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Redefining Customary Law: Insights from the Common Law System

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ABSTRACT

In Malaysia, the custom is recognised as a source of law, whether in written or unwritten laws. Regarding unwritten law, Article 160 (2) of the Federal Constitution of Malaysia provides that customs are enforceable as long as they possess the force of law. However, there remains uncertainty regarding the extent to which the Federal Constitution recognises specific customs as law. Consequently, it is the responsibility of Malaysian courts to fill these gaps and determine whether a particular custom meets the requisite threshold to be acknowledged as customary law. To date, Malaysian courts have not established definitive criteria for determining this. Thus, this article seeks to address that gap by critically examining the criteria developed through judicial experience within the broader common law system for legitimising customs as valid sources of law and by comparing these criteria with the Malaysian legal framework. Ultimately, this study aims to contribute to a more transparent and coherent legal framework that better integrates customary law into Malaysian jurisprudence.

Keywords: Source of law; Custom; Common law; Judicial decision; Federal Constitution

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1. Introduction

Given the significant differences in these contexts, this article is limited in scope, as it does not address international customary law or the concept of custom and usage in commercial matters. Instead, it focuses on longstanding customs tied to particular social groups that are recognised as sources of law within domestic legal systems.

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A key aspect in legitimising customs is their close connection with religion, which is often rooted in historical beliefs and cultural practices. In *Aliyathammuda Beethathebiyyappura Pookoya v. In Pattakal Cheriyakoya*, the case concerns the competing interests of who should be appointed to manage the waqf (trust) in the mosque.[1] It was argued that it is customary for descendants of Saint Ubaidulla to be appointed as trustees based on historical materials that establish that Saint Ubaidullawas was the first custodian of the mosque 1300 -1400 years ago. His descendants continued to hold this post after his death. The court accepted this evidence and concurred with the claims.

However, there is a distinction between custom and religion in terms of context. While custom primarily focuses on the traditions of a specific community, reflecting collective practices passed down through generations, religion centres on personal belief and individual adherence to spiritual principles guided by the teachings of a particular religion. At the same time, the custom is often linked to the principles of historical jurisprudence, a legal theory that emphasises the law must be grounded in a nation's historical and cultural foundations (Perreau-Saussine & Murphy, 2007). This theory highlights that through continuous and established practice, customs can develop into recognised sources of law, commonly referred to as customary law (Perreau-Saussine & Murphy, 2007).

2. Methodology

This research integrates doctrinal research with the historical method by exploring the historical development of customary law in the worldwide common law system, including in the Malay Peninsula and Borneo, alongside its present-day application in Malaysia. It will analyse both written and unwritten laws within the context of the common law system to better understand customary law issues.

Meanwhile, extensive research reveals that several key terms are frequently used within the common law system concerning this article. They are 'custom,' 'customary law,' 'force of law,' and 'usage.' Consequently, three questions must be addressed: (1) What is the common law system? (2) What are the definitions of custom and usage? and (3) what is the relationship between the common law system and customary law?

2.1 What Is a Common Law System?

The common law system is a legacy inherited from the British Empire. Often described as 'the empire on which the sun never sets', the British Empire played a significant role in shaping legal systems worldwide, including Malaysia. One of its key influences was the development of European-style government structures, particularly the doctrine of separation of powers. This doctrine established three bodies of government: (1) the

[1] *Aliyathammuda Beethathebiyyappura Pookoya v. Pattakal Cheriyakoya* [2019] 6 Madras Law Journal 464 (Supreme Court, India).

legislature, which holds the power to enact laws; (2) the executive, responsible for enforcing laws; and (3) the judiciary, tasked with interpreting and applying the law.[2]

Two law sources arise from the separation of powers doctrine: written and unwritten laws. Written law comprises 'statutory law, together with constitutions and treaties, as opposed to judge-made law' (Garner, 2009). This definition parallels Malaysian law, where Article 160 (2) of the Federal Constitution refers to 'written law includes Federal Constitution and State Constitution'. The word 'includes' indicates an expansive interpretation, broadening the scope of the written law (Bindra, 2016). Further elaboration is provided in Sections 3 and 66 of the Interpretation Acts 1948 and 1967, which specify written law as encompassing: (1) the Federal Constitution, (2) the State Constitution, (3) primary legislation like the Act of Parliament, enactment, and ordinance, (4) subsidiary legislation; and (5) United Kingdom written laws that retain force in Malaysia.

The second category is unwritten law, which refers to 'a rule, custom, or practice that has not been enacted in the form of a statute or ordinance and case law' (Garner, 2009). This concept aligns with Malaysian law as well, where Article 160 (2) also provides that 'law includes written law, the common law insofar as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof.' Thus, Malaysian law clearly distinguishes between written and unwritten laws, with the latter encompassing common law, customs, and usages.

Common law refers specifically to the body of case law developed by the English judiciary, which continues to influence Malaysia's legal system.[3] Two essential features of common law are particularly relevant to Malaysia. The first is the judiciary's ability to develop laws through judicial decisions (Garner, 2009). This can be understood through the overlapping roles of the legislative and judicial bodies. While the judiciary does not make laws in the legislative sense, its role in establishing legal principles to fill the gaps in the written law creates a new rule. The origins of this judge-made law can be traced back to the reign of Henry II of England, who is often regarded as the father of the common law system. He centralised the English judiciary by appointing itinerant judges to hear cases nationwide. These judges would then convene in London to deliberate and reconcile their decisions, thereby reducing errors and ensuring consistency in the law (Marinac et al., 2018).

The second fundamental aspect is the doctrine of precedent or stare decisis.[4] It refers to the concept that the court must follow earlier judicial decisions when the same points arise again in litigation (Garner, 2009). Consequently, it imposes a duty on judges to follow previous decisions unless those decisions are manifestly wrong.[5]

In the Malaysian legal system, the doctrine of stare decisis can be invoked under various enabling legislations beyond Article 160 (2) of the Federal Constitution. These include the

[2] *Anderson v. Secretary of State for the Home Department,* [2002] 4 All England Reports 1089 (House of Lords).

[3] *Dato' Seri Anwar bin Ibrahim v. Public Prosecutor* [2010] 5 Malayan Law Journal 145 (Federal Court, Malaysia).

[4] *Tetuan Wan Shahrizal, Hari & Co v. PP* [2023] 4 Malayan Law Journal 1 (Federal Court, Malaysia).

[5] *Re Lee Gee Chong* [1965] 1 Malayan Law Journal 102 (Federal Court, Singapore).

Criminal Procedure Code 1935, Subordinate Courts Act 1948, Civil Law Act 1956, and Courts of Judicature Act 1964, all of which permit the application of English common law. However, only superior courts, namely the High Court, Court of Appeal, and Federal Court, can create ratio decidendi (binding precedent). This authority stems from their constitutional status, as these courts are explicitly mentioned in the Federal Constitution and possess appellate jurisdiction to oversee lower court decisions (Ibrahim, 2004).

Together, these two features, the judiciary's law-making role through judicial decisions and the doctrine of precedent, form the foundation of what is known as the common law system. Meanwhile, the definitions of custom and usage will be explored further below.

2.2 What Are the Definitions of Custom and Usage?

There is no universally accepted definition of custom; it is inherently complex and difficult to encapsulate in a concise explanation (George, 2025). This complexity arises because customs encompass various interactions and deeply rooted practices that vary significantly across regions, communities, and historical periods. As such, custom is a dynamic and context-dependent concept, evolving alongside the societies in which it operates.

Similarly, the lack of consensus on a precise definition of custom is particularly evident from a legal perspective. One definition from English law describes a custom as 'a particular rule which has obtained either actually or presumptively from time immemorial in a particular locality and obtained the force of law in that locality, although contrary to, or not consistent with, the general common law of the realm' (Alavi, 2018). Another definition characterises a custom as 'a usage which obtains the force of law and is, in truth, the binding law, within a particular district or at a particular place, of the persons and things which it concerns, it must be certain, reasonable in itself, commencing at time immemorial, and continued without interruption'.[6]

Meanwhile, the English legal definition of 'usage' is largely irrelevant to this topic, as it defines usage as 'a particular course of dealing, or line of conduct generally adopted by persons engaged in a particular department of business'.[7] This definition, which focuses on business practices, does not align with the concept of custom as a legal source, which is more closely tied to societal traditions and practices that evolve into binding laws. Consequently, the English legal definitions of custom and usage are not particularly useful from the perspective of the Malaysian legal system.

This ambiguity surrounding the meanings of custom and usage is similarly reflected in Malaysian law. Although Article 160 (2) of the Federal Constitution recognises 'custom and usage having the force of law' as sources of law, it does not provide precise definitions for these terms, leaving their scope open to interpretation.

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[6] *Tyson v. Smith* [1835-42] All England Reports 95 (Court of Exchequer, England).

[7] *Lac Minerals v. International Corona Resources* [1989] Law Reports of the Commonwealth (Commercial) 932 (Supreme Court, Canada).

Nevertheless, the definition of law in Article 160 (2) of the Federal Constitution bears similarities to the Indian position outlined in Article 13 (3) (a) of the Indian Constitution. The legal resemblance is no coincidence, as the Federal Constitution is modelled after the Indian Constitution, and both laws are part of the British legacy, wherein English law heavily influences the origin of the country's law (Harding, 2022; Mohamed & Ahmad, 2022). This statement is further supported by the fact that Malaysian judges frequently refer to the Indian legal position to clarify ambiguous legal terms. India's early independence after World War II and its experience in drafting and interpreting laws have provided valuable guidance in managing the complexities of diverse populations, democracy, and post-colonial governance. As a result, several former British Empire territories, including Malaysia, have adopted law definitions in their constitutions that closely resemble the Indian framework (Cuskelly, 2011).

In this regard, the context of 'force of law' refers to any unwritten law that can be enforced in court based on the Indian experience.[8] However, Indian law presents a divided view on the relationship between 'custom' and 'usage.' One perspective suggests that 'custom' and 'usage' are interchangeable within the legal framework (Robertson, 1922). On the other hand, another viewpoint emphasises that the usage framework is more flexible than custom. This perspective defines usage as 'a habit, mode of conduct, or course of action' (Lal, 2012, p. 602; Tarabout, 2018).[9] Unlike custom, usage does not necessarily require time immemorial. Still, it must be known, certain, uniform, reasonable, and not contrary to law.[10] In contrast, the custom is defined as 'a rule within a specific family or district that has obtained the force of law due to longstanding usage'.[11]

Despite these definitional variations, a key distinction between custom and customary law within unwritten law consistently emerges. Customs refer to the traditions practiced by groups within a community. In contrast, customary law comprises those customs that can be enforced as legal rights, provided they meet specific criteria established by the courts. Furthermore, the analysis presented here indicates that usage cannot establish a customary right until it has endured for a specific period and become crystallised as a custom.[12]

2.3 What Is the Relationship Between the Common Law System and Custom?

Based on an analysis of the common law system and various definitions of custom, it can be summarised that the system recognises custom as a source of law in two ways. The first is the codification of custom into written law, which is more straightforward as it provides

[8] *Chanabasappa Shivappa v. Gurupadappa Murigappa* All India Reporter 1958 Karnataka 184 (High Court, India).

[9] *N. Adithayan v. The Travancore Devaswom Board All India Reporter* 1996 Kerala 169 (High Court, India).

[10] *T. Rajaram Mehta v. Narayanasami Naidu* (1931) 2 Madras Law Journal 357 (High Court, India).

[11] *Hurpurshad v. Sheo Dyal* (1876) Law Reports 3 Indian Appeals 259 (Privy Council on appeal from India); *Anirudh Jageorao v. Babarao Irbaji* All India Reporter 1983 Bombay 391 (High Court, India); *State of Bihar v. Subodh Gopal Bose* 1968 All India Reporter 281 (Supreme Court, India).

[12] *The Deputy Commissioner for Hindu Religious and Charitable Endowment Board v. K Sidhdhivinayaga Mudaliar* (1971) 1 Madras Law Journal 42 (High Court, India).

clear parameters defining what constitutes a legally acceptable tradition compared to unwritten law. A notable example is the Welsh Language Act 1993 in the United Kingdom, which was enacted to promote the use of Welsh, a minority language. Specifically, Section 22 of the Act permits the use of Welsh in legal proceedings in Wales.

Regarding unwritten law, the common law system categorises customs in judicial decisions into two types: (1) customs originating from Britain, particularly those of the English people, and (2) customs established by Indigenous peoples in former British Empire territories. One example can be found in *Lawrence v. Hitch*.[13] The case involved the validity of a customary toll payment for a cartload of vegetables sold on a street in England. The court upheld the validity of the toll based on three pieces of evidence: (1) a royal letter patent authorising a person to collect the toll, (2) a board from 1841 that outlined the toll fees, and (3) witness testimony confirming the toll had been collected even before 1841.

Another example is *Campbell v. Hall*, a plantation owner who sought to recover an export duty collected by the British Crown on Grenadian goods.[14] The dispute arose from two conflicting letters patent: one granting the British Governor the power to establish a local legislative assembly and the other imposing the export duty. The court agreed, ruling that the tax was unlawful because the Crown had already delegated legislative authority to the colony. Additionally, the court clarified a key principle of British colonial rule. Local laws remained in force in conquered territories until the British explicitly changed them. However, once a British-style legislature is introduced, the Crown's ability to govern by prerogative ends, and new laws must follow the proper legislative processes.

Accepting custom as a source of unwritten law preserves a group's cultural identity, which may exist separately from the general rules that apply to everyone. For example, in Sara de Richford's Case (1330), it was observed that inheritance law under ancient English common law differed in Kent (Allen, 1927, p. 360). Unlike the general rule of primogeniture, where the eldest son inherited the estate, Kent's custom required equal distribution among all sons in cases of intestate succession (Allen, 1927).

However, recognising custom as unwritten law can be challenging due to each society's unique history and culture. This statement can be exhibited in *Ryland v. Edros*, which involves Muslim marriages in South Africa.[15] One issue is whether the concept of harta sepencarian (jointly acquired property principle under Malay custom and Islamic law) is applicable. The court held that this was not because the custom was not prevalent among the Islamic community in the Western Cape.

Historically, two seminal English treatises have influenced the recognition of custom as unwritten law. Edward Coke stated that customs must consist of possession/usage and time, and for the possession criteria, it must have three qualities: (1) long, (2) continual, and (3) peaceable (Coke, 1628–1644/1818). Another English jurist, William Blackstone, explained that

[13] *Lawrence v. Hitch* (1868) Law Reports 3 Queen's Bench 521 (Court of Exchequer, England).

[14] *Campbell v. Hall* [1558-1774] All England Law Reports 252 (Court of King's Bench, England).

