

Legal Study on Transferring Function (Ruislagh) of Waqf Land which is Affected by the Development of Public Facilities on the Maqashid Sharia Perspective

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Abstract— Essentially, beneficial value of a waqf land is the main core as one of the evidences on the successful of waqf management. However, in fact, there were many waqf lands have been evicted and even lost due to the impact of development projects organized by the government, or other forms of projects. It seems that Nazhir (the waqf manager) does not understand their duties and function on management of waqf assets. Whereas, one waqf land can support most of the people's livelihood, especially those that are adjacent to the waqf object. The indicator of the happiness fulfillment (al-falaah) is through the fulfillment of basic human needs. Islamic law stipulates basic needs as described in the five maqashid sharia which are the objectives of implementing Islamic law, namely to maintain religion (*hifzu al-din*), soul (*hifzu al-nafs*), offspring (*hifzu al-nasl*), reason (*hifzu al-'aql*), and wealth (*hifzu al maal*). This article provides an explanation and disclosure of the implementation of the Transferring Function (ruislagh) of waqf land that is not in accordance with the laws and regulations. Looking back at the philosophical aspects of Islamic law by using the maqashid sharia perspective. The method used is a qualitative method using a normative juridical approach. This paper examines the principles, concepts of waqf law, legal provisions for management and transfer of waqf land functions. Next, taking some examples of cases from the implementation of the transferring functions of waqf land and analyze them using the maqashid sharia approach. The exchange of waqf assets is regulated in Article 49 paragraph (1) of Government Regulation Number 42 of 2006 which confirms that the exchange of waqf assets can be carried out after written permission from the Minister of Religion is based on the approval of the Indonesian Waqf Board (BWI). The procedure for exchanging or transferring functions (ruislagh) of waqf land is carried out in accordance with the provisions of the Waqf Law. On the maqashid sharia perspective, the exchange of waqf property can be done as long as it met the benefits and basic needs are fulfilled through the choice of transferring function. For example, Transferring function can be done if the waqf land to be used is in accordance with the general spatial planning (RUTR) and it is not against statutory regulations and Islamic law. Such as the exchange of waqf property for procurement of public funerals managed by the government can be done, as long as the assets or other assets to be exchanged have a equivalent value to the main waqf property. Public cemeteries, public roads, the provision and expansion of educational facilities, and other forms of designation, in the context of Islamic law are seen as objects that are the main needs of the community. So that in order to fulfill basic needs and achieve maqashid sharia, the exchange of waqf property (*ruislagh*) can be held.

Keywords—, *Transferring function, Ruislagh, waqf land, development, maqashid sharia.*

I. INTRODUCTION (*HEADING 1*)

Al-Ghazali^[1] explained that literally, *maslahah* means something that brings benefits, advantages and avoids harm (damage) which is essentially keeping the purpose of the Shari'a in establishing the law. It means that *maslahah* is something that is not shown by certain arguments that justify or annul it and the benefit is in line with the actions of sharia and the objectives of sharia law (maqashid sharia), namely preserving religion (*hifzu ad-din*), preserving the soul (*hifzu annafs*), maintain the reason (*hifzu al-'aql*), maintain offspring (*hifzu an-nasl*), and maintain property (*hifzu al-maal*).^[2]

The explanation in Article 215 paragraph (1) Compilation of Islamic Law states that waqf is a legal act of a person or group of people or a legal entity that separates part of his property and institutionalizes it forever for the benefit of worship or other public purposes in accordance with Islamic teachings. Meanwhile, according to Article 1 of Law Number 41 of 2004 concerning Waqf, it is stated that Waqf is a legal act of *wakif* to separate and/or give part of his property to be used forever or for a certain period of time in accordance with its interests for the purposes of worship and/or general welfare according to sharia.

The essence of waqf is eternity and benefits that are continuously accepted and enjoyed by the beneficiaries (*mauquf 'alahi*). Furthermore, the affirmation is found in the Hadith which states that selling or changing waqf property is proscribed/not allowed. When a waqf property has been pledged by the wakif to nazhir, then nazhir is responsible for maintaining the integrity and the benefit of the waqf property.

The principles adopted in the implementation of spatial planning in Law Number 26 of 2007 concerning Spatial Planning are the principles of management in a wise, efficient manner, and by following the rules of spatial planning so that the quality of national territory space can be maintained in its sustainability for the realization of general welfare and social justice in accordance with the basic principles. the 1945 Constitution of the Republic of Indonesia.

