

COMPENSATION SYSTEM OF *WAQF* LAND ACQUIRED FOR DEVELOPING PUBLIC INTEREST

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Abstract

A number of activities related to land acquisition for public interest use waqf. The principle of waqf is derived from Islamic Law in which wakif (the owner) donates waqf (in the form of land) to nazhir (the manager of the edified property) for worship purposes. The problems in this paper consist of whether there is a system regarding waqf land acquired for public interest, and how compensation and supervision are given regarding waqf land acquired for developing public interest. Using normative legal research with legislation and conceptual approach, this paper argues that acquisition of waqf land is regulated in Law No. 2/2012 on Land Acquisition for Developing Public Interest and Law No. 41/2004 on Waqf. It is regulated that compensation will be given to nazhir for waqf land acquired. It also regulates that the status of waqf land can be changed into non-waqf one for public interest through exchange mechanism. In order to provide legal certainty over waqf land acquired for public interest, legislation on land acquisition needs to be harmonized with legislation on waqf.

Keywords: *Waqf Land; Land Acquisition; Public Interest*

1. Introduction

The need for land for developing public interest through land acquisition can be fulfilled not only from state land but also from private land. Private land refers to the land which has a right of ownership. Land acquisition for public interest in order to improve public welfare corresponds to the concept of rule of law. As a legal basis in Indonesia, the preamble of the 1945 Constitution, specifically the fourth paragraph, philosophically states that one of the national goals is to improve public welfare. The concept of the rule of law cannot be separated from its element, legal sovereignty. The basic idea of welfare nation, as stated by Watts, Dalton, and Smith already existed in the 18th century when Jeremy Bentham (1748-1832) explained the notion that government had responsibility in ensuring the greatest happiness (welfare) of the greatest number of their citizens¹. This means that it is obligatory for governments to provide happiness for their citizens.

The government must not play passive roles; in other words, they need to be actively involved in providing the means of improving public welfare by regulating economic and social life. Bentham uses the term of utility in explaining the concept of happiness or welfare. He also argues that governments have an obligation to provide happiness for the greatest number of their

¹ Judith Bessant, *Talking Policy: How Social Policy is Made* (Crows Nest: Allen and Unwin, 2006).

citizens. In addition, Bagir Manan states that rule of law is a principle in which a state or government does not only merely function as the guardian of public security and order, but they also have responsibility to achieve social justice and public welfare to the greatest extent².

One way to achieve community welfare is to build and provide public facilities. In fact, due to the increasingly widespread development of public facilities carried out by the government, land acquisition is very likely to involve waqf land. Waqf is a noble act in Islam, and it is highly recommended to get closer spiritually to Allah³. There are differences of opinion among scholars regarding the term waqf. Differences cause different laws to be applied⁴. Waqf is considered an institutionalized legal act that has long been implemented in Indonesia. As a regulator, the government provides a set of regulations in the field of national land in the form of a written law and then the implementation of law enforcement in the form of implementing land registration effectively to achieve legal certainty. Land rights are recognized by the government, one of which is waqf land rights⁵. Provisions regarding legal sources, procedures, and waqf practices are contained in Law Number 5 of 1960 concerning General Provisions on Agrarian Principles, Government Regulation Number 28 of 1977 concerning Development of Owned Land, Book III of Compilation of Islamic Law issued through Presidential Instruction 1 Year 1991, Law Number 41 of 2004 concerning Waqf, and Government Regulation Number 42 of 2006 concerning the Implementation of Law Number 41 of 2004 concerning Waqf. Waqf according to the constitution is defined as a legal act to build or donate some assets to be used permanently or for a certain period of time for purposes of worship (religious interests) or general welfare based on sharia law.⁶

In order to achieve its goals and functions, *waqf* property, as regulated in Article 22 of Law No. 41/2004, only serves the following purposes: a) Infrastructures of worship/religious activities; b) Infrastructures of education and health activities; c) Assistance to the poor, abandoned children, orphans, scholarships; d) Improvement of public economy; and/or e) Improvement of other public welfare which corresponds to the sharia law and constitution.

With regard to the list above, the functions of *waqf* property must be determined by *wakif* (the owner) when making the pledge. If the owner cannot determine the functions, *nazhir* (the

² Abrar Abrar, "Hak Penguasaan Negara Atas Pertambangan Berdasarkan Undang-Undang Dasar 1945" (Universitas Padjajaran, 1999).

³ Jaih Mubarak, *Wakaf Produktif* (Bandung: Rafika Offset, 2008).

⁴ Oyo Sunaryo Mukhlas, *Pranata Sosial Hukum Islam* (Bandung: Refika Aditama, 2015).

⁵ Kurnia Rheza Randy Adinegoro, "Perubahan Status Harta Benda Wakaf Berupa Tanah," *Jurnal Pertanahan* 11, no. 1 (2021), <https://103.123.13.129/index.php/jp/article/view/38>.

