

RELOCATION MODEL OF WAQF LAND AND BUILDINGS IMPACTED BY SIDOARJO MUD BLOWOUT

Abdul Rokhim*, Suratman

Universitas Islam Malang, Indonesia

Jl. Mayjen Haryono 193 Malang, Indonesia

*email: abdulrokhimsda@gmail.com

DOI: 10.30631/al-risalah.v21i2.805

Submitted: August 27, 2021; Revised: December 26, 2021; Accepted: December 29, 2021

Abstract: This research aims to analyse the validity relocation of land and buildings that cannot be used according to the aim of waqf stipulated in the Islamic Sharia and the Law on Waqf, as well as the relocation model of land and buildings that are impacted by the Sidoarjo mud blowout. This is juridical-normative research that uses statutory and conceptual approaches. The results show that there are dissents among Islamic law experts on the permissibility of waqf object relocation. Then, the Law on Waqf prohibits waqf diversion, except for public interests. Then, the Presidential Decree No. 14 of 2007 and its changes do not regulate waqf object replacement. Even so, in 2020 the government has relocated 8 out of 50 waqf objects outside of the Map of Impacted Area through build swap (*ruilslag*), whereas none of the waqf objects within the Map of Impacted Area that is the obligation of PT Lapindo Brantas company have been substituted. According to Article 15 clause (1) and (3) of the Presidential Decree No. 14 of 2007, the waqf land or buildings should be relocated using the sales transaction scheme. Its proceeds will then be used to buy substitute waqf objects elsewhere.

Keywords: Sanctions, Islamic, Corruption, Justice.

Abstrak: Penelitian ini bertujuan untuk menganalisis keabsahan relokasi tanah dan bangunan yang tidak dapat digunakan sesuai dengan tujuan wakaf yang diatur dalam Syariat Islam dan Hukum Wakaf, serta model relokasi tanah dan bangunan yang terkena dampak lumpur Sidoarjo. meledak. Penelitian ini merupakan penelitian yuridis-normatif yang menggunakan pendekatan perundang-undangan dan konseptual. Hasil penelitian menunjukkan bahwa terdapat perbedaan pendapat di antara para ahli hukum Islam tentang boleh tidaknya relokasi objek wakaf. Kemudian, UU Wakaf melarang pengalihan wakaf, kecuali untuk kepentingan umum. Kemudian, Perpres No. 14 Tahun 2007 dan perubahannya tidak mengatur tentang penggantian objek wakaf. Meski begitu, pada tahun 2020 pemerintah telah merelokasi 8 dari 50 objek wakaf di luar Peta Wilayah Terdampak melalui *build swap* (*ruilslag*), padahal tidak ada satupun objek wakaf yang berada di dalam Peta Wilayah Terkena Dampak yang menjadi kewajiban perusahaan PT Lapindo Brantas. telah diganti. Menurut Pasal 15 ayat (1) dan (3) Perpres No. 14 Tahun 2007, tanah atau

bangunan wakaf harus direlokasi dengan skema transaksi jual beli. Hasilnya kemudian akan digunakan untuk membeli benda wakaf pengganti di tempat lain.

Kata Kunci: Model Relokasi, Tanah dan Bangunan Wakaf, Semburan Lumpur Sidoarjo

Introduction

More than 15 years ago, specifically on May 29th, 2006 an environmental disaster in the form of an underground mud blowout occurred around the exploration area of PT Lapindo Brantas at Porong District, Sidoarjo Regency, East Java Province, Indonesia. This disaster has damaged road infrastructure, electricity network, gas pipes, rivers, agricultural land, arable land, people's houses, etc. It also destroyed or wiped out waqf land and buildings such as mosques, *mushola* (small mosques), graveyards, and education facilities. Waqf itself is an endowment of a Muslim to a religious, educational, or charitable cause. As a response to the social and economic impacts from the still-ongoing Sidoarjo mudflow, the government has issued Presidential Decree No. 14 of 2007 on the Sidoarjo Mud Response Agency (PD 14/2007) that has been amended four times. The most current version is the Presidential Decree No. 37 of 2021 on the Fourth Amendment of the Presidential Decree No. 14 of 2007 on the Sidoarjo Mud Response Agency (PD 37/2012). The PD 14/2007 was changed several times as a response to the increasing mudflow area.

