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Native Law as One of The Sources of Law in Sabah Legal System

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Abstract

Native law is one of the sources of law recognised by the Federal Constitution in Malaysia. In Sabah¹, one of the states in East Malaysia, native law received its formal recognition from the British government in 1888. It continues to exist until today, governing matters involving the natives of Sabah. The law is administered by the native court, presided by the native chiefs. This paper discusses the evolution of native law in the State of Sabah since colonial times and analyses the development of customary law as one of the sources of law in the Malaysian legal system. The analysis includes a discussion on the validity of customs and the position of native law in the Sabah legal system.

Keywords: customs, native law, source of law, legal system, legal pluralism

Introduction

All law begins with custom.² This proposition emerges from anthropologists and ethnographers. However, not all legal scholars agree with this statement. This is speculated by the different opinions presented by the different schools of thought, for example, the positive law school (Legal Positivism). The positivist school has tried to displace the role of tradition as a source of legal philosophy. On the other hand, the sociological school argued that custom is not the fundamental and primal element of sound philosophy. Still, it is one of the factors involved in establishing acceptable solutions. A German jurist and legal historian, Friedrich Karl von Savigny, introduced the concept of the *Volkgeist*, or "the spirit of the *Volk*." Savigny explains that the law is the unique creation of a race, a people, a *Volk*. According to him, there is a need to understand the interrelationship between law and people.³ It is first developed by custom and popular acceptance and next by judicial decisions and not by the arbitrary will of the law-giver. Despite different opinions given by the legal jurists, many legal systems in the world today have recognised custom as one of its sources of law, such as the Romano-Germanic Family and the Common Law.

¹ Sabah is one of the states in East Malaysia. Its population is made up of 33 indigenous groups that communicate in over 50 languages and 80 ethnic dialects. The Kadazan-Dusun is the largest ethnic group in Sabah that makes up almost 30% of the population. The Bajaus, or also known as "Cowboys of the East", and Muruts, the hill people and head hunters in the past, are the second and third largest ethnic group in Sabah respectively.

² Bederman, J. D. (2010). *Custom as a source of law* (p. 3). New York: Cambridge University Press.

³ Rai, N. *Basic concept of Savigny's Volkgeist*. Retrieved from www.academia.edu/428817/BASIC_CONCEPT_OF_SAVIGNY'S_VOLKSGEIST on 01.03.2021

Definition of Custom and Customary Law

Custom is considered an important source of unwritten law and still plays an essential part in modern law. Still, for a custom to be regarded as conferring legally enforceable rights, it is vital that such custom must be reasonable, acceptable by the locality, certain, consistent, in existence from time immemorial in a given community to mention but a few.⁴ It is defined, as usual, generally accepted and the long-established way of behaving or doing things.⁵ It is a practice followed by people of a particular group or region.⁶ Legally, the term custom is defined as long-established practice considered as unwritten law.⁷ Osborn's Concise Law Dictionary defines customs as a rule of conduct obligatory to those within its scope, established by long usage.

In an attempt to define custom, V.D. Mahajan⁸ reveals that a study of ancient law shows that in primitive society, people's lives were regulated by customs, which developed spontaneously according to circumstances. It is contended that the law of the country was to be found in the customs of the people. The people were accustomed to a particular way of living and doing things, which was to be found in the customs of society. Since the King was anxious to rule the people according to the popular notions of right and wrong, those were found in their customs. Later on, the same custom was recognised by the sovereign by putting his permission on it. It was in this way that custom was transformed into law. It is said that custom was vague in the beginning, but it became definite and concrete with time. Austin, another legal scholar, defines custom as a rule of conduct which the governed observe spontaneously and not in pursuance of law settled by a political superior.⁹

According to Carter,¹⁰ the simplest definition of custom is the uniformity of conduct that the governed observe spontaneously and not pursuance of law settled by a political superior. In Tanistry case (30 ER 516)¹¹, the custom was described in these words,

It is *jus non-scriptum* and made by the people with respect to the place where the custom obtains. For where the people find any act to be good and beneficial and apt and agreeable to their nature and disposition, they use and practice it from time to time, and it is by frequent iteration and multiplication of this act that the custom is made and being used from time to which memory runneth not to the contrary to or no consistent with the general common law of the realm.

It is a traditional common rule or practice that has become an intrinsic part of the accepted and expected conduct in a community, a mirror of accepted usage¹² profession or trade, and it is treated as a legal requirement. Not many countries in the world today will operate under a legal system that could be wholly customary.¹³ According to Salmond, the importance of custom diminishes as the state legal system grows.¹⁴

⁴ Hamzah, W. A. (2009). *A First Look at the Malaysian Legal System* (p.104-107.) Selangor Darul Ehsan: Oxford.

⁵ Hornby, S. A. (1994). *Oxford Advanced Learner's Dictionary* (p. 294). Oxford: University Press.

⁶ *The Free Dictionary*. Retrieved from <http://www.thefreedictionary.com/custom> on 04.10.2021.

⁷ Curzon, B. L. (2010). *Dictionary of Law* (6th ed., p.115). Petaling Jaya: International Law Book Services.

⁸ Vidyadhar, M. (1987). *Jurisprudence & legal theory* (5th ed., p. 255). Lucknow: India, Eastern Book Company.

⁹ Ibid

¹⁰ Vidyadhar, M. (1987). *Jurisprudence & legal theory* (5th ed., p. 255). Lucknow: India, Eastern Book Company.

