

The Red-Ink Grant: Tracing Legitimacy in History

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The Malay Reservation Enactment is nothing but small token of love from our grandfather handed down to us with a trust that we shall hand it down to our children and their children. Malay Reservation Land is a land under a Trust. We are the trustees of the Malay Reservation Land.

— Nik Abdul Rashid,¹

I. Introduction

The most unusual feature of the Federal Constitution, according to Harding, is the way it entrenches special rights and privileges reserved to a racially defined group of the Malaysian population, namely the Malays.² The special rights and privileges of the Malays constituted the central and most sensitive issue in the formation of Malaysia, and their adoption into the Constitution was justified by the fact that the Malays were, although numerically in the majority, a historically disadvantaged race.

This article aims at scrutinising the extent to which the Malays' claim on land is protected and preserved in Malaysian Law. The focal

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¹ Nik Abdul Rashid, "Malay Reservation Land: Concepts", Seminar on Malay Reservation Land: Development Perspective, *Bulletin INSPEN*, Jilid 8, Bil 4, 1993, 1.

² Harding, A, *Law, Government and the Constitution in Malaysia* (Kuala Lumpur: MLJ, 1996) at p 229.

point of the discussion is Wan Sulaiman FJ's statement in the *Collector of Land Revenue v Noor Cahaya*³ where he characterised the Malay Reservation Land as a "Cinderella piece of property". This article explores the issue of reservation policy from a legal and historical perspective and addresses the following questions: How did the Malay Reservation Land come about in Malaysia? Who introduced this policy? And what were the reasons for this policy?

II. Definition

The "red-ink grant", as the Malay Reservation is commonly known as, is a special category of land within the boundary of a state that has been declared and published in gazette as Malay Reservation by the state authorities. The said land can only be owned, dealt with or transferred to Malays who are the natives of the state, and to certain specified bodies statutorily recognised as Malays. This is to protect and preserve the Malay race by prohibiting all kinds of transactions involving Malay reservation land with non-Malays.

Article 89(6) of the Federal Constitution defines Malay Reservation as "land reserved for alienation to Malays or to the natives of the State in which it lies". It is important to note that not all land owned by Malays is automatically Malay reservation land. A Malay proprietor may, on his own discretion, apply to the state authorities to declare his land as Malay Reservation.

III. Federal Constitution and Positive Discrimination

According to Groves, Article 8(1) of the Federal Constitution has two components, namely equality before the law and equal protection of the law.⁴ In addition to that, Article 8 (1) asserts that no one is above

³ [1979] 1 MLJ 180.

⁴ Groves, HE, "Fundamental Liberties in the Constitution of the Federation

the law and that the law should be blind⁵ in treating all parties equally, irrespective of their race. Political theorists like Hobbes, Locke and Rousseau developed this principle of strict equality in the seventeenth century.⁶ America was one of the first countries to adopt this fundamental liberty or rule of law that “all men are created equal”.⁷

In *Public Prosecutor v Tengku Mahmood Iskandar & Anor*,⁸ the accused who was convicted of an offence relied on his position as a member of the “Johor royal family” and appealed to be evicted from the conviction. The Federal Court in rejecting the appeal went on to say that “there is only one kind of law in the country to which all citizens are amendable ... every citizen, irrespective of his official or social status, is under the same responsibility for every act done without legal justification”.⁹

Despite the above assurance that all men are equal before the law, there does exist an element of protection of the Malays in Malaysia, for they are entitled to preferential or privileged treatment. One justification, according to Kevin Tan, is to treat a disadvantaged party of society preferentially, so that they can be brought up to par with the advantaged parties and equality is meaningfully enjoyed.¹⁰ Equality is thus achieved by converting the said Article into a positive discrimination policy to justify the special needs to reserve land only for the Malays.

of Malaya” in M Suffian, Lee HP & Trindade FA (eds), *The Constitution of Malaysia: Its Development 1957-1977* (Kuala Lumpur: Oxford University Press, 1979) at p 32.

⁵ The term is used by Tan, Kevin YL and Thio, Li-Ann, *Constitutional Law in Malaysia and Singapore* (Singapore: Butterworth Asia, 1997) at p 737.

⁶ *Ibid.*

⁷ *Ibid.* See the American Declaration of Independence Proclamation (1776), followed by the French Declaration in 1789.

⁸ [1973] 1 MLJ 128.

⁹ *Ibid.*

¹⁰ Tan, *supra* n 5 at p 738.

Suffian LP in the case of *Datuk Haji Harun bin Haji Idris v Public Prosecutor*¹¹ confirmed that the equality provision under the Federal Constitution is not absolute but qualified. The said Article permits specific discrimination and the concept of equality has been qualified to suit the interest of one race, the Malays. This is evident in Articles 89, 90 and 153 of the Federal Constitution.

IV. The Federal Constitution and the Malay Land Rights

Article 89 of the Federal Constitution comprehensively underlines the constitutional foundation of Malay Reservation policy, whilst Article 90 lays the foundation for Malay holding. It was designed for the Malays as natives of the country not only in order to ensure that the Malays would continue to remain to earn their living as peasants but also to preserve land for the future generations of the Malays.¹² Articles 89 and 90 are the legacy of our historical past.¹³ As has been argued by Shaik Md Nor Alam, the institution of Malay Reservation has become a permanent feature of Malaysia's geo-politics.¹⁴ According to Salleh Buang, Malay Reservation law can be classified as the "entrenched laws protected by the Constitution".¹⁵ It has become an established law and thus is nearly impossible to be altered. However, in the view of Gordon P Means, the inclusion of Malay Reservation in the Constitution could potentially cause disharmony and inequality among the races.¹⁶

¹¹ [1977] 2 MLJ 155 at p 165.

