

# Construction of Waqf Istibdal Regulations for Empowering Non Productive Waqf in Indonesia

Abdur Rohman\*, Mohammad Ali Hisyam

Faculty of Islamic Science  
Universitas Trunojoyo  
Bangkalan, Indonesia  
\*amans\_07@yahoo.co.id

Ridan Muhtadi

Department of Sharia Economic  
STAI Miftahul Ulum  
Pamekasan, Indonesia  
ridanmuhtadi@gmail.com

Nur Rachmat Arifin

Faculty of Economic and Business  
Universitas Airlangga  
Surabaya, Indonesia

**Abstract**—The purpose of this study is to answer the problem of how istibdal waqf regulatory system in Indonesia and how is the model of the waqf feasibility management for economic empowerment. This research uses descriptive qualitative analysis method, which is then analysed using the provisions of Islamic law and provides a model for the management of waqf empowerment. Data Collection Method with In-depth Interview (In-Depth-Interview), in this study, the authors used in-depth interview guidelines that were made to interview management and employees of waqf institutions 'X' in Surabaya and secondary data sources were obtained by the writer through various books, magazines, scientific journals, and legislation related to the object being studied and so on which explained the application of the endowments. The results of the study concluded that the application of the waqf land at the waqf institution 'X' in Surabaya was in accordance with the pillars and conditions of waqf. The eligibility of the waqf land is in accordance with Islamic law and Law Number 41 of 2004 concerning representation which states that the transfer of waqf land is permissible if it is for public interest.

**Keywords:** *regulation construction, istibdal waqf, economic empowerment*

## I. INTRODUCTION

Imam Muslim narrated from Abu Hurairah who stated that the Prophet Muhammad. said: "From Abi Hurairah: That Rasulullah SAW said: when someone dies, then all deeds are cut off except for three things: namely sadaqah jāriyah, or useful knowledge or pious children who pray for him." (*HR. Imam Muslim no. 1631*) [1]. The opinion of some scholars Sadaqah Jāriyah in the above hadith is intended as waqf [2]. The practice of waqf includes a very large reward according to Islamic teachings. All human deeds will not be rewarded; the reward is when the Adam died. The reward of waqf will still flow and will still be accepted by waqif even though he has passed away. Waqf is one of the contracts of worship, please

help sustainably, the goal is tabarru'āt as stipulated by the Shari'a, the application of waqf through a long process between nadzir and waqif sometimes experiences obstacles in applying waqf to achieve the goal of tabarru'āt [3].

Policy in regulating waqf in Indonesia in 1960, has issued Law No. 5 of 1960, but the law only provides guidance on the basic legal framework of waqf in the form of land [4].

Revitalizing efforts to raise the potential for waqf, the Indonesian government and the Parliament passed Law No.41 of 2004, this fact implies that waqf has great potential and has an impact on reducing poverty that occurs [5].

Utilization and illustration of waqf funds in 2016, 75% of waqf assets are still used by mosques or mosque, 14% for education, 5% for funerals and 6% for other uses, basically the use of waqf assets is still focused on the less productive sectors [6]. Indonesia has widely used waqf for the purpose of mosques, pesantren and funeral facilities. However, other potentials of waqf have not been fully used yet, because the majority of waqf land is land that is used as a non-profit social facility.

According to data collected by the Indonesian Ministry of Religion, the number of waqf land in Indonesia reached 4.359.443.170.00 square meters (four billion three hundred fifty-nine million four hundred forty-three thousand one hundred and thirty point square meters) or 287.160 hectares (two hundred eighty thousand seven hundred one hundred sixty hectare) spread over 435.768 locations throughout Indonesia [7].

Such a large amount of land must be productive for the sake of welfare and not eliminate the obligation to religion [8]. This abundant endowment property is an opportunity and challenge for the Muslim Ummah to carry out the function of waqf maximally equipped with enormous human resources, with the capital of the Muslim Ummah being the majority in

Indonesia, it is expected that with the existence of waqf property can prosper the Muslim Ummah in Indonesia and implement it accordingly the true teachings of Waqf.