[15] *Ryland v. Edros* [1997] 4 Law Reports of the Commonwealth 70 (Supreme Court, South Africa).

there are three types of customs in England: (1) English common law or general custom, which are court decisions that are binding on everyone; (2) court procedures; and (3) local customs that apply to a particular class of society. He further provided seven criteria of local custom: (1) long-established, (2) continuous, (3) peaceful, (4) reasonable, (5) certain, (6) consent, and (7) consistent (Blackstone, 1765/2005).

However, the criteria established by Coke and Blackstone are now considered outdated and redundant, as not all common law systems have adopted them. Today, customs as a source of law have evolved further in the former British Empire territories than in Britain itself. The basis is that while English courts imposed strict criteria for recognising custom, other common law systems have progressively improved the integration of customs into their legal frameworks. It is also noted that finding case law related to customs derived from English courts is increasingly rare.

For instance, in *Browne v. In Munokoa*, the case related to the right of succession in the Cook Islands.[16] The issue was whether the adopted son was entitled to inherit the land belonging to the adoptive family under Māori custom. The court highlighted a vast difference between the development of custom in England, which is rigid, and that of the Cook Islands, which modernised the legal system and continuously accepted customs as a source of law. Consequently, there was an evolution in the Cook Islands' court that permitted non-blood adoptees to succeed their adoptive parents if there was evidence that the adoption was complete.[17]

3. Criteria for Recognising Customary Law in Unwritten Law

Therefore, based on an analysis of the common law system, five criteria are required for a custom to be enforceable as an unwritten law. They are (1) rights must be attached to the custom, (2) custom cannot conflict with the written law, (3) custom must align with other unwritten laws, (4) custom must endure a sufficient period to be crystallised, and (5) custom must be exercised without interruption.

3.1 Customary Right

It means there must be a clear connection between the claimed custom and the rights that can be recognised and enforced. This statement can be illustrated in *Paki v. Attorney-General (No 2)*, which involved customary ownership of the riverbed.[18] The court held that the conveyancing presumption of the common law of usque ad medium filum aquae (the ownership of land bordering a river extends to the riverbed to the mid-point of the river's

[16] *Browne v. Munokoa* [2018] 5 Law Reports of the Commonwealth 565 (Privy Council, on appeal from Cook Islands).

[17] *Browne v. Munokoa* [2018] 5 Law Reports of the Commonwealth 565 (Privy Council, on appeal from Cook Islands).

[18] *Paki v. Attorney-General (No 2)* [2015] 1 New Zealand Law Reports 67 (Supreme Court, New Zealand).

flow) cannot be invoked because it is unclear whether there is a customary right on that matter.[19]

This criterion is essential, as not all customs qualify as customary law. An example is *Mills v. Colchester Corp*.[20] The case is about the refusal by the Colchester Corporation to allow an oyster dredger to fish due to his refusal to pay the licensee fee. It was argued that a custom allows oyster dredgers to fish without interference. However, the oyster dredger admits the corporation's right to impose control over the fishing area. Consequently, the court held that no custom existed since the right of any oyster dredger to fish is qualified, which is subject to approval by the corporation.

This contrasts with *Goodman v. Saltash Corp*.[21] The Saltash Corporation brought a case against several fishermen, claiming that they had trespassed in the corporation's fishery areas. The fishermen countered that they had a custom to collect oysters in that area every year from 2nd February to Easter Eve, which had existed for at least 200 years before the legal action was taken. The court ruled that a custom existed. The basis is that the corporation's acquiescence in the fishermen's practices invoked the presumption of a charitable trust created to benefit local inhabitants in exchange for the corporation obtaining fishing rights from the government.

This criterion aims to ensure that the claim is not frivolous. It is important to note that the custom is ancient and rooted in longstanding practices, yet it must also be adaptable to current circumstances. This may not be feasible if a custom has evolved in ways that no longer align with contemporary human rights standards. Several examples are provided:

(1) *Gazula Dasaratha Rama Rao v. State of Andhra Pradesh:*[22] The court held that the appointment of Village Munsif by the government based on hereditary custom criteria was invalid as it is discriminatory and against equality of opportunity in matters of public employment.

(2) *Sant Ram v. Labh Singh:*[23] The court held that the custom of preemption of purchasing a property was illegal as it discriminates against persons of different religions, races, or castes from acquiring property.

(3) *Suen Toi Lee v. Yau Yee Ping:*[24] The case is about whether the offspring of a concubine is entitled to inheritance in Hong Kong. In this case, Mr Sung Chuen Pao has two women as his concubines: Madam Sung So Chun and Madam Chu Lee in China. Later, Mr. Sung and Madam Chu lived and died in Hong Kong. The question is whether Madam Sung's

[19] *Paki v. Attorney-General (No 2)* [2015] 1 New Zealand Law Reports 67 (Supreme Court, New Zealand).

[20] *Mills v. Colchester Corp* (1867) Law Reports 2 Court of Common Pleas 476 (Court of Common Pleas, England); affirmed by the Court of Exchequer Chamber, (1868) Law Reports 3 Court of Common Pleas 575.

[21] *Goodman v. Saltash Corp* [1881-85] All England Law Reports 1076 (House of Lords).

[22] *Gazula Dasaratha Rama Rao v. State of Andhra Pradesh* (1961) 1 Madras Law Journal 63 (Supreme Court, India).

[23] *Sant Ram v. Labh Singh* 1965 All India Reporter 166 (Supreme Court, India).

[24] *Suen Toi Lee v. Yau Yee Ping* [2001] Hong Kong Court of Unreported Decisions 1416 (Court of Final Appeal, Hong Kong).

daughter has a claim against Madam Chu's estate. The court held the claim invalid as Madam Sung and Madam Chu were domiciled in China when they entered into unions of concubinage, and China had already prohibited the practice of concubinage. Thus, Madam Sung and Madam Chu were not Mr Sung's concubines.

(4) *Maya Leaders Alliance v. Attorney General*:[25] The court recognised the right to obtain compensation for the failure of the government to protect Maya customary land rights that existed in the Belize Constitution.

The criterion has threefold requirements. First, the court will not legalise the custom if it poses a risk of harm to another person or their property. There are three examples:

(1) *Bell v. Wardell:*[26] There is no custom of walking and riding over a close of arable land at all seasonable times because it could damage the crops.

(2) *Wolstanton and Duchy of Lancaster v. Newcastle-under-Lyme Borough Council:*[27] There is no custom of mining underneath the land and without compensation for the damage to the surface, as it would render the value of the land nearby useless.

(3) *Thakur Gokalchand v. Parvin Kumari:*[28] There is no custom to exclude the daughter from inheriting the mother's property as claimed by the natural father. The basis is that apart from no evidence of marriage, most of her mother's property is a gift for a wealthy lady caring for the mother, and the father never took care of the family. Thus, denying a daughter's right to property is unnatural.

Second, legalising customs must promote justice, and the court will affirm such customs if doing so enhances fundamental liberties based on the nation's values. Four illustrations approved:

(1) *Ex parte Crow Dog:*[29] The defence of non-jurisdiction of American courts on a murder case among American Natives at an Indian reserve was valid; the U.S. law itself, § 2146 of the Revised Statutes recognised the tribal authority to order the payment of restitution to be applied in this circumstance.

(2) *R v. Loumia*:[30] The defence of provocation for murder on the basis that the accused has a legal duty under custom to protect the tribe since he saw his tribe members had been injured and killed failed because it is against preserving the right to life under the Solomon Islands Constitution (Corrin, 2002).

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[25] *Maya Leaders Alliance v. Attorney General* [2016] 2 Law Reports of the Commonwealth 414 (Caribbean Court of Justice, appeal from Belize).

[26] *Bell v. Wardell* (1740) 125 English Reports 1131 (Court of Common Pleas, England).

[27] *Wolstanton and Duchy of Lancaster v. Newcastle-under-Lyme Borough Council* [1940] 3 All England Law Reports 101 (House of Lords).

[28] *Thakur Gokalchand v. Parvin Kumari* 1952 All India Reporter 231 (Supreme Court, India).

[29] *Ex parte Crow Dog*, 1883 United States LEXIS 997 (Supreme Court, United States).

[30] *R v. Loumia* [1985/86] Solomon Islands Law Reports 158

(3) *State ex rel. Thornton v. Hay:*[31] The State of Oregon's decision to prohibit landowners from constructing fences on the dry sand beaches in front of their property was valid since there is a custom that the area had been used by the public even before its statehood.

(4) *R v. East Sussex County Council*:[32] No English custom exists to go onto the foreshore for recreation unless the case falls within the public right of navigation and fishing in the sea.

Third, acknowledging a custom is closely tied to the community that practices it. A custom gains legitimacy when a specific group in the community widely follows it. This is because the custom is typically limited to members of a particular group, and outsiders may be unable to invoke it. At the same time, while an individual brings a case to court, the legitimacy of custom is not derived from the individual's rights but from the broader group's customs and practices. Five samples proved this statement:

(1) *Fitch v. Rawling*:[33] The defence of custom allowing recreation and sporting activities on the land against trespass to the land was invalid since most of the defendants were not residents of the neighbourhood land.

(2) *R v. Ecclesfield (Inhabitants)*:[34] The court held that it is customary for the inhabitants of a specific district, 'Ones Acre and Oughty Bridge,' to repair the road and not the responsibility of the parish at large.

(3) *Mercer v. Denne*:[35] The claim of custom among fishermen to dry nets on beach grounds owned by the landowner since the landowner's land adjoining the sea was valid since they collectively applied this custom for more than seventy years.

(4) *Adair v. National Trust for Places of Historic Interest or Natural Beauty*:[36] The court disallowed the custom of taking lugworms from the foreshore since it is unclear which group is entitled to enjoy the custom.

(5) *Mitchell v. M.N.R*:[37] The claim of the custom among Aboriginal Canadians to import goods from the Canada-United States boundary without payment of duty was invalid since it is not widely practised among Aboriginal Canadians. Thus, it is not integral to the cultural lifestyle of the Aborigines.

It is noted that proving the existence of a custom widely approved by a particular group can be challenging. This is because changes in the way of life may cause certain practices to

[31] *State ex rel. Thornton v. Hay*, [1969] Oregon LEXIS 409 (Supreme Court of Oregon, United States).

[32] *R v. East Sussex County Council* [2015] Appeal Cases 1547 (Supreme Court, United Kingdom).

[33] *Fitch v. Rawling* [1775-1802] All England Reports 571 (Court of Common Pleas, England).

[34] *R v. Ecclesfield (Inhabitants)* (1818) 1 Barnewall & Alderson 348 (Court of King's Bench, England).

[35] *Mercer v. Denne* [1904-07] All England Reports 71 (Court of Appeal, England).

[36] *Adair v. National Trust for Places of Historic Interest or Natural Beauty* [1998] Northern Ireland Reports 33 (High Court, Northern Ireland).

[37] *Mitchell v. M. N. R.* [2001] Supreme Court of Canada 33 (Supreme Court, Canada).

be no longer followed by certain group members. Thus, the common law system solves this issue in two ways: (1) an expert witness or (2) a codifying evidence law that allows custom acceptance (Allott, 1957). The locus classicus is *Angu v. Attah*.[38] The case involved a claim for tribute by a native chief against the occupier of customary land in Ghana. The court allowed the claim, citing evidence from testimonies in previous cases. This established the precedent that the courts had become so familiar with such practices that they took judicial notice; the acknowledgement of specific facts is so well-established that they do not need to be proven in court.[39]

For the first point, the number of witnesses is not a determining factor in proving a fact. Instead, the veracity of witness statements is the key parameter for meeting the standard of proof, similar to other civil cases. Three exhibits were presented:

(1) *H. H. Mir Abdul Hussein Khan v. Mussammat Bibi Sona Dero*:[40] The custom of inheritance that excludes women from any share, which contradicted Islamic law, was invalid, although sixty-one witnesses were presented.

(2) *Twimahene Adjeibi Kojo II v. Opanin Kwadwo Bonsie*:[41] Bonsie and Atwimahene have a competing claim over customary land. The court sided with Bonsie based on evidence that Bonsie's ancestors had enjoyed collecting tributes and giving them to their superiors without interruption for 80 years. There was also a previous decision wherein Bonsie's superior won the trespass case for land near the disputed customary land. The court ruled that the inference drawn from the facts precedes the witness's demeanour in cases of historical inconsistency.

(3) *Moropane v. Southon*:[42] The case involves a man refusing to recognise the customary marriage of the Pedi tribe in South Africa despite having followed all the customary rites of marriage and cohabiting with the woman. The court held that the marriage was valid, based on the testimony of two expert witnesses who confirmed that the rites performed by the man constituted a legitimate solemnisation of marriage.

The second point may be explicitly based on the written laws governing the admissibility of evidence in the legal system. For example, the former Indian Evidence Act of 1872 allowed evidence of customs to be considered relevant facts before the court without requiring proof of the custom's duration to be materialised as customary law. One such method is the codification of judicial notices. There are three examples:

[38] *Angu v. Attah* (1916) Gold Coast Privy Council Judgments (1874–1928) 43 (Privy Council, on appeal from Gold Coast [Ghana]).

[39] *Angu v. Attah* (1916) Gold Coast Privy Council Judgments (1874–1928) 43 (Privy Council, on appeal from Gold Coast [Ghana]).

[40] *H. H. Mir Abdul Hussein Khan v. Mussammat Bibi Sona Dero* (1918) 1 Madras Law Journal 48 (Privy Council, on appeal from India).

[41] *Twimahene Adjeibi Kojo II v. Opanin Kwadwo Bonsie* (1957) 1 Weekly Law Reports 1223 (Privy Council, on appeal from Gold Coast [Ghana]).

[42] *Moropane v. Southon* [2014] 5 Law Reports of the Commonwealth 598 (Supreme Court of Appeal, South Africa).

(1) *Mahomed Ibrahim Rowther v. Shaikh Ibrahim Rowther*:[43] The custom claim that permits Muslim women's exclusion from inheritance was invalid based on several court decisions in India.

(2) *Kaliamma v. Janardhanan Pillai*:[44] The judicial notice of court decisions for a custom of Pathini Bhagam, wherein the deceased's property is divided per stirpes, which, according to the number of wives instead of not per capita, the number of children was rejected because none of those decisions involved a proper evaluation of evidence.

(3) *Trijugi Narain v. Sankoo*:[45] There is a competing interest concerning inheritance, in which the court accepted the impartible estate custom that embeds the rule of primogeniture instead of the coparcenary custom, which divides the property among family members. The basis was previously affirmed case law, which established that the rule of primogeniture was a rule of succession in all princely states.

