

The Underlying Issues of Depravity in Waqf Land Development Within the Context of Malaysia

Fatin Dayana Rashid¹, Razi Yaakob², Hanif Md Lateh³, Mohd Ridhuan Tee Abdullah⁴, Tarmisi Salah⁵ and Wan Mohd Khairul Firdaus Wan Khairuldin⁶

Abstract

In terms of value and size is not parallel of waqf land development. This indicates the occurrence of certain issues that hinder of the waqf land development. Among the constraining issues are from the aspect of funds and law. The focus of this study is to examine funding and legal issues that arise in the development of waqf land. This case study and uses a fully qualitative research approach. Data were collected through three methods namely documents, interviewers and observations. The results of the study found that poor land management and administration makes it difficult for waqf land to be developed. The State Islamic Religious Council (MAIN) has been entrusted to take full responsibility for waqf land. However, in the Malaysian context, the legislative power is divided into Federal Legislatures and State Legislatures. There is the Kanun Tanah Negara and the Rental Control Act which must be complied with before taking waqf land. Therefore, the acquisition of waqf property is not something that can be done easily without relying on principles and fatwas. The law of taking waqf land is also depends on the current situation. Likewise with the issue of funds, where it is also the main issue to preserve waqf land. This study has demonstrated that the related measures proposed serve as solutions to the presented issue. However, the efficacy of these solutions is contingent upon their interdependence. Thus, this study underpins the methods of resolution within the broader framework for a country like Malaysia in addressing land endowment development.

Keywords: *Waqf, Waqf Land, State Islamic Religious Council (MAIN), National Land Code*

INTRODUCTION

In the Malaysian context, the term "wakaf" is borrowed from its original Arabic counterpart (Lateh, H.M. et al. 2018). Hence, its approach is friendly and aligned with Islamic principles. In the early 1940s, most waqf lands were developed in the form of traditional physical developments such as Islamic burial grounds, mosque sites, and prayer halls. However, with development over time, waqf property has been divided into two sections. The first is the development section advanced by the State Islamic Religious Councils (MAIN), while the second section began with the establishment of the Department of Waqf, Zakat, and Hajj (JAWHAR) in 2004. The Council acts as the sole trustee for each state's waqf property, whereas JAWHAR is a Government Institution established to assist MAIN in preserving waqf assets. According to JAWHAR (2014), there are 996 units of general waqf land and 4744 units of special waqf land, making a total of 5740 units equivalent to 16751 hectares in area. The overall value of waqf land is estimated to be RM 111,413,889.85. According to the Chief Executive Officer of the Malaysian Waqf Foundation (2020), there are many waqf assets in Islamic countries that have not been developed, which prevents the realization of the waqif's desire for their land to be used for public welfare. For example, in Malaysia, over 33,000 acres of waqf land are registered with the State Islamic Religious

¹ B.A Hons Candidate for Master's Degree Faculty of Islamic Contemporary Studies, Universiti Sultan Zainal Abidin, Malaysia E-mail: fatindayana.fdr@gmail.com, <https://orcid.org/0009-0001-1055-0693>

² Ph.D Senior Lecturer Faculty of Fundamental Studies and Continuing Education, Universiti Sultan Zainal Abidin, Malaysia. E-mail: raziyaakob@unisza.edu.my, <https://orcid.org/0009-0007-9154-989X>

³ Ph.D Senior Lecturer Faculty of Islamic Contemporary Studies, Universiti Sultan Zainal Abidin, Malaysia. E-mail: hanifjunid@unisza.edu.my, <https://orcid.org/0000-0002-4349-9847>

⁴ Ph.D Professor Faculty of Fundamental Studies and Continuing Education, Universiti Sultan Zainal Abidin, Malaysia. E-mail: ridhuantee@unisza.edu.my, <https://orcid.org/0009-0003-8678-0131>

⁵ Ph.D Associate Professor Academy of Islamic and Arabic Studies, Princess of Naradhiwas University Thailand. E-mail: aiaa_tarmisi@hotmail.com, <https://orcid.org/0009-0007-2248-5415>

⁶ Ph. D. Assoc. Professor at Faculty of Contemporary Islamic Studies (FKI), Universiti Sultan Zainal Abidin, 21300 Kuala Nerus, Terengganu, MALAYSIA E-mail: wanfirdaus@unisza.edu.my, ORCID iD: 0000-0002-9546-139X

Councils (MAIN). However, only 15 percent of these lands are cultivable. This is due to various constraints and issues that arise in the successful development of waqf real estate (Rashid, F.D., et al. 2022).

