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This is used where the court has consciously refused to follow a case although potentially relevant. It implies that the annotated case is wrong. If a case is not followed because of some distinction in the facts or law, the proper annotation would be (distinguished).

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**A THE POSSIBLE APPLICATION OF THE ISLAMIC PRINCIPLES OF
EQUITY TO MALAYSIAN LAND LAW: A DISCUSSION**

by

B

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ABSTRACT

D

The application of equitable principles owns a respectable position in almost all legal subjects; land is not an exception. The presence of the prohibitive provision under s 6 of the Civil Law Act 1956 does not affect the original role of equity ie, to give justice to the parties by questioning the conscience of the person involved in land transactions. This feature of equity has become acceptable in all jurisdictions in the world. Nevertheless, as it will be shown in this article, the yardstick used to measure equity may differ from one situation to another. This article holds that the concept of justice as promoted under the equitable principles of Islam may look similar to the English concept of equity, yet differs in its sources and objectives. In Islam, the knowledge of the objectives of Shariah determines the ability to exercise ijtihad (independent reasoning) and helps the judges arrive at a judgment that renders justice to both parties involved in the dispute. It is possible to invoke all concepts of equity, either from English or other laws, as long as they conform to the objectives of the Shariah.

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INTRODUCTION

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The application of the equitable principles in Malaysia can be derived from ss 3 and 5 of the Civil Law Act 1956.¹ The reception of equity took effect by virtue of the Charter of Justice 1807 that was applicable to Penang, later followed by Malacca and other Malay States.² Besides these two authorities that caused the introduction of English law of equity in our legal system, the application of English equitable principles to the Malaysian land law has

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1 (Revised 1972) Act 63.

2 In *Regina v Willan* (1858) 3 Ky 16, Sir Benson Maxwell expressed in his judgment that 'a direction in an English Charter to decide according to 'justice and right', without expressly stating what body of known law, they shall be dispensed and so to decide in a country which has not already an established body of law, is plainly a direction according to the law of England. The whole of Charter appears to me to support this view, it gives the court the powers of the Superior Courts of Law and Equity at Westminster, to be exercised as far as circumstances admit'.

I

taken place quite isolated and restrictive.³ Malaysian land system has its origins in Australia. In order to avoid the dualism of the English land tenure system Malaysia adopted the Australian system of registration ie, the Torrens system.⁴ This is evident from the prohibitive section for the importation of any principles and rules that have their origin in the English land tenure system.⁵ The debate arising from s 6 of the Civil Law Act 1965 has produced two factions. The first faction argues that the concept of equity encompasses the concept of English land tenure. It is a universal concept of equity that transcends the border of jurisdiction or law. It is a universal principle that ought to be embedded in all legal systems, and not the English system alone. Its application should not be restricted to any subject of law but universally applicable as a basis to do equity to any parties.

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The concept of equity in Islam covers a wider scope than the concept of equity under English law. It is a concept that is embedded in the Shariah and it derives its sources from the Quran and Sunnah. The methodology of exercising equity in Islam has been developed in the various works of Islamic jurisprudence. Muslim jurists have applied it in order to derive rulings in legal problems to which no precedents was found in the traditional texts. The earlier practices of the companions of the Prophet Muhammad (pbuh) provided legal authority and prohibited his followers from produce legal rulings which inflicted injustice to either one or both of the disputing parties. In Islam, the means, the cause and the effect of a legal reasoning must not contravene to the divine texts. The application of the principles of equity must be exercised in line with the *maqasid al-Shariah* (objectives of Shariah). The proper application of the rules of equity in Islam shall not just depend on the moral conscience of the individual. Similarly, there should be no application of equity in cases where is only serves the interest of one of the involved parties.

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THE NLC: FROM AN ISLAMIC PERSPECTIVE

The National Land Code 1965 ('NLC') was introduced with the aim to provide uniformity of the land laws for all the states in the Malaysian Peninsular. Neither the Preamble nor the provisions mention the applicability of an Islamic concept. Only s 4(2) provides for the overriding interest of any customary practices (*adats*) or any law that relates to *waqf* (endowment) etc. Any student of Islamic law knows that sound legal principles established by foreign law are generally retained in order to

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3 The reception of equity took place in the Malay States through statutory as well as judicial process. It finds effect gradually and the debate over the suitability of the system is still ongoing.

4 The first land regulation which had applied Torrens system of registration was the Land Titles Regulation 1891 in Selangor.

5 Section 6 of the Civil Law Act 1956.

I

A accommodate public interest, necessity or local custom, as long as they do not contradict the general principles of Islam.

The NLC agrees with the Islamic concept of land ownership and equity. There exists no major 'unislamic' element in the present land system.

B Nevertheless, it is submitted that there are a few minor areas which run against Islamic principles of land ownership. For example, the imposition of 'interest' or extra charges for any payment which exceeds the period agreed by the parties is contrary to the Shariah which prohibits usury. There is also a failure to adhere to Islamic principles of land administration. For example, the Islamic rules of equity are not applied by the judges. Basic concepts could be highlighted, such as the real owner of land being Allah, and the land law in Malaysia is governed on the basis that the State Authority being the owner of all unalienated land⁶ is managing the property in trust for Allah swt. Similarly, whenever a property is alienated or disposed to any individual or body, the owner or the proprietor of the land has a similar duty and becomes a new trustee whose ownership is governed not only by the NLC or other laws but also by the law of Allah. For a Muslim, this duty arises from his conviction that he has a moral duty to fulfil his *amanah* (trust) for the sake of Allah.

C This article seeks to analyse to what extent the non-application of Islamic principles of equity contributed to current land problems. The basis of the Islamic principle of equity lies in the implementation of the Islamic concept of property. An Islamic land system can be a successful land system if there is a comprehensive approach in legal administration in general and land management in particular. A cut and paste approach of the rule should certainly be avoided.

