

THE PROSPECTS AND CHALLENGES OF MALAY RESERVATION LAND IN THE 21ST CENTURY

Dr. Nor Asiah Mohamad*
Dr Bashiran Begum Mubarak Ali**

Abstract

Malay Reservation Land has always been and continues to be an important aspect of Malaysian land development. Some parties regard the endorsement of "Malay Reserve" an obstacle to the agenda of general development. Others understand the endorsement as a privilege and a safeguard of Malay interests. The objective of the paper is to analyze the legal provisions and policies in regard to the preservation of Malay reservation land. What role plays a Malay land owner in the overall agenda of land development of urban and rural areas? The authors intend to illustrate that a lack of understanding of the nature and purpose of Malay reservation land has added to a low level of commitment to preserve land which falls under the 'red-ink grant'. In legal deliberation, Malay land is not a sacred title where the owner's title is absolutely secured. There are many factors which can lead to a title be legally released from the land owner, with or without his/her consent. Many of the parties involved are not truly aware that Malay reservation land is a piece of 'entrusted' land which is ought to be conserved.

Key words: Malay, Malay reservation land, land development, trusts.

1.0 INTRODUCTION

"Malay reservation land" refers to a special category of land confined within the boundaries of a state which can only be owned and dealt over by Malays or persons deemed native residents of the state. Article 89(6) of the Federal Constitution 1957 defines "Malay reservation" as land reserved for alienation to Malays or to natives of the State in which it lies. The same provision also states that "Malay" includes any person who -- under the law of the State in which he is resident --¹ is regarded a Malay for the purposes of the reservation land. The declaration of any area of land as Malay reservation must follow certain constitutional and statutory procedures, such as the declaration and its publication in the gazette. The law also stipulates that any revocation of such land can only apply if there is a piece of land of similar character

* Assistant Professor, Private Law Department, International Islamic University Malaysia.

** Assistant Professor, Private Law Department, International Islamic University Malaysia.

¹ Article 89(3)

and size which does not exceed the area of the said land.² These areas are mostly rural areas which usually lack basic infrastructure and have fallen behind in the development agenda of the country. In addition, these areas are associated with complex developmental problems, relative poverty and poor living conditions.

2.0 THEORETICAL BACKGROUND

2.1 History of the Malay Reservation Land

The series of the earliest laws applicable to the Malay States show that the Malay Reservation Enactment was first enacted in 1913 and applicable in the Federated Malay States. It was later followed by the un-federated Malay States in 1930.³ In 1911, a similar enactment was already provided for the reservation of land but only made enforceable and implemental under the Malay Reservation Enactment of 1913. Apart from that, there existed other policies on specific and exclusive Malay land rights introduced by the British. Several earlier land legislations including the earliest legislation guaranteed an exclusive Malay right to land which can be traced back to the Malacca Land Code (the Code) initiated by W.E. Maxwell in the 1880s. Maxwell also introduced the Selangor Registration of Titles and initiated a category of 'smallholding customary lands' which aimed at providing a secured right of land tenure to Malay peasants.

However, the Code did not specifically state the term 'Malay'. Instead, the British referred to the Malays as the "Mohammedans" in whose interest a restriction on dealings with these customary lands was imposed.⁴ The restriction created issues and controversies⁵ among several eminent colonial figures and the Malays and was repealed two years after its implementation. The Malays asked the British Land Officer to remove the 'Mohammedan clause' in the land enactment claiming that the term restricted their rights to deal with their land freely and slowed down their economic progress. They found themselves unable to invest freely in their land. Others argued that the term "Mohammedan" restricted their rights to mortgage or sell

² Ibid.

³ For example, the Malay Reservation Enactment was introduced in Kelantan in 1930 followed by Perlis in 1931, Perlis 1953 and Terengganu in 1936.

⁴ Section 23 of the Selangor Land Code 1891. David S.Y. Wong, *Tenure and Land Dealings in the Malay States*, 1975, Singapore University Press, at 74; Also *SS BA Office (1875-1955) File No. 294/1891*, 'Minute by Attorney General J.W. Bonser, April 28th 1891 on Acting BR Selangor to Colonial Secretary' in Lim Teck Ghee, *Peasants and Their Agricultural Economy in Colonial Malaya 1874-1897* (Kuala Lumpur, Oxford University Press, 1977) at 18. It was said that 'Everything should be done to prevent them mortgaging their holdings and then in default of payment being ejected and their places taken by Chinese, Chettiers and others. The result might be that the inhabitants of Selangor for whose benefit the British protection is primarily designed might become a class of vagrants in their own country.'

⁵ See David, above n 4 at 77-78; J.M. Gullick, *Rulers and Residents: Influence and Power in the Malay States 1870-1920* (Singapore: Oxford University Press, 1992) 197-198, 221-222; See also *S.S.B.A. Office, File No. 247/97 (M477/86)*, 'Application from other Non-Mohammedan Races such as Asiatic, Europeans for the customary lands which could only be alienated to Mohammedans'; *S.S.B.A. Office 1891, File No. 3508/91 (M222/84)*, 'Application from one Mr. Sithampara Pillay, A Hindu who occupies about 2 acres of Customary land'

their land to Non-Muslims.⁶ As a result, the term “Mohammedan” was replaced by the term ‘any person.’

