ADAT LAWS IN MODERN MALAYA

Land Tenure, Traditional Government and Religion

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ORAL TRADITION AS LAW

THE traditional statement of adat is most characteristically found in the form of perbilangan.[1] This form of expression is confined to the adat perpateh districts of Negri Sembilan and the Naning district of Malacca and is cast in the form of a metrical stanza. The literature on adat perpateh is full of examples of perbilangan, most of which were collected in the early years of this century.[2] In addition to collecting perbilangan most authors attempted not only their translation into English but also their interpretation as a system of law. This interpretation has two levels. First, one must consider the validity of the verbal translation. It is probably justifiable to assume accuracy in this respect if the translations are consonant with later linguistic work. A detailed examination on this point, however, is outside the scope of this book.

The second level is more serious. We have to consider here the interpretation of perbilangan by the various collectors in the light of their assumptions as to the nature of law in general and of adat in particular. Almost without exception we find that the collectors' interpretation is characterized by a comparative and historical approach to Malayan data.

Wilkinson (1908: 1–45) provides us with the best example of this. Broadly speaking, Wilkinson's comparative approach was that of Maine, whose central interest lay in comparing Roman and 'modern' Western law with the law of India and East Europe, so as to link changes in social groupings with changes in the theory of law, i.e. 'from status to contract'. More specifically, Wilkinson's interest lies in an examination of the sources of law, and in the contrast between what he calls the 'matriarchal democratic adat [perpateh]' and the 'aristocratic and autocratic adat [temenggong]'.

In the course of this attempt Wilkinson stresses the slow evolution of law and its intimate connexion with the particular characteristics of a race. In addition he lays much stress on the formal arrangement of perbilangan in their characteristic form—the metrical stanza. He further divides the perbilangan into 'sources of law' at a rather

[1]'Customary sayings'—the term *kata pesaka*, 'traditional sayings' is also sometimes used.

[2]See for example Caldecott, 1918: 3–41; Hale, 1898: 43–61.

sophisticated level. This is in addition to the common subdivision by topic or field of law which is made on analogy with English law.

We may illustrate these general statements by setting out a series of perbilangan divided into topic heads:[1]

'*Adat and Religion*'

(i) Customary law hinges on religious law,
Religious law on the word of God,
If custom is strong, religion is not upset;
If religion is strong, custom is not upset,
Religious law is the offspring of covenant,
Customary law also the offspring of covenant.[2]

(ii) Custom may be split into three branches:—
Custom clear as the triangular rush in a rice-field,
Custom strong and round as a pillar, whereon all men agree,
Custom laid down in God's book, the law of the Koran,
It is for custom to suppress the wrong,
To bring the good to pass,
It is for religious law to command righteousness and bid men eschew evil[3]

'*Justice*'

(iii) The quart measure that is full,
The gallon measure that is true,
The weight that is just,
The scales that are even,
These cannot be upset.[4]

[1]Examples are taken from Caldecott, 1918: 3–41.

[2]Adat bersendi hukum,
Hukum bersendi kitabu'llah,
Kuat adat, ta' gadoh hukum,
Kuat hukum, ta' gadoh adat,
Ibu hukum muafakat,
Ibu adat muafakat. (Caldecott, 1918: 26–7).

[3]Keputusan adat tiga perkara:
Pertama adat mansiang ia-itu terjali,
Kedua adat tiang ia-itu adat berkebulatan,
Ketiga adat kitabu'llah* ia-itu hukum Kuran
Pada adat menghilangkan yang burok,
Menimbulkan yang baik;
Pada shara' menyurok berbuat baik
Meninggalkan berbuat jahat. (Caldecott, 1918: 26–7).
*note the use of this word from Arabic—*kitab*, (religious) book.

[4]Chupak* yang pepat,
Gantang* yang piawi,
Bongkal yang betul,
Teraju yang baik,
Tiada boleh di-aleh lagi. (Caldecott, 1918: 28–9).
**Chupak*. A liquid measure equivalent to ½ a coconut shell.
**Gantang*. When referring to liquid is about 1 gallon.
The general sense of these terms in this stanza seems to be to indicate gradation upwards.

'*The Adat Constitution*'

(iv) The king carries out his justice,
The chief his law,
The tribal headman his ancestral rights,
The inheritors their entail,
Heads of families their custom,
The bride's kin their sworn profession,
The husband his conventions.[1]

'*Husband and Wife*'

(v) Warder of the wife is the husband,
Warder of the husband his wife's family,
Warders of the family its elders,
Warder of the shire* the chieftain,
Warder of the world the king.[2]

(vi) To unravel disputes,
To pick up the fallen and search for the lost,
To pay debts and receive dues
Is the business of a man's wife's family.[3]

'*Conjugal Property*'

(vii) Earnings by husband or wife, during marriage are given to him or her who has earned them;*
What a man has got by his wife remains with her tribe;
What the husband brought goes back to him;
Property in partnership is split up;
The common property acquired by a man and wife's joint labour is equally divided;*
Any loss or profit on the wife's estate is a matter for her tribe
The man's person is restored to his own tribe.[4]

[1]Raja sa-keadilan,
Penghulu sa-undang,
Tua sa-lembaga,
Waris sa-pesaka,
Ibu-bapa sa-adat,
Tempat semanda satu shahadat,
Orang semanda sa-resam. (Caldecott, 1918: 22–3).

[2]Kunchi bini laki,
Kunchi semanda tempat semanda
Kunchi anak buah ibu bapa,
Kunchi luak* penghulu,
Kunchi alam raja. (Caldecott, 1918: 20–1).
*The Malay luak is better translated 'traditional district'—see Chapter 1.

[3]Kusut menyelesaikan,
Chichir memungut, hilang menchari,
Utang membayar, piutang menerimakan
Oleh tempat semanda. (Caldecott, 1918: 38–9).

[4]Chari bahagi,*
Dapatan tinggal,
Pembawa kembali,
Kutu di-belah,
Suarang di-ageh,*
Rugi laba pulang ka-tempat semanda,
Nyawa darah pulang ka-pada waris (Caldecott, 1918: 38–9).

*The forms of property are probably the same here as line 5 is unusual.

'*Circumstantial Evidence*'

(viii) By the law for theft
Twelve circumstances are forbidden:
To set a strut against a house-pillar, to rip open a partition;
To be chased and caught panting;
To be found with booty snatched or stolen by force;
To be found wounded and hacked;
To be found with fluttering heart or trampled footprints;
To be convicted of swindling and cheating;
To have transplanted and to give a crooked story,
For 3 x 4 = 10 + 2,
(And these twelve signs are circumstantial evidence).[1]

The range in content among these stanzas is wide not only in respect of subject matter but also in respect of specificity of statement. Thus stanzas (i) and (ii) set out in a somewhat vague manner an ideal pattern of interaction between a religious law (Islam) and adat. On the other hand stanza (vii) appears to contain a detailed pattern of response to a defined situation i.e. distribution of property on divorce: here respective patterns of action are clearly set out.

The question we now face is, what do we do with perbilangan? There appear to be two possible choices. First, we can attempt to interpret the face value provisions by putting them in a context, i.e. reading them in the light of the social structure of Negri Sembilan peasant society. Thus we define 'clan' 'family' 'elder' etc. This has been dealt with in Chapter 1.

The second choice is to subject the perbilangan to a formal legal analysis and in this way attempt to describe the structure of this form of adat. The traditional legal method employed in this sort of operation is to construct a taxonomy based on subject headings as set out in the examples of perbilangan given above. If we admit that this is possible the next step is to make abstractions on the basis of this taxonomy which, possibly, will tell us something of the nature and sources of adat. Wilkinson (1908: 1–45) made some attempt at

[1]Undang-undang churi;
Pantang dua-belas—
Tiang terpalang, dinding teretas,
Terkejar terlelah,
Terebut terampas,
Terchinchang terpakok,
Di-gedabang, di-gedabekkan,*
Di-serang, di-kelekai
Nama kinchang kichoh,
Beranggur, kalak-kalak,*
Tiga kali empat sa-puloh dua. (Caldecott, 1918: 26–7).

