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ADAT AND ISLAM IN MALAYA

INTRODUCTION

The aim of this essay is twofold: First, to describe the relationship between the system of law (*adat*) and a religious system which is also a legal system (Islam) as these co-exist in contemporary Malaya. The relationship is important because although both systems apply to the same persons — the Malay peasants — their respective rules in such important matters as marriage and inheritance are dissimilar and indeed conflict in certain important respects.

The second aim is to attempt a better understanding between lawyers and anthropologists both of whom have studied *adat*, Islam, and the relationships between them.¹ It is widely recognised that the methods and standards of these disciplines are by no means mutually comprehensible, but by concentrating attention upon a subject of common interest the present position may very well be improved. An obvious caveat has to be entered here because the writer is by training a lawyer; the approach adopted in this paper will, therefore, be an approach developed upon the canons of jurisprudence but taking account of ethnographic fact. A yet further qualification has to be added: this is that the substance and scope of both Islam and *adat* is subject to legislative and judicial determination as well as to administrative regulation. It is hoped, however, that by setting out the sorts of arguments deemed necessary in jurisprudence a better appreciation, benefiting both studies of Malay *adat* and Islam, may result.

The existence of a dual legal culture and a variant disciplinary approach may be illustrated in the following example.

¹ Data for this paper are confined primarily to the state of Negri Sembilan, the matrilineal kinship system of which is well known. For anthropological accounts see Swift (1965), Gullick (1949, 1965), Diane K. Lewis (1962), Josselin de Jong (1960). For accounts by lawyers see Taylor (1929, 1948) and Hooker (1972).

The Malay peasant of Negri Sembilan is, as a Muslim, bound both by conscience and by law to the performance of obligations imposed by Islam. One of the most important of these obligations is *mas kahwin* which is usually said to be "the obligatory marriage payment due under the Muslim law to the wife at the time the marriage is solemnized".² This usage tends to obscure several confusions which exist around the term, and indeed it may be said that terminological confusion is almost inevitably concomitant with Islamic usage in Malaya. The first point which should be made in the present case is that *mas kahwin* originally meant money paid by the bridegroom to the *bride's parents*,³ but through a confusion with the concept of *mahr*, i.e. money paid to the bride herself by the bridegroom, *mas kahwin* now refers to a payment to the bride herself. A further factor is that as a matter of practice, the money is not often actually paid to the bride but is usually left as an outstanding debt recoverable upon divorce.

The complexities just mentioned are not, however, the end of the matter. In common with the rest of the states of Malaya, Negri Sembilan possesses legislation providing for the implementation of Islamic law. In the present case, the governing act is the Negri Sembilan Administration of Muslim Law Enactment,⁴ which provides for the payment of *mas kahwin* including a provision for repayment upon breach of contract.⁵ The reference in the statute to *mas kahwin* is the reference set out above, to "the obligatory marriage payment due under the Muslim law to the wife at the time the marriage is solemnized". The reference is clear enough and, on the face of the statute, might seem to resolve confusions in usage were it not for one fact. This is that the term is not used by the peasants solely in the Islamic law reference described immediately above. In the district with which the writer is most familiar, Gunong Pasir, the term *mas kahwin* is used to indicate two separate payments:

- (a) in its Islamic law sense as the payment due to the wife. As mentioned above, it is uncommon for this sum to be actually handed over. It is thus not a "payment" in the strict legal sense but a debt recoverable by civil action under the relevant legislation. This distinction is important and must be kept in mind.

² Ahmad Ibrahim 1965: 174.

³ cf. Taylor 1948: 164.

⁴ No. 15/1960 as amended.

⁵ S. 119.

- (b) a payment, made as an *adat*, i.e. as a strict usage, which is made to the clan chief (*lembaga*) of the bride's clan. This payment, which varies in amount according to the rank of the bride's father, is always made. It becomes the property of the bride's clan and is a necessary step in legitimizing the union at *adat*. This actual payment in which money changes hands, is also sometimes referred to as *wang adat* - i.e. the "*adat* payment".⁶

In addition, there is yet one further class of payment which should be mentioned. This is the payment by the bridegroom or his kin to the bride's kin to help defray the wedding expenses; this is termed *belanja kahwin*, "marriage expenses" and it is quite separate from the variant meanings of *mas kahwin* just described. There is, however, occasionally a connection in fact, as it is not unknown for some of the *wang adat* to be paid to the bride's parents to help defray marriage expenses. This is always subject to a prior agreement between them and the clan chief and only takes place after the formal and public handing over of the *wang adat*.