Nevertheless, the repeal was interpreted as an act of exposing the Malays to equal competition with other races in the acquisition of land. Deleting the clause had the effect that ‘the customary title became marketable, and its value increased tremendously’.⁷ All this indicates the efforts made by the British Residency to protect the right of the Malays. Certain parties doubt British intentions⁸ and argue that such efforts were merely done to serve their own political interests.

2.2 The Rationale of the Malay Reservation Land

British officials claimed that the declaration of Malay reservation land was aimed at protecting and preserving the right to land ownership of the Malays in Peninsula Malaysia.⁹ Here, the declaration and reservation was not confined to the Malay reservation land but included several other types of land which could only be owned or dealt over by Malays, such as the Malay holdings, Sultanate land, Malacca customary land, Malay agricultural settlements, the customary tenure of Negeri Sembilan and its *Lengkongan* lands.

Pressed by poverty, the Malays sold or leased their lands to Non-Malays. On the Conference of the Residents of the four Federated Malay States held in 1908,¹⁰ the issue on the sale of Malay land was addressed for the first time. The British representatives were alerted to the drastic increase of land sales initiated by Malay land owners to foreign immigrants. It was anticipated that such acts would inevitably affect the political power of the Malays. Brockman, then Resident of Perak, suggested that Malays land dealings ought to be restricted to prevent a complete sell-out of Malay land. Brockman was supported by Campbell, the Resident of Negeri Sembilan, who recommended the creation of Malay *kampung* (village) reserves.¹¹ Unfortunately, these proposals were deemed impracticable and rejected.¹²

Another proposal was submitted by R.J.B. Clayton, the District Officer of Ulu Langat (Selangor) in form of a memorandum to the Resident.¹³ Clayton argued that only the Malays were likely to form ‘a permanent agricultural population and labour force in the Federated Malay States, thus their rights to the land should be protected.’¹⁴ If not, it would defeat the main objective of the British policy to create a permanent agricultural population.¹⁵ Similarly, any sale of these lands was deemed detrimental

⁶ S.S.B.A Office, File No. 1892 (M 243/86)

⁷ J.M. Gullick, above n 5, at 197

⁸ See, Helmi Hussain, 1999, *Rizab Melayu: Indah Khabar dari Rupa*, Helmi Consultancy Services, Kuala Lumpur, Malaysia, p. 14

⁹ This objective is clearly stated in the heading of the Malay Reservation Enactment No 15 of 1913.

¹⁰ HCOF, File No. 1667/08, “FMS Conference of Residents”, October 1908.

¹¹ Ibid.

¹² Ibid.

¹³ This memorandum known as ‘The Absorption by Large Land Owners and Estates of Native (Malay) Holdings’ was proposed on July 28th 1910

¹⁴ Ibid., ‘The Absorption by Large Land Owners and Estates of Native (Malay) holding, July 28th 1910’

¹⁵ Ibid.

to Malay interests as they would end up being a landless race and forced to work as land-less labourers in their own country.

As a way to resolve the problem of a sell-out of Malay reservation land caused by poverty and lack of income, the British initiated a devaluation of the land purchase price.¹⁶ Later, the British Residency introduced a scheme for registration of ancestral land which was implemented in July 1911.¹⁷ The scheme restricted the sale of ancestral land to non-Malays without the permission of the Collector. However, many Malays remained ignorant of the rationale of this scheme and refused to endorse their land with the Malay Ancestral condition.¹⁸

The issue of Malay ancestral land sales reappeared at the Conference of Residents in November 1911.¹⁹ The four British Residents, the Chief Secretary and the High Commissioner unanimously agreed to pass a common Enactment applicable to all four Malay States.²⁰ The Enactment aimed at protecting Malay rights and ensured that they would not become homeless in their own country.²¹ However, the Enactment was never enforced and on December 23rd 1913 the Malay Reservation Enactment was passed and came into force on January 1st 1914. It stipulated that the Enactment would ensure that the Malays were no longer tempted to sell their land by putting this option 'beyond their reach.'²² The silent and most decisive feature was the prohibition to plant rubber trees on the reserved land.²³ This was actually detrimental to the immediate interests of the Malay owners who were eager to open vast areas to serve as rubber plantations.

The obvious intention of the British was to protect the long term interests of the poverty-stricken Malay population living in the Malaya States.

When this particular enactment for the protection of Malay land rights was introduced, some parties raised their doubts. It was argued that since the Malays were already lagging behind economically, the Malay Reservation Enactment might further aggravate their weak economic status.²⁴ This argument is still put forward by opponents of Malay reservation land until today.

One might suggest that the British Malay Reservation land policy was not a sincere effort, however protective it was for the Malay rights. The Malays were the native population of Malaya but they were economically weak and their reserved land did

¹⁶ Ibid.