¹² *Report of the Malay Reservation Committee 1930*, para 12.

¹³ Shaik Md Nour Alam B SM Hussein, "Malay Reservations: Meeting The Challenges of the Millennium", PETA Seminar on Repositioning of Agriculture in the Next Millennium, 13 July 1999, at p 1.

¹⁴ *Id* at p 2.

¹⁵ Salleh Buang, *Malaysian Torrens System* (Kuala Lumpur: Dewan Bahasa Dan Pustaka, 1989).

¹⁶ *Supra* n 2 at p 178.

The drafters of the Constitution have to some extent embodied this protection in the form of constitutional "permanent" provisions by making the protection a matter of national policy.¹⁷ Land law in Malaysia is a state subject¹⁸ and is governed by the National Land Code 1965. The National Land Code is pursuant to the provision of Article 76(4) of the Federal Constitution which establishes a uniform system of law and policy with respect to land tenure. Insofar as the Malay Reservation land is concerned, even though Malay reservation land is under the State list,¹⁹ the Federal Government is given unlimited jurisdiction to control and oversee the implementation of the Malay Reservation Enactment. The Reid Report stated that in order to facilitate schemes for national interest development and ensure the uniformity of the land system, it was advisable that the Federation had power to monitor or carry out these schemes.²⁰

Article 89(1) is only applicable to States which enacted the Malay Reservation Enactment and have determined the Malay Reservation land prior to the Independence. They are Selangor, Negeri Sembilan, Pahang, Perak, Johor, Kedah, Perlis, Trengganu and Kelantan. About 1,757 883 hectares of Malay Reservation land were already in existence by then. This naturally excluded the Federal Territory of Labuan, Sabah, Sarawak, Penang and Malacca.

Article 89(1) emphasises the sacredness of the Malay Reservation institution as it provides a very stringent procedure in altering the size of the pre-independence Malay Reservation land. Any act of excision, revocation, acquisition or alteration of the size of Malay Reservation land can only be made by the Legislature²¹ of the

¹⁷ Federation of Malaya, *Report of the Land Administration Commission, Appointed to Enquire into and Make Recommendations for the Improvement of Land Administration in the Federation of Malaya* (Kuala Lumpur: Government Printers, 1957) at p 43.

¹⁸ Federal Constitution, Schedule 9 List 11 Clause 2(b).

¹⁹ *Ibid.*

²⁰ *Federation of Malaya Constitutional Commission, 1956-1957 Report.*

²¹ Federal Constitution, see Article 160.

State. To do so the State has to enact a new Malay Reservation Enactment which has to be passed by the State Legislative Assembly²² and approved by each House of Parliament.²³ In the State Legislative Assembly it is to be passed by a majority vote of all members of the Assembly, whether present or not, and votes of not less than two-thirds of the members present giving their vote. Subsequently, the Enactment has to be approved by a resolution in both the House of Parliament, the Dewan Rakyat²⁴ and the Dewan Negara.²⁵ In the Dewan Rakyat, the Enactment has to be passed by a majority of the total registered number of members, irrespective of their actual presence or attendance, and by the votes of no less than two-thirds of the voting members. Then, the enactment must be approved and passed by the Dewan Negara following a similar procedure.

The rationale behind this tedious and stringent procedure is to ensure that there is no abuse of power by the State and to protect the interests of the Malay landowners. According to Nik Abdul Rashid, the reason for requiring a simple and a two-thirds majority of members in both the State Legislative Assembly and the Parliament is to prevent hasty and arbitrary amendments.²⁶ Any changes to the area of the Malay Reservation land by by-passing the proper procedures are deemed illegal and constitute a breach of trust. Land which has been declared Malay Reservation land after Independence falls solely within the jurisdiction of the State Authority.

²² *Id.*, Article 160, Schedule 8 Clause 4(1).

²³ *Id.*, Article 44.

²⁴ House of Representatives.

²⁵ House of Senate.

²⁶ Nik Abdul Rashid, *Land Law and Land Administration* (Kuala Lumpur: University of Malaya, 1971) at p 143.

Malay Reservation Land in the Malay Peninsula
1913-1957 (Hectares)

No	Year/ State	Area Size of the State (hectares)	1921 ²⁷	1931	1947 ²⁸	1955	%
1	Perlis	79,481.4			37,165	5,028	6
2	Kedah	942,379.92			808,162	127,804	13.5
3	Negeri Sembilan	664,144.9	187,079	208,421	237,259	39,472	5.94
4	Johor	1,898,156.8			49,985	80,585	4.24
5	Pahang	3,595,560.6	54,005	275,479	299,393	218,326	6
6	Trengganu	1,295,197.6				1,257	0.098
7	Kelantan	1,491,651.7			127,785	717,879	48.12
8	Perak	2,100,009.7	567,619	703,647	737,126	523,0312	24
9	Selangor	795,314.3	36,503	86,927	125,84	544,501	5.59

Archives Malaysia, SSF G 1195/30.