⁶ "Wakaf" (Indonesia, 2004).

manager of edified property) can determine the functions based on the objectives (as stated in Article 22 Law No. 41/2004)⁷. Land acquisition for developing public interest through *waqf* land is interpreted as a goal and function of *waqf* property which is “used for improving public welfare and corresponds to the sharia law and constitution”. Through Government Regulation Number 1 of 2008 concerning Procedures for Applications for Exchange/Change of Status of Waqf Assets, it is indicated that changes in the status of waqf objects are prohibited except with written permission from the Minister based on the consideration of the Indonesian Waqf Board.⁸

Developing infrastructure for the public interest by using *waqf* land often prompts problems such as disputes, disagreement, or conflict regarding the compensation for the use of *waqf* land. Thus, the problems that will be addressed in this paper consist of: 1) whether there is a system regarding *waqf* land acquired for public interest, and 2) how compensation and supervision are given regarding *waqf* land acquired for developing public interest.

2. Discussion

2.1. System of *Waqf* Land Used for Public Interest

Waqf land refers to land which has a right of ownership and has been edified by an individual or legal entity by donating some of their property (land) and permanently institutionalizing it as social *waqf*⁹. Based on Law of *Waqf* Article 16, it is stated that the objects (including inanimate one) which are eligible for being *waqf* consists of: a) Right of land ownership according to the existing constitution, both the registered and unregistered ones; b) Structures or part of structures standing thereon; c) Plants and other objects related to the land; d) Ownership right of apartment according to the existing constitution; and, e) Other inanimate objects according to the existing sharia law and constitution.

Moreover, in paragraph (1) Article 17 of Government Regulation No. 42/2006, types of ownership right of land which can be edified involve: a. ownership right of registered and unregistered land; b. ownership right of land and apartment according to the existing constitution; c. right of use of structures, right to cultivate, and right of use; right of use of structures standing

⁷ Ibid.

⁸ Ali Salama Mahasna and Nani Almuin, “Analisis Hukum Tukar Guling Tanah Wakaf: Studi Kasus Tanah Wakaf Di Indonesia,” *Al-Awqaf: Jurnal Wakaf dan Ekonomi Islam* 12, no. 1 (2019): 86–104, <https://jurnal.bwi.go.id/index.php/awqaf/article/view/14>.

⁹ Boedi Harsono, *Hukum Agraria Indonesia: Sejarah Pembentukan Undang-Undang Pokok Agraria, Isi, Dan Pelaksanaannya* (Jakarta: Djambatan, 1997).

thereon the land with a right of management or private ownership which requires written permission from the official holding the right.

Within the national agrarian law, the system of *waqf* land is stipulated in Article 49 paragraph (3) of the Basic Agrarian Law stating that edification of owned land is protected and regulated by Government Regulation. More specifically, the regulation created to specify the provisions in Article 49 paragraph (3) of the Basic Agrarian Law refers to Government Regulation No. 28/1977 on Edification of Owned Land. Owned land is defined as land with a right of ownership. This corresponds to the definition of *waqf* stated in Government Regulation No. 28/1997 which refers to “legal action of an individual or legal entity to donate part of their property and permanently institutionalize it for worship or other public purposes based on Islamic laws”. The term ‘permanently’ means that *waqf* land is not limited in terms of period. In its development, regulations on *waqf* are further stipulated in Law No. 41/2004 on *Waqf* Land. The inclusion of *waqf* regulations in law is based on the consideration that legal action of *waqf* has been implemented for a long time, yet the regulations have not been comprehensive and widely spread. The Law of *Waqf* was initially implemented through Government Regulation No. 42/2006 on the Implementation of Law No. 41/2004 on *Waqf*, which was further changed into Government Regulation No. 25/2018. In *Waqf* Law and its implementing regulations, land which is eligible for *waqf* is not limited to land having ownership rights. This also follows the definition of *waqf* in *Waqf* Law that it refers to legal action of *wakif* to separate and/or donate part of their property to be used permanently or for a certain period for worship and/or public welfare purposes based on sharia laws. The terms ‘for a certain period’ enable a right of land without right of ownership to be edified. This includes right of use of structures, right to cultivate, right to use state land, or right of use on right of management and right of ownership having written permission from the holder.