It is clear that, as a matter of ethnographic fact, the term *mas kahwin* cannot be confined to its Islamic law reference alone. This is not just because the only payment made is made to the bride's parents but primarily because the bride possesses only a right to recover a debt in some future action. This reference to some future legal action is, as indicated earlier, of fundamental importance. A reference to the Islamic legislation will disclose provisions limiting the jurisdiction of Islamic legislation in favour of the rights and powers of the civil courts. The significance of this is that *adat* is a matter within the jurisdiction of the civil courts alone which not only have sole determination of the effect of any *adat* rule, but may also, upon production of satisfactory evidence, recognise as a binding rule some hitherto localised *adat* usage. The extent of this determination is very wide and it cannot be doubted that in the case of *mas kahwin* an established peasant usage will be given judicial effect. This is not to deny that a wife might very well be awarded a sum promised as *mas kahwin* at the commencement of marriage; but the award will be made upon the basis of what has been

⁶ This description has been independently confirmed by an anthropologist for the neighbouring district of Inas; cf. Diane K. Lewis 1962: 170. It may be supposed that the existence of these distinct referents of the term, together with an insistence upon the actual payment of the *adat* fee, was the cause of earlier writers referring to *mas kahwin* as "bride price" and asserting that it was not known to Islamic law; cf. Parr and Mackray 1910: 92-96.

and continues to be an established judicial and administrative practice — that the determination of what is or is not the applicability of a principle of Islamic law will be finally decided on the basis of what is found to be an admissible peasant practice. This principle is subject only to direct legislative intervention and not, at least in Malaya, to a statement of principle of Islamic law.⁷

This proposition may easily be illustrated by reference to a recent decision given by the High Court of Malaysia. In *Nafsiah v Abdul Majid*⁸ the plaintiff brought an action for damages in breach of promise to marry where both parties were Muslims. It was contended that the Malacca Administration of Muslim Law Enactment, 1959, excluded any court⁹ other than the court of the Kadhi Besar from jurisdiction. The High Court rejected this argument and, relying upon the Courts of Judicature Act 1964, restated its overriding jurisdiction: this is only the latest of many such cases.¹⁰ The principle is clear; the effect of legislation giving effect to principles of Islamic law is not to oust the jurisdiction of the secular courts. It may also be pointed out here that there are other examples of similar conclusions in respect of *adat* and Islamic law principles. One thinks, for example, of the payment of *zakat* and *fitrah* in Negri Sembilan. These are Islamic obligations but the *method of payment* of these contributions is regarded by the peasant as an *adat*. An attempted government regulation of the *adat* on this point gave rise to considerable difficulty in Negri Sembilan in the late fifties and has been described by an anthropologist¹¹ and a lawyer.¹² The important point is that not only is Islamic law confined to and by statute, but that even the principles so set out are subject to judicial interpretation in the light of prior precedent.

The examples which have just been given, though of some importance, are only introductory to what seems to be the major question on the relationship between law and ethnography in the field of *adat*. This is primarily that *adat* is a part of the technical legal system of Malaya and, as at present constituted, is contained in statute, law reports and

⁷ This principle does not of course appear in legislation; on the contrary, it is a persistent feature of judicial decision and has for long been refined in various precedents.

⁸ [1969] 2 M.L.J. 174. (M.L.J. is the recognized abbreviation for Malayan Law Journal).

⁹ Relying upon section 40 (3) (b).

¹⁰ For a summary see Hooker 1972: 228-250 on *harta sepencharian*.

¹¹ cf. Swift 1965: 93-96.

¹² cf. Hooker 1971: 273.

similar documents. At the same time it is part of the general Malay culture; anthropologists who wish to enter the *adat* field, therefore, have to come to grips with this total body of *adat* in all its forms. Many of these forms after all make up the substance of day to day transactions in the District Office and thus affect peasant life in a very direct way, especially in land matters. Similar arguments of course apply to Islamic law in Malaya.

Having reached this point, it is proposed to devote the remainder of the essay to a brief description of classifications in jurisprudence which seem to be necessary for an analysis and comparison of such disparate systems as *adat*, Islamic law and English law. It should be noted that attention will be devoted to classifications in *jurisprudence*, i.e., "legal science" and not those utilized by practising lawyers as such. The reason for this is that the latter assume an accepted definition of "law" or "legal system" and of its relation to their own society. For example, when an English lawyer talks about a "parent" or "heirs at law" or any other such term he has in mind a generally accepted content as to what is meant by person, thing, act or event. Such categories may or may not be defined in his own technical subject, (i.e., crime, tort, contract and so on) or there may be general cultural assumptions as to what these categories mean or imply. The point is that such assumptions are culturally relative and the meaning or implication of any particular category in English law may and does differ from those in *adat* or Islamic law. It follows, therefore, that any comparative jurisprudence, to be at all satisfactory, must set out and justify the classifications which it proposes to utilize. This means that one must commence with an examination of what are generally accepted as being the most basic factors which identify and characterise the idea of legal system. This emphasis upon "system" rather than upon "law" or "a law" as such is necessary because the individuals who are subject to any particular named system find their legal existence within the ambience of the whole system and not merely by reference to particular laws contained in the system. Further, because particular laws are always culturally relevant, comparative study requires that the individual be regarded as a point of normative reference, that is to say, we distinguish between the rational individuality of a human being and the concept of legal personality. The former does not necessarily possess legal personality within the terms of any particular system; examples abound and include lunatics, infants (in varying respects), slaves and so on. On the other hand, in some legal systems, legal personality may be

assigned to entities other than individual human beings, e.g., a fund, or an idol.¹³ These examples and the distinction which they illustrate are of course well known both to jurists and to those social scientists interested in the ethnography of law but they are emphasised here for one very important reason. This is that any comparative study, such as that involving *adat* and Islam, requires us to specify the ways in which the category of legal person is defined and delimited. This was said a few lines earlier, but the (logically) necessary implication of this appears to require not only an analysis of the idea of "person" but also the provision of answers to the following questions:

- (i) How do the systems of law with which we are here concerned (*adat* and Islam)¹⁴ define what is or is not a legally relevant personality?
- (ii) How do the systems in question attribute obligations to the legal persons so defined?

