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TOPIC : 'MALAY RESERVATIONS -
ARE THERE ADEQUATE SAFEGUARDS'

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MALAY RESERVATIONS - ARE THERE ADEQUATE SAFEGUARDS

1. INTRODUCTION

The subject on Malay Reserve land or in short Malay Reservation has been discussed at great length. Several court decisions have been made by Judges basing on the Spirit Of The Laws on Malay Reservation. There are several Enactment on Malay Reservation from various Malay States in the Penninsular Malaysia. Different states have different provision on Malay Reservation. There are also differences in the different states especially on the definition of 'Malay' which is the vital most point with regard to the discussion on Malay Reservation, from the right to possess land under the Malay Reservation is vested on the Malays only. The definition of 'Malay' will be dealt with in greatest detail towards the later part of this

1.1. This paper will examine to what extent the Malays have been safeguarded as to their interest in land, or whether they have really benefitted from the provisions of the laws which I would humbly submit are intended to protect their interest due to some reason or others.

1.2. One of the reasons why the Malays are given such a privilege is that due to the economic reason of the Country then. The British when first came to Malaya adopted the Divide And Rule Policy. The various races are segmented and made to specialise in their own field of interest. The Chinese are known to be good in farming and mining. Therefore they were posted at the various tin mining areas in the state of Perak. The Indians descents were interested in rubber tapping and they were found predominant in the rubber plantations. As for the Malays they were told by the British that they need not worry about anything as they are the sons of the soil and they do not have to work hard to earn their living. The Malays are complacent. As long as their sentivities (1) are not disturbed they would be very more than happy. Until such time that when the other races became industrious that there need to be a system whereby the land owned by the Malays should not fall into the hand of the Non - Malays, not only this will cause the Malays to become a 'slave' in their own motherland but may result in a repercussion between

1. A gift from the book 'A Malay dilemma by Dr. Mahathir Mohamad, the Prime Minister of Malaysia

the Malays and the Non-Malays. This may result in the dissatisfaction of the Malays, or on the other hand on the Non-Malays as they might think that they may be deprived of their rights to strive hard to earn a living.

Another reason for protecting the Malay rights to possession of land is that it is considered as one of the Malay rights guaranteed under the Constitution. (2) The Constitution also provides that the right to own property as a fundamental liberty.

On the negative side of it, the privilege given to the Malays in guaranteeing their ownership of land rights be wrongly interpreted in the sense that Malays are incapable to administer their own land and far more from protecting it from being bought over by other people. That is why, accordingly to some observers the Malays should not be left alone to safeguard their own interest in land. They need guidance as they are not self-reliance. However, those are only the views of some of the Malay intellectuals speaking on behalf of the Malays themselves and therefore are not sensitive as compared to those voiced out by the Non-Malays, if any.

2. Article 89 of the Federal Constitution. Federal Publications Sdn. Bhd., 1970.

2. POSITION OF THE MALAY RESERVE MALAY LAND

Malay reserve land is an area of land which has been gazetted specially for the Malays only and the Non-Malays have no right to hold any interest in the land which has been gazetted as such. The Malay Reserve land are those land gazetted in the Penninsular Malaysia. In Sarawak there is no provision of the Malay Reserve land. However, there is a system of land holding which guarantee the special right of the sons of the soil or the natives in Sarawak to own such land. A major portion of the land in Sarawak has been gazetted for the ownership of the natives there and the ownership is only on a personal or individual ownership. In Sabah there is no provision for the reservation of land for the interest or ownership of certain category of people or the natives there. But a piece of land can be converted into a land which is to be owned by the natives only or in this case the Bumiputera when requested by the owner of such land to do so or when
(3)
a transfer of ownership is made.

In addition to the Malay Reserve land that has been mentioned above there is also a provision of the

3. Taken from Mohd Ridzuan Awang 'Konsep Undang-Undang Tanah Islam - Pendekatan Perbandingan p.335.

law relating to land holding by the Malays in Trengganu⁽⁴⁾ and the customary land in Negeri Sembilan and Malacca. All these lands have been guaranteed, controlled and provided for under the Federal Constitution and the various enactments of Malay Reserve land for the Malay States in the Penninsular Malaysia. The Federal Constitution has defined 'Malay Reserve land' as land which is reserved to be given ownership to the Malay people or to the Bumiputera in which states the land are situated.

