

## Istibdal Method for Sustainable Development: Analyses of Jurisprudence and Implementation on Waqf Properties

Kaedah Istibdal untuk Pembangunan Lestari: Analisis Fiqh dan Pelaksanaan ke atas Harta Wakaf

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### ABSTRACT

*Istibdal is a method for waqf properties development intended to solve underdevelopment problems of these properties. This paper intends to present an analysis of the relevant jurisprudence and how istibdal can be implemented specifically in waqf properties scenarios. This study used primary data sources through interviews to elicit information that shaped the implementation practice conducted. A literature review was also done to aid researchers to obtain secondary data on the waqf properties issues. Several law cases were reviewed to highlight important implementation issues addressed using istibdal method. This study shows how istibdal method is an innovation that offers a dynamic and comprehensive mechanism which facilitates the development of waqf properties in Malaysia and tailored with SDG11. It also shows how istibdal method can facilitate the development of waqf properties in Malaysia while achieving SDG goals. In line with the views of the majority sect in istibdal concept, it is a medium to sustain the waqf properties and lives. It turns out that Islamic Law has provided alternatives to address the problem of waqf property which is not liable to be converted to another property with a high prospect for development and public interests. However, it is done with integrity and to prevent conflicts and violations of waqf land. Thus, a law replaces the main principles of property law of conservation and sustainability of the assets. With the implementation of istibdal, these lands and other waqf properties have been successfully utilized, benefiting society.*

*Keywords: Istibdal; Waqf; Land; Islamic councils; Law*

### ABSTRAK

*Istibdal ialah kaedah pembangunan harta wakaf bertujuan untuk menyelesaikan masalah pada harta yang tidak dapat dibangunkan. Kertas kerja ini berhasrat untuk membentangkan analisis fiqh yang berkaitan dan bagaimana istibdal boleh dilaksanakan secara khusus dalam senario harta wakaf. Kajian ini menggunakan sumber data primer melalui temu bual untuk mendapatkan maklumat yang membentuk amalan pelaksanaan yang dijalankan. Kajian literatur juga dilakukan untuk membantu penyelidik mendapatkan data sekunder mengenai isu harta wakaf. Beberapa kes undang-undang telah dikaji semula untuk mengetengahkan isu pelaksanaan penting yang ditangani menggunakan kaedah istibdal. Kajian ini menunjukkan bagaimana kaedah istibdal merupakan satu inovasi yang menawarkan mekanisme dinamik dan komprehensif yang memudahkan pembangunan harta wakaf di Malaysia dan disesuaikan dengan SDG11. Ia juga menunjukkan bagaimana kaedah istibdal dapat memudahkan pembangunan harta wakaf di Malaysia di samping mencapai matlamat SDG. Selaras dengan pandangan majoriti mazhab dalam konsep istibdal,*

ia adalah medium untuk mengekalkan harta dan nyawa wakaf. Ternyata Undang-undang Islam telah menyediakan alternatif untuk menangani masalah harta wakaf yang tidak boleh ditukar kepada harta lain yang mempunyai prospek pembangunan dan kepentingan awam yang tinggi. Namun, ia dilakukan dengan penuh integriti dan bagi mengelakkan konflik dan pencabulan tanah wakaf. Oleh itu, undang-undang menggantikan prinsip utama undang-undang harta pemuliharaan dan kemampuan aset. Dengan terlaksananya istibdal, tanah-tanah dan harta wakaf yang lain telah berjaya dimanfaatkan dan memberi manfaat kepada masyarakat.

Kata kunci: Istibdal; Wakaf; Tanah; Majlis Agama Islam Negeri; Undang-undang

## INTRODUCTION

Waqf land is a form of waqf property which contributes towards socioeconomic development in many Muslim countries (Daud 2018). In Malaysia, waqf land area constitutes more than the land area of some of the world cities. According to Belloa et al. (2020) despite the relatively large waqf land area and properties in Malaysia, i.e., 30,888 hectares or 308.88km<sup>2</sup>, only two percent of the total area has been redeveloped. Among the reasons for the underdevelopment of waqf land include inefficient management, legal issues, development issues and lack of financing of the awqaf (Isa et al. 2011; Ihsan & Ibrahim 2011; Ahmad & Muhamed 2011; Chowdhury et al. 2012). Islam provides a practical solution to counter this problem through the implementation of *istibdal*. *Istibdal* refers to the method of replacing a property with other property or endowment funds of the same or higher value whether through replacement, purchase, sale or any other means in accordance with Islamic law (Ilyas 2016). Implementation of *istibdal* on *waqf* land is important as it is a mechanism to resolve the various conflicts that hinder the development of *waqf* lands.

