

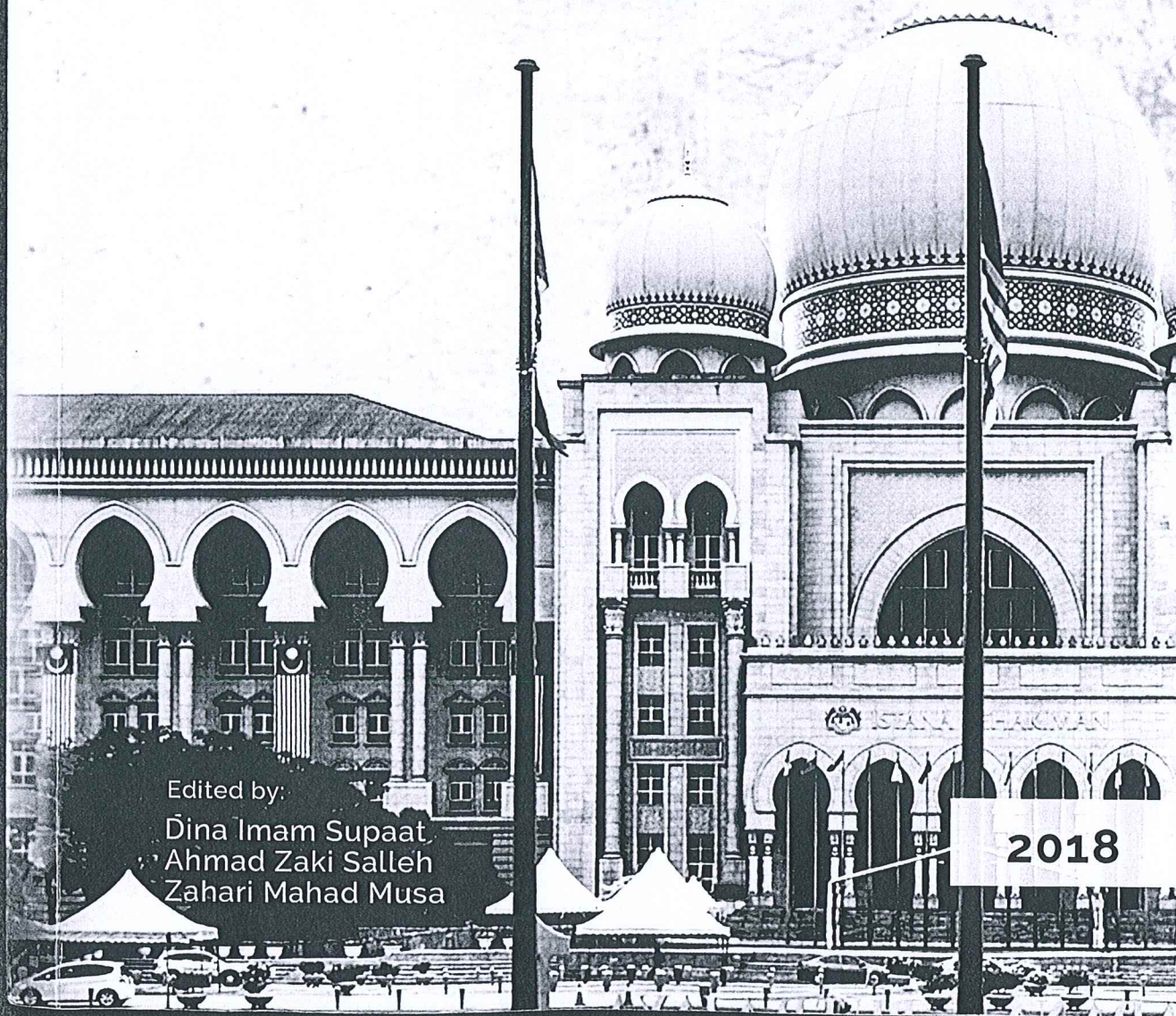
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SYARIAH *And* LAW

Edited by:

Dina Imam Supaat
Ahmad Zaki Salleh
Zahari Mahad Musa

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Contemporary and Emerging Issues in **SYARIAH AND LAW**

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PRINCIPLES OF LAND OWNERSHIP & THEIR APPLICATION IN THE MALAYSIAN LAND LAW AND ISLAM

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Introduction

Allah is the ultimate and the sole owner of everything in this universe (*Al Maidah*:120; *Ta Ha*:6). Furthermore, land ownership in Islam is essentially a gift that Allah (swt) bestows as a trust (Ainul J.M *et al*, 2008, 610). It is the responsibility of mankind to cultivate, care and flourish land based on the concept of man as the *khalifah fi al ardh* (vicegerent of Allah (swt) in this world). It can be inferred that men only use the land to gain benefit but not as the real owner since the real ownership is fixed to Allah (swt). The principle of land use, on the other hand, refers to the usage of lands for the purpose of agriculture, transportation, source of food, communication, infrastructure and anything that could assist men to live as the vicegerent of Allah (swt) on the earth (*Ta Ha*:53-54). It means that all the resources embedded in the land are for the purpose of exploitation by men in order to survive on the Earth as well as to portray the mightiness of Allah's domain so that men will submit to Him.

Research Methodology

This paper uses the content analysis approach of research. The authors reviewed the provisions of the National Land Code 1965 (the NLC), books and documents contain Islamic principles and civil law. This is done in order to have more idea and a better understanding of the topic in supporting and justifying the arguments given. The authors also referred to relevant case law and the translation of the Holy Quran to illustrate the advantages or disadvantages if the harmonisation of Islamic land law and the National Land Code were to be carried out, *vice versa*.

History Of Malaysian Land Law And Islamic Land Ownership

The history of land ownership in Islam is traceable to the era of the Prophet Muhammad (p.b.u.h) and it was followed by the caliphs until the Ottoman empire in Turkey (Ainul J.M *et al*, 2008). The cardinal principle of Islamic land law is that Allah (swt) owns the land and men is the trustee to enjoy and manage the land. Private ownership is recognised subject to tax but it does not confer absolute ownership. It is based on the principles of social justice (Ainul J.M., 2008) where the owner must share his profits with those who are underprivileged because generally, land belongs to all. An example of the Prophet (p.b.u.h)'s practice concerns the failure of a landowner to utilise his land. The Prophet (p.b.u.h) had specified a time limit of three years in which if the land is not cultivated, someone else is able to take possession over it. Accordingly, Caliph Umar (*radhiallahu anhu* (r.a.) also practiced it against Bilal on the grant of Wadi Aqiq. Bilal was given a huge piece of land at the Valley of Aqiq but for 15 years he failed to make use of the land. Caliph Umar

(r.a) later told him that Bilal can only take the part which was under cultivation land but must leave the rest. (ZiaulHaque, 2009)

In Islam, *mawat* (dead) land refers to abandoned land and thus, it generally belongs to the state. *Ihya' al-mawat* (revival of dead land) is where anyone who works on a piece of abandoned land (*mawat land*) shall be the owner of that land. Therefore, since Bilal had been occupying and living on Wadi Aqiq for 15 years, he was entitled to the ownership of the land but limited to the part in which he worked on (ZiaulHaque, 2009). Other than that, *iqta'* (alienation of *mawat* land or state land) refers to the practice when the *imam* or a State leader alienates a piece of land to the deserving grantees. This has been the practice of the Prophet (p.b.u.h) as well when he gave a piece of land known as *Bi'ru-Qais* to Saidina Ali (r.a) along with all the trees on the said land. These are the examples of some of the Islamic practices by the Prophet (p.b.u.h) which are continuously enforced even after his demise. The Malay customary principles which were the common practices among the locals in the Malay states before the colonialism also have some Islamic values.

