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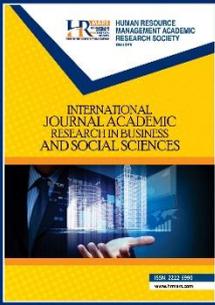
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## **Compensation Distribution for the Acquisition of Land Owned by Many Proprietors in Malaysia: Addressing the Related Grievance from the Perspective of Siyasaah Syar'iyah**

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### **Abstract**

Under Malaysian National Land Code 1965 (NLC), co-proprietorship of land connotes that each of the co-proprietors shall be entitled to the possession and enjoyment of the land according to his share. Nevertheless, there is a common practice in Malaysia, that the land is partitioned into several parts based on informal agreement among co-proprietors so that every one of them can enjoy a designated part of the land exclusively. This practice seems to be not in line with the law and has caused some negative consequences especially in the case where the land is acquired by the government and the compensation is paid to all proprietors

according to their registered portions of share in disregard of the agreement. This has caused the dissatisfaction of the proprietors whose designated land has been acquired but the compensation was paid to all co-proprietors whose parts of land remained intact. Therefore, it is important to carry out a study to look into this problem in light of the provisions in the Malaysian National Land Code and the practice of land administrative bodies and to propose some practical solutions to the issue. In order to conduct this study, relevant data is taken from the library research and empirical examination. The collected data then is analyzed using inductive, deductive as well as comparative methods of analysis. The study shows that the dissatisfaction of the co-proprietors is reasonable. However, the payment of compensation by land administrators to all co-proprietors is also according to the law. Accordingly, it is suggested that law provisions relating to co-proprietorship be amended taking into account the interest of all parties especially the co-proprietors who are exclusively affected by the acquisition. It is hoped that would be able to solve some of the existing problems and to prevent the problems from recurring in the future.

**Keywords:** Land Acquisiton, Co-proprietorship of Land, Siyasaah Syar'iyah

### **Introduction**

Malaysia, as a developing country, on many occasions has resorted to land acquisition exercises in order to meet development needs. The exercise is normally premised on the need for the development of the country subject to the financial capability of the government because it involves a relatively large expenditure. In this country, the land acquisition process is regulated under the Land Acquisition Act 1960 (Act 486). The lands involved in the acquisition exercise are various whether it is government land, agency land, or individual land.

### **Problem Statement**

In the land acquisition exercise, among the critical problem that emerges is regarding the distribution of the compensation in the case where part of the land owned by many registered owners is subjected to acquisition processes by the government. This is because, the method of compensation payment practiced by the government often causes problems to the registered landowners. Consulted literature suggests the problem has become the concern of the general public.

Salleh Suman (2012) highlighted that one of the big problems faced by registered co-owners is the repossession of part of the land by the State Authority (Suman, 2012). According to a former Minister of Natural Resources and Environment, (Khalid, 2008), such problems are widespread throughout the country.

In an interview with Deputy Secretary General (Land and Natural Resources), Suhaimi Mamat (personal communication, March 23, 2018) he said :

“Acquisitions that involve some jointly owned lots often cause problems for landlords. The landlords are in a dilemma and don't know what they should do. They expect that since the government had done wrong, it is the government that should correct the wrong”.

Meanwhile, Aziz (2009) in his study found that the issue was difficult to resolve. In an interview with an employee of the Marang Terengganu Land Office, Ariffin Sidek (personal communication, 2018) added that if the problem is not resolved, it can devolve to the future generations which can eventually rupture family's relationship.

Based on the above findings, the current researchers hereby analyse the problem in order to identify the cause of the problem and propose practical solutions to the problem. This

initiative is in line with recommendations by a number of individuals who had practical experience in handling this kind of acquisition process. For example, Suhaimi Mamat (personal communication, 2018) suggested that there should be an initiative by the authorities to find a long-term solution to the issue.

### **Cause of The Problem**

In the land acquisition processes, practically, the amount of compensation is determined according to the market price and the payment of the compensation will be distributed to all the registered owners in proportion to their ownership of the land as recorded in the document of title (Institute of Land & Survey (INSTUN), 2018). In respect of the compensation, the law provides that the State Authority cannot acquire alienated land except by paying adequate compensation to its owner. The matter is guaranteed in Article 13 (b) (1) of the Federal Constitution which states;

"No law can provide for the forcible taking or use of property without adequate compensation"

The meaning of 'adequate compensation' is interpreted to be the amount according to the market value (Jabatan Ketua Pengarah Tanah dan Galian, n.d.).

