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Malay customary tenure and conflict on implementation of colonial land law in Peninsular Malaysia

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Since the independence in 1957, land tenure system in the Peninsular Malaysia (PM) has changed. The land law and regulations have been frequently amended so that the provisions and rationale of the laws can be properly understood and continuously evaluated to suit the current requirements. This paper review the Malay customary land tenure and the development of colonial land system, which has be examined through its historical evident with the aid of law cases. Even though the modern system of land tenure and land law has been widely observed and has governed land dealings in the country, customary land tenure system are still much influenced and practiced especially among the rural Malay society. The Malay customary law consists of customs and traditions of the Malay, which in the course of time acquired the character of laws and can be only, enforced by the chief or elders. It must be ancient, certain and reasonable and being in derogation of the general rules of law, and construed strictly. The paper identified the mixtures and interaction of both systems, which has been developed by the colonials to displace the existing indigenous Malay customary land tenure. The development of modern land tenure system was explained in the context of the different separate entities other than historical study on the previous land law before the commencement of the current act. Therefore, by combining the ancient Malay customary tenure, the period of colonial and the post independence land tenure system, this paper highlight a concise and comprehensive form of land tenure system that is being applied in the Peninsular Malaysia.

Key words: Customary law, land tenure, colonial government, sultan, Malay reservation.

INTRODUCTION

Malay customary law

The Malay customary law consists of customs and traditions of the Malay, which in the course of time acquired the character of laws and can be only, enforced by the chief or elders. Being a living law of a certain place it is adaptable to changing social needs and as such may not suitable for codification (Ibrahim et al., 1987). The Malay customary law or Malay *adat* varies from one region to another and between one racial or ethnic group.

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Hooker (1972) defined custom or *adat* as a canon of morality and justice respect for tradition and kinship structure and judicially stated rules. Wu (1982) defined the Malay customary law as a body of rules, applies only to a particular racial or religious group in which in this context refers to the Malays and the religion of Islam. For example, Islamic law applies to Muslims irrespective of their ethnic affiliation, and native customary law to those identified as natives. Customary law is further defined as a rule in a particular family or in particular district has from long usage obtained the force of law (Harpushad v. Sheo Dyal). It must be reasonable and being in derogation of the general rules of law, and construed strictly.

Customary law used in the sense of a rule in a particu-

lar district, class, or family, which has from long usage obtained the force of law, must be ancient, continued, unaltered, uninterrupted, uniform, constant, peaceable and acquiesced, reasonable, certain and definite, compulsory and not optional to every person to follow or not (Haji Saemah v. Haji Sulaiman). The acts required for the establishment of customary law must have been performed for the establishment with the consciousness that they spring from a legal necessity. According to the rules, a custom must possess the characteristics of being ancient and standing with the passage of time. The criteria for acceptance of custom as a source of law are it has to possess sufficient measure of antiquity, it has been followed continuously, it must be certain and precise and it must be consistent with other customs in the area. In the Peninsular Malaysia (PM) custom and the law of *adat* survived as acquired by the character of law in the course of time. This was characterized by "*adat perpatih*" and "*adat temenggong*" (Ibrahim, 1992). According to Wilkinson (1908) the *"adat perpatih"* was democratic and addressed to the common people and find expression in quaint sayings that seem to belong to the homely province of proverbial philosophy. The "*adat temenggong"* is autocratic and imbued with Hindu influences and Islamic law (Ibrahim, 1989) and based on a patrilineal system, which was influenced by the *syariah* law and became patriarchal. It is protected by classifying it as *"mukim"* land (village or sub-districts) under the registration of titles or Land Enactment or under the Malay Reservation Enactment. In order to preserve the tribal lands, early titles issued by the British in Malacca were endorsed as customary land and incidents of ownership were regulated by tribal *adat* rules. When such land is sold to an outsider with consent from the tribe, the land will no longer be tribal land. The first European power that came to Malaya was the Portuguese and seconded by the Dutch. The Portuguese destroyed Malacca Sultanate and occupied the kingdom from 1511 - 1641 and were succeeded by the Dutch who occupied for 130 years before surrendered to the British in 1795. The British began with the occupation of Penang (1786); Singapore (1819) and the cession of Malacca (1824). The Dutch re-occupied it from 1801 - 1807 but ceded it to the British in 1824.

The Lex loci of Malacca after it was re-occupied by the British is that the Portuguese and the Dutch while they held Malacca, left the Malay customary land law or lex non scripta on practiced. According to the British, the Portuguese and the Dutch left to the Malay people with their customary land law unaltered, in force with plain and general principles (Maxwell, 1884). The law does not leave much evident on administration of justice in the Malacca empires before conquered by the Portuguese. Land in Malacca during the period was governed by the rules of customary land tenure, a system which acknowledged that all lands belong to the Sultan on the throne. Indeed, this is one of the basic principles of the Malay customary tenure apart from the *"adat perpatih."* The British view is that the administration of justice and the enforcement of the Malay customary law were made by the means of increasing respects to the position of the Sultan. The Malay customary tenure and principles of law were indeed contained in some of the Malacca Sultanate State Laws of 1523 and was also described in the Malay Annals and Malacca Digest.

MATERIALS AND METHODS

Data collection

In this study data semi-structured and informal interviews, discussions, observations and investigations were employed. Three types of investigation techniques were employed to collect the data, which were the documentary reviews, field observations and in-depth interviews. The reviewed documents included historical and current legal documents, statutes, precedent cases and arbitration reports on various issues of land disputes. References on legal cases and statues were reviewed from the Supreme, Federal and High Court and Ministry of Justice, Malaysia. The State Secretary and Land Offices shared the information on state law and enactment, gazettes and circulars related on Malay customary law. In addition, the respective State Royal Council members illustrated historical information on royal court related matters. Overall, the gathered secondary information helped to clarify the basic issues in assessing the actual condition and characteristics of the system implemented in the PM. Micro-politics and other social economic imperatives directly concerned with local communities, their opinions and perspectives were also considered important in this study.

RESULT AND DISCUSSION

The sultan and sovereign right on land

Legal writers and historians believed that before the arrival of British to the Malay Peninsula, a systematic form of government existed in various states since the Malacca Sultanate. Indeed, there was a hypothesis that monarchial government was superimposed on the Malay communities whose origins were from the Hindu rulers (Winstedt, 1935). Nevertheless, after the fall of Malacca Sultanate (1511) there was no evident whether the Sultan or ruler in other states continued to declare as absolute owner of the state land until the British arrived. As the political system in the Malay states developed with the advent of the sultanate, the Malay peasants were subjected to certain obligations such as payment of tithes on land, agriculture or forest products to the Sultan who owned the land.