THE STATUS OF WAQF PROPERTY MANAGEMENT

In the past, at the initial stages of waqf endowment, there was no clear form of waqf property management. What can be traced are only a few signs indicating that the management of waqf was in the hands of the endowers themselves or local community leaders directly involved in religious activities such as village heads, chiefs, qadis, imams, or mosque committees appointed by the local community.

This was because, typically, those who wished to endow their property, whether as general waqf or specific waqf, would do so verbally in the presence of a few trustworthy Muslims, subsequently appointing a waqf manager to manage the waqf property. Management at that time was simple, and the community adhered to clear laws and regulations related to waqf. Hence, at that time, any property and proceeds were used transparently; specific waqf was used for its intended purpose, and general waqf proceeds were used for the general welfare of Islam. Misunderstandings, encroachments, breaches of trust, or claims for the return of waqf property by heirs were rare, even though these practices were carried out verbally (Ismail, C.Z., 2010).

However, this situation led to a less organized waqf system due to the absence of written records, neglected registration of waqf properties, and so forth. This occurred because, at that time, there were no laws, regulations, or systems requiring all waqf properties to be registered as such. Additionally, there was also a lack of awareness among some managers to register or keep records for memorial record purposes of the endowed properties. This condition persisted until the establishment of the State Islamic Religious Councils (MAIN) and the introduction of the State Syariah Law Administration Enactments in Malaysia, which stipulated that the Islamic Religious Council is the sole trustee for all waqf or general endowment properties.

However, initially, the MAIN faced two major problems. First, the problem of identifying the quantity and location of waqf properties. Second, the challenge of registering waqf properties in the name of the Islamic Religious Council as the trustee. These issues became more complicated if the endower or appointed manager had passed away while heirs claimed that the property was not intended as waqf. As a result of these challenges faced by the Council, there are several cases of waqf property being reclaimed by heirs without the Council's knowledge, and not to mention the amount of waqf property that has been detected being used for non-waqf purposes (Ismail, C.Z., 2010).

Referring to the MAIN Enactment, MAIN is the Sole Trustee for all waqf properties, including General Waqf or Specific Waqf. The management and administration of waqf are placed under the Islamic Religious Council of each state, and the State Islamic Religious Council is the sole holder of all waqf properties in Malaysia. This is established through legislation for each state.

In Selangor, Section 89 of the Selangor Islamic Religious Administration Enactment 2003 states 'The Council becomes the sole trustee of waqf, nazar, and trust.' Similarly, in Penang, the Penang Islamic Religious Affairs Administration Enactment 1993, Section 92, stipulates that MAINPP is the sole trustee and is responsible for developing it for the benefit of Muslims. Section 93 under the same enactment provides the power where the Council shall take the initiative and assert rights and register all waqf lands, trusts, and general endowments contained in Section 92 according to relevant land laws. In the Federal Territories, the Federal Territories Islamic Law Administration Act 1993, Sections 61 and 62 (1),(2), provides that MAIWP is the sole trustee for waqf properties (Ab Rahman, A., 2009).

Additionally, this provision is also clearly mentioned in the Enakmen Pentadbiran Hal Ehwal Agama Islam Terengganu (2001) [Terengganu Islamic Religious Affairs Administration Enactment (2001)]:

“Walau apapun peruntukan yang berlawanan dalam mana-mana surat cara atau pengisytiharan yang mewujudkan, mengawal atau menyentuh kepada perkara itu, maka hendaklah Majlis menjadi pengawal tunggal bagi semua wakaf, sama ada wakaf Am atau Wakaf Khas dan semua nazar am dan semua amanah dari serba jenis yang mewujudkan amanah khairat untuk bantuan dan kemajuan Agama Islam atau bagi faedah orang-orang Islam mengikut Hukum Syarak, dan yang terletak di negeri ini atau jika orang yang membuat penyelesaian

harta itu atau lain-lain orang yang mewujudkan amanah, wakaf atau nazar am itu berdomisil di negeri ini, setakat semua harta yang tersentuh olehnya di mana jua harta itu terletak” [Notwithstanding any provision to the contrary in any deed or declaration creating, controlling, or pertaining to the matter, the Council shall be the sole guardian of all waqfs, whether General Waqf or Special Waqf, and all general endowments and all trusts of any kind that establish a charitable trust for the aid and advancement of the Islamic religion or for the benefit of Muslims according to Sharia Law, and which are situated in this state, or if the person making the settlement of the property or any other person creating the trust, waqf, or general endowment is domiciled in this state, as far as all properties affected by it wherever such properties may be located] (Seksyen 63)