3.2 Written Law Prevails Over Custom

The second criterion is that custom cannot contravene written law. This test is known as the incompatibility test (Oba, 2011). This test determines whether written and customary laws can coexist or if one must take precedence over the other (Ntobengwia & Ginj, 2020). The test is based on three key justifications.

The first justification is based on the common law system, which emphasises that the role of unwritten law is to supplement written law when there is a lacuna in the written law for a particular subject matter. Unwritten law fills the gaps and guides in areas where written law may be silent or ambiguous, and there is no attempt to override the written law. A good illustration is in *Ass Kaur v. Kartar Singh*, which relates to the application of custom in the Hindu Women's Right to Property Act 1937.[46] The issue is whether the deceased's daughter or stepmother is entitled to the inheritance. The daughter argued that the Zimindara custom was inapplicable. The custom provides that the other surviving widow takes the property by survivorship on the death of a co-widow. The court rejected the argument and held that the custom applied because the legislation was silent. Furthermore, another previous legislation, the Punjab Laws Act 1872, allowed customs applications for this issue.[47]

The second justification is supremacy. Parliamentary sovereignty is the core principle in countries without a codified constitution, establishing the legislative body as the supreme authority to enact laws. As a result, laws passed by Parliament take precedence over any

[43] *Mahomed Ibrahim Rowther v. Shaikh Ibrahim Rowther* (1922) 2 Madras Law Journal 69 (Privy Council, on appeal from India).

[44] *Kaliamma v. Janardhanan Pillai* [1973] All India Reporter 1134 (Supreme Court, India).

[45] *Trijugi Narain v. Sankoo* [2020] 1 Madras Law Journal 449 (Supreme Court, India).

[46] *Ass Kaur v. Kartar Singh* All India Reporter [2007] Supreme Court 2369 (Supreme Court, India).

[47] *Ass Kaur v. Kartar Singh* All India Reporter [2007] Supreme Court 2369 (Supreme Court, India).

custom, regardless of its historical or local significance. Two examples based on New Zealand's experiences:

(1) *Hoani Te Heuheu Tukino v. Aotea District Māori Land Board*:[48] The court approved the law made by the New Zealand legislation, which makes the statutory body that repre-sented Māori's interest liable for the debt despite the existence of the Treaty of Wai-tangi, an agreement between the Crown and the Māori that protected Māori rights in exchange for British sovereignty over New Zealand. It was ruled that the Treaty of Wai-tangi was not enforceable in the courts, as the subject matter of this issue had not been incorporated into New Zealand legislation.

(2) *McGuire v. Hastings District Council*:[49] The court held that the Māori Land Court does not have jurisdiction to hear matters concerning the local government's proposal to build a road on the Māori land since the Māori Land Act 1993 does not grant the judi-cial review jurisdiction and the power vested in the Resource Management Act 1991 is more comprehensive regarding maintaining natural resources. Thus, the court conclud-ed that the Parliament intended to make the Resource Management Act 1991 prevail over the Māori Land Act 1993 based on their respective legal frameworks.

Meanwhile, in a country with a codified constitution, the principle of constitutional supremacy dictates that the constitution is the supreme law of the land. As such, any law, including custom, that conflicts with the constitution is deemed void. For example, in *Bhe v. Magistrate of Khayelitsha*.[50] The cases concern several South African customary succession laws. There are two points in this case. First, the succession laws of Africans differ from those of European descendants. Second, Black law or custom governed the Africans' succession law, and it excluded women and children born out of wedlock from being considered intestate heirs. The court held that the laws were invalid as they contravened the South African Constitution's equality and the right to human dignity clauses.[51]

Another essential aspect for a country with a codified constitution is that there must be enabling provisions in the written law to allow the custom to become the source of law. The basis is that the codified constitution typically reserves the power to make laws to the legislative body. Thus, the custom can be recognised if it is undergone through the process of law-making defined by the constitution. Additionally, the constitution typically reserves the power to make laws to the legislative body, an elected body accountable to the people (Taufiqurrohman et al., 2024). As such, written laws are crafted within the framework of the constitution, ensuring that they reflect the democratic will of the people.

[48] *Hoani Te Heuheu Tukino v. Aotea District Māori Land Board* [1941] Appeal Cases 308 (Privy Council, appeal from New Zealand).

[49] *McGuire v. Hastings District Council* [2002] 2 New Zealand Law Reports 577 (Privy Council, appeal from New Zealand).

[50] *Bhe v. Magistrate of Khayelitsha* [2005] 2 Law Reports of the Commonwealth 722 (Constitutional Court, South Africa).

[51] *Bhe v. Magistrate of Khayelitsha* [2005] 2 Law Reports of the Commonwealth 722 (Constitutional Court, South Africa).

In contrast, unwritten laws like customs are not subject to the same democratic process and may not always align with constitutional principles. This makes the custom less adaptable to evolving societal needs and constitutional values. Therefore, the constitutional framework ensures that written law precedes unwritten laws, including custom, as they are directly derived from the constitution and the democratic legislative process. There are three examples:

(1) *Moh Ah Kiu v. CPFB*:[52] The court does not recognise the Chinese customary marriage in Singapore through long cohabitation since its personal law legislation, Women's Charter 1961, had put a cut-off date, 15.9.1961, for recognition. The Women's Charter 1961 is valid as existing laws under the Singaporean Constitution.[53]

(2) *Alexkor v. Richtersveld Community*:[54] Richtersveld Community, South African Indigenous inhabitants, filed an action against Alexkor to reclaim the customary land deprived due to racially discriminatory laws and practices. The source of law is derived from Sec-tion 25 (7) of the South African Constitution and the Restitution of Land Rights Act 1994. The court allowed the application as those written laws enabled the restitution, and the community continuously occupied the land until it was wrongly extirpated.

(3) *Shilubana v. Nwamitwa*:[55] The case is about the custom of succession for the Hosi (chief) of the Valoyi community in South Africa. In this case, the customary authorities appointed Ms. Shilubana to succeed her father, contrary to the traditional principle of male primogeniture. This change was made to align the custom with the equality clause of the South African Constitution, which advocates for gender equality. The court held that custom modification was valid since the constitution permitted it.

The third justification is based on common law statutory interpretation rules, such as the principles of extinguishment and legality. The purpose is to determine the compatibility between custom and written laws related to the issue. A purposive approach will be deployed so that the court can decide whether the purpose of enacting the written law can deprive the custom (Nakuta, 2020).

The principle of extinguishment varies among the common law jurisdictions (Dorsett, 1997). However, the general characteristic of this principle is that it allows the custom to be extinguished either expressly or by implication through the lens of the court (Gilbert, 2007). The court determines how the extinguishment works by assessing the subject matter of customary claims and determining whether the written law has excluded those customs. Three examples can be drawn:

[52] *Moh Ah Kiu v. Central Provident Fund Board* [1992] 2 Singapore Law Reports 569 (Court of Appeal, Singapore).

[53] Constitution of the Republic of Singapore, art 162.

[54] *Alexkor v. Richtersveld Community* [2004] 4 Law Reports of the Commonwealth 38 (Constitutional Court, South Africa).

[55] *Shilubana v. Nwamitwa* [2009] 3 Law Reports of the Commonwealth 48 (Constitutional Court, South Africa).

(1) *Mayor of New Windsor v. Joseph Taylor*:[56] The court held that the custom of collecting tolls for passage was extinguished in the first statute, which passed the right to collect the tolls from municipal corporations. Meanwhile, the second statute extinguished the statutory toll once the term had expired.

(2) *Winfat Enterprise (HK) Co Ltd v. AG Hong Kong*:[57] The court ruled to extinguish customary land in Hong Kong upon enacting the Land Court (New Territories) Ordinance 1900. This legislation converted the land from customary Chinese tenure to a leasehold arrangement with different legal rights and restrictions.

(3) *Queensland v. Congoo*:[58] The case concerns whether WWII security orders can extinguish Aboriginal Australians' customary land. The case caused a split decision in which the French CJ's judgment was the deciding factor. It was held that the custom still exists since security orders are only temporary, and the purpose of enacting security orders and their enabling legislation is not to extinguish the custom.

Meanwhile, the principle of legality offers a presumption that the written law cannot authorise matter that adversely affects the rights of the person unless it is within the clear intention of the lawmaker (Hepburn, 2015). Thus, anyone must act within the boundaries of the law and cannot override established rights without proper legal authority (Varuhas, 2020). Two of New Zealand's decisions are illustrated:

(1) *Tamaki v. Baker*:[59] The court affirmed that customary land existed, as specific provisions of the Treaty of Waitangi had been codified into the Native Rights Act 1865. Thus, the self-governing New Zealand government could not argue that customary land does not exist and preclude the civil court from adjudicating the matter.

(2) *Ngati Apa Ki Te Waipounamu Trust v. The Queen*:[60] This case is part of a series of legal actions filed by the Ngati Apa tribe as a significant element of the Māori Renaissance movement. There is a dispute between the Ngati Apa and Ngai Tahu tribes concerning a decision made by the Māori Appellate Court concerning the Ngai Tahu tribe having sole ownership of the West Coast of the South Island. The Te Runanga o Ngai Tahu Act 1996 and Ngai Tahu Claims Settlement Act 1998 were enacted to give effect to the deci-sion. It was argued that Ngati Apa was not represented when the decision was made, and judicial review was filed against the Māori Appellate Court's decision. The case was struck out, leading to an appeal. On appeal, it was held that the case should not be struck out as the decision affects Ngati Apa's rights to natural justice, and neither of the statutes excludes Ngati Apa's right to file a claim.

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[56] *Mayor of New Windsor v. Joseph Taylor* [1899] Appeal Cases 41 (House of Lords).

[57] *Winfat Enterprise (HK) Co Ltd v. AG Hong Kong* [1985] 2 Weekly Law Reports 786 (Privy Council, appeal from Hong Kong).

[58] *Queensland v. Congoo* [2015] 5 Law Reports of the Commonwealth 754 (High Court, Australia).

[59] *Tamaki v. Baker* [1901] Appeal Cases 561 (Privy Council, appeal from New Zealand).

[60] *Ngati Apa Ki Te Waipounamu Trust v. The Queen* [2000] 2 New Zealand Law Reports 659 (Court of Appeal, New Zealand).

3.3 Conform With Other Unwritten Laws

The common law system adopted the repugnancy test to determine the consistency between the custom and other unwritten laws (Cameron, 2024). In certain common law system countries, it is called a public policy or morality test (Moses & Sheka, 2021). The test is believed to have originated from Roman law and was initially used by English courts to evaluate the legality of customs practised by Indigenous peoples within the British Empire (Uweru, 2008).

Thus, the Anglo-centric repugnancy test allows the court to determine whether a custom conflicts with principles derived from English law. As a result, if the custom conflicts with these principles, English law will prevail, and custom will be declared incompatible (Meroka-Mutua, 2025). However, a custom is only declared incompatible if an apparent conflict exists and the custom is deemed inhumane. What is considered inhumane is typically assessed from an uncodified human rights perspective, which can vary based on a territory's legal framework.[61] Three examples will be deployed:

(1) *The Tanistry*:[62] It was held that the Irish custom of Brehon law was invalid. The basis is that it was repugnant to the English law of primogeniture, which mandated inheritance by the eldest son. The court reasoned that Tanistry's custom encouraged bloodshed among family members, as inheritance was determined by the most potent male rela-tive rather than by a fixed legal succession.

(2) *Eshugbayi Eleko v. Officer Administering The Government of Nigeria*:[63] The case in-volved the deportation of Eleko after his dismissal as the head of the house of Docemo. The written law stipulated two conditions for deportation: (1) the chief had been re-moved from his position, and (2) native law and custom required the deposed chief to leave the area. The case was remitted to the Supreme Court of Nigeria due to uncer-tainties surrounding the custom Eleko had allegedly breached. The court ruled that the custom was illegal if repugnant to natural justice, equity, and good conscience.

(3) *Baluswami Reddiar v. Balakrishna Reddiar*:[64] The court held that the custom of marrying his grandchild was invalid as it promoted an incestuous marriage. It was also ruled that the nation's values must determine the morality and public policy parameters and not be based on the specific group of the community.

However, the court will not automatically disregard the custom, even if it conflicts with the principles of English law. The reason is that the repugnancy test is not solely intended to impose English law standards. Instead, its purpose is to ensure uniformity and to provide

[61] *Ngati Apa Ki Te Waipounamu Trust v. The Queen* [2000] 2 New Zealand Law Reports 659 (Court of Appeal, New Zealand).

[62] *The Case of Tanistry* (1608) Davis 28; 80 ER 516 (Le Case de Tanistry) - Case Summary [2001] Australian Indigenous Law Reporter 73 (Court of King's Bench, Ireland).

[63] *Eshugbayi Eleko v. Officer Administering The Government of Nigeria* [1931] Appeal Cases 662 (Privy Council, appeal from Nigeria).

[64] *Baluswami Reddiar v. Balakrishna Reddiar* (1956) 2 Madras Law Journal 357 (High Court, India).

protections that may not be guaranteed under custom. This test seeks to strike a balance, ensuring that custom does not conflict with fundamental principles of justice. For instance, in *Oyekan v. Adele*.[65] The case concerns the status of ownership of the official residence of the Oba of Lagos, known as the Iga Idunganran. The court held that the British Crown grant should be read based on custom, as the land in Lagos belonged to tribal families, and the leader controlled the land.[66]

The repugnancy test was maintained after the end of British colonisation because it brought positive development to the justice system. Two examples are:

(1) *Agbai v. Okogbue*:[67] The custom of forcing people to join members of an age-grade association was invalid as it is against the freedoms of religion and association guaranteed in the Nigerian constitution. The basis of rejection is due to specific acts of association against his religious beliefs.

(2) *Commonwealth of Australia v. Yarmirr*:[68] The case involves the ap-plication to determine the rights of Aboriginal Australians over the area of seas and sea-beds surrounding Croker Island in the Northern Territory. It was held that the right ex-isted for personal and non-commercial use. However, aboriginals do not have the right to exclusive possession of areas, as this would contradict common law principles of public rights of navigation, fishing, and the nation's responsibility over territorial waters.

3.4 Sufficient Period

There is a vast difference in the legal framework between the English legal system and other common law systems regarding this criterion.

3.4.1 English Law's Position

The English court often used time immemorial or antiquity concepts to crystallise a particular custom (Callies, 2006, p. 158). The application of this concept is based on an inference, and the judge had to make fact-finding depending on the context.

At first, it refers to the period before the legal memory in English law was recorded, 6th July 1189, when King Richard I began his reign (Neuberger, 2011). The rationale is based on a well-known scholar, Matthew Hale, who discussed the relationship between the Statute of Westminster 1275 and the Writ of Right limitation period (Hale, 1713, pp. 2–4). He states that Chapter XXXIX of Statute of Westminster 1275, which provides the limitation pe-riod, that is, no action could be brought under a writ of right before that king's reign, has consequently divided the English law into two parts: (1) written law, which is the Acts of

[65] *Oyekan v. Adele* [1957] 2 All England Reports 785 (Privy Council, appeal from Nigeria).

