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IMPLEMENTATION OF LAND TITLE REGISTRATION SYSTEM IN MALAYSIA: LESSONS FOR HONG KONG

Richard Wu

Associate Professor

Faculty of Law

The University of Hong Kong

and

Mohd Yazid Bin Zul Kepli

Researcher

Faculty of Law

The University of Hong Kong

INTRODUCTION

Hong Kong is one of few common law jurisdictions that still adopt deeds registration system, rather than the system of registration of title. The Hong Kong's Land Registration Ordinance (Cap 128) was enacted in 1844 and is the oldest piece of legislation still in use in Hong Kong. The system is costly and time consuming as lawyers have to review title deeds for every property transaction to verify that the title is good. In contrast, the system of registration of title, like the Torrens system adopted in Australia, will enable lawyers to establish conclusive evidence of ownership and interests in the property by conducting a search at the land title register. In fact, Malaysia has implemented such a system back in the 19th century and the current registration of title legislation, the National Land Code, was adopted as early as in 1965.

In the past few decades, the registration of title system has become an international trend in land administration. Both United Nations and the World Bank recommended the adoption of such system.¹ Hong Kong is desirous of following such international trend and in 2004, its government adopted the Land Titles Ordinance (LTO), paving the way for the transition of a deed registration system to a registration of title system in the near future.

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While Malaysia and Hong Kong have their own distinctive political, economic and social characteristics, there are common legacies shared by both jurisdictions. For example, both places were former British colonies, with Malaysia becoming independent in 1957 and Hong Kong reuniting with China in 1997. They both use common law inherited from Britain. The two governments also look to each other for inspiration in other

reform initiatives like anti-corruption and financial development.²

In this article, the authors first presented an overview of the registration of title system under the Malaysian land law. They then examined the implementation experience of registration of title system in Malaysia and evaluated the lessons Hong Kong could learn in its future implementation of the registration of title system.

REGISTRATION OF TITLE SYSTEM UNDER THE MALAYSIAN LAW

The 'Torrens system', named after Sir Robert Torrens³ and introduced in South Australia in 1858, is perhaps the best known system of the registration of title (Willoughby and Wilkinson, 1995). The introduction of a Torrens system in Malaysia was a slow and complex process spreading over a long period of time (Sood and Tee, 2008).

Apart from the Torrens system, the Malaysian land law had also been influenced by the Islamic and customary laws. Such influence could be seen from the concept of *harta sepencarian* or 'jointly-acquired property'. Under the concept, the right of a wife towards the property or land is recognised as long as it had been acquired during the marriage even if the property was under the name of the husband and the wife is a fulltime housewife since the contribution of the wife to the family must be recognised. However, a declaration to such effect by the court is required and is usually given upon the division of such property upon death or divorce.

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The reason for the influence of Islamic law is not difficult to understand. Since 1400, (since the establishment of the Sultanate of Malacca), the locals (the Malays) have been professing the religion of Islam, a characteristic that remained until after independence.⁴ Although the Malaya States were occupied by various countries for 446 years, they were not occupied comprehensively (with the exception of the short period of Japanese occupation) and autonomy largely remained.⁵ The policy of various states was mostly one of 'non-interference' and the Sultans or local leaders had de facto control over land matter.⁶ This was explained by Salleh Abbas LP, the former Lord President, as follows:

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 that 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 however, he still remained an absolute ruler but was required to administer the state with the advice of a British Resident.⁷

In another case, *Shaik Abdul Latif & Ors v Shaik Elias Bux*,⁸ Edmonds JC further said that 'the only law applicable to the Malays in the Malay States before the arrival of British administrators is Islamic law modified by local custom'. Concerning the customary land, Horne J stated that:

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'Customary land' is land the title to which has been endorsed 'customary land' and that the expression 'customary land' meant land which was ancestral property (*harta pesaka*) as opposed to acquired land (*harta carian*).⁹

Before the introduction of Torrens system to Malaysia, the rights over land allegedly belonged to the Sultans but the people were given the liberty to occupy and use it.¹⁰ Sir Benson Maxwell CJ in *Sahrip v Mitchell & Anor*¹¹ summarised the legal position by stating 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 waste 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.¹²

After the British occupation, common law and equity principles were introduced into the Federated Malay