We now go on to attempt some answers to these questions.

I. THE DEFINITION OF LEGAL PERSONALITY

We commence from the proposition that the definition of legal personality is primarily a question of establishing the typical features of an individual's capacity to perform legally relevant action. That is to say, in the systems concerned, there will be a minimal capability attributed to individuals which constitutes a legal personality for the purposes of that system. It will be obvious that this formulation will direct attention to the relationship between the human substantiate as this exists in the natural world and the view of "legal person" as this exists in the jurisprudence of each system. We have thus entered that area, common to both law and metaphysics, in which each system of law has to consider empirical facts and the ascription of (jurisprudential) value to those facts.

(a) Adat:

We may illustrate these general propositions by taking a selection of the *perbilangan*,¹⁵ the characteristic form in which the *adat perpatih* of Negri Sembilan was traditionally couched:

¹³ For a judicial discussion of this see *Pramatha Nath Mullick v. Pradyumna Kuma Mullick* (1925) L.R. 52 Ind. App. 245.

¹⁴ We include also by implication the introduced English law which, over the passage of about a century, has had important effects upon both systems.

¹⁵ "Customary sayings". The term *kata pesaka*, "traditional sayings" is also sometimes used.

- (i) Goats bleat,
Buffaloes bellow,
Cocks crow,
Magpie-robins twitter.¹⁶
- (ii) The clan chief administers customary law,
The learned in law administers religious law,
The warrior raids the enemy's country,
The trainer lets fly the fighting cock,
The merchant fingers weights and measure,
The woman works with a needle and thread.¹⁷
- (iii) Pound rice in a mortar
Boil rice in a cooking pot ¹⁸
- (iv) Who wounds must heal
Who slays must replace
Who sells must restore ¹⁹

These are but a few of the great number of *perbilangan* which could be cited;²⁰ but the point of the present selection is that the term *adat*, which is used to describe these lines as well as more contextually exact propositions,²¹ has a range of reference which includes the natural order of the universe. For example, it is *adat* ("proper") that cocks crow and goats bleat, a reversal of these roles would be against the natural order. Similarly, the *perbilangan* cited here introduce us to a conception of the human being which, in the *adat* universe, is taken to be the individual as defined in terms of his natural attributes as basic to his social roles. The characteristics of this universe include the *adat* require-

¹⁶ *Kambing biasa membebek*

Kerbau biasa menguak,

Ayam biasa berkukok,

Murai biasa berkichau

¹⁷ *Penghulu biasa menghukumkan adat,*

Alim biasa menghukumkan shara',

Hulubalang biasa menjarah,

Juara biasa melepas,

Saudagar biasa bermain bungkal teraju

Perempuan biasa berusaha kapas dan benang

¹⁸ *Menumbok di-lesong,*

Menanak di-periok,

¹⁹ *Yang menchinchang, yang memapas*

Yang membunoh, membangunkan,

Yang menjual, memberi balas.

²⁰ For a large selection cf. Caldecott (1918).

²¹ Such as those cited in (x) and (xi) on pp. 80 and 81, below.

ment that the conduct of men be suited, in empirical terms, to the purpose desired in any activity (*cf.* (iii) above). Similarly, in the second *perbilangan* cited above, the correct modes of conduct for particular categories of person are set out: the implication quite clearly being that any reversal of the stated action would not be *adat*.

The important point, however, is the conception of the individual as a natural human being who is in harmony, dependent upon sex and profession, with the universe. This emphasis upon the propriety of the universal order and man's acceptance of it extends even to the relationship between *adat* and Islam as seen in the *perbilangan*. The following are illustrations here:

- (v) *Adat* hinges on religious law,
 Religious law on the word of God,
 If *adat* is strong, religion is not upset,
 If religion is strong, *adat* is not upset,
 Religious law is the offspring of covenant,
 Adat law is also the offspring of covenant.²²
- (vi) *Adat* may be split into three branches:
 Adat clear as the triangular rush in a rice-field,
 Adat strong and round as a pillar, whereon all men agree,
 Adat laid down in God's book, the law of the Koran;
 It is for *adat* to suppress the wrong,
 To bring the good to pass;
 It is for religious law to command righteousness
 and bid men eschew evil.²³

The emphasis in *adat perpateh* is clearly upon the ascription of a basic capacity to the natural human being without qualification; the

²² *Adat bersendi hukum*
Hukum bersendi kitabu'llah,
Kuat adat, ta'gadoh hukum,
Kuat hukum, ta'gadoh adat,
Ibu hukum muafakat,
Ibu adat muafakat.

²³ *Keputusan adat tiga perkara:*
Pertama adat mansiang ia-itu terjali,
Kedua adat tiang ia-itu adat berkebulatan,
Ketiga adat kitabu'lah ia-itu hukum Kuran;
Pada adat menghilangkan yang burok,
Menimbulkan yang baik;
Pada shara' menyuroh berbuat baik
Meninggalkan berbuat jahat.

particular view taken of any individual human being is that the conduct which is *adat* for him is that which is proper according to his position in life. This view of a minimal capacity in the *adat* legal universe is markedly at variance with that in Islamic law.