The problem that often occurs in the case of part-acquisition of jointly-owned land (JOL) is when JOL has been partitioned between the owners under an agreement. Under the agreement, every registered owner of the land has been apportioned with a specific demarcated part of the land (the assigned share). This practice has been preferred by the owners since they can enjoy the respective part of the land exclusively (Taha, 2016) and can avoid the cost of subdividing the land which is regarded as relatively high (Berita Harian, 2013). In such a practice, usually, the lands are divided by using boundary signs such as fences, trees, wells, and the like to show their respective ownership (U.A. Aziz, n.d.). Generally, most of the agreements are done orally (Suman, 2012). Researchers anticipate this practice to become prevalent in the future due to the rising cost of sub-division coupled with the inheritance of jointly-owned lands by a large number of heirs (Taha, 2016). Irrespective of the agreement, from a legal point of view (*de jure*), each owner still has a right to every inch of the land.

An interview with a former Assistant District Officer in several Land Offices in Selangor Under the Malaysian National Land Code, this practice of informal sub-division of lands is not recognized by the law, thus cannot be taken into account by the Land Administrators. Accordingly, since there is no sub-division under Section 140 of the National Land Code 1965 (NLC) has been made, the Land Administrator will effect the payments to every registered owner whose names appear in the Document of Title (Suman, personal communication, May 13, 2018). The Land Acquisition Manual issued by the Department of the Director-General of Lands and Mines (JKPTG) states:

"The practice of compensating only the effected owners (based on informal subdivision) of the areas involved in the acquisition is incorrect, violates the provisions and raises legal problems. Paragraph 343 (1) (b) of NLC has provided that as long as the land is jointly owned then each owner is entitled to jointly own and enjoy the whole of the land" (Citation Department, n.d).

Based on the above position of law, the compensation amount is distributed according to the shares in the Issue Document of Title (IDT). For example, in an acquisition process which

involves a portion of land jointly owned by A, B, C and D with each owns  $\frac{1}{4}$  shares. If the acquisition only involves the part of the land allocated to A based on informal subdivision, B, C, and D will also entitle to the compensation according to the rate of the shares they own. In addition, the names A, B, C, and D together with their respective share will remain in the IDT issued thereafter in accordance with the provisions of Section 26 of the Land Acquisition Act 1960 (Jabatan Ketua Pengarah Tanah dan Galian, n.d.).

This issue can be seen clearly in the case of the acquisition of a piece of land for the purpose of the construction of Mass Rapid Transit (MRT) of the Klang Valley Sungai Buloh-Kajang line (Mamat & personal communication, 2018). The facts mentioned that the land was owned by several owners which had been subdivided by a mutual agreement. The acquisition made by the government only involved part of the land but the compensation award was handed over by the Land Administrator to all the registered names in the IDT. There were owners, whose shares were not affected by the acquisition and had also been given the compensation money, who refused to do away with their original informal boundaries. This situation caused a dispute among the owners to the extent that some of them wanted to demolish the existing madrasah on the land. In order to solve the problem, the Federal Village Security and Development Committee (JKKKP) which represents the owners appealed to the authorities to pay compensation only to the affected registered owners based on the informal subdivision. JKKKP is of the opinion that compensation based on the concept of undivided shares does not do justice to some owners. JKKKP also believes it is time for the authorities concerned to seriously consider the proposal otherwise it will bring more problems to the owners of land who are mainly Malay ethnic in the future.

However, in a reply letter to the Chairman of JKKKP, the Director of JKPTG explained;

- a. The action taken by the Registrar of the Land Office to distribute the compensation to all registered owners is in line with the provision of section 343 (1) (b) of NCL
- b. that the informal verbal sub-division among owners does not valid under the law.

In another incident in the district of Marang in the State of Terengganu, a dispute happened between the owners due to the same problem where the affected owners under an informal subdivision were not satisfied with the compensation paid to other owners whose portions of land under the informal subdivision were not affected. The conflict began around the 80s and has continued for decades up to the current generations. Until this study is conducted, the conflict has yet to show signs of ending (Sidek, personal communication, June 16, 2018).

