

ASPECTS OF TERMINOLOGICAL PROBLEMS IN DESCRIBING PROPRIETARY RELATIONS UNDER MALAYSIAN LAND LAW A CRITIQUE¹

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Introduction

The peoples of the Malay peninsula came into contact with western legal systems first through the Portuguese, then the Dutch and then the British (Braddell 1982; Ibrahim 1970: 9). Of these three, the British legal influence had the most enduring effect on the Malaysian legal system. However, before the advent of British administration, the system of laws existing in Malaya was already an amalgam of Muslim law and Malay *adat* (Ibrahim 1970: 5).

In the early stages of foreign dominance, neither personal laws nor religious practices nor customs relating to land tenure were tampered with. According to Ahmad Ibrahim, the Malays “retained their customary tenure, which had not been interfered with” by any of the foreign powers (Ibrahim 1970: 41; see also Braddell 1982: Chap. 1). It is therefore an undeniable fact that “[t]he history of law in Malaysia is a history of legal pluralism” (Hooker 1976: 186). On the other hand, the claim that the Malays were left to retain their customary tenures without interference from the new colonialists should be understood as referring only to a certain period

¹ This paper is dedicated to Professor A.N. Allott, Professor Emeritus, School of Oriental and African Studies, University of London.

of history. In the first Charter of Justice,² for example, the clause providing for the preservation of customary practices was in fact a direction to administer justice according to the principles of English law, with only an invitation rather than a mandatory request to individual judges to take into account indigenous circumstances (Hooker 1976: 187). As time passed even this policy was not much adhered to, and remained in the books essentially as part of legal history. Since the earliest times many changes have been introduced into the system of land administration, and these have inevitably led to serious modifications of the early policy. That was so especially after the introduction of the Torrens System of title registration. The remaining customary rights over land seemed then to be merely tolerated rather than fully recognized under the new system.³

Problems of Description

In any discourse the improper use of words may produce undesirable results (Hart 1954). In the western, doctrinal type of legal culture much depends on the legacy of precisely written laws and on the established system in which lawyers receive formal training. For those trained in these systems, precise legal language is, in effect, as important as the spirit of the law itself (Mazrui 1989). In the law of property relations, it is required not only that the language used and the terms employed should be precise, but also that they be definitively selective (Kadouf 1997: cxxi). Hence, many legal assumptions, and much that would later be translated into action, as a result either of statutory prescriptions or of court pronouncements, become intelligible and effective only because they are understood by the participants (Hooker 1976: 189).

Under the Malaysian tenurial system, where rights arising under customary laws are administered by civil courts, a different situation is encountered. The administration of customary rights through civil courts means the employment of civil law terminologies and concepts to determine these rights. As “the mode of procedure is

² There were three Charters of Justice which specified the legal principles which were to apply in the early Straits Settlements, viz, the first Charter of Justice of 1807, the second of 1826, and the third of 1855 (Braddell 1982; Ibrahim 1970; Hooker 1976: Chap. 1).

³ See e.g. the Registration of Titles Regulations (Selangor) 1891. In s. 4 it was provided that any dealings regarding titles and interests over land would be “null and void” if not in conformity with statutory requirements. See also judicial decisions such as *Haji Abdul Rahman v Mohamad Hassan* [1917] A.C. 209.

often based on concepts which are wholly alien to the bulk of the recipient population” (Hooker 1976: 190) the result is not always favourable to the parties. For that reason it seems necessary that, before any attempt is made to discuss proprietary relations in a Malay society under modern Malaysian land law, there must be a categorisation not only of the various types of rights but also of the types of language used to describe these rights. The writer will not attempt to develop this kind of categorisation here. The present discussion aims only to explore one particular instance of misunderstanding caused by the use of the language of western law to try to explain an aspect of Malaysian proprietary relations, rather than at a full discussion of the current range of proprietary relations.

The use of specialized language (lawyers’ language) in describing indigenous property relations has led to unsatisfactory results. As language is not just a vehicle for the transmission of ideas but also sets patterns of thought, it follows that the formulation of concepts for any particular purpose will be based on the features of the language used. The unheeding employment of a foreign language to formulate traditional proprietary concepts will necessarily prove inadequate, since the categorization of the applied language and the concepts which flow from it

do not necessarily extend to data from outside that system. Therefore, any cross cultural application is not possible except if it be shown that the foreign data supports this particular view of language use. (Hooker 1976: 189⁴)

The problem is characteristic of systems manifesting legal pluralism, where it may be erroneously believed that a certain vocabulary as employed by the official law may automatically and validly be employed as well to describe other sub-systems. In the Malaysian context, for example, differences in form and texture are only one of the apparent dichotomies that exist between the official law and other customary practices governing proprietary relations.⁵

⁴ Cf. Watson (1994), where it is argued that foreign laws may readily be recycled in order to fit alien countries, showing that it is difficult to sustain the view that law must reflect “the intellectual, social, economic and political climate” of a particular country. For a general discussion on this point see Watson (1993).

⁵ Hooker (1976: 188-89) gives an example of rural people in the State of Negeri Sembilan who, having lost confidence in the legal system imposed upon them regarding the registration of titles over their property, developed their own

About Terminologies

I start with a quotation from Allott:

Terminology... is not the last, but the first, act of analytical activity in creating a field of study. This is because the choice of terms defines (= limits, directs) both what one wishes to look at, and how one looks at it. (Allott 1985: 22)

Thus the choice of a given terminology involves a certain level of abstraction and theorization. This I do not attempt, since the type of terminological issues I propose to discuss do not relate to terms invented or employed by a researcher in a particular field of study to delimit or define a certain object or the subject-matter of a discipline. I intend merely to reflect, like an arm-chair anthropologist, upon certain terms used in the Malaysian legal system for describing proprietary relations. This exercise may not be considered a new contribution; but it is nevertheless important as it seeks an understanding of what we already have, and asks whether there is any need to reconsider our attitudes towards certain legal norms and other customary practices. I shall focus on those terms that are borrowed from the English legal system and employed to determine rights and interests arising solely under local legal systems. It will become apparent how these terms have progressively changed their meanings, in part through the usages of legal scholars, lawyers, or judges in order to suit the taste of each group, or simply to sound more compatible with modern state law.