*Translation, doubtful.

second order abstraction and classified the basic types and sources of adat as follows:

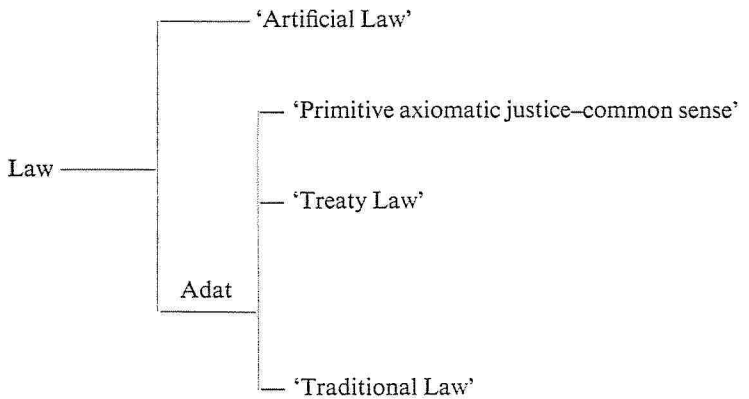
a. '*Primitive axiomatic justice—common sense*'; this is confined to admonitions directed generally to the settlement of simple issues of dispute which do not involve matters of title to land, succession to property, the validity of marriages and divorces, or the proper election of chiefs. An example of this source is the statement:

'Who wounds must heal
Who slays must replace
Who sells must restore.'

b. '*Treaty Law*'; this refers to the provisions governing the internal matters of the various states of Negri Sembilan. It relates to questions of election and the appointment of superior officials, and the rules governing the relations of the states one to another within the confederacy.

c. '*Traditional Law*'; these are statements which deal with matters not covered in (a) and (b) above. They are mainly concerned with questions of land tenure.

Wilkinson's classification may be represented diagramatically thus:



Wilkinson equates 'artificial law' with Islamic law and does not deal with it.[1]

This sort of classification is not very satisfactory for the following reasons. First, the lines of division between each of the major head-

[1]It is interesting to compare this classification with the sources of law stated in s.6 of the *Undang₂ Sungei Ujong* (Winstedt and Josselin de Jong, 1954) as follows: (i) ancient custom; (ii) created custom; (iii) inherited lore; (iv) decisions of common accord; (v) ancient law that awaits ratification; (vi) decisions to be reached by later deliberation.

ings are not defined in any detail and therefore abstractions which are supposedly based on topic headings are unsatisfactory. However, a more serious objection is that the headings do not adequately describe the nature and function of the perbilangan. Though Wilkinson, in common with other authors of his period, does make a distinction between 'law', in the English sense, and adat, he does not get to the root of the definition problem involved in such terms as 'status' 'right' etc. The crux of this problem appears to be the arrangement of a formally complete system of categories within which a delineation of the meanings of folk terms[1] and their formal relations, one with the other, may be set out.

The stanzas given above contain in themselves such diverse elements as the following:

Stanza (i). This stanza attempts to express a distinction between two systems of law but at the same time makes one depend upon the other. It is interesting to note here the use of the term 'covenant' as a translation of *muafakat*—Arabic 'agreement'. Wilkinson (1955 (ii): 781) in his translation of muafakat refers to pakat—an 'agreement'. This latter term is commonly used to describe an agreement on devolution of inheritable property by the heirs but may be based either on Islamic law or upon some unspecified adat (cf. Blagden, 1930: 307–13).

Stanza (ii). This stanza immediately precedes stanza (i) in Caldecott's summary and is noteworthy for two reasons. First, lines 4–8 attempt a more detailed distinction of function between Islam and adat than occurs in stanza (i). Adat has the job of suppression in respect of crime while Islam, presumably by exhortation and the inculation of the fear of God, acts so as to force people to the correct and true path. Second, adat is seen as having three branches: the law of nature—the reference to the rice field, the law of man—the reference to the pillar, and third, the law of God—the reference to the Koran.[2] In other words the stanza implies a unitary conception of adat, which is here used to mean 'law' in its widest sense as including all forms and types. A better translation of line 1 stanza (ii) would then replace the term 'custom' with some such phrase as "the concept" of law has three branches'—though this is not a very elegant phrase!

Stanza (iii). As it stands, this stanza is completely incomprehensible.

[1]See below, pp.41–4.

[2]This is strongly reminiscent of the European conception of natural law. See also Winstedt 1953: 3 where the Minangkabau Legal Digest (Perak), sections 5 and 6 distinguish three types of law: custom, religion and the 'law of reason'.

Caldecott, however, has added a note on the interpretation of lines 1–4. He says that 'Malay causists distinguish four points: line (1) = if the bench of judges be full; line (2) = if they have full authority; line (3) = if the weight of evidence is sufficient; line (4) = if the judges are just.' Line (5) may bear two constructions. First, it may mean that given the requirement of lines 1–4 then a judgment cannot be upset. Second, it may mean that the contents of lines 1–4 are fixed principles of adat which can never be abolished or done away with. Caldecott obviously leans to the first interpretation as indicated by his use of the word 'if' though *yang* does not necessarily justify this interpretation. On the whole, the second interpretation seems to be the better one.

Stanza (iv). In contrast to the first three stanzas, this stanza gives little difficulty in interpretation provided that we have other sources, e.g. empirical observation, which allows us to specify the various functions of the named officials—viz. the *raja* (or more correctly now, the *Yang di-Pertuan Besar*),[1] the penghulu, the lembaga, waris, ibu-bapa, tempat semenda and orang semenda.There is, however, one notable feature in this arrangement. This is the use of hierarchical steps in setting out the functions of these officials going from all inclusive down to the less inclusive. This is also characteristic of the Malayan legal digests (cf. Chapter 4 below).

Stanza (v). The general meaning of this stanza is also clear though the last line could probably be qualified by noting that 'world' means 'adat world' and this should be read in the light of the constitutional position of the raja. The use of the word 'kunchi' is rather interesting here. This bears the primary meaning of 'lock' or 'bolt'(cf. Wilkinson, 1955 (1): 625) and the translation 'warder' is most appropriate. This usage may be contrasted with the more common 'waris' which is specifically related to Islam.

Stanza (vi). This stanza refers to the duties of wife's kin in respect of the husband, and given an adequate knowledge of Negri Sembilan social structure, is not difficult to understand.

Stanza (vii). This stanza does not present any problems except to note that at present its detailed working can be found in the form of judicial and administrative procedure (cf. Chapter 3 below).

Stanza (viii). This stanza almost inevitably appears in any summary of adat and has been used to justify the statement that 'under adat perpateh circumstantial evidence is preferred to oral evidence ten-

[1]Commonly abbreviated to Yam Tuan or Yamtuan.

dered by witnesses' (Minattur, 1964: 347). There is no outside evidence for this and the true position is probably that the function of this stanza is rather to encourage avoidance of compromizing situations. The requirements of this stanza should also be contrasted to those demanded by Islamic law (cf. Ahmad Ibrahim, 1965: 367–74). It is unlikely that this stanza was at all effective (it certainly is not now) in the past.

The most obvious characteristics which appear from the summary may be stated as follows. First, many stanzas contain diverse elements; for example, from highly theoretical statements on the nature of adat down to mundane rules for the distribution of property. Second, we note that in many cases a stanza cannot be understood except in the light of exterior factors such as kinship and social structure; for example, we can only define 'elder' or 'family' in this way. This is in marked contrast to Euro-American legal systems where the law provides its own set of self-justifying and self-continuing premises. Third, we can divide the eight stanzas given into two largely self-contained groups. In the one case there are the 'specific' stanzas (numbers iv–vii). The matters with which they deal are now to be found in other forms; for example inheritance or division of property on dissolution of marriage are now contained in an authoritative body of case law, statute and administrative minutes. On the other hand, the 'vague' stanzas (numbers i–iii, viii) exist only in perbilangan form.[1]

Having noted this distinction we must now establish how to subject the total body of the perbilangan to a formal legal analysis. We may proceed in this aim in three stages.

Interpretation

We have earlier noted this factor, though in a rather incidental fashion, in dealing with the stanza translations. The problem here is to determine the amount of weight which we wish to give to the use of folk terminology as expressing legal concepts. Since this book is being written in English and Euro-American concepts are being used, caution must be exercised in the use of folk terms. This is especially the case where the terms are inexact or contextual (cf. 'adat' in stanza (ii) above). This very inexactness must, it might be supposed, mitigate against the use of these terms as a sole unit of classification. Some

[1]As to their function in this form see below.

attention has recently been paid to this problem. Black and Metzger (1965: 141–65) use a method founded on semantic responses which is designed to discover the boundaries of a particular sub-system within a particular culture. This as we noted above[1] attempts to map 'the structure of a segment of the categorization of legal role types' (Black and Metzger, 1965: 142). The problem in respect of the present case, though related, is different. Our job is to discover some way of analysing the perbilangan and then relating this analysis to a total system of adat. Interpretation is thus a matter of the relation between adat and the total social system.

Description

The perbilangan comprise ideally stated 'ought' propositions which supposedly have the function of governing behaviour.[2] They are felt to be the 'right' ways (cf. Llewellyn and Hoebel, 1941: 20–1). There are several elements here, of which we may distinguish two: the notion of norm and the notion of system. Norm has a variety of related meanings such as 'standard', 'pattern' and 'rule' but only the idea of rule will be considered here. This notion seems to have three elements:

i. It refers to a precept which attaches a definite legal consequence to a detailed state of fact, and provides a pattern of response to any definite situation.

ii. It is a 'complete symbol' (Northrop, 1960: 29–30) in the sense that it carries its own terms of reference within itself.

iii. The existence of a definite sanction for breach denotes the presence of a rule statement.

