



Factors of Exchange of Waqf Property According to Positive Law and Islamic Law in Indonesia; A case study in Pidie district of Aceh province

Neilul Masyitah¹, Amiadi², Riadhus Sholihin³, Marium Kamal⁴

^{1,2,(3)}Ar-Raniry State Islamic University Banda Aceh, Indonesia

⁴ University of the Punjab, Pakistan

Correspondence Email: armiadi@ar-raniry.ac.id

Abstract

This study aims to answer the factors of the exchange of waqf assets according to positive law and Islamic law. The research approach that the author uses is empirical juridical, technical research is descriptive analysis with data collection methods through interviews and documentation. The results of the research on the factors causing the exchange of waqf in Kembang Tanjong District are to make it easier for the people of the two villages to utilise the results of the waqf, the community and Nadzir are also easier to supervise and manage the results of the waqf. The view of positive law on the exchange of waqf assets in Kembang Tanjong sub-district, the exchange process that occurs in Kembang Tanjong sub-district is not carried out based on Government Regulation No. 42 of 2006 concerning the exchange of waqf assets which contains the requirements and conditions for exchanging waqf assets. The view of Islamic law on the exchange that occurred in Kembang Tanjong Subdistrict, when viewed from the provisions of the imam mazhab which discuss the exchange of waqf property, the exchange carried out does not contain maslahat and does not fulfil the conditions for exchanging waqf property.

Keywords: Islamic law, Indonesia law, Waqf, and Waqf xchange object

Introduction

Islam is a religion and the right way of life based on the word of God written in the Qur'an and AsSunnah. The teachings of Islam are not only addressed to a particular group or nation, but as *rahmatan lill a'lamin*.¹ Therefore, every Muslim is obliged to behave in his or her entire life in accordance with the provisions of the Qur'an and As-Sunnah.²

Abu Ja'far said that Allah has forbidden the taking of property by means of unlawful means, and there is no difference of opinion among the Muslims about this, and Allah has not forbidden the taking of property by unlawful means.³ Islam teaches that the basic principle in acquiring property rights is that it is not permissible to seize the property of others, take other people's property arbitrarily, and harm other people's rights.

Likewise in other issues, such as in this study researchers focus on the transfer of management of rights to waqf agricultural land used for farming by the local community, where it is feared that it can lead to an agricultural land management system in a way that is invalid and not in accordance with sharia.

Although in Islamic studies, ownership means a person's relationship with property that is recognised by shara' which makes him have special power over the property so that he can take legal action against the property, unless there is a shara' obstacle. Islam also commands and teaches its followers to give charity in the form of charity, including waqf. The sources of waqf institutions are the Qur'an and hadeeths.

Indonesia is a state of law, in addition to the above sources legally formal within the framework of national law waqf has also been regulated in national waqf, namely Law Number 41 of 2004 concerning Waqf, Government Regulation of the Republic of Indonesia Number 42 of 2006 concerning the implementation of Law Number 41 of 2004 concerning Waqf.

1 Rosihan Anwar, *Introduction to Islamic Studies*, (Bandung: Pustaka Setia, 2009), p. 17.

2 A. Rahman I Doi, *Fiqh Muamalat*, translated by Zainuddin and Rusydi Sulaiman, (Jakarta: Raja Grafindo Persada, 2003), p. 5

3 Abu Ja "far Muhammad bin Jarir ath-Thabari, *Jami "Al-Bayan an Ta "wil Ayi alQur "ān*, translated by Akhmad Affandi under the title Tafsir Ath-Thabari 6, (Jakarta: SInar Grafika, 2000), p 12.

Government Regulation of the Republic of Indonesia Number 28 of 1977 concerning Perwakafan of Owned Land, Minister of Religious Affairs Regulation Number 1 of 1978 concerning Implementation Regulations of Government Regulation Number 28 of 1977 concerning Perwakafan of Owned Land, Minister of Home Affairs Regulation Number 6 of 1977 concerning Procedures for Land Registration Regarding Perwakafan of Owned Land, Joint Instruction of the Minister of Religious Affairs and the Minister of Home Affairs Number 1 of 1978 and Number 6 of 1978 concerning Implementation of Government Regulation Number 28 of 1977 concerning Perwakafan of Owned Land.

Decree of the Minister of Religious Affairs of the Republic of Indonesia and Head of the National Land Agency No. 422/2004 and No. 3/SKB/BPN/2004 on Waqf Land Certificates, Fatwa Decree of the Fatwa Commission of the Indonesian Ulema Council on Cash Waqf and Presidential Instruction No. 1 of 1991 on the Compilation of Islamic Law. The above provisions are the legal basis for waqf. Among the objects that can be waqfed is land. Land can be meaningful as worship if it is used for good, such as land that is waqfed for buildings such as mosques, schools, orphanages or other useful places. Because basically waqf land is land for God.⁴ Regarding the object of waqf land, it can also occur on lands other than property rights, such as Building Use Rights and Business Use Rights, as long as these lands are free from all debts, ties with other parties, encumbrances or disputes. And of course, the land must be legally owned by the party concerned.