In order to declare that *waqf* land is considered valid, the provisions in Article 2216 of the Compilation of Islamic Law (KHI) must be considered properly, including: *Waqf* is handed over forever; *Waqf* may not be withdrawn, either by the perpetrator or his heirs; *Waqf* assets may not be transferred for purposes that are contrary to the purpose of the *waqf* itself; and every *waqf* property must be used in accordance with the purpose of *waqf* in general.¹⁰

Basically, all regulations regarding *waqf* have regulated the utilization of *waqf* property in accordance with its function, one of which is the economic benefit of the *waqf* property for the

¹⁰ Fatimah Fatimah, “Pendaftaran Tanah Wakaf Dalam Konteks Kepastian Hukum Hak Atas Tanah,” *Jurnal Hukum Samudra Keadilan* 13, no. 2 (2018): 286–294, <https://ejournalunsam.id/index.php/jhsk/article/view/908>.

benefit of worship and also to promote public welfare. The enactment of waqf law on a matter will apply if there is a statement from the party who is waqf his property, this opinion is based on Islamic law. Meanwhile, according to positive law, the implementation of waqf must be carried out with a pledge made in the presence of the Waqf Pledge Deed Official (PPAIW) and two witnesses and must be made in the form of a Waqf Pledge Deed (AIW).¹¹

After the determination of land to be handed over to Nazhir there is an obligation to register it with the local Land Office, this step is taken to give legal force to a land if in the future it experiences a dispute. Giving trust to nazhir to be registered is a pending factor to influence nazhir's behavior. The limited knowledge that nazhir has to register waqf land so that it has a certificate is a preventive step in reducing waqf land problems in Indonesia.¹²

Article 40 of *Waqf* Law also contains 7 prohibitions on *waqf* property (including land). The property is strictly prohibited from being used as collateral, confiscated, granted, sold, inherited, exchanged, or transferred in any form of right transfer. Despite the prohibition, *waqf* land is allowed to be exchanged if it is used for public interest in accordance with spatial plan which follows prevailing legislation and sharia laws. In other words, the status of *waqf* land as part of *waqf* property can be changed from *waqf* land to non-*waqf* land due to its function in developing public interest. The land used for public interest must be exchanged for replacement land. There are two essential elements in changing status from *waqf* land to non-*waqf* land: its function to develop public interest and its exchange method. The change must receive written permission from the Minister of Religious Affairs based on approval from the Indonesian *Waqf* Agency. Government Regulation No. 25/2018 emphasizes that the status change is prohibited unless there is written permission from the Minister of Religious Affairs based on approval from the Indonesian *Waqf* Agency. Issuing written permission from the Minister is based on the consideration that *waqf* land is used for public interest in accordance with spatial plan which follows prevailing legislation and sharia laws.

In general, Indonesian Muslims understand that the allocation of waqf is only limited to the interests of worship and things that are commonly carried out in Indonesia such as mosques, prayer rooms, schools, graves and so on. So it can be said that in Indonesia currently the potential of waqf

¹¹ Aurelia Nadya Pricilia Tjung, Debby Eka Kartikasari, and Choiryzha Rochmatul Hilma, "Kedudukan Tanah Wakaf Yang Dikuasai Ahli Waris," *Perspektif* 24, no. 2 (2019): 106–117, <http://jurnal-perspektif.org/index.php/perspektif/article/view/704>.

¹² Variahatul Ratnasari and Ahmad Ajib Ridlwan, "Persepsi Nazhir Dalam Pendaftaran Tanah Wakaf," *Muqtasid: Jurnal Ekonomi dan Perbankan Syariah* 10, no. 2 (2019): 80–94, <https://muqtasid.iainsalatiga.ac.id/index.php/muqtasid/article/view/2843>.

as a means of making policies for the benefit of the community has not been managed and utilized optimally within the scope of the national economy.¹³ In society, waqf is seen in 3 forms, including immovable and movable objects, land and buildings on it, and the granting of rights based on wills.

The dominance of land waqf that occurs in Indonesia makes the government have several alternatives in obtaining land for the needs of the public interest. Along with the development in the process of changing the status of waqf land into non-waqf land, various obstacles were found, such as waqf land that was neither certified nor properly recorded by an official body. Therefore, it is necessary to settle in advance so that the land can be used by the government for other facilities. Indeed, in waqf, the basic rules are closely related to Islamic law through the Compilation of Islamic Law (KHI) which is the regulation of Islamic law in Indonesia which includes the waqf process.¹⁴

However, the implementation of changing the status of waqf to non-waqf is a gap from the limitations and corners of the government for the welfare of the people through the construction of facilities to support people's lives. The use of waqf land in waqf law must not leave the original purpose so that the waqf (wakif) gives its rights to individuals or institutions that administer it.¹⁵ Islam emphasizes and is subject to certain conditions. If the property is waqf in the form of special use (typical waqf), then it may not be used in other forms or purposes, other than what has been determined by the waqf (waqif).¹⁶

The orientation of waqf is only intended for the needs of Muslims, which indirectly requires innovation in the management process, sometimes it is unthinkable that financing is needed because waqf should not only focus on the object but other aspects are also considered. The concept of waqf can be juxtaposed with the public interest, only the focus of its activities is fixated on all religious activities. In the end, the development of waqf management models should be able to be touched with innovations that are more economically empowering. For this reason, it is important to discuss various models of waqf land utilization practices that exist in Indonesia, their

¹³ Mohammad Syamsul Arifin, "Peranan Badan Wakaf Indonesia Dalam Penyelesaian Sengketa Tanah Wakaf," *Jurnal Hukum dan Kenotariatan* 4, no. 1 (2020): 27–40, <http://riset.unisma.ac.id/index.php/hukeno/article/view/6446>.

