

OVERVIEW OF THE COMPENSATION SCHEME UNDER THE TORRENS SYSTEM: AN ANALYSIS FOR ADOPTION IN PENINSULAR MALAYSIA

Kamilah Wati Mohd*,¹ Sharifah Zubaidah Syed Abdul Kader²

¹ *Ph.D Candidate, Ahmad Ibrahim Kulliyah of Laws, International Islamic University of Malaysia, Box 10, 50728 Kuala Lumpur, Malaysia. Email:kamilah@usim.edu.my*

² *Assoc. Prof., Public Law Department, Ahmad Ibrahim Kulliyah of Laws, International Islamic University of Malaysia.*

ABSTRACT

Keywords:
*Malaysian Torrens
System; Insurance;
Principal;
Compensation
Scheme;*

One of the common features of the Torrens land registration system is that it provides compensation scheme to indemnify all persons who are deprived of their land or suffered loss from the malfunction of the system. Nevertheless, the compensation scheme has been an absence of the Malaysian Torrens system since its inception. The question is whether non-adoption of the compensation scheme in the land registration system would render the system defect and detrimental to the user of the system? If so, then there is an urgent need to review the lacuna in the existing land registration system. This paper examines the rationale behind the compensation scheme and the necessity for such scheme to be adopted as a backstop to the state guaranteed title. This paper suggests that a statutory compensation scheme is to be established in the Torrens system in Peninsular Malaysia if the system is to remain effective and relevant in the 21st century.

Publisher All rights reserved.

To Cite This Article: Kamilah Wati Mohd and Sharifah Zubaidah Syed Abdul Kader. Overview of the compensation scheme under the torrens system: an analysis for adoption in peninsular Malaysia. Journal of Asian and African Social Science and Humanities, 2(3): 1-11, 2016

INTRODUCTION

The land administration system in Peninsular Malaysia owes its origin from the Torrens system in Australia. It was first introduced in Peninsular Malaysia by the General Code of Regulations Regarding Land (Perak) enacted in 1879 (Sihombing, 1989, p.7). Currently, two main statutes governing land administration in Peninsular Malaysia are the National Land Code 1965 ('the NLC 1965') and the National Land Code (Penang and Malacca Titles) Act 1963. Land matters in Sabah and Sarawak are governed by Sabah Land Ordinance (Cap 68) and Sarawak Land Code (Cap 81) 1958 respectively. It is important to understand that the Torrens system is not an exclusive system but the Malaysian land administration system does recognise other sources of law such as customs, Islamic law, common law and equity. In Malaysia, land matters come under the state jurisdiction (Federal Constitution, 9th Schedule).

One striking departure of the local system from its origin of the Australian Torrens system is the absence of the insurance principle, which provides an assurance fund to compensate persons who without any fault of their own, may have been deprived of their property or suffered loss due to the working of the Torrens system (Wong, 1977, p. 407). Thus, the Torrens system in Peninsular Malaysia is a modified system having omitted the insurance principle. The main issue to be assessed is whether the absence of the compensation scheme would render the system defect and detrimental to the user of the system? If the answer is in the affirmative, then there is an urgent need to review the lacuna in our land registration system.

This paper examines the rationale behind the compensation scheme and analyses the necessity for such scheme to be established in the working of the Torrens system in Peninsular Malaysia. This paper recommends that a statutory compensation scheme to be adopted as part of the land administration system in Peninsular Malaysia if the system is to remain effective and relevant in the 21st century.

THE COMPENSATION SCHEME

The compensation scheme is the legal mechanism underlying the insurance principle, which is one of the three guiding principles of the Torrens system. The insurance principle means that if a loss is suffered due to an error on title or registration of fraudulent dealing, the state will compensate them against loss (Martin, 2002, p. 30).

The scheme is a system of governmental compensation to provide a fund for compensating all persons who are deprived of their land, through

no fault of their own, but due to the operation of the concept of the conclusive register under the Torrens system. The method of guaranteeing immunity from lost distinguishes the Torrens system from other system of land registration (Woodman & Grimes, 1974, p. 389).

