

Fatwa Lajnah Bahtsul Masail NU Concerning *Istibdâl* Wakaf and Their Relevance with Renewal of Islamic Law

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Abstract

This article aims to describe the views and arguments of NU scholars in responding to the concept of *istibdâl* waqf through the fatwas issued by Lajnah Bahtsul Masail (LBM-NU), and their relevance to Islamic law reform. The concept of *istibdâl* is basically one way that can be used by policy makers in managing waqf land so that it remains productive. However, the concept of *istibdâl* has not been fully accepted by scholars. In general, the responses of scholars regarding the concept of *istibdâl* can be grouped into two. The first group strictly prohibits *istibdâl*, and the second group allows *istibdâl* but with strict conditions. The difference is more due to the tendency of the principle that is the weight, namely the principle of eternity (*ta'bid al-ashl*) and the principle of expediency (*tasbîl al-manfa'ah*). This research is a normative legal research because it examines the legal provisions, arguments and arguments used. The approach used is a conceptual approach. Primary data sources are fatwa texts issued by NU scholars, while secondary data sources are scientific books, articles, journals, laws related to this research. This study shows that NU scholars allow the practice of *istibdâl* with agreed terms, namely the existence of disadvantages contained in the waqf object so that the waqf property is in an emergency condition that must be saved. The argument is that the concept of benefit is the spirit of *maqâshid syari'ah* (the purpose of syari'a), where the value of benefit in *istibdâl* practice is far greater than its harm. The concept of benefit which is the argument in the fatwa is in accordance with the spirit of reforming Islamic law.

Keywords: *Istibdâl*; fatwas; *ta'bid al-ashl*; *tasbîl al-manfa'ah*; *maqasid sharia*

Abstrak

Artikel ini bertujuan untuk mendiskripsikan pandangan serta argument ulama-ulama NU dalam merespon konsep *istibdâl* wakaf, melalui fatwa-fatwa yang dikeluarkan oleh Lajnah Bahtsul Masail (LBM-NU), serta relevansinya dengan pembaharuan hukum Islam di Indonesia. Konsep *istibdâl* pada dasarnya salah satu cara yang dapat digunakan oleh pemangku kebijakan dalam mengelola tanah wakaf agar tetap produktif. Meskipun demikian, konsep *istibdâl* belum sepenuhnya diterima oleh para ulama. Secara umum, respon ulama tentang konsep *istibdâl* dapat dikelompokkan menjadi dua. Kelompok pertama, melarang *istibdâl* secara ketat, dan kelompok kedua membolehkan *istibdâl*, namun dengan syarat-syarat yang ketat. Perbedaan tersebut lebih disebabkan pada kecenderungan prinsip yang menjadi pemberatnya, yakni prinsip keabadian (*ta'bid al-ashl*) dan prinsip kemanfaatan (*tasbîl al-manfa'ah*). Penelitian ini merupakan penelitian hukum normatif karena mengkaji tentang ketentuan hukum, argument dan dalil yang digunakannya. Pendekatan yang digunakan adalah pendekatan konseptual. Sumber data primer adalah naskah fatwa yang dikeluarkan oleh ulama NU, sedangkan sumber data sekunder berupa buku-buku ilmiah, artikel, jurnal, undang-undang yang berkaitan dengan penelitian ini. Penelitian ini menunjukkan bahwa ulama NU membolehkan praktik *istibdâl* dengan ketentuan-ketentuan yang telah disepakati yakni adanya kemudharatan yang terdapat pada objek wakaf sehingga menjadikan harta wakaf dalam kondisi darurat yang harus diselamatkan. Argumentasinya adalah konsep kemaslahatan yang menjadi ruh *maqâshid syari'ah* (tujuan syariat), di mana nilai kemaslahatan dalam praktik *istibdâl* jauh lebih besar dari pada kemudharatannya. Konsep masalah yang menjadi argumentasi dalam fatwa tersebut, sesuai dengan semangat pembaharuan hukum Islam.

Keywords: *istibdâl*; fatwa; *ta'bid al-ashl*; *tasbîl al-manfa'ah*; *maqashid syari'ah*.

Introduction

Waqf is one of the highest forms of philanthropy in Islamic teachings in the form of an Endowment Fund, which has a very close relationship from legal, social, and especially economic aspects. The economic dimension becomes very important because from *waqf* assets, assets with high economic value can be produced, the results of which can be used for social welfare (poverty alleviation, job creation, and the construction of public facilities). Therefore, *waqf* is one of the economic instruments that has the potential to have an impact

on social life, equitable development, and economic growth that has the potential to improve the welfare of the people. However, the potential for *waqf* is not in accordance with the facts on the ground. Where based on information from the Ministry of Religion, data on *waqf* land in Indonesia reached 398,103 locations, 53,202.18 ha of *waqf* land area, but they have not been able to contribute more in terms of the welfare of the people. This is due to management factors that have not been maximized, where the use of *waqf* land is 44.24 % (175,495 locations) for mosque construction, 28.27 % (112,134 locations) for prayer rooms, 4.45% (17,639 locations) for graves, 10.68% (42,365 locations) for schools, 3.62 % (14,366 locations) for pesantren, and 8.75 % (34,705 locations) for other social activities.¹

Based on these data, *waqf* land is more likely to be used for worship purposes, compared to social interests. In addition, of the total *waqf* land, only 239,426 locations, 20,223.58 Ha (60.17%) have certificates, and 158,677 locations 32,978.60 Ha.² This condition makes the management of *waqf* land not optimal, thus affecting its potential. Even though *waqf* land has high economic value, if it is used for productive activities, it can improve the people's economy.

In addition to *waqf* land, cash *waqf* also has significant potential to improve the people's economy. The Indonesian Waqf Agency (BWI) states that the potential for cash *waqf* is IDR 180 trillion every year. Meanwhile, based on data from the Ministry of Religion (2018), the realization of cash *waqf* recorded from 2011 to 2018, an average of only IDR 31.9 billion per year. This means that cash *waqf* still has enormous potential to be developed.

Land management that has not been maximized has resulted in a lot of land being neglected, neglected, and not managed optimally. One of the factors, abandoned land, unmanaged land, and not yet optimal management is a less strategic location. In fact, the non-strategic location of the land can be overcome by exchanging other lands that are more strategically located (*istibdāl*). However, due to people's understanding of the *waqf* principles that have been developing so far, making the exchange of *waqf* land still poses its own problems.

Basically in *waqf* there are two principles that must be guided by *nadzīr* as a manager, namely the principle of immortality (*ta'būd al-ashl*) and expediency (*tasbīl al-manfa'ah*). The principle of immortality is a principle that requires managers (*nadzīr*) to maintain the sustainability or existence of *waqf* goods (*mawqūf bil*) so that it is a necessity anytime and anywhere, cannot be sold for any reason and cannot be exchanged in any form, especially if The *waqf* property

¹ http://siwak.kemenag.go.id/tabel_jumlah_tanah_wakaf.php

² http://siwak.kemenag.go.id/tabel_jumlah_tanah_wakaf.php

is in the form of a mosque. The principle of expediency is a principle that allows managers (*nadzir*) to exchange waqf objects for certain reasons.³

Based on these two principles (the principle of eternity and expediency), *waqf* has distinctive characteristics and distinctions from other philanthropies. The principle of immortality (*ta'bid al-ashl*) and usefulness (*tasbil al-manfa'ah*) on *waqf* objects, then along with developments in the management of *waqf* objects which are always dynamic, the exchange of waqf objects (*istibdāl*) has given rise to differences of opinion among scholars.

Nahdlatul Ulama (NU) through its bahtsul masa'il forum, is one of the institutions that actively responds to various actual phenomena that occur in society. The concept of *istibdāl*, including one of the problems that have been responded to, is related to the issue of *waqi'iyah*. Therefore, NU's response to *istibdāl* as outlined in the fatwa reflects the responsiveness of the bahtsul masa'il institution in solving problems that are currently happening.

