

ADAT IBAN: A LIVING TRADITIONAL WISDOM?

by

RONNIE EDWARD

LL.B, Polytechnic of North London, 1990

LL.M, University of London (School of Oriental and African Studies), 2002

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Abstract

Adat Iban¹ are Indigenous law of the Iban people of Sarawak, Malaysia. This dissertation explores the wisdom of Adat Iban and examines whether the Adat and the underlying wisdom are living Adat. Currently, the interpretation, application, and enforcement of the Adat are basically following the Iban ancestors' practices and complying with spiritual obligations. This practice provides very little legal reasoning which obscures the rationales and wisdom of Adat. Under such situation, the flux of socio-economic and political developments and social changes that have been taking place in the Iban communities impinges the relevance and significance of Adat in the regulation of social relations of the communities. This study presents a reinterpretation and/or re-evaluation of Adat Iban to elucidate the rationales and wisdom of Adat Iban. This approach could provide legal reasonings which could rejuvenate the relevance of Adat and make Adat to become more comprehensible law of general application² to the changing Iban communities. "Wisdom" encompasses Iban autochthonous knowledge, ideas, experiences, judgements, and spiritual principle that evolved into Adat. Wisdom is the quality that enables an Adat to be utilised to bring about beneficial or noble purpose, or justice. The study contends that there is wisdom in most Adat Iban. However, the social changes and modernisation³ that are taking place in most Iban communities raise the question of whether the Adat and the underlying wisdom are living Adat. A living Adat is one that is dynamic and flexible and constantly adjusting and adapting to the new or changing social situations. This study concludes that most Adat Iban have the potential to be living Adat and continue to be relevant for the regulation of Iban communities. However, the survival, development, and continuing relevance of Adat Iban depend on the Iban.

¹ The term Adat Iban is used as a plural noun here. The Iban language and grammar do not have or distinguish plural and singular nouns.

² Lon Fuller, *The Morality of Law*, rev ed (New Haven, Yale University Press, 1969) at 39.

³ See paragraph 2.3 *infra* for the definitions of traditional and modern Iban communities.

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Dedication

To my family, my late father, Edward Adut Umon, and mother, Bata Cheling.

Glossary of Iban Terms

Abi besi: The first clearance of virgin jungle by the pioneer settlers as a prima facie proof of first in rights over the territorial domain of the pioneer settlers and their descendants.

Adat: According to the Iban socio-legal context, Adat generally refers to law, rules, customs, procedures, rituals, ethics, values, sanction, and prohibitions (taboos).

Alas: An old vase. The value of the vase is used as a quantum of a fine. One *alas* is RM3.00 in monetary term.

Angat: A spiritual term referring to a period of ill-fortune suffered by a community such as poor harvest, premature death befalling some members of a community and other ill-fortune.

Antu pala: Skulls of slayed enemies that are kept as trophies and symbol of bravery and valour in wars and for other cultural and spiritual purposes.

Bansa asal: Native.

Baum: A meeting.

Bebendai: A small brass gong

Bebiau: A simple blessing ceremony.

Bechara: Iban judicial procedure and process of hearing of cases

Beduruk: A system and rule of labour exchange in the Iban communities based on the concept of reciprocity. If a person works for another for a day in any activity or work the person who has received the work or labour must reciprocate or repay a day's labour or work to the person who has provided the work or labour. There is no gender discrimination in the quality, quantity, and type of labour or work. A One-day of work by a man in rice planting activities can be reciprocated by a woman working for one day in cash crop activity. The Iban communities had very little or no money to pay for labour in the past. This labour exchange was the backbone of a very efficient socio-economic system and rule.

Bejalai betungkat ka Adat, tinduk bepangal ka pengingat: This phrase is literally translated in English as: "When I walk, Adat is my walking stick and when I sleep, memory is my pillow". This expression is equivalent to the concept of rule of law.

Belelang: Unspecific adventure

Bepinang benibung: Literally translated in English as "there is *pinang* and *nibung*". This is an idiomatic phrase which means injustice and unfairness in the judgment.

Beranak beteresak: Having many children, grandchildren, and great grandchildren.

Berandau: A deliberation during a meeting (formal), or a conversation (informal).

Berumpang menoa: Establishment of settlement by pioneer settlers.

Besapat: A ritual of spirits appeasement and purification of land and waters to formalise an incestuous marriage of the lower degree, e.g. a man marrying a woman who is his mother or father distant cousin.

Betembang: The Adat and ritual for the emancipation and adoption of a slave by a master.

Beterang: A public declaration of a marriage.

Bilik: A family apartment unit in a longhouse.

Bilik bejenguk: A spiritual prohibition or taboo relating to the arrangement of family apartments in a longhouse. For instance, family apartments belonging to two siblings are structurally separated or wedged by an apartment belonging to non-family. This taboo only affects the violators not the community. The violators may be punished by spiritual wraths in the form of ill-fortune such as premature death, serious illness, or other ill-fortunes.

Bilik pun: This is a cultural and legal term referring to a principal family or founding family. “*Bilik*”, in this context, refers to a family, not a family apartment unit. This family, technically, continues and inherits the ancestral house of the male ancestor who first established the family. The family inherits and takes charge of all the rights and liabilities over any movable or immovable ancestral property.

Buah tuai: Fruit trees planted or maintained by the ancestors of the distant past. The descendants of the person who planted the fruit trees share common ownership of the fruit trees.

Bunga pinang: A nuptial gift from the bridegroom to the bride. A “*bunga pinang*” may be a fixed amount of money of one “*alas*”, which is RM3.00 in monetary terms. A “*bunga pinang*” is a symbolic ritual for fertility.

Chelap dapur: A technical term to describe a cooking hearth that has not been used for cooking for more than 30 days and, thus, becomes a “cold” cooking hearth.

Dampa: A temporary house.

Derian: A dowry or a marriage gift, which may be in the form of a brass gong pledged by the marrying couple to each other as a condition to uphold the marriage until death separates them.

Enda bepinang enda benibong: This is an Iban idiom which is equivalent to the legal doctrine of “fairness and equality before the law”.

Entara: A small sum of money or gift exchanged between spouses as a symbol of the dissolution of marriage.

Gawai Dayak: Dayak festival day is held on June 1st and a public holiday in Sarawak.

Gayu guru, grai nyamai, lantang senang: Longevity, good health, and prosperity.

Genselan: A propitiation ritual to seek forgiveness or appeasement of Gods and Spirits.

Iban: An Indigenous people of Sarawak, an east Malaysian state.

Indu tau nengkebang, tau takar, tauka ngar: A salutation for a woman who is highly talented and knowledgeable in weaving cloths, mats, and basket. The phrase may be literally translated in English as “a lady of creativity and innovation”.

Kati: A measurement of a fine. One *kati* is equivalent to MR1.00.

Kelam ai: A method of dispute resolution by water contest. The party who stays longer under wins the contest. The contest was normally performed by representatives of the disputing parties.

Kepit bilik: A spiritual prohibition or taboo relating to the arrangement of the family apartments in a longhouse. This is where a family apartment is sited and constructed in between two apartments belonging to two siblings.

Kering semangat: Fortification of the soul by giving an item made of iron or steel.

Mali: A spiritual prohibition or taboo, that may affect an individual person, or a family, or the whole community.

Mampul: A spiritual prohibition or taboo that prohibits the apartments of two siblings to be sited at opposite ends of a longhouse.

Manang: A Shaman or spiritual healer.

Mandal Tuai Rumah: A deputy Headman or deputy longhouse leader.

Mejam nangam: A son or daughter who looks after his or her parents during their old age until their death. He or she manages and pays the expenses for their funeral, burial, and bereavement rituals. Any other person may undertake these responsibilities if a person has no children to look after him or her during old age until death.

Melah Pinang: A solemnisation of marriage with full rituals that climax with the cutting of a betel nut or areca nut (*pinang*) into pieces.

Menua: Homeland or country.

Menua puang: An area of land where nobody or only a very few people have settled in.

Mengin: According to Iban mythology, Menggin was an Iban ancestor who married a spirit named Tincin Temaga, who was a daughter of Sengalang Burong. According to Iban spirituality, Sengalang Burong is the Iban God of war.

Nampung: Preserving and perpetuating.

Nemui: Visiting and staying with close relatives on a short-term basis.

Nupi nengkani mejam nangam: Looking after the welfare of parents during their old age until their death and managing their funeral, burial and bereavement rituals.

Netak sungai: A longhouse that is sited and constructed perpendicular to a navigable river is called *netak sungai*. There is a spiritual prohibition or taboo against such constructions. It is believed that a longhouse in such a position acts as virtual dam (*nekat utai jai*) and collects all the bad fortune or bad things drifting down river.

Ngajar: Giving advice or teaching.

Ngampang: An unmarried woman who becomes pregnant but either wilfully refuses to make a paternity claim or is unsuccessful in her paternity claim.

Nibung: A species of palm tree with needle sharp thorns growing all over its trunk.

Nikah: A solemnisation of marriage and wedding ceremony without the ritual of splitting a betel nut or areca nut (*pinang*).

Ngelindung: Overshadowing

Nguai: This is a rule to determine the permanent matrimonial residence of a newly married couple. Under this rule one of the spouses must marry into the family of the other spouse and reside permanently in that home.

Ngudi menoa: There is no equivalent in English for “*ngudi menoa*”. It is a kind of unnatural and immoral behaviour that may cause havoc or upheaval to the land and weather or bring bad fortune to a community.

Nyanda: An Iban practice or system of borrowing without interest. For example, if a person borrows (*nyanda*) 10 pounds of rice from another, he will repay 10 pounds of rice to the lender.

Nyundang pinang: A return visit by a newly married couple to the bride’s longhouse after the wedding if the couple is not from the same longhouse. Or a return visit to the bride family apartment if the couple is from the same longhouse. A small celebration would be held during the return visit.

Orang asal tauka peturun orang berumpang menoa: The members or descendants of the founding or pioneer settlers of a settlement or a longhouse. They are deemed to be the indigenous members of a longhouse community under Adat Iban and culture.

Orang datai: The members of a community who are not members or descendants of the founding or pioneer settlers of a settlement or a longhouse. They are deemed to be the “migrants” according to Adat Iban and culture.

Panas ngerejang rumah: A spiritual prohibition or taboo that prohibits one end of a longhouse from facing toward sunrise. This is where the sunrays could penetrate a longhouse lengthwise from east to west.

Pantang: A spiritual prohibition or taboo, which is divided into two categories. The first category is a prohibition called “*penti*”, which is confined to an individual person and may extend to his or her family members. The other category is a prohibition called “*pemali*”, which is a prohibition affecting the whole community.

Pelasi menua: A purification of land and waters and a spirit appeasement ritual.

Pemai Anak: A gift from a father to a child who is not under his custody following a divorce. The gift can be in monetary form or a piece of a movable property.

Pemakai menoa: A technical term for a territorial limit of a longhouse, which may include an area of land covered by virgin jungle or secondary forest situated within or adjoining the native customary rights land that is claimed by the Iban as an exclusive economic zone.

Pemanca: A District Chief who oversees all the *Penghulu* (Chiefs) in the district.

Penemu ka manah enggau beguna: A phrase describing wisdom in Iban. The phrase refers to sound knowledge, sensible ideas, good experiences, and good judgment that can be utilised to bring about benefits for the well-being of a community.

Penghulu: A Chief or a community leader who oversees the *Tuai Rumah* (Headmen) and affairs of the Iban communities in a specific geographical area.

Penyandih: A back-rest or back-support of a chair or a seat.

Penyangkai: A technical term for the longhouse where a married couple would establish their permanent residence.

Pikul: A measurement of fine. One *pikul* is equivalent to MR100.00

Pinang: A betel or areca nut palm with smooth trunk.

Pulau galau: A traditional forest reserve. This is an area of land covered by virgin jungle or partially felled jungle set aside and declared as communal forest reserve by a leader of a pioneer community or as agreed by the whole community.

Puntang Raga: The Spirit who advised the Iban to abolish the death penalty for incest and substitute it with a purification of land and waters and appeasement rituals called “*Besapat*”. Incest of the highest degree was punished by death in the past. The same Spirit is believed to have taught an Iban leader, Serapuh, the rules and procedures for funeral, burial, and bereavement rituals.

Rimba: An area of land which has been cleared of virgin jungle.

Ruai: An open corridor running lengthwise throughout a longhouse. This is a common area in a longhouse where anybody can walk on or pass through.

Rumah panjai: A longhouse

Rusa: A porcelain vase that is used as a measurement of fine by the Iban in the Saribas and Kelaka river systems. One *rusa* is equivalent to RM8.00.

Semina ngabas bilik ngabas penaik: An idiom describing a marriage of a short period.

Sengalang Burung: The Iban God of war.

Sera Gunting: An Iban ancestor who was believed to be half human and half spirit in descent. He was the son of Mengin, an Iban ancestor and a human, and Tincin Temaga, a spirit and a daughter of Sengalang Burong.

Serapuh: The Iban leader who received the Adat regulating funeral, burial, and bereavement from the Spirit, “Puntang Raga”, and regarded as the source of the Adat.

Tanju: An open platform for drying purposes and situated at the front end of every family apartment.

Tau tepang: The supernatural power of a person to curse or to put a spell on others to cause failure in their undertakings or their crops or fruit trees.

Tembawai: Site of an old and abandoned settlement.

Temenggong: An Iban Paramount Chief

Temuda: a piece of land that has been cleared of virgin jungle for rice farming or other agricultural purposes.

Tuai Rumah: A Headman or community leader of an Iban longhouse and community.

Tunggu: A form of restitution with two purposes. First, to provide a settlement between a person who breaches the Adat and the injured person or community. Second, to provide appeasement, or atonement, or restoration of the physical and spiritual well-being of the injured person or community.

Timbang: A lump sum payment for the maintenance of a child.

Tulung: Assistance either in the form of cash or in kind.

Tusut bebalut: A term referring to a state of disorder in kinship hierarchy among close relatives due to incestuous marriage, for example, a man married to his mother’s first cousin. According to Iban culture, first cousins are deemed to be “brothers and sisters”. Under such circumstances, the man is deemed to be married to his “mother”. What is the relationship between the man’s mother and his wife? Is she a “daughter-in-law” or a cousin? Such relationships become more complicated if the man and his wife have children and grandchildren. What is the relationship of the children with the man’s mother and his siblings? This is a kind of disorder of kinship hierarchy according to Iban culture and values. It could lead to unregulated sexual relations among close relatives.

Introduction

This dissertation presents a socio-legal study of Adat Iban. I refer to “Adat Iban” as the “Indigenous law of the Iban people”. This study is an interdisciplinary study of the relationship or interplay between Adat (law) and the interactions of members of Iban communities. Thus, the study involves law, sociology, and anthropology. Adat is an integral part of the wider socio-economic and political institution of the Iban communities and almost every aspect of life, be it act or omission, in the communities are regulated by Adat. The Adat are playing a major role in moulding the behaviour of members of the Iban communities or society and simultaneously being shaped by the communities or society. As such, Adat are used as an instrument of political power and authority for social control and system of justice. Despite such important function, the legal reasonings and purposes for application and enforcement of each Adat are not comprehensively articulated. The common justification for application and enforcement of Adat is following the practice of their ancestors or complying with spiritual sanctions for the promotion and maintenance of peace, harmony, unity, and well-being of the community. This justification is not intellectually acceptable to explain an institution or a system of social control and justice to the present Iban communities. This interpretation of Adat is quite close the interpretation of Indigenous law as fundamentalist, which associate with making rigid claims about law, culture, and people. This approach provides only way for one interpretation of law and often claim that there is only one right way of being or doing. This is very much opposite to a deliberative approach where debates and discussions are important.⁴ The study attempts to suggest some legal reasonings and purposes to the Adat through the search for wisdom. This approach could

⁴ Indigenous Law Research Unit (ILRU), *Gender Inside Indigenous Law Toolkit* (University of Victoria 2016) at 15. URL.<http://w.w.w.uvic.ca/law/assets/docs/ilru/Gender%20Inside%20Indigenous%20law%20Toolkit%20october%202017.pdf>.

help to make meanings and rejuvenate the relevance of Adat for the regulation and governance of the Iban communities.

However, the Adat may not continue to be relevant for the regulation of social relations of the Iban communities because of the flux of social changes that have been taking place in the communities. In this regard, the study examines whether the Adat would be a living Adat and suggests that the Adat must be dynamic and flexible to adjust and adapt to the new or changing social situations.

The Adat chosen for the study in this research are the Adat which are commonly practised by the Iban of Saribas and Kelaka river systems which are located in Betong and Saratok administrative districts of Sarawak. These districts are commonly known among the Iban as “the Saribas and Kelaka river systems”.⁵ The area is marked and circled in red on the map of Sarawak as shown in Diagram 3 below.

⁵ Adat Iban are normally categorized and distinguished according to the river systems in which the Iban reside in Sarawak. The Adat may differ in interpretation and application from one river system to another.



Diagram 1: Map of Sarawak. The map was sourced from SCORE's (Sarawak Corridor of Renewable Energy) website providing some information on RECODA (Regional Corridor of Development Authority), Sarawak. The map was created and published SCORE and in the public domain. <http://www.recoda.com.my>

Legend:



The area circled in red shows the geographical location, more or less, of Saribas and Kelaka river systems. Some of the Adat of the Iban living within these river systems have been chosen as the main subject matter of this research.

The term “Adat Iban” or “Adat” has various meanings according to the Iban language. The Adat Iban which are the subject matter of this research are those Adat Iban which are “law-proper”⁶ and having legal force and binding among members of the Iban communities living in longhouses or having connection with their longhouses. The administration and enforcement of Adat regulate or formalise social relations of members of the communities, for examples, the management of longhouses and solemnisation of marriage. Any non-compliance is an offence

⁶ See paragraph 2.4.2 *infra* for the definition and discussion of “law-proper”.

would be a breach of law, or an offence, or legal wrong, which may be punishable by fine, or restitution, or spiritual punishment, e.g. failure to light the cooking hearth. The Adat which are culture, rituals, traditions, and values, to name but a few, do not have any legal force or implication are not the subject matter of this research. They may be mentioned in passing to help elucidate certain point or issue being discussed in this dissertation.

The Iban are the natives of Sarawak, an East Malaysian state situated on the western part of Borneo Island. This dissertation explores the wisdom of Adat Iban and examines whether the Adat and their underlying wisdom are living law or living Adat. The organisation of writing this dissertation is divided into eight parts namely: Introduction, the main body, namely: Chapters 1 to 6, and the Conclusion. Some of the Adat of the Iban communities of Saribas and Kelaka river systems, which are located in the Betong and Saratok administrative districts of Sarawak, have been chosen for this research. They are the Adat regulating the traditional Iban leadership system; orientation of longhouse; family apartments organisation; lighting of cooking hearths; marriage and divorce; custody and maintenance of children; and rights of former spouses to property. Some other Adat are also mentioned and discussed along the way to better explain the concept and meaning of the Adat chosen for the study.

The Iban traditional practice of the Adat demonstrates that the Adat are used as an instrument of social and political control. The present practice basically follows, preserve, and perpetuate (*nampung*) the ancestors' practices and complies with spiritual sanctions and prohibitions. Compliance with Adat is largely based on the belief that it can bring spiritual rewards to the communities, such as good harvests, good health, and other good fortune. Any violation of Adat may be punished by spiritual wrath, leading to potentially premature death, disease, and other bad fortunes. There is very little legal reasoning among the Iban to explain why the Adat are

necessary and what are the ideals or aims in the application and enforcement of Adat. In view of this, the dissertation asserts that there are legal rationales behind each Adat from which the wisdom is construed. “Wisdom” is the autochthonous knowledge, or idea, or experience, or judgement, or spiritual principle of the Iban which evolved into Adat. Wisdom is the important element underlying an Adat that has the quality and capacity which can be utilised to bring about benefits and justice to the Iban communities. A rationale is elucidated through a reinterpretation and/or re-evaluation of the purpose for the application and enforcement of an Adat. This is a reinterpretation or re-evaluation of the relationship between the Adat and interactions of members of the Iban communities in their social, economic, and political relations. The articulation of rationale and wisdom could make sense and give meaning to an Adat. This approach could make an Adat to be better understood and capable of general application for the regulation of certain social relation in the Iban communities. In theory, Adat are, more or less, a purposive or consequential set of rules and a means to an end.⁷

In view of the changing social situations and modernisation that are taking place in the Iban communities, the Adat and the underlying wisdom may not continue to be relevant for the regulation of social relations of the communities. The flux of social, economic, and political changes that have been taking place during the last 50 years or so in Iban communities are turning traditional communities into modern ones.⁸ Thus, the Adat that have been serving traditional communities very efficiently and efficaciously may not continue to be relevant in modern Iban communities. This is where the Adat must transform into laws or rules of general application to adapt to changing social situations and changing Iban communities. This analysis of Adat is looks directly at social situations and then examines the relevance of the Adat to these

⁷ David N. Schiff, “Socio-Legal Theory: Social Structure and Law” (1976) 39:3 Mod L Rev 287 at 296, online: JSTOR: <www.jstor.org/stable/1095549>.

⁸ See paragraph 2.3 *infra* for definitions of “traditional” and “modern” Iban communities.

changing or new social situations in modern Iban communities. This dissertation asserts that some Adat Iban are at the crossroads between diminishing and surviving. The Adat have to be dynamic and flexible in order to adjust to the changing social situations and to survive as living Adat. However, the continuing relevance of Adat depends very much on the dynamism and flexibility⁹ of Iban themselves, failing which the Adat could become obsolete and eventually disappear.

Chapter 1 describes the methodology, literature review, and rationales for this study. Iban Indigenous methodology is described and discussed in this chapter. This qualitative methodology was used to collect and interpret the data on Iban spirituality, cosmology, and mythology, and helped to get inside Iban philosophy in these matters. Quantitative methodology was used to conduct a very small portion of this research: a minor survey on the awareness and knowledge of Adat Iban among the Iban youths who live in a city. Semi-structured face-to-face interviews with participants were the main method used for data collection and interpretation of Adat Iban. Scholarly works were also consulted.

The literature review focuses on the books and articles that were my primary sources of knowledge, ideas, and insights quoted or mentioned in this dissertation. The review is also an indication of my awareness of works by some scholars on similar topics or issues discussed in this dissertation. To the best of my knowledge, there is no literature or scholarly work in the field of law and society or jurisprudence that has ever been written on Adat Iban. Therefore, books and articles on sociology and anthropology were very helpful as sources of knowledge and insights in writing this dissertation.

⁹ Franz Von Benda-Beckmann & Keebet Von Benda-Beckmann, "Myths and Stereotypes About adat Law: A Reassessment of Van Vollenhoven in the Light of Current Struggles over Adat Law" (2011), 167:2/3 Brill Indonesia Bijdragen tot de Taal-, Land- en Volkenkunde at 171, onlinep: JSTOR: <<https://www.jstor.org/stable/41288760>>..

The rationales for this study of Adat Iban are mentioned at the end of this chapter. The main rationale is to contribute to the pool of knowledge towards a better understanding of Adat Iban. The other rationale is to articulate that there is wisdom in Adat Iban and not just automatic submission or compliance with customs and spirituality. Acknowledging the wisdom of Adat Iban gives sense and meaning to the Adat as law.

Chapter 2 discusses five topics, namely: the Iban; Adat Iban; Native Courts: Colonial intervention in law; and women's rights, gender equality and the human rights of lesbian, gay, bisexual, transgender and queer (LGBTQ) people. The descriptions and discussions of these topics give a general picture of the people, the theory of Adat Iban, administration and enforcement of Adat, the impact of colonial intervention on Adat, and the flexibility (or lack thereof) of Adat when facing new social situations or social phenomena.

Iban society has been described by some scholars¹⁰ as an egalitarian society. However, in practice, there exist many inequalities and unfairness, particularly in the application and enforcement of Adat. Egalitarianism is just an ideal that is yet to be achieved consistently by Iban communities. The social fabric of an Iban community is based on families and kinship. A typical Iban community is ethnically homogenous and its people live in a longhouse consisting of between 10 to 40 autonomous families.

Four definitions of Adat and customary law are highlighted in this chapter. The definitions reflect the different views of various institutions and people about what constitutes Adat and customary

¹⁰ Clifford Sather, "All Threads Are White": Iban Egalitarianism Reconsidered in James J Fox & Clifford Sather, eds, *Origins, Ancestry and Alliance: Explorations in Austronesian Ethnography*, (Canberra, Australian National University E Press, 2006) at 73.

law. I define Adat Iban as the indigenous law and social-legal system of the Iban people. Adat are political instruments for the regulation of the social, economic and political relations and affairs of Iban communities for the maintenance of peace, harmony, unity, justice, and well-being. The other three definitions of Adat Iban are: 1) the Iban worldview of Adat; 2) scholars' definitions of customary law; and 3) statutory definitions of customary law and Adat. The Iban's and the scholars' definitions are quite similar. The term "Adat" has several meanings according to Iban language, culture, and spirituality. Adat can refer to customs and traditions, canons, spiritual sanctions or obligations, procedures, and the way that things ought to be. The meanings of Adat may vary and can only be distinguished by the context in which the Iban used the term. Scholars' definitions of customary law and Adat lean more towards culture, traditions, rituals, and spirituality. This is because most of the research have been done by anthropologists. However, the definitions give some ideas of the relationship between Adat and Iban social interaction. Statutes provide authority for the legal definitions of "customary law" and "Ada". "Customary law" is the English language translation of "Adat" in most state enactments in Malaysia. However, the statutes technically define "customary law" and "Adat" as two distinct terms that contradict or rebut each other with regard to the recognition of Adat. "Customary law" means a custom or body of customs which law gives effect."¹¹ Conversely, "adapt' " means a native custom or body of native customs to which lawful effect has not been given thereto under the *Native Customs (Declaration) Ordinance, 1996 [Cap. 22]*¹² or any other written law and shall be deemed to include the tradition and culture of the native".¹³ This contradiction raises the question of whether legislators made a drafting mistake or intentionally drafted these d in such a manner.¹⁴ Such contradiction can create confusion and repercussions for the legality of the

¹¹ These are the exact words of section 2(1) of the *Native Courts Ordinance*1993.

¹² *Cap. 22* means Chapter 22.

¹³ These are the exact words of Section 2(1) of the *Majlis Adat Istiadat Sarawak Ordinance* 1977.

¹⁴ At the time of writing this dissertation the Native Courts of Sarawak and the Council for Cultures and Traditions were in the process of collaborating to amend the statutory definitions of customary law and adat

judgements made by the Native Courts on Adat cases but not for customary law cases. The statutory definitions of “customary law” and “Ada” are very critical toward the recognition of Adat Iban. The state has the power and authority to decide and determine the definitions of “customary law” and “Adat”.

In Sarawak Adat Iban has been long recognised by the state at various levels of recognition and with regard to various substantive elements¹⁵ With the gradual formalising of law under the white rajahs, who recognised the importance of legal culture which was epitomised by the instituting of the native courts in 1870. This recognition moved from informal adjudication to formal statutory provisions of some Adat during the British colony¹⁶ and the restructuring of the Native Courts in 1955 through the legislation of the *Native Courts Ordinance*, 1955. The latest effort in the development of Adat Iban was the codification of Adat Iban 1993 (the Iban Law of 1993). The Code is not comprehensive and just covering a very small area of Adat Iban. The Adat regulating natural resources and land matters are completely absent in the Cde. There is a still a large gulf between Adat as conceived by the state and Adat as conceived by the Iban community, given that the entire basis of law is different in Adat from common law. For this reason, 'recognition' is not an unambiguous term and many issues remain to be determined as to the relationship between the two systems of law within a system that embraces legal pluralism. A relevant distinction here is that between official and unofficial legal pluralism. At one level official legal pluralism applies to the status of adat, but at another level unofficial legal pluralism

¹⁵ Andrew J. Harding, “Legal Pluralism and the Constitutional Position of East Malaysia's Indigenous Peoples: The View from the Longhouse” in Gary F Bell, ed, *Pluralism, Transnationalism and Culture in Asian Law: A Book in Honour of M.B. Hooker*. 1 ed. (ISEAS–Yusof Ishak Institute, 2017).

¹⁶ For example, A.J. N Richards, a British colonial officer compilation the Dayak Adat Law in the Second Division which as published in 1963. In 1963 the Iban wee colleen Dayak. Hence, the Dayak Adat Law in the Second Division.

more accurately describes the reality. This is evidenced by the conflicting definitions of customary law and adat as mentioned above.

The concept of Adat Iban is discussed in this chapter to give insights on the theory of the Adat. The Adat are used as a tool to regulate social control and social contract in Iban communities. The primary purpose is the promotion and maintenance of peace, harmony, unity, justice, and well-being of the communities. Thus, Adat may be described as a means to achieve an end. Adat and spirituality are intertwined, and spirituality plays a very important role as a means in the enforcement of Adat. Most breaches of Adat entail spiritual punishments. The Adat that are spiritually derived are regarded as sacred Adat and are higher in hierarchy than man-made Adat. While there are elements of fear that have some psychological influence in compelling compliance of Adat, compliance is mainly based on respect for the Adat and is reinforced by the egalitarian ideology in the administration and enforcement of Adat. This ideology emphasises that every person is equal before the Adat and stresses the Iban principle of the rule of law. It is the execution of Adat that sometimes deviated from the ideology and principle and can result in unfairness or inequality.

Under Adat Iban, morality and crime are also intertwined. Most conduct that an Iban community deems immoral is also considered to be a criminal act and may be punishable by fine and may also be liable for restitution. A fine indicates that conduct or behaviour is criminal in nature. For examples, co-habitation between a man and a woman outside of marriage and an unmarried woman who becomes pregnant are considered both immoral and criminal. Acts or omissions are not considered to be crimes if perpetrators are only required to provide restitution.¹⁷ Public and

¹⁷ Restitution is a payment of a sum of money to restore the position of an aggrieved or injured person or community to the position before the act was committed.

private morality are not clearly distinguished and defined in Iban communities. Morality is generally enforced by Adat.

The sources of Adat Iban are narrated and discussed in this chapter. This section illustrates that Adat are derived from various sources and are not purely customs, spiritual sanctions, and spiritual prohibitions. However, the exact origins of most of the Adat are not very clear because the Iban have no written record of their Adat. All knowledge of Adat has been transmitted by oral tradition and stored in people memories. Some of the Adat are believed to be derived from customs and spirituality, while some are derived from Iban cosmology, narratives, stories, mythology, and natural law. The more recent Adat were all made through deliberative means in meetings of the longhouse communities.

A brief history of the development of the Native Courts is provided in this chapter. It is important to mention these courts as an institution that symbolised various stages and levels of the recognition of some native laws in Malaysia. The statutory definitions of “customary law” and “Ada” are problematic, as mentioned above, and impede the complete recognition of native law. Nevertheless, the Native Courts provide a forum for the adjudication of matters that are purely Adat between the natives of Sarawak. These courts are a hybrid or quasi-judicial system in which the community leaders, administrative officers, and legally qualified persons are appointed as presiding officers of the various levels of courts. The good thing is that the *Tuai Rumah* and Chiefs are given the opportunity to participate in the administration, adjudication, and enforcement of their own Adat. However, there are many weaknesses in the Native Courts especially in the enforcement of judgment and competency of judicial personnel. There is an urgent need to restructure the courts to enhance the justice system and enforcement of judgements. Presiding officers must be trained in Adat and other relevant law, such the civil

procedures and evidence. At the moment, there is no institution or school providing teaching or training in Adat of the various natives of Sarawak. Retired administrative officers are recruited as presiding officers based on the presumption that they have passed their customary law examination and dealt with matters of Adat during their civil service days. The *Tuan Rumah* and the community Chiefs are presumed to be knowledgeable and competent in Adat. However, both presumptions may be misplaced.

The discussion of colonial intervention is dealt with in this chapter. It is important to mention the colonial intervention in law in Sarawak. The transplanting or transfer of English law to Sarawak from 1841 to 1962 changed the legal landscape of Sarawak. Some native laws, including Adat Iban, began to experience different stages or level of recognition. At the same time, some Adat were displaced and trampled. The Brookes regime used the native laws, including Adat Iban, to regulate the native affairs and established the native justice system, i.e. the Native Courts, in 1870. However, most of the transplanted English law modernised Sarawak but at the expense of the development of native law. The first attempt to compile Adat Iban was made during the British colonial era.¹⁸ However, the development of native law and the Native Courts has been rather slow ever since. Even after Sarawak gained her independence in 1963, there has been very little improvement in native law development.

The discussion of Adat Iban, particularly regarding the leadership system and family matters, would not be complete without addressing women's rights and gender equality under the purview of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).¹⁹ Some Adat Iban are examined under the recommendations and demands of

¹⁸ A.J.N. Richard, *Dayak Adat Law in the Second Division*, (Sarawak Government, 1963).

¹⁹ United Nations General Assembly resolution 34/180 of 18 December 1979.

CEDAW. There are a few recommendations that are in line with Adat Iban. Lesbian, gay, bisexual, transgender, and queer (LGBTQ) human rights in family and morality matters are discussed within the scope of the 1948 United Nations Universal Declaration of Human Rights. Adat Iban are still not flexible and responsive to LGBTQ rights. However, the future of Adat will be in the hands of the young generation of today. Culture and mind set are not static they change with time. There might be changes in Adat Iban to accommodate these rights in the future. Nevertheless, such changes must conform to the state law and policies in Malaysia. Adat is subordinate of state law and any provision of any codified Adat which is repugnant or inconsistent with a provision of any written law, the latter shall prevail.²⁰ Unwritten Adat do not have any legal force.²¹

The discussions on wisdom in Adat Iban are dealt with in chapters 3 to 5. The definitions and explanations of wisdom are discussed at the beginning of chapter 3 as a prelude to all following discussions on the wisdom of Adat Iban. The main issue is the difficulty of creating “correct” universal definition of “wisdom”. The Iban define wisdom as prudent or sound knowledge, sensible ideas, valuable experiences, good judgement, and sound spiritual principles, which make the Adat good and wise and can be utilised to bring benefit, fairness, and justice to Iban communities. The Adat regulating Iban traditional leadership system, orientation of longhouses, organisation of family apartments and lighting of cooking hearths are chosen as case studies in wisdom of Adat Iban in this chapter.

The Adat regulating Iban traditional leadership system is one of the various Adat that regulate longhouse politics and power. A longhouse, together with the community and territorial domain,

²⁰ Section 9 of the *Native Customs (Declaration) Ordinance*, 1996.

²¹ Section 2 of the *Council for Cultures and Traditions Ordinance*, 1977.

form an Iban community's political entity and identity. The Adat are the instruments for the governance and management of social, economic, and political relations and affairs of the longhouse. The discussion on the Adat regulating the Iban traditional leadership system specifically examines the quality of the Adat as a guide for an Iban community to choose a leader. The discussion also highlights the flexibility of Iban in adjusting and adapting the criteria for choosing competent leaders according to the prevailing needs and aspirations at a particular time. This part touches on colonial and Sarawak government legal and political interventions in the Iban leadership system.

The Adat regulating the orientation of longhouses, organisation of family apartments and lighting of cooking hearths consist of spiritual sanctions and prohibitions. These Adat are re-interpreted and analysed in term of their relationship to the socio-economic interactions and affairs of the members of an Iban community. From such a perspective, the Adat can be analysed as being wise, s they bring benefits to Iban communities. The Adat regulating the orientation of longhouses contains good basic knowledge of settlement planning. The Adat requires the siting of a building should take into consideration the right to direct natural light, harvesting of solar energy, logistics, and infrastructure. The Adat regulating the organisation of family apartments that requires that siblings' apartments must be sited next to each other and cannot be sited at either ends of a longhouse is designed to promote unity, harmony, reciprocity, and caring communities. These factors are the backbone of community existence, survival, and development. The Adat requiring the lighting of cooking hearths at least once a month to prevent the cooking hearth to become "cold" is an idiom requiring regular checks and maintenance of family apartments. These Adat ensure the safety of the occupants and visitors to the longhouse. They are also a means to inform members of a community about what is going on in the

longhouse. These Adat can be developed further to adjust to changing social situations in order to provide protection of rights and socio-economic benefits to Iban communities.

The wisdom of Adat Iban regulating marriage and divorce is discussed in Chapter 4. According to the Iban culture, marriage is a commencement and establishment of a new family and the creation of kinship through affinity. The Adat are to help create orderly families, kinship, and society. These Adat are also examples of law being used to regulate morality. The Iban subscribe to the principle of monogamous marriage and marriage is a matrimonial union between a man and a woman. The core matrimonial matters discussed in this chapter are solemnisation, validity, capacity, sanctity, and impediments. The public announcement of a marriage is the most important legal formality for a valid marriage under the Adat. Determination of infidelity, polygamy, polyandry, child custody, and rights to property depend on whether a marriage is valid or otherwise.

Divorce is a process and system to terminate any failed marriage due to various grounds. The Adat provide that any failed marriage must be settled quickly and efficiently. The aim is to avoid acrimonious divorce and to promote harmony in communities. The Adat help form spouses to continue with their separate lives without any legal or moral obstacles. The other issues discussed in this section are grounds for divorce.

At present, the Adat regulating marriage is still technically not accommodative to LGBTQ rights. Adat Iban is subordinate and subject to the state law and, thus, Adat must not be repugnant to or inconsistent with any provision of any written law of the country. Same-sex marriages and

sexual relationships between gay persons are still illegal in Malaysia.²² However, there seems to be no law prohibiting sexual relations between non-Muslim lesbian persons unless such relationship falls under the offence of outrages on decency.²³ Furthermore, Malaysia has not ratified the United Nations *Universal Declaration of Human Rights*. To-date, nobody has challenged the Adat or attempted to solemnise the same-sex marriage according to Adat Iban. It would be interesting to see the reaction of the Iban communities should such challenge or issue arises.

Chapter 5 analyses and discusses the principle, concept, and wisdom of the Adat that regulate the custody of children, maintenance of children, and rights of former spouses to property following marriage dissolution. The welfare and up-bringing of children and rights to property are among the most serious matters to be settled and managed following the dissolution of a marriage and break-up of a family. The Adat on the custody of children is unfair and disadvantageous to the party who is responsible for the divorce. He or she may not be entitled to have custody of the children. Furthermore, the actual physical dividing of the children between the divorcing parents fails to consider the welfare and emotional needs of children and parents. The quantum of maintenance fixed by the Adat is a mere token in term of the welfare and up-bringing of children. There is very wisdom in the Adat. It is inadequate and out-dated in today's situation. However, the Adat can be reviewed to adapt to the welfare and emotional needs of the present time.

The right to a fair share in any property acquired during a marriage is important in Iban communities. The general rule is that any property acquired during the subsistence of the

²² Section 377A of the *Penal Code* (Act 574).

²³ Section 377D of the *Penal Code* (Act 574).

marriage would be divided equally between the members of the family, subject to the residential status of the individual spouse after the divorce. Members of a family would include the children and they are entitled to the family property. This Adat is very wise and designed to protect the rights and welfare of every member of a family.

The question as to whether Adat Iban are living Adat or laws is discussed and examined in Chapter 6. The wisdom underlying the Adat is autochthonous wisdom of the Iban. The wisdom was developed by Iban ancestors in the past and evolved into Adat. Thus, I describe the wisdom as traditional wisdom. Living traditional wisdom means an Adat that would continue to be relevant in new or changing social situations in Iban communities. In other words, the Adat is a living law or Adat. The wisdom of Adat Iban is examined and discussed in Chapters 3, 4 and 5, and is evaluated to find out whether it is living wisdom. Thus, the Adat are analysed as to how they are applied in new social situations.²⁴ This could determine whether the Adat would continue to be relevant. Traditional Iban communities are becoming modernised and the Adat that have been functioning very efficiently and effectively in one social situation may no longer be relevant in another. Living Adat and their underlying wisdom must be dynamic and flexible²⁵ in order to adjust and adapt to any changing social situation. Any Adat that does not have such characteristics and capability may not continue to be relevant and could disappear. The development and modernisation of Adat depend on the dynamics and flexibility of Iban communities.²⁶ The “centre of gravity of legal development”²⁷ of Adat lies in the Iban society

²⁴ David N. Schiff, “Socio-Legal Theory: Social Structure and Law” (1976) 39:3 Mod L Rev at 287. *JSTOR*, www.jstor.org/stable/1095549.

²⁵ Franz Von Benda-Beckmann & Keebet Von Benda-Beckmann, “Myths and stereotypes about adat law: A reassessment of Van Vollenhoven in the light of current struggles over adat law” (2011), 167:2/3 Brill Indonesia Bijdragen tot de Taal-, Land- en Volkenkunde at 171. URL: <https://www.jstor.org/stable/41288760>.

²⁶ Durkheim in work in *De La Division du Travail Social* in David N. Schiff, “Socio-Legal Theory: Social Structure and Law” (1976) 39:3 Mod L Rev at 290 - 301. *JSTOR*, www.jstor.org/stable/1095549.

²⁷ Ehrlich’s assertion in his work, *Fundamental Principles of the Sociology of Law*, in David N. Schiff, “Socio-Legal Theory: Social Structure and Law” (1976) 39:3 Mod L Rev at 303. *JSTOR*, www.jstor.org/stable/1095549.

itself. The social, economic, and political changes of the last 50 years or so will be critical to the continuing relevance of Adat.

The Conclusion presents my research findings as well as my thoughts and reflections about Adat Iban. My research suggests that the Adat under study are not just customs and spirituality but there is wisdom underlying the Adat. There is sound knowledge, sensible ideas, good experiences, good judgement, and sound spiritual principles underlying most Adat Iban, which has the capacity to be utilised to bring about benefits or justice to Iban communities. However, there are weaknesses in Adat, particularly on matrimonial matters. At the moment, LGBTQ person cannot get married under Adat Iban. The Adat on divorce can be manipulated by those with unscrupulous intentions. However, overall, it can be concluded that the Adat are generally good and wise, although their execution and enforcement can be faulty and unfair.

Some of the Adat have the potential to be living wisdom. But the legal development of the Adat depends on whether the Iban can adjust and adapt the Adat to changing social situations. The continued relevance of the Adat depends very much on the culture and value system of the Iban, which is not static but evolving with time. The flux of social, economic, and political changes in Iban communities could determine the survival or disappearance of the Adat. The Adat are the primary laws for the regulation and governance of social relations and affairs peculiar to Iban communities. The state laws are not comprehensive or exhaustive enough to regulate such social relations and affairs. Many Adat Iban are not given lawful effect by the state law of Sarawak.²⁸ As such, there is a need to broaden the recognition and review the statutory interpretations of Adat and customary law, which were derived and adopted from the colonial

²⁸ See the statutory definition of adat under Section 2 of *the Council for Customs and Traditions of Sarawak Ordinance, 1977 (Majlis Adat Istiadat Sarawak Ordinance, 1977)*.

interpretations of Adat and customary. Overall, the Adat need to be reinterpreted and/or re-evaluated to ensure that they continue to be living laws. The Adat should be developed into understandable law of general application to thru changing social situations in Iban communities.

Chapter 1

1. Methodology, literature review and reasons for the study

1.1 Introduction

James Tully²⁹ argues that: “The activity of studying politics, whether it is called science, theory, or philosophy, always brings itself into question. The question does not ask for a single answer, for there are countless ways of studying politics and no universal criteria for adjudicating among them.” I am guided by these words and draw the same parallel, and I agree that there are many ways of studying law and society.

This chapter describes the methodologies used for this research. It also presents a literature review of the books, journal articles, and papers read as sources of references and guides in the preparation and writing of this dissertation. This research is an inter-disciplinary study of law and society of Adat Iban. As such I read or referred to a number books, articles and academic materials in the various disciplines of studies as sources of knowledge and insights, e.g. social legal theories, jurisprudence, sociology, and anthropology.

1.2 Methodology

The main methodology used for this research was the qualitative and specifically the Iban Indigenous methodology. The Iban Indigenous methodology was used to help to understand the Iban concept of Adat and Iban customs, spirituality, cosmology, and mythology in the interpretation, application, and enforcement of Adat. The methods used for research in social legal theory, sociology of law and sociology are also adopted as a guide to conduct the research and style of writing approaches of this dissertation. A minor part of this research was conducted

²⁹ James Tully, “Political Philosophy as a Critical Activity”, (2002) 30:4 Political Theory, Sage Publications, at 533.

using a quantitative methodology. This consists of a survey on the awareness and knowledge of Adat Iban among 20 youths in the city of Miri, a city in the state of Sarawak, Malaysia.

1.2.1 Qualitative methodology

This research was conducted primarily by using qualitative methodologies. The first part of the dissertation is a reinterpretation and/or re-evaluation of the Adat. This includes an analysis of the purpose of and the goal to be achieved by the application or enforcement of the Adat. The inquiry focuses on the purposes and the aims of the Adat in construing the rationales and wisdom underlying the Adat. I aim to prove that Adat do consist of customs and spirituality but embody goodness and wisdom in their application and enforcement.

The second part of the dissertation examines whether the Adat and their wisdom can continue to be relevant, given changing social situations in Iban communities. Traditional Iban communities are rapidly becoming modern. The inquiry examines the dynamism and flexibility of the Iban and Adat adjusting and adapting to changing social situations in Iban communities.

The data collected were both primary and secondary. The primary data were collected via a series of semi-structured face-to-face interviews, discussions, and consultations with seven participants between February 2013 to August 2016 and September 2017 to September 2020. The interviews generally took the form of conversations. The follow-up discussions and consultations were mostly made by telephone conversations during the same period. Some direct question and answer sessions were used during the follow-up discussions and consultations. The data from one participant, an Anglican priest, was obtained through a set of questionnaires sent by e-mail.

There were nine regular participants recruited for the research. They consisted of two male Iban elders, five Iban men, a male priest, and a female Iban academic. I conducted two dialogue sessions with two groups of Iban community leaders (*Tuan Rumah*) and Chiefs (*Penghulu*) on July 22, 2020 and September 24, 2020. Each session was about three hours and consisted of 30 community leaders and Chiefs. The Adat chosen for the studies were the main topics for discussed.

Nine main participants participated in this research. The two male Iban elders, Edmund Langgu Saga and the late Mandie Anak Melana, were considered to be experts in Adat Iban, and their selection was based on the recommendations made by a number of people from the Saribas and Kelaka areas. They were among the most knowledgeable persons on Adat Iban in the area under study available and within easy reach. The five Iban men were quite knowledgeable in Iban Adat, culture and language. Three of them, Enchana Labau, Jimbun Tawai, and Phillip Igai Melina, were research officers attached to the Council for Customs and Traditions of Sarawak. The fourth one, Janang Ensiring,³⁰ was a linguist and knowledgeable in Iban language, culture and Adat. Richard Muluk Entering, was an Iban Paramount Chief (*Temenggong*). He was knowledgeable in Adat Iban, culture and language. The priest was Rev. Ft. Dennis Gimang. He provides some insights on the conflicts and concurrence between Adat Iban and Christianity. The Iban woman was Dr Anna Durin. She is a retired Associate Professor and lecture in culture and heritage in the faculty of Arts and Humanities at the University Malaysia, Sarawak. She has doctorate in Anthropology focusing on Iban Arts and culture. Dr Durin was recruited in response to a strong critique by my supervisory committee that there needed to be a least one female participant in thru study.³¹ One of the most important factors in the selection of the participants

³⁰ Janang Ensuring was working with a research and publication institution doing research in Iban culture and tradition. The fifth participant,

³¹ Dr. Anna Durin was recruited on April 6th 2020 to give her views on Adat Iban from the women perspective.

was their knowledge of Adat Iban and their willingness and ability to participate in the research. Except for Jimbun Tawai, they were all born and brought-up in the Iban communities of the Saibas and Kelaka river systems. All of them, except for the late Mandie Anak Melana, resided in Kuching, where I was living most of the time during the research, which made it convenient to meet with them to conduct interviews and follow-up consultations and discussions. There were some ad hoc participants interviewed for specific matters. Their names are mentioned and acknowledged in the footnotes as my sources of knowledge and authority. The selection of mostly men as participants was not a result of any bias or adverse influence in my thinking. In Iban society, the administration and enforcement of Adat have traditionally been performed by men. In the past, the enforcement of Adat was mostly carried by brute force, and such force came from men. This legacy lingers on today. However, I have been doing my best to be very objective in considering and deciding any issue before me. In order to achieve objective results, I have been trying my very best to free my mind from personal bias or personal inclination when determining any important issue.³² The research was carried out with very limited resources.

The proposed interview of two lawyers practising in the Native Courts was eliminated. I was not able to arrange for interviews and meet them. The proposed interview of the Bishop of the Anglican Church of Sarawak did not go through because the Rt. Reverend Bishop chosen for the interview had retired by the time the interview was to be scheduled. A senior priest of the Anglican Church was chosen as a replacement to give his opinion on conflicts and concurrence between Adat Iban and Christianity and why many Iban have embraced Christianity and

³² The explanation for the selection of participants and the influence on my thinking was made in response to a query and comment by my supervisor, Professor Val Napoleon: "What is the consequence of only interviewing men? Please explain why this was the case and how it affects your thinking. Male privilege is just as difficult for Indigenous men as for non-Indigenous men." A woman participant was recruited on April 6th, 2020 as a response to this query.

abandoned their traditional Adat and spirituality. The selection of a male Anglican priest, Rev. Dennis Gimang, was very natural. To-date no female Anglican priest has ever been ordained in Sarawak. Rev. Gimang was born and brought up in the Saribas area. The majority of the Christian Iban in the Saribas and Kelaka areas belong to the Anglican denomination. A set of questionnaires was sent to Rev. Gimang by e-mail and his responses were also provided by e-mail. The questionnaires are attached infra and marked as Appendix "B".

The seven male participants were asked to narrate and to give their own interpretation and understanding of the Adat regulating the management and organisation of the longhouses and matrimonial matters. Most of the data on the traditional and spiritual interpretation of the Adat were provided by Edmund Langgu Saga, an Iban elder who is considered to be an expert in Adat Iban. I interviewed the other Iban elder, the late Mandie Anak Melana,³³ only once, on February 10th, 2013. I could not conduct more interviews with him because he was very old and quite weak at that time. The seven male participants were asked the same questions. The purpose was to verify the consistency and accuracy of the Adat. A set of basic questions is attached and marked as Appendix 'A'.³⁴ The knowledge of Adat was transmitted and acquired by the participants through the oral tradition. As such, it is prudent to be assured of the consistency and accuracy of the Adat by comparing the data from the different participants. All the participants provided a very similar customary and spiritual interpretation and understanding of the Adat. Some of them either observed or participated in the execution of Adat, for examples, the solemnisation of marriage and longhouse construction. The knowledge provided was very helpful in understanding the traditional and spiritual implications of the Adat. Without such knowledge, the understanding of the traditional and spiritual meaning and significance of the

³³ The late Mandie Anak Melana died on August 5, 2018.

³⁴ The questions for interviews were not only confined to the prepared questions.

Adat would be limited. The participants were also asked whether there was any wisdom in the Adat and whether the Adat was a living wisdom. All the male participants agreed that there is wisdom in the Adat, and they thought most Adat would continue to be relevant to Iban communities as long as they live in communal settings in longhouses. However, when pressed further, some of them could not articulate their views beyond the traditional and spiritual interpretation and application of Adat. They did not view Adat as instruments of political power and authority for the administration and management of the longhouses and communities. Nevertheless, their views are taken as an insight in my reinterpretation and re-evaluation of Adat. The rationales, wisdom, and continued relevance of Adat are based on my own analysis and views construed through the reinterpretation and/or re-evaluation of the Adat.

Dr. Anna Durin was provided with a copy of the Abstract and chapters 3 - 6 of the draft. She was asked to give her views on the dissertation's proposition with regard to women's rights, gender equality, and the weaknesses of the Adat. The copy of the draft was sent by e-mail to her on April 6th, 2020. Her views are incorporated into chapters 2 – 4.

The data collected from the interviews, discussions, and consultations were transcribed in notebooks or recorded in electronic media and then verified for correctness by each participant. After verification, the data were incorporated into the dissertation draft. The interpretation and opinions of every participant on the subject matter was recorded accordingly. The final interpretation of the data was made by me, the researcher, after consultation with the participants who provided the data.

Secondary data were obtained through reading books, journals, articles, the *Federal Constitution of Malaysia*, and the law of Sarawak. These materials were sourced in libraries and

by conducting internet research. Some of the books, journals, and articles consulted were works of anthropologists who did their research on the Iban in Sarawak. These materials were very helpful for extrapolating ideas and understanding the Adat Iban from different perspectives. I will indicate my opinion as and when their work comes up for discussion.

The first part of dissertation question is asking whether there is any wisdom in the Adat. The Adat are derived from centuries-old practices, customs, and many other sources are analysed to find out the legal reasonings and purposes as the rationales from which the wisdom is construed. In this respect, the Adat are examined as purposive or consequential rules and a means to an end.³⁵ The exercise is a reinterpretation and/or re-evaluation of the relationship between Adat and the social, economic, and political interaction Iban communities members.³⁶ This is an analysis of Adat and social relations in Iban communities. The Adat which are spiritual sanctions and prohibitions are reinterpreted in a secular manner. The spiritual, cosmological, and mythological implications of the Adat are ignored at this juncture. For examples, Adat which requires any family who stays away from the longhouse most of the time to return every month is reinterpreted as Adat requiring regular inspection and maintenance of the family apartment. Any family which fails to carry out or neglect such duty may be liable to pay restitution to any person who suffers bodily as a result of stepping or walking any rotten plank on the open corridor of their apartment. Wisdom is the quality of knowledge, or idea, or any other factor underlying the Adat which can bring useful benefits to the communities. The wisdom of Adat is discussed in detail in chapter 3. If an Adat is a social burden without any useful benefit to the community, then there is no wisdom in the Adat.

³⁵ Rudolf Ihering's pupose in law in David N. Schiff, "Socio-Legal Theory: Social Structure and Law (1976) 39:3 Mod L Rev at 296. *JSTOR*, www.jstor.org/stable/1095549.

³⁶ The reinterpretation and/or re-evaluation of Adat has done by the researcher. Iban traditional interpretations and applications of Adat do not articulate and explain the rationales for and wisdom of Adat.

The second part of dissertation question is asking whether Adat Iban and their underlying wisdom are living Adat or living law. In this exercise, David Schiff's socio-legal theories give me a good insight. Schiff's contends that the "analysis of law is directly linked to the analysis of the social situation to which the law applies, and should be put into the perspective of that situation by seeing the part the law plays in the creation, maintenance and/or change of the situation."³⁷ In this dissertation, the analysis of Adat is directly applied to the analysis of social situations and the relevance of the Adat is then examined in the new social situations. I am guided by Franz and Keebet Von Benda-Beckmann's characterisation of living law to examine whether the Adat are living wisdom. According to these scholars, a living law ought to be dynamic and flexible³⁸ in order to be considered as living wisdom. In addition, an Adat must be capable of adjusting and adapting to a new social situation if that Adat were to continue to be relevant in the new social situation. Any Adat that does not have such characteristics and capabilities may become obsolete and eventually disappear. According to Émile Durkheim's theory of interdependency, Adat depend on Iban communities and vice versa.³⁹ The social, economic, and political development⁴⁰ and changes in modern Iban communities are the phenomena that could determine the continuing relevance of Adat in changing social situations.

1.2.2 Iban indigenous methodology

The Iban Indigenous methodology is a qualitative methodology. The cultural, social, political and natural surroundings in every Iban community play a significant influence on Iban epistemology

³⁷ David N. Schiff, "Socio-Legal Theory: Social Structure and Law" (1976) 39:3 Mod L Rev at 287. *JSTOR*, www.jstor.org/stable/1095549.

³⁸ Franz Von Benda-Beckmann & Keebet Von Benda-Beckmann, "Myths and stereotypes about adat law: A reassessment of Van Vollenhoven in the light of current struggles over adat law" (2011)167:2/3 Brill Indonesia Bijdragen tot de Taal-, Land- en Volkenkunde at 171. URL: <https://www.jstor.org/stable/41288760>.

³⁹ Durkheim, *De la division du Travail Social* in Schiff, D.N. "Socio-Legal Theory: Social Structure and Law" (1976) 39:3 The Mod L Rev at 290 – 301.

⁴⁰ The rapid socio-economic and political progress has changed the standard and quality of living and livelihood in most Iban communities.

and ontology in most aspects of living in communal setting. Adat are an Iban socio-cultural expression and an instrument of political powers and authority for the regulation of communities and territorial domains⁴¹ is just one aspect. The primary method of learning, obtaining and dissemination of knowledge in Adat in the Iban communities are by observation and absorption and transmission through oral tradition. An Iban who was born and brought in a longhouse community would learn from very young age. As a young boy or girl, he or she would, initially, observe the administration and enforcement of Adat through curiosity and absorb knowledge in inadvertently. He or she may later acquire the knowledge through interest, or involvement, or participation in the administration and enforcement of Adat. The knowledge acquired through epistemology and ontology belongs to the individual person and such person becomes an authority in the knowledge. He or she may cite his or her source of knowledge but it is not mandatory to do so and it is not plagiarism for not doing so.⁴² The Iban Indigenous methodology is an unregulated or free way of learning, acquiring, and disseminating knowledge. As an Iban born and brought up in a longhouse community I underwent the learning and knowing the knowledge of Adat through such method. The methodology is a familiar tool to me to understand how customs, spirituality, cosmology, and mythology are used for the interpretation, application, and enforcement of Adat as instruments for social control and social contract to achieve certain desired social, economic, and political purposes or ideals. The Iban Indigenous methodology helped me to understand better the Iban way of thinking (mind) and understanding of the Adat. At the same time, the methodology gives me an idea that Adat as ancient law could be reinterpreted and/or re-evaluated to make them more dynamic and flexible to adapt and adjust to any new or changing social situation.

⁴¹ For the definition of territorial domain refer to chapter 3, paragraph 3.1 *infra*.

⁴² The knowledge was transmitted through a telephone conversation (oral tradition) on July 20, 2020 to me by Edmund Langgu, a participant in this research.

I agree with some ideas asserted by Rix, Wilson, Sheehan, and Tujague in their book entitled: *Indigenist and Decolonizing Research Methodology*.⁴³ They assert that: “Indigenist research respects and honors Indigenous ways of knowing, being, and doing through using methods that are informed by, resonate with, and are driven and supported by Indigenous peoples.”⁴⁴ However, I do not agree with their assertion that: “Researchers working respectively with, and learning from Indigenous peoples aim to decolonize western research methodologies and methods in order to include Indigenous ways of seeking, analysing, and disseminating new knowledge.”⁴⁵ By using Iban Indigenous methodology, it does not mean that my intention is to decolonise western research methodology. My idea is to include the Iban Indigenous methodology and ontology in my research to help to better understand the Iban way of thinking and approach on Adat. Iban Indigenous methodology is used to complement any other mainstream methodologies.

I agree with Kovach that Indigenous people have a specific ways of knowing based upon the oral tradition of sharing knowledge through “conversational method”.⁴⁶ The method involves a series of dialogue sessions in which the researcher asks participants to tell their stories as a means to assist the researcher. Kovach’s conversational method is a mean of acquiring knowledge through oral tradition. I used similar method in my fieldworks and most of my interviews with the research participants were conducted through a series of conversations for data gathering. This method seemed to be suitable and comfortable to my research participants.

⁴³ Elizabeth F. Rix et al, *Indigenist and Decolonizing Research Methodology*, Pranee Liamputtong, ed, Handbook of Research Methods in Health Social Sciences (Singapore: Springer, 2018).

⁴⁴ *Ibid* at 1.

⁴⁵ *Ibid*.

⁴⁶ See Margaret Kovach, “Conversational Method in Indigenous Research” (2010) 5 *First People Child & Family Review* at 40 – 48.

They were more participative in the conversations and provide knowledge without pressure if compared to the direct question and answer method of interview.

1.2.3 Quantitative methodology

A minor survey⁴⁷ on the awareness and knowledge of Adat Iban among Iban youths in Miri, a city in Sarawak, was conducted from September to November 2017. Questionnaires were distributed to about 60 Iban youths; only 20 participants returned their responses. The participants were 18 – 40 years old and were either born or brought up in Miri. At the time of the survey, they were not living in Iban traditional communities. They lived in multi-racial residential areas and heterogeneous communities. The number of responses may not be high big enough to represent the younger generation’s awareness and knowledge of Adat Iban. However, the survey is quite adequate to indicate the awareness and knowledge of Adat among the younger generation of Iban removed from their traditional settings. The survey indicates that all the participants were aware of Adat Iban, but their level of knowledge varied from minimal to significant. This indicates that knowledge of Adat Iban among the younger generation of Iban is at the crossroads and the future survival of Adat is rather uncertain. The younger generation is the bridge that links the present and the future of Adat Iban. The development and survival of the Adat rests on the shoulders of the younger generation and the social situations surrounding them. The questionnaires for the youth survey are attached as Appendix “C”.

1.2.4 Research methods

In developing my answer to the dissertation questions, I take note of Jeremy Webber’s “general conception of how legal reasoning is related to human societies—how law, conceived in

⁴⁷ I could only conduct a minor survey because of the high costs and lack of fund.

customary terms, exists in intimate relation with the array of practices in any human society.”⁴⁸ This presumption gives insight and guidance in developing my reinterpretation and/or re-evaluation of the Adat. I look at the Iban traditional practice which give very little legal reasoning in the interpretation, applications and enforcement of Adat. Then I examine whether a reinterpretation or re-evaluation of Adat for the same purpose would still produce similar or better results or benefits to the Iban communities. This is an analysis of the relationship of Adat and the social interactions of members in Iban communities in certain social situations. Webber asserts that: “Any order develops its own language of normative analysis, its own grammar, that materially shapes how the fundamental elements of legal relations are conceived”⁴⁹ I presume that this assertion provides some freedom and latitude for an innovative and creative approach in the interpretation and evaluation of Adat.

I read Bronislaw Malinowski’s research method in his books, *Crime and Custom in Savage Society* and *Argonauts of the Western Pacific*. The books are anthropological studies of tribal jurisprudence and social and economic cultures of the Melanesians of New Guinea conducted in the 1920s. Despite their age, I find the research methods of participation-observation and carefully and precisely recording data are still relevant to researchers conducting fieldwork. Malinowski asserts that “the study by direct observation of the rules of custom as they function in actual life”⁵⁰ are ideal for fieldwork. This method includes joining in what is going on, following people being studied on their visits and walks, and sitting down to listen and share in their conversations.⁵¹ I find such methods can enrich the personal experience for a researcher who

⁴⁸ Jeremy Webber, “The Grammar of Customary Law” (2009), 54 McGill LJ 579 at 583.

⁴⁹ *Ibid.*

⁵⁰ Bronislaw Malinowski, *Crime and Custom in Savage Society* (Kegan Paul, Tench, Trubner & Co. Ltd, New York, 1926) at 125.

