

Legal Pluralism And Indigeneity in Sarawak And Sabah: Issues And Challenges

Codification of Adat: Benefits and Challenges

1. Introduction

This paper begins with an attempt to define “Adat”. As a prelude, I would outline the establishment of Majlis Adat Istiadat Sarawak (the Majlis) and the main purposes for its establishment. At this juncture, I would mention the traditional method of learning Adat and the depository of knowledge among the native communities in Sarawak as a catalyst for the establishment of the Majlis.

The codification of Adat began in 1974. The Majlis the first success was the codification and publication of Adat Iban 1993. The other 6 Codes of Adat followed thereafter. The publications of the codes entrenched the Adat written therein as state laws which give them a sort of omnipotent status. However, the legal status of the unwritten Adat are not clear.

The Majlis has been facing many challenges in the codification of Adat. Most of the native legal systems are based on sociocultural concepts of the native communities. However, the development of native legal system require the reinterpretation of Adat from sociocultural concepts to jurisprudence and sociolegal concepts. This reinterpretation is a very ambitious and a herculean task. The other challenges are the constitutional and legal limits imposed on Sarawak on legislative matters. These constraints emasculate the development and modernisation of Adat through the codification exercise.

2. What is Adat

According to some native languages in Sarawak the term “adat” can mean many things. The meanings depend on the context in which the term is used. For the purpose of this paper, adat can be broadly categorized into legal rules and social rules. Legal rules are law proper¹ and enforceable in the court of law. These Adat² are mainly for the regulation of social relations and affairs of the native communities. The preservation, development, promotion and dissemination of these Adat are the primary role and function of the Majlis. The adat which are social rules, among others, are cultures, traditions, ethics, etiquette, values, decorum, and procedures, to name but a few. They are not enforceable in the court of law but are guiding principles for good behavior and up-bringing. The Majlis assists as an advisory and promotion agency for better understanding and appreciation of these adat, which include the history of the various native communities.

The current legal definitions of adat and customary law in most laws of Sarawak are rather confusing. This could be due to the difficulty in distinguishing and separating the Adat which are legal rules and social rules. According to section 2(1) of the Majlis Adat Istiadat Sarawak Ordinance, 1977, ““adat” means a native custom or body of native customs to which lawful effect has not been given thereto under the Native Customs (Declaration) Ordinance, 1976 or any other written law and shall be deemed to include the tradition and culture of the natives.” This means that only those Adat which have been codified in the seven (7) Codes of Adat³ and those

1 John Austin, *Province of Jurisprudence Determined* (London: Weidenfeld & Nicolson, 1971), cited in Gerald J Postema at 471. [Austin’s work was originally published in 1832]

2 Capital letter “A” is used for Adat which are legal rules and small letter “a” is for adat which are social rules.

3 The 7 codified Adat are Adat Iban 1993; Adat Bidayuh 1994; Adet Kayan-Kenyah 1994; Adat Bisaya 2004; Adat Lun Bawang 2004; Adet Kelabit 2008 and Adet Penan 2011.

which have been adopted by the courts as common law since the colonial era are having lawful effect. The rest of the unwritten adat, including traditions and cultures, have no lawful effect. These adat seem to fall within, what I define as, the social rules. Yet the preamble of the Native Customs (Declaration) Ordinance, 1976, states that: “certain customs of the several native races of Sarawak have always constituted a part of the laws of Sarawak”.

According to section 2 of the Native Courts Ordinance, 1992 ““customary law” means a custom or body of customs to which the law of Sarawak gives effect”. Unlike section 2 of the Majlis Adat Istiadat Sarawak Ordinance, 1977, this provision does not insert the word “native” before “custom or body of native customs”. But for intent and purposes, it means “native custom or body of native customs. I am of the opinion that this provision attempts to distinguish the custom or body of customs which are legal rules or law from those social rules as defined under section 2(1) of the Majlis Adat Istiadat Ordinance, 1977. Again, the seven codified Adat and the common law seem to fall under this definition.

Both provisions of law seem to imply that the terms “adat” and “customary law” refer to the same things, i.e. native custom or body of native customs, but simultaneously distinguish them according to their legal status. Hence, an Adat has no lawful effect, i.e. social rule, whereas a customary law has, i.e. legal rule. If a case is an adat case it may not be justiciable in court of law. Whereas, if a case is a customary law case it may be justiciable. Thus, a Claimant or Plaintiff must choose the appropriate term when filing his claim in any Native Court or any other court of law. Arguably, adat and customary law could be two distinct and different things. However, it is a common

understanding in Sarawak that “customary law” is literally an English translation of “adat”. Could “adat” and “customary law” are just a matter of semantic or technical terminologies?

