Reasons for the Permission of Replacement of Wakaf Assets (Istibdâl Waqf) in Indonesian Regulations: An Interpretative Study

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Abstract: Reasons for the Permission of Replacement of Wakaf Assets (Istibdâl Waqf) in Indonesian Regulations: An Interpretative Study. Government’s regulation about the implementation of istibdâl waqf (replacement of waqf treasure) aims to ensure benefit of waqf in order to get longer endurance that can be utilized in accordance with its designation unfortunately, the explanation about reasons of istibdâl waqf in the existing waqf regulation is unavailable, so it can raise confusion in the implementation stages. This study aims to formulate explanation about reasons of istibdâl waqf in existing regulation to prevent differences in understanding that may harm the waqf treasure. This study belongs to literature study using law interpretation approach. The results of this study indicate that the reasons of istibdâl waqf in the article 49 (2), Government Ordinance No. 42 of 2006 concerning the Implementation Constitution Number 41 of 2004 concerning Waqf refer to Regulation Government No. 19 of 2021 about Land Procurement Administration for public interest. Whereas the explanation of reasons of istibdâl waqf on point b, which related to the waqf treasure that can not be used or utilized in accordance with waqif’s pledge, and point c, which is related to waqf treasure that is still can used or utilized, can only be found through grammatical, historical, and teleological interpretation.

Keywords: istibdâl waqf, method of interpretation, Islamic law


Kata kunci: istibdâl waqf, metode interpretasi, hukum Islam

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Introduction

Waqf assets have enormous potential in the distribution of assets to alleviate poverty and improve social welfare among Muslim communities. Therefore, maintaining and increasing the waqf assets requires good management by all parties, including the Nâzâr and the community and the state. Some of these waqf assets are used directly, and some are managed productively, namely by making waqf assets worth investment, such as through a business contract mechanism (tijâr) in the form of ijâra, mudhâraba, mushâraka contracts and others. In addition, it is not uncommon to find problems in managing waqf assets, so waqf assets require good and correct management. Among the problems are waqf assets affected by development projects from the government, waqf assets cannot be used following the waqf pledge and the reduced quality of the waqf assets. The solution to these problems is exchanging waqf assets for other assets better used as waqf assets.

2 There are two patterns in the development of productive waqf namely; social waqf development patterns and economic waqf development patterns. Read Abdurrahman Kasdi, ‘Model Pemberdayaan Wakaf Produktif di Indonesia’, ZISWAF: Jurnal Zakat dan Wakaf, 1.1 (2016): 108-109. Certainly by maintaining professionalism, transparency and accountability in the management of waqf assets to maintain public trust.Read, Tuti. A. Najib Ridwan al-Makassary, Wakaf, Tuhan, dan Agenda Kemamusaan (Jakarta: CSRS UIN Jakarta, 2006), p. 148. There are five basic philosophies in managing waqf productively, namely: First, the management pattern must be in the framework of “integrated project”, not part of separate costs. Second, the principle of Nâdzir’s welfare, third, the principle of transparency and accountability where the waqf agency and the institutions it assists must report every year on the process of managing funds to the people in the form of an audited financial report including the fairness of each cost item. Fourth, a Nâdzir should be an entrepreneur who is good at running business in an Islamic manner. Fifth, a Nâdzir is someone who is devoted to Islamic business who has experience and has a fairly extensive business network and is able to see business opportunities and market opportunities. Read, Veithzal Rivai Zainal, “Pengelolaan dan Pengembangan Wakaf Produktif,” al-Awqaf: Jurnal Wakaf dan Ekonomi Islam, 9.1 (2016): 14.

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In addition to the solutions above, another solution is commonly used, namely by using the *istibdâl waqf* method, namely exchanging waqf assets with other assets to become waqf assets. This method aims to protect against a decline in value⁴ or even termination of the benefits or results of waqf due to a decrease in the value and quality of the waqf property itself and to develop waqf assets to make them more valuable and productive.⁵ It’s just that in practice, in the past, rulers took waqf assets by abusing the *istibdâl* method for their personal gain, even with the approval of tyrannical judges and false witnesses.⁶

The discussion on *istibdâl waqf* among fiqh scholars is extensive, starting from the study of madhhab scholars in the classical period and then in the period afterwards to the present.⁷ This discussion relates to whether or not implementing *istibdâl waqf* is permissible, the reasons for the permissibility of carrying out *istibdâl waqf*, conditions for replacement assets and others. In this discussion, there are similarities and differences of opinion between the scholars of one school and another regarding implementing *istibdâl waqf*; even these differences also occur between scholars within one school of thought.⁸ The fatwas of the madhhab’s scholars who have received validity and legitimacy from the methodological aspect by the followers and supporters of that school are favoured and given authoritative status as the opinion held by that school. Then with the taqlid method, the opinion that is relied upon by the ulema of that mazhab is considered a provision of Islamic Law that must be followed by the ulema, judges, and mufti within that mazhab and then practised

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⁷ The issue of *istibdâl* waqf is indeed unknown in Islamic jurisprudence, it’s just that contemporary scholars and classical scholars provide an idea about the need for changes or over the function of waqf if the waqf is no longer able to function as desired by the waqif. Read, Ali Salama Mahasna and Nani Almuin, ‘*Analisis Hukum Tukar Guling Tanah Wakaf*’, *al-Awqaf: Jurnal Wakaf dan Ekonomi Islam*, 12.1 (2019): 93.
by society and the state.\textsuperscript{9} For this reason, a law is needed to facilitate all parties in understanding or implementing Istibdâl waqf following Islamic Law to create legal certainty in society.\textsuperscript{10}

