



INTERNATIONAL JOURNAL OF LAW,
GOVERNMENT AND COMMUNICATION
(IJLGC)
www.ijlgc.com



CONNECTING THE LEGAL GAP: ALIGNING THE NATIONAL LAND CODE 2020 WITH CURRENT TENANCY REALITIES

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Article Info:

Article history:

Received date: 16.06.2025

Revised date: 20.07.2025

Accepted date: 28.08.2025

Published date: 21.09.2025

To cite this document:

Jalil, N. I. A., & Jalil, M. H. W. A.
Connecting the Legal Gap: Aligning
the National Land Code 2020 with
Current Tenancy Realities.
*International Journal of Law,
Government and Communication*, 10
(41), 502-509.

DOI: 10.35631/IJLGC.1041032

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Abstract:

In Malaysia, the administration of tenancy is based on the Torrens system and various acts such as the National Land Code 2020, the Contracts Act 1950, Distress Act 1950, and Specific Relief Act 1950. Recently, there has been a growing demand for specific regulations on various tenancies due to societal changes. Managing landlord and tenant relations is challenging, especially in the absence of specific laws and institutions to implement and enforce these regulations. The problem lies in the application of current tenancy laws, which require specific attention regarding the endorsement of tenancy, the application of equitable principles, and the recognition of oral tenancy. One challenge is the broad application of tenancy laws across various contexts, such as agricultural, commercial, and residential tenancies. This paper examines the current tenancy provisions in the National Land Code 2020, highlighting their strengths and weaknesses, particularly in matters such as the endorsement of tenancy, the application of equitable principles, and the recognition of oral tenancy. The study is based on library research, analysing statutory provisions, court decisions and journal articles to identify the gaps in the National Land Code 2020 within the context of tenancy. The aim of the study is to assist policymakers in addressing the insufficiencies in the existing law on tenancy. It is found that although the National Land Code 2020 outlines provisions for tenancy, it lacks a comprehensive framework for modern tenancy, resulting in unclear obligations between landlord and tenant, and insufficiency in dispute resolutions mechanism. This study will contribute to the broader body of knowledge on tenancy and property law governance.

Keywords:

Tenancy, Property Law, Residential Tenancies, Land Law

Introduction

The regulation of tenancy in Peninsular Malaysia is a critical issue, attracting significant attention due to the growing demand for housing, commercial, and agricultural sectors, and the need to balance the rights and obligations of landlords and tenants. The prevailing law governing tenancies in Malaysia is a blend of combination between common law, principles of equity, legislation, and court decisions. The current legal frameworks are scattered across various statutes such as the National Land Code 2020, Contracts Act 1950, Distress Act 1950, and Specific Relief Act 1950 has been criticized for inadequately addressing modern tenancy issues (Abdullah et al., 2023; Isa et al., 2023; Suffian, 2012).

Regulating tenancy should not be considered irrelevant, as tenancy has been subject to regulatory measures since the early 1900s in response to prevailing economic and social circumstances. Regulatory measures are crucial in addressing emerging issues such as war, rural-urban migration, inequalities in contracts, and occupancy quality. A sophisticated form of regulation is essential to balance market pressures and maintain predictability and security for both landlords and tenants. If rent increases disproportionately to income, there is pressure on the government to intervene for distributional reasons, ensuring people have access to affordable housing and equitable commercial and agricultural contracts. This study adopted a doctrinal approach by exploring the key challenges and legal gaps within the existing provisions of the National Land Code 2020 that affect the administration of residential tenancy in Peninsular Malaysia, drawing insights from various statutory provisions, judicial decisions, and academic journals. The discussion in this paper focuses on the endorsement of tenancy, application of equitable principles to tenancy and recognition of oral tenancy. The analysis aimed to identify provisions related to tenancy and to assess their adequacy. This study highlights the need for legislative amendments to effectively respond to the realities of modern tenancy in Peninsular Malaysia.