According to Islamic law, what is meant by ownership etymologically is having something and being able to act freely on what is owned. This means that a person is free to do anything with something he owns, without being interfered with by others. But it must be remembered that not everything that can be owned freely or personally can be recognised as its ownership. There are certain objects that are forbidden to be owned privately, which objects must be handed over or managed by the state. Islam states that there are three kinds that can be owned jointly by humans, namely water, land and air. This means that humans have been given the same freedom. If these provisions are compared with the

4 Brahmana Adhie and Hasan Basri Nata Menggala, *Land Reform*, (Bandung: Mandar Maju, 2002), pp. 52.

provisions in the 1945 Constitution, there are similarities. This is contained in Article 33 paragraph (2), which reads that the earth and water and the natural resources contained therein shall be controlled by the state and utilised for the greatest prosperity of the people. This provision is also elaborated in article 6 of Law No. 5/1960 on the Basic Regulation of Agrarian Principles or UUPA.⁵

Land ownership is basically the common property of mankind. This is in accordance with what has been outlined by Allah. However, all procedures for obtaining it have been regulated in Islam and do not harm each other. Whether it is through eviction, seizure or exchange (*ruislag*) that is not in accordance with applicable regulations. Seeing from the explanation above, currently there are many evictions or expansion of areas that are in the interests of many people or public interests carried out by the government or the private sector, for example against land located on the side of the road that disturbs or is affected by part of the traffic road, land that will be used as social facilities, such as schools, hospitals and others.

In the UUPA, the above problems have been mentioned and regulated. In addition to the above cases, there are also many cases in the community about the exchange of waqf land or known as *ruislag*, where the waqf land is exchanged for land in another place on the grounds that the original waqf land is no longer productive, not useful or for reasons of public interest. The eviction of land and buildings on it that are carried out for public, social and other interests is reasonable if it is necessary, but what if this happens to waqf land, which in fact is waqf land for God, land that functions for the value and interests of worship. The waqf law explains that waqf objects may be transferred, sold, transferred, and donated under the pretext of public interest.

In Islam, the practice of waqf has a very important position as well as zakat and sadaqah. Waqf requires a Muslim to give up the property given to be used for the benefit of worship and goodness. The waqf assets that have been given are no longer private property but the property of the community. Waqf can be used as a potential economic institution to be developed as long as it can be managed optimally, because the institution of waqf is one of the national cultural assets from the social aspect that needs attention as a support for the life and dignity of the nation. Therefore,

⁵ Suparman Usman, *Law of Perwakafan in Indonesia*, (Jakarta: Darul Ulum Press, 1999), pp. 113

the condition of waqf in Indonesia needs extra attention, especially waqf in Indonesia which is generally in the form of immovable objects and is not managed productively.⁶

Research Methodology

This research uses a *phenomenological* approach, which is research that seeks to understand the meaning of events and their links to ordinary people in certain situations and places in accordance with the object of research conducted.⁷ This research uses descriptive qualitative research methods, this is in accordance with the explanation put forward by M. Nazir that, "Descriptive method is a method that examines a condition, a thought or an event at the present time, which aims to make descriptive, description or painting systematically, factually and accurately about the facts, properties and relationships between the phenomena being investigated."⁸

The type of research used in this scientific work is field study research, namely research conducted by researching and observing the field about the use of infaq funds at the Syahid Lapan Cemetery in Tambue Village, Simpang Mamplam District, from the perspective of Islamic economic law. Data Collection Methods in this study are *Field Research and Library Research* methods. The data collection techniques are observation and .

After the data is collected, the next step is to analyse the data. In analysing the data, the author uses a descriptive qualitative method consisting of three activities; namely data collection and at the same time data reduction and verification conclusion drawing. In this case, the researcher analyses the data using several stages, the first is that the data obtained from various sources are reviewed as a whole. The data is in the form of observation results, documentation, and interview results obtained. Second, the collected data were summarised to obtain effective and synchronous statements or statements so that they remained in accordance with the topic of discussion. Third, the data that has been summarised is interpreted in accordance with the theoretical basis in research on the

6 Bashul Hazami, The Role of Waqf Applications in Realising People's Welfare in Indonesia, *Journal of Analysis Volume XVI* Number 1, (June 2016), pp. 174-175

⁷Lexy Moleong, *Qualitative Research Methodology*, (Bandung: Remaja Rosdakarya, 2007). p, 9.

⁸Nazir, *Research Methods*, Cet. I (Jakarta: Ghalia Indonesia, 1998), pp. 63.

utilisation of infaq funds at the Syahid Lapan Cemetery in Tambue Village, Simpang Mamplam District so as to get answers to problems in the formulation of problems obtained from research. Fourth, the conclusion

Results and Discussion

A. Kembang Tanjong sub-district profile

Kembang Tanjong is a sub-district in Pidie District, Aceh, Indonesia. Geographically, it is bordered by the Strait of Malacca to the north, Geulumpang Lhee and Bandar Baru sub-districts to the east, Mutiara sub-district to the south and Simpang Lhee sub-district to the west. The centre is divided by Krueng Tiro, which empties into Ileubeue. Pasi Ileubeue Beach and Kuala Tari are famous tourist attractions in Kembang Tanjong. Economically, Kembang Tanjong, the name of one of the sub-districts in Pidie Regency, has an area of 46.50 km², a population of 22,040 people, consisting of six settlements and 45 villages. (Pidie Regency in Figures 2018. The sub-district is only 12 kilometres from Sigli, the capital of Pidie Regency. Those of you who have visited Kembang Tanjong will know the culinary destinations that are crowded, especially in the morning. One of them is Keude Ie Leubeu Market. This market is a morning market with culinary snacks such as bu gurih (nasi gurih/nasi lemak), putu, adee ie leubeu, and various other types of wet cakes.

