

REVIEW OF FIQH AND STATUTORY LAW CONCERNING WAKAF LAND EXCHANGE AFFECTED IN THE SEMARANG - DEMAK TOLL ROAD PROJECT

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Abstract: Replacement of waqf land is a problematic issue. This study aims to find answers to problems regarding mechanisms and procedures for replacing waqf land affected by the Semarang-Demak Toll Road project as well as an analysis from the point of view of fiqh and law. With research on normative law/doctrinal law as optical and field data as a basis for analysis, this research finds that the many stages taken and the involvement of many parties in the process of replacing waqf land is an effort and legal engineering to guarantee benefit, both in the form of immortality of waqf land and designation. Engineering carried out is an act/action that is not prohibited according to sharia. Therefore, engineering to replace waqf land is permissible and legal. Legal engineering, as stated in various laws and regulations, is a manifestation of functional legal instrumentation. Various laws and regulations, especially the Waqf Law and its implementing regulations have become a means of achieving development goals. In fact, the Waqf Law, unlike other laws and regulations, is able to penetrate so deeply in

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reaching theological matters. This is reasonable because the Waqf Law is nothing but the result of the positivization of Islamic law/fiqh

Penggantian tanah wakaf merupakan masalah yang problematik. Penelitian ini bertujuan untuk menemukan jawaban atas permasalahan mengenai mekanisme dan prosedur penggantian tanah wakaf yang terkena proyek Jalan Tol Semarang-Demak serta analisis dari sudut pandang fikih dan hukum. Dengan penelitian terhadap hukum normatif/doktrin hukum sebagai optik dan data lapangan sebagai dasar analisis, penelitian ini menemukan bahwa banyaknya tahapan yang ditempuh dan keterlibatan banyak pihak dalam proses penggantian tanah wakaf merupakan upaya dan rekayasa hukum untuk menjamin kemanfaatan, baik berupa keabadian tanah wakaf maupun peruntukannya. Rekayasa yang dilakukan merupakan perbuatan/perbuatan yang tidak dilarang menurut syariah. Oleh karena itu, rekayasa untuk menggantikan tanah wakaf diperbolehkan dan sah. Rekayasa hukum, sebagaimana tertuang dalam berbagai peraturan perundang-undangan, merupakan perwujudan dari instrumentasi hukum fungsional. Berbagai peraturan perundang-undangan, khususnya UU Wakaf dan peraturan pelaksanaannya telah menjadi sarana pencapaian tujuan pembangunan. Padahal, UU Wakaf, tidak seperti peraturan perundang-undangan lainnya, mampu menembus begitu dalam hingga menyentuh persoalan teologis. Hal ini wajar karena UU Wakaf tidak lain merupakan hasil positivisasi hukum/fiqh Islam.

Keywords: Legal engineering; Waqf perpetuity; value and benefits; legal instrumentation.

INTRODUCTION

The immortality of waqf assets has become the agreement of all scholars and adhered to by Muslims. Not infrequently in some areas this principle is applied rigidly. Waqf assets may only be taken for the benefits generated. Waqf assets may not be traded, inherited or donated. Likewise, the purpose of waqf should not be diverted from the original intention. For example, the intention of a wakif to endow his land for the prosperity of certain mosques or certain educational institutions cannot be transferred to other mosques or educational institutions at any time (Al-Syathiri, n.d.: 157).

The principle of perpetuity of waqf is also an important principle in waqf regulations in Indonesia. Article 40 of Law Number 41 Year 2004 concerning Waqf states emphatically that waqf assets that have been donated are prohibited from being used as collateral, confiscated, donated, sold, inherited, exchanged, or transferred in other forms of transfer of rights. From this provision, it can be understood that the law of origin of waqf objects must remain and cannot be changed, both the object and its designation.

Permissible change or replacement (*istibdal*) of waqf objects is an exception (*rukhsah*) with predetermined reasons. The reason for *istibdal* that is permitted, as stipulated in Article 41, is if the waqf property that has been donated will be used for the public interest in accordance with the general spatial layout plan (RUTR) based on the provisions of the applicable laws and regulations and does not conflict with sharia.

The reason for the permissibility of this replacement exception in Government Regulation Number 25 Year 2018 is added to two more things,

namely if the waqf property cannot be used in accordance with the waqf pledge, and *istibdal* is carried out for direct and urgent religious needs (Article 49 paragraph 2). It is permissible to change waqf objects with complicated mechanisms and procedures. Such as having to get approval from the Indonesian Waqf Board (BWI) and permission from the Minister of Religion, and the object of exchange must have the value and benefits of at least the same as the original waqf property. For example, if the waqf property was originally in the form of land or buildings, then it must be exchanged for land or buildings of the same value.