In Malaysia, the matters relating to the property aspects of *waqf* is a property trust listed under the Ninth Schedule, List II, State List. Matters relating to *waqf* are provided in the enactment of the respective states (Article 74 (1) (2), Federal Constitution of Malaysia). All the *waqf* land is administered and managed by the State Islamic Religious Councils (SIRCs) whether movable or immovable (Sayin 1998). *Waqf* lands are registered to the SIRCs vested as sole trustee of *waqf* property (Johor Islamic Religious Administration (No.16/2003), Sek.89; Wakaf Rules, 1983, Johore, Sek.15 (2); Administration of Islamic Law Enactment). Public need to trust other parties to manage the property as one form of trust that has been practiced by the Islamic society nowadays (Said et al. 2019). SDG 11, *istibdal* implementation is expected to play a key role in facilitating cities and human settlements to be inclusive, safe,

resilient and sustainable. This is because *istibdal* implementation would help alleviate the problems of under-development of land, hence paving the way for more sustainable use of land resources. Despite the advantages of *istibdal* method in resolving land use issues, the method has not been widely implemented, particularly in Malaysia. The change in strategy was often necessitated due to changed socio-economic institutions in waqf lands but his fact did not bring about a change in the policy (Hasan 1979).

A possible hindrance to the successful implementation of *istibdal* is the lack of understanding on the jurisprudence and implementation process. Despite various fatwas available, SIRCs role in facilitating implementation of *istibdal* is still limited. Thus, studies on the generation of *waqf* property particularly waqf land is highly warranted. In particular, better understanding of *istibdal* could provide an injection of enthusiasm to SIRCs to play a more proactive role in the development of *waqf* land in Malaysia. (Sabri & Mahamood 2019). Therefore, the aim of this study is to present an analysis of the jurisprudence, *fatwas* and implementation of *istibdal* in Malaysia.

## LITERATURE REVIEW OR RESEARCH BACKGROUND

### THE CONCEPT OF WAQF

*Waqf* is a mechanism provided by Islam in the distribution of wealth to ensure economic development is enjoyed together by society (Ibrahim & Ibrahim 2018). It is a very important system in life, as it is a great source of financing in line with the history of Islamic civilization (Othman 2013). Therefore, it is necessary to make sure that the property is fully used and properly managed by the Malaysian Islamic councils (Daud 2019).

In language, the word *waqf* gives the meaning of a property given to public use as a donation or for requirements related to the religion of Islam (*Dewan Dictionary Fourth Edition 2007*). The word comes from Arabic '*waqf*'. It is a verb *Masdar* '*waqafa*' which has the same meaning with the word '*habasa*' (Sabiq 1971; Abu Zahrah 1971; Mughniyyah n.d.) which detained, to prevent or stop. In terminology term, it is '*mawquf*', '*mahbus*', '*muhabbas*' or '*low*' (Gibb & Kramers 1961). This word used to be popular in the sense of *mawquf* is called '*al-mawquf*' meaning donated things or property (Al-Zuhayli 1985). *Waqf* is also known as a *sadaqah jariah* or called *al-Sadaqat al-Muharramat* (Al-Syawkani n.d.; Sabiq 1992; Al-Syirbini 1994). When the word "*al-Waqf*" associated with assets such as land, animals and other, means freezing the property or a specific interest (Ibn Manzur 1990). The authorised organizations in the waqf sector, namely, State Islamic Religious Councils, Waqf Department, Zakat and Hajj Department (JAWHAR) and Waqf Foundation of Malaysia (YWM), use the waqf approach to encourage Muslims to make endowments (Zakaria et al. 2017). The *waqf* in Malaysia are categorised according to the *waqif*'s intentions. If the *waqif* specifically states the intention of *waqf*, then it is called *waqf khas* (specific *waqf*). But if the *waqif* does not specify the purpose of *waqf*, then it is called as *waqf am* (general *waqf*) (Abdullah 2009; Daud 2018).

#### ISTIBDAL CONCEPT AND WAQF DEVELOPMENT

Most states in Malaysia do not define *waqf* in detail except for a few states, namely the Federal Territory, Malacca, Selangor, Johor and Negeri Sembilan. Most of the definitions provided in the enactment explain briefly about *waqf* such as general and specific *waqf*. These involve all types of *waqf* assets which include designated land as immovable property (Administration of Islamic Religious Affairs Enactment, 2001, Terengganu (No.2 of 2001); Council of the Religion of Islam and Malay Custom Enactment, 1994, Kelantan (No.4 of 1994); Administration of Islamic Law Enactment, 1992, Perak (No.2 of 1992); Administration of Islamic Law Enactment, 2004, Penang (No.4 of 2004); Administration of Islamic Law Enactment, 1991, Pahang (No.3 of 1991)). According to the Enactment No. 15 of 2015, *Wakaf* (State Of Selangor) Section 1, *waqf* means the surrender of any property that can