[66] *Oyekan v. Adele* [1957] 2 All England Reports 785 (Privy Council, appeal from Nigeria).

[67] *Agbai v. Okogbue* [1993] 1 Law Reports of the Commonwealth 541 (Supreme Court, Nigeria).

[68] *Commonwealth of Australia v. Yarmirr* (2001) 184 Australian Law Reports 113 (High Court, Australia).

Parliament after the limitation period, and (2) unwritten law, rules that were made before the reign of King Richard I (Hale, 1713).

Two questions must be addressed. First, what is the purpose of a limitation period? Literature suggested it was meant to shut any dispute relating to the land expropriation caused by the civil war in England (1135–1153) that should have been settled during King Henry II's era, when his son, King Richard I, succeeded him (Pesklevits, 2002). The second question is why the beginning of King Richard I's reign is called the starting point of legal memory (Ulmer, 2020). The basis is that there is a belief among English judges that the date was also meant to serve as a historical point that there was no proper law record before King Richard I's reign (Ulmer, 2020). However, the rules still exist in the community's practice since they have never been repealed or amended by the Acts of Parliament (Wharam, 1972).

An example is based on *New Windsor Corporation v. Mellor*, which is a claim of land by custom based on the English Commons Registration Act 1965.[69] In this case, there is an application to make a piece of land known as Bachelors' Acre to be registered as the town or village green. There are three situations in which the registration can be approved. One is to show that 'the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes.' The court held that the customary claim was established since there was evidence that the community had used this land before 1651 for bow and arrow practices.

Another example is in *R v. City of London Corporation, ex p Matson*, where the court allowed a judicial review concerning the Court of Aldermen's failure to provide reasons for rejecting a person to become an alderman upon winning the local election.[70] However, the court acknowledged that the office of alderman has Anglo-Saxon origins and the Court of Aldermen has a customary right to confirm the election of an alderman.[71] In this context, the Anglo-Saxon period is said to have begun in the fifth century (450 AD) and continued until the eleventh century (1066 AD) (Javed, 2019).

However, the inference can be rebutted if there is a piece of evidence to contradict that the custom existed after 1189 (Loux, 1993). For instance, in *Simpson v. Wells*, the accused was charged with obstructing a public footway by putting a stall for a business. He argued that he holds customary rights as it was done for over fifty years, and the source of law de-rived from a statute passed after 1189.[72] The court upheld the conviction as no custom could exist after 1189.

Thus, English judges have not fully embraced the initial approach of the time immemorial concept due to the legal challenges in proving it. This matter was discussed in *Bryant v. Foot*.[73] The case concerned whether the claim of the customary fee of 10s payable to the rector

[69] *New Windsor Corporation v. Mellor* [1975] 3 All England Law Reports 44 (Court of Appeal, England).

[70] *R v. City of London Corporation, ex p Matson* [1997] 1 Weekly Law Reports 765 (Court of Appeal, England).

[71] *R v. City of London Corporation, ex p Matson* [1997] 1 Weekly Law Reports 765 (Court of Appeal, England).

[72] *Simpson v. Wells* (1872) Law Reports 7 Queen's Bench 214 (High Court, England).

[73] *Bryant v. Foot* (1867) Law Reports 2 Queen's Bench 161 (High Court, England); affirmed by the Court of Exchequer Chamber, (1868) Law Reports 3 Queen Bench 497.

and 3s to the clerk for marriage in parish churches was valid. The evidence is that from 1808 until 1854, these fees were 10s and 3s and were received and paid. However, the court rejected the evidence and held it could not be construed as custom. The basis was that it was excessive and could not be imposed in 1189. However, Cockburn CJ had made an ad-verse comment on this matter. He states there is a legal fiction exception as the duration is fixed to twenty years.[74]

The rationale for adopting a twenty-year duration stems from the now-repealed Limitation Act 1623, which prescribed twenty years for landowners to reclaim possession of their land (Harpum, 2000, para. 18-134). Thus, judges drew an analogy from this limitation period, reasoning that if a landowner failed to assert their rights within the prescribed timeframe, it implied tacit consent to the adverse use of the land (Harpum, 2000). An illustration is based on *Brocklebank v. Thompson*, which concerns the right of the way to go to church.[75] The defendant argued that there was no trespassing on the plaintiff's land since the land had been used as a church way for more than 20 years by the inhabitants of the parish. The court concurred that customs existed regarding the defendant's right-of-way.

Currently, several English statutes have codified this approach. For instance, Section 2 of the English Prescription Act 1832 established that twenty years without interruption is sufficient to claim a right of way, even if it originated after 1189. Furthermore, when a custom has been exercised continuously for forty years, it becomes absolute and indefeasible unless it was enjoyed by consent or documented in writing. Other statutes are Section 22 (1A) of the Commons Registration Act 1965 and Section 15 of the Commons Act 2006, which codified the custom of recreational rights, and recognized particular areas to be classified as town or village greens apart from customary claims if a significant number of the inhabitants have continuously indulged in lawful sports and pastimes on that land as of right for not less than twenty years. Similarly, Section 31 of the Highways Act 1980 creates the common law presumption of dedication for certain land to be a highway if the public has used a path as of right and without interruption for twenty years unless the landowner can provide evidence to rebut this presumption.

One of the locus classicus of this matter is in *R v. Oxfordshire County Council*.[76] The subject concerns the application of the glebe used for public recreation at Sunningwell in Oxfordshire to be registered as a town or village green under the Commons Registration Act 1965. The registration was rejected, which led to a judicial review application. The court held that the rejection was unlawful as the glebe has been used predominantly by village inhabitants for at least 20 years.

Another example is the case of *R v. Secretary of State for the Environment, Food, and Rural Affairs*, where several landowners sought to challenge the presumption of a right of way

[74] *Bryant v. Foot* (1867) Law Reports 2 Queen's Bench 161 (High Court, England); affirmed by the Court of Exchequer Chamber, (1868) Law Reports 3 Queen Bench 497.

[75] *Brocklebank v. Thompson* [1903] 2 Chancery 344 (High Court, England)

[76] *R v. Oxfordshire County Council, ex parte Sunningwell Parish Council* [1999] 3 All England Law Reports 385 (House of Lords).

under Section 31 of the Highways Act 1980.[77] However, the court rejected their claims, finding that most of the methods employed by the landowners, such as sending letters to the local planning authority, placing a sign nailed to a beech tree, having landowner employees challenge anyone using the way, and an agreement between the tenant and land-owner for the tenant to warn and keep off unauthorised persons constituted only passive tolerances. These methods do not qualify as valid means to negate the presumption under Section 31. The court emphasised that valid methods include erecting a visible notice to the public or giving notice to the appropriate council if the notice is subsequently removed or defaced.

3.4.2 Other Common Law Systems' Position

Compared to other jurisdictions, the concept of time immemorial has largely been abandoned in most common law system countries, as it does not align with pre-colonial communities' historical and legal contexts (Hannigan, 1958).

Even during colonisation, the British adopted a conditional approach to local customs, recognising them as long as they did not conflict with colonial objectives or the fundamental legal principles imposed by the colonial administration. There are a few examples, which are:

(1) *Garurudhwaja Parshad Singh v. Saparandhwaja Parshad Singh*:[78] The court held that the inheritance custom is based on the primogeniture rule instead of Hindu law. The basis is that Section 49 of the former Indian Evidence Act 1872 permitted the court to accept oral evidence from family members and concluded that there was a family usage of the primogeniture rule.

(2) *Kumarappa Reddi v. Manavala Goundan*:[79] The evidence of the custom existing between 1826 and 1905 was deemed sufficient to establish the custom of a mirasidar (landlord) to collect thunduwaram (customary fee) from a ryot (tenant) in a mirasidar estate in the Chingleput district of India.

(3) *Re Southern Rhodesia*:[80] The court held that customary land existed in the former colony of Southern Rhodesia (Zimbabwe) as the beneficial interest remains in the natives despite the land being alienated.

(4) *Kunwar Basant Singh v. Kunwar Brij Raj Saran Singh*:[81] The case revolves around the right of succession of Khushal Singh, the adopted son of the well-known Raja Nahar Singh

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[77] *R v. Secretary of State for the Environment, Food and Rural Affairs* [2007] 4 All England Law Reports 273 (House of Lords).

[78] *Garurudhwaja Parshad Singh v. Saparandhwaja Parshad Singh* (1900) Law Reports of the Privy Council 27 Indian Appeals 238 (Privy Council, appeal from India).

[79] *Kumarappa Reddi v. Manavala Goundan* (1918) 1 Madras Law Journal 104 (High Court, India).

[80] *Re Southern Rhodesia* [1919] Appeal Cases 211 (Privy Council, on appeal from Southern Rhodesia [Zimbabwe]).

[81] *Kunwar Basant Singh v. Kunwar Brij Raj Saran Singh* (1935) 2 Madras Law Journal 225 (Privy Council, on appeal from India).

of Ballabgarh. The central issue pertains to the legality of Khushal Singh's wife adopting a male successor in the event of his death, should he have no male heirs. The right to adopt was based on a custom prevailing in the Delhi District. The court upheld that Khushal Singh was subject to this custom, referencing government records known as Riwaj-i-am (tribal custom), which confirmed the existence of this custom as early as 1880 and 1910.

(5) *Baba Narayan Lakras v. Saboosa*:[82] The court rejected the defence of Shia Muslims over the customary right to immerse Tazias at the Padmathirtha tank as the duration of prac-tice between 1915 and 1925 was insufficient to create a custom.

3.4.3 Another Method to Establish a Sufficient Period

The idea behind these cases is that while the duration of a custom is essential, it is not the sole determining factor for its recognition. The key factor in recognition is the connection between the custom's historical roots and the subject matter at hand. The claimant must provide evidence of a historical claim grounded in the custom's ancient origins if he wishes to claim ownership of a particular property under custom.

For example, in *Bhimashya v. Janabi*, the question of whether a person has been lawfully adopted is discussed.[83] The court dismissed the appeal, citing the failure to plead the custom in the pleading and the lack of evidence of custom. However, the court ruled that the time-immemorial concept of English law does not extend to India, as it is sufficient to prove that the custom has been practiced in the group for a long time.[84]

What is considered ancient is a question of fact, depending on the case's specific circumstances. Generally, the court assesses whether the connection to the past is clear, and it can be simplified based on whether the practice has been an integral part of the group's life over an extended period. In the contemporary common law system, the concept of an integral part of the community's life is often associated with vulnerability, even though it is not the sole reason. This criterion remains sustainable and appropriate in the modern era. Three well-known cases, A*modu Tijani v. Southern Nigeria Secretary*,[85] *Calder v. British Columbia (AG)*,[86] and *Mabo v. Queensland (No 2)*,[87] had approved pre-existing rights, a legal entitlement that existed even after there was a change of law towards indigenous people's claim over the land.

First, in *Amodu Tijani v. Southern Nigeria Secretary*, the case concerns the status of customary land upon compulsory acquisition by the government. Amodu Tijani, the head chief of the Oluwa family, claimed that he was entitled to compensation based on his right to

[82] *Baba Narayan Lakras v. Saboosa* (1943) 2 Madras Law Journal 186 (Privy Council, on appeal from India).

[83] *Bhimashya v. Janabi* Aironline [2006] Supreme Court 355 (Supreme Court, India).

[84] *Bhimashya v. Janabi* Aironline [2006] Supreme Court 355 (Supreme Court, India).

[85] *Amodu Tijani v. Southern Nigeria Secretary* [1921] 2 Appeal Cases 399 (Privy Council, on appeal from Nigeria).

[86] *Calder v. British Columbia (AG)* [1973] Supreme Court Reports 313 (Supreme Court, Canada).

[87] *Mabo v. Queensland (No 2)* (1992) 107 Australian Law Reports 1 (High Court, Australia).

control and manage the land. The court allowed the claim since he enjoyed a usufructuary right over the land.

Second, in *Calder v. British Columbia*, several Aboriginal Canadians sued over land claims in British Columbia. They argued that their basis derived from the aboriginal title, which has not been extinguished since colonisation. The case was dismissed on a technical basis, with Pigeon J as the deciding factor. However, the Supreme Court of Canada's decision was split between Judson, Martland, and Ritchie JJ, who held that the native title was extinguished when the coloniser controlled the land and established its own rule regarding land ownership. On the contrary, Hall, Spence, and Laskin JJ held no extinguishment since no treaty or legislation construed a concession of the right to live in that area. Furthermore, they emphasised that the colonial government consistently recognised the existence of Aboriginal interests in North America, as its central policy often prioritised negotiation and compromise over military action.

Although recognising Aboriginal rights in Calder was part of a minority decision, it played a significant role in laying the groundwork for the Aboriginal Australians' claim in the third case of *Mabo v. Queensland (No 2)*. The case involved the Meriam people, who claimed possessive rights over the Murray Islands. The issue is whether the annexation of the said Islands by Britain, which Australia subsequently inherited, caused the extinguishment of the Meriam people's possessory right over the land. The court held it did not, as Australia only obtained a radical title. The beneficial interest remains with the Meriam people, who lived for an extended period before the colonisation. The court further affirmed the previous principle that colonisation could alter the customary right without appropriate extinguishment, which is discriminatory as it is based on the perception of an imperialist mentality.

Being an integral part of the group's life can also be analogous to the idea that the majority continuously practices this custom. A custom deeply woven into a community's daily life and social structure is likely to be constantly practiced by the majority. Three examples are provided.

(1) *Muthusawmi Mudalliar v. Masilamani*:[88] The case involves the legality of customary marriage between a woman who was born to Christian parents and a Hindu man ac-cording to Hindu custom. The husband and wife also come from different castes. The court held that the customary marriage was valid as there was evidence that the hus-band's caste accepted her since they had been living for thirty or forty years from the date of marriage with the husband's parents. Furthermore, the husband's caste mem-bers often associate the wife as a Hindu.

(2) *Oxfordshire County Council v. Oxford City Council*:[89] There is an application to regis-ter Trap Grounds as a town or village green under the Commons Registration Act 1965. One key issue in the case was whether the claim would be unsubstantiated if there was evidence

[88] *Muthusawmi Mudalliar v. Masilamani* (1910) 1 Madras Law Journal 49 (High Court, India).

[89] *Oxfordshire County Council v. Oxford City Council* [2006] 4 All England Law Reports 817 (House of Lords).

of another community's involvement. The court acknowledged the incon-sistency in common law cases regarding this matter. However, it ultimately held that the claim could still succeed as long as the inhabitants of the relevant locality had pre-dominantly exercised the custom.

