ADAT LAWS IN MODERN MALAYA

Land Tenure, Traditional Government and Religion

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TRADITIONAL GOVERNMENT, LAND TENURE AND COLONIAL LEGISLATION IN MALACCA

THE state of Malacca provides one of the most interesting though intricate examples of the integration of differing legal systems affecting the Malay peasant. There are three reasons for this. First, parts of Malacca state possess matrilineal clans with the same structure as that described in Chapter 1. The members of these clans are governed by an adat, termed adat Naning,[1] which is the same or very similar to the adat perpateh found in Negri Sembilan.

The second factor to be taken account of in the study of Malacca land tenure is the state's long history of European domination: the Portuguese from 1511, the Dutch from 1641 and the English from 1825.[2] The Dutch and the English had of necessity to make arrangments for the government of the territory and this had some influence on traditional Malay land tenures.

Third, and arising out of this, various acts and regulations were enforced by the English colonial government on land holding and taxation in the state. But government action took place on an insufficient knowledge of local tenure, and indeed, on a misconception of the principles of Malay landholding in general. This resulted not only in the government regulation of the matrilineal adat but also in the creation of a new 'statutory' form of customary land tenure. This chapter describes first the matrilineal adat and second, discusses the creation of the statutory land tenure system.

Adat in Naning[3]

Naning is said to have been one of the original nine states of the old Negri Sembilan (Wilkinson, 1911: 13–14) but its boundaries were not clearly defined until comparatively recently. The current

[1]Naning is the name of the matrilineal adat district in Malacca though of course not all the persons living in Naning are members of a clan. The area of Naning corresponds more or less to the jajahan of Alor Gajah.

[2]Under the Treaty of London of 17 March 1824, the settlement of Malacca was ceded to Great Britain as from 1 March 1825. The East India Company took formal possession on this day though Malacca had been occupied from 1797 to 1818. From 1818 to 1825 it had reverted to Dutch occupation.

[3]Hereafter referred to as 'adat Naning'.

State Constitution refers to an '*Adat Perpateh Naning*' ('which is a custom having no connection whatever with religion') which is defined as the adat practised in the mukims set out in the second schedule to the constitution.[1] These are as follows:

Ramuan China Besar
Ramuan China Kechil
Sungei Bahru Ulu
Masjid Tanah
Sungei Siput
Berisu
Ayer Pa'abas
Lendu
Sungei Buloh
Melekek
Taboh Naning
Pegoh
Kelemak
Pulau Sebang
Tanjong Rimau
Padang Sebang
Gadek
Malaka Pindah
Rembia
Sungei Patai
Kemuning
Tebong
Batang Malaka
Jas
Nyalas[2]

The State Constitution makes it quite clear that only these areas and no others have been definitively designated matrilineal adat areas. Administratively, the *adat Naning* areas make up the whole of the jajahan of Alor Gajah and a small part of Jasin (mukims of Batang Melaka, Jas and Nyalas).[3]

The earliest description of adat Naning appears in Newbold's extensive summary of British activities in Malacca (Newbold, 1839 (i):235–40). Newbold dealt only with the political and executive

[1]Malacca State Constitution 1957—Art 34(5).

[2]Abdullah writes (1955: 229) that in 1831 fifteen penghulus were appointed to Naning by the Straits Settlements government. This was consequent upon the outbreak of war between Naning and the Straits Settlements government (see Mills, 1960: 137–51). The penghulus appointed were as follows:

	Penghulu's name	*Clan*	*Area*
1.	Bilal Mania	Batu Belang	Ikan Lemak
2.	Marat	Batu Belang	Piku
3.	Maulana Sultan	Batu Belang	Malkek
4.	Safar	Semelenggang	Taboh
5.	Kiman	Tiga Batu	Lendu
6.	Dul (Dol)	Anak Melaka	Ayer Pa'Abbas
7.	Aludin	Anak Melaka	Berisu
8.	Laut	Semelenggang	Sg. Siput
9.	Kuroh	Tiga Nenek	Padang Sebang
10.	Lengkar	Tiga Batu	Tj. Rimau
11.	Talib	Mungkal	Pulau
12.	Udin	Semelenggang	Kemuning
13.	Kujak	Mungkal	Batang Melaka
14.	—	—	—
15.	Dol Kunchi	Biduanda	Tebong

With one exception, these areas are all identifiable with current mukims in Naning.

[3]The latter are contiguous with parts of the adat areas of Negri Sembilan

organization of Naning, the district in Malacca to which the matrilineal adat is largely confined (see above p.92). He remarked that 'The classification of the people into tribes was nearly as well defined as that of the children of Israel...'(1839 (1):235). He went on to describe the office of 'Panghulu' (Penghulu), noting that it was hereditary and based on the Minangkabau law of succession which he described as 'Anak Perpati' (Adat Perpateh) or '*Tromba Pusaka Minangkabowe*' *(Tembera Pesaka Minangkabau)*. The right to succeed to the office of Penghulu, he said, devolved upon the eldest male child of the sister.