Studies on *istibdāl* have basically been carried out by several researchers, both in the form of thesis research, dissertations and journal articles. The researches on *istibdāl* include field research and library research. In general, these studies can be categorized into three groups. 1) the study of *istibdāl* is seen from the legal formal side, such as Luqman Haji Abdullah,⁴ 2) the study of *istibdāl* is seen from the point of view of its implementation, such as Mohd. Ridzuan Awang,⁵ Jasni bin Sulong,⁶ 3) the study of *istibdāl* seen from the concept of *mashlahah* or *maqashid al-syarī'ah*, such as Achmad Siddiq,⁷ Mohammed Farid Ali al-Fijawi⁸. Thus, the study of *istibdāl* viewed from the perspective of the ulama's response and the arguments he builds have not been touched by previous researchers. So this article attempts to fill that void.

By taking the object of the fatwa of NU ulama represented by LBM-NU, this study certainly has a distinction with previous studies. Where NU

³ Tholhah Hasan, "Istibdal Harta Benda wakaf", dalam *Jurnal Al Awqaf: Jurnal Wakaf dan Ekonomi Islam*, Vol. II, No. 03, Agustus 2009, h. 5.

⁴ Luqman Haji Abdullah, "Istibdal Harta Wakaf dari Perspektif Madzhab Syâfi'e", dalam *Journal of Fiqh* No. 7, 2010.

⁵ Mohd. Ridzuan Awang, "Konsep Istibdal: Sejauhmana Amalannya di Malaysia" *Jurnal Pengurusan Jawbar*, Vol. iv, No. 1 (2010).

⁶ Jasni bin Sulong, "Permissibility of Istibdāl in Islamic Law and The Practice in Malaysia", *Journal of US-China Public Administration*, Vol. 10 No. 7 (July 2013).

⁷ Achmad Siddiq, "Praktik Masalah Istibdal Wakaf (Studi Penukaran Tanah Wakaf Masjid Baitul Qodim di Loloan Timur Negara Jembrana Bali, Tanah Wakaf Masjid Kampung Bugis Suwung Sasetan Denpasar Bali dan Tanah beserta Bangunan Wakaf Persyarikatan Muhammadiyah Kota Blitar)" Disertasi Program Pascasarjana IAIN Walisongo, 2013.

⁸ Mohammed Farid Ali al-Fijawi, Maulana Akbar Syah U Tun Aung, and Alizaman D. Gamon "Waqf, Its Substitution (*Istibdāl*), and Selected Resolutions of Islāmic Fiqh Academy India: A Maqāṣid al-Syarī'ah Perspective" dalam journal *Intellectual Discourse*, Special Issue (2018) 1093–1108 Copyright © IUM Press. ISSN 0128-4878 (Print); ISSN 2289-5639 (Online).

scholars are representatives of Indonesian scholars, of course this study will show the character of Indonesian scholars in responding to the phenomenon of *istibdâl* which is assumed to be a form of productive *waqf* property. This study argues that, there are reforms in the context of Islamic legal thought, issued by LBM-NU. Where NU scholars so far, in their Islamic legal thinking, tend to be syafi'iyah centric, now they have started to switch to other schools of jurisprudence, in order to get answers that are more beneficial for the people. This can be seen from the fatwa regarding *istibdâl* that he issued, where the fatwa not only answered it using the opinions of the Shafi'iyah scholars, but also included opinions from other schools of thought.

This research is included in the category of normative legal studies, with the type of library research. The approach uses a conceptual approach by examining the content of the fatwa. The primary data source is a copy of the fatwa of NU scholars along with the books used as references in giving fatwas. Meanwhile, secondary data sources were obtained from several books, journals, and books related to the theme being studied. The data analysis technique uses the content analysis technique using the theory of Miles and Huberman or the three-step technique, namely data reduction, data presentation or display, and drawing conclusions.

The formulation of the problem in this research is how to reinterpret the *waqf* principles that have been initiated and developed by the scholars? How is the concept of *istibdâl* and its relation to the paradigm of *ta'bid* (eternity) *waqf*? And how is the formulation of the LBM-NU fatwa about the concept of *istibdâl* and how are the arguments built in the formulation of the fatwa.

This study hopes to contribute to research in the field of law, especially in terms of Islamic legal thought. Because this study, when viewed from the point of view of a legal research model, is of course included in the category of a normative legal research model. Thus, the results of this study can contribute to the development of Islamic legal thought which continues to experience reforms. In addition, the existing findings, such as whether or not the object of *waqf* is *istibdâl*, is of course an input for policy makers, both the government, BWI and *nadzir*.

Discussion

Reinterpretation of Waqf Principles

The word *waqf* is an absorption from the Arabic *waqf* in the form of *masbdar* from *waqafa* which means *al-habs* which means to restrain and *al-man'u* which means to prevent. In Arabic the word *waqf* even though it is in the form

of *mashdar*, what is desired is isim *maf'ul*. Thus, the general use of the word waqf in question is *mawquf* (*waqf* objects).⁹

In terminology, *waqf* is defined as holding assets that can be used by maintaining the integrity of the property, and deciding the ownership of the goods from the owner for things that are permissible.¹⁰ The existence of the expression “deciding ownership” is an explanation that the wakif no longer has ownership rights over the property, so it is prohibited to sell, donate and bequeath it.

The issue of *waqf* has strong theological roots, although it does not explicitly mention the term *waqf*, the Qur'an clearly teaches the urgency of social generosity for various good purposes. The Hadith of the Prophet and the practice of the Companions show that *waqf* is indeed part of the core teachings of Islam. However, in its development, *waqf* institutions cannot be separated from the social, economic, and cultural dynamics that accompany the development of Islamic society from time to time. Waqf in a simple form has been practiced by the Companions on the instructions of the Prophet.¹¹

Juridically, *waqf* is a matter of *ijtihadh* nature. Although there are no explicit and specific verses in the Qur'an that explain waqf, the *tasyri'* waqf can be explored substantively in various general verses that command humans to do good for the good of society by giving charity, by Islamic jurists it is seen as a basis for endowment.¹² Among the verses of the Qur'an that are used as a legal argument for *waqf* before the *Ijma'* is QS. Ali Imran [3]: 92. The verse explains that a good will be achieved by giving charity. While waqf is a form of alms. This is, based on a narration that Abu Talhah (w. 53 H) when he heard the verse, he rushed to donate part of the property he loved, namely *Beiruha'*, a garden famous for its fertility. Hearing the wishes of Abu Talhah (d. 53 H), the Prophet advised him to make the plantation as a *waqf* for his family, namely Hasan bin Tsâbit (d. 73 H) and Ubay bin Ka'ab (d. 48 H).¹³ This history was then used by the scholars as the basis for the legality of *waqf*,¹⁴ specifically *waqf* which was referred to by later scholars as expert *waqf* or *dzurri*, namely *waqf* which was originally intended for the wakif or certain people and or entities

⁹ Ibn Mandhâr, *Lisân al-Arab*, (Makkah al-Mukarramah: Dâr al-Bâz, Juz. 9, 1996), h. 359.

¹⁰ Muhammad Abid Abdullah Al- Kabisi, *Abkâm al-Waqf fî al-Syarî'ah al-Islâmiyah*, (Ciputat: Dompot Dhuafa Republika dan IIMaN, 2004), h. 41.

¹¹ Muhammad Kamal al-Dîn Imam, *al-Washîyyah wa al-Waqf fî al-Islâm Maqâsid wa Qawâ'id*, (al-Iskandariyah: ManSya'ah al-Ma'ârif, 1999), h. 200-203.

