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A Comparative Studies Between Partition and Sub-Division of Land under Mamluk Iqta' System and Malaysian National Land Code 1965

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Abstract: The government of Malaysia has initiated an effort to amend some provisions of the National Land Code 1965 (NLC) to allow and facilitate the sub-division and partition of land, primarily for agricultura land, for the purpose of land development. Sub-section (3) of Section 140 was amended to allow the co-proprietor of agricultural land involving an area of 2/5 acres or less to be partitioned. The former Section 141A which only allows a co-proprietors holding the majority share in the land to apply for the approval to partition the land without the consent of the other co-proprietors is now substituted with the new principle which states any co-proprietor where other co-proprietors neither join in nor consent to the making of the application may apply for approval to partition the land. As a result, the requirement of acquiring consent for the purpose of partitioning the land is now waived. These amendments are made in order to allow them to easily develop the land, especially agricultural land. This study compares the problems of Iqta system in Egypt during the Mamluk period, especially 50 years before the fall of kingdom. This study found that several human factors affected the Iqta system during that time which affected the level of agricultural productivity.

Key words: Partition, sub-division, agricultural land, Iqta, Mamluk, Egypt

INTRODUCTION

The Iqta was the land (or rarely the taxes) allocated by the great amir or sultan to soldiers in return for military service (Poliak, 1937). The term Iqta in the plural is Iqta at or aqati and the Iqta holders were called Muqta un (plural of Muqta), arbab al-Iqta at and ulu al-Iqta at. The Mamluks were not the first government to introduce the Iqta system in Egypt. Al-Maqrizi implies that this system was introduced under the Ayyubids by Salah al-Din al-Ayyubi and when the Mamluks came to power they inherited the Egyptian Iqta system as it had developed under the Ayyubids. Nevertheless, they made changes to it by abolishing its hereditary character. When the Muqta retired died or was dismissed his Iqta would be returned to the sultan to be conferred on another Muqta. In exchange for the benefits derived from the Iqta, the Muqta had a number of responsibilities. These included military duties such as supplying troops in times of war and a number of non-military functions such as the supervision of cultivation and irrigation, in addition to some personal services to the sultan. The Muqta also paid the soldiers under his command and paid for their equipment and supplies from the revenue from his Iqta. The sultan who was the supreme ruler and the head of all branches of the government, owned the lands with the highest yield as his Iqta.

These lands were known as al-khass al-sultani. The amirs, on the other hand were conferred an Iqta based on their rank and favour with the sultan (Tsugitaka, 1997). Petry (1998) defined Iqta as a revocable allotment of revenue yield from a tract of agrarian land to provide an officers with resources to support his troop contingent and personal expenses. In Malaysia, land development is

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one of the government's strategies for improving living standards, especially among rural communities. The issue of abandoned land and small areas of land due to the division under the law of inheritance (faraid) should be dealt with in order to develop the land. One of the reasons that prevents land to be developed is because of the difficulty in obtaining separate titles to land of size of <0.4 or 2/5 acres of agricultural land.

The other uses of land shall be in accordance with the minimum area of law and the local authorities as illustrated under Section 136 (1) (f) (i) and (ii). Sub-section (3) of Section 140 was amended to allow the co-proprietors of agricultural land involving an area of 2/5 acres or less to be partitioned. Further, sub-section (a) and (c) of Section 141 are amended to waive the requirement of former Section 141A to allow any co-proprietor or co-proprietors in the land to apply for approval to partition the land without the consent of the other co-proprietors. To meet this end the provisions of Section 143A of the National Land Code 1965 (International Law Book Services, 1965) was introduced to authorize the Land Administrator or State Director to consider the partition of agricultural land involving the agricultural land area of 2/5 acres or less. Thus, as a step to develop the land for more productive use or for the purpose of selling or transferring property to other parties, the process of partition can be adopted in accordance with the provisions found in the law.

