

ADAT LAWS IN MODERN MALAYA

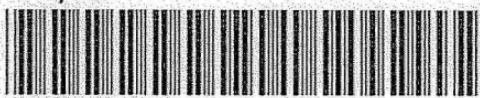
*Land Tenure, Traditional Government
and Religion*

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INTRODUCTION

The Scope of Adat Studies in Malaya

MALAYA¹ is distinguished in that it possesses a modern legal system of three component parts. This amalgam, which affects only the ethnic Malay population, includes a basic land tenure system (*adat*), a religious law governing family relationships (Islam) and an over-lying judicial, legislative and executive system founded in colonial English law. The aim of this book is to describe the interaction and integration of these three systems. The method adopted is to take *adat* as a base and consider the interaction from the viewpoint of the Malay landowner. This method has been prompted by the fact that the bulk of the Malay population are peasant farmers, and land tenure is thus of first importance to them. But at the same time all Malays are Muslim by religion and this is the official state religion enshrined in the Federal Constitution and for which Parliament has legislated. Both these legal systems are administered through the forms and techniques of English law.

We may commence with some introductory comments on *adats* in Malaya and build around this what is hoped to be complete summary of the legal systems affecting a South-East Asian peasant society.

To those familiar with the massive Indonesian *adat* compilations made by Dutch scholars, this may seem rather optimistic, but two factors go a large way towards making this possible. First, unlike Indonesia, Malaya does not have a great variety of named localized *adats*, each requiring separate treatment. This general statement is not affected by the range of meanings which the term *adat* bears in Malaya.² In the Malayan Peninsula there are only two named systems

¹'Malaya' here refers only to the states in the former Federated and Unfederated Malay States plus Malacca, a part of the former Straits Settlements. The states are: Johore, Negri Sembilan, Malacca, Perak, Kelantan, Trengganu, Pahang, Selangor, Kedah and Perlis. *Adats* extant in the former North Borneo territories (Sabah, Sarawak and Brunei) are not dealt with in this book. Sources may be found in Hooker 1967: 30-32, 64-66.

²Possible meanings are as follows:

- i. manners, etiquette;
- ii. proper, in the sense of correct;
- iii. the natural order e.g. rivers run downhill;
- iv. law, in the sense of rules of law; legal usages and techniques
- v. law, in the sense of concept of law—this sense of *adat* is related to (iii) above, e.g. it is *adat* that law and religion complement each other.

of adat¹ and information on one of them, *adat temenggong*, is sparse and inconsistent.

The second factor which goes toward making a relatively complete summary possible is that the book is primarily about a legal system expressed through the medium of judicial decisions, statutes and state constitutions. It is within this framework that adats in Malaya now find their modern expression. They form part of the day-to-day administration at District Office level, and since they are largely concerned with land tenure, they are of major importance in a peasant economy.

At the state level, all state constitutions make provision for the deployment of adat officials in state affairs. Though the scope and function of adat officials varies from state to state,² it is nevertheless true that in no state are they completely ignored.

Finally, the courts and the legislatures are actively concerned with adat matters, as is evidenced by the number of cases and statutes discussed throughout this book. It may also be noted that the vast majority of judgments are concerned with problems of land tenure.³

The modern forms of adat in Malaya are thus confined and certain relative to the present position in Indonesia. Adats in Malaya are possibly unique in the area of customary legal systems in that they are so uniform and well documented.

But these remarks do not imply that details of Malay peasant social structures are irrelevant to the present study. Chapter 1 is devoted specifically to this topic and the range of references cited there and elsewhere in this book in connexion with adat bear out the importance and immediacy of this point.

In addition, the book contains a list of all the *suku* (clans) and *perut* (lineages) which can be traced in the states of Negri Sembilan and Malacca. Some of these have been compiled from earlier works (e.g. Nathan and Winstedt, 1920, Parr and Mackray, 1910, and Gullick, 1949) but others are completely new. All have been ex-

¹These are:

i. *Adat Perpateh*; found primarily in Negri Sembilan and Malacca states. This is dealt with in Chapters 2, 3, 5, 6-9.
ii. *Adat Temenggong*; this term is used to describe any adat which is not adat perpateh. There are no set rules as to its geographical distribution and strictly speaking it does not constitute a system in the same sense as adat perpateh: see below chapters 1 and 5.

²The degree of integration between the state and adat officialdom is greatest in Negri Sembilan; see Chapters 6-9.