Because the codification of the formulation of the opinion of the Ulema contained in fiqh books from its traditional form into the form of statutory regulations is a new matter,\textsuperscript{11} the results of its formulation in the form of statutory regulations have made many adjustments to specific situations and conditions. These adjustments can be in the form of formulating new regulations or reinterpreting (reinterpreting) existing regulations based on scientific disciplines related to these regulations. Such includes the reasons for the permissibility of \textit{istibdâl waqf} according to fiqh scholars, where the discussion regarding this is comprehensive and has many details among madhhab scholars. But the laws and regulations in Indonesia are formulated for three reasons: public interest cannot be used according to waqf pledges and religious needs that are direct and urgent.\textsuperscript{12}

There is no explanation for these reasons in waqf laws and regulations, thus confusing for some people. Based on the results of Zaenuri’s research, 


\textsuperscript{11} Such cannot be separated from the touch of the modern western legal system which has influenced the Islamic world and which has led to several reforms of Islamic law in Islamic countries. This renewal had started since the mid-19th century when the Ottoman Empire ratified Western commercial and criminal laws, then continued into the 20th century. The first phase of Islamic law reform in Turkey occurred in 1915 and 1917 in the field of family law which was then followed by by the colonial countries. After the end of the second world war in 1950-1971 there was a renewal of family law in the second phase, and this took place in a number of Islamic countries such as: Jordan (1951), Syria (1953), Tunisia (1956), Morocco, Iraq, Algeria, Pakistan and Iran. Then followed by the third renewal phase, namely in the period 1971 to the present, in Afghanistan, Kuwait, South Yemen, Indonesia and Somalia. So that the implementation of Islamic law is divided into three categories, namely; 1) An Islamic state that implements the provisions of family law as contained in fiqh books, 2) An Islamic state that has abandoned the provisions of Islamic family law and replaced it with European Civil law, 3) An Islamic state that continues to implement Islamic family law but with do some updates. Read, M. Atho Mudzhar, \textit{Membaca Gelombang \textit{Ijtihad}: Antara Tradisi Dan Liberasi} (Yogyakarta: Titian Ilahi Press, 1998), pp. 174-175., Read, Misnan Misnan, ‘Sejarah Kodifikasi Hukum Islam (\textit{Taq\textit{n}i\textit{n}) di Negara Islam’, \textit{al-Ursrah: Jurnal al-Ahwal As-Syakhsiyah}, 9.01 (2021): 72-82.

\textsuperscript{12} Article 49 (2), Government Regulation of the Republic of Indonesia Number 42 of 2006 concerning Implementation of Law Number 41 of 2004 concerning Waqf (Indonesia, 2006).

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the reason for *istibdâl waqf*, "because there is a direct and urgent religious need" should be eliminated. For that reason, it is highly subjective and depends on the interpretation and interests of each party, so it can cause differences in understanding.\(^{13}\) Studies regarding the explanation of the reasons for the permissibility of regulations in Indonesia, in particular, are still scarce.\(^{14}\) Studies are more on the provisions of *istibdâl waqf* in Islamic law,\(^{15}\) laws and regulations in Indonesia,\(^{16}\) and the implementation of *istibdâl waqf* in Indonesia.\(^{17}\) Whereas, the explanation regarding the reasons for the permissibility of *istibdâl waqf* is significant for the applicant for the implementation of *istibdâl waqf*.

\(^{13}\) Zaenuri, "Ringkasan Disertasi "Implementasi UU. No. 41 Tahun 2004 Tentang Wakaf (Studi Tukar Menukar (Regulasi) Tanah Wakaf Pada Kementerian Agama RI., Jangka Masa 2007-2010)" (Universitas Islam Indonesia, 2017), p. 64.

\(^{14}\) As far as the author has been able to trace, there are two studies that discuss the reasons for *istibdâl waqf* in laws and regulations from the perspective of legality and subjectivity; namely doctoral research from Fahrurroji which explains that among the arguments for rejecting the application for *istibdâl waqf* for reasons other than public interest are non-RUTR reasons that are not mentioned in Law 41 of 2004 concerning Waqf. Read Fahrurroji, Pengembangan Harta Benda Wakaf Dengan Istibdal Studi Kasus Istibdal Wakaf Tahun 2007-2012, *Disertasi Program Pasca Sarjana UIN Syarif Hidayatullah, Jakarta*, 2015, p. 170, and Zaenuri’s doctoral research suggesting that "due to direct and urgent religious needs" should be omitted, as explained above. Read, Zaenuri, "Ringkasan Disertasi "Implementasi UU. No. 41 Tahun 2004 Tentang Wakaf (Studi Tukar Menukar (Regulasi) Tanah Wakaf…, p. 64.


Moreover, for the team examining requests for the implementation of *istibdāl waqf* both at the lower and upper levels, both within one institution and between institutions. So that with an explanation of these reasons, it can prevent differences in understanding between the parties involved, where the consequences of these differences can be detrimental to waqf assets. Therefore, this study aims to explain the reasons for *istibdāl waqf* in laws and regulations and the results of this formulation are novelties in this research. The approach in this study uses methods of interpreting laws and the opinions of fiqh scholars. With this approach, explanations regarding the reasons for *istibdāl waqf* are formulated, and their legality is recognized both from the aspect of national law and the aspect of Islamic law. The results of the formulation of the explanation in this study are beneficial in helping to provide a better understanding of the reasons for *istibdāl waqf* in applicable regulations so that it should be used as a reference by interested parties regarding *istibdāl waqf*.

