FAMILY LAW AND CUSTOMARY LAW IN ASIA:

A CONTEMPORARY LEGAL PERSPECTIVE

Editor,
DAVID C. BUXBAUM

MARTINUS NIJHOFF / THE HAGUE / 1968

VIII. ISLAM AND CUSTOMARY LAW IN THE MALAYSIAN LEGAL CONTEXT

I. Historical Introduction

The Malays in Malaya did not become Muslims until comparatively recent times and it is generally accepted that the Malays were not Muslims at the time when they migrated from Sumatra. When they came to Malaya they brought with them and preserved much of their ancient customary law. Muslim law has been superimposed on this. Although the Malays are generally strict Muslims they have never adopted the whole of the Muslim law, and the Muslim law which is applied in Malaya is Muslim law varied by Malay custom.

The Malays in Malaya are said to have originally come from the Minangkabau highlands of Sumatra. Some are said to have come directly and brought with them the pure Malay law of Minangkabau, the matriarchal *adat perpateh* and the tribal organization. Others are reputed to have arrived by way of Palembang, where during the centuries of Hindu and monarchical influence the tribal organization has broken down, and they are believed to have brought with them the patriarchal *adat temenggong*.

In Malaya, the greater part of Negri Sembilan and the Naning district of Malacca follow the *adat perpateh*.[1] The immigrants brought with them the *adat perpateh*, which still exists to this day. In purely *perpateh* tradition, sovereignty in the state resides in the subjects of the state. Power and authority are vested in their elected representatives. Society consists of the individual, the family, then the tribes, who constitute the components of the state. In the *perpateh* set-up of Negri Sembilan there are twelve tribes in all. Each tribe is presided over by a *lembaga* or headman and the twelve tribes in turn come under the authority of four *undangs*, each of whose jurisdiction extends in his *luak* or district. Finally, the state is governed by the ruler who is the Supreme Head of the state. "Constitutionally" it is laid down by custom that:

> The individuals elect the elder
> The elders elect the Lembaga

[1] The early immigrants from the *perpateh* hinterland of Sumatra settled on the upper reaches of the Muar River to establish the territory of Ulu Muar and Jempol; on the Linggi and Rembau Rivers to found the States of Sungei Ujong and Rembau; on the course of the Malacca River to found the States of Naning, Johol and Inas; and on the Triang River to found the State of Jelebu.

The Lembaga elect the Undang
The Undang enthrone the Ruler.[1]

Power is vested in these various chieftains after they are elected and the exercise of such powers is defined and determined. Thus:

The Ruler rules the State
The Undang rules the *luak* (district)
The Lembaga rules the tribe
The elder rules his followers.[2]

Before the integration of the various territories of Negri Sembilan each of the constituent members was ruled by an *Undang*. At this period before the Confederation of the State of Negri Sembilan in 1773, each *luak* was a state owing a remote allegiance to the *temenggong* or Sultan of Johore. It was in 1773 that Raja Melewar, a member of the Royal House of Minangkabau, was invited to be the first ruler of Negri Sembilan. This brought Negri Sembilan in line with the other states in Malaya in having rulers of royal lineage and this constitutes the *adat temenggong* element in the constitution of Negri Sembilan.[3]

In the other states of Malaya, the *adat temenggong* became identified with the Muslim system and absorbed the institution of the Sultanate. The customary *temenggong* states became Muslim Sultanate states. In time the teachings of Islam were absorbed into the *adat temenggong* and the two became parts of one system, though traces of the *adat temenggong* are still to be found, especially in the inheritance of Malay holdings.[4]

II. Federal Constitution

The Federal Constitution provides in effect that in every state, which has a ruler, the position of the ruler as the Head of the Muslim religion in his state in the manner and to the extent acknowledged and declared by the Constitution of that state and subject to the Federal Constitution all rights, privileges and powers enjoyed by him as Head of the Muslim Religion, shall remain unaffected and unimpaired. Thus

[1] Bulat anak buah menjadi buapak / Bulat buapak menjadi Lembaga / Bulat Lembaga menjadi Undang / Bulat Undang menjadi Raja.

[2] Raja memerentah alam / Undang memerentah luak / Lembaga memerentah Suku / Buapak memerentah anak buah-nya.

[3] Haji Mohamed Din bin Ali, "Two Forces in Malay Society," *Intisari*, (Singapore, 1962) Vol. 1, No. 3, p. 15f.

[4] *Ibid.*

we find it provided in the Constitutions of the States of Johore, Kelantan, Pahang, Perak, Selangor and Trengganu that the ruler shall be the Head of the Muslim religion in the state. In Negri Sembilan the ruler is the Head of the Muslim religion, but in exercising his functions, he is required to obtain the concurrence of the *Undangs*. In Malacca, Penang and Singapore it is provided that the Yang di-Pertuan Agong shall be the head of the Muslim religion in the state.[1]

The Federal Constitution provides that the Muslim personal and family law and Malay custom are matters within the legislative and executive competence and jurisdiction of the states.[2] No law with respect to any matters of Muslim law or the custom of the Malays may be made by the Federal Parliament even for the purpose of implementing a treaty, agreement or convention between the Federation or any other country or any decision of an international organization of which the Federation is a member until the government of any state concerned has been consulted.[3]

In some of the states of Malaya there is provision for the constitution of a *Majlis Ugama Islam dan Adat Istiadat Melayu* to aid and advise the ruler on all matters relating to the religion of the state and Malay custom. In Selangor, Kelantan and Pahang it is provided that the *Majlis* shall be the chief authority in these matters in the state and that the *Majlis* shall take notice of and act upon all written laws in force in the state, the provisions of *Hukom Shara* (Muslim law) and the ancient custom of the state of Malay customary law. A legal committee consisting of the *Mufti*,[4] not more than two other members of the *Majlis* and not less than two other fit and proper persons (who may be members of the *Majlis* or not) is constituted. Power is given to the legal committee and *Majlis* to make and issue rulings (*fetua*) on any point of Muslim law or doctrine or Malay customary law. It is provided that in making and issuing any such ruling the *Majlis* and the legal committee shall ordinarily follow the orthodox tenets of the *Shafii* school of law. If it is considered however that the following of such orthodox tenets will be opposed to the public interest, the *Majlis* may, unless the

[1] Federal Constitution, Article 3; Constitution of the State of Johore, Articles LVII and LVIIA; Constitution of the State of Kelantan, Articles V and VI; Constitution of the State of Pahang, Article 24; Constitution of the State of Perak, Article VI; Constitution of the State of Selangor, Article XLVIII; Constitution of the State of Trengganu, Article IV; Constitution of the State of Negri Sembilan. Articles V and VI.

[2] Federal Constitution, Ninth Schedule List II.

[3] Federal Constitution, Article 76(2).

[4] The *mufti* or jurisconsult is a specialist on law who can give authoritative opinions on points of doctrine.

ruler shall otherwise direct, follow the less orthodox tenets of the *Shafii* school. Further if it is considered that the following of either the orthodox or the less orthodox tenets of the *Shafii* school will be opposed to the public interest the *Majlis* may, with the special sanction of the ruler, follow the tenets of any of the *Hanafi*, *Maliki* or *Hanbali* schools, as may be considered appropriate. In making and issuing any such ruling the *Majlis* shall have regard to the *adat istiadat Melayu* or the Malay customary law applicable in the state.[1]

In Trengganu it is provided that the *Majlis Ugama Islam dan Adat Melayu* shall aid and advise the ruler in all matters relating to the religion of the state and Malay custom. The *Majlis* shall take notice of and act upon all written laws in force in the state, the provisions of the *Hukom Shara* (Muslim law) and the ancient custom of the state or Malay customary law. Power is given to the *Mufti* to make and issue any rulings (*fetua*) on any point of Muslim law or doctrine and to the *Majlis* to make and issue any rulings on Malay customary law.[2]

In Perlis it is provided that the *Majlis Ugama Islam dan Adat Istiadat Melayu* shall advise the ruler on all matters relating to the Muslim religion and Malay custom and such advice shall be given in accordance with Muslim law (*Hukom Shara*) and such other Malay customary laws as may be applicable in the state. The *Majlis* shall, when requested by any person or any court to do so, issue a *fetua* or ruling on questions relating to the Muslim religion or Malay custom. A *Shara'aih* committee consisting of the *Mufti*, two members of the *Majlis* and two persons, not being members of the *Majlis*, who profess the orthodox Muslim religion (*Ahli Sunnah waljamaah*) is established for the purpose of advising the *Majlis* on any matter relating to a *fetua* to be issued by it. The *Majlis* when issuing such a ruling shall follow the *Quran* and the *Sunnah* of the Prophet, but where the following of such teachings would be opposed to the public interest, the *Majlis* shall refer such ruling to the Ruler for his decision. In issuing such rulings the *Majlis* shall have

[1] Selangor Administration of Muslim Law Enactment, 1952, Ss. 5, 37, 38, 41 and 42; Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, Ss. 5, 38, 39, 42 and 43; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, Ss. 5, 30, 31, 33 and 34.

[2] Trengganu Administration of Islamic Law Enactment, 1955, Ss. 9, 18 and 20.

In making and issuing any ruling upon any point of Muslim law or doctrine the *Mufti* is required ordinarily to follow the orthodox tenets of the *Shafii* school, but if the *Mufti* considers it to be in the interest and welfare of the Muslim community he may issue a *fetua* within the tenets of any of the four schools. In making and issuing any ruling upon a point of Malay customary law the *Majlis* shall have regard to the *Adat Istiadat Melayu* or Malay customary law applicable in the state; and if the point concerns in any manner the Muslim law, the *Majlis* shall refer the matter to the *Mufti* for his advice.

due regard to the *adat istiadat Melayu* or Malay customary law applicable in the state.[1]

In Perak it is provided that the *Majlis Ugama Islam dan Adat Melayu* shall advise the ruler in all matters relating to the Muslim religion and the Malay custom. No specific provision is made for the issuing of *fetuas* but it is provided that no member of the *Majlis* who is not a subject of the ruler and who is not a Malay shall take part in any discussion relating to matters of purely Malay custom. "*Adat Melayu*" is defined as that portion of the *adat* or custom having the force of law which has been acted on, or is in force in the state, and which is commonly known as "*Harta Sapencharian*" but shall not include that portion of the "*adat*" known as "*adat resam*" except as authorized from time to time by the State Executive Council.[2]

In Negri Sembilan, Penang, Malacca and Kedah the *Majlis* is the *Majlis Ugama Islam* and no provision is made for advice or rulings on the Malay customary law. The *Majlis Ugama Islam* is constituted to aid and advise the ruler (or in the case of Penang and Malacca, the Yang di-Pertuan Agong) in matters relating to Muslim religion in the state. A legal committee (in Kedah called the *Fetua* Committee) is constituted consisting of the *Mufti*, two members of the *Majlis* and not less than two or more than six other fit and proper Muslims who are not members of the *Majlis*. Power is given to the *Majlis* and the legal committee of the *Majlis* to issue *fetuas* on any point of Muslim law, and in issuing any such ruling the *Majlis* and the legal committee are ordinarily required to follow the orthodox tenets of the *Shafii* school.[3]

In Johore too the *Majlis* is the *Majlis Ugama Islam*, whose duty is to aid and advise the ruler in all matters relating to the religion of Islam.[4]

In Sarawak the *Majlis Islam* is given the English title of "Council of Religion and Malay Custom." It is provided that the *Majlis* shall aid and advise the governor on all matters relating to the Muslim religion and Malay customary law of the state and shall in all such matters be the chief authority in the state. Power is given to the *Majlis* to issue *fetuas* on any point of Muslim law or doctrine or Malay customary law

[1] Perlis Administration of Muslim Law Enactment, 1963, Ss. 4, 5, 7 and 8.