The above-mentioned definitions reflect the colonialists’ attitude toward the colonized people. I summarise the attitude in this manner: “The natives were savage and uncivilized people. They did not have any intellectual and institutional capacity to make law based on reason and rationale. What they had were only customs. Hence, their adat became known as “customary law” which were not in the same standard as laws in the western societies. Therefore, the transplanting of Western law was the best thing that ever happened to the colonies.”⁴ Hence, the transplanting⁵ and application of the English law in Malaya,⁶ the Strait settlements, North Borneo (Sabah)⁷ and Sarawak.⁸

4 It was fundamental to the "civilizing mission" of imperialism, particularly British imperialism of the nineteenth and early twentieth centuries. The introduction of Western law justified and legitimised conquest and control. This involved a large transfer and transplant of laws and legal institutions from the colonising society to the colonised society (Sally Engle Merry, “Law And Colonialism” (1991) 25: 4 *Law & Society Review* at 890.)

5 From 1947 to 1962, the British colonial government transplanted a large volume of English law to Sarawak. The *Application of Law Ordinance* 1949 authorised the reception of English common law and doctrines of equity together with the statutes of general application. The application was supposedly in ‘so far as the circumstances of Sarawak and of its inhabitants permit and subject to such qualifications as local circumstances and native customs render necessary (Ramy Bulan, “Native Customary Land: The Trust as a Device for Land Development in Sarawak” (2006) 1 *Journal of State, Communities and Forests in Contemporary Borneo* at 47.

6 Section 3(1) (a) of Civil Law Act 1956 - In Peninsular Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7 April 1956.

7 Section 3(1) (b) *supra*. In Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 1 December 1951

8 Section 3(1) (c) *supra*. In Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 12 December 1949, subject however to subparagraph (3)(ii).

Subparagraph 3(ii) states: the Acts of Parliament of the United Kingdom applied to Sarawak under sections 3 and 4 of the Application of Laws Ordinance of Sarawak [Cap. 2] and specified in the Second Schedule of this Act shall, to the extent specified in the second column of the said Schedule, continue in force in Sarawak with such formal Laws of Malaysia ACT 67067e.fm Page 9 Friday, March 31, 2006 4:11 PM alterations and amendments as may be necessary to make the same applicable to the circumstances of Sarawak and, in particular, subject to the modifications set out in the third column of the said Schedule.

I am of the opinion that “customary law” is not a comprehensive translation for the term “Adat”,⁹ particularly in the case of Adat Iban. Adat Iban are still widely practiced and relevant for the regulation of the social relations and affairs of the Iban longhouse communities compared to any other Adat of the other native races.¹⁰ The present Adat Iban are derived from various sources, namely: customs, Divine laws, spiritual sanctions, commands of the powerful leaders, deliberation (positive law), and influences from social intercourse, to name but a few. In the case of the Kayan communities, many of their Adat are derived from the commands of powerful leaders and elite group (the Maran), Divine law and spirituality. For the purpose of the native legal system, it is suggested that “Adat” simply means “native law” or “Indigenous law”¹¹. As I have mentioned above, these Adat are legal rules and law proper. Customary law refers rather specifically to those Adat which were derived from customs. I have been advocating this definition of Adat to some people in authority. However, so far, I have not been successful. Their mind set is still locked in “customary law” as the legal definition of Adat.

3. Epistemology of Adat and Depository of knowledge

Most of the present Adat of the natives of Sarawak were formulated and evolved at various stages centuries ago. Nobody really knows when the Adat were made. During those formative years, the ancestors of the present-day native communities were illiterate in the sense that they could neither read nor write according to the standard of literacy in some western societies. They had no writing and numbering

9 Holleman J.F., Ed, Van Vollenhoven on Indonesian Adat-Law, Vol. 1, 1918: vol. II, 1931. The term has been adopted by many Indonesian scholars.

10 The Adat of the other major native races are declining in significance and relevance for the regulation of the social relations and affairs of the communities. One of the reasons for the decline is the conversion to Christianity, which led to the abandonment of most Adat that derived from spirituality.