Replacement or alteration of waqf objects, especially for the development of public interest, although it has been regulated in various laws and regulations, in practice it often creates complex legal problems. The most recent *istibdal* waqf case is 83 fields of waqf land in Demak which were affected by the 23.99 KM Semarang-Demak Toll Road construction project. The waqf land that was most affected belonged to the Sunan Kalidjogo Kadilangu Foundation which covered 73 points with an area of 116,244 m², spread over three sub-districts of Sayung, Wonosalam and Demak (Kantor Kementerian Agama Kabupaten Demak, 2021).

According to the provisions, these lands must be exchanged for the same land elsewhere, the value of which is at least the same as the original land. *Nazhir* is not allowed to receive replacement money, even if it is used for public purposes. Because, by doing so, waqf objects will disappear. On the other hand, the state as the party needing land for the project also cannot purchase replacement land directly and then hand it over to *Nazhir*. Therefore, the replacement process involves three parties at once, namely

Nazhir as the owner of the land to be exchanged, the owner of the exchanging land as the seller, and the state as the buyer and at the same time the exchanger. The problem is whether the formula for the exchange of waqf land is justified by fiqh or law, especially the laws and regulations and contract law?

RESEARCH METHOD

This type of study is normative juridical legal research (Soekanto, 2001) and empirical juridical. The object of this research is the implementation of istibdal/tweaking of waqf land affected by the Semarang Toll Road construction project, so that the primary data needed is in the form of documentation, such as a document on the list of affected waqf land, estimated replacement value, nazhir waqf list, list of replacement land, mechanisms replacement, and replacement land conditions. These data are accessed from the Work Unit for Land Acquisition of the Semarang - Demak Toll Road, Ministry of PUPR c.q. Commitment Making Officer; Office of the Ministry of Religion of Demak Regency; Regional Office of the Ministry of Religion of Central Java, Central Java Indonesian Waqf Agency, affected Nazhir, and other related institutions.

DISCUSSION

The requirements and procedures for replacing waqf assets are regulated in the Decree of the Director General of Islamic Community Guidance of the Ministry of Religion Number 659 Year 2018 concerning

Technical Instructions for Application for Permits to Exchange Waqf Assets.

The procedure is as follows:

First, Nazir must submit an application for a permit to exchange waqf land under his authority in writing to: a) the Minister of Religion through the Head of the Regency/City Ministry of Religion Office for the exchange on the grounds of public interest with an area of more than 5000 m² and other than public interest; or b) To the Head of the Regional Office of the Provincial Ministry of Religion through the Head of the Regency/City Ministry of Religion Office to exchange for reasons of public interest with an area of up to 5000 m².

Second, the Nazhir application letter is signed by the Head of Nazhir (for Organizational and Legal Entity Nazhir) or by all Nazhir (for Individual Nazhir).

Third, the permit application letter must be accompanied by related documents, namely: Photocopy of waqf pledge deed or replacement deed of waqf pledge deed and waqf certificate; Photocopy of letter of validation of Nazhir and Decree on extension or replacement of Nazhir from BWI (if there is a replacement of Nazhir); Letter of agreement on the exchange of waqf assets between Nazhir and the exchanger; Photocopy of the identity of Nazhir and the exchange party; Photocopy of certificate of exchange property or other valid proof of ownership in accordance with statutory provisions; Photocopy of the deed of establishment or permit for a legal entity organization, for the organization/legal entity exchange party; Regional spatial layout plan/detailed spatial layout plan/location determination/spatial recommendation, specifically for reasons of public

interest; The results of the appraisal by the appraiser or public appraiser on waqf assets and exchange assets.

Fourth, the procedure for applying for a permit to exchange waqf assets for public purposes with an area of more than 5,000 m² and other than public interests: Nazhir submits a written request to the Minister of Religion through the Head of the Regency/City Office of the Ministry of Religion by attaching the requirements as above; The Head of the Regency/City Ministry of Religion Office checks the completeness of the files/documents after they have been declared complete and issues a receipt; The Head of the Regency/City Ministry of Religion Office shall form the Determination Team through a Decree no later than 5 working days after the application and Nazhir files are declared complete.

Determination team consists of elements: Regency/Municipal Government; Regency/City Land Office; Regency/municipality Indonesian Ulama Council; Regency/City Ministry of Religion Office; Nazir and District Office of Religious Affairs.

