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Tenure In Peninsular Malaysia And The Philippines Compared

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Abstract

Peninsular Malaysia and the Philippines has its own history of colonial intervention. Each country has a defined system of government and a form of land tenure and administration. However, with the colonial powers' arrival and the introduction of new laws into Peninsular Malaysia and the Philippine archipelago respectively has changed the law which both countries were accustomed to. Thus, giving birth to the new system and eventually culminated the adoption of the National Land Code, 1965 and the Philippines National Land Laws. The Torrens system is the core of the system where the precept epitomized the principle that 'register is the key to title.'

Corollary to the above, the Customary tenure (which were the concoction of Islamic law and adat) and land administration was replaced by the system which is western in nature. Hence, in Malaysia, the present land laws and tenure was the by-product of the British land laws and the Philippines were that of the Spanish and eventually the American land laws and tenure.

1.0. Conceptual Background:

Historical facts have it that prior to the advent of the European colonisers, Peninsular Malaysia and the Philippines had their own system of land tenure. The Philippines like Malaysia too, had observed the system of land tenure which was based on their customs.

With the arrival of the British in Peninsular Malaysia and the Spaniards in the Philippines respectively, the system which both countries were accustomed to, had undergone an abrupt change. Land tenure and its administration were also affected as new laws were enacted relating thereto. The laws introduced and the development pursued by the new masters have in one way or the other affected the subdued local inhabitant.

1.1. Colonial Rule and Post Colonial Rule:

The Philippines under the hands of the Spaniards and later under the American imperialists as compared to Malaysia under the British rule, has suffered most. Needless to mention the laws enacted have worked to the disadvantage of the local inhabitants. The colonisers' intervention resulted in the dichotomy of the Filipino people- i.e. the Christian Filipinos and the Moros in Mindanao and Sulu as well as the tribal Filipinos. Malaysia, suffered too but not as seriously as their Filipino counter-parts. But one peculiar thing that prompted the hungry colonisers' was the promising natural resources they could extract from both countries. In the case of Malaysia, the

main purpose of the British officers was securing and exploiting the tin and mining resources in the Malay States particularly in the States of Perak and Selangor.[1]

In the Philippines, the Spanish administration was attracted to the country's natural resources, to engage in trade in spices and to propagate Christianity.[2] Both colonial powers saw the prospect to promote their selfish ends. That is, to gain riches that would bring ease, comfort and glory to their mother country. To give expression to their thoughts, laws were then enacted.

In Malaysia, when the British extended their rule in the last quarter of the 19th century they thereby set up their 'Residential System' whereby each Malay State was assigned a British Resident who would then assist and advice the Malay Ruler/Sultan in matters of governing the State. In reality, however, the Sultans were reduced to a petty heads as it was indeed the Residents who held the real power since the Sultans were bound to follow the latter's advice. The Philippines on the other hand, were subjected to the Laws of the Indies[3] which the Spanish government had introduced.

> Law VII of the said law stipulated that:
> "... in the distribution of lands whether it be in the new settlements or in those localities already settled and inhabited, lawful and peaceful means should be employed to the end that the rights and interests of the natives might not be impaired."[4]
>
> It was provided further in Law IX that:
> "...in granting estancias (mansions, dwellings and habitations) and lands to Spaniards, care should be taken that the natives were not to be deprived of their holdings or disturbed in their peaceful occupation and cultivation.[5]

Despite the above instructions and royal decrees and edicts, the officers who were assigned to administer the archipelago took advantage of what they saw as an answer to their needs. They exploited the natives and stripped them of their land through the introduction of the royal grants and the land registration policy in 1884.

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* (Excerpt of her Ph.D Thesis chapter on Tenure in Peninsular Malaysia and the Philippines).

1 The two States were the first to open their country to foreigners. This explained the influx of foreign nationals (specifically Chinese) in Perak and Selangor. Refer to the Sultan of Perak Proclamation in 1874 (Malay Peninsular Further Correspondence, No. 20 of C 1320 while the Selangor Proclamation was published in Straits Settlements Government Gazette on Dec. 12, 1874, Notification No. 50. See David Wong, supra, pp. 24-25.

2 Historians (like Zaide and others) claimed that the main purpose of the Spaniard was to enrich themselves through trade and exploit the country and its people and propagating Christianity was just a last recourse to cover up their selfish motives.

3 The Laws of the Indies was a compilation and digest of laws for the government and administration of Spanish colonial possessions.

4 Emphasis mine.

5 Emphasis mine.

Another serious blow to the Filipino people was the land policy of the Americans when they took possession of the Philippine archipelago. The Muslim Filipinos[6] and the tribal communities were the ones who suffered the brunt of the laws implemented in the region. This period also paved the way for the intrusion of capitalists in Muslim Mindanao, Sulu and Basilan. Meanwhile, in Malaysia, the intervention also had opened up the country for the entry of the capitalists. J. K. Sundram[7] noted in his studies that the pre-capitalist atmosphere and class relations of the Malays were radically altered after the colonial intervention. The colonial legislation and policy transformed the significance of land in the peasant economy and hence affected the peasants rights of production. Land law in the colonial rule recognised private property rights in land, rendering it a commodity to be owned, bought or sold. The new legislation, combined with other measures under the colonial regime also undermined the practice of shifting cultivation.

The colonial intervention in Malaysia had created the conditions for landlordism and its corollary, peasant tenancy, and likewise facilitated the proletarianisation of the poor peasants. Before the advent of the colonial power access to the use of uncultivated land was not constrained by law, but since the advent of the British, land was transformed into a commodity to be owned and transacted, over which the State ultimately controlled access.

