REAL ESTATE MARKET IN ISLAMIC HISTORY TO MODERN ERA: THE ORIGIN AND EVOLUTION OF HOUSING SPECULATION

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Abstract

Speculation is a contemporary financial term that was not used or discussed by classical Muslim scholars in the past. Speculation represents the significant risk of losing most or all of the capital in the pursuit of substantial profit. This study reviews the history and the development of real estate transactions that are profitable to the extent of creating speculative activity in the current financial world. This study reviews the history and development of real estate transactions that are profitable to the extent of creating speculative activity in the current financial world. This study traces the timeline of speculation in the real estate market from the era of Prophet Muhammad (PBUH) till today. To achieve the objective, this qualitative study collected the data needed through library research and interviews. Next, the data was analysed using the content analysis method. This descriptive research is timely in Malaysia given the soaring prices of housing and its growth into a significant area for investment.

Keywords*: *Commodities, History of Speculation, Property Market, Real Estate, Speculation

Introduction

The real estate market, like any other commodity market is heterogeneous; it is a multi-commodity, multi-competitor market. The real estate market is segmented by certain criteria, such as the types of product and geographic area.[1] Although the Malaysian real estate market is a liberalised market, it is still governed by various national legislations that control the construction industries.

As the Universal Declaration of Human Rights (UDHR) of 1948 recognises the right to adequate shelter is a right to an adequate standard of living.[2] Owning a house is part of the right to adequate shelter and a salient condition for sustaining human settlement in a rapidly urbanising world. Today, people have begun to acknowledge the importance of residential property as a basic necessity. As family income increases, purchasing a house is seen as fulfilling the basic need of a family. This has forced many households to allocate a proportion of their savings or funds to own a house. However, the residential property market in Malaysia has experienced significant price expansion over the past years. There is concern that households are becoming unaffordable due to increasing house prices and cost of living.[3] Studies reveal that speculation is among the factors contributing to continued real estate price escalation.[4]

Speculation consists of buying and selling commodities, or securities, or other properties, in the hope of profiting from the anticipated change in value. It usually involves a short holding period. The expected capital gain should be over and above the transaction and holding cost plus income tax on gain. In the narrowest sense, it is the attempt to make money out of fluctuations in the value of goods as distinct from its earnings. In a wider

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[1] Abdul Hamid Mar Imran (2012), *Basic Aspects of Property Market Research*. Johor: Penerbit UTM Press. p. 91.

[2] Siraj Sait and Hilary Lim (2006), *Land, Law and Islam: Property and Human Rights in the Muslim World*. London: Zed Books, p. 59.

[3] Zafirah al Sadar Syed, Wan Nor Azriyati Wan Abd Aziz and Noor Rosly Hanif (2016), Housing Affordability Problems among Young Households. *Journal of Surveying, Construction and Property*, 7 (1), pp. 1-18.

[4] Wong, So-Ling, Sophia (1998), *Analysis of The Relationship Among Speculation, Shortage of Land And Housing Supply*. (Unpublished master dissertation). Centre of Urban Planning and Environmental Management, University of Hong Kong, p. 2; Abrams, Charles (1964). *Housing in the Modern World*. London: Faber and Faber Limited, p. 7; Nathanson, Charles G. and Zwick, Eric (2017), *Arrested Development: Theory and Evidence of Supply Side Speculation in the Housing Market*. National Bureau of Economic Research Working Paper No 23030, p. 1.

sense, it involves large risks for the chances of large gains. It depends on uncertainties and involves the risk of present possession for the sale of future gain.[5] The study shows that the purchase of houses as capital gain (speculation) has caused sharp increases in housing prices which cannot be explained fundamental in economics.[6] According to Shiller and Case, a housing bubble occurs when a house is defined as a commodity to trade and not as a house to occupy.[7] This study explores the history of how perceptions of housing have evolved.

To do so, we refer to history when legal enforcement was doubtful even in countries where property is now well respected, and understand, step by step, how basic respect for property emerged. To root ourselves firmly in facts, we will examine how real estate moved in little over a hundred years from a basic shelter to commodity traded by speculators for gaining profit.

Discussion

The right to land and housing is part of a broader set of property rights that include real property interests and personal property. The latter is distinguished as tangible and intangible property. Property rights include not only the right to use the property but also benefit from the property, such as usufruct or rent. Lawyers, philosophers, sociologists, anthropologist and economists have differing perspectives on the nature and scope of property rights, but they are conventionally understood to be a bundle of rights that includes the acquisition, ownership, control, use, management, transfer and sale of property.