Kembang Tanjong is famous for the production of melinjo chips (keureupuk mulieng), milkfish, tiger prawns and rice. In Pidie Regency, Kembang Tanjong is known for its ade leumiek cake, which is quite tasty and specific. As part of the migrant community, many Kembang Tanjong residents work as tailors, textile sellers and gold sellers in other cities such as Banda Aceh, Bireun. Lhokseumawe, and Langsa. Because many of its inhabitants live overseas like the people of Pidie in general.

Kembang Tanjong sub-district is currently led by Fauzi, S.KM. M.M, this research focuses on the villages of Kembang Tanjong and Jurong Bale which are villages where waqf objects are exchanged and are also within the administrative area of Kembang Tanjong sub-district,

B. Factors Causing the Exchange of Waqf Objects

In managing and developing waqf assets, there will inevitably be an obstacle that causes the object to be changed. Such changes may be made if permission is obtained in accordance with Article 41 paragraph 1 of the Law. Article 44 paragraph 2 explains that permission is given if the waqf

asset cannot be used in accordance with the designation stated in the pledge.

From the description of Law No. 41 of 2004 concerning waqf and PP No. 42 of 2006 concerning the Implementation of Law No. 41, it can be seen that the exchange carried out on waqf assets in the view of today's society is still in a narrow context, meaning that the property can be changed if the urgency is emergency or because of need, not yet to the development of productivity. This means that the potential utilisation of immovable property in society is only consumptive. In practice, the author takes the example of waqf land which is a rice field in Jurong Bale village.⁹

Regarding the implementation of waqf land exchanges, strict regulations in the procedure for changing or transferring waqf assets aim to minimise deviations in designation and maintain the integrity of waqf assets so that actions that can harm the implementation of waqf itself do not occur. As in the data obtained by the author through interviews, that waqf land in the area of Pidie Regency, Kembang Tanjong Subdistrict, Jurong Bale Village, where there is waqf land in the form of rice fields measuring approximately 20 x 38 metres which belongs to the late H. Rasyid who has been donated to the village of tanjong for 30 years, basically the utilization results are intended for the village of jurong bale in exchange for the results to the village of tanjong which is the owner of the waqf land.¹⁰

Of course, this is not just moving goods and occupancy but still transferring the entire waqf land asset that is a mandate as it should be used without reducing it in the slightest. As explained in Law Number 41 of 2004 concerning Waqf Article 40 states that waqf assets may not (1) be used as collateral, (2) confiscated, (3) donated, (4) sold, (5) inherited, (6) exchanged or rezoned, or (7) transferred in the form of transferring other rights. Therefore, the way to go is to do a ruislag or exchange of waqf land based on Article 41 paragraph 2 of Law Number 41 of 2004 concerning Waqf and Article 49 paragraph 1 of Government Regulation Number 41 of 2006 explains that the exchange of waqf assets can be carried out after written permission from the Ministry of Religion based on the approval of the Indonesian Waqf Board (BWI).¹¹

⁹ Gramedia Pressindo Team, *Kitab Undang-Undang Hukum Per, KUHP, KUHAP along with its Explanation*. (Jakarta: Gramedia Pressindo, 2015).

¹⁰ Interview with Nasir Daud, on 12 March 2024

¹¹ Urip Santoso, *Agrarian Law Comprehensive Study* (Jakarta: Kencana, 2012) p 33

After meeting with local village leaders, the reason for the unproductivity may arise due to the understanding that the form of land productification is by making it a rice field or garden is exchanged to make it more productive for the public interest. This is reflected in the reason for the exchange, namely because the land owned does not produce for the local village, waqf land in the form of rice fields which belongs to the waqf of tanjong village located in jurong bale village, and waqf land in the form of rice fields located in tanjong village which belongs to jurong bale village, needs to be exchanged for the village in the form of productive rice fields or gardens. The land was originally managed by the village and the results were independent and the benefits were also for their respective villages, the land has the potential to become a public interest due to the location of the waqf land which is not suitable and wants to utilise it with the same value.

The waqf land that was originally endowed by the waqif already owned land in the two villages when it was endowed, and this event took place around 30 years ago and even the *waqifs* from the two villages have passed away, of course the exchange is still participated in by the surviving *waqif* families even though they no longer live in the village where the land was endowed.

Nadzir certainly really wants to make the exchange because there are many benefits for the community and clarify the function of waqf land and the results are in accordance with the *waqif*'s purpose when it was *endowed*, the main reason for the *nadzir* to make the exchange so that the waqf land in the two villages is more targeted and easier to manage, even though before the exchange of the two waqf lands there were already benefits but if making an exchange is the best solution, then the exchange will be carried out.

Factors affecting waqf objects in Kembang Tanjong Subdistrict as stated by the sources when the author conducted interviews with *Nadzir*, and also the author's findings at the exchange location:

1. In order to facilitate the people of the two villages in utilising the results of the waqf, because the location of the waqf land is not strategic between the two villages. After conducting a search, the location of the waqf land between the two parties did not cause any problems at all, the distance and location between the two villages when viewed did not cause factors to exchange the waqf.

2. The community and *Nadzir* are also easier to monitor and manage the results of the waqf, if you look at the location of the waqf land, the location of the waqf land and the mobilisation between the villages is only about 5 Km, and the access between the two villages is very easy to pass by vehicles and pedestrians, unlike when the access between the two villages is very difficult to pass through hills or mountains, that's where the problem occurs and is the main factor behind the exchange.