¹⁷ A.N. Abdullah, *Melayu dan Tanah*, 68; Lim Teck Ghee, above n. 4, 109.

¹⁸ P.H. Kratoska, 'Ends that We Cannot Foresee: Malay Reservations in British Malaya', *JSEAS*, 14(1), 1983, 153-155.

¹⁹ *HCOF*, File No. 1583/1911.

²⁰ Ibid., 2.

²¹ *DOF Kuantan* 672/15 or *SS. BA. Office File No. 3013/1912*, 'Objects and Reasons', 2.

²² HCO. 309/1914, 'Report for the Secretary of State on Federated Malay States Enactment No. 15 of 1913 (The Malay Reservation Enactment, 1913)'

²³ The restriction was not mentioned in the Bill, but rather it was an order directed to the District Land Officers. See *SSF (1875-1955)*, File No. 1870/1915, Enquiries if Rubber is permitted as a crop on land in a Malay Reservation, April 9th 1915; *SSF (1855-1955)*, File No. 2742/1915, 'Permission to plant rubber in Malay Reservation in Labu Mukim, May 18th 1915'.

²⁴ *Proceedings of the Federal Council of the Federated Malay States, 1913*, p. B23. Mr. Eu Tong Sen and Mr. Skinner strongly objected to the Bill by saying that the Bill might create negative effect on the development of the Malay race.

not have any significant economical potential. The Malays themselves lacked any awareness of the importance to preserve their status as land owners. Today, the reserved land is slowly diminishing in size and overall poorly developed. Its necessity and usefulness continues to be questioned. The Malays continue to own their customary land, but the dilemma is that they have also become restricted them to their land because protection usually means a certain degree of restriction.

2.3 The Size of Malay Reservation Land

A look at the available data from 1957 until 2005 shows that there exists no exact figures on the actual size of Malay Reservation Land. This could have been caused by a change of the land features and the lack of appropriate replacement with other pieces of land. One may wonder whether the respective governmental departments and agencies are actually aware of the present size of the Malay reservation land. Information obtained from the Ministry of Natural Resources for 2005 reveals that the available data are incomplete and do not cover all states. The Ministry has failed to produce data on revoked Malay reservation land and its appropriate replacement.

According to the statistics shown below, the Malay Reservation Land covers an area of circa 44,000 square kilometres. There are claims that the size of the Malay Reservation Land has been continually decreasing. A total acreage of 82,995.99 hectare of Malay Reserve Land is reported to have been sacrificed for development purposes.²⁵ Only 28,337.48 hectares of the lost reserve land was subsequently replaced. Accurate figures are not obtainable to verify or falsify this allegation.

Table 1: Malay Reservation Land, Peninsular Malaysia 1913 - 1957

| State | Area of State (km ²) | 1921 ²⁶ | 1931 | 1947 ²⁷ | 1955 | % |
|-------------------|----------------------------------|--------------------|---------|--------------------|---------|-------|
| Perlis | 795 | | | 37,165 | 5,028 | 46 |
| Kedah | 9,426 | | | 808,162 | 127,804 | 89 |
| Federal Territory | 243 | | | | | 3 |
| N. Sembilan | 6,643 | 187,079 | 208,421 | 237,259 | 39,472 | 32 |
| Johor | 18,986 | | | 49,985 | 80,585 | 17 |
| Pahang | 35,964 | 54,005 | 275,479 | 299,393 | 218,326 | 12 |
| Terengganu | 12,955 | | | | 1,257 | 0.007 |
| Kelantan | 14,920 | | | 127,785 | 717,879 | 99 |
| Perak | 21,005 | 567,619 | 703,647 | 737,126 | 523,031 | 42 |
| Selangor | 7,955 | 36,503 | 86,927 | 125,845 | 44,501 | 21 |
| Penang | 1,030 | | | | | |
| Malacca | 1,651 | | | | | |

²⁵ See, *Harakah*, Monday, May 17, 1999. The Chairman of TERAS, a non-governmental organisation was reported to make such allegation under the topic "Pengambilan Tanah oleh Kerajaan Turut Menjadi Punca Banyak Tanah Melayu Tergadai", 9.

²⁶ *Proceedings of the Federal Legislative Council Feb. 1948-Feb. 1949*, B124-125 cited in A.N. Abdullah, *Melayu Dan Tanah*, 182.

