

# Inovative Istibdal on Development of Endowed (Waqf) Land A Study on Issues of Acquisition of Endowed Land by the State Authorities

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## Abstract

*Waqf land acquisition by force is a part of the current jurisprudence law is founded on the concept of "ijtihadiah Maslahah 'Ammah" and Istibdal mechanism found in Islamic waqf law. This thing is not expressed in a clear and detailed ruling by Islamic jurists in their writing. But studies from the perspective of Islamic law must be seen to identify and explain the law of waqf land acquisition by the government especially in relation to the acquisition of land by private endowment for the purpose of economic development. Writing this a try to see how far implementation of land acquisition by the State based on the Land Acquisition Act 1960 to meet and consistent with Islamic law. Some suggestions towards Islamize this act has been produced to improve by taking the principles and methods used in the Islamic Shari'a that all development can be implemented in a more dynamic and comprehensive line with the current needs of today.*

## 1. Introduction

Islamic law in general allows the acquisition of endowed land for the public benefit, and thus, the Istibdal concept is viewed as a mechanism that can maintain the perpetuity of endowed land without sacrificing its original principles. Istibdal concept, which is known as the exchange of endowed properties, is in fact one of the solutions to the problems involving development of endowed properties (Siti Mashitoh Mahamood, 2002). Primarily, one dedicates his/her properties for the sole reason of submitting oneself closer to Al-Mighty Allah and in return, expects continuous reward from HIM, apart from HIS Mercy, Blessing and His Willingness. Nevertheless, this original purpose cannot be achieved if the inevitable barriers exist. Among them is the abolishment of the endowment status following the acquisition of the said land by the authorities. Hence, the inspectors (nazir), being a trustee of the endowed property should solve this problem by taking an alternative approach so that the benefits arising from the endowed property can be perpetually channeled as intended or aspired by those who dedicate such property.

Based on the research done, in Trengganu at least 94 lots of endowed land affected by the land

acquisition by PBN. In Pulau Pinang 17 lots have been taken by the government for development purposes which involves a total compensation of RM 2,541,762.28. Similarly, in Selangor, there are 3 lots involved in the highway development. In Kelantan, Wilayah Persekutuan and Pahang respectively, a lot each has been taken by PBN. In Perak, there are two cases involving 2 lots. Latest study reveals that there is no endowed land being affected by the acquisition in Negri Sembilan. 7 lots are recorded in Malacca though. The total endowed land area taken is no less than 4.525 acres and the accumulated compensation by MAIM is estimated to be at RM 292, 983.34. In Kedah, 26 lots of endowed land have been identified and the area of the affected endowed land is estimated to be at 28,312 acres (Mohd Afandi Mat Rani, 2020)

## Acquisition Of Endowed Land by The State Authority: Obstacles and Constraints

Research reveals that the endowed land owned by MAIN and acquired by PBN were not replaced even though the government had long taken the said land and the compensation had been fully paid. This is attributed to the fact that in Malaysia Istibdal issues is still regarded as a sensitive issue and strange among

the community, including the endowment administrators themselves. This scenario is seen to be closely related to the fact that the community of this country clings to the endowment law of Shafi'i sect which strictly prohibits Istibdal on endowed land (Siti Mashitoh Mahamood, 2002). There are several factors that cause the compensation awarded to MAIN being held back or frozen. The study found out that earlier, the administrators felt that there was no urgency to find replacement of endowed land taken by PBN. This was so because then, the alienated or government land were in abundance and can be applied at any time.

Similarly, the market value of the properties then was far fetch from the current market price. The acquisition of such land by the government was not substantial either. As such, they did not make an attempt to reapply but took a slower approach instead. This was not considered as a problem or burden to MAIN as there were many endowed lands which were abandoned and were has not developed as intended by those who endowed their land.

In addition to the abovementioned factors, there are other factors that have also been identified. Among them is that most of the endowment land taken by the government did not involve the entire the land area. Therefore, the amount of compensation paid by the government is relatively small. For a special endowment that benefits the mosque and lineage endowment, it is difficult to distribute to the endowment recipients because it involves several mosques and other heirs. Shortage of staff and obscured information further impedes these efforts.<sup>13</sup> The main problem which often being highlighted is that the current market price of the land is very high, and the amount of compensation awarded by the government is insufficient to match the present valuation. So, this becomes the main reason as to why the issue of endowed land taken by PBN cannot be replaced with another land. Alienated or government land are decreasing and if available, the location is not strategic, incomparable to the original endowed land, uneconomic and not viable. If they are purchased as replacement, it would be in contrary to the Istibdal law which dictates that it must be replaced with land of equal value or better.