[2] Perak Majlis Ugama Islam dan Adat Melayu Enactment, 1951, Ss. 3–5.

[3] Negri Sembilan Administration of Muslim Law Enactment, 1960, Ss. 4, 37 and 38; Penang Administration of Muslim Law Enactment, 1959, Ss. 4, 36 and 37; Malacca Administration of Muslim Law Enactment, 1959, Ss. 4, 36 and 37; Kedah Administration of Muslim Law Enactment, 1962, Ss. 4, 37 and 38.

But where the following of such tenets would be opposed to the public interest the *Majlis* may follow the less orthodox tenets of the *Shafii* school, or, with the special permission of the Ruler or the Yang di-Pertuan Agong, the tenets of the *Hanafi*, *Maliki* or *Hanbali* schools.

[4] Johore Council of Religion Enactment, 1949, Ss. 2 and 3.

of the state. In making and issuing any such ruling the *Majlis* is ordinarily required to follow the orthodox tenets of the *Shafii* school.[1]

III. Malay Custom and Muslim Law in the Malaysian Legal Context

Malay custom has modified the Muslim law in its application to the Malays in Malaysia, and it is proposed to examine the modifications in relation to (a) the law of marriage and divorce, (b) the law relating to guardianship and adoption, and (c) the law relating to property and inheritance.

A. Marriage

Under the Malay custom a marriage is regarded not merely as a personal, but as a family and tribal tie as well, and there are elaborate ceremonies for the betrothal. Even outside the *adat perpateh* areas a Muslim marriage in Malaysia is often preceded by a betrothal. The first move is made by the man's family which ascertains from the girl's family whether a proposal would be favorably received. When an understanding has been reached, the parties proceed to set the date of the marriage and the precise amounts of the payments for *maskahwin* and presents. There may be a formal ceremony of betrothal at the girl's home, which finalizes the contract between the two families.[2]

In Negri Sembilan the ceremonies are more elaborate. First there is the *menghantar chinchin* or "sending the ring" ceremony. This is done by depositing a ring with the parents of the prospective bride. This signifies a request for the bride's hand on the part of an interested groom. A feast is held to which the bride's relatives are invited, the ring is shown and at the same time opinion and approval are sought. If the relatives do not approve the marriage the ring is returned to the suitor.

[1] Sarawak Majlis Islam (Incorporation) Ordinance (Cap. 105 of the Laws of Sarawak, 1958), S. 4, 33, 37 and 38.

But where the following of such tenets would be opposed to the public interest, the *Majlis* may follow the less orthodox tenets of the *Shafii* school or, with the special sanction of the Governor, the tenets of the *Hanafi*, *Maliki* or *Hanbali* schools. In making and issuing any such ruling the *Majlis* shall have due regard to the Malay customary law applicable in the state. Further if it is considered that the following of either the orthodox or the less orthodox tenets of the *Shafii* school will be opposed to the public interest, the *Majlis* may, with the special sanction of the governor, follow the tenets of any of the *Hanafi*, *Maliki* or *Hanbali* schools, which may be considered appropriate. In making and issuing any such ruling the *Majlis* shall have regard for the *Adat Istiadat Melayu* or the Malay customary law applicable in the state.

[2] See M. Siraj, "Muslim Marriages in Singapore," *World Muslim League Magazine* (January. 1964), p. 41f; Ahmad bin Mohamed Ibrahim, "Status of Muslim Women in Family Law in Malaysia," *Malaya Law Review* (December 1963), p. 314 f.

If the proposal is accepted, another ceremony is held, to which the relatives of both parties are invited. Here the *chinchin tanya* or seeking ring is circulated to be viewed and examined by the relatives present, symbolizing the discussion of the merits and demerits of the bridegroom to be. The appearance of the double ring signifies that the match is agreed upon and the agreement is sealed under the custom expressed thus:

> One ring to sound the parents
> Two rings unanimous agreement
> Approval entails the customary covenants
> Repudiation by the man he forfeits the token
> Breach by the bride she repays twofold
> Blemish of either the pact is annulled
> Insanity and lunacy are outside the pact.[1]

In Sarawak Malay custom regarding betrothal is briefly: first the boy's parents will approach those of the girl to talk about the possibility of marriage. If the boy is acceptable and agreement is reached generally the second stage is to take a *tekol*[2] to the girl's parents. This *tekol* in practice must take place within seven days of the agreement's being reached. If the boy breaks the agreement and does not take the *tekol* to the girl's parents he will be liable for the offence called *balak pengamang* and liable for a fine; but if the girl breaks the agreement before the *tekol* is received, she is not guilty of any offence. The third stage is *pertunangan* or betrothal which must take place within one month of the giving of the *tekol*, failing which the *tekol* will lapse. If the betrothal does not take place due to the default of either party, he or she will be liable to a fine; and if it is the girl who defaults, she will have to return the *tekol*. After the betrothal comes the last stage, marriage, which should be solemnized within one year of the betrothal. Failure to do so on the part of the boy will entitle the girl to sue him for *mungkir* or breach of promise to marry. If either party breaks the betrothal agreement, he or she will be liable to a fine and if it is the girl who breaks the agreement, she will have to return the betrothal gifts or their value.[3]

[1] Chinchin sabentok menanya ibu bapa nya / Chinchin dua bentok oso sekata / Oso sekata janji di-ikat, / Elah si-laki lonchor tanda, / Elah si-perempuan ganda tanda / Chachat chida berkembalian / Sawan gila luar janji.
See Haji Mohamed Din bin Ali, "Two Forces in Malay Society," *op. cit.*, p. 25.

[2] The word *tekol* is used in colloquial Malay in Sarawak to mean an object, usually a weight, placed on a lighter object to prevent the latter from being shifted or blown away. *Tekol* usually takes the form of money, precious metal or stone, such as gold or diamond rings.

[3] *Sarawak Undang-Undang Makhamah Melayu*, Sarawak, Ss. 1–20; Ahmad bin Mohamed Ibrahim, "Status of Muslim Women in Family Law in Malaysia," *op. cit.*, p. 317.

In the states of Malaya provision is made in law for breaches of the betrothal agreement. In Selangor, Negri Sembilan, Penang, Malacca and Kedah it is provided that where a party to a contract of betrothal breaks such contract without lawful reason and the other party is willing to carry out the contract, the party in default is liable to pay to the other party the sum which was agreed in the contract. If the defaulting party is the groom-to-be he has also to pay as damages the amount of the *maskahwin*, and in Negri Sembilan, Malacca and Kedah also the *hantaran*, which would have been payable together with other moneys expended in good faith in preparation for the marriage.[1] If the woman defaults she has to return the betrothal gifts, if any, or the value thereof in addition to paying the agreed damages.[2] In Kelantan, Trengganu and Pahang, if a person who has entered into a contract of betrothal refuses to marry the other party and the other party is willing to fulfill the contract, the defaulter (if male) is liable to be adjudged to pay the value of the *maskahwin* which would have been paid had the marriage taken place, together with other moneys expended in good faith in preparation for the marriage. If the woman defaults, she has to return the betrothal gifts, if any, or the value thereof, in addition to paying the agreed damages or the amount expended in preparation for the marriage.[3] In Perlis it is provided that where a party to a contract of betrothal breaks such contract, such party shall be liable to pay to the other the sum agreed in the contract and, if male, to pay the amount of the *maskahwin* payable under the contract and such other sums as may have been expended by the other party in good faith in preparation for effecting the terms of the contract; and where the party so liable is female, the return of the betrothal gifts or the value thereof, and such other sums expended by the other party in good faith in prepa-

If the engagement or betrothal is broken because of the interference of a third person, such person is liable to a fine and restrictions are imposed on the marriage of the party who broke the engagement or betrothal to the person who caused it to be broken.

[1] *Maskahwin* is the obligatory marriage payment due under Muslim law by the husband to the wife at the time the marriage is solemnised. *Hantaran* is the obligatory cash payment due to be paid under local custom by the bridegroom to the bride at the time the marriage is solemnised.

[2] Selangor Administration of Muslim Law Enactment, 1952, S. 124; Negri Sembilan Administration of Muslim Law Enactment, 1960, S. 119; Penang Administration of Muslim Law Enactment, 1959, S. 119; Malacca Administration of Muslim Law Enactment, 1959, S. 118; Kedah Administration of Muslim Law Enactment, S. 119.

[3] Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, S. 137; Trengganu Administration of Islamic Law Enactment, 1955, S. 95; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, S. 117. In Pahang the female party has to pay as damages the amount agreed in the contract, by which the marriage was arranged, to be paid by her on breach of the contract.

ration for effecting the terms of the contract.[1] In the other states where no express provision is made for breach of the contract of betrothal, the consequences of the breach will be expressly provided for by the parties. In Singapore, for example, it is usual to stipulate that if the breach is on the man's side he will forfeit the presents or payments given by him; if the breach is on the girl's side the man will be entitled to payment of double the value of the presents or expenses given or incurred by him.

Although the Muslim marriage is in essence a contract effected by the *akad nikah*, that is the declaration of offer on the part of the one party and the acceptance by the other in the presence of at least two witnesses, custom imposes a number of ceremonies. The most outstanding feature of a Malay marriage is the *bersanding* or the sitting in state of the bride and bridegroom on the bridal throne, the "Rajas for a day." This ceremony, which is Hindu in origin, holds a greater significance to the ordinary Malay than the proceedings of the *akad nikah*. Indeed so important is the *bersanding* ceremony that in a form of marriage known as the *nikah gantong*, literally suspended marriage, the couple, although wedded in the eyes of religion, may not live together or even see each other in private until the *bersanding* is held months or even years later. This in effect reduces the Muslim marriage ceremony to the status of an engagement. The *berhinai* or *henna* ceremony is another evidence of the importance of custom in Malay marriage. This again is Hindu in origin although the significance of the ritual has been forgotten by most Malays. The *berhinai* ceremony is held before the *akad nikah* and the *bersanding* and the essential part of the ceremony is the staining of the finger tips (originally the anointing of the bride's forehead) and the obeisance to the guests by touching the forehead with the tips of the fingers held together. Among the Malays of Malacca, Johore, Negri Sembilan and Selangor it is also customary to dress the bride in ancient Chinese costumes on a night of the *berhinai* ceremonies. The fashion started after one of the rulers of old Malacca took as his bride a Chinese woman sent by the Emperor of China. Through the centuries what began as a fashion became an integral part of Malay wedding customs. While the *bersanding* has been made to appear as a Muslim ceremony by the recitation of Muslim benedictions or *doa* before the *pelamin*, no such attempt has been made with the *berhinai* ceremony. There are other customary practices usually followed in Malay marriages. It is usual to have ornamental trays of flowers and

[1] Perlis Administration of Muslim Law Enactment, 1963, S. 88.

betel leaves and rose water sprinklers for the engagement ceremony and for the wedding ceremony. On the day of the *bersanding*, the bridegroom is invited to the home of the bride by the sending of *sireh latlat* (bouquet of betel leaves). When the bridegroom arrives at the home of the bride it is usual for the entry of the bridegroom and his friend to be barred at one or more places before reaching the bridal throne and some token payment will be made to open the way. At the throne another payment will have to be made to the *Mak Andam* (or mistress of ceremonies) as it is customary for her to hold a fan in front of the bride so that she cannot be seen. If the payment to her is satisfactory, the *Mak Andam* will remove the fan and lead the bridegroom to the throne. After the *bersanding* it is customary to have a ceremonial bathing of the bride and bridegroom. There are also elaborate ceremonies for the *bertandang* or visit of the couple to the bridegroom's house to be introduced to his family.[1]

The Malay customary rules regarding the *maskahwin* represent a compromise between Muslim law and the ancient Malay custom. The Muslim law recognizes the payment of the *mahr*, the gift given by the groom to the bride. Malay custom on the other hand insists on a whole series of conventional presents, beginning with the betrothal and sometimes continuing till the birth of the first child or even later. A sort of compromise has been arrived at by identifying one of these many presents, the *maskahwin*, with the Muslim *mahr*. *Maskahwin* originally meant money paid by the bridegroom to the bride's parents but is now like the Muslim *mahr* paid (or more usually promised and left as an outstanding debt to be paid on divorce) to the bride herself.