The exercise is important as it demonstrates that, while customary land tenure under the modern Malaysian legal system may officially be regarded as a mere variation rather than a separate legal phenomenon in itself, yet this variation has its own distinctiveness which is clearly visible against the general framework of the wider legal system within which it operates, or rather with which it coexists. Failure to appreciate these separate qualities may lead to grave superficiality in the administration of justice. The discussion may reveal serious misapprehension. A false impression may have been created by the fact that certain customary law practices have been ostensibly rendered defunct or been superseded by a system of codified laws, according to which rights and interests in land may be acquired only through statutory enactments. It might be concluded that certain customary norms have been completely destroyed. There is, however, ample evidence to show that

terminology, viz., *di-registrakan*, which is in effect a form of a validation process of a registered title used at the village level.

that is not always true. It has been said of India that frequently “the displacement of indigenous law from the official legal systems does not mean the demise of the traditional norms or concerns” (Galanter 1989: 50). This is emphatically true in Malaysia as well. As Wong states:

Although land throughout the country is in law governed by the modern system of land law, customs are as a matter of fact still commonly followed among the rural Malays. (Wong 1975: 4)

The instances which I intend to discuss in the following pages are by no means exhaustive. They cannot be claimed to portray in any detailed manner the whole range of complexities relating to terminological issues that become apparent whenever Malaysian official law and other legal sub-systems are investigated. Three situations will be looked at. In the first western legal terminologies were wrongly employed to describe indigenous customary institutions. In the second an attempt was made to falsely equate certain indigenous proprietary notions with apparently similar western notions by claiming that the indigenous terms carried legal connotations similar to those found in western legal systems. In the third situation, however, because of developments that had taken place within the customary institution itself, certain terms, either by sheer evolutionary process, or through deliberate imposition of a foreign legal culture, or by an intermarriage between two sub-systems such as Islam and *adat*, have tended to be distorted by gaining meanings which diverge from their original usages. In each of these situations terms thus employed have become totally divorced from their original context. Situations were created where, as put by Hooker:

Particular and specified rules were retained whilst the original world of which these were a part was ignored. The retention and development of such rules therefore took place in a vacuum which was rapidly filled with English law concepts... (Hooker 1976: 192)

By this process of abstraction a condition of superficiality is created in which all parties, both the indigenous community and those acculturated in the western legal system, may be deluded as to the nature and true state of affairs of the existing legal concepts.

Hooker gives us some examples of cases where terms employed to describe certain proprietary relationships in a Malay traditional society (namely, Negeri Sembilan) were taken to indicate a different thing from what was actually taking place. The “inappropriateness of [applying] ... technical vocabulary of English law to the facts of a foreign legal system”, is found, according to Hooker, where concepts of

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English trust law are used to describe a seemingly similar situation under the customary system of *adat perpateh* in Negeri Sembilan. Under this system ownership of land goes through the female line of a clan organization. It is strictly contrary to custom to transfer such land into male ownership. Hooker points out that such an arrangement gave the erroneous impression that female members of the clan held such land “in trust for the tribe”. He argues that the definition of trust is unclear even under the English law, in which the term indicates an equitable obligation where a person holding the property in trust will be bound as trustee to deal with such property for the benefit of the beneficiaries. This, according to Hooker, is diametrically opposed to what actually exists under the *adat* rule. Under the system of *adat perpateh* the female land owners are not looked on as trustees in the English sense of the term. A woman can hold land exclusively as an ‘absolute owner’ enjoying an indefeasible title if registered as such under appropriate statutory regulations. Furthermore, the system of the customary *adat perpateh* does not distinguish, according to Hooker, between law and equity, a distinction which is at the root of the institution of trust (Hooker 1976: 188; see also Winstedt 1961: 96).

A further example given by Hooker concerns the customary payment known as *mas kahwin* in Negeri Sembilan. This customary payment has its roots in Islamic law. Originally it was “the obligatory marriage payment due under the Muslim law to the wife at the time the marriage is solemnized” (Ibrahim 1965: 174, cited Hooker 1975: 164-65). The verbal usage, according to Hooker, appears to be incorrect, and obscures several other confusions which accompany the term. This signifies a typical “terminological confusion ... almost inevitably concomitant with Islamic usage in Malaya”. Primarily *mas kahwin* refers to that money paid by the bridegroom to the parents of the bride; but terminological usage confuses it with the Islamic notions of *mahr* whereby the money is paid to the bride herself. The problem is that in the normal situation the bride will never actually receive any money except on a future date pursuant to separation by divorce or otherwise, in which case the money is recoverable only as a civil debt through court proceedings. The confusion in the usage was partly rectified in Negeri Sembilan through legislation stating that *mas kahwin* was an obligatory marriage payment. But that in fact was not enough, according to Hooker, because “the term is [still] not used by the peasants solely in the Islamic law reference” as specified by the statute (Hooker 1975: 164-166).

Missing the Point: the Terminology Issue and the *Jual Janji* Custom⁶

Jual janji custom slipped into modern Malaysian land law terminology through the writings of W.E. Maxwell on the early Malay customary tenures. According to Maxwell, *Jual Janji*, which is translated as a 'conditional sale', is a customary security transaction whereby a land owner transfers his property to a creditor for a loan on condition that, if the loan is repaid within a stipulated time, the property will be retransferred to the vendor for the same price. The custom was originally practised by the Malays. Being Muslims they do not charge interest since *riba* (usury) is vehemently prohibited by their religion. If the condition is not met, then the *jual janji* (conditional sale) arrangement is transformed into *jual putus* (outright sale). The loan is considered part of the price of the land, and in former years was normally not commensurate with the actual value of the property (Maxwell 1884).