There were evidences that the locals have been professing and practising Islam since the Malay Kingdom of Malacca. Islam remains as the religion of the Federation till present (Article 3 of the Federal Constitution). One of the terms of reference for Reid Commission when working on the Constitution of Malaysia was to maintain the power of the Sultan on land. Thus, the two matters fall under the governance of the Sultans as a way to protect the interest of the Malays. This was explained by Salleh Abbas in *Tengku Jaafar and Anor v Government of Pahang* [1987] 2 MLJ 74: "*there can be no doubt that before the British intervention, the Sultan was an absolute ruler of his State in whom powers to make laws and to govern the State were vested, and there he exercised these powers presumably after advice of, or more appropriately, consultations with his orang-orang besar (Ministers), was sought or held. After the British intervention, he still remained an absolute ruler but was required to administer the State with the advice of a British Resident*". Furthermore, in *Ramah v Laton* (1927) 6 FMSLR 128 through court pronouncement, Islamic law was clearly established as the law of the land and the local courts should take judicial notice. Nevertheless, English judges were not convinced to give Islamic law its rightful recognition. For example, as far as land is concerned, Islam has some influences on the local practices as summarised by Maxwell. He explained the features of land tenure as practices by the locals as follows:

- i. There can be no propriety right in *tanah mati*;
 - ii. *Tanah hidup* was of three kinds –
 - a. Land planted with fruit trees (*tanah kampong*);
 - b. Wet rice land (*tanah bendang or sawah*);
 - c. Hill land is taken up for shifting crops (*tanah huma or ladang*)
 - iii. The propriety rights in *kampong* land endure during the occupation and afterwards so long as any fruit trees remain as evidence that the land is *tanah hidup*.
 - iv. The propriety right in *tanah bendang or sawah* last as long as the land is occupied and for three years afterwards.
 - v. The propriety right in *tanah huma or ladang* lasts as long as the land is occupied, which is usually a single season.
- Nevertheless, the above principles were later replaced by the Deeds system and later, the Torrens system.

Initially, when the British occupied the Malay states, the land tenure system enforced was the Malay Customary Land Tenure system with the exception of Penang. This has been acknowledged by the courts in *Shaik Abdul Latif & Ors v Shaik Elias Bux* (1915)1 FMSLR 204 where Edmonds JC said that: "... the only law applicable to the Malays at that time was

the Mohamedan law modified by custom". Sir Benson Maxwell CJ in *Sahrip v Mitchell & Anor* [1879] Leic 466 summarised that: "It is well known that by the old Malay law or custom of Malacca, while the sovereign was the owner of the soil, every man had nevertheless the right to clear and occupy all forest and wasted land, subject to the payment, to the sovereign, of one-tenth of the produce of the land so taken... If he abandoned the paddy land or fruit trees for more than three years, his right ceased and the land reverted to the sovereign."

The earlier discussion shows that the Malay customary land tenure shares the spirit of Islamic law. For instance, in both the Islamic land principles and the Malay customary land tenure, both have a limitation period of three years to the landowner to cultivate the land. If the landowner failed to observe his duty, someone else can occupy the land. Both systems adhere to the principle where the abandoned land can be occupied by anyone so long that he revives the land into something beneficial. There are many other circumstances where both laws were quite similar and this is due to the long period of harmonious blending and integration between the Islamic law and the customs of the Malays.

Principles Of Land Ownership & Its Application In Malaysian Land Law And In Islam

Torrens System which was introduced by Sir Robert Torrens from Australia is a system of land title registration where it provides that registration is everything in the land system. (Esposito, A, 2003). The person who has his name registered and accompanied by the particulars of the land, such as the area and location of the land, is regarded as the registered proprietor of the land. Such registered proprietor has exclusive right and usage on his land and his rights shall prevail over any other claims in the world unless if there are certain circumstances to challenge his rights Torrens found that the English Deeds system was a complicated system and full of uncertainties which could lead to prejudice to those who had interest and wished to place his title on a particular land (*ibid.*). The Deeds system was also time-consuming and costly. At the same time, Deeds system recognized equitable interests when a purchaser took with actual notice of that interest rather than the one who has the legal interest and right over the land (Ainul J. *et al*, 2008)

Torrens system is applied by many countries including Malaysia. The incorporation of the Torrens system into land matters in these states can be seen through the introduction of various legislations. Perak was the first state that introduced registration of title system through General Land Regulations 1879 and followed by Selangor by way of General Land Regulations 1882. In Negeri Sembilan, registration of title system was introduced by way of General Land Regulations 1887 and in Pahang through the General Land Regulations 1889. (Sihombing J., 1989; Wu, R. and Md Yazid Z.K, 2011,3).

