



Fiqh Frameworks of *Dharar* (Harm) Principle in Landuse based on *Kitab al-I'lan Bi Ahkam Al-Bunyan*

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Abstract

Fiqh is essential in addressing issues related to the built environment, such as land. This study aims to develop fiqh frameworks of land use. In this particular piece of work, content analysis on *Kitab al-I'lan Bi Ahkam Al-Bunyan* was employed. According to the findings, the fiqh frameworks have three (3) primary components. These components are as follows: 1) Legal development, 2) Illegal constructions or plants and 3) Reclamation of land (*Istihqaq*). The frameworks would benefit the local authorities, planners, and society to manage land better.

Keywords: fiqh; framework; *dharar*; land

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DOI: <https://doi.org/10.21834/jabs.v7i22.411>

1.0 Introduction

The built environment significantly shapes and influences a community's culture and way of life. In addition, the built environment represents Islamic beliefs and values in the Islamic faith (Babangida, 2019). Therefore building design, construction, and other built environment activities must adhere to Islamic standards to create a harmonious and pragmatic environment (Hassan et al., 2020). Meanwhile, *fiqh al-Bunyan* (fiqh for the built environment) is defined as laws and solutions to issues related to building and construction (Besim Selim Hakim & Muhamad, 2017). It is concerned with setting rules to regulate disputes and the need for human arbitration involving rules about buildings, houses, roads, etc. based on certain principles such as *la dharar* (eliminating harm), neighbour's rights and privacy (Abu-Ghazze, 1997; Farhat, 2017; Shokry, 2012). In the built environment context, fiqh ensures that building design and construction adhere to Islamic principles and values (Besim S. Hakim, 2001).

Several studies proposed solutions and mechanisms for land use and development, but they still need to be solved. There is a need for an alternative approach to handle the issues, particularly from the Islamic perspective. Gaps were also found that there is a limited study related to fiqh as the solution for land use and development issues. Therefore, this study aims to develop fiqh frameworks of the *Dharar* principle for land use and development based on *Kitab al-I'lan Bi Ahkam Al-Bunyan*.

2.0 Literature Review

2.1 Issues of Land Use

According to a study by Wattoo et al.(2022), uncontrolled development has resulted in various detrimental effects, including global warming, pollution, and a decline in biodiversity. Thus, his research advises that the foundation of growth based on simplicity (*wasatiyyah*) be leveraged to address this issue. The results of a study by Riyanto (2022) support this by claiming that human exploitation of the environment has caused pollution. Thus, he stressed the role of people as caliphs to preserve nature, based on the ideas of environmental preservation education. Uncontrolled deforestation is another environmental concern that must be emphasized since it affects biodiversity habitats, global warming, and soil contamination (Muhammad, 2018).

Very prevalent in Malaysia, illegal land encroachment affects a variety of land categories, including government, customary, and indigenous land (Zainal Abidin & Ridouan, 2019; Abdul Wahab & Manaf, 2020). Urbanization has driven up demand for property, which has led to the illegal use of land for residential, agricultural, and commercial (Gallaso et al., 2019). Furthermore, illegal land invasion causes the loss of forest reserves, which are crucial watersheds (Zainal Abidin & Ridouan, 2019). Large-scale commercial operations like plantations and logging also encroach on traditional territory and jeopardize indigenous populations' ownership rights (Abdul Wahab & Manaf, 2020; Am et al., 2016). Also, there is a problem with unpermitted land development, which includes building, paving

roads, and planting without the owner's or authorities' consent (Mohsin et al., 2022; Rashid et al., 2015). The issue of land encroachment also contributes to wasteful land usage, pollution, and environmental harm (Othman, 2006; Zainal Abidin & Ridouan, 2019). In addition, private businesses' infringement of indigenous land rights leads to exploiting natural resources without the required authorization (Abdul Wahab & Manaf, 2020).

2.2 Principle of *Dharar* (Harm)

Several terms describe the principle of *Dharar* (harm). It refers to 'No damage and does not cause damage'; or "There is no injury nor counter injury" (Al-Hathloul, 1981; Jamel Akbar, 1988). The essence of this principle comes from the hadith of the Prophet PBUH "*La Dharar Wa La Dhirar*" (Do not harm and do not harm others) (HR Ahmad and Ibnu Majah) (Besim Selim Hakim & Muhamad, 2017). Scholars agree that this hadith is authentic (Faleh, 2021). The occurrence harms property and people (Jamel Akbar, 1988).