D The Islamic notion of equity is almost identical to equity as proposed by Saunders,⁷ *Dudley v Dudley*⁸ and *Snell's*,⁹ and also its meaning is identical as found in the legal dictionaries and differs only in its sources. While the English concept of equity is derived from various sources such as the natural laws and the conscience of the judges, the Islamic concept of equity finds its basis in the *Quran* and *Sunnah*.¹⁰ Its major aim is to achieve the realisation of benefit (*maslahah*) for the people. In the legal sphere, justice is the main objective that needs to be achieved by any parties who have referred their cases for legal judgment.

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F 6 Section 40 of the NLC.

7 Saunders, John B, (edit), *Words And Phrases Legally Defined*, (2nd Ed 1969), Vol 2, Butterworth, London. For a detailed discussion refer to Chapter 4 of this thesis.

G 8 (1705) Prec Ch 241, cited in *Snell's Principles of Equity*, (30th Ed 2000), p 4.

9 *Snell's Principles of Equity*, (28th Ed 1982), Sweet and Maxwell, London, p 25.

10 Both are considered as the primary sources for any Islamic principles.

THE GENERAL PRINCIPLES OF LAND IN ISLAM

Islamic law was designed to govern all aspects of human life. It contains general principles and rules as well as very specific rules to be administered in exceptional cases. In land matters, a similar rule applies. The general rule is that all things in this earth belongs to Allah,¹¹ the concept of *al-ard* (earth) and *ihya al-mawat* (reviving dead land), public right prevails against the private right, the right of *shuf'ah* (preemption) or the law of *zakah* (alms-giving) are always taken into account in determining any conflict of right concerning land. These rules are based strongly on equitable principles which serve to give justice to all in disputes over land. Therefore, a proper understanding of these basic principles is important to any land administrator or judge in order to ensure that any decision over land will be a just one.

In Islam, land is perceived as wealth created by Allah swt¹² whereby all His creatures have the right to enjoy it in a lawful manner. At the same time, Islam recognises individual rights to property¹³ but such rights should be exercised within the limit that has been prescribed by the Shariah.¹⁴ Such recognition shows that ownership of land has a purpose in Islam.

In Islam, the human desire for the mundane enjoyments of life is acknowledged but Allah as the Creator laid down His divine legislation proclaimed by His Messenger. The concept that land is a gift from Allah and man merely its trustee requires a system which is able to balance between the rights of the primary owner, namely God, and its temporary owner and beneficiary, man. Though the Quran and Sunnah (tradition) of the Prophet

11 Refer to Quran: 57:2; 63:7; 65:12; 78:37.

12 It was narrated by Abu Hurayrah:

While we were in the mosque, Allah's Apostle came out to us and said, 'Let us proceed to the Jews'. So we went along with him till we reached Bayt-al-Midras (a place where the Torah used to be recited and all the Jews of the town used to gather). The prophet stood up and addressed them, 'O Assembly of Jews! Embrace Islam and you will be safe!' The Jews replied, 'O Abu-I-Qasim! You have conveyed Allah's message to us'. The Prophet said, 'That is what I want (from you)'. He repeated his first statement for the second time, and they said, 'You should know that the Earth belongs to Allah and His Apostle, and I want to exile you from this land, so whoever among you owns some property, can sell it, otherwise you should know that the Earth belongs to Allah and His Apostle'.

Sahih Bukhari, Book 85, Number 77: Hadith No 392, Vol 4, <http://www.usc.edu/dept/MSA/fundamentals/hadithsunnah/bukhari/o85.sbt.html>.

(Quran: LV:10-11) states ' it is He who has spread out the earth for (the benefit) of (His) Creatures Therein is fruit And date palms, producing spathes (enclosing dates); Quran (II: 29) 'It is He who has created for you All things that are on the earth'.

13 Quran: IV: 32 (After the payment of taxes) whatever men and women earn belongs to them'. The authorities can also be found in Al Quran: 4:2; 2:188; 3:186; 9:111.

14 Al-Tahwi, 'Al-Iqtisad al Islami', Vol 1, *Majma' al Buhuth al-Islamiyyah*, 1974.

A stand as the main guidance, both sources of the law only lay down general rules and leave out any specific matters. During ‘Umar Ibn al-Khattab’s reign, there were occasions when he differed from the decisions originally made by the Prophet (pbuh) whenever he found a basis for his own *ijtihad* (legal reasoning). Another example can also be derived from his advice to Abu Musa when he appointed him as a judge: ‘Judgment is to be passed on the basis of express *Quranic* imperatives or established Sunnah. Make sure that you understand clearly every case that is brought to you for which there is no applicable text of the Quran or Sunnah. Yours then is a role of comparison and analogy, so as to distinguish similarities in order to reach a judgment that seems nearest to justice and best in the sight of God’.¹⁵

B

C The above authorities show that Islamic law developed according to the needs of the people of the time, and Quran and Sunnah remained the main sources beside the *ijtihad* (independent reasoning) Muslim jurists were applying in other cases. It can be seen that in the domain of land law, the equitable principles work on the same basis of the principle of *usul al-fiqh* (Islamic jurisprudence).¹⁶ The classical definition of *fiqh* is derived from the famous *hadith* of Mu’adh ibn Jabal. It demonstrates that in this process, independent judgment, within certain limits is not only permissible but even praiseworthy.¹⁷

D

E The history of Islam shows that the Prophet (pbuh) used the Islamic principles of equity in determining what the best policy for his people was. It was reported that after the battle against the Banu Nadir the lands of the Jews were occupied by the Muslims. An issue arose as to how such lands were to be distributed. As a result, a verse was revealed to the Prophet:

F Whatever lands fall to you from the people of the town, they belong to Allah and the Apostle and orphans and the needy and the wayfarer and the poor among the *muhajireen* who were driven from their homes, and all for all those who came after.¹⁸

15 See Ibn al Qayyim, *I Ilm al Muwaqqi’in, An Rabb al-Amin*, ed Muhammad Munir al-Dimashqi, Cairo, Idarah al-abaah al-Miniriyyah.