While the Muslim law fixes no specific amount for the *maskahwin*, under the Malay custom the *maskahwin* is fixed and normally depends on the rank of the father of the bride. In Negri Sembilan for example the amount of the *maskahwin* must be the traditionally accepted amount as fixed by custom in the particular area. The customary *maskahwin* among the peasantry in Negri Sembilan is twenty-four dollars. A bridegroom may be asked to pay varying amounts to the bride's parents depending upon the status, education and eligibility of the bride. But whatever sum is asked for, the legal customary *maskahwin* must be the amount fixed by custom, that is twenty-four dollars. The rest is regarded as being for the personal and ceremonial expenses of the oc-

[1] M. Siraj, "Muslim Marriages in Singapore," *op. cit.* p. 43f; Dr. Mahathir bin Mohamed, "Interaction and Integration," *Intisari*, (Singapore), Vol. 1, No. 3, p. 39f; Tengku Pekirma Wira, "Custom in Trengganu," *Intisari*, (Singapore), Vol. 1, No. 4, p. 38f.

casion. Such customary expenses are called *belanja hangus* or incidental expenditures and are quite apart from the *maskahwin*. In Pahang it is provided that the amount of the *maskahwin* may be fixed from time to time by the ruler in council. In Perak according to the *Ninety-Nine Laws of Perak*, the fixed amount of *maskahwin* for all ordinary persons was a *tahil* and a *paha* of gold at the most; in the case of Hashimites (that is Arabs descended from the family of the Prophet) five *tahils* of gold. It is stated that rank has to be considered in such cases. At present the amount of the *maskahwin* in Perak varies with the status of the father of the bride ranging from fifty dollars for the daughter of a commoner to one thousand dollars for the daughter of the ruler. In the districts of Naning and Alor Gajah in Malacca which follow the Malay custom the amount of *maskahwin* is fixed at sixty dollars for an unmarried woman and forty dollars for a previously married woman.[1]

The term used for the *maskahwin* in Sarawak and Sabah is *berian*. In Sabah the minimum amount payable as *berian* in the various districts is prescribed by rules and varies from fifty dollars to two-hundred dollars in the case of an unmarried girl, and forty dollars to sixty dollars in the case of a woman who has been previously married. Among the Ilanun and Bajau races in the Kota Belud district of Sabah, the *berian* was originally paid in weight of brass cannon but this custom has been replaced by fixed cash payments, the basis of which is however still the weight of brass cannon and is so referred to locally. The amount varies according to the class to which the father of the bride belongs.[2]

An addition to the *maskahwin* provision is made in the states of Malaya for the payment of *hantaran*, the obligatory cash payment due under local custom from the bridegroom to the bride at the time the marriage is solemnized; the *pemberian*, the optional marriage settlement, in cash or in kind, made by the husband to the wife at the time of the marriage; and the *belanja* or optional expense agreed upon by both parties at the time of the betrothal. The *belanja*, *pemberian* and *hantaran* are customary, but details of them are mentioned during the religious ceremony of *akad nikah* and they are included in the marriage register.[3]

[1] Haji Mohamed Din bin Ali, "Two Forces in Malay Society," *op. cit.* at p. 27; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, S. 2; Mahmud Ahmad, *Kebudayan Sa-pintas Lalu*, Singapore, 1960, pp. 144–145; *The Ninety-Nine Laws of Perak* (edited and translated by J. Rigby, Kuala Lumpur) 1908, p. 23.

[2] *Undang-Undang Makhamah Melayu*, Sarawak (Appendix); North Borneo Muslims Berian and Fees Rules Laws of North Borneo, 1953, Vol. 5, p. 353; D. Headly, "Some Ilanun and Bajau Marriage Customs in the Kota Belud District, North Borneo," 1950, *Journal of the Malayan Branch of the Royal Asiatic Society*. (Part 3), p. 159.

[3] Ahmad bin Mohamed Ibrahim, "The Status of Muslim Women in the Family Law in Malaysia," *op. cit.*, p. 329f.

The preference of custom for payments to be fixed is also seen in the rules relating to the payment of maintenance for the support of the wife in the *adat perpateh* areas. In Rembau for example where a husband fails to support his wife she can apply for maintenance in the *kathi's* court; the rate is fixed by custom at $6/- a month irrespective of the means of the parties or the number of children of the marriage. Similarly on divorce by the husband, the wife is entitled to maintenance during the *eddah* at the conventional rate of $6/- a month.[1]

The marriage feast, although encouraged by Islam, is elaborated under the Malay custom. In Negri Sembilan for a spinster, especially if hers is the first marriage in the family, the slaughter of a buffalo, or cattle, is considered the usual practice. To this marriage ceremony both the *lembaga* and the headmen of the two tribes are invited, their presence being regarded as tacit approval of the marriage. In the other states of Malaysia, the marriage feast is usually held after the *akad nikah* to give publicity to the marriage.[2]

While Muslim law forbids marriage within the relationship of agnates, the *adat perpateh* goes further and bars marriage between cognates. Thus marriage between maternal cousins is not allowed in the *adat perpateh* areas of Negri Sembilan although it is allowed and common in the other states. Marriage or liaison during a wife's lifetime with another woman of her tribe was punishable by death under the custom in Negri Sembilan, but marriage with a deceased wife's sister is a common practice, as it provides for the welfare of the children of the wife's tribe. The children of a brother and sister can intermarry, as belonging to different maternal tribes; but illogically the marriage of children of brothers, although their mothers may belong to different tribes, is forbidden.[3]

Muslim law also forbids intermarriage between persons related by fosterage but fosterage is not frequent in Malaysia. According to the *Ninety-Nine Laws of Perak*, when foster children marry according to the law of this world they may do so but their respective mothers must meet and forgive them so that they may obtain pardon. A man may even marry a woman who has been suckled by his own wife, but alms must be distributed in the mosque.[4]

Polygamy though permitted in Islam is in practice rare among the

[1] E. N. Taylor, "Customary Law of Rembau in 1929," *Journal of the Malayan Branch of the Royal Asiatic Society*, Part I, p. 17.
[2] Haji Mohamed Din bin Ali, "Two Forces in Malay Society," *op. cit.*, p. 25.
[3] *Ibid.*, p. 23; R. O. Winstedt, *The Malay* (London, 1961) p. 59.
[4] *The Ninety-Nine Laws of Perak*, *op. cit.*, p. 49.

kampong or rural Malays while common among the urban Malays. Under the custom it is an offence to take another wife within the same tribe. It is an offence, says custom, to take two when one is given. The Hindu law allowed three wives for a Brahman, two for a Kshatriya and one for the Vaisya. Similarly polygamy was a symbol of rank in old Malay society. In Negri Sembilan custom prescribed that only the ruler could have four wives, only an *Undang* or territorial chief three, only a *Lembaga* or tribal chief two, and the ordinary folk one. Monogamy is preferred under the custom as being the surest guarantee that a tribeswoman and her children will be supported. A second marriage destroys half the man's value as a tribal asset. Custom thus reduces the incidence of polygamy and encourages monogamy. In Rembau a man may not marry a second wife without obtaining the special sanction of the ruler, while in the other states which follow the *adat* the first wife's consent is expected before a second wife is taken. In Sarawak it is provided that a person is permitted to marry more than one wife, as for example where he has money or houses or estates, or is in receipt of an ample salary. The proper maintenance payable for each wife is fixed at from twenty dollars to fifty dollars a month.[1]

The usual custom in the *adat perpateh* areas in Malaya is that the husband stays with the wife or her family, and even outside the *adat perpateh* areas it is customary for the husband to live in the house of his bride for some period after the marriage ceremony. In Sarawak it is provided that if the husband, contrary to the usual custom, asks the wife to leave her family and stay with him or his family, she will not be asked to do so unless the husband can provide a separate house for her in her village, or if there is no place available in her village, at some other place. If however the husband has to stay at a particular place because of his work, then the wife must accompany him.[2]

B. Divorce

Custom lays down certain rules and rituals to be followed in the case of divorce. Just as marriage entails the co-relationship of a host of tribal relatives, if not of tribes themselves, so too divorce entails a break-up of such relationships and might produce considerable social embarrassment if not open quarrels. Custom requires that before a divorce takes

[1] R. O. Winstedt, *op. cit.*, p. 59; R. J. Wilkinson, *Malay Law*, (Kuala Lumpur, 1908), p. 54; Haji Mohamed Din bin Ali, "Two Forces in Malay Society," *op. cit.*, p. 25; Sarawak *Undang-Undang Makhamah Melayu*, s. 37.

[2] R. J. Wilkinson, *Malay Law*, *op. cit.*, p. 30; *Undang-Undang Makhamah Melayu*, Sarawak, s. 43.

place there should be due deliberation on the reasons for the intended dissolution. The husband who contemplates divorce from his wife must go through conciliation or arbitration called *bersuarang* or settlement. A small feast is held by the husband to which he invites both his wife's relatives and his own. The husband will then state his grievances, so that they may be considered by the persons present. In many cases the presence of the elders proves beneficial in patching up the differences between the parties and helps to mend a hasty decision or an irrelevant quarrel. But if the husband still insists on divorce, despite the counsel and advice given to the parties, separation will be allowed after a settlement of the conjugal property.[1]

The division of the conjugal property plays an important part in the divorce under custom and follows the principle:

> Joint earnings are shared
> Wife's property remains
> Husband's property returned
> The union is dissolved
> Settlement permits a gift.[2]

Marriage property falls into three classes. That which is acquired during the marriage is called *harta charian* which is shared. That which the husband brought at the time of the marriage, called *harta pembawa*, reverts to the husband. That which belonged to the wife at the time of the marriage, *harta dapatan*, remains in the wife's possession. When this settlement is agreed upon, then the marriage is dissolved. The husband may leave a portion of his share of the property to the children of the marriage because under the *adat perpateh* the children belong to the mother and her tribe. Thereafter the responsibility of the father for the children ceases altogether under the custom, and the mother has custody of the children.[3] It has been held under the positive law of Malaysia in *Alus* v. *Mohamed*[4] that a husband is liable to pay for past maintenance of his children only if an order of the *kathi* has been made directing the husband to pay such maintenance or authorizing the wife to recover the expenses of maintenance of the children. In *Jemiah binte Awang* v. *Abdul Rashid bin Haji Ibrahim*[5] it was held that the rule

[1] Haji Mohamed Din bin Ali, "Two Forces in Malay Society," *op. cit.*, p. 26.
[2] Chari bahagi / Dapatan tinggal / Pembawa Kembali / Sekutu Belah / Suarang berageh.
[3] Haji Mohamed Din bin Ali, "Two Forces in Malay Society," *op. cit.*, p. 27.
[4] E. N. Taylor, "Malay Family Law," in 1937 *Journal of the Malayan Branch of the Royal Asiatic Society*, Part I, p. 67.
[5] (1941) *M.L.J.* 16.

under the *adat* whereby a husband after divorce is not liable for the support of his children does not apply where he is lawfully practising polygamy. Horne J. said "As he cannot do so lawfully under the *adat* I think it right to regard him as a person whose civil rights and duties in respect of wives and children fall to be dealt with under the rules of the Muhammadan law as varied by local custom."

