

FAMILY LAW AND CUSTOMARY LAW IN ASIA: A CONTEMPORARY LEGAL PERSPECTIVE

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II. THE NATURE OF MALAY CUSTOMARY LAW

Introduction

Malay customary law is called *adat*, a word borrowed from the Arabic. *Adat*, in general, means right conduct; and in common usage, it stands for a variety of things all connected with proper social behaviour.¹ Thus it will connote rules of etiquette and the ceremonies prescribed for a particular occasion, such as marriage, as well as those customs which have "legal consequences."² It is in this last sense that the word is generally used in this paper.

It has been said:

A social norm is a customary mode of behaviour—it is what people in a given society are expected by their fellow members to do, not only because such behaviour is usual but also because it is deemed good. The man who upholds the norms will be rewarded by his fellows—with approbation, honours and the like; these are positive sanctions. The man who does not uphold the norms will be punished by negative sanctions. These may take many different forms ranging from minor social sanctions, such as ridicule and refusal to interact with him, to the most extreme—that of ostracism by the community. Economic sanctions such as refusal to cooperate in economic activity and political sanctions such as the depriving of an elected person of one's support and vote may be applied. Legal sanctions are those in which force may be used by a recognized authority.³

Attempts have been made to redefine law so that the definition may cover customs which have legal consequences. "A social norm," writes Hoebel, "is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognized privilege of so acting."⁴ S. Roy would define law as "a body of rules of human conduct, either prescribed by long established usages and customs or laid down by a paramount political power."⁵ Sir Arthur Goodhart defined it as "any rule of human conduct which is recognized as being obligatory."⁶ Dr. T. O. Elias attempted to improve upon the definition by suggesting that "the law

¹ Dictionaries give the following meanings, among others, for *adat*: custom, customary law, customary behaviour, proper behaviour, courtesy.

² C. Snouck Hurgronje, *De Atjeher* (The Achinese) Vol. I, p. 357. To connote the *adat* that has legal consequences, he used the Dutch expression "adatrecht" i.e. "adat law."

³ P. C. Lloyd, *Yoruba Land Law*, 1962, p. 14.

⁴ E. A. Hoebel, *The Law of Primitive Man*, p. 28.

⁵ S. Roy, *Customs and Customary Law in British India*, p. 4.

⁶ Quoted in T. O. Elias, *The Nature of African Customary Law*, p. 53.

of a given community is the body of rules which are recognized as obligatory by its members.”¹

Writing of Sumatra more than 150 years ago, William Marsden stated:

There is no word in the language of the island which properly and strictly signifies law; nor is there any person or class of persons among the *Rejangs* regularly invested with legislative power. They are governed in their various disputes by a set of long-established customs (*adat*) handed down to them from their ancestors, the authority of which is founded on usage and general consent. The Chiefs, in pronouncing their decisions, are not heard to say, “so the law directs,” but “such is the custom.”²

It may be that *adat* will weld the society as sweetly and well by any other name, such as *sadachara*³ or “native law and custom.”⁴

Adat Melayu (Malay Custom)

The Malay community may be classified into two different groups: one following *adat temenggong* and the other, *adat perpateh*. *Adat perpateh* is adhered to by the Malays inhabiting Negeri Sembilan and certain parts of Malacca, especially Naning. Malays in other parts of Malaysia are supposed to follow *adat temenggong*. Though both the *adat* originated from tribal organizations in the past, it is in *adat perpateh* that the remnants of tribal structure are clearly evident at present. To cite one instance, marriage between two persons belonging to the same clan is regarded as incestuous and is strictly prohibited. Another characteristic of *adat perpateh* is that it adheres to matriliney while *adat temenggong* favours patriliney.

The two *adat* are believed to have been called after two legendary law-givers, Parapatih nan Sa-batang and Kei Tamanggungan. According to the *terombo* (song of origin) familiar to the present day followers of *adat perpateh*, these law-givers held sway over different parts of Minangkabau in Sumatra, Parapatih ruling over the hilly inland region and Tamanggungan governing the coastal region. According to legend, they were half-brothers. Why Parapatih insisted upon matriliney and exogamy for his followers, while his half-brother was inclined to patrilineal descent and endogamy is not known. A legend narrated by Willinck⁵ may explain the prevalence of exogamy in *adat perpateh* society, but it does not indicate why it is not followed in *adat temenggong*.

¹ *Id.*, p. 55.

² William Marsden, *The History of Sumatra*, 3rd Edition, 1811, p. 217.

³ A Sanskrit word used by text writers to mean approved usage.

⁴ A term used by British colonial administrators. No distinction was made between law and custom, and as P. C. Lloyd (*op. cit.*, p. 15) remarks, “it was perhaps not intended to be made.”

⁵ G. D. Willinck, *Het rechtsleven bij de Minangkabausche Maleiers*, p. 121.

society. According to the legend, Parapatih, when young, went on a long journey. On his return he married Putri Zamilau, without knowing that she was his half-sister. Later when it was discovered that they were blood relations, Parapatih and Tamanggungan, horrified by the incestuous connection, decided to divide the Minangkabaus into two groups, Koto-Piliang and Bodi-Chaniago, and ruled that no one should marry within his own group.

In general, it is the *adat perpateh* group which seems to follow its *adat* strictly, and therefore it is not unlikely that when the *adat temenggong* group gradually gave up exogamy, the other group adhered to it. The adherence to matriliney seen in the *adat perpateh* society may also be due to its general tendency to adhere strictly to the *adat*. Assuming that matriliney was indigenous to Minangkabau, it is not improbable that the system gained strength from the South Indian settlers who followed a similar rule of descent. But the possibility of its having been introduced into Minangkabau¹ by South Indians cannot be absolutely ruled out. It could be that the South Indians in Minangkabau were those who followed matriliney in their own native land and they either introduced the system into the country of their adoption or incorporated it with the indigenous system.

