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**A STUDY OF THE APPLICATION OF
EQUITABLE PRINCIPLES
TO THE MALAYSIAN LAND LAW**

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**INTERNATIONAL ISLAMIC UNIVERSITY
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AUGUST, 2002

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**A STUDY OF THE APPLICATION OF
EQUITABLE PRINCIPLES
TO THE MALAYSIAN LAND LAW**

BY
NOR ASIAH BINTI MOHAMAD

A THESIS SUBMITTED IN FULFILMENT OF THE
REQUIREMENT FOR THE DEGREE OF DOCTOR
OF PHILOSOPHY IN LAW

AHMAD IBRAHIM KULLIYYAH OF LAWS
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ABSTRACT

This study uses the method of case analysis in order to synthesis between two opposing arguments pertaining to the application of equitable principles to the Malaysian land law. However, the analysis of the majority of the cases shows that equitable principles of universal application might be necessary. This thesis further discusses the new developments of equity in other Torrens jurisdictions especially Australia, which has, to a considerable extent, influenced the trend of the application of equitable rules in Malaysia. An attempt is also being made to point out that the application of equitable principles to the Malaysian land law has caused some sort of uncertainties to the registration of titles. Since a policy consideration may be needed to resolve the dilemma of equity in the Malaysian land law, perhaps, time has come to consider other bases of equity including Islamic law. The numerous modes of deducing legal rules in Islam provide various means of exercising Islamic concept of equity.

Chapters 1-4 discuss research methodology, literature review, historical development of equity and sources of land law in Malaysia. The nature of equitable concepts applicable in Malaysia is also discussed. Chapters 5-7 survey the extent of application of equitable principles to all aspects of the Malaysian land law. Chapter 8 attempts to highlight the practicality of introducing Islamic equitable principles into the Malaysian land law. Chapter 9 concludes the research by giving some relevant recommendations.

ملخص البحث

إتبع هذه الدراسة الطريقة التحليلية لقضايا الأراضي وذلك لغرض المناقشة والتوفيق بين الآراء المتباينة حول تطبيق مبدأ العدالة الأنصافية في قانون الأراضي بماليزيا. لقد تناولت الدراسة أيضا بالتحليل مبدأ العدالة الأنصافية لدى الدول ذات الأنظمة المتشابهة لتسجيل ملكية الأراضي القائم على نظام (تورنز). لقد عنت الدراسة بصفة خاصة ما يحدث في أستراليا، عن طريق المقارنة، لكونها الدولة التي نشأت لديها نظام تسجيل الاراضي وأيضا لما كانت لأستراليا من أثر فعال في التطور الذي حدث في ماليزيا وخاصة في مجال تطبيق العدالة الأنصافية في قانون الأراضي. كما أنه لم يفت الباحثة أن تشير في بحثها ما للشرعية الإسلامية من أثر في هذا المجال وخاصة إذا سلمنا جدلا أن فرص تطبيق العدالة الأنصافية لا تخلو من الأعتبارات السياسية العملية التي تعنى بها الشريعة الإسلامية.

الفصل ١-٤: يتضمن مواضيع مختلفة مثل منهج البحث، الأستعراض العام وتطور العدالة الأنصافية وطبيعتها ثم مصادر قوانين الأراضي بماليزيا. الفصل ٥-٧: عبارة عن مسح تحليلي عام لتطبيق مبادئ العدالة الأنصافية لقانون الأراضي بماليزيا. الفصل ٨: محاولة لألقاء الضوء على مدى إمكانية الأستعانة بمبادئ الشريعة الإسلامية في مجال تطبيق العدالة الأنصافية لقضايا الاراضي بماليزيا. ثم كانت الخاتمة بالفصل ٩: حيث تضمنت الدراسة بعضا من المقترحات المتعلقة بنتائج البحث.

DECLARATION

I hereby declare that this thesis is the result of my investigations, except where otherwise stated. Other sources are acknowledged by footnotes giving explicit references and a bibliography is appended.

Name: Nor Asiah binti Mohamad

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It goes without saying that all the shortcomings and mistakes in the thesis are mine.

