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LAND LAW AND
THE ADOPTION OF
THE NATIONAL LAND CODE
IN THE STATE OF MALACCA

by :

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of the requirements for the Degree of Master
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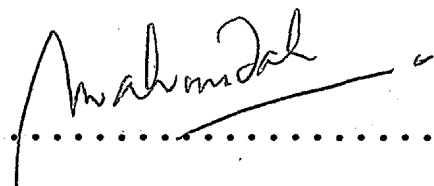
To:

Abah, without his love and never ending
support, this paper may not exist
in reality

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CAVEAT

This dissertation is written with the undertaking that it should be a classified document. As such, it is not for public reading. Any person who may want to refer to this study should get the consent in writing from the Dean, Kulliyah of Laws, International Islamic University, Malaysia. References to the statistics contained in the study shall not be made except with the written approval of the Pengarah Tanah dan Galian Melaka and the respective District Land Offices.


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NOOR MAHMUDAH BTE MOHD.NOR

PREFACE

This topic was chosen mainly due to the writer's personal and sentimental interest to know and study the land law administered in the state of her origin. The interest was further supported with the development of the law, and in particular with the introduction of the National Land Code to the state; which at the same time reflected the peculiarity of the land law existing in Malacca as compared to all other states in Malaysia.

With due recommendation and support from the writer's supervisor, it has indirectly motivated the writer to carry out the study on this topic. It is of importance to mention here that the study will not be able to be accomplished without valuable assistance from all departments concerned. Accordingly, the writer wishes to express greatest appreciation to:

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Noor Mahmudah Mohd Nor
Melaka

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CHAPTER 1

INTRODUCTION

INTRODUCTION

It is generally accepted that the system of land tenure in Malaysia today is based on the concept and system known as The Torrens System. The National Land Code was formulated to bring in such system in the country and also to provide a uniform land law throughout Malaysia.

The introduction of the National Land Code in the State of Malacca and Penang, however is not as smooth as in other states in Peninsula Malaysia. This is basically due to historical reasons, primarily connected with the different systems governed and administered in the States. As compared to the Malay states, the introduction of the National Land Code is merely a continuation of the System in existence. But, for the State of Malacca, a totally new image was necessary in transforming the system administered to the "new" system to be adopted in the state.

The new system therefore represents a radical and fundamental change to the existing law in Malacca. Accordingly, the National Land Code (Penang and Malacca Titles) Act, 1963 was promulgated as the major step for converting the system in Malacca to assimilate to the system promoted by the National Land Code.

It is equally important to mention that the term "Malacca" and "Melaka" shall be used interchangeably in this paper.

1.1 Purpose of the Study

The main purpose of the study is basically to produce the historical development of land law in the state of Malacca. Besides it is also an attempt to examine the effect of the introduction and the adoption of the National Land Code in the State by focusing on the process of conversion from the old system to the new one; taking into account the problems encountered in making the conversion a success; and consequently to represent the present scenario of land law as administered in Malacca.

1.2 Scope of the Study

In order to serve the purpose of the study, the discussion in this paper is divided into several chapters which will concentrate on specific issues concerned.

The historical development of land law in Malacca is outlined in Chapter 2. This chapter therefore, includes the position of the land tenure system as practised by the people of Malacca prior to invasion of the Portuguese, the Dutch and British. Historical background is given due emphasis in this paper mainly to portray the pre-existing land laws in Malacca, which had affected and 'coloured' the land tenure system. In other words, this chapter is intended to show the different kinds of law which had once governed the state of Malacca and had indirectly contributed to the problems faced in introducing the National Land Code to the state.

In furtherance of the introduction of National Land Code in Malacca, Chapter 3 sets out brief account on the Torrens System including the basic features of the National Land Code which shall be assimilated to the system in Malacca. The chapter also introduces the National Land Code (Penang & Malacca Titles) Act, 1963 which operates as the vital machinery in transforming the old system in Malacca to the Torrens System.

In order to provide a clearer picture as to the function of the Titles Act, 1963, Chapter 4 will

enumerate the process of conversion. It comprises also the substantial elements to be dealt with in converting the English Deeds System to the Torrens System as provided under the National Land Code.

Upon presenting the conversion process, it is equally important to analyse the problems encountered especially the problems faced in administrative department and the actions taken to reduce or solve the problems. This issue will be dealt with in Chapter 5.

Chapter 6 attempts to provide the present scenario particularly the achievement and the status of conversion. This is rather important as an assessment, especially considering the fact that 12 years have passed since the expiration of the Interim Period for the process of conversion.