Conversion: 640 acres = 2.59 km²

1 hectare = 2.471 acres

In the case of *Mohamed Isa & Ors v Abdul Karim & Ors*,²⁹ Raja Azlan Shah J held that there was but one way a Malay Reservation land could cease to be a reservation land, namely if the Menteri Besar revoked its status under s 4(i)(b) of the Malay

²⁷ *Proceedings of the Federal Legislative Council Feb 1948-Feb 1949*, at pp B124-125.

²⁸ *Ibid.*

²⁹ [1970] 2 MLJ 165.

Reservation Enactment 1933. This could affect only Malay Reservation land that was declared a reservation after Independence. However, the Court erred in this case when it stated that the particular land had been declared and published in the gazette as Malay Reservation land on 8 September 1921 (prior to Independence). The law that is applicable in the revocation of Malay Reservation land that has been declared as Malay Reservation prior to Independence is Article 89(1) of the Federal Constitution, and not s 4(i)(b) of the Malay Reservation Enactment 1933. It is pointed out here that the whole procedure of revocation of Malay Reservation land under Article 89(1) differs substantially from the Malay Reservation Enactment.

Article 89(1)(A) of the Federal Constitution permits any person or any corporation, company or other body (whether corporate or unincorporated) to be deprived of the land on the reason that it has ceased to qualify as owning party under the Malay Reservation Enactment.

Article 89(2) states that any State land, which has not been developed or cultivated, may be declared Malay Reservation land. If any undeveloped or uncultivated State land has been declared as Malay Reservation, then:

- a. an equal area of land in that state which has not been developed or cultivated, shall be made available for general alienation; and
- b. at no time shall the total area of Malay Reservation land exceed the total area for general alienation.

General alienation here includes disposal of land by the State Authority through alienation to the general public, non-Malays and Malays under s 43 of the National Land Code 1965.

Article 89(3) envisages that if any Malay Reservation land is revoked, the State Authority shall replace it with another piece of state land. There are three conditions which need to be adhered to for replacement:

- a. it has to be similar in kind;
- b. an area not exceeding the area revoked; and
- c. the replacement should be exercised immediately.

V. Malay Reservation Enactment – A Special Law

The Malay Reservation Enactment is a special law. The legal maxim *generalia specialibus non-derogant* (a special law overrides a general law) is in conformity with s 4(2) of the National Land Code 1965 and applicable to all personal laws recognised by the National Land Code.³⁰ Being a specific law it overrides the general law. This statement has been confirmed by Wan Hamzah bin Salleh J in the case of *Asia Commercial Finance (M) Bhd v Pemungut Hasil Tanah & Anor.*³¹

History has produced two different forms of the Malay Reservation Enactment, namely a single uniform law known as the Federated Malay States Malay Reservations Enactment 1933, and the five State Enactments which are applicable to all states in Peninsular Malaysia except for Penang and Malacca. The relevant State Malay Reservation Enactments are:

- a. the Federated Malay Reservation Enactment 1933 (Cap 142), applicable to the States of Selangor, Perak, Negri Sembilan, Pahang and the Federal Territory of Kuala Lumpur;
- b. the Perlis Malay Reservation Enactment 1353;³²
- c. the Malay Reservation Enactment of Kedah 1931;³³
- d. the Johor Malay Reservation Enactment 1936;³⁴

³⁰ Salleh Buang, *Malaysians Torrens System* (Kuala Lumpur: Dewan Bahasa Dan Pustaka, 1989) at p 215.

³¹ [1983] 1 CLJ 86.

³² No 7 of 1353.

³³ No 6 of 1349.

³⁴ No 1 of 1936.

- e. the Malay Reservation Enactment of Trengganu 1941;³⁵
and
- f. the Kelantan Malay Reservation Enactment 1930.³⁶

The Malays are the sole beneficiaries of the Malay Reservation land. By protecting Malay land, the British wanted to ensure that Malay land rights were preserved and protected through their incorporation into the Malay Reservation Enactment. However the British legislators had also drafted and implemented the Enactment in their own interests which had created substantial differences in the provisions of the Enactment of the respective States. Their obscure definitions of "Malay" and "native", the method of alienation, revocation, declaration or types of land, had created considerable degree of uncertainty.

It is not in the power of the State to dispose of any Malay Reservation. Malay land cannot be sold, leased or disposed of in any manner to any person who does not officially belong to the Malay race. Only a Malay person or Malay company or corporation specified in the Schedule of the Enactment can hold or acquire Malay Reservation land. Likewise, a Malay owner of a Malay Reservation land cannot transfer, lease or charge his land to a non-Malay. The Malay Reservation Enactment prohibits any attachment in execution of any Malay Reservation land. No dealings in such land by way of power of attorney executed in favor of a person who is not a Malay can be executed. Moreover, a trust cannot be created on such land to persons who are non-Malays.

The Malay Reservation Enactment states the term "Malay" but the different use of the terms "Malay", "Malayan" and "Malaysian" in the respective State Malay Reservation Enactment in fact creates ambiguity and confusion. Gordon argues that the British had defined the term "Malay" differently in each case "according to the ethnic

³⁵ No 17 of 1960.