11 Indigenous law means autochthonous law, i.e. law which were formulated and evolved from within the people themselves.

system.¹² Under such condition, knowledge of Adat was transmitted through oral tradition from one generation to another. The depository of knowledge was in the memories of the people. This kind of learning and depository of knowledge were, and still are, vulnerable to loss due to death and loss of memories. Further, the interpretation and practices of Adat can be inconsistent and vary from one community to another and/or from one locality to another. The importance of Adat in the regulation of social relations and affairs of the native communities and the vulnerability of the system of learning and depository of knowledge also prompted the establishment of the Majlis.

4. The Establishment of the Majlis Adat Istiadat Sarawak

The Majlis Adat Istiadat Sarawak was established in 1972 by Tun Jugah Anak Barieng with the approval of Sarawak government. The primary purpose was for the preservation and promotion of the Adat of the natives of Sarawak. The Majlis began as an office in the Chief's Minister Department. In 1974 the office became a Unit in the same department and Tun Jugah was appointed as the first President of the Majlis. In 1977 the Majlis Adat Istiadat Sarawak Ordinance, 1977,¹³ was passed by the Dewan Undangan Negeri Sarawak and came into force on 1 April 1979. The Ordinance formally establishes and provides powers and prescribes the roles and functions of the Majlis. The primary function of the Majlis is to advise the TYT Yang di-Pertua Negeri and the Majlis Mesyuarat Kerajaan Negeri (MMKN) on all matters relating to the Adat of the natives of Sarawak.¹⁴ The Majlis is also given the responsibility, inter alia, to review and recommend to MMKN the application,

¹² Most natives' annual calendars were based on their farming cycle.

¹³ The office of the President was changed to Ketua Majlis.

¹⁴ Section 3(1) (a) of the Majlis Adat Istiadat Ordinance, 1977.

codification, publication, enforcement, and deletion or abolition of Adat.¹⁵ In addition, the Majlis is responsible to conduct research and study of Adat for the purpose of the preservation, development, promotion, and dissemination of Adat. The Majlis is also established for promoting the better understanding and appreciation of Adat, cultures, traditions and history of the various native communities of Sarawak.¹⁶ Cultures, traditions and history of the natives are sometimes referred to as “adat” by some natives.

In 2002 the Majlis was established as a body corporate. However, the corporatization of the Majlis has not been fully implemented yet. Extensive efforts have been undertaken since the beginning of this year to fully implement the corporatization. At the moment, the Majlis is still operating as a Unit under the Premier of Sarawak Department. Its roles and functions remain the same.

5. Codification of Adat

The earliest attempts to codify and publish some Adat in the form of codes were made by AJN Richards, a British colonial officer. Richards published the Tusun Tunggu 3rd Division in 1952, Dayak Adat Law 2nd Division in 1963, and Adat Bidayuh Serian in 1963. These so-called codes contained some very basic provisions of Adat Iban and Adat Bidayuh. The publications of these codes did not give any legal force to the Adat as state law. Only those Adat which were adopted by the courts and, hence, became the common law had the legal force in Sarawak. A large amount of Adat Iban, Bidayuh and other native Adat were still unwritten. The Adat, whether written or unwritten, operated as a quasi-legal system outside the periphery of the

¹⁵ Section 3(1)(b) of the Majlis Adat Istiadat Sarawak, 1997.

¹⁶ Section 3(1)(d) supra.

central legal system. The Adat were generally enforceable among the natives to which the Adat belonged. However, Richard's codes provided a good guide and reference for the Majlis during the initial stage of the codification exercise.

The Majlis started its concerted effort to codify Adat in 1974. The codification involved numerous engagements and consultations with the native elders and "experts" in Adat. From 1993 to 2011 seven (7) native Adat were codified and published, namely: Adat Iban 1993; Adat Bidayuh 1994; Adet Kayan-Kenyah 1994; Adat Bisaya 2004; Adat Lun Bawang 2004; Adet Kelabit 2008; and Adet Penan 2011. These codified Adat are now being reviewed and reinterpreted from sociocultural concept towards jurisprudential and legal sociology concepts. The purpose is to adjust and adapt the Adat to the new social conditions.

There are five (5) native Adat which are going through the various stages of final drafting and vetting. They are Adet Melanau, Adet Berawan, Adet Kajang, Adet Bagatan and Adet Kiput.