Up to now, the government has only relocated 8 out of 50 waqf locations impacted by the mud outside of the Map of Impacted Area (MIA) based on the Decree of the Republic of Indonesia's Ministry of Religion on the Status Change Permit of Waqf Land Exchange to the Waqf Objects Impacted by the Lapindo Mud. The issuing of the 8 (eight) Decrees of the Ministry of Religion was witnessed by the General Director Secretary of the Islamic Society Guidance, Head of the

Legal Bureau of the Republic of Indonesia's Ministry of Religion, Head of Sidoarjo Ministry of Religion, representative of the Central Indonesian Waqf Agency, Sidoarjo Indonesian Waqf Agency, representative of the Indonesian Islamic Scholar Assembly, the Sidoarjo Regency Government, and members of the Sidoarjo Mud Center of Control.¹ The eight waqf objects are mosques, *mushala*, and education facilities – located in two districts, namely seven objects at Porong District, and one at Jabon District.² This waqf land and building exchange was carried out based on the Law No. 41 of 2004 on Waqf (the Law on Waqf) and it was completed step by step according to the document completeness based on the mechanism regulated in the Governmental Decree No. 25 of 2018 on the Implication of the Law No. 41 of 2004 on Waqf.

The problem is that there are also damaged, destroyed, and dysfunctional waqf land and buildings by the Lapindo mud disaster inside the map of the impacted area or inside the Sidoarjo Mud embankment. This problem happened because the government policy that is stipulated in the PD 14/2007 and its changes do not clearly regulate the responsibility of the PT Lapindo Brantas and the government to buy or to exchange the

¹ Sidoarjo PU, "Kementerian Agama Serahkan KMA Terkait Tanah Waqaf Terdampak Lumpur Sidoarjo," accessed on April 4th, 2021, <http://sda.pu.go.id/pusat/ppls/main/post/28-kementerian-agama-serahkan-kma-terkait-tanah-wakaf-terdampak-lumpur-sidoarjo>

² Sidoarjo PU, "Sosialisasi Tukar Menukar Waqaf," accessed on April 4th, 2021, <http://sda.pu.go.id/pusat/ppls/main/post/20-sosialisasi-tukar-menukar-wakaf>. Akses 04 April 2021

waqf land and buildings impacted by the Sidoarjo mudflow in and outside of the MIA.

The vague legal norms (*vage normen*) on PT Lapindo Brantas' obligation to "buy" waqf land and buildings impacted by the mud in the MIA and the governmental obligation to buy" waqf land and buildings impacted by the mud outside of the MIA in Article 15 clauses (1) and (3) of PD 14/2007 implies on the vague responsibilities of PT Lapindo Brantas and the government to "buy" or to carry out *ruilslag* to the waqf land and buildings both in and outside of the MIA on March 22nd, 2007. Because of that, this research on the relocation of the waqf land and buildings impacted by the Lapindo mud tries to find the ideal model in resolving the relocation of waqf land and buildings around the gas and oil mining exploration area of PT Lapindo Brantas in Sidoarjo is highly urgent.

Based on the background above, the interesting legal issues to be analyzed in this research are: (1) How is the validity of relocated waqf land and buildings according to the Islamic Sharia (*Fiqh*) and the Law on Waqf? (2) How is the relocation model of the waqf land and buildings impacted by the Sidoarjo mud?

This research aims to analyze and describe the relocation process of waqf land and buildings impacted by the Sidoarjo mud to find the ideal relocation model of waqf land and buildings impacted by the Sidoarjo mud. It is hoped to become a reference for the government to revise PD 14/2007 and other related laws.