Basically, the rationale underlying the introduction of the compensation scheme is to ensure that any unfair or mistaken loss of title is properly compensated (Report on Torrens Title, 1996). Normally, the compensation scheme covers two types of losses namely losses caused by errors of the land office and losses caused by the registration of the interests of others, for example in the case of fraud (Report on Torrens Title, 1996). The scheme is funded from a levy on dealings lodged for registration (Sihombing, 1981, p. 23). The amount of compensation will be that which will put the claimant in a position that they would have been had the deprivation not occurred. Basically it is for the value of the interests involved. (Roushi & Lynden, 2014).

Torrens (1859) commented on the theoretical basis for the inclusion of compensation provisions in the 1857 Act:

“...as we cannot give the land to one and the improvements to another, there is no way of avoiding injustice of other than that adopted in the South Australian Act, giving compensation in money to the rightful proprietor ...indefeasibility of title is a necessary corollary to the [abolition of the respective investigation of titles], and from this again follows the necessity of providing a fund whence compensation in money may be secured to the rightful owner may be secured to the rightful heirs and others who through the operation of the law may be barred from recovering the land itself.”

The legal framework of the compensation fund differs from one jurisdiction to another and can be broadly divided into the ‘last resort’ and ‘first resort’ models (Carruthers & Skead, 2014). The basic difference between the two models lies on the mode of claiming the compensation from the fund. Under the ‘last resort’ model, the deprived party must exhaust all other avenues before applying to the fund for compensation. On the other hand, under the ‘first resort’ model, the deprived party is entitled to bring action directly against the registrar. The registrar is then subrogated to any rights that the claimant have against the wrongdoer.

THE NECCESSITY FOR A COMPENSATION SCHEME UNDER THE TORRENS SYSTEM

The Internal Factors Affecting Security of Land Tenure and Dealings

Initially, the first compensation scheme was introduced in Australia to serve two purposes. First to neutralize the opposition to the title registration based on fears that bringing land under title registration would result in many landowners losing their interests. Second, to afford the administration such a measure of latitude in its approach to conveyancing problems as was considered essential to the smooth and economic flow of business (Woodman & Grimes, 1974, p. 389). Even though, the compensation scheme is considered as one of the important components of the Torrens system, there are some countries have been implementing land registration system without the compensation scheme. Malaysia is one of the countries besides Germany, Austria, Fiji and Sudan. Would this suggest that the Torrens system could work satisfactorily without such scheme? To answer this, it is important to understand the working of the Torrens system and its base principle of indefeasibility of title. Under this principle, the person whose name is recorded on the register as proprietor is assured of a good title free from unregistered encumbrances.

It is acknowledged that the principle of indefeasibility of title may deprive one's title in favour of another person's interests. This can happen when a bona fide purchaser for value is registered as proprietor, his title, subject to certain exceptions, is good against the world, notwithstanding that the title is acquired through fraudulent means. In such situation, one party will be the victim of the operation of the system and consequently the victim will be deprived of his indefeasible title (O'Connor, 2003)

The above scenario is the major repercussions of the working of the Torrens system that would not occur at common law. At common law an owner of land who found himself wrongfully excluded from possession could recover possession by an action of ejectment. The right to recover at common law works against a bona fide purchaser for value. This is the very essence of a right in rem (Woodman & Grimes, 1974, p. 405).

The inherent risk in the working of the Torrens system suggests the need of a compensation scheme to be in place so that any person who has been wrongfully deprived of his title or interest due to the working of the system may be able to seek compensation against the state. The State is obliged to compensate persons who suffer loss through an error of the land office officials since the land administration is in the hands of state officials. There is a logical and inseparable connection between the principle of indefeasibility and compensation scheme. Hogg (1920) observed:

“The indemnity machinery set up by the statutes, for the purpose of compensating persons who suffer loss through others being registered with warranted title is complementary to the provisions by which the warranted title is conferred. The right to indemnity and the right to land under the warranted title are often interchangeable rights as where a right to indemnity arises by reason of the loss of a registered interests”. (p. 384)

The External Factors Affecting Security Of Land Tenure And Dealings

Besides the inherent risk in the working of the Torrens system, there are also external factors that may wrongfully deprived landowner or interest holder of their title and interests. These factors includes among others the following:

Land fraud

Fraud means wrongful or criminal deception intended to result in financial or personal gain. It comes within the crime of cheating-where person gets money or goods illegally. In land fraud, such cheating arises out of land transactions. The purpose of land fraud is to illegally turn the value of the land into money through sale or security transactions relating to such land (Sharifah Zubaidah, 2008). Once fraudulent land dealings are registered, and subsequently transferred to a bona fide purchaser, the principle of indefeasibility of title may works against the original landowner. In Malaysia, the incidence of land fraud is alarming. The statistics by Royal Malaysian Police reveals that in between 2010 to 2013 there are 450 land fraud cases reported. Several studies suggest the inherent defects in the land registration system being the reasons for the occurrence of fraudulent land dealings (Ainul Jaria & Hunud, 2010, p. 1). Furthermore, the presence of sophisticated and organised crime syndicates, which engage in identity theft, may become a threat to the security of land tenure and land dealings.

Computerised Land Registration System

The introduction of the computerised land administration system may introduce new opportunities for fraud within the conveyancing process since the system is more open for abuse. The new system provides a shift from a system that contained inbuilt protection measures to avoid fraud and registration of incorrect instruments, to one that relies on the skill and integrity of the users of the system. Accordingly, the title registration is at the mercy of the dishonest or incompetent conveyancer (Thomas, 2003, p 349). Likewise, the type of fraud currently occurring in the paper system

can continue to occur in the electronic environment albeit in different forms and may perhaps introduce new type of fraud i.e fraudulent use of a certifier's digital signature. It has been observed that the implementation of preventive measures in digital environment is not a guarantee against fraud (Roushi, 2006, p. 225).

In Peninsular Malaysia, electronic land administration system (e-Tanah) or Sistem Pendaftaran Tanah Berkomputer (SPTB) has come into operation in mid 1990s to year 2000. Its objective is to enhance efficiency and effectiveness of delivery system in Land Registry of Peninsular Malaysia (Shukri, 2011, p. 67). However, since its introduction, there were incidences where the system has being abused. For example, there were instances where the staff employed by private consultant engaged to manage the computerised land registration system have misused the access code to the system and become involved in land fraud scams (Utusan Malaysia, 2007)

Mistake and Misfeasance by the Registering Authority

Under the Torrens system, the officials in the registry office affect the act of registration. The power and responsibilities of the Registrar and his staff may give rise to the possibility of loss; for mistakes and misfeasance may occur in the registry office to the detriment of registered proprietors and others. The errors or mistakes may happen due to the registering of other person as proprietor or error, omission or misdescription of important particulars pertaining to the land. Even though under these circumstances, the law empowers the land office or Registrar to restore the title and interest by way of correction, the Registrar's power to make correction may not be exercisable as against a subsequent bona fide purchaser (David, 1977, p 407-408)

The above discussion suggests that the Torrens land registration system is not a fraud proof system and it is open to human errors and mistakes. Thus it is in need for a backup system in the form of a compensation scheme since total prevention of fraud is not viable and cost effective. Similarly, it is more efficient to insure the land dealings than to burden the land officials in checking the instruments of dealings. According to Martin (2010), any registration system that guarantees title effectively will need to provide a system of compensation for those persons who suffer loss by reason of the application of the system. He states that the existence of the compensation scheme is not so much that persons who suffer loss are compensated but rather that the very existence of the compensation scheme gives confidence to those using the system and encourages reliance on it (p. 36).

THE ADVANTAGES OF THE COMPENSATION SCHEME

The existence of a compensation scheme has several advantages. It achieves fairness and encourages people to rely on the register. It provides what is in effect an insurance service and this can bring business efficiency in the land administration. If there were no compensation system, persons dealing with land would be likely to take expensive and time consuming precautions to avoid losses which could, but are not likely to, occur under the system. The social cost of taking such precautions is not justifiable. It is better to accept the fact that there will be losses and to spread them over all users through a user-funded compensation scheme (Joint Land Title Committee Report, 1990, p.28). The stakeholders of the Torrens system benefited from the scheme in the following ways :

Landowner and interest holder

The landowner and interest holder who suffer loss due to the working of the Torrens system and its base principle of indefeasibility is guaranteed with economic security in the form of payment of compensation for the loss suffered. This mechanism reduces the risk and transaction costs. Economist suggests that increasing security of individual property rights in land stimulates private investment and agricultural development because individual is more willing to make long-term improvements (Hanstad, 1998).