6. Benefits of the Codification of Adat

The codification is one of the methods for the preservation, development, promotion, and dissemination of some of the very important Adat of the natives. The codified Adat are being used as the principal reference for the teaching of Adat and judicial works in the Native Courts. Copies of the codified Adat have been distributed to the Native Chiefs, Headmen and many members of the communities whose Adat have been codified. However, the Codes are not exhaustive. There is still many Adat which could not be written down in the Codes.

The codification helps to resolve some issues regarding the variations and inconsistencies in the interpretation and administration of Adat. The codified Adat, to a certain extent, provide a sort of uniformity in Adat.

According to section 3 of the Native Customs (Declaration) Ordinance, 1976, the seven (7) codified Adat have formally become state law. The publications of the Codes entrenched the customs as State law of the native race for which it was compiled,¹⁷ and the correctness shall not be questioned in any court. Further, any Code or its amendment shall not be held invalid by reason of failure of the Majlis tom consult with one or more of the Chiefs or Headmen of the native community concerned before publication.¹⁸ These provisions give any codified Adat or any amendment to the codified Adat a kind of omnipotence status.

7. Challenges relating to the Codification of Adat

The knowledge and understanding of most Adat are based on sociocultural concept. Again, I take Adat Iban and the Iban communities as examples.¹⁹ The Adat are explained and practised according to the cultural, traditional, and spiritual purposes and rationale, in which Adat are commonly intertwined with culture, tradition, and spirituality. Some of the Adat are presumed to have derived from Divine law and Spiritual sanctions, which are expressed in terms of prohibition, restrictions and taboos. Gods, Spirits and humans co-exist in this universe. Gods and Spirits reside in the unseen world while humans dwell in the seen world. Gods watch over humans conduct and behaviour and are having overarching powers over humans'

¹⁷ Section 7(1) of the Native Customs (Declaration) Ordinance, 1976.

¹⁸ Section 7(2) *supra*.

¹⁹ The Author is primarily using Adat Iban as his reference and examples throughout this paper.

fate and life. Gods and Spirits are the prosecutors, judges and enforcers of Adat. Any breach of Adat shall be punished by Gods through the Spirits during the lifetime of the offender on earth and not during his/her afterlife. Thus, the compliance and enforcement of Adat contains some elements of fear of divine and/or spiritual wraths.²⁰ In the case of the other Adat which are not spiritual prohibitions, or restrictions, or taboos, the Divine or Spiritual wrath could befall the offender or the community for non-compliance with any punishment or order. As such, every member of every native community plays a very important role in the enforcement of the punishment or order to avoid the collective punishment. The main purpose is to appease the Gods and Spirits through the maintenance of spiritual equilibrium between Gods, Spirits and humans. Spiritual equilibrium is maintained through good conduct, behavior and morality of humans. Good spiritual relationship between Gods, Spirits and human could bring spiritual blessings to humans in the form of longevity, prosperity, good health and other good fortune. Therefore, jurisprudential and sociolegal reason and rationale of Adat are not part of any consideration for the compliance of Adat.

For almost 50 years the research for codification and teaching of Adat by the Majlis has been based on sociocultural anthropology concept. This approach is not quite compatible with the principle of jurisprudence as practised in the Native Courts of Sarawak and the judiciary, as a whole. In view of this, the Majlis is reviewing and reinterpreting the Adat in accordance with jurisprudence and legal sociology concepts. This pioneering work is a herculean task and not only challenging but a very difficult task to perform. The sociocultural concept and jurisprudence and legal

²⁰ Divine or Spiritual wraths is known as "*tulah*" in some native language. "*Tulah*" could be in the form of death, serious sickness, bad fortune, poor harvest, inclement weather, to name but a few.

sociology concepts are worlds apart. In some cases, the sociocultural concept terminologies do not have any appropriate equivalent in jurisprudence and legal sociology. Our criminal or civil laws are mostly derived from English law. The natives' cultures and traditions are quite different from the English's. Thus, many of the principles of these law may not quite appropriate for the natives. The main worry is that the proper meaning of an Adat could be lost in the reinterpretation and translation.

The reinterpretation and codification of Adat need competent researchers in the field of jurisprudence and sociolegal theories. The Majlis must codify Adat and publish textbooks to explain and disseminate Adat according to jurisprudence and legal sociology theories.²¹ Unfortunately, the Majlis does not have any researcher trained in those fields and law drafting. This is big hinderance to the exercise. In view of this, the Majlis is looking forward to collaborating with any institution of higher learning to train its researchers in jurisprudence, legal sociology, and law drafting. Perhaps, the University of Malaya or any other competent institution of higher learning could give a helping hand in this matter.