The difference between sub-division and partition of land Mamluk period: For the purpose of distribution and allocation of the Iqta the cultivated lands in Egypt were divided into 24 qirats (qirat simply means a 24th part). In the early Mamluk period, 4 qirats were in the hands of the sultan including his Mamluks (al-mamalik al-sultaniyya), 10 were in the hands of the amirs and the last 10 were in the hands of the ajnad al-halqa (a free corps). These proportions were subsequently changed as a result of the husami rawk (cadastral survey) in 1298 and the nasiri rawk in 1315. The husami rawk was instituted by Sultan Husam al-Din Lajin and the nasiri rawk was instituted by Sultan al-Nasir Muhammad. In the latter rawk, the sultan received ten qirats with the remaining 14 qirats being reassigned to the amirs and the ajnad (Hassanein, 1972). It is clear from that the main objective of Sultan al-Nasir Muhammad was to strengthen his position by two means, firstly by weakening the power of the Mamluk amirs by decreasing the extent of their Iqta holdings and secondly by cementing his own power by increasing the area of his al-khass al-sultani. In addition, al-Nasir is reported to have conferred a large area of Iqta's on his family and his loyal amirs. Thus, it was reported that he conferred an Iqta on amir Yashbak and that its annual yield was more than the yield from the Iqta's belonging to seven amirs and seventeen tabalkhana. There is no official rawk mentioned by historians after the nasiri rawk until the fall of the kingdom. The data provided by the rawk al-nasiri were copied without modification from its register until the end of 15th century or even later. However, Ibn Iyas mentions that the sultans during the period of 872-922/1468-1517 occasionally confiscated the Iqta's belonging to the amirs and the Mamluks (Mujani *et al*., 2011).

Problems in the Iqta's system: The period under discussion was subject to the impact of the changes in the Iqta system in Egypt. The abolition of the hereditary character of the Iqta forced a number of Muqta's to abandon their agricultural lands or at least to make no effort to maintain them. This was simply because the land could not be transferred to their heirs. Moreover, the Muqta's were only concerned to get as much revenue as they could while still in possession of their Iqta's. Thus, in order to obtain the maximum revenue they imposed high taxes on the peasants. In this environment, the peasants could not be productive labourers and some of them fled (Yaakub *et al*., 2011).

Some of the Muqta's also successfully avoided their lands being taken away by the sultan by converting them into waqf-land (pious endowments). In this way, the lands continued to benefit their descendants. The consequence of this transformation of agricultural land from Iqta's to another category of land tenure like waqf affected the kharaj (land tax) that was one of the main sources of income for the state treasury (bayt al-mal) at that time. The number of Iqta's which were transformed into waqf lands increased at the end of the Mamluk period. According to Muhammad Muhammad Amin, ten qirats of the Egyptian land were found in the waqf category when the Ottomans occupied Egypt. The number of Iqta's which were transformed into waqf lands increased at the end of the Mamluk period. According to Muhammad Muhammad Amin ten qirats of the Egyptian land were found in the waqf category when the Ottomans occupied Egypt.

Another factor which affected the Iqta system was the geographical scattering of Iqta's. From 1315, the Mamluk Sultans conferred upon the amirs Iqta's scattered over many provinces of Lower and Upper Egypt. This was intended to reduce the influence of the Muqta in his Iqta and to prevent any move towards independence or rebellion. However, the distance from the Muqta's residence which was normally in the vicinity of Cairo and his Iqta had the undesirable effect of encouraging him to make little effort to manage his lands. The Muqta also needed to employ a separate agent and staff of clerks in

each part of his Iqta and the cost of their salaries as well as the frequent dishonesty, affected the revenue derived from the Iqta. According to Sato Tsugitaka, these agents or staffs were often covetous of revenue without considering the conditions needed for successful cultivation (Yaakub *et al*., 2011).

This state of affairs was untenable and did not benefit the small Iqta holder. At the same time, the Iqta's which were situated in the countryside and far from the city were exposed to the pillaging of the Bedouin. As a result of these developments, Sultan al-Nasir Faraj created the diwan al-musta'jarat wa al-himaya (The Bureau of Lease and Protection) which was intended to give protection to the Iqta's. The Muqta had to pay a tax (dariba al-himaya) to this diwan for the service.