According to Islamic literatures, man is allowed to use resources such as land but can never own it. Abdul Rauf quotes extensively from the Quran and Sunnah to conclude that there is a concept of dual ownership (human-God) under Islamic principles.[8] The existence of the right to own (*raqaba* or full ownership), enjoy or alienate property is not contested, but these rights are conditional on their legitimacy as derived from Islamic principles.

In capitalist theory, private property right is largely unfettered, while property rights in Islam are circumscribed. Rights in property or real estate depend upon Islamic principles emphasising that property is a sacred trust for human beings and should be put to continuous productive use. However, excessive exploitation and hoarding of property which is called speculation are prohibited. Islamic property right is conditional on the requirement that property not be used wastefully or exploitatively, or in a way that will deprive others of their justly acquired property.[9] As Guner notes, 'Islam is against those who accumulate property for the purpose of greed or oppression as well as those who gain through unlawful business practice'.[10] These Islamic principles clarify that real estate cannot be used as a commodity by speculators who only seek to profit

Islam's insistence that ownership of everything belongs to God alone[11] signifies that ownership is subject to equitable and redistributive principles. The divine ownership is coupled with repeated Quranic references to the effect that all of humanity benefits from nature's resources. However, the interactions among Islamic, customary approaches and Western influences on real estate add new dimensions to the concept of ownership of real estate. Real estate which was once considered a basic necessity for people has turned into a commodity used by the rich in order to grow wealth. Thus, this study was initiated to trace the history of how real estate was commercialised as a profitable commodity. To achieve this objective, the development of laws and practices concerning real estate will be explored through several periods of influence - Prophet's lifetime to the Ottoman Empire, and pre-colonial, colonial and post-colonial/modern Malaysia.

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[5] Emery, Henry Crosby (1969), *Speculation on the Stock and Produce Exchange of the United States*, USA: Greewood Press, p. 96; Wong (1998), *op.cit*. p. 8; Grebler, Leo and Mittlebach, Frank G. (1979). *The Inflation of House Prices*: *Its extents, Causes and Consequences*, Canada: D.C Health and California, p. 79; Ghosh, S., Gilbert, C., L., Halletts, A.J. Hughes (1987). *Stabilizing Speculative Commodity Markets*, Oxford: Clarendon Press, p. 101.

[6] Zaemah Zainuddin (2010), An Emperical Analysis of Malaysian Housing Market: Switching and Non-switching Models. (Unpublished Doctoral dissertation). Linconl University, New Zealand, p. 64.

[7] Case, Karl E., and Shiller, Robert J. (2003), *Is there a Bubble in the Housing Market*. Paper presented at the Brooking Panel on Economic Activity (Brookings Institution), pp. 299-342.

[8] Abdul Rauf, M. (1984), *A Muslim's Reflection on Democratic Capitalism*. Washington: American Enterprise Institute for Public Policy Research, p. 19.

[9] Al-Baqarah (2): 188; Rodinson, Maxime (1973), *Islam and Capitalism*. Translated from the French by Brian Pearce. United States: Pantheon Books, p. 56; Mannan, M. A. (1970), *Islamic Economics: Theory and Practices*. Lahore: Islamic Publication, p. 112.

[10] Guner, O. (2005), Poverty in Traditional Islamic Thought: Is it Virtue or Captivity?. *Studies in Islam and the Middle East*, vol. 2, p. 1.

[11] Al-Baqarah (2): 108; Ali Imran (3): 190.

Prophet's Lifetime until the Ottoman Empire

During the prophetic period, issues related to property did not arise except for property that constituted spoils of war which included the Jews' land around Madinah. This is because the agricultural land in the peninsula of Madinah is small.[12] According to history, the first conquest of the Prophet and his army was Bani Nadhir (4H/623M). On 6H/625M, the Prophet (PBUH) confiscated the lands of Bani Nadhir in Madinah. This was the first expansion of the territorial land of Muslims by the Muslim army.[13]

The confiscation of Bani Nadhir's land was an important event for the Prophet (PBUH) in the management of property. In this case, the Prophet (PBUH) did not divide the land except for the lands in Khaibar in which he divided into five parts; four parts for the Muslims and a part for himself.[14] However, the Prophet (PBUH) asked some of the Jews to work the land by charging *muqasah*[15] taxes which amounted to half of the gain from its production.[16]

This practice was observed during the life of the Prophet (PBUH), the era of Abu Bakar al-Siddiq (11H/632-13H/634M) and the governance of Umar al-Khattab (13H/634M-23H/644M). Umar reformed property rules due to the expansion of Islamic territory during his reign. He introduced several policies regarding property particularly in allocating and possessing land.[17]