The Sultan or ruler of the state declared himself as the absolute owner of the land in his ruling state. However, there was never any evidence of the notion under the Malay political system existed prior to the British intervention that the Sultan was the absolute owner of the land within his jurisdiction. According to Wong (1972a), there is no concrete evidence to suggest that the imposition of

monarchial rule on the Malay peasants even at the stage of its later development into a sultanate as powerful as that Malacca Sultanate had resulted in the introduction of the tenurial system of relationship between the Sultan and his subjects. In addition, Wong (1972b) held in his treatise and critical point of view that it is not accurate to treat all lands belonging to the Sultan as provided under the Malay customary land tenure system. The tenure recognized private usufructuary rights in the land.

The Sultan and territorial chiefs have established areas of settlements such as the vast uncleared and occupied land was simply no man's land. That is, the powers of the Sultan and chief's should accurately be defined in reference to the localized communities or settlements than in terms of any notions of paramount ownership in the settled lands. Wong propounded and further argued about the theory in the Malacca sultanate on which the soil was vested solely in the Sultan arose on the misconception of the Maxwell classic work interpretation and treatise on Malay customary land tenure. The fallacy of Maxwell's argument was thus relied unreservedly on a supposition of Hindu influence in explaining the historical or conceptual origin of such feudal system in the Malay Peninsula. Maxwell did not provide any conclusive evidence as to the feudal existence of such a system. Maxwell's theory was merely a product of speculation and theorization based on his personal ideas and perspectives on the application of land tenure system existed in the Malay Peninsula. Maxwell propounded such theory in order to justify his claim. Land then the only asset of the country was really what the colonial government was after. The potentialities of their use and development for mining, agriculture and forest exploitations could be see no limits but the boundaries of the state.

The new government should have full ownership in and power of disposal over the vast no man's land could not therefore have been subject to any question. Whatever was the exact position under the indigenous system of land tenure, it was simply taken for granted by the colonial government that all lands in the state must owned by the Sultan. The right of the *ra'ayat* (people) was absolute as long as he continues to pay tithe. A regards abandoned land or land to which there is no heir, it reverted to the Rajah (Sultan). Forfeiture was incurred in default of payment of tithe. In the next result the *ra'ayat* could not claim more than a usufruct, continuous as so long as he chose, and terminable on abandonment. It was thus that the doctrine of the ultimate right to the soil in the Rajah was created and it is still the law in the Malay States. Whatever may be the true position of the system the enforced in the Malay States, with the British intervention changes took place.

The British established a central government in each state and the Sultan was held out as the absolute monarch of his ruling state. During the period the Sultan could not exercised his power in his own state. For the real source of power were the British officers through their Resident General. The Sultan was only regarded in theory as the ultimate owner of all the land in his state. He likewise equipped with the power to grant and deal with land or make new laws pertaining to land related matters. However, the final decision was in the British Resident authority.

The inheritance of English law was applied in Malacca from the introduction of the King's of England Charter of Justice in 1807 *(Rodyk v. Williamson and Moraiss v. De Souza).* However, the Dutch law was also preserved and later converted to English in the nature of fee simple. The English Deeds System was enforced by the English colonial administrators that henceforth all land shall be vested in the Crown as the English property law. While there was unanimity as to the effect of the Charters of Justice in introducing English law into the SS, there was considerable doubt that English law was introduced and the modification was necessary on account of the Malay customary land law and usage of the inhabitants.

The Charter of 1807 secures to all the native subjects the free exercise of their religion, indulges them in all their prejudices and pays the most scrupulous attention to their ancient customary land law, usage and habits. All land tenure and civil related matters justice was to administer among the native races, which meant the Malays according to their respective customary land law. When Malacca administered by the British, the Malay customary land tenure, the system of Dutch Grants and the English deed system was prevailed in the state. In contrast to the FMS, the states were sovereign and not subject under the British colony. Therefore, English land law was not deemed to introduce into those states. The prevailing land law was only the Malay *adat* law, an amalgam of *Syariah* law and the Malay customary land law. However, for the U-FMS, the land property would be distributed according to English land law, or secondly, according to *Syariah* law or thirdly, according to the state law. U-FMS are virtually English and that the land law administered must be English because the judges and lawyers are English *(Ong Cheng Neo v. Yap Kwan Seng).* English land law as such does not prevail in these courts except in so far as it has been adopted. As to the *Syariah* law, the entire law is considered as personal law.

Founded on religion bases and gives rights only to those who acknowledge Islamism. Only a Moslem has a right of succession regulated by the laws of Islam. But as to the succession by non-Moslems to the inheritance of non-Moslems in Islamic country, it is simply ignored by the laws of Islam. Non-Moslems can have no right under these laws because they are religious laws only and the succession to an infidel in Islamic country is neglected to whatever is the forum of his domicile. The British treaties with the Sultans of the states merely provided that the advice of the British administration should followed and in accordance with such advice court have been established by enactment *(Shaik Abdul Latif and Ors v. Shaik Elias Bux).* British judges appointed and a British administration

established. The only law applicable before the British was Islamic land law modified by local customary land law. The Sultans have formally recognized the British influence on the state administration. The only law existed and was accepted by the Malays and other Moslems as applicable to questions of inheritance and testamentary dispositions that was *Syariah* law modified by local customary land law.

The applied Islamic land law is not foreign law but it was a customary land law *(Ramah v. Laton).* Therefore, the law of land tenure is a native law of which the court must take judicial notice. With regard to land tenure, Islamic law is varied in the different states of the federation, and in some instances in different districts of the same states, by local customary having the force of land law and it would not be practicable therefore to pass a Federal Enactment dealing with all the states of the federation. The learned judges swayed by the doctrines of English equity, and not paid sufficient attention to the fact that they were here in the Malay states dealing with totally different land law and Malay customary land tenure, namely a system of registration of title contained in a codifying enactment.

The English law was applicable to the SS because they were under the legal, political and executive sovereignty of the Bengal Presidency. Act 13 George III c.63 established the Supreme Court of Judicature in Bengal, Bihar and Orissa and by Act 39 and 40 George III c.79 the jurisdiction of the Supreme Court of Calcutta and Singapore, which was under the control of the Government of Bencoolen may therefore be considered as being a recipient of the common law before its formal cession in 1824. The Anglo-Dutch Treaty (1824) ceded Malacca. By virtue of Act 6 George IV c.85, Act 39 and 40 George III c.79 was made applicable to Malacca and Singapore on March, 17th 1824. Therefore, the laws of the Supreme Court of Calcutta have been in force in each of three SS before the publication of their respective Charters. By Act 6 George IV c.85, it was provided that it would be lawful under the Crown Letters Pattern to provide for the administration of justice in Singapore, Penang and Malacca, which was annexed to Penang and subject to the British government.

