



Reconstruction of the Management, Utilization and Sale of *Waqf* Property in Indonesia from the Perspective of *Maqāṣid Ash-Shari'ah*

Herlina Kurniati¹, Muslim²

Lecturer at Faculty of Sharia UIN Raden Intan Lampung, Indonesia^{1,2}

* Corresponding email: herlinakurniati@radenintan.ac.id

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Abstract: *The issue of selling waqf objects has different opinions among scholars, as some scholars of the Mālikī and Shāfi'ī schools of thought are of the opinion that waqf assets cannot be sold or exchanged. Meanwhile, according to the Hanbali school of thought, waqf assets may be traded provided that the waqf assets are no longer productive and the conditions require it. Therefore, because this waqf doctrine is included in the ijtibādiyah issue, it is not a matter of worship (ta'abbūdi). The focus of the problem in this research is how to reconstruct the management, empowerment and trading of waqf assets in Indonesia from the perspective of Maqāṣid Ash-Shari'ah. The method used in this research is typologically, this research is a model of Islamic legal research categorized as qualitative research. Qualitative research is descriptive qualitative, this research is included in the category of library research which aims to explore and search for maqāṣid ash-shari'ah concepts from classical and contemporary uṣūl al-fiqh experts, whose data are obtained from searching for reading sources to obtain primary legal materials, secondary legal materials, and tertiary materials. The results of the research can be concluded that in Indonesia the regulations governing waqf issues can be found in Law No. 41 of 2004 concerning Waqf, which was signed by the President of the Republic of Indonesia (SBY) on October 2, 2004. A few years later, PP No. 42/2006 was issued to implement the law. From the perspective of maqāṣid ash-shari'ah, the management and utilization, including selling waqf assets that are no longer productive, badly damaged, and have almost lost their usefulness, is basically the purpose of the waqf asset itself, which is to fulfill the needs and interests of the community.*

Keywords: *ijtibādiyah; Maqāṣid Ash-Shari'ah; Reconstruction; Productive Waqf*

Abstrak: Persoalan menjualbelikan benda wakaf terdapat perbedaan pendapat dikalangan ulama sebagai ulama pengikut mazhab Mālikī dan Syāfi'ī berpendapat bahwa harta benda wakaf tidak boleh dijualbelikan atau ditukarkan. Sedangkan menurut mazhab Hanbali bahwa harta benda wakaf boleh diperjualbelikan dengan syarat harta wakaf tersebut sudah tidak produktif dan kondisi menghendaki. Oleh sebab itu karena doktrin wakaf ini termasuk pada persoalan *ijtibādiyah*, bukan masalah ibadah (*ta'abbūdi*). Adapun fokus permasalahan dalam penelitian ini bagaimana rekonstruksi terhadap pengelolaan, pemberdayaan serta menjualbelikan harta benda wakaf di Indonesia Perspektif *Maqāṣid Aṣy-Syari'ah*? Metode yang digunakan dalam penelitian ini adalah secara tipologis, penelitian ini merupakan model penelitian hukum Islam yang terkategori penelitian kualitatif. Penelitian kualitatif bersifat deskriptif kualitatif, penelitian ini termasuk kategori penelitian kepustakaan (*library research*) yang bertujuan untuk menggali dan mencari konsep-konsep *maqāṣid aṣy-syari'ah* dari para ahli *uṣūl al-fiqh* klasik dan kontemporer, yang data-datanya diperoleh dari penelusuran terhadap sumber-sumber bacaan untuk mendapatkan bahan hukum primer, bahan hukum sekunder, dan bahan tertier. Hasil penelitian dapat di simpulkan bahwa di Indonesia peraturan yang mengatur persoalan wakaf dapat dalam UU No. 41 Tahun 2004 Tentang Wakaf, yang ditandatangani oleh Presiden RI (SBY) pada tanggal 2 Oktober 2004. Beberapa tahun kemudian diterbitkanlah PP No. 42 Tahun 2006 Tentang

Pelaksanaannya UU tersebut. Dalam perspektif *maqāṣid asy-syari'ah*, pengelolaan dan pendayagunaan, termasuk menjual harta wakaf yang sudah tidak produktif, rusak parah, dan hampir musnah daya manfaatnya pada dasarnya adalah tujuan dari harta wakaf itu sendiri, yaitu untuk memenuhi kebutuhan dan kepentingan Masyarakat.

Kata Kunci: *ijtihadiah; Maqāṣid Asy-Syari'ah*; Rekonstruksi; Wakaf Produktif

■ Introduction

The reconstruction of *maqāṣid ash-shari'ah* means reorganizing *maqāṣid ash-shari'ah* as an approach or method of ijtihad with the principle of "preserving the old that is still good and taking the new that is better (*al-muhāfazah 'alā al-qadim as-ṣālih wa al-akḥḥ bi al-jadid al-aṣlah*)".¹ The emphasis is more on maintaining, updating, and completing the theoretical level that has been formulated by classical and contemporary usul fiqh scholars, including matters relating to the determination of the level and classification of *ḍarūriyyah al-khamsah*, the range of laws covered by *maqāṣid*, the range of people covered by *maqāṣid*, the level of generality of *maqāṣid* in the context of legal *istinbat*, and the division of *maqāṣid ash-shari'ah* into an independent discipline separate from the science of usul fiqh, so that its existence can answer and solve various cases of contemporary Islamic law, one of which is related to the management, empowerment and sale and purchase of waqf assets that arise in the modern era.

Throughout the author's search, there have been many studies that discuss waqf issues, including research conducted by Eka Nur Safitri, Suad Fikriawan, Nafi'ah,

arguing that there are differences in *istinbat* among Shafi'iyah scholars in allowing the sale and purchase of waqf goods resulting from the demolition of mosques because they do not bring benefits to waqf and the sale will bring new benefits to waqf assets, and this is inseparable from the aspect of fairness.² In addition, research conducted by Diniyah Sukma, Eny Lathifah argues that Islamic monetary policy in Indonesia can be developed through digital-based productive waqf instruments developed by Islamic financial institutions in the form of programs managed by waqf management institutions in Indonesia, so as to achieve prosperity in life and prosperity. able to increase the development of Islamic economics.³

Research conducted by Rahman, Faqizida states that in the view of fiqh law the sale and purchase of waqf objects is universally permitted considering that if the waqf object no longer has the usefulness of benefits by considering the provisions of the ijtihad of the fuqaha who are more

² Nafi'ah Eka Nur Safitri, Suad Fikriawan, "Jual Beli Harta Wakaf Bekas Bongkaran Masjid Perspektif Ulama Syafi'iyah," *Al-Musthofa: Journal Of Sharia Economics* 4, no. 2 (2021), <https://ejournal.iaitaboh.ac.id/index.php/musthofa/article/view/627/442>.

