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THE LAW OF EASEMENT UNDER THE NATIONAL  
LAND CODE 1965: A COMPARATIVE ANALYSIS

BY  
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## ABSTRACT

The law of easement enables the owner of one neighbouring land (known as the dominant owner) to enjoy benefits from the use of land belonging to the actual owner (known as the servient owner). In the Malaysian Torrens System, the grant of easement must be in accordance with the National Land Code 1965 which requires the registration of the prescribed instrument. On the other hand, easement under the English law of real property may be acquired by various methods such as by prescription and express or implied grant, etc. Furthermore, Islamic law recognises rights similar in nature to those of easement, known as *irtifāq*, a liberal approach being adopted by the Islamic scholars in dealing with the acquisition of rights of *irtifāq*.

This dissertation attempts to examine the concept, nature and implementation of law of easement in Malaysian law, common law and Islamic law. This library based research emphasises the practicality of the different approaches adopted in respect of creation of easement and concentrates on relevant statutory provisions and decided cases.

Based on the comparative analysis made, it is observed that the strict rule of registration of an express grant of easement under the National Land Code 1965 resulted in conflicting claims as to the existence of easement especially in dealing with landlocked cases and cases of uninterrupted user for long periods of time. Recommendations are brought up with a view to suitably recognising some common law and Islamic law principles in the concept of easement in Malaysia.

## ملخص البحث

تمكّن القواعد القانونية المنظمة لحقوق الارتفاق من إنشاء علاقات قانونية بين مالكي العقارات المتجاورة حيث يصبح بمقتضاها للمالك عقار معين حق الاستفادة من عقار مالك آخر مجاور له، و يسمى العقار المستفيد بـ(المرتفق) و العقار المستفاد منه بـ(المرتفق به). و وفقا لنظام التسجيل العقاري القائم في ماليزيا و المعروف باسم النظام "التورنزي" فإن منح حق الارتفاق يجب أن يتم وفقا لأحكام قانون الأراضي الماليزي لسنة 1965م و الذي تنص أحكامه على لزومية تسجيل وثيقة المنح.

و من جانب آخر فإنه وفقا لأحكام القانون العام الانجليزي المتعلق بالملكية العقارية فإن حق الارتفاق يمكن اكتسابه بعدة طرق، مثل التقادم المكسب و المنح الصريح أو الضمني و غيرها. أما الشريعة الإسلامية فقد ضمنت حقوقا شبيهة في طبيعتها لهذه الحقوق العينية التبعية و تسمى أيضا بحقوق الارتفاق، هذا و قد اتخذ فقهاء الشريعة الإسلامية نزعة أكثر تسامحا في تحديد طرق اكتساب هذه الحقوق.

و يتناول هذا البحث التحليلي النظري موضوع الارتفاق مفهوما و طبيعة و تطبيقا في كل من القانون الماليزي و القانون العام الانجليزي و الشريعة الإسلامية مؤكدا على بيان مدى نجاعة مختلف النظريات المتعلقة بنشوء حق الارتفاق في مختلف الأنظمة موضوع الدراسة مركزا على تحليل النصوص القانونية و السوابق القضائية ذات الصلة.

و قد كشفت هذه الدراسة المقارنة أن التقييد الحرفي بقانون الأراضي الماليزي لسنة 1965م في تسجيل منح حق الارتفاق قد أدى إلى جدل قانوني حول مدى نجاعة هذا القانون لا سيما في قضايا الأراضي الحبيسة أو تلك التي استُخدمت لمدة طويلة نسبيا دونما اعتراض.

وعليه فقد أوصت الدراسة بتطعيم قانون حق الارتفاق المعمول به في ماليزيا ببعض المبادئ المناسبة من القانون العام الانجليزي و الشريعة الإسلامية.

## APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Master of Comparative Laws.



---

Azmi Hj. Harun  
Supervisor

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Master of Comparative Laws.



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This dissertation was submitted to the Ahmad Ibrahim Kulliyah of Laws and is accepted as partial fulfillment of the requirements for degree of Master of Comparative Laws.