### Concept Of Istibda in Accordance to Islamic Law

According to the jurist's "Scholar", Istibdal means the purchase of 'ayn / asset as replacement, and it will be lodged as charity again. Ibdal on the other hand is the selling of 'ayn / endowed asset in order to purchase another property/asset or to obtain monetary gain (Badran, Badran Abu al- 'Aynayn, 1986), Al-Kubaysi, Muhammad 'Ubayd, 1977, Ahmad Farraj Hassan, 1986). Today, the acquisition endowed land refers to the concept

of selling of endowed 'ayn or Ibdal to the government which is then replaced either in the form of land or monetary compensation (Mohd Afandi Bin Mat Rani, 2008). The Istibdal concept refers to the purchase of other land by the inspectors (nazir) using the proceeds from sales of the endowed land and the newly purchased land is to be re-endowed as substitute. Ibdal and Istibdal are related to one another as Ibdal of an endowed property leads to Istibdal of the said property. Each sale of endowed asset must be substituted or replaced by another 'ayn. The exchange can be made either in the form of currency or other ayn/ property. (Abu Zahrah, Muhammad, 1971).

### Muslim Jurists' (Fuqaha) Point of View Pertaining to Istibdal of Endowed Land

In essence, the jurists unanimously accept that Istibdal concept in resolving the issue of endowed land acquired by government by way of force either through sale, exchange and purchase. Nevertheless, there are difference of opinion among them is the methodology or execution of Istibdal of movable and immovable assets because they are specially and generally utilized for different purposes (Hassan 'Abd Allah al-Amin, 1994) Land Acquisition based on the Istibdal mechanism need to be distinguished in terms of type or category. This is so because each category gives different implication as to terms of its usage which are subject to certain conditions. Acquisition of Special endowed land is more complicated than to the General Endowment, especially for those bequeathed for the benefit of the mosque, site for mosque and cemetery (Al-Khinn, Mustafa Sa'id, 1992).<sup>20</sup> If the land is endowed for specific applications such as for construction of the mosque, cemetery, religious schools and others, this endowed land and the revenue generated if any, cannot be used for other purposes, other than what has been determined by the person who endowed the property (Waqif) (Badran, Badran Abu al- 'Aynayn, 1986). The approach adopted by both Maliki and Syafi'e with regard to the acquisition of the special endowed land ie for the mosque is relatively firm and rigid as compared to other sects (Abu Zahrah, Muhammad, 1971). Both of these sects agreed that the endowed mosque cannot be sold or exchanged, except for reasons that cannot be avoided (Al-Syirazi, Abi Ishak, 1995, Abu Zahrah, Muhammad, 1971).

Shafi'e sect holds a firm and high stance over the issue of *al-manqul Istibdal* or endowed land. They advocate that endowed land of Special, General and Lineage in nature, cannot be sold or purchased. This means that all types of endowed property cannot be taken by the government for any kind of development. Shafi'i sect's firm stance is based on their endowment principles that the endowed

property could be traded, donated or inherited in line with hadith by 'Umar, who endowed his land in Khaibar and stipulated that the land cannot be sold, purchased, given away or inherited (Al-Nisaburi, Imam Abi Husayn Muslim al-Hajjaj al-Qusyairi, 1997), al-Syawkani (t.t)). The purpose for which endowment is made cannot be changed other than what has been prescribed by the waqif (Al-Nawawi, Abu Zakariyya Yahya, 2000, al-Khinn, Mustafa Sa'id, 1992). This Sect absolutely prohibits execution of Istibdal for fear that the sale and replacement may lead to the loss of the endowed property. (Al-Kubaysi, Muhammad 'Ubayd, 1977). However, there are also some scholars of Shafi'i sect that permit implementation of Istibdal provided the substitute/new endowed land is more beneficial than the former. Nonetheless, Hanafi and Hanbali sects take a more lenient and loose approach about the execution of Istibdal as compared to Shafi'i and Maliki sects. They make Istibdal possible in all aspects or situations as long as it benefits the public (Al-Zayla 'i, Jamal al-Din Abu Muhammad 'Abd Allah b. Yusuf, 1996, Al-Ghazali, Muhammad b. Muhammad b. Muhammad, 1997, Hassan 'Abd Allah al-Amin, 1994, Ibn al-Humam, Kamal al-Din Muhammad b. 'Abd Wahid, 1977).

This means that endowed land that are acquired by force be it Special or General endowed land other than mosques can be interchanged depending on the Maslahah. Maliki sects absolutely prohibits the sale of endowed property involving site for the mosque or the mosque itself. Endowment of this nature cannot be replaced with another, and this opinion is shared by majority of the jurists. However, in the event of emergency and if the situation warrants, istibdal even by way of force is deemed permissible. Such situations involve expansion of the mosque, cemetery or roads because they would benefit the community in general. If istibdal of the property in these cases is not done, it would give a negative impact on the Muslims. as they would not have enough place to perform their prayer, lack of funeral facilities and accessible roads. Then, it is indeed obligatory, to ease and rectify the situation. According to the Hanbali sect (Ibn Qudamah, Muwaffaq al-Din Muhammad 'Abd Allah b. Ahmad b. Muhammad, 1999), the sale and purchase transaction, exchange and replacement of endowed properties should depend on the benefits that can be derived from them. Hanbali sect practices an open concept for the execution of istibdal on the endowed properties especially those that are damaged in order to prevent the loss of their benefits. The flexibility of Istibdal law in the Hanbali sect is evidence by its act of allowing istibdal be done on moveable asset like the mosque. This is made possible when the mosque is damaged, can no longer be utilised, congested, irreparable unless unless it is sold or replaced with another one (Abu Zahrah, Muhammad, 1971), If the damage involves just a part of the mosque, then that

part of it should be sold. Similarly, if the whole mosque is damaged, it is necessary to sell it and the proceeds of such transaction is to be used to build another mosque in place of the mosque that has been endowed (Ibn Qudamah, 1999).

