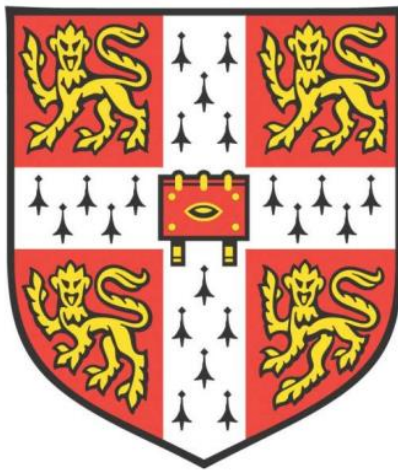


**Land, history, and housing:  
Colonial legacies and land tenure in Greater Kuala Lumpur**



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March 2023

**This dissertation is submitted for the degree of Doctor of Philosophy**

## **Declaration**

This thesis is submitted according to the requirements of the Degree Committee of Land Economy.

It does not exceed the regulation length of 80,000 words including footnotes, references, and appendices.

It is the result of my own work and includes nothing which is the outcome of work done in collaboration with others, except where specifically indicated in the text and acknowledgements.

It is not substantially the same as any work that has already been submitted before for any degree or other qualification except as declared in the preface and specified in the text.

# **Land, history, and housing: Colonial legacies and land tenure in Greater Kuala Lumpur**

**Nur Fareza binti Mustapha**

## **Thesis summary**

What land is available for the development of non-market housing in Greater Kuala Lumpur (KL) and how do housing providers attain the rights to them? In Malaysia, the power relations that underlie the relationship between land, housing, and society are entrenched in historically path dependent processes that were instigated at specific critical junctures in the country's colonial history. This research utilizes historical institutionalist concepts and analytical approaches to reconceptualize existing constraints in the land and housing markets in Greater KL. Findings from the research highlight the role of existing land institutions in structuring the capacity of critical actors to produce non-market housing. This study bridges the analysis of contemporary findings with their historical underpinnings. Data were collected over a 16-month period of fieldwork, from 2019 to 2020, using a two-part data strategy that combines qualitative data from in depth interviews with elite participants alongside archival data from repositories as well as secondary sources to illustrate this relationship.

The findings show that the corresponding rights to land in Malaysia can be held and controlled by a complex constellation of actors depending on how these rights are allocated, which may differ depending on whether these claims are assessed through the legislative framework or in practice. More specifically, differences in claimants over the right of disposal, use, and dealings may lead to friction during the land procurement process when the interests of these claimants are not aligned. This study further finds that differences in power exist among critical actors within the non-market housing sector and remains an important factor in determining housing outcomes. The research specifies two development pathways along which negotiations for the procurement of land transpire, i.e., the constitutional and the operational, based on the different levels of power entrenchment that guide the actions of critical actors and influence their bargaining positions.

This study further identifies three critical junctures that altered the way land is governed in Malaysia in significant ways. The first introduced the concept of allodial rights into the existing Malay tenure system, the second installed separate spheres of government within the Federated Malay States, and the third ratified allodial rights to its rights holder within a newly minted national constitution. This study illustrates that the emergence of critical junctures was contingent on both the capacity of actors to capitalize on and benefit from the external shifts that jolted their prevailing social systems as well as the propensity of the external shock to successfully generate a tangible impact onto the agency of the critical actors. These transformations were shown to catalyse institutional innovations that promoted an intended advancement in the land tenure system of the country. Inherent to this process, the findings suggest that the institutional innovations acted as a medium to allocate and transfer power between critical actors in a causal cycle that allows those to benefit from this innovation to solidify their positions.

This study contributes to knowledge with its empirical and conceptual findings as well as methodology. The empirical and conceptual findings generate understanding on the role of institutional structures in determining land and housing outcomes in Greater Kuala Lumpur. It considers how rights to land and property are allocated, distributed, and negotiated within the housing system and see power as the driving force in shaping housing outcomes in non-market housing developments. The use of the critical juncture framework as well as the historical institutional approach provide new insights into how land and housing constraints are conceptualized. It highlights the need to consider the contextual dynamism (both spatial and temporal) of the site of intervention when policy reforms are instituted. Lastly, the methodology used in this research introduces a new approach for amalgamating contemporary and historical data within housing studies.

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## List of abbreviations

DBKL	<i>Dewan Bandaraya Kuala Lumpur/ Kuala Lumpur City Hall</i>
EXCO	State Executive Council
FELDA	Federal Land Development Authority
FLC	Federal Land Commissioner of Malaysia
FMS	Federated Malay States
HI	historical institutionalist
JKPTG	<i>Jabatan Ketua Pengarah Tanah dan Galian Persekutuan/</i> Department of Director General of Lands and Mines
JPN	<i>Jabatan Perumahan Negara/ National Housing Department</i>
KL	Kuala Lumpur
MCA	Malayan Chinese Association
MCP	Malayan Communist Party
MIC	Malayan Indian Congress
NEP	New Economic Policy
NIE	new institutional economics
NLC	National Land Code 1965 (Act 56 [Rev. 2020]) (Malaysia)
PPA1M	<i>Program Perumahan Awam 1 Malaysia</i>
PR1MA	<i>Perumahan Rakyat 1 Malaysia</i>
PTG	<i>Pejabat Tanah dan Galian/ Land and Mines office</i>
RC	rational choice
RDA	Regional Development Agency
RMM	<i>Rumah Mesra Rakyat/ Rumah Mampu Milik</i>
RUMAWIP	<i>Residensi Wilayah</i>
SA	State Authority
SEDC	State Economic Development Corporation
SPNB	<i>Syarikat Perumahan Negara Berhad/ Malaysia National Housing</i> Company Limited
SS	Straits Settlements
TOL	Temporary occupation license
TPGT	Theory-guided process tracing
UDA	Urban Development Authority
UMS	Unfederated Malay States
UMNO	United Malays National Organisation

## **Chapter 1 Introduction**

Since its formation in 1963, Malaysia has urbanized rapidly, making it one of the fastest urbanizing countries in Southeast Asia. Over the last five decades, the rate of urbanization has tripled from 28.4% in 1970 to 75.1% in 2020 (DOSM, 2022). Over the same period, the total number of people living in urban areas increased eight-folds from three million to 24.4 million (ibid.), most of whom are concentrated in the country's capital city, Kuala Lumpur, and its surrounding metropolitan areas. As with many post-colonial cities, the meteoric expansion of Malaysia's economy and population has led to rapid urbanization and migration into the Greater Kuala Lumpur (Greater KL) region. These developments in turn have led to increases in the demand for housing to accommodate a growing urban population and consequently, a burgeoning housing affordability challenge.

Housing affordability in Malaysia has continued to deteriorate despite many interventions to alleviate the gap between housing demand and supply. As will be described in this thesis, policy interventions for housing delivery and by extension, the role of the state in the provision of housing have evolved to meet this challenge. Nevertheless, these interventions have only further distorted the existing housing provision system by blurring the lines between the market or social sector in housing, and in doing so have entrenched the sector further in a web of complexity and hybridity. The failure of existing policy interventions to adequately improve housing affordability in Kuala Lumpur ultimately reflects a flawed understanding of the constraints and challenges that affect the sector, particularly with respect to the supply of land for housing development.

Existing research on housing affordability in Malaysia and its challenges often position failures in land markets as a supply side constraint amongst a multitude of other variables under scrutiny (Ismail et al., 2015, 2019; Olanrewaju et al., 2018; Yap & Ng, 2018). Scholars who undertake a more institutional analysis of the property market point to restrictions on access or land use as evidence of the institutional constraints in place but often attribute these observations to failure in the planning or land administration system (Nuruddin & Jaafar, 2015; Yakob et al., 2012). These studies critically neglect to account for both long and short term spatial and temporal processes that affect how rules regarding tenure are created,

implemented, and enforced. More importantly, previous studies generally ignore the role of non-market forces in determining housing outcomes.

This research takes a different perspective. It brings to light other elements that drive the relationship between land and housing in Malaysia. It is fundamentally informed by the notion that efficiency is not the only consideration that characterizes this relationship. It argues that history matters, especially when we consider that land and society's relationship with land is fundamentally governed by the societal interactions and negotiations that determine: "who can use what resources for how long and under what conditions" (FAO, 2002). The discourse on land and housing challenges must move away from a sterile conceptualization of the sector that is often governed by neoclassical economic models and must instead reflect the complexity that permeates it. This research is guided by the premise that land and housing development are inherently political and contextually dynamic. Consequently, the institutions that govern them are not neutral and are steeped in power and class relations (Ryan-Collins, 2017). In Malaysia, the power relations that underlie the relationship between land, housing, and society are entrenched in historically path-dependent processes that were instigated at specific critical junctures in the country's colonial history. This thesis presents an examination of these ideas.

Land is a fiercely contested resource and is subject to myriad challenges with respect to its governance. Institutions stand at the centre of this debate and analysis of institutions forms the core theoretical argument of this research. To understand how institutions affect how land is allocated and used for housing development, particularly non-market housing, the dynamics of their genesis and evolution must be understood. For developing cities and nations that had been colonized, it is necessary to examine the dynamics which underscore the establishment and evolution of institutions governing the relationship between society and land in these countries as it may differ significantly from those afforded the opportunity to develop their institutions endogenously.

This chapter introduces the research. Section 1.1 presents the research aims and questions as well as the hypotheses tested. Section 1.2 introduces the conceptual framework and

section 1.3 provides the chapter outline. Finally, section 1.4 presents the contributions to knowledge made by the study.

## **1.1 Research components**

### *1.1.1 Research aims and questions*

This research examines how and why institutional change in the governance of land occurs and how it affects the current supply of and access to urban land for non-market housing, through a case study of Greater KL. This research utilizes historical institutionalist concepts and analytical approaches to re-conceptualize existing constraints in the land and housing markets to account for the historical trajectory of its governing institution. By focusing upon the land tenure system, this research underscores the line of inquiry it seeks to follow. In order to understand why land supply constraints occur in non-market housing developments in Greater KL, this study analyses the fundamental building blocks (i.e. the institutional structure, along with its genesis and evolution) governing the market rather than the current dynamics of the market itself. This research bridges the link between cause and effect by specifying the causal mechanisms that explain which rules of tenure matter for non-market housing developments, how they were institutionalized, and why they continue to affect housing outcomes in Greater KL.

The following main research questions frame the nature of this investigation. They aim to generate a better understanding of the process of institutional change for land tenure systems in Greater KL by focusing upon the British colonial period (1874-1957), during which significant aspects of the current institutional structure governing tenure were introduced and formalized. The questions also guide the research in seeking to explain why the dynamics of these transitions matter for current urban land markets.

- i. What land is available for the development of non-market housing in Greater KL and how do housing providers obtain the rights to it?
- ii. How does the institutional structure governing land tenure affect non-market housing outcomes and what are the important features?
- iii. How did the current institutional structure emerge and what were the critical junctures in its development?

- iv. What were the sources of institutional change and what are its stabilizing mechanisms?
- v. What is the best conceptual framework for understanding the dynamics of non-market housing development in Greater KL?

### *1.1.2 Research hypotheses*

This research is driven by two main hypotheses:

- i. Land tenure in Greater KL is limited by institutional entrenchments that emerge from path-dependent processes

The first hypothesis emerged from a review of the evolution of land tenure in the existing literature. The system of land tenure installed by the British in the Federated Malay States formed the basis of reference for successive British advisers in the Unfederated Malay States (Wilson, 1975) and when Malaya was constituted, served a model for the creation of a National Land Code (NLC) for the newly independent state (Salleh, 1989). The NLC 1965 remains the main legislation which amends and consolidates the law relating to land and land tenure in Peninsular Malaysia. This study argues that, looking at current institutional constraints, this evolution must be seen in the context of path-dependence (by identifying the self-reinforcement mechanism as well as the timing and sequence that underlies this process), which may explain why some constraints are entrenched.

- ii. Current tenure arrangements were negotiated between actors marked by power asymmetries, which still affect how current dealings are made

The second hypothesis is grounded in the theoretical approach that this research follows. As an institution, land tenure fundamentally seeks to control how land is owned and used. However, possession of rights to land often enables actors to also influence other institutional spheres and in consequence further strengthens their positions or weakens others. Following the historical institutional approach, an institution's ability to become a "distributional instrument laden with power implications" (Mahoney & Thelen, 2009) suggests that power asymmetries present during the initial conception of an institutional



arrangement may continue to affect how actors interact with and negotiate outcomes within these institutions at the present time.

## **1.2 Conceptual framework**

The thesis uses a case study of Greater KL to examine the role of institutional structure in determining the supply of land for non-market housing developments and how it affects housing outcomes. This study uses conceptual tools and approaches from institutional theory to frame and situate its findings. It primarily adopts the historical institutionalist approach to institutionalism, which conceptualizes institutions as a power distribution mechanism (Hall, 2009; Mahoney & Thelen, 2010; Thelen & Conran, 2016) or “macrostructures in which political action occurs” (Schmidt, 2014). The approach posits institutions as the “political legacies of concrete historical struggles” (Mahoney & Thelen, 2010), fundamentally arguing that “institutions cannot be explained solely by their contemporary effects” (Thelen & Conran, 2016). This conceptualization enables an examination of land tenure in Greater KL as an institutional structure beyond its current functional form and its mechanism for change and stability.

This research applies several conceptual tools and theories from the literature on institutional order, critical junctures, and path-dependence to the post-colonial context of Greater KL. It does so by merging these approaches to generate a two-part conceptual framework that explains the dynamic (which defines the period of institutional change) and static (which defines the stabilizing mechanism) components of its analysis. These concepts work together to describe how power asymmetries frame both past interactions that led to path destruction and creation in the development of the main institutional structure as well as current interactions which influences the bargaining positions of critical actors within the non-market sector and consequently, affect housing outcomes.

### **1.3 Thesis structure**

The thesis has 11 chapters, including this introductory chapter.

The research findings are presented in two parts to delineate the contemporary and historical component of the research. Chapters 5 and 6 form the first section of findings for the study. These chapters present the data and analysis of the current dynamics of the land and housing sector in Malaysia and more specifically, the non-market housing sector in Greater KL. Chapters 7, 8, and 9 form the second section of the study findings. These chapters identify three critical junctures that led to the formation of the institutional structures that govern and limit the actions and behaviours of critical actors in the land and housing sector, which are described and summarized in the preceding chapters.

A summary of the chapters of the thesis is provided in this section.

#### *Chapter 2: Literature review*

This chapter summarizes the gap that this research aims to fill. It surveys the existing literature to situate the research aims and objectives within the wider discourse on housing and land policy. It focuses upon two core areas that frame the nature of the study. The first introduces land as a factor of production for housing and describes how the distinctive nature of land affects its value as well as governance. The second core area is the variegated nature of property rights and land tenure, and here we focus upon how these terms have been defined and conceptualized in the literature. The aim of this chapter is to conceptually locate the role of land in housing production and highlight how property rights and land tenure institutions affect housing outcomes.

#### *Chapter 3: Conceptual framework*

This chapter introduces the conceptual tools and approaches used and outlines its conceptual framework. This conceptualization is guided by institutional theories and approaches from political science and sociology, which were adapted to reflect the findings. The chapter is organized into three parts. The first provides an overview of the literature on institutions, focusing upon how the main approaches to institutional analysis have defined and conceptualized the nature of institutions. The second part describes how institutional

change and stability are conceptualized within the main approaches to institutionalism. It describes the main conceptual debate on the sources of institutional change, the role of structure and agency in institutions. Finally, the chapter explains the theoretical and conceptual framework that guides the research and situates its findings.

#### *Chapter 4: Methodology*

This project is a single case study utilizing a range of qualitative methods designed to address the main research objectives. The study employs a two-part data strategy to bridge the analysis of contemporary findings and their historical underpinnings. It combines qualitative data from in-depth interviews with elite participants alongside archival data from repositories to illustrate this relationship. This chapter describes the case study selection, the two-part data collection process, and the process of data analysis used in the study.

#### *Chapter 5: Non-market housing in Greater KL*

This first findings chapter provides an overview of the land and housing sector in Malaysia and introduces a conceptualization of the housing system that frames the findings of the study in Chapter 6. It sets the scene for this research by describing the political, legislative, and administrative structure (i.e. the operating environment) that characterizes the context of the case study. It further describes the evolution of housing policy in Malaysia to demonstrate the policy interventions that have been undertaken and to illustrate the dynamic role of the state in housing provision. Finally, this chapter presents a conceptual analysis of the housing system in Malaysia, viewing the use of power (or lack of it) as an allocative mechanism to delineate the market and non-market housing sector. This chapter partly answers the final research question.

#### *Chapter 6: Actors, strategies, and pathways for housing development*

This chapter answers the first and second research questions. It presents an analysis of the current regulatory challenges that critical actors face in obtaining land for the development of non-market housing. The first part of this chapter identifies what land is available for housing development and presents a typology of the different categories of land in Malaysia according to their definition and how rights are allocated. The second part describes two

different pathways for development within the non-market housing sector and illustrates how critical actors navigate the negotiation of the rights to land during the procurement process. The research found that power asymmetries frame the nature of these interactions and play a critical role in determining housing outcomes. These findings indicate that critical actors extract power from three key features of the institutional structure to support their actions: (1) the allocation of allodial rights to land to the state government; (2) the nuanced relationship between federal and state government, and (3) the use of the Federal Constitution as a legitimizing instrument.

*Chapter 7: Critical Juncture 1: The transplantation of allodial rights into the rules of tenure*

This is the first findings chapter in the historical component of the research. This chapter describes the events leading to the first critical juncture and their impact. It provides an overview of the introduction of British influence in Malaya and its effects on land tenure in the Malay States, specifically the transplantation of a new legal system for land. This was primarily achieved through a two-pronged strategy that generated the space for the colonial government to alter and rewrite the rules of tenure as well as amplify the presumed legitimacy of these alterations, using an existing institutional arrangement for rule enforcement.

*Chapter 8: Critical juncture 2: The introduction of separate institutional spheres for government*

This findings chapter describes the antecedent conditions that led to the second critical juncture and specifies the institutional innovation that emerged during the period under study. It describes both the external and internal conflicts and developments that allowed for the passage of the federation scheme for the unification of the Malay States. This generated the institutional structure that introduced separate layers of government at the federal and state levels and consequently, altered the rule-making process of each state by amalgamating their individual constitutional orders into a collective.

### *Chapter 9: Critical juncture 3: The fortification of power*

This chapter identifies the last critical juncture and describes the events that led to its emergence. The analysis focuses upon a critical period in the formation of the country. It highlights the processes that resulted in the creation of the nation's Federal constitution and subsequently, the nation's independence from British sovereignty in 1957. Institutional flux during the post-war period provided the space for the renegotiation of the existing political structure and rule-making process in Malaya. The institution of the Federation of Malaya in 1948 cemented the integration of states previously comprising the Federated Malay States, the Unfederated Malay States, and the Straits Settlements into one political unit. During this process, several rules of tenure regarding land were negotiated and were inscribed in the resulting constitution.

### *Chapter 10: The institutional origins of power in land and housing*

This is the final findings chapter. This chapter applies conceptual tools from the historical institutionalist approach, which form the core of this study's theoretical and conceptual framework, to answer the fourth and final research question. It situates the findings from the preceding findings chapters within the conceptual and theoretical framework presented in Chapter 3 so as to generate understanding of the dynamics of current regulatory constraints on land faced by actors in the non-market housing sector in Greater KL. It does so by analysing how the institutional structure has facilitated enduring legacies that underpin existing power asymmetries within the non-market sector.

### *Chapter 11: Summary and discussion*

This chapter summarizes the empirical and theoretical findings of the study and emphasizes its contribution to knowledge. It also identifies other potential research topics that have emerged from the observations made in this study.

#### **1.4 Contributions to knowledge**

This study contributes to knowledge with its empirical and conceptual findings as well as methodology. The empirical and conceptual findings of this study contribute to a deeper understanding of the role of institutional structures in determining land and housing outcomes in Greater KL. Its methodology introduces a novel approach for analysing both historical and contemporary land and housing data. More importantly, this thesis stresses that the discourse on land and housing in Malaysia can benefit significantly from a richer discussion of the processes that underlie the institutional development of land tenure in the country.

This study introduces the use of a critical juncture framework as well as the historical institutional approach to generate new insights into how land and housing constraints in Malaysia are conceptualized. This novel approach enables this research to situate the current challenges of non-market housing delivery in the context of their roots in Malaysia's colonial history. More importantly, this approach provides new ways to conceptualize the land and housing sector in Malaysia that move beyond standard arguments on market efficiency.

Furthermore, this research introduces a novel approach to amalgamating contemporary and historical data within housing studies. The two-part data strategy utilized combines and assimilates the tools of historical and archival research with contemporary, qualitative methods to study the land and housing sector. The approach taken in this research provides an innovative methodology to bridge the analysis of contemporary land and housing data and their historical underpinnings.

Ultimately, this thesis seeks to catalyse ideas and trigger more scholarship on the role of institutional development in the governance of land and housing, particularly in regard to the post-colonial cities of Southeast Asia.

## **Chapter 2 Literature review**

This chapter outlines and frames the large body of scholarship in which this research is situated. Section 2.1 introduces land as a factor of production for housing, highlighting its distinctive nature and how this affects its value and governance. Section 2.2 explores the complexity of property rights and land tenure which forms the theoretical core of this research. Section 2.3 summarises the review and locates the gap that this research seeks to fill.

### **2.1 The supply of land for housing and the role of governance**

Adequate availability of residential land at affordable prices is essential for a well-functioning housing sector (Angel, 2000). As a factor of production for housing, the supply of land available for residential development and its constraints dictate how, where, and how many houses can be built. In this way, land is better conceptualised as space, anchored in its locational and geographical attributes rather than as a commodity or asset. How this space can be utilised or occupied over time is determined by the constraints that are placed upon it. For the housing sector, land supply constraints in the development process include physical, financial, and regulatory factors which may impose restrictions on available land, determine the length of the development period and/or increase the cost of development. This section discusses the distinctive nature of land that distinguishes it from other factors of production and how this distinction affects the way land is valued and governed in practice. Ultimately, the section seeks to situate the economic understanding of how land markets function against the wider context in which they operate, to make the case that the discourse on land values and markets must begin (not merely supplemented, as suggested by mainstream economics) with an examination of the elements that drive its innate value – the property rights that are associated with it and the institutions that determine its allocation.

#### *2.1.1 The inelasticity of land supply*

As a factor of production, land differs from capital and labour in that its amount is fixed and it cannot be produced, making supply highly inelastic. While reclamation of land from the sea has been a viable strategy for physical growth in city nations like Hong Kong, Macao and

Singapore, the fact remains that, as a resource, the stock of land is fixed within a geographically bounded area. While the supply of land can vary significantly across time and locations depending upon its corresponding demand and constraints, the total volume of land within that area does not change (Harvey, 2003; Oxley, 2004). Land that is deemed suitable for a specific use (be it for housing, agricultural or commercial use) simply cannot be moved from one place to another, because: “land is the place itself” (Ryan-Collins, 2017). By its very nature, land as a space to be occupied or utilized is immobile and eternal; this attribute impedes its capacity as a factor of production to adjust accordingly to the corresponding demand upon it. Unlike labour and capital, an increase in demand for land does not induce the production of more land nor can other land parcels be moved to meet the demand at another location. This inelasticity of supply makes land naturally scarce as a commodity; in a competitive market in which supply is limited and finite, *ceteris paribus*, this scarcity provides those who own or control land the monopolistic ability to set prices and determine its value.

In the economics literature, the value of land is fundamentally inherent in its locational and topographical attributes, i.e. both the actual physical place and its relationship to other places, depending upon its intended use and the demand for such use (Cheshire et al., 2014; Evans, 2004; Oxley, 2004). Theories of residential location and urban land values (see among others: Alonso, 2013; Brigham, 1965; Evans, 2004; Fujita, 1989; Kok et al., 2014; North, 1955; Oxley, 2004) observe that land values, prices, and the resulting configurations of land use are determined by a competitive bidding process that reflects the locational preferences expressed by households and firms in their optimization strategies to maximize utility and profits, subject to existing constraints. These preferences can be guided by factors such as accessibility, amenity levels, demographics, geography, and topography (*ibid*) which households and firms try to balance in a trade-off between cost and distance (from the places that they wish to reach). Thus, for housing developments, the demand and value of land intended for this use and, therefore, housing prices, is often dictated by the contiguity between the intended location or place with other places. It is vital to recognize that while some degree of substitutability is possible for individual dwellings – particularly between different housing typologies within the same housing market area (Oxley, 2004) – each



parcel of land is unique in its features and its spatial relationship to the proximity of jobs, good schools, public parks, or transportation networks, making locations that are primed and suitable for housing development relatively scarce and, often, without adequate substitutions (Ryan-Collins, 2017).

Furthermore, unlike labour and capital, as a factor of production, the scarcity in land exhibits both spatial and temporal dimensions – a plot of land in a particular location does not have any equivalent substitute in another location and its inherent locational value increases over time as the surrounding development proceeds and matures. For example, increments in locational value for existing housing developments can be induced by the development of new or improved transport links, accessibility, and amenity levels. In this instance, the natural scarcity of land, thus its value and/or expected price, increases with demand and over time without a corresponding response in quantity from the market or any increase in the cost of production for the owner. This attribute makes land (and housing) particularly susceptible as a vehicle for storing value and extracting economic rent (Evans, 2004; Oxley, 2004). The expected returns as an asset class incorporate both the current and expected future value of land, to the benefit solely of those who hold the rights to use, control, and/or alienate land, “unrelated to their costs of bringing it into production” (Ryan-Collins, 2017). Classical economists argue that economic rent, which refers to the surplus gained through the possession of a factor of production in excess of the amount needed to secure its use for an intended purpose, is unproductive and distortionary to economic growth; these attributes, however, mean that it can theoretically be appropriated through taxes on site values or windfall gains without any effect on efficiency or equity (Oxley, 2004). In practice, however, it is difficult to separate unproductive economic rents from productive payments in land value increments as there is no clear method to accurately delineate them.

Nevertheless, many mechanisms have been used to limit the economic rent that accrues to land values for development - often termed ‘value capture’, ‘betterment’, or ‘planning gains’. These interventions aim to limit the magnitude of this unproductive surplus (which can grow excessively without limit given a mainly inelastic supply) and incentivises rent-seeking behaviour rather than investment in other productive activities. Interventions to address

this market failure are usually designed following the regulatory or planning traditions of the country and often serve to also control and/or shape development processes according to the development goals of the country/area (Cheshire et al., 2014). Most commonly used, land use regulations (such as zoning, planning permissions, growth controls, or development taxes/levies) aim to restrict or withdraw land from buildable supply for particular uses (to reduce the associated negative externalities) in favour of an intended use by distorting the incentives or expected gains from the development process (Gyourko & Molloy, 2015; Hilber & Vermeulen, 2016; Quigley & Rosenthal, 2005). Kok et al. (2014) further contend that land use regulations can also indirectly shape the character of neighbourhoods and cities through restrictions on development, which inadvertently affects prices and values. For residential developments, empirical evidence on the effects of these regulations on the housing market have been mixed. These regulatory constraints may increase the cost of housing construction and housing prices, inhibit new construction, and reduce the elasticity of housing supply. However, overall effects on the housing market vary depending upon what regulations are in place and how their effects are measured (see Gyourko et al., 2008; Huang & Tang, 2012; Ihlanfeldt, 2007; Mayer & Somerville, 2000; Quigley & Rosenthal, 2005). The empirical challenge to the evaluation of these regulations and their effects has generally been hampered by a lack of direct evidence of their causal effect, made difficult by the wide-ranging constraints that take shape in a particular locality. It is clear, however, that artificial land supply constraints alter the expected interaction between supply and demand even further, making unexpected consequences that result from any interventions in land and housing markets difficult to account for.

The natural scarcity of land makes it a distinct factor of production, granting owners possession of a good that does not conform to the same rules of supply and demand that regulate the prices and markets of other commodities. This attribute makes market failure naturally endemic in land markets, motivating regulatory interventions that attempt to restrict unproductive surpluses and minimize incentives for rent-seeking behaviours. Actors in land markets optimize their supply and demand of this factor of production subject to these prevailing regulatory constraints. Fundamentally, these constraints alter and regulate what land is available for development and how it can be used. For those who own or control

land, these regulations circumscribe and define how they can deal with their land and under what conditions, i.e., it defines and allocates the property rights associated with their land.

### *2.1.2 Land market regulations and property rights*

Without any regulatory constraints, the price and elasticity of the supply of land for housing can be said to be determined by the demand derived from housing requirements (Angel, 2000; Harvey, 2003; Oxley, 2004). However, the demand for residential land and the ability of actors to respond is likely situated within a complex system of regulations which define and allocate the property rights associated with the land, e.g., zoning policies in the United States or planning policies in the United Kingdom determine how plots of land can be used. Variations in these rights determine the availability and characteristics of the land supplied, which will be reflected in the variations in demand for it (ibid.) The diversity by which the right to land has been governed throughout history goes beyond the limited notion of private property that is prevalent in most Western societies today. In medieval Europe, feudal systems facilitated the transfer of rights to use and occupy land from the monarch or the church to the nobility thus the peasantry, often in exchange for labour or allegiance. Under Islam and Judaism, the possession of land by rulers is often acknowledged but total ownership is deemed to be held by its Creator (Linklater, 2013). Even today, variations exist in how land is governed - both in the fundamental manner in which rights are allocated and in the administrative systems that are put in place to control land use. In Peru, different legal and judicial systems are in place to govern the use of individual and communal lands which reflect the different institutions that exist in Andean peasant and Amazonian indigenous communities (Deininger et al., 2011). In China, the tenets of urban land governance has continued to evolve following the re-articulation of the state and its wider role (Xu & Yeh, 2009).

What is pertinent across these different systems of regulations for land is the central idea that a web of complexity permeates the relationship between societies and the land that it occupies. These systems of regulation are often anchored in the culture and history of the country or society, which affects the behaviour and incentives of actors within the system (Evans, 2004; Linklater, 2013). The customs and laws of each nation dictate how rights to

land are allocated and therefore, how access to it for specific purposes is governed. Given the contiguous nature of land to its surroundings, actors can only control or exercise the rights to their plot of land with the agreement of others as any alterations to one's holding directly affects the value and usability of other plots (Evans, 2004; Ryan-Collins, 2017). Control over how to use land is in fact achieved and made legitimate by ongoing societal interactions with these elements to the benefit of those who can influence outcomes in these processes. This relationship is neither static nor binary – an individual or a group does not, in the first instance, have absolute control over the plot of land it owns or occupies. Rather, the rights to land that are held are constrained by the conditions negotiated with others, which may evolve as dynamically as the relationship between land and society as well as among members of the community evolve. This layered approach, wherein the rights of use, occupancy, and alienation (among others) are not necessarily ascribed to ownership, makes control over land more reliant upon societal interactions compared to other factors of production.

More fundamentally, however, in places where land resources are governed by a system of property rights, land without any rights attributed to it will not command any value nor is it available to the market for development. Land markets, therefore, facilitate trade in the bundle of rights to act upon land rather than in the physical plot of land itself (Alchian & Demsetz, 1973; Musole, 2009; Oxley, 2004). It is vital then to acknowledge that the process by which rights to land are allocated is inherently political and that land markets, ultimately, act as a medium to transfer the power to control land between actors, a feature that is often not accounted for in the economic analyses of these markets. This less normative conceptualization of the land market is important given that land and its governance is often a complex entanglement of social, economic, and political forces. Apart from its competing uses as a factor of production for housing, agriculture, and industry, land also serves as territory in socio-cultural and political discourses. Without accounting for this complexity, policy discourses surrounding land governance run the risk of magnifying issues in one dimension at the expense of others (Borras Jr & Franco, 2010; Musole, 2009). A more detailed discussion of property rights and their complexity is presented in the next section,

which defines and explores the relationship between property rights and land tenure in the context of housing production.

## **2.2 Property rights, land tenure, and why it all matters for housing**

Existing studies on Malaysia's land market highlight the regulatory land supply constraints inhibiting the development process (see among others: Abdul Fatah, 1988; Ganason, 2012; Mohd et al., 2009; Omar & Yusof, 2002; Voon, 1976; Zaki et al., 2010; Zulkifli et al., 2015). As discussed in the previous section, while many of these point to existing structural barriers in place in the local planning or land administration system, more fundamentally these barriers illustrate how existing rules of tenure (i.e., land rights allocated to the state or individual) restrict the actor's ability to respond appropriately to the market. This section discusses land tenure and its relationship with property rights, how legitimacy in property rights and land tenure is attained based on both legal and non-legal frameworks, and ultimately, the complexity of land tenure systems in practice and the ramifications for policy. It is, however, vital to first recognize that land tenure and property rights are not the same thing and refer to distinct frameworks of rules and regulation that interact with one another. Thus it is important to understand how each element is defined and conceptualized and how they interact in a system.

### *2.2.1 Property rights and land tenure*

Property rights are an "instrument of society" (Demsetz, 1974). They constitute "the authority to undertake particular actions related to a specific domain" (Schlager & Ostrom, 1992). Theoretically, the private ownership of property rights implies recognition from the community of the owners' right to exclude others from exercising the bundle of rights that were granted to them (Alchian & Demsetz, 1973; Demsetz, 1974). It is a form of reciprocated expectation of behaviour that guides an individual in their dealings with other people, often underlining characteristics such as "exclusivity, inheritability, transferability, and enforcement mechanisms" (Feder & Feeny, 1991). Possession of a right implies that others must observe and authorize the right-holder's ability to exercise their right. In this way, property rights in land may refer to rights of use (e.g., hunting, grazing, cultivation, mining, or logging), or rights of alienation (e.g., who can one sell land to or purchase land from).

Rights that are conferred may be exclusive or shared among multiple holders and may also have a temporal dimension – a right that one holds currently may not necessarily be held indefinitely. These rights are regulated by a set of rules that specify what these rights are, how they operate, and to whom they are allocated.

Land tenure is the relationship between people (as individuals or groups) with respect to land, which can be legally or customarily defined (FAO, 2002). Rules of tenure define how property rights to land are allocated and governed among members of society; this determines how rights are granted and regulated to use, control, and transfer land. As an institution, a land tenure system is a consolidation of the social, economic, and political processes in place to govern the behaviour of society with respect to land as a resource. These relationships may be held in place through formal legislation or customary practices and can be well defined or ambiguous. Together, land tenure systems and the corresponding property rights ultimately define: “who can use what resources for how long and under what conditions” (ibid).

On their own, however, both land tenure and property rights to land correspond to distinct levels of operational and decision-making mediums of transaction/negotiation. For example, a developer who operates within a planning system can hold the right to develop a parcel of land without having the right to decide how it can be developed. These levels can be differentiated by distinguishing the order in which they operate – property rights or similar institutional arrangements reside at the individual or operational level of action while tenure or other collective and/or constitutional choice actions form the constitutional order, that is – “the rules for making rules” (Feder & Feeny, 1991; Schlager & Ostrom, 1992). This distinction is crucial and often neglected in the property rights economic literature; it highlights the different processes (and the actors that participate in them) that determine how a society’s relationship to land is constituted and can evolve. It should be noted that this distinction is different from simply holding a smaller bundle of rights, which is extensively reflected in the literature through property right typologies (see among others: Payne, 2004; Schlager & Ostrom, 1992) – one can hold the largest bundle of rights to land, which in most cases refer to a freehold interest in private property, but may still be subject to land use controls by the state or the law. Regardless of the property rights held by an actor, they may

have little power to shape the land tenure system within which these property rights are governed.

While the traditional/conventional property rights approach in economics (see among others: Alchian, 1965; Barzel, 1997; Coase, 1960; Demsetz, 1974; Furubotn & Pejovich, 1972; Libecap, 1986; North & Thomas, 1973) acknowledges the role of actors and their incentives in the utilisation and allocation of resources, its conceptualization of property rights as an instrument that guides these actions relegates it to a self-regulating and static system which, when well defined, allows the invisible force of the market to determine its most efficient outcome and to minimise negative externalities, independent of other institutions (Musole, 2009; Williamson, 2000). Following this approach, changes to, and the evolution of, property rights only serve to affect outcomes that relate to actors' incentives and costs. In the case of land, in theory the demand to apply and enforce more precise and secure land rights arises from an increased need to settle land disputes when land (in the form of access to or usage) becomes valuable and scarce (Durand-Lasserve & Selod, 2009). This evolution has been attributed to "a combination of increasing population density, technical progress, commercial integration and reduction of risk" (Deininger & Feder, 2001). Given that the conventional property rights paradigm and its analysis using economic theory is primarily anchored in the incentives of actors, this conceptualization oversimplifies and excludes the complex mechanisms and interdependencies with other institutions (such as land tenure) that structure and modify the property rights system, which in turn also affects incentives. Ultimately, the exclusion of interactions with other institutions from this conceptualization of property rights limits its application given that in practice property rights are multi-dimensional in nature and often reside within and amongst other institutional spheres. The new institutional economics (NIE) approach attempts to address this limitation by emphasizing the impact of positive transaction costs on the allocation and enforcement of property rights, consequently affecting prices and the efficiency of the market for them more generally (see among others: Coase, 1960; Musole, 2009; North, 1991b). Taking this into account enables the NIE approach to naturally acknowledge the existence of institutions that structure and modify the system of property rights which gives rise to this market failure. Changes to these institutions therefore affect how property rights are assigned and

exercised, and consequently, the mechanism for resource allocation that it incentivizes (ibid).

A flaw in both conceptualizations, however, is that land tenure and property rights are presented as neutral instruments guided only by prices and the markets, when in reality they are instruments of society that can be guided by many forces and actors. As acknowledged by Demsetz (1960) and Coase (1960), while oversimplification in these models (particularly in the neoclassical paradigm) can ease and guide thinking in theoretical exercises, their ability to explain institutional evolution (and how this affects outcomes), particularly when it deviates from theoretical predictions, is limited to a starting point in the exercise. Relevant to this research, the formalization of land rights, from *de facto* to *de jure* rights, should in theory mark the point at which negotiated communal systems receive the support of a legal system. In practice however, land tenure systems rarely follow this binary process and often exist as a continuum (as illustrated in Table 1), particularly in developing countries where a diversity of legal systems and/or ownership patterns may coexist (Deininger & Feder, 2001; Durand-Lasserve & Selod, 2009; Payne, 2004). The resilience of prevailing systems of property rights, which may co-exist with others which are deemed to be more efficient, runs contrary to what is predicted by economic theory – which stresses the need to default to centrality or an equilibrium outcome. Musole (2009) contends that the failure of policies or state intervention measures to eliminate “inefficient or unproductive” property rights regimes implies that other intervening factors may exist. The NIE approach attributes this disjuncture between theory and practice mainly to incoherence between formal rules and informal constraints (North, 1991b), an asymmetrical bargaining power between actors (Greif & Laitin, 2004; Libecap, 1986; North, 1991b) and the lack of institutional knowledge or motivation for change (Heiner, 1983; Keogh & D’Arcy, 1999; Musole, 2009). This acknowledgement of other intervening factors is a necessary step in the conceptualization of property rights as being more than just a mechanism to attain efficiency in land markets.

Nevertheless, NIE’s ontological focus upon transaction costs and relative prices limits the approach in its conceptualization and analysis of property rights systems and the institutions that govern and/or affect them, particularly for land tenure, the main subject of this research. As discussed in the previous section, land markets are inherently political,



serving as a medium to transfer the power to control land between actors, which consolidates a multitude of other privileges. What rights can be transferred in these markets and how they are determined matter. Whilst the NIE approach distinguishes between property rights as an institutional instrument and land tenure as its guiding institution, omission of the political nature of these processes from its institutional analysis, in favour of specifying more quantifiable elements like relative price and transaction costs, renders its approach restrictive, particularly when the dynamic operating environment of land markets and their interaction are taken into consideration. It is difficult to specify and analyse mechanisms that influence institutional form and function when these complexities are modelled into a conceptual framework with a singular purpose i.e., to minimize/eliminate the transaction cost. A more detailed critique of the NIE's approach to institutional analysis is included in the next chapter, which lays out a conceptual framework for institutional analysis for this research.

**Table 1 Land tenure continuum**

<div>Tenure status</div> <div>Level of rights</div>	Squatters <sup>a</sup>		Occupants in unauthorized land subdivision		Holders of temporary permits to occupy	Holders of long-term or renewable permits to occupy	Leaseholders		Long-term leaseholders (registered leaseholds)	Freeholders
	Not protected against forced evictions	With temporary protection against forced evictions <sup>b</sup>	On sites suitable for development	On sites eligible for upgrading			With no formal contracts	With formal contracts (short-term renewable leaseholds)		
No rights	●		●							
Rights limited to legal or administrative protection against forced evictions		●	●	●						
Access to a limited number of rights to use <sup>c</sup>				●	●	●	●	●		
Access to the full bundle of rights <sup>d</sup>									●	●

Notes:

a. These refer to pavement dwellers, squatters, and tenants in squatter settlements.

b. Squatter settlements declared as 'slums' in some Indian cities or located in Special Zones of interest in Brazilian cities can benefit from some legal or administrative protection.

c. Land can be developed, inherited, sublet.

d. Land can be developed, transferred, inherited, mortgaged etc.

Source: Reproduced from Durand-Lasserve & Selod (2009)

### *2.2.2 Legality vs legitimacy in property rights and land tenure*

The preceding observations highlight that the simplification of property rights, both as a conceptual construct and as an institution does not reflect its complex multidimensional nature in practice. In the case of land, the complexity by which property rights and its governing institution, land tenure, are allocated and exercised transcend the dichotomy between formality and informality that is usually used to classify it. Formal property rights are generally understood to be rights “that are explicitly acknowledged by the state and which may be protected using legal means”; informal rights, by contrast, lack these attributes (FAO, 2002). While classifications that use this aspect – even if only as a basis to generate a wider continuum of tenure typologies (e.g. Table 1) – are useful for analysis, often this still obscures the true nature of the property rights that are held by claimants (ibid). Fundamentally, the bundle of rights allocated to each claimant under any tenure system depends upon where these rights attain legitimacy; property rights are enhanced by the law but can exist and be exercised without it, e.g., via social convention, informal contracts, or other non-legal frameworks (Alchian & Demsetz, 1973; Musole, 2009). This is clearly illustrated by the plurality in property right regimes that often exist in countries that have been colonised, where legal systems generally reflect the transplanted tenure patterns resulting from colonisation while prevailing tenure arrangements co-exist in practice outside the legal system (see among others: Acemoglu et al., 2001; Njoh & Akiwumi, 2012; Payne, 2004; Berkowitz et al., 2003). It is clear that legal frameworks are not the only defining institution for property rights and an examination of land tenure systems must consider both legal and non-legal influences in its genesis, evolution, and administration.

Legal frameworks and their influence on property rights regimes and land tenure are widely acknowledged in the literature (see among others: Alchian, 1965; Demsetz, 1974; Furubotn et al., 2005) . A nation’s legal order can be developed internally or take on a transplanted legal code through imperialism, importation, or adaptation. In countries that have developed their own legal orders, legal traditions can vary wildly. For example, English law is common law, which comes into being through decisions made by judges that are incorporated into legislation while civil legal traditions used by French, German, and Scandinavian laws depend upon scholars and legislators, following the basis of Roman law (Porta et al., 1997). This diversity in legal order is often reflected in the way

property rights are allocated and enforced –English common law served to protect Parliament and property owners from expropriation by the sovereign while civil law was developed as an instrument for state-building and economic control (ibid). Countries with transplanted legal codes often exhibit the same idiosyncrasies in their legal origins, albeit with increased complexity and complication when adapted to and exercised in the local context. Fundamentally, the way in which these legal codes are transplanted matters. For example, Berkowitz et al. (2003) emphasizes the gaps in enforcement that follow adaptation of European and American legal systems by former socialist countries in Central and Eastern Europe and contends that the importation of legal codes without the accompanying legal institutions renders these laws ineffective. For colonised nations in particular, their legal traditions can mainly be attributed to the coloniser's legal code – which may be transplanted in parts and/or as a whole (Acemoglu et al., 2001; Porta et al., 1997; Berkowitz et al., 2003). The incorporation or exclusion of pre-existing legal orders (i.e., pre-colonial or those left by colonial powers) into the legal code during occupation can also determine how legal systems are ultimately formulated in the independent nation. Njoh & Akiwumi (2012) illustrate both elements clearly in their comparative analysis of land tenure systems in Cameroon and Sierra Leone. While both countries had similar land tenure systems in the pre-colonial era, Sierra Leone (which came under British rule) preserves a dual tenure system, with customary law dominating land governance throughout the country (with the exception of the Western Area). By contrast, Cameroon (which came under German and French rule), customary laws have no officially recognized roles in the land domain. This is argued to be largely due to differences in the English and French legal traditions and colonial philosophies (ibid).

Non-legal frameworks affect property rights and land tenure through practices that guide behavioural expectations which reside beyond the official or state sanctioned legal system. The legitimacy of claims/rights that are secured through these practices often emerge simply from community recognition of the owner's right to exclude others from exercising the bundle of rights granted to them (i.e., how property rights are fundamentally defined), which can be anchored by, among others, social or cultural conventions, religious doctrines or jurisprudence, informal contracts, and/or customary law. Legal scholars provide a useful lens through which to explore this multiplicity using the legal pluralism approach, which contends that many legal and normative frameworks coexist and affect how dealings are exercised and enforced in a social field/domain,

depending upon which legal order is invoked by claimants (see among others: Griffiths, 1986; Meinzen-Dick & Pradhan, 2002; Merry, 1988; Tamanaha, 2008). This contrasts with the dominant ideology of legal centralism, which conceptualizes the law as a: “unified and uniform system administered by the state” (Tamanaha, 2008). Meinzen-Dick and Pradhan (2002) argue that the dominance of legal centralism has led to the consolidation of property rights through statutory law, emerging from a flawed conception of property rights (and in consequence, land tenure) as “unitary and fixed, rather than diverse and changing”. Recognition of the varied and possibly overlapping bases for claims in property rights is vital so as to advance a more accurate and rich understanding of the operating environment that users or claimants face in practice.

The ramification of this plurality is not inconsequential. Conflicts arising from the disjuncture between different legal or normative frameworks regarding tenure often stem from how legitimacy over these systems is achieved and enforced. It is necessary to recognize that various legitimizing institutions coexist and may be unequal in power (ibid). To understand how conflicts arise, it is useful to illustrate how plurality in property rights and land tenure manifests in practice. In situations in which claimants have access to a multiplicity of legitimizing institutions (which can be legal or extra-legal), individuals will incline towards or utilize one or more institutions that will benefit them the most – depending upon, among others, “expediency, local knowledge, perceived contexts of interaction, and power relations” (Spiertz, 2000) – in a process known as “forum shopping” (Benda-Beckmann, 1984) or “rules shopping” (Benton, 1994). With land (and natural resources generally), this is further complicated by the varying degree of rights, i.e., both use rights and decision-making rights, across many different regimes. Conflicts arise when different claimants use different institutions to rationalize and legitimize their claims/rights. Resolution of conflicting claims will depend upon a multitude of intervening factors (e.g. power relationships, history, ecology, changes in resource flow, and social relationships) that determine how each legitimizing institution acquires its influence, as well as how strongly it is supported by the collective within the specific context that it currently operates in (Meinzen-Dick & Pradhan, 2002). This dynamic evolves, being subject to negotiation and re-interpretation amongst those that call upon these institutions to substantiate their rights/claims (ibid).