There were several types of land during Umar's period. The land of *al-Sawad*,[18] for example, remained in the possession of its Iraqi owner despite being conquered by Muslims. Umar did not allocate it to the Muslim army but asked the owner to pay *jizyah* and *kharaj* tax. Consequently, as stated by Raana, this policy ended the oppression of the landlord in renting land as occurred in the feudal system.[19]

Furthermore, Umar instructed land of *iqta'*[20] and *mawat*[21] to be established and developed for the benefit of the community. For instance, the land of *mawat* which was under the possession of an individual needed to be developed by its owner within three years. If he failed to do so, the ownership of the land would move to the next person who had established it.[22] This policy accords with the Prophetic teaching, "He who brings dead land back to life shall himself possess it and he who by force wants to make use of it has no right or title to it at all".[23] Based to this hadith, Umar viewed that land occupied by Muslims needs to be developed and worked on for the benefit of the Muslims. Hence, the administration of property during the period of Umar shows that it was fair and free from speculation.

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[12] Al-Jawwad, Muhammad Abdul (1971), *Milkiyyah al-Aradi fi al-Islam: Tahdid al-Milkiyyah wa al-Tamim*, Kaherah: al-Taba'ah al-'Alamiyyah, p. 36.

[13] Al-Baladhuri, Abu al-Hasan (1978), *Futuh al-Buldan*, Beirut: Dar al-Kutub al-Alamiyyah, p. 31.

[14] Abu Ubaid (1968), *Al-Amwal*, Mesir: Maktabah al-Kulliyyah al-Azhariyyah, p. 55-56; al-Mawardi (1989). *Kitab al-Ahkam al-Sultaniyyah*, Kuwait: Maktabah Dar Ibn Qutaybah, p. 127.

[15] *Al-musaqah* contract is derived from *saqa*, which means to water or irrigate the land. Technically, this principle can be defined as a contract between the landowner of some trees and the farmer, who treats, services, irrigates and cares for the shade trees, and stipulates that the crop produced is to be shared between them. Abu Bakr b. Mas`ud al-Kasani (1910). *Bada'i` al-Sana'i` fi Tartib al-Shara'i`*, Mesir: Matha'al Jamaliah, vol. 6, p. 185; Muhammad b. al-Khatib al-Sharbini (1958). *Mughni al-Muhtaj ila Ma`rifah Ma`ani Alfaz al-Minhaj*, Mesir: Mustafa al-Babi al-Halabi, vol. 11, p. 322.

[16] Abu Ubaid (1968), *op.cit*. p. 107.

[17] Md Yazid Ahmad (2016), Polisi Umum Pentadbiran Tanah Era Khalifah 'Umar bin al-Khattab, in Md. Yazid Ahmad, Anwar Fakhri Omar and Mohammad Zaini Yahya, *Isu Syariah dan Undang-undang Siri 22*, Kuala Lumpur: Universiti Kebangsaan Malaysia, p. 92.

[18] *Sawad* was the name used in early Islamic times (7th–12th centuries) for southern Iraq. It means "black land" and refers to the stark contrast between the alluvial plain of Mesopotamia and the Arabian desert. Abu Yusuf Yaakub b. Ibrahim (1932), *Kitab al-Kharaj*. Kaherah: al-Matba'ah al-Salafiyah wa Maktabatuha, p. 2-3; al-Mawardi (1989), *op.cit*. p. 172; Campopiano, Michele (2011), Land Tax *al-Misaha* and *Muqasama*: Legal Theory and Balance of Social Forces in Early Medieval Iraq (Sixth to Eighth Centuries). *Journal of the Economic and Social History of the Orient* 54 (2), pp. 239-269.

[19] Raana, Irfan Mahmud (1977), *Economic System Under Umar the Great: a Treatise on Muslim Economy in Early Seventh Century*, Lahore: Sh. Muhammad Ashraf, p. 16.

[20] *Iqta'* were originally lands grants by the ruler (who in Islamic law owned all land not developed and owned by others) to those in his view is entitled to receive such gifts. Muhammad Ibn Ismail al-Khalani (1950). *Subul al-Salam*, Kaherah: Mustafa al-Babi al-Halabi, vol. 3, p. 86.