Maxwell described the customary practice of *jual janji* as "the only form of hypothecation of land known to Malay law" (Maxwell 1884). However, a consideration of the nature and the concept of 'hypothecation', used by Maxwell to describe *jual janji* customary institution, seems to indicate that it is a completely different legal phenomenon. The concept of hypothecation, taken in its historical context, is different from the notions of sale or conditional sale as found under *jual janji* custom, which appears to be a combination of a sale and a security transaction. The legal nature of this custom is such that some sort of a divestiture of the proprietary interest would be envisaged from the vendor in favour of the creditor. This must necessarily be different from the old Roman law concept of hypothecation. Lee states that under the Roman law, *hypotheca* was regarded as a "real security created upon land by bare agreement without delivering the property" (Lee 1956: 177). The term naturally found its way into the French legal system. There, according to Lawson, the oldest form of the hypothec security attached to ships. (This was the case in English law also.) Lawson states that the concept was later developed under the French Civil Code to constitute securities over movable and immovable property (Lawson et al. 1967: 128). The point of resemblance between the hypothec and the English common law mortgage is that, like a mortgage, a hypothec is a "real right created as a security for the payment of money". Nevertheless, what concerns us here is that even under the French law "the

⁶ The literature on the *jual janji* custom has grown enormously in the recent years. The reader may be referred to the following select bibliography: Maxwell 1884; Wong 1973, 1975; Ibrahim 1989: 201-209; Sihombing 1981: Chap 6; Allan and Hiscock 1989: 86; Kadouf 1995; Teo Keang Sood and Khaw Lake Tee 1995: 409-433, where the relevant cases are set out.

hypothecary creditor has no right to enter into possession” (Lawson et al. 1967: 123-124). As for English law, Earl Jowitt agrees that the term has its origin in the French Civil Law tradition. In *Jowitt's Dictionary of English Law* the term ‘hypothecation’ is defined as a “pledge in which the pledgor retained possession of the thing pledged, ..., the act of pledging a thing without parting with the possession” (Burke 1977). In the same reference Jowitt mentions that the term entered English legal literature as a borrowed or a loan word and tends to be equivalent to ‘charge’. But even in this sense, the hypothecation transaction does not endow the creditor with any possessory rights nor entitle him to sell the property (Burke 1977. For a further detailed exposition of the meanings of the term ‘hypothecation’ and how the term has come to be applied in different legal systems, old and modern, see generally OED 1989: vol. VII). The most that a creditor can acquire under a hypothecation transaction is a right of realization by judicial proceedings. This does not seem to be the case under *jual janji* customary security transaction. The concept of *jual janji*, as reported by Maxwell and later elaborated by commentators and judicial interpretations, is inherently a combination of a sale and a security in which the property will first be transferred to the creditor and later be retransferred to the debtor upon satisfaction of the debt. A further difference is that, in as much as the concept of hypothecation may emerge as totally inapplicable, it could also be said that a *jual janji* transaction may be converted into a sale proper and thus become a *jual putus* (outright sale). Under *jual janji* custom the vendee/creditor is entitled by law to enter into possession of the property immediately after the conclusion of the contract and may later on become a buyer himself.

The unhappy situation of the *jual janji* customary practice within the system of the state official law is not difficult to apprehend. In their book *Credit and Security in West Malaysia*, Singh et al., point out:

...[T]he source of any right or interest that is claimed must be the [National Land] Code itself. Any right or interest in the land can only be created and dealt with in accordance with the provisions of the statute. Accordingly a personal contractual claim cannot be used as the basis of a claim against the land itself, so that no equitable interest in the land will be recognized. (Singh et al. 1980: 170. See also Jackson 1964)

Examples of personal rights arising outside the Code may be found in collateral agreements under *jual janji* transactions. The legal effect of these agreements has always posed difficult problems for legal scholars. Being unregistrable in nature, these contracts are different from those arising under English law. The orthodox view is that the mere execution of a collateral agreement does not in itself confer or

create rights in land in favour of the borrower enforceable in law or equity. The judicial view, however, seems to give a different picture. The courts have shown more resilience in cases regarding rights and interests arising solely in contracts as they have become more inclined to enforce equities between the parties albeit that these are outside the Code. The problem with this type of judicial approach is that, by granting equitable reliefs in such circumstances, the courts may be supporting or establishing new types of interests in land that have already been denied by the Code and the practice (Singh et al. 1980: 171). Although there has been considerable relaxation of the statutory provisions regarding the creation of rights and interests in land in Malaysia, nonetheless, the overall policy holds intact. Rights and interests over landed property are still created essentially through statutory provisions.

Conflicts between the policy considerations in land administration under the Code and the policy of upholding or protecting rights and interests arising under *jual janji* customary transactions have prompted the introduction of inadequate foreign legal terminologies for determining the legal significance of this customary practice. Opinions differ greatly as to the juridical nature of the *jual janji* custom. Maxwell (1884: 122) as a pioneer translates *jual janji* custom as 'conditional sale'. Allan and Hiscock (1989: 80, n1) prefer to call it 'sale of a promise'. The same authors also think that *Jual Janji* is the same as the customary *gadai makan hasil* which according to them can be literally translated as "pledge by way of appropriation of produce" (Allan and Hiscock 1989: 80, n2; See also: Taylor 1929; Wong 1975: 12). Salleh Buang (1991: 5-6) is of the opinion that *jual janji* custom "corresponds to the transaction of *bai' bil wafa*" under the Islamic law as acknowledged by the Hanafi School. (*Bai-ul-Wafa* is a version of a sale and security transaction in Sharia which is acknowledged by the Hanafi School.) The most modern translation of *jual janji* is an 'optional sale' in which the collateral agreement gives an optional right to the borrower to repurchase the property upon repayment of the principal sum.⁷ It is also claimed that the custom, in the course of its development within the Torrens system, has assumed "the form of an absolute transfer of the borrower's land by way of registration to the lender" (Wong 1975: 281).