be enjoyed benefits and the benefits are for charitable purposes either general or specific *waqf* accordance with Islamic law, but not defined under the Trustee Act 1949 [Act 208] (Administration of Islamic Religious Affairs Enactment, 2001, Terengganu (No.2 of 2001); Council of the Religion of Islam and Malay Custom Enactment, 1994, Kelantan (No.4 of 1994); Administration of Islamic Law Enactment, 1992, Perak (No.2 of 1992); Administration of Islamic Law Enactment, 2004, Penang (No.4 of 2004); Administration of Islamic Law Enactment, 1991, Pahang (No.3 of 1991); Administration of Islamic Law Enactment, 2003, Johor (No.16 of 2003) in clause 2). Thus, *waqf* is basically properties that are given to Malaysian Islamic Councils as trustee in managing *waqf* properties. However, according to Abas et al. (2018) found that the inefficiency of *waqf* institutions in managing its *waqf* property. As we know that, *waqf* is Islamic properties and act as an economic instrument that help public and beneficiaries. *Waqf* is an Islamic micro finance that can act as an indicator of socioeconomic well-being. It is essentially a measure of national income, as these instruments can act to generate economic of a country. Nevertheless, its presence of welfare for welfare-enhancing economic, it benefits of ecosystem services.

*Istibdal* term means selling less or any missing entry results of *waqf* property and buy what is better than and made in lieu (Muhammad 1985). According to Enactment No. 15 of 2015, *Wakaf* (State of Selangor) Enactment 2015 (Part 2), "*Istibdal*" means replacing a *mawquf* with another property or money having the same value as or higher value than the *mawquf*, by exchanging, purchasing, selling or any other manner in accordance with Hukum Syarak". Generally, *istibdal* is to replace a property with other property or endowment funds of the same or higher value whether through replacement, purchase, sale or any other means in accordance with Islamic law (Ilyas 2016).

Section 7 of *Wakaf* (State of Selangor) Enactment 2015 shows "the power of Majlis to *Istibdal*". The Majlis may *istibdal* any *mawquf* subject to Section 41 where the implementation *istibdal* policy covered under *Wakaf* Enactment 2015 (State of Selangor) No. 15 (Malaysia) states that the Council may perform *istibdal* act towards any *mawquf* (*waqf* property) in the following circumstances:

- (1) Subject to the decision of the Fatwa Committee, the Majlis may *istibdal* any *mawquf* in the following circumstances:

- (a) if any of the conditions of wakaf is inconsistent with any written law;
  - (b) if the mawquf is taken by any authority in accordance with any written law;
  - (c) if the usage of mawquf fails to provide benefit or interest as required by the waqif;
  - (d) if the usage of mawquf fails to fulfil the purpose of wakaf;
  - (e) if any condition prescribed by the waqif cannot be executed by reason of lapse of time or changes in circumstances;
  - (f) if the Majlis wants to *istibdal* a mosque or site of a mosque which is a mawquf;
  - (g) if any of the conditions prescribed by the waqif cannot be executed and the Majlis intends to execute the wakaf in the manner as close as possible with the conditions prescribed by the waqif; or
  - (h) in other circumstances as the Majlis deems necessary.
- (2) The value of mawquf acquired by way of *istibdal* shall not be less than the current value of the original mawquf.
- (3) The Majlis shall *istibdal* any mawquf whether wholly or partly within the reasonable period.

The development of *istibdal* policy is a transformation or a change from a situation that is not or less successful to the more successful situation or a bad situation into a better situation. According to Dewan Dictionary (2007), development is the process of development, progress and development of things. Thus, development is a productive process, which resulted from the development of a useful means of *waqf* land or property development activities to fulfil endowment purposes in various dimensions (Waluya 2018).

The purpose of land development in *waqf* is to worship Allah Al-Mighty, in search of His blessings in utilising *waqf* land through physical and spiritual transformation. Therefore, the proactive development of endowment land has associated with the *ta'abbud* of people to Allah Al-Mighty. Example of specific *waqf* properties such as land donated for specific purposes such as mosques, schools and others, the intention of *waqif* must be quickly fulfilled so that the practice continues rewards from Allah Al-Mighty to the *waqif*. While the general *waqf* property, the purpose of development is up to the general benefit. For example, the land could be leased out and the rental revenue can be part of the endowment. It can also be used to build something that can be used by the public such as hospitals, clinics, mosques, rest areas, public toilets, wells, irrigation canals, libraries, houses for orphanages and others as long as they can be used for public welfare (Jamari & Islam 2019; Daud 2019).

#### IMPLEMENTATION USING *ISTIBDAL*

#### METHODS BY JURISTS (FUQAHA)

A few rules as guidelines for implementing *istibdal* are:

##### 1. Terms of *Waqf* Lands Replacement

*Waqf* land that is converted based on the *Istibdal* concept should be replaced in its original form. The question of succession is not clearly specified by the jurists whether in the form of money (*nuqud*) or land (*al-Aqar*). If replacement is in monetary form thus it is included in the purpose of buying and selling it for the money to buy another land (*ibdal*). Conversely, if replacing it with another land, it involves exchange or replacement. This is because the original *waqf* land has exchanged to another land (*istibdal*) (Salleh 2015).

In discussing the status of the land taken by the government, the jurists required that the takeover should be paid with compensation otherwise known as *al-Ta'wid*. Compensation and reimbursement are usually done either with money compensation or with the same type (land with land). The replacement form is very important to be discussed in the context of replacing different *waqf* land with land owned by another individual. It takes into account the benefit and the current situation today. Assessment and consideration should be made in determining whether compensation in money is more important and relevant than replacing the land with land or vice versa (Asni & Sulong 2017).