Previous researchers specifically explain the meaning of *dharar* and *dhirar*. Some scholars state that the two terminologies have the same meaning (Hamouche, 1999). However, some scholars distinguish between the two. *Dharar* refers to a noun, while *dhirar* refers to a verb (Jamel Akbar, 1988). Meanwhile, *dharar* is a wrongful act that benefits the perpetrator by exploiting others maliciously. For example, converting a property into a factory will harm neighbours due to noise (Jamel Akbar, 1988). In contrast, *dhirar* refers to behaviour that causes harm to others without benefiting the perpetrator (Jamel Akbar, 1988).

2.3 Fiqh of Land

The discussion on Islamic land use and development is rooted in the warning of Allah SWT in the Al-Quran as follows:

"Corruption has appeared throughout the land and sea by [reason of] what the hands of people have earned so He may let them taste part of [the consequence of] what they have done that perhaps they will return [to righteousness]."

(Surah al-Ruum: Verse 41)

2.3.1 Rights of Land Owner

The general principle is that landowners have the right to use and enjoy it in the way that suits them best (Jamel Akbar, 1988). However, owners must not harm their neighbour's property or encroach on it, which makes it useless to them (Muhamad, 2007). Accordingly, construction without permission, encroachment, or expropriation contradicts this general principle.

2.3.2 Construction on Other People's Land

According to Shariah law, construction on other people's land must be done with the permission or consent of the landowner by a fair and equitable contract and terms of the agreement (Mustapha Ben Hamouche, 2010). This concept is based on the local

community's customs, practices and traditions, emphasizing mutual agreement and justice between the parties involved (Mustapha Ben Hamouche, 2010).

Among the forms of the contract include *al-'Ariyah* and *al-Ijarah*. *Al-'Ariyah* is a loan-borrowing agreement where the owner permits an individual to occupy or develop their land for free without payment (Khalidah, 2018). Meanwhile, *al-Ijarah* refers to a contract of interest for goods or services through payment without transfer of ownership (R. Zainul Musthofa & Siti Aminah, 2021).

2.3.3 Right of Reclaim (*Istihqaq*)

The land owner has the right to reclaim his property (*istihqaq*) from a third party. If it involves a long period where the asset has undergone a transformation and has been fully used, then the owner is entitled to receive compensation (Mustapha Ben Hamouche, 2010). However, the form of execution and the conditions used may vary depending on a case's jurisdiction and circumstances.

2.4 Review of Previous Research Related to Land From an Islamic Perspective

This section will review the significant previous research related to land from an Islamic perspective. The reviews will be limited to the resources within the period 2019-2023 and presented based on relevant themes as follow:

2.4.1 Land Acquisition

Sahih (2022) examined Islamic land acquisition methods, focusing on *ihya' al-mawat* (rehabilitation of uncultivated land) and its Shariah status. This research improves our understanding of Islamic land ownership laws and Pakistan's current land ownership legislation. Unfortunately, numerous parts of the study need to be clarified. Secondly, it needs to describe the scope and methods of the research, such as the sources used to analyze modern land ownership legislation in Pakistan.

2.4.2 Land Ownership

Research by Gojali (2022) advocates using Islamic law to determine national land law in Indonesia, to resolve land problems created by a mismatch between land law theory and practice. It focuses on the concept of land in *Madzhab al-arba'ah*, the historical evolution of land law in Indonesia, and the relationship between this law and Islamic land law. This study could use Islamic law to resolve land disputes in Indonesia. A research topic or gap in the literature needs to be identified. A more specific research question on Islamic and Indonesian land law is required. The research also needs a clear methodology, which could affect its trustworthiness.

2.4.3 Land Invasion

Tanjung (2022) discusses land management in Indonesia and the usage of public property for private use. This paper examined the legal implications of such behaviour under Islamic and common law. The allegation combines land grabbing with private use of the public

property. Land grabbing is when powerful parties, such as governments or businesses, illegally or unethically acquire land for financial advantage. In contrast, private use of public property may refer to the activities such as cultivating and exploiting government land for personal gain without authority approval or for non-public reasons. While both concerns have detrimental effects, they require different legal frameworks and solutions.

2.4.4 Contract of Land Use

Research concentrating on land use and development contracts involves various perspectives. Among them are related to the build-operate-transfer (BOT) model in terms of Islamic law, conducted by Araz (2020). This study briefly discusses the Build-Operate-Transfer (BOT) concept, its three main stages, and its pros and cons. It also highlights Islamic law discussions about the BOT concept, specifically its conformity with regular fiqh contracts. Islamic jurists differ on whether the BOT model's contracts are new or similar to lease, payment, foundation, fief, corporate, and exception contracts. This research gives a solid understanding of the BOT model and Islamic law. Nonetheless, further research is needed to reconcile the BOT model and the *dharar* principle in Turkish land use and development.