³ Diniyah Sukma dan Eny Lathifah, "Wakaf Produktif Berbasis Digital Sebagai Instrumen Pengembangan Kebijakan Moneter Islam," *Al-Musthofa: Journal Of Sharia Economics* 4, no. 1 (2021), <https://ejournal.iaitaboh.ac.id/index.php/musthofa/article/view/631/447>

¹ Said Agil Husin Munawar, *Hukum Islam dan Pluralitas Sosial*, Editor Hasan M. Noer dan Musyafaullah (Jakarta: Penerbit Penamadani, 2005), h. 4.

inclined to the principle of the usefulness of waqf objects by considering Article 5 of the Waqf Law, while in Article 40 it is prohibited to sell waqf objects due to the ijtihad views of fuqaha who are more principled in the permanence of waqf objects and can be subject to criminal sanctions for nazirs and administration for officials who do so based on Article 67 and Article 68 of the Waqf Law.⁴ Furthermore, research conducted by Mohammad Suyudi, Erie Hariyanto states that the act of buying and selling waqf objects is not allowed, this is based on the views of the scholars of the Syafi'i, Maliki and Hambali madzhab, because the object being traded is not an object that is included in the category of objects that can be traded, even the sale and purchase is categorized as a bâthil sale and purchase, because it does not fulfill the conditions of sale and purchase, namely the seller is not the one who has the right to sell the object. While in the view of the Hanafi madzhab scholars it is permissible, because there is already a promising compensation for the sale of the waqf object as one of the requirements as a tradable waqf object. In addition, in terms of muamalah, it includes a valid sale and purchase, which fulfills the pillars and conditions of sale and purchase.⁵

⁴ FaqiAzida Rahman, "Jual Beli Benda Wakaf Dalam Konteks Meningkatkan Sosial Dan Ekonomi Umat" (Palembang: Diss. Universitas Brawijaya, 2016., 2016), <https://repository.ub.ac.id/id/eprint/156125/>

⁵ Erie Hariyanto Mohammad Suyudi, "Jual Beli Benda Wakaf Untuk Pembangunan Masjid Istiqlal Di Desa Palengaan Daja Pamekasan," *AL-DAULAH: JURNAL HUKUM DAN*

From these studies, it can be understood that there are clear differences in the discussion of this article, especially in the method of approach taken, namely the reconstruction of *maqāṣid ash-shari'ah* in the sale and purchase of waqf objects. Although it can be emphasized that there is not a single verse explicitly explaining the doctrine of waqf. There is not even a single verse of the Quranic verses that mention the word '*waqf*' or '*auqāf*'. The basis of waqf doctrine is understood by scholars from the context of the Quranic verses that talk about good deeds (*wa if'alū al-khair*), both universal (*kullīyyah*) and specific (*juṣū'īyyah*), including Q.S. al-Hāj (22), among others. al-Hāj (22), verse 77, which tells us to do good in order to gain victory; Surah al-Imrān (3), verse 92, which explains that one will not achieve perfect goodness until he gives away what he loves; and al-Baqarah (2), verse 261, which encourages believers to spend some of their wealth in the cause of Allah, so that He will reward them with multiple rewards.

Throughout the search, it can be asserted that not a single verse was found that explicitly explains the doctrine of waqf. In fact, there is not even a single verse of the Quranic verses that mention the word '*waqf*' or '*auqāf*'. The basis of waqf doctrine is understood by scholars from the context of the Quranic verses that talk about good deeds (*wa if'alū al-khair*), both universal (*kullīyyah*) and specific (*juṣū'īyyah*), including Q.S. al-Hāj (22), among others.

PERUNDANGAN ISLAM 8, no. 1 (2018), <https://jurnalfsh.uinsa.ac.id/index.php/aldaulah/article/view/665/531>.

al-Hāj (22), verse 77, which tells us to do good in order to gain victory; Surah al-Imrān (3), verse 92, which explains that one will not achieve perfect goodness until he gives away what he loves; and al-Baqarah (2), verse 261, which encourages believers to spend some of their wealth in the cause of Allah, so that He will reward them with multiple rewards.

In addition to these verses, the doctrine of waqf is also understood from the Prophet's traditions, among others: First, the Hadīth addressing the issue of *ṣadaqah jāriyah*, the Prophet said:

عَنْ أَبِي هُرَيْرَةَ رَضِيَ اللَّهُ عَنْهُ أَنَّ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ: إِذَا مَاتَ ابْنُ آدَمَ انْقَطَعَ عَنْهُ عَمَلُهُ إِلَّا مِنْ ثَلَاثٍ. صَدَقَةٍ جَارِيَةٍ أَوْ عِلْمٍ يُنْتَفَعُ بِهِ أَوْ وَلَدٍ صَالِحٍ يَدْعُوهُ. ﴿رواه مسلم﴾

"Abu Hurairah reported that the Prophet said: When the son of Adam (man) dies, his deeds will cease, except for three things: *sadaqah jāriyah*, useful knowledge, and a righteous child who prays for his parents" (HR Muslim)⁶

This Hadīth is included in the chapter on *waqf (al-waqf)* by as-San'āni, because scholars understand and interpret *ṣadaqah jāriyah* as waqf. So one of the good deeds whose rewards continue to flow especially for the deceased is *ṣadaqah jāriyah*, or waqf.