The Determination Team makes a Minutes of the results of the assessment and submits recommendations for the exchange of waqf assets no later than 5 working days after the appraiser or public appraiser submits the results of the assessment Head of the Regency/City Ministry of Religion Office; The Head of the Regency/City Ministry of Religion Office determines and sends the results of the valuation of the exchange of waqf assets to the Minister and BWI with a copy to the Head of the Regional Office of the Provincial Ministry of Religion no later than 4 working days after receiving the recommendation from the Determination Team; BWI

gives approval to the Minister of Religion no later than 5 working days after receiving the files and the Regency/Municipal Office of Ministry of Religion which has been decided in the BWI Plenary Meeting; and The Minister issues/does not issue a written permit to exchange heirloom assets no later than 15 working days after receiving approval from BWI which has been decided in a Plenary Meeting chaired by an Echelon I Official.

Fiqh Analysis

Scholars differ on the possibility of changing or *istibdal* (swapping) waqf assets. The opinions of four schools of fiqh scholars regarding *istibdal* waqf as quoted by Wahbah az Zuhaily (Al-Zuhaily, 2002: 7599-7604) are as follows:

The Hanafi school of thought argues that the law of *istibdal* is permissible, as long as *istibdal* is done for the benefit and benefits of more optimal waqf. Changes to waqf assets are permitted as long as the *istibdal* is carried out for the purpose of preserving the benefits of waqf goods. According to him, the important thing is that the waqf "eternity" requirement is met, so it does not violate waqf law. whereas what is meant by the term "eternity" here is not only about the form of the goods but also in terms of their continued benefits. If it turns out that the waqf goods no longer provide benefits, then *istibdal* must be done to preserve the benefits of waqf.

The Maliki School is of the opinion that *istibdal* of waqf assets is not permissible. Imam Malik prohibits exchanging waqf on immovable objects, such as mosques, cemeteries or highways. But he excluded when in an emergency such as expansion. Whereas malikiyah scholars allow the

exchange of waqf movable objects if there is fear that the benefits will decrease.

The Shafi'i school is very careful about the implementation of waqf istibdal. They do not allow the exchange of movable or immovable waqf assets. This opinion is motivated by their understanding of the "eternity" nature of waqf. Eternity according to the Shafi'i school of thought is the perpetuation of the physical form of waqf goods. So that it seems that they absolutely prohibit istibdal under any circumstances. They indicated that the replacement could indicate embezzlement or misuse of waqf goods.

The Hanbali school of thought is more moderate in that its decrees are not as free as the Hanafi school of thought. Regarding istibdal waqf, the Hanbali school still allows and does not differentiate based on movable or immovable waqf assets. In fact, it seems that it makes it very easy for permission to carry out waqf istibdal practices. They argue that if waqf goods are prohibited from being sold while there are strong reasons for this, it is feared that waqf assets will be wasted. The opinion of the Hanbali School of Scholars regarding selling waqf assets can be detailed as follows:

- a. If the benefits of the waqf property have been lost, such as the house has been destroyed and the plantation has become a forest or the mosque is no longer used by local residents, or the mosque has become cramped and can no longer accommodate the local congregation, while the costs to repair and expand the mosque are not If there is, then the waqf band assets may be sold;
- b. If the waqf property has been sold, then the proceeds from the sale may be purchased for anything (other waqf objects, similar or not the same),

as long as the purchased property is beneficial to the public interest. Because the basic principle in waqf is the optimal use of these assets for the public interest;

- c. If the benefits of a part of the waqf property can still be utilized even a little, then the property may not be sold. However, in an emergency it may be sold to maintain the purpose of the waqf itself;
- d. If the waqf property is in the form of an animal but it cannot be used again and then it is sold and the proceeds from the sale are not sufficient to buy another animal of the same type and quality, then it is permissible to buy another animal that is not of the same type and not of the same quality, in accordance with the money available, so that it is still waqf beneficiary can use it; and
- e. It is not permissible to move the mosque and exchange it for another, nor is it permissible to sell the mosque grounds, except when the mosque and the mosque grounds are no longer useful.

Contemporary scholars seem to prefer the views of Imam Hanafi and Imam Hambali, because they are considered more moderate and in line with the needs of modern waqf management. Sayyid Sabiq (2004: 1072), in this case citing the opinion of Ibn Taimiyyah, allows *istibdal waqf* with something better even though it is still useful. Muhammad bin Ibrahim Al Tuwaijiri said that *istibdal waqf* because there is a need is a necessity, and if there is no need then it is permissible to replace the waqf with something better than that because there are benefits and benefits (Al-Tuwaijiri, 2009: 692). The same thing was also stated by Khalid bin 'Ali Al Musyaiqih who allowed *istibdal* because of the benefit (Al-Musyaiqih, 2013: 258).