This is a juridical-sociological type of research that analyzes the issues on the relocation of waqf land and buildings impacted by the mud disaster in Sidoarjo based on the constitutional regulations and the empirical reality in the society or the field. In line with that, this research uses the statutory approach and the sociological approach. The

research was carried out in several villages at the Porong and Jabon Districts of Sidoarjo Regency, East Java Province, Indonesia, that was impacted by the mud around the gas and oil mining exploration area of PT Lapindo Brantas in Sidoarjo Regency.

Discussion

The Validity of the Relocation of Waqf Land and Buildings according to the Islamic Sharia and the Law on Waqf

Waqf is a highly recommended type of worship for Muslims as the rewards will keep on flowing even after the death of the person.³ The term "waqf" comes from the Arabic word *waqofa*, meaning "to stop", "to withhold", or "to stay".⁴ Generally, this term means a type of endowment whose implementation is carried out by withholding the original ownership (*tahbishul ashli*) on the object given for waqf to not be inherited, sold, or pawned and so that its benefit is for the public according to the willingness of the waqf giver (*waqif*) without obtaining honorariums.⁵ Waqf means withholding the legal actions of the waqf giver on the object given for waqf to be used for the good of the public,⁶ or to withhold wealth from using its benefits for the sake of getting closer to Allah (God).⁷ Meanwhile, Article 1 number 1

³ Lutfi El Falahy, "Alih Fungsi Tanah Wakaf Ditinjau Dari Hukum Islam dan Undang-Undang Nomor 41 Tahun 2004 Tentang Wakaf," *Al Istinbath: Jurnal Hukum Islam*, Bengkulu: Sekolah Tinggi Agama Islam (STAIN) Curup 1, no 2 (2016): 123.

⁴ Farida Prihatini, et al., *Hukum Islam: Zakat dan Wakaf, Teori dan Praktiknya di Indonesia* (Jakarta: Papas Sinar Sinanti dan Badan Penerbit Fakultas Hukum UI, 2005), p. 108

⁵ Abdul Manan, *Pembaharuan Hukum Islam di Indonesia* (Jakarta: Kencana, 2017), p. 277.

⁶ Musyifikah Ilyas, "Istibdal Harta Benda Wakaf Perspektif Hukum Islam", *Jurisprudentie* 3 no 2 (2016): 140.

⁷ Sudirman, "Regulasi Wakaf di Indonesia Pasca Kemerdekaan Ditinjau Dari Statute Approach," *de Jure: Jurnal Syariah dan Hukum* 6 no 2 (2014): 191.

of Law No. 41 of 2004 on Waqf (the Law on Waqf) states that waqf is a legal action of the waqif to separate and/or submit some of his/her wealth to be used forever or for a certain period to worship and/or for public welfare according to the sharia.

On the position of the waqf object, Islamic scholars of the Hanafi sect opine that the waqf objects are still owned by the waqif. Also, Maliki sect scholars state that the waqf objects are returned to the waqif at certain periods according to the pledge. Then, scholars of the Shafii and the Hambali sects state that the waqf objects are cut or no longer owned by the waqif. It is owned by Allah or the public. As a consequence, since the statement of the waqf pledge, the waqif no longer has the authority to manage the waqf objects.⁸ Then, the management of the waqf objects for worship or public use is shifted to the hands of the *nazhir* (waqf managers) according to the waqf pledge.

Experts of Islamic law (*fuqaha*) have differing opinions on the validity (the permissibility) of the exchange of waqf land and buildings objects that are no longer usable according to the aim of waqf as they are damaged or destroyed. The *fuqaha* of the Maliki sect state that these objects cannot be exchanged even though they are destroyed or are unusable. But, some Maliki *fuqaha* state that exchanging unusable waqf objects is permissible, so long as they are exchanged with other fixed assets. Meanwhile, for waqf objects that are current assets, the Maliki *fuqaha* permit their exchange so that they become functional. Then, Shafii scholars state that waqf objects in the form of fixed assets cannot be exchanged so as to become more functional.^{9, 10} Thus, there is no common ground among the Islamic law experts on the validity of the relocation of no longer usable waqf land and buildings through ex-

changes. Some permit it to continue the usability of the waqf objects, meanwhile, some others prohibit it as waqf objects are eternal.

