

Substitution of *Waqf* Properties (*Istibdal*) in Malaysia: Statutory Provisions and Implementations

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Abstract: *Waqf* property is an important instrument in Muslims' economic development. An effective management of *waqf* properties should be able to generate positive returns to beneficiaries. However, there are various problems currently faced by administrators in managing *waqf* properties. These include the issue of land value and its location, damages to *waqf* properties, public interest and government development planning among others. However, these problems can be solved with the implementation of *waqf* substitution (*istibdal*). In addition, a proposal for legal and *istibdal* provision and multiuse of *waqf* assets is being suggested to enhance the development of *waqf* properties. Therefore, the objective of the paper discussed the relevance of statutory *waqf istibdal* provision in management of *waqf* lands by the State Islamic Religious Councils (SIRC) which also includes elements of Shariah compliances through the approval of the states' fatwa committee. Additionally, the paper also deliberates on the cases and procedures *istibdal* implementation among the various states in Malaysia. Therefore, it is provided the systematic management of *istibdal* will strengthen the administration of *waqf* assets by the State Islamic Religious Councils in Malaysia.

Key words: Waqf • Substitution (*Istibdal*) • Property • Religious Council • Provision

INTRODUCTION

The practice of giving charity is greatly encouraged in Islam. It provides aid and income facilities to the poor and needy. It has contributed to the development of Muslims' socio-economy throughout the Islamic world. Thus, the principle of *waqf* as one of the provision in Islamic contracts is instrumental in the development of Muslims economics. Unfortunately, there are also cases where *waqf* properties cannot be developed due to several reasons which cannot be avoided. This issue needs to be addressed to safeguard the viability of *waqf* properties as income generators. Therefore, the concept of *istibdal* as an investment instrument is important in improving the *waqf* management by the State Islamic Religious Councils (SIRC). This paper also serves as a guide to the State Authorities in implementing the *waqf* substitution (*istibdal*) process for the *waqf* development.

The Concept of Substitution of WAQF Properties

(*Istibdal*): In principal, the *waqf* institution is a very important mechanism in Islamic economic development. It has a very significant impact on both the spiritual and physical elements in Muslim communities. In other perspective, it also opens a door for wealthier Muslims to utilize their assets in accordance with Islamic teachings of righteousness and kindness. These elements work together to realize the spiritual and worldly interest of the donor and beneficiaries. Moreover, Allah S.W.T. will reward the existing of *waqf* contracts for their contribution for those who surrendered their asset for their religion will enjoy the reward forever.

Islamic scholars and jurists have put forth numerous opinions and views on the definition and role of *waqf* in Muslim society. According to al-Syarbiniyy [1], *waqf* defined holding something that could be used to perpetuate the form (*‘ain*). Therefore, all transactions are subject to the laws of Islamic legislation [1]. As for

al-^c Asqalani [2], he defined *waqf* as a form of property holding that can be used on conditions to produce an income or a sort of benefit [2].

Al-Syawkaniyy in his most popular book on hadith ahkam [3], acknowledged the *waqf* contract as Ibn Umar reported; Umar acquired a land at Khaibar. He came to Allah's Apostle (May peace be upon him) and sought his advice about it. He said; *Allah's Messenger, I have acquired land in Khaibar. I have never acquired property more valuable for me than this, so what do you command me to do with it?* Thereupon he (Allah's Apostle) said: *If you like, you may keep the corpus intact and give its produce as Sadaqa.* Therefore, 'Umar gave it as a Sadaqa declaring that the property must not be sold, inherited or given away as gift. Moreover, Umar devoted it to the poor, the nearest kin and for emancipation of slaves and for the sake of Allah. There is no sin for he who administers it if he eats something from it in a reasonable manner or if he feeds his friends and does not hoard up goods (for himself). He (the narrator) said: I narrated this hadith to Muhammad, but as I reached the (words)" without hoarding (for himself) out of it."