G 16 It is the science of the sources of Shariah with a purpose of providing a set of guidelines in exercising *qiyas* or *ijtihad* (legal reasoning). One of the authorities which shows that *ijtihad* is valid could be seen in the occasion where Mu’adh ibn Jabal states that when the Prophet sent him to Yemen, he was asked: ‘What will you do if a matter is referred to you for judgment?’ Mu’adh said: ‘I will judge according to the Book of Allah’. The Prophet further asked: ‘What if you find no solution in the Book of Allah?’ Muadh said: ‘Then I will judge by the *Sunnah* of the Prophet’. The Prophet asked: ‘And what if you do not find it in the *Sunnah* of the Prophet?’ Mu’adh said: ‘Then I will make *ijtihad* to formulate my own judgment’. The Prophet patted Muadh’s chest and said: ‘Praise be to Allah, Who has guided the messenger of His Prophet to that which pleases Him and His Messenger’.

H 17 MA Laldin, *Introduction to Shariah and Islamic Jurisprudence*, 2006, Cert Publication, Kuala Lumpur, 6.

I 18 Surah *Al Hashr* (59):9-10. This issue was discussed in Masud-ul-Hasan, *Hadrat-‘Umar Farooq*, 1982, Islamic Publications Ltd, Lahore, Pakistan, pp 187-188.

Another authority is seen in surah *al-Anfal*:¹⁹

A

And know that out of All the booty that ye may acquire (in war), a fifth share is assigned to Allah, and to the Messenger, and to near relatives, orphans, the needy, the wayfarer, ...

The above verses provide that a division of a fifth share allocated for Allah requires an exercise of equitable principles division. The rationale for the practice of equitable principles is to guard against human greed and selfishness. Practically, the fifth share of the booty will fall under the discretion of the *imam* or the leader of the state. Here, the *imam* must use his discretion to properly distribute the property for himself, for the poor etc. Therefore, it can be seen that an exercise of equitable principles is required in determining what would be the best policy in handling the spoils of war.

B

C

During the reign of 'Umar, Islam managed to conquer Iraq and Syria. The warriors demanded that all agricultural lands be divided among them but he rejected their plea based on several reasons. First, he observed that economically if the land were to be distributed among the warriors, no assets would be left with the state to provide the source of revenue for the future. Socially, he opinionated, the warriors who had fought in several fronts would have acquired a large acreage of land; thus in the long run, such policy would create a big gap between the rich and the poor thus causing a feudal system repugnant to Islam. Therefore, the best course was that such land should be declared as state property which generated income for future needs of the future generations. 'Umar has interpreted the verse '*and those that will come after*' to imply that such land should remain state property so that the coming generations might also profit therefrom.²⁰ Looking at this basis, it is submitted that the policy which declares all unalienated land as state land is found to be in consistent with the principles of Shariah, especially in a country which only has a limited tract of land while the population is increasing. It can be seen that 'Umar used his *ijtihad* as a basis of legal reasoning to make a decision departing from the early practice of the Prophet.

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The above policy received objections from some of the companions but Umar's idea received support from 'Ali Ibn Abi Talib, 'Uthman Ibn 'Affan, Talha Ibn Zubayr and Mu'adh Ibn Jabal who agreed that the government would have nothing to give to those others who rose next to defend the frontiers of Islam if the policy of dividing conquered land were continued.²¹ After having *shura* consultation, 'Umar's proposition was enforced.

G

Besides the guidance from the Prophets, the companions and the earlier jurists, Islamic land policy also developed on the basis of *maslahah 'amah*

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19 Surah No 8: 41.

20 Masud-ul-Hasan, *Hadrat Umar Farooq*, 1982, Islamic Publications Ltd, Lahore, Pakistan, pp 187-188.

21 See SA Mawdudi, *Economic System in Islam*, (3rd Ed 1997), Islamic Publications Limited, Lahore, Pakistan, pp 141-142.

I

- A** (public benefit). This basis is quite similar to a Latin maxim which says ‘*Necessitas publica major est quam privata*’, but the application of the Islamic concept of *maslahah ‘ammah* must work within the limits of Shariah. Land acquisition in Islam should be initiated by those of authority. The rationale behind this rule is that it is hoped that this right can be exercised only for public interest. Most importantly, Islam requires a fair compensation to be paid to the landowner. The process of *ta’mim* (nationalisation) should only be enforced merely when the need for it arises²² and with a just and proper compensation.

- B**
- C** In relation to the above, it is observed that the main objective in exercising any legal reasoning is to find a just solution in the interest of the public. However, it is difficult to identify the yardstick to be used in order to determine that. According to *Ghazali*, *maslahah* (public interest) consists of considerations to secure a benefit or prevent harm. In the same time, however, they have to harmonise with the objectives of the Shariah.²³ These objectives consist of protecting the five essential values, namely religion, life, intellect, lineage and property.²⁴ One of the examples of the practice of *maslahah* is *kharaj* or land tax for agricultural lands in a conquered territory. No textual authority could be established in its favour.²⁵ On this basis, it is submitted that the principles of *maslahah* stand as a very important mechanism of applying equitable principles under Islamic law.

- D**
- E** The principle of *maslahah* has developed a rule that public interest is given priority to private interest. In land matters, this principle is important to determine any policy in a Muslim state. Al-Jawwad suggests²⁶ that the concept of *maslahah ‘ammah* determines whether the principle of restriction of ownership (*tahdid al-milkiyyah*) or *al-ta’mim* (universal ownership) should be exercised in any state. He gives four bases for determining whether *maslahah ‘ammah* (public interest) is applicable or not, there are:

- F**
- (a) objectives of the interest must not be in contradiction with the purpose of Shariah;
- (b) the public interest must be logical and acceptable;
- (c) the public interest if exercised, should be able to overcome a particular problem in existence;
- G**
- (d) the interest must be for the interest of public as a whole (including the landowner).

