family, pp. 41, 42 & 114, Cambridge 1971.

<sup>38</sup> (1937) 15.1, J.M.B.R.A.S. 18.

<sup>39</sup> Tijah v. Mat Alli (1886) 4 Ky, 124.

<sup>40</sup> (1937) 15.1, J.M.B.R.A.S. 16.

<sup>41</sup> Awee v. Ibrahim (1916) 1, F.M.S.L.R. 274.

<sup>42</sup> (1937) 15.1, J.M.B.R.A.S. 25.

<sup>43</sup> Rasina v. Said (1937) 15.1, J.M.B.R.A.S. 29; cf. Re Noorijah dec. (1937) 15.1, J.M.B.R.A.S. 59.

<sup>44</sup> (1937) 15.1, J.M.B.R.A.S. 35; (1926) 6, F.M.S.L.R. 116.

*Qadis* before the trial judge was not admissible. The case was sent back for retrial but the parties arrived at a settlement and a consent order was made.

Three important points were brought up in *Re Elang, Re Kulop Degor dec. Lebar v. Niat*.<sup>45</sup> First, the share which a wife could receive depended on whether or not she had worked on the land. If she had actually worked she could claim one-half, otherwise one-third.<sup>46</sup> Second, the term *harta sharika* caused confusion and difficulty. Third, the basis of the claim, was in fact, local *'adat* and the term *harta sharika* was actually used to denote a purely Malay idea.<sup>47</sup> A claim to such property need not necessarily be made at the time of divorce, and remarriage did not extinguish such a claim.<sup>48</sup> With regard to Pahang there was no fixed rules as to the shares<sup>49</sup> and a woman could claim either in accordance with Islamic law or custom.<sup>50</sup>

Whether such property may be correctly termed as *harta sharika* is doubtful. Those who interpreted it as *harta sharika* based their reasoning on a Qur'anic verse which means; Men shall have the benefit of what they earn and woman shall have the profit of what they earn.<sup>51</sup> According to *Minhaj Et Talibin*, the only permitted form of partnership is *sharika el 'ain* or particular partnership. Where the share of each partner must be expressly indicated. Thus, a partnership of this kind cannot exist if the parties merely reach an agreement to combine their shares. Profit and loss should be shared in proportion to the contribution of each partner regardless of the value of the labour of each. Any stipulation to the contrary would only involve illegality of the contract.<sup>52</sup>

To constitute a legal and binding partnership there must be a contract between the parties. The profit and the loss are to be shared, in proportion. *Harta sepencarian* is, therefore, hardly to be termed *harta sharika* and it is obviously misleading to apply the rule of partnership when dealing with it. Most of the reported decisions support the view that such property is, in fact, a matter of Malay *'adat*.

In all the states of West Malaysia, except Johor, the Chief *Qadi* and the Courts of *Qadis* are given jurisdiction to hear and determine actions and proceedings which relate to the division of or claims to *harta sepencarian*. There are no express references to *harta sepencarian* in the legislation of Kedah and Perak, but the Courts of

<sup>45</sup> (1937) 15.1, J.M.B.R.A.S. 48.

<sup>46</sup> cf. *Rasina v. Said* (1937) 15.1, J.M.B.R.A.S. 29; *Re Noorijah dec.* (1937) 15.1, J.M.B.R.A.S. 59; *Haji Ramah v. Alpha & Ors* (1937) 15.1, J.M.B.R.A.S. 22, (1924) 4. F.M.S.L.R. 179; *Teh v. Kelsom* (1939) 8. M.L.J. 289.

<sup>47</sup> cf. *Lotan v. Ramah* (1937) 15.1, J.M.B.R.A.S. 35; (1926) 6. F.M.S.L.R. 116; *Habsah v. Abdullah* (1950) 16. M.J.L. 60.

<sup>48</sup> *Habesah v. Abdullah* (1950) 16. M.L.J. 60.

<sup>49</sup> *Taylor E.N.* p. 73.

<sup>50</sup> *Teh Kelsom* (1939) 8. M.L.J. 289; *Haji Saemah v. Haji Sulaiman* (1948) 14. M.L.J. 108.