Currently, formulation of the National Land Code 1965 prescribes the main registration of title to regulate land dealings and transactions. This statute incorporates the Torrens system within such legislation. Torrens system of registration of titles is indeed reliable, simple, cheap as well as time-saving. This has been recognized by the court in *Teh Bee v Maruthamuthu* [1977] 2 MLJ 6. In that case, it was established that as the register document of title was in the name of the appellant was conclusive evidence that the title was vested in the appellant. The National Land Code 1965 (Act 56) (the Code) being the comprehensive law for land provides uniformity on land tenure system and lists down the salient features of the land system and administration in Malaysia. This Code guarantees indefeasibility of title that is obtained upon registration (Section 340 of the NLC). This is the very essence of Torrens system emphasising on 'title by registration' and registration and issuance of title upon a piece of land is everything (*ibid.*). The National Land Code 1965 also recognizes equitable interests and rights that are yet to be registered as provided for under Section 206(3) of the Code.

Principles of Islamic Land Ownership

In Islam, land ownership is vested solely in Allah S.W.T. (*An Nisa* (4):132; *Al A'raf* (7):128). However, as man acts as a trustee and vicegerent of Allah (swt) on this earth, the State Authority is not the absolute owner of the land. There are various provisions in the Code with the assurance that the people will have the opportunity to enjoy their rights or benefits on the land as well as to perform their obligations to work on the land. Nevertheless, Islam does recognize private land ownership as a part of the role of mankind to hold the land as trustees. Islam indeed recognizes the right to own property and the protection of property is essential under *maqasid al-shariah* that has to be safeguarded at all cost. Enjoyment of property in Islam does not depend on an individual alone but is an obligation to share the wealth for the benefit of the *ummah* and the public at large as to prevent economic gaps among the wealthy and underprivileged (*Surah An Nisa* (4):29) Allah (swt) says, "*O you who have believed, do not consume one another's wealth unjustly but only [in lawful] business by mutual consent. And do not kill yourselves [or one another]. Indeed, Allah is to you ever Merciful.*"

In the case of neglect and abandonment, the State Authority is empowered to forfeit the land where the landowner fails to make full use of his land and if the state requires the land for public purposes. The famous case was the case of Bilal who failed to develop his land, is one the examples. Under this situation, the state is not required to pay compensation to the owner if the owner has breached the obligation to utilise his land within 3 years of acquiring it. It differs from the situation where the state has to repossess a particular land from the private landowner to be utilised for public interest (*maslahah ammah*) and the state has to compensate such landowner. Such a situation can be seen when Caliph Umar had granted land to the people of Bajeela. However, such land was acquired to serve the community at large and compensation had been granted to people of Bajeela (*Sahih Bukhari*, Chapter 7, hadith 2011).

General categories of land ownership are unclaimed or ownerless land and private property or owned land (Nuzhat Iqbal, 2000). For the first category is related to unclaimed land which can be divided into two: firstly, the land that is not owned by any person but it is used for the benefits of the community. An example is *waqf* land. The second type of unclaimed land is dead land (*mawat*). An individual may acquire ownership of *mawat* land through *ihya' al-mawat*, by developing the land to life or by way of rehabilitating it. According to Shafie jurists, *mawat* land is land that has never been worked on or land that shows no sign that it has ever been cultivated or developed or even no signs of any human beings on it. Shafie jurists consider that all people have rights upon *the mawat* land.

