

A HISTORICAL REVIEW OF THE LAND TENURE AND REGISTRATION SYSTEM IN PALESTINE

by

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ABSTRACT

Due to its strategic location, Palestine has played a significant role in world politics. These politics, in turn, have been major influencing factors in the culture and history of Palestine. The land in Palestine has been, and still is, the central issue in the Palestinian - Israeli conflict; each claiming sovereignty over it. This paper will briefly outline the evolution of the land tenure and registration system in Palestine from the early days of Islam up to the present. A future methodology that may improve the current system will be proposed at the end of the paper.

ملخص

نظرا لموقعها الاستراتيجي، فقد لعبت فلسطين دورا هاما في السياسة العالمية، وهذه السياسة كانت بدورها عاملا مؤثرا في تشكيل حضارة وتاريخ هذا البلد. على وجه الخصوص، فإن الأرض في فلسطين كانت وما زالت تشكل محور الصراع الفلسطيني-الإسرائيلي، حيث أن كلا الطرفين يدعي أحقية الملكية لهذه الأرض. هذا البحث سوف يلقي الضوء على تطور نظام ملكية وتسجيل الأراضي في فلسطين منذ العصر الإسلامي الأول وحتى يومنا هذا، علاوة على اقتراح استراتيجية لتحسين الوضع الحالي عند تحقيق الاستقلال.

1. Introduction

Before reviewing the history of the land tenure and registration system in Palestine, we would like to acquaint the reader with this area of the world. Palestine occupies the heart of the Middle East which is known in the literature to be the cradle of civilization, as settled agriculture first originated there (Madison, 1947). The transition from a hunting and plant collecting economy to permanent cultivation and livestock breeding in this area led to relatively stabilized communities. A centralized system of irrigational canals was laid and maintained which resulted in an extraordinary increase in the amount of agricultural land. Due to its strategic location, Palestine was subject to the avidity of the competing forces of the world which ended with the Israeli occupation in 1948.

The total area of Palestine is 26,626 square kilometers, while the cultivable area is about 8253 square kilometers (Stein, 1984). The current population (both Arabs and Jews) is estimated to be 6 million people. The majority of the people, especially Arabs, live on agriculture which is considered to be the backbone of their economic existence under occupation.

The land laws and regulations in Palestine are by origin a mixture of traditions and rules, some of which date back to the early days of Islam, some to the time of the Ottomanic rule, some to the time of the British mandate, and others introduced by the Jordanian and Israeli authorities. In the following sections, the researcher will briefly outline the evolution of the land tenure and registration system in Palestine and propose a future methodology that may improve the current system. Because of the scarcity of the reference material on the land laws and customs during the Byzantine rule in Palestine, the Islamic period will be taken as the starting point.

2. Islamic Concept of Land Tenure

Like any other Muslim country, Palestinian land regulations were directly affected by the Islamic land laws. In Islam, tenure is defined as "the relationship between man and things which he gets by a legal and lawful work" (Jamal Al-Din, 1966). This man - thing relationship leads to a man - society relationship which is in turn controlled and regulated by the Islamic laws and statutes.

Islam has allowed private ownership, but within the natural needs and requirements for living. However, the generic concept of tenure calls for public and state control over all the resources and properties. On the other hand, Islam has guaranteed to fulfill all the needs of people through its regulations, and the Islamic history is the best witness on this issue (Gaballah, 1951).

Two types of land can be distinguished in the Islamic period (Jamal Al-Din, 1966). The first is the land which is located within the boundaries of the cities and villages (urban areas). This land can be owned privately by people and includes the houses, small roads and yards. The second type is the land which lies outside the boundaries of urban areas. This land is considered to be state lands, but can be leased to people to use it under certain conditions, like paying a tithe to the state.

Land registration in its current modern concept was not known in the early days of Islam. However, there was some sort of registration system which was confined to the public and state lands which were used by private individuals.

The purpose of this registration was to control the state's income and expenses. It did not include the lands which were privately owned, nor did it include any accurate description of the registered public lands like areas, boundaries, etc. However, it included a list of the names of the grantees who were supposed to pay tithes and tributes (see next paragraph). The registration was decentralized and files kept in separate offices called "diwans". This made them easy to be destroyed and lost by seditions which occurred from time to time.

How did this affect the land system in Palestine?