In addition to the above, there are some constitutional and legal limits imposed on Sarawak, and particularly the Majlis, regarding the codification of Adat. There are a few serious examples mentioned below.

²¹ In most cases the Majlis has to adopt the western jurisprudence and sociolegal principles in this exercise.

Item 13 of List IIA of the Federal Constitution²² enlisted native law and custom and some family matters as state matters for Sarawak. However, it is not clear how wide or narrow the term “native law and custom” covers. With regard to criminal law, the Majlis may codify those Adat which are minor in nature and can be heard by the Native Courts of Sarawak.²³ The other kinds of criminal cases would be unconstitutional to be codified by reason of being a federal matter. However, there are some Adat which are major criminal cases in nature and which may be unconstitutional to codify. For example, the unauthorized exhumation and desecration of graves of the Iban communities is a very serious criminal offence under Adat Iban. At the moment, such a case is treated as a minor case and may be prosecuted under Sarawak Minor Offence Ordinance, 1958. There are some other criminal cases under the Adat which may over-lap with the Penal Code. For examples, theft, incest, trespassing, and elopement, to name but a few. These cases may be better dealt with according to the native justice. The limitations create a very tight space for the Majlis to maneuver in the codification of Adat.

The subordination of Adat vis-à-vis the state laws is another huddle in the codification of Adat. For example, the Adat regulating land and family matters. To-date, very little Adat regulating land matters have been codified. There are unspoken sensitivities relating to land matters. The biggest conflict between Sarawak land law²⁴ and most natives Adat is the status of untitled land holding. According to the Land Code, all land in Sarawak belong to the State. Any native may only occupy any

22 List IIA—Supplement to State List for States of Sabah and Sarawak [Article 95B(1)(a)]. Native law and custom, including the personal law relating to marriage, divorce, guardianship, maintenance, adoption, legitimacy, family law, gifts or succession, testate or intestate; and registration of adoptions under native law or custom.

23 Section 5(1)(d) of the Native Courts Ordinance, 1992.

24 Land Code Chapter 81 (1958 Edition).

untitled land as a licensee under the native customary rights (NCR).²⁵ This concept is against the grain of the sociocultural principle and understanding of land holding held by many natives. According to them such land belong to them. It is difficult to explain to them that the State has overriding rights and legal ownership over untitled land. The perception on land ownership held by many natives derived from the concept of nation. Before the establishment of the Brooke government in Sarawak and Netherland East Indies in Kalimantan Borneo, every native community considered itself to be a sovereign nation.²⁶ Everything, including the land, waters, forests, animals, fish, etc., within the jurisdiction of a longhouse or village was owned by the community. The community made and enforced its own law or rules regulating the social relations and affairs of the community or intercommunity and foreigners. Thus, any Adat or law which states that any untitled land does not belong to them is not acceptable and would be fiercely rejected. At this moment, nothing much can be done to resolve this social impasse. Even if the Adat is codified it may have no legitimacy or still be invalid because of a conflict between the Adat and the state law, in which the latter would prevail.²⁷ Therefore, codifying such Adat may be a futile exercise.

8. Conclusion

The learning of knowledge by oral tradition and depository of knowledge in memories are very vulnerable and susceptible to loss by death and loss of memories. This is further aggravated by the diminishing significance and relevance of Adat of most natives due to conversion to new religions²⁸ and the flux of social changes. These

25 See section 5 of Land Code Chapter 81 (1958 Edition).

26 The concept of "menoa" among the Iban.

27 Section 9 of the Native Customs (Declaration) ordinance, 1976.

28 Many natives of Sarawak have been converted to the various denomination of Christianity.

factors are a very serious threat to the survival of Adat. As such, the codification of Adat is a very important intervention to prevent the further loss of Adat, which may contain some ancient wisdom of the native ancestors. As long as the natives continue to live in the traditional social environment, there are still a lot of social relations and affairs that need to be regulated by Adat. The state laws do not regulate all social relations and affairs peculiar to the native communities.

The codification and publication of Adat strengthens the status of Adat as state law and which may not be challenged in the court of law. There are many difficult challenges in the codification of Adat. However, the benefits derived from codification far outweigh the challenges and worth the effort to carry-on doing.

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