

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

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Abstract: Government regulations regarding the implementation of *Istibdâl Waqf* (replacement of Waqf assets) aim to guarantee the benefits of Waqf so that it has longer durability so that it can be used according to its intended purpose. Unfortunately, in this regulation there is no explanation regarding the reasons for *Istibdâl Waqf* that can cause confusion in the implementation stages. This research aims to formulate an explanation of the reasons for *Istibdâl Waqf* in existing regulations to prevent differences in understanding. This research is a literature study with a legal interpretation approach. The results of this research indicate that the reason for *Istibdâl Waqf* in Article 49 paragraph (2) of Government Regulation No. 42 of 2006 concerning the Implementation of Law No. 41 of 2004 concerning Waqf refers to Government Regulation No. 19 of 2021 concerning Organizing Land Acquisition for Development in the Public Interest. Meanwhile, the explanation regarding the reasons for *Istibdâl Waqf* in point b that relates to Waqf assets which cannot be used or exploited in accordance with the Waqf pledge, and point c that relates to Waqf assets which can still be used or utilized, is still not clear; So it requires grammatical, historical and teleological interpretation to find out it.

Keywords: *istibdâl Waqf*; interpretation method, Islamic law

Abstrak: Peraturan pemerintah tentang pelaksanaan penggantian harta wakaf (*Istibdâl Waqf*) bertujuan untuk menjamin kemanfaatan Waqf agar mempunyai daya tahan lebih lama sehingga dapat digunakan sesuai peruntukannya. Sayangnya dalam peraturan tersebut tidak dijelaskan mengenai alasan *Istibdâl Waqf* sehingga dapat menimbulkan kebingungan dalam tahapan pelaksanaannya. Penelitian ini bertujuan untuk merumuskan penjelasan alasan *Istibdâl Waqf* pada peraturan yang ada untuk mencegah perbedaan pemahaman. Penelitian ini merupakan studi kepustakaan dengan pendekatan interpretasi hukum. Hasil penelitian ini menunjukkan bahwa alasan *Istibdâl Waqf* dalam Pasal 49 ayat (2) Peraturan Pemerintah Nomor 42 Tahun 2006 tentang Pelaksanaan Undang-Undang Nomor 41 Tahun 2004 tentang Wakaf mengacu pada Peraturan Pemerintah Nomor 19 Tahun 2021 tentang Penyelenggaraan Pengadaan Tanah bagi Pembangunan untuk Kepentingan Umum. Sedangkan penjelasan mengenai alasan *istibdâl Waqf* pada butir b yang berkaitan dengan harta Waqf yang tidak dapat digunakan atau dimanfaatkan sesuai dengan janji wakif, dan butir c yang berkaitan dengan harta Waqf yang masih dapat digunakan atau dimanfaatkan, masih belum jelas; sehingga memerlukan penafsiran gramatikal, historis dan teleologis untuk mengetahuinya.

Kata Kunci: *Istibdâl Waqf*; metode penafsiran, hukum Islam

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Introduction

Waqf assets have enormous potential in supporting poverty alleviation programs and increasing social welfare among Muslims.¹ This means that efforts to maintain and increase Waqf assets, including good management is needed by all parties, starting from the Nazir (Waqf manager), the community, to government. Some of the Waqf assets are used directly, and some are managed productively,² namely by making the Waqf assets investment value through business contract mechanisms (*tijâry*) in the form of *ijâra* (leasing), *mudhârabâ* (profits sharing) *musyâraka* (business cooperation) and other contracts.³ In practice, it is not uncommon for problems to arise in the management of Waqf assets that requires good and correct solutions. These problems include Waqf assets being affected by government development projects, Waqf assets can not be used in accordance with the Waqf pledge, Waqf assets decrease in quality, etc. The solution to this problem is to exchange Waqf assets with other assets which are better for use as Waqf assets.

¹ Nur Atikah Atan dan Fuadah Johari, "A Review on Literature of Waqf for Poverty Alleviation Between 2006-2016," *Library Philosophy and Practice (e-journal)*, 2017, p. 1486.

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. Professionalism, transparency and accountability in the management of Waqf assets are needed to maintain public trust. Read, Tuti. A. Najib Ridwan alMakassary, *Wakaf, Tuhan, dan Agenda Kemanusiaan* (Jakarta: CSRS UIN Jakarta, 2006), p. 148. There are five basic philosophies in productive management of Waqf, namely: First, the management pattern must be within the framework of an "integrated project", not separate parts. Second, the principle of Nâdzir welfare, third, the principle of transparency and accountability where Waqf institutions, and institutions that assist them, must report every year the process of managing funds to the people in the form of financial reports that have been audited including their fairness. each cost item. Fourth, a Nâdzir must be an entrepreneur who is good at running an Islamic business. Fifth, Nâdzir is someone who is dedicated to sharia business, 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): 143.

³ In the Waqf literature there are two forms of Waqf financing, namely the traditional (classical) Waqf financing model and the contemporary Waqf financing. Read, Muhammad Afidi Nizar, *Pengembangan Wakaf Produktif di Indonesia: Potensi dan Permasalahan* (Development of Productive Waqf in Indonesia: Issues and Challenges), *Penguatan Fundamental Sektor Keuangan dalam Mendukung Stabilitas Perekonomian*, (Munich University Library, Germany, 2017), pp. 193 – 250 . Read, Abdurrahman Kasdi, 'Model Pemberdayaan Wakaf Produktif di Indonesia', *ZISWAF: Jurnal Zakat dan Wakaf*, 1.1 (2016): 108-109.

Apart from the solution above, there is another solution to choose, namely using the *istibdâl Waqf* method (exchanging Waqf assets with other assets to become Waqf assets). This method aims to protect Waqf assets against the decline in value⁴ or even loss of benefits or results of Waqf due to a decrease in the value and quality of the assets, as well as to develop Waqf assets to make them more valuable and productive.⁵ However, in practice, there are a handful of managers who take advantage of Waqf assets by abusing the concept of *istibdâl* for personal gain, even with the approval of unjust judges and false witnesses.⁶

The discussions about *istibdâl Waqf* among fiqh scholars, from classical to contemporary period, have developed widely.⁷ This study discusses several issues especially relating to whether or not carrying out *istibdâl Waqf* is permissible, why it is or not permissible, the conditions for replacement assets, etc. In the discussions regarding the implementation of *istibdâl Waqf*, there are similarities and differences of opinion between scholars from one madzhab (school of thought) and another, even these differences also occur among scholars within the same mazhab.⁸ The fatwas from the 'ulama (religious scholars) that have received validity and legitimacy in their methodological aspects are liked by the followers and supporters of that madzhab and are given authoritative status like other opinions held in the madzhab. Through the *taqlid* (blind following) method, the opinions that have been used as a basis by the madzhab's scholars are considered as provisions of Islamic law which must be followed by ulama, judges and muftis and then must be implemented in the Madzhab's circles by society and the state.⁹ For this reason, regulation is needed to facilitate

⁴ Ahmad Abû Zaid, *Nizhâm al-Waqfi al-Islâmiyy: Tathwîr Asâlib al-'Amal wa Tablî al-Natâij Ba' dhi al-Dirâsati al-Hadîtsah* (al-Kuwayt: al-Amânah al-'Ammah li al-Auqâf, 2000), p. 52.