Syauqi Allam ('Allam, n.d.), the mufti of Egypt as stated on his official website, said that replacing waqf land for mosques with something else, replacing it with a pesantren or other social institution, if there is benefit then it is permissible, but the one who has the right to decide this is qadi, not based on the views of the general public.

The same thing is also the fatwa of Darul Ifta Egypt which is the official fatwa institution of the State of Egypt. In the fatwa it is stated that it is permissible to replace the land donated for the mosque with something else and/or build it with a pesantren or with another stipulated good place, if the benefits of the waqf increase. Waqf exchange assets must be ensured that the beneficial value is greater, such as the new land is wider and more useful, or the mosque building is sturdier and more luxurious than the old one. But it is Qadhi who decides this, and not the general public's subjective considerations (Darul Ifta Mesir, n.d.).

From various opinions about whether it is permissible to swap or replace waqf assets, the opinion that is flexible and in accordance with the latest developments is that which allows changes to waqf assets in order to increase the benefits and benefits. This opinion is followed by the law of waqf in Indonesia. Although basically waqf may not be sold, inherited, transferred, pledged and other forms of change, there are exceptions. Changes or replacement of waqf objects are permitted if there are special reasons. The permitted reason is as arranged in Article 41, namely if the waqf property that has been donated will be used for public purposes in accordance with the general spatial planning (RUTR) based on the provisions of the applicable laws and regulations and not contrary to sharia.

In addition to the interests of the RUTR, in Article 49 of Government Regulation Number 42 of 2006 it is added, that changes in waqf assets are also permitted in the event that waqf assets cannot be used in accordance with the waqf pledge, or exchanges are made for religious purposes directly and urgently, provided that the assets the exchanger has a certificate or proof of legal ownership in accordance with the Legislation and the value and benefits of the exchanger's assets are at least the same as the original waqf assets. Granting permission to change waqf assets is not contrary to the principles of waqf management according to sharia.

The case of exchanging waqf land for the construction of the Semarang-Demak toll road does not violate sharia provisions for the following reasons:

Empirically, the waqf lands in Demak were affected by the toll road project which was built to meet the needs of many people. Namely to meet the need for fast roads along with the rapid growth of motorized vehicles. The existing roads are no longer sufficient, there are frequent traffic jams which drain time, energy and wasted fuel oil (BBM). This toll road cannot be diverted or diverted just to avoid waqf land. So waqf whose purpose is for the benefit of the people must be moved to another place, for the greater and more pressing benefit.

Philosophically, what is meant by waqf assets must be permanent and eternal and cannot be transferred, what is meant is the value and benefits, and not the objects or their physical properties. In this world nothing is permanent. Change is a necessity. Including changes to the law. In Islam, laws can change at any time due to changes in illat and the purpose of law.

Changes to waqf assets that are prohibited are changes that result in deviations, for example switching to private property or diverting its benefits for purposes other than the intentions of all waqifs.

Sociologically, the value and benefits of an object will change dynamically from time to time. The waqf mosque which was built in the 1970s, will no longer be adequate for 50 years later. The buildings are worn or run down, uncomfortable, and large enough to no longer accommodate the growing congregation. If the change is not permitted, the purpose of the waqf will not be achieved and the waqf will be in vain, because it has lost its useful value. Likewise, waqf lands, can be marginalized or isolated by the growth of housing or buildings. Therefore, waqf assets must continue to be developed productively and professionally, so that the value of the benefits increases for the welfare of the people.

Juridically, so that changes in waqf assets do not deviate from the purpose of waqf, the mechanism is regulated in statutory regulations. Changes to waqf must obtain permission after fulfilling various requirements. Laws and regulations that must be referred to include Law Number 41 of 2004 concerning Waqf, Government Regulation Number 25 of 2018 concerning Amendments to Government Regulation Number 42 of 2006 concerning Implementation of Law no. 41 of 2004 concerning Waqf, Indonesian Waqf Agency Regulation No. 1 of 2008 concerning Procedures for Preparing Recommendations for Requests for Exchange/Change of Status of Waqf Assets; Indonesian Waqf Agency Regulation No. 3 of 2012 concerning Changes in Allocation of Waqf Assets. In addition, they also

have to comply with various land regulations, especially those governing land acquisition for the development of public interests.