¹⁴ Nur Aini, "Perlindungan Hukum Tanah Wakaf Yang Tidak Bersertifikat Di Kabupaten Enrekang," *Jurisprudentie : Jurusan Ilmu Hukum Fakultas Syariah Dan Hukum* 6, no. 2 (2019): 219–229, <https://journal.uin-alauddin.ac.id/index.php/Jurisprudentie/article/view/9767>.

¹⁵ Sayuti Ab Ghani and Burhanuddin Jalal, "Isu Pendaftaran Tanah Wakaf Dalam Kanun Tanah Negara (KTN) 1965: Satu Kajian Menurut Perspektif Islam," *Journal of Fatwa Management and Research* 16, no. 2 (2019): 101–111, <https://jfatwa.usim.edu.my/index.php/jfatwa/article/view/250>.

¹⁶ Ibid.

advantages and disadvantages, so that in the future, various breakthrough efforts will be able to produce optimal profits.¹⁷

2.2. Forms of Compensation for *Waqf* Land Used for Public Interest

Article 1 point 2 of Law No. 2/2012 on Land Acquisition for Developing Public Interest states that land acquisition is an activity of acquiring land by giving appropriate and fair compensation to an entitled party. The entitled party is the one who controls and owns the objects of land acquisition. The objects consist of underground and surface areas, structures and plants, and other valuable objects related to land. The definition of land acquisition is further elaborated in Presidential Decree No. 71/2012 on the Implementation of Land Acquisition for Public Interest and Regulation of the Head of National Land Agency No. 5/2012 on the Technical Guidelines of Land Acquisition. With regard to this definition, as described in the introduction, it is very likely to use *waqf* land for developing public interest. In fact, land acquisition for developing public interest can involve *waqf* land managed by *nazhir*. Based on the legislation mentioned earlier, compensation for *waqf* land acquired will be given to the entitled party, that is *nazhir*. Based on the laws and regulations mentioned above, compensation for the *waqf* land obtained will be given to the rightful party, namely *Nazhir*.¹⁸

Law of Land Acquisition does not comprehensively regulate *waqf* land acquired for developing public interest. The main norm related to *waqf* land in the context of land acquisition is that compensation for *waqf* land acquired will be given to *nazhir*. Article 40 of Law of Land Acquisition states that compensation for the object of land acquisition is directly given to the entitled party. In this case, the party refers to *nazhir*. In addition, Article 20 of Presidential Decree No. 71/2012 states that compensation is given to *nazhir* as he is the one who receives *waqf* property from *wakif* to be managed and developed based on its function.

Despite the fact legislation of land acquisition stipulates that compensation will be given for *waqf* land acquired, it does not clearly regulate the forms of compensation and the mechanism. Article 20 of Presidential Decree No. 71/2012 only states that the giving compensation for *waqf* land is implemented based on the legislation of *waqf* affairs. This means that the forms, procedures,

¹⁷ Agus Triyanta and Mukmin Zakie, "Problematika Pengelolaan Tanah Wakaf: Konsep Klasik Dan Keterbatasan Inovasi Pemanfaatannya Di Indonesia," *Jurnal Hukum Ius Quia Iustum* 21, no. 4 (2014): 583–606, <https://journal.uui.ac.id/IUSTUM/article/view/4602>.

¹⁸ Azriati Azriati, Jamaluddin Jamaluddin, and Hamdani Hamdani, "Penyelesaian Sengketa Tanah Wakaf Masjid (Studi Kasus Di Gampong Ulee Tanoh Kecamatan Tanah Pasir Kabupaten Aceh Utara)," *Jurnal Ilmiah Mahasiswa Fakultas Hukum (JIM FH) Universitas Malikussaleh* 2, no. 3 (2019).

or mechanism of compensation for *waqf* land follows legislation regulating *waqf*. The legislation mentioned earlier includes Law No. 41/2004 on *Waqf*, Government Regulation No. 42/2006 on the Implementation of Law No. 1/2004 on *Waqf* which is changed into Government Regulation No. 25/2018 on Changes in Government Regulation No. 42/2006 on the Implementation of Law No. 1/2004 on *Waqf*, Ministerial Regulation of Agrarian and Spatial Planning/National Land Agency (Permen ATR/BPN) No. 2/2017 on Procedures of Registering *Waqf* Land in the Ministry of Agrarian and Spatial Planning/National Land Agency.