The development of colonial land tenure system

Prior to the advent of the British colonial government in PM, the economics of the Malay had been depending mainly on agriculture and forest products. The existing land tenure system in the peninsula was based on the ancient customary land tenure. However, with the arrival of the British and their intervention on the local administration, changes were inevitable.

A local colonial government was first established in the form of "Residential System", which needed the advice of a British Resident to be sought and followed except on matters pertaining to Malay religion and *adat* or custom. Concomitant to the establishment of the new government, a new system was implemented by the British. Thus, colonial officers had to devise a scheme to meet the exigencies and the economic changing needs of their colonies. The British officers were confronted with a paramount task to make a change relating to land tenure system, the resumption and further expansion of the tin mining, timber and rubber industries in the peninsula to support military activities in their colonies (Hassan-Zaki et al., 2004). All these requirements necessitated the introduction of a new system of private land ownership that would certainly cater for the needs and foster the capitalist or commercial exploitation of resources.

The Malay customary land tenure system based on subsistence agriculture was clearly insufficient and defective. The capitalist development of land in the Malay States would only materialize with foreign capital and immigrant labor. It was noted that European capital though came during the later part had gained domination and monopoly over the local colonial economy. Capitalist land development, foreign capital, labor and long term economic policy is to promote British investment together resulted in the further introduction and modification of a new and modern system of land law throughout the Malay Peninsula. The British in the Malay States who were responsible to draft a new form of private ownership system however faced with the dilemma of what was the most appropriate for land ownership system to adopt (Swettenham, 1880). The British proposed a permanent nature of ownership to be desired in order to attract foreigners to take up land and to invest in its improvement and development (Swettenham, 1874). They referred to the land law in Britain but the implementation wrangling with a problem whether to adopt the free hold or lease hold form of ownership. When the British occupied Singapore in 1819 there were only a few Malay fishermen on the island. A royal family, Dato' Temenggong (of Johore royal family) and some of his followers ruled the island and exercised the land law according to the Malay customary tenure system.

The island was practically inhabited and as in Penang islands, it took several years to introduce a proper system of land law. British Resident, Stamford Raffles (1879a) entered an agreement and treaties with the Sultan, Dato' Temenggong and local rulers in 1823 to define the rights of all parties on land. All cases on rules of inheritance, the laws and customs of the Malays, land hold which was practiced under the customary tenure would be respected where they should not be contrary to reason, justice or humanity. The laws of the British authority were to be enforced with due consideration to the habits and usage of the peoples. From the cession to June 1820, Singapore was under the control of the Government of Bencoolen in Java and made dependency of the British Indian Government in 1823. Stamford Raffles (1879b) set a law on the principles of English laws to a large extent

but directing to native customs especially in the matters of inheritance, religion and customary land tenure. These regulations were too general and left much of its discretion to the magistrates. Raffles stated that the old and irrational in the societies which were dealt must be rooted out that the rules must be replaced by the universal and nature law of nature, the outstanding embodiment of which was undoubtedly the British Common Law (Winstedt, 1956). The British could not do better than to apply the general principles of British law to all, equally and alike, without distinction of tribe and nation, under such modifications only as local circumstances and peculiarities and a due consideration for the weakness and prejudice of the natives part of the population. In the seventeenth century, the Penang Island was part of the territory of the Kedah, which was ruled by a Muslim Sultan.

In eighteenth century, the Sultan was having problems from the Bugis pirate activities and the Siamese from the south and north of Kedah, respectively. When Captain Francis Light came to lease of the island for King George III of Britain in 1786, the Sultan requested the British to render military assistance to fight their enemies. In legal parlance, the British have neither settled nor dominated the island as a colony but to continue with the existing customary land tenureship system. The customary land tenure of a conquered country must continue in force until they are altered by the conqueror *(Campbell v. Hall).* Therefore, the position of land proprietorship in the Penang was not subjected to British law but according to the Malay customary land tenure of the Kedah State. In fact, the Penang was originally owned by the Sultan of Kedah (Rajah of Quedah) and leased out to the East India Company (*Vereenigne Oost Indische Compaigne* or *V.O.C)* at 6,000 Spanish dollars annually. Hence, the Malay customary land tenure of the Kedah should have been regarded as the *lex loci* of the island and be permitted to continue in force as the Portuguese and the Dutch did in the Malacca (Roland, 1982). In January 22, 1787, the British government informed Light to make discretion to admit and to give each family a portion of land as circumstances allow. Taking this for his authority, Light offered grants to all that would take them and issued a general permission for clearing and occupying the land with an assurance that those regular written grants would be issued. Light made no restrictions as to conditions upon which the grants were made or as to resumption by the V.O.C. These grants were always considered to be as Dutch Grants in fee simple.

The British Government of India confirmed all Light's verbal and written grants in April 1795 but unfortunately, no accurate record or register of them was kept and the position generally was bad that an attempt to remedy matters was made in Bengal Regulation I of 1831. Thus, when the English took over the reign in Malacca from the Dutch after the Anglo-Dutch Treaty of 1824, Malacca had already its *lex loci* consisting of a blending of Islamic law and Malay customary law. Then the land law that prevailed was the Malay customary tenure with the system of Dutch Grants implemented in the urban areas. At the turn of the 19th century, the English Deeds System was introduced. Unlike the Penang and Singapore, Malacca being an old Malay Kingdom had enjoyed a long illustrious history of self-rule under the Malacca Muslim Sultans until it was invaded by the European power. The natives had retained their customary land tenure, which had not been interfered by the Portuguese, the Dutch or the British.

In old Malay law or custom of Malacca by customary tenure, the natives were entitled to take up wasteland where they chose to cultivate it temporarily or permanently on the condition that one tenth of its produce was payable to the Sultan and that abandonment for more than a certain period operated as forfeiture *(Sahrip v. Mitchell).* The customary land tenure, lands were also held in Malacca upon grants in fee simple, which was introduced by the Dutch *(Abdul Latiff v. Mohamed Meere Lebe).* The Dutch followed the Malay custom by granting seigniorial rights but all lands under the customary tenure later purchased by the British Government of India in 1828 and 1829. It seems to disclose a fairly intelligible state of affairs in the three settlements.