Meanwhile, Section 64 of the Enactment states:

“segala harta, pada yang ditetapkan, tertakluk kepada seksyen 63 hendaklah, jika terletak di dalam negeri ini, terletak hak pada majlis [All property, as specified, subject to Section 63, shall, if located within this state, vest in the council]”

The purpose of appointing the Council as the sole trustee of waqf property is to ensure that waqf is managed and administered more effectively and efficiently, generating significant income that can be utilized for welfare purposes, whether specified by the endower or not. Most importantly, it is to avoid various issues that arise through the appointment of untrustworthy private trustees and the interference of heirs, which have led to the loss of property and waqf status, thereby deviating from the original intentions of the endower and contradicting legal principles (Mahamood, S.M., 2005).

MAIN, as the mutawalli or sole trustee, must preserve waqf property so that its benefits do not cease and the rewards for the endower continue to flow. However, in managing and administering waqf property, various issues and constraints have arisen within the Council. Therefore, the establishment of the Department of Zakat, Waqf, and Hajj (JAWHAR) assists MAIN in preserving waqf property in a more systematic, effective, and organized manner. JAWHAR has also appointed the Malaysian Waqf Foundation as a subsidiary to facilitate the smooth management of waqf property in Malaysia (Interview, 2021).

LEGAL ISSUES (WAQF LAND ACT)

According to the study by Mohamad, M.R. (2022), before the arrival of the British in Malaya, the topographical situation of the land was covered with forests. Most of the land used by communities at that time was for farming and paddy cultivation. At that time, land law was focused only on customary rules or unwritten traditional practices. Even the Malay community settlements at that time were concentrated along riversides and some other places with additional living facilities.

After the arrival of the British, land law began to be implemented under British administration in 1874 in Perak, Selangor, and Negeri Sembilan, while in Pahang it was established in 1888. It was then unified at the federal level in 1896. By 1911, land law was successfully codified with a total of 130 sections contained in the legislation. The legal process continued to evolve until the Kanun Tanah Negara was formed in 1926.

49 years later, the land law was comprehensively enforced, which is the Kanun Tanah Negara in 1965. When waqf property involves land, these lands are indirectly related to the Kanun Tanah Negara such as the land registration process under Sections 76, 197, 200, 214, 416C, and 421A. However, the position of waqf is also included in this legislation under Section 4 (2) (e): “mana-mana undang-undang buat masa itu berkuatkuasa berhubung dengan wakaf atau bait-ul-mal [“any law then in force relating to waqf or bait-ul-mal].”

Despite this, there exists an issue when waqf land is intended for development. This legal issue of waqf land is a common challenge faced in the management system. To ensure smooth operations, the enforcement of laws needs to be strengthened. Typically, without laws, enforcement cannot be carried out. This proves that laws are the backbone of smooth operations.

In Penang, the Penang State Islamic Religious Council (MAINPP) is the sole trustee fully responsible for managing, administering, and maintaining the state's waqf land. Similarly, in each state, mostly the Islamic Religious Affairs Councils have been directly tasked to manage and maintain the waqf institutions in Malaysia.

This aligns with the legal jurisdiction in Malaysia, which is divided into two parts: the Federal Legislative Body (Parliament) and the State Legislative Bodies (Yaakob, R., 2018).

According to further study by Yaakob, R., the power to the State Islamic Religious Councils (MAIN) has been delegated by the Sultan, who is the head of Islam for the states in Malaysia. Since the Islamic Religious Council (MAIN) is recognized as the sole trustee for all general and specific waqf properties, this power has been given to the Islamic Religious Council to manage all waqf properties, whether general or specific. Each state has different provisions regarding waqf land property. From the perspective of waqf administration, Section 70 of the Pahang Islamic Law Administration Enactment 1991, Section 61 of Act 505 recognizes MAIN as the Sole Trustee (sole trustee) for all waqf properties including waqf land. The same provisions are also found under the State Islamic Religious Administration Enactments and State Waqf Enactments (JAWHAR, 2010). In terms of related discussions, waqf is linked to endowments whose authority comes through trust letters or wills. Therefore, matters regarding waqf are usually brought to Civil Courts, especially if the land is not registered in the name of the Islamic Religious Council or involves non-Muslim individuals in the case (Shakrani, M.S., et al., 2003).