Nadzirs who make exchanges do not depart from problems and emergencies, so that exchanges occur not based on regulations and authorities or can be called exchanges carried out by the two villages very carelessly and not ideal. A good exchange must depart from the problem and the element of emergency so that the waqf land is clear and protected by a legal umbrella so that it does not become a problem in the future.

The community is certainly held a notice or socialisation through meetings and deliberations and the community agrees regarding the exchange of waqf land, which is used for the benefit of the village which was originally managed for the village of jurong bale then managed by the community for the benefit of tanjong village, which is the right of use which is the motive for the exchange of waqf land as stated by Tgk Imum of jurong bale village.

Waqf in the village both exchanged and handed over is very rarely written, waqf in the village is only recorded in the *menasah* through the village administration, in the event that the exchange of waqf objects that occurs in the village of jurong bale does not reduce the amount or results of the opening and also through community approval which is for the convenience of the range of uses that are more ideal for the people of jurong bale village.¹²

The exchange factor that occurs between the two village parties is to produce waqf land that is beneficial to both village parties, because the location that is not within the territory of each village makes it very difficult for *Nadzir* to manage the waqf land, which is a village asset, and also the same size as the waqf land in the form of rice fields which are still productive until now is a factor in making the exchange.

¹² Interview with Nasir Daud, on 12 March 2024

Like waqf land in general, it must prioritise openness and also find a solution that must be mutually acceptable to the people of both villages so that the waqf land can be very useful, because the waqf land will become a field of charity for the waqif.

C. P and the view of Positive Law on the Exchange of Waqf Objects

In Indonesian terminology, the exchange of waqf objects is often known as *ruislag*, which means exchange. According to the Big Indonesian Dictionary (KBBI) *ruislag* is exchanging goods without adding money. In the Civil Code, it is stated that exchange is an agreement in which both parties commit themselves to give one item reciprocally in exchange for another item.

In positive law in Indonesia, assets that have been endowed cannot be used as collateral, confiscated, donated, sold, inherited, exchanged or transferred in other forms of transfer. This is contained in Law No. 41 of 2004 Chapter IV Article 40 concerning Waqf and Government Regulation No. 28 of 1977 Article 11 concerning *Perwakafan Tanah Milik*, which basically means that land that has been waqfed cannot be changed to another designation or use than that intended in the waqf pledge. However, human life always changes dynamically over time, so that many things that happen can be a determining factor for waqf assets that can no longer be maintained both in physical form and use. To maintain the productive use of waqf assets, it is necessary to exchange them.

The exchange is made on the basis of consideration to prevent the waqf object from being easily changed in function so that it becomes misused and no longer retains either its physical form or its usefulness. In order to maintain the productive use of waqf objects, an exchange is necessary. Indonesian laws and regulations have explained the mechanisms and conditions that must be met in carrying out waqf exchanges. These mechanisms and requirements are made in consideration of the need to prevent waqf objects from being easily changed in function so that they become misused.

Through the village leaders by explaining how the waqf between the waqf land is exchanged, the waqf land that occurs between the village of *tanjong* and *jurong bale*, which both have waqf land, exchanges the results of managing the waqf to reach and use the ideal for both parties.

The concept given by PP Number: 42 of 2006 concerning the procedures for changing waqf property by not involving the waqif at all when the waqf property will undergo changes. Whereas the waqif who has endowed his property with a certain purpose and appointed a nazir at the same time, will not necessarily accept if the waqf property that he has endowed changes form, he may object to the decision to change the waqf property.

In addition, if with the exchange, the position of the waqf object moves, problems will arise regarding the nazir as the manager, where originally the nazir who lived in the same area as the waqf property could be appointed as the manager of the waqf property, with the movement of the waqf property from the area where the nazir originally lived, then the nazir who was originally the manager of the waqf property can no longer manage it, because the waqf property that was originally in his area has moved outside his area, then by itself the nazir is no longer eligible to be appointed as nazir to the replacement of the waqf property.¹³

In this case, the exchange of waqf land is only recorded in the village administration and is not included in the National Land Agency in the bureaucratic flow as an official national body that issues waqf certificates because land waqf from Islamic religious institutions has become part of the national land system considering the urgency of the problem of waqfing property land that occurred at that time, so that there is a special regulation through Government Regulation No. 28 of 1977 concerning Perwakafan Tanah Milik as an implementing regulation for the Basic Agrarian Law. Basically, objects that have been endowed cannot be changed, either in terms of designation or status. However, if it has obtained written permission from the Minister of Religious Affairs through a series of processes and conditions that have been determined and has a justified reason according to the law, then the exchange of waqf objects may be carried out in accordance with Government Regulation No. 28 of 1977 concerning Perwakafan Tanah Milik.

The practice of exchanging the results of waqf objects carried out by the jurong bale village which is the research location has reasons that are not in accordance with the above regulations, although the exchange

¹³ Adijani al-Alabi, *Land Trust in Indonesia in Theory and Practice* (Jakarta: CV Rajawali, 1992), pp. 85-87

procedure is not in the process of following the regulations and waqf institutions that participate in the process, namely to facilitate the parties in managing the results of waqf land that is used for the benefit of the village.

Because in the waqf regulations in Indonesia, one of the conditions for the exchange application must include a new replacement land for waqf objects and it must be in the form of land at least equal to the value of the previous land. As stipulated in PP. No. 42 of 2006 Article 49 paragraph (3) stipulates: "Apart from the considerations as referred to in paragraph (2), a waqf asset exchange permit can only be granted if (BWI, 2011: 30-31): a) The exchanging asset has a certificate or proof of legal ownership in accordance with the Laws and Regulations, and b) The value and benefits of the exchanging asset are at least the same as the original waqf asset.