⁵ Nur Rachmat Arifin, Ridan Muhtadi, and Abd Aziz, 'Manajamen Istibdâl Atas Aset Wakaf Sebagai Pembangunan Ekonomi', *Filantropi: Jurnal Manajemen Zakat dan Wakaf*, 1.2 (2020): 204.

⁶ Muhammad 'Abid al-Kabîsî, *Abkâm al-Waqf fi al-Shari'ah al-Islâmiyyah* (Baghdâd: Mathba'ah al Irshâd, 1977), 2: 381.

⁷ The issue of *istibdâl Waqf* had not been extensively explored in the classical Islamic jurisprudence; However, contemporary scholars provide an overview of the need to discuss the change the object of Waqf if the Waqf assets are no longer able to function as desired by the waqif (Waqf actor). Read, Ali Salama Mahasna and Nani Almuin, 'Analisis Hukum Tukar Guling Tanah Wakaf' *al-Awqaf: Jurnal Wakaf dan Ekonomi Islam*, 12.1 (2019): 93.

⁸ Nor Mohammad Abdoeh, 'Tinjauan Maqâshid Syari'ah Terhadap Pandangan Ulama Mengenai Ruislagh', *Ulul Albab: Jurnal Studi dan Penelitian Hukum Islam*, 3.1 (2020): 74-80.

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all parties in understanding or implementing *Istibdâl Waqf* to create legal certainty in the society.¹⁰

Because codification, which is a formulation of Ulama opinions contained in fiqh books, from its traditional form to the form of statutory regulations, is something new,¹¹ the results of its formulation in the form of statutory regulations require many adjustments to certain situations and conditions. These adjustments can take the form of formulating new regulations or reinterpreting existing regulations based on scientific disciplines related to these regulations. One form of this effort is to formulate reasons for allowing *istibdâl Waqf* according to fiqh scholars whose discussions on this matter have been very detailed, comprehensive and complete. In Indonesian legislation, the formulation of the reasons why it is permissible to replace Waqf assets is stated in three reasons: (1) public interest (2) it cannot be utilized in accordance with the Waqf promise and (3) direct and urgent religious needs.¹²

There is no explanation for these reasons in Waqf laws and regulations, creating confusion for some people. Based on the results of Zaenuri's research, on the reason for *istibdâl Waqf*, the author suggests

“Pengkakiman Mahkamah Syariah Malaysia: Analisis Kes-Kes Terpilih: Shariah Court Judgement in Malaysia: An Analysis of Selected Cases,” *Jurnal Syariah*, 29.3 (2021): 510.

¹⁰ Pagar, ‘Kodifikasi Hukum Islam: Kajian Kesejarahan dan Pelembagaannya’, *Analytica Islamica*, 6.2 (2004): 2.

¹¹ This phenomenon cannot be separated from the touch of the modern western legal system which then influenced the Islamic world and led to several legal reforms. This reform began during the Ottoman Empire in the mid-19th century, which ratified Western commercial and criminal law, then continued until the 20th century. The first phase of Islamic law reform took place in Turkey in 1915 and 1917 in the field of family law, which was then followed by other Islamic countries. After the end of World War II, in 1950-1971, there was a second phase of family law reform, which occurred in a number of Islamic countries such as: Jordan (1951), Syria (1953), Tunisia (1956), Morocco, Iraq, Algeria, Pakistan and Iran. Continuing to the third phase of reform, namely in the period 1971 until now, the phenomenon of legal reform also occurred in Afghanistan, Kuwait, South Yemen, Indonesia and Somalia. The process of reform and application of Islamic law in turn led to the separation of Islamic state forms into three categories, namely; 1) Islamic countries that implement the provisions of family law contained in the book of fiqh, 2) Islamic countries that have abandoned the provisions of Islamic family law and replaced them with European civil law, 3) Islamic countries that still apply Islamic family law but with several reforms. Read, M. Atho Mudzhar, *Membaca Gelombang Ijtihad: Antara Tradisi Dan Liberasi* (Yogyakarta: Titian Divine Pers, 1998), pp. 174-175., Read, Misnan Misnan, *Sejarah Kodifikasi Hukum Islam (Taqnîn) di Negara Islam*, *al-Ushrah: Jurnal al-Ahwal As-Syakhsiyah*, 9.01 (2021): 72-82.

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).

that the phrase "because there is an immediate and urgent religious need" must be eliminated. Because this is very subjective and depends on the interpretation and interests of each party, it can lead to differences in understanding.¹³ Meanwhile, studies specifically discuss the issue Explanation of the reasons why it is permissible to replace Waqf assets in regulations in Indonesia is still rare.¹⁴ Existing studies mostly discuss the provisions of *istibdâl Waqf* in Islamic Law,¹⁵ statutory regulations in Indonesia,¹⁶ and the implementation of *istibdâl Waqf* in Indonesia.¹⁷ However, explanations regarding the reasons why this is permitted *Istibdâl*

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 can trace, there are two studies that discuss the reasons for *Istibdâl Waqf* in Indonesian laws and regulations in terms of legality and subjectivity, namely doctoral research from Fahrurroji which explains that among the reasons for rejecting a *Istibdâl Waqf* application apart from the public interest are reasons not RUTR which is not mentioned in Law 41 of 2004 concerning Waqf. Read Fahrurroji, Development of Waqf Assets with Istibdal Case Study of Istibdal Waqf 2007-2012, Dissertation of UIN Syarif Hidayatullah Postgraduate Program, Jakarta, 2015, p. 170, and Zaenuri's research which suggests that the phrase "due to immediate and urgent religious needs" should be removed, as previously explained. Read, Zaenuri, "Dissertation Summary" Ringkasan Disertasi "Implementasi UU. No. 41 Tahun 2004 Tentang Wakaf (Studi Tukar Menukar (Regulasi) Tanah Wakaf. p.64.