¹² Muhammad Mushtafâ Syalabî, *Muhâddarât fî al-Waqf wa al-Washîyyah*...h. 23.

¹³ Abi 'Abdillah Muhammad bin Ahmad bin Abi Bakr al-Qurthubi, *Al-Jami' li Abkam al-Qur'an*, ditahqiq oleh 'Abd Allah bin 'Abd al-Hasan, (Beirut: Al-Resalah, Juz 6, 2006), h. 199.

¹⁴ Al-Imam Abi Zakariya Muhyi al-Din ibn Syaraf Al-Nawawi, *Al-Majmu' Syarh al-Muhadzdzab*, (Beirut: Dar al-Fikr, Juz 16, 1996), h. 225.

although in the end it was for the public interest. The next verse that is used as a proof is and QS. Al-Ma'idah [5]: 2. The verse explains the commandment to help each other among human beings in goodness. Both help in the form of material and non-material. Regarding the material, there are several solutions offered by Islam in helping others, both within the scope of fellow Muslims and non-Muslims, including *zakah*, alms, *infaq*, grants, and *waqf*. Waqf is a form of charity or philanthropy that has a wider target scope than others. Because, waqf is not only intended for Muslims, but can also be distributed to non-Muslims. Likewise, *waqf* income can also be obtained from non-Muslims.¹⁵

Based on the verses above, it can be understood that the normative foundation of *waqf* from the Qur'an is the verses in general ('*amm*) which explain the recommendation to do good and help with goodness and piety both through alms and *infaq*.¹⁶ Thus, the true basis of *waqf* teachings is better understood based on the context of the verses of the Qur'an as a good deed.¹⁷ The hadith of the Prophet which was used as the argument for the regulation of *waqf* (*al-masyru'iyah argument*) specifically that used the *waqf* editorial was also not found. The hadiths that are used as the basis for *waqf* use the editorials of *shadaqah*, *habbasa*, and *ibtahasa*, including the Hadith of Imam Muslim history about uninterrupted practice, even though the person who does charity has died.¹⁸ The hadith above explains that alms is an uninterrupted practice of reward, this cannot happen except by giving the alms and then holding it (*waqf*). According to 'Abdillah 'Abd al-Salam, the hadith above shows several deeds whose rewards are eternal until death, so that they can trigger the spirit of Muslims, the first is *waqf* which is interpreted with the word *shadaqatin jariyatin*.¹⁹ Accordingly, according to Al-Syaukani (d. 1250 H), the scholars interpret it as *waqf*, because this form of alms causes the main assets to be restrained and the results or benefits continue to flow.²⁰ In relation to this Hadith, Imam Nawawi (d. 676 H) said that the Hadith is a proof for the validity of waqf,²¹ as well as how great the reward will be from it.

¹⁵ Al-Kabisi, *Abkam al-Waqf fi al-Syari'ah al-Islamiyah*...h. 296-298.

¹⁶ Ahamad Ibrahim Bik, *Mausu'ah Abkam al-Waqf 'Ala Madzhab al-Arba'ah*, (Kairo: al-Maktabah al-Azhariyyah Li al-Turats, 2009), h. 12.

¹⁷ Husam al-Din, *Kitab al-Hithan: Dirasah Fiqhiyyah li Abkam al-Bina' wa al-Irtifaq*, (Beirât: al-Rayyân, Juz 2, 2014), h. 7.

¹⁸ Al-Nawâwî, *al-Minhâj Syarh Sahih Muslim bin Hijâj*, (Mesir: al-Mishriyyah al-Azhar, Juz 11, 1929), h. 84-85.

¹⁹ 'Abdillah 'Abd al-Salâm, *Ibânah al-Abkâm Syarh Bulâgh al-Murâm*, (Beirut: Dâr al-Fikr, 2006), h.198.

²⁰ Muhammad bin Ali Al-Syaukani, *Nayl al-Authâr*, (Al-Maktabah al-Taufiqiyyah: Amân al-Bâb al-Akhdhar-Sayyidina al-Husain, Juz 6, t.t.), h. 30.

²¹ Abî Zakaria Muhyî al-Dîn bin Syaraf Al-Nawawî, *Shabîb Muslim bi Syarh al-Imâm al-Nawawî*, (Beirut: Dâr al-Fikr. t.th. jilid VI), h. 85.

Waqf, when viewed from the point of view of the designation and utilization of *waqf* goods, is divided into two, namely *waqf ahlî* and *waqf khayrî*. *Ahl waqf* is a *waqf* intended for the interests and social security within the family and relatives. Meanwhile, *khayrî waqf* is a *waqf* whose purpose from the beginning was intended for the benefit of the general public in the fields of religion, education, health and so on.²² The existence of the two *waqf*, there is no difference between the scholars regarding the permissibility and validity of both, because *waqf* is a form of virtue and alms. As there is no difference regarding the prevalence of *waqf* which is decided by the judge, so that *waqf* may not be sold, donated and inherited. Likewise, *waqf* is due to the will of the wakif, as when the wakif says “when I die, then my house or my land I will donate to the poor”. Likewise *waqf* for mosques and graves. New differences arise when scholars respond to other than the two forms of *waqf* above, whether it is a *lâzim* contract or vice versa (*ghayru lâzim*).²³ *Lâzim* contract is a contract that cannot be revised, canceled or revoked by one of the parties, but must be approved by both parties. On the other hand, a *ghayru lâzim* contract is a contract that can be revised, canceled or revoked by one party without the consent of the other party because it is in accordance with the character of the contract itself, such as a loan agreement (*i’arah*) or because of considerations of the benefit of the parties, such as a contract that accompanied by an option agreement (*al-khiyar*).²⁴

Responding to the position of *waqf*, whether it is a *lâzim* or *ghair lâzim* contract, the scholars are divided into two groups. *First*, the group which states that *waqf* is a common contract. This group is supported by the majority of Islamic jurist, including the Mâlikiyyah school, two followers of the Hanafiyyah school, namely Muhammad (d. 189 H) and Abû Yûsuf (d. 182 H) as well as the Syafi’iyyah and Hanbaliyyah schools. *Second*, the group of scholars who stated that *waqf* was a *ghayru lâzim* contract, this group was supported by Imam Abu Hanîfah (d. 150 H) and his students except Muhammad (d. 189 H) and Abû Yûsuf (d. 182 H).²⁵

The legal implications if *waqf* is categorized as a common contract is that there is no room for anyone to revoke what has been *waqf* by the wakif, it is not allowed to damage the *waqf* contract either by word or deed, nor is it allowed to take legal action (*tasharruf*) in the form of selling, donating or bequeath. In the book of al-Muhadzdzab, it is explained that according to the shahih opinion, if

²² Wahbah al-Zuhailî, *al-Waqf fî al-Syar’ah al-Islâmiyyah*, (Libanon: Dâr al-Fikr, 1996), h. 23.

²³ Muhammad Hasnain Makhlâf, *Manhaj al-Yaqîn fî Bayân Anna al-Waqf al-Ahlî min al-Dîn*, (Mesir: Musthafâ Li Bâbî al-Halibî wa Awlâdihî, 1351 H.), h. 21.

²⁴ Wahbah al-Zuhailî, *al-Fiqh al-Islâmî wa Adillatuh*, (DamSyiq: Dâr al-Fikr, 1997), Juz IV, h. 3094.