Land administrator

The existence of the compensation scheme in the land administration system benefits the registering authority whereby it enables the registrar to adopt a mixed strategy of risk prevention with selective risk assumption. Thus the registering authority can work with certain latitude towards their work. (O' Connor, 2003).

Economy

Secured land tenure system is one of the catalysts for economic growth. It enables real estate interests to move freely and easily in commerce, encourages economic activities and stimulate foreign investments (Siti Radiaton & Khadijah Hussin 2012).

POSITION IN PENINSULAR MALAYSIA

The Torrens system in Peninsular Malaysia from its inception has not adopted the insurance principle as part of the system. As such, no statutory

compensation scheme is in place to remedy those persons who has been wrongfully deprived of their property due to the working of the system and it's base principle of indefeasibility of title. The deprived party has no other remedy than to pursue the matter against the person who has wrongfully caused the loss, which normally involves a long and costly litigation process and no guarantee that the person will be adequately indemnified. *Boonsom Boonyanit'* case is the illustrious example on the predicament suffered by the innocent landowner (Boonsoom Boonyanit, 2001).

There are several reasons suggested for the omission of the insurance principle in the land registration system when the British administration first introduced the Torrens system in the Malay states. Summarily, the main reason being that the British administration perceived that there was no urgent need for such sophisticated compensation scheme to be established in the newly established land registration system. This is due to the simplicity and scarcity of land dealings that suggests less possibility of error and fraudulent dealings (Dass, 1963, p. 68). Furthermore, easy access to the regional land officials to assist in all dealings and the fact that all grant emanated directly from the state suggest that the system could be well carried on without the compensation scheme (Sihombing, 1989, p. 23). Conversely, the British considered that probably it was not practical to introduce a compensation scheme at that point of time since the staffs were not well trained and the public was still ignorant about the system. Under such scenario it was not economical to set up compensation scheme since it may attract more claims against the fund due to errors and mistakes that may take place (David, 1977, p. 407).

On this note, David S.Y Wong (1977), one of the earliest writers on the Torrens system in Peninsular Malaysia observed that the absence of compensation scheme in the land registration system in Malaysia is a defect. Similar observation shared by Salleh Buang (2008) where he commented:

“... apparently when we borrowed the Torrens system from Australia more than century ago, we do not do a complete job. We overlooked the need to have an assurance fund or something like state guarantee. We did not introduce any machinery to compensate innocent victims such as Boonsom”.

Establishing a compensation scheme is a vital measure in providing protection to the landowner or interest holder since the existing compensation provisions provided in the NLC 1965 are very limited in application and not applicable to fraudulent land dealings or error made by the land office. Their applications are confined to the following circumstances:

1. Section 61 of the NLC 1965 provides compensation payable in respect of any land, tree or crop damaged in the exercise of power conferred on the State Authority under the NLC 1965;
2. Section 386 of the NLC 1965 provides compensation payable to any purchaser of any alienated land who suffers any loss or damage by reason of any error of certificate of search,
3. Section 393 of the NLC 1965 provides compensation in respect of any use or damage of land as a Land Administrator's right of way.

The current policy under the Malaysian Torrens system is to leave the loss where it falls. This may bring difficulties to the deprived party to pursue the matters against the wrongdoer since the litigation process is complicated, time-consuming and expensive. On top of that, no guarantee the victims can recover their property and fairly indemnified. Thus, it is submitted that the existing legal redress is insufficient to protect the rights and interests of the deprived party and as such a statutory compensation scheme is necessary to ensure economic security is guaranteed to the affected parties.

SUGGESTIONS AND CONCLUSION

By looking at the current scenario, the reasons behind the non-adoption of the insurance principle may no longer relevant. Malaysia has undergone rapid development and along the line high land transactions are recorded. The incidence of fraudulent land dealings, even though comparatively small in number is a cause for concern and the risk might be greater in the current digitalised environment. Many quarters have called for the establishment of the compensation fund as one of the measures towards improvement of the existing system. (Salleh Buang, 2013). Therefore, it has come to the stage where we need to revisit the insurance principle and establish a compensation scheme to face the challenges in the 21st century. The law must meet with the need of the time to protect and serve the interest of the society.