(3) *R v. Redcar and Cleveland Borough Council*:[90] There is an application for certain land to be registered as a town or village green under the Commons Act 2006. The land has been utilised for various purposes, from recreational activities to golfing. The applica-tion was rejected as evidence shows that golfing activities have priority use compared to recreational activities. However, the court reversed the decision as the relationship of co-existence between recreational activities and golfing should not impede the registra-tion. At this juncture, the court concluded that landowners' non-action to prevent rec-reational activities creates an acquiescence for the public to think they have the right to use the land.

(4) *J. Belli Gowder v. N.M. Pamba Gowder*:[91] There is a competing interest among mem-bers of tribes, Thodha Nadu Seemai and Merku Nadu Seemai, in the exclusive right to perform Poojas at Sri Nanjundeswarar Bajanai Temple. The court rejected the exclusive claim because the temple's construction was based on the public contribution of the en-tire tribe, and both members performed poojas concurrently before the suit was filed.

Other ways to negate the duration of the crystallised period are based on judicial notices. There are two examples:

(1) *The Deputy Commissioner v. K. Sidhdhivinayaga Mudaliar*:[92] The issue in this case was whether the trusteeship of the temples was based on hereditary rights. The court observed that since 1900, there had been a consistent usage where the Nattamaikars of the Sengunthar community were allowed to appoint trustees based on hereditary suc-cession. The court held that this usage was sufficient to establish a customary law, ref-erencing the previous case law of *Palaniandi Thevan v. Puthirangonda Nadan (1897)*, which indicates a usage spanning thirty years is adequate to crystallise into a custom.

(2) *Salekh Chand v. Satya Gupta*:[93] The case concerns whether the land sale by the adopt-ed son was valid, as the adoption took place sometime between 1928 and 1929. The court held that the sale was invalid since the custom of adoption under ancient Hindu law was already extinct and prohibited. However, the court noted that the judicial no-tice, like a public customs record, can negate the immemorial time criterion.[94]

[90] *R v. Redcar and Cleveland Borough Council* [2010] 2 All England Law Reports 613 (Supreme Court, United Kingdom).

[91] *J. Belli Gowder v. N. M. Pamba Gowder* [2011] 8 Madras Law Journal 630 (High Court, India).

[92] *The Deputy Commissioner for Hindu Religious and Charitable Endowment Board v. K Sidhdhivinayaga Mudaliar* (1971) 1 Madras Law Journal 42 (High Court, India).

[93] *Salekh Chand v. Satya Gupta* (2008) 5 Madras Law Journal 117 (Supreme Court, India).

[94] *Salekh Chand v. Satya Gupta* (2008) 5 Madras Law Journal 117 (Supreme Court, India).

Another example is in a series of Nigerian cases involving the Oshodi family, a well-established family with historical control over land in the Epetedo area of Nigeria. It is judicially recognised by the colonial courts, which are:

(1) *Sakariyawo Oshodi v. Moriamo Dakolo*:[95] The court recognised the custom over the reversionary right to the land since the chief of the Oshodi family held a contingent right over the land. A contingent right refers to the right to reclaim the property if the family of an occupier ceases to exist or becomes extinct.

(2) *Idewu Inasa v. Sakariyawo Oshodi*:[96] The court upheld the custom of the chief of the Oshodi family to evict land against occupiers who breached custom by selling the land to another person and those who sided with the breacher.

(3) *Sakariyawo Oshodi v. Brimah Balogun*:[97] The court concluded that the custom could not be disregarded during the leadership vacuum. The case centred on whether the Oshodi family implicitly agreed to sell land to strangers and mortgage it to a company despite the absence of a chief at the time. The court ruled that acquiescence could not be proven, as the breach occurred during the leadership hiatus. Depriving the property held for the family for many years was inequitable.

3.5 Without Interruption

This criterion assessment is based on evidence that a particular group within the community has consistently practised the custom without interruption. One leading English case is *Hammerton v. Honey* (1876) concerning customary recreation rights (Shiner & Rotolo, 2005, p. 71). In 1813, a piece of open land known as Stockwell Green was leased. It was fenced off in 1816 and again in 1855 after the original fence fell into disrepair. By 1875, the inhabitants of Stockwell had been excluded from the Green for a significant period. When they claimed a right to use and enjoy the land, their claim was unsuccessful (Shiner & Rotolo, 2005, p. 71).

The basis of this criterion is to ensure fairness within society at large. It is important to note that custom often represents a claim of exclusivity, distinguishing a particular group from the general law that applies to everyone. While legalising customs aims to promote diversity and preserve cultural identity, it can create an unfair advantage to others subjected to different types of law. Thus, to counter this potential inequality argument, an element of cultural heritage that has continued in the contemporary situation must be shown. There are three examples:

[95] *Sakariyawo Oshodi v. Moriamo Dakolo* [1930] Appeal Cases 667 (Privy Council, on appeal from Nigeria).

[96] *Idewu Inasa v. Sakariyawo Oshodi* [1934] Appeal Cases 99 (Privy Council, on appeal from Nigeria).

[97] *Sakariyawo Oshodi v. Brimah Balogun* [1936] 2 All England Law Reports 1632 (Privy Council, on appeal from Nigeria).

(1) *Egerton v. Harding*:[98] The court ruled that there is a customary duty to fence against the common land based on evidence that several adjoining lands had already put fences in place for an extended period.

(2) *Yorta Yorta v. Victoria*:[99] The court rejected the application of native title by Aboriginal Australians as applicants did not show any historical link to that area from 1788, when the British asserted the claim on Australia, to the date of application. First, they could not prove that most of their ancestors lived there. Second, they could not provide evi-dence of what the legal framework of Aboriginals should be observed in that area, which can be transmitted across generations. Consequently, the custom is construed to have expired since there is no continuity.

(3) *Whakatōhea Kotahitanga Waka (Edwards) v. Ngati Ira O Waioweka*:[100] The New Zea-land court held the customary marine title claim could not be granted if a competing el-ement was effectively pushed off or excluded from exercising custom in that area.

The consequence of inaction to the custom is treated as abandoning those rights. Abandoning a custom would typically means that the individual no longer claims the right to participate in the custom or enjoy its benefits (Australian Law Reform Commission [ALRC], 2014). For example, in *Takamore v. Clarke*, there is a dispute regarding the burial place between the deceased's partner/executrix of the deceased's estate and members of the deceased's family.[101] The tribe insists that the deceased be buried in a traditional burial ground, while the executrix argues that it should be at Christchurch. The court concurred with the executrix's decision as the deceased had already abandoned his custom by dedicating most of his life to her and their children in Christchurch.[102]

However, there are four qualifications for this criterion. First, the continuity criterion will be unsubstantiated if the custom is not embedded with an element of continuity. Two examples are presented:

(1) *Zainoon v. Mohamed Zain*:[103] The Syariah court held that the harta sepencarian concept is part of Singapore's legal system based on judicial notice on the experiences of Malay states, despite no court decision in Singapore since 1968.

(2) *Shafeeg Salim Talib v. Fatimah Abud Talib*:[104] The court affirmed that the concept of harta sepencarian in Singapore does not apply to Muslim Turkish-Yemeni Arab descent. This only applies to the Malay race.

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[98] *Egerton v. Harding* [1974] 3 All England Law Reports 689 (Court of Appeal, England).

[99] *Yorta Yorta v. Victoria* (2002) 194 Australian Law Reports 538 (High Court, Australia).

[100] *Whakatōhea Kotahitanga Waka (Edwards) v. Ngati Ira O Waioweka* [2024] New Zealand Supreme Court 164 (Supreme Court, New Zealand).

[101] *Takamore v. Clarke* [2013] 2 New Zealand Law Reports 733 (Supreme Court, New Zealand).

[102] *Takamore v. Clarke* [2013] 2 New Zealand Law Reports 733 (Supreme Court, New Zealand).

[103] *Zainoon v. Mohamed Zain* [1981] 2 Malayan Law Journal 111 (Syariah Court's Appeal Board, Singapore).

[104] *Shafeeg Salim Talib v. Fatimah Abud Talib* [2010] Singapore Court of Appeal 11 (Court of Appeal, Singapore).

Second, the continuity of the custom may not be disrupted by external factors, such as exploitation or interference, as long as the practice remains a recognised and integral part of the community's way of life. Three exhibits were presented:

(1) *Warrick v. Queen's College, Oxford*:[105] The freehold tenants sued the college for closing certain areas. The issue is whether the custom ceased due to a threatening act. The court held that such acquiescence is not capable of destroying the custom.

(2) *Sunmonu v. Disu Raphael*:[106] There is a dispute among natives in Nigeria concerning the native land. It was held that the occupation of the land does not create a legal right since there is a continuous request from the family's representative.

(3) *Muniandi Kone v. Sri Ramanatha Sethupathi Hereditary Trustee of Arulmigu Mangalanathaswami Temple*:[107] The court allowed the custom of taking Mangai Perumal deity for a specific period, even though the element of practise disruption appears. The basis is that temple authorities are the ones who prevent them from exercising the custom.

Third, the context differs if the custom has been recognised in a written law. In this scenario, abandonment will not destroy the custom unless the extinguishment process is by another written law. This was illustrated in *Wyld v. Silver*, which concerns the custom of holding fairs or wakes.[108] In this case, there has not been a fair over one hundred and sixty years since the Act of Parliament granted the custom. However, the court held that the custom still subsisted.[109]

Fourth, can the de minimis deviation destroy customs? The criterion flows from Blackstone, stating that '… an interruption of the possession only, for ten or twenty years, will not destroy the custom' (Blackstone, 1765/2005). It remains a question of fact, and the court should ask whether the custom has ceased to be practised if there was an interruption. If the answer is affirmative, then the claim fails. Two decisions are highlighted:

(1) *R v. Van der Peet*:[110] The court concluded there is no custom for Aboriginal Canadians to sell fish to non-indigenous people since it is not integral to the life of Aboriginals. The court further added that the continuity requirement does not demand that Aboriginal people provide a detailed, year-by-year account of how their rights have been exer-cised. The focus should be on whether there is a link between historical rights and the current situation.

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[105] *Warrick v. Queen's College, Oxford* (1870) Law Reports 10 Equity 105 (Court of Equity, England); affirmed by the Court of Appeal (1871) Law Reports 6 Chancery Appeal 716.

[106] *Sunmonu v. Disu Raphael* [1927] Appeal Cases 881 (Privy Council, appeal from Nigeria).

[107] *Muniandi Kone v. Sri Ramanatha Sethupathi Hereditary Trustee of Arulmigu Mangalanathaswami Temple* (1982) 1 Madras Law Journal 20 (High Court, India).

[108] *Wyld v. Silver* [1962] 3 All England Law Reports 309 (Court of Appeal, England).

[109] *Wyld v. Silver* [1962] 3 All England Law Reports 309 (Court of Appeal, England).

[110] *R v. Van der Peet* [1996] 2 Supreme Court Reports 507 (Supreme Court, Canada).

(2) *Tang Che Tai v. Tang On Kwai*:[111] The court held that the Chinese custom of making decisions unanimously among clan members is valid as there is evidence of twenty years 1980 of uninterrupted observance of such a practice. A minor disruption does not alter most of the duration of adherence to the custom.

4. The Status of Customs Before the Formation of Malaysia

The Malaysian legal system is no stranger to customs as a source of law. Before the European colonisation, the Malay Peninsula and Borneo were dominated by Malay Kingdoms (Fang, 2007). The Malay Kingdom's legal system is based on a synthesis between Malay customary and Islamic law (Fang, 2007). There are two types of Malay customs: (1) Adat Perpatih, applicable in Negeri Sembilan and Naning, and (2) Adat Temengung, which is based on states having a Sultan as a ruler (Radzi & Yusoff, 2023).

Each Adat has its distinct characteristics, particularly in customary inheritance laws. Adat Perpatih follows a matrilineal system, where specific property types referred to as harta pusaka tinggi (high heritage property) are inherited through the female line (Wan Rushdan et al., 2023). This tradition differs from Islamic inheritance law, as the property is regarded as the collective possession of the tribe (Wan Rushdan et al., 2023). In contrast, Adat Temenggung is patrilineal, emphasising individual property ownership (Wardi & Sahid, 2018). Thus, the distribution of deceased assets conforms to Islamic inheritance principles (Wan Rushdan et al., 2021).

However, European colonisation changed the paradigm of the legal system in Southeast Asia. The British are most influential in the Malaysian legal system, occupying more than 150 years. The British divided Malaysian customary law into five categories, which still exist. They are (Ahmad, 2012):

(1) Malay customs apply to the Malay race.

(2) Aboriginal customs apply to the Aboriginal people in the Malay Peninsula;

(3) Native custom applies to the Indigenous communities in Sabah and Sarawak;

(4) Chinese custom applies to the Chinese race; and

(5) Hindu customs apply to followers of Hinduism.

There are a few examples of written laws, such as:

(1) Malacca: Lands Customary Rights Ordinance 1886;

(2) Federated Malay States: Negeri Sembilan Customary Tenure Enactment 1926 (Chapter 215), Undang of Rembau (Lands) Enactment 1949, and Federated Malay States Malay Reservations Enactment 1933 (Chapter 142);

[111] *Tang Che Tai v. Tang On Kwai* [2007] 5 Hong Kong Court Reports 277 (Court of First Instance, Hong Kong) affirmed by the Court of Appeal [2008] 3 Hong Kong Court Reports 521.

(3) Kedah: Malay Reservations Enactment 1930 (Enactment 29);

(4) Kelantan: Malay Reservations Enactment 1930;

(5) Perlis: Reservations Enactment 1934 (No. 7 of 1353H);

(6) Johor: Malay Reservation Enactment 1936; and

(7) Terengganu: Malay Reservations Enactment 1941 (No. 17 of 1360H);

(8) Sarawak: Chinese Marriage Ordinance 1933 (Cap 74); and

(9) Sabah: Marriage Ordinance 1959 (No 14 of 1959).