In the Fiqh of Waqf, the exchange of waqf objects is called "*Istibdal*" or "*Ibdal*". *Al-Istibdal* means the sale of the waqf object to buy other objects as the substituting waqf. It also means releasing an object from the waqf status and exchanging it with other objects. Then, *al-Ibdal* is the exchange of waqf objects with other objects whose functions are either similar or not, such as exchanging agricultural land with land for buildings.¹¹

Fiqh scholars have dissents in responding to the "*Istibdal*" or "*Ibdal*" of waqf objects. Some complicate it, while others ease it. Some even prohibit it except in emergency conditions as exceptions (*ahwal istisnaiyah*). Those who prioritize the "Eternality principle" (*ta'bidul ashli*) state that it is absolute to maintain the continuity of the waqf objects (*mauquf*), meaning that the objects cannot be exchanged with anything else, moreover if the waqf object is a mosque. But, the Hambali sect believes that in emergency cases, mosques may even be sold or exchanged. The proceeds will then be used to buy new waqf objects in exchange. But, the *fuqaha* who prioritize the "Principle of Benefit" (*tasbihul manfaah*), waqf object exchange may be carried out for certain reasons. For example, that object can no longer give benefit as intended by the waqif; it is damaged; or there are other goals with greater benefit or *maslahah* for the public, for example, to extend mosques or to extend roads that are highly required by the society.¹²

In the Law on Waqf, the case of *Istibdal* is categorized as a "law of exception" (*al hukmu al ististna'i*) as stated in Article 40 and Article 41 clause (1) of the Law on Waqf. According to Article 40 of this law, principally, "Waqf objects are prohibited from: a. becoming collateral; b. being confiscated; c. being

⁸ Faishal Haq, *Hukum Wakaf dan Perwakafan di Indonesia* (Pasuruan: PT Garoeda Buana Indah, 1994), p. 37-38.

⁹ Manan, *Pembaharuan*, p. 281.

¹⁰ Haq, *Hukum Waqaf*, p. 39.

¹¹ Tholhah Hasan, "Istibdal Harta Benda Wakaf," accessed on April 11th, 2021, <https://www.bwi.go.id/502/2010/10/27/istibdal-harta-benda-wakaf/>

¹² Ibid.

granted; d. being sold; e. being inherited; f. being exchanged; or g. being substituted in the form of other transfer of rights." But, Article 41 clause (1) of the Law on Waqf states that the prohibition of Article 40 letter f is an exception if the waqf objects are used for the public according to the General Spatial Plan

based on the constitutional regulations that apply and without contradicting the sharia.

Differences of opinion among the Imam Mazhab regarding the validity (permissible and not) of exchanging immovable waqf objects by means of exchanging (relocation), including according to the Law on Waqf, can be described in the following table.

Table 1. The Validity of the Relocation of Waqf Objects According to the Imam Mazhab and the Law on Waqf

No.	Mazhab/School of Islamic Law	Validity/Permissibility	Description
1	Imam Maliki	Forbidden	even if it's broken/doesn't produce
2	Some of the followers of the Maliki school	may, on condition	must be replaced with other immovable objects (<i>ibdal</i>)
3	Imam Shafii	not allowed/ prohibited	Waqf is eternal
4	Imam Hanbali	may, on condition	emergency, by way of exchange or sale
5	The Law on Waqf	Prohibited, with the exception	for the public interest {Article 40 letter f jo. Article 41 paragraph (1)}