Newbold gave a list of the four 'tribes' (*ampat suku*) of Naning as follows: Suku Sa Melongan, Anak Malacca, Tiga Battu, and Munkal. There were also three other clans, 'Battu Balang', 'Tiga Nenek' and 'Bodoanda' (Biduanda) but as their numbers were so few they had been incorporated into the four suku.

Newbold's list is accurate so far as it goes but it provides no information on lineages. Ramsay (1950: 97–101) gives the following more detailed information:

Clans	*Lineages*
1 Semelenggang	i. Kg. Padang ii. Taboh iii. Naning
2 Anak Melaka	i. Kg. Bukit
3 Tiga Batu	i. Nesan Tinggi ii. Tiga Nenek
4 Mungkar	i. Bedara ii. Kuala Ena

This list is largely incomplete and in some respects, inaccurate. The complete and current (March 1969) list is as follows:[1]

[1]The writer acknowledges with gratitude the assistance of the present Dato' Naning who supplied the current list.

Clans	*Lineages*
1 Semelenggang Taboh (Note that in Ramsay's list 'Taboh' is given as a *perut*)	i. Batu Kikir ii. Bunga Tanjong iii. Ayer Hangat iv. Melekek v. Naning vi. Ibu
2 Anak Melaka	i. Paya Dalam ii. Limau Perut iii. Paya iv. Kundangan v. Sg. Buloh vi. Rembau vii. Kg. Bukit viii. Solok
3 Tiga Batu	i. Lubok Kepong ii. Kemus iii. Peliang (Perling) iv. Chiniage v. Nesan Tinggi vi. Cherana Puteh vii. Seri Ayer
4 Mungkar	i. Kemus ii. Peliang (Perling) iii. Bedara iv. Arongan v. Machap vi. Chiniage vii. Kuala Ina

In addition, the following clans are represented in the Naning district:

Tiga Nenek	Biduanda Waris
Paya Kumboh	Biduanda Dagang
Tanah Datar	Biduanda Segamat
Batu Hampar	Biduanda Rembau

THE DATO' NANING

In adat matters, Naning is ruled by a penghulu, *Seri Raja Merah Orang Kaya, Dato' Penghulu Naning*, usually referred to as the Dato' Naning. His position is expressly recognized in the Malacca State

Constitution, Part IV of which provides that the Dato' Naning shall be appointed by the Governor of the State in accordance with the rules of the 'Adat Perpateh Naning'—Art. 34(1). The Dato' Naning is entitled to submit his advice to the Governor on any adat matter and similarly the Governor may consult the Dato' on such matters. This is the total extent to which the Dato' Naning has a function in the state government.

Newbold noted (1839 (1): 239) that the Dato' Naning was advised and guided by four officials who may even overrule the Dato' if unanimous among themselves. The correct position is that the Dato's clan, Semelenggang Taboh, has no clan chief (Lembaga) but has instead four hereditary officials with the following titles: Sri Maharaja, Lela Maharaja, Mentri Penghulu and Shahbandar. Their function is to guide and advise the Dato' Naning.

The origin of the office of Dato' Naning is rather obscure. Abdullah says (1955: 227–8) that before the year in which the Dutch captured Malacca from the Portuguese (1641) the office did not exist. Instead, the clans governed themselves in their own territory. From what we know of the history of Negri Sembilan at this time (see below Chapter 6) and the Sumatran immigration[1] into the Malay Peninsula, this is probably true. However in 1642 the Governor of Malacca instructed three commissioners to go to Naning and there see appointed a ruler for the whole territory. This was done, and a ruler was appointed from the Biduanda[2] clan with the title Dato' Seraja Merah.[3] He was succeeded by his sister's son, an unnamed person, but from the Biduanda and with the same title.

In 1703 the right to provide the Dato' Naning was lost to the Biduanda, the clan named Semelenggang holding it instead, as they do to the present day. But succession, though confined to the one clan, continued to pass from the deceased holder to his sister's son. This also is the present position. The following is a list of the first nine Dato':

Dato'		*Biduanda*
1	1643	Dato' Seraja Merah
2	?	Unnamed

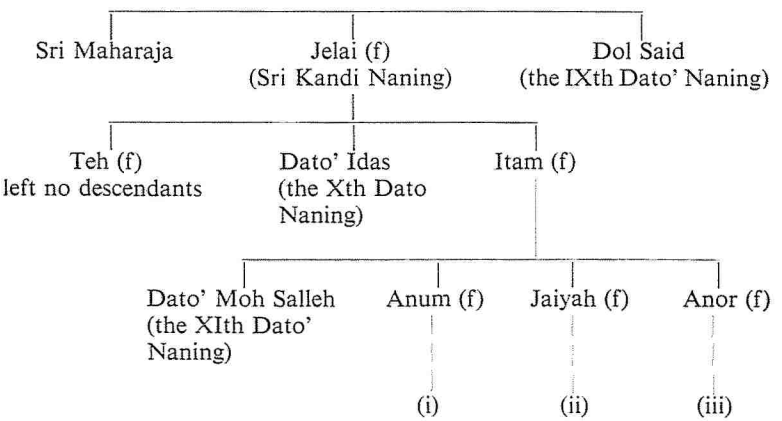
[1]It should be noted that all the clan names and the titles of the clan chief are Minangkabau names originating from west Sumatra.