#### *Factors of Dissatisfaction*

Among the obvious reasons for the dissatisfaction is that the owners whose assigned share has been acquired by the government felt that they are entitled to the compensation in full (Mamat, 2021). Dissatisfaction becomes more obvious if the compensation received by the non-affected owners is more due to greater ownership of the land (Sidek & personal communication, 2018).

Undoubtedly, from a legal point of view, the affected owner still has the right to the remaining part of the land proportionate to his shares as recorded in the IDT issued after the acquisition. The question is, how can the affected owners enjoy their right over the land beyond the assigned shares, for the non-affected owners will refuse to modify the assigned boundaries particularly when they had built residential houses or planted crops on the land. In the above-cited Kampung Batu case, the owner of the unaffected part refused to move as there was a madrasah (religious school) on the assigned land. If reallocation or adjustment is done to the

earlier agreed delineation of the land, the exercise will cause the position of the houses and madrasah to be changed and this would cause hardship and costs to the concerned owners. Based on the above exposition, it shows that the current practice of compensation paid to the owners of the acquired land has caused some difficulties to the affected owners. On the other hand, it benefits the non-affected owners who receive part of the compensation while maintaining their assigned shares. However, the applied practice of payment has made the acquisition process becomes simpler and easier on the part of the government since the practice has the apparent basis of law and absolves the government of the related issues that arise between landowners.

#### *Part-Acquisition of Jointly-Owned Land from The Perspective of Al-Siyasah Al-Syar'iyah*

Based on the above discussion, the question arises as to the extent to which the practice of the current compensation payment meets the requirements of Islamic administration. In resolving this issue, it is necessary to first understand the concept of al-Siyasah al-Syar'iyah. In its terminology term, Ibn al-Qayyim defines al-Siyasah al-Syar'iyah as actions that can lead people towards *maṣlahah* (goodness) and prevent them from *mafsadah* (harm) even though the practice is not specifically stated by the Prophet SAW and the revelation of Allah SWT ('Adnan, 2008). According to 'Abdul Wahhāb Khalāf, al-Siyāsah al-Syar'iyah is the administrative rules of an Islamic state which consists of laws and systems that are in line with the principles of Islam although there is no specific evidence sanctioning them (Al-Turkumani, 1984). Based on the above definitions, it can be concluded that al-Siyāsah al-Syar'iyah refers to the practices and actions of the Islamic government that are not contrary to the Quran and Sunnah with the aim of bringing good to the government and the people.

The jurisdiction of the government to do good deeds under the policy al-Siyāsah al-Syar'iyah is very wide. It covers two main domains of things namely; the things that have been legalized in the Quran and Sunnah as well as the things that have not been clearly legalized by the two sources of Islamic Law (Al-Syarif, 2013).

In Islam, the basis for the government in exercising its power is based on the jurisprudence maxim, namely; التصرف على الرعية منوط بالمصلحة which means "all actions in managing the affairs of subordinates are subject to *maṣlahah*". This maxim constitutes the cardinal principle in the implementation of the policy of al-Siyāsah al-Syar'iyah (Al-Nadawi, 1983). Hence, it is the responsibility of the government authorities to ensure that every public policy they made meets the demands of *maṣlahah* which is to bring benefits to all parties not only to the authorities but also to the people below (Al-Badawi, 2000). In this regard, al-Nawawi explained that rulers are given the responsibility to be fair and to look after the welfare of their subordinates in their lives whether it is the life of this world or the hereafter. (Al-Nawawi, 1972)

Therefore, according to the policy of al-Siyasah al-Syar'iyah, the resulting benefits from the administration of the government should not only go to the government alone but also the people as well as long as the things are within the scope allowed by Syarak (Al-Ghazali, 1937; Al-Qardawi, 1998; Al-Zarqa', 1998). This is in line with the statement of Ibn Taymiyyah that al-Siyāsah al-Syar'iyah reflects the good administration of a government that brings good to the government and the people (Al-Badawi, 2000). Therefore, an action that only serves the government but leaves the registered owners in a land acquisition process in a difficult situation is not in line with the concept of al-Siyāsah al-Syar'iyah.

In the context of land administration, al-Siyasah al-Syar'iyah offers a broad jurisdiction to the government to act as long as it is not contrary to the principles of Islamic law and that the

benefits of administrative actions or practices will go back to the government as well as the people. Apparently, the implementation of this conception is subjective as well as dynamic in that it depends on the judgment and discretion of the government to consider what constitutes goodness or utility to the people.