(b) Islamic law:

The Islamic legal system ascribes a minimal capacity and recognition only to those persons who are Muslims.²⁴ It is upon the fact of adherence to religion that Islamic law claims and exercises an exclusive jurisdiction. This is quite dissimilar to both the *adat* and English law position; the former does not demand any similar condition nor is the person defined otherwise than as a natural person. English law is similar to *adat* in that the point of normative reference taken is the natural human being; however, English law, like Islamic law, does claim an exclusive jurisdiction in the definition of the legal person.

The distinction between *adat* and Islam can best be illustrated by a description of the treatment of the Islamic claim to jurisdiction over the definition of legal personality as this has appeared in judicial proceedings. The choice of this framework for discussion has been dictated by the fact that the substance of Islamic law in Malaya²⁵ is that which is determined by an English law-based judicial and legislative system. The outstanding example is the decision given by the Singapore Court of Appeal in *Re Maria Huberdina Hertogh : Mansor Adabi v. A.P. Hertogh & Anor.*²⁶ The background to this decision is as follows: Maria Hertogh had been left in Indonesia as a child during the Japanese advance in 1941. She was cared for and brought up as a Muslim girl by a servant of the respondent. The respondent had managed to trace her whereabouts after the war and attempted to regain custody of his daughter. This was resisted by the girl's foster parent and resulted in an action in the Singapore High Court where the respondent was successful. At the time this decision was given, however, the girl entered into a contract of marriage to the appellant in the present case. Her age at this time was fifteen years. The Court was asked to decide upon the validity of this marriage (which was valid at Muslim law): the Court found as a fact that the girl was an adherent of the Muslim religion.

²⁴ For the purposes of this essay we leave aside the position of Christians and Jews which tend to qualify somewhat the validity of this generalization.

²⁵ And also in Singapore.

²⁶ [1950] M.L.J. 214, [1951] M.L.J. 12 & 164.

However, at Dutch law, the law of her father's domicile, she had no capacity to contract a valid marriage except with certain permissions which had not been obtained. The Court held that as the girl was a minor she had a domicile in Holland, following her father's domicile, and the marriage was therefore declared a nullity. So far as Islamic law was concerned the marriage was valid, considerations of domicile being irrelevant.

The point in citing this decision here is that it exemplifies a face to face conflict between two legal systems each claiming exclusive jurisdiction on respective bases which bear no relation to one another. Islamic law defines capacity to marry on the basis of adherence to the religion of Islam. English law, on the other hand, proposes that the concept of domicile, in this case of derivative domicile, will "fix" or establish an individual as the subject of a particular legal system. The court had a clear choice in deciding which of the two systems governed and the fact that the court itself was part of an English law-based system probably made the decision it did give more or less inevitable. This is clear from the fact that it was established as a fact that the girl was Muslim but the court decided to disregard this in her best interests; what such interests were does not appear from the face of the law reports. The important point is that in such a conflict neither system of law possesses a criterion for deciding which of two definitions of personal capacity is to apply; this is an aspect of the truism that legal systems are exclusive. In this case, the exclusiveness was (and remains) based upon mutually irreconcilable definitions of the person within a system of jurisprudence.²⁷

The same situation obtains of course in respect of *adat* and Islam, but the position in relation to out and out disagreement as in the *Hertogh* case is somewhat easier, at least in the traditional sphere, for one very good reason. This is that in some *perbilangan* of *adat perpateh* a very real effort has been made to minimise the distinction. For example, let us look again at a portion of the last cited *perbilangan*:

(vii) *Adat* may be split into three branches:

Adat clear as the triangular rush in a rice-field,

Adat strong and round as a pillar, whereon all men agree,

Adat laid down in God's book, the law of the Koran; . . .²⁸

²⁷ For further examples involving both Muslims and Chinese cf. Hooker (1968), Nygh (1972).

²⁸ For the Malay, see footnote 23 above.

These propositions amount to a further definition and extension of the concept of *adat*. The reference to the "triangular rush in a rice-field" is a reference to the immanent logical necessity of the natural order; the reference to "*adat* ... whereon all men agree" is a reference to the necessity and primacy of right reason; the final reference is to Islam itself but the clear implication is that all these elements are parts of the unitary concept.²⁹

If we turn now to a portion of another previously cited *perbilangan* the argument may be carried a good deal further:

- (viii) *Adat* hinges on religious law,
 Religious law on the word of God,
 If *adat* is strong, religion is not upset,
 If religion is strong, *adat* is not upset,
³⁰
- (ix) It is for *adat* to suppress the wrong,
 To bring the good to pass;
 It is for religious law to command righteousness
 and bid men eschew evil.³¹

The total effect of (viii) is to locate the origin or source of *adat* in the will of God whereas in (ix) an equivalence of function, although with respective emphases, is set out. The result is, therefore, to create a unified concept of the right and proper in which *adat* and Islamic definitions of the individual are seen as complementary versions of the single concept. This may or may not be acceptable in the classical jurisprudence of Islam, but this is not in point; instead we are looking at an accommodation in the matrilineal *adat perpatih*. As such, it may be described as sophistry but it does serve an essential function in avoiding the face-to-face clash of principle exemplified in *Hertogh*. It may even be proposed that such clashes are more likely to occur in the context of an English law-based judicial system merely because the logic of the system itself demands that disputes be put before it on the basis of an exclusive adjudication rather than on the principle of inclusive mediation. This should not, however, blind us to the fact that the definitions of legal personality in the respective systems — *adat* and Islam — are fundamentally quite distinct.