In the other states of Malaya it has been held that a divorced wife is entitled to a share of all property acquired during the marriage. Where she has in fact assisted in cultivating the land she is entitled to one half of the jointly-acquired land and in other cases to one-third of the jointly acquired property (*harta sapencharian*).[1] According to the Malay custom the guardians at a lawful marriage should inquire as to the separate property of the man and the woman so that on divorce it may be returned to the owner, while property acquired during marriage is divided equally. If separate property has vanished during the marriage and the joint property acquired during the marriage is large, then the separate property is made good and the residue is the joint property; losses too are divided. If the husband wants to divorce his wife for no fault, then the joint property is divided into three, the man taking one share and the woman two.[2]

According to the *Ninety-nine Laws of Perak*, if a divorce was at the instance of the husband and there was no blame attached to the woman he must provide her with maintenance for three months and the personal property would be divided. Weapons and instruments of iron went to the husband, vessels of brass and household utensils went to the wife. To the wife also belonged the house or plantation, to the husband debts and dues. If a divorce was sought owing to the misbehaviour of the woman—that is on account of her adultery, or neglect of service at bed and board or refusal to do works of charity and to pray—she forfeited her settlements only and the law was that the husband must pay a *paha* of gold. Where a woman sought divorce, if she thrice made out a case of misconduct on the husband's part, she could obtain a divorce; but she must redeem herself by returning the settlements and the movable property went to the husband. If property had been brought from the parents' home, being acquired before the marriage, each party

[1] *Rasinah* v. *Said* reported in E. N. Taylor, "Malay Family Law", *op. cit.*, p. 29. In *Habsah* v. *Abdullah* (1950) *M.L.J.* 60 it was held that on divorce a woman is entitled by customary law to half of any property acquired during the marriage and such a claim is not barred or extinguished by her re-marriage.

[2] J. E. Kempe and R. O. Winstedt, "A Malay Legal Miscellany," (1952) *Journal of the Royal Asiatic Society, Malayan Branch*, Part I, p. 6.

would keep possession of it. Such property was known as separate property and was not thrown into the property to be divided on divorce, but if the parties had lived together for three years and had children, it would be included in the property to be divided.[1]

The Perak State Council has declared that the custom of the Malays in Perak in the matter of dividing up property after divorce when such property has been acquired by the parties, or one of them, during marriage, is to adopt the proportion of two shares to the man and one share to the woman. It has been held that the divorced wife's share may be increased to one-half depending upon the nature of the work actually done by her on the jointly acquired property.[2] In Pahang it has been declared that a woman can claim *harta sapencharian* on divorce. There is no fixed rule as to the share of the divorced wife but either equal or unequal shares may be awarded pursuant to an agreement between the parties or in confirming a gift or by judgment of the *kathi*.[3] In some of the states of Malaya, power is given to the court of the *kathi* to hear and determine actions and proceedings relating to the division or claims to *sapencharian*[4] property. In Sarawak it is provided that if both parties to the marriage have joined in acquiring the matrimonial property, for example—the farm or ricefield—then on divorce the wife is entitled to one-half of the matrimonial property. If on the other hand, the husband is the only earner, then on divorce the wife is entitled to one-third of the matrimonial property.[5]

The general rule of the Malay custom is that the whole matter of property should be settled and done with at the time of the divorce. The husband takes his half share of the *charian laki-bini* and goes back to his tribe; the wife takes her half and remains with her tribe. Claims to partition of *charian laki-bini* must therefore be made at the time of divorce.[6] The division of the property with respect to divorce can be enforced afterwards provided that it was claimed at the time of the divorce.[7] In *Jasin*

[1] *The Ninety-Nine Laws of Perak*, *op. cit.*, pp. 31 and 39.
[2] E. N. Taylor, "Malay Family Law," *op. cit.*, p. 41.
[3] E. N. Taylor, "Malay Family Law," *op. cit.*, p. 73.
[4] Selangor Administration of Muslim Law Enactment, 1952, S. 45(3); Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, S. 48(1); Trengganu Administration of Islamic Law Enactment, 1955, S. 25(1); Pahang Administration of the Law of the Religion of Islam Enactment, 1956, S. 37(3); Penang Administration of Muslim Law Enactment, 1959, S. 40(3); Malacca Administration of Muslim Law Enactment, 1959, S. 40(3); Negri Sembilan Administration of Muslim Law Enactment, 1960, S. 41(3); Perlis Administration of Muslim Law Enactment, 1963, Ss. 11 and 94.
[5] *Undang-Undang Makhamah Melayu*, Sarawak, S. 41.
[6] *Rahim* v. *Sintan*, E. N. Taylor, "Customary Law of Rembau," in 1929 *Journal of the Malayan Branch of the Royal Asiatic Society*, Part I, p. 114.
[7] *Si-Alang* v. *Samat*, E. N. Taylor, "Customary Law of Rembau," *op. cit.*, p. 115.

v. *Tiawan*[1] the respondent nine years after her divorce from the appellant brought a claim for half of his land according to the custom because the land was their *charian laki-bini*. It was held that claims to *charian laki-bini* must be brought at the time of the divorce and that therefore in the absence of agreement or misrepresentation at the time the wife could not succeed in her claim to the land after the divorce. In *Hasmah* v. *Abdul Jalil*[2] however it was held that proceedings to recover land which was *charian laki-bini* can be commenced within a reasonable period after divorce. In this case the wife was divorced on 2nd November, 1955, and commenced the proceedings on 30th August, 1956. It was assumed that the *adat* in Kuala Pilah is different from that of Rembau, which was followed in *Jasin* v. *Tiawan*. Evidence was given that on divorce the wife's relatives should decide what should happen to the property and that if the relatives refused or were not asked to do so, a *lembaga* must decide. In the absence of mutual agreement therefore the matter can be referred to the *lembaga* for arbitration or as in this case referred to the court within a reasonable period.

In Sarawak, too, provision is made for the division of the *pencharian* property at divorce. Moreover it is provided that if the married couple has debts and the *pencharian* property is insufficient to pay the debts, the divorce will not be allowed unless the husband undertakes to pay the debts. If the husband has deserted the wife and failed to maintain his wife and children for any period, he will be ordered to pay the arrears of maintenance, the amount being fixed at between $20/- to $50/- a month for the wife and between $10/- to $25/- a month for each child. If the husband is in financial difficulties and cannot pay the arrears, the amount payable will be at the discretion of the court.[3]

In Malaysia it is common at the time of the marriage to require the husband to make a condition or *ta'alik* to enable the wife to obtain a divorce if the husband should abandon her, fail to maintain her for a stated period or assault her. In some states, like Kelantan, Trengganu and Pahang the *ta'alik* is made mandatory[4]; in the other states it is encouraged. In such cases the divorce is suspended to take effect on the breach of the condition and if the husband breaks the condition, the wife can apply to the *kathi* for a divorce by *cherai ta'alik*.[5]

[1] *Jasin* v. *Tiawan* (1941) *M.L.J.* 247.
[2] *Hasmah* v. *Abdul Jalil* (1958) *M.L.J.* 10.
[3] Sarawak *Undang-Undang Makhamah Melayu*, Section 41.
[4] Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, S. 144(5); Trengganu Administration of Islamic Law Enactment, 1955, S. 102(5); Pahang Administration of the Law of the Religion of Islam Enactment, 1956, S. 124(5).
[5] Selangor Administration of Muslim Law Enactment, 1952, S. 128; Kelantan Council

The wife is also given a right to apply to the *kathi* for divorce. In such cases the husband is summoned to the court and asked whether he agrees to divorce the wife or to a divorce by redemption (*kholo'*). If the husband does not agree, the *kathi* may appoint arbitrators to deal with the matter, with power for them to pronounce a divorce on behalf of the husband or to accept a divorce by redemption (*kholo'*).[1] According to the Malay custom if a husband guiltless of offence towards his wife under religious and customary law refused her divorce, she could leave him in the clothes she wore, returning her dower or otherwise paying for the divorce. If she wanted a divorce because she could not endure her husband's behaviour but not because of any offence towards her under religious law, then she could get a divorce in accordance with custom returning half her dower and all property acquired during the marriage which went to the man, each party taking his or her own personal property.[2] According to the *Ninety-Nine Laws of Perak* however, a woman wishing to be divorced from her husband may establish a complaint at the court on three occasions, and can have a divorce but must redeem herself by returning an amount equivalent to her dowry. But if there is no fault on the part of her husband she may not have a divorce.[3] In Sarawak, a wife who insists on leaving her husband, who is not shown to be at fault, will be given a period of fifteen days in which to reconsider. If she still insists on the divorce, thereafter, she will be required to pay a fine and to return the amount of the *berian* to the husband as *tebus talak*. When the *berian* is outstanding it will be regarded as compensation for the *tebus talak*. If the wife is unable to pay the *berian* she will be asked to return to her husband. When a wife has committed adultery, she will be fined and asked to repay the *berian* as *tebus talak*. If the *berian* has not been paid in full by the husband, the balance of the *berian* will be regarded as the compensation for the *tebus talak*. If the

of Religion and Malay Custom and Kathis Courts Enactment, 1953, S. 147; Trengganu Administration of Islamic Law Enactment, 1955, S. 105; Pahang Administration of the Law of Religion of Islam Enactment, 1956, S. 128; Penang Administration of Muslim Law Enactment, 1959, S. 123; Malacca Administration of Muslim Law Enactment, 1959, S. 123; Negri Sembilan Administration of Muslim Law Enactment, 1960, S. 123; Kedah Administration of Muslim Law Enactment, 1962, S. 123; Singapore Muslims Ordinance, 1957, Ss. 32 and 34.

[1] Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, S. 146; Trengganu Administration of Islamic Law Enactment, 1955, S. 104; Pahang Administration of the Law of the Religion of Islam Enactment, 1956, S. 127.

[2] J. E. Kempe and R. O. Winstedt, "A Malay Legal Miscellany," *op. cit.*, p. 6.