For endowed land that derives no benefit due to its location; remote, away from urban areas with no economic values and does not have the potential to be developed, The Hanbali and some of Shafi'i sects, (Ibn 'Abidin, Muhammad Amin, 1979) opine that the authorities can exercise Istibdal over the said land provided the 'new' and replaced land can generate more revenue, thus benefitting the recipients of the endowment.

### Istibdal As a Medium to Reinstate the Status of Endowed Land/Property

The need for implementation of Istibdal mechanism for endowed land which are acquired by government is no longer an option. In fact, it is a necessity that cannot be disputed. The party or authority concerned must review and critically examine the mechanism so that all actions taken, and its implementation are in tandem with the objectives of the Islamic law. In addition to performing the obligation under Islamic law, istibdal has to be enforced due to economic factors, laws, policultural and for multiple reasons (Mohd Daud Bakar, 1999). The existence of this mechanism does not mean the endowed land can be taken in any situation to meet the current demand and developments and at the same time, disregard various aspects and issues that are of more important and should be given a priority.

In other words, Istibdal is not a mechanism that can be applied to all category of endowed land and can be taken lightly by the authorities. Thus, the jurists have different opinions on the laws, especially in terms of its implementation. In this aspect, the jurists prohibit the practice except in exceptional circumstances. There are also among the jurists whose point of view are rather rigid and they uncompromisingly prohibit the execution of Istibdal in any situation. The jurists exercise caution in determining the istibdal laws in order to safeguard the benefit of the property placed in trust by the Muslims. Otherwise, it would certainly result in poor management of the law thus making way for fraud and breach of the principles of endowment laws which have been laid out by our Islamic scholars in the past.

In general, the majority of the sects accept Istibdal concept as a medium to sustain the endowed properties and their benefits (Abu Zahrah, Muhammad, 1971). If Islamic law does not provide other alternatives in dealing with acquisition of endowed land whilst at the same time the law permits the authorities to take the land said for public interest, there will definitely be conflicts and violation of the law with regard to the acquisition of the endowed land and the main

principle of endowment in Islam, ie to sustain the endowed assets and to ensure that its existence is perpetual. This concept is also in line with the principle of the endowed properties that does not allow the same to be sold, donated or inherited (Al-Nisaburi, Imam Abi Husayn Muslim al-Hajjaj al-Qusyairi, 1997, al-Syawkani, Syaykh Muhammad b. 'Ali (t.t.)).

### Methodology on the Implementation of Istibdal on Endowed Land

#### Implementation

of Istibdal concept on endowed land encompass sale, purchase and exchange or replacement. All the three methods stated aim at maintaining the status of endowed property so that the benefits can be continuously enjoyed by recipients of the endowment as so desired by the waqif. As such, its implementation stresses on two aspects that if the asset is sold, it must be replaced as its original state, or it should be in a much better form than the former. Hence, the party who is qualified to determine implementation of istibdal is either the judge or qadi.

#### Terms Of the Replacement of Endowed Land

Baed on the istibdal concept, the endowed land taken by the government by force should be replaced as its original form. However, the type/form of replacement are not clearly specified by the jurists, either in the form of money (nuqud) or land (al-'Aqar). Should the replacement be in monetary form it is included in the context of purchase because the sales proceeds can be used buy another land. Conversely, if the replacement is to be in the form of land, it falls within the term exchange or replacement. This is so because the first or original endowed land is being exchanged with another land.

In discussing the status of land taken by the government, the jurists have stipulated that the acquisition shall be accompanied by compensation, known as al-Ta'wid. The compensation and replacement are normally in the form of money or replacement of assets of the same type/nature (land to land). It is pertinent to discuss the form of substitution in the context of endowed land which has different concept with the land owned by other individuals, bearing in mind, the benefits and the current situation. Assessment and consideration must be made in determining whether compensation in money is more prudent and relevant than replacement in kind ie land in exchange for another one, or vice versa. Among the fiqh scholars, Ibn 'Abidin had discussed the matter and concluded that the sale or exchange of endowed land cannot be in the form of money for fear that it might be misused by certain parties (Ibn 'Abidin, Muhammad Amin, 1979). This condition is related with other condition

the requires endowed asset be replaced with asset of the same type. For instance, if the endowed asset is a landed property, it cannot be istibdal solely with a piece of land. In reference to this, replacement of land with compensation in form of money is not permissible unless the compensation money is used to buy another 'ayn / endowed asset of the same status quo.