Current Legal Framework and Its Limitations

Managing the relationship between landlords and tenants is not easy, especially in the absence of specific laws and dedicated institutions to implement and to enforce the existing laws. Clear policies that provide guidance on the management of residential tenancies are lacking and need to be formulated to ensure the sustainability of the tenancy sector in the country (Zairul, 2013). Developing residential tenancies as a specialized branch of real property law is essential, not only to clarify the rights and obligations of landlords and tenants but also to support broader stakeholder and governmental interests in providing a stable and equitable housing market (Jalil & Maidin, 2021). The administration of agricultural tenancies under the National Land Code 2020 has been adapted to regulate general tenancies in the states of Peninsular Malaysia. However, the focus of agricultural tenancies may not be suitable for managing modern residential tenancies, as the former primarily concerns the handover of vacant land to tenants, with less emphasis on the quality and management of rental premises and related issues (Martinez, 2020; Summers, 2020). The protections afforded under agricultural tenancy provisions in the National Land Code 2020 are limited, and the tenant's occupation of the rental premises is largely subject to the landlord's discretion. While the payment of rent guarantees the tenant peaceful possession, the landlord is merely expected to refrain from interfering with the premises or land. Therefore, the existing legal framework governing general tenancies may not be adequate to fully address the complexities and needs of residential tenancies (Marley, 1981; Martinez, 2020; Quinn & Philips, 1969).

The existing legal framework governing tenancy in Peninsular Malaysia is fragmented and lacks speciality. The lack of specific law for regulating tenancies is due to the failure of the common law to recognise tenancies as an ordinary contract between the parties. The existing law on tenancy will cover all types of tenancies such as commercial, residential or agricultural tenancies. Unlike jurisdictions such as the UK, Australia, New Zealand, and Canada, Malaysia does not have dedicated legislation that comprehensively addresses landlord-tenant relationships in either residential, commercial or agricultural. Tenancy law in Malaysia is governed by several statutes, including the National Land Code 2020, Contract Act 1956, Distress Act 1951, Civil Law Act 1956, Specific Relief Act 1950, and Rules of Court 2012. These acts provide various remedies for both landlords and tenants. A tenancy can be established either orally or in writing, but the period must not exceed three years, as established in the case of *Than Kok Leong v Low Kim Hai* [1983] 1 MLJ 187. Unlike a lease, which can range from four to ninety-nine years and requires registration in a prescribed statutory form, a tenancy does not create a registrable interest in the land. The National Land Code 2020 provides for the endorsement of tenancy agreements to protect tenants, as seen in the case of *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719. However, if a tenancy is not endorsed on the document of title for the tenanted premises or land, although valid, it will not be binding on future owners of the property.

Act(s)	Explanation
National Land Code 2020	<ol style="list-style-type: none"> 1. Regulate tenancy in Peninsular Malaysia 2. Provides procedures for endorsement of tenancy, repairs and forfeiture of tenancy.
Contracts Act 1950	<ol style="list-style-type: none"> 1. Determine the existence of a valid tenancy 2. Regulate the contractual relationship between landlord and tenant.
Specific Relief Act 1950	<ol style="list-style-type: none"> 1. Provides procedures for recovery of immovable rental unit when the tenancy has come to an end or being terminated but the tenant remains on the rented premises.
Civil Law Act 1956	<ol style="list-style-type: none"> 1. Provides remedy for landlord in the event the tenant holding over after the termination of the tenancy.
Distress Act 1950	<ol style="list-style-type: none"> 1. Provides procedures for recovery of rent arrears by way of writ of distress but this action does not automatically end the period of tenancy.