Several case laws recognised the custom before the colonial court, for instance, in *Cheang Thye Phin v. Tan Ah Loy*.[112] The case concerned the right of succession under Chinese custom as two people claimed that they were the second wife and daughter of the deceased. Evidence of marriage is based on the wedding tea ceremony, the long duration of cohabitation, support after marriage, acknowledgement by the deceased's family, and the daughter's name appearing on the deceased's tombstone. The court held that they were part of the deceased's legitimate family.[113]

Another example is in *Munah Haji Badar v. Isam Mohamed Syed*.[114] The landowner owns the customary land of Suku Tiga Nenek at Malacca. The landowner uses the land as security for a loan. However, the landowner failed to pay the loan, which caused the lender to auction the land. Ahmad bought the land and later sold it to Salleh. Both of them are strangers to the Suku Tiga Nenek, as Salleh, a male of the same tribe, could not be registered as the customary land owner, causing him to register under his wife's name. However, the wife is not part of the tribe. Later, the landowner's descendants want to reclaim the land, arguing that it is customary in Naning that if the customary land is registered in the name of someone not of the tribe, there remains a right vested in the tribe to redeem the land. The court accepted the claim.[115]

Next is *Habsah Binti Mat v. Abdullah Bin Jusoh*.[116] In this case, the ex-wife seeks to claim a half-share in land against her ex-husband. The husband argued that the ex-wife's re-marriage to another person should extinguish such a claim. The court allowed the ex-wife and held that the property is presumed to be subjected to harta sepencarian as long as it is acquired during the marriage.

[112] *Cheang Thye Phin v. Tan Ah Loy* [1920] Appeal Cases 369 (Privy Council, Appeal from Straits Settlements).

[113] *Cheang Thye Phin v. Tan Ah Loy* [1920] Appeal Cases 369 (Privy Council, Appeal from Straits Settlements).

[114] *Munah Haji Badar v. Isam Mohamed Syed* [1936] 1 Malayan Law Journal 34 (High Court, Straits Settlements).

[115] *Munah Haji Badar v. Isam Mohamed Syed* [1936] 1 Malayan Law Journal 34 (High Court, Straits Settlements).

[116] *Habsah Binti Mat v. Abdullah Bin Jusoh* [1950] 1 Malayan Law Journal 60b (High Court, Federation of Malaya).

5. The Current Position of Customs Under the Malaysian Legal System

The Malaysian legal system permitted customs as a source of law, similar to the common law system (Mohamed & Ahmad, 2023). The primary reference should be based on the Federal Constitution, as it is the highest law in Malaysia, by Article 4 (1). Therefore, any law will be binding if it aligns with the provisions set out in the Federal Constitution.

Regarding written law, Article 74 houses the power to make law. It further grants state and federal legislatures the power to make law according to the Federal, State, and Concurrent Lists in the Ninth Schedule of Legislative Lists. On the federal level, Items 6 (e), 15 (c), and 16 of the Federal List permit the Parliament to enact laws concerning the Malay customs, native law and customs in the Federal Territories, Hindu endowment, and the welfare of Aborigines, respectively. At the same time, most matters like civil law fall within the responsibility of Parliament under Item 4 of the Federal List. Additionally, cultural preservation and heritage fall under the Concurrent List, permitting federal and state legislative bodies to enact the laws.

On the state level, the state legislative assembly was allowed to enact laws concerning Malay customs under Item 1 of the State List. At the same time, Sabah and the Sarawak state legislative assemblies granted additional power to make laws relating to native law and customs and personal law under Item 13 of the Supplement to State List and Item 10 of the Supplement to Concurrent List.

Additionally, any laws enacted before Merdeka Day (31.8.1957) remain in force by Article 162 of the Federal Constitution as existing laws. However, these laws may be modified by a court or tribunal if the legislative bodies fail to amend them to ensure conformity with the Federal Constitution. At the same time, any law made by Sarawak and Sabah before Malaysia Day (16.5.1963) shall be valid under Section 73 of the Malaysia Act 1963. Thus, several written laws recognise custom as a source of law, including but not limited to:

Customs	*Legislations*
Malay	(1) National Language Acts 1963/67; (2) Section 122 of the Islamic Family Law (Federal Territories) Act 1984; and (3) Customary Land Tenure For Luak Tanah Mengandung Customary Land And Lingkungan Customary Land Enactment 2022.
Aboriginal	(1) Aboriginal Peoples Act 1954; (2) Section 62 (2) (b) of the National Forestry Act 1984; and (3) Section 51 of the Wildlife Conservation Act 2010.
Natives	(1) Sabah Interpretation (Definition of Native) Ordinance 1952; (2) Section 3 (1) of the Sarawak Interpretation Ordinance 2005;

	and (3) Labuan Native Title Act 2007.
Chinese	1) Cheng Hoon Teng Temple (Incorporation) Act 1949; 2) Section 1 of the First Schedule to the Martial Arts Societies Act 1976; and 3) Section 2 (c) of the Schedule to the Education Act 1996.
Hindu	(1) Hindu Endowments Ordinance 1906; (2) Section 11 (1) of the Law Reform (Marriage and Divorce) Act 1976; and (3) Section 2 (d) of the Schedule to the Education Act 1996.

Concerning the application of custom in unwritten laws, Malaysian courts seldom invoke custom as a source of law under Article 160 (2) of the Federal Constitution. A review of online legal databases, such as LexisNexis and CLJ Law Journal, reveals that there are very few if any, cases in which the court has specifically applied custom as a source of law under this provision.

There are three primary reasons for this. The first is that many customs are deeply intertwined with religious beliefs, and certain aspects of these customs are no longer practised in contemporary Malaysia. A notable example is the definition of Malay identity, which is inherently tied to Islam. This connection is symbolised in Article 160 (2) of the Federal Constitution and the constitutions of all states, except for Sabah and Sarawak, where one of the criteria for being considered Malay is adherence to Islam. Thus, Islamic principles have increasingly influenced and, in many cases, supplanted Malay customs.

One example of this is the practice of adoption among the Malay community. Historically, adopted children were often regarded with the same status and rights as biological children. This is illustrated in the case of *Jainah Semah v. Mansor Iman Mat*.[117] In this case, Jainah and her husband adopted a girl who was the daughter of her brother-in-law. However, when the girl turned twelve, her biological father and grandfather forcibly took the child, prompting Jainah to file a claim for custody. The court ruled in favour of Jainah, acknowledging the Pahang Malay customary practice of adoption, despite Islam not recognising the concept of adoption in the same way.

Under the current legal framework, however, an adopted child within the Malay community does not hold the same legal status or rights as a biological child (Mufti of Federal Territory, 2020). This change arises from the fact that matters concerning Malay customs now fall under the exclusive jurisdiction of the Syariah Court, as outlined in Article 121(1A) of the Federal Constitution. Before the enactment of Article 121 (1A), matters relating to Malay customs, as specified in Item 1 of the State List of the Federal Constitution, could be heard by both the Syariah Court and civil courts, including the High Court and inferior

[117] *Jainah Semah v. Mansor Iman Mat* [1951] 1 Malayan Law Journal 62 (High Court, Federation of Malaya).

courts such as Magistrate and Session Courts.[118] As a result, the precedent established in *Jainah Semah v. Mansor Iman Mat* applied to civil courts, which had the authority to recognise and enforce customary practices related to adoption.[119]

However, with the inclusion of Article 121 (1A) on 10 June 1988, the jurisdictional authority over matters related to Malay customs was exclusively granted to the Syariah Court.[120] This constitutional amendment significantly altered the jurisdictional landscape by explicitly stating that the High Court and inferior courts, such as the Magistrate's and Sessions Courts, no longer have authority over matters that fall under the purview of the Syariah Court. As a result, civil courts are now precluded from hearing cases concerning matters listed under Item 1 of the State List, including Malay customs.

The rationale behind this shift is that Item 1 of the State List clearly delineates the areas of jurisdiction for the Syariah Court, restricting its authority to matters specifically outlined within that item. Therefore, any matter falling under the Syariah Court's jurisdiction cannot be heard by civil courts.[121] Furthermore, Article 121 (1A) creates jurisdiction by implication, meaning that civil courts cannot interfere with or adjudicate on matters falling within the Syariah Court's jurisdiction, even in the absence of written law governing that particular matter.[122]

Within the Syariah Court's jurisdiction, Islamic law dictates that an adopted child does not have the same legal status or rights as a biological child, particularly in matters such as inheritance and familial ties.[123] This is consistent with the broader influence of Islamic principles, which emphasise the importance of biological lineage in determining legal and familial rights.[124] As a result, while Malay customary practices like adoption may have been recognised by civil courts in the past, they are now largely subject to the constraints of Islamic law, which limits the rights of adopted children in ways that differ from traditional customary practices.

The second reason for the lack of unwritten laws of custom decisions is that many customs have already been codified into written laws. For instance, in Sarawak, customary land laws have been integrated into the legal framework through the Sarawak Land Code 1958. Sections 5 (1) and (2) of the Land Code outline several methods by which customary land rights can be established after January 1, 1958, such as (1) clearing virgin jungle and occupying the land, (2) planting fruit trees on the land, (3) occupying or cultivating the land, (4) using the land for a burial ground or shrine, (5) using the land for rights of way, or (6)

[118] *Boto' binti Taha v. Jaafar Bin Muhamed* [1985] 2 Malayan Law Journal 98 (High Court, Malaysia).

[119] *Sean O'Casey Patterson v. Chan Hoong Poh* [2011] 4 Malayan Law Journal 137 (Federal Court, Malaysia).

[120] Constitution (Amendment) Act 1988.

[121] *Mohamed Habibullah Mahmood v. Faridah Dato Talib* [1992] 2 Malayan Law Journal 793 (Supreme Court, Malaysia).

[122] *Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam* [1992] 1 Malayan Law Journal 1 (Supreme Court, Malaysia).

[123] *Jabatan Pendaftaran Negara v. A Child* [2020] 2 Malayan Law Journal 277 (Federal Court, Malaysia).

[124] *Mohd Salim Said v. Tang Pheng Kee* [2014] 3 Malayan Law Journal 504 (Court of Appeal, Malaysia).

any other lawful method. Consequently, claims to customary land established after this date that fall outside these prescribed methods cannot be recognised as customary rights.

One illustrative case is *Bisi ak Jinggot @ Hilarion Bisi ak Jenggut v. Superintendent of Lands and Surveys Kuching Division*.[125] In this case, a Sarawakian native of the Iban community claimed native customary rights to land that he had purchased from another native. However, the claimant was from the Julau community in central Sarawak and had no ancestral connection to the Iban community where the land was situated. The court held that no customary rights existed since Section 5 of the Sarawak Land Code 1958 does not allow for the recognition of customary rights through the purchase of land.

The third reason is that, while several court rulings have recognised the unwritten law of custom, this recognition has primarily been based on foreign custom from common law countries rather than directly invoking the local custom as a source of unwritten law under Article 160 (2) of the Federal Constitution. As a result, the Malaysian courts have failed to establish clear criteria for when custom should be recognised as customary law.

One leading example is *Adong Kuwau v. Kerajaan Negeri Johor*, a landmark case concerning the status of the aboriginal people of Peninsular Malaysia.[126] The case involves several Aboriginal people who lived around Johor's Sungai Linggiu catchment area. The area had become a source of livelihood for Aborigines, primarily roaming around to gain food resources. However, they were prevented from entering due to the construction of a dam. Thus, they sought a declaration and remedy that the land was their customary land and was entitled to compensation.

The court allowed the Aboriginal claims, and there are several bases; the government does not dispute the area as their livelihood area, there is an admission from the government that the compensation ought to be given, and judicial notice, like common law positions, recognises usufructuary rights.[127] The court decision is based on reliance on several Commonwealth decisions, such as *Re Southern Rhodesia*,[128] *Amodu Tijani*,[129] *Calder v. British Columbia (AG)*,[130] and *Mabo v. Queensland (No 2)*.[131]

[125] *Bisi ak Jinggot @ Hilarion Bisi ak Jenggut v. Superintendent of Lands and Surveys Kuching Division* [2013] 5 Malayan Law Journal 149, (Federal Court, Malaysia).

[126] *Adong Kuwau v. Kerajaan Negeri Johor* [1997] 1 Malayan Law Journal 418 (High Court, Malaysia); *Kerajaan Negeri Johor v. Adong Kuwau* [1998] 2 Malayan Law Journal 158 (Court of Appeal, Malaysia); *Kerajaan Negeri Johor v. Adong Kuwau* [2002] 3 Malayan Law Journal 705 (Federal Court, Malaysia).

[127] *Adong Kuwau v. Kerajaan Negeri Johor* [1997] 1 Malayan Law Journal 418 (High Court, Malaysia); *Kerajaan Negeri Johor v. Adong Kuwau* [1998] 2 Malayan Law Journal 158 (Court of Appeal, Malaysia); *Kerajaan Negeri Johor v. Adong Kuwau* [2002] 3 Malayan Law Journal 705 (Federal Court, Malaysia).

[128] *Re Southern Rhodesia* [1919] Appeal Cases 211 (Privy Council, on appeal from Southern Rhodesia [Zimbabwe]).

[129] *Amodu Tijani v. Southern Nigeria Secretary* [1921] 2 Appeal Cases 399 (Privy Council, on appeal from Nigeria).

[130] *Calder v. British Columbia (AG)* [1973] Supreme Court Reports 313 (Supreme Court, Canada).

[131] *Mabo v. Queensland (No 2)* (1992) 107 Australian Law Reports 1 (High Court, Australia).

The approach in *Adong Kuwau* was further liberalised in *Kerajaan Negeri Selangor v. Sagong Tasi*, focusing on the existence of the proprietary rights of Aborigines.[132] The aborigines of the Temuan tribe brought an action for unlawful eviction from their lands following the acquisition of 38,477 acres of their land to construct the highway to the Kuala Lumpur International Airport. While they received compensation for the loss of their crops, fruit trees, and homes, they were not compensated for the loss of the land.

Building on the precedent set in *Adong Kuwau*, the court upheld the Aboriginal claims, reasoning that the community had lived on the land for at least 210 years, during which their customary rights had crystallised.[133] It was also noted that no written law had extinguished their customs and that the common law had evolved from recognising usufructuary rights to proprietary rights for Indigenous groups due to their vulnerable status. However, the court emphasised that any claim to customary land was limited to settled land, and mere roaming or foraging for livelihood was insufficient to establish ownership of the land.

Both *Adong Kuwau* and *Sagong Tasi* demonstrate that Malaysian courts are capable of enforcing the unwritten law of custom. However, neither case introduced a systematic framework for transforming customary practices into recognised customary law within the court system. This lack of clarity contributed to the lack of recognition of customary law in *Director of Forest Sarawak v. TR Sandah Tabau*'s case.

5.1 The Issues in *Director of Forest Sarawak v. TR Sandah Tabau*

The case of the *Director of Forest Sarawak v. TR Sandah Tabau* involved several natives of Sarawak who claimed native customary rights to a specific land area.[134] They argued that their claims were rooted in longstanding customary practices, such as Pemakai Menoa and Pulau Galau, within the Iban community. These practices were described as rituals that permitted the natives to cultivate and use land.