Land tenure in the state was complicated as a result of proper registrations and survey. The written documents in most cases were filled by native surveyors who have no official information and specifications about the existing land. The British government has to enforce its rights to avoid suffering consequently on enormous loss of revenue from quit rents. As a result, the Government Indian Act X of 1837 was passed on May 22, 1837 by the British enabling the Governor in Council to decide upon claims to hold lands within the three settlements. Draft act with necessary amendments became law in the shape of Indian Act XVI of 1839 namely the Straits Land Act of 1839. By this act, the procedure of the land offices with regard to the issues of titles, the collection of land revenues and the registration of transfer were regulated from January, 1st 1840 until 1886. However, as a result of the Malay customary law tenure, the act did not apply to existing customary landholders. Although the Act of 1839 professed to solve the problem, in fact, it was very deficient in its operation for the principal reasons that the measurement of land and issues of titles were never kept pace with the occupation and cultivation of land. The government was not in full possession of its rights to derive the real conditions of ownership and title from land and survey records. Realized that the Malay customary land tenure rise many difficulties for the land administration, Indian Act XXVI was passed by the British in 1861 to remove the difficulties of government with regard to the Malay customary land holders. This act abolished native customary law altogether with regard on the rights to take wasteland in the future. However, all previous rights with regard to customary tenure were

respected. Land ownership according to the Dutch Grants and Malay customary land tenure, which the seigniorial rights held at the time of the cession of Malacca were declared rights of under tenants and cultivators then forward to be vested in fee simple by the Crown. Since then, the native customary tenure in the SS thus abolished.

The Malay sultans, the federated (FMS) and unfederated Malay States (U-FMS)

Unlike Penang and Singapore which were ceded but subsequently regarded for all intents and purposes as a settled territory and Malacca, which the British received in exchange for Bencoolen from the Dutch in 1824, the FMS of Perak, Selangor, Negeri Sembilan and Pahang were the independent states under sovereign Muslim Sultans. The FMS were brought under British protection in the middle of the nineteenth century. The reason for British intervention in the FMS was to safeguard the economic interests of the British and Chinese merchants and investors in the SS. The pressure of the merchants and trading interests in the SS and the superior forces of the British Empire led to British protection of the FMS. The excuse for the intervention was the lawless state of affairs in the FMS caused by the internecine quarrels between rival claimants to the throne and rival chiefs and clashes between Chinese miners grouped of Ghee Hin and Hai San, rival secret societies.

The Sultan of Perak and Selangor accepted British protection in 1873 to 1874. The nine states in Negeri Sembilan accepted British protection. In 1898, the states federated under one ruler namely *Yang di-Pertuan Besar* (equivalent to Sultan) with one British Resident. The four British Residents came under one Resident-General who was responsible to the Governor of the SS, as British High Commissioner. Discounting exaggeration and looking firstly at the position, that the protecting power is de facto ruling the FMS and the Malay Sultans are merely registering that rule, the position being de facto but not *de jure*, only minimally different from that in a colonial protectorate. The strange and indeed unique thing however about this position is that it has not been created deliberately by Great Britain. On the contrary, it has arisen in the face of the definite intentions to the Great Britain as declared by her local agents the High Commissioners.

There has therefore been no assumption of authority by a paramount power based upon rights of usage such as is claimed by Great Britain and the Indian Empire in the natives states of India and concerning which there is now much dispute among the British jurists. The jurists however find the reason in the fact that all remedial steps taken by the protecting power have ignored the true juristic position. While intending to benefit the Malay Sultans and strengthen their position, the steps taken actually brought about the precise contrary because these steps ignored the fundamentals of the legal position (Braddell, 1931).

The question of the sovereign rights and status of the FMS and their Sultans have been challenged in court and decided in a number of cases. In *Mighell v. Sultan of Johore* the question of the immunity of the Sultan as a sovereign was raised in the English Courts. During the arbitration, a letter from the Colonial Office was evident. The letter enclosed a copy of the 1885 treaty which stated the State of Johore was an independent state. The defendant was the sovereign ruler and the relations between the Sultan and his Majesty were relations of alliance and not of sovereignty and dependence *(Anchom v. Public Prosecutor).* It was held that the courts of the state have no jurisdiction to interpret the written constitution of the state or to construe the meaning or intent of any particular article or part thereof.

The Sultan of Johore is an independent sovereign Sultan saves to such extent, as he may be treaty; sufferance or usage has surrendered any of his sovereignty. Sultan Abu Bakar was an absolute monarch and desired to establish a legislature, which was to be some extent limited in its power. He divested himself of some of his personal powers by transferring them to a Legislature of which he was a part and has endeavored to hold that the constitution was an overriding enactment. The constitution itself and all the supplements were made by His Highness with the advice and concurrence of the Council of State, in other words by the legislature of the State of Johore and the supplements are enactment of that legislature and must be regarded in the same light as any other enactment. While it is unusual, a sovereign legislature cannot say that a particular enactment shall be interpreted by a particular person or body of persons and that it shall not be interpreted by the courts. In that case, it was held that it was not competent for the courts to say that the offences by Islamic enactment duly passed by the Council of State and assented by the Sultan was ultra vires the constitution. In *Sultan of Johore v. Tengku Abu Bakar t*he Privy Council accepted the statement in a letter of the Secretary of State to the Rulers of the Malay States dated February, 1st 1951.

Viscount Simon stated that His Majesty‘s Government in England regards the rulers as independent sovereigns in so far as the relations with His Majesty are concerned. Their Lordships so accept it and take judicial notice of the fact so certified. They can therefore proceed on the admitted basis that appellant was recognized by His Majesty’s Government at the relevant time as an independent sovereign entitled to the immunities in respect of litigation which attached to their status. In *Pahang Consolidated Company Ltd. v. State of Pahang* the Privy Council summarized the Sultan of Pahang is an absolute ruler in who resides all legislative and executive power, subject only to the limitations, which the Sultan has from time to time imposed upon himself in the circumstances

herein after mentioned. In 1889, the Sultan was appointed. There has State Council, but this is only an advisory body. Since then, the Sultan in council has enacted laws of the state; the legislative power has remained in the Sultan, acting with the advice of the British Resident.

In 1895, the FMS was first formed by treaty between the states. The treaty did not curtail any of the powers of this Sultan of the State of Pahang within his state. By an agreement made in 1909, Federal Council was constituted of which the Sultan of Pahang was a member. It was agreed that laws passed or not to be passed by the State Council should continue to have full force and effect in the state, except in so far as they might be repugnant to any law passed by the Federal Council. Nothing in the agreement was intended to curtail any of the powers or authority held by any of the Sultan or Rulers in their separate states. By a further agreement in 1927 the Federal Council was reconstructed in such manner that *(inter alia)* the Sultan of Pahang was represented by the British Resident of Pahang. It was provided that The Federal Council should pass all laws intended to have force throughout the Federation. Laws passed by such council should be enacted by the Rulers of the FMS with the advice and consent of the Federal Council and should be signed by each of the Sultans before coming into force.