The area of the Malay Reserve land in the Penninsular Malaysia fluctuates from time to time. This is due to the fact that the land keeps on changing ownership or has been cancelled or withdrawn and so forth. For instance a statistical data on the area of the Malay Reserve land collected by Malayan University is different from the data obtained from the land offices or the offices of the Director of Land and Mines of the states. Accordingly, to the former, report showed that at the end of year 1975, a total of 4.3 million acres or 13.4% of 32.5 million acres of Penninsular Malaysia are Malay Reserve land.

4. Article 90(1) of the Federal Constitution.

Whereas in the latter i.e according to the research done by the office of the Director of Land and Mine of the State, the area of Malay Reserve land up to February, 1983 showed a figure of more than 1,493,765 hectares. Kelantan is the state in which has been gazetted the most Malay Reserve land, and then followed by the other states like Kedah, Pahang, Johor, Negeri Sembilan and Perak. The area of Malay Reserve land in the whole of Penninsular Malaysia is as shown in Appendix A.

From the figure shown in Appendix A it is evident that the existence of the Malay Reserve Land are for the Malays and it is a special privilege for the Malays in the States of Penninsular Malaysia with the exception of Penang.

The Malay Reserve land in Trengganu is known as Malay Land Holding and the Malay Reserve Land in Negeri Sembilan is known as Customary Land Holding. In principle Malay land reservation cannot be transferred of its ownership, leased and let out to a Non-Malay. Nevertheless from a total of 4 million acres Malay Reserve land throughout the country it is

found that about 800,000 hectares Malay Reserve land has lost and let of the hand of the Malays for the purpose of National Development projects and some other purpose such as transfer of ownership.

3. SOME VIEWS ON MALAY RESERVE LAND ✓

A judge once described Malay Reserve land as
(5)
Cinderella piece of property. Critics have viewed the Malay Reservation law as an unwanted relic of a past age when the Malays were regarded by their colonial masters as simple and uneducated village folks, devoid of any political clout, bereft of any substantial economic strength living in a country in which they were the original sons of the soil, unable to fend for themselves, and they were in dire need of some legal cum psychological crunth in the form of such archaic legislation. Whether Malay Reservation law is now something out of date, whether as a state plicy it has brought any lasting and substantial benefits to the Malays, whether it was in fact beneficial at all at one time but has now outlived its purpose, and whether as a piece of legislation it is now out of time and context and should be expunged from the Statute book is indeed an open question.

5. Wan Suleiman F.J in Collector of Land Revenue ,
Kuantan v Noor Cahaya (1979) INCJ 180.

Wan Suleiman F.J in the case of Collector of Land Revenue, Kuantan v Noor Cahaya however, has aptly said that the Malay Reservation law had effectively isolated the Malays from credit facilities which they were sorely in need in order to uplift their economic status, obviously the reverse of what the policy makers and the legislator had in mind.

The law on Malay reservation has served to highlight the predicament resulting from:

- a. the individualism of the state authorities
- b. the lack of cohesion amongst the state legislatures
- c. the lack of uniformity amongst the state laws.

This unhappy state of affairs had not changed much since the Pre-Merdeka period. Thus, to take an extreme illustration, the term 'Malay' in Kedah and Perlis includes decendants of Arabs. The relevant law in these two states also permits Malay reservation lands to be owned by Siamese. However, in Johor, issues of Arab fathers and Malay mothers are not regarded as 'Malays' for the purposes of the State Enactment although they would be 'Malays' for the purpose of the Federal Constitution.

The Position in Kelantan is even more perplexing, as the State Enactment does not even consider the status of 'Malays' as the final and determining factor for the purposes of owning such lands in the state. Instead, the law in Kelantan uses the term 'native of Kelantan', which has the effect of excluding the Malays from the other states in West and East Malaysia.

The effectiveness of the law was also at one time a matter of great concern. IN 1930s, the Malay owners happily went on to change their Malay reserve land to their Chinese friends and Indian professional money-lenders and these chargees did not seem to face any legal hinderances at all when they took foreclosure proceedings against the Malay borrowers.