In Pemakai Menoa, the community will recognise the interest when natives build a longhouse with sufficient rooms arranged in a row; all joined together to accommodate the families. The land includes farming activities. Meanwhile, Pulau Galau refers to customary claims established in the forest area when natives went hunting, fishing, and collecting forest produce. The natives argued that these customs had been in practice since at least 1800, predating the rule of the Brooke family, who governed Sarawak at the time. Furthermore, earlier High Court's decisions, such as in *Bungkong v. Ladang Sawit Bintulu Sdn Bhd*, have recognised these customary practices.[135]

[132] *Kerajaan Negeri Selangor v. Sagong Tasi* [2002] 2 Malayan Law Journal 591 (High Court, Malaysia); *Kerajaan Negeri Selangor v. Sagong Tasi* [2005] 6 Malayan Law Journal 289 (Court of Appeal, Malaysia).

[133] *Kerajaan Negeri Selangor v. Sagong Tasi* [2002] 2 Malayan Law Journal 591 (High Court, Malaysia); *Kerajaan Negeri Selangor v. Sagong Tasi* [2005] 6 Malayan Law Journal 289 (Court of Appeal, Malaysia).

[134] *Director of Forest Sarawak v. TR Sandah Tabau* [2017] 2 Malayan Law Journal 281 (Federal Court, Malaysia).

[135] *Agi ak Bungkong v. Ladang Sawit Bintulu Sdn Bhd* [2010] 4 Malayan Law Journal 204 (High Court, Malaysia).

Despite the long-standing traditions of the Iban community, the court dismissed the natives' claim by a three-to-one majority. Honourable Justices Raus Sharif, Ahmad Maarop, and Abu Samah Nordin delivered the majority opinion. Justices Raus Sharif and Ahmad Maarop held that these customs could not be recognised as customary law in Sarawak because they had never been formally codified during the reign of the Brooke Rajahs or by the Sarawak state legislature. Furthermore, they argued that common law recognition could only be established through continuous occupation of land, and simply roaming or foraging for food would not create a customary right to land. Consequently, these customs did not carry the force of law under Article 160 (2) of the Federal Constitution.

In contrast, Justice Abu Samah Nordin acknowledged the possibility of recognising the customs, particularly through Section 5 (1) of the Sarawak Land Code 1958. He noted that Section 5 (1) only restricts the application of unwritten customs related to customary land after January 1, 1958. However, he ultimately ruled that the natives failed to provide sufficient evidence that the land had been used for traditional activities like cultivation or farming before January 1, 1958. This ruling was based on government records indicating that the land was still classified as primary forest in 1951 and 1953.

The minority opinion, delivered by Justice Zainun Ali, asserted that customary law encompasses both written and unwritten forms. Regarding unwritten law, Justice Zainun Ali argued that customary rights over land could be established through practices such as foraging and gathering as long as the land was used exclusively by the tribe. The Justice contended that the Brooke Rajahs had implicitly acknowledged the existence of these customary practices, as evidenced by their failure to take any action to extinguish them.

Furthermore, Justice Zainun Ali pointed to historical records, such as Rajahs and Rebels: The Ibans of Sarawak under Brooke Rule, 1841–1941, which documented that such practices were widespread during the Brooke Rajah era. In this context, the Justice emphasised that the recognition of these customs could be substantiated by calling witnesses familiar with native practices to testify to their existence. This approach, according to Justice Zainun Ali, would ensure the protection and acknowledgement of Indigenous land rights based on customary law, especially where no formal written documentation exists.

The ruling in *Director of Forest Sarawak v. TR Sandah Tabau* created a contentious situation. While the case was dismissed, the decision was divided regarding the recognition of unwritten customary law. The natives, dissatisfied with the outcome, filed a review before the Federal Court.[136] However, the review was rejected by the majority of the court. The court concluded that there must be finality in every case filed and found that no injustice had occurred against the natives. This was based on the absence of evidence showing that their right to a fair hearing was undermined.

This decision has sparked significant criticism in the literature, notably from Zubir and Wook (2024). The critique centres around two main points. First, the authors argue that the Federal Court failed to exercise its judicial power to bridge the gap in the legal framework,

[136] *TR Sandah ak Tabau v. Director of Forest, Sarawak* [2019] 6 Malayan Law Journal 141 (Federal Court, Malaysia).

specifically under the Sarawak Land Code 1958, to safeguard customary land rights. This failure is viewed as a missed opportunity to uphold the rights of Indigenous communities whose customary land claims were not adequately recognised by the Court.

Second, the decision has been criticised for creating a dual standard in the treatment of Indigenous peoples' land rights between Sarawak and Peninsular Malaysia (Zubir & Wook, 2024). According to them, several court decisions in Peninsular Malaysia have been more liberal in recognising and protecting the customary rights of Indigenous peoples over their land. In contrast, the Sarawak decision reflects a more restrictive approach, perpetuating the disparity in the legal treatment of indigenous communities in the two regions. This inconsistency is seen as undermining the principles of equality and justice for indigenous groups across Malaysia.

Ultimately, the decision in *Director of Forest Sarawak v. TR Sandah Tabau* overlooks the common law system's approach of recognising the customary law through unwritten law. The common law system historically maintained that the lex loci, customary law, should remain unless extinguished by colonial rule.[137] In this case, the Brooke Rajahs, as foreign conquerors, never extinguished the customary laws of Pemakai Menoa and Pulau Galau. After Sarawak joined Malaysia, the situation remained unchanged, as Article 160 (2) of the Federal Constitution recognises custom as a source of unwritten law in Malaysia. Furthermore, the Sarawak state legislature has never extinguished these customary laws.

In response to the evolving legal landscape, the Sarawak state legislature amended the Sarawak Land Code 1958 to provide for the recognition of customary practices such as Pemakai Menoa and Pulau Galau under Section 6A, albeit with the limitation that claims are restricted to a maximum of one thousand hectares.[138] This statutory recognition of Pemakai Menoa and Pulau Galau was affirmed in *Busing ak Jali v. Kerajaan Negeri Sarawak*.[139] This case, while similar to TR Sandah Tabau, was heard after the amendment to the Sarawak Land Code 1958. Consequently, the Federal Court allowed several cases brought by natives to return to the lower courts to determine whether the claims were substantiated under Section 6A.[140]

5.2 Moving Away From Director of Forest Sarawak v. TR Sandah Tabau's Decision

Thus, the decision in *TR Sandah Tabau* underscores the need for a more structured approach to customary law within Malaysia's legal system. Building on the criteria established by the common law system, this study found that the criteria set up in the common law system are compatible with the Malaysian legal system framework.

[137] *Campbell v. Hall* [1558-1774] All England Law Reports 252 (Court of King's Bench, England).

[138] Sarawak Land Code (Amendment) Ordinance 2018.

[139] *Busing ak Jali v. Kerajaan Negeri Sarawak* [2022] 2 Malayan Law Journal 273 (Federal Court, Malaysia).

[140] *Busing ak Jali v. Kerajaan Negeri Sarawak* [2022] 2 Malayan Law Journal 273 (Federal Court, Malaysia).

5.2.1 Customary Right

Similar to the common law system, the Malaysian legal system's framework codifies evidence law in the Evidence Act of 1950. There are several provisions relating to proof of custom in the Evidence Act 1950, such as Section 13 (facts relevant when right or custom is in question), Section 32 (1) (d) (cases in which statement of relevant fact by person who is dead or cannot be found), and Section 48 (opinion as to the existence of right or custom when relevant). Furthermore, the combination of Sections 56 and 57 (1) (a) recognises the law that has a force of law in Malaysia is one example of judicial notice. At this juncture, the custom is considered within the definition of 'law' as per Section 66 of the Interpretation Acts 1948 and 1967, which aligns with the definition provided in the Federal Constitution. There are a few examples within the context of customary rights, which are:

(1) *Ang Siew Hock v. Ang Choon Koay*:[141] In this case, the testator, Ang Seng, created a trust in which the use and enjoyment of the family house were governed by Chinese custom among his descendants. The key issue was determining who qualified as Ang Seng's 'descendant' under Chinese custom. The court held that 'descendants' primarily refers to male issues (sons) and unmarried female issues (daughters), based on expert testimony and the previous court decision in *Re Tan Soh Sim*.[142]

(2) *Re Ko (An Infant)*:[143] The case is about the competing interests of the custody of a child from the marriage due to marital issues. Even though custody went to the mother, the court allowed evidence from the husband to be admissible, such as an expert in Chinese custom under Section 48 and judicial notice of Chinese customary family practices in *Dorothy Yee Yeng Nam v. Lee Fah Kooi*.[144]

(3) *Foo Khai Yuen v. Pengarah Jabatan Pendaftaran Negara Kuching, Negeri Sarawak*:[145] The case involves the right to correct the date of birth. It was argued that the mistake was because his mother followed a Chinese custom of adding two years to the age or date of birth of a child when the child was born. However, the court rejected it since he failed to call any expert witness to prove the existence of such a Chinese custom under Section 48.

(4) *Ch'ng Team Soo v. Khor Hok Kee*:[146] There is a competing interest in the custom to manage the Chinese burial ground. It was alleged that there is a Chinese custom that a burial ground must always come under the management and supervision of a temple. The court allowed the claim based on statements from temple management members as evidence that the custom existed.

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[141] *Ang Siew Hock v. Ang Choon Koay* [1970] 2 Malayan Law Journal 149 (High Court, Malaysia).

[142] *Re Tan Soh Sim* [1951] Malayan Law Journal 21 (Court of Appeal, Malaysia).

[143] *Re Ko (An Infant)* [1990] 1 Malayan Law Journal 494 (High Court, Malaysia).

[144] *Dorothy Yee Yeng Nam v. Lee Fah Kooi* [1956] Malayan Law Journal 257 (High Court, Malaysia)

[145] *Foo Khai Yuen v. Pengarah Jabatan Pendaftaran Negara Kuching, Negeri Sarawak* [2012] 8 Malayan Law Journal 634 (High Court, Malaysia).

[146] *Ch'ng Team Soo @ Cheng Chiu Seng v. Khor Hok Kee* [2012] 10 Malayan Law Journal 280 (High Court, Malaysia).

(5) *Eddy Salim v. Iskandar Regional Development Authority*:[147] The Aboriginal people of Seletar make a customary claim of land and water territories. The basis is that these territories have been part of their economic livelihood since 1800. The court allowed it based on several testimonies of Aboriginal people themselves and expert testimony, which established that Aboriginal families have lived for extended periods and generations. Thus, it was allowed under Section 32 (d). Furthermore, the court accepted Adong bin Kuwau's decision to prove the existence of customary rights.

At the same time, evidence of usage can substantiate a claim for a customary right. For example, Section 49 (a) of the Evidence Act 1950, which is pari materia to the former Section 49 of the Indian Evidence Act 1872,[148] stipulates that the opinions of individuals who possess special knowledge of the usages and practices of any particular group or family are considered relevant facts in legal proceedings. An application of this is illustrated in *Sagong Tasi v. Kerajaan Negeri Selangor*.[149] One of the issues is whether the Aboriginals were permitted to introduce oral evidence of their ancient practices on the said land. The court held that Section 49 could be used to prove the existence of customs.[150]

5.2.2 Written Law Prevails Over Custom

This criterion can be analysed within the context of Malay customs related to land ownership. Historically, land law in the Malay Peninsula was based on uncodified customary Malay tenure. In certain areas, a person obtained land ownership through cultivation (Wook, 2017). This ownership is aligned with Islamic law principles, wherein a person can abandon their land only if they fail to utilise it within a specific period (Maidin, 2008, pp. 3–36).

In other circumstances, it is recognised that the Sultan is the ultimate landowner (Maxwell, 1885, p. 122). For a subject to obtain legal possession of land, it was essential for the land to be cultivated, and the payment of produce or dues was made to the Ruler as a form of tribute (Maxwell, 1885, p. 122). In *Sahrip v. Mitchell (1879)*, a Malacca Malay sued the British officer for trespassing on his land.[151] The said Malay argued that he owned the land through a prescription. It is based on cultivation and payment of 10% of the produce. The issue is whether the prescription principles applicable are based on English law or Malay

[147] *Eddy Salim v. Iskandar Regional Development Authority* [2017] Current Law Journal Unreported 822 (High Court, Malaysia).

[148] The current provision is Section 43 of the Bharatiya Sakshya Adhiniyam 2023.

[149] *Kerajaan Negeri Selangor v. Sagong Tasi* [2002] 2 Malayan Law Journal 591 (High Court, Malaysia); *Kerajaan Negeri Selangor v. Sagong Tasi* [2005] 6 Malayan Law Journal 289 (Court of Appeal, Malaysia).

[150] *Kerajaan Negeri Selangor v. Sagong Tasi* [2002] 2 Malayan Law Journal 591 (High Court, Malaysia); *Kerajaan Negeri Selangor v. Sagong Tasi* [2005] 6 Malayan Law Journal 289 (Court of Appeal, Malaysia).

[151] *Sharip v. Mitchell and Endain* (1884) 13 Journal of the Straits Branch of the Royal Asiatic Societ 205–211 (Supreme Court, Malacca, 1870), https://www.sabrizain.org/malaya/library/jsbras/jsbras13.pdf#page=208.

custom. The court held that the land law was based on Malay custom since the British did not extinguish those principles.[152]

When the British arrived, it was found that the legal system in the Malay Peninsula differed from the European model, as the law is always in the form of a statute and is authorised by a legitimate body (K. S., 2015). There have been several historical law changes, but the most consequential was the Torrens system, a land registration system based on registration and title documents (Zaki et al., 2010). The system remains a cornerstone of land law in Malaysia today, as it is embedded in key legislation such as the Sabah Land Ordinance 1930,[153] the Sarawak Land Code 1958,[154] the National Land Code (Penang and Malacca Titles) Act 1963,[155] and the Peninsular Malaysia National Land Code 1965.[156]

This system effectively extinguished the Malay customary tenure principles by introducing a legal framework that differed fundamentally from the traditional system (Zaki et al., 2010). Section 48 of the National Land Code 1965 states, 'no title to State land shall be acquired by possession, unlawful occupation or occupation under any licence for any period whatsoever.' It is also considered a crime under Section 425, which is liable to a fine not exceeding RM 500,000 or imprisonment for a term not exceeding 5 years or both. Consequently, the Torrens system focused on registered land titles, gradually diminishing customary land rights' relevance among Malay and shifting control to a more formal and centralised legal structure.

The locus classicus is *Sidek Haji Muhamad v. Government of Perak* (Zaki et al., 2010). Several squatters are seeking action against the government on the alleged right to land ownership based on Paddy cultivation and a reliance statement made by the State Director of Lands and Mines in the news. The court held that the action was invalid since the only way to obtain the land interest was through what was stipulated in the National Land Code 1965 (Zaki et al., 2010).