⁵¹ Bronislaw Malinowski, *Argonauts of the Western Pacific* (London, G. Routledge & Sons, New York, E.P. & Co., 1922) at 2 - 25.

wish to observe the relationship between law and people's social interaction. Malinowski further asserts that a good researcher should see with the eyes of the local people; their perspective should permeate through his thinking and feeling until he understands these processes. An anthropologist should also establish what is a norm, custom, or a rule in a given community. A researcher should also live among the people being studied rather than resort to the hearsay method of field work.⁵² Malinowski was an outsider when he did his research on the *Argonauts of the Western Pacific* and as such his theory is quite practical for an outsider. However, the theory may not be totally applicable to a researcher like me, who is an insider and member of one of the communities under study. I am an insider and a backyard researcher. I was born and brought up in one of the Iban communities under study and I learned the knowledge of Adat by direct observation and participation. I observed the elders applying and enforcing the Adat in my youth and then participated in the administration and enforcement of Adat while serving in Sarawak state civil service.⁵³ Malinowski's theory of "study by direct observation of the rules of custom as they function in actual life" or "participation-observation"⁵⁴ is a very common way of learning knowledge in the Iban communities.

Malinowski's observation of the Melanesian gives and take principle and the theory of reciprocity as the basis of social structure and binding obligation⁵⁵ have some similarities with the Adat that regulate the organisation of family apartments. Malinowski says: "What perhaps is most remarkable in the legal nature of social relations is that reciprocity, the give-and-take principle,

⁵² Bronislaw Malinowski, *Argonauts of the Western Pacific* (London: G. Routledge & Sons, New York, E.P. & Co., 1922) at 6 and Bronislaw Malinowski, *Crime and Custom in Savage Society* (London: Kegan Paul, Trench, Trubner, & Co., New York, 1926) at 125.

⁵³ I participated in the administration and enforcement of Adat while serving as an administrative officer in the various districts in Sarawak from 1973 to 1986 and as the Chief Registrar of the Native Courts of Sarawak from 2005 to 2013. I was on study leave from October 2010 – December, 2011.

⁵⁴ Bronislaw Malinowski, *Crime and Custom in Savage Society* (Kegan Paul, Trench, Trubner & Co. Ltd, New York, 1926) at 21.

⁵⁵ *Ibid* at 39 - 49.

reigns supreme also within the clan, nay within the nearest group of kinsmen.”⁵⁶ The discussions on the principle of reciprocity and mutual assistance between siblings in the Iban communities is discussed in chapter 3.

1.2.5 Research works in other fields

I referred to some works in anthropology and ethnography to help me to understand Adat from the Iban socio-cultural perspective. Benedict Sandin’s ⁵⁷ ethnographical works, Jérôme Rousseau’s ⁵⁸ anthropological work, and other scholars’ works on Iban communities and society were very helpful insight for my research. The knowledge in Iban culture,⁵⁹ spirituality, mythology, and cosmology written by these anthropologists was quite helpful in attempt to formulate legal reasonings and jurisprudential principles for the Adat according to the Iban worldview. The choice of ethnographic works by Sandin, an Iban, and anthropological works of others on Iban communities is not an attempt to decolonize and deconstruct western scholarship and European imperialism and colonialist research methodology as argued by Linda Tuhiwai Smith.⁶⁰ It is not meant to resist what Edward Said refers to as western discourse about the “Other” which is supported by “institution, vocabulary, scholarship, imagery, doctrines, even colonial bureaucracies and colonial styles”.⁶¹ The purpose is to acquire some knowledge and insight through some scholarly works on the culture and tradition of the Iban in order to better understand Adat Iban. As far as I am aware, scholarly or literary works in the field of jurisprudence or legal studies on Adat Iban are not available.

⁵⁶ Bronislaw Malinowski, *Crime and Custom in Savage Society* (Kegan Paul, Trench, Trubner & Co. Ltd, New York, 1926) at 47. st

⁵⁷ Benedict Sandin, *The Sea Dayak of Borneo before the White Rajah Rule* (Macmillan, London, 1967) and Benedict Sandin, *Iban Adat and Augury* (Universiti Sains Malaysia, Penang, Malaysia, 1980).

⁵⁸ Jérôme Rousseau, ‘Iban Inequality’ (1980), *Bijdragen tot de Taal-, Land- en Volkenkunde* at 136.

⁵⁹ For example, the Iban genealogy is not merely for tracing one’s origin but it can be used for dispute resolution to trace and determine the rights to property or inheritance.

⁶⁰ Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous People* (Dunedin, NZ: University of Otago Press, 1999) at 1.

⁶¹ Edward Said, *Orientalism* (London: Vintage, 1978) at 2 in Linda Tuhiwai Smith *ibid* at 2 - 3.

1.2.6 An insider and own backyard researcher

This section explains my position within the context of an insider doing research on the Adat of my own people. As an insider, there are some advantages to conduct research among one's own people. However, I am aware of the prejudices and bias that I may face in doing such research. Nevertheless, I will try my very best to be neutral in work.

I am a male Iban and a native of Sarawak. I was born and brought up in the Iban traditional social environment in an Iban longhouse⁶² in Betong, Sarawak. Iban language is my first language and my mother tongue. I learned and acquired knowledge of Adat Iban through oral tradition and by observing the elders performing their duties in the administration of Adat. I have been observing and absorbing the traditional practice of Adat in my own community since my childhood. I participated in the administration and enforcement of Adat Iban as an officer of the Native Courts of Sarawak⁶³ for more than 10 years. Since June 2020 I have been holding the appointment of the Head of Council for Customs and Traditions Sarawak (*Majlis Adat Istiadat Sarawak*). The Council is an advisory body advising the Sarawak state government of native Indigenous law, customs and traditions. In addition, the Council is also entrusted with the duties, among other things, to promote, disseminate and conduct researching in native Indigenous law, cultures and traditions. Through the above-mentioned orientations and experiences, I have acquired a fair amount of knowledge of Adat Iban. Therefore, I am an insider doing research in my own backyard, under such circumstances, I have the advantages of understanding the Adat through first-hand knowledge and as a member of an Iban community subject to the Adat.

⁶² I was brought up in an Iban community that was practising subsistence agriculture, hunting, fishing, and gathering. The majority of the members were practising Iban spirituality. An Iban traditional longhouse may consist of between 10 to 40 families' apartments linked together like a row of terrace or townhouses.

⁶³ I served as the Chief Registrar of the Native Courts of Sarawak from 2005 until 2013. I took a one-year study leave from October 2010 to November 2011 to attend the first academic year of my Ph.D. program at the University of Victoria, BC, Canada. As the Chief Registrar, I was the Head of Department of the Native Courts. From 2013 – 2016, I served as a contract officer at the Native Courts.

However, I may face issues on neutrality in my interpretation of data and finding. Nevertheless, I will try my very best to be objective and uphold the principle of reflexivity in my research. I will always look at myself as an Iban, a native and a researcher and my relationship with my research. As Kristi Malterud contends, “Preconceptions are not the same as bias, unless the researcher fails to mention them.”⁶⁴ In the same manner, my preconceptions or presumptions in the interpretation of Adat are not intentionally bias but may be unconsciously influenced by cultural conditioning.

I take note of the worries expressed by some academia and in law about ethnographic researchers “going native” and that they may be subjective or biased in their research. As a native, I may be easily labelled as “going native” in my research. My research is not pure ethnography. However, because of it is a study of the Indigenous law of specific communities of the Iban society, there are some ethnographic elements to it.⁶⁵ I invoke Clifford Geertz argument that an ethnology is something that social anthropologists, as practitioners do, and it is in understanding of the “doing” that creates the anthropological analysis as a form of knowledge.⁶⁶ John Creswell cautions against researchers conducting research among their own people who are sharing similar interest. Creswell argues that there are positive and negative aspects of doing backyard research. A positive aspect is the ease of access. The negative aspects are that the data may be compromised; individual might withhold information; and the participants might provide information that they want the researcher to hear, or provide ‘dangerous knowledge’ that

⁶⁴ Kirsti Malterud, “Qualitative Research: Standards, Challenges and Guidelines” (2001) 358 *The Lancet*, at 483.

⁶⁵ John W. Creswell, *Qualitative Inquiry and Research Design: Choosing Among Five Traditions* 3rd ed (Thousand Oaks, CA: Sage 2012) in Valerie R. Napoleon, Ayook: Gitksan Legal Order, Law, And Legal Theory (Ph.D. Law Dissertation, University of Victoria, BC, Canada, 2009) at 19 - 20.

⁶⁶ Clifford Geertz, *The Interpretation of Cultures* (New York: Basic Books, 1973) in Valerie R. Napoleon, Ayook: Gitksan Legal Order, Law, And Legal Theory (Ph.D. Law Dissertation, University of Victoria, BC, Canada, 2009) at 19.

is political and risky for an ‘inside’ investigator”.⁶⁷ This caution is a reminder to me to be objective and unbiased in my work.

The negative aspects of the caution of “going native” asserts by Creswell are more imaginative rather than real. I did not face such issues in my data collection or interviews of participants or discussion with other people. I find the caution is prejudicial to any researcher who is conducting research among his or her own people. If Creswell’s assumption is sustained, any researcher or Indigenous researcher who conducted or conducts research among his or her own people could be easily being accused of being subjective or biased in his or her work. This is an unfair assumption against such researcher. When will a researcher be able to conduct research his or her own backyard be free of such unfair assumption? I found that there were some advantages of conducting research in my own backyard. I was fluent in the Iban language and I understood the Iban culture and values. Such ability and competency made access, conversations, and communication easy. Richard Daly, an anthropologist and an expert witness in the *Delgamuukw v British Columbia* [1997] 3 SCR 1010, gave a comprehensive professional response when he was accused of “going native and being a “subjective advocate” by Crown lawyers. Daly asserts:

As researcher, I strove to work with professional dispassion, within the limits of the “facts” and the relevant documentation, and within the discipline of my professional training; yet I was not especially assiduous in seeking to appear to be more dispassionate by desituating myself from objects of study and the problematic of being party to one side in a court case. I did not subscribe to the obscurantist legal fiction that I was working as a transcendent subject who observes the phenomenal world from a non-phenomenal Platonic realm of forms, removed from the historical and partisan events pertaining to Aboriginal rights in Canada during the 1980s and 1990s

⁶⁷ John W. Creswell, *Qualitative Inquiry and Research Design: Choosing Among Five Traditions* 3rd ed (Thousand Oaks, CA: Sage 2012) in Valerie R. Napoleon, Ayook: Gitksan Legal Order, Law, And Legal Theory (Ph.D. Law Dissertation, University of Victoria, BC, Canada, 2009) at 19 - 20.

Well, I did not “go native” (which is an ethnocentrically loaded and colonist term), and I hope I did not go non-Native.⁶⁸

Daly’s contention may be called as an honest researcher and professional creed of neutrality and objectivity. I reminded myself of such standard of neutrality through out my research and writing the dissertation.

Creswell’s caution and the Crown’s contention in *Delgamuukw* question the neutrality and objectivity of Indigenous researchers doing research among their own people.⁶⁹ These contentions demand that Indigenous researchers must not have any slightest trace influence of their social and cultural inclination their works. It is incredible for any researcher to be completely neutral and objective in his or her research. I find the views of Linda Tuhiwai Smith and Sally Falk Moore are more realistic when they say that all researchers are fundamentally and inherently political.⁷⁰ But this does not mean that the high standard of neutrality and objectivity should be compromised when conducting own backyard research. Geertz contents that intellectual rigor is still necessary in our backyard research but concurs that complete objectivity is impossible in such matters and “one might as well let one’s sentiment run loose.”⁷¹ Tully supports this contention and states that:

Freeing ourselves from the problematisations and practices in which we think and act is difficult because participation tends to render their shared patterns of thought and reflection and rule following and rule contesting prereflective and habitual.

⁶⁸ Richard Daly, “*Our Box Was Full: An Ethnography for the Delgamuukw Plaintiffs*” (Vancouver: UBC Press, 2005) in Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (Ph.D. Dissertation, University of Victoria, BC, Canada, 2009] at 20.

⁶⁹ *Ibid.*

⁷⁰ Linda Tuhiwai Smith, *Decolonizing Methodology: Research and Indigenous People* (University of Otago Press, Dunedin, New Zealand, 1999) at 19-72. See also Sally Falk Moore “Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949-1999” (2001) 7:1 J. Royal Anthropology Inst 95, at 95-116.

⁷¹ Geertz Clifford *The Interpretation of Cultures: Selected Essays* (Basic Books, New York, 1973) in Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (Ph.D. Dissertation, University of Victoria, BC, Canada, 2009] at 20.

They come to be experienced as necessary rather than contingent, constitutive rather than regulative, universal rather than partial.⁷²

Tully explains by quoting Quentin Skinner:⁷³ “It is easy to become bewitched into believing that the ways of thinking about them [our normative concepts] bequeathed to us by the mainstream of our intellectual traditions must be the ways of thinking about them”.

As an Indigenous researcher and I hope to live up to the standard as expounded by Eva Marie Garrouette⁷⁴ in her theory of “Radical Indigenism”. The theory assumes that scholars can take philosophies of knowledge carried by indigenous people seriously. I conducted my research and learned the knowledge and philosophies of Adat Iban seriously and passionately. I am morally bound to articulate the knowledge and wisdom of Adat Iban as an intellectual orientation and not just as an interesting object of study. Some readers of this dissertation might say that I would concur with anything Iban because I am an Iban and researching the Indigenous law of my own people. I would avoid falling into William P. Alford’s presumption that researchers have the tendency to be influenced by their own cultural values when judging and evaluating other legal systems.⁷⁵ As a lawyer by training and as a member of the Sarawak Roll of Advocates,⁷⁶ I invoke William Twining’s comment about lawyers and anthropologists to support, if at all, my credential and neutrality in my work. Twining asserts that “lawyers are more likely than anthropologists to have practical objective in mind” and “to identify, consciously or unconsciously, with certain types

⁷² James Tully, “Political Philosophy as a Critical Activity” (2002) 30:4 Political Theory Sage Publications at 547.

⁷³ Quentin Skinner, *Liberty before Liberalism* (Cambridge, UK: Cambridge University Press, 1998) at 116 in Tully *ibid*.

⁷⁴ Eva Marie Garrouette, *Real Indians: Identity and the Survival of Native America* (Berkeley, CA: University of California Press, 2003) at 10.

⁷⁵ William P Alford, “On the Limits of ‘Grand Theory’” (1986) in *Comparative Law* 61 Wash L Rev 945 at 947.

⁷⁶ My academic qualifications are stated at page above. I am a member of the Roll of Advocates of Sarawak (Membership No.675). The Sarawak Roll of Advocates is a body regulating the admission and practice of the legal profession in Sarawak. A member of the Roll of Advocates may practise in the Courts of Sabah and Sarawak (see Advocate Ordinance Sarawak 1953). I served as a legal officer in the State Attorney-General Chambers, Sarawak, for over a year and as the Chief Registrar for the Native Courts, Sarawak, for eight years.

of practitioners in looking at legal processes from an internal point of view”.⁷⁷ However, I was not facing any serious conflicting ethnocentricity because I was not working on a cross-cultures study as referred to by Twining.⁷⁸ Twining observes that jurists working on a cross-cultures have the tendency to develop an internal view of law, but they are challenged by their conflicting ethnocentricity. This is a matter of self-discipline and integrity for a researcher. I take note of the caution and I have tried my very best to be neutral in this research. I gave appreciation and critique as and when necessary.

I am aware of the sensitivity and concerns of the Human Research Ethics Board of University of Victoria regarding the ethics of conducting research which involve people and particularly Indigenous people. In this respect, I have conducted my interviews, discussions, consultations, and a minor opinion survey with the highest confidentiality and respect to the participants and their cultures. I am trying my best to maintain the highest ethical standard required of a researcher.

The discussions above seem to give the impression that the theory of neutrality and objectivity is speculative and elusive. Creswell’s caution could be implied as a patronising view whereby Indigenous researchers cannot conduct research in their communities or among their own people. If they did, their research would be deemed subjective or biased. The assumption seems to suggest the unreliability and inferiority of Indigenous researchers. Valerie Napoleon responds to Creswell’s assumption by arguing that “if this were the case for Indigenous researchers, it should also be the case for non-Indigenous researchers – a completely nonsensical and

⁷⁷ William Twining, “Law and Anthropology: A Case Study in Inter-Disciplinary Collaboration” (1973) 7 *Law & Soc’y Rev* 561 at 573-575.

⁷⁸ *Ibid.*

untenable situation for everyone.”⁷⁹ Creswell’s and Napoleon’s contrasting views could create an academic impasse. However, Napoleon suggests that “the goal for all researchers is to “undertake the difficult task of being reflexive continually since none of us is outside the existing power structures and power dynamics that surround us.”⁸⁰ I think this suggestion provides an opportunity for any researcher to conduct any research in any field and place unmolested and respected. This contention is supported by Garrouette’s theory of Radical Indigenism. Garrouette’s theory of Radical Indigenism directly and indirectly champions the case of any indigenous researcher doing backyard research. She asserts that the theory “opens up dramatic ways for American Indian people to interact with the academy and to accomplish goals they define for their own communities.”⁸¹ Garrouette’s theory is applicable to any other Indigenous researcher even though she specifically mentions “American Indian people.”⁸² Her main point is referring to Indigenous researchers conducting research among their own people.

1.2.7 Difficulty of correctly translating Iban terms into English

There are difficulties in correctly translating some Iban words or terms into English because there is no equivalent in English. Some words or terms are based in cultural or spiritual nuances or idioms. The cultural and social differences between Iban society and English (England) or north American societies could be one of the reasons for the problem. For examples, “*tulah*” and “*busong*”,⁸³ are believed to be spiritual punishments such as ill-fortune, sickness or death. In Iban language, the terms refer to a spiritual punishment that would befall person who has done an act of evil to another, for example, stealing chicken or chopping down a fruit tree. Inaccurate

⁷⁹ Valerie R. Napoleon, “Ayook: Gitksan Legal Order, Law, And Legal Theory” [Ph.D. Dissertation, University of Victoria, BC, Canada, 2009] [unpublished] at 21.

⁸⁰ *Ibid.*

⁸¹ Eva Marie Garrouette, *Red Indians: Identity and Survival of Native America* (University of California Press, Berkley and Los Angeles, California, 2003) at 10.

⁸² Eva Marie Garrouette, *Red Indians: Identity and Survival of Native America* (University of California Press, Berkley and Los Angeles, California, 2003) at 10.

⁸³ The terms are similar to “Karma” in Hinduism.

translation could lead to a distortion of meaning of the Adat. To circumvent this problem, any word or term which has no equivalent in English could be described or explained in a rather lengthy manner. However, this would result in an unwieldy text. As far as practicable, therefore, I adopt Barend Ter Haar's three possible methods of resolving the issue: (1) to seek the nearest equivalent; or (2) to continue to use the Iban's terms; or (3) to coin "neutral" terms in the recipient language.⁸⁴

1.3 Literature review

1.3.1 Books and articles referred to in writing this dissertation

The arrangement of the literature review of the books, journal articles and other reference materials follows this dissertation's structure as described in the Introduction. This research is primarily based on data collected from interviews, discussions, and consultations with nine main participants. To the best of my knowledge and notice, there is no literature on socio-legal study on Adat Iban. The academic works specifically on the Iban people and Adat Iban are mostly anthropological works by Indigenous and non-Indigenous scholars. Their names and their works are mentioned below and in chapter 2. These works were useful in providing insights and information as a guide in the preparation and writing of this dissertation. As E. Adamson Hoebel explains:

If the integration of law and anthropology is to flourish, it must be on a truly functional basis. Each must contribute to the dynamics of the other; each must add to the operative effectiveness of the other; each must nourish the other as a process. Mere static comparison, a paralleling of civilized rules of law with selected examples from sundry primitive tribes, is a sterile accomplishment.⁸⁵

⁸⁴ Barend Ter Haar in Max Gluckman, "Adat Law in Indonesia" (1949) 31:3/4 *Journal of Comparative Legislation and International Law* at 63.

⁸⁵ E. Adamson Hoebel, "Law and Anthropology" (1946) 32 *Va L Rev* at 835 in Twining "Law and Anthropology: A Case Study in Inter-Disciplinary Collaboration" (1973) 7:4 *Law & Soc'y Rev* at 561. See also E. Adamson Hoebel, "Law and Anthropology" 32 *Va L Rev* at 835.

I agree with Hoebel. The partnership between Karl N. Llewellyn and Hoebel is a good example of collaboration between a lawyer and an anthropologist.⁸⁶ A number of legal scholars have used anthropological literature and jurisprudence has provided ethnographers of law with some of their main concepts. It is an advantage to possess some knowledge of the culture of the society whose law and society is being researched.

The knowledge in both fields could complement each other and give a better understanding of the law from the cultural and social perspectives of the people. The joint work of Llewellyn, a specialist in law, and Hoebel, an anthropologist, in producing "*The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence*"⁸⁷ is a good example, despite some inconsistencies. Many social and cultural anthropologists viewed that "trouble-cases" in "*The Cheyenne*" was a new and productive way to understand "tribal culture."⁸⁸ It was the legal academy that was slow to see the importance of tribal ethnography in the study of law. Most legal scholars believed that because "primitive" societies bore little resemblance to the modern world and anthropology had little to offer the study of law. Legal scholars paid little attention to how the Cheyenne study had informed legal discourse. According to Llewellyn's biographer Ajay K Mahatma, American legal scholars in particular have neglected Llewellyn's innovative anthropological and sociological approach to the study of law.⁸⁹ In my case, the works of anthropological scholars on the Iban of Sarawak have been very helpful to my research in the field of law and society.

⁸⁶ Llewellyn acted as one of Hoebel's advisers in two early studies of the law-ways of the Comanche and the Shoshones (Hoebel, 1935, 1939, 1940); they then collaborated on their famous study, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Norman: University of Oklahoma Press of the Cheyenne, 1941).

⁸⁷ *Ibid.*

⁸⁸ Mehrotra, Ajay K., "Law and the "Other": Karl N. Llewellyn, Cultural Anthropology, and the Legacy of The Cheyenne Way" (2001) Maurer School of Law, Indiana University at 742. <http://www.repository.law.indiana.edu/facpub/2530>.

⁸⁹ Ajay K. Mehrotra, "Law and the "Other": Karl N. Llewellyn, Cultural Anthropology, and the Legacy of The Cheyenne Way" (2001) Law & Social Inquiry at 741-742. Online: <http://www.repository.law.indiana.edu/facpub/2530>>

I read a number of research works in various academic fields in other regions or societies to help me to conduct my research and write my dissertation, for examples, anthropological jurisprudence,⁹⁰ Adat-law,⁹¹ socio-legal theory, sociology of law and jurisprudence. In addition, I also read Ramy Bulan's articles, "Native Customary Land: The Trust as a Device for Land Development in Sarawak"⁹² and "Statutory Recognition of Native Customary Rights under the Sarawak Land Code 1958: Starting at the Right Place",⁹³ to obtain some information on the colonial interventions in law in Sarawak during the Brookes dynasty and British colony person from 1841 to 1963. These articles are reliable scholarly works on the colonial intervention in native law and the transplanting of English law into Sarawak.

With regard to gender equality and women rights, I read the *Convention on the Elimination of All Forms of Discrimination Against Women*, articles 1 - 30 of the *United Nations Universal Declaration of Human Rights* 1984, and a few articles on the convention and declaration to provide some ideas to help me to examine the discrimination against and rights of Iban women under Adat Iban. The convention directed the signatory governments to implement the recommendations. The declaration imposed an obligation on all the member countries of the United Nations to implement the recommendations. The Iban communities could the learn and under the universal definition and meaning of freedom and equality from the recommendations. I read the *Gender Inside Indigenous Law Toolkit* (2016), Faculty of Law, University of Victoria, BC, Canada. The toolkit gives me the insights on the efforts of Indigenous Law Research Unit

⁹⁰ For example, the works of Malinowski, Bronislaw, *Argonauts of the Western Pacific*, London, G. Routledge & Sons, New York, E.P. & Co 1922 and *Crime and Custom in Savage Society* (Kegan Paul, Trench, Trubner & Co. Ltd, New York, 1926).

⁹¹ Mirza Satria Buana, "Living *adat* law, Indigenous Peoples and the State Law: A Complex Map of Legal Pluralism in Indonesia" (2016) 1:3 Intl. J. Indonesian Studies.

⁹² 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.

⁹³ Ramy Bulan, "Statutory Recognition of Native Customary Rights under the Sarawak Land Code 1958: Starting at the Right Place" (2007) 34 Journal of Malaysian and Comparative Law.

and the people involved in the research to articulate Indigenous laws and Indigenous legal systems in Canada. The work on gender issues, identify, and legal needs within Indigenous law in Indigenous communities is a beacon to other people doing research and teaching on Indigenous law. The objective of the Toolkit is a good guide to strengthen healthy communities, create productive legal processes for inclusive discussions and debate, and help create spaces for voices that are often silenced in communities.

1.3.2 Methodology and methods

I am guided some suggestions advanced by Webber in “The Grammar of Customary Law”⁹⁴ as a method of looking at the meanings and purposes of Adat indifferent social situations. Webber suggests that legal reasoning is related to human societies and law is conceived in customary terms and exists in intimate relation with practices in any human society. Law develops its own language which shapes how core elements of legal relations are conceived.

I read Malinowski’s books entitled: *Argonauts of the Western Pacific* and *Crime and Custom in Savage Society* published in 1922 and 1926, respectively.⁹⁵ These books are anthropological jurisprudence studies of the Melanesian people inhabiting the Trobriand Islands. Despite the age of these works, some parts are quite helpful in providing guidance and insight regarding methodology and methods for law and society research. Even though Malinowski’s research and mine are almost 100 years apart, some methods are still relevant. Malinowski emphasises that living among the people being studied, participation-observation, and language competency is “the best” method for a researcher to obtain first-hand knowledge or primary data from the people bring studied. Using this method, a researcher can observe the daily activities of people

⁹⁴ Jeremy Webber, “The Grammar of Customary Law” (2009), 54 McGill LJ 579 at 583.

⁹⁵ Malinowski, Bronislaw, *Argonauts of the Western Pacific*, (London, G. Routledge & Sons, New York, E.P. & Co., 1922) and Malinowski, Bronislaw, *Crime and Custom in Savage Society* (London and New York, 1926).

and understand their culture. Malinowski says that it is an advantage if a researcher acquires the language and can speak and write in the language of the people he or she studies.⁹⁶ This could solve the problem of translation. Malinowski contends that: “The translation often robbed the text of all its significant characteristics—rubbed off all its points”⁹⁷ I agree with Malinowski that translation of terms from one language to another can be a big problem.

Three chapters in Malinowski’s *Crime and Custom in Savage Society* are relevant and helpful in my attempt to analyse the “following and compliance” with Adat by the Iban because the Adat are customary practices or spiritual sanctions or prohibitions. These chapters record Malinowski’s observation of Melanesian society relating to the automatic submission to custom, reciprocity as the basis of social structure, and the rule of law in religious acts. The chapter on the automatic submission to custom is summarised by Robert H. Lowie’s view: “Generally speaking, the unwritten laws of customary usage are obeyed far more willingly than our written codes, or rather they are obeyed spontaneously.”⁹⁸ I agree with Malinowski’s presumption that: “The fact is that no society can work in an efficient manner unless laws are obeyed “willingly” and “spontaneously”. The threat of coercion and the fear of punishment do not touch the average man, whether “savage” or “civilized”.⁹⁹ These presumptions are not quite applicable to the attitudes of the Iban in their compliance with Adat which are derived from spirituality. Most Iban comply with these Adat because of fear of spiritual punishments and respect for the Adat. However, Malinowski’s presumption has some relevance to the Adat that are derived from

⁹⁶ Malinowski, Bronislaw, *Argonauts of the Western Pacific* (London, G. Routledge & Sons, New York, E.P. & Co., 1922) at 23.

⁹⁷ *Ibid.*

⁹⁸ Dr. Robert H. Lowie, *Primitive Society* (Boni and Liveright, New York, 1920) at 398 in Malinowski, Bronislaw *Crime and Custom in Savage Society*, Kegan Paul, Tench, Trubner & Co. Ltd, New York, 1926) at 13. Malinowski quoted the page as 387.

⁹⁹ Malinowski says “the word savage whatever association it might have had originally, connotes ideas of boundless liberty, of irregularity, of something extremely and extraordinarily quaint.” See Malinowski in his book, *Crime and Custom in Savage Society* (Kegan Paul, Tench, Trubner & Co. Ltd, New York, 1926) at 10.

customs. Malinowski's observation that reciprocity is the basis Melanesian social structure is very similar to the concept of reciprocity in Iban culture, which has become the backbone of the Iban traditional economy¹⁰⁰ and of many other social institutions. For instance, reciprocity is the foundation for the Adat regulating labour exchange called "*beduruk*"¹⁰¹ backbone of the Iban traditional economy. Many other social and economic relations in Iban communities are depending on the concept and Adat of reciprocity. Malinowski's observation on the rule of law in religious act shows a legal side of religious transactions: "[there is] not one single mortuary act, not one ceremony, which is not considered to be an obligation of the performer towards some of the other survivors."¹⁰² This is quite similar to the understanding of Adat as law and spirituality in Iban communities, where some spiritual obligations are treated as legal obligations.

I find David Schiff's article, "Socio-Legal Theory: Social Structure and Law",¹⁰³ provides good guidance on research methodology and methods for my research. Schiff argues that an "analysis of law is directly linked to the analysis of the social situation to which the law applies, and should be put into the perspective of that situation by seeing the part the law plays in the creation, maintenance and/or change of the situation."¹⁰⁴ In my case, it is the analysis of Adat and the social situations in Iban communities that could help to determine whether an Adat are living wisdom. Schiff further asserts that the methodology of the sociology of law is determined by an initial understanding of society, of the social system. It does not start with the primacy of legal rules, or laws, or a legal system. This methodology analyses social structures and social

¹⁰⁰ The Iban traditional economy is based on subsistence agriculture. Rice, maize, rubber, peppers, and other cash crops are the main crops. The planting of these crops requires an intensive and back-breaking labour. Apart from farming, their main economic activities are hunting, fishing and gathering.

¹⁰¹ "*Beduruk*" (literally reciprocity in English) is a system and rule for labour exchange and other social and economic relations in the Iban communities. See paragraph 2.8 *infra*.

¹⁰² Malinowski, Bronislaw, *Crime and Custom in Savage Society*, Kegan Paul, Tench, Trubner & Co. Ltd, New York, 1926) at 33.

¹⁰³ David N. Schiff, "Socio-Legal Theory: Social Structure and Law" (1976) 39:3 *The Mod L Rev*.

¹⁰⁴ *Ibid* at 287.

institutions and law is one such institution.¹⁰⁵ It is a fair contention that a researcher ought to understand the society being studied first and then its law. Understanding trait and culture of a society could help in the understanding of the rules and system for the control and governance of that society.

Schiff's article also compares the definitions and conceptions of law of various scholars of sociology of law and sociology (e.g. Weber¹⁰⁶ and Durkheim¹⁰⁷). Ehrlich's theory on the development of law provides insight on the future evolution of Adat Iban. He says that "the centre of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself."¹⁰⁸ In the case of Adat as customary law, the development of Adat depends on the Iban themselves.

1.3.3 Adat Iban

I read Sandin's books, *Iban Adat and Augury*¹⁰⁹ and *The Sea Dayaks of Borneo: Before White Rajah Rule*,¹¹⁰ as my secondary sources of information to help me to understand Adat according to the Iban worldview. *Iban Adat and Augury* is an anthropological study of the Iban customary law (Adat) and Iban augury. This book is divided into two major parts. The first part describes the relationship between the customary law (Adat) and, among others, the social relations of members, matrimonial matters and economic undertakings of Iban communities. The second part deals with the relationship between Adat and augury. The practice of augury (including the

¹⁰⁵ David N. Schiff, "Socio-Legal Theory: Social Structure and Law" (1976) 39:3 The Mod L Rev at 294.

¹⁰⁶ Chapter 8 of Volume of Weber's Economy and Society deals with Economy and Law (the Sociology of Law) in David N. Schiff, "Socio-Legal Theory: Social Structure and Law" (1976) 39:3 Mod L Rev at 289.

¹⁰⁷ Durkheim work in *De la Division du Travail Social* in David N. Schiff, "Socio-Legal Theory: Social Structure and Law" (1976) 39:3 Mod L Rev at 299.

¹⁰⁸ Ehrlich in David N. Schiff, "Socio-Legal Theory: Social Structure and Law" (1976) 39:3 Mod L Rev at 303.

¹⁰⁹ Benedict Sandin, *Iban Adat and Augury* (Universiti Sains Malaysia, Penang, Malaysia, 1980). The Introduction of this book is written by Clifford Sather.

¹¹⁰ Benedict Sandin, *The Sea Dayaks of Borneo: before white rajah rule* (MacMillan & Co. Ltd., London, 1967).

interpretation of the various types of omens) and the observance of spiritual rituals has become part and parcel of Adat. This is evidence that law and spirituality are not separated under Adat Iban. In fact, some of the Adat prescribe rituals and other aspects of spirituality.¹¹¹ The Introduction to Sandin's work, written by Clifford Sather, provides a good outline of and commentary on some of the Adat. Sandin's book is considered an authority on some Adat Iban that are written therein and is very helpful in understanding the traditional interpretation and meaning of Adat, that is, the interpretations and meanings formulated by Iban ancestors in the past that are still followed today. Sather states that Iban view the Adat as something binding, although tangential to orderly social relations, nevertheless, most of the Adat have a strongly normative character. The Adat and augury describes in this book are based on the socio-legal situation of Iban communities in the Saribas and Kelaka river systems from the early 1930s to the late 1960s.¹¹² The interpretation and application of Adat reflects the social and cultural thought and expression at that time. Sandin observes that traditional Iban society as a whole has no centralised leadership system and no hierarchical political order. Political power was spread among the sovereign local communities,¹¹³ longhouses, and kindred.¹¹⁴ This is an accurate analysis of the Iban perception that a longhouse, its community, territorial domain and Adat fuse as an autonomous political entity and a power unto itself.

¹¹¹ Clifford Sather, Introduction in Benedict Sandin, *Iban Adat and Augury* (Universiti Sains Malaysia, Penang, Malaysia, 1980) at xi – xlv.

¹¹² The writer, Benedict Sandin, was born in 1918 and died in 1982. He was born and brought up in an Iban traditional longhouse community in Krangan Punggai, Paku, in Saribas. He observed, experienced and participated in the administration and enforcement of Adat when the majority of the Iban in the Saribas and Kelaka river systems were still practising Iban spirituality. Sandin was very knowledgeable in Adat Iban, Iban augury and rituals, to name but a few. He wrote and published 16 books and booklets. See: The Introduction by Clifford Sather to Sandin, Benedict (1980), *Iban Adat and Augury*, Universiti Sains Malaysia, Penang, at xlv - xlv.

¹¹³ See: paragraph 3.4 infra.

¹¹⁴ Benedict Sandin, *Iban Adat and Augur* (Universiti Sains Malaysia, Penang, 1980) at xiii.

Sandin's book, *The Sea Dayaks of Borneo: before white rajah rule*, is an authoritative work on the migration of Iban ancestors from present day north-western Indonesian Borneo into Sarawak. He also relates some of the origins or sources of Adat Iban in this book. For example, the Adat requiring a person who caused the death of another person to pay compensation¹¹⁵ for the loss of life of that person to the deceased family or next of kin was a declaration made by an influential Iban leader in the past. This is a very important source of knowledge for my research.

Webber's article, "The Grammar of Customary Law", provides some insights on the conception and development of law. Webber says all law is customary, except those laws that are despotic may not have any trace of customary elements. He articulates how "we should conceive of the customary nature of law, proposing a framework for understanding how legal orders are related to their various societies."¹¹⁶ His contention is based on the pragmatist conception of law developed by Lon Fuller and Gerald Postema. Fuller sees the primary function of law as facilitating the interaction of individuals and groups. Webber says that their pragmatic conception "goes well beyond their accounts, but their predominantly functionalist approaches are inadequate."¹¹⁷ Webber further asserts that "Law can only be understood if one takes those grammars seriously".¹¹⁸ He draws comparisons between Indigenous and non-Indigenous legal orders to explore what Indigenous legal orders can reveal about law generally. This is exactly what I intend to do when I argue that Adat are not purely customary and spiritual but that there

¹¹⁵ The compensation was in the form of porcelain vase in the early days.

¹¹⁶ Jeremy Webber, "The Grammar of Customary Law" (2009) 54 McGill L J at 579.

¹¹⁷ *Ibid* at 579 - 581.

¹¹⁸ *Ibid* at 579.

is wisdom in Adat Iban. The wisdom is the essence of the Adat which could be utilised to bring about the useful benefits and justice to Iban communities.¹¹⁹

There has been intensive study of Indigenous law, which was commonly referred to as “customary law” by many European legal anthropology scholars particularly during the European colonial period.¹²⁰ These studies tend to lean more towards the relationship between law and culture of Indigenous people and not much towards the field of jurisprudence and legal theory. In the case of the Iban society, many studies have been done in the field of social and cultural anthropology but very few or none have been done in socio-legal studies. It is unclear why there has been much less interest in socio-legal studies of Adat Iban compared to the interest in anthropological studies of the same society. I would like to borrow Twining’s words describing western scholars scepticism about customary law: he says these scholars contended that Indigenous people “did not appear to have anything that resembled law ‘properly so called’ and that they were unable or unwilling to articulate in general terms, if any, which guided or which were used in settling disputes”.¹²¹ This presumption is unfounded and demonstrates a superiority complex. Law cannot be the same in all societies. What is law to one society may not be law to another. My research is mainly based on unstructured interviews, discussions, and consultations with the participants. There no books and articles on Adat in the field of law and legal studies. The books and articles reviewed here are mostly works on anthropology on the Iban and some socio-legal studies from outside Malaysia. The anthropological works of

¹¹⁹ Adat like any other law can be a double edged sword. Adat can used to benefit the people or to oppress or supress the rights of the people.

¹²⁰ Valerie R. Napoleon, *Ayook: Gitksan Legal Order, Law, And Legal Theory* [Ph.D. Dissertation, University of Victoria, BC, Canada, (2009)] at 22.

¹²¹ William Twining, “Law and Anthropology: A Case Study in Inter-Disciplinary Collaboration” (1972-1973) 7 *Law & Soc’y Review* at 56.

Freeman,¹²² Sandin,¹²³ Sather,¹²⁴ Rousseau,¹²⁵ and Heppell¹²⁶ on the Iban in Sarawak provide some guides and insights in my research.

1.3.4 Wisdom

I looked for the both general and universal definitions in Richard Trowbridge's Ph.D. dissertation: *The Scientific Approach to Wisdom*,¹²⁷ and in his article, Introduction to Psychology and Wisdom.¹²⁸ Trowbridge says that the correct definition of wisdom is not quite settled yet which is a major concern for scholars in all fields with an interest in the concept. I read Nicholas Maxwell's article, "Misconceptions Concerning Wisdom", to look further for the definition and meaning of wisdom. Maxwell says:

What "wisdom" means may, quite legitimately, depend on context and purpose. It is up to us to decide what, precisely, we choose to mean by "wisdom", depending on what our purpose is. And indeed, those who take the task of defining wisdom seriously have come up with a great variety of definitions. What needs to be appreciated is that there can be no such thing as *the correct* definition of wisdom: the search for it is the search for something that does not exist.¹²⁹

¹²² John D Freeman, "Shaman and Incubus" (1967) 4 *Psychoanalytic Study of Society* at 315-44; John D Freeman, *Report on the Iban* (London: Athlone Press, 1970); and John Derek Freeman, Some Reflections on the Nature of Iban Society (An Occasional Paper of the Department of Anthropology, Research School of Pacific Studies, Australian National University, Canberra, 1981).

¹²³ Benedict Sandin, *The Sea Dayak of Borneo before the White Rajah Rule* (Macmillan, London, 1967); Benedict Sandin, "Sources of Iban Traditional History" (1994) Special Monograph no. 7, Sarawak Museum Journal, XLVI, at 67; and Benedict Sandin, *Iban Adat and Augury* (Universiti Sains Malaysia, Penang, Malaysia, 1980).

¹²⁴ Clifford Sather, "Introduction" (1980) in Benedict Sandin, *Iban Adat and Augury* (Universiti Sains Malaysia Penang 1980); Sather, Clifford, "All Threads Are White": Iban Egalitarianism Reconsidered in Origins" in James J Fox & Clifford Sather, eds, Chapter 5, *Ancestry and Alliance: Explorations in Austronesian Ethnography* (ANU E Press, Canberra, Australia, 2006). url:<http://press.anu.edu.au?p=63701>.

¹²⁵ Jérôme Rousseau, 'Iban Inequality' (1980) Volume 136:1 *Journal of the Humanities and Social Sciences of Southeast Asia*, Leiden at 52-63.

¹²⁶ Michael Heppell, *The Saribas Johnny-Come-Latelys?* (2013) Issue 3 of 2013, Ngingit, The Tun Jugah Foundation Journal, Kuching, Sarawak, Malaysia.

¹²⁷ Richard H. Trowbridge, "*The Scientific Approach to Wisdom*" [Ph.D. dissertation, the Union Institute & University Cincinnati, Ohio, 2005] at 24 (Unpublished).

¹²⁸ Richard Trowbridge, "Introduction to Psychology and Wisdom: (2013). Online: www.wisdompage.com

¹²⁹ Nicholas Maxwell, "Misconceptions Concerning Wisdom" (2013) 2 *Journal of Modern Wisdom* at 92 - 97.

Trowbridge and Maxwell argue that there is no correct universal definition of wisdom. The definition depends on the context and purpose for the usage of the term. This contention gives me some latitude to think outside the box and define wisdom in Iban.

I searched for the ordinary definition of “wisdom” in the English dictionaries. The *Cambridge Advanced Learner’s Dictionary* defines wisdom as the ability to use your knowledge and experience to make good decisions and judgements.¹³⁰ The *Oxford Dictionary of English* defines wisdom as the quality of having experience, knowledge, and good judgement.¹³¹ The two dictionaries give different definitions of wisdom. The meanings of “the ability to use” and “the quality of having” are quite far apart. Therefore, the definition of wisdom depends on who defines it, in what context and for what purpose. I take notice of some other definitions in chapter 3.

1.3.5 Adat Iban a living traditional wisdom?

The Adat are the Indigenous law or traditional laws of the Iban. The Adat were developed from Iban ancestors’ wisdom centuries ago and have been evolving and practised by the Iban until today. Hence, Adat are laws formulated from traditional wisdom. However, the Adat and their underlying wisdom may or may not continue to be relevant and significant for the regulation and governance of Iban communities because of the continuing social, economic, and political changes in Iban communities. This leads to the question of whether Adat and the underlying wisdom are living laws. A living law is a law that is dynamic and flexible and capable of adjusting and adapting to any new or changing social situation.

¹³⁰ *Cambridge Advanced Learner’s Dictionary, 4th ed.* (Cambridge University Press, 2013).

¹³¹ B. Duckett, *Oxford Dictionary of English 2ed rev.* (Emerald Group Publishing Limited, 2006).

I read Schiff's "Socio-Legal Theory: Social Structure and Law"¹³² to seek guidance and knowledge about how to define and analyse how and what is a living law. The concepts narrated and discussed in this article are very abstract and difficult to understand. However, it provides some insight in the concepts of social situation analysis, purpose in law and dependency of law on society and vice versa which are relevant to the subject of living law. This article is a review of the debates about various methodologies, methods, and jurisprudence as advocated by some prominent sociologists and other scholars.

I read Mirza Satria Buana's article, "Living *adat* Law, Indigenous Peoples and the State Law: A Complex Map of Legal Pluralism in Indonesia", to look for the definition and concept of Adat as living wisdom. Buana examines the legal pluralism's discourse in Indonesia which experiences challenges from within and discusses the appropriate terminology for the Indonesian "adat law". He contends that the concept of living law is more appropriate than "*adat* law": "The living *adat* law is a living, actual and contextual law that is being practiced and obeyed by the community."¹³³ He also cited Vollenhoven who considers *adat* as 'folk law', 'people's law' or 'living law', which has dynamic and flexible characteristics. I concur with Buana that a living Adat must be dynamic and flexible to adjust and adapt to the changing any changing social situation in a society. Otherwise, Adat would be obsolete and disappear.

1.4 Reasons for the study

The main reason for the study is to contribute to the pool of knowledge toward a better understanding and scholarship of Adat Iban. To-date, there is no socio-legal literature on Adat

¹³² David N. Schiff, "Socio-Legal Theory: Social Structure and Law" (1976) 39:3 Mod L Rev.

¹³³ Mirza Satria Buana, "Living *adat* Law, Indigenous Peoples and the State Law: A Complex Map of Legal Pluralism in Indonesia" (2016), International Journal of Indonesian Studies, 1:3 at 2. The word *adat* is spelt in small letters and in italic in the original.

Iban. Hitherto, there has been very little interest in the legal study of Adat Iban especially among the Iban themselves or others as an academic subject in the institutions of higher learning in Malaysia.

This research is also aimed at disseminating knowledge about Adat Iban to the younger generation. The survival of the Adat depends on this generation and the next. The Iban in general have taken for granted that the Adat would naturally flourish forever in their society. The presumption is that every adult Iban ought to possess the knowledge and understanding of Adat Iban. However, this is a fallacy and a mistaken presumption. The knowledge of the Adat, like any other knowledge, if it is not disseminated and propagated through formal and systematic learning it could be forgotten and disappear forever. If the Adat are to survive into the future, they must pass down through systematically learning and availability of written literature.

The second reason for this study is to articulate that Adat are still important for the administration and management of social relations and affairs peculiar to Iban communities. There are some social relations and affairs not regulated by the Malaysian state law. When disputes or issues arise out of such unregulated relations or affairs, is no state rule or forum to govern it. For examples, the siting order and maintenance of family apartment are still very important for the Iban communal mode of living but are not matters taken up by the state. The Adat do not merely consist of just customs and spirituality, but there are rationales and wisdom underlying the Adat.

Chapter 2

2. The Iban and Adat Iban

2.1. Introduction

This Chapter is very lengthy and consists of three main subject matters. The first part describes the geographical location, social organisation, and social fabric of the Iban people. Information about the cultural and social background of Iban communities provides a picture of how and why the Adat are useful for the regulation and governance of communities. The next section describes and discusses the philosophy of Adat Iban, which includes the definitions, concepts, and sources of Adat Iban. The third part describes and discusses the significance of the Native Courts in the administration and enforcement of Adat; the colonial interventions in law in Sarawak; and women's rights and gender equality. The discussion of the Native Court gives a glimpse of the situation of the native justice system in Malaysia. The Native Court was established through colonial intervention in law and was the beginning of the subordination and disappearance of some native law, including Adat Iban, in Sarawak. However, not all the colonial interventions were bad. Some interventions brought modernisation to Sarawak. A brief discussion of women's rights and gender equality within the purview of Adat Iban examines whether Adat Iban discriminates or shows bias toward Iban women.

2.2 Iban geographical location

The Iban, also known as Sea Dayak, are predominantly found in Sarawak and are natives of Sarawak,¹³⁴ Malaysia.¹³⁵ "Native" is a term used to refer to the Indigenous people in the

¹³⁴ The Schedule to section 3 of the *Interpretation Ordinance*, 2005 lists the ethnic groups that are now considered to be Indigenous to Sarawak and, accordingly, natives within the meaning of this ordinance. Iban or Sea Dayak are listed under the Schedule.

¹³⁵ Sarawak is one of the east Malaysian states situated in the North-western part of Borneo.

Malaysian states of Sabah and Sarawak.¹³⁶ Iban, is a recent legal and political creation of racial term for the same people.¹³⁷ The Iban is the largest native group forming about one-third of Sarawak's population of 2.8 million. The origin of the present-day Iban is not clearly known but what is clear is that most of the ancestors of the present-day Iban in Sarawak were the Indigenous people of North-western Indonesian Borneo.¹³⁸ They moved freely within the region until the arrival and colonisation of the region by the Dutch and British. There was no international boundary on Borneo Island until the Anglo-Dutch treaty of 1824 which arbitrarily divided Borneo Island into British and Dutch spheres of influence.¹³⁹

2.3 Iban social organisation and social fabric

An Iban community is a microcosm of Iban society and therefore, in order to narrow down the scope of research, the analysis and discussion in this dissertation revolves around communities rather than the society as a whole. In principle, the Adat practised throughout Iban society in Sarawak are quite similar, but the application and enforcement vary according to the geographical location. Any attempt to study the Adat of Iban society would be beyond the scope of this dissertation.

¹³⁶ The term "native" is used in article 161A (6) of the Malaysian *Federal Constitution* to refer to the Indigenous Peoples of Sabah and Sarawak. Other legislations that define them as "natives" include the Schedule to the Sarawak *Interpretation Ordinance* (1958). The determination of native identity is important because of the entitlement to special privileges and rights accorded to natives. See: Ramy Bulan, "Dispute Resolution: Restorative Justice Under Native Customary Justice In Malaysia" in Wilton Littlechild & Elsa Samatopoulou, eds, *People's Access to Justice, Including Truth and Reconciliation Processes* (Columbia University, 2014) at 319.

¹³⁷ The term "Iban" as racial identity was created through the enactment of the new *Interpretation Ordinance* 2005 [Chapter 61] by the State Legislative Assembly of Sarawak in 2005.

¹³⁸ Benedict Sandin, *The Sea Dayaks of Borneo: before white rajah rule* (MacMillan & Co. Ltd., London, 1967) at 1 – 81.

¹³⁹ Michael Eilenberg, "Evading Colonial Authority. Rebels and Outlaws in the Borderlands of Dutch West Borneo 1850s–1920s" (2014) 29:1 *Journal of Border Studies* at 3. The Anglo-Dutch treaty of 1824 divided Southeast Asia into two spheres of influence, namely: the Dutch and British spheres of influence. Borneo Island arbitrary divided into two domains. The southern part Borneo became Dutch West Borneo, or the Residency of the west division of Borneo (*westerafdeeling van Borneo*) while the northern part, Sarawak, became the British through the Brooke Government in Sarawak.

This dissertation uses the terms “traditional Iban communities” and “modern Iban communities” to describe social situations in Iban communities. A traditional Iban community may be described as a socially and culturally homogenous community. Most of its members live in longhouses. The members of the community take part in similar socio-economic activities for their livelihood, such as rice farming, planting of cash crops, hunting, fishing, and gathering. The literacy rate among members is relatively low. Members generally practise the same belief system, i.e. Iban spirituality, which some anthropologists describe as animism. Iban spirituality is not a monotheistic religion like Judaism, Christianity, or Islam. The communities’ socio-economic aspiration is to have plenty of rice through good harvests; plenty of wild game in the surrounding forests; and plenty of fish in the rivers. Iban communities have a common ideal, which is expressed via a philosophical mantra of “longevity, good health, and prosperity” (*gayu guru, grai nyamai, lantang senang*). These communities may be viewed as conservative and tend to stick to the old way of living.

A modern Iban community is a socially and economically diverse community. Some of the members live in longhouses while some live-in cities and towns most of the time. They return to their longhouses occasionally. The city and town dwellers either have their own family apartments in the longhouse or they are members of extended families. They are involved in a variety of economic activities, e.g. rice farming, cash crop planting, wage earning, and participating in commercial activities, to name but a few, for their livelihood. However, most of them are wage earners employed in cities and towns. The majority of members of the community are Christians. Literacy among younger members is relatively widespread. Members have no common aspiration or ideal. Rather, each member strives to achieve his or her personal ambitions. These communities are more liberal and tend to accept new ideas in their way of living.

Iban social organisation has some characteristics of a basic egalitarian society.¹⁴⁰ In principle, Iban so-called “egalitarianism” is a concept of encompassing equality. The egalitarian ideology emphasises that all individual persons are equal before the Adat (law), and have equal opportunities in social, economic, and political fields, and personal freedom to marry, engage in any decent trade, and travel. However, freedom and equality are subject to Adat, such as the Adat on defamation and morality. The Iban have some Adat that are very similar to the law of defamation in western societies. The utterance of words or false accusations that could lower the esteem of a person or put a person to shame is an offence under Adat Iban.¹⁴¹ The freedom to marry is subject to the Adat on morality, which include prohibitions against same-sex marriage and incest. Iban society is a patriarchal society dominated by male social values.

Iban society is classless in the sense that it is not stratified. There is no ruling class, or middle class, or working class in Iban society. Socially and economically, almost every family is similar and there is nothing much to differentiate or classify them into caste or class. In decision making concerning matters relating to or affecting the longhouse and the community, members of a community, men and women, are free to express their opinions. However, the final decision is normally reached by consensus. If a decision cannot be reached by consensus, it would be made through a democratic process in which the decision of the majority prevails.¹⁴² Thus, to call the Iban a democratic society may be an overstatement, because the democratic process of decision making regarding social, economic and political matters is sparingly used. A *Tuai Rumah* (Headman) is the leader of a longhouse, but he, alone, has very limited powers to administer the Adat. The *Tuai Rumah* and the community are the power and authority only in

140 This is my inference from the data given by some of participants and also from my own observation as a member of an Iban community.

141 The Adat is within the personal knowledge of the researcher with verification by Edmund Langgu Saga.

142 This view was provided by Edmund Langgu Saga.

the administration and management of the longhouse and the Adat. A family or an individual is not subject to any control of the *Tuai Rumah* or anybody else in the management and welfare of the family or regarding engagement in any decent trade or activity to earn a living. The movements of members of a community are not restricted but are subject to the Adat on the maintenance of family apartments and mandatory communal duties and functions.

Some anthropological scholars describe the Iban social system as egalitarian, democratic and classless. Freeman¹⁴³ and some other ethnographic scholars similarly characterise Iban society as egalitarian, democratic, and classless.¹⁴⁴ Edmund Leach contends that the Iban are a prime paradigmatic example of an “egalitarian society” in which “class stratification ... is absent in a formally instituted sense”.¹⁴⁵ Freeman¹⁴⁶ observes that traditional Iban society has four main social traits that categorise it as egalitarian. First, the Iban are essentially in a state of anarchy with regard to the application and administration of Adat in a community. He explains that, jurally, each family is a power unto itself and manages its own affairs. The family acknowledges no other family to be its superior or master. Thus, every family is autonomous and not subordinate to any other family. Second, “there is no institution of leadership” within each community. Under the Adat the *Tuai Rumah* has no authority to command any member of the community and the members of the community are not subordinate to him. Thirdly, there is no supra-local leadership

143 John D. Freeman, *Report on the Iban* (LSE Monograph no. 41, London: Athlone Press, 1970) at 111, 129 in Jérôme Rousseau, ‘Iban Inequality’ (1980) Volume 136:1 Journal of the Humanities and Social Sciences of Southeast Asia, Leiden at 52-53. See Erik Jansen, *The Iban and Their Religion* (Oxford: Clarendon Press, 1974) at 31; et al.

144 Michael Heppell, *Iban Social Control: The Infant and The Adult* (PhD Dissertation, Australian National University, 1975) [unpublished] at 19. See also Clifford Sather, “All Threads Are White”: *Iban Egalitarianism Reconsidered in Origins*” in James J Fox & Clifford Sather, eds, *Ancestry and Alliance: Explorations in Austronesian Ethnography*, (ANU E Press, Canberra, Australia, 2006) at 79-81.

145 Edmund R. Leach, *Social Science Research in Sarawak: a report on the possibilities of a social economic survey of Sarawak* presented to Colonial Social Science Research Council, (London, London: HMSO, (1950a) at 71.

146 John D. Freeman, *Report on the Iban* (LSE Monograph no. 41, London: Athlone Press, 1970) at 62, 111, 129 in Jérôme Rousseau, ‘Iban Inequality’ (1980) 136:1 Journal of the Humanities and Social Sciences of Southeast Asia, Leiden at 52-53.

system, i.e. the Iban have no clear concept of regularly constituted leadership hierarchy beyond the longhouse level.¹⁴⁷ This structural feature has been said to lead to the resolution of disputes by agreement and by ritual contests or ordeals¹⁴⁸ instead of by negotiation. Fourthly, there is a marked absence of ranking in Iban society and all persons are equal before the Adat.

Appell,¹⁴⁹ citing Freeman, describes Iban society as not being based on unilineal descent to perpetuate its existence but being based on the individual and on the independent family (*bilik*). Iban society is cognatic in structure. The social organisation consists of two distinct levels of institutional organisation of social units, namely: the individual family and the longhouse community. The family unit is a corporate group that endures in perpetuity, providing social continuity. The Iban have a stable cognatic society that is built around the corporate and perduring entity of the family, kindred, and the longhouse community. Freeman asserts that the corporate characteristic of the family that binds the society together is too simplistic. Appell argues that this is not the criterion of corporateness, but only the consequence. The Adat is regarded by the Iban as a “normative order that is very largely constitutive of society”, and, thus, a longhouse is an Adat community.¹⁵⁰ The continuous existence of a longhouse and its community depend very much on the members complying with the Adat as tool for social cohesion and regulation of social relations. The Adat is the tie that binds the members of the community together.

147 Robert Pringle, “Rajahs and Rebels: The Iban of Sarawak under Brooke Rule, 1841-1941” (Ithaca, NY: Cornell University Press, 1970) at 35, cited in Jérôme Rousseau, ‘Iban Inequality’ (1980) 136:1 *Journal of the Humanities and Social Sciences of Southeast Asia*, Leiden at 53.

148 Examples include a staying under water contest, cock fighting, and retrieving a stone from boiling water using bamboo.

149 George N Appell, “Iban Studies: Their Contributions to Social Theory and the Ethnography of Other Borneo Societies” in Joanne Sutlive & Vinson H Sutlive, eds, *The Encyclopaedia of Iban Studies*, vol 3 (Kuching, Sarawak: Tun Jugah Foundation in cooperation with the Borneo Research Council, 2001) 741.

150 Michael Heppell, “Iban Social Control: The Infant and The Adult [Ph.D. Dissertation, Australian National University, Canberra, 1975] in George N. Appell.

Rousseau has a different opinion, however. He argues that the characterisation of traditional Iban society as egalitarian is based on the contrast with the some other ethnic people of Sarawak and central Borneo. For example, the Kayan society has a stratified social system characterised by corvée labour and the monopolisation of political authority by an upper stratum of the chief class and families.¹⁵¹ Rousseau asserts that the Iban possess an “unequal social structure”, although he acknowledges that they hold to an “egalitarian ideology”.¹⁵² He says that inequality is present to a significant extent, and that Iban society is much more similar to the stratified societies of Borneo than is superficially evident.

Some of the anthropological scholars’ observations mentioned above are quite reflective of the Iban social system. The Iban theory of communal living and social organisation emphasises equality and freedom based on an egalitarian ideology. It is in the execution of Adat and policies [what kind of policies?] that the spirit and intent of egalitarianism is often deviated from. Iban women are not typically much involved in decision making, leadership, and administration and enforcement of Adat. Women are not formally barred from these activities but customarily they tend to leave it to the men to make decisions, lead, and administer and enforce Adat. However, women are involved in decision making and administration of Adat if they are the heads of families. Given the lack of female decision makers, inequality could result in use of land and leadership decisions (e.g. appointment of *Tuai Rumah*). Pioneering families or their descendants may have priority of access to natural resources or priority to “own” land by virtue of the Iban land law principle of *abi besi*.¹⁵³ This principle gives the pioneering families or their descendants

151 Jérôme Rousseau, ‘Iban Inequality’ (1980) 136:1 Journal of the Humanities and Social Sciences of Southeast Asia, Leiden at 52-54.

152 Jérôme Rousseau, ‘Iban Inequality’(1980) 136:1 Journal of the Humanities and Social Sciences of Southeast Asia, Leiden, at 54.

153 *Abi besi* is literally translated into English as “mark of iron”. The term means the first felling of the virgin jungle by the pioneering families for settlement and farming. It is an Iban land law that gives priority to the pioneering

priority as the first settlers who established the settlement, asserted control, and claimed the territory surrounding the settlement. This is the Iban version of the English common law doctrine of “first in time, first in right”.¹⁵⁴ The migrant families’ rights of access to natural resources and usage of the land depend on the charity of the *Tuai Rumah* and the pioneering families. Migrant families are those families that joined the pioneering community at a much later date after the establishment of the settlement. When it comes to leadership appointment, pioneering families are collectively omnipotent and are privileged to decide who should be appointed as *Tuai Rumah*. But as time passes by, migrant families come to be treated as equals in most matters.

A traditional Iban settlement consists of a single longhouse made up of between 10 to 40 individual family apartments.¹⁵⁵ Each family lives in their own apartment but all families are virtually living under one roof. An Iban community is made up of kin and close-knit families living in communal style. Thus, almost everybody is related to each other, either through blood or through marriage (affinity). It is rare to find a family that is not related to at least one other family in a longhouse. A family is a basic social unit in an Iban community, and each family is autonomous in so far as family affairs are concerned. The concept of family in Iban society refers to the extended family. It is unlike the nuclear family in western society, which is normally made up of just parents and children. An Iban extended family may consist of four generations of kinship, i.e. grandparents, parents, children and grandchildren, living in the same family apartment unit or household (*bilik*).¹⁵⁶ A family or an individual is not subject to control by the

families or their descendants the right to own or use of land. It is similar to the English land law principle of “first in time, first in right”.

154 See the *Dearle v Hall 3 Russ 1* [proper cite?] principle, which states that in respect of most of intangible assets, priority is given to the party that first gives notice of its interest to the third party.

155 The population of a longhouse is normally about 30 - 200 people.

156 The term *bilik* literally means “a room” in English. In relation to the concepts of dwelling and family, it has two meanings in the Iban language. *Bilik* may refer to a family as a social unit or to a family apartment unit in a longhouse. In order to avoid confusion, this thesis will use the terms “family” and “family apartment” as the context dictates.

Tuai Rumah or anyone else in the management and bringing-up of the family or in relation to engaging in any decent activity to earn their living. The movement and travel of members is not restricted. However, such activities are subject to certain Adat that require them to come home regularly. The Adat on the maintenance of family apartments and on mandatory communal duties and functions are examples. An Iban man may travel far and wide looking for employment (*bejalai*) or may go on an unspecific adventure (*belelang*). But if he has no contact with his community and his whereabouts are unknown for a long time, he may lose his rights to share in his family or communal land. Iban women normally stay at home, but they may travel to visit close relatives (*nemuai*).