¹⁵ Read Fathoni Muhtar and Fikro Shulkhu Aziz, '*Istibdâl Harta Benda Wakaf Perspektif Maslahah Mursalah*', *Jurnal Pendidikan Tambusai*, 6.2 (2022): 16345–52. Read Hisham Sabri and Siti Mashitoh Mahamood, 'Signifikansi Konsep *Istibdâl* dalam Sistem Pengurusan Wakaf: Analisis dari Perspektif Fiqh dan Undang-Undang: Significance of *Istibdâl* Concept in Waqf Management Systems: An Analysis from Fiqh and Law Perspectives', *Journal of Fatwa Management and Research*, 2020: 15–24. See, Aisyah Yasmin Che Mohd Amin and Mohd Zamro Muda, 'Konsep *Istibdâl* Harta Wakaf Menurut Perspektif Islam', *BITARA International Journal of Civilizational Studies and Human Sciences (e-ISSN: 2600-9080)*, 2.3 (2019): 22–33.

¹⁶ Read, Ummi Salamah Lubis, 'Ruislag Harta Wakaf', *Delegalata: Jurnal Ilmu Hukum*, 6.1 (2021): 116–26. See Muhammad Aiz, '*Istibdâl* Wakaf Saham Pada Tabung Wakaf Indonesia: Legalitas dan Dampaknya', *Indo-Islamika*, 6.1 (2016): 82–107. See Lutfi El Falahy, 'Alih Fungsi Tanah Wakaf Ditinjau dari Hukum Islam dan Undang-Undang Nomor 41 Tahun 2004 Tentang Wakaf', *al-Istinbath: Jurnal Hukum Islam*, 1.2 (2016). Also El Falahy, 'Alih Fungsi Tanah Wakaf Ditinjau dari Hukum Islam dan Undang-Undang Nomor 41 Tahun 2004 Tentang Wakaf'.

¹⁷ For example, the research conducted by Ali Salama and Nani which examined the legal analysis and effectiveness of Waqf land exchanges in Indonesia, since the enactment of Waqf law no. 41 of 2004. as well as the process of exchanging Waqf land in Indonesia in the use of public facilities and social facilities, See Ali Salama Mahasna and Nani Almuin, 'Analisis Hukum Tukar Guling Tanah Wakaf', *al-Awqaf: Jurnal Wakaf dan Ekonomi Islam*, 12.1 (2020) : 86–104; Also Ekasari's research which highlights the implementation of *istibdâl Waqf* for toll road construction. See Ekasari Damayanti, 'Pelaksanaan Tukar Guling (Ruislag) Tanah Wakaf di Kota Semarang Untuk Pembangunan Jalan Tol Trans Jawa', *Journal of Political and Governmental Studies*, 8.04 (2019) : 351–60.

Waqf is very important for applicants before carrying out replacement of *Waqf*.

Next, for the team that reviews requests for the implementation of *istibdâl Waqf*, both at the lower and upper levels, whether occurring within one institution or between institutions, such an explanation is very important. With this explanation, differences in understanding that may occur between the parties can be prevented as it may have consequences for *Waqf* assets. In respond to this need, this research attempts to formulate the reasons for *istibdâl Waqf* in statutory regulations, where the results of this formulation are something new in this research. The approach in this research uses the method of interpreting the law and the opinions of fiqh scholars. With this approach, an explanation of the reasons for *Istibdâl Waqf* can be formulated and the legality of the formulation can be recognized both from the perspective of national law and Islamic law. In addition, the results of the explanatory formulation in this research can be useful in helping to provide a better understanding of the reasons for *istibdâl Waqf* in the applicable regulations so that they should be used as a reference by parties interested in the issue of *istibdâl Waqf*.

Research Method

This research can be classified as normative legal research which uses a conceptual approach, namely an approach based on views, ideas and doctrines developed in legal science.¹⁸ The aim is to study reasons for allowing *istibdâl Waqf* in Government Regulations No. 42 of 2006 concerning the Implementation of Law Number 41 of 2004 concerning *Waqf* through the method of interpreting jurisprudence which is then compared with certain concepts existing in Islamic law. Data were collected through literature studies which were processed and then analyzed using legal interpretation methods. In analyzing this data, three lines of activities were carried out, namely: 1). The data reduction stage is simplifying the data that has been collected by selecting data that is relevant to the research objectives. 2). The stage of data presentation is compiling the

¹⁸ N.S Enggarani, "Independensi Peradilan dan Negara Hukum," *Jurnal Law and Justice*, 3.2 (2918): 85.

collected data as narrative text. 3). Concluding (verification) stage, namely the activity of searching for meaning, regularity patterns, explanations, cause-effect relationships or propositions from the data that has been collected.¹⁹

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Istibdâl Waqf in *fiqh*

Meanwhile, *Waqf* assets can be damaged or can no longer be used. Under these conditions, can the *Waqf* assets be exchanged or replaced with other assets? That's where the discussion of *istibdâl Waqf* in *fiqh* emerged among the ulama. The discussion regarding whether or not it is permissible to carry out *istibdâl Waqf* is closely related to the reasons that may be used to carry out *istibdâl Waqf*. Therefore, to facilitate explanation, the discussion regarding the opinions of *fiqh* scholars regarding *istibdâl Waqf* in this description is divided into two categories,²⁰ namely;

- a. *Istibdâl Waqf* Assets in the form of a Mosque; *Waqf* assets in the form of mosques according to the Mâliki,²¹ Syâfi'i²², and Hanâfi school of thought scholars,²³ are prohibited from being exchanged or replaced. Only Hanbali sect clerics allow *Istibdâl Waqf* for mosques in case of emergency.²⁴
- b. *Istibdâl Waqf* for Immovable assets; Mâliki scholars prohibit *istibdâl Waqf* assets in the form of immovable assets as long as they still provide benefits except in emergency situations, such as the expansion of mosques and cemeteries.²⁵ If the *Waqf* assets are no longer able

¹⁹ Matthew B. Miles dan A. Michael Huberman, *Qualitative Data Analysis (Analisis Data Kualitatif)*, ed. by trans. Tjetjep Rohendi Rohidi (Jakarta: UIPress, 1992), p. 16-19.

²⁰ Wahbah Zuhailiy, *al-Fiqh al-Islâmiy wa Adillatuhu* (Dimasyq: Dâr al-Fikr, 1985), p. 223.