[21] *Mawat* is such land from which no benefit is derived, because the land no longer receives water; or it is submerged in water; or for any other similar reason which prevents cultivation. It is permissible to cultivate ancient land which has no master; or it had an owner during the Islamic period but its specific owner cannot be identified. The land must be so far from the city that if one stood by the building right at the end of the city and shouted, one would not be heard in that land. Zaydan, `Abd Karim (1969), *Al-Madkhal li al-Dirasah al-Shari`ah al-Islamiyyah*. Baghdad: Matba`ah al-`Aani, p. 259.

[22] Md Yazid Ahmad (2016), *op.cit*., p. 91.

[23] Al-Bukhari, Abu `Abd Allah b. Muhammad b. Isma`il (2000), Kitab Cultivation and Agricultural, no. hadith 2335 "Sahih al-Bukhari." In *Mawsu`at al-Hadith al-Sharif: al-Kutub al-Sittah*, ed. Salih b. `Abd al-`Aziz Al al-Shaykh. Riyad: Dar al-Salam, p. 183.

The main objective of ownership of property, especially land is to render it advantageous to the ummah and not to be assembled and collected as a benchmark for someone's wealth.[24] This orientation is evident in the story of Bilal bin Harith who received a part of land as a gift when the Prophet (PBUH). However, during the governance of Umar, some parts of the land were taken back by the government because Bilal was incapable of developing it.[25]

Thus, land ownership in Islam is linked to land use. Behdad points out when the private property rights are well established, an individual who uses the land will have a priority to access a patch of land over another who has failed to work it.[26] Unworked land cannot be owned, and according to theorists, it cannot be rented. Whether any land can be rented at all was a matter of Islamic debate, although leasing is now widely accepted.[27] This debate arose out of the hadith: 'He who has land should cultivate it. If he will not or cannot, he should give it free to a Muslim brother and not rent it to him'. Furthermore, there are several hadith prohibiting the practice of renting land.[28]

The question of whether land can be leased against a specified rent and recompense, or against a certain part of the produce of land, or against a fixed sum of money are some of the fundamental questions which have occupied an important position in the hadith and fiqh literature since very early times. Jurists of all schools of legal thought have addressed the problem of land tenure which was closely related to and formed a significant part of the social institutions of Islam in its formative period. Ibn Hazm, the Andalusian jurist, interpreted the prohibition hadith in a literal sense and pronounced his conclusion that lease of land (*kira' al-ard*) against anything at all was absolutely null and void. Therefore, he did not allow any lease of land that uses money, in kind or anything else.[29] The second viewpoint to which the majority of the fuqaha subscribed maintains that lease of land against a certain part of its production, against money, or in kind, is legal and permissible. This standpoint, again, contains various nuances of interpretation according to the relations they bear to the central analogy of the contract of Khaybar which unifies this version and also to the theory of primitive tenures.[30]

Even though lease is a kind of financial transaction, in this research, the sales transaction is the main focus because speculation in the real estate market is based on sales. Al-Tirmidhi strictly criticised the practice of real estate investment: "The blessings have been removed from the real estate prices, as it is contrary to the rules of Allah Taala, because Allah made the land a place of residence and not for trading. And he made the hills as pegs. And He has made commodity prices on gold and silver. So if you trade things that are created for merchandise, you will be blessed with it and if you trade the thing created as a home, it will be deprived of blessing".[31]

The Ottoman practice, which was rooted, in part, in traditional Islamic principles, and shaped by custom and socio-political contexts, is best known for efforts to codify the law.[32] The 1877 Majalla or Ottoman Civil Code, dealing with commercial transactions, substantively codified Shariah law, principally from the perspective of the Hanafi school of Muslim jurisprudence, but following Napoleonic form. In 1858 the Ottoman government consolidated various existing laws into a Land Code.[33]

The concept of real estate which was stated in the Majalla is the same as the concept of West Europe's law.[34] For example, article 1192 provides that every single person can manage or use owned property in absolute

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[24] Salleh Buang (1992), "Undang-undang Harta Tanah di Malaysia: Prospek dan Kemungkinan untuk Islamisasi," This paper has been presented at Seminar Undang-undang Harta Tanah: Pendekatan Islam, organised by Institut Penilaian Negara (INSPEN) Ministry of Finance Malaysia.

[25] Afzalur Rahman (1980), *Economic Doctrines in Islam*, Lahore: Islamic Publications, vol. 2, p. 16.

[26] Behdad, Sohrab (1989), Property Rights in Contemporary Islamic Economic Thought: A Critical Survey. *Review of Social Economy* 47(2), 185-211.

[27] Johansen, Baber (1988), *The Islamic Law on Land Tax and Rent: The Peasents' Loss of Property Rights as Interpreted in the Hanafite Legal Literature of the Mamluk and Ottoman Periods*, London and New York: Croom Helm and Methuen, p. 37.