To illustrate this complexity, first consider the multiple institutions involved in determining how land may be inherited by a person in Negeri Sembilan, a state in Peninsular Malaysia. Unique to the state, communal matrilineal land ownership is a customary practice among the Minangkabau people and is protected by the state through a statute on customary land laws (Mohamad, 2016). This practice runs contrary to Islamic jurisprudence (which regulates matters related to Muslim inheritance for the state) and land laws in other states (as land is regulated at the state and not at the federal level in Malaysia). Depending upon whether the claimant is an ethnic Minangkabau, a native resident of the state, and/or is Muslim, claims to land as inheritance can be made through any or all these legal institutions. In this example, the issue of legality is not contested when claimants forum shop as all pathways for claims are both legal and legitimate. Now consider, by contrast, the complexity in overlapping claims for water use rights in Kenya's Nyando basin, which is inherently tied to land rights in the country (Meinzen-Dick & Nkonya, 2007; Onyango et al., 2007). When land on the Kiptegan site was privatized and sold to smallholders, it was done without consideration of its effects on communal water access points. While strong social norms in Kenya dictate that everyone has the right to use water, landowners were not legally required to grant access to water and did not do so, effectively restricting this right of use. This conflict was resolved when, through negotiations, several landowners agreed to allocate a part of their land so as to enable development of a communal spring (ibid). In this instance, the disjuncture between how water rights are exercised in practice and how they are codified in state law (particularly when tied to land rights) highlight how access to different legitimizing institutions are available to different claimants and how, when the legal and extra-legal components interact, legality does not necessarily supersede legitimacy in determining outcomes. (Boamah & Walker, 2016) further contend that these dynamics, wherein both legal and extra-legal dimensions exist, provide avenues for users to exploit cleavages in rule-making and pursue optimization strategies in land use that are: "paradoxically legal and illegal at the same time". In urban Ghana, this has led to the development of urban spaces that both comply with and transgress different legal orders that coexist in Ghana, further complicating the conventional dichotomy between formality and informality that is used to classify urban spaces (ibid).

Ultimately, however, while the legal pluralism approach provides a powerful conceptual lens through which to further understand how multiplicity in legal and normative

frameworks coexist and affect dealings in property rights and land tenure, the ontological tools of legal pluralism largely anchor its conceptual framework and analysis to the dichotomy of legal versus non-legal institutions. This limits its capacity to analyse property rights and land tenure as evolving institutions that often sit at the intersection of economic, legal, and social institutions – the main objective of this research. Furthermore, how a legal and non-legal institution is defined – that is, what is law and how should it be delimited among other systems of normative ordering – remains a contested element among legal pluralists, although some recent developments in this tradition have sought to move away from this dichotomy (Tamanaha, 2008).

### *2.2.3 The complexity of land tenure and its implications for housing policy*

It is clear from the preceding observations that property rights and land tenure are neither neutral instruments of the market nor can they be easily sorted into clean and sterile categories, particularly in contexts in which plurality is the norm rather than the exception. It is crucial that the discourse on these institutions and those that they affect reflect the complexity that is innate in property rights and tenure arrangements so as to achieve a rich and full understanding of the dynamics that drive trends in prices, behaviours, and policy-making/reform. The exclusion of the variegated nature of property rights and land tenure in the contemporary analysis of land and housing markets, in favour of a more sterile conceptualization that is often propagated by neoclassical economic models, has led to the erroneous conceptualization and idealization of these institutions as ‘efficient and productive’ if and when all frictions and/or transaction costs can be removed. As argued, this conceptualization fails to account for the inherently political and contextual dynamism of these institutions that renders them neither fixed nor unitary. The misspecification of these institutions has led to a focus upon the privatization and liberalization of property markets as the main policy response to combat land and housing challenges in mainstream policy debates, driven by a general belief that unconstrained market forces is the panacea (Ryan-Collins, 2017). This belief has manifested itself in the way land and housing challenges are addressed in at least two major ways.

The first is the unbridled inclination towards formalization in both land and housing development. This can be observed most starkly with the rapid adoption and propagation by governments, policy-makers and industry professionals alike of De Soto’s (2000) call

for formalization, fuelled by the strong and wilful assertion that, without legality, insecurity proliferates (Gilbert, 2012). Even as evidence mounts against De Soto's claims (see among others: Bromley, 2009; Deininger & Feder, 2009; Durand-Lasserve & Selod, 2009; Payne, 2004; Von Benda-beckmann, 2003; Woodruff, 2001), governments and international organisations have not been discouraged from following his recommendations, which at their core, amalgamate the neoliberal ideas of: "market forces, sensible borrowing and individual initiative, and the joys of ownership in a form that promises to bring economic growth to all" (Gilbert, 2012). More generally, driven by the promise of productivity and efficiency that results from greater formality and security, policy reforms have taken to the idea of developing the 'best' (or second best) institutions (Rodrik, 2008) to govern dealings in land and housing. As discussed, the reliance upon legality alone ignores the multiplicity of both legal and normative frameworks that often provide overlapping bases for claims in property rights and land tenure. By neglecting to recognize other legitimizing institutions, interventions in land and housing developments may have led to the creation of "empty or non-credible institutions" that prioritize form over function (Ho, 2014, 2016).

Second, the misspecification of property rights and land tenure as neutral and insular institutions has allowed for the pervasive commodification of land and housing as a factor of production, paving the path to their unrestrained privatization and financialization. The contemporary and widespread treatment of land and housing as a commodity to be freely traded and used as collateral (Aalbers, 2017; Fernandez & Aalbers, 2016) stems from a failure to associate them with the nature of the institutions that govern how they are used and allocated. These institutions are, as discussed, glaringly not neutral and steeped in power and class relations (Ryan-Collins, 2017). Critically, Marx contends that the separation of land and housing from their governing institutions provides the conceptual space in which the supply and demand for land and housing can be subjected to the same rules as any other commodity (Gunnore, 2014). This ideological postulate enables the pursuit of interventions that are based on the premise that efficient market forces should play a defining role in guiding and regulating the price and allocation of land and housing. This is starkly observed in the mainstream policy debate where interventions to curb rising property prices are mainly concerned with improving supply side competitiveness and intensifying the use of housing finance to alleviate demand side pressures (Fernandez & Aalbers, 2016; Ryan-Collins, 2017). In doing so, these



interventions neglect to account for the role and influence of property rights and land tenure institutions in driving and determining prices, behaviours, and policy.

Ultimately, a simplistic and objective conceptualization of land and housing markets, anchored by the disengagement of existing studies with scholarship that reflects the complexity of the institutions that govern and constraint activity within the sector, has allowed for the misspecification of policy solutions to address challenges faced in the development of housing.

## **2.3 Summary**

This chapter explores and synthesizes the wide-ranging scholarship on land and housing to conceptually locate (a) the role of land and land markets in housing production, and (b) how property rights and land tenure institutions influence outcomes of housing policy.

In summary, this literature review leads to the following observations:

- a) The natural scarcity of land makes it a distinct factor of production, granting owners possession of a good that does not conform to the same rules of supply and demand that regulate the prices and markets of other commodities.
- b) Economic conceptualizations of the value and markets for land exclude the political nature of the process. Land value is determined by the rights that are allocated to it and allocation of these rights is not a neutral process.
- c) The variegated nature of property rights and land tenure in the contemporary analysis of land and housing markets is overlooked in favour of a more sterile conceptualization that is often propagated by neoclassical economic models, leading to the erroneous conceptualization and idealization of these institutions as efficient and productive.
- d) The misspecification of these institutions has led to a focus upon the privatization and liberalization of property markets as the main policy response to combat land and housing challenges in mainstream policy debates. This in turn has led to an unbridled inclination towards formalization in both land and housing development as well as the unrestrained privatization and financialization of land and housing more generally.

Ultimately, these observations highlight the need for a conceptual framework that can accurately reflect the complexity of property rights and land tenure institutions and their impact on housing policy. Several approaches to institutional analysis that may be useful in this exercise, e.g., NIE and legal pluralism, are briefly introduced and critiqued in the preceding discussions with the object of substantiating the foundations of the next chapter, which develops and lays out a conceptual framework for the institutional analysis used in this research.

## **Chapter 3 Conceptual framework**

This chapter explores and outlines the theoretical frame of the research. It provides a critical overview of the major approaches to institutional analysis and presents the argument for why historical institutionalism is appropriate to this research. Section 3.1 defines institutions and illustrates their complexity. Section 3.2 discusses institutional change and endurance. Section 3.3 presents a conceptual framework for institutional analysis for this research.

### **3.1 Institutions: Form, function, and credibility**

The definition of institutions can vary within and across disciplines as well as according to the object of study. It can, however, be broadly defined as the “humanly devised constraints that structure political, economic and social interaction” (North, 1991a), and includes both formal rules such as laws, standards, and constitutions as well as informal constraints such as customs and traditions (ibid.). A narrower definition of institutions sees institutions as: “collectively enforced expectations with respect to the behaviour of specific categories of actors or to the performance of certain activities” (Streeck & Thelen, 2005). For cities, Sorensen (2015) uses this definition, seeing planning institutions as “collectively enforced expectations with respect to the creation, management, and use of urban space”, and arguing that a narrower definition enables a more focused examination of the formal legal-political institutions that structure urban space. Given the wide and cross-disciplinary scholarship on institutions, how institutions are defined and characterized by scholars reflects the theoretical approach that is used to guide their analysis. This section provides an overview of the main approaches to institutional analysis.

#### *3.1.1 Rules of the game*

Institutions, in all their forms and manifestations, serve to structure how individuals behave in and make sense of their interactions with other people. These ‘rules’ set out expectations of behaviour upon the individual to allow replicable and predictable outcomes to emerge from their interactions with others in otherwise diverse and complex situations and settings (Ostrom, 2005). However, depending upon the rules, situations, or settings as well as their accompanying assumptions, how institutions are specified and conceptualized for the purpose of analysis can differ significantly (March &

Olsen, 2008; Shepsle, 2010). Differences stem from a divergence in understanding the nature of institutions (their form) as well as the processes by which they achieve their aim of structuring behaviour (their function and credibility). Institutionalism, across its diverse approaches, differs from pluralist and structural-functionalist accounts of institutions by inferring the autonomy of institutions as entities in their own right – institutions are more than just a medium for different competing social forces or tools utilized by social groups (Thelen & Conran, 2016).

Following the rational choice (RC) tradition, institutional economists generally characterize institutions as a form of game played by rational economic actors in the analysis of economic institutions, where equilibrium is achieved subject to bounded rules which are exogenous or endogenous to the game, depending upon how the play is conceptualized. When rules are exogenous to the game (i.e. they are not affected by players, are assumed to endure, thus they are regarded as self-enforcing), actors are given a fixed set of alternatives at any point in the game tree and make decisions based on these given choices (Shepsle, 2016). This results in a structure-induced equilibrium as deviations from the underlying structures are impossible (North, 1991a; Shepsle, 1979). Institutional analyses which utilize this conceptualization focus, by design, upon the outcomes that arise from the play. As rules do not change, differences in outcome are attributed to the actor's behaviour and rational decision-making process. By contrast, the assumption of endogeneity in the rule making process generates an equilibrium institution instead – rules are chosen and maintained by actors in the game, which generates an equilibrium of behaviour when nearly all actors subscribe or adhere to them (Calvert, 1995; Greif, 2006; Shepsle, 2016). This equilibrium, which is generated as the game form itself, must emerge as the rational choice for nearly all actors in order for this to occur. Thus changes to the setting or operating environment in which the game is played (e.g. a technological development) may alter actor preferences, behaviour, and choices, disrupting the overall rules equilibrium (ibid). Institutional analysis following this approach “does not assume that compliance with the rules necessarily occurs”; this allows deviation from the game form and an exploration of how those changes emerge (Shepsle, 2016). Despite this slight difference, both conceptualizations anchor institutions in the pareto-optimal equilibria of their form and function, which can only be disturbed when the rules or context/game form of the play is altered exogenously. More fundamentally, a game form view of institutions limits the rational choice approach to

institutional analyses that are not spanned or stretched over long periods of time. The analytical basis of this approach needs a duly specified field of actors, preferences and pay offs with a beginning and an end, which increases in unmanageable complexity when this temporal aspect is extended (Pierson & Skocpol, 2002). This makes it useful for the analysis of mainly temporal static phenomena rather than slow-moving macro or historical processes (ibid).

Similarly, the sociological tradition in institutionalism views the institution as the determining force in structuring individual behaviours and outcomes, similar to the role of markets in economic analysis (DiMaggio & Powell, 1983). The equilibrium institution that dictates actors' behaviours seeks a convergence of individual organizations and practices into a homogeneous set of social rules to be followed and adhered to (Thelen & Conran, 2016). This homogeneity results in a stable and routine self-enforcing social script that guides future behaviour. However, the mechanism by which this occurs is conceptualized differently. While the rational choice approach dictates that an equilibrium is attained when individual actors converge towards the best pay-off or outcome for their choice, the sociological institutionalist tradition posits that rationality itself is: "socially constructed and culturally and historically contingent" (Schmidt, 2014). 'Appropriate' behaviour is thus structured through collective cognitive scripts that consist of norms, cognitive frames, and meaning systems that "define and defend interests" of actors that control this process (Thelen & Conran, 2016). How and why these scripts are constructed, interpreted, and maintained by actors is central to inquiries which follow this tradition, which allows scholars to account for and explain individual reasons for actions. Nevertheless, its conceptualization of institutions as an equilibrium, like the rational choice approach, makes it similarly useful for mainly time-static studies.

The historical institutionalist (HI) tradition provides a hybrid conceptualization of institutions based on the other two approaches by acknowledging both their coordinating function (the rational choice approach) and their role as an anchor for cultural or social norms (the sociological approach), while positing that institutions are: "political legacies of concrete historical struggles" (Mahoney & Thelen, 2010). Rather than an equilibrium, this conceptualization positions institutions as a dynamic site for contestation to determine the 'appropriate' structure or rules for behaviour. By this definition, institutions are seen as both determinants of behaviour as well as the object

of strategic action themselves – an anti-functionalist position that diverges from the conceptualization of institutions adopted by the rational choice and sociological institutionalist traditions, that is: “institutions cannot be explained solely by their contemporary effects” (Thelen & Conran, 2016). The focus upon the role of power and the distributional effects of institutions as the medium by which power can be concentrated and solidified over time provides a lens to investigate institutions as “macrostructures in which political action occurs” (Schmidt, 2014; Steinmo et al., 1992). More importantly, while this macro frame lures the HI tradition away from inquiries that focus upon individual actions and motivations, it naturally makes it more compatible to investigate research questions that explore long run, slow-moving macro or historical processes given its emphasis on sequencing, timing, and history.

Finally, discursive institutionalism takes this dynamism further by conceptualizing institutions as an arena where meaning is structured and constructed by agents who use their ideational and/or discursive abilities to create, change, or maintain ideational structures (Carstensen & Schmidt, 2016; Schmidt, 2008, 2010). Ideas and discourse rather than external structures are the mechanisms which shape actors’ behaviours and incentives, thus outcomes. “Interests are subjective ideas, which though real, are neither objective nor material. Norms are dynamic, intersubjective constructs rather than static structures.” (Schmidt, 2008). These positions contrast starkly with those traditionally promulgated by the rational choice tradition (in which interests are objective) and the sociological institutionalist (in which norms are static). They also allow discursive institutionalism to diverge from the conceptualization of institutions as equilibria, similar to the historical institutionalist tradition. Rather, discursive institutionalism’s focus upon what and how ideas are featured prominently in which discourse steers the inquiry towards how “ideational power” (ibid.) (i.e. the ability of actors to persuade others to adopt their worldview) succeeds in setting agendas and shaping outcomes.

These approaches use different explanatory objects and logics to frame analyses of institutions. Nevertheless, a clear commonality between these approaches is the acknowledgement that institutions encompass complex and diverse entities in which interactions between agents, meaning, and structures are rife and evolving, continuing to affect the way institutions are theorized and conceptualized by scholars. How this

complexity and diversity shape the way this research is conceptualized is addressed in the next section.

### *3.1.2 Institutional diversity and complexity*

The various approaches to institutionalism point to the different forms and functions that institutions take in diverse and complex settings. Often, a multitude of institutions exist in tandem and interact to generate an outcome. Categorization of these variations provides a more systematic frame for analysis, particularly in settings where many institutions are nested within each other and/or are interdependent. While dichotomies (e.g., formal versus informal, government versus market, or public versus private) have often been used to group institutions together, institutions that are categorized by their primary objectives (horizontal approach) or by their level of authority (vertical approach) may be a more strategic classification for institutional analysis (Ostrom, 2005).

Using a vertical approach, institutions can be grouped into three basic categories: constitutional order, institutional arrangements, and normative behavioural codes (Cole, 2017; Feder & Feeny, 1991; Ostrom, 2005). This specification enables an examination of different types of institutions according to their place in the institutional structure and the level of formality. The constitutional order refers to the 'rules for making rules', thus institutional arrangements are established and are expected to function within the prescribed constitutional order. Normative behavioural codes are social or cultural norms that provide legitimacy to what is construed as acceptable behaviour and often imposes an informal constraint on institutional arrangements (ibid.). Classification of institutions in this way is useful to examine the interaction of institutions and actors between not only formal and informal rules but also across different operating contexts of rule-making, assuming that the 'rules for making rules' may differ when a nation state is governed by a monarch, is being colonized, and/or is guided by democratic principles.

By contrast, classifying institutions using the horizontal approach sorts them out at a singular level according to their functional objectives. By conceptualizing institutions as a set of rules that work towards a specified goal, Ostrom (2005) specifies seven broad objectives for this purpose:

- 1) Position, which creates positions or slots for actors in the decision tree;

- 2) Boundary, which affects how positions are regulated i.e. their entry and exit rules;
- 3) Choice, which specifies the matrix of options available to actors;
- 4) Aggregation, which determines the need for collective decision-making at any node in the decision tree;
- 5) Information, which affects the availability of information to actors;
- 6) Pay-off, which assigns incentives and/or deterrents to available options, and
- 7) Scope, which defines the set and domain for the expected outcome.

The horizontal approach sorts different types of institutions into similar functional groups which enables the clarification of their linkage and structure at a given operational level. Nevertheless, these categories are not mutually exclusive, thus institutions might need to be categorized further for a more comprehensive map of their dynamic functions (ibid).

The focus of this research, land tenure, is a form of institutional arrangement that is situated within the larger context of a nation's constitutional order as well as its normative behavioural code. In this research, land tenure is defined, following Sorensen (2015) as a set of collectively enforced expectations with respect to the ownership, management, and use of land. This includes characteristics that are inherent to property such as exclusivity, inheritability, transferability, and enforcement mechanisms (Demsetz, 1974). Situating land tenure in its operating environment renders the conventional property rights approach in economics restrictive; examination of its impact and evolution entails understanding not only the incentives and transaction costs considered by agents engaged in the system of property rights in land but also both the dynamics of the constitutional order and social norms in which it operates as well as how these elements interact at the individual operational level. For this reason, inquiries into land tenure must adopt an institutionalist tradition in their theoretical approach. A discussion of how institutionalism conceptualizes institutional stability and change proceeds below.

### **3.2 Change and endurance in the development of institutions**

Given the definition and conceptualization of the institution as a form of constraint on behaviour, analyses of institutions traditionally began as a conceptual tool for studies in comparative statics, i.e. institutions were invoked as an independent causal force to

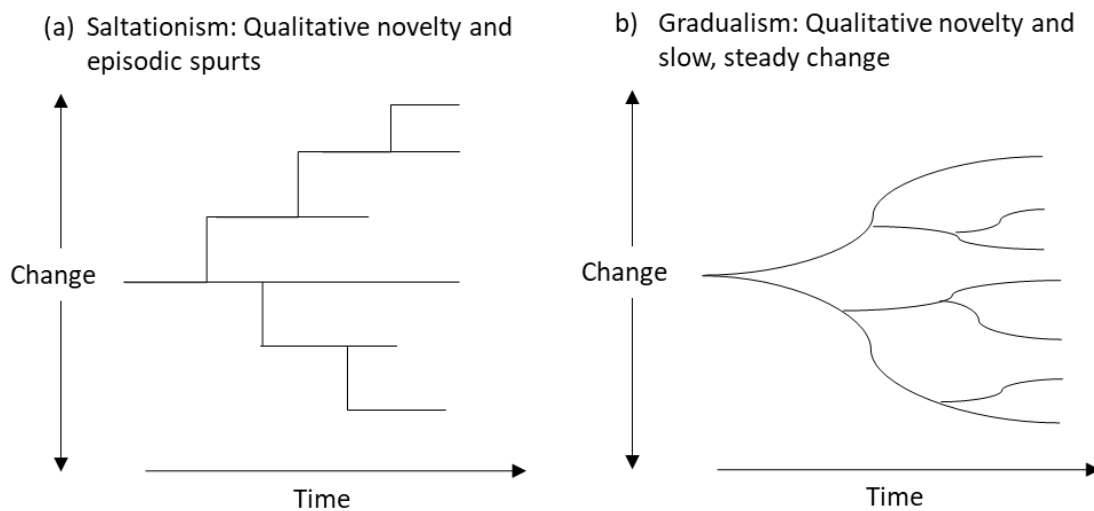


explain an observed outcome (Thelen & Conran, 2016). Thus theoretical work among institutionalists tended to gravitate more towards understanding institutional stability and not its evolution. The “non-plasticity” (ibid) of institutions (therefore, their autonomy as a force) was an imperative feature to substantiate the causal claims to their importance in determining outcomes, particularly when set against other competing approaches that invoke pluralist, behaviouralist, and structural-functionalist theories (ibid). However, more recent work on institutions sees the conceptualization of institutions as structures that can evolve over time or remain the same. By delineating the period of institutional development into its static and dynamic components, institutions can be invoked both as an independent variable (to explain outcomes) and a dependent variable (to study their characteristics). Explanations that are employed to account for these developments are often tied to how different approaches define and conceptualize institutions. This section describes how and why institutions change or endure over time and introduces the theories and concepts used by institutionalists to explain these developments.

### *3.2.1 Sources of institutional change*

Explanations of institutional change often attribute the primary cause of evolution to either endogenous or exogenous factors, or a combination of both. These factors can be distinguished both by their source and nature as well as by their impact on the institution they affect. Endogenous sources of change can be defined as factors that promote change from within a system or paradigm, often in an incremental, gradual, and/or cumulative way. These “slow and piecemeal changes” add up to “fundamental transformations”, enabling institutions to: “evolve and shift in more subtle ways across time” (Thelen & Conran, 2016). By contrast, exogenous change point to rapid discontinuous shocks or shifts that occur due to factors external to the institution of interest (Munck, 2022), that is, change in an institution is motivated by its relationship with other elements or institutions that are extrinsic to its own. In the wider literature, these changes are characterized as “leap-like”, “step-like” or a “power jump” (ibid.). These different models of change are conceptualized by Munck (2022) (see Figure 1) to illustrate distinctive pathways for motivating change in the subject of interest.

**Figure 1 Models of institutional change**



Source: Reproduced from Munck (2022)

Alongside these distinct models of change, Kingston & Caballero (2009) provide an extensive survey of theories of institutional change and suggest that the differences in the way institutionalists conceptualize change and its sources can generally be categorized into two distinct approaches – institutional change occurs as a “centralized, collective-choice process”, and change occurs where no central mechanism acts as the coordinated catalyst for the process. Collective-choice theories of institutional change, which follow the reasoning outlined in works such as Alston (1996), Libecap (1993), North (1981), and Ostrom (2005), posit that rules are determined and altered by processes of collective action, in which actors (or groups of actors) interact, bargain, and cooperate in the rule-making process to advance their interests – this conceptualization necessarily results in the achievement of one shared objective, i.e. the resulting institutional equilibrium. By contrast, evolutionary theories of institutional change, found in the works of Alchian (1950), Hayek (1973), Knight (1998), and Williamson (2000), attribute change to a less coordinated and more spontaneous force. That is, rules are determined and altered by processes that emerge through a random selection process, possibly leading to many institutional outcomes that can both succeed and fail in the long run, i.e. a multiple equilibria scenario.

This delineation is useful, both for anchoring the conceptualization of institutional change around an equilibrium (or multiple equilibria) and for coordinating actors’ choices in the change process. However, the focus upon specifying processes of change renders it

insufficient as a holistic approach to institutional analysis because the conceptualization does not account for the variety of change factors, nor does it attempt to illuminate them in the analysis. That is, the nature of change is relegated to how it disrupts an equilibrium, whether via an exogenous or endogenous source, and not how it affects the eventual development of the institution. Ultimately, these limitations represent the difficulty faced in integrating the various attributes of the change process (as well as its impact) and can be observed in the way institutional change is conceptualized by the main approaches to institutional analysis.

Fundamentally, the RC and sociological institutionalism's similar ontological view of institutions as path-dependent equilibria and social scripts respectively relegates the source of institutional change under these approaches to the exogenous, given an implicit tendency to maintain or replicate the existing institutional forms (Hall, 2009; Mahoney & Thelen, 2009; March & Olsen, 2008; Thelen & Conran, 2016). While this view of institutions conforms to the punctuated equilibrium model which assumes discontinuous change, i.e. where long periods of path-dependent institutional reproduction and continuity is disrupted by external shocks at critical junctures (Capoccia & Kelemen, 2007), it forces the analysis: "to underestimate both intra and interinstitutional dynamics and sources of change" (March & Olsen, 2008). Even though more endogenous models of institutional change do not evoke the concept of critical junctures, these works nevertheless acknowledge and explain the existence of self-reinforcing mechanisms in institutional reproduction by invoking concepts such as increasing returns (North, 1991b), positive feedback effects, and cumulative causes (Pierson, 2004).

Scholars in both traditions have attempted to incorporate endogenous sources of change in their analyses of institutional change (Greif & Laitin, 2004; Lawrence et al., 2009; North, 1991b; Shepsle, 2016). However, their ontological interpretations of institutions nevertheless limit the view and examination of institutions as continually contested spaces. The HI approach, which positions institutions as a power distribution mechanism (Hall, 2009; Mahoney & Thelen, 2010; Thelen & Conran, 2016), allows this research the flexibility to explore how rules and rule-makers (and their legacies) continually interact, are contested, and determine outcomes. That the HI approach also acknowledges the role of institutions as equilibria as well as social scripts (*ibid.*), and does not contradict the other two approaches whilst accounting for the dynamics of power and its effects on

these roles, makes it possible to examine institutional dynamics both through their respective functional forms and their mechanisms for change.

### *3.2.2 Path-dependence, institutional endurance, and critical junctures*

The idea that institutions have enduring effects and influence outcomes is pervasive in the literature on institutions. As highlighted, institutional analysis began as a conceptual tool to look at how institutions affect outcomes. This necessitates the conceptualization of institutions as stable, enduring elements of a polity that can function as a causal force for a phenomenon. Across the different approaches to institutionalism, scholars adopt and invoke the concept of path-dependence to explain this argument. For institutional analysis, path-dependence describes the idea by which: “contingent events set into motion institutional patterns or event chains that have deterministic properties” (Mahoney, 2000). Put simply, it presents the argument that: “what happened at an earlier point in time will affect the possible outcomes of a sequence of events occurring at a later point in time” (Sewell, 1996). While Sewell’s simple definition of path dependence has allowed for a broader application of the conceptual idea, it has also diluted its analytical prowess, leading many scholars to claim path dependence “simply because earlier events affect later events” (Mahoney, 2000). Peters (2019) further argues that the deceptively simple conceptualization of path dependence hides the complexity that can emanate from its use as a conceptual tool for institutional analysis. Whilst the concept of path-dependence is central to the arguments of historical institutionalists, the concept can fundamentally be differentiated by the way institutions are conceptualized by the various approaches.

Nevertheless, while there is variance in the way scholars explain how path-dependence manifests in and affects the institution’s functional form, all subscribe to similar features in their analysis of path-dependent processes. The anchoring feature in path-dependent analyses is the use of self-reinforcing or reactive sequences to connect distal causes to their outcomes (Mahoney, 2000; Munck, 2022). With self-reinforcing sequences, institutional patterns that are adopted at pivotal points generate a mechanism that promotes long-term reproduction of the same institutional patterns/structure. This further emboldens the institutional structure and ultimately, makes it difficult to reverse. For example, institutionalists subscribing to the RC approach posit that efficiency considerations underpin the mechanisms that generate an outcome of path-dependence.

Scholars in this tradition (North, 1991a; Williamson, 2000) argue that institutions are difficult to alter once they are created because institutions are, by design, generated as structure-induced equilibria to reduce transaction costs in the market and are continuously reproduced through institutional patterns/structures that promote increasing returns with each revolution. With reactive sequences, contingent events set in motion a causal chain of temporally ordered and connected events, i.e. each event unfolds as a consequence of its antecedent conditions (Mahoney, 2000). Weber (1978), as cited in Munck (2022:p117), terms this causal sequence a “concatenation of circumstances” that bridges causes and effects that are temporally distant. However, while both types of causal chain lead to path-dependent outcomes, only processes that follow self-reinforcing or self-replicating sequences create what has been termed a “historical legacy” (Munck, 2022), “institutional reproduction” (Mahoney, 2000), or “positive feedback” (Pierson, 2000). The difference between the two causal chains is key and is illustrated in Figure 2.

**Figure 2 Two types of causal chain**

a) Causal cycles: Chain with a repeated cause-effect pair

$X_{t1} \longrightarrow Y_{t2} \longrightarrow A_{t3} \longrightarrow Y_{t4} \longrightarrow A_{t5} \longrightarrow Y_{t6}$

b) Causal series: Chain without a repeated cause-effect pair

$X_{t1} \longrightarrow m_{t2} \longrightarrow n_{t3} \longrightarrow O_{t4} \longrightarrow P_{t5} \longrightarrow Y_{t6}$

Source: Reproduced from Munck (2022)

By extension, institutional stability or endurance, i.e., the reinforcement of institutional features/structures that persist over time, may emerge from path-dependent processes that are underpinned by a self-reinforcing mechanism. Analysis of these enduring features (if they are present) must then specify these processes. Inherently, the presence of historical legacies within institutions suggest that an understanding of the present must be informed by the past, without which these substantial “forces of inertia” may be overlooked (Peters, 2019). Here, a critical juncture framework provides the conceptual and theoretical tools necessary for a systematic and robust analysis of institutional development as well as specification of the underlying processes and mechanisms. A critical juncture is a: “concentrated, macro episode of innovation that generates an

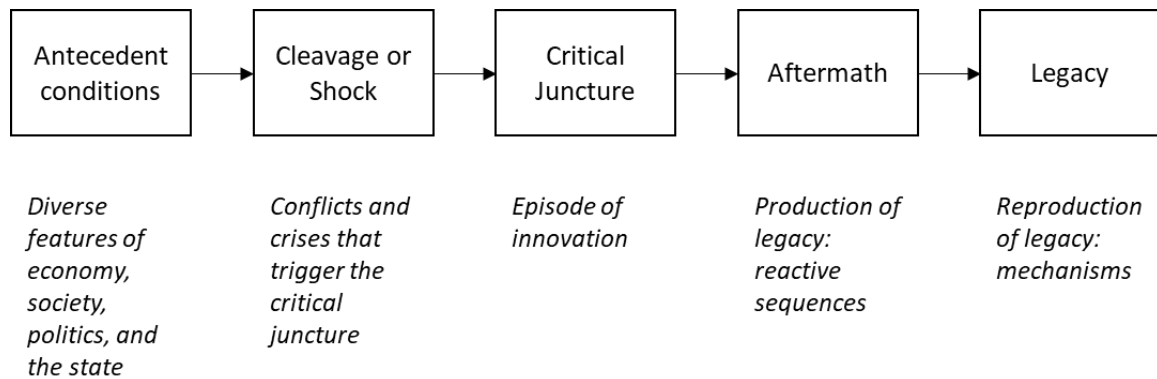
enduring legacy” (Munck, 2022). By design, a critical juncture framework delineates the period of institutional development into its static and dynamic components, i.e. periods of institutional stability and change. Put simply, a critical juncture framework sets the stage for both path destruction and path creation in the institution’s developmental path. An important feature of the critical juncture definition is that this break must generate a legacy; this feature differentiates critical junctures from any other distinctive moments in the institution’s development.

Critical juncture research is generally associated with ‘punctuated equilibrium’ models of change in which disruptions are driven by exogenous factors of change and are characterized as “leap-like”, “step-like” or a “power jump” (see section 3.2.1) (See among others: Capoccia, 2016; Capoccia & Kelemen, 2007; Thelen & Steinmo, 1992). This is unsurprising as the design of the framework makes it ideal to explain the upheaval of an existing system by conceptualizing the period of change to occur following a three-step process: shock/cleavage, critical juncture, and legacy (Collier & Collier, 1991; Rokkan & Lipset, 1967). However, limiting the framework for use with change models that only account for exogenous shocks reflects a flawed conceptualization of institutional innovation that is achieved only through contingency. As Sorensen (2022) observes, while exogenous shocks can accelerate innovation or policy changes, “substantive changes to major social institutions are rare and are highly likely to be contested”. Collier (2022) proposes a revision to this conceptualization by modelling a five-step template to the critical juncture framework (see Figure 3) and adding two stages to the process: antecedent conditions and aftermath. These additions reduce the focus upon the shock/cleavage stage (which specifies the immediate trigger), thus generating the space to theoretically specify endogenous sources of change in the intervening periods before and after the critical juncture. Both steps, i.e. the antecedent conditions and the aftermath, fundamentally seek to explain the context in which critical junctures occur and their relationship with other elements in the causal chain. These additions are also reflected in similar analytic models by Mahoney (2000) and Sorensen (2022).

While the five-step template provides a solid basis to conceptualize a framework for critical juncture analysis, a useful adaptation by Munck (2022) delineates the causal chain into its static and dynamic components (see Figure 4). For this research, this delineation

provides the analytical framework to distinguish the period of path destruction and path creation and inherently, the historical and contemporary components of the research.

**Figure 3 Five-step template for the Critical Juncture Framework**

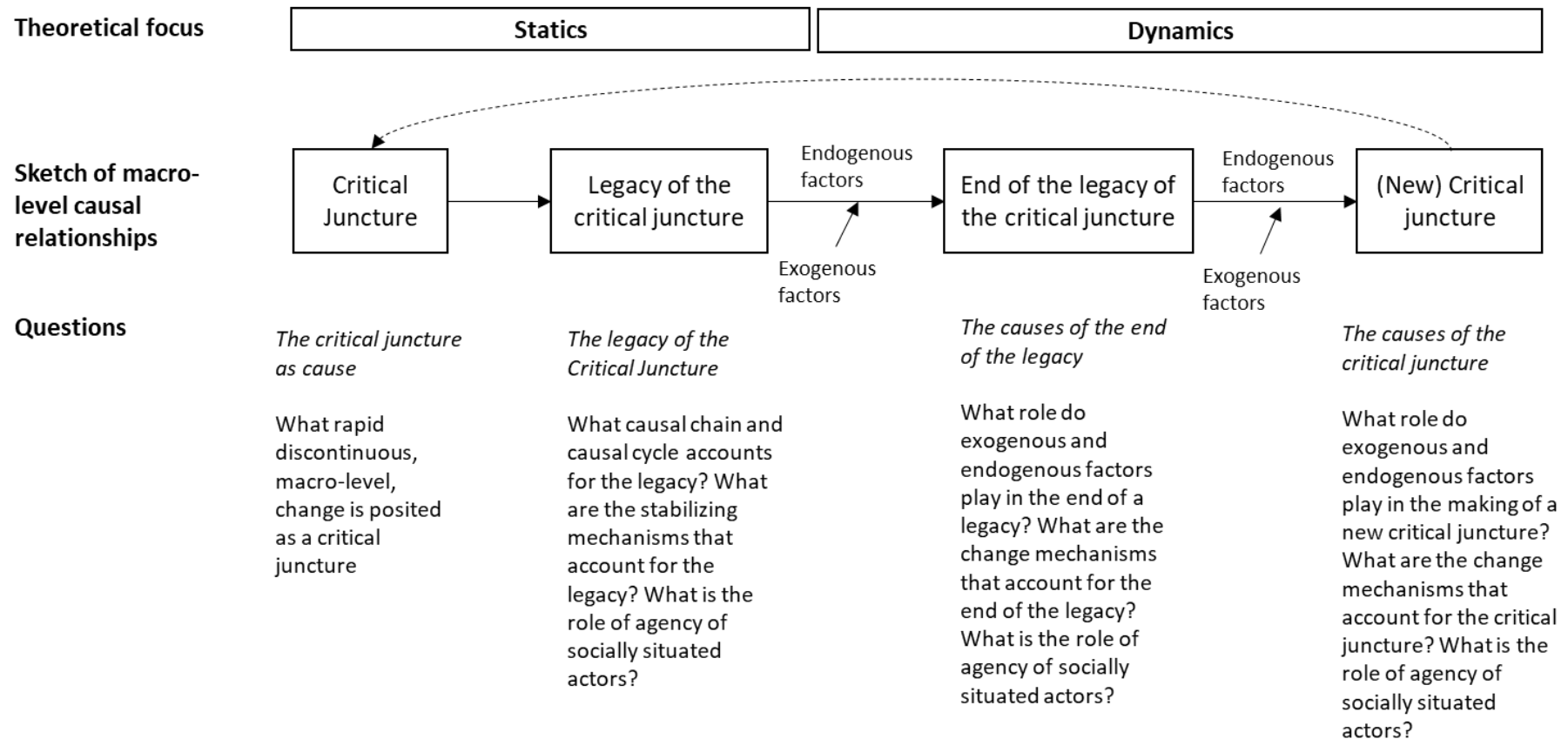


Note: Arrows indicate a historical sequence. They also reflect potential causal connections.

Source: Reproduced from Collier (2022)

As Sorensen (2022) observes, the critical juncture framework is designed to “construct arguments about historical causality and consequences” by focusing on “the role of actors, events, and institutional contexts” within processes that underpin the development of the institution. It is essential that any analysis of institutional development that subscribes to this approach must consider the relationship and interaction between the individual and the collective. This are addressed in the next sub-section.

**Figure 4 The critical juncture framework: An approach to the study of statics and dynamics**



Note:

1. Endogenous factors are internal to the system under consideration; exogenous factors are external to the system under consideration.
2. The dotted line connecting the (new) critical juncture to the prior critical juncture is not a causal arrow; rather, it indicates that with a new critical juncture, the analysis moves next to the effect of the critical juncture.

Source: Reproduced from Munck (2022)



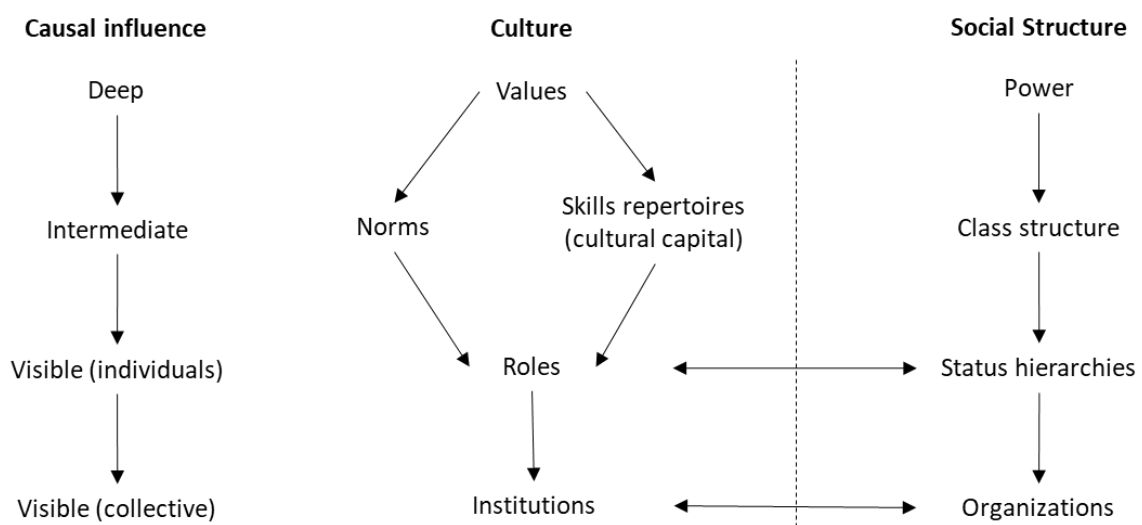
### *3.2.3 The role of structure, agency, and power in institutional development*

The problem of specifying the relationship between structure and agency is intrinsic to the study of institutions and their development. That is, how do social constraints established by the collective affect the decision-making and self-interest of the individual? (Portes, 2006) By extension, this query also permeates the discussion on institutional development, i.e. is institutional change explained by structural factors or by the actions and choices of actors? While the relationship between structure and agency has been widely theorized in social theory (See among others: Archer, 2003; Callinicos, 2004; Joas & Knöbl, 2009), conceptualization of this relationship remains contested in the study of institutions and the corresponding critical juncture framework used to analyse their development. Munck (2022) notes that a key hazard for the tradition, particularly for those using path-dependence as a conceptual tool, is avoiding historical and structural determinism. That is, “processes of path destruction and new path creation are always latent in the process of path dependence” (Martin & Sunley, 2006), thus agency must be construed as possible: “all the time and not just in the very rare moments when structures break down entirely” (Thelen & Conran, 2016).

An observation by Giddens (1993, as cited in Portes, 2010) may clarify this distinctive relationship – “institutions are not social structures; they have social structure as the actual embodiment of the blueprints guiding relationships between actors”. Using this conceptualization, Portes (2006) postulates that social structure can be seen as “the realm of interests, individual and collective, backed by different amounts of power” and institutions, in turn, are characterized by “power differentials”. Power is defined following Weber’s classic definition, that is, the ability of an actor to impose their will and consequently, the actor or group that exert power must have access to and exclude others from power-conferring resources (Portes, 2006; Weber, 1966). Power can be extracted from the control of the means of production (following Marx’s classic definition), the production and appropriation of knowledge or information, as well as through violence. This conceptualization provides a basis for acknowledging the role of institutions while “systematically relating it to other elements of social life” (Portes, 2006), thus generating the space to examine the role of both agency and structure in a social setting without “the problem of embeddedness” (Granovetter, 1985).

When Portes' observations are viewed alongside the conceptual tools highlighted in the preceding sections, their utility become exceedingly clear. In particular, the analytic separation between institutions and the social structures they govern allows an examination of their impact across multiple layers of social life, which coincides and complement the varying impact of institutions as expressed through the idea of institutional order (as described in 3.1.2 Institutional diversity and complexity). That is, institutional shifts across the varying institutional order (be it at the level of constitutional order, institutional arrangements, or social/behavioural norm) may influence institutional development differently when viewed against the structure of the social life they intend to affect and the corresponding agents that function within them. The role of power, both of those in positions of power as well as its extraction from power-conferring resources, permeates this interaction across all levels as it sits at the deepest level of social structure (as illustrated by Portes (2006) in Figure 5) and must not be separated from an analysis of institutional development.

**Figure 5 Elements of social life**



Note: Arrows indicate the hypothesized direction of causal influence

Source: Portes (2006)

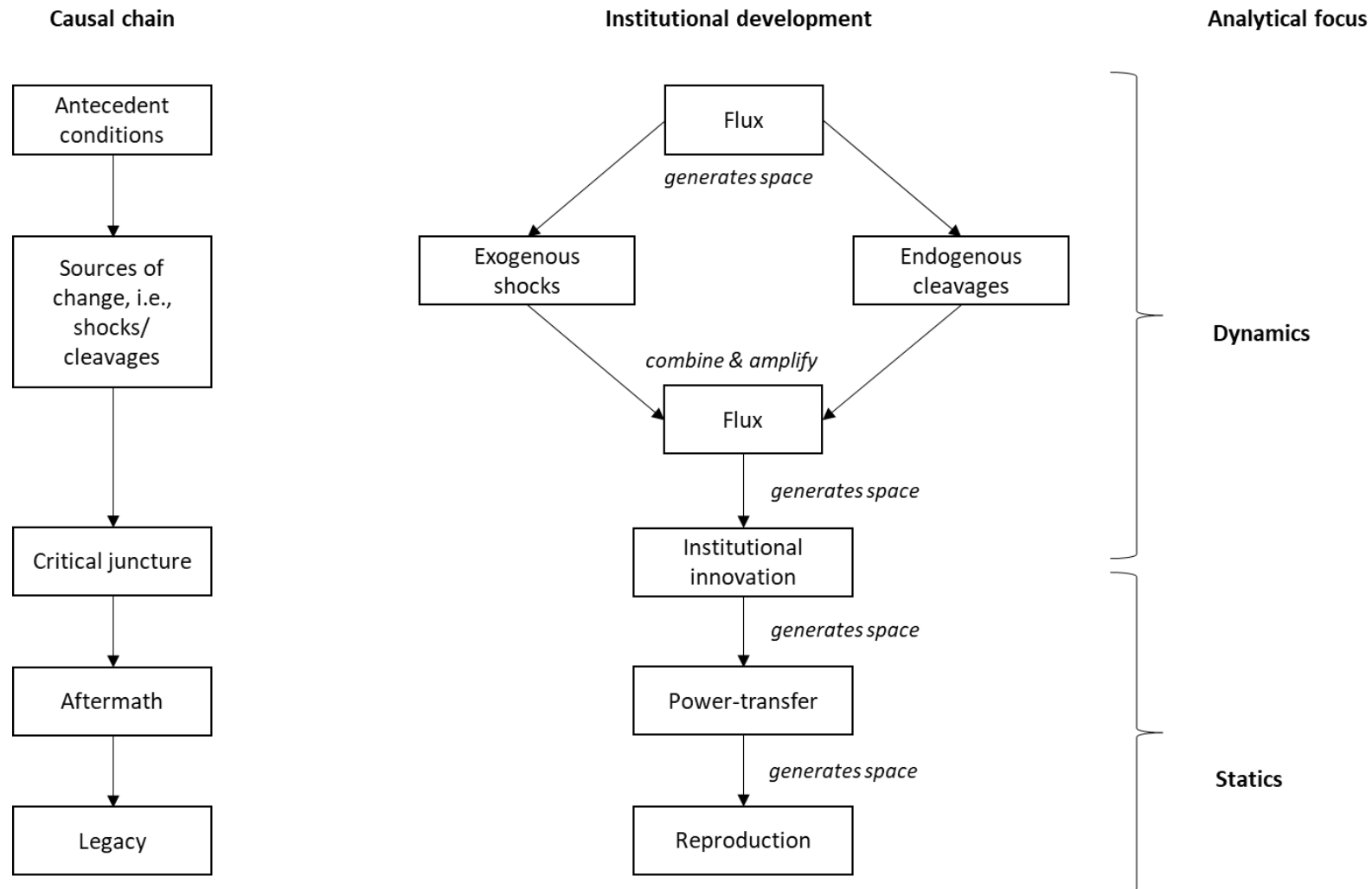
### **3.3 The conceptual framework of the research**

The preceding sections introduce important conceptual and theoretical tools to study the development of institutions, both their evolutionary and enduring qualities. This section introduces the conceptual framework used in this study. This research uses insights and conceptual tools from historical institutionalism and applies the critical juncture framework to an analysis of the Malaysian land tenure system and the impact of its historical legacies on the development of non-market housing in Greater Kuala Lumpur.