¹¹ Ibid

¹² See *Owonyi v. Omotosho* F.S.C.249/1960; LN-e-LR/1961/75 (FSC) 15TH JUNE, 1961. <http://lawnigeria.com/Court-Judgments/1961-JUDGMENTS/1961-OWONYIN-V.-OMOTOSHO.html>.

¹³ Abdulkadir Owolabi A., Akanbi M.M., Abdulkadir B.A., Sambo O.A., Imam-Tamim M.K. *Rethinking On Dilution Of Custom With Religion: An Exposition Of The Nigerian And Malaysian Legal*. Retrieved from <https://www.elaw.my/ELawArticleDisplay.aspx?info=SHk+VM7hFDZtOhZi/YdxwtXlrf/Ackk5dT9H931/DKs=#b24> on 03.08.2020.

¹⁴ Vidyadhar, M. (1987). *Jurisprudence & legal theory* (5th ed., p. 257). Lucknow: India, Eastern Book Company.

On the other hand, customary law is generally described as the law relating to the customs and traditions of a group of people; and which affects the character, attitude, and culture of the people to whom they apply.¹⁵ Customs features the repeated social practices of a particular circle of people; while customary law, an intermediary concept between custom and law, belongs primarily to unofficial law and official law as far as an official law sanctions it.¹⁶ It refers to that particular thing that is evolved spontaneously and continually with the culture of a society and is imitated by the majority of people.¹⁷ Customary law commonly refers to a law that legal authority has created to support a particular custom because of that custom's antiquity and a widespread belief that such a law is necessary.¹⁸ The term "customary law" has existed for a long time and generally does not cause special questions and discussions, as it seems understandable and familiar.¹⁹ The first scholars to undertake a serious attempt at conceptualising customary law were ancient Romans faced with the apparent differences between the statutes created by central authorities and the customary law that preceded them and differences between Roman law and the indigenous customary law used in outlying parts of the empire. Nonetheless, customary law still plays a significant role, like in the matters of marriage, in many countries or political entities with mixed legal systems.²⁰

According to Lakshman Marasinghe, customary law is a regular pattern of social behaviour which the bulk of a given society has accepted as binding upon its members because such behaviour is beneficial not only as a means of encouraging inter-personal relations among them but also as being useful for maintaining a cohesive society for their individual and collective betterment.²¹ One author, Keeton, defines customary law as those rules of human action, established by usage and regarded as legally binding by those to whom the rules are applicable, which are adopted by the courts and applied as a source of law because they are generally followed by the political society as a whole or by some part of it.²² He stressed the recognition of customs by a court of law. In other words, for a custom to be regarded as law, it must be recognised by the court. On the other hand, Salmond defines customary law as any rule of action observed by men – any rule that expresses some actual uniformity of some voluntary action. Irene Watson came out with a different stand. She wrote in her chapter²³ that she has never used the term "customary law" to describe the Aboriginal laws of Australia. She argued "customary law" is an assimilationist term, one in which the dominant culture has the power to determine – that is, to determine, to recognise or not, to incorporate or not. She instead uses the term "Aboriginal law", which refers to the sovereign law of the first people of Australia, a place of the immense diversity of peoples, laws and cultures before the invasion in 1788. And customary law is sometimes used interchangeably with the term native law. Native law refers to the law of the local

¹⁵ Akolokwu, O. G., & Raji, A. B. (2018). *Property rights of married women under customary law in Nigeria: myth or reality* 1 Ins(a) xxxv. Retrieved from https://www-cljlaw-com.ezaccess.library.uitm.edu.my/Members/DisplayArticle.aspx?ArticleId=132251684&SearchId=7marali_b1 on 01.08.2018.

¹⁶ Chiba, M. (2007). Custom and Law. In David S. Clark (ed.), *In Encyclopedia of Law & Society: American and Global Perspectives*. Retrieved from <http://sk.sagepub.com.ezaccess.library.uitm.edu.my/reference/law/n161.xml> on 10.07.2016

¹⁷ Khan, H. U. (2012). *Jurisprudence and Comparative Legal Theory*, Dhaka: Ain Prokashan at p. 169

¹⁸ Strouthes, D. P. (2002). "Customary Law" from *Encyclopedia of crime and punishment*. SAGE Publications. Retrieved from <https://sk-sagepub-com.ezaccess.library.uitm.edu.my/reference/download/crimepunishment/n116.pdf>.

¹⁹ Ibid
-sagepub-com.ezaccess.library.uitm.edu.my/reference/download/crimepunishment/n116.pdf.

²⁰ A mixed legal system is a combination of two or more legal systems practiced by some countries. Socialist law is based on fundamental tenets of Marxist-socialist state and centered on the concept of economic, political, and social policies of the state. This can be found in some independent states of the former Soviet Union, China and other Marxist-socialist states. See <http://www.law/teacher.net/criminallaw/essays/legal-system-of-malaysia.php>.

²¹ Lakshman Marasinghe, 'Customary Law as an Aspect of Legal Pluralism, with Particular Reference to British Colonial Africa', JMCL, 25 (1998): 19-20

²² Vidyadhar, M. (1987). *Jurisprudence & legal theory* (5th ed., p. 254). Lucknow: India, Eastern Book Company

²³ Watsons, I. (2008). Aboriginal women's laws and lives. How might we keep growing the law?, In Elliot Johnston, Martin Hinton and Daryle Rigney (Eds.), *Indigenous Australians and the law* (2nd ed). Abingdon, Oxon: Routledge-Cavendish.

people developed and handed down by a recognised native authority from time immemorial.²⁴ It is said that native law is the true culture, where it has grown up from the common people; it is not something that has been imposed from above; development in a community will be accompanied by inherent changes in its customs.²⁵ J.N. Egwummuo defines native law as social habits and patterns of behaviours that sometimes tend to evolve without express formulation of consciousness but which, in the course of time, ossify into rules observed by those societies as binding.²⁶ Disregard the fact that different authors have used different terms to indicate customs and customary laws; there is a large volume of published studies describing the role of customs in a legal system. Undoubtedly, the subject discussed in the published studies is well understood by other authors and legal jurists.