[3] *The Ninety-Nine Laws of Perak*, *op. cit.*, p. 22 and 34. The ancient customary form of divorce called *beli laki* is obsolete; it was only applicable where a man contracted a polygamous marriage and both wives lived in Rembau – see E.N. Taylor, "Customary Law of Rembau" *Journal of the Malayan Branch of the Royal Asiatic Society*, 1929 (Part I) p. 19.

wife is unable to repay the *berian*, she is liable to be sent to gaol.[1]

Under the Muslim law the period of *eddah* or compulsory waiting after a divorce, generally consists of three periods of purity after menstruation but it would appear that according to the Malay custom the period of *eddah* on divorce is three months and ten days.[2]

Under the custom of the old Malay communities, fornication was the accepted road to marriage. While the Muslim law prescribed death as the punishment for *Zinah* (fornication), the old Malacca digest prescribed a fine as the penalty for fornication by the unmarried, the Pahang digest or the other hand, prescribed a hundred strokes and banishment for a year. In the Minangkabau Legal Digest from Perak it was provided that where there was circumstantial evidence of fornication between a free man and woman, the judge should order them to marry; if either the man or the woman refused to marry, he or she was to be fined. According to the *Ninety-Nine Laws of Perak* the seducer of a betrothed girl was merely fined and married off on payment of double the dower, half of which was for the jilted suitor. If the seducer could not pay the fine and the dower, he was to be beaten and banished. It was also provided that a couple guilty of illicit intercourse could marry or settle the matter between themselves. Where a man was charged with illicit intercourse the judge would make an order for the parties to get married.[3] These Malay customary rules have been enacted in the *Undang-Undang Makhamah Melayu* in Sarawak. It is provided that if a man has illicit intercourse or has committed an act which is considered as wrong (*salah*) in Malay custom with a woman whom he can marry, the parties will be asked to marry and the *berian* or *maskahwin* in such case shall not exceed $50/–. If the man refuses to marry the woman he is liable to pay a fine and to pay the *berian* of $50/– to the woman, and if the woman is pregnant he is liable to pay the expenses of her maintenance of the child until the age of two years. But if the woman refuses to marry the man cannot force her. If a man has illicit intercourse with a woman who is in her *eddah*, he is liable to a fine but the parties can marry after the completion of the *eddah*.[4]

Under the Muslim law a husband who has repudiated his wife in a revocable manner has a right to take her back as long as she is still in

[1] *Undang-Undang Makhamah Melayu*, Sarawak, S. 41 and Addenda.
[2] J. E. Kempe and R. O. Winstedt, "A Malay Legal Miscellany," *op. cit.*, p. 4.
[3] Sir Richard Winstedt, "An old Minangkabau Legal Digest from Perak," 1953, *Journal of the Malayan Branch of the Royal Asiatic Society*, Part I, p. 2 and 6; *The Ninety-Nine Laws of Perak*, *op. cit.*, pp. 5–6; 33–34; 37–38; 44–45.
[4] *Undang-Undang Makhamah Melayu*, Sarawak, Ss. 14, 15, 17, 20, 48, 50 and 57.

her period of *eddah*, provided the marriage has not in the meantime become illicit for any other reason. Malay custom however, to some extent helps to protect the woman who is forced to return to her husband against her will. According to the *Ninety-Nine Laws of Perak* the law applicable in the case of a woman who was divorced and whose husband wanted her back within three months and ten days was that if she was unwilling she might be forced to return to her husband, but the husband must give her settlements in cash. If he was forcibly rejected the woman must pay the amount of the marriage settlement.[1] In Selangor, Negri Sembilan, Penang, Malacca, Kedah and Perlis it is provided that in every case in which revocation takes place after the expiration of one month from the divorce, the *kathi* shall make inquiry from both the husband and the wife to satisfy himself that the divorce has been lawfully revoked.[2] In Kelantan and Trengganu it is provided that if after a revocable divorce the husband has pronounced a revocation of the divorce, then if (a) the wife has consented to the revocation, she may, on the application of the husband, be ordered to resume conjugal relations unless she shows good cause in accordance with Muslim law to the contrary, in which case the *kathi* appoints arbitrators to deal with the dispute; (b) if the wife has not consented to the revocation for reasons allowed by Muslim law, she must not be asked by the *kathi* to resume conjugal relations but on her application the *kathi* may require her husband to divorce her and on refusal should appoint arbitrators to deal with the dispute.[3] In Pahang it is provided that where after a revocable divorce the husband pronounces a revocation of the divorce, whether the wife has consented to the revocation or not, she may on the application of the husband be ordered by the *kathi* to resume conjugal relations unless she shows good cause in accordance with the Muslim law to the contrary, provided that the *kathi* shall impose such conditions in accordance with Muslim law as he thinks appropriate.[4]

Under the Muslim law where a woman has been divorced by three *talaks* or for the third time, she is not allowed to remarry her previous husband, unless prior to such marriage she is lawfully married to some

[1] *The Ninety-Nine Laws of Perak*, *op. cit.*, p. 48.

[2] Selangor Administration of Muslim Law Enactment, 1952, S. 127; Negri Sembilan Administration of Muslim Law Enactment, 1960, S. 122; Penang Administration of Muslim Law Enactment, 1959, S. 122; Malacca Administration of Muslim Law Enactment, 1959, S. 121; Kedah Administration of Muslim Law Enactment, 1962, S. 122; Perlis Administration of Muslim Law Enactment, 1963, S. 93.

[3] Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment, 1953, S. 151; Trengganu Administration of Islamic Law Enactment, 1955, S. 109.

[4] Pahang Administration of the Law of the Religion of Islam Enactment, 1945, S. 126.

other person and such marriage is consummated and later lawfully dissolved. The device has been adopted in such cases of employing a person to marry the woman on the promise to divorce her after consummation of the marriage, so as to enable her to remarry her former husband. Such a person is called "*muhallil*" in Arabic and the derisive "*China-buta*" (or blind Chinese) in Malay. The device has been given legislative sanction in Sarawak where it is provided that where the divorce is by three *talaks* or for the third time, the parties cannot remarry again except by the device of *China-buta*.[1]

C. Adoption

Adoption is not recognized as a mode of establishing parental rights and obligations in Muslim law but in the parts of Negri Sembilan and Malacca which follow the *adat perpateh* adoption was recognized under the *adat* as creating family relationship. Full adoption (*kadim adat dan pesaka*) gives a woman (and her children whether born before or after the adoption) all the rights of inheritance and all the responsibilities belonging to the natural daughters and grand-daughters of her adopter. A man if fully adopted becomes eligible for office in his adopting tribe. Limited adoption (*kadim adat pada lembaga*) of a girl of one's own tribe or sub-tribe gives her a right only to property expressly declared and bestowed during the life of the adopting mother. The practice of adoption by *kadim* rites is disapproved by Islam and was abolished in Rembau in 1940.[2]

The basic principles of *kadim* or adoption as practised in the various *luaks* or tribal districts were the same though there might have been some minor differences as regards details and procedure. In Johol and Inas the adopted daughters, if of non-Malay origin, were precluded from inheriting the customary estates of their adopted mothers, but the transmission of those estates was made directly to the children of the adopted daughters. According to one authority an adopted child of non-Malay parentage could not inherit her adopted mother's customary lands but might be given lands purchased from the *harta charian* of her parents. Most *adat* experts however agree with the principle and practice as carried out in Rembau whereby a fully adopted child had all the rights and liabilities of a natural child, both direct and collateral, and became entitled to inherit all property of whatever kind, to which

[1] *Undang-Undang Makhamah Melayu*, Sarawak, S. 58.

[2] E. N. Taylor, "Customary Law of Rembau," *op. cit.*, p. 39f; Inche Lokman bin Yusof, "Custom as seen in Land Inheritance," *Intisari*, (Singapore) Vol. 1, No. 4, p. 17f.

a natural child would succeed. The approval of the *wariths* and the consent of the *lembaga* were necessary before adoption or *kadim* could take place. A feast was held for which a buffalo or a goat was slaughtered. The feast was attended by the *lembaga*, the *buapaks*, the *besars* and the *warith kadims*. A *berchechah darah* ceremony would be performed, at which a member of the adopting family and the person to be adopted dipped their fingers in a bowl containing the blood of the slaughtered buffalo or goat followed by the sprinkling of the *tepong tawar* (pounded rice mixed with water). The child was then proclaimed as having been adopted into the tribe. The *kadim* or adoption ceremony was usually held when the adopted child reached the age of between 8 and 10, but some parents preferred to wait until the child was *pulang rumah tangga*, i.e. given away in marriage. The *adat* did not prescribe when the ceremony should be held. If the foster-mother died before the ceremony was performed, then the responsibility for holding the *kadim* passed on to the *wariths*. A problem might arise if the *wariths* subsequently refused to admit the adopted child into the tribe. The adopted child could not be admitted otherwise than with the full consent of the *wariths*. It would, therefore, be in the interest of all concerned that the *kadim* ceremony should be held with as little delay as possible.[1]

Adoption within the family circle or *perut* was called *tarek*, and the *adat* enjoined—

> Poultry which is tied is given food
> A person who is adopted is given property.[2]

Adoption of this kind must also be proclaimed and publicized. A family feast would be held; the *lembaga* need not be present himself, but it would be preferable for the *buapak* or the *besar* to be present in case of a possible dispute later regarding the validity of the ceremony.[3]

A person properly *di-tarek* or adopted succeeded to the customary estate of the "foster-mother"; but it was doubtful if she could also receive a share from the estate of her natural mother. E. N. Taylor stated that she was not precluded and was entitled to receive such but opinions and practice have not been unanimous. The validity or propriety of adoption was often disputed at the time of the disposal of customary estates of the foster-mothers, and it sometimes became necessary for the

[1] *Ibid.*
[2] Ayam di-tambat di-beri makan, / Orang di-tarek di-beri harta.
[3] Inche Lokman bin Yusof, "Custom as seen in Land Inheritance," *op. cit.*, p. 18–19.

Collector to hold a separate enquiry to determine the validity of the previous adoption.[1]

Kadim rites were a survival of pagan practice and would appear to be objectionable to Islam. The practice of dipping one's fingers into a bowl containing blood as a means of forging a blood relationship is most objectionable from the Islamic point of view for blood is an unclean thing. Its continued practice was deplored by certain sections of the people and from time to time there had appeared articles in the Malay press calling for its immediate cessation. In Rembau, adoption was abolished in 1940. Its abolition was sanctioned by the *kebulatan* of all the *lembagas* and the four *Orang Besar Undang*. The motive for its abolition was however not so much because of religious conviction as a desire to exclude outsiders from inheriting and enjoying the rights and privileges which would normally be conferred upon adoption. The change was dictated by economic motives rather than religious orthodoxy. The tribes no longer want their limited *tanah pusaka* to be given to others by way of admission or adoption into the tribes.[2]

Adoption is recognised by Malay custom in Sarawak and if registered in accordance with the laws of Sarawak, the effect of such adoption is that the adopted child stands in the same relation to the adopting parent or parents as would a child born in lawful wedlock, though this is not in accordance with the Muslim law.[3] In Sabah, it has been held that although under the Muslim law adopted children take nothing in intestacy, the Muslim law must be applied subject to section 7 of the North Borneo Civil Law Ordinance (No. 2 of 1938) which provided that adopted children were to be treated as children[4]; the Civil Law Ordinance has now been repealed but the provisions of the Adoption Ordinance, 1960,[5] would appear to apply to Muslims, so that in effect adopted children are placed in the same position in relation to the

[1] *Ibid.*

[2] *Ibid.* Some have questioned the wisdom or even the validity of the order prohibiting *kadim*. They argued that the practice of *kadim* was an essential and integral part of the *adat*, and to do away with *kadim* was an act *ultra vires* the *adat*. A test case was brought in 1944 during the Japanese occupation. A certain member of the Suku Biduanda Dangang tribe was admitted into the Sedia Raja Warith which is one of the two Warith Dua Charak in Rembau. As the result of this the Buapak, the Besar and the Dato' Mangkubumi – (the last named was one of the Orang Besar Undang drawing a political allowance of $200/– per month) were dismissed from their tribal posts. The *Undang* found them guilty of transgressing the *adat*; they had permitted a *kadim* ceremony to be held contrary to the *kebulatan* made in 1940 which abolished the institution of *kadim* once and for all insofar as the Luak of Rembau was concerned. The tribal officers concerned lodged an appeal againstt heir dismissal in 1946. The British Military Administration Authority however upheld the *Undang's* decision.

[3] *Sheripah Unei* v. *Mas Poeti* (1949) *Sarawak Law Reports*, p. 5.

[4] *Matusin bin Simbi* v. *Kwang* (1953) *Sarawak Law Reports*, p. 106.