[2]The term Biduanda was a Royal title used in the Malacca empire which was destroyed by the Portuguese in 1511.

[3]The present Dato' still bears this title.

		Semelenggang
3	1703	Juara Megat
4		Gegah
5		Maulana Garang
6		Langgut
7		Timba
8		Anjak
9	1803–1831	Dol Sayid

Dato Naning, Dol Sayid, was defeated by the Straits Settlements government in the Naning war of 1831–2 but the succession continued through his sister. The following is the official line of descent:



There are thus three possible descent lines, from Anum, Jaiyah and Anor, but they are not equal. Preference goes in the order i, ii and iii. It will be noticed that succession to the office devolves upon the sister's son, and Ramsay also notes this point. The present Dato' specifically pointed this out and noted that succession does not fall to his own son.

Both Ramsay and Josselin de Jong assert that the Dato' Naning is required to marry a woman from what they call perut Taboh of suku Semelenggang. In the light of the list of clans set out above this requirement is meaningless and is disputed very strongly by the present Dato' Naning. He says that such a marriage cannot take place as the Naning clans are exogamous. He may marry any Malay Muslim woman who is not a member of his own clan. If she is not already a member of a clan then she should be adopted *(dikadimkan)* into a clan prior to the marriage. The ceremony of installation must

be carried out only in the mosque at Taboh which is regarded as the centre of the Naning luak.

Adat Officials

In common with the Negri Sembilan luak there is a hierarchy of adat officialdom. This runs as follows:

i. *Tiang Balai Naning*. These, the pillars of the Dato's Balai, are his closest and most intimate advisers and include the four officials from his own clan (cf. above p.95).

ii. *Isi Balai Naning*. These, the 'residents' of the Balai, are also known as the *Lembaga Undang Naning*. They act as the Dato's representatives at various adat functions in the luak.

iii. *Lembaga and Ibu-Bapa*. These officials perform the same function as in the Negri Sembilan clans (see Chapter 1). The correct titles are as follows:

(a) Anak Melaka — Dato' Andika and Dato Angkai Besar
(b) Tiga Batu — Dato' Mangun
(c) Mungkar — Dato' Angkai Kechil.[1]

Gilirin is involved in the election of the lembaga.[2]

iv. *The Penghulu Adat Mukim*. The penghulu mukim is a government official and thus not strictly part of the traditional adat constitution. But in Naning this official has been incorporated into a unitary adat system. The justification for this is found in the following perbilangan which is undeniably ancient:

Alam nan beraja
Luak nan berpenghulu
Suku nan bertua
Anak2 nan beribu bapak

The penghulu mukim, subtitled 'adat luak' is referred to in the second line. The problem of course is that there are no luak in Naning but only administrative mukim divisions. The perbilangan quoted above properly applies to Negri Sembilan where there are Yamtuan, undang and penghulu. In Naning, there is no connexion with the Yamtuan nor is there a confederation. In the Malay States generally, the penghulu is appointed by the District Officer of the jajahan and is responsible for the affairs of one mukim. His functions

[1]This agrees quite well with Newbold's list cf. 1839: (1): 235.

[2]Cf. the perbilangan—*Yang besar menurum, yang kechil bergilir*. Ramsay, 1950: 99–100. See Ramsay's use of the term '*sidang*': this does not appear to be current at present.

include the fixing of times for rice planting and harvesting and in general the translation of government edict to the people of his mukim. In addition he has a 'paper authority' to conduct a penghulu's court which may impose and levy fines up to a certain amount in civil cases. This court has not in fact sat in any state since 1940. The appointment of the penghulu mukim provides an interesting example of the integration of a government administrative office into the Naning adat constitution.

In the Alor Gajah district (i.e. in most of luak Naning) the practice was and still is to appoint the penghulu on a partially elective basis tied directly to the adat structure. The practice, at least in Alor Gajah, as reported by Ramsay, is that on the death, retirement or dismissal of any penghulu the lembaga determine which clan is to provide the next penghulu. The office goes by rotation, so, for example, if the previous three penghulu had been Tiga Batu, Semelenggang and Anak Melaka then necessarily the rotation fell to Suku Mungkar. Once this had been established the various (male) members of the clan concerned put up their candidates who were thinned out by the District Officer. This was done on the basis that the persons to be eligible for election must have some degree of literacy, a reputation for regular attendance at public prayers and for respectable behaviour generally (cf. Ramsay, 1950:99). In some cases this version of giliran was even carried into *charak* (lineage) determination. Thus, for example, if the right of the suku Mungkar had been established it still might be necessary to choose between Mungkar Bedara and Mungkar Kuala Ena. This again was a matter for the male members of the clan. The candidates then submitted themselves to ballot and the winner was appointed penghulu.