Thus, on liability for wrongful acts:

'Who wounds must heal;
Who slays must replace;
Who sells must restore.'

We may examine each of these elements in a little more detail.

i. It is generally taken as fundamental to the notion of rule that it is promulgated by someone (the rule author) and is to affect the behaviour of others (the rule subjects) (cf. Wright, 1963: 7). In respect of the perbilangan this is clearly not the case unless we wish to

[1]See Chapter 1.

[2]What follows is a technical and abstract description of the perbilangan. A man to be influential must even now have some knowledge of perbilangan and be skilled in their use.

indulge in the mysticism of 'social conscience'. But in some ways perbilangan are rule statements. They influence conduct, they exert a pressure, and this is reflected in the various punitive measures which adat society once imposed on breach. Yet the perbilangan are not 'given' by any person and thus have to be characterized as anonymous rules. Another point of contact between the perbilangan and the Euro-American rule is that they require promulgation in a specified form. Most important, however, they define patterns of action.

ii. A complete symbol, in its relation to rule, is one which bears meaning merely by locating an observable fact in terms of a stated prescription. Thus:

'Who wounds must heal'

is an example of this. Similar examples of this are to be found in stanza (vii) on the distribution of property acquired during marriage. Given the fact of marriage, of acquisition of property and of dissolution of marriage, the rule stating shares *ipso facto* operates. There is no need to refer to other parts of adat or to religion or any other institution.

iii. The topic of sanction is one of the most vexed in jurisprudence and in the social sciences generally. Different aspects of this will be dealt with in this book.

In its relation to rule, sanction is said to determine criteria as to what are and are not valid patterns of behaviour. Institutional discussions of this function (i.e. within the framework of the Euro-American legal systems) usually emphasize powers and liabilities (cf. Hohfeld, 1917: 710–70). From this it follows that the relation between rule and sanction is that of a mechanism for the limitation of powers since the relation in operation effects a manifestation of power. That is, this relationship distributes duties on persons, either named or in general, and may be equated with the notion of obligation. Sanctions for the breach of any rule are of this nature.[1]

Having summarized the notion of norm in terms of rule we may now turn to the idea of system. In stanzas (i) and (ii) we find statements which are clearly not rule statements as defined above but statements of value or of desired ends. In addition, these stanzas provide no pattern of response to any situation, and they immediately raise all sorts of queries as to interpretation, for example, how do

[1]E.g. *Chinchang pampas: buroh beri balas*. For wounding, restitution must be made. The term *pampas* means 'restitution for wounding'. Cf. Caldecott, 1918: 31, footnote 7.

these stanzas work, what is their function and so on. In other words, within the common form of perbilangan there are statements of rule and statements of value. In both cases, terms such as 'ought', 'must', 'is bound' are used in our interpretation. Thus we have a series of perbilangan which can be described in the technical words of jurisprudence. This of course is dangerous and leads to much distortion, especially if we attempt to state the implications of rule statements except in the most general way. But the use of these technical terms immediately prompts us to consider all perbilangan as being parts of a unitary system, an integration of rule and value which can be formally analysed.

Analysis

By system we mean legal system, that is, a series of normative propositions in the form of both detailed behavioural responses and values which are integrated into a unitary whole. The integration is conceptual and may be summarized in two ways: first, by an analysis of ought propositions, and second, in establishing the validity of such propositions.

i. *'Ought' proposition.* These are statements to the effect that one 'ought to' or 'must (not)' perform certain activities. Stanzas (iii)–(viii) are of this type. Now if we confine the content of 'ought' propositions to a reference to rights and duties only (as we may, cf. Wright, 1963: 89–90) we may regard stanzas (iii–viii) as setting out a normative scale which can be arranged in various ways; for example, stanza (iv) sets out in hierarchal fashion the varying degrees and scope of rights and duties attaching to certain people. On the other hand stanza (iii) sets out a series of required standards which specifies general 'ought' qualifications which must be present before a specific duty can be stated. Stanzas (v)–(vi) state 'ought' in the sense of prescription. Stanza (viii) states prohibitions which may be considered theoretically the same. These stanzas all contain rules.

ii. *Validity of 'ought' propositions.* The subject of enquiry here is to ascertain how we know that the 'oughts' described above are valid in the sense that they constitute appropriate responses for behaviour, that is, how do we know that a rule is a rule of what we call law and not just an abberation? This has sometimes been described as ascertaining what has been called a 'rule of recognition' (cf. Hart, 1961: 97–107). This rule specifies some feature of features, possession

of which is taken as a conclusive indication that a rule belongs to a system. In respect of the perbilangan this rule seems to have two facets:

First, there is the formal statement of adat in the perbilangan form. This includes statements of rules and of value as in stanzas (i) and (ii). The promulgation of normative propositions in a standard form seems to serve three functions.

Firstly, the common form serves as a means of identifying a normative proposition having legal effect. The proposition is not enunciated in everyday language and it contains some archaic or particular expressions (e.g. kunchi). It may be suggested that the requirements of form are essential to the validity of the proposition. Thus the perbilangan are (or were) invoked every time a particular situation calls for them and their statement is controlled by the party who opposes those who have invoked them, for an inaccurate statement is immediately contested. In addition the perbilangan are associated with various vested interests, specifically the adat officials (lembagas, buapas, etc.) who find much of the ideology for their official existence in the perbilangan. It should also be noted that there is a notable frequency of repetition and a particular style of delivery. That is, sitting facing one's opponent and speaking in a low tone quite rapidly. One's opponent is ready to point out any error immediately it occurs.

Secondly, the common form provides a vehicle of continuity with the past. This not only acts to validate present adat propositions but provides a ready made framework for the existence of precedent.[1] Now in a sense, though statements of legal directives creates precedent, the opposite is also true. Where precedent exists, an ought proposition to be considered valid must fit in with precedent or at least not be wildly inconsistent with it. This effect is rather heightened by a rigid technique of transmission.

In addition, the existence of precedent in this form may give us some idea of the historical developments which have taken place in adat society and which are preserved in the perbilangan. Thus, for example, there is a perbilangan which sets out the position of the *Sakai*[2] in respect of land ownership (cf. Caldecott, 1918: 14–15).

[1]Mr. E. N. Taylor, a noted adat authority, in a communication to the writer, lays much stress on this aspect.

[2]The aboriginal inhabitants of the Malay Peninsula. The term 'sakai' means slave or serf and its use is now being officially discouraged by the Government. It is retained here because it is invariably used by earlier writers.

Though this cannot be regarded on its own as a completely reliable summary it does indicate, at least, an attempt by the immigrants (Malays) to establish some ideology regarding the position of these people. Contrary to what Vansina says (cf. Vansina, 1961: 161) it is sometimes possible to assign various perbilangan to more or less definite periods in the past though not entirely on the basis of internal evidence alone.

Finally the common form acts so as to induce a psychological feeling of being 'bound' to obey the contents of a prescription. This is partly because of an immemorial tradition and partly because the organized force of the community can be bought to bear in respect of these propositions. Thus, to quote Olivecrona:

> ...law-givers gain access to a psychological mechanism, through which they can influence the life of the country.... The relevant point is that the provisions of [a law] are made psychologically effective. And this result is attained through the use of a certain form, which has a grip over the mind of the people (cf. Olivecrona, 1939: 54).

Independent evidence of the problems of form is provided by Blundell, though in a different context. In speaking of the attempts of the East India Company to persuade the Malay peasants of Malacca to accept English land titles he comments (cf. Blundell, 1848: 741–2):

> 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. It requires some knowledge of law to understand the English original...and the attempt to translate those terms into Malay has produced an utterly unintelligible jumble of words.... To secure therefore the payment (often of a few annas only per annum) the tenants (ignorant Malay peasants) were sent for in shoals to put their marks to these sheets of foolscap paper filled with writing. They naturally got alarmed and evinced the greatest reluctance to affix their signatures.

The second point of analysis concerns the nature of the relationship between 'ought' proposition and the type of proposition contained in stanzas (i) and (ii). In other words we are talking about statements which do not, on their face, bear any necessary relation to behavioural facts; but these are also defined in Negri Sembilan peasant society as adat and no distinction on the definitional ground is drawn. Stanza (ii) especially talks about the law of nature, the law of man and the law of God. These divisions are all, however, part of

adat—of the concept of adat. In other words there is a conscious model as to a unified adat. To say this is not to advocate any fiction of uniformity and conformity in adat: it is just to note the important point that adat is regarded as a unified system which has three interrelated branches. The mode of relating these branches to each other is never specified in *toto* nor, in fact, usually specified at all. But stanza (iii), if Caldecott's addendum is accurate, certainly shows that statements of ideology and the rule statements are held to be part of a unitary system.