In Malaysia, although the Sultans of Perak and Selangor issued similar Proclamations upon the advice of the British Residents' respectively, the Malays were not totally stripped off of their lands. In fact, the British had enacted laws like the Malay Reservations Land Enactment in order to protect the Malays from losing their lands to the money lenders who were non-Bumiputra. The terms and conditions in the enactment stipulated that the Bumiputra could only dispose or sell their lands to the Malays.

2.0. THE NATIONAL LAND LAWS:

Both Peninsular Malaysia and the Philippines enacted laws that breathed and embodied the substratum of the legal notions and principles of the colonial powers. This however, was inevitable owing to the prevailing situation under colonial rule.

2.1. Torrens System:

First and foremost, both Malaysia and the Philippines adopted the Torrens system where registration is the key to title. In Malaysia, the Torrens system of land legislation was introduced during the British colonial rule through W.E. Maxwell after he came back from Australia to observe the land tenure there. It was observed that the Torrens system of land legislation suited the Malaysian land tenure system.[8]

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6 Although aTreaty was forged between the American and the Sultans of Sulu and Mindanao known as the Bates Treaty whereby the American government guaranteed that the Moros will not be interfered with in their religious customs and practises. Likewise, the Sultanate and his loyal council would be given freedom and respect due to their position. In return, the American Government asked the Moros to accept American sovereignty over the Moro-land. But the treaty was purely deceptive strategy on the part of the Americans because it was a ploy to trick the Muslims not to wage war against Americans at the initial stage. Immediately after the American imperialist crushed the uprising in Luzon they unilaterally abrogated the terms and conditions of the treaty and enforced their rule and control over the Moros of Mindanao and Sulu.

7 J. K. Sundram, "**A Question of Class, Capital, the State and Uneven Development in Malaya**" Monthly Review Press, New York, (1988). He also noted that tenancy and share- cropping emerged as a result of the colonial land laws and policies that favoured the interests of capital.

8 But its efficiency was affected by the machinery responsible for its implementation as observed by Nik Mohd.Zain Bn. Nik Yusuf supra.

In the Philippines, the Torrens system was also implemented as early as the Spanish colonial era through the Spanish Mortgage Law pursuant to the 1880 Decree in order to register and tax lands.[9]

The Mortgage Law provided for the systematic registration of land titles and deeds as well as possession of lands. The said law was discontinued by virtue of P.D. 892[10] and P.D. 1529.[11] Section 1 of P.D. 892 provided:

> "that the system of registration under the Spanish Mortgage Law is discontinued and all lands recorded under the said system which are not yet covered by the Torrens titles shall be considered unregistered."[12]

The Land Registration Act (Act 496) (as amended by P.D. 1529 which was enacted on June 11, 1978) was passed in order to establish a system of registration by title recorded to become absolute, indefeasible and impresciptible. Following the Torrens system of land registration, rights acquired under this system are guaranteed by the government which provided an **Assurance Fund** to answer for damages to be suffered by persons through the operation of this system.[13]

In Malaysia, however, the Assurance Principle was not adopted under the Malaysian Torrens system because each State government was responsible for any loss or damage its officers might cause to others in the course of carrying out their duties.[14] In other words the Assurance Principle has no place in the land statutes in Malaysia. The Assurance Fund as existing in Australia was considered unnecessary in Malaysia due to the following reasons:

> the simplicity of dealings;
> the easy access to regional land officials to assist in all dealings; and
> the fact that all grants emanated directly from the State.[15]

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9 The Mortgage Law took effect and was adopted in the Philippines on July 24, 1893. See also Owen James Lynch, "**Native title, Private Right and Tribal Land Law: An Introductory Survey,**" Philippine Law Journal, Vol. 57, [1982] p. 267. The Spanish Mortgage law stipulates that owners who lack recorded title of ownership could have their interests registered during a possessory information proceeding before informacion posesoria to qualified applicants. (Ss/ 32 and 83). The Mortgage Law was enacted to have a uniform Mortgage Law for Spain, Cuba, Puerto Rico and the Philippines. See Manalac, supra, p 35. It may be considered the most important piece of land legislation ever promulgated in the Philippines.

10 Dated February 16, 1976.

11 Dated June 11, 1978.

12 In pari materia with section 3 of P.D. 1529. Further it provided that "hereafter, all instruments affecting lands originally registered under the lands shall have been brought under the operation of the Torrens system." It was stated that the books of registration for unregistered lands provided under S. 194 of the Revised Administrative Code (as amended by Act 3344) were to continue to remain in force provided all instruments dealing with unregistered lands would henceforth be registered under Section 113 of the Decree.

13 Took effect in February 1, 1903. The method is known as the Torrens system of land registration. See Also Antonio Noblejas & Edilberto Noblejas, **Registration of Titles And Deeds,** (revised ed.) Rex Printing Co. inc, Quezon City, (1992) p.43.

14 See Ss. 16(3) & 21 of the NLC, 1965.

15 The Philippines and Singapore adopted the Assurance principle as it was felt necessary to adopt it .

In Peninsular Malaysia, the law that regulates land is the National Land Code. The National Land Code (Penang and Malacca Titles) Act, 1963[16] and the National Land Code, 1965 which is applicable to the whole of Peninsular Malaysia are the two main legislations pertaining to land matters.[17] The introduction of the National Land Code unified the whole system of the land law in the Peninsular. The operation of the NLC which provides for the Torrens system of title is supplemented by the various subsidiary legislation enacted and passed by the respective State Governments in Peninsular Malaysia.