To develop waqf land, several processes need to be scrutinized and their regulations complied with. The most important matter is to check the topography of the land. It is crucial to know the status of the land in terms of who owns it, whether it is agricultural land or otherwise, the size of the land, whether there are any restrictions on the land if it is developed? Where is the land located? Is it in the forest or remote areas? Is it suitable for development? And other matters that need to be examined before any development is carried out. These matters involve the waqf enactments, Islamic administration enactments, syariah court enactments, civil court enactments, and further involve the land acquisition act, Kanun Tanah Negara (KTN) (Interview: Mohamad, M.R., 2022).

In the context of waqf land, when intending to apply this method, approval must first be obtained from the State Authority. Subsequently, MAIN will reapply for the land that has been surrendered to the Land Office (PTG) to be designated as waqf land. The method of reapplication is through an application under Section 76. Under this section, the State Authority will grant land ownership to MAIN, and the land will be registered by the Land Office as waqf land (Mohamad M. R., 2022).

Kanun Tanah Negara (KTN) 1965 [National Land Code]

Although there are provisions as a sole trustee in the context of state enactments, there are also legal obstacles because the Kanun Tanah Negara (KTN) 1965 does not define waqf (Shakrani M.S., et al., 2003). Mohidin Md Omar's study (2013) shows that there are clear constraints through sections allocated in the KTN such as sections 4, 52, 76, and so forth. This situation indicates a contradiction in terms of enactments and the power of adjudication in court. The use of civil courts will lead to a lack of reliance on the KTN involving land administration matters in Malaysia.

Therefore, the absence of a waqf definition in the KTN should be re-evaluated and standardized to ensure the strength of the argument about waqf land rights and issues related to waqf land that is not transferred by the heir. This evaluation and standardization should take into account provisions that can prevent waqf land from encroachment by irresponsible parties. General legal provisions such as encroachment on private land are provisions that the government needs to take seriously. Methods to curb encroachment on public land should be applied to waqf land as provided through section 341 of the KTN (Yaakob, R., 2018).

Akta Kawalan Sewa, 1966 [Rent Control Act]

Apart from the KTN, which should be the cornerstone in every issue related to land, there are other legislative provisions that become obstacles in the development of waqf land. These provisions indirectly also act as barriers towards land development, specifically in the context of waqf land. Among these provisions is the law of the Rent Control Act, 1966 No. 56/1966, which was in use for a long period until it was repealed on 01 September 1997 through the Rent Control (Repeal) Act 1997 (Yaakob, R., 2018). The Rent Control Act 1966 defined controlled premises as:

Buildings completed after January 31, 1948

Premises fully furnished and rented with payments including food and drink.

Premises owned by the federal government or the government of any state

Premises the rights to which are held or acquired by or on behalf of any municipality for the purposes of the State Strata Ordinance effective in the states of Malacca and Penang and as extended to apply to other states under the power of the Ordinance (Extension of Application) Municipal Ordinance, 1948.

Premises no longer considered controlled premises under the authority of section 23, Rent Control Act 1966.

Through the definitions above, there exists a jurisdictional conflict with the State Islamic Religious Councils under the Islamic Law Administration Enactment 1959, which recognizes MAINPP as the sole trustee for administering and developing waqf properties. The contradiction with the jurisdictional provision of the Rent Control Act 1966 arises because MAINPP does not have the power to raise rental rates for premises. Although the Rent Control Act was repealed in 1997, there still exist legal obstacles that hinder development.

Overall, in the legal issue of waqf, the State Islamic Religious Council (MAIN), the Kanun Tanah Negara (KTN), and the Rent Control Act each have their own legislation, and there are jurisdictional conflicts in easily developing waqf land. The Sultan has given the sole authority and trust to the State Islamic Religious Councils to manage and maintain all waqf properties. Meanwhile, in the Malaysian Constitution, the power to legislate is divided between the Federal Legislative Body, namely Parliament, and the State Legislative Bodies. Since waqf matters are commonly created in wills, such matters are brought to Civil Courts, especially when the land is not registered in the name of the Islamic Religious Council or involves non-Muslim individuals.

ISSUE OF INSUFFICIENT FUNDS

Besides that, the next issue that arises is the lack of funding. How can a waqf land be preserved if it faces financial constraints? Therefore, funding is the most critical foundation in property development, and the issue of insufficient funds is crucial for researchers to highlight because this factor will indirectly hinder the development that has been planned at the MAIN level.