³⁶ No 18 of 1930.

composition and interest of the various states".³⁷ For example, some of the Kedah royalty were of Siamese origin, and Perlis royalty of Arab descent. Said mentions that when the British enacted the Malay Reservation Enactment they intended to include all the inhabitants of the Malay Peninsular and the Archipelago, including the Banjarees, Boyanese, Javanese, Bugis, Pattani, *etc.*³⁸

In the Kelantan case of *Hanisah v Tuan Mat*,³⁹ the Federal Court left the issue undecided whether the appellant was a Malay and a native of Kelantan within the Kelantan Malay Reservation Enactment and the Kelantan Land Enactment. Under s 13 of the Kelantan Malay Reservation Enactment, it is up to His Highness the Sultan in Council to decide whether an appellant is a Malay or not, and the decision shall not be questioned or revised by any court. For David Wong, this case indicates the sort of problems which arise when trying to determine exactly who is considered a Malay and who not.⁴⁰

VI. The Legislative History of Malay Reservation Enactment

The policy of Malay Reservation can be explained as one of preservation and paternalism. It serves to protect and preserve the Malay race as permanent settlers on agricultural land. The earliest statement can be traced back to 1910. On 28 July 1910, RJB Clayton, the District Officer of Ulu Langat, submitted a memorandum to the Resident entitled "The Absorption by Large Land Owners and Estates of Native (Malay) Holdings".⁴¹ He declared that only the Malays, and not the

³⁷ Gordon, Shirle, "Contradictions" *Intisari*, Vol 1, No 2, 1963, 36.

³⁸ Muhammad Said Abd Kadir Al-Haj, *Undang-Undang Tanah Rizab Melayu-Siapakah Melayu?* (Kuala Lumpur: Kementerian Tanah dan Pembangunan Koperasi, 2nd ed, 1992) at p 12.

³⁹ [1970] 1 MLJ 213.

⁴⁰ Wong, David SY, *Tenure and Land Dealings in the Malay States* (Singapore: Singapore University Press, 1975) at p 513.

⁴¹ "The Absorption by Large Land Owners and Estates of Native (Malay) Holding, 28 July 1910", SS BA Office 1910, File No 3170/10.

Chinese or the Tamils, should be protected because the Malays were the only race likely to form "a permanent agricultural population and labour force in the Federated Malay States".⁴² He divided Malay land into three categories: isolated holdings, the orchard (*kebun*) and the village (*kampong*).

According to Clayton, the sale of the first two categories were "unobjectionable ... [and] perfectly legitimate"⁴³ as they were non-permanent lands. However, according to him, the *kampong* land, which was considered a permanent settlement area of the Malays, had to be protected. The sale of these lands would be detrimental to the Malays as they would quickly degrade into a landless race and thus become hired labourers in their own country. Moreover, it would defeat the main objective of the British which was to create a permanent agricultural population.⁴⁴

The Malays would surely sell their land if they were offered sufficient amounts of money in return. To prevent a sell out of Malay land, Clayton advocated the devaluation of the land purchase price.⁴⁵ He made several suggestions, *inter alia* a clear notification of the Government's disapproval of selling *kampong* land. Alternatively, he suggested the imposition of a restriction, for example "no rubber" restriction on the land, which would then make these lands less attractive to potential purchasers.

Another reference to apparent altruism can be found in Earnest Birch Woodford, the son of JWW Birch, who initiated the idea of Malay reservation land in Perak.⁴⁶ He showed his deepest concern for the Malays who were losing their ancestral lands to the immigrants;

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ The man who repealed the Mohammedan clause from the Selangor Land Code 1891.

“... nine-tenths of Malay lands” according to him “had been sold to non-Malays. The Malays were not in the habit of making provisions for their children and grandchildren”.⁴⁷ He felt sorry for the Malays and proposed a policy preserving Malay land⁴⁸ and rallied for the immediate enforcement of the policy. He believed that the British were indebted to the Malays and proposed a policy preserving the Malay land: “To say that it is impossible to do that is to forget that these are Malay States under the Malay Sultans and that the people have only taken from us a document to evidence their title.”⁴⁹

According to Birch, British rule in the Malay States had become legitimate with the Pangkor Engagement 1874. Therefore, it was incumbent upon the British to safeguard the welfare of the Malay race. The Malay race had to be preserved and freed “from the clutches of those people who now remit to India the large sums of money, which they bleed, from the (Malay) people”.⁵⁰

This was not the first attempt to introduce law on reservation of land in the Malay States. In fact as early as 1891, WE Maxwell, while serving as a British Resident of Selangor, introduced the Selangor Land Code 1891. For the Malay peasants he created a category of “smallholding customary lands” to provide a security of land tenure to the Malay peasants. It had to be prevented that their (Malay) holdings were mortgaged and then in default of payment ejected and their places taken by the Chinese, Chettiers or others. The inhabitants of Selangor for whose benefit the British protection was primarily designed was feared to become a class of vagrants in their own country.⁵¹

⁴⁷ *Proceedings of the Federal Council of the Federated Malay States for the Year 1913*, at p B25.

⁴⁸ “Copy of a Minute by the British Resident, Perak Dated the 7 September 1910”, SS BA Office 1910, File No 3170/10.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.* He was referring to the Chetties.

⁵¹ “Minute by Attorney General JW Bonser, 28 April 1891 on Acting BR Selangor to Colonial Secretary”, SS BA Office (1875-1955), File No 294/1891, in Lim, Teck Ghee, *Peasants and Their Agricultural Economy in Colonial Malaya 1874-1897* (Kuala Lumpur: Oxford University Press, 1977) at p 18.