REFERENCES

- Adorna Properties Sdn. Bhd. v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1MLJ 241 FC
- Ainul Jaria Maidin & Hunud Abia Kadouf, (2010). Weaknesses In The Registration of Land Dealings Systems in Malaysia: Suggestions For Improvements For Enhancing the System. *LNS (A)* 1.
- Caruthers, P. & Skead, N. (2014). 150 Years On : The Torrens Compensation Provisions in the 'last resort' Jurisdiction. Retrieved on 5th May 2014 from <http://ssrn.com/abstract=2177459>.
- Dass, S.K. (1963). *The Torrens System in Malaya*. Singapore. Malayan Law Journal Ltd.
- Federal Constitution.
- Hanstad, T. (1998). Designing Land Registration Systems For Developing Countries, *American University International Law Review*, Vol 13 (3).
- Hogg,J.E (1920). Registration of land Throughout the Empire. Retrieved on 27th March 2016 from <https://archive.org/details/registrationofti00hogguoft>.
- Martin. D. (2002). *Principles of Land Law*. Great Britain : Cavendish Publishing Limited.
- Martin. D. (2010). *Modern Land Law*, 8th edn. London: Routledge Taylor & Francis Group.
- Mohd Shukri Ismail, (2011). National Land Code 1965: Electronic Land Administration System in Land Registries. *Jurnal Pentadbiran Tanah* 1(1) (2011).
- National Land Code 1965.
- n.a. (1996). The Torrens System Compensation and Insurance Principle. Report 76 (1996)-Torrens Title: Compensation for Loss, Retrieved on 2nd April 2013 from [http:// www.lawlink.nsw.gov.au](http://www.lawlink.nsw.gov.au)
- n.a (1990). Joint Land Title Committee Report. Renovating the Foundation: Proposals for A model Land Recording and Registration Act For The Provinces and Territories of Canada. Retrieved on 30th March 2016 from <https://www.alri.ualberta.ca/docs/MLRA.pdf>.
- n.a. (March, 2007). Sistem PTG diceroboh- Sindikit Palsukan Dokumen Pendaftaran Berkomputer. Utusan Malaysia
- O'Connor, P. (2003). Double Indemnity –Title Insurance and the Torrens System. Retrieved on 22nd May 2013 from <http://www.austlii.edu.au/journals/OUTLJJ/2003/9.html>.
- Roushi, L (2006). Opportunities for Fraud in An Electronic Land Registration: fact or Fiction? *eLaw Journal*, 13.

- Roushi,L. & Lynden, G. (2014). Going Through The Obstruction, The Torrens System Assurance Fund and Contemporary Solutions-A Tale Weaved from A Story of A Nun, A Romantic Triangle and Sibling Corruption, Australian Property Law Journal, 23.
- Salleh Buang. (2013). *Land Tenure in Malaysia: Prospects for Reform*. Kuala Lumpur : Dewan Bahasa dan Pustaka.
- Salleh Buang, (October, 2008) "Land Fraud Victims Needn't Suffer", The News Straits Times.
- Sharifah Zubaidah Syed Abdul Kader. (2008). Disclosing the Types of Land Fraud under Malaysian Law. Paper presented at Seminar on Risk Reduction in Land Fraud. Shah Alam, Selangor, Malaysia.
- Sihombing, J. (1981) *National Land Code, A Commentary*. Kuala Lumpur. Malayan Law Journal Pte. Ltd.
- Siti Radiaton Adawiyah & Khadijah Hussin, (2012). Assurance Fund as a New Mechanism Protecting landowners in Malaysia. Paper presented at 3rd International Conference on Business and Economic. Bandung, Indonesia.
- Thomas, R. (2003). Fraud, Risk and the Automated Register. In Grinlinton D (ed). *Torrens in the Twenty-Fist Century*. Wellington.
- Torrens. R.R. (1858). The South Australian System of Conveyancing by Registration of Title, Retrieved on 26th March 2016 from <https://arisp.files.wordpress.com/2009/06/the-southaustraliansystemofconveyance.pdf>.
- Wong, S.Y. (1977). *Tenure and Land Dealings in the Malay States*. Singapore. Singapore Universiti Press.
- Woodman, R.A & Grimes, P.J. (1974) *Baalman : The Torrens System in New South Wales*. Australia: The Law Book Company Limited.