Although there is a diffuseness inherent in the adat power structure and adat officialdom is characterized by competing though sometimes overlapping spheres of influence (cf. Part II below on the adat constitution), adat does seem to constitute a unified system. Thus stanza (iv) which sets out in hierarchical form the powers of various officials to sanction clearly supposes a unity of principle and rule into a system—'the law of man' (stanza (iv)). The important point to note here is that an institution, such as a legal institution, not only represents a norm in the sense of rule but also summarizes standards *for* behaviour and outlines *of* behaviour (cf. Nadel, 1951: 111). Finally, and most important, all legal institutions presuppose some final basis or 'ground norm' which provides an essential premise or set of premises validating the whole system. Naturally, the nature of this basis will vary in complexity and ideology with each particular legal system. Thus, for example, medieval Natural Law posited a law of nature which was in essence the law of God as revealed in scripture. The German Romantics of the nineteenth century gave us the will of the '*volk*', and Communism now gives us economic dialectical materialism.

In the case of adat we may distinguish two basic premises in stanzas (i) and (ii). Stanza (i) directs our attention to religion. It says, in effect, that adat and religious normatives are interrelated and depend ultimately on a belief in (the Islamic conception of) God. Stanza (ii) goes further than this and distinguishes a law of nature; but given the premises of belief in God, one must relate this law to religion since all things, including the law of nature, ultimately find their *fons et origo* in God. These premises do not contain direct statements of value, but it will be appreciated that in discussing law and religion value-laden terms such as 'good', 'right' etc. must be used. This can be illustrated very simply by the following example. 'Why must you obey *adat*?' The answers range from '...it is good', to

'...it is good because God made it'. In actual fact, both answers, or variants of them are given in any discussion of perbilangan.

Our problem now is, how do we deal with such premises as these? There are three possible answers. First, we may isolate our ground norm but treat it merely as something extra-legal; as a sort of context which aids in our understanding of the working of a legal system. Because the ground-norm is extra legal we do not attempt to analyse its characteristics, leaving this to theologians, historians, anthropologists and other specialists. The ground-norm remains a sort of invisible footnote to each page of our description of (the rules of) a legal system. There is an extensive literature in jurisprudence approving this sort of approach (cf. Paton, 1964: 14–18) and concentrating on a scientific study of legal rules abstracted from all social conditions. Such an approach is possible in dealing with Euro-American legal systems where law may be considered as rather divorced from other social phenomena. But, as seen in Chapter 1, this is not really possible so far as adat is concerned. The definition of the legal person, for example, depends as much on kinship and residence factors as it does on non-kinship adat rules. In addition there is the further reason that adat, in the sense of a concept of law, includes these basic premises along with rules of law (for example, stanza (vii)) into one unitary system characterized by a common form.

The second answer to our question directly involves the value element contained in stanzas (i) and (ii). One school of juristic thought would reject any considerations of 'ought' in this sense by asserting that the business of a jurist is with the scientific study of existing rules. This is the famous distinction between 'ought' (*Sollen*) and 'is' (*Sein*). That is, the realm of law is concerned with the operation of normative rules and not with causality as this occurs in nature. Further, one cannot posit a legal 'ought' on the basis of a non-legal 'is'. But our problem in dealing with the perbilangan is that the term 'adat' also includes not only the ground-norms but is used to describe natural behaviour. For example, it is adat ('proper') that goats bleat and cocks crow; it is not adat if these roles are reversed. This would be against the natural order of things and thus directly against religion and ultimately against our ground-norm. In dealing with adat it is therefore necessary for us to deal with the ground-norm to an extent greater than that necessary in studying Euro-American legal systems. The following approach is suggested as providing a formal framework within which this can be done.

First of all we may note that the term 'norm' has a variety of meanings, one aspect of which we have already dealt with. It was said above that some of the stanzas ((iv) and (viii)) contained prescriptions or rules to which were attached sanctions. Now stanzas (i) and (ii) also contain rules though they are not the same as prescriptions. They are instead ideal rules which contain standards of proper behaviour with an implied sanction; in this case an ultimate religious sanction. Both types of rules are equally adat and both were (and to some extent still are) parts of a unitary power structure (cf. stanza (iv)). Further, religion is an integral part of this structure.

Summary

This consideration of perbilangan has kept the normative order of law quite distinguished from such things as morals and other forms of social control. This is quite consistent with the jurists' claim that the legal norm is self-justifying and internally consistent. From the discussion of perbilangan it has been noted that adat in this form is a complex whole of different phenomena. In addition, it is orderly in the sense that its form and rules are not just chaotically thrown together but have a definite structure, both in formal presentment and in terms of obligation *('ought')* statements. These include norms which regulate behaviour and the function of which is not only to guide the main behaviour envisaged but also to guide those who make decisions about the standards of behaviour (cf. stanza (iii)). It may also be concluded that the norms in the perbilangan are explicitly or implicitly related to forms of coercion, that is, the authority of a norm is supported, where required, by acts of external compulsion. This coercion itself is brought to bear according to established norms and is not, ideally at least, capricious or spontaneous (note for example the power/scope gradations in stanza (iv)).

These characteristics are not intended to serve as a definition of adat as 'law' in the Euro-American sense, but they serve as an outline of the relationship between the structure of adat as a system and the peasant society in which the adat exists. But their practical use in present day Negri Sembilan is now limited in the legal context. The detailed and specific rules dealing, for example, with land distribution, have now been superseded by the provisions of the formal legal and administrative systems. In addition, detailed knowledge of specific perbilangan is becoming uncommon except

among older people, especially women, who may posses hand-written copies. As pointed out in the introduction (p. 6), documents such as these vary greatly in value, but one can now foresee the time when they will have become the only surviving examples in the villages of this form of adat law.

Now although these comments are undeniably valid at the level of day to-day legal practice it must be remembered that the perbilangan have some present day function, inchoate and abstract as this might seem. In the mere fact of their existence, both in oral and written form, they provide a link with the past so essential to any legal system. In addition, and partly because of this link, they have an emotive force important in the lives of those peasants who live under their influence. The unitary conception of adat, wherein the worlds of nature, religion, and the formalized legal system are seen as one, is summed up in Malay literary form by the perbilangan. Though the values so expressed are not capable of bureaucratic administration they are nevertheless real and deserving of preservation and sympathetic study.

The next two chapters deal with written forms of law including the place of English law[1] in the modern context of adat.

[1]Islam is dealt with in Chapters 9 and 10.

3

ENGLISH LAW AND ADAT LAND TENURE[1]

THE great bulk of adat rules in Negri Sembilan now appear in the form of judicial decisions, acts of parliament, administrative minutes and the like. Adat as expressed in this way is subject to the technical demands of a legal system based on common law. The work which has been done on this form of adat, though sparse, is uniformly good. Taylor's work, for example, provides the most reliable detailed study of adat perpateh as regards marriage, divorce, adoption and inheritance and succession (cf. Taylor, 1929: 1948). It is not proposed to summarize Taylor's work here but instead to deal with some interesting points which arise from his work and which have practical implications today. The law in its present state is a combination of adat, common law and modern statute. This chapter will be concerned mainly with questions of land tenure since it is within the framework of this topic that these various legal manifestations have interacted.

It is necessary at this stage to refer briefly to the relevant socio-political groupings in Negri Sembilan which have already been dealt with in more detail elsewhere (cf. Chapter 1). The emphasis here will be upon their integration within a formal set of legislative and constitutional documents.

a. *The Lineage*. This is the smallest socio-political unit in Negri Sembilan and is headed by an ibu-bapa ('mother-father') or buapak. The Malay term, perut[2] means 'womb' and the members are supposedly able to trace their descent from a common ancestress. Lewis records that the term appears to cover the lineage, and she defines it as 'a quasi-genealogical territorial group'.[3] The functions of the buapak in respect of the lineage are set out below.

b. *The Clan*. The clan is formed from related lineages and is often designated 'tribe'.[4] The clan is a corporate exogamous group.

[1]Parts of this chapter have appeared elsewhere:see Hooker, 1968:415–430.

[2]Josselin de Jong (1951: 122) is of opinion that this unit corresponds to the '*Minangkabau* (Sumatra) *perui*'.

[3]Cf. Lewis, 1962: 87.

[4]This term is used extensively in the literature on adat perpateh and also in statutory instruments and judicial decisions. Its meaning in the present context is confined to those 'tribes' (i.e. clans) listed in the schedules to the enactments set out below. Similarly, 'tribal land' is land registered in the name of a member of one of the 'tribes', the title to which is endorsed 'customary land'.