However, in the later part of this paper an elaborate discussion will, it is hoped, throw some light as to whether the Non-Malay friend chargees are actually benefitting from the desperate Malays who are hard up of money to fulfill their needs which are only known to them.

4. THE LAWS RELATING TO MALAY RESERVATION
LANDS (BEFORE MERDEKA)

Penninsular has an area of about 51,000 square

miles and out of this the British Administration had passed several laws relating to land some of which are the Land Code, the Mining Enactment, Land Acquisition Enactment, Malay reservation Enactment and Customary Land Holding Enactment.

Malay Reservation land came into being in 1913 after the first Malay Reservation Enactment was enacted and passed for the states in the Federal Malay States. The declaration of certain land as Malay Reserve land is for the sole purpose of ensuring the certain category of land in the Malay States is given ownership only to the Malays or whether interest in it will continue to be in the hands of the Malays.

The policy of the Englishmen in having introduced the Malay Reservations Enactment in 1913 is for the sole intent and purpose of ensuring that the Malays will remain permanently on their land and will continue with their traditional profession of being a peasant and would shy away from the business world or industrial concern.

There is no specific reason for the Englishmen to do this, but any humble submission would be that the English wanted the Malays to love for their land and in times of any invasion from outside forces they (the Malays) would be even willing to protect their land as this land is their motherland in which they have interest and it would be easier for them to draft in the Malays into the Security Forces for this purpose. The other races in the country may not want to protect the Malay Penninsular for most of them were immigrants who came down to Malaya to seek a fortune and after achieving their objectives would want to go back to their places of origin, like the Chinese to China and the Indians to India or some other races to other neighbouring countries.

That was only 20 years later in 1933 the Malay Regiment was formed. The idea may be one that was sold by the British to the Rulers of the Malay States who agreed to the idea and thus the first batch of the Royal Malay Regiment was formed with an experimental squad of 25 strong and able bodied young men to take on the challenge and to compete with their counter-

parts who were at one time their colonial masters the Englishmen. According to William R. Roff, approving such a law showed that the Federated Malay States governments wished to continue having the Malays, stayed permanently on their land and continued with their traditional way of life i.e. working on the land to plant their traditional staple food.

The Malay Reservation Enactment 1913 had 2 main objectives i.e.:-

1. To stop any negotiation towards the Malay reserve land as something of business transaction.
2. To save the Malays from being burdened with debts through land dealings.

With the above mentioned objectives in view ever since 1914 till 1930s Malay villages, virgin jungles and the mountainous areas were gazetted as Malay Reserve land. Up to 1923 the area of Malay Reserve land in the Federated Malay States i.e. Perak, Selangor, Pahang, Negeri Sembilan was 1,167,204 (6) hectares. Nevertheless, only 538,000 hectares were suitable for the purpose of cultivation. On the other hand most of the lands are thick jungles and mountainous lands.

6. Mohd. Ridzuan Awang at p.342.

Until 1933, the total area of Malay Reserve land continued to increase making a figure of 1,274,927 hectares. The increase was as result of gazetting the abandoned used mining areas as Malay Reservation land. From the total of this only 239,834 hectares were owned by the Malays i.e. the area which can be developed into a land for purposes of agriculture.

With regard to the implementation part of it, it was found out there was diversity in the 4 states of the Federated Malay States. Perak started with 13 areas in the district of land, about 140,000 acres gazetted on 15th. June, 1914. This was followed by a number of areas in the districts of Krian, Kuala Kangsar, Perak Ulu, Perak Hilir dan Batang Padang. In 1923 an area of 54,000 acres was gazetted as an addition to the Malay Reservation in Perak. In 1930 60% of the land in Perak i.e. 215,524 acres out of 361,159 acres were gazetted as Malay Reserve land.

In my humble submission, I would safely say that the Federated Malay States then had tried hard enough to protect the interest of the Malays in land so as to avoid them from falling into the hands of the Non-Malays. A word of praise should be given to the rulers

of the Malay States then, together with the British for non-intervention in the land matters. Perhaps the British had made a study that the Malays should not be deprived of their right owning land if they i.e. the British wanted to stay longer in Malaya.