It is a known fact that customs have always played a significant role in the formation of law. This is widely acknowledged in the case of the legal system of the common law. It was argued that the most striking example of the role of custom in rule-making is in the pre-state period, where societies created means of conveying to their members the parameters of the desired behaviour and the scope of the obligations that developed upon them and the rights that accrued to them. However, not all legal jurists agree with the role of customs in a legal system. Legal jurists are divided on this matter. A German jurist and legal historian, Friedrich Karl von Savigny, who introduced the concept of the *Volksgeist*, or "the spirit of the Volk",²⁷ explained that law is an expression of the will of the people. It does not come from deliberate legislation but arises as a gradual development of the common consciousness of the nation.²⁸ According to him, laws, which evolve from customs, are more likely to reflect the social reality they are apart from. Customary law, in its essence, is a reflection of the social, cultural and religious 'compact' of a group of people in effect their *Volksgeist*. Based on the theory of *Volksgeist*, it can be said that customs and law cannot be separated. There is a close connection between the two, and both represent crucial elements in a legal system.

Another author, Owen Rutter, provides a distinction between a law and a custom by saying, "strictly speaking the difference between law and custom is that a law is a rule of which a judicial court takes cognisance, punishing its infraction, whereas custom is where it punishes in its manner those who disobey it." He argued that law and custom are two different entities. According to Austin, the custom is not positive law unless the court so declares it, or in other words, it is not law until it has received judicial recognition or has been embodied in some statutes.²⁹

Native Law as a Source of Law

The term "sources of law" has been used in different senses. Sometimes, the term is used in the sovereign or the State from which law derives its force or validity. The more common of which are as follows:

- a) Historical sources, indicating the factors that have been influential in the development of the law but by themselves not recognised as law. Examples of these factors that influence the development of the law are religious practices and beliefs, local customs, and jurists' opinions.
- b) It may also refer to places where the law can be found, such as in statutes, law reports, textbooks and decisions of courts.
- c) In most cases, however, it refers to legal sources, the legal rules that make up the law.

²⁴ Phelan, R. P. Native Law in Sabah. In Syed Ahmad Idid bin Syed Abdullah Idid (Ed.) (1993) *Native Court and Customary Law of Sabah (with Cases and Decisions)* (p. 87). Kota Kinabalu: Sabah Government Printer.

²⁵ Vidyadhar, M. (1987). *Jurisprudence & legal theory* (5th ed., p. 255). Lucknow: India, Eastern Book Company.

²⁶ Egwummuo, J. N. *Principles and practice of land law* (p. 139). Academic Publishing Company.

²⁷ Kazi, F. *Savigny's Theory of Volksgeist* retrieved from https://www.academia.edu/5297796/Savignys_theory_of_Volksgeist on 15.01.2020

²⁸ Doherty Michele, *Jurisprudence: The Philosophy of Law*, 2nd ed., Old Bairy Press, London, p.g. 233.

²⁹ Mani, B. N. (1999). *Jurisprudence (Legal Theory)*, Faridabad: Allahabad Law Agency, at p. 165

Based on the above description, it is submitted that explanation (c) is the most relevant ones in the context of this paper. Legal sources refer to the constitution, legislation, the common law and judicial precedent, custom, international law and equity. On the other hand, literary sources describe the location of law, where the law can be found, for example, in books, legal treatises, law reports or legislation. The historical sources refer to the causative factors behind the Rule of law, historical origin and development. One may view custom as both a legal source and a historical source by looking at its definition.

When we speak of custom as a legal source, we are concerned with the rules of law, which apply in a particular locality and form a body of law distinct from the common law. According to anthropologists, all law begins with custom. Some legal jurists agree with this stand and give many reasons why custom is given the force of law. Among the reasons given by the legal jurists are as follows:

- i. Custom embodies those principles, which have commended themselves to the national conscience as principles of truth, justice and public policy.³⁰
- ii. The existence of an established usage is the basis of a rational expectation of its continuance in the future. Justice demands that this expectation should be fulfilled and not frustrated.³¹
- iii. A custom is observed by a large number of persons in society, and in the course of time, the same come to have the force of law.³²
- iv. Custom rests on the popular conviction that it is in the interests of society. This conviction is so strong that it is not found desirable to go against it.³³
- v. Custom is useful to the law-giver and codifier in two ways. It provides the material out of which the law can be fashioned – it is too great an intellectual effort to create law *de no vo*.³⁴

Custom, as a source of law, sits uneasily with the positivist lawyer. When the judge applies customary rules, the priority of written law is questioned and, with it, so is the differentiation between the making of the legal rules and their application.³⁵ V.D. Mahajan³⁶ has discussed two theories regarding the question as to when a custom is transferred into law, namely Historical theory and Analytical theory.

i. Historical Theory

Based on this Historical theory, the growth of law does not depend upon the arbitrary will of any individual. It grows as a result of the intelligence of the people. Custom is derived from the common consciousness of the people. It springs from an inner sense of right. Law has its existence in the general will of the people. Savigny gives it the name of *Volkgeist*. To quote Savigny, A law, like a language, stands in organic connection with the nature or character of the people and evolves with the people.

