

ADAT LAWS IN MODERN MALAYA

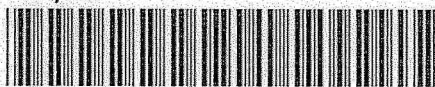
*Land Tenure, Traditional Government
and Religion*

M. B. HOOKER

Koleksi Hooker
Universiti Kebangsaan
Malaysia



PTSL, UKM



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TRADITIONAL WRITTEN LAWS¹

Apologia

It may seem surprising that a book which purports to deal with legal systems in a modern nation state should include a chapter on written digests, many of which are some two to three centuries old. The reason for including an analysis of the digests lies not only in their historical value but also in three other factors.

First, there is the point of terminology. The contents of the Malayan legal digests are often referred to as *adat temenggong*, which Winstedt translates as 'the law of the Minister of War and Police' (cf. Winstedt, 1947:79). This translation is apparently prompted by the amount of space in most digests which is devoted to a description of crimes and the penalties thereof. We will not give any such construction to the term, and indeed, in the light of the comments made in the first chapter it is difficult to justify this, but it may be used as a convenient label to describe in general all *adats*, including the digest provisions, which are not clearly *perpatih*. To some extent, then, we are indulging in the necessary, though rather academic, exercise of classifying our terminology.

The second factor is that the provisions of the digests are often spoken of as being connected with present day *adat* laws. For example, a modern author (Ahmad Ibrahim, 1965 : 229), when discussing the distribution of property jointly acquired during *coverture* refers to some of the provisions of the Ninety-Nine Laws of Perak. Again, in Malacca, a modern statute supposedly reproduces some of the provisions of the Malacca Digest (see Chapter 5). A later section of this chapter is devoted to the problems of this supposed correspondence.

The third and final factor is potentially the most interesting of the three. The digests were products of the courts in the various Malay principalities. They are largely devoted to stating a supposed law which emanated from the Sultan and, in theory, applied to all within his dominions. Now although it is true that the Sultan's writ did not run wide and, even more pertinent, that most of his nominal subjects were ignorant of his laws, the structure of these documents does

¹Parts of Chapter have appeared elsewhere. cf. Hooker, 1968a: 157-70.

illustrate one important fact, that is that the nature of the legal authority claimed by the ruler was essentially different in type from that claimed by the local chief. We can draw a clear distinction between the 'Sultan's laws' and 'village laws', even if the former was more honoured in the breach. The distinction rests in the nature of the power claimed in each case. So far as the Sultan was concerned, this was universal in scope and 'God inspired' in quality. The ruler was, after all, God's representative on earth. Village law on the other hand, had no such pretensions, but rested on such mundane factors as the preservation of economic and social stability.

We will return to all of these points later in the chapter but one further item of interest can be noted here, that the Malayan digests are part of a wider Indonesian digest complex, references to which may be found in the works of Ronkel (1919 and 1921). The texts considered in this chapter, while they undoubtedly have parallels and similarities to Indonesian material, are confined to specifically Malay examples. The criterion for selection is rather unscientific and is merely that the texts purport to relate to specific areas in Malaya.

*The Main Texts*¹

i. THE UNDANG² KERAJAAN²

This is a Digest which purports to relate to Perak, Pahang and Johore.³ The translation and commentary given by Kempe and Winstedt (1948: 1-24) is based on Maxwell MSS.17 and 20, both in the library of the Royal Asiatic Society London.⁴

MS.17. This was copied in A.H. 1296 (A.D. 1879) from a MS. belonging to Bendahara (afterwards Sultan) Idris ibni Raja Iskandar for Maxwell when he was Assistant Resident, Perak. The Sultan Idris MS. was itself a fairly recent copy made in A.H. 1234 (A.D. 1819) by one Naina Ahmad, Lebai, bin Nahkoda Muhammad Hussain.

¹There is a considerable amount of repetition and overlapping of MSS. sources in the various Digest translations. This part of the chapter will attempt to sort these out for purposes of later comparison.

²'Laws of the Monarch' or 'Sovereign'.

³A separate translation of the laws of Johore also exists (cf. Logan, 1855, 71-95). This is probably based on part of Raffles MS. 33.

⁴Maxwell himself had translated a series of laws relating to slavery in Perak, Pahang and Johore (1890: 247-97) which he termed Undang² ka-Raja-an (1890: 256). It seems probable that these are parts of the same MSS. that Kempe and Winstedt translate especially in view of the fact that both Maxwell and Kempe and Winstedt note that many provisions are identical with the Undang² Melaka. Winstedt is certainly of opinion that this is so (cf. Winstedt 1953: 1).

MS.20. This was copied in A.H. 1300 (A.D. 1884) for a Mr. Leech, Clerk to the Resident of Perak, by Luakang bin Muhammad Rashid from laws dated A.H. 1248 (A.D. 1832) then belonging to the Dato Sri Adika Raja. Kempe and Winstedt asserts that both MSS. are copies of an earlier text, or possibly texts compiled in the reign of Sultan Abd. al-Ghafur¹ and may therefore be dated between A.D. 1592—A.D. 1614.

The MS. may be divided into two parts. Ss. 1–23 of the translation state rules which are distinct from Islamic rules.² On the other hand, ss. 24–66 are almost entirely Islamic (*Shafi*) law. The translators have omitted s. 67 (in this numbering) on the ground that it is merely a restatement of ss. 25–7 of the *Undang2 Melaka* (cf. Ronkel, 1919: 42–7).³ This section deals with animal trespass, trespass to person and property, rape, gaming, thieving, slavery and royal slaves and debtor and creditor—summarized by the translators (cf. Kempe and Winstedt 1948, 2–3). We may also note that in ss. 68–92, while many of the provisions are Muslim, the death penalty for harbouring a slave, helping a thief, using yellow cloth and the ordeal by diving are all unknown to Islamic law.