According to al-Mawardi (1986) there are 3 conditions applicable for reclamation of dead land i.e. (i) making a barrier to enclose the land, (ii) channelling water to the land if it were dry or draining water from the land if it were flooded, and (iii) ploughing the land to make it level. This view is relevant for Malaysian context where for paddy cultivation, it is important to remove the weeds and wild plants, ploughing the land and the draining water from the land. Generally, whoever develops the *mawat* land will gain the ownership but the majority of the jurists opined that such ownership has to be preceded by the alienation of the land by the State through *iqta'*. However, there are different views in regards to the *mawat* land that initially belonged to a Muslim and was left abandoned. The Shafie and Hanbali jurists opined that no one can acquire the right to such land and the state has no authority to grant such land to other persons either through *ihya' al-mawat* or *iqta'*.

Second general category of landownership concerns private land. It can be divided into *ushri'* land which in the context of agricultural land, such land is governed by terms of

a treaty. Ibn Qudamah gave examples of such land such as the land that is surrendered by the owner without any force or the land where people there embraced Islam like Madinah and Yemen. Secondly, it is the land where the owners do not convert to Islam but they compromise to surrender to the obedience of Muslim rule. Such owners will remain in possession of such land. Also, when a country is conquered by force and war, the land of that country would be dealt in 3 ways; (1) the land will be distributed as bounty for the people who are entitled to the benefits of war. Imam Shafie opined that such land will become *ghanimah* or booty of war and those who receive the allocation will pay '*ushur*' and not *kharaj*, (2) the land retained by non-Muslims who surrender to the Muslims rule will be imposed with payment of *kharaj* as a form of tax of protection by Islamic State towards the non-Muslims living in that State including the protection of their lands, and, (3) the land will be taken away from their owners and give the land on lease or rent to any person including the ex-owners (Abu Ubayd, 1978). The land will cease to be private property and become part of *Bait-ul-Mal*. The third type of owned land is the land that is acquired through *iqta'* system or individual ownership system (Abu Yusuf, 1979). This is in line with the Islamic principle that allows private individuals to own a land in order to develop such land in serving for the benefits of the *ummah*. *Iqta'* can be divided into *iqta'* of *mawat* land and *iqta'* of *Amir* land. *Mawat* land is the dead and uncultivated land while *Amir* land refers to cultivated land. State Authority is empowered to grant such lands to anybody who will develop it. The claim for *mawat* land is called *iqta' tamlik* which consist of the land that is totally vacant and undeveloped and the land that was once being worked on but it was then left abandoned. Caliph Uthman (r.a) used to make *iqta'* for the second type of *mawat* land and he gave them to Muslims who could cultivate such land to make it productive and to increase the revenue of the state. Those who are allocated with land has a duty to pay '*ushr*'. There is also another type of *iqta'* which is *iqta' irfaq*. *Iqta' irfaq* concerns the right to enjoy certain areas or public places like mosque compound, public road or market. Usually, such land is in the interest of traders or businessmen in the ordinary course of business. Under *iqta' irfaq*, a trader is only entitled to enjoy land subject to the purpose and condition attached to it. Thus, it does not give him full ownership of the land. Nowadays, *iqta' irfaq* may appear in the form of licenses or permits issued by the authorities to those who want to utilize state land or land owned by the public authority such as the National Electricity Board etc. Principles of land ownership in Islam deal more with the usage of land. As long as the landowners utilise the land and contribute to the benefits of the *ummah*, they are entitled to the ownership of the land.

Discussion And Findings

The most distinct aspect in the Torrens system is that the register reflects all the facts material to the registered owner's title in the land. These material facts include the name of the proprietor, for the time being, the land which had been alienated, its area and location, its survey plan and its boundary limits (Das, 1963). The registered proprietor has the exclusive rights and usage on his own land and his rights shall prevail unless if there are certain circumstances to challenge his rights, for instance, if the registration of the land transaction is based on fraud, forgery or through void instruments.