The head of the family is usually the most senior and able-bodied male member of the family. The oldest male member, if he is old and weak, would normally relinquish his position to his son. The head of a family is the person who represents and decides for the family in all matters relating to inter-family and communal matters. However, under certain circumstances, a matriarch may become the head of family. A matriarch will become the head of family following the death of the male head of the family if the family has no male member or a male member is too young to handle the responsibilities. A matriarch would assume the position until the family has an eligible male member, either through marriage or when a male member has come of age and is deemed capable of leading the family. A matriarch may be a very capable head of the family, but she would normally hand over her position to a male member voluntarily, even if such member is less capable. However, she would always be consulted in important matters concerning the family or community affairs. This is a centuries-old custom and tradition and not Adat as law-proper, which may not be compatible with the principle of gender equality. Nevertheless, this system is still widely practised by the Iban today. The custom and tradition run deep among the Iban and it could take some time for a meaningful change to come. This

Adat is a legacy of the tribal wars and the searching for new lands up until the early 19th century,¹⁵⁷ when brute power and bravery was a necessity.

2.4 Adat Iban

As mentioned above, Adat Iban is the Indigenous law of the Iban people of Sarawak, Malaysia. The phrase “Adat Iban” is styled according to the sentence construction of the Iban language. The origin of the word Adat is not exactly known. The word “Adat”¹⁵⁸ could have originated from the Arabic word *adat*, which is a generic term referring to custom or habit.¹⁵⁹ I define Adat Iban the law for the regulation and governance of social relations of the Iban communities. The term Adat has been commonly used to refer to customs, traditions, social values, practices, ethics, and norms, to name but a few, by some ethnic groups in Malaysia, Indonesia, and Brunei.¹⁶⁰ The Iban language has many similarities with some native languages in Borneo. According to the Iban language, the word or term “Adat” refers to many things or several meanings and purposes. Adat can mean law, customs, cultures, traditions, and values, just to name but a few, since time immemorial. As such, the specific meaning of Adat can only be understood from the activity or context the term is used.

¹⁵⁷ Tribal wars and headhunting ended between the Iban of the Saribas, Kelaka, Skrang, Ulu Ai, Lemanak and Engkari river systems after the last peace-making ceremony held at Simanggang on February 1, 1924. Source: Sarawak Government Almanac, 2020, Chronology of Events, at 4.

¹⁵⁸ The term “Adat” is used interchangeably in the plural and the singular throughout this dissertation [I have tried to address this – see previous comments]. The Iban language does not distinguish plural or singular nouns. Plural and singular is distinguished by the verb “to be”, i.e. is or are, or an adjective, e.g. many, or an, or every.

¹⁵⁹ Max Gluckman, “Adat Law in Indonesia” (1949) 31:3/4 *Journal of Comparative Legislation and International Law* at 61. Retrieved from <http://www.jstor.org/stable/754246>

¹⁶⁰ The social intercourse of the people in the region has some influence in the development of language. The Malays of the former Malaya (now Peninsular Malaysia) refer to their customary law and legal tradition as “Adat”. Also, many other races in Borneo, e.g. the Iban and most native of Sarawak (now part of East Malaysia) also refer to Indigenous law as “Adat”.

In order to clear the confusion on the usage of the term “customary law”¹⁶¹ or “custom”,¹⁶² the term would be used in any discussion involving any state of Sarawak official document and statutory definition of Adat. The official documents and statutory definition use the term to refer to any “Adat” of the natives of Sarawak, i.e. including Adat Iban. Similarly, the scholars’ works which I read are using the term to refer to law which evolved from repetitive pattern or practices. The term “customary law” or “custom” would be retained to maintain the originality or actual term used in the official documents, or statutory definitions of Adat, or literature. The term has been used in Sarawak at least since the Brookes imperial and British colony¹⁶³ periods in Sarawak from 1841 to 1963. It is not clear why these regimes used customary law or custom to refer to the Indigenous law of the native of Sarawak. It is my presumption that the quality or standard of legal reasoning behind the making and practices of Indigenous law were nothing near to that of the English law at that time. Or at best, Adat were more of customs than law-proper¹⁶⁴ compared to the more advance societies during that periods. Or the Brookes and British colony might not had been familiar with the complexity of the native societies’ social organisation¹⁶⁵ and their law and system of justice. But amazingly, the term been perpetuated until today by the state of Sarawak. I wish to reiterate that my English translation of “Adat Iban” or “Adat” is “Indigenous law” of the Iban people.

The four definitions of “Adat” below illustrate the difficulty of finding a universally accepted definition of Adat. The four definitions and/or descriptions are: (1) my own definitions of “Adat”; (2) the Iban worldview of Adat; (3) scholars’ definitions of Adat as “customary law”; and (4) the

¹⁶¹ See paragraph 2.4.4 *infra*.

¹⁶² See paragraph 2.4.4 *infra*.

¹⁶³ The definitions of customary law were inserted in section 2 of *the Native Courts Ordinance*, 1955 and section 2 of *the Native Customary Laws Ordinance*, 1955.

¹⁶⁴ See paragraph 2.4.2 *infra* for the definition of law-proper.

¹⁶⁵ John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2011) at 51.

statutory definition of “Adat”. A definition of Adat can be subjective or objective and depending on the context and surrounding circumstances in which the term is used. It can be very simple and non-technical and at the same time very complicated. The definition of “Adat” is not as complicated as the definition of what is law according to western jurisprudential. For example, Hans Kelsen’s ‘pure theory of law’ is a positivist theory which sets out the epistemological basis of the pure theory in 'cognition' of the law, that is how law is perceived and recognised. His idea of a legal system which comprises norms, including a foundational basic norm or 'Grundnorm'. Also discussed is Kelsen’s theory of the State, i.e. the judicial process and of administrative decision-making. There are common criticisms of the pure theory discussed and assessed.¹⁶⁶ Another example is HLA Hart’s *Concept of Law*¹⁶⁷ which presents a theory of legal positivism. Hart views that laws are rules made by humans and that there is no inherent or necessary connection between law and morality—within the framework of analytic philosophy. Hart sought to provide a theory of descriptive sociology and analytical jurisprudence. In the case of Adat Iban, the statutory definitions of “Adat” by the state law prevail over any other definitions if any dispute arises. The state is the power and authority on any law in the land including, the Adat Iban. Below is my definition of Adat.

2.4.1 My definition of Adat Iban

I define “Adat Iban” are the indigenous law of the Iban people. The Adat are autochthonous law of the Iban people, which evolved from knowledge, ideas, experiences, and spiritual principle originated from within the Iban communities or through their social intercourse with other people. Adat are social, cultural and political expression used as instruments of power and authority for the regulation and governance of social relations of the communities, longhouses, territorial

¹⁶⁶ Tim Murphy, “Hans Kelsen's Pure Theory of Law”(2004),T. Murphy (ed.), *Western Jurisprudence* (Dublin, Thomson Round Hall) at 251–268. Sourced from SSRN: <https://ssrn.com/abstract=2616604>

¹⁶⁷ H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1994).

domains.¹⁶⁸ As such, Adat may be described as instruments for the construction of hegemonies¹⁶⁹ in moulding social behaviour of members of the Iban communities. As such, Adat have great influence in the social, cultural, and political philosophy of the Iban. The Iban social organisation, which is basically based on the egalitarian ideology, is a manifestation of the social, cultural, and political expression of the philosophy. Another example is the Adat regulating sexual relations which the Iban concept of law and morality of the Iban. Adat or law is used to enforce morality.

As social expression, Adat are commonly expressed through spiritual sanctions or prohibitions. The Adat regulating the orientation of a longhouse with the position of the sun is an example. The Adat which are spiritual sanctions considered as higher Adat than human made Adat and must be obeyed to avoid spiritual wraths. The Iban cosmology narrates the co-existence and relationship between of the Iban (as human beings) and Gods and Spirits in this universe. This is the main source for the belief that compliance with Adat would maintain good spiritual relationships or spiritual equilibrium between humans and Gods and Spirits. Gods and Spirits would give blessings and rewards to humans for maintaining good spiritual relationship. Any violation of Adat which is a spiritual sanction or prohibition could be visited by spiritual punishment (see paragraph 2.4.5). As such, cosmology has been used for the validation of the authority of Adat. Logically, if everybody obeys Adat there would be peace, harmony, unity, and well-being of the community will prevail. It is my presumption that the Iban ancestors could have invoked spirituality in the enforcement of Adat as a leverage for compliance. There was no proper or systematic enforcement authority or body in the past. The relationship of Adat and

¹⁶⁸ "Territorial domain" means the area of land and waters claimed by a longhouse as its territory.

¹⁶⁹ Jaime LLambías-Wolff, "Law as the Expression of Politics and the Result of Its Own Dynamics" (2014) 3:5 International Journal of Social Sciences 91.

cosmology shifts the definition and meaning of Adat from social science matter to a very abstract theological and metaphysical subject.

Adat, as a political expression of power and authority, defines the Iban longhouse politics. Politics is about power and authority to make and use Adat to regulate social control and social contract. Adat and politics are integral parts of the larger institution of governance. Law is an essential tool by which the government influences and controls society.¹⁷⁰ In similar manner, Adat, as the Indigenous law of the Iban people, are the foundation of power and authority of the Iban “parochial” longhouse politics. Adat are the tools necessary for every *Tuai Rumah* and the longhouse community to influence and control the members of the community. Many Iban perceive that a longhouse, the community, territorial domain, and the Adat merge as a sovereign political entity. A longhouse and the community are the socio-economic and political institutions that have the exclusive rights and power of governance over the territorial limit of the longhouse and treat it as if it is a sovereign political entity, which the community referred to as “*menua*”, which is literally means “country” in English.¹⁷¹ This is a typical perception or thought existing in the mind of many Iban. However, the perception may be misconceived because the power and authority over the land and waters within the territorial boundary of the state are vested in the state of Sarawak. While Iban are aware of the existence of state government, they are adamant and think that their Adat prevail over state law. An Iban longhouse and territorial domain are not legally autonomous. The Adat which is regulating the territorial limits of a longhouse is not been legally recognised as binding on the state, but it is binding and enforceable amongst the Iban

¹⁷⁰ Keith E Whittington, ed, *Law and Politics: Critical Concepts in Political Science* (New York: Routledge Press, 2015). (Summary).

URL: <https://scholar.princeton.edu/kewhitt/pages/law-and-politics-critical-concepts-political-science>

¹⁷¹ The data was provided by Edmund Langgu Saga, a participant in this research and has been interpreted by me, the researcher.

communities by the Native Courts, which are State courts. This is an example of a unique position of Adat Iban.

In a narrow sense, Adat are mainly rules of social control that regulate the behaviour of members of a close-knit community living in a communal setting and virtually under one roof. For examples, the Adat that regulate rights to property, protection from bodily harm, and freedom to marry, to name but a few, are Adat regulating social control. Some of the Adat are social contracts, which may be in the form of implicit or unspoken agreements stipulating binding obligations. All members of a community are contractually bound by the Adat by virtue of living in the community. For example, the mandatory participation in certain communal activities and functions are social contracts. A member who does not want to be bound by such social contracts may opt out by moving out of the community. Adat typically make some reference to an established pattern within Iban communities, seen by them as creating binding obligations.¹⁷² The main purpose of these obligations is expressed in a common mantra: For the promotion and maintenance of peace, harmony, unity, and well-being of the communities. The specific purpose for each Adat is not articulated or comprehensively explained.

In a broader sense, Adat Iban may be described as the Iban socio-legal system. It is a system that encompasses law or rules, Adat-making, spiritual sanctions and prohibitions, social rules, and a system of justice, and any other thing which regulate any action or omission. The Iban socio-legal system is not only Adat and a legal system but an all-encompassing system regulating life, death and beyond. The socio-legal system includes anything related to legal, social, cultural, and spiritual regulation. It is a forum for seeking remedies, dispute resolution,

¹⁷² See John Borrows, *Canada's Indigenous Constitution* (University of Toronto Press, Toronto, Canada, 2011) at 51.

and settlement for violation of legal rights, procedure, values, and spiritual sanctions or prohibitions (taboos, to name but a few. This is one of the reasons why the word or term “Adat” can mean many things in the Iban language and culture.

2.4.2 The definition of Adat according to Iban worldview

The Iban do not have any clear technical or legal definition of Adat. The intellectual articulation or discourse of Adat has not quite developed among the Iban. The Iban definitions of Adat are construed from the descriptions and data provided by some participants in this research.¹⁷³ The word Adat has various meanings in the Iban language. The definitions can be very simple and, at the same time, very complex depending on the context and purpose the word is used. To borrow Cheri Yavu-Kama-Harathunian’s¹⁷⁴ words, Adat Iban look simple and non-technical yet complex to understand, and current yet ancient in origin.

The term or word Adat has many meanings according to the Iban language and culture. Adat means, among others, law, customs, traditions, spiritual sanctions or prohibitions, ethics, and values. According to the ordinary Iban language, Adat is “the manner and how things ought to be”. For the purpose of this study, the Iban worldview of Adat which are law-proper is presented here. In this regard, Adat are described or referred to as law or rules and a system of justice for the regulation and management of social relations of the members of the community and the longhouse (*ngempung perabung enggau nembiak redak*).¹⁷⁵ The Iban phrase is an encompassing description of Adat which prescribes the socio-economic and political

¹⁷³ The data were provided and verified by Edmund Langgu Saga, the late Mandi Melana and Jimbun Tawai during the interviews and discussions held in 2013. They were research participants.

¹⁷⁴ Cheri Yavu-Kama-Harathunian, “Aboriginal Law and Spirituality defined within a specific clan perspective from within Pan-Aboriginal Interpretations” (1998) (An Extract from-“Healing Circle Healing Ways-An Indigenous Alternative Therapeutic Model) at 6. [Unpublished].

¹⁷⁵ “*Ngempung perabung enggau nembiak redak*” the phrase is literally in English means to unite the long house and members of the community.

responsibilities and functions imposed by the Adat. The description includes norms, sanctions, prohibitions, and a system of remedy and dispute resolution. Adat is also describes as a code of conduct and behaviour and normally expressed as “dos” and “don’ts” and any violation would be liable to punishment, or restitution, and/or performance of a spiritual ritual. This is similar to Kelsen’s observation of what is law by his example that ‘One shall not steal; if somebody steals he shall be punished’.¹⁷⁶ As a comparison, the Adat which are purely customs, cultural practices, values, and ethics are social rules and, in most cases, any violation of any such Adat is not punishable by fine or restitution but treated as recalcitrance and shunned by the community. These Adat are mainly regulating social behaviours, decorum, and protocol. I am of the view that Iban social rules are not “law proper” but mannerism and social values used mainly for guidance in children up-bringing, protocol, and decorum.

The Adat as “law proper” means the Adat which have legal force, binding, and imposes mandatory obligation among the people who subscribe to it or belonging to a social group. Any breach of such law would be liable to a penalty and punishment, or restitution, or compensation. For examples, criminal law, law of contract and tort are “law proper”. John Austin, while often using common law in the province of jurisprudence, had also opened his treatise with the sentence, “Laws proper, or properly so called, are commands ...”¹⁷⁷ This treatment of law does not include social rules as “law proper”. An Adat which is a social custom or social rule is not a “law proper”. A practice or ritual formulated as a standard method for performing certain specific function which is now commonly referred to as “the standard operating procedure” is not a “law proper”. A breach or an omission of such Adat may not invalid the legality of the main Adat. For

¹⁷⁶ Hans Kelsen, *General Theory of Law and State* (Cambridge, MA: Harvard University Press, 1945) at 61.

¹⁷⁷ John Austin, *Province of Jurisprudence Determined* (London: Weidenfeld & Nicolson, 1971) in Gerald J. Postema’s “Law as Command: The Model of Command in Modern Jurisprudence” (2001) 11 *Social, Political, and Legal Philosophy* at 470 - 471. Austin’s work was originally published in 1832.

example, the skipping of some rituals following the solemnisation of marriage would not invalidate a marriage which has been announced in public in the present of a *Tuai Rumah*. However, the old or traditional Adat regulating the appointment and succession of *Tuai Rumah* (Headman) is a custom but evolved into a “law proper”.

Spiritual sanctions and prohibition are belief, but the Iban acknowledge them as Adat derived from Gods or Spirits. Spiritual belief or principle is enforced as Adat. This is because Adat and spirituality are intertwined in the Iban social practice. The spiritual sanctions and prohibition are considered sacred Adat and are of the highest order in Adat hierarchy. For example, the Adat sanctioning that the cooking hearth must not become cold is a spiritual sanction. This Adat requires that every family must cook their meal on the hearth at least once a month. The spiritual prohibitions are preventive rules expressed in the form of prohibition. Another example spiritual prohibition is the Adat which states that a longhouse should not be constructed and sited perpendicular to a navigable river.

The above descriptions and definitions of Adat show the Iban have very limited words or terms to differentiate what are “law proper” and what are not, for examples, social rules, values, and manners. But they are all referred to as Adat. Some are social rules or ethics. Furthermore, the Iban have no universally acceptable description and definition of “Adat”. Almost all the law, rules, procedures, rituals, or any system of control and ordering are referred to as Adat. The difference between the Adat can only be distinguished from the context the term is being used and applied. For example, the Adat for the arrangement of family apartments is a spiritual sanction and the Adat for the solemnisation of marriage is law-proper or rule. But both are referred to as Adat. The Iban normally state their Adat but do not provide a comprehensive definition or explanation of the Adat in term of the purpose and aim of the Adat from the social, or economic, or political

perspective. Perhaps, it is taken for granted that every adult Iban understands the purpose(s) of the Adat.

2.4.3 Scholars' definitions and descriptions of Adat

The definitions and descriptions of Adat by some legal and anthropological scholars in this section highlight some similarities and difference of views of what Adat is among some scholars in these two fields. They used the term “customary law” to refer to the law which evolved through repetitive pattern or practice and accepted as binding by the people who subscribed to it.

John Borrows opines that “Customary law can be defined as those practices developed through repetitive patterns of social interaction that are accepted as binding on those who participated in them”.¹⁷⁸ Many of Adat Iban could have evolved in similar manner. However, Adat are not solely derived from customs but from many sources. However, many of Adat Iban are believed to be derived from customs and spirituality,¹⁷⁹ while some are derived from Iban cosmology, mythology and declarations made by powerful leaders in the past. The more recent Adat are positive law made through deliberation and approval of members of the communities. E. Adamson Hoebel contends that the core cultural values of certain society as the basic social postulates on which the law of the society is based.¹⁸⁰ Many law are the manifestation of the society values. In the case of the Iban, the Adat are the cultural expression and social construction from the society social values.

¹⁷⁸ John Borrows, *Canada's Indigenous Constitution* (University of Toronto Press, Toronto, Canada, 2011) at 51.

¹⁷⁹ See paragraph 2.4.5 *infra* for a brief description of Iban spirituality.

¹⁸⁰ E. Adamson Hoebel, *The Law of Primitive Man*. (Cambridge, Mass.: Harvard University Press, 1954) in Ramy Bulan, “Dispute Resolution: Restorative Justice Under Native Customary Justice In Malaysia” in Wilton Littlechild & Elsa Samatopoulou, eds, *Indigenous People's Access to Justice, Including Truth and Reconciliation Processes* (Columbia University, 2014) at 32.

Lon Fuller, a legal scholar observes that customary law developed from human social interactions. He defines customary law as reciprocal obligations arising from the relationship of “human interaction where each participant guides himself by an anticipation of what the other will do and will expect him to do. There is, therefore, in customary law something approaching a contractual element; its underlying principle is reciprocity of expectations.”¹⁸¹ Customary law are not just customs or habits but they are rules of social control or social contract which create legal or social obligations. As such, there is an element of duty, responsibility, and expectation created by customary law. As I have explained at the beginning of this dissertation, the Iban do not articulate the legal reasonings and rationales for the application and enforcement of Adat in such manner. Their normal explanation is that this is a practice or a spiritual sanction or prohibition which must be complied with because of the expectation of spiritual rewards or punishment for violation.

Malinowski, a legal anthropologist, defines tribal law or customs of the Melanesian people of the Trobriands as “a body of “civil law”, the positive law¹⁸² governing all the phases of tribal life, consists then of a body of binding obligations, regarded as a right by one party and acknowledged as a duty by the other, kept in force by a specific mechanism of reciprocity and publicity inherent in the structure of their society.”¹⁸³ Malinowski discovers most of the customs are positive commandments. “Positive law” here is not the same thing as positive law made through deliberation, e.g. parliament. He concludes the Melanesian law are “positive and elastic and yet binding obligations, which correspond to the civil law in more developed cultures.”¹⁸⁴ The Trobriands’ “civil law” is quite similar to some Adat Iban. A breach of an Adat which is

¹⁸¹ Lon L. Fuller, *Anatomy of the Law* (London, New York, Washington: Frederick A. Praeger Inc. Publishers, 1968) at 74.

¹⁸² Bronislaw Malinowski, *Crime and Custom in Savage Society* (London: Kegan Paul, 1926) at 58.

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid* at 124.

enforcing spiritual sanction or prohibition is penalised by providing restitution but not penalised. Adat as social control or social contract create binding obligations which must be complied with by every member of every community. However, those who are very young, e.g. young children, may be exempted from the obligations. They do not understand what is right and wrong. Breaches of Adat regulating social values or ethics are not penalised or punished but considered as recalcitrance, which is a social condemnation.

Some anthropological scholars define and describe Adat from the socio-cultural perspective while some equate Adat as rules derived from customs and habit. Daniel S. Lev describes customary law as an unadulterated expression of social and spiritual character which contains the myriad of virtues.¹⁸⁵ Clifford Sather asserts that customary law “covers all of the various customary norms, jural rules, ritual interdictions and injunctions that guide an individual’s conduct, and the sanctions and forms of redress by which these norms and rules are upheld...these rules apply to virtually all spheres of human life, social, economic, religious and political.”¹⁸⁶ Bekker defines customary law as “an established system of immemorial rules which have evolved from the way of life and natural wants of the people, the general context of which was a matter of common knowledge, coupled with precedents applying to special cases, which were retained in the memories of the chief and his counsellors, their sons and their sons’ sons, until forgotten, or until they became part of the immemorial rules...”¹⁸⁷

¹⁸⁵ Daniel S. Lev, *The Lady and the Banyan Tree: The Civil-Law Change in Indonesia* in Daniel S. Lev, *Legal Evolution and Political Authority in Indonesia: Selected Essays* (Kluwer Law International, The Hague, Netherlands, 2000) at 137.

¹⁸⁶ Clifford Sather, “Introduction” in Benedict Sandin, *Iban Adat and Augury* (Universiti Sains Malaysia Penang, 1980) at xi – xii.

¹⁸⁷ W.M. Seymour & J.C. Bekker, ed, *Seymour’s Customary Law in Southern Africa*, 5th ed, (Cape Town, Juta & Co. Ltd., 1989) at 11.

The above-mentioned definitions and descriptions of Adat, which the scholars call customary law, suggest that Adat are law or rules for the regulation of social relations, values, behaviour, and habits, to name but a few, of members of a society. The scholars seem to agree that Adat are cultural and social expression of the people and derived from many sources such as customs and traditions for the governance of societies or communities. The difference in the definitions of Adat highlight how different scholars define and see the same thing differently. The term “customary law” is being problematised by the scholars to fit their own paradigm and field. The definitions can either be subjective or objective depending very much on the context of the subject matter, field of study, and time and place of the writing and research.

2.4.4 Statutory definitions of Adat

The statutory definitions of Adat are very critical for the recognition and enforceability of Adat Iban in the state of Sarawak, Malaysia.¹⁸⁸ The statutory definitions are the state’s legal definitions of Adat and the state is the exclusive authority in the recognition and enforceability of Adat. Most of Sarawak statutes (Ordinances),¹⁸⁹ legal instruments, and legal documents use the term “customary law” to refer to Adat. The first statutory definition of Adat appears in the *Adat Iban* 1993. The *Adat Iban* 1993 is a codification of some Adat Iban and the terms “Iban customary law” and “Adat Iban” are used interchangeably in the Code.¹⁹⁰ Sir Charles Brookes, the second white Rajah of Sarawak, refers to Adat as “customs” in his communication to the General Council Assembly on October 11th, 1870. The British colony enacted the first *Native Courts Ordinance* in 1955. Section 2 of the Ordinance defines “customary law” as “ a custom or body of customs to which the law of Sarawak gives effect”.¹⁹¹ Section 2 of the *Native Customary Law Ordinance*,

¹⁸⁸ Adat Iban are not enforceable in any other state in Malaysia. Native Adat in Sarawak is a state matter under the Ninth Schedule, List IIA, Item 13 of the Federal Constitution.

¹⁸⁹ Any law made by the State Legislative Assembly of Sarawak is styled “Ordinance”.

¹⁹⁰ See Item 2 and 3 of the General Explanation to *Adat Iban* 1993.

¹⁹¹ Section 2 of the *Native Courts Ordinance* 1955.

1955, refer to Adat as “customary law”. Most of the current statutes in Sarawak are originated from the British colony. When Sarawak achieved her independence on September 16, 1963, the successor Sarawak government inherited and adopted the term “customary law” to refer to Adat of the natives from the British colony. Therefore, “customary law” is a colonial creation and origin. The term “customary law” is used in the discussion of statutory definitions of Adat below and wherever the statutory definition is being discussed.

This section discusses three statutory definitions of “customary law”, which are the Adat of the natives of Sarawak and which I refer to in English as the Indigenous law of the native of Sarawak, and a statutory definition of Adat. Section 2(1) of the *Native Courts Ordinance*, 1992, states that ““customary law” means a custom or body of customs to which the law of Sarawak gives effect.” This definition adopts word for word the colonial definition of customary law in section 2 of the *Native Courts Ordinance*, 1955, which has been repealed by the 1992 Ordinance. Section 2 of *the Native Customs (Declaration) Ordinance*, 1996 states that “customary laws” ... shall have the meaning attributed to it by the *Native Courts Ordinance*, 1992.” Section 2(1) of the *Majlis Adat Istiadat Sarawak* 1977 states that customary law has the same meaning attributed to it as in *the Native Courts Ordinance* 1992.¹⁹² The three Ordinances mentioned above all define “customary law is “a custom or body of customs to which the law of Sarawak gives effect.” Thus, by implication, a custom or body of customs to which the law of Sarawak does not give effect are not customary law and not enforceable. The statutory definition seems to suggest some difficulties to define Adat which are law-proper and those which are not, e.g. culture, traditions, and values, to name but a few. The term Adat which can mean many things may be one of the

¹⁹² The *Native Courts Ordinance* 1992 substituted *the Native Courts Ordinance* 1955 [Chapter 43]. Section 2(1) of *Majlis Adat Istiadat Sarawak Ordinance* 1997 by an amendment in 1996. The Council of customs and Tradition Sarawak may give lawful effect to the native customs after consultation with the Chiefs and Headmen of a native community and with the approval of the state government by publishing a code of the customs. See section 3 of *Native Customs (Declaration) Ordinance* 1996

reasons for the awkward statutory definition. The 1992 Ordinance was legislated by the state legislature whose members were mostly natives of Sarawak. The difficulty of defining Adat can be inferred from the definition of Adat under the *Majlis Adat Istiadat Sarawak Ordinance 1977*.

Section 2(1) of the *Majlis Adat Istiadat Sarawak Ordinance 1977*¹⁹³ states that ““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, 1996 [Chapter 22]*¹⁹⁴ or any other written law and shall be deemed to include the tradition and culture of the natives.” The statutory definition Adat seems to imply that the Adat which are not law-proper are those which are comprised of tradition and culture or something similar. Such Adat do not have any legal force. Be as it may, the statutory definitions of “customary law” and Adat seem to imply that “customary law” and Adat are two different and distinct things. However, the term “customary Law” is an English translation of “Adat”. The confusion and awkwardness are further aggravated by the interchangeably used of the terms “Iban customary law” and “Adat Iban” in sections 2, 3, 4, and 5 of the *Majlis Adat Istiadat Sarawak Ordinance 1977* and paragraphs 2 and 3 of the General Explanation of the *Adat Iban 1993*. The statutory definitions show a very clear conflict and confusion on definition of “customary law” and “adat”.¹⁹⁵ As such, only those Adat which have been codified under *Adat Iban 1993* and those customary laws which have been given lawful effect through the judgements given by the British colonial courts and Malaysian High Courts are customary law

¹⁹³ *Majlis Adat Istiadat Sarawak Ordinance, 1997* literally “the Council of Customs and Traditions Ordinance 1997 in English. The Council function is “to advise the Yang di-Pertua Negeri on all matters relating to customary law and adat of the various natives of Sarawak other than Malays or natives who profess Islamic religion ad for matters connected therewith and incidental thereto.” See the Preamble to The Majlis Adat Istiadat Ordinance, 1977.

¹⁹⁴ The words “*The Native Customs (Declaration) Ordinance, 1996 [Chapter 22]*” substituted the words “*the Customary Laws Ordinance 1955 [Chapter 51]*” vide an amendment made in 1996. The Council of customs and Tradition Sarawak may give lawful effect to native customs after consultation with the Chiefs and Headmen of a native community and with the approval of the state government by publishing a code of the customs. See section 3 of Native Customs (Declaration) Ordinance 1996.

¹⁹⁵ The word “adat” is spelt in small letters to retain the original style of spelling of “ adat” in the *Majlis Adat Istiadat Sarawak Ordinance, 1977*.

and enforceable. Technically, the statutory definition of “customary law” does not include any Adat which is not derived from a custom or body of customs. Any Adat which is derived from spiritual law, or natural law, or declaration by any Iban leader in the past, or positivist law is not a custom or body of customs and has no legal force and not enforceable.

It is not known whether the colonial statutory definition was intended to limit the recognition of the native Adat, which include Adat Iban. I can only speculate by echoing some common colonial assumptions about Indigenous law like Adat Iban. Indigenous people, like the Iban, were and are lawless as they were not advanced or evolved enough to have law. Indigenous laws, like Adat Iban, are only customs and spirituality and are not about dealing with issues or problems. They were simple and had habits and had no real ways of governing through law.¹⁹⁶ The reason for the adoption of colonial definition in the *Native Courts Ordinance*, 1992, by the independent state of Sarawak is unknown. It is my presumption that it could be an undetected drafting error or no suitable alternative definition could be offered at that time. The statutory definition of “adat” was inserted by an amendment to the *Majlis Adat Istiadat Sarawak Ordinance* 1977 in 1996. The definition does not seem to take any notice of the statutory definition of “customary law” made four years earlier. This is very awkward and may be construed as a rebuttal of the statutory definitions of “customary law”. These conflicting definitions could raise some serious legal issues or repercussions to the decisions and judgments made by the Native Courts since 1996. If the definition of “adat” was intended, any judgments on any case of referred as “adat” case could be null and void ab initio. This is because “adat” have no lawful effect given by any state law in the first place. But, if the definition was a drafting error, the mistake may be cured by the doctrine

¹⁹⁶ Indigenous Law Research Unit (ILRU), *Gender Inside Indigenous Law Toolkit* (University of Victoria, 2016) at 12.

of judge-made law, which is referred to as common law¹⁹⁷ in England and United States of America. The common law, characterized by a case-law system based essentially on judicial decisions and the rule of precedent.¹⁹⁸ This is where the judges by adopting and applying the Adat in their judgments are giving lawful effect to the Adat, i.e. the judges are making law. The Native Courts are lawfully established under a state law, i.e. the *Native Courts Ordinance*, 1992, and by making and delivering the judgments the courts are making law,¹⁹⁹ i.e. judge-made law or common law. This is reinforced by section 198 of the *Adat Iban* 1993 which allows the recognition of any Iban custom which is not codified in the 1993 Adat. This section states that an action or suit for any breach of custom which is recognised by a community but not expressly provided for in the *Adat Iban* 1993 may be instituted in any Native Court having original jurisdiction over such mater. This provision seems to give power to any Native Court to give lawful effect to the Adat which are not codified under the *Adat Iban* 1993. It is, therefore, suggested that any judgment given by any Native Court is deemed to give lawful effect to the Adat being decided by the court.

In view of the statutory definitions mentioned-above, the Adat that have no lawful effect may remain as normative orders and applicable and enforceable among the people who are racially categorised to be under the same native system of personal law. In the case of Adat Iban, a large number of Adat which are law-proper are still not recognised and enforceable in any court

¹⁹⁷ Section 3(1) of the Civil Law Ordinance 1956 provides that the Court shall apply the common law in England and the rules of equity, as administered in England at the date of coming into force of the Ordinance i.e. 7 April 1956. In 1971, the Civil Law Ordinance 1956 of Malaysia which was only applicable in West Malaysia was extended to Sabah and Sarawak vide the Civil Law (Extension) Order 1971. Despite this, Sabah and Sarawak still have their own respective legislation on the application of English law i.e. the Application of Laws Ordinance 1951 in Sabah and the Application of Laws Ordinance 1949 in Sarawak.

¹⁹⁸ Del-Bove, Marion & Francoz-Terminal, Laurence, "How Common is the Common Law? Some Differences and Similarities in British and American Superior Court Decisions (2015) *Alicante Journal of English Studies* at 59 – 61.

¹⁹⁹ F. Granville Munson, "Does the court make or interpret law?" (1910) *University of Pennsylvania Law Review and American Law Register* at 365–375. *JSTOR*, www.jstor.org/stable/3313544. Accessed 18 Feb. 2020.

of law in Malaysia. The position of Adat is analogous to a coin-tossing contest where “head I win tail you lose”. Thus, in any which way, whether a case is expressed as “customary law” case or “Adat” case, the Adat is at the losing end. This is a legal and political problem which is a hindrance to the development and recognition of Adat Iban. The problem can only be resolved through political means.

Adat are treated as the most inferior law in the hierarchy under the Malaysian legal system. It is expressly stated that in the event of a conflict between customary law and state law, the state law takes precedence over any native customary law. Section 9 of the *Native Customs (Declaration) Ordinance* 1996, states that “If any provision of a code²⁰⁰ is found to be repugnant to or is inconsistent with a provision of any written law, the latter shall prevail.” Such treatment of Adat pushes the Adat to exist and operate in the periphery of the Malaysian legal system. This is one of the weaknesses in the Malaysian plural legal system. Law are not equal, and some are superior to others. However, if the Adat are having equal legal status as the state law, the situation could create legal or constitutional impasses or conflicts in the Malaysian legal system and politics.²⁰¹ The question is: should the native Adat be given the same recognition

²⁰⁰ Section 2 of *the Native Custom (Declaration) Ordinance*, 1996 states that: ““Code” means a code of native customs compiled and published under this Ordinance or by the Council of Customs and Traditions Sarawak with the authority of the State Cabinet prior to the enactment of this Ordinance.” The *Adat Iban* 1993 is a Code of Iban customs published under the 1996 Ordinance.

²⁰¹ The Islamic law and Civil law are supposed to exist as parallel systems in Malaysia. Recently, many jurisdictional and constitutional conflicts have arisen. Article 121(1A) was introduced to prevent the conflict of jurisdiction between the Civil court and Sharia court and came into effect on June 10, 1988. The administration of Islamic law is confined to the personal law for Muslims and the Sharia court is subordinate to the Civil courts established under the Federal Constitution and under the federal law. However, Islam is the religion of the federation (Article 3 of the Federal Constitution). Unlike the Civil court, Sharia court is the creature of state law. The Federal Constitution is the Supreme law of the federation and any law passed after the Independence Day on August 31, 1957 which is inconsistent with the constitution shall be void (Article 4 of the Federal Constitution). The most divisive cases on jurisdictional constitutional conflicts are the cases banning the use of the word “Allah” by non-Muslims including the Roman Catholic Church weekly newspaper, *the Malaysian Herald*, could not refer to God as “Allah” in its Malay-language edition; and the seizure of 300 copies of Bible in Malay and Iban languages that contain the word “Allah”. The High Court in the *Herald* case held that the Church had the constitutional right to use “Allah”. But the decision was set aside by the Court of Appeal. The constitutionality of the ban is still unclear because the Federal Court (the highest appeal court) refused leave to appeal (*Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors* [2014]4 MLJ 765). See Roslie Dahlan & Fawza

and status as the Sharia law in Malaysia? The Sharia law and Sharia court are gaining political and religious prominence now by virtue of Islam being the religion of the federation.²⁰² At the moment, Adat Iban or any other native Adat are in a very precarious situation because any Adat that has not been given any lawful effect by any state law is not recognised and enforceable. However, Adat may still be practised and enforced without the recognition of the state and operate outside the state regime provided that the communities uphold their trust and confidence in the Adat. But such non-state and decentralized practice and operation could face a big problem without the full support of the state agencies, such as the police and prison, in case of default or refusal to comply with any judgment or order. The invocation of spiritual intervention to compel compliance like what the Iban did in the past is not effective now.

The descriptions and definitions of Adat above illustrate that there is no universally accepted definition of Adat or customary law. The statutory definitions of “customary” law and “Adat” are very awkward and confusing in term of the recognition and legal force of Adat Iban. The definitions are very restrictive in respect of the recognition of Adat. The state intervention is very commanding and domineering in deciding what and which Adat is recognised and enforceable. It is a paradox, whether the Adat are recognised or not they are all binding among the members of every Iban community and the Native Courts on-behalf of the state enforce the Adat. The people who practise the Adat have very little power to decide their own law. However, state intervention and control are inevitable as long as the government and the state control the law and order. The state may take notice of the Iban worldview and any other view, but it may not carry much weight in the recognition of Adat.

Sabila Faudzi, “The Syariah Court: Its position under the Malaysian legal system” (2016) Mondag. Mondag.com./Article/472794.

²⁰² Article 3 of the *Federal Constitution* of Malaysia.

In order to resolve the conflict on the statutory definitions of “customary law and “Adat”, it is suggested that a single term “Adat” should be used to refer to any Indigenous law of any native of Sarawak. It is further suggested that: “Adat mean the Indigenous law of any native of Sarawak which are having legal force and binding on or applying to the members of that community forming the whole or part of any native race as specified in the Schedule to the *Interpretation Ordinance*, 2005.”²⁰³

2.4.5 The concepts of Adat Iban

Adat may be described as the cultural expressions and social constructions²⁰⁴ of the Iban. Conceptually, Adat may be described as a means to achieve an end.²⁰⁵ Brian Z. Tamanaha argues that “people see law as an instrument of power to advance their own personal interests or the interest or polices of the individuals or groups they support. Today, law is widely viewed as an empty vessel to be field as desired, and to be manipulated, invoked, and utilized in furtherance of ends.” This is a proposition that law can be a double-edged sword and can be used for bad or good purposes. The use of law depends on the integrity of the people in power. This proposition applies to Adat Iban. Adat, as law and a socio-legal system, can be used as tool to achieve some predetermined ends for the common good of a community or manipulated to advance the personal interest of some members of the community. Fuller argues that the internal morality of law is concerned “not with the substantive aims of legal rules, but with the ways in which a system of rules for governing human conduct must be constructed and administered if it is to be efficacious and at the same time remain what it purports to be”.²⁰⁶ I

²⁰³ The Schedule to section 3 of the *Interpretation Ordinance*, 2005 enumerates the races which are considered to be Indigenous to Sarawak.

²⁰⁴ H.A.L Hart, *The Concept of Law*, 3rd ed, (Oxford University Press, UK, 2012) at xvii.

²⁰⁵ Brian Z. Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge University Press, New York, USA, 2006) at 1 – 7.

²⁰⁶ Lon Fuller, *The Morality of Law* in Jamie Cassels, “Lon Fuller: Liberalism and the Limits of Law”(1986) 36:3 *The University of Toronto Law Journal* at 325.

think those state actors who apply and enforce the Adat are not much concerned with the internal morality of the Adat; rather, they are concerned with the obligation and duty to comply with the Adat based on the belief of spiritual reward for compliance and punishment for violation.

Adat are the instrument of political power and authority of a longhouse and the community as a political entity. They are used as tools for the regulation and governance of the social, economic, and political relations and affairs of the Iban communities and the territory. At the same time, Adat are used as a dispute resolution to provide justice. The main purpose is for the promotion and maintenance of peace, harmony, and unity to provide a favourable social environment to achieve the social, economic, and political well-being of the community. The ultimate goal is longevity, good health, prosperity, and happiness (*gayu guru, grai nyamai, lantang senang*).²⁰⁷ This is the Iban hope and aspiration of an Ideal society which they have yet to achieve in perpetuity. Despite the good intention, Adat are sometimes misused as instruments of power to advance certain personal interests or the interests or policies of the individuals or groups. Adat are similar to law, which is “widely viewed as an empty vessel to be filled as desired, and to be manipulated, invoked, and utilized in furtherance of ends.”²⁰⁸

As an instrument of political power and authority in an egalitarian society,²⁰⁹ the fundamental theory in the administration of Adat is equality before the law and rule of law. The golden rule of dispute resolution is: “*Utai besai gaga mit; Utai mit gaga nadai*”, which is literally translated in English as “make large thing small; a small thing becomes nothing”.²¹⁰ This is an old Iban idiom

²⁰⁷ “*Gayu guru grai nyamai, lantang senang*” is literally longevity, good health, prosperity, and happiness in English. The Iban always ask for Gods and Spirits to give them blessings for “longevity, good health, and prosperity and happiness” in their incantation during the calling of Gods and Spirits rituals.

²⁰⁸ Brian Z. Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge University Press, New York, USA, 2006) at 1 – 7.

²⁰⁹ See paragraph 2.3 *supra*.

²¹⁰ Justice Dato’ Abang Iskandar bin Abang Hashim, “Native Customary Laws and Rights in Sarawak: A Brief Insight” (2018) *Journal of the Malaysian Judiciary* at 2.

which encourages the parties to any dispute to settle or resolve the dispute quickly and peacefully through compromise. If a dispute involves a minor issue, it should be settled amicably as if nothing had happened. This method of dispute resolution could help maintain the peace, harmony, and unity in a closely knit community. Disputes among the members of a community are quite common. Sometimes a minor dispute could be overblown and become a big issue and could jeopardise the peace, harmony, and unity in a community. In the past, when a dispute became overblown and protracted it could only be settled by trial by ordeal, such as staying under water contest²¹¹ or retrieving of stone from boiling water contest.²¹² These methods had been abolished quite some time ago.

Freeman²¹³ in his *Report on Iban*, among other things, observes the practice of equality before the Adat, equal rights, and equal opportunities among the Iban.²¹⁴ In theory, the doctrine of equality before the Adat gives every person equal opportunities and equal rights to seek justice or to defend himself or herself in any case of breach of Adat or violation of rights. The people or person who adjudicates and decides the case must be fair and guided by the rule of law. Equality before the Adat and rule of law is a “standard of quality” in the administration of Adat. The standard is immortalized in the Iban doctrines of “*enda bepinang enda benibung*”²¹⁵ and *bejalai*

²¹¹ Staying under water contest is called “*kelam ai*”. This was a method to settle a major dispute, e.g. land dispute between two longhouses, once and for all. Each party to the dispute would engage a diver to represent them as contestant. The two contestants would be submerged under water and the contestant who stayed longer under won the contest and the party who engaged him won the case.

²¹² Retrieving a stone from boiling water contest is called “*becheluk betong*”. The purpose was the same as “*kelam ai*”. The parties to the dispute would retrieve a stone from boiling water cooked in a big bamboo called “*betong*”. The party who retrieved the stone without being scalded by boiling water won the case. This method of dispute resolution was replaced by “*kelam ai*” contest.

²¹³ John D. Freeman, *Report on Iban* in Jérôme Rousseau, “Iban Inequality” (1980)136:1 *Journal of Humanities and Social Sciences of Southeast Asia*, Leiden.

²¹⁴ John D. Freeman, *Report on Iban* in Jérôme Rousseau, “Iban Inequality” (1980)136:1 *Journal of Humanities and Social Sciences of Southeast Asia*, Leiden.

²¹⁵ “*Enda bepinang enda benibung*”, literally translated in English as: “No areca palm (*pinang*) and no thorny palm (*nibung*)”. *Pinang* is the areca palm or betel nut palm having smooth trunk whereas *nibung* is a wild palm with sharp thorny trunk. Inequality is akin to a tree climbing competition where one climber climbs a *Pinang* palm while the other climbs a thorny *nibung* palm. The unfair advantage is in favour of the climber who climbs the

betungkat ka Adat, tinduk bepinang ka pengingat". However, in practice, there are some degrees of inequality and injustice that happen, but they are not prevalent. It is the administration and enforcement of Adat that are sometimes faulty or do not conform to the principle. In the past, the administration and enforcement of Adat were normally performed by men but today many women are participating in the administration and enforcement of Adat in the Iban communities.²¹⁶

"Enda bepinang enda benibung" means every person is equal before the Adat. *"Pinang"* is the areca palm or betel nut palm which has a smooth trunk, whereas *"nibung"* is a wild palm with sharp thorns growing on the trunk. The doctrine of *enda bepinang enda benibung* is an analogy for inequality in a tree climbing competition where one participant climbs a smooth palm while the other climbs a thorny palm. The unfair advantage is in favour of the participant who climbs the smooth palm. The participant who climbs the thorny palm would be slowed down by the thorny obstacle. The doctrine imposes a duty on every person, man or woman, who is entrusted with the administration and enforcement of Adat to be fair and just when discharging their duties. This theory is a very ancient ideal and has been with the Iban since time immemorial. The Iban theory of equality before the Adat is similar to the universal concept of equality before the law of most societies having more developed legal systems like in Europe and North America. It is a concept that requires the highest standard of integrity in discharging judicial duties without fear or favour. However, the Iban are fallible and have not been able to achieve the standard consistently. In practice, injustice and unfairness do happen which lead to a phrase *"bepinang benibung"*²¹⁷ (literally injustice and unfairness in English). The phrase is the opposite of *"enda*

Pinang palm. This idiom or metaphor is used refer to equality or inequality in any matter pertaining to any question relating rights and privileges under the Adat.

²¹⁶ All *Tuai Rumah* and Chiefs are ex-officio presiding officers of the Native Courts.

²¹⁷ *"Bepinang benibung"*, literally translated in English as "there is *pinang* and *nibung*". The phrase means injustice and unfairness in the judgment.

bepinang benibung". The failure could be because of personal bias, personal inclination, or other factors. This theory is reinforced by the doctrine of "*bejalai betungkat ka Adat, tinduk bepangal ka pengingat*".²¹⁸

The doctrine is quite similar to the rule of law. A person who holds a position of responsibility, or is entrusted with judicial duties, or umpire ought to act or discharge his or her duties according to the rule of law. Even in his sleep, he or she must always remember his duties and responsibilities and the standard required of him or her in dispensing justice. The standard in the administration and enforcement of Adat and dispensing justice required by these doctrines is very high and ought to leave no room for injustice and unfairness.

The pictures below show the portions of a *pinang* palm (areca palm) and a *nibung* palm.



Picture 1: A picture showing a section of an areca nut palm or betel nut palm trunk, which is smooth. This picture is in the public domain.



Picture 2: A picture showing a section of the a "*nibung*" palm trunk with its sharp thorns. This pictures in the public domain.

²¹⁸ "*Bejalai betungkat ka Adat, tinduk bepangal ka pengingat*" is literally translated in English as: "*Adat is my walking stick when I walk and memory is my pillow when I sleep*".

Adat as law are intertwined with spirituality. Under this concept the spiritual sanctions and prohibitions, which are spiritual beliefs or principles, are referred to as Adat and enforced as Adat (law). Thus, Adat as law and spirituality are integral elements under the concept of Adat Iban. The interdependency of Adat and spirituality on each other in their operation and execution creates a legal relationship between them. Spirituality gives sanctity to Adat which are derived from spirituality by force of their origins to justify the enforcement of spiritual principle or belief. Adat gives the legitimacy or lawful effect to spiritual principle or belief to become enforceable rules. Through such relationship the spiritual principles or belief are formalised as Adat like any other Adat.²¹⁹ In a pluralistic society like Canada, notwithstanding the implications of the Canadian Charter of Rights and Freedoms,²²⁰ it is highly likely that law cannot legitimately be used to enforce some principle or belief which is exclusively religious, even if the majority of people held the principle or belief.²²¹ The enforcement of Adat which are exclusively spiritual principles or beliefs has become a controversial issue in some multi-religious Iban communities, especially where Christians are the majority. However, in most multi-religious communities, tolerance and mutual respect are still prevailing. The spiritual sanctions and prohibitions must be obeyed because of the belief that compliance could bring spiritual reward and non-compliance could be punished by Gods or Spirits. Spiritual wrath could be fatal to the social and spiritual well-being of a community. Thus, there is an element of fear to compel compliance. Gods and Spirits are believed to be the final prosecutors, judges, and enforcers of Adat, and any deviance or delinquency may be punished by the same authority. However, the compliance of Adat is not totally dependent on fear or coercion. The most important factor which compels compliance is the respect and confidence for the Adat. John Locke has quite similar view. He

²¹⁹ The knowledge and insights of Adat and spirituality were provided by Edmund Langgu Saga, Richard Muluk Entering, and Bernad Agan during various discussions in July 2020.

²²⁰ The *Constitution Act*, 1982 and specifically sections 2 and 24 of the Act.

²²¹ John W. Morden, "An Essay on the Connections between Law and Religion" (1984), 2:1 *Journal of Law and Religion* at 11, Cambridge University Press. Stable URL: <https://www.jstor.org/stable/1051031>

opines that “punishment is not the cause of obligation, but the effect of the failure to fulfil one’s obligations, while the threat of punishment and the promise of reward is what moves one to obey God’s commands. So, even if punishment is indispensable to the operation of law, it is not the cause of its obligatory force.”²²²

Before the establishment of the Native Courts in 1870²²³ the Iban had no formal system or institution or agency to support the administration and enforcement of Adat. The *Tuai Rumah* with the support of the members of the longhouse community was administered and enforced. Even after the establishment of these courts, most of the Adat were administered and enforced with very little assistance from the state agencies. Spirituality plays a significant role in the enforcement of Adat. The Adat regulating the spiritual sanctions and prohibitions are examples of Adat enforcing spiritual belief or principles. A sanction is similar to the judicial remedy of mandatory injunction, which compels a person or community to perform or do certain acts according to the Adat. For example, the Adat which requires that every family must cook their food on the cooking hearth at least once a month is a sanction. Anyone in violation would be ordered to provide restitution and to perform an appeasement or purification ritual.

A prohibition²²⁴ is similar to a judicial remedy of prohibitive injunction. For example, “no entertainment may be held in a longhouse while under a mourning period order” is a prohibition. It is a preventive order to stop any person from doing an act or omission. A prohibition can be a permanent or temporary order and depends on the Adat and act or activity. For example, the prohibitions relating to the family apartment siting order are permanent prohibitions (see

²²² Peter P. Cvek, *John Locke on the Relationship between God and Morality* (2017) 35: 3–4, 2012 *Ultimate Reality and Meaning*, University of Toronto Press at 269.

²²³ See paragraph 2.6 *infra*. <https://doi.org/10.3138/uram.35.3-4.260>.

²²⁴ Prohibition is similar to the prohibitory injunction in the advanced or western legal systems.

paragraph 3.5), and, whereas the prohibition of holding any entertainment during a mourning period is temporary. Some prohibitions are also similar to the strict liability law. There is no defence to any charge under such Adat. The act of breaching a prohibition is sufficient to convict and impose restitution on the offender. Restitution²²⁵ is a mandatory order requiring a violator to make a payment of a sum of money as a settlement and perform certain specific rituals of appeasement or purification following a breach of a prohibition.

The Iban cosmology is part of the Iban spirituality and plays a very important role in the application and enforcement of Adat.²²⁶ The Iban cosmology²²⁷ expounds the concept of spiritual rewards for compliance and spiritual punishments for violation or disobedience. According to the Iban cosmology, humans co-exist with Gods and Spirits in this universe. Humans inhabit the visible realm while Gods and spirits inhabit the invisible realm. Gods and Spirits watch over the conduct and behaviour and determine the fate of every human. This belief creates the spiritual relationships between humans and Gods and Spirits in this universe. Good spiritual relationship is a state where the “spiritual equilibrium” is maintained through the compliance of Adat. The compliance of Adat may be rewarded in the form of longevity, good health, prosperity, and happiness to the members of the community and no calamities or natural disaster. Bad spiritual relationship is where the “spiritual equilibrium” is upset because of deviance or disobedience of Adat. Deviance or disobedience of Adat may be punished in the form of ill-fortune such as frequent premature deaths, sickness and poor harvests, and/or calamities and natural disasters befalling the community. The state of spiritual relationship is manifested in two opposite extremes of “cold” (“*chelap*” in Iban) and “hot” (“*angat*” in Iban). The

²²⁵ Restitution is quite similar to the mandatory injunction in the advanced or western legal systems.

²²⁶ The Iban cosmology was narrated by Edmund Langgu Saga, a participant. The interpretation and implication of the Adat was made by the researcher.

²²⁷ Peter P. Cvek, *John Locke on the Relationship between God and Morality* (2017) 35: 3–4, 2012 *Ultimate Reality and Meaning*, University of Toronto Press at 269.

term “hot” and “cold” are technical and spiritual terms. The term “cold” refers to a period where the “spiritual equilibrium” is maintained. The term “hot” refers to a period where the “spiritual balance” is upset.

If we examine the logic of Iban cosmological beliefs and concepts, it is natural that the compliance of Adat or law by every members of a community would bring peace, harmony and unity which could bring about the well-being of the community. The well-being is in term of the social, economic, and political benefits. Violation or disobedience of Adat could bring many troubles, hardships, and other bad things to the community. The unique aspect of the concept is the use of spirituality for enforcement of Adat. The concept may provide an answer to the question of why people obey law. This question why people should obey law or rules has become a major discourse in jurisprudence, political philosophy, and sociology at least from Socrates era (c. 470 – 399 BCE) in Athens. Thomas Hobbes in his theory of social contract opines that to avoid war every person should enter into an agreement with other person not to harm each other. However, the agreement alone is not sufficient to ensure peace. Compliance with social contract requires the coercive power which Hobbes believed only a powerful sovereign could provide.²²⁸ The essence of Hobbes’ theory is similar to the Iban theory that if every person obey law peace and harmony would prevail. The coercive power is provided by Gods and Spirits as the almighty sovereign. The Iban’s theory is echoing what John Locke observes that humans are obligated to obey God’s laws since God is a superior to whom we owe both our being and our work. As such, we are obligated to show obedience to the limits he

²²⁸ Thomas Mouritz, “Comparing the Social Contracts of Hobbes and Locke” (2010) 1 The Western Australian Jurist 6 at 125. URL: <http://www.austlii.edu.au/au/journals/WAJurist/2010/index.html>

prescribes.²²⁹ For Jeremy Bentham, people obey law because they were motivated by the desire to achieve pleasure and avoid pain.²³⁰

The question was still a popular jurisprudence subject in 1988 when Greenawalt²³¹ posted his five "philosophical" generalizations on why people obey law. First, the concept of legitimate authority logically implies the obligation to obey. Secondly, all persons have implicit promissory, or quasi-contractual, obligation to obey the law. Thirdly, the utilitarian ideal of the greatest good underlies a general obligation obey the law. Fourthly, a duty of fair play underlies the duty to obey. Fifthly, there is a natural duty to obey based on the idea of reciprocity. The Iban ancestors had some very basic idea in jurisprudence or political thought and not far removed from the philosophers' ideas mentioned above. However, the idea did not develop farther academically. It is not known whether the concept and idea were a divine revelation or internally developed by the Iban would be peaceful. The Iban society would be perfect if everybody obeys the Adat. Again, this is an ideal which is impossible to achieve. But it is a very good idea and not only a social rhetoric or a euphemism.

Conceptually, some Adat may be deemed as commands backed by some elements of reward and fear. The spiritual sanctions and prohibitions may be considered to be divine commands. A spiritual sanction is quite similar to a mandatory injunction which requires a people to act in a specific way. A prohibition is similar to a prohibitory injunction which prevents a person or community from doing something. For example, the Adat regulating the orientation of the

²²⁹ Peter P. Cvek, *John Locke on the Relationship between God and Morality* (2017) 35: 3–4, 2012 *Ultimate Reality and Meaning*, University of Toronto Press at 267 – 268. <https://doi.org/10.3138/uram.35.3-4.260>.

²³⁰ J.H. Burns, "Happiness and Utility: Jeremy Bentham's Equation" (2005) 17:1 *Utilitas*, University of Cambridge Press at 48 - 50.

²³¹ Thomas Morawetz, "The Jurisprudence of Duty and Obedience" (1988) 88:5 *Columbia Law Review*, The Clarendon Press at 1140. URL: <https://www.jstor.org/stable/1051031> 1135-1152. doi:10.2307/1122702.

longhouse enforces both spiritual sanction and prohibition. The sanction, which says that the longhouse must be sited parallel to the river, is backed by reward of social and spiritual well-being, which is pleasure. A prohibition, which says it is taboo for a longhouse to be sited perpendicular to a river, is backed by spiritual punishment, which is pain (see paragraph 3.4). These Adat may fall within Jeremy Bentham's and Austin's principle of command theory of law and that law is essentially a command of a sovereign. Bentham contends that "A law is a command Thus, much we must conceive of it on all occasions, to conceive clearly. Everything that is not a command therefore is not a law."²³² Bentham asserts that pleasure and pain govern how human beings act or ought to act. Human beings tend to act in a way that brings greater happiness (pleasure) and to avoid pain.²³³ The fear of punishment is fear of pain that must be avoided; thus, fear indirectly compels compliance and obedience. Arguably, the Adat derived from spirituality may fall within the category of sovereign commands because Gods are supreme beings, and their commands are supreme commands which are similar or higher in legitimacy and sanctity compared to sovereign commands. Austin views "Laws proper, or properly so called, are commands ..."²³⁴ Adat are quite similar in some respect with the concept and characteristic of Bentham's theory of law as discussed above. However, not all Adat have the elements of fear and fall within the "command theory of law". For example, the Adat regulating the solemnisation of marriage and sexual relation and morality are for the protection of family and individual happiness and prevent pain (see paragraph 4.2.1).

²³² Jeremy Bentham, "What a Law is" (Bentham Manuscripts, University College London, box 69, folios 69-76) in Gerald J. Postema, "Law as Command: The Model of Command in Modern Jurisprudence" (2001) *Philosophical Issues* 11, *Journal of Social, Political, and Legal Philosophy*, Blackwell Publishing Ltd, at 470. doi: 10.1111/0029-4624.35.s1.18., URL: <http://dx.doi.org/10.1111/j.1758-2237.2001.tb00036.x>

²³³ J.H. Burns, "Happiness and Utility: Jeremy Bentham's Equation" (2005) 17:1 *Utilitas*, University of Cambridge Press at 48 - 50.

²³⁴ John Austin, *Province of Jurisprudence Determined [Province]* (London: Weidenfeld and Nicolson, 1971) in Gerald J. Postema *ibid* at 471.

If the concept of some Adat is similar to Bentham's and Austin's "command theory of law"²³⁵ and duty-imposing, then it is contrary to Hart's argument in *The Concept of Law*.²³⁶ Hart argues that there is no logical connection between law and coercion or between law and morality. He asserts that to classify all laws as coercive orders or as moral commands is to oversimplify the relation between law, coercion, and morality. To conceptualise all laws as coercive orders or as moral commands is to impose a misleading appearance of uniformity on different kinds of laws and on different kinds of social functions which laws may perform. If all laws are described as coercive orders it would mischaracterise the purpose and function of some laws and misunderstand their content, mode of origin, and range of application.²³⁷

Hart's argument is more leaning towards the regulation of the socio-economic and political relations in modern western societies. For example, commercial law is basically non-coercive order and morality is generally not the business of the law to enforce. In some modern western societies, there are public and private moralities, and some private moralities are considered as a personal matter and not regulated by law. For example, in British Columbia, cohabitation between a man and a woman is treated as a common-law relationship and they are referred to as common-law spouses according to section 3 of the *Family Law Act* [SBC 2011] Chapter 25. Such relationship is not illegal and immoral, and the spouses are entitled to rights, among others, in property and pension division. Under Adat Iban such relationships are invalid, illegal and immoral. If the couple has acquired any property during their cohabitation and if their relationship ends in a break-up, the couple has to go to the civil court to determine their rights or share in

²³⁵ Jeremy Bentham's and John Austin's command theory of law in in Gerald J. Postema, "Law as Command: The Model of Command in Modern Jurisprudence" (2001) 11 *Philosophical Issues, Journal of Social, Political, and Legal Philosophy* at 470 – 501. <http://www.jstor/stable/3050611>

²³⁶ HLA Hart, *The Concept of Law*, 3rd ed (Oxford University Press, 2012).

²³⁷ HLA Hart, *The Concept of Law*, 3rd ed (Oxford University Press, 2012) at 268 – 271.

the property under the law of equity and trust.²³⁸ Adat Iban have no provision to determine the issue.

The discussion above illustrates that the concept of some Adat is similar to Bentham's command theory. At the same time, the same Adat can be deemed as rules imposing duties or obligations. These Adat may be backed by other Adat to give effect and authority for the Adat which imposed duties or obligations. It is suggested that jurisprudential and intellectual discourses could be developed along the principle of Bentham's and Austin's command theory of law and Hart's *The Concept of Law* principles to modernise Adat. The English common law is a good example of the development of customs into law. The articulation of the Adat through creative and innovative interpretation and intellectual discourse could facilitate the discovery of the rationales, principles, or wisdom underlying the Adat. This could make Adat more acceptable to multi-religious Iban communities. Further, the intellectual discourse could introduce a new rule to improve the current practice of interpretation and application by simply following blindly the centuries' old customs and spiritual sanctions or prohibitions. For example, the belief that good spiritual relationship between the Iban and Gods and Spirits would bring about social and spiritual well-being to the communities is too complex to understand and hard to believe if an Iban is not practising the Iban spirituality.

Crime and morality are not distinguished under Adat Iban. If they are, the distinction is very blurred. Morality in the Iban communities is regulated by Adat. The Cambridge English dictionary

²³⁸ English common law on Equity and Trust is applicable in Malaysia. With effect from April 1st, 1972 the *Civil Law Ordinance*, 1956 was extended to Sabah and Sarawak by the *Civil Law Ordinance (Extension) Order*, 1971. The *Civil Law Act 1956 (Act 67)* (Revised 1972) being incorporated to all three earlier statutes that are the statutory authority for the application of English Law in Malaysia. The application of English Law is prescribed in sections 3, 5 and 6 of the *Civil Law Act 1956*. Section 3(1) of *Civil Law Act 1956* provides that the courts in Malaysia shall apply the common law as well as rules of equity existing in England in the absence of written law on April 7th 1956 in West Malaysia, December 1st in Sabah and December 12th, 1949 in Sarawak.

defines morality as set of personal or social standards for good or bad behaviour and character. According to the Iban view,²³⁹ morality is a standard which refers to the state of decency of conduct or behaviour which is appropriate and proper for the social relations in the Iban longhouse communities. The standard of morality is the appropriateness and propriety of the conduct or behaviour as adjudged by a community. This is the basis for judging what is appropriate and proper with regard to decency of conduct or behaviour. Adultery, incest, premarital pregnancy, lesbian or gay relationships, to name but a few, are considered as immoral conduct or behaviour. However, transvestite and transsexual are tolerated and not regulated.

