

Recognition of the Economic Security in the Form of Assurance Fund as a Protection to Landowners and the Economic Stimulator in Malaysia^{*}

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The increase of land fraud statistics in Malaysia's administration system shows that the legal security, at present, is not able to guarantee landowners in the long run. Furthermore, there are registered landowners who are not able to recover their losses due to the stripping of title done erroneously by the government. This occurs due to the Malaysia's administration system only practices two principles out of the three principles in the Torrens systems, which are the mirror principle and the curtain principle. The retention of these two principles for the last 40 years since the National Land Code came into effect on the 1st January, 1966, and this has revealed the failure of the government in guaranteeing the landowners in the form of the economic security. This can indirectly impact the real estate investment in Malaysia due to the complaints pertaining to the loss of trust in the Malaysia administration system. Based on the studies conducted, we can see that the recognition towards economic security in the form of assurance fund can impact the increase of real estate investment in Malaysia. This can bring benefits not only to land owners as a protection but also towards the increased securities legislation in the form of the Malaysia land administration system, which could attract in an increase in the interest of investors to invest in Malaysia. So, the interviews with the directors of the land office in Peninsular Malaysia, legal practitioners, and insurance companies have been conducted to support this study. The results of this study hopefully will assist our land administration system in creating a form of economic security in order to make our system more guarantees, efficient, and good governance in resolving matters related to land, especially to address the issue of fraud and forgery. Furthermore, it is expected to help the landowners and innocent buyer in seeking protection of economic loss is not due to their own mistakes and to increase the investment in Malaysia.

Keywords: economic security, assurance fund, investment, fraud, protection

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Introduction

The land administration system in most countries adopts the Torrens system as a basis to manage issues pertaining to land. Sir Robert Torrens introduced this system in South Australia in 1858 to improve the old system, which had many problems such as complication, high cost, etc. (Torrens, 1859).

This system has three main principles, namely, the mirror, curtain, and guarantee. These three principles will form the security of tenure that is the cardinal rule in the Torrens system, as the basis for a land administration system. According to O'Connor (2003), the Torrens system promises legal security to registered owners, and economic security to those whose property rights are suppressed by the system's rules. Legal security means the enforceability of an interest as a right *in rem* against others, and economic security means that the holder of an interest will be compensated for its loss.

Yet, not all countries had seen the importance of the economic security, and Malaysia is one of the countries, which do not accept the provision of the economic security due to any undisclosed reasons.

It cannot be denied that these two principles (mirror and curtain) alone are adequate to create the concept of indefeasibility of title, which is a guarantee by the state authority that no one has the right to deny the rights of the landowner as long as they are the registered proprietors.

But, the immunity of this indefeasibility of title mentioned earlier is not absolute especially when it involves fraud, forgery, misrepresentation, and null ownership. As a result, landowners are subject to the risk of losing their title and their rights on the land. Due to the Malaysia land administration system which does not provide the economic security in the form of protection from the economic aspect, therefore the risk of loss incurred by the landowner will not be compensated by the State Authority even though the stripping and loss of title was caused by the error of government officers.

Problems in the Safety of Current Land Tenure

It has been 40 years since the Malaysian land administration system in operation without a guarantee to protect the victims of fraud and forgery. The retention and development have caused the land administration system be exposed to the dependency on the legal security alone. When the indefeasibility doctrine of titles provided by the legal security was disturbed, the emergence of the economic security will definitely increase the need to support the legal security in ensuring a long-term guarantee.

As a result, there are registered landowners who are reported to have suffered in the existing system, which has no form of support from the government. This shows the significant gap exists in the legal security. Pursuant to that, a lot of people are now admits that this is the best time to establish an economic security to support the legal security which has been promised by the government so far.

The case which highlighted the need for a security economy, i.e., Adorna has raised a lot of attention to the issue (Adorna Properties Sdn Bhd vs. Boonsom Boonyanit, 2001). Back to the facts of the case, Boonsom was a Thai nationality, who possessed two lots of land, namely, Lots 3606 and 3607 that was located in Tanjung Bungah, Penang. He lost his land due to the forgery done by someone who did a land transfer to the Adorna Properties. During the court proceedings, Boonsom lost his land title and the court favoured Adorna Properties as the innocent buyer with a value consideration.

For Boonsom, he had gone through a situation whereby as a registered proprietor, the guarantee provided by the government could not be enjoyed in a long term despite the error not occurring due to his own fault. As per the legal security, the wrong decision made in the *Adorna Properties Sdn Bhd vs. Boonsom Boonyanit* case

was rectified in the case of *Tan Ying Hong vs. Tan Sian San and 2 Ors* (2010) MYFC 4. The Federal Court stated that the decision made earlier on was wrong and cannot be used as a precedent case. It thus rectified the deferred indefeasibility in the Malaysia Torrens system. Yet, this would be meaningless if not supported and backed by the economic security. This is because the registered landowner (Boonsoom Boonyanit) and the innocent buyer (Tan Ying Hong case) still suffered a loss due to the forgery and fraud committed in the land deal. The compensation sought by Boonsoom amounting to RM14,636,854.48 could not be restored due to the absence of the economic security. Therefore, this raises questions of how does the Torrens system in Malaysia protect registered landowners and innocent buyers in the event of a forgery, fraud, misrepresentation, and null ownership?