[28] Al-Bukhari (2000), Kitab Cultivation and Agricultural, no hadith 2340- 2345, *op.cit*., p. 183.

[29] Abu Muhammad `Ali b. Ahmad b. Sa`id Ibn Hazm (1934), *al-Muhalla*, Mesr: Idarah al-Taba`ah al-Munirah, p. 190.

[30] Ziaul Haque. (2009), *Landlord and Peasant in Early Islam*, Delhi: Idarah Adabiyat Delli, p. 51.

[31] Abu 'Abd Allah al-Hakim al-Tirmidhi. (1992), *Nawadir Al-Usul Fi Ahadith Al-Rasul*, ed. 'Abd al-Rahman 'Umayrah, Beirut: Dar al-Jil, p. 39.

[32] Liebesny, Herbert J. (1975), *The Law of the Near and Middle East: Reading Case and Materials*, Albany: State University of New York Press, p. 66.

[33] Maria Owen, Roger (2000), *State, Power and Politics in the Making of the Modern Middle East*. London: Routledge, p. 8; Jorgens, D. (2000), A Comparative Examination of the Provisions of the Ottoman Land Code and Khedive Said's Law of 1858. In R. Owen (ed*.) New Perspectives on Property and Land in the Middle East*. Cambridge, MA: Harvard University Press, p. 93.

[34] Liebesny (1975), *op.cit*., p. 65.

terms however he likes, but when the property is related to other people, then the owner cannot manage or use it however he likes.[35] Absolute ownership of property can be expanded from airspace and underground without any limits.

The Ottoman's land history offers an expansive case study of the application of Islamic land principles in a specific context, lessons from which can also contribute to a modern debate. The relationship governing landholders and the state, or between peasant and landlords or the state, or to do with the cultivation of *mawat* land, were all inspired by Islamic principles. These continue to inform contemporary land classification in many successor states, despite colonial and postcolonial modifications. Even today, the Ottoman land records are being used in property transactions in several countries. The Ottoman's land administration experiences, derived theoretically in part from Islamic principles but equally conditioned by other socio-political considerations, establish several facts. First, ownership freely existed for the landed classes, while for the peasants there were limited but definite opportunities to access land - for example, through the reclamation of *mawat* land. Second, there was a concentration of state land, although there were interests and rights created for intermediaries and peasants. Third, the cadastre (register of lands) and tax collection indicate that Islamic principles do not inhibit effective land administration systems. Fourth, land settlement patterns were determined by the availability of water and the nature of the irrigation system. Fifth, the role of the state regarding land was not static but diverse and evolving.[36]

There are widely thought to be three broad types of land and property in Islamic theory, which continue as categories in modern Muslim societies. There are first, *mulk* or private ownership, second, state-owned property and third, *waqf* property.[37] The first type is the focus in this study. Private ownership may be obtained through either transaction, such as *bay'* (sale), or *hibah* (gift), including the revival of *mawat* land and inheritance.[38] History explains that most ancient people use the right to reclaim the *mawat* land to get full ownership. The dead land (*mawat*) concept is important in the material sense, but also in the way people 'think through' their relationship with land. Bukhari points out that large-scale modern 'squatting' in al-Madinah in Saudi Arabia in the 1970s was 'viewed by the squatters as a continuation of their traditional and legal rights'. He recounts that squatters occupied 'virtually dead' land, building a fence, putting up the shelter and then took their case to the religious court for the legalisation of their possession. Provided the court deemed the land to be useless and unclaimed, after investigation, it was registered in the name of the occupier. Later the occupants invested in the property and erected permanent homes.[39]

Islam recognises contractual rights, and the Quran commands followers to fulfil their contractual promises[40] and obligations when dealing with each other.[41] It is stated: "Keep your promise, you are accountable for all that you promise".[42] This command is relevant to the modern debate about the extent to which the state may intervene in contracts, for instance, to control property transactions.