In contrast, under Islamic law, it provides that the fundamental concept of land ownership in Islam is that all rights over the land vests solely in Allah (swt) and not the State Authority. However, the State Authority has the role to act as a trustee of Allah (swt) to govern the lands in its territory for the benefit of its citizen. (*Al A'raf*(7): 128). Islam looks at any procedural matters for better administration as part of the *siyasah syariyyah*. It is manifested from a proper understanding of Islam which promotes good governance and

work excellence (*ihsan*). As the ownership of land is vested in Allah, any land development carried out by man must be maintained in nature, in order to give the future generations the right to derive benefit from the land. However, Islam does recognize private land ownership as a part of the role of mankind to hold the land as trustees and also the right to own property and protection of property which is essential in *maqasid al-shariah* (objectives of al-Shariah)

The Torrens system also adopts the mirror principle and the curtain principle. These principles confer the indefeasibility of title to the registered owner (*Teh Bee v K. Maruthamuthu* [1977] 2 MLJ 6). In contrast, the right of any registered owner in Islam is always kept on balance with the right of the authority to take action against any wrongful act. Thus, the concept of indefeasibility of title has a place in Islam but it is always open to be challenged or proved otherwise. Furthermore, in Islam, the power of *imam* is to alienate the rights of possessions to such "deserving grantees" who are able to put the land to productive use and to benefit the society at large (Salleh Buang, 2010). Besides, the State Authority can repossess the land at any time if it is required for the sake of public benefit. This Islamic principle is similar to the powers of State Authority under the Land Acquisition Act 1960, all compulsory acquisition of land is in the nature of appropriations of private properties by the State with adequate payment of compensation based on market value. The Islamic approach is fundamentally different based on the principle of "ownership" as the amount of compensation is to secure the owner of the land in respect of his expenses incurred on the land and the loss of income arising from the loss of use of the land.

Under the Torrens system, the transaction becomes void if there is non-compliance with the statutory requirements under the Code unless there is consideration of an interest in equity. The court maintains that such equitable interest is recognised in equity when the relevant parties have acted in full compliance with the statutory requirements of the Code, short of actual registration (*Teh Bee v K. Maruthamuthu*). If the dealing does not comply with the statutory requirements, it is void. In contrast, under the Islamic principle, there is no confusion regarding this matter. This is because there is no distinction between legal rights and equitable interests. For example, there is no distinction between registered proprietors and beneficial owners or between registered chargees and equitable chargees.

The Torrens system deals with other dealings such as charges and leases but an easement came under a category of its own. The easements could be created only by express grant and must be registered. There was no such thing as an equitable easement, nor be an easement by implied grant, prescription custom or acquiescence, as in the case under the English law of real property (*Alfred Templeton & Ors. v Low Yat Holdings Sdn Bhd* [1989] 2 MLJ 202). In contrast, a similar principle of Islamic law of easement exists which is known as *irtifaq*. *Irtifaq* arises on the basis of a long user and their existence being proven since time immemorial. However, this right rests upon the consent of the owner and the consent can be revoked by the owner at any time. There are a few examples of easements according to Islam which are right of way over land, right of having a water channel going across the land and the right to discharge water onto land.

To some, it may not be a smooth effort to consider incorporating Islamic elements or principles in the Malaysian land law let alone amending the National Land Code 1965 (the NLC). It is shown in some of the court decisions in which the foreign judges or local judges with western's training had, in many a time refused to recognise Islamic law principles such as in the case of *jual janji*, *harta sepencarian* as well as *waqf*. The practice of possession of land by *Ihya al-mawat* was removed due to its contradiction to the principle alienation of land by the authority and its similarity to adverse possession as propagated under English land tenure (*Sidek bin Haji Mohamed and Ors. v Gov Perak and Ors* [1982] 1 MLJ 313).

Nevertheless, gradually, the NLC 1965 has been amended by the NLC (Act A832) which has added Section 421A to include Shariah Courts.