As it is the *adat perpateh* society that follows its *adat* scrupulously, when one speaks of Malay *adat*, one is more inclined to think of *adat perpateh* than of *adat temenggong*. Wilkinson wrote in 1908: "The difference between the *adat perpateh* and the *adat temenggong* is visible in these days of British administration. Whenever a miscarriage of justice occurs in Perak, Pahang and Selangor, the Malays take it very calmly; but in the Negeri Sembilan the whole population is excited by any non-recognition of the local *adat*."²

¹ Despite all legends concerning the origin of the name Minangkabau, it is probable that it originally meant the portion (or division) of land allotted to *Mennoki* (Malayalam, literally, a Superintendent). *Mennoki* was also a baronial title in North Kerala. *Menokibhagam* (the chief's or superintendent's portion) could easily have been corrupted to *Minangkabau*. See also the *bau* or *bu* endings in place names like Rembau, Jelebu which may once have been *Rem* (Rama?) *bhaga*, *Jelabha*. *Lembaga* originally seems to have meant a territorial division. *Bahagian* in Malay vocabulary indicates that the Sanskrit *bhaga* was not unknown to the Malay world.

If this etymological interpretation be correct, it is possible that the baron and his kinsmen who occupied the fenced area (Pagar Ruyong) and its surroundings followed matriliney, while their local tenants or dependents followed the (indigenous) system of patriliney. It could as well be that while the baron and his kinsmen followed matriliney, those who adhered to patriliney were those of the chief's followers who, though they also came from South India, were given to following the rules of patrilineal descent in their own country. It was only certain sections of the Kerala community (for example, the Nayars, and certain groups of Tiyas and Mapillas) which followed matriliney.

² Wilkinson, "Law: Introductory Sketch," pp. 19-20 (in *Papers on Malay Subjects*).

This paper concerns itself more with *adat perpateh* as representing Malay customary law than with *adat temenggong*. The digests dealing with *adat temenggong* are "mixed with relics of Hindu law and overlaid with Muslim law."¹ Thus the Malacca Laws (Undang Undang Melaka) though entitled Risalat Hukum Kanum (A Tract on Customary Law) is a digest "grafting the Islamic Law of the new Sultanate [of Malacca] on to the earlier law of a Hindu court."² One is, therefore, on surer ground in dealing with Malay customary law when such rules of *adat perpateh* as could be gleaned from traditional sayings are selected for discussion.

Basic Laws

It is arguable that even the Austinian definition of law would cover the fundamental rules of the Malay customary law, as they were laid down by the two law-givers, Parapatih and Tamanggungan; they were rules, (if one gives credence to their legendary origin), "set by political superiors to political inferiors."³ But it may be conceded that the Malays follow their *adat* not merely because it is believed to have been laid down by the law-givers, but also because it is expressive of an instinctive sense of right, of the common consciousness of the people (*Rechtsüberzeugung*).

What the law-givers proclaimed for the observance of their followers may be regarded as the basic rules of the *adat*. Tamanggungan laid down:

Who casts the net shall jump to drag it in;
 Who commits an offence shall compensate;
 Who owes shall pay; who slays shall be slain.⁴

Parapatih declared:

A debt adheres to the tribe [clan] of the debtor;

¹ Winstedt, *Malays, A Cultural History*, 4th Edition, p. 91.

² *Id.*, p. 99. See also Haji Mohd. Din bin Ali, "Two Forces in Malay Society," *Intisari*, Vol. I, No. 3; p. 15, where he says in regard to the inheritance of Malay holdings in the "Islamic-cum-Temenggong States": "Take away the Hukum Shara and the residual adat and that which is Temenggong would be beyond recognition," (p. 19). He also says: "At present the amalgamation of Islam and the Adat Temenggong is so complete that it is well nigh impossible to separate one from the other." (p. 20)

³ Austin's *Jurisprudence*, (1911 Edition) p. 87.

⁴ Siapa menjala, siapa terjun, / Siapa salah, siapa bertimbang, / Siapa berutang, siapa membayar; / Siapa bunoh, siapa kena bunoh.

The translation quoted is that of A. Caldecott, "Jelebu Customary Songs and Sayings," *J.S.B.R.A.S.* Vol. 78, p. 3, at p. 17.

Most of the translations of *perbilangan* in this paper are those of A. Caldecott, J. L. Humphreys, Parr and Mackray, Wilkinson and Winstedt.

A mortgage becomes a lien on the tribal land;
 Who wounds shall pay smart-money, who kills shall give
 restitution.¹

These by no means seem to have constituted all the rules of conduct followed by the Malay society and generally contained in *kata pesaka* (traditional sayings) or *perbilangan* (customary sayings). According to tradition, these were the laws first formulated. The rest of the customary laws may be regarded as springing from them.

The history of the development of his customary law is not a secret to the Malay. For as the *perbilangan adat* (customary saying) puts it

The old men know tradition,
 The young men hear report.²

And the law of the tradition is:

The pattern becomes the mould;
 The example becomes the type;
 Precept passing into usage,
 Practice passing into custom,
 The custom handed down by our forefathers from generation to generation:
 Transplanted it withers,
 Uprooted, dies.³

Here in a few words is summarized the development of traditional or customary law (*kala tua*) which may be distinguished from the custom of the country (*resam negri*) expressed in such sayings as:

Duty gives and receives again,
 Courtesy repays kindness.⁴

Adat Law and Custom

From the sayings it is not always easy to distinguish between the

¹ *Hutang nan berturut, chagar bergadai; / Chinchang pampas, bunoh beri balas.*

This again is from Caldecott's "Jelebu Customary Songs and Sayings." Some versions of the *terombo* (for instance, the one familiar to the people of Naning) contain many more rules. See J. L. Humphreys, "A Naning Recital," *J.S.B.R.A.S.*, Vol. 83, p. 1. See also Haji Mohd. Din bin Ali, "Two Forces in Malay Society," *op. cit.*, p. 15. I prefer the Jelebu version as laying down the basic law. The various rules given in the Naning version appear to be either elaborations of the basic principles or mere matters of procedure. See below, section on administration of the *adat*.