Pre-colonial Era in Malaya (Malaysia)

Before the colonial period, Malaysia did not exist as one entity. The country which we see today is a combination of 11 states in Peninsular Malaysia, Wilayah Persekutuan, Sabah and Sarawak. Before the arrival of the Westerners, all laws pertaining to real estate especially land was done according to the Malay custom which was known as *Adat Temenggung* and *Adat Pepatih*.[43] Five elements can be identified in *Adat Temenggung* as reflecting the Islamic influence. Firstly, its law of inheritance which is termed *fara'id* in Islam.[44] Secondly, there is an Islamic legal provision in the law governing land tenure in the Malacca Digest

[35] *Majallah al-Ahkam al-`Adliyyah: The Mejelle* (2007), trans. C. R. Tyser, D. G. Demetriades dan Ismail Haqqi Effendi. Kuala Lumpur: The Other Press Sdn. Bhd, p. 192.
[36] Siraj and Hilary. (2006), *op.cit*., p. 21.
[37] *Ibid*., p. 60.
[38] Hamza, Manaf (2002), Land registration in Bahrain: its Past, Present and Future within and Integrated GIS Invironment. (Unpublished PhD Thesis). University of East London, p. 103; Zaydan (1969), *op.cit*., p. 247; Muhammad Uthman Syibir. (2004). *Al-Madkhal ila Fiqh al-Mu'amalat al-Maliyyah*, Urdun: Dar al-Nafais, pp. 128-143.
[39] Bukhari, Saleem M. (1982), Squatting and the Use of Islamic Law. *Habitat International* 6 (5), pp. 555-563.
[40] Al-Nisa' (4): 33; al-Nahl (16): 91.
[41] Al-Maidah (5): 1.
[42] Al-Isra' (17): 34.
[43] Fuadah Johari et. al. (2014), The Malaysian Land Taxation System: A Chronological Review of The Torrens System from the Islamic Perspective. *Wulfena Journal* 21 (1), pp. 118-133.
[44] Judith Sihombing. (1977), The Bare Trust Syndrome in The Peninsular Malaysian Torrens System. *Journal of Malaysian and Comparative Law* 4, p. 269; Mohd. Din Ali (1965), Islam dan Adat: Two Forces in Malay Society. *Intisari* 2 (2).

1523, Pahang Digest 1650, Kedah Digest 1650, Johor Digest 1789 and the Perak Code. Thirdly, on the clearing of land in *Adat Temenggong*, it says that one may clear land if he/she is a Muslim and the said land is not already owned by someone else, and this was stated in the 99 Laws of Perak (1765). Fourthly, the concept of ownership in Islam (*ihya* opening up of land and developing it). The Customary Law states that a piece of idle land may remain in one's ownership for up to three years only; after which a Ruler or Head has the right to award the land to someone else. Fifthly, Bumiputeras (indigenous people) may lay claim on any piece of idle land on condition that 1/10 proceeds be given to the state. This is documented in the Laws of Melaka (Risalat Hukum Kanun 1523), Pahang Digest 1596, Kedah Digest 1605, Johor Digest and the 99 Laws of Perak.[45]

Adat Pepatih, on the other hand, is not influenced by Islamic Law like in the matters regarding inheritance and division of property where it dictates that land is passed on from mother to daughter. However, with the introduction of Islam, in the 14th century, a woman who inherits land is considered a trustee and the collective inheritance concept does not make her the absolute owner but a trustee or guardian who may put the land to use for her benefit; much like the idea of humans as vicegerents in this world.[46]

On the whole, it would be appropriate to conclude that ownership of land during this phase was not commercially oriented.

Colonial Era in Malaysia

A historical study of the development of the law of real estate in Malaysia is best done by looking at the legal history of the country in the context of three separate entities which existed before Malaysia attained independence. These three entities were:

a) The Straits Settlements, comprised of Penang, Malacca and Singapore
b) The Federated Malay States of Perak, Selangor, Negeri Sembilan and Pahang
c) The Unfederated Malay States of Kedah, Perlis Kelantan, Terengganu and Johor.

The land law prevailing for the Straits Settlements was the Malay customary tenure, with the system of Dutch grants implemented in the urban areas. Among the principal characteristic of the Malay customary tenure regarding real estate were:

a) The nature of ownership of the land under Malay customary tenure was not one of absolute ownership as presently provided for under the National Land Code, but was a lesser extent known as 'proprietary rights' where the right of ownership extends not to the soil as such but to the usufruct or the right to utilise the soil.
b) If the owner wishes to sell his land, the price which he could expect from the purchaser would reflect the sum of his labour and out-of-pocket expenses incurred in cultivating and developing the land.
c) If the owner wishes to borrow money on the security of his land, Malay custom recognises the transaction known as '*jual janji*' which is basically a sale transaction with a collateral agreement by the buyer to sell back the land to the borrower upon the latter paying back an identical price before a stipulated date. If the buyer fails to do so, the sale agreement become absolute, in which event the transaction becomes known as '*jual putus*'.[47]