<sup>51</sup> *al-Qur'an, Nisa'* v. 32; *al-Tabari, M.J. Tafsir al-Tabari*, pp. 265-267, vol. 8 Cairo.

<sup>52</sup> *Nawawi, Mihaj Et. Talibin*, pp. 179-180; (trans) Howard E.C., London 1914.



*Chief Qadi* or *Qadi* have jurisdiction to hear any dispute as to the disposition of a claim to property arising out of marriage or divorce.<sup>53</sup> The jurisdiction of the Shari'a Courts is not of course exclusive<sup>54</sup> and a claim may be made in the civil courts.<sup>55</sup>

#### 'ADAT PERPATIH

'*Adat Perpatih*'<sup>56</sup> can be distinguished from the rest of the Malay Customary laws by its traditional statement or customary saying which is known as *Perbilangn*. The customary saying, in the first place, is unwritten but unlikely to be forgotten because it is regarded as a source of law. It has been handed down from generation to generation. Nowadays, most of the customary sayings have been collected and reduced into writing. This form of expression is confined to the area of Negri Sembilan and certain districts in Malacca such as Naning and Alor Gajah.<sup>57</sup>

Wilkinson classifies '*Adat Perpatih*' into four groups;

i Primitive axiomatic justice – equity and common sense (*cupak yang asli*)

This group is limited to admonitions directed generally to the settlement of simple issues of dispute which do not involve matters such as title to land, succession, the validity of marriage and divorce and the proper election of chiefs.

ii Artificial law (*cupak yang buatan*)

This is to describe the authority of Islamic law.

iii Treaty law (*kata maufakat*)

This refers to the provisions governing internal matters of the various districts of Negri Sembilan. It relates to questions of election and appointment of superior officials and the rules governing the relations of the districts one to another within the confederacy. This refers to the Negri Sembilan constitution.

iv Traditional law (*kata pesaka*)

These are statements which deal with matters not covered in (i) and (iii). They are mainly concerned with question of land tenure.<sup>58</sup>

<sup>53</sup> The Administration of Muslim Law Enactment; Selangor S. 45 (3); Trengganu s. 25 (1); Pahang s. 37 (3); Penang s. 40 (3); Malacca s. 40 (3); Negri Sembilan s. 41 (3); Kedah s. 41(3); Perlis s. 4 (b); Perak s. 45 (3); Kelantan s. 9 (1).

<sup>54</sup> *Wan Kelsom v. Taib* (1950) 16. M.L.J. 68.

<sup>55</sup> *Ali Mat bin Khamis v. Jamaliah bt. Kassim* (1974) 1. M.L.J. 18.

<sup>56</sup> It was presumed that the whole of '*Adat Perpatih*' was invented by Dato' Perpatih Pinang Sa-Batang of Minangkabau; Wilkinson R.J. p. 20; Mayer D.S. op. cit. 265.

<sup>57</sup> '*Adat Naning*' is also founded in a matrilineal system. The nature of '*Adat Naning*', to some extent, is very similar to '*Adat Perpatih*' especially pertaining to land. It is believed that '*Adat Naning*' was more frequently described as '*Adat Perpatih*'; see Ramsay A.B. pp. 97-98; Hooker M.B. (1976) pp. 71-72; Blagden C.C., '*Minangkabau Custom*,' p. 307. J.M.B.R.A.S. vol. 8; pt. 11. 1930; Wilkinson R.J. p. 9; Wilkinson R.J. Note on Negri Sembilan p. 291 P.M.S. 1971.

<sup>58</sup> Wilkinson R.J. Law, pp. 20-22; Hooker M.B. (1970) pp. 2-3; Hooker M.B. (1972) p. 38; cf. Winstedt R.O. & De Jong J.P.E. Dr. "A Digest of Customary Law from Sungai Ujong," pp. 8, 16, 20 & 21. J.M.B.R.A.S. vol. 27, pt. 3, 1954.

