

ESTABLISHING A COMPENSATION SCHEME UNDER  
THE MALAYSIAN TORRENS SYSTEM

BY

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## ABSTRACT

This thesis is grounded on the proposition that no men shall be deprived of their land without adequate compensation. Land, being the most valuable asset is the catalyst for economic and social development. As such, the security of land tenure and dealing is one of the utmost important aspects of any government administration. Any possible risk of wrongful deprivation of one's land must be prevented, and if such risks are unavoidable, it must be properly covered under a statutory compensation scheme guaranteed by the state. Deprivation of property without any proper compensation is against the constitutional guarantee provided under the Article 13 of the Federal Constitution. The Malaysian Torrens system adopts only two main principles of the Torrens system i.e the mirror and curtain principle which guarantee the legal security to the registered title and interest holders. Nevertheless, the system is yet to incorporate the insurance principle which provides statutory compensation to the deprived party due to the malfunction of the land registration system. The absence of economic security under the system requires serious consideration in view of possible new risks of land fraud with the introduction of the computerised land registration system. This research examined the need to establish a statutory compensation scheme in Peninsular Malaysia by using qualitative research methods of content analysis, comparative study and field work interviews with various stakeholders. The research resolved that the threat to the security of land tenure and dealings are becoming more complicated and sophisticated in this digital era thus requires immediate attention. To cater to the risks, the research proposes a statutory compensation scheme to be established by the government, as a form of viable consumer protection to the registered title and interest holders. This recommendation is in line with the fundamental right to the property enshrined in Article 13 of the Federal Constitution as well as the *maqāṣid al-sharī'ah* which strongly emphasises the protection of property as one of the essentials (*ḍarūriyyāt*) in Islam. The research concludes that a secure land tenure system is important to enhance public confidence in the land registration system and it will contribute to the economic development of the country.

## خلاصة البحث

تقوم الدراسة على أساس أنه لا يمكن أي فرد أن يجرم من أرضه بدون تعويض كاف له؛ حيث تعد الأراضي لها قيمة عالية وحافزة للتنمية الاقتصادية والاجتماعية. وبذلك، فضمان حيابة الأراضي والتعامل فيها من الجوانب الهامة لإدارة حكومية؛ فيجب منع هذا الخطر المحتمل عن طريق غير شرعي. وإن كانت هذه المخاطر لا يمكن أن تجنبها، بل تغطيها على النحو المناسب حسب نظام تعويض قانوني الذي يتضمنه الدولة. والغضب من الممتلكات دون أي تعويض مناسب يتعارض مع الضمان الدستوري المنصوص عليه في المادة 13 من الدستور الاتحادي. ولا يعتمد نظام "تورينس" الماليزي سوى مبدأين رئيسيين وهما: مبدأ "المراة" و"الستارة" اللذين يضمنان الأمن القانوني لحامل اللقب وصاحب المصلحة. وكذلك يظهر فيه النقص في النظام؛ حيث لم يدرج مبدأ التأمين لتعويض قانوني في طرف المحروم بسبب الخلل في نظام تسجيل الأراضي. فغياب الأمن الاقتصادي في ظلّ هذا النظام يتطلب اهتمامًا جادًا خاصة في اكتشاف المخاطر المحتملة الجديدة للاحتيال على الأراضي مع نظام تسجيل الأراضي الحالي عبر الحاسب الآلي. وحصلت الدراسة على الحاجة إلى إنشاء نظام تعويض قانوني في شبه جزيرة ماليزيا باستخدام أساليب البحث النوعية وذلك القيام بالدراسة النصية، والدراسة المقارنة، والدراسة الميدانية بإجراء عدّة مقابلات مع الجهة المعنية. وقررت الدراسة على أنّ التهديد المعاصر لأمن حيازة الأراضي والتعامل معها قد تطوّرت وأصبحت أكثر تعقيدًا في هذا العصر الرّقمي، وبالتالي يتطلب اهتمامًا فوريًا. واقترحت الدراسة وضع تشريع قانوني فعّال من قبل الحكومة لنظام التعويض من أجل حماية المستهلك، وحامل الملكية، وصاحب المصلحة. وهذه القرارات تتماشى مع مقاصد الشريعة التي تؤكد على خطورة حفظ المال واعتبرتها ضرورية من الضروريات الشرعية. والخلاصة من الدراسة، أنّ نظام حيازة الأراضي المضمون مهم لتعزيز ثقة الجمهور تبعًا نظام تسجيل الأراضي مما يساهم في التنمية الاقتصادية للبلد.