The National Land Code was enacted pursuant to Article 76 (4) of the Federal Constitution. Article 76 (4) stipulates further that although land is a State matter, Parliament may make laws to ensure and achieve uniformity of laws and policy with respect to land matters in all States. [18]

As land is a State matter,[19] it follows that the State Authority is empowered and authorised to make laws relating thereto and likewise the State is vested with all the State land within its territory. Section 40 of the National Land Code provides that the State Authority is vested solely with the entire property in:

i) All State land within the territories of the State;
ii) All minerals and rock materials within or upon any land in the State the rights to which have not been specifically disposed of by the State Authority.[20]

The provision of the Code gave the State Authority a vast power and covers a wider scope. It is equipped with the powers to deal with the land and dispose of it in the manner enumerated and prescribed for in the Code, the Mining Enactment (Cap. 147) and the Forest Enactment (Cap. 153)[21] together with all such rights in reversion and other similar rights conferred on it under the aforesaid laws.

Thus, where land matters are concerned, the National Land Code categorically enunciates that the State Authority holds a high position. It is endowed with the power to alienate land as well as being the owner of all the State land within its territory. It has been stated that "the National Land Code is a complete and comprehensive code of law governing land in Malaysia and the incidents of it, as well as other important matters affecting land ..."[22]

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16 Applicable to Penang and Malacca only.

17 For Sabah and Sarawak, the Sabah Land Ordinance (Cap 68) and the Sarawak Land Code (Cap. 81) .

18 Article 76 (4) of the Federal Constitution, 1957. This article was challenged in the Federal Court case of **East Union (Malaya) Sdn. Bhd. v. Government of the State of Johor and Government of Malaysia** [1981] 1 M.L.J. 151 (F.C) where the applicant company applied for a declaration that s. 100 of the National Land Code enacted by the Federal Parliament is void on the ground that it is ultra vires Article 76(4) of the Federal Constitution and the section deals with a subject with respect to which it has no power to legislate. However, the Federal Court dismissed the suit on the following grounds:
"...[T]he sole test is simply this: does the impugned provision enacted by Parliament ensure uniformity of law and policy? If it does, it is constitutional, regardless of the previously. If it does not, it is unconstitutional. By this test, the impugned section is within the power of Parliament to enact."

19 Article 76(4) List II Item 2, 9th Schedule of the Federal Constitution.

20 Section 40 (a) (b) of the NLC.

21 The Forest Ordinance/Enactment has been repealed by the National Forest Act 1984 (Act 313) pursuant to clause (3) of Article 76 of the Federal Constitution. See also Teo Keang Sood and Khaw Lake Tee, **Land Law in Malaysia, Cases and Commentary**, supra, pp. 15-16.

22 **United Malayan Banking Corporation Bhd.**v. **Pemungut Hasil Tanah, KotaTinggi,** [1984] 2 M.L.J. 87.

In the Philippines, the Regalian principle found its way and roots in the national land laws where all lands vest solely on the State Authority by virtue of Article XII, Article XIII and Article XIV on the National Economy and the Patrimony of the Nation of the Philippine Constitution. Section 8 of Article XIV states categorically that:

> "All lands of public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, wildlife, and other natural resources of the Philippines belong to the State. With the exception of agriculture, industrial or commercial, residential and resettlement lands of the public domain, natural resources shall not be alienated, and no
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> license, concession, or lease for the exploration, development, exploitation, or utilisation of any of the natural resources shall be granted for a period exceeding twenty-five years, renewable for not more than twenty-five years, except as to water rights for irrigation, water supply, fisheries, or industrial uses other than the development of water power, in which cases, beneficial use may be the measure and the limit of the grant."[23]

Like Malaysia too, in the Philippines, the State Authority is equipped with the powers to deal with the land and alienate it to whom the State Authority think fit. This is embodied in the 1986 Philippines Constitution on national patrimony.[24] Section 2 of Article XII clearly states that natural resources except agricultural, commercial and industrial residential and resettlement lands shall not be alienated. It provides further that:

> "the exploitation, development and utilisation of natural resources shall be under the full control and supervision of the State."

Thus, the State may by law undertake any reform programme or may formulate laws and policies affecting land if deemed necessary.[25] It can be discerned from the above that the Philippine national land laws have closely adhered to the Regalian doctrine which subjects all agricultural, timber and mineral lands to the dominium and disposition of the State.[26] It follows that before any land may be declassified and converted into inalienable or disposable land for agricultural or other purposes, there must be a positive act from the government. Even rules on confirmation of imperfect titles do

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23 Minerals lands are inalienable under section 8 of the same article (refer also to Commonwealth Act No. 137). The mining patents issued under the former mining laws (Act of Congress of July 1, 1902, Ss. 60 - 62; Act 624), registered in the registry of property in accordance with section 122 of Act 496 remain under the operation of the Torrens system.

24 Article XII of the 1987 Philippine Constitution on National Patrimony and Article XIV s.8 of the Philippine Constitution.

25 In consonant to the above, section 4 of Article XIII of the Philippine Constitution clearly enunciates that: "The State shall, by law, undertake an agrarian reform programme founded on the rights of the farmers and regular farm workers, who are landless, to own directly or collectively the lands they till or in the case of other farm workers to receive just share of the fruits thereof."
Likewise the State shall encourage and undertake the just distribution of all agricultural lands subject to such priorities and reasonable retention limits as the Congress may prescribe, taking into account ecological, development or equity considerations, and subject to the payment of just compensation.