²⁵ Muhammad Hasanain Makhlâf, *Manhaj al-Yaqîn fî Bayân Anna al-Waqf al-Ahlî min al-Dîn*...h. 21.

the waqf is a *lâẓim* contract, then the right to take legal action (*tasharruf*) is cut off and also the loss of ownership rights to the object. Because waqf causes loss of ownership of *tasharruf* rights in property as well as benefits as well as freeing slaves.²⁶ While in Syarh al-Kabîr it is explained that waqf is a common contract which is not allowed to damage it either by speech or by other means. The commonality of *waqf* can occur even if only by speech, because it is a form of *tabarru'* which prevents buying and selling, grants and inheritance, as is the case with the liberation of slaves. Meanwhile, in the book of Kasyaf al-Qanâ', it explains that *waqf* is a *lâẓim* contract, which cannot be damaged by speech or anything else, because it is a contract that requires *ta'bîd* (forever) so that the *lâẓim* of *waqf* can occur only by saying without any decision from a judge.²⁷

Furthermore, the legal implication if *waqf* is categorized as a *ghayru lâẓim* contract is that there is an authority for anyone to revoke what he has donated whenever they want. So that the position of the *waqf* contract is not much different from the loan agreement (*'ariyah*) in that both are *tabarru'* contracts with benefits. In addition, there is also the authority for anyone to take legal action (*tasharruf*) in the form of selling, donating or bequeathing, and it can be canceled because of the death of the wakif.²⁸

In addition to the legal implications arising from the position of waqf as a *lâẓim* or *ghayru lâẓim* contract, another implication is regarding the status of *waqf* property ownership. There are four opinions in addressing this issue. *First*, ownership of property after *waqf* turns into the right of Allah, no one owns the *waqf* property. This is the opinion of Abû Yûsuf (d. 182 H) and Muhammad (d. 189 H) of the Hanaf school, some of the Maliki scholars, a narration from Ahmad and the strongest opinion of the Syafi'iyya school.²⁹ Al-Kabîsi quotes the opinion of Muhammad (d. 189 H) and Abû Yûsuf (d. 182 H) that *waqf* is the detention of property as property of Allah, ownership of wakif is lost and transferred to Allah's property to be used for the benefit of the people, so it is permanent and cannot be sold or inherited.³⁰ Basically, ownership of property cannot be separated from the ownership of Allah, because he is the creator of everything and who owns it. Therefore, what is meant by making the *waqf* property owned by Allah is the transfer of property from the wakif property to Allah's property after not previously.

Second, property ownership is transferred to *mawqûf 'alayh*, but they are not allowed to take legal action (*tasharruf*) against it such as selling, donating or

²⁶ Khâlid bin Ali, *Al-Jâmi' li Abkâm al-Waqf wa al-Hibât wa al-Washâyâ*, (Qathar: Wizârah al-Syu'ân al-Islâmiyah, 2013), Juz II, h. 26-28.

²⁷ Khâlid bin Ali, *Al-Jâmi' li Abkâm al-Waqf wa al-Hibât wa al-Washâyâ*, h. 26-28.

²⁸ Wahbah al-Zuhailî, *Al-Washâyâ wa al-Waqf*, (Beirut: Dâr al-Fikr al-Mu'âsir, 1996), h. 137.

²⁹ Khâlid bin Ali, *Al-Jâmi' li Abkâm al-Waqf wa al-Hibât wa al-Washâyâ*, h. 9-11.

³⁰ Al-Kabîsi, *Abkâm al-Waqf fî al-Syarî'ah al-Islâmiyah*, h. 142.

bequeathing it. This opinion was put forward by the Hanabilah scholars and is a weak opinion among the Syafi'iyah schools.³¹ Ibn Qudâmah (w. 620 H) from the Hanabilah school stated that the ownership of the *waqf* property was transferred to the person who was *waqf*, even according to Imam Ahmad (164-241 H) himself if someone donated his house to his brother's children, the house became his property. In line with the opinion above, the Ja'fariyah stated that the *waqf* moved into the property of the person who was *waqf*, because the benefits of ownership were with him.³²

Third, the ownership of the property is still with the wakif, it's just that he is not allowed to take legal action (*tasharruf*) on the waqf property, in the form of selling, donating, and bequeathing it. This is the opinion of some Hanafiyyah scholars, the opinion of Malikiyah, the weak opinion of the Syafi'iyah, and the history of Imam Ahmad bin Hanbal (164-241 H).³³ The argument of this opinion is based on the understanding of the Hadith text of Ibn 'Umar when the Prophet advised 'Umar, namely "*in syi'ta habbasta aslahâ wa tasaddaqta bihâ*". According to Ibn Hamam (d. 861 H) the two words "*habs*" (hold) and "*shadaqah*" (give charity) have different meanings. Because the original meaning of alms "*shadaqah*" is to make it belong to Allah, while the meaning of holding "*habs*" means as usual.³⁴ Thus, the *waqf* property (principal) still belongs to the wakif as it was before the *waqf*, while the proceeds belong to the person who was given the *waqf*.

Fourth, the *waqf* property still belongs to the wakif perfectly, and he may take legal action including bequeathing it. This is the opinion of the *shabih* Imam Abû Hanifah.³⁵ The basis of this opinion is the Hadith narrated by al-Tahâwî regarding the statement of 'Umar "*lawlâ annî dhakar sadaqatî li rasûl Allâbi la radadtuhâ*". This hadith is also the basis if waqf may be revoked.

The Concept of *Istibdâl* and its Relation to the *Ta'bid* Paradigm (eternity) of Waqf

Waqf as a form of transaction that will have a legal impact, is considered valid if in its implementation it meets the requirements and pillars. Scholars have different opinions in determining the pillars of *waqf*. This difference is an implication of differences in viewing the substance of *waqf*. The majority of Malikiyah, Syafi'iyah and Hanâbilah scholars state that the pillars of *waqf* consist of: wakif (people who make *waqf*), *mawqûf 'alayh* (people who receive waqf), *mawqûf* (waqf property) and *sighat (ijâb and qabûl* or expressions that indicate the process of waqf). the occurrence of waqf). The Hanafiyyah scholars view that

³¹ Khâlid bin Ali, *Al-Jâmi' li Abkâm al-Waqf wa al-Hibât wa al-Wasâyâ*, h. 09-10.

³² Al-Kabîsi, *Abkâm al-Waqf fî al-Syarî'ah al-Islâmiyah*, h. 145-146.

³³ Al-Kabîsi, *Abkâm al-Waqf fî al-Syarî'ah al-Islâmiyah*, h. 145-146.

³⁴ Al-Kabîsi, *Abkâm al-Waqf fî al-Syarî'ah al-Islâmiyah*, h. 144-145.

³⁵ Muhammad Mustafâ Syalabî, *Muhâdarât fî al-Waqf wa al-Wasiyyah*, h. 19.

the pillars of *waqf* are only limited to *sighat* which shows the meaning or substance of *waqf*. This opinion is chosen by Al-Kabîsi, he argues that an object is not necessary if the subject has been mentioned, and the *sighat* (lafadz) itself includes the wakif, *mawqûf ‘alayh*, and *mawqûf* itself.³⁶

In general, *sighat* is a form of pledge or statement from both parties who are transacting or contracting in order to seek an agreement which is described with consent and acceptance. All schools state that the contract in *waqf* is a *tabarru’* contract, namely a unilateral transaction that is considered valid as a contract that does not require acceptance from the recipient and is satisfied with the consent of the wakif. The contract in *waqf* is a form of legal action that results in the certainty of the transfer of an asset which is stated from the will of legal action by the interested party, even if the statement is unilateral. Thus, the contract in *waqf* is not the same as the contract contained in buying and selling, leasing and so on.³⁷

In essence, *waqf* is a form of alms that is eternal and timeless, so *waqf* is said to be charity *jâriyah*, namely alms whose rewards continue to flow throughout time. It is this enduring and eternal nature (*ta’bîd*) which then becomes the hallmark of *waqf*, so that it can be distinguished from other forms of alms. Responding to the *ta’bîd* statement contained in the *waqf*, broadly speaking, there are two opinions among scholars. Among them there are those who list the nature of *ta’bîd* as an absolute condition of *waqf*, and some do not include it as a condition of *waqf*. Therefore, some of them allow *mu’aqqat* (temporary) *waqf* or *waqf* for a certain period of time.