²¹ Ibnu Juzayy al-Gharnâthî, *al-Qawânin al-Fiqhiyyah*, (Bayrût: Dâr Ibnu Hazm, 2013), p. 611, al-Imâm Mâlik bin Anas, *al-Mudawwanah* (Bayrût: Dâr al-Kutub al-Ilmiyyah, 1994), 4, p. 259.

²² al-Khathîb al-Sharbinî, *Mughnî al-Muhtâj ilâ Ma'rifati Ma'âni al-Fazhi al-Minhâj* (Bayrût: Dâr al-Ma'rifah, 1997), 2: 506.

²³ Ibn 'Abidîn, *Rad al-Muhtâr 'alâ al-Dâr al-Mukhtâr Syarah Tanwir al-Abshâr* (Riyâdh: Dar 'Alam al-Kutub, 2003), 6: 548.

²⁴ Ibnu Qudâmah, *al-Mughnî* (Riyâd: Dâr 'Alâmi al-Kutub, 1997), 8: 220-221.

²⁵ Abû Zakariyyâ al-Haththâb, *Risâlah Fî Hukmi Bay' i al-Abbâs* (al-Kuwayt: al-Amânah al-'Ammah li al-Auqâf bi al-Shâriqah, 2006), p. 29.

to provide benefits, the Mâlikiyyah scholars divide them into three categories, namely;

- 1) If the Waqf assets no longer provide benefits and there is no longer any hope that the benefits will return, even though if left alone it would be detrimental, then it is permissible to carry out *istibdâl Waqf*.
- 2) If there is still hope that the benefits of the Waqf assets will return and their existence is not detrimental, then no *istibdâl* may be carried out on Waqf assets.
- 3) If there is no hope of returning the benefits of the Waqf assets and their existence is not detrimental, then according to the famous qaul from Imam Mâlik, it is not permissible to sell or exchange them (*istibdâl*).²⁶

Hanâfi scholars, on the other hand, are of the opinion that if the waqif requires *istibdâl Waqf*, then *istibdâl Waqf* is permitted, even though the Waqf assets can still be used.²⁷ However, if there are no conditions from the waqif, and the Waqf assets can no longer be used, then in this case, *Istibdâl Waqf* may be carried out as long as a permission has been obtained from the Qâdi (judge) and based on the benefits of the Waqf assets. If the Waqf assets can still be utilized and there is no better replacement, then according to some scholars of the Hanafi school, it is not permissible to carry out *istibdâl Waqf*.²⁸ Meanwhile, according to the scholars of the Shafi'i school, as stated by Muhammad Ubaid alKubaysi, there is no firm opinion in the madzhab regarding the *istibdâl Waqf* of immovable objects. Hence, as if they think that it is impossible not to get benefits from immovable goods. If the order is like that then it is forbidden to sell it and carry out *istibdâl*.²⁹ Meanwhile, according

²⁶ Abû Zakariyyâ al-Haththâb, *Risâlah Fi Hukmi*, p. 27, Muhammad al-Kharasyi, *Syarah al-Kharasy 'Alâ Mukhtashar Khalîl* (Mishr: al-Mathba'ah al-Amiriyyah al-Kubrâ), 7: 95.

²⁷ Fakhru al-Din Abî Mahâsin al-Fargânî, *Fatâwâ Qâdhî Khân fî Mazhab al-Imâm Abî Hanîfah al-Nu'mân* (Bayrût: Dâr al-Kutub al-'Ilmiyyah, 2009), 3: 183. Ibn 'Abidîn, *Rad al-Muhtâr*, 6: 583. Ibn Nujaym, *al-Bahru al-Râiq Sharh Kanzu al-Daqâiq* (Bayrût: Dâr al-Kutub al-'Ilmiyyah, 1997), 5: 371.

²⁸ Ibn 'Abidîn, *Rad al-Muhtâr*, 6:584

²⁹ Muhammad 'Abid al-Kabîsî, *Abkâm al-Waqf*, 2: 41

to Hanbali school scholars, Meanwhile, according to Hanbali school scholars, carrying out *istibdâl Waqf* assets is permissible whether in the form of a house, land, mosque building or non-mosque, as long as long as it can still maintain the benefits of Waqf assets.³⁰

- c. *Istibdâl Waqf* in the form of movable assets; As for Waqf assets in the form of movable assets, according to Ibnu Qâsim, a famous scholar from the Mâliki school, it is permissible to sell Waqf assets that are no longer useful and then replace them with something that can be useful.³¹ Hanafi scholars do not differentiate between movable and immovable Waqf assets; According to them, *istibdâl Waqf* assets, both movable (*manqûlât*) and immovable, is permitted as long as the assets can no longer fulfill the purpose of the Waqf. Shafi'iyyah scholars, on the otherhand, are divided into two groups. The first group prohibits *istibdâl Waqf* because Waqf assets must be used until they no longer function. The second group does not prohibit *istibdâl Waqf* assets as long as the Waqf assets cannot be used according to the wishes of the wakif.³² Scholars from the Hanbali school madzhab allow *istibdâl Waqf* for movable property,³³ In reality, the permission to replace Waqf assets for immovable property is actually based on *istibdâl Waqf* for movable assets; then it becomes the legal basis for those who allow *istibdâl Waqf* in the form of immovable property.³⁴

Based on the description above, it can be concluded that Mâliki ulama and Shafi'i ulama seem to be very careful in allowing *istibdâl Waqf*; There is even a tendency for them to ban it if there is no urgent matter. Meanwhile, Hanafi and Hanbali ulama tend to provide convenience for people who want to carry out *Istibdâl Waqf*, as long as the situation requires it.³⁵ Prohibiting *istibdâl* for Waqf assets that are damaged or

³⁰ Ibnu Qudâmah, *al-Mughnî*, 8: 220-221.

³¹ Imâm Mâlik, *al-Mudawwanah al-Kubrâ bi al-Riwâyah al-Imâm Sahnûn 'an al-Imâm Ibnî Qâsim* (Bayrût: Dar Shâdir), 15: 99.

³² Abû Ishâq al-Shîrâzî, *al-Muhazhhab fi Fiqhi al-Imâm al-Shâfi'î* (Bayrût: al-Dâr al-Syâmiyyah, 1992), 3: 689.

³³ Ibnu Qudâmah, *al-Mughnî*, 8: 220

³⁴ Muhammad 'Abid al-Kabîsî, *Abkâm al-Waqf*, 2: 44.