The second Hadīth narrated by Imām an-Nasā'i illustrates the recommendation of endowment in the form of shares (land, gardens):

عَنِ ابْنِ عُمَرَ قَالَ: قَالَ عُمَرُ ابْنُ الْخَطَّابِ لِلنَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: إِنَّ مِائَةَ سَهْمٍ الَّتِي لِي بِخَيْرٍ لَمْ أَصِبْ مَالًا قَطُّ أَعْجَبَ الَّتِي مِنْهَا قَدْ آرَدْتُ أَنْ تَصَدَّقَ بِهَا

فَقَالَ النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: أَحْسِنِ اصْنَعِهَا وَسَبِيلٌ تَمَرَّتْهَا. ﴿رواهُ النَّسَائِيُّ﴾

"From Ibn Umar r.a. he said: Umar ibn al-Khattab said to the Prophet, I have one hundred shares (land, gardens) in Kabibar, I have never acquired such a treasure that I admire the most, but I want to give it in charity. The Prophet said to Umar: Hold on to the principal (do not sell it, give it away, and bequeath it), and give the proceeds to charity" (HR. An-Nasā'i)⁷.

Based on the above, it can be understood that the doctrine of waqf has not been clearly established. Therefore, these verses and traditions cannot be used as legal arguments regarding the necessity of waqf. But it can be positioned as a guide for the mujtahids in legal reasoning when facing waqf problems. Therefore, the doctrine of waqf is a matter of *ijtihādīyah*, not a matter of worship (*ta'abbūdī*). Because it belongs to the realm of *ijtihādīyah*, it means that waqf assets can be managed and utilized productively and professionally to improve social welfare, including technically being able to be sold if conditions require. Such as a plot of land affected by road widening, affected by a toll road construction project, a mosque badly damaged and the road closed by a company's wall, and others. This phenomenon is interested in further research in the form of a research article that focuses on the problem of how is the reconstruction of the management, empowerment and trading of waqf assets? How is the reconstruction of the management, empowerment and trading of waqf assets from the

⁶ As-San'āni, *Subūl al-Salām* (Bandung-Indonesia: Dahlan Thab' alā Nafaqah, t.t.), Jilid. ke 2, Juz ke 3, h. 87.

⁷ An-Nasā'i, *Sunan an-Nasā'i*, Bairut: Dār al-Fikr, Jld. ke 3, Juz ke 5, 1348H/1930 M., h. 234.

perspective of *Maqāṣid Ash-Shari'ah*?

This research focuses on *library research*,⁸ in accordance with the focus of the problem discussed. Library research is conducted with the aim of exploring, searching and finding concepts, theories, and thoughts of Islamic legal theorists (*uṣūliyyin*) about *maqāṣid ash-shari'ah* and its application in legal *istinbat*. In this context, there are several approaches applied in studying *maqāṣid ash-shari'ah*: philosophical approach, historical approach, and interdisciplinary approach.

Lexy J. Moleong explained that doing good analytical work requires systematic data processing by organizing, sorting, grouping, giving codes, and categorizing them.⁹ The organization and processing of data can at least be done manually, namely compiling data in several categories according to criteria that arise logically and the problem to be solved.¹⁰ As for technically, it is done by selecting valid and invalid data, selecting valid data that is relevant to the focus of the research problem, arranged chronologically and systematically.

Data analysis is also called data processing and data interpretation.¹¹ The data that has been collected is classified and then analyzed using *qualitative content analysis* techniques, interpretation methods, and holistic methods.

⁸ Hadāri Nawawī, *Metode Penelitian Bidang Sosial* (Yogyakarta: Gadjah Mada University Press, 1990), h.30.

⁹ Lexy J. Moleong, *op.cit.*, h. 103

¹⁰ Winarno Surachmad, *Dasar dan Teknik Reseach: Pengantar Metodologi Ilmiah* (Bandung: Penerbit Tarsito, 1972), h. 101.

¹¹ Imam Suprayogo, Tobroni, *Metodologi, op.cit.*, h. 191.

Discussion

1. Perwakafan di Indonesia

The terminology of waqf according to the *maḏhab* imams is different in terms of stressing. The Hanafi *Māḏhab* emphasizes that the *waqif* may not take legal action on an object that remains as property, but may donate its benefits to others for the purpose of present and future good. So basically, the waqf asset still belongs to the *wāqif*, what is waqfeded is only the principle of its benefits. If one day *manqūf 'alaih* cannot utilize it properly, then the *wāqif* is allowed to withdraw his waqf property. Meanwhile, the Māliki school of thought seems to emphasize that the *wāqif* restrains the waqf property from being used by ownership (not free to use), but it is allowed to use the proceeds for good purposes reasonably. Therefore, waqf is only valid for a certain period of time, and should not be stipulated as a waqf in perpetuity. In contrast to the emphasis of the two opinions, the Shāfi'i *maḏhab* and Ahmad ibn Hanbal assert that the *waqf* property transfers its ownership from the *wāqif* to another party (*nāẓir*) as its manager whose status becomes the property of Allah, the waqf property cannot be taken back by the *wāqif*, therefore, the *nāẓir* or *manqūf 'alaih* has the obligation to manage it, and utilize the proceeds for good purposes. If the *wāqif* dies, his heirs cannot inherit, sell, and grant the waqf property he has endowed. From some of the terminology of waqf according to the scholars mentioned above, the author can emphasize that *waqf* is holding or perpetuating something that is eternal in substance, cannot be exhausted of its principal and the results can be taken for its benefit

to be utilized in the path of goodness by others who are in dire need on a priority basis, not to be sold, not to be donated, and not to be damaged by the goods (objects) to anyone, while the ownership passes from the *waqif* to Allah.

In addition to the terminological definitions according to the scholars above, in Indonesia, based on waqf legislation, waqf is chronologically mentioned as follows:

Furthermore, in the Basic Agrarian Law (UUPA) Number 5 of 1960, the implementation of which was outlined in Government Regulation (PP) Number 28 of 1977 concerning the Perwakafan of Owned Land, it is stated that waqf is "a legal act of a person or legal entity that separates part of its assets in the form of property and institutionalizes it forever for the benefit of worship or other public purposes in accordance with Islamic teachings".¹² Subsequent developments, followed by various other laws and regulations, then issued a Joint Instruction of the Minister of Religion and the Head of the National Land Agency Number 4 and 24 of 1990 concerning the Certification of Waqf Land. In the following year, the Compilation of Indonesian Islamic Law (abbreviated as KHI) was born on the basis of Presidential Instruction Number 1 of 1991. Book III on the Law of Perwakafan in KHI states that waqf is "a legal act of a person or group of people or legal entities that separates part of their property and institutionalizes it for the benefit of worship or other public purposes in accordance with

Islamic teachings".¹³

The terminology of waqf according to the formulation of PP No. 28 of 1977 and KHI is almost the same redactionally, but substantially there are differences in stressing. The PP emphasizes the waqf of land, while the KHI emphasizes the general nature of waqf, meaning that it is in the form of certain objects that are eternal, long-lasting, and institutionalized forever. The stressing of the KHI, if carefully criticized, seems to be the result of a reconstruction of article 1 (1) of PP No. 28 of 1977, because in terms of time the formulation of waqf in the PP has existed earlier (13 years) compared to that in the KHI.