States ('FMS') as the new sources of land law, in addition to the local customary land tenure (Maidin, 2008). Moreover, the laws governing lands in these FMS were characterised by the Torrens system, instead of Islamic land law.¹³ This marked the beginning of a new regime of the registration of title law akin to the Torrens system in Australia on the basis of the Real Property Act 1857 of South Australia. The four states of Perak, Selangor, Negeri Sembilan and Pahang, which later became the Federated Malay States were the first to enact laws introducing Torrens title for use in a Malaysia setting (Sood and Tee, 2008). The registration of title system was first introduced in Perak by way of the General Land Regulations 1879; in Selangor by way of the General Land Regulations 1882, in Negeri Sembilan by

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way of the General Land Regulations 1887 and in Pahang by way of the General Land Regulations 1889 (Sood and Tee, 2008). By 1911, a unified Federated Malay States land enactment was passed. Currently, the main registration of title statute in Malaysia is the National Land Code ('NLC'). According to Suriyadi J in the case of *Sime Bank Bhd v Mohd Hassan bin Sulaiman*:¹⁴

the National Land Code 1965 was made effective from 1 January 1966 whereby thenceforth a uniform system of land tenure and dealing existed throughout Peninsular Malaysia. Penang and Malacca were also absorbed into the system by the promulgation of the National Land Code (Penang and Malacca Titles) 1963, effective also on 1 January 1966.

Dealings recognised under the NLC may be divided into those capable of registration like transfers, charges, leases and easements and those which are not capable of registration including tenancies exempted from registration, statutory liens and lien holder's caveat (Sood and Tee, 2008).

At the beginning, the concept of indefeasibility under the registration of title system was well received in Malaysia as it purported to bring certainty to land transactions. In *PJTV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd*,¹⁵ Raja Azlan Shah CJ reiterated that:

The concept of indefeasibility of title is so deeply embedded in our land law that it seems almost trite to restate it. Therefore, the registration of the transfer of the said land under the National Land Code defeats all prior unregistered interests in that land unless the party who acquires the registered title has been guilty of fraud (see s 340(2)(a) of the National Land Code).

Unfortunately, the registration of title system in Malaysia failed to address the important issues concerning indefeasibility and ownership. One major problem was with regards to the conflicting interests of the original owner and the third party bona fide purchaser. Under the registration of title system, the original owner might lose his land without negligence or fault of his own when someone forged his signature and sold his land to an innocent third party purchaser. On the other hand, if the system allows for rectification and 'returns' the land to the original owner, it will cause injustice to the innocent purchaser as he was not negligent and had merely relied on the register of title to complete his land transaction. The matter will become worse when there is no compensation or indemnity fund provided to protect the interests of the

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parties. In recent Federal Court decision of *Tan Ying Hong v Tan Sian San & Ors*,¹⁶ the court overruled the problematic case of *Adorna Properties Sdn Bhd v Boonsoom Boonyanit @ Sun Yok Eng*¹⁷ ('the Adorna case') and restored the concept of deferred indefeasibility under s 340 of the NLC.¹⁸ While the situation has been improved with this latest landmark judgment, it is submitted that the interests of the innocent parties are inadequately protected under the existing registration of title law of Malaysia.¹⁹

IMPLEMENTATION OF THE REGISTRATION OF THE LAND TITLE IN MALAYSIA AND LESSONS FOR HONG KONG

The implementation of the registration of title system in Malaysia provides important lessons for Hong Kong in three major areas, namely, fraud, rectification and equitable relief.

Fraud

Fraud is the most serious problem in the implementation of the registration of land title system in Malaysia.

For example, Anthony Wong Fook Hin, a Malaysian advocate and solicitor, recently highlighted in the 15th Malaysian Law Conference 2010 that nearly all forgery cases involved identity theft, that is, either the identity of the landowners are forged or 'fake' identity cards and forged signatures and attestations were involved.²⁰ According to the police statistics on fraud and forgery cases involving lands in Malaysia, between the years 2005 and 2009, there were 398 cases.²¹

In theory, the registration of title system was adopted to achieve the policy goals of simplicity and certainty. In a way, these two goals have been undermined by rampant cases of fraud.

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The requirement to establish fraud in order to set aside a land transaction in a registration of title system is clear. In *Goh Hooi Yin v Lim Teong Ghee & Ors*,²² Edgar Joseph Jr J stated:

It is not enough to show that the transfer had the effect of depriving the plaintiff of a known existing right. It must be demonstrated that the transfer was executed with the intention of cheating the plaintiff of such right. Furthermore, it is immaterial to decide whether there were other intentions and equally immaterial to decide which was the dominant intention. The intention to cheat must be one which has a substantial influence on the decision to make the transfer.

Dishonesty or actual fraud cannot be presumed merely because the party has knowledge of an unregistered claim or interest in the land.²³ In cases where the registration had been illegally completed, the registered of title or interest may be defeasible by reason of fraud (s 340(2)(a)) or forgery (s 340(2)(b)).