The majority of Hanafiyyah, Syafi’iyyah, Hanabilah, Zaidiyah, Ja’fariyah and Zahiriyyah scholars state that *waqf* must be given permanently (forever) and must include a statement that shows this meaning. Therefore, according to them, *waqf* with a certain period of time (*mu’aqqat*) is invalid. According to Imam Mawardi, *waqf sighat* must be lasting and unbroken. Therefore, if the wakif limits the time, then the *waqf* is considered invalid. According to Ibn ‘Abidin the nature of *ta’bîd* is a requirement in *waqf*, it’s just that according to Abu Yûsuf the pronunciation of *ta’bîd* is not a requirement, while Muhammad stated that the mention or pronunciation of *ta’bîd* must be in the contract.³⁸

Al-Syairazî (w. 476 H) said that *waqf* is not allowed for a certain period of time, because basically *waqf* is a form of spending assets that aims to get closer to Allah (*taqarrub*). Therefore, it is not permissible to make *waqf* within a certain period of time, such as the liberation of slaves and alms. In contrast to Ab al-Abbas who stated that *waqf* with a certain period of time remained valid,

³⁶ Wahbah Al-Zuhailî, *Al-Waqf fî Syarî‘ah al-Islâmiyyah*, (Libanon: al-Maktabah al-Hadîthah, t.t.), h. 10.

³⁷ Abâ Zahrah, *Muhâdarât fî al-Waqf*, (Kairo: Dâr al-Fikr al-‘Arabi, 2005), h. 51-52.

³⁸ Al-Kabîsi, *Abkâm al-Waqf fî al-Syarî‘ah al-Islâmiyyah*...h. 159.

and ended at the end of the specified time. The reason is that when it is permissible to draw closer to Allah (*taqarrub*) with all of our wealth or half of it, then we are also allowed to draw closer to Allah all the time or half of it.³⁹

The opinion of Al-Syairazî (d. 476 H) above is in line with the opinion of al-Khasyaf from the Hanafi School which states that *waqf* accompanied by a time limit is void. This is as understood that the Hanafiyyah provide *ta'bîd* conditions (forever) for the validity of *waqf*.⁴⁰ Therefore, according to them, it is not permissible to donate movable property, because movable objects will not last forever or at least last long and often damage occurs. Unless, the movable object is donated together with immovable property, such as donating a hoe together with *waqf* of rice fields or fields.⁴¹

Ibn Qudâmah (w. 620 H) from the Hanabilah, he stated that it is not permissible to *waqf* for a certain period of time, because *waqf* is issuing wealth with the aim of *taqarrub* to Allah. The prohibition of *waqf mu'qqat* is based on the allusion of *waqf* to the liberation of slaves. Because, in the liberation of slaves, it is not allowed for a certain period of time, as well as *waqf*.⁴²

As for Malikiyah scholars, the majority of them allow *waqf* within a certain period of time (*mu'qqat*). However, they say that implicitly the word *waqf* itself actually has an eternal and continuous meaning. If the wakif says "My house is *waqf*" and he does not add a word after it, then this *waqf* is obligatory and is eternal.⁴³ This Malikiyah opinion is in accordance with some of the Hanabilah, Ja'fariyah and Ibn Surayj (d. 306 H) scholars from the Syafi'iyah circles. Al-Khurasyi (d. 1101 H) states that the validity of *waqf* is not required to have *ta'bîd* (eternal conditions), even valid *waqf* without any eternal meaning and becomes a necessity to be used within a period of one year, then after that period it returns to property wakif.

Based on the Egyptian Qanun no. 48 of 1946 article 5, regarding the law of *ta'bîd* *waqf* can be divided into two, namely *waqf* for mosques and for other interests. *Waqf* for mosques applies *ta'bîd* law, while *waqf* for other purposes applies *ta'bîd* and *ta'qîd* laws. If the wakif absolutes his words then the law of *ta'bîd* applies. The permissibility of *ta'qîd* in *waqf* for purposes other than the mosque, is only limited to a maximum of 60 years. The maximum time limit is based on anticipating the death of the wakif. Meanwhile, *waqf* for families (*ahlî or dzurr*) is limited to a maximum of two generations.⁴⁴

³⁹ Al-Kabîsi, *Abkâm al-Waqf fî al-Syarî'ah al-Islâmiyah*...h. 159.

⁴⁰ Al-Kabîsi, *Abkâm al-Waqf fî al-Syarî'ah al-Islâmiyah*...h. 162.

⁴¹ 'Abd al-Latîf Muhammad 'Am, *Abkâm al-Wasâyâ wa al-Waqf*, h. 212.

⁴² Al-Kabîsi, *Abkâm al-Waqf fî al-Syarî'ah al-Islâmiyah*, h. 163

⁴³ Al-Kabîsi, *Abkâm al-Waqf fî al-Syarî'ah al-Islâmiyah*...h. 167-168.

⁴⁴ Muhammad Kamâl al-Dîn Imâm, *Al-Wasîyah wa al-Waqf fî al-Islâm Maqâsid wa Qawâ'id*, (Al-Iskandariyah: ManSya'ah al-Ma'ârif, 1999), h. 235-236.

Al-Kabîsi⁴⁵ said that the majority of scholars agree that mosque *waqf* is one of the *waqf* objects that cannot be limited by a time limit. Meanwhile, Muhammad Alisy said that scholars have agreed that mosque *waqf* is an abolition of ownership rights, such as the liberation of slaves, no creature has the right to own it as Allah says in QS. Al-Jinn [72]: 18. In addition to the mosque, *waqf* for graves is also a *waqf* that is not owned by anyone. Ibn Taimiyah said that mosques and the like are forms of *waqf* that are not owned by certain people with the agreement of Muslims. Whereas in the book *al-Furûq*, it is said that the scholars agree on the mosque issue that it is part of the chapter on the abortion and release of slaves, so that no one owns it.⁴⁶

Apart from the above description, in essence, the benefit of *waqf* is the main goal of a person's act of *waqf* of some property. The practice of implementing *waqf* recommended by the Prophet. to 'Umar bin Khattab and followed by several other companions who emphasized the importance of holding back the existence of *waqf* objects (*ta'bîd al-ashli*) and giving alms from the management of these *waqf* objects (*tasbîl al-manfa'ah*). Therefore, the issue of *waqf*, the substance of its teachings lies not solely in the existence of *waqf* objects, but it is much more important that the value of the benefits of these objects is for the public interest and benefit.

Based on the main principles of *waqf* law, namely the principle of immortality (*ta'bîd al-ashli*) and usefulness (*tasbîl al-manfa'ah*) on *waqf* objects, developments in the dynamic management of *waqf* objects have led to differences of opinion among scholars, especially regarding the exchange of *waqf* objects. *waqf* (*istibdâl*).⁴⁷ Responding to the issue of whether or not exchange is permissible (*istibdâl*), there are two groups, namely groups that allow *istibdâl* under certain conditions and groups that do not allow *istibdâl* under any conditions. These differences stem from differences in understanding of the principle of *waqf* which requires forever (*ta'bîd al-ashli*) but must also provide benefits (*tasbîl al-manfa'ah*). The first group is represented by the Hanafî school and the Hanbal school. The Hanafî School allows *istibdâl* with two conditions. First, the wakif itself requires the replacement of the *mawqf* to be done alone, or done by someone else, or done with other people. Second, wakif does not require it, but the *mawqf* is no longer able to provide benefits to the *mawqûf 'alayh*, because of an emergency and or because of the public interest (*mashlahah 'ammah*).⁴⁸ As for the Hanbali school, it is seen as a school that provides a lot of

⁴⁵ Al-Kabîsi, *Abkâm al-Waqf fî al-Syarî'ah al-Islâmiyah*...h. 171.