² *Pebilangan pada nang tua-tua, / Perkhabarhan pada nang kechil-kechil.*

³ *Berlukis berlambaga, / Berturas berteladan; / Nang di-ucha di-pakai, / Nang di-pesar di-biasakan, / Turun-menurun dari-pada nenek moyang: / Di-anjak layu, / Di-chabut mati.*

⁴ *Shariat palu-memalu, / Berbudi orang berbahasa kita.*

customs that have legal consequences and those that do not have such consequences. Here again what ascribes legal consequences to a custom is the law of tradition: if, according to tradition, the pattern has become the mould which the clansmen will be interested in maintaining intact with whatever coercive powers they may possess for the purpose, one may assume that that pattern has passed from custom into customary law. It is obvious that when it is said:

Clansmen of a clan, tribesmen of a tribe,
With kin both far and near;
To those afar we hearken,
Those near we mark and obey.¹

the hearkening (*di-dengar-dengarkan*) cannot be enforced.

But the rule of exogamy contained in "Our boys we wed to other clans"² should not be broken, for a breach would bring in its train dire consequences on the offender. Again, the saying

A stranger weds into our clan.
For every stranger that weds into our clan
A share is set with just consent³

contains a rule of law which will be enforced by the community.

The sayings handed down from generation to generation are known to every one so that in fact ignorance of law can be no honest or valid excuse. According to a derisive saw, dull-witted may be the people of Minangkabau, who have no footing on the sea, but they and their kinsmen in Malaysia are smart enough to know and remember their *adat*.

The sayings are simple and can be easily memorized. This memorable quality does not always make for easy comprehension. Thus the pithy saying

Pound rice in a mortar,
Cook rice in a pot.⁴

is explained to mean that complaints should be made to the proper court.⁵ It is also supposed to imply that punishment must fit the crime.⁶

¹ Bersuku berwaris, / Jauh pun ada, dekat pun ada / Jika jauh di-dengar-dengarkan, / Jika dekat di-pandang-pandangkan.

² Yang jantan di-semendakan ka-orang.

³ Menerima pula orang semenda. / Tiap-tiap menerima orang semenda itu, / Di-tentukan pula dengan benar dengan muafakat:

⁴ Menumbok di-lesong / Menakan di-periok.

⁵ See J. L. Humphreys, "A Collection of Malay Proverbs," *J.S.B.R.A.S.*, Vol. 67, p. 108; also Winstedt's "Notes to Caldecott's Jelebu Customary Songs and Sayings," *J.S.B.R.A.S.*, Vol. 78, p. 29.

⁶ Winstedt's "Notes," *op. cit.*, p. 29.

A third explanation given is to the effect that a person should attend to his business in the proper manner.¹

There is probably no harm if a saying signifies many things, provided all of them are in conformity with the accepted social norms.

In spite of a variety of meanings attributable to some of them, the interpretation of these saws appears to be less difficult than the interpretation of a statute in a common law court; for the interpretation of the saying along with the significance of the metaphor or other figure of speech contained in it is handed down from generation to generation. This recourse to what one might regard as the preparatory work to the enunciation of the rule makes the saying not unduly difficult of understanding.²

Constitutional Structure

Adat perpateh appears to envisage a hereditary constitutional monarchy. The ruler of Negri Sembilan, Yang di-Pertuan Besar (one who is acknowledged as the great lord) is, in theory, elected by the *Undangs* of Sungei Ujong, Jelebu, Johol and Rembau. But as Wilkinson observes: "Nowadays the choice of a Yamtuan³ is a foregone conclusion; his election is a mere form."⁴ In 1934 when Muhammad Shah died, his son Abdul Rahman succeeded him. All that the *Undang* of Sungei Ujong declared in this connection on behalf of the four electors at the installation ceremony was that "...This day we have installed Tuanku Abdul Rahman, son of the late Yang di-pertuan Besar Muhammad Shah, on the Lion Throne of the Kingdom of Negri Sembilan."⁵ Neither the matrilineal principle nor the rule of primogeniture is accepted in relation to the succession to the throne. It is up to the electors to choose a younger son of the late Yang di-Pertuan Besar in preference to the eldest, if the latter is found unsuitable for the position; but no Yang di-Pertuan Besar is elected from outside the royal family.⁶ The democratic principle, however, appears to be maintained in the tradition that the Yamtuan should marry a woman who is one of his subjects and not of royal descent.⁷ The opinion is sometimes expressed that the royal con-

¹ Wilkinson, "Law: Introductory Sketch," *op. cit.*, p. 17.

² Differences in interpretation as well as differences in the text do occur in different areas; this may be because there are variations in the custom between one area and another.

³ A colloquial term for Yang di-Pertuan.

⁴ Wilkinson, "Sri Menanti," p. 39 (in *Papers on Malay Subjects*).

⁵ J. J. Sheehan, "Installation of Tuanku Abdul Rahman," *J.M.B.R.A.S.*, 1936, p. 237.

⁶ See the Laws of the Constitution of Negri Sembilan, Article VII (3) which reads "No person shall be elected Yang di-Pertuan Besar of the State unless He ... is a lawfully begotten descendant in the male line of Raja Radin ibni Raja Lenggang."

⁷ P. E. de Josselin de Jong, *Minangkabau and Negri Sembilan*, p. 151.

sort should be a member of the Ayer Kaki family of the Batu Hamper clan, the family to which Raja Melewar's wife belonged.¹ But no such rule is considered obligatory at present.²

The principle of election is recognized in the choice of the *undang*, the *lembaga* and the *buapa*. The *buapa* is to be elected by the members of his *perut* and approved by the *lembaga* who can dismiss him at will.³ In the election of the *lembaga*, the principle of *giliran* or *pesaka bergelar*⁴ is followed, that is, every *perut* in turn has the right to supply the *suku* chief. The principle thus postulates, as de Moubrey puts it, "that each *perut* should have its equality in this matter ensured by being placed as it were on a roster."⁵ In Rembau and Naning, the *lembagas* elect the *undangs* by unanimous vote from different *perut*, offshoots of the original Malacca house.⁶ In Jelebu, Johol and Sungai Ujong, there are electoral colleges for the election of the *undangs*. Though the principle of election, direct or indirect, is recognized, one finds that the choice for the electors is strictly circumscribed, and, in some instances, as, for example, in the case of the election of the *Undang* of Sungai Ujong, the electors themselves generally have to be members of certain specified families. No election or dismissal of a *lembaga* is valid until confirmed by the *undang*.⁷ A *buapa* may be dismissed at will by the *lembaga*.⁸ In spite of the democratic elements evident in the *adat perpateh* society,⁹ one cannot be oblivious to the hierarchical pattern, based on blueness of blood and ancient lineage, in the general social structure.