One possible further MS. source of these laws is a MS. found among the Swettenham documents—Perak Museum Document No. 48 (Jakeman, 1951: 150–1). Apart from linguistic similarities this MS. contains two pages which correspond to s. 67 of Kempe and Winstedt's translation (cf. above) and omitted by them as being an interpolation from the *Undang2 Melaka*. The provisions in this section correspond closely in both MS. 18 and the Swettenham document. This text differs from that given by Kempe and Winstedt in the following ways: it omits the whole of the statement on the functions of the Ruler and *Orang2 Besar*; it contains twenty-three numbered sections on penalties and offences, as does the Kempe and Winstedt text, but s. 16 is dissimilar; and it omits ss. 92, 93 of Kempe and Winstedt.

ii. THE MINANGKABAU DIGESTS

The term 'Minangkabau' is used here as a convenient label to describe the Digests which probably share a common background though they are not, on their faces, strikingly similar.

¹This ruler is rather a shadowy figure: all that is known of him has been summarized by Linehan (1936: 29–34).

²The translations describe such non-Islamic rules as 'customary and [with a] Hindu colouring'.

³The doubling of various sections in the texts is very common.

In comparison to Minangkabau texts from Indonesia the Malayan examples are fragmented. Generally, a Minangkabau digest is divided into three parts:

- i. the *Tambo Minangkabau* which traces the history and origin of Minangkabau;
- ii. the undang² which state specific rules, and
- iii. the Fikih which includes both adat and Islamic rules (cf. Liaw 1967: 118). This section often attempts to reconcile adat and Islam (cf. p. 83 below).

The Minangkabau Digests from Malaya include only categories (ii) and (iii).

The first of the Minangkabau Digests is known variously as the *Undang² Minangkabau* or the *Undang² Dua-Belas*¹ (cf. Maxwell, 1890: 256). Its translated version is entitled 'An Old Minangkabau Legal Digest from Perak' (Winstedt, 1953, 1-13).

This translation is based on Maxwell MS. 44, to be found in the Library of the Royal Asiatic Society, London. In addition to the laws, this MS. also gives a list of the Chiefs and Sultans of Perak, the Sultans of Istanbul and a list of Perak place names. The MS. was copied in A.H. 1292 (A.D. 1875) at Penang and Winstedt proposes that the original text must be dated in the period A.D. 1700-1728 since the text bears evidence of the Minangkabau-Bugis clash. Wilkinson agrees with this date² (cf. Winstedt and Wilkinson, 1934: 122-4).

The laws contained in this Digest are ascribed to Ahmad Taju-Din, Shah of Kedah, who conquered part of Perak in 1816-18, but this is probably a later gloss, of a type by no means unusual.

The original owner of Maxwell's MS. 44 is not known, but it was in the possession of the Megat family, a fact Winstedt regards as helping to corroborate its authenticity.

The digest itself is notable for the following characteristics: there is no description of a matrilineal social system; there is no attempt to treat the people on a 'tribal' basis; inheritance of deceased's property is given as: sons, a two-third share; daughters, a one-third

¹The Twelve Laws', cf. also Maxwell, 1885: 38.

²The dating is on the basis of a Minangkabau-Bugis clash as evidence for which Winstedt cites a semi-mythical tale of two white negritos whose (adopted) descendants have both Minangkabau and Bugis connexions. Winstedt interprets this as a clash between matriliney and the prejudices of Perak royalty. There is of course no doubt as to the importance of folklore in the interpretation of Malay adat, especially in the perbilangan (cf. Hale 1898: 43-61), but the connexion here is rather uncertain.

share (cf. Perak State Council Minute, 1937: 70); sections 42, 43 and 120 deal with slavery, which was rare in Minangkabau districts, though not unknown; sections 6, 74 and 75 attempt a reconciliation between Islam and custom.

The second Minangkabau Digest is entitled *Undang² Sungei Ujong* and the translation (Winstedt and Josselin de Jong, 1954) is taken from Maxwell MSS. 118 and 118(a): the former MS. is in Jawi and the latter is romanized. Both texts date from the early years of this century. The contents of the Digest consists mainly of perbilangan of the type discussed in Chapter 2.

Section 6 of this Digest (cf. Winstedt and Josselin de Jong, 1954: 8) gives the sources of law as follows: ancient custom; created custom; inherited lore; decisions of common accord; ancient lore that awaits ratification; decisions to be reached by later deliberation.

This text is noteworthy in that section 8 (ibid. 1954: 10) states that source of law 'created customs', may contravene canon, i.e. Islamic law, if the provisions of the former are introduced with due ceremony, for instance, by the sprinkling of rice paste or the slaughtering of buffaloes, neither ceremony being Koranic.¹

iii. THE KEDAH DIGEST

This text of these laws, which has five parts, was obtained (through Mr. W. E. Pepys, M.C.S.) from the Dato Luar of Kelantan. They purported to be Kelantan laws but on the basis of genealogical evidence of the rulers of Kedah and Kelantan, Winstedt (1920: 34) ascribes these laws to Kedah.²

The sections of the MS. are as follows:³

- a. The Port Laws—dated A.D. 1650.
- b. Tembera Dato' Sri Paduka Tuan—dated A.H. 1078 (A.D. 1667). This concerns miscellaneous matters such as cock-fighting, land ownership, rights of way, etc.
- c. *Hukum Qanun Dato' Star*—no date. These are concerned with various rules for the use of flags and royal colours and with the duties of watchmen.
- d. *Bunga Mas*—on the tribute of gold flowers paid by Kedah to Siam. This section also describes the Royal regalia.