Consequently, the British introduced a system known as Malay reservation land to mitigate the impact of the fundamental changes in Malay land ownership (Md Damiri et al., 2023). This system was designed initially to protect and preserve land for the Malay population in the Malay Peninsula. The reservation system is currently permitted per Articles 89 and 90 of the Federal Constitution. It is treated as one of the remaining existing laws of colonial law.[157]

However, the Malay reservation land framework has been criticised for failing to safeguard Malay interests. Despite its name, the legal framework allows non-Malays to

[152] *Sharip v. Mitchell and Endain* (1884) 13 Journal of the Straits Branch of the Royal Asiatic Societ 205–211 (Supreme Court, Malacca, 1870), https://www.sabrizain.org/malaya/library/jsbras/jsbras13.pdf#page=208.

[153] Sabah Land Ordinance 1930, s. 88.

[154] Sarawak Land Code 1958, s. 132.

[155] National Land Code (Penang and Malacca Titles) Act 1963, pt. VII.

[156] National Land Code 1965, s. 340.

[157] Federal Constitution, art. 162.

acquire an interest in the Malay reservation land. For instance, in *Foo Say Lee v. Ooi Heng Wai*, there is a dispute about whether the sale of Kelantan Malay reservation land to non-Malay is valid.[158] The court held that it was valid since the agreement provided that the sale was subject to the approval of the Kelantan Government and the Ruler in Council, which is allowed under Section 13A of the Kelantan Malay Reservations Enactment 1930.[159]

Thus, it is often treated as obsolete by the court due to the failure of legislative bodies to bring the relevant legislation into conformity with the current situation. Consequently, any ambiguity in the interpretation of Malay reservation land legislation allowed the court to exercise its discretionary power to safeguard the landowner's interest.

A flexible approach to dealing with definitions of Malay is evident in *Zaleha Sahri v. Pendaftar Hakmilik Tanah Johor*, where a woman purchased land in Johor and subsequently changed her nationality to Singaporean.[160] Later, the State Government gazetted the land as Malay reservation land. After the State Government made a policy that the Malay reservation land should be held only by Malaysian citizens, the gazette was made by His Highness the Sultan in Council under Section 22 of the Johor Malay Reservation Enactment 1936. She desired to pass the land to her husband and her children as her health was deteriorating but was refused by the State Government, which led to this suit. The court allowed her application since there was a lacuna in the enactment to resolve her situation.[161]

5.2.3 Conform With Other Unwritten Laws

Although the repugnancy test does not explicitly appear in Malaysian cases, extensive research shows that several rulings have implicitly suggested that customs will be recognised as long as they do not conflict with the fundamental principles of English law (Bulan, 2019). There are a few examples:

(1) *Chua Mui Nee v. Palaniappan*:[162] The case occurred before the Law Reform (Marriage and Divorce) Act 1976 was enacted. In this case, Suppiah Chettiar, a Hindu, married in India in 1925 and had two children. Later, Suppiah Chettiar came to Malacca and married a Buddhist woman, Chua Mui Nee, and they had three children. The marriage was duly solemnised according to Hindu rites at a temple in Malacca in 1943. Suppiah Chettiar later died, and there was a dispute over the inheritance. The court held that the marriage between Chua Mui Nee and the deceased was valid as Hindu law and custom permitted polygamous marriages.

[158] *Foo Say Lee v. Ooi Heng Wai* [1969] 1 Malayan Law Journal 47 (Federal Court, Malaysia).

[159] *Foo Say Lee v. Ooi Heng Wai* [1969] 1 Malayan Law Journal 47 (Federal Court, Malaysia).

[160] *Zaleha Sahri v. Pendaftar Hakmilik Tanah Johor* [1996] 2 Current Law Journal 147 (High Court, Malaysia).

[161] *Zaleha Sahri v. Pendaftar Hakmilik Tanah Johor* [1996] 2 Current Law Journal 147 (High Court, Malaysia).

[162] *Chua Mui Nee v. Palaniappan* [1967] 1 Malayan Law Journal 270 (Federal Court, Malaysia).

(2) *Roberts Alias Kamarulzaman v. Ummi Kalthom*:[163] An ex-husband sought to claim a half-share in a home at Setapak, Kuala Lumpur, against his ex-wife, arguing that the joint resources of the parties acquired the property. The property was registered in the name of the ex-wife. The court allowed the ex-husband's claim to the said home. The basis is that the Malay custom recognises the harta sepencarian concept.

(3) *Superintendent of Land and Surveys Miri Division v. Madeli Salleh*:[164] A Sarawakian Malay Native claimed customary land because he and his father acquired and exercised the said land by clearing, occupying, and planting rubber trees and, later, fruit trees for many years before 1.1.1958. The court allowed the claim. The basis is that a custom in Sarawak existed before James Brooke's administration about land tenure, and Brooke had continuously recognised the system.

(4) *RS Thanalachimi v. Sundararaju Mattaya*:[165] Sundararaju (male) works in the United States, while RS Thanalachimi (female) works in London. Sundararaju proposed marriage to RS Thanalachimi, and they underwent a traditional Hindu wedding ceremony in Teluk Intan, Perak, Malaysia. However, the marriage was not registered. Eventually, the relationship broke down, and RS Thanalachimi filed a suit against Sundararaju for breach of promise to marry. The court ruled that the marriage was void due to the lack of formal registration. However, the court found that RS Thanalachimi's claim for breach of promise to marry was valid. This was based on her willingness to give up everything she had in London for the promise of marriage and to move to a new and unfamiliar place, California, to start a new life with Sundararaju. The court also referenced several English case law examples, which support claims for breach of promise to marry in similar circumstances.

(5) *Khoo Guat Tee v. Lim Kim Neo*:[166] The case occurred before the enactment of the Law Reform (Marriage and Divorce) Act 1976. In this case, there is an application for kin inquiry for Chinese families, and the issue is whether a polygamous marriage during the colonial era was valid. The court held that there is a lawful Chinese customary marriage if there is a mutual, consensual union of the couple, proven by compelling evidence of cohabitation and reputation. It is also permissible under Chinese custom for the man to have secondary wives but not for the woman to have secondary husbands.

5.2.4 Sufficient Period

No Malaysian case is directly involved with this criterion, similar to the repugnancy test. However, a few cases indirectly recognised the custom after a sufficient period of recognition, which are:

[163] *Roberts Alias Kamarulzaman v. Ummi Kalthom* [1966] 1 Malayan Law Journal 163 (High Court, Malaysia).

[164] *Superintendent of Land and Surveys Miri Division v. Madeli Salleh* [2008] 2 Malayan Law Journal 677 (Federal Court, Malaysia).

[165] *RS Thanalachimi v. Sundararaju Mattaya* [2011] 7 Current Law Journal 197 (High Court, Malaysia).

[166] *Khoo Guat Tee v. Lim Kim Neo* [2016] 8 Malayan Law Journal 639 (High Court, Malaysia).

(1) *Syed Kechik Syed Mohamed v. Government of Malaysia*:[167] Datuk Syed is a Malaysian citizen with a West Malaysian identity card. Since he has resided in Sabah for an extended period, he decided to apply before the Native Court for a status declaration as Anak Negeri Sabah (native of Sabah), which has been approved. Later, a political issue creates a possibility that he can be expelled from Sabah. Therefore, he sought a declaration that he was entitled to reside in Sabah. The court allowed the application since it was established that he was a native of Sabah.

(2) *Jaya Asahak v. Munggau ak Lawai*:[168] The court allowed the customary claim to ownership of a bird's nest cave as the custom originally existed before 1.1.1958, which is the cut-off date for customary recognition under Section 5 (1) of the Sarawak Land Code 1958, and he continued to inherit customary rights from ancestors.

(3) *Magudar Ambit v. Rambilin Ambit*:[169] A Sabahan native had occupied and cultivated the land since 1982. She applied before the Collector for Native customary rights. The said native occupation of the land ended abruptly when she was forcibly dispossessed in 1996 by one Ruddy, who entered the land without consent, demolished her house, and destroyed the crops on the land. Later, there was a land application to claim land from another person, which led the said native to claim the land. The court allowed the native claim and held that another native driving out of the land could not extinguish the Native right. Furthermore, the right to customary land should be recognised since it can be traced back to the colonial era.

(4) *State Government of Sabah v. Ab Rauf Mahajud*:[170] A Sabahan native sought action against the State Government, claiming that his right of customary rights over Sipadan Island had been breached by preventing him and his family from collecting turtle eggs. Since the British administration, he and his ancestors have exercised the right to collect turtle eggs on Sipadan Island and own a house on 2.5 acres. However, in 1997, the island was declared a protected area and protected place under the Protected Areas Order 1997. Since then, the island has been controlled by the Prime Minister's Department of the Federal Government. It was held that only his customary rights existed for the house, but not the collection of turtle eggs. The basis is that customary rights under Section 15 of the Sabah Land Ordinance 1930 do not cover such native claims.

(5) *Hajemi Din v. Elite Agriculture*:[171] The registered lessee for 99 years of a lease over land had been prevented from entering the land by the aborigines of Pahang. The purpose of entering is to clear the land for oil palm cultivation. Therefore, the lessee sought a court order to evict the aborigines summarily. The court refused to grant the order since it is

[167] *Syed Kechik Syed Mohamed v. Government of Malaysia* [1979] 2 Malayan Law Journal 101 (Federal Court, Malaysia).

[168] *Jaya Asahak v. Munggau ak Lawai* [2010] 6 Malayan Law Journal 224 (High Court, Malaysia).

[169] *Magudar Ambit v. Rambilin Ambit* [2014] 5 Malayan Law Journal 873 (Court of Appeal, Malaysia).

[170] *State Government of Sabah v. Ab Rauf Mahajud* [2016] 12 Malayan Law Journal 194 (Court of Appeal, Malaysia).

[171] *Hajemi Din v. Elite Agriculture* [2022] 5 Malayan Law Journal 363 (Court of Appeal, Malaysia).

unclear whether the land forms part of the customary land of the aborigines. Thus, the matter had to be decided for a trial.

5.2.5 Without Interruption

The Malaysian courts have clearly expressed this criterion compared to the above mentioned criteria. They are:

(1) *Nyalong v. The Superintendent of Lands & Surveys 2nd Division, Simanggang*:[172] The customary land claim failed since it was discovered there had been 20 years of non-cultivation and allowed others to use the lands without objecting.

(2) *Superintendent of Lands & Surveys, Bintulu v. Nor Anak Nyawai*:[173] Several Sarawakian natives claim native customary rights over the lands allegedly established before 1930. However, the court rejected the claim as it must show that there is a continuous occupation of the land to claim native customary rights over the land. It means there must be sufficient control to prevent strangers from interfering, while an actual physical presence is unnecessary.

(3) *Ketua Pengarah Jabatan Hal Ehwal Orang Asli v. Mohamad Nohing*:[174] Several aborigines at Bera, Pahang claimed customary land rights over settlement lands to the Federal Land Consolidation and Rehabilitation Authority (FELCRA) to cultivate oil palm. The issue is that the land was gazetted as a Malay reserve land. The court held that three criteria for customary land claim: (1) there must be an exclusive occupation and continuous use of the land, (2) actual physical presence is not necessary, but there must be a sufficient measure of control to prevent strangers from interfering, and (3) written law has not expressly extinguished the right. Based on these findings, the court partially allowed the claim because the status of Malay reservation land does not extinguish the right of customary land, and there is no express provision in any written law to extinguish customary land rights. However, roaming and foraging alone are insufficient to be considered an occupation.

(4) *Sangka bin Chuka v. Pentadbir Tanah Daerah Mersing, Johor*:[175] The aboriginal people of the Jakun tribe in Peninsular Malaysia successfully challenged a notice issued by the Land Administrator of Mersing, ordering them to vacate the Endau Rompin National Park. The court ruled in their favour, as the aboriginal people were able to demonstrate that they had been continuously engaged in various activities in the area, such as harvesting, hunting,

[172] *Nyalong v. The Superintendent of Lands & Surveys 2nd Division, Simanggang* [1967] 2 Malayan Law Journal 249 (High Court, Malaysia).

[173] *Superintendent of Lands & Surveys, Bintulu v. Nor Anak Nyawai* [2006] 1 Malayan Law Journal 256 (Court of Appeal, Malaysia).

[174] *Ketua Pengarah Jabatan Hal Ehwal Ehwal Aborigine v. Mohamad Nohing* [2015] 6 Malayan Law Journal 527 (Court of Appeal, Malaysia).

[175] *Sangka bin Chuka v. Pentadbir Tanah Daerah Mersing, Johor* [2016] 8 Malayan Law Journal 289 (High Court, Malaysia).

maintaining gravesites, and conducting traditional ceremonies at sacred sites since the 1940s.

(5) *Director of Forests, Sarawak v. Racha Ak Urud*:[176] Several native people of Sarawak claimed native customary rights over land were rejected because the evidence shows that they had left their land about 66 years before they filed their claim before the court.

6. Conclusion

Custom is a source of law in Malaysia, as it is in the common law system. It can exist in both written and unwritten forms. Based on the analysis in this paper, the unwritten law of custom within common law systems can be redefined through five key criteria: (1) rights must be attached to the custom, (2) the custom cannot conflict with written law, (3) the custom must align with other unwritten laws, (4) the custom must endure a sufficient period to crystallise, and (5) the custom must be exercised without interruption.

In Malaysia, the unwritten law of custom is preserved under Article 160 (2) of the Federal Constitution. Several Malaysian cases, such as Adong Kuwau and Sagong Tasi, demonstrate that the approach to custom as an unwritten law follows a structure similar to that of the common law system. However, in both cases, the reliance on custom was based on foreign customs derived from the common law system. The direct reliance on foreign principles without establishing a systematic framework specific to Malaysia has led to a lack of clear guidelines for Malaysian courts in applying local customs as customary law.

The absence of a clearly defined framework for applying customary law was evident in the TR Sandah Tabau case. In this case, the court demonstrated a lack of appreciation for local Malaysian customs, underscoring the need for a more defined approach to incorporating Indigenous customs into the legal system. Therefore, Malaysian courts need to develop a systematic framework for recognising and applying customary law that reflects the unique cultural practices of its diverse communities. This would ensure the preservation of local traditions while aligning with the country's constitutional principles.

One way to achieve this is by using the criteria above as guidelines to recognise certain customs as unwritten laws. It is hoped that, with the development of such a framework, robust arguments on customary law will emerge before Malaysian courts, ultimately acknowledging and celebrating Malaysia's diversity.

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[176] *Director of Forests, Sarawak v. Racha ak Urud @ Peter Racha Urud* [2017] 4 Malayan Law Journal 42 (Federal Court, Malaysia).

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