The Indonesian Waqf has the potential to play a more important role in the development of this country, increasing prosperity and helping the government improve the welfare of the Indonesian people. The government has begun to make important improvements in this sector, but there is still much work to be done to remove obstacles that prevent the growth of waqf in order to carry out its true role in improving the welfare of the Indonesian people [6].

Research that discusses waqf with the title "Substitution of Waqf Properties (Istibdal) in Malaysia: Statutory Provisions and Implementations, Substitution of Waqf Properties (Istibdal) in Malaysia: Statutory Provisions and Implementations" was written by S. Hisyam and Hazel Adria Jasiran researching asset management waqf through istibdal methods can also assist the socio-economic development of Muslim communities in Malaysia [9], and another study entitled "Waqf, Its Substitution (Istibdāl), and Selected Resolutions of Islamic Fiqh Academy of India: A Maqāṣid al-Sharī'ah Perspective" written by Mohammed Faris Ali al-Fijawi and Maulana Akbar Shah researched the replacement of waqf land assets recognized as Istibdāl, and the resolution chosen by the Indian Fiqh Academy of Islam under the objective of Sharqa waqf and Tabarru'at [3].

The principle of waqf in Islamic contracts plays a role in the economic development of the Muslim Ummah, but there are some cases of waqf property that cannot be developed, due to some unavoidable reasons, requires a concept of adaptation to the needs of the community for the continuation of the Waqf concept as an important investment instrument in improving management waqf [9]. Then this study discusses the management of Istibdal waqf conducted through waqf institutions registered at BWI. While previous research focused on the concept of application in accordance with the Malaysian Religious Council Law along with the opinion of Indian Islamic Fiqh, this study tries to discuss the concept of Istibdal waqf, identification, challenges, and application of Istibdal waqf through waqf institution, as well as discussing the empowering impact that results from applying waqf Istibdal, considering that in the official website of the BWI there is no waqf institution that applies the istibdal concept, or nadzir to further produce waqf assets.

## II. RESEARCH METHOD

The area of this research was conducted at a waqf institution 'X' in Surabaya. This research approach uses a descriptive qualitative analytic approach that describes and describes data in the field to obtain a holistic understanding of the essence of the data in terms of Islamic economics. Primary data sources in this study were sourced from interviews with waqf management and waqf staff employees who directly provided information on the application of Istibdal waqf in the institution. This secondary data source was obtained by the writer through various books, magazines, scientific journals, and legislation related to the object being studied and so on which explained the application of the endowments.

Data Collection Method with In-depth Interview (In-Depth-Interview), in this study, the authors used in-depth interview guidelines that were made to interview management and employees of waqf institutions. The documentation method is a document used in the form of diaries, newspapers, transcripts, books, magazines, minutes of meetings, case notes in social work, and other documents.

## III. RESULTS AND DISCUSSION

### A. The concept of Fiqh on Istibdal Waqf

The word "Waqf" is derived from the English word "Wact" in Arabic "*Waqafa*", meaning "to hold" or "stop" or "stay still". The word "*Waqafa-Yaqifu-Waqfa*" has the same meaning with "*Habasa-Yahbisu-Tahbisan*" in Shari'a, waqf means to hold the subject and to donate fruit or to proclaim its benefits in the path of Allah [10]. Istibdal comes from the word *Istabdala, yastabdilu, istibdalan* which gives the purpose of swapping [11].

Another description is that a waqf property such as land is exchanged or redeemed for other land or houses to be exchanged and used as waqf. *Ibdal* is selling waqf goods to buy other goods instead. Istibdal is making other goods as a substitute for the original waqf goods that have been sold [12].