Finally, the concluding chapter is meant to observe in general the overall situation of Land Law in Malacca and to illustrate the achievement of the Torrens System in the state and also to analyse the success of its assimilation in accordance with the National Land Code.

1.3 Methodology

The methodology adopted in the study consists of library research particularly in dealing with the historical outline of the land law in Malacca. The research work is complemented with analysing data obtained from Land Offices of Jasin, Alor Gajah and Melaka Tengah and also data obtained from the Offices of Land and Mines, Melaka. The sources of data also include the interviews and discussion held with the government officers and the land administration personnel.

1.4 Limitation

Due to several shortcoming and unexpected eventualities, the writer was unable to carry out extensive research or field work on the study. Besides, there is not much detailed legal writing on the matter concerned particularly on the issue of conversion. This may be due to the fact that the problem accrues only in the state of Malacca and Penang. At the same time, the analysis of data and file digging process is not a clear-cut process mainly due to the unsystematic filing of old records had further limit the access to relevant information.

CHAPTER 2

DEVELOPMENT OF THE LAW -
HISTORICAL OUTLINE ON
LAND TENURE SYSTEM
IN MALACCA

DEVELOPMENT OF THE LAW -

HISTORICAL OUTLINE ON LAND TENURE SYSTEM IN MALACCA

A glance at the historical background of Malacca will show that Malacca had enjoyed a long and illustrious history. It began when it was first founded by Parameswara, and subsequently experienced its glorious era of self-rule under the Malacca Muslims Sultans.¹

The glorious period however was terminated when Malacca was conquered by the Portuguese conquerors in the 15th century (from 1511 to 1641 - for a period of 130 years), followed by the Dutch in the 16th and 17th centuries (from 1641 to 1795, and later from 1818 to 1824 - for a period of 160 years) and finally by the British when they took over Malacca from the Dutch after the Anglo-Dutch Treaty of 1824² and a brief period under the Japanese from 1941 to 1945; until Malacca, under the umbrella of Malaysia, obtained independence in 1957. The total of 446 years of colonization have ruined the glorious history of Malacca.

¹ Salleh Buang, *Malaysian Torrens System*, Kuala Lumpur, Dewan Bahasa dan Pustaka, (1989), p.3

² Ahmad Ibrahim and Ahilemah Joned, *The Malaysian Legal System*, Kuala Lumpur, Dewan Bahasa dan Pustaka, (1987), p.9.

Accordingly, this chapter is intended to enumerate briefly the different stages of land law which were once governed the state of Malacca prior to the existence of the present system governing the land law in Malacca today.

2.1 Early Malay Land Law

The early land law prevailing in the state of Malacca was the Malay customary tenure which remained unchanged in any way either by Portuguese or Dutch rulers³. Historical records show that Malay customary tenure and principles of law⁴ were contained in some of the Malacca state laws of the time as in the Malacca Laws of 1523⁵ and also as provided in the Malay Annals and the Malacca Digests⁶. It is also important to note that in some areas in Malacca, the land tenure was subject to Adat Perpatih which is followed by a number

³ Maxwell, W.E., **The Law and Customs of the Malays with Reference to the Tenure of Land**, (1884) 13 JSMBRAS, p. 148.

⁴ Salleh Buang, "Malay Customary Tenure - A Brief Historical Survey," in **The Centenary of The Torrens System in Malaysia**, ed. by Ahmad Ibrahim and Judith Sihombing. Kuala Lumpur - Singapore, Malayan Law Journal, (1989), p.171

⁵ Ahmad Ibrahim, **Towards A History of Law in Malaysia and Singapore**, Singapore Malayan Law Journal, (1970), p.7.

⁶ Judith Sihombing, **National Land Code - A Commentary**, 2nd ed. Kuala Lumpur Malayan Law Journal, (1992), p.12.

of the inhabitants of Malacca, which is generally known as Adat Naning. The tenure under Adat Perpatih differs from the land tenure described in the Malay Annals and Digests.⁷

The basic principles of the Malay Customary land tenure, other than under Adat Perpatih recognised that all land belonged to the Ruler. Proprietary right is created by the clearing of the "dead land" by way of cultivation or building a house on the land and thus causes the "dead land" to "live". Such right is absolute as long as it is followed by continuous occupation or the land bears signs of appropriation⁸. This position was given judicial recognition in the decisions of Abdul Latif v. Mohamed Meera Lebe⁹ in which it was stated :

"There are two kinds of land, first the 'living land' and second, the 'dead land'. With regard to 'dead land' nobody has property rights to it, (when) there is no sign of it being under cultivation by someone, (then) certainly nobody can lay a claim to that land.