There is a difference between the Colony and the FMS. In the Colony, the early settlers were deemed to have brought with them the Common Law of England and all that it implied *(Woon Ngee Yew and Ors. v. Ng Yoon Thai and Ors).* The Charters of Justice of 1807, 1826 and 1855 specifically provided the administration of justice was to be adapted as circumstances that permit the religious manners and customs of the several classes of litigations. As a result, either on the principle of comity introduced by the common law or as a result of the Charters of Justice, the English rules of law have been modified in the case of persons of alien race and custom. In the FMS, there are no Charters of Justice and the British Common Law was not introduced until the passing of the Civil Law Enactment No.3 of 1937. In *Duff Development Company v. Kelantan Government,* a letter received from the Under Secretary of State for the Colonies with copies of the relevant treaties stated that the Kelantan was an independent state.

The Sultan was the ruler thereof; that the present relations between His Majesty the King and the Sultan of Kelantan which were those of friendship and protection were regulated by an agreement signed on October, 22nd 1910. His Majesty in England did not exercise or claim any rights of sovereignty or jurisdiction over Kelantan and went on to specify that the Sultan-in-Council made laws, dispensed justice, conferred titles of honor and generally speaking exercised without question the usual attributes of sovereignty. Influence by British in the other five U-FMS came later in time compared to the four FMS. The northern States of Kedah and Perlis and eastern coast States of Kelantan and Terengganu were under the influence of the King of Siam (currently known as Thailand).

The British possessed these four states from Siam in pursuant to the terms of the Anglo-Siamese Treaty (1909). The British adviser was appointed to look after British interests in each of these states. The Johore was the last state to come under the British influence but the Sultan of Johore had maintained a close alliance with the King of England. In time, the Torrens system was introduced in these five U-FMS.

Torrens system and the uniformity of land tenure system

The British government ascertains what were the existing native rights retained under the act. With regard to the continuation problems of landholders under the Malay customary land tenure, a regular system of land settlements was laid down in the act. The Attorney General, Sir Braddell, T. recommended dealing with the conflict of Malay customary tenure introducing upon the principle of the Torrens System, which was devised in 1857 by Sir Torrens, R.T. for use in South Australia and most of the British colonies.

The principle of the system was that land title should not be conveyed by an instrument in writing executed by the landholder but by the registration of that instrument. Sir Weld F.A. summed up the faults and deficiencies of the land system as; i) the sub-division of land transfer and mortgages. Without registration, the land office could not trace person liable for the payments of rent; ii) the resulting impossibility of preparing accurate rent-rolls; iii) the consequent loss of revenue to the government; iv) the discrepancies between the areas described in titles and those in the actual occupation of landholders; v) encroachment increasing in Crown lands and; vi) the general confusion by the land and survey offices personals. On principle, the English Courts administered the Dutch law previously than the Dutch Courts. Malacca was immovable property. Therefore, the law of the place should govern the state and subjected to the Malay customary land tenure and other related native law. Such a doctrine would imply that the continuance of the existing customary law in a ceded or conquered country, as the right, however precarious, of the late sovereign or of the soil itself, rather than the privilege of the inhabitants. Unlike the principal characteristics of the Malay customary tenure, National Land Code (1965) provided that the nature of land ownership under Malay customary land tenure was not absolute ownership. It was of a lesser extent known as “proprietary rights” where the rights of ownership extends not to the soil as such but to the usufruct or limited only to the right on utilizing the soil.

The usual method of acquisition of the forestry land is by opening up and cultivating virgin forest. While working

on the land under continuous activity the cultivators was obliged to pay one-tenth of the revenues as tax to the Sultan as the ultimate owner of the soil (Maxwell, 1980). If the land was neglected or not utilized for a substantial period of time without reasonable cause the Sultan would forfeit the land and the cultivators would lose all his rights therein. The customary land tenure prevailing in Malacca at the time of the arrival of the British, land belonged to the Sultan and the Sultan had the discretion to grant the right of possession (not ownership) of the land to his subjects. Such rights of possession included the right to succession and the right to deal in the land either by way of sale, transfer, pledge, etc. Such alienation by the Sultan was always subject to the fulfillment to two conditions. In default of any of these conditions, the land would revert back to the Sultan i) payment of one-tenth of the proceeds to the Sultan; and ii) the land remains under cultivation (Sihombing, 1977). Effective from the 1st of January 1966, the main land law practice in the PM is the NLC of 1965. It is a uniform system of land tenure and dealing existed throughout eleven states of the PM. Prior to the date; all states have two different system of land tenure. The States of Penang and Malacca have a system peculiar to the pre-war SS (modeled based on the English laws of property and conveyance) whereby privately executed deeds were the basis of title on the land. The nine Malay States, by contrast, employed a system based on the principle that private rights in land could derive only from express grant by the Sultan or secondarily from state registration or subsequent statutory dealings.

The system practiced is commonly known as the Torrens system or the registration of title system. The NLC was drafted based on the FMS Land Code of 1926 (the law was applicable to the FMS of Pahang, Perak, Selangor and Negeri Sembilan before 1966). To abolish the employed system in the States of Penang and Malacca, the NLC (Penang and Malacca Titles) Act 346 of 1963 was enacted and brought into force in 1966. Thus, with the NLC and NLC (Penang and Malacca Titles, 1963) all the eleven states in PM have a uniform system of the Torrens system. When the Torrens system was first introduced in the FMS, there was already a prevailing system of land law based on Malay customary land tenure and Islamic land law. The land law in the State of Pahang before the introduction of the Torrens system was Islamic land law of the Shafii School *(Tengku Jaafar and Anor. v. The State of Pahang).* When the British administration system employed in the FMS, the rules of Malay customary land tenure soon gave way to the Torrens system. In the early stages of the introduction of the Torrens system, the General Land Regulations were enacted in all the FMS of Perak (1879), Selangor (1882), Negeri Sembilan (1887) and Pahang (1888). It was follow by The Registration of Titles Regulation of Selangor (1891), Perak and Pahang (1897) and Negeri Sembilan (1898). Two separate state legislation namely the FMS Land Enactment and the FMS Registration of Titles Enactment was enacted in 1911. Thus, uniformity of law and land administration was finally achieved within six years since its formation on the FMS.