³See especially Chapter 3.

haustively checked in the field, and changes where they occur have been noted.

This reference to earlier work brings us to a very important topic: the considerable body of existing literature on adats in Malaya. It is necessary to examine here some of this previous work because the student must contend with the individual bias and background training of all writers on the subject. These range from the narrowly legalistic (e.g. Taylor, 1929) to the comparative and historical (e.g. Wilkinson, 1908). The former approach has never been particularly popular but the historicism of Wilkinson, which is representative of much nineteenth and twentieth century work, has had a great influence extending to the present day. An extreme example of this, which appeared as recently as 1964, runs as follows:

When the westerner looks at the customary law of the east, he may see it blurred; the kathi, trained in the ways of religion and immersed in Arabic culture, may find it far too worldly for his sympathetic understanding; and one does not learn the rules of Naning games in London's Lincoln's Inn Fields. The only persons who can be expected to have a clear understanding and a proper appraisal of customary law are the traditional leaders of the community. They are interested in maintaining the norms of their community and to them should be entrusted the administration of customary law. They will know how to reinterpret it to keep pace with social changes, changes which their own community has accepted as being relevant to it. (Minattur, 1964: 352)

While this extract completely ignores the formal demands of the Malayan legal system it also implies a comparison of the adat rules to the forms and substantive content of the English legal system. Wilkinson himself was not averse to indulging in this sort of comparison and indeed his main work (1908) is almost solely concerned with this. Historicism emphasizes two factors. First, there exists the primacy of the 'racial' characteristics of a people as expressed in legal terms. An example pertinent to the matrilineally organized Malays of Negri Sembilan is that, supposedly because they were averse to bloodshed, their adat knew nothing of the death penalty but instead prescribed restitution. There is no empirical evidence for any such supposition, let alone that it is particular to the Negri Sembilan 'race'.

The second feature of classical historicism which appears in accounts of Malay *adat* and which is exemplified in the quotation above, is that law develops unconsciously and truly expresses the 'inner spirit' or 'will' of the people. There may be some truth in this but it is undeniable that many laws in any community are based not

on any instinctive sense of right but on the interests of a strong minority.¹

Finally, historicism, while valuable, does not adequately deal with the variety of approaches needed in analysing a non-Western system of law. Moreover it must be remembered that adat is no longer as purely 'customary', as it was when early accounts of it were written. It is now part of the national legal system of Malaya, though limited in its scope to certain defined persons occupying a certain category of land. For this reason historicism is quite inadequate as a method of analysis and, in some topic areas, rather formal legal techniques become necessary.

These are to be found in respect of legislative judicial and administrative documents. The range of documents in this area includes State Constitutions, Acts of Parliament, Law Reports, District Office Minutes and Registers of Title. Each of these types of document, while tending to fix the content of adat rules, raises its own particular problems of interpretation. State Constitutions, for example, must be interpreted within the context of the Federal Constitution. It is especially important to remember this when dealing with the powers and functions of superior adat officials.

Acts of parliament dealing with adat must of course be interpreted on the principles of statutory interpretation. There are at least four so-called principles of interpretation, ranging from the most literal to the most liberal, with consequent shifts of emphasis in individual cases. In addition to this, the statutes do not generally contain specific adat rules; instead they provide for the implementation of rules which are found to exist as fact in each particular instance and which also fulfil various (statutory) requirements. While these factors provide a fertile field for the academic lawyer to argue over, the effect on the recipient, the Malay peasant, must not be lost sight of. The confusion which has arisen, especially in the immediate pre-war cases, resulted in a partial loss of peasant confidence in the workings of the judicial system. Even now, when the situation in these respects has much improved, a comparison, specifically on this point, between 'our law' and 'government law' is still drawn, usually to the detriment of the latter.

This lack of confidence has been compounded by the problems raised when adat law has been enshrined in official law reports. This centres around the place of precedent in the English-based Malayan

¹See Chapter 4.

legal system. Briefly, the doctrine of precedent provides that a court should follow its own earlier decision, or a decision of another but recognized court where the same or a similar point of law is raised. The function of the doctrine is to provide certainty in the law, but all too often the result has been technical rigidity. As with statutory interpretation, the problems of rigid reliance on precedent were especially acute in pre-war days, but the position now has substantially improved. It should be remembered, however, that both problems are inherent in the national legal system of Malaya, and unless care is exercised they may again tend to sap the confidence of the peasant in the law. This is especially important because both topics arise in land distribution proceedings, (see especially Chapter 3).