Fiqh of five madzhab of thought argues that the legitimacy of paraphrasing does not require the existence of *qabūl* (acceptance) and this is also in the opinion of scholars. At the time of the representation process the presence of a witness is also not included as a pillar and the legal requirements for the representation. This means that when the process of accounting is considered valid, however, there must be 4 pillars of waqf which are fulfilled in the process of representation, including: *wakif* (the person who is the owner of the assets), *mauqūf bih* (goods that are represented), *mauqūf alaih* (nazhir or those who receive waqf) and *sighāt* [12].

Waqf fiqh, indeed many opinions of different scholars have arisen, partly because most of the arguments used by the Ulema fatwas are "ijtihādiyah", so that the different propositions used will produce different ijtihad products. Some of them forbid it absolutely, some forbid it except in certain circumstances which rarely occur, and some others allow it because there are conditions from the previous waqf or there is a reason to increase the productivity of waqf assets [12].

The Hanbali madzhab and the Hanafi madzhab more elastic and tend to facilitate this practice permit while still paying attention to aspects of benefit [13]. The istibdal conditions are: *first*, get a wakif permit on the condition of the waqf property, if the wakif has said to make the land available. The conditions of the said wakif are crucial in the exchange of the waqf, both the type of waqf goods, or the place. Second, because of the dharūrah situation or because of mashlahah, such as waqf land that cannot be planted, and cannot produce any results and benefits so that the "mauqūf 'alaih" does not receive the benefits of the results, or the results are shrinking insufficient for the costs of care and management, then the government / judge may exchange it for land or other endowments as a substitute, even if there is a condition or no condition from wakif [13].

The four schools of thought, besides the differences, there are similarities, among others: a) Wherever the endowments must be preserved and their existence protected. b) Exchange or sale of waqf goods is only permitted if there is an emergency reason or to maintain its benefits. c) Exchange or al-Istibdal or sale of waqf goods must be done by the government, at least with the permission of the government. d) The results of exchange or sale of waqf goods must be translated into substitute waqf goods [13].

### *B. Istibdal Waqf Regulation*

Law No. 41/2004 Regarding this Waqf, the issue of Istibdal is included in the "exclusion law" (al-hukmu al-istitsna'i) as referred to in Articles 40 and 41 paragraph (1). In Article 40 it is stated, that waqf property that has been represented is prohibited: 1) As a guarantee. 2) Confiscated. 3) Awarded. 4) For sale. 5) Inherited. 6) Exchange, or 7) Transfer in the form of transfer of other rights [5].

Article 41 states:

- Provisions as referred to in Article 40 letter f are excluded if the waqf property which has been represented is used for public purposes in accordance with the general spatial plan (RUTR) based on the provisions of the applicable laws and regulations and does not conflict with the Shariah.
- Implementation of the provisions referred to in paragraph (1) can only be done after obtaining written permission from the Minister with the approval of the Indonesian Waqf Board 3. Waqf property that has been changed due to the exclusion provisions as referred to in paragraph (1) must be exchanged for assets whose benefits and exchange rates are at least the same as the initial waqf property.
- Provisions regarding changes in the status of waqf property as referred to in paragraph (1), paragraph (2), and paragraph (3) shall be further regulated by Government Regulation (UUD, article 40).

The provisions listed starting in Articles 40 and 41 above, shows the attitude of caution in the exchange of waqf, and still emphasizes efforts to maintain the permanence of waqf as long as the conditions are still normal. But on the other hand has also opened the door of Istibdal even though it is not *tasahūl* (easing the problem).

### *C. Istibdal Waqf Empowerment Mechanism*

The mechanism that was carried out for the Istibdal was: Nazhir submitted a written application to the Minister through the Head of Office by enclosing, Waqf property documents including the Waqf Pledge Deed, substitute deed for Waqf Pledge Deed, Waqf certificate, certificate of assets, or other valid proof of ownership of property in accordance with statutory provisions.

Documents for the exchange of assets in the form of certificates or other proof of ownership of legal assets in accordance with statutory provisions. The results of the valuation of Waqf property to be exchanged and exchanged by

the Appraiser or Public Appraiser and Nazhir resident identification card.