Waqf land included in a spatial plan will be used for development through land acquisition, and it needs to go through the following stages:¹⁹ a) *Nazhir* (the manager of edified property) submits a compensation request to the Minister through the Subdistrict Religious Affairs Office and explains the reason for the status change/exchange; b) The Head of Subdistrict Office forwards the request to the District/City Religious Department Office; c) After receiving the request, the District/City Religious Department Office creates a team with a structure stated in Article 49 paragraph (4), and the Regent/Mayor issues a decree; d) The Head of District/City Religious Department Office forwards the request attached with assessment result from the team to the Head of Regional Office of Religious Department to be forwarded to the Minister; and, e) After receiving written approval from the Minister, the compensation can be granted, and the result must be reported by *nazhir* to the Land Agency and/or related institutions for further registration.

According to the procedures above, there are at least five stages in changing the function of *waqf* land. Specific procedures are needed regarding the change of *waqf* land function for public interest which simplify the stages and accelerate the process of land acquisition for public interest.

Waqf land acquired for public interest, based on Law No. 2/2012 on Land Acquisition for Developing Public Interest, is included as a land object which gets compensation. Compensation in Article 1 point 10 of Law No. 2/2012 refers to appropriate and fair compensation given to an entitled party in the process of land acquisition. Compensation is a means of realizing respect to an individual's rights and interests given for public interest, and it is considered fair if the compensation does not make the individual become richer or poorer.²⁰ The policy regarding giving compensation is, in fact, not only limited in terms of compensating the values of land, structures,

¹⁹ *Pelaksanaan Undang-Undang No. 41 Tahun 2004 Tentang Wakaf*, 2006.

²⁰ Maria S. W. Sumardjono, *Kebijakan Pertanahan Antara Regulasi Dan Implementasi* (Jakarta: Kompas, 2007).

or plants, but it also includes valuing immaterial loss and arising loss such as business activities, new location, and decline in the number of customers and profits.²¹

Article 40 Law No. 2/2012 states that compensation for the object of land acquisition is directly given to the entitled party. Principally, the compensation must be directly given to the entitled party.²² However, if the entitled party is unavailable, (s)he may give authority to another party or her/his heir. The authorized party can only have authority from an entitled party. Those entitled to the compensation include: a. the holder of ownership right; b. the holder of right of management; c. *nadzir* (for *waqf* land); d. the owner of land formerly belonging to customary land; e. customary law community; f. the party controlling state land; g. the primary holder of land ownership; and/or h. the owner of structures, plants, or other objects related to the land.

Compensation can be given in the forms of²³: a. money; b. replacement land; c. resettlement; d. shareholding; e. other forms agreed by both parties. Resettlement refers to a process of providing land for the entitled party in another location based on the agreement in the land acquisition process. Meanwhile, compensation through shareholding refers to getting a share in a development activity for the public interest in terms of its management based on mutual agreement. Another mutual agreement may involve the combination of two or more types of compensation.

In terms of *waqf* land acquired, there are three important points regulated in Law of Land Acquisition. First, compensation will be given for *waqf* land acquired. Second, compensation will be given to *nazhir*. Third, the implementation of compensation payment corresponds to legislation of *waqf* affairs. In addition to law of land registration affairs, acquisition of *waqf* land is also regulated in legislation on *waqf* affairs involving Law No. 41/2004 on *Waqf*, Government Regulation No. 42/2006 on the Implementation of Law No. 1/2004 on *Waqf* which is changed into Government Regulation No. 25/2018 on Changes in Government Regulation No. 42/2006 on the Implementation of Law No. 1/2004 on *Waqf*, and Regulation of Indonesian Waqf Agency No. 1/2008 on Procedures of Formulating Recommendation on Permission of Status Exchange/Change of Waqf Property.

According to legislation on *waqf*, *waqf* land can be used for public interest in accordance with general spatial plan (RUTR) which follows prevailing legislation and sharia laws through exchange. In other words, *waqf* land used for public interest must be replaced with exchange land.

²¹ BF. Sihombing, *Pergeseran Kebijakan Pengadaan Tanah Untuk Kepentingan Pemerintah Dan Swasta (Studi Kasus Pengaturan Pemilikan, Penguasaan Tanah Di Provinsi DKI)* (Jakarta: Universitas Indonesia, 2004).

²² “Pengadaan Tanah Bagi Pembangunan Untuk Kepentingan Umum” (Indonesia, 2012).

²³ *Ibid.*

Furthermore, basic principles in changing status of *waqf* land used for developing public interest through exchange are listed as follows: a) The change must obtain written permission from the Minister of Religious Affairs based on approval from the Indonesian *Waqf* Agency (BWI); b) Exchange property has certificate or legal ownership proof according to legislation; c) Value and benefit of exchange land is at least equal with that of *waqf* land acquired; d) Exchange land has equal Taxable Value of Property (NJOP) with that of *waqf* land and, e) Exchange land is located in a strategic area which can be easily developed.