Table 1: Explanation on Legal Provisions Related to Residential Tenancies in Peninsular Malaysia

Under the National Land Code, two types of tenancies are exempted from registration: tenancies and sub-lettings with a duration not exceeding three years. Similarly, under previous land laws, such arrangements must not exceed one year (Section 213 (1)(a) National Land Code). The terms “tenancy” and “tenancy exempt from registration” are used interchangeably, with the latter reflecting the legislature’s intent to exclude short-term lettings from the formalities of registration required for leases. Within the context of the National Land Code, both terms refer to lettings for a period not exceeding three years. The authority to grant tenancies lies with the registered proprietor of alienated land, as well as with lessees, sub-lessees, tenants, and sub-tenants (Section 223(1) (a-c) National Land Code. Tenancy agreements may be made orally or in writing. In *Than Kok Leong v Low Kim Hai* [1983] 1 MLJ 187, the court affirmed the validity of an oral tenancy agreement for a term not exceeding

three years. However, such a tenancy will not bind a subsequent purchaser unless it is endorsed on the land register.

Endorsement of Tenancy

Tenancy represents an unregistrable interest in alienated land, in contrast to leases for which statutory registration forms are prescribed. The absence of a prescribed form for tenancy marks a clear departure from Section 206(1) National Land Code 2020, which mandates strict compliance for dealings involving land. However, Section 206(2) National Land Code 2020 provides an exception, stating that these requirements do not apply to tenancies of less than three years. As noted by K.S. Dass (1983), the law's complacent approach to tenancy creation has led to administrative challenges and even hardship in managing tenancy transactions (Dass, 1983). Section 316 National Land Code, which uses the permissive term "may," indicates that endorsement of tenancies is discretionary, depending on the significance of the arrangement. The law provides give discretion to the parties on whether to apply for endorsement of tenant based on the gravity or important of the tenancy. Tenants must weigh the benefits of compliance against the risks of remaining unprotected under an unregistrable tenancy (Kok, 1984). Despite its availability, the endorsement of tenancy remains unusual. There are three reasons for this. Firstly, endorsement of tenancy is not a mandatory procedure, and its execution may incur financial cost to the landlords. Secondly, if the rented property is charged to a chargee as a security, the landlord must obtain the consent of the chargee prior to the creation of tenancy and its endorsement. Frequently, the landlord fails to obtain the chargee's consent before proceeding to create either the tenancy or the endorsement. Lastly, endorsing tenancy may deter prospective buyer who wants an immediate possession of the rented property (Yong et al., 2022).

Despite the seemingly straightforward requirements of Section 316 National Land Code, tenants may face difficulties if landlords fail to provide necessary land details for endorsement. This lack of protection becomes critical when the land is subject to subsequent dealings, as a new proprietor is not estopped from denying the existence of an unendorsed tenancy. Endorsement on the register document of title offers limited protection and does not extend to private caveats. Chapter 7 National Land Code 2020 further restricts tenant protection, as endorsement does not prevent subsequent registrations of dealings. Section 317(2) National Land Code 2020 prioritizes earlier applications for registration over tenancy endorsements, allowing registrable dealings to take precedence (Wong, 1975). Moreover, Section 213(3) National Land Code 2020 stipulates that among competing tenancies, the one endorsed first prevails, even if created later rendering the traditional "first in time" rule inapplicable within this context.

Application of Equitable Principles to Tenancy

The absence of comprehensive statutory provisions governing tenancy in Peninsular Malaysia has led courts to rely on English legal concepts relating to leases and tenancies. In *Chew Khan v Lim Weng Yoon* [1965] 2 MLJ 136, it was affirmed that common law principles have consistently influenced Malaysian tenancy law, despite the general prohibition under Section 6 Civil Law Act 1956. This section restricts the application of English law concerning immovable property, yet courts have continued to apply English principles unless they conflict with existing Malaysian legislation. David S.Y. Wong supports this position by arguing that the Torrens system adopted from Australia was superimposed upon existing English land law, allowing for the integration of leasehold interests from general law. Consequently, when the

Torrens system was introduced in the Malay States, it was modelled after the Australian framework with the mixture of the English legal concepts of leases and tenancies, shaping the administration of tenancy in Malaysia (Wong, 1975).