Analysis of Law and Statutory Regulations

The analysis of the implementation of waqf land swaps for the Semarang-Demak toll road project from a legal perspective and statutory regulations here is actually not only limited to waqf regulations, but also regulations in general as far as birth and emergence aspects are concerned, the substance of the regulation, the direction of the regulation, the nature of the regulation, the motives and reasons for choosing a policy, and the regulatory context in carrying out state duties. Based on these considerations, this sub-discussion consists of the transformation of Fiqh plus, not bound to one particular school of thought, solution-oriented legal unification, exceptional policy in nature, legal instrumentation for development, making the public interest a priority and legal reference, winding and ambiguous procedures to ensure clear and clean, law as an instrument of development.

a. Transformation of Fiqh Plus

Regulations regarding waqf in Indonesia with the waqf law as the primary legislation are actually a transformation of Fiqh plus (Suganda, Ahmad & Firmansyah, 2022). This means that the main substance of the regulation comes from fiqh. This is logical and natural considering that waqf is a religious institution in Islam which contains two dimensions at once, namely the private dimension (worship, spiritual, reward, inner satisfaction) seen from the perpetrator's motives and the socio-economic dimension (institutional and public welfare) when viewed from the function and its purpose. While the plus is the

administration and management aspects to support and guarantee the running of waqf to ensure it reaches its goals.

With such origins mentioned above, waqf regulations cannot ignore fiqh, especially those related to the existence, definition, elements, functions, and objectives of waqf. What is encouraging in this regard is the fact that fiqh always moves dynamically, both through comparative studies that explore the added values that exist in various schools of thought as well as bringing out new *ijtihad* results that are in accordance with current conditions without being uprooted from the roots of past thoughts and still referring to the *istinbath* method that existed before. With such a character of fiqh, legislators have the option to adopt the results of the new and current *ijtihad* in statutory regulations. The norms regarding the permissibility of changing the status of waqf assets in the form of exchange are mostly derived from the latest thoughts contained in various religious scientific meetings and forums, both national and international.

The transformation of fiqh in the laws and regulations itself is legitimate. This does not mean that Muslims as the majority in Indonesia have forced Islamic law into force as national law. In fact, what is adopted is not fiqh as a product of thought alone, but aspects of its application and implementation in the field. Thus, even though the legislators use fiqh as their reference, actually what is developing in society and actually happening is what is meant to be regulated. So the transformation of fiqh into laws and regulations implies the formation of national law based on Islamic legal material that is developed and is actually practiced

in everyday life. The connection with waqf and the exchange of waqf assets is clear, that waqf is a real religious institution in society. Likewise, the exchange of waqf assets is also a real fact that occurs so much in society. The enactment of the Waqf Law is a necessity in response to legal needs in society (Nawawi, 2021). It is intended as a guideline for the Muslim community in general and also for the state apparatus in charge of providing services, so that the purpose of waqf existence can be achieved. It is sufficient for people to guide the Waqf Law as a practical reference, no longer to fiqh books.

b. Not bound to a particular school of thought

The transformation of Islamic law into national law in the form of Legislation is faced with the problem of not having the sole substance to be adopted. The character of fiqh is its plurality. Likewise in the matter of exchanging waqf assets there are various kinds of opinions, both between schools of thought and within a particular school of thought. The adopted pattern of adoption is disengagement with one particular school, even though in Indonesia the Shafi'i school of thought is dominant.

Disengagement with certain schools of thought in the context of being a state is appropriate. This is because legislators have many alternatives on the one hand, and in fact there are always opinion options that can be chosen with a level of accuracy and precision that can be accepted by many parties on the other. Moreover, a field such as waqf is not considered pure worship, so that taking opinions from non-

popular/dominant schools of thought does not bring much theological problems.

The permissibility of swapping waqf land, as stipulated in the Waqf Law, follows/takes the options offered by the Hanafi school of thought and/or Hanbali school of thought, even though these two schools are not popular in Indonesia (Yazid, 2021). The acceptance of the two schools of thought and not the opinion of the Shafi'i school, because the replacement of waqf land is absolutely not permitted by the Syafi'i school. The same thing has previously been taken when compiling the Compilation of Islamic Law as well as when formulating crucial norms in the marriage law, for example concerning the status of legitimate children and the marriage of pregnant women. The same thing was taken when the Supreme Court formulated the Compilation of Sharia Economic Law (KHES) as material law for the Religious Courts in deciding sharia economic disputes.

c. Solution-oriented legal unification

The legal norms in the Waqf Law are the only norms that are used as a reference in practice in the field. Officials are no longer allowed to be guided by other norms as contained in various books of fiqh. Thus, the formulation of these norms has resulted in legal unification (Edy Sujendro Prananda & Kemenkumham Jawa Tengah, 2020). That is, only that norm applies, nothing else. This is in accordance with the adage and legal maxim "government decisions negate differences". That was taken with the spirit of finding the best solution to the problems that arise.