Palestine was under the control of the Byzantine Empire at the time when it was conquered by Muslims arriving from the Arabian Peninsula. The Muslims did not dispossess the existing inhabitants of their lands. From the early days of Islam, land in Palestine, as well as in the nearby Arabic countries, was divided into two main classes: Ushuri land (tithe paying) and Kharaji land (tribute paying) (Goadby and Doukhan, 1935). The Ushuri land was the land which was delivered over to the Muslim conquerors (soldiers) or which was left to the inhabitants who embraced Islam. Owners of this kind of land paid a tithe of one-tenth of the gross yield to the Islamic state. The Kharaji land was the land left in the hands of non-Muslim inhabitants. The owners of this land were supposed to pay an agreed upon fixed amount every year whether the land was cultivated or not, or to pay a certain percentage of the product which was not less than one-tenth. Land of these two classes was in private ownership. It was the property of the proprietor. As will be explained in the next section, this was called Mulk and was equivalent to "fee simple" ownership.

The status of land tenure and land registration remained loose with no specific and definite regulatory laws in the early days of Islam. No attempt was made to clearly organize land tenure matters until the Ottomanic Empire took over the Islamic countries, including Palestine.

3. The Ottomanic Rule in Palestine

During the Ottoman Turks rule in the middle East, many ordinances and land laws were passed, the most important of which is the well-known land code of 1858 which aimed to increase agricultural production and, as a result, tax return. According to this land code, the first governmental land registries, called Tapu, were established in 1859 (Tannous, 1951). In 1874, Defter Khakani or land registrars and Tapu clerks were employed. These officials were assigned the job of issuing ownership or Tasarrouf (tenancy or land utilization) documents (deeds) (Tannous, 1951). These documents included some information pertaining to the land parcel such as the area and the boundaries of the land. From this date onward, no one could acquire any utilization rights without written permission from the land registrars.

The Ottoman land laws, which were partly affected by the French land regulations, classified the lands of Palestine into six categories (Madison, 1947; Stein, 1984):

- a. **Mulk, or land held in absolute ownership.** The holder of this land exercised complete rights of utilization and exploitation representing "fee simple" ownership. Two sources of origin for this type of land ownership can be traced. First, the Ushuri and Kharaji lands which existed when the Ottomans took over. And second, the land granted from the state domain by Arab rulers and Turkish sultans to soldiers, tribal chiefs, or local leaders in compensation for military or political services.

The amount of land held as Mulk was small, not more than 5 percent (Madison, 1947), and most of it was confined to urban sites, mostly buildings and gardens.

- b. **Miri land.** The holding right of this land belonged basically to the state, while the Tasarrouf (utilization) rights were given to the individuals under certain conditions, like paying a tithe to the state. The grantee (user) was obliged to cultivate the land granted to him, subject to the liability of being dispossessed if he failed to do so, thus according to the prophet Mohammad saying (Hadith):

Every individual who, during three years, shall leave uncultivated a piece of land of which he has possession, shall lose his rights over the same; and if a third party appears, who will cultivate it, this latter shall have a greater right to possess it than the former owner (Goadby and Doukhan, 1935).

Prior to 1913, the owner of Miri land could not mortgage or sell it without the consent of the state, which was obtained from the land office. Moreover, he could not use it for brick-making, planting, vineyards, orchards, building houses, or for creating enclosures without consent from the government. However, the 1913 Provisional Law of Immovable Property gave the holder of Miri land the right to use it for any purpose, though still requiring the owner to register any improvements with the government (Stein, 1984).

The largest portion of the agricultural land in Palestine today belongs to this class (no accurate percentage is available). This is justified by the sense that the ultimate proprietary interest is in the state; but the cultivating interest is enjoyed by grantees whose right, though assignable and inheritable, is less than ownership.

- c. **Waqf land.** Waqf is a peculiar Muslim law. It is the transfer of the land ownership to the Deity to be used for certain educational or charity institutions or purposes. It is divided into two main types: true and untrue Waqf. The first arises from the dedication of Mulk property, while the second from dedication of Miri property. Traditionally, this Waqf was administered by the "Ministry of Awquaf" which was superseded by the British mandate on Palestine. Currently, this land is administered by the "Supreme Muslim Council for the Inspection of Waqf".