³⁵ Ahmad Furqon, 'Penukaran Tanah Wakaf Masjid Agung Semarang dalam Perspektif Fikih *Istibdâl*', *Ijtihad: Jurnal Wacana Hukum Islam dan Kemanusiaan*, 17.1 (2017): 43.

cannot be reused, can result in losses for Muslims. Thus, based on the discussion above, it can be concluded that the permissibility of *Istibdâl Waqf* according to fiqh scholars is because (1) there is an emergency, (2) Waqf assets cannot provide benefits, (3) there are conditions in the wakif, (4) there are interests general. These reasons are closely related to the type of Waqf assets, regardless of whether the assets are movable or immovable, still useful, or no longer providing benefits.³⁶

***Istibdâl Waqf* in Indonesia Regulations**

In 1977 the Indonesian Government issued Government Regulation No. 28 of 1977 concerning Owned Land Waqf.³⁷ This 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, there were two reasons why *istibdâl Waqf* was permitted at that time, namely; 1) Because Waqf assets can no longer be used according to the designation as stated in the Waqf pledge. 2) Because it is in the public interest.³⁸

To complement these regulations, especially regarding procedures for implementing *istibdâl Waqf*, the Government issued a set of regulations such as; Minister of Religion Regulation Number 1 of 1978, and Implementing Regulations of Government Regulation Number 28 of 1977 concerning Owned Land Waqf. Furthermore, in 1991 the Indonesian Government again issued Presidential Instruction No. 1 of 1991 concerning the Compilation of Islamic Law (KHI). The KHI consists of three discussion chapters, namely Book I on Marriage, Book II on Inheritance, and Book

³⁶ In general, according to the views of contemporary scholars and fatwa institutions such as those in Egypt, Saudi Arabia, Yemen, 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.

³⁷ The definition of waqf in this regulation is more inclined towards the Shafi'i school, Read, Lutfi El Falahy, 'Alih Fungsi Tanah Wakaf Ditinjau dari Hukum Islam dan Undang-Undang Nomor 41 Tahun 2004 Tentang Wakaf', *al-Istinbath: Jurnal Hukum Islam*, 1.2 (2016): 128.

³⁸ Article 11 Government Regulation of the Republic of Indonesia Number 28 of 1977 Concerning Waqf of Owned Land (Indonesia, 1977).

III on Waqf.³⁹ This regulation also contains the reasons why *istibdâl Waqf* is permitted, which is almost the same as the previous regulation relating to the procedures for applying for *istibdâl Waqf*, namely to the Indonesian Ulama Council and the local sub-district head (Regional Head). This KHI attracted a lot of controversy because it was made in the form of a Presidential Instruction (Inpres) whose position in the regulatory hierarchy in Indonesia did not yet exist at that time.⁴⁰ Therefore, the implementation of *istibdâl Waqf* must still follow previous regulations, namely Government Regulation Number 28 of 1977 concerning Property Waqf Land and Minister of Religion Regulation Number 1 of 1978 concerning Implementing Regulations of Government Regulation Number 28 of 1977 concerning Waqf of Owned Land.

In 2004, the government issued Law No. 41 of 2004 concerning Waqf which was followed by the issuance of implementing regulations namely Government Regulation No. 42 of 2006 concerning Implementation of Law No. 41 of 2004 concerning Waqf.⁴¹ In the Waqf law, the reason for allowing *istibdâl Waqf* is for the public interest only, whereas in the implementing regulations there are three reasons for the permissibility of *istibdâl Waqf*, namely;

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.

⁴⁰ In TAP MPRS no. XX/MPRS/1966, which became a reference regarding the hierarchy of laws and regulations in Indonesia at that time, explained that the hierarchical sources of law in Indonesia were (1) the 1945 Constitution of the Republic of Indonesia (2) TAP MPR, (3) Laws/Perpu, (4) Government Regulations, (5) Presidential Decrees, and (6) Other implementing regulations, such as: Ministerial Regulations, Ministerial Instructions and others. These provisions are the legal basis for statutory regulations which are part of positive law and have binding legal force in Indonesia. Read, Marzuki Wahid and Rumadi, *Fiqih Madzhab Negara Negara Kritik Atas Politik Hukum Islam di Indonesia* (Yogyakarta: LKIS, 2001), pp.175-176. In Law Number 12 of 2011 concerning the Formation of Legislative Regulations, it is not regulated that there is a regulatory order that applies in Indonesia. The law only states that the order of regulations that apply in Indonesia is 1. 1945 Constitution; 2. MPR Decree; 3. Law/Perppu; 4. Government Regulations; 5. Presidential Regulation; 6. Provincial Regional Regulations; and 7. Regency/City Regional Regulations. Read, Muhammad Helmi, 'Kedudukan Kompilasi Hukum Islam dalam Tata Urutan PerundangUndangan di Indonesia', *Mazahib Jurnal Pemikiran Hukum Islam* 15.1 (2016): 142.

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)', *Jurnal Penelitian*, 8.2 (2014): 321-322.

- a. Changes in Waqf assets are made for public purposes
- b. Waqf assets cannot be used after the Waqf promise
- c. Exchanges are made for immediate and urgent religious needs.⁴²

These three reasons can be used in applying requests to carry out *istibdâl Waqf* in Indonesia. The application process begins with a letter of application made by Nâzir regarding a request for permission to carry out *istibdâl Waqf* to the Minister of Religion. An application letter and other complementary documents are submitted to the sub-district Religious Affairs Office (KUA). Next, After being examined by the sub-district KUA, the application files are sent to the Ministry of Religion at the district/city level for examination. Then the Regional Head at the district or city level provides recommendations based on the results of the inspection team. The results of the recommendations are, then, submitted to the provincial Ministry of Religion 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 inspection. Based on the results of the inspection by BWI and the Ministry of Religion, the *Istibdâl Waqf* document was discussed in a plenary meeting with the Director General of the Ministry of Religion. Then, based on the results of deliberations, the Minister of Religion decides whether or not to approve the application of *istibdâl Waqf*.⁴³

Methods of Interpreting Legislation in Indonesia

Meanwhile, Laws and regulations can not regulate all aspects of human life: There are always incomplete and unclear regulations in regulating a case. Therefore, to complete and obtain an explanation of these regulations, there must be a discovery and findings.⁴⁴ The term "findings" means the law already exists in various forms, whether in writing, behavior or events so it requires efforts to explore and discover.

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.

⁴⁴ Sudikno Mertokusumo, *Penemuan Hukum Sebuah Pengantar* (Yogyakarta: Liberty, 2007), p. 37.