Section 23 of the Selangor Land Code was designed to prohibit the Muslim ("Mohammedan") landowners from mortgaging or transferring their rights over land to non-Muslims.⁵² In some respects this provision resembled the Malay Reservations Enactment which was put into force twenty-two years later. Both were aimed at the same group, the Malays. However, unlike the Malay Reservation which was restricted to the Malays the Selangor Land Code cast a wider net as it was made available to all Muslims.

The clause in the Selangor Land Code, however, was repealed merely after two years after its implementation because of the controversial provision it included.⁵³ The controversy was created not only by Sir John Anderson and Frank Swettenham but also by the Malays of Ulu Langat who pleaded to the British Land Officer for the removal of the "Mohammedan" clause on the ground that they were poor and unable to invest in land. Furthermore they could not mortgage or sell their land to non-Muslims.⁵⁴ Sir John Anderson, the then Governor of the Straits Settlements, with the assistance from EW

⁵² Wong, David SY, *Tenure and Land Dealings in the Malay States* (Singapore: Singapore University Press, 1975) at p 74; see also "Minute by Attorney General JW Bonser, 28 April 1891 on Acting BR Selangor to Colonial Secretary", SS BA Office (1875-1955), File No 294/1891, in Lim, Teck Ghee, *Peasants and their Agricultural Economy in Colonial Malaya 1874-1897* (Kuala Lumpur: Oxford University Press, 1977) at p 18. It was said that: "Everything should be done to prevent their mortgaging their holdings and then in default of payment being ejected and their places taken by Chinese, Chettiers and others. The result might be that the inhabitants of Selangor for whose benefit the British protection is primarily designed might become a class of vagrants in their own country."

⁵³ Gullick, JM, *Rulers and Residents: Influence and Power in the Malay States 1870-1920* (Singapore: Oxford University Press, 1992) at pp 197-198 & 221-222; "Application from other Non-Mohammedan Races such as Asiatic, Europeans for the Customary Lands which could only be Alienated to Mohammedans", SS BA Office, File No 247/97 (M477/86); "Application from one Mr Sithampara Pillay, A Hindu who Occupies about Two Acres of Customary Land", SS BA Office 1891, File No 3508/91 (M222/84).

⁵⁴ SS BA Office, File No 1892 (M 243/86).

Birch, the Acting Resident of Selangor, repealed the said clause and "Malay" was replaced by "any person." This was to accommodate other races or nationalities to acquire customary land. In consequence, "the customary title became marketable, and its value increased tremendously".⁵⁵

In 1910, a committee "to inquire into and report on the question of the alienation of hereditary rights in land by Malays and the desirability or otherwise of preventative or remedial action being taken" was set up to look into the Malay problems.⁵⁶ It started out by investigating into the bleak living conditions of the poor Malay peasants and stated:

While there is no desire to prohibit Malays from sharing in the benefit of the prosperity brought to the country by recent developments in agriculture, there is some fear that, by taking advantage of the present high value of the land to divest themselves of interests of ancient standing, the inhabitants of these States may be depriving themselves and their children of the future means of livelihood.⁵⁷

The committee acknowledged that rubber contributed vastly to the development of the country. Everyone was entitled to enjoy this prosperity but the Malays were reminded not to sell their ancestral land to the non-Malays. The land created as agricultural settlement by their Malay ancestors should remain as it was for the future

⁵⁵ Gullick, JM, *Rulers and Residents: Influence and Power in the Malay States 1870-1920* (Singapore: Oxford University Press, 1992) at p 197.

⁵⁶ "Report by the Committee to Enquire into and Report on the Question of the Alienation of Hereditary Rights in Land by Malays and the Desirability or otherwise of Preventative or Remedial Action Being Taken", SS BA Office 1910, File No 3170/10. The committee, which was established to look into the problems of the Malays, was created on 14 December 1910 and released the report in May 1911. The committee comprised of E Burnside (Chairman), RJB Clayton, Inche Abdul Razak and Haji Brahim. See also Ahmad Nazri Abdullah, *Melayu Dan Tanah: Tumpuan Khusus Kepada Tanah Simpanan Melayu* (Petaling Jaya: Media Intelek Sdn Bhd, 1984) at p 66.

⁵⁷ *Ibid.*

generation of the Malays, without being taken over and alienated by non-Malays. It was argued that such land would ensure the continuity of the Malay race.

The Committee argued that if the Malays were allowed to continue selling their land, they would become "dispossessed wanderers." To avoid such a disastrous development and to protect the Malay peasants and their heirs, steps had to be taken to discourage the divesting of the Malays' right over the land. The committee likewise recommended suitable areas to be set aside "for alienation to persons of the Malay race and religion only".⁵⁸ Restrictions or "special conditions"⁵⁹ should be endorsed on the land. RJB Clayton recommended that "no rubber" should be endorsed on the land and the number of fruit trees to be planted on the land should also be limited.⁶⁰ This would discourage non-Malays from buying the land and would have a direct effect on the value of the land itself.

To encourage other Malays to take up the reservation land, the committee suggested that quit-rent should be reduced.⁶¹ The Committee believed that the system would work as it had been successfully implemented in Kelantan. It strongly urged the

⁵⁸ Apart from Maxwell's used of Mohammedan clause. This was the first attempt made by the British to associate the race with religion. Unfortunately, no reasons were given for such a move.

⁵⁹ The term used by the Committee referring to the restrictions imposed on the land.