Exchange land for *waqf* land used for public interest, from the perspective of land acquisition, is regarded as a form of compensation agreed by both parties. Exchange land is substantially equal to replacement land as regulated in regulations on land acquisition. However, the availability of exchange land is determined by *nazhir*, and the exchange process involves various parties. On the contrary, the party responsible for providing replacement land is the institution requiring land. The process of providing exchange land is carried out through strict stages by involving various parties. The stages are regulated in Government Regulation No. 42/2006 on the Implementation of Law No. 1/2004 on *Waqf* which is changed into Government Regulation No. 25/2018 on Changes in Government Regulation No. 42/2006 on the Implementation of Law No. 1/2004 on *Waqf*. The parties involved in exchange of *waqf* land for public interest are *nazhir*, the party who owns exchange land, public auditors (KJPP), assessors of status exchange/change of *waqf* property (including Regional Government at district/city level, Land Agency, Indonesian Ulema Council (MUI) at regency or city level, Religious Department Office at district/city level, and *nazhir* of *waqf* land), regent/mayor, Indonesian *Waqf* Agency, and the Minister of Religious Affairs. Based on Government Regulation No. 25/2018 on Changes in Government Regulation No. 42/2006 on the Implementation of Law No. 1/2004 on *Waqf*, there is an important change that written permission from the Minister of Religious Affairs, which was initially based on the consideration from the Indonesian *Waqf* Agency, is changed in accordance with the consideration from the Indonesian *Waqf* Agency. This means that the Indonesian *Waqf* Agency has an essential role in exchanging *waqf* land, not only as an agency giving consideration but also as the one having authority to decide whether the exchange is accepted or rejected.

Based on article 50 of Government Regulation Number 25 of 2018, it is clear that *waqf* land affected by development for the public interest by the government must obtain a replacement with

a similar value.²⁴ The next difficulty arises due to the determination of a similar value and being in a strategic location is the main factor that the settlement of waqf land swaps requires a long time. In addition, the inhibiting factors in the process of exchanging waqf land include: lack of completeness of administrative files, lack of nadzir skills, requests for extension of time to occupy the project affected location, and delays in the construction of replacement buildings.²⁵

The application of this provision does not necessarily apply to all waqf land in general, there are special conditions so that an exception can be made for exchange. According to Article 40 changes in the status of waqf property are prohibited, however in Article 41 there is an exception that allows the exchange of waqf property and is included in the general spatial plan.²⁶

2.3. Supervision of Compensation Payment for *Waqf* Land Used for Public Interest

Law No. 41/2004 on *Waqf* states that as a strategic way to improve public welfare, the role of *waqf* needs to be improved as a religious system which not only functions to provide various means of worship and social activities but also become economic potential which eventually leads to improvement of public welfare. Thus, a system of *waqf* land development and use needs to be developed based on sharia principles as the basic concept. In a simple way, *waqf* can be used for commercial and non-profit purposes. *Waqf* is generally understood as an infrastructure provider for non-profit religious activities such as building mosques, Islamic schools, and cemeteries. In simple terms, waqf can be used for commercial and non-profit purposes. Waqf is generally understood as providing infrastructure for non-profit religious activities such as building mosques, Islamic schools, and cemeteries.²⁷

²⁴ Pitasari Pitasari, I Gusti Nyoman Guntur, and Sri Kistiyah, "Problematika Penyelesaian Pelepasan Tanah Wakaf, Tanah Desa, Dan Tanah Instansi Pemerintah Untuk Bandara Baru Di Yogyakarta," *Tunas Agraria* 3, no. 1 (2020): 30–49, <https://www.jurnaltunasagraria.stpn.ac.id/index.php/JTA/article/view/66>.

²⁵ Ekasari Damayanti and Yuwanto Yuwanto, "Pelaksanaan Tukar Guling (Ruislag) Tanah Wakaf Di Kota Semarang Untuk Pembangunan Jalan Tol Trans Jawa," *Journal of Politic and Government Studies* 8, no. 4 (2019): 351–360, <https://ejournal3.undip.ac.id/index.php/jpgs/article/viewFile/25064/22316>.

²⁶ Yeni Rohmatul Mufidah, "Status Hukum Tanah Wakaf: Penjualan Tanah Wakaf Masjid Baiturrohman Untuk Pembiayaan Pembangunan Masjid Al-Ikhlas Menurut Undang-Undang Nomor 41 Tahun 2004 Tentang Wakaf (Kasus Di Dusun Kalirejo, Desa Ngunggahan, Kecamatan Bandung, Kabupaten Tulungagung)," *Sakina: Journal of Family Studies* 3, no. 1 (2019): 1–12, <http://urj.uin-malang.ac.id/index.php/jfs/article/view/351>.

²⁷ Ali Idrus, "Analisis Atas Lembaga Wakaf Dalam Menjalankan Wakaf Produktif Pada Yayasan Dompot Dhuafa," *Misykat al-Anwar: Jurnal Kajian Islam dan Masyarakat* 3, no. 2 (2020): 311–328, <https://jurnal.umj.ac.id/index.php/MaA16/article/view/8724/5127>.