In undertaking an institutional analysis of land tenure and its evolution, this research anchors its understanding of institutions following the historical institutionalist (HI) approach. While other leading approaches, i.e. rational choice (RC) institutionalism and sociological institutionalism, may provide a salient lens for analysing institutions more generally, HI's conceptualization of institutions as "distributional instruments laden with power implications" (Mahoney & Thelen, 2009) enables this research to frame its analysis through the power asymmetries that characterize the context under study. It also provides a conceptual framework for analysis that examines current sets of institutions governing property in urban areas that were developed through processes that are: "saturated with power relations" (Sorensen, 2018). This conceptualization and more fundamentally, HI's ontological and epistemological stand on institutions allow this research the flexibility to incorporate, merge, and utilize myriad concepts (see sections 3.1. and 3.2) to explain and specify how historical legacies affect the development of non-market housing in Greater Kuala Lumpur.

The two-part conceptual framework, following Munck (2022) and Collier (2022) (see section 3.2.2) incorporates the key concepts that are described in this chapter into analysis of the contemporary and historical components of the research. The contemporary component is a study of statics, that is, it describes the enduring legacies of the identified institutional structure. By contrast, the historical component is a study of dynamics, that is, it describes the period of institutional innovation that generated a critical juncture in institutional development. Figure 6 provides a model of the conceptual framework.

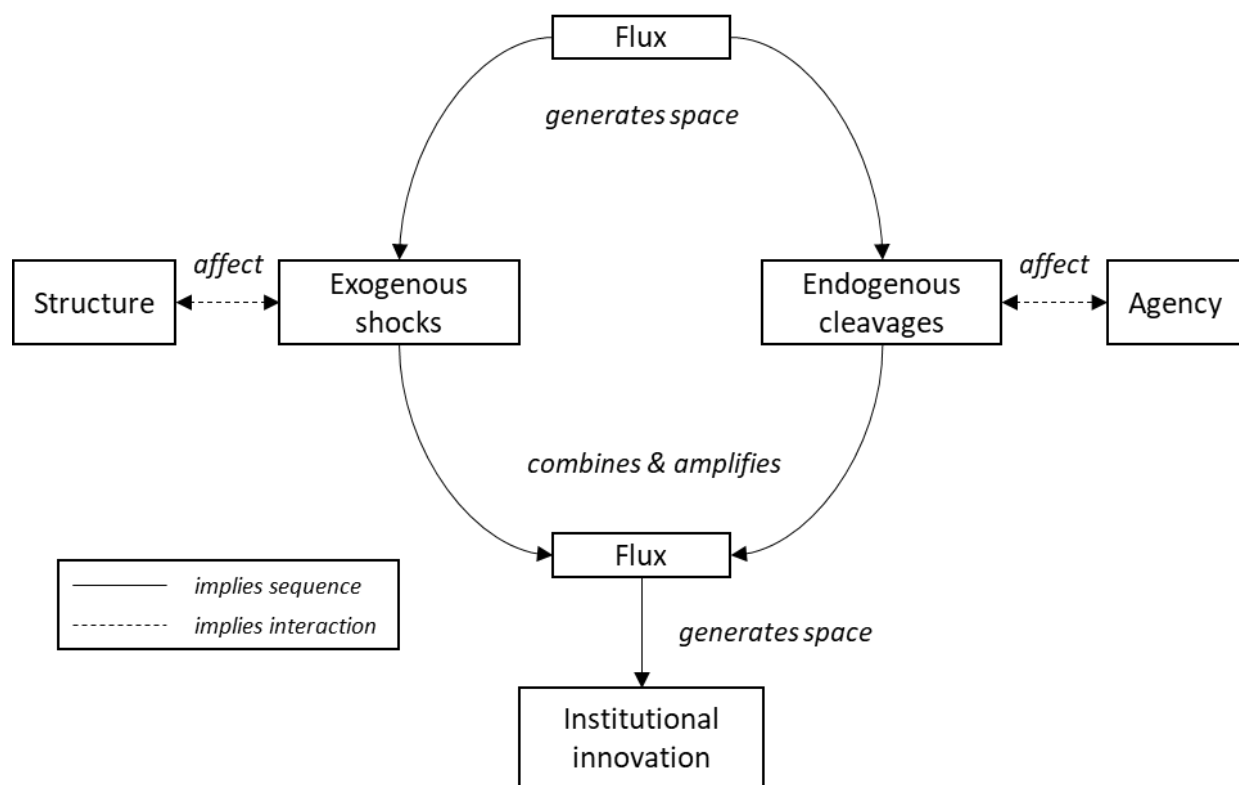
**Figure 6 The conceptual framework for this research**



Source: Researcher's model (adapted from Collier, 2022 and Munck, 2022).

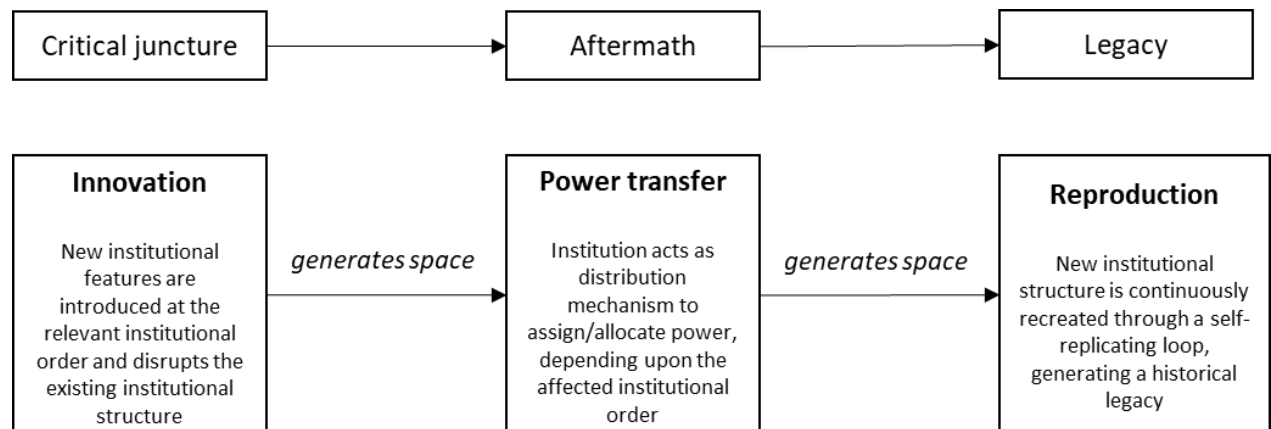
Figure 6 shows the sequence of institutional development that incorporates the key features of the critical juncture framework as well as key ideas and concepts from historical institutionalism. The conceptual framework highlights the role of power as the intervening variable that underlies the production of historical legacies. Furthermore, it argues that both exogenous and endogenous sources of change must occur during the innovation period in order to generate a critical juncture, reflecting similar arguments in the wider literature that major change to institutions occur through a convergence of multiple factors (Capoccia & Kelemen, 2007; Hall, 2016; Mahoney & Thelen, 2010; Pierson, 2004; Sorensen, 2022). For the purposes of analysis, it is useful to distinguish between the dynamic and static component of the conceptual framework to illustrate the underlying processes that generate the sequence. Figure 7 and Figure 8 depict the sequence for path-destruction and path-creation in the development of the institution, as represented by the dynamic and static components of the conceptual framework in Figure 6. These models provide further clarification to the main conceptual framework by describing the processes that occur in each sequence.

**Figure 7 Dynamic component to path-destruction**



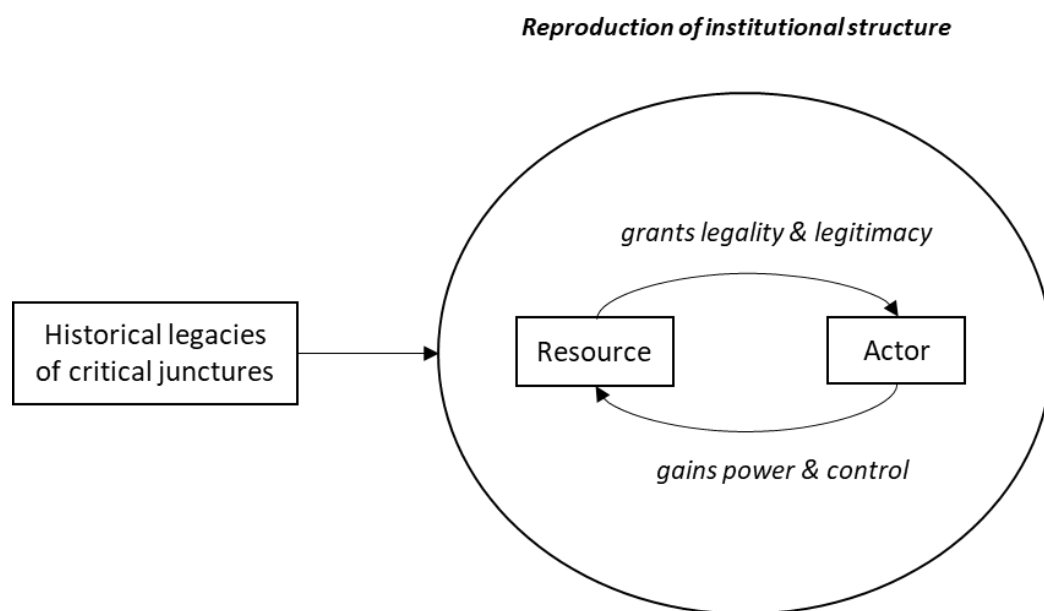
Source: Researcher's model

**Figure 8 Static component to reflect path-creation**



Source: Researcher's model

**Figure 9 Illustration of self-replicating loop**



Source: Researcher's model

In sum, this framework provides the conceptual and theoretical foundation to anchor and structure the findings of this study.

## **Chapter 4 Research Methodology**

This chapter presents the research methodology used in this thesis. There are four parts in this section. Section 4.1 provides an overview of the methodology, describes the case study, and introduces the two-part data collection strategy for this research. Sections 4.2 and 4.3 describe the two-part data collection strategy utilized in this research. Section 4.4 discusses the evolution of the methodology, the limitations of this study, and summarizes the preceding parts.

### **4.1 Overview**

#### *4.1.1 Summary*

This project is a single case study utilizing a range of qualitative methods designed to address the main research objectives. The study bridges the analysis of contemporary findings with their historical underpinnings. In doing so, it utilizes a two-part data strategy that facilitates the collection and analysis of data for both the contemporary and historical components of the project. It combines qualitative data from in depth interviews with elite participants with archival data from repositories to illustrate this relationship.

Given the focus upon understanding the processes of change and their dynamics within the context of a single institution, the single case study approach was chosen to enable an in-depth, within-case analysis of key themes (Creswell, 2012). As a research design strategy, Yin (1981) further explains that the inclusion of context as part of a study's parameter of inquiry relegates other strategies such as standard experimental and survey designs unsuitable as the boundaries between context and phenomenon cannot be clearly distinguished.

While the case study approach has been criticized for its generation of context-dependent knowledge rather than more generalized findings, Flyvbjerg (2006) argues that the strategic choice of a critical case can offer insights that can be generalized to a wider phenomenon, particularly through falsification. Hence strategic sampling, rather than a large sample, is the more necessary condition for generating knowledge. More fundamentally, without context-dependent knowledge of the subject under study, policy interventions run the risk of being mistargeted, affecting their overall efficacy.

This research subscribes to a constructivist paradigm and is designed to explore and reflect findings about a “socially constructed dynamic reality” (Yilmaz, 2013). It aims to generate an in-depth understanding of the land and housing sector in Malaysia that is both context-sensitive and anchored in the experiences of those who participate in it. As such, its approach to data collection and analysis is value-laden (Mittwede, 2012), context-dependent, and heavily reliant upon both the participant input and the researcher’s ability to interpret findings and convey meaning.

#### 4.1.2 Case study selection

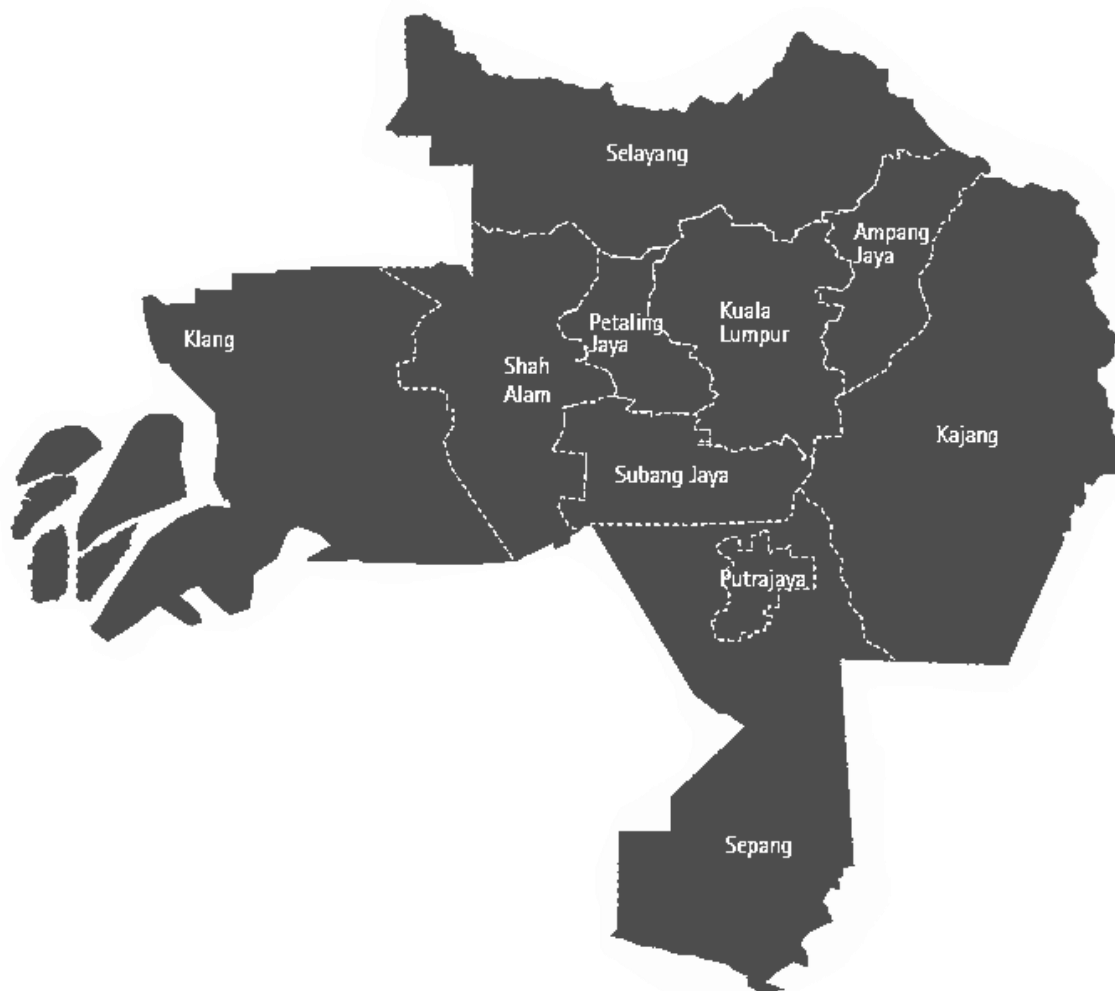
The geographical area chosen for this study is the Greater Kuala Lumpur Metropolitan Area (Greater KL). Kuala Lumpur is the capital city of Malaysia and is the country’s centre of economic development. It is the biggest and most populous city in Malaysia. While jobs and economic activity are mostly concentrated in Kuala Lumpur city centre, the housing demand for those who participate in the city’s urban ecosystem is served by areas that extend beyond the city-state border (Ismail et al., 2019). Greater KL is defined as the area covered by 10 municipalities situated within and close to Kuala Lumpur (see Figure 10). Each municipality is governed by local authorities: *Dewan Bandaraya Kuala Lumpur*, *Perbadanan Putrajaya*, *Majlis Bandaraya Shah Alam*, *Majlis Bandaraya Petaling Jaya*, *Majlis Perbandaran Klang*, *Majlis Perbandaran Kajang*, *Majlis Bandaraya Subang Jaya*, *Majlis Perbandaran Selayang*, *Majlis Perbandaran Ampang Jaya*, and *Majlis Perbandaran Sepang*. These municipalities are currently geographically located within the Federal Territories of Kuala Lumpur and Putrajaya and the State of Selangor. Collectively, the Greater KL area represents the economic, social, political, and administrative centres in Malaysia. Using Greater KL as the geographical boundary for this case study enables it to focus upon the “highest density economic agglomerations within the Kuala Lumpur conurbation” (PEMANDU, 2010). In 2010 Greater KL contributed 30% of the gross national income with 20% of the national population residing within the area (ibid.).

As a case study, the geographical focus of this research provides a rich and complex example of the institutional evolution that has transpired in Malaysia. Kuala Lumpur (the anchor for this metropolitan area) and Putrajaya (the administrative and political capital of Malaysia) have evolved from being a locality of Selangor, first under sovereign rule in pre-colonial times and subsequently under British rule as part of the Federated Malay States during colonial occupation, to being a federal territory under Malaysia today. As



federal territories, land regulations in Kuala Lumpur and Putrajaya reflect the amalgamation of the process of institutional change in the governance of land for Malaysia as a nation state, while enabling analysis of the impact of land governance on the city/metropolitan scale. This distinction is particularly important given that land is governed at the state level in Malaysia. In addition, the inclusion of municipalities in the state of Selangor, which forms part of the wider Greater KL area, enables us to highlight the crucial dynamics that exist between the federal and state governments of Malaysia, which are detailed further in Chapter 5.

**Figure 10 Map of Greater KL**



Source: Invest KL (n.d.)

#### *4.1.3 Two-part data strategy*

The mode of inquiry for this research necessitated a two-pronged data collection and analysis strategy – the first, to illuminate understanding of the contemporary experiences and challenges faced by actors in the sector, and the second to reveal the historical root of these challenges. By delineating the data strategy into two components, this research utilized and merged data generated from two different qualitative techniques for the project: in-depth interviews and archival work. Both components required their own strategy of data generation and collection as well as analysis. However, the researcher used preliminary findings and feedback from each component to inform and improve the overarching data collection framework, both through further refinement of the selection criteria for archival work and adjustments to the interview structure or questions.

### **4.2 Part 1: Contemporary component**

#### *4.2.1 In-depth interviews*

A total of 18 face-to-face in-depth interviews were conducted over a period of six months of fieldwork from July-December 2020. All interviews were held in the offices of the interviewees and lasted between one and two hours, depending upon the availability of participants and the natural flow of the conversation. The interviews were recorded with the consent of the participants and were summarized after each session. The aim of these interviews was to understand the challenges faced by critical actors in the land and housing sector in the development of non-market housing. The interviews comprised both structured and unstructured questions intended to illuminate the nature of these challenges as well as to identify how key actors interact with each other in the pursuit of their respective housing development objectives. More fundamentally, these interviews were designed to ascertain how challenges due to institutional structures affect housing outcomes.

#### *4.2.2 Sampling methods and validity*

This research relied upon two sampling methods to identify participants for the interviews; purposive and snowball sampling. The identification process was primarily guided by information obtained from the organizational structures of relevant government departments and ministries as well as referrals and suggestions from existing participants. Based on prior experience and knowledge of the industry, a

preliminary list of participants was generated and was then further refined through feedback from early interview participants. The snowball sampling technique was applied primarily to gain access to senior management executives in private development firms and high-ranking government officials. This is necessary as access to these research subjects would have been difficult to secure without referrals from existing participants.

While the sampling methods used in this study attempt to reduce the potential bias as well as ensure validity and representativeness as well as possible, the approach is anchored, thus limited, by its purpose – to understand the challenges critical actors face in the provision and delivery of non-market housing. This led to the exclusion of non-actors, such as academicians, civil society associations, and industry observers, from the pool of prospective research subjects. This research addressed this limitation through the interview design, using methodological techniques such as vignettes or scenarios when necessary.

#### *4.2.3 Participants*

Two groups were interviewed for this study: (1) housing/land regulators and (2) housing providers, totalling 18 in-depth interviews. Details of the sample by category and how the data was obtained are described below.

##### *Housing Regulators*

To understand the challenges that housing regulators face, this study sampled a limited pool of high-level administrators in relevant government department or agencies. The contact details of prospective participants were found through an online search in the department's directory and then contacted by email and/or phone. Given the hierarchical nature of government services, official requests were submitted, when strategically advantageous, to the head of each identified department/agency who act as gatekeepers to these institutions. In many cases, this granted the researcher access to other officers/administrators in the same department. The biggest challenge was to establish contact with the appropriate officer within the relevant ministry or department as civil servants are often limited by their specific portfolio/job scope, which is generally obscured from public knowledge. This researcher faced rejections to interview requests from relevant departments upon discovery (through preliminary contact) that the individual in charge of issues relevant to housing or land had recently been transferred

or were no longer responsible for the portfolio. However, once contact was established with the appropriate individual, most government officers were willing and happy to be interviewed.

The main criterion used to determine selection (besides working in a relevant department) was that civil servants had to play a more strategic (rather than operational) role in their organizations to ensure that they understand and can articulate the institutional constraints that they face. In most cases, this translated as being employed at Grade 48 or higher on the civil service employment scale. In addition, this researcher sought to speak with individuals who had acquired more than a decade of experience in the sector, particularly through appointments in relevant departments within the federal or state government civil service. Eleven people from five different departments/agencies were interviewed (see in Table 2).

**Table 2 Housing and land regulators by government office**

<b>Ministry/Department/Agency</b>	<b>Total</b>
National Housing Department (JPN)	5
Department of Director General of Lands and Mines (JKPTG)	3
State department - PTG Kuala Lumpur	1
Local council - Kuala Lumpur City Hall (DBKL)	1
Ministry of Federal Territories	1

Questions posed to housing/land regulators differed according to their roles in government but focused upon gaining perspectives on current institutional challenges in the land and housing sector more broadly (and in Greater Kuala Lumpur specifically), as well as how their respective departments/agencies address these challenges. To add to the richness of the data, the researcher also incorporated questions designed to reflect the diverse career experiences that characterized most of the respondents' profiles. This included questions that required interviewees to reflect on the challenges faced by other departments/ministries during their varied career. To this end, the interviewees also described how constraints have evolved over time and offered their insights on the possible origins of these constraints.

### *Housing Providers/Developers*

The housing supply in Malaysia is served by a varied range of providers from the public and private sector. In addition, both the federal and state governments employ a multitude of strategies (e.g. quotas, schemes, and programmes) to ensure the delivery of affordable housing (currently defined as houses priced below RM300,000 for Kuala Lumpur and Selangor) as well as public/social housing throughout the country. As such, the main criterion for selection was that providers interviewed for this study comprise those which serve these segments. A total of seven people from three different categories were interviewed (see Table 3).

Several strategies were used to reach providers, in particular private development firms which did not publicly publish the contact details of their employees. These include: (a) cold calling/emailing; (b) introductions through third-party intermediaries, and (c) referrals by existing participants.

**Table 3 Total housing providers by type**

Type of housing provider	Total
Private sector development company	3
Government-linked development company	2
Federal departments	2

Questions asked of housing providers focused upon understanding the challenges that they face in building non-market housing, particularly constraints related to land supply and governance. The interviews also sought to ascertain the similarities/differences (if present) across the different categories of providers. Interviews with housing providers were primarily designed to understand their interaction with housing/land regulators and, more importantly, how they navigate the regulatory environment.

#### *4.2.3 Data analysis*

This research used thematic analysis to “identify, analyse and interpret patterns of meaning” (Clarke & Braun, 2017) within the interview data. After the researcher familiarized herself with the data, multiple rounds of coding were undertaken using the dataset. The researcher utilized different coding techniques to analyse the interview data

(which comprise the individual transcripts, summaries, and recordings), as well as to generate themes from the analysis. First, codes were generated semantically to capture and organize similar topics or concepts that characterized the participants' statements at the superficial level. These semantic codes formed the building block of analysis for the research by organizing the data into meaningful observations. The next phase of analysis required the use of latent coding to develop themes that reflect ideas and meanings that were not explicitly stated by interview participants. This technique was used to construct themes that informed the overarching theoretical framework of the research. At each stage of the analysis, the generated themes were reviewed, adjusted, and refined through an iterative and recursive process that moved between the different phases.

### **4.3 Part 2: Historical component**

#### *4.3.1 Overview*

Evidence for the historical component of this research was retrieved from primary and secondary sources. Primary sources consist of historical documents and publications which were mainly collected from three public archives located in London, Cambridge, and Kuala Lumpur. Further documentary evidence was also obtained from official government websites and databases. These primary sources of data were supplemented by data collected from secondary sources. These consist of documentary evidence retrieved from published works about the period under study and were gathered from the collections at three libraries in Cambridge and Kuala Lumpur.

At each repository, the researcher invested the first few weeks of fieldwork in understanding how the collections are indexed, organized, and accessed. This process involved requesting and attending an introductory workshop/session prior to the first visit, holding meetings with relevant archivists, and exploring the facilities at each location. Insights from this preliminary exploration provided the researcher with an understanding of what is available at each location and how best to access the materials – in particular, how to effectively design a search strategy for each archive's database.

The processes undertaken for data collection and analysis for this component are detailed in subsequent subsections.

#### 4.3.2 Primary sources

This subsection details the primary sources used to extract documentary evidence for this research and describes the process of collection. The researcher visited three archives in the United Kingdom and Malaysia. These archives were selected based on a preliminary search and exploration of their online databases, as well as their relevance to the research topic as reflected by extensive reference to their collections in published works on the subject in the literature. In particular, the researcher identified several collections that were located at each archive through a review of relevant literature on land tenure in Malaya and the history of Malaysia.

- 1) *The National Archives, London*: Collections available at the National Archives in Kew Gardens, London mainly cover the British colonial period (1874-1957). Most were official government documents, particularly those related to the British Colonial Office. Indexes to the material were used as guidance where available.
- 2) *Cambridge University Library, Cambridge*: The Royal Commonwealth Society collection at Cambridge University Library mainly covers materials contributed by the British Association of Malaysia. These comprise mainly private letters, memoirs, and personal papers of selected British colonial officials. Data collection on the RCS collection mainly focused upon gathering information on several identified British officials (namely Sir William and George Maxwell, and Sir Frank Swettenham) as well as any materials related to land tenure from other officials.
- 3) *The National Archives, Kuala Lumpur*: Collections available at the National Archives in Kuala Lumpur cover the British colonial period and the post-independence period (1957-present). The collections explored mainly comprised official documents from the governments of the Federated Malay States, the Federation of Malaya, and Malaysia as well as the personal papers of prominent Malaysian officials and scholars.

Prior to each archive visit, a preliminary search strategy was developed and tested on the online databases of each archive. This included using relevant keywords (e.g. 'land tenure', 'land regulations', 'land rights') to explore and select potential collections to view. Where online databases were not available (e.g. for selected collections at the Cambridge University Library and the National Archives, KL), the researcher spent the first week at these archives exploring the physical indexes to identify relevant collections. In addition,

the researcher sought feedback from archivists at each archive on the planned search strategy and adjusted the search framework based on their suggestions. These preliminary steps were taken to ensure visits to the archive were optimized for the research. Results from these preliminary searches along with collections identified in the literature, were listed for viewing requests, according to the daily limits set by each archive (if any). Upon reviewing the requested materials, the researcher adjusted the search parameter based on the preliminary findings and observations made by perusing the archival materials.

Over nine months of fieldwork, this researcher reviewed and analysed a total of 80, 15, and 115 files/folders at the National Archives UK, Cambridge University Library, and the National Archives KL respectively, excluding collections that were deemed irrelevant after a preliminary viewing. Evidence gathered from these sources were digitized (where permitted) and categorized based on their type and content (see Figures 11, 12, and 13). Where the researcher was restricted from making a personal copy of the material, a summary of the relevant information was prepared. A list of archival material used in the final analysis of the project is listed in Appendix A.

**Figure 11 Example of the archival collection at Cambridge University Library.**

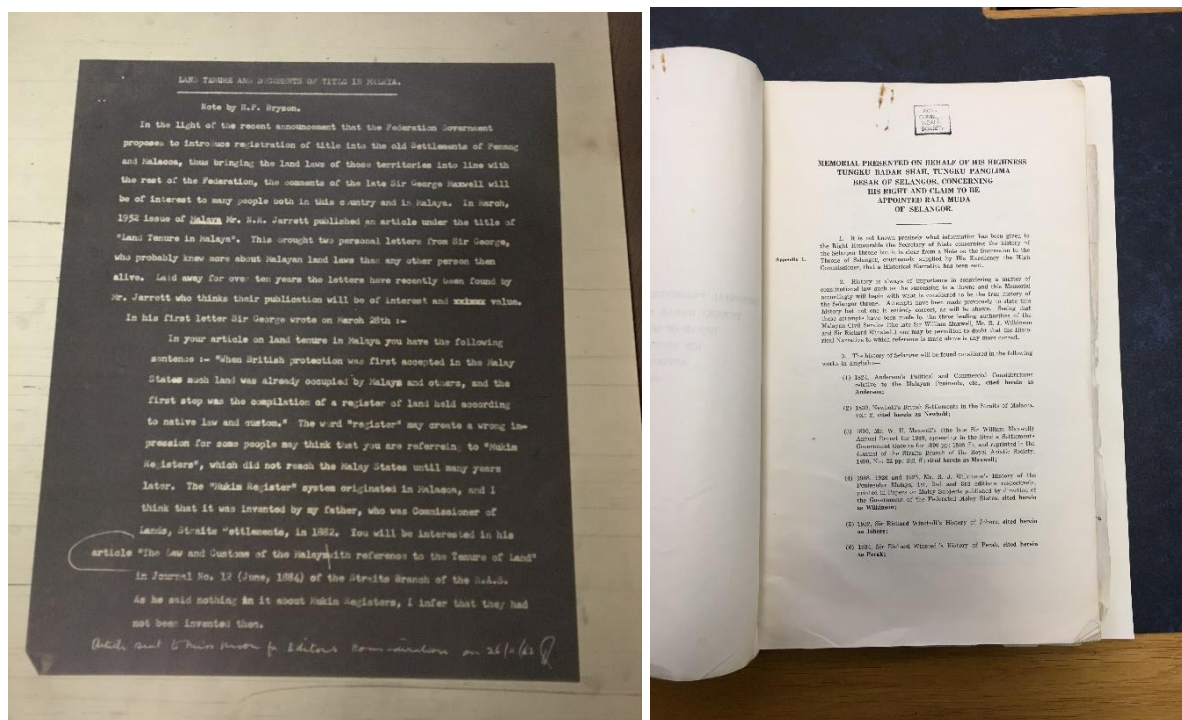




Figure 12 Example of the archival collection at the National Archives UK.

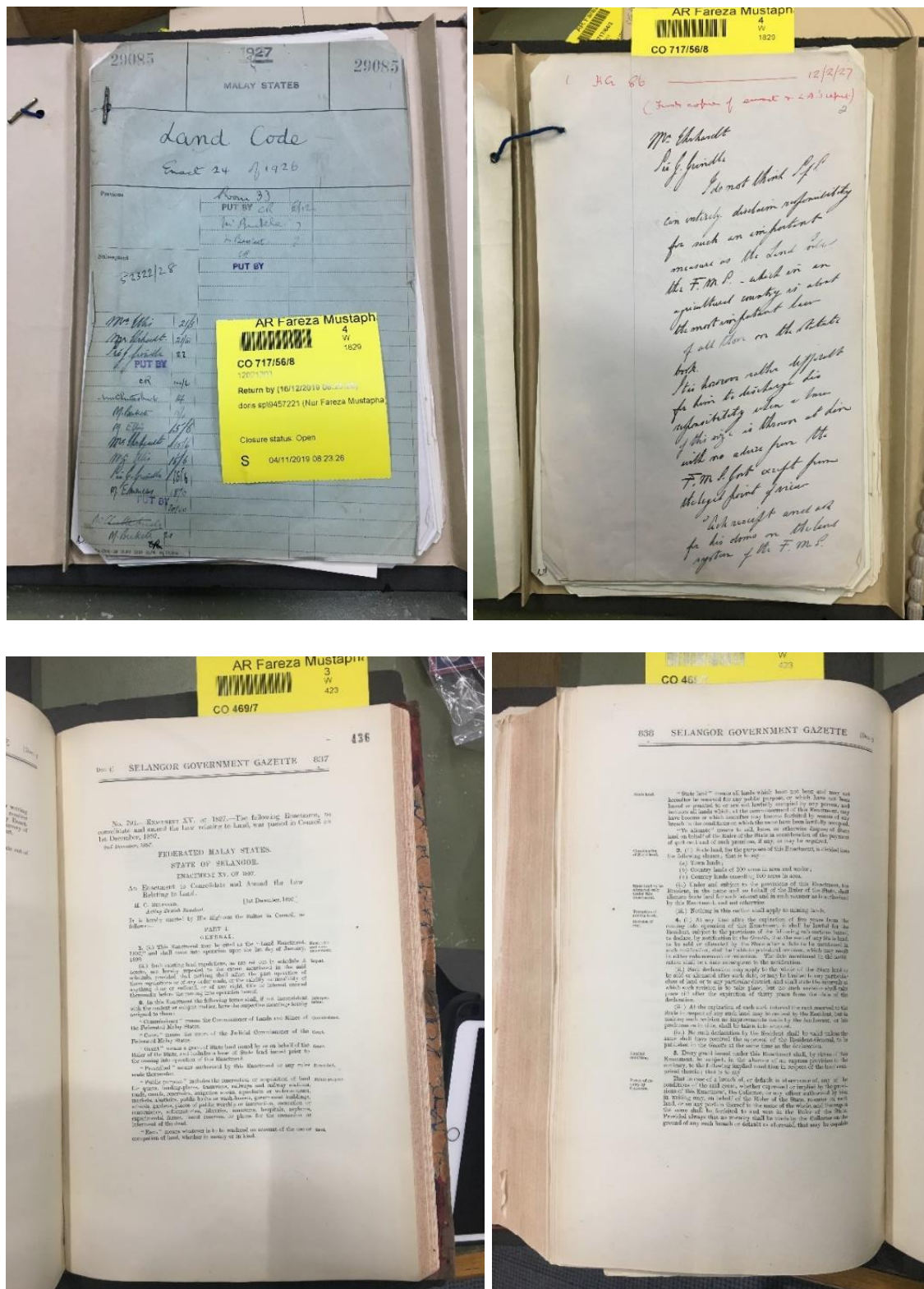
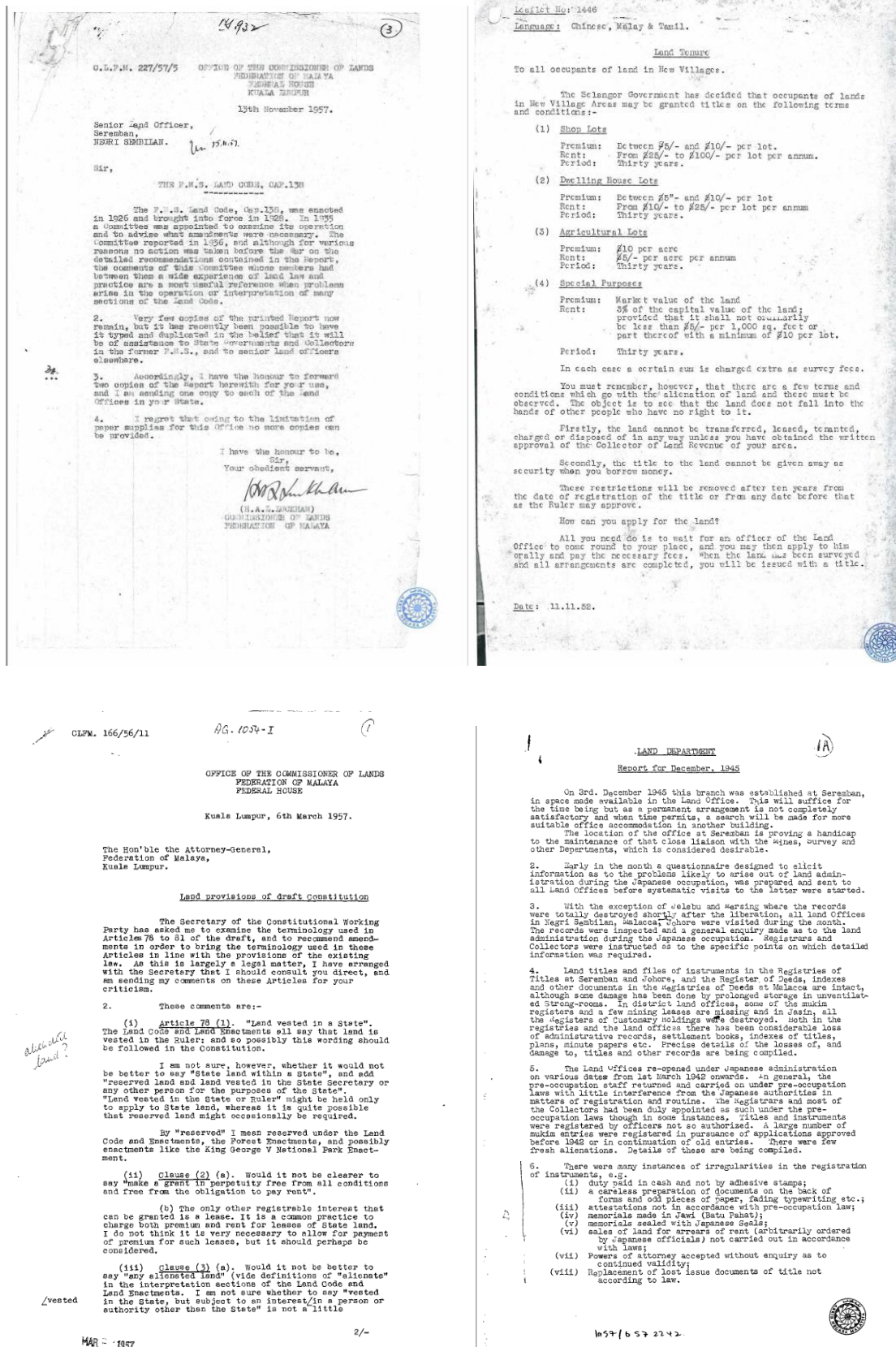


Figure 13 Example of the archival collection at the National Archive, KL.



#### *4.3.3 Secondary sources*

This research also relied upon secondary sources of data to supplement the archival work undertaken. Given the restrictions in place during the Covid-19 pandemic, the researcher was not able to revisit the archives after preliminary analysis of interview data, as initially planned. Whilst the original plan was to revisit the archives after the interviews with a second search strategy and sample, closure of the archives meant that the first sample of archival material was used as the primary historical data source. To support the historical component, secondary sources were identified. These were primarily published works on relevant topics about the period under study. The researcher prioritized published works that included lengthy extracts from original documents as well as works that reflect the author's personal experience during the period under study. Many of these published sources are themselves historical, for example, first-hand accounts written during the colonial period, or analyses of events in the early post-colonial period. This meant that the secondary sources gathered and used for analysis were largely written by prominent British colonial officers as well as European scholars active during the period, most of whom analysed and observed the developments using a foreign, western, and imperialistic lens. While these narratives were useful as a data source, the researcher also consulted more recent publications on the history of Malaya, particularly works authored by Malaysian scholars, to corroborate the analysis. A list of documentary/written evidence used in the final analysis of the project is listed in Appendix A.

#### *4.3.4 Sampling methods and validity*

The researcher used strategies employed by archivists (i.e. subjective and statistical sampling) to appraise, cull, and select relevant materials from several voluminous collections of works and archives. For both primary and secondary sources of data, subjective sampling (also known as 'purposive' or 'selective' sampling) was used to select and extract the most significant files, documents, or publications from a larger collection/series. This involved scanning the contents of the selected materials using an index/guide (when available), as well as a physical review of the actual material. Based on a review of the literature and other preparatory ground work, the researcher used her judgment to select/discard materials for the final analysis. Similarly, statistical sampling was used when a voluminous collection that is generally homogeneous was viewed and nothing suggests that any individual file/item within the volume was

significant/important. To capture the characteristics of the collection, the researcher collected a random sample from these types of materials. More fundamentally, the main selection criteria for both sampling techniques employed was the relevance of materials to the research questions and/or hypotheses.

#### *4.3.5 Data analysis*

Process tracing is an attempt: “to identify the intervening causal process – the causal chain and causal mechanism – between an independent variable and the outcome” (George & Bennett, 2005). In its focus upon investigating causal mechanisms, process tracing differs from the congruence method (i.e. an alternative method for establishing within-case inference); it goes beyond offering a narrative of a historical process and testing the correlation between variable and outcome by examining how they are causally linked (Beach & Pedersen, 2013).

Following Falleti (2016), theory-guided process tracing (TGPT) is defined as: “the temporal and causal analysis of the sequences of events that constitute the process of interest”. Using the data collected from both primary and secondary sources, this research utilized TGPT to identify the causal mechanisms that led to the development of the institutional structure currently in place in the land and housing sector. Falleti (ibid.) argues that using the TGPT method, a process “must be clearly conceptualized, both theoretically and operationally, with reference to previous theories” emphasizing the need to pay attention to the temporal sequences of events given that they are causally consequential. TGPT enables the identification of: “different patterns of sequences and their related causes and consequences” (Trampusch & Palier, 2016).

By employing the TGPT method, this research used a more inductive approach to provide: “a historical explanation of a specific outcome” (ibid.). Given that the primary objective of this research is to study and elucidate causal mechanisms, an information-rich case is essential to permit the study of causality (Patton, 2015). It was imperative that the research design permits the exploration of both current observations and historical records to identify the intervening variables or causal chains at work. This is reflected in the process of using both archival records as well as in-depth interviews and in the data analysis process through the iterative nature of bridging the preliminary findings from the two components of the project, i.e. the contemporary and historical components. The

importance of temporality in the TGPT method also situates time as central to the analysis, making the sequence of events a key variable to investigate and explain.

A summary of this process is described in Table 4. While this analytical framework is presented in a linear and predictable sequence for ease of understanding, the actual process of analysis was iterative and nonlinear. The phases of the analytical framework, in reality, better reflect the analytical objectives that was necessary to identify and specify the overarching causal process generated from the historical data.

**Table 4 Steps to process tracing**

Phases of Process Tracing	Description
Phase 1: Identify hypotheses	Identify relevant theories Identify independent and/or dependant variables
Phase 2: Establish timeline	Specify the significant steps or events of the process of interest
Phase 3: Construct causal graph	Derive intervening variables Identify critical junctures
Phase 4: Identify alternative event/choice at each moment	Identify counterfactuals for each critical juncture based on theoretical predictions
Phase 5: Identify counterfactual outcomes	Identify a plausible theory-informed alternative outcome for each critical juncture
Phase 6: Find evidence to support primary hypothesis	Consider different types of evidence and how they work to establish causation Categorize evidence based on its ability to support/negate hypotheses at each choice node Infer causal mechanism
Phase 7: Find evidence for rival hypothesis	Repeat step 6 for rival theories to exclude each alternative explanation

Adapted from Beach & Pedersen (2013), Falleti (2016), and Ricks & Liu (2018)

## **4.4 Discussion and summary**

This section discusses the evolution of the project, the limitations and challenges that emerged during the research, and summarizes the chapter.

### *4.4.1 Evolution of the project*

During fieldwork, two major changes were made to the scope of the project. These were made to reflect the evolving nature of the preliminary findings that emerged during the data collection process.

#### 1) Change in geographical scope from Kuala Lumpur to Greater Kuala Lumpur

The research initially limited the geographical scope of the case study to the city-state of Kuala Lumpur, given its burgeoning housing affordability issues. However, following feedback and insights from interviewees, this scope was expanded to include the Greater KL area. As explained in section 4.1.2, while KL city centre remains the anchor of jobs and economic activity for Malaysia, the housing demand of those who participate in the KL city ecosystem is served by the metropolitan area beyond the city-state border. It is imperative that any study looking at the delivery of housing for the city-state ecosystem reflects of this dynamic.

#### 2) Change in research focus upon affordable housing to non-market housing

The research initially limited its focus to the development of affordable housing. As defined in section 4.2.3, the umbrella term 'affordable housing' is currently defined in Malaysia as houses priced below RM300,000 for Kuala Lumpur and Selangor. While the term served well to frame the discussion on housing affordability in Malaysia in more general discussions, it became clear through conversations with interview participants that the use of term limited the scope of discussion to housing development projects that were more heavily driven by private development firms or private-public partnerships. This excluded a significant share of housing developments that did not have private sector participation, particularly during the land procurement process. In addition, preliminary findings suggested the importance of power relations within the sector, which transcended the delineation of housing developments through pricing categories.



#### *4.4.2 Limitations*

This study was limited by time, funding, and structural constraints in place during the Covid-19 pandemic. These are listed below. These issues may be addressed by future studies.

##### Archival data collection strategy

The myriad constraints of fieldwork, including here time and the structural restrictions adopted by governments during the Covid-19 pandemic, limited the initially planned data collection strategy for archival materials. While the researcher has obtained extensive articles and primary sources, limited time and the extensive domestic as well as international travel restrictions in place during the pandemic limited my data collection to Kuala Lumpur, London, and Cambridge during the intermittent 14-month data collection period. Fewer travel restrictions during this period would have enabled the researcher to gain more information from the archives in Kuala Lumpur and London as well as allowed time to visit other archives. In Malaysia alone, other invaluable archival materials may be kept in places other than the National Archives in Kuala Lumpur, particularly in the museums and state archives of Perak and Selangor. Outside Malaysia, relevant archival materials may reside in Singapore as well as Oxford, which was identified in the initial data collection strategy.

Nevertheless, these limitations drove the researcher to implement a more focused data collection strategy, particularly during the lapse in Covid restrictions in Malaysia. The researcher sought support from archivists at the National Archives in Kuala Lumpur to identify relevant material and utilized feedback as well as preliminary findings from my interview data to focus my search. Furthermore, the search strategy expanded to include published materials on the relevant subject matter, particularly items that were written and/or published during the period of study. This offered access to materials that would have otherwise been excluded by limitations of time and structural restrictions.

##### Case study design

The constraints of fieldwork meant that this study relied upon the extensive professional experience of the interview participants to capture data on experiences that are observed not only in their current roles but also in prior roles. While the researcher has sought to interview a wide range of respondents, limitations on time as well as restrictions in place

during the pandemic made it pertinent that a rich data set would need to be generated from a limited number of interview participants. Despite these limitations, the participants selected for this study have varied career experience which made them ideal to provide insights that not only reflect the challenges that they face in their current positions, but also augment their responses with a rich and detailed perspective that reflect challenges and constraints that coloured their prior career experiences. Hence, the study generated a rich dataset from interviews with a small sample size.