¹Further references to Minangkabau MSS may be found in the following places: Overbeck, 1926 (2): 233-59. Ronkel, 1921: 47-60 (Indonesian material)

²Winstedt's genealogy may be compared with that given by Nong Jiwa and Fariduddin Haji (1958: 55). The dates given in these sources vary from about one to five years in respect of accession and death but there are no basic discrepancies.

³Winstedt (1928: 1-13) gives summaries of sections (a)—(d.)

e. *Undang2*—dated A.H. 1199 (A.D. 1784). Winstedt does not include a translation of these laws with (a) – (d) above on the ground that they are mainly copies of *undang2* given in the Malacca Digest (cf. below). There are other copies of the text of these *undang2* including a text from Aceh belonging to the Batavia Society (cf. Ronkel, 1921: 48 (entry number 120)). Another text is also referred to in Hollander (1893: 253–7). Winstedt refers to further MS. (1928: 2) including Raffles MS. 77, and Maxwell MS. 47. The latter MS. also contains Minangkabau laws and a section of *Undang2 Laut* (Folios 33–48, ‘Sea Laws’).¹

iv. THE MALACCA DIGEST

This is the most often cited Digest, if one may speak of ‘a Digest’ in the literature in the Malayan Digests. It may be divided into two parts: the Maritime Laws (cf. Winstedt and Josselin de Jong, 1956: 22–59)² and General Provisions (cf. Kempe and Winstedt, 1952: 1–19). Texts collated for the maritime laws are as follows: (cf. Winstedt and Josselin de Jong, 1956: 22–4).

A. From the Library of the Royal Asiatic Society, London.

1. Raffles Malay MS. 33, copied for Sir Stamford Raffles at Penang in 1220 A.H., 16 Dzu’l-ka’edah (5 February 1806) (cf. Kempe and Winstedt, 1952).’

2. ‘Raffles Malay MS. 34, described on a fly-leaf as *Undang-Undang Mengkasar dan Bugis*. Copied for Raffles in 1221 A.H. (1806 A.D.) on paper dated 1800 A.D. Pages 14–21 contain Maritime Laws, and were used by Raffles for his translation. Described in van der Tuuk’s short account of Malay MSS belonging to the R.A.S. (Miscellaneous Papers relating to Indo-China, Second Series, Vol. II, page 26, London, 1887).’

3. ‘Raffles Malay MS. 74. 211 pages. Pages 1–28 contain the *Undang2 Laut* and pp. 80–81 their Introduction. The legal contents of the MS. comprise sections of the Malacca Code (or Digest), of the *Hukum Kanun* of Pahang, Perak and Johore (cf. Kempe and Winstedt, 1948: 124), here (fol. 79, page 159) called “Johore Laws”, and Selangor Slave Law copied (p. 169) in 1189 A.H. (1775 A.D.) for Sultan Salehu’d-din. Folios 51–61 contain marriage and divorce laws indetical with those in Raffles MS. 33. Other contents are described by van der Tuuk (op. cit. p. 42).’

4. ‘Maxwell Malay MS. 5. 42 pages copied for W.E. Maxwell, then Magistrate, Singapore. Pages 1–11 contain the *Undang2 Laut*, followed by the Malacca Code, sections on marriage and divorce (§ 42 in Raffles MS. 33) and some miscellaneous laws.’

¹For historical sources reference should be made to Winstedt, 1936: 155–89 and Rentse, 1934, 44–62).

²Also translated by Raffles (cf. Raffles, 1879: 62–84, 1879a: 1–20).

5. 'Maxwell Malay MS. 6. 55 pages. Copied in 1304 A.H. (1887 A.D.) from a Malacca MS of 1237 A.H. (1821 A.D.). It contains part of the *Undang₂ Laut* (pp. 1,2, 41-45), the Malacca Code, the *Hukum Kanun* of Pahang, some sections of Raffles MS. 33 and of the Johore Laws translated by Logan (1855: 71-95).'

6. 'Maxwell Malay MS. 11(a). 38 pages copied for W. Maxwell. It has the Introduction (p. 21) and a few sections (pp. 46-48) of the *Undang₂ Laut*, sections from the Malacca and Pahang Codes and (p. 35) a reference to Patani.'

7. 'Maxwell Malay MS. 19. 79 pages copied in a Penang hand for W. Maxwell. The colophon (p. 8) of the *Undang₂ Laut* states the copy was derived from an original, dated 1083 A.H. (1672 A.D.) and recorded in writing by Enche' Maulana. The MS contains sections from the Malacca and Pahang Codes. There are references to Patani (p. 49), to the laws of Kedah, Makassar and Rum (p. 57) and a statement (p. 60) that it was Kathi Sadar Jahan who compiled *Undang₂ dan Kanun dengan titah kurnia dari bawah duli Sultan Mahmud Shah* of Malacca, whose Bendahara was Sri Maharaja. There are other legal sections from an unidentified source.'

8. 'Maxwell Malay MS. 47. 167 pp. copied in 1882. Beside the *Undang₂ Laut* (folios 33-48) it contains *Minangkabau* laws given by the Sultan of Pagar Ruyong to his five Penghulus on 8th *Bulan Rasul* 1180 A.H. (1766 A.D.), a *Minangkabau* fragment (folios 82-4) and Kedah laws.'

B. *From Leiden University Library.*

9. 'Leiden MS. Orient. 1705 (224). Juynboll, 1899: CCCXXVIII. It contains (pp. 1-75) the Malacca Code, the *Undang₂ Laut* (pp. 76-95), followed by miscellaneous laws some on trapping and fishing, some maritime. It was written at Batavia, in 1829.'