Many factors in combination have led to the transformation of the legal meaning of this customary practice to suit the purposes of those dealing with it. Indigenous practising lawyers, because of their acculturation in English property terminologies, and in order to make the custom sound more familiar to their taste and ideas of

⁷ *Ismail bin Haji Embong v Lau Kong Han* [1970] 2 M.L.J. 213; *Kanapathi Pillay v Joseph Chong* [1981] 2 M.L.J. 117; *Nawab Din v Mohamed Shariff & Ors* (1953) 19 M.L.J. 12.

proprietary rights under English law, played a significant role in transforming the legal meaning of this customary practice. They made it seem similar either to “a sort of mortgage by an out-and-out transfer of land subject to a deed of defeasance” (Wong 1975: 281⁸) or to an equitable mortgage subject to an equity of redemption at any time.⁹ In all situations English notions of contract were resorted to in order to determine the rights and liabilities of the parties. In some of the cases time was taken to be of the essence in the transaction.¹⁰ This is, surely, contrary to the original custom in regard to which Maxwell was categorical in stating that “...the payment of the money at some later time would, in most cases, be sufficient to enable the conditional vendor to regain his land from a stranger under purely native rule” (Maxwell 1884: 124).

An extreme example may be found in the case of *Kanapathi Pillay v. Joseph Chong*,¹¹ where it was argued by counsel that the judicial nature of the option to repurchase the property under a *jual janji* agreement gave rise to a trust in favour of the borrower-vendor. Reliance was placed on the English case of *Lysaght v. Edwards* in which Jessel M.R. stated the principle under the general law thus:

... [T]he moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold,

⁸ See also *Nawab Din v Mohamed Shariff & Ors. and Mohamed Shariff & Ors. v Nawab Din*, where in a dispute over a *jual janji* transaction Thomson J. stated that

... the agreement ... represent[s] an arrangement of the nature of a mortgage made to secure the original loan ... by the plaintiff on which the profits of the portion of the land involved were to constitute the interest. ((1953 19 M.L.J. 12: 14; emphasis added)

⁹ See: *Yaacob bin Lebai Jusoh v Hamisah binti Saad* (1950) 16 M.L.J. 255; *Tengku Zahara binti Tengku Chik v Che Yusoff bin Che Mat* (1951) 17 M.L.J. 1; *Ismail bin Haji Embong v Lau Kong Hon* [1970] 2 M.L.J. 213; *Ahmad bin Omar v Haji Salleh bin Sheik Osman* [1987] 1 M.L.J. 338.

¹⁰ See: *Haji Abdul Rahman and another v Mohamed Hassan* [1917] A.C. 209; *Wong See Leng v Saraswathy Ammal* (1954) 20 M.L.J. 141.

¹¹ [1981] 2 M.L.J. 117; see also *Mohamed Noor bin Awang v. Mek Tok binti Mat Min* [1977] 2 M.L.J. 248.

and the beneficial ownership passes to the purchaser, the vendor having a right of the purchase money and a right to retain possession of the estate until the purchase-money is paid ...¹²

This situation does not arise under the *jual janji* custom. The difference between the *jual janji* institution and that of the English trust and contract law is such that concepts such as form and validity of contract, effect of contract, title, estate, constructive conversion, trust and consideration are totally alien to the actual participants in *jual janji* customary practice. Furthermore, the vendee-lender under a *jual janji* agreement would never be regarded as an unpaid mortgagee with the power to foreclose on the property. It is true that the traditional *jual janji* may be converted into a *jual putus* (an absolute sale) but that process is not synonymous with foreclosure proceedings. The development of the law governing this custom has been such that neither the judicial precedents¹³ (except in some very doubtful authorities¹⁴) nor the statutory provisions¹⁵ confer any proprietary right or interest in land on the borrower under the *jual janji* transaction. The precarious situation of the borrower is such that Allan and Hiscock rightly state:

¹² (1876) 2 Ch.D. 499, 506.

¹³ *Haji Abdul Rahman v. Mohamad Hassan* [1917] A.C. 209; *Wong See Leng v. Saraswathy Ammal* (1954) 20 M.L.J. 141. In *Kanapathi Pillay v. Joseph Chong Salleh Abas* F.J. (as he then was) criticised the decision in *Ya'acob bin Lebai's case* in which an option to repurchase under a *jual janji* agreement was treated as similar to the right to redeem a common law mortgage, holding:

The position today it seems, is that it requires legislation to amend the National Land Code, if the rule established in [*Haji Abdul Rahman's* and *Wong See Leng's cases*] is to be overruled. ([1981] 2 M.L.J. 117 at 120)

¹⁴ Above, note 10.

¹⁵ See the National Land Code, 1965, s. 205 (1), concerning dealings capable of being effected under the Code. Here also, as indeed was the situation under the former land codes, *jual janji* transaction was not provided for, so that any such transactions could be entered into only outside the ambit of the statutory law. But cf. s. 206 (3) of the Code, where it is provided that rights in contract regarding alienated lands may be enforceable, mostly as personal rights.

The *jual janji* does not confer on the borrower any right or interest which is covered by that section [National Land Code, 1965, s. 322 (1) (a), providing for caveating]. If the *jual janji* is classified as a conditional contract, no registrable interest arises until the condition is satisfied. And if the agreement is an option to purchase then that option must be exercised, and can only be exercised when the debt is paid, and not when the contract is executed. (Allan and Hiscock 1989: 89)¹⁶

The National Land Code, 1965 adopts the Torrens system of title registration. One of its cardinal rules is that interests and rights acquired under the statute should be registrable in nature and that instruments effecting such dealings should be duly registered.¹⁷ In *Haji Abdul Rahman v. Mohamad Hassan* the lower court sought refuge in English equitable principles in order to resolve a dispute arising out of a *jual janji* transaction. Lord Dunedin, in delivering the opinion of the Privy Council on appeal was critical of this approach and stated:

It seems to their Lordships that the learned judges... have been too much swayed by the doctrines of English equity, and not paid sufficient attention to the fact that they were dealing with a totally different land law, namely, a system of registration of title contained in a codifying statement. *The very phrase 'equity of*

¹⁶ S. 322 (1) (a) requires the entry of a private caveat for the protection of unregistered, registrable interests over alienated land. *Jual janji* is not a recognizable dealing under the Code and cannot therefore be registered. It follows that interests accruing under such customary transactions are not registrable; hence the authors' conclusion that they are not caveatable interests under the Code.