²⁹ These divisions and others of a similar nature also appear in Minangkabau law texts, cf. Winstedt and Josselin de Jong (1954).

³⁰ For the Malay, see footnote 22 above.

³¹ For the Malay, see footnote 23 above.

II. THE ATTRIBUTION OF OBLIGATIONS

In the last section we discussed the definition of the legal person as essentially the ways in which a particular culture gives a value to and organizes the fact of human existence for purposes of defining a normative structure. The particular characteristics of such a structure vary from one legal system to another as we have just seen. In this section we shall go on to consider, on the basis already indicated, the condition of belonging to a particular class of persons to whom a particular legal system assigns certain obligations.³² It will be clear that the definition of "person" is, as we have seen, fundamental to such a condition. We may look at each peculiar definition in the light of formulations which refer us to statements of individual obligation.

(a) Adat:

As with the definition of legal personality, we may illustrate the *adat* view of the attribution of individual obligation from the *perbilangan*. As we saw earlier, the sort of person envisaged in the *perbilangan* is the "natural" person. Similarly, the attribution of obligation falls to be determined upon the basis of the "natural" relationships which subsist between individuals. We may illustrate this proposition by the following *perbilangan* selected from many upon the subject:

- (x) i Earnings by husband or wife, during marriage are given to him or her who has earned them;
- ii What a man has got by his wife remains with her clan;
- iii What the husband brought goes back to him;
- iv Property in partnership is equally split;
- v Any loss or profit on the wife's property is a matter for her clan;
- vi The man's person is restored to his own clan.³³

³² That is to say, actions which ought (not) to or must or may be performed. Such actions are either prescriptions or technical norms, i.e., statements of the proper action required to attain a desired end. Although law "properly so-called" is often said to be limited to prescriptions in the study of municipal (i.e. state) systems, we have no warrant, in comparative study, for excluding technical norms from any general statement of obligations. To do so would be to import into a foreign system a characteristic classification of one's own technical jurisprudence.

³³ i *Chari bahagi*
 ii *Dapatan tinggal*
 iii *Pembawa kembali*
 iv *Kutu di-belah*
 v *Rugi laba pulang ka-tempat semenda*
 vi *Nyawa darah pulang ka-pada waris*

- (xi) vii Warden of the wife is the husband,
- viii Warden of the husband his wife's lineage,
- ix Warden of the lineage its elders,
- x Warden of the district the chief,
- xi Warden of the world the "king".³⁴

These two *perbilangan* contain in succinct form the basic principles of the *adat perpateh* social system. This is more apparent from the Malay version than from the English translation, especially in (x) which is obviously concerned with a specific distribution of obligation in respect of property. The Malay equivalences of the English translation, e.g., "*chari bahagi*", "*dapatan tinggal*", not only state prescriptions as such but imply a certain sort of marriage regulation; i.e., that the parties do not belong to the same clan.³⁵ The provisions of this *perbilangan* also make clear that the property controlling unit is not the individual but the clan. The nature of the *adat perpateh* kinship system is well known³⁶ and need not be repeated here; the point which must be made, however, is that *adat*, as represented in this *perbilangan*, is but an expression of kinship principles. That is to say, one can describe the obligations stated by *adat* (as prescriptions) in terms of kinship groupings. It is clear that obligations are not determined exclusively by an *adat* which is separate from and unrelated to the kinship system. At the level of "husband" for example, a "rule" of *adat* may be a residence rule which anthropologists would describe in a formally different manner.

However, when we come to *perbilangan* (xi) another conception of *adat perpateh* becomes possible. Lines vii - xi define, in an ever-increasing area of competence, the spheres of *adat* as these are spheres each with its own particular obligation sets.³⁷ Anthropologists are already familiar with the idea of a multiplicity of legal levels within a single legal culture and *perbilangan* (xi) is an example of this. However, this form has one further feature of importance; this is that in the Malay term *Kunchi* translated as "warden", we are being served notice that

³⁴ vii *Kunchi bini laki*
 viii *Kunchi semenda tempat semenda*
 ix *Kunchi anak buah ibu bapa*
 x *Kunchi luak penghulu*
 xi *Kunchi alam Rajah*

³⁵ This is often an ideal; in many *adat* districts membership of different lineages is often sufficient. However, no general rule as to practice can be laid down as the requirement of distinct membership varies from place to place.

³⁶ cf. the sources in footnote 1.