As pointed out by Schultz (1993), a fundamental question constantly confronted by the courts has been whether the concept of 'deferred indefeasibility', or that of 'immediate indefeasibility', should be adopted.²⁴ One difference between the Malaysian land law and other Torrens jurisdiction is the effect of the registration that had been obtained by forgery. Various authors alleged that under the NLC, registration of forged instrument should only confer deferred indefeasibility but in other jurisdictions, such as Australia, such forged document could confer immediate indefeasibility.²⁵ This was not reflected in the court decisions, especially in the *Adorna's* case.

Two Federal Court decisions

In Malaysia, the Federal Court decision in the *Adorna's* case had caused legal uncertainty in Malaysian land law for nearly nine years. The concept or principle of indefeasibility which was at the heart of the *Adorna's* case was not a complicated one. Under a Torrens system, registration is everything and the state guaranteed an indefeasible title to anyone who was registered on the register of title, as reflected in s 340(1) of the NLC. Certain exception was provided under sub-s 340(2). Therefore, if the title or interest is acquired using

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fraud, misrepresentation, forgery or through an insufficient or void instrument, it can still be defeasible. Under the NLC, only the subsequent bona fide purchaser should get an indefeasible title (and not the immediate bona fide purchaser). Unfortunately, the Federal Court held that *Adorna* obtained a good title despite being an immediate bona fide purchaser.

The decision in *Adorna* has been persistently criticised by the academics and practitioners as being wrong and the decision was finally overturned recently. As abovementioned, the latest Federal Court decision in *Tan Ying Hong v Tan Sian San & Ors* overruled the *Adorna's* case and restored the principle of deferred indefeasibility. The Chief Justice, Tun Zaki Azmi also criticised the error committed by the Federal Court in *Adorna* as being 'obvious and blatant'.²⁶

In the case of *Tan Ying Hong v Tan Sian San & Ors*, a dispute arose when a crook, used a forged power of attorney of Tan, the original registered owner, to mortgage Tan's property to the United Malayan Banking Corporation ('the bank') to obtain overdraft and loan facilities amounting to RM300,000 in favour of Cini Timber Industries Sdn Bhd ('Cini Timber').²⁷ When Cini Timber defaulted in payment, the bank commenced foreclosure proceedings against Tan. In an unusual move, all parties in this case called on the Federal Court to re-examine and overrule the *Adorna's* case. In the midst of the trial, the judge queried as to why there was

no amendment made to solve the legal uncertainty created by the *Adorna's* case. The Malaysian Attorney General's Chambers explained that there were many issues which required further deliberations, including the issue of compensation, but they conceded that the *Adorna's* case should be revisited and overruled, even before the delivery of the judgment.²⁸

In *Tan Ying Hong v Tan Sian San & Ors*, leave to appeal was granted on the following issue, namely, whether an acquirer of a registered charge or other interest or title under the NLC by means of a forged instrument acquired an immediate interest or title. The court replied firmly in the negative and the decision in *Adorna's* case was overruled. In fact, the Malaysian Attorney General's Chambers contemplated an amendment of the NLC to curb

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fraudulent land transfers.²⁹ However, the Head of the Civil Division in the Attorney General's Chambers, See Mee Chun admitted that the Federal Court's decision in *Tan Ying Hong v Tan Sian San & Ors* will influence the further approach of amending the NLC.

While the latest Federal Court's decision was welcomed,³⁰ it failed to solve completely the problems caused by fraud. Fraud could still affect the title and the scope of protection afforded to an innocent registered owner is still limited.³¹

Rectification

The Torrens system is a simple system. The Federal Court in *Teh Bee v K Maruthamuthu*³² stated that 'under the Torrens system the register is everything and it would be wrong to allow an investigation as to the right of the person to appear upon the register when he holds the certificate of title'. Under the registration of title in Malaysia, if an instrument is apparently fit for registration, the registration authority is obliged to register it.³³ The scope of power of correction given to the registration authority is arguably limited as it is confined to errors or omission made by the registration authority, and not the parties involved.³⁴ This practice is laudable because if the registration authority is given enormous power of correction, it might adversely affect the interest of bona fide purchasers. However, the limited power of the registration authority may prejudice the interest of innocent registered owners if their titles were tainted with fraud.