After the explanation of the case study of waqf land exchange in Kembang Tanjong Subdistrict and its review from positive law, there are several points that the author summarises and still needs to be improved in order to be better in the future, as follows:

1. Inadequate administration. Not going through the legal process and following the provisions of the law makes the exchange of waqf land a polemic in the future.
2. There is no direct supervision from the relevant agency regarding the involvement of the distribution of waqf land proceeds between the two parties of the waqif from the nadzir, although in practice until now it has not caused any problems.
3. The waqf exchange process carried out between the two villages violates the provisions of Government Regulation No. 42 of 2006 as stated in Article 49 paragraphs (1), (2), (3), paragraph (1) which states that changes in the status of waqf assets in the form of exchanges are prohibited except with written permission from the Minister based on BWI considerations, paragraph (2) Article 49 Written permission from the Minister as referred to in paragraph (1) can only be given with the following considerations:
 - a. The change of waqf assets is used for the public interest in accordance with the spatial plan (RUTR) based on the

- provisions of laws and regulations and does not conflict with Sharia principles;
- b. The waqf assets cannot be utilised in accordance with the waqf pledge; or
- c. Exchanges are made for immediate and urgent religious needs.

Paragraph (3) Apart from the considerations as referred to in paragraph (2), a licence to exchange waqf assets can only be granted if:

- a. replacement of exchange property has a certificate or proof of legal ownership in accordance with laws and regulations; and
- b. The value of the exchange asset is higher or equal to the waqf asset.

and paragraph (4) The balanced exchange rate as referred to in paragraph (3) letter b is determined by the Regent/Mayor based on the recommendation of an assessment team whose members consist of elements:

- a. district/city government;
- b. district/city land office
- c. Indonesian Ulema Council (MUI) district/city

Government regulations, while the exchange that occurred did not go through the process and recommendations of the Indonesian Waqf Board (BWI).¹⁴ The exchange that occurred in Kembang Tanjong Subdistrict did not go through the process and regulations regarding the exchange of waqf assets, which waqf is an asset that must be demanded for clarity so that it can become a clear asset.

- 4. In terms of the exchange value of waqf assets carried out in the Kembang Tanjong sub-district, it does not at all undergo Article 50, which states that the exchange value of waqf assets as referred to in Article 49 paragraph (3) is calculated as follows:
 - a. the replacement property has a higher Tax Object Sale Value (NJOP), or at least the same as the NJOP of the waqf property; and

¹⁴ Interview with Nasir Daud, on 12 March 2024

- b. The replacement property is located in a strategic area and is easy to develop.
5. The exchange that occurred in Kembang Tanjong Subdistrict, *the Nadzir* did not make efforts and steps to change the status of the waqf land exchange as stated in Article 51 of Government Regulation No. 42 of 2006, namely the exchange of waqf assets to be changed in status is carried out as follows:
- a. The Nazir submits a request for exchange to the Minister through the local District Religious Affairs Office by explaining the reasons for the change in status/exchange;
 - b. The head of the sub-district KUA forwards the request to the district/city Office of the Ministry of Religious Affairs.
 - c. The Head of the Office of the Department of Religious Affairs of the Regency/Municipality after receiving the request forms a team with the composition and purpose as in Article 49 paragraph (3), and then the local Regent/Mayor makes a Decree.
 - d. The Head of the Regency/City Office of the Department of Religious Affairs forwards the application with the results of the team's assessment to the Head of the Provincial Office of the Department of Religious Affairs and then forwards the application to the Minister; and
 - e. After obtaining written approval from the Minister, the exchange can be carried out and the results must be reported by the Nazir to the land office and/or relevant institutions for further registration.

In the process of exchanging waqf land for public use, there is the principle of social function, where the exchange of waqf land for social use is in the form of paddy fields and other public interests. the process of exchanging waqf land in several cases such as those that occurred in the Kembang Tanjong sub-district is not in accordance with the procedures of waqf laws and regulations in Indonesia, because it does not go through the administrative process by the Waqf Board, it is only recorded and written by village officials.

The exchange carried out should have to follow legal steps so that the exchange in the view of positive law is in accordance with the provisions of the applicable law, the exchange through the legal process makes *Nadzir* and *wakif* as well as the community benefit, and the exchange process must also meet many requirements and considerations that make the waqf property worthy of exchange so that the exchange is not done carelessly.

The phenomenon of the exchange of waqf property has a positive impact on the development of waqf property, more productive, more useful, better for the benefit of which, the exchange of waqf land to clarify the ownership of waqf land and the results are very useful such as educational activities (schools), religion (majelis taklim), and worship activities....

D. View of Islamic Law on the Exchange of Waqf Objects

In Islam, the law of exchanging waqf objects is basically not allowed, especially according to some Shafi'iyah circles. This is based on the Prophet's hadith, which states that waqf cannot be sold or given away or inherited. However, according to some other circles, it is permissible to exchange waqf objects as long as the reason for the exchange and its use can be accounted for.