⁴⁶ Khâlid bin Ali, *Al-Jâmi' li Abkâm al-Waqf wa al-Hibât wa al-Wasâya*,... h. 24-25.

⁴⁷ Afiffudin Mohammed Noor dan Mohm. Ridzuan Awang, "The Implementation of *Istibdâl* Endowment in the State of Kedah Darul Aman", *Journal Islamiyyât* 35 (1), 2013, h. 49. Lihat <http://e-resources.perpusnas.go.id/library.php?id=00001>. Diakses 03 Januari 2018.

⁴⁸ Ali bin Sulaiman al-Murdawi, *Al-Insâf fî Ma'rifat al-Râjib min al-Khilâf*, (Kairo: Dâr al-Ihyâ' al-Turâth al-'Arabîy, 1986), h. 100-101.

flexibility and convenience for the practice of *istibdâl* on *waqf* assets, although basically it is not much different from the other three schools, namely as much as possible maintaining the existence of *waqf* goods as before. The Hanbal school provides concessions for the *istibdâl* of *waqf* goods, in the event of harm that befalls *waqf* goods, or there is a public interest that requires the use of *waqf* goods, such as road expansion. In the Hanbal school they allow it, even in relation to *waqf* goods in the form of mosques, they allow the exchange or sale of *waqf* goods.⁴⁹

The second group is represented by the Malik school and the Syafi'i school. The Maliki school forbids *istibdâl* in two ways. *First*, when the *waqf* property is in the form of a mosque. *Second*, if the *waqf* property is in the form of productive land, then it is not permissible to sell or exchange it unless there is an emergency. While the Syafi'i school is like the Malik school which complicates and narrows the practice of *istibdâl*, in order to preserve the *waqf* property.⁵⁰ The nature of immortality (*ta'bid*) which is an absolute requirement in *waqf*, can actually be found in the practice of *istibdâl*. If the *istibdâl* is intended to preserve the benefits of *waqf* goods so that what is meant by "eternal" is not only about the form of the goods, but also in terms of sustainable benefits. This is what actually becomes *maqasid al-syar'i'ah* in *waqf*.

One form of effort to empower *waqf* property is by optimizing the role of *waqf* to be more productive. Meanwhile, one way how *waqf* can be productive is to practice *waqf* exchange (*istibdâl*). It is realized that *waqf* has considerable potential to be developed into a productive asset, which in the end is not only able to support socio-religious services, but is also directed to support various initiatives aimed at social justice and education. Thus, the goals of *waqf* are in line with the benefit paradigm which is the orientation of Islamic law. From this description, it is very important to conduct a study of the method of determining the law related to *waqf*, especially those related to benefit considerations, because *maslahat* is the spirit of *maqasid al-syar'i'ah* that must be maintained in every Islamic law.

LBM-NU Fatwa Regarding *Istibdâl*

The fatwa chosen in this article, as representatives representing Indonesian Ulema, is the LBM-NU fatwa in 1996. This fatwa is the answer to a case in Simpang Wetan village, Buaran district, Pekalongan regency. Where an ancient mosque is located on the edge of the highway will be affected by eviction because there is widening of the road. The *takmir* of the mosque has anticipated this incident by forming a renovation construction committee in the following way: The front of the mosque will be converted into a courtyard and

⁴⁹ Muhammad Qadri Pasha, *Qanân al-Adli wa al-Insâf fî al-Qadâ' 'alâ Musykilât al-Anqâf*, (Kairo: Dâr al-Salâm, 2006), h. 281-287.

⁵⁰ Muhammad Qadri Pasha, *Qanân al-Adli...* h. 282.

parking lot, considering that the mosque does not have a courtyard and parking lot. The front of the mosque, which was converted into a courtyard and parking lot, was replaced with *waqf* land behind the mosque. The new mosque, built with two floors and the second floor in the shape of the letter “U”, makes the mosque look grander and bigger so that it can accommodate worshipers with a large capacity. The question is “Is it permissible to exchange the mosque’s *waqf* land? and how does the law change the function of the land which was originally a mosque into a yard and parking lot for the benefit of the mosque? LBM-NU’s answer is that regarding the legal status of exchanging mosque *waqf* land, there are two opinions. First, saying no, this is the opinion of the Shafi’ school which is the majority school of Indonesian society. Second, saying yes, this is the opinion of the Hanafî and Hanbalî schools. This permission is provided on the condition that the *waqf* land is exchanged for a better benefit and use which is based on the decision of the entire *takmir* of the mosque and the local ulema. The LBM-NU’s answer regarding the legal status of the change in the function of the land which was originally a mosque, then became a yard or parking lot is as follows: According to the Shafi’i school, the law remains like a mosque in general. According to the Hanafî school, the land of the mosque that has become a yard or parking lot, is not the same as the law of a mosque. As for the Hambal school, after the land changed its function to a non-mosque, the law also changed.⁵¹

The arguments used by LBM-NU in answering these questions are the opinions of scholars across schools of thought in *mu’tabar* books. Among the scholars’ opinions quoted is Sayyid al-Bakrî bin Sayyid Muhammad Syathâ’ al-Dimyâtî (d. 1310 H/1892 M) from the Shafi’î school, which is contained in the book *I’ânah al-Tâlibîn*. Al-Dimyâtî said that a damaged mosque, whatever its condition may not be changed, either by restoring or renovating or by tearing down the damaged building and then replacing it with a new building. However, the mosque was left in its damaged condition, because of the damage, it was still possible for some places that were considered good to be used for prayer as they functioned, and there was hope that they would be returned to normal.⁵²

Another opinion quoted is the fatwa of Abdullâh al-Syarqâwî (1150 - 1227 H) in his book *Hâsyiyyah al-Syarqâwî ‘Alâ al-Tahrîr*. Al-Syarqâwî said that according to the Syafi’iyyah scholars exchanging waqf bands of whatever form is not allowed, even if they are in a damaged condition, in contrast to the Hanafiiyyah scholars, who allow the exchange of waqf property with notes based on a judge’s decision, the damage is something that is certain.⁵³ Furthermore, al-

⁵¹ http://ppssnh.malang.pesantren.web.id/cgi-bin/content.cgi/masail/aula/tahun_1996/09.single

⁵² Sayyid al-Bakrî bin Sayyid Muhammad Syathâ’ al-Dimyâtî, *Hâsyiyyah I’ânah al-Tâlibîn*, (Indonesia: Dâr Ihyâ’ al-Kutub al-‘Arabiiyyah, Juz 3, t.t.), h. 181

⁵³ Al-Syarqâwî, *Hâsyiyyah al-Syarqâwî ‘Alâ al-Tahrîr*, h. 198.

Syarqâwî (1150 -1227 H) said that *waqf* objects in any condition should not be sold, such as dry *waqf* trees and fallen mosques. Mosques that are in a damaged condition and difficult to return to their original state, also cannot be sold or replaced (*istibdâl*), because parts of the mosque that are still in good condition or the level of damage is not so severe can still be used for prayer and *i'tikaf*, so the purpose of the mosque's establishment is still obtained. In contrast to mosque facilities or inventory in the form of a grant, it may be sold if its condition is damaged, then the proceeds from the sale are used to buy similar items instead. This is so that it is not considered a waste of property. This opinion is the opinion of the majority of Shaf'iyyah scholars. However, according to al-Subki, sales which are then used to buy other goods (*istibdâl*) are allowed with three conditions. *First*, the changes are small, so it does not change the name of the *waqf* object. *Second*, there is no omission of any *waqf* object except in part for other purposes. *Third*, there is a benefit value in the sale. It is like a village whose inhabitants have abandoned it, even though there is a mosque in the village, so that no one prays in it. Then the mosque may be sold or moved to a more strategic place, so that people can easily reach and perform prayers in it.⁵⁴

The opinions of al-Dimyâtî (d. 1310 H/1892 M) and al-Syarqâwî (1150 -1227 H) above, are representations of the opinions of the Syafi'iyah scholars. Where they are very strict in giving permission to replace or sell *waqf* objects even though they are in a damaged condition. Because according to them, one of the features of *waqf* objects is the existence of an element of immortality in the *waqf* object, so that its existence must be maintained and protected from all forms that threaten its existence. Therefore, they forbid the sale of *waqf* property even if it is in a heavily damaged condition, because there is a possibility that it can be repaired, so that it can function as it was originally.