Meanwhile, the terminology of waqf according to Law Number 41/2004 concerning Waqf, states that waqf is "a legal action of a waqif to separate and/or transfer part of his property to be utilized forever or for a certain period of time in accordance with his interests for the purposes of worship and/or public welfare according to sharia".¹⁴

Based on all the terminology of *waqf*, both according to the scholars and according to the legislation mentioned above, it is clear that in principle there is no fundamental difference, it only occurs in terms of determining the elements that must be fulfilled, and whether the waqf property is still in the hands of the *waqif*, or is in the power of *mauquf'alaib*. In

¹² Lihat, pasal 1 (1) PP No. 28 Tahun 1977 tentang Perwakafan Tanah Milik.

¹³ *Kompilasi Hukum Islam di Indonesia* (Jakarta: Departmen Agama RI Dirjen Pembinaan Kelembagaan Agama Islam, 2000), h. 99.

¹⁴ *Undang-Undang Nomor 41 Tahun 2004 Tentang Wakaf dan Peraturan Pemerintah Nomor 42 Tahun 2006 Tentang Pelaksanaannya* (Jakarta: Departemen Agama Dirjen Bimbingan Masyarakat Islam, 2007), h. 3.

this case, Indonesian scholars generally choose the opinion that the waqf property that has been waqf becomes detached and moves to become the property of Allah, or the property of Muslims.

Starting from the definition of waqf, and the legal arguments (al-Qur'ān and hadith), Islamic jurists formulate and determine the elements of *waqf* (*arkān al-waqf*) as follows: (1) the existence of *wāqif*, i.e. the person who endows the property. (2) *Mauqūf 'alaih*, which is the recipient of waqf, namely certain people such as family, fakir, miskim, ibn sabil, and others. For public purposes such as mosques, madrasas/schools, social institutions, and others. (3) *Mauqūf*, which is the property being *waqf*, and (4) *Ṣigat*, or *waqf* pledge, which is a statement of will from the *wāqif* to endow his property.¹⁵ These four elements of waqf must fulfill certain requirements. **First**, for the *wāqif*, there are several requirements that must be met, namely a person who is free, has reached adulthood, is of sound mind, and is not under guardianship. From these four requirements, it can be understood that the *wāqif* who will donate his property must be a person who is capable of acting legally (*kamāl al-ahliyyah* or *legal competent*). **Second**, *mauqūf 'alaih*, which is the recipient of waqf property, such as family, the poor and needy, ibn sabil and others. The *mauqūf 'alaih* must be present when the *waqf* property is handed over by the *wāqif*, be

professional in owning and managing the waqf property, and must not be someone who disobeys Allah, and must be a trustworthy person whose credibility is not in doubt. In addition, *mauqūf 'alaih* is someone who must be responsible for the maintenance and management of waqf property.¹⁶ **Third**, *mauqūf* (the property being waqf). The waqf asset must be something that is useful for a long period of time, permanent in substance (*baqā' 'ainih*) or durable so that when it is used it will not be quickly damaged, diminished, or depleted, and has value according to Shara'. Then the form of the property is clear, such as mosques, madrasas, or other property, both immovable objects (*al-'aqār*) and movable objects (*al-manquūl*).¹⁷ According to Sayyid Sābiq, it is valid to endow immovable and movable objects that can be separated (distinguished), such as the Quran (*al-muṣṣaḥafah*), books (*al-kutub*), weapons of war (*as-silāh*), and livestock (*al-hayawān*), and it is also valid to endow anything that can be sold and can benefit from it, and must remain (eternal) substance.¹⁸ This view of Sayyid Sābiq can be understood, if the item being endowed is not permanent in substance, such as drinks, food, and the like, even tends to spoil quickly, nor can it be taken advantage of, and it is prohibited to be sold, such as dogs, pigs, and other animals that are prohibited from consumption, then it is not allowed (invalid) to be endowed. **Fourth**, the waqf pledge (*ṣigat*). The *waqf* pledge made by the *wāqif* must be clear, not subject to

¹⁵ Muhammad Muṣṭafā Salabi, *op.cit.*, h. 42. Lihat, Jalaluddin al-Mahalli, *Qalyubi wa 'Umairah* (Semarang: Maktabah wa Maṭba'ah Taha Putra, t.t.), Jld. ke 3, h. 97. Ibn Qāsim al-Gazālī, *al-Baijūri* (Mesir: Dār al-Kutub al-'Arabiyyah, t.t.), h. 42.

¹⁶ Muhammad Jawād Mugniyah, *op.cit.*, h. 312-313.

¹⁷ Al-Khatib, *al-Iqnā'*, *op.cit.*, h. 81.

¹⁸ Sayyid Sābiq, *op.cit.*, h. 382.

any conditions, and must not contain any words that indicate that he will revoke the waqf property by unilateral action, whether the pledge is clear (*ṣarīḥ*) or unclear (*kināyah*). However, the *waqf* pledge uttered by the *wāqif* already indicates *jjāb*, and the *qabūl* statement for *manqūf 'alaih* according to fiqh under certain conditions is not required, but a gesture of acceptance is sufficient.¹⁹

From the elements of waqf and its requirements mentioned above, the main problem arises, is it permissible to sell waqf property in the form of movable or immovable objects? To discuss this issue, it is necessary to first determine the status of *waqf* assets, look at the scholars' understanding of the legal arguments used as the basis for the law of *waqf*, and then determine the legal provisions using the *maqāṣid ash-sharī'ah* approach.

