CHAPTER 2: LAND IN MALAYSIA

2.1. Introduction

By the 20th century land aspects in Malaysia have undergone a dramatic change. Almost all aspects related to land are not the same with what they were in previous centuries. This is due to the colourful factors which existed during the pre and post colonial period.

Before the pre-colonial period, Malaysia did not exist as one entity. The country which we see today is actually a combination of 11 states in Peninsular Malaysia, Sabah and Sarawak. Peninsular Malaysia alone covers an area of 127,560.2 KM². As in other countries not all of these areas are habitable or used. Before the unification, each state was governed by a different ‘government’, therefore naturally this status and affair affected the land aspects as well.

This paper would like to discuss land tenure and land classification, together with land use in this chapter while the following chapters pay more attention to the ‘Malay Reserve Land (MRL)’ itself. In this way, it would be appropriate and easier to understand MRL if one had understood land in Malaysia in general first.

2.2. Land Tenure in Peninsular Malaysia

Although land is finite in its nature nevertheless the same cannot be said of its tenure, especially in the case of Peninsular Malaysia. It cannot be denied that land tenure
plays an important role in deciding its use. Land tenure could be a catalyst in
maximising a land use and at the same time it could cause a detrimental effect. In the
Malaysian context land tenure could be defined as the system of rules and procedures
which grants access to and use of land resources and the legal processes which enforce
these rules (Penn, 1970).

Land tenure in Malaysia is best seen by dividing the study into 3 different
periods. This is due to the various different reasons and methods that have been
practised during these periods. The three periods are as follows:

2.2.1 Pre-colonial period
2.2.2 Colonial Period
2.2.3 The modern era.

2.2.1 Pre-Colonial Period

Before the arrival of the westerners all laws pertaining to land was done
according to the Malay custom which was known as “Undang-undang Adat Tanah”.
According to this custom all land belongs to the ruler (sultan). Ordinary citizens are only
allowed to work on these lands with his permission. Ownership of a piece of land is
based on concepts such as ‘live land’ (tanah hidup) and ‘dead land’ (tanah mati).
However one must bear in mind that terms such as ‘owner’ and ‘ownership’ are not
exactly of the same meaning in the Malay custom and English terminology. A vague
picture about these concepts was given by Maxwell (1884).

In the Malay custom, there is no such thing as permanent ownership of a land.
An individual can only claim ownership to a piece of land as long as he clears and works on that particular piece of land with the condition that the particular piece of land was not yet occupied by anyone else. An individual can claim ownership to land although he did not cultivate it for 3 years for wet rice fields, but he can claim land planted with fruit trees as long as the planted trees planted were still surviving and there is possibility that those trees could bear fruits.

The rules as to proprietary rights may be stated as follows:

i. There can be no proprietary rights in *tanah mati*;

ii. *Tanah Hidup* is of 3 kinds;
   a. Land planted with fruit tree;
   b. Wet rice land (*tanah bendang* or *sawah*); and
   c. Hill-land taken up for shifting crops (*tanah huma* or *ladang*);

iii. The proprietary rights in *kampung land* endures during occupation and afterwards long as any fruit remains as evidence that the land is *tanah hidup*;

iv. The proprietary rights in *tanah bendang* or *sawah* lasts as long as the land occupied, and for 3 years afterwards; and

v. The proprietary rights in *tanah huma* or *ladang* lasts as long as the land is occupied which is usually a single season (Maxwell, 1884).

But the most important criterion is that the person should be a Muslim.

An individual could not simply claim ownership of the land. According to Malay custom it is believed that all the land belongs to the king, and they are allowed
only to work on the land but in no way they could claim that the land belongs to them (Maxwell, 1884). However there are some who do not agree with this conclusion. For example Hunud (1997) refutes the claims made by Maxwell that land belonged to the ruler, because he sees there is no evidence either in the traditional Malay codes or Law Digest that supports this notion. He believes that this idea was merely from the conclusion of Maxwell’s interpretation and opinion (Hunud, 1997)). This argument is also supported by Wong (1975).

In return for this permission to use the land the person would have to pay taxes to the sultans. Sometimes the sultan gives consent to his pembesar or chief to collect the taxes, but in no way the sultans loses his right over the land. This can be seen by the ‘taxes’ they have to pay them. This relationship between the sultan, pembesar and tax of almost similar to the “Zamindars System” practised in India before the British rule.

The tax method is some what similar to that of a freehold land in the English system (Maxwell, 1884). The tax rate is usually one-tenth of what is produced on the land. It is believed that this rate was first used in Malacca. This ‘one-tenth’ concept is very vague because there is no clear definition on how to measure the land produce which sometimes brings about a lot of disputes.

