

Fact and Implementation Analysis of *Istibdal* Method on *Waqf* Land in the State of Penang

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Abstract

The purpose of this study is to analyse the factors and implementation of *istibdal* method for waqf land in the Penang State. This study is based on two main methodologies namely data collection method and data analysis method. The data collection process was conducted through interview by interviewing the respondents at the Penang Islamic Religious Council to obtain information on the implementation of *istibdal* in the State of Penang. After that, the results from the interview were analysed using content analysis method. Besides, this method was also used to analyse the documents obtained from the respondents to extract detailed information on the factors and implementation of *istibdal*. The findings of the analysis reveal that the implementation of *istibdal* in the State of Penang is based on several factors regarding public interest known as road construction projects, flood mitigation projects and Islamic cemeteries.

Keywords: *Waqf* Land, *Istibdal*.

Introduction

Waqf land is the gift property of a Muslim either individually or in partnership. Usually, a person who carries a portion of his property for waqf is for charity and because of Allah SWT. Hence, when a property has been given to waqf, the property is bounded by the Islamic law and remained as the property of the Muslims forever. Therefore, the properties of waqf need to be managed and administered so that its benefits can be enjoyed forever with the persistent rewards to the waqf payer. Thus, in order to ensure that the properties of waqf continue to exist, the *fuqaha* have discussed a method of '*istibdal*' to preserve and retain waqf property and the purpose of waqf. This method is crucial because it is not only implemented on damaged property, but can be also employed to maintain the property of waqf especially land when the location of the waqf property is involved with development to meet the urgent need.

In Malaysia, there are some states that have implemented the *istibdal* method in waqf property including the State of Penang. Therefore, this study wants to analyse the factors behind the implementation of *istibdal* for waqf property in the State of Penang and how it is implemented.

Waqf Istibdal

The word *istibdal* is the Arabic word derived from the word (بَدَلَ) (إِبْدَالَ) (أَسَدًا بِدَالٍ). The word *badal* means 'change' or 'replace', while *ibdal* and *istibdal* mean the same thing, which is to 'convert something by taking something else instead' (Shuwayri, J.H, 1995). From the side of terminology, the term *istibdal* means to sell what is lacking or has lost the entry or revenue of the waqf property and buy what is better than that (Qal'aji, M.R, 1985).

According to the Selangor State Endowment Enactment and the Malacca Endowment Enactment, *istibdal* means to replace a waqf property with another property or money with equal or higher value either by substitution, purchase, sale or any other means according to the Islamic law.¹ Meanwhile, the *istibdal* definition contained in the Negeri Sembilan Waqf Enactment replaces a *mawquf* with other property or money, or in the form of money, equal to or higher in value from the *mawquf*, whether by substitution, purchase, sale or any other means according to sharia principles.² In conclusion, *istibdal* waqf means to convert a waqf property with a property of the same kind and value or substitute it with another property by selling the original waqf property and buying a new property in lieu of.

¹ Selangor State Endowment Enactment Year 1999; Malacca Endowment Enactment Year 2005. ² Negeri Sembilan Waqf Enactment Year 2005.

Constitutions of *Istibdal* According to *Fuqaha'* and Law

From the point of execution of *istibdal* concept in waqf property, there are quite different views among Islamic scholars. In the Hanafi school, implementing the *istibdal* concept to solve any problems related to matters that may affect the property of waqf is a must. Even in the case where the waqf property is still in a good condition; if the implementation of *istibdal* will give more results and benefits, then the implementation will still be required. However, the *fuqaha* of the Maliki school distinguishes the necessity for in implementing *istibdal* on movable and immovable property. The agreed opinion on the necessity of *istibdal's* execution is on the movable property. This is because the movable property is more vulnerable to damage (Anas, M, n.d). As for immovable property, the necessity of implementing the *istibdal* concept is granted when the waqf property is in an emergency and should be replaced with the same kind of property (Abu Zuhrah, M., 1971).