26 Section 2 of Article XII, 1987 Philippine Constitution. Refer also to Antonio Noblejas & Edilberto Noblejas, **Registration of Land Titles and Deeds,** supra, p. 53; Also refer to **Consolidated Inc. vs. Hon. Court of Appeals**, No. L44092, April 15, 1988, 160 SCRA 231.

not apply unless and until the land classified for example as forest land or mining land is released in an official proclamation of lands of public domain.

Both in Peninsular Malaysia and the Philippines, the State Authority is endowed with a vast power and their position is subservient to no one. They can alienate and dispose of land within its territory in a manner prescribed by the law, i.e. National Land Laws, Mining Law Act and the Forest Enactment/Act.

With regard to customary land tenure, in Malaysia it is not totally displaced by the statutory system of land tenure.[27] Section 4 (2) (a) of the National Land Code, 1965 relating to a given situation or the category of land which is the customary land. Customs relating to tenure are indeed preserved.

While in the case of the tribal Filipinos or members of the cultural communities and the Muslim Filipinos their custom relating to land tenure were also not totally wiped out. Those being driven into the sparse hinterlands still practise their so- called customary law. However, there was no law that operates to safeguard and preserve such custom. In fact, the traditional leaders who were originally the guardians of the community's patrimony became some kind of feudal lords. It is undeniable that there were laws enacted to protect the rights of the cultural communities but it is difficult to implement them fully because Parliament are composed mainly of elite landlords.

The customs though different in both countries have survived the onslaught of the Torrens system of title registration since its introduction. In the case of Malaysia, the British colonialist had the desire to preserve the indigenous laws of the native inhabitants. This can be deduced from the statement of Sir Benson Maxwell to the effect that:

> "[The] administration of justice shall be adapted, so far as circumstances permit, to the religions, manners, and customs, of the native inhabitants."[28]

The above finds support under the wordings of Section 3 (1) of the Civil Law Act, 1956 where it is stated that the application of the English Common law and equitable principles and other statutory rules "...shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary."[29]

Therefore, it can be deduced that local circumstances would come to mean the indigenous laws and customs of the native inhabitants. In the Philippines, the royal decrees and edicts embodied the same rulings but were however, unimplemented by the then administrator of the Islands.

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[27] David Wong has acknowledged that "in so far as matter of land tenure are concerned their (the Malays) custom has been displaced by the statutory legislation on land tenure yet he pointed out while discussing the Customary Tenure Enactment in Negri Sembilan "the mere fact that the subsequent enactment confines its application to customary land cannot by itself be taken to have deprived the custom of its place as general law.

[28] In **Regina v. Willans** (1858) 5 Ky. 16. See also the case of **Choo AngChee v. Neo Chan Neo & Ors.** (1908) 2 S.S. LR. 120 where Braddell J. stated that:"[T]he law of England would necessarily require to be administered with such modifications as to make them suitable to the religions and customs of the inhabitants... "Refer also to Roland St. John Braddell, **The Law of the Straits Settlements: A Commentary,** Oxford University Press, Kuala Lumpur, (1982) p. 86.

[29] Section 3 (1) of the Civil Law Act of 1956: See also Wu Min Aun, **An Introduction to the Malaysia Legal System**, Rev. 3rd Ed., Heinemann (Malaysia) Sdn. Bhd., Kuala Lumpur, (1982) rep. 1983/1985 p. 168.

What set apart with respect to custom between the Muslim Filipinos, the tribal or cultural communities and the Malays in Peninsular Malaysia particularly in Negeri Sembilan and some parts of Malacca is the observance of the adat perpatih[30] and adat Naning relating to land tenure. The Muslim Filipinos and the cultural communities are very much clannish but do not confine their property to the female members of the clan only. They do not subscribe to the practice of having the property held by the female members of the clan only. Indeed, male members of the family are given high preference and respect over the women members in all aspects.

Both adat perpateh and adat naning prescribed the rules of succession whereby :

> "Tribal descent goes through women and a man is a member of his mother's tribe and after marriage, received into his wife's tribe...[L]and can be owned by women only."[31]

However, in the Philippines particularly the Muslim Filipinos do not allow land to be owned by women only. The son could own the same size of land as the female offspring. Sometimes, it is more than the size of the female members of the family. This is due I believe to Islamic law of faraid which is assimilated to the Muslim custom in Southern Philippines.

Customary land as noted earlier remained enrolled in the Mukim land or Mukim register.[32] The acquisition of title to this type of land in the Mukim register is subject to customary rules as evolved by the adat or custom in Malacca and Negeri Sembilan.[33] Alienation of such land to non-members of the tribe or community was a rare phenomenon.[34] Should any member of the tribe need or wish to sell his land he must first consult or offer it to the family members or the tribe as the general rule is, land should not be disposed of outside the clan or tribal group. Only in the event that members of that particular family or tribe refuse to buy the land will it be sold to outsiders or non-tribal members.

The above practice is also common to the Muslim Filipinos and the tribal communities. They would not allow any outsiders to acquire land belonging to the tribe unless there is a need to sell the land and the family members or clan has refused to buy it. However, there is nothing that prevents a non-tribal member in acquiring interest in land provided the customary requirements of alienating such interest are duly complied with. However, the land once sold outside the clan or tribal group ceased to be the tribal land and would no longer be governed and under the ambit of the tribes custom.

Except for customary lands in Negeri Sembilan and Malacca, customary land situated in the Malay States has been so assimilated with registry land or Mukim land that any distinction between the

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30 Adat perpatih is also known as tribal adat and is prevalent among the Malays of Negri Sembilan and some parts of Malacca. (This was already discussed in Chapter 4 footnote no. 11.