An Iban longhouse and the community are a self-regulated institution. The *Tuai Rumah* and the longhouse community merge as an institution vested with the power and authority to adjudicate and determine what conduct or behaviour is moral or immoral.²⁴⁰ Men and women are part of the social structure of this institution and may express their view on the behaviour being judged. However, an individual person has no liberty to judge himself or herself in morality matters.²⁴¹ This is the burden of living in a community. It does not matter whether a member of a longhouse community agrees with such Adat or not. This is an unspoken and unwritten social contract or obligation which binds every member of a community. At the moment, there is no avenue or mechanism to redress this power imbalance or any unfair decision. Technically, every member

²³⁹ The definition of morality is a deduction of narratives provided by Edmund Langgu Saga and the other participants. They did not provide any direct and clear definition but more of a description of morality.

²⁴⁰ In the case of the Iban, the *Tuai Rumah* and the longhouse community perform all the roles of the three branches of a democratic government. In an advanced democratic country like Canada, the government is consisted of the Executive, Legislative, and Judiciary. Yet the laws made by Parliament were not only confined to the law which the people have fully agreed to. The courts adjudicate and determine whether an act which is alleged to have contravened the law is wrong. An individual person does not have the liberty to judge as to whether his or her act is wrong in law. In the case of the Iban, the *Tuai Rumah* and the longhouse community merge to perform all the roles of the three branches of a democratic government.

²⁴¹ Lord Devlin, *Morals and the Criminal Law* (Oxford University Press, 1965) at 29.

of a community is subject to the Adat as long as he or she resides in the longhouse or within the jurisdiction of the longhouse.

Morality must be regulated to preserve and safeguard good conduct and behaviour which are essential for the existence of the community.²⁴² Unity, peace, and harmony can be very delicate and fragile matters in an Iban community. Provocative conduct or behaviour can create tension and lead to quarrels. Quarrelling among members of a longhouse²⁴³ or quarrelling among family members²⁴⁴ is breach of Adat and morally wrong. There ought to be a common agreement about good and bad in communal living. Without such agreement the community might disintegrate. Iban community unity cannot be held by physical means. Adat is the common agreement that binds a community together. An Iban longhouse community is a very closely knit community, despite the influence of Christianity and modernisation there is still a general consensus among the communities that there is a need to regulate morality and decency.²⁴⁵ Adat cannot be too relaxed because it may cause the members to drift apart. Adat which regulate morality impose obligations which the members of a community must comply with as the price to live in such a social environment.²⁴⁶

Spirituality and morality are also intertwined in Adat Iban. Spiritual sanction and punishment are commonly used for the disapproval of any act or behaviour which is considered immoral. For example, an incestuous relationship is illegal and may bring ill-fortune, climate upheaval, storms, land slide, and soil infertility, which could adversely affect a community. However, a secular

²⁴² Lord Devlin, *Morals and the Criminal Law* (Oxford University Press, 1965) at 34.

²⁴³ Section 41 (1) of the *Adat Iban* 1993.

²⁴⁴ Section 41 (2) of the *Adat Iban* 1993.

²⁴⁵ The interpretation and view of the Adat are mine. The knowledge is derived from my observation of living as a member of a longhouse community and my association with members of the other communities who are my relatives or acquaintances.

²⁴⁶ Lord Devlin, *Morals and the Criminal Law* (Oxford University Press, 1965) at 33.

disapproval of an incestuous relationship is more concerned with an unregulated sexual relationship in the communities. Unregulated morality could cause members who disagree or are not happy with the moral situation in the community to leave the community and bring others to join them. Unity and harmony of a community can be destroyed if there is no common agreement on moral standards. Incest is not only confined to parent/child or between siblings in the Iban culture. Sexual relations between very close relatives are also prohibited, e.g. between an aunt and a nephew. Incest can threaten the notion of an orderly community. Other sexual relations which are considered immoral conduct or behaviour include polygamy, polyandry, and bigamy. If such behaviour is tolerated, it could cause quarrels and no peace between families.²⁴⁷

By comparison, law and morality has been intensely debated in England and some western societies since the 1960s. The discourse can be considered as the turning point of more liberal ideas influencing the legislation on morality, particularly on homosexuality, prostitution, women's rights, and gender equality. The Iban concept of law and morality is similar to Devlin's initial view on the Wolfenden report. After the Wolfenden report in 1957, Devlin argued in his 1959 Maccabean lecture in Jurisprudence in support of James Fitzjames Stephen that popular morality should be allowed to influence law making, and that even private acts should be subject to legal sanction if they were held to be morally unacceptable by the "reasonable man", in order to preserve the moral fabric of society. Devlin's "reasonable man" was one who held commonly accepted views, not necessarily derived from reason as such. H. L. A. Hart supported the report's opposing view which was derived from John Stuart Mill that the law had no business interfering with private acts that harmed nobody. Devlin's argument is contained in his 1965 book *The Enforcement of Morals*. Hart wrote *Law, Liberty and Morality* (1963) and *The Morality*

²⁴⁷ The Adat were narrated by Edmund Langgu Saga on April 5th, 2020. He was an expert in Adat Iban and a research participant.

of the Criminal Law (1965) following his famous debate with Devlin on the role of the criminal law in enforcing moral norms. Devlin argued that a society's existence depends on the maintenance of a shared common agreement as the force that binds the society. If the law is relaxed the society might disintegrate. Devlin argued that in certain situations public morality would override matters of personal or private judgement. He further argued that an attack on "society's constitutive morality" would threaten society with disintegration. Thus, such acts ought to be scrutinised because they were purely private acts. Devlin viewed homosexuality as a threat to society's morality and suggested that legal intervention to criminalise such behaviour was necessary to prevent the disintegration of a society. He suggested that "the limits of tolerance" were reached when the feelings of the ordinary person towards certain form of conduct reached the level of intensity of "intolerance, indignation, and disgust". If the feeling of society was genuine that homosexuality was "a vice so abominable that its mere presence is an offence", then society had the right to prohibit it. However, Devlin's views changed over time and he was one of the signatories calling for the implementation of the Wolfenden reforms. The same scenario could happen to Adat Iban in the future. Adat Iban are not cast in stone and I think that Adat may gradually change according the social and cultural changes in Iban society.

Adat Iban may be described as a "unitary system of law" which means that Adat are not categorised or differentiated into criminal law and civil law. All Adat are categorised as one matter only and are treated in the same manner by the Native Courts and the Iban communities. This illustrates that the development of Adat Iban have been frozen for a long time. The only distinction is in term of the order given following a breach of an Adat, which is either a punishment or restitution. A breach of Adat regulating conduct or behaviour having the characteristics of a criminal act or a contractual obligation, e.g. theft, trespassing, and failure to perform a promise, to name but a few, shall be subject to a secular (temporal) punishment in

the form of a fine (*ukum*).²⁴⁸ A breach of a spiritual norm, or sanction, or prohibition (taboo) would make one liable for restitution (*tunggu*) and the performance of an appeasement or purification ritual.²⁴⁹ A fine (*ukum*) implies the condemnation of the community for certain unacceptable acts or behaviour. The punishment is usually higher in term of monetary value compared to restitution (*tunggu*). Restitution is a settlement between the offender and an individual or a community and looked upon as a less serious matter, unless it is incest of the high degree category.²⁵⁰ Social norms, such as ethics and values, are also called Adat, but a breach of such norm may not be subject to any “legal action”. But they are imposing moral or spiritual obligations. Any breach of such social norm would not be subject to any penalty or restitution but considered as recalcitrance, or disrespectful, or bad manners and may be subject to public reprimand or condemnation. Many of such norms function as a social engineering tool and used for moulding and promoting good conduct and behaviour among young children. For example, children are prohibited (*taboo or mali*) to call their parents by their names under the doctrine of filial piety.²⁵¹ This is purely manners and respect for the parents who brought them into this world and are bringing them up. Calling parents by their names is bad manners or disrespectful. A person who is not an Iban who has lived in a longhouse or an outsider might have some difficulty in distinguishing whether an Adat is regulating criminal conduct or behaviour or civil matters.

The categorisation of Adat into criminal law and civil law could develop Adat Iban into a more systematic justice system similar to the state law in Malaysia. The Adat which regulate crimes

²⁴⁸ Item 21 of the General Explanation to Adat Iban 1993. Any offence against any rule of social behaviour shall be subject to secular fine and the term used is “*ukum*” and payment is specified in “*kati*” or “*pikul*”.

²⁴⁹ Item 22 of the General Explanation to Adat Iban 1993. A breach of custom or taboo shall be subject to a restitution which is called “*tunggu*” in Iban. The measurement of fine is “*mungkul*” which is equivalent to RM 1.00.

²⁵⁰ An example of incest of the highest degree is a sexual relationship between parent-child, or between siblings, or between a man and a woman who is a sister of the man’s parents or vice versa. In the past, such act was considered as a very serious breach of Adat and could be sentence to death by execution.

²⁵¹ According to the Iban culture under the doctrine of filial piety, parents are higher in kinship hierarchal order than the children by virtue of creation and bringing them into this world. Children must be respectful and obedient to their parents and it is bad manners for any child to call their parents by their names.

would reflect the gravity or seriousness of the matters being regulated. The penalty and punishment could be either exemplary or rehabilitative depending on the crime committed. The Adat which are categorised under civil matters could be developed into Adat which are the equivalent of family law, law of contract, law of tort and other branches of civil law. This could help to facilitate the modernisation of the Adat and to adjust and adapt to any new or changing social situations in the Iban communities. If Adat Iban are to be dynamic and flexible, the unitary system of law under the present system of Adat Iban should be restructured to allow the categorisation of Adat in the various fields or branches of law. But is wrong of copying a better and more efficient legal system from others like the English and the north American legal systems.

2.4.6 Sources of Adat Iban

Adat Iban are derived from several sources and not only from customs as denoted by the English translation of Adat as customary law. The origins of most of the traditional or old Adat Iban are not clear. There is no written record available. Some of the origins or sources are narrated in Iban mythology and stories transmitted through oral tradition. There is no study to trace the origin of Adat Iban. However, most Adat are believed to be originated from customs or norms, spirituality, natural law, and declarations made by influential and powerful leaders in the past. The more recent Adat are positivistic Adat. They were made through deliberation in meetings of members of the communities. The *Adat Iban* 1993 is a codification of some of the traditional Adat and was made under delegated legislation²⁵² and approved by the Yang di-Pertua Negeri in Council (formerly the Governor of Sarawak).²⁵³ Prior to the approval, there was a series of

²⁵² Sections 3 and 5 of the *Native Customary Laws Ordinance* [Chapter 51] 1972.

²⁵³ The Yang di-Pertua Negeri in Council means the Governor approval was made with the advice of the state cabinet.

discussions and deliberations by the Iban Paramount Chiefs and Chiefs in Sarawak. As such, *the Adat Iban* 1993 may be deemed as deliberative law, which is quite similar to positivistic law.

Many Adat Iban are believed to be derived from customs or norms. The Adat which have been practised repetitiously over the centuries by the Iban were labelled by the colonial regimes as customary law. The label has been adopted and perpetuated until today. For example, the Adat regulating family matters and appointment of *Tuai Rumah* are customary law. Does the repeated application of Adat or following the legal practice of the ancestors make Adat become customary law? Or is the repetition of legal practice similar to the concept of following precedent and not customary? Many Adat Iban evolved through “the Iban doctrine of precedent.” This is a practice of strictly following the interpretation, application, and decision made centuries ago by the ancestors. It is different from the doctrine of judicial precedent or *stare decisis* in the English law or Canadian law, which is standing by the previous decisions of a superior court. If a point of law has been decided in a particular case by a superior court, the decision shall bind any future case containing the same material facts. In *Shaw v DPP* [1962] AC 220 the House of Lords held that a crime of conspiracy to corrupt public morals existed. The House of Lords in effect created a new crime. This was followed in *Knulier v DPP* [1973] AC 435. However, a court of the same level in of hierarchy may differ by distinguishing the issue and material facts. At one time the House of Lords were absolutely bound by their own previous decisions in *London Street Tramways Co Ltd v London County Council* [1898] AC 375.²⁵⁴ However, in 1966 the Lord Chancellor, Lord Gardiner, issued a Practice Statement allowing the House of Lords to depart from a previous decision where it appears right to do so under the Practice Statement HL Judicial Precedent [1966] 1 WLR 1234. The House of Lords have used the Practice Statement in *R v G*

²⁵⁴ In *London Street Tramways Co Ltd v London County Council* [1898] AC 375.

& *R* [2003] 3 WLR to overrule *MPC v Caldwell* [1982] AC 341 in relation to the test of recklessness applicable for criminal damage.

Under the Iban doctrine of precedent there is no rule for distinguishing the issue and material facts when deciding on Adat. The person who delivers the judgment recites in his or her preamble that he or she is following the Adat of certain ancestors or naming the person who first introduced the Adat. This is a formality to inform the people present that he is not making his own Adat but following a precedent established long ago.

Why should customary law be thought to be law at all?²⁵⁵ The answer to the question, if there is any, resides in the mind of the colonial regimes and the early scholars who coined the term “customary law” for native Indigenous law. The colonial regimes or the early scholars might have thought that the Iban were a primitive society and were not capable of making law similar to the advanced societies. Anyway, the Adat Iban which are derived and evolved from customs are quite similar to the case of English law that are derived from the English common law. Hobbes observes that the common law of England was rooted not in the expressions of the sovereign will, but in common custom of the land.²⁵⁶ Adat were developed from the common customs of the Iban communities in the past and not from some kind of sovereign will. There are some customs, traditions, norms, and rituals which are complimentary or accessories to the principal or main Adat, but they are still referred to as Adat. Those customs are mostly social rules or cultural rituals which do not have any legal force. I refer to them as secondary or complementary Adat. The principal or main Adat and the secondary or complimentary Adat are not the same

²⁵⁵ Lon L. Fuller, “Human Interaction and the Law” (1969), Vol.14:1, *The American Journal of Jurisprudence*, at 1.

²⁵⁶ Gerald J. Postema, “Law as Command: The Model of Command in Modern Jurisprudence” (2001) *Philosophical Issues* 11, *Journal of Social, Political, and Legal Philosophy*, Blackwell Publishing Ltd, at 472. doi: 10.1111/0029-4624.35.s1.18., URL: <http://dx.doi.org/10.1111/j.1758-2237.2001.tb00036.x>

thing as Hart's primary and secondary rule in *The Concept of Law*.²⁵⁷ The secondary Adat are lesser in importance compared to the principal Adat, which is mandatory for the purpose being dealt with. The compliance or execution of the secondary Adat, e.g. a ritual, is optional or discretionary. An omission does not invalidate the legality or validity of the main Adat and the purpose. For example, the principal Adat for the solemnisation of marriage is the public announcement of the marriage before a *Tuai Rumah*. The ritual of "melah pinang", that is the cutting of a betel nut into two or more pieces to signify and conclude the solemnisation of marriage is just a ritual which is not mandatory. But if the ritual is held, it would entail other cultural rituals and obligations. Thus, the ritual of cutting the betel nut is a secondary or complementary Adat. The non-performance of the ritual does not invalidate the solemnisation of marriage by public announcement in the presence of a *Tuai Rumah*.

Many Adat Iban are believed or attributed to be derived from spiritual law.²⁵⁸ These Adat are mostly expressed as spiritual sanctions or prohibition (taboos). An Adat which is a spiritual sanction or prohibition is similar to a legal remedy of mandatory or prohibitory injunction, respectively. There is very little or no explanation for the application and enforcement of any Adat which is a spiritual sanction or prohibition. In some cases, the sanctions or prohibitions cannot be questioned because they are considered to be spiritual commands. Some of the receptions of the Adat are contained in the Iban mythology, for example, the Adat regulating

²⁵⁷ Hart's primary rules are obligations which impose duties and giving liberties to individual. Primary rules represent standard modes of behaviour that impose the members of society to perform or abstain from certain types of actions. Hart's secondary rules are rules about rules which allow the creation, alteration, or extinction of the primary rules. They are institutions for the recognition and enforcement of primary rules. See HLA Hart, *The Concept of Law* HLA Hart, *Concept of Law* in Marcus G. Singer (1963) 60:8 *The Journal of Philosophy* at 199. URL: <http://www.jstor.org/stable/2023267>

²⁵⁸ The data was given by two participants, in the persons of Edmund Langgu Saga and Jimbun Tayai. The Divine or sacred law is believed to be given or taught by the Spirits or Gods. See: John Borrows, *Canada's Indigenous Constitution* (University of Toronto Press, Toronto, Canada, 2011) at 24 - 28.

funeral, burial and bereavement²⁵⁹ and incest.²⁶⁰ The Adat which are attributed to be derived from spiritual law are those whose receptions from Gods or Spirits are not specifically known or narrated in the Iban mythology but presumed to be spiritual law.

The Adat which prescribe the rules and procedures for funerals, burials, and bereavement are believed to be taught (*diajar*)²⁶¹ by a Spirit known as “*Puntang Raga*” to an Iban leader named *Serapuh*. The Spirit taught *Serapuh* that every dead person must be accorded a proper respect for funerals, burials, and bereavement. Before the reception of the knowledge, the Iban did not have any formal rules and procedures for funerals, burials, and bereavement. The corpses were carried into the jungle and left behind to the mercy of the elements and wild animals.²⁶² This is a very old mythology handed down by oral tradition. The narrative does not mention the place and date for the reception of the advice. The details of the rules and procedures for the rituals and Adat for funerals, burials, and bereavement could have been developed further by the Iban ancestors throughout the centuries. The procedures and rituals which are practised today are not likely to have all originated from the conversation between *Serapuh* and the Spirit. The rituals and Adat are very detailed and elaborative to be told and memorised in a short period of time. The period for the giving of advice could not be very long. No Iban elders have any knowledge as to where and how long the conversation took place.

²⁵⁹ The Adat regulating funeral and bereavement is believed to be given or taught by a Spirit called “*Puntang Raga*” to an Iban leader called “*Serapoh*.”The Adat was narrated by Edmund Langgu Saga and the late Mandie Anak Melana.

²⁶⁰ The Adat on incest and the rituals formalising the lower degree of incestuous relationship were believed to be given is taught by a Spirit called “*Sengalang Burong*” to an Iban ancestor named “*Sera Gunting*”.

²⁶¹ “*Ngajar*” is literally advising or teaching in English.

²⁶² This mythology has been told many times to me. The narrative was confirmed by Datuk Edmund Langgu Saga and Janang Ensiring during the various interviews and discussion with the researcher in 2013. Janang Ensiring is a Research Officer with Tun Jugah Foundation in Kuching, Sarawak.

The Adat regulating incest and the rituals formalising the lower degree²⁶³ of incestuous relationships were taught by the Iban God of war called “Sengalang Burong” to an Iban ancestor named “Sera Gunting”. Incestuous relationships of the higher degree were prohibited but incestuous of the lower degree could be formalised through the ritual of “*besapat*” and payment of heavy fine and performance of purification ritual.²⁶⁴ If the guilty couple could not pay the fine they would be sentenced to death. The Spirit, “Puntang Raga”, ordered the abolition of the death penalty and reduced the fine for the lower degree incest. The Adat was conveyed by the Spirit, “Puntang Raga”, to an Iban leader named “Beti” and a group of men while they were about to carry out the execution of a couple who could not afford to pay the heavy fine.

Another source of Adat is natural law. Natural law is an ambiguous and a very complex term and theory to define. Attempts to define natural law by philosophers such as Aristotle, Thomas Aquinas, Bentham, Austin, Dworkin, Hart and many others have not found a universally agreed definition. Aristotle (384–322 BCE) argued that what was right by nature was not the same as right by law. He believed that there was a natural justice that was valid everywhere with the same force, and that this natural justice is positive, and did not exist by people thinking this or that.²⁶⁵ Hans Kelsen argues that Aristotle’s natural law is a constituent part of the positive law of the state.²⁶⁶ Thomas Aquinas defines natural law as 'the rational creature's participation in the eternal law'. Aquinas argues that natural is not 'automatic' or 'mechanistic', and participation is both reasonable and natural. Each person must use his or her reason to discover what 'right reason' in any situation is, and 'right reason' always conforms to the order inscribed by the

²⁶³ The classification of incest into lower and higher degree is discussed in Chapter 4, paragraph 4.2.6 *infra*.

²⁶⁴ The incestuous relationship is discussed in paragraph 4.2.6 *infra*.

²⁶⁵ Bernard Yack, “Natural Right and Aristotle's Understanding of Justice” (1990) 18:2 *Political Theory* at 218. URL: <https://www.jstor.org/stable/191342>.

²⁶⁶ Hans Kelsen, “The Foundation of the Theory of Natural Law” in Tony Burns, “Aristotle and Natural Law” (1998) 19: 2 *History of Political Thought* at 147. *JSTOR*, www.jstor.org/stable/26217500. Accessed 16 Apr. 2020.

Creator in nature.²⁶⁷ In certain societies, such laws are derived from legal reasoning, guidance, standards of judgement and analogies developed through the observations and experiences interacting with the physical world, including the land, forest, water, animal, natural circles and natural consequences.²⁶⁸ Natural law has developed intensively throughout the centuries and became the basis for law on human rights in some societies.

The Iban have no clear technical definition of natural law. According to the description given by some of my participants, there are some Adat Iban which seem to fall within the early definitions of natural law. The Iban concept of natural law is based on the idea of “right” and “wrong”. The Iban ancestors could have perceived the notion from their observation or experience. They found certain things or systems to be useful and good, and other things to be bad, destructive, or evil. What constitutes “right” and “wrong” was adopted as a standard and culture of doing things and evolved into Adat. For example, it is generally accepted among the Iban that killing a person is wrong, and that to punish someone for killing a person is right. Another example is theft. Stealing is legally and morally wrong. It is an act of taking away something of value or useful from the owner without permission and which deprives the owner permanently of the enjoyment or benefit of such thing. The thief is enjoying the benefit without earning it. Similarly, plagiarism is intellectual theft which is legally and morally prohibited in academic disciplines and ethics. However, not all acts of taking away something of value without permission of the owner would amount to theft in the Iban community. Generally, necessity is an exception in the Iban culture, but subject to reasonableness. It is not a breach of Adat if a hungry person picks some fruits from someone else’s orchard and consumes them there and then to satisfy his hunger. But it is

²⁶⁷ Thomas Aquinas, *Summa Theologiae*. Rome: Marietti in Stephen Pope, *Reason and Natural Law*, Gilbert Meilaender & William Werperowski, eds, (Oxford Handbook of Theological Ethics, 2007) at 151.

²⁶⁸ John Borrows, *Canada’s Indigenous Constitution* (University of Toronto Press, Toronto, Canada, 2011) at 28 - 35.

a breach of Adat if he fills his basket and brings the fruit home. The act of bringing the fruits home is not a necessity anymore but depriving the owner permanently of the fruits and the fruits of his or her labour. Necessity is an immediate need to satisfy an emergency need, e.g. thirst or hunger. Thus, murder and theft are examples of Adat derived from natural law. The acts of taking away a person's life and property are wrong. The Adat evolved from the natural ability to judge that certain acts or omissions are naturally wrong.²⁶⁹

Some Adat Iban are made through deliberative law-making systems. A deliberative law-making system is a process and method of Adat making by deliberation (*berandau*)²⁷⁰ in a longhouse meeting (*baum*).²⁷¹ This is similar to positive law making. The more recent Adat were made through this method. The Adat requiring every family's mandatory attendance and participation at funerals and other important communal activities is an Adat made through deliberation. In every Iban community, any matter involving or pertaining to the interest of the longhouse or community must be formally deliberated by the *Tuai Rumah* and heads of families in a meeting. Other members of the community may attend such meetings and air his or her opinion. However, the decision is normally made by consensus or compromise. Adat are now made through the deliberative system.

A lot of Adat Iban are positivistic law. These Adat are normally derived from declaration, proclamation, rules, and practices that the Iban ancestors recognised and accepted solely based on the perception of the authority of the person or persons proclaiming them. John Borrows says similar things in his book, *Canada's Indigenous Constitution*, "another source of Indigenous law can be found in the proclamations, regulation, codes, teaching, and axioms that are regarded

²⁶⁹ The Adat was narrated and explained by Edmund Langgu Saga, a participant.

²⁷⁰ The term "*berandau*" means a deliberation in a meeting.

²⁷¹ "*Baum*" is literally meeting in English.

as binding or regulating people's behaviour."²⁷² Some powerful or influential Iban ancestors or leaders in the past had pronounced or declared certain practices or procedures as Adat which are still practised today. The Adat is contained in an Iban narrative or story. For example, the Adat "*derian*" (dowry)²⁷³ and "*pati nyawa*", which is a rule regulating payment of compensation for causing death by intention or accident.²⁷⁴ Other examples are the Adat regulating the rights of gathering, hunting, and fishing within a longhouse territorial domain. These Adat were mostly Adat declared by the leaders and pioneers of new land in the past.

The codification of Adat Iban under the *Adat Iban* 1993 is an example of both deliberative and positivistic Adat. The *Adat Iban* 1993 was the outcome of a series of discussions and deliberations among the Iban Paramount Chiefs and Chiefs which were approved by the Governor in Council. This is the positivistic aspect of the Adat, i.e. an Adat made by a state authority by virtue of the delegation of power to make law.

2.5 The Native Courts

The Native Courts are the epitome of the political and legal recognition of some of the native laws in Malaysia. The establishment of the first Native Court by Brookes' government in 1870 paved the way for the official recognition and development of some natives Adat. The Native Court was a quasi-judicial system, which was a blend of some elements of the English legal system, administrative systems and traditional leadership systems. This system is still intact today and used as the Native Courts system. The continued existence of such quasi-judicial

²⁷² John Borrows, *Canada's Indigenous Constitution* (University of Toronto Press, Toronto, Canada, 2011) at 46 - 51.

²⁷³ The Adat was started by Tindin, a powerful Iban leader. The data was given by Edmund Langgu Anak Saga.

²⁷⁴ An Iban leader named Kanyong declared and propagated the Adat called "*Pati Nyawa*". See: Benedict Sandin, *Sea Dayaks of Borneo: Before White Raja Rule*, (McMillan & Co. Ltd., 1967) at 8. "*Pati nyawa*" is literally "compensation for death" in English.

system may be a paradox. It may be inferred as a continuation of colonisation as there are not many decolonisation projects²⁷⁵ being done at the moment to make these courts and system “native”. Ramy Bulan²⁷⁶ says that these courts are a hybrid of customary law court structures, combining the traditional leadership structure with State administrative personnel as well as the judicial officers. These courts administer a system of laws entirely different from the laws administered in the civil courts in Malaysia.²⁷⁷ The present Native Courts are established under the *Native Courts Ordinance, 1992*.²⁷⁸ The legal pluralism as practised in Malaysia allows the establishment of the Native Courts in Sarawak. There are three separate and distinct legal systems operating alongside each other in Malaysia, namely: the Civil Courts,²⁷⁹ the Sharia Courts,²⁸⁰ and the Native Courts.²⁸¹ This section describes and discusses the function, system of justice, jurisdiction, power, Iban participation, and some weaknesses of the courts in the administration and enforcement of Adat Iban.

The function of the Native Courts is to administer, adjudicate, and enforce the native law in Sarawak. The Courts’ jurisdiction is restricted to cases of native law or custom, religious matters, and matrimonial or sexual matters. Technically, any matter or cause which falls within the definition of customary law under Section 2(1) of the *Native Courts Ordinance, 1992* come under

²⁷⁵ Gordon Christie, “Indigenous Legal Theory: Some Initial Considerations” in Napoleon, V.R. Ayook: Gitksan Legal Order, Law, And Legal Theory (Ph.D. Law Dissertation, University of Victoria, BC, Canada, 2009) at 241.

²⁷⁶ Ramy Bulan, “Dispute Resolution: Restorative Justice Under Native Customary Justice In Malaysia” in Wilton Littlechild & Elsa Samatopoulou, eds, *Indigenous People’s Access to Justice, Including Truth and Reconciliation Processes* (Columbia University, 2014) at 239.

²⁷⁷ *Ongkong ak Salleh v David Panggau ak Sandin and Anor* 1983 (1) Malayan Law Journal. 419. (Per Seah J).

²⁷⁸ The Native Courts were first established in 1870 by Rajah Charles Brooke.

²⁷⁹ The courts which administer civil law and has general jurisdiction over every citizen, or permanent resident, or visitors to Malaysia.

²⁸⁰ Sharia is spelt “Syariah” in Malaysia. These courts administer Sharia law or Islamic law relating to among others succession, testate and intestate, betrothal, marriages, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts and Malay custom. These courts and their jurisdiction apply to Muslims only.

²⁸¹ The Native Courts are State’s courts established in Sabah and Sarawak which administer only native laws. See Item 13 of the Ninth Schedule, List IIA, - *Supplement to State List for States of Sabah and Sarawak* under Article 95B(a) of the *Federal Constitution* of Malaysia.

the jurisdiction of the Native Courts.²⁸² These courts do not have jurisdiction on any Islamic family matters, inheritance, or succession, or testacy or intestacy, and civil cases under the jurisdiction of the Sharia courts. However, disputes over land held under the native customary rights between natives professing the religion of Islam come under the jurisdiction of the Native Courts. Under such case the issue for determination is a matter under Adat and not an Islamic matter. Except for religious and matrimonial or sexual matters regulated by Adat, the parties must be natives and subject to a native system of personal law. Any Iban who has been converted to Islam is not subject to the Adat and the Native Courts in any case or cause which falls within any Islamic law and the jurisdiction of the Sharia Courts.²⁸³ The Native Courts have no jurisdiction to hear and adjudicate any case which is criminal in nature under the *Penal Code* (Act 574).²⁸⁴

The Native Courts are technically divided into two sections, namely the community leaders' section²⁸⁵ and the administrative officers and judicial officers' section. The courts under the community leaders' section are presided over by the *Tuai Rumah* and the other Chiefs (*Temenggong* [Paramount Chief], *Pemanca* [District Chief], *Penghulu* [Chief]). The courts under the administrative officers and judicial officers section are presided over by administrative officers and a Judge or a person who has held the office of a Judge or qualified to be appointed as a Judge of the High Court.²⁸⁶

²⁸² Section 2(1) of the *Native Courts Ordinance*, 1992 and see paragraph 2.5.3 *supra*.

²⁸³ Matters relating to Islamic law and Islamic religion are state matters under the Ninth Schedule, List II, of Article 95B of the Federal Constitution.

²⁸⁴ *Penal Code* (Act 574) is a Malaysian law relating to criminal offence and a codification of criminal offences.

²⁸⁵ Section 4(1)(b)(c) and (d) of the *Native Courts Ordinance* 1992.

²⁸⁶ Section 13(3)(a) and (b) of the *Native Courts Ordinance* 1992.

The community leaders section adjudicates, inter alia, cases on matrimonial, paternity claim, sexual, inheritance, succession, and native customary rights land (NCR)²⁸⁷ disputes. The Chief's Court and the Headman's Court are first instance courts. However, the Chief's Court hears appeals from the Headman's Court. The Chief's Superior Court is the highest and final appellate court in any cause or matter of Adat which is not involving any dispute relating to any overlapping claim over native customary rights (NCR) land.²⁸⁸ The administrative officers and judicial officers section only hear NCR land disputes cases. The District Native Court is a first instance court, while the Resident's Native Court²⁸⁹ and the Native Court of Appeal are appellate courts.²⁹⁰ The Native Court of Appeal is the highest appellate court in the Native Courts system. The hearing and judgment on NCR dispute cases are based on the various Adat regulating property matters, such as Adat on land clearing, inheritance, succession, to name just a few. NCR cases are similar to land or property dispute cases in other societies.

The concept of justice at the community leaders' section of Iban communities is based mainly on the traditional philosophy of restorative justice. The emphasis is the promotion and maintenance of peace, harmony, and unity. Conflicts between members of family or between individual members of a community are commonly settled by mediation or conciliation. Even in cases where injury is inflicted or a crime is committed, a restorative justice approach emphasizes the repairing of harm done to the injured party rather than punishing the offenders. Under the restorative approach, a crime is treated as a "violation of people and relationship" which gives rise to an "obligation to make things right."²⁹¹ A similar concept of justice is practised by many

²⁸⁷ NCR is an acronym for "native customary rights" in Sarawak.

²⁸⁸ Section 13(1)(b) and (b) of the *Native Courts Ordinance* 1992.

²⁸⁹ Section 13(1)(d) of the *Native Courts Ordinance* 1992.

²⁹⁰ Section 5(3)(a) of the *Native Courts Ordinance* 1992.

²⁹¹ Ramy Bulan, "Dispute Resolution: Restorative Justice Under Native Customary Justice In Malaysia" in Wilton Littlechild & Elsa Samatopoulou, eds, *Indigenous People's Access to Justice, Including Truth and Reconciliation Processes* (Columbia University, 2014) at 231 - 332.

Indigenous peoples all over the world from Native American and Indigenous peoples in Canada to African and Asian, Hebrew and Arabic and many other cultures. Indigenous customary justice has largely contributed towards the practice and acceptance of restorative justice reflecting the intention to repair harm to promote reconciliation and reassurance instead of getting retribution or to inflict equivalent harm.²⁹² However, the community leaders section does mete out retribution or punishment in cases of criminal in nature, such as vandalism, as exemplary justice.

The territorial jurisdiction of the Native Courts is confined to the territorial limit of the State of Sarawak. These courts have no jurisdiction in any other states in the federation of Malaysia. Thus, an Iban who breaches an Adat and then escapes or travels to any other state in Malaysia cannot be brought back to face the charge in a Native Court. There is no provision under the *Native Courts Ordinance* 1992 to summons or arrest the offender outside the state of Sarawak. This is one of the weaknesses of the Native Courts.

The powers of the Native Courts to impose fine, restitution, and child maintenance are very limited. A Native Court can only order an amount not exceeding RM300 (RM means Malaysian Ringgit) for a fine or restitution. An order for child maintenance should not exceed RM 200 per month. This gives the image that these courts are inferior and less important compared to the federal Civil Courts or Sharia Courts. There have been a lot of proposals to increase the amount of fine, restitution and child maintenance but the Iban and the other natives have been adamant and very reluctant to support and agree to the proposal. The main reason is that most Iban are poor and would not be able to pay the fine, or restitution, or maintenance if the quantum is to be at par with the monetary value of about a century ago. If we look back at the value of \$100

²⁹² Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Scottsdale, PA: Herald Press, 1990) in Wilton Littlechild & Elsa Samatopoulou, eds, *Indigenous People's Access to Justice, Including Truth and Reconciliation Processes* (Columbia University, 2014) at 231 - 332.

Sarawak dollars about a century ago, it would be a lot of money nowadays. In 1879, 1 Sarawak dollar was equivalent to 4 British shillings.²⁹³

The Native Courts are an institution and forum where the Iban and all the other natives participate in the administration and enforcement of their own Adat as Judges, Magistrates, presiding officers, and assessors. Any person (man or woman) holding the appointment of *Temenggong* (Paramount Chief), or *Pemanca* (District Chief), or *Penghulu* (Chief) and *Tuai Rumah* (community leader) is automatically ex-officio presiding officer of the lower courts. This is a very important opportunity and responsibility for the Iban and the other natives to participate in the administration and enforcement of their own Adat.²⁹⁴ However, in view of the statutory definitions of customary law and Adat and the subordination of Adat vis-à-vis the state law, there is a lingering doubt on the power and freedom of Native Courts in the interpretation and application of Adat or customary law.

From my observation, the Native Courts have a very limited power to give lawful effect to those Adat which are not yet given lawful effect by the law of Sarawak or the Civil Courts (High Courts) of Malaysia.²⁹⁵ If the Native Courts are empowered to give lawful effect to such Adat it could lead to some serious conflicts between some State law and some Adat Iban. Paradoxically, any Adat which is not recognised by the state may exist and operate outside the state legal system if the Iban communities recognise and accept such Adat. These Adat are enforceable between the Iban who are subject to the same personal law. However, there would be a point where the Adat and the state law would clash, and the state law would prevail. For example, the Adat Iban

²⁹³ Sarawak Government Almanac, 2020, Chronology of Event at 2.

²⁹⁴ See John Borrows, "Indigenous Legal Traditions in Canada" (2005) 19 Wash UJL & Pol'y 167 at 195 -196.

²⁹⁵ The High Court of the federal judiciary has the power to decide whether an Adat or a custom is legally enforceable or not.

regulating land ownership states that the ownership over land and waters within the territorial domain of a longhouse either belong to an individual member or members of the longhouse community. The issues of native rights under their Adat to occupy or utilise over the land which they claim to be their territory or territorial domain have been a persistence problem between some Iban and the Sarawak government.²⁹⁶ According to section 5(1) of the *Land Code* [Chapter 81(1958 Edition)] any native person who cleared the land of virgin jungle before 1 January 1958 shall occupy and use the untitled land as a licensee by virtue of his native customary rights. And section 10(3) of the same *Land Code* states that no native customary rights shall accrue to a native person if he cleared the land on or after 1 January 1958, unless he has obtained a permit to occupy the Interior Area Land from the Superintendent of the Land and Surveys. In 2018 the Sarawak state government took some bold political and legislative actions in the recognition of the native customary rights over land claimed by natives as their exclusive economic zone (*pemakai menoa*) and communal forest reserves (*pulau galau*). The recognition was made through the amendments to sections 5, 6 and 18 the Sarawak *Land Code* (Chapter 81 [1958 Edition]).

One of the major weaknesses of the Native Courts is relating to the personnel adjudicating the cases. Despite the establishment of the courts since 1870, presently, only a very few of the magistrates are academically and professionally trained in law let alone on Adat Iban or other native Adat for that matter. Most of the magistrates are recruited from among the retired senior

²⁹⁶ Such claims have been a source of major legal conflicts between many Iban and Sarawak government. Land in Sarawak belongs to the State. Sarawak state government may alienate land by leasing to any Sarawakian or corporate body and issue propriety title to the land. In Sarawak not all parcels of land have been settled or surveyed and issued with titles. Any parcel of land which has not been issued with title is state land. Any native of Sarawak may occupy any state land under the native customary rights provided that such native could prove that he or she fulfilled certain conditions under the Sarawak *Land Code* [Chapter 81(1958 Edition)]. One of the conditions is that the land had been cleared of virgin jungle and occupied since or before January 1st, 1958. See section 5(1) of the Sarawak *Land Code* [Chapter 81(1958 Edition)], i.e. the Land Law of the State of Sarawak.

government administrative officers.²⁹⁷ They are presumed to have some knowledge and competency in Adat Iban or other native Adat by virtue of the appraisals conducted through the Sarawak government examinations in the 1970s and 1980s. Further, they have some administrative and judicial experience dealing with Adat cases as administrative officers and third-class magistrates while serving in the districts in Sarawak. The problem is further aggravated by the fact that there is no institution or facilities to train people to become magistrates and judges for the Native Courts. Unless and until these weaknesses are addressed, the problem would be endemic and could impede the development of professionalism in the native law judiciary. A restructuring of these courts and establishment of training facilities are urgently required.²⁹⁸

2.6 Colonial Intervention in Adat Iban

Law has been described as the most important instrument for colonialism. 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. The societies had their own distinct sociocultural organization and legal culture.²⁹⁹

The colonial intervention in law brought mixed results to the Iban and other natives. The transplanting of English law in Sarawak displaced and abolished many native laws and pushed

²⁹⁷ These officers were recruited as Sarawak Administrative Officers in 1970s. Among others, they were required to sit and pass the Sarawak Government Examinations for confirmation and promotion. One of the papers which they must pass was the Local Law and Customs, which examined their competency in some native laws and Chinese customs and traditions.

²⁹⁸ A restructuring exercise of the Native Courts was on-going at the time of writing this dissertation.

²⁹⁹ Sally Engle Merry, "Law And Colonialism" (1991) 25: 4 Law & Society Review at 890.

the surviving native law to the periphery of the state legal and administrative systems. The most vivid impact of the colonial intervention was the adoption of the English law for the governance of Sarawak during the British colony. Even today most of the state law of Sarawak are originated from the English law. The philosophy of Sarawak state law is still basically based on English legal principles. For examples, criminal, tort and contract law are still substantially based on English law. The federal judiciary is based on the English legal system and most of Malaysian federal law originated from English law. Thus, the legacy of colonial intervention in law is still very much alive in Malaysia. The impact of globalisation and international conventions which Malaysia has ratified have, to a certain extent, perpetuated the colonial intervention in law, for example, the *International Labour Law*.

Sarawak was ruled by the Brookes dynasty, a British family, from 1841 until 1946³⁰⁰ and became a British colony from 1946 to 1963. English law was formally applied by the Brookes through *Order L-4 (Laws of Sarawak Ordinance)* 1928, which was applicable to native laws and local conditions.³⁰¹ The abolishment of slavery in 1888³⁰² by the Brookes also abolished all the Adat and culture relating to slavery in the Iban community. The emancipation of slavery was formalised by an Adat called “*betembang*”, which was a public announcement of the emancipation and adoption of slaves by their masters as their children. The Adat normalised the relationship between the slaves and their masters and after the “*betembang*” the slaves became members of the former masters’ families. The slaves could choose complete freedom. However, most of them had nowhere to go and had no relatives or kin to go to. The former masters

³⁰⁰ The present day Sarawak was acquired by the Brooke from the Sultan of Brunei in stages from 1841 until 1905. When Sarawak was handed over to James Brooke in 1841 by the Sultan of Brunei it was more or less the size of the present Kuching district. Sarawak was given to James Brooke as a reward for helping the Sultan to suppress a rebellion against the sultan.

³⁰¹ 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.

³⁰² Sarawak Government Almanac, 2020, Chronology of Events at 3.

provided land to the emancipated and adopted slaves. After the abolition of slavery, it was, and still is, an offence under Adat Iban to call someone a slave or a descendant of slaves. The Adat “*betembang*” can be considered as wisdom and one of the earliest human rights law made and introduced by the Iban leaders for their communities. As a result, the former slaves and their descendants were not discriminated against.³⁰³ This was a case of human exploitation of fellow humans turned into salvation. Slavery was abolished in the United States of America (U.S.A) through the 13th Amendment of the U.S.A Constitution in 1865. However, the legacy of slavery somehow led to racial prejudices and discrimination faced by former slaves and their descendants which culminated in the segregation policies in 1950s.³⁰⁴

Brookes also introduced the various Orders, such as the *Court’s Order 1870* and *Marriage Order 1871*.³⁰⁵ The Native Court was established in 1870 as Probate and Divorce Court for the Muslim natives to manage and settle their marriage engagement, rights and divorce cases, and division of property occasioned by divorce or death. The court was reconstituted as Native Courts under the *Native Courts Order 1940*. The powers and jurisdiction of these courts were extended to the other natives for the administration and enforcement of their Adat (customary law). These courts are the precursor of the present Native Courts in Sarawak. Before the establishment of the Native Courts, the natives, including the Iban, had no systematic judicial system. These interventions may be considered as a good “civilising mission”.

³⁰³ The Adat and data on slavery were to criminalise provided by Edmund Langgu Saga, a research participant.

³⁰⁴ Racial segregation of schools was constitutional if the segregated public facilities were constitutional as long as the black and white facilities were equal to each other based on *Plessy v. Ferguson (1896)* judgement. The decision was overruled by *Brown v. Board of Education (1954)*, which held that racial segregation in public schools violated the Equal Protection Clause of the fourteenth amendment.

³⁰⁵ Justice Dato’ Abang Iskandar bin Abang Hashim, “Native Customary Laws and Rights in Sarawak: A Brief Insight” (2018) *Journal of the Malaysian Judiciary* at 4.

The restructuring of the native leadership system by the Brookes in 1883 brought adverse political and legal implications to the power and authority of the *Tuai Rumah*, longhouse, community, and Adat as an autonomous political entity. Before the arrival of the Brookes, the Iban who lived in the interior part of Borneo had never acquiesced or acknowledged of being ruled by any ruler or anybody.³⁰⁶ In 1883 the “*Penghulu system*” was introduced.³⁰⁷ A *Penghulu* was a native Chief appointed by the government to take charge of all the *Tuai Rumah* and the longhouse communities within a specifically designated area. The *Tuai Rumah* and the communities were for the first time subordinated to a person or authority. They lost their absolute political power and authority over the longhouse, territorial domain, and Adat.

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’.³⁰⁸ One of the most devastating laws which abrogated the Iban and the other natives’ land rights was the *Land (Classification) Ordinance* 1948.³⁰⁹ A provision of the 1948 Ordinance only entitled the natives to occupy interior area land and to create native customary rights as licensees on Crown land. Native customary rights are rights accrued from the customs or practice of clearing virgin jungles for crops cultivation, hunting, fishing and foraging, burial and

³⁰⁶ In the 16th century Brunei claimed suzerainty over the whole coast of Borneo. But its power declined from the mid-17th century. See C.M. Turnbull, “Brunei History” in Eur, *The Far East and Australia* 2003, 34th ed (Psychology Press, 2002) at 203 – 204.

³⁰⁷ Peter Mulok Kedit. “Iban Leadership: Some Reflections on the *Penghulu System*” (2012) 2 *Ngingit, The Tun Jugah Foundation Journal*, at 31 - 33.

³⁰⁸ 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.

³⁰⁹ Under the *Land (Classification) Ordinance* 1948 was classified into mixed zone land, native area land, interior area land, native communal reserve, reserved land, and native customary land.

ceremonial purposes. The clearing and cultivation of virgin jungles conferred permanent rights onto the original clearer and such rights were inheritable and transferable. As a licensee, a native held the land at the discretion of the Colonial government, the owner had no proprietary rights or legal title to the land which he or she and his or her ancestors had held or owned and occupied or used for generations occupied. The reduction of native rights from ownership to a mere licence gives a presumption that natives had only a usufructuary right with no kind of ownership.³¹⁰ This rights only allowed the natives to use and enjoy the property belonged to the Crown of England. McNeil opines that to deny the existence of a valid native perspective on land ownership, based on an elaborate system of rules and customs, was 'characteristic of the self-serving ethnocentricity upon which colonialism is based'.³¹¹ Amendments were made to the Ordinance 1948 through the *Land (Classification) (Amendment) Ordinance* 1955 which stopped the creation of customary rights over interior area land³¹² from April 16th, 1955 unless a permit was obtained from the District officer. The *Land Code* (Chapter 81 [1958 Edition]) incorporated the amendments and came into force in January 1958. The *Land Code* (Chapter 81 [1958 Edition]) continues to be Sarawak land law until today but has undergone many amendments since 1963.

The British colonial government enacted the *Local Authority Ordinance* 1958 and vested the power on the British Governor to appoint the native community "Headmen".³¹³ The "Headmen" were confined to native Chiefs and Malay village leaders. The Iban *Tuai Rumah* were still selected and appointed by the individual communities. The *Tuai Rumah* was not part of the

³¹⁰ 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 48.

³¹¹ Kent McNeil, 'A Question of Title: Has the Common Law been Misapplied to Dispossess the Aboriginals' (1990) *Monash Law Review* in 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 48.

³¹² Interior area land refers to land located in the interior part of Sarawak.

³¹³ Section 6 of the *Local Authorities Ordinance*, 1958.

government administrative system but acknowledged as the representatives of Iban communities to criminalise. The Native Courts were restructured again with the passing of the *Native Court Ordinance* 1955 (Chapter 43). This Ordinance restricted the recognition and application of customary law to “a custom or body of customs to which the law of Sarawak gives effect.” The definition excluded many of Adat Iban and made the Adat just like rules of private social clubs or associations. This definition of customary law is adopted by the *Native Courts Ordinance* 1992 and still stands today.

2.7 Adat and women’s rights, gender equality, and LGBTQ rights

The mention of women’s rights and gender equality in this paragraph is an acknowledgment and awareness of the importance of these principles in some subject matters discussed in this dissertation. Adat Iban are very ancient law which evolved when women’s rights, gender equality, and LGBTQ rights were never heard of or obscured by male privileged society or male culture dominance. This is a question of how dynamic and flexible the Iban and the Adat Iban are in dealing with this social issues, some of the recommendations and demands for women’s rights and gender equality under the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) and the rights of lesbian, gay, bisexual, and transgender (LGBT) under the *United Nation Universal Declaration of Human Rights* 1948 (UDHR) will be considered in the discussion below. CEDAW has been adopted by the United Nations on December 19th, 1979 and came into force as a human rights treaty on September 3, 1981. This Convention has been called “the definitive international legal instrument requiring respect for and observance of the human rights of women; it is universal in reach, comprehensive in scope, and legally binding in character.”³¹⁴ Malaysia ratified CEDAW on July 5th, 1995 with several controversial

³¹⁴ Rebecca J. Cook, “Reservations to the *Convention on the Elimination of All Forms of Discrimination Against typical voice spell Women*” (1990), 30 VA. J. INT’L L. 643 at 1.

reservations mainly on article 16 relating to women and family and withdrew articles 2(f), 9(1), 16(1b), (1d), 1(e) and 1(h) in 1986. Articles 5(a), 7(b), 9(2), 11, 16(a), 1(c), 1(f) and 1(g) remain as reservations.³¹⁵ The recommendations and demands stipulated under CEDAW and UDHR are directed to the governments either as signatories to the Convention and as member countries under the United Nations. In the case of Adat Iban, any adoption of any of the recommendations or demands under CEDAW and UDHR shall comply with Malaysia's law, domestic policies, and international policies and stance on international conventions, treaties, and declarations, to name but a few. Any adoption of any matter under the articles which Malaysia has withdrawn or still remain as reservations, may be challenged by the Sarawak state government³¹⁶ on the basis that any Adat which is repugnant or inconsistent with any written law may not prevail.³¹⁷ Specific issues on women's rights, gender equality, and the human rights of LGBT will be discussed in Chapter 3 and Chapter 4. A brief and general commentary on the position of Adat Iban with regard to the recommendations and demands of CEDAW is appended below.

As I mentioned at the beginning of this section, Adat Iban are ancient law and not perfect for the regulation of the present days Iban social relations in the Iban communities or society in general. But at least the Iban still have their Adat which are substantially intact, except for the diminishing relevance. In general, Adat Iban are quite neutral. Whether Adat are gendered or otherwise depends on which gender perspective one is viewing the Adat. To those from the men perspective, the Adat are equal to everyone and not gendered. But if you view Adat from the women perspective, there are inequalities and gendered in favour of the men. Women may

³¹⁵ Sharifah Syahirah Syed Sheik, "The Implementation of CEDAW on Malaysia: A Human-Rights Based Analysis" (2010) 25:3 Sarjana at 60.

³¹⁶ Native law are state of Sarawak matters under Item 13 of the Ninth Schedule to Article 95B(1)(a) of the Federal Constitution of Malaysia.

³¹⁷ Section 9 of the *Native Customs (Declaration) Ordinance* 1996.

argue that the women did and still do not fully participate in the making and administration of Adat. Under the concept of gender binary, it is quite difficult to accept the contention that “[A]ll law is gendered: this means that the way people experience the consequence of the law depends on their gender and sexual orientation.”³¹⁸ This contention seems to over stretched the meaning of gender. Under gender binary, a gendered law is where certain provision(s) of the law specifically gives preference or advantage to certain gender. Gender and sexual orientation may be too personal to give gender to any law of general application to other people. For example, the Catholic Church reserving priestly ordination to men alone.³¹⁹ However, if we look beyond the gender binary or the two sexes, personal feelings or opinion influenced by gender and sexual orientation may classify law into gender and any other things. In the case of Adat Iban, the Adat may be viewed differently by the different “groups of sexual orientations”, i.e. LGBTQ. Thus, Adat may be viewed as discriminatory against one group or gender biased by another. The same Adat may be viewed as fair and equal another group. The Adat can never be perfect and would not satisfy everyone need and aspiration. It is in the interpretation, or application, or execution of the Adat that inequality or unfairness could occur. This human action that would lead to the classification and implication of Adat according to gender and sexual orientation. Men domination in the interpretation, administration, and execution of the Adat has been a problem to ensure fairness and justice under gender equality and women’s rights the Human societies have not found the perfect system which would please everyone.

Valerie Mashman argued that the Iban social life has been projected as dominated by male values. Iban history has emphasised the dominance of the male prestige system and minimised the importance of women. This was because the anthropologists have, for most part, been men

³¹⁸ Indigenous Law Research Unit (ILRU), *Gender Inside Indigenous Law Toolkit* (University of Victoria 2016) at 25.

³¹⁹ Pope John Paul II, Apostolic Letter, *Ordinatio Sacerdotalis* (1994).

and have been biased by their own perceptions of gender. It is possible to approach gender relations from a different perspective. Women have their own system of prestige differentiation and do not derive their own status solely from the male value system.³²⁰ A female participant, Dr. Anna Durin, contended that the Adat on traditional leadership was gender biased and Adat on divorce and maintenance of children do not provide sufficient protection to women. However, she was of the opinion that Adat Iban are generally fair to the women. Iban women have been well respected in the Iban communities. Dr. Anna Durin asserts that women could earn high prestige as a “Maestro”³²¹ in weaving (*Indu tau nengkebang, tau takar, tau ngar*³²²) which is a title for the highest talent and knowledge in weaving. In the past, such prestige was deemed to be similar to the prestige of bravery and valour accorded to the Iban war leaders or warriors. Nowadays, social prestige is judged from personal achievement or success in academic qualifications, position in the public and private sectors, and entrepreneurship. The means to achieve success in these fields, e.g. education and trainings, are not restricted to any gender in the Iban communities now, and this is in line with the recommendation of article 10 of CEDAW. From my personal observation, in the past it was customary not Adat for the Iban girls to stay at home with their parents and to help with the daily chores as they grew up. The boys were sent to schools or allowed to leave the family and look for jobs soon as they were able to fend for themselves. This custom can be viewed as either over-protective of the girls or the girls were subject to more control by the parents while the boys were given more freedom to go to school or movement. However, many Iban children, both boys and girls, are not going to schools or pursuing higher education because of poverty and ignorance on the importance of education.³²³

³²⁰ Valerie Mashman, “Warriors and Weavers: A Study of Gender Relations Among Iban of Sarawak” (1991) in *Female and Male in Borneo: Contributions and Challenges to Gender Studies* 1 Borneo Research Council Monograph Series at 232 – 233.

³²¹ The term “Maestro” is my description of the highest standard of talent and knowledge in weaving.

³²² “*Indu tau nengkebang, tau takar, tau ngar*” literally translated in English as “a lady of creativity and innovation”.

In my own experience, I was asked by my parents to discontinue my sixth form study (A level) because they could not afford to pay my school and boarding fees. According to my parents, my secondary education was good enough and I better get a job and help them to pay for my two sisters' secondary education. I did as I was told but I did not view it as a kind of discrimination or gender bias. It was a necessity to sacrifice in time of need. There were gender inequality or discrimination in favour of the boys in the Iban communities, but it was not widespread. Education up to secondary school level (high school in Canada) is free in Malaysia now, but only very recently. However, there are still costs to send children to school. Tertiary education is not free in Malaysia.

From my personal observation, the separation and specialisation of certain activities or sectors of the social, economic, and cultural activities into male and female sectors in the Iban communities are blurring the concept of gender equality as recommended by articles 3 and 5 of CEDAW. There is nothing that specifically states that certain activities must or must not be done by men or women in any Adat Iban. Women and men may swap their social, economic, and cultural activities as they wish. The separation and specialisation of activities and responsibilities are cultural practices and not Adat. For example, looking after infants and young children are the responsibilities of the women. Breast feeding of babies is one of the reasons for such specialisation of responsibility which men in the past could not do. Men are responsible for bringing food home.

Gender equality and the elimination of discriminations against women in the field of employment similar to the recommendation under article 11 of CEDAW have been practised by the Iban for centuries under the Adat and system of "*beduruk*", which is literally reciprocity in English. The Iban had no system of wage payment for employment or cash economy in the past. Employment

and payment for work were regulated and managed as Adat and a system of employment by labour exchange called “*beduruk*”, which was the backbone of the Iban economy. The Adat creates contractual obligation between a person who provides and a person who receives the benefit from the labour. The Adat is also similar to Hart’s primary rule in *The Concept of Law*.³²⁴ If a person works for another for a day in any activity or work, the person who has received the benefit from the work or labour must reciprocate and repay a day’s work or labour to the person who has provided the work or labour. The value of work provided by a woman is equal to the value of work provided by man. Thus, a one-day work of tree felling provided by a man can be reciprocated by a one-day work in any cash crop activity or other activity by a woman. This is an example of gender equality practised by the Iban communities. Today, the practice of labour exchange by reciprocity has almost been replaced by wage payment and the rate of payment for men and women are the same. The concept and practice of gender equality is still maintained. This Adat evolved through custom and culture in the Iban communities long before the idea of gender equality and women’s rights in the western societies came into existence. This Adat may be considered as natural law of the Iban. The ideas could have originated from within the Iban communities or learned through social intercourse with the other peoples in Borneo Island or beyond.

It is very easy to make accusation or assumption that ancient Indigenous law, like Adat Iban, as gendered law and applied and enforced for the maintenance and perpetuating male dominance and privilege communities or society. Such Indigenous law are always associated with sexism and oppression of women in the Indigenous societies.³²⁵ In the case of Adat Iban, such

³²⁴ See HLA Hart, *The Concept of Law* HLA Hart, *Concept of Law* in Marcus G. Singer (1963) 60:8 The Journal of Philosophy at 199. URL: <http://www.jstor.org/stable/2023267>.

³²⁵ See Joyce Green, ed, *Making Space for Indigenous Feminism* (Winnipeg: Fernwood, 2007) in Indigenous Law Research Unit (ILRU), *Gender Inside Indigenous Law Toolkit* (University of Victoria 2016) at 24.

accusation or assumption must be specific and well informed. The gender implication and bias must be understood from the history, culture, and survival of the Iban people which have tremendous significant influence in the evolution of the Adat. Culture and ways of living are not static and always changing according to the changing social surrounding. As such, Adat Iban have changed and blurring gender inequality. For example, the traditional leadership system has been abolished and replaced by a state law where many women have been appointed as *Tuai Rumah* (Headmen)³²⁶ and Chiefs (*Penghulu, Pemanca and Temenggong*).³²⁷

The way forward to eliminate gender inequality and intensify women's rights in the Iban communities is to build up gender dynamic among women and LGBTQ. The women and LGTBTA should insist on playing a bigger role in the making and administration of Adat. In doing so, women and LGBTQ would have to abandon some of the old customs and traditions. This is where open and frank conversation with their male counterpart has to be regularly organised.

2.8 Chapter conclusion

This Chapter provides some social and cultural background of the Iban people. Adat have been the main socio-legal system for the regulation and government of the social relations and affairs peculiar to the Iban communities. Despite the important of Adat, the recognition of Adat is very restrictive by the statutory definitions of customary law and Adat. The definitions are confusing at best and perplexing at worst. The statutory definitions are crucial because they determine the scope of recognition of the Adat. The Iban definition of Adat is not important at the moment because the State is the authority to decide which Adat is recognised and enforceable.

³²⁶ The term "Headmen" is masculine, but it is not gendered. This is rather a poor choice of English for the term "*Tuai Rumah*".

³²⁷ See paragraph 2.6 *supra* and paragraph 3.3 *infra*.

The administration, application, and enforcement of Adat Iban can be complicated because of the complex concept of Adat Iban. Adat, the law proper, are not separated from the principles or belief in spirituality. Thus, the principles which are purely spirituality are enforced in the same manner as law proper. This is not quite acceptable to the Christian Iban because the traditional spiritual obligations become legal obligations. This has led to some tension among some members who are still practising the Iban spirituality and the Christian Iban. The Adat are not classified into law and morality and law are used to enforce morality. Thus, an immoral act is also an illegal act. There are some social rules which are purely mannerism and values but, at the same time, they are treated as morality and subject to Adat. The meaning and concept of morality is very broad in the Iban culture. For example, cohabitation between a man and a woman is immoral and illegal at the same time and punishable by Adat. Adat regulating matrimonial matters are mainly regulating morality. Some Adat regulating morality are viewed as obsolete by some members of the younger generation. Further, Adat are not classified into criminal and civil matters. All cases, whether criminal or civil in nature, are lumped under one category. But if Adat are analysed in depth, the cases can be divided into criminal and civil cases. If certain Adat are intended to be used as exemplary punishment for the prevention of serious crimes, such as theft and desecration of graves, they ought to be classified into criminal matters to criminalise. These are examples of complications for non-separation of law into specific legal spheres. Adat Iban need improvement and the Iban have to find a middle ground to suit the needs and aspirations of most, if not all, members of the communities.

The Native Courts are an institutional symbol for the recognition of the native laws in Malaysia. The State is providing an institution and legal infrastructure for the administration and enforcement of native law regulating matters peculiar to the natives of Sarawak. The Civil Courts of Malaysia only hear cases between the state and any native on the question of Adat, e.g. a

land claim under the native customary rights by any native against the State of Sarawak. Thus, these courts are very important for the natives where they can participate in the administration of their own law. However, there are some glaring weaknesses in term of the courts' personnel and power in the recognition or giving legal effect to Adat. The recognition of Adat is a very sensitive political issue which needs political solution. This issue may never be completely resolved.

The colonial interventions in law by transplanting English law to Sarawak brought mixed results to the natives and their law. Some were good, like the abolition of headhunting ended the tribal wars and brought peace to the natives and Sarawak. The abolition of slavery brought an end to a culture of cruel exploitation of fellow humans. However, it is undeniable that most of the English law brought modernisation to Sarawak. Nevertheless, the transplanting of English law displaced most of the native law of their importance in the administration of the social relations in the Iban communities. Those that survived were pushed to the periphery and almost to insignificance. Women's rights and gender equality vis-à-vis Adat is discussed briefly above as awareness on the importance of the issues in today's world in any society. Even though Adat are ancient law, they are not outright discriminating or biased against Iban women. It is the execution of the Adat by men that deviate from the so-called Iban egalitarianism.

Chapter 3

3. The wisdom of Adat Iban regulating the Iban traditional leadership system, orientation of longhouse, organisation of family apartments, and lighting of cooking hearth

3.1 Introduction

Four important Adat Iban are examined in this Chapter to find out whether there is any wisdom in Adat Iban. They are Adat regulating the traditional leadership system; the orientation of a longhouse; the organisation of family apartments; and the lighting of cooking hearth. Some other Adat are discussed briefly along the way to help explaining the meaning and purposes of the Adat being examined. The definition of wisdom is discussed at the outset of this Chapter as a prelude to the discussions in this chapter and the next two chapters.