The opinion quoted by the next LBM-NU is Ibn 'Abidin (1198-1252 H.), in the book Radd al-Mukhtar one of the Hanafiyah scholars, whose work is widely used as a reference, because it is considered representative of the Hanaf school. Ibn 'Abidin said that if a mosque is damaged, then it is demolished and replaced with a new, stronger and better building, then it is permissible.

The last quote is the opinion of Ab al-Farj al-Maqdisî (597-682 H) one of the Hanbal scholars. He is one of the main references in his school, because the book Syarh al-Kabîr is the Syarh from the book al-Muqni' by Ibn Qudâmah (541-620 H) who became one of the leaders of the Hanabillah scholars. Abî al-Farj al-Maqdisî (597-682 H) said that if the *waqf* object is no longer able to provide the slightest value of benefit, either because its condition is damaged, or the *waqf* land returns to dead land that is impossible to manage again, or a mosque that is abandoned by its inhabitants, or the land of the mosque is narrow so that it cannot accommodate the congregation, then the *waqf* object

⁵⁴ Al-Syarqâwî, *Hâsyiyah al-Syarqâwî 'Alâ al-Tabrîr*, h. 198.

may be sold either in part or in whole.⁵⁵ The opinion of Ab al-Farj al-Maqdisi (597-682 H) above, if examined more deeply, actually he has explained Ibn Qudâmah's statement (541-620 H) about the prohibition of selling *waqf* objects unless there is no benefit value. Therefore, if the *waqf* property does not provide the proper benefit, the *waqf* object may be sold, then the proceeds from the sale are bought with the same object so that its form and function are the same as the first object. Like *waqf* of war horses that are thin and weak so that they cannot be used for war, it is permissible to sell the horse and buy another horse that is still fit for war. Likewise, a mosque that is no longer used as a place of prayer, because its residents have left it may be sold, but according to one history it is not sold, but the equipment or facilities of the mosque are moved to another mosque. According to Abî al-Farj al-Maqdisi (597-682 H) in principle, *waqf* objects should not be traded and donated, this is based on the Hadith of the Prophet regarding his advice to 'Umar, namely "*ghayr annahu lâ yubâ'u aslubâ wa lâ yûhabu wa lâ yûrathu*" that the alms (*waqf*) may not be sold, donated and inherited. If the value of the benefits of the *waqf* object as a whole is gone, such as a collapsed house or land that has been damaged and returns to dead land that is impossible to manage anymore, or a mosque whose villagers have moved, so that the mosque becomes a place that is not used for perform Salah, or the mosque is narrow and cannot accommodate the congregation and it is not possible to expand it in that location, if it is possible to sell part of it to manage the rest, then it is permissible to sell part of it. And if it is not possible to have the slightest benefit value, then it is permissible to sell the whole thing. Even Imam Ahmad (d. 241 H) in one narration of Ab Dâwud (202-275 H) said that when in a mosque there are two valuable woods, it is permissible to sell one of them and then the proceeds from the sale are used to maintain the mosque. In Salih's narration, Imam Ahmad (d. 241 H) also said that the mosque may be moved if it is feared from the thieves of the mosque's facilities, and it may also be moved if the mosque is in a slum area. And in the history of al-Qâdî, Imam Ahmad (d. 241 H) also said that if the mosque is in a place where the people prevent it from being used as a place of prayer, then the mosque can also be moved.⁵⁶

If you pay attention, the opinions quoted by LBM-NU are representative of each school that they follow, namely the Syafi'i, Hanaf and Hanbalî schools. The Syafi' school is too strict in terms of selling or exchanging (*istibdâl*) *waqf* objects, almost all exchanges of *waqf* objects are legally prohibited even if they are in a damaged condition. On the other hand, the Hanafi and Hanbal schools are actually very loose on this issue. Because according to them, in the matter of *waqf*, in essence, selling or replacing *waqf* objects for the sake of

⁵⁵ Syams al-Dîn Abî al-Farj 'Abd al-Rahmân bin Muhammad bin Ahmad Ibn Qudâmah al-Maqdisî, *al-Syarh al-Kabîr*, (t.k: Hajar, Juz 16, 1995), cet 1, h. 522.

⁵⁶ Abî al-Farj al-Maqdisî, *al-Syarh al-Kabîr*, h. 522.

a benefit is the same as keeping the *waqf* property. Although the form of care is not focused on the types and kinds of the original *waqf* goods.

As for the opinion of the Maliki scholars, ‘Alī bin Khalaf al-Maliki (857-939 H) and ‘Alī al-Sa’idī al-‘Adawī al-Malikī said that *waqf* objects should not be sold even if they were in a damaged condition and did not provide any benefit. Thus, if the condition of the *waqf* is not harmful and it can still be expected that one day it will return to its original state, namely the condition of the *waqf* can provide benefits to the recipient of the *waqf* (*mawqūf ‘alayh*). However, if the existence of the *waqf* can be dangerous or there is a potential towards it, and there is no hope of returning to its original condition, then Malikiyah scholars agree that they may sell the *waqf* object. Or if previously the *waqf* giver (*wakif*) has given conditions to the *mawqūf ‘alayh* to sell it, then in order to carry out the conditions of *wakif*, the sale of the *waqf* object is allowed. Exceptions from the law on the origin of *waqf* – they cannot be traded – are if there is a need or interest (*hājah*) for the expansion of mosques, roads or graves. So based on these exceptions, the sale of *waqf* objects is allowed, because according to them the benefits of the mosque, the paths traversed by Muslims and the graves are much larger and larger than the *waqf* itself. And it has approached the intent and purpose of the *waqf* carried out by the *wakif*. Of course, the proceeds of the sale are used to buy goods that are the same as the *waqf* objects that have been sold, if indeed the *waqf* objects have an equivalent. But if you can't find the equivalent, you just need to buy another object that has the same function. Such as the permissibility of selling *waqf* horses that are thin and weak so that they cannot be used for war, then the proceeds from the sale are bought for swords or other weapons, which both have the function of fighting or *jihad*.⁵⁷

When compared with contemporary opinions, it is found that according to Khalid bin ‘Alī when a mosque is not functioning properly, such as when it is damaged so that no one takes care of it, or the local community moves to another place so that no one prays in it, then he classifying the opinions of scholars into three groups. First, it is permissible to move the mosque, for reasons of public benefit, even though the mosque can still be used as its function. Like a mosque that is too narrow for the congregation, there are difficulties in expanding the mosque because there is no space. This is the opinion of Imam Ahmad (d. 241 H) and was chosen by Syaykh al-Islām Ibn Taymiyyah (661-728 H/1263-1328 AD). Even Syaykh al-Islam said that replacing (*ibdāl*) *waqf* objects because of a definite benefit element such as a better replacement, or a mosque being replaced with another mosque building that is better and more suitable for the local community, then sells the first *waqf* as capital for sustainable development new, then according to Imam Ahmad (d.

⁵⁷ ‘Alī bin Khalaf al-Mâlikī, *Kifâyah al-Tâlîb al-Rabbânî*, (Kairo: al-Madani, Juz 3, 1987), h. 540-541.