In the context of land acquisition specifically, the Muslim jurists set out the principle that acquisition for the public interest is permissible provided the landowner is given appropriate compensation (A Group of Muslim Scholars, 2006; Abduh & Yahya, n.d.; Al-Turkumani, 1984; Qal'aji, 1988). In this connection, *Majallah al Ahkam al 'Adliyyah* (n.d.) mentions;

“In the time of necessity, by the command of the Sultan, a man's *mulk* property can be taken for its value, and joined to the road. But until the price is paid his *mulk* cannot be taken out of his hand”.

The meaning of the appropriate compensation must be determined by a qualified assessor (A Group of Muslim Scholar in Khilafah 'Uthmaniyyah, n.d.; A Group of Muslim Scholars, 2006; Abduh & Yahya, n.d.).

Therefore, it is clear that al-Siyāsah al-Syar'iyah allows the government to acquire land provided it is accompanied by fair compensation. The question is, is the current method of distribution of compensation in the acquisition of the jointly-owned land fair? Based on the above discussion, the researchers are of the view that the method of distribution needs to be improved so that the practice of the land authorities will be more in line with the concepts and objectives of al-Siyāsah al-Syar'iyah.

#### *Proposed Solutions of Compensation Distribution Based on Siyāsah Syar'iyah Policy*

In this study, researchers are of the view that there are two parties that need to play a role in addressing this issue, namely; the authorities and the landowners.

##### a. Role of the Authority

Regarding the payment of the distribution, the paper suggests that the government make improvements in two aspects, namely; in the giving to the co-owners the option to determine the method of distribution of compensation whether compensation is to be paid only to the affected owners of the acquired assigned shares or to all co-owners as well as facilitating the mechanism of transfer of shares between the co-owners.

##### i) Giving the option to the unaffected co-owners whether to receive compensation or not

The researchers are of the opinion that there is a need to make amendments to the JKPTG circular which directs that compensation shall be given to all co-owners regardless of their agreement on the division of the land. In this respect, it is suggested that the Registrar/Land Administrator provides an option to the owners regarding the payment of the compensation whether;

- a. the compensation is paid to all co-owners or,
- b. the compensation is paid only to the affected owners.

To enable the method to be implemented, new provisions need to be inserted in the Land Acquisition Act 1960.

The above-proposed method of payment has its basis under the rules of equity. The Malaysian court has recognized subdivision if there was an agreement between the owners (Suman, 2012) based on equity rights (Sinha & Dheeraj, n.d.) in order to ensure justice done to every owner. Equity means justice and fairness. It is used in judicial decision making taking

into account the right of justice in interpreting the statute of law. (Sathiaseelan, 2006). Teoh Keang Sood while commenting on the case of *Murugappa Chettiar v. Chinniah* [1962] advanced the following comments:

*"Where the allotment of different portions of the land has been agreed to by each of the co-proprietors themselves for his exclusive possession and enjoyment and the agreed division has been acted upon by one of them to his detriment, such division is binding between the co-proprietors in equity". (Teo & Khaw, 1995)*

In addition, Teo Keang Sood made the following comments while addressing the case of *G.P. De Silva & Anor v. Chua Yam Thong* [1962]:

*"A purchaser who buys an undivided share of a co-proprietor on the basis of the existing division of the land as agreed to by each of the co-proprietors themselves is bound by such a division in equity". (Teo & Khaw, 1995)*

In this case, YA Suffian (a High Court Judge at the time) had ruled that:

*"The law on the first issue, as I understand it from section 44 (i) of the Land Code (Chapter 138), is that the co-proprietors are entitled to the land in undivided shares in the proportions specified on the register. As land includes "things attached to the earth", section 2, this means that they are also entitled to the fruits of the houses built by the defendant, in undivided shares in the proportion specified on the register. But if in fact, it is true, as the defendant alleges, that when he bought the land in 1951 the then co-proprietors agreed that he should get Portion A, then the other co-proprietors are no longer entitled to any interest in Portion A or in any of the houses built on it" (Teo & Khaw, 1995)*