The most important parts of the 'Adat are the rules governing the following matters;

- i Administrative and Constitutional matters
- ii Marriage and divorce
- iii Adoption
- iv Inheritance and succession
- v Property matters<sup>59</sup>

The basic unity of *perpatih* society is the clan, a genealogical unit comprising smaller sub-units in extended family *perut* – womb or group. The effective relevant members of a lineage are the women and their daughters. Every *perut* has according to its size one or more elders – *buapa*, elected by its members subject to the approval of tribal chief – *lembaga*, who can dismiss him at will. The clan is generally associated with a village or group of villages and is ruled by a *lembaga*. In the election of the *lembaga*, the *buapas* of the *peruts* supported by the fully enfranchised members of the tribe will decide the most eligible man among them for the office. When a *lembaga* has been elected he can only be removed by unanimous vote.<sup>60</sup>

Not every *lembaga* can be elected as an *Undang* because the election is a matter of 'adat procedure and rests upon the principle of rotation. The office of *Undang* is appointed from certain provinces of the state which consists of Sungai Ujong, Jelevu, Johol and Rembau.<sup>61</sup> The method of electing the *Undang* varies from each *luak* to another. In Rembau the *Lembagas* elect the *Undang* by unanimous vote of different utrine womb, offshoots of the original patriarchal Malacca house. In Sungai Ujong, Jelevu and Johol, there are electoral colleges for the election of their *Undangs*.<sup>62</sup>

Concerning the election of the ruler – *Yamtuan Besar*, he must be chosen by the unanimous vote of the four *Undangs* and should always be a delegate from Minangkabau which in the present day is confined to one family. Indeed, this requirement was recognised in the Sri Menanti Agreement of 4th June 1887. The

<sup>59</sup> For observation, see Winstedt R.O. & De Jong J.P.E. Dr. pp. 7-37, Wilkinson R.J. op. cit. pp. 8-34; Ali M.D. Sembah Chakap dan Adat Perpatih, Kuala Lumpur 1957; Mohamad A.R. Dasar Dasar Adat Perpatih, Kuala Lumpur 1964; Hooker M.B. (1976) pp. 63-71.

<sup>60</sup> Winstedt R.O. The Malays, op. cit. pp. 82-84; Wilkinson R.J. Note on Negri Sembilan, P.M.S. p. 318; Kuala Lumpur, 1971. Hooker M.B. (1972) pp. 15, 51 & 54; The ancient Constitution describe Sungai Ujong as 'berundang berkeadilan berteromba berselasilah, berlembaga,' and Rembau as 'berundang berlembaga,' Johol as 'berundang berteromba berselasilah -- Nathan J.E. & R.O. Winstedt, p. 11.

<sup>61</sup> The district of Rembau has succeeded to the position of Undang formerly held by Klang; Birch E.W. Constitution of Negri Sembilan, J.M.B.R.A.S. No. 46, 1906.

<sup>62</sup> Winstedt R.O. op. cit. p. 85; Nathan J.E. & R.O. Winstedt, pp. 13-15; Caldecott A, "Jelevu. Its History & Constitution," pp. 335-336, P.M.S. 1971; Hooker M.B. (1972) p. 54; Minattur J. p. 334.

ruler, in fact, has a double status, ruler of Sri Menanti by right of birth and ruler of the state by election.<sup>63</sup>

Principles regarding the structure of the 'adat society are provided in an axiom;

The king rules his world,  
 The chief rules his luak,  
 The Lembaga rules his tribe,  
 The elder rules his own people,  
 The peasant rules his house.<sup>64</sup>

The position of the ruler and 'adat officials at the present time is well-defined in the Negri Sembilan Constitution of 1959<sup>65</sup> and in the Small Estate (Distribution) Ordinance No. 34 of 1955<sup>66</sup> and in the Customary Tenure Enactment, Cap. 215 as amended in No. 4 of 1960<sup>67</sup>