31 R. J. Wilkinson, "**Malay Adat,**" **Readings in Malay Adat,** ed. M. B. Hooker, Singapore University Press, Singapore (1970), p. 12.

32 It is also known as the Malacca Customary Land Register (those in Malacca) but will still be subject to the provisions of the National Land Code. See also Sihombing, **The National Land Code: A Commentary,** supra,p. 50

33 It is humbly submitted that the customary lands in Malacca and Negri Sembilan are subjected to a dual system of rules, such as the general territorial law as embodied in the National Land Code and the customary rules (both adat perpatih and adat temenggong); see also Hunud Abia Kadouf, infra, p. 8.

34 David Wong, **Tenure and Land Dealings in the Malay States,** supra, p. 477

customary nature of land tenure and the registry or Mukim land has disappeared.[35] In other words the customary lands in the Malay States have been subjected to continuous modification and the customary practices have become amalgamated with the other types of land that there remained no marked difference between the said customary land, the registry land and Mukim land. [36]

3.0. RECENT DEVELOPMENT

In the Philippines, a bill was tabled and has been approved by the Parliament entitled the Land Code of the Philippines.[37] It provides for the recognition of the rights of the cultural communities and their ancestral lands which they occupied since time immemorial. Also, another bill was tabled calling for extending the period of cultural communities to perfect their titles to ancestral land occupied by them and for other purposes.[38] In Peninsular Malaysia, the move by the State Government of Perak and Pahang to award land titles to the Orang Asli was greeted with reservation by the Orang Asli and Orang Asli advocators.[39]

4.0. RIGHTS TO PROPERTY AND LAND OWNERSHIP:

4.1. Under the Constitution:

In Malaysia, the right to own property is given constitutional protection under Article 13 of the Federal Constitution which states that:

1. No person shall be deprived of property save in accordance with law.

2. No law shall provide for the compulsory acquisition or use of property without adequate compensation.

It may be understood that anybody who is able and capable of owning a property can do so and he shall not be deprived of his property and ownership therein save in accordance with law. It follows that his property could not be acquired compulsorily without due consideration or adequate compensation.

In the Philippines, the right to own property is also afforded protection and embodied in the Philippine Constitution. It is a vested right and enjoys constitutional protection. Although it is constitutionally mandated, due process,[40] however, does not prevent the government from taking the private property of the Philippine citizens pursuant to **eminent domain** proceedings or through the exercise of police power. Due process does require that before the government can legally confiscate vested property rights, it must at the minimum give the owner prior notice of the confiscation plan and a meaningful opportunity to be heard before the land is taken. These procedures are

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35 Ahmad Ibrahim, "**Islamic Concepts and the Land Law in Malaysia,**" Ahmad Ibrahim & Judith Sihombing, (eds.), **The Centenary of the Torrens System in Malaysia,** M.L.J Sdn. Bhd., Kuala Lumpur, (1989) p. 199

36 This is open to argument; Refer to Hunud Abia Kadouf, "**The Relevance of Section 4(2) (a) of the National Land Code, 1965, to the Jual Janji Customary Security Transaction: A Call for Discussion,**" (unpublished) 1995, p. 7.

37 House Bill No. 3963.

38 House Bill No. 8604 Introduced by Congressman Jose T. Ramirez.

39 Refer to chapter 5 for details.

40 In Malaysia this comes under due consideration.

constitutionally mandated "to promote social justice... ensure the dignity, welfare and security of all people and equitably diffuse property ownership."[41] After all the formalities are satisfied the government can proceed to take the land, but just compensation must be made.[42]

The term "adequate compensation" was not defined in the Constitution. Accordingly, the term adequate compensation may mean compensation that is fair and reasonable to both acquiring authority and the owner of the property and other interested parties.[43]

The Malaysian courts seem to follow the view advanced by the Indian courts prior to 1955 whereby compensation means fair and full value of the property taken. In the United States, compensation must be just for any land to be acquired. The position in the case of **Hurley v. Kincaid,**[44] was that compensation means "equivalent of the property " and it is the duty of the courts to see that the expropriated owner obtains the equivalent of his property even though "just" was omitted from the constitutional provision.[45]

In the Philippines the determination of just compensation, particularly when applied to specific cases, involving directly as it does private rights, is a judicial function. The Supreme Court has had occasion to define just compensation and how it should be determined in specific cases. In the **City of Manila v. Estrada,**[46] the Court stated that:

> "Compensation means an equivalent for the value of the land (property) taken. Anything beyond that is more and anything short of that is less than compensation. To compensate is to render something which is equal in value to that taken or received. The word "just" is used to intensify the meaning of the word "compensation," to convey the idea that the equivalent to be rendered for the property taken shall be real, substantial, full, ample. "Just compensation," therefore, means a fair and full equivalent for the loss sustained."

Thus, the ordinary measure of the compensation is the market value of the property to be expropriated, to which must be added the consequential damages minus the consequential benefits that will accrue to the owner of the property.[47]

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41 Article III section 6 of the Philippine Constitution; See also Owen James Lynch, Jr., "**Native Title: Private Right and Tribal Land Law: An Introductory Survey,**" Philippine Law Journal, Vol. 57, (1982) p. 283.

42 Article III section 1 (1) and Article IV section 1 of the Philippine Constitution.

43 Abu Hassan Abdullah, "Penentuan Pampasan (Jadual Pertama Akta Pengambilan Tanah, 1960)," Kursus Penilaian Negara, Kementerian Kewangan Malaysia (28th October -1-9th November, 1985); See Also Ratna Azah Rosli, **"Discrepancies on the Award of Compensation Under the Land Acquisition Act, 1960 in Peninsular Malaysia,"** M.C.L.- Dissertation International Islamic University, (1994) p. 14.