- d. **Public or Metruki land.** Metruki in Arabic means left alone. This represents the land left for roads or assigned as common land such as pastures and woodlands. It is used by the community as a whole and cannot be sold or disposed of by individuals.
- e. **Mewat (meaning dead) land.** This is the land which is not owned or used by anybody and is situated beyond a distance of one and a half miles from the buildings and from which a man's voice could not be heard. It is vested in the government, and permission to cultivate it requires the issue of a tithe deed (Kushan). This land constituted a considerable portion of the land of Palestine.
- f. **Musha land.** Musha means undefined share in a common property. It is a system of collective holdings whereby land is held by a corporate body, normally a village, and is temporarily partitioned among its individual members. Each share holder owns a fractional share in the village, but has no separate parcel of land allocated to him in proprietary rights. This has led somehow to a weak man-land relationship and has greatly retarded development, decreased fertility, and exposed the land to the effect of soil erosion.

The previously mentioned land code of 1858 attempted to define land holdings precisely. However, it was not until 1871 that land in Palestine started to be actually registered in an organized way. Prior to this date, there were no official documents (deeds) proving ownership, except for the Mulk lands which were registered according to the Muslim religious courts. The registration was at first confined to Miri lands. A few years later, it was extended to include Mulk and other land classes discussed above (Goadby and Doukhan, 1935).

4. The British Mandate

As a result of the First World War, Palestine fell under the British occupation. During the war, many inhabitants had heavily encumbered their property in order to provide money to purchase exemption from military service and to provide necessities of life at a time when Turkish currency was depreciating. Owing to the financial Chaos, it was impossible for these people to redeem their properties without selling them. However, to prevent the appearance of landless class of people, land registration offices (Tapu) were closed in the period 1917-1920. During this period no transactions in immovable property were allowed.

In 1920, the registries were re-opened under the sanction of the Land Transfer Ordinance (LTO) which required that transactions should only be valid if made with the consent of the government. To achieve this purpose, the Department of Land Registries was formed to accomplish all functions of the Tapu office of the former Ottoman government in Palestine. Among these functions were the preparation of all documents affecting immovable property and the investigation of titles. Registration fees were also charged on the capital value of land involved. These fees varied according to the nature of the transactions - from 0.5% on partitioning to 5% on the registration of land not hitherto registered (Goadby and Doukhan, 1935).

In the year 1920, a survey ordinance was also passed which provided facilities for the demarcation of boundaries and for the making of surveys with a view to a cadastral survey. A cadastral survey rigorously maintained to date whereby the parcels of land affected are accurately defined on a plan is considered to be the foundation of an effective system of land registration.

In order to provide all necessary surveys and maps, the Department of Surveys was established in the same year (Solel, 1988). The entire country was covered with major and third-order triangulation network and a 1:10,000 plantable surveys showing all topographical features. In urban areas, a dense network of fourth-order triangulation was provided.

The village in Palestine was the main registration unit and it was divided into blocks of convenient size called registration blocks. "Each block was subdivided into parcels, and a specific number was given to each block and to every parcel in it" (Solel, 1988). Provisional block plans were prepared followed by the demarcation on the ground and by plotting on the block plan of the mosaic of parcels within the registration block according to the boundaries claimed by the individuals. Later, the areas of the parcels were computed and the final registration block plans prepared by the Survey Department. These plans showed the location, shape and size of every individual parcel of land within the area described in the registration block. Coordination was established between the Departments of Surveys and Registries to ensure the compatibility of land information.

The 1920 survey ordinance was replaced in the year 1929 by another one which regulated in a comprehensive manner the survey of lands in Palestine, providing particularly for a public survey of Palestine under the direction of the High Commissioner (Stein, 1984).

The Department of Registries continued to use the registration of deeds system which was originated in the days of the Ottomanic Empire. It was not until 1928 that the Torrens registration of title system was introduced. Under this system, the parcel of land was adopted as a unit of registration. A separate folio was prepared for each land parcel which recorded information pertaining to the ownership in that parcel and all the interests to which it was subject, the charges, cautions, and easements affecting it. Every subsequent dealing with the land was recorded in the register of title. A certificate or an extract from the register was issued to a holder of a title which has an indefeasible character.

In Palestine, these two systems of registration were intended to operate side by side. No amalgamation of the two systems was possible owing to the difference in their backgrounds. No attempt was made to make registration compulsory, and title was proved by presentation of private unregistered conveyances.

Under the British mandate on Palestine, the main classes of land tenure, discussed previously, remained without considerable change, except for the unclaimed Mawat land which was added to the state lands. According to the land ordinances of 1928, authorization was given to start immediately dividing the Musha land between the owners after defining the rights of each. One of the major British intentions behind this authorization is to facilitate the sale of land to the Jews. This resulted in a considerable decrease in the Musha land, which constituted the greatest portion of Palestine lands, and an increase in privately owned land. Some of the Palestinian owners of these lands had no choice but to sell their lands to the rich Jews under the pressure of the severe economic situation imposed by the British at that time.