Among the scholars of *fiqh*, Ibn 'Abidin had discussed this matter to provide sale or exchange of *waqf* land cannot be exchanged for money for fear that it will be abused by certain parties (Ibn Abidin 1979). These are conditions that are associated with other conditions that the *waqf* asset should be replaced with the same type. If the *waqif* donates a house, then compensation cannot be done with a land form. Referring to this condition, the replacement of land with the compensation money is not encouraging, because different types, however, if the compensation money used to buy '*ayn/waqf*' asset of the same nature can be considered. However, some scholars require that the property can be replaced with the money provided that the person doing the conversion or replacement is recognized as an honest and trustworthy man (Zuhdi u.d.; Sabiq 1992; Ibn Qudamah 1999; Al-Zuhayli 1987; Tarablas u.d.).

Al-Kubaysi in his book emphasises that *waqf* lands to be *istibdal* cannot be replaced with money

but replaced with land (Hafiz 1997; Al-Kubaysi 1977). However, he said the conditions stated can be changed and amended to suit the current state of society today in order to keep the continuity of *waqf* property, thus ensuring the wellbeing of the endowed (Al-Kubaysi 1977).

## 2. Istibdal Approval Qualification

Detailed aspects of *istibdal* implementation should involve views from people with authority (Ibn al-Humam 1977; Ahmad 1986). This is because the *istibdal* concept involves the *ijtihadiyyah* discussion. Managing the succession of *waqf* land is the responsibility of the government or courts to look to the general wellbeing and should not be denied unless there are reasons that led to *mudorat* and does not generate revenue either to *waqif* himself or any person receiving the *waqf* benefit (Ahmad 1986; Zakri 2014; Hasbullah et al. 2019). Al-Tarsusi has outlined three main conditions that need to be adopted in implementing the *Istibdal* concept (Abu Zahrah 1971; Zakaria et al 2019).

*Qadi* should make every possible investigation before implementing *istibdal*;

*Qadi* should appoint two fair and honest experts to investigate the proposed *istibdal* whether there is a need for *istibdal* in order to ensure that the implementation actually leads to good purpose or vice versa;

*Qadi* needs to make a report after hearing suggestions from the appointed experts and support the implementation of *istibdal*. Approval from *qadi* depends on the decision of his satisfaction to ensure good *waqf* had made.

In conclusion, the determination whether the succession of money or the land is subject to condition and situation in a country. What is important is the affected *waqf* land replace to another land should be purchased or replaced with other land and the amount of compensation cannot be used or keep on its own (Al-Syirbini 1994). However, if the replacement of the compensation raises many barriers and constraints due to factors such as lack of suitable land, higher cost or difficult to find replacement land, in this case, the exchange of land with land is preferred. In fact, in certain circumstances obliged by law, a number of *Fiqh* methods states that it is not mandatory in the first place but if it does not achieve the desired goal then it becomes compulsory (Al-Asyqar 2001; Sabri & Mahamood 2020).

### ISLAMIC JURISPRUDENCE PRINCIPLES IN ISTIBDAL

Principles of *Fiqh* Rules such as “*al-darar*

*yuzal*” (something harmful should be removed) together with some other methods such as “*al-hajah tunazzal manzilah al-darurah*” (a requirement is regarded as harmful) (Al-Suyuti 1998; Ibn Nujaym 1980) can be used to analyze the current state regulations. The views of legal Islamic scholars who support the implementation of *istibdal* to be adopted can overcome the obstacles that occur during the development of *waqf* in the country (Noor et al. 2017).

In addition, the flexible characteristics or “*murunah*” included in Islamic law itself support the implementation of *istibdal*. The feature emphasised in Islamic law is applicable in any given time. Thus, if the law is too rigid, meaning that it cannot respond to current problems, thus it is contradicted with the criteria of “*murunah*” described herein. Examples mentioned above are issues relating to a land acquisition made by the State Authority or Pihak Berkuasa Negeri (PBN) based on the Land Acquisition Act, 1960 (Act 486). In this Act, PBN has the authority to take back any land if it feels that it is useful for public interest and economic development (Mohamad et al. 2020). 1960 Act was subsequently amended by the Land Acquisition (Amendment) Act A999, came into force on 1<sup>st</sup> March 1998 through PU (B) 94/98) which gave greater consideration to the landlords, which will be made in consultation between the landlord and any relevant applicants for the purpose of the proposed acquisition (Abdullah 2017). The owner of the land will be compensated according to the amount deemed appropriate by the PBN. However, when a situation where negotiations for the acquisition failed or no conclusive results achieved within the prescribed times, PBN jurisdiction is to consider the application and make such recommendations that it thinks fit (Section 3A Act A999). To face of these problems if the principle of “not transaction” contained in the original *waqf* is maintained by law, then surely donated property will disappear on its own. Thus, *istibdal* applied in this situation, the property compensation will be used to replace the original *waqf* assets, the *waqf* is going to be realized, although not through the original property as envisioned by *waqif* (Hasbullah et al. 2019).