Ahmad Ibrahim was instrumental in promoting for harmonising Islamic law and civil law (www.ahmadibrahim.ikim.gov.com). In his writing of Islamic concepts and the land law in Malaysia, he narrowed down the concepts that were relevant to three matters i.e. *harta sepencarian*, *Jual Janji* and the opening of the Land (Sihombing J and Ahmad Ibrahim, 1989). All the principles have their roots in the Malay customs. However, these practices are in fact based on Islamic principles based on the practices of the prophet, companions and other Islamic scholars. He suggested that the National Land Code should acknowledge in some manner *Jual Janji* or the form of transaction in light of Islamic principles that allows Muslims to access a transaction that is interest-free. This is with regards to the prohibition upon Muslims to engage in loans with interest. The NLC does not provide any provision that prohibits such dealings in the NLC. On Temporary Occupation Licence, the late Ahmad Ibrahim and Salleh Buang (210) suggested that some consideration of possessory rights under Islamic law should be recognized. This would give adequate justice to those who are under TOL to properly end their contract upon extension to those who have worked on it for years and would be substantially deprived of the rights were given away. He also touched on a few future considerations such as recognition that use of property should not be to the extent of encroaching the rights of the neighbour and also the right of *Shufaaah*. It is a right of giving preference to the nearest or contiguous neighbour to acquire property if an owner wishes to dispose of his property. This is to ensure a peaceful and quiet enjoyment of the property. It also shows how Islam respects and protect the right of neighbours being the nearest person in the community.

With regards to pre-emption rights, it should be conferred to co-owners of undivided shares in the land upon meeting certain requirements. In terms of forfeiture, more leniencies with regards to inability to cultivate land due to unforeseeable hardship would reflect the principle of *maslahah ammah* or public interest that is applied in Islamic land law. In the past, individuals who were unable to cultivate their land due to some valid causes were given exemption from tax and if their lands were to be acquired by the government, they would be compensated fairly based on the amount of development done by the individual on the land. This principle is called '*pulang belanja*' under the Malay customary land tenure. Similarly, in terms of agricultural tenancies, the law should be more humane and stray away from fixing the amount of proceeds required from the tenant. This is especially when he is unable to fulfil what was agreed on previously.

Lastly, for charges and interests, there should be an exemption for Muslims to transact or deal with instruments that have interest rates as *Riba* (usury) is prohibited. This can be achieved by introducing *jual janji* which is a more shariah compliant instrument. *Jual janji* is a kind of security transaction which has mix foundation based on Islam and *adat*. Under the Malay customary tenure, it served to provide a mean to create security transaction or contractual dealing free from *riba* (usury). Even though the NLC does not provide clearly for it, it has been widely recognised by the court since the colonial period but with a different understanding of its practices. This already exists under the guise of Islamic banking of *bai' bithamin ajil* but have yet to be given any statutory recognition in the respective land laws. Many institutions have instigated the attempts of harmonising Islamic law in the Torrens system. Some have been successful but as the world progress, the law needs to be more comprehensive. These institutions have taken up the task to gather more traction from legal scholars in the Islamisation of the Torrens system and not just harmonise the conventional and Islamic land law, but also other branches of law.

Conclusion

Many principles in the National Land Code 1965 are similar to the principles of Islamic land system. These principles also have their roots in the Malay customary tenure practices which are highly influenced by Islam. Any application of Islamic land system based on *maqasid al shariah* would reflect its protection, safeguards, restrictions and procedures that have to be abided by. The application will produce a better safeguard through effective procedures such as the preparation of express grant, title by registration and guarantees by the state against any mishap, damages and certainty of procedures. There are leniencies of the application of the Islamic principles as evidenced by practices of the Prophet (saw). This may be interpreted according to the contemporary needs in which Islam provides various means based on jurisprudence such as *ijtihad* and *istihsan*, *masalih mursalah* and the like in meeting the demand of the present period.

Secondly, Muslims in Malaysia has a wide option to practice their faith in every aspect of their lives as provided under Article 3 of the Federal Constitution. Islam is provided as the religion of the Federation thus putting Islam in the highest position in Malaysia, while other religions may be practiced without affecting the peace and harmony or sacrificing Islam as the main religion. Therefore, the suggestion made by the late Prof Ahmad Ibrahim and Salleh Buang that there should be an exemption for Muslims to transact with interest-free instruments is very valid.