Ramsay (1950:100) reports a variation of this method which occurred when at the election of a penghulu the suku entitled to provide the candidates waived its right, admitting that it had no eligible candidate. In this case the post went to the clan next in order of rotation but with the proviso that the entitled clan be reinstated when the next vacancy occurred. This was described in the phrase '*Disandarkan pada suku yang lain*'.[1]

In the non-matrilineal adat areas the penghulu is appointed on a similar rotational basis, but in this case this is at a territorial division of the mukim, i.e. by selecting a candidate from each largish

[1]This is rather difficult to translate. *Sandarkan* means 'to give security' and the saying thus means something like the office of the penghulu-ship is deposited without losing the right to resume it when required.

kampong unit. *Sidang* were also appointed though of course in these areas this term is not equivalent to lembaga. It is notable, however, that four sidang are always appointed in each mukim. This immediately reminds us that each luak in Negri Sembilan theoretically has four clans (see Chapters 6,7,8). Further, in Alor Gajah, the four mosque officials, Imam, Khatib, Mungkim and Bilal are referred to as *Ampat Tiang Masjid.*

Rules of Adat Naning

Data on actual adat rules for adat Naning is largely lacking, there being only one account of rules relating to land (Blagden, 1930: 307–12) and to other property (cf. Blagden, 1930: 312–13). Blagden's account moreover was written about 1900, though not published until thirty years later, and was communicated to him by one man only, a Penghulu in the Jasin district. Further, the rules were apparently stated in answer to a series of hypothetical questions and in the only land case cited in the account, were expressly disapproved. It is only fair to add that Blagden himself doubts the accuracy and extent of many of these rules.

However, even though these objections are taken into account there is a great deal of correspondence between the provisions in Blagden's account and those set out for Negri Sembilan. Apart from this correspondence, however, there are some rather peculiar points apparent in Blagden's account. First, it is said that in the absence of daughters or their female descendants, pesaka land will be inherited equally by sons. Blagden notes that this is not correct and cites an Alor Gajah land case to the contrary (1930:308). But this odd 'rule' may have been the result of bad phrasing in questioning.

Second, if no daughter survives to take pesaka land then this will be inherited by grandchildren *per stirpes* irrespective of their sex and the sex of their parents. The reason for this is that grandsons, unlike sons, have no *perentah*[1] over the land of their cousins (the female grandchildren) and they are thus entitled to a share in the land itself. This runs directly counter to the principle of succession in the female line.

Third, the grandson though a daughter divides pesaka equally with a son (i.e. mother's brother) if he (presumably) has no sisters.

[1]Perentah—'authority' in the sense of guardian of property and family (contrast the Negri Sembilan 'kunchi'—above Chapter 2).

This also runs counter to the principle of female succession and is in fact getting close to Islamic law provisions.

Fourth, a grandson or granddaughter through a daughter divides pesaka equally *per stirpes* with grandsons or granddaughters through sons.

Fifth, the waris (i.e. in this case those persons who would be waris at Islamic law) may take the whole pesaka or failing them the sisters or their waris equally *per stirpes*. If, however, the deceased leaves a nephew through a sister then the land should be held for him, his uncle (i.e. brother of deceased) having a life interest.

Finally, a man and a woman belonging to the same clan may intermarry, though the children of two sisters cannot. The children of two brothers also may not intermarry (this is disputed by the present Dato' Naning) though the children of brother and sister can.

The whole account, of which the propositions above are only peculiar points, is characterized by a great deal of confusion: in the terms it sets out the document is just not consistent as to principle. It is of course obvious that there will be differences in particular rules but not to the extent given in Blagden's account.

Fortunately there are judicial decisions on this adat which tend to show, though only to a limited extent, the nature of Adat Naning as being very similar to the Negri Sembilan adat.

Judicial Decisions on Adat Naning

The first suit, *Munah* v *Isam*,[1] decided in 1935, turned on the position of the waris in respect of Naning pesaka land. The plaintiff was claiming the return of pesaka land which had been transferred outside the clan to a male belonging to another clan who, not being capable of holding this land, had registered it in the name of his wife. The original transfer had been made for purposes of security for loan, but from the time of transfer to the commencement of proceedings the land had increased in value from $60 to $400. The court in finding for the plaintiff and ordering the transfer to her on payment of $60 laid down the following principles. First, if pesaka land belonging to the member of one clan is registered in the name of a member of another clan then the waris of the former clan have a

[1][1935] S.S.L.R. 366, [1936] M.L.J. 42.

right to redeem the land.[1] Second, the registered 'owner' merely has a defeasible interest conditional upon payment of a sum equivalent to the sum which he himself expended upon 'purchase'. These principles are interesting as the court quite clearly said, apparently on the basis of expert evidence, that pesaka is not transferable to a person not a member of the owner's clan. This is not the case in the adat districts of Negri Sembilan where such a transfer is permitted if there is no one in the owner's clan able or willing to purchase the pesaka.[2]

In addition to these substantive adat principles three other matters arose in the judgement. First, some attempt was made in counsel's argument to show that the male 'owner' in whose wife's name the land was registered was a trustee in the English (law) sense of this term. The court refused to accept this, noting that he was never required to perform any of the duties of a trustee, that is, to account for profits. Second, and following from this, the court found that he was in a position analogous to that of a mortgagee. It followed from this that he could not claim the increased value of the land because a mortgagor is bound to pay on the original mortgage price. This is notable as illustrating English law principles being applied in the absence of specific adat rules. It also illustrates the tendency to bias on the part of common law judicial officers toward adat. We have already noted the extreme case of this in Negri Sembilan in respect of precedent.