³⁷ Line xi must be qualified in that "world" refers to the "*adat* world".

a boundary is being drawn between the *adat* obligation and the rules of Islamic law. The primary meaning of *Kunchi* is "lock" or "bolt" used to guard and protect. This is contrasted to the Islamic usage in that the term, *wali* "guardian", is avoided in the *perbilangan*. In other words, the ascription of boundaries to obligation systems, whether of prescription or of technical norm, is also a part of *adat*, but a part which is not concerned with kinship principles as such. This does not mean that there is a dual *adat* culture, more than one *adat*; both *perbilangan* are equally *adat* and both rest upon the same view of the individual set out in the last section of this essay. All *perbilangan* are thought of as being part of a unified body called *adat*; we have looked at the various ways in which these different *perbilangan* function and these distinctions are also perfectly apparent to the Negri Sembilan peasant. The fact is that *adat* in the form of the *perbilangan*, which have been cited so far, is a complex whole made up of different phenomena, at least to the eyes of the Western observer. To the Negri Sembilan peasant it is a consistent whole which defines, delimits and states the sources and forms of obligation. The ultimate validation is seen to be the propriety which exists between the laws of man, nature and God. This is especially exemplified in the following *perbilangan* which sets out the limits of power of those whose function it is to make decisions about standards of behaviour:

- (xii) The King carries out his justice,
 The Territorial Chief his law.
 The Clan Chief his ancestral duty
 The Inheritors their entail,
 The Lineage Heads their custom
 The Wife's Kin their duty
 The Husband his conventions.³⁸

To conclude, the total conception of *adat perpatih* includes the worlds of kin relations, religion and the organisation of political office in the traditional federation of the Negri Sembilan.³⁹ This total system

³⁸ *Raja sa-keadilan,*
Penghulu sa-undang,
Tua sa-lembaga,
Waris sa-pesaka,
Ibu bapa sa-adat,
Tempat semenda satu shahadat,
Orang semenda sa-resam.

³⁹ We return to the question of political organization below.

of obligation has not been treated as a coherent whole by the dominant English law-based legal system except where the *adat* formulations themselves were open to adoption as convenient categories so far as the dominant system was concerned. Thus, for example, it was long a feature of colonial policy in Malaya that the occupation of land by the Malay peasant be protected; this was embodied in a set of enactments known as the "Malay Reservation" legislation. In the spirit of this policy, Negri Sembilan was provided with a "Customary Tenure Enactment"⁴⁰ which took as its basic units for reserving land such groupings as the "tribe" (clan), the "family" (lineage) and gave specific functions to the clan and lineage heads as well as preserving the principle of female ownership. In addition, the *adat* land classifications into *pesaka* (ancestral) and *charian* (acquired) were also expressly adopted. Later legislation has continued this position.⁴¹ All this, however, is in marked contrast to the *perbilangan* cited earlier which deal in the *adat* of values and in the relationship between clan and religion. Their sole function seems to have been to act as a definer of the place of man in the world; the more detailed specific obligations, especially prescriptions, thus assume and rest upon them. It is the prescriptions which are later taken over in legislation and judicial decision and the comparative success of this translation might very well be attributed to the "natural" definition of person set out in the earlier *perbilangan*, and which is not dissimilar to the English law view.

(b) Islamic Law:

The attribution of obligation in Islamic law stems both naturally and logically from the definition of the individual in terms of religious adherence. Particular areas in which detailed prescriptions differ sharply from *adat* prescriptions include marriage, adoption and inheritance. Naturally enough, in a largely peasant community, such differences come to a head particularly in respect of property. For example, *adat* recognizes and Islamic law does not recognize the right of an adopted child to succeed to his adoptive parents' estate. In so far as marriage is concerned, the *adat* forbids a marriage between the children of sisters; the reason being that as members of the same clan such a marriage would be tantamount to incest — *sumbang*. Islamic law, on the other hand, has nothing to say on such a marriage.

⁴⁰ In 1909, amended 1930. c. 215 laws of the Federated Malay States.

⁴¹ cf. Hooker (1968a).

It is in the sphere of inheritance of property, however, that crucial distinctions really arise. Islamic law lays down a scheme for distribution among named kin within a defined range. The nature of the property to be distributed is not of itself important; attention is instead concentrated upon the degrees of relationship of individual Muslims. In *adat perpateh* on the other hand, although degrees of relationship are important, the nature of the property itself is crucial: if it is *pesaka*, i.e., ancestral, then it must devolve upon female inheritors according to "degrees of nearness" to the original owner.⁴² This scheme has the sanction of statute behind it.⁴³ If, on the other hand, the property is *charian*, i.e., acquired during coverture, the position is more difficult; the *adat* authority will attempt to claim that such property be distributed according to *adat* because on this point definite and fixed rights are set out by the relevant rules. However, Islamic law does not know such a form of property and to the relevant Islamic official (in this case, the Kadhi) such property forms part of a normal estate and falls to be distributed according to Islamic law. The important point is that this legal system claims an exclusive jurisdiction and this, as we saw earlier, is a consequence of religious adherence *simpliciter*. Although *adat* does claim a similar exclusive jurisdiction within its own *adat* universe it is prepared to admit and take account of the rules of an outside legal system. This is exemplified in the *perbilangan* cited earlier but no similar provision exists in Islamic law except in matters not directly subject to definite rules. The question therefore resolves itself into determining what effect is to be given to an exclusive claim to attribute obligation. On the one hand, this question would seem to be decided in favour of Islam in that legislation providing for the implementation of its obligations, including the sorts of property just mentioned, is in force in Negri Sembilan.⁴⁴ On the other hand, there is also legislation in force providing for the recognition of *adat* rules relating to *charian* in the same state.⁴⁵

⁴² In the *adat perpateh* these are as follows:

- I (a) Mother.
- (b) Sister, Sister's daughter.
- II (c) Mother's Mother.
- (d) Mother's Sister, Mother's Sister's Daughter.
- III (e) Mother's Mother's Mother.
- (f) Mother's Mother's Sister's Daughter.