In Selangor the process of reserving land for the Malays covered an area of 60,000 acres in the districts of Ulu Selangor, Kuala Selangor and Kuala Langat. In Negeri Sembilan, the areas of Kuala Pilah and Tampin put under Malay Reservation are the leading districts compared to the other areas in the State. In 1918 an area of 400,000 acres was gazetted in the state as Malay Reservation. Several areas in Port Dickson and Seremban which were not Malay Reservation land were converted into Malay Reservation for the purpose facilitating administration. Whereas in Pahang the government had gazetted land situated in the districts along the river banks of Pahang River i.e. the whole area which were under the level as Malay Reservation.

The Malay Reservation Enactment of 1913 comprised of 3 essential parts i.e.

1. part 3 provides powers vested on the Resident to
-

choose and declare a certain area as Malay Reservation.

2. part 7 emphasised that land which had been reserved as Malay land cannot be transferred of its ownership to a Non-Malay.

3. part 8, 9, 10 imposed the restrictions on ownership of Malay Reserve land.

The 1913 Malay Reservation Enactment provided that the Malay Reservation land cannot be sold to a Non-Malay. Despite this provision of the law the fact remains that Malay Reserve land continued to be a problem and the land sold and leased to the Non-Malay. This problem had not been overcome especially when the Malays had dealings with the money-lender (Chettiar) who happened to be holder of the land title. For instance in 1920s the Malay Chieftans in Perak had raised the problem whereby the owners of the Malay Reservation land had entered into a secret agreement/contract with the Chinese for the purpose of leasing their land to the latter.

As a result of so many instances of ownership transfet of Malay Reserve land from a Malay to Non-Malays, the Malay Reservation Enactment 1913 was

revised and amended in 1933. The Malay Reservation Enactment 1933 strictly provides that Malay Reserve land cannot be transferred, leased or sold to any person who is not a Malay and any documents of transfer of ownership, charges or leases which contravene the provision of this law could not be registered at any land office or any Registration Office for ownership. (7) The Malay Reservation Enactment of 1933 (cap 142) was applicable only in the Federated Malay States whilst in the other Unfederated Malay States similar laws were also passed as follows:-

- i. Kelantan in 1930
- ii. Kedah in 1931
- iii. Perlis in 1935
- iv. Johor in 1936
- v. Trengganu in 1941 on the eve of the Japanese invasion into the Country.

The above mentioned laws are classified as the laws before Merdeka (Independence). By the time the country attained independence, the F.M.S Enactment had been amended several times to allow the listing of various leading agencies and institutions which had

7. Sek. 7 & 8 Malay Reservation Enactment 1933.

been permitted to take Malay reserve lands as security for land granted to their owners. The 1933 Enactment was amended several times, in 1934, 1936 and 1938. It was subsequently revised and reprinted in 1938 as F.M.S (cap 142). This liberalisation exercise was sorely needed by the owners as the experience of the 1930s has shown that even after the passing of the 1913 Enactment, the Malay owners either out of utter desperation or sheer ignorance, had continued to charge their lands to their Non-Malay creditors.

Even between the Malay Reservation Enactments of Federated Malay States and those of the Unfederated Malay States there is a difference in the provision of the Laws. For instance, in Kedah and Perlis, the Malay Reserve land following the provision of the law, can be leased or rented out to a Non-Malay for a period not exceeding 3 years. That being so there is in Kedah less than 60% of the Malay reserve land are those of the Malay Reserve land owned by the Malays themselves whereas the other 40% of the land belongs to the Malays in the name sake only and these Malay Reserve land which have economic value normally are owned by the Non-Malays. The Malays are regarded as

6. Mohd Ridzuan Awang at p. 346

9. See the statement made by the Deputy Director of Land and Mines of Kedah during the briefing to the UMNO Youth Chiefs in Utusan Malaysia dated 14.2.1975.

de facto owners.

There are also cited cases which further explained certain provisions of the 1913 Enactments especially that with regard to the dealings in the Malay Reserve land between Malays, and Non-Malays.