Hanbali sect also stipulates that Istibdal should be between assets of the same form/nature such as land with land, building with building and so on. Endowed property exchanged by way of Istibdal should be of better quality than the former. The reverse should not be entertained. This sect stipulates such Istibdal based on what has normally happened to the endowed land taken by the government whereby they were not replaced with another land. Only a small number of endowed lands have been replaced (Ibn 'Abidin, Muhammad Amin, 1979). However, some scholars agree that the acquisition of endowed property to be replaced with money provided the entrusted person doing the substitution or replacement is a qadi who is recognized for his honesty and integrity (Zuhdi Yakan (t.t.), Sabiq, Sayid, 1992), Ibn Qudamah, 1999, Al-Zuhayli, Wahbah, 1987, Tarablas (t.t.)). Al-Kubaysi in his book stated that istibdal of the endowed land cannot be replaced with money, but land instead (Hafiz al-Din al-Nisfi, Abi al-Barakat 'Abd Allah b. Ahmad, 1997), al-Kubaysi, Muhammad 'Ubayd, 1977). However, he reiterated that the conditions can be changed and amended to suit the current situation in order to maintain sustainability of the endowed assets, thereby ensuring that the recipients of the endowment continue to enjoy the benefits out of the said property (Al-Kubaysi, Muhammad 'Ubayd, 1977).

#### Qualification For Approval of Istibdal

There are various aspects of istibdal implementation that need to be explicitly examined by with authority and those conversant in this matter (Ibn al-Humam, Kamal al-Din Muhammad b. 'Abd Wahid, 1977, Ahmad Farraj Hassan, 1986). This is so because Istibdal concept involves ijthadiyyah. It is the responsibility of the government or the courts to oversee that the interest of the public is not compromised unless there are reasons to believe that the endowed property would cause harm and does not benefit the waqif himself or the persons receiving the endowment (Ahmad Farraj Hassan, 1986). In this respect, al-Tarsusi has outlined three main conditions to be adopted in implementing the Istibdal concept (Abu Zahrah, Muhammad, 1971):

- i. Qadi shall in every possible way, conduct his own investigation before implementing the concept.
- ii. Qadi shall appoint two experts who are fair and honest to conduct research and investigate the need for the proposed Istibdal to ensure that its

implementation would really benefit others or otherwise.

- iii. After hearing the findings from the appointed experts, Qadi shall make a report and support the implementation of Istibdal. Approval of Istibdal depends on the Qadi as to whether he is satisfied with the proposal made, to ensure that the good cause of the endowment remains intact.

In another aspects of the implementation, endowed land to be taken by the government based on the conditions outlined by the jurists shall first be referred to the authority concerned. Investigations and detailed studies should be conducted so that the concept of acquisition by force based on the Istibdal concept is absolutely in line with the conditions and guidelines of the Islamic law, as discussed previously.

In conclusion, to determine the type of replacement, be it currency or land depends on the circumstances and current situation of the country. What's important is that the endowed land acquired by government must be purchased or replaced with another land and the compensation shall not be withheld or kept on its own (Al-Syirbini, Syam al-Din Muhammad b. Muhammad al-Khatib, 1994). However, if the replacement through the monetary compensation pose a lot of constraints due to other factors such as lack of suitable land, exorbitant land price so much so the inspectors (nazir) has difficulty in finding the land replacement, so in this case, the exchange with another land is highly preferred. In fact, in certain circumstances it becomes obligatory based on several Fiqhiyyah that:

Something which is not obligatory at the beginning, may become obligatory later if the desired objective is not achieved. (Al-Asyqar, Muhammad Sulayman b. 'Abd Allah, 2001),

### Fatwa/Guidelines Regarding Acquisition of Endowed Land by The State Authority and Implementation of Istibdal

Essentially, Islamic law reckons that the compensation money received by MAIN following the land acquisition by PBN is Istibdal and is categorized as "Endowed Istibdal" if it fulfills the criteria set out under the Islamic Endowment law (Siti Mashitoh Mahamood, 2001). However, in certain circumstances this istibdal is not recognized/acceptable if the benefits intended by the the waqif is not fulfilled. If MAIN accepts this compensation and freezes it without providing the 2nd endowed asset to replace those acquired, it means that the benefit out of the endowed asset is equally frozen and indirectly not fulfilling the intention of the waqif. This practice is clearly in violation of the endowment legal law and Istibdal in Islam. In order to fulfill the aspiration of the waqif, the trustee should make

every effort to create a second asset to replace the first one and the revenue or income generated from the said property shall be utilized for purposes as affirmed by waqif or to be channeled its beneficiaries. Undoubtedly, it is not easy to put the methodology of Istibdal on endowed property into practice. The new or substitute asset shall be at par with the first one be it in value, quality or status or perhaps, better than the former.

In the nutshell, MAIN has spelled out guidelines that requires for every endowed land taken by PBN, a compensation in monetary terms that equates the current valuation or in the form of land ought to be made. The monetary compensation shall then, be used to purchase other land in lieu of the endowment, and not otherwise. This decision is unanimously agreed by all states fatwa which are involved in the acquisition of endowed land. In this respect, MAIN has been given the task to handle such responsibility and not the Land Administrator.