What is important in *istibdal* issue is the *Qadi*'s involvement in deciding on an *istibdal*'s implementation. In Malaysia, the jurisdiction to decide regarding Islamic law has been submitted to the Mufti. These parties are those who have the authority in considering whether *istibdal* permissible or not. In

fact, the four sects also recognize the involvement of *Qadi* in this matter. Their consideration involves what we call as *ijtihad*, which is based on Islamic authority, the authority associated with Islamic rules, including taking into account the views of other scholars of Islamic law (Amin et al. 2019).

If we look at the implementation of *istibdal*, not all adopt the *Shafi'i* sect of view, they also take the views of the *Hanbali* School, the *Maliki* and *Hanafi*. Thus, the diversity of Islamic legal principles has turned out to support the implementation of *istibdal*. However, what is important is that it should be based on reasonable grounds and in accordance with the conditions that have been raised above.

#### FATWAS RELATED TO *ISTIBDAL* WAQF PROPERTIES IN MALAYSIA

*Muzakarah* Fatwa Committee of the 4th National Council for Islamic Affairs on 13 April 1982 has decided that:

“Changing Endowments (*waqf ibdal*) is meant to change the *waqf* property with other property through the sale or purchase or otherwise for the purpose of *waqf* is required to maintain the property in accordance with the opinion of Imam Abu Hanifah”

This is because the opinion of the *Hanafi* sect has a moderate opinion in providing *istibdal*. It does not strict as *Shafi'i* sect and *Hambali* and it is relevance to practice in Malaysia (Jabatan Kemajuan Islam Malaysia 2015).

*Muzakarah* Fatwa Committee of the 41<sup>st</sup> National Council for Islamic Affairs from 3 to 4 November 1996 had decided that the *waqf istibdal Ihtiyat* is a very good thing to do and should be adopted as the development is progressing at a rapid pace while the *waqf* lands and abandoned site of the old mosque complicated the authorities (JAKIM).

For the purpose of land acquisition by the government which is covered under Section 3 of the Land Acquisition Act 1960 has stated that State Authority (PBN) can take any land needed. The State Economic Planning Unit, or the Committee for the Federal Territory of Kuala Lumpur consider the application referred to in subsection 3(4) on the following aspects:

- (a) public interest;
- (b) the capacity and capability of the applicant to carry out the purpose for which the land is to be acquired;

- (c) the feasibility of the project; and
- (d) the development approval granted to the registered proprietor.

To comply with the provisions of the Act, once again *Muzakarah* Fatwa Committee of the 46<sup>th</sup> National Council for Islamic Affairs on 22 April 1999 has made the decision to hand over part of the law of *waqf* land to the authorities. *Muzakarah* decided that any *waqf* land is taken or transferred to the government, the party must pay compensation according to the value of the land taken or replaced by another land of equal or better value. In addition, the *waqf* land to be developed can be used to exchange of land for the construction of public facilities such as roads, drainage, electricity substation site and others. Similarly, a *waqf* land for specific purposes such as mosques and schools, those who took the land shall be allocated certain parts as a substitute taken by the *waqf* to maintain the current status of the endowment. Although the decision made not by *Muzakarah* committee (binding) agreed on but it is a guide to states in Malaysia, whether to follow the fatwa, issued a fatwa or others for their own state. For example, section 52 (1), Islamic Administration Enactment (Selangor) 2003 does provide for:

“The Fatwa Committee shall adopt any advice and recommendation of the Committee of the National Fatwa Council which affect the acts or practices agreed by the Council of Rulers .....”

Most of *Majlis Agama Islam Negeri* (MAIN) in Malaysia has agreed on *istibdal* concepts and application of *istibdal* in the development of *waqf* land. In the Federal Territory, there is a need to implement *istibdal* which have been decided by the 35<sup>th</sup> Consultative Committee of Islamic Law which was held on 19<sup>th</sup> November 1993. Islamic Law Consultative Committee has agreed to transfer the *istibdal waqf* land from one place to more useful purpose but needs to find equal or greater value of land. This decision is based on fatwa issued by *Sahibus Samahah Dato 'Abdul Kader b. Talib, Mufti of the Federal Territories 1991 - 1996* and the verdict was gazette on February 5, 1994 (JAWI/145: PN (PU2) 530). In Johor, MAIJ (*Majlis Agama Islam Johor*) has empowered the *istibdal waqf* with the approval of the *Waqf* Committee to *istibdal waqf* land according to the conditions approved by the Islamic

law (Rule Endowments Johor 1983, Section 9 (a)).