The short duration of control of the Muqta over his Iqta also had an effect on the level of agricultural productivity. A stable ownership system would provide a stimulus for improving cultivation while on the other hand, rapid changes in ownership inevitably resulted in negligence. Statements in contemporary chronicles reveal that an Iqta sometimes tended to pass rather rapidly from one Muqta to another. This was especially the case during the 50 years before the fall of the kingdom when five sultans reigned in a short period. The situation became worse during the outbreaks of plagues in this period, when one Iqta could have several owners in the course of a few days. In June-July 1492, Ibn Iyas says that even allotments freed by plague deaths and held in reserve could not satisfy the recruits, since their maximum annual output now rarely exceeded 30,000 dirhams. Other reasons for the rapid transfer of Iqta's included the arrest or execution of Muqta's (Mujani *et al*., 2011).

During Qaytbay's reign, several Iqta's no longer yielded the sums recorded in cadasteral surveys decades earlier. A number of Iqta's had been so subdivided in order to provide allotments for new officers that they now produced insufficient yields for the amir's needs. Ibn Iyas mentions that in November-December, 1488 an impoverished amir of ten whose Iqta no longer produced its stated yield, petitioned for a new grant by pleading the poverty of his family and retainers and hanged himself when his request was refused.

In describing the Iqta s belonging to the awlad al-nas, al-Sayrafi remarks; their Iqta yielded them no protection money (himaya) nor cultivated produce. Indeed, some (officers) sought to deprive some of them of their fiefs, since they no longer yielded any (tax). The accountants (mubashirin) did not know whether their land was productive or unproductive. Even if some owned estates they still resembled these wretched (landles) types (Mujani *et al*., 2011).

Malaysian law

Sub-division: The proprietor of any alienated land held under Registry or Land Office title may with the approval of the State Director or Land Administrator sub-divide the land into two or more portions to be held by him under seperate titles. For example, an area of Lot A of 10 acres owned by three co-proprietors of Ali, Abu and Ahmad who then agreed to sub-divide it into two lots, Lot B and C. As a result, Lot B is owned jointly by Ali, Abu and Ahmad and Lot C is jointly owned by Abu, Ali and Ahmad. Thus, the two lots (Lot B and C) are still held together despite the sub-division done.

Section 136 of the National Land Code (NLC) has made it clear that sub-division approval is given only when the application of sub-division meets all requirements and conditions imposed. Thus, it is the responsibility of the applicant to ensure that the requirements of this section are complied with. There are several requirements that must be met before approval of sub-division application may be made by the State Director or Land Administrator as contained in Section 136 of the NLC, namely:

- Sub-division to be implemented would not contravene any restrictions in interest which the land is for the time being subject to
- The sub-division would not be contrary to the provisions of any written law for the time being in force and that any requirements imposed with respect thereto by or under any such law have been complied with
- A landowner who wishes to sub-divide the land shall ensure necessary approval of any planning authority has been prior to submitting sub-division application. The sub-division would not be contrary to any plan approved by the State Authority

In addition no item of land revenue for the current year and previous years is outstanding in respect of the land. Written consent of the parties who have an interest in land as security holder, the holder of the lease and lien holder also must has been obtained. If the land applied for is for the purpose of sub-division, land subject to agriculture or for agricultural purpose, the area of 2/5 acres or less be sub-divided for development purposes other than agricultural land, an area will not be less than the minimum area apropriate for land of the class or description in question as determined for the purposes of this sub-paragraph by the planning authority for the area in which the land is situated or (if there is no such authority) by the State Authority. The shape of the proposed sub-division of land should be compatible with

the purpose of land development to be implemented. There are also the requirements that a satisfactory means of access either to a road, a river, a part of foreshore or a railway station will be available or be capable of being obtained. Apart from Section 136 of the NLC, the application for sub-division approval is subject to compliance with the requirements of Section 137 of the NLC that is the sub-division applications should be submitted by using Form 9A and accompanied by the following actions:

- Payments of fees as may be prescribed
- Preparation of pre-computation plan showing the land details on of the sub-division
- Copies of the approval or consent obtained under paragraph (c) of sub-section (1) of Section 136
- All such written consents of making the application as required under paragraph (e) of sub-section (1) of Section 136

Sub-division approval application: After all the requirements and conditions provided for by Section 136 and 137 NLC are observed then the application of sub-division will be processed. The power to approve the sub-division application is provided in sub-section (2) of Section 135. In respect of the application of sub-division of land held under Registry title, the approval is determined by the State Director while the approval is determined by the Land Administrator in the case of land under the Land Office. Both of them are responsible for processing applications of this sub-division and shall approve the application if the application meets the requirements of sub-section (1) of Section 136 of NLC. If not then the State Director and the Land Administrator have the right to reject the application.