²⁷ *Ibid.*

| | | | | | | |
|-------|---------|--|--|-----------|-----------|----|
| Total | 329,733 | | | 2,422,720 | 1,757,883 | 33 |
|-------|---------|--|--|-----------|-----------|----|

Archives Malaysia, SSF G 1195/30

640 acres = 2.59 km²

Table 2: Malay Reservation Land February 1983

| State | Area (hectare) | Area (acre) |
|---------------------|---------------------|---------------------|
| Kelantan | 3, 689 599.7 | 1 493 765.06 |
| Perak | 416 879.5 | 168 777.12 |
| Pahang | 6 631 311.29 | 268 474.2 |
| Kedah | 1 675 777 | 654 150.72 |
| Johor | 547 323.55 | 221 588.48 |
| Negeri Sembilan | 545 231 | 220 741.29 |
| Perlis | 84 276.4 | 34 120 |
| Terengganu | 226 | 107.69 |
| Wilayah Persekutuan | 2 441.1 | 988.29 |
| Selangor | 391 180.8 | 158 372.79 |
| Malacca | 10 745.66 | 4 348 619 |
| Total | 7 956 066.34 | 3 221 079.48 |

Source: Director of Land and Mine West Malaysia, taken from Ridhuan Awang, *Undang-Undang Tanah Islam: Pendekatan Perbandingan*, 1994, Dewan Bahasa dan Pustaka, Kuala Lumpur.

Table 3: Malay Reservation Lands in Malaysia 1998 (km²)²⁸

| State | Area Size of the State | Malay Reservation Land 1998 | Percentage of Malay Reservation Land |
|--------------------------------|------------------------|-----------------------------|--------------------------------------|
| Perlis | 795 | 375 | 47 |
| Kedah | 9 426 | 8 394 | 89 |
| Federal Territory Kuala Lumpur | 243 | 7.83 | 3 |
| Negeri Sembilan | 6 643 | 2 116 | 32 |
| Johor | 18 986 | 3 273 | 17 |
| Pahang | 35 964 | 4 361 | 12 |
| Trengganu | 12 955 | 0.95 | 0.0073 |
| Kelantan | 14 920 | 14 771 | 99 |
| Perak | 21 005 | 8 769 | 42 |
| Selangor | 7 955 | 1 792 | 22 |
| Penang | 1 030 | - | - |
| Malacca | 1 651 | - | - |
| Sabah | 73 619 | - | - |
| Sarawak | 124 449 | - | - |
| Federal Territory Labuan | 92 | - | - |
| TOTAL | 329 733 | 44 019.78 | 13.3 |

²⁸ Department of Statistics, *Yearbook of Statistics Malaysia 1998*, Malaysia, 2-6.

Source: Department of Statistics, *Yearbook of Statistics Malaysia 1998*, Malaysia, 2-6.

Table 3: Malay Reservation Lands in Malaysia 2005

| State | Area Size of the State (km ²) | Malay Reservation Land (km ²) | Malay Reservation Land (%) |
|-------------------|---|---|----------------------------|
| Perlis | 79 481.4 | 37 516.94984 | 47 |
| Kedah | 942 379.92 | 868 996.15948 | 89 |
| Federal Territory | 664 144.9 | 803.43 | 3 |
| Negeri Sembilan | 1 898 156.8 | 244 014.05 | 32 |
| Johor | 3.595 560.6 | 273 096.684 | 17 |
| Pahang | 1 295 197.6 | 242 743.826 | 12 |
| Trengganu | 1 491 651.7 | 118.2141 | 0.0073 |
| Kelantan | 2 100 009.7 | 1 306 205.025 | 99 |
| Perak | 795 314.3 | 880 158.236 | 42 |
| Selangor | 79 481.4 | 160 024.904 | 22 |
| TOTAL | | 4 013 677.478 | 13.3 |

Source: Ministry of Natural Resources and Environment.

The lack of disclosed accurate data on Malay reservation land is regrettable. The public has the right to be informed about the actual size of reserved land, especially where it is claimed that land was revoked but not replaced.

2.4 Problems and Challenges in regard to Malay Reservation Land

i. Ignorance of the purpose

Since the Malay reservation land was introduced by the British, people have remained sceptical. On the other hand, the abolishment of reservation land would raise stern opposition in other quarters. The problem is how to fully utilize the protection and to ensure that the Malays can benefit from it. This is the responsibility of the owners and administrators together with the policy makers. In the Preface to the Malay Reservation enactment 1913, it is stated that the purpose of the reservation is to "provide for securing the Malays their interests in land". The Johor Malay Reservation Enactment 1936 provides that the purpose of the Enactment is to prevent interests in land from passing out of the hands of the Malays. Thus, it is not only to protect the ownership of the land but also to ensure that the interest in the land

shall remain to the benefit of the Malays. Therefore, any law and policy which is introduced must ensure that the interests remain with the Malays.

ii. The factor of complacency

It has been argued that the Malay Rulers persuaded the British to implement the laws in question.²⁹ The Malays soon developed a complacent attitude toward the reservation laws and thus failed to make any effort to change or improve the law. This complacency has -- to a certain extent -- become a hindrance for the development of these pieces of land because a portion of the Malay owners have failed to initiate any efforts to the further enhancement of their land and increase its value. Similarly, the restrictions on dealings have hindered the Malays from competing in the open market which resulted in a value reduction of their properties. As such, it is commonly perceived that the reservation has contributed to the slow development of the Malay reservation land in Malaysia.