H 22 For example, in emergency cases and it is applied based on the principle that ‘Necessities make forbidden things canonically harmless’ (art 21 of the Law of Majallah).

23 Cited in Hashim Kamali, *Principles of Islamic Jurisprudence*, Pelanduk Publications, Kuala Lumpur, 1989, p 338.

24 *Ibid.*

I 25 Khallaf ‘AW *‘Ilm Usul al-Fiqh*, (12th Ed, 1978), Kuwait, Dar al-Qalam, p 84.

26 Al-Jawwad, MA, *Milkiyyah al-Aradiyah Fi al-Islam: Tahdid al-milkiyyah wa al-ta’mim*, Cairo: al-Tab’ah al alamiyyah, 1974, pp 369–373.

The concept of *maslahah ammah* also prevents damage (*darar*) to the society, and therefore, restriction of ownership may be adopted if there is a possibility that there will be not enough land for future generations. Similarly, land acquisition in Islam is allowed on the basis of *maslahah ammah*. Any acquisition which lacks the element of public purpose and is not done with adequate compensation is prohibited since Islam recognises individual ownership of any property.²⁷

Apart from the above, the concepts of *darar* (injury) are relevant in resolving land problems. It works on the basis that the court must take into account the 'damage' as a result of a strict application of the law. For this purpose, Islamic law establishes a number of legal rules deriving from the Prophet's saying for examples '*La dharar wa la dhirar*' which means that 'harm shall not be inflicted nor reciprocated'.²⁸

The concept of damage is further derived from a number of legal maxims related to the above including '*Al dhararu yuzal*' (harm is put to an end)²⁹ (art 20 of the Law of Mejelle).

In view of the above, a correct perspective of the Islamic concept of land is important to justify the call for the implementation of the Islamic equitable principles under the Malaysian land law. Such effort is much desired. Furthermore, being a Muslim country where the majority of the population is Muslims, the law should reflect the aspirations of the people. At least, the law should offer an option to Muslims to practise their own religion in total. Aside from that, the positive response of the public to services offered by Islamic conventional banks and financial institutions indicates that the general public is willing to accept the implementation of Islamic land administration. Usually, banking and land are inter related. It is time for the judicial authority to dictate certain land matters under the jurisdiction of the Syariah court. With that it is hoped that the application of Islamic equitable principles especially among the Muslim will become a reality.

In land law, all relevant issues on the application of the Islamic equitable principles need to be properly addressed based on the present land administration. Certainly, these issues require immediate responses from Muslim jurists. It is unfortunate that despite the efforts that are being made, the problem of jurisdiction between the civil courts and Shariah Courts have affected the people's confidence on the competency of Islamic law in dealings with various issues in Malaysia. It is high-time for the government as well as the relevant agencies to work towards identifying the areas of harmonisation between the common law and Shariah. The spirit of art 3 of

27 Article 97 of the *Mejelle* stipulate that 'without legal cause it is not allowed for anyone to take the property of another'.

28 Narrated by Ibn Majah, Malik, Al Hakim, Al-Bayhaqi, and Al-darulqutni.

29 Article 20 of the Law of Majallah; For more discussion on this maxim, see, Hasan Saleh, *Al Qawaid al fihiyyah*, (Bahasa), (3rd Ed 1984), Pustaka Aman Press Sdn Bhd, pp 77-88.

A the Federal Constitution³⁰ must not only be preserved but also upheld in all legal resolutions. In particular, the land laws in Malaysia contain almost all principles which are common to the spirit of Islam which are manifested in their emphasis on a transparent land dealings and procedures. Thus, it is submitted that the emphasis on the Islamic concept of equity will support as well as further strengthen the implementation of land laws in Malaysia.

B The concept of equity in Islam is not only wide and flexible but holds firm in the general provisions of the Quran and Sunnah. Said Ramadhan argues that 'the door is wide-open to the adoption of anything of utility, of whatever origin, so long as it does not go against the texts of the Quran and Sunnah.³¹ In this connection, there is a legal maxim which states that:

C *Al asl fi al asyaya al ibahah* (the original state of things is their permissibility).

However, art 39 of the Law of Majallah also provides that the requirement of the law changes with the change of times, which cannot be denied³². In fact, this rule offers an important equitable principle. It shows an important feature of the Shariah, namely its high level of adaptability to changing times. The practice of legal reasoning must encompass the five principal objectives of the Shariah (*kulliyat al-khams*). They are: protection of religion, protection of life, protection of reason, protection of lineage and protection of property³³.

E Though Islamic equitable principles cover a wide scope of justice, they never exceed the limits set by Allah. It is important to understand that a true concept of equity resides in the proper understanding of the concept of Islam, its *tawheed* (faith), the objectives of Shariah, the *khilafah* (vicegerency) as well as the concept of accountability to Allah. Therefore, in his *ijtihad*, a *qadi* (Muslim judge) would normally decide on *maslahah* (public interest) guided by the Quran and Sunnah. A judge or any qualified person may be allowed to initiate a new legal ruling provided that he has exerted himself in trying to find the answer in the Quran and Sunnah. The existence of the multitudinous methods of doing equity in Islam strongly dismisses the misleading perception that a Muslim *qadi* sits under a tree 'dispensing justice according to considerations of individual expediency'.³⁴

Suggestions for the application of Islamic principles are not new in the

H 30 This article declares Islam as the religion of the Federation.
31 Said Ramadhan, *Islamic Law its Scope and Equity*, (2nd Ed 1970), p 71.
32 CR Tyser, DG Demetriades, IH Effendi, *The Mejelle*, The Other Press Kuala Lumpur, (reprint of 1901 Ed, 2001), p 8.
33 Dr Riaz-ul-Hasan Gilani, *The Reconstruction of Legal Thought in Islam*, Markazi Maktaba Islami, Delhi, 1982, p 171.
34 *Terminiello v Chicago* (1949) 337 US 1, at p 11. A similar sentiment have been voiced in eg, *Colonial Trust Co v Goggin* 230 F2d 634, at p 636 (9th Cir 1955); *Boston and Maine Corp v Illinois Central RR Co* 396 F2d 425, at p 425 (2nd Cir 1968); *US of A v Murray*, 621 F2d 1163 at p 1169 (1st Cir 1980).