The same issue was also deliberated in the case of *Yeoh Moi & Anor v. Lau Choo Yeong & Others* [2011] The plaintiffs in the case applied to the court for an order that the first and the third defendants demolish their houses that were built on the undivided shares of a piece of co-owned land. They argued that since all the "co-proprietors" of the Property were "entitled to possession and enjoyment of the whole" as long as the Property was not subdivided, then since the Property was not divided the Plaintiffs were entitled to enjoy and own the whole Property, including the part on which the 8 houses were erected. The Muar High court judge, Umi Kalthum binti Abd Majid observed that the argument of the Plaintiffs' counsel is, in principle, admissible if the Property does not have any building on it or any valuable crops and that all the owners have not "divided" the property; physically or not, and have not developed the land. But in this case the property has already been informally "divided" by one Lim Keng San to his 5 children and they have already sold their shares to the First Defendant and Third Defendants, In my opinion with such "division" physical or not, by Lim Keng San to his five children, who later sold their shares, the Plaintiffs should accept the fact that the shares of the Property purchased by the Defendants together the 8 houses were also already been "divided" as if the Property was already been partitioned under Chapter 2, Part Nine, NLC. Therefore, the court rejected the plaintiffs' application (Mamat, 2021).

Based on the above discussion, it can be argued that the application of Section 343 (1) (b) NCL which provides that each owner is entitled to the entire land is confined to the situation where there is no mutual consent or agreement even verbally. If a mutual agreement has

been reached, then based on a number of case laws, the right to the specific portions can be recognized under equity. In the case of *G.P. De Silva & Others v. Thong* [1962], the defendant had successfully proved the existence of an oral agreement in 1951 between him and the other co-owners regarding subdivision of their jointly-owned land. Accordingly, Judge Suffian ruled that the plaintiff was not entitled to claim any profit from the development proceeds undertaken by the defendant on top of the portion that had been agreed to be allocated to him through the oral agreement (Suman, 2012). The court's decisions have opened up a legal basis for the co-owners of such lands to establish the existence of an agreement between them whereby each of them has the exclusive right to enjoy their respective portions of land as agreed under the agreement.

Based on the above court decisions, it is timely for JKPTG to make a new ruling allowing compensation to be paid solely to the affected owners.

ii) Facilitating the mechanism of transfer of shares between co-owners

To affect the above-proposed solution that compensation be paid only to the affected owners, the owner of the affected shares who have received the compensation shall transfer his registered shares in the document of title to the other co-owners. Briefly, the proposed procedure is as follows;

1. An agreement is reached whereby the unaffected owner agrees to surrender compensation in favour of the affected owner whose portion has been acquired by the government.
2. A survey by licensed surveyor is made to ascertain the acquired portion. Based on the survey the acquired areas, as well as the amount of compensation eligible to be received by the owner, can be known.
3. After the Issue Document of Title has been issued by the Land administrator/Land Office, the affected owner shall transfer his ownership of shares that is equivalent to the acquired shares to the other co-owners using Form 14A as required under Sections 215, 217, and 218 of NLC.

Through the procedures proposed above, it is believed that the distribution of compensation can be done better and will indirectly benefit all the owners involved.

b. The Role of Owners

In addition to the authority's roles, there are several initiatives proposed to be worked out by the co-owners in order to assure the smooth execution of the process in resolving the issue of compensation. Among the initiatives are;

i) Executing written agreement among co-owners

This step is necessary given that most of the agreed sub-divisions are done through verbal agreement and understanding only (Suman, 2012). Concerned that such a method could pose problems that since the agreement was unwritten it could probably be ignored or disputed by subsequent owners. Thus, a written agreement is essential.

Salleh Buang, expert in Malaysian Torrens System (personal communication, 2018), Suman (personal communication, 2018) and Suhaimi Mamat (2021), the written agreement can be enforced and has been recognised by the court. Based on case law, agreements between co-owners can be accepted and recognized in court based on equity rights even if made orally (Buang, 1993). If a verbal agreement or agreement is acceptable, then of course a written agreement is more cogent and advisable (Teo & Khaw, 1995)

In preparing the written agreement, the following issues should be addressed and clarified in the agreement;

a. in the case where the compensation is received by all owners; in such a case, the boundaries of each portion that were previously agreed shall be re-demarcated so that the portions of each subdivision will be adjusted accordingly proportionate to their original holding of shares recorded in the IDT.

b. in the case where compensation is paid to the affected owner only;

The owner who receives the compensation has to transfer the shares he owns to other owners who do not receive compensation. The shares of the other owners will be adjusted on the basis the acquired portion shall be considered as belonging to the paid owner only.