Finally, and on a technical ground, the court refused to order any interest on the loan since the male 'owner', not being a trustee, had in fact taken the profits of the land. In addition the court accepted evidence that 'Naning Malays' never take interest as this is forbidden by Islamic law. Interest is of course forbidden by Islamic law but there is abundant Negri Sembilan authority that any claim in pesaka land entitled the claimant to a share in any increased value of the land.[3]

[1]The position in the adat perpateh districts is similar cf. *Bador Samat* v *Loyok & Ganda* (Taylor, 1929: 193) where it was held that the waris are entitled to an option on any land at a price not exceeding a fair and reasonable valuation of the land.

[2]*Sihi* v *Baiyah & Sipau*, Taylor, 1929: 192 where it was held that a clan must pay the price offered by a member of any other clan if it wishes to retain the pesaka.

[3]The authority for this is now contained in legislation. Section 24(b) of the Small Estates (Distribution) Ordinance, No. 34 of 1955 provides for transfer taking account of untong where applicable.

The next case, *Dato Kamat* v *Sapian*,[1] decided in 1938, was concerned with whether or not liens or charges can be registered over pesaka land. In the course of its judgement the court found that pesaka land held under adat Naning could only be sold or charged to a female member of the same clan as the vendor or chargor. It accepted the evidence of the Collector (Ramsay) on this point. In addition to this point the court considered the position of the waris. After considering the variable meanings which attach to this term the court stated the following propositions. The waris have a recognized position under the adat. They are not eligible, however, to hold pesaka land under adat because ownership is limited to female members of the clan. This of course is accurate as far as it goes and is in agreement both with *Munah's Case* discussed above and Negri Sembilan practice. No other questions of present interest were raised in this suit.

The final decision is *Sapian* v *Tiamat*,[2] decided in 1939, and was concerned with establishing the qualifications for registration as a customary landholder. It was held that where land is pesaka held under adat Naning then the owner must be a member of one of the four clans of Naning.

This concludes our survey of the judicial decisions on adat perpateh Naning. Each of the three cases discussed above will be raised again in this chapter in the context of Malacca adat legislation: the summaries so far given have been confined to describing substantive adat Naning principles only.

As a conclusion to this part of the chapter we may confidently assert the existence of an adat in parts of Malacca State which are substantially similar to adat perpateh in Negri Sembilan. We may also note that detailed rules of this adat are lacking and that urgent fieldwork is required.

Adat Temenggong in Malacca

Both Ramsay and Blagden note the existence of a non-perpateh adat in this state but they describe it in different terms. Blagden, for example, notes that in the southern inland kampongs succession to land is arranged by a family pakat or agreement. This generally

[1][1938] M.L.J. 111. This suit is connected with the decision *Sapian* v *Tiamat* [1939] M.L.J. 116, discussed below though the matters raised in each suit are dissimilar.

[2][1939] M.L.J. 116.

results in equal shares being awarded between male and female, but in cases of dispute Islamic law is applied (Blagden, 1930:307). On the other hand, he notes that in the coastal villages succession is sometimes arranged by pakat and sometimes in accordance with Islamic law, but again Islamic law is generally the binding authority in cases of dispute (Blagden, 1930:307). We have already noted Ramsay's description (1950:101) of the offices of penghulu and sidang in the non-perpateh areas of Alor Gajah (see p. 98). Further data is lacking except that the writer's field experience in the Jasin district excluding the three *perpateh* areas (1966) shows a fairly consistent use of the term 'adat temenggong', but this is confined only to the distribution of deceased estates. It has no other meaning: in this context the common rule appears to be that land and money are distributed equally whilst the house furniture goes to the females. These are often referred to 'outside' and 'inside' property. One must therefore hesitate in describing this isolated rule as constituting a separate body of adat. The true position as to adat 'temenggong' is probably as Ramsay and Blagden describe it.

Statutory Adat

This is rather unusual, being the only one of its kind in existence in Malaya; it grew out of the history of the Dutch and English occupation of Malacca and the difficulties which arose on the formal transfer of the state to the East India Company in 1825.

At that time there were apparently three classes of land-holders:

i. Holders of land in the town and suburbs of Malacca with or without certificates of title from the (Dutch) Court of Justice. (cf. Maxwell, 1884: 213–15 who gives examples of some Dutch documents including a 'Proprietor's Grant').

ii. Proprietors of concessions, in the nature of Zamindari rights, over country lands (Maxwell, 1884: 152). This system operated in the following manner. Lots of land, upon which cultivation was taking place, were subject to a levy of one-tenth of its total produce per year. The rights to collect the tenth were often awarded by Government to certain persons known as Zamindars. The latter rarely, if ever, visited these lands and the amount collected through the agency of a Malay chief or a Chinese collector, was very small. (cf. Maxwell, 1884: 97–103).

iii. Native cultivators holding proprietary rights under an adat which Maxwell supposed to be based on the Malacca Digest. The Digest, he thought, had two important provisions both of which were to be found in the adat of native land tenure. First, rights to land were proprietary rights only and ceased to exist when land was no longer cultivated. Second, the ruler of the State had the right to levy a tax of one-tenth on all produce gained from this land. Maxwell regards the Zamindari rights of class (ii) above to be based on these Digest provisions; he makes it clear that the title to Zamindari lands is not a fee simple title but is a right only to levy a tax.