44 [1932] 285 U.S. 29.

45 See Nik Mohd. Zain bin Nik Yusof, supra, p. 162.

46 25 Phil. 208, see also **MRR Co. v. Velasques**, 32 Phil. 286. Refer also to Jeremias U. Monte-mayor, **Labor, Agrarian and Social Legislation,** Vol. I, 2nd Ed., Quezon City, (1967), p. 39.

47 Jeremias U. Montemayor, **Labor, Agrarian and Social Legislation,** supra, p. 39. See also **City of Manila v. Corrales,** 32 Phil. 85; see also section 6, Rule 67, Revised Rule of Court, Philippines.

In Malaysia, the main problem faced by the Land Administrator when acquiring land is the adequacy of compensation. Disputes often arise over the value of the land acquired between the land administrator and the dispossessed owner. In such an eventuality, the dispossessed owner who is not satisfied with the amount of compensation may contest under Section 37 (1) of the Land Acquisition Act, 1960 or bring the matter to the court through an appeal. The Act actually contains the procedures governing the acquisition of land, principles relating to assessment and payment of compensation and other incidental matters thereto.[48] Section 2 of the First Schedule of the Act, states that compensation for land acquired compulsorily is to be based on the 'market value' of the land and no other consideration to be paid.[49]

Adequacy of compensation must be ensured by providing a standard basis of assessment. In the case of **Lembaga Amanah Sekolah Semangat Malaysia v. Collector of Land Revenue, Dingding,**[50] Hashim Yeop Sani J. (as he then was) remarked that :

> "Our Land Acquisition Act, 1960 makes it clear the basis for determining is the market value and other factors set out in paragraph 2 of the First Schedule. All matters of compensation point to the First Schedule (see Section 47 (2) of the Act)... [A] ll these provisions seem to me to be an express direction of the legislature to exclude all other considerations... [W]hat is adequate compensation is a matter for the courts and Article 13 (2) of our Constitution to enable a law for compulsory acquisition or use of property to provide for a method of valuation or a basis of assessment. Our Land Acquisition Act, 1960 has adopted the valuation method prescribed in paragraph 2 of the Schedule with the express direction that no other considerations shall be taken into account in arriving at an award... [M]aterial to the construction of paragraph 2 of the First Schedule to our Act are also provisions of paragraph 3 of the First Schedule to our Act. [I]t is clearly seen that whereas paragraph 2 deals with principles as basis for determining the amount of

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48 The principles of compensation (in the First Schedule of the Act were radically amended by the Land Acquisition (Amendment) Act, 1976 (Act A 366). This was nullified the following year by virtue of the Land Acquisition (Amendment) Act, 1977 (Act A 388) which restored the previous principles. In 1984, the Land Acquisition Act, 1984 (Act A 575) came into effect as a result of the recommendation of the Jawatan Kabinet Mengenai Langkah-langkah Mempercepatkan Perlaksanaan Projek-projek Pembangunan.

49 See also N. Khublall, **Law of Compulsory Purchase and Compensation, Singapore and Malaysia,** Singapore, Butterworth, (1984) p. 101.

50 [1978] 1 M.L.J. 34, pp. 37-38; See also the case of **Nanyang Manufacturing Co. Ltd v. The Collector of Land Revenue,Johor,** [1954] 1 M.L.J. where Buhagiar J. echoed the definition of Jenkins C.J. in **Kailas Chandra v. Secretary of State,** 17 Co. LJ. 35 which stated that market value as:

> "...[T]he price an owner willing and not obliged to sell, might reasonably expect to obtain from a willing purchaser with whom he was bargaining for sale and purchase of the land."

The above was approved by Suffian L.P.in **Superintendent of Lands & Surveys, Sarawak v. Aik Hoe &Co. Ltd.** [1966] 1 M.L.J. citing Lord Romer's Judgment in **Vyrichala Naraya v. The Revenue Divisional Officer,** [1939] A. C. 302 where Suffian L.P., said that market value means the price which :

> "a willing vendor might reasonably expect to obtain from a willing purchaser. The disinclination of the vendor to part with his land and the urgent necessity of the purchaser to buy must alike be disregarded. Neither must be considered acting under compulsion... [T]he land for instance may have for the vendor a sentimental value far in excess of its market value, but the compensation must not be increased by reason of such consideration. [1966] 1 M.L.J. 243, p. 245. The above was again applied by Syed Agil Barakhbah F.J. (as he then was) in **Ng Tiong Hong v. Collector of Land Revenue, Gombak,** [1984] 2 M.L.J. 35 when he stated that the elements of unwillingess or sentimental value on the part of the vendor to part with the land and the urgent necessity of the purchaser to buy are to be disregarded and cannot be made a basis of increasing the market value. Thus, market value is to be interpreted as :

..[T]he price which a willing buyer is prepared to pay a willing seller for the property in an open market."

> compensation paragraph 3 deals with matters which should not be considered in determining the amount of compensation... because of their nature being either trivial (damages not otherwise actionable) or sentimental (disinclination on religious or other grounds or matters not relevant to the value of the land to the owner (for example, degree of urgency of acquisition) and resultant increase in value of the land.

The same procedure is applied in Malaysia. Before the Government could compulsorily acquire private property of any Malaysian citizen the government has to issue notice as to the proposed acquisition, survey and value the land, and take other necessary steps relating thereto. The private property can only be acquired for the interest and welfare of the public.