## 2. Decision of the National Fatwa Council

The issue of endowed land being acquired by the government has attracted the attention of the religious authorities. The Committee of the Fatwa Council in its 46<sup>th</sup> meeting, discussed this issue, emphasizing on the laws pertaining to the surrendering of a piece of bequeathed/endowed land to the authorities. Results of the fatwa read as follows (<http://infad.kuim.edu.my/modules.php>):

- a. Ownership of endowed land can never be transferred except in an emergency case that requires such action be taken according to certain conditions.
- b. Endowed land which is acquired and transferred to the government shall be compensated according its value or be replaced by another land of equal or greater value.
- c. c. If the endowed land is developed for public interest such as the construction of roads, drainage, site for electricity substation and others, then the stipulated conditions as above are not applicable or exempted.
- d. d. If the endowed land used for specific purposes such as building up of a mosque, schools and others is acquired, the party who acquired such land shall provide a certain portion as substitute endowment and it should be of equal value in order to maintain its endowment status. For example, if a multi-storey building is erected, some of the units must be valued according to the current valuation and subsequently allocated for mosque, school and so on as intended by the waqif.

The guidelines issued by the National Fatwa Council shows that in principle endowed land can not be arbitrary taken by government or without reasonable grounds. Permission to acquire such

land cannot be deemed as absolute instead, it is bound by the terms and conditions contained in the Islamic Endowment law. The prerequisites for the takeover depends on the situation. Exemption or modification on conditions for the acquisition of endowed land can only be made, if the situation warrants it ie if the situation is critical, there is no other options or in emergency cases. In cases like these, the government has been given the option either to replace it with the monetary value or land of equal value or better than the former and at the same time, take into account the terms contained in Istibdal concept of endowed land.

### 5.0.2 Fatwa of the Trengganu Mufti Department

In Terengganu, there were not many fatwa regarding problems of endowed land being acquired and issues on development of istibdal on endowed property being issued by the State Mufti Department of Trengganu since the year 1951-2006 (Noor Naemah Abd Rahman, 2006). This is contrary to the general fatwas related to endowment which are normally referred to the Fatwa Committee, decided and minuted in the meetings held by the Islamic Religious Council and Malay Custom (MAIDAM) (Ahmad Hidayat Buang, 2004).

In 1990, the State Mufti Dato 'Hj Engku Alwi bin Engku Hj Ambak issued guidelines on land acquisition and Istibdal issue and he referred to several books such as Mughni al-muhtaj, Hasyiyah al-Jamal, Nihayah al-Muhtaj. These guidelines were among the first in Trengganu that addressed the issue of land acquisition. The guidelines read as:

*When someone endowed his property, he forfeits or disclaims ownership of the same and simultaneously submit and transfer it to Allah SWT. The trustee of this property should safeguard it because he has been entrusted to manage the property so that it will be preserved and can be used as determined by the waqif. The trustee must protect the endowed property under his control so that the original intention of the waqif is not neglected. In the event that something happens to the endowed property and it is beyond the trustee's control or his capacity and the property is considered damaged, the trustee is entitled to the compensation ie its price.*

Pursuant to this, the Fatwa Committee has prescribed some conditions in relation to acquisition of endowed land by the government as follows:

- i. Endowed land that is taken back has to be replaced with similar land and then declared with "Sighah Endowment".
- ii. Paddy land that is taken back is to be replaced with the same type of land.
- iii. If the same type of land is available within the vicinity, there is no necessity to seek for the substitution elsewhere.
- iv. Istibdal is carried out based on land valuation

and the trustee should ensure that compensation paid reflects its actual value. Therefore, replacement of unequal area coverage due to increasingly higher valuation does not arise.

- v. Surplus fund arising from the purchase of endowed replacement shall be used to buy a portion of the said replacement.

Based on the guidelines issued by the Trengganu State Mufti, Dato' Engku Alwi bin Engku Hj Ambak clearly that monetary compensation to replace the acquired endowed land would suffice. MAIDAM on the other hand, being the trustee establishes that in accordance with the terms and conditions of the Fatwa Committee, endowed land acquired by the government has to be replaced with another land as endowed replacement. The land to be replaced has to land of the same type in term of its utilisation, located within the vicinity and is of the same value.

Consequently in 1997, the Fatwa Committee had issued a fatwa to the Director of Lands and Mines of Trengganu. The Fatwa Committee sets out the rules that any acquisition involving endowed land should obtain prior approval from MAIDAM. Transaction without the consent of MAIDAM is considered illegal and contradicts Section 143 of the Administration of Religious Affairs Enactment 1986. Besides, the Land Administrator of Kuala Terengganu should pay compensation regardless of whether the endowed land is registered in the name of the Council or otherwise.