A king has his royal annals,
A chief his genealogical tree,
A tribal headman [*lembaga*] his song of origin.¹⁰

¹ Wilkinson, "Sri Menanti," p. 22 (*Papers on Malay Subjects*).

² *Ibid.*

³ Winstedt, *The Malays, A Cultural History*, p. 82.

⁴ The Minangkabaus call it *adat sansako*.

⁵ G. A. de C. de Moubrey, *Matriarchy in the Malay Peninsula*, p. 106.

⁶ Winstedt, *op. cit.*, p. 85.

⁷ *Id.*, p. 84.

⁸ *Id.*, p. 82.

⁹ According to customary sayings in Jelebu, "If a chief dies, election by the common voice is required. A family by common consent can elect or dismiss its elder; elders by their common consent and with the support of the enfranchised members of the clan can elect or dismiss the headman of a clan. The headmen of clans by common consent can elect or dismiss an *undang*. The chiefs by common consent and with the support of the *lembagas* can elect or dismiss the King."

Ganti mati barkebulatan / Kebulatan anak buah membuat atau memechat buapa / Buapa bulat, waris-nya rapat, membuat atau memechat tua; / Kebulatan tua, boleh membuat atau memechat *undang*; / *Undang* bulat, lembaga rapat, waris sedia, membuat atau memechat raja.

Caldecott, "Jelebu Customary Songs and Sayings," *op. cit.*, pp. 34-35.

¹⁰ Raja besejarah, / Penghulu bersalsasilah, / Lembaga berteromba.

This need not be a matter of surprise when one considers that the *adat* originated in a tribal organization, with its paramount chief, subordinate chiefs, headmen and elders.

This hierarchical set-up is evidenced by the saying:

The king rules his world;
The chief rules his province;
The lembaga rules his clan;
The elder rules his own people;
The peasant rules his house.¹

Another saying describes the dignity attributed to the king and the chief:

The king has Majesty, the chief Honour;
The king decrees, the chief orders;
The king rules the world, the chief rules the clan.²

The nature of the jurisdiction of the various dignitaries is expressed in the *perbilangan*:

The Raja is the fount of equity;
The Chief carries out the law;
The cord for arrest is the tribal headman's,
The execution creese is the territorial chief's,
The headman's sword is the Raja's –
He can stab without asking leave of any suzerain.
He can behead without reporting it to any suzerain.³

In spite of his being able to wield the headman's sword (or the sword of execution), he had only limited powers as may be seen from the fact that:

The King does not own the soil nor can he levy taxes;
he is the fountain of justice and may levy definite fees for
his maintenance.⁴

As a Jelebu saying puts it, "The highroads with their stepping stones

¹ Raja menobat di-dalam alam; / Penghulu menobat di-dalam luak; / Lembaga menobat di-dalam lingkongan-nya; / Ibu bapa menobat pada anak buah-nya; / Orang banyak menobat di-dalam teratak-nya.

² Raja berdaulat, penghulu berandika; / Raja bertitah, penghulu bersabda; Raja berkhalifah, penghulu bersuku.

³ Raja sa-keadilan; / Penghulu sa-undang; / Tali pengikat daripada lembaga; / Keris penyalang daripada undang; / Pedang memanchong daripada keadilan, / Tikam, ta' ber-tanya, / Panchong, ta' berkhabar.

⁴ Ada-pun Raja itu tiada mempunyai negeri dan tiada boleh menchukai kharajat, melainkan berkeadilan sahaja serta permakanan-nya.

belong to the prince and the bulbul's."¹ Any attempt on his part to levy taxes would cause him to be expelled, or in the picturesque language of the traditional saying, he would be cast out upon "a waveless sea and a grassless field."²

Under the *keadilan* (the fountain of justice) the jurisdiction of the various chiefs and headmen was well defined and carefully graded.

Wilkinson wrote:

In itself the gradation of official powers is no protection of the liberty of the subject. Its effectiveness in Negri Sembilan lay in the fact that the higher authorities were like our own appellate or assize courts: they could not initiate an attack on an individual. If the peasant committed a petty offence, he was judged by his own people: the chief could not interfere. If he was charged with a graver crime, he was heard by his own people and if a *prima facie* case was made out against him, he was handed over to the higher authorities for trial.... The (territorial) chief could not proceed against any one except the tribal headman [Lembaga], nor was he strong enough to attack any single Lembaga unjustly in face of the opposition that such a proceeding would arouse among the rest.³

The other members of the hierarchical order also had their allotted position and sphere of influence:

Disputes among their families
Are the province of the elders.
When a husband disputes about the property
acquired by his own and his wife's joint labour
It is the province of his family.
Within the four threshold beams of his house
Is a husband's province.⁴

Land Tenure

The importance of landed property to an immigrant people like the Minangkabau settlers in the Malay Peninsula cannot be exaggerated, especially when they were given to the felling of trees and the tilling of land rather than to commercial business. In spite of all the acquisitiveness one might expect of them, the Minangkabau settlers seem to have been guided by a remarkable sense of justice in the acquisition and apportionment of land. According to the customary saying current in Jelebu,

¹ Winstedt, *op. cit.*, p. 88.

² *Ibid.*

³ Quoted in Winstedt, *op. cit.*, p. 89.

⁴ Anak buah yang berchalun / Ibu bapa yang punya / Orang semenda yang gadoh bersuarang, / Anak buah yang punya. / Lingkongan bendul yang empat, / Orang semenda yang punya.