The principal characteristics of the Torrens system when it was first introduced into the FMS could be regarded as constituting a radical departure from the rules of Malay customary land tenure were: all land vest in the Sultan who has the power to alienate land to his subjects either in perpetuity or for a fixed term of up 999 years; all dealings in land must be in the prescribed form and must be duly registered with the relevant authorities. Failure would render the dealings null and void as arbitrated by the Privy Council in the jual janji case of *Haji Abdul Rahman and Anor. v. Mohamed Hassan* owners of land are given indefeasibility of title, which could be questioned only under special circumstances; traditional method to virgin and wasteland acquisitions as permitted under the Malay customary land tenure was abolished *(Sidek and 461 Ors. v. The Government of Perak).* Forms of dealings which were recognized under the law were transfers, leases exceeding three years, charges and liens; and two types of caveats were recognized, namely private and registrar's caveats.

The uniform laws of 1911 mentioned above perpetuated the division of land in the PM into two distinct categories, namely the Land Enactment, which dealt with the registration of country lands less than 40.46 hectares (ha) in area on a mukim register (sub-districts), that is, lands formerly held under the Malay customary land tenure; and The Registration of Titles Enactment dealt with registry lands, that is, town lands and country lands exceeding 40.46 ha and estates. These two parallel legislation in the FMS continued in force until it was amended by the Land Code of 1926, which came in to force in January 1, 1928 and came to be cited as the Land Code 1928 (Cap.138 of Revised Laws). The Land Code 1928 affected further change in the law while maintaining the two categories of land and the basic Torrens principles above mentioned.

The following changes were later introduced; namely the principle of indefeasibility of title was more clearly defined with specific statutory exceptions being spelt out; adverse possession against individual owners of land is no longer possible, adverse possession against the state had been disallowed since the Torrens legislation in the respective states, customary land tenure system is preserved and in the Federal Court *(Wilkins v. Kannamal and Mahadevan s/o Mahalingam v. Manilal and Sons (M) Sdn. Bhd).* The strictness regarding compliance statutory form and registration as indicated in Haji Abdul Rahman case has been abandoned and; specific types of cultivation were enforced. While the uniformity of law and consistent land administration procedures were attained in the FMS, the position of other five U-FMS still lagged behind in near disarray. Thus, the State of Johore had its Land Enactment of 1910, the Kedah had its Land Enact-

ment of 1906 (amended in 1912) and the Concession Enactment of 1909, State of Kelantan and Terengganu had their own Land Enactment of 1938. Under the twin principles of the Torrens system, the register title reflects all the facts material to the registered owner's title in the land. These materials facts refer to the name of the proprietor for the time being, the alienated land, its area and location, its survey plan and its boundary limits.

The Torrens system has thus endowed the register with the attributes of a mirror of sorts that can reveal al the necessary particulars and information relating to the land. In any transaction, by the registered owner, the only concerned was the register and the potential purchasers can rely on the registration. The cumulative effect of the Torrens system principles is that it conferred an indefeasibility of title to the registered owner. In *Teh Bee v. K. Maruthamuthu* the Federal Court held that under the Torrens system the register of the land is everything. However, the supremacy of such title is still subject to certain statutory exceptions as spelt out in section 340 (2) and exceptions under Malay customary law or law of *adat.*

In the newly emergent independent states of the PM, it became imperative to formulate on a new NLC, which can achieve uniformity of land law and administration in all the eleven states. Therefore, pursuant to the FMS agreement, which was formed in 1948 had possessed of one uniform land code for the four FMS; five separate state legislation in each of the five U-FMS; and English Deeds System still prevailing in the former SS of Malacca and Penang. Weaknesses in the land law and administration were the indiscriminate issue of Temporary Occupation Licenses (TOL) and the ease of renewals, giving rise in false expectations by the public generally; the inability of the state administration to check and prevent illegal occupation of state land and alienated lands; large-scale fragmentation of alienated lands; haphazard alienation of state land by the state authorities; and the disadvantageous position of the Malay reserved lands.

In the SS, the land law is substantially similar to the law of England. In the formal FMS, the land law is substantially uniform, subject to certain specialties of Malay customary land tenure and in the U-FMS the land law is not uniform. The FMS Land Code (1928) therefore became the guideline of the National Land Council (1965) to achieve uniformity for all the nine Malay States and the SS. In 1966, separate law of the NLC (Penang & Malacca Titles) Act 518 of 1963, which was enacted to change the English Deeds System to the Torrens system in these two states, was enforced. The NLC maintained the rule contained in the earlier Land Code of 1928 that adverse possession is no longer possible as against the state as well as against any individual landowner. The code amend and consolidate the laws relating to land and tenure, the registration of title to land within the State and of purposes connected therewith. In addition, the code also described the state rights and accentuates no permanent right is granted for any land. Any alienated land despite licensee holder's efforts to utilize the land still could not conferred them paramount rights on the land.

The state has absolute and ultimate right to take possession of land including in urgent cases even though in the situation in which the compensation cannot be agreed by the holders or owner which has been used in a general sense as applying to any person, statutory body or to whom land has been alienated (in perpetuity or for a term of years), reserved land has been leased or a TOL has been granted in respect of land. Under the code, the owner has been given two species of rights, the first of which may be called paramount rights and the second to be called subsidiary rights. In the case of the subject was only provided a subsidiary or exclusive right by the respective state.

As land is a state matter for the purposes of the Federal Constitution (FC), the National Land Code (NLC) was enacted pursuant to the provisions of clause (4) of Article 76. of the FC. This subsequently gives legislative effect in the respective states by means of State Legislation.

In PM, the right of the individual to own property, including land is safeguarded under Article 13 of the FC. However, the NLC also defined that the property in all state land, minerals and rock materials situated within the territories of a state vests in the state authority. The term "state land" has be defined to mean all land in the state including bed of any river, foreshore and seabed situated within the territorial waters other than alienated land, reserved land, mining land and reserved forests. The term state authority has likewise been defined in section 5 to mean the Sultan or Ruler of the state. Where alienated lands are required for development purposes to be undertaken by the federal government or agency, acquisition proceedings taken pursuant to the provisions of the Land Acquisition Act (1960) are instituted by the state authority and not by the federal government. The position of the state authority in land matters is therefore paramount and subservient to none (NLC, 1965). The position of the state as absolute owner of state land combined with the legal protection afforded under section 48 of the code scale in the country especially when involving the Sultan of the state. As stated in Article 94 of the FC, the executive against adverse possession has created various political and social economic problems on a major authority of the federation only extends to the conduct of research, the provision and maintenance of any experimental and demonstration stations, the giving of advice and technical assistance to the states government, and the provision of education, publicity, and demonstration for the inhabitants of any state in respect of any matters.