From a closer look at the construction of Article 13 (1) of the Federal Constitution it will be observed that the protection thereby given is qualified but not absolute. Furthermore, it restricts or limits the power of the executive. Accordingly, the article appears to codify the English common law principles with regard to private property whereby the executive could not take any property without the approval or authority of the law.[51]

As a corollary to the above, Jeremias U. Montemayor[52] stated that the constitutional provision that private property shall not be taken for public use without just compensation[53] is more of a limitation rather than a grant of the State's power of eminent domain.

With regard to Article 13(2), of the Malaysian Federal Constitution, it authorises the government to acquire land compulsorily provided a piece of legislation has to be enacted for that purpose. Accordingly, Article 13 of the Malaysian Federal Constitution, is in pari materia with Article 31 of the Indian Constitution which states that "no property can be acquired compulsorily unless for public purposes.[54]

As to what constitutes "public purpose" this is highlighted by Hashim Yeop Sani J. in the case of **Kulasingam & Anor. v. Commissioner of Lands, Federal Territory & Ors.,**[55] when he stated that :

> "The expression "public purpose" is incapable of a precise definition... [B]ut in my view , it is still best to employ a simple common sense test, that is, to see whether the purpose serves the general interest of the community."

In **Yew Lean Finance Development (m) Sdn. Bhd. v. Director of Land and Mines, Penang,**[56] Arulanandom J. stated that the Government is the sole authority to decide what is, or what is not a public purpose, and that in particular circumstances it might be impractical to specify the exact purpose of any particular lot or area of land so required. If the land was required for a "public

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51 Nik Mohd.Zain bin Nik Yusof, "**Land Tenure and Land Reform in Peninsular Malaysia,** p. 160.

52 Jeremias U. Montemayor, , **Labor, Agrarian and Social Legislation,** Vol. I, 2nd ed., Quezon City, (1967), p.34.

53 Paragraph 2, Section 1 Article III of the Philippines Constitution.

54 M. Hidayatullah, **Right to Property and the Indian Constitution,** Calcutta University and Arnold-Heinemann. (1983) p. 144; see also Nik Mohd. Zain bin Nik Yusof, supra, p. 161.

55 [1982] 1 M.L.J. 204 p. 208.

56 [1977] 2 M.L.J. 45.

purpose," the owner had no choice but to surrender the land and it was immaterial for what purpose the land was subsequently used, as long as it was for public purpose.

He said further that the State Authority is under no obligation to confine the acquisition of land to purposes which came under one particular category only as described in section 3 of the Land Acquisition Act, 1960. The authority may use any particular category individually or as circumstances may determine.

The power of the State Authority under Section 3(b) of the Act is a discretionary power. Even, where the State Authority is of the opinion that the work to be done by the person or corporation is beneficial to the economic development, it would have to consider whether the person or corporation should more appropriately purchase the land from the proprietor by private negotiation. It would have to consider whether the undertaking could not be more conveniently located on land which is state person or corporation rather than compulsorily acquire alienated land for the purpose.[57]

In the Philippines, the term employed is "public use." The declaration that the taking of a certain property or class of property is for "public use" is primarily a matter of national policy within the proper function of the Congress. The Courts should not interfere with such declaration unless it is patently impossible or unreasonable. In the light of Section 4 of Article XIII of the Philippine

Constitution it might be thought that expropriation of landed estates for subdivision and distribution to individuals is, by congressional declaration, taking for "public use." However, in the case of **Guido v. Rural Progress Administration,** [58] the Supreme Court still had to decide the question of whether or not the application of a law for such expropriation in a particular case is for public use or not.

> "In a broad sense, expropriation of large estates, trusts in perpetuity, and land that embraces a whole town or large section of a town or city, bears direct relation to public welfare. The size of the land expropriated, the number of people benefited, the extent of social and economic reform secured by the condemnation, clothes the expropriation with **public interest** and **public use**.[59] The expropriation in such cases tends to abolish economic slavery, feudalistic practices, endless conflicts between landlords and tenants, and other evils inimical to community prosperity and contentment and public peace and order. Although courts are not in agreement as to the tests to be applied in determining whether the use is public or not, some go so far in the direction of a liberal construction as to hold that public use is synonymous with public benefit, public utility or public advantage, and to authorise the exercise of the power of eminent domain to promote such public benefit, and others, especially where the interests involved are of considerable magnitude."[60]

In the above case, the Court declared that under Section 4 of the Constitution, the government may only expropriate landed estates with extensive areas especially, those embracing the whole or a large

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Shiv Charan Singh, **"Problem which Arise in the Course of Implementing the Law Relating toLand Acquisition,"**Bahan Rujukan Untuk Peserta Kursus Pengambilan Tanah, Penolong Pentadbir Tanah Daerah, **INTAN**, Bukit Kiara, K.L., Unit Latihan, Bahagian Pengurusan dan Perundangan Tanah, Kementerian Tanah dan Pembangunan Koperasi, Kuala Lumpur, (26th November 1990), pp. 17-18.

84 Phil. 847: See also, Jeremias U. Montemayor, **Labor, Agrarian and Social Legislation,** supra, p. 35.

Emphasis mine.