Renting out the land is allowed in the Malay custom, but the tenant will have to pay the ‘landlord’ the rent in the tax form which is the same as the ‘one-tenth concept’. But the rent has to be in money and not in material form (Das, 1963).
Selling is allowed in the Malay custom, but there is a lot of difference in what we currently perceive of selling a land. For example, when we sell a piece of land, we also mean the ownership of the land too. But in the Malay custom, only his interest on the land is sold but not the land itself because as mentioned earlier, the sultan is the rightful owner to the land.

One surprise character in the Malay custom is the permission to mortgage a piece of land. However, once again there are certain differences. For example when a person mortgages the land, the person who advances the money will possess the land. In fact if the lender wishes to possess the land then he would have to pay 'rent' to the lender. In other words when a person mortgages the land, he loses the 'ownership' of that land, until he repays back the amount he had borrowed. This is known as *jual janji*. In the case of the borrower who fails to pay the sum he has borrowed in the stipulated time then he loses the possession to the land permanently. This is known as *jual putus*.

To the question of inheritancy, the Malay community has two choices to follow, these are:

1. *Hukum Syarak*: based on Islamic principles; and
2. Malay custom.

However Maxwell (1884) feels that the trading class tends to follow the *Hukum Syarak* while the agriculture class prefers to follow the Malay custom. But in cases where the Malay custom is observed, it cannot be concluded that all the Malays states
have the same custom. For example, in Perak, land and houses are inherited by
daughters while the sons would get personnel property of the deceased. But in Negri
Sembilan where the Minangkabau law is practised *nephew on the sister's side becomes
heir to his uncle's property to the exclusion of the son of the latter* (Maxwell, 1884).

Maxwell felt that the Malay land custom has a lot of Islamic characters. He
proves this by comparing the Malay land custom with other Islamic countries such as
Turkey which was considered as a true Islamic country of that time.

On the whole the Malay Land Custom during this period could be characterised
as follows:

i. the nature of ownership of the land under Malay customary could be termed as
   'proprietary rights' where the persons has the right only to work on the land but
   not the right to the land itself;

ii. a piece of land is acquired by clearing up and cultivating jungle area;

iii. the 'owner' is required to pay at least one tenth of land returns to the ruler;

iv. if the land is not cultivated for a certain period then the ruler could retract the
   'rights' and the person would lose all his rights to the land;

v. the owner is allowed to sell the land, but the price which he expects would
   reflect the amount of expenses incurred in cultivating the land. This is known as
   "*pulang belanja*"; and

vi. the owner is allowed to 'mortgage' the land. This is known as "*jual janji*" where
    the lender is required to sell back the land to the owner when he repays the loan.
Most of the land during this period was used for agriculture. But there was a small portion used for mining especially tin. Agriculture was mainly done by the ordinary citizens where else mining was dominated by the aristocrats with ordinary citizen only participating as labour force. For most citizens land was only a tool for surviving, it was never used as capital (Ahmad, 1985).

On the whole it would be appropriate to conclude that ownership of land was not in the commercial form. Law regarding land was never documented and all of them were done in the oral manner.

2.2.2 Colonial Period

Historians define colonial period from the time Malacca was conquered by the Portuguese, but due to data insufficiency, the analysis is restricted to the period when Malaya was under the British rule.

Definition of land is different from what the British and the Malays perceive and define. For the westerners land is defined as everything that is on and in the land. But the Malays claim only by products from the land and not the land itself as practised by the westerners.

Before Penang was occupied by the East India Company, land law was not available. Therefore it would be appropriate to conclude that the East India Company was the first to introduce formal land laws in Malaysia. For example, when The East India Company occupied Penang and Singapore it did issue documents called "Grant of
title” but there were many loose ends in them. In fact, the shortfall was so severe that a commission was summoned. Suggestions from this commission brought about to the passing of an act known as Straits Land Act in 1839. Through this act a land office was set up with its primary objective to issue land title and govern matters relating to land. Even this act too was amended from time to time till 1886.

However it was not easy to implement these laws because of the existence of two major obstacles :-

i. Dutch Grants: When the Dutch were occupying Malacca they gave away land concessions to the locals which were contradictory to the British land laws; and

ii. Customary Lands: The British overcame this problem by classifying this land under a special category. For example in Malacca it was classified as “mukim land” (Sihombing, 1981).