Like the view of the Hanafiyah Ulama, they divide the permissibility of exchanging waqf objects into three things, namely:

- a. If the waqif allows exchange at the time of the pledge.
- b. If the waqf object cannot be preserved. This is where the mashlahat necessitates the exchange of the waqf.
- c. And if the use of the waqf replacement object turns out to be much greater and more useful than the previous object, it is permissible.¹⁵

So it can be concluded that the Hanafiyah view allows the exchange of waqf objects based on mashlahat and the absence of mashlahat (if the waqif had stipulated the exchange during the pledge agreement). In practice, the waqf land in jurong bale village, which is the place of research, has fulfilled the three conditions above, namely the approval of the wakif even though it was not done at the time of the pledge, even though there

¹⁵ Muhammad Abu Zahra. *Muhad arat fi al-Waqf*. (Cairo: Matba'ah Ahmad Ali Mukhaimar, 1959) p 44.

was no application for permission to exchange it to the Office of Religious Affairs (KUA), because the wakif and heirs were not in the village.

This is not in accordance with the reason for the exchange that the two villages both have waqf land located in other villages, that the jurong village waqf land is located in the tanjong village and vice versa, so that the two villages both enjoy the results of the waqf land and its utilisation is right on target,¹⁶ That reason or factor is the basis for the exchange of waqf property that occurs in Kembang Tanjong Sub-district.

The process of exchanging waqf assets that occurs in Kembang Tanjong Subdistrict, after conducting research through interviews with *Nadzir*, when viewed according to the Malikiyah view, does not fulfil the permissibility of exchanging waqf assets:

- a. In the first condition, the *waqif* exchange process allows waqf exchange, this is in accordance with the Mailikiyah view.
- b. The object of waqf can still be preserved and can also still generate returns, so there is nothing that requires the exchange of waqf.
- c. The results of the exchanged waqf land have the same value, while according to the Mailikiyah opinion, the permissibility of waqf exchange, the waqf property to be exchanged must be higher or greater in value than the original waqf, then it is allowed to be exchanged.

This rule explains that if there is the same time faced with two choices, namely damage or benefit, then what must take precedence is to reject damage. Because rejecting damage means getting benefits as well. Avoiding the non-functionality or neglect of waqf assets is the option of rejecting damage. The last condition is that the usefulness of the replacement in the sense that the existence of waqf land in the new location is needed by the surrounding community.

As for the Malikiyah view, it is the same as the Hanafi madzhab, even the nature of the waqf property still belongs to the waqif, which can be changed at any time according to the waqif's decision. Maliki also does not require waqf to last forever because there is no evidence that requires waqf to last forever, therefore it is allowed to waqf according to the

¹⁶ Interview with Nasir Daud, on 12 March 2024

wishes of the waqif, including if he wants to exchange the waqf. However, the Malikiyah still divided it into three conditions, namely:

- a. The waqf, when making the pledge, stipulates that it can be exchanged or sold,
- b. The waqf object is a movable object and its condition is no longer in accordance with the original purpose when it was endowed.
- c. If the replacement waqf object is needed for public purposes, such as the construction of mosques, roads, and so on.¹⁷

Meanwhile, Hanbali scholars are even stricter, not distinguishing whether the waqf object is in the form of a mosque or not a mosque. According to the Hanbali madzhab, there are two views of Taghyir al-Waqfi, namely Taghyir Mashraf (changing the direction of benefit allocation) and Taghyir Shurah (changing the form of mauquf). Ibn Taymiyyah divides it into two kinds of replacement of waqf property, namely in terms of replacement due to need and replacement due to stronger interests. In the practice of exchanging waqf land, the exchange has fulfilled two reviews according to Ibn Taymiyyah, namely exchanging out of necessity (needed by the community for the benefit of worship) and exchanging for a stronger interest (avoiding the scarcity of functions and benefits of the waqf asset).

In fact, As-Shafi'i's opinion differs from that of the previous scholars. He forbids replacing mosques, gifts, and land that are endowed, because the nature of the property has changed hands into the ownership of Allah swt, so it cannot be contested even if the property has been damaged or has no function and benefit. However, some of the Shafi'i scholars agree on the permissibility of changing or exchanging waqf objects, if the waqif authorises the exchange of these assets which is considered to be beneficial to the waqf,¹⁸

More details can be found in the book Fatawa written by asSubki, the legal conditions of Taghyir al-Waqfi:

- a. The changes are minimalist or do not go as far as to change the designation of waqf.

¹⁷ Siddiq, Achmad. The Application of the Principle of al-Maslahah in the Practice of Exchange (Istibda) of Waqf Property in Indonesia. *Dissertation at UIN Walisongo Semarang*, 2012

¹⁸ Jamal. Daur Nizhom *Al-Waqf Al-Islamy Fi at-Tanmiyah Al-Iqtishadiyah Al-Muashirah*. (Cairo: Dar as-Salam, 2007) p 77.

- b. It does not remove parts of it, but it is moved to other parts, for example, the land on which the mosque was built has a remaining plot for the mosque yard. Then it is permissible to convert part of it into a car park and garden to beautify the mosque environment. If the change eliminates part or all of the waqf, then it is not allowed.
- c. Based on mashlahat for the Muslims and no harm to the waqf.

From all of the above, it can be concluded that the law of exchanging waqf objects is permissible, based on the conditions why the waqf object must be replaced, the benefits and benefits. It is also in accordance with the original intention and purpose.

Back to the law of exchanging waqf objects, if the purpose is based on the intention of worshiping in the way of Allah swt and hoping for His pleasure alone and for the common good, then that is the law, the same as the original law when the person first endowed his property.