### Context

This study focuses upon a limited geographical region in Peninsular Malaysia, i.e. the areas encompassing the Greater KL region. As such, it neglects to account for developments in other states in Peninsular Malaysia, as well as Malaysia Borneo. As land regulations in Malaysia are governed at the state level, these exclusions remain immaterial to the overall conclusion and findings of the study. However, the key limitation here is that the causal chains and mechanisms identified within the Greater KL context may not exist or apply to the rest of the country, even if similar institutional structures do exist. Colonial developments in the other states of Peninsular Malaysia and in Malaysia Borneo followed a different trajectory, given the different historical trajectories of these states. Prior to the Federation of Malaya in 1948, the other states in Peninsular Malaysia formed the Unfederated Malay States, each with its own political, economic, and social structure and development. The Borneo states of Sabah and Sarawak did not form part of British Malaya and only formed part of Malaysia when they agreed to join Malaya in 1963 to form the country as it exists today.

#### *4.4.3 Ethics and positionality*

This study faced several ethical risks in its data collection, fieldwork, and analysis. These risks and the strategies of mitigation are described below:

#### Positionality of documentary evidence and interview data

The researcher realizes that the production of archival records, particularly official reports by colonial offices, must be situated against a backdrop of the role of their producer and administration as well as the reason for archive creation and preservation. Similarly, interview data must also be positioned against the backdrop of the role of the interview participant in his/her organization and the wider housing ecosystem. In



addition, the researcher is also affected by their own cultural and academic bias. To mitigate this, the researcher reflected upon the research process and considered the impact of bias by recording it in field notes. To ensure that the researcher do not misrepresent the views of the participants in analysis, they consulted their interviewees to obtain their feedback and/or clarification.

#### Effect of affiliation with Khazanah/University of Cambridge on interview process

My affiliation with Khazanah Nasional Berhad and the University of Cambridge may have generated unintended consequences for the interview process. Participants may have expected a positive/negative impact from the process. The researcher was transparent with participants about the aims of the research and interview as well as their role as an academic researcher. This was made clear on all means of communication prior to and at the beginning of the interview. Responses have been kept anonymous, were analysed in aggregate form, and are presented in the thesis in without any identifying details.

#### *4.4.4 Summary*

This chapter provides a comprehensive description of the research methodology. To bridge analysis of contemporary findings about non-market housing delivery in Greater KL with their historical underpinnings, this study utilizes a two-part data strategy that combines qualitative data from in depth interviews with elite participants alongside archival data from repositories. While the process of data collection, fieldwork, and analysis are described in this chapter in a linear and predictable sequence, much of the research and its processes required a more flexible and iterative approach in practice. These data are gathered from myriad sources and were examined separately as well as together to generate the study's empirical and conceptual findings. These findings are presented in the following chapters.

## **Part 1 – Findings from the contemporary component**

Chapters 5 and 6 form the first part of findings for the study. These chapters present the data and analysis of the current dynamics of the land and housing sector in Malaysia and, specifically, the non-market housing sector in Greater Kuala Lumpur. These chapters use qualitative data drawn from semi structured interviews as well as data from documentary evidence and the wider literature. The findings in chapters 5 and 6 form the analytical foundation that guide and anchor the analysis of historical data in subsequent chapters.

Chapter 5 provides background information on how and where land and housing institutions in Malaysia are situated within the nation's administrative and political systems. It also presents a new conceptual analysis of the housing system in Malaysia generated from findings in the interview data and provides the frame of analysis for the findings described in the following chapter. Chapter 6 analyses the institutional structure that governs the land and housing sector in Malaysia, focusing upon the land procurement process for the development of non-market housing and its challenges. It explores the distinctive institutional features that frame the nature of interactions and relationships that constitute the sector, particularly between the state and federal governments.

## **Chapter 5 Land and housing in Malaysia**

It is important to analyse and understand the institutions under study within the context in which they operate. This chapter provides background information on how and where land and housing institutions in Malaysia are situated within the nation's administrative and political systems. It aims to detail the context in which these institutions operate and, crucially, to illustrate how these institutions do not stand in a vacuum but rather are linked to a multitude of other institutions in their operating environment. Illustration of this network of institutions is critical if we are to understand how land and housing institutions affect and are influenced by other institutional spheres. Methodologically, this chapter uses qualitative data drawn from semi-structured interviews along with documentary evidence and the literature.

The findings and analysis presented in this chapter are divided into four sections. Section 5.1 describes Malaysia in general, focusing upon its administrative and political structure. Section 5.2 details the evolution of housing policy in Malaysia and the changing role of the state in housing provision. Section 5.3 provides a conceptual outline of the Malaysian housing system. Section 5.4 presents the chapter summary.

### **5.1 The Federation of Malaysia**

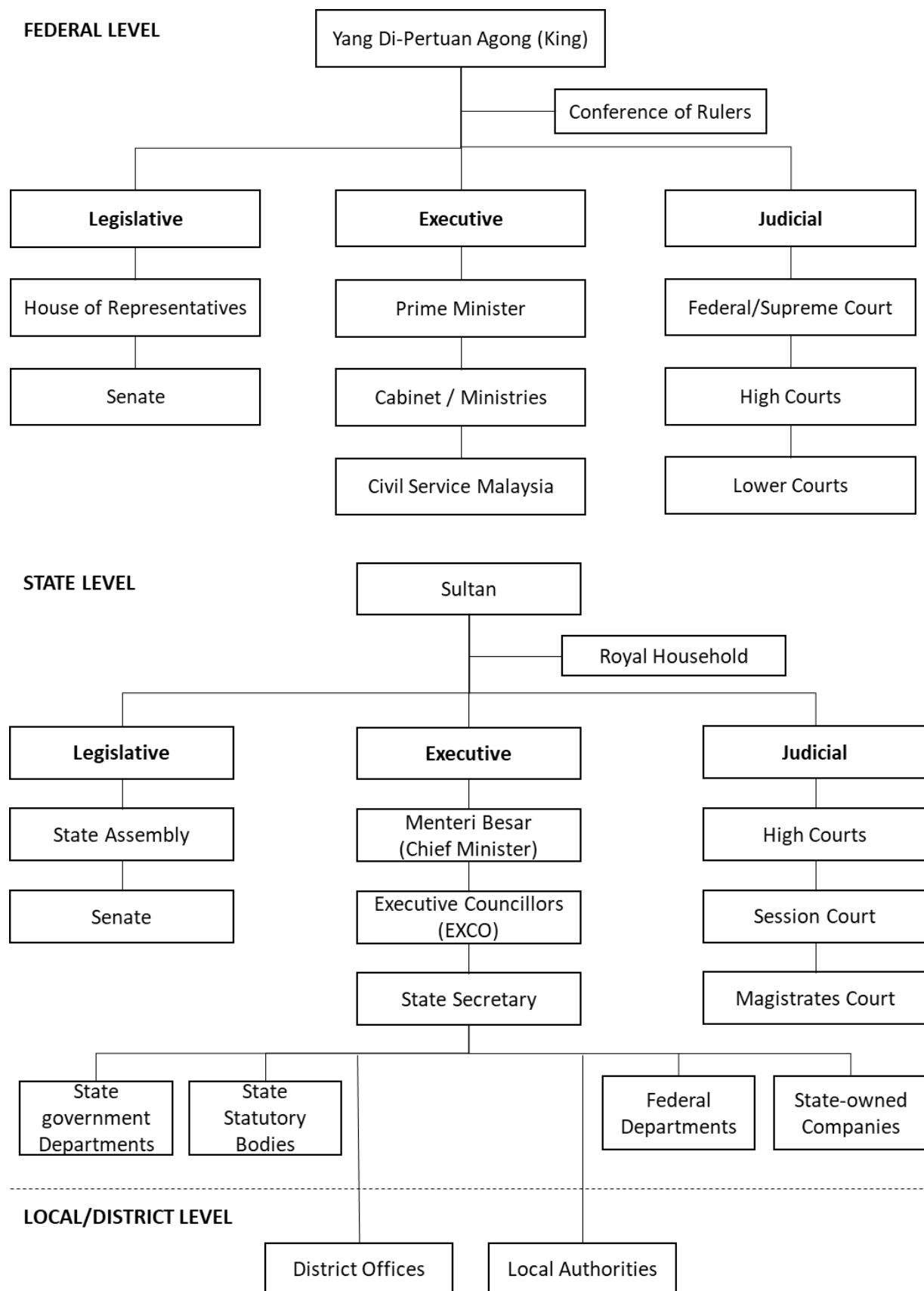
Malaysia is a federation of 13 states and three federal territories. Peninsular Malaysia borders on Singapore and Thailand while East Malaysia forms part of the island of Borneo, bordering on Indonesia and Brunei. Prior to the current federation structure, the country went through several changes to its composition. The Federation of Malaya was formed in 1948 and was comprised of all the states in present-day Peninsular Malaysia. It gained independence from British sovereignty in 1957. The Federation of Malaysia was formed in 1963 when Sabah and Sarawak (which form East Malaysia on the island of Borneo) joined the federation alongside Singapore. Singapore's participation in the Federation of Malaysia was short-lived as the country exited the federation in 1965.

Malaysia adopted constitutional monarchy and parliamentary democracy as a system of government. It is led by *Yang di-Pertuan Agong*, the ceremonial head of state, who serves a five-year term and is elected from amongst the hereditary rulers (*Sultans*) of the states. Governance of the country is guided by the Federal Constitution of Malaysia which prescribes a two-tier government structure, i.e. the federal and state levels. Legislative

power is divided between federal and state legislatures. The head of the government of Malaysia is the Prime Minister, who leads a cabinet of ministers within the executive branch of the Federal Government. The parliament of Malaysia, which holds legislative power at the federal level, is closely modelled on the Westminster system. It consists of two chambers, the House of Representatives (*Dewan Rakyat*) and the Senate (*Dewan negara*). At the state level, nine states in the country consist of hereditary monarchies while four others (Melaka and Pulau Pinang in Peninsular Malaysia alongside Sabah and Sarawak in East Malaysia) are led by governors who are appointed by the *Yang di-Pertuan Agong* for a four-year term. Each state is governed by its own constitution. A Chief Minister (*Menteri Besar*) leads the executive branch of the State through a State executive council and is answerable to the elected member of the state assembly. Figure 14 illustrates these organizational relationships.

The distinction between the two levels of government is important for this study and is discussed in further detail in Chapter 6. As an overview, it is important to note that the authority on land legislation and administration resides in and is applied at the state level of government. This makes the system of land governance in Malaysia highly complex and varied as each state retains its own right to govern land. Nevertheless, land law in Peninsular Malaysia is mainly unified under the National Land Code (Act 56 of 1965) while Sabah and Sarawak draw upon their own legal systems, namely the Sabah Land Ordinance (Cap 68) and the Sarawak Land Code (Cap 81). In addition, all three laws adopt the Torrens system of land registration, in which legal priority is reserved for the owner of the title. At the federal level, a National Land Council is prescribed by Article 91 of the Federal Constitution and is tasked to formulate the national land policy, use and legislation for the states of Peninsular Malaysia. The council is made up of representatives from each state (including Sabah and Sarawak) and 10 representatives from the federal government.

**Figure 14 The administrative structure of Malaysia**



Source: The Public Service Department Malaysia. (n.d.)

## 5.2 Housing policy in Malaysia and the role of the state

The overarching objective of Malaysian housing policy since gaining independence in 1957 has been to provide access to adequate and quality housing. Prior to 2012, this objective was pursued as part of the country's five-year development plans<sup>1</sup> rather than the national policies that are currently in place. Several studies review the initiatives undertaken in these periods by organizing the policy initiatives undertaken by the government in the respective 5-year periods (See among others: Liu & Ong, 2021; Shuid, 2016; Sulaiman et al., 2005; Yahaya, 1989). Shuid (2016) makes the striking observation that the formulation of housing policy and provision in Malaysia has always been framed through segmentation of perceived variations in housing needs according to targeted income levels. A consequence of this strategy is a government-led multipronged approach to housing provision that delineates policy initiatives and subsequently housing supply strategies by a predetermined pricing band/ceiling for housing units. This multipronged approach can be observed by taking stock of the multitude of non-market housing initiatives that have been in place since the late 1950s. Prior to 2012, state intervention in the provision of housing can be more easily demarcated given the state's policy focus upon the provision of housing for selected groups of the population. The introduction of affordable housing schemes in the early 2010s complicates this delineation in current housing provision in Malaysia.

### *5.2.1 The evolution of housing policy and the changing role of the state*

During the country's early development (pre-independence to the late 1960s), government housing provision was anchored in the socio-political dynamics that emerged from the aftermath of the Second World War and the development goals of a newly independent nation state. Severe housing shortages emerged from the destruction and lack of housing construction in urban areas caused by the war (Shuid, 2006) as well as population movement during and after 1945 (M. Johnstone, 1981). This led to an increase in illegal land occupation particularly in the main cities. Between 1946 and 1957, the number of squatter houses more than doubled in Kuala Lumpur (ibid). The Federal

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<sup>1</sup> Five-year development plans are formulated and published by the Federal Government of Malaysia. These documents detail the country's development goals during the period and have been used to provide guidance for investment decisions by both public and private organizations in the main sectors of the national economy.

Government<sup>2</sup> attempted to alleviate the situation by taking the lead in public housing provision through the establishment of the Housing Trust Federation of Malaya in 1951. The Housing Trust was empowered to raise funds for the development of housing and focused upon the provision of low-cost housing<sup>3</sup> (Shuid, 2006). However, the only large-scale government housing provision during this early period was a resettlement programme undertaken to combat communist insurgencies during the Malayan Emergency (Agus, 2002). This saw the relocation of approximately 500,000 people (primarily Chinese squatters) from the jungle fringes to 480 new villages across Malaya, where basic housing units were constructed near or within urban centres by military personnel. Under the Second Malaya Plan (1961-1965), the government began to adopt a more focused approach to housing provision, anchored in an ideological shift in promoting a 'home-owning democracy' as a component of the state's social welfare goals, focusing particularly upon the provision of low-cost accommodation for the poor (Agus, 2002; Bilal et al., 2019; M. Johnstone, 1984; Shuid, 2010). In 1964 the Ministry of Housing and Local Government was set up to facilitate these objectives. Several housing programmes were put in place during this period, for example the Crash programme, a small-scale housing development scheme of 32-50 houses in selected smaller cities. The government also expanded its public housing programme for civil servants, which were previously limited to high-ranking officers or administrators. Nevertheless, the slow pace of housebuilding, paired with a low priority for housing development in the overall policy framework for national development (illustrated by the absence of a total national housing plan), led to low levels of government housing provision (M. Johnstone, 1980; Salih, 1976). Between 1956 and 1965, low-cost housing made up less than 2% of total dwellings produced during the period (Sulaiman et al., 2005).

A fundamental shift in this position, as well as in the overall policy direction and strategy for development in Malaysia, occurred through the introduction and adoption of the New Economic Policy (NEP) in 1971<sup>4</sup>. The NEP ushered in a period in which interventionist

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<sup>2</sup> In the pre- independence period until 1957, the Federal Government referred to the British Colonial Government.

<sup>3</sup> The definition of 'low-cost housing' is historically pegged to a predetermined pricing band and/or target group of recipients and has varied over time. It does not refer to the cost of house construction, rather to the price paid by the consumers.

<sup>4</sup> The NEP was enacted following the racial riots of 1969, a pivotal juncture in Malaysia's history that led to increased state intervention in all aspects of the nation's social and economic development. The NEP and its wide-ranging impact on Malaysian politics and socio-economic policies are widely discussed in the

policies were pursued by the government in order to actively restructure and reconstruct the nation's socio-economic landscape — primarily to correct interracial imbalances in economic wealth and power that characterized the nation. This included a more aggressive approach to housing provision consonant with the NEP revisionist objectives. Housing programmes were undertaken by various agencies in the Federal and State governments such as federal statutory bodies (e.g. the Urban Development Authority (UDA), Regional Development Agencies (RDA), the Federal Land Development Authority (FELDA)) and state economic and development corporations (SEDC), for example, Selangor State Development Corporation (PKNS), Johor Development Corporation (JDC), and Pahang State Corporation (PKNP) (S. H. Tan, 1983). Unlike before, these housing programmes were wide-ranging and no longer limited to the provision of low-cost housing to the poor. Between 1971 and 1975, housing built by government agencies constituted a third of total housing production in Malaysia (M. A. Johnstone, 1979). Most of the housing (approximately 75%) was built by federal departments and agencies as institutional quarters for their employees or as part of resettlement (FELDA) or development schemes (UDA and *Majlis Amanah Rakyat*) enacted under the NEP policy banner (ibid), benefiting mainly Malay beneficiaries. The Housing Trust, which has built most of the low-cost public housing in the country since its inception, was disbanded in 1975, its responsibilities transferred to and resumed by the National Housing Department. The State Economic Development Corporation, a vehicle financed by capital from both the Federal and State Governments, built housing directed at middle- and upper-income groups as well as civil servants with access to cheap government loans. These wide-ranging programmes illustrate the major shift in the role government played in the housing sphere – from that of bystander to adopting a vital and direct role in overall housing provision.

By contrast, housing development by private developers before the 1970s was primarily limited to housing that catered to the wealthy population (M. Johnstone, 1980; Shuid, 2006) and did not materially change even after the NEP was initially instituted. Minimal restrictions and regulations on housing development before the 1970s led to the proliferation of private housing development firms, many of which were part of a

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literature (see among others: Osman-Rani, 1990; Rasiah & Shari, 2001; Thillainathan & Cheong, 2016) and will not be discussed in this section.



conglomerate and had strong international links (M. Johnstone, 1980, 1984). Large firms, particularly those belonging to a diversified group, had better access to finance and material resources, therefore were best positioned to benefit from the uncertain and precarious nature of housing construction. This led to the foundation of a house building industry that is structurally concentrated, both by its capital structure and spatial location (ibid). When housing demand began to boom in the early 1970s, 43% of licenced developers were based in Selangor and produced 56% of total private sector output during the period. The 50 largest developers (which made up 12.2% of the total and operate mainly in Kuala Lumpur and its conurbation) built 45.7% of the total units produced nationally between 1969 and 1976 (M. Johnstone, 1980). Between 1971 and 1975, only 1% of housing built by the private sector was low cost while a significant majority of housing production in this sector was affordable for only 10-15% of the urban population (ibid). In the private sector, the early years of the NEP marked a change in other facets of the industry rather than simply the types of dwelling produced by the sector, markedly through the extension of financing and increased capital investment by the government in private firms. For example, the government owned a majority of share capital in four large development firms in Kuala Lumpur, either directly or through a statutory authority (M. Johnstone, 1984). Public agencies, such as the UDA, also injected capital into private housing development projects by undergoing joint ventures with private firms (ibid)<sup>5</sup>. This is in line with the NEP goal of diminishing the domination of private firms (mainly Chinese) in the urban economic sector<sup>6</sup>, albeit with very minimal impact.

Both through increased interventionist programmes and direct/indirect participation in the private sector, housing provision emerged as a tool of socioeconomic engineering by the state in the early 1970s. This stance continued to frame the nature of the government's role in the provision of housing throughout the 1970s and 1980s, when policy initiatives under the NEP banner were most actively pursued. Nevertheless, rapid urbanization and industrialization in tandem with the state-sanctioned push for migration of rural Malays into the cities during this period exacerbated housing shortages

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<sup>5</sup> The UDA was also a major shareholder in two of the country's largest housing development firms at the time (M. Johnstone, 1984).

<sup>6</sup> Private housing development firms are largely owned and controlled by the Chinese — in 1976, 80% of housing development firms in Peninsular Malaysia were owned by the Chinese (M. A. Johnstone, 1979).

in big cities like Kuala Lumpur, Penang, and Johor Bahru, particularly for low-income households. By the late 1980s, the aftermath of an economic recession as well as a general push for economic liberalization towards the end of the decade led to a reduction in the budget for public housing development, forcing the government to abandon its role as a major producer in the housing sector. The total share of public sector housing fell from 49.7% during the 4<sup>th</sup> Malaysia Plan (1981-1985) to a mere 14.2% during the 7<sup>th</sup> Malaysia Plan (1996-2000) (Shuid, 2016). Despite efforts to induce private development firms to produce more low-cost housing in the early 1980s<sup>7</sup>, low profit margins for the segment discouraged investment even as the supply-demand gap widened (Sulaiman et al., 2005). Private firms only increased production of housing in the low-cost segment through public-private partnerships with the government in the 1990s (ibid.). Joint venture companies were formed between federal/state governments and private development firms to produce housing. In these partnerships, state governments often contributed land for development while private sectors firms provided capital and technical expertise (Shuid, 2016). In addition, funds were made available to private sector firms for the development of low-cost housing via the Low-Cost Housing Revolving Fund (Sulaiman et al., 2005). At the end of the decade, another federal government agency, the *Syarikat Perumahan Negara Malaysia Berhad* (SPNB) — Malaysia National Housing Company Limited, was established in 1997 to coordinate and implement the development of low-cost housing for the public sector (ibid). State governments also reduced their direct role in housing provision during this period; in 1998, SEDCs (which played a major role in public housing provision for the state during the implementation of the NEP) were transformed from state agencies into corporate entities and began operating as profit oriented private firms despite being owned by the state governments. Despite the increased focus upon the provision of housing for low-income households, housing shortages persist. Increased migration into the cities and lack of access to formal housing led to the proliferation of informal settlements, particularly in urban areas. While informal settlements were always part of the urban fabric in pre- and post-independence Malaysia<sup>8</sup>, a significant shift in the government's approach and treatment of squatter

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<sup>7</sup> In 1981, the Ministry of Housing and Local Governments imposed a requirement to build low-cost housing to make up at least 30% of housing units in every housing development project. These units were then allocated and sold to eligible buyers at a predetermined price. (Sulaiman et al., 2005)

<sup>8</sup> Informal housing includes both legal and extra-legal tenures.

housing occurred in the aftermath of the Asian Financial Crisis of 1997. The adoption of a 'Zero Squatters 2005'<sup>9</sup> policy in Kuala Lumpur and Selangor in 2001, and the establishment of the *Program Perumahan Rakyat Bersepadu* by the National Economic Action Council at the end of 1998 led to massive state-led relocation and resettlement of squatter households in urban areas (Shuid, 2016). This marked the first public housing rental programme provided by the federal government, establishing government intervention in the housing sector across different housing tenures. This programme initially targeted the resettlement of squatter households and was eventually widened to include low-income households. The housing programme (which has been renamed to '*Program Perumahan Rakyat*') continues to be a significant node in the housing provision strategy for the federal government even today.

### *5.2.2 The growing complexity of non-market housing*

The lack of a national housing policy prior to its introduction in 2012 meant that housing provision strategies were undertaken as part of an overarching national development policy. Ultimately, Malaysian housing provision was guided not by a defined or focused housing agenda but rather to complement the national development strategy during the respective periods. As illustrated in the previous subsection, this led to the establishment of many federal/state-level agencies, each in pursuit of a separate objective for housing provision. Accordingly, the government's housing provision strategy was defined by a range of developmental goals, for example, to further the NEP agenda or to contribute to state government finances, thus making housing a policy vehicle or tool to attain various objectives. Housing supply and demand in Malaysia can then be said to interact with each other against the background of a multitude of other factors. The supply and demand of housing, therefore, is embedded within a web of complexity which influence and determine housing outcomes.

Given the existing structure of the housing provision system and past interventions by the government, the introduction of affordable housing schemes in the early 2010s further complicates this system. While past interventions were varied in their approach and nature, the housing provision system could still be segmented into dualistic

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<sup>9</sup> The 'Zero Squatters 2005' policy set a goal to eradicate squatters and provide low-cost housing to squatting households within five years, from February 2000 to December 2004. Local authorities were given the power to demolish any new squatter settlements built after 1<sup>st</sup> January 1998 and squatters were relocated to new housing sites via several resettlement programmes (Abdullah et al., 2017).

components, whether by the final allocative strategy (restricted or open market) or according to the underlying objective (profit or welfare). In 2010, the federal government embarked on a long-term programme for economic and administrative transformation under the Economic Transformation Programme and Government Transformation Programme based on a comprehensive review of the nation's development needs. A key shift in the approach to housing provision emerged from this exercise — historically, the focus upon state intervention for housing has primarily been to cater to low-income households, generating a gap in housing supply for the sandwiched middle class which neither could afford market housing nor be eligible for existing public housing programmes. This became the overarching objective of the National Housing Policy issued in 2012. A series of housing initiatives for the middle class was established to address this gap with the target of building a million homes within five years (Ismail et al., 2019; Shuid, 2016). Many new housing programmes were launched by both the federal and state governments, (e.g., Perumahan Rakyat 1 Malaysia (PR1MA), Rumah Mesra Rakyat (RMM) by SPNB, Rumah Selangorku, Rumah Mampu Milik Johor, etc), each with their own housing targets and eligibility criteria (see Table 5) (ibid). These programmes were often implemented as a joint venture with private sector firms, in which concessions on housing development are negotiated and granted based on a variety of factors (Ismail et al., 2019). These included concessions on land, planning requirements and/or pricing subsidies. On the demand side, eligible middle-income households were able to apply for support for house purchases under a range of new financing schemes introduced by the government — this includes both direct subsidies upon purchase as well as cheaper financing arrangements for mortgages (Ismail et al., 2019; T. H. Tan et al., 2017). Both supply and demand side interventions introduced during this period further distorted the existing housing provision system by blurring the lines of what constituted the market or social sector in housing.

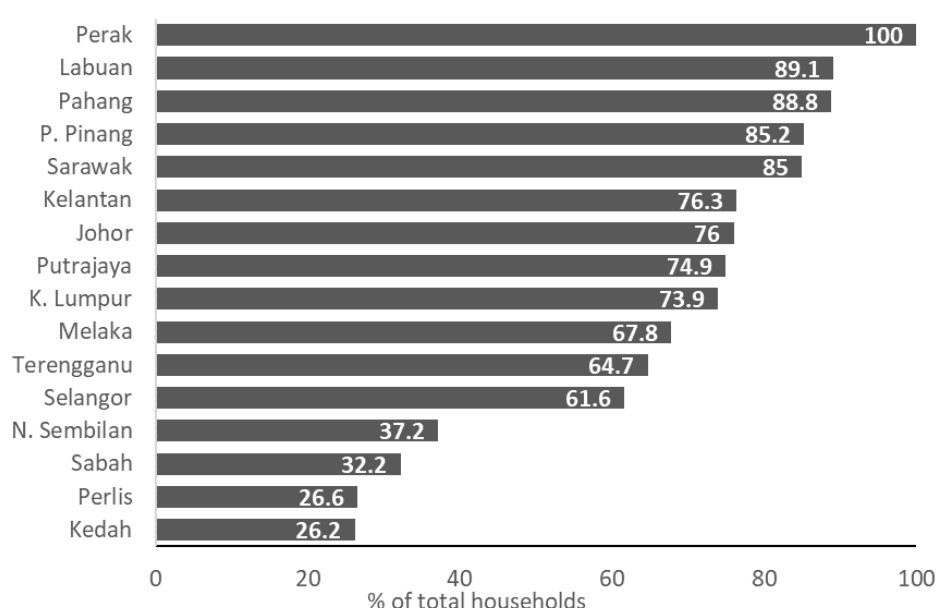
**Table 5 Selected list of Federal and State governments affordable housing programmes since 2012**

FEDERAL GOVERNMENT						
Programme	PR1MA	Rumah Idaman Rakyat	RUMAWIP	PPA1M	MyHome	
Responsible agency	PR1MA	SPNB	Ministry of Federal Territory	Perbadanan Putrajaya	Ministry of Housing & Local Government	
Private sector involvement	Yes	No	Yes	No	No	
Year implemented	2012	2014	2013	2013	2013	
Target group monthly household income (RM)	2,500-10,000	7,500 and below	6,000 and below	8,000 and below	2,000-6,000	
Selling price (RM)	100,000-400,000	250,000	52,000-300,000	150,000-300,000	80,000-250,000	
Land area/ built-up area (sq. ft.)	n/a	n/a	650-800	1,000-1,500	800-850	
Eligibility criteria	Minimum 21 years old Owned not more than one unit	Minimum 21 years old and above	Minimum 21 years old Do not own a house in th Federal Territories	For civil servants only Priority given to those who work in Putrajaya	Minimum 18 years and above	
STATE GOVERNMENT						
Programme	Rumah Selangorku	PR1MA Pahang	Penang	RMM Johor	RMM Sarawak	RMM Sabah
Responsible agency	Selangor housing and property board	Housing Section, State Secretary of Pahang	Housing Section, State Secretary of Penang	Johor Housing Board	Ministry of Housing, Sarawak	Ministry of Housing, Sabah
Private sector involvement	Yes	Yes	Yes	Yes	Yes	Yes
Year implemented	2014	2013	n/a	2014	n/a	n/a
Target group monthly household income (RM)	3,000-8,000	5,000 and below	6,000-10,000	3,000-6,000	3,000-5,000	n/a
Selling price (RM)	42,000-250,000	150,000	200,000-400,000	150,000	n/a	150,000-400,000
Land area/ built-up area (sq. ft.)	Strata: 700-1,000 Landed: 18x60 ft.	1,000	n/a	Strata: 1,000 Landed: 18x60 ft.	n/a	n/a
Eligibility criteria	Minimum 18 years old Living in Selangor Do not own a house in Selangor Owner occupation	Below 40 years olds Subject of the Sultan of Pahang and have been a resident in Pahang for more than 5 years	Minimum 21 years old Born in Penang Registered voter in Penang Working in Penang and/or living in Penang for more	Minimum 18 years old Single and/or married with one, two, and subsequent wife eligible to purchase	Age 18-65 years for married, 40 years old for single Born in Sarawak	n/a

Source: Reproduced from Shuid (2016)

In practice, the range of eligibility criteria for these programmes meant that the definition of ‘social sector’ for housing was no longer anchored by any definitive factor. That is, depending upon the location of the housing unit or the corresponding housing provider or simply, by the way these housing developments were negotiated into production, housing that is eventually supplied can be categorized as belonging to the social or market sector. For example, while household income remains a major qualifying criteria, the proportion of households that were eligible for assistance under these programmes varied across different states in 2021 (see Figure 15). This includes 100% of households in the state of Perak and close to 90% of total households in states such as Labuan and Pahang (Ismail et al., 2023). Similarly, housing providers for this segment also varied in their nature and objectives, ranging from state agencies (PR1MA, PP1AM), profit-driven state development corporations (SEDCs), public-private partnerships, and private sector firms (under state governments’ affordable housing programmes like RUMAWIP or Rumah Selangorku). In effect, any dwelling that is priced below the predetermined ceiling of RM300,000 can be categorized as affordable housing under the scheme irrespective of the way it is produced, the nature of its tenure, or how it is eventually allocated. Thus, housing supplied and demanded in this segment resides within an ambiguous space of hybridity and complexity in which intended interventions for housing may become mistargeted.

**Figure 15 Share of households that are eligible for state social and government-assisted affordable housing programmes**



Source: Ismail et al. (2023)

### **5.3 A conceptual reanalysis: The housing system in Malaysia**

Following Van Der Heijden (2013), a housing system is defined here as a composition of organized parts that interact in time and space to meet and facilitate the supply and demand of housing. It is embedded in a wider societal system, which both influences and is affected by its outcomes. A housing system encompasses the actors and institutions that operate within its productive sectors, markets, and/or regulatory framework, embodying an ecosystem of interactions that extend beyond the housing market or sector. Thus, whilst housing markets form a significant part of this ecosystem, it is not the only component that matters. The provision of housing in a housing system is determined not only by how its markets function but also by socio-political and economic developments, as well as a variety of other forces that shape and control how society functions within and beyond the housing system.

What is important to ascertain when looking at a housing system is how the supply and demand of housing are allocated and met in practice. As discussed in Chapter 2, markets for land and similarly housing can be more accurately conceptualized as a medium or allocative mechanism to transfer rights that are attributed to the property rather than to trading the physical asset. Residential dwellings that cannot be occupied, leased, or modified will not command any value nor can they be made available to the market to be traded. Conceptualizing property as situated in the rights conferred on its rights holder and not as a physical good to be traded allows us to explore how these rights are utilized and traded within the wider societal system beyond the limitations of a market. This conceptualization makes clear what is already implicit in practice, that is, the market is not the only mechanism used by actors to negotiate or secure rights to property (i.e., land or housing) nor by which the supply and demand for housing is met. It is therefore limiting to anchor and focus analysis of a housing system solely upon the outcome and efficiency of its housing markets. With this in mind, the Malaysian housing system is described in this section.

Findings from the interview data, which are described in detail in Chapter 6, indicate the dichotomy of market versus social housing sectors frequently used to illustrate the distinctive spheres of productive capacities in housing systems is particularly ill-suited when discussing the Malaysian case. Such a framework presumes that both public and private actors can be disentangled and differentiated as to their roles and involvement in

the housing sector. In practice, a continuum that places private and public sector actors at the extreme ends of its range fails to consider that both state intervention in housing and private sector involvement can permeate the artificial boundaries of what constitutes the market or social sector in housing. As discussed in section 5.2, this is especially relevant in Malaysia, where the housing provision cannot be easily delineated based on this distinction. While government intervention in the housing sector is not as pervasive in Malaysia as it is in countries such as Singapore, an attempt to describe Malaysia's housing system by separating the market and social sector quickly becomes problematic given the heavy government involvement in all sectors of the economy, particularly through government linked companies, state development corporations, and government equity holdings in private firms. Thus the Malaysian housing system is best understood using a framework that brings to light the spectrum of complex relationships that define housing provision strategies in the country.

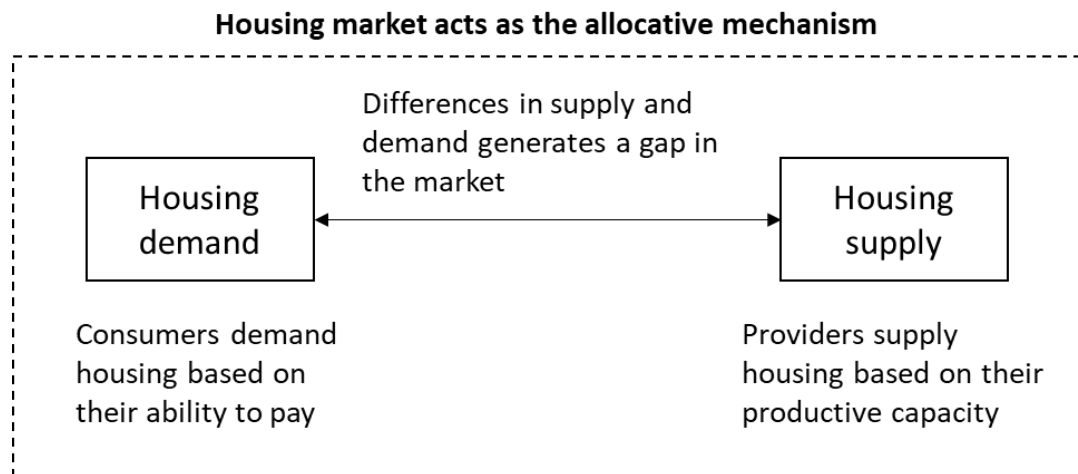
Within this context, this study finds that the housing system in Malaysia can be more appropriately described by anchoring the analysis not in the characterization of its housing markets or sectors, but rather in the way rights to property are allocated, distributed, and negotiated within the system. Empirical evidence to support this conceptualization is detailed in Chapter 6. A key conclusion of this study reveals that a distinction can be made between housing delivery mechanisms in which power differentials form the major force in determining housing outcomes. Power is defined as the ability to compel others into action (Portes, 2006) and differentials between actors indicate that outcomes may be determined by the actor's interest rather than efficiency or viability. Analysis of the data showed that in the Malaysian housing system, power differentials among actors and institutions that operate within the system determine how rights to property are secured, allocated, and distributed. For analytical purposes, the housing system in Malaysia has been broadly segmented into two different sectors in this study – one in which power differentials drive outcomes and one in which they do not. Within both sectors, a multitude of actors and institutions ranging from public to private interact to deliver housing outcomes.

'Market housing' is defined in this study to characterize the sector in which power differentials do not significantly influence housing outcomes. It reflects the characteristics of a housing sector in which the supply and demand for housing is guided



by the rational choice of actors and institutions that operate within the system. The primary goal of policy, actors, and institutions in a housing system anchored in the market is to eliminate constraints or barriers so that the market can clear and produce the most efficient outcome. While power amongst actors may exist within this sector, as can be assumed through the existing ownership of property rights over land or housing, this conceptualization assumes that the differences in power amongst actors are not adequately significant to affect the way these rights are transferred within the sector. That is, the power held by actors that demand or supply rights to land/housing in this sector are functionally equalized at the point of interaction/transaction. In Malaysia, market housing can be used to describe a segment of the housing system in which the development and delivery of housing is intrinsically driven by the productive capacity of the actors and institutions that operate within it. That is, housing provision is guided by the viability of housing providers to supply it and the ability of housing consumers to attain it. Fundamentally, interactions between actors are more horizontally positioned where actions taken by actors are not compelled by the influence of other actors but are rather made through assessment of an actor's own position within the system. The market housing sector in Malaysia describes the supply and demand of residential dwellings that are traded on the open market. The market in this way acts as a medium or allocative mechanism in which the rights to develop, use, lease, and/or own housing are traded and exchanged based on the actor's ability to pay. Housing producers in this segment range from private firms to state owned corporations which bid and compete for rights to use land and develop housing. Housing consumers demand and obtain housing by declaring and matching their housing preferences with their ability to pay for it. Housing systems that are anchored in the market can be static or dynamic, based on their intrinsic role as a consumer good or as an investment (Van Der Heijden et al., 2011). External factors such as economic developments or demographic changes which affect the productive capacity of producers or consumers are more likely to affect housing outcomes and activity in the market. Figure 16 illustrates these interactions and linkages in the market housing sector.

**Figure 16 Elements of market housing**



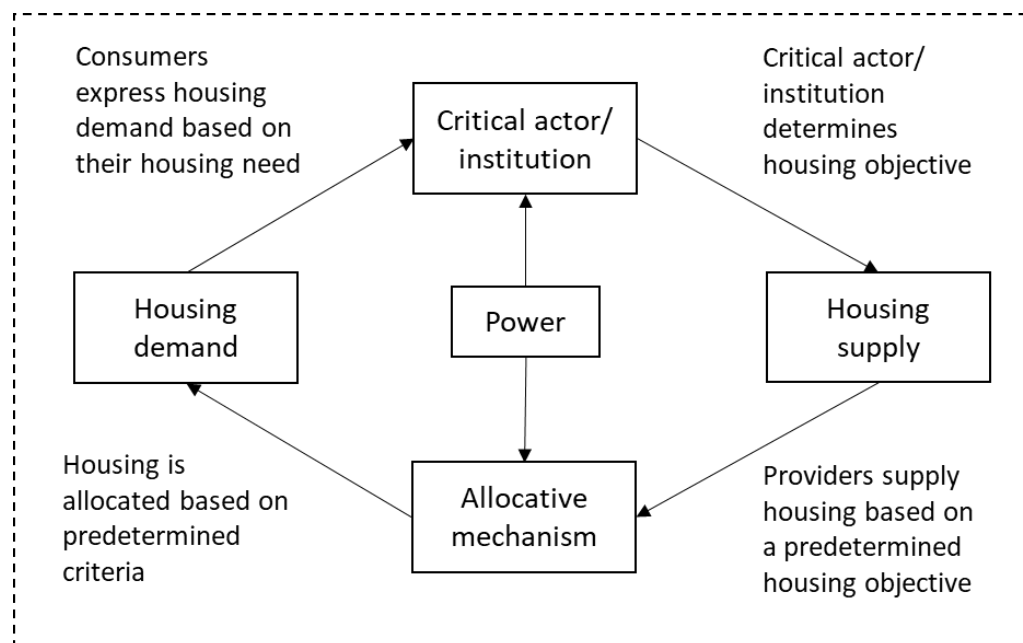
Note: The dashed line reflects the housing market boundary

Source: Researcher's model

By contrast, a key conclusion of this study is that in Malaysia non-market housing is best defined as the sector in which power differentials play a significant role in determining housing outcomes, that is, actors and institutions interact to meet the supply and demand for housing according to an assigned position and/or hierarchy and are compelled into action by the influence of other actors or institutions. These interactions can be characterized by their vertical, rather than horizontal, alignment and linkages. This dynamic makes the sector naturally more susceptible to developments in the ideological, political, and/or legislative structures of society, which can be more hierarchal in nature. It differs from the social housing sector, which is widely used in the literature as the contrast to the market sector (see among others: E. K. Scanlon & Whitehead, 2008; K. Scanlon et al., 2014; Whitehead & Scanlon, 2007), in that its definition and attributes are anchored in the dynamics of interactions and linkages of actors and institution that operate within it, rather than in the overarching goal of housing provision or the nature of housing ownership in the segment (ibid.). In this manner, social housing may form part of the more widely defined non-market housing sector but does not fully define it. This research finds that markets play a less pivotal role in this sector – the market is not the medium or mechanism by which rights to property are traded or exchanged, rather it serves as a reference or starting point to determine the bargaining position of actors and institutions that operate in this sector. The primary goal of policy as well as actors and institutions in this sector is therefore not to ensure that the market clears but rather to arrive to a favourable bargaining position to achieve their housing objectives whether as

a housing producer or consumer. Analysis of the data shows that in Malaysia, the supply of housing in this sector is delivered by a multitude of actors and institutions that range from the federal or state government to private sector firms that are driven to action under the influence of another actor or institution that guides its behaviour. For example, data described in Chapter 6 illustrates how the development of housing projects in the Projek Perumahan Rakyat (a type of social housing in Malaysia) and PR1MA (a type of affordable housing scheme in Malaysia) are not guided primarily by the viability of the project but on the ability of actors to negotiate their desired outcomes. These negotiations fundamentally determine where and how many housing units are built under these programs. On the other hand, those that demand housing in this sector obtain housing not by declaring and matching their housing preferences in the market but rather by entering or joining a process/mechanism, for example, a registration database or list, that determines allocation based on any number of qualifying criteria. For example, PR1MA houses are allocated through a registration process and a public ballot. Figure 17 illustrates these interactions and linkages in the non- market housing sector. These interactions and allocation mechanisms are further explored and illustrated in Chapter 6.

**Figure 17 Elements of non-market housing**



Note: The dashed line reflects the political/ administrative boundary

Source: Researcher's model

Using these broad categories, further distinctions can be identified within each sector based on the data drawn from the fieldwork and observation. For the market housing sector, different categorizations of housing can be used to describe and analyse the sector, depending upon the object of study and the overarching basis of inquiry. Given the focus of this study upon non-market housing, further categorization in this framework is anchored in the vertical or hierarchal dynamics of the non-market sector. For analytical purposes, the continuum of housing schemes/products in the Malaysian housing system are identified and ranked based on the entrenchment or visibility of power in the dynamics of their housing provision strategy. Through analysis of the data collected, two main pathways of development for non-market housing have been identified and defined by the different levels of entrenchment of power that guide the actors, institutional behaviour, and bargaining positions. These pathways are defined in this study as constitutional and operational. On the constitutional pathway, the power to drive or compel housing provision from actors and institution is extracted from visible and concrete sources. Forces of power can be derived from tangible vehicles that provide legality to these actions, for example, formal legislative devices such as federal or state constitutions, legal codes or acts, and state council proceedings as well as administrative structures and levels. On the operational pathway, the force of power is entrenched and less visible. It is derived from intangible sources that provide legitimacy to these actions, for example, political structures or patronage as well as social, economic, or cultural capital. The mechanisms and dynamics that structure these pathways are further explored in Chapter 6, using evidence collected from fieldwork.

## **5.4 Summary**

The conceptualization of the housing provision system in Malaysia into market and non-market components provides a lens through which to analyse and frame the findings of this research. More importantly, situating the sector against the role power plays in determining housing outcomes provides the theoretical and conceptual framework to analyse and interpret data as well as curate the empirical findings that are generated in the contemporary component of this study. These findings are explored in the next chapter.

## **Chapter 6 Actors, strategies, and pathways to housing development**

This chapter is the second findings chapter in the contemporary component of the study. It analyses the institutional structure that governs the land and housing sector in Malaysia, focusing upon the land procurement process for the development of non-market housing and its challenges. It describes distinctive institutional features that frame the nature of interactions and relationships that forms the sector, particularly between the state and federal governments. This chapter answers the question:

- 1) What land is available for the development of non-market housing? Who owns the rights to such land?
- 2) How do housing providers obtain the rights to development for non-market housing?
- 3) What does this mean for housing provision?

Methodologically, this chapter draws upon qualitative data from semi-structured interviews with critical actors in the land and housing sector in Malaysia as well as official documents. It builds on the data and analysis presented in Chapter 5 by providing empirical evidence that supports the conceptual analysis in the preceding chapter and provides the analytical basis for the historical component of this research.

### **6.1 Who holds the rights to land – What rights? Which land?**

In Malaysia, housing development actors must adhere to different tenure rules depending upon where they plan to build housing, the type of land they intend to use as well as the type of housing they plan to build. These rules vary across the different phases of the housing development process and can affect how housing is eventually supplied in various ways. Given the scope of this research and its limitations, only actors, regulations, and processes that are relevant to the procurement of land specifically for housing development - particularly those intended for social and/or affordable housing projects - will be described and analysed. To build houses, developers must obtain the rights to use and develop the intended parcel of land through direct granting of these rights from, or by negotiating a partnership with, the corresponding owners. That is, an actor must demand the right of use for a particular parcel of land from those who can supply it - the holder of this right. It is then vital that we begin this discussion by describing what land is available for development and who owns the right of use for it.

When we look at the rights to land as an institution, the pertinent question to ask when we attempt to ascertain who can make decisions with regard to how a parcel of land can be developed or used is: Who holds the corresponding rights to make those decisions? These rights can be held by a range of actors which include but is not limited to the landowner, its proprietor, the local government/council, and/or a constellation of these actors, depending upon how the rules of tenure have prescribed their roles in the land tenure system in place. If institutions prescribe the 'rules of the game', then to analyse and understand the institution, we must first define which rules are being analysed and within which game it is played and by whom. This section outlines the actors and rules involved in securing access to land for housing development in Malaysia. It describes those who supply and demand land for development and the conditions under which they interact.

#### *6.1.1 Land as property under the National Land Code*

As all actions and proceedings with respect to housing development in Malaysia are fundamentally regulated by a range of legislative orders, we must begin by first outlining how land is defined in the legal code. As discussed in Chapter 5, laws relating to land and land tenure for the Federal Territory of Kuala Lumpur and the state of Selangor is consolidated under the National Land Code 1965 (Act 56 [Rev. 2020]) (Malaysia). The National Land Code (NLC) generally provides the legislative overview for land dealings in the states of Malaya (i.e. states in Peninsular Malaysia) but does not affect the provisions of any laws for lands that are specifically governed by other existing acts or legislation, for example: customary tenure; Malay reservations/holdings; mining activity; sultanate lands; waqf or Baitul-mal lands, and/or any individual state legislation on land settlements.