An immediate difference of opinion arose between the East India Company and the Dutch proprietors of land in class (ii) above as to the status of their title. The proprietors not unnaturally claimed a fee simple title and this was disputed by the Company which contended that their only right was to levy the tenth .The Company held that the native cultivators were the real proprietors of the soil and decided to buy back the Dutch proprietors' rights to levy the tenth. It also decided that all lands under cultivation in 1830 should continue under 'native tenure' which, relying apparently on the Malacca Digest, it equated with cultivation by the Malay peasant. With regard to land opened up after 1830 it was decided that grants and leases should be issued in the forms of English law which by its procedural mechanisms would effectively abrogate native customary tenure. This latter intention was provided for by Regulation IX of 1830. This inconsistency immediately gave rise to what later became known as the 'Malacca Land Problem'. The Regulation provided for the issuance of valid titles to land but the Company could not under the terms of this Regulation give good fee simple titles.[1] The Malay landholders naturally resisted these measures. Further, the customary forms of land tenure in Malacca had already been judicially recognized as constituting 'a good and reasonable custom'.[2] In the same suit the court said that in Malacca the owners of soil and the cultivators of soil are entirely different persons but that the latter cannot be ejected unless he fails to pay the tax of one-tenth. He may also be ejected for non-cultivation.[3]

[1]In any case Regulation IX was probably invalid, cf. Mills 1960: 128.

[2]*Abdullatif* v *Mahomed Meera Lebe* (1829) 4 Ky. 249, Maxwell, 1884: 205.

[3]The period for paddy being three years;
The period for fruit trees being three years;
The period for gambier trees being one year;
The period for pepper trees being one year; (cf. Maxwell, 1884: 205).

In 1837, the Government of India repealed the laws of 1830 and an Indian Act XVI of 1839 specifically protected tenants by prescription in Malacca, that is, the customary forms of land tenure in Malacca were preserved.[1]

The next step in this rather confused history was the passing of the Malacca Lands Ordinance in 1861.[2] The aim of this act was to vest all land in the Crown in fee simple. The court in *Sahrip* v *Mitchell & Endain*[3] held that the Act referred to and recognized the same two classes of tenure as were recognized by Indian Act XVI of 1839, namely, 'cultivators and resident tenants' of land redeemed from Dutch grantees and 'occupiers who hold their lands by prescription'.

The result of this rather involved legislative history was simply the recognition of two forms of land tenure, that is, customary tenure, though as yet there was no serious attempt to legislate for the working of these tenures. This came about in 1886 when the Malacca Land Customary Rights Ordinance of that year was passed.[4] This act, which is the end point of the historical situation just described, provides for a customary tenure based on occupation and cultivation though with statutory exceptions. It is this total body of regulation plus judicial decisions interpreting the act which make up Malacca 'statutory adat'. The salient points of the 1886 act are as follows:

Section 2

'Customary Landholder' is defined as 'a person in lawful possession of land according to local customary tenure ... which was cleared and occupied by him or by the person under whom he claims'. It also includes any person who has been recognised as customary landholder by the Resident Commissioner in Malacca under Section 31. This section provides that the Resident Commissioner may grant any applicant a block of Crown land not exceeding ten acres and recognise him as a customary landholder.

Section 3

The persons qualified to be customary landholders are as follows: any Malay domiciled in the State of Malacca: any person holding a certificate from the Resident Commissioner that he is qualified to hold customary land.

[1]By section 12. Judically examined and approved in *Sahrip* v *Mitchell & Endain* (Maxwell, 1884: 205–11 esp. at 209–10. Cf. also *R* v *Willans* (1898) 3 Ky. 16 which was to the effect that local custom and usage is to be upheld.

[2]Indian Act XXVI 1861, sections 1, 2 and 13 of which are now to be found in sections 2, 3 and 4 of the Malacca Lands Ordinance (1861) cap 127 revised laws of the Straits Settlements, 1936. The remaining sections of the original act have been repealed: sections 9 and 10 by Act No. 33/1907; sections 3, 8 and 11 by Act No. 4/1870.

[3]Cf. note 1 above.

[4]Now cap 125, revised laws of the Straits Settlements, 1936. It incorporates the following amendments: 1/1890, 7/1901, 24/1902, 22/1905, 30/1906, 33/1907, 2/1914, 27/1917, 16/1922, 7/1931, 10/1952 and 5/1956. None of these amendments affect its provisions in respect of customary land tenure.

This section has been the subject of judicial proceedings. In *R* v *Salim*,[1] decided in 1938, a Chettiar who advanced money to a Malay domiciled in Malacca for the purchase of customary land, was in fact the real owner. His intention was to defeat the Ordinance by placing a nominee in possession. The latter received no rents and profits from the land at all nor had he entered into any mortgage in respect of the land.