Affiliation is reckoned through the mother and residence after marriage is matrilocal. This grouping forms the framework for economic, social and political relations within the district. The clan is generally associated with a village or group of villages and is ruled by a lembaga.[1]

For the purposes of this chapter the clan will be treated as a corporate unit when considering marriage, divorce, and inheritance rules in respect of statutes and judicial decisions. There will be no attempt to discuss the internal structure of this group since this has not proved relevant in proceedings under a formalized legal system.

c. *The Luak*. The two units so far considered are genealogical but the luak is a territorial unit. The name, Negri Sembilan—Nine States—implies a traditional federation of nine negeri. During different historical periods the actual number of states has varied, and at present thirteen may be distinguished.[2] Theoretically, each luak has four suku but this is apparently an ideal arrangement.[3] Some luak are under the control of a penghulu luak, also designated, undang.[4]

The penghulu luak must be distinguished from the penghulu mukim who is a government servant with specific duties. A mukim is an administrative sub-district, the boundaries of which do not necessarily coincide with the luak or traditional district. Negri Sembilan is divided into six administrative districts. One of these, Port Dickson, is not within the traditional district organization. The luak of Rembau and Jelebu correspond to the administrative districts of those names; the luak of Sungei Ujong is in the administrative districts of Seremban and Port Dickson. The luak of Johol, Inas, Gunong Pasir, Terachi, Ulu Muar and Jempol are included in the administrative district of Kuala Pilah. The remaining luak of Gemencheh and Ayer Kuning and the area under the control of the Tengku Besar Tampin are included in the administrative district of Tampin.

The term luak as used in statutes refers to the traditional district. Titles to land, however, are denoted by a numbered entry in the mukim ('parish') register (E.M.R.) which refers to an administrative sub-district.

It is worthwhile stating briefly here the relevant statutes and

[1]His legal functions are dealt with below: see also Josselin de Jong, 1951: 145.

[2]Cf. Josselin de Jong, 1951: 123 and Part II below.

[3]Cf. Winstedt, 1934: 81.

[4]I.e. the luak of Sungei Ujong, Jelebu, Johol and Rembau. Cf. Chapter 7.

constitutional documents relevant to adat. The relative statutes and constitutional provisions are as follows:

i. STATUTES

Customary Tenure Enactment (c.215 of the revised laws of the F.M.S. 1935).

Customary Tenure (Amendment) Ordinance (No. 23 of 1949).

Customary Tenure (State of Negri Sembilan) Ordinance (No.33 of 1952).

Customary Tenure (*Lengkongan* Lands) Enactment (No. 4 of 1960).

Undang of Rembau (Lands) Enactment (No. 2 of 1949).

Small Estates (Distribution) Ordinance (No. 34 of 1955). Small Estates (Distribution) (Amendment) Ordinance (No. 26 of 1959).

Of this legislation, the Customary Tenure Enactment (c. 215 of the revised laws of the F.M.S. 1935) is the most fundamental. This Act was originally passed in 1909 and its replacement in 1926 together with the amendment of 1930 provides the bulk of the Act as it stands at present. Its scope is confined to land, the title to which has been endorsed 'customary land'. Enactment No. 4 of 1960, the Customary Tenure (Lengkongan Lands) Enactment, is largely a section by section copy of c. 215 restricted in scope to part of the administrative district of Kuala Pilah in Negri Sembilan. 'Lengkongan land', is land held by one of the tribes specified in schedule A of that enactment, the title to which has been endorsed with the name of one of the tribes. As a general rule the principles of interpretation and later comments which apply to c. 215 may also apply to this enactment.

The only other enactment to which attention should be drawn here is the Small Estates (Distribution) Ordinance (No. 34 of 1955), Part III of which applies specifically to Negri Sembilan. This legislation is apparently designed to take account of land which may be 'customary' but the title to which has not been endorsed under the provisions of c. 215. Finally, it should be noted that the provisions of the National Land Code 1965 do not directly touch these enactments. Reference may, however, be directed to the position of non-registered interests under the Code.[1]

ii. CONSTITUTIONAL PROVISIONS

The relevant documents are the Federation of Malaysia Constitu-

[1]Cf. Wong, 1967: 36.

tion, 1957, as amended, and the Negri Sembilan Constitution, 1958, as amended.

The constitutional and statutory provisions allow a wide measure of continued adat activity, especially in permitting the continuation of law-declaration and law-making processes. In addition, the position of adat officials, under whose control these processes are, is made certain under the relevant instruments: the position of these officials may be summarized as follows:

i. *The Yang di-Pertuan Besar.* This official is the ruler of the State and is in all respects a constitutional monarch. He is elected by the four Undang of Sungei Ujong, Jelebu, Johol and Rembau.[1] Under the Negri Sembilan Constitution, his qualifications are that he must be a male, a Malay Muslim, and a descendant of Raja Radin ibni Raja Lenggang.[2] He has power to make laws on Muslim religion and Malay custom[3] and he appoints the Appeal Committees which hear appeals on questions of Malay custom.[4]

ii. *The Undang2 of Sungei Ujong, Jelebu, Johol and Rembau.* The Undang is the elected head of one of the four luak outlined above. The election is a matter of adat procedures, and rests upon the principle of giliran or rotation.[5] The Undang act in concert with the ruler in matters of state government, especially in any matter affecting the adat.[6] They may also be members of the State Appeal Committee.[7] The Tengku Besar of Tampin, though his office is not elective, has similar rights and duties under the Constitution and statutes.

iii. *The Lembaga.* This official is elected by the members of his clan, that is, by the buapak and waris. Elements of giliran are also present in this election. His powers and duties are stated in the principle statutes.[8] Of special importance, here, is his administrative function of giving evidence as to the content of adat rules in his clan and luak in any proceedings involving the transfer or transmission of adat, or supposedly adat, land.

iv. *The Buapa.* This official is elected by members of the lineage[9] and has various functions under adat though not specifically under any statutory provision. Thus the marriage fees are paid through

[1]Art. 10. Negri Sembilan Constitution 1958.
[2]Art. 10(1)(2). [3]Art. 41(2)(a).
[4]Under: The Small Estates (Distribution) Ordinance (No. 34 of 1955) Part III, ss.19(1)(a) 25, 29: The Customary Tenure Enactment, c. 215, and amendment No. 4 of 1960, s. 15.
[5]Cf. Josselin de Jong, 1951: cc, ix, x.
[6]Arts. 61, 62, 67, 68, Negri Sembilan Constitution 1958.
[7]See note 4 above.
[8]Ibid. [9]Cf. Lewis, 1962: 87.

him, *harta terbawa* (property bought to a marriage) is declared before him, he witnesses adoptions within the lineage and debts are paid before him.

The rest of this chapter ascertains how adat and the formalised judicial system have interacted and are at the moment interacting.

Adat and the Judges—A General View

In the former federated and unfederated Malay States, in the Straits Settlements and in present-day Malaysia, the courts have in general framed their attitudes to any body of 'customary law' in terms of the 'personal law' of any litigant. In many cases the judges have attempted to state the position and nature of the personal law *vis-à-vis* English law in the form of general principles. These attempts have not in general been successful. For example, it has been judicially declared that the personal law of the Malays (adat Melayu)[1] is 'communal',[2] whatever this might mean. There are several reasons for avoiding this reference to personal laws in the present context.[3] In the first place, a reference to personal law does not help us to determine the substantive rules of any adat. To do this one must move outside the personal law strictly so called, i.e. the adat, to such areas as Federal legislation and so on. In other words, the category of person defined in adat terms remains valid only to the extent that it is not affected by a law external to adat. Following from this, legislation itself in many cases determines what categories of law are matters for adat jurisdiction. Thus, for example, the sphere of adat in Negri Sembilan is almost entirely confined to questions of land tenure and, to some extent, to the maintenance of the adat constitution.

Further, under the Malay Reservation Enactments a new class of 'personal law' seems to have made its appearance. The aim and effect of this legislation is to restrict the ownership of certain land to persons who are 'Malays' within the meaning of the acts. Thus all

[1]Note here yet another variant meaning for the term adat.

[2]*Jainah* v. *Mansor* [1951] M.L.J. 62.

[3]The term has in fact a well-defined meaning in Conflict of Laws with which we are not here concerned. Briefly, in that subject, it relates to matters of domicile, capacity and so on.

customary land in Negri Sembilan is also endorsed 'Malay Reservation'. In this State, where the rules of adat perpateh are ascertainable, the definition of 'Malay' has never given rise to litigation. In the other States, however, the definition of 'Malay' varies from state enactment to state enactment.[1] The difficulties attendant upon defining 'personal law' in terms of rules to meet different circumstances are thus formidable.