These criticisms, however, should not blind us to the merits of the precedent system. In one field of semi-judicial activity, the workings of State Appeal Committees,¹ a non-reliance on precedent tends to produce inconsistent decisions on various points of land tenure. Each appeal is decided on its own particular facts and so far no attempt has been made to achieve any consistency. The problems for the judicial administrator are thus formidable: to steer a course between over-rigidity on the one hand, and a too lax administration on the other. This is made even more difficult because the adat in Malaya is a developing and living system of law. New forms of property are coming to be recognized, especially in view of the ever increasing changeover from a subsistence to a cash economy. Even relatively minor innovations such as the introduction of Post Office Savings Banks accounts raise important questions of principle. How, for example, is interest on such accounts to be distributed when the owner is deceased? Do the adat rules on natural increase i.e. of the progeny of an animal (*untong*) apply? Even more serious, is the taking of interest contrary to the demands of the dominant religious system (Islam)? This then, is the context within which the judge must function, and precedent and statute will only provide him with a guide in some cases: in others, he will have to make new law.

¹These are committees set up under authority of the State Constitutions. Their function is to hear and determine appeals on matters of 'Malay custom' from district level decisions. 'Malay custom' may be regarded here as synonymous with land tenure. See Chapter 3 below.

At District Office¹ level there is no reliance on prior precedent as such in land administration. But in cases of dispute, past practice so far as this is known is always followed. This lack of authority, however, sometimes forces the District Officer to turn to early articles on Malay adat and use these as a basis for his decisions. The danger here is that the article relied upon may contain rules of adat from a different district where details of adat may well vary. In addition, the particular bias of the author may influence the District Officer in his whole approach to the problem. Fortunately, these dangers are well-recognized, and indeed, have been judicially commented upon.

There is one further class of documents which should be mentioned here, though legal techniques of interpretation are not directly relevant. These are indigenous accounts, usually of recent origin,² preserved by individuals who pride themselves on their knowledge of adat. They include genealogical tables, descriptions of local adat ceremonial, and some quite extensive local histories. Naturally these documents differ greatly in value, but nevertheless they must be taken into account if only because they are regarded as accurate by their owners and thus inevitably colour local accounts of adat.

English law and Islamic law share one characteristic in common. They are both written systems with defined bodies of literature, but here the similarity ends. The Malay peasant, as a Muslim, is absolutely bound both by conscience and written law to observe the dictates of Islam. But this is complicated by the fact that the relation between Islam and adat is not a one to one relationship consistent in every context. For example, Chapter 10 is concerned in describing judicial uncertainty on the relation between these two systems. Even more to the point, Chapter 9 demonstrates the possibilities of conflict at state level between Islam and adat. It is notable here that the possibilities of conflict are enshrined in the state constitution itself. Finally, at grass roots level, it is not uncommon to find the Malay peasant attempting to explain away the discrepancies between the systems. The fact that there is relatively little open conflict says much for the tolerance, some would say the causistry, of the Malay peasant. But the real reason for the sometimes surprising accommodation in all

¹All states in Malaya are divided into administrative districts (*jajahan*), each headed by a member of the Malayan Civil Service who is styled District Officer. His functions include responsibility for land registration and administration in his district and for the collecting of land tax. By virtue of his position the District Officer is also a Magistrate of the First Class. For more detail of his functions in land tenure problems see Chapter 9.

²I.e. written in the last forty years.

contexts appears to be that both systems are regarded by the Malay peasant as being reconciliable. Traditional adat verses stating complementary functions for adat and Islam are known to every Negri Sembilan peasant. On the other hand, all with any pretensions to Islamic knowledge admit that the practice of adat is not forbidden by the Koran. It is significant here that the Koran does not deal in terms with land tenure. In other words, the conflict area is drastically reduced because one of the competing ideologies, Islam, has no very specific rules on the topic. The main area in which conflict is probable and indeed almost always present is in the distribution of political power in the states. This is especially acute in only one state, Negri Sembilan, and is as much a result of modern constitutional government on the federal model as it is of the inherent repugnancy, one for the other, of the competing legal systems.¹

Another factor tending to lessen stress is that the traditional adat sanctions for serious criminal or family law offences are no longer operative. These are now dealt with by the English modelled legal system which deals with all ethnic groups in the country on the basis of a unified criminal code. On the other hand Islamic sanctions for breaches of family law rules have been preserved and are dealt with by religious courts. There is no adat on these matters. It will be seen then that conflict is largely avoided² by a rather neat division of function. We may also note here that this division of function itself is an example of the political inferiority of adat as a system of law. It is inferior in the sense that Federal and State Parliaments are competent to legislate it out of existence. Islam, being an entrenched religion, is not to be dealt with so easily but it is subject to the formal technical demands of an English-based legal system, and it is a trite observation among lawyers that law is at least as effective a weapon in its procedure as it is in its substance.