**Research Method**

This type of research is normative legal research using a conceptual approach, namely an approach that is based on the views, ideas, and doctrines developed in the science of law. The aim is to examine the reasons for the permissibility of *istibdāl waqf* in Government Regulation No. 42 of 2006 concerning the Implementation of Law No. 41 of 2004 concerning waqf by using interpretation methods in jurisprudence which are then juxtaposed with certain existing concepts in Islamic law. Data was collected through a literature study and processed and analyzed using legal interpretation methods. In this data analysis, three flows of activities are carried out, namely: 1). Data reduction, namely simplifying the data that has been collected by selecting data that is relevant to the ultimate goal of this study. 2). The stage of presenting the data, namely compiling the data collected as narrative text. 3). The stage of concluding (verification), namely the activity of searching for meaning, regularity,

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patterns, explanations, causation or propositions from the data that has been collected.\(^\text{19}\)

**Reasons for Permissibility of *Istibdâl Waqf* According to Jurisprudence and Legislation in Indonesia**

**Reasons for *istibdâl waqf* in fiqh**

Waqf assets can be damaged or can no longer be used. With this condition, is it permissible for this waqf property to be exchanged or replaced with other assets? Such is where the discussion of *istibdâl waqf* in fiqh arises among scholars. The discussion regarding whether or not *istibdâl waqf* is closely related to the reasons that may be used to implement *istibdâl waqf*. Therefore, to make it easier to explain the opinions of fiqh scholars regarding *istibdâl waqf*, the discussion is divided into three categories,\(^\text{20}\) namely;

a. *Istibdâl waqf* Assets in the Form of a Mosque

Waqf assets in the form of mosques, according to scholars from the Mâliki,\(^\text{21}\) Syâfi‘i\(^\text{22}\), and Hanâfi schools of thought,\(^\text{23}\) prohibit *istibdâl waqf*. Only the scholars of the Hanbali school allow *istibdâl waqf* as a mosque in an emergency.\(^\text{24}\)

b. *Istibdâl waqf* Assets in the Form of Immovable Assets

The Mâliki school of scholars prohibits *istibdâl waqf* assets in the form of immovable assets that still provide benefits except in emergencies,
such as expanding mosques and cemeteries.\textsuperscript{25} If the waqf assets are no longer able to provide benefits, the Mālikīyya scholars divide them into three categories, namely:

1) If the waqf property no longer provides benefits and there is no hope of returning the benefits, whereas if it is allowed to exist, it will be harmful, then it is permissible to carry out \textit{istibdâl waqf}.

2) If there is still hope of returning the benefits of the waqf property and its existence is not harmful, then it is not permissible to do \textit{istibdâl} on the waqf property.

3) If there is no hope of returning the benefits of the waqf property and its existence is not harmful, then according to the famous qaul of Imam Mālik, it is not permissible to sell or exchange (\textit{istibdâl}).\textsuperscript{26}

Hanâfi scholars explain that if waqif requires \textit{istibdâl waqf}, then \textit{istibdâl waqf} is permissible, even though the waqf property can still be beneficial.\textsuperscript{27} However, suppose there are no conditions from the waqif, and the waqf property cannot be used for benefits. In that case, the \textit{istibdâl waqf} may be carried out provided that it has received permission from the \textit{Qâdi} and based on the benefit of the waqf property. If the waqf property can still be utilized, and there is no better replacement property, then according to some scholars of the Hanâfi school, it is not permissible to carry out \textit{istibdâl waqf}.\textsuperscript{28} Meanwhile, according to the scholars of the Shâfi‘i school, as stated by Muḥammad Ubaid al-Kubaysi, there is no firm opinion regarding the \textit{istibdâl} of immovable waqf assets. So it’s as if they think it’s impossible to benefit from these immovable goods. If the order is like that, it is illegal to sell and do \textit{istibdâl}.\textsuperscript{29} Meanwhile, according to scholars of the Hanbali school, it


\textsuperscript{28} Ibn ‘Abidîn, \textit{Rad al-Muhtâr}, 6:584

\textsuperscript{29} Muḥammad ‘Abîd al-Kabîsî, \textit{Ahkâm al-Waqf}, 2: 41
is permissible to carry out istibdâl of waqf assets, whether in the form of houses, land, mosque buildings or not mosques, as long as it is to maintain the benefit of the waqf assets.\(^{30}\)

c. **Istibdâl waqf Assets in the Form of Movable Assets**

As for waqf assets in the form of movable assets, in the opinion of Ibn Qâsim, a well-known scholar of the Mâliki school of thought, it is permissible to sell waqf assets that are no longer useful and then replace them with something that can be benefited.\(^{31}\) Hanâfi scholars do not distinguish between movable and immovable waqf assets, so istibdâl waqf assets in the form of movable or immovable assets, namely allowing istibdâl waqf in the form of movable property (manqûlât) on condition that the property can no longer fulfill the purpose of waqf. The Shâfi‘iyya scholars are divided into two groups. The first group prohibits istibdâl waqf assets because they must be utilized until they don’t function anymore. The second group does not prohibit istibdâl waqf assets as long as the waqf assets can’t be used according to the wishes of the waqif.\(^{32}\) Scholars from the Hanbali school allow istibdâl waqf in the form of movable property,\(^{33}\) and even the legal basis for the permissibility of istibdâl waqf in the form of immovable property is based on the argument regarding istibdâl waqf in the form of movable property.\(^{34}\)

Based on the description above, it can be concluded that the Mâliki and Shâfi‘i madhab scholars seem to be very careful in allowing istibdâl waqf; there is even a tendency to prohibit it when there is no urgent need. Meanwhile, the Hanâfi and Hanbali scholars tend to make it easier for them to practice istibdâl waqf as long as benefits require it.\(^{35}\) Such is