2.4.5 Customary Law

The research by Mazhitova et al., (2020) recounts the history of legal plurality in Kazakh regions in the 18th and 19th centuries when Shariah and customary law coexisted and finally complemented each other. According to the study, the Russian government supported the customs to decrease Islam's impact on the local community. Nevertheless, the assertion lacks evidence and facts. The research illuminates the coexistence of diverse legal systems in a specific historical context. It also demonstrates external political factors' influence on regional legal systems. Further in-depth research would help explain the coexistence of Shariah and customary law in Kazakh territories and the causes that led to customary law's eventual triumph. The research also lacks proof to substantiate the argument that the Russian government supported the custom of limiting Islam's influence.

2.4.6 Land Use for Public Facilities

A study by Afla (2018) may relate to *maslahah ammah* (public interest). The study examines Muslim burial traditions and public cemetery management in Kuala Lumpur and Jakarta, focusing on the scarcity of space and land for Muslim cemeteries in these cities. The study analyses contributing causes and discusses ways to fix Muslims' burial difficulties in Kuala Lumpur and Jakarta. While concentrating on the *maslahah* principle, one of the Shariah principles of the built environment, this study needs to discuss the fiqh approaches specifically.

2.4.7 Religious Attitudes

Ryan et al., (2013) examine how farmers' religious beliefs and practices affect agricultural issues in Antalya. The study presents a holistic view of religious views and agricultural

production challenges. The study is unique in its focus on the religious ground in solving production process difficulties and developing content for the producer's religious awareness, which is disregarded in agricultural production challenges. Unfortunately, the study's shortcomings restrict the validity and significance of the findings for agriculture stakeholders.

The reviews of the above past research suggest that the fiqh perspective of land is one of the most important contextual issues identified by researchers. However, most relevant studies are from abroad, and only a few are from Malaysia. Moreover, no study develops fiqh frameworks of the *Dharar* (Harm) principle in land use and development based on *Kitab al-I'lan Bi Ahkam Al-Bunyan*. Due to this enormous gap, this research is relevant to fulfil the gap and enrich fiqh knowledge related to this area.

3.0 Methodology

This study conducts qualitative research using document analysis on *Kitab al-I'lan Bi Ahkam Al-Bunyan*, driven by the objective formulated. This analysis aims to develop fiqh frameworks of the *Dharar* (Harm) principle with evidence from the abovementioned *Kitab*. The fiqh frameworks developed by this research are expected to minimize land use and development issues from a fiqh perspective and complement their potential towards good practices in future.

Data were analyzed using thematic content analysis. Specifically, deductive (based on themes constructed from the literature) and inductive thematic approaches (building themes based on findings obtained from classic fiqh books) are employed to reach the research objective.

4.0 Results

4.1 Introduction to *Kitab al-I'lan Bi Ahkam Al-Bunyan*

Kitab Al-I'lan bi Ahkam Al-Bunyan was written by the Tunisian mason Ibnu al-Rami. There are several legal judgements and views on various urban design and building concerns made by Maliki scholars from North Africa and Al-Andalus. Ibn al-Rami's manuscript on construction and space is divided into five chapters: 1. Buildings and walls; 2. Preventing harm or damage; 3. Building defects; 4. Plantations and the conflicts between farmers who build towers; and 5. Grindstones. The current authors have thoroughly reviewed this treatise's rationale and notable instances.

4.2 Fiqh Frameworks of *Dharar* (Harm) Principle as Solutions for Land Use Issues Based on *Kitab al-I'lan Bi Ahkam Al Bunyan*

Based on the findings from *Kitab al-I'lan Bi Ahkam Al-Bunyan*, the researcher has developed fiqh frameworks as presented in Figure 1 below:

Table 1: Fiqh Frameworks of Dharar (Harm) Principle for Land Use
Based on Kitab al-I'lan Bi Ahkam Al-Bunyan

Num.	Constructs	Sub-constructs
1	Legal development	Permission
2		Forms of contract
3		Contract conditions
4		Rights and responsibilities
5	Illegal constructions or plants	Removal of illegal constructions or plants
6		Empathy and compassion
7		Tree replanting
8	Reclamation of Land (<i>Istihqaq</i>)	Legal and ethical principles
9		Practical and comprehensive process