Section 5

The ordinance is specifically restricted so as not to affect 'the custom called the Naning custom, or any other recognised customary tenure'.

Section 6

The tenure of a customary landholder is defined, *inter alia*, as comprising (a) the payment of rent or assessment, (b) the liability to give free labour for the common benefit such as was customary prior to 27 February 1890, (c) the duty to plant padi simultaneously with the other customary landholders in the mukim and (d) the duty to conform with the directions of the Resident Commissioner on the planting of certain crops.

Section 7

The penalties for infringing (b), (c) and (d) of the above include fines which may be recovered in court.

Section 9

Customary land shall be forfeited for non-cultivation for a period of three years.

Section 10

Customary land shall be used for agricultural purposes only and not for building purposes.

Section 11

If a deceased customary landholder is a Muslim then the land shall devolve upon 'the person who according to Muhammadin law as varied by local custom, if any, would be entitled ...'.

In *Abdul Wahab* v *Haji Wahab*,[2] decided in 1940, this section was applied *simpliciter*. If the deceased is not a customary landholder then the Collector may partition the land or may direct the persons claiming to apply to the court for grant of probate or letters of administration. In other words, a non-Muslim customary landholder may dispose of this land by will whereas a Muslim may not.

Sections 12–14

All mutations in title are to be registered and the Penghulu of the *mukim* in which the land is situated shall attend and identify the parties.

[1][1938] M.L.J. 210.
[2][1940] M.L.J. 263.

Sections 15–18

Any person who asserts that he is a customary land-holder or is entitled by succession to any customary land may apply to the Collector to make an order to this effect. The Collector may make such order if he thinks fit and register this in the Mukim Register. An appeal may lie from such order to the High Court.[1]

Section 19

All changes in possession of customary land shall be notified to the Penghulu of the mukim in which the land is situated or to the Collector. The penalty for non-notification is a fine.

Sections 20–29

Customary land may be mortgaged but this must be done at the land office and the mortgage shall be registered. In default the property may be sold but there is an appeal against the order directing sale. All sales must take place at the land office. No mortgage is valid unless made in accordance with the ordinance. The registration of a mortgage is evidence of an indefeasible title except in cases of fraud or misrepresentation.[2]

Section 31

The Resident Commissioner may recognise any applicant as a customary landholder in respect of any land not exceeding ten acres in extent.

Sections 32–36

There may be assessment in lieu of tithe which may be set at so much per acre but not exceeding one-tenth of the value of the produce of the land. The method of assessment may be periodically adjusted and the sum payable is a personal debt for which the customary landholder is jointly and severally liable.

It is obvious that the provisions of the act, as judicially interpreted, bear no relation to the rules of either adat naning or of adat temenggong as described above. The act instead authorizes an occupation of land confined largely to Malays and giving full scope to Islamic law. Tenure, though registered under a modified Torrens system, remains indefeasible only while cultivation continues: cultivation itself is hedged about with restrictions. The government retains large discretionary powers over this form of tenure.

It is noteworthy that the provisions of the Malay Reservations Enactments[3] do not apply to Malacca State and one may view the Malacca Lands Customary Rights Ordinance as performing the

[1]Cf. *Tan Lian* v *Hussein bin Mohamad* (1891) Straits Law Reports, 5 (incorporated in vol. 5 of the *Straits Law Journal*, 1892).

[2]See *Re Malacca Lands Customary Rights* (1921) Quarterly Notes, 1, on the interpretation of S. 28 of this ordinance. Attention is also directed to *Re Customary Land Serial No. 1031 Sungei Rambei*, (1958) 2 M.C. 117 where the court dealt, *inter alia*, with the rectification of the register.

[3]Cap 142, revised laws of the Federated Malay States, 1935, as amended by 28/1936, 51/1936, 3/1938, F1/1948, 25/1954.

functions of the Reservation Enactment in Malacca. Thus, one of the effects of section 3 of the Malacca ordinance is to reserve rights to occupation to Malays domiciled in Malacca and the provisions of section 11(i) on the scope of Islamic law tend to bear out this view.

Adat Naning and the Malacca Lands Customary Rights Ordinance

Earlier in this chapter we discussed three judicial decisions relating to adat naning. These cases must be considered a second time here because the decision in each of them turned upon provisions in the Malacca ordinance just described. We may commence by noting that section 5 of the ordinance specifically states that 'Nothing in this Ordinance shall be deemed to affect the custom called the Naning custom ...'. This has never been judicially interpreted but on its face it seems to mean that the principles of adat naning shall not be affected by the ordinance. The following cases will be considered with the intention of seeing whether or not this observation is justified.

In *Munah* v *Isam*[1] the point at issue was the refusal of a Collector under section 13 of the ordinance[2] to expunge the name of a registered owner from the Register. The question was decided solely upon evidence of adat naning and no other provision of the ordinance was cited. This seems to bear out the proposition stated above. The ordinance, in other words, is a mechanism for having adat naning disputes taken to the court, and that is its total function in this context.