The economic loss felt by the fraud and forgery victims such as Boonsoom will continue to impact the loss suffered by other landowner as long as the economic security does not take over in Malaysia land administration system. In fact, the UN Guidelines have a provision whereby a good land administration system must provide security of tenure that is the title guarantee and security held by landowners. This is for innocent landowners who have suffered due to the loss of titles and economic profit due to the carelessness of the land officers. Besides that, Sir Torrens who is the founder of the registration system said that the government guarantee is an essential item in completing the title registration system.

If compared between the Malaysia land administration system and the UN Guidelines, there are still some slacks, which need to be considered and paid attention to. It looks like the current land law only provides for the law relating to the legislation security without looking into the importance of economic security. Where else in ensuring security of title and guarantee held fairly and comprehensively, both must be considered. Is this still relevant in the current development state with the increase of fraud cases (see Table 1), the land administration system still exists without looking into the economic security aspect?

Table 1

Land Fraud Statistic in Malaysia From 2005 Until April 2010

State in Malaysia	2005	2006	2007	2008	2009	2010	Total
Sabah	7	10	13	18	29	9	86
Selangor	72	13	10	11	18	2	56
P. Pinang	3	8	17	11	6	2	47
K. Lumpur	1	3	6	19	4	2	35
Perak	2	3	9	11	7	2	34
Terengganu	0	8	3	7	12	2	32
Johor	3	4	1	6	5	3	22
Sarawak	4	3	2	10	5	1	25
Kedah	4	5	4	8	6	7	34
Melaka	3	2	1	4	2	1	13
Kelantan	2	3	2	2	7	3	19
N. Sembilan	1	2	4	4	5	1	17
Pahang	2	2	2	2	5	2	15
Perlis	0	0	0	0	0	0	0
Jumlah	34	66	74	113	111	37	435

Note. Source: Jabatan Siasatan Jenayah Komersial, Polis Diraja Malaysia (PDRM).

Imagine that in 2007 alone, according to the Polis Diraja Malaysia (PDRM), amount of losses up to RM10,402,559.00. Is it fair, if the innocent landowners as reported in this statistic are equally will go through fate as Boonsoom, return with empty hands? Roger Tan (2010) who was the ex-chairman of the Conveyancing

Practice Committee stated that the assurance fund must be established due to the many fraud cases which give a huge impact on rightful landowners and also land buyers who have their own rights. Without the assurance fund in place, only one party, which is the registered landowner, will be protected in a deal with no protection to the buyers. If this happens, the investment in property will never be conducive (Tan, 2010). According to Joyce Palomar, security of tenure is crucial to stimulating the development of land. If land tenure is not secure, both local and foreign investors will be hesitant to invest in land development (Palomar, 2002).

Economic Security Requirements in the Form of Compensation Funds

Economic security is one of the two securities under the security of tenure. The economic security provides security, which protects landowners from economic losses and differs than what has been guaranteed under the legal security. Even though both provide guarantees differently, yet the application of both securities is very important and gives a positive impact in protecting landowners.

Economic security is a security, which provides protection from the economical aspect. The need for economic security emerged when there was exclusion in providing guarantees in the legal security. By virtue of this exemption, which will result in a loss to landowner (if proven), Sir Torrens prepared the guarantee principle as the third principle in the Torrens system, which is also known as the state of guarantee. This guarantee means in a case where a person is deprived of any estate or interest in the operation of the system or suffers loss through any commission, mistake of the registrar or any of his officers, the person who sustain the deprivation or loss will be entitled to compensation for his loss from the state (The Annotated Statutes of Malaysia, 2001).

This explains that when the government itself cannot guarantee fully on the course of law and may cause the occurrence of an omission or error in the registration, the government will act to compensate the loss suffered by the affected party as stipulated by the guarantee principle (Simpson, 1976). In this way, the landowner will have a firmer guarantee. Assuredness in land tenure security will have a big impact in the local and national economy.

Generally, the fund means the amount of money set aside and earmarked for a specific purpose and compensation is something in the form of money given to someone in return for the loss, injury or suffering. The Real Property Act 1900 defines compensation as compensation excluded from compensation fund to anyone as listed under Section 129 (see s 128 Real Property Act (RPA) 1900 No. 25 Part 14). Therefore, the assurance fund in the Torrens system specifically defines the purpose of the fund filled with the amount of money to be given to the people (registered owner) who have had their rights forfeited or without their fault or interest as compensation by the state government.

Sir Robert Torrens explained the purpose of compensation as a complement to the “indefeasibility of title” created by his new system (Torrens, 1859). Under this system, a person whose name has been registered as a registered landowner will possess the title free of all claims. However, to complete the feasibility of any system in operation, which could cause the landowner to lose their rights and interest, the compensation fund was set up with the goal of preparing a financial compensation to the landowner involved. In brief, under the Torrens system, the compensation provision is intended to guarantee the landowner whether there is an interest in land or adequate financial compensation therefor. In other words, the indefeasibility and compensation provisions have a logical and inseparable connection (Report 76, 1996).