Adoption is recognised by 'Adat Perpatih.<sup>68</sup> The ceremony of adoption is called *berkadim*. Thus, normally when a family has no natural daughter the mother will adopt a girl to inherit the property at her death. In making the choice it should go to the nearest niece but it seems to be impractical because the adopted daughter tends to return to her natural mother when she grows up. It is, therefore, usual for a mother to choose someone outside the family,<sup>69</sup> or even outside the Malay race.<sup>70</sup> The form of adoption is either a full adoption, a limited adoption or a pseudo adoption. In respect of the full adoption, in the case of a woman, it gives her all rights of inheritance and all responsibilities belonging to a natural daughter and a grand-daughter of her adoptive parents.<sup>71</sup> A man who is fully adopted becomes eligible for the office of his adoptive tribe. Limited adoption means that a definite relationship is created, but the right of inheritance, if conferred at all, is restricted. Pseudo adoption is where a woman merely takes a relative to live with and cherish her without adopting her or giving her any property. Such relative acquires no legal rights of any kind<sup>72</sup> but if she pays the funeral expense she is entitled to recover.<sup>73</sup>

<sup>63</sup> Winstedt R.O. p. 87, Birch E.W. pp. 10-11; Hooker M.B. pp. 54 & 117; Raja Melewar was installed by the four Undangs as Yamtuan Besar of Negri Sembilan in 1773.

<sup>64</sup> Wilkinson R.J. p. 24.

<sup>65</sup> Arts. 7, 10, 11, 13, 14, 39, 40, 45 and 79.

<sup>66</sup> Ss. 19 (1) (a) and 25.

<sup>67</sup> Ss. 2A. and 15.

<sup>68</sup> Under the Temenggung system, adoption is recognised merely as giving rise to a right of custody but not to create a family relationship. It is recognised by Malay custom in Sarawak; see *Sheripah Unei v. Mas Poeti* (1949) S.C.R. 5, and in Sabah; see *Matusin bin Simbi v. Kwang* (1953) S.C.R. 106.

<sup>69</sup> *Re Siadus* (1929) 7. J.M.B.R.A.S. 239.

<sup>70</sup> Ali M.D. "Customary Law/Family," *op. cit.* p. 38.

<sup>71</sup> *Bulat* (1929) 7. J.M.B.R.A.S. 247.

<sup>72</sup> Taylor E.N. "Customary Law of Rembau," p. 40, Winstedt R.O. p. 60; Hooker M.B. pp. 135, 136 & 138; Ibrahim A, "The Administrative of Muslim Law in South East Asia," pp. 155-156, *Mal. L.R.* 1971.

However, adoption is subject to the approval of the family and the consent of the *Undang*, in the case of *kadim adat dan pesaka*, and the consent of the *lembaga* in the case of *kadim adat pada lembaga*. Once it has been performed it is irrevocable.<sup>74</sup> Rules relating to it are laid down;

The touching of blood,  
 The supplication of prayer,  
 The affirmation of an oath,  
 The bearing of witness of the Qur'an;  
 Poultry which is tied is given food,  
 A person who is adopted is given property.<sup>75</sup>

When the person to be adopted is within the family circle no formal ceremony is required, other than a family feast.<sup>76</sup> The chiefs need not be present but they ought to be informed of the event. However, it should be proclaimed and publicised. Usually the elder is invited although his presence is not essential to the validity of adoption. It becomes necessary in the case of possible future disputes regarding its validity. Adoption within a family is called *tarik*. If the adopted child comes from a different family but from within the same tribe, it seems that a formal ceremony should be held,<sup>77</sup> although it is not necessary to refer the matter to the *Undang*. An adopted child is not debarred from inheriting from its natural mother. In the case of a male he is prohibited from marrying any member of that exogamic unit.<sup>78</sup>

There are two kinds of property -- ancestral and aquired -- recognised under the system. The fundamental principle of the '*adat* in this respect is tribal.<sup>79</sup> The rules governing ancestral property are,<sup>80</sup>

- i . Ancestral property belongs to the tribe.<sup>81</sup>
- ii All ancestral property vests in the female members of the tribe, but they hold it as trustees for their tribe rather than as owners.<sup>82</sup>
- iii Ancestral property cannot be disposed of by will.<sup>83</sup>

<sup>73</sup> Re Siada dec. (1929) 7. J.M.B.R.A.S. 257.