Source: Processed from primary and secondary legal materials

In terms of legal procedure, the change of status or the exchange of waqf objects according to Article 41 clause (2) of the Law on Waqf may be carried out under certain circumstances and after obtaining a written permit from the Ministry of Religion with the approval of the Indonesian Waqf Agency. The waqf object whose status has changed must be exchanged with another object whose benefit and transactional value are at least the same as the original object. Further stipulations on the procedure of the waqf object change of status through exchanges are written in Articles 49 to 51 of the Governmental Decree No. 25 of 2018 on the change of the Governmental Decree No. 42 of 2006 on the Execution of Law No. 41 of 2004 on Waqf (GD 25/2018).

Thus, according to the Law on Waqf and the Executing Laws, basically, the waqf items cannot have their legal status or own-

ership changed by selling, inheriting, granting, exchanging, or transferring through other manners. But, change of status or transfer of waqf objects may be carried out through exchanges under certain circumstances and conditions. This applies to the condition of the mud disaster due to the exploration of PT Lapindo Brantas in Sidoarjo, which made waqf objects no longer usable. This waqf object exchange is carried out based on a written permit from the Ministry of Religion with the consideration of the Indonesian Waqf Agency.

The change of status or the relocation of waqf land and buildings impacted by the Sidoarjo mud may be carried out by exchanging (*ruilslag*) them with other objects with similar functions based on the Islamic sharia and the constitutional regulation that apply, namely the Law on Waqf. This exchange is carried out as the condition is ur-

gent since the waqf objects can no longer be used due to the mud disaster.

Up to now, more than 15 years since the mudflow of the Sidoarjo mud, the government has only exchanged 8 out of 50 waqf object locations (land and buildings) impacted by the mudflow outside of the Map of Impacted Area (MIA) based on the Presidential Decree No. 14/2007 by exchanging them (*ruilslag*). The *Ruilslag* on these eight waqf buildings and land is carried out based on the Decree of the Ministry of Religion based on the application proposed by *Nazhir* who has obtained approval from the Indonesian Waqf Agency, according to the procedures of the Law on Waqf and its Executing Regulations. Since PD 14/2007 does not clearly regulate the exchange of waqf land and buildings impacted by the Sidoarjo mud, there is no clear information on the relocation of the rest of the waqf land and buildings both in and outside of the MIA.

The Decree of the Ministry of Religion on September 2020 that determined the relocation of 8 out of 50 waqf objects impacted by the mud outside of the MIA is a governmental response based on the applications for the exchange of the waqf objects impacted by the mud disaster that was proposed by waqf *nazhir* before the Sidoarjo Mud Control Agency was disbanded.¹³ This exchange should be carried out to all waqf objects. It should not only be carried out to the waqf objects outside of the MIA that is the responsibility of the government but it must also be carried out to those in the MIA that is the responsibility of PT Lapindo Brantas. But factually, most of the waqf land and buildings impacted by the mud have not yet obtained compensation in the form of exchanges (*ruilslag*), even though this exchange is carried out so that the waqf functions and aims as *amal jariyah* (eternal re-

ward) from the waqf are sustainable and so that it does not stop even though the object is impacted by the mud.

Based on the description above, it can be concluded that according to the Law on Waqf, the relocation of the waqf land and buildings impacted by the Sidoarjo mud through exchanges (*ruilslag*) is permissible (valid). Even, the government has implemented it in 8 locations outside of the MIA. The exchange of the waqf land and buildings are obligations of PT Lapindo Brantas and the government according to their portions based on the PD 14/2007 and its changes. The governmental relocation of the eight waqf land and buildings impacted by the Sidoarjo mud was carried out based on the Law on Waqf and its Executing Regulations (positive law).