In the Syafi'i school, the necessity to implement *istibdal* concept is limited. *Fuqaha* from Syafi'i school argues that the devoted property is the property of Allah SWT and cannot be changed in any way. Even if the waqf property has been destroyed, it will not return to its original owner (Zuhayli, W, 2005). They adhere to the views of Saidina Umar RA, which stated that the property of waqf cannot be sold, hired and inherited. They also adduce the *qias* reason stating that "a property that cannot be sold when there is a benefit cannot be sold without any benefit" (Sabri, S.I, 2008).

Meanwhile in the Hanbali school, the concept of *istibdal* is absolutely accepted and they require the concept to be implemented on movable and immovable property if the waqf property has been damaged. *Fuqaha* from Hanbali school argues that the waqf property cannot be sold, rewarded and inherited as long as it benefits; thus, when the property is damaged and not useful, *istibdal* should be used to maintain the meaning of waqf forever (Jakim, 2009).

Fatwa and Legal Provisions Regarding the *Istibdal* of Waqf Property in Malaysia

In the context of implementation of *istibdal* concept in Malaysia, the National Fatwa Committee had chosen the opinion of the Hanafi school that is moderate and not too free for employing the waqf property development activities in Malaysia. This can be seen as a result of the Muzakarah of the National Fatwa Committee for 4th Malaysian Islamic Religious Affairs held on 13 to 14 April 1982 in Kuala Lumpur. The Fatwa Committee has discussed matters related to the Alternate Waqf

and concludes that: "Alternate Waqf used to change the property of waqf with another property through sale or purchase or otherwise with the purpose of maintaining waqf property is required according to the opinion of Imam Abu Hanifah". Based on the *fuqaha* and obligations of the Fatwa Committee, several states in Malaysia have employed *istibdal* in the State Endowment Enactment such as the Selangor Waqf Enactment and the Malacca State of Waqf Enactment, which have provided that the Majlis can use *istibdal* on any *mawquf* in the following circumstances:²

- a) *Mawquf* has been taken by any public authority in accordance with the provisions of any written law;
- b) The use of *mawquf* no longer benefits or give benefits as required by waqf payer, or
- c) The use of *mawquf* does not conform to the purpose of waqf.

The Negeri Sembilan Waqf Enactment states that subjected to sub-section (2), the Majlis may use *istibdal* on any *mawquf* in the following circumstances:³

- a) If any condition of waqf is not in accordance with any written law;
- b) If *mawquf* is taken by any authority in accordance to any written law;
- c) If the use of *mawquf* does not bring benefits or profits as required by waqf payer;
- d) If the use of *mawquf* cannot meet the purpose of waqf; or
- e) Where the time or circumstances of change any condition set by waqf payer is not feasible.

(2) The Council shall seek the opinion of the fatwa committee if the council is to use *istibdal*:

- a) The mosque or the site of the mosque is being assigned; or
- b) In circumstances other than the circumstances specified in sub-section (1).

(3) Notwithstanding anything specified by waqf payer:

- a) Implementation of such conditions is subjected to any written law; and

² Selangor State Endowment Enactment Year 1999; Malacca Endowment Enactment Year 2005.

³ Negeri Sembilan Waqf Enactment Year 2005.

b) If the council cannot perform any of the conditions prescribed by the waqf payer, the council shall determine any other way to perform the waqf so that the *mawquf* is used as closely as possible with the same conditions prescribed by the waqf payer. (sub-section 3)

(4) The *mawquf* value acquired through *istibdal* shall not be less than the present value of the original *mawquf*.