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LIST OF ABBREVIATION

A.G	Attorney General
AC	Appeal Cases
ACT	Australian Capital Territory
AIR	All Indian Reports
ALJ	Australian Law Journal
ALJR	Australian Law Journal Reports
All E.R.	All England Reports
AMR	All Malaysian Reports
App Case	Appeal Cases
APLJ	Australian Property Law Journal
Art	Article
Bhd	Berhad
Bom	Bombay
Bond LR	Bond Law Review
Bros.	Brothers
C.J	Chief Justice
CA	Court of Appeal
Cap	Chapter
Ch	Chancery
CH D	Chancery Division
CJ	Chief Justice
Cl.	Clause
CLA.	Civil Law Act
CLR	Criminal Law Review
CLR	Commonwealth Law Report
Co	Company
Conv.	Conveyancer
Corp.	Corporation
DBP	Dewan Bahasa dan Pustaka
DLR	Dominion Law Report
Ed.	Edition
Edit	editor
ER	English Reports
et al.	(et. alia) and others
FCJ	Federal Court Judge
FMS	Federated Malay States
FMSLR	Federated Malay States Law Reports
Fn; fn.	Footnote
Geo	Geocieties
Govt.	government
HL	House of Lords
HL Cas	Clark's House of Lords Cases
Http	hyper text transfer process
Ibid.	(ibidem) in the same place
i.e.	id est (Lat) that is
IDT	Issue Document of Title
IU	International Islamic University
in liq	In liquidation
Insaf	Bar Council Journal

J.H	Journal Hukum
Jan.	January
JCJ	Journal of Criminal Justice (Aust)
JIAEA	Journal of Indian Archipelago and East Asia
JMBRAS	Journal of Royal Asiatic Society – Malayan Branch
Ky.	Kyshe's Reports
Kyshe	Kyshe Law Reports
LAA	Land Acquisition Act
LBC	London Book Company
Leic	Leicester Reports
LP	Lord President
LR	Law Review; Law Reports
Ltd	Limited
Mal LR	Malaya Law Review
MLJ	Malayan Law Journal
MLN	Malaysian Law News
MLR	Malayan Law Review
MRE	Malay Reserve Enactment
MSLJ	Malaysian Student Law Journal
n.a	no author
n.pp	National Land Code
No	Number
no.	number
NSW	New South Wales
NT	Northern Territory
O	Order
OCBC	Oriental Chinese Banking Corporation
OUP	Oxford University Press
Ors	Others
p.	page
PC	Privy Council
Ph. D	Doctor of Philosophy
PHT	(Pemungut Hasil Tanah) Colletor of Land Revenue
pp.	pages
Prec. Ch.	Precedents in Chancery
Pte	Property
QB	Queens Bench
rd.	Third
Reg	Regina
Rep	Report
s.w.t	Subhā nahu wata 'āla
SA	State Authority
SALR	South Australian State Reports
Sask. L. Rev.	Saskatchewan Law Review
SCJ	Supreme Court Judge
Sdn	Sendirian
Sec	section
SS BA.	Straits Settlement British Administration
SSF	Selangor State Files
Supp	supplementary
TAS	Tasmania
TLA	Transfer Land Act

TOL	Temporary Occupation Licence
ULR	University Law Review
UNSW Law Journal	University of New South Wales Law Journal
V-C	Vice Chancellor's Court
VIC	Victoria
Viz	videlicet (Lat) namely
Vol.	volume
WA	Western Australia
WALR	Western Australia Law Review
WLR	Weekly Law Report
WN (NSW)	Weekly Notes (New South Wales)

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TRANSLITERATION TABLE

CONSONANTS:

ا	A	ز	z	ق	q
ب	B	س	s	ك	k
ت	T	ش	sh	ل	l
ث	Th	ص	ṣ	م	m
ج	J	ض	ḍ	ن	n
ح	ḥ	ط	ṭ	ه	h
خ	Kh	ظ	ẓ	و	w
د	D	ع	‘	ء	’
ذ	Dh	غ	gh	ي	y
ر	R	ف	f		