Because everything that comes from the intention, the intention turns into a form of worship that brings goodness to the person who does it. And if the purpose of exchanging waqf objects is not in accordance with the original intention of waqf, then the law becomes impermissible.¹⁹

Although Islam does not regulate the flow of exchange of waqf objects in detail as in Indonesian positive law, the mechanism that has been regulated by the law is in accordance with the applicable sharia.

In this age of dynamic and practical changes, it is necessary to be clear in carrying out all forms of muamalah activities, especially in waqf. This means that the contract made at the beginning when the waqif wants to endow has a very important role to avoid problems that might occur in the future, and the good intention will be more perfect if it is manifested into a physical form that is legal and strong in the eyes of the law such as the mechanism for applying for waqf and its conditions that have been regulated by legislation.²⁰

In the perspective of Islamic law on the exchange of waqf land, the opinions of the fuqaha vary, the Hanfiyah and Hanabilah Mazhabs

¹⁹ Sari, Elsi Kartika. *Introduction to Zakat and Waqf Law*. (Jakarta: PT Grasindo, 2006) p 76

²⁰ Rahardjo, Satjipto. *Progressive Law A Synthesis of Indonesian Law*. (Yogyakarta: Genta Publishing, 2009) p. 99

allow the exchange of this waqf land, if the exchange is carried out on the basis of the benefit of the community at large, the waqif can carry out the exchange of waqf objects if required when waqf, if not required by the waqif, the exchange of waqf property is carried out based on the determination of the qodi / judge (government).

Different point of view of fuqoha Mazhab Malikiyah and Syafi'iyah known prudence to prohibit the exchange of waqf land is done because it has the potential to eliminate waqf land, unlike what happened in Kembang Tanjong District the exchange process does not reduce the amount, size and shape of the waqf land at all, the parties only exchange the location of the waqf land to return to their respective places.

Conclusion

The exchange of waqf property that occurs in Kembang Tanjong Sub-district is carried out only for its utilisation and is the main basis for the exchange. The factor that really influences the exchange after researching the waqf administrators is to facilitate access for residents and also the exchange of use rights in accordance with their ownership and so that *Nadzir* can easily manage the waqf land because it is located in accordance with the location of the village, residents and village leaders as well as the community really welcome the results of the exchange. The community is also a factor that influences the factors of the exchange, the community in receiving the results and benefits of waqf must also be able to maximise the waqf land, one of which is community access to the location of the waqf land and makes it easier for both village parties to use the waqf.

Waqf exchange in positive law is regulated in Indonesian Waqf Board Regulation Number 1 of 2008 concerning Procedures for Preparing Recommendations for Applications for Exchange / Change of Status of Waqf Property, and PP No. 42 of 2006 Article 49, such as the exchange that occurred in Kembang Tanjong District, Pidie Regency, the village community is certainly greatly facilitated by the existence of these regulations in order to provide legitimacy for the exchange of waqf land assets, but in the process that occurs, the exchange carried out by the *nadzir* does not follow and comply with PP No. 42 of 2006 which discusses and clearly contains the terms and conditions of the exchange of waqf property, the managers in conducting the exchange only involve the waqif and the

nadzir of the two parties, the exchange should also involve related institutions and the *nadzir* of the two parties. The managers in conducting the exchange only involve the *wakif* and the *nadzir* from both parties, the exchange should also involve related institutions and government procedures.

The Islamic view of waqf is very clearly regulated in fiqh, many schools of thought differ in opinion, especially regarding the exchange of waqf objects, in Islam waqf objects if they want to be exchanged or with the term called *Ruislak* must be in accordance with the object to be exchanged in the form of value, results and also utilization, it must not decrease if it decreases then it cannot be exchanged because it can reduce the original value of the waqf object, The reason for the exchange must be very objective, and based on several considerations, as is done in Kembang Tanjong District, there are several provisions and conditions for making exchanges in Islamic law that are not fulfilled or it can be said that the process that occurs does not follow the provisions of the imam mazhab and scholars, because the exchange of waqf must consider the benefit and also so as not to cause problems in the future.

Bibliography

- Abduurrahman. (1994). *Perwakafan Tanah Milik and the Position of Waqf Land in Our Country*. (4th Mould). Bandung: PT Citra Aditya Bakti.
- Abdurrahman, *Problems of Perwakafan Tanah Milik and the Position of Waqf Land at Our Country*, (Bandung: Alumni, 1979)
- Abdul Hilmim, *Law of Perwakafan in Indonesia*, (Jakarta: Ciputat Press, 2005), p 18
- Ahmad Azhar Basyir, *Islamic Law on Waqf Ijarah and Shirkah*, (Alma Arif: Bandung, 1987), pp. 9
- Adijani Al-Alabij, *Land Trust in Indonesia in Theory and Practice*, (Raja Grafindo: Persada, Jakarta, 2002), pp. 25
- Ahmad Furqon, "The Exchange of Waqf Land of Semarang Great Mosque Perspective of Fikih Istibdal" (Journal-, Walisongo State Islamic University, Semarang, 2017).
- Al-Alabij, Adijalani. (2002). *Land Trust in Indonesia: In theory and practice*. Jakarta: PT Raja Grafindo Persada.
- Al-Kabisi, Muhammad AbidAbdullah. (2004). *Waqf Law The First and Most Complete Contemporary Study on the Function and Management of Waqf*