Other Islamic scholars have also given various definitions on the concept *istibdal*. However, the fiqh practitioners still prioritize to have the continuity of *waqf* legislation. This is to preserve the integrity of Islam and the intention of endower (*waqif*) to the *waqf* recipient. In addition, Kahf [4] defines the concept of *istibdal* as the sale of all or part of a *waqf* land to purchase another piece of land dedicated as *waqf* for similar purposes. This practice is acceptable by majority of Muslim jurists such as the Shafi'i, Maliki and Hanbali scholars provided that it fulfils certain requirements.

From the Malaysian perspective, section 2 of the Enactment of *Waqf* (State of Selangor) 1999 provides that the meaning of *istibdal* is "to substitute a *waqf* property with another property or with money which is of the same or higher value than it either by substituting, purchasing, selling or any other means in accordance to Shariah law" [5]. Therefore, value and intention from the *waqif* are the key factors in implementing *istibdal*.

Mat Rani (2008) wrote a number of issues related to acquisition of *waqf* lands. One of the issues covered in the paper was on the method of acquisition of land by the government for the purpose of public benefit. The paper also touched on the role of the law (the National Land Code, 1965) on *waqf* assets and the method

of *istibdal* for the *waqf* property substitution for the benefit of the *ummah*. At the same time, a number of cases have been discussed from data taken from the State Islamic Religious Councils (SIRC). Based on these studies, most of the state authorities only pay for the compensation without replacing the sold *waqf* properties. Therefore, the SIRCs need to find the best method to decide on the intent of the waqif and to manage the money from sales of *waqf* lands for the good of the *ummah*.

In addition, there are scholars who also discuss the *istibdal* issues in a more specific matter. Mahamood [6] has explored the issues of *istibdal* and its implementation in Malaysia in her book "Pelaksanaan *Istibdal* Dalam Pembangunan Harta Wakaf di Malaysia". The discussion looked at the method of *istibdal* implementation in Malaysia from the civil and Islamic law perspective. Furthermore, various authors have also delved into the issues related to some of the principles of Islamic law relating to *waqf* property. Among them is the use of the concept of "*al-murunah*" and "*al-darar yuzal*" that helps in the development of *waqf* properties in Malaysia [6]. In addition, several cases involving *istibdal* have been reported to support the implementation of *istibdal* in Federal Territory of Kuala Lumpur, Penang and Perak.

Mat Rani [7] has voiced his concern over the findings that endowers might not be fulfilled if there are obstacles and problems on the *waqf* asset. Therefore, the author states that the concept of *istibdal* is the best mechanism to maintain and manage the *waqf* properties. From the study, the author found that most of the state authorities did not make the substitution of *waqf* land, but only make a payment of compensation for that purpose [7].

He also discusses the *istibdal* concept from the various opinions among the Islamic scholars and he also scrutinise the *istibdal*'s fatwa at both the national and state levels. Furthermore, he states that uncultivated public *waqf*, which involved in the acquisition, will not suffer from any losses. However, the public *waqf* properties are believed to be the simplest method generating maximum income. This is because any productive activities on the property may be conducted without specific condition from the endower. The researcher also zeroed in on the implementation of *istibdal* and the fatwa ruling in Selangor and Penang as case studies since both states have high property values, which deems that any *waqf* properties in the two states would be worth investing on.

Awang [8] discusses the importance of *istibdal* implementation based on the opinion of the Islamic scholars. Some scholars allow the implement the *istibdal* concept based on certain conditions, internal factors and types of *waqf* assets [8]. Meanwhile, other scholars only agree on the necessity of *istibdal* if the property is damaged in a very serious condition. He also stressed that the *istibdal* concept can be used to only seek for the public interest. In addition, the author also looks at various *istibdal*-related cases several states in Malaysia including Perak and Federal Territories.