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\(^{33}\) Ibn Qudâmah, *al-Mughnî*, 8: 220


because if you prohibit the implementation of *istibdâl* while *waqf* assets require *istibdâl* so that they are not damaged or can be used again, this can result in losses to Muslims. Based on this discussion, it can be concluded that the reasons for the permissibility of *istibdâl waqf*, according to fiqh scholars, are because (1) there is an emergency, (2) it cannot provide benefits, (3) there are conditions from *waqif*, (4) there are benefits and interests general. These reasons are closely related to the type of *waqf* property that is movable or immovable, not useful or still providing benefits.\(^{36}\)

**Reasons for *Istibdâl Waqf* in Laws and Regulations**

In 1977 the Government of Indonesia issued Government Regulation No. 28 of 1977 concerning *Waqf* of Owned Land.\(^{37}\) The regulation also explains the provisions for *istibdâl waqf* in the form of land, in principle, the Indonesian government does not allow the implementation of *istibdâl waqf*, except after obtaining permission from the Minister of Religion. Apart from that, two reasons were allowed to do *istibdâl waqf* at that time, namely; 1) Because the *waqf* assets cannot be used following the purpose of the *waqf* as stated in the *waqf* pledge. 2) Because it is in the public interest.\(^{38}\)

To complete these regulations, especially regarding the procedures for implementing *istibdâl waqf*, the Minister of Religion Regulation No. 1 of 1978 issued Regulations for Implementing Government Regulation No. 28 of 1977 concerning *Waqf* of Owned Land. Furthermore, in 1991 the Government of Indonesia issued Presidential Instruction No. 1 of 1991 concerning the Compilation of Islamic Law (KHI), which contained three discussion chapters, namely Book I on Marriage, Book II on Inheritance

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\(^{36}\) In general, according to the views of contemporary scholars and fatwa institutions such as those in Egypt, Saudi Arabia, Islam, and Qatar, it is permissible to carry out *istibdâl waqf* assets that still provide benefits on condition that there are more problematic circumstances and have received permission from the judge or qadi. Read. Atep Waluya, *‘Istibdâl Wakaf dalam Pandangan Fukaha Klasik dan Kontemporer*, Misykat Al-Anwar Jurnal Kajian Islam dan Masyarakat, 1.2 (2018): 63.


and Book III on Waqf.\textsuperscript{39} This regulation also contains reasons for the permissibility of \textit{istibdâl waqf}, which is almost the same as the previous regulations relating to parties related to aspects of the application procedure, namely the Indonesian Ulema Council and the local Camat (head of district). This KHI invites a lot of controversies because KHI is made in the form of a Presidential Instruction (Inpres), whose position in the regulatory hierarchy in Indonesia at that time did not exist.\textsuperscript{40} So that the implementation of \textit{istibdâl waqf} must still follow the previous regulations, namely Government Regulation No. 28 of 1977 concerning Waqf of Owned Land and Regulation of the Minister of Religion Number 1 of 1978 concerning Regulations for Implementing Government Regulation Number 28 of 1977 concerning Waqf of Owned Land.

In 2004, the government issued Law Number 41 of 2004 concerning waqf, followed by the issuance of implementing regulations, namely Government Regulation Number. 42 of 2006 concerning the Implementation of Law Number 41 of 2004 concerning waqf.\textsuperscript{41} In the waqf law, the reason for the permissibility of \textit{istibdâl waqf} is only for the public interest. Whereas in the implementing regulations, there are three reasons for the permissibility of \textit{istibdâl waqf}, namely;

\begin{itemize}
\item [39] Republic of Indonesia, Instruction of the President of the Republic of Indonesia Number 1 of 1991 Concerning the Dissemination of the Compilation of Islamic Law.
\item [40] In TAP MPRS No. XX/MPRS/1966 which became the reference for regulations regarding the hierarchy of laws and regulations in Indonesia at that time, that the sources of law in Indonesia were (1) the 1945 Republic of Indonesia Constitution (2) TAP MPR, (3) Laws/Perpu, (4) Government Regulations, (5) Presidential Decree, and (6) Other implementing regulations, such as: Ministerial Regulations, Ministerial Instructions and others. These provisions are the legal basis for the statutory regulations which become positive law and have binding legal force in Indonesia. Read, Marzuki Wahid and Rumadi, \textit{Fiqih Madzhab Negara Kritik Atas Politik Hukum Islam di Indonesia} (Yogyakarta: LKIS, 2001), pp.175-176.
\item [41] After Indonesia’s independence there were three phases in the development of regulations regarding waqf, namely the Old Order phase, the New Order phase and the Reformation phase.. Read. Solikhul Hadi, ‘Regulasi UU Nomor 41 Tahun 2004 Tentang Wakaf (Tinjauan Sejarah-Sosial)’, \textit{Jurnal Penelitian}, 8.2 (2014): 321-322.
\end{itemize}
a. Changes in the waqf property are used for public purposes
b. Waqf assets cannot be used following the waqf pledge
c. Exchanges are made for immediate and urgent religious needs.⁴²

These three reasons are used in requesting the permissibility of *istibdâl waqf* in Indonesia. This application process begins with an application letter made by *Nâzir* regarding the application for the permissibility of implementing *istibdâl waqf* to the Minister of Religion. An application letter and other complementary documents are submitted to the sub-district Office of Religious Affairs (KUA). After being examined by the sub-district KUA, the application document is sent to the district/city-level Ministry of Religion for examination. Then the regional head at the district or city level provides recommendations based on the inspection results from the examining team. The results of the recommendations are submitted to the Ministry of Religion at the provincial level and then sent to the central Ministry of Religion. After that, the central Ministry of Religion sent a letter of application to the central Indonesian Waqf Board (BWI) for examination. Based on the results of inspections by BWI and the Ministry of Religion, the document for *istibdâl waqf* was discussed in plenary with the Director General of the Ministry of Religion. Then, based on the deliberation results, the Minister of Religion decides whether or not *istibdâl waqf* is carried out.⁴³

**Methods of Interpreting Legislation in Indonesia**

Laws and regulations cannot regulate all aspects of human life, so there are always incomplete and unclear regulations in these regulations. Therefore, to complete and get the explanation from the regulation, it must be searched and found.⁴⁴ The term “found” means that the law already exists in various forms, both writing, behaviour, and events, so it requires effort to be explored and found. Efforts to find this law are

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⁴² Article 49 (2) Government Regulation of the Republic of Indonesia Number 42 of 2006 concerning the Implementation of Law Number 41 of 2004 concerning Waqf.