⁶⁰ "Letter from District Officer Ulu Langat, RJB Clayton to Resident Dated 17 April 1912", SS BA Office 1910, File No 3170/10. See also "Report of the Committee Appointed to Consider the Question of the Relief of Small-holders", SSF (1875-1955), File No 1634/31; See also "Note on Second Draft FMS Land Code, March 1925", SSF 2447/31, at p 5, where it was stated that as nine-tenths of the Peninsular Malays were a community of peasant proprietors, the ideal future of the community was to encourage everything that tended to make them better cultivators and to discourage them from disposing their lands and the best method was to put restriction on transfer of land.

⁶¹ "Letter from the Office of Secretary to the Resident, Selangor, 8 December 1911". The rent for 1st class land was reduced from \$1.20 to 80 cents and 2nd class to 60 cents.

enforcement of a “fresh legislation on the lines of s 23 of Selangor Land Code 1891” which would give an assurance to the Malay “that his neighbours will be his own nationality, and to protect him from the temptation of sacrificing his landed rights for the sake of a temporary superfluity of ready money”.

The issue of the sale out of Malay ancestral land reappeared at the Conference of Residents in November 1911.⁶² All four Residents, the Chief Secretary and the High Commissioner unanimously agreed to have one common enactment applicable to all four Malay States.⁶³ The Draft Enactment was first circulated in April 1912. A Malay draft copy was forwarded to the Sultan of Selangor for his perusal and approval.⁶⁴ The preamble read:

Thus a race of yeoman-peasantry aforetime happy and prosperous incapable from the very nature of their country and genus of supporting themselves in any other country find too late they have become homeless wanderers in their own land. The Rulers of the Federated Malay States and their Advisers conclusively feel that unless a better judgement is exercised on their behalf the result will be extinction of the Malay yeoman-peasant.⁶⁵

The above statement made it clear that the British perceived themselves as guardians of the Malays who should remain a permanent agricultural population. It was felt that the Malay was “prodigally and

⁶² HCOF, File No 1583/1911.

⁶³ *Id* at p 2.

⁶⁴ “Draft Enactment to Provide for Securing to Malays Their Interests in Land, 3 October 1912”, SS BA Office (1875-1955), File No 2822/1913. When the Bill was before the Federal Council, the Sultan of Perak suggested that the Enactment should apply to all land held by the Malays. Whereas in the opinion of Sultan Selangor, the Government should allow Malays, especially those with the industrious habit to take up land outside the Reservation.

⁶⁵ “Objects and Reasons”, DOF Kuantan 672/15 or SS BA Office, File No 3013/1912, at p 1; Gullick, JM, was of the view that it is a “flowery preamble”. See Gullick, JM, *supra* n 53 at p 224.

improvidently divesting himself of his birth-right and inheritance".⁶⁶ In addition, the British justified the implementation of the legislation by stating that similar provisions existed to protect the native people in Dutch East Indies, Maori in New Zealand and Muslims in Punjab, India.⁶⁷

Unfortunately, however, the Enactment was never enforced and in 1913 the Malay issue resurfaced. On 23 December 1913, the Malay Reservation Enactment was passed and came into force on 1 January 1914. No rubber trees could be planted on the Malay Reservation land although the Malays were eager to open vast areas for rubber plantation. Thus, the British deliberately denied the Malays their opportunity to share the prosperity of the country, which rubber had brought.

RG Watson, the Acting Chief Secretary of Federated Malay States, during the reading of the 1913 Bill said that the Malay Reservation Enactment "may be regarded as one of the rare cases in which the end justifie[d] the means".⁶⁸ He proceeded by saying that the 1913 Bill would deter the Malays from selling their land to the non-Malays. Therefore, the Malay ancestral land could be protected from encroachment by the non-Malays.

It seems that they were concerned that the proposed 1913 Bill might provoke some opposition as the legislation was of an extraordinary character. It protected the rights of only one particular race, officially and politically the leading race of the country but unfortunately economically backward people. As foreseen, there were objections from Chinese and European businessmen but both parties consented as the rulers of the Malay States had agreed to the Bill.⁶⁹

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ Federated Malays States, *Annual Report* (1913) at p 22.

⁶⁹ *Id* at p B23. Mr Eu Tong Seng and Mr Skinner strongly objected to the Bill. To them, the Bill might create a negative effect on the development of the Malay race.

The idea of protecting the interests of the Malays can be traced back to the Pangkor Engagement. Unfortunately, from the date of signing of the Pangkor Engagement, the duty of promoting and safeguarding British interests always prevailed over the preservation and development of the Malays. The creation of the Federated Malay State Federal Council also did not provide a proper forum for the Malays to address their grievances. With the British upholding the doctrine of economic *laissez-faire*, resulting in a massive flow of immigrants into the Malay states, and with a liberal land alienation policy, the idea of preserving, protecting and developing the Malay race was continuously sidelined.

Under the British policy, the demand for land for commercial cultivation, mining and settlement increased tremendously. Foreign immigrants began to acquire Malay land. The Malays had considered their land merely as a source of livelihood. But with the liberal British land policies, land became a valuable property, a marketable and transferable commodity. Malays began selling their lands to non-Malays and lacked interest in their own economic development.

After 17 years of implementing the Malay Reservation Enactment 1913, the British realised that the policy of preserving the Malay race had failed.⁷⁰ The legislative sanction had not succeeded in stopping the Malays from selling their land to non-Malays. More drastic measures had to be taken which led to the passing of the Malay Reservation Enactment 1933 to ensure that Malays would remain an agricultural population.