iii. The factor of remoteness and low fertility

Under the British Regency, fertile land was preferably given to fellow British citizens. For example, Kuala Lumpur's fertile lands were alienated to Thomas Heslop, Ambrose Beatty Rathborne and Martin Lister.³⁰ The British declared the whole of Kelantan and most of the villages surrounding it a Malay reservation, and so they could have declared the city of Kuala Lumpur a Malay reservation as well but they did not. Today, only about 13% of land in the Klang Valley is being gazetted as Malay reservation land.³¹

Most of the land that had been declared as Malay reservation by the British was considered third and fourth class land.³² Moreover, these lands were located in rural areas and covered by jungle vegetation. Developing these types of land is expensive and considered uneconomic,³³ a reason for these lands being abandoned by its owners and neglected by the government. Although much of the Malay reservation land is situated in rural areas, the Malay owners need to invest in the development of their land. Proper policies could ensure that Malay land ceases from being treated as second class land to obtain loans from financial institutions.

²⁹ See W. Roff, *The Origins of Malay Nationalism* (New Haven, Yale University Press, 1967).

³⁰ Ho Chin Soo, "Golden Hope vs Guthrie", *The Star*, Monday August 21st 2000, 21.

³¹ *Ibid.*

³² This can be inferred from section 3(10) of the Kedah Malay Reservation Enactment. This provision states that "Provided that no land shall be declared to be a Malay Reservation which, at the coming into force of this Enactment, is included in any area declared to be Sanitary Board area in accordance with the provisions of section 3 of Enactment No. 106 (Sanitary Boards) or is included in any area declared to be a town under section 5 of Enactment No. 56 (Land). See also the views of N. Abdul Rashid, 'Kearah Meninggikan Nilai Tanah Rizab Melayu', Seminar Kearah Meninggikan Nilai Tanah Rizab Melayu, Kuala Lumpur, July 1st 1979, p. 5.

³³ M.R. Awang, *Undang-undang Tanah Islam: Pendekatan Perbandingan*, Dewan Bahasa dan Pustaka, 1994, p. 44; Yahaya Bin Udin, *Malay Reservations- Are There Adequate Safeguards*, Master Dissertation submitted to Kulliyah of Laws, International Islamic University Malaysia, May 20th 1991, 63-64.

iv. The factor of location

Most of the Malay reservation land is situated in remote areas with limited accessibility and low infrastructure. Most of the land declared by the British was village land or wasteland where the value of the land was low.³⁴ Some of this land was subsequently neglected and not worked by its owners.³⁵ Any land that had development potential, urban areas and mining areas were excluded from Malay reservation.

It is believed that the British prejudicially viewed the Malays as incapable and not keen in developing their land. Thus only rural areas, except for Kota Bharu, have been declared as Malay reservation. Kuala Lumpur Malay reservation land counts up to a mere 3 %, and Ipoh and Johor Bharu to 3.4% and 4.8% respectively.³⁶

The question here is how this state of affairs can be improved. With sufficient political will and resolution, many things can be accomplished. Common complaints revolve around the fact that the Malays are incapable of properly developing their lands. It is not enough to furnish the Malays with subsidies and special quota, but the areas need developing and proper infrastructures.

v. The effectiveness of restriction on Malay reservation land

All Malay Reservation Enactments provide for restriction in dealing with non-Malays.³⁷ The restriction includes the disposal of Malay reservation land to any non-Malay. Similarly, in a case of alienated land (except for Kelantan), no Malay reservation land can be sold, charged or leased to a non-Malay, irrespective of the time period. Furthermore, every state has a list of companies which are listed as Malay companies with whom Malay owners may deal. Unfortunately, despite the many restrictions provided in the Enactments, a lot of Malay reservation land has lost title and privileges, mostly caused by the irresponsibility of decision makers who either openly or secretly sell, charge or even lease the land to non-Malays. Others simply refuse to acknowledge the importance of the Cinderella piece of land opted and fought for change of title. Unfortunately, people who are entrusted to deal with the 'red ink grant' fail to understand the need to preserve and protect the reserved land and decide to revoke the land and do not care to replace it.³⁸

vi. The state authority's power of disposal

Legally, land is a state matter.³⁹ The 1933 Malay Reservation Enactment states that no Malay reservation land shall be sold, leased or disposed of to non-Malays.⁴⁰ However,

³⁴ Helmi Hussain, *Indah Khabar dari Rupa*, 1999, Helmi Consultancy Services, Ulu Kelang, Selangor, 13.

³⁵ Mohd Ridhuan Awang, *Konsep Undang-Undang Tanah Islam* (Kuala Lumpur, Al-Rahmaniah) 368.

³⁶ Nik Mond Zain, "Pembangunan Tanah Rizab Melayu Dari Perspektif Sejarah, Perundangan Dan Pembangunan Masa Depan", *Persidangan Pembangunan Tanah Rizab Melayu*, November 9th 1996, 32.

³⁷ See for example section 7 of the Malay Reservation Enactment 1913; sections 7 & 8 of the MRE Enactment FMS Cap 42; dealings by attorney in section 9, restrictions on caveats in sections 10 & 11; restriction as to attachment in execution under section 13 etc.