However, this theory receives total disagreement from two legal jurists, namely, Paton and Gray. Paton argued that the growth of most of the customs is not the result of any conscious thought by tentative practice. Gray contended,

³⁰ V.D. Mahajan, *Jurisprudence & Legal Theory*, 5th Edition (Lucknow, India, Eastern Book Company, 1987) at page 257

³¹ Ibid

³² Ibid

³³ Ibid

³⁴ Ibid

³⁵ Holden, S. L. (2003). *Custom and law practices in Central India: Some case studies South Asia research*, 23(2), 115–134, 034681. Retrieved from https://www.academia.edu/39628037/CUSTOM_AND_LAW_PRACTICES_IN_CENTRAL_INDIA_SOME_CASE_STUDIES.

³⁶ Vidyadhar, M. (1987). *Jurisprudence & legal theory* (5th ed., p. 259). Lucknow: India, Eastern Book Company

Not only does custom play a small part at the present day as a source of non-contractual law, but it is doubtful if it ever did, doubtful whether, at all stages of legal history, rules laid down by judges have not generated custom, rather than custom generated legal rules. It has often been assumed, almost as a matter of course, that legal customs preceded judicial decisions and that the latter has served to give expression to the former, but of this, there appears to be little proof. It seems at least as probable that custom arose from legal decisions.

According to this theory, most of the time, customs have been imposed upon by the ruling class. It can be seen that the Historical jurists underestimated the creative roles of the judges and of legislators, which are so important in modern times.³⁷

ii. Analytical Theory

Austin, Holland, Gray, Allen and Vinogradoff support this Analytical theory. According to Austin, the custom is a source of law and not law itself. Customs are not positive laws until the decisions of the courts recognise their existence. He further argues that a custom becomes law when it is embodied in the act of the legislature. It becomes law when the State enforces it. It is not every custom that is binding. Only those customs are valid, which satisfy the judicial test. The sovereign can abolish custom. A custom is a law only because the sovereign allows it to be so. Custom has persuasive value only. Customary practices have to be recognised by courts before they become law. According to Holland, customs are not laws when they arise but are primarily adopted by state recognition laws. English courts require that not only the existence of custom be proved, but it should also be proved that the same is reasonable. The legislature can also abrogate customs, whether partially or wholly. To quote Holland:

The binding authority has thus been conceded to custom, provided it fulfils certain requirements, the nature of which has also long since been settled and provided it is not superseded by the law of a higher authority.³⁸

It can be said that the analytical theory contains some truth, but that is only partial and not the whole truth. The analytical approach is defective due to many reasons. Among others, the bulk of customs is non-litigious, and hence, it does not come before the courts. Further, according to the Sociological point of view, customs lie in the foundation of all legal systems. They come into existence with the existence of society. Custom is to society what law is to the State. Therefore, according to the analytical school, customs are not law until recognised by the sovereign contains undoubtedly some truth not wholly correct. The starting point of all custom is convention rather than conflict, just as the starting point of all society is cooperation rather than dissension.

According to English jurists, all customs must fulfil certain conditions before they can be recognised as having a force of law.³⁹ The requirements for a valid custom are, first, a custom to be valid must be proved to be immemorial. According to Blackstone:

A custom, in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary. So that if anyone can show the beginning of it, it is no good custom.

In the case of *Baba Narayan v. Saboosa*,⁴⁰ Sir George Renkin observed:
In India, while a custom need not be immemorial, the requirement of long usage is essential since it is from this that custom derives its force as governing the parties' rights in place of the general law.

³⁷ Mani, B. N. (1999). *Jurisprudence (Legal Theory)*, Faridabad: Allahabad Law Agency, at p. 166

³⁸ Vidyadhar, M. (1987). *Jurisprudence & legal theory* (5th ed., p. 260). Lucknow: India, Eastern Book Company

³⁹ Vidyadhar, M. (1987). *Jurisprudence & legal theory* (5th ed., p. 269). Lucknow: India, Eastern Book Company

⁴⁰ (1944) 46 BOMLR 312

The second requirement is that it must be reasonable, useful and convenient to society. If any party challenges a custom, it must satisfy the court that the custom is unreasonable. To ascertain the reasonableness of custom, it must be traced back to the time of its origin. The unreasonableness of custom must be so great that its enforcement results in more significant harm than if there were no custom at all.

Thirdly, a custom must continuously be observed without any interruption from time immemorial. If a custom has not been constantly followed and interruptedly for a long time, the presumption is that it never existed at all. Fourthly, the enjoyment of custom must be a peaceable one. If that is not so, consent is presumed to be wanting in it. A valid custom must also be certain and definite.

Further, a custom is valid if its observation is compulsory. An optional observance is ineffective. It is the court's duty to satisfy itself that the custom is observed by all concerned and not by any one who pleases to do so. Another requirement for a custom to be recognised by law is that the custom must be general or universal. According to Carter:

Custom is efficient only when it is universal or nearly so. In the absence of unanimity of opinion, custom becomes powerless or rather does not exist.⁴¹

In most cases, customs are recognised not with the assumption that the recognition gives them the sanctity of law but with the assumption that they are the law and have to be treated as such.⁴² It is observed that by combining historical knowledge of the law with a conceptual, systematic understanding of how rules interrelate with one another and with the whole, jurists separate what still has validity from that which is lifeless "and only belongs to history, "arriving thereby at a "living customary law."