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Nik Ahmad Kamal Nik Mahmod  
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# DECLARATION

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

NUR HAYATI BT. HJ. HAMZAH  
Name .....

Signature.....

Date...24<sup>th</sup> February 2001.....

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*Dedicated to My Beloved Husband,*

*Daughter and My Family*

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# TABLE OF CONTENTS

Abstract	ii
Approval Page	iv
Declaration	v
Acknowledgements	viii
Table of Cases	xi
CHAPTER ONE: INTRODUCTION	1
1.0 Background of the Study	1
1.1 Statement of Problem	2
1.2 Objectives of the Study	3
1.3 Scope and Limitation of Study	4
CHAPTER TWO: NATURE OF EASEMENTS	5
2.0 Introduction	5
2.1 Definition	6
2.2 Characteristics of Easement	9
2.2.1 There must be a dominant and a servient tenement	10
2.2.2 The right must accommodate the dominant tenement	11
2.2.3 Dominant and servient owners must be different persons	13
2.2.4 The right must be capable of forming the subject matter of the grant	14
2.2.5 Characteristics under Islamic law	18
2.3 Easement Distinguished from Other Rights	19
2.3.1 Natural rights	19
2.3.2 Public rights	21
2.3.3 Restrictive covenants	22
2.3.4 Licence	24
2.3.5 <i>Profits a prendre</i>	24
2.4 Species of Easements	25
2.4.1 Rights of way	27
2.4.2 Right of support	29
2.4.3 Rights of water	30
2.4.4 Rights of light and air	32
2.4.5 Rights of neighbours	33
2.5 Conclusion	35
CHAPTER THREE: CREATION OF EASEMENT	36
3.0 Introduction	36
3.1 The Creation under English law	37
3.1.1 Easements acquired by Statute	38
3.1.2 Easements acquired by express grant or reservation	39
(i) Express grant	39
(ii) Express reservation	40

3.1.3 Easements acquired by implied grant or reservation	41
(i) Implied grant	41
a. Easements of necessity	42
b. Intended easements	45
c. Easements within the rule in <i>Wheeldon v. Burrows</i>	46
d. Easements under section 62 of Law of Property Act 1925	48
(ii) Implied reservation	49
a. Easements of necessity	49
b. Easements of common intention	50
3.1.4 Easements acquired by prescription	51
(i) Prescription at common law	53
(ii) The Prescription Act 1832	53
(iii) The doctrine of lost modern grant	54
3.2 The Creation under Malaysian law	58
3.3 The Creation under Islamic law	68
3.4 Conclusion	69
CHAPTER FOUR: EQUITABLE RIGHT TO EASEMENT IN MALAYSIA	72
4.0 Introduction	72
4.1 Implementation and Enforcement of Easement in Malaysia	72
4.2 Equity in the Malaysian Land Law	78
4.3 Application of Equitable Principles in the Law of Easement	83
4.4 Acquisition of Easement in Equity	84
4.4.1 By estoppel	84
4.4.2 The doctrine of constructive trust	89
4.4.3 By contractual obligation	90
4.5 Conclusion	92
CHAPTER FIVE: CONCLUDING REMARKS	94
BIBLIOGRAPHY	101