10. 'Leiden MS. Orient. 1726 (346). Juynboll 1899: CCCXXX. It contains the *Undang₂ Laut* (pp. 1-20) followed by a legal miscellany (e.g. § 43 of Raffles MS. 33), the Malacca Code, a story of Nushirwan the Just, Riau regulations for the taxation of cargoes and examples of letters from a Sultan ('Abdu'l-Jalil of Johore and Pahang) and from chiefs. Copy completed on 18 Safar 1245 A.H. (19 August 1829) at Riau by Enche' Isma'il.'

11 & 12. 'Leiden MS. Orient. 3199 (Malay 700). Juynboll 1899: CCCXXX-I. It contains two versions of the Maritime Laws. The MS. contains also (a) two recensions of the Malacca Code, the second followed by (b) miscellaneous laws that mention Patani and "came from Marhum Kasim down to Marhum Bongsu and so to our lord *Duli Baginda Ta'dzimmat dan m. khr. h.*", (c) a tale of Nushirwan the Just, (d) the genealogy of the Sultans of Sumanib, (e) a list of fees permitted to his clerk by the Yang di-pertuan of Riau, (f) a Riau *terasul*, (g) ten pages on the genealogy of the Sultans of the Riau-Lingga empire.'

C. *From the Royal Military Academy at Breda.*

13. 'Breda MS. 6619 claims in its introduction to have been written in the year *dal* on 4 Jumadi'l-awal 1066 A.H. (1655 A.D.). It is in illiterate hand-

writing; is often corrupt; has sentences from the Malacca Maritime Digest in confused order; and the last 13 pages of its 35 pages have sections absent from other MSS and evidently miscellaneous additions to the original digest. The Royal Asiatic Society, London, has photographs of the whole MS.⁷

The general provisions of the Malacca Digest (Kempe and Winstedt, 1952: 1-19) are based on Raffles MS. 33 in the library of the Royal Asiatic Society, London. This MS. is of special value as it gives a variant reading of Ronkel's edition of the Undang² Melaka (1919 : 49) and of Kempe and Winstedt's Pahang Digest (1948: 1-24). The local origin of this MS. is perhaps testified to by one reference in s. 28 to *Tangga Batu*, a district of Malacca, though this is of course not conclusive. The MS. does not confine itself to Malacca alone since Fol. 59 professes to contain the laws of Johore and Fols. 62-4 profess to give a statement on the law of slavery applicable to Selangor. These latter folios are modelled upon s. 15 of the Undang² Kerajaan (cf. Kempe and Winstedt, 1948: 1-24), and this similarity is further borne out by the fact that MS. 33 was copied for Raffles at Penang in A.H. 1220 (A.D. 1805). In addition, s. 8 of Fol. 59 appears to contain the same material as ss. 22, 68-70 and 76 of the Undang² Kerajaan. Folios 23-43 give a fragmentary text useful for comparison to van Ronkel's edition.

There is also a reference to Selangor slave law and ss. 20-1 use a Bugis term for charian laki-bini. (The remaining sections are not given elsewhere and contain provisions relating to adultery, divorce, division of property upon divorce, and trials by ordeal). Folios 61-2 are addressed to Allah and ask forgiveness since many of the subsequent laws violate Islamic law, but pleading that the rendering of traditional custom helps to preserve peace (note s. 8 of the Undang² Sungei Ujong (cf. Winstedt and Josselin de Jong, 1954) on the primacy of custom). Attention should also be drawn to Maxwell MS. 19 which has references to Malacca and Pahang laws as well as references to Kedah, Makassar and Rum (s. 57). This MS. is derived from an original dated A.H. 1083 (A.D. 1672).¹

V. THE NINETY-NINE LAWS OF PERAK

For details of this MS. reference should be made to the M.S. sources given for the Undang² Kerajaan. These laws have been included under a separate heading here as they have been separately translated and arranged (cf. Rigby, 1908: 20-56).

¹On the problems of dating the Malacca Digest (cf. Winstedt, 1953a: 31-3).

The most striking factor so far as textual sources are concerned is the overlapping of the various MSS. In view of this, the division of the Digests into five categories as set out above may seem arbitrary and perhaps excessively legalistic. But once some analytical order is admitted to be necessary, a categorization such as this appears to be inevitable. It is not denied that this reconstruction is largely artificial but it is useful as a general indication of the scope of digest 'legislation'. Indeed, in the study of any code system categorization is accepted as proper, but subject to these qualifications (e.g. Lee, 1956: 8). There is the additional, but not very scientific reason, that these divisions are hallowed by long usage in the Digest literature of Malaya.

The Characteristics of the Texts¹

Almost all the Digests deal with a wide range of subject matter. Topics are not arranged in any set order except where the (English) translators have made selections (cf. below on the Ninety-Nine Laws of Perak). There are two texts, however, whose subject matter is confined and relatively specific. These are the texts dealing with the Kedah Port Laws, and the Kedah Bunga Mas. Since they provide exceptions to the general Digest pattern we will deal with them first.

THE KEDAH PORT LAWS (Winstedt, 1928: 2-7)

The great number of the provisions in these laws are concerned with the payment of taxes and duties on ships and cargo entering and leaving the port (cf. sections 5-9, 17-22, 25-6, 30-4). Section 35 lays down the appropriate ceremonial for the receipt of Letters from various foreign rulers including 'the [Dutch] Company at Malacca'. The remaining provisions provide for the specification of weights and measures (s. 28) and the prevention of gambling and crime generally (s. 27). All disputes were to be heard and determined on the principles of Islamic law (s. 29). Section 37, makes provision for the collection of dues and taxes from persons coming to trade by land routes.

¹The following translations are taken as our sources: i. Undang² Kerajaan—Kempe and Winstedt, 1948: 1-24; ii. The *Minangkabau Digests* (a) Perak—Winstedt, 1953: 1-13, (b) Sungei Ujong—Winstedt and Josselin deJong, 1954: 1-37; iii. The *Kedah Laws*—Winstedt, 1928: 1-13; (iv) The *Malacca Digest* (a) *Maritime*—Winstedt and Josselin de Jong 1956: 51-9, (b) *General*—Kempe and Winstedt, 1952: 1-19; v. *The Ninety-Nine Laws of Perak*—Rigby, 1908: 20-56.