Recognition of Customary Law in the Malaysian Legal System

Customs and customary law have been recognised as important sources of law in many legal systems globally. Although legal jurists give different opinions about its validity, customary law continues to be applicable, for example, in Malaysia. Malaysia is referred to as having 'the classic pluralistic society'⁴³, where Malay *adat* (customs) and native law are considered essential sources of the unwritten law. Both have received legal status in the Federal Constitution and the state constitution of Sabah and Sarawak. Three legal systems exist in the country: the civil court system, the Syariah court system, and the native court system in Sabah and Sarawak.

Legal pluralism is the existence of multiple legal systems within one population and geographic area. The most comprehensive treatment of the concept of legal pluralism is John Griffith's essay published in 1986.⁴⁴ John Griffiths defines legal pluralism as,

The State of affairs for any social field in which behaviour pursuant to more than one legal order occurs. Since legal pluralism in this sense obtains in all but the most constructed will concern itself with a kind of continuous variability in social

⁴¹ Vidyadhar, M. (1987). *Jurisprudence & legal theory* (5th ed., p. 269). Lucknow: India, Eastern Book Company

⁴² Mani, B. N. (1999). *Jurisprudence (Legal Theory)*, Faridabad: Allahabad Law Agency, at p. 166

⁴³ TN Harper (2001). *The End of Empire and the Making of Malaya*. Cambridge, Cambridge University Press, p. 2

⁴⁴ Timmer, J. (2018). 'Legal pluralism'. Retrieved from https://www.academia.edu/37576316/legal_pluralism

organisation, not with the specification of a taxonomic criterion for a distinct type of social situation.⁴⁵

According to Griffiths, "strong" (i.e., new, sociological) legal pluralism referred to and resulted from the fact that not all law is state law administered by a single set of state-sponsored institutions. His legal pluralism theory is a critic of the Kelsenian 'legal centrist' approach that claims all law is and should comply with the *grundnorm* – which in the contemporary case is often the State's constitution–, uniform for all persons, applied equally across all social groups, and emphatically superior to, if not exclusive of, any other systems or repositories of law.⁴⁶ A situation of legal pluralism is omnipresent, is a normal situation in human society, is one in which law and legal institutions are not all subsumable within one system but have their sources in the self-regulatory activities which may support, complement, ignore, or floor of the society is the result of enormously complex and usually in practice unpredictable patterns of competition, interaction, negotiation, isolationism and the like.⁴⁷

For example, in Nigeria, legal pluralism is very complex.⁴⁸ Nigeria is pluralistic in terms of ethnicity, religion and laws.⁴⁹ Law in Nigeria is traceable to three distinct legal traditions, namely customary law, Islamic law and English common law.⁵⁰ This parallel system of courts has many challenges, and there may still be a case for administering Islamic Law by specialists within a unified courts system.⁵¹ Writers have adopted various terms in the search for solutions to the crisis in Nigeria's legal pluralism. There has been the talk of 'unification', 'fusion', and 'harmonisation.' Harmonisation is defined *inter-alia* as making or forming a pleasing or consistent whole.⁵²

Canada is also a pluralistic legal state; civil common and indigenous legal traditions organise dispute resolution in different ways.⁵³ There is no doubt that Canada's cultural complexity can be a daunting challenge to unity. Nevertheless, a plurality of traditions need not weaken, threaten or overwhelm Canada's historical and constitutional framework. Indigenous peoples in Canada developed various spiritual, political and social customs and conventions to guide their relationships.⁵⁴ And these diverse customs and conventions became the foundation for many complex systems of law.

TN Harper referred to Malaysia as having 'the classic pluralistic society'.⁵⁵ Malaysian legal system recognises custom as one of its sources of law, and it is argued that there is no customary law of general application in Malaysia.⁵⁶ It is contended that the customary laws that survive to date are the Malay customary law, Chinese customary law, Indian customary law, Orang Asli customary law and native law, which applies primarily to the non-Muslim indigenous communities in Sabah and Sarawak.⁵⁷ The issue of recognition of adat or what in relation to East Malaysia is known as 'native law' is relatively unproblematical due to the prevailing legal pluralism in the legal systems of Sabah

⁴⁵ Medha P M, Legal Pluralism retrieved from https://www.academia.edu/37576316/Legal_Pluralism

⁴⁶ Nadia Fadhila, Constitutionalizing Legal Pluralism and the Rights of Indigenous People in South East Asia Explaining the Constitutional Entrenchment of Indigenous People's Customary Law in Malaysia and Indonesia, Constitutionalism in South East Asia https://www.academia.edu/30977319/Constitutionalizing_Legal_Pluralism_and_the_Rights_of_Indigenous_People_in_South_East_Asia_Explaining_the_Constitutional_Entrenchment_of_Indigenous_Peoples_Customary_Law_in_Malaysia_and_Indonesia

⁴⁷ Medha, P. M. *Legal pluralism*. Retrieved from https://www.academia.edu/37576316/Legal_Pluralism.

⁴⁸ Oba, A. A. (2011). Religious and legal pluralism in Nigeria: Religious and customary laws in Nigeria. *Emory International Law Review*, 25 Emory Int'l L. Rev.881

⁴⁹ Abdulmumini A. Oba, Religious and Legal Pluralism in Nigeria: Religious and Customary Laws in Nigeria, *Emory International Law Review*, 25 Emory Int'l L. Rev.881

⁵⁰ Ibid

⁵¹ Ibid

⁵² Harmonisation. (1994). In *Pocket Oxford English Dictionary*. Oxford University Press.

⁵³ Borrows, J. (2005). 'Indigenous legal traditions in Canada'. *Journal of Law & Policy*, 19:167, p. 175.