Under the law, the agreement is an instrument that protects the rights and obligations of each owner. If one of them fails to comply with the terms and clauses of the agreement, then legal action can be taken against him.

Nevertheless, the question arises as to the extent to which such an agreement can be enforced. According to Salleh Suman, the Registrar/land administrators will act in accordance with the Land Acquisition Manual issued by JKPTG; that the compensation is to be made to all owners. Therefore, in order to enforce the agreement, it needs to be brought to Court and usually, the Court will make a decision based on the terms of the agreement that has been agreed upon (Suman, personal communication, 2018). To ensure that the agreement can be accepted as evidence in Court, then it must be stamped as required in provisions of Section 52 of the Stamp Act 1949 (Husin, 2019).

In fact, taking a case to court is not an easy task because it not only takes time and cost but it can also cause dispute and sore relationship among the owners. It is more unfortunate if the owners are close family members whose actions can damage the family relationship that has been established for so long. Therefore, the method that is seen as the most practical so far is through the efforts of the authorities by improving the method of acquisition as well as facilitating the transfer of shares between owners. Such measures can help owners solve problems easily, quickly, and cheaply.

ii) Practicing Islamic Principles in solving problems

To assure smooth running of the proposed scheme of the arrangement, all owners are to practice religiously the prescribed Islamic partnership etiquettes, particularly the principles of facilitating the affairs of partners. This practice is highly recommended by the Prophet SAW through his words;

فأما من ابتغى وجه الله وأطاع الإمام وأنفق الكريمة ويأسر الشريك واجتنب الفساد كان نومه ونهيه أجرا كله (Malik, 2004) .....

Meaning:

"..... As for the person who seeks the pleasure of Allah SWT, obeys the leader, contributes from the good property, facilitates the affairs of his partner and stays away from something destructive, then his sleeping and caring are fully rewarded ....."

The above hadith explains how great the advantage of a person who makes ease the affairs of his partners entitling him the rewards from Allah SWT. In this regard, the owners whose portions of land were acquired may expect a tolerant attitude from the other owners so that an amicable and win-win solution could be achieved. At this point, all owners need to be open-minded and willing to listen to the views of their partners in finding the best method to solve the problems faced.

Apart from that, the owners also are also advised to avoid unnecessary quarrels among each other. This praiseworthy attitude was shown exemplarily by the Prophet SAW (Al-San'ani,

n.d.). Al-Sā'ib al Makhzūmī narrated that the Prophet SAW used to be his partner during the pre-Islamic era and he was his best partner who never quarrelled with him (Al-Nawawi). Discussions to resolve land acquisition issues require a lot of patience because it involves the most valuable property as well as emotional aspects of the parties. Any quarrel if occurs would make the problem more difficult to resolve, it can even affect the existing good relationship between them.

The attitude of making ease the affairs of partners and trying to avoid disputes will benefit all parties involved, in addition to instilling respect and maintaining a harmonious relationship between the co-owners.

### Conclusion

The above discussion clearly shows some of the conflicts that occur in the distribution of compensation for properties that have many owners. This problem is seen to have dragged on for a long time and is estimated to increase due to the aggressive acquisition of co-proprietorship land for development purposes by the authorities. Therefore, it is believed that it is timely for the government to consider the problem more seriously. The study finds that the law provisions relating to co-proprietorship should be amended to resolve the problems. This step taken is in line with the policy of *al-Siyāsah al-Syar'iyah*, that the administration of the government should resolve all issues arising from the rigidity of the provisions of the law.

Therefore, two methods of improvement were suggested, first; provide co-owners the option to determine the method of distribution of compensation between them, and second; give the option to the unaffected co-owners whether to receive compensation or not. At the same time, all co-owners need to have a written agreement between them to ensure they know all of their rights. In addition, each co-proprietor must apply full of Islamic ethics while handling their case. It is hoped that the authorities pay attention to the proposal of this paper so that continuous improvements can be made to the law and the land administration system. Failure to address the problems efficiently will not only cause problems among the owners but will also have negative repercussions on the development of the country in the long run.

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