The Legal Adviser was adamant that the 1933 Bill would assure Malay proprietors that they should not be disturbed in their holdings. It was designed to make it "as unhealthy as possible" for Malay proprietors to deal or negotiate with their land titles. The 1933 Bill aimed at preventing the negotiability of land as an article of

⁷⁰ See "Malays Reservations" in KLO 668/1930 or SS BA Office (1875-1955).

commerce and at preventing proprietors of and in Malay reservations "from being encumbered with a burden of debt which they would find it difficult to get rid of".⁷¹

The Bill was welcomed by the respective rulers, Malay representatives and the Residents. It was contended that the British were the ones "who have the welfare of the Malays really at heart" and were the Malays' best friends.⁷²

VII. Historical Antecedents of the Malay Reservation Policy

On 20 January 1874, Raja Muda Abdullah of Perak provided the "key to the door" to the dollar arsenal of Great Britain in the form of the Pangkor Engagement signed between Raja Muda Abdullah and Sir Andrew Clarke.⁷³ It contained 14 clauses and was signed quickly without waiting for other representatives from Perak. It was assumed that Sir Andrew was extremely worried there might be objections from other representatives. Raja Muda Abdullah had agreed in advance in a letter dated 30 December 1873 accepting a British Resident in the State.

The British were fully aware that the Malays obeyed and respected their rulers. With that assurance, they included in the clause of the Pangkor Engagement that a British Resident would be appointed whose advice had to be sought and adhered to in all matters except those pertaining to Malay religion and customs. This gave them an assurance that they enjoyed unlimited access to the natural resources of the country, for the Malay rulers were willing to be used for British ends. JM Gullick in his excellent account on the relationship of Malay rulers and the Residential system, cites that there was no attempt made by the Residents to consult Malay rulers on the policy and

⁷¹ *Federal Court Proceedings 1933*, at p B132.

⁷² *Id* at p B135.

⁷³ Li, Dun Jen, *British Malaya, An Economic Analysis* (Insan: Kuala Lumpur, 1982) at p 41.

implementation of the new land tenure in the Malay States.⁷⁴ The Residents arrogated wide and undefined administrative powers to themselves.

The Residential system was most effective in mobilising the Malay rulers to open up the Malay States for the attainment of British economic interests. This was what Emerson characterised as Indirect Rule,⁷⁵ namely to lawfully rule and exploit the country "by using the Rulers to bolster their (British) own position".⁷⁶

Up until the end of the 20th century, the Malay States had developed progressively. However, there was a serious shortage of manpower to work the tin-mines and rubber estates. The British were not interested in inviting the Malays to work. According to the British, the Malays were complacent with their easy way of living and were not hard working people,⁷⁷ and so Chinese and Indian immigrants were invited.⁷⁸ The Malay States became an Asian "El Dorado" where immigrant coolies could rise from "rags to riches".⁷⁹

The flood of immigrants from China and India created a workforce for the Malay States which was badly needed for the development of the country.⁸⁰ These immigrants brought energy and ambition to the exploitation of natural resources.⁸¹

⁷⁴ Gullick, JM, *supra* n 55 at p 198.

⁷⁵ Emerson, R, *Malaysia: A Study in Direct and Indirect Rule* (London: Macmillan, 1937); reprinted Kuala Lumpur, University of Malaya Press, 1964.

⁷⁶ Turnbull, C Mary, *A Short History of Malaysia, Singapore and Brunei* (Singapore: Graham Bash, 1981) at p 13.

⁷⁷ Swettenham, Frank, *Malay Sketches* (Singapore: Graham Bash Pte Ltd, 1984) at pp 2-4.

⁷⁸ Wan Hashim, *A Malay Peasant Community in Upper Perak* (Bangi: University Kebangsaan Malaysia Press, 1978) at p 12.

⁷⁹ Abraham, CER, *Divide and Rule: The Roots of Race Relations in Malaysia* (Kuala Lumpur: Insan, 1997) at p 1.

⁸⁰ Sadka, Emily, *The Protected Malay States 1874-1895* (Kuala Lumpur: University of Malaya Press, 1970) at p 47.

⁸¹ Hickling, RII, *Essays in Malaysian Law* (Selangor Darul Ehsan: Pelanduk Publications, 1991) at p 49.

Since so many different ethnic cultures had come to live in one country, the British authorities adopted the Divide and Rule policy where there would be as little as possible interaction between the various cultures.⁸² The effect of this rule was that the Malays remained backward and were expected to remain peasants or tillers of the soil.⁸³ The Chinese inherited all trading and became the richest residents in the Malay States. The Indians were rubber tapers and were poor without social amenities. All three races co-existed side by side but lived apart from each other in their own well-defined worlds. The economic and social development was uneven with the progressive development of modern economy.⁸⁴

VIII. The Chinese Influence

In the later period of their rule in the Malay States, the British realised that they were competing with an aggressive economic power, the Chinese. The Chinese population was increasing tremendously and was settling permanently in the Malay urban and rural areas. The Chinese investors were keen not only to acquire tin mining areas but also rubber plantations and showed interest in the cultivation of rice. They were also learning and communicating in the Malay dialects and inter-marriages took place with the Malays. In some rural areas the Malay children spoke fluently Chinese rather than Malay.⁸⁵

It is pertinent to note that the Chinese possessed a different set of beliefs of life and their choice of emigration to Malaya had

⁸² *Supra* n 79 at p x.