⁵⁴ Ibid p. 90

⁵⁵ TN Harper (2001). *The End of Empire and the Making of Malaya*. Cambridge, Cambridge University Press, p. 2

⁵⁶ Hamzah, W. A. (2009). *A First Look at the Malaysian Legal System* (p.175.) Selangor Darul Ehsan: Oxford.

⁵⁷ Ibid

and Sarawak.⁵⁸ Previous studies of legal pluralism have shown that the entrenchment of customary indigenous law in the constitution allows for the double-edged swords of State's recognition. The State's constitutional recognition, on the one hand, can contribute to the stronger protection of the indigenous people's rights. However, it can also lead to the tendency for the state structures to undermine the indigenous people's rights through bureaucratisation or conflicting legislations.⁵⁹

It is to be noted that sources of Malaysian law can be divided into two, namely written and unwritten law. Written law refers to the law embodied in the Federal and State Constitutions, code or statute, subsidiary or delegated legislation. On the other hand, unwritten law applies to the law not enacted by the legislature and is not found in the federal and state constitutions. Customs is one example of the unwritten law. It is evident by Malaysian legal history that the preservation of customary laws took place during the colonial era. For instance, in the Straits Settlement, customary laws were applied as an exception to English law. The Charters of Justice of 1808, 1826 and 1855 granted the Court of Judicature with the jurisdiction to apply English law as the law of general application. This means the provisions in the Charters allowed the judiciary to modify English law to accommodate the personal laws of the local inhabitants in the Strait Settlements.

Traditionally, the basic principle of Malay customary law is that all land is owned by the ruler.⁶⁰ Malay customary law (*Malay Adat*) can be divided into two, namely *adat perpatih* and *adat temenggong*. At the time of the British intervention in the Malay States, customary law prevailed either as *adat perpatih* in most areas of what became Negeri Sembilan and as *adat temenggong* on other parts of the peninsular. By that time, Islamic law relating to marriage and divorce had been adopted mainly in both of these types of *adat*. In relation to succession, customary law prevailed.⁶¹ *Adat perpatih*⁶² is characterised as democratic because it exists in a peasant society, organised matrilineally. It is also referred to as tribal *adat*. It is a matriarchal system of the Malays living for the most part in Negeri Sembilan and parts of Malacca. Under *adat perpatih* tribal land can be owned only by women, and ancestral or pesaka property is strictly entailed as tail female so that dealings with this land must comply with custom. *Adat Naning* is *adat perpatih* which is observed in one area of Malacca, namely Naning.

Its great feature was the system of collective responsibility. It emphasised law based on group responsibility. Criminal or civil offences were not differentiated. Punishment stressed compensation rather than retribution. A crime was absolved by payment in kind, for example, or by a reconciliation feast given to the aggrieved person. The payment was enforced by community pressure.⁶³ R.J. Wilkinson commented that,

The liability of a family for the faults of its members...the administrators of the law could rest assure that all possible family influence would be brought to bear on the criminal to induce him to mend his ways and to become a source of profit instead of loss and disgrace to his relations...It was just; it was humane, it tolerated

⁵⁸ AJ Harding, Legal pluralism and the constitutional position of East Malaysia's indigenous peoples: The view from the longhouse, book chapter in G Bell and V Taylor (ed), *Pluralism, Transnationalism and Culture in Asian Law: A Book in Honour of M.B. Hooker*, Singapore, ISEAS, late 2015. https://www.academia.edu/12342159/Legal_pluralism_and_the_constitutional_position_of_East_Malaysia_s_indigenous_peoples_The_view_from_the_longhouse?fs=rwc-h

⁵⁹ Nadia Fadhila, Constitutionalizing Legal Pluralism and the Rights of Indigenous People in South East Asia Explaining the Constitutional Entrenchment of Indigenous People's Customary Law in Malaysia and Indonesia, *Constitutionalism in South East Asia* retrieved from https://www.academia.edu/30977319/Constitutionalizing_Legal_Pluralism_and_the_Rights_of_Indigenous_People_in_South_East_Asia_Explaining_the_Constitutional_Entrenchment_of_Indigenous_Peoples_Customary_Law_in_Malaysia_and_Indonesia

⁶⁰ Halsbury's Laws of Malaysia -- Land (Volume 10(1) (2017)) retrieved from [https://www.lexisnexis.com/my/legal/results/docview/docview.do?docLinkInd=true&risb=21_T28924203474&format=GNBFULL&sort=\\$PSEUDOXAB,A,H,\\$PSEUDOLOSK,A,H&startDocNo=1&resultsUrlKey=29_T28924203478&cisb=22_T28924203477&treeMax=true&treeWidth=0&csi=347238&docNo=9](https://www.lexisnexis.com/my/legal/results/docview/docview.do?docLinkInd=true&risb=21_T28924203474&format=GNBFULL&sort=$PSEUDOXAB,A,H,$PSEUDOLOSK,A,H&startDocNo=1&resultsUrlKey=29_T28924203478&cisb=22_T28924203477&treeMax=true&treeWidth=0&csi=347238&docNo=9)

⁶¹ Ibid

⁶² Adat Perpatih is only confined to Negeri Sembilan and some areas of Naning in Melaka.