Sirc as the Sole Trustee and Regulator for Waqf Properties and Istibdal Implementation: State Islamic Religious Councils (SIRC) plays an important role in the management of *waqf* properties. In fact, they are entitled to manage the *waqf* properties based on the Shariah and Islamic law provision. Section 4 of the National Land Code 1965 explains that *waqf* from its purview, allowing it to be governed by Islamic Law. As such, it provides the SIRC with a systematic development plan. In fact, the power conferred upon SIRC allows them to develop and invest the *waqf* assets in the future without any restrictions [9].

According to the provisions in Malaysian law, SIRC are the sole trustee of *waqf* properties. Section 32 of the Enactment of *Waqf* (State of Selangor) 1999 stated that any provision to the contrary contained in any instruments or declaration creating, governing or affecting any *waqf*, the SIRC shall be the sole trustee of all *waqf*. The practice of *istibdal*, therefore is also regulated under the state's enactment. State Islamic Religious Councils have the authority to deal with the matter of investment of *waqf* lands under *istibdal*. For instance, section 19 of the Enactment of *Waqf* (State of Selangor) 1999 provides that the Majlis (State Islamic Religious Council) may substitute any *waqf* property (*mawquf*) if the *mawquf* has been acquired by any public authority, or if the *mawquf* does not yield any profit or benefit as intended by the endower (*waqif*), or if the use of the *mawquf* does not comply with the purpose of the *waqf*.

According to the 4th Fatwa Committee Conference held from April 13th until 14th, 1982, Malaysia Department of Islamic Development (JAKIM), the committee stated the approval of *istibdal*. The fatwa committee also agreed on *istibdal* implementation through buying or purchasing or other means for the purpose of keeping the *waqf* property and it is permissible following (*taqlid*) the opinion of Imam Abu Hanifah [10].

Procedures of Istibdal: In general, there are three main procedures related to *istibdal* implementation. They include the acquisition of *waqf* land, identification of unproductive *waqf* asset and opening *istibdal* suggestions from individuals, agencies or developers for *waqf* development.

In the first procedure, which involves the acquisition of land, State Islamic Religious Council (SIRC) is required to get information about the status and details of the land before the actual acquisition. Next, the SIRC need to prepare a working paper to be discussed in the proposal of *istibdal* with the fatwa committee for approval by the state. Then, the SIRC will receive the notice of award of the land administration form 1960 K-APT (Kanun-Akta Pengambilan Tanah). Subsequently, the SIRC will also receive compensation and will note it as a liability account. After that, the councils will present the proposed purchase of new assets as *istibdal* properties. Once approval is obtained, *istibdal* process will be implemented through the land office. Next, it will be registered as *waqf* lands and included in the land information system and the files.

As for the second procedure, the State Islamic Religious Council (SIRC) will make the initial inquiries at the involved location. Next, they will announce the *istibdal* proposal to the local community. Then, the sale of *waqf* land will be made through open tender to get the best price. Similarly however, the councils also need to present a working paper of *istibdal* implementation to their respective state's fatwa committee. A report on the potential growth from the proposed *istibdal* investment must be made to increase the value of *waqf* asset.

The third procedure in *istibdal* implementation must be done through the offer of *waqf* property *istibdal* application by the interested individuals, agencies or developers. It will involve exchange of money or land swap. In this matter, a paper will be presented to the *waqf* management and development committee for the *Istibdal* proposal from the third party. It will later be presented to the state's fatwa committee for the approval. Next, it will be sold and awarded title to its new owner in accordance with section 124 of the National Land Code.

Various Cases of Istibdal Implementation: *Istibdal* implementation involves several states in Malaysia. It has to follow a specific set of procedures in accordance with the provisions of *waqf* law in their respective states. However, it is the state's fatwa committee which

is ultimately responsible in determining the approval of the implementation *istibdal* to prevent defamation and failure to comply with the Shariah requirement concerning *waqf* assets.

State of Penang has a good number of highly-valued *waqf* lands; among them is *waqf* al-Mashoor. The land was initially intended as a site for a school for religious studies. However, the *waqf* land is strategically located at the state's administrative center and main business hub. In this regard, agreement was reached between both the State government and Majlis Agama Islam Pulau Pinang) for the purpose of the *waqf* land's acquisition by the state government. As a substitution, the state government awarded RM 6 million and 30 acres of land in Balik Pulau district as compensation and land substitution (*istibdal*) to the Penang Islamic Religious Council.