The Determination Team submits a recommendation to exchange Waqf property within 5 (five) working days after the Appraiser or Public Appraiser submits the results of the appraisal to the Head of the Office and copies it to the Determination Team; first, the Head of the Office determines and sends the results of the valuation of the exchange of Waqf assets to the Head of the Regional Office and to the provincial BWI no later than 4 (four) working days; second, the provincial BWI gives approval to the Head of Regional Office no later than 5 (five) working days from receiving the results of the exchange of Waqf property valuation from the Head of Office; and third, the Head of the Regional Office on behalf of the Minister issues written permission to exchange Waqf assets no later than 10 (ten) working days after receiving approval from the provincial BWI.

### *D. Istibdal Waqf Feasibility Management*

Management of Waqf in using Istibdal cases that occur in waqf institutions 'X' in Surabaya is a wish of waqif and waqf managers to carry out the endowment objectives with the non-functioning of the waqf land, then at the beginning of the waqf agreement the covenant carefully considers and offers if the land is exchanged with others considering the need for maintenance and expense, based on mutual agreement in converting waqf land as expected.

Determination of the legal basis for doing Istibdal for employees and Management of Waqf does not refer to any part of any school of thought. The management of waqf management takes a policy and focuses on the *maslahah* and *mubazhīr* which allow the existence of waqf Istibdal. The concept of *Maslahah* is used by the management of waqf that the waqf can provide benefits for the needy such as orphans, the poor and needy people, while the concept of *mubazhīr* in question is that waqf land that does not contribute positively to the community while in need of care and expenses. This attitude actually has similarities with the opinion of the Hanafi school of thought which states that exchange can be done by anyone as long as it can provide benefits, either onsite by waqif itself or other people without looking at the type of goods represented, in the form of land that is inhabited, uninhabited, movable or immovable.

In solving problems related to Islamic law, researchers also do not directly take one opinion that is considered the most correct, but also associate that opinion with Islamic law. If it refers to the purpose of the waqif which is for the benefit and development of Islamic symbol. So according to Islamic law also that exchange is not contrary to Islamic law. Especially when following the opinion of the scholars, including: Imam Hanafi and supported by legislation namely PP No. 28 of 1977 article 11 and Regulation of the Minister of Religion No.1 of 1978 article 13 paragraph 3 which contains, that changes in the status of waqf land can be permitted if given a substitute of at least the same value and balance with its use in accordance with the Waqf Pledge.

Therefore, the waqf land which is considered to have no benefit so that the waqf land is compared to land that has

benefits. Then the occupied land is converted to land that can be used for educational purposes. In accordance with the waqf agreement, Nazir and the management of the waqf institution have been purchased and become certified as waqf land.

The Waqf Institution 'X' has a different principle in converting its waqf assets not by looking at the equivalent waqf property, but managing waqf and nazir attaches importance to the benefit of the waqf property which can provide greater benefits.

#### IV. CONCLUSION

Based on the results of this study, it can be concluded that the application of the Istibdal concept of the waqf land happened to install the waqf land because it was feared that the state of the land with increasing years would be increasingly damaged and could not take its benefits for the benefit of the community. Management Eligibility of waqf Istibdal land waqf, harmony and conditions must be met. Starting from waqif, mauquf alaih, mauquf bih and sighat. The istibdal waqf management is more inclined towards the Hanafiyah mazhab of worship which allows Istibdal, and the management of collection, the management of the waqf property has carried out the management functions: planning, organizing, implementing, controlling and controlling. Based on the above conclusions, the authors provide some relevant advice to the problem as follows: Should the management of waqf institutions to pay more attention to the completeness of documents and administration, and the public must understand and learn about the growing representation in the community regarding waqf property, and understand the procedures for istibdal waqf land in accordance with Law No. 41 of 2004

concerning representation which allows the exchange and replacement of waqf land.

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