

ICHGA~2018

INTERNATIONAL CONFERENCE ON HISTORY AND  
GOVERNANCE OF AWQAF IN SOUTH AND SOUTHEAST ASIA  
**SUBSTITUTION OF WAQF IN TERENGGANU: MAQASID  
SHARIAH AND PUBLIC INTEREST APPROACH.**

*Assoc. Prof Dr, Abdul Bari Bin Awang*

*Dr. Amilah Bt. Awang Abd. Rahman*

*Faiz Sakinah Bt. Amir Hamzah*

*Department of Fiqh and Usul Al-Fiqh*

*Kulliyyah Islamic Revealed Knowledge and Human Sciences. IIUM.*



# Abstract.

*Application of waqf property in modern society is highly anticipated to fulfill more demand for economic growth and development and help the needs in society. Therefore, Istibdal Waqf is indispensable in the implementation of waqf so the waqf property will not be wasted and always beneficial to society. Although the Istibdal Waqf is important but it is doubtful whether it is a necessity (Daruriyyat) for the society or needs (Hajiyyat) or embellishment (Tahsiniyyat) while the discussion are involve in the framework of Maqasid Shariah so the main purpose of waqf are still preserved. This article aims at discussing the issues with regard to the application of Istibdal Waqf concept in Islam. Specifically, the study sets out to explain on the importance of Istibdal Waqf for muslim society in the framework of maqasid shariah and public interest. The study also focusing on Istibdal in Terengganu as case study.*

# WAQF SUBSTITUTION (ISTIBDAL WAQF)

- Istibdal means to substitute a waqf property with another property or cash which is of the same or higher value than it either by substituting, purchasing, selling or any other ways in accordance with Shariah principles.
- Any waqf property that do not provide any benefits will be allowed to be substituted by the process of istibdal with better property in terms of economy benefits as long as it is still in maslahah for people and the concept of perpetuity and everlasting (واللزوم التأييد) as well continuous benefit (الإنتفاع دوام) of a waqf property should be preserved and maintained.
- Substitution can be divided into two forms ie substitution of one waqf with a similar and the substitution of land with its cash value.




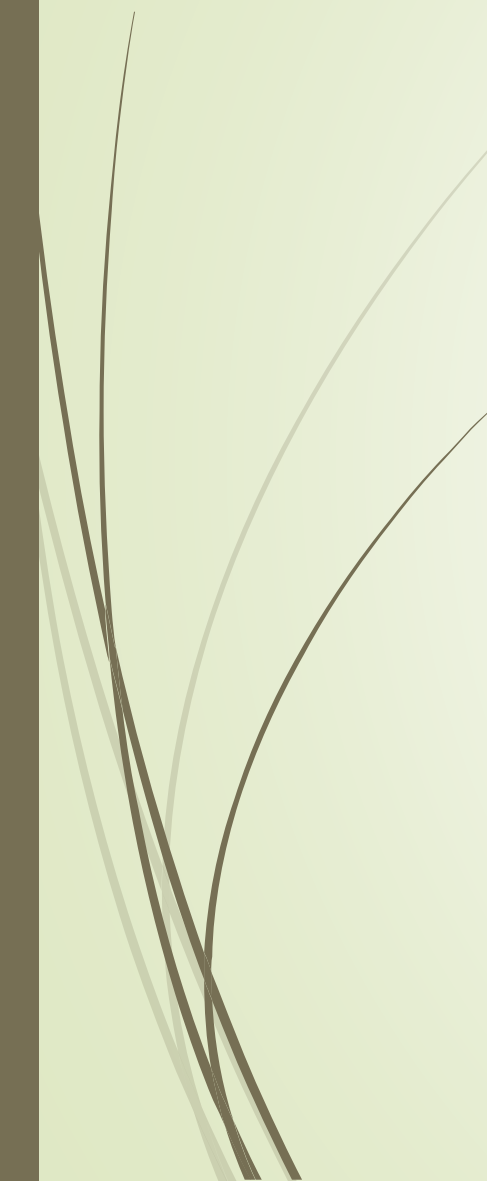
# Fuqaha' Opinion on Waqf Istibdal

	Movable	Immovable	Others opinion/arguments
Hanafi	Valid (with certain conditions)	Valid (with certain conditions) Mosque is not permissible	Other discussion is the permissibility of istibdal if the waqif or owner put a condition to not istibdal his waqf. 1.It is not permissible for qadi or others to Istibdal his waqf unless the waqif put a terms on it 2. permissible if it have any maslahah (views of Abi Yusuf and others from Hanafi's scholars)
Malikiyy	Valid (if it leads more benefits for the assets and prohibit it would lead to its destruction)	1. Not valid • majority view of Malikiyyah who have prohibited the istibdal altogether neither it was a mosque. 2. Not valid • smaller group of Malikiyy who claimed that istibdal is not permissible to sell or istibdal unless its necessity to expand the mosque or graveyard or public road because it is <b>public interest</b> for ummah.	