The NLC defines 'land' to be:

- a) The surface of the earth and all substances forming that surface;
- b) The earth below the surface and all substances therein;
- c) All vegetation and other natural products, whether or not requiring the periodical application of labour to their production, and whether on or below the surface;
- d) All things attached to the earth or permanently fastened to any thing attached to the earth, whether on or below the surface, and

- e) Land covered by water.

It further defines land to be of five categories, as follows:

- a) Alienated land: any land (including any parcel of a subdivided building) in respect of which a registered title for the time being subsists, whether final or qualified, whether in perpetuity or for a term of years and whether granted by the 'State Authority' under this act or in the exercise of powers conferred by any previous land law, but does not include mining land;
- b) Reserved land: land for the time being reserved for a public purpose in accordance with the provisions of section 62 of the NLC or any previous land law;
- c) Mining land: any land in respect of which a mining lease or certificate granted or issued under any written law relating to mining is for the time being in force;
- d) Forest reserve: any land gazetted under the National Forestry Act 1984, and
- e) State land: all land in the State (including so much of the bed of any river, and of the foreshore and the bed of the sea, as is within the territories of the State or the limits of territorial waters) other than the above.

In addition, other categories/classifications of land are also used and defined in the NLC, to be utilized by government officials/legislators according to their intended purpose. Under Section 51(2), land above the shoreline is classified as one of the following according to its geographical location:

- a) Town land: land in any area of the State declared in accordance with the provisions of section 11 or section 444 to be a town;
- b) Village land: land in any area of the State declared in accordance with the provisions of section 11 or section 442 to be a village, and
- c) Country land: all land above the shoreline other than the above.

Under section 52(3), land is further differentiated according to its land-use categories, which is determined when it is alienated for use. These categories are agriculture, building, and industry. In this way, the NLC uses the terms 'classification' and 'categories' as distinctive legal concepts in the document to differentiate the physical location/aspects of the land and their intended use (Salleh, 1989). These typologies organize land according to its status and/or type of use for the general reference of land administrators as to the purpose of effective legislation through the NLC. These

administrative objectives include attaining order in development (e.g. density control, zoning for development and planning for essential services), optimizing the utilization of land and mapping/identifying land for acquisition (ibid).

While these typologies are used (and are presumably helpful) in the administration of land across all relevant government ministries or agencies, they do not ultimately indicate who holds the right of use across the different categories of land. The lack of such a typology makes it unclear from whom and how actors in the land and housing sector procure rights to land for housing development. This inhibits analyses of the development processes through which housing is ultimately delivered. There is therefore a need to generate a typology of land for this purpose. To do so, we must first understand what land is available for development, who owns the rights to it and consequently, how the different rights to land in Malaysia are held and transferred. Using the categories defined in the NLC, we can infer that all land in the country can be effectively segmented into two distinct groups: land that has been disposed (e.g. alienated land and reserve land) and state land. 'Disposal' of land refers to the granting of certain rights over land to individuals or bodies as stated under the provisions of sections 44 and 45 of the NLC. These proprietary rights, both natural and subsidiary, entitle their holders to the use and enjoyment of land under Malaysian law. These may include the right to own or possess, the right to transfer/assign/engage in dealings, and the right to use/of access to a designated piece of land. Natural rights are inherent while subsidiary rights are acquired or imposed. For our purposes, the right to land that is of interest is:

- 1) The right of disposal: the right to alienate and to confer rights over the land;
- 2) The right of use/access: the right of exclusive and lawful use and enjoyment over the land, which includes the right to support of the land and the right of access to the land, and
- 3) The right of dealings: the right to engage in transactions (transfers, leases and tenancies, charges and liens, and easements) upon the land.

To aid analysis, it is useful to think about who these rights are allocated to in each land category and how such rights may be procured for housing development.

In Malaysia, the right to govern all matters relating to land is conferred to the state government, as provided through Article 74 (9<sup>th</sup> Schedule, List II - State list) of the Federal



Constitution of Malaysia. Section 40 of the NLC further prescribes that the property in all 'State land' vests in the 'State Authority' (SA) — defined as the Ruler of the State. For the Federal Territory of Kuala Lumpur, the right of the SA as defined in the NLC is conferred on the Government of the Federation through modification order P.U.(A) 56. This provides the federal government similar rights in nature over federal land as state governments do over state land. This distinction is important because the relationship between the federal and state government on matters related to land (and the corresponding powers and rights attached to land) cease to exist in a federal territory. Land within a federal territory has been alienated to and is fully under the jurisdiction of, the federal government. In the case of Kuala Lumpur, land within its boundaries was alienated to the Federal Government by the state of Selangor upon its establishment in 1973. Operationally, land in the Federal Territories is vested in and managed by the Federal Land Commissioner (FLC) through his office, which is provided by the Federal Lands Commissioner's Act 1957 (Act 349). Provision under this act prescribes the FLC as the registered proprietor of all federal lands, granting the FLC the associated rights consonant with that role.

Under the NLC, the SA has wide powers of disposal and upon initial alienation can impose any conditions on the parcel of land at its discretion. The SA holds the singular right to alienate any state land to any individual, organization, or government agency. It also holds the power to determine the land use category for the alienated parcel. For housing, any developer looking to build housing on state land must apply for the land from the SA, agree to the imposed conditions, and pay a premium and any associated rent and/or fees on the land before the land can be alienated and a title can be issued. Apart from alienation, the SA can also dispose of state land by issuing temporary occupation licences (TOL) or by placing the intended parcel under reserve for a public purpose (which can be revoked at any time and/or also be leased to other parties for any period not exceeding 21 years). Through disposal (whether by alienation or other means), the right of use for the land is typically transferred from the state and is effectively held by its corresponding proprietor – this role can be held by a wide range of actors from private landowners, federal ministries/agencies, state agencies, TOL holders, trusts, lessee, etc. Consequently, a developer looking to build housing on any disposed land can approach proprietors directly to negotiate a purchase or a partnership for their development project.

The NLC guidelines prescribe the legislative framework that governs how the rights to land in Malaysia are held and transferred. Nevertheless, data gleaned from interviews indicate that, in practice, these processes are neither linear nor as straightforward as they appear in the legislation. Hence, depending upon where the land is located (in this case, whether it is in the Federal Territory of Kuala Lumpur or in the state of Selangor) and the status of the land (whether it is alienated, reserved, leased, or owned by the State Authority/proprietor), land that is available for housing development is procured differently from various actors and may be subject to varied constraints upon procurement. The research found that these differences matter, particularly the distinction between state and non-state actors as right-holders because this ultimately defines the set of regulations as well as the inherent dynamics at play in the negotiation for land procurement at any point in the process. The research further discovered that developers looking to build housing use this tacit knowledge to navigate the development process and ultimately face a complex constellation of actors and processes when demanding suitable land for housing development. These dynamics are described in the next subsection.

#### *6.1.2 Land for housing development*

This section provides an overview of the types of land available for housing development and introduces the main actors involved. It further identifies strategic actors in the land procurement process as well as the final housing development — these actors can influence outcomes and/or have sufficient power to change the rules of the game within these processes (Hufty, 2011). It concludes by presenting a curated typology of land types and corresponding right-holders, which is presented in Table 6. Based on existing definitions and land types, this typology re-organizes and reframes existing categories to make clear the actors involved in supplying or holding the rights that are demanded by developers to build housing.

##### State land

As specified in the preceding subsection, state land is defined as all land in the state that has not been disposed for a purpose. In effect, state land encompasses all land within the territory of a state that is not yet marked for development or has had its rights transferred to a proprietor. As prescribed in the NLC, this means that all rights to state land are

effectively owned and held by the State Authority in absolute<sup>10</sup>. This includes all the rights under study, i.e. the rights of disposal, use, and dealings.

It is pertinent then to describe what ‘State Authority’ constitutes in practice. That is, who or which institution effectively holds the right to make decisions and execute them in the role as State Authority. Under Section 5 of the NLC, the term ‘State Authority’ is defined as the “Ruler or *Yang Di-pertuan Negeri* of the State, as the case may be”. Sharifah and Nor Asiah (2008) argue that the term cannot be read independently of the provisions in Schedule 8 of the Federal Constitution, which stipulates that: “the ruler or governor must act on the advice of the State Executive Council”. Data drawn from the interviews indicate that this interpretation is consonant with what transpires in practice, as illustrated by the response below:

“Thus, under the state constitution of each state, the authority of the Sultan/Raja is transferred to the State Authority, that is the ‘ruler in council’ – who is the ruler in council? It’s the state executive council. The State Executive Council is the state authority. The head of the government are the politicians, the head of the state is the Sultan/Raja.” (P2) Translated from Malay.

Fundamentally, this relegates the power to make decisions on all matters relating to land to the Ruler of the State (i.e. the *Sultan* or *Yang Di-pertuan Negeri*) with the support or advice of the head of the State Executive Council (EXCO), i.e., the Chief Minister of the state government (see Figure 14, Section 5.1). This research found that in practice, all applications relating to land, e.g. for alienation or land-use conversion, are brought into EXCO meetings for the approval of the State Authority. These meetings are led by the Chief Minister, vesting in him/her the rights to state land and with it, the role of a strategic actor in these interactions. As explained by a land administrator:

“The right to alienate land is held by the State Authority. Members of the council (*for Kuala Lumpur*)<sup>11</sup> include the Secretary of State and representatives from several other ministries. In the council, if they believe that there is a need to alienate land for development, even if the application is not supported by officers

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<sup>10</sup> There are some restrictions to this which may be prescribed by other legislation. For example, the NLC stipulates that the SA has no power to dispose of any land for the purpose of mining or for the purpose of removing forest produce.

<sup>11</sup> Interview data that are translated from Malay include many contextual details that are implicit in speech. These details are italicized in the English translation.

(*at the land administration office*) who have reviewed them, they can overrule this decision.” (P4) Translated from Malay.

### Disposed land

‘Disposed land’ can be defined as any land other than state land which has been disposed for a purpose. The NLC uses four categories to describe these types of land: alienated land; reserve land; mining land, and forest reserve. Only alienated land and reserved land fall under the scope of this study given its focus upon housing development as mining land and forest reserves are not typically used for this purpose. As stated in subsection 5.1.3, state land can be disposed through several means to any individual, organization, or state agency. Through disposal, selected controlling rights over such land are conferred on the registered proprietor of the land. Actors can procure the rights to use lands that have been disposed by demanding these rights directly from their registered proprietor — the registered proprietor of the land is the strategic actor for this process. Depending upon the type of land, the process of acquiring rights from their registered proprietors can differ. These are further described below according to the different types of land.

### Federal land

Federal land is a category of disposed land. It is defined as land used by the ministries/departments of the federal government. In the official guidelines of various district/state lands and mines offices, these lands are categorized into nine groups as follows:

- 1) Any land alienated to the Federation of Malaysia and/or vested under the Federal Lands Commissioner;
- 2) Any state land placed under reserve for the use of the Federation under article 85(5) of the Federal Constitution;
- 3) Any land in the Federated Malay States and Unfederated Malay States placed under reserve for the use of the Federation under article 166(4) of the Federal Constitution;
- 4) Any land in the state of Malacca and Penang that is occupied, used, controlled, and managed by the Federal Government for the use of the Federation under article 166(3) of the Federal Constitution;

- 5) Any land that was held under a lease issued under section 221 of the NLC or under any similar provision of any law in force prior to the NLC;
- 6) Any land that is held under tenancy issued under section 223 of the NLC;
- 7) Any land that is occupied under the issuance of a Temporary Occupancy License from the State Authority;
- 8) Any land that is used for a period of not more than 3 years under section 57 of the Land Acquisition Act 1960;
- 9) The use of airspace on state land or reserve land under the issuance of a permit by the State Authority.

As discussed in subsection 5.1.1, property in federal lands is vested in the Federal Lands Commissioner of Malaysia (FLC) under provisions of the Federal Lands Commissioner Act 1957. This act grants the FLC associated legal rights as a registered proprietor of the lands as stipulated in section 92 of the NLC. In addition, the right of the 'State Authority' as defined in the NLC is conferred to the Government of the Federation, providing the federal government similar rights in nature over federal land as state governments enjoy over state land. However, interview data indicate that, in practice, while the FLC is the administrator of these rights, they do not have the power to execute them without consent from their respective owners, that is, the ministries/departments these lands were allocated to. This is illustrated in a response from a land administrator which emphasizes the true allocation of rights in the case of federal land:

“Except for land that belongs to the Federal Government, which is owned by the ministries. All federal land is held under the Federal Land Commissioner but behind that, the FLC holds federal land on behalf of different ministries. Each land has a different ministry that really takes care/charge of the land.” (P2)

This observation does not contradict what is formally legislated in the legal code, which simply confers on the FLC the right to: “enter into contracts and may acquire, purchase, take, hold and enjoy movable and immovable property of every description, and may convey, assign, surrender and yield up, charge, mortgage, demise, reassign, transfer or otherwise dispose of, or deal with, any movable or immovable property vested in the Corporation upon such terms as to the Corporation seems fit”. Nevertheless, this relegates the FLC to the role of a coordinator, rather than a strategic actor in the land procurement process. While the FLC has legal standing to act as the proprietor of federal land, it possesses these rights only as a custodian, acting on behalf of the actual owners,

i.e. the relevant ministries/departments in the Federal Government. The study found that this distinction is critical when we consider who actors must negotiate with in order to use the land for housing development. The strategic actor holding the power to make decisions for this purpose is not the FLC, but rather the head of the ministry/department that 'owns' the land.

### Reserved land

Reserved land is a category of disposed land. Apart from alienation, the State Authority can also dispose of state land by reserving such land for public purposes either temporarily or permanently. This provision is prescribed under section 62 of the NLC<sup>12</sup> — the State Authority is required to publish a notification in the state gazette for this purpose and in doing so, can designate the rights to control the reserved land to a selected public officer. As such, reserved land is, in effect, maintained and managed by the selected officer of a state or federal ministry/department. To alienate any reserved land for use other than the declared purpose, the State Authority must first revoke the reservation by holding an enquiry on the matter. In this manner, both the State Authority and the designated public officer play a critical and strategic role when such land is demanded for housing development.

The data collected shows that the corresponding rights to land can be held and controlled by different actors depending upon how these rights are allocated, both in the legislative framework of the country or in practice. These findings have been used to generate a typology that is presented in Table 6, which provides a summary of how these rights are held according to the different land types.

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<sup>12</sup> 'Reserved land' in this context does not include land that is reserved under the provisions of other enactments, for example: Malay Reservation under the various Malay Reservation Enactments; Forest reserves under the National Forestry Act 1984; aboriginal reserves under the Aboriginal Peoples Act 1954, and wild-life reserves under the Protection of Wild Life Act 1972 (Sharifah & Nor Asiah, 2008).

**Table 6 Typology of land in Malaysia, by selected rights-holder**

Type of land	Definition	Holder of rights		
		Right of disposal	Right of use	Right of dealings
State land	All land in the state including the riverbed, foreshore and seabed situated within the territories of the State or the limits of its territorial waters other than alienated land, reserved land, mining land and reserved forests.	State authority	State authority	State authority
State reserve land	State land that is reserved for a public purpose (e.g., roads, drainage, and river) under section 62 of the National Land Code	State authority	Relevant state agencies/ departments	State authority
Federal land	Any land alienated to the Federation of Malaysia and/or vested under the Federal Land Commissioner	State authority	Relevant federal ministries/ departments	Federal Land Commissioner
Federal reserve land	Any land placed under reserve for the use of the Federation under article 85(5), 166(4), and 166(3) of the Federal Constitution.	State authority	Relevant federal ministries/ departments	Federal Land Commissioner
Disposed land	Any land with a registered title (excluding those held by the FLC), including but not limited to: <ol style="list-style-type: none"> <li>1. Alienated land</li> <li>2. Leased reserve land</li> <li>3. Malay reserve land</li> <li>4. Land held under Temporary Occupation Licences (TOL)</li> <li>5. Waqf land</li> </ol>	State authority	Registered proprietor	Registered proprietor

Source: Author's conceptualization, National Land Code.

Note:

- 1) Mining land and forest reserves are not included in this table as they are beyond the scope of the study.
- 2) The definition of 'State Authority' differs according to the location of the land.

## **6.2 Power and pathways for non-market housing development**

As discussed in Chapter 5, the analysis found that power can be present in the interaction and alter outcomes in the housing provision system through what is defined in this study as a constitutional or operational pathway. In this section, these pathways are described through evidence collected from semi-structured interviews with critical actors that characterized the interactions between actors during the land procurement process. As illustrated in the preceding section, the various rights to land can be held and controlled by a range of actors in the Malaysian housing sector. This section describes how claims to these rights are negotiated and transferred between different actors as well as the constraints that impede these interactions.

The findings indicate that power differentials between actors exist in practice and shape the outcomes of housing provision in the non-market housing sector. Most importantly, this study found that actors in the sector select and utilize institutional instruments that enhance the legitimacy of their claims to optimize their bargaining positions and shift outcomes in their favour, similar to a process known as ‘forum shopping’ (Meinzen-Dick & Pradhan, 2002; Von Benda-beckmann, 2003), both within and across constitutional and operational pathways, separately as well as together. Given that both pathways are legal and legitimate, actors base their actions and strategies on whichever institutions and institutional rule-making environment best fits their negotiating position. Both housing providers and regulators reported taking actions to compel and are constrained by the actions of other actors, depending upon how much power they can exert in the negotiation process.

### *6.2.1 Constitutional pathway – Legality matches legitimacy*

Through the constitutional pathway, actors utilize and adhere to a set of rules defined by the country’s legal or constitutional order. That is, the power to compel actions and decision-making among actors is derived by what is codified into law, which provides both legality and legitimacy to the course of action. For land and housing development in Greater Kuala Lumpur, interactions between actors are anchored and framed by the many laws or institutions that govern the sector (see Chapter 5) for example, the National Land Code, federal/state constitutions, and the various federal/state enactments on land. An obvious example of how this pathway is used by actors in the land and housing sector



is in the implementation of planning permissions to structure or frame the way housing development projects are designed. That is, while landowners retain the right to use their land, this right is governed by planning regulations in place that allow the State to impose conditions on development.

However, what is often implicit and rarely described in this process is the hierarchical order in which codified laws are designed and enforced. As discussed in Chapter 3, in settings where many institutions are nested within each other and/or are interdependent, outcomes may be determined by the position and order of the legitimizing institution within or along the institutional structure. That is, some laws are more powerful than others and can provide the basis from which different claimants can trump others in the negotiation process. This hierarchical order can be illustrated most clearly in negotiations for land with a state government i.e., the State Authority. As discussed in the preceding section, the right to govern all matters relating to land in Malaysia is conferred on the State Authority. This right is supported by provisions in both the federal and state constitutions as well as the National Land Code. During fieldwork, this researcher observed that this right is acknowledged and recognized almost universally by all actors in the land and housing sector, as illustrated by the responses below:

“At the beginning, all land matter is a state matter. So, we don’t have the authority on managing or decision-making on land matters. The decision of the land matters sits with the state.” “We at JPN (National Housing Department), we only have a very thin layer of authority over the issues. [...] If you look at Chapter 4 of the Federal Constitution, it’s all on land matters. So, we are limited. All the land power stays with the state.” (P5)

“Land is brought into power under the state. [...] It all started with land. The state feels that land is their right, so the federal government needs to respect (*that right*).” (P1), translated from Malay.

These responses corroborate the description of this dynamic offered by all respondents interviewed. The overarching convention that is accepted by all actors in the land and housing sector is all the power to govern any matters related to land is held solely by the state governments.

Strikingly, the right to govern land held by the state government is perceived to be absolute even if other legislation seemingly curtails this right. The responses below exemplify how interactions between different legislative instruments are at play in legislating developments on land and how the state's rights of governance supersede other legislative instruments.

"Uniquely, land is under the jurisdiction of the state government. Land is a state matter in Malaysia. However, the federal government has the power to enact law (*related to land*) for the sake of creating uniformity in Peninsular Malaysia (*through the National Land Council*)."

 (P2) Translated from Malay.

"You have two articles within the federal constitution which relate to land matters. You have articles 90 & 91 on the National Land Council and then you have the 10th schedule of the Federal Constitution where land is a state matter. So, it's like, two articles within the Federal Constitution relating to land and one does not supersede the other, so (participant shrugs)." (P3)

In these examples, the respondents acknowledge the provision granted to federal government to enact laws relating to land through the National Land Council. However, they also recognize that the success of the Council in achieving any objective has often been trumped by the state governments' ability to secure their power and rights. Even though both provisions are provided with legitimacy within the same constitutional document, the state's rights to land clearly supersedes any attempts to modify or circumvent these rights. A respondent observes:

"In 1957, we created the National Land Council, on what pretext? To codify it (*i.e. the differences in land laws in the different states*), to bring everybody to come to an understanding together. But do you think anybody will give in? Nobody will give in. [...] The only success we've had is to standardize the form" (P5)

As explained by one respondent, the success of the Council in enacting any laws with respect to land is fundamentally contingent upon its ability to persuade its members to come to an agreement and ratify or codify the outcome.

This is unsurprising as the legitimacy and power of the state governments are attained from institutions that make up the constitutional order of the nation, i.e. these institutions define and structure the rules of the game and, therefore, control the: "rules for making

rules” (Cole, 2017; Feder & Feeny, 1991; Ostrom, 2005). In the case of land in Malaysia, this order is prescribed by provisions in both the Federal Constitution of Malaysia and individual state constitutions. Thus other institutional arrangements that are established under these institutions (i.e. legislations that govern land and housing) are expected to function within the prescribed constitutional order. By contrast, while the National Land Council (as an entity) is given legitimacy by the same institutions, its power is confined to that of facilitator. In this example, the provision for the National Land Council simply provides a platform to discuss and consolidate decisions undertaken by members of the Council i.e., it is an institutional arrangement that functions within a prescribed constitutional order. Therefore, its ability to enact laws relating to land is nested within and subject to the overarching right of the member states to govern land.

Ultimately, the research found that the possession of rights to land confers on the state governments advantages that enables them to steer and dominate negotiations for housing development, particularly in the non-market sector. State government actors often exert this right in the negotiation process to ensure that they can maximize their gains from the development, as explained by this respondent:

“Through (*land*) alienation, it is the most important source of revenue (*for the state government*) [...] The states want the best deal. Land is scarce, so whatever is alienated or provided to the federal government, they want to make sure that is the best deal that the state would get.” (P2)

This sentiment is echoed by several other respondents who note that land alienation remains a vital source of revenue for state governments in Malaysia. Negotiations for land between the state government and other actors provide the space for state governments to extract gains from other actors in the housing development process, often without room for other actors to negotiate. These gains might be in the form of funding, as exemplified in the response above, or other forms of compensation e.g., allocation for housing units and priority for development. A respondent explains how the alienation of state land is used to achieve housing development goals for the state government/local council:

“The (*state*) government also looks at what is the best use of their land. Because this is the only way to possibly generate income for the government – for the

government to alienate the land to a private entity or to do a joint venture with a private firm to get the best use of the land. But the government's effort to build affordable housing is still ongoing. For state land that is alienated to private development firms, we will request that 50% of the units are made into affordable housing. This is one of the policy initiatives that we currently use to develop affordable housing on state land." (P11) translated from Malay.

Ultimately, the legal or constitutional order provides a direct pathway for strategic actors to compel others into action, through the combined support of legal instruments and legitimate power. Actors who use the constitutional pathway benefit from the rights allocated to them through these legal instruments and, correspondingly, exercise these rights to achieve their objectives.

#### *6.2.2 Operational pathway – Legality-legitimacy mismatch*

When tangible sources of power remain insufficient to affect housing outcomes, actors choose to utilize the operational pathway (together with or in spite of the constitutional pathway) to achieve their objectives. This may occur when there is a mismatch between what is legal and what is perceived to be legitimate among actors. While what is codified into law can seek to structure and guide decision making among actors across many scenarios, it is not unusual to surmise that gaps exist. This is especially relevant when we consider the nature of property rights and how rights are enforced or exercised in practice by claimants. As discussed in Chapter 2, legal frameworks are not the only defining institution for property rights and any examination of land tenure systems must consider both legal and non-legal influences in its administration. Gaps that exist between what is legal and legitimate provide a space for extra-legal responses to emerge. Analysis of the interview data reveals that these solutions are usually negotiated and/or enforced where power differentials between actors exist but are not supported by the existing legal or constitutional order. While less tangible, power derived through this pathway still provides these actions with legitimacy, for example, through underlying political structures or patronage as well as the accumulation of social, economic, or cultural capital.

This study found that, through this pathway, strategic actors use a range of tactics to indirectly influence where and how non-market housing is built. As explained by the

government officers below, actors in both the state and federal governments may be compelled into action through political patronage or organizational rank, for example, to alter the location of the development by changing the designated land parcel or to accommodate requests for development.

“Sometimes, even when they (*the state government*) have previously allocated a location for the housing development, when there are changes to the political structure, this might be changed. They (*political actors*) have their own interests. That is, to develop their own area (*voting constituency*) or to capture voters.” (P8), translated from Malay.

“The second constraint that we face (*in housing development*), sometimes we will receive, for example, we have members of parliament and their constituencies. This is a constraint. Sometimes, we have our own plans or projects (*for housing development*) that we have brought forth for approval to the Economic Planning Unit. Suddenly, we will receive requests from these MPs. So, we will try to fulfil their requests, to try to accommodate their needs because we understand that housing is a need in Malaysia, particularly for lower income households.” (P9), translated from Malay.

These responses characterize the expected behaviour of individuals who find themselves in these types of interaction. It reflects a set of expectations that are in place to guide outcomes within situations that might generate conflict and/or are complex i.e., where actors can wield power by extra-legal means to influence negotiation processes or outcomes. That is, when extra-legal means are utilized, actors revert to solutions that minimize the expected friction among all actors. In the example, the respondent further notes that they are compelled to accept the change in the location of housing development despite any work done to study or prepare the previous site for development, as illustrated in the following response:

“When (*political*) changes happen, for example there is a change in the area or state’s elected politician, we can see the trend (*of changing land parcels for housing development*), they want to develop their constituency. But in terms of implementation (*what should have been done*), whatever projects that were allocated previously should have been continued. For example, we had a session

yesterday where the State Secretary (*of Kedah*) raised the issue (*of changing land parcels*). The old project (*at a location that was planned and approved*) is disregarded and a new project is allocated. The location of the project is changed. He remarked that he has had enough (*of the changes made by political actors*) and that the location should not be changed any further. So this still happens. Even though he is the Secretary of State, but in terms of power, of course the Chief Minister is on top. Even though each state has an executive council on land and housing, where these councils should finalize or make the final decisions (*on land or housing matters*). But this still happens, anywhere (*in Malaysia*). (*We/No one*) have not been able to avoid it so far.” (P8), translated from Malay.

An important deduction that can be gleaned from these types of response is that political patronage serves as a powerful force to compel government actors to alter outcomes in housing development. In this way, actors in the federal or state government are more strongly bound by the decisions made by political actors to further their interests rather than what transpires through due process. Another officer explains that the alternative, that is, to challenge this accepted solution, might hinder the development altogether and/or disrupt future relationships between the parties involved in the development. This is exemplified in the following response from a federal government officer:

“Land is a state matter. The state has the full authority over which land they will give or alienate. So, whatever it is, if we (*the federal government*) want to build any sort of housing, we have to go to the state authority for the land. So land matters, they (*the state government*) will decide. They can decide not to give land to us, they can cancel the earlier decision to give particular land to us, they can ask us to move to other land. It’s their prerogative, we cannot do anything. We have the funds, but we do not have the land. So, we need the land (*for housing development*).” (P7), partially translated from Malay.

These rules of behaviour, which are entrenched by an accepted norm either through social convention or institutional legacy (Alchian & Demsetz, 1973; Musole, 2009), limit the choices that are available to actors even if these actions are not guided by the legal or constitutional order. The overlap in legitimizing institutions (both legal and extra-legal) which exist generates a space where this can occur. The following response illustrates this situation further:

“The government, they can impose any requirement on the land [...] For example, for our project in Bukit Jalil<sup>13</sup>, they required us to build a public health clinic. So, for that development, they wanted a clinic. So, you will need to build a four-storey clinic with the development. [...] (*The government will say*) ‘I give you a parcel of reserve land, you will need to give me the facilities that I want’ [...] If we get land from the government, they can impose any conditions that they want.” (P13), translated from Malay.

This respondent further explained that the land parcel in question was originally allocated for use by the Ministry of Health for the development of a clinic, granting the ministry the right of use to the land (see the preceding section). When the parcel was requested by another federal agency for the development of affordable housing, the right of use for the land parcel was transferred to the agency contingent on its ability to fulfil the necessary demands of the ministry. These demands are made to serve the interest of the existing right holder and are upheld by both parties despite the lack of any legal obligation to do so <sup>14</sup>. The alternative would disrupt long-held institution-wide recognition by federal government actors who were interviewed that: “the rights held by the (original) claimants must be observed” (multiple respondents). In this way, power derived through the operational pathway illustrates the innate idea that property rights in land can be secured and enforced through collective recognition of the right-holder.

### *6.2.3 Pathways for housing development in Malaysia - legality and legitimacy*

In foregoing subsections, this research shows that actors can derive power from a variety of legitimizing institutions via a constitutional or operational pathway. Each pathway provides a space for actors to extract and exert power on others to compel them to action in a way that benefits the actor. This space emerges from differences in power amongst actors. However, it is vital to recognize that any solutions advanced through either pathway must still be anchored by a legitimate claim to the property rights that are held by actors. That is, power differentials between actors can only affect outcomes if the source of power is recognized and supported by a legitimizing institution. This means that actors can select and utilize institutions that enhance the legitimacy of their claims

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<sup>13</sup> Bukit Jalil is a suburb of Greater Kuala Lumpur

<sup>14</sup> A 2008 internal circular by the Department of Lands and Mines notes that ministries/agencies in the federal government lose the right of use to any federal land allocated to them that remains undeveloped after five years (multiple respondents)

in order to optimize their bargaining positions and shift outcomes in their favour, as long as these actions are anchored by a legitimate claim to the rights that they hold. This can transpire independently within each pathway, as illustrated in sections 6.2.1 and 6.2.2, or across both pathways, where strategic actors mix and enhance the power gained from different legitimizing institutions to achieve their goal — hence the focus of this subsection.

Where a singular pathway is not effective in influencing the desired outcome, strategic actors derive power from a combination of legitimizing institutions to achieve their goal. This can occur when extra-legal means are insufficient to affect outcomes, or the legal/constitutional order is ambiguous or provides a space in which a desired outcome cannot be guaranteed. This often means extracting power, therefore legitimacy, from both pathways to compel action. In the following example, an officer explains how housing development actors are compelled to provide additional public amenities for an area/district as part of a public housing development project. There are no legal requirements for the provision of these additional items and yet actors are forced to comply based on an implicit expectation based on the existing relationship between both parties.

“When we get land from the state to build PPR housing, they’ll give us plots that are in the kampungs or rural areas. State governments, they expect this is a federal project, the responsibility to develop the surrounding areas (*falls on the federal government*), to build roads and amenities so that the location can be developed. They expect that from us [...] Actually, we want to build a house but in addition, we have to build other things.” (P7), partially translated from Malay.

The officer further notes and acknowledges that this expectation must be complied with, despite having no legal obligation to do so:

“They know this is a federal government project, the federal (*government*) have to do (*the housing development*). They (*the federal government*) will find the money somehow, they have to do (*the housing development*). For instance, we have a project in Tapah. The local council in Tapah, they are forcing us to build roads in the area. In fact, our responsibility is just to build/provide the housing units.” (P7), partially translated from Malay.



Moreover, as the respondent elaborates, a failure to comply would result in an unfavourable outcome, i.e. the state (via the local council) may delay completion of the project even if the housing units have been built and are ready to be given to the intended recipients. This is done by restricting or delaying final approval that will certify the units are fit for habitation.

“We can take the easy way out and say, ‘Never mind, you (*state government via local councils*) don’t want to give the CCC (*Certificate of Completion and Compliance*<sup>15</sup>), it’s okay, that’s it’. But the victim here will be the people. Some of these (*public housing*) projects, we have allocated the housing units. So as long as the CCC is not approved, the people (*housing recipients*) cannot move in. So, we must get the CCC, but to get the CCC you have to comply with the PBT’s (*local council*) requirement [...] There are two effects, the first for the buyer and the second to the developer. We cannot pay the developer unless we get the CCC. So there are two effects on us.” (P7), partially translated from Malay.

In sum, in this example strategic actors in the state government extracted power from both the constitutional and operational pathway to achieve their development goals. First, they used provisions in the legal and constitutional order to allocate a designated parcel of land in a location that will benefit from the onset of new development. However, while this provision can be utilized to impose conditions on the development itself, it alone is not sufficient to impose requirements for additional developments in the surrounding area/district. Rather, they rely upon an institutional legacy to force their counterparts to provide additional public amenities in the district. This is further emboldened by withholding another legal instrument from their counterparts to seal the success of their development goals.

The ability to steer action through one pathway may also provide advantages to actors who intend to exert power from a different pathway. For example, strategic actors who succeed in attaining an intended outcome through the constitutional pathway (e.g. by forcing actors to adhere to a selected law/regulation from a set of other similar choices/options) may pave the way for them to exert power through the operational pathway. As a respondent explains, different provisions in the NLC can be used to achieve

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<sup>15</sup> A CCC is granted by local councils at the end of the development process when an assessment of the property by industry professionals has ensured that it is safely constructed and is fit for habitation.

similar goals and choosing to utilize one over another may lead to other avenues of influence being enforced.

“I’ll give you an example. Development firm A has acquired reserve land (*from the federal government*) but (*for the firm*) to get this land, they have imposed the condition that the firm will need to surrender the land to the state government under section 197 of the NLC and apply for alienation of the land under section 76, (*to alienate*) state land. Do you understand (*the implication of this action*)? This is very risky. If it is the same government (*both governments are governed by the same political party*), then it’s easy for us to come to an agreement. It is one ship. (*What will happen*) if it is a different government (*i.e., the state and federal governments are governed different political parties*), for example, Penang or Selangor? The state government has the right to refuse this application. They can choose not to alienate the reserve land to us. This means that when they own the land, (*they can say*) ‘Oh, I refuse to alienate the land to the development firm A’. They can do this! So for the officer, why would you do this when you can transfer the land directly to us? The cabinet has approved it, you can transfer the land to us directly.” (P13), translated from Malay.

In this example, officers in the federal government opt to transfer the rights to land for a project by using the state government as an intermediary even though no legal requirement necessitates this transfer structure. The implication of this action is explained by the respondent: the state may choose not to alienate the designated land parcel or may include other requirements in doing so. This opens up the possibility for strategic actors in the state government to exert power through the operational pathway. Via interviews with several respondents, this researcher observed that there is some apprehension around directly attributing these practices to political interference even though the evidence suggests that it is highly likely. As acknowledged by another respondent:

“The most difficult thing (*to address*) about Malaysia is the politics (*political interference*). We need the political will (*to follow through with policy decisions*). We can do a lot of structures and what not [...] but when there is political interference, it is finished. (*i.e., there is nothing more that we can do*).” (P12), translated from Malay.

Ultimately, the use of both pathways to derive power and legitimacy to compel other actors into action enables strategic actors to consolidate and enhance the likelihood of success in achieving their desired outcome.

### **6.3 Power differentials and their impact on housing outcomes**

The preceding section found that power differentials between actors exist and are exerted through multiple pathways. These interactions provide insight into the role of power as an alternative mechanism to transfer rights allocated to land and housing, external to the standard conceptualization of this process through land and housing markets. Ultimately, despite the illusion of objectivity, the process of transferring or allocating the rights to land for the purpose of housing development is not inherently neutral and can be dominated by strategic actors who can exert their power to control this process. The reported power differentials constrain actors and produce outcomes that are in the interests of those able to use these differentials to their advantage. This affects the provision of non-market housing in Malaysia in many ways, mainly by introducing constraints in the development process and by altering the mechanism by which housing is allocated.

The study discovered several key constraints that emerge within the development process when actors negotiate to secure land for the development of non-market housing. First, the cost of the overall development may be affected by the imposition of high land premiums or by imposing additional conditions for development on the land itself. The following responses illustrate how land premiums (through alienation or conversion of land for development) are often used to extract financial gains from both public and private housing developers who intend to build housing:

“For example, like Kuala Lumpur, if you want to develop land, beside the land prices that you pay, you have to pay development charges, a conversion premium, these are very, very prohibitive prices to bear. The conversion premiums, development charges can be a very high amount to be paid by the developer to the government authorities. These are some of the barriers. Okay, how do we incorporate social housing, affordable housing with very prohibitive development costs?” (P14).

“So, the state would like to ensure that they get the best deal through alienation. So normally, the state would impose the highest possible premium on the party that applies for the land so it would be problematic for (*federal government*) bodies like PP1AM or PR1MA to meet the requirement or the approval of the state, especially regarding the premium charged by the state. It is an obstacle. Some projects did not work out because the federal government could not pay the land premium.” (P2).

Increases in cost may also arise from the imposition of additional requirements on the development itself, as explained by this respondent:

“State government, they provide the land, of course they are generous, they provide the land, but the land is situated further inland and we have to provide all the amenities. So it doubles the cost. Actually, we want to build a house but in addition we have to build other things.” (P7), partially translated from Malay.

As illustrated in these responses, increases in the overall cost of development for the housing project may result in outright cancellation of these developments if project owners are not able to make these projects viable. When actors are forced to complete the development, despite the additional cost increase, which often transpires in government-led projects, this practice affects the future relationship between parties. An officer expresses their frustrations with this practice:

So what we can do in the future (*this is*) not to say (*that we will*) blacklist (*the concerned party*), but we will somehow show them. You give us a hard time like this, in the future we will take this into account, maybe in the future project we will limit the state’s (*housing*) allocation, but it cannot be done, as I said due to the political (*pressure*) and (*housing*) requirement from people.” (P7), partially translated from Malay.

Furthermore, costly delays may emerge from the process when strategic actors insert extraordinary requirements for development, beyond the standard development process. This may consist of requests to include or exclude selected actors in the development process or to alter the scope of the development itself, as explained below:

“Sometimes, there are instructions (*from those with vested interest*), so we will need to acquire special permissions to satisfy these requests/interventions. This

causes delays in the housing development process, even when we've secured the development funding for the project." (P9), translated from Malay.

In addition, the perceived absolute control over land rights grants the state government the ability to determine not only where non-market housing is developed but also how it is eventually allocated to eligible recipients, as illustrated below:

"The state would like to have a say in choosing the participants/purchasers because it really connects into the political concerns when you talk about this election promises to provide affordable housing to the people." (P2).

"Public housing is different. Because we have the Federal Land Commission. And there's a law for the Federal Land Commission (FLC) itself. The requirement for the state to develop public housing using federal funds, they have to transfer the state land to the FLC. So, when they transfer it to the FLC, then it is done, no issue. But if the (*federal*) government funds the project, but the land still belongs to the state, then the federal government does not have the right (*to decide*) on who stays in the house [...] who owns the land owns the right to enter the land. Even though you have a building (*on the land*), the building doesn't belong to you." (P5).

Even though allocation of these units is controlled through a centralized registration system, interview data suggest that strategic actors can manipulate this process by either changing the location of the development through the provision of a different land parcel for development (therefore changing the targeted group of recipients entirely) or by negotiating outcomes for a selective group of individuals that benefits their interest.

## **6.4 Summary and discussion**

This chapter presents the findings generated from analysis of interview data and documentary evidence to illustrate the institutional structure that governs the behaviour of critical actors and the constraints they face in the development of non-market housing in Greater Kuala Lumpur. The main findings are summarized in this section.

First, this study has shown that there are different types of land available for development in Malaysia and the rights to land are held and/or controlled by a complex constellation of actors, depending upon the type of land and where it is located. This complexity has resulted in a system in which the bundles of rights to land are allocated to different actors depending upon their purpose. For this research, the rights to land that are of interest are the right of disposal, use/access, and dealings. This study shows that for the types of land relevant to non-market housing development, these rights may be held by multiple actors who each pursue their own policy objectives.

More importantly, where these objectives do not align, actors reported taking actions to compel and were constrained by the actions of other actors, depending upon how much power they could exert in the negotiation process for land. The findings indicate that power differentials between actors exist in practice and shape the outcomes of housing provision in the non-market housing sector. Analysis found that power can affect the interaction and alter outcomes in the housing provision system through what is defined in this study as a constitutional or operational pathway. That is, power can be derived from tangible vehicles that provide legality to these actions (for example, formal legislative devices such as federal or state constitutions, legal codes or acts, and state council proceedings as well as administrative structures and levels), as well as from intangible sources that provide legitimacy to these actions (for example, political structures or patronage as well as social, economic, or cultural capital).

Furthermore, this study shows that, while formal legislations anchor the nature of interactions between critical actors in the land and housing sector, these actors are also bound by other institutional structures that govern the way they exert their right. This study found that actors in the sector select and utilise institutional instruments that enhance the legitimacy of their claims to optimize their bargaining positions and shift outcomes in their favour. In particular, this study found that in settings where many

institutions are nested within each other and/or are interdependent, outcomes may be determined by the position and order of the legitimizing institution within or along the institutional structure. Data drawn from the interviews indicate that the ordering of institutions confers on some institutional instruments more power than on others, which makes for a hierarchy within the institutional structure. Thus actors who can derive power from institutional instruments at the top of the institutional structure (i.e. those that make up the constitutional order) can steer and dominate the action of others who derive power from institutional instruments that sit lower on the hierarchy (e.g. institutional arrangements or social/behavioural forms)

These more general findings, alongside the specification of their occurrence, described in sections 6.2 and 6.3 enabled this research to identify three critical features of the institutional structure that govern the behaviours of critical actors during the land procurement process for the development of non-market housing.

The first critical feature highlights the pivotal nature of the Federal Constitution of Malaysia as a guiding instrument for dealings in the land and housing sector. While actors use many institutional instruments to derive power and exert control over the negotiations process, this study found that actors cite provisions from the Federal Constitution as the overarching legal instrument that governs how land legislation can be interpreted by the relevant parties. As argued in section 6.2.1, this is unsurprising given that the Federal Constitution is an institutional instrument that sits at top of the institutional structure, i.e. the constitutional order of the nation, thus other institutional instruments are expected to function within its prescribed provisions. This includes other legislative instruments that is used to govern land dealings such as the National Land Code or as well as institutional arrangements such as the National Land Council. Continued use of this instrument as an anchor for critical actors to extract power and claim legality and legitimacy for their actions reinforces its strength and significance within the institutional structure.

This is consonant with the second critical feature, that is, the dynamics between the federal and state Government actors within the sector reflect the balance of power between the two levels of government as prescribed by the Federal Constitution. The right to govern land is allocated to the State Authority, as prescribed by the Federal Constitution (see section 6.1.1). However, the Federal Constitution also includes a

provision for the Federal Government to enact laws relating to land through the establishment of the National Land Council. These different provisions alongside other provisions that guide the sector (see the preceding sections) frame the complex nature of how land and housing is governed and administered in Malaysia. As illustrated by both the typology generated in section 6.1.2 and the descriptive interview data presented in section 6.2, federal and state government actors do not form a singular unit of government but rather inhabit separate institutional spheres within the sector, even if they pursue similar policy objectives for housing development. This separation, both in power and administrative capacity to affect housing outcomes, makes for a sector that is both complex and opaque, allowing the space for extra-legal measures to emerge and requiring implicit knowledge of expected behaviours from participants. As illustrated in section 6.2, the power differentials between actors in these two parallel but separate institutional spheres continue to be reinforced by the existing institutional structure, through both constitutional and operational pathways.

Finally, the third critical feature highlights the nature of state ownership of land in Malaysia and how it inherently affects housing outcomes. The allodial rights to land for all state land is held by the State Authority i.e., the Ruler of the State, which is represented by the State Government in practice. This study found that possession of this right (and by extension, the right of disposal for state land) provides advantages to the bargaining positions of critical actors within the state government, enabling them to dominate and steer negotiations to their benefit. Data drawn from the interviews (see sections 6.2.1 and 6.2.2) illustrate how possession of this right guide the behaviour of critical actors when they navigate interactions with other parties and incorporate their demands on development through both constitutional and operational pathways. Continued use of this right to exert power and control over the development process reinforces its power and amplifies its significance within the institutional structure.

These features reflect how the existing institutional structure frames the interaction of agents within the sector. While these features describe the contemporary dynamics of how land and housing is governed in Malaysia, analysis of interview data indicate that they are neither newly introduced nor do they represent the current needs of the sector. The enduring quality of these features indicate that they are deeply engrained within the



institutional structure of the nation and are rooted in sources that go beyond the current period. These are explored further in the subsequent chapters.

## **Part 2 Findings from the historical component**

The next three chapters form the second part of this study's findings. These chapters identify three critical junctures that led to the formation of the institutional structures that govern and limit the actions and behaviours of critical actors in the land and housing sector, which were described and summarized in Chapter 6. The first juncture introduced the concept of allodial rights into the existing Malay tenure system, the second installed separate spheres of government within the Federated Malay States, and the third ratified allodial rights to their rights-holders within a newly minted national constitution.

These chapters build a case for a historical institutional analysis of Malaysia's land and housing sector. They seek to prove that the power differentials that exist within the sector identified in the previous chapter can best be understood by focusing upon the creation and evolution of institutions, applying concepts of path-dependence, self-reinforcement mechanisms, timing, and sequence. Chapters 7, 8 and 9 present findings generated from historical analysis and answer the questions below:

- 1) What was the nature of British land policy in Malaya?
- 2) What were the major institutions (including policies) that led to the power structures currently in place in the country's land and housing sector?
- 3) What motivated the actions of Malaya's various actors?

These findings are presented using a narrative method to describe the time, events and processes that reflect the analytical process employed through the historical institutional approach and the critical juncture framework. While these findings are descriptive in nature, they go beyond descriptions that are usually found in historical studies. The primary use of historical narration does not merely provide a historical account of events and development in the history of Malaya/Malaysia but identifies and specifies the components that support the core historical institutional argument of this thesis.

These chapters draw upon qualitative data consisting of archival data from primary sources, i.e. official documents, meeting notes, colonial records, and personal writings, as well as secondary sources and other published materials. These chapters use findings generated in the contemporary component of the research to anchor and guide analysis of historical events and development of Malaysia.

## **Chapter 7 Critical Juncture 1: The transplantation of allodial rights into the rules of tenure**

This is the first findings chapter in the historical component of the research. This chapter describes the events leading to the first critical juncture (i.e., the antecedent conditions as well as both exogenous shocks and endogenous cleavages) and their impact. It provides an overview of the introduction of British influence in Malaya and its effects on the land tenure of the Malay States, specifically the introduction of allodial rights to land.

The chapter begins with a discussion of the counterfactuals in order to establish the causal chain. Section 7.2 presents a brief overview of British intervention in the Malay States and summarizes the slate of land legislations introduced in the Malay land tenure system. It provides a brief background on the history of British intervention and its impact on the land tenure system. To understand the operating context prior to British intervention, section 7.3 describes the prevailing land tenure rules in the Malay States prior to British rule and section 7.4 explains the existing socio-political organization within the Malay States. These sections present the antecedent conditions and describes the sources of change that generated the space for institutional innovation to occur. Finally, section 7.5 narrates the events that led to the codification of land rights and tenure under the Torrens system. This section describes the critical juncture and its aftermath.