<sup>74</sup> Sapiah v. Sintan (1929) 7. J.M.B.R.A.S. 237.

<sup>75</sup> Ali M.D. pp. 38-39; Ibrahim A, "Islam & Customary Law in The Malayan Legal Context," p. 128, Family Law and Customary Law in Asia, The Hague, 1961.

<sup>76</sup> Re Siato (1929) 7. J.M.B.R.A.S. 249.

<sup>77</sup> Re Haji Abdul Rahim (1929) 7. J.M.B.R.A.S. 244.

<sup>78</sup> Hooker M.B. (1970) pp. 137, 139-141; Yusof L, "Islam & Adat as seen in Land Inheritance," pp. 18-19, Intisari, vol. 4, Singapore 1963.

<sup>79</sup> Tar Haar, Adat Law in Indonesia, pp. 188-189, New York, 1948; Hooker M.B. "Adat & Islam in Malay," p. 180.

<sup>80</sup> cf. Winstedt R.O. "An Oleh Minangkabau Legal Digest from Perak," pp. 2 & 12; Sheen J.J. & A.A. Khamis, "Adat Kuala Pilah," P. 214, J.M.B.R.A.S. vol. 14, pt. 3, 1936.

<sup>81</sup> Timah v. Taib (1929) 7. J.M.B.R.A.S. 175.

<sup>82</sup> Taylor E.N. op. cit. pp. 9 & 31; Hooker M.B. (1972) op. cit. p. 209.

<sup>83</sup> Re Dato Nyiang Kulop Kidal dec. (1929) 7. J.M.B.R.A.S. 92.

Ancestral property can only be inherited by a female, whilst sons have no right at all over it. It was pointed out in *Sapian v. Tiamat*<sup>84</sup> that where land is an ancestral property the owner must be a female member of the appropriate clan. Landed property which is newly acquired does not necessarily become ancestral. It may be classed as ancestral land only if the owner informs his intention to the *Lembaga*. Once it becomes ancestral it belongs to the tribe. In *Haji Hussein v. Maheran*,<sup>85</sup> Horne J. realised that newly acquired land may be converted into ancestral land under the custom. It may also become ancestral land once it devolves to female heirs.<sup>86</sup>

It was decided at a meeting of the Negri Sembilan State Council in 1899, with respect to Rembau, to permit a son a life tenancy of an ancestral property in default of female heirs of the same degree. However, at his death those lands revert to his nearest female relative in the tribe.<sup>87</sup> A son cannot sell, mortgage or lease an ancestral land and only female holders are permitted to do so.<sup>88</sup> The validity of the sale outside the holder's clans and lineage is effective and permitted only when the clans and the lineage members have been given an option to purchase it<sup>89</sup> at a price not exceeding a fair and reasonable value.<sup>90</sup> The question of priority of right of purchase can be clearly observed in *Kechik v. Samsiah*<sup>91</sup> and in *Ijah v. Indam*.<sup>92</sup> In the former case priority was given to the nearer in degree whereas in the latter case to the nearer in blood relationship – *perut*, of the tribe.

As regards the acquired property it may be divided into two forms; personally acquired property and property jointly acquired during coverture. The rules are;

Wife's property remains,  
 Husband's bringings go back to him,  
 Joint earnings during marriage are divided,  
 On death of husband they go to wife,  
 On death of wife they go to husband.<sup>93</sup>

That is to say, what is found in the possession of the wife at the time of marriage remains with her on divorce<sup>94</sup> and it goes to her customary heirs on her

<sup>84</sup> (1939) 8. M.L.J. 116.

<sup>85</sup> (1946) 12. M.L.J. 116.

<sup>86</sup> Wong S.Y.D. *Tenure & Land Dealing in the Malay States*; p. 472, Singapore, 1975.

<sup>87</sup> Parr C.W.C. & W.H. Mackray, "Rembau. Its History, Constitution and Custom," pp. 69-70, J.M.B.R.A.S. vol. 56, 1910.

<sup>88</sup> *Ijah v. Sa-Elah* (1929) 7. J.M.B.R.A.S. 179.