Since forestry land is absolutely under the state authority, the legislature of a state can make their own state laws on forestry related matters. Notwithstanding anything provided in the FC, the existing State Forest

Department or any department which was established during the colony, the functions exercise by them was allow to continued immediately before Merdeka Day (Independence Day). In addition to the code, land as a legal concept is given wider meaning beyond what is understood in common parlance. It was not only referred to the land surface itself and all substances forming that surface, but also the subsoil and all substances therein.

The concept of "land" under the Malaysian Torrens System is different from the concept of land under English Law of Property, and the law of fixtures in PM generally adopts the *maxim quic quid plantatur solo solo credit*. There are a long line authorities and bureaucracies on the law of fixtures under the Malaysian Torrens System, which reflect virtually the same principles as being laid down by the court of England. The owner's right to use his land is exclusive but is not absolute. Section 44(1) (a) specifically states that the use and enjoyment extends so far as is reasonably necessary to the lawful use of the land. This statutory right conferred on the owner under the Malaysian Torrens System is therefore not at par with the common law rights in accordance with the Latin *maxim cujus est solum ejus est usque ad coelum et ad inferos.*

The Malay reservation

Malay reserve land (or Malay reservation) refers to special category of land situated within the territorial boundaries of each state in the PM. These can only be owned or held by Malays. The Sultan of the state and the state authority in exercise of its disposal powers under the code can alienate such lands only to the Malays. What constitutes "Malay" depends on the definition and interpretation of the term as determined in the respective state legislation. Dealings in respect of such lands can only be transacted amongst Malay and any attempt by non-Malays in dealing with such Malay reserve lands will be held null and void.

The Constitution State of Kelantan (1948) regarding the special provision relating to the Malays stated that it shall be the responsibility of His Royal Highness the Sultan to safeguard the special position of the Malays and to ensure the reservation for Malays of such proportion as he may deem reasonable of position in the public service of the state, special facilities given or accorded by the state government and when any permit or license of operation of trade is required by state law, then, subject to the provision of that law and this article, of such permits and licenses. In addition, section 3 also stated the Sultan, may, in order to ensure the reservation to Malays of position in the public service give such general directions as may be required for that purpose to any Public Service Commission whose jurisdiction extends to persons in the public service of his state or to any authority charged with responsibility. All the commission and authority must duly comply with the directions.

The earliest law of Malay reservation in the FMS was the Malay Reservation Enactment (1913) enacted with the twin objectives of controlling alienation by the Sultan or the state authority and restriction dealings in respect of Malay reserve lands. By the thirties, the 1913 enactment was repealed and replaced by the Malay Reservation Enactment (1933) (Cap.142). This is applicable only in the FMS. In the other U-FMS similar laws were also passed for example in the State of Kelantan (1930), Kedah (1931), Perlis (1935), Johore (1936) and Terengganu (1941). The FMS Land Enactment had been amended several times to allow the listing of various leading agencies and institutions which had been permitted to take Malay reserve lands. When the nation attained independence and the FC became the supreme law of the land, Malay reservation law became one of those species of the country's laws, which became classified as the entrenched laws, special protection by the Federal/State Constitution and NLC (1965). As the Malays special rights and privileges, any change in the Malay reservation law requires two thirds majority vote of both the state and the federal legislature and the concurrence of the Conference of Rulers as supreme head of the state, the assembly of Malaysia's own constitutional monarchs. No alterations or change of title are permitted without consent from the Sultan of the respective states.

In the PM where approximately 3,237,485 ha of such Malay reserve lands can be found at present the corpus of the law is contained in six separate states legislation (Awang, 1987). Only one single uniform law known as the FMS Malay Reservation Enactment (1913) (Cap.142) (amended in 1933) and subsequently updated from time to time. This law applies uniformly in all the four former FMS. Five separate Malay Reservation Enactments (but generally in *pari materia* for each state comprised in the former U-FMS. Whether Malay reservation law is now an *anachronism,* whether as a state policy 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 out lived its purpose, and whether as a piece of legislation it is now outdated and context and should be expunged from the statue is indeed a very sensitive issue and unresolved question in this country.

In other words, the Malay reservation can be describe as a modification of customary land tenure system or archaic law, which has been blended with the modern concept of land law to achieve for the sociopolitical and economic purpose by the state authority. It also can be viewed as an alternative for the Sultan of the respective state to continue their sovereignty and paramount rights on the state land especially among the states, which are rich with natural resources. Since the British colony period the state of affairs in the land ownership system in the PM has shown not much improvement. Thus, to take an extreme illustration, the definition of Malay in the State of Kedah and Perlis legislation includes descendants of

Arabs. The relevant law in these two states also allows Malay reservation lands to be owned by Siamese. However, in Johore State Enactment, issues of Arabs fathers and Malay mothers are not regarded as “Malay” although in the FC confirmed that they are the Malays. The position in the State of Kelantan is perplexing, as the state enactment does not even consider the status of “Malay” as the final and determining factor for the purpose 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 Malay reservation enactment is one unique example of a special law overbidding or prevailing over a general law, in conformity with the *maxim generalia specialibus non derogani*. The NLC empowered the state authority to alienate state land to such persons, bodies or corporation. Where the alienation state Malay reservation lands, state authority must only alienate the land to the Malays. The Sultan or the Ruler -in-Council possessed ultimate power to alter or extend the boundaries of any Malay reservation land within his state. The Sultan can revoke any declaration of a Malay reservation either as to the whole or any part of the state land thereof to include as a Malay reservation, which previously excluded. Since the Sultan are the paramount owner of the state property, all the uniform enactment in stipulating dealings, disposals and all attempt to deal in or dispose of any Malay reserve lands (without his concern) in contravention of the law shall be null and void.

Besides the principle restrictions against alienation by the state authority of Malay reservations to non-Malay, and the restriction against dealings in such lands by their Malay owners with non-Malays, the enactment also contain other general restrictions relating to the creation of a trust of such lands in favor of non-Malays, dealing by non-Malay attorneys, attachments in creation, vesting in the official assignee on bankruptcy and the lodgment of caveats on such land by non-Malay caveators. In addition, the sanction exist in both enactment’s also contain a further sanction by empowering the Sultan of the respective state or Ruler-in-Council to institute forfeiture proceedings. Similarly, all the enactment stipulate that in the event of any doubt arising to such lands the matter shall be referred through the *Menteri Besar* (Chief Minister) to the Sultan or Ruler-in-Council for his decision. The Sultan decision shall be final and shall not be questioned or revised by any court of law. In *Haji Hamid bin Ariffin and Anor v. Ahmad bin Mahmud,* the Federal Court had the opportunity to reconsider case of *Goh Soon Leong v. The Commissioner of Lands and Two Ors* as remarked that the Sultan may forfeit his land if any Malay attempted to dispose of any Malay reservation land to an unqualified person or approve the sale and allow the land to be excised from the reservation.