My search for the wisdom of Adat Iban is prompted by the lack of explanation in the purpose and aim for the application and enforcement of Adat Iban. The traditional interpretation, application, and enforcement of Adat may be described as essentially following or repeating the practices of the ancestors or complying with the spiritual sanctions or prohibitions, or belief in cosmology and mythology. This practice provides very little legal or jurisprudential rationales or principles for the interpretation, application, and enforcement of the Adat. A judgment or decision is normally validated by stating that the ancestors did the same thing on similar cases in the past. The interpretation, application, and enforcement do not take into consideration of the legal rationales and wisdom of Adat from the relationship between Adat and social, economic, and political interactions of the members of the Iban communities. The traditional practice has some similarities with the maxim of *“like cases should be treated alike”* (LCM)³²⁸ and which requires judgments on similar cases to be treated similarly. It is a presumption that by defining the

³²⁸ Aristotle, Politics III.13; see also Nicomachean Ethics V.3 in Benjamin Johnson & Richard Jordan, “Should Like Cases Be Decided Alike?: A Formal Analysis of Four Theories of Justice” (2018) at 2, 26. SSRN: <https://ssrn.com/abstract=3127737> or <http://dx.doi.org/10.2139/ssrn.3127737>

similarities of cases objectively as opposed to subjectively, judges would be consistent in their judgment. However, in the case of Adat, the *ratio decidendi* of the judgments replicate the earlier judgment. There is no hierarchy of the decision-making forum or person making the decision. Furthermore, there is no practice or provision to distinguish the earlier judgment as a means not to be bound by an earlier or past decision. If a case is a breach of a spiritual prohibition, the *ratio* is simple: it is a spiritual prohibition or taboo and needs no further explanation. It is my presumption that a spiritual law is sacred and unquestionable and beyond the ability of humans to explain. If a case is a breach of a norm or other Adat, the *ratio* is: it is wrong according to the custom or tradition which has been practised since the ancestors' time. This seems to be an automatic submission to custom³²⁹ or spiritual belief. This is the problem with the Iban traditional application or enforcement of Adat. The rationales and wisdom of Adat are not comprehensively explained to the people who are being subject to the Adat. It is not sufficient to say that an Adat is a custom or spiritual sanction or prohibition without explaining the reasons for its application and enforcement. The legal rationale and wisdom of the Adat must be explained to let the people know and understand the reasons and aim of the Adat.

3.2 Definition of wisdom

This section attempts to define wisdom according to the Iban world. But before dealing with the Iban definition I would mention some definitions of wisdom by some scholars. The search for what is wisdom started long before Hinduism (*Vedas*),³³⁰ the Greco-Roman thinkers (e.g. Plato and Aristotle), Socrates (Athens), Christianity and until now is not quite settled yet. In the search

³²⁹ Dr. Robert H. Lowie, *Primitive Society* (Boni and Liveright, New York, 1920) at 398 in Malinowski, Bronislaw *Crime and Custom in Savage Society*, Kegan Paul, Trench, Trubner & Co. Ltd, New York, 1926) at 13. Malinowski quoted the page as 387.

³³⁰ I do not mean that the search for the correct meaning of wisdom began from Hinduism. The search could have started long before that. Hinduism is just my historical point to indicate the length of time that the search has been going on. But still there is no universally accepted correct definition for wisdom until today.

for wisdom to resolve global crises, such as pollution and natural resources depletion, Robert Sternberg says, “If there is anything the world needs, it is wisdom. Without it, I exaggerate not at all in saying that very soon, there may be no world.”³³¹ At this point, wisdom is the capacity and desire to realise or to capture and produce what is valuable in life for us. As such, wisdom includes knowledge, technological know-how and understanding, and other things.³³² Richard Trowbridge says that wisdom is difficult to define correctly and the correct definition is still not quite settled, and “defining wisdom remains a major concern for scholars in all fields with an interest in the concept.”³³³ What “wisdom” means may, quite legitimately, depend on context and purpose. It is up to us to decide what, precisely, we choose to mean by “wisdom”, depending on what our purpose is. And indeed, those who take the task of defining wisdom seriously have come up with a great variety of definitions.³³⁴ At the moment, it is suggested that there can be no such thing as the correct definition of wisdom. The search is for something that does not exist. It is generally accepted that wisdom is an intangible thing of great value to have. I take note of the warning to “avoid defining wisdom in a detailed, precise, narrow way because, if this definition is taken seriously in subsequent work, it will mean results will be restricted to this narrow definition.”³³⁵

I consulted at least five of the participants³³⁶ on various occasions to define or describe what wisdom is according to the Iban’s worldview. They all come up with a similar description. In the

³³¹ Sternberg, R J., 2003, *Wisdom, Intelligence, and Creativity Synthesized* (Cambridge University Press, New York, 2003) “Misconceptions Concerning Wisdom” (2013) 2 *Journal of Modern Wisdom* at 92-97.

³³² Nicholas Maxwell, *From Knowledge to Wisdom*, (Blackwell, Oxford, 1984) in Nicholas Maxwell, “Misconceptions Concerning Wisdom” (2013) 2 *Journal of Modern Wisdom* at 92-97.

³³³ Richard Trowbridge, *The Scientific Approach to Wisdom* [Doctor of Philosophy Dissertation, Union Institute & University Cincinnati, Ohio, 2005] [unpublished] at 24.
Available at: www.wisdompage.com/TheScientificApproachtoWisdom.doc.

³³⁴ Nicholas Maxwell, “Misconceptions Concerning Wisdom” (2013) 2 *Journal of Modern Wisdom* at 92-97.

³³⁵ *Ibid.*

³³⁶ The participants were Edmund Langgu Saga, the late Mandi Anak Melan, JimbunTawai, Janang Ensiring, and Temrnggong Richard Muluk Entering. The discussions were held between 2013 – 2020.

Iban language wisdom is “*penemu ka manah enggau beguna*” which is literally the knowledge that is sound and useful in English. Based on the description, it is my inference that wisdom according to the Iban worldview is the prudent or sound knowledge, good idea, good experience, good judgment, and spiritual belief which can be utilised to bring about useful benefit and justice for the well-being of the Iban communities. The knowledge, or idea, or experience, or judgement, or belief could have been observed or proven to be useful, or beneficial, or just by the Iban ancestors and was formulated or adopted into Adat. But it does not mean that an Adat which is burdensome does not have prudent or sound knowledge, or sensible idea, or good experience, or good judgment, or spiritual belief as the core element of the Adat. For example, an Adat which imposes a spiritual prohibition is applied and enforced as a preventive measure to prevent any act or omission which may threaten the peace, harmony, and unity of the community. A prohibition is also used to enforce uniformity of standard or quality. Some Adat are regarded as unwise or bad because they are viewed as imposing burdens instead of obligations to the members of the communities. For example, the Adat which states that failure to complete the construction of a family apartment in a longhouse within the agreed timeframe is a violation of a prohibition.³³⁷ But if this Adat is reinterpreted from a different perspective, the Adat is imposing a moral and legal obligation on every family to complete the construction, more or less, at the same time. If an apartment or some apartments are partially completed and their completion is indefinite, this could give a poor physical image of a longhouse and, to a certain extent, it projects a picture of a disorganised community.

It is my contention that wisdom is the quality and capability of the knowledge, idea, experience, judgement, and spiritual belief principle underlying the Adat which make Adat a good or wise law, or rule, or system, which can be utilised to bring about useful purposes, or benefits, or

³³⁷ Section 13 of *Adat Iban* 1993.

justice to the Iban communities. For example, the maintenance of peace, harmony, and unity is a useful purpose, and the social well-being of a community is benefit derived from the wisdom of an Adat. But if an Adat brings about benefit only to a certain sector of the community, it does not necessarily mean that the Adat has no wisdom. It could be the execution of the Adat that is unfair or selectively applied. However, if an Adat brings more burden or pain than benefits or happiness to the community, then the Adat may be considered as not wise or bad Adat. The concept of wisdom here is quite similar to Bentham's utilitarianism principle of law which promotes the greatest happiness for the greatest number. An action is approved if it promotes happiness, or pleasure, and disapproved if the tendency is to cause unhappiness or pain.³³⁸ For example, the Adat regulating the maintenance of family apartment³³⁹ is wise. The Adat contains some elements of sound knowledge or good ideas for avoiding pain and promote happiness for the occupants and visitors in a longhouse through the promotion of safety.

3.3 The wisdom of Adat Iban regulating the Iban traditional leadership system

The discussion of Adat regulating the Iban traditional leadership system is roughly divided into three eras. The first era is about 100 years ago. The second is between 1920 until 1996, and third is from 1996 until today. The reason for dividing the discussion into three eras is because of the changes in the socio-political landscape and colonial intervention in law in Sarawak that brought about changes to Adat Iban. The Iban traditional leadership system means the system of leadership which has been developed within the Iban communities and practised by the Iban from one generation to another.

³³⁸ Julia Driver, *The History of Utilitarianism* in Edward N. Zalta, ed, Winter 2014 ed (The Stanford Encyclopaedia Philosophy, 2014) at paragraph 2.1. URL= <http://plato.stanford.edu/archives/win2014/entries/utilitarianism-history/>>

³³⁹ The Adat which sanctions that the cooking hearth must not become cold and must be lighted at least once a month.

A *Tuai Rumah* means the leader of a longhouse. The appointment of *Tuai Rumah* officially came under the nomenclature of Headmen³⁴⁰ with effect from January 1st, 1998,³⁴¹ vide section 140 of the *Local Authority Ordinance*, 1996. Prior to that, the appointment was not officially recognised as Headmen but existed and operated under Adat Iban and tradition. The *Tuai Rumah* are the custodians and bastion of Adat Iban and the key person leading in the administration and management of a longhouse. The Adat on the traditional leadership could be better understood by providing some information on the Iban social and political theory³⁴² of a longhouse. According to the traditional Iban social and political theory, the longhouse, its community, territorial domain,³⁴³ and Adat (the components) constitute a sovereign political entity and identity (*menua*)³⁴⁴ of an Iban community. Clifford Sather describes an Iban longhouse socio-political identity, in the first instance, with a “*menua rumah*”,³⁴⁵ which means home country.³⁴⁶ The social and political theory is a concept of power and territorial dominance developed by the Iban when there was no effective government ruling the interior region of Borneo by the early 19th century. The Brunei empire had authority only along the coastal regions of the present days Sarawak. The interior of Sarawak suffered from tribal wars fought by Iban,

³⁴⁰ The term Headmen includes of *Tuai Rumah*, *Tua Kampung*, *Penghulu*, *Pemanca* or *Temenggong*.

³⁴¹ The *Local Authority Ordinance*, 1996 came into effect from January 1st, 1998.

³⁴² The Iban traditional political theory regard the longhouse, community, territory domain, and Adat as a sovereign entity, which they call “*menoa*”. This notion derived from a historical legacy of the Iban. Before the establishment of the Brookes government (1841-1963) every Iban community was autonomous and the power and authority unto itself. The Brunei sultanate which claimed suzerainty over did not have effective power beyond the coastal areas of the present days Sarawak. The Iban who lived in the interior region were governing their own affairs. The socio-political circumstances have a lot of influence in political notion of the Iban. This presumption is inferred from an incident in 1836, where the Malays and Land Dayak (Bidayuh) of the Sarawak river basin revolt against the Brunei and proclaimed their independence. Retrieved from: https://www.sarawak.gov.my/web/home/article_view/228/244/

³⁴³ unTerritorial domain means the land and waters claimed by every Iban longhouse as their legal and political territorial limit. I use this term because there was no legal recognition of the claim. The claim was made ilaterally by the Iban.

³⁴⁴ “*Menua*” is literally country or homeland in English.

³⁴⁵ Clifford Sather, “Posts, Hearths and Thresholds: The Iban Longhouse as a Ritual Structure” in James J. Fox, ed, *Inside Austronesian House: Perspectives on domestic designs for living*, (The Australian National University, Canberra 1993) at 70.

³⁴⁶ “*Menua*” means country and “*rumah*” means home. The combination of these two words literally means home country in English.

Kayan and Kenyah peoples.³⁴⁷ Each Iban community was the sovereign power and authority over the land they claimed as its territory. The physical existence of longhouse, its community, territorial domain,³⁴⁸ and Adat is the ultimate symbol for the legal and political entity and identity of an Iban community. Some extreme Iban view that a real Iban community must have these factors. The power, legitimacy, sanctity, and jurisdiction of Adat are derived from or attributed to the existence of those factors.³⁴⁹ The *Tuai Rumah* and the community are the authority and power that regulates and administers the social relations and government of the longhouse and its territorial domain. An Iban community political entity and identity cannot exist without these factors. Political entity and identity cannot exist in the mind only.³⁵⁰

The theory is quite similar to a village at its formative stage to become a sultanate in this part of the world. For example, Malacca started as a humble fishing village and grew to become a powerful Malay sultanate in the 4th century.³⁵¹ The theory is expressed in an Iban phrase of “*menua kami, tanah kami, adat kami*” (our country, our land, and our law). However, the Iban concept of a state and powers has never developed beyond the longhouse and its territorial domain. The theory could have been developed from the social and political circumstances in which the Iban communities lived as autonomous political entities up until the arrival of the Dutch and British colonies in Borneo Island around the early 19th century.³⁵²

³⁴⁷ Alistair Morrison, *Fairland Sarawak: Some Recollections of Expatriate Officer* (Cornell University, Itchaca, New York, 1993) at 10.

³⁴⁸ Territorial domain means the land and waters claimed by every Iban longhouse as their legal and political territorial limit. I use this term because there was no legal recognition of the claim. The claim was made unilaterally by the Iban.

³⁴⁹ The view was inferred from the data related by Edmund Langgu Saga and the other 5 male participants.

³⁵⁰ Compare this theory to the Shikh's Khalistan movement. The movement is claiming the region around Punjab in India and Pakistan as their ancestral and historical home land, which they called Khalistan. The Sikh empire was dissolved at the end of Anglo-Sikh in 1849. Thus, the home land only existed in the mind of the members of movement.

³⁵¹ R.J. Wilkinson, “The Malacca Sultanate” (1912) 61 *Journal of the Straits Branch of the Royal Asiatic Society* at 67.

³⁵² The Brunei sultanate claimed suzerainty of land and waters of the present day Sarawak from 1598 until 1841. Retrieved from https://www.sarawak.gov.my/web/home/article_view/228/244/. The sultanate control was effective in the coastal area. But it is not clear whether the sultanate had any effective control of the interior

Shown below are four pictures of the Iban longhouses. Diagram 2 is a structural drawing of a traditional Iban longhouse. Picture No. 3 is a photograph of a traditional Iban longhouse; picture no. 4 shows a traditional longhouse common corridor; picture no. 5 shows a modern Iban longhouse; and picture no. 6 shows the common corridors of two modern longhouses. The pictures show a conceptual abstract of a longhouse as the physical structure in which the Iban families live as a community regulated by the institution of Adat. The relationship of Adat and the interaction of members of the Iban communities are discussed under such social and physical situations. The pictures show a comparison of the physical structure of traditional longhouses and the modern longhouses. This may help to explain the reasons why certain Adat are very important for the social control of communities under such social situations.

area where the Iban and other native tribes were living. The native tribes were left to their own device and ingenuity to run their own political affairs and government. They provided their own defence their communities and territories. The Brooke government was the first government that managed to establish effective control of the people in all Sarawak.

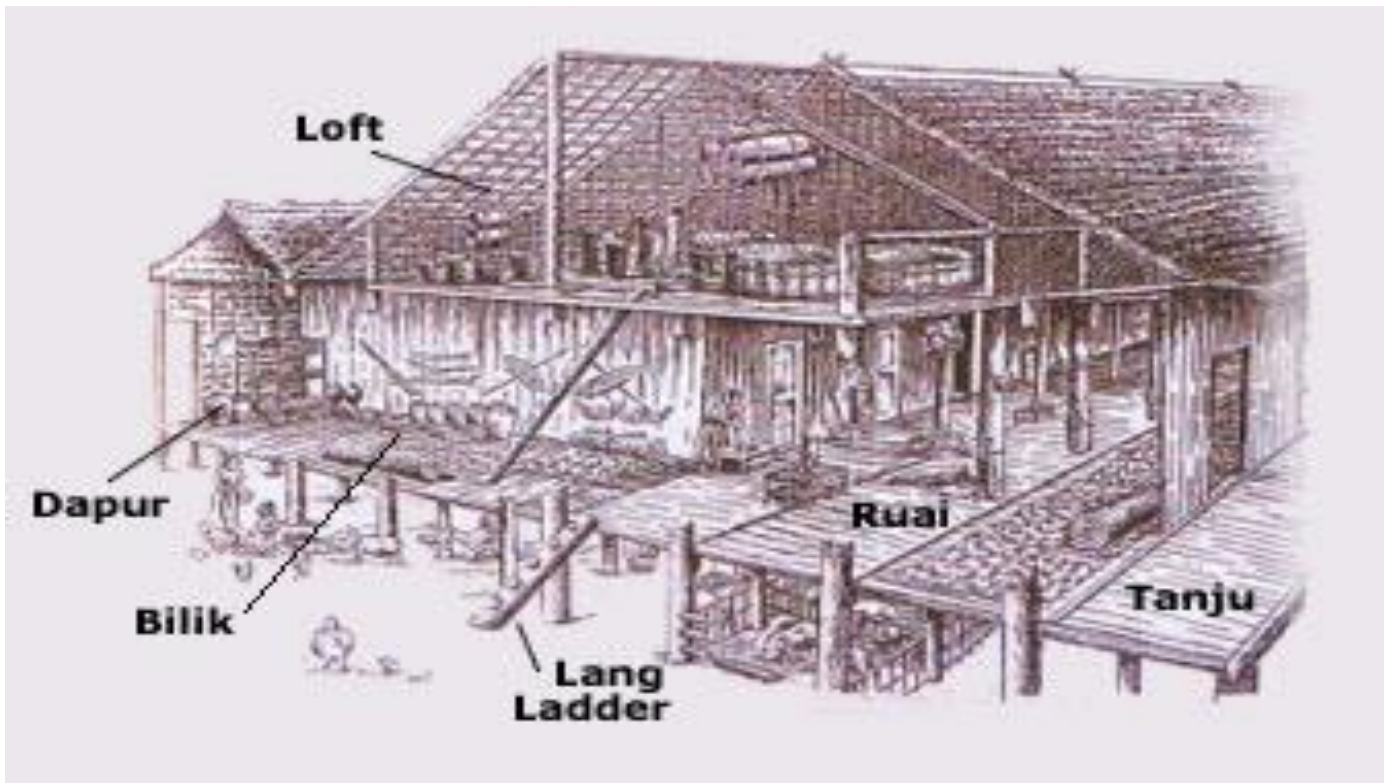


Diagram 2: A drawing of a traditional Iban longhouse structure. This drawing is in the public domain. Source: Go2.TravelMalaysia.com/index.html.

Each family has its own separate apartment consisting of the three main parts. An Iban longhouse is a linked house consisting of individual family apartments (*bilik*). The front part is an open drying platform (*tanju*) for sun drying of rice grains and other things. The middle part is a common open corridor (consists of *tempuan*, *ruai* and *pantar*) running throughout the whole length of the longhouse for gathering and public functions. The back part is a walled-up area consists of the living room (*bilik*), bedroom, kitchen (*dapur*) etc. Right above the middle portion is the loft (*sadau*), which is a walled-up area, for storage and sleeping (“bedroom”).



Picture 3: A picture of a traditional Iban longhouse at Labang River, Ulu Kemena, Bintulu, Sarawak. This picture is in the public domain and published in the social media.



Picture 4: A picture of a common corridor of a traditional Iban longhouse. The common corridor runs through-out the whole length of the longhouse. This picture is in the public domain.



Picture 5: A picture of a modern Iban longhouse. This picture is in the public domain.



Picture 6: Pictures of the common corridors (*ruai*) inside two modern Iban longhouses. The *ruai* is a common area in a longhouse where anybody can walk on or pass through. The family apartment units are on the right sides of both pictures. These pictures are in the public domain and published in the social media.

According to the Iban traditional leadership system until 1883³⁵³ the highest traditional leader of a community was the *Tuai Rumah*.³⁵⁴ The Iban had no system of leadership beyond the longhouse level. As such, the Iban did not have any Adat and leadership system beyond the *Tuai Rumah*.³⁵⁵ The appointments of community leaders beyond the *Tuai Rumah* level have been made pursuant to the various state law since 1883. The old Adat stated that a community ought to have a leader or *Tuai* who was capable to lead and unite its members. The leader provided completely free or voluntary service to the community and the appointment was for life or until retirement. Retirement was at the discretion of the leader. There was no Adat for the dismissal of *Tuai Rumah*. A *Tuai Rumah* would normally retire if he lost the trust and confidence of the community. Alternatively, the unhappy members would leave the community to form another community or join another community. The main criterion for the leadership was “a person who was capable to lead and unite” the community. The protection of the community and territory (*menua*), however small it was, from any adversary was the top priority. Only those powerful persons who had proven bravery and valour were qualified to become leader and lead an Iban community and such persons could only be found among men.³⁵⁶ Therefore, the person who was capable to lead and unite the community was a powerful person who had proven bravery and valour. The appointment was made by consensus in a meeting (*baum*) of all the heads of families and members of the community.

³⁵³ The Brookes government introduced the “*Penghulu system*” in 1883. Peter Mulok Kedit. “Iban Leadership: Some Reflections on the *Penghulu System*” (2012) 2 *Ngingit*, The Tun Jugah Foundation Journal, at 31 - 33. See paragraph 2.6 *supra*.

³⁵⁴ During the 16th to the early 18th century, some Iban warriors or war leaders were bestowed titles of the lower ranking chiefs under the Brunei customs and traditions were awarded to some Iban warriors of Saribas and Kelaka river systems. The titles did not grant any administrative or political power to the holders. They were symbols of recognitions for the warriors’ contributions as alliance helping the Sultans of Brunei to suppress the enemies. See: Peter Mulok Kedit. “Iban Leadership: Some Reflections on the *Penghulu System*” (2012) 2 *Ngingit*, The Tun Jugah Foundation Journal, at 31 - 33.

³⁵⁵ Robert Pringle, *Rajahs and Rebels: The Iban of Sarawak under Brooke Rule, 1841-1941* in Jérôme Rousseau, ‘Iban Inequality’ (1980) 136:1 *Journal of the Humanities and Social Sciences of Southeast Asia*, Leiden at 53.

³⁵⁶ The information was given by Edmund Langgu Saga, a research participant.

Was this Adat fair and wise from the perspective of the socio-political relations and situations in an Iban community about over a hundred years? The Iban were living in small communities and moving from one place to another searching for new fertile land teeming wild animals and fish. Intertribal and intra-tribal or internecine wars were rife in Borneo during the 18th to early 19th centuries.³⁵⁷ They were living in a hostile environment. This type of living and culture needed a capable leader to lead, unite, and protect the community from wild animals and other adversaries. The brute muscle power, sword, and bravery were a necessity for survival not idealism. It was a case of “survival of the fittest” in the struggle for life to survive and to have the chance to reproduce. This is analogous to Darwin’s theory of evolution.³⁵⁸ The method for choosing a *Tuai* was easy to apply then because the community was small and the person selected as the “*Tuai*” was normally stood out from the rest from his credential in wars and success in assisting the previous *Tuai* in looking for new land. With regard to women’s rights and gender equality, the term “*Tuai*” meant leader in English. The term “*Tuai*” was not gendered because the Iban language has no distinctions on grammatical gender. But if one reads in between the lines and the social situations at that time, *Tuai* meant a male leader. The Iban social system was and still is a male value dominated society. No woman in the Iban community has ever achieved a warrior status and been appointed as a leader in the past. The women earned their social prestige equivalent to men in a different way.³⁵⁹

The ultimate goal to be achieved by the Adat was survival; anything else was secondary or negligible. A community which did not have a powerful and brave leader to provide protection could be eliminated under such hostile social conditions. The Adat was a mean to bring about

³⁵⁷ Robert Pringle, “Rajahs and Rebels: The Iban of Sarawak under Brooke Rule, 1841-1941” (Ithaca: Cornell University Press, 1970).

³⁵⁸ Charles Darwin, *On The Origin of Species by Means of Natural Selection*, 1st ed, (John Murray, London, 1859) at Chapters 3 – 4. <https://www.gutenberg.org/files/1228/1228-h/1228-h.htm>.

³⁵⁹ See paragraph 2.7 *supra*.

unity and security to ensure the well-being and survival of the communities. Women's rights and gender equality was unknown at that time and it is not fair to judge the Adat for something that was not in existence. But if there was such an ideology at that time, it was not a top priority. Thus, it is quite fair to conclude that the Adat was good and wise fitting with the social situations prevailing at that time. The choice was very limited, and survival was the ultimate goal.

The leadership term leader or "*Tuai*" later changed to "*Tuai Rumah*" (longhouse leader)³⁶⁰ probably when the Iban were more settled and started living in more permanent longhouses (*rumah panjai*) from 1920s onward. By this time, the Iban began to have proper and more permanent longhouses and *Tuai Rumah* became a common term to call the leader of a longhouse.³⁶¹ The old Adat were adopted for the appointment or succession of *Tuai Rumah*. The condition remained as "a person who was capable to lead and unite", but the criterion was reinterpreted according to the social and political situations at that particular time. A person who was capable to lead and unite the community meant "a person who was capable to lead, unite, and bring about economic progress to the community". The credential of bravery and valour was not a requirement because security was the responsibility of the state. The *Tuai Rumah* were predominantly chosen and appointed by consensus. The focus was the improvement of their economy.

The Adat regulating the traditional system of leadership were generally fair but there was some unfairness in the execution or application. The wise aspect was that the selections and appointments or successions were made in harmonious manner without any crisis or contest.

³⁶⁰ *Tuai Rumah* is literally the Head or Leader of a longhouse in English and has no gender bias or perpetuating gender discrimination in the Iban communities. The official and legal term of *Tuai Rumah* came under the term of "Headman" with effect from January 1st, 1998 vide section 140 of the *Local Authority Ordinance*, 1996.

³⁶¹ According to the late Mandi Anak Melana, a research participant, the more permanent longhouses in Saribas and Kelaka river systems were mostly built from 1920s onward. See Picture No. 4 *supra*.

The peace, harmony, and well-being of the communities were maintained. The *Tuai Rumah* were chosen and appointed without any open objection. The knowledge, or idea, or experience, or judgement of making important decision by consensus was an Ideal way to avoid bad feelings or antagonism between members of the communities

However, there are some discrepancies and weaknesses in the execution of the Adat. Firstly, Rousseau³⁶² observed that the pioneer members of a community or the descendants of the pioneer members formed the core group of the community. Whenever there was a selection for a succession of *Tuai Rumah*, the successor was chosen by the whole community, including those who joined in after its foundation of the community, i.e. the new or non-pioneer members. The core group was very influential in deciding the outcome on the selection and appointment of a *Tuai Rumah*. They were the majority and able to sway the decision in their favour. It was an established practice (Adat) to give priority to the pioneer settlers or their descendants the appointment of *Tuai Rumah*. They were deemed to be the Indigenous people of the settlement (*orang asal tauka peturun orang berumpang menoa*) and ought to be accorded a special privilege in leadership for their contribution in the establishment of settlement. The non-pioneer members were deemed to be “migrants” (*orang datai*) under such Adat, and as such, they were accorded lesser privileges. This Adat discriminated and impeded the opportunity for those capable new non-pioneer members to progress up the leadership ladder. They were only offered the leadership as the last choice when nobody else was capable or willing to take up the responsibilities. Sather observes that: “Although some families take a more active role in these discussions than others, the tenor of the aum is markedly democratic. Every adult has a voice, dissenting views are normally respected, and whenever a decision is reached, discussions are

³⁶² Jérôme Rousseau, ‘Iban Inequality’(1980) *Journal of the Humanities and Social Sciences of Southeast Asia* 136:1 Leiden at. 54-55.

characteristically lengthy and generally strive for unanimity.”³⁶³ Freeman observes that "the core-group . . . is always able to exert the most influence, and it is always one of its members that is chosen".³⁶⁴ The system can be manipulated by the majority to serve their interests and perpetuate their control of leadership of the community.

Secondly, it was quite common for an Iban community to offer a son of the former *Tuai Rumah* the honour and the right of first refusal to succeed his father. It was a presumption that a son of a former *Tuai Rumah* was capable to lead the community because he had learnt some leadership skill, longhouse management, and knowledge of Adat through observation and association with his father. If the *Tuai Rumah* had no son or none of his sons were capable or refused to succeed him, the position would be offered to any capable male descendants of the pioneer settlers. The presumption was based on the belief that a descendent of a pioneer settler would likely inherit similar capability, fame, and fortune of his ancestors. Also, the children of past capable leaders and pioneers were presumed to have acquired some leadership skill through observation and association with their parents. If none of them were capable, then the leadership would be offered to any male member of the new or non-pioneer member of the community. The practice as described above seems to create indirectly a kind of hereditary system of leadership or an elite group in a community. Freeman argued that the position of *Tuai Rumah* was elective and not hereditary.³⁶⁵ I do not fully agree with Freeman’s assertion because election of *Tuai Rumah* was not a tradition in the Iban communities. Most of the decisions in the Iban communities, including the selection of *Tuai Rumah*, were and are still made by consensus.

³⁶³ Clifford Sather, “All Threads Are White: Iban Egalitarianism Reconsidered in Origins” (2006) in James J Fox and Clifford Sather, eds, Chapter 5, *Ancestry and Alliance: Explorations in Austronesian Ethnography*, ANU E Press, Canberra, Australia, at 80.

³⁶⁴ John D. Freeman, *Report on the Iban*, (LSE Monograph no. 41, London: Athlone Press, 1970) at 111, in Jérôme Rousseau, ‘Iban Inequality’ (1980) Volume 136:1 *Journal of the Humanities and Social Sciences of Southeast Asia*, Leiden at 52-53.

³⁶⁵ Jérôme Rousseau, ‘Iban Inequality’ (1980) *Journal of the Humanities and Social Sciences of Southeast Asia* 136:1 Leiden at 55.

Election was alien to Iban culture and could bring about divisive effect to the communities. However, some communities have started using the democratic system, i.e. election, for shortlisting of names to be recommended for the appointment of *Tuai Rumah*.

Thirdly, all the Iban communities were not sensitive about women's rights and gender equality in leadership appointment in the past. They were still trapped in the ancient culture of a male dominated society. This could be a hangover from the tribal wars era which ran deep in the men's blood. It may be because they were not aware and exposed to the ideologies. Most Iban longhouses were, and still are, located in the jungles in Sarawak. Their education and exposure to outside ideas were limited. Naivety and ignorance could be a reason for the attitude.

The descriptions and discussion above illustrate that the traditional Adat can be considered as wise and reflective of the so-called Iban egalitarianism ideology. However, the weakness was in the execution, which did not comply with the spirit and ideology. The consensus system was meant to bring about harmony but riddled by manipulation and giving an unfair advantage to the group that had the majority to advance their own interest.

The state law, namely Part X of the *Local Authority*, 1996 which was repealed and substituted by the *Community Chiefs and Headmen Ordinance*, 2004,³⁶⁶ trampled and brought the demise of Adat Iban regulating the traditional Iban leadership. The old Iban Adat became a wasted wisdom. With effect from January 1, 1998, the longhouse communities cannot appoint their own official *Tuai Rumah*. The *Tuai Rumah* are now appointed by the Governor (*Tuan Yang di-Pertua Negeri*) of Sarawak section 3 of *the Community Chiefs and Headmen Ordinance* 2004. This will

³⁶⁶ *The Community Chiefs and Headmen Ordinance* 2004 came into effect on January 1st, 2020.

be discussed in more details in Chapter 6 below. The change in the community leadership system is to synchronise the administrative system at the grass roots level, i.e. the community leaders, with state political system in Sarawak. The *Tuai Rumah* and the various native Chiefs are now called community leaders (*Ketua Masyarakat* in the Malay language). However, the old procedure (*Adat*) is still being used as a system for short listing the candidates recommended for the appointment or succession of *Tuai Rumah* by the government. At present, the communities are still participating in short listing the names of candidates to be appointed as *Tuai Rumah*. The final selection and appointment are done by the state government. The old condition for leadership is no longer applicable. Any person, man or woman, can be selected, recommended and appointed as *Tuai Rumah*. Many *Tuai Rumah* are women now. The participation of the Iban communities in form of short listing the candidates for the appointment as *Tuai Rumah* is just a mere courtesy by the government. The government is not legally obliged to appoint any of the candidates submitted by any longhouse community. As such, there is nothing wise about the *Adat*. Any discussion on the wisdom on this *Adat* after January 1, 1996 may be purely academic and historical.

However, the old *Adat* are still used for the appointment of the unofficial *Tuai Rumah*. A *Tuai Rumah* appointed under the *Adat* is not legally recognised by the government and does not receive any financial allowance for such appointment. Any longhouse which is consisting of less than 20 families is not entitled to an official *Tuai Rumah*, unless the longhouse has existed since 1963, i.e. Sarawak independence. The longhouses which are not entitled to the official *Tuai Rumah* are still practising the old *Adat*. The *Adat* is now a non-centralised law regulating non-state matters. This topic is discussed in detail in chapter 6. One of the most important duties of a *Tuai Rumah* is to propose, manage, and oversee the construction of longhouse as and when

there is a need to build a new one.³⁶⁷ The next three sections are narrating and discussing three important Adat relating to longhouse construction and management.

3.4 The Wisdom of Adat Iban regulating the orientation of longhouse

The Adat regulating the orientation of longhouse³⁶⁸ are spiritual sanctions, which state the ideal alignment of a longhouse to the position of the sun and a navigable river. The Adat states that the façade of the longhouse must face the sunrise with a slight angle, i.e. facing eastward. It is a breach of a spiritual sanction if one end of a longhouse is facing the sunrise (eastward) and the other facing the sunset (westward). According to this alignment, the sunrays penetrate the longhouse lengthwise (*panas ngerejang rumah*), i.e. the from the east end toward the west end. This could cause the longhouse to be “hot”. The Adat is silent in the case where the back of the longhouse faces the sunrise. If a longhouse is to be constructed and sited near a navigable river, it must be aligned parallel lengthwise to the river.³⁶⁹ It is a breach of the spiritual sanction (taboo) if a longhouse is perpendicular to a navigable river (*netak sungai*). A longhouse constructed in such position acts as virtual dam which collects all the unclean matters or ill-fortune (*nekat utai jai*) washed off or drifting down river.³⁷⁰

The Adat are also prohibitions (taboos). It is a prohibition (taboo) to breach any of the sanctions. According to the Iban spirituality, the siting, orientation, and alignment of a longhouse could

³⁶⁷ Section2 of *Adat Iban* 1993.

³⁶⁸ A traditional longhouse normally consists of between 10 to 40 family apartments. The length of a longhouse is roughly between 180 to 800 feet long. The construction of a longhouse begins with a number of intricate Adat³⁶⁸ and rituals regulating the siting, orientation, organisation of family apartments, construction, and maintenance. Even the demolition of a family apartment or the longhouse is regulated by Adat.

³⁶⁹ The data and view on the Adat were provided and verified by Janang Ensiring on January 28, 2018. He was a participant in this research.

³⁷⁰ Certain purification of land and water or shamanic rituals to rid the evil spirits are performed near or in the river be flashed off the unclean matters downriver and to the seas. It is believed that any longhouse which is constructed perpendicular to a river could collect the unclean matters and ill-fortune could befall the community. This data was provided by Janang Ensiring, a research participant.

influence the fate of a longhouse and its community. If the Adat are complied with the longhouse would be “cold” (*chelap*). whereas, if the Adat are breached, the longhouse would be “hot” (*angat*).³⁷¹ That is the incentive to comply with the sanctions and the liability for breaching the prohibitions. All Adat which are spiritual sanctions and prohibitions are subject to the same rewards or incentives and punishments or liabilities. This is the traditional interpretation and explanation for the application or enforcement of Adat.

The Adat is expressed as spiritual sanctions or and prohibitions in order to use spirituality for the enforcement of Adat or law. Spirituality gives the legitimacy and sanctity of the Adat. In the past most Iban were Gods and Spirits fearing people, spiritual sanctions and prohibitions as sacred Adat and higher in hierarchy of legitimacy than the man-made law because they are derived from divine law. The Iban would naturally obey the spiritual sanctions or prohibitions. If the Adat are analysed in terms of legal reasoning and the Iban interaction with the physical world like land, water, and the natural of the consequence,³⁷² I am of the view that this Adat may be a natural law not spiritual law. It is natural and most appropriate thing to do to align a longhouse with the source of natural light and the main mode of transportation.

I am not questioning the truth of Iban spirituality in this Adat and the other Adat, which are spiritual sanctions or prohibitions, described and discussed in this dissertation. I am contending that the application and enforcement of the Adat are more than just customs and spirituality. I am of the view that there are rationales and wisdom underlying the Adat as asserted below. The

³⁷¹ “Cold” (*Chelap*) is a spiritual term to describe a period of good fortune where a longhouse community is experiencing bountiful harvest, good health, longevity and good fortune. This is believed to be due to the spiritual equilibrium being maintained. Whereas, “hot” (*angat*) is a term to refer to a period of bad fortune where a longhouse is experiencing frequent premature death, suffering prevalent poor health, poor harvest, and other ill-fortune and natural calamities. This is where the spiritual balance is being up-set. See also paragraph 2.4.4 *supra*.

³⁷² John Borrows, *Canada’s Indigenous Constitution* (University of Toronto Press, Toronto, Canada, 2011) at 28 - 35.

reinterpretation and/or re-evaluation of the Adat by analysing the relationship of the sun and river with the socio-economic activities of the Iban communities elucidate my contention.

The mainstays of a traditional Iban community are subsistence agriculture, small scale cash-crop farming, hunting fishing, and gathering. Rice is the staple food of the Iban. Rice grains and other grains must be dried properly before being stored to prevent attack by fungus and insects. Refrigeration was never heard of about 50 years ago in any Iban community. Thus, many of the foods were sundried for preservation and storage. Diagram 2 above shows the drying platform (called *tanju* in Iban) is at the farthest end of the front part of a longhouse. The drying platform is mainly for sun drying purposes. By facing sun rise, the platform would get the maximum heat from the sun, at least, from the morning until early afternoon. Even though the sun travels overhead at around noon every day in the equatorial region, torrential rain is common occurrence in the afternoon especially between the months of October to March in Sarawak. The drying activities could be interrupted or stopped if it rains in the afternoon. If one end of a longhouse is facing the sunrise, the heat from the sun would gradually cover the drying platforms from one end to the other. The entire platform would not simultaneously get maximum heat from the sun.

Having analysed the relationship of the Adat and the socio-economic activities above, it is contended that the rationale for the enforcement of the Adat is to harness unobstructed solar energy for economic purposes. The orientation of a longhouse must be aligned with the position of the sun in order to get maximum heat from the sun for foods and grains preservation and storage or for any other social and economic activities. If the orientation of a longhouse is not strategically aligned with the sun, the drying activities could be hampered by not receiving the maximum heat from the sun from morning until the afternoon. In the tropic it always rains in the

afternoon. Thus, sometimes drying activities cannot be done for the whole day. From the economic perspective, the Adat has some elements of sound knowledge or good idea which can be utilised for useful economic purpose, for example, for drying rice grains and other drying activities. Rice grains must be sundried properly before storage to prevent borers attack. In view of what have been discussed, the Adat can be considered as wisdom.

The knowledge and idea underlying the Adat can be developed further into positive law either by the Iban communities or the state to harness and harvest solar energy. In some countries rights to light have become law. Under the Early English and United States common law, a property owner's right to light based on theoretical principles of prescriptive easements is recognized. The landowner has the right to enjoy light and air for productive use of the land. The United Kingdom's *Prescription Act* (1832) established the common law right to light and air, and a protection for claimants who have demonstrated twenty years of solar use. Before this period, a neighbour could stop any solar access rights by filing an objection with the government.³⁷³

The knowledge and idea can also be developed into easement law, i.e. the rights to unobstructed passage of air and natural light to a building or land. The English common law has been giving protection of access to natural light. For example, a landowner has the right not to be blocked from sunlight by any structure or vegetation of unreasonable heights erected or planted by a neighbour. The express easements are recognized as an easement of light and legally enforceable by law in many common law jurisdictions like Australia. The easement would be incorporated into a legal document to protect against any obstruction of direct natural light which

³⁷³ Kamaal R. Zaida, "Solar Energy Policy in Canada: An Overview of Recent Legislative and Community-Based Trends toward a Coherent Renewable Energy Sustainability Framework" (2009) 17 *Mo. Env'tl. L. & Pol'y Rev.* 108 at 115.

is integral for the maintenance of a solar farm or solar collector panel to produce energy.³⁷⁴ From these examples, the Adat could be developed further into easement law to protect the rights of property owners to unobstructed natural light against anybody harvesting of solar energy, or constructing of high rise building, or any other purposes on neighbouring land in the future.

The Adat regulating the orientation of longhouse to a navigable river is also a relationship of Adat and the social and economic activities in the Iban communities. The main mode of transportation of the Iban communities until very recently was the rivers. This could be one of the reasons why most of the Iban longhouses or settlements were sited on the banks of navigable rivers. Even today many longhouses are still situated on the riverbanks. Roads reached many of the Iban longhouses in the Saribas and Kelaka areas in 1990s. According to the Adat on settlement, the area along the riverbank right in front of a longhouse is usually designated as the formal landing and berthing place (*pengkalan*)³⁷⁵ of a longhouse. If a longhouse is constructed parallel lengthwise to the river it would provide an easy access to the landing place for loading and unloading of goods and other materials. If a longhouse position is perpendicular to the river it would be cumbersome for those families whose apartments are sited at the far end of the longhouse to load or unload and carry their goods and materials to or from the longhouse and their boats. Furthermore, the closeness to the landing and berthing place would enable them to oversee and manage the safekeeping of boats especially during big flood or high tide. For most the longhouses which are constructed near a riverbank where the water is clear and clean, the landing place is also used a common bath and for drawing water for

³⁷⁴ Kamaal R. Zaida, "Solar Energy Policy in Canada: An Overview of Recent Legislative and Community-Based Trends toward a Coherent Renewable Energy Sustainability Framework" (2009) 17 Mo. Env'tl. L. & Pol'y Rev. at 116.

³⁷⁵ A landing and berthing place symbolises the existence of a longhouse and the people. The place entails some important social and legal implications in respect of the settlement and its people. See section 31 of *Adat Iban* 1993.

drinking and cooking purposes. A longhouse built parallel to a river gives it a picturesque setting blending into the landscape. Whereas the image of a longhouse built perpendicular to a river could be obscured by the lush vegetation.

From the above analysis it may be concluded the rationale for the application and enforcement of the Adat is similar to the law regulating urban and town planning in modern town and cities. The idea behind the Adat is to harmonise the longhouse with the main transport system, infrastructure, amenities, and aesthetic beauty of the longhouse. The knowledge and idea are capable of being utilised to harmonise the various facilities to provide convenience and ease of access to the transport system, infrastructure, and amenities naturally available. These are the factors which can be considered as the wisdom underlying the Adat which can be developed further.

If we compare the Adat with some of the law regulating urban and regional planning in some countries, there are some similarities in the underlying ideas and knowledge. For example, the British Columbia's *Growth Strategies Act* describes how urban development is to take place and section 849(2) of the Act provides a set of planning goals, to be used as a checklist by communities in the development of their regional growth strategy. The regional growth strategy should include a consideration of housing, transportation, regional district services, park and natural areas, and economic development.³⁷⁶ The Urban and regional planning, among others, incorporating the above mentioned infrastructure, services, and amenities has become and legitimate function of the government. Many law and regulations have been made under their urban and regional planning to make the towns and cities beautiful and liveable. The Adat may

³⁷⁶ John Meligana, "British Columbia's "Growth Strategies Act": A Policy Critique" (2000) 1 *Canada Journal of Urban Research* 9 at 98 – 99.

be developed in similar fashion to improve the standard and quality of living in Iban longhouses and other types of native settlements. The ideas and knowledge could be used as an impetus and insight to formulate a rural development strategies law in Sarawak with an emphasis on harmonising the longhouses and other native settlement with the energy supply main grid, infrastructure and transport system, and also the provision of amenities. At the moment, the Iban and other natives are left on their own to manage their settlement planning and strategies. Most of the planning have been done on ad hoc basis and very basic. For example, the Iban longhouses have been constructed without any plan or architectural drawing. The design and construction come spontaneously from imagination and experience.

3.5 The wisdom of Adat Iban regulating the organisation of family apartments

Three sanctions and prohibitions are narrated and discussed under this section. They are "*bilik bejenguk*", "*kepit bilik*" and "*mampul*". These Adat are both spiritual sanctions and prohibitions and are among of the most sacred and feared law to the Iban. This Adat is expressed through spiritual sanctions and prohibitions, and, again, another example of spirituality being used to enforce Adat. The sanctions and prohibitions are only applicable to the individual family not the whole community. Should there be any breach of the Adat, only the families who are subject to the Adat would be punished by the spiritual wrath. However, it is asserted that these Adat promote reciprocity, mutual help, and sharing and caring for each other and not merely customs or spirituality.

The Adat seem to fall within Fuller's implicit rules, which arise from the sustained interaction and conduct of people over time, which is a "direct expression in the conduct of people toward one

another."³⁷⁷ These rules enable groups of people to mutually predict the behaviour of others. The practical force of implicit rules derives from the fact that they find direct expression in the conduct of people toward one another. They do not depend either on authority or on enactment.³⁷⁸ In the case of the application and enforcement of the above-mentioned Adat, they depend on mutual predictable behaviour under the reciprocity concept and interdependence of families on each other in an Iban community.

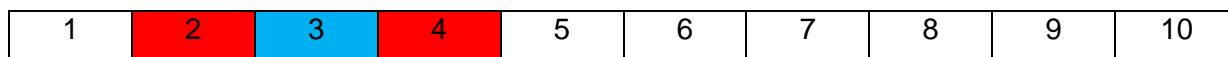
Coming back to the Adat, the Adat states that the family apartments of two siblings must be sited and located next to each other in a row. A breach of this Adat is a prohibition (taboo) called "*bilik bejenguk*". Simultaneously, it is a prohibition for non-sibling apartment to be sandwiched or bounded by two apartments belonged to two siblings. This prohibition is called "*kepit bilik*". The Adat is a two-prong prohibition, i.e., thus, any which way it is a prohibition. However, it is not a prohibition for the siblings' apartments to be structurally separated by two or more apartments belonging to non-sibling or others. In this case, there is, at least, one other apartment belonging to a non-sibling which acts as a buffer and dispels the prohibition. Therefore, it is not prohibited. It is the separation by a single apartment that is prohibited. It is beyond the comprehension of ordinary human why the separation by a single apartment is prohibited, whereas the separation by two or more apartments is not. This Adat is spiritual belief which is a relationship between Iban and their Gods and Spirits that regulates matters relating to fate in life and death. As has been explained above, there are always reward and punishment entailing spiritual sanctions and prohibitions, and no other reasons or explanation articulated. The illustration below explains the positions of the prohibitions of "*bilik bejenguk*" and "*kepit bilik*".

³⁷⁷ Lon Fuller, "Human Interaction and the Law" in Gerald J. Postema, "Implicit Law" (1994) 13:3 Law and Philosophy at 363.

³⁷⁸ *Ibid* at 364.

Illustration:

The layout plan below represents a longhouse consisting of 10 family apartments. Apartments no. 2 and no. 4, shaded in red, belong to two siblings while apartment number 3, shaded in blue, belongs to a family who is not a sibling to the owners of apartments number 2 and 4. In this case, apartment no.2 and apartment no.4 are “*bejenguk*”, which is a prohibition. Apartment no.3 is “*kepit bilik*”, which is also a prohibition. The siblings’ apartments should be sited at no. 2 and no. 3.



The prohibition for a family apartment being sandwiched or bounded by the apartments of two siblings is to enhance the prohibition that the apartments of two siblings must not be structurally separated by a non-sibling’s apartment.

The secular explanations on the rationales and wisdom of the Adat could offer some explanations on the awkwardness of the Adat. These Adat have some useful purposes than just purely spiritual belief. Perhaps, the incentive and liability could be stretched further by looking at the relationship of the Adat social interactions in an Iban community. The Adat can be reinterpreted as promoting and maintaining reciprocity, mutual help, and sharing and caring culture in an Iban community. The culture has been the life support system of communal living in every longhouse. The system instills a moral principle that every able member of a community is duty bound to help and care for each other in in good time or bad time. All the families are interdependent on each other. Because of the social and economic importance and benefits derive from the culture, it has evolved into Adat for the well-being and survival of the community.

The Adat which states that the sibling apartments must be sited next to each other has very important economic and social reasons. The Adat facilitates the traditional concept of sharing and giving of excess foods and helping each other particularly during hard times. If the siblings

are living next to each other, it would be very convenient to deliver foods or providing other assistances among the sibling families privately.³⁷⁹ Until very recently, rice was very important economic asset to every family and the amount of rice grain stock was a measure of wealth. Hunger was always associated with poor rice harvest. If a family rice stock ran out before the next harvest, they would borrow (*nyanda*)³⁸⁰ some rice from a sibling family as first choice. It was convenient to borrow from a sibling family next door because of social stigma. Borrowing rice from a sibling family next door could be done and delivered surreptitiously to avoid the gossip by the community.³⁸¹ If the sibling apartments were separated by another family apartment, the delivery would be done by walking across the open corridor which could be noticed by others. A family which regularly ran out of the rice stock before the harvest was considered, at best, poor and unable to feed themselves and, at worst, lazy. Land for rice farming was abundant in the past and it was a matter of whether a family was hard working or lazy. Laziness was, and still is, frowned upon and projects a very negative social stigma in the Iban communities. However, sometimes fate plays some role in determining the yield in rice harvest, e.g. pests and diseases could destroy the rice crop.

Another important rationale for the Adat is relating to the participation of families in communal functions. For example, funeral³⁸² (which includes funeral wake, burial, and other bereavement matters) is a communal function and compulsory for every family to participate and provide

³⁷⁹ In the past, there used to be an opening in the partition wall of the kitchen of the sibling apartments for delivery of foods and other things privately. It was and still is unethical to walk along the open corridor (*ruai*) to deliver foods in full public view if one has limited amount to share or give those who witness the delivery.

³⁸⁰ "*Nyanda*" is an Iban practice or system of borrowing without interest. If a person borrow (*nyanda*)10 pounds of rice from another, he would repay 10 pounds of rice.

³⁸¹ There was a small window or opening in the kitchen wall in between the family apartment in the traditional longhouse used for the delivering of foods, rice, etc.

³⁸² It is customary for the Iban communities of Saribas and Kelaka to invite the nearby Iban longhouse communities to attend the funeral wake and burial of a deceased person. The invited guests and the relatives of the bereaved must be provided with foods, drinks and lodging during the function. The funeral rituals is held for period of three (3) days and three (3) night. The 3rd night is the funeral wake and burial will be held the next morning.

assistance to the bereaved family and hospitality to anybody who comes to pay his or her last respect. If any family is absent or away beyond recall, the family must delegate the duties to his or her sibling next door to perform the duties and responsibilities on his or her behalf. If the family has no sibling residing in the longhouse, the family has to pay certain amount of money as default fee. The Adat could provide convenience to any absent family by asking a sibling family next door to assist in the performance of the duties and responsibilities. It may not be convenient for a sibling family to perform the duties if the absent sibling's apartment is one apartment away. The delegation of duties and responsibilities is based on the presumption that a sibling is morally duty bound to help another sibling in time of need unless there is a personal or other reason which prevents such arrangement. The underlying idea in the Adat is perpetuating the culture of helping each other in time of need. Under the longhouse communal concept of living, this idea is wise and very helpful to families who are working far away from the longhouse. This view comes from my own experience.

The Adat prohibiting a family apartment from being sandwiched or bounded on both sides by two apartments belonging to two siblings (*kepit bilik*) promotes harmonious relation among community members. If the family being sandwiched or bounded is economically less affluent compared to the two siblings, it could cause some kind of uneasiness or embarrassment to the family being bounded or vice versa. The economic disparity between the families could be a source friction between families. For example, during the communal festivals or functions the affluent family or families would be very generous and lavish in their hospitality while the less affluent could not afford to keep up in a similar manner with his or her neighbour. Such situation can cause an embarrassment to the less affluent family or families. Anything that can cause uneasiness or embarrassment to any family could destroy the harmony of a community. The Adat can be used to avoid glaring economic disparity and to promote and maintain harmony

among the families living in a communal setting.³⁸³ I am of the view that this Adat is used to enhance the efficacy of sanction and prohibition discussed earlier and to be doubly sure of the compliance. It is a good idea but the Adat is enforcing the same sanction and prohibition under another Adat.

The third sanction, which is prohibition (taboo) at the same time, is “*mampul*”. The Adat states that the apartments of two siblings must not be constructed and sited at both ends of the longhouse (*pun ramu and ujung ramu*).³⁸⁴ The sanction and probation is illustrated below.

Illustration:

The diagram below represents a layout plot of a longhouse consisting of 10 family apartments. Apartments no. 1 and no.10, shaded in red, belong to two siblings. In this case, the family apartments at both end of a longhouse belong to two siblings are contravening the prohibition called “*Mampul*”.



None of the research participants³⁸⁵ could really explain the secular rationale behind the prohibition. The only explanation given was that an act which is a spiritual prohibition and must not be breached and not questionable. The purpose of mentioning this Adat is to illustrate that some of the Adat which are derived from spirituality are applied or enforced without knowing the real reason or explanation for the application and enforcement. They are enforced because of

³⁸³ The data on the sanctions and prohibitions relating to family apartments siting was provided by Jimbun Tawai, Phillip Igai Melina and Enchana Labau during an interview and discussion on May 10, 2014. They were my research participants.

³⁸⁴ “*Pun ramu*” is literally the beginning of building materials and “*Ujung ramu*” is the end of the building materials. T “*Pun Ramu*” means the end from which the longhouse begins and the site of the first family apartment. “*Ujung ramu*” means the end of a longhouse where last family apartment is constructed.

³⁸⁵ “*Mampul*” is literally muffling in English. This is a situation where the apartments of two siblings are sited and built at both ends of a longhouse. The data was provided by Richard Muluk Entering on December 30, 2017(a *Penghulu* or Chief then) and verified by him on October 19th, 2019. Richard Muluk Entering is now an Iban Paramount Chief. He was a participant in this research. I asked the same question to the other male participants in 2017 but they could not give any definite reason.

spiritual belief and must be complied with to avoid spiritual punishment. But from my further discussions with the participants the situation may be inferred as “*ngepit*”, which is literally squeezing in English. “*Ngepit*” is a technical term according to the Iban social and cultural tradition. The Iban believe that a breach of such spiritual sanction could bring ill-fortune to the families being “squeezed” by the siblings. The ill-fortune is the spiritual punishment for disobedience or violation of the Adat. There is no other clear reason given by the participants.³⁸⁶ On July 21st, 2020, I asked a gathering of 30 Iban Chiefs (*Penghulu*) and *Tuai Rumah*³⁸⁷ the reasons or rationales for the application and enforcement of the Adat. They gave the same reason as mentioned above.

I view the Adat from the perspective of control of a longhouse. Both ends of a longhouse are the main entrances and exits. It is customary for any visitor to enter from either end of the longhouse. The permission or invitation to enter the longhouse is given by any member of the family at either end of the longhouse. The probable rationale for sanction is to avoid the impression that the community is controlled by the two siblings. This rationale is inferred from the Iban egalitarian ideology where an individual Iban family is autonomous and does not subject itself to the authority of the *Tuai Rumah* or control by anybody in the community.³⁸⁸

The following is my general observation and experience of the Adat regulating the organisation or order of family apartments. The Adat is peculiar to the Iban communities in the area under study and most of Iban communities outside the area. To the best of my knowledge, no other

³⁸⁶ The participants were Edmund Langgu, Richard Muluk Entering, and Philip Igai Melina.

³⁸⁷ The 30 Iban Chiefs (*Penghulu*) and *Tuai Rumah* were attending a two-day Adat Iban seminar in Bintulu, a town in Sarawak, from July 20 – 21, 2020. The seminar was organised by the Council for customs and Traditions Sarawak.

³⁸⁸ See: paragraph 2.3.

society makes it mandatory for siblings to live next to each other and uses law to enforce the spiritual belief or principles. The Iban have some special needs which require the force of law to regulate the social relations and affairs in the communities. The purpose of the Adat is to inculcate the culture of reciprocity, sharing, and caring among siblings and members of the community. The obligations emanate from principle of interdependence of families and the social and cultural norm under principle of reciprocity. The Iban are very mindful of the philosophy that nobody would be free from problems or difficulties in his or her lifetime. Thus, if you help someone in need you would be reciprocated for your good deeds in times of needs or trouble.

3.6 The wisdom of Adat Iban regulating the lighting of cooking hearth

This Adat is spiritual sanction and prohibition which the whole community is subject to. The Adat seems to fall within the natural law and implicit law as discussed above. From the idiomatic language used to express the Adat, it is presumably disguised as a spiritual obligation. This Adat has been codified under section 21 of the *Adat Iban* 1993³⁸⁹ and, thus, becomes a positive law and explicit law, i.e. a state made or human institution made law.³⁹⁰ This is a case of spirituality being used to enforce law. Spirituality is giving sanctity and legitimacy to the Adat. Where an Adat is believed to be a spiritual sanction or prohibition the Adat is sacred and placed on a higher level than man-made law. Obedience of spiritual law is based on belief not on legal reasoning or rationale. I argue that the Adat in this case is not purely spirituality but there is rationale and wisdom underlying the Adat. The Adat imposes an obligation of regular maintenance of the family's apartment to ensure the soundness of the structure and other materials for safety to occupiers and visitors of a longhouse.

³⁸⁹ Section 21 of the *Adat Iban* 1993 states that: "Whoever fails to light his fire place once in every 30 days shall provide a tunggu of 4 Mungkul and genselan consisting of a fowl and a kering semengat". This provision uses the term "fire place" to refer to the traditional Iban wood fire cooking place. I use the term cooking hearth to avoid confusion with the fire place for heating in European or Western homes.

³⁹⁰ Gerald J. Postema, "Implicit Law" (1994) 13:3 *Law and Philosophy* at 361 - 2.

This Adat states that the earthen cooking hearth³⁹¹ must not be “cold” (*chelap dapur*). The hearth is “cold” if it is not being used for cooking for more than 30 days.³⁹² Any family who breaches the Adat shall be liable to pay restitution to the *Tuai Rumah on* behalf of the community. The Adat requires that every family must cook on the cooking hearth in the kitchen regularly so that the cooking hearth would not be cold. The language is expressed in euphemistic and proverbial manner which is a common cultural expression in the Iban society. The way the Adat is expressed, I think, is one of the reasons why the real intention of the Adat is obscured. The Adat is derived from a spiritual belief that the hearth is also associated with the tutelary hearth spirits (*antu dapur*) who resides at the posts of the cooking hearth. The tutelary spirit which is supposed to protect and bring good fortune to a family. If a hearth is not used for any cooking activity for more than 30 days the hearth would become cold and tutelary spirit may abandon the family and bring away with it the good fortune or it may cause havoc to other families. If any family is away from the longhouse for whatever reason, at least a member of the family must return to their apartment to cook on the cooking hearth to avoid the phenomena.

The emphasis of the Adat is the regular use of the kitchen. This requires any family who stay away from the longhouse most of the time must return regularly to their apartment. By cooking their food on the hearth, the family would have to spend a reasonable period of time in the apartment. By sending sometimes in the apartment, they would likely notice the physical and structural condition of their apartment and repair it as and when necessary. This Adat does not directly say that the apartment must be maintained in good condition at all time. Another Adat says that the family who owned the apartment is liable to pay restitution to any person (excluding

³⁹¹ A traditional cooking hearth is a rectangle block of about 4ft x 6ft x 1ft in dimension and made of clay. At each of the four corners there is a small wooden post of about 5 – 6 feet high to support the firewood storage rack above. Firewood is used for cooking on the hearth.

³⁹² This is a spiritual term referring to a cooking hearth which has not be lighted or used for cooking for more than 30 days.

the family members) who suffers any bodily injury due trip or fall as a result of stepping on rotten plank or material on the corridor.³⁹³ This Adat evolved when the Iban longhouses were made of non-durable materials. The longhouse structure was made from soft timber. The floors were made of bamboo strips or small round wood. The walls were made of thick tree bark or bamboo splits and the roof was made of palm thatches or wooden shingles. The materials for binding the framework and structure were creepers such as rattan. Under such circumstances, the physical and structural condition of a longhouse and the apartments were not strong and durable.³⁹⁴

A reinterpretation of Adat from the social interaction of the Iban communities could offer a reasonable rationale and wisdom of Adat. The Adat which requires the hearth must not be “cold” is imposing an obligation on every family to ensure that the apartment is always in good habitable condition, and to ensure the safety of any person walking on the open corridor. The open corridor (*ruai*) is a common area of a longhouse where anybody can walk on or pass through. This Adat is similar to Hart’s primary rule of obligation. It imposes duties or obligations on individuals. The Adat which imposes liability on the family for any bodily injury caused by tripping or falling due to stepping on rotten plank is similar to Hart’s secondary rule. The Adat provides an authoritative statement for the first Adat to function effectively.³⁹⁵

The rationale and wisdom behind the Adat have been misunderstood because of the overbearing weight given to the spiritual implication of the sanction and prohibition. Many families demolished their cooking hearth or used modern cooking appliances to circumvent their spiritual obligation. Their argument is that, without the cooking hearth in the kitchen no Adat can be breached. However, the argument or reason is a misnomer because act of demolition of the

³⁹³ This Adat is now codified under section 40(1) of *Adat Iban* 1993.

³⁹⁴ The data was provided by the late Mandi Anak Melana in 2013.

³⁹⁵ Marcus G. Singer, “Hart’s Concept of Law” (1963) 60:8 *The Journal of Philosophy* at 199.

cooking hearth is taking the Adat too literally and simplistic. The obligation imposed by the Adat is not literally lighting the fire on the cooking hearth. The rationale behind the Adat is to compel every family or at least a member of every family to return and stay regularly in their apartment is to carry-out a regular maintenance of the apartment to ensure the safety of members of the community and visitors.

The Adat is similar in principle to the law of Tort on occupiers' liability law like the English Occupiers' Liability Act 1957.³⁹⁶ It has some ideas similar to the English law of Tort on negligence as expounded by Lord Atkin's ratio on duty of care and neighbour principle in *Donoghue v Stevenson* (1932) A.C. 562. The owner of an apartment owes a duty of care to ensure the safety of the members of the community or visitors who are the owner's neighbours. They are the people who are very close to the owner and would be likely to be injured if the owner failed to keep his or her duty of care. The Iban discovered the wisdom a long ago but they never developed the idea and knowledge into a positive law or explicit law. As I mentioned above, The Adat is still expressed as spiritual sanction and prohibition. The good idea and sound knowledge underlying the Adat have the potential and quality to be developed into a secular Adat regulating the occupiers' liability for the modern Iban community.