(Source: Author, 2023)

5.0 Discussion

5.1 Legal Development

a) Permission: According to *Kitab al-I'lan bi Ahkam al-Bunyan*, Abu Salmah b. Abd al-Rahman and Ali b. Al-Husayn disagreed about illegal land invasion. Ibn Wahb looked into the matter after hearing from Abu Ishaq Maula of Bani Hashim that the Prophet Muhammad (PBUH) had said: "Anyone who takes even an inch of land unlawfully will sink into the seventh layer of the earth in the hereafter." This statement underlines the legal ramifications of deterrence and threats from such activities in Islam and briefly presents pertinent information from a jurisprudential standpoint on land invasion.

b) Forms of contract: *Kitab al-I'lan bi Ahkam al-Bunyan* highlights several forms of Islamic contracts, such as 'ariyah, ijarah, ji'alah and muza'raah to allow the use of land without transfer of ownership with limitations and conditions that can be implemented related to legal land use. 'Ariyah contract refers to the free use of property without a price. The following contract form is Ijarah (rent) which needs to state the terms and ownership of the land. A ji'alah contract is a wage-based contract that does not require a written agreement, and the employee (*Ma'ajul 'alaih*) can bind it. Another form of contract highlighted in *Kitab al-I'lan bi Ahkam al-Bunyan* is muzara'ah which refers to the sharing of crops.

c) Contract conditions: The findings on contract conditions for land development from Islamic law underline the significance of fair and equitable provisions in any land development contract. Contracts must be based on fair conditions, including controlling construction, contract duration, redemption or destruction, contract compliance requirements, notification, construction tools and labour provision, monetary compensation and ownership rights. These requirements ensure that both parties are safeguarded and that the development project is carried out according to Islamic principles and values.

d) Rights and responsibilities: Landowners' rights should be considered. Within the restrictions imposed by the Shariah law, they are free to sell, lease, or develop their land. Nevertheless, they are also accountable for ensuring that their development projects adhere to rules and do not harm the community or the environment. In land development, developers also have rights and responsibilities. They are entitled to conduct development projects that adhere to legal requirements and Islamic law. They are also accountable for ensuring their development efforts do not negatively impact the environment or society. To comply with pertinent rules and regulations, the government has significant power to regulate land development operations. The government should also ensure that community-wide benefits, not just a select few, accrue from development activities. Local communities also have rights and duties regarding land development. They have a right to information and consultation regarding any development initiatives that may impact them. Individuals also have the right to participate in decisions impacting their communities. On the other hand, they must also not prevent development efforts that benefit the community's welfare.

5.2 Illegal Constructions or Plants

a) Removal of illegal constructions or plants: To address the harm caused by land development, *Kitab al-I'lan bi Ahkam al-Bunyan* recommends removing illegal land development. The topic of discussion is the removal of buildings that are illegal or pose a risk to the public. The assertion lists instances where experts have concurred that demolition is necessary, such as when a wall or structure of walls is flimsy and could collapse. Additionally, the declaration highlighted the opinions of other scholars, such as Ibn Habib and Malik, who supported tearing down buildings erected illegally on private property. Another part of the topic is related to trees spreading onto adjacent territory. On the other hand, a tree planted without permission on another person's property might do considerably more damage because it revokes the person's rights without their consent. Referring to two instances mentioned in the hadith, the Prophet PBUH ordered that the tree be taken down if it intruded on neighbouring land and caused harm. The Prophet (PBUH) once recommended either selling the tree to a neighbour or giving the proprietor a payment in exchange for it. If a neighbour cuts down a tree, the tree owner has the right to reimbursement for the tree's value, but he also has to pay back the cost of the tree's removal.

b) Empathy and compassion: The Quran and Hadith urge us to treat one another with love and compassion to create a more egalitarian and harmonious society. Thus, any framework for the Islamic built environment ought to precede these principles, particularly when demolishing or taking down illegal land development. From the writings of 'Abdullah bin Abd al-Hakam, Master Mason Muhammad quoted: *"Whoever builds on other people's property without their consent, then the owner claims the property; if the owner wants, they can give him the value of the building that was torn down and possess it."* They can even

transfer it to a different location if they choose". The quote promotes charity and goodwill towards others, notably in the building and owning real estate. Offering the developer the value of the building (which was built without their consent) demonstrates the necessity of upholding the Islamic teachings that stress the need for people to be treated with respect and dignity.