[5] No. 23 of 1960.

adopting parents as would children born in lawful wedlock. Similarly in Singapore, a Muslim adopted under the provisions of the Adoption of Children Ordinance[1] is placed in the same position as a child born in lawful wedlock; and in Sarawak in an adoption registered under the Adoption Ordinance the adopted child stands in the same relation to the adopting parent or parents as would a child born in lawful wedlock with regard to the obligations and estate of the adopting parents.[2] In the states of Malaya however, it is specially provided that the Adoption Ordinance, 1952, shall not apply to any person who professes the religion of Islam either so as to permit the adoption of a child by such person or so as to permit the adoption by any person of a child who is a Muslim.[3]

D. Property and Inheritance

In its origin the law of the Malays relating to property was based on the *adat* or tribal custom and the *adat* continued to govern the ownership and devolution of property in the period before the Malay states came under British influence. The Malay rulers were Muslims but in matters of property followed the old Malay *adat*. Sir William Maxwell recorded that in the state of Perak the lands and houses of the deceased descended to his daughters equally while the sons divided the personal property. The latter were supposed to create landed estates for themselves by clearing and planting land which they may select or at all events to obtain the use of land by marrying women who may have inherited it. The early minutes of the Perak State Council note that it was customary among Malays of rank or position for a husband to appropriate a particular house to the use of his wife at the time of the marriage. She was entitled to live there during coverture and if she was divorced by the husband the house was regarded as hers and was assigned to her for her use during her life. According to the Minangkabau Legal Digest from Perak property jointly acquired by husband and wife, being rice-fields, garden and landed property in general, was divided equally between them; if the property was perishable two-thirds went to the husband and one-third to the wife, and if there was a child, one-third is taken from the father's share and given to the child. If there were two children, male and female, ancestral property was divided into three, one portion for the male and two for the female. The girl got the homestead with its trees and apparel and jewellery.

[1] Chapter 21 of the Revised Edition.
[2] Adoption Ordinance (Cap. 91), Sections 2 and 6.
[3] Adoption Ordinance, 1952 (No. 41 of 1952) Secton 31.

Livestock was divided equally between them.[1] About 1886 the Perak State Council ordered the land of a major chief, Tengku Long Jaffar, to be transmitted in the female line. Since then however, Muslim law has been more extensively adopted and the customary laws in the Malay states (other than Negri Sembilan and Malacca) have only survived in relation to the rights of widows and divorcees. Among the country people, many estates are still divided according to *adat kampong*, but this can only take place by consent. In case of disputes the courts and the collectors of land revenue have tended to apply the Muslim law. Thus the law of inheritance in the Malay states, other than Negri Sembilan and Malacca, is now the Muslim law, except for the special right of the spouses. Questions of property and inheritance are seldom litigated between a woman and her children but are often settled by agreement, and the tendency has been that in such agreements the widow receives more than her share under Muslim law. In the vast majority of Malay families, one-eighth of the estate, which is the share of the widow under Muslim law, will not provide her with subsistence. The matter was therefore regulated by Malay custom rather than by Muslim law. The fact that Muslim law allows distribution of the estate of a deceased person to be settled by consent of the heirs has enabled many arrangements which are in reality applications of the *adat kampong* to pass as distributions according to the Muslim law.[2]

An illustration of the application of the *adat kampong* or *adat temenggong* is given in the case of *Shafi* v. *Lijah*.[3] In that case the question

[1] Sir William Maxwell, "Law and Customs of the Malays with reference to tenure of land" in *Journal of the Straits Branch of the Royal Asiatic Society*, No. 13 (1884), pp. 75–220; R. J. Wilkinson, *Malay Law*, *op. cit.*, p. 36–37. Sir Richard Winstedt, "An old Minangkabau Legal Digest, from Perak," *op. cit.*, p. 2 and 12.

[2] E. N. Taylor, "Malay Family Law," *op. cit.*, p. 7f.

[3] *Malayan Law Journal* 1948–49, Supplement p. 49. Callow J. in this case said:

I am satisfied that in the absence of strong evidence to the contrary, which was not forthcoming, the lack of endorsement on the titles of customary land precludes the *adat perpateh*. It is always open to a land owner to request the endorsement of title as customary, and it could be inferred from the omission in this case that the late Abdul Majid did not desire the land to be subject to the *adat perpateh*, although I do not believe inheritance or succession in accordance with the law of the *Shafii* sect of the *Sunni* school of Islam was ever contemplated. But although the more defined tenets of the *adat perpateh* may not in this case be adhered to, there remains the still older and perhaps more fundamental *adat temenggong*, which one might perhaps almost term the common law behind the more statutorised *adat perpateh*, though whereas in England statutory law evolved from the common law, in this country one might almost conclude the reverse – that the *temenggong* is from the law or codes of by-gone generations. I suggest this notwithstanding Wilkinson's observations at page 40 of his work "The true *adat temenggong* of Malaya was an unwritten law"; it was and is unwritten, deriving its origin from the lawgivers of ancient times. Another simile is that *adat temenggong* was as the royal prerogative, and exercised in suitable cases where strict adherence to the *adat perpateh* would cause hardship. The holder of the Ministerial Office of *temenggong* exercised on behalf

for decision was whether the inheritance of certain real property should be in accordance with the *adat* or the Muslim law. The land was acquired during wedlock but the titles of the land were not endorsed "Customary Land." It was held that the lack of endorsement on the titles of customary land precluded, in the absence of strong evidence to the contrary, the *adat perpateh*. It was held further on the evidence that it was clear that the deceased intended some form of local customary law to apply and that therefore the *adat temenggong* should be applied in this case and the estate distributed equitably between the claimants.

Where the Muslim rules of inheritance on intestacy are applied they are subject to the following modifications:

(a) on the death of a peasant his widow is entitled to a special share in is estate as her share in *harta sapencharian* unless provision has been made for her *inter vivos* by registering land in her name. If the deceased has no children and the estate is small, she may take the whole estate; in other cases she takes a half or less according to circumstances;

(b) the residue of the estate is distributed according to Muslim law but inasmuch as the widow's special share is discretionary, her one-eighth share or one-quarter share can and should be taken into consideration in assessing the special share.[1] In Sarawak where both the spouses work together on the land the *pencharian* property is divided equally between them (and this is the custom followed under Melanau custom). Where the husband is the sole wage-earner the *pencharian* property is divided into three parts, the husband taking two parts and the wife one part.[2]

of the ruler the prerogative which could not be challenged, it was an autocratic decree and should in proper circumstances the *adat perpateh* conflict or differ from the code of conscience the *adat temenggong* could be invoked and so over-rule the former. It seems to me clear, and I accept the evidence of Lijah accordingly, that the deceased Abdul Majid acquired this property for the benefit of his widow and adopted daughters. He did not contemplate the administration of his estate in accordance with the inheritance scales contained in the *Shafii* school of Muhammedan law. He intended some form of local customary law to apply, although he was probably quite vague as to detail or principle. Therefore, although the *adat temenggong* is depreciated by Wilkinson (at page 45), and although Taylor regards it as essentially the same as the *adat perpateh* (*Royal Asiatic Society Journal* May 1937, page 3) I distinguish the two *adats* and rule that the *adat temenggong* should apply. This means that the estate should be distributed equitably between the claimants, such division being decided by the circumstances of the particular case before the court. It is not a division necessarily to be followed in every such case.

[1] E. N. Taylor, "Inheritance in Negri Sembilan," in 1948 *Journal of the Malayan Branch of the Royal Asiatic Society*, Part 2, p. 47f.

[2] Sarawak *Undang-Undang Makhamah Melayu*, s. 41; *Serijie* v. *Hanipah* (1953), Sarawak Law Reports, p. 40.

In the parts of Negri Sembilan and Malacca which follow the *adat perpateh* the fundamental principle that is followed is that property is tribal rather than personal. The social unit is not the family but the tribe and therefore all rules affecting persons tend to maintain the integrity of the tribe and all rules affecting property are designed to conserve the property in and for the tribe. The tribe is the unit and it is matriarchal and exogamous. The main object of the *adat* is to provide for the continuance of the tribe through its female members and to prevent alienation of property so that it may always be sufficient to provide maintenance for the woman through whom alone the tribe can be continued. The cardinal principles of distribution are fourfold:

(a) all property vests in the tribe, not in the individual;
(b) acquired property, once inherited, becomes ancestral;
(c) all ancestral property vests in the female members of the tribe; and
(d) all ancestral property is strictly entailed on tail female.

From the basic principle that property is tribal rather than personal and that the man passes into his wife's tribe upon marriage, it follows that all property owned by a married pair is joint property and that it belongs to the tribe of the wife so long as the marriage subsists.[1]

The *adat* lays down certain fundamental rules regarding the distribution of movable and immovable property in the event of death or divorce. Ancestral property devolves upon the daughters of the deceased in equal shares, the share of the deceased daughter, if she predeceases her mother, devolves on her female descendants. In the absence of direct female descendants, ancestral property devolves on the female descendants of the nearest common ancestress in equal shares, *per stirpes*, but subject to the rights, if any, of the sons and brothers of the deceased to statutory life-occupancy. The various degrees of *kadimship* or relationship among the heirs in the family are termed *sanak ibu* if the mothers were sisters, or *sanak dato'* if the grandmothers were sisters, or *sanak moyang* if the great-grandmothers were sisters. These *kadims* or *wariths* became the indirect heirs to a deceased's customary estate in the event of failure of direct heirs, subject to the rule that the nearer in degree excludes the more distant. In default of both direct and indirect heirs the land will be auctioned, and it will be a condition of the sale that members of the same tribes should have priority to bid at the auction before it is thrown open to members of other tribes. The

[1] E. N. Taylor, "Customary Law of Rembau," *op. cit.*, p. 8f.

proceeds of the sale will go to the deceased's son or sons or her maternal brothers or uncles as the case may be.[1]

Life-occupancy is granted to the deceased's male issues or to her maternal brothers in default of direct customary heirs; the rights of the sons prevail over those of their maternal uncles. Life-occupancy permits the occupants to enjoy the produce of the land during their lifetime. Generally the life-occupants are seldom found living on the land or cultivating the *sawah* land or rice-field. Nonetheless the bestowal of life-occupancy is normally insisted upon to serve as an assurance and a safeguard against failure on the part of the female *wariths* to maintain or cherish a destitute or a divorced relative.[2]

The fundamental principle of division of property among the members of the tribes are:

> Husband's property is returned
> Wife's property remains
> Joint earnings are shared
> On death of husband, they go to wife
> On death of wife, they go to husband.[3]

That is to say, what is brought by the man to the woman's house at the time of marriage goes back with him on divorce, or to his *wariths* on his death; that which is found in the possession of the wife at the time of the marriage remains with her on divorce or it goes to her customary heirs on her death; that which is acquired during the period of wedlock is to be equally divided between them on divorce and on the death of the husband it goes to the wife, and vice-versa, provided there are no children from the marriage.[4]

Harta charian bujang or property acquired by a man while he is still single devolves on the nearest female relatives of the deceased. Property given to a son by his parents ranks as *charian bujang*, and become *harta pembawa* on his marriage and this reverts to his *wariths* on his death. Similarly a gift to a married man by his family also ranks as *pembawa* and not a *charian* of the marriage. Both *harta pembawa* and *harta dapatan* must be declared before the elders at the time of the marriage, and in the event of death, claims for the return of *harta pembawa* must be made on the 100th day funeral feast.[5]

[1] Inche Lokman bin Yusof, "Custom as seen in Land Inheritance," *op. cit.*, p. 17.
[2] *Ibid.*
[3] Pembawa, Kembali; / Dapatan, Tinggal; / Charian, bagi; / Mati laki, tinggal ka-bini; / Mati bine, tinggal ka-laki.
[4] Inche Lokman bin Yusof, "Custom as seen in Land Inheritance," *op. cit.*, p. 17.
[5] *Ibid.*

Difficulties often arise with regard to the separate estates of the spouses, that is the *harta pembawa* of the husband and the *harta depatan* of the wife. These are inherited by the nearest *wariths* or *kadims* of the respective spouse in his or her tribe. Complications may occur if the deceased has been married twice or more and acquired some property during one marriage and some during another. Property acquired in the first marriage may be *harta pembawa* or *harta dapatan* of the second marriage. If *harta pembawa* increases in value during marriage, the increase or *untong* ranks as *charian laki-bini*. Similarly, if *harta dapatan*, say a buffalo, has a natural increase during the married period, the increase also ranks as *charian laki-bini*. Many complicated and vexing problems will arise regarding devolution and distribution of property following death or divorce, but however difficult or insoluble the problems may appear the basic principles for dealing with them remain unchanged, namely, *Pembawa*, *Kembali*; *Charian*, *bagi*; *Dapatan*, *Tinggal*.[1]

The basic principle of the custom is that all the ancestral property of the family is to be divided equally *per stirpes*. The property is therefore distributed equally to direct female descendants *per stirpes*, but due regard is made for any partial distribution which may already have been made. The rule applies only to the proper share of the proprietor, so that if the deceased was registered as the holder of all land derived from her mother and left one sister, the sister would be entitled to half, and the daughters of the deceased the other half in equal shares. Acquired property is divided into two classes according to its origin—*charian bujang* which plainly belongs to one tribe and that acquired by the joint efforts of a married pair, *charian laki-bini*, in which the tribes are interested. *Harta pembawa* means the personal estate of a married man, the property brought by him to his wife into which he passes on marriage; it may include property of three kinds, viz., his own earnings as a bachelor (*charian bujang*), his share of the earnings of any former marriage, and any ancestral property of his own family in which he has an interest. *Harta dapatan* means the separate estate of a married woman and also includes three kinds of property, viz., her own acquisitions as a spinster, divorcee or widow (*charian bujang* or *janda*), her share of the earnings of a former marriage and her ancestral property. *Charian bujang* thus becomes *harta pembawa* or *dapatan* of a subsequent marriage.[2]

The rules for the distribution on death of acquired property are as follows:

[1] *Ibid.* See also p. 134 note 3.
[2] E. N. Taylor, "Customary Law of Rembau," *op. cit.*, p. 14f.

(1) The *harta dapatan* or *pembawa* reverts on death to the *waris* of the deceased, that is the nearest female relative in the tribe of the deceased, (in the case of a man his sister, in the case of a woman her daughter).
(2) The *charian laki-bini* is apportioned
    (a) on the death of either spouse without issue of the marriage the whole remains to the survivor;
    (b) on the death of the husband leaving issue—the whole remains with the widow and issue;
    (c) on the death of the wife leaving issue, it is divided between the widower and the issue, but not necessarily equally; the principle of the division, by agreement or otherwise, is to make provision for the issue.[1]

In the non-tribal parts of Negri Sembilan (Seremban and Port Dickson) the tribal organization had ceased to be effective by 1874, and it would appear that the practice adopted was the *adat temenggong*. In general the distribution follows a family settlement or *pakat* but where there is dispute the distribution tends to follow the rules laid down by the *adat temenggong* (which is not as definite as, but tends to follow, the *adat perpateh*), though there also appears to be a tendency to follow the rules of Muslim law.[2]

The basic principle of *adat perpateh* relating to the tenure of *harta pesaka* is that property vests in the female members of the tribe, in tail female. The individual holder of the property at any time holds it on behalf of the tribe; the right is transmissible but not alienable. Under strict customary law a male cannot acquire any proprietary interest in *harta pesaka* except the interest of beneficial life occupancy in the event of failure of direct customary heirs, but the reversionary interests remain in the nearest female relatives.

The introduction of the Torrens system of land registration introduced a revolutionary change in the concept and practice of customary land tenure. The occupant of tribal land has now become the registered proprietor of land held under entries in the *Mukim* registers; the area is surveyed by the Survey Department; she possesses a document of title; dealings have to be executed in statutory forms, duly attested, and the instruments have to be presented and registered under the provisions of the Land Code. She is responsible for the payment of the quit rent and for the observances of the conditions in the title either ex-

[1] *Ibid.*
[2] E. N. Taylor, "Inheritance in Negri Sembilan," *op. cit.*, p. 80.

pressed or implied. The result is that registered proprietors are asserting their individual rights of possession to the exclusion of other members of the tribe. This is a departure from the old concept that the land is the property of the tribal community, and that the right of the individual extends only to its use. There is no doubt that land registration gives the registered proprietor a greater sense of security regarding land tenure and a greater incentive to practice good husbandry; but at the same time it tends to weaken the very basis on which the *adat* rests, and may in the end lead to the disintegration of the *adat*.[1]

Until the passing of the Customary Tenure Enactment, 1909, there was no restriction in law to stop dealings in tribal or ancestral lands, although strictly under the *adat* dealings outside the tribe were forbidden. The Customary Tenure Enactment, 1909, was enacted with the express object of preventing dealings in tribal lands with those outside the tribes. The Enactment empowered the Collector to inscribe the words "Customary Land" on titles held subject to the custom. Unfortunately, this provision of the law has not been systematically complied with and there are still many titles in the *mukim* registers which are undoubtedly ancestral lands but which have not been inscribed. All titles which are derived from the old Malay Grants are *prima facie* ancestral lands, but if the titles are not endorsed "Customary Land" under the provisions of the Customary Land Tenure Enactment, there would appear to be nothing to stop the registered proprietors from disposing of the lands under the provisions of the Land Code even though this practice is contrary to the *adat*.[2]

The Customary Tenure Enactment, 1909, was repealed and replaced by the Customary Tenure Enactment, 1926. The object of the latter Enactment was to consolidate and amend the law relating to customary tenure. "Customary Land" is defined to mean land held by an entry in the *Mukim* register which has been endorsed under the provisions of that Enactment or under those of the previous Enactment. In spite of this definition, the expression "Customary Land" is ambiguous, and this ambiguity gave rise to misunderstanding and confusion of interpretation and decision. Where the titles are endorsed, no difficulty arises on the question as to whether or not the land is held subject to the custom. The endorsement on the title is in itself conclusive evidence that the land is held subject to the custom, and all dealings and transmission connected with the land are dealt with under the Customary

[1] Inche Lokman bin Yusof, "Custom as seen in Land Inheritance," *op. cit.*, p. 14.
[2] *Ibid.*

Tenure Enactment. Where the titles are not so endorsed, the procedure regarding the distribution of a deceased's estate was governed by section 184(iii) of the Probate and Administration Enactment, now repealed and replaced by section 12(7) of the Small Estates (Distribution) Ordinance, 1955,[1] which requires the Collector to ascertain, in such manner as may be most appropriate, the law applicable to the devolution of the estate of the deceased, and to decide who in accordance with such law are the heirs and beneficiaries and the proportions of their respective shares and interests.[2]

In trying to find out the law or the custom having the force of law applicable to the deceased, the Collectors are often confronted with two vexing problems; firstly, how are they to find out whether or not a particular piece of land is held subject to the custom; and secondly whether the custom (*adat perpateh*) is the law applicable to the deceased. It is difficult to get two *lembagas* or *buapaks* or *besars* (who are supposed to be experts on *adat*) to be unanimous on their interpretation on any point raised concerning the *adat*; nor are members of the tribes unanimous in their preference as to whether any particular estate should be distributed according to *adat* or the Muslim law of inheritance. Their choice would naturally depend on the form of distribution which would benefit them.[3]

In the case of *Re Kulop Kidal*,[4] Acton J. enunciated the principle that the *adat* follows a person like his own shadow. He held that a will made by a person subject to the *adat Rembau* is inoperative as the custom governs the devolution of estates subject to the *adat* to the exclusion of wills. This principle was followed in *Re Haji Pais*[5] in which Burton J. held that the *adat* is a personal custom and affects the land by virtue of its ownership by persons subject to custom. Burton J. in that case said, "If then the custom is personal and attaches to the person, it follows that there is no place for inheritance according to Mohammedan law. It is not possible with a personal custom that certain property descend according to the custom and some according to the Mohammedan Law."

As a result of the decision in *Re Haji Pais*, the Customary Tenure Enactment, 1926, was amended in 1930, to provide as follows:

4.(i) In the case of any land particulars of which have been or may hereafter be

[1] No. 34 of 1955.
[2] Inche Lokman bin Yusof, "Custom as seen in Land Inheritance," *op. cit.*, p. 14.
[3] *Idem.*
[4] E. N. Taylor, "Customary Law of Rembau," *op. cit.*, p. 92.
[5] E. N. Taylor, "Inheritance in Negri Sembilan," *op. cit.*, p. 61.

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, 1926, 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.

It was also provided that nothing in the Enactment shall affect the distribution of the estate, not being customary estate, of any deceased person.

The effect of this Enactment was for a time misunderstood. In *Kutai* v. *Taensah*,[1] Mudie J. held the view that under the Customary Tenure Enactment, 1926, as amended in 1930, land in the customary districts must be either customary or non-customary, and that the only land which can descend according to the custom is "Customary Land," namely, that which is endorsed. If it is not endorsed, then its devolution has to be according to the Mohammedan law. This decision was followed by Pedlow J. in *Re Imah deceased*[2] and by Raja Musa J. in *Re Teriah deceased*.[3]

The position was so confusing that in the case of *Re Haji Mansor bin Duseh*[4] the Collector referred a case for the opinion of a High Court Judge and for a ruling as to what were the rules of distribution of an estate, other than ancestral land, or lands which have their titles endorsed, or deceased proprietors in the customary districts. In a lengthy judgment, Cussen J. ruled that the Customary Tenure Enactment, 1926, is not exhaustive of the *adat*. If a title has been inscribed "Customary Land" the *adat* governs succession but the converse is not true. The absence of the words "Customary Land" does not prove that the land is not occupied subject to the custom. The only conclusive proof that the land is not so occupied is a recorded finding by the Collector to that

[1] (1933–34) *F.M.S. Law Report* p. 304; E. N. Taylor, "Inheritance in Negri Sembilan," *op. cit.*, p. 83.
[2] E. N. Taylor, "Inheritance in Negri Sembilan," *op. cit.*, p. 86.
[3] *Ibid.*, p. 90.
[4] (1940) *M.L.J.* 110.

effect under section 4 of the Customary Tenure Enactment. As regards land occupied subject to the custom in respect of which the titles are not so inscribed, the customary law of succession applied. In coming to this decision, the learned Judge endorsed the earlier judgment by Burton J. in *Re Haji Pais*, and he dissented from the judgment of Mudie J. in *Kutai* v. *Taensah*.

The decision of Cussen J. in *Re Haji Mansor bin Dusch* was followed by Horne J. in *Sali* v. *Achik*[1] and *Haji Hussin* v. *Maheran*.[2] In the earlier case he held that the absence of the words "customary land" (which means ancestral land) does not prevent devolution according to the *adat*. The Collector has to consider what rules are applicable for the distribution of the estate of the deceased person, and these are stated in the Distribution Enactment to be the rules of Mohammedan law as varied by local custom. In the latter case he considered the effect of section 4 of the Customary Tenure Enactment and said: "A decision under section 4 that the land is not 'occupied subject to custom' means that the land is not at the time the decision is given 'ancestral property.'" Such a decision is therefore "conclusive proof" that the land is "acquired property." It is open to the Collector in proceedings under the Probate and Administration Enactment to transmit the acquired property of the deceased in accordance with the personal law of the deceased. The law is the Mohammedan law as varied by local custom. Under the Probate and Administration Enactment the Collector is concerned with the law applicable to a person. Under the Customary Tenure Enactment, section 4, he is concerned with the character of a certain kind of property, viz. land. But under the custom it must be remembered that there is no difference between land and other property. All is property and is either acquired property, *harta charian*, or ancestral property, *harta pesaka*. There is therefore no conflict between the decision under section 4 and the decision under section 129 of the Probate and Administration Enactment. These decisions were followed in *Anyam* v. *Intan*[3] in which Taylor J. held that under the Probate and Administration Enactment, the Collector has to distribute the estate of the deceased according to the law or custom having the force of law applicable to the deceased. Where a deceased was a member of a tribe, that law is almost always the *adat*. The absence of the words "Customary Land" in the land register does not by itself prove that the land

[1] (1941) *M.L.J.* 14.
[2] (1946) *M.L.J.* 116.
[3] (1949) *M.L.J.* 72.

was not occupied "subject to custom" or that it was not ancestral. Where the *adat* is relied on it is necessary to prove it.

In a recent case dealing with *harta pembawa*, *Tano* v. *Ujang*,[1] Callow J. in his judgment said:

> It seems right to require proof of *adat* before the Shariah can be set aside. Indeed, it is strange to me to find a desire to set aside the Shariah which is the law of God to every Muslim; and in this case it appears a perverted custom to deprive a widow and the children of the father's property.

The claim was dismissed in that case as there was no proof that the land in question had been declared to be *harta pembawa* before or at the time of the marriage and that a claim had been lodged before or at the hundredth day ceremony of the deceased.

In *Derai* v. *Ipah*,[2] where the land had been alienated to a male, it was held that it had not been proven that the land was "Customary Land." Pretheroe J. said "If the land is not customary land it will devolve according to the rules of Mohammedan law as [the] deceased was a Moslem." He therefore directed that the land should devolve to the widow and the two daughters in accordance with the rules of Mohammedan law. This case seems to go against the authority of the cases of *Re Haji Mansor bin Duseh* (*supra*), *Sali* v. *Achik* (*supra*) and *Haji Hussin* v. *Maheran* (*supra*).

In *Minah* v. *Haji Sail and two others*[3] the appellant, *Minah*, appealed against the Collector's decision in ordering the distribution of her deceased husband's estate according to *Hukom Shara*. The appellant claimed that the land was *harta charian laki-bini* and this fact was not disputed, but the Collector held that the land was not held subject to the custom because the title was not endorsed "Customary Land." He further held that, since the deceased was a Muslim, his estate must devolve according to Muslim law of inheritance. On appeal it was held that the *adat* must prevail over Muslim law, and the appeal was allowed. Bellamy J. said "The words 'Customary Land' which have been said 'merely to operate as a caveat to protect the rights of the tribe to their control of entailed land' do not in any way affect the classification of the land under the *adat* or its devolution." After referring to the cases of *Romit* v. *Hassan* and *Re Kulop Kidal* (*supra*) he continued, "The land in question having been acquired by the deceased during his marriage to the appellant was clearly *charian laki-bini* and

[1] Seremban Civil Appeal No. 5 of 1948.
[2] Seremban Civil Appeal No. 6 of 1949.
[3] N.S. Civil Appeal No. 4 of 1953.

should have devolved to the widow, the appellant. The *adat* must prevail over the Muslim law."

In *Teriah* v. *Baiyah and three others*[1] the appellant, Teriah, claimed transmission of her deceased son's land to her on the ground that it was *harta pembawa*. The Collector held that the land was not held subject to the custom because the title was not endorsed, and accordingly granted Letters of Administration to the deceased's widow, Baiyah. Teriah appealed against the Collector's decision, but the appeal was dismissed by Abbott J.

In the case of *Maani* v. *Mohamed*,[2] Ismail Khan J. said "In the case of non-customary lands the legal position is in my view correctly set out by Cussen J. in *Re Haji Mansor bin Duseh* and followed by Horne J. in *Sali binte Haji Salleh* v. *Achik*. The general effect of these two judgments is that the distribution of such lands is governed by the personal law of the deceased, and if it is proved in a particular case or if it is generally accepted in the district that the Muslim law of descent is varied by local custom (*adat*) effect should be given to such custom (*adat*) as the personal law of the deceased. In the case of *Sali binte Haji Salleh* v. *Achik*, it was held that the fact that the title of the land is not endorsed "Customary Land" does not preclude the Collector from considering the personal law of the deceased which may be the Muslim law varied by local custom (*adat*). In a latter case *Haji Hussin* v. *Maheran* it was held that notwithstanding a finding by the Collector under section 4 of the Customary Tenure Enactment that the land was not customary, it was still open to him to distribute the land in accordance with the custom (*adat*)."

Under the Muslim law a person cannot validly dispose of more than one-third of his property by will. The rule of the *adat* is stricter than that of the Muslim law, a person cannot under the custom dispose of his property by will at all (*Re Kulop Kidal deceased*)[3]; and an agreement made during life to vary the succession is void (*Romit* v. *Hussan*).[4]

E. Death

There are no special rites regarding funerals in Islam but the Muslims are enjoined to bury and participate in the funeral upon knowing of the death. Islam does not require heavy expenditure on funerals nor does it encourage the holding of *tahlils* or feasts in commemoration of

[1] N.S. Civil Appeal No. 9 of 1954.
[2] (1961) *M.L.J.* 88.
[3] E. N. Taylor, "Customary Law of Rembau," *op. cit.*, p. 92.
[4] *Ibid.* p. 63.

the dead. During the days of the Prophet it often happened that some relatives of the dead or others who were well off paid *sadaka* or charity by giving money or coming to the aid of the family, as for example by cooking for them as they were busy in their misfortune. In Malay custom however, funeral expenses are a matter of great importance. They include not only the actual burial charges but also the expenses of the last illness and the cost of the customary feasts which are held on the third, seventh, fourteenth, fortieth and hundredth day, and are called respectively, *meniga hari*, *manujoh hari*, *dua kali menujoh*, *ampat puloh hari* and *saratus hari*. Some of these may be omitted; the most important one is the last, especially in the case of a married person because on that day the two families meet together with their respective tribal authorities (not always the *lembagas*) to settle the questions of property which necessarily arise on the disruption of the link between the two tribes.

Funeral expenses are chargeable:

(a) in the case of a child or unmarried girl—on the joint property of the parents;

(b) in the case of an unmarried man—on his personal acquired property or, if he had none, on his mother's or sister's ancestral property;

(c) in the case of a married person of either sex—on the joint property of the marriage, primarily on movable property, and failing that, on land;

(d) in the case of divorced or widowed persons—on the shares of property acquired before, or during, or after, marriage and failing that, on the ancestral property of the mother's family.[1]

It is a rule that where any individual leaves acquired property the funeral expenses must, if practicable, be limited to that amount, (*Re Badoh deceased*)[2]; only in the last resort may recourse be had to the ancestral property. An aged woman, however, may distribute her property among her daughters or nieces, reserving only a portion by way of *kepan* or funeral expenses; in such a case her funeral expenses are chargeable on the property so allocated and the relative who pays them is entitled to the *kepan* in addition to her ordinary share.[3]

The funeral expenses are by the custom an actual encumbrance on the appropriate property[4] If it appears that the wrong party has paid

[1] E. N. Taylor, "Customary Law of Rembau," *op. cit.*, p. 10–11.
[2] *Ibid.*, p. 150.
[3] *Re Miut deceased*, *Ibid*, p. 219.
[4] *Re Dahil deceased*, *Ibid*, 113; *Re Sitam deceased*, *Ibid*, p. 222.

them (as he often does where there is a dispute in the family) an order for transmission may be made conditional on the repayment of those expenses[1] and the Collector has power to order a portion of the estate to be auctioned if necessary.

IV. Conclusion

The integration of the *adat* and Islam in Malayan law is an established fact and although there are points of conflict between them, these have normally been glossed over by alleging that both systems are in fact directed to the same end:

> Our customary law bids us
> Remove what is evil
> And give prominence to what is good;
> The word of our religious law
> Bids us do good
> And forbids our doing evil.[2]

The one system depends upon and supplements the other:

> The custom is based on the religious law.
> Religious law is based on the Quran.[3]

Conflicts between them should be avoided and one system should not infringe on the other:

> Custom infringing on Muslim law excludes the latter.
> Muslim law infringing on Custom excludes the latter.[4]

Custom has historically played an important part in the development of Muslim law. Recent research has shown that the details of the Muslim law were developed during the Umayyad Caliphate in the second century of the Hegira (670–720 A.D.) on the basis of the Umayyad administrative practices and regulations and the ideas and custom of the peoples including those of the conquered territories. Muslim law grew out of customary and administrative practices which were impregnated with religious and ethical ideas based on the teachings of the Holy *Quran* and the Prophet.[5] The Muslim legal system recognizes the

[1] *Niah* v. *Alias*, *Ibid*, p. 81.

[2] Pada adat, / Menghilangkan yang burok / Menibulkan yang baik / Kata Shara / Menyurohkan berbuat baik / Menegahkan berbuat jahat.

[3] Adat bersendikan hukom / Hukom bersendiran Kitabullah.

[4] Adat ka-hukom mati hukom / Hukom ka-adat mati adat.

[5] J. Schacht, *Origins of Muhammadan Jurisprudence*, (Oxford 1959); J. Schacht, "Pre-Islamic Background and Early Development of Jurisprudence and the Schools of Law and Later Development of Jurisprudence," *Law in the Middle East*, (Washington, 1955); Fazlur Rahman, *Islamic Studies*, (Karachi, 1962 and 1963).

force and validity of custom in establishing rules of law. The validity of such laws rests on principles somewhat similar to those of *ijma* or consensus, which is one of the accepted sources of Muslim law. The customs and practices which prevailed in Arabia in the time of the Prophet are accepted where they have not been abrogated by the Holy *Quran* or the practice of the Prophet. As to customs which have appeared since that time, their validity is justified on the authority of the tradition, which lays down that whatever the people generally consider to be good for themselves is good in the eyes of God. Custom has come to be an important source of law in some Muslim countries, especially in Morocco, where the principle of *amal* or judicial practice has been developed by the jurists. In Malaysia too, the *adat* has played an important part in the development of Muslim law and there would appear to be no reason why it should not continue to do so, especially in those spheres where it helps to maintain the status and position of women in society. A synthesis between the *adat* and Muslim law is possible if on the one hand the principles of the Muslim law as contained in the *Quran* and the *Sunnah* are subjected as they were in the early days of Islam to the free activity of interpretation through *ijtihad* – *ijma*[1] to meet the ever-changing social and economic conditions, and if on the other hand the *adat* itself is subject to modification to meet the needs of such social and economic conditions:

> If chipped, you mend,
> If broken, you rivet
> If bushy, you prune
> If old, you renew.[2]

[1] The Muslim law developed through the deductive reasoning (*ijtihad*) of individual jurists which was later accepted by the other jurists and the Muslims generally (*ijma*).

[2] Sumbing-sumbing di-titek, / Patah-patah di kimpal / Rimbun-rimbun di-tutoh / Burok-burok di baharui.