## APPROVAL PAGE

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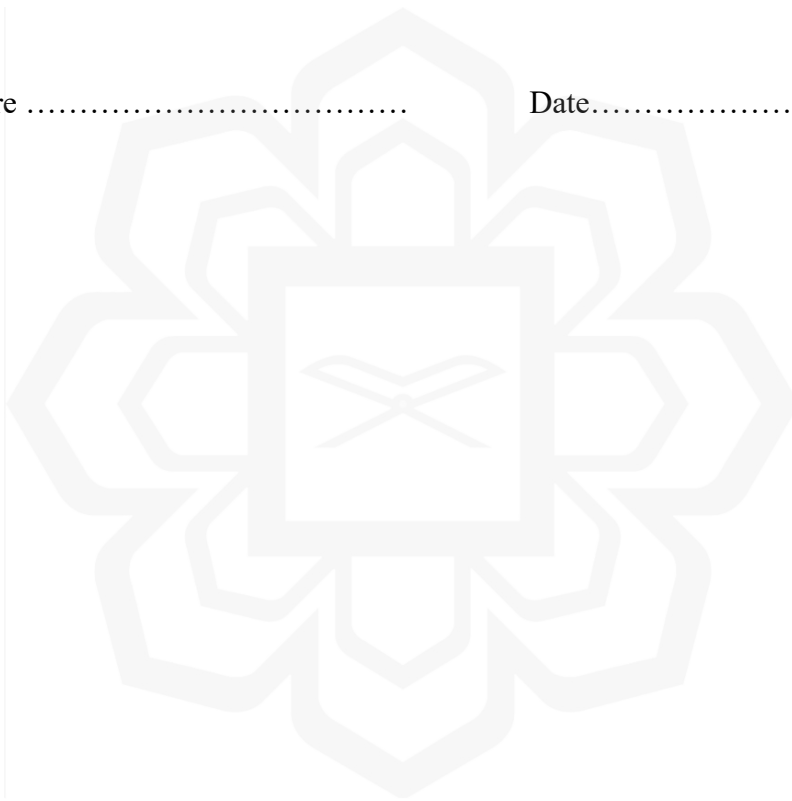
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## DECLARATION

I hereby declare that this thesis is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as whole for any other degrees at IIUM or other institutions.

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I dedicated this thesis to all landowners in Malaysia.

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# CHAPTER ONE

## INTRODUCTION

### 1.1 INTRODUCTION

Land has social, economic, and political significance to every human being. It is a highly valuable resource and an increasingly scarce one. The ways in which a society allocates title and rights to land is an important indicator of the nature, character and organisation of that society, since rights to land can be held to reflect rights in other areas of public life.<sup>1</sup> Thus, security of land tenure and dealings is a vital element in a modern land administration system.<sup>2</sup> Security of tenure refers to the right of all individuals or groups to effective protection by the state against forced eviction.<sup>3</sup> Whereas security of dealings signifies that the process of acquisition of property is facilitated by a set of rules which is able to confer conclusive title on a new acquire.<sup>4</sup> The significance of security of tenure and dealings can be further appreciated by observing the words of *Hammond J.* in the New Zealand case of *Registrar-General of Land v Marshal*<sup>5</sup> where he said: “if there is any area of law in which absolute security

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<sup>1</sup> Geoffrey Payne and Alain Durand-Lasserve, “Holding On: Security Tenure-Types, Policies, Practices and Challenges,” (paper presented for an expert group meeting on Security Tenure convened by the Special Rapporteur on October 22-23, 2012), <http://www.iut.nu/wp-content/uploads/2017/07/Holding-On-Security-of-Tenure-Types-Policies-Practices-and-Challenges.pdf>. (accessed May 28, 2020) Security of tenure implies that a right of access to and use of land or property is underwritten by a known set of rules, and that this right is capable of enforcement Siraj Sait and Hilary Lim, *Land, Law & Islam: Property and Human rights in the Muslim World* (London: Zed Books Ltd, 2006), 13.