⁴³ Read article 51, Government Regulation of the Republic of Indonesia Number 42 of 2006.

usually carried out by judges or certain authorities who are given the task of implementing regulations regarding a concrete event.\textsuperscript{45} One of the methods that can be used to find the law is to interpret the provisions contained in the regulation.\textsuperscript{46}

Legal interpretation can occur if there are provisions in laws and regulations that concrete events cannot directly determine. This method is carried out in cases where the regulations already exist but are not difficult to apply because there are vague or unclear norms (vague norms), conflicts between legal norms (antinomy norms), or uncertainty.\textsuperscript{47}

The method of interpretation or interpretation is used to find and determine the meaning of the arguments contained in the Law according to what is desired and intended by the legislator.\textsuperscript{48} This method is part of an effort to find law, especially for judges in implementing laws, when deciding on a legal event that occurs while the existing legal rules (UU) are unclear or have not even been regulated at all.\textsuperscript{49} In other words, the purpose of the interpretation method is to explain the real intent of the text of the legislation so that the provisions in the law can be applied in resolving concrete events that occurred.

In the study of Law in Indonesia, there are many methods of interpretation, each of which has different characteristics so that they can complement each other. Some interpretation methods are categorized

\textsuperscript{45} Sudikno Mertokusumo, \textit{Penemuan Hukum}, p. 39

\textsuperscript{46} In general there are three methods of finding the law, namely: 1) method of interpretation (interpretation method), method of legal construction or reasoning (\textit{redencruweijizen}). Legal interpretation occurs when there are statutory provisions that can be directly stipulated in the concrete events at hand. Read, Bambang Sutiyoso, \textit{Metode Penemuan Hukum} (Yogyakarta: UII Press, 2006). p. 52. Meanwhile, legal construction occurs when there are no statutory provisions that can be directly applied to the legal issues at hand, or in the absence of regulations (\textit{recht vacuum}) or a legal vacuum (\textit{wet vacuum}). To fill the void in this law, the judge uses logical reasoning to further develop a text of the law. Read, Azim Hamidi, \textit{Hermeneutika Hukum, Sejarah, Filsafat dan Metode Tafsir} (Malang: UB Press, 2011). Also, Sitti Mawar, “Metode Penemuan Hukum (Interpretasi dan Konstruksi) dalam Rangka Harmonisasi Hukum,” \textit{Jurnal Justisia: Jurnal Ilmu Hukum, Persandang-andangan dan Pranata Sosial}, 1.1 (2020): 22–38.


\textsuperscript{48} R. Soeroso, \textit{Pengantar Ilmu Hukum} (Jakarta: Sinar Grafika, 2005), p. 97

based on literal and functional, some are narrow and broad. Each method has its characteristics, so there is no clue which method should be used in a concrete case. Specifically related to the topic of this discussion, namely the reasons for the permissibility of *istibdâl waqf* in regulations in Indonesia, three kinds of interpretation methods can be used, namely grammatical interpretation methods, historical systematic interpretation methods and sociological or teleological interpretations.

The grammatical interpretation method is used because to understand the text in statutory regulations better, one must first understand the meaning of each word in the text. If necessary, this step can be followed up with an authentic interpretation formulated by the legislators. Furthermore, the laws and regulations of one country constitute a complete system. That is, interpreting one statutory provision must be connected with the provisions of other statutory regulations so that in interpreting a statutory regulation, it may not depart from or deviate from the legal system of a country. Systematic interpretation methods are used to interpret statutory regulations by relating them to other legal regulations or the entirely legal system. This systematic interpretation applies the principle that the laws and regulations of one country constitute a complete system. That is, interpreting one statutory provision must be connected with the provisions of other statutory regulations so that in interpreting a statutory regulation, it may not depart from or deviate from the legal system of a country.

Regarding the historical interpretation method, this method is carried out using a historical approach, both the history of the occurrence of laws (*wet historisch*) and legal history (*recht historisch*). Interpretation according to the history of the law (*wet historisch*) is carried out to find the meaning of the statutory regulations as seen by the legislators when the Law was drafted. Meanwhile, interpretation of legal history (*rechts historisch*) is used to understand laws in the context of the history of legal development.50 Here what is examined is the legal sources used by legislators.51

50 Ahmad Rifai, *Penemuan Hukum*, p. 66.
51 Sudikno Mertokusumo, *Penemuan Hukum*, p. 60.
The interpretation, which begins with grammatical interpretation, usually ends with the sociological or teleological interpretation method. The teleological Interpretation method is based on the objectives of forming laws from a sociological aspect. The primary purpose of involving the sociological aspect of regulation is to find a basis for interpreting the provisions contained in the regulation. In this way, a relationship between the adjustment of meaning in laws and regulations will be found with the situation and conditions of the new society. Every interpretation is also a teleological interpretation. The older/obsolete a law, the more things must be looked for to find the legislators' goals which are then adapted to the development of society.  