¹⁷ S. 5 defines 'dealing'. Section 206 (1) reads:

- (a) every dealing under this Act shall be effected by an instrument complying with the requirements of Sections 207 to 212; and
- (b) no instrument effecting any such dealing shall operate to transfer the title to any alienated land or, as the case may be, *to create, transfer or otherwise affect any interest therein, until it has been registered....* (Emphasis added)

*redemption' is quite inapplicable in the circumstances.*¹⁸

Although the Privy Council refrained from discussing in depth the issue concerning the nature of the *jual janji* custom, their Lordships' comments on the inappropriateness of English equitable terminology to the indigenous land legislation in the then Malay States was clear and forceful.

The warnings of the Privy Council seem not to have been fully absorbed by the local judges who were anxiously

...inclined to protect the borrower, [and thus] did not want to take so stringent a view of the exclusiveness of the statutory system and therefore [persistently] looked to English jurisprudence for a more desirable solution. (Wong 1975: 281)

This judicial attitude led to some disparity of opinion regarding the nature of *jual janji* custom. Wong states that some judges trying *jual janji* cases found it safer to follow strictly the rule of non-recognition of any rights or interests created outside the registration system. Others, defiant towards precedent and statutory requirements, went all the way to apply the English conceptions of equitable interests in land. Yet other judges, who "tracked out a mid-way course", were "caught", as it is put by Wong, "in a shadow of obscurity in an attempt not to stand opposed to Lord Dunedin's distinctions" (Wong 1975: 281).

Such was the state of perplexity which occurred partly as a result of distorted concepts, arising primarily from imprecise terminologies employed by judges, lawyers and academics in the area of *jual janji* custom. The uncertainty is still far from over. Wong commented that "the state of authorities [on *jual janji*] cannot yet be said to be free from uncertainties, and there is still much confusion in judicial thinking" (Wong 1975: 300). Salleh Buang is also of the opinion that "the law of *jual janji* ... remained in a flux shrouded by the thick mist of uncertainty" (Salleh Buang 1991: 92). Another writer states rather cynically that, "[a]s it now stands, no one really knows what a *jual janji* is" (Rashid 1977: 197).

Emile Durkheim once wrote that in "a contract not everything is contractual" (Durkheim 1984: 158), referring to the importance of the social forces underlying any contractual relations. Hunt mentions that Durkheim treats contract as having a three-party dimension rather than the conventional two-party model. The third party is the society itself which, in effect, lays down in advance the permitted versions of

¹⁸ [1917] A.C. 209, at 216 (emphasis added).

any contractual activity relating to proprietary relations (Hunt 1978: 86). Thus, the binding force behind a contractual relation is the society. Indeed, if modern contractual concepts are to be applied to *jual janji* custom then this should be done in a Durkheimian sense, as “the supreme legal expression of co-operation” (Durkheim 1984: 79). The notion of *gotong royong* as one of the most essential social mores in early Malay society has effectively been translated into a jural concept exemplified in *jual janji* custom, where it is the moral consideration rather than mere pecuniary reward that plays the most significant role in the enforceability of the transaction by either party. Critical observations have been made on earlier writers on the *jual janji* custom because of their failure to take the socio-economic and religious dimensions of the custom into account (Salleh Buang 1991).

Despite many changes in the *jual janji* custom there is much to be admired in its traditional form. By the evolutionary process, many factors that gave rise to the development of *jual janji* custom have started to wither away, and this process has continued to the extent that very little remains that can be called traditional. Salleh Buang has commented that “[t]he full impact of this customary dealing... has been reduced considerably, surviving as it is now merely as an ordinary contract” (Salleh Buang 1989: 179). That is so especially when dealings regarding this custom take place in urban commercial cities involving modern banking system. As put by Salleh Buang:

Whilst the primary motivation of the parties now may not be the strict observance of the Islamic injunction against *riba* (usury) (an inescapable part of the modern banking practice in this country), the relationship of the parties involved in *jual janji* is still grounded on the spirit of *gotong royong* (help your neighbour) prevalent amongst the rural peasantry. (Salleh Buang 1991: 96)

The notion of *gotong royong*, according to which it was incumbent upon the rich members of the community to help needy members promptly, signifies the concept of social interdependence. (Aid by the rich to the poor is however only one aspect of *gotong royong*. Basically each member of the community, whether rich or poor, is under the same moral obligation to help the other in times of need.) This institution seem to have been morally conditioned to suit the Islamic ethics prevalent in Malay society. It is submitted that any analysis of proprietary relations accruing from *jual janji* transactions must necessarily prove inadequate if it considers the elements of pecuniary reward alone in disregard of the notions of *gotong royong*. The latter element in the transaction gives proprietary relationships their direction and substance in Malay society. According to Sihombing:

The *jual janji* evolved from a local community loan transaction with religious, *adat* and *gotong royong* overtones. ... In most cases the lender was a wealthy member of the community who was lending to assist his neighbour rather than to act as a professional money lender. The *jual janji* was clearly an incident of Malay communal life. (Sihombing 1981: 54; see also Wong 1973)

It was the failure to consider *jual janji* as “an incident of Malay communal life” which prompted the invention of a welter of inappropriate legal terms for its description.