## TABLE OF CASES

- Ackroyd v. Smith* (1850) 10 CB 164
- AG for Southern Nigeria v. Holt & Co.* [1915] AC 599
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*Kueh Teck Lin & Ors v. Hock Hua Bank Ltd.* [1968] 2 MLJ 225  
*Kwong Hing Realty Sdn. Bhd. v. Malayan Building Society Bhd.* [1997] 5 MLJ 670  
*Lian Keow Sdn. Bhd. (in liquidation) & Anor v. Overseas Credit Finance (M) Bhd & Ors* [1988] 2 MLJ 449  
*Liow Tow Thong & Ors v. Pentadbir Tanah Alor Gajah & Ors* [1998] 1 MLJ 79  
*Lye Thean Soo & Ors v. Syarikat Warsaw* [1991] 3 MLJ 369  
*Lysaght v. Edwards* (1876) 2 Ch D 499  
*Mahadevan s/o Mahalingam v. Manilal & Sons (M) Sdn. Bhd.* [1984] 1 CLJ 286  
*May v. Belleville* (1905) 2 KB 685  
*Mercantile Bank v. The Official Assignee* [1969] 2 MLJ 196  
*Metropolitan Railway Co. v. Fowler* [1892] 1 QB 165  
*Mok Deng Chee v. Yap See Hoi & Ors* [1981] 2 MLJ 321  
*Moody v. Steggles* (1879) 12 Ch D 261  
*Nickerson v. Barraclough* [1981] Ch 426; [1981] 2 All ER 369  
*Oh Hiam v. Tham Kong* [1980] 2 MLJ 159  
*Ohna Mohamed Abubakar v. Tho Yan Poh & Ors* (1915) 13 SSLR 39  
*Ong Chat Pang v. Vallappa Chettiar* [1971] 1 MLJ 224  
*Phillips v. Low* [1892] 1 Ch 47  
*Phipps v. Pears* [1965] 1 QB 76  
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*Re Ellenborough Park* [1956] ch 131; [1956] 3 ALL ER 667  
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*Wilkins v. Kannamal* (1951) MLJ 99  
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# CHAPTER ONE

# CHAPTER ONE

## INTRODUCTION

### 1.0 Background of the Study

The Malaysian Torrens System recognised rights which one land owner could acquire over the land of another, easement being one of the rights conferred over neighboring lands. By virtue of section 5 of the National Land Code 1965 (hereinafter referred to as 'the Code'), easement falls within the general scheme of 'dealings' as set out in Division IV of the Code. Like any other dealings such as charges, transfers, leases and tenancies, the grant of easement must be in accordance with the statutory form and procedure as prescribed in the Code since the Torrens System strictly adheres to the cardinal rule that only registration that will enable a person or body to obtain title or interest in any alienated land. Thus, section 284 of the Code strictly stipulates that the only method of creation of easement is by express grant in Form 17A or Form 17B<sup>1</sup> which must be duly registered.

On the other hand, easement in English law is described as 'a privilege that one neighbour has of another, *by way of prescription* (emphasis added), without profit, as a way or link through his land or such like'.<sup>2</sup> It is clear from this description that easement under English law can be created otherwise than by express grant such as by prescription, implied grant, long user, custom or acquiescence, etc.

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<sup>1</sup> Schedule 1 of the Code

<sup>2</sup> Bakshi, P.M., *Katiyar's Easements and Licences*, 11th ed., The Law Book Co (P) Ltd, India, 1993, p.50.

Rights of a similar nature to easement under Islamic law are known as *irtifaq* and it can come into being on the basis of long user, according to which their existence have been proven since time immemorial.

## 1.1 Statement of Problem

Easement acts as a tool in order to enable the owner of one neighbouring tenement<sup>3</sup> (known as the dominant owner) to gain any benefit from the use of land belonging to the actual owner (known as the servient owner). This conforms to the definition of the term 'easement' itself which means something to makes life easier.<sup>4</sup> However, the position in Malaysia in this respect is quite stringent since application must first be made for the grant of easement. Therefore, when there is a need for an easement in respect of neighbouring lands, the dominant owner must fill in the necessary form and must register it before the benefit can be conferred upon him.

The writer feels that such a position in Malaysia needs to be improved since it creates difficulties on the part of both owners of land. In fact, disputes have arisen as a result of the strict requirements of section 284 of the Code. Thus, this study seeks to answer the following questions;

1. Is the requirement of express grant in the Code necessary?
2. Can equitable easement be applied in Malaysia?
3. To what extent is the law of easement implemented and enforced in Malaysia?
4. To what extent is the law of easement recognised in Islamic law?

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<sup>3</sup> A 'tenement' is a term which is used to refer to a piece of land or/ and portion of land, such as building or flat

<sup>4</sup> Sara, C., *Boundaries and Easements*, Sweet and Maxwell, London, 1996, p.169.