<sup>2</sup> The SDGs comprises of 17 goals where three of the SDGs specifically refers to secure land ownership and by extension highlight the need for good land administration. <https://sdgs.un.org/goals>

<sup>3</sup> Forced evictions refer to the permanent or temporary removal against the will of individual, families and /or communities from the home and/or land they occupy, without the provision of, and access to, appropriate for of legal or other protection. Committee on Economic, Social and Cultural Rights, General Comment No. 7: The right to adequate housing (Art. 11.1): forced eviction, para 3. <https://www.ohchr.org/EN/Issues/ForcedEvictions/Pages/Index.aspx>

<sup>4</sup> Pamela O Connor, “Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Title System,” *The Edinburgh Law Review*, Vol. 13 (2009): 198.

<sup>5</sup> See *Registrar-General of Land v Marshall* [1995] 2 NZLR, 198-199.

is required-without any equivocation, it must be in the area of security of title to real property”.

Discussions on the issue of security of land tenure and dealings in Malaysia have significantly emerged after the court decisions in the case of *Adorna Properties Sdn. Bhd. v. Boonsom Boonyanit* (*'Adorna Properties'*).<sup>6</sup> In this case, the Malaysian apex court had decided that a party who had acquired a piece of land directly from an imposter and a forger is to have an indefeasible title to the property against the registered landowner.<sup>7</sup> The registered owner in *Adorna Properties's case*, despite exhausting all legal channels, was left without any remedy because the imposter had since disappeared and was untraceable.<sup>8</sup> The unfortunate saga in *Adorna Properties's case* caused great concern among landowners on how safe land dealings are in this country. The law as it stands, following the decision of the case seems to favour forgers.<sup>9</sup> It has created havoc in the Malaysian law of real property. Following this decision, numerous comments surfaced on the issue and pressure mounted on the government and the judiciary to correct the judicial error committed in *Adorna Properties's case*. In 2010, the Federal Court in *Tan Ying Hong v Tan Sian San & Ors* (*'Tan Ying Hong'*)<sup>10</sup> had the opportunity to reconsider its decision in the *Adorna*

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<sup>6</sup> *Adorna Properties Sdn. Bhd. v Boonsom Boonyanit @Sun Yok Eng* [2001] 1MLJ 241 FC; *Boonsom Bonyanit v Adorna Properties Sdn. Bhd.* [1997] 2 MLJ 62 CA; *Boonsom Bonyanit v Adorna Properties Sdn. Bhd.* [1995] 2 MLJ 863.

<sup>7</sup> Indefeasible title means upon registration, the registered owner, subject to certain exceptions, holds a conclusive, unimpeachable, and unexaminable title over the land against any person who prior to the registration would have a superior title over the land. See Judith Sihombing, *National Land Code: A Commentary*, (Kuala Lumpur: Malayan Law Journal Pte. Ltd.,2015), 794. Section 340 (1) of the NLC provides that the title and interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the exceptions provided under subsection (2), be indefeasible.

<sup>8</sup> Roger Tan, “The Stink of Injustice,” *The Star*, June 9, 2013, <http://www.thestar.co.my>. (accessed June 9, 2015); Eileen Ng, “Sosothikul Family Still Fighting for Justice Over Land,” *The Star*, 13 March 2013, <http://www.thestar.co.my> (accessed April 16, 2015).

<sup>9</sup> Tang Hang Wu and Loh Khian Chung, “A Law which Favours Forgers? Land Fraud in Two Torrens Jurisdictions”, *Australian Property Law Journal*, Vol. 19 (2011): 130.

<sup>10</sup> *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1.