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Equitable relief

The issue of whether the equitable principles are recognised by the registration of title system in Malaysia was discussed a long time ago.³⁵ In principle, the Malaysian land law should reject any English rules of equity:

The National Land Code is a complete and comprehensive code of law governing the tenure of land in Malaysia and the incidents thereof of it, as well as other important matters affecting land, and there is no room for the importation of any rules of English law in that field except in so far as the Code itself may expressly provide for this.³⁶

However, the intervention of the English equitable principles was seen in cases such as *Wilkins and others v Kannammal (f) and Anor*,³⁷ in which Taylor J held: 'The Torrens system is a system of conveyancing; it does not abrogate the principles of equity.' Likewise, in *Oh Hiam & Ors v Tham Kong*,³⁸ Lord Russell of Killowen stated: 'the Torrens system is designed to provide simplicity and certitude in transfer of land which is amply achieved without depriving equity of the ability to exercise its jurisdiction in personam on grounds of conscience.'

Accordingly, there has been some uncertainty over the scope of application or non-application of the English equitable principles in relation to the registration of title law in Malaysia. Apparently, the uncertainty in relation to the applicability of equity principles in the Malaysian Torrens system arises from the conflicting legislative provisions within the land law legislation.³⁹

CONCLUSION

The registration of title system is a simplified and effective system which provides the parties with a high degree of certainty. It saves time and costs as there is no need to check the old title documents like what the solicitors are now doing in Hong Kong. However, the issues of fraud and rectification need to be addressed properly. Moreover, the applicability of equity principles to the

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registration of title system needs to be carefully determined. These are the three major lessons that Hong Kong can learn from the implementation of the system of the registration of title in Malaysia.

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- (13) Willoughby, Peter G, (1984), *The Conveyancing and Property Ordinance 1984: An Introduction and Parts I-II*, Hong Kong Journals Online, Law Lectures for Practitioners, (Vol 1984) at p 1.
- (14) Willoughby, Peter G and Micheal Wilkinson, 1995, *Registration of Titles in Hong Kong* (Butterworths: Hong Kong).

1 See for example, Byamugisha, F, (1999), *The Effects of Land Registration on Financial Development and Economic Growth: A Theoretical and Conceptual Framework*, World Bank Policy Research Working Paper No 2240; United Nations -- Economic Commission for Europe, (1996), *Land Administration Guidelines -- With Special Reference to Countries in Transition*, ECE/HBP/96, (New York and Geneva) at pp 15-18.

2 For example, Malaysia adopted the Malaysian Anti-Corruption Commission (MACC) (formerly known as Anti-Corruption Agency (ACA)) which was apparently inspired by the Independent Commission Against Corruption (ICAC) of Hong Kong. Likewise, Hong Kong is attempting to establish itself as an alternative Islamic financial hub like Malaysia. See 'Hong Kong Aims to Become Islamic Finance Hub: Tsang', *Agence France Presse*, 11 October 2007; 'Hong Kong Seeking Slice of Trillion Dollar Islamic Finance, Tsang says', *AFX News Limited*, 9 October 2007; Enoch Yiu, 'Hong Kong Could Benefit as Islamic Finance Hub', *South China Morning Post*, 14 October 2008.

3 Recently, it is widely believed that the Torrens system originated from Germany. For dissenting view on this, see Taylor, Greg, *Is the Torrens System German?* (2009) *The Journal of Legal History* 29:2 253-285.

4 After independence, this characteristic is further strengthened in the Federal Constitution which states that being a Muslim is one of the conditions to be considered Malay. The other two are the ability to speak Malay language, and understanding and practicing of Malay culture.

5 The occupations were not always characterised by brutality. This could be demonstrated by the way Malaysia received its independence from the British in 1957 in a peaceful manner after negotiations.

6 Some argued that there was never any strong evidence of Sultan being the absolute owner of the land within his jurisdiction under the Malay political system which existed prior to British intervention. See for example, Pakhriazad Hassan Zaki, Mohd Zaki Hamzah, Mohd Hasmadi Ismail, Khairil Wahidin Awang and Hazandy Abg Hamid, *Malay Customary Tenure and Conflict on Implementation of Colonial Land Law in Peninsular Malaysia*, *Journal of Law and Conflict Resolution*, Vol 2(2), February 2010 at pp 33-45.

7 *Tengku Haji Jaafar ibni Almarhum Tengku Muda Ali & Anor v Government of Pahang* [1987] 2 MLJ 74 (SC). 'Resident' is the title of certain colonial and/or diplomatic officials who represented their state with diplomatic status, with low rank in the West, in a protectorate or colonial entity.

8 [1915] 1 FMSLR 204.

9 *Haji Hussin bin Haji Matsom v Maheran binti Haji Mohamed Tahir* [1946] MLJ 116 at p 117.