This difference caused a lot of problems when the British tried to introduce its land laws in this country. The Malays took almost 3 generations before they finally adapted themselves to these laws (Brookfield, 1991).

One of the concepts was the ‘grant concept’. Grant is a document which shows the location and size, the owner, date of registration, quit rent and land use. This particular concept symbolises private ownership of a piece of land. This never existed in the Malay culture. All this while the Malays perceived that the land belonged to the ruler and that they are only allowed to work on them.
Land laws which the British tried to introduce caused a culture shock to many Malays. This is why it took them three generations before they could finally accept these laws.

During the early colonial period, the British government, through the residents, tried to introduce and simplify the land ownership procedure in Peninsular Malaysia. In the Federated Malay States (FMS) the British introduced General Land Regulations in each state: Perak (1879), Selangor (1882), Pahang (1889), Negri Sembilan (1887). In all these states the British replaced them with Registration of Titles, in Selangor (1897), Negri Sembilan (1898), Perak (1894), Pahang (1897).

In FMS there were certain acts where Torrens principles were visible. For example:

1877 - Rules for the Disposable of lands in Selangor
1878 - Terms on which Agriculture Lands will be granted
1879 - Special Regulations for the leasing of waste land.
1882 - The general land Regulations Notification 495 of Selangor
1885 - The general Land Regulations Order in Council of Negri Sembilan
1891 - Land Code Selangor
1897 - Land Enactment Perak No 17
   - Registration of Titles Enactments No 29
   - First Unified FMS land enactment

In the Unfederated Malay States a system similar to Torrens system was used. For example Johor land tenure showed 'a typical' Torrens characters (Sihombing, 1981).
By 1896 uniform land code was used in all the Federated Malay States. For example in 1911, Land Code 1911 was introduced, which was later amended in 1926, where it was accepted as the first Land Code. However it came into force only in 1928, therefore it was known as Land Code 1928 or Cap 138 Revised Laws 1935 (FMS).

British was serious in implementing its land laws. For example it was an offence if the state land was occupied without an approval (Das, 1963). On the whole the nation benefited from the introduction of Torrens system. For example through this system an individual has a document to prove his ownership of a piece of land, which is not questionable by anyone since it is guaranteed by the government. On top of that this document which is called as a ‘title’ allows the owner to mortgage or rent out the land without going through the hassle of proving his ownership (Malaysia, 1980).

2.2.3 The Modern Era

A National Land Code (NLC) was developed in 1965 (Act No 56 of 1965). It came into force only in January 1 1966, and this was the first time that the whole Peninsular had a uniform land law. However it was not much different from what was before the independence. A comprehensive study was done on the National Land Code where a lot of matters regarding the powers of state and federal government’s was amended.

But the implementation of NLC does not mean that the Malay custom was completely forbidden. Act No 56 of 1965, gives provision for perseverance of the customary land especially Adat Perpatih.
2.3 Land Use and Land Classification

Land is very important in the existence of mankind. Due to its finite nature, it is very important that land is utilised accordingly to its maximum usage. One of the most important factors in deciding land use is human population and needs.

During pre-colonial period land was abundant and population was scarce. Since people's needs and wants were limited at that time therefore land use was relatively an unimportant aspect of their lives. This can be seen by the extensive cultivation and forest clearing activities that have been carried out. Nothing was done to curb on these activities.

On the contrary, at present, government intervention in deciding land use is very vital and significant. One of the reasons why government intervention is important is due to the fact that land is used as a business tool, thus causing individual objective and society's objective to vary (Mather, 1989).

The Torrens system introduced by the British clearly shows the significance of government intervention in matters related to land. Even if the government were to take linear stand that would cause a severe repercussion. For example, due to population growth a large area of jungle was cleared haphazardly causing such as:

i. increase in flood frequency;
ii. disruption in water resources;
iii. soil erosion problem; and
iv. costly maintenance of engineering works (Daniel, 1975).
In the Malaysian context, government regulates land use through the National Land Code (NLC). In fact, one of the primary reasons why NLC was introduced is to maximise land use. Prior to NLC there were 43 different types of legislation related to land, both at Federal and the state level (NLC).

The objectives of NLC on land use are:

i. land is not under utilised;
ii. to ensure that mining activities on mining land do not cause detrimental effect such as silting of rivers;
iii. to ensure safety in rivers; and
iv. there is no land held in an uneconomic situation which could lead to unproductive use, under-employment and under-utilisation (Nik, 1993).