### **7.1 Dealing with counterfactuals**

To establish a causal chain, we must first address the counterfactuals, i.e., events that might have pushed land tenure in Malaysia to develop on a different trajectory.

Before the onset of British influence, the pre-colonial Malay States were exposed to many factors that could have directed its overall development along a different trajectory. For land tenure in particular, several choice points during this period helped shape the creation/evolution of the institution currently in place. For example, like its neighbours, the Malay States could have been colonized by the Dutch, like the Dutch East Indies (Indonesia), or maintained its independence, like neighbouring Siam (Thailand). A range of colonial powers was present in the region during the period. Why did the Malay States choose to work with the Straits Government (i.e. the British) rather than other colonial powers? Furthermore, why did the East India Company not annex the Malay States like

it did with Singapore, Malacca, and Penang and instead choose to work with local rulers to exert its influence? More importantly, why did the British colonial government choose to transpose and adopt the Torrens system, a land administration system that originated in Australia, one of Britain's colonies, rather than its own deeds system when establishing its influence on land in the Malay States?

To begin with, there are numerous reasons that led the Malay States to accept British influence over other colonial powers in the region. The first are the ramifications of the Anglo-Dutch Treaty of 1824 which delineated British and Dutch influence in the region (Cowan, 1961). While early attempts were made to directly intervene in the Malay States subsequent to the treaty, these efforts were unsuccessful, resulting in financial and political setbacks for the British in the region (ibid). In 1833, Straits Governor Ibbetson solidified the aversion to direct rule in the Malay States, proclaiming that the: "frontier delimitations [between Johol (a Malay town near Naning) and Malacca (Straits Settlement)] as an excellent opportunity for showing that accessions of territory and encroachments upon rights, is the furthest from our views and intentions" (Mills et al., 1960). The acceptance of British influence, through the Pangkor Treaty in 1874, therefore reflects the convergence of interests between the Straits government and rulers in the Malay States.

A second counterfactual that needs to be addressed is the adoption of the Torrens system as the primary land administration tool in the Malay States. Prior to efforts at land administration in the Federated Malay States, British officials introduced English common law and equity and with it the English deeds system in the Straits Settlements. While this posed few problems in Penang and Singapore, which were relatively inhabited, in Malacca this imposition was at odds with a long-established institution for land governance, i.e. Malay land tenure, which was a blend of Islamic law and Malay customs (Salleh, 1989; Zaki et al., 2010). This led to a: "chaotic land system in Malacca where British efforts at land administration had created an extremely confused and unhappy situation" (Kratoska, 1985). This experience resulted in an attempt to incorporate rights granted under the existing Malay land tenure system into new land legislation for the Federated Malay States.

Nevertheless, many aspects of the land legislation eventually put in place departed significantly from the prevailing land laws of the Malay States. The Torrens system was

considered adequate for easy understanding and administration by the colonial government and was adopted by many governments in the British empire. William Maxwell's (Commissioner of Land for the Straits Settlement) familiarity with the system, as well as his observations concerning its advantages in land administration practices in Australia, Burma and Ceylon led him to successfully petition for the adoption of the Torrens system in the Malay States against a suggestion by Frank Swettenham (then Acting Resident of Perak) to instate a form of land tenure system derived from English practice (Wilson, 1975).

## **7.2 Interventions in land tenure in British Malaya**

British influence in Malaya's land administration and policy can be reviewed according to the separate entities in place before independence. These entities are the Straits Settlements (SS), which comprise Penang, Malacca and Singapore; the Federated Malay States (FMS), made up of Selangor, Perak, Negeri Sembilan, and Pahang, and the Unfederated Malay States (UMS) of Kedah, Perlis, Kelantan, Terengganu, and Johor. The system of land tenure installed by the British in the Federated Malay States formed the basis of reference for successive British advisers in the Unfederated Malay States (Wilson, 1975) and when the Federation of Malaya was formed, served as a model in the creation of a National Land Code for the newly independent state (Salleh, 1989). The Straits Settlements of Malacca and Penang adhered to the English deeds system up to Malaya's independence in 1957. Given the focus of this research, only developments in the Federated Malay States are discussed.

British intervention in the affairs of what would eventually become the Federated Malay States began with the signing of the Pangkor Engagement in 1874. According to the agreement, a British Resident was appointed in Perak and given the power to collect revenue and administer all government affairs with the exception of issues related to Malay custom. Intervention in the states of Selangor, Pahang, and Negeri Sembilan followed suit with similar arrangements and by the end of 1888 British authority in these states was solidified. Over the next two decades, the British colonial government moved to consolidate power and control in these states and in 1895 formed the Federated Malay States under the authority of a Resident General (Kratoska, 1985; Loh, 1969).

Upon instigation of British influence in Perak, Selangor, Negeri Sembilan, and Pahang, the General Land Regulations were enacted in all four states to introduce the Torrens system: Perak in 1879; Selangor in 1882; Negri Sembilan in 1887, and Pahang in 1888. As the British Resident of Selangor, Maxwell drafted a land law for the state, i.e. the Selangor Land Enactment of 1891, which became the basis for the Land Enactments of 1897 that were instrumentalized almost identically in all four of the Federated Malay States (Kratoska, 1985; Salleh, 1989). In 1911, two uniform laws were enacted for all four states: the FMS Land Enactment of 1911, and the FMS Registration of Titles Enactment, 1911. These two pieces of legislation remained in force in the Federated Malay States until 1928 when they were amended by the Land Code 1928 (ibid.).

The move to instate colonial land regulations in the Malay States must be understood and analysed by appreciating both the tenets of the existing land tenure system and the motivation to dismantle them for the transposition of the new colonial system of tenure. These are explored in the next sections.

### **7.3 Malay land tenure prior to British intervention**

Prior to the British occupation of Malaya, the governance of land in Peninsular Malaysia is best reviewed by looking at the principles of Malay land tenure. However, a review of Malay land tenure is fundamentally clouded and limited by the availability of material on the subject, most of which was recorded and published by Europeans employed in the colonial public service in the Malay peninsula (Wong, 1975). Maxwell's (1884) account of these principles offers a glimpse of how colonial officials sought to understand the nature of native rights in land during its occupation. However, the introduction of English concepts along with English terms to illustrate concepts in Malay land tenure may have led to confusion on the subject (Kratoska, 1985). Nevertheless, given his legal training, Maxwell's study, serves as a valuable source of information, containing: "translated extracts from the Malacca, Perak and Minangkabau Codes of Law as well as a number of the published rulings of English judges, and translations of Dutch documents and proclamations" (Wilson, 1975). Maxwell's study necessarily forms the basis of analysis in this section. Maxwell, who later became Commissioner of Land for the Straits Settlement, influenced the formulation of land policy and its administration both in the Straits Settlements and in the Federated Malay States (Kratoska, 1983; Loh, 1969; Wilson, 1975).

While rules may vary across the Malay states, customary Malay customary land tenure generally had several principal characteristics. Particularly relevant to the discussion of property rights in land is the nature of rights provided for by the Malay land tenure system and how land-holders held onto and exercised those rights.

### *7.3.1 Proprietary right to land*

Claims to land in indigenous Malay society were anchored in the claimant's right to use the soil rather than his absolute ownership of it (Salleh, 1989). Unlike the European traditions of ownership of land as property, emphasis is placed on the claimant's labour in the appropriation of the land in question (Kratoska, 1985). A proprietary right is created when land is cleared, cultivated and/or utilized and this right endured as long as the claimant's occupation or appropriation of the land continued. This right is acquired by the person whose labour resulted in transforming the land from '*tanah mati*' (dead land i.e., land that is not utilized) to '*tanah hidop*' (live land).

This aspect of indigenous Malay law concerning land illustrates the centrality of labour as the basis for land tenure (Kratoska, 1985). Underpinning the Malay concept of land tenure is the principle that a person was entitled to the products of his labour. Thus: "a person retained proprietary rights over land so long as the land continued to be affected by his labour". Land which was noticeably neglected would be forfeited and any claims to it by a previous possessor would lapse. Thus no proprietary right was attached to *tanah mati*.

Maxwell (1884) observed that Malay laws did not speculate with whom absolute property in land resided, and exclaiming that: "Tenant right is the cardinal doctrine of the Malay cultivator, and as long as that is fully recognized, it does not matter to him who or what functionary or power may, in theory, be clothed with the original and supreme right to the soil." Maxwell further concludes that a superior right of property in the soil existed and was vested in the Raja (the Monarch). This assumption stemmed from his observation that the Raja held and exercised the right to collect taxes on appropriated land as well as the right to dispose of abandoned land. These rights were considered superior to the proprietary rights held by the Malay land-holder.

Furthermore, Maxwell (ibid.) makes the distinction between what he observed to be an absolute right to property in land, which he claims, resided with the Raja permanently,

and the right to collect taxes on appropriated land, which can be transferred to anyone, most likely a chief or royal favourite. He argues that the lack of understanding regarding this distinction made it difficult for Straits officials to confer appropriate rights to grant-holders in Malacca upon its succession from the East India Company in 1825. Unlike the English idea of a freehold holding, the grants offered by the local Dutch government gave grantees the right merely to collect taxes on the land in their allocated districts, which were held in accordance with Malay tenure. These observations formed the foundation of Maxwell's understanding of Malay land tenure and correspondingly, how taxes can be exerted on land in the Malay states.

Salleh (1989), in his criticism of Maxwell and later scholars' understanding of Malay land tenure, argues that in the prescription of merely proprietary rights rather than allodial rights to land for cultivators the indigenous Malay society's relationship to land reflects the Islamic precepts regarding the principles of property ownership; it is not based on a feudal tenure, as was implied by Maxwell. Fundamentally, Salleh argues that following Islamic teachings, the absolute right to property resided with God and not in the Raja as observed by Maxwell. Correspondingly, "man's ownership in the property is dependent on his ability to use it for the general benefit of the ummah" (ibid.).

This misconception concerning the ownership of absolute property in land is echoed by Maxwell's (1884) own observation of Malay laws in Java where: "the delegated ruler [...] is not the owner of the soil in the European sense of the word. He cannot, for instance, evict the cultivator from it". He further notes that: "The Raja's absolute property in the soil is but a barren right, and as he undoubtedly has, independently of it, the right of levying tenths and taxes and of forfeiting lands for non-payment, Malay law does not trouble itself much with speculation about it" (ibid.). Wong (1975) substantiates this observation, stating that no evidence can be ascertained for the argument that a tenurial system between the ruler and his subjects existed in indigenous Malay society, arguing that it would not be accurate to treat all lands as owned by the Ruler under Malay land tenure. Zaki et al. (2010) further argue that Maxwell's argument relied upon his supposition of Hindu influence to explain the existing feudal system in the Malay Peninsula and neglected to fully understand the nature of this right under Malay laws given the government's incentive to take possession of all unsettled land.



### *7.3.2 Payment of tithes on the produce of land*

In addition to continued occupation and utilization of the land, the land-holder was also expected to pay a tithe from the produce of the land in his possession to maintain his claims on it (W. E. Maxwell, 1884). This payment was set customarily at one-tenth of the gross produce value and was collected by the ruler, usually through a village chief (*Penghulu*) or a royal favourite. In practice, however, Maxwell (ibid.) notes that the amount of payment varied across the Malay States. In Negri Sembilan, for example, this tax was non-existent.

Maxwell (ibid.) further notes that the absence of legal powers to exert the taxation rendered it impossible to punish its evasion using the law, a difficulty expressed by colonial officials during their service in Malacca as part of the Straits Settlements. In his analysis, Maxwell (ibid.) also draws comparison of taxation in the Malay land tenure system with similar taxation systems in India, Ceylon, China, Cambodia, and Siam. In each of these kingdoms, the rate of one-tenth (or its approximate) of the produce was also paid in rent to the ruler.

Salleh (1989) again argues that the payment of a tithe of one-tenth of the produce to the Ruler follows the Islamic tradition and duty to pay '*ushr*' (literally meaning one-tenth). This view defines the tithe exerted on the land-holder not as rent on land but as a religious obligation of Muslims regarding a category of their wealth.

### *7.3.3 Transfer of land by sale or mortgage*

While only proprietary rights were assigned to possessors, land which was appropriated or cultivated could be transferred from one party to another (Maxwell, 1884). The right of alienation resided with the claimant and subsequently his descendants as long as the claim on the land was maintained, i.e. through occupation or appropriation and with the payment of a tithe to the ruler. However, Maxwell (ibid.) stresses that the transferrable right in this transaction referred to the right of occupation of the land (which was permanent and inheritable) and not of the land itself.

Maxwell (ibid.) further elaborates on the technicalities of this exercise based on his own observation of the practice in Perak during his term as Assistant Resident in 1874. The transfer of land by sale is known as '*pulang belanja*', which can be literally translated as return of expenses. The term used for this dealing is self-explanatory. The price of the

transfer of land is not a valuation of the land itself, rather it is the: “recoupment of the outlay incurred by the vendor in bringing it into cultivation” (ibid.). In this way, the purchaser simply compensated the current proprietor for his labour in cultivating and developing the land and with that payment: “obtains the right to stand in his place.” (ibid.)

This fundamental departure from the right of alienation of property in land as practiced in the English freehold or fee simple tenure is stressed in Maxwell’s study, which states that the terms ‘*jual*’ (sell) and ‘*beli*’ (buy) when used in reference to the transfer of land under native tenure in the Malay States cannot be assumed to indicate that a title to the soil has been exchanged through the transaction.

Similarly, Maxwell observes that using land as collateral to raise money also differs significantly when compared to the corresponding European concept of mortgage of real property. First, property in the land was not transferred in such a transaction, only the proprietary right is passed from one party to another. Second, possession of the land (in terms of its proprietary rights) was given to the lender upon the transaction. In addition, interest, given the restriction on usury in Islam, was not charged in this transaction. Rather, on taking possession of the land, the lender made a profit by utilizing the land for his own cultivation or charging rent (in money or in kind) to other cultivators to do so.

This exercise, termed ‘*jual janji*’, can best be understood as a conditional sale of the land, i.e. the exchange of money for the land was conditional on the premise that repayment of the borrowed sum (within a specified period) entitled the borrower to again possess his land. Failure to repay made the sale absolute, i.e. ‘*jual putus*’, which results in the lender taking over full rights of proprietorship over the land in question.

While Maxwell (ibid.) describes the practice of *jual janji* as “the only form of hypothecation of land known to Malay law”, comparison of this exercise to the concept of hypothecation as defined in the English tradition as well as further references to foreign legal terminologies, contributed to confusion in determining the actual nature of the transferred rights as well as the legal significance of this practice (Abia Kadouf, 1998).

#### *7.3.4 William Maxwell and his theory oo Malay land tenure*

What is clear from Maxwell’s work and theory on the subject is that the biased and contrived use of his colonial administrative experience and English judicial training led to the imposition of English concepts concerning land and tenure on a foreign and

dissimilar institution. This is used in the colonial government's favour (as with much colonial ideology at the time) to form the basis of its political and administrative action in the Malay states (Wong, 1975). As observed by Meek (1946), "In the making of treaties with natives, Colonial Governments and individuals have assumed that they were being given exclusive rights over land, whereas the natives have assumed that they were merely granting the qualified rights of user which they themselves enjoyed."

#### **7.4 Land tenure in the Malay States and the Malay ruling class**

As discussed in the previous section, a form of social organization existed in Malay society that guided and regulated the way land was used and transferred. It is important then to illuminate the critical actors who controlled these processes. While the Raja or Sultan represented the head of the state or *negeri*, this role did not afford them absolute power and instead merely leads as a part of the larger Malay political economy.

Prior to British intervention, individual Malay states in the peninsular were not part of a larger Malay political entity. Each *negeri* was a sovereign entity which pursued his own political and economic interests. The Malay sultanate political system is generally presumed to have found its roots in the *Temenggong* system from the Malacca kingdom (1400-1511) (Wilkinson, 1923). The head of state (i.e. the Raja or Sultan) was given the title of *Yang di Pertuan Negeri* and was placed into power through the support of the Malay nobility (Gullick, 1988). Thus power was generally devolved to the Malay aristocracy who often decided on succession and the appointment of the next Sultan, which does not necessarily follow the patriarchal line (ibid.). The *Bendahara* was the second in command and assumed the role of Prime Minister and Chief Judge within the states' governance structures. Other senior ministers were equally ranked and included the *Temenggong* (head of security and the police), *Laksamana* (Chief naval officer), *Penghulu Bendahari* (Head of state revenue), and *ulamak* (Islamic religious chief). The Malay nobility class and territorial chiefs lay below these senior ministers. The legislative body for the *negeri* was known as the *mesyuarat bicara*, which was composed of ministers and nobles in the state, and resolutions were achieved through *muafakat* (consensus) rather than majority ruling, consonant with Malay *adat* (customary practices). At the local level, each area in the state was led by a territorial chief, each with his own deputies, minor chiefs, and *penghulu* (village heads). The *rakyat* (i.e. the people) lay at the bottom of this administrative structure and were brought under this kingly government through

their *penghulu* who collected taxes and tolls, administered the territories, and mobilized the rakyat as required.

Just prior to the advent of British rule, in Perak and Selangor devolution of the Sultan's power to the state's powerful territorial chiefs had been so pronounced that, in terms of his power and rule, the Sultan was, in effect, just another territorial chief (Wong, 1975). Internal political feuds as well as the large influx of foreign capital and labour (mainly Chinese) to capitalize on tin mining activities in the Malay states resulted in intense rivalries between Chinese clans which operated the mines as well as among Malay territorial chiefs in territories where tin deposits were discovered (Sadka, 1968). When the internal political feuds intensified and disrupted mining activities in the region, in the 1860-70s calls for British intervention were made by the Straits settlements' business community (which benefited the most from mining activities in the neighbouring states of Perak and Selangor), leading to the Pangkor Treaty of 1874 (ibid.). This provided a legal basis for a British Resident in Perak to the "right of regulation of the collection and control of all Revenues and the general administration of the country", and for his advice to be: "asked and acted upon on all questions other than those touching Malay Religion and Custom" (W. G. Maxwell & Gibson, 1924). Selangor, Negeri Sembilan and Pahang followed suit, and all accepted British protection (and a resident) between 1874 and 1888.

While British presence in the region during the 19th century primarily focused upon the Straits Settlements (consisting of Singapore, Malacca and Penang), the colonial power's engagement with the rulers in the Malay states was already extensive during this period. Treaties between the various Malay states and the British (Straits) authority were established, for example, for protection against potential Siamese aggression (Sadka, 1968). Furthermore, established relationships between the Malay ruling class and British officers in the Straits Settlements were not uncommon. Tengku Kudin, the regent of Selangor, who ruled Klang and Kuala Selangor (1870-1874) was described as "a thoroughgoing admirer of European manners and customs" and was highly regarded by British administrators (ibid.). Thus these relationships with the Malay ruling class afforded British colonial officers the space and opportunity to appropriate the existing Malay political economy to work in their favour upon their intervention in the Malay States. This is most obvious in the usurpation from the state of the rights to govern land.

As discussed in the previous section, while the political system of the sultanate afforded the ruler of such a kingdom territorial possession of his state, this does not necessarily translate into absolute ownership of land within the territory. There is no evidence to suggest that the monarch ruled over his *rakyat* in the same tenurial relationship that is observed in European feudalism (Salleh, 1989; Wong, 1975). Rather, the *rakyat* is a subject that has obligations to the ruler and his noblemen, through elements such as *kerah* (forced labour) or the payment of dues (ibid.). In terms of the rights to land, individual cultivators retain their customary rights to acquire and work any available land within the state albeit with interference from the Malay ruling class. Substantiating this view, Frank Swettenham (then British Resident in Perak) observed in 1890, which substantiates this view:

“... there was not in the pre-Residential period any system of payment by tenths, or, indeed, any recognized system of native tenure of any kind. The people occupied and cultivated such lands as they chose, and paid nothing for them, but the authorities, Sultan, State Officer, local headman, or anak Raja, whoever had the power or might, dispossessed the occupants at pleasure, or helped themselves to any produce that they thought worth having whenever they felt able and inclined.”  
(Perak Administration Report for 1890, as cited in Wong (1975))

Furthermore, while the Sultan sat at the apex of the Malay political system, devolution of his powers to strong territorial chiefs made it unlikely that he held the right to govern all land in the state, particularly land that was uncleared, unoccupied, and unused (Wong, 1975). That Malay native tenure granted only usufructuary rights to land (and not absolute) to those that work the land also indicates that the right of disposal for land did not reside in the Sultan, nor was it functionally required. That is, land was ‘disposed’ when an individual settled on a parcel of land and worked it. This tenure arrangement was ultimately incompatible with the goals of the British colonial government which wanted to court foreign capital into the Malay States in order to expand the mining and plantation industries.

## **7.5 The formalization of rights, the separation of power (de facto vs. de jure)**

The incompatibility of the existing land tenure laws with the wider extractive goals of the colonial government<sup>16</sup> made it pertinent for early British residents in the Malay States to gain control of land matters in their respective states. This was primarily achieved through a two-pronged strategy: (1) the design and codification of land regulations (i.e., rule-making) by the British Resident and his subordinate officers, particularly in the early years of British influence, and (2) the preservation of the Malay political economy in land administration (i.e. rule-enforcement). Both were necessary to ensure the smooth transposition of a new legal system for land that benefited the colonial government. The first prong generated the space for the colonial government to alter and rewrite the rules of tenure while the second amplified the presumed legitimacy of these alterations, using an existing institutional arrangement for rule enforcement.

Most importantly, employment of the existing political system enabled the colonial government to install and control allodial rights to land in the Malay States without much resistance from any critical actors. The possession of allodial rights, a fundamental aspect that was missing from the existing tenurial relationship in Malay society, was necessary to ensure British officers could unreservedly acquire and allocate land within their respective states so as to optimize the Colonial Office's economic gains. A critical move that made this viable was the placement of absolute ownership of all land in the Sultan, and by extension, the British resident who administered the state in his name. This presumption (as advanced by Maxwell's theory) served to advance the goals of the colonial government rather than to preserve the existing tenurial relationship. Nevertheless, strategic use of the Sultan's institutional influence within the state structure ensured that Malay de jure rule was artificially fortified even as de facto power over land was held by the colonial government. An examination of the Perak Proclamation (and a similar Selangor Proclamation in 1874) highlights this duality during the early years of British intervention:

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<sup>16</sup> "In general the first object of British land policy has been to fix and stabilise the whole land situation by vesting supreme control of all land in the territory in the Governor on behalf of His Majesty, and thus to establish effective control by the State over the whole land of the territory and overall changes in it whether of tenure, title, alienation or transfer..." from United Nations document T/AC, 36/L.10, as cited in Lim (1976).

“Be it known to all men that we, Sultan Abdullah Shah, son of the late Sultan Jaafar Almoathain Shah, who is now sitting on the throne of the Kingdom of Perak, its provinces and dependencies.

Now, we are desirous to open our country, with a view to afford all the inhabitants of our country peace and security; and for this motive we applied to His Excellency Sir Andrew Clarke, R.E., K.C.M.G., C.B., Governor and Commander-in-Chief of the three Settlements, Singapore, Penang and Malacca, and Vice-Admiral of the same and His Excellency the Governor, has sent us one of his officers, who is called British Resident of Perak, to live with us, and to afford us his assistance and good advice, in order that we may govern our country with justice, and protect the lives and property of those who trade or dwell in our country, of whatever nationality they may be.

Now we make known to all European gentlemen, Chinese headmen, and others, that we shall regard with great favour any one who will come and do useful work in our country, such as opening tin-mines or gold-mines or agricultural purposes, or to carry on trade in our country, such as searching for gutta, rattan, or felling timber or following any other profitable business for themselves.

And we, through the advice of the aforesaid British Resident, will protect the lives and property of those who come into our country, to the utmost of our ability.

Whosoever likes to open plantations, such as sugar-cane, pepper, tobacco, cotton, or any thing else, we will give the land for it free of cost; and he may work on it for three years without paying any tax whatever upon the produce. Whosoever opens mines must pay the taxes according to the rule of our country.

Now, this we make known to all men, that whosoever is willing to work in our country may either discourse with us personally, or with the British Resident in Perak.”

Excerpt from The Perak Proclamation 1874, as cited in Wong (1975)

As noted by Wong (1975), these proclamations sought to consolidate presumption of the Sultan’s power over land in the state, even so far as to posit his possession of the right of disposal over all land. Even more critical to this discussion, these proclamations

highlighted the use of the Sultan's institutional influence to install new rules of tenure that would advance the goals of the colonial government for land development. This dynamic relationship between British *de facto* power and Malay *de jure* rule coloured the landscape of the new system of land tenure installed in the Malay States.

At the most fundamental level, power and control over rulemaking resided with British officers stationed in the different Malay States, the Governor in Singapore (i.e., the highest-ranking British officer in the Peninsula) and/or the Colonial Office in London. For example, in Perak, the 1875 Trans Krian Rules and the 1879 Perak General Lands Regulations originated from Maxwell's work on the subject while in 1885, Swettenham introduced a new set of General Land Regulations in Perak, similar to the land rules he had enacted for Selangor in 1882 (Lim, 1976). Other regulations included Compulsory Planting of Coconuts by Malays 1880, the Prohibition of Felling of Forest 1881, Special Regulations for Gambier and Pepper Lands 1885, Alienation of Nipah Lands 1888, Registration of Land Transfers 1888, Bendang Land Kuala Kangsar 1889, Discouragement of Ladang Cultivation 1890 and Products on State Lands 1891, all of which pertained to the specific problems encountered by local officials in land or agricultural matters (*ibid.*). On matters relating to more general rules of tenure, authority on the design and principle often resided with the Governor of the Straits Settlements in Singapore or the Colonial Office in London. For example, in deciding between the adoption of the freehold or leasehold form of ownership, despite the keenness of local colonial officers in granting freehold lands, a dispatch from the Colonial Secretary to the Governor of the Straits in 1891 indicated that the policy of granting freehold lands was undesirable:

"The policy which you thus indicate is one which may be justified, and is often, adopted in countries which are comparatively destitute of population and capital, and in which an immediate influx of a tax-paying and producing population is necessary to provide resources for carrying on the government and holding together the framework of society. But it seems to me that in some of these States, and notably in Selangor, the community may well be considered to have passed that stage in its development when it is expedient to sacrifice state land rights to the necessity of introducing population and balancing the balance..."

Reports relating to Malay States for 1891, C6858, as cited in Wong (1975)



So, while local officials often provided insight and detailed the practicalities of administration, the guiding principles of land tenure in the Malay States were in fact designed to benefit the overarching goal of the Colonial Office for the region. In this example, the leasehold form of private land-ownership became the preferred choice for the Malay States so as to ensure that the colonial government maintained control over how land was used and could be benefited from in future ventures. This system of land-holding was eventually adopted in all other Malay States and continues to form the fundamental tenurial relationship on land in Malaysia at present time.

While the power to make rules resided with British officials, the success of this endeavour was made certain by the use of the Malay political system, both as an avenue to generate legitimacy and to suppress resistance from the Malay elites. Legally, all land legislation was made in the name of the Sultan through deliberations in the State Council. In practice however, this perceived authority was mere pageantry. While new land measures were explained to the members of the Malay ruling class who sat on the State Council, there is no evidence that they initiated or had any control over how these measures were designed or eventually enacted (Lim, 1976). For example, in 1879 the British Resident of Selangor was reproached by the Governor in Singapore for submitting the draft of the first land rules for Selangor for deliberation in the State Council prior to receiving approval from the Singapore office. Further, he was warned that “the risk of having advice tendered by you to the Sultan overruled by the Governor thus injuring, in his estimation, your position and that of the members of the Council” (SSF 116/79, as cited in Lim, 1976), which would effectively reveal the lack of control or power held by the more performative State Council. In land matters, rather than conceding control over the rule-making process, the colonial government instead chose to actively suppress resistance from the Malay ruling class and the population both by using existing Malay institutions for the implementation of land policies and by compensating elites with land, tax revenue collection rights and/or allowances. At local government level, the role of *Penghulu*, which is traditionally vested with the powers and responsibility of being the head of his district, was preserved and utilized to enforce land regulations in his *mukim*. This includes encouraging the cultivation of lands alienated for agriculture, to act as arbitrator in minor land disputes, to issue licences for the collection of jungle produce, as well as aid the collection of land dues (Lim, 1976). Enforcement of the newly enacted regulations required someone able to wield influence over the local population: “along the lines on

which they had been accustomed" (ibid.). The choice of *penghulus* and their supervision, however, still resided with the Resident and his officers. For example, Swettenham employed different strategies to elect *penghulus* during his tenures in Perak and Selangor. In Perak, these appointments were made to bolster the political standing of Raja Yusuf, while in Selangor these appointments were made through consultation with the villagers and influential Malays in the Mukim (Sadka, 1968). Duties accorded the *penghulus* also varied and depended upon the Resident in charge. Under Douglas, only some *penghulus* were entrusted with revenue collection while under Swettenham instruction was given to invite *penghulus* to assist district officers in the collection of revenue (ibid.). As for the ruling class, pensions and allowances were paid to Malay Rajas and chiefs as well as to their dependents (in Perak, these were provided for by the terms of the Pangkor Engagement) (ibid.). In many cases, these payments reflected their political influence in the state rather than any work or role that they held in the new colonial government. In their reports, Swettenham remarked that certain rajas were underpaid, not "for their services, but for political reasons", while Rodger agreed: "with the exception of Raja Laut at K. Lumpur & Raja Abdullah at Jeram, the value of their services is infinitesimal" (Sel/Sec 902A/97, as cited in Sadka, 1968). The colonial government regarded these payments as a way of maintaining order and suppress rebellion, as indicated below:

"The influence of pecuniary interest is one of the strongest ties which ensures the loyalty of chiefs to the existing form of Government and a chief who has assigned away his allowance for a long period in advance has considerably lessened this influence, he is sure to be discontented, and having nothing to lose is likely to become disaffected and to be ready to oppose the wishes of the Resident and measures he may bring forward for the development of the country." (Sel/Sec. 562A/94).

Ultimately, these strategies paved the way for the smooth transplantation of a new legal system for land that was designed to advance the extractive goals of the colonial government at minimal financial or political cost to the administration. The codification of new tenurial relationships between the people of the Malay States and their land (i.e. by installing allodial rights and consequently a leasehold system of land-holding) was made possible by critical measures undertaken by the colonial government to take charge of and alter the rule-making process in the Malay States. These processes were further

legitimized through the adoption and utilization of existing political institutions that supported these objectives.

## **7.6 Summary**

This chapter describes the events leading to the emergence of the first critical juncture and their impact. It describes the institutional flux and identifies the antecedent conditions that generated the space for a significant institutional innovation to emerge, allowing the smooth transplantation of a new legal system for land in the Malay States. This was primarily achieved through a two-pronged strategy that generated the space for the colonial government to alter and rewrite the rules of tenure, as well as amplify the presumed legitimacy of these alterations, using an existing institutional arrangement for rule enforcement.

## **Chapter 8 Critical juncture 2: The introduction of separate institutional spheres for government**

This is the second findings chapter in the historical component of the research. This chapter describes the antecedent conditions that led to the second critical juncture and specifies the institutional innovation that emerged from the period under study. More importantly, while the preceding chapter identified a critical break in the way the relationship between land and society was redefined in the Malay States, this chapter specifies the mechanism that was put in place to exert power and exercise control over the state machinery (and in consequence, land administration in these states). This process includes the introduction of new institutions as well as the modification and utilization of existing institutional arrangements within the polity.

The chapter begins with a discussion of the counterfactuals to establish the causal chain. Section 8.2 explains the administrative challenges that characterized the early years of British intervention in the Malay States which generated a state of institutional flux within the polity. Tensions within this uncertain operating context came to a head when several developments, both external and internal, paved the way to realizing the federation proposal. Section 8.3 describes these exogenous shocks and endogenous cleavages. Finally, section 8.4 sets out the developments that led to the second critical juncture identified in this study, i.e. the inauguration of the Federated Malay States, and its aftermath.

### **8.1 Dealing with counterfactuals**

During the period of British colonization, the Malay States were subject to many factors that could have altered the way they were governed, both as separate states under the Residential system that was instituted as well as informally, a singular, amalgamated entity administered by the Colonial Office in London and the Straits Government in Singapore. The first two decades of British intervention was a volatile period in which numerous paths for institutional development were available to the Malay States. These possibilities could have given the current institutional structure of the country a different character entirely. This section considers several alternative developmental paths, each with the potential to significantly alter the trajectory of institutional development for the country.

First, consider the overall need for federation for the four Malay States in the first instance. Why was federation an overarching goal for the colonial government for only these states and not others? At the time, the states of Selangor, Perak, Pahang, and Negri Sembilan (which eventually formed the Federated Malay States), were among the many sovereign nations located in the Malay Peninsula. Other sovereign nations that made up the small, compact, and homogeneous area include the northern states of Kedah (alongside Perlis), Kelantan, and Terengganu (which remained under the considerable influence of Siam until the early 1900s when it came under British protection), the southern state of Johor (which was closely linked to Britain), and the Straits Settlements of Malacca, Singapore, and Penang (which were crown colonies). Despite their commonalities and the obvious inclination to associate them, a common union of the entire peninsular did not materialize until the formation of the Federation of Malaya in 1948.

Second, formal unification of these states under one federal colonial government was a strategic plan that was years in the making, but given the administrative necessity, the entire process could have been simplified by direct annexation of the Malay States as a British crown colony. Why did the British administration choose to maintain a façade of sovereignty in these states despite the administrative efficiency of simply removing the existing monarchy and/or Malay political power? As will be described in section 8.3, several proposals were put forward to resolve the problems that plagued the administration of the Malay States, one of which was annexation. Why was this more simple and direct option not adopted?

To answer these questions, we must consider the nature of British rule in the Malay Peninsula. Similarly, we must explain why it was beneficial for the colonial government to preserve a sense of autonomy in the administration of the Federated Malay States. Both fall in line with the overarching policy of keeping financial and political costs down in favour of short-term gains with respect to management of the Malay Peninsula (Noh, 2012). The colonial administration in the Malay States was staffed primarily by British officers on a short tenure and was more likely to: “take a short-term policy outlook, adopt tried and tested policies, and avoid taking unnecessary risks in their tour of duty” (ibid.). This approach, alongside an expensive and deadly prior attempt to suppress a rebellion in the state of Perak made major disruptions to the socio-political structure of the Malay

States less palatable. The Perak episode cost the British administration £71,000 and the death of Perak's first resident, J. W. Birch (Sadka, 1968). In addition, whilst federation of the four Malay States was successful, further attempts to unify the Malay Peninsula beyond the four states met with difficulty and: "more than one Governor has found his political life made miserable when he attempted a rationalization which would break down the over-centralization of the Federated Malay States, draw the five remaining States into a Malayan union, and link the whole to the Colony" (Emerson, 1937).

## **8.2 Administrative constraints in the Malay States before the Federation**

The protected Malay states of Perak, Selangor, Negri Sembilan and Pahang belonged to a category of British protectorates in which the Crown (and by extension, the Colonial Office) held no jurisdiction. British 'advice' provided by resident officers to the Sultan was the primary instrument used to embed British influence in the state administration and was guaranteed by a local treaty/agreement with each of the rulers of these sovereign states. Given this arrangement, there was no legal/statutory link between the Colonial Office and the dealings/policies introduced by resident officers in place in the Malay states. That is, the Colonial Office had no formal jurisdiction or authority to control the actions of officers in the states and the outcomes. Owing to this loose structure of authority, local administrators wielded the power and control over what British 'advice' constituted in the states where they were stationed. The residential system, put in place to administer British influence in the Malay States, was in fact an instrument used to exert the authority of individual residents during the early years of British intervention.

The initial status and function of residents were clearly defined in a despatch from the Colonial Office at the start of British intervention in 1876, as follows:

"You will observe that in continuing the Residential System, Her Majesty's Government defines the functions of the Resident to be the giving of influential and responsible advice to the ruler, a position the duties of which are well understood in the East.

The residents are not to interfere more frequently or to a greater extent than is necessary with the minor details of government; but their special objects should be the maintenance of peace and law, the initiation of a sound system of taxation, with the consequent development of the resources of the country, and the

supervision of the collection of the revenue, so as to ensure the receipt of funds necessary to carry out the principal engagements of the Government, and to pay for the cost of the British officers and whatever establishments may be necessary to support them.” Instructions from Lord Carnarvon to Residents in the Malay States (1876, as cited in Swettenham, 1906).

By 1893, the role and status of the residents in the Malay States had evolved significantly, granting each resident the power and independence to govern their respective states as they saw fit. William Maxwell, then Acting Governor of the Straits Settlements, wrote of this independence:

“The powers of the Resident are not confined to the enforcement of the few written laws which the State possesses. In special cases he may exercise in the name of the Sultan the authority which H.H. undoubtedly possesses of passing any order or sentence which may seem to be just, subject to the instructions, special or general, of the Governor.

In the present instance I authorise the Resident to direct the magistrates that they may safely proceed to punish breaches of the Farmers’ privileges, in connection with gaming, in the manner indicated in para. 16 of the conditions.” (Sel/Sec. 976/93, as cited in Sadka, 1968).

In matters relating to land, this independence from the Colonial Office is clearly exemplified by the following statement by Maxwell when he was asked about how land matters were administered without the formal support of a land code/written law:

“What enactment is there in Selangor providing for the collection of duty on tin, for the recovery of farm-rents etc.? What legislative sanction is there for the creation of a police force at all or for the creation of particular judicial (civil) duties by the Chief Magistrate? It will never do to imagine that everything in Selangor depends upon the Council. The Sultan’s power is always held in reserve.” (Sel/Sec. 311/91, as cited in Sadka, 1968)

The residential system placed the resident at the apex of state administration, granting the officer in charge wide-ranging powers and control over the policies enacted and enforced in the state (Sidhu, 1980). In the early years of British intervention, this free hand was, by design, framed as principles of non-interference and overall disengagement

with matters related to the Malay States were emphasized by officials in the Colonial Office – driven by both the essence of the underlying treaties with the Rulers of the Malay States, as well as an overall aversion to taking responsibility for the work done by residents and their outcomes (Sadka, 1968). However, as time progressed, this stance became more fluid, often reflecting the dynamics of the relationship between the residents in the Malay States, the Governor in Singapore, and officials in the Colonial Office in London. However, given the ambiguity of the right to govern, paramount control over the affairs of the Malay States often depended upon the contingent interpretations of the officials in charge (ibid).<sup>17</sup> Sir Frederick Weld, Governor of the Straits Settlements at the time, provided a succinct summary of this view in a speech in 1884:

“[...] the residential system, and even such a modification of it as I am able now to apply to the little independent States in the heart of the country [i.e. in the Negri Sembilan], gives us all we want and suits the natives best, so long as we have the right sort of administrators; but I cannot conceal from myself that all depends upon administration and upon individuals. It is personal government with all its advantages, and also its obvious dangers.” as cited in Chew (1968).

In terms of the administrative structure, things were just as ambiguous. The Colonial Office, while maintaining its responsibility over supervision of the residents and their advice to the Sultan, were only afforded official communication with the states through the Governor in the Straits Settlements (Sadka, 1968; Thio, 1969). The appointments and conditions of service of the Residents and Assistant Residents in Perak and Selangor were decided by the Governor and these officers were officially considered to be servants of the rulers rather than the Crown (ibid.). Official annual reports/estimates, council proceedings, and bills were sent only to the Governor in Singapore and were not forwarded to the Colonial Office in London (ibid.). In this manner, legally the residents were acknowledged to be under the control of the Governor of the Straits Settlements, a representative of the Crown in the region. This can be observed on many occasions through correspondence on the matter, for example, on the retirement terms of an officer in Perak, the Secretary of State in the Colonial Office wrote: “The whole question [...] of gratuities and pensions to the subordinate officers of the Protected States belongs

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<sup>17</sup> For examples on conflict in matters of state administration and how it was resolved, see Sadka (1968), pp. 121-123.



properly, I would observe, to the Governors of the Settlements and the Resident.” (CO 273/123, as cited in Sadka, 1968). This deference to the Governor was materialized both in the ambiguity of the relationship between the British Government and the Malay States, as well as in a general refusal of the colonial government in Singapore (and correspondingly, the colonial governments in the Malay States) to be placed under the Colonial Office. This view, however, was not shared by all in the civil service of the Malay States. While many were appointed to the Malay States from the Colonial Service (e.g., Low, Maxwell, and Swettenham) and retained their status as servants of the Crown, many others were appointed without this status, i.e. these officers were never servants of the Crown and did not qualify for many of the associated benefits (Sadka, 1968).

Ambiguity in the relationship between the colonial governments in the Malay States, the Governor in Singapore and the Colonial Office in London meant that, for the most part, policy and development decisions in the Malay States rested on the Resident and his officers, as long as they were not reported for abusing their powers<sup>18</sup> and their work did not conflict with the objectives of the Colonial Office (Sadka, 1968; Swettenham, 1906; Thio, 1969). In practice, this resulted in a lack of uniformity and many discrepancies in administrative regulations between the Malay States. As observed by Swettenham (1906): “Of the States, their topography, chiefs, people, industries, needs, and resources, the Secretariat in Singapore only knew what the Residents chose to tell, and they had not much time for correspondence, or any but rare opportunities of despatching letters to Singapore or even to a neighbouring State.” The stark differences between attitudes to the colonial governments in Singapore and London, and their policy outlook within the states can be observed in the way different residents responded to a similar circular on land dealings in 1885. The Secretary of State, in response to a report of gross misconduct in the Land Department of Selangor by Douglas (Resident of Selangor at the time), issued a general prohibition against salaried public servants in the Malay States occupying more than 20 acres of land or any land more than six miles from his residence for profit (Sadka, 1968). Low and Swettenham, both residents at the time, took opposite views on the matter of land speculation: Low received the instructions without reserve while Swettenham replied to the 1882 circular with a long letter asking for clarification (ibid.).

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<sup>18</sup> In cases of abuse or misconduct, the Colonial Office acted as the final arbiter between the opposing parties.

On the same matter, two governors held separate views and as such provided different supplementary instructions. Weld stipulated that the matter should be determined by personal decision of the resident or himself while his successor, Smith, concluded that the existing regulations were inadequate and in 1888 proposed that any European officer be prohibited from acquiring property other than for his own occupation (ibid).

By the early 1890s, the disjuncture between residents in the Malay States and their counterparts in the Straits Settlements and London made it increasingly difficult for the Colonial Office to get a grip on development in the region. Residents acted independently and were more knowledgeable about the Malay States than their counterparts in Singapore or London (Sidhu, 1980). As problems with the administration of the Malay States continued to compound, proposals were made to consider a union or federation of the states in the region to pool resources and standardize regulations/dealings. These developments are explored in the next section.

### **8.3 The road to federation**

In the first two decades of British intervention in the Malay States, each sovereign nation was brought under British influence through the independent Residential system. While Residents were obliged to report and were accountable to the Colonial Office through their relationship with the Governor of the Straits Settlement in Singapore, the administration of each state remained separate and independent, reflecting the nature of the treaties signed with each Sultan. This granted Residents in the Malay States significant independence and wide authority in the administration of their respective states, creating both differences and similarities in their individual approaches. Attempts were made to promote uniformity across the states—between 1876 and 1882 a Secretary of Malay Affairs was appointed to the office in Singapore who: “not only knew the country and the people, but periodically visited all the protected States, travelled about in them, audited the accounts of the various stations, made suggestions to the Residents on all subjects, and did something to secure uniformity of method when dealing with similar matters in different States” (Swettenham, 1906). Suggestions to form a union or confederation were raised by various actors in the Malay States as early as 1889<sup>19</sup> but were largely ignored by the Colonial Office. However, several developments during the

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<sup>19</sup> Proposals from Low and Swettenham dated back to 1889 (Thio, 1969)

early 1890s led these suggestions to fruition: Pahang and Negeri Sembilan/Sungei Ujong's mounting financial debt to the colony; increasing calls by business and legal interests in the Straits Settlements for annexation of the Malay States, and shuffling staff assignments from the Colonial Office as well as in the political leadership of the Malay ruling class within the states (Thio, 1969).

Pahang and Negri Sembilan's mounting debt and the refusal of the colonial government in the Straits Settlements to further fund their developments made it pertinent for the other Malay States of Perak and Selangor to stand as substitutes to extend support to these states (Sadka, 1968; Thio, 1969). The last western Malay state to be brought under British influence was Pahang in 1888. Driven by the expectation of wealth from an anticipated mineral deposit in the state, Pahang had accumulated approximately \$800,000 in loans from the Colony at the end of 1892 to fund its annual operating expenditure and \$157,000 in loans from the Colony as well as Selangor and Perak for war expenditure to curb a rebellion (Sadka, 1968). In Negri Sembilan the failure of the Sungei Ujong Railway Company to deliver profits as well as increasing loans to fund excess expenditure by the state led to debts of \$210,000 (Negri Sembilan) and \$199,000 (Sungei Ujong) in loans from the Colony at the end of 1891, which more than tripled in 4 years from a total of \$90,000 in 1887 (*ibid.*). Continued loans from the Colony was seen as palatable to Strait Settlements' administration during the 1880s while revenues thrived. By the early 1890s, a trade depression shrunk Straits revenue from \$4,268,000 in 1890 to \$3,652,877 in 1892 (*ibid.*). Increased expenditure, along with falling revenues, meant that access to loans for the Malay States were challenged. Against this background, Perak and Selangor, which had an excess balance of \$2,200,000 at the end of 1891, were touted by Smith (Governor of the Strait Settlements), Low (Resident of Perak), and Maxwell (Resident of Selangor) as a solution to assist Pahang and Negri Sembilan to resolve their financial crisis (Sadka, 1968; Thio, 1969). The first official proposal for the federation scheme in 1892 was promoted to resolve Pahang's financial difficulties. In addition, by the early 1890s business and legal interests in the Straits Settlements increased pressure on the Colony to further their intervention in the Malay States. Increased European business activity in the Malay States generated the need for judicial and legal reform. Annexation of the Malay States was supported by these actors as well as several state officials, making the argument that annexation by Britain would allow them to operate more securely in the Malay States (Sadka, 1968). Ultimately, the need for financial, legal,

and administrative reforms across the Malay States made it critical that some form of resolution be pursued to resolve the issues.

Three competing solutions were proposed to resolve the complex amalgamation of issues that beset administration of the Malay States (Thio, 1969). The least likely of the three, annexation, was not ideal as the move would effectively have uprooted all existing institutional arrangements that were previously put in place. Opposing this proposal, Swettenham (1906) wrote:

“To enable members of the Straits Bar to practise in the Native States Courts, to be able to compel the Native States to contribute to the cost of Imperial Troops stationed in Singapore, to induce English speculators to invest money and safeguard their transactions by English laws [...] these are some of the grounds advanced for breaking faith with the Malays, who are now perfectly satisfied with existing arrangements wherein they have an influence and interest of which they would certainly be deprived by annexation.”