⁶³ <https://www.britannica.com/topic/adat>

no delay in criminal matters; it secured compensation for the injured; it never brutalised or disgraced a first offender, it was understood by al...⁶⁴

While *adat temenggong*⁶⁵ is characterised as aristocratic and autocratic, prior to Islamic influence *Adat Temenggong* consisted of a mixture of Hindu law and native custom. It encompassed civil, criminal, constitutional, and maritime law and invoked torture, amputation, or even death as punishment for offences.⁶⁶ R.J. Wilkinson warned us,

Malay laws never committed in writing...they varied in each State...they are often expressed in metaphors or proverbs that seem to baffle interpretation.⁶⁷

Native Laws in Sabah Legal System

In East Malaysia, the application of customary law is more extensive and systematic compared to in the Malay Peninsula.⁶⁸ For Sabah and Sarawak, native laws are considered as the law of general application. Interestingly, the native courts' system was also established to administer native customary law during the British era. In the early 1920s, the Government of North Borneo (as Sabah was then known) instructed the District Officers to draw up lists of offences and punishments in their respective Districts. The written collection of native laws was known as codes when the North Borneo Company Administration published a series of six booklets describing various aspects of the customs of three of North Borneo's main non-Muslim ethnic groups: the Dusuns, the Muruts and the Kwijau. All six booklets, published as Native Affairs Bulletins No. 1-6, covered the customs of these people. The bulletins were written and compiled by G.C. Woolley, a Government Commissioner of Lands.⁶⁹ The number of written collections of native laws remains the same until today.

When Sabah joined the Federation of Malay States and formed Malaysia in 1963, the native law continued to be administered by the native courts. The system of native law governed by native courts had long been an integral part of the state legal system.⁷⁰ Under the Federal Constitution, native law and native court remain state matters regulated by state legislation. Ninth Schedule (Article 74, 77) Legislative Lists, List IIA- Supplement to State List for the States of Sabah and Sarawak states,

13. Native law and custom, including the personal law relating to marriage, divorce, guardianship, maintenance, adoption, legitimacy, family law, gifts or succession, testate or intestate, registration of adoption under native law or custom; the determination of matters of native law or custom; the constitution, organisation and procedure of native courts (including the right of audience in such courts) and the jurisdiction and powers of such courts, which shall extend only to the matters included in this paragraph and shall not include jurisdiction in respect of offences except in so far as conferred by federal law.

Further in article 160(2) of the Federal Constitution states,

⁶⁴ R.J.Wilkinson. (1970). Malay law (p. 9). In MB Hooker (Ed.), *Reading & adat laws*. Singapore University Press.

⁶⁵ *Adat temenggong* is applied to other states in Malaysia. It is a body of written rules. It is found in several legal digests for example the Undang-undang Melaka or Risalat Hukum Kanun, Undang-undang Kerajaan of Pahang, the Kedah Digest, the Undang-undang Kerajaan of Pahang, the Kedah Digest, the Undang-undang Kerajaan and the Ninety-nine Laws of Perak.

⁶⁶ <https://www.britannica.com/topic/adat>

⁶⁷ R.J.Wilkinson. (1970). Malay law (p. 6). In MB Hooker (Ed.), *Reading & adat laws*. Singapore University Press.

⁶⁸ Hamzah, W. A. (2009). *A First Look at the Malaysian Legal System* (p.184) Selangor Darul Ehsan: Oxford.

⁶⁹ Danny Wong Tze Ken. (2009). "Wooley and the codification of native customs in Sabah". *New Zealand Journal of Asian Studies*, 11(6), 187-105.

⁷⁰ Danny Wong Tze Ken. (2009). "Wooley and the codification of native customs in Sabah". *New Zealand Journal of Asian Studies*, 11(6), p.185

Law includes written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof.

Both provisions indicate that custom and customary law are given formal recognition as one of the sources of law in the Malaysian legal system.

After 1963, the State government formed Sabah Bumiputera Affairs Unit (*Unit Hal Ehwal Bumiputra*). This unit oversees the customs, disputes and administration run by the native courts. Later, from 1999 onwards, native affairs came under the jurisdiction of the Sabah Native Affairs Council (*Majlis Hal Ehwal Anak Negeri Sabah*), and Native courts are vested with the authority to settle disputes and compensations in cases involving natives.⁷¹ The Sabah Native Affairs Council was formed under *Majlis Hal Ehwal Anak Negeri Sabah Enactment 1998*.⁷² The main objectives of the Council, among others are, to advise the State Government on all matters about the native system of personal law and *adat* in Sabah, to examine various *adat* of the natives and to review from time to time the customary laws of the natives.⁷³ The Council comprises a President, the State Secretary, the State Attorney-General; the Permanent Secretary of the Ministry of Local Government and Housing; a Secretary, and six other members who have specialised knowledge of the customary laws and *adat* of the natives Sabah.⁷⁴

Today, native law continues to be administered by the native courts established under the Sabah Native Courts Enactment 1992, which replaced the Native Courts Ordinance 1953. Section 3 of the Native Courts Enactment 1992 provides that the *Yang DiPertua Negeri* of Sabah has the power to establish Native courts. In 1998, Sabah had 32 Native courts with a total of 2,981 local chieftains comprising 43 District Chiefs, 172 Native Chiefs, 406 Assistant Native Chiefs and 2,360 village headmen.⁷⁵ In 2018, the number of the local chieftains had increased from 2,981 to 3751, comprising 45 District Chiefs, 203 Native Chiefs, 591 Assistant Native Chiefs and 2724 village headmen.⁷⁶

Sources of native law in Sabah include statutes, ordinances, proclamations, enactments and rules which incorporated and legalised native customs; written collections of native laws known as codes, past court cases and unrecorded oral tradition.⁷⁷ The important source of native law in Sabah is the Native Court Enactment 1992. However, whether there is any hierarchy to these sources of native law in Sabah is still unknown. Currently, a case that is heard in a native court originates at the village level. If an individual feels that he has a just claim or that he has been injured under the practice of customary law, he usually brings his grievance to the Headman of the village.⁷⁸ If one or both of the parties are not satisfied with the ruling by the Headman, then the issue is taken to the Native court. From this, it can be said that the feature characteristic of Native courts in Sabah is more of conciliation. This spirit of conciliation is evident in rule 13(1) of the Native Courts (Practice and Procedure) Rules 1995. It is stated in this Rule that the Native Court may advise and assist the parties to settle their dispute amicably. If the parties do not agree to an amicable settlement, the Native Court shall proceed to hear the action and enter a judgment or adjourn the action's hearing to another date for the final hearing.