⁷ Ibid

⁸ Maxwell, op.cit p.78

⁹ (1829) 4 Ky 249

If someone cultivates it into (a rice field, be it) a huma or ladang or sawah or bendang, no one can proceed against him. That is what is understood by 'living land'. "

However, such right or "Private Ownership" of land was nothing more than a right of occupation, although it was capable of being inherited. The occupier was required to pay a tithe in the form of one-tenth of the harvest or the income derived from the land, regularly and without fail, to the Ruler. He also had to ensure that the land remained in constant cultivation and in default of which the land would be subject to forfeiture by the Ruler ¹⁰. This is enhanced by the decision held by Sir Benson Maxwell C.J. in Sahrip v. Mitchell and Another¹¹

"It is well known that by the old Malay law or custom of Malacca, while the sovereign was the owner of the soil, every man had nevertheless the right to clear and occupy all forest and

¹⁰ See also Judith Sihombing, op.cit, Maxwell, op.cit, at p.92 and Salleh Buang, op.cit, at p.174.

¹¹ (1879) Leic 466.

wasted land, subject to the payment, to the sovereign, of one-tenth of the produce of the land so taken. The trees he planted, the houses he built, were his property which he could sell or mortgage or hand down to his children. If he abandoned the paddy land or fruit trees for three years, his rights ceased and the land is reverted to the sovereign. If, without deserting the land he left it uncultivated longer than usual or necessary, he was liable to ejection."

At the same time, the occupier had an interest with certain proprietary incidents so that he could charge or assign the land. In other words the occupier may make transaction over the land according to the Malay customary dealings that were well developed and mainly of the following kinds¹² :

- i) **Out-and-out** transfer of cleared and cultivated land by sale known a "Pulang belanja" (return of expenses).

¹² Maxwell, op.cit at p.121 cited in David SY Wong, **Tenure and Land Dealing in the Malay States**, Singapore: Singapore University Press, (1975), p.11.

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ii) **Letting (sewa)** which is an arrangement whereby a cultivator allowed another person to cultivate his land for the return of a share in the produce crops of for a rent in kind or in money. iii) **Security transactions (gadai)** which were in two main forms. One is commonly known as *jual janji* (conditional sale)¹³. Under a *jual janji* transaction, a person who is in need of money will sell his proprietary right in the land to a purchaser, to whom the land will be transferred. The transfer is executed subject to the condition that if the seller is able within a specified time, or at any time thereafter, to repay the sum advanced by the purchaser, the land will be transferred back to the seller. The other form of security transaction is when a cultivator-borrower made himself a "tenant" of his creditor and the latter is entitled to a share in the produce crops as his "interest" on the loan.

¹³ Please also refer to Allan D.E. and Hiscock, M.E. "Jual Janji", in *The Centenary of the Torrens Systems in Malaysia*, ed. by Ahmad Ibrahim and Judith Sihombing, Kuala Lumpur, *Malayan Law Journal* (1989), p.80.

In short, amongst the principal characteristics of the Malay customary tenure were :

- i) The nature of ownership of land was not of absolute ownership as provided under the National Land Code, 1965 (Act No 56 of 1965) but of a lesser extent known as "proprietary rights" where the right of ownership extends only to the right to utilise the soil.
- ii) The land is acquired by opening up and cultivating virgin jungle land or waste land.
- iii) The occupier was under the obligation to pay one-tenth of the proceeds to the Ruler as tax.
- iv) The occupier is to maintain the land under continuous cultivation or occupation.
- v) The practice of sale of land known as "Pulang belanja" is to reflect the total amount of the seller's labour and out of pocket expenses in cultivating and developing the land.
- vi) The recognition of the practice of security transaction known as jual janji.¹⁴

¹⁴ Salleh Buang, op.cit, at p.3

2.1.1 Other intrinsic features of the Malay Customary Land viz. the influence of Islamic Law (the Syari'ah)

According to the historians, Islam had spread out in the South East Asia since the 13th century and reached Malaya in the 14th century. However, it only gained footing in Malacca in the 15th century. In the advent of Islam, the Rulers and their subjects embraced Islam and subsequently adopted Islamic law and the Malay customs too were modified so as to make them conform to Islam¹⁵, as Ahmad Ibrahim observed :

"..... Muslim law ... absorbed such parts of the Malay Customary Law as were compatible with Islam. We may therefore also call it Malay Adat"¹⁶

¹⁵ Ahmad Ibrahim and Ahilemah Joned op.cit , p.52

¹⁶ Ahmad Ibrahim, op.cit , p.9 cited in Judith Sihombing op.cit , p.20