*"Reacquisition of something that has been donated/endowed is not as easy as what happened in the past. It requires MAIDAM's approval as a single trustee for all the endowment as provided in Section 143 of the Islamic Affairs Administration Enactment 1986 and if approved, replacement or payment shall be made to Religious Council for necessary action".* (MAIDAM 01-006/14 / 9-9-(50) date: 18/Nov/1997)

In addition to the above rulings, the Trengganu Fatwa Committee has also decided that the laws that govern all government land used for religious activities are the same as the other endowed land. The endowed land shall be preserved in any circumstances. In the event of emergency, public interest is of paramount importance, then the land could be acquired on condition that damages or compensation is paid. MAIDAM shall endeavor to obtain another land as the new endowed land to replace the one acquired. As for the cemetery land, the Fatwa Committee clearly states that it cannot be eliminated for development purposes. Any burial site should be preserved as it is. The rulings state

(<http://infad.kuim.edu.my/modules.php>):  
*Muslims cemetery cannot be eliminated because it is contradicting the Islamic teachings that require: Islam respects and protects other Muslims who have*

died as much as if they are alive as explained in the books of Fiqh. The grave where a person is buried belongs to the deceased. Therefore, it is sinful and illegal for it to be invaded, escavated and so on. The burial ground for the Muslims whereby the waqif is not known is termed by fiqh scholars as "musbalah" and the cemetery will remain as burial ground and according to Islamic Law, no one can change its status.

### Decision of the Kedah Fatwa Committee

In Kedah, the State Fatwa Committee has decided that the acquisition of land affecting the site, compound and structure of the mosque and prayer house should be avoided. It should be preserved and maintained as site for construction of the mosque and prayer house. If the project to be carried out is for road construction or other public emmities which cannot be avoided, then the acquisition of land can be made provided it is far away from the mosque or the prayer house. The land affected should be replaced with another which has equal coverage area. The mosque and the prayer house must then be rebuilt at another site. *Acquisition of site / the mosque area which was involved in the upgrading of K10 path from Gurun to Sik, Kedah was not allowed whether it was for the expansion of the road or to be kept as reserved land. In any case, the site for the mosque should never be disturbed, encroached or smeared (Committee meetings on Fatwa Kedah State, in 10hb. July 2005)*

Acquisition affecting the Muslim burial ground should be replaced with the land of the same size or area and the affected graves should be transferred to the area within the vicinity. In relation to this, the Kedah Mufti Department decides to differentiate between burial grounds that can be transferred and those which cannot be transferred based on their tenor. The Committee provides flexibility for the burial ground exceeding 100 years. They need not be transferred and excavated for the purpose of road expansion. This stance is taken on the pretext that human remains of 100 years old would have been perished. However, for those less than 60 years, they must be dug up and moved to another burial ground. This ruling explains that (<http://infad.kuim.edu.my/modules.php>).

*Syari'ah permits the acquisition of the burial land for the purpose of expanding the village embankment because it would benefit the general community. Soil can be piled up on the cemetery that is 100-years-old without having to excavate or dig it out because the remains of human bodies are believed to have destroyed whereas for a burial ground below 60 years, the graves must be carefully excavated or dug out and if the remains of human bodies are found, they must be assembled and reburied at any another Muslim cemetery.*

### Decision of Melaka Syariah Committee

In Melaka, the Syari'ah Committee has issued a ruling that all endowed land taken by government shall be paid compensation and replacement by another land to be made by MAIM in replacement of the acquired land (Melaka State Fatwa, on 2 February 1995. No.54). The ruling states:

*That according to Islamic law, endowed land can not be traded, cannot be given to anyone and is not transferable. Such happens to the endowed land of Sayyidina Umar Al-Khattab in Khaibar, which became the first land endowed in Islam. Pursuant to section 37 of the Administration of Islamic Law Enactment (State of Malacca) 1991, all endowed land in Melaka is under the purview of Islamic Religious Council as the Sole Trustee. Thus, if the endowed land is taken back by the state authorities for any reason, the State is obligated to pay the compensation and it should be duly vested and paid to the Islamic Religious Council and it will subsequently be used to get another land to replace the one acquired in order to fulfill the aspiration of the waqif.*

In relation to the acquisition of the graveyard, those with less than 60 years cannot be taken and its acquisition should be avoided.

### Decision of the Johor Fatwa Committee

In Johor (File Reference (2) in. JMJ606/ WAKAF (W) -2/2004), there are not many endowed land being acquired by PBN. There was an application for land acquisition made by the District Land Office (PBT), Johor Bahru for a mosque site at Taman Munshi Ibrahim Munshi PTD Lot 84437 with an area of 4.4923 acres to replace the mosque site PTD Lot 39931 of Taman Mewah with an area of 14,776 square meters in Mukim Teberau, Johor Bahru. The Fatwa Committee which met on January 16, 2004, had decided that:

***Istibdal Syarie is permissible either through exchange, purchase or sale that does not reduce the original coverage area.***

This is subject to Johor Bahru City Council shall first pay the remaining value for the area covering 0.84 acres to the Johor Islamic Religious Council according to its current valuation/price, or. *Johor Bahru City Council must first replace with another site in other area that require the site for a mosque from Johor Bahru City Council or has made request from the government.*

### Decision of the Kelantan Fatwa Council

The same thing has been discussed at length by the Islamic Religious Council of Kelantan (MAIK) in respect of land acquisition by the government whether for public development as well as sites for the mosque and prayer house. Although these decisions are confined to land owned by individuals, but indirectly they are also applicable to the endowed land owned by MAIK. The MAIK Religious Council during its meeting on 17th July 1994 agreed

(<http://infad.kuim.edu.my/modules.php>):  
That the acquisition of public land by the government to implement its programmes for public purposes is permissible.