⁴³ c. 215 revised laws of the Federated Malay States.

⁴⁴ Administration of Muslim Law Enactment No. 15/1960.

⁴⁵ Small Estates (Distribution) Ordinance No. 34/1955 S. 24.

This legislative ambivalence is a continuing source of tension and much depends, in particular cases, upon the attitudes adopted by individual members of the state executive. Such officials, especially the District Officer, have been provided with a set of mutually opposing rules, but have not been given guidelines by the legislature which could establish the primacy of one system over the other. However, three factors tend to favour the *adat*; first, the District Officer in deciding such a question is acting in a judicial capacity which means that his actions are subject to review by or appeal to the *secular* judicial system. Second, and related to this, there is a clear line of judicial precedent which treats *adat* as part of the secular English law-based national legal system. In other words, *adat* and the secular legal system are identified as being part of a coherent national legal system. It is tempting to attribute this coherence or cohesiveness in which the obligations of two systems are mutually comprehensible as being a consequence of similar views in defining the legal person. Islam, on the other hand, because of the mere fact of its exclusiveness in definition and hence in the attribution of obligation, is limited in scope and effectiveness; this cannot be surprising when it is remembered that English law has been, and in its principles continues to be, the dominant source of law. Further, we should also remember the factors pointed out in the introductory section of this essay, particularly that the operation of Islam is confined by and to statute. The principle upon which such a limitation is based is that Islam is a part only of the total national system and it is also a part which, by simple act of parliament, can be amended or be subjected to the formal technical demands of a legal administration based upon principles of English law.

The third and final factor in tending toward a form of *adat* application is the fact that in the majority of cases actually dealt with at District level some sort of compromise in the actual distribution of an estate is usually arrived at. In all distribution a Kadhi's certificate is required which sets out the Islamic fractions and which should, in terms of the legislation providing for the implementation of Islamic law, be binding upon the parties. Instead, if there is dispute as to the nature of the law governing the property, then this certificate serves as a basis for a process of bargaining between the parties. This practice is encouraged by the officials in charge of the distribution who make every attempt to achieve a compromise and avoid future litigation. Many of the recorded settlements are thus neither strictly *adat* nor Islamic but the practice of compromise itself, as a stage in the official administration,

is now well enough established to have become a widely recognised usage. This is an important point because what is essentially involved in distribution proceedings is not a high flown exposé of rules of law but an attempt to satisfy individual aspirations to control of land. The parties involved are all Muslim and in the proceedings, though reference is made to Islamic and *adat* rules, the major emphasis falls upon working out a distribution which is *adat* (i.e., proper or suitable) *for the particular circumstance*. It is only when this proves not to be possible that recourse is had to the higher reaches of the (secular) judiciary and it is here that an opposition of systems becomes obligatory.

III. ADAT, ISLAM AND THE STATE

So far in this essay we have concentrated our attention upon *adat* and Islam as regarded from their respective positions in the definition of the individual and the attribution of obligations to such an individual. The important overlying influence of English law has been implicit in this description and it has been occasionally more explicit. In this section a brief description will be given of the State Constitution of Negri Sembilan in which both *adat* and Islam form essential components. The importance of this cannot be underestimated because the state government is competent to affect the substantial obligations arising under each system through its control of the legislative process. An equally important point in the present discussion is that the superior *adat* official (the *Undang*), of whom there are four, is included in the definition of the term "Ruler" in the State Government. Negri Sembilan possesses an elected legislature and a parliamentary system of government; all state enactments require the assent of the "Ruler" before they become law and this term includes the head of the state (the *Yamtuan*) as well as the four *Undang*. The latter owe their office to election by the clan chiefs of the matrilineal clans and are themselves clan members. In theory they can be dismissed from office by a unanimous decision of the clan chiefs on the ground of a breach of *adat* rules. This question of dismissal is of vital importance because the *Undang* are not only elected by the clan chief but are also part of the state constitution, and hence, the question arises directly of the power of *adat* officialdom in relation to the constitution.

A further complicating factor and one which adds considerably to the tension of this situation is the involvement of Islam. Chapter 2 of the Negri Sembilan State Constitution provides that Islam shall be the religion of the state⁴⁶ and goes on to establish a Council of Muslim Religion

(*Majlis Ugama Islam*) of which the *Undang* are members and whose concurrence is necessary in any matter concerning the Muslim religion.⁴⁷ It can easily be seen that in this situation the relationship between Islam and *adat* is primarily a political one; we can illustrate this by a reference to a by now well documented crisis which occurred in 1957. In that year the Negri Sembilan legislative assembly passed an enactment entitled the Council of Muslim Religion Enactment⁴⁸ of which sections 54-56 made provision for the method of payment of *zakat* and *fitrah*.⁴⁹ This proved to be extremely unpopular among the villagers who regarded their original method of payment as an *adat*, i.e., an established usage, with which the legislature had no right to interfere. Much of their resentment was directed against the *Undangs* who, as mentioned above, are by virtue of their position as being part of "Ruler", required to formally assent to the passing into law of any state bill. In one district, Jelebu, feeling ran so high that the clan chiefs took the peasants' protests to the *Undang*, who not only rebuffed them but attempted to deal direct with the lineage heads. This in itself was a breach of the *adat* procedure in the Jelebu area and the reaction of the clan chiefs was to dismiss the *Undang* from office. The dismissal was valid in Jelebu *adat* and the State Constitution itself provides for the recognition⁵⁰ of such a dismissal. In the event, however, the dismissal was ineffective; the *Undang* retained his government income and the outward trappings of rank. No move was made to declare the post vacant and the *Undang* continued to exercise his powers and functions under the Constitution.