<sup>89</sup> Hooker M.B. "Law, Religion & Bureaucracy in a Malay State," p. 265. A.J.C.L. vol. 19. No. 2, 1971, Ali M.D. "Malay Customary Law/Family," p. 39; Sheehan J.J. & A.A. Khamis, p. 216.

<sup>90</sup> *Bador Samat v. Loyak & Ganda* (1929) 7. J.M.B.R.A.S. 193.

<sup>91</sup> (1929) 7. J.M.B.R.A.S. 189.

<sup>92</sup> (1929) 7. J.M.B.R.A.S. 190.

<sup>93</sup> Wilkinson R.J. p. 32; Caldecott A, "Jelevu Customary Songs and Sayings," p. 38-39, J.M.B.R.A.S. No. 78, 1918. Ibrahim A, p. 134.

<sup>94</sup> *Nyachik v. Ali* (1929) 7. J.M.B.R.A.S. 100; *Saudah v. Siman* (1929) 7. J.M.B.R.A.S. 104.

death.<sup>95</sup> What is brought by the husband to his wife's house at the time of marriage goes back with him on divorce or to his customary heirs on his death.<sup>96</sup> What is acquired during coverture is equally divided – *per stripes*, between them on divorce,<sup>97</sup> and on death of the husband it goes to the wife<sup>98</sup> and *vice versa*,<sup>99</sup> provided there is no issue from the marriage.<sup>100</sup>

Marriage property is of three kinds. Those belongings to the wife are called *dapatan*<sup>101</sup> and those brought over by the husband are *pembawa*.<sup>102</sup> Those which are acquired jointly by the parties during the coverture are *sepencarian*.<sup>103</sup> The first two forms of property should be declared before the elders at the time of the marriage.<sup>104</sup> If *pembawa* or *dapatan* increased in value during marriage the increased portion ranks as jointly acquired property.<sup>105</sup> A gift to a married man by his family ranks as *pembawa*<sup>106</sup> and he cannot dispose of it without the consent of his family. A similar rule applies to a married woman.<sup>107</sup> There can be no gift between husband and wife.<sup>108</sup> On the other hand, husband can recover no compensation in respect of a house built by him on the wife's ancestral land.<sup>109</sup> If the house is sold the proceeds of the sale become ancestral property.<sup>110</sup> On dissolution of marriage the whole of the property of the parties, moveable or immovable, should be brought into account.<sup>111</sup> A claim need not necessarily be made at the time of divorce;<sup>112</sup> it may be brought after divorce.<sup>113</sup>

There are exceptions to the rule of equal share. First, in the case of a conditional divorce the wife retains the whole of the property.<sup>114</sup> Second, she retains

<sup>95</sup> Haji Hussain v. Maheran (1948) 21.2. J.M.B.R.A.S. 110.

<sup>96</sup> Re Taat dec. (1929) 7. J.M.B.R.A.S. 74; Sali v. Achik (1941) 10. M.L.J. 14.

<sup>97</sup> Pesah v. Dollah (1929) 7. J.M.B.R.A.S. 119.

<sup>98</sup> Re Pral dec. (1929) 7. J.M.B.R.A.S. 128; Minah v. Kepam (1929) 7. J.M.B.R.A.S. 143.

<sup>99</sup> Niah v. Mohamad Alias (1929) 7. J.M.B.R.A.S. 81; Re Kahar (1929) 7. J.M.B.R.A.S. 129.

<sup>100</sup> Re Inap dec. (1929) 7. J.M.B.R.A.S. 140; cf. Pesah v. Dolah (1929) 7. J.M.B.R.A.S. 119; Re Kering dec. (1929) 7. J.M.B.R.A.S. 136.

<sup>101</sup> Public Prosecutor v. Tahir (1929) 7. J.M.B.R.A.S. 102.

<sup>102</sup> Tiano v. Si-Alus (1929) 7. J.M.B.R.A.S. 71.

<sup>103</sup> Sadiyah v. Siakam & Hassan (1929) 7. J.M.B.R.A.S. 65.