In Malacca, Malay customary tenure was abolished towards the end of the 19th century, some three decades after the passing of the Third Charter of Justice. This was brought about when in 1861 a law was passed by the English administrators that henceforth all land shall be deemed to be vested in the crown following the English law of property. As in Penang, the English deeds system was also ultimately introduced in Malacca. This means that when Malacca was administrated by the British, three systems of land tenure were prevailing in the state, namely the Malay customary tenure, the system of the Dutch grants and the English deeds system.[48]

[45] Mohd. Ridzuan Awang (1987), *Konsep Undang-Undang Tanah Islam*, Shah Alam: al-Rahmaniyah, p. 102-108
[46] Ibid.
[47] Maxwell, W. E. (1884), Land and Customs of the Malays with Reference to the Tenure of Land. *Journal of the Straits Branch of the Royal Asiatic Society*, pp. 120-124.
[48] Salleh Buang (1989), *Malaysian Torrens System*. Kuala Lumpur: Percetakan Dewan Bahasa dan Pustaka, p. 6; Mohamed Azam Mohamed Adil and Mohd Afandi Mat Rani (2014), The Implementation of Land Acquisition Act 1960 and Its Negative Impact on the Development of Waqf (Endowment) Land in Malaysia. *Islam and Civilisation Renewal* 5 (3), pp. 375-393.

Unlike Straits Settlements, the Federated Malay States (FMS) were independent states under sovereign Muslim rulers. After the British had formally taken over the administration of the four FMS: Perak (1877), Selangor (1891), Pahang (1889) and Negeri Sembilan (1887), the Torrens[49] System began to be incorporated into the General Land Regulations. In 1877 the British Resident introduced the Perak General Land Regulations in Perak. These regulations were later revised in 1879 to accommodate the Torrens System. The regulation states that all land belongs to the Ruler. In 1891 the Selangor authorities formulated their own land laws modelled after the Torrens System. In 1898, however, these laws were updated. The state of Pahang introduced the Torrens System in 1889. A year later it was amended and subsequently replaced by Enactment 28 and 29 in 1897. Negeri Sembilan formulated Enactment 23 in 1897 and 1898. British influence in the other five Unfederated Malay States came later when compared with the four FMS. Thus, Johor had its Land Enactment of 1910, Kedah had its Land Enactment of 1906 amended in 1912 and the Concession Enactment of 1909, Kelantan and Terengganu had their own respective Land Enactment of 1938.[50]

The colonisation of Malaya by the Portuguese 1511 and the Dutch 1641 before the 19th century did not control over the entire administration of Malaya including the land administration. However, since the arrival of the British, they have intervened in the administrative matters including the formulation of Malaya property and real estate laws. Since the arrival of Western colonists, the activity of trading or buying land began.[51] We mention land laws because the land laws that existed after the arrival of the British provides evidence that British colonialism had placed value on land and from this time on, land became commercially traded commodities that required law for administrative, management and land ownership.[52]

Post-colonial Era to Modern Day

The Federation of Malaya had formed the Federal and State Legislative Councils with the introduction of a written constitution. After independence in 1957, all statutes concerning land were replaced by the Torrens System. The conversion followed similar developments in Singapore in 1956, Penang in 1966, Melaka in 1966 and the enforcement of the 1965 National Land Code. According to the Federal Constitution, matters concerning land are under the purview of the respective states. The federal parliament is only empowered to standardise the various laws between the states. In the Malay states, personal ownership of land is only possible through a grant from the government, and this is done by registration. This practice is known as the Torrens System or the Registration of ownership system. The adoption of this system paved the way for the formulation of the National Land Code in 1963.[53]

In Peninsular Malaysia, amendments and efforts towards grouping and standardising all laws pertaining to land, its holding, registration of ownership as well as transactions involving land and proceeds are spelt out in the 1965 National Land Code. With it, all states in Peninsular Malaysia observed common laws pertaining to land administration effective 1 January 1966.[54] Finally, commencing 1 January 1966, the Torrens-based National Land Code was implemented. This goes to show that the presence of the British in Malaya has led to the conversion of land laws from those based on a mix of Malay customs and Islamic law to those based on the Torrens System. Till today, the Torrens-based 1965 National Land Code is still in use.