Analysis of Fact and Implementation of *Istibdal* on Waqf Land in the State of Penang

Among the waqf land involved with the implementation of *istibdal* in the State of Penang is Lot 1177 GM 2380. This waqf land is located in Mukim 7, Kepala Batas, Seberang Perai north district. The waqf land is a rice paddy field with an area of 21929.9127 square metres. The waqf payer has given the land in 1948 with the intention of channelling the land revenue for the benefit of the Pajak Song Religious School in the State of Penang (Abd Razak, M.N, 2016). However, a total of 6131 square metres of the total waqf land has been involved with the acquisition by the State Authority for the purpose of building roads for the convenience of the community from the aspect of interconnection. The project was implemented to connect the Permatang Buluh slip road to Pajak Song. However, the project had to pass some part of the waqf land registered under the name of the Penang Islamic Religious Council located at Lot 1177 GM 2380.

As a replacement or *istibdal* to the waqf land taken, the State Authority has repaid compensation money of RM 399,577.50 to the Penang State Islamic Religious Council.⁴ With this amount, the Penang Islamic Religious Council bought two lots of land adjacent to the original waqf land lot as *istibdal* for some of the original waqf land taken, which are:⁶

- i. Lot 6742 GM 3032, Mukim 7, District of Seberang Perai Utara with a total area of 0.7892 hectares.
- ii. Lot 6743 GM 3033 Mukim 7, North Seberang Perai Region with a total area of 0.7796 hectares.

⁴ Penang Islamic Religious Council file, 2016. ⁶
Ibid.

The two replacement lots are also paddy fields and the proceeds from which they are distributed were channelled to the benefits and benefits of Pajak Song Religious School as intended by the waqf payer (Abd Razak, M.N, 2016).

Apart from that, there are two lots of waqf land that have employed *istibdal* on them. According to the respondents, both land lots were organised as a result of the takeover by the State Authority for implementing the Flood Mitigation Project in Penang. Although the flood disaster does not happen often, it is a serious problem that needs to be avoided. This is because the floods are not only impeding the daily activities of the community, but also the destruction of personal property, public property as well as causing the spread of diseases by the disaster. Following the problem, the Penang State Authority has planned a project known as the Flood Mitigation Plan (RTB) to eradicate flood disaster from continuing repeatedly in Penang. The flood mitigation project is a dilapidation activity of the Sungai Kerian involving the acquisition of several lots of land including two lots of waqf land registered under the ownership of the Penang Islamic Religious Council (Othman, M.A, 2016).

As such, the Administration of the Penang Islamic Religious Council has received the application for the recovery of waqf land from the Department of Land and Mines Director General to implement the Sungai Kerian Flood Mitigation Plan as planned. Waqf land lots involved with the project are:

i. Lot 8078 HSM 1110. This waqf land is located in Kampung Haji Omar, Titi Timbul, Mukim 9, Seberang Perai South District. A surau known as Surau Kampung Haji Omar was built on the land area of waqf by 1.000035 acres equivalent to 4047 square metres. However, 0.084015 acres equivalent to 340 square metres of the original land was taken for the purpose of widening the Kerian River with a total payment of RM 84,174.00.⁵ Up until now, the Penang Islamic Religious Council has not yet used the money to buy the replacement property for the original waqf land. However, plans for the replacement of the waqf land are being undertaken by the Penang Islamic Religious Council (Othman, M.A, 2016).

ii. Lot 4129, Mukim 9, South Seberang Perai District. The 1.2 acres of land was dedicated on August 20, 2014 for charitable purposes. However, part of this waqf land is also involved with the recruitment of the State Authority for implementing the Sungai Kerian flood mitigation plan. The area involved with the acquisition is 1720 square metres. In lieu of the acquisition of the waqf land, the authorities paid compensation of RM 352,462.00 to the Penang Islamic Religious

⁵ Penang Islamic Religious Council file, 2016.

Council.⁶ Since the waqf payer only applies the land generally for welfare purposes, the Penang Islamic Religious Council has applied for the use of the *istibdal* money to purchase a piece of land at Lot 1443, Mukim 9, the Seberang Perai Utara District with 0.77 acres to be used as extra cemetery. This application was made because the existing cemetery in the area was narrow (Othman, M.A, 2016).