It should be understood that these are face value comparisons of translations and are not intended to incorporate textual corruptions, etc.

THE KEDAH BUNGA MAS (Winstedt, 1928: 12-13)

The Bunga Mas consisted of an ornamental plant made of gold and silver. This was sent triennially by the Sultan of Kedah to the King of Siam. The text on the Bunga Mas contains only a description of the plant and does not deal with its significance which was, and still is, a matter of some dispute. The Malay Sultans maintained that it was merely a token of alliance and friendship while the Siamese maintained that it was a direct admission of suzerainty on the part of the Ruler who sent it (cf. Mills, 1960: 42-52). Kedah, of course, was for many years under Siamese control and it is significant that when the transfer of Kedah to British control took place in March 1909, the Bunga Mas which had already been prepared was offered to and accepted by H.M. the King of England (cf. Mustaffa Tam, 1960: 42-3).¹ The rest of this text deals with court etiquette, a description of the regalia and installation of the Sultan and various miscellaneous matters.

The remaining Digests may be sub-divided into two sections: those which deal with maritime matters and those which deal with non-maritime matters.

THE MARITIME LAWS—MALACCA (Winstedt and Josselin de Jong, 1956: 51-9).

This Digest includes the following subject headings: Discipline and insubordination; adultery on board ship; finding of property on shore by a servant of the captain; runaway slaves on board ship; rescue of mariners; desertion; disrespect to captain; matters for which the death penalty may be ordered on board ship; borrowing on board ship; the duties of navigator and rules relating to the carriage of a super cargo; rules relating to cargo lost overboard in a storm; rules on collision at sea; tasks of the midshipmen; penalties for evading patrol boats; punishment for allowing fire on board; duties of the watchman, penalties for fighting; rules for the carriage of cargo owned by the crew; on the mishandling of the ship by the captain especially in the monsoon season; on the compensation payable by the captain for delivering cargo or super cargo to the wrong destination; theft; the rewards due to a crew for a successful voyage; the duties of the mate. There is little to comment on here but there are three provisions which should be mentioned in a little more detail.

¹For later descriptions of bunga mas cf. Ismail Bakti, 1960: 40-2 and Mustaffa Tam, 1960: 42-3.

First, in the preamble to the Digest it is stated that 'The sea captains desiring a code of maritime law... the Sultan consented'. Contrary to what may perhaps be said of other provisions of the Digest, this may be read literally. The control exercised by the Sultans over the ports in their domains was very real. Political power in Malaya has always entailed control over rivers and estuaries since these were the major trading routes. Hsieh Ch'ingkao records that in the eighteenth century all arrivals and departures at Kelantan were taxed at standard rates (cf. Wang, 1960: 34). Newbold (1839: (2) 230 ff.) also notes that taxes imposed in Kedah and Malacca were efficiently collected.

Second, the Digest states that the 'captain is, as it were, a caliph on board his own ship'. Section I of the laws sets out the hierarchy of rank of board ship. The captain (*nakhoda*) is described as 'king'; the steersman (*jurumudi*) is described as 'Prime Minister' (*Bendahara*); the officer-in-charge of casting anchor and taking soundings (*jurubatu*) is described as the 'chief of police' (*Temenggong*); the petty officers (*tukang kanan* and *kiri*) are described as 'courtiers' (*sida-sida*). This use of court terms to describe somewhat parallel functions on board ship is common in the maritime sections of the Digests. Winstedt (1928: 12) includes two sections of the Kedah Digests (8 and 11) which make similar provisions.¹ However, some caution must be exercised in the interpretation of these terms: 'Temenggong', for example, as 'chief of police', is somewhat misleading.

Finally, some comment is called for in respect of section vii of the Appendix (Winstedt and Josselin de Jong 1956: 59) which states that if a person is caught by an angler's hook then the person so 'caught' becomes the property of the angler—'even if it were the captain's wife or concubine'. This is undoubtedly the invention of some over-enthusiastic scribe.

THE MARITIME LAWS—JOHORE (Logan, 1855: 71-95)

We saw earlier that the text of these laws is to be found in fol. 79 of Raffles MS. 74 and is thus part of the sources used for the translation of the Malacca Digest. Logan's Johore Laws, however, contain a section relating to shipwrecked persons and goods lost at sea. This does not appear in any of the other Digests. The provisions them-

¹Cf. also Wan Ibrahim, 1968: 24 on the Laksamana, the officer-in-charge of the Kedah coastal area, which extends from Setoi to Parai.

selves are quite unremarkable, merely providing for ransom or sale of goods and persons.

THE NON-MARITIME LAWS

These comprise the Undang² Kerajaan, the Minangkabau Digests (Perak and Sungei Ujong), the Kedah (non-maritime) Laws, the (non-maritime) provisions of the Malacca Digests, the Ninety-Nine Laws of Perak and one final text, the laws of Johore.¹ Without exception, all Digests contain rules on many unrelated topics usually arranged in haphazard order. There is one exception to this, in that Rigby has arranged the Ninety-Nine Laws of Perak in the following categories:² Public Law (Constitutional, Administrative and Criminal); Proprietary and Other Rights and Duties; Slavery, Sorcery and Miscellaneous; and Relations of the Sexes. These heads must of course be regarded as artificial and for discussion purposes only.

It is not possible in the space available here to summarize all the detailed provisions of the Digests: the most that can be done is to give an outline of the contents of each Digest.