See Jeremias U. Montemayor, supra, pp. 35-36;

part of a town or city, and that once the landed estate is broken up and divided into parcels of reasonable areas, either through voluntary sale by the owner or owners of said landed estate, or through expropriation or through inheritance by several heirs so that each heir would receive barely one hectare each, the resulting parcels are no longer subject to further expropriation"[61]

Though constitutionally mandated, the right to property and ownership thereof, however, is not absolute. Indeed, it is qualified and restricted by the legislations in both countries. The right which the person has is limited and qualified. In other words, the right to ownership of property, while it covers more than the things which the person owns, and which includes the right to acquire, use and dispose of them, is never unqualified. It is always subject to limitations and regulations and ratification by the State. Rights to property and all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious; and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.[62]

It is humbly submitted that whenever compulsory acquisition proceedings take place, the area must be properly identified, lay-out plans, land acquisition plans and land evaluation preliminary reports must be prepared and it is made known whether the area in question is to be developed by the government for economic purposes or to be developed by a private sector. There must also be a clause that protect and safeguard the interests of the landowners.' Recently, it was reported that a bill[63] was passed by the Dewan Rakyat relating to Land Acquisition which contains adequate provisions to protect the interests of the landowners'. The move is very timely since the amendments are meant to provide greater transparency in land acquisition procedures and a fairer deal for landowners. However, the proponents of the amendment should review their proposal to overcome the weaknesses that the opposition has identified to avoid any abuses from taking place. The adoption of the proposed amendments which involved 33 provisions of the Act may yet be the biggest contribution of the national legal order to landowners. At least they are assured that their rights and interests would not be adversely affected.

5.0. PROPRIETARY RIGHT TO LAND OWNERSHIP:

5.1. Under the Code:

When it comes to the right to ownership, the Philippines National Land Laws and the National Land Code seems to be in agreement. Under the National Land Code, 1965 the concept of land ownership is tied up and relates to the concept of the indefeasibility of title. This is derived from the Torrens system, a system of land registration which establishes and certifies under the authority of the State Government, the ownership of an indefeasible [64] title to land and simplifies, hastens and cheapens all dealings thereof. This is also so in the Philippines. Hence, those who failed to register their land-holdings were treated as squatters on their land.[65]

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61 **Province of Rizal vs. San Diego** L-10802, January 22, 1959. Also see **Gabriel vs. Reyes**, L-22305, April 30, 1966. **Municipality of Caloocan v. Manotoc Realty Inc**, 94 Phil. 1003.

62 Jeremias U. Montemayor, supra, p. 25.

The Land Acquisition Bill (Amendment) 1997. For detail see **New Straits Times**, Monday May 19, 1997, p. 17. N.b. the said amendment has already been approved and adopted.

64 Sections 92 & 340 of the National Land Code.

65 Recently, a special order and a law was promulgated recognising the rights of the cultural communities. Likewise, those who failed to perfect and register their titles are given the opportunity to do so.

Under the above system of land registration, once a title is registered it confers immunity to the registered proprietor to the exclusion of others. Registration is the key to title and thereby makes the registered owner the land proprietor and the legal owner of the said land.

It was the Federated Malay States Land Code that pioneered and introduced the registration of titles to all private land under the Torrens system. However, some of the provisions were amended when the National Land Code was adopted.

In the Philippines it was the Spanish Mortgage Law and later the Maura Law that make registration of titles to all private lands compulsory. The need for the registration of title was intensified via the Public Land Registration Act of 1902. With the introduction of the new land laws which gave to title holders the ownerships of the lands, private and individual ownership of lands bloomed all over the Philippines but particularly in Mindanao, Sulu, Basilan where land in general remained untitled.

In order to establish a system of registration by which title recorded become absolute, and indefeasible , Act No. 496 otherwise known as the Land Registration Act, was passed and took effect on February 1, 1903. Rights acquired under this system are guaranteed. This method as mentioned earlier is also known as the Torrens system of registration.[66] Under this system once a title is registered, the owner may rest secure , without the necessity of waiting in the portals of the court, or sitting on the "mirador su casa," to avoid the possibility of losing his land.[67]

In Malaysia, with the adoption of the National Land Code, 1965, the previous land laws were consolidated into one unified law and this eventually brought changes and improvements particularly relating to land ownership policy. Another conspicuous improvement brought about by the National Land Code was the new concept of proprietorship or land ownership through the registration of subsidiary title to the parcels in buildings which have two or more storeys.[68] The National Land Code also streamlined some forms of registration. The ownership of land held under the Mukim Register were grouped together with Registry Title to become substantively the same.[69]

6.0. Conclusion

It is irrefutable that the system of land tenure and administration in Peninsular Malaysia and the Philippines indeed breathe and clothed with the western system of land tenure and administration. In Peninsular Malaysia it is the by-product of the British land tenure system and the Philippines were that of the Spanish and the American land laws. Hence, the administrators in both countries find it

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66 Act No. 496 was amended by Presidential decree (P.D.) 1529 which was enacted on June 11, 1978. There are two laws ancillary to Act. No. 496 such as the Cadastral Law of February 11, 1913 (Act 2259) and the Public Land law of December 1, 1936 (Com. Act No. 141) which have been subsequently amended by later legislations.

67 **Ching vs. Court of Appeals,** [1990], 181 S.C.R.A. 9 p. 18 citing the case of **National Grains Authority vs. Intermediate Appellate Court,** [1988], 157 S.C.R.A. 388.

68 The Strata Title Act, 1985; See Also Nik Mohd. Zain bin Nik Yusof, supra, p. 163.

69 See David Wong, **Tenure and Land Dealings in the Malay States,** supra, p. 121.

difficult to divorce the local land laws from the system of land laws introduced by the previous masters'. The influence were so great that it has crept deeper into the substratum and finds it way in the fibre of the Malaysian National Land Code and the Philippines National Land Laws. It is of significant to note that the new laws has its advantage and disadvantage. As indicated earlier, the disadvantage outweighed the positive points brought about by the changes.