*Properties's* case on the issue of indefeasibility of title. In reversing the decision in *Adorna Properties's* case, *Tan Ying Hong's* case in essence reaffirmed the concept of deferred indefeasibility in the Malaysian Torrens system which means if a person acquired a title or interests through fraud, misrepresentation, forgery or by means of an insufficient or void instrument, then that person's title or interest shall not be indefeasible. The indefeasibility is deferred to a subsequent purchaser who acquires the property *bona fide* and with valuable consideration<sup>11</sup>

However, it is important to note that notwithstanding *Tan Ying Hong's* decision having managed to bring the concept of deferred indefeasibility as embodied in the National Land Code 1965 ("NLC") on the right track and having injected some feel-good feelings among the registered title and interest holders, the decision in no way eliminates the risk of fraudulent land dealings from recurring.<sup>12</sup> The hypothesis that the concept of immediate indefeasibility leads to increased fraud as compared to deferred indefeasibility has been considered as an overly simplistic argument.<sup>13</sup> Undoubtedly, the concept of deferred indefeasibility might make it harder for rogues to commit fraud, but it is not in itself an effective tool to reduce the incidences of land fraud.<sup>14</sup> The enterprising fraudsters may still take advantage of the current weaknesses in the land registration system and conveyancing practices and keeps raking in millions by selling and charging someone else's land.<sup>15</sup> This is evident from a series of land fraud incidences post *Tan Ying Hong's* case which indicates that the existing system is not

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<sup>11</sup> See section 340 (2) of the National Land Code 1965 on the vitiating factors to the indefeasibility principle.

<sup>12</sup> Andrew Wong Fook Hin, "Recent Federal Court's Decision on Section 340 of the National Land Code 1965: *Tan Ying Hong v Tan Sian San & Ors*-Are Landowners and Bank Secured?" *Praxis Chronicle Malaysian Bar*, (2010), <http://www.hba.org.my> (accessed June 23, 2015).

<sup>13</sup> Tang Hang Wu and Loh Khian Chung, 130.

<sup>14</sup> Teo Keang Sood, "Deferred Indefeasibility Reinstated in the Malaysian Torrens System: The End of An Unfortunate Saga", *Singapore Journal of Legal Studies* (2010): 546-557.

<sup>15</sup> Husin, N, "Tipu hartanah: 151 Mangsa Rugi RM30 Juta." *Utusan Malaysia*, July 9, 2016.

full-proof from fraud.<sup>16</sup> The reversal of the decision is only the first step in a series of corrective measures, which should have been taken a long time ago.<sup>17</sup>

In this regard, it is crucial for the government, while working on the fraud preventive measures, to provide a statutory compensation scheme for the purpose of providing a fund to indemnify all persons who have been deprived of their land or interest, through no fault of their own. The provision of the fund mitigates the economic losses suffered by the parties following the deprivation of their title or interest through the indefeasibility principle. This is in line with the objective of the Torrens system that a man is to have either his interest in land or adequate money compensation, therefore.<sup>18</sup> Having adopted a modified Torrens system,<sup>19</sup> the provision for a compensation scheme is missing in the Malaysian Torrens system. As such, in addressing the pressing issue of land fraud, there is an urgent need to reassess the *lacuna* in our Torrens system for the greater the security that the state could guarantee, the more valuable the land would be.

## 1.2 PROBLEM STATEMENT

As evident in the series of land fraud cases reported,<sup>20</sup> the land title registration system in Peninsular Malaysia is still deficient in providing security of land tenure and dealings to the registered title and interest holders and *bona-fide* purchaser for value. The incidences of fraud cause adverse impact on the confidence of the public and industry

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<sup>16</sup> See statistics on land fraud in Chapter 3.

<sup>17</sup> Salleh Buang, *Land Tenure in Malaysia: Prospects for Reform*, (Kuala Lumpur: Dewan Bahasa dan Pustaka, 2013), 65.

<sup>18</sup> DJ Whalan, *The Torrens System in Australia* (Sydney: The Law Book Company Limited, 1982), 346.

<sup>19</sup> The compensation scheme has always been an integral part of the Torrens system to guarantee against loss and is a common feature in many Torrens jurisdictions such as Australia, New Zealand, Canada and Singapore. The scheme is not available in several land title registration jurisdiction including Malaysia, German, Fiji, and Sudan.

<sup>20</sup> This is discussed in Chapter 3. Joseph Loh, "Land Scams on the rise", *The Sunday Star*, December 23, 2007, <http://thestar.com.my> (accessed October 19, 2015).

players in the land registration system and if left unattended may have great implications on the country's economy. Insecure land tenure and dealings may prevent people from taking full advantage of the productive use of their land. Escalating price of property makes land fraud a global issue. It is further acknowledged that the total eliminations of fraud in land dealings is hard to achieve. This is contributed by the internal and external factors surrounding the working of the Torrens system.