Undang² Kerajaan. This Digest deals with the following matters: hierarchy of rulers (introduction to rules); the use of certain regalia, notably the use of yellow cloth; on the ownership of abandoned rice fields; duties of cultivators to fence land and restrain the wandering of buffaloes; on the rights of a person to kill or capture a trespasser; on insults to women; on adultery; on slavery including the harbouring of fugitive slaves; on debts and pledges including hiring and borrowing; on finding; on treason and the penalties thereof; on the law of lease of land, of guarantee of debts on contracts generally; on foundlings and their position *vis-à-vis* Islamic law; on the killing of infidels; on punishments for various offences; on oaths and witnesses; on judging religious offences; on ordeals and finally on taxes.

The Malacca Digest—(non-maritime provisions). This Digest contains matter similar to the Undang² Kerajaan except that it lays

¹This is Folio 59 of Raffles MS 33 (general provisions of the Malacca Digest) and contains laws supposedly applicable to Johore (cf. Kempe and Winstedt, 1952: 1). MS 33 also contains what purports to be Selangor Slave law (cf. Kempe and Winstedt, 1952, 18–19).

²This Digest is also notable because it is the only one set out in the form of question and answer—*responsa* e.g. 'Said the King...'; 'what is the law relating to ...'. This form is probably taken from a Middle Eastern model, perhaps Persian, since the names of the main personages mentioned are Persian, e.g. *Nushirwan*.

more stress on debts between husband and wife and the attachment of conjugal property for family debts. It also contains a section (cf. Kempe and Winstedt, 1952: 17) on the relation between Islamic law and its own laws.

The Kedah Digest. Apart from the Port Laws the remaining laws of this Digest deal with miscellaneous matters similar to the above two Digests though not in much detail. Emphasis is laid on prohibitions regarding the use of certain trappings of Royalty, especially the wearing of yellow cloth.

The Ninety-Nine Laws of Perak. This is the most detailed of all the Digests and it has four main divisions as given above. It should be noted that these are the divisions given by Rigby and not by the author of the MS. The subject matter of the Digest is the same as in the preceding Digests but considerable attention is paid to sorcery, demoniacal possession, midwives, medicine and ceremonial bathing. These matters are barely mentioned in other Digests.

The Laws of Johore—(non-maritime provisions). This Digest has sections on hiring and borrowing; on land tenure; on principal and agent; on trespass; on accidents from cattle; on accidents during famine; on theft and robbery; on kidnapping; on offences against the marriage contract; on adultery; on affrays, assaults, homicide, the hiring of assassins; on ordeals and on contracts. The major characteristic of this Digest is its overwhelming emphasis on prevention and punishment of criminal and immoral actions—there is not much distinction between these two categories. Contract, for example, is dealt with in a few lines and then the main concern is with the prevention of forgery and punishment therefore.

THE MINANGKABAU DIGESTS

These two Digests form a category on their own. They consist mainly of perbilangan² (cf. Chapter 2 above) though sections 42, 43 and 120 of the Perak Digest deal with slavery which was rare in Minangkabau districts though not unknown. The Undang² Sungei Ujong is notable in that sections 8–13 attempt a reconciliation between adat and Islam. Section 8, especially, says that custom may agree with or contravene canon law but will be effective if introduced with due ceremony.¹ The Perak Digest is notable in that there is no attempt to treat the people on a matrilineal basis, as is seen for example in the Undang² Sungei Ujong. There are also very few sections on slavery or debt slavery. There are many sections on the

¹The slaughtering of buffalo, sprinkling of rice paste, etc.

relationship between adat and Islam (sections 5, 8, 13, 34, 47, 49 and 90). The relationship is conceived of as being one of mutual interdependence (cf. Chapter 2 above).

With the exception of the Minangkabau Digest of Sungei Ujong, the other Digests have many provisions in common. On the other hand, there are discrepancies, perhaps the most notable of which are those sections relating to penalties. Thus, for example, the penalty for fornication by the unmarried ranges from a fine (Malacca Digest) to one hundred strokes and banishment (Undang² Kerajaan), to a fine payable by both culprits or in default banishment for the man and pillory for the woman (Ninety-Nine Laws of Perak). By contrast, the Minangkabau Digests merely require the parties to marry. Similarly in the case of theft and wounding the Malacca Digest requires death, the Undang² Kerajaan prescribes the lopping off of a thief's hand; and the Ninety-Nine Laws prescribe a fine payable in camels. The Minangkabau Digests require only compensation on a fixed scale.¹

We have noted the existence of attempts in the Minangkabau Digests to reconcile Islam and adat and a similar attempt in the Malacca Digest. This is rather interesting as the Islam/adat problem is a very live issue in Negri Sembilan and in parts of Malacca (cf. Chapter 5 below). In Perak also, there are certain types of inheritance which suggest Negri Sembilan practice, e.g. the inheritance of land and houses (cf. Wilkinson, 1908: 36). In view of the matters raised in Chapter 2 these Digest provisions immediately raise the possibility of an attempted syncretism between native beliefs (of the 'good' and 'just' etc.) and the doctrines and rituals of Islam. The Digest situation is not so much the situation of a conversion response to Islam, which while establishing the outer forms of Islam retains the inner meaning of native beliefs, but rather an attempted reconciliation. This is justified first on the ground of convenience, i.e. that adat does in fact keep peace and order, and second on the view that there are different forms and types of law—of God, of Man and Reason. This usually appears in the Minangkabau or Minangkabau-influenced Digests and rarely in any of the others, the Malacca Digest being the only other example.²

¹It may also be noted that though some of these penalties are Islamic, some are not.

²Many of the texts contain large portions of Islamic law, especially on betrothal, marriage and divorce. On the other hand penalties for crimes are often non-Islamic.