Another complex dimension in the landlord-tenant relationship is the application of equitable principles, particularly in cases involving oral tenancies permitted under Section 213(2)(a) National Land Code. This has given rise to the “Three E’s principle”: expenses, encouragement, and expectation which were derived from *Ramsden v Dyson* [1866] LR1HL 129 (Suffian, 2012). In this case, it was held that the equity will intervene if a tenant incurs expenses on the rented premises, encouraged by the landlord with the landlord’s knowledge and without objection. This principle was affirmed in *Devi v Francis* [1969] 2 MLJ 169, establishing that equity may compel the landlord to honour the tenant’s expectation before reclaiming possession. The doctrine was further refined in *Inwards v Baker* [1965] 1 All ER 446, where equitable estoppel was held to apply even in the absence of a binding agreement, provided the tenant acted on the landlord’s inducement.

In *Devi v Francis* [1969] 2 MLJ 169, the court invalidated a notice to quit due to substantial tenant investment and the requirement to sell the rented premises to the tenant was not observed by the landlord. Conversely, in *SS Saw v Siew Heen Yuen & Ors* [2009] 2 MLJ 214, routine payments such as rent and assessments were not deemed sufficient to establish equitable expectation as it is considered as an obligation due to the possession of the rented premise by the tenant and it was imposed and payable to the local authority. The principle was again invoked in *Lee Lian Low v Chew In Hai & Ors* [1994] 2 CLJ 525, where tenant protection was granted based on landlord encouragement and tenant expenditure. The tenant is led to believe that if he does any expansion or expenditure on the rented premise, he will be allowed to remain there. The equity must be satisfied and is not sufficient to terminate the tenancy in the form of notice to quit. However, in *Muniandy & Anor v Muhammad Abdul Kader & Ors* [1989] 2 MLJ 416, the court suggested that prolonged occupation post-expiry of notice could satisfy equity.

Recognition of Oral Tenancy

Section 213(2)(a) of the National Land Code 2020 enables tenancy exempt registration to be granted in writing or oral (Razak & Abdullah, 2022). Under oral agreement, tenant is subjected to a risk if landlord denies the oral agreement between them and demands possession of the rented building or land. However, possession of the rented building and land by the tenant may give rise to legal presumption that such oral tenancy agreement between the parties exists. In oral tenancy agreement, the parties will orally agree on the payment of rent, and time of payment. As for other stipulations, there was no written agreement between the parties.

In *Keng Huat Film Co. Sdn Bhd v Makhanlal (Properties) Pte Ltd* [1984] 1 MLJ 243, where the tenancy has been created orally, the written tenancy agreement executed on a later date can be effective based on the date of the oral tenancy. The court cannot supply the effective date and period for tenancy if it is not expressly provided in the agreement or by implication on the parties’ conduct. The court will lean against the construction of perpetual lease or tenancy unless it is clearly expressed by the parties in the agreement. The construction, however, will not be based by the acts of the parties preceding before the execution of the agreement. Although the contents of the agreement must be proven by the document itself under Section 91 and 92 Evidence Act 1950, the court can use oral evidence to point the inconsistency between the background of the case and the claim made by the claimants. The issue relating to

risk of oral tenancy agreement was settled in the *Than Kok Leang v Lom Kim Hai* [1983] 1 MLJ 187 case, where court held that although an oral tenancy agreement is valid, it would not be binding on the subsequent third party. Additionally, section 228(2) National Land Code 2020 also provides that any option conferred by any oral tenancy shall be unenforceable.