I

Malaysian land law. For example, Salleh Buang commented on the decision of Raja Azlan Shah in *Sidek bin Hj Muhammad & 462 Ors v Government of the State of Perak & Ors*³⁵ that His Lordship had missed the opportunity to impart the Islamic land principles when His Lordship refused to recognise the principles of *ihya al-mawat*.³⁶ The query is, to what extent is the above suggestion practicable under the Malaysian land system. Here, it is important to decide whether it is viable to implement the principle of *ihya al-mawat* when all land in the state is statutorily declared as state land. For this purpose, a proper definition of *mawat* land has to be worked out in the context of Malaysian land law. All jurists agreed that *mawat* land which opens for *ihya* must be ownerless land which has never been developed before or has any sign of development³⁷ or land which has been developed but was left uncultivated after a certain period of time.³⁸ This opinion raises a query whether state land could be declared as 'mawat land' or not. The argument is relevant if it is read together with the opinion that consent of the *imam* is necessary for any development of 'mawat land'. This opinion is held by the *Hanafi* school.³⁹ It is proposed that such condition is practical for the purpose of regulating land administration. The consent serves as a way to avoid any competing claims or any abuse of power which may result in uncontrolled opening of land. Although there are opinions which maintain that consent of the ruler is unnecessary,⁴⁰ the opinion of Abu Hanifah is preferable to encourage healthy development of state land since land is a crucial asset of human life.

Under the Malaysian situation, the practicality of *ihya al-mawat* may be feasible in resolving temporary occupation license (TOL) and squatters' problems. Under the NLC, s 48 provides that no title to state land shall be acquired by possession, unlawful occupation or occupation under license for any period whatsoever. Section 425 of the NLC declares that any act of the above is an offence under the Code. Furthermore, the courts have also declared that the squatters have no right in law or in equity.⁴¹ Clearly, based

35 [1982] 1 MLJ 313.

36 Salleh Buang, *The Law of Real Property in Malaysia: Prospects for Islamisation* (1989) IJU Law Journal, Vol 1, No 1, 94 (83-112).

37 J Ibn al-Hasan Najm al-Din, *Syarai' al-Islam*, 1390H, Vol 2, Beirut: Dar Maktabah al-Hayah, p 168; al-Mawardi, Abu'l-Hasan, *Kitab al-Ahkam al-Sultaniyyah*, (1386H 2nd Ed), Cairo, Musafa al-Babi al-Halabi, p 177.

38 It was reported in the *Kitab al-Kharaj* that 'Umar allocated three years for any land owner to develop his land. After that period and his land was found uncultivated, and a second person developed the land. 'Umar decided that the second person has better priority than the first. See *Kharaj* Abu Yusuf: 72, *Al-Mughni*: 5/520.

39 Abu Yusuf, 1392H, *Kitab al-Kharaj*, (4th Ed) Cairo: Matba'ah al-Salafiah, 12.

40 Among the jurists are Abu Yusuf and al Shafi'i. See Abu Yusuf, 1392H *Kitab al-kharaj*. 64; see also, Al-Shafi'i, *Al-Umm* Vol 7, Cairo: Dar al-Misriyah Li al-Ta'lif Wa al-Tarjumah, p 214.

41 *Sidek v Government of Perak* [1982] 1 MLJ 313.

- A** on the above view of jurists on the concept of *ihya al-mawat*, no squatters of any state land in the urban area has the right to invoke the principle of *ihya al-mawat* to justify their settlement on the state land. If a person relies on a promise of somebody who has an authority on land matters, clears a piece of land in which the land is regarded as waste or idle land, yet development is also acknowledged by other dignitaries, should the person be simply declared as a squatter? Should the person be denied any right to the land? Here, the position of estoppel in Islam is similar to the common law.⁴² Therefore, any person who knows that someone is relying on his words is not allowed to simply deny the effect of his words on another person. This principle is important enough to be given strict effect especially if it involves a person who holds a position under trust of other people.

- C** The application of Islamic principles seems relevant in *Sentul Murni Sdn Bhd v Ahmad Amiruddin Kamaruddin & Ors*.⁴³ The respondents claimed that they were occupants of land as licensees in equity. The area Kampung Chubadak is largely a 150-years old Malay village which received official visits from a previous *Agung*, a previous Prime Minister of Malaysia, Tunku Abdul Rahman and several other dignitaries. Between 1960 and 1990, the village owned public halls and *suraus* provided by various state authorities. It was reported that during the official launch of the 'Klinik Kesihatan Kanak-Kanak dan Ibu' in Kampung Chubadak Tambahan, the State Minister promised that the Selangor State Government would take certain measures to issue land titles. Based on the above, the court found the respondents not to be the 'squatters simpliciter' but held them to have the right in equity. Although they were not recognised as the owner of the land, they were considered tenants in equity and entitled for compensation on the satisfaction of the principle of equitable estoppel. It is observed that the effort to distinguish between 'squatters simpliciter' and 'tenant in equity' or 'licensee' indicates the tendency of the court not to unreasonably deny the rights of occupiers of state land.