The approval of such application should consider as well as matters concerning any modifications to be made in respect of the application (if any) and registration of documents of final title should be communicated to the applicant (co-proprietor). Conversely if the application is rejected, the matter should also be communicated to the applicant and the State Director and Land Administrator shall cancel the entry made on the document of title in respect of the sub-division application.

Partition of land: The difference between the partition and sub-division of land is sub-division would create a separate title for each part of the land but the land is still under the same proprietorship. While partition of land is a process where any alienated land which is held under Registry or Land Office title by two or more persons as co-proprietors may be partitioned upon the approval of the State Director (in the case of land held under Registry title) and by the Land Administrator (in the case of land held under Land Office title). Through this method, each of them will have a separate document of title for an area proportionate as nearly as may be to his undivided share in the whole.

Thus, partition of land is to create a separate document of title for each portion of land owned. For example, a title of an area of 10 acres held by Abu and Ali agreed to be partitioned to Lot A and B. Lot A is intended to be held by Ali and Lot B is by Abu. As a result, Ali and Abu are no longer share the proprietorship of the land under the same title document. Thus, Ali would have the new title deeds issued by the Land Office for Lot A while the new title deeds for Lot B is issued to Abu.

Conditions for approval of partition of land: Section 141 of the NLC has set out several conditions for approval of partition of land that must be followed in each of the applications, namely:

- Each of the co-proprietors has either joined in or consented to the making of the application for its approval. However, if the co-proprietor holds the majority share in the land then this condition can be dropped through the provisions of Section 141A NLC
- The area of land acquired by the owners of the land after the partition is as nearly as may be proportionate to his undivided share in the whole
- The conditions specified in sub-section (1) of Section 135, in cases of partition, apply with respect to the condition specified in paragraph (h) of sub-section (1) of that section with the omission therefrom of sub-paragraph (ii) of paragraph (b)
- For purposes of partition of agricultural land, the State Director or Land Administrator have the power to waive the provisions of paragraph (h) of sub-section (1) of Section 136

However, sub-section (a) and (c) of Section 141 are amended to waive the requirement of former Section 141A to allow any co-proprietor or co-proprietors in the land to apply for the approval to partition the land without the consent of the other co-proprietors. In addition to Section 141 of the NLC application for partition approval is also subject to the provisions of Section 142 of the NLC. Any application for approval of any partition of land must be submitted in writing using Form 9B and accompanied with the following matters, namely:

- Payments of fees as may be prescribed
- A plan of land on a scale sufficient to satisfy the land administrator

- If required by the land administrator, the submission a copy of any approval or consent under paragraph (c) of sub-section (1) of Section 136
- All such written consents to the making of the application

Upon receiving the application, the Land Administrator shall notify the other co-proprietors of the proposed partition, requiring them to submit in writing within a period of 28 days from the date of service of the notice any objection setting out fully the grounds on which objection is based. Upon the expiry of the period, the land administrator where there are objections shall notify the applicant and the remaining co-proprietor and hold enquiry and if satisfied that good grounds exist shall reject the application. In any other case, the land administrator may approve the application. In the case where there are no objections after due consideration may approve the application .

Partition of land by applied by the co-proprietor who holds majority share and minority share (situation prior to the amendment): If an applicant wants to apply the partition is the majority shareholder in the land, the provision under Section 141A NLC can be used and consent of the co-proprietors of the land is not needed. Prior to this if the applicant or applicants who is a minority shareholder of the land failed to obtain consent from the co-proprietors, the provisions of Section 145 of the NLC on the court intervention may be used. However, Section 141A of the new NLC in 2007 has been amended to allow the owner of the minority shares to make an application for the partition of land without the consent of the co-proprietor or co-proprietors. This amendment is made to facilitate the application of partition of land.