But even in Negri Sembilan the difficulty persists though in a slightly different form. Throughout the literature on adat a distinction is drawn between 'law which follows the land' and 'law which follows the person'. By the former term, authors generally mean the *lex loci situs*. By the latter, they mean that the shares in any distribution of land, either upon divorce or on death, are determined by the 'personal law' of the deceased. That is, either by Islamic law or some form of adat. This difficulty will be avoided if we proceed, instead, to consider the statutory tests for the determination of the law applicable.

As noted above these revolve around questions of land tenure, more specifically around the problem of endorsement and non-endorsement of title. Negri Sembilan, in common with the rest of the Malay States, has adopted a modified version of the Torrens System of land registration.[2] Under this system an estate or interest in land can only be acquired by virtue of due conformity with statutory procedure. In this case, this involves the registration in a register (the mukim register) of all titles to any land. Sales, charges and devolutions of land are all entered in the register. The holder of a registered title has a legal estate in land at law. All titles which refer to land owned by a female member of any clan are endorsed with the words 'customary land'. This endorsement acts as a bar to all subsequent dealings in this land and restricts its transfer or transmission to persons who are members of a named clan.

For the purposes of this book endorsement seems to play a dual role in respect of adat. First, it determines whether or not the rules of adat apply in any devolution. Second, it provides a means through which adat rules can be conclusively demonstrated and proved in case of conflict.

[1]Cf. Sheridan, 1961: 344–5.

[2]The basic act is the National Land Code (Ordinance 56/1965).

The Application and Proof of Adat

Endorsement, under the terms of statute, is the standard test used by the politically dominant legal system to determine the effectiveness of the politically inferior legal system. In the absence of endorsement some law other than adat will apply, i.e. Islamic law or some local adat, the rules as to the latter of which are a question of local proof. The categories of land affected by the legislation fall into two groups: those with endorsed titles and those with non-endorsed titles.

i: *Endorsed Titles.* The law governing land the title to which is endorsed 'customary land' is relatively simple. The devolution of such land is governed by the Customary Tenure Enactment as are all matters related to its disposal. In addition, there are special provisions under section 4(i) (ii) enabling the collector to endorse the title to certain classes of land. The amendment of 1960 which specifically relates to Lengkongan land has provisions parallel to those of the Customary Tenure Enactment. Part III of the Small Estates (Distribution) Ordinance also gives the collector power to endorse land as 'customary land' at his discretion and also to take account of *adat* matters not specifically covered in c. 215.

ii: *Non-endorsed Titles.* The law relating to land the titles to which are not already endorsed 'customary land' in accordance with the Customary Tenure Enactment is more difficult. There are three categories of land not endorsed; first, land which should have been endorsed when the Customary Tenure Enactment was first introduced in 1909 but was not because of administrative oversight. Upon proof as to the 'ancestral' nature of this land, the collector will endorse the title.[1]

The second and third categories of land the titles to which are normally not endorsed are respectively:

a. *charian laki-bini.* land acquired by the parties to a marriage through their joint efforts during coverture.

b. *charian bujang.* the property acquired by one party prior to a

[1]An application for endorsement was made in 1965, and is described in the suit, *Re Minum binte Ahmad*, collector's file No. 050/1965. The land in question was originally registered as Malay Grant land in 1906. When the Customary Tenure Enactment came into force in 1909 this land should have been endorsed 'customary' under s. 10 of this enactment. This was not in fact done but the collector in 1965, on proof that the land was in fact adat land so endorsed the title. The proof consisted of the signature of a lembaga on the 1906 document which the collector regarded as conclusive evidence that the land was subject to adat.

marriage.[1] The law relating to these two categories may be considered together.

The problem in respect of this land is quite simple; how is it to be distributed? Here is land which, on the face of the title, is not 'customary', and thus, so far as c.215 is concerned, has no connexion with adat. In essence, the solution to this problem depends upon whether or not the provisions of the relevant statute, i.e. the Customary Tenure Enactment, totally exclude adat rules from all land not endorsed.

Judicial authority is equally divided on this point. From the period 1926, when the Customary Tenure Enactment was re-drafted, until 1955 when the Small Estates (Distribution) Ordinance was passed there was confusion as to the exact scope of the Enactment. This revolved around the interpretation of S.4 of the Customary Tenure Enactment subsections (i) and (ii) of which run as follows:

4(i). In the case of any land particulars of which have been or may hereafter be entered in any of the mukim registers of the districts of Kuala Pilah, Jelebu and Tampin in accordance with the provisions of the Land Code or of any previous Land Enactment it shall be lawful for the Collector at the instance of himself or of any interested party, to enquire whether or not such land is occupied subject to the custom. If he be satisfied that such land is occupied subject to the custom and that it is registered in the name of a female member of one of the tribes included in Schedule B the Collector shall add to the entry in the mukim register the words 'Customary Land' and authenticate them by his signature; and the addition of such words so authenticated to any entry in the mukim register shall, subject to the result of any appeal to the Resident under Section 15, be conclusive proof that the land to which such entry relates is occupied subject to the custom.

If the Collector is not satisfied that such land is occupied subject to the custom he shall record his decision to that effect and such decision shall, subject to the result of any appeal to the Resident under Section 15, be conclusive proof that the land to which the entry relates is not occupied subject to the custom.

[1]The relevant categories of adat property are as follows:

Charian — (a) charian laki-bini. Property acquired during life-time of the owner: used in opposition to pesaka, 'ancestral property' (see also pesaka) — divided equally on divorce.

(b) charian bujang. This is property acquired by one party before marriage: it is either *harta pembawa* or *harta dapatan* (see below).

Harta dapatan — ancestral property brought to a marriage by the wife which reverts to her on divorce.

Harta pembawa — inherited non-pesaka property brought by a husband to the marriage. On divorce it reverts to him.

Pesaka — family property, especially quasi-entailed property. Used in opposition to charian property.

(ii) It shall also be lawful for the Collector in the case of the alienation of lands by the State in the districts referred to in subsection (i) of this section to female members of the tribes included in Schedule B, to add with the consent of the alienee, to the entry in the mukim register the words 'Customary Land' and for him to authenticate the same by his signature, and the addition of such words so authenticated to any entry in the said mukim register shall, subject to the result of any appeal to the Resident under Section 15 of this Enactment, be final and conclusive proof that the land to which such entry relates is occupied as land subject to the custom under this Enactment.

The usual method of dealing with titles under investigation in terms of these sub-sections was to ask whether or not the land was 'ancestral'. This term was interpreted to mean that land could be proved to have been held under adat for some period of time[1] by means of evidence given before a collector. But there was argument as to the exact scope of S. 4(i) and (ii) on the point that interpretation of 'ancestral' should be confined to holdings under Malay Grant only and not to charian laki-bini.

The argument on both sides can be summarized in two judicial examples. In *Indun* v. *Haji Ismail*[2] it was held that non-endorsement precluded adat. The grounds for this were as follows: first, 'custom' was said to be only law when embodied in statute. This proposition was later expanded into the following principles:[3] (a) the law appli-

[1]There was (and is) naturally no agreement as to the length of time (cf. Moubray, 1931: 247–68) and conflict around this point opens up fundamental questions on the nature of adat property in general and its formal legal administration in particular. The most reliable historic summary concerning the period 1926 to 1939 is given in Taylor (1947) where, leaving aside the position of Islamic law, the question was the status of adat either as a law attaching to individuals (i.e. as a 'personal law') or to specified areas of land. Taylor's view is that the former is the correct interpretation so that the property of any Malay who is a member of one of the named clans devolves according to adat rules: it is immaterial whether the property is situated in Negri Sembilan or not. On the other hand, many officials, including Caldecott, were of the opinion that adat rules applied only to specified land, namely, land already endorsed 'customary'. Since 1955, the second view is no longer wholly accurate as the Small Estates (Distribution) Ordinance of that year has made provision for endorsement on proof of adat tenure. But this does not completely dispose of the problem of the ownership of property not being land within the state. Part III of the Small Estates (Distribution) Ordinance 1955, applies only to property situated in named areas of Negri Sembilan (s. 20(3)). Where property is situated elsewhere the provisions of Part II and, in particular, section 12(4) apply. This allows the collector to ascertain the applicability of any customary law to the devolution of the estate of the deceased so it would seem that under this section adat rules as to inheritance could apply outside the state. In other words, adat perpateh is a personal law of inheritance: this conclusion is not altogether surprising as Mr. Taylor informs the writer that he had a hand in the drafting of the 1955 Act.

[2][1939] M.L.J. 65.

[3]*Derai* v. *Ipah*, Seremban Civil Appeal No. 6/1949.

cable to Malays in Negri Sembilan is Islamic law except (b) where, in the case of land, that land is proved to be subject to adat by, *for example*,[1] endorsement and (c) adat is only law when embodied in a statute as otherwise it is uncertain.