From another perspective, the Adat may be viewed as an unspoken contractual agreement between members of a community contracted through the ritual of installing the cooking hearth in a new longhouse. According to Sather,³⁹⁷ after all families have installed their hearths, the

³⁹⁶ In theory this Adat is quite similar to the English Law on Occupiers' liability Act 1957, which largely codified the English Common law. However, under the Adat, negligence can be committed even before any person got injured. The act of not lighting the cooking hearth is a breach of the sanction. This Adat has been practised by the Iban for centuries.

³⁹⁷ Clifford Sather, "Posts, Hearths and Thresholds: The Iban Longhouse as a Ritual Structure" in James J. Fox, ed., *Inside Austronesian House: Perspectives on domestic designs for living*, (The Australian National University, Canberra 1993) at 75.

first fire is lit by the *Tuai rumah*. The other families then take their first fires from the headman's hearth. The installation and lighting of hearth in every family kitchen bind the separate families together into a single ritual and Adat community. From the time the hearths are installed in the longhouse until the structure is dismantled and replaced by a new one, they must not be allowed to become 'cold' (*chelap*). A 'cold' hearth signifies an unoccupied apartment which may indicate the family's withdrawal from the community. Under the old Adat, a fire must be lit, and meal cooked over the fire at least twice each lunar month, which were at the new moon and full moon. This was to prevent the hearth from becoming "cold". As mentioned above, this Adat has been substituted by section 21 of *the Adat Iban* 1993. If a family breaches the Adat, they must perform an appeasement ritual. The observance of the Adat is to prevent the disintegration of the longhouse community. In the past the dismantling of the hearth marked the formal withdrawal of a family from the longhouse community. Only by maintaining a *bilik* hearth may a family exercise membership in the longhouse community and cultivate land within its *menoa*.

The picture below shows a humble traditional earthen cooking hearth in the kitchen of an Iban family.



Picture 7: A picture of a traditional earthen cooking hearth in a kitchen of a longhouse. A traditional cooking hearth is a rectangle block of about 4ft x 6ft x 1ft in dimension and made of clay. At each of the four corners there is a small wooden post of about 5 – 6 feet high to support the firewood storage rack above. Firewood is used for cooking on the hearth. This is where meals are cooked, and other food preparations are made. Placed around hearth are cooking utensils and two plates are hanging around the cooking hearth. Three of the posts of the cooking hearth, where the spirit supposedly resides are visible in this picture. The jars are for water storage. This picture is in the public domain.

3.7 Chapter conclusion

This Chapter examines and explains the wisdom of Adat Iban for the management and maintenance of the longhouse. The Iban definition of wisdom is the quality in the utility of knowledge, or idea, or experience, or judgement underlying the Adat which can bring about benefits or judgment to the communities. But the concept of wisdom may change according to needs of the social situations prevailing at a particular time. For example, in the case of the Iban

leadership, the concept of wisdom shifted from survival to economic up-grading of the communities. The Adat emphasised the concept consensus in decision-making. Only if consensus failed the elective system used to finish the job. The idea was to make important political decision through harmony to suit the social condition of a communal living. Consensus is an ideal concept for a perfect world where integrity reigned. However, it did not always work perfectly and could open to manipulation by some influential people or a group having the majority in number to achieve a decision that could serve their interest.

The Adat Iban regulating the construction and management of longhouse are natural and implicit law probably disguised as spiritual sanctions and prohibitions to effect compliance. The sanctity and legitimacy of spiritual law are sacred and regarded as higher than man-made law. Such Adat are always backed by reward for compliance and punishment for violation by Gods and Spirits. However, such reasons are too simplistic and do not articulate the rationales and wisdom of the Adat. The use of spiritual reward and punishment could diminish in importance once the fear of Gods and Spirits dissipates or evaporates through the intervention of other religions or new ideas. For example, Christianity and modern education have dispelled many aspects of Iban spirituality. Therefore, the reinterpretation and/or re-evaluation of Adat based on reasons and purposes for the application or enforcement of the Adat could discover the potential of the knowledge or ideas behind the Adat to be developed into explicit and modern law. For example, the knowledge underlying the Adat regulating the orientation of longhouses could be developed for the rights to unobstructed natural for landowners and settlement planning strategies for the Iban and other natives.

The Adat regulating the organisation of family apartments promote mutual welfare, caring, and reciprocity in an interdependence community. Reciprocity is the backbone for the survival of an

Iban community and the pillar of welfare for the weak and poor members. If reciprocity is taken away from an Iban community, the communal longhouse living could gradually collapse and disappear. There have been many instances of disintegration of longhouse communities where individualistic and money replaced the reciprocity system. In these communities, every service is paid for in money. But most Iban communities are now practising a mixed concept of reciprocity and money for foods and labour. The mutual welfare and reciprocity were very far sighted knowledge and idea when the Iban ancestors introduced the systems in past. They were able to see very far into the future when they developed this Adat. Adat provides convenience and relief for those families who are always away from the longhouse.

The Adat regulating the maintenance of family apartment requiring a regular check on the physical and structural condition of the apartment is a traditional wisdom. The idea could be developed into positive Adat for the regulating of maintenance of the family apartment. At the moment, the Adat is expressed as a spiritual sanction and in a euphemistic way. This is the reason why many Iban do not understand what the purpose and intention of the Adat is. Thus, by demolishing the earthen fire hearth they are not subject to the Adat. Logically, the prohibition or taboo cannot be violated where the subject matter regulated by the Adat is not in existence.

Chapter 4

4. The wisdom of Adat Iban regulating marriage and divorce

4.1 Introduction

The Adat Iban regulating marriage and divorce are social control for the creation of orderly families and communities and at the same time managing sexual relations and morality. The Adat regulating the solemnisation, permanent residence, parental consent, capacity, and impediments of marriage are among the most important matrimonial matters discussed in this chapter. The discussion on the Adat regulating divorce highlights the Iban legal system for the termination and settlement of any fail marriage. The purpose is to dissolve any failed marriage quickly and efficiently so that the couple could move on without any legal or moral hindrance and to rebuild their future. Some provisions for the Adat are designed to protect women welfare and rights. At the moment, there is no provision in the Adat to allow same-sex marriage between to lesbians, gays, bisexuals, transgender, and queer (LGBTQ).

4.2 Marriage

A marriage is a matrimonial union between a man and a woman. The Iban traditional concept of marriage is that a marriage creates a family of procreation. A family of procreation refers to a family formed through a marriage and consists of spouses and children.³⁹⁸ A marriage between a man and a woman which begets many children and grandchildren is considered as a successful marriage and family. This concept is presumed to have been developed centuries ago when the Iban need a dynamic population growth to support their quest for new land and struggling to survive the tribal wars in Borneo. A man and woman living together and having children without the sexual relation being formalised according to the Adat is not a legitimate

³⁹⁸ "Family of Procreation" (2013) in Bell Kenton, ed., *Open education sociology dictionary*. Retrieved from <https://sociologydictionary.org/family>

matrimonial union and does not create a family of procreation. Any issue or child begot from such union is an illegitimate child. Such family is not considered as a family unit in a community and may not be entitled to any communal resources such as land.³⁹⁹

Marriage is an integral part of the structure of the Iban society.⁴⁰⁰ The institution of marriage creates the institution families which play the role in the socialisation of children and the continuation of society through procreation. The families are the social units and social fabric of the communities which build up and reproduce the Iban society biologically. In the Iban society, a marriage is also a creation of kinship through affinity. The families of orientation⁴⁰¹ of individual spouses become kin by affinity. A family of orientation means the family in which an individual person is born into or grows up in. The families and kinship are an integral part of the Iban social fabric upon which the Iban society is established and developed. This kinship extends the concept of family and relatives, and, hence, creates and establishes new legal and social relations in Adat between the two affinal families. The kinship extends the concept of incestuous relationship in the Iban sexual relation and morality.

The Adat regulating marriage and the Iban concept of marriage are ancient law and notion, respectively. A marriage is regarded as a sacred matrimonial union and must be between a man and a woman who are not prevented or prohibited by any legal or moral impediment. The legal requirements and the concept of marriage are contrary to article 16 of the *United Nation Universal Declaration of Human Rights* 1948 (UDHR). The Iban through their Adat, the concept

³⁹⁹ The data on the concept of marriage were provided and verified by Enchna Labau, Jimbun Tawai and Philip Igai, who were my research participants, during an interview and discussion with them on June 23, 2014.

⁴⁰⁰ Lord Devlin, *Morals and the Criminal Law in The Enforcement of Morals* (Oxford University press, 1965) at 33. The essay "Morals and the Criminal Law" was part of the series of Maccabaeian lecture in jurisprudence, 1959, of the British Academy, entitled "The Enforcement of Morals."

⁴⁰¹ "Family of Orientation" (2013) in Bell Kenton, ed., *Open education sociology dictionary*. Retrieved from <https://sociologydictionary.org/family>.

of marriage, and the understanding of law and morality are in still frozen in the past. They do not allow same sex marriage between persons whose sexual orientation are defined as lesbian, or gay, or bisexual, or transgender, or queer (LGBTQ). The Iban and Adat still cannot accept any matrimonial union of persons of the same sex. For the time being, the concept of same sex marriage is still beyond the comprehension and still a prohibition (taboo) of the Iban. Such kind of sexual relationship is against the grain of the mainstream Iban moral values which could upset the social order and harmonious society. Any sexual relation or union between the persons of the same sex is considered as an act of gross indecency or immorality and is an offence under Adat Iban.⁴⁰² Such relationship is viewed as unnatural and morally wrong (*ngudi menua*),⁴⁰³ which could upset the spiritual equilibrium and might be punished by spiritual wraths. The spiritual punishment could be in the form of ill fortune, or natural disaster, or other calamities befalling to the community concerned. The application and enforcement of this Adat is an example of the cultural and spiritual compliance of Adat and the belief of spiritual rewards for compliance and punishment for violation. The belief in the spiritual punishment could be interpreted as a social and cultural expression of rejection and condemnation of same sex marriage and sexual relation by the Iban communities at the moment. This is a relationship of law and morality in the regulating of sexual relations in Iban communities. Adat as law is used to enforce morality and what is immoral is illegal. To the Iban closely knit communities the Adat is good and wise for keeping the communities orderly. But the Adat may be viewed as ancient and out-dated for not keeping up with the social changes of the time.

The development of this Adat is not very dynamic and pragmatic enough in the recognition and acceptance of same sex marriage and the various sexual orientations. LGBTQ human rights

⁴⁰² Section 130(a) of *Adat Iban* 1993 for gay (male and male) and Section 130(b) for lesbian (female and female).

⁴⁰³ There is no equivalent in English for "*Ngudi menoa*". It is a kind of behaviour which is unnatural and may cause moral upheaval in the society.

and same sex marriage are quite a new phenomenon particularly to the Iban society and Malaysia in general. The Iban have not been confronted directly by this phenomenon. So far, nobody has ever challenged this Adat. It would be very interesting to see how the Iban communities would react and resolve such issue if and when it arises in the future. At the time of writing this dissertation, Malaysia has yet to ratify the declaration. There is no legal protection or rights for LGBTQ in Malaysia. Even if the Iban are dynamic and willing to adjust and adapt the Adat to the needs and rights of LGBTQ, they are not in a position to adopt article 16 because Malaysia has not ratified the declaration. The state law in Malaysia still criminalises same sex marriage. Any consensual sex act between two consenting males even in private is still a crime in Malaysia under carnal intercourse against the order of nature.⁴⁰⁴ There is a general provision under the Malaysian *Penal Code* (Act 574) which may criminalise and punish sexual relation between lesbians.⁴⁰⁵ The words “whoever voluntarily commits carnal intercourse against the order of nature” may bring in lesbian relationship within this provision. However, it is a crime under the Sharia Law in Malaysia for the Muslims lesbians to marry or having sexual relationship.⁴⁰⁶ The way to resolve the issue is for the Malaysian government to ratify the UDHR and abolish the law on sodomy, i.e. carnal intercourse against the order of nature. This could allow the Iban and Adat Iban to consider changing the Adat and the concept of marriage. The responsibility would rest on the shoulders of the younger generation which may have different concept of marriage. One of the most important things is add “love and affection” to procreation in the concept of marriage. This concept would mean marriage is not just reproduction but also for love and affection, which could allow same-sex marriage.

⁴⁰⁴ Section 377A of *the Penal Code* (Act 574). The Penal Code is Malaysian criminal law code.

⁴⁰⁵ Section 377B of *the Penal Code* (Act 574) states that: “Whoever voluntarily commits carnal intercourse against the order of nature shall be punished with imprisonment for a term which may extend to twenty years, and shall be punished with whipping.”

⁴⁰⁶ Islam is a state matter and every state in Malaysia administered its own Sharia law. Same sex marriage or sexual relationship between women (*musahaqah*) is an offence under Section 23 of the *Syariah Criminal Law Offence Ordinance 2001* of Sarawak. Sharia is spelt Syariah in Malaysia.

Coming back to the Adat, Iban subscribe to the sanctity of the institution of monogamous marriage. Bigamy is expressly prohibited under section 131 of *Adat Iban* 1993. This Adat defines bigamy as a man having more than one wife at a time. Adat Iban has no specific provision regulating polyandry, which refers to any woman having more than one husband at a time. Polyandry is by implication not permitted under the concept of monogamous marriage. Should this issue arise, it would be interesting to see how the Native Courts would adjudicate and decide on such case. However, exogamous marriage between relatives of the same level of kinship hierarchy, e.g. marriage between first cousins or second cousins and so on, is permitted. Any other kind of sexual relationship or cohabitation is not a valid marriage and not permitted. The Adat which prohibit polygamy and polyandry is meant to maintain the concept of harmonious unitary family. If a man has more than one wife or a woman more than one husband, it could bring chaos, unfairness, and dispute among members of the families.

4.2.1 Solemnisation of marriage

The traditional Adat Iban requires that marriage must be solemnised by public announcement in the presence of a *Tuai Rumah* (Headman) and the relatives of the marrying couple and members of the longhouse community or communities, if the marrying couple are from two different longhouses. It has been a practice for the Iban to announce any marriage to relatives, friends, and members of the community or communities. The practice evolved into an Adat which imposes an obligation that a valid marriage must be solemnised by public announcement before a *Tuai Rumah*. This Adat has been codified under section 148 of the *Adat Iban* 1993 with some modifications and came into effect on June 1, 1993.⁴⁰⁷ The Adat states:

⁴⁰⁷ Section 1 of the *Adat Iban*, 1993.

An Iban marriage which is solemnised in accordance with the Iban custom shall be performed in a public ceremony called “Melah Pinang” or a simple ceremony called “Bebiau” (jadi melaki bini) before a Tuai Rumah.

A marriage Testimonial may be issued by a Penghulu at the request of the married couple.

The codification of the Adat for the solemnization of marriage under section 148 of the *Adat Iban* 1993 regularises the uniformity of the rule and procedure for the solemnisation of marriage in the Iban communities in Sarawak. Before the codification of the Adat, the solemnisation of marriage varies from one community to another. However, at the time of writing this dissertation, there is no proper system for the registration of marriage and registration of Marriage Testimonial. The *Adat Iban* 1993 does not state which authority should keep and maintain the register of marriage and Marriage Testimonial.

At the moment, there is an ad hoc administrative arrangement for the *Majlis Adat Istiadat* Sarawak⁴⁰⁸ to receive and keep the record of marriage from 40 District Offices and 26 Sub-District Offices in Sarawak. The computerised record is linked to the National Registration Department, Malaysia, mainly for the verification of marital status of any Iban who wishes to get married under the state law of Law Reform (Marriage and Divorce) Act 1976. The primary purpose is to prevent polygamous, bigamy, and polyandry marriages amongst the Iban. The other purposes are relating to the issuance of birth certificates and identity cards, and also to determine citizenship status. The major unresolved issue is the recognition of marriage solemnised under Adat Iban by some federal government agencies or authorities in Malaysia. The document certifying a marriage contracted under Adat Iban is known as “Marriage

⁴⁰⁸ Majlis Adat Istiadat, Sarawak, is the Council of Customs and Traditions, Sarawak, in English.

Testimonial” not a marriage certificate. Some federal government agencies or authorities are not aware or informed of the legal status and validity of marriage solemnised under Adat Iban. They only accepted and recognised marriage certificates for non-Muslims Malaysians are those issued by the National Registration Department under the Malaysian Law Reform (Marriage and Divorce) Act 1976. This is ignorance rather than technical or legal issue.

Section 148 of *Adat Iban* 1993, states only two methods for the solemnisation of marriage, namely: *Melah Pinang* and *Bebiau*. There is one more method call “*beterang*” which is commonly used for the solemnisation of marriage in the Iban communities which is not included in the Adat. “*Melah pinang*” is a term referring to a solemnization of marriage and wedding ceremony conducted in full traditional rituals of the Iban society. A marriage contracted under Adat Iban without the “*melah pinang*” ritual but solemnised by public announcement before a *Tuai Rumah* is valid. The public announcement of the marriage before a *Tuai Rumah* of a longhouse is the legal formality that makes a marriage valid. This will be discussed in detail under “*bebiau*” and “*bererang*” below.

“*Melah pinang*” is a cultural ritual of splitting an areca nut (or betel nut) ⁴⁰⁹ to signify the completion of the formalities of the solemnisation of marriage. Hence, the ceremony is called “*Melah Pinang*”. The splitting of a betel nut into pieces has no legal implication. It is a cultural ritual to fix a return date for the married couple to make a return visit to the bride’s longhouse or family apartment (*nyundang pinang*).⁴¹⁰ In some Iban communities in Saribas sad Kelaka area, the solemnisation of marriage by *Melah pinang* would involve a tradition ritual of asking for dowry

⁴⁰⁹ An “areca nut” or betel nut is a fruit of the Areca palm (*Areca catechu*).

⁴¹⁰ The areca nut is split into either 3, or 5, or 7 pieces (odd number). If the nut is split into 7 pieces, the couple must make a return visit on the 7th day after the wedding ceremony. If 3 pieces the return dated will be on the third day. A small ceremony would be held by the bride’s parents to celebrate the return visit. This information or data was provided by Richard Mulok Entering during an interview at Lachau on August 6, 2014

(*derian*) and nuptial gift (*bunga pinang*) by the bride. The groom may ask a gift for his “back-rest” (*penyandih*). This ritual has some cultural significance and connotations and a vow for both spouses to keep the marriage until death separates them. If the marriage only lasted for a very short time (*semina ngabas bilik ngabas penaik*), the party who is responsible for the divorce would forfeit the dowry or gift.

More and more people are opting for “*bebiau*” a simple and less expensive ceremony. A solemnisation of marriage by “*bebiau*” is a public announcement of a marriage before a *Tuai Rumah*. “*Bebiau*” is actually a ritual of summoning Gods and Spirits through incantation to seek divine and spiritual blessings and protection for the marrying couple. A bard or a person appointed for the task would recite an incantation and at the same time waves a cockerel over the heads of the marrying couple. It is customary for words of warning and advices are uttered to the public that the couple are now subject to Adat of fidelity and sanctity of marriage, and whoever transgresses the Adat would be liable for punishment accordingly. This kind of solemnisation of marriage is normally witnessed by the relatives of the marrying couple and members of the community.

“*Beterang*” is a term referring to a solemnisation of marriage by public announcement in the presence of the relatives and members the community either before or without a *Tuai Rumah*. This process of solemnisation of marriage is without any spiritual ritual. A person appointed by the families of the marrying couple would make a public announcement of the marriage of the couple. “*Beterang*” is the simplest procedure for a solemnisation of marriage. This procedure was the most common way to solemnise marriages in the past and still quite widely used today.

The wisdom of the Adat is that marriage cannot be secret and must be made known to the public. This is because of the sanctity of the institution of marriage and the moral values intertwined with sexual relations. The public announcement of a marriage is a formal declaration and to notify the whole world of a marriage between a man and a woman. The world of an Iban community is very small but it is legally very significant. The public announcement is the symbol telling the whole world that a man and a woman are married, and they are belonging to each other. It would be an offence to have sexual relationship (adultery)⁴¹¹ or any kind of physical or passionate relationship which may amount to infidelity and unfaithfulness on either one of the spouses after the announcement of the marriage. The warning is stated in very clear term that no one else should come in between to disturb or destroy the matrimonial union. This is a very important reminder not only for the others but also for the marrying couple to protect the fidelity and sanctity of the marriage. Infidelity such as adultery is a good ground for an application for the dissolution of a marriage. It is also a measure to check polygamy, polyandry, and bigamy. Therefore, a marriage cannot be a secret or private matter in the Iban communities.

Marriage cannot be secret in the Iban communities. This is because of the sanctity of the marriage institution which entails sexual morality and rights under matrimonial and social matters. Any marriage which is not solemnised in public and before a *Tuai Rumah* may not be a valid marriage and protected by the Adat. If any question regarding the validity of a marriage would arise in the future, the people who witnessed the ceremony or ritual could verify the validity of the marriage. If a marriage ends up in divorce, the rights to property, custody, and maintenance of child or children are protected accordingly. The validity of a marriage is crucial in determining the rights to property through inheritance in the event of the death of a spouse.

⁴¹¹ There are a various kinds of adulteries under Adat Iban. The offences are codified under section 163 to section 170 of the *Iban Adat* 1993.

The Iban uphold the principle of purity and holiness of marriage and that nobody should come in between a married couple. The warning against infidelity uttered during the solemnisation of marriage is a clear and serious message on the sanctity of marriage. Infidelity, e.g. adultery, is an offence⁴¹² under the Adat and a ground for an application of divorce. Adultery is not only an offence but could obliterate the rights of custody and maintenance of children.

The concept that a marriage is a matrimonial union between a man and a woman is an example of Adat imposing sexual morality. The public solemnisation of marriage could ensure that the sexual morality is complied with. Apart from the prohibition on same sex marriage, the other prohibition on sexual relations is incest. Incest is not only confined to parent/child or sibling/sibling sexual relationship but an extended incest. For example, a marriage between a woman and a man who is a brother to one of the women parents is incest of the higher degree. According to the Iban kinship hierarchy, the man is deemed to be the father of the woman. It would be the same if a man is married to a woman who is a sister of one the of the man's parents. Such marriage is prohibited. It is still incestuous marriage, if a marriage is between a man and a woman who is a distant cousin of one of the man's parents. But such marriage falls under a lower degree of incest. Such relationship is restricted and may be allowed. Incestuous relationship is traced by a recital of genealogies of the man and woman, which is still practice among the Iban in Saribas and Kelaka areas. This Adat is a custom. But there may be rationales or reasons for the enforcement of such Adat which might be still useful or beneficial to the Iban communities. The Adat prohibiting incestuous relationship is an attempt to create and maintain an orderly society in term of kinship hierarchy.

⁴¹² Section 163 of *Adat Iban*, 1993.

4.2.2 Permanent residence of a newly married couple

The Adat called “*nguai*”, requires that one of the spouses must move out of his or her family of orientation and marry into the family of the other spouse to establish their permanent residence. The Adat regulates the membership of a longhouse community. The permanent residence status gives an automatic membership of the community and the rights and privileges of a member.⁴¹³ I am of the opinion that this Adat is similar in principle to the modern citizenship and immigration laws of a sovereign country. This Adat depicts the Iban concept of sovereign political entity of a longhouse and its territorial domain. If the man and the woman who are getting married are from two different longhouses, the Adat requires that they must decide their permanent residence which is called “*penyangkai*”, which is literally a port or landing place in English, for a newly married couple. “*Penyangkai*” is a technical term for the longhouse where the couple would establish their permanent residence.⁴¹⁴ Dual permanent residence in two longhouses is allowed under certain circumstances but very rare. This case could happen where one of the spouses takes over the household and family apartment in another longhouse following the death his or her parents or a sibling, provided that they can perform the duties and responsibilities required of them in both longhouses. If the man and the woman are from the same longhouse, they must decide which family or household would be their permanent residence. The wisdom of the Adat “*nguai*” is relating to the defining or establishing the rights, privileges, and responsibilities of a married couple as members of a community and as members of a family in respect social, economic, and political relations in the community. Some examples of the wisdom of the Adat are discussed below.

⁴¹³ The meaning of “*nguai*” was given by two Iban bards, Laga Anak Luna and Jiram, from Saratok during a meeting and discussion with them in 2013.

⁴¹⁴ The concept and implication of the Adat were narrated by Edmund Langgu Saga in a series discussion from 2013 to 2020. The late Mandie Anak Melana explained to me the importance of the Adat to the Iban communities in the old days.

The Adat regulating the rights to property related to the permanent resident Adat is very important to avoid property disputes. According to the Adat, the spouse who moves out of his or her family of procreation and to live permanently with the other spouse family shall lose his or her rights to any landed property owned or held such family. The rights to landed property cannot be brought over to the new family. By moving out of the family he or she is no longer a member of the household. He or she becomes a member of another household now and the right to landed property is superseded by his or her rights in the new household. He or she is not entitled to the landed property from both households. However, he or she may be given a landed property as a gift from his or her family of procreation but he or she cannot demand for it as a right. When a married couple breakaway from the principle family and forms their own family and having their own apartment, they would be entitled to property from the principle family and the communal natural resources. The principle family means the family which the married couple established as their permanent residence after the solemnisation of their marriage. If the status of permanent residence is “undetermined”, the rights to landed property is also undetermined. When the time comes to distribute the property among the members of the household, the person whose permanent residence is undetermined may not be given any share if the property is limited. This has been a source of land disputes in the Iban communities.

In death, a married couple would be entitled to rights and privileges for the funeral wake and bereavement ritual in the longhouse and burial at the community cemetery of their permanent residence. The rights and privileges relating the funeral, burial, and bereavement rituals may have no significance to an outsider. But these rights and privileges are very important to the Iban. There are many spiritual sanctions and prohibitions regulating the funeral, burial, and bereavement which can be are very problematic for many Iban communities. Only the members of a longhouse community are entitled to be given the respect and honour of funeral wake and

bereavement rituals in the longhouse and buried in the community cemetery. It is a spiritual prohibition for non-members to be given any these rights and privileges. A breach of such prohibition could cause the longhouse and the community to be “hot” (*angat*).⁴¹⁵ If the spouses are from the same longhouse, the Adat has very little significance. They are still members of the community and entitled to be accorded the rights and privileges upon their death. But it could be a big problem for any married couple whose permanent residence is “undetermined”, and they are not from the same longhouse and their place of abode is in a town or city. If one of the spouses dies at their place of their abode, the place for funeral, burial, and bereavement rituals could be a grave matter. The funeral wake and the bereavement rituals can be held and enforced at the couple placed of abode if the house belongs to the surviving spouse or belonged to the deceased spouse. But the burial of he remains may be problematic. The remains may be buried in the cemetery belonging of the longhouse where the deceased was a resident before the marriage with the permission of the *Tuai Ramah* and the longhouse community. But such permission may be difficult to obtain. A few local or city councils in Sarawak are providing burial grounds for city dwellers or those patients who died in the hospitals without anybody claiming their remains. At the moment, Funeral service and parlour are very limited in Sarawak and the Iban are not practising cremation of remains.

Another important aspect of the Adat “*nguai*” is relating to the duties and responsibilities of taking care of parents during their old age and the management of their funeral, burial, and bereavement in the event of their death.⁴¹⁶ It is a moral and filial duty for one of the children, if more than one child, to look after the welfare of their parents during their old age until their death (*nupi nengkani mejam nangam*). This filial piety obligation is a serious consideration when

⁴¹⁵ See paragraph 2.4.4 supra for the description of the term “hot” (*angat*).

⁴¹⁶ The concept and importance of the Adat was provided by Edmund Langgu Saga and Jimbun Tawai in a number of interviews and follow-up discussions from 2013 to 2018.

determining who should move out of the family of procreation and reside permanently with the other spouse family. If a person getting married is the only child, his or her spouse would likely to move out of the family and reside with his or her family after the solemnisation of the marriage. This Adat is still observed strictly by many Iban today because there no welfare homes or nursing homes in most Iban areas. Even if there are, very few Iban can afford the fees. The care for the old age parents is still a very much part of the Iban culture and Adat. If the son or daughter who is supposed to look after the welfare of his or her old parents refuses to carry out such duty, the breach is not an act or omission punishable by fine or restitution. But such act or omission is considered recalcitrance and shun by the community. If the old couple has no other children, their relative would normally help them. This is one of the reasons why the family apartments of siblings must be sited and constructed next to each other.

In view of the above discussions, it is prudent or wise to settle the permanent residence issue at the initial stage of the marriage. The permanent residence of the married couple must be determined and settled by the families of the marrying couple before the solemnisation or during the solemnisation of marriage and to be announced in public. This Adat was very important to the Iban communities about 40 years ago. Lately, the intent and purpose of this Adat have been misinterpreted and misunderstood as purely for economic purposes and regarded as having no relevance by some Iban. The common presumption is that the spouse who marries into the family of the other would sever his or her financial and other economic contributions to his or her biological family. This is because he or she has become a member of another family. The presumption is quite correct, but it is not the primary purpose of the Adat. As discussed above, the primary purpose is to determine which Adat and the rights and privileges the couple would be subject to. At present, the application of this Adat is optional now. If the Adat is not applied and enforced, it would not invalidate the solemnised marriage. But the Adat which the married

couple are subject to are undetermined. This could raise some serious legal and social issues in the future. However, the importance of this Adat may resurge in the near future. This will be discussed in chapter 6 below.

The Adat “*nguai*” is gender neutral, which is slightly different from gender equality in the Iban culture.⁴¹⁷ Gender neutral means that the Adat has been neutral all the time in its practice. The neutrality is based on the Iban egalitarianism ideology and simply a right thing to do under the family matters. Whereas gender equality is an adjustment to adapt the practice of Adat to accommodate certain women’s rights which have been hitherto denied or overlooked. For example, the new Adat for the appointment of *Tuai Rumah* where the application of the Adat is adjusted to accommodate women’s rights and gender equality. Adat “*nguai*” applies equally to the bride or bridegroom and does not give any unfair advantage to either of them. The decision on who should marry into which family would be determined entirely on social and economic considerations. For example, being the only child or the only breadwinner of the family is a good reason for a spouse family to convince the other spouse to acquiesce and marry into that family.

4.2.3 Ways of contracting marriage

Freedom of marriage is a right in the Iban communities. Any person is free to choose a person of the opposite sex to marry. However, the freedom is a qualified freedom and not extended to LGBT at the moment. This contradicts the description of Iban society as an egalitarian society. There are a number of ways of contracting marriage in the Iban communities. However, whatever way a marriage is contracted, the marriage would not be valid unless it is solemnised or deemed to be solemnised according to the above-mentioned Adat. The most common way

⁴¹⁷ The interpretation of Adat “*nguai*” in this paragraph is inferred from the views of some members of the Iban communities during my visits to Betong from 2013 to 2020. Richard Muluk Entering and many others had contributed their ideas on the subject. Their names are too many to mention here.

of contracting marriage nowadays is by personal choice under the Iban concept of freedom of marriage. However, arrange marriage is still practised by some Iban families. In the past, it was the responsibility of the parents to arrange or to be involved in the marriage of their sons and daughters. It was always the hope and aspiration of every parent to see that their sons and daughters were properly married and establish their own families. Under such circumstances, arrange marriages between relatives were very common in the past. It was preferable to marry one's son or daughter to a relative rather than to marry someone outside the kinship or to a stranger. The younger generation sees this cultural or customary practice is out-dated. Thus, freedom of choice of husband or wife is the common trend now.

There are two unique ways of contracting marriage in the Iban communities. The first is a marriage contracted through the Adat of paternity claim. An unmarried woman who got pregnant must make a paternity claim in public by naming a man who is responsible for the pregnancy. The claim needs not be supported by concrete evidence. If the claim is successful, the man responsible for the pregnancy may be ordered to marry the woman and the marriage would be solemnised immediately by public announcement there and then. Normally, in a successful case, the man admits that he is responsible for the pregnancy. If the man refuses to marry the woman, he would be punished and ordered to pay a fine and restitution.⁴¹⁸ In addition, the man, as the putative father, would be ordered to pay the maintenance of the bastard child until it reaches the age of 18 years.⁴¹⁹ This Adat is quite similar to the old English laws, namely: the *Poor Law 1733*, *Bastardy Act 1845*, and *Bastardy Laws Amendment Act 1872*, which require the putative father to pay the maintenance to a bastard child.

⁴¹⁸ Section 179 of *the Adat Iban 1993*.

⁴¹⁹ Section 159 of *the Adat Iban 1993*.

The Iban uphold the notion that no woman can be pregnant without any sexual relationship with man.⁴²⁰ The Iban have no concept of immaculate conception. Some Iban family genealogies trace and claim their ancestors were descendants of certain divines or spirits. Those Iban ancestors were the issues of divines or spirits appeared in the form of human beings during their marriage to the Iban ladies.⁴²¹ If the woman refuses to make a claim or fails in her claim, the pregnancy would be deemed to be a result of a sexual relation with an animal. The deeming is not saying that the woman was actually having sexual relation with an animal. But because she refuses to make a claim or fails in her claim against a man as the person responsible and there is no notion of immaculate conception, therefore, the pregnancy is attributed to an animal. This is an Iban cultural and ritual mean of condemning and demonising an immoral and shameful behaviour. The refusal to make a claim could be because of incestuous relationship or the women had sexual relation with more than one man and unable to determine who is man actually responsible for the pregnancy. This Adat was developed when no scientific knowledge was available to carryout DNA test to determine who fathered the baby. This Adat ought to be amended to allow DNA test to determine the father of the baby. If a pregnancy is a result of a rape, the victim would make her claim in a similar manner. However, it would be very easy for the victim to claim paternity under this case.

A wilful refusal to make a paternity claim or an unsuccessful claim turns such pregnancy into an offence and would be liable to a fined and to perform a purification ritual.⁴²² Such refusal or failure would make the child, if born alive, to be an illegitimate child. The act is condemned as

⁴²⁰ The concept of the Adat was narrated by Edmund Langgu Saga.

⁴²¹ For example, Chabu was a famous Iban leader of Batang Ai, in the present day Lubok Antu administrative district, a few centuries ago. He was believed to be an issue of a marriage between a spirit and an Iban lady. The spirit appeared in the form of a human being during his marriage to Chabu's mother. The narrative was told by the late Jagit Anak Sana to me sometimes in the early 1980s.

⁴²² Section 178 of *Adat Iban* 1993.

a bad or immoral behaviour. The act is known by a derogatory term of “*ngampang*” in the Iban Adat and culture.

The wisdom of this Adat may be inferred from three aspects. Firstly, it is a preventive measure against unwanted pregnancy amongst unmarried women. Pregnancy of unmarried woman is immoral and very shameful social stigma to the woman and her family. This social behaviour is always equated with poor up bringing in the Iban communities. The communities think that it is their moral duty to regulate such behaviour. The moral standard of the Iban as reflected by this Adat may be similar to the Victorian England morality view on unwed mothers and their illegitimate infants. They were considered as an affront to morality.⁴²³ Secondly, it is a protection of women against sexual exploitation by men. The Adat requires that the person who is responsible for the pregnancy must admit the responsibility and marry the woman as a “face saving” measure to avoid the social stigma of immoral and shameful behaviour. Thirdly, to ensure the man who fathered the child must be responsible for the welfare and up-bringing of the child, if the child were born live. Bringing up a child alone by the mother was and still is a very heavy burden. Thus, it is not fair for the mothers or women in general to shoulder the burden of the children welfare and up-bringing.

The Adat has been viewed as a very harsh and cruel shaming and damning rule by many Iban women. The rule is enforcing sexual morality which many view as private morality. The Adat is encroaching into the realm of personal and private morality. It is up to every Iban women concerned to decide what she think best for herself. The younger generation of Iban especially those living outside the traditional settlements, such as cities and big towns, view this Adat as

⁴²³ Dooty L. Haller, “Bastardy and Baby Farming in Victorian England” (2209), Paper selected by the Department of History as the outstanding paper for 1989-1990 academic year, Loyola University.

obsolete. They think that every woman has the rights to decide what she wants to do with her own body. The different of opinions among the Iban indicates that the standard of morality in the Iban society is not uniform. The standard of morality is not static but evolve with time, place, and social environment.

The other unique way a marriage is contracted through the Adat regulating co-habitation. If a man and a woman co-habit or living together for six (6) successive nights, they may be deemed as husband and wife if reported to the *Tuai Rumah*. The reporting of the co-habitation to the *Tuai Rumah* is sufficient to declare that a man and a woman as legally married. Any parent who fails to report such cohabitation shall be liable to a restitution to be paid to the community.⁴²⁴ This Adat is regulating sexual relation and sexual morality in the Iban communities. This is another example of Adat as law being used to enforce morality. What are the wise things about the Adat? Firstly, this is a safeguard against unwanted pregnancy amongst unmarried woman and a protection against sexual exploitation of women. If the woman gets pregnant due to the co-habitation and what will become of her if the man leaves and refuses to marry her? The pregnancy would be an unwanted and illegitimate pregnancy. This is the kind of social issue which the Iban want to safeguard with the Adat. Another issue which worries the Iban is the sexual exploitation of the woman by the man. The Adat is an attempt to protect women from sexual exploitation. Secondly, any child born out a co-habitation is not born out of wedlock and therefore an illegitimate child. Legally and socially speaking, illegitimacy can be a big problem for such child. The child would carry the social stigma throughout his or her life the in conservative communities. The child would be registered under the name of its mother and have no right of inheritance or share in any property of the putative father. The Adat depicts the

⁴²⁴ Section 149 of the *Adat Iban* 1993.

disapproval or intolerance of the Iban communities for a man and a woman living together without being legally married. The idea is to create an orderly communities and society so that peace, harmony, and unity could prevail.

4.2.4 Parents' roles in marriage

This section discusses parental roles in marriage where the intended marriage is a personal choice. Parents have some important roles in the marriages of their sons and daughters. The most important role which has evolved into Adat is the consent or approval of parents in marriage of their sons and daughters. The consent of parents is a cultural or customary practice under the doctrine of filial piety doctrine. It is a respect to the parents who have given birth and brought up their sons and daughters into this world. It was mandatory for the parents of both the man and woman to give their consent or approval for marriage in the past. However, because of the social and cultural changes during the last few decades, parental consent may still be required but is not mandatory now. The consent has evolved into a formal notification of marriage for parents. Any parent may still object to the marriage but if the man and the woman insist to marry, no Adat or reason can stop the marriage. A marriage can only be stopped on the ground of incestuous relationship or one of persons wanting to marry is too young to marry. A breach of this Adat would not be punished by fine or restitution but only considered as recalcitrance and disrespectful. The most common condemnation is uttered in a phrase: "the son or daughter has forgotten his or her parents". This phrase has a very deep social and cultural meaning in the Iban society. It is beyond comprehension and imagination that a person forgets his or her parents' and their deeds.

Under the doctrine of filial piety, the parents have some intrinsic authority in the marriage of their sons and daughters. It is customary for the man to inform his parents first and seek the consent

or approval of the parents of the woman for a hand in marriage. The man parent may object but he may proceed without his parents' consent to seek the consent from the woman parents. If the woman parents grant their consent or approval, the solemnisation of marriage would be planned and fixed. But if the woman parents declined the request, the marriage according to Adat Iban may or may not take place. Technically, if the man and woman have reached the age of 18 years old, the marriage may proceed without the consent of the parents from one side or both sides. The minimum age for marriage is discussed below. A marriage without the parents' consent is still valid as long as the marriage is solemnised in public before a *Tuai Rumah*. An objection does not invalidate a properly solemnised marriage. But if the man and woman have attained the age of 21 years old, they may marry under the *Malaysian Law Reform (Marriage and Divorce) Act 1976*. An Iban has a choice either to solemnise his or her marriage under Adat Iban or under the state law, i.e. *Malaysian Law Reform (Marriage and Divorce) Act 1976*, unless there is a social or legal obstacle under both law.

What is good about this Adat? This Adat is meant to instil respect and good social relationship between parents and their sons and daughters and sons-in-laws or daughters-in-law. The consent for marriage is a way to cultivate and nurture harmonious relationship between the two families. It is a good practice and respectful for both man and woman to inform and get the consent from their parents to get married. The doctrine of filial piety imposes a moral duty of obedience and respect on every person towards his or her parents but there is still a freedom of choice in marriage for every Iban. This is a social value which has evolved into Adat. A breach of such moral duty is considered as a very disrespectful behaviour. Even though there is penalty in the form fine or restitution, it is shun by the Iban communities because it can bring bad example and destroying the Adat and culture which have been a cohesion that bind the family and communities together.

4.2.5 Capacity to marry

According to Adat Iban, a person may marry if he or she “has come of age” and without any impediment preventing or prohibiting him or her to marry. This is one of the most unclear provisions of Adat Iban. Adat Iban does not specifically state the minimum age required for a valid marriage for both sexes. What does it mean by “has come of age”? None of my research participants could explain what the minimum age for marriage by the term is “has come of age”. Their explanations were very speculative. According some of the participants⁴²⁵ the term “has come of age” is an Iban cultural term referring to some physical and biological conditions of a male or a female that has reached puberty. But, whether a 12-year-old girl or a 13-year-old boy who has reached puberty “has come of age” and has the capacity to be legally married with the consent of her or his parents? The interpretation is debateable and has not been legally resolved at the time of writing this dissertation.⁴²⁶ The Malaysian *Law Reform (Marriage and Divorce) Act 1976*⁴²⁷ states that the consent of the father or mother is required for any person under the age of twenty-first year of age to get married.⁴²⁸ The Adat is silent with regard to the mental capacity or soundness of mind of a person to be married. I am of the opinion that the term of “has come of age” is a measure of maturity of an Iban youth. A man would be considered as “has come of age” when he is able to participate in tree felling during farming season, collecting firewood and able to build boat by himself. He would be around 18 years old. A woman “has come of age” when she is able to join his family in sowing seeds during farming season, drawing water from the river and cooking food for the family. Her age would be around 17 years old. Women tend to mature earlier than men in the Iban communities.⁴²⁹ From the records in the online electronic

⁴²⁵ Edmund Langgu Saga, Jimbun Tawai et al.

⁴²⁶ There has been a lot of discussions on the minimum age for marriage for the Muslim communities in Malaysia. But no decision has been reached so far. Any decision on this matter could influence Adat Iban.

⁴²⁷ The *Law Reform (Marriage and Divorce) Act 1976* is a Federal Law of Malaysia which regulate marriage and divorce for non-Muslims in Malaysia

⁴²⁸ Section 12 of the *Law Reform (Marriage and Divorce) Act 1976* of Malaysia.

⁴²⁹ The knowledge is my personal knowledge acquired from listening to the elders in my longhouse. Edmund Langgu Saga and Philip Igai Melana, who were both participants, gave similar interpretation for the term.

register of native marriages kept by the Council for Customs and Traditions Sarawak (*Majlis the Adat Istiadat Sarawak*) the minimum age for marriage under the various native Adat is 18 years of age. However, this is only a practice and not Adat or rule.

4.2.6 Marriage impediments

The main marriage impediments are the various categories of incestuous relationship. There are some other impediments which are not very serious but may be a ground for the parents of the man or woman to object to a proposed marriage. These impediments are mental illness, laziness and “*tau tepang*” (sorcery).⁴³⁰

4.2.6.1 Incest

The Adat regulating incestuous relation reflects the seriousness of the Iban in their effort to create an ideal society. Incest has a broad scope and very intricate and complex rules under Adat Iban. Any sexual relationship between very close blood relatives not in accordance with kinship hierarchy is incest and marriage may be forbidden. For example, a sexual relationship between a parent and a child, or brother and sister, or an aunt and a nephew, or between an uncle niece and niece comes is incest and marriage is forbidden. The concept of extended family and affinity give incest a very broad scope. Any sexual relationship between relatives by marriages (affine) is incestuous relationship and marriage is forbidden. For example, a stepfather and a stepdaughter, or a stepbrother and a stepsister is incest and marriage is forbidden. The Adat on incest under the concept of extended family is minefield for marriage

⁴³⁰ There is no equivalent English translation for “*tau tepang*” in Iban. The nearest translation is sorcery. “*Tau tepang*” is the supernatural power of a person to curse or to put a hex on or spell on others to cause failure in their undertakings or their crops or fruit trees. The power are believed to be genetically inherited from their ancestors. Those who have the power of “*tau tepang*” could cause failure to others with or without intention. Some Iban believe that the mere words of such person commenting on the abundance of fruits in an orchard could cause the fruits to withers and fall prematurely.

under Adat Iban. Once a relationship falls within any category as mentioned above, the marriage would be forbidden. Any sexual relationships between distant blood relatives are incestuous relationship which is prohibited but the marriage may be allowed and formalised through certain rituals, for example, between first cousins or between a man and a distant aunt. Similarly, sexual relationships between distant relatives by marriage is incestuous relationship is prohibited but the marriage may be allowed and formalised through certain rituals, for example, between a step-brother first cousin and a step sister first cousin.⁴³¹ Most categories of incestuous relationships are offences under the *Adat Iban* 1993. Any breach of the Adat would be liable to a fine and to perform the purification and appeasement rituals.⁴³² Boyd observes that Incest according to the Dayak custom includes relationships which by English law would not even be a bar to marriage.⁴³³

What is the usefulness or benefit this Adat could bring to an Iban community? The Adat on incestuous relationship are regulating sexual morality in the tightly knitted communities. It is a tool to create an ideal communities and society. In the tightly knitted communities almost everyone is related by blood to each other or by affinity. The general rule is that those persons who are very close relatives through blood ties are forbidden to marry. The purpose is to ensure that sexual relations among members of blood relatives are orderly. Any sexual relationship which is not in order could cause a disorder in the kinship hierarchy (*tusut bebalut*) among close blood relatives. For example, if a man marries a woman, who is his mother first cousin, is allowed, what will become of the kinship hierarchy in this family and other close blood relative?

⁴³¹ The Adat and data on incestuous relationship mentioned and discussed under paragraph 4.2.6.1 were narrated by Edmund Langgu Saga, the late Mandi Ank Melana, Richard Muluk Entering et al at various times between 2013 to 2020.

⁴³² Sections 144, 145, 146 and 147 of the *Adat Iban*, 1993.

⁴³³ T. Stirling Boyd, "The Law and Constitution of Sarawak" (1936) 18:1 *Journal of Comparative Legislation and International Law*, Cambridge University Press, at 69. The term Dayak includes the Iban.

According to the long established Iban culture, first cousins are deemed to be brothers and sisters and they are also deemed to be parents to all their children. According to the example above, the man is marrying his “mother” which is incest and marriage is forbidden. What is the kinship hierarchy between the man’s mother and his wife who is her first cousin and “sister”? Are they still first cousin/sister or mother-in-law/daughter-in-law? If they have children, what is the kinship hierarchy between the children and the man’s siblings? Are they nephews and nieces or second cousin? Let’s stretch it further, what is the kinship hierarchy between children and man’s parents? Are the children their nieces and nephews or grandchildren, respectively? This is what the Iban call “*tusut bebalut*”, i.e. a messy and disorderly kinship hierarchy. If this kind of kinship disorder is tolerated, at the end of the day nobody would take cognisance of who is who in sexual relation and sexual morality.⁴³⁴

The Iban view the sexual relationship between people of very close blood relation as unacceptable and morally wrong and ought to be forbidden. The Iban ancestors might have found it was difficult to explain and enforce the rules. Perhaps what they could think of as a more effective way of enforcing the prohibition was by declaring it as a spiritual sanctions or prohibitions. Therefore, it is taboo for any person who fall within such blood relation to have sexual relation or to marry. Any person contravening any of the sanctions or prohibition could be punished by spiritual wrath in the form of premature death (*enda gayu*)⁴³⁵ or suffer bad fortune throughout his or her lifetime. How and why did the Iban ancestors know and understood that marriage between very close blood relatives was not good? They had no scientific knowledge. Science has proven that marriage between very close blood relatives is similar in breeding in

⁴³⁴ The issues on kinship hierarchy order and disorder were inferred from the narratives told by Edmund Langgu Saga, the late Mandi Ank Melana, Richard Muluk Entering et al at various times between 2013 to 2020.

⁴³⁵ “*Enda gayu*” *literally* a short life in English, which is the opposite of longevity.

husbandry. Inbreeding could increase the chance of getting and aggravating the incidence of genetic disease among people who married their own close relatives. This is the wisdom of the Adat.

Incestuous relationships among the not very close blood relatives are restricted but may be permitted to marry. For example, a marriage between a man and a woman who is his first cousin's daughter is restricted but they may be permitted and formalised through the performance of a purification and appeasement of spirits ritual and payment of restitution. The general rule is that a man should not have any sexual relationship with any woman who is his niece in terms of kinship hierarchy. The marriage is considered as an unnatural matrimonial union and the land and waters upon which the couple walk on or step on could become "dirty" and infertile. The couple would be ordered to perform purification rituals to purify the land and water. The punishment is an exemplary measure, and the offenders are being demonised.⁴³⁶

Some incestuous relationships between relatives by marriage (affinal) are forbidden, for example, between a stepfather and a stepdaughter even after the stepfather and her mother have divorced. Even though there is no blood tie between them they are deemed to be parent/child or father/daughter in relationship through the earlier marriage of the mother to the stepfather. Marriages between stepchildren are forbidden because they are deemed as blood siblings. However, marriage between distant relatives through marriage may be restricted but may be allowed through the payment of fine and performance of appeasement of spirits and purification rituals. However, the formalising of incestuous relationships and marriage cannot and would not

⁴³⁶ The narratives told by Edmund Langgu Saga, the late Mandi Ank Melana, Richard Muluk Entering et al at various times between 2013 to 2020.

clear the kinship hierarchy disorder.⁴³⁷ The formality is just to give a peace of mind and to appease the community. Again, the Adat discussed above are all functioning as a social engineering tool to create an orderly society.

4.2.6.2 Other marriage impediments

The other marriage impediments are mental illness, laziness, and sorcery (*“tau tepang”*). These impediments are not as serious as incest but can be a good reason for parents to object to a proposed marriage. Mental illness is a very dreaded disease and a social stigma in the Iban society. Not many parents would allow their sons or daughters to marry a person whose family has a history of mental illness. It is an assumption in the Iban society that mental illness would pass down from one generation to another – a genetic disease in today’s medical term.⁴³⁸ It is very speculative to determine whether there is useful aspect on this ground for rejecting a marriage proposal. This is more of a worry.

Laziness is a ground for parents of a woman to object to a marriage. It is a presumption that a man who is lazy would not be able to feed and look after the well-being of his family. In the past, the mainstays of the traditional economy were subsistence agriculture (e.g. rice farming), hunting, fishing and gathering. Bringing up a family by these means was very tough. A man who was lazy would not be able to feed his family and thus no woman would marry a lazy man. I think this is a good ground for refusing to consent to a proposed marriage. Marriage entails a heavy responsibility of taking care of the family well-being.

⁴³⁷ The narratives were told by Edmund Langgu Saga, the late Mandi Ank Melana, and Richard Muluk Entering various times between 2013 to 2020.

⁴³⁸ The information was provided by Edmund Langgu Saga.

Sorcery (“*tau tepang*”)⁴³⁹ is a kind is a supernatural power of destruction or to cause failure to others. The power is believed to be genetically inherited and not acquired through learning. Many Iban are reluctant to have kinship ties through marriage with any person from such families. There is no tangible benefit derive from such power to those believed to be possessing such power. It is a kind of social stigma in most Iban communities.⁴⁴⁰ The impediment is a kind of prejudice against the descendants of sorcerers of long distant past.

4.3 Divorce

The Adat regulating divorce is the system and process to facilitate and expedite the dissolution of any failed marriage. A failed marriage is a marriage where the spouses cannot live together anymore due multifarious reasons which cannot keep the marriage alive. Some of the reasons have become grounds for the dissolution of marriage as discussed below. In principle, failed marriage is quite similar to the concept of the relationship of the spouses is irretrievably broken down in *Owens v. Owens* [2018] UKSC 41. Any failed marriage must be settled quickly and efficiently. The purpose is to disentangle or free the couple to the failed marriage from all legal or moral obligations toward each other. Where the couple has children and property, these matters must be settled fairly and equitably. When all these matters have been settled properly, the couple could go on their separate ways without any legal or moral impediment. Divorce is not considered as a shameful or social stigma in the Iban communities, but it is not an occasion for celebration.

⁴³⁹ There is no equivalent English translation for “*tau tepang*” in Iban. The nearest translation is sorcery. “*Tau tepang*” is the supernatural power of a person to curse or to put a hex on or spell on others to cause failure in their undertakings or their crops or fruit trees. The power are believed to be genetically inherited from their ancestors. Those who have the power of “*tau tepang*” could cause failure to others with or without intention.

⁴⁴⁰ The impediment was narrated by the late Mandi Anak Melana and Richrd Muluk Entering.

The Adat for the dissolution of any marriage solemnised under Adat Iban is now codified under section 151 of the *Adat Iban* 1993. Under this Adat, except for divorce under the ground of mutual consent, the dissolution of marriage must be made by application in writing to a Chief Court (Native Court). There are six (6) main grounds under section 151 of *Adat Iban* 1993 for dissolution of marriage, namely: mutual consent, desertion, Imprisonment, serious incapacity or sickness, adultery and any other grounds.

4.3.1 Mutual consent

A marriage may be dissolved under the ground of mutual consent.⁴⁴¹ Mutual consent is an agreement between the spouses to dissolve their marriage. This is where both spouses mutually agree to dissolve their marriage. The spouses who seek to dissolve their marriage under this ground normally have no children and have been married for a short period of time. The dissolution of marriage on this ground is verbally made before a *Tuai Rumah* or a *Penghulu* (Chief). The spouses simply state that they are dissolving their marriage *Tuai Rumah* or a *Penghulu* (Chief). No fine shall be imposed for any divorce granted under this ground. The spouses would exchange a separation token, e.g. a small ring or MR 1.00 (one Malaysian dollar). Once this ritual is done, the marriage is dissolved there and then. This is the fastest and easiest system and process of marriage dissolution in the Iban communities. None of the spouses is blamed for this kind of divorce. Mutual consent is a very common ground for the dissolution of short and failed marriages. This system and process give the image that marriage under Adat Iban is easy to dissolve. The idea behind this Adat is to provide an easy way to dissolve a marriage and the spouses find out that they are not meant for each other. There is no point for them to carry-on living together.⁴⁴² Marriage is very important for the progress of every Iban

⁴⁴¹ Section 151(1) of the *Adat Iban* 1993.

⁴⁴² The knowledge and insights were provided by Edmund Langgu Saga.

community, but a failed marriage could be detrimental to the harmony of families and community. In such case, the dissolution of marriage is a better option and less harmful to the community harmony.

4.3.2 Desertion

If a spouse (husband) travels or stays away in another place without providing maintenance to the other spouse (wife) or without informing his whereabouts and no contact can be made with him for a minimum period of two (2) years, the wife can apply for the dissolution of the marriage on ground of desertion.⁴⁴³ This provision is to provide a means for any wife who stay at home and deserted by their husband to get out of the marriage if there is no prospect for the husband to provide maintenance and return home. This Adat provides a relief for any wife who is neglected by her husband and where the marriage has no meaning anymore. This is a case where a woman is legally married but without the husband. This is a legal means for an abandoned wife to get out of a bad marriage and get on with her life. This is a very thoughtful Adat for those abandoned and neglected wives. There is no provision or right for abandoned the husbands now. It is a presumption in the Iban communities that the men or husbands should be able to fend for themselves and accept the fact if their wives abandoned them. According to the Iban culture, a husband may travel far to look for fame and fortune, but he must keep regular contact with his wife and family. A wife stays at home and tends to the domestic chores and affairs. Under this Adat a wife has full authority to decide whether to keep or dissolve the marriage. This is a safeguard for wives against irresponsible husbands.⁴⁴⁴

⁴⁴³ Section 151(2) of the *Adat Iban* 1993.

⁴⁴⁴ The information and insights were provided by Edmund Langgu Saga.

4.3.3 Insanity or leprosy

A spouse may apply for dissolution of marriage on the grounds of insanity or leprosy if the other spouse suffers from insanity or leprosy for more than two (2) years and certified by a mental or leprosy institution.⁴⁴⁵ This Adat seems to be rather harsh and could be taken advantage of by an unscrupulous spouse to get out of his or her moral obligation to look after the sick spouse. Mental illness and leprosy are among the most dreaded diseases in the Iban society. Many Iban believe that mental illness is genetically inherited and could be passed down from one generation to another.⁴⁴⁶ Leprosy has a bad publicity because of the lepers were isolated from the public and kept in lepers' colony or asylum.⁴⁴⁷ The wisdom of this Adat in term of its usefulness or benefit is debateable. It is my presumption that insanity or leprosy may amount to a failed marriage because one of the spouses may not be able to perform his or her part of moral or sexual obligation and responsibilities. It is a wise Adat if the spouse who suffers insanity is violent. But it not a wise Adat if the spouse is not violent. Leprosy in may lead to disability and an infectious or transmittable disease.⁴⁴⁸ Divorce and separation could prevent the other spouse from getting infected by the disease. This Adat may be justified on this ground. However, the Adat seems to provide a relief to the healthy spouse to be release from the moral burden of looking after the sick spouse and start a new life.

4.3.4 Imprisonment

A party to a marriage may be granted a divorce on the ground of imprisonment if the other party is serving a term of imprisonment for more than two years.⁴⁴⁹ This is a new Adat introduced in

⁴⁴⁵ Section 151 (3) of the *Adat Iban* 1993.

⁴⁴⁶ The presumption was provided by Jimbun Tawai, Philip Igai Melana, and Richard Muluk Entering. The presumption is within my knowledge. I was told many times by the elders in my community.

⁴⁴⁷ Charles Brooke memorial hospital, Kuching, Sarawak, was established in 1925 as a lepers' asylum. This hospital still provides outpatient treatment to people diagnosed with Hansen's disease in Sarawak. Email address: rajahcharlesbrookememorialhosp@gmail.com

⁴⁴⁸ World Health Organization fact sheet. <http://who.int/news-room/fact-sheets/detail/leprosy>.

⁴⁴⁹ section 151 (4) of the *Adat Iban* 1993,

the Adat Iban 1993. This Adat did not evolve from the Iban custom or tradition. The Iban had no penitentiary system in the past. The reason why imprisonment is a ground is also not clear. If the term of imprisonment is for life, the marriage has no meaning at all. In this respect the Adat is very meaningful to the free spouse. He or she should not be unnecessarily restricted to marry again or to move on with his or her life without any moral or legal obligation or restriction. This is also an opportunity for spouse who is free to distance himself or herself from the social stigma if the crime committed was serious or heinous and shunned by the general public. The Adat is very thoughtful and helpful to any spouse who is a victim of domestic violence or physical abuse to get out of the marriage if the imprisonment is a sentence for domestic violence or physical abuse. The otherwise aspect of the Adat is that it gives the spouse who is free to rectify a wrong choice in the person whom he or she married. A spouse might not have any knowledge of the other spouse criminal activities. He or she might have only found out much later in the marriage. If the spouse would not marry the imprisoned spouse had she or he knew about his or her criminal activities, then the Adat is providing a chance to get out of a marriage to a wrong person. However, the Adat can be manipulated by an unscrupulous spouse who is looking for a chance to get out of the marriage. It may not be a bad ground for divorce if the imprisonment is just for two years or lightly more and the offence may be tax evasion or failure to pay a fine. Under such circumstance, the free spouse should be more supportive of the imprisoned spouse in time of trouble. The Native Courts court should be very careful not to be used by unscrupulous spouses to get out of the marriage under this ground. He or she may use the opportunity to dissolve the marriage to marry a secret lover or someone he or she met while the other spouse is serving the imprisonment term.

4.3.5 Serious incapacity or sickness

A divorce may be granted on the ground of an incapacity if the husband or wife is suffering from a serious sickness or infirmity. The party seeking the divorce shall provide the incapacitated party a restitution⁴⁵⁰ and if they have children, each child under the custody of the sick or invalid party must be given a gift of movable or immovable property (*pemai anak*)⁴⁵¹ and maintenance. The maintenance for each child is not exceeding RM100 per month. ⁴⁵² This Adat seems to provide a convenient means for the healthy spouse to be released from his or her moral duty of caring for the sick or infirmed spouse. Any which way this Adat seems to be insensitive and rather cruel to the sick or infirmed spouse. It is in time of sickness and incapacity that the sick or infirmed spouse tutelary that the sick spouse may be granted the custody of a child or children. This Adat does not reflect the reality of the situation. A sick or an infirmed spouse has no means or capacity to look after a child or children if they are still young. Therefore, the issue of child custody should not arise in any divorce application under this ground. The able and healthy spouse should be responsible for the up-bringing and well-being of the children. If a divorce is granted under this ground, who will look after the sick or invalid spouse? He or she is only entitled to MYR120 (*120 mungkul*) divorce restitution. Malaysia is not a welfare state and the facilities available for poor and infirmed people are not always available or very limited. This Adat contains both convenience and cruelty. On the balance of rationality, this Adat could be used to provide an easy escape route for any unscrupulous spouse to avoid his or her moral duty. The cruelty aspect seems to out-weigh the convenience aspect that the Adat could bring. There is no provision for maintenance of the sick or infirmed spouse under this Adat Iban. There seems to be nothing much that this Adat could do for the welfare of the infirmed spouse.

⁴⁵⁰ Payment of restitution (*Tunggu Tingal*) in the sum of RM 120.00.

⁴⁵¹ *Pemai Anak* is a gift given to a child by the parent who is not granted the custody of the child.

⁴⁵² Section 151 (5) of the *Adat Iban* 1993.

4.3.6 Adultery

A divorce may be granted on the grounds of adultery.⁴⁵³ Adultery is a very serious matter in the Iban society and a very good ground for divorce. The Adat reflects the Iban intolerance of marriage tainted by adultery. The unfaithfulness element of adultery strikes at the core of the sanctity and fidelity of the institution of marriage. In many cases, adultery destroy marriages and has been is a major cause of failed marriages in the Iban communities. Adultery is has always been treated as an immoral behaviour in the Iban communities.⁴⁵⁴ I think this Adat is fair and good law by providing a way for the injured spouse who feels cheated and cannot condone the unacceptable behaviour of the other spouse to get out of the marriage. This is where the cheated spouse thinks that the marriage is over.

4.3.7 Other grounds

This is a very broad ground for granting divorce under Adat Iban.⁴⁵⁵ This provision provides a wide discretion for the court to determine any application for divorce on any ground not listed above. The *Adat Iban* 1993 cannot provide an exhaustive list of grounds for divorce and there may be some unique circumstances which may be a good ground to grant a divorce. There are many other grounds under Adat Iban for the dissolution of marriage. I just mention and discuss one example for this general and broad category. Bigamy is a very serious ground for an automatic grant of the dissolution of marriage.