The internal factor revolves around the application of the indefeasibility principle in the Torrens system. There are contradicting objectives in the operation of this principle wherein a person who has been conferred with an indefeasible title or interest upon registration may get defeated by a superior title or interest of a *bona fide* purchaser with value without notice.<sup>21</sup> In the case of fraud, one party will be the victim of the operation of the system and consequent to that will be deprived of his indefeasible title. Courts are having difficulties in resolving the conflicting interest of the registered title or interest holders with that of a *bona fide* purchaser. Thus, the possibility of wrongful deprivation is inherent in the Torrens system. Having foreseen such issue is inevitable in the operation of the Torrens system, a statutory compensation scheme serves as a mitigating tool to cover losses following such incidence. The absence of such tool is considered as a defect to the system.<sup>22</sup> This is currently experienced by the Malaysian Torrens system.

The external factors affecting the security of land tenure and dealings in Peninsular Malaysia emanate from the weaknesses in the registration of land dealings system.<sup>23</sup> These weaknesses are contributed by negligence and error on the part of the

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<sup>21</sup> Whalan, 345.

<sup>22</sup> David S.Y. Wong, *Tenure and Land Dealings in the Malay States* (Singapore: Singapore University Press, 1975), 407.

<sup>23</sup> Ainul Jaria Maidin and Hunud Abia Kadouf, "Weaknesses in the Registration of Land Dealings System in Malaysia: Suggestions for Improvements for Enhancing the System," *LNS (A)*, 1.

registering authority and loopholes in conveyancing practices.<sup>24</sup> Consequently, these pave the road for fraud to be perpetrated in land dealings. Furthermore, poor security management in the computerised land registration system open the system to more abuse<sup>25</sup> and creates a new form of fraud which is not available in paper-based system.

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Land fraud victims suffer emotional and financial burdens. Under the current system, the victims need to pursue the fraudsters either through criminal or civil action.<sup>27</sup> Court proceedings are always been associated with complex process, being time consuming and costly. The fraudsters are usually very smart in not retaining the land acquired by fraudulent means in their name so that the actual owner is not capable of applying for the remedy of restitution. Once the land fall into the hands of a *bona fide* purchaser with value without notice, the only remedy available to the actual owner is to claim damages by bringing an *in personam* claim against the fraudsters which can hardly be successful because of the fraudsters' disappearance or inability to pay.<sup>28</sup> The infamous land fraud case of *Adorna Properties's* is certainly one of the most illustrative examples on how the existing law fails to protect the interests of the landowner and provide adequate remedies to the victim of land fraud.

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<sup>24</sup> Noraziah Abu Bakar, *Legal Implications of Land Fraud on Security of Land Tenure Under the Conveyancing Law and Practices in West Malaysia* (Ph. D thesis, University Teknologi Mara, 2019).

<sup>25</sup> The new system provides a shift from a system that contained inbuilt protection measures to avoid fraud, and registration of incorrect instruments, to one that relies on the skill and integrity of the users of the system. The title registration is at the mercy of the dishonest or incompetent conveyancer. R. Thomas, "Fraud, Risk and the Automated Register" in *Torrens in the Twenty-first Century*, ed. David Grinlinton, (Wellington: LexisNexis, 2003), 349.

<sup>26</sup> The NLC was amended in 1992 to provide for the introduction of the computerisation system in Malaysia. Section 5A was inserted in the NLC under the National Land Code (Amendment) Act 1992. See Ainul Jaria Maidin, "Land Registration System in Malaysia at the Threshold of Fraud", (Paper presented at the Seminar on 'Risk Reduction in Land Fraud', Grand Blue Wave Hotel, Shah Alam, Selangor, Malaysia, October 22-23, 2008), 10.

<sup>27</sup> Sharifah Zubaidah Syed Abdul Kader, "Disclosing the Types of Land Fraud Under Malaysian Law", (paper presented at Seminar on 'Risk Reduction in Land Fraud', Grand Blue Wave Hotel, Shah Alam Selangor, Malaysia, October 22-23, 2008).

<sup>28</sup> M.Carabash, "Legal options available to victims of Real Estate Fraud in Ontario," <http://www.hg.org/article.asp?id=7376> (accessed August 20, 2014).