The public land acquired by government for individual or certain project, is subject to the following rulings:

The law rules that it is permissible if agreed by the landowner.

If it is neither agreed by the landowner or not meant for public purposes, then it should not be taken;

If the acquisition of land is viewed as beneficial to the public and there is no other way to replace it, the ruling permits the acquisition even without the owner's permission.

The owner of the land shall be paid or given a fair compensation for any land acquired.

**All decisions made by the Religious Council are based on the following evidence:**

- i. Hadith of the Prophet Muhammad says: "Property of a Muslim is illegal except with the consent of his master" and the hadith: "There is no harm and be harmed."
- ii. Islamic methodology which reads: "Any actions taken by the ruler for his subject are for their general welfare and interests". The status of the ruler in the eyes of the people is the same as the status of 'wali' or manager towards the orphans.

### Decision of Perak Syari'ah Committee

In Perak (<http://infad.kuim.edu.my/modules.php>), The Perak State Syari'ah Committee has discussed the status of the land granted by government to the Perak Islamic Religious Council (MAIP) for the purpose of religious activities. Among them are the sites for construction of a mosque, house of worship, cemetery, sites for religious schools and other purposes for the benefit of Muslim communities in the state. These lands are directly involved with the acquisition of land by the government for development projects. The issue was raised by MAIP because they do want the utilisation of the lands to contradict the Endowment laws if the lands are recognized as endowed lands. The

Perak Syari'ah Committee during its 154<sup>th</sup> meeting on 3<sup>rd</sup> Zulqaedah 1422 or January 17, 2002, agreed that the status of the government land granted for the purpose of building a mosque and graveyards is categorised as endowed property. While those granted for development purposes is treated as Baitulmal land.

### Planning Of Istibdal On Endowed Land By Main

Each state in Malaysia has set up several committees such as endowment working committee, endowment control committee, development committee, investment and others (Azizian Bin Hamid, 1999). However, the istibdal committees are

not set up except in Kedah ((Abdul Halim Ramli, Kamarulzaman Sulaiman, 2006). For those states which do not specifically establish this committee. the task and responsibility are given to the endowment unit to perform istibdal without creating a special body and it merely consists of several parties with authority: Zainal Abidin Mat Nor, 2000).

In Terengganu, the Zakat Committee, Endowment and Baitulmal during their first meeting on August 9, 2005, had forwarded several proposals regarding replacement transaction or Istibdal of endowed land which were not done in a very long time. This approach was taken after witnessing that no actions had been taken about the endowed land acquired by government or PBN. As the result of this postponement, MAIDAM had to deal with the depleting quantity of endowed land, especially those in urban and suburban areas. Among the proposals is that MAIDAM will find and purchase other land in replacement of the land acquired, as stated in the fatwa. The land acquired shall be replaced with similar land and then declared with "sighah" endowment. This vulnerability is closely linked to the land acquisition records or information. Managers of endowed land did not list out the entire details of the endowed land that are involved in the acquisition since 1951. Detailed studies and monitoring were not carried out continuously by the relevant parties. Similarly, from the researchers' point of view, MAIDAM did not give much emphasis on its plans and activities as to their effectiveness and success of each of its plan.

Kedah is quite advanced in the planning and development of istibdal land as compared with other states. The "Land Acquisition Committee". chaired by Dato' Yang DiPertua (the President) has been established as MAIK is concerned about the acquisition of endowed land by the government. Its objective is to facilitate and expedite efforts towards implementation of Istibdal on the endowed land acquired by government so that the same is replaced with another land within a short period of time without too much of bureaucracy. During the meeting, the Land Acquisition Committee has structured several methods of implementation. Among them are:

- a) The decision of the Committee shall take into account the valuation from
- b) the Valuation and Property Services Department to ensure that the new or replaced endowed land is equal in value or of better value than the former;
- c) The committee may refer to Syarikat Pengurusan IZZAH Sdn Bhd, a subsidiary of MAIK
- d) or other parties concerned, for advice on the suitability of the land;
- e) The Committee may decide to purchase the replaced land and thereafter
- f) inform MAIK for every decision made;

g) d) The endowment department of MAIK administration can execute the transfer of land ownership and payment of the land price in accordance to the decision made by the land purchase committee.

In Melaka, Melaka Islamic Religious Department has yet to develop any relevant plans regarding Istibdal on the land acquired by government. They are of the opinion that the amount of endowed land acquired is small and it does not pose any critical problem. Hence, the need for replacement of land is yet to be decided by MAIM. Furthermore, the government has supported the Melaka Islamic Religious Department (JAIM) by giving approval for the graveyard with total land area of 85 acres for two districts in Melaka Tengah and Jasin. As for the district of Alor Gajah, the result of such application is still pending.