On the other hand in *Re Haji Mansur bin Duseh decd.*[2] the court said that the effect of the Customary Tenure Enactment, as regards land said to be customary, is to replace the unwritten law of custom by the written law of the enactment, in so far as this is possible from the rules of statutory interpretation. However, it also said that non-endorsement does not of itself preclude the application of customary rules. Conclusive proof to the contrary can be advanced by a finding of the collector under s.4 of the Customary Tenure Enactment. In *Haji Hussin* v. *Maheran*,[3] the Court gave effect to a finding of the collector under s.4 of this Act that the land was not endorsed and was, therefore, not 'customary' in terms of the Act, but held that the rules of adat were not precluded by the Act. It seems that the later authority is to be preferred, i.e. that lack of endorsement does not preclude adat. There are three grounds for this, all of them rather technical.

i. *The Scope of the Statute.* The first ground arises from the scope of the Customary Tenure Enactment itself, and its relation to the Torrens System of land registration in existence in the Malay States. The introduction of this system has brought with it the idea of indefeasibility.[4] Indefeasibility of title operates to protect a *bona fide* purchaser for value who has procured the registration of his interest or title, but s.166 of the repealed Land Code and the new National Land Code do not make clear whether or not a person having an interest under adat may lodge a *caveat* to protect his claim. The effect of the Customary Tenure Enactment seems to be analogous to a caveat in that endorsement itself acts as such, and it also gives further protection under s.7, relating to sale and charge of land so endorsed. Further, since the Customary Tenure Enactment is concerned only with land endorsed 'customary' under s.2, then its terms are irrelevant to any land not so endorsed. It does not follow from this, however, that non-endorsed land is not subject to adat rules. The Customary Tenure Enactment is also irrelevant to the determination of the law of

[1]Italics supplied.

[2][1940] M.L.J. 110.

[3][1946] M.L.J. 116. Cf. also *Maani* v. *Mohamed* [1961] M.L.J. 88.

[4]Cf. Section 42 of the repealed Land Code of the Federated Malay States now re-enacted in Section 340 of the National Land Code, 1965.

succession to non-endorsed land since succession only arises upon death; the provisions of the National Land Code do not touch upon the substantive law of succession.

ii. *Judicial Authority*. The second line of cases (i.e. *Haji Hussin* v. *Maheran*) which culminated in *Maani* v. *Mahomed*[1] has reasserted the principle that 'a living body of customary law cannot be destroyed by a written law except by express declaration or by necessary implication'. There is abundant English and Indian authority for this proposition. This is clear enough but some confusion has arisen in respect of decisions given by the Appeal Committee set up under Part III of the Small Estates (Distribution) Ordinance. The Committee is appointed by the Ruler in Council and its competency is confined to questions of 'Muslim law or Malay custom'.[2] The Committee appointed either under this act or under Section 15 of the Customary Tenure Enactment has adjudicated on a not inconsiderable number of appeals relating to endorsement and non-endorsement. As with the High Court, their decisions have been divided on the question of the place of adat in relation to statute. So far as the Committee is concerned this whole problem is somewhat illusory. There is no need for it to discuss this question because the competency of the Committee under the relevant legislation is confined to the ascertainment of the rules of adat and the proof of these rules. Questions of statutory interpretation i.e. as to the scope of an enactment, must belong to High Court jurisdiction.[3]

Similarly, the collector, in making an order for distribution, i.e. making a choice of law, is acting in a judicial capacity.[4] His competency is therefore confined to the ascertainment and proof of adat rules.

So far as judicial decisions are concerned we are faced with the existence of a tri-partite body, having separate functions, though the parts are connected by the mechanism of appeal. The collector decides on the applicability of adat and the appropriate rules in the first instance. Both of these matters are subject to respective appeals to the High Court and the Appeal Committee.

[1][1961] M.L.J. 88.

[2]Cf. Sections 19(1)(a) and 25 of the Small Estates (Distribution) Ordinance, 1955.

[3]So far as the writer can ascertain from transcripts of Seremban Civil Appeals since 1955, the Committee has always based its decision on facts, though there are certainly assumptions of law inherent in the decisions.

[4]Cf. Section 4(i) (ii) above and Section 24 of the Small Estates (Distribution) Ordinance, 1955. Cf. also below.

iii. *The Small Estates Legislation.* The third ground for preferring the continued effectiveness of adat despite lack of official endorsement on a land title arises from recent small estates legislation. Section 24 of the Small Estates (Distribution) Ordinance, 1955, provides as follows:

> 24. In making any distribution order the Collector ... shall apply the following principles:
>
> (a) if any land appears to be ancestral customary land, though not registered as such, it shall be transmitted to the customary heiress, subject if necessary to life occupancy;
>
> (b) where any property is found as a fact to be *harta pembawa* or *harta dapatan* it may be transmitted to the customary heiress of the deceased subject to the right of any other person to a share in or charge over that property according to the principle of *untong*, where applicable, and on registration of the order the Collector may, if necessary, add the words 'Customary Land' to any title affected but he shall not be bound to do so;
>
> (c) where any property is found as a fact to be *harta charian bujang* or *harta charian laki-bini* it may be transmitted according to the custom of the *luak* and on registration of the order the Collector may, if necessary, add the words 'Customary Land' to any title affected but he shall not be bound to do so;
>
> (d) the Collector shall give effect to customary adoptions where they are satisfactorily proved;
>
> (e) in all cases regard shall be had to any partial distribution of property made or agreed upon in the life-time of the deceased and to the existence of any property which is affected by any such distribution or agreement though not part of the estate;
>
> (f) wherever practicable the Collector shall avoid transmitting undivided shares in any one lot to members of different tribes;
>
> (g) where funeral expenses are by the custom chargeable on specific property and the party on whom that property ought to devolve has not paid them, the Collector may require such party to pay the funeral expenses as a condition of inheriting that property or may, by the order, charge that property with the amount of the funeral expenses.

The Customary Tenure Enactment is now confined to dealing with land, the title to which is already endorsed. Section 24, in fact, provides for all disputed points in respect of land which is claimed to devolve subject to adat rules.

Another point should be made in respect of land disputes, especially disputes concerning charian. Al Wahab (1968: 42–3) describes the situation where a dispute over the characterization of land became a dispute between two clans. That is, each clan, through its lembaga, attempted to take control of the land. This necessarily involved opposing interpretations of adat rules and in one case,

pressure on one party as to the nature and quality of her evidence. The matter was eventually settled by the district court but not before the Undang of luak Rembau had become involved. In other words, an inter-clan dispute, if serious enough, will eventually reach the constitutional head of the luak. In the great majority of cases disputes of this magnitude usually involve land. This problem reappears in a constitutional context (Chapters 6–8 below) emphasizing the intimate connexion between land and adat status.

The Form of Adat

Adat appears through the medium of a formalized judicial process and this is inevitably different from its traditional statement—the perbilangan; more important, however, is the effect which the imposition of the westernized legal form has had on the substantive rules of adat. There are two important points to note here. First, English legal terminology is a specialized and refined use of the English language and is partially incomprehensible to a great majority of English speakers. Second, when this terminology is used to express the rules and concepts of a foreign law which operates on 'strange' premises then some distortion in a description of that law is inevitable. In the case of a customary law the degree of distortion is increased. The problem is to choose terms for use in an adat context which are coherent and definable in that context, but which at the same time remain sufficiently distinguishable from their English legal meanings.

Two examples, one from English law and the other from adat, will illustrate this difficulty. First, the term 'trust'; this is commonly used in phrases such as 'women hold land *in trust* for the tribe'. The definition of 'trust' is by no means clear and confined even in English law, but the three definitions given below contain elements generally accepted today.

(a) A trust is an equitable obligation binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property) for the benefit of persons (who are called the beneficiaries or *cestuis que trust*) of whom he may himself be one, and any one of whom may enforce the obligation (In *Re Marshall's will Trusts* [1945] Ch. 217 at 219).

(b) A trust, in the modern and confined sense of the word, is a confidence reposed in a person with respect to property of which he has possession, or over which he can exercise a power to the intent that he

may hold the property or exercise the power for the benefit of some other person or object. It is an equitable obligation... (Halsbury's Laws of England (2nd. ed.) v. 33, p. 87).

(c) A trust is really nothing except a confidence reposed by one person in another, and enforceable in a Court of Equity. *Re Williams* [1897] 2 Ch. 2 at 19. (This definition is mentioned only because it emphasizes the two factors of confidence and enforceability.)