According to a study by Mahmud, R.H., et al. (2017), waqf institutions in Malaysia face the problem of insufficient funds in developing waqf properties. The funds available to waqf institutions are not sufficient to cover the necessary costs. Failure to provide adequate funding for development and construction on waqf land will stifle the development of such land. This has resulted in the existence of neglected and undeveloped lands. Furthermore, developing waqf land involves substantial costs, and the required funding is significant. Most development projects on waqf land are high-impact projects that will benefit the public.

The construction of rental houses valued at RM1.5 million planned by the Meru Mosque Parish Committee could not proceed due to the lack of capital, even though the project was seen as very progressive and had great potential to be utilized by the community (Othman, R., 2001). Moreover, financial institutions, whether related to government or private interests, do not support MAIN in developing these projects. For example, Bank Islam treats MAIN like a business company with stringent requirements that MAIN cannot meet (Yusof, N.M.Z., & Bahari, A., 1999).

The problem of insufficient financial resources occurs for several reasons, such as the income earned by the trustees, especially MAIN, is too small compared to the total expenses incurred (Yusof, N.M.Z., & Bahari, A., 1999). Additionally, the expenses for maintenance and administration of waqf sometimes exceed the annual income of the waqf property. In 1992, the total income collected from waqf properties was RM 5556467.20 while the expenses incurred to administer these properties amounted to RM 5903648.91 (Romli, S., et al., 2022).

Therefore, strengthening funding is crucial to ensure that all forms of waqf land development can be carried out. This is important so that every development planned for the public benefit can continue without being halted mid-construction. This is also important so that the rewards of the waqif can continue to flow to the waqif.

SOLUTIONS TO WAQF LAND LEGAL ISSUES

To address legal issues within the Malaysian context, the decisions of the Fatwa Council are crucial in determining the status of waqf properties. The Fatwa Council must resolve issues as swiftly as possible because prolonged delays can lead not only to detrimental consequences but also to mockery from the non-Muslim community. The study by Shakrani, M.S., et al. (2003) highlighted the issue of waqf land development, focusing on the interpretation of the waqf concept based on scholarly opinions. The solution proposed through this study involves the perspectives of the four madhhabs' imams.

In Malaysia, the context reveals that the National Fatwa Committee for Islamic Religious Affairs Malaysia serves as an advisory body providing decisions on Islamic legal issues. At the state level, other fatwa institutions recognized by the Islamic law of the states include the State Islamic Religious Department and the Shariah Court.

Generally, in Malaysia, the issue of fatwa on waqf has not been given significant attention by State Fatwa Committees and the National Fatwa Council. A fatwa on istibdal has been issued, but it only focuses on non-economically viable waqf lands that are to be sold or replaced with more economically viable lands (Rahman, N.N.A., et al., 2006)

Waqf land is a sensitive issue and should not be taken lightly by the government without strong reasoning and arguments. As with the National Fatwa Council session on 22 April 1999, the 46th Meeting of the Fatwa Committee discussed this issue under the topic of transferring part of waqf land to the authorities (Yaakob, R., 2018). The fatwa decision stated:

Waqf land intended for development shall be exempted from the requirement of land transfer for the construction of public facilities such as roads, drainage, electrical substation sites, and the like.

Waqf land shall not be transferred under any circumstances except in emergencies requiring such action under specific conditions.

Waqf land that is acquired and transferred to the government shall be compensated at the value of the land taken or replaced with other land of equal or greater value.

For waqf land designated for specific purposes such as mosques, schools, etc., the party acquiring the land must allocate specific portions as a substitute for the waqf land taken, based on the current value, to maintain its waqf status. For example, multi-storey buildings constructed with certain units must follow the current value allocated for mosques, schools, or the like as intended by the waqf donor.

To ensure the continuity of waqf assets for flawless succession, the Office of the Mufti also highly supports the planning and mechanisms that have been proposed (Interview: Noor, W.S.W.M, 2016). In summary, the law on acquiring waqf land is permissible and depends on the current situation. If the situation is considered critical and there are no other options or necessities, then this condition changes the original form of the law on waqf land acquisition in Islam (Rani, M.A.M., 2008).

Clearly, in the method of acquiring waqf assets, this matter is not one that can be decided lightly without adhering to principles and fatwas. To resolve the issue of waqf land, the Fatwa Council as an advisor on Islamic legal issues has outlined the laws that must be followed in the transfer of waqf land properties. However, at the state level, the State Islamic Religious Department and the Shariah Court have been recognized to establish Islamic law for the states.