Interpret the Reasons for Permissibility of Istibdâl Waqf in Indonesian Laws and Regulations

In principle, based on provisions in Indonesian laws and regulations, the government prohibits changes or exchanges of waqf assets except after obtaining permission from the Minister of Religion of the Republic of Indonesia. To obtain the permit, the applicant must meet several conditions and procedures, among which are the reasons that the applicant must submit in the istibdâl waqf application letter to the Minister of Religion of the Republic of Indonesia. According to Indonesian laws and regulations, there are three permissible reasons for applying for istibdâl waqf, namely:

a. The change in waqf assets is used for public purposes following the spatial plan (RUTR) based on the provisions of laws and regulations and does not conflict with Sharia principles;

b. Waqf assets cannot be used following the waqf pledge; or

c. Exchanges are made for immediate and urgent religious needs.  

The reasons stated above are optional. An applicant can apply for istibdâl waqf for three reasons. Then after the application is submitted, the application documents supporting the reasons for the istibdâl waqf

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52 Sudikno Mertokusumo, Penemuan Hukum, p. 61.
53 Article 49 (2) Indonesia, Government Regulation of the Republic of Indonesia Number 42 of 2006.
are examined by various agencies, starting from the lowest level to the top level. So that the understanding of the reasons for *istibdâl waqf* in these laws and regulations can be intact because the feasibility of these reasons determines the permissibility of doing *istibdâl waqf*.

Based on the search results on the torso, the general explanation, and the explanation in each of its articles in Government Regulation number 42 of 2006 concerning the implementation of the waqf law number 41 of 2004 concerning waqf, the researchers found no explanation regarding these reasons so the exact interpretation method as an approach in understanding the explanation given by regulation and contained in the text of the regulation cannot be used in this study.

Based on the principle that a rule in a country is systemic, where one and the other are interrelated, the reasons for applying for *istibdâl waqf* can also be traced in other regulations that have similarities in terms of substance, purpose or principle. Following the characteristics of systematic interpretation, Law is seen as a unit in the regulatory system. In other words, a rule is not seen as a stand-alone but as part of a system. Not only can one rule in one set of rules justify a specific interpretation of a rule, but several rules can also have the same primary intent or principle. Such is because the relationship between all the rules is not solely determined by one rule against another but by the common goals or principles underlying the rules simultaneously.\(^54\)

Based on the search results for other regulations, the author only found an explanation regarding the reasons for *istibdâl waqf* in the point above (because of public interest) in Government Regulation No. 19 of 2021 concerning the Implementation of Land Procurement for Public Interests. In that regulation, it is explained that what is meant by the public interest is "*the interests of the nation, state and society which must be realized by the Central Government/Regional Government and used as much as possible for the prosperity of the people.*"\(^55\) These public interests can be in the form of "National defence and security, public roads, toll

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\(^{54}\) Sudikno Mertokusumo, *Penemuan Hukum*, p. 59.

\(^{55}\) Article 1 (7) Government Regulation No. 19 of 2021 concerning Implementation of Land Procurement for Public Interests.
roads, tunnels, railroads, railway stations, reservoirs, dams, irrigation, ports, airports, oil, gas, geothermal infrastructure, power plants, government hospital disposal sites, etc.\textsuperscript{56}

Through this method of systematic interpretation, an explanation of the term public interest, referred to in the reason for istibdâl waqf in point a, can refer to Government Regulation No. 19 of 2021 concerning the Implementation of Land Procurement for Public Interests. However, specifically for the explanation regarding the reasons for istibdâl waqf in points b and c, even though a search has been carried out on Indonesian laws and regulations, the researcher did not find an explanation of the reasons for these reasons, so that the systemic interpretation method as an approach in interpreting the reasons for istibdâl waqf in points b and c cannot be used.

Furthermore, to find an explanation regarding the reasons for istibdâl waqf in point b, namely "waqf assets cannot be used following the waqf pledge", several sets of words need to be explored for their meaning, namely "waqf assets", "cannot be used", "following the pledge of waqf". Grammatically, waqf assets have long-lasting durability and long-term benefits and economic value according to sharia donated by waqifs.\textsuperscript{57} As for the phrase "cannot be used", the word does not mean "a particle to express denial, rejection, denial, and so on. While the word "can" means "able, can, possible"\textsuperscript{58} and the word “used”, according to the Indonesian dictionary, is a passive form of the word “to use”, which means “to use, to take advantage of”.\textsuperscript{59} Furthermore, the word "appropriate" means "fit, moderate, suitable."\textsuperscript{60} Whereas the word "waqf pledge" is "a statement of the will of the wakif spoken verbally and/or in writing to the Nâzhîr to endow his property".\textsuperscript{61}

\textsuperscript{56} Article 2 Indonesia Republic, Government Regulation No. 19 of 2021.
\textsuperscript{57} Article 1 (5), Republic of Indonesia, Law No. 41 of 2004 concerning Waqf.
\textsuperscript{58} Tim Penyusun Kamus Pusat Bahasa, \textit{Kamus Bahasa Indonesia} (Jakarta: Balai Pustaka, 2008), p. 1701.
\textsuperscript{59} Tim Penyusun Kamus Pusat Bahasa, p. 505.
\textsuperscript{60} Tim Penyusun Kamus Pusat Bahasa, p. 1530.
\textsuperscript{61} Article 1 (3) Government Regulation of the Republic of Indonesia Number 42 of 2006 concerning the Implementation of Law Number 41 of 2004 concerning Waqf.
Based on the explanation of the meaning of each word above, an understanding can be formulated that the reason for the permissibility of implementing *istibdâl waqf* is if the waqf property cannot be used or utilized in line with the designation of waqf assets, as desired by the waqif in the waqf pledge. Such means that when the waqf pledges the waqf property, it has determined the designation of the waqf property, such as building a mosque, madrasa or others. However, the waqf property cannot be utilized or used when *Nâzîr* wants to use or utilize the waqf property as the waqif desires in the waqf pledge.