The Iban subscribe to principle of monogamous marriage and it is illegal to marry more than one husband or wife during the subsistence of a valid marriage. Section131 of *Adat Iban* 1993 describes bigamy as a man who marries another woman during the subsistence of a valid

⁴⁵³ Section 151 (6) of the *Adat Iban* 1993.

⁴⁵⁴ This information was provided by Edmund Langgu Saga, a participant in this research.

⁴⁵⁵ Section 151(7) of the *Adat Iban* 1993.

marriage. The Iban do not practice polygamy and polyandry. Polygamy is a practice or custom of having more than one wife or husband at any one time. Polyandry refers to a practice or custom or practice where a woman is permitted to marries more than one husband at any one time. Section 131 of *Adat Iban* 1993 may be a drafting error. According to the Iban culture, bigamy means a man or woman who marries another wife or husband, respectively, during the subsistence of an earlier and valid marriage. The marriage is either known or unknown to the other spouse. Bigamy is known as “*berangkat*” in Adat Iban. The Adat regulating bigamy applies equally to both men and women. An application for divorce on the ground of bigamy would be granted automatically. Where the injured party from the first marriage apply for the dissolution of the marriage, it would be automatically granted. The purpose of this Adat is to prevent any person to marry more than one wife or husband during the subsistence of a valid marriage. The Iban uphold the presumption or believe that bigamy could lead to endless quarrels between the two or more families belonging to person because of jealousy, unfairness and other issues. The quarrels could destroy the harmony and happiness the families. Bigamy is always viewed as a destroyer of the fidelity and sanctity of monogamous marriage and family harmony. The Adat is an example of a very useful instrument or tool to create a happy and harmonious family as a foundation for an ideal community and society.⁴⁵⁶ However, the Adat could be unfair or disadvantageous to the injured party of a subsisting marriage. This Adat does not safe the subsisting marriage but instead it dissolves the marriage and formalises the second marriage. This provision is not very helpful to the injured party if he or she wishes to save the marriage. However, the Adat provides a mean for a spouse who wants to dissolve a failed or broken marriage because of bigamy. The very act of bigamy means the first marriage is over.

⁴⁵⁶ The data was provided by Edmund Langgu Saga and Jimbun Tawai during the various interviews and discussions from 2013 – 2020.

The other serious and important ground which falls within this heading is the behaviour similar to “violence”, which is referred to as “*mangah*” in the Iban culture. The term “*mangah*” is not only violent but a behaviour which may be described as a mixture of violence and cruelty of one spouse toward the other. “*Mangah*” or “violence and cruelty” can be physical abuse or verbal abuse or both. Physical abuse is normally committed by the husband on the wife, whereas verbal abuse is commonly committed by the wife on the husband. This social problem is somewhat similar to domestic violence in the western societies or other societies. Either spouse may apply for the dissolution of marriage on ground of “*mangah*”. The wise thing about this Adat is that it provides a legal mean for abused spouse or the victim to escape from the physical or mental suffering due to the violent and cruel behaviour of the other spouse. This Adat has been practice by the Iban since time immemorial. It is a good ground for an application for the dissolution of marriage.⁴⁵⁷ The Native Chief Court has been quite considerate in granting applications for the dissolution of marriage under this ground.⁴⁵⁸ There is no statistics available to show whether the husbands or wives have the higher tendency of violence and cruelty behaviour in marriage.

4.4 Chapter conclusion

The Adat regulating matrimonial matters as described and discussed above are fundamental for the creation and up-bringing of ideal families and communities. The fabric of an Iban community is made-up of closely knit families where almost everybody is related by blood to each other and living in communal setting. An establishment of a new family and the propagation of a community and society begin with a marriage between a man and a woman. The work to create an orderly community begins at the establishment of a family though the regulation of marriage. The Adat regulating matrimonial matters starting from the solemnisation of marriage are functioning to

⁴⁵⁷ The data was provided by Dr. Anna Durin and Edmund Langgu Saga.

⁴⁵⁸ This is my observation from my personal experience as the Chief Registrar of the Native Courts, Sarawak, from 2015 – 2013..

forge and frame a family into an orderly family as a social unit to merge with other family to form an ideal community. The Iban subscribe to the concept of monogamous marriage and sanctity of the marriage institution. In this respect, certain norms and standards are set in the form of Adat to regulate fidelity and morality among the members of a closely knit community. The requirement that a solemnisation of marriage must be performed in public in a ceremony of *Melah Pinang* or *Bebiau* before a *Tuai Rumah* is an expression of such norms and standards.

Where a marriage fails, it must be dissolved speedily and efficiently. This would allow the spouses to go on their separate way without any legal or moral impediment. The process for the dissolution of marriage must not be protracted. Any delay could bring about a lot of social issues such as bigamy, adultery and legitimacy of a child born after the divorce application was made. After the submission of an application for the dissolution of marriage the spouses would normally live separately. If they are not from the same longhouse, the contact or communication between them could be broken down. In some cases, the spouses would remarry without bothering to wait for the final dissolution of the marriage. Thus, where a marriage fails, notwithstanding the importance of marriage, it must be dissolved speedily and efficiently.⁴⁵⁹

From my observation, at the moment the Iban communities are still not dynamic and flexible to adjust and adapt their Adat to accept same sex marriage and the establishment of family by LGBTQ. Many Iban families living in the area under study have access to television and internet, but the concept of same sex marriage is still incomprehensible to them. The idea is still too remote for the communities living in the secondary jungles of Sarawak. The articulation of the idea is not widespread for the time being.

⁴⁵⁹ The interpretation of the social situation is inferred from data and discussions with Richard Muluk Entering, Jimbun Tawai, Philip Igai Melina and the other participants during 2013 – 2020.

Chapter 5

5. The wisdom of Adat Iban regulating the custody and maintenance of children and rights of former spouses to property

5.1 Introduction

This Chapter examines and discusses the principle, concept, and wisdom of the Adat which regulates the custody of children, maintenance of children, and rights of former spouses to property following the dissolution of marriage. These Adat lay down the rules and procedures to determine the rights of each parent if the custody of children is contested, welfare and up-bringing of children, and division of property following a divorce. The Adat regulation the custody of children is a very old Adat and not adequate to cater for certain difficult and emotional situations following the break-up of family. The Adat regulating the child maintenance is a very basic rule for child welfare, and not adequate for the present day's situation. The difficulties relating to the enforcement of the maintenance order made under the Adat are a major problem for the communities. The Adat on the rights of former spouses to property following a divorce is quite comprehensive and fair to both former spouses.

5.2 Custody of children

The Adat on the custody of children is very basic in term of the welfare and up-bringing of the children. Custody under the Adat Iban means the award of sole or split legal custody which includes the, responsibility, caring and permanent residence of a child or children to a parent following the dissolution of marriage. The Adat emphasises more on the rights of the parents in the custody of a child or children. The concept of the Adat is different from the legal concept of child or children custody in the western societies. For example, in Canada only the best interest of a child or children is a paramount consideration for the court in deciding the custody of a child

to a parent.⁴⁶⁰ There is no provision for joint custody or the rights of access or visitation of child under the Adat. This shows that the Adat is very basic and does not cater for the emotional needs of the parents and the child or children.

The Adat regulating the custody of child or children is now codified under section 160 of *Adat Iban* 1993. This provision prescribes the formulae for the court to award the custody of child or children between the parents. Section 160 states that:

If the divorced couple have one child, the child shall be under the custody of the successful petitioner. If there were two or more children, each party has the custody of one of the children, provided that the elder child shall be awarded to the successful petitioner. A child who is still breast-fed shall be awarded to the mother, but the child shall not be entitled to *Pemai Anak* if the mother is the guilty party. If there are three children, one goes to the father, another goes to the mother and the eldest is given a free choice.

If the custody of a child or children is contested, the general rule is that both parents would have equal rights of custody before the Adat. If the number of children they have is odd, e.g. 1, or 3, or 5 and so on. If the couple has only one child, the custody would be granted to the successful petitioner in the application for divorce. This means that the parent who causes the break-up of the marriage is the guilty party and estopped or disentitled to the custody of the child. However, if the child is being breast-fed,⁴⁶¹ the custody would be award to the mother irrespective of whether she is the guilty party or not. The best interest of a child or its welfare is paramount under this Adat. It is an overriding consideration for awarding the sole custody to the mother. However, if the mother is responsible for the divorce and the custody of the child is awarded to

⁴⁶⁰ Section 16(8) of the *Divorce Act*, RSC, 1985, c3, (2nd Supp), Canada.

⁴⁶¹ "Breast-fed" is a term referring to an infant who is still very young and still being breast fed by his or her mother. Whether the availability of formula milk would change this Adat in the future?

her, the child will not be entitled to a “gift” (*“pemai anak”*)⁴⁶² from the father. If they have more than one child and the number of children is even, e.g. 2, or 4, and so on, the custody would be split equally between the parents. If the couple has 3 children, the eldest child is given a freedom of choice to pick which of the parents he or she wishes to live with. The Adat does not state the minimum age for such a child to be presumed capable of making the decision on such an important matter. Ultimately, the court would decide after asking the child to make a choice and hearing the request from both parents. The other two children will be split or divided equally between the parents. Each parent will be responsible to look after the up bringing of the child or children under their custody. As has been described above, except for a child who is being breast-fed, the rights of the parents are paramount in child or children custody matter. The welfare of a child who is still breast-fed is an exception to award the custody of the child to its mother if she is responsible for the break-up of the marriage.

The main purpose and wisdom of the Adat is the distribution of the responsibility in the bringing-up the child or children between the parents after the dissolution of their marriage. In the past, the bringing-up of the child or children was usually left to the former wife/mother after the divorce. Even nowadays, there are still many incidents where the bringing-up of children are left to the former wife/mother. The former husband/father just “disappears” after the divorce. This Adat is an effort to relief the burden of the former wife/mother to fend for the welfare of the child or children. The other rationale behind the Adat is to fulfil the pride and affection of each parent to take with him or her and to live together with the child or children. In the Iban communities the parents are looking forward towards their children to look after them during their old age. However, there is an element of punishment in the Adat. The party who is responsible for the

⁴⁶² There is no equivalent translation in English for the Iban term of *“Pemai Anak”*. The nearest translation is a “gift”. When a married couple divorces the child or children under the custody of the mother would be given a gift from the father if he is guilty party. The gift can be a brass gong (heirloom), or an antique plate, or cash not exceeding RM200.00.

divorce may not be given the custody of the child if the couple has only one child. However, if the child is being breast-fed, the wife would be given the custody of the child even if she is responsible for the divorce.⁴⁶³ The Adat served the Iban communities very well under the social situation up to about 50 years ago. But the Adat is inadequate to cater for the current social situation. This issue is discussed in more detail in chapter 6 below.

There is no provision in Adat Iban for a joint custody, rights of access or visitation of child or children by the parent who is not awarded the custody of a child or children. These are the main weaknesses of the Adat. In practice, there is nothing to prevent the parent to visit or to have access to any child who is not under his or her custody. There is also nothing to stop any child to visit or stay with the parent who is not granted the custody. It is a culture in the Iban communities that children can visit their parent who is not granted the custody. The rigidity or flexibility of access or visitation depends on the state of relationship between the parents after their divorce. Generally, where a marriage ended in an acrimonious divorce, one of the parents usually 'prohibits' the other to have access or visit the child or children (or vice-versa) under his or her custody. Such prohibition is imposed by the parent or personal prohibition and not by Adat. The former wife/mother seems to be more dominant in this matter in the Iban communities. The former husband/father seems to be more liberal. This kind of prohibition is quite effective when the children are young. But as they grow older the effectiveness of the prohibition diminishes and is eventually forgotten. When the children are older and able to decide for themselves, they would normally allowed to decide for themselves.⁴⁶⁴ There is no provision for legal remedy in the Adat similar to the mandatory or prohibitory injunction to redress the issue.

⁴⁶³ The knowledge is inferred from the interviews and discussions with Edmund langgu Saga, Richard Muluk Entering, Dr. Anna Durin and the other participants.

⁴⁶⁴ The knowledge is inferred from the interviews and discussions with Edmund langgu Saga, Richard Muluk Entering, Dr. Anna Durin and the other participants.

5.3 Maintenance of Children

There was no provision for a periodical payment of children maintenance under the traditional Adat Iban, i.e. the old and unwritten Adat. The periodical payment of maintenance, i.e. monthly payment, for a child or children is a recent introduction under section 159 of *Adat Iban* 1993. Under the traditional Adat, a former husband had an option to pay or not to pay a “*timbang*”,⁴⁶⁵ which was a one lump sum payment of money to any child who was not under his custody. This Adat only applied to the former husband and not the former wife. This was based on the Iban socio-economic theory that the man or husband is the person responsible to feed his family. This theory still applies even after the dissolution of marriage. The Adat was meant to protect the former wife and to provide welfare for the children who were left behind by the former husband following the divorce. The former wife was not required to pay any maintenance even if she divorced her husband and left the children behind under her former husband’s care. The former husband, as a man, was presumed to be able to maintain and bring-up the children.

Under the traditional Adat, the former wife was entitled to “*timbang*” as of rights if the husband divorced her, i.e. the husband who wanted the marriage to be dissolved. The maintenance of children who were left behind or under the custody of the former wife was optional. If the former husband decided to pay the “*timbang*” to any child who was not under his custody, he would not have any further responsibility in the up bringing of the child or children. By paying of the “*timbang*” the father was legally severing the parent/child relationship with his child or children. The child or children was/were not entitled to inherit any property from his/their father. If the former husband/father decided not to pay the “*timbang*”, he was still legally responsible for his

⁴⁶⁵ “*Timbang*” is a one lump sum payment of alimony to any child who is not under the custody of a former husband. The quantum was fixed according to an early system of weights and measures used in Sarawak called “*Pikul*”. The quantum of “*timbang*” for a child was one *pikul* which was equivalent to Sarawak dollar \$72.00 during the Brooke and British colonial regimes. 1 *pikul* is now equivalent to Malaysian RM100.00

child or children welfare and up-bringing. Under such circumstance, the child or children may be entitled to their shares of their father property in the future.⁴⁶⁶

The “*timbang*” payment must be made in one lump sum because in most cases in the past the divorce would lead to a complete separation and severance of ties between the former spouses. Under such circumstances, the payment of maintenance on a monthly basis or by periodical payment was not practical. Furthermore, most of Iban men did not work for wages and, thus, they did not have any regular income to make the monthly payment. Most Iban men were engaged in rice farming, rubber-tapping, hunting, and gathering. Therefore, in the best interest of both parties, the one lump sum payment was a better means of enforcing this Adat. The Adat required that all issues that cropped up following a divorce must be settled once and for all. The chance of settling any outstanding issue after the divorce was very slim or none.⁴⁶⁷ This Adat was considered inadequate to cater for the welfare of children under the changing social and economic circumstances.

By 1990s many Iban were wage earners and began to have stable income. As such, the State Government of Sarawak introduced the monthly payment of child or children maintenance under section 159 of *Adat Iban* 1993 which impliedly repeals or replaces the one lump sum payment of “*timbang*”. However, the new Adat is silent on the provision for the maintenance of a former wife or former spouse. It is not clear whether the new Adat abolishes the maintenance of the former wife or not.

⁴⁶⁶ The Information was provided and verified by Edmund Langgu Saga and Janang Ensiring, both were participants in the research.

⁴⁶⁷ *Ibid.*

Section 159 states that:

The following shall be a guide as to which of the divorced couple shall be responsible for child maintenance: -

(1) The party who divorces the other shall pay monthly maintenance to all surviving children of the marriage who are in the custody of the divorced party until they reach the age of 18 years old or until they get married or until the party who has the custody of the children re-marries, whichever comes first.

(2) If the divorce is on the grounds as provided in section 151(2), (5), (6) and (7) thereof, the guilty party may be ordered to pay maintenance of any child who is not in his or her custody. If the father or mother of the children is unemployed and has no fixed income, the guilty party may be ordered to make a monthly allowance for the maintenance of his child or children at such monthly rate not exceeding RM100.

(3) If the father or the mother of the children is a person of means and has steady income, the guilty party may be ordered to make a monthly allowance for the maintenance of his child or children at such monthly rate not exceeding RM200.

The new Adat is an improvement to the traditional Adat on the maintenance of children. The good thing about this Adat is that there are some provisions for the court to help with the child or children welfare at least until the child or children reach the age of 18 years old. However, the Adat fixes the quantum of maintenance which restricts the court to exercise its discretion to increase the quantum in the future or where the party who is ordered to pay the maintenance has the financial means to pay more. In theory, both spouses are subject to this Adat. However, in practice, so far, only the former husbands have been ordered to pay the children maintenance. The past socio-economic theory as mentioned above is being perpetuated or applied today

5.4 Rights of former spouses to property

According to tutelary the traditional Adat, the ownership of any property is vested in the household or family and not individually owned, except the immovable property (land) which is

registered under the name of any individual person under the state land law.⁴⁶⁸ The property is owned in common by all members of the family. With regard to property rights, members of family mean husband, wife, and children. It is the nuclear family not the extended family. Every member of the family is entitled to the property. The head of the family is vested with the authority to deal with any property on-behalf of the family. There is no formal ritual for the selection and appointment of the head of family. A family nominates the most capable person among its members to represent them in any communal activities and functions by consensus. The husband and wife are treated as equal partners during their marriage. Any property acquired by or donated to them during the period of marriage shall be owned in common by the family.⁴⁶⁹

The Adat regulating rights to property following a divorce is quite comprehensive and disputes on the distribution of property are not common. The main reason is because the Adat is quite fair in the distribution of property. The Adat regulating the distribution of property following a divorce is now codified under section 182 of the *Adat Iban*, 1993. The distribution of property of a divorced couple must be carried out under the supervision of *Tuai Rumah* or a Chief (*Penghulu*). Any inherited property (real or personal) will revert to the original owner. This is normally a property acquired by either the husband or wife before the marriage. However, if the inherited property is developed during the subsistence of the marriage, any product or outcome derived from the development shall be divided equally among all the members of the family. The owner shall compensate other members of the family according to their shares in the development of the estate. The owner gets the whole inherited property if the property is not developed during the marriage.

⁴⁶⁸ Land Code (Cap.81 [1958 Edition])

⁴⁶⁹ The Information was provided and verified by Edmund Langgu Saga, a participants in the research.

If the inherited property was a piece of land which has no document of title at the time the property was inherited but was issued a document of title during the marriage and registered in the name of the spouse or party who was not the party who owned it before the marriage, the registered proprietor must pay compensation to the original owner.

Any acquired property (real or personal) during the marriage would be divided equally among all the members of the bilik-family including a baby in a womb. The property would be distributed between the former husband, former wife, and their children, which includes the “child” inside the mother womb. Under this Adat, a foetus inside the mother womb is entitled to property as soon the pregnancy bump is noticeable.⁴⁷⁰ This physical sign was a term coined before a pregnancy could be verified by medial science. From the information provided by the participants, I am of the opinion that the wisdom of this Adat is that it entrenches the rights of every family member in the common property. Even an unborn child is deemed to be a living member of a family and entitled to the property. In the case of an unborn child, the Adat is to ensure that the unborn would not miss the distribution the property. The unborn child will miss the distribution of property if the rights only accrue after its birth. By that time, the property would have been distributed to the other members of the family and there would be nothing for nothing left to the child.

I find that there is certain degree of inequality or exception in the implementation of the Adat despite the emphasis on equality of distribution of property. Firstly, inequality or exception would normally apply in a case where the father or the mother is granted the custody of all the children or where the divorcing couple or parents mutually agree that the children would be looked after

⁴⁷⁰ The knowledge was provided by Edmund Langgu Saga.

by one of them. The party who looks after the up bringing of the children would be given greater share. The inequality or exception may be justified and reasonable because the parent who looks after the welfare and up-bringing of the children need the resources to perform his responsibilities.

Secondly, a former spouse who leaves the household and resides in another longhouse or locality after the divorce may not be given any unregistered immovable property⁴⁷¹ acquired during the marriage, unless the property is registered under his or her name under the state land law. According to the Adat regulating the landed property, a person who moves out of the longhouse and resides in other locality is not entitled to any immovable property held under the native customary rights (*temuda*)⁴⁷² as of rights. He or she cannot demand for share in such property but he or she may be given such property as a gift. The purpose of this Adat is to conserve immovable property for the residents of the longhouse. This is based on the Iban concept on the relationship of land and population, where land cannot multiply unlike population. If ownership or rights to the land is not restricted and follows a person wherever he or she goes than one day there would be no more land left for the residents. This is because everyone who leaves the longhouse would virtually take away the land by way of rights over the land. But the former spouse may be entitled to any movable property. This is a conflict between family law and property law in the Iban communities. At the moment, where such conflict arises, property law would prevail.

⁴⁷¹ Land which is held under the native customary rights is an unregistered and untitled immovable property.

⁴⁷² Section 5 of the Sarawak Land Code [Cap.81 (1958 Edition)] states that as from 1st January, 1958, native customary rights may be created in accordance with the native customary law of the community concerned by the felling of virgin jungle and the occupation of the land, or planting the land with fruit trees, or occupying or cultivating the land, or by any other lawful method, to name but few. Until a document of title is issued, such land shall continue to be State land and any native lawfully occupying the land shall be deemed to hold the land by licence from the Government.

5.5 Chapter conclusion

From my observation and understanding of the Adat, the Adat on the custody of children, maintenance of children, and former spouses' rights to property are meant to settle any legal or moral issues efficiently and effectively following the dissolution of marriage. Before a family split up the issues on the custody of children, maintenance of children, and former spouse rights to property must be settled properly. The purpose of this Adat is noble, that is to clean up any social mess left by a failed marriage in an orderly manner to create an ideal community. If the mess is not settled in an orderly manner, it could disturb the peace and harmony of a community. However, there are some weaknesses in the Adat. For example, the party who is responsible for the divorce may lose the rights to child or children custody and this is prejudicial and not justice. He or she may be a good and responsible parent. The consolation is that, at least there are some provisions in the Adat for the courts to help in the welfare of the children. The most glaring weakness is that there is no provision in the Adat for the maintenance of a former wife. The Adat on the rights to property following a divorce is still serving most Iban communities very well today.⁴⁷³ However, even though Adat emphasises on equality of property distribution, absolute equality cannot be had where certain social and legal conditions prevent the implementation of the Ada.

⁴⁷³ The opinion I mine inferred from the data and information given by my research participants such as Edmund Langgu, Ricard Muluk Entering, Dr. Anna Durin and the others.

Chapter 6

6. Adat Iban: A living traditional wisdom?

6.1 Introduction

Adat Iban have been a very effective and efficient instrument for the enforcement of social control and social contract in the traditional Iban communities.⁴⁷⁴ However, during the last 50 or so years, the social, economic, political, and spiritual developments have substantially transformed the Iban communities from traditional to modernity.⁴⁷⁵ These developments have brought about some serious impacts on the relevance and significance of Adat in the regulation of the communities today. In this regard, this Chapter examines whether the Adat and the underlying wisdom would be living Adat. This part of the dissertation is a re-evaluation of the Adat discussed in Chapters 3, 4, and 5 against the new or changing social situations in the Iban communities. This is to find out whether the Adat and the underlying wisdom would continue to be relevant and significant in the changing social situations and which may be regarded as living Adat. The interpretation and opinion expressed in this Chapter are mine inferred from the data or information acquired from my research the participants, *Tuai Rumah*, Chiefs and some community members from the areas under study. This Chapter begins with an attempt to define and discuss what is meant by a living Adat. The Chapter will then proceed to examine whether the main Adat discussed in Chapters 3, 4, and 5 are living Adat. The analysis of Adat is directly applied to the analysis of the social situations to evaluate the relevance and significance of the Adat in the new social situation.⁴⁷⁶

⁴⁷⁴ The definition of traditional Iban communities is stated in paragraph 2.3 *supra*.

⁴⁷⁵ The definition of modern Iban communities is stated in paragraph 2.3 *supra*.

⁴⁷⁶ David N. Schiff, "Socio-Legal Theory: Social Structure and Law" (1976) 39:3 Mod L Rev at 287. Retrieved from <http://www.jstor.org/stable/1095549>.

6.2 What is living Adat?

It is my presumption that most of Adat Iban were originated and evolved from the sound knowledge, good ideas, valuable experiences, good judgement, or good spiritual principle developed within the Iban communities of long ago and continue to be practised until today.⁴⁷⁷ Hence, I coin the wisdom underlying the old Adat as traditional wisdom. I do not rule out that there might be some outside influence in the evolution of the Adat through social intercourse with other cultures. What is a living law or living Adat? According to Ehrlich⁴⁷⁸ a living law is the law which “dominates life itself even though it has not been posit in legal propositions”. This living law may be considered as similar to the inner ordering of society itself. Some scholars from the common law tradition often use the concept of customary law to depict the phenomena.⁴⁷⁹ While the civil law scholars tend to use living law or *adat* law, because *adat*'s definition has a broader meaning than customary law according to Vollenhoven.⁴⁸⁰ Vollenhoven considers *adat* as ‘folk law’, ‘people’s law’ or ‘living law’, has the characteristics of being dynamic and flexible.⁴⁸¹

The living *adat* law is divided into two laws. First, the *adat* which is not flexible and this is a strict *adat* law. It is not adjustable or adaptable to changes, and also rigid and sacred in nature. Second, the *adat* that is flexible and fluid which can be passed down from one generation to the next and is adaptable to social change. Buana contends that the concept of living law is more appropriate than “*adat* law”: “The living *adat* law is a living, actual and contextual law that is being practiced and obeyed by the community.” because of its general characteristic, can be

⁴⁷⁷ The presumption is based on the narratives told by the elders in my community and some of my research participants such as the late Mandi Anak Melana and Edmund Langgu Saga.

⁴⁷⁸ Ehrlich, *Fundamental Principles of the Sociology of Law* in David N. Schiff, “Socio-Legal Theory: Social Structure and Law” (1976) 39:3 Mod L Rev at 306.

⁴⁷⁹ Jain, Allot & Forsyth in Mirza Satria Buana, “Living *adat* Law, Indigenous Peoples and the State Law: A Complex Map of Legal Pluralism in Indonesia” (2016) 1:3 International Journal of Indonesian Studies at 2.

⁴⁸⁰ Franz & Keebet, Benda-Beckmann in Mirza Satria Buana *ibid*.

⁴⁸¹ Bourchier, Thorburn & Hertogh in Mirza Satria Buana *ibid*.

classified as a principal taxonomy (*genus*), and the customary law as a part of living law can be classified as a its *species*. Adat are the manifestation of the people's legal culture.⁴⁸² He also cited Vollenhoven who considers *adat* as 'folk law', 'people's law' or 'living law', which has dynamic and flexible characteristics. This *adat* is a living law, grows, and thrives within the community.⁴⁸³

The above-mentioned definitions of living law or living *adat* are quite similar to my understanding of living Adat Iban. The Adat ordering spiritual sanctions or prohibitions are quite similar to Ehrlich's definition of living law. These Adat have some characteristics of dominating law and inner ordering of society. However, such law may be too rigid and not able to adjust and adapt to the changing social situation and might diminish in relevance. Buana's definition of living *adat* law is closer to my understanding of what is a living Adat Iban. An Adat that is dynamic and flexible has the potential to be a living Adat.

It is contended that a living Adat is an Adat which is dynamic and flexible and continue to be relevant in any social situation. A dynamic and flexible Adat is an Adat that is capable of adjusting and adapting to any changing social situation. The Adat has the capacity to react to the interaction of the members of the Iban communities. The continuing relevance and significance of Adat is dependent on the social situation of Iban communities. But to a certain extent, the social situations in the communities depend on the Adat.⁴⁸⁴ Adat, as an instrument of social control, have the capacity to shape the social situation. The Adat which is not dynamic and

⁴⁸² Mirza Satria Buana, "Living *adat* Law, Indigenous Peoples and the State Law: A Complex Map of Legal Pluralism in Indonesia" (2016), International Journal of Indonesian Studies, 1:3 at 2. The word *adat* is spelt in small letters and in italic in the original.

⁴⁸³ Mirza Satria Buana, "Living *adat* Law, Indigenous Peoples and the State Law: A Complex Map of Legal Pluralism in Indonesia" (2016) 1:3 International Journal of Indonesian Studies at 2 - 3.

⁴⁸⁴ Durkheim in work in *De La Division du Travail Social* in David N. Schiff. Socio-Legal Theory: Social Structure and Law (1976) 39:3 Mod L Rev at 299 – 301.

flexible and cannot adapt and adjust to the new social situations would become irrelevant and eventually disappear. For example, those sacred Adat which enforce spiritual obligations or prohibitions are not dynamic and flexible and are being abandoned by many Christian Iban. This is where the conducive social situation for the Adat to flourish or the people who practised the Adat are diminishing or not existing anymore. The social, economic, and political progress⁴⁸⁵ have changed many of the Iban communities from traditional to modern. This societal evolution could determine the continuing relevance and significance of Adat as law or rules for the regulation and management of the “modern Iban community”.

In the case of the Iban communities, I define “modernity” as a state of social, economic, and political situation that has changed and different from the situation during the last 50 years or so, which I referred to as traditional. The social, economic, and political development have relatively improved the quality and standard of living in the communities. Literacy is widespread and they are now practicing several religions. The new leadership system is giving equal opportunity to men and women and the *Tuai Rumah* are appointed by the government and not by the communities and based on different criteria. Many Iban are moving away from their traditional social, economic, and political setting and migrating to big towns and cities to look for employment and new livelihood. In towns and cities, they live in heterogeneous communities and their social relations are regulated by state law and state authorities. However, modernity is a very elusive state of being or situation to define. It is a flux of societal evolution and what is modernity to one generation may be out-dated and obsolete to another generation. This societal evolution is repeated in every generation in the Iban society. The social change is a reaction or adaptation, either consciously or unconsciously, to a new social, economic, and political

⁴⁸⁵ The rapid socio-economic and political progress has changed the standard and quality of living and livelihood in most Iban communities.

changes or situation to suit the prevailing needs and aspirations of that generation. Different scholars have conceived different idea for modernity. Wittrock argues that there are varieties of cultural patterns, beliefs, and institutional arrangements within this all-encompassing phenomenon which he terms as modern. He asserts that a society is modern only if some key defining institutions and types of behaviour can be said to be modern.⁴⁸⁶ In the case of the Iban, modernity is a continuous process of changes in their social, economic, and political evolution as described above may be considered as key defining institutions and types of behaviour which are modern. The influence of the above-mentioned factors on a person has led some Iban to call themselves “modern Iban”. A modern Iban is a person who is educated in western style of education, a Christian, wage earning and living in a town or a city. In term of culture, the modern Iban do not practise the traditional Iban culture, i.e. the culture which the Iban have practised for centuries. As such, they are subject the state law only. Most of the modern Iban observe and/or celebrate Christmas, Easter, New Year’s, birthdays, and Dayak festival.

During the last 50 or so years the social, economic, political, and spiritual developments have “transformed” traditional Iban communities to modernity, which have brought about some serious impacts affecting the relevance and significance of Adat in some modern Iban communities. The social development in term of modern education has brought widespread literacy among the Iban. Literacy through modern education brings about new ways of thinking and new approach to matters surrounding their social and spiritual activities. The economic developments have improved the standard and quality of living of Iban communities in the areas under study significantly. Many of the longhouses are constructed of concrete and other strong materials, and, as such, there is no requirement for regular maintenance. Public amenities and

⁴⁸⁶ Björn Wittrock, "Modernity: One, None, or Many? European Origins and Modernity as a Global Condition." (2000) 129:1 *Daedalus* at 31 - 59.

infrastructure facilities, like clean water, electricity, roads, and telecommunication, have reached many Iban longhouses. Such development also makes contact and communication easy between the *Tuai Rumah* and those who are living and earning far away from their longhouses.

A foreign dynasty, British colonial government and Sarawak state government interventions in law and politics of the native communities brought both positive and negative impacts on the relevance and significance of Adat Iban. For example, the establishment of the Native Courts in 1870 pioneered the limited recognition of native law including Adat Iban. The colonial and recent Sarawak state interventions and reform, by implication, abolished in the Adat and introduced a new native community leadership system.

Another critical factor which affects the relevance and significance of Adat is the spiritual development during the early 1970s. Many Iban in the area under study have been converted to Christianity and many of them do not practise the Adat which are based on spiritual principle or belief. These Adat are deemed to be contrary to the Christian teaching and belief. The Adat are demonised and treated as suppositions.⁴⁸⁷ Those who have been converted to Islam and Buddhism have totally discarded the Adat.

The most critical factor which could impede the development and significance of the Adat is Iban themselves. The significance and survival of the Adat depend on the Iban. If they do not practise and develop the Adat, the Adat would disappear. At the moment, the Iban are not dynamic to develop their Adat and inflexible enough in the interpretation of Adat, particularly those that derived from spiritual principles and belief. This could make Adat rigid and difficult to adjust and

⁴⁸⁷ The opinion is inferred from Rev. Dennis Gimang's response to the questionnaires and attached as Appendix B.

adapt to the new social situation. The Adat and the underlying wisdom may be relevant and significant in one social situation, which is, in the traditional Iban communities, but may not be in another, that is, in the modern Iban communities. It is against the above-mentioned social situations that the Adat and the underlying wisdom would be examined to find out whether they would continue to be relevant and may be considered as living Adat.

6.3 Adat Iban regulating the Iban traditional leadership system

The Adat regulating the Iban traditional leadership system was one of the most important Adat in any Iban community in the past. It was a manifestation of the golden era of Adat Iban in the administration of law, politics, and government in the Iban communities. The Adat was dynamic and flexible which enable it to adjust and adapt to the changing social situation. This was illustrated by the way the Iban reinterpreted the criterion for the leadership, that was “a person who was capable to lead and unite the community”. During the tribal wars period the criterion was interpreted as a powerful person who had proven bravery and valour because the leader main responsibility was to provide protection to the community and territory. When tribal wars were over and peace and new political situation came to the land, the criterion was reinterpreted to mean “a person who was capable to lead, unite, and bring about economic progress to the community”. The Adat continued to be relevant in the changing social situation and may be considered as a living Adat until the state interventions legal which abolished the Adat.

The recent legal and political developments in Sarawak have brought some major and radical reforms to the native community leadership system and the demise of the Adat. The Adat was completely abolished by the state through the enactment of the *Local Authorities Ordinance*,

1996 which was substituted by the *Community Chiefs and Headmen Ordinance, 2004*.⁴⁸⁸ With effect from January 1, 1996 until today the office of *Tuai Rumah* has been appointed by the State government. Under such circumstances, it is concluded that the Adat and the underlying wisdom for regulating the Iban traditional leadership system is not a living Adat. The demise is not because the Adat is not dynamic and flexible but because of the state interventions. However, the Adat is still used by some Iban communities as a system for short-listing the names of persons recommended to the State Government for the appointment of *Tuai Rumah*. Nevertheless, the government, i.e. the appointing authority, is not bound by the recommendation and may appoint any person who is not recommended by the community or other authority.⁴⁸⁹

The Iban, as mentioned in paragraph 3.3 above, did not have any leadership system beyond the longhouse. As such, the Iban never had any Adat regulating the appointment of *Penghulu* (Area Chief), *Pemanca* (District Chief) or *Temenggong* (Paramount Chief). The appointments for these offices have been made by the government under the state law. The system for the appointment of leaders beyond the longhouse, namely: *Temenggong*, *Pemanca*,⁴⁹⁰ and *Penghulu*,⁴⁹¹ is not autochthonous to the Iban.⁴⁹² The mention and discussion on the new leadership system is to illustrate that the Adat and the underlying wisdom have been completely over-ridden by the leadership system introduced by the state under the state law. This Adat has the capability of being a living Adat. It was capable to adjust and adapt to the changing social situation and continued to be relevant under the changing social situations in the past. It was

⁴⁸⁸ Under section 140 of the *Local Authorities Ordinance, 1996*, the Headmen were appointed by the *Yang di-Pertua Negeri* (formerly known as the Governor of Sarawak).

⁴⁸⁹ Section 4(1) of the *Community Chiefs and Headmen Ordinance, 2004* states that: "In exercising the powers to appoint a Chief or Headman, the appropriate appointing authority shall consider but shall not be bound by any recommendation made by the Resident of a Division or the District Officer of a District"

⁴⁹⁰ The appointment of *Pemanca* was a change of nomenclature for the appointment of *Pengarah*.

⁴⁹¹ During the British colony, the appointment of *Penghulu* was made by the Governor vide section 6(1) of the *Local Authority Ordinance, 1958* (Chapter 117).

⁴⁹² See paragraph 3.3 *supra*.

not a living Adat not because it was not dynamic and flexible but because of the state interventions which cut short its life. The Adat has been abolished by the various government legal and political interventions as mentioned below.

The Brookes' regime first introduced the system of leadership beyond the longhouse in 1883.⁴⁹³ This intervention somehow or rather took away and dilute the power and authority of the Iban and their Adat in the regulation of their leadership system. The British colonial government adopted the system. The Sarawak State government inherited the system from the British colony and has made a lot of changes to the system. The various Iban Chiefs (*Temenggong*, *Pemanca* and *Penghulu*) are now full-time Sarawak state government co-opted employees and are paid a monthly salary. The *Tuai Rumah* have not been co-opted as full-time state government employees but they have been paid a monthly allowance since 1980s. They would be called for duties as and when required by the District Officer or the Native Courts of the District in which they are appointed. The payment of monthly allowance has made the office of *Tuai Rumah* very attractive and competitive.

The state through the *Local Government Ordinance*, 1996, introduced and implemented gender equality and new criteria for the appointment of headmen. The term headmen include *Tuai Rumah*, *Tua Kampung* (village leader), *Penghulu* (Area Chief), *Pemanca* (District Chief) or *Temenggong* (Paramount Chief). The policy and practice are perpetuated by the *Community Chiefs and Headmen Ordinance*, 2004. The term headmen (*Tuai Rumah*) refer to male and masculinity in its ordinary meaning. However, under any state law of Sarawak any word importing the masculine gender includes females.⁴⁹⁴ These changes were among the most

⁴⁹³ The Brookes government introduced the "*Penghulu system*" in 1883. Peter Mulok Kedit. "Iban Leadership: Some Reflections on the Penghulu System" (2012) 2 Ngingit, The Tun Jugah Foundation Journal, at 31 - 33.

⁴⁹⁴ Section 3(4) of the *Interpretation Ordinance*, 2005 of the state of Sarawak.

radical reforms introduced by the state on women's rights and gender equality. The Iban communities did not protest or object to the reform. In fact, it was very well received and appreciated by the Iban.⁴⁹⁵ Following the reform, a number of women have been appointed as *Tuai Rumah*, Chiefs, and Paramount Chiefs for the Iban communities. However, an Iban woman was appointed as *Temenggong* (Paramount Chief) for the Iban communities of Kuching Division before the reform was introduced.⁴⁹⁶ Apart from that, two women have been appointed to the position of *Pemanca* (District Chief) for the Iban communities.⁴⁹⁷ A number of women have been appointed as Chiefs (*Penghulu*) and *Tuai Rumah* (Headmen). The reform in the leadership system seems to come naturally with the political and cultural evolution of the Iban society. The acceptance of women as *Tuai Rumah*, Area Chiefs, and District Chiefs or Paramount Chiefs is a proof that the egalitarian ideology in the Iban society is still very much alive.⁴⁹⁸

The criteria for the appointment of *Tuai Rumah* and the other Chiefs are no longer based on "a person who was capable to lead and unite the community". Knowledge and competency of Adat are not a priority. The new unwritten criterion for the appointment of a *Tuai Rumah* or any other community leader, is a person who is "capable" to serve the people. A person suitable for the appointment of a *Tuai Rumah*, or a Chief, or a Paramount Chief must have leadership quality and other merits and not because the person is a descendent of a pioneering family or group which has produced a long line of Chiefs in the past. Political affiliation with the government of the day is important. The credential of being knowledgeable in Adat or having the trust and

⁴⁹⁵ This is my personal view. I was serving as an administrative officer and serving at the Sarawak Ministry for Local Government when the law was passed. The Ministry did not received any official complaints, or objection, or protest.

⁴⁹⁶ The late Datuk Seri Tra Zehnder was appointed as the first Iban woman *Temenggong* for Kuching Division. She served from July 1988 until February 1996. She then served as the first woman President of the Council for Customs and Traditions (*Majlis Adat Istiadat Sarawak*) from 1996 to 2002.

⁴⁹⁷ One of them was the late Valarie Manyi Lanyu. She was appointed as an Iban *Pemanca* for Tatau District of Sarawak.

⁴⁹⁸ It is not the purpose and beyond the scope of this dissertation to discuss gender equality and Feminism movement in the Iban society.

confidence of the members of the community is secondary in importance. The *Tuai Rumah*, Chiefs, and Paramount Chiefs are grass-root leaders, and their co-operation and loyalty are very important to ensure the smooth implementation of government policies. However, there are also many politically neutral persons appointed as *Tuai Rumah* and Chiefs. But those who are not government supporters are seldom appointed to such positions. The non-supporters might not be able to discharge their duties against political inclination and conscience. Thus, many of the *Tuai Rumah* and Chiefs are members or supporters of ruling political parties or people who are closed to political leaders. This is a paradigm shift in the criteria for the appointment of *Tuai Rumah*, Area Chiefs, and District Chiefs or Paramount Chiefs as leaders at the grass-root level.

The new criteria for the appointment of *Tuai Rumah* and the various Chiefs have some negative impact on the administration of Adat. Many of the *Tuai Rumah*, and Chiefs, e.g. *Penghulu*, *Pemanca* and *Temenggong*, are not very knowledgeable and competent in Adat Iban.⁴⁹⁹ This is a serious weakness in term of the administration and development of the Adat. However, the duties and functions of the *Tuai Rumah* and Chiefs nowadays are not only confined to the administration and enforcement of Adat but many other duties and functions. The administration of Adat is not a major duty of the *Tuai Rumah* and Chiefs now. Nevertheless, it is a set-back towards the development of Adat. This is because the social relations and affairs of the Iban communities are still largely regulated by Adat. The lack of knowledge and competency is a handicapped and could impede a smooth administration and promulgation of Adat. The *Tuai Rumah* and Chiefs are still the guardians and the last bastion of Adat.

⁴⁹⁹ The assessment is based on my own experience serving in the Sarawak state civil service for over 40 years (1973 - 2016) as an administrative officers and Chief Registrar of the Native Courts.

6.4 Adat Iban regulating the orientation of longhouse, organisation of family apartments and lighting of cooking hearth

As discussed in Chapter 3, the Adat regulating the orientation of a longhouse, organisation of family apartments and lighting of cooking hearth are imposing spiritual obligations and enforced as spiritual sanctions or prohibitions. The adherence of Adat is largely based on the belief of spiritual rewards for compliance and punishment for violation. The compliance is based on belief and not reasoning. The legal rationale and wisdom for the application and enforcement of the Adat are not explained. This practice may impede the continuing relevance of the Adat because of the changing social situations in the Iban communities. The articulation of the wisdom of Adat through reinterpretation or re-evaluation could provide an alternative meaning or different way of understanding the Adat. This could make Adat to be understandable rules of general application and continue to be relevant and living. The Adat and the underlying wisdom is examined against the prevailing or new social situation to find out whether the Adat would continue to be relevant and a living Adat. In this respect, the Adat are analysed against the social, economic, and political developments that have taken place in the Iban communities during the last 50 years.

6.4.1 Adat Iban regulating the orientation of longhouse

The Adat regulating the orientation of a longhouse requires that the façade of a longhouse must face sunrise and, if it is constructed near a navigable river, it must be parallel to the river. The Adat is a spiritual sanction and also a prohibition. If the enforcement of this Adat continues as a spiritual sanction or prohibition, it may not continue to be relevant in many Iban communities. I think the belief of spiritual reward for compliance and punishment for violation may not be sustainable for long. Firstly, many of the Iban in the Saribas and Kelaka areas (the location where this research is conducted) have been converted to Christianity. Christianity has become

part their daily life and consider themselves to be liberated from the belief of the Iban spirituality. Their Christian faith helps them to dispel the fear of spiritual punishment for non-compliance with the Adat. They do not view the spiritual sanction or prohibition as a sacred obligation to comply and but dismiss the spiritual sanctions or prohibition as superstitions. However, they would respect the old traditional practice if there are members of the community who are still practising the Iban spirituality. For example, the Adat which requires the façade of a longhouse to face the sunrise is still widely practised today. The sensitivity toward of other belief and harmony of the community are paramount in importance in communal living. Some of them might have observed or witnessed that non-compliance of the Adat is not a fatal omission.

Secondly, roads have taken over the rivers as the main mode of transportation in many areas where the Iban communities are living. More and more longhouses are built near to the main roads and highways. At the moment, there is no Adat regulating the orientation of longhouse and the road alignment or the Adat is silent on this issue. The Adat was developed before the existence of roads and highways and quite slow to adjust and adapt the changing or new social development and situation. There is no requirement for a longhouse to be parallel to a motorable road or highway. In the Iban communities, where there is no specific or explicitly expressed Adat regulating certain matters, any act or omission is not illegal or prohibited.⁵⁰⁰ The orientation of many new longhouses that are built near to the main roads and highways seems to be depending on the contour of the land. If the flat land runs parallel to the road, the longhouse will be constructed parallel to the road. As far as Adat are concerned, roads have not been accorded with similar spiritual significance as the rivers.

⁵⁰⁰ The presumption was provided by Edmund Langgu Saga and Richard Muluk Entering.

Thirdly, literacy is quite widespread among the younger generation. Those who have received modern education view some Adat differently from the older generation. Most of the new generation of Iban do not see the spiritual sanction or prohibition as sacred anymore. They are inquisitive and not quick to accept anything without explanation and rationale. In the case of spiritual sanction or prohibition, where there is no comprehensible explanation, the Christian Iban tend to view such Adat as superstition.

If this Adat is to survive and continue to be relevant for the regulation of the social relations of Iban communities it may be reinterpreted to make it dynamic and flexible. The reinterpretation would articulate the wisdom of the Adat from the social and economic perspectives. The Adat which require the façade of a longhouse must face sunrise maybe reinterpreted as easement rights and rights to unobstructed natural light as discussed in paragraph 3.4 above. The title of the Adat ought to be changed to Adat regulating easement. This is to circumvent the spiritual implication of the Adat. The Adat which requires that a longhouse which I sited near a navigable river must be constructed parallel to the river, maybe reinterpreted as enforcing a system settlement planning. The Adat requires the harmonising of the residential facilities and amenities with the transportation, infrastructure, and landscape. The title of the Adat would be appropriately renamed as the Adat for settlement planning.

6.4.2 Adat Iban regulating the organisation of family apartments

The Adat ⁵⁰¹ regulating the organisation of family apartments is still widely practised today. The spiritual sanction or prohibition ⁵⁰² is very sacred to most Iban communities and there has been no incident of any breach of such Adat. Whether the spiritual punishment or wrath is real or

⁵⁰¹ This Adat requires that the apartments of siblings must be sited next to each other in a row.

⁵⁰² The term “taboo” is used in *Adat Iban* 1993. The term may be more appropriate in anthropology rather than law. I prefer to use the same term as used in the codified *Adat Iban* 1993.

imaginary cannot be determined, but the fear of the punishment seems to be very effective in compelling the compliance of the Adat. This is an example of an automatic submission to custom or Adat.⁵⁰³ When a community constructs a new longhouse, the community automatically organise themselves according to the Adat and nobody raise any question. It is not clear whether they all understand the purpose of the Adat or just comply because it is customary or spiritual sanction. There is no temporal punishment or fine prescribed for any violation of this Adat. The secular rationale and the useful purposes or benefits that this Adat brings are obscured by the spiritual connotation of the Adat. The Christian members of the Iban communities are still very cautious about this Adat. They are still complying with the Adat.

The wisdom of the Adat is the promotion of mutual help, caring, sharing and reciprocity between siblings and members of a community as discussed in paragraph 3.5 above. The close and harmonious relationship between siblings is a key factor for unity in a longhouse community. The culture of caring and sharing between siblings is still widely practised today. However, to a certain extent this culture is eroding because of the changing economic situation and the means of earning the living in most communities. Thus, many families are more concerned about the well-being and welfare of the individual family. The sources of foods are no longer derived from the jungles and rivers but from the grocery stores or supermarkets in towns and cities. Salaries and wages replace subsistence agriculture as the mainstay of their economy. Foods become expensive and are seldom shared among close relatives. The availability of electricity and modern storage facilities, such as refrigerators and freezers, make it easier to store any excess food for a long period of time. Unlike in the past where fresh food can get spoilt fast in tropical region and storage and preservation of food facilities were limited. Thus, excess food was

⁵⁰³ Bronislaw, Malinowski, *Crime and Custom in Savage Society* (Kegan Paul, Tench, Trubner & Co. Ltd, New York, 1922) at 9 – 16.

shared between siblings and close relatives. There was no commercial value for foods because every family had easy access to foods.

The Adat regulating the organisation of family apartments would continue to be relevant for a long time into the future and a living Adat. As long as the Iban communities live in longhouses and there are compulsory communal duties or functions for every family to attend or participate, the Adat would be a necessity. There would be more and more urban/town migration among the young Iban in the future to look for employment and some families would not be able to return home to perform their communal duties. The siblings are interdependent on each other for communal functions and activities. Many families are absent-apartment owners nowadays as more and more Iban are working and living at their place of work in towns and cities. This is the best measure for the time being to preserve the culture and Adat. Some longhouses are only occupied by the old people. Sometimes some families cannot return to their longhouse to perform the compulsory communal duties or functions because of various reasons. In this case it would be handy for a sibling next door to help or perform the duties or functions on-behalf of the absent sibling. Providing hospitality such as serving food and drink during funeral or wedding are examples of the compulsory communal duties. A sibling is the closest relative to help as the first responder in time of need. The sharing of burden and helping each other among the siblings and members of every Iban community has been enshrined in the Iban culture since time immemorial. The success or failure of managing and holding communal activities or functions depends on the solidarity, reciprocity, and co-operation of all families. Many communities have made the attendance or participation of certain activities or functions compulsory and become Adat. For examples, funeral, wedding and maintenance of roads, footpaths, and cemetery, to name but a few, are compulsory for every family having an apartment in a longhouse to attend or participate. Any absence or non-participation would be liable for a default fee which is between

MR200 – MR400 at the time of writing this dissertation. The fee is paid to the *Tuai Rumah* on behalf of the community.

The new Adat has both positive and negative impacts. The Adat could strengthen the culture and spirit of solidarity, reciprocity, and co-operation in a community. It could provide a relief for any family who is genuinely not able to return to the longhouse to make a payment as a contribution. The negative aspect is that the new Adat could give an opportunity to any absent family to choose not to attend but to make payment even if such family can return to the longhouse. In the case of a funeral, the cost of returning to the longhouse and providing hospitality is more expensive than the default fee. Some families have taken advantage of the loophole in the Adat and chose to pay the default fee. This has watered down the spirit and intent of the Adat. However, despite of some drawbacks the new Adat would continue to be relevant in the near future.

The wisdom underlying the Adat is secular in nature and would remain relevant in any changing social situation. This Adat promotes mutual help, reciprocity, and harmony in a close-knit community is a novel idea in communal living. It is suggested that the title of the Adat should be: “the Adat regulating the organisation of family apartments” instead of stating it in the form sanction or prohibition to make it neutral to the Christian and non-Christian members of the communities.

6.4.3 Adat Iban regulating the lighting of cooking hearth

This Adat prohibits the cooking hearth in the kitchen to become “cold” by not being unused for cooking for more than 30 days. The relevance and significance of this spiritual sanction and prohibition seems to be have been overtaken by the improved standard and quality of living of

most Iban communities. Many Iban communities can afford to build good quality longhouses now. Many of the modern longhouses are similar in quality with those townhouses in towns and cities. Thus, the chance of a family apartment become dilapidated or in a state of disrepair may not be a serious issue anymore. The modern longhouses are mostly made of concrete and durable materials. The availability of modern kitchen and cooking appliances make the fire hearth obsolete and out of place.

According to the Adat, the modern kitchen and cooking appliances, for example, the modern gas or electric stoves or ovens, are not falling within the meaning of cooking hearth (*dapur*).⁵⁰⁴ Therefore, these appliances are not subject to the rule of “cold cooking hearth” (*chelap dapur*). If a family apartment does not have the earthen cooking hearth the Adat does not apply to such family. The rule does not apply to any thing that is not in existence. Where the cooking hearth has been demolished and replaced by modern cooking appliances, it is not necessary for those families who work in towns and cities to return every month to their longhouses. This interpretation of the Adat is too literal and simplistic. The interpretation does not reflect the intent and purpose of the Adat which is an Iban version of Tort law. The Adat imposes a duty on the family to return regularly to its longhouse and apartment and to check the physical and structural condition of the apartment. The regular return to the longhouse would keep the family informed or aware of the affairs of the longhouse. The misunderstanding of the meaning of the Adat could be due to the limited discourse in the principle or jurisprudence of the Adat. It is common that any Adat enforcing spiritual sanction or prohibition is not questionable in the Iban communities.

⁵⁰⁴ *Dapur* can mean two things according to the Iban language. First, *dapur* is a general term referring to a kitchen, i.e. a room in a family apartment where cooking activities or food preparation are taking place. Secondly, *dapur* refers specifically to the facility and physical structure of the earthen cooking hearth where the actual cooking over fire is carried out.

The communication between the *Tuai Rumah* and any family living in town or city has greatly improved with the availability of good roads, cars, and modern telecommunication (telephones and computers). A *Tuai Rumah* can contact and keep in touch with members of his longhouse community at any time if he or she requires any family to come home for any urgent matter. Under such circumstances, the Adat has been overtaken by the changing socio-economic improvement of many Iban communities.

The Adat regulating the lighting of the cooking hearth is rarely enforced now or has no relevance in most Iban communities in the Saribas and Kelaka areas. In some cases, the relevance of the Adat had been obliterated by the misinterpretation or misunderstanding of the purpose of the Adat. While in some other cases, the Adat may be considered otiose and being gradually phased out because the Adat is not relevant to the new social situation. If the importance of this Adat is to be revived, it has to be rebranded and reinterpreted. It is suggested that the Adat ought to be known as “the Adat regulating the maintenance of family apartment”. This Adat would impose the duty on every family to regularly check and maintain their apartment to ensure that apartment is structurally sound and safe for anybody to pass through or walk on. This approach could make the Adat to be dynamic and flexibility to adjust to the new social situation.

6.5 Adat Iban regulating marriage and divorce

Chapters 4 examined and discussed the wisdom of some Adat regulating marriage and divorce in the Iban communities. These Adat have been very useful for the regulation of sanctity, fidelity, and moral values relating to marriage. The Adat serve the Iban communities very well where tradition and customs are unadulterated, or outside influence are limited. But the Iban communities are evolving from traditional to modern. They are moving out from the old social situation into a new social situation. The socio-economic development, state intervention, and

conversion to Christianity and other religions are among the crucial factors impeding and challenging the relevance of the Adat. The issue now is whether the Adat would continue to be relevant and living Adat in view of changing social situations.

Generally, the relevance and significance of the Adat regulating matrimonial matters are declining because of the number of Iban using the Adat is diminishing. The decline is caused by two main factors, namely: the competition with a state law, i.e. the *Law Reform (Marriage and Divorce) Act, 1976*, and Christianity. The Adat is competing with the state law in term of the perception on the security and protection of marriage. Many non-Christian Iban seem to lose their trust and confidence in the Adat. Most of them prefer to solemnise and register their marriages in civil registry. There is a general perception⁵⁰⁵ that marriage contracted under Adat Iban is considered to be less secure and provide less rights and protection in term of alimony for the woman/wife in the event of the dissolution of marriage. The women, and also their parents,⁵⁰⁶ prefer to have their marriages solemnized and registered under the *Law Reform (Marriage and Divorce) Act 1976*. There is a general presumption that a marriage solemnised under *Law Reform (Marriage and Divorce) Act 1976* is more secure. If a marriage is dissolved, the state law would provide better rights and protection for women. There is no study available to support the perception and resumption. However, there is a paradox. Most marriages solemnised and registered according to the 1976 Act seem to last longer. The Act seems to provide a better rights and protection for women when compared to marriages solemnised according to Adat Iban. One of the reasons for insecure marriage is that divorce under the Adat

⁵⁰⁵ This perception and presumption were disclosed to me personally by some Iban while I was serving as the Chief Registrar of the Native Courts of Sarawak. Dr. Ana Durin and Rev. Ft. Dennis Gimang also expressed the same perception.

⁵⁰⁶ Parents (or parent) are still playing some important roles in the marriages of their children. For example, the seeking of consent of the bride or woman's parent is still widely practiced in many Iban communities. This is an old tradition of filial piety and courtesy.

is quite easily granted by the Native Courts, i.e. the Chief Court. In most cases, this court would grant an application for dissolution of marriage without much delay. The main reason for most of the decisions (*ratio decidendi*) is that there no point to prolong a failed marriage or where the married couple mutually agrees to dissolve the marriage. Sometimes, an application for divorce to a Chief Court can be granted in just a short time and no costs. Divorce is prevalent among the Iban. However, there are many factors why the rate of divorce is high among the Iban. For example, I have seen a lot of marriages among young couples were contracted on emotional ground and not carefully considered. After sometimes they faced a lot of problems and the better option to solve the problems was to dissolve the marriages.

There is no half-way house for an application for dissolution of marriage under Adat Iban. An application for the dissolution of marriage would either be granted or refused. There is no provision in Adat Iban for an order of decree nisi (separation order) to be granted first before a grant of decree absolute. It is up to the ingenuity of the presiding officer of the Chief Court to takes an extra-judicial initiative by giving a fixed period to the divorcing couples to try reconciliation, and if reconciliation fails then the application would be heard and decided accordingly.⁵⁰⁷ With regard to rights, the Adat does not provide any right for maintenance or alimony for former wife upon the dissolution of marriage. A former wife has to seek for maintenance under a state law, the *Native Customary Marriage (Maintenance) Ordinance, 2003*. The process is very troublesome because a former wife has to go two avenues to seek for justice and rights.

⁵⁰⁷ A *Pemanca* (District Chief), the late Wilson Siang Lim, who presided in a Chief Court in Miri, Sarawak, normally gave the divorcing couples certain period for reconciliation.

I think the presumption of secure marriage or protection of marriage under the state law, i.e. the *Law Reform (Marriage and Divorce) Act 1976*, derives from the difficulty of getting the dissolution of marriage from the High Court. The process is normally very lengthy and costly. It can take months or years to get the dissolution of marriage. The process begins with filing the petition and then progresses slowly to marriage tribunal inquiry, reconciliation, separation order (decree nisi) and finally the granting of decree absolute. The lengthy and costly processes could act as deterrence or hindrance for a spouse who wishes to get out of the marriage. This is one of the kinds of securities envisaged by Iban women for a lasting marriage. The provisions for maintenance of former spouses/wives, custody of children and division of property, if applicable, are better and clearer under Malaysian *Law Reform (Marriage and Divorce) Act 1976*. Further, the High Court is far better equipped to enforce any order in case of any default or non-compliance with any court order. The High Court is supported by the police and prison authorities in the enforcement of judgment or order. The Native Courts are not fully supported by the enforcement agencies such as the police and prison in case of any default or non-compliance with the order issued by the Courts.⁵⁰⁸ Any enforcement of judgement order issued by any Native Court is treated as civil matters by the police and prison authorities. Thus, the costs for the execution of any warrant of arrest and warrant of commitment (imprisonment) issued by the Native Courts to the police and prison authorities must be paid by the Native Courts and person or party requesting for the enforcement of the judgment or order, respectively. These are among the reasons for the weakness and lack of confidence in the Adat Iban and the Native Courts.

⁵⁰⁸ The present Native Courts are the State of Sarawak courts and state agency created under the *Native Courts Ordinance, 1992* in accordance the Federal Constitution of Malaysia. (See the Ninth Schedule to Article 95B(1)(a), item 13, *List IIA, Supplementary List for States of Sabah and Sarawak*, of the Federal Constitution of Malaysia). The police and prison authorities are federal agencies. The powers and relationship of the Native Courts with the police and prison authorities might have never been properly explained and understood by these authorities.

The Brookes dynasty⁵⁰⁹ and British colonialism brought Christianity to Sarawak and their combined impact brought about both positive and negative results to the Iban and Adat Iban. The propagation of Christianity was made through the establishment of churches and mission schools during the Brookes regime (1842 – 1946) and British colony (1946 – 1963). The spread of literacy and introduction of modern education was a novel gift to the Iban and others. However, the spread of Christianity impeded and killed many Adat Iban. This could be a case of dominating a society by taking away its spirituality and values and then superimpose another belief system onto the society. Most Iban students studying in mission schools were converted to Christianity.⁵¹⁰ This spread of Christianity continues to intensify until today by the local churches of various dominations. Conversion to Christianity has to a certain extent diminished the relevance and significance of the Adat on matrimonial matters. The majority of the Iban living in the areas under study are Christians.⁵¹¹ As more and more Iban are converted to Christianity, the solemnisation of marriage according to the Adat diminishes. The Christian Iban do not solemnise their marriages according to Adat Iban. They solemnised their marriages in Churches in accordance with the Christian vow of holy matrimony or at the Civil Registries⁵¹² according to the *Law Reform (Marriage and Divorce) Act 1976*.⁵¹³ The reasons are not only because of the

⁵⁰⁹ Tan Jin Huat, *Brookes, the British, and Christianity: Christian Missions and the State in Sarawak 1841 – 1963* (Genesis Books, ARMOUR Publishing Pte Ltd, Singapore, 2012) at xi. The major denominations came to Sarawak came during the Brookes dynasty rule (1842 – 1946). The Anglican mission came in 1848, the Roman Catholic in 1881, and the Methodist in 1901. See:

⁵¹⁰ My father and many other Iban students studied in a mission school in the late 1940s were converted to Christianity. I witnessed many Iban students studied with me in mission school in 1960s - 1970s were converted to Christianity.

⁵¹¹ There is no statistics available for the areas under study. But it is a general presumption that the majority of the Iban in Saribas and Kelaka are Christians.

⁵¹² A Civil Registry is available in almost every National Registration Department office in Malaysia. This department is responsible for the registration of marriage of non-Muslims, birth, death, citizenship, adoption, permanent residence, and the issuance of national identity card.

⁵¹³ A marriage may be solemnised in Church before a priest who is an Assistant Registrar of Marriages appointed by the Minister having the charge of National Registration Department (see: section 24 of the *Law Reform (Marriage and Divorce) Act 1976* of Malaysia. But such marriage will be registered according to section 27 of the *Law Reform (Marriage and Divorce) Act 1976*. However, the 1976 Act does not apply any non-Muslim native of Sabah and Sarawak who may elects to solemnize his/her marriage according to his/her own customary law (See: section 3(4) of the *Law Reform (Marriage and Divorce) Act 1976* of Malaysia). Before the coming into force of the *Law Reform (Marriage and Divorce) Act 1976* in Sarawak on 1 March 1982, there were two earlier statutes that regulate civil and church marriages in Sarawak, namely: the *Church* and the *Civil*

security and protection of marriage under the 1976 Act, but it is more of a religious obligation for them to follow the Christian holy matrimonial ceremony and rituals. The Christians may perform some of the rituals under Adat Iban during the wedding reception, e.g. “*bebiau*”.⁵¹⁴ But these rituals have no legal or moral implication toward the validity or sanctity of the marriage. It is just a ceremonial and cultural symbolism only.