The next decision, *Dato Kamat* v *Sapian*,[3] is a little more difficult to reconcile with this proposition. The point at issue here was the validity of a lien or equitable charge over customary land established by deposit of the mukim extract. This necessarily involved a consideration of the provisions of the ordinance. It was held that no lien or equitable charge could be created by delivery and that a customary landholder can only charge his interest in the manner set out in the ordinance. In other words, the ordinance was taken as applicable to all forms of customary tenure including pesaka land. But in addition to this, the court decided the status of the parties in adat naning terms. It did not consider, for example, the definition of 'customary landholder' in section 3(2)(a).

[1][1936] M.L.J. 42. [2]Now section 30(4) [3][1938] M.L.J. 111.

The final case *Sapian* v *Tiamat*,[1] is the most enlightening on our problem. Here the issue was the validity of an agreement by qualified holders of pesaka to transfer to an unqualified purchaser. In holding that such an agreement was invalid the court stated the following propositions. First, the object of the Ordinance is to maintain Malacca customary landholders in possession and to define the rights of the holders. It is obvious that this is the aim of the Ordinance but it is equally obvious that it cannot define the rights of a pesaka landholder unless a further qualification can be made. This is, and the court made this point also, that where land is pesaka the owner must be a female member of the appropriate clan.

Second, and following from this, a rightful occupier's credentials are then defined as 'Malacca customary landholder, modified where necessary by Naning custom...' (report at pp.117–18). In the light of section 5, this is a substantial qualification.

We may conclude by noting that section 3 is not exclusive in the light of the three judgements considered. Second, section 5 is to be read as barring the substantive provisions of the statute from applying to Naning pesaka. And finally, that any pesaka dispute may be brought to court under any section of the ordinance which has the sole function of being a mechanical transmitter of adat. It does not replace adat principles in determining the detailed rights of the parties. The Malacca State Constitutional provisions relating to the Dato' Naning tend to have a similar function.

Adat Perpateh in General and Malacca Statutory Adat: A Comparative Summary

The policy of the Colonial government, as expressed in the first Charter of Justice 1807, was to apply English law with due regard for 'native customs, usages and law'. In Naning, adat perpateh was largely left undisturbed and its place in the legal system was formally stated by District Office practice and regulation, as, for example, the District Office influence in the selection of candidates for adat offices (cf. Ramsay, 1950: 97–101). The same course was followed in Negri Sembilan with the exception of the customary tenure enactments (see below Chapters 6,7,8). However, these enactments, whilst embodying rules of law, *stricto sensu*, determining rights to inheritance and succession, yet made provision for the application

[1][1939] M.L.J. 116.

of adat principles. For example, those confirming the traditional position of the lembaga and (in the Negri Sembilan Constitution 1959) the Undang2 by allowing these officers to determine the specific rule content of adat in any proceedings under the enactment. Again, in the Small Estates (Distribution) Ordinance (No.34/1955) the collector has power under section 24 of that ordinance to determine the content of certain rules of adat. In Negri Sembilan the effect of legislative interference has been to impose a non-traditional procedure relating to the determination of adat rules. However, even now the effect of this non-traditional formulation of adat has not been exclusive. The kebulatan, for example, is still an effective means for determining the rules and principles of adat perpateh in the traditional form. Direct formal innovation is, generally speaking, rather insignificant, though of course there is a considerable amount of indirect influence exerted by the executive.

But the situation in respect of statutory adat in Malacca is strikingly dissimilar. From Regulation IX of 1830, through the acts of 1861, 1886 and later amendments, the legislature has followed a consistent pattern of legislative supremacy in purporting to state not only the form but also the principles and rules of this tenure. The problems which can arise from the promulgation of a law in non-traditional form are nicely illustrated by the following passage from Blundell, (1848: 741–2) commenting upon deeds issued under the act of 1861:

> This legal document occupies the whole of one side of a sheet of foolscap, while the other is filled with Malayan writing purporting to be a translation of the English, but as may well be supposed, failing entirely to convey to a native reader any idea of its meaning .... They [the Malays] naturally got alarmed and evinced the greatest reluctance to affix their signatures.

The acts of 1861 and later assumed throughout a static rule situation in respect of customary tenure. In the light of this assumption the legislature has consistently left the establishment of rule to statutory authorities, generally the Collector or Resident, and the principles upon which this is carried out are statutory principles, for example section 3 of the Malacca ordinance, where a possible sole qualification to becoming a customary tenant is the Resident's certificate to that effect. The net result has been the replacement of whatever the original (i.e. pre-1830) customary tenure had been, by an act more applicable to the political and executive spheres than to the legal. Its main effects have been to promote and protect the 'Malay

reservation' idea and to invest the determination of customary tenure in legislative hands.

In addition, the introduction of an alien system of courts and the fact that rights of appeal to them were incorporated in the new statutory custom upon assumptions of that statute alone, must have contributed greatly to a departure from the traditional customary tenure as well as to a breakdown of old patterns of dispute settlement. This was not the case in Negri Sembilan, at least in respect of customary tenure, nor in regard to Naning adat since the control of traditional officials has, to some extent, been retained in both areas.