This incident illustrates not only the sorts of tensions inherent in the composition of the constitution but also the anomalous position of both *adat* and Islam. The determining factor in such circumstances, of which there are other instances⁵¹ is likely to turn upon the attitude of the state government which will act in support of one side or the other in the light of what it sees to be its own best interests. In other words, neither *adat* nor Islam can of its own resources determine their mutual relationship. Such determination belongs to an institution which operates upon imported principles of substance and procedure; these have been manipulated so as to allow an accommodation of *adat*, and to a limited extent, of Islam. The differences in respective accommodations are

⁴⁶ Art. V.

⁴⁷ Art. VI (2)

⁴⁸ No. 1/1957.

⁴⁹ The Muslim charity/tax.

⁵⁰ Art. XIV (3).

⁵¹ cf. Hooker (1971).

important. It may be supposed that the relative success of the *adat* accommodation is due first to the similarity of its conception of the legal person to the definition adopted as proper by English law. Second, both *adat* and English law recognise the existence of other legal systems and both provide in themselves some principles for giving effect to a foreign system. Islam on the other hand claims an exclusive jurisdiction which it is not disposed to give up in the case of individuals who are followers of Mohammed.

The *adat* response can be summed up:

It is for *adat* to suppress the wrong,
To bring the good to pass.
It is for religious law to command righteousness
And bid men eschew evil.⁵²

IV. CONCLUSION

The material put forward in the foregoing part of this essay is not of course exhaustive nor does it deal with the whole range of the *adat*/Islam complex in Malaya. However, as was made clear at the beginning, the aim of this paper was to concentrate attention upon a field of common interest to social scientists and jurists. The major factors joining jurisprudential and anthropological interest lie in the fact that *adat* is not only part of the general Malay culture but is also a portion of the technical legal system. Students of *adat* must thus come to grips with the total body of *adat* but this, because the Malay is also Muslim, necessarily includes Islam. In the past, and with few exceptions, anthropological work has stopped short at the boundaries of the technical system despite the fact that this is an important factor in day to day peasant life. On the other hand, technical legal description, again almost without exception, generally ignores anthropological data and even persists, in the majority of judicial proceedings, in using terms such as "tribe", "patriarchal", "matriarchal" and so on, in ways which ignore important features of the lives upon whose aspirations and courses of action the court is giving a ruling. The absolutely crucial point is of course that data from both disciplines refer to the same individual. It is obvious, therefore, that for some sort of mutual comprehension at

⁵² *Pada adat*
Menghilangkan yang burok
Menimbulkan yang baik.
Kata Shara'
Menyuruhkan berbuat baik
Menegahkan berbuat jahat.

least, if not for the better administration of justice, we must provide a language or method of investigation which can take account of the varieties of data. In this essay it has been suggested that an essential first step in establishing such a method is to distinguish between the individuality of the human substantiate and the concept of legal personality. This distinction requires that we specify the ways in which a particular culture gives a value to and organizes the fact of human existence for purposes of defining a normative system. It is hoped that the particular examples chosen in this essay go some way toward illustrating these propositions.

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APPENDIX

The State enactments providing for the implementation and administration of Islamic law in Malaysia contain a variety of definitions in respect of the various payments made upon marriage. A summary of these is given below and, as is clear from the material provided, the legislative usage is anything but consistent.

- Belanja* This term is found only in the Pahang legislation. It means "the optional expense agreed by both parties at the time of the betrothal". (Administration of the law of the Religion of Islam Enactment, 1956.)
- Hantaran* This term is used only in the Negri Sembilan, Malacca and Kedah legislation. It is defined in the first two states as "the obligatory cash payment due to be paid under local custom by the bridegroom to the bride at the time the marriage is solemnised". (Negri Sembilan Administration of Muslim Law Enactment, 1960 and Malacca Administration of Muslim Law Enactment 1959.) The term is not defined in the Kedah Administration of Muslim Law Enactment 1962, although section 120 of this act provides for the registration of *Hantaran* at the time the marriage is solemnised.
- Mas Kahwin* There is a standard definition of this term in all the state legislation. It means "the obligatory marriage payment due under Muslim [or Islamic or Mohammedan] law by the husband to the wife at the time the marriage is solemnised, whether paid in cash or in kind, or payable as a debt with or without security".
- Pemberian (Berian)* This is a term which has a variety of definitions which vary somewhat from state to state. The following is a representative sample.
- Selangor: "The optional marriage settlement made by the husband on the wife at the time of marriage in cash or in kind".
- Malacca, Negri Sembilan and Penang: "The marriage gift other than cash made by the husband to the wife at the time of the marriage".
- Kedah and Kelantan: "The marriage gift in cash or in

kind made by the husband to the wife at the time of the marriage".

Trengganu: "A gift in cash or in kind made by the husband to the wife on account of the marriage".

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