II. RESEARCH METHODE

This research is a qualitative study using a normative juridical approach. This study examines library materials and secondary data, in the form of legislation, literature related to Maqashid sharia and benefits in Islamic law. Furthermore, this study examines the regulations regarding the mechanism for implementing the transfer of function or replacement of waqf property in Indonesia which is linked to the regional planning development plan in the General Spatial Planning (*RUTR, Rencana Umum Tata Ruang*) which is regulated in Law Number 26 of 2007 concerning Spatial Planning.

III. FINDINGS AND DISCUSSION

The term "*istibdal*" in waqf has been known for a long time in several cases of selling waqf property to be replaced with another object with the aim of replacing the first property. The object of waqf exchange can be of the same or different types of goods. The term "*istibdal*" waqf is becoming popular and includes exchange because it is allowed to replace the waqf object at the beginning of the same type of object. Then over time the waqf object was exchanged directly for currency values.

Ibn Taymiyyah (1263-1328 AD) argued about the benefit of waqf. He argues that *istibdal* waqf property is allowed with absolutely better, either lost its benefits or not. The exchange of waqf property for something better is divided into two types. First, exchange for an interest. Like an object that loses its functions, then it sold for buying other things with the same price. For example, a damaged mosque building is then moved to another place or sold for getting other equivalent objects. Second, exchange for the greater benefit. For example, the story of Umar bin Khattab ra. who moved the old *Kufah* mosque to another place, the land was used as a date market for traders. This exchange was done to buy mosque land in another place.^[3]

In the context of statutory regulations, the term "istibdal" is known specifically as the exchange of waqf property or referred to as "ruislagh". Ruislagh can be held as long as it is intended for the benefit of national waqf in a systematic, consistent and effective manner. This process is carried out with the approval of the Indonesian Waqf Board (BWI). As affirmed in Article 36 of the Waqf Law which states that "in the event that the waqf property is exchanged or its designation is changed, Nazhir through Waqf pledge deed registrar (PPAIW, Pejabat Pencatat Akta Ikrar Wakaf) registers with the competent authority and the Indonesian Waqf Board for the waqf property that is exchanged or its designation is changed in accordance with the provisions in force in the regulation.

Article 225 of the KHI states that objects that have been given as waqf cannot be changed or used other than what is pledged in the waqf. Deviations from these provisions can only be made on certain matters after previously obtaining written approval from the Head of the District KUA based on local recommendations from the Indonesian Ulama Council (MUI) of the District and the Head of District for the following reasons: a) because it is no longer in accordance with the purpose of the waqf as pledged by the *waqif*; b) because of the public interest.

Provision of public facilities such as repair of public roads, provision of road lighting (such as tolls), small roads between residents' houses (alleys), construction of dams, provision of clean water facilities, provision of public burial areas, and other forms of public facilities which are part of the government responsibility. However, due to the policy of the General Spatial Planning (*RUTR*) and limited land, sometimes the program for fulfilling these utility facilities intersects with part of the land or land which is become part of waqf land. Therefore, in this situation on the basis of the interests of the benefit of the exchange process or the transfer of waqf property can be carried out.

The provisions in Government Regulations Number 28 of 1977 have the same basic foundation as Islamic law, which basically cannot change the designation or use of waqf land.^[4] There are several reasons for the exception to the change in the designation of waqf land which has been approved by the Minister of Religion. As the provisions in Government Regulations No. 28 of 1977 explain the reasons are:

1. Because it is no longer in accordance with the purpose of waqf as pledged by the wakif;
2. Due to meet the public interest. Principally, Nazhir can make a designation from the use of waqf land. however, they must obtain written permission from the Minister of Religion or other appointed official;
3. In the provisions of Article 41 paragraph (2) of Law Number 41 of 2004 concerning Waqf, it is explained that in addition to the permission of the Minister of Religion, an approval from the Indonesian Waqf Board (BWI) is added. BWI is an independent institution to develop waqf in Indonesia based in Jakarta.

As stipulated in Article 60 of Law Number 26 of 2007 concerning General Spatial Planning (*RUTR*), it is stated that the community participates in knowing the process of implementing the spatial plan and obtaining adequate compensation for losses arising from the implementation of development activities in accordance with the spatial plan. As for waqf property, which is the property of the community, including mauquf 'alaihi, then Nazhir as the waqf manager must play an active role in supervising and following the administrative process of licensing the exchange of waqf property.