2. Scholars' Views on Selling Waqf Objects

As stated above, *waqf* assets are separated from their owners (*wāqif*) and managers (*nāẓir*), but belong to Allah, or to the Muslim community. Thus, although the benefits can be enjoyed by the *nāẓir* and the community in general where the property is endowed, the endowed property must remain and cannot be owned by anyone individually or institutionally. This statement indicates that no one has the competence to inherit, grant, and sell or exchange it. This is based on the Prophet's hadith narrated by Imām Bukhari and Muslim from Ibn Umar as mentioned above, which states that it is prohibited to sell waqf assets. This prohibition was first uttered by the Prophet during the early

days of the waqf doctrine, when Umar ibn al-Khattāb acquired a large plantation located in Khaibar. To utilize it, Umar asked the Prophet for advice. He then suggested that, if Umar wished, the land be donated to the people who really needed it. At that time the Prophet emphasized that "waqf land cannot be sold, donated and inherited". Umar then implemented his advice, and the proceeds were used for social purposes, such as helping the poor, freeing slaves, and other avenues of goodness.

Methodologically (*uṣūl al-fiqh*), the Hadith narrated by Imām Bukhari and Muslim from Ibn Umar has different understandings among scholars. Some scholars understand the Hadith literally (*al-lugawiyah*), while others understand it substantively (*al-ma'nawiyah*). Among the scholars who understand it literally are some followers of the Māliki and Shāfi'i schools of thought who argue that waqf property cannot be sold or exchanged.²⁰ According to this opinion, a mosque or mosque equipment as a waqf even if it is unusable, severely damaged, or the people who live in it have moved to another place (mosque), and there are no more people passing by there, it can be known and strongly suspected that there are no more people praying in the mosque. Even under such conditions, the mosque cannot be sold, replaced or exchanged (*al-ibdāl wa al-istibdāl*). This is because selling or exchanging waqf assets means breaking the relationship between the mosque and the person who endowed it and others, except with Allah. The *Wāqif* only gets his waqf reward from the asset he endowed, not from other objects he exchanged. Therefore, if the demolished wall of the mosque cannot be

¹⁹ Wahbah az-Zuhaili, *al-Fiqh*, *op.cit.*, Juz ke 10, h. 7606. Al-Khāṭib, *al-Iqna'*, *op.cit.*, h. 82-83.

²⁰ Muwaffiquddin Syamsuddin Ibn Qudāmah (selanjutnya disebut Ibn Qudāmah), *al-Mughni wa Syarḥ al-Kabir* (Bairut: Dār al-Fikr, t.t.), Juz ke 6, h. 251-252.

reused as a wall, it can be used for other purposes for the benefit of the mosque, not sold.

Some scholars who understand the above Hadīth of Ibn Umar substantially are the Hanbali school. According to them, the prohibition of selling waqf assets (*la yubā'u*) in the Hadīth is only for waqf assets that can still be utilized. Meanwhile, waqf assets that have been damaged, or can hardly be utilized anymore may be sold, and the money bought back a replacement. Furthermore, according to this opinion, it is permissible to sell a mosque if the inhabitants of the mosque have moved away, so that no one prays in the mosque, or there are not enough people there, and it is impossible to expand the mosque or build part of it, except by building part of it. Also, if there is something in the mosque that cannot be used except by selling it, then it is permissible to sell it.²¹ As for exchanging or replacing waqf assets with other assets, Ibn Taimiyyah al-Hanbali (d. 728 AH) stated by stating the opinion of Ahmad bin Hanbal that waqf other than mosques may be exchanged for better ones to be waqf. Likewise, exchanging a mosque that can still be utilized for a mosque that is of greater benefit to the *jama'ab*, there are two narrations from Ahmad bin Hanbal, one that allows it and one that does not allow it. Ibn Taymiyyah chose the first opinion that allows it. Ibn Taymiyyah's view is based on a narration by Abū Bakr 'Abd al-'Aziz in his book "*asb-Shāfi'*" which relates that, when a companion of 'Abdullāh ibn Mas'ūd went to see the Treasury in Kūfah, Baghdad, the Treasury inside the mosque was broken into by thieves. This incident was immediately reported to Caliph Umar ibn al-Khattāb in Medina. Umar ordered that the mosque

be moved to a safer place, and the treasury be placed near the mihrāb of the mosque, because it would always be seen by the people who prayed in turn. The followers of the Hanbali school used this incident as a basis for the validity of exchanging or moving the mosque from one place to a place that is better and more beneficial for the *jama'ab*. Similarly, exchanging waqf land for land that is better and strategically located for the benefit of the *congregation*.²²

Of the two patterns of scholars understanding of Ibn 'Umar's hadith above, the author is more inclined to the second opinion, where the hadith is understood with a substantial approach. It should be emphasized here that history has recorded that the recommendation of waqf was prescribed during the time of the Prophet Muhammad, after he migrated to Medina, in the second year of hijriyah, and the first person to implement the waqf shari'a was the Prophet Muhammad, by donating a piece of land to build a mosque.²³ The purpose of waqf is none other than for the benefit of the *congregation*, namely to fulfill the needs and interests of the community, especially those of the *mustad'afin* (poor, poor, poor families, etc.). This waqf tradition was then followed by the Companions, such as 'Umar ibn al-Khattāb, Abu Bakr, Usmān ibn 'Affān, 'Ali ibn Abi Ṭalib, Abū Talhah, Mu'āz ibn Jabal, Ānas ibn Mālik, 'Abdullah ibn 'Umar, Zubair ibn 'Awwām, and 'Āisyah, the Prophet's wife.²⁴

²² Taqiyuddin Abū al-'Abbās Ahmad ibn al-Hālim ibn 'Abd as-Salām ibn Taimiyyah (selanjutnya disebut Ibn Taimiyah), *Majmū'ah Fatawā Ibn Taimiyyah* (Bairut: Dār al-Fikr, 1400 H/1980 M), Jld. ke 16, Juz ke 31, h. 118-119.

²³ *Fiqh Wakaf* (Jakarta: Direktorat Pemberdayaan Wakaf Dirjen Bimas Islam Departemen Agama RI, 2007), h. 4

²⁴ Abū Bakar Ahmad bin al-Husain ibn 'Āli al-Baihaqī, *as-Sunan al-Kubrā* (Bairut: Dār as-Sadir, t.t.), Juz ke 6, h. 161.