In Melaka, Melaka Mufti, on behalf of the Malacca *Syariah*, has issued the following fatwa:

*“If the endowment of land is taken back by the PBN for any reason, then the duty is to make sure compensation paid to the Islamic Council, to be replaced by another land as an endowment to maintain and fulfil the requirements of the waqif” (Fatwa was gazette on 2<sup>nd</sup> February 1999 (JAKIM).*

In Kelantan, MAIK meeting *Jamaah* scholars (*Majlis Agama Islam Kelantan*) which was held on 8 Rabiulawal 1416 (1995) has produced a fatwa in respect of the replacement and disposal of assets endowment (*Jamaah Meeting Papers - Kelantan Islamic Council, “Fatwa About Proposal to develop the Waqflands”, August 5 1995/8 Rabiulawal 1416 H*). In this case *Jamaah* scholars (Yusof, 1996:166) has agreed with the view of Ibn Taymiyyah that requires the conversion of *waqf* assets based on these main aspects:

(a) urgent change is necessary as *waqf* property damage can be sold and the proceeds from the sale may be purchased by others in lieu of the first endowment.

(b) In order for avoiding *maslahah*, such as conversion of an old mosque to better mosque, while the old building is sold.

## METHODS

This study is a qualitative study that uses a descriptive method. Qualitative studies are used to explain the latest status of a phenomenon that occurs (Mokhtar 2015). Thus, descriptive qualitative research can provide an overview and explanation to answer research questions through observation of spoken or written words about human behavior (Taylor & Bogdan 1984). The qualitative research design that will be used includes content analysis methods at the stage of obtaining theoretical data. Data collection through document analysis can provide information relevant to the issues and problems being studied and it is the easiest source for researchers because the required information is already available and difficult to deceive (Jasmi 2012). A literature review was conducted to collect data that was analyzed and interpreted to help answer the objectives in the writing study. Therefore, references to documents such as academic books and jurisprudence books, journals, written laws, reports, pamphlets, circulars, notes, information from websites as well as other materials or documentation.

## RESULT AND DISCUSSION

*Istibdal* land waqf has provided many gains and improvements to Muslims throughout the country. Especially for those who are entitled to receive benefits and help in continuing ummah daily lives and also capable to preserve the original intention of the donor. Malaysian Islamic Religious Councils (MAIN) has clear jurisdiction based on provisions in the enactments. Thus, MAIN can overcome all challenges from legal aspect. The implementation of *istibdal* on the development of *waqf* land can be linked to several regulations and reality of its implementation in Malaysia.

*Waqf* land that has been identified with the *istibdal* is HM Land GM 4944 Lot 6303, Mukim Kapar donated by Ahmad bin Arshad. The donated land is an agricultural rubber land. The benefit from the land is expected to donate Ash-Sharif Mosque, a mosque located in the Mukim. However, since there is no benefit or revenue obtained from the *waqf* land then the mosque is not developed. As such, the council undergo the *istibdal* process on the given *waqf* land which is a specific *waqf* so that the welfare of the mosque is fully utilised. Once the monitoring and discussions were carried out with the MAIS Board (*Majlis Agama Islam Selangor*), then the land is replaced with a reserve of land which was gazetted by the government of 0.454 acres of the mosque site. All terms and conditions of *waqf* land were transferred to reserve status, which is now converted to *waqf* land. The council also conducted discussions to develop a three-storey shop-houses of six units. The proposals are designed to provide more charitable that can be distributed to *Ash-Sharif* mosque as such intent and purpose made by *waqif* (*Majlis Agama Islam Negeri Selangor*).

In Penang, Tun Abdul Razak Complex (KOMTAR) was originally the *waqf* property where Sekolah Agama Al-Mashoor established. Penang State Government has made the location as it is the centre of the main business of this state and because the location is in the middle of Georgetown city. Thus, the location of the school was transferred to Balik Pulau, Penang. Agreement was reached between the State Government and MAINPP for land acquisition and the State Government agreed to provide compensation amounting to RM6 million in cash with 31 hectares of land in Balik Pulau (personal communication, October 2009).

In Malacca, *istibdal* has been applied to the Masjid Tanah Merah Kundur after the acquisition of

the land by the state authority (PBN). The mosque was demolished and replaced with the Masjid Pantai Kundur on other sites (personal communication, March 2010).

In Kuala Lumpur, *istibdal* can also be implemented to overcome the development of *waqf* assets, including increasing the potential of the existing *waqf* fund-raising. The problem of not being economical has often faced by the council and *istibdal* concept used to solve this problem. Among these is the Federal Territory of Kuala Lumpur involving *waqf* donated by Noorchahaya Abdul Majid, which is located at No. 135, Raja Muda of Jalan Kampung Baru, 2,613.60 square feet. This *waqf* was created on February 3<sup>rd</sup>, 1982. This land was later sold (the deceased, Hajjah Fatimah bt. Abdullah which is 3,397.68 square feet) to Naza Motors Trading Sdn. Bhd. With the price of RM300, 000.00, the sale made the original *waqf* land Noorchahaya is too small to be developed. Thus, the joint sales and another RM33,230.00 treasury money (from the General Resources Unit) used to buy another 3 houses at No.151, 153 and 155 Taman Pelangi Jaya, Sentul. These houses are rented and the proceeds used for the benefit of Muslims as specified by the *waqif* (Mahamood 2000).