³⁸ Read for example, *Zaleha Sahri v Pentadbir Tanah Johor Bahru* [1996] 2 CLJ 147

³⁹ See section 40 of the NLC.

⁴⁰ See section 7 of the MRE 1932.

in 1962, the Malaysian Government -- in order to allow companies and corporations to deal with Malay reservation land -- amended this provision. The provision states that the Ruler-in-Council or the Yang di Pertuan Agong in the case of the Federal Territory is given discretion to alienate state land within a Malay reservation to any person, body, corporation or company which is specified in the Third Schedule, and to declare any company or corporation as Malay. This decision is final and cannot be questioned by the Court.⁴¹ It has also the discretion to add, delete or amend the list in the Third Schedule.⁴² Any item on the list becomes official once it has been published in the gazette.

The objective of the above amendment was to permit development and to raise the economic status of the Malays Reservation Land owners. In relation to that, many companies and corporations which were not 100% Malay have been declared Malay for the purposes of section 7 of the Federated Malay States Malay Reservation Enactment. For instance, Chung Khiaw Bank, Kwong Yik Bank, and Lee Wah Bank are banks whose 100% equity was not held by Malays.⁴³

Meanwhile, the Kedah Malay Reservation Enactment has allowed the State to dispose Malay reservation land to Siamese agriculturists residing in the state, certified by the Director in writing.⁴⁴ The Kedah Malay Reservation Enactment has also given a wide discretion to the Ruler-in-Council to declare any person of any race or nationality⁴⁵ as 'Malay' who becomes able to hold any Malay reservation land.⁴⁶

In Perlis, no Malay reservation state land shall be alienated, sold, leased or otherwise disposed to any person who is not a Malay or Siamese.⁴⁷ However, an exception is also found here in section 17A (i) where all those persons specified in Schedule D may hold or apply for Malay reservation land.

In the case of Johor, by virtue of section 8, the State Authority, nevertheless, has no right to dispose by way of alienation to any person not being Malay. The Johor State Authority can dispose Malay reservation land to non-Malays through Temporary Occupation Licence, lease or tenancy.

2.5 The role of Malay Reservation land in Malaysian Economic Policy

The Malays were deemed to own only low class land and not to be financially strong enough to develop their land. As they showed a lack of interest, know-how and education, the Government introduced and implemented various strategies to improve and further develop Malay reservation land. For example, in the Second Industrial Master Plan (IMP2) 1996 – 2005, the government introduced two new strategies: manufacturing plus strategy and cluster-based industrial development. As most of the Malay reservation land was agricultural land, value was added by introducing agro-

⁴¹ FMS MRE ss. 7, 20; Muhammad Said Abdul Kadir, *Persatuan Pengurusan Tanah Malaysia*, 43-44.

⁴² See *Zainal Abidin Bin Mohd. Taib v. Malaysia National Insurance Sdn. Bhd.* [1994] 3 CLJ 731 where the Court held that the decision of the Ruler-in-Council is final and conclusive.

⁴³ FMS MRE, Third Schedule.

⁴⁴ Kedah MRE, s. 8(1)

⁴⁵ Emphasis added.

⁴⁶ Kedah MRE s. 19

⁴⁷ Perlis MRE s. 7(i)

based incentives and new products, fish and livestock products, fruits, vegetables and floriculture to ensure that reasonable returns were obtained.

Among the policies to achieve economic stability and equity were the New Economic Policy (NEP 1971-90), the New Development Policy (NDP 1991-2000) and recently the National Vision Policy (NVP). The NEP and subsequently the NDP provided the broad policy framework which constrained the Outline Perspective Plan 1 (OPP1), the Outline Perspective Plan 2 (OPP2) (1991-2000), and the recent Outline Perspective Plan 3 (OPP3) (2001-2010) which have been constraining the five yearly National Development Plans produced since 1961. The OPP3 lays special emphasis on 'Sustainable Growth with Resilience' in 'Restructuring of the Society' to oversee the development of Malay reservation land.

Apart from these policies, it is argued that the development of the Malay reservation land in Malaysia needs to go together with trainings, financing as well as marketing back-up. For example, the Ministry of Agriculture and Agro-based Industry Malaysia has set up a Business Development Centre to provide various services, such as training, courses, advices and consultation to familiarize Malay owners with available government funds for various schemes in the agro-food industry. Besides, attractive tax exemptions are available to Malay investors in agro-based industries.⁴⁸ Unfortunately, no study has been conducted to this day to evaluate the success of these policies.

2.6 Market Value of Malay Reservation Land

By virtue of the amendment of the Land Acquisition Act 1960 (amendment 1983), the government has statutorily guaranteed that the value of the Malay reservation land shall not be affected by its status as a Malay reservation land.⁴⁹ Anyhow, after more than twenty years since the amendment, the problems of Malay reservation land remain. In general, most of the Malay reservation properties are sold at lower or discounted prices. As a result, the gap between Malay reservation land and open title seems to increase year by year.