Although, there are provisions stating that the application of the majority shareholders are not required to obtain the consent of minority shareholders under section 141A NLC but in practice, the Director of Lands or the Land Administrator sometimes will not make application for approval of partition of land without the consent of all the other co-proprietors even though they are minority shareholders. Under the NLC 1965, the special provisions on partition of land provides 2 methods of partition of land which may be implemented through the approval by the co-proprietors as set out in Section 141 (1) (a) of the code. While the second method is through the power of the court to facilitate the termination of co-proprietorship of the land as it deems just for the benefit and interests of co-proprietorships as stated in Section 145 (1) (a) of the code which provides as follows:

Power of court to facilitate the termination of co-proprietorship. Where in the case of any land vested in co-proprietors:

- Any of the co-proprietors will neither join in, nor consent to the making of, an application for partition under this chapter
- By reason of the operation of paragraph (f) of sub-section (1) of Section 136 (as applied by Section 141), partition of the land between all of the co-proprietors is incapable of being approved

The court, subject to and in accordance with the provisions of any law for the time being in force relating to civil procedure may on the application of any of the co-proprietors, make such order as it may thinks just for the purpose of enabling the co-proprietorship to be terminated. Thus, Section 145 may be applied in the situation of application for partition by the majority co-proprietor who has neither obtained the consent of other co-proprietors nor received approval from the Director of Lands or the Land Administrator.

In Ku Yan bte Abdullah v Ku Idris bin Ahmad and Ors., the plaintiff who was the holder of the majority share in the land had applied to the land administrator to partition the land under Section 141A of the NLC. The other co-proprietors did not consent to the application. The application was rejected by the State Director of Land and Mines. The State Director did not give any reason for the rejection but advised the plaintiff to make the application before the High Court.

The plaintiff thus applied to the High Court for partition purportedly under Section 145 (1) of the NLC. The defendants (the co-proprietors) opposed the application on the grounds that the court has no jurisdiction to hear the application. The learned judge, KC Vohrah J held that the court has the jurisdiction and allowed the application. Held: dismissing the defendants' objection on the ground that:

- Section 141A of the code does not compel a co-proprietor holding the majority share in a piece of land to apply to the land administrator for approval to partition the land; it is merely a permissive section
- A co-proprietor having the majority share in a piece of land thus is not barred from applying to the High Court under sub-section (1) of Section 145 of the code to have the co-proprietorship terminated and the land partitioned under Section 145 on the general ground that a co-proprietor will not join in nor consent to the making of an application for partitioning

The same principle was applied in the case of Aishah bte Mohd Saman and Ors v. Kalsom bte Hj Mohamad Nor where the plaintiff had entered into a Joint Venture Agreement (JVA) to develop a parcel of land. A defendant who is co-proprietor of the land involved refused to sign the JVA.

Plaintiffs thereafter applied to the Land Administrator for the partition of land but the defendant refused to sign the forms relating to land partition. Defendant also refused to choose between the two parts of the land offered to him and insists that he is not bound to select from the plaintiff. Plaintiffs applied to the court to order the defendant to choose one of several parcels of land offered to him, failure of which would cause the court to make a choice on his behalf. The judge in this case had decided that the court has jurisdiction to hear the application.

Apart from these two cases that have been reported, a similar principle can also be observed from the other two cases which are unreported. In the case of Saad bin Din, Rashid bin Ali and 6 others v. Embun Dahaman. The facts of this case as follows:

Eight of the applicants and the respondent are the co-proprietors in the title deeds to land in the area of 1447 ha of Behor Pulai, Perlis. The respondent held the majority share of the land among the eight appellants. But if the eight portions of the appelants' land are combined, they held the majority share as compared to respondent. All the appellants had proposed to the respondent through the proposed plan provided for the purpose of applying for the partition of the land. The respondent, however did not co-operate and rejected the proposed plan for partition of the land application.

The first and second appellants, together with six other appellants had agreed to develop part of their land to housing projects in the future. The decision was made due to the reason that the land had been abandoned for years without being cultivated.

The respondents had denied the appellants as the co-proprietors to a legitimate use or access roads of the ground behind the lands that have been agreed verbally as the appellants' land. Various attempts had been made by the appellants to the respondent for the proposed partition but failed. Furthermore, the respondent still refused to allow access to the path given to the appellant at the back of the land.