In Johor, there have been cases of landlords following the acquisition of *waqf* land by PBN in the implementation of a highway construction project known as the Eastern Pisperseal Link (EPL) in Johor Bahru. The landfill involved in the acquisition at Lot 9261 HS(D) 19947 with an area of 0.3 acres. The *waqf* land located at Jalan Stulang Darat, Bandar Baru Johor, Johor Bahru was leased by Y. B. Dato Haji Mohd Eusoff bin Chin for general *waqf* purposes. In exchange for the landfill, the authority paid a sum of RM900,000 to the MAIJ. To finance the implementation of real estate with fixed assets, MAIJ has used the proceeds of the purchase of four storeys located at Fortune Point, Excellent Industrial Park, Nusajaya. The four lots for the shop were rented for a rent of RM1,500.00 per lot. (Johor Islamic Religious Council file 2017)

In Kuala Lumpur, *istibdal* implementation is made based on the approval issued by the 35<sup>th</sup> Consultative Committee Islamic Law of Federal Territories which was held on 9<sup>th</sup> November 1993. Results of this meeting stated that *istibdal* was gazetted on February 5, 1994, stating that the *istibdal* made in appropriate cases, including those involving in public *maslahat* provided that the land value is equal or provide a better investment to the *waqf* (Mahamood 2000; Sabri & Mahamood 2019). The implementation of

*istibdal* on *waqf* property in Perak only involves for the purposes of mosque construction, burial sites and religious schools. The MAIAMP (Islamic Religious Council and the Perak Malay Customs) has decided by the 154 Perak *Syariah* (modified) on January 17, 2002 (JAKIM).

In Perak, Lembangan Sungai Kerian Mitigation Project was carried out involving the acquisition of part of the *waqf* land at Lot 660 GM 3401, Lembah Keluang, Kubu Gajah, Mukim Selama. The 1,2445 hectares of land is for the benefit of Ar-Rahmaniah Mosque, Lembah Keluang. Out of the total area of the *waqf* land, 0.1178 hectares have been involved in the Sungai Kerian flood mitigation project. In lieu of a portion of the *waqf* land involved in the acquisition, PBN has paid compensation of RM28,272.00 to MAIPk. With that amount of compensation, the Ar-Rahmaniah Mosque Jail Committee has proposed to build a house on another *waqf* land. But the Perak State Government Mufti has expressed his view that the proposal does not comply with Shariah. He pointed out that the land that had been taken over by the authorities should have been replaced by another land by *istibdal*. Since MAIPK has received the compensation money, another piece of land needs to be purchased using the compensation money in lieu of the land taken. According to the Mufti's view, the MAIPK and the Ar-Rahmaniah Mosque Committee are working to identify a new land suitable for use as the original *waqf* land.

In Perak, another case is when a *waqf* land approved to Perak State Development Corporation (PKNPk) where 17-acre tract of land located on Lot 17675 (MMK No. 941 / 23.1.80) of the Wilayah Air Putih, Mukim Asam Kumbang, Larut and Matang districts where areas have been approved by the Perak State Development Corporation for development. The original purpose of the survey was for the use of the Islam Wilayah Air Putih. In response to the landfill involved, the authority has replaced a plot of land larger than the original land area of 19,045 acres. The land is located on Lot 18373, Kampung Pak Dollah, Kamunting, Mukim Asam Kumbang, Larut and Matang District and has been gazetted [No. 700 (08-07-1993)] for the use of Islamic burial grounds in accordance with the original purpose of the *waqf*. (Perak Islamic Religious Council File, 2015).

A firm of Ipoh Country Club Sdn. Bhd. has submitted an application in writing in 1999 to MAIAMP to obtain permission to build access road on lot 3985 which was gazetted as a mosque site (GN 20/25.1.1901) of Kampung Simpang Lawim, Mukim



Kampung Buaya, Kuala Kangsar to build drain and tap water on the same a lot of 4408 in a government reserve land for Muslim burial (No. Ref. PTKK (AT) 1 / 88 PU 33/93). To enable the access for roads, drainage and water pipe were built by the developer, an area of 624 square meters (lot 3985 and lot 303 square meters in 4408) should be handed over to PBN. To replace the land, an area has been taken for both purposes, the developer has agreed to give a lot located at Lot 1670, spanning more than the land in the same area.

Mufti Perak's view was obtained on August 11<sup>th</sup>, 1999, in respect of applications from developers. The application was not approved by the Mufti with a reason that the *waqf* property must be maintained. However, on July 3<sup>rd</sup>, 2000, the developer had submitted an appeal to the Mufti. After the matter reviewed by the MAIAMP and Mufti, they identified that the land needed for public use and the developer agreed to replace more extensive new land. On March 25<sup>th</sup>, 2004, a conference convened by MAIAMP (145) and approve the proposal thus hand over the area applied by the developer to the PBN and replaced with a reserve of land located at Lot 1670 as a land of MAIAMP. Conversion of some land owned by the developer of PCB Development Sdn.Bhd. that the land passed under the name of the MAIAMP at Meru Raya. The government grants a total area of 55.6 acres and 25.8 acres for the construction of new mosques of 21,310 lots. However, after monitoring performed by the Investment Committee, the MAIAMP Development and Finance discovered the structure of the earth in a hilly area and near to public sewage.