²¹ *Ibid.*, h. 251.

3. Reconstruction of Management, Empowerment and Sale of Waqf Property in Indonesia

Historically, the enactment of perwakafan legislation in Indonesia when traced further, and referring to historical facts can at least be distinguished in three periods, namely the period before independence, the period after independence, and the period after the enactment of Government Regulation (PP) No. 28 of 1977 concerning Perwakafan Tanah Milik.

a. Before the Independence of the Republic of Indonesia

The institution of waqf in Indonesia has actually been implemented by Indonesian Muslims since Islam came and developed through kingdoms such as the Demak kingdom in Java, the Pasai kingdom in Banda Aceh, and others, because the doctrine of waqf is actually derived from Islamic teachings. But in practice in the community, it is justified in Indonesian customary law.²⁵ This can be seen in the past when people built mosques, muşallā, surau, etc. by working together. For the orderly administration of waqf management, the Dutch Colonial Government issued various regulations governing waqf issues, including:

First, the Circular Letter of the Secretary of the First Government dated January 31, 1905 No. 435, as contained in Bijblad 1905 No. 6196 concerning *Toeziçt op den bouw van Muhammedaansche bedehuisen*. Although this Circular Letter did not specifically

regulate waqf, it stated that the government did not intend to prohibit Muslims from fulfilling their religious needs. For example, the government allowed the establishment of places of worship if they were really desired by the general public. The Circular Letter was addressed to the Heads of Regions in Java and Madura, except for the Swapraja areas, as long as there had been no registration of lands, or houses of worship for Muslims in their respective Regencies. In the list, the origin of the land, whether or not it has a yard, from whose waqf, and so on, should be proposed.

Second, the Circular Letter from the Secretary of the Government dated June 4, 1931 No. 1361/A, which was published in Bijblad 1931 No. 125/3 concerning *Toeziçt van de Regeering op Muhammedaansche bedehuisen, Vrijdagdiensten en mokaaf*. The Circular Letter basically stated that the Bijblad of 1905 No. 6169 should be taken into account, with the intention of obtaining a register that is useful for obtaining legal certainty of the existence of waqf land.

Third, the Circular Letter of the Secretary of the Government dated December 24, 1934 No. 3088/A as contained in Bijblad 1934 No. 13390 concerning *Toeziçt van de Regeering op Muhammedaansche bedehuisen, Vrijdagdiensten en mokaaf*. This Circular Letter only emphasized what was mentioned in the previous Circular Letter, which gave the Regent the authority to lead and settle cases, in the event of a land dispute as long as it was requested by the parties to the dispute.

²⁵ A. Faishal Haq dan Saeful Anam, *Hukum Wakaf dan Perwakafan di Indonesia*, Cet. Ke 4 (Surabaya: PT GBI, 1994), h. 30-31.

Fourth, the Circular Letter of the Secretary of the Government dated 27 May 1935 No. 1273/A as contained in *Bijblad* 1935 No. 13480. This Circular Letter is also a confirmation of the previous circular letters, namely regarding the procedures for waqf, as a provision of *Bijblad* No. 6169/1905 which emphasizes that all waqf land be properly registered.

b. After the Independence of the Republic of Indonesia

Legislation on land trusts issued during the Dutch colonial rule, since the Proclamation of Independence of the Republic of Indonesia on August 17, 1945 is still in effect, based on the provisions of Article II of the Transitional Rules of the 1945 Constitution: "All existing State Bodies and Regulations are still in effect as long as a new one has not been made according to this Constitution." To adapt to the conditions of the independent Indonesian nation, several instructions regarding waqf were issued by the Ministry of Religious Affairs of the Republic of Indonesia dated December 22, 1953 concerning Instructions Regarding Waqf. Henceforth this *perwakafan* is the authority of section D (social worship), *Jawatan Urusan Agama*. On October 8, 1956, Circular Letter No. 5/D/1959 was issued concerning Land Trust Procedures. As the implementation of the aforementioned laws and regulations on land ownership was deemed inadequate, and there were still many weaknesses here and there, Law No. 5 of 1960 on the Basic Regulation

of Agrarian Principles (UUPA) was enacted. Article 49(3) of this Act states that "The perpetuation of the ownership of land is protected and regulated by Government Regulation."

c. Land Trust After the Enactment of Government Regulation No. 28 of 1977

As the author has alluded to above, the laws and regulations regarding this waqf still have weaknesses here and there, then finally promulgated Law No. 5 of 1960 concerning Basic Regulations on Agrarian Principles, article 49 (3) which confirms that the waqf of property land is protected and regulated by PP, then the government on May 17, 1977 stipulated PP No. 28 concerning the waqf of Property Land. *The background* considerations for the issuance of this PP are stated as follows: (a) Waqf is a religious institution that can be used as a means for the development of religious life, especially for Muslims, in order to achieve spiritual and material welfare towards a just and prosperous society based on Pancasila. (b) The current laws and regulations governing the waqfing of property, apart from not fulfilling the need for ways of waqfing, also open up the possibility of unwanted things arising due to the absence of accurate and complete data on the lands being waqfed. With the enactment of Government Regulation No. 28 of 1977, all previous laws and regulations concerning waqf, to the extent that they conflict with this Government Regulation, are declared invalid. Meanwhile, matters that have not been regulated in this

Government Regulation will be further regulated by the Minister of Religious Affairs and the Minister of Home Affairs in accordance with their respective fields.

From time to time until the enactment of UUPA and PP No. 28 of 1977, it turns out that Indonesian Muslims are still accustomed to using religious traditions in terms of waqf, such as their habit of doing land waqf legal acts orally on *the* basis of mutual trust in individuals, or institutions, believing that waqf property as a good deed in the sight of Allah, moves to belong to Allah without having to be represented procedurally administrative, and Allah will take care of it. In addition to these traditions and beliefs, Indonesian Muslims follow the Syāfi'iyah school of thought in making *waqf* pledges, the assets that can be *waqfed* (*mauqūf bih*), the position of the assets after they are waqfed, who the assets are intended for, whether or not they can be exchanged, and/or sold. This kind of waqf tradition then raises the problem of waqf in Indonesia which is not encouraging, because it does not develop, is not managed and utilized productively-professionally, has no economic value, *the* management institution (*nāzīr*) is not professional because the resources of *nāzīr* are relatively unqualified, waqf assets are generally in the form of immovable objects, such as land, many cases of waqf land and other waqf assets are lost. Starting from the "*moribund*" condition of waqf in Indonesia, the Indonesian government felt responsible,

interested in fixing and perfecting the waqf regulations, so Law No. 41 of 2004 concerning Waqf was enacted, which was signed by the President of the Republic of Indonesia (SBY) on October 2, 2004. A few years later, PP No. 42 of 2006 was issued regarding its implementation.