The Relocation Model of Waqf Land and Buildings Impacted by the Sidoarjo Mud Blowout

The term waqf land and building "relocation" in this paper is used concerning the agreement or the practice of exchanging waqf land and buildings at some locations that are impacted by the Sidoarjo mud blowout with the waqf land and buildings at new locations (relocation) based on the Decree of the Ministry of Religion. The waqf land and building relocation are carried out by "exchanging" the original waqf land and buildings with new ones at other locations through "exchange", "build swap", or "swap" which is commonly known as *ruilslag*.

The term "*ruilslag*" comes from the word "*ruil*" in Dutch, meaning "to exchange" and "*slag*" meaning "*gewestelijk*" or a plot of land (*persil*).¹⁴ Thus, the term "*ruilslag*" literally

¹³ Interview with Lukmanul Hakim, Head of the Coordination in Handling Social Impacts Sub-Sector, Sidoarjo Mud Center of Control (Surabaya, April 12th, 2021).

¹⁴ Arifin P. Soeriaatmadja, *Penulisan Karya Ilmiah tentang Aspek Hukum Masalah Ruilslag* (Jakarta: BPHN, Departemen Kehakiman, 1995-1996), p. 11.

(*letterlijk*) means “exchange of a plot of land”. According to the Indonesian-Dutch dictionary, the term “*persil*” in Indonesian came from the word “*perceel*” in Dutch, meaning “a plot of land with a building”,¹⁵ or “a plot of land with a certain size (for plantations or residential houses)”.¹⁶

Initially, the term *ruislag* was terminologically defined as a legal action in the form of a Build Swap Agreement whose objects are land and/or buildings owned by the center or the regional governments. But, in its development, the *ruislag* object also includes private-owned land and buildings (individuals or private companies)¹⁷ Even, this build swap may also be carried out to waqf land and buildings, such as the *ruislag* of waqf land and buildings that are used to build highways or those impacted by the Sidoarjo mud outside of the MIA. In this case, the swapping of the eight waqf land and buildings outside of the MIA of Sidoarjo Mud was based on the Decree of the Ministry of Religion, as a follow-up of the *nazhirs'* proposal with the agreement of the Indonesian Waqf Agency. The build swap was carried out by the Sidoarjo Mud Center of Control by buying the exchange of waqf land in a new location (relocation) based on the Decree of the Ministry of Religion and also building the waqf objects according to their original functions. This was carried out based on the PD 14/2007 that has been changed several times, with PD 34/2012 as the most recent version.

According to Fauzia, “swapping” (*ruislag*) is the exchange between one item and another, either by buying the first item

then exchanging it with a new one or by re-locating it. In the context of waqf, waqf swapping is called *istibdal* in the *fiqh* term. It has entered the discourse of scholars of Islamic sects in their *fiqh* books since the Middle Ages. The scholars have different opinions on this. Imam Shafii does not allow it, though some of his students do. Generally, Indonesians follow the Shafii sect. There are more and more cases of waqf swapping in line with the acceptance of modernization and rationalization in practicing waqf. It means that slowly, the waqf practice transformation in Indonesia becomes more developed, in line with the social and economic developments.¹⁸

In reality, the relocation of the waqf objects impacted by the Sidoarjo mud blowout using the *ruislag* model is not holistically practiced. Based on the field observation, not all of the waqf land and buildings in that area are legal-formally registered as waqf objects. Apart from that, through PD 14/2007 on March 22nd, 2007, the government differentiated victims of the mud disaster into two, namely those inside and those outside of the MIA. This causes differing implications on who is responsible for the waqf land and buildings in and outside of the MIA, and how the realization of the waqf object build swaps are at these two locations.

In the reality in the field, the building swap of the waqf land and buildings are not carried out to unregistered or uncertified waqf land, namely those whose ownership rights are still under the name of the waqif or the descendants, including the waqf buildings such as *mushala* or *madrasah* (Islamic schools) that are built on it. The waqf land and buildings outside of the MIA that

¹⁵ S. Wodjowasito, *Kamus Umum Belanda Indonesia* (Jakarta: Ichtiar Baru-van Hoeve, 1985), p. 129

¹⁶ Kamus Besar Bahasa Indonesia, “Arti Kata Persil,” accessed on April 26th, 2021, <http://kbbi.co.id/arti-kata/persil>

¹⁷ Abdul Rokhim, “Perjanjian Tukar Bangun (Ruislag) Aset Negara: Perspektif Hukum Perdata dan Hukum Administrasi,” *Jurnal Ilmiah “Dinamika Hukum”* XX, no 38 (2014): 7.