Many other laws relating to land and real estate are used today such as the Land Acquisition Act 1960, Land Act (Group Placement Area) 1960, Small Estate Act (Distribution) Act 1955, Rice Growers Act (Control of

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[49] The Torrens System was introduced by an Australian Sir Robert Torrens. The system was first introduced in Australia in 1864. It is an exclusive system with a fixed scheme where equity is excluded. It was introduced by the British to increase the efficiency and effectiveness of land administration. The Torrens system operates on the principle of "title by registration" and it is an indefeasible title to the estate or interest. Details of the owner and land such as size, location, survey plan and boundaries however are stated. The Torrens system has thus endowed the register with the attributes of a mirror of sorts that can reveal all the necessary relating to the land that would interest a potential purchaser or charge. A second attribute of the Torrens system is that the register becomes a 'curtain'. In any transaction between the registered owner and any potential purchaser, the latter will be concerned only with the register and nothing else. Saudah Sulaiman (1997), Pemakaian Undang-Undang Inggeris Dalam Urus Niaga Tanah di Malaysia. *KANUN: Kanun Jurnal Undang-Undang Malaysia* 9 (3), p. 17; Salleh Buang (1989), *op.cit*., p. 6; Judith Sihombing (1977), *op.cit.* p. 269; Fuadah Johari et. al. (2014). *op.cit*. pp. 118-133.

[50] Salleh Buang (1989), *op.cit*, p. 9.

[51] Hasniyati Hamzah (Senior Lecturer, Faculty of Built Environment, University of Malaya), interview by authors, April 5 2017.

[52] Noor Rosly Hanif (Assocociate Profesor, Faculty of Built Environment, University of Malaya), interview by authors, April 3 2017; Mather A.S. (1989*), Land Use*, New York: Longman Scientific and Technical Review, p. 18.

[53] Salleh Buang(1989), *op.cit*. p. 10; Fuadah Johari et. al. (2014), *op.cit*. pp. 118-133.

[54] Ramanaidu, Ramesh Rao (1998), *Malay Reservation Land: a Case Study of Sungai Penchala*. (Unpublished master dissertation). University Malaya p. 14; Fuadah Johari et. al. (2014), *op.cit*. pp. 118-133.

Rent and Guarantee) 1967, Strata Title Act, Malay Reserve Enactment and Real Property Gain Tax 1976. The Real Property Gains Tax Act 1976 was introduced on 7 November 1975 to replace the Land Speculation Act 1974. Both acts were introduced to control property speculative activity in the property sector which has resulted in a sudden rise in property prices by imposing a tax on gains on the disposal of property in Malaysia (flats, houses, condominiums, apartments, farms, vacant land and others) as well as shares of a real estate company

The implementation of the Developers Interest Bearing Scheme (DIBS) by property developers has spurred property prices on an artificial basis and will have a detrimental effect on house prices. DIBS is a proof of how property speculation gets wider.[55] Developers would end up being speculators because it facilitates them to make substantial financial gains with comparatively low costs. The developer bears the interest. In other words, the purchaser does not have to pay anything to his bank until construction is completed.[56] After there's a steep increase in house prices because of DIBS, Bank Negara Malaysia and the Malaysian government banned the use of DIBS as mentioned by the National Housing Department in November 2013 in line with the introduction of a more punitive Real Property Gains Tax (RPGT) rate by the Government. This prohibition is in place to ensure house prices are stable and control speculation activities so that people can afford to buy houses.[57]

Conclusion

The main objective of this study is to outline the development of property perceptions relating to law, rather than to offer present-day country case studies. Even though the histories of individual Muslim countries vary, the contemporary perception on property has evolved from, or has been influenced by, a variety of historical periods or episodes. To unravel or effectively engage with this complex study requires a sensitivity to land history, which often takes the form of local or communal narratives. These include the discussion on the classical law relating to property and land rights that underwent several periods of influence – the Prophet's (PBUH) lifetime to the Ottoman Empire, and pre-colonial, colonial and postcolonial/modern Malaysia. The evolution of land and property tenure regimes from the classical and Ottoman periods to colonial and contemporary times provides vital insights into the dynamics of land and property. Historical narratives with an impact on the development of contemporary law about property not only provide an appreciation of why such classical concepts persist in the present manifestations, but also offer insights into how the property may be traded for profit.

By the 21st century, real estate in Malaysia had undergone dramatic change. Almost all aspects related to real estate had changed. This is due to the colourful factors which existed during the pre-colonial and post-colonial period. During the pre-colonial period, land was abundant, and the population was scarce. Since people's needs and wants were limited at that time, land use was relatively an unimportant aspect of their lives. This can be seen by the extensive cultivation and forest clearing activities that have been carried out. Nothing was done to curb such activities. On the contrary, at present, government intervention in deciding land use is vital and significant. This is because land is used as a business tool thereby causing an individual's objective and society's objective to vary.

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