In general, the compensation fund was created by the State Government as a payment for the two types of

damage caused by errors done by the Land Title Office and damages caused by the registration of other interests. This includes:

- Fraud;
- The registration of any other person as the proprietor of land, property, or interest;
- Any errors and omission or misdescription in the registration which could lead to any suing in any court of action for damages.

Payment of compensation to be removed from the compensation fund is covering the costs listed below:

- Financial lost;
- Legal costs were associated with claims;
- Any other reasonable costs involved with the claim.

Therefore, with the presence of security in the form of compensation fund, this will enable registered landowners to be covered with even more security. Besides that, security in land tenure will also attract the interest of investors to invest in Malaysia. This is because the security in the land tenure is related to the assurance on the investment to be made.

Methodology

This research uses the case study approach. To get the relevant information, the countries involved in this study are Singapore, Australia, New Zealand, and Canada. Interviews were also conducted on focus groups that had the relevant knowledge in land affairs, the office of the State Director of Land and Specialist in Land Law. The author has also made references to secondary data such as journals, articles, and reports, which aided this study.

Discussion of Findings

Based on interviews obtained from ground legal experts and lesson learned from case studies that have adopted economic security, there are three advantages which are profound that can be viewed from the existence of the economic security in the form of assurance fund in Malaysia. The three advantages are as follows:

- (1) Increase the level of guarantee towards security of tenure.

Following the absence of economic security in the form of assurance fund, landowners will not be protected from economic loss. As a result, owners who lose their land title and suffer loss due to the errors made by the registrar are not able to claim redress from the state government. Therefore, a majority of Directors of the State Land Office agreed that the setting up of an assurance fund would ensure security of tenure provided by the government more prolonged than previously to the landowners. Besides that, according to the legal experts, the creation of compensation funds is a good initiative to provide a comprehensive guarantee to the landowners, and also towards the Malaysia's land administration system. For example, the impact of land policies on farm productivity in Thailand, showed that the higher the degree of tenure security, the higher the demand for investment, especially for goods and services that become attached to land. Access to the formal credit system is easier for titled farmers because they represent a lower risk for the lending institutions (Palomar, 2002).

- (2) Necessity of economic security for sustainable economic market.

With the presence of economic security in the land administrative system, security on land titles will be

more stringent than before. The State Government will compensate registered landowners who have suffered loss due to the stripping of their land title. This clearly indicates that the government has increased security towards ownership as a prolonged protection measure. Based on the researches done, the impact on increasing securities held can stimulate the growth and development of the nation's economy. It will not only stimulate the property market but also form the basis for sustainable economic market. This is because the community will depend on the level of security that they can get from an investment to be made. This is a precautionary measure taken to avoid any loss on purchase made. Besides that, landowners will feel secure towards the ownership they will make and will act to develop their land, expand their business, and create more business opportunities and profit. This in turn will also increase the income of the community nearby. The increase of income and appreciation of property value will also increase the nation's income via taxes. This is accordance with the view of De Soto (2000).

If [occupiers of land who do not have legal title] cannot enforce their rights to land, housing, and equipment, their incentives for investing in them are considerably reduced. People build less if they think there is a risk that the state or another person might take away or occupy what they have built... The effect of all this is to reduce aggregate investment. (pp. 159-160)

Secure property rights, on the other hand, encourage holders to invest in their property because of their certainty that the property will not be usurped. From a strictly economic standpoint, therefore, the true purpose of property rights is not to benefit the individuals or entities holding those rights, but to give them the incentive to increase the value of their assets by investing, innovating, or combining them advantageously with other resources, something which would have beneficial results for society. (pp. 159-160)

Needless to say, security of tenure facilitates access to credit. In the United States, 70 percent of the commercial credit extended to new business is secured with land titles offered as collateral for the loan (Ismail, 2009).

(3) Stimulation of foreign investment.

According to the parties interviewed, investment actions are inextricably linked with the level of security holdings they will receive. This is because the political aspect that will emphasize security holdings is among one of the factors that will be considered by investors before deciding to make an investment. In the event that the economic security is not at a convincing level, they will decide not to make an investment to avoid loss. While investing in Malaysia, such as purchasing land, building a factory or any transaction, each investor will ensure that the investment made is protected and generates profit. With the presence of economic security in the form of assurance fund that will pay for any losses occurred due to the errors of the government, investors would feel more secure to make an investment here. Therefore, we can say that the existence of economic security will indeed provide a stimulant for foreign investors to invest in Malaysia because of the increasing of security of tenure.

Conclusions

The introduction of economic security in the form of assurance fund is indeed needed in the present scenario to provide protection to land owners and also to develop the economy of Malaysia. Assuredness of securities held in a country will affect the level of trust prospective owners as well as investors from within and outside the country. A low level of security will cause many to feel doubtful to buy, own, or make an investment. The losses of trust in the Malaysia's land administration system indirectly have a huge impact on

the nation's economy. Therefore, this introduction will help the country not only to improve of security of tenure, but also even to attract both, local and foreign investors to invest which will enhance the country's economy.

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