Apart from annexation, two competing proposals for a form of union or federation of the Malay States were advanced by Swettenham and Maxwell (Sadka, 1968; Thio, 1969). While both proposals made similar suggestions for a combined civil service and a common treasury, rationalization of the Resident's power and control, as well as wide judicial and legal reforms, the administrative structure to deliver these wide-ranging changes differed significantly in how power and control over the Malay States would be allocated. Maxwell's proposal called for the centralization of administrative control under the Governor of the Straits Settlements in Singapore along with a council of four officers (i.e. a Secretary for Native Affairs, a Judicial Commissioner, a Financial Comptroller, and a Consulting Engineer) to form the essential civil service of the Malay States, all to be stationed in Singapore (Sadka, 1968). In addition, all legislative functions would be deferred to Singapore, rendering the existing State Councils (and their members) as well as Residents, mere consultative actors in the proposed administrative structure. By contrast, Swettenham's proposal aimed to introduce a new position, a Resident-General, to serve as the head administrator for the federation, accountable to the Governor in Singapore (ibid.) Swettenham's proposal effectively strived to maintain the existing administrative structures while introducing a range of federal departments in Kuala Lumpur to consolidate offices of similar functions across the various Malay States. The

adoption of Swettenham's proposal over Maxwell's reflected the culmination of several forces at play.

The first was the resolution of longstanding administrative rivalry between Maxwell and Swettenham in the Malay States<sup>20</sup>. The career trajectories of both had made them competitors on several occasions (Pakri, 2011; Thio, 1969). For example, both had competed for the role of Resident of Selangor in 1882, with Swettenham the winner by a margin. Weld, the Governor of the Straits Settlements at the time, commented: "I know no officer in the Straits Settlements whose services, seniority and general capability for the post [the Resident of Selangor] can be put in competition with Mr. Swettenham, excepting Mr. Maxwell" (Barlow, 1995 as cited in Pakri, 2011). By way of consolation, Maxwell was sent to Burma and Australia to study the Torrens system of land tenure and was later appointed as the Commissioner of Land Titles in the Straits Settlements, a position created for him (Pakri, 2011; Thio, 1969). In the early 1890s, when proposals for the federation were being made, Maxwell had been nominated Colonial Secretary of the Straits Settlements in 1892 and was Acting Governor in 1893. Swettenham's proposal for the creation of a Resident-General for the Malay States (Swettenham being the primary candidate for the post) would have set both men against each other in the region (*ibid.*). This rivalry was resolved when Maxwell was appointed Governor of the Gold Coast in 1895. Second, the proposal for federation came under serious consideration at a period when Smith, the existing Governor, was retiring from the post and was due to be replaced (Sadka, 1968; Thio, 1969). Mitchell, his successor in 1895, mirrored Smith's position on the matter—the creation of a new Resident-General position would grant the colonial government in Singapore control and power over policy-making without the added burden of administering the Malay States. Maxwell's proposal was not supported by both men even though centralization in Singapore would be far cheaper to the Colony (*ibid.*). Finally, shifts in the political leadership among the Malay ruling class in several states provided a friendly platform to push the idea of federation between the different states. In Perak (where Swettenham was Resident at the time), Sultan Idris ascended the throne with British support in 1887 even though he was not in the direct line of succession (Sidhu, 1980). In Negri Sembilan, where six small states were recently confederated by

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<sup>20</sup> For a more comprehensive review of the rivalry between Maxwell and Swettenham, see among others: Chew (1968), Pakri (2011), Gullick (1991), Barlow, (1996), and Loh (1969).

the British in 1889 and 1895, no head of state (*Yang di-Pertuan Besar*) had yet been appointed; the state was ruled by several territorial chiefs. Through his tenure in the Malay States, Swettenham was also well acquainted with the ruler of each state, positioning him as the ideal candidate to acquire their consent to the arrangement (ibid.).

Against this background, Governor Mitchell proposed a federation scheme for the Malay States in 1895 and Swettenham was sent to acquire the agreement of the Malay rulers (Emerson, 1937; Sadka, 1968; Sidhu, 1980; Thio, 1969). Joseph Chamberlain, the Secretary of State for the Colonies, underlined a key point in his instructions (and approval) of this exercise, in that:

“... no pains should be spared to safeguard the position and the dignity of the Native Rulers, to invite them to co-operate as fully as heretofore with the British Advisers in promoting the advancement of their respective territories and subjects, and to give them the assurance that such changes as shall be made are solely intended to promote strength by combination, uniformity of policy and harmony of purpose”. (CO 717/1921, as cited in Sidhu, 1980).

In ensuring preservation of the right to self-government by Malay rulers, he further stressed that:

“It will of course be most important to point out that in binding themselves and their States by this agreement the rulers will not in the slightest degree be diminishing the powers and privileges which they now possess nor be curtailing the rights of self-government which they at present enjoy.” (Emerson, 1937)

Whilst the prepared treaty was vague and had little description of what the federation would entail, the process of acquiring consent from the rulers was resolved speedily and with little difficulty, as described by Swettenham (1906):

“Sir Charles Mitchell, after nearly two years' consideration, recommended that, if the Malay Rulers favoured the proposal, federation should be adopted. Mr. Chamberlain approved, and, acting on instructions, I visited the several States, explained the scheme very fully to the Malay Rulers and British Residents, and secured the written consent of the former and the verbal concurrence and entire sympathy of the latter. In a month the question was settled, and the new departure was formally inaugurated on 1 July, 1896.”

The Federated Malay States (FMS) was formally inaugurated on 1 July 1896. The four Protected States of Perak, Selangor, Negri Sembilan, and Pahang were federated under a centralized administration in Kuala Lumpur, where important departments were placed under one federal head. Swettenham was chosen to lead this new government as a Resident-General. At the state level, the Residents remained the chief administrators of each state.

#### **8.4 Structures of power in the Federation**

Federation of the four Malay States materialized after many years of strategic manoeuvring by critical actors and was made possible by flux in the existing operating environment. The Federation treaty and scheme that was finally adopted reflected these interactions and negotiations. Mitchell, in finally pushing the Federation agenda, was both supported and restricted by the various actions taken by his colleagues and predecessors. For the colonial government, a critical objective was achieved through adoption of the Federation scheme; it paved the way for the introduction of a new institutional structure by which rule-making could be formally uniformed and centralized across the four sovereign states.

Details of Mitchell's scheme<sup>21</sup> (and the eventual proposal for the Federation) were not incorporated into the treaty signed by the Malay rulers. In fact, the five articles of the treaty made no mention of what changes would be instituted to bring about the Federation or how administration of the Malay States might differ post-Federation. Apart from the obvious agreement to form a federation, the only glaring addition to the existing structure of government was provided by Article 4 in which:

“The above-named Rulers agree to accept a British Officer, to be styled the Resident-General, as the agent and representative of the British Government under the Governor of the Straits Settlements.” (W. G. Maxwell & Gibson, 1924), as cited in Sidhu, 1980)

However, there was also a very clear goal in preserving the existing structures as Article 4 ends by affirming that:

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<sup>21</sup> For a more detailed account, see among others: Emerson (1937), Sadka (1968), Sidhu (1980), and Thio (1969).

“The appointment of the Resident-General will not affect the obligations of the Malay Rulers towards the British Residents now existing or hereafter appointed to offices in the above-mentioned Protected States.” (ibid.)

Most importantly, the treaty contained a distinctive prescription for the preservation of British *de facto* rule and Malay *de jure* rule in these states. The final part of the last article of the Treaty of Federation reads:

“Nothing in this Agreement is intended to curtail any of the powers or authority now held by any of the above-named Rulers in their respective States, nor does it alter the relations now existing between any of the States named and the British Empire.” (ibid)

Preservation of Malay rule in these states was also guaranteed by Mitchell’s predecessor, Smith, who had promised the Sultan of Perak: “that the integrity of his country would be preserved, and that there would be no radical changes in the system of administration of which he did not approve” (Sadka, 1968). Nevertheless, despite the sparse and loose wording of the treaty, its ratification led to disruptive shifts in the institutional structure (both in the constitutional order and in the institutional arrangements) of the four Protected States.

In agreeing “to constitute their countries a Federation [...] which were to be administered ‘under the advice of the British Government’” (Sidhu, 1980), the various Rulers of the Protected Malay States had effectively entered their states into an indefinite formal alliance and in doing so, altered the mechanism by which their constitutional order was designed. That is, the power and control to determine the ‘rules for making rules’ no longer resided with each individual state (and by extension, its ruler), but rather were surrendered to an external institution, i.e., the Federation and by extension, the Resident-General of the FMS. It is vital to make the distinction between the actor and the state in this case since, while the various Malay Rulers can be said to have surrendered to the colonial government their effective power and control over the rule-making process long before the Federation came to fruition, each state had maintained a constitutional order that was independent of one another prior to the Federation treaty. In theory, this development altered the rule-making process by pooling not only the actors but also each state’s constitutional order into a collective. The ‘rules for making rules’ for each state



was now bound by additional restrictions in accordance with other states. In practice, however, the ambiguity of the treaty meant that, while uniformity in legislation and practice was expected of the administration in the various states, the lack of clear delineation of powers within the Federation made this an arduous task which was heavily (ibid.). As the only administrative role prescribed by the treaty, the Resident-General position was at the apex of the Federation administration, above the Resident and only outranked by the High Commissioner in Singapore or the Colonial Office in London (ibid.). As described by Swettenham (1906):

“One of the best results of federation was the opportunity it gave for the Resident-General to meet all the Residents (and any of the federal heads of departments) in consultation, and so settle in a few days matters which months or years of correspondence would have brought no nearer to finality.”

For the Malay rulers, collective nation-building, which was hitherto non-existent,<sup>22</sup> required formal introduction of a Conference of Malay Rulers in the institutional sphere of the FMS. The significance of this move was noted by Swettenham, who wrote:

“...it is difficult to estimate now the present and prospective value of this unprecedented gathering of Malay Sultans, Rajas, and chiefs. Never in the history of Malaya has any such assemblage been even imagined. I doubt whether anybody has ever heard of one Ruler of a State making a ceremonial visit to another; but to have been able to collect together, in one place, the Sultans of Perak, Selangor, Pahang, and the Negri Sembilan is a feat that might well have been regarded as impossible.” Quoted in Emerson (1937).

While this institution was largely ceremonial (as the body had no legislative power), it provided an unprecedented institutional space where the Malay rulers could henceforth discuss their relative positions vis-à-vis the Federation and the colonial government. This addition to the institutional sphere proved to be significant when in 1903: (1) it paved the way for greater Malay participation in the Malayan Civil Service<sup>23</sup>, and (2) it provided

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<sup>22</sup> Treaties for cooperation between the Malay States had existed prior to the Federation but did not bind the administrative/legislative objectives of the states. Furthermore, Weld introduced a conference of Malay Rajas (then termed a ‘Malay League’) in 1883 to settle political disputes in Negri Sembilan but this remained largely a “paper creation” (Chew, 1968).

<sup>23</sup> Many other factors also motivated this move. For further details, see among others: Wah (1980) and Roff (1967).

a platform on which discontent could be raised regarding the existing Federation scheme. This led to reforms in the federal structure in 1909 and continued flux over the search for a federal framework that was palatable to the Malay rulers that lasted nearly 30 years (Emerson, 1937; Loh, 1969).

The Federation also generated the institutional space to introduce a layer of government so as to centralize a range of state government departments and anchor the overall administration in the Federation. For land tenure in particular, the Federation provided an institutional space where land regulation and administration across the different states could be standardized (a longstanding issue prior to federation<sup>24</sup>). Despite previous efforts to assimilate the land system in the Malay States to each other and to that in the Straits Settlements, the existing system of government prior to federation meant that such issues were generally deferred to the inclinations of the individual Residents and the Governor in charge (Lim, 1976). The Federation scheme allowed the Resident-General to utilise other institutional pathways to achieve this objective. Merely a month after the inauguration of the FMS, a Federal Land Conference was called in August 1896 for this purpose. The conference was used to draft a Federal Land Code for the Federation. This draft was immediately submitted for approval to the Colonial Office in London and the resulting enactment was adopted by each state in 1897. Swettenham (1906), in his remarks on the matter, noted how federation provided a pathway by which this was achieved:

“As regards the land question and the terms on which Government land [and that was practically all land] should be alienated, held, and transferred, there had been for years the most serious controversy, the most divergent opinions ever called forth by any administrative question in the Malay States. A very simple set of almost identical regulations had been a sufficient guide for nearly fifteen years. Then something much more elaborate became necessary, and as by that time there were in the States British Residents with very strong views on this and other questions, the result had been that policies were in some cases reversed, in others maintained and accentuated, and there were in different States widely different land laws, causing much very natural dissatisfaction. It was therefore a notable

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<sup>24</sup> Proposals to formulate a common land system were raised as early as 1878. For further details, see Lim (1976) and Loh (1969).

achievement to secure unanimity on a matter of so great importance, and this early promise of enthusiasm for a common cause has been maintained in subsequent conferences of the Residents with the Resident-General.”

Ultimately, federation not only altered the existing institutional structure that determined power and control over the rule-making process in the Malay States, but it also generated other platforms and pathways to motivate institutional change. Its ratification provided the space for existing institutional arrangements to be reset, reconsidered, and revised by critical actors who are positioned to benefit from the new rules of the game.<sup>25</sup>

## **8.5 Summary**

This chapter describes the events leading to the emergence of the second critical juncture and their impact. It describes the external and internal conflicts and developments that enabled the passage of the Federation scheme for the unification of the Malay States. This generated the institutional structure that introduced separate layers of government at the federal and state levels and, consequently, altered the rule-making process of each state by amalgamating individual constitutional orders into a collective.

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<sup>25</sup> Many new institutional arrangements were introduced with the formation of the Federated Malay States. Despite its importance, an attempt to cover all these developments is beyond the scope of this thesis.

## **Chapter 9 Critical juncture 3: The fortification of power**

This is the third and final findings chapter in the historical component of the research. This chapter identifies the last critical juncture and describes the events that led to its emergence. The analysis focuses on a critical period in the formation of Malaysia highlighting the processes that resulted in the creation of the nation's Federal Constitution, and subsequently, Malaya's independence from British sovereignty in 1957. Institutional flux during the post-war period provided the space for renegotiation of the existing political structure and rule-making process in Malaya. Institution of the Federation of Malaya in 1948 cemented the integration of states previously comprising the Federated Malay States (FMS), the Unfederated Malay States (UMS), and the Straits Settlements (SS) into one political unit. During this process, several rules of tenure regarding land were negotiated for the country and inscribed in the resulting Constitution.

Section 9.1 presents the counterfactuals. Sections 9.2 and 9.3 describe the antecedent conditions that laid the path to institutional innovation. Section 9.2 describes the growth of the plantation economy in the Malay Peninsula and illustrates the colonial government's increased investment and growing stake in the economy of the Malay States. Section 9.3 examines post-war dynamics in the Malay Peninsula. It emphasizes the political and social cleavages within the country that emerged after the Second World War. Section 9.4 provides an overview of both the creation of the Malayan Constitution and the Federation of Malaya's independence from British sovereignty. It describes the emergence of the identified critical juncture and discusses its aftermath. Section 9.5 summarizes the chapter.

### **9.1 Dealing with counterfactuals**

The years following the Second World War were a tumultuous period in the Malay Peninsula. In their pursuit of independence, states in the Malay Peninsula were presented with various potential paths to statehood which could have determined how the eventual unified nation was governed. These possibilities might have led the country down a different developmental path, particularly with regard to the design of its institutional structure. This section considers the various pathways of institutional development that could have altered the character of Malaysia's current land and housing institutions.

First, consider the proposals for the political and economic integration of all the states in the Malay Peninsula. Several competing proposals for statehood were available during the period of contention. As this chapter will describe, the federation scheme that was instituted in 1948 did not reflect the goals of the colonial government, which preferred annexation through the Malayan Union constitution. In addition, proposals for Malayan unification proffered by civil societies and political associations in Malaya reflected its diverse political economy, ranging from proposals to form a political union of former British and Dutch colonial territories (*Indonesia-Raya* or *Melayu-Raya* i.e. Greater Indonesia or Greater Malay) (Roff, 1967), a non-communal pan-Malayan republic, and annexation by China. Why did the federation scheme prevail against other options for unification? After the war, the main pillars of pre-war policy, i.e. “the sovereignty of the Malay Rulers, the autonomy of the Malay states and the privileged position of the Malay community”, were dismantled (Stockwell, 1979). Given the nature of post-war dynamics, a strong military government representing British interests would have had little difficulty asserting its force to achieve their political objective. Why was this option not exercised?

To answer this question, we must situate the unification exercise against the socio-political backdrop of during the period. While the Malay Peninsula was geographically small, compact, and homogeneous, socio-political cohesion and solidarity across the various entities within its boundaries remained elusive until just before the Second World War when economic depression in the 1930s led to widespread poverty in the region and at the same time, a reversal in the colonial government’s policy on open political activities allowed for freedom of political expression (Simandjuntak, 1969). However, early attempts at large-scale, pan-Malayan organization among the Malays were halted by the Japanese occupation in 1942. Despite efforts to promote a Malay nationalist movement, this underlying lack of cohesion characterizes the nature of Malayan politics in the post-war period.

Ultimately, the success of the federation scheme materialized out of a coalescence of several factors. In the face of overwhelming rejection of the Malayan Union constitution and the need to contain a surging communist insurgency, the colonial government opted to stifle the proliferation of political organizations in favour of tolerating the development

of just two, the UMNO and the MCA which were deemed benign and friendly to colonial interests. This chapter describes their role in developing the federation scheme.

## **9.2 The growth of plantation agriculture in the Malay Peninsula**

In the years following federation of the Malay States, land policy in the region began to respond to the wider economic objectives of the FMS government for the individual states. The Land Enactment of 1897, which marked the formal beginning of this process and primarily aimed to standardize land legislation across the four states, had categorized land into three types in which town lands and country lands exceeding 100 acres in area were held under the leasehold system while country lands of 100 acres and below would simply be held by registration through the Mukim Register (Wong, 1975). This delineation effectively set different pathways for the regulation and administration of smallholdings (which, in general, were previously held under the customary tenure<sup>26</sup>) as opposed to the other two types of land, generating a: “dual system of land tenure” (ibid). Revision of this legislation, brought on by the adoption of the Land Code of 1926, converged the separate tenures under one system of administration, albeit maintaining the categories. Under the 1926 legislation, small country holdings were redefined to be country lands of 10 acres and below.

This distinction in policy between smallholdings and larger estates during the early days of the FMS set the stage for the proliferation and rapid expansion of rubber plantations in the two decades after federation, further supported by the FMS government’s overarching objective of promoting agriculture as an alternative to mining enterprises at the start of the 20<sup>th</sup> century. Following his visit to Malaya in 1904 to report on the region’s agricultural prospects, J. C. Willis, the Director of the Royal Botanic Gardens in Ceylon, made recommendations to cultivate rubber as a crop for large scale capitalist enterprise (Drabble, 1967). In 1905 the Department of Agriculture was set up to develop the agriculture sector in the FMS and in the years that followed, several measures were taken, in response to growing demand for rubber on the global markets.<sup>27</sup> Among others, the FMS government supported planters with research to improve yields (King, 1939),

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<sup>26</sup> For further details on customary tenure, see among others: Wong (1975), Wilson (1975), and Lim (1976)

<sup>27</sup> The demand for rubber rose steadily at the turn of the century, in tandem with the increased production of automobiles. For a detailed history of the rubber industry in Malaya, see Drabble (1967, 1973).

provided low-interest government loans to interested parties (Drabble, 1967), facilitated the migration of Indian labour into Malayan plantations, and offered concessions in land rents and duties alongside access privileges for Western (mainly British) investors in the sector (Kaur, 2014). In addition, extension of British control, first through inauguration of the FMS and subsequently to other states in the peninsula that make up the Unfederated Malay States (UMS), i.e. Johor, Kedah, Kelantan, and Terengganu, provided planters in Malaya with access to British capital and markets (Jackson, 1968). The increased capital flow into rubber led to the rapid creation, and later dominance, of agency houses in the country's rubber industry and overall economy (see Table 7).

**Table 7 British investment in Malayan plantation rubber by type of financial firm**

Year	Number of estates	Malayan agency house (£ 000)	London issuing house (£ 000)	Total authorized capital (£ 000)	Percent of total investment via Malayan agency houses
1904	6	137.0	55.0	192.0	71.4
1905	14	255.0	330.0	585.0	43.6
1906	28	1,225.0	915.0	2,140.0	5.7
1907	19	534.0	776.5	1,310.5	39.0
1908	12	50.0	311.5	361.5	13.8
1909	94	2,490.0	320.0	5,710.0	42.3
1910	98	2,870.0	5,142.0	8,012.0	33.9
1911	44	1,740.0	2,827.0	4,602.0	37.8
1912	37	900.0	1,655.0	2,555.0	35.2
1913	21	327.5	595.0	922.5	30.0
1914	5	185.0	150.0	335.0	55.2
1915	3	157.0	26.0	183.0	85.8
1916	1	1.0	15.2	16.2	6.2
1917	1	8.0	50.0	53.0	13.8
1918	2	120.0	263.0	383.0	31.3
1919	24	2,723.0	3,818.0	6,541.0	41.3
1920	37	6,874.7	7,669.3	14,544.0	47.0
1921	6	107.5	286.6	394.1	23.5
1922	1	62.3	19.9	82.2	75.7

Notes:

1. Investment is measured by changes in authorized capital. Data come from various issues of the Stock Exchange Official Intelligence.
2. The estates are the total number of estates making investment through the stock exchange. They include new estates being formed and established estates expanding by means of new stock issue. Data from the Official Intelligence.
3. Twenty Malayan agency houses were identified: British North Borneo Co.; Boustead Bros.; D.A. Clapperton; Gibson & Anderson; Greenhill & Clapperton; Guthries, Harrison, & Crosfield; Lyall Anderson; Macdonald Stewart & Stewart; Naftel Rutherford; Patterson Simons & Co.; Planters Stores & Agency Ltd.; R.G. Shaw; Rowe White & Co.; Rubber & General Trust Ltd.; Sharpe Ross & Co.; Sime Darby; Taylor Nobel & Co.; Thomas Barlow & Bros., and W.H. Thompson.

Source: Reproduced from Stillson (1971)

By the 1930s, rubber cultivation accounted for 90% of the value of export trade in Malayan agricultural products (King, 1939) and more than half of total exports (Bauer, 1944). When considered together with tin mining, exports of these products made up to 90% of the total for Malaya (ibid). Land used for both these enterprises was widespread throughout the region but was mainly concentrated on the western lowlands (see Figure 18). Large rubber plantations (i.e. estates over 100 acres) made up about 60% of the sector and were mainly cultivated by Europeans, who controlled 82% of the estates in the FMS and over two-thirds in the UMS (King, 1939) (see Table 8). The colonial government also previously attempted to maintain British domination of the Malayan rubber estates by the passage of the 1917 Rubber Lands (Restriction) Enactment, which prohibited the alienation of lands over 50 acres for rubber cultivation except to British subjects, subjects of the Malay rulers, companies registered in British Dominions or in the FMS, and to other persons resident in the Malayan Peninsula or the Straits Settlements for at least seven years (Drabble, 1967). While this enactment was later revised in response to protests from Japanese government, its passage signified increased intervention to maintain the dominance of British interests. Among non-Europeans, Chinese smallholdings dominated the sector while Malay participation in the rubber industry was generally limited by several policy restrictions on the cultivation of rubber by Malay landowners (ibid.).

By 1939, British economic and financial interests in Malaya had expanded extensively. Myriad institutional arrangements were introduced to facilitate this expansion, facilitated by the new institutional structure that was set up by the process of federation. Upon return of the colonial government to post-war Malaya however, many of these institutions were altered by wartime conditions and had to be renegotiated.

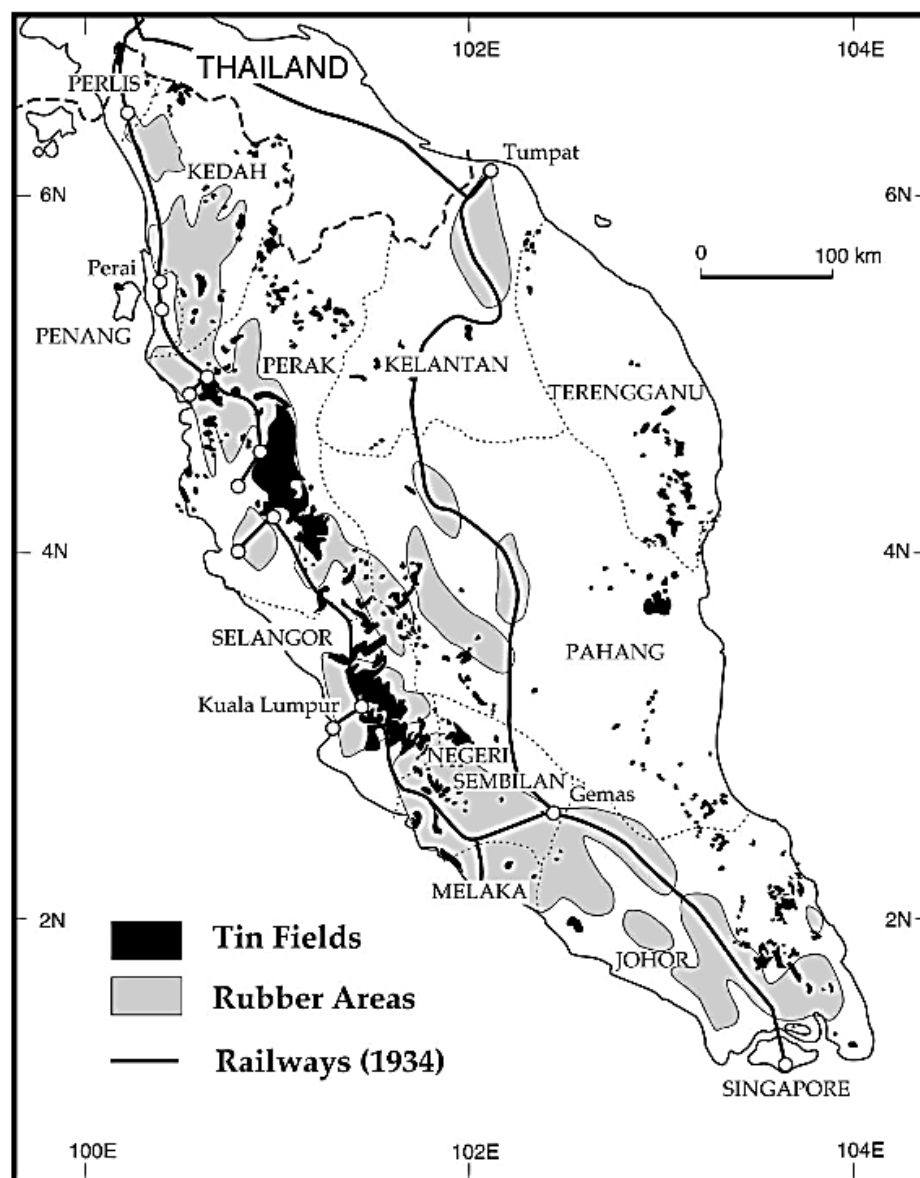


**Table 8 Expansion of the area given over to rubber in British Malaya (1900-1922) by acre**

<b>Year</b>	<b>European</b>	<b>Asian</b>	<b>Total</b>
1900	6,000	-	6,000
1901	11,000	-	11,000
1902	15,000	-	15,000
1903	20,000	-	20,000
1904	28,000	-	28,000
1905	46,000	-	46,000
1906	97,000	-	97,000
1907	168,000	2,000	170,000
1908	237,000	18,000	255,000
1909	289,000	45,000	334,000
1910	377,000	164,000	541,000
1911	494,000	256,000	750,000
1912	591,000	351,000	942,000
1913	646,000	428,000	1,074,000
1914	672,000	490,000	1,168,000
1915	712,000	578,000	1,290,000
1916	782,000	648,000	1,430,000
1917	948,000	710,000	1,658,000
1918	1,050,000	836,000	1,886,000
1919	1,121,000	940,000	2,061,000
1920	1,182,000	999,000	2,181,000
1921	1,220,000	1,020,000	2,240,000
1922	1,230,000	1,030,000	2,260,000

Source: D.M. Fogart (1925), Plantation Rubber Industry in the Middle East, (U.S. Department of Commerce. Trade Promotion Series No. 2, Washington), as cited in King (1939)

**Figure 18 The rail network and the distribution of rubber in Malaya, 1935.**



Source: Kaur (1999, as cited in Kaur, 2014)

### **9.3 Post-war nationalism and the making of the Malayan Constitution**

Developments during the Second World War and the effects of Japanese occupation<sup>28</sup> changed the operating environment in the Malay Peninsula significantly. A rise in inter-ethnic conflict as well as widespread nationalist sentiment among the population made it necessary for the political structure and rule-making process for the states of the Malay Peninsula to be renegotiated.

<sup>28</sup> For further details on the Japanese occupation of Malaya, see Kratoska (1998)

While previous attempts have been made to amalgamate the three entities of the Malay Peninsula (the Straits Settlements, the Federated Malay States, and the Unfederated Malay States) into a single nation state, attempts to unify them gained momentum only after the Second World War. Critical opposition to unification, previously driven largely by the fear of curtailment of individual state's independence and overall scepticism about a centralized government in the Malay Peninsula (Emerson, 1937; Simandjuntak, 1969), gave way to widespread Malay nationalism throughout the Peninsula as well as a burgeoning and concerted aspiration towards independence from the British colonial government (Roff, 1967). Political cohesion amongst the Malays had only begun to take shape in the Peninsula at the advent of the Japanese invasion of the Malay Peninsula and came to fruition in the post-war period (*ibid.*).

Alongside this development, the colonial government anticipated that the post-war flux would afford an opportunity to resolve its longstanding attempt to integrate the Malay states in the Malay Peninsula (Simandjuntak, 1969). This objective was clearly declared in its policy statement on the future constitution of Malaya and Singapore:

“The increasing complexity of modern administration, economic, and social developments demand a system of government less cumbersome, more adequate for large common services, and making better use of time and labour. A return to the old position would be manifestly contrary to the interest of the territories and their inhabitants in the post-war world.” (as cited in Simandjuntak, 1969)

A Malayan Planning Unit (MPU) was established in mid-1943 to provide a blueprint for the new system of government in the Malay Peninsula (Stockwell, 1979). The resulting proposal for the unification of Malaya was the Malayan Union constitution, which was to replace the interim British Military Administration instated after the war. This proposal was designed by a group of officials in London, led by Sir Edward Gent and required the colonial government to acquire *de jure* jurisdiction in the Malay States, i.e. the rulers of each Malay state would need to surrender the sovereignty of their state to the colonial government (Simandjuntak, 1969; Stockwell, 1979). Sir Harold MacMichael was sent to states in the Malay Peninsula to acquire the rulers' formal consent agreement to this scheme in early 1946. Under the scheme, the Malay Peninsula (including Penang) would be placed under the rule of a Governor who had wide-ranging legislative and administrative powers (*ibid.*). The Malay rulers were retained in their positions and given

legislative powers over matters concerning the Muslim religion, subject to the approval of the Governor. At the state level, individual states would be administered by a Resident Commissioner, who would be accountable to the Governor (and not the Malay ruler as previously structured) (Simandjuntak, 1969). Furthermore, all assets of the states, including land, would be surrendered to the Malayan Union government (ibid.). For land, this meant that the allodial rights to land in each state would rest with the central government and not the state government as dictated by the existing rules of tenure. Most critically, the scheme proposed a blanket provision of citizenship to all persons who were born or had been resident in the Malay Peninsula irrespective of race (Stockwell, 1979). This ran contrary to the status quo wherein immigrants to the Malay states were not subjects of rulers and were not granted rights as citizens while persons in the Straits Settlements were British subjects (ibid.).

However, the Malayan Union proposal found no support among the Malay and non-Malay population in the Peninsula. The Malay rulers lamented that they were effectively coerced into agreement with the scheme. The Malay people found no collective benefit in the scheme which introduced the threat of Chinese political dominance in the Malay Peninsula given the proposal of common citizenship and the diminishing political standing of their own rulers in the effective annexation of the Malay States as a colony (Simandjuntak, 1969; Stockwell, 1979). The consolidation of Malay political strength culminated in the emergence of the 'United Malays National Organization' (UMNO) in March 1946, which resulted from the amalgamation of 41 Malay associations from all over the region. The UMNO adopted the slogan 'We want protection, not annexation' in their campaign against the Malayan Union proposal (Simandjuntak, 1969). The Chinese, by contrast, were not enticed by the offer of citizenship for fear of losing their existing Chinese citizenship. Inauguration of the Malayan Union and the installation of its first Governor, Sir Edward Gent, was boycotted by the Malays and their rulers (Stockwell, 1979). Lt. Col. David Rees-Williams, an ex-Malayan civil servant, who had visited Malaya during this period to consult with the nine Malay rulers and the leaders of the Malay community on the matter, reported to the House of Commons on his return that:

"There was no consultation; there was no investigation; there was no Royal Commission; there was no Parliamentary Mission [...] The Malays were prepared to sign a treaty accepting the advice of a British Adviser on all matters with the

exception of the Mohammedan religion and Malay customs. What they wanted was State land to be vested in the Rulers, and not in the Crown, the prerogative of mercy to be left to the Rulers, and the Rulers to be able to signify assent to all legislation. They wanted a Protectorate, not a Colony; they wanted a Federation, not a Union, and they wanted a High Commissioner and not a Governor. They agreed that all subjects of government, except control of rural land, should remain in the hands of the Federation.” as cited in Simandjuntak (1969)

In addition, despite efforts to diminish Malay objections to the Malayan Union constitution, Gent (Governor of the Malayan Union) reversed his position on the matter merely a month after he was installed as Governor (Stockwell, 1979). To expound on the issue, Gent wrote to Hall, the Secretary of State, in London that: “‘almost universal Malay political opinion’ would obstruct ‘the effective operation’ of the Malayan Union constitution and the ‘strength and organisation of Malay opinion and their free criticism of their own rulers has surprised all who have experience of Malaya’” (ibid.).

Resolute rejection of the Malayan Union by the Malays led to revision of the constitutional arrangement for the Malay Peninsula. This was undertaken by a working committee consisting of six representatives of the British government, four of the Malay rulers and two representatives of the UMNO (Stockwell, 1979; Simandjuntak, 1969). A new constitutional proposal for the Federation of Malaya was published in December 1946, providing a blueprint for unification of the states in the Malay Peninsula (ibid.).<sup>29</sup> This proposal reversed the annexation of the Malayan Union to the British Crown and put in its place: “a draft Federal Agreement and a Model State Constitution” (Stockwell, 1979). Critically, the revised constitutional proposals for Malaya preserved the sovereignty of the Sultans and the individuality of the states (ibid.).

#### **9.4 Power and control in Independent Malaya**

The Federation of Malaya was instituted on 1 February 1948, putting in place the political integration of nine Malay states and two of the three Straits Settlements (Penang and Malacca). The Federation was characterized by a strong central government with wide

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<sup>29</sup> Opposition to the proposal published by the working committee came from several left-wing parties (e.g. the Malay Nationalist Party (MNP), the All-Malaya Council of Joint Action (AMCJA), Pusat Tenaga Rakyat (PUTERA) etc). The colonial government relegated these parties’ resistance to their communist ties. (Stockwell, 1979)

legislative powers (Simandjuntak, 1969). A British High Commissioner (appointed by the British Crown) presided over both the Federal Executive Council and the Federal Legislative Council, giving him the power to control the federal executive functions and put into effect any bill deemed to be in the public interest which failed to pass within a reasonable time. All members of the Federal Executive Council and 61 out of a total of 75 members of the Federal Legislative Council were appointed by the High Commissioner (ibid.). At the state level, while the authority of federal government was recognized, each ruler was restored as the sovereign of their respective state. A Council of State held the power to legislate on matters that were not delegated to the federal government while a State Executive Council was introduced to advise the rulers (ibid.). The centralization of government in the Federation was further prompted by the emergence of a political threat from the Malayan Communist Party (MCP) (Fernando, 2002), which led to a declaration of special emergency regulations for the Federation in June 1948 and with it, wide legislative powers for the High Commissioner:

“Notwithstanding anything on which you [the High Commissioner] want to make a regulation which has not been itemized here, you [the High Commissioner] can, nevertheless, make a regulation on it, if it is in the interest of the community in any emergencies through which we may be passing.” Excerpt from the Emergency Regulations Bill of 1948, cited in Simandjuntak (1969)

In the effort to combat and defend against these threats, the individual states and settlements had to effectively surrender control to the federal government in return for financial and military support. In the next decade before Malaya's independence in 1957, communist terrorism and racial antagonism characterized the trajectory of both its political organization and its structure of government.

In the decade between the institution of the Federation of Malaya in 1948 and the appointment of a constitutional commission in 1956, several important developments had transpired which shaped the socio-political character of Malaya. Emergency regulations, which remained in effect from 1948 to 1960, had effectively stifled the political diversity in the country in favour of overwhelming support for a tripartite communal based political alliance comprising of the UMNO, the Malayan Chinese

Association (MCA)<sup>30</sup>, and the Malayan Indian Congress (MIC) which represented the interests of the three main ethnic groups residing in the Federation (Fernando, 2002). Deep seated communal sentiments (particularly between Malays and Chinese), which had been brewing prior to the Second World War, was exacerbated by the Japanese Occupation, the Malayan Union Crisis, and The Federation of Malaya Agreement (ibid.). The formation of the Communities liaison Committee (CLC) in January 1949 was the colonial government's attempt to bridge this divide (Fernando, 2002; Simandjuntak, 1969). The CLC provided a platform for discussing inter-communal issues and to incubate inter-communal co-operation among the different communities within the Malayan populace. Within the CLC, the Malay and Chinese community was represented by the UMNO and the MCA, respectively, while several British officers stood as observers (Simandjuntak, 1969). The significance of this development was evident in the overwhelming victory (winning a total of nine of the twelve contested seats) of the Kuala Lumpur municipal elections in 1952 by candidates from the political alliance of the UMNO and the MCA (Fernando, 2002). The political dominance of this pact (which was later expanded to include the MIC) was mirrored in the subsequent 1952 and 1953 municipal and town council elections, and in the 1955 Federal elections (ibid.).

Negotiations for the independence of the Federation of Malaya began soon after the 1955 federal elections and the Reid Commission (a constitutional commission) was appointed in early 1956 to make recommendations on the constitution of the Federation of Malaya as an independent, self-governing country within the Commonwealth. The political alliance between the UMNO, the MCA, and the MIC, which was aptly named 'The Alliance', continued to play a significant role in determining the design and structure of the eventual Federal Constitution. A joint memorandum by the Alliance which has been often referred to as the 'inter-communal bargain' was submitted to the Reid Commission (Fernando, 2002). This memorandum reflected the outcomes of the private negotiations between the parties in 1956 on a range of constitutional issues and ultimately, "served as an important basis for the Commission to frame the new constitution" (ibid.).

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<sup>30</sup> The formation of the MCA in 1949 was a colonial government invention in its attempt to quell support for the MCP. Sir Henry Gurney (High Commissioner of the Federation of Malaya) wrote: "Steps are now being taken by leading Chinese to form a Malayan Chinese Association open to all who have made their home in the Federation with the object of co-operating with the Government and with other communities in restoring peace and good order in this country." CO 537/773, cited in Fernando (2002).

Following proposals<sup>31</sup> from a wide range of individuals and organizations as well as visits and consultations with the Malay Rulers and officers of the colonial governments of the individual states, the Reid Commission submitted their recommendations for approval to Queen Elizabeth II and the Malay rulers (Simandjuntak, 1969). These were then published in February 1957 and formed the basis of the constitution of the Federation of Malaya upon independence in August 1957. Following the proposal from the Malay rulers, the Head of State of the Federation of Malaya was entitled the '*Yang di-Pertuan Agong*' and would be chosen by the rulers from among themselves following a system of their own choice (ibid.). The existing Conference of Rulers would be retained, as would their positions as the sovereign rulers of their states. In consideration of the division of power between the Federation and the individual states, a State List and a Concurrent List detailing matters which fall under the legislative and executive control of each government was introduced (ibid.). In general, Parliament was given the power to legislate state matters, but these legislations would not come into force without the approval of the state assembly, as follows:

"The Commission paid particular attention to the power of Parliament to legislate with regard to State subjects for purposes of uniformity. Their recommendation was that Parliament should have power to pass an Act on any State subject but that such an Act should not come into force in any State until it had been adopted by an Enactment of the State Legislative Assembly, and that in adopting such an Act the State Legislative Assembly should be entitled to make such modifications as it deemed appropriate." The Constitutional Commission, No. 15 of 1956

State autonomy was retained in matters that constitute the State List. For land tenure in particular, several recommendations were included in the report to anchor its legislative and administrative to the state. As stressed in the preceding sub-section, the transfer of rights over land from the state to the Federation in the Malayan Union scheme was a highly contested issue among its dissenters. The recommendations proposed by the Reid Commission reflected a complete reversal on the matter, as illustrated in the report:

"These subjects are land tenure, the relations of landlord and tenant, registration of titles and deeds relating to land, transfer of land, mortgages, leases other than

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<sup>31</sup> 131 memoranda were received on a wide range of issues (Simandjuntak, 1969). For further details, refer to: Federation of Malaya, *The Constitutional Commission*, No. 15 of 1956



mining leases and charges in respect of land, easements and other rights and interests in land, compulsory acquisition of land, rating and valuation of land, and local government. Under the present Federation Agreement, the Federal Legislature has wide powers to make laws on these subjects; in respect of some the power is unrestricted, and in respect of others it is limited to ensuring uniformity of legislation or ensuring common policy and a common system of administration. The extent to which such laws should confer executive authority on the States and Settlements is set out in the agreement. It is proposed to adopt a modified form of these arrangements. The intention is that Parliament should have power to make laws with respect to the subjects referred to above only for the purpose of ensuring uniformity of law and policy, and if any such law makes provision for conferring executive authority on the Federation it will not operate in any State unless approved by resolution of the Legislative Assembly of that State.” (ibid.)

Furthermore, establishment of a National Land Council, as provided by the Constitution, was proposed to ensure that an institution is established to formulate: “in consultation with the Federal Government, the State Government and the National Finance Council a national policy for the promotion and control of the utilisation of land throughout the Federation” (ibid.).

## **9.5 Summary**

The chapter describes the events that led to the emergence of the third critical juncture, i.e. the codification of land tenure rules into the Federal Constitution of Malaya. It provides a descriptive narrative of the internal and external conflicts and developments that enabled both the creation of the Federal Constitution of Malaya and the country’s subsequent independence from British sovereignty.

## **Chapter 10 Conceptual analysis**

This is the final findings chapter and it addresses the question:

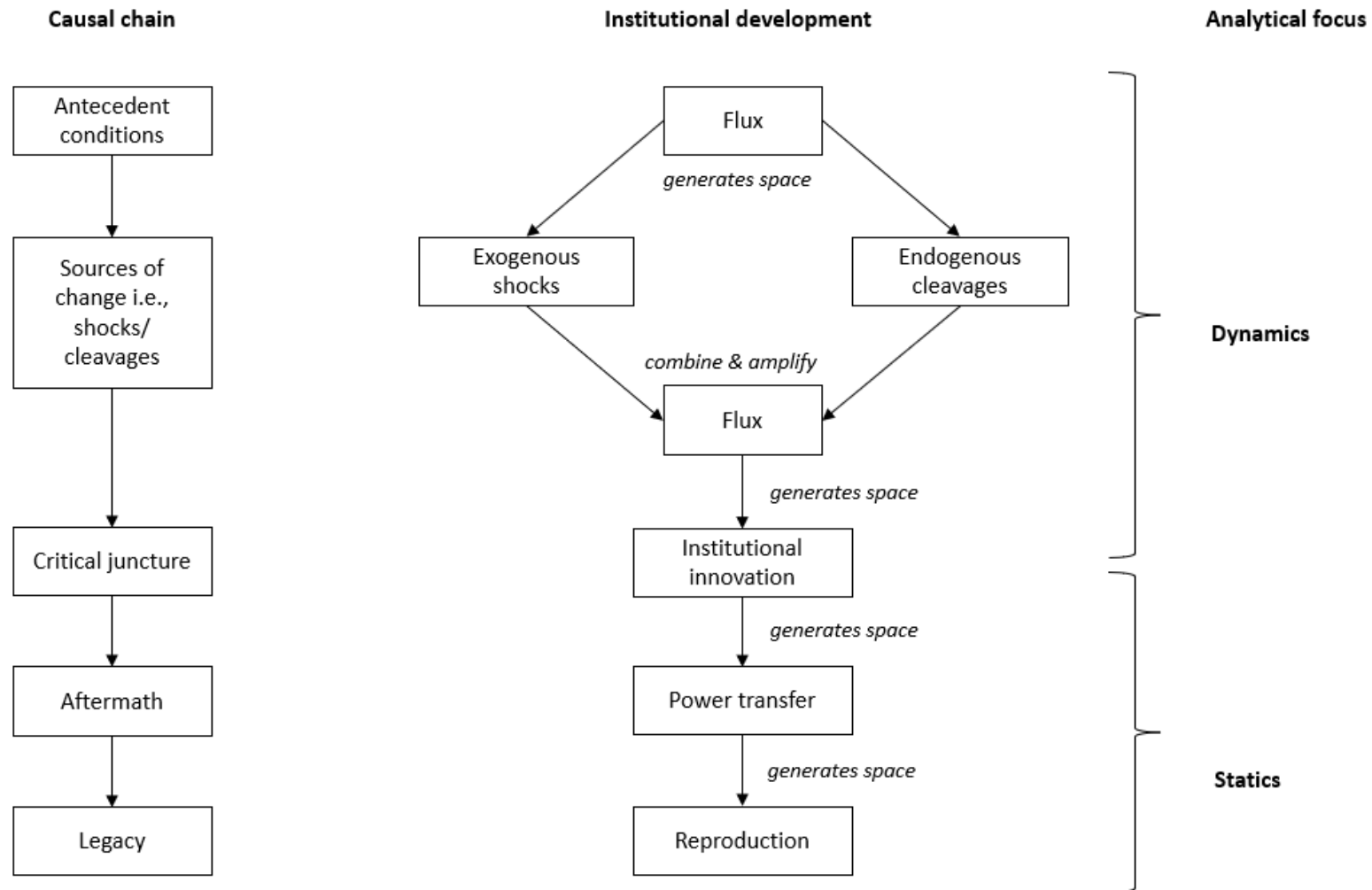
- 1) What is the best conceptual framework for understanding the evolution of the land tenure system in Greater Kuala Lumpur and the consequences for access to urban land for non-market housing?
- 2) What conceptual tools are most useful to generate this understanding?

Chapters 5 and 6 describe the current institutional landscape of the land and housing sector in Malaysia. These chapters specify the critical actors in the sector and the power asymmetries that exist in their operating environment. Chapters 7 to 9 provide a historical analysis of three critical junctures identified as significant markers in the development of the institutional structure of the land and housing sector. This chapter bridges these findings.