Furthermore, the waqf land planned to be implemented with *istibdal* is the 20112 lot, Mukim 13, Bukit Gambir, Northeast District. The land that belongs to the Penang Islamic Religious Council covers an area of 1,283 acres equivalent to 55,887.48 square feet and was enacted in 1876 with the purpose of being used as the burial ground of Haji Abdulrahman bin Lebby Long or a charitable purpose.⁷ The implementation of *istibdal* on the waqf land is based on an application by the Islamic Centre of Universiti Sains Malaysia that wants to convert his land to the land belonging to the Penang Islamic Religious Council. This application was made because the University Sains Malaysia requires a strategic area to be used as the Islamic cemetery site for *Qaryah* Masjid al-Malik Khalid, Universiti Sains Malaysia.

At this point, *Qaryah* Mosque al-Malik Khalid did not have its own burial ground. All burial operations of *qaryah*'s participants were buried in the Nibong Masjid Mosque. Therefore, the cemetery for *Qaryah* Masjid al-Malik Khalid is indispensable to accommodate the needs of burial children of *qaryah* including Malaysian and international students who are studying at Universiti Sains Malaysia. However, the current land owned by Universiti Sains Malaysia, Lot 10276, which is 3,516 acres equivalent to 153,156.96 square feet is not suitable to be used as a cemetery.⁸ Since the land has not been used and developed, the Islamic Centre of Universiti Sains Malaysia applied to the Penang Islamic Religious Council to change the land with the land belonging to Penang Islamic Religious Council, which is Lot 20112, Mukim 13, Bukit Gambir, North-east District with an area of 1,283 acres equivalent to 55,887.48 square feet. Until now, negotiations with the parties involved to carry out the *istibdal* on land are still on going.

Conclusion

The results from the analysis found that there were three lots of waqf land in Penang involved with the implementation of *istibdal*, whereas another one was in the process of implementing *istibdal*. The analysis also found that the factors influencing the implementation of *istibdal* on waqf

⁶ Ibid.

⁷ Ibid.

⁸ Penang Islamic Religious Council file, 2016.

land in the State of Penang are road construction projects, flood mitigation projects and land applications to be used as a cemetery, which are the interests and needs of the people especially in the State of Penang. From the substitution aspect, it was found that the waqf lands were replaced with the same category of property, which is land. However, there is a lot of land that has not been replaced because the State Islamic Council of Penang Island is looking for a strategic location suitable for waqf assets.

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References

Abd Razak, M.N. (2016). *Pelaksanaan Istibdal Harta Wakaf di Negeri Pulau Pinang*. George Town: Penang. 1st February.

Abu Zahrah, M. (1971). *Muhadarat fi al-Waqaf*. Cairo: Dar al-Fikr al-Arabi.

Jakim. (2009). *Himpunan Keputusan Muzakarah Jawatankuasa Fatwa Kebangsaan Berhubung dengan Isu-Isu Muamalat*. Kuala Lumpur: Jakim.

Malacca Endowment Enactment (2005).

Anas, M. (n.d). *Al-Mudawwanah al-Kubra (4)*. Egypt: Dar al-Fikr.

Negeri Sembilan Waqf Enactment Year 2005.

Othman, M.A. (2016). *Pelaksanaan Istibdal Harta Wakaf di Negeri Pulau Pinang*. George Town: Penang. Interview, 1st February.
Penang Islamic Religious Council file, 2016.

Qal'aji, M.R. (1985). *Mu'jam Lughah al-Fuqaha*. Beirut: Dar al-Nafais.

Selangor State Endowment Enactment Year 1999.

Shuwayri, J. H., (1995). *Mu'jam al-Talib*. Beirut: Maktabah Lubnan Nashirun.

Zuhayli, W. (2005). *Al-Fiqh al-Islami wa Adillatuh*. Vol. 10. Beirut: Dar al-Fikr.