VOWELS:

Short Vowels

اَ A

اِ I

اُ U

Long Vowels

اَـ ā

اِـ ī

اُـ ū

Diphthongs

اَوـ aw

اَيـ ay

Doubled

اَوَوـ uww

اَيَيـ iyy

CHAPTER ONE

STATEMENT OF INTENT AND RESEARCH METHODOLOGY

1.1 Background of Study and Statement of Problem

Much has been said about the role of equity and its peculiarity under the Malaysian land law. Most of the writers and academics seem to agree that equitable principles have taken their place comfortably under the Malaysian land system despite many attacks and criticisms made by the courts in their decisions.¹ In fact, it has been suggested that it should be considered a well-settled law that equity has formed part of the Malaysian land law.² However, further discussion of this topic will show that equity does not fit easily into the structure of the Malaysian Torrens system. Part of this can be seen in the many conflicting decisions from the courts, some of which emphasise registration as the cardinal principle under the system. Hence, accepting the role of equitable principles will, to some extent, undermine the Torrens concept.³ Another important point which the writer wishes to emphasise in this study is the issue of the acceptance of English equitable principles as part of the concept of equity. There are cases where the judiciary has overlooked Islamic principles as a possible basis for the application of equitable principles.⁴ This has resulted in some of the legal

¹ Teo and Khaw, *Land law in Malaysia, cases and commentary*, Butterworth Asia, Malaysia, 2nd. Ed., 1995, p. 258; Wong Sai Heng, "Equity in Malaysian land law", (1991) *Insaf*, (Special Report) 9th. Malaysian Law Conference, p. 300

² R.R Sethu, "Equity in Malaysian land law", (1991) *Insaf*, (Special Report) 9th. Malaysian Law Conference, p. 301.

³ See, a comment by Teo and Khaw pertaining to the decision of *Mok Deng Chee v. Yap See Hoi* [1981] 2 M.L.J 321 in "Equity in Malaysian land law", (1991) *Insaf*, (Special Report) 9th. Malaysian Law Conference, 255 at p. 273.

⁴ See, Salleh Buang, "Kearah pengislaman Kanun Tanah Negara: satu kajian perbandingan". Paper presented at Seminar Perundangan Tanah Menurut Perspektif Islam, IIU, 18-19 March, 1989.

practitioners missing the valuable opportunity to apply the Islamic principles in their decisions as one of the bases for administering the “equitable principles”⁵. Furthermore, recently, the English courts have accepted a principle known as the “new equity”. One of the problems with this new principle is that in some ways it runs contrary to the religious and moral teachings in Malaysia.⁶ Thus, it is vital for the Malaysian courts to revise its policy towards adopting the English equitable principles as a basis for promoting equity.

Various court decisions and scholars’ opinions on this subject show that there are many uncertainties with regard to the position of equity especially in the aspect of real property law in Malaysia. Judges, lawyers and academics have made many remarks and observations on this issue but the uncertainties have yet to be resolved. Their writings seem to suggest some justifications as to whether equity should be adopted or rejected in the Malaysian land law. However, there is no an in depth study so far, to convince the public of the legitimacy of rejecting or accepting the equitable principle. Furthermore, up to this date, to the best knowledge of the author, there is no research undertaken to assess to what extent the equitable principles are in compliance with Islamic principles and values in the Malaysian context. Thus, this study seeks to analyse the views of the academics and the judiciary with the hope of providing the basis for accepting or rejecting the principles of equity. At the very least, it is hoped

⁵ For example, see *Sidek v. State Govt. of Perak*, [1982] 1 M.L.J 313

⁶ *Tinsley v. Morgan* [1993] 3 All ER 65. It has been said that this case “is a spectacular manifestation of diversity of current judicial opinion on this most confused and confusing branch of law, namely recovery of property transferred under or pursuant to illegal transaction,” see Enonchong Nelson, “Illegality, the fading flame of public policy”, (1994) 14 *Oxford Journal of Legal Studies*, 295.