The counsel argued that the court has jurisdiction to decide the case because the application had been previously brought to the Land Office. The judge had allowed the appeal to determine the partition of land as proposed in the plan by the appellant. The same principle was uphold in the case of Ooi Eng Chong Yok v. Kam Cheong. The facts of the case as follows:

The applicant and the respondent are the co-proprietors with the legal title on a piece of agricultural land planted with rubber trees in an area of 1.7781 ha in Titi Tinggi on the way to Padang Besar, Perlis in equal parts during the joint ownership of the land, the applicant cannot access directly into the ground to enjoy the benefits of the land by the tapping of rubber trees because the respondents who did not allow the applicant to enter the land. The applicant has received advice from the counsel to solve this problem by having a separate title deeds. In other words, the applicant will have a new title deed and the respondent will also receive a separate title of new proprietorship.

The applicant has appointed a registered and qualified surveyor to make an application for the partition of land to the Land Office Perlis. Unfortunately, the application was not approved by the Land Office Perlis due to the refusal of the respondents to give the consent for the partition application or issuance of individual land title. The Land Office Perlis also states that this case should be resolved through court proceedings and decisions. The court decided to allow the application of the applicant for the partitioning of land for the sake of justice and interest of all parties involved in any area. However, there is a different case had decided the same issue with a different decision. In the case of S Subramaniam and Ors v Inderjit Kaur d/o Karnail Singh and Anor., the Alor Star High Court had ruled that:

This application by the plaintiffs raised the question whether a co-proprietor for a piece of land who was also the holder of a majority share in that land could apply to the court for the partition of the land pursuant to Section 145 (1) (a) of the National Land Code (the NLC). Both parties were the co-proprietors of a piece of land (the land). The plaintiffs held the majority share whilst the defendants held the minority share. The plaintiffs wanted to partition the land, so that the first defendant would cease to be a co-proprietor and instead would be issued with a separate title for a portion of the land the size of her proportionate share. The plaintiffs had informed the first defendant in writing of their intention to apply to the land administrator to have the land partitioned but the first defendant had refused to give her consent. Thus, the application went to the court. A question was posed whether the court had jurisdiction to hear the application. Held: Dismissing the application on the ground that:

- The court had no jurisdiction to make the order sought. Since, it was the holder of the majority share who wanted the land to be partitioned, they had to comply with the provisions of the NLC dealing specifically with such a situation, i.e., Section 141A read together with Section 142 of the NLC

- Section 145 (1) (a) of the NLC only refers to a situation where it is the holder of the minority share who intends to apply to the land administrator pursuant to Section 142 but one of the co-proprietors has refused to consent to it. The holder of the minority share can then apply to the court pursuant to Section 145 (1) (a)
- The holder of the majority share can only apply under Section 141A read with Section 142 where he is not required to obtain consent of the other co-proprietor(s) and this exemption is made clear by Section 142 (1) (e). If the application is rejected, he can appeal to the High Court against that rejection

However, it should be explained that the rationale for court intervention in the application of this partition of land as decided in the case of Ku Yan, Aishah, Din bin Saad and Ooi is to safeguard the principles of justice. This is because the rights of each proprietor of the land must always be complied with. But the basic principles of land co-proprietorship must be adhered to and implemented as set out in Section 343 (a) regarding the right of co-proprietorship which paragraph (a) and (b) of the Section 343 states that:

- Their shares therein shall be deemed to be equal unless different proportions are specified in the memorial of registration
- They may at any time apply for the partition of the land under Chapter 2 of Part Nine but so long as their co-proprietorship continues, shall each be entitled to possession and enjoyment of the whole

CONCLUSION

Researchers find that the human factors were indentified as affected the Iqta system such as the abolition of the hereditary character of the Iqta, the trans formation of agricultural land from Iqta to another category of land tenure, the geographical scattering of Iqta and the short duration of control of the Muqta over his Iqta. These caused the decrease of the level of agricultural productivity. Where as the amendments to the NLC by the National Land Code (Amendment) 2007 provides a fairly significant impact because they allow the partition of land in category agriculture or to the condition requiring its use for purposes of agricultural as no longer subject to a minimum area of 2/5 ha. Through this act, the partition application may be submitted by any co-proprietors of the land regardless of the majority of shares owned by him or without the consent of the other co-proprietors. This effort is intended to help the co-proprietors of the land to develop small land to become a more competitive land.

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