<sup>104</sup> Saleha & Habibah v. Amun (1929) 7. J.M.B.R.A.S. 164.

<sup>105</sup> Limah v. Lateh (1929) 7. J.M.B.R.A.S. 88.

<sup>106</sup> Re Ripin (1929) 7. J.M.B.R.A.S. 77.

<sup>107</sup> Re Haji Norijah dec. (1929) 7. J.M.B.R.A.S. 76.

<sup>108</sup> Nyai Ampar v. Impan & Langkar (1929) 7. J.M.B.R.A.S. 67.

<sup>109</sup> Ungkar v. Sichik (1929) 7. J.M.B.R.A.S. 220.

<sup>110</sup> Milah v. Shariff (1929) 7. J.M.B.R.A.S. 182.

<sup>111</sup> Saleha & Habibah v. Amun (1929) 7. J.M.B.R.A.S. 164.

<sup>112</sup> Pesah v. Dolah (1929) 7. J.M.B.R.A.S. 119.

<sup>113</sup> Hasmah bt Omar v. Abdul Jalil (1958) 24. M.L.J. 10.

<sup>114</sup> Mahawa v. Manan (1929) 7. J.M.B.R.A.S. 111.

landed property, such as rice field and farm acquired from joint earning. On divorce the wife is entitled to the whole of the property.<sup>115</sup> On the death of the wife the property goes to the female issue to the exclusion of the husband.<sup>116</sup>

The Small Estate (Distribution) Ordinance No. 34 of 1955 provides the principles governing the distribution of acquired property.<sup>117</sup> As regards the ancestral land the custom had been in force prior to 1889 where native holdings were recognised as lawful by virtue of local custom.<sup>118</sup> A few years later several enactments were passed which subsequently led to the registration of customary land in the mukim register.<sup>119</sup> The most important would be the Customary Tenure Enactment of 1926. This enactment was amended in 1930. It remains in force and is now called the Customary Tenure Enactment, chapter 215 of 1935.<sup>120</sup> The new enactment does not seek to ensure the observance of the custom in respect of all lands which are subject to the custom.<sup>121</sup> It confines its application only to a statutorily defined class of land called "customary land" which is entered in the *mukim*.<sup>122</sup> There is another enactment which deals with the custom of certain tribes other than those provided by the Customary Tenure Enactment (chapter 215). That is the Customary Tenure (Lengkongan Lands) Enactment of 1960<sup>123</sup>

#### CONCLUSION

The customs of the people of Malaysia are varied according to race and religion. The custom of each group is not only confined to the members of the group, but it is limited also in its area of applicability, such as '*Adat Perpatih*'. The scope of customary laws is confined primarily to matrimonial matters and succession, especially regulating landed property, and chieftancy. The Malay custom, for instance, is a part of the technical legal system of Malaysia and is contained in the statute, law reports and above all preserved in the various state constitutions and in the Federal Constitution.

<sup>115</sup> Re Rahmat Pakeh dec. (1929) 7. J.M.B.R.A.S. 126.

<sup>116</sup> Temah v. Haji Zakaria (1929) 7. J.M.B.R.A.S. 125.

<sup>117</sup> Sec. 24.

<sup>118</sup> Order in Council (Negri Sembilan) 9/1889. Sec. 5.

<sup>119</sup> Negri Sembilan Land Enactment No. 22/1897; Registration of Title Enactment of 1898; Negri Sembilan Land Enactment of 1903 which was in force until 1911; The Customary Tenure Enactment of 1909.

<sup>120</sup> Federated Malay States Revised Laws, 1935.

<sup>121</sup> Kutai v. Taensah (1934) 3. M.L.J. 251; cf. Re Haji Mansur dec. (1940) 9. M.L.J. 110.

<sup>122</sup> Customary Tenure Enactment C. 215/1935; cf. Haji Hussein v. Maheran (1946) 12. M.L.J. 116; Shafi v. Lijah (1949) 15. M.L.J. 65.

<sup>123</sup> Customary Tenure (Lengkongan Land) Enactment No. 4/1960.