c) Tree replanting: When a person cultivates plants on another's land, the owner has the right to request the removal of the trees when the land has been seized, cultivated for agriculture, and increased in value. Suppose it includes a crop with a quick growth cycle, such as grain. In that case, the owner has two options: either wait until the crop is mature before demanding its removal or pay the expropriator an amount equal to the grain's value in exchange for the removal. According to Isa ibn Dinar, a tree can be kept alive on a neighbour's land, provided the neighbour consents to him or if the tree was planted previously. If a neighbour cuts down a tree, the tree owner is entitled to compensation for the tree's value, but he also needs to cover the expense. Replanting trees that have been damaged or removed from a neighbour's land is only permitted if it poses no risk to the surrounding area and the new trees are the same type and size as the old ones. Although the companions forbid it if it causes harm, Ibn al-Qasim believes replanting with two or more trees is allowed. As described, the procedure for planting trees should be based on the teachings of the Prophet PBUH and the opinions of scholars like Isa ibn Dinar and Ibn al-Qasim. This procedure calls for the utmost respect for the rights of neighbouring landowners and the assurance that any replanting will harm no one.

5.3 Reclamation of Land (*Istihqaq*)

a) Legal and ethical principles: Findings from *Kitab al-I'lan bi Ahkam al-Bunyan* present various scholars' opinions regarding reclaiming land and ownership. The focus is on two cases where individuals reclaim and develop abandoned land and later know that others claim ownership. The judgments of Umar bin al-Khattab and Abu Bakr al-Siddiq are presented, as well as the opinions of other scholars such as Malik, al-Mughirah, Ibn Dinar, and Ibn al-Qasim in resolving the reclamation issues. Among the main points that can be extracted from both cases is the importance of intention in determining land ownership. If someone intentionally takes over another person's land, they are considered a trespasser and must pay compensation for any damage or loss caused by their actions. However, suppose someone unknowingly develops a piece of land they consider a wasteland; they are entitled to compensation for their efforts, provided they are not intentionally trespassing on someone else's property. The above findings show that Islamic law allows confiscated landowners to reclaim their land but highly relies on their intention, reflecting compliance with Islamic ethical principles.

b) Practical and comprehensive process: The passage in *the Kitab al-I'lan bi Ahkam al-Bunyan* also touches on the right to reclaim (*istihqaq*) ownership of land confiscated

through court procedures. If an individual takes and sells the land illegally, the owner (the claimant) can get the land back through a court decision. Therefore, the claimants must prove their ownership to the courts. If the claimant wins the case and gets the land back, they can pay the expropriator for the value of their building or give the rubble to the buyer. If the buyer of the ruins is also the seller of the land, the claimant can choose either to give the value of the building or to keep it. This evidence proved that land reclamation should include legal procedures for filing a claim, acquiring evidence, and presenting a case in court. The claimant should compile evidence of their title and that the land was confiscated without reasonable cause. They should also demonstrate the property's value. During land reclamation, practical issues should be addressed. For instance, the approach should examine existing structures' costs and how to handle disagreements with other parties.

6.0 Conclusion

This research has explored the fiqh perspective on the land use and development discussed in *Kitab al-'lan Bi Ahkam Al-Bunyan*. The fiqh frameworks of the *Dharar* (Harm) principle in land use and development was developed through the analyzed data. Specifically, there are three constructs of this fiqh framework comprised of; i) Legal Development, ii) Illegal Constructions or Plants, and iii) Reclamation of Land (*Istihqaq*).

As land use and development continue to evolve and face more complicated issues in future, the appreciations and compliance towards the fiqh perspective by all related parties are crucial to minimizing the related issues due to the potential and strength of Islamic approaches. By applying this framework responsibly and ethically, it is possible to promote sustainable land use practices that protect the environment and promote the well-being of communities. A further study comparing fiqh and current land use and management policies is required to provide more integrated and holistic insights.

Acknowledgement

The authors wish to thank ReNeU UiTM and ILD UiTM for facilitating the writing and publication workshop and Academy of Contemporary Islamic Studies (ACIS), Universiti Teknologi MARA Shah Alam, for supporting this research.

Article Contribution to Related Field of Study

The article makes numerous contributions to studying the Islamic built environment by offering fiqh frameworks for land use based on the principle of *dharar* (harm). First, it emphasizes the significance of ethical considerations in land use practises, which sometimes need to be considered in land planning and development approaches. Second, it illustrates how Islamic law is still relevant for dealing with today's environmental problems.

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