⁸³ *Supra* n 78 at p 12.

⁸⁴ *Supra* n 52 at p 4.

⁸⁵ Coope, AE (translator), *The Voyage of Abdullah (Pelayaran Abdullah) – being an Account of his experience on a Voyage from Singapore to Kelantan in AD 1838* (Kuala Lumpur: Oxford University Press, 1967). Cited in Siaw, Laurence KL, *Chinese Society in Rural Malaysia - A Local History of the Chinese in Titi, Jelebu* (Kuala Lumpur: Oxford University Press, 1983) at p 4.

forced them to be aggressive, challenging and willing to take any risk in order to be successful.⁸⁶ The hardships, shortage of food and ongoing war back home forced them to be “hardened” and readied them to face any difficulties in the Malay States. Al-Attas observed four reasons which led to the commercial and economic success of the Malaya Chinese: Chinese religious practices were money dominated, obligation to honor ancestors which necessitated wealth, the association of public and private events with money, and many taboos and symbols were associated with wealth and good luck.⁸⁷

The Chinese attitudes towards life and their distinct capitalist and entrepreneurs class brought them into direct confrontation with British interests.⁸⁸ In the tin industry, the British failed and the Chinese succeeded. Sir Andrew Clarke conceded that the Chinese were “the only industrious population” and the backbone of all trade and commerce throughout the Malay Peninsula.⁸⁹ Swettenham recognised the major economic contribution made by the Chinese workers in the Malay States.⁹⁰ They became very powerful economically, socially and could pressurise, dominate and dictate the British authorities. The Resident-General of the Federated Malay States had to acknowledge how powerful the Chinese had become and posed a threat to British rule. He strongly urged that in order to govern the Chinese efficiently, British cadets should be sent to China to learn the various Chinese dialects.⁹¹ The British realised that Chinese economic power and demands for political power would soon constitute a serious threat not only to the Malay rulers but also to British interests. Above all, the British realised that they owed an explanation to the Malay rulers as

⁸⁶ Norhashimah Mohd Yassin, *Islamisation/Malaysianisation: A Study on the Role of Islamic Law in the Economic Development of Malaysia: 1969-1993* (Kuala Lumpur: AS Nordeen, 1996) at p 26.

⁸⁷ SN Alattas, *Islam Dalam Sejarah dan Kebudayaan Melayu* (Kuala Lumpur: University Kebangsaan Malaysia) at pp 31-32.

⁸⁸ *Supra* n 79 at p 217.

⁸⁹ *Supra* n 80 at p 50.

⁹⁰ Swettenhem, FA, *Footprints in Malaya* (London, 1942) at pp 71-72.

⁹¹ *Supra* n 80 at p 50.

they had not fulfilled their promise in protecting the Malays' interests, in particular their rights as "the sons of the soil".

The objective of the Malay Reservation policy was designed to prevent the Chinese from owning new land.⁹² If they were permitted to do so, they might form an even more serious threat to British political and economic predominance in future. The British also used the Malay Reservation Enactment to hold land not so much for the interest of the Malays but rather for the disposal of the British companies. By 1938, the British owned more than 43% of alienated land in the Malay States. The actual beneficiaries of the Malay Reservation policy owned only 27% (paddy land), and the Chinese and Indians merely 23%.⁹³

The British feared that the Malay States could fall into the hands of the Chinese. Hence, to counter the Chinese threat, the Malay Reservation policy was introduced. In sum, it was more for the political stability of the British, rather than the welfare of the Malay peasants that this Malay Reservation policy was implemented in the first place:

... any threat to the stability of the Malay political structure was either directly or indirectly a threat to the legitimacy of the colonial power itself. This point has been repeatedly argued. But the more direct threat, which was always economic and latterly political, was from the Chinese; and the events of the 1930 section were sufficient grounds for the colonial government to depart from its traditional economic *laissez-faire* policy towards the Chinese and to bring them under the direct control of the government.⁹⁴

⁹² *Supra* n 75.

⁹³ *Supra* n 79 at p 217.

⁹⁴ *Id* at p 211.

IX. Conclusion

The “love” the British expressed for their Malay subjects was in fact a political ruse to protect their own supremacy in the Malay States. The British wanted the Malays to remain economically undeveloped and in need of protection. When the Chinese immigrants began to dominate the economic sector, the British authorities felt threatened and quickly answered by retaining the Malays on their agricultural lands. In the mean time the Chinese were barred from acquiring more valuable land in the Malay States. In short, the Malay Reservation policy was introduced by the British authorities to safeguard their own political and economic interests.

Money Laundering: Civil Liability at Common Law and in Equity†

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We hear a lot about the global fight against money laundering, described as a modern international evil requiring concerted attention. Many countries, under pressure from the international community, have introduced criminal law enforcement measures to combat the problem, as well as imposing elaborate procedures on banks and similar institutions before they can receive money. This talk does not concern those aspects of money laundering, but rather the tools available under the civil law to enable the victim of the wrong to recover his money or compensation for his loss.

The key to money laundering is the receipt and disguise of the proceeds of a wrongful act, usually a crime. The English criminal statute dealing with these matters is appropriately named the Proceeds of Crime Act 2002. One is therefore not concerned with the initial wrong, be that theft or embezzlement, breach of trust or whatever, but rather with what happens to the money thereafter. Typically, it will pass through the hands of those, such as banks, who act ministerially, *ie* not beneficially. But there will also be a beneficiary to be found,

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