Proprietary Relations Reconsidered

Maxwell, in describing Malay customary tenures in the late 19th Century, tried to warn us not to use or treat terms, such as *jual* (sell), *beli* (buy) and *jual janji* (conditional sale) as bearing the same implications as the words in English law. He wrote:

As the Malay *pulang belanja* differs widely from our idea of a sale of land, so the *jual janji* (conditional sale), the only form of hypothecation of land known to Malay law, is, in its principal incidents, quite unlike our mortgage of real property. (Maxwell 1884: 122-123)

The term *pulang belanja*, which in Perak stands for sale, strictly means ‘return of expenses’. In principle the new proprietor does not buy the land, but simply buys out the occupier by compensating him for his labour (Maxwell 1884: 122). The reason he expressed thus:

Nothing can be more certain than the fact that no subject in a Malay State can lawfully claim to hold any property in land approaching our freehold or fee simple tenure. (Maxwell 1884: 122; cf. Kadouf 1997: cxxii-cxxiii)

He further warned that “there is even a danger of imbibing and conveying erroneous ideas on the subject by the use of English technical terms” (Maxwell 1884: 76).

Maxwell was not the only one who tried to draw attention to the disparity between the native tenure systems and the western mode of property holding. Baden-Powell expressed the same opinion when writing about the 19th century Indian tenure

system, saying:

These are the facts of the tenure; you may theorize on them as you please; you may say this amounts to proprietorship; or this is a *dominium minus plenum*, or anything else. (Baden-Powell 1894: 138, cited Wong 1975: 12.)

Although both Maxwell and Baden-Powell were writing in the Asian context, the same difficulties seem to be felt when African tenurial systems come under scrutiny. The present author, in a study of Nyimang¹⁹ institutions of property, expressed the same concern in regard to the categorization and general analysis of Nyimang concepts of property. The problem stated by the author was “how to find an appropriate language capable of describing and analyzing a particular system of a traditional law” (Kadouf 1981: 52). The difficulty facing any attempt to analyze the cluster of rights and duties that define and hence govern proprietary relationships in any traditional society seems to be insurmountable. This is a recurrent issue in the work of the many students of African tenurial systems. Some Africanists even think it difficult to define African tenurial systems in terms of any “familiar legal and linguistic concepts” (Biebuyck 1963: 52; also Elias 1956: 163-166, 173-175; Bohannan 1963; *per* Viscount Haldane L.C. in *Amodu Tijani v Secretary, Southern Nigeria*²⁰: 402-403).

The ideal solution might seem to reside within the customary institution itself. Perhaps resort must be had to the vernacular terms employed by the members of the community to describe the situation. However, it is submitted that this will not be free from some latent problems. The problem is that many of these traditional societies may not possess elaborate legal systems rich enough in jural terms to be capable of describing property relations similar to those which exist under advanced modern legal systems. This speaks in favour of those who argue that there is a necessity to look for foreign data in order to help understand customary institutions (although only partially).

Allott once expressed his dissatisfaction with the notion that an account of any given customary law institution of a particular society could be given only in the language of that society (Allott 1967). He thus subscribes to the point that a subject is not always conveniently defined exclusively by its own origins, and that this is the case

¹⁹ The Nyimang are one of the largest Nuba tribal groups. They live in an area commonly known as the Nuba Mountains in the centre-west of the Sudan.

²⁰ [1921] 2 AC 399.

with certain customary law practices also. Expressing the same views in the Asian context, Wong, disagreeing with Baden-Powell's statement quoted above, is of the opinion that

... any description of any native custom could hardly be free from a foreign 'translation' of the native customary norms (Wong 1975: 12).²¹

This simply means that the absence of appropriate legal terms in the indigenous tenure systems may warrant recourse to the borrowing of alien legal terms to fill the gaps for either practical or academic purposes (Allott et al. 1969: 15-22).

One is tempted to agree with those who advocate the necessity of 'translating' indigenous legal institutions into some alien languages if need arise. Yet there are dangers involved in any such attempt. In his analysis of judicial decision-making and the 'open texture' of rules, Hart doubts the usefulness of all attempted definitions. He maintains that for every word there exists a 'core' of settled meaning and a 'penumbra' of uncertainty. He writes:

Very often the ordinary, or even the technical, usage of a term is quite 'open' in that it does not *forbid* the extension of the term to cases where only some of the normally concomitant characteristics are present. *This ... is true of ... certain forms of primitive law....* (Hart 1961: 15; emphasis added)

He argues that such terms, though they may generally be understood to refer to a given (core) meaning commonly familiar to the participants, may also be linked to other phenomena "in quite different ways from that postulated by the simple form of definition". For that reason, "several instances may be different constituents of some complex activity" (Hart 1961: 15). Hart's phraseology bears a direct relationship to our argument, especially in respect of our objection to the proposal to 'translate' or, to put it more moderately, explain any part of a customary rule or any form of indigenous institution into or in another language. Like John Locke, Hart wants to convey to us that words, though there is no logical connection between them and the things they represent, relate to ideas (Locke 1959, cited Klinck 1992: 10, 11; see also Williams 1945: 71, reprinted in Schauer 1993: 97). Ideas carry meanings and

²¹ But Wong proceeds to state at the same page that "it is indeed quite a different matter to define or categorize a native cultivator's rights relating to land according to western conceptions". See also his ideas advanced in criticizing Maxwell's theory, below.

these meanings define social realities. It is these social realities, which differ from one society to another, that make it difficult to adequately translate one social institution into another, lest there be a kind of distortion. The misconception is apt to occur in *jual janji* cases where the transfer of land under this custom may be treated either as an 'outright sale' without 'consideration' or as a conditional sale with repurchase at the borrower's option upon repayment of the debt.

Translating *jual janji* into any other language provokes some vexing questions. For example, how much of that customary concept could adequately be translated into a foreign language? This is not to ignore the fact that language is a social reality. Since it is, and given the fact that there are hardly any two identical languages, a further question is whether translating a customary law institution into a foreign language would not completely fail to reveal the social reality represented by the institution. Thus, would it be sufficient to translate *jual janji* as 'a conditional sale' or 'a sale of a promise'? What about the welter of other traditional realities within which the customary rule operates? What about the view of '*jual janji*' as a 'practice' or an 'activity', a social phenomena similar to what was once observed by Gluckman in Barotse society in Africa.