- D** The importance of the encouragement or promises from any quarters of authority before a party could claim for equitable rights on occupied land was made clear in *Shaheen bte Abu Bakar v Perbadanan Kemajuan Negeri Selangor & Other Appeal*.⁴⁴ The court held that if the initial entry of the settlers on the land was unlawful, they committed an offence under s 425(1) of the NLC. They could also be evicted under O 89 for being 'squatters' simpliciter'. From the evidence, the state government was aware of their presence on the said land from December 1981 onwards. No action was taken to charge them under the NLC for illegally occupying the land no proceeding was taken to evict them under O 89. From January 1988 onwards the State Minister was aware of the existence of the settlers but approved the renovation of their *surau*. He knew that the settlers were provided with water supply, roads and a community hall. As stated earlier,

I 42 See Law of Mejele, arts 1647-1659

43 [2000] 4 MLJ 503.

44 [1996] 1 MLJ 825.

when the land was given to the Selangor State Development Agency, it knew about the settlers. Therefore, the court held that there was an arguable case that the settlers occupied the said land with the acquiescence of the state authorities. This case also stressed that active encouragement from related authorities resulted in a legitimate expectation on the part of the occupier to invoke any equitable principles to the case.

A similar fact of case arose in *Juta Permai Sdn Bhd v Mohd Zain Jantan & Ors*⁴⁵ and *Bohari bin Taib & Ors v Pengarah Tanah Galian Selangor*.⁴⁶ In both cases, the courts refused to classify the settlers on state land as 'squatters simpliciter' who illegally stayed on state land, breaching the provision of s 425(1) of the NLC. There is a tendency of the courts to consider the equitable elements in each case. In this respect, it can be seen that the role of equity is invoked not to give proprietary rights to the occupiers but more to give justice to both parties. The government is correct in not considering the proprietary right of the occupiers if the decision is made on the basis of limited tract of land and also to protect the right of the future generation. The Prophet (pbuh) used to distribute land to many people including 'Abd al-Rahman Ibn 'Awf, 'Umar Ibn al-Khattab, 'Alqama Ibn Wayl, Zubayr, Bilal Ibn Harith and others.⁴⁷ 'Umar used his *ijtihad* based on public interest not to distribute conquered land to the army.⁴⁸ Disgressing from an earlier *hukm* meant there existed a better one and a better justification for doing so provided that it was according to Shariah.

The principles of equity should not be applied in a way to defeat the policy of the government. Raja Azlan Shah in *Sidek v Government of Perak* has declared that squatters have no right either in law or equity. However, as decided in *Lebbey Sdn Bhd v Tan Keng Hong & Anor*,⁴⁹ squatters should be divided into 'squatters' simpliciter' or 'ex-licensees' who become squatters as a result of their failure to comply with certain requirements of the law or procedures. Therefore if they fail to invoke the principle of estoppel, they should be considered as 'squatters' simpliciter' and they are not entitled to any compensation from the state. In fact, they can be penalised for illegally occupying state land as provided under s 425.

The NLC expressly prescribes that all unalienated land belongs to the State and at the same time declares a registered owner's right as indefeasible. This principle has merits and demerits. If the provision declares that all unalienated land belongs to the state, does this imply that the state is the real owner or that the state merely acts as a trustee of Allah? Tracing the whole provisions of the NLC, nothing seems to suggest Allah as the absolute and final owner of all unalienated land. Then what is the real

45 [2001] 2 MLJ 322.

46 [1991] 1 MLJ 343.

47 See Mawdudi, *Economic System of Islam*, pp 145-148.

48 See above, Masud-ul-Hasan.

49 [1998] 5 MLJ 368.

A meaning of the provision and the intention of the legislature? Although 'Allah' is not explicitly mentioned, it is generally accepted that the Code carries a similar objective of Shariah that is to provide the best system for the public. However, it is hoped that a clear word in the Preamble or in any provision of the NLC clearly stating 'Allah' as the real owner of all things on Earth, and the state authorities as His temporary agents to administer the lands, would remind and guide the Muslim in dealings with Allah's property. The saving clause under s 4 of the NLC states that nothing in the Code shall affect the provisions of Muslim law presently in force in the country.

C It is agreeable that the high demand for land — especially in urban areas — may not permit any kind of opening up of unused land on the basis of *ihya al mawat* by any individual or body. Thus, it may be practical for the government to identify certain areas such as remote areas or land with high cost of development to be opened up by any individual or agencies with prior permission from the government. A similar scheme may also be used to encourage people to reclaim land or revive deserted land with proper monitoring system by the experts so as not to affect the balance of the natural eco-system.

E Islamic equitable principles could also be derived from other practices such as check and balance either from the public interest groups or even from other related government bodies as to the power of the State Authority, the emphasis of transparency in decision making as well as creating more avenues for public participation in decision making. These practices are emphasised under the concept of *hisbah*.⁵⁰ Unfortunately, it is observed that all these practices are still lacking under the administration of land system in Malaysia. For example, the Official Secret Act could be used to provide protection to the State Executive Council from any public criticism. Therefore, the NLC should be amended to give more avenues for public enquiry before any application for alienation or alteration or to vary any condition especially if it involves sensitive matter such as the Malay reserve land or alienation of state land to certain companies for the purpose of development involving general public as a whole. Furthermore, the presence of the Delegation of Powers Act 1956⁵¹ in addition to the powers of delegation given under s 13 of the NLC, can be easily abused by the

H 50 *Hisbah* as defined by Ibn Taymiyyah is to enjoin what is commonly known as good (*al-ma'ruf*) and forbid what is commonly known as evil (*al-munkar*). The authority given to *hisbah* is actually an authority that is beyond the authority of governors, judges, or other specified public officers. See, AA Islahi, Economics Concepts of Ibn Taimiyah, The Islamic Foundation, London, 1988, p 187. Islahi also quoted a definition given by Muhammad al-Mubarak from his book, Al-Mubarak, M, Ara Ibn Taimiyah (np, Dar al-Fikr, 1973, pp 73–74 where he said that *hisbah* 'is a control function of the government through persons acting especially in the field of morals, religion and economy, and generally in the areas of collective or public life, to achieve justice and righteousness according to the time and place.