There are two probable reasons for this. First, in contradiction to *adat perpatih*, the other *adats* in the remainder of the Malay Peninsula never aspired to the status of a legal system. Thus there was no normative system of jurisprudence with which Islam had to compete. Second, the degree of Islamic penetration varied from district to district in Malaya. We may illustrate this from the Digest provisions themselves on the basis of penalties. The degree of Islamic penetration seemed to be in direct proportion to the type and severity of penalty. Many texts retain non-Islamic (pre-Islamic?) penalties for public law offences. It may, of course, be argued to the contrary, that Islamic influence was strong but the texts themselves preserved rules no longer effective. But, as Gullick points out (1965: 52-3), written documents enjoyed great prestige though the Sultans were not usually literate. The status of the scribes in general was low though some attained considerable influence over their masters. It is therefore unlikely that once Islam became firmly established in any district, the Digests would remain unaltered. Because the Digests do in fact contain many non-Islamic penalties we may surmise that Islamic influence was superficial and largely confined to strictly religious matters.

The final point which emerges from our description of the Digests so far concerns the various influences which have clearly gone into their composition. We may summarize these as follows:

Firstly, there is some measure of uniformity among the provisions of the various digests. Whether or not this argues for a common origin or for a process of local diffusion is uncertain, as is the amount of weight to be given to conscious imitation. Secondly, and correlatively, there are disparities among some of the provisions which may argue for a local origin and a state of relative cultural independence. Thirdly, there is evidence of Bugis, Hindu and Muslim influence of varying degrees of effectiveness.

The Digests also show a Persian element at least in nomenclature (*Nushirwan* and *Buzurjmihir*) though whether or not this is evidence of Persian influence is highly problematical; it may be perhaps merely a genealogical gambit. This is not peculiar to these MSS. alone as many Malayan texts attempt to suggest direct genealogical connexions from the text 'patron' to Muhammed, and from him to Adam. Any evidence which such texts therefore provide in the way of pedigree relating to Persian, Islamic or other influences and sources must be proved by other means. We will return to this point shortly.

The Legal Significance of the Texts

THE historical value of the Digests is immense despite the unreal schematism that characterizes many of them. This is not a claim that they had any great practical significance or that they formed the basis for any form of judicial proceedings. Their importance lies in the fact that they form part of a South and South-East Asian Digest complex which expressed various ideologies on the nature of sovereign authority (see below pp. 89–90).

Although all writers on Malay adat have stressed the importance of customary rules as such, it seems fairly generally characteristic that they have disregarded this customary influence when considering the Digests. That the Digests are not a complete statement of the law has been recognized by all, but the reason for this lack of completeness has usually been laid at the door of the 'autocratic' and 'aristocratic' ruler. It is probably truer to say that the incompleteness is to be found rather in the domain of private law, where the Digests themselves assume an already existing body of customary regulation. Many of the texts can be dated as far back as the mid-1700s, but in themselves they do not appear to throw light upon any established historical sequences regarding the growth of Digest law. They do not, in fact, mention customary law and even less do they enumerate the elements essential to the establishment of customary regulation.

It is significant that many of the inadequate propositions of adat temenggong are based largely upon the MSS. described above, or rather upon variable(?) translations of them. The reason for this appears to be the fact that internal inconsistencies in the Digests themselves left room for much scope on the part of the local ruler, and hence it is often implied that the Digests did not represent the true (or 'democratic') law of Malaya. This is not sufficient reason when it is noted that the Digests themselves are far from complete. It also ignores the presence of Islamic law which deals in detail with the law of personal relations. But it is in the domain of comparative law that the value of the Digests far transcends their local boundaries. The Malay peninsula was never isolated but was subject to various foreign influences at differing periods in its history. So far as the Digests are concerned, Rigby (1908: 12–13) draws our attention to the existence of similar Digests in Aceh and Sumatra, and also Java (cf. also Newbold, 1839 (2): 224–30). Both the large Islamic content in the Digests and the supposed Persian element have already been

mentioned. Winstedt also mentions (1928: 2) the existence of Siamese words in the Kedah Digest.

The Malay digests betray some affinities with the Hindu codes, especially in the prominence assigned by both to the State as represented by the Sultan or Raja in matters of private law. There is, therefore, a redaction as in most of the Indo-European codes, *ex auctoritate principis*. It is natural that the framers of the digests should have striven to exalt the royal prerogative, probably at the expense of earlier custom. This may have been given greater impetus with the introduction of Islam, which tended to invest the ruler with functions unknown to the traditional law; for example the Sultan was generally known as *Berkhalifah*, the 'Vice-Regent' of God.

No doubt the main reason why Islam did not completely eradicate earlier Hindu and customary influence lay in the absence of anything like a centralized authority. In the Malay states a ruler had no real authority over any but a varying portion of his domains; but within them, on the establishment of Islam, it was possible to alter the texts and flavour of many of the digests, as was in fact done. But the extent to which the ruler's writ ran cannot have been very extensive, if indeed it ran far at all. The conflicting rules found in many strata of the translations may be safely ascribed to this real change in law on the introduction of an absolute system of religious law. Examples are provided by conflicting provisions relating to public penalties for various crimes and the varying standards of circumstantial or factual evidence required to prove an offence. In these two categories it is possible to distinguish rules having close affinities to Indian practice, to Islamic, mainly *Shafii*, texts, and to a third group not recognizable as either.

The Digests and English Law

It may seem odd to attempt an analysis of the Digests in connexion with colonial legal administration but this is not as unusual as it seems in the light of the relation between the Minangkabau Digest. (Undang² Sungei Ujong), the perbilangan and English law (cf Chapters 2 and 3 above). But even in respect of other Digests there seem to be some parallels which need explaining or at least explaining away. Two documents in particular merit our attention.