Referring to the general stance of a Barotse litigant and the responding attitude of the courts towards litigants, Gluckman reports that a

litigant in many cases arising from these multiplex relationships comes to court not as a *right-and-duty bearing persona* but in *terms of his total social personality* ... [I]n administering law the judges consider *these total relationships not only the relations between right-and-duty bearing units*. (Gluckman 1955: 23, cited in Simmonds 1984: 28)

As Gluckman argues, the underlying concepts of these units appear to form the nuclei of the substantive law governing patterns of behaviour in a specific society. As we have asked earlier how could that be translated into a foreign legal terminology? And if it could be, would the outcome be intelligible to the participants? If not then what is the use of the translation? This may apparently lead us to the conclusion that in simpler societies, as indeed in most human societies, "law must be recognized as an aspect of the total culture of the people, characterized by the psychological and ideational features of each fostering people" (Chiba 1986: 1. Cf Watson 1994: 21). But this general understanding of the relation of law to society is not always welcomed. Those who are familiar with Watson's theory of 'legal transplants' may recall his objection to Steven Vago's similar statement that

Every legal system stands in a close relationship to the ideas,

aims, and purposes of society. Law reflects the intellectual, social, economic, and political climate of its time. It also reflects the particular ideas, ideals and ideologies which are part of a distinct 'legal culture' - those attributes of behaviour and attitudes that make the law of one community different from that of another... (Vago 1981.)

Watson believes that law does not necessarily and always reflect "the intellectual, social, economic and political climate of its time". He claims that any law of any remote time from any remote country may easily and readily be recycled to fit the adopting community in a legal transplant (Watson 1994: 21). But is it not also the case that sometimes, when a 'legal transplant' takes place, it is the alien law that adapts itself to the requirements of the local community? Nevertheless, in cases where local laws have been vigorously modified by imported foreign laws²² a dichotomous situation may be created between the superimposed 'official law' and the 'unofficial law' or 'people's law' that still continues to exist. Transplanting alien laws with new norms does not always seem to terminate the operations of the existing legal norms ingrained in people's culture. The success or failure of the new law may depend largely on the political will, the societal openness and the general education and enlightenment of the people. It may be conceded that the old laws or the so-called 'unofficial law' may still continue to function, even if little or no recognition is accorded to them by the state authorities. Thus the adoption of the Torrens System of title registration in Malaysia never killed all forms of property dealings between the Malays. However, whereas it is possible to adopt commercial laws, which lack much subjectivity, the situation may appear different in areas of personal law. Laws as personal matters, affected by religious and cultural precepts, have a lasting influence on the people's day-to-day lives and in many cases may be regarded as determinant factors in the individual's behaviour. Numerous examples could be cited from Turkey, Malaysia, the Sudan, India and many more former colonies to demonstrate the point.

It may, nevertheless, be conceded that laws which are divorced from the lives of the

²² Examples may be found in the introduction of the Swiss Civil Code into Turkey by Attaturk and the Jordanian Civil Law into Sudan. In the latter case two attempts were made to introduce Civil Laws to replace the Sudan common law system. The first attempt was made in 1972, when Egyptian Civil Law was imported. The exercise proved an utter failure, and the new imported law was abolished after two years with certain unhappy experiences. The second attempt was made, this time with a certain success, in 1984, when Jordanian Civil Law transactions based on the Ottoman Islamic civil law were introduced.

bulk of the people have not necessarily been brought from somewhere else. Modern legislation, especially in the Third World countries, often does not relate to the people's own culture or pay attention to what the majority of the people think or believe in. Members of Parliament are sometimes referred to as people's representatives. Yet most often members of the legislative body do not themselves know what they are legislating about, and if they do they are not in a position to appreciate the socio-economic or political repercussions of their legislation. Laws may be legislated through democratic methods, yet the policies, motives and ideas underlying them may represent the culture of the elite political or cultural minority. Watson may be referring partly to this when he states:

... the direct link between a society and its law is tenuous, whether the law is customary or formed by professional full-time lawyers. Legal development depends on the lawyer's culture. When an issue arises, whether in theory or in practice, and requires a legal answer, the lawyers habitually seek authority.
(Watson 1985b: 117)

The making of laws, especially in certain Third World countries, may be the product of political or economic manipulation. This appears emphatically true when one looks at the mass 'importation', 'transplantation', 'reception' or 'borrowing' that took place in Sudan. The acts of 'importation' of the Jordanian civil law into the Sudan in the early eighties resulted from a dictatorial decree made for political purposes. Together with the application of the Shariah laws by President Nimieri it was the last of the series of attempts to relate the Sudan through legal ties to the so-called its sister Arab countries. It had nothing to do with the people's cultural aspirations. Watson is of the opinion that "[a] sole ruler has no group or even personal interest in inadequate source of law (Watson 1985a 109). However, in the Sudanese case, at least, the main driving force behind the 'importation' of civil law transactions to replace the common law system was not a perception of the inadequacy of the sources of law - although it is not claimed that all sources of law then existing in Sudan were adequate. The act itself was not done solely to improve the legal system, but rather was all part of a political scenario. The culture such laws represent can only be that of those in effective economic control or political power.

The only 'law' that may closely relate to the people's culture is 'customary law'. As put by Watson elsewhere, in such a situation,

custom should most closely match society..., it should be a mirror image. It is not imposed from above, arbitrarily perhaps, but..., is law because the people follow it as law, and it corresponds to their normative behaviour and changes when

behaviour changes. (Watson 1985b: 115)

Although Watson refers here to custom as "law" in a different context, ironically he sounds very much like Steven Vago whose views, we have seen, he rejects. Of course, Watson does not and could not naturally claim that customary laws can adequately cater for the complexity of modern economic and socio-political problems. In the coming millennium, in which most societies will be multi-cultural, resort to legislation, 'borrowing', 'transplanting' and 'reception' will become a necessity. The only question that remains is whether the process referred to above will be done in complete disregard of the cultures, and the societal, political and economic aspirations of the fostering people.