I 51 Section 8 (Revised 1988).

respective authorities, especially with excessive delegation of power to the Chief Minister.⁵² The application of Islamic principles of equity would allow a judge to consider related issues before he decides to give over a piece of land. The concept of Islamic equitable principles requires an integrated approach from all parties and of all perspectives.

The application of equity based on Islamic law is also relevant in case of rights of co-proprietorship. So far, there is no clear provision in the NLC which states that a co-proprietor has the right to claim priority in the event another co-proprietor or his partner wishes to sell his share. In Islam this right is called *al-shuf'ah* or the law of pre-emption.⁵³ Article 1008 of the Law of Mejelle⁵⁴ states that the right of *shuf'ah* arises from three causes, namely:

- (a) participation in the thing sold ie, co-owners of undivided shares in the land;
- (b) joint ownership of an easement, eg, co-owners of a stream or a blind valley;
- (c) contiguous neighborhood.

Legally, *al-shuf'ah* implies that a co-owner has the right to demand a pre-emption from the other co-owner in jointly owned property to purchase it at a certain price in preference to other interested parties.⁵⁵ The principle rules that a partner is to seek permission from his co-owner before he initiates a transaction involving the latter's property. Prophet Muhammad (pbuh) is reported to have said:

Whoever has a share in a piece of land or houses is not permitted to sell it until he seeks permission from his co-owner. If he (the co-owner) wishes he can take it (the option of the pre-emption) and if he does not wish he can leave it (to be sold to others).⁵⁶

The principle of *shuf'ah* is found to be practical in the Malaysian land

52 See SZ Al-Junaid, 'Delegation of Powers Relating to Land in Selangor', paper presented at the Ahmad Ibrahim Kulliyah of Laws Public Lecture Series No 7, 21 August 2002.

53 Initially, the rule is also derived from the *hadith* that water, street and male dates are exempted from being the subject of pre-emption' and: 'Whoever has a share in a piece of land or houses is not permitted to sell it until he seeks permission from his co-owner. If he (the co-owner) wishes, he can take it (the option of pre-emption) and if he does not wish he can leave it (to be sold to others).'

54 *The Mejelle*, CR Tyser, BAL, (tr), Law Publishing Co, pp 158-165. See also, art s 950, 1008-1044.

55 Al-Zurqani, AM (dH1122), *Sharh Muwatta' al-Imam Malik* 4 Vols, Beirut, 1401/1981, p 377.

56 Al-San'ani, AB (dH 211), *Al-Musannaf*, 11 Vols, edit H al-Azami Beirut, 1392/1972.

A system. It ensures a more harmonious relationship among neighbors. More importantly, it does not interfere with the existing laws and its implementation considered viable and practical. *Shuf 'ah* enjoys priority in the settlement of conflict of claims. Al-Shaybi reported that the Prophet said: '... And the co-owner has more right to the pre-emption than the owner of an adjoining property (the neighbor).'⁵⁷ Ibn Hazm also reported a similar saying: 'The co-owner has more right (in pre-emption).'⁵⁸

B This priority of pre-emptive right further includes the owner of the servitude in the property followed by *al-jar al-janb* or the lateral owner of an adjoining property,⁵⁹ the adjacent neighbor not belonging to the family is the pre-emptor last in order of priority for pre-emption.⁶⁰ Perhaps, the view of Ibn Hazm would provide us a guideline as to how the order of priority in case of *shuf 'ah* should be carried out. However, the lists of the people should rather be extensive than short, thus leaving it to the discretion of the legislature to decide. This principle should apply to both Muslims and non-Muslims except in a clear cut case involving Malay reserve land, Orang Asli or native titles where the laws have already determined the special criteria applicable for these lands. Furthermore, this right is very restrictive. Islam only gives a limited period for all related parties to claim their right of pre-emption.

C The majority of the rules pertaining to *shufa'ah* are actually the product of *ijtihad* exercised by the companions and later jurists. In other words, the law of *shufa'ah* is actually a result of the equitable principles. In legal history, 'Umar Ibn al-Khattab is reported to have allowed his people to make pre-emption to a *dhimmi*.⁶¹ Shurayh argued that pre-emption is only applicable for immovable property, real estate and land.⁶² Muslim jurists never found themselves bound by the judgments of the earlier jurists and they are always willing to change the rules whenever there is a basis for it. Thus, this is part of the process of implementing Islamic law, with the principle of equity as basis.

D In *jual janji* cases, one may wonder whether equity is invoked as a customary English principle or whether it has evolved as a universal value of fairness and justice. The cases show that although the courts are trying to invoke equity as a customary practice understanding it as an English legal tradition. It is rare to find a case which is decided purely on Islamic principles although they actually form the basis of *jual janji*. Although judges usually recognise *jual janji* as a security, it does not indicate that the transaction is a pure *jual janji* in which no interest or *riba* is involved.

E **H** 57 Malik Ibn Anas, *al Muwatta*, MH Al-Shaybani, 1399/1979, Beirut, p 305.

58 Ibn Hazm, *Kitab al-Muhalla*, vol IX, Ahmad Muhammad Sh, Beirut, pp 95-98.

59 EW Lane, *Arabic-English Lexicon*, Cambridge, 1984, pp 465-466.

60 Al-Tabari, *Jami' al-Bayan an Ta'wil Ayat al-Quran*, Cairo, 1388/1968, Vol 5, p 80.

I 61 A free non-Muslim living in an Islamic state and pay *al jizyah*.