During the British rule, land was divided according to its use. For example in Pahang in 1889, land was categorised as:

i. Waste land - uncleared or abandoned and available for agriculture purposes;
ii. land in the occupation of natives under Malay tenure;
iii. building allotments in towns or village or government reserves; and
iv. mining reserves.

Article 51 of NLC classified land as:

i. Land over the shore line;
ii. Land above the shore line: town land; Village land; and Country land.
Meanwhile, Article 52 categorises land use into 3 types

i. Agriculture

Section 5 of NLC defines agriculture as "the cultivation of any crops (including trees cultivated for the purposes of their produce), market gardening, and the breeding and keeping of live stock and fish"

ii. Building

Section 116(1)(b) do not allow land categorised as building to be used for agriculture or industrial purpose

iii. Industry

Section 117(1)(a) defines industry as the erection or maintenance of factories, workshops, foundries, warehouses, docks, jetties, railways or other buildings for purposes of manufacture, smelting, power supply, warehouses or godowns or as permitted by the state authority"

(NLC, 1965)

In the First Malaysian Plan Land Capability Report, land was classified as follows:

i. State Land

Areas not alienated, gazetted or reserved for special purposes, but including land held on temporary occupation licenses commonly referred as T.O.L land;

ii. Land Alienated for Agriculture:

Land alienated for agriculture purposes, including approve applications and land allocated for agriculture schemes in cause development, but excluding toll land;
iii. Land Approved For Mining:
Land covered by extend mining leases or mining certificates;

iv. Malay Reserves:
Unalienated land declared by gazette notification for the use of Malays under the Malay reservation enactment. Land within these areas which has been gazetted for other specific use, for example as forest reserve, as been included under this other categories;

v. Grazing reserves
Land reserved by gazette notification for grazing purpose under the control of veterinary department;

vi. Orang Asli reserve:
Land reserved by land notification for use by orang asli;

vii. Forest reserve:
Land reserved by gazette notification for productive or protective forestry purposes under the provisions of several states forest enactments ;

viii. Game Reserves:
Land reserved by gazette notification as national park game, reserved game reserved or wild life sanctuary under the control of the game department; and

ix. Land Alienated/ Gazetted for other purposes:
Land alienated or reserved for urban development (including land classified as town land and village land), cemeteries. police and military reserves, airfields and other government reserves but excluding water catchment reserves (Lee, 1971).
Since Malaysia was an agriculture based country, it is no wonder that in the First Malaysian Plan, 29.65 percent of land in Peninsular Malaysia alone was alienated for agriculture but only 8.6 million acres of land was actually utilised (Nik, 1993). This is not only caused by the lack of interest of the Malaysians in agriculture but also because of the government emphasis on industrialisation programme.

The transition from agriculture to industrialisation has caused a few set backs in land use in Malaysia. NLC strictly indicates that land classified under a category could not be used for another purpose. Industrialisation needs more land but there is a shortage of land allocated for this purpose. To cater for this demand, land previously categorised as agriculture land had to be converted to industrial use. This conversion is no far easy task as national agriculture policies stands as stumbling block. One way to overcome this problem is by realienation of the land in Malaysia. The government should not hesitate to reclassify land itself, since the primary objective of land classification is to yield the highest social and economic benefit (Jack, 1946). But it is necessary to ensure that land is used in accordance with the national development. In Malaysia, although there is NLC but Articles such as 83, 84, 85, 86 and 88 constitutes that land is a state matter thus limiting the powers of government in administering land.

Due to this there is a lot of variances in land laws in Malaysia. Sometimes the differences are so great that it seems as though we are back to the times before NLC was developed. The effect of this difference can be seen in the land use status in Malaysia. In one way or another it has caused underutilization of the land itself. For
example, it has caused the agriculture land to be under-utilised (Nik, 1993). However the effect of this is reduced by the formation of a National Land Council.

Another way to overcome this problem is to amend the constitution itself, that is by classifying land into the jurisdiction of the federal government. But based on the Malaysian experience this move would not be favourable to the state government, as losing the autonomy in land matters is equivalent to losing a political tool, for evidence shows that land decisions is quite often based on political motives (Lee Lik Meng, 1991). Sometimes it is better to leave land decisions to the local authorities in a particular area. Perhaps the state and federal governments should play the role of synchronising land use in Malaysia.

The government should also make sure that, land is not misused in the name of development. Although there are laws regarding land misuses but it seems to be ineffective. For example, the Forest Enactment has only jurisdiction over reserved forest and not other forest land (Goh, 1982). This type of limitations, causes some people to take advantage. Never the less, it is important to reclassify land classification so that land use rate is increased.