When the first clod was upturned
 And the first creeper severed,
 And the first tree felled –
 Our custom and system of entail were not yet established.¹

When holding was dovetailed into holding,
 When our stretches of rice-field were made,
 When the shoots of our plants swayed in the breeze,
 When our betel palms grew up in rows
 Then were established our custom and system of entail.²

In determining rights to property, the social position of a person and his lineage are of significance. It is recognized that

The highroad with its stepping stones
 Belongs to the king.³

Stretches of rice-field
 Old betel-nut palms
 Ancestral coconuts
 Belong to the tribal headmen [lembaga]
 The path over the knolls in the swamps
 Belongs to the tribal headmen [lembaga]
 The Sakai path with its tree-trunk bridges
 Belongs to the clan that owns the soil.⁴

While the land cleared and cultivated by the immigrants was regarded as belonging to them, the aborigines and their heirs whose lands the immigrants had taken possession of also had rights recognized under the *adat*.

Ravines and valleys
 Hills and hill-bases
 Belong to the territorial tribe and their chief.⁵

The *adat* attempted to be fair to the birds and fishes too.

¹ Sa-bingkah tanah terbalek, / Sa-helai akar yang putus, / Se-batang kayu rebah – / Adat dengan pesaka belum di-adakan.

² Tetekala / Kampong sudah bersudut, / Sawah sudah berjinjang / Puchok sudah meliok, / Pinang sudah berjijir / Adat dengan pesaka di-adakan, ia-itu.

³ Jalan raya titian batu / Raja yang empunya.

⁴ Sawah yang berjinjang / Pinang yang gayu / Nyiur yang saka / Lembaga yang punya. / Jalan paya titian permatang / Lembaga yang empunya. / Jalan Sakai titian batang / Waris yang empunya.

⁵ Gaung guntong, / Bukit bukan, / Waris dan penghulu yang punya.

The high way with its stepping stones,
 Hills and hill-bases,
 Lonely forest,
 Deep ravines,
 Broad plains,
 Sloping water-courses,
 Belong to the birds.
 Deep pools
 To the fishes.¹

While the king shared with the birds the highroad with its stepping stones, the *waris* and their chief shared with them the hills and the hill-bases.

As Wilkinson observes, ownership of land was based on real working tenure.

The *adat*

did not allow a landlord to lock up valuable land at his own discretion or to exact a heavy tax from would-be workers. To use a homely metaphor, it allowed the dog-in-the-manger to levy toll on the cows to the extent of the value of the manger to the dog, while English law allows toll to be levied to the extent of the value of the manger to the cows.²

The *adat* expected its adherents to take good care of their property, for

Rice-crops unfenced become waste grass,
 Buffalos unpent become wild cattle.³

The conditions of entail are also laid down. When the land bears clear evidence of occupation, it is considered heritable.

Idle fallow, land with stubble,
 Land with tree-stumps left by the feller,
 land that has been levelled –
 These can be inherited.⁴

And the inheritance under *adat perpateh* is in the female line.

Our heritage comes from our women,
 Men wear the insignia of hereditary office,

¹ Jalan raya titian batu, / Bukit bukau, / Rimba yang sunyi / Gaung yang dalam / Lepan yang lebar / Bandar yang sundai, / Si-barau barau yang punya. / Lubok dalam si-
 kitang kitang yang punya.

² Wilkinson, "Law: Introductory Sketch," *op. cit.*, pp. 28-29.

³ Padi ta' berpagar lalang / Kerbau ta' berkandang seladang.

⁴ Pesaka / Yang bersesapan, yang berjirami, / Bertunggul, berpemarasan.

The inheritance belongs to the women
The man cherishes it.¹

As a measure of social security envisaged to prevent a member of the clan ending up landless and homeless, certain restrictions on the alienation of ancestral property were contemplated under the *adat*.

The woman's nearest of kin can approve or prevent;
The full members of the woman's clan elect to find the money;
If there are full members of her clan, they can subscribe to save the tail;
If there are next of kin, they can bar the sale;
If the property in question has an owner already, the sale cannot proceed;
The tribal headman can quash the sale.²

Husband's Position

Contrary to popular belief, this system of inheritance does not mean that the husband is under a petticoat government in the *adat perpateh* society. His high position in the family is guaranteed to him under the *adat*.

Within the four threshold beams of his house
Is a husband's province.³

His importance in the home is again acknowledged in the saying

Slaves can offend against the masters,
Pupils against their teachers,
Children against parents,
Wives against husbands.⁴

This clearly indicates that wives are expected to be obedient and faithful to their husbands. It is also said

Warder of the wife is the husband
Warder of the husband his wife's family.⁵

¹ Terbit pesaka ka-pada saka, / Si-laki-laki menyandang pesaka; / Si-perempuan yang punya pesaka, / Orang semenda yang membela.

² Sah batal ka-pada sa-kadim; / Kata berchari ka-pada waris-nya; / Tinggal waris menongkat; / Tinggal sa-kadim melintang; / Tinggal harta bertuan ta' jadi; / Tinggal tua batal.

³ See p. 26, note 4.

⁴ Salah hamba ka-pada tuan / Salah murid ka-pada guru / Salah anak ka-pada bapa / Salah bini ka-pada laki.

⁵ Kunchi bini laki / Kunchi semenda tempat semenda.

Because the wife's family happens to be his warder, a husband may occasionally find himself in certain unenviable situations:

When a man marries and goes to his wife's family,
 If clever, he will be a friend in council;
 If a fool, he will be ordered here and there.
 A tall man, he will be as a sheltering buttress,
 Prosperous, he will be as a laden branch that gives shade.
 The married man must go or stay as he is bid.¹

It is also said,

A bridegroom among his wife's relations
 Is like a soft cucumber among spiny *durian*;
 If he rolls against them, he is hurt,
 And he's hurt, if they roll against him.²

If he follows the customs of his wife's family and makes himself useful, he may find his life among his wife's relations not too unhappy, though,

If a fool, he will be ordered about
 To invite guests distant and collect guests near.³

but,

If he is strong, he shall be our champion.⁴

A fool's position may hardly be better elsewhere.