62 Al-San'ani, *al Muaunnaf*, Vol VIII, p 87.

Therefore, for one to really appreciate the practicality of *jual janji* as an Islamic as well as customary transaction, he needs to understand how the concept of *jual janji* evolved in the Malay community. The practice of *gotong-royong* (voluntary work done in communal groups) highlights the Islamic principle of security being free of interest; or perhaps the transaction is a modification of the concept of *bay' al-wafa*.⁶³

It is time for the Malaysian legislature and the courts to consider a new approach to s 3 to transform a principle regarded merely a local custom into a legal and religious paradigm. A total change of s 3 would set the best start for the new legal paradigm shift in the Malaysian land system. It was a long and difficult to change the colonial laws and furthermore, the Malaysian land system has developed from various traditions and schools and requires flexibility in applying a variety of approaches in its legal interpretation. As proposed by the late Ahmad Ibrahim,⁶⁴ an additional section should be added similar as in the Egyptian Civil Code of 1948 which states:

In the absence of an express provision, the judge shall follow the rules of custom; if they do not exist he shall follow the principles of Islamic law and if they in turn do not exist he shall follow the principles of natural law and equity.

When interpreting equitable principles, one should be able to resort to the Islamic principles to attain the fairest judgment. Ahmad Ibrahim also proposed that as for commercial matters, the provision in the earlier Egyptian Code on the Organisation of Native Courts 1883 could be added to include 'and in commercial matters he shall follow commercial usage'.⁶⁵ Perhaps, it is time for the Civil Law Act to clearly incorporate a provision which states that in a case where there is a *lacuna* in the law, a reference to Islamic notions or equitable principles becomes advisory. Although the above proposal was made more than 30 years ago, the application is much awaited not only by the Muslims but also the non-Muslims. It is time to end the unnecessary application of English legal principles and replace them accordingly. Lastly, the position of Muslim law as the law of the land can be re-emphasised and adequately recognised.⁶⁶

Looking at the issue of equity in the context of the NLC, it is doubtful whether Islamic principles of equity can find their proper place in the Malaysian land system. If not, then it is perhaps because equitable principles are not properly utilised in land law cases. Under present Malaysian law, Shariah judges have no jurisdiction to hear land law cases and of course the civil law judges are not well-versed in the Shariah and

63 As some may argue the 'Islamicness' of the practice of *bay' al-wafa*, it is similarly difficult to deny the possible influence of the transaction on the practice of *jual janji* taking into consideration the fact that Malaysia received Islam from the Arab Merchants who came to do trading in China.

64 'The Civil Ordinance in Malaysia' (1971) MLJ lviii, at p lxi.

65 *Ibid.*

66 *Ibid.*

A generally do not appreciate any submission from the Islamic point of view.

There are avenues for the civil court judges to employ the Islamic law concept of land in the present Malaysian legal system. Section 3 of the Civil Law Act 1956 needs to be amended to include equity that is based on conscience, fairness, justice and custom of the people or perhaps a clear provision for a reference to Islamic equitable principles. Only then this section can be used as a platform for a judge to instigate change. The English concept of equity may also include the general application of equity based on the concept of conscience, fairness and justice. Therefore, it can be suggested that the Islamic concept of justice which is also based on the same basis but differs in the defining parameters should be considered. The various methods of legal reasoning in Islamic law offer a wide degree of justice and the recognition of custom (*'urf*) serve the requirements of local circumstances. With regard to non-Muslims, their rights are clearly stated and safeguarded in the Quran or Sunnah. They are free to practise their religion and customs or their laws within their own community. Again, the Islamic principles of equity would provide a wide basis of flexible legal rulings to cater for the various needs of the public.

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Qualified equitable jurisdiction in land matters should not be regarded an obstacle to the implementation of Islamic equitable rules in our legal system. The beauty of Islamic law is that it works on the basis of justice and the principle of *maslahah* (public interest). Thus, any Muslim judge or lawyer is able to impart Islamic principles in their submissions or judgments.

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The application of *istihsan* (preference) is usually considered as nearest to the Islamic principle of equity and to the notion of equity under English law as both are grounded in fairness and conscience and both validate departure from positive law when its enforcement leads to unfair results.⁶⁷

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Muslim jurists have prescribed guidelines pertaining to when we shall make such a departure possible in Islam. In contracts, for example, Islamic law emphasises a clear and properly binding agreement (*'aqad*) for a legal transaction. However, when going shopping in a super market, it is impossible to have every single piece of transaction carried out by all involved parties, thus, by *istihsan*, the transaction is validated even without proper agreement. Thus, using the methodology of *istihsan*, based on a clear ruling (*hukm*), the judge can deviate from the original ruling and choose another to avoid negative effects of the previous one. This practice is based on the principle of avoiding any damage (*darar*) in the implementation of the principles of Shariah.

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I 67 See, Hashim Kamali, 'Law, Commerce and Ethics: A Comparison of the Shariah and Common Law', Paper presented in International Seminar on Syariah & Common Law 2006, 20–21 September 2006, Palace of the Golden Horses Hotel, Selangor.

There are many other cases which set the examples of the common values and ethical contents shared by Shariah and the common law.⁶⁸ It is not only confined to land or any contractual transaction alone.

CONCLUSION

While the present land system emphasises the distinction between equitable and registered interest from the perspective of registration of the dealings, neither Islamic land ownership nor the Islamic concept of equity seems to specifically emphasise on that. This, however, does not mean that such differences are alien to Islam. The application of equity in a registration system is justifiable. Despite the need for a clear definition of the concept of equity, it is important for the legislature to arrive at a clear understanding of how equitable principles can be applied. A proper knowledge of the *maqasid* of Shariah is important to qualify a judge to exercise Islamic concept of equity.

⁶⁸ For example, the concept of equality (*musawat*), justice (*adl*) or freedom (*hurriyyah*) are among the common concepts which Islam propagates, protects and uphold throughout the history of Islam until todate.