Unification is needed to provide legal certainty as well as to be a solution to the problem of the impact of waqf land by toll road projects. If the crucial matter of the permissibility of exchanging waqf land is not regulated in the Waqf Law, then the problem will drag on and be delayed without any certainty of resolution. In fact, this norm, which incidentally is state school of fiqh, can be accepted by the public, without being confronted with the opinions of the Shafi'i school of thought as the dominant school of thought. If that happens, the toll road project will be hampered and disrupted.

The exchange of waqf land in Demak was carried out without any theological obstacles. The Nazhirs did not object to their waqf land being exchanged. According to them, the exchange of waqf land is not only a legal obligation as regulated in the Waqf Law, but also a syar'i obligation. So, for the nazhirs, the exchange is legal according to Islamic law and what they do regarding the exchange is the nadzir's proper duty

d. Exceptional Policy

As stated in the previous paragraphs, waqf land is basically prohibited from changing its status in any way. The permissibility of swapping waqf land is only exceptional for one or more of three reasons, namely the waqf land is used for public purposes in accordance with the general spatial plan based on statutory provisions and does not conflict with sharia principles, waqf land cannot be used according to the waqf pledge, or the exchange is made for direct and urgent religious needs. Unless there are reasons or reasons for this, certain conditions are still required, the most important of which is that the land exchanged has a

certificate or proof of legal ownership in accordance with statutory provisions, and the value and benefits of the exchange land are at least the same as the original waqf land.

The first reason is regulated in Article 41 of the Waqf Law and then republished in its entirety in Article 49 paragraph (2) letter a of Government Regulation. The second reason is regulated in Article 44 paragraph (2) of the Waqf Law and then republished in Article 49 paragraph (2) letter b of Government Regulations. Unlike the first reason, this second reason is not related to the exchange of waqf land, but a change in allotment. The third reason is not regulated in the Waqf Law, but suddenly appears in a Government Regulation. The emergence of this new norm should not be allowed (Wayan Parsa, 2017). Government regulations are implementing regulations that only regulate technically, do not contain new norms that are not regulated in the law. The exchange of waqf land in Demak has fulfilled the first requirement/reason. Also, the exchange land has fulfilled the requirements for certificate ownership or proof of legal ownership in accordance with statutory provisions, and the value and benefits of the exchange land are at least the same as the original waqf land. In fact, based on the sales value of the tax object (NJOP), the value of the exchanged land is higher than the value of the original waqf land. This happened because the NJOP of the lands in the locations affected by the toll road was still low, while the allocated acquisition budget had been adjusted to market/real prices or higher.

The permissibility of exchanging waqf land which was originally limited to an exception, turns out to be a necessity in practice. There is already a regulation in the form of a Presidential Decree which authorizes the government to enforce the provision of profit compensation for land that is intended to be utilized for public purposes. This means that the waqf land affected by the toll road project has to be exchanged automatically. Thus, the permissibility of exchanging waqf land as an exception is inappropriate. In fact, this norm has turned into a norm of obligation, because actually Nazhir has no choice but to agree to an exchange. It's just that, in practice, the compensation value is high enough to make the Nazhir do not object and do not even have to think long about agreeing to it.

e. Legal Instrumentation for Development

The exchange of waqf land for the Semarang-Demak toll road is an implementation of the legal instrumentation policy in development (Mulyadi, 2009). In this context law is not only a means of social control, but also functions as a tool of social engineering. This means that the construction of toll roads is a necessity in the effort to realize the prosperity and welfare of the people. The development will not be carried out if the land acquisition is of a civil nature. This is because the civil law regime only allows the transfer of ownership through the voluntary initiative of the owner. Therefore, regulations regarding land acquisition for public purposes including the exchange of waqf land constitute public law which limits the applicability of civil law. The main consideration is the interests of the nation, state and society. The

enactment of public law which limits the civil law regime itself is a consequence of the adoption of the concept of the welfare state as a state doctrine.

The arrangement for the exchange of waqf assets in the Waqf Law is the embodiment of progressive law. According to a progressive law perspective, the law is devoted to human interests, not the other way around humans is devoted to law. The progressiveness of the Waqf Law in this context is its orientation not only for the sake of worship rituals and or social purposes, but also for the benefit of economic development (Khairuddin, 2014). Thus, the instrumentation of the Waqf Law for economic and social development meets the criteria of progressive law.

f. Public Interest as Priority and Legal Reference

The selection of opinion options from unpopular schools of thought as regulatory content, as stated in the previous paragraph, is oriented towards aspects of public welfare, public interest, and so on. It becomes the standard and criterion as well as the *raison d'etre* of his options. Opinions were chosen and followed which allowed changes/exchanges of waqf assets because of the consideration that the waqf land was intended to be used for public purposes, public facilities.