Efforts to discover the law are usually carried out by judges or certain officials who are given the authority to carry out regulations regarding a concrete event.⁴⁵ One way that can be used to discover the law is by interpreting the provisions contained in the regulation.⁴⁶

Legal interpretation can occur if there are provisions in laws and regulations that can not be determined directly by real events. This method is used in cases where regulations already exist but difficult to implement because there are vague or unclear norms, or conflicts between legal norms (antinomic norms), or uncertainty.⁴⁷

The method of 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.⁴⁸ This method is part of efforts to find the law, especially for judges in implementing the law when deciding on a legal event that occurred while the existing legal regulations (UU) are unclear or even do not regulated at all.⁴⁹ In other words, the aim of the interpretation method is to explain the true meaning of the text of the statutory regulations so that the provisions in the law can be applied in resolving concrete events that occur.

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 of the methods can be categorized based

⁴⁵ Sudikno Mertokusumo, *Penemuan Hukum*, p. 39

⁴⁶ Among the available methods of Law finding are Legal interpretation method and legal construction method or reasoning (*redeneerweijzen*). Legal interpretation method occurs when there are statutory provisions that can be directly stipulated in the concrete events at hand. Read, Bambang Sutiyo, *Metode Penemuan Hukum*, (Yogyakarta: UII Press, 2006). p. 52. Meanwhile, legal construction occurs when no statutory provisions can be directly applied to the legal issues at hand, or in the absence of regulations (*recht vacuum*) or legal vacuum (*wet vacuum*). To fill the gaps in this law, the judge uses logical reasoning to further develop a text of the law. Read, Azim Hamidi, *Hermeneutika Hukum, Sejarah, Filsafat dan Metode Tafsir* (Malang: UB Press, 2011). Also, Sitti Mawar, "Metode Penemuan Hukum (Interpretasi dan Konstruksi) dalam Rangka Harmonisasi Hukum," *Jurnal Justisia: Jurnal Ilmu Hukum, Perundang-undangan dan Pranata Sosial*, 1.1 (2020): 22–38.

⁴⁷ Bambang Sutiyo, *Metode Penemuan*, p. 52. See Muwahid, "Metode Penemuan Hukum (*Rechtsvinding*) oleh Hakim," *al-Hukama'*, 7.1 (2017): 235.

⁴⁸ R. Soeroso, *Pengantar Ilmu Hukum* (Jakarta: Sinar Grafika, 2005), p. 97

⁴⁹ Muliadi Nur, "*Rechtsvinding*: Penemuan Hukum (Suatu Perbandingan Metode Penemuan Hukum Konvensional dan Hukum Islam)," *Jurnal Ilmiah Al-Syir'ah*, 2.1 (2016): 12.

on literal and functional, some are narrow and broad. As each method has its own 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. The three kinds of interpretation methods that can be used are: grammatical interpretation method, historical systematic interpretation methods and sociological or teleological interpretations method.

The grammatical interpretation method is used in understanding the text in statutory regulations where one must first understand the meaning of each word in the text. This step, If necessary, can be followed up with an authentic interpretation formulated by the legislators. Furthermore, as Laws and regulations of a country constitute a complete system, in interpreting one statutory provision one must connects a regulation with the provisions of other statutory regulations to prevent the interpretation deviates from the legal system of the country. Moreover, 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 an integrated system. That is, interpreting one statutory provision must be connected with other provisions of statutory regulations. This strategy is also aims at preventing a statutory regulation interpretation deviates from the legal system of the country.

With regard to 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 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 drafting the Law: While, interpretation of legal history (*rechts historisch*) is used to understand laws in the context of the history of legal development.⁵⁰ What is examined in this method is the legal sources used by legislators.⁵¹

Furthermore, the interpretation which begins with grammatical interpretation, usually ends with the sociological or teleological interpretation

⁵⁰ Ahmad Rifai, *Penemuan Hukum*, p. 66.

⁵¹ Sudikno Mertokusumo, *Penemuan Hukum*, p. 60.

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 will generally also involve a teleological interpretation. The older/outdated a law is, the more things that must be looked for to find the purpose of the law maker which is then adapted to societal developments.⁵²

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 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. One of the conditions to be met is 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.⁵³

The reasons stated above are optional. An applicant can apply for *istibdâl Waqf* for the above reasons. Then after the application is submitted, the application documents supporting the reasons for the *istibdâl Waqf* will be examined by various agencies, starting from the lowest level to the top level. In this way, it can be assured that the

⁵² Sudikno Mertokusumo, *Penemuan Hukum*, p. 61.

⁵³ Article 49 (2) Indonesia, Government Regulation of the Republic of Indonesia Number 42 of 2006.

reasons for the application for *istibdâl Waqf* is in accordance with the provisions of the statutory regulations and fulfills all the elements of eligibility for making the change.

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 on the subject of the implementation of the Waqf law number 41 of 2004, 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 regulations in a country are systemic in nature, where one regulation and another are interconnected, efforts to trace the reasons for applying for Waqf *istibdâl* can also be carried out in other regulations that have similar substance, objectives or principles. This principle is in line with the characteristics of systematic interpretation, where the law is seen as a unit in a regulatory system. In other words, a regulation is not seen as something that stands alone, but as part of a system. Not only can a rule within a set of rules justify a particular interpretation of a rule, but several rules can also have the same main purpose or principle. This is because the relationship between all regulations is not solely determined by one regulation and another, but rather by the similarity of objectives, principles tunderlying these regulations simultaneously.⁵⁴

Based on the results of searching for some regulations, the author managed to find an explanation regarding the reasons for *istibdâl Waqf* at the point mentioned above in Government Regulation Number 19 of the Year 2021 concerning the Implementation of Land Acquisition for the Public, namely "for the public interest". In this regulation it is explained that what is meant by "public interest" is "the interests of the nation, state and society which must be implemented 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 defense and

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.

security, public roads, highways, tunnels, railways, train stations, reservoirs, dams, irrigation, ports, airports, oil, gas, geothermal infrastructure, power plants, houses, hospitals, government buildings, rubbish dumps, etc."⁵⁶

Through this systematic interpretation method, the explanation of the term "public interest" as referred to in the reasons for *istibdâl Waqf* in point a, can be known by referring to Government Regulation Number 19 of 2021 concerning Implementation of Land Acquisition for the Public Interest. However, specifically for the explanation regarding the reasons for *istibdâl Waqf* in points b and c, even though the author has searched it from the laws, regulations and Indonesian language, the author can not find the explanation regarding these reasons, So the systemic interpretation method used an approach in interpreting the reasons of *istibdâl Waqf* in points b and c cannot be used.