At this stage, the explanation through the grammatical interpretation method can already provide a better understanding of the reasons for *istibdâl waqf* in point b. However, understanding based on that method is not enough because there are still problems regarding the measure of "not usable" in *istibdâl* reasons at point b. Such shows that to complete the explanation formulation using the grammatical method, another method of interpretation is needed, in this case, an interpretation based on history (historical interpretation) when the regulation was made, namely by examining the sources of Law referred to by the legislators.\(^62\)

Based on its history, regulations regarding waqf, including those regarding *istibdâl waqf*, were made by referring to several opinions of classical scholars.\(^63\) In the view of the clergy, the limitation of "cannot be used" is that the waqf property has no hope of being used or utilized again and if left unchecked, the waqf property will be damaged.\(^64\)

Furthermore, to complete the explanation based on grammatical and historical methods of interpretation, another method of interpretation is required, which in this case is the method of teleological interpretation. The teleological interpretation method in this study is applied by returning the implementation of *istibdâl waqf* to the goal of proper implementation of *istibdâl waqf* from a social perspective. Based on the

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\(^62\) Sudikno Mertokusumo, *Penemuan Hukum*, p. 60.

\(^63\) Kementrian Agama Republik Indonesia, *Proses Lahirnya Undang-Undang Nomor 41 Tahun 2004 Tentang Wakaf* (Jakarta: Direktorat Pengembangan Zakat dan Wakaf Ditjen Bimas Islam dan Penyelenggaraan Haji, 2005), p. 35.

considerations in the waqf laws and regulations, the purpose of establishing waqf laws is to effectively and efficiently manage the potential and benefits of waqf assets to benefit worship and promote public welfare. In other words, the reason for the permissibility of *istibdâl waqf* in point b is to manage the potential and economic benefits of waqf assets so that they can make a major contribution to worship interests and improve social welfare quickly. In line with this teleological interpretation, one of the strategic considerations of Islamic law in formulating an explanation of the reasons for *istibdâl waqf* is through consideration of shara’ objectives (*maqâshid al-shari’a*) so that these regulations can be applied in society. Waqf property is an asset for Muslims that must be maintained and maintained always provide benefits to Muslims. However, suppose the waqf assets cannot be used or provide benefits. In that case, the waqf assets may be exchanged or replaced with other assets to protect them and preserve their benefits as part of good management of waqf assets.

Based on the grammatical, historical and teleological interpretation methods, an explanation can be formulated regarding the reasons for the permissibility of *istibdâl waqf* in point b. namely regarding the meaning of the sentence "waqf assets cannot be used following the waqf pledge" is "waqf assets that cannot be used or utilized as desired by the waqif in the waqf pledge, then the waqf assets may be exchanged or replaced with other assets with the aim of maintain waqf assets and preserve their benefits through effective and efficient good management."

As for a reason for *istibdâl waqf* in point c, namely "exchanges are made for direct and urgent religious needs", according to the grammatical

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65 See preamble in Law No. 41 of 2004 concerning Waqf. The word “effectiveness” comes from the word “effective” which implies the achievement of success in achieving the goals that have been set. Effectiveness is always related to the relationship between the expected results and the actual results achieved. Read, Nur Fitryani Siregar, “Efektivitas Hukum,” *al-Razi*, 18.2 (2018): 2. Meanwhile, the meaning of the word efficient is appropriate or suitable for doing (producing) something (by not wasting time, energy, costs). See Tim Penyusun Kamus Pusat Bahasa, p. 375.

66 This is as stated by al-Buti "where benefit is found (achieved), then there is Allah’s Shari’a (law). Therefore, it is not appropriate for us to be rigid with the texts (Quran and Hadith texts) and previous fatwas, and it is also not appropriate for us to close ourselves off from the development of the times and present benefits." Muhammad Sa’îd Ramdhan al-Bûti, *Dawâbith al-Mashlahah Fî Syarî’ah al-Islâmiyyah* (Bairût: Muassasah al-Risâlah, 1986), p. 12.
interpretation method, there are several words whose meanings need to be explored. First, "exchange" means the act (things and so on) of exchanging or exchanging; replacement, transition.\(^{67}\) Furthermore, the word "made" is a passive form of "make", which means doing, holding, carrying out, doing something against...\(^{68}\) Then the word "necessity", which means "interests, aims or objectives";\(^{69}\) the word "religious", which means "everything about religion";\(^{70}\) the word "direct", which means "continue (not by intercession, not stopping, and so on)";\(^{71}\) and the word "urgent" which means "to force; important to be done immediately (fulfilled, completed)".\(^{72}\)

Based on this grammatical interpretation method, the explanation in point c can be formulated as making exchanges or substitutions for interests or purposes related to religion directly and immediately. This formulation of an explanation of the grammatical interpretation method can be used as additional information regarding the reasons for the permissibility of *istibdâl* in point c. However, this formulation is still insufficient to provide an understanding that can be applied in society. Such is because there are words that require more explanation than grammatical interpretation, namely the word "religion, directly and urgently". These words require a more detailed explanation regarding in what context they are used. Therefore, the historical interpretation method can be used to complete the explanation in the above formulation. Concerning the allotment of waqf assets, Law No. 41 of 2004 does not mention "religious needs..." but mentions "for worship and/or public welfare according to Sharia".\(^{73}\) Such shows that what is meant by religious needs in point c is the need for worship,\(^{74}\) namely worship facilities and activities such as mosques, prayer rooms,\(^{75}\) Muslim tombs and others. At the same time, explaining the word "direct" concerning managing waqf