10 After Malaysia received its independence in 1957, Malaysia became a constitutional monarchy and the Sultans were no longer the absolute rulers. The absolute immunity of the Sultans was abolished and the remaining immunity is severely limited.

11 [1879] Leic 466.

12 This practice is noticeably similar to the practice under Islamic land law where the rights of the citizens to make good use and cultivate the land are recognised and such land will only revert back to the state when he or she failed to make proper use of the land for certain specified period.

13 The influence of Islamic law was heavily limited by the British. Originally, the agreement between the British and the Sultans was that the British will be the advisors for the Sultans and the Sultans must follow such advice unless related to Malay culture or Islam. Muslims believe that Islam is a comprehensive way of life which covers trade and commerce, criminal law, conveyance and also personal matters like marriage and divorce. However, for the British, religion is more limited to personal matters like marriage and divorce only. After the occupation by the British, the latter interpretation was adopted.

14 [2000] 2 MLJ 158 at p 161.

15 [1980] 2 MLJ 136.

16 [2010] 2 MLJ 1 (FC).

17 [2001] 1 MLJ 241 (FC).

18 See Kevin Kam and Shanmuga Kanesalingam, *MLC 2010: Recent Federal Court's Decision on s 340 of the National Land Code 1965: Tan Ying Hong v Tan Sian San & Ors -- Are Landowners and Banks Secured?* via www.malaysianbar.org (31 July 2010).

19 Angie Ng, 'Putting a Stop to Illegal Land Transfers in Malaysia', *The Star*, 23 January 2010.

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21 Shaila Koshy, 'Your Land can Land in the Wrong Hands', *The Star*, 8 August 2010.

22 [1990] 3 MLJ 23 (HC).

23 *Tueh Guat Choo Alias Tin Wat Choo (f) v Cheah Ah Hoe and Yong Pow Meng* [1932] MLJ 109 (HC).

24 Under deferred indefeasibility, legal protection is only afforded to subsequent bona fide purchasers while under immediate indefeasibility, legal protection is conferred immediately to a purchaser provided that he or she acted without fraud and for consideration.

25 Sharifah Zubaidah, *Indefeasibility of Title and Interests* (Chapter 5) in Ainul Jaria Maidin et al, 2008, *Principles of Malaysia Land Law*, LexisNexis Malaysia at p 169.

26 See Angie Ng, 'Putting a Stop to Illegal Land Transfers in Malaysia', *The Star*, 23 January 2010; Teo Keang Sood, 2002, *Demise of Deferred Indefeasibility under the Malaysian Torrens System?*, Singapore Journal of Legal Studies at pp 403-408; Teo Keang Sood, *Basics of Indefeasibility under the National Land Code*, Malaysian Law Conference, 29 October 2007; and PK Nathan, *Nightmare for Registered Owners of Landed Property* [2002] CLJ xxiii.

27 *The New Straits Times*, 30 October 2009.

28 *Ibid.*

29 'A-G's Chamber to amend National Land Code', *Bernama*, 30 October 2009.

30 Terence Fernandez, 'Retiree Gets Back Land', *The Sun*, 23 February 2010.

31 See Shanmuga K, *Landowners Still Not Fully Secure*, *The Malaysian Insider*, 26 January 2010.

32 [1977] 2 MLJ 7 (FC).

33 *Island & Peninsular Development Bhd & Anor v Legal Adviser, Kedah & Ors* [1973] 2 MLJ 71 (HC).

34 See *Island & Peninsular Development Bhd & Anor v Legal Adviser, Kedah & Ors* [1973] 2 MLJ 71 (HC). For different view, see *Mohammad bin Buyong v Pemungut Hasil Tanah Gombak & Ors* [1982] 2 MLJ 53; *Kuah Chiew Ann v Pendaftar Hakmilik Tanah Wilayah Persekutuan*[2000] 6 MLJ 127[2000] 6 CLJ 246 (HC).

35 For example, see SY Wong, *Equitable Interests and the Malaysian Torrens System* (1967) MLR Vol 9 20.

36 *Pemungut Hasil Tanah, Kota Tinggi v United Malaysian Banking Corpn Bhd* [1981] 2 MLJ 264 (FC). See also *United Malaysian Banking Corporation Bhd & Anor v Pemungut Hasil Tanah, Kota Tinggi* [1984] 2 MLJ 87 (PC).

37 [1951] MLJ 99 (CA).

38 [1980] 2 MLJ 159 (PC).

39 For detailed discussion, refer to Yong Chiu Mei, *The Role of English Equity in the Peninsular Malaysian Torrens System of Land Law: A Review of Salient Statutory Provisions (Part 1)* [2005] 1 MLJ lxviii.