## 1.2 Objectives of the Study

In conformity with the statement of the problem and in the absence of any detailed study as to the practicality of the position of easement in Malaysia, it is the intention of the study to trace and tackle any loopholes in the Malaysian Torrens System in this respect.

Indeed, this study aims to achieve the following objectives:

- a. To examine the practicality of creation of easement under the Code as compared to the position in the English law of real property.
- b. To study the application of equitable easement in Malaysian land law.
- c. To ascertain to what extent the law of easement is implemented and enforced in Malaysia.
- d. To make a comparison with the nature of easement under Islamic law.

Some recommendations will be made at the end of this study to improve the law of easement in Malaysia based on the research. In order to grasp a clear idea of the nature of easement and to tackle the shortcomings of the present system, comparisons will be made with English law, Islamic law as well as other jurisdictions, if possible.

### **1.3 Scope and Limitation of Study**

This study humbly attempts to examine the concept, nature and implementation of easement in the Malaysian Torrens System. The writer will emphasise mainly the question of creation of easement according to the Code and compare it with the position in English law and Islamic law. This study seeks to identify any loopholes in the Malaysian Torrens System as regard to the issue in question.

This study consists of five main chapters. Chapter one which is the introductory part will define the background, objective and scope of study.

Chapter two will touch on the nature of easement which includes the definition of easement, the essential characteristics of easement, easement as compared to other rights and types of easement.

Chapter three will concentrate on the creation of easement and a comparative analysis will be made between section 284 of the Code, English law and Islamic law. An analysis on the relevant leading cases will also be conducted.

Chapter four will discuss the application of equitable easement in Malaysia as compared to the position in England.

Chapter five, which is the concluding chapter will summarize the dissertation and emphasise on the comparative analysis between the law of easement in Malaysian law, English law and Islamic law. Recommendations will be made with the aim of improving the position in Malaysia based on the research.

## CHAPTER TWO

# CHAPTER TWO

## NATURE OF EASEMENTS

### 2.0 Introduction

Under English common law, easement is classified as incorporeal hereditaments, which means “the rights of property of certain special classes”. In contrast, the Malaysian Torrens System does not possess such a classification for easement since both corporeal and incorporeal hereditaments together make up what is ‘real property’ in the wide sense.<sup>1</sup> The basic difference between corporeal and incorporeal hereditaments is that corporeal hereditaments are physical objects and not rights while incorporeal hereditaments are rights and not physical objects. Incorporeal hereditaments refer to rights in land which do not give the owner a right of way to physical possession of the land such as easement and *profits a prendre*. Both are merely rights over the land of another.

The law of easement is introduced to provide a solution in respect of neighbouring lands since one may claim certain rights over the land of one’s neighbour. In order to understand the nature of easement generally, we must first examine the definition of easement, the essential characteristics of easement, the distinction between easement and other rights and the various types of easements.

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<sup>1</sup> Burn, E.H., *Cheshire and Burn's Modern Law of Real Property*, 15th ed., Butterworths, London, 1994, p. 814

## 2.1 Definition

Easement is defined in section 282 (1) of the Code as 'any right granted by one proprietor to another, in his capacity as such and for the beneficial enjoyment of his land'. Section 282 (3) further explains that the land and the benefit of which the easement is granted is called the 'dominant land', and the land of the proprietor by whom it is granted is called the 'servient land'.

Under English common law, easement is defined as 'a privilege without a profit, that is to say, it is a right attached to one particular piece of land which allows the owner of that land either to use the land of another person in a particular manner, as by walking over or depositing rubbish on it, or to restrict its user by that other person to a particular extent, but which does not allow him to take any part of its natural produce or its soil'.<sup>1</sup>

An easement may also be defined as 'a right annexed to land to utilise other land of different ownership in a particular manner (not involving the taking of any part of the natural produce of that kind or any part of its soil) or to prevent the owner of the other land from utilising his land in a particular manner'.<sup>2</sup>

Gale defines an easement as being a privilege without profit, which the owner of one neighbouring tenement has of another, existing in respect of their servient tenements.