\(^{67}\) Tim Penyusun Kamus Pusat Bahasa, p. 1742.  
\(^{68}\) Tim Penyusun Kamus Pusat Bahasa, p. 862.  
\(^{69}\) Tim Penyusun Kamus Pusat Bahasa, p. 1165.  
\(^{70}\) Tim Penyusun Kamus Pusat Bahasa, p. 17.  
\(^{71}\) Tim Penyusun Kamus Pusat Bahasa, p. 876.  
\(^{72}\) Tim Penyusun Kamus Pusat Bahasa, p. 346.  
\(^{73}\) Article 1 (1), Government Regulation of the Republic of Indonesia Number 42 of 2006.  
\(^{74}\) Article 22 (a), Republic of Indonesia, Law no. 41 of 2004 concerning Waqf.  
\(^{75}\) Kementrian Agama Republik Indonesia, *Proses Labirnya Undang-Undang Nomor 41*, p. 78.
assets can be understood as direct and indirect. Management of waqf assets is direct, namely, waqf assets used to achieve their goals, such as mosques for prayer, schools for teaching and learning activities, hospitals for treating sick people, etc. While the management of indirect waqf assets can be investing waqf assets in a business scheme, the results of which are then handed over to **mauqûf alaihi** (beneficiaries of waqf assets). The word "urgent" indicates a situation that requires immediate action because it relates to the need for worship facilities and infrastructure. Thus, it can be understood that the word "direct religious needs" relates to goals and means or methods. While "urgent" indicates a situation or condition requiring immediate action.

Furthermore, the types of waqf assets that can be included in the reasons in point c are waqf assets in the category of assets that can still provide benefits. Such is based on the discussion of scholars regarding the permissibility of istibdâl waqf for assets that still provide benefits and waqf assets that no longer provide benefits. In the discussion, most scholars allowed the implementation of **istibdâl** on waqf assets that could no longer be used or utilized. So, the reason in point b can be related to the discussion of these scholars, because of the similarities between the two.

Even though most scholars do not allow **istibdâl waqf** assets that still provide benefits, there is an opinion from Hanâfi scholars who allow it, as the opinion of Imam Abû Yûsuf. According to Imam Abû Yûsuf, the implementation of **istibdâl waqf** assets that still provide benefits or can be used following the waqf pledge can be carried out provided that the implementation of **istibdâl waqf** is more beneficial and does.

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not conflict with the purpose of waqf.\textsuperscript{78} Because in the reason for the permissibility of \textit{istibdâl waqf} in point c there is no text explaining its relation to waqf assets that cannot be used anymore, the reason for the permissibility of \textit{istibdâl waqf} in point c can be interpreted concerning assets that still provide benefits. This is because the reason in point c is in line with Abû Yûsuf’s opinion, which allows \textit{istibdâl waqf} for assets that still provide benefits. Even if the reason in point c is interpreted as relating to assets that cannot be used, then the urgency of the reason in point c is lost because it has been represented in the reason in point b.

Through this teleological interpretation method, it can be concluded that the reason in point c is to manage waqf assets so that they are always maintained and can provide direct benefits for religious interests. In other words, the reasons for the permissibility of implementing \textit{istibdâl waqf} in point c for the benefit of waqf assets are; to maintain the existence of waqf assets and distribute the benefits (\textit{limuhâfazhati ta}\textit{bbisi al-waqfi wa t\textescapetilde{a}sbi\textescapetilde{t} al-manf\textescapetilde{a}a}).

Based on the descriptions above, the explanation regarding the reasons in point c can be formulated as follows "\textit{that for religious interests that are direct (such as building places of worship, schools and others) and urgent (conditions that demand immediate action)}. With the formulation of this explanation, a better understanding can be obtained for all parties, especially the applicant and examiner of the \textit{istibdâl waqf} application. So that with this formulation, differences between the parties related to the application for the implementation of istibdâl waqf can be prevented. Such means that the formulations explaining the reasons for applying for \textit{istibdâl waqf} in this study can be used to understand better the reasons for applying for \textit{istibdâl waqf}. Especially for the reasons in point c, where according to the results of previous studies, the interpretation of it depends on each party’s interests. With the existence of an explanatory formulation in this study, the concern of the element of subjectivity can be reduced.

Conclusion

Based on the results of a study regarding the explanation of the reasons for the permissibility of *istibdâl waqf* in Article 49 of Government Regulation No. 42 of 2006 concerning Implementation of Waqf Law No. 41 of 2004 concerning Waqf. An explanation of the reasons for point a can be found in Government Regulation No. 19 of 2021 concerning the Implementation of Land Acquisition, namely for the Public Interest. Meanwhile, the reasons for the permissibility of implementing *istibdâl waqf* in points b and c can be formulated using legal interpretation methods. Through this method, the formulation of reasons for explanation in point b can be found related to waqf assets that cannot be used or utilized per the waqf pledge. In point c, which relates to waqf assets that can still be used following the waqf pledge, the reason is justified when there is a direct and urgent religious interest, such as building places of worship, madrasas, cemeteries and others.

Author Contributions

*Musthafa*: Roles: conceptualization, methodology, validation, investigation, resources, data curation, original draft preparation, review and editing, visualization, supervision, project administration. *Luqman bin Haji Abdullah*: Roles: conceptualization, methodology, validation, review and editing. *Nurhidayah binti Pauzi*: Roles: conceptualization, methodology, validation, review and editing, supervision.

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