Land that was declared Malay Reservation were mostly low level swampy tracts the British planters and estate owners were not interested in. Therefore, the Malay reservation lands were of low market value and lacked infrastructure.

⁴⁸ <http://pico.neofission.com/websites/agribdcom/index.php>

⁴⁹ Refer to Schedule 2 of the Land Acquisition Act 1960

2.9 Security of land title and the Malay reservation land

The issue of security of land title, i.e. the indefeasibility of title under the Malaysian land system, has been challenged several times at court. It was argued that a registered land owner's right over the land can be defeated by a new owner who later in time obtains a title over the same land via proper registration in the land office. This affects the Malay reservation land as well. Legal opinion was based on the endorsement made by the Federal Court in *Boonsom Boonyanit v Adorna Properties*⁵² (hereinafter referred as *Boonsom's* case) which tested the integrity of the registration system under the Malaysian land law.

In the above case, the Federal Court emphasized on the immunity of a *bona fide* purchaser for valuable consideration from any claim under section 340(2) NLC.⁵³ The concern over the future of Malay reservation land is justified. Most of the land is situated in rural areas and the majority of the owners cannot afford to seek legal redress. Court and the legislators should play a bigger role in minimizing ambiguity in the related laws. As exercised in other government departments (e.g. Immigration), the use of thumb prints is viable and practical to provide high security in land transactions. More importantly, the government must guarantee that the law protects the interests of the citizens. Perhaps it is high time to consider insurance for land titles.⁵⁴

2.10 The future of the Malay Reservation land – a proposal

Many argue that the future of the Malay reservation land is clouded and there is yet much to be done to realize its initial purpose. It is suggested that all financial institutions registered under the Finance 1989 (Act 372) or Islamic Bank Act (Act 276) must not accept any charge of Malay reservation land. No corporation either established under the Federal or state laws subject to approval from the State Authority should be allowed to accept any charge of Malay reservation land.

It is also proposed that any corporation or company providing loan for land or housing to its employees should be exempted from being required obtaining approval from the State to create charge. A saving clause is necessary in order to provide those enjoying the exemption under Schedule 2 to remain assured of their exemption. However, the requirement that only Malays shall be involved in the auction and vesting order must

⁵² *Adorna Properties Sdn Bhd v Boonsoom Boonyanit* [2001] 2 CLJ 133

⁵³ The Federal Court decision in *Boonsom* has received criticisms from all levels but due to the rule of precedent the High Court in *Ismail Mohamad & Anor v Husin & Ors* [CLJ Bulletin Vol. 2005, Issue 35] as well as one of the judges at the Court of Appeal in *Abu Bakar Ismail & Anor v Ismail Husin & Ors & Other Appeals* [2007] 3 CLJ 97; [CLJ Bulletin 15/2007; case of the week] felt that they were bound by the decision of the Federal Court in *Boonsom's* case. The attempt to differ with the above judgement appeared in the judgment of *Subramaniam a/l NS Dhurai v Sandrakasan a/l Retnasamy & Ors* [[2005] 6 MLJ 120-131 though merely a judgment from the Court of Appeal, but the decision of Gopal Sri Ram is worth noting. In this case, the judge highlighted that in *Boonsom's* case, the Federal Court failed to differentiate between a purchaser and a proprietor as explained in section 5 of the NLC. A similar argument was raised in *Abu Bakar Ismail & Anor v Ismail Husin & Ors & Other Appeals*.

⁵⁴ Salleh Buang, "Security of Tenure Under the Malaysian Torrens System: What Next After Boonsom Boonyanit?", *International Real Estate Research Symposium (IRERS)* 11-13 April, 2006, PWTC, Kuala Lumpur, Malaysia.

remain and closely monitored to ensure that Malay reservation land does not fall into the hands of other parties.

The creation of power of attorney to non-Malays could be allowed for limited periods, such as 25 years. To allow a 60-year lease may create some other legal problems, especially if the parties die, the documents are lost or the issuing legal firm is dissolved.

The development of Malay reservation land is slowed down due to the financial weakness of the Malay owners. It is suggested that a Malay company shall be considered an individual under the Enactment. A non-Malay equity in a company may be increased so that more non-malay invests in Malay reservation land. Such a company may be categorized as a Malay Holding, provided there is a better mechanism to monitor the management of the company. With this formation, Malay companies can develop Malay reservation land. The state government should give priority to develop Malay reservation land or give priority to the owners of Malay reservation land to develop their land with the support from the state government.

The Malaysian Government has initiated several programmes and schemes in order to ensure that the lands can be developed. Nevertheless, many obstacles have remained and the fast catching development in urban areas does not boost the potentials of Malay reservation land.

The attitude of treating the value on economic basis should not apply to Malay reservation land. This land is not similar to Native American reservation land or Aborigines land in Australia. It should be treated like any other land having economic potential, especially since Malaysia is not a big country. It ought to be incorporated in planning and development projects through the establishment of Malay companies and organisations.