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<sup>1</sup> Burn, E.H., *Cheshire and Burn's Modern Law of Real Property*, p.518

<sup>2</sup> *Halsbury's Law of England*, vol.14, 4th ed., Butterworths, London, 1975, p.4.

However, the servient owner is obliged 'to suffer or not to do' something, on his own land for the advantage of the dominant owner.<sup>3</sup>

By comparing the definitions as set out in the Code and English common law, it seems that the definition given in the Code is rather brief and needs further explanation. While from the definition of the English scholars, it can be inferred that they tried to distinguish between easement and *profits a prendre* when the term 'privilege without profit' was emphasised. It is therefore, submitted that the concise way of defining easement in the Malaysian context is 'a right granted in respect of neighbouring tenements, which allows the owner of one particular piece of land (known as the dominant owner) to utilise and benefit from the land of the other (known as the servient owner) in a particular manner, either by way of doing something or restricting its user to a particular extent'.

Under Islamic law, on the other hand, rights which correspond with the nature of easement are known as *irtifāq*. Literally, it is defined as benefit or putting one's hand under one's chin. Technically speaking, a right of *irtifāq* is one that relates to the property itself and not the owner or the benefiting party. Since it has no relation to the person, this right exists forever without any regard to death or change of ownership. Thus, it shall run with the land and no one has the right to terminate or extinguish this right.<sup>4</sup>

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<sup>3</sup> D.H. Mc Mullen, *Gale on Easement*, 12th ed., Sweet & Maxwell, London, 1950, p.10

<sup>4</sup> Muḥammad Salām Madkūr, *Al-Fiqh Al-Islāmī*, 2nd ed., vol. 1., Maktabah 'Abdullah Wahbah, Cairo, 1955, p.194

An easement under English law and Malaysian law may be either positive or negative. A positive easement entitles the dominant owner to do something upon the land of the servient owner. For example, A has the right to walk or pass unimpeded over the land of his neighbour, B. While negative easement does not permit the execution of an act but imposes a restriction upon the use which the servient owner may make of his land. Easement of light may serve as an example, in which B is prevented from blocking the access of light to A's window. In either event, an easement is usually a legal interest capable of benefiting A's land and burdening B's indefinitely.<sup>5</sup>

Section 283 (1) of the Code explicitly explains that both positive and negative easement may be granted. It states:

- The rights capable of being granted as easements are, subject to subsection (2) –
- (a) any right to do something in, over or upon the servient land; and
  - (b) any right that something should not be so done.

An easement confers upon its owners no proprietary or possessory right in the land affected. It merely imposes specific restrictions upon the proprietary rights of the servient owner. A right which entitles one person to unrestricted use of the land of another may be an effective ownership or possession, but it cannot be an easement.

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<sup>5</sup> Ricquier, W.J.M., *Land Law*, 2nd ed., Butterworths, Singapore, 1995, p.155.

## 2.2 Characteristics of Easement

If an interest is to be an easement, it must possess the following four characteristics,<sup>6</sup> namely :

- (a) there must be a dominant and a servient tenement
- (b) an easement must accommodate the dominant tenement
- (c) the proprietors of the dominant tenement and the servient tenement must be different persons, and
- (d) the right must be capable of forming the subject matter of the grant.

It is worth noting that these characteristics which have established the criteria for a valid easement under English Law would appear to apply in their full vigour in Malaysia.<sup>7</sup> In fact, in *Tam Kam Cheong v. Stephen Leong Kan Seng & Anor*,<sup>8</sup> Salleh Abas F.J (as he then was) stressed that for a claim of easement to be established, every easement must possess these four characteristics.<sup>9</sup>

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<sup>6</sup> *Re Ellenborough Park* [1956] ch 131; [1956] 3 All ER 667

<sup>7</sup> Salleh Buang, *Malaysian Torrens System*, Dewan Bahasa dan Pustaka, Kuala Lumpur, 1995, p.138.

<sup>8</sup> [1980] 1 MLJ 36

<sup>9</sup> see also the Singapore case of *Seah Sye Kim v. Chua Mui Ying* [1988] 2 MLJ 1 where these characteristics were quoted with approval.