In this context, the legislators of the Waqf Law did not think through the issue of law enforcement methods, in this case preferring *tasyri'* goal-oriented methods (*al-qawa'id al-ushuliyah al-tasyri'iyah*), not methods that rely on linguistic rules (*al-qawa'id al-ushuliyah al-lughawiyah*). On the other hand, the legislators are only limited to choosing and following the opinion of the school of thought that allows

the exchange of waqf land. Of course, in this context it is irrelevant to discuss whether the position of the founder of the Waqf Law in this case is a mujtahid, muttabi', or muqallid. What is certain is that the legislators in this case are making Islamic law as material for national law.

Like the legislators, nazhirs and officials in the field all agree that the exchange of waqf land for toll road projects is definitely in the public interest. Meanwhile land acquisition for public interest is mandatory. That is, there is no alternative to refuse, be it owned land or waqf land. In the end, all landowners must be willing and agree that their land will be released for public use, including by introducing concurrent payments for landowners who refuse. That is payment unilaterally and submitted/entrusted to the local District Court and the land has been deemed to belong to the state.

g. Twisted and Confused Procedures to Ensure Clear and Clean

The mainstreaming of public interest as a ratio d'etre is balanced with strict mechanisms and procedures to ensure that the immortality of the waqf object is maintained in essence, even though the outward appearance of the waqf land has changed. The procedure for exchanging waqf land for the Semarang-Demak toll road project is laden with convoluted and ambiguous scenarios to ensure that the exchange is not for the benefit of certain people, but solely for the benefit of the waqf land and its allotment.

It is said to be winding because actually the exchange of waqf land is not as simple as the meaning of the word exchange itself. This exchange of waqf land requires a long stage and involves different parties.

The stages passed include: Nazhir is looking for land exchange with the criteria determined by the laws and regulations; Waqf land and exchange land are valued by appraisers/public appraisers at the expense of the Land Acquisition Unit; The Land Acquisition Unit enters into a replacement land sale and purchase agreement with the owner; Nazhir entered into agreements with the Land Acquisition Unit regarding the exchange of waqf land and replacement land; Nazhir submitted an application for a waqf land exchange permit to the Head of the Office of the Ministry of Religion in Central Java; The internal process of the Ministry of Religion which includes the establishment of the Team for Determining the Balance of Values and Benefits of Waqf Land Exchange, providing recommendations by the Team, determining the balance of values and benefits by the Head of the Office of the Ministry of Religion of Demak Regency, providing recommendations by the Indonesian Waqf Board of Central Java province, and granting exchange permits waqf land by the Head of the Office of the Ministry of Religion of Central Java; Payment of the replacement/exchange price of land by the Land Acquisition Unit to the owner of the replacement land; and The process of certifying waqf land in the name of nazhir against replacement land.

The exchange process is said to be ambiguous because the exchange involves waqf land with replacement land. In fact, the replacement land belongs to a third party who in the licensing process has never been involved and was involved except to provide a statement regarding the status of the land not being in dispute. Even when the Land Acquisition Unit pays the

price for the replacement land, the total price is exactly the same as the waqf land price, even though based on the calculation of the Selling Value of the Tax Object as well as the assessment of the balance of values and benefits the amount is greater/expensive.

Not a single document showing the involvement of a third party as the replacement land owner was found in the documents for the exchange permit. Even though at the time of filing, the replacement land was still his legal possession. On what basis did the Land Acquisition Work Unit enter into an agreement with Nazhir to exchange waqf land for replacement land that does not belong to him? The licensing process also only involves Nazhir and the Land Acquisition Unit as parties. How can high-value transactions involving other people's assets be carried out without actively involving that person?

The Another confusion is that the calculation of the value and benefits of the exchanged land is solely based on the selling price based on the sales value of the tax object. This calculation always results in a higher total value and benefits of exchange assets than the value and benefits of waqf land. In fact, the values and benefits are not always identical/proportionate, although the value should be influenced by the benefits. The value of land is reflected in the selling price of the tax object, while benefits are greatly influenced by many factors, especially external ones. In fact, when paying for replacement land, as stated above, what is paid is the amount of the waqf land price. Perhaps because of these considerations, the balance assessment team always mentions the same value between waqf and replacement land. The question is, where did this same

value suddenly appear, while from the calculation process based on the sale value of the tax object and the balance assessment it is clear that the value of the replacement land is higher?