Key Legal Issues in Residential Tenancy Laws in Peninsular Malaysia

The current tenancy laws in Malaysia shows significant gaps that necessitate the development of a new and modern tenancy law and regulations. Although the National Land Code 2020 provides for the provisions for tenancy, its application lacks sufficiency in modern application. These gaps primarily stem from the absence of a comprehensive legal framework specifically addressing landlord-tenant relationships, the creation of tenancy, the obligation and rights on repair leading to power imbalances between them and inadequate dispute resolution mechanisms (Jalil & Maidin, 2021; Abdullah et al., 2023). This legal fragmentation results in inadequate legal protection on the rights and obligations of both landlords and tenants (Suffian, 2012). The need for a specific legislation to regulate various sectors such as residential, agricultural and commercial tenancies in Peninsular Malaysia has been repeatedly emphasized in various studies (Jalil & Maidin, 2021; Kader et al., 2015; Suffian, 2012). A dedicated tenancy act has been proposed to address the issues and provide a balanced regulatory framework that protects the interests of both landlords and tenants. A new tenancy law should incorporate specific provisions that enhance the rights and obligations of both landlords and tenants, ensuring a balanced and fair relationship. The proposed legislation should focus on creating a comprehensive framework that addresses key issues such as endorsement or registration of tenancy, standardized tenancy agreement, and dispute resolution mechanism (Abdullah et al., 2023).

A Need of Reform

Based on the discussion above, there are at least five areas of reform that are essential for tenancy, as shown in **Figure 1**.

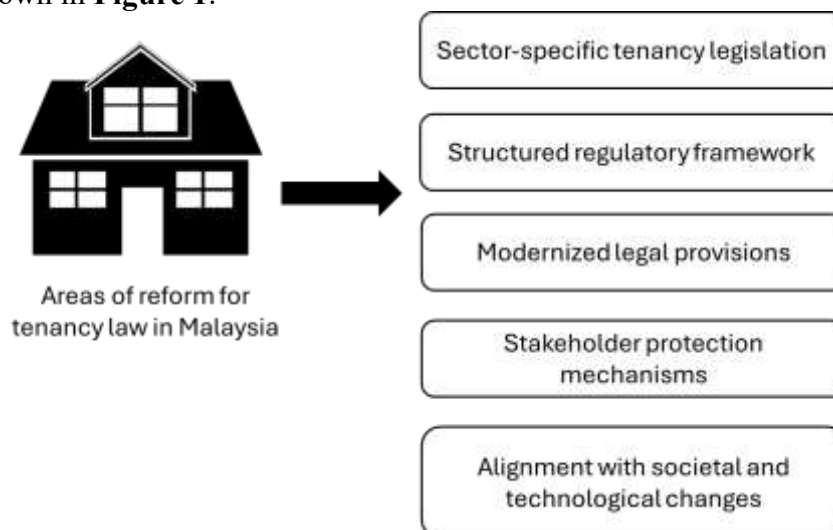


Figure 1. Areas Of Reform for Tenancy Law in Malaysia

The continued reliance on general tenancy provisions in the National Land Code 2020 is increasingly inadequate, considering the evolving societal norms, and economic transformations. Current societal demands shaped by globalization and seamless interaction with the international community requires a more structured and sector-specific regulatory

framework. The implementation of precise regulations and guidelines would not only provide clarity and protection for all stakeholders involved but also support broader national objectives. Therefore, the development and promotion of sector-specific tenancy legislation are essential to ensure that legal frameworks evolve in tandem with societal needs.

Conclusion

The current legal framework governing tenancy relationships in Malaysia in the National Land Code 2020 lacks the clarity and specialization necessary to effectively address the distinct needs of the landlord and tenant. This absence of specific provisions often results in prolonged disputes, legal uncertainty, and procedural inefficiencies, particularly in residential tenancies where both landlords and tenant face significant barriers in enforcing their rights. In light of these observations, Malaysia should consider enacting specific legal framework for residential, commercial and agricultural tenancies. Each sector has its own demand and characteristics in terms of operational, economic and social consideration that merits a specialized treatment. The approach of one-size-fit all is no longer suitable for the current market taking into consideration the changes adopted by other jurisdiction such as New South Wales, Australia and Scotland in enacting distinctive legal instruments for each tenancy. These reforms streamlined procedures for creation and terminations of tenancy, and dispute resolution, showcasing a balanced and responsive legal approach towards the demand of the society. By adopting a more structured and sector-specific approach to tenancy law, Malaysia can better protect the rights of both landlords and tenants, promote investment in the rental market, and align its legal infrastructure with international best practices.

Acknowledgment

The authors would like to thank Universiti Utara Malaysia for providing the necessary support and resources for completing this paper.

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