	<b>Movable</b>	<b>Immovable</b>	<b>Others opinion/arguments</b>
Shafi'i	<p>1. Not valid (even it has damaged and has no longer be benefited by the intended beneficiaries)</p> <p>2. Valid (Some jurists validates istibdal if its no longer has any benefit and buy with a standing price)</p>	<p>Not valid (not permissible to sell the damaged or destroyed property that may be preserve and repair)</p>	<p>a few Shafi'i jurists who have validates the sale of the waqf, whether it is movable or immovable, in accordance with the benefit or interest (maslahah) of the waqf</p>
Hanbali	<p>Valid due to al-haajah (embellishment) and maslahah rajihah (preponderant exigencies)</p>	<p>Valid due to al-haajah (embellishment) and maslahah rajihah (preponderant exigencies)</p>	<p>The flexibility of the hanbali's school for istibdal on the practice of Umar al-Khattab when he had transferred the mosque of Kufah to another place as it was no longer visited by the worshippers.</p>



# Substitution of Waqf in the Framework of Maqasid Shariah

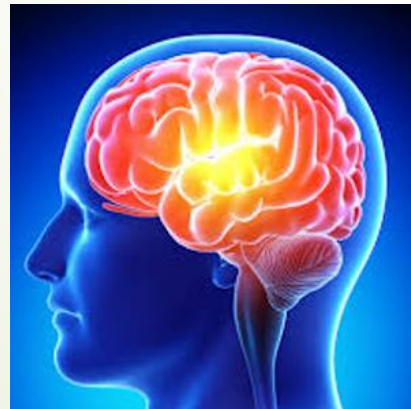
- 
- 
- ▶ Maqasid of the Islamic law are the objectives/ purposes/ intents/ ends/ principles behind the Islamic rulings.
  - ▶ For a number of Islamic legal theorists, it is an alternative expression to people's 'interests' (*masalih*) or the stated purposes of the Shari'ah in fulfilling human interest (*Masalih al-'ibad*).
  - ▶ Imam al-Ghazali describes *maqasid* Shariah in a view that benefits (*masalih*) that should be consistent and in line with the objective of the Shariah, since the basic purpose of Islamic legislation is to protect the interest of people against harm (*mafsadah*).
  - ▶ the benefits (*masalih*) of Maqasid Shariah can be categorized into three which are:
    1. Necessities (*dharuriyyat*),
    2. Needs (*Haajjiyyat*)
    3. Embellishment (*Tahsiniyyat*),



➤ the necessities (*Dharuriyyat*), covers five areas which are the basic needs of human's existence;

1. Religion (*deen*),
2. Life (*nafs*),
3. Intellectual (*aql*)
4. Lineage (*nasl*)
5. Property or wealth (*maal*)

الله



# Relation of Istibdal Waqf and Maqasid Shariah

- The rule of the Maqasid with regard is to gaining benefit and preventing evil and harm.
- Jurists have established the conflict between benefits and evils on three distinct levels;
  1. benefits are found to be greater than evil, in which case the fatwa must follow the path of benefit
  2. evil overcomes benefit, in which case priority is given to evil rather than benefit.
  3. both evil and benefit are the same, in which case jurist set the rule stating that “Repelling harm is preferred to the attainment of benefits” (Daf` al-Mafasid Muqaddam `ala Jalb al-Manafi`).
- However, the evils resulting from substitution are only suspected. Even when they do occur as testified to by Muslim history they are not able to override the benefits resulting from substitution. The consequent benefits resulting from permitting waqf substitution within a set of legal regulations significantly outweighs all suspected evils in the issuance of a fatwa of permission.

# The relationship between waqf Substitution and Dharuriyyat in the Frame work of Maqasid

- ▶ substitution of a totally deteriorated or damaged waqf completely suit and reflect the spirit and rule of necessity because apparently it has no longer beneficial to the beneficiaries, so the rule dictating necessities permit prohibitions (al-Darurat Tubih al-Mahdurat) may be applied . In such case however, the beneficiaries are in a case of necessity to fulfill their needs.
- ▶ Other than that the necessity to preserve the community's wealth is yet another aspect which contributes to the increase of the degree of necessity.
- ▶ Prohibiting substitution however, may contribute to the decline the great amount of waqf properties, which essentially violates the principle of wealth preservation. The legal opinion which prohibits substitution seems to have overlooked this universal Shariah principle through exposing waqf to decay and collapse, causing the nation decreasing amounts of resources. Allowing for substitution however, is a positive measure which helps preserve wealth.