There are other *waqf* lands in Penang that have benefited from the systematic project development. It can be seen at Buckingham Lebu which now has new four-storey building. It consists of offices and business establishments. Furthermore, there is also the residential project at *waqf* land in Teluk Air Tawar which contains a planned housing park with complete infrastructures as well as the mosque facilities. Excellent housing development can also be seen at *waqf* land in Coopee Amah where it has two levels of residential properties. All these developments in *waqf* lands are geared toward eradicating poverty and improving the socio-economy of the Muslims. It is a useful instrument that would allow both the development the state's economy in form of charitable instruments with worldly and spiritual values. Similarly, the Melaka Islamic Religious Council (MAIM) also has a number of *istibdal* cases which is implemented for several reasons such as economic factors, public interest and comprehensive development plan by the state government. One of the case involved a *waqf* land and three-storey shop houses located at Lot 233, Kawasan Bandar 20, Jalan Bendahara off Jalan Temenggung. The undesirable location of the *waqf* was the main reason of the *istibdal* process implementation on the *waqf* land. It was not a commercially strategic area and it also caused a management problem to MAIM. In addition, the high cost of repairing and maintaining the asset was another crucial factor that caused implementing *istibdal*. Thus, the *waqf* assets was sold to a new tenant and the revenue from the *waqf* asset sales was used to acquire a more commercially viable land and buildings at Lot 8166 and 8167, Taman Tasik Utama, Ayer Keroh.

Proposed Legal and Administration of Istibdal: From the legal aspect, it has been proposed that a special clause in the *Istibdal* Enactments should be created to allow the sole trustee to make any suggestions for improvement regarding *waqf* properties. This proposal should be implemented in each state to facilitate the administration of *waqf* properties. This enactment should also act as a guide to SIRC's for *istibdal* process. It should contain all relevant aspects such as objective *istibdal*, conditions of execution, proof of legislation of *istibdal* and its implementation.

Various methods could be utilised in developing *waqf* properties, which includes the use of *istibdal* implementation, to advance the method of *waqf* property development for the Muslim economic growth. Buildings, lands, vehicles and various forms of *waqf*, i.e. movable or immovable asset can be developed for the benefit of beneficiaries.

Istibdal implementation for the *waqf* properties can be divided into several types of development. Firstly, it can be used as accommodations for the beneficiaries. As such, they can live on the *waqf* land on cheap and affordable rental rates. However, it should be stipulated that the occupation of the land is temporary. It aims to give opportunities to other individuals among the beneficiaries who are also in need of cheap accommodations. Therefore, everyone would be able to enjoy the facilities provided by the *waqf*.

Secondly, through *istibdal* implementation, *waqf* properties can also be used and as income-generating commercial assets. However, a monitoring must be appointed by the SIRC's to manage these commercial assets and ensuring their success and expansion. This strategic use of *waqf* assets can be done, especially if the (new *waqf* properties) through *istibdal* are located in major urban and business centres.

CONCLUSION

In the conclusion, properly-managed *waqf* assets have big potentials for a sustainable economic growth in Malaysia. In fact, the State Islamic Religious Council has already established collective management of human resources to oversee the administration and exploitation of *waqf* lands. Accordingly, the *istibdal* implementation is a practical and viable alternative instrument to develop *waqf* properties. In fact, the problems that occur on *waqf* land can be solved through *istibdal*. Thus, by using the *istibdal* method, the properties would be able to realise their commercial potentials for the good of

Muslims economic growth through the proposal of specific *waqf* enactment. It also aims to ensure the benefit for the survival of *waqf* property. Therefore, management of *waqf* assets through *istibdal* method also can help the socio-economic development of Muslims communities in Malaysia. Apart from these, it also recommended that a new financial mechanism to be set up to for *waqf* development in the future.

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