In fact, Article 43 paragraph (2) of the Waqf Law allows the management of productive waqf.²⁸ The management can be realized through building commercial hospitals, mining, apartments, sharia hotels, shop houses, sport centers, offices, etc. in which the use and the profits are allocated for the interest and development of Moslem-following the initial goal²⁹. In Article 40 it is stated that *waqf* property is prohibited from being used as collateral, confiscated, granted, sold, inherited, exchanged, or converted into other forms of conversion. However, according to Article 41 of Law No. 41/2004, there is exception that *waqf* land can be exchanged (Article 40 point f of Law No. 41/2004) if the property is used for public interest based on a spatial plan (RUTR) following the existing constitution and sharia principles.

Provisions on the use of waqf land related to public interest can only be made after obtaining written permission from the Minister with the approval of the Indonesian Waqf Board. Based on Government Regulation Number 42 of 2006 concerning the Implementation of Law Number 41 of 2004 concerning Waqf, it is stated that the exchange of waqf assets must obtain permission from Minister. Specifically in paragraph (1), changes in the status of waqf assets in the form of exchange are prohibited unless written permission is given by the Minister in accordance with the considerations of the Indonesian Waqf Board.³⁰

The provisions of *waqf* land use related to public interest can only be made after getting written permission from the Minister with the approval from Indonesian Waqf Agency. Based on Government Regulation No. 42/2006 on the Implementation of Law No. 41/2004 on *Waqf*, it is stated that the exchange of *waqf* property must require permission from the Minister. Specifically in paragraph (1), the status change of *waqf* property in the form of exchange is prohibited unless written permission is given by the Minister according to the consideration from the Indonesian *Waqf* Agency.³¹

The property whose status has been changed as it is used for public interest, according to the provisions in Article 41 paragraph (3) of Law No. 41/2004, must be exchanged with property which has equal benefits or values. The permission of exchange can only be given if³², a) the

²⁸ Choiriyah Choiriyah, "Wakaf Produktif Dan Tata Cara Pengelolaannya," *Islamic Banking : Jurnal Pemikiran Dan Pengembangan Perbankan Syariah* 2, no. 2 (2017): 25–34, <https://ejournal.stebisigm.ac.id/index.php/isbank/article/view/29>.

²⁹ Direktorat Pemberdayaan Wakaf Departemen Agama RI, *Bunga Rampai Perwakafan* (Jakarta: Departemen Agama RI, 2006).

³⁰ *Pelaksanaan Undang-Undang No. 41 Tahun 2004 Tentang Wakaf*; Fahrurroji Fahrurroji, "Istibdāl Wakaf: Ketentuan Hukum Dan Modelnya," *Misykat: Jurnal Ilmu-ilmu Al-Quran, Hadist, Syari'ah dan Tarbiyah* 2, no. 1 (2017): 111–150, <https://pps.iq.ac.id/jurnal/index.php/MISYKAT/article/view/34>.

³¹ *Pelaksanaan Undang-Undang No. 41 Tahun 2004 Tentang Wakaf*.

³² Ibid.

substitute for the exchange has a certificate or legal ownership proof based on the constitution, b) the value of the substitute is higher or equal with the *waqf* property. The term of “equal value” is determined by Regent/Mayor based on the recommendation given from assessors which consist of the Regional Government of District/City, Land Affairs Office of District/City, Indonesian Ulema Council (MUI) of District/City, Religious Department Office of District/City, and *Nazhir*.

Therefore, Indonesian *Waqf* Agency is responsible for supervising legal actions in the form of relinquishing the right of land ownership from *waqf* land to the state for land acquisition purpose. This responsibility includes supervision regarding the form of compensation for *waqf* land used for public interest. The provisions stating edification in Indonesia are regulated in Law No. 41/2004 on *Waqf*. In Article 63 paragraph (1), it is stated that the Minister gives guidance and supervision to the implementation of *waqf* to realize the goals and functions of *waqf*. In paragraphs (3), it is also stated that the guidance and supervision as stated in paragraph (1) and (2) are carried out by taking into account suggestions and considerations from the Indonesian Ulema Council.

Thus far as stated in Law No. 41/2004 Article 49 on *Waqf*, the duties and authority of the Indonesian *Waqf* Agency are limited to: a) managing and developing *waqf* property on national and international scale, b) managing and developing *waqf* property on national and international scale, c) giving approval and/or permission for the function and status change of *waqf* property, d) dismissing and replacing *Nazhir*, e) giving approval for the exchange of *waqf* property, f) giving suggestion and consideration to the government in formulating policies regarding edification. The duties and authority of the *waqf* agency needs to be extended in giving approval and/or permission for the function and status change of *waqf* property as well as giving supervision and evaluation regarding the way and the form of the change.