For example, in Bogor, in the Bocimi toll development project, it is known that some waqf assets in the form of mosques, prayer rooms, madrasas, and taklim assemblies are affected by the provision of this toll road facility. There were eight affected mosques which underwent a fairly tough and lengthy negotiation process. In the process of land acquisition for the Bocimi Section I Ciawi-Cigombong toll road, there are 9,060 meters of waqf land affected and must be relocated as stipulated in the legislation.^[5] In the process, this activity involved elements of the West Java Regional Office of the Ministry of Religion, the Bogor Regency Office of the Ministry of Religion, the Religious Affairs Office (KUA) and Nazhir as the waqf manager.

In the context of benefit and the application of *maslahah* in the determination of Islamic law, al-Ghazali made operational limitations of *maslahah* so that it can be

accepted as the basis for establishing Islamic law, as described below:^[6]

- 1) *Maslahah* must be in line with the objectives of establishing Islamic law, namely preserving the soul, religion, lineage, property, and honor;
- 2) *Maslahah* must not conflict with the Qur'an, as-sunnah, and ijma' (consensus or agreement);
- 3) *Maslahah* occupies the level of daruriyat (primary) or hajiyah (secondary) which is at the same level as *daruriyah*^[7];
- 4) The benefit must be clear the law (*qath'ie*) or doubtful the law (*zhanniyy*) status that is close to qath'iy;
- 5) Certain cases require requirements, they must be *qath'iyah*, *daruriyah*, and *kulliyah*.

One of the requirements for private ownership of every human being stipulated in Islam as stated by Yusuf al-Qaradhawi in his book, quoted by Rozalinda^[8], that private ownership should not conflict with the public interest. If there is a conflict, then the ownership rights must be revoked and must be replaced with a fair replacement. This is because the common good (interest) takes precedence over personal interests. According to Mustafa Husni As-Siba'i in his book "Isyirakiyyah al-Islam" suggests that the government can intervene to take ta'min (nationalization) actions against objects in which there is a public interest, society or state (*hajjah 'aammah*). If the public benefit really requires nationalization, the law becomes mandatory and the state (ruler) is obliged to implement it.

Regarding to the correlation between *maslahah* and *maqashid sharia*, Oni Sahroni provides a formulation of the thought that, the substance of *maqashid sharia* is to realize *maslahah* and avoid *mafsadah* from humans. *Maslahah* is a human desire as well as *maqashid sharia*, then *maslahah* is *maqashid sharia*.^[9] The indicator of achieving *falah* (happiness) is the fulfillment of basic human needs in a balanced way or the fulfillment of *maslahah daruriyah*. Basic needs include religion (*al-din*), soul (*al-nafs*), offspring (*al-nasl*), reason (*al-'aql*) and property (*al-maal*). This is in line with the objectives of shari'a (*maqashid al-shari'ah*) which is to maintain and preserve: religion (*hifzu al-din*), soul (*hifzu al-nafs*), offspring (*hifzu al-nasl*), reason (*hifzu al-'aql*), and wealth (*hifzu al-maal*).^[10]

The allocation of waqf for the benefit of worship facilities in the form of mosques and mushallas, the interests of educational facilities in the form of madrasas or al-Quran education parks (*TPA*), and the interests of burial grounds, are also vital facilities needed to support the needs of the community to support the realization of economic and social benefits. Therefore, various forms of policies drawn up by the government, especially regional development policies that are in contact with waqf property, should be implemented optimally with the intention that the pledge submitted by wakif regarding the designation and benefits of waqf is always realized and maintained.

IV. CONCLUSION

Referring to the explanation above as well as the provisions in the laws and regulations related to the exchange of waqf assets, it is concluded that the exchange

of waqf assets is prohibited in principle unless there is a reason or a situation that allows it. The implementation of the exchange will continue to follow the procedures or mechanisms that have been determined by the legislation. If there is a violation of this provision, Article 67 paragraph (1) of the Waqf Law affirms that anyone who intentionally makes waqf property as an object of collateral, object of grant, object of sale and purchase, even object of inheritance, is subject to imprisonment.

The needs of the general public fall into the category of *al-haaajah al'ammah* whose level exceeds the interests of beneficiaries (*mauquf 'alaihi*) and several groups of beneficiaries of the waqf. This means that the interests of the wider community are in a more important and prioritized position. All forms of action that lead to the fulfillment of the interests of the wider community is a benefit that occupies the primary (*daruriyah*) level.

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