It is hoped that the recently launched East Corridor Economic Region (ECER), North Corridor Economic Region (NCER) as well as the South Corridor Economic Region (SCER) will spur better development and opportunities for Malay reservation land. It is anticipated that some of the Malay landowners may continue to remain passive and complacent, and that further attempts will be made to revoke the Malay reservation status. Nevertheless, an increase in land value will provide more economic opportunities for the Malays. Malay reservation land may be leased to non-Malays for a reasonable period and within the control of the Malay owners.

At present, Johor has a provision that allows a Malay owner to have his/her land to be categorized as Malay reservation land.⁵⁵ It is a good initiative and this option may gradually increase the size of Malay reservation land. It is also in line with Article 89(3) of the Federal Constitution. The State has to ensure that any piece of Malay reservation land, which has been revoked for whatever purposes, is properly replaced. This should be considered a public duty.

Above all, there is a pressing need for all Malays to understand the aim and purpose of the Enactment. Despite the strict restrictions the Enactment imposes, there are

⁵⁵ See section 6(1) of the Johor Malay Reservation Enactment 1936.

many ways by which Malay reservation land may fall into the hands of other parties. The power given to the Ruler-in-Council to declare any person or Malay companies is prone to be abused. Though the Malay reservation Enactment provides for a Malay company, there is no provision to control any amendment to the companies' constitutions. This may give room for the share to be transferred to the non-Malays.

3.0 CONCLUSION

The future of the Malay reservation land lies in the hand of the Malays. The Enactments contain many restrictions but do not provide a sufficient protection against abuse and misappropriation. Malay reservation land has been marked with *red ink* to show its importance. The trust to protect the land lies in the hands of many different parties, such as the State Authority and the Ruler-in-Council. Land administrators and politicians also have an important role to play in determining the future of the Malay reservation land.

REFERENCES

- Kasitah Gaddam, (2002) "Pemilikan dan Penguasaan Tanah oleh Orang Melayu." *Jurnal Tanah*, Vol. 3.
- "DEB bukan sekadar bantu Melayu", *Utusan Malaysia*, 31 March 2007.
- "Old Kelantan Land Law frustrates property buyers", *New Straits Times*, June 28 2007.
- Lim Kean Siew, "Can Non-Malays Hold Charges over Malay Rights in Malay Reservation Lands to Secure Their Interests?". *The Malayan Law Journal* 1965, 16-22.
- Helmi Hussain, *Rizab Melayu: Indah Khabar dari Rupa*, Ulu Kelang, 1999.
- Ridzuan Awang, (1994). *Undang-Undang Tanah Islam Pendekatan Perbandingan*. Kuala Lumpur: Dewan Bahasa dan Pustaka.
- S.Y. Wong, David. (1975) *Tenure and Land Dealings in the Malay States*, Singapore: Singapore University Press.
- Lim Teck Ghee, (1977). *Peasants and Their Agricultural Economy in Colonial Malaya 1874-1897*, Kuala Lumpur: Oxford University Press.
- J.M. Gullick, (1992). *Rulers and Residents: Influence and Power in the Malay States 1870-1920*, Singapore: Oxford University Press.
- HCOF, File No. 1667/08, (July 28. 1910) FMS Conference of Residents', October 1908, 'The Absorption by Large Land Owners and Estates of Native (Malay) Holding'.
- P.H. Kratoska, (1983). 'Ends that We Cannot Foresee: Malay Reservations in British Malaya', *JSEAS*, 14: 1.

DOF Kuantan, 672/15 or SS. BA. Office File No. 3013/1912, '*Objects and Reasons*'.

HCO. 309/1914, 'Report for the Secretary of State on Federated Malay States Enactment No. 15 of 1913

SSF (1875-1955), File No. 1870/1915, Enquiries if Rubber is permitted as a crop on land in a Malay Reservation, April 9th 1915; *SSF (1855-1955)*

File No. 2742/1915, 'Permission to plant rubber in Malay Reservation in Labu Mukim', May 18th 1915'

Report of the Malay Reservation Committee 1930 Constitutional Proposals for Malaya: Report of the Constitutional Committee together with Proceedings of Six Public Meetings, a Summary of Representations Made and Letters and Memorandum Considered by the Committee, February 20th 1947

Shaik Md. Noor Alam B S.M. Hussein, (1999). 'Malay Reservations: Meeting The Challenges Of The Millennium', PETA Seminar on Repositioning of Agriculture in the Next Millennium, 13 July 1999.

Federation Of Malaya, Report Of The Land Administration Commission, Appointed To Enquire Into And Make Recommendations For The Improvement of Land Administration In The Federation of Malaya, Kuala Lumpur: Government Printers, 1957.

Tanah Rizab Melayu Wilayah Persekutuan', Letter from Zahrullail Bin Ayub to Dato Drs. Suleiman Mohamad, dated December 20th 1994 found in Nazlinda Abdullah, Kemudahan Pembiayaan Bagi Pembangunan Tanah Rizab Melayu di Wilayah Persekutuan, University Teknologi Malaysia, April 1995.