In the light of the above, the Adat regulating marriage and divorce would continue to be relevant among the Iban who are still practising the Iban spirituality. This is because they have a choice between the Adat and the state law, i.e. the *Law Reform (Marriage and Divorce) Act, 1976*. The state law is having a slight edge in terms of presumed marriage security and protection which could impede the continuing relevance of the Adat. This is further aggravated by the number of Iban practising the Adat is diminishing because of the conversion to Christianity. The Christian Iban have totally discarded the Adat regulating marriage and divorce. The declining in relevance and significance of the Adat is not because the Adat is not dynamic and flexible to adjust and adapt to the prevailing social situation. The decline is because of the loss of the trust and confidence in the Adat and the diminishing number of Iban using the Adat because of conversion to Christianity. These two factors are fatal to the survival of Adat. Adat cannot continue to be relevant and living without the people practising them. The Adat cannot operate in a vacuum. The prospect of the continuing relevance of the Adat is rather bleak and the Adat is not likely to be living Adat.

Marriage Ordinance (Chapter 92) and the *Civil Marriage Ordinance* 1952. Marriages solemnized and registered under any of the earlier law are deemed to be subsisting and registered under the 1976 Act with the coming into force the Act – see sections 4 and 33 of the Act.

⁵¹⁴ “*Bebiau*” is a ritual of seeking spiritual blessings. During the ritual a shaman would wave a roster or chicken over the heads of the marrying couple and calling for the spirits and gods to come and give the couple their blessings.

6.6 Adat Iban regulating the custody of children, maintenance of children, and rights of former spouses to property

The continuing relevance of Adat Iban and the underlying wisdom for regulation of the custody of children, maintenance of children, and former spouses' rights to properties following a divorce, as examined and discussed in Chapter 5 above, is also declining. The continuing relevance and significance of these Adat depends on the relevance and significance of Adat regulating the solemnisation of marriage and divorce. The Adat regulating the solemnisation of marriage and divorce are the "primary" or "principal Adat" whereas the Adat regulating the custody of children, maintenance of children, and former spouse rights to properties are "secondary" or "accessory" Adat to the earlier. The continuing relevance and significance of a secondary Adat depends on the primary Adat. As discussed in paragraph 6.5 above, the primary Adat are declining in relevance and significance and, as such, the secondary Adat would naturally decline in relevance and significance. The domino theory effect on the secondary Adat is unavoidable. These Adat would continue to be relevant among the Iban who solemnised their marriage according to Adat Iban. However, there is a need for the Adat to be amended to address the weaknesses, as mentioned in paragraphs 5.2, 5.3 and 5.4, to make the Adat to be living Adat.

6.6.1 Adat Iban regulating the custody of children

The principle of equal division of children under this Adat is not suitable for the prevailing social situation. The concept of dividing the children equally between the parents is not popular among many divorced couples who have many children. Some Iban regard this Adat as insensitive to the emotional need of the people concerned. This Adat has been codified under the Adat Iban, 1993, and can be amended with the consent of the Iban communities to make it dynamic and flexible to adjust and adapt to the changing social situation. The old wisdom which emphasises on the need of sharing of responsibilities to bring up the children separately between parents

and pride of having children is not appropriate for the prevailing social situation. From what I have seen and experience, the physical dividing and separating of the children could be a very emotional and traumatic for both parents and children. The Adat has been a source of great distress to both the parents and children. Normally, the former wife/mother would refuse to hand over the children awarded to the former husband/father for custody. The execution and enforcement of custody order is extremely challenging for the Native Courts.⁵¹⁵ The Adat splits a family right down the middle and is a double tragedy for the family. The parents and the children are torn apart. This is really a broken family. If the parents are not from the same longhouse, one would move out and return to his or her old longhouse or move somewhere else. Sometimes the separation could be for life for the children and family relationship could be cut-off forever. This is an example where equality is not always fairness or justice.

Many Iban view this Adat is out-dated and rather cruel and need to be reviewed. This Adat and the underlying wisdom are no longer suitable under the present social situation. Good communication and transportation are available now to help maintaining good relation between the children and their parents. It would be deal if both parents are given joint custody and the child or children could freely or certain arrangement for the child or children to live or stay with any parent. Joint custody would redress the concept of the blaming and penalising the party who is responsible for the divorce. This party may not be given the custody of the child if the couple has only one child. The joint custody would cater for the emotional of the parents. Alternatively, one of the parents is given the legal custody of the child or children and the other would be given clear and unhindered given access and visitation rights. In this way, the impact of losing one parent may be less traumatic. The suggestions mentioned above are similar to the principle

⁵¹⁵ The observation is made from my own personal knowledge and experience of enforcing the custody order as the Chief Registrar of the Native Courts of Sarawak from 2015 to 2013.

practised by the High Court of Malaysia under the *Law Reform (Marriage and Divorce) Act* 1976. Many Iban prefer the Adat to be amended and adopt the principle practiced by the High Court which is more suitable to the prevailing social situation.⁵¹⁶ The High Court normally awards the legal and physical custody of all the children (if more than one child) to one parent and grants the rights of access and visitation to the other. These are the main issues to be redressed to make the Adat dynamic and flexible to adjust and adapt to the emotional and economic needs of any breaking-up family. This Adat has the potential to be a living Adat but through amendment or modification.

As mentioned in paragraph 5.2, the Adat is silent on the access and visitation rights of the parent who is not given the custody of the child or children. In the past, one of the parents would return to his old family or longhouse or move somewhere else and gradually disappear from the physical up-bringing of the child or children.⁵¹⁷ Access, visitation, or contact between a child or children and a parent not given the custody depend on the personal relationship between the divorced parents. If good relationship were maintained after the divorce, there would be no problem of access, or visitation, or contact between the child or children and the parent. But if the relationship is bad, the parent having the custody would normally does not allow any contact between the child and the other parent.⁵¹⁸ This kind of reaction under such circumstance is quite common in the longhouse communities, particularly where a marriage ends in bitterness and acrimoniously.

⁵¹⁶ This observation is inferred from my discussions with some participants, e.g. Dr. Anna Durin, Edmund Langgu Saga and Jimbun Tawai. Some Chiefs (*Penghulu*) who presided in the Chief Court hearing divorce applications had expressed similar view to me while I was serving as the Chief Registrar of the Native Courts.

⁵¹⁷ The narrative was provided by my research participants, Edmund Langgu Saga and Philip Igai Melina.

⁵¹⁸ The observation derives from my own knowledge and experience living in an Iban longhouse community and my encounters with the members of the other Iban communities.

6.6.2 Adat Iban regulating the maintenance of children

The wisdom underlying the Adat is the sharing of burden and responsibilities of child or children up-bringing and welfare. However, the biggest challenge is the enforcement of maintenance order. The Native Courts of Sarawak are still unable to resolve this most difficult problem.⁵¹⁹ The Iban are very mobile people. Many of them are employed in the oil and gas industries and other jobs in Malaysia and throughout the world. As the judiciary established under of the state of Sarawak, the Native Courts jurisdiction is only confined to the territorial limit of the state of Sarawak. The Native Courts jurisdiction is subject to the state/federal constitutional relationship and powers under the concept of federalism. Thus, a maintenance order made by a Native Court under this Adat cannot be enforced against a person who resides in Malaysia but outside Sarawak or outside Malaysia. This is a big problem face by the Native Courts. These courts are not fully supported by the police and prison authorities in the enforcement of judgement as mentioned in paragraph 6.6.1.⁵²⁰

Another issue is that there is no provision for an unemployed former wife, to obtain any maintenance under the *Adat Iban*, 1993. This issue, among others, led to the passing of the *Native Customary Marriages (Maintenance) Ordinance, 2003*⁵²¹ which complements *Adat Iban*

⁵¹⁹ The information is obtained through my own personal knowledge and experience while serving as the Chief Registrar and a senior officer in the Native Courts for about 11 years from 2005 to 2016.

⁵²⁰ This knowledge and observation are acquired through my own experience while serving as the Chief Registrar of the Native Courts of Sarawak from 2005 to 2013.

⁵²¹ Section 3(1) of the *Native Customary Marriages (Maintenance) Ordinance, 2003* states that:

“Where –

(a) a native customary marriage has been dissolved or terminated by a Native Court or in accordance with any native system of personal law; or

(b) the wife has been deserted by the husband during the subsistence of such marriage; or

(c) the husband has failed, refused or neglected to provide maintenance or support:

(i) for the wife: or

(ii) for any child of the marriage who is still a minor or who is physically or mentally disable and is incapable of supporting himself,

The court may order the husband to make periodical payment of sums of money or to make a lump sum payment, for the maintenance of the wife and any child of the marriage.

1993 to provide an avenue for a former wife to seek maintenance for herself and the children in the Magistrate's Court under the Civil Court.⁵²² The Ordinance is not a codification of Adat Iban but a state law providing a legal avenue to plug in the lacuna in the unwritten traditional Adat and/or the *Adat Iban*, 1993. With the enactment and enforcement of the *Native Customary Marriages (Maintenance) Ordinance, 2003*, and if the problem as described above persists, the Adat on the maintenance of children may not survive for very long. However, the Adat would continue to be relevant to marriages solemnised under Adat Iban. The Adat would be dynamic and flexible by amendment or improvement to resolve the weakness. The Native Courts Ordinance, 1992, should have a provision which allows the enforcement of maintenance order throughout Malaysia through the High Court of Malaysia. This could resolve the jurisdictional issue. Further, the *Adat Iban*, 1993, should have a provision which provide maintenance for a former spouse who is unemployed or has limited source of income. This would plug the lacuna in the unwritten Adat Iban and *Adat Iban*, 1993. These suggestions are to provide better and clear rights in addition and complementing the former wife rights under the *Native Customary Marriages (Maintenance) Ordinance, 2003*. The support of the police and prison authorities could be resolved through administrative means. These are the main issues which could determine whether the Adat is dynamic and flexible and to be a living Adat or otherwise. The diminishing in relevance of the Adat is not because the Adat does not have the capacity to adjust and adapt to the prevailing social situation, it is because of the Native Courts limited jurisdiction and number of marriages solemnised under Adat Iban is declining. Any Adat which is not spiritual sanction or prohibition is flexible. A spiritual sanction or prohibition could be rigid and difficult to

(2) In determining the amount of maintenance to be paid by the husband to the wife, the court shall base its assessment primarily on the means and needs of the parties, regardless of the proportion such maintenance bears to the income of the husband but may have regard to the degree of responsibility which each party bears for the breakdown of the marriage if such evidence is available before the court."

⁵²² The Magistrate's Court under the Federal Civil Court of Malaysia.

amend. But there is always an exception to every Adat Iban. For example, a mourning period may be lifted by paying a self-imposed fine.⁵²³

6.6.3 Adat Iban regulating rights of former spouses to property

The Adat regulating the distribution of property between the former spouses following the dissolution of marriage is based on the principle of equality and common ownership of property of a family. The wisdom is that every member of the family, including an unborn child inside the womb, if it would be born alive, would be entitled to equal share in the family property. A family, according to the Iban culture can be an extended family and may consist of three generations living together in a household.⁵²⁴ However, with regard to the distribution of property following the dissolution, family means a nuclear family which consists of the parents and children. The wisdom of the Adat may not be materialised where a former spouse after the divorce leaves the household and resides in another longhouse or locality. She or he may lose the rights to own any share in unregistered immovable property⁵²⁵ and registered immovable property which is not registered under his or her name. The Adat regulating landed property does not allow a person who moves out of the community to retain his or her rights over native customary rights⁵²⁶ land as of rights. A former spouse who moves out of the community also cannot demand for his or her share but he or she may be given an unregistered immovable property as a gift.

⁵²³ The observation is inferred from the interviews and discussion with Edmund Langgu Saga from 2013 to 2020 and some members of my longhouse community in March 2020.

⁵²⁴ According to section 1 of *Adat Iban*, 1993, bilik-family means “a family consisting of the parents, their children and grandparents who live in the family section of a longhouse”.

⁵²⁵ An example of unregistered immovable property is the untitled land held under the native customary rights.

⁵²⁶ Section 5 of the *Sarawak Land Code* [Cap.81 (1958 Edition)] states that as from 1st January, 1958, native customary rights may be created in accordance with the native customary law of the community concerned by the felling of virgin jungle and the occupation of the land, or planting the land with fruit trees, or occupying or cultivating the land, or by any other lawful method, to name but few. Until a document of title is issued, such land shall continue to be State land and any native lawfully occupying the land shall be deemed to hold the land by licence from the Government.

The Adat is derived from a very old practice which reflects equality and the concept of incorporation of an Iban family. However, there is a kind of rigidity with regard to the rights over unregistered immovable property for anybody who ceased to be a permanent resident or a member of the community. The Adat does not allow any person who ceases to be a permanent resident or a member of the community to retain such rights to property. These rights are exclusive rights attached to the permanent residence or membership of the community as discussed in paragraph 4.2.2. This Adat is quite rigid and may not be dynamic and flexible to adjust and adapt to the changing social and economic situation in the Iban community. However, this Adat may be considered as an exception or an estoppel. The Adat would continue to be relevant irrespective whether the marriage was solemnised according to Adat Iban or otherwise. This as an Iban property law which is applicable to the distribution of property following the dissolution of marriage. According to my definition of a living Adat above, this Adat does not fall within a living Adat. The wisdom underlying the Adat may not allow for the Adat to be easily amended or modified allowing the ownership or holding of right to land by non-permanent residents or non-members of a community. However, the purpose and aim behind the Adat are necessary for land management and control to prevent landlessness among the permanent residents or members of a community. Nevertheless, it is all depended on the Iban themselves to make the Adat dynamic and flexible to adjust and adapt to the social changes according to the needs and idea of a particular time. The Adat is not casted in stone and may be amended or modified in the future.

6.7 Chapter conclusion

The question addressed in this Chapter is whether Adat Iban and the underlying wisdom are living Adat. The question is asking whether the Adat would continue to be relevant and significant under the new or changing social situation in the Iban communities. A living Adat is an Adat that

is dynamic and flexible to adjust and adapt to the changing and new social situation in the Iban communities. The dynamism and flexibility are the capacity of an Adat to continue to be relevant either by necessity, or amendment, or modification to adjust and adapt to the prevailing social situations. From the examination of the relationship of Adat and the interaction of the Iban communities, some of the Adat examined seem to have the potential to be living Adat while some might diminish in their relevance. The Adat which are diminishing or ceased to be relevant are either no longer suitable to the changing social situation in the Iban communities, or overridden by social, or legal, or political reforms introduced by the Sarawak state government. However, some of the Adat have the potential to continue to be relevant have to be amended or modified to make them dynamic and flexible to adjust and adapt to the changing social situation. The Adat which have certain intrinsic wisdom may not require amendment or modification to continue to be relevant. For example, the Adat which estops the rights to own or hold immovable property by any person who ceases to be a permanent resident or member of a community does not need to be amended or modified to continue to be relevant.

The legal and political reforms since 1998 made by the state government have by implication abolished the Iban traditional leadership system. With the coming into force of *Local Authorities Ordinance*, 1996 from January 1st, 1998, the power to appoint the *Tuai Rumah* has been vested in the state government of Sarawak. The relevant provisions the *Local Authorities Ordinance*, 1996⁵²⁷ were repealed and substituted by the *Community Chiefs and Headmen Ordinance*, 2004 which came into force from January 1st, 2020. These two state laws brought the demise of the traditional Adat. The Adat is still practised by some communities for shortlisting the names of persons recommended to the government to be appointed as *Tuai Rumah*. However, this is

⁵²⁷ Part X of the *Local Authority Ordinance*, 1996.

not a requirement. The government may not appoint any person recommended by the community. For the time being, the Adat regulating the traditional leadership system is dead and gone. The community's power to appoint its own *Tuai Rumah* may not be given back in the foreseeable future. If the Iban want the Adat to be resurrected and the power to be returned to them, they have to be politically dynamic.

The wisdom underlying the Adat for the regulation of the orientation of longhouse, organisation of family apartment, and lighting of cooking hearth are still relevant and would continue to be relevant to the Iban communities. The Adat are sound knowledge and good idea as guide for the settlement planning, instilling and promotion of caring and sharing among close relatives, and regular maintenance and safety of longhouse. The flux of social, economic, and political changes such as widespread literacy among the younger generation and improved mode of transportation, quality and standard of living, and communication have brought a paradigm shift which challenge the relevance of the Adat. The conversion to Christianity has to a certain extent dispelled the fear of the spiritual sanctions or prohibitions imposed by the Adat. If the Adat are to be dynamic and flexible to adjust and adapt to the changing situation, the intention and usefulness of the Adat have reinterpreted and articulated in a secular manner to give clear and sensible meanings and aim of the Adat. The reinterpretation ought to reflect to usefulness of the Adat the perspective of the social and economic activities of the Iban communities. The spiritual sanctions or prohibitions, i.e. taboos, be circumvented by secular and neutral meanings.

The Adat regulating the organisation of family apartment is very useful to the prevailing situation in almost every longhouse. Many families are now living in cities and towns most of the time because of their employment and other reasons. As more and more families are staying away from the longhouses, this Adat would be a necessity in the future. The culture of mutual help,

caring and sharing among siblings and close relative become a need rather than a taboo. Siblings and close relative are morally expected as first responders in time of need and trouble. This Adat would continue to be relevant to all families whether they are still practising the Iban spiritual belief or otherwise.

The Adat Iban regulating the matrimonial matters are at the crossroads of being irrelevant. The availability of choice between two legal regimes for contracting and solemnisation of marriage for the Iban communities is challenging and impeding the relevance of Adat. The Iban have a choice to solemnise their marriages according to Adat Iban or state law known as the *Law Reform (Marriage and Divorce) Act, 1976*. The presumption that the 1976 Act provides better security and protection of marriage is a factor why some Iban, especially the women, prefer to solemnise their marriages under the 1976 Act. Whether there is any truth in the presumption is a very subjective matter. In addition to that, the perpetual impact of colonialism through the introduction and conversion to Christianity is posing a threat to the survival of Adat. The majority of the Iban communities in the areas under study have been converted to Christianity and most of them solemnised their marriage according to the Christian ritual of holy matrimony but register the marriage under the *Law Reform (Marriage and Divorce) Act, 1976*.⁵²⁸ Another important advantage for a marriage solemnised under the Act is the recognition of the marriage nationally and internationally. Whereas the recognition of a marriage testimonial issued under Adat Iban can be precarious even at national level let alone internationally. The good thing about the Adat is the ease of getting married and divorced. The formalities for the solemnisation of marriage and divorce can be very simple and quick. But the enforcement of child or children custody and maintenance order can be very difficult. The former spouse rights to property following the

⁵²⁸ Some priests are appointed as Assistant registrars of marriages under the 1976 Act and empowered to solemnise marriages in Church. See: section 28(3) of the *Law Reform (Marriage and Divorce) Act 1976* (Act 164).

dissolution of marriage are generally fair. But if the property consists of immovable property, the rights are subject to the Iban land law. The Iban land law can disentitle a former spouse who ceases to be a member of the community.

The continuing relevance of Adat regulating the matrimonial matters in the Iban communities is very limited and rather uncertain. The *Law Reform (Marriage and Divorce) Act, 1976*, which is a state law, seems to be more popular choice for the solemnisation of marriage among the Iban women. The conversion to Christianity is another factor which draws away the Iban from practising the Adat. The Adat may be dynamic and flexible but if the number of people practising or using the Adat diminishes, the relevance of the Adat would follow the same fate and eventually disappeared.

Conclusion

Most of Adat Iban are legacy of ancient Indigenous law of the Iban people and have been used for the regulation of the social relations and affairs of the Iban communities since centuries ago. Hence, I call the Adat as “traditional Adat Iban”. The Adat are still used for the regulation of the Iban communities today and presumably with some amendments or modifications. For example, the Adat regulating sexual relation relating to incest had been modified. The death penalty has been abolished and substituted with fine, appeasement and purification rituals. However, the manners in which the Adat are expressed and practised remain similar. The Adat are commonly expressed in “dos” and don’ts or spiritual sanctions or prohibitions (taboos). The application and enforcement of the Adat may be described as following the practices of the ancestors or complying with the spiritual sanctions or prohibitions based on the belief of spiritual rewards for compliance and punishments for violation. This creates the relationship and intertwining of Adat and spirituality. The practice seems to be an automatic submission to customs and spirituality and gives the impression that Adat are just customary practice or spiritual sanctions or prohibition. There could be some ingenious reasons for the application and enforcement of Adat through spirituality in the old days. Fear of Gods and respect for divine law could be among the reasons to use spirituality for the application and enforcement of the Adat. However, in the present time, there is not much explanation given for the application and enforcement of the Adat in term of the regulation of social, economic, and political relations and affairs of the Iban communities. What the Iban understand is that the main purpose of the Adat is to promote and maintain peace, harmony, and unity the communities. The ultimate goal is the social well-being of the individual members and the community which is expressed in the Iban philosophical mantra of “*Gayu guru, grai nyamai, lantang senang*”.⁵²⁹ The mantra is literally means longevity,

⁵²⁹ The knowledge was provided by Edmund Langgu Saga, an Iban elder and a research participant.

good health, and prosperity in English. It epitomises the state of utopian society according to the Iban culture.

Under the Iban social, economic, and political relations today, Adat is a cultural and political instrument of power and authority for the regulation and governance of social relations and affairs of the longhouses, communities, and territorial domains.⁵³⁰ Adat are a means to achieve the end and used for the exercise political power and the construction of hegemonies.⁵³¹ Adat are essential tool for social control and social contract for the government to influence and control society.⁵³² Adat also provide means for dispute resolution, which is a means to settle dispute in a fair manner to bring justice, peace, and harmony. In the light of the above, the Adat, as ancient law and applied and enforced as customs and spiritual sanctions or prohibition cannot be accepted as law for many Iban communities. Adat have to be reinterpreted or re-evaluated to rejuvenate and modernise the Adat to adjust and adapt the Adat to the new social situations. The reinterpretation would take into account of the prevailing social, economic, and political relations and affairs of the Iban communities. The analysis of the Adat may come up with knowledge or ideas similar to some law in modern societies. This approach could reinstate the importance and confidence to the Adat Iban among the Iban.

This dissertation attempts to reinterpret the Adat Iban to understand the obscured meanings and purposes behind the Adat. One of the ways to explain the meanings and purposes is to articulate the wisdom of the Adat. This could substantiate that Adat Iban are not just customs and

⁵³⁰ Territorial domain means the area of land and waters claimed by a longhouse as its territory.

⁵³¹ Jaime LLambías-Wolff, "Law As The Expression Of Politics And The Result Of Its Own Dynamics" (2014) 3:5 International Journal of Social Sciences at 91.

⁵³² Keith E. Whittington, ed, *Law and Politics: Critical Concepts in Political Science* (New York: Routledge Press, 2015). (Summary). <https://scholar.princeton.edu/kewhitt/pages/law-and-politics-critical-concepts-political-science>

spirituality but there are wise reasons and purposes behind the Adat. Customs and spirituality are medium or vehicle for the application and enforcement of the Adat. Wisdom is the sound or good knowledge, or idea, or experience, or judgement, or spiritual principle underlying the Adat which is element or agent that can bring about the useful purpose or benefit to the Iban communities. The wisdom is inferred through a reinterpretation and/or re-evaluation of the relationship of Adat and the social, economic, and political interactions of the Iban communities. The reinterpretation or re-evaluation is an alternative or different way of looking at the meanings and purposes of the Adat. It liberalises the approach to give some latitude for creative and innovative thinking on Adat. With such approach, I conclude that most of the Adat under study have some elements of wisdom.

If we refer to the discussions on the wisdom of Adat regulating the orientation of longhouse above, it shows some basic knowledge of settlement planning. The knowledge is expressed as a spiritual sanction. This makes the Adat a divine and sacred law and higher in hierarchy than man made law in the Iban communities. Whether the giving of the status of the Adat as divine law was intentional or otherwise is not known. But it demonstrates that there is a relationship between social ordering and spirituality in the Iban communities. The same method or tactic is used for the enforcement of Adat regulating the organisation of family apartments and lighting of fire on the cooking hearth. Adat regulating the organisation of family apartments is a good idea or experience for the promotion of mutual help, caring and sharing in time of need and trouble between close relatives. A sibling next door can perform the mandatory communal function in the apartment on behalf of the absent sibling.⁵³³ This Adat was very useful and functional during the tribal wars period more than a century ago. A sibling living next door was

⁵³³ Communal functions are normally performed in the open corridor of a longhouse. Every family must provide hospitality at the individual family open corridor. This is where a sibling next door can perform the duty on behalf of the absent sibling.

in close proximity and had a moral duty as first responder to help defend or repeal any enemy attack on another sibling.

The Adat regulating lighting of fire on the cooking hearth is a sound knowledge and a good idea to compel regular checking and maintenance of the family apartment for the safety of occupants and visitors. I think that this is an example of spirituality being used to enforce Adat (law). It is an ingenious mean of improvising the power and authority of enforcing Adat where police and prison authorities are not available to support the enforcement of the Adat.

The knowledge and ideas underlying the Adat reflect law making power and development by a sovereign political entity at its formative stage. The Adat never developed beyond that stage.⁵³⁴ The Adat and the underlying wisdom were relevant and significant for the regulation of social relations and governance of the Iban communities about 50 years ago and beyond. Today many of the Adat are diminishing in relevance and significance due to the various legal and political interventions. However, some of the Adat have the potential to be dynamic and flexible to adjust and adapt to the changing social situation. This could be achieved through a constant amendment or modification of the Adat. An Adat which is rigid may not continue to be relevant in a changing social situation, unless the Adat is expounding a principle of necessity, for example, the Iban land law relating to the exclusive rights of members to own land as mentioned in paragraph 6.6.3.

There were some Adat which had some elements of wisdom and could continue to be relevant in a changing social situation, but they were overridden by the colonial and state social and legal

⁵³⁴ The political power of the Iban never developed beyond their longhouses and territorial domain. The Dutch and British imperialism and colonialism, beginning from the 18th century in Borneo, put a stop to power and territorial struggles among the natives.

or political interventions. The Adat regulating the appointment of *Tuai Rumah* according to Iban traditional leadership system is a good example of an Adat abolished by state legal or political intervention. The Adat had demonstrated that it had the capability to be dynamic and flexible to adjust and adapt to the changing social situation. During the tribal wars period the criterion for a capable person to lead and unite a community was a strong person with proven bravery and valour. The leader was responsible to provide protection and safety of the community. When peace came to the land the criterion remained, but the interpretation changed. As such, the Adat was dynamic and flexible. However, the *Tuai Rumah* are now considered to be leaders at grassroots level and should be regulated by a centralised law and government.

The wisdom of Adat regulating sexual relationship, moral values, children welfare and rights to property under the matrimonial matters as discussed in Chapters 4 and 5 are still relevant but diminishing. The Adat are being overshadowed by the *Law Reform (Marriage and Divorce) Act, 1976*, which is presumed to provide better security and protection of marriage. However, the weakness in the Adat can be addressed by adopting some of the rights and protections provided in the *Law Reform (Marriage and Divorce) Act, 1976*, by way of amendment or modification. This could strengthen the relevance of the Adat. The main problem is that many Iban are abandoning their Adat because of conversion to other religions and lack trust and confidence in the Adat.

One of the biggest issues which challenge and impede the continuing relevance and development of Adat is the intertwining of Adat and spirituality. The spiritual sanctions and prohibitions which are enforced as Adat are against the Christian teaching and belief. The Christian Iban find the Adat particularly those Adat which are derived from divine law or

spirituality are not relevant to them.⁵³⁵ Most Iban who are Christians have abandoned or refused to be subject to the Adat.

The conversion to Christianity is a major reason for the declining in the practice to Adat Iban. The majority of Iban living in the Saribas and Kelaka river systems have been converted to Christianity.⁵³⁶ Until the early 1980s, the Iban in Sarawak were predominantly practising their traditional spirituality. In 1947 and 1960, 96% and 89%, respectively, of the Iban were practising the Iban spirituality (traditional belief), and only 4% in 1947 and 11% in 1960 were Christians. However, the religious grouping of the Iban has changed in the recent years. In 1991, 55% of the Iban were Christians, 28% pagans,⁵³⁷ 12% no religion, 3% other religion, and 1% Islam. In the year 2000, the number of Iban Christians increased to 420,329 or 70%, whereas the proportion of tribal religion decreased to 16%, and no religion 7%. But there was a slight increase of other religions, Islam and Buddhism, which was 3.6% and 0.5%, respectively.⁵³⁸

Now 76.3% of the Iban in Malaysia are Christians although some of them may also continue some traditional spiritual practices. There is no statistics available on the number of Iban who have been converted to Christianity living in the areas under study. But the majority of Iban are Christians. Many Christian Iban view Adat as a superstitious belief and out-dated. The practice of Adat is contrary to the teaching and belief of Christianity.⁵³⁹ A small number of Iban in the

⁵³⁵ The statement is inferred from the response given by Rev. Ft. Dennis Gimang to the Questions for Clergyman. The response is attached as Appendix "B".

⁵³⁶ The information was inferred from several conversations with the Rt. Rev. Bishop Aries Sumping and Rev.Ft. Dennis Gimang in 2013 – 2020. The statistics was not available at the time of writing this dissertation. But it is a common knowledge that the majority of Iban in Saribas and Kelaka areas are Christians.

⁵³⁷ Some scholars label the Iban spirituality as pagan or animistic.

⁵³⁸ Lam Chee Kheung, "The Iban Population of Sarawak 1947-2000, Working Paper Series No. 13" (2006) Institute of East Asian Studies (I.E.A.S.) Universiti Malaysia Sarawak (UNIMAS), at 15 -16. www.archive.unimas.myThe statistics represents the overall conversion of Iban to Christianity in Sarawak and not the areas where this research is conducted.

⁵³⁹ According to Rev. Father Dennis Gimang, an Anglican Priest and research participant, in his response to my research questionnaires, says that Adat are contrary to the teaching and belief of Christianity.

same areas have been converted to Islam and Buddhism. Adat have no relevance and significance to the Muslim Iban because the Sharia law is the law governing all social relations for the Muslims. The Buddhist Iban have discarded Adat Iban. Those who are converted to Buddhism are mostly women married to Buddhist husbands.

Another issue which is critical to the continuing relevance and survival of Adat Iban is the paradigm shift brought by widespread literacy in the Iban community. In any developing country like Malaysia, education is the gateway to a better future for the people. Even though schooling is not compulsory in Malaysia, many Iban understand the importance of education and many have attended school at least up to secondary school level.⁵⁴⁰ Education has brought widespread literacy and socio-economic progress to many Iban. They view education as a catalyst to improve their socio-economic standard and create better opportunities for good employment. According to Lam Chee Kheung⁵⁴¹ the literacy rate of the Iban was extremely low in the early years of the 20th century. There were only 3 out of every 100 Iban were literate in 1947, 5 in 1960, 16 in 1970, and 29 in 1980. Even during the most recent years, the literacy rate among the Iban was still low, which was 56% in 1991 and 66% in 2000.

Despite the low rate of literacy, education has a substantial impact on the practice and development of Adat Iban. Young minds could be influenced and conditioned through learning at schools and institutions of higher learning. The acquisition of modern knowledge has brought along intellectual revolution and cultural evolution among the younger generations of Iban. Their social conditioning brings new way of thinking and new approaches and understanding to the

⁵⁴⁰ Secondary school level (form 1 to form 5) is equivalent to Middle to High school level (year 6 to year 12) in Canada.

⁵⁴¹ Lam Chee Kheung, "The Iban Population of Sarawak 1947-2000, Working Paper Series No. 13" (2006) Institute of East Asian Studies (I.E.A.S.), Universiti Malaysia Sarawak (UNIMAS) at 13 -14.

social surrounding. Cochrane⁵⁴² asserts that education has multiple effects on the access to information, market opportunities, non-market efficiency, attitudes, behaviour patterns, and status. An individual who has gone through the process of formal education would acquire skills and attitudinal predispositions and that could help to build up capability to plan ahead. Cochrane's assertion is quite valid for the Iban younger generations. Most of the younger generation view the importance and relevance of Adat quite differently from the older generations. They are more pragmatic and practical in their approaches and may not always conform to the normative approach of the older generation. For example, some aspects of the Adat which regulates sexual relationship are considered by many female members of the younger generations as repugnant and out-dated. The Adat which protects and simultaneously punishes and condemns⁵⁴³ any unmarried woman for getting pregnant is considered out-dated and derogatory.

Education has also brought some negative impact on the fluency of the Iban language.⁵⁴⁴ There is a general decline of fluency in the Iban language, and more prominently among the younger generations living in towns and cities. Fluency in the Iban language is a prerequisite to understand the theories, concepts and principles of Adat, which are sometimes manifested through ceremonies, ritual, chanting and summons expressed in classical and poetic language. Non-fluency in the language would make it very difficult to understand and acquire adequate knowledge of the Adat and could create a gap and a breakdown in the transmission of the knowledge of Adat. I am not saying that education is bad for the Iban in general. Good education

⁵⁴² Susan H. Cochrane, *Fertility and Education. What Do We Really Know?* (John Hopkins University Press, Baltimore, 1979) at 70 in Lam Chee Kheung, "The Iban Population of Sarawak 1947-2000, Working Paper Series No. 13" (2006) Institute of East Asian Studies (I.E.A.S.), Universiti Malaysia Sarawak (UNIMAS) at 13

⁵⁴³ The Adat compels an unmarried woman who got pregnant to make her paternity in public.

⁵⁴⁴ Iban language is being taught as an optional subject in school now. It is hoped that the teaching of the language could help the young Iban to regain or improve their fluency in the language.

is the key to achieve socio-economic progress in any society. But it may be unavoidable that we may have to lose the language in its classical form in order to gain other things. But modern education could be detrimental to the acquisition of knowledge where the knowledge is transmitted through oral tradition. The problem could be further aggravated by the lack of written materials or literature articulating the jurisprudence of Adat.

I observe that the traditional interpretation, application, and enforcement of Adat are not compatible with the change or new social situation in the Iban community. In view of the circumstances, this dissertation attempts to suggest that a middle ground has to be found to accommodate the circumstances under the social situations. A reinterpretation and/or re-evaluation of the Adat in a secular manner could make the Adat relevant and significant to all members of the communities. The separation of Adat and spirituality could help to make Adat more acceptable to most members of the communities. This would make the Adat neutral to any belief system and acceptable to most members of a community.

The Iban have very little choice in term of rules for the management of their communities. Adat are primary socio-legal system for the regulation and government of the social relations and affairs of communities. A community of 7 to 40 or more families living virtually under one roof communal setting cannot be managed without a common agreed rule. The state law is not adequate or comprehensive enough to regulate the affairs and matters peculiar to the Iban. Yet many of the Adat are still not recognised under the law of Sarawak. There is a need to give broader legal effect to Adat Iban to cater for the needs and aspiration of the society. At the moment, the statutory interpretations of Adat are a hindrance. But if there is a political will and determination by the government, the Iban could development the Adat much further. A functioning and efficient socio-legal system is the basic requirements for those people who live

in communal and the close-knit communities. Most of the Adat which are enforced in the Iban communities operate outside (non-state and decentralised) the state legal system and have been fundamental in the maintenance of peace, harmony and social well-being, including disputes and conflicts resolution and prevention, of the communities. However, the Iban communities' social, economic and political culture is constantly changing and bringing new paradigm in thinking and creates a constant shift in culture. Culture evolves and never ends and as the old ones disappear, the new one emerges to replace the old one. The Adat could disappear if they do not evolve in tandem with the changing culture and socio-economic and political development in the Iban communities. The ancient Adat have the potential to be developed further by amendment or modification. The constraint may be the adaptability to change is only allowed within Adat to the extent that legal decision making can be packages as a mere restoration of the old law. The government may limit the range of legal decisions which encroaches into matters under the purview of the state. The development of Adat through positive law can make it possible to bring the flux of changing social situations and behaviour within the scope of Adat.⁵⁴⁵

Many of Adat Iban are at the crossroads between diminishing of relevance and continuity. But the road to continuity is long, steep and slippery. It may take a few generations to reinstate the former prominence of Adat as the main socio-legal system for the regulation of social relations and governance of the Iban communities. The road towards diminishing is wide and clear because of the socio-economic development in the Iban communities, as discussed above, is challenging the importance of Adat and provides choices to the Iban.

⁵⁴⁵ Niklas Luhmann, *The Differentiation of Society* (New York: Columbia University Press, 1982) at 101 in William E. Scheuerman, "Reflexive law and the challenges of Globalisation" (2001), 9:1 *The Journal of Political Philosophy* at 93

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United Kingdom's *Prescription Act (1832)*

Almanac

Sarawak Government Almanac, 2020.

Appendices

Appendix “A”

Questions for Interviews

1. What is your name?
2. Do you want your actual name to be quoted for data provided in this interview or you want to be anonymous under a pseudo name?
3. What is your age?
4. Where do you normally reside?
5. What is Iban Indigenous law according to Iban’s method of understanding and knowing (epistemology)?
6. Is Iban Indigenous law in general important to the Iban society?
7. How much knowledge do you have in Iban Indigenous law?
8. How much do you know about the Iban Indigenous law regulating family and sexual matters?
2. Is Iban Indigenous law still relevant to the Iban society today?
3. If so, in what social aspects is Iban Indigenous law still relevant?
4. What are the role and function of Iban Indigenous law in aspects?
5. What is the significance of the Iban Indigenous law in these social aspects?
6. If customary law is not relevant what should be done to the Iban Indigenous law to make it relevant to the prevailing social situations?
7. Would reinterpretation of the Iban Indigenous law based on reasons, rationale, and logic, make it relevant, more adaptable and accommodating to the contemporary Iban society?
8. Would reinterpretation of the Iban Indigenous law make Iban Indigenous law more comprehensible and meaningful to the present social environment?
9. Would the Iban Indigenous law lose its legality, legitimacy sanctity and efficacy if the spiritual component is extricated?
10. Would the reinterpretation of the Iban Indigenous law create conflicts and tensions in the Iban communities where they are Christians and non-Christians (animism) living together in the villages?
11. If there are conflicts and tension, how do you resolve the problems?

Questionnaire:
Questions for Clergyman and Response

Note: The Questions will be written in the Iban language

Title of the Research Project: Adat Iban: A Living Traditional Wisdom?”

Introduction

The Researcher, Ronnie Edward, is a graduate student (Ph.D. Candidate) of the Faculty of Law at the University of Victoria, British Columbia, Canada. He is doing a research project on the Iban Indigenous law as a partial fulfilment of the requirement for the Degree of the Doctorate in Law. His research is to find out whether there is any wisdom in the Iban Indigenous law and if so whether it is a living traditional wisdom. The Iban Indigenous law regulating the Iban social organisation and family matters have been chosen as a case study or reference.

The questions below are designed to find out whether the conversion to Christianity among the Iban has any impact on the Iban Indigenous law which is intertwined with the Iban spiritual belief.

Personal Particulars of Participant

1. Can you tell me your name?

My name is Dennis Gimang

2. Do you want your real name to be mentioned or quoted in the research? If you do not want your real name to be mentioned or quoted, your identity will be anonymous and will be substituted by a pseudonym.

I don't mind my name to be quoted.

3. Are you an Iban yourself?

Yes

4. Where were you born?

I was born in the longhouse

5. Where were you brought up?

Most of my childhood days were spent in the longhouse

6. What Christian denomination do you belong to?

Anglican

7. What is your position in the church?

Clergyman

Awareness and Knowledge of Iban Indigenous law

8. Do you have any knowledge of the Iban Indigenous law regulating family matters, namely on marriage, rights to property as a newly established family, divorce, rights to property following a divorce, custody of children, maintenance of children and adoption of children?

I am quite aware of the Iban customary law which does not give proper protection to women when it comes to divorce. When a man leaves his wife, the customary law allows his wife to keep the dowry given to her at their wedding. His wife is to keep her wedding ring and a few other items given to her at their wedding. Very often the children are left to the care of their mothers that inevitably giving latter a very heavy load and responsibility as single mothers.

Conflicts between Christianity and Iban Indigenous Law

9. What are the conflicts between the Christianity and Iban Indigenous law?
Marriage:

As far as the customary law is concerned is it meant for the pagan Iban as most of its contents are connected with 'tungkal' and 'penti-pemali' taboos and superstitions. Many of them are longer relevant to the modern generation of the Iban community who are never taught about the spiritual implication of the law. For instance, dowry (derian) is a must. If the dowry is not mentioned or offered, the married couple will not have a happy marriage. In the old days if the dowry adat was not given the guardian spirit of the man may refuse to follow him and he would become weak and vulnerable against his enemies.

Any bards or men of noted authority in Iban law who speak on behalf of either the bride or the groom during the wedding can demand for any other minute extra unwritten laws as they wish from each other. I often see these people want to outdo each other in demanding for extra adat. This I believe is because each adat is translated into cash. The clever they are in demanding for extra adat the more money they will poke into their pockets. For instance, the one who speaks for the bride can ask for 'adat penyandih, adat pengait duku or 'tanduk rusa'.

Each of these little extra adat may come to at least 'sigi alas' or RM4.00. Without that adat the groom will not be able to perform his task as an able, dedicated, hardworking husband. He will always envy other men in the village. On the other hand, if the bride is to 'nguai' or follow her husband, the one who speaks on behalf of the groom may demand for 'adat penuduk' from the bride. It is meant to sustain the bride in assimilating herself into the new family. Christians see all those adat are loaded with superstitious and pagan in nature.

Even the Federal Court sees that the customary law is not binding. The Strait Times (dd 30.1.2004) reported "Customary Marriages after 1982 invalid if not registered, rules Federal Court". Customary law cannot stand by itself because it does not give due consideration and proper protection to women and children of failed marriages.

In Christian marriage the couple are asked to exchange solemn vows with each other. They promise to take one another for better for worse, for richer or poorer, in sickness and in health, forsaking all others, until death do they part. Normally in Christian wedding people put on suit which is a universal dress code that makes the occasion really beautiful and up to date. If the couple were to 'bebiau' at the longhouse the man may be forced to wear the loin cloth. The

church is really a very beautiful to conduct the wedding service where friends from far and near would expect. The church is where we are baptised, married, and buried.

Belief:

Most of the practices under the customary law are associated with religious belief which are said to be originated from various sorts of demons. Christians call them demons while the Iban call them gods. Some christo-pagan (Christians who still advocate the pagan practices) have reduced those demons to 'legendary figures'. For instance, Keling the fertility god who is said to have many wives including the spirit of a frog (bunsu kerak put), cannot be reduced to a legendary figure. He is a real demon who often gives charms and witchcraft to the Iban. Keling is said to be a very handsome and strong god. But he can also change himself into a demon (antu) called 'antu gerasi'. We know this by his name: Keling gerasi nading, bujang berani kumpang, jerangau ke betugau mayuh rambang. The last three words refer Keling to be a very 'womanising' demon.

10. Does your church discourage the Christian Iban to practise or observe the Iban Indigenous law?

What the Iban called gods or goddesses are indeed demons. They do have the word 'petara' which means 'god'. But their 'petara' is not in a singular form. It is always in a plural form. Most of the Iban customary law is associated with superstitions and belief which has its origin from various demons. For instance, 'miring' (the ceremony in giving offering to the gods) was said to be originated from a god called Sempulang Gana. When they perform the 'miring ceremony' for the government ministers, they are not showing their culture of respect but simply doing what Sempulang Gana had told them to do. Some of the Iban are trying to water-down the religious connotation on the meaning of 'miring' to 'miring basa' which means the offering is offered not to the gods but simply a gesture of respect. But the Iban believe that one man can become strong and famous without the assistance of the gods or the guardian spirit that they call 'yiang-semang'. Thus 'miring' cannot simply be reduced to the culture of respect because it is offered to the guardian spirit of the visitors or the very important persons who come to visit them in the longhouse.

11. What is your view on the mandatory animal and bird blood sacrifice in-connection with certain rituals required by the Iban Indigenous law?

I completely disagree with any form of animal and bird blood sacrifice. Christians believe that Jesus' death on the cross is a ransom and sacrifice for our sins. Any form of animal and bird blood sacrifice has become obsolete after the sacrificial death of Jesus on the cross. Any form of blood sacrifice is a mockery to the sacrificial death of Jesus Christ. Many of the Iban couples who are married under customary law do not know what the law entails. For instance, 'Adat bebiau' (swinging the cockerel above the heads of the newlywed couple) is to seek blessing for the married couple. As Christians we should seek blessing from God and not from the bird or from the demons that the cockerel purportedly tasks to invite to the wedding. Hence, cockerel is a polygamous bird. It takes every hen at the backyard to be its bride. We cannot reduce any pagan rituals and ceremonies to culture due their spiritual implications.

'Adat besapat' is used when the married couple are close relatives (e.g., niece and uncle relationship) that is considered as incestuous relationship. If nothing is done to stop them to

consummate their marriage, they would bring curse in the form of natural catastrophes and bad harvest to the land. The only way to appease and repel the curse is for the couple to bath in the pig blood. This is the most abominable thing for Christians to do.

Concurrence between Christianity and Iban Indigenous Law

12. What are concurrences between Christianity and Iban Indigenous law?

13. What are the role and function of the Iban Indigenous law to the Christian Iban?

I believe that once an Iban has become a Christian he or she should conform to the Christian discipline. For any Iban Christian to still mingle and associate themselves with the customary law which are loaded with pagan belief, they will soon find themselves neither Christians nor pagans. This is the reason we have so many what I call “Christo-pagan” in my diocese.

14. Does customary law has any significance and relevance to the Christian Iban?

With regard to the culture of kindness and respect ‘basa’, the Iban are second to none. They are the most hospitable people I have ever seen. They welcome any visitors known or unknown to them. They will try to offer their best by offering their guests a nice bed or mattress to sleep and even slaughter a chicken for the dinner. They never expect any reciprocal kindness. They give and never expect any return. They are duty bound towards their parents and they have a great respect for the elderly. That is why the Iban do not need the hospice of home for the elderly. This is where we see the relevance between the customary law and Christianity.

15. Whether there is any wisdom in the Iban Indigenous law regulating the family matters?

I don’t see any

16. If there is wisdom in Iban Indigenous law, is it a living traditional wisdom?

Morality:

The marriage customary law I believe started when the Iban still practiced the night courtship between a man and a woman that we call “Ngayap”. Some people may think ‘ngayap’ is a culture of courtesy of a man visiting a girl on her bed or room at night. In the past, when handphone was unheard of, it was an accepted norm for the man to know the woman better by visiting her at night. However, the culture of ngayap had been abused that led to promiscuity and unwanted pregnancies.

From what I observe “Ngayap” has its origin from the demons – Keling or bunsu antu. The goddess Kumang who was the legitimate wife of Keling used to say this to the other female demons that Keling had had affairs with: “Kita wai ngetau jambai tang aku ngetau padi, kita wai semina empu ambai, tang aku empu laki.” “Jambai” or barley grain is secondary to padi from which we get rice is. While barley is only for supplement, but rice is always our staple food. The words of the goddess Kumang tell us that the practice of promiscuity and illicit

affairs is an accepted norm in the world of demons. Keling who is said to be a very handsome demon has been regarded as a role model by any Iban gentlemen. The Iban also believe that the 'bunsu antu' or the less powerful demons often 'ngayap' even the married Iban women. As demons are spirit, therefore they may not be able to beget any children with the human women. But the 'demonic and abusive culture of ngayap' brings curse to the Iban community. It is the curse of promiscuity, adultery, sex before marriage which resulted in the begetting of "anak ampang" (bastards) and countless of young single mothers. I wonder how many of the Iban women are still virgin until the wedding night.

17. What are the most appropriate methods for changing or amending the Iban Indigenous law to adapt and accommodate the needs and aspiration of the Christian Iban?

As most Iban are more familiar with the rites and rituals of the customary law but without knowing their spiritual implications, I believe there must be a seminar to explain on how Christian look at the Iban customary law. It cannot be explained in a 20-minute sermon on Sunday morning. They ought to be taught that customary law are either man-made or demon-made which is meant to keep the Iban people in spiritual bondage.

18. Why and what are the reasons and circumstances that attract many Iban to embrace Christianity?

A dynamic preaching of the gospel and a vibrant ministry amongst the school and university students has contributed to the rapid conversion of the young Iban. The culture of 'bejalai' or 'pegi' (travel to another country) has exposed the Iban to the outside world. Most of our young people no longer practice their ancestral belief. They either become atheists or Christians and many have chosen the latter. As these young people believe in Jesus their pagan parents start to question their own identity and destiny. If they die their children will not get a funeral shaman 'lemambang sabak' to sing the funeral dirge. Without it their souls will not settle peacefully in hades or sebayan. Young Christian people who have settled in town often give their parents a choice either to stay in their longhouse to look after themselves and remain as pagans or to follow them and be converted to Christianity. The Anglican Christian cemetery in Kuching only accepts registered members of the member churches that share the cemetery. Pagans who died here will have to find their own cemetery. As Iban are very concerned with their souls "Enti bejalai anang enda betungkatka adat, enti tinduk anang enda bepanggalka semengat" therefore most of them chose to become Christians where they can easily get burial plot when they die and hence their souls can live on peacefully in the next world. Many young Iban see the old way of life that is connected with the customary law has become obsolete and no longer relevant to the modern world. When I was in Betong, a lady shaman for the funeral dirge was converted to Christianity. Her conversion was a great loss to the pagan community in Ulu Skrang because she was the last funeral dirge shaman left in the area. That means they didn't have any one left to usher or bring their souls to 'sebayan' when they die. They have no choice left but to embrace the Christian faith.

The young Iban see that by no longer practising the customary law does not mean they have lost their identity as Iban. In Christianity they have found a new and better identity. Their identity remains as far as they can speak their Iban language. Globally, their new identity as

Christians lies with the rest of Christian community world-wide. So, they are proud to possess two identities at the same time: as Iban and as Christians. As Iban they are concerned over their right of existence and privileges in the society.

The issue over the NCR land pulled all Iban community together regardless whether they are Christians or pagans. They wanted to speak as one voice. They wanted to claim back their ancestral right as the native of Borneo. They wanted their leaders to speak up for them. But when their pagan neighbours started to perform the miring ceremony the Christian Iban refuse to join them. To perform the 'miring' during the demonstration of anger is to invoke the demons to literally eat and devour the leaders who have the power to speak but prefer to remain silence.

Since my arrival at St. Francis' Church, Kota Samarahan 6 years ago, I baptised two arch shamans (tuai manang). The reason they wanted to be converted to Christianity because they see that people are no longer interested in their art and practices. They realised that their guardian spirit is trying to avoid them. An arch-shaman at Merdang saw his guardian spirit was no longer closed to him as Christians started to pray for his conversion. When Christians came to seek his healing power, he told them to seek prayer in church or medical treatment in the hospital. He said that there is no point for him to pretend to do something for them when his guardian spirit is no longer around to assist him like before. He later came personally to church and told the warden that he wanted to become a Christian. When I arrived at Kota Samarahan, I started with about 300 worshippers and now I have the average of 1100 worshippers every Sunday spread out into three services and that does include the 13 chapels in my parish that simultaneously experiencing Christian spiritual revival over the past few years.

AWARENESS AND KNOWLEDGE OF THE ADAT IBAN SURVEY
(PANSIK PEMISI ENGGAU PENDALAM PENEMU BA ADAT IBAN)
QUESTIONNAIRE
(JAKO TANYA)
(In ENGLISH and IBAN)

This "Awareness and Knowledge of Adat Iban Survey" is conducted by Ronnie Edward, a Ph.D Law candidate of the University of Victoria, British Columbia, Canada, as part of his research for his dissertation entitled: "Adat Iban: A Living Traditional Wisdom?"

(Tinjau Pemisi Enggau Pendalam Penemu Ba Adat Iban tu di pejalai ka Ronnie Edward, siko ari pelajar Ph.D Undang-Undang di University Victoria, British Columbia, Canada. Nyadi tinjau tu bekaul enggau pengawa pansik iya ka benama: Adat Iban: Penemu Asal Aki Ini Ka Dalam Bisi Reti enggau Beguna Ka Mengkang Meruan Belama?)

The purpose of this Awareness and Knowledge of Adat Iban Survey is to find out the level of awareness and knowledge of the Iban customary law among the younger generation of Iban who are living in the towns and cities. The level of awareness and knowledge of the law could help to predict whether the law is heading toward of its survival or disappearance if more and more Iban are emigrating or removed from their traditional social environment.

(Tuju tinjau tu kena ngabas tikas pemisi enggau pendalam penemu ba bala Iban ke rebak baru lalu diau ba negeri besai. Tikas pemisi enggau pendalam penemu ba Adat Iban tu tau di kena merati penunga Adat Iban jemah ila enti makin maioh bala Iban pindah ari menoa asal lalu diau netap di negeri besai.)

Personal Particulars/Pasal Diri Empu

1. How old are you?
Berapa taun umur nuan?
..... years old/ taun
2. Are/were both your parents Iban in term of their ethnic origins?
Apai enggau Indai nuan sama bansa Iban?
Tick/Tanda [] Yes/Ya No/ukai Father/Apai (Iban/other) Mother/Indai (Iban/other)
3. Where were you born?
Di endor/menoa nuan ada?
Name of longhouse/village/town/city:
NamaRumah Nama Rumah Panjai/Kampong/Nengeri:
4. Where do you reside now?
Di endor nuan diau diatu?
Name of town/city:

Nama Nengeri:

5. Have you ever lived in an Iban longhouse or village?
Nuan kala diau di Rumah Panjai tauka Kampong Iban?
Tick/Tanda [] Yes/Ya [] No/Enda kala
- 5a. If your answer is yes to question no. 5, state the period during which you lived in the longhouse or village.
Enti saut nuan Ya ngagai tanya no. 5, padah ka pengelama nuan diau ba rumah panjai tauka kampong tu.
No. of year(s)/ *Berapa Taun:*
6. If your answer to question no. 5 is no, have you been to an Iban longhouse or village?
Enti nuan enda kala diau di rumah panjai tauka kampong Iban, kala nuan nemuai ngagai rumah panjai tauka kampong Iban?
Tick/Tanda [] Yes/kala [] No/Enda Kala
7. Where did you spend your childhood?
Dini endor nuan diau maia nuan agi mit?
Name of longhouse/village/town/city:.....
Beri nama rumah panjai/kampong/nengeri :.....
8. Where were you brought-up?
Dini menoa endor nuan diau sampai besai tuai?
Name of longhouse/village/town/city:
- Beri nama rumah panjai/kampong/nengeri:*
9. If you were not born in a town or city, when did you move to the town/city?
Enti nuan ukai ada di Nengeri, taun kemaia nuan mindah ke Nengeri?
Year: 19..... or 20.....
Taun: 19..... tauka 20.....
10. Do you still maintain any social and cultural contact with your traditional longhouse or village?
Agi kala nemuai ke tauka agi kala ngundang bala di rumah panjai/kampong lama?)
Tick/Tanda [] Yes/kala [] No/Nadai

Iban Spiritual Belief and Religions

Pengarap Asal Iban Enggau Pengarap Baru

11. Do you practise or observe the Iban spiritual belief?
Nuan agi megai pengarap lama Iban?
Tick/Tanda [] Yes/ Agi [] No/Nadai [] Occasional/kadang-kadan
12. Do you belong to any religion other than the Iban spiritual belief (e.g. Christian/Baha'i/Islam/Buddhism/Hinduism)? (*Please state your religion if your answer is yes*).

Bisi masuk pengarap nuan diatu, baka Christian/Baha'i/Islam/Buddha/Hindu. Enti saut nuan bisi, beri nama pengarap nuan diatu.

Tick/Tanda Yes/Bisi No/Nadai

12a. If your answer to Question 12 is yes, do you discard the Iban spiritual belief?

Enti saut nuan ngagai Tanya No. 12 bisi, agi tau ka enda nuan ngereja pengawa nitih ka pengarap lama Iban?

Tick/Tanda Yes/Agi Selectively/Kadang-kadang No/Nadai

Fluency and Usage of Iban Language

Pengelandik Bejako Iban

13. What is your level of fluency in the Iban language?

Baka ni pengelandik nuan bejako Iban?

Tick/Tanda Fluent/Landik Good/Nemu Poor/Enda landik

14. What language do you speak at home?

Jako nama dikena nuan bejako di rumah?

Tick/Tanda Iban Other/Jako bansa bukai

Awareness of the Iban Indigenous Law

Penemu dalam Adat Iban

14. Do you have any awareness of the Adat Iban?

Nuan bisi penemu dalam Adat Iban?

Tick/Tanda Yes/Bisi Some sort/Mimit No/Nadai

15. Have you seen or attend any Iban cultural/traditional function, or ceremony, or ritual (e.g. wedding, festival and offering to gods).

Kala meda orang tauka enggau orang ngereja pengawa asal/lama Iban, baka melah pinang, gawai enggau miring.

Tick/Tanda Yes/Kala No/Enda kala

15a. If your answer to Question 8a is yes, did you have any idea of the custom or tradition that was being performed?

Enti saut nuat ngagai Tanya No. 8a nya kala, nemu nuan reti pengawa ke dikerja orang maia nya?

Tick/Tanda Yes/Nemu No/Enda kala

Knowledge of Iban Indigenous Law

(Do not answer the following questions if your answer to questions 7 and 8 are No)

Pengelandik dakam Adat Iban

(Tanya dibaruh tu enda ibuh disaut enti saut nuan ngagai Tanya No.7 enggau No.8 nya Enda kala)

16. Do you have good knowledge of the Iban Indigenous Law?

Nuan bisi pengelandik ka dalam ba Adat Iban?

Tick/Tanda Yes/Bisi No/Nadai

17. How do you rate your knowledge of the Iban Indigenous Law?

Ni pendalam penemu nuan ba Adat Iban?

Tick/Tanda Well verse/Landik Good/Nemu Satisfactory/Nemu mimit Limited/Enda dalam

18. How did you learn Iban Indigenous law?

Ari ni nuan belajar Adat Iban?

Tick more than one box where appropriate/*Tau ditanda lebih ari siti*

Oral tradition/*Meda lalu mending ka sida ke tuai ngereja Adat Iban*

Books and written literature/*Maca surat enggau utai ditulis ba Adat Iban*

From my grandparents/*Ari Aki Ini aku*

From my parents/*Ari Apai Indai aku*

From the Elders/*Ari sida ke tuai*

Observing the traditional ceremonies, rituals, and functions/*Meda lalu merati ke pengawa ngereja Adat baka miring enggau gawai.*

Taking part in the traditional ceremonies, ritual, and functions/*Kala enggau orang ngereja pengawa bekaul enggau Adat Iban*

Others (Please state the methods of learning and knowing the customary law/*Ari cara bukai (sebut cara nuan belajar ke pengelandik dalam Adat):*

.....
.....
.....

19. Do you or your family observe the Iban Indigenous law?

Kita sebilik agi ngemeran lalu ngereja pengawa nitih ka Adat Iban?

Tick/Tanda Yes/Agi No/Nadai occasionally/Kadang-kadang

Importance, Significances and Relevance of the Iban Indigenous Law

Reti Enggau Guna Adat Iban

(Ignore this section if your answers to the questions under the Awareness of the Iban Indigenous Law are all Nos)

(Enda ibuh saut tanya dibaruh tu enti saut nuan madah ka diri nadi penemu dalam Adat Iban)

20. Is the Iban Indigenous Law important to the Iban society now?

Agi tauka nadai agi guna Adat Iban ngagai bala Iban diatu?

Tick/Tanda Yes/Agi To a certain extent/Agi tang kurang No/Nadai

21. Do the Iban Indigenous Law have any significance to the Iban society now?
Agi tauka nadi agi reti Adat Iban ngagai bala Iban diatu?
Tick/Tanda [] Yes/Agi [] To certain extent/ *Agi tang kurang* [] No/Nadai
22. Do the Iban Customary Law have any relevance to the Iban society now?
Agi bisi tauka nadai agi tuju Adat Iban ngagai bala Iban diatiu?
Tick/Tanda [] Yes/Agi [] To a certain extent/ *Agi tang kurang* [] No/Nadai

Thank you for your response.
Terima kasih ke saut nuan.

Explanatory Note

(This explanatory note will not be shown to the participants but for clarifying the purposes and ideas behind the questions to the Ethics Board.)

The Iban society is a homogenous society. They live in communities among themselves in longhouses or villages without any other competing culture and spiritual belief. Nowadays, more and more Iban are emigrating from their traditional settlements and live in towns and cities all over Malaysia. Many of them are now settling in a multi-racial, multi-cultural, and multi-religious society – i.e. a heterogeneous Malaysian society.

The purpose of the Awareness and Knowledge of Iban Indigenous Law Survey is to find out the level of awareness and knowledge of the Iban Indigenous Law among the younger generation of Iban who are living in the towns and cities. The level of awareness and knowledge of the Iban Indigenous Law may help to indicate a trend toward the survival or a diminishing trend of the law if more and more Iban are no longer living in or remove from their traditional social environment.

The Iban Indigenous Law, i.e. Adat Iban, is mostly express in classical Iban language and intertwined with the Iban spiritual belief. As such, language fluency and religions could have some adverse influence in the awareness and knowledge of the Iban Indigenous Law. The questions on the fluency of language and religions could indicate a tendency that the less fluent an Iban in the classical language the higher the propensity that he/she would not understand the Iban Indigenous Law. The conversion to other religions may indicate a trend of abandonment of the practice of the Iban Indigenous Law.

List of names of research participants

Edmund Langgu Saga (An Iban elder and expert in Iban Adat)

Late Mandi Anak Melana (a former *Penghulu*, an Iban elder and expert in Iban Adat)

Enchana Labau (Research Officer, Council of Customs and Traditions, Sarawak)

Jim bun Tawai (Assistant Research Officer, Council of Customs and Traditions, Sarawak)

Phillip Igai Melina (Research Assistant, Council of Customs and Traditions, Sarawak)

Janang Ensiring (Research officer, Tun Jugah Foundation, Sarawak.)

Richard Muluk Entering (an Iban Paramount Chief)

Rev. Father Denis Gimang (Anglican Priest, St. Francis' Church, Kota Samarahan)

Dr. Anna Durin (a lady participant and former Associate Professor of University Malaysia Sarawak)

20 Iban Youths from Miri, *Sarawak, participated in the Awareness and Knowledge of Iban Customary Law (Adat) Survey.*