SOLUTIONS TO FUND ISSUES

According to a statement released by the Chief Executive Officer of the Malaysia Waqf Foundation in 2020, Prof Madya Dr Amir Shaharuddin said the Islamic Religious Council of Malaysia (MAIN), as the sole administrator of waqf land, faces the problem of having insufficient capital to finance development projects such as the construction of business complexes, educational institutions, health centers, and public housing, which, as we know, are expensive and require significant funding injections.

Consequently, the Chief Executive Officer of the Malaysia Waqf Foundation has identified four strategies that could revitalize the role of waqf for the benefit of the people and the country. First, the effort for collaboration between the authoritative body managing waqf assets, namely the Department of Waqf, Zakat and Hajj (JAWHAR), Malaysia Waqf Foundation (YWM), and MAIN with the private sector needs to be intensified. This is referred to as corporate waqf. Corporations are encouraged to be directly involved in the development of waqf assets nationwide. For instance, through collaboration with plantation companies, idle waqf land can be cultivated with various agricultural projects generating income for the B40 group in rural areas. To encourage corporate involvement, the government can offer incentives to private companies to carry out such economic activities.

Previously, through the Malaysia Plan (RMK), the federal government provided funding injections to two established entities, JAWHAR and YWM, to coordinate all efforts in developing waqf assets nationwide. As a result, three hotels in Terengganu, Melaka, and Perak, as well as over 200 shop houses, were successfully built across the country, continuing to impact the local communities. However, in the current economic situation, waqf cannot rely entirely on government funds. Instead, the role of the private sector is crucial. For the Malaysia Waqf Foundation, the CEO stated, "YWM is ready to facilitate any collaboration that provides returns to the corporate sector and MAIN."

The second strategy to address this funding issue is to conduct large-scale cash waqf collections. As mentioned by the Chief Executive Officer of YWM, there is currently a greater need for cash funds for the development of idle waqf land. For example, the Ministry of Education and the Ministry of Health have land sites for new schools and hospitals. However, the construction of these projects has been postponed due to a lack of development funds. Therefore, cash waqf contributions from all community members can be pooled for this purpose. To successfully conduct large-scale cash waqf collections, cooperation with Islamic banking institutions is very important. As is well known, Islamic Banks have various internet banking facilities that make it easy for the public to make contributions. In addition, the method of salary deductions for public and private employees can be expanded to fill the waqf fund more quickly and consistently (Shaharuddin, A., 2020).

Moreover, the success of a waqf asset development project also depends on the involvement of the corporate sector and the public. Their involvement, in turn, depends on their confidence and trust in the management of the collected waqf funds and assets. Therefore, the third solution method is to emphasize efforts to empower the authoritative body in waqf management, including JAWHAR, YWM, and MAIN. High integrity, transparency, and professionalism need to be better instilled at all operational levels. Additionally, these agencies need to be more visible so that the community can see their role in advancing waqf assets.

Finally, the fourth strategy to overcome this funding issue is to implement stricter regulation on unlicensed waqf fundraising activities. Currently, many individuals or groups are seen collecting cash waqf funds from the public. They take advantage of the public's generosity to donate and provide assistance. However, the extent to which the contributions are channel for welfare purposes and public benefit is uncertain. Individuals and groups collecting cash waqf will take a commission from each waqf contribution. To date, how much commission is taken is not monitored by any party. Therefore, it is time for the authorities through the existing waqf enactment to enforce this matter so that misappropriation of waqf funds can be curbed (Shaharuddin, A., 2020).

CONCLUSION

Waqf land is a property that needs to be developed for the benefit of Muslims in particular. However, in developing waqf land, several problems have arisen. One of the issues discussed is the legal issue concerning waqf land. This issue needs attention to avoid hindering the development of waqf land. In this legal issue, even though the Sultan has entrusted the State Islamic Religious Councils to administer and manage waqf land, in Malaysia, legal authority is divided between the Federal Legislative Body and the State Legislative Bodies. However, to resolve this issue within the context of Malaysia, the National Fatwa Committee delegates authority to the Department of Islamic Religious Affairs Malaysia to act as an advisory body to provide definitive guidance on issues related to Islamic law. The Fatwa Council has outlined the law on the transfer of waqf land. Therefore, all waqf properties need to be utilized by the trustees by channeling the waqf properties for their

intended purposes. The management of waqf properties is under the responsibility of the State Islamic Religious Council (MAIN), which acts as the trustee for the land and waqf properties that have been endowed by various parties.

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