One should not be misunderstood as claiming that it is impossible to 'translate' customary law terms from one language into any other for whatever purposes. I suggest nonetheless that it is better to describe the agent's activities in terms that are intelligible to him or her. Misunderstanding of the nature of laws operating unofficially, especially those describing the complexity of proprietary relations, is due, as Allott put it, to the false assumption on the part of some researchers that tenurial institutions in traditional societies cannot exist unless there is a corresponding legal terminology describing them. He points out that

'the external analyst may ... debate the presence or absence of some legal quality or function ... without there being a verbal parallel in the indigenous language, in such an instance he is creating an analytical super-category or meta-rule. (Allott 1970: 13)

That, at best, would be irrelevant to the tenurial system. For example, a principle such as "once a mortgage always a mortgage" as advocated in the lower court in *Wong See Leng v. C. Saraswathy Ammal*²³ with reference to the customary security transaction of *jual janji* could, therefore, conveniently be termed as a 'meta-rule', since trying to explain the operational nature of *jual janji* custom in terms of the old common law maxim of equity will never give the true meaning of the expression *jual janji*. At least we know that *jual janji* transaction may potentially be transmuted into *jual putus* (absolute sale). The latter differs qualitatively from the English common law mortgage. Hence, borrowing terms from the English common law to explain *jual janji* is misleading as they will not be appreciated by the participants.

²³ (1954) 20 M.L.J. 141. Cf. *Yaacob bin Lebai Jusoh v Hamisah binti Saad* (1950) 16 M.L.J. 255.

The recent Supreme Court decision in *Malayan United Finance Bhd. v Tay Lay Soon*²⁴ supports the view that it is futile to use foreign legal terms to describe proprietary relations arising solely under the Malaysian land law. In this case the court appeared highly critical of the use of the notion of the 'equity of redemption' to refer to the discharge of a charge under Malaysian land law. The Supreme Court sought to point out the difference between the notions of 'equity of redemption' and the discharge of a charge under the National Land Code 1965, holding that "the equity of redemption and a discharge of a charge are poles apart". According to Jemuri Serjan SCJ:

*To speak of the equity of redemption or the like of it in our situation under the Land Code is clearly technically and legally incorrect. The term so used in relation to a charge is not only a misnomer but nonsensical.*²⁵

We would claim that it is not always a useful exercise to explain indigenous tenure systems by reference to foreign legal terminologies because "if the explanation is not one the agent would accept, ..., then the explanation must be rejected, for it fails to capture the meaning of the act in question" (Patterson 1992: 106). Furthermore, 'if the *framework* within which a practice is prescribed is not ... cognizable by the subjects of the description it must be rejected as meaningless' (Patterson 1992: 106). It is meaningless to the practising society as a 'meta-rule', that is, a rule beyond the societal cultural milieu within which the rule operates, and the meaning so sought will be neither in the text nor in the minds of the participants. In order really to appreciate concepts such as those of *jual janji* and the accompanying notions of *gotong royong* together with the ideas subservient to them such as loan, repayment, contract and breach, these must be apprehended entirely in their operational situation in the respective society. It may further be argued that translation of these activities into words in other language will give us only 'brute facts' (Patterson 1992: 107). *Jual janji* and the concept of *gotong royong* must be explained as actions pertaining to the reciprocal behaviour of helping one's kin or neighbours in a society where under *jual janji* the practice of money lending with a promise to allow the land to be repurchased prevails, perhaps without the notion of consideration. Phrases such as *gotong royong* and *jual janji* are not theories. They are terms that explain actions of people in a given Malay society. It is therefore truly stated by Patterson that "[u]nderstanding a practice and understanding the concepts that comprise the practice are one and the same thing" (Patterson 1992: 107). One should, therefore,

²⁴ [1991] 1 M.L.J. 504

²⁵ [1991] 1 M.L.J. 504, 507-508.

understand the cultural traits of the society in the context of such practices.

Conclusion

The examples given earlier demonstrate the paradoxical situation that exists when foreign legal terminologies are used to describe property relations in countries experiencing plural legal systems. The conflicts endemic to these legal systems are not confined to the competing elements (basically normative in nature) at the level of a particular sub-system. Further differences may also be manifested in the type of vocabulary used by each sub-system to portray its own value judgments or cultural traits. According to Hooker, customary laws or practices within a plural legal system normally do not exist independently, but are “accommodated within the forms of the various personal laws”. Such laws seem to be tolerated “only upon the terms and conditions of the national legal system” (Hooker 1976: 191). This accommodation is expressed by some legal sociologists as existing on two levels.²⁶ The first is the official level comprising statutes and judicial decisions. The second is what Hooker calls the “level of reality”, or the “living law” as it is referred to by some sociological jurists, or that what actually takes place in the real world. Faced with this, the official accommodation simply cannot hold (Hooker 1976: 191). The different cultures and values reflected in the people’s proprietary relations can hardly be traced in the codified statutes, and even less so in court decisions. The failure of the official law to genuinely reflect what exists at the ‘level of reality’,

[t]o a large extent ... is a consequence of the law not being able to subsume the ‘facts’ of Malaysian cultures into its own schemes of classification. The facts of these cultures were and are generally limited by the (legal) rules of relevance to what was and is acceptable to the dominant system. (Hooker 1976: 191)

The imbalance, one would say, cuts deep into the level of legal sub-systems where certain terms, employed by those educated in western legal thought, for describing customary proprietary relations have been grossly distorted. The effect of such distortion may be observable in changes in the normative content of these terms and the negative impact produced on the nature of the proprietary relations under modern Malaysian land law.

²⁶ Cf. Chiba (1986: 5) suggesting that the legal system may be seen as a three-level structure: official law, unofficial (customary) law and legal postulates.

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