Moreover, to find out the explanation regarding the reasons for *istibdâl Waqf* in point b, namely "Waqf assets cannot be used after the Waqf has been promised", there are several series of words that need to be explored to obtain their meaning namely "Waqf assets", "cannot be used", "following the Waqf pledge". Grammatically, Waqf assets which are donated by the wakif according to the Sharia have a long shelf life and long-term benefits and economic value.⁵⁷ The phrase "cannot be used" does not mean "particle for express rejection, refusal, and so on. Meanwhile, the word "can" means "able, possible, perhaps"⁵⁸ Furthermore, the word "used", according to the Big Indonesian Dictionary, is the passive form of the word "using" which means "to be used, to be utilized".⁵⁹ While the word "appropriate" means "suitable, moderate, appropriate."⁶⁰ Moreover, what is meant by "Waqf promise" is "a statement of the Waqif's made verbally and/or in writing by the Waqif to Nâzhir with the intention of donating his assets".⁶¹

⁵⁶ Article 2 Indonesia Republic, Government Regulation No. 19 of 2021.

⁵⁷ Article 1 (5), Republic of Indonesia, Law No. 41 of 2004 concerning Waqf.

⁵⁸ Tim Penyusun Kamus Pusat Bahasa, *Kamus Bahasa Indonesia* (Jakarta: Balai Pustaka, 2008), p. 1701.

⁵⁹ Tim Penyusun Kamus Pusat Bahasa, p. 505.

⁶⁰ Tim Penyusun Kamus Pusat Bahasa, p. 1530.

⁶¹ 61 Article 1 (3) *Government Regulation of the Republic of Indonesia Number 42 of*

Based on the explanation of the meaning of each word above, it can be formulated that the meaning contained in the reasons for allowing the implementation of *istibdâl Waqf* is when the Waqf assets cannot be used or utilized in accordance with the allocation of Waqf assets according to the wishes of the wakif as stated in the Waqf pledge. This means that when the wakif has stated that the assets he has donated are intended for certain purposes such as building a mosque, madrasa or something else, then the wakif assets must be managed in accordance with the wishes of the wakif. However, if the Waqf assets cannot be utilized by the Nazir, this then creates problems.

At this stage, explanation through grammatical interpretation of the method can provide a better understanding of the reasons for *istibdâl Waqf* in point b. However, understanding based on this method alone is not enough because there are still problems regarding the measurement "not being used" in the *istibdâl* reasons in point b. This shows that apart from formulating explanations using grammatical methods, other interpretive methods are still needed, which in this case can be based on historical interpretation. This historical interpretation is carried out by examining the intent of the regulations at the time the regulations were made, by examining the sources of the laws referred to by the legislators.⁶² Historically, regulations regarding Waqf, including those regarding *istibdâl Waqf*, were made with reference to several classical ulama opinions.⁶³ In the ulama's view, the definition of "unusable" is that it can not be used any more and 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 interpretation methods, another interpretation method is needed, which in this case is the teleological interpretation method.

2006 concerning the Implementation of Law Number 41 of 2004 concerning Waqf.

⁶² Sudikno Mertokusumo, *Penemuan Hukum*, p. 60.

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

⁶⁴ Abû Zakariyyâ al-Haththâb, *Risâlah Fi Hukmi*, p. 37.

The teleological interpretation method in this research is applied by returning the implementation of *istibdâl Waqf* to the aim of implementing *istibdâl Waqf* well from a social perspective. Based on the considerations in Waqf laws and regulations, the purpose of establishing Waqf laws is to manage the potential and benefits of Waqf assets effectively and efficiently for the purposes of worship and advancing public welfare.⁶⁵ In other words, the reason for allowing *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 the interests of worship and improve community welfare. In line with this teleological interpretation, the strategic consideration of Islamic law in formulating an explanation of the reasons for *istibdâl Waqf* is through consideration of the objectives of the Shari'a (*maqâshid al-shari'a*)⁶⁶ Waqf assets are assets for Muslims that must be guarded and cared for so that they always provide benefit to Muslims. However, if the Waqf assets cannot be used or no longer provide benefits, then the Waqf assets can be exchanged or replaced with other assets to protect and preserve the benefits as part of good Waqf asset management. In this way, the regulations regarding the ability to exchange Waqf assets can be in accordance with the realities of society.

Based on the grammatical, historical and teleological interpretation methods, an interpretations regarding the reasons for allowing *istibdâl Waqf* in point b. particularly, The meaning of the sentence "Waqf assets cannot be used after the Waqf pledge" can be formulated with a new sentence, namely "Waqf assets that cannot be used or utilized according to the Waqif's wishes in a Waqf pledge can be exchanged or replaced with other

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 Fitriyani 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'id Ramdhan al-Bûti, *Dawâbith al-Mashlahah Fi Syari'ah al-Islâmiyyah* (Bairût: Muassasah al-Risâlah, 1986), p. 12.

assets as long as the replacement aims to maintain the Waqf assets and preserving its benefits through good, effective and efficient management.”

As for the reason for *istibdâl Waqf* in letter c, namely the phrase "the exchange is carried out for direct and urgent religious needs", can also be interpreted grammatically. For this purpose, there are several words that need to be studied for their meaning. First, "exchange" means the act of exchanging (goods and so on) or bartering; replacement.⁶⁷ Furthermore, the word "make" is the passive form of "make" which means to do, hold, carry out, do something towards...⁶⁸ Next is the word "necessity" which means "interest, aim or purpose";⁶⁹ Then the word "religious" which means "everything about religion";⁷⁰ the word "direct" which means "to continue (not through intermediaries, not stopping, etc.)"⁷¹ and the word "urgent" which means "to force; important to do, immediately fulfilled, completed".⁷²

Based on this method of grammatical interpretation, the explanation of point c can be formulated as "exchanging or substituting for interests or purposes related to religion directly and immediately". This formulation is an explanation that uses grammatical interpretation. The method can be used to add information regarding preferences for allowing *istibdâl Waqf* in point c. However, this formulation is still not sufficient to provide an understanding that can be applied in society. Because, there are words that require further explanation than grammatical interpretation, namely the phrase "religion directly and immediately". This phrase requires a more detailed explanation related to the context used. For this purpose, historical interpretation can be included to complete the explanation of the formulation on.. As for the allocation of Waqf assets, Law No. 41 of 2004 does not mention "religious needs..." but rather mention "for worship and/or general welfare according to sharia".⁷³ This shows that what is meant by religious needs in letter c are needs for worship,⁷⁴