The developers have submitted bids to replace the 21,310 lots of land with 33,004 lots owned by developers in the City Meru Raya as the site of the mosque. The land is located close to residential areas developed rapidly as well as an area of 25.8 acres. Bids submitted by the developer to the 145<sup>th</sup> convening MAIAMP session on March 25<sup>th</sup>, 2004. The conference has recommended the offer made by the developer as a new area for mosque development and a suitable location for residential areas than the original land owned by MAIAMP. In addition, the conversion of these areas will not under grade the area of land originally granted to MAIAMP.

According to the decisions by fatwa committee meeting of MAIDAM (Islamic Religious Council and Terengganu Malay Traditional) for the first time in the 7<sup>th</sup> parliament on 2<sup>nd</sup> February 2005, the MAIDAM has sought views on the compensation money of *waqf* acquisition land (PBT) for the erection

of *istibdal*. Accordingly, the meeting has the opinion that the compensation money for land acquisition of specific *waqf* to the mosque can be used to construct a building on the remaining land as *istibdal*. The result of the agreement reached in the meeting of the fatwa committee, where the development plan has been extended further to the third meeting to MAIDAM which was held on December 26, 2005, which has recommended the purchase of a two-storey shops in Bukit Payong, Marang, a replacement (*istibdal*) land that was taken back by the government. *Waqf* land affected by the land acquisition by the government is a lot of land 28 Grant 2291 Chabang Tiga, Kuala Terengganu. It was endowed on February 2, 1986, by Tuan Haji Mohd. Yusuf bin Yahya to Madrasah Qur'an Kubang Bujuk, Serada. Acquisition of land measuring 0.0488 hectares is an upgrading project of Kuala Terengganu in 2004. MAIDAM has agreed to buy a replacement for a two-storey shop of the Terengganu Economic Development State Corporation (PMINT) priced at RM235, 000 (Council of Islamic Religion and Malay Customs, Terengganu, 2006, *Waqf* File MAIDAM 03-025/1/42/1, Kuala Terengganu).

## CONCLUSION

This article builds on *istibdal* implementations by examining the prospects and challenges of *istibdal*. *Waqf istibdal* has already occurred in Malaysia, but its application is not widespread because it cannot be done arbitrarily, without reasonable excuse. What is important is the issue of *Qadi's* involvement in deciding on an implementation of *istibdal*. In Malaysia, the jurisdiction has decided the question of Islamic law should be submitted to the Mufti. These parties are those who have the authority in considering *istibdal* is something is permissible or not. In fact, the four sects also recognize the involvement of *Qadi / Mufti* in deciding this question.

In line with the views of the majority sect in *Istibdal* concept, it is a medium to sustain the *waqf* property and lives. It turned out that Islamic Law has provided other alternatives to address the problem of *waqf* land which is not liable to be converted to another land which has a high prospect for development and public interests. However, it is done with integrity and to prevent the occurrence of conflicts and violations of *waqf* land. Thus, a law to replace the main principles of property law of conservation and sustainability of the assets.

Sustainable Development Goal (SDG) 11, one of 17 Global Goals that make up the 2030 Agenda

for Sustainable Development, recognizes the need to provide safe, resilient and sustainable human settlements. A process called as *istibdal* is an effective solution to the Islamic councils to ensure the benefits of *waqf* properties continue to be used by the public. The implementation of *istibdal* indirectly helps attain the economic and social prosperity of societies. Previously, *waqf* land is not fully utilized and becomes a big loss to the *ummah* as it is not properly developed. This is because the *waqf* lands are restricted to certain requirement by the waqif. Since the waqif's intentions cannot be fulfilled, these lands became under-utilized. With the implementation of *istibdal*, these lands have been successfully utilized which in turn benefit the society. Public should also who acts as industry players and whom have good intentions in achieving concrete socio-economic development leading to prosperity for the general populace (Harizan et al. 2020). Therefore, *istibdal*, resulted in a big impact in structuring the mobility of the *waqf* lands and quest for sustainable development, particularly SDG 11. Thus, indirectly achieving the goal to "make cities and human settlements inclusive, safe, resilient and sustainable." There should be more future research in *istibdal* since as this study found that much evidence have create opportunities to the Islamic councils especially on how to manage idle waqf lands. Future research especially in law, regulations for Malaysian Islamic councils, reporting, accounting and technology on *istibdal* can be more useful in fulfilling these issues. According to Ibrahim et al. (2022) at present, technological advancement has a significant impact on sustainable in *waqf* sector, and there is room for improvements in the integration of technology advancement in *istibdal* operation. The future studies would help the government, practitioners, and society to be aware and knowledgeable of the processes involved in the managing *istibdal*.

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#### AUTHORS' CONTRIBUTIONS

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