- and the Settlement of Waqf Disputes*. Jakarta: Dompot Dhuafa Republika and IIMaN.
- Annie Rafika, "The Use of Rice Measuring Units among the People of District Indrapuri Subdistrict According to Islamic Law", (Thesis), Faculty of Sharia and Law, State Islamic University (UIN) Ar-Raniry, Banda Aceh, 2018.
- Anwar, Rosihan, et. al. (2009). *Introduction to Islamic Studies*. (1st mould). Bandung: Pustaka Setia.
- On Disputes, ed: Khaeron Sirin, Translated by Ahrul Sani Faturrahman and colleagues. Retrieved from KMCP, Cinere, (IIMaN Press: Depok, 2004), pp. 350
- Djunaedi, Ahmad, et.al. (2007). *The New Waqf Paradigm in Indonesia*. Jakarta: Directorate of Waqf Empowerment.
- In Nailul Authar juz 6 page 20; as quoted by Wahbah az Zuhaili, *alFiqhu al-Islam wa Adillatuhu* (Dimasyqi: Dar ar Fikr, tt), VIII: 155
- Elsa Kartika Sari, *Introduction to Zakat and Waqf Law*, (Jakarta: Grasindo, 2007)
- Farida Prihatini, (2005), *Islamic Law on Zakat and Waqf*, Papas Sinar Kinanti and Publishing Agency of the Faculty of Law, University of Indonesia UI: Jakarta,
- Halim, Abdul. (2005). *Law of Perwakafan in Indonesia*. (1st mould). Jakarta: Ciputat Press.
- Hasan, Sudirman. (2011). *Waqf Money from the Perspective of Fiqh, Positive Law, and Management*. Malang: UIN-Maliki. 71
- Ibn Hajar al-Haytami, 2006 *Shihab al-Din Ahmad, Tuhfah at-Muhtaj bi Syarh al Minhaj* volume 6, Dar Fikr: Beirut
- Hasan Mansur Nasution, et al, (2007) *Waqf and Community Empowerment*, ed: Bandrun Nur Tanjung and Farid Wajdi, Sinar Grafika: Jakarta.
- Muhammad Jawad Mughniyah, (2005) *Fiqh Five Mazhabs: Ja'fari, Hanafi, Maliki and Shafi'I, Hambali*, Translated by Masykur AB et al, Lantera: Jakarta,
- Muhammad Abid Abdullah Al-Kabisi, *Waqf Law: A Contemporary Study The First and Most Complete Study of the Functions and Management of Waqf and the Settlement*
- Hadi Setya Tunggal, (2005), *Law of the Republic of Indonesia Number 41 Year 2004 on Waqf*, Harvarindo: Jakarta
- JA, Abu.far Muhammad Bin Jarir Ath-Thabari, (2008), *Tafsir Ath-Thabari* ter. Akhmad Affandi.
- Mamudji, Sri, et al. (2005). *Legal Research and Writing Methods*. Jakarta: Publishing Agency of the Faculty of Law, University of Indonesia.
- Mohammad Daud Ali, (1998) *Islamic Economic System Zakat and Waqf*, Jakarta, University of Indonesia Press

- Melong, Lexy J. (1991). *Qualitative Research Methodology*. Jakarta: PT.Raja Grafindo Persada.
- Moh. Pabundu Tika, (2006) *Business Research Methodology*, Jakarta: P.T. Bumi Aksara
- Musyfikah Ilyas, "Istibdal of Waqf Property from the Perspective of Islamic Law" (Journal, Alauddin State Islamic University, Makassar, 2016).
- Islam" (Journal-, Alauddin State Islamic University, Makassar, 2016).
- Rachmadi Usman, (2013), *Perwakafan Law in Indonesia*, cet-II, (Sinar Grafika: Jakarta.
- Mohammad Daud Ali, (1988) *Islamic Economic System, Zakat and Waqf*, UI-Press: Jakarta
- Sugiyono, (2014) *Quantitative and R&D Research Methods*, Bandung: Alfabeta
- Suhrawardi K. Lubis, (2013), *Waqf and Community Empowerment*, Sinar Grafika, Jakarta
- Sayyid Sabiq, (2008) *Fiqh Sunnah*, Translation of Asep sobari et al, Al-I'tishom: Jakarta
- Wahbah Az-Zuhaili, (2011), *Fikih Islam Wa Adillatuhu*, Journal of Translations Abdul Hayyie al-Kattani et al, cet-1, volume 10, Gema Insani, Jakarta,
- Yulia Mirwati, (2016) *Waqf of Customary Land in the Dynamics of Indonesian Law*, Rajawali Pers: Jakarta,
- Zein Yudha Utama, (2020), "Ruislag of Waqf Land According to Positive Law and Islamic Law", thesis, Faculty of Sharia and Law, Universitas Airlangga, 2020. Islamic Law", thesis, Faculty of Sharia and Law, university of Islamic University Syarif Hidayatullah State University. <https://yatimmandiri.org/blog/berbagi/jenis-wakaf/> accessed on 11 December 2023
- Letter from the Minister of Religious Affairs to the Minister of Justice and Human Rights and its attachments, Number: MA/451/2002, Perihlm: Permission to Initiate Waqf Bill, dated 27 December 2002.
- Meeting of Ulama, Experts/Leaders and Islamic Organisations on the Waqf Bill, 6 March 2003, opened by the Minister of Religious Affairs, at the Operation Room of the Ministry of Religious Affairs.
- Report of the Meeting of Ulama, Experts/Leaders and Islamic Organisations on the Waqf Bill on 6 March 2003.