CONCLUSION

The implementation of the exchange/exchange of waqf land affected by the Semarang-Demak toll road refers to many regulations both within the Ministry of Religion, as well as those that are cross ministries/institutions at the central and regional levels. In general, these regulations are divided into two, namely regulations related to land acquisition for development in the public interest and regulations specifically related to waqf, especially changes to waqf assets in the form of land. The exchange of waqf land affected by the Semarang-Demak toll road project is fiqh permissible. The series of processes consisting of various stages, both those that are explicitly stipulated in laws and regulations and those that exist based on the prevalence, are hilah or engineering to avoid the prohibition on changing the status of waqf assets.

The waqf land exchange is a unified transaction, in which there are many stages and sub-transactions and involves many parties, both nazhir elements, exchangers (Land Acquisition Unit), land exchange owners, public appraisers, Regional Office of the Ministry of Religion of Central Java Province, Office of the Ministry of Religion Regency Religion, Determination Team, Indonesian Waqf Board of Central Java province, and National Land Agency. The many stages that are passed and the parties involved are hilah to avoid the prohibition on changing the status of waqf assets and at the same time it is intended to ensure that the exchange does

not change the designation of waqf nor does it eliminate or reduce waqf assets or their value and benefits.

Hilah elements in the exchange of waqf land include: (a) prohibited actions, namely pledging, confiscating, granting, selling, inheriting, exchanging and transferring waqf assets; (b) engineering actions (with hidden means) which are externally and internally permissible, namely an exchange agreement between Nazhir and the Land Acquisition Unit (unfortunately it does not involve a replacement land owner; a sale and purchase agreement between the Land Acquisition Unit and the replacement land owner at the price of the land waqf; establishment of the Determination Team; giving recommendations by the Team; determination of the balance of values and benefits, recommendations from the Indonesian Waqf Board; permits from the Head of the Regional Office of the Ministry of Religion, payment of replacement land prices; and finally certification on behalf of Nazhir on replacement land; and (c) Sharia goals, namely the maintenance of waqf assets and perpetuate them. With the fulfillment of the hilah elements as stated, hilah law or waqf land exchange engineering is permissible because the engineering actions carried out are also permitted by sharia and the sharia goals of waqf are fulfilled, namely perpetuity and maintenance of waqf assets.

From the perspective of laws and regulations governing waqf, including the permissibility of exchanging waqf assets is a transformation of fiqh plus. This means that the regulatory material in the waqf law and its implementing regulations rests on fiqh and public administration actions that are neutral in nature. That is, fiqh is Islamic law, while public

administration is regulation related to certain religious laws and teachings. It is based on the principles of good governance. The transformation of fiqh in laws and regulations (taqin) is actually a tarjih or evaluation and selection of opinions from various kinds of opinions, both across schools of thought and within internal schools of fiqh. In this context the state is not bound to a particular school of fiqh. The state preference in choosing an opinion focuses on aspects of conformity with the demands of the public interest which are identical to the duties carried out by the state. Thus, the chosen opinion is believed to bring more extensive benefits, without compromising adherence to religious sacred texts. It doesn't matter whether the opinion to be voted on comes from the dominant school of thought or not.

The transformation of fiqh and the selection of opinions that are considered appropriate is a policy of limited legal unification. This means that the opinion that has been selected and set forth in the legislation does not lose its status as Islamic law and becomes the only one that is followed by the state through the services carried out by its apparatus. All services refer to it. The permissibility of waqf land exchange in the Waqf Law is an exceptional regulation. This permissibility does not arise out of nowhere, but as an exception to changes in the status of waqf assets in general. As an exceptional policy, the permissibility norms are applied selectively and strictly and utilization for public facilities is the only reason for exchange. So on the one hand the state wants fiqh norms regarding waqf to be obeyed, but at the same time the state also opens up space for the exchange of waqf assets to support its work plans and public policies. The permissibility of exchanging waqf land is in line with state policies in land acquisition for the

construction of public facilities, which are mandatory with or without negotiation.

The mainstreaming of the public interest as a *ratio d'etre* is balanced with strict mechanisms and procedures to ensure that the immortality of the waqf object is essentially maintained, even though the waqf land has changed outwardly. The procedure for exchanging waqf land for the Semarang-Demak toll road project is laden with convoluted and ambiguous scenarios to ensure that the exchange is not for the benefit of certain people, but solely for the benefit of the waqf land and its allotment. [W]

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