The variety of meanings included in the term 'Malay adat' has occasioned the division of this book into three parts. Part I (Chapters 1-3) deals with the traditional legal systems both historically and as they exist at present. This involves a consideration of peasant social structure and its relation to traditional oral laws and introduced English law. The second part of this book (Chapters 4-8) deals with adat in the context of modern state government. This is introduced historically but the bulk of this section sets out the adat constitutions

¹For a full description see Chapter 9.

²But not *completely* avoided: see Chapters 3 and 9.

as they now exist and attempts to relate these to a federal state government system. It has been found necessary to add maps and diagrams at this point. Part III (chapters 9-10) deals with adat and Islam. In addition, chapter 9 devotes some space to the political power system in one state, Negri Sembilan, including the introduction of politics into a changing peasant economy.

It is natural that there is some overlapping in these divisions. It would be surprising if this were not so, since adat is after all a living system of law. Similarly, the methodology of approach to the whole topic of adat varies. It ranges from the technically legal (chapters 3 and 10) to the most esoteric jurisprudential (chapter 2). In addition, approaches involving anthropology (chapter 1), history (chapter 4), and comparative religion (chapter 9) have been found necessary.

The diversity of types of data and hence methodology, tends to militate against a uniform presentation of Malay adat. This is particularly noticeable where a stand is taken in legal material, for here problems in the study of comparative law immediately arise. The practising lawyer will ask for cases and statutes; the jurist for a coherent analysis of a system; the anthropologist and administrator for the ground level workings of given segments in the system. These requests all involve different levels of legal description and analysis which is not helped by the diverse range in meaning of the term 'law' itself; a difficulty compounded in dealing with a non-European system which has its own problems and theories of terminology.

On the other hand, in Malaya, and also in any peasant legal system, it is not possible to discuss any one of land tenure, religion or government in isolation. These three elements, the vital underpinnings of any society, all interact, one upon the other. A discussion of adat therefore entails more than what a Euro-American lawyer would consider 'law'. At the same time it contains less in that complex technical topics such as 'contract', 'tort', and so on are not dealt with. The reason for gaps such as these provides some possible unifying factors in Malay adat study.

These include the country-wide history of British colonial administration. Though this varied in length of time from state to state it had two major characteristics of legal significance. First, it was the policy of that administration to preserve and protect Malay family structure, land ownership (and inheritance) and traditional government. This was made possible by enabling legislation and by administrative practice at the district level. Both legislation and practice

have continued into the post-colonial era although now the ideology of preservation is supplemented with an ideology of development. But the old forms remain and the new ideology has been adapted to them so that legislative and administrative uniformity is nation-wide, although underneath diverse substantive systems (such as those described in Chapters 3, 5 and 10) still exist. The second effect of the colonial administration was to protect only selected parts of the indigenous system, namely family and land matters. Even in matters of government the authority of traditional leaders was either circumscribed or absorbed into the colonial hierarchy. This disposal of power centres has continued to the present but has now had added to it a parliamentary party system. This of course is also nation-wide, and the various ethnic Malay political parties share a common platform towards adat—one of preservation and support. One may thus look at adat in the light of its common legal/administrative form and place in current political ideology.

A second unifying factor for the adat analyst may possibly be found in the twin characteristics of language and religion. All varieties of adat share a common core of reference which essentially concerns land and family matters, in addition to a sense of an ordered natural world (cf. Chapter 2). The religion of Islam provides a common system of belief throughout the peninsula and, most important, adat and, whatever the learned might say, Islam are everywhere seen as separate but complementary systems.

It is in these contexts that the separate topics in this book should be read. A stand has been taken in the legal facts of Malay peasant life but the diverse forms of this should not blind us altogether to a possible uniform approach to the adats. Little more can be said on this subject here as the primary aim of this book is to provide an accurate summary of the existing adat system. Though it is possible to show a structural unity in adat law study, this must await future research and, of primary importance, must pay attention to Indonesian adat material.