# Istibdal for a public interest or welfare (maslahah 'ammah)

- Many jurists have agreed that Istibdal for public welfare is permissible as it was more beneficial for Muslim generally. Ibn Taimiyyah for instance said that permissible for Istibdal is due to needs (haajah) and preponderant exigencies (maslahah raajihah) of the beneficiaries and the community.
- Therefore, in the name of public welfare the government is allowed to take any property of waqf in the method of *Istibdal* for public welfare benefits such as making a road, hospital, cemetery, mosque, or any building which the main purpose of erecting is for the public as long as the waqf land is going to be replaced with another land or have compensation.



# Istibdal Waqf in Terengganu for A Public Interest

- ▶ MAIDAM is so concerned about the land of waqf by not allowing the waqf lands to be taken indiscriminately by the State Authority except in a state of necessity.
- ▶ This matter was decided at the MAIDAM Meeting (Waqf Land Acquisition File No. 03-003-4): "The meeting noted that the President as the chairman of the land waqf shall defend that waqf lands are not arbitrarily taken by certain parties even replaced by unless in exceptional cases only".

Based on data collected from MAIDAM, Terengganu

There are 10 places involves with Istibdal Al-Waqf. The 10 places mentioned are:

District	Place	Lot	The purpose of Istibdal	Type of Maqсад
1. Chendering	Teluk Chendering	1059 GM 34 (0.106 acres)	To develop aquaculture place at Chendering	1.To protect the life of fisherman living there. (حفظ نفس) 2.To provide financial support of the fisherman (حفظ مال)
2. Pengadang Buluh	Pengkalan Laut	7096 GM 803 (4.812 acres)	To expand / wider the road	1.To protect the religion as they can go to mosque easier (حفظ دين) 2. Give benefit to the villagers to go somewhere else e.g. school, worker place, etc. (حفظ نفس)
3. Manir	Kg. Banggol Syed Hussin	10344 GM 1380 (0.719 acres)	To enhance drainage system to avoid the flood	to protect the life of the villagers (حفظ نفس)

District	Place	Lot	The purpose of Istibdal	Type of Maqsad
4.Chendering	Kg. Barang	3396 GM 1698 (0.781 acres)	To develop a ditch system (for agriculture)	<ol style="list-style-type: none"> <li>To protect the life of villagers as to maintain their life sustainability (حفظ نفس)</li> <li>To protect wealth of people as a financial support system (حفظ مال)</li> </ol>
5.Bukit Payong,	Kepala Titian To' Ided	3538 GM 1560 (0.344 acres)	To expand / wider the road	<ol style="list-style-type: none"> <li>To protect life as to avoid accident due to the road is more safety for users (حفظ نفس)</li> </ol>
6.Kubang Parit	Kg. Baroh Gong Benjok	1628 KRM 1442 (3.195 acres) (used to be waqf khas for mosque)	to provide the relocation of Kubang Parit	<ol style="list-style-type: none"> <li>To protect life of villagers (حفظ نفس)</li> <li>To protect lineage of family</li> </ol>

District	Place	Lot	The purpose of Istibdal	Type of Maqсад
7.Kepong	Kg. Alor KandeH	789 GM 25 (0.1012)	To build water supply project (water tank)	To protect life of people in order to maintain the water supply as one of major basis in human life (حفظ نفس)
8.Gelugur Kedai	Padang Pak Diam	772 GM 242 (0.08336)	to build flood barrier	To protect life of people from any harmful during rain season (حفظ نفس)
9.Bukit Besar	Mak Jipa	2583 GM 2838 (0.0809)	to build feeder road and bypass	To protect life as to avoid accident due to the road is more safety for users and easier for them to go to another place (حفظ نفس)
10.Gelugor Raja	Baroh Kg. Panji	294 GM 883 (0.7259)	to build centre for the development of the resident and family in Terengganu.	1. to protect life of villagers (حفظ نفس) 2. To protect lineage





# Conclusion

To conclude this research we can say that the government or mutawali al-waqf have a right to apply Istibdal Waqf according to Islamic Law for the benefit of the community. The relation between maqasid syariah and Istibdal waqf was very close and without referring to maqasid syariah, the application of Istibdal may violates or distract from its main purpose as a solution for loss of waqf property and maintain waqif indicated. Therefore, the government must aware the importance of Istibdal and it's return the benefit of the society. It is important to note that the proper management to administer waqf and especially to istibdal waqf property by following it conditions as mention by scholars now days is very important to help the socio-economic growth and assist in public welfare.

By referring to MAIDAM cases, we can concluded that MAIDAM as a mutawalli al Waqf for Terengganu State did the right thing in istibdal waqf to protect al Daruriyyat al Khomsah and for the public interest.