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.

namely worship facilities and activities such as mosques, prayer rooms,⁷⁵ Muslim cemeteries and others. At the same time explaining the word "direct" in relation to Waqf management assets can be done directly and indirectly. Management of Waqf assets is direct when the Waqf assets are used to achieve goals such as building mosques for prayer, schools for teaching and learning activities, hospitals to treat sick people, orphanages to support orphans, etc.⁷⁶ Indirect Waqf, on the other hand, can be done in the form of investing Waqf assets in a business scheme; the results of which are then handed over to the *mauqûf alaihi* (recipient of Waqf assets). Meanwhile, The word "urgent" indicates a situation that requires immediate action because it relates to the need for religious facilities and infrastructure. Thus, it can be understood that the words "direct religious needs" relate to goals and means or methods whereas "urgent" indicates a situation or condition that requires immediate action.

Furthermore, the type of Waqf assets that can be included in the reasons in letter c are Waqf assets which are included in the category of assets that can still provide benefits. This is based on discussions by scholars regarding whether or not *Istibdâl Waqf* applies to assets that can still provide benefits and Waqf assets that no longer provide benefits. In their discussions, the majority of ulama only allow the implementation of *istibdâl* for Waqf assets that can no longer be used or utilized.⁷⁷ Thus the reasons in point b can be related to the discussion of these ulama, because there are similarities between the two.

Even though most scholars do not allow replacing Waqf assets that can still bring benefits, there are opinions from Hanafi scholars who allow it, such as the opinion of Imam Abû Yûsuf. According to Imam Abû

⁷⁵ Kementrian Agama Republik Indonesia, *Proses Lahirnya Undang-Undang Nomor 41*, p. 78.

⁷⁶ Munzir Qahf divides two categories in the implementation of waqf, namely 1) direct waqf 2) productive waqf, Read, Mundzir Qahaf, *al-Waqf al-Islâmî Tathawwuruhu Idâratuhu Tanmiyyatuhu* (Damaskus: Dâr al-Fikr, 2006), p. 34. See Mubarok, "Model Pengembangan Wakaf Produktif (Studi tentang Pengelolaan Wakaf pada Yayasan Muslimin Kota Pekalongan)," *Jurnal Hukum Islam*, 15.1 (2013): 19–33.

⁷⁷ See the opinion of Hanâfi madhab scholars, Ibn 'Abidin, *Rad al-Muhtâr*, 6: 584, See the opinion of Mâlîki madhab scholars, Imâm Mâlik, *al-Mudawwanah al-Kubrâ bi al-Riwâyah*, 15: 99. See the opinion of Shâfi'i madhab scholars, Abû Ishâq al-Shirâzi, *al-Muhazhhab fi Fiqhi*, 3: 689. See the opinion of Hambali madhab scholars, Ibnu Qudâmah, *al-Mughnî* (Mishr: Mathba'ah al-Manar, 1928), 6: 225-226.

Yûsuf, the implementation of *istibdâl Waqf* on assets that still provide benefits or can still be used after the Waqf pledge can be carried out provided that the implementation of *istibdâl Waqf* is more beneficial and does not conflict with the purpose of Waqf.⁷⁸ With the opinion that allows *istibdâl Waqf* for assets that can still provide use or benefits, then the reason in letter c regarding the absence of texts that allow replacement of Waqf assets even those that are no longer useful can be put aside because it turns out that a scholar, Abu Yusuf, allow it. With the same opinion, the concern that exchanged assets can still provide benefits can also be refuted because according to Abu Yusuf, even assets that can still provide benefits can become the object of exchange. Thus, the urgency of the reason mentioned in letter c is lost as it has been represented in the reason in letter b.

Through this teleological interpretation it can be concluded that the statement "for the benefit of Waqf assets" which is the reason for allowing the implementation of *istibdâl Waqf*, as stated in letter c, must be interpreted as an effort to maintain the existence of Waqf assets and distribute its benefits (*limuhâfazhati tabbîsi al-Waqfi wa tasbîli al-manfa'ah*). Thus, the permission to replace Waqf assets is to keep its benefits so that they can provide direct benefits for religious interests.

Based on the descriptions above, the explanation regarding the reasons in point c can be formulated as follow: "that the reasons for religious interests must be interpreted as direct and urgent, for example for the construction of places of worship, mosques, cemeteries, schools, etc.; or because of other interests/conditions that require immediate action., With this explanation formulation, a better understanding can be obtained by all parties, especially the applicant as well as the examiners of the *istibdâl Waqf* application. By the same token, differences in understanding between the parties involved, especially the applicant and the examiner of the *istibdâl Waqf* application can be reduced. This explanatory formulation, for some reasons, is more appropriate to serve as a guide for *istibdâl Waqf*

⁷⁸ Muhammad 'Abîd al-Kabîsî, *Abkâm al-Waqf*, 2: 22-23, Ibrahim 'Abd al-Latif Ibrahim al-'Ubaydî, *Istibdâlu al-Waqfi Ru'yah Shar' iyyah Iqtishâdiyyah Qanûniyah* (Dubây: Dairah al-Shuûn al-Islâmiyyah wa al-'Amal al-Khayrî, 2009), pp. 67-68. See Abû Zahrah, *Muhadharât fî al-Waqfi* (al-Qâhirah: Dâr al-Fikri al-'Arabî, 1971), pp.194-195.

applicants compared to the previous formulation; because, based on the results of previous research, the previous formulation really depends on the interpretation of each party, so that the possibility of the emergence of elements of subjectivity will be greater.

Conclusion

Based on the previous description, it can be concluded that the permission to replace Waqf assets (*istibdâl Waqf*) as stated in Article 49 of Government Regulation No. 42 of 2006 concerning the Implementation of Waqf Law No. 41 of 2004 concerning Waqf, is solely for the public interest. This explanation is as also stated in Government Regulation Number 19 of 2021 concerning the Implementation of Land Acquisition. As for other reasons relating to the permissibility of *istibdâl Waqf*, the explanation can only be known using legal interpretation methods. By using this method, it can be identified that Waqf assets can also be replaced if it can not be used or exploited in accordance with the Waqf pledge or for reasons of very urgent religious needs such as to build places of worship, mosques, schools, cemeteries, or other purposes. The reasons like this are not stated explicitly in statutory regulations but can be identified using legal interpretation methods.

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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