The economic disadvantage of such inferior land tenure system by the Malay rural peasantry, the patent artificiality of the term “Malay” had led to legal necessitating the designation of various governmental agencies and financial institutions as “Malays.” Within the meaning of the relevant state legislation, the diversity and disparity in the definition of the term “Malay” found in the various enactment - these are some of the criticism leveled at the Malay reservation law. In the larger concept, questions were also raised as to whether the concept of Malay reservation itself should be allowed to continue in force in the present archaic form. Some legal practitioners deny the good intentions of the architects of this law which essentially aimed at bringing a higher economic income of the rural Malay peasantry who constitute the greater majority of the owners of such lands. Regrettably, with the wisdom of hindsight such good intentions appeared to be difficult due to the absence of any concrete follow up and enforcement measures. Any system of land law and administration must not merely gear at creating a Malay land owning society although it is admittedly a laudable state policy. The important steps is to ensure that such a land tenure policy should also bring about and generate an income earning society, occupying a place in no way *inferior vis-a-vis* by other community. After the FMS Reservation Law (1913) was enacted and following various lawsuits in the other U-FMS, the Malay reservation landowners were still no improvement in their economic advantages. On the contrary, after the prohibition against dealings was imposed under the enactment, the economic value of their properties suddenly depreciated compared with the other free hold properties in the same area. For a long time, there were no follow measures in educating or assisting the Malay owners how to produce a higher yield or earn a better income from the properties. Owners of Malay reserve lands do not enjoy any special privilege in matters of quit rents and other forms of revenue payable to the authorities.

It is generally believed that the law of tenure in the PM is totally devoid of Islamic content. This misapprehension is understandable when one considers the course of this country legal history as a whole, being shaped and developed by the civil court presided by judges trained in the British Common Law tradition and having to interpret written laws drafted by English trained legislators. Even the rules of equity that went along with the development of the common law are English rules of equity. The brief historical survey on the land tenure in the PM as recounted and proved that the western trained legal historians used to label as customary law or customary land tenure was in fact a harmonies blend of Islamic land law and local custom. Whatever rules of Islamic land law relating to land tenure that regulate the sovereign of the Malay rulers, or daily lives of the Malays societies over the centuries since the sovereign Malacca Sultanate embraced Islam, the tradition have seeped into the Malay psyche, absurd and integrated as part of the Malay way of life - the law of *adat*.

Conclusion

The historical development of land law in the PM could be described with the account of the indigenous Malay custom relating to land prior to the advent of the British colonial powers and the subsequent development of the modernized system of land law through the introduction of the Torrens system. It must be pointed out that the Malays have never committed their customary law to evident on writing or any manuscripts hence our knowledge of the past custom is limited (Wong, 1975). The study of jurisprudence is one that presents the greatest difficulties. Malay customary law and land tenure was never committed into writing (Wilkinson, 1908). The law varied in each state; and did not harmonize with the doctrine of Islam. It often expressed in metaphors or proverbs that seems to baffle interpretation.

Systematic studies of the Malay customary land tenure only came with the advent of the European writings during the second half of the century and the first quarter of the following century. According to Maxwell (1884), early writers were at one time or another employed in the colonial public service in the Malay Peninsula. There was no doubt that their piece of work had immensely helped in understanding the indigenous Malay customs founded on their personal accounts, observations and perceptions at the time. However, their observation were inevitably marred and tainted with much subjective speculation, rationalization, theorization and generalization (Meek, 1968).

The superior forces of the British Empire have led to an intervention and to safeguard the economic interests of the British and Chinese merchants and investors. Another reason was the lawless state of affair in the FMS caused by the internecine quarrels between rival claimants to the throne and rival chiefs and clashes between Chinese rival secret societies. By providing the military aid for the rivals in the civil war, the new ruler considered that he owned a high debt of favor from the British. As a result of such bargaining, the British successfully exercised their power on the state matters. The Sultan was forced to accept a British advisor.

Since then, all the matters pertaining to the state was subject to the British Resident for final decision. It also can be viewed as a profit share for the Sultan and the British especially among the states, which are rich with natural resources. All the circumstances mentioned such as capitalist land development, foreign capital, labor and long term economic policy are aiming to promote British investment, resulted in the further introduction and modification of a new and modern system of land law. The aggressive division and rule of the British imperial policy continue to intervene in the economic sector development other than the sociopolitical imperatives. For the British, issues on state land are complex and sensitive to resolve, especially when dealing with the aggressiveness of the Malay local chief. To get a trust and support from the Malays, the British amended the land law to expand the Sultan's sovereignty pertaining to land matters. By empower the Sultan with paramount right on the state land and formulating the Malay reservation land, the British had successfully utilized the Sultan as an effective mediator to coordinate their economic interest in the Malay States.

The literature review on the Malay reservation land that has been illustrated in this study is one of a unique example regarding a special law overbidding or prevailing over a general law, in conformity with the *maxim generalia specialibus non derogani.* In other words, the current land law and Malay reservation can be described as a product of British economic hegemony that insulted the ancient customary land law to achieve for the socio-political and economic interest. Concomitant to the establishment of the new government has led the British to implement a new system of administration. Thus, colonial officers had to devise a new scheme to meet the exigencies and the economic changing needs of their colonies and protectorates.

The British officers were confronted with a paramount task to make a drastic change relating to a new concept of land tenure system as a result of further resource based industrial development and the expand of rubber plantations in the peninsula. From the economic point of view, all these requirements necessitated the introduction of a new system of private land ownership that would certainly cater for the needs and foster the capitalist or commercial exploitation of resources. The land law in PM has developed with the account of the indigenous Malay custom prior to the advent of the British colonial power. The Malays have never committed their customary law to evident into writing or any manuscripts. Hence, our knowledge of the past custom is limited, and merely based on the historical arbitration, evidence, legal documents and the aid of law cases as major instruments.

Therefore, being a living law on a certain place, customary land law is not appropriate or suitable for codification because it is adaptable and flexible to the changing of social needs of the Malays. The basic ingredients and concepts of modern land law, which has been developed and formulated by the colonials to lessen the important role of existing indigenous Malay customary land tenure was discussed.

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