5. Current Status

The British mandate on Palestine resulted in the partitioning of the country into two parts. The first constitutes about two-thirds of Palestine where the state of Israel was established in 1948. The second part, which includes the West Bank and Gaza Strip, was controlled temporarily by Jordan and Egypt until 1967 when it was occupied by Israel.

Since Jordan fell under the British mandate (the same as Palestine), all the previously mentioned land ordinances by the British authorities were also applied in Jordan. It continued to use the dual system of land registration, i.e. the deed and title systems, with emphasis on the title system, especially for the new transactions. Efforts were also continued to prepare all cadastral maps required for the delimitation and mapping of rights to land. Registration remained voluntary, and land categories remained almost the same, except in the percentages of each land class. Some regulatory land amendments were passed in Jordan and the West Bank in the years 1951 and 1953, but unluckily not much information is available about them.

Soon after the West Bank and Gaza Strip fell under the Israeli occupation in 1967, the military authorities issued an order forbidding any land transactions without a written permit (Benvenisti et al., 1986), which implied that land registration has become practically compulsory since that date. All land registration has to be done according to the Torrens registration of title system which has been adopted in Israel.

Since that time, many orders which affect the land directly have been issued. These orders were not determined by physical planners, but dictated by political considerations to confiscate as much as possible of that land. Among these was the reclassification of lands in the occupied territories. Some lands were classified as "rocky lands, unsuitable for cultivation", others as "nature reserves", and a third class as "essential military territory" (Benvenisti et al., 1986). The result was the confiscation of more lands to become state lands used later to build the Israeli settlements and achieve other political purposes.

In 1980, the Israeli government adopted a new "legal" approach to state lands. This approach declared uncultivated, unregistered land as state land. Under this declaration, all Mawat lands and Miri lands which were not cultivated for 10 years or more became state lands and liable to be confiscated at any time. This judicial and administrative structure resulted in Israeli control of over 52% of the area of the West Bank by 1986 (Benvenisti et al., 1986); 41% of this area is under direct Israeli possession, while the other 11% is placed under severe restrictions.

6. Conclusions and Future Outlook

It is clear from the preceding review that the status of land in Palestine was and still is affected by political considerations which most of the time conflict with the socio-economic needs of the inhabitants. These considerations have their negative effects on the agricultural development; devastating a country which depends mainly on agriculture.

This happened due to the lack of the security of tenure, which in turn inhibited long term planning, limited accessibility of credit sources, and eliminated incentives for soil conservation practices. Furthermore, the Israeli occupation kept the cadastral system in Palestine in a rudimentary stage. Files are processed in a time consuming manual way without any chance for computerizing the system. Old cadastral maps still exist without any efficient mechanism for updating them, and the geodetic reference framework, which was built during the British mandate by old inaccurate surveying methods, has lost most of its monuments. Moreover, Palestine suffers from the scarcity of qualified surveyors and skilled people at a higher level, as well as the lack of surveying institutions.

Thus, it is clear that the cadastral system has been totally exposed to conditions which through the centuries made it unstable. Although little can be done under the current situation where everything falls under the control of the occupying Israeli authorities, an overall revision and redesign of the system should be completed soon after attaining liberation. This should include:

- Revision and re-evaluation of the outdated and inefficient laws and procedures introduced by the occupiers which directly retard the establishment of an efficient cadastral system.
- Designing a strategy for establishing a progressive cadastral system that can be applied rapidly and at a low per unit cost and which can be upgraded and improved to higher standards as rapidly as resources and political support permit (Tamim, 1992; Williamson, 1986). This strategy should take into consideration the following:

- a) The socio-economic needs of people and the country as a whole. The system should be simple and easy to be accepted by the populace.
 - b) Evaluation of the existing technical and administrative procedures.
 - c) The selection of appropriate procedures and technologies which could be well used and maintained.
 - d) Re-evaluation of the land titling procedures. These can include making the registration compulsory and at a lower cost which can be paid over a few years for poor landholders. Giving legal precedence to registered documents will also help speed up the evaluation process. This, in turn, will give enough security to farmers and help develop the agricultural sector.
- A comprehensive program should be set up to redesign and maintain the geodetic reference framework and update the existing cadastral maps. A continuing program for post-cadastral survey, mapping and registration should be considered.
 - Attention should be given to the establishment of surveying institutions as well as introducing the surveying major in existing universities to cover the shortage in qualified surveyors and skilled manpower required to run the system.

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