In the sense outlined above, the term 'trust' is clearly inapplicable to adat, specifically to the holding of customary land by women of the 'tribe'. In the first place, adat knows no distinction between law and equity and the only serious attempt to draw such a distinction ended in failure (see below pp. 66-7). Second, women belonging to any of the 'tribes' specified in the schedules to the enactments are not trustees in any sense near the English use of this term. If a woman is the registered holder of land she has an indefeasible title at law and she also has a beneficial ownership under the adat. Both titles, however, are subject to the exercise of tribal options whether or not the title is endorsed. If the title is endorsed, 'customary land', then the options are protected by the statutory equivalent of a caveat. It appears that the whole question of options has given rise to the use of 'trust' together with the resultant confusion.

A second problem may arise from the use of native adat terms in law and their translation, both linguistic and procedural, into an English administrative and legal organization. The term '*sudah ambil kuasa*' provides an example. This may mean any of the following: an application for an order to transmit land *inter vivos*; the granting of such an order; an application for an order for the immediate distribution or transmission of the property of a deceased; the granting of such an order; an application for letters of administration; or an application for leave to transfer from applicant as administrator to applicant as proprietor.

It is obvious that there is plenty of room for confusion here and that from the point of view of the peasant applicant areas of uncertainty persist. This is not helped by terminological confusion at judicial level on the same or similar points. For example, the courts have not infrequently in the past confused the terms *harta sapencharian* and *harta sharikat*. They both refer to the acquisition of property but the former relates to an adat dealing with acquisition during marriage. Harta sharikat, on the other hand, refers to property required by a partnership and is governed by principles of Islamic law.

'Static' Adat

The word 'static' is introduced here to indicate the fact that the substantive provisions of adat are now largely 'frozen' in the form of statutes and judicial decisions. This leads us directly into a consideration of precedent in relation to *adat*. This clearly is a large topic and only a few suggestions are offered here. From what has gone before, it may fairly be said that the judges and collectors in dealing with adat have both considered as valid that which the native legal order has considered as valid, and have taken native culture as their starting point when investigating the tenability of adat principles, in so far as no statutory rules exist. The introduction of statute has confused several issues, and judicial departures from these assumptions have in the main been occasioned by statutory interpretation.

However, probably the most novel importation into adat has been the common law doctrine of precedent. This has arisen *ipso facto* from the nature of judicial proceedings and their enshrinement in law reports, district office minutes, and the like. Some attention was paid above to the distinction between two conflicting streams of authority, partly on the ground of judicial precedent. The main principles of precedent have been set out elsewhere and need not be elaborated upon here. So far as the Federation of Malaysia is concerned, it is presumed that the same doctrine of precedent is applicable as in England, though there is no direct authority for this (cf. Sheridan, 1961: 24–6). However the actual details of judicial hierarchy are not of concern here; more important is the effect of the doctrine of precedent upon the adat principles embodied in case law, and the following points are suggested for future study.

First, from the nature of its function the High Court will be more concerned in its *ratione decidendi* with questions of principles of adat. A brief glance at the reported cases given earlier in this chapter will confirm this. This leads to the supposition that principles may become fixed in their statement and effect. On the other hand, however, rules of adat are matters for the collectors' proceedings in which it is rare to find any statement of general principle.

So far as precedent is concerned, the mode of application of adat rules may be varied, and it is varied by agreement between the parties with the Collector's assent; but these pakats do not themselves vary the substance of the rules. Thus in *Hassan* v. *Romit*, (cf. Taylor, 1929: 63) the Resident (not the Court) said that a member of a 'tribe' had no right to enter into an agreement which was inconsistent with adat.

So far as State Appeal Committees are concerned the same situation seems to prevail. There is a similar reluctance to state abstract or general principles, and there is an emphasis upon facts and their manipulation. There is, therefore, the situation of adat possessing fixed principles with rules variable in their applicability at differing levels of the judicial hierarchy. Adat is thus rendered more certain from one point of view and less certain from another. It does not seem unduly pessimistic to assert that this uncertainty will persist and may even become greater in time. Similarly, it seems that the tensions between Islam and adat (see below Chapters 9 and 10) must be a continuing feature to be taken account of in any description of precedent. Some of the more important factors supporting these predictions are as follows.

Many of the collector's decisions never come up for appeal and in fact the majority of them embody family pakats, the rule contents of which often vary. These decisions therefore are not authority for propositions of adat but are only illustrations of trends in decision making over a period of time. Thus a survey of collector's decisions covering the period 1960 to 1965 from the administrative district (jajahan) of Kuala Pilah showed that Islamic law was almost invariably *cited* in cases of formal dispute. However, in the many settlements recorded, there were strong indications that adat was applied. It is almost possible to say, in this jajahan at least, that the law applicable in any district in any distribution of land will depend upon whether or not there are strong dispute elements present. And further, one might say that the presence or absence of open dispute is itself a function of the formal proceedings. That is, the possibility of conflict between Islam and adat is more often verbalized because of the existence of dispute settling mechanisms.

English Legal Concepts and Adat

English law has two basic divisions, common law and equity. Equity may be described as the codification in rule form of considerations of morality. It acts so as to supplement the common law and, like common law, is found in judicial decisions and occasionally in statute form. It operates so as to lessen the rigour of common law rules (cf. Geldhart, 1911: 21–46). There has been one judicial attempt to apply this distinction in adat. This arose in *Shafi* v. *Lijah*,[1] a case

[1][1949] M.L.J. 65.

on the devolution of charian laki-bini land, the title to which was not endorsed 'customary land'. On this ground alone the judge precluded the applicability of adat rules as to devolution. As we have seen, such a decision is not justified.

The judge then went on to consider the relevance of Islamic law but dismissed it on the ground that the deceased 'intended some customary law to apply'. This law he held to be adat temenggong. His grounds for holding this were: (i) that the deceased intended this law to apply; and (ii) that adat temenggong is analogous to equity in English law and it operates to lessen the harshness of adat perpateh which is analogous to statute.

As to (a), intention is irrelevant to the determination of personal law; this depends upon such objective facts as constitutional and statutory provisions.

As to (b) no rule content of adat temenggong dealing with this form of land was proved either on the basis of statute or prior judicial decision. However, it is the comparison of the two adats with common law and equity which is surprising here. The older writers on adat are all more or less unanimous in describing adat temenggong as 'autocratic' (cf. Winstedt, 1947: 79) and though we need not accept this description this is a far cry from an 'equitable' adat temenggong. It is impossible to see how such a comparison is possible in the light of our previous discussion of perbilangan. If we refer back to our previous discussion of trust we can illustrate this point. In English law the institution of trust is an equitable institution. It has rules, often of some complexity, governing all matters of trusts. We found that the whole conception was alien to adat and the importation has in fact given rise to much confusion. The whole basis of classification of property in the two laws, adat and English, are totally dissimilar. English law classifies property as real and personal, a distinction made on the basis of forms of action for recovery. Adat, on the other hand classifies all property as pesaka and charian, a distinction based on the mode of acquisition. These factors all mitigate against the acceptance of English legal conceptualism in this field. It is surprising and somewhat distressing to note that this decision has been recently referred to as authority on the application of adat temenggong (cf. Ahmad Ibrahim, 1965–6: 64). This is not to deny that adat temenggong (in the sense of an adat which is not adat perpateh) has a place in Negri Sembilan: the

objection is solely to the excessively culture-bound reasoning in this case.[1]

We may conclude this chapter with two observations on traditional social structure as it has been affected by legal formalization. First, the provisions of the statutes and judicial decisions discussed in this chapter have left clan and lineage structure untouched. Indeed, the incorporation of the clan ('tribe') as a basic unit into the land tenure system of the state may tend to strengthen it, at least formally. But this should not blind us to the fact that the influence of the lembaga, the clan chief, has been continually lessened in recent years. Even in matters of land tenure, his most important area of control, he now has only the status of a witness in transmission proceedings, instead, as formerly, deciding the whole matter.

Second, and following from this, though most of the traditional perbilangan on land tenure are now given effect to in legislation, those which relate to adat as a system of values and a way of life are becoming forgotten. Even among the older men who still pride themselves on their knowledge of perbilangan it is difficult to find many who, if they remember many perbilangan, can explain them adequately. There is a notable lack of interest in the whole topic among the young people, especially the English-educated. It seems likely, therefore, that apart from those areas of adat which have a direct relation to modern land tenure systems, the traditional law will have little influence on modern life. Perhaps this is an inevitable result of the formality of the English legal and administrative system. In Chapters 5 to 8 similar tendencies in the modern forms of the traditional adat constitution will also be noticed.

[1]We may note for example, the more sensible approach taken in *Saepah* v. *Abdul Wahab* [1964] 3 M.C. 60, where the court, in dealing with the question of charian laki-bini applied the test of work done on the land and did not concern itself with general statements on 'types' of adat. This decision is also notable because non-adat judicial authority was cited.