The husband among his wife's relations is naturally expected to observe the customs of her family:

When you enter a byre, low;
 When you enter a goat's pen, bleat;
 Follow the customs of your wife's family.
 When you tread the soil of a country and live beneath its
 sky,
 Follow the customs of that country.⁵

It would not be fanciful if one assumed that the position of the man

¹ Orang semenda bertempat semenda. / Jikalau cherdek, temen berunding; / Jikalau bodoh, di-suroh di-arah. / Tinggi, banir tempat berlindong; / Rimbun, dahan tempat ber-naung; / Orang semenda pergi karna suroh, / Berhanti karna tegah.

² Orang semenda dengan orang tempat semenda / Bagai mentimum dengan durian, / Menggolek pun luka, kena golek pun luka.

³ Jikalau bingong di-suroh arah, / Menyeput nan jauh, mengampongkan nan dekat.

⁴ Jikalau kuat di-bubokhan di-pangkal kayu.

⁵ Masok kandang kerbau, menguak; / Masok kandang kambing, membebek; / Bagai-mana 'adat tempat semenda, di-pakai / Bila bumi di-pijak, langit di-junjong, / Bagai-mana adat negeri itu di-pakai.

in a matrilineal society should be more than enviable. Though matrilocal residence of the wife and the customary requirement that the husband should live in the wife's home may bring in certain problems of human relations, especially in his association with the in-laws, one cannot overlook the fact that he has his "province," his sphere of influence and power within the four threshold beams of his house, and that he also has a cherished place in his own family and clan. In his capacity as uncle or brother, he may be the manager of the family and it is not unlikely that he is or he becomes an elder or chief in his clan.

Even when he suspects a shade of unfairness, he should be philosophic enough to console himself with the thought that

The hap of this life goes by turns,
Awhile to him, anon to me.¹

This is specially relevant if his wife's male relations forget that "courtesy repays kindness" (*Berbudi orang berbahasa kita*), the relatives of their own wives may be equally forgetful of the adage.

If the wife's relations exercise some control over him, it seems to be justified for two reasons. The well-being of the family is mainly their concern, and it is their responsibility to see that the husband of their sister or niece contributes to that well-being. Further, they have taken upon themselves a good deal of responsibility for him. For the *adat* stipulates

To unravel disputes,
To pick up the fallen and search for the lost,
To pay debts and receive dues
Is the business of a man's wife's family.²

For this extreme solicitude envisaged in the requirement about picking up the fallen and searching for the lost, the price he pays in the inconvenience of his being ordered about, if he be a fool, is small in comparison with the value of the benefits he receives. *Noblesse oblige*. All that the *adat* seems to enjoin on him in return, apart from attending to his duties in his new surroundings, is that he should pay due regard to the customary law of marriage which stipulates:

Two familiar spirits in one household,
Two ladders to one sugar-palm,³

¹ Dunia berganti-ganti, / Sa-kali di-orang sa-kali di-kita.

² Kusut menyelesaikan, / Chichir memungut, hilang menchari / Utang membayar, pintang menerima / Oleh tempat semenda.

³ These two lines signify a man's union with another woman of the same clan as his wife during the wife's life.

Sprouts without seed¹
 Are offences against morals.
 Custom looks for signs of guilt;
 When custom declares the offence proved,
 It is not a peccadillo to be mildly corrected.
 Nor can recourse be had to religious law –
 For this crime of taking two brides when a man has been
 given one.²

Whatever discomforts he may consider himself to be put to by his wife's relations, the *adat* prescribed a fair distribution of property between the husband and the wife, if a divorce is decided upon.

What a man has got by his wife remains with her clan,
 What the husband brought goes back to him;
 Property in partnership is split up,
 The common property acquired by a man and wife's joint
 labour is equally divided;
 Any loss or profit on the wife's estate is a matter for her
 clan;
 The man's person is restored to his own clan.³

The husband's absence of independence among his wife's relations does not seem to deprive him of his rights to a fair share in the division of property. After all,

What is the custom of the land?
 Duty gives and receives again.⁴

Administration of the Adat

The Malay, in general, is not a litigious person. When he happens to be a litigant, he appears to be unhappy about it. It is said,

Victory – a defeated foe,
 defeat – a bowed head,
 agreement – a joining of hands.⁵

¹ A euphemism for bastards.

² Pelesit dua sa-kampong / Enan sa-batang dua sigai / Mata tumboh tiada berbeneh / Sumbang ka-pada tabiat. / Adat menuju ka-pada tanda / Bila 'Sah' kata adat tiang / Tanggal ta' boleh di-patoh lagi, / Salah ta' boleh di-hukum / Ia-itu suatu di-beri, dua di-ambil.

³ Dapatan tinggal, / Pembawa kembali / Kutu di-belah / Suarang di-ageh / Rugi laba pulang ka-tempat semanda / Nyawa darah pulang kapada waris.

⁴ Nama mana resam negeri? / Shariah palu-memalu.

⁵ Menang berkechudang / Alah berketundukan / Sa-rayu berjabat tangan.

What he likes to do when conflicts arise is expressed in the saying

The injured is made whole,
The tangled is made straight.¹

The injured is made whole by applying the customary remedy, which in most cases, especially in *adat perpateh* society, consists in awarding compensation.

In a tribal society such as the one envisaged by the *adat*, “arbitration” plays a very important role. Petty disputes were referred for “arbitration” to the village elder. Only when “arbitration” failed or when the dispute was serious enough to require stronger measures were the services of the *lembaga* sought. He could make an arrest and, if he found it necessary or expedient, hand the offender over to the *undang* who could command the use of the execution creese.

Small matters are the place for “arbitration,”
great for the application of custom,
the most weighty for ancient ancestral right.²

Though no doctrine of judicial precedent, as applied in common law jurisdictions, is recognized under the *adat*, the phrase *menchari adat* (search for the custom) is significant in that a search for a precedent remedy is usually made. The saw is

A day of loss is a day of search,
The hurt is healed, the wound is stanch'd.³

The judges are usually the village elders or the chiefs of the clans who uphold the norms of their society. As they are not bound by precedent, though a precedent may have great persuasive value, it is not difficult for them to reinterpret the *adat* in the light of modern needs. The sayings in which the *adat* rules are couched may be reinterpreted in such manner as to suit present day conditions. As interpretation of *perbilangan* has not been developed into an esoteric science, there will be no serious objection to re-interpretation which is intended to keep pace with the times. One could therefore argue that customary law needs no modification. Whatever modification is necessary is being made in the application of the *adat* by those who are interested in upholding the norms of their community. Until the *adat* rules are written down, and

¹ Burok di-baiki / Kusut di-selesaikan.