241 H) and others allow the act. Second, it is permissible to sell and replace the mosque, when it is no longer functioning properly. Such as the condition of the mosque being damaged and not being repaired, making it difficult for the congregation to pray in it, or the absence of land to expand the area of the mosque so that the congregation is jostled because of the narrow mosque. So the mosque in such condition, may be sold and exchanged with other buildings to avoid wasting property (*idllâ'ah al-mâl*). Because if the *waqf* of the mosque is left as it is, then what happens is that the mosque cannot function properly and of course the *waqf* object is neglected. Therefore, selling and exchanging old mosques with new mosque buildings is in order to keep *waqf* objects intact and intact. Third, it is not allowed to sell and replace the mosque even though it is in a non-functioning condition. Mosques under no circumstances may be sold and replaced with other mosques, even though they are in damaged condition and no one is praying in them. This is because, no one has legal ownership rights to *waqf* property, because the ownership of *waqf* objects has been transferred to the absolute right of Allah. So that no one has the right to sell and replace the *waqf* object.⁵⁸

From the description of the classification, according to Khalid, the strongest opinion is the first opinion that allows selling and replacing *waqf* objects, including mosques, because of the definite public benefit. In addition, the non-functioning of *waqf* objects as they should be a very significant consideration for the permissibility of selling and replacing *waqf* objects, because leaving *waqf* objects abandoned without any function is an act of wasting property (*idllâ'ah al-mâl*). Thus, the benefit value contained in this issue is from the wakif side, the sustainability of the *waqf* object will remain guaranteed even with the different conditions of the *waqf* object, while from the side of the *waqf* beneficiary (*mamqûf 'alayh*), the benefits of the *waqf* object will continue to be obtained and obtained. In addition, there are *fiqh* rules that command to seek or realize benefit (*jalb al-mashalih*) and refuse or avoid damage (*dar'u al-mafâsid*).⁵⁹

The LBM-NU decision above is in accordance with the KF-MUI fatwa on January 26, 2009 in Padangpanjang during the Ijtima' Ulama of the MUI Fatwa Commission throughout Indonesia III. In its fatwa KF-MUI explains that the exchange of *waqf* objects (*istibdâl al-waqf*) is allowed as long as it is for realizing benefit because it is to maintain the continuity of the benefits of *waqf* (*istithmâr baqâ'i al-manfâ'ah*), and is carried out with replacements that have an equivalent or better value. . In addition to the exchange provisions, KF-MUI also allows the sale of *waqf* objects with the following conditions: a) the existence of *hajah* (interest) in order to maintain the purpose of wakif; b) the

⁵⁸ Khâlid bin 'Alî bin Muhammad, *Al-Jâmi' li Ahkâm al-Waqf wa al-Hibât wa al-Washâya*, (Qatar: Idârat al-'Ammah li al-Awqâf, Juz 3, 2013), h. 43-46.

⁵⁹ Khâlid bin 'Alî bin Muhammad, *Al-Jâmi' li Ahkâm al-Waqf wa al-Hibât wa al-Washâya*,... h. 42-47.

proceeds from the sale must be used to purchase other property as a substitute *waqf*; and c) the benefits of the substitute *waqf* are at least commensurate with the previous *waqf* object. As for the technical implementation, it must obtain the permission of the Minister in accordance with the provisions of the legislation and the MUI's considerations.⁶⁰ The law explains that the exchange of *waqf* assets can only be carried out after obtaining written permission from the Minister with the approval of the Indonesian Waqf Board (BWI). In addition, *waqf* assets must be exchanged for property whose benefits and exchange value are at least the same as the original *waqf* property.⁶¹

When viewed from the point of view of the Indonesian Waqf Law No. 41 of 2004, it is found that the *istibdâl* problem is included in the exception category. Because in the Act basically follows the principle of *waqf* which cannot be exchanged, replaced and changed and everything that can threaten the existence of *waqf*. Article 40 of the Indonesian Waqf Law explains that *waqf* assets that have been *waqf* are prohibited: a) pledged as collateral; b) confiscated; c) granted; d) for sale; e) inherited; f) exchanged; or g) transferred in the form of another transfer of rights. Article 41 paragraph (1) explains: The provisions as referred to in article 40 letter (f) are excluded if the *waqf* property that has been *waqf* is used for the public interest in accordance with the General Spatial Planning (RUTR) based on the provisions of the applicable laws and regulations and does not conflict with sharia. Paragraph (2) implementation of the provisions as referred to in paragraph (1) can only be carried out after obtaining written permission from the Minister with the approval of the Indonesian Waqf Board (BWI). Paragraph (3) *waqf* property whose status has been changed due to the provisions of the exception as referred to in paragraph (1) must be exchanged for property whose benefits and exchange value are at least the same as the original *waqf* property. Paragraph (4), provisions regarding changes in the status of *waqf* assets as referred to in paragraphs (1, 2, 3) shall be further regulated by a Government Regulation.⁶²

If you pay attention, the above Act shows that there is an attitude of prudence in the issue of *istibdâl* (exchange) of *waqf* assets. This is done because it still emphasizes efforts to maintain the eternal nature of *waqf* goods as long as the condition is still normal. But on the other hand, the *waqf* law also opens the door for *istibdâl* even though it is not *tasâbul* (easing the problem). Thus, the *waqf* law has followed the opinion that allows *istibdâl*, such as the Hanafi school. With this superstitious approach, in the context of modern life as it is today, choosing the opinion that is considered the most suitable in accordance with reality is a necessity that cannot be avoided by legal decision makers.

⁶⁰ Ma'ruf Amin, dkk., *Himpunan Fatwa MUI Sejak 1975*, (Jakarta: Emir, Penerbit Erlangga, 2015), h. 1119.

⁶¹ Undang-Undang tentang Wakaf No. 41 Tahun 2004.

⁶² Undang-Undang tentang Wakaf No. 41 Tahun 2004.

Conclusion

Istibdâl is one of the methods used by Nadzir or the government to make waqf assets (mauqf) productive. Although basically the issue of *istibdâl* is still debated by scholars from the schools of thought. The difference of opinion is more due to the understanding of the principle of immortality and the benefits contained in the *waqf* object. The group that prohibits *istibdâl* focuses more on the principle of immortality (*ta'bîd al-ashl*). According to him, preserving the existence or existence of *waqf* goods (*mawqûf bih*) is a necessity anytime and anywhere, it cannot be sold for any reason and cannot be exchanged in any form, especially if the waqf goods are in the form of a mosque. The group that allows *istibdâl* focuses more on the principle of benefit (*tasbîl al-manfa'ah*). They say that the exchange of *waqf* goods may be carried out for certain reasons, including: (1) if the *waqf* goods are no longer able to provide the benefits as intended by the wakif, (2) the condition is fearful of being damaged, (3) there is a purpose -Other purposes with greater benefits and benefits for the wider community, such as expansion of mosques, public roads, cemeteries for Muslims.

The formulation of the LBM-NU fatwa has allowed the practice of *istibdâl* with agreed terms, namely the existence of disadvantages contained in the *waqf* object so that the *waqf* property is in an emergency condition that must be saved. There is also a much greater benefit both for the *waqf* property itself and for the wider community. The *istibdâl* permissibility is strengthened by law no. 41 of 2004, article 41. Where definitively, *istibdâl* is a form of exception from general provisions, namely in the form of emergencies, and needs (hajah), then *istibdâl* and others are permitted. The government, as the authority holder in the management of *waqf* assets, has the authority to exchange *waqf* objects.

This study will certainly be more interesting if other researchers can see how the response of other scholars, such as Muhammadiyah, MUI, and also other mass organizations. The response, of course, is accompanied by the arguments used, so that it is more comprehensive in seeing a problem. This study can certainly be used as a consideration for parties who have the authority to manage *waqf* assets, be it the government, BWI or Nadzir himself.

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