With the enactment of Law No. 41 of 2004, and PP No. 42/2006, waqf in Indonesia began to find its identity, by making updates in various fields of management and utilization. This is certainly a significant reconstruction, because this law has regulated productive *waqf* products such as *cash waqf*, shares, or other securities, which technically the management mandated to the *nāzīr* institution can be optimized. The use value of this management and development can be utilized for the benefit of many people. Such management is envisioned to mobilize the entire potential of waqf for the welfare of Indonesian society in general.

The enactment of Law No. 41 of 2004, and Government Regulation No. 42 of 2006 when compared to other countries such as Saudi Arabia, Egypt, Malaysia,²⁶ and others can be

²⁶ Chairman of Jabatan Wakaf, Zakat and Hajj (JAUHAR) Datuk Anam when meeting with Director General of Islamic Guidance Abdul Djamil in Jakarta, May 2011 said that Malaysia has eleven thousand waqf land locations. The waqf land is designated, among others, to build waqf hotels. Malaysia has four waqf hotels in Trengganau, Perak, Malacca and Negeri Sembilan. Waqf hotels give positive results, all guests feel cool staying in waqf hotels, both Muslim guests and non-Muslim guests. See, <http://Indonesiarayanews.com/news/kronik>,

said that in Indonesia based on these laws and regulations the management and utilization of waqf assets is quite good, but not optimal. This can be seen in terms of land utilization that is still managed traditionally, such as mosques located on large waqf lands only for worship, educational institutions (madrasah) are only limited to learning, and burial grounds are only limited to burying the dead. Such land utilization and allocation is clearly unproductive. Future management should be more optimized to successfully meet the needs and welfare of the people. For example, waqf land is leased for per-pit graves with a certain time limit, building learning institutions, training places and training that have economic value. The mosque, in addition to being a place of worship, is also designed to be an adequate facility and infrastructure with high economic value, and is managed professionally. Aside from that, the institution of *nāzīr* as the trustee should ideally be qualified, have advanced and productive understanding so as to be able to manage, empower and develop waqf objects, but so far *nāzīr* is still entrusted to religious leaders who do not understand the business world and business. To make matters worse, many waqf lands are still not certified, and as a result, many waqf lands are not legally protected, and even become civil cases against the plaintiffs (heirs

of the waqf) in court.

Indonesia, through the Indonesian Waqf Board (BWI), should learn and do much like countries in the Islamic world, such as establishing waqf hotels in 33 provinces, constructing apartment buildings, national and international conference halls. These ideas and thoughts have actually been discussed by the Chairman of BWI (KH. Tolhah Hasan) by saying that the role and function of waqf as an instrument of people's economic development is very beneficial. However, the development of productive waqf in Indonesia is not maximized properly. As a result, the development of waqf funds is still inferior compared to other countries in the Southeast Asian region.²⁷

In relation to the not optimal management and empowerment of waqf in Indonesia, Muhammad Syaffi Antonio said that we are now entering a period of total waqf empowerment involving all the potential of the community with full support, namely Law No. 41/2004 on Waqf, the role of the Regional Autonomy Law, the role of regional regulations, national monetary policy, tax laws and so on.²⁸ Indonesia inevitably has to learn from modern Muslim countries with advanced waqf management and empowerment, such as Egypt, Turkey, Saudi Arabia, Jordan, Qatar, Kuwait, Morocco, Bangladesh, Pakistan, and Malaysia. As a comparative example,

November24, 2012, *Malaysia's Waqf Management is more advanced, Indonesia's not optimal*, p. 2. 2.

²⁷ *Ibid.*

²⁸ Ahmad Djunaidi dan Thobieb Al-Asyhar, *op.cit.*, h. vii.

Antonio pointed out that around the Grand Mosque and the Prophet's Mosque today, which were once waqf lands, there are several business places as powerful economic engines, such as hotels, restaurants, apartments, commercial centers, government centers, and so on.²⁹

Starting from the description of *waqf* management, empowerment, and development in Southeast Asia and the Middle East in general, I can emphasize that Indonesia is far behind in terms of *waqf* management, empowerment, and development, both *cash waqf* and productive waqf.

4. Reconstruction of the Management, Empowerment and Sale of *Waqf* Property from the Perspective of *Maqāṣid Ash-Shari'ah*

Given that waqf is an *ijtihādiyyah* issue, there are differences in the meaning of waqf in terms of stressing, for example, the Hanafi Maḏhab emphasizes that the *waqif* may not take legal action on an object that remains as property, but may donate its benefits to others with the aim of goodness in the present and future. So basically, the waqf asset still belongs to the *waqif*, what is waqfed is only the principle of its benefits. If one day *mauquf 'alaih* cannot utilize it properly, then the *waqif* is allowed to withdraw his waqf property. Meanwhile, the Māliki school of thought seems to emphasize that the *waqif* restrains the waqf property from being used by ownership (not free to use), but it is allowed to use the proceeds for good purposes reasonably. Therefore,

waqf is only valid for a certain period of time, and should not be stipulated as a waqf in perpetuity. In contrast to the emphasis of the two opinions, the Shāfi'i maḏhab and Ahmad ibn Hanbal assert that the *waqf* property transfers its ownership from the *waqif* to another party (*nāẓir*) as its manager whose status becomes the property of Allah, the waqf property cannot be taken back by the *waqif*, therefore, the *nāẓir* or *mauquf 'alaih* has the obligation to manage it, and utilize the proceeds for good purposes. If the *waqif* dies, his heirs cannot inherit, sell, and grant the waqf property he has endowed. From some of the terminology of waqf according to the scholars mentioned above, the author can emphasize that waqf is holding or perpetuating something that is eternal in substance, cannot be used up, and the proceeds can be taken to be utilized in the way of goodness by other people who are in dire need on a priority basis, not to be sold, not to be granted, and not to be damaged by the goods (objects) to anyone. Meanwhile, the ownership passes from the *waqif* to Allah.