THE MALACCA LANDS CUSTOMARY RIGHTS ENACTMENTS (1861 and 1886)

The act of 1886 does have some provisions which seem to parallel those of the Malacca Digest. S.32 of the act of 1886 provides for assessment in lieu of the tithe and s.33(1) provides for the payment of one-tenth of a profit as rent between landlord and tenant. This has been judicially approved by the court in *Abdullatif v. Mahomed Meera Lebe*.¹ It was approved on the ground of being a 'good and reasonable custom', but in the proceedings no mention was made of any digest provisions. Ss.20-21 of the same enactment provide for obvious variations from digest provisions in regard to mortgages and leases, but s.6(d) which provides for customary landholders to give free labour for road-building, etc. to the government has echoes in the Malacca Digest. Mills (1960: 118-20) relying upon Maxwell, regards the provisions of the Malacca Digest as stating the true legal system of the Malays. But this opinion must be qualified when a distinction is drawn between the face value provisions of the digest itself and the proprietary rights claimed by the Dutch in respect of Malacca land. The Dutch claimed that they were in fact merely replacing the Raja as the lawfully constituted authority, and continued to press their claim up until the late 1830s. It is true, however, that neither they nor the Portuguese ever attempted to replace the native system of land tenure by one of their own, but contented themselves with taking political and executive control. The acts of 1861 and 1886 and accompanying regulations were designed not to copy or preserve native land tenure but to settle the claims of Proprietors under Dutch grant and to establish *fee simple* ownership in the Crown. The only similarity between government arrogated rights and the provisions of the digest relating to the Raja is that provided by parallels, mainly confined to tithe tenure, which the authorities regarded, on the basis of the Malacca Digest, as being Malay Law. This matter is dealt with in more detail in the next chapter.

PERAK STATE COUNCIL MINUTE

So far as the other states are concerned, only a Perak State Council Minute (1937: 70) providing for shares in the distribution of property on divorce seems to have any parallel in the Ninety-nine Laws of Perak, (ss.52-3) but even so the correspondence is not exact and must be 'read into' the Digest. There are no judicial decisions on the point.

¹(1829) 4 Ky. 249.

Conclusion

What then can be concluded from this survey of the Malay Digests? It is clear that their merit does not approach anywhere near the terms of the eulogy bestowed upon the Roman codes by Maine, but neither are they to be dismissed as the self-interested wanderings of a group of 'autocrats'. The point that they are not isolated products of their own localities has already been made, and leaving aside for the moment the large elements of direct Islamic content, what is left has clearly some connexion with the general Middle and Far Eastern structure of, for example, the codes of *Manu* and those further West. This fact has been obscured by the stretching of the *ex auctoritatis principis* to absurd lengths, especially in the excessively formal preambles to many of the digests concerning the sumptuary regulations of the royal courts (cf. Kempe and Winstedt, 1948: 4-5). In their excessive formalism and in the fictions of uniformity and continuity, the Digests present a picture of conventional generalization which probably had a basis in fact, but which was not the case to the full degree of their statements. In other words, there are the activities of glossators to be contended with, but this in itself does not justify Diamond's dismissal of such digests as 'false laws', unless it is also proposed to jettison much of the work of the great Roman jurists (cf. Binchy, 1943: 215). This, of course, is not to deny the often harmful pedantry in the glossators' work, but in the case of the Malay digests this is not linguistic but is a relatively unsophisticated attempt to imply the existence of legal institutions, of legal powers, and of legal completeness, which, from historical sources, clearly did not exist.

What may be implied, however, from the texts as they stand, are two points of possible contact between these digests and Indo-Indonesian digests. First, a ranking of penalty is common to these writings and may have for its basis of justification the notion of caste, whereby penalties are measured in severity according to the status of the person or his property unlawfully interfered with. Thus for example, there are ranking penalties for insult to various persons arranged in gradation. The formal prescriptions of the outward trappings of rank helps to confirm this impression (cf. Winstedt, 1928: 10 on the use of various coloured flags).

Second, the Digests are political documents as well as legal documents. We may illustrate this by referring to *adat perpatih*. We saw earlier that the constitution of Negri Sembilan is an all-inclusive

integrated system of law. This adat regulates both political and legal matters and all persons find their status within this system. In the other Malay states, however, this is not so. There is a distinction between the 'village law' and the 'law of the Sultan'. The distinction is precisely this one of political power. The Digests confer upon the Sultan a legal status¹ which is distinct from and different in kind to that held by minor chiefs. The large Islamic element in the texts helps to confirm this proposition.

We know from independent historical sources that the political organization in the Malay sultanates was fluid and unstable. In this situation, the provisions of the Digests provided a series of fixed points theoretically defining the legal suzerainty of the rulers. But the Digests may also be regarded as fixed points on a political organization scale. Each new pretender to office, for example, attempted to supply himself with a genealogy to support his claim and inevitably modelled his regalia and the outward trappings of rank on the Digest examples.

As Gullick says (1965: 66):

The Sultan of the State was thus the apex of the Ruling class, the symbol of the unity of the group and the point of reference by which, ... the members of the ruling class determined their relative status. The concept of differential status was one of the main interests and values of the ruling class.

Something of these observations comes through in the modern state constitutions though of course the contexts are entirely different. For example, in the Kelantan State Constitution, the Royal Prerogatives remaining to the Sultan are listed as follows: he is the head of the religion in the state; he is the protector of Malay custom; and he is the ultimate owner of the soil.

The content of these prerogatives is now the responsibility of the individual state governments, but the function of the Sultan in each state legislature is to assent to the passing of legislation some of which falls within these very broad categories. In a constitutional sense then, he is intimately though very formally connected with the law making processes. This is dealt with in detail elsewhere in relation to one state (cf. chapter 9) but the constitutional function of the Ruler is similar throughout the Federation.

¹For example, by referring to the Sultan as 'Vice-Regent' of God and by the regulations on dress.