### 3. Conclusion and Recommendation

Implementation of istidbal on the land acquired by government cannot be postponed or delayed. It should be done as fast as possible by the trustee in order to protect the interests of the waqif and the Muslims as a whole and to prevent the abuse of the compensation funds, apart from the increase in the current land value. Implementation of istidbal should take into account the opinion of Fiqh scholars without being tied down or confined to one sect and should be in line with the decision made by of the State and National Fatwa Committee. The methodology or procedures of Istibdal issued by the Department of Tithe, Endowment and Hajj through the Endowment Land Management Manual can be followed as a guide to ensure the the Istibdal procedures between states are uniform. The concept of substitution between General, Special and Lineage endowed land should be distinguished, so as the endowed land, taken in whole or a portion. Some of the suggestions on the implementation methodology of Istibdal on the General, Special and Lineage endowed land which are acquired by PBN are as follows:

#### Acquisition of the entire land

As for the land acquired in whole or a big portion of it, the replacement should be solely on land-to-land basis (*al-'Aqar bi al-' Aqar*) regardless of whether it is General, Special or Lineage Endowment. Replacement on land-to-land basis involving acquisition of a large area is given due priority to facilitate the search for another land of the same type and coverage area by the agency and MAIN. Apparently, a large size of land is relatively easy to purchase as Istibdal.

#### Acquisition of a portion of the endowed land

A land for which only a small portion of it is taken, it

is relatively difficult to replace it with another land. Thus, it is not necessary to substitute it on a land-to-land basis. In fact, it is sufficient to compensate in monetary form. If land is required as the replacement, it is extremely difficult and impossible to implement. In this instance, it is recommended that total compensation for the General and Special endowed land be combined. It is through this method that the total value of compensation paid by the government, is combined and consolidated into a large amount of as per the endowment category. With this huge amount, MAIN is able to purchase other land that has higher commercial value in lieu of land which have been acquired. The same can be applied for the lineage endowment. The benefits derived from the new assets would be channeled back or distributed to the beneficiaries according to distribution method of the earlier assets. Fatwa committee shall review and issue guidelines that enable these monies to be consolidated and be used to buy something other than land which otherwise would have posed a great problem to MAIN if replacement on the basis of land to land is insisted, as previously prescribed in the guidelines.

#### Acquisition of Endowed land as sites for Mosque, Prayer House and Graveyard

As far as the land endowed for mosque and prayer house are concerned, there are two types of utilization categories prescribed by the waqif. These two categories should be given due attention because each category provides different benefits. There are waqif who endowed their land specifically as sites for a mosque and a prayer house. This land is meant for construction of a mosque or a prayer house. Another is the endowed land meant to benefit the mosque and the prayer house. All revenue generated from such land shall be channeled to the mosque and the prayer house for their maintenance. Methodology of istidbal on this land are as follows:

- i. As for the acquisition of the mosque / prayer house which does not involve the whole land and buildings, the agency must bear the cost of repairing the mosque and the prayer house as per their original form with the consent of the committee member of the said mosque/prayer house.
- ii. As for the site acquisition belonging to mosques and prayer house that includes the building, the agency /developer shall reconstruct a new mosque / prayer house on the new site and the land / site is to be replaced with a land that has the same area coverage as the one acquired. Problem is imminent if the developers/ agencies offer monetary compensation. Problems arise maybe in terms of difficulty to find a land for replacement and rebuilding of the mosque / prayer house can also be very costly and unpredictable. The agency may seek other

land within the vicinity or adjacent to the original land.

- iii. The affected Muslim cemetery on the other hand, shall be replaced by land as well. The old graves should then be transferred to a new Muslim cemetery site.

From the aspect of the Land Acquisition Act 1960, the provisions of Section 15 (1) must be enforced, particularly in providing the right and option to MAIN, as owner of the land to make a decision. The government should be impartial in solving the problems; they should not be bias and neither can they neglect those whose ownership of the property has been deprived. In the case of the acquisition of endowed land, MAIN should be given the opportunity to participate in project developments as it thinks fit or replace the acquired endowed land with the same land type or of better type than the former, apart from the monetary compensation made previously. In addition, it has been proposed under APT 1960 to disallow the transfer of ownership or sales of the endowed land to the private sector. The concept of a lease transfer is more appropriate as far as private sector is concerned in order to salvage these lands from being permanently owned by other parties. This leasing concept would provide a long-term benefit to both MAIN and the Muslims.

In addition, on the part of MAIN, there is a need to establish a specific Istibdal committee to perform the duties and responsibilities of tracking down suitable government or alienated land so that application can be made to the land administrator of each district. The Committee shall be comprised of religious scholars, professionals and administrators such as the State Exco, land administrators, economists and other stakeholders in addition to the MAIN itself. In order to carry out this mission successfully, the committee may be managed by the subsidiary companies which have been legitimately appointed by MAIN. All the policies, procedures and methodology of istibdal will be decided by the members of this committee and the subsidiary companies will in turn, implement Istibdal as planned by the committee. The Committee will also monitor those who are responsible to perform the above task.

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