Using the historical institutionalist approach, this chapter situates the findings in the preceding chapters within the conceptual framework presented in Chapter 3 (see Figure 19) in order to understand the dynamics of current regulatory constraints and to identify potential pathways for reform. This study uses a critical juncture approach to analyse and specify the causal links between the historical and contemporary components of the study. It explores these findings within the larger context of the land and housing sector in Greater Kuala Lumpur, analysing how institutional structures have facilitated enduring legacies that underpin existing power asymmetries within the non-market sector.

This chapter consist of three sections. Section 10.1 describes the sources of institutional change and section 10.2 explores the causal mechanisms of institutional endurance. Section 10.3 provides a summary and discussion of the findings.

**Figure 19 The conceptual framework (revisited)**



Source: Researcher's model

## **10.1 Critical junctures: the interaction of structure and agency in institutional change**

The preceding three chapters describe three critical junctures that led to significant shifts in the way land is allocated and governed in Malaysia. The first introduced the concept of allodial rights into the existing tenure system, the second juncture installed separate spheres of government within the Federated Malay States, and the third ratified allodial rights to their-rights holder within a newly minted national constitution. These junctures led to distinctive changes within and among different institutional spheres and orders. This section explains the processes and factors that motivated change.

### *10.1.1 Sources of institutional change: exogenous shocks and endogenous processes*

It is vital to begin this subsection by asserting that all three critical junctures occurred during periods when considerable institutional flux allowed critical actors to influence the trajectory of a developing polity. In considering the myriad sources of institutional change, both exogenous shocks and endogenous processes contribute to the resulting period of institutional flux, granting critical actors considerable opportunities to affect outcomes. As highlighted in Section 3.2.1, a distinction must be made between sources of change that are exogenous and endogenous to the unit/period under study – external shocks to the system illustrate how change shapes the prevailing institutional structure while endogenous processes of change highlight how actors generate change through their actions and choices. This sub-section uses the data presented in chapters 7 to 9 to explain how antecedent conditions resulted in the emergence of these critical junctures.

At the first critical juncture, the distinction between these two factors is apparent. As described in section 7.4, allodial rights to land were not prescribed in the existing Malay land tenure system nor did they fundamentally affect how land was allocated in the Malay States prior to British intervention. That is, while the Malay ruling class exerted control over territory in their respective states and the ruler could, theoretically, allocate land to himself or his political supporters/allies for a specific use (e.g. tin mining or an agricultural enterprise), for the general population (i.e. subjects of the ruler) the proprietary right to land was fundamentally anchored in their right to use and not in the ruler's absolute ownership of the land. Thus the introduction of allodial rights into the existing institutional structure of land tenure can accurately be attributed to the

transplantation of English rules of tenure regarding the right of alienation of property in land onto the Malay land tenure system. This critical juncture emerged along two distinct pathways. Along the more obvious pathway, British intervention in the Malay States introduced an external shock to the prevailing sultanate political system through the appointment of Residents as representatives of British influence in the state, altering the states' rule-making dynamics, hence allowing changes to be made to the rules of tenure to reflect British interests. The power and control over rule-making among the Malay ruling class were effectively reduced by this shift. While the intervention of a colonizing power in the affairs of its protectorate presents an obvious exogenous shock to the prevailing system, the lack of force through which this shift occurred in the Malay States suggests that it must be viewed against the context of the States' existing operating environment. Cleavages within the Malay ruling class as well as among competing Chinese clans, as described in section 7.4, resulted in a misalignment of interest amongst critical actors within the Malay States. These developments, along with a longstanding relationship between British officers in the Straits Settlements and the Malay ruling class, illustrate the endogenous processes that were in place which contributed to political instability within the Malay States, thus paving the way for both the occurrence of an exogenous shock as well as the resulting critical juncture.

At the second critical juncture, differences between exogenous and endogenous sources of change are less evident. To distinguish between the two, it is imperative that institutions are seen as separate, independent structures that affect behaviour and rulemaking processes within their separate spheres of influence. As highlighted in Chapter 3, this enables analysis of the distinctive sources of change whether external to or forming part of the system. Transformation of the Malay States into a federation provides a glimpse of how endogenous processes across similar institutional spheres (yet all bound by an external colonial interest) amalgamate to generate a new institutional structure that shifts the process of rulemaking within each sphere. Section 8.2 describes developments across the states of Perak, Selangor, Negri Sembilan, and Pahang that gave rise to a concerted negotiation of power and control between Residents who resided within the state's institutional structure and colonial administrators in both the Straits Settlements and the Colonial Office, which continued to be excluded from the state's institutional structure. Residents, who sat at the apex of state administrations, gained prominence and authority through appointment as advisors to the rulers of the Malay

States. Developments and emergent needs within the states evolved over time to grant these actors wide-ranging powers and independence vis-à-vis the policies enacted and enforced within each state. Residents, in this way, inadvertently solidified their roles and positions within the states' institutional structures at the expense of oversight from their Colonial Office masters. Alongside these developments, several other processes (see section 8.3) within each state compounded the instability that emerged from a misalignment of interests among critical actors in the states' institutional structures. This paved the way for the installation of a new external institutional structure to exert control within all institutional spheres across the various Malay States i.e., the Federation. The external impetus for federation, imposed by the officers in the Straits Government and the Colonial Office, only gained momentum and legitimacy from these internal developments. The resulting institutional structure which emerged, in which different layers of government form part of the process used to make the rules of tenure for land, was consequently the outcome of consolidation of these factors.

Similarly, at the last critical juncture, several sources of change having both exogenous and endogenous origins contributed to its emergence. As described in section 9.2 and 9.3, pre-war and post war developments within the FMS (and what later became Malaya) resulted in constitutional ratification of the rules of tenure for land in the emerging independent nation. Pre-war, the growth and development of plantation agriculture within the FMS meant an increased stake in the state economy for the British colonial government. It became increasingly clear that there was a need to control land and its regulations in order to guarantee its use for plantation agriculture for British stakeholders and investors. The Second World War constituted an external shock to the institutional structure in place in the FMS. Developments during the war dismantled many of the previously instituted arrangements, consequently calls for their renegotiation had to be addressed. Also inherent in this process was the rising demand for independence from what was now a pluralistic, politically conscious society – a significantly different operating environment than what was in place prior to the Second World War. These various sources of change culminated in negotiations for the unification and independence of Malaya and the codification of its national constitution i.e. the last critical juncture.

Evidence from the data in this study (see chapters 7 to 9) indicate that critical junctures can emerge from a combination of multiple sources of change. Ultimately, as discussed in Chapter 3, while exogenous factors have often been attributed as the singular source of institutional change in studies invoking the concept of critical junctures, endogenous processes also play a meaningful role in facilitating the emergence of a major rapid and discontinuous change.

#### *10.1.2 Institutional flux and the agency of critical actors*

Following the analysis in the preceding subsection, both exogenous shocks and endogenous processes have been identified as the source of institutional change for land tenure in Malaysia. At each critical juncture, interactions within and amongst different institutional spheres and orders generated a state of institutional flux that paved the way for change. Contrary to many assertions in the literature, critical junctures not only emerge through a singular source of change (be it exogenous or endogenous), but rather, can arise from a culmination of both (see Chapter 3). The role of structure and agency in manifesting institutional change is thus one of symbiotic interaction rather than causal relationship. This is evidenced by the way critical junctures emerged as we have seen.

At all three critical junctures, multiple sources of change (exogenous shocks and endogenous processes) materialized and affected outcomes only when productive opportunity and permissive conditions came together to generate the desired outcome. That is, without both sources of change, the likelihood of either structural shifts or actors' choices alone may not have been sufficient to significantly affect outcomes, i.e. to lead to a critical juncture. For instance, without the support and advocacy of the Malay ruling class, British intervention, therefore the transplantation of foreign rules of tenure onto the existing Malay land tenure system, would have met with much resistance (as in the case in Malacca during its occupation by the Portuguese<sup>32</sup>). Similarly, both the internal developments within the four Malay States and the increasing lack of control and power of oversight felt by the Colonial Office and the colonial government in the Straits Settlements came to a head, generating the urgency for federation. This finding is significant as many studies focus upon explaining institutional change using a singular source of change, whether exogenous or endogenous to the system. Studies invoking the

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<sup>32</sup> Refer to W. E. Maxwell (1884) for more details

concept of critical juncture often rely upon the conceptualization of its emergence using exogenous shocks alone (see Chapter 3). Nevertheless, as illustrated in the preceding subsection, analysis of institutional change and the emergence of critical junctures cannot discount the role of endogenous processes that take place as well as the critical actors that navigate their actions and choices, who do so throughout the period and not just when “structures break down entirely” (Thelen & Conran, 2016). Inherently, critical junctures describe a point in the development of institutions at which the prevailing structures crumble and are replaced or rebuilt – they, in essence, highlight the intersection between processes of path-destruction and path-generation /switching in the institution’s development. By acknowledging the role of actors in this process, and without discounting the structural constraints/order that limit their capacity to act, this finding highlights the interdependent link that defines the relationship between structure and agency in the context of a changing polity.

This is evident through analysis of data presented in this study. The emergence of all three critical junctures were contingent both on the capacity of actors to capitalize on and benefit from the external shifts that jolted their prevailing social systems, and the propensity of the external shock to generate a tangible impact on the agency of critical actors. For example, as highlighted in section 8.4, the FMS materialized after many years of strategic manoeuvring both by actors within the four Malay States and by those agents external to the state. While proposals for federation had been put forward for many years, the success of the federation agenda (i.e. the external shift), and institutional changes in the rules of tenure for land that became possible through it, only manifested when a multitude of internal shifts led various actors to re-align their interests and objectives with those that act in their favour, henceforth amplifying the impact of eventual federation. Similarly, as described in section 7.5, British intervention in the Malay States was made possible given the cleavages that existed amongst the Malay ruling class and the Chinese clans and, conversely, agents who benefitted from the intervention (i.e. the ruler of the state who received protection) facilitated the colonial government’s ability to install allodial rights to land into the prevailing tenure system – that is, both external and internal drivers of change heightened the magnitude of each shift through their interdependent links with each other. In both cases, the processes of path-destruction and, consequently, path-generation, were characterized by instances in which critical



actors willingly made choices to their benefit against and/or within prevailing structural constraints.

Ultimately, as the evidence shows, it is imperative that analyses of sources of institutional change using the critical juncture framework address and incorporate the multifaceted dimension of antecedent conditions that exist prior to its emergence. Attributing the source of institutional change to either external or internal sources independently ignores the reality that change does not occur in an institutional vacuum where change catalysts can be individually delineated according to their sources. Rather, meaningful shifts in the institutional structure often occur when both internal cleavages and external forces of change combine, magnify, and enhance the impact of their catalytic effect. That is, major, rapid, and discontinuous change with lasting legacies occurs when shifts in the institutional structure complement or advance the agency of critical actors.

## **10.2 Identifying the mechanisms for institutional endurance**

Section 10.1 explains how a critical juncture emerged, focusing upon the factors that promoted the institutional change. This section will look at the impact of a critical juncture, i.e. its historical legacy, by illustrating the causal cycle that entrenches institutional endurance, primarily through identification of the relevant causal mechanisms. It does so by bridging findings from the contemporary and historical components of the research using the critical juncture framework as well as conceptual tools from the historical institutional approach.

### *10.2.1 Institutional order and the entrenchment of power*

As highlighted in the conceptual framework in Chapter 3, it is critical to specify both the critical juncture and its legacy in order to analyse its causal link. In this study, three critical junctures are identified and have been described in detail in chapters 7 to 9. Their corresponding historical legacies (i.e. the enduring features of these shifts in institutional structure) have embedded distinctive features into the current system of land tenure in Malaysia which were explored in Chapter 6. The causal chain that binds the distal cause with its enduring impact is explored in this sub-section. A summary of the vital elements of this relationship for all three critical junctures is summarized in Table 9.

**Table 9 Summary of critical junctures and their legacies based on findings in chapters 6 to 9**

	<b>The prevailing institutional structure prior to critical juncture</b>	<b>The critical juncture, i.e. the rapid, discontinuous, macro-level change</b>	<b>The enduring legacy within the current institutional structure</b>
Critical Juncture 1	Land is utilized by the population through its right of use, not the right of disposal	The introduction of allodial rights to land for all state land through British intervention. Control and power over land alienation is implicitly allocated to the Ruler of the State	Allodial rights to land for all state land is held by the Ruler of the State, and by extension, the state government.
Critical Juncture 2	Land is governed by individual state governments. There is no legal basis for uniformity of tenure rules across different states	Land is governed at two levels of government through the federation of the Malay States. Uniformity in land tenure and regulation was a primary goal of the federation scheme	Land is governed by individual state governments, with non-binding oversight from the federal government through the National Land Council
Critical Juncture 3	Rules of tenure for land are governed through legislation or enactment, revised according to the interests of critical actors	Several fundamental rules of tenure for land are ratified into the National Constitution of Malaysia in the bid for the nation's independence	The Federal Constitution of Malaysia is used to uphold the rules of tenure for land. It is the overarching legal instrument that governs how land legislation can be interpreted/ revised

At all three critical junctures, a distinctive break was generated from the prevailing institutional structure through both external shocks and internal shifts (see the previous section), resulting in new institutional structures that have endured to the present day. These distinctive features are explored in detail in Chapter 6. While the factors leading to path-destruction are explained by the identified exogenous and endogenous sources of change, the elements that contribute to new path-generation and the stabilizing mechanisms that ensure its endurance have been more difficult to specify and will rely upon a more theoretical approach to institutional analysis. These conceptual tools are described in more detail in Chapter 3 and are incorporated in the conceptual framework presented in section 3.3.

At the first critical juncture, the introduction of allodial rights to land into the Malay tenure system generated a distinctive macro-level change by altering the fundamental nature of land ownership in the Malay States. Prior to the critical juncture, 'state' land, in practical terms, did not exist. No agent within the institutional structure of the state held the power and right to control the alienation of land as no one person held the right of disposal to land. Introduction of this right not only added to the prevailing basket of institutional arrangements governing the tenure of land at the time, but also simultaneously disrupted both the constitutional order and the normative behavioural code relating to land for the people for the Malay States. This innovation effectively changed the main underlying assumption that defined the Malay population's relationship to land – that land can now be owned rather than merely used. The repercussion of this ideological shift transcends its basic overarching aim of enabling the British colonial government to control and allocate land in the Malay States to benefit their interests. In addition to the right of alienation to land, the right of disposal (through state ownership of land) grants the rights-holder the power to confer rights over the specified land, i.e. the power to alter the rule for making rules. As emphasized in Section 6.1, this innovated power henceforth resided in the ruler of the state. Furthermore, by changing the nature of how land is acquired (i.e. by ownership rather than use) within Malay society, the fundamental normative behavioural code that prescribes this prior relationship is destroyed within the social structure. Land, previously a medium for resource generation (e.g. for dwelling, agriculture, mining) was now the resource itself, transforming the value of land from tangible resources gained from the land to its perceived development value to other potential users. Land is now a commodity and as

described in section 7.5, all regulations concerning land proceeding from this institutional innovation continued to anchor and amplify these features, both in the transformed nature of land ownership and in the Sultan's allodial rights to land.

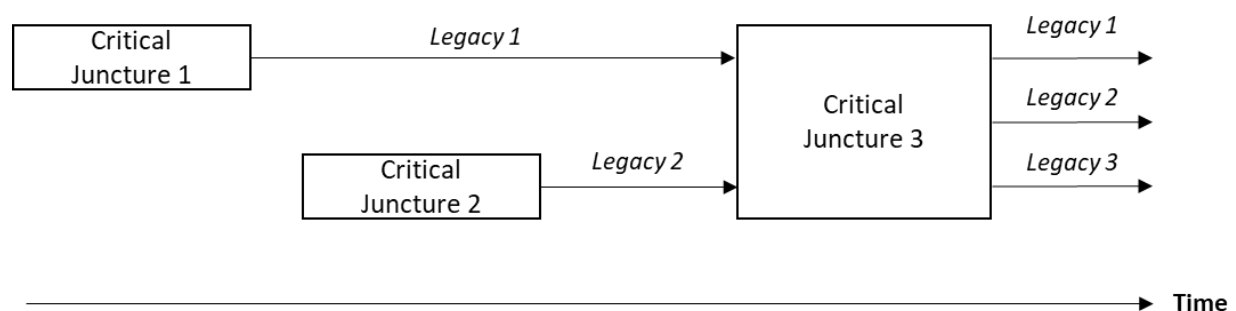
Similarly, at the second critical juncture, the introduction of a second layer of regulatory oversight over land and its rules of tenure generated another institutional arrangement for land in the overall institutional structure. Through the process of federation, this additional layer of governance effectively disrupted the rule-making process for land in individual Malay States. This innovation again led to a distinctive shift in the constitutional order for land tenure, granting the power to alter the rule for making rules to a different agent/institutional sphere. As described in section 8.4, the capacity to create and revise the rules of tenure relating to land is now shared by actors in both the federal and state governments, overhauling the prevailing independence and discretionary powers of state government actors in the previous institutional structure. This shift in power and control from the resulting critical juncture is still evident within the current institutional structure in Malaysia, as described in Section 6.1. The balance of power between the federal and state governments is also a defining feature in the land negotiations for non-market housing development as highlighted in Section 6.2. The splintering of the institutional structure generated two parallel but separate institutional spheres with different actors, objectives, and capacity, i.e. the state sphere with its government, constitution, and regulations and the federal sphere with its government, constitution, and regulations. As illustrated by the findings in section 6.2, land and housing outcomes in the resulting institutional structure are heavily dependent upon the alignment of interests between these spheres as well as their inherent power differentials.

Finally, at the third critical juncture the path from ratification of several rules of tenure to inscription in the national constitution of Malaya solidified and entrenched these features in the institutional structure of the nation. Prior to their ratification, regulations over land and its rules of tenure in the FMS were primarily exercised and revised through federal or state enactments. This institutional structure provided ample space for critical actors to negotiate and alter the rules to ensure that they were aligned with their interests and policy objectives. This is illustrated by the many instances in which land regulations were altered to facilitate the evolving development objectives in the Malay States, as

described in sections 7.5, 8.4, 9.2, and 9.4. In sections 9.3 and 9.4, developments within the FMS made evident that while innovations to the institutional structure during the first and second critical junctures were firmly embedded as the distinguishing features framing the land tenure system in place at the time, the opportunity for path-switching became a possibility with the Malayan Union proposal. Realization of the Malayan Union proposal would have resulted in a major overhaul of the existing institutional structure, through the circumvention of both the state's allodial rights to land and the dual layer institutional sphere for land governance. The failure of this switch to materialize and the resulting federation proposal that paved the way for the unification of Malaya meant that the legacies of the previous two critical junctures remained. The last critical juncture, in this way, is a macro-level step up from the existing institutional structure through the introduction of the national constitution for Malaya. This innovation solidified the prevailing constitutional order through a formal process of codification, granting it both legality and legitimacy as an instrument to grant power and control to those that benefit from its institutional structure.

Evidence from the data illustrates the link between the specified critical juncture and its corresponding present-day legacy. Changes to the institutional structure, across different institutional orders, provided the catalyst for new path-generation and its historical legacy to endure in the evolution of the institution. These paths are summarized and illustrated in Figure 20. Most importantly, changes to the institutional structure at each critical juncture paved the way for the re-allocation and entrenchment of power and control over the rule-making process among institutional spheres and critical actors. This causal chain is explored further in the next sub-section.

**Figure 20 Critical junctures and the path for institutional development**



Source: Researcher's model

### *10.2.2 Path-dependence and the endurance of choice*

Following the analysis presented in the previous sub-section, the role of power in determining the development of an institutional structure and the entrenchment of its historical legacy needs to be further specified if we are to reveal the causal chain that links a critical juncture to its legacy. While critical junctures provide a space for lasting institutional transformation, the period of institutional flux that precedes both path-destruction and path-generation also provides a space where the re-allocation and entrenchment of power occurs. In this way, institutions that are altered or innovated during this period of transformation also act as a medium to transfer or grant power among critical actors, consonant with the definition of institutions as presented in Chapter 3. This interaction, as argued in section 11.1, results in a major, rapid, and discontinuous change with lasting legacies that persist when shifts in the institutional structure complement or advance the agency of critical actors. It is useful then to look at how power and control over land were transformed at each critical juncture and how these transformations led to the power structure that is entrenched in the land and housing sector in Malaysia today.

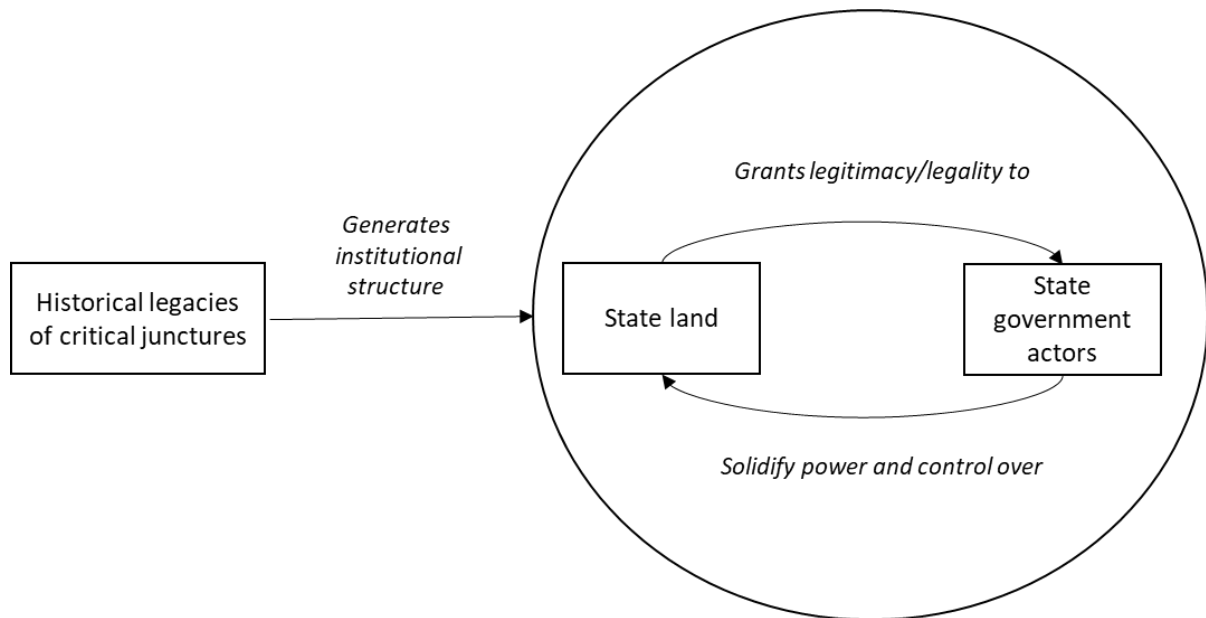
As argued in the previous sub-section, the historical legacies of the critical junctures identified generated distinctive rules for land tenure that remain embedded in the current institutional structure for the land and housing sector. All three legacies, i.e. the prescription of allodial rights to the state, the split in governance over land and housing over two layers of government, and use of the constitution as an institutional instrument to govern land, continue to provide the basic constraints that guide how critical actors interact in the sector. All actors, as illustrated in Chapter 6, continue to rely upon these basic tenets to strengthen their negotiating positions in pursuing their intended outcomes, whether through constitutional or operational pathways. These legacies, which have been shown to be non-negotiable within the current institutional structure, continue to assign control, allocate rights, and prescribe power for the critical actors within the state and federal governments in their pursuit of housing outcomes, as highlighted in section 6.2. That is, these legacies generate power differentials between actors that improve and/or impede their capacity to negotiate for and transfer rights to land for non-market housing developments. Differences in power between actors structure their actions and strategies, who can select and utilize whichever institution

and institutional rule-making environment best fit their intended outcome. State government actors, as described in detail in section 6.2, often invoke their irrefutable right to alienate land to control and negotiate outcomes for non-market housing, through both the constitutional and operational pathways. This advantage, which was found to create friction between actors when the interests of the state and the federal government do not align, often enables actors to compel the actions of others to advance their policy objectives. Section 6.2.2 further describes how these behaviours reflect the accepted set of expectations in place to reduce conflict and determine outcomes, particularly when extra-legal means are used to influence negotiations. The introduction of these institutional structures was described through the institutional innovations that occurred at the three critical junctures. Entrenchment and solidification of their influence can be observed both at the point of their introduction and in the way these institutional instruments are currently invoked.

At each critical juncture, an institutional innovation was introduced to promote an intended advance in the Malaysian land tenure system. Inherent in this process, the institutional innovation acted as a medium to allocate and transfer power between critical actors in a causal cycle that enables those who benefit from this innovation to solidify their positions. For example, prescription of the right of disposal (held by the state) during the first critical juncture, which was described in detail in section 7.2, transferred power and control over the alienation and use of land in the individual Malay States from the general population to the designated ruler. The institutional innovation, in the form of introducing allodial rights, transformed the relationship between land and people in the Malay States, from that of all persons in the population were entitled to proprietary rights over all land, to that in which the ruler (represented in practice by the Resident) exerted control and held the right to allocate (i.e. through alienation) land as he saw fit. All land became state land possessed and owned by the designated ruler and, ultimately, entrenching the ruler's power through land-ownership within this new institutional structure. Similarly, the introduction of a new layer of government provided the institutional innovation that allowed for the separation of government into two institutional spheres, each with its own rules and structures. Henceforth, actors within each institutional sphere were allocated their own powers and rights. Finally, ratification of the national constitution generated an institutional innovation that provides a medium (i.e. an institutional instrument) in which these innovations can be embedded and

solidified within the institutional structure of the new nation. This causal cycle is illustrated in Figure 21.

**Figure 21 Reproduction of institutional structure**



Source: Researcher's model

### 10.3 Summary

This chapter presents the conceptual analysis and findings generated from this research. It uses the conceptual tools and framework presented in Chapter 3 to situate the findings presented in preceding chapters and in doing so bridges the historical and contemporary components of the research.

This study reveals that for the case of Greater Kuala Lumpur, both exogenous and endogenous factors of change were required to generate a critical juncture. At all three critical junctures identified in the study, multiple sources of change (exogenous shocks and endogenous processes) combined to produce a catalytic shift in the existing institutional structure governing land. The study further shows that the emergence of all three critical junctures were contingent both upon the capacity of actors to capitalize on and benefit from the external shifts that jolted their prevailing social systems as well as the propensity of the external shock to successfully generate a tangible impact on the agency of critical actors. In addition, this study specifies the causal mechanism that has generated an institutional structure that is path-dependent and enduring, i.e. the historical legacy of the critical junctures. It theorizes that redistribution of power during



the critical junctures led to the emergence of power differentials among actors that have been continuously replicated.

## **Chapter 11 Summary and Discussion**

This thesis begins by looking at the housing affordability challenges facing Greater Kuala Lumpur as a rapidly urbanizing post-colonial city. It describes various policy interventions that have been undertaken to close the affordability gap, which continues to widen. It essentially argues that existing approaches to policy-making within the land and housing sector in Malaysia have been couched in an understanding of the sector's constraints and challenges that does not fully reflect their complexity. More importantly, it postulates that existing studies of housing affordability generally neglect to consider other elements that shape the relationship between land, housing, and society in the country, beyond market efficiency considerations. This is the gap in knowledge that this research strives to fill.

This thesis takes a different approach. In examining the non-market housing sector in Greater Kuala Lumpur, this work demonstrates that the housing delivery process for non-market housing in the city is subject to power asymmetries that both guide and limit how critical actors in the sector negotiate for land in order to achieve their housing development objectives. This critical examination shows that the rather sterile conceptualization of the housing sector conventionally used to guide policy-making in the sector is deeply flawed and would benefit from insights generated through a conceptual framework that reflects the complex and layered nature of the sector. This thesis employs conceptual tools and approaches from the historical institutionalist tradition to frame and illustrate that the relationship between land, housing, and society in Greater Kuala Lumpur is embedded in historically path-dependent processes instigated at three critical junctures in Malaysia's colonial history.

Ultimately, this thesis does not claim to provide the sole explanation of the dynamics of the land and housing system in Malaysia. Rather, it seeks to enrich the discourse on the subject and widen the perspective on policy-making in the sector. This chapter concludes the thesis. Section 11.1 provides a summary of the study's main findings and discusses its initial hypotheses. Section 11.2 reflects on the study's findings and their policy implications. Section 11.3 discusses the contribution to knowledge and outlines opportunities for future research.

## 11.1 Summary

### 11.1.1 Summary of findings

This thesis has uses conceptual tools and analytical approaches from historical institutionalism to examine and reconceptualize institutional constraints in the development of non-market housing in Greater KL. The key findings of the study are summarized in this sub section.

- 1) The bundle of rights associated with land available for development can be held by multiple claimants, complicating the land procurement process.

This study finds that the corresponding rights to land can be held and controlled by different actors depending upon how these rights are allocated, which may differ depending upon whether these claims are assessed through the legislative framework or in practice. More specifically, differences between claimants over the right of disposal, use, and dealings may lead to friction during the land procurement process when the interests of these claimants are not aligned. Table 6 in Section 6.1.2 provides a summary of how these rights are held according to the different land types in Malaysia.

- 2) Power asymmetries frame interactions between actors within the non-market housing sector in Greater KL

This study finds that power differentials exist among critical actors in the non-market housing sector and remains an important factor in determining housing outcomes. The research specifies two development pathways along which negotiations for the procurement of land have transpired, the constitutional and the operational (see Chapter 6). These pathways were identified based on varying levels of power entrenchment that guide the actions of critical actors and influence their bargaining positions, that is, power can be extracted from a tangible or intangible source. This conceptualization is described in detail in Chapter 5 and elaborated through the findings presented in Chapter 6. Furthermore, this study finds that critical actors gain their leverage from three key features of the institutional structure that governs land in order to support their action and strengthen their negotiating positions: (1) the allocation of allodial rights to land to the state government; (2) the nuanced relationship between federal and state government, and (3) use of the Federal Constitution as a legitimizing instrument.

3) Institutional flux at critical junctures has led endogenous and exogenous factors of change to prompt a leap-like change in the prevailing institutional structure

This study identifies three critical junctures that have altered the way land is governed in Malaysia in significant ways. The first introduced the concept of allodial rights into the existing Malay tenure system, the second installed separate spheres of government within the Federated Malay States, and the third ratified allodial rights to the rights-holder within a newly minted national constitution. The study finds that critical junctures emerge from a combination of multiple sources of change with both exogenous and endogenous factors contributing to its emergence. Furthermore, as described in Chapter 10, the findings suggest that exogenous shocks and endogenous processes exact a complementary effect on the process of change, each supporting the other to generate the resulting institutional innovation. Via the descriptive analysis in chapters 7, 8, and 9, this study illustrated that the emergence of all three identified critical junctures were contingent on both the capacity of actors to capitalize on and benefit from the external shifts that jolted their prevailing social systems, as well as the propensity of the external shock to successfully generate a tangible impact on the agency of the critical actors.

4) Historical legacies are generated when disruptions in different institutional orders result in a reallocation and entrenchment of power and control over land

This study shows that disruptions to the institutional structure can occur across different institutional orders, as described in Chapter 10. At each critical juncture, shifts to the constitutional order, institutional arrangement, and/or normative behavioural code generated a space for path-destruction and generation. These paths are illustrated in Figure 20 (Chapter 10). These transformations have been shown to catalyse institutional innovations that promoted an intended advance in the Malaysian land tenure system. Inherent to this process, the findings suggest that the institutional innovations acted as a medium to allocate and transfer power between critical actors in a causal cycle that enables those who benefit from such innovation to solidify their positions. This causal cycle is illustrated in Figure 21 (Chapter 10).

In sum, these empirical and conceptual findings answer the research questions posed at the beginning of the thesis. The research hypotheses are considered in the next subsection.

### *11.1.2 Hypotheses revisited*

The research findings support but also add complexity to the two initial hypotheses:

- iii. Land tenure in Greater KL is limited by institutional entrenchments that emerge from path-dependent processes.

The first hypothesis posits that institutional constraints within the land and housing sector stem from features within the institutional structure that cannot be explained merely by its contemporary characteristics. That is, the institutional constraints inherently reflect the historical legacies entrenched within the institutional structure. This study, therefore, expected critical actors to report and consider regulatory constraints that not only reflect efficiency considerations but are also deeply tied to their own expectations of behaviour and outcomes. This study also expected actors to acknowledge that the regulatory constraints identified may be rooted in the legacy of the institutional structure.

This thesis finds that key features of the institutional structure which guide and constrain the behaviour of actors are rooted in their historical legacies. These are summarized in Table 9 (Chapter 10). This thesis demonstrates that actors derive legitimacy for their actions mainly from a range of institutional instruments that were instituted at three critical junctures in Malaysia's colonial history (see Chapter 6). The first introduced the concept of allodial rights into the existing Malay tenure system (Chapter 7), the second installed separate spheres of government within the Federated Malay States (Chapter 8), and the third ratified allodial rights to its rights holder within a newly minted national constitution (chapter 9).

- iv. Current tenure arrangements were negotiated between actors marked by power asymmetries, which continue to affect how dealings are undertaken

Following the historical institutional approach, an institution's potential to become a "distributional instrument laden with power implications" (Mahoney & Thelen, 2009) suggests that power asymmetries present during the initial conception of an institutional arrangement may continue to affect how actors interact with and negotiate outcomes within these institutions. The research envisaged that current institutional structures reflect expectations of behaviour that are shaped by power differentials between actors.

This thesis shows that power asymmetries exist among critical actors within the non-market housing sector and remains an important factor in determining housing outcomes (see Chapter 6). It also demonstrates that these power differentials are rooted in Malaysia's colonial history. At each critical juncture, changes in the institutional structure paved the way for the re-allocation and entrenchment of power and control over the rule-making process among institutional spheres and critical actors. In this way, institutions that are subject to alteration or innovation during this period of transformation also act as a medium to transfer or grant power to critical actors (see Chapter 10).

## **11.2 Discussion**

### *11.2.1 Reflection on findings*

This thesis presents both empirical and conceptual findings that answer the study's main research questions. More importantly, by focusing upon the land tenure system and its genesis/evolution, the findings promote a fresh understanding of the dynamics of non-market housing development in Malaysia by bridging insights into the contemporary constraints of the sector with the country's colonial history. In doing so, it re-conceptualizes the constraints faced by the sector to reflect the complex and layered relationship between land, housing, and society in Malaysia. Ultimately, the findings broaden the basis of discourse for land and housing in Greater Kuala Lumpur and other post-colonial cities in several ways.

First, by illustrating the role of power asymmetries in the land procurement process and in determining non-market housing outcomes, this research demonstrates that the way rights to land (and housing) are allocated in Malaysia can no longer be conceptualized as neutral and apolitical. It must be acknowledged that land markets, in effect, facilitate trade in the bundle of rights to act upon land rather than in the physical plot of land itself (Alchian & Demsetz, 1973; Musole, 2009; Oxley, 2004), and that the institutions governing land and housing are obviously not neutral but are steeped in power and class relations (Ryan-Collins, 2017). Consequently, discourse on improving housing affordability must move away from merely considerations of efficiency (see Ismail et al., 2015, 2019; Olanrewaju et al., 2018; and Yap & Ng, 2018). Rather, the characterization of the sector and the basis for policy interventions should reflect the inherently political way in which the rights to land are traded, transferred, and allocated.

Second, through identification of critical junctures and the specification of their legacies, this research shows that, as an institution, land tenure in Malaysia: “cannot be explained solely by its contemporary effects” (Thelen & Conran, 2016). As argued in Chapter 3, this finding forces us to see institutions as social structures beyond their coordinating function as: “political legacies of concrete historical struggles” (Mahoney & Thelen, 2010). This conceptualization fundamentally contradicts a more limited view of institutions as equilibria (see Chapter 3). Hence this study stands alongside similar scholarship that argues against pursuing policy reforms based on instituting the ‘best’ (or second best) institutions (Ho, 2014, 2016). Ultimately, this finding indicates the need to consider the contextual dynamism of the site of intervention. Otherwise, interventions in land and housing developments may lead to the creation of “empty or non-credible institutions” that prioritize form over function (ibid). For post-colonial cities, in particular, discourse on reforms with respect to housing and land tenure must examine the relationship between land, housing, and society within the context of their colonial histories.

Finally, use of the critical juncture framework and the historical institutional approach in this research can assist scholars to understand why current constraints in the land and housing sector are sticky and static despite many interventions to alleviate the problems facing the sector. The delineation of analysis into their respective static and dynamic components (see Figure 4) provides the analytical framework to distinguish periods of path-destruction and path-creation for institutions. This enables examination of the land and housing sector beyond a snapshot of their contemporary characteristics. In addition, assimilating conceptual tools from the historical institutional approach such as path dependence, sequencing, and power differentials into the analytical framework provides a conceptual frame to explain the phenomenon beyond its current efficiency considerations. As in this research, situating the challenges of non-market housing delivery within the context of Malaysia’s colonial legacies enables future research to generate an explanation that not only reflects the complex and layered nature of the sector but also the reasons for its underlying institutional endurance.

### *11.2.2 Policy implications*

Based on the findings on this study, two policy prescriptions are proposed in this subsection. These proposals reflect the complex dynamics that underlie the interactions between critical actors in the sector that have been excluded in existing policy interventions.

#### Land access as the foundation of non-market housing schemes

This study finds that securing access to suitable and strategic land for the development of non-market housing remains a critical challenge for housing providers. Central to this constraint is a mistargeted policy focus upon housing delivery and efficiency improvements without considering what is fundamentally needed for housing development to be viable and to succeed, i.e. access to land.

Existing housing affordability schemes stake their viability on the capacity of critical actors within the development to successfully negotiate for land at minimal or subsidized cost to the housing provider. This strategy relegates the viability of such schemes to the fickle nature of such processes and their political legacies. In particular, findings from this study indicate that these processes can be disrupted by political actors who use extra legal means to achieve their personal objectives. This thesis has argued that these actions are facilitated by the existing institutional structures that are in place which ultimately limits the ability of actors to effectively negotiate housing outcomes that are optimal for the non-marketing housing sector.

It is, therefore, critical to posit secure access to suitable and strategic land for housing development as the main tenet for these schemes and as the first step in the programme design. This means prioritizing the development of initiatives that aim to secure land for non-market development such as community land trusts and affordable housing land banks. These initiatives must incorporate steps that allow the process to acquire land to circumvent existing institutional structures within the sector (for example, by appropriating land parcels which lie outside of the spheres of influence of existing critical actors, e.g. waqf land) and/or steps which increases the transparency of the negotiation process to minimize the potential for political interference (for example, by requiring these initiatives to undergo a public audit process).



## Accounting for power asymmetries in government initiatives for housing

This study finds that power asymmetry characterizes interactions among the constellation of actors involved in the land procurement process for the development of non-market housing. More importantly, it demonstrates that the expectations of behaviour for navigating these interactions are usually not made explicit during the negotiation process and rely upon the actors' tacit knowledge. Hence it is important to both acknowledge the hierarchal nature that characterizes the institutional instruments which makes these interactions legitimate. By doing so, policy interventions for housing can incorporate strategies to mitigate and minimize the power differentials entrenched in the institutional structure. These strategies can include the requirements of an expert arbiter on land matters or a mandatory training programme on land legislation for housing for practitioners.

### **11.3 Contribution to knowledge**

#### *11.3.1 Contributions*

This study contributes to knowledge with its empirical and conceptual findings as well as its methodology. The empirical and conceptual findings of this study contribute to a deeper understanding of the role of institutional structures in determining land and housing outcomes in Greater KL. Its methodology introduces a novel approach to analysing both historical and contemporary land and housing data.

#### Empirical findings

The empirical findings contribute to knowledge in two ways.

First, based on interview data and analysis, a new and insightful typology of land has been generated. Existing Malaysian land typologies (see Chapter 6) are presumably useful in the administration of land across all relevant government ministries or agencies. However, they do not ultimately indicate who holds the right of use across the different categories of land, making it unclear from who and how actors in the land and housing sector procure rights to land for housing development. The new typology (see Table 6, Chapter 6) provides a summary of how land rights are held according to different land types and therefore identifies the critical actors involved in supplying land for housing development.

Second, this study compiles a history of land tenure and illuminates the connection to constraints in current housing development. The historical narrative in chapter 7, 8, and 9 constitute a descriptive account of the evolution of institutional structures affecting land tenure and use this narrative to explain contemporary challenges in housing development. While many studies provide a comprehensive account of land tenure evolution in Malaysia and the challenges of contemporary housing development separately, this thesis bridges the two empirical findings to provide broader insights into how challenges within the land and housing sector can be better understood.

### Conceptual findings

This study introduces the use of a critical juncture framework as well as the historical institutional approach to generate new insights into how land and housing constraints in Malaysia are conceptualized. This novel approach enables this research to situate the current challenges of non-market housing delivery amid their roots in the country's colonial history. More importantly, this approach provides new ways to conceptualize the land and housing sector in Malaysia that move beyond standard arguments on market efficiency. Findings from this research enabled this researcher to re-conceptualize the housing provision system in Malaysia. The resulting analysis (see section 5.3) considers how rights to land and property are allocated, distributed, and negotiated within the housing system and see power as the driving force in shaping housing outcomes in non-market housing developments.

### Methodology

Housing research has generally focused upon explaining contemporary dynamics that characterize the market by using large, quantitative datasets and/or contemporary qualitative methods. This approach ignores the nuances and contextual dynamism that often encapsulate the subject under study and the overarching research objectives. This study introduces a novel approach to amalgamating contemporary and historical data within housing studies. The two-part data strategy utilized combines and assimilates the tools of historical and archival research with contemporary, qualitative methods to study the land and housing sector. The approach taken in this research provides an innovative methodology to bridge the analysis of contemporary land and housing data and their historical underpinnings. Housing research can benefit from adopting these techniques

to generate a richer and fuller understanding of the context in which housing development operates.

### *11.3.2 Opportunities for further research*

This thesis sees a need to explore the important topics that follow from this study. As detailed in section 4.4.2, the study was limited by time, funding, and structural constraints in place during the Covid-19 pandemic. Further research could refine the conceptual model, improve the methodological tools employed as well as enrich empirical findings that were limited by the scope of the thesis.

First, this study focused upon one geographical area within the Malaysian context. As such, its findings do not account for the historical developments and colonial legacies of the other states in Peninsular Malaysia as well as Malaysian Borneo. Further research might test the viability of the conceptual framework and the methodological innovation employed by examining a different city or geographical region in the country. This will enable a more holistic discourse on land tenure and housing affordability in Malaysia. In addition, future work could also employ the conceptual and methodological approaches used in this study to examine other post-colonial cities.

Second, this study was limited by several constraints in its data collection strategy. Future research could build on the empirical findings presented in this study by expanding the data collection strategy to include data from archives located in other cities/states in Malaysia, Singapore, and the United Kingdom. This would generate a richer data set for examining the historical legacies embedded within the country's housing system.

Finally, the scope of this research limits its design to the examination of land tenure as an institution. As such, it does not take into account other variables that may shape access to land and housing. Future work could employ the conceptual and methodological approaches of this thesis to examine the role of power and historical legacies on the development of housing finance, the planning system, and the construction industry. Housing studies in Malaysia will benefit from a broader approach so as to increase understanding of the multidimensional nature of both land and housing.

## **Appendix A Selected bibliography**

This list details the selected documents consulted for analysis in the historical component of the study. Only materials that are relevant to the research are included.

### **(1) Primary sources**

#### ***Official records/reports***

CO 469 *Selangor Government Gazette*, 1890-1895.

CO 574 *FMS Government Gazette*, 1911-1933.

CO 574 *Supplement to the FMS Government Gazettes*, various years.

CO 439 *State annual reports (Selangor)*, various years.

CO 576 *Report on Land Enactment*, Kuala Lumpur, 1913.

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*Land Department monthly reports*, various years

*Report of the Federation of Malaya Constitutional Commission 1957*, Kuala Lumpur

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*Draft Land Enactment, 192*, Kuala Lumpur, 1924

*Review of the FMS Land Code, Cap 138*, Kuala Lumpur, 1936

#### ***Proceedings***

*Proceedings of the Federal Council of the FMS*, 1911-1933.

*Meeting minutes of the National Land Council*, various years.

*National Land Council Papers*, various years.

*Meeting minutes of the Conference of Commissioners of Land and Mines*, various years.

*Conference of Commissioners of Land and Mines papers and reports*, various years.

#### ***Unpublished papers***

Private papers from the RCS collection, Cambridge University Library

T. P. Coe, *Malayan Civil Service 1912-1942*

H.P. Bryson, *Twenty-nine and a half years in the Malayan Civil Service 1912-1950*

The Maxwell Papers, a collection of private papers of Sir George Maxwell

#### ***Official correspondence***

CO 717 Malay States original correspondence, various years

(2) Secondary sources

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## **Appendix B List of guiding questions for semi-structured interview with elite participants**

### Key questions

1. Why is it difficult to provide/build affordable housing in Kuala Lumpur?
2. How did these constraints emerge and why?
3. How do current policies governing land and housing affect these constraints?
4. How does history affect how we govern land and housing today?
5. What needs to change to make it easier to build affordable housing?

### Detailed guiding questions

#### *Warm up questions*

1. Can you tell me about yourself? How long have you been working in the land and housing sector and in what roles?
2. What does your current department/firm do (with respect to the housing sector)? Can you tell me about some of the work that you currently do?

#### *Questions about land and housing*

1. Do you think it is difficult to provide access to/build housing that is affordable in Kuala Lumpur? If it is difficult, how is it difficult for you? Based on your experience, can you describe an example? What about public housing? (*For government agencies*)
2. Why do you think it is difficult/not difficult? What are some of the challenges/constraints that exist?
3. Why do you think these constraints exist? How do you think they came to be?
4. (*if land/land use is not mentioned*) Is access to/availability of land for residential housing a major barrier for housing affordability? How so/why not?
5. How do you think current policies (formal/informal) on land/housing affect these constraints? Can you think of any policies that make it better/worse? How does it alleviate/exacerbate the problem?
6. (*if Bumiputra specific policies/Malay reservation land is not mentioned*) Do you think Bumiputra specific policies affect the housing/land market? How so/why not?



7. How has your department/firm addressed these challenges (*to specify if too many is mentioned*)? Can you give me an example of some of the steps that your department/firm have taken? Do they alleviate the problem? Why/why not?
8. What do you think needs to be different? What can make it easier for you to provide/build more affordable housing?
9. Are there any policies/changes that can make building affordable homes easier but is not currently possible? Why/why not?
10. (*if not mentioned in earlier responses*) Do you think our colonial legacies affect the way we govern land and housing markets today? In what way? Can you give me an example of how this presents itself in your line of work?

*Questions about inter-institutional constraints*

1. Do you work/interact with people outside of your own department/firm when dealing with land/housing matters? Can you tell me more about the work that you do together? Who do you work with and how do you work with them?
2. Thinking about the work that you do with others with respect to housing, what are some of the challenges that you face in doing your work? e.g. structural barriers, legislative, coordination, etc?
3. How do you usually deal with these challenges? Do they work? Why/why not?
4. What do you think needs to be different? What can make it easier for you to work with other firms/departments within the housing sector?

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