⁷¹ See <http://aboutsabah.com/sabah-news/natives-of-sabah/online> retrieved on 04.09.2021

⁷² Section 3(1) of the *Majlis Hal Ehwal Anak Negeri Sabah Enactment 1998*

⁷³ Section 4(1)(b) and (c) of the *Majlis Hal Ehwal Anak Negeri Sabah Enactment 1998*

⁷⁴ Section 6(1)(f) of the *Majlis Hal Ehwal Anak Negeri Sabah Enactment 1998*

⁷⁵ Madi, E. (1998, May 4) Native courts part and parcel of non-Muslim Bumiputera culture Malaysia. *General News*. retrieved from <http://www.lexisnexis.com/ap/academic/> on 12.09.2021

⁷⁶ Gindok @Ginduk, J (2018) *Mahkamah Anak Negeri Satu Transformasi* (p.69) Kota Kinabalu: Jabatan Cetak Kerajaan Sabah, Malaysia

⁷⁷ Phelan, R. P. (2003) *The traditional legal system of Sabah* (p.7). Kota Kinabalu: Pusat Kajian Borneo.

⁷⁸ Vidyadhar, M. (1987). *Jurisprudence & legal theory* (5th ed., p. 260). Lucknow: India, Eastern Book Company

To the natives of Sabah, native law or *adat* is not primarily a system based on right or wrong or fault and punishment. Instead, it is a system for maintaining a kind of balance in the universe.⁷⁹ The people have traditionally been animists and believe that everything in the universe is guarded or inhabited by various spirits. The natives believe that these spirits have the power to bring about misfortunes to humans; it is necessary to pacify them in order to maintain harmony in the universe. When the universe is disturbed, it is thought to become 'hot', and in that State, all kinds of disasters occur, such as plagues, disease, poor harvests and floods. If one in some way injures or angers a spirit, it may be necessary to cool its wrath with a *sogit*⁸⁰ payment. An example of this is the incident that took place in 2015 in Kota Kinabalu, where a group of 10 foreign tourists who posed naked on Mount Kinabalu had flouted local customs and should pay for their breach in Sabah's native court. Some upset Sabahans have also linked the recent quake on the Borneo state's west coast that killed 18 to the allegedly indecent act and wants the bare-naked Kinabalu tourists to pay *sogit* to appease the spirits of the mountain.⁸¹

Further, it is observed that the application of customary laws in Sabah and Sarawak is more extensive and systematic compared to in the Malay Peninsula. There are several reasons for this, namely:⁸²

- a) The Charter granted by the Gladstone Government of Great Britain to the British North Borneo Company (BNBC) and the legislation formally introducing English law to Sabah and Sarawak in 1938 and 1928, respectively, were more protective of customary laws than the Charters of Justice granted to the Straits Settlements and the corresponding legislation formally introducing English law to the Malay states.
- b) The courts in Sabah and Sarawak, partly because of the above, were more customary law-oriented than their counterparts in the Malay Peninsula.
- c) Sabah and Sarawak have a long history of codification of customary law.
- d) Legislation, as early as in the administration of the BNBC in North Borneo (as Sabah was then) and the Brookes in Sarawak, supplements the codification to preserve and develop customary laws (Malay customary law, Native customary law and, in Sarawak, Chinese customary law).
- e) Sarawak has a mechanism established by statute to continue to preserve and develop customary laws.

In section 3 of the Application of Law Ordinance 1951 in Sabah, which is *pari materia* with section 2 of the Sarawak Application of Laws Ordinance, states that,

In the exercise of their jurisdiction...all courts shall have regard to the laws and custom of the inhabitants of the State so far as they are not inhumane, unconscionable or contrary to public policy.

In conclusion, native law in the state of Sabah continues to be recognised as one of the sources of law since British colonisation until today. It plays a vital role in the legal system, governing matters among natives of Sabah in the modern era. It is safe to conclude that native laws and native courts are human rights of the natives of Sabah, based on the theory of *Volsgeist*.

⁷⁹ Knaup, K. (1970-1971). Native family law in Sabah: As study of customary law within a common law state. *Saints Louis University Law Journal*, 15,257.

⁸⁰ Sogit fine is usually edible, such as chicken or buffalo. The original idea being that it was a kind of sacrifice to the spirits who would savour the offering after which it would be eaten by the villagers, the injured party or the relatives.

⁸¹ CHAN, J. (2015, JUNE 9). Sabahans Want Stripper Tourists Charged In Native Court. *The Malay Mail Online*. Retrieved From <https://Sg.News.Yahoo.Com/Sabahans-Want-Stripper-Tourists-Charged-Native-Court-110200638.Html>.

⁸² Hamzah, W. A. (2009). *A First Look at the Malaysian Legal System* (p.184) Selangor Darul Ehsan: Oxford.

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