In the 2 leading cases of that period the Malay land owners had changed their lands to Non-Malays and had further executed powers of attorney in their favour. In the first case of GAN KHOR V SOAN BIN (10) PELITA decided in Selangor, Sir Samuel Thomas C.J had regrettably left open the question as to whether the charge in favour of the Non-Malay was valid or not under the Federated Malay States Enactment of 1913. At first assuming that the charge was not prohibited by section 8 of the said Enactment, the Chief Justice had later side-stepped the issue by conveniently declaring that:-

...it is unnecessary declaring in this case whether the charge is or is not valid under the Enactment, since, even assuming it is valid, the chargee has not entered into possession under the provision of the Land Code.

10. (1935) MLJ 158

Having so decided that the chargee had entered into possession of the Malay Chargor's land by virtue of the power of the attorney and not under the Land Code, and having further found that the said power had in fact been properly revoked the court held that the Chinese chargee was not entitled to remain in possession of the land.

I would humbly submit that despite all the attempts made by either party i.e. Malays or the Non-Malays the court when deciding on the issue of Malay Reservation should look into the spirit of the law. If it is for the protection of the interest of the Malays so be it. The decision in the Gan Khor's case, I submit is a good decision.

In the second case, which was from Perak, IDRIS
(11)
V NG SIEW the Malay owner had charged his land to a Non-Malay to secure a loan. Subsequently, the Malay owner had executed a power of attorney in favour of the chargee and also executed another agreement where-
he covenanted that the power of attorney would not be revoked as long as the loan had not been fully repaid. The owner however, subsequently, revoked. The power of attorney before full payment was made. The chargee

brought proceedings claiming, inter alia, that the agreement and the power of attorney constituted a valid and subsisting contract.

In the Court Of Appeal, Thomas C.J (F.M.S) held that the combined effect of the charge, the power of attorney and the agreement all bearing the same date, amounted to an evasion of the Malay Reservation Enactment of 1913. A different approach was taken by Huggard C.J (S.S) who, omitting any reference to the charge, held that:-

' the whole transaction as represented by the power of attorney and agreement was, in my view an obvious attempt to evade the provisions of the Malay Reservation Enactment and must be regarded as null and void under Section 13 of the Enactment '

It must be interesting to note that in most of the cases decided on the issue of charges in Malay Reservation land the parties are usually Malays and Non-Malays. There were no dealings in the early days between Malays and Malays. Why it was so ? 2 reasons came to my mind.

Firstly may be those days it was easier to get a loan from Non-Malays than from Malays. This was due to the fact that the Chinese were more well off compared to the Malays especially in Perak where the mining areas were mostly opened by the Chinese. This is again of the strategies adopted by the British Administrators in their Divide And Rule Policy. As mentioned earlier, Malays are mostly busy tilling their land and some unlucky ones without land would join the civil service and predominantly landed themselves in the Military and Police Forces.

Another reason could be that the Malays themselves feel that they are more secured dealing with the Chinese in matters relating to changing of Malay Reserve land for they very well know that the Chinese at the end of the day could not own the Malay Reserve land and that was why they are ever willing to go to court and let the law take its course.

The third appeal Judge Terrel J. stated that whilst he entertained no doubt whatsoever that the parties had intended to give the Chinese creditor 'some right or interest in Malay reservation land contrary to the provisions of the Enactment, he nevertheless held that as far as the charge was concerned,

it was 'not contrary' to the Enactment.

(12)

In SAKINAH V KUA TEONG HOW, Howes J similarly left open the question as the validity of a charge created by the Owner of a Malay reserve land in favour in favour of a Non-Malay.

(13)

In KAPOOR SINGH V HAJI IBRAHIM BIN HJ. MOHAMED the question involved was a simple one, i.e. the construction of the Malay Reservation Enactment, but it was one of practical importance. The facts are that plaintiff has a judgment against the defendant which is unsatisfied. The only asset of the defendant is land in a Malay reservation. The Malay Reservation Enactment is an example of legislation of a type which is quite common, and its objective is to prevent Non-Malays from owning land in certain areas. With this end in view certain transactions are prohibited. Among the transactions prohibited are certain proceedings by which creditors may enforce their rights. Section 12 provides that no Malay holding shall vest in the Official Assignee on the bankruptcy of the proprietor thereof. Section 13 is the material one, it provides that no Malay holding shall be attached in execution of a decree or order of any court. The plaintiff being unable to have recourse to bankruptcy

12. (1940) F.M.S.L R. 246

13. (1948) MLJ 29