² Dudok dengan aturan kecil nama mepakat; / besar nama Adat: gedang, bernama pesaka sembah.

³ Sa-hari hilang sa-hari di-chari / Sakit di-ubat, luka di-tasak.

the meanings of words and phrases are quibbled over by lawyers conversant with the interpretation of modern statutes, there will be no need for the modification of these rules, as they are easily adaptable to the demands of rapid social changes.¹

Though a search is made for a precedent, there may be a few cases for which no precedent can be found. In such a situation, the procedure followed by the Rejangs in Sumatra is described by Marsden.

It is true, that, if any case arises, for which there is no precedent on record (of memory), they deliberate and agree on some mode that shall serve as a rule in future similar circumstances. If the affair be trifling, that is seldom objected to; but when it is a matter of consequence, the *pangeran* or *kalippah* (in places where such are present) consults the *protatins* or lower order of chiefs who frequently desire time to consider it, and consult with the inhabitants of their *dusun*. When the point is thus determined, the people voluntarily submit to observe it as an established custom....²

This procedure in its essentials seems to have been adopted in Malaysia too, though no case is known where the inhabitants of a *mukim* were consulted before laying down a principle for its decision; but it may be assumed that the elders or chiefs who act as judges are aware of the common consciousness of the people. When once the law is "discovered," it is applied in the same way as

When a coat is ready, it is put on,
When a mould is there the metal is poured in.³

A good judge is he who is skilled in the art of the wriggling lizard,⁴ and not one who will automatically apply a precedent remedy without taking trouble to make a cautious and thorough inquiry. Like the wriggling lizard which climbs slowly from the foot to the top of a tree, the judge should proceed carefully and cautiously, not unwilling to retrace his steps when his line of inquiry has been found wrong.

Astray at the end of the track –
Back to the start of the track,
Astray at the end of the talk
Back to the start of the talk.⁵

A method of inquiry that is discountenanced by the *adat* is that of in-

¹ See the observations of P. C. Lloyd, *Yoruba Land Law*, p. 17.

² William Marsden, *The History of Sumatra*, 3rd Edition, 1811, p. 217.

³ Baju sudah di-sarangkan / Lembaga ada di-tuangi.

⁴ Malim biawak bengkong.

⁵ Sesat ka-hujong jalan – / Balek ka-pangkal jalan; / Sesat ka-hujong kata – / Balek ka-pangkal kata.

In some versions of the *terombo* these lines are included among the laws declared by Parapatih nan Sa-batang.

sufficient discrimination and is described as the judgment of the thrusting fish trap (*hukum serkap*), for a cone-shaped trap when thrust down in shallow water may enclose indiscriminately a myriad catch of fish.¹

Under *adat perpateh*, circumstantial evidence is preferred to oral evidence tendered by witnesses.

Change a sarong behind the house,
Change a word behind the tongue.²

It is easier to commit perjury than to change clothes; no built-up privacy is required for the feat.

Customary law requires signs of guilt,
Religious law calls for witnesses.
When religious law meets circumstances obscure,
It throws wide its net to catch the offender...
There is a clear case says custom,
When there is evidence of guilt and information laid,
When a man is chased from the scene of the crime and is
found panting.
When there are hacks and cuts;
If evidence be at hand, it requires to be shown it,
If it be not at hand, it requires it to be related.³

When there is no such clear case, circumstantial evidence is relied upon and becomes more significant. In relation to the laws of theft, twelve circumstances are forbidden. They range from being found with booty snatched or stolen by force to being found with a fluttering heart. In this reliance placed on circumstantial evidence, it is probable that mere coincidence will be mistaken for cause and effect.

The branch breaks as the hornbill passes.⁴

The purpose of the *adat* in accepting circumstantial evidence may have been that men should be encouraged to walk warily, avoiding

¹ J. L. Humphreys writes: "I regret to say that this proverb is commonly used, not without a certain aptness, to describe some phases of English justice, especially the summary trial and conviction of batches of prisoners, such as gang-robbers, hawkers or gamblers." (J. L. Humphreys, "A Collection of Malay Proverbs," *J.S.B.R.A.S.*, Vol. 67, p. 111).

² Beraleh kain ka-balik rumah, / Beraleh chakap ka-balik lidah.

³ Adat bertanda, hukum bersaksi; / Adat yang tiba ka-gelap menjala. / Sah, kata adat. / Apa-bila tertanda, terbeti; / Terkejar, terlelah; / Terpakkok, terpauk; / Dekat, tertunjokkan; / Jauh, terkatakan.

⁴ Enggang lalu, ranting patah.

suspicious proximities.¹ After all, *adat* is approved behaviour, apart from its being customary law.

What is contemplated under the *adat* is perfect, even-handed justice.

The quart measure that is full,
The gallon measure that is true,
The weight that is just,
The scales that are even.²

The compensation to be paid for a wound would vary according to the intensity of the provocation and also according to the place where it was inflicted—in the language of the *adat*, whether it “grows on the hill, on the slope or in the valley,” (*tumboh di-bukit, di-lereng, di-lembah*) that is, on the head, on the body or on the leg.³

The saying

It is forbidden by custom
To conceal and abet.
It is approved by custom
To bring to light and compare facts.⁴

indicates the high sense of civic duty the Minangkabau settlers possessed. To conceal and abet would be socially dangerous acts and the *adat* forbids them in the interests of social justice and general well-being.

Restitution rather than retribution was the keynote of the humane administration of criminal justice under the *adat*.⁵ But this statement should not be taken to imply that all offences were compoundable. Incest was punishable by death and was usually punished with outlawry and confiscation of property.⁶

¹ Tergesek kena miang, / Tergegan kena embun.
(Rub against the stem of a bamboo and you itch, / Shake it and you are sprayed with moisture.)