From the perspective of *maqāṣid ash-shari'ah*, Ibn 'Umar's Hadīth, which informs us about the Apostle's instruction to 'Umar: "If 'Umar wants, he should endow the land to someone who needs it. But at that time, the Apostle emphasized that waqf land cannot be sold, donated, or inherited" indicates and can be understood that waqf assets can be managed professionally by individuals or entities, or an institution called *nāẓir*: The substance of the Prophet's order to Umar is not merely the maintenance of the waqf object,

²⁹ *Ibid.*

but far more important is the value of the benefits of the waqf property to meet the needs and interests (benefit) of the people. The waqf assets, which are quite potential, have not been managed and utilized optimally in Indonesia, still far from the expectations of the people, because Indonesian Muslims in general, there is a kind of claim to adhere to and take the opinion of the Māliki and Shāfi'i schools of thought that emphasize the importance of maintaining permanence, may pledge verbally, waqf property belongs to God, very high trust in the *nāẓir*, may not be sold, donated, inherited, and exchanged for other objects even if the object is damaged, and the value of its benefits is almost extinct. As a consequence of adhering to this opinion, it seems that it causes inflexibility, lack of context, and future prospectivity.

From the perspective of *maqāṣid ash-shari'ah*, the management and utilization, including selling waqf assets that are no longer productive, severely damaged, and have almost lost their usefulness, is basically the purpose of the waqf asset itself, which is to fulfill the needs and interests of the community. The needs here are either consumptive or productive. This can certainly be fulfilled if the waqf assets can be managed and utilized professionally, in the sense of being appropriate, and right on target. Theoretically normative, the doctrine of classical waqf fiqh needs to be changed with a contextual, flexible, and *futuristic* (future-oriented) *mutasyabihat* understanding. Thus, the understanding that waqf assets cannot be sold, exchanged, and empowered is time to be abandoned. Waqf management,

which has been done as it is, needs to be improved by using a modern management system, managed and developed in a professional productive manner. Likewise, the institution and management of *nāẓir*-an need to be changed and improved to be more professional, and the recruitment of human resources really meets the criteria and requirements that have been determined. Meanwhile, at the applicative level of implementation, waqf as an instrument of people's economy, as well as a considerable potential to be managed and utilized in line with the demands of the modern era. This is based on data owned by the Ministry of Religious Affairs, that the wealth of waqf in the form of land in Indonesia is very large in number (403,845 locations with an area of 1,566,672,406 M²), 75% have been certified, and around 10% have high economic potential³⁰ Data from 2011 showed 426,003 locations with an area of 3,492,045,373,754 M², or 349,204,537 Ha. Meanwhile, only 282,321 locations have been certified, and 132,396 locations have not been certified. This data shows that the amount of waqf assets, in this case especially land and buildings, is a huge opportunity for the economic development of the ummah in the present, medium and future. The vast potential of waqf land that may be strategically located, such as on the side of a highway, in a shopping area, etc., allows it to be managed and developed productively. For example, a mosque can be built on top of it, and a

³⁰ Lihat, Ahmad Djunaidi dan Thabieb Al-Asyhar, *Menuju Era Wakaf Produktif*, Pengantar Muhammad Syafi'i Antonio, Cet. Ke 4 (Depok Jakarta: Mumtaz Publishing, 2007), h. 76.

meeting hall, shop, office, etc. can be built underneath to be managed by the waqf owner, or rented out, and the proceeds can be used to pay for the maintenance of the waqf building, and/or for the cost of fostering the empowerment of the weak economy of the surrounding *mustad'afin* groups. For example, in Lampung, the Al-Furqān mosque in Lungsir has been able to economically finance the maintenance of the building, etc., from the rent. Other examples that the author is aware of that manage waqf land productively and well are the Foundation for the Maintenance and Expansion of Waqf of Pondok Modern Gontor, East Java, the Waqf Board of Universitas Islam Indonesia (UII) Yogyakarta, the Waqf Board of Universitas Muslim Indonesia (UMI) Makassar, the Paramadina Waqf Foundation, Jakarta, and others.

Thus, if the verses and traditions on which the doctrine of *waqf is* based are understood in a contextual *mutasyabihat manner*, then the *waqf* assets can be managed and utilized productively in a professional manner in the form of *cash waqf*, etc. All of these efforts are none other than the *maqāṣid of waqf*. All of these efforts are none other than the *maqāṣid* for the benefit of improving the welfare of the people.

• Conclusion

Based on the explanation above, this research can be concluded as follows;

Historically, the enactment of perwakafan legislation in Indonesia when traced further, and referring to historical facts can at least be distinguished in three

periods, namely the period before independence, the period after independence, and the period after the enactment of Government Regulation (PP) No. 28 of 1977 concerning Perwakafan of Owned Land.

Starting from the condition of waqf in Indonesia which is "*moribund*", the Indonesian government feels responsible, has an interest in fixing, and perfecting the rules of waqf, so Law No. 41 of 2004 concerning Waqf was promulgated, which was signed by the President of the Republic of Indonesia (SBY) on October 2, 2004. A few years later, PP No. 42 of 2006 was issued regarding its implementation.

With the enactment of Law No. 41 of 2004, and PP NO. 42/2006, waqf in Indonesia began to find its identity, by making updates in various fields of management and utilization. This is certainly a significant reconstruction, because this law has regulated productive *waqf* products such as *cash waqf*, shares, or other securities, which technically the management mandated to the *nāzīr* institution can be optimized. The use value of this management and development can be utilized for the benefit of many people. This kind of management is envisioned to mobilize the entire potential of waqf for the welfare of Indonesian society in general. From the perspective of *maqāṣid ash-shari'ah*, the management and utilization, including selling waqf assets that are no longer productive, badly damaged, and have almost lost their usefulness, is basically the purpose of the waqf asset itself, which is to fulfill the needs and interests of the community. The needs here are either consumptive or productive.

This can certainly be fulfilled if the waqf assets can be managed and utilized professionally, in the sense of being appropriate, and right on target.

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