Lastly, the NLC should strive to accommodate other branches of Islamic law to assist the practical application of Islamic teaching. This would promote a more effective and comprehensive legal system in Malaysia with dual legal systems. Efforts have been made towards this goal by introducing Section 421A of the NLC which allowed for Shari'ah Court's order to be registered under the NLC. This effort appeals for more aggressive move in the future. The challenge for the lawmakers is to continuously study the provisions in the NLC so that it meets the increasing demand for harmonisation and Islamisation of various aspects of other interacting laws such as contract law, Islamic finance as well as waqf. For this, the right human capital and strong political will are undeniably needed.

References

- Awang & R. (1987). "Konsep Undang-Undang Tanah Islam: Pendekatan Perbandingan", Kuala Lumpur: Al – Rahmaniah.
- Das & S.K., (1963). "The Torrens System in Malaya, Singapore: Malayan Law Journal".
- Esposito & Antonio, (2003) "A Comparison Of The Australian ('Torrens') System Of Land Registration Of 1858 And The Law Of Hamburg In The 1850". Australian Journal of Legal History, accessible at <http://classic.austlii.edu.au/au/journals/AJLH/2003/13.html>, retrieved 16 July 2018.
- Implementation of Land Title Registration System in Malaysia from Law Teacher <https://www.lawteacher.net/free-law-essays/property-trusts/implementation-of-land-title-registration-law-essays.php#ftn7>
- ISC. Benefits of the Torrens System <https://www.isc.ca/About/History/LandTitles/TorrensSystem/Pages/Benefits.aspx>
- Judith Sihombing and Ahmad Ibrahim (1989) Centenary of the Torrens System Malaysia, pg. 199 Malayan Law Journal Sdn Bhd
- Sihombing J.
- Maidin, A.J et al., (2008), "Principles of Malaysian Land Law", Malaysia: Malayan Law Journal Sdn Bhd.

- Nuzhat Iqbal (2000) "The concept of land ownership in Islam and poverty alleviation in Pakistan". The Pakistan Development Review, 39(4)
- Salleh Buang (2010), "Torrens system in Malaysia". Kuala Lumpur: DBP.
- Sihombing, J. & Ahmad Ibrahim (1989) "Centenary of the Torrens System Malaysia", Kuala Lumpur: Malayan Law Journal Sdn. Bhd.
- (Siraj et al., 2006) "Land Law and Islam Property and Human Rights in the Muslim World". Malaysia: Malayan Law Journal Sdn. Bhd
- Syams al-Dīn al-Sarakhsī (1978). "al-Mabsut", vol. 3. Beirut: Dār al-Ma'rifah
- Wu, R. & Mohd Yazid, Z.K. [2011] "Implementation of land title registration system in Malaysia: Lessons for Hong Kong". Malayan Law Journal Articles, 1
- ZiaulHaque, (2009) Landlord and Peasant in Islam, <https://thecrg.wikispaces.com/file/view/Landlord%20and%20Peasant%20in%20Earl%20Islam%20%20Ziaul.pdf> retrieved 16 July 2018.
- <http://www.sabrizain.org/malaya/library/jmbras/jmbrasvol11.pdf>
- www.ahmadibrahim.ikim.gov.com IKIM.
- Al Quran Tafsir Ar Rahman (2005). Department of Islamic Development of Malaysia.
- Al-Quran, *An Nisa*, (4):29
- Al-Quran, *An Nisa* (4):132
- Al-Quran, *Al Maidah* (5):120
- Al-Quran, *Al A'raf* (7):12
- Al-Quran, *Ta Ha* (20):6
- Al-Quran, *Ta Ha* (20): 53-5
- [1879] LEIC 466
- (1915) 1 FMSLR 204
- (1927) 6 FMSLR 128
- [1966] 1 MLJ 163
- [1977] 2 MLJ 6
- [1982] 1 MLJ 313
- [1987] 2 MLJ 74