In connection with the duties and authorities mentioned above, in particular points (c) and (e), the *waqf* body is also responsible for supervising whether the compensation is appropriate or equal in value to the *waqf* property used for the public interest.³³ The supervision needs to cover the form of compensation given for the exchange of *waqf* property used for public interest. The Minister of Religious Affairs and the Indonesian *Waqf* Agency, as the state personification in carrying out their duties and authority, including the authority to give supervision regarding the form of compensation for the *waqf* property used for public interest, aim at ensuring the expediency of the exchange (*waqf* land) used for public interest. This corresponds to three basic

³³ Muhammad Sandia, “Analisis Kepastian Hukum Hak Milik Atas Tanah Wakaf Dalam Konsepsi Hukum Agraria Dan Hukum Islam,” *Al Mashlahah Jurnal Hukum Dan Pranata Sosial Islam* 2, no. 3 (2014): 219–226, <http://jurnal.staialhidayahbogor.ac.id/index.php/am/article/view/121>.

principles proposed by Gustav Radburch that law must meet three basic values: justice (philosophical aspect), assurance (juridical aspect), and expediency (sociological aspect). Gustav Radburch connects reality and expectation. The connection is based on the idea that life consists of reality (*das sein*) and expectation (*das sollen*).³⁴

The presence of a law with a legal function as social control provides a definition that the settlement of cases can be handled if there are rules that regulate, social control must be applied to change the status of waqf land into non-waqf land because the changes made are very intersect with 2 different legal concepts. The difference in the implementation of the law between Islamic law and positive Indonesian law regarding the issue of waqf which is converted into other forms with the aim of public interest is very different. Although the public interest must take precedence over personal interests, in accordance with the legal principles that apply to the implementation of a shared life in society. But even so the interest Individuals also cannot be ignored because they are respected and protected by law, therefore if the public interest urges personal interests, they must be given proper and fair compensation. Both Islamic Law and National Land Law prioritize public interest over personal interests.³⁵

3. Conclusion

The specific regulations regarding *waqf* are Law No. 41/2004 on *Waqf*, Government Regulation No. 42/2006 on the Implementation of Law No. 41/2004 on *Waqf*, and Government Regulation No. 28/1997 on Edification of Land Property. The specific regulations regarding Land Acquisition for Developing Public Interest are Law No. 2/2012 on Land Acquisition for Developing Public Interest, Presidential Decree No. 71/2012 on the Implementation of Land Acquisition for Public Interest and Regulation of the Head of National Land Agency No. 5/2012 on the Technical Guidelines of Land Acquisition. Legislation regulating *waqf* land acquired for public interest consists of legislation on land acquisition and *waqf* affairs. The legislation regulating land acquisition are Law No. 2/2012 on Land Acquisition for Developing Public Interest, Presidential Decree No. 71/2012 on the Realization of Land Acquisition for Public Interest which was changed into Presidential Decree No. 71/2012 on the Realization of Land Acquisition for Public Interest and its changes, and Regulation of Head of National Land Agency

³⁴ FX Adji Samekto, *Pergeseran Pemikiran Hukum Dari Era Yunani Menuju Postmodernisme* (Jakarta: Konpress, 2015).

³⁵ Tegar Gallantry, Yusuf Hidayat, and Fokky Fuad Wasitaatmadja, "Penerapan Prinsip Keadilan Dalam Pengadaan Tanah Untuk Kepentingan Umum Menurut Hukum Tanah Nasional Dan Hukum Islam," *Jurnal Magister Ilmu Hukum* 6, no. 1 (2021): 62–78, <https://jurnal.uai.ac.id/index.php/JMIH/article/viewFile/797/557>.

No. 5/2012 on the Technical Guidelines of the Implementation of Land Acquisition. Meanwhile, the legislation regulating *waqf* includes Law No. 41/2004 on *Waqf*, Government Regulation No. 42/2006 on the Implementation of Law No. 1/2004 on *Waqf* which is changed into Government Regulation No. 25/2018 on Changes in Government Regulation No. 42/2006 on the Implementation of Law No. 1/2004 on *Waqf*.

Forms of compensation for *waqf* land acquired for developing public interest comprise replacement land. The process of providing replacement land not only involves the institution requiring land but also *nazhir* through procedures and terms stipulated in legislation regulating *waqf*, especially the one regulating exchange of *waqf* property for public interest. Exchange land has been obtained or available before compensation is given by the authority on behalf of the institution requiring land.

The Indonesian *Waqf* Agency is responsible for giving supervision regarding whether the compensation is appropriate or has the equal value with the *waqf* property used for public interest. The supervision also needs to cover the form of compensation given for the exchange of *waqf* property used for public interest. The *waqf* property used for developing public interest obtained through the exchange process must be published and available to be accessed by the public. The additional duties and authority are further regulated in government regulation.

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