¹⁸ Amelia Fauzia, “Tukarguling Wakaf Perspektif Sosiologis,” accessed on April 10th, 2021, http://bwi.or.id/index.php?option=com_content&view=article&id=710:tukarguling-wakaf-dari-perspektif-sosiologis&catid=27:opini&lang=in.

are uncertified or that are not yet registered at the National Land Agency are relocated or moved by selling it under the name of private entities as if they are land and buildings that are personally owned by the mud disaster victims. The sales transaction and the payment processes are the same as the land and buildings of mud disaster victims. Then, the proceeds are used to buy waqf land and buildings are built according to the function of the original waqf object elsewhere (independent waqf relocation). The release of waqf land and buildings by selling them and using the proceeds to buy similar objects elsewhere to become waqf objects in exchange is called *al-Ibdal*.¹⁹

This independent waqf relocation is relatively quick and easy. It is carried out under the personal name of the owner whose asset was given for waqf under the supervision of society as the waqf beneficiaries. Ironically, it is difficult to sell or to obtain compensation on the certified or registered waqf land in or outside of the MIA since March 22nd, 2007. In reality, up to now, the waqf land and buildings located in the MIA have not yet been bought by PT Lapindo Brantas. This may be due to PD 14/2007 that does not clearly explain the obligation of the PT Lapindo Brantas to buy waqf land and buildings. Up to now, there has not been any clarity on the relocation process of waqf objects that are no longer functioning due to the mud disaster in the MIA through "Build swap" (*ruilslag*). Then, there are only 8 out of 50 certified waqf land and buildings outside of the MIA that has been granted compensation elsewhere by the Ministry of Religion through the build swap mechanism in September 2020. Since then, there has not been any certainty on the continuity of the building swap of the rest of the waqf objects.

The exchange of the 8 waqf land and buildings was carried out by the Sidoarjo

Mud Center of Control. It is a special institution formed by the government based on the Decree of the Minister of General Affairs and Residential Houses No. 05/PRT/M/2017 of 2017 on the Change of the Decree of the Minister of General Affairs and Residential Houses No. 15/PRT/M/2015 on the Organization and Work Procedures of the Ministry of General Affairs and Residential Houses. According to that Ministerial Decree, the main task and function of the Sidoarjo Mud Center of Control is to control the Sidoarjo mud, including controlling its social, economic, and environmental impacts.²⁰ This law does not clearly stipulate the Sidoarjo Mud Center of Control's authority to carry out build swap on waqf land and buildings impacted by the mud.

Some factors cause the difficulty in the build swap process of waqf land and buildings impacted by the Sidoarjo mud, including the regulatory issue of the Sidoarjo Mud Center of Control's authority to handle waqf issues. This agency does not have the authority to handle waqf issues, as its job and authorities are only directly related to controlling the mud, so as to not cause social, economic, and environmental impacts to the surrounding area. So far, this Center of Control only handles the waqf exchanging process because it follows up the process carried out by the Sidoarjo Mud Response Agency.²¹

Article 15 clause (1) of PD 14/2007 only regulates the obligation of PT Lapindo Brantas to buy land and buildings of the mudflow victims in the MIA on March 22nd, 2007. It does not mention waqf land and

¹⁹ Suhairi, *Fiqih Kontemporer* (Yogyakarta Idea Press, 2015), p. 92.

²⁰ Sidoarjo PU, "Tugas Pokok dan Fungsi PPLS," accessed on April 12th, 2021, <http://sda.pu.go.id/pusat