² Chupak yang pepat, / Gantang yang piawi, / Bongkal yang betul / Teraju yang baik.
Caldecott has the marginal note “We seek for perfect justice” for these lines; but he adds in a footnote that Malay casuists distinguish four points in these four lines: (i) if the bench of judges be full (ii) if the judges have full authority (iii) if the weight of evidence is sufficient (iv) if the judges are just. (A. Caldecott, “Jelebu Customary Songs and Sayings,” *op. cit.*, pp. 28-29.

³ See J. L. Humphreys, “A Collection of Malay Proverbs,” *J.S.B.R.A.S.*, Vol 67, pp. 107-108.

⁴ Kepantangan adat, / Di-lindong di-endapkan. / Kepejatian adat, / Di-tcrang dibandingkan.

⁵ For wounding smart-money is the penalty, / For slaying substitution of a person to the dead person's clan. / The children of the murderer are invited to the feast of atonement, / And one of his kin given to the clan of the murdered man.

Chinchang pampas; bunoh beri balas, / Anak di-panggil makan, / Anak buah di-sorong 'kan balas.

⁶ Parr and Mackray, “Rembau,” *J.S.B.R.A.S.*, Vol. 56, p. 78.

The requirement in the *adat* that there should be absolute unanimity for every decision and every election may have been induced by the concept of *laras*, (harmonious, belonging together).

The greatness of men lies in taking counsel together;...
As a bamboo conduit makes a round jet of water,
So taking counsel together rounds men to one mind.¹

The imposition of a decision of the majority might leave the minorities discontent, while a unanimous decision would make every one feel a sense of harmony, a feeling of belonging together. This requirement of unanimity was probably desirable and certainly effective during the days of close-knit clan organizations.

Conclusion

One of the versions of the *terombo* has the line:

Adat sentosa di-dalam negeri.²
(Custom brought peace on the land.)

This appears to have been the purpose of the *adat*—to bring peace and harmony induced by a sense of justice. And this purpose was achieved, by letting covenants develop into customs.

What in the beginning are covenants
Grow up into customs;
Custom is lord over covenants.
Water proceeds along water-ways,
Sanction proceeds from covenant;
A country grows up with its customs.³

This growth is accelerated by the scrupulous observance of the traditional injunction:

Each shall get his share and portion;
Take ye not the goods of others;
Squander not the children's birth right.⁴

¹ Kelebahan umat dengan muafakat, / Bulat ayer karna pematong, / Bulat manusia karna muafakat.

² See Caldecott, "Jelebu Customary Songs and Sayings," *op. cit.*, p. 17.

³ Tetekala kechil bernama muafakat / Tetekala besar bernama adat: / Si-raja adat kapada musfakat / Ayer melurut dengan bandar-nya, / Benar melurut dengan pakat-nya, / Negeri bertumboh dengan adat-nya.

⁴ Berumpok masing-masing / Berharta masing-masing, / Harta orang jangan di-tarek / Untuk anak jangan di-berikan.

In its pursuit of justice and fair play, the *adat* considers itself to be in harmony with religious law. It declares:

Customary law hinges on religious law,
Religious law on the word of God.
If custom is strong, religion is not upset;
If religion is strong, custom is not upset.¹

If there is any difference between the two, it is only a difference in emphasis:

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

If the difference, according to the followers of the *adat*, is so negligible, can there be any serious conflict, in their view, between religion which is ideal law and custom which is real law?³ If there is no major conflict, why should they be persuaded to forsake their *adat* and adopt a tantalizing hybrid, *adat ketemenggongan*? The Mapillas of North Kerala, a Sunni Muslim group, are not regarded any the less Islamic in their life because of their adherence to matriliney. They are predominantly matrilocal too.⁴

In the same way as covenants grow up into customs, covenants can destroy custom.⁵ An enactment, passed by a majority of votes, can effectuate the destruction more easily still. But it will be harder to retrace one's steps and resurrect the *adat*.

It may be suggested that customary law should be regarded as the common law of the people in those spheres of their lives where it is applicable. To equate "native law and custom" with local customs in England and to treat them as facts to be proved in court as is done in Malaysia does not seem fair, because they deserve to be regarded as common law rather than as local customs. That this is not such a fantastic suggestion as might appear to some may be shown from a

¹ Adat bersendi hukum / Hukum bersendi kitabullah. / Kuat adat, ta' gadoh hukum, / Kuat hukum, ta' gadoh adat.

² Pada adat menghilangkan yang buruk, / Menimbulkan yang baik; / Pada shara menyuroh berbuat baik, / Meninggalkan berbuat jahat.

³ Adat yang kawi, / Shara yang lazim.

⁴ See Schneider and Gough (Ed.), *Matrilineal Kinship*, pp. 415 *et seq.*

⁵ Hilang adat karna muafakat.

decree issued in 1708 by Johan van Hoorn, Governor-General of the Dutch East Indies. He ordered that all civil and criminal matters in the Preanger districts should be decided in the courts of the regents who would render justice according to the local laws. The Dutch officials had only the duty to see that the local laws and customs were faithfully applied and justice impartially administered.¹ Commenting on the decree, a Dutch historian said, "In the Preanger there were continuous conflicts between the Batavian and the regency courts but the principle had been stated that native law would not be superseded by western law."²

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

Customary law is constantly being reinterpreted to satisfy the needs of a commercial economy; one would use the word *reinterpreted* and not *changed*. Many modern transactions, such as sale, were not illegal a century ago and legal today—a century ago they were inconceivable to most Yoruba... each generation sees its own problems, though the law may remain basically unchanged.³

Adat is

Uncracked by the sun,
Unworn by the rain.⁴

¹ B. H. M. Vlekke, *Nusantara*, pp. 222-23.

² B. H. M. Vlekke, *op. cit.*, p. 223.

³ P. C. Lloyd, *Yoruba Land Law*, pp. 11-12.

⁴ *Tak lekang dek panas / Tak lapok dek hujan.*

See Tunku Hussain bin Tunku Yahya's article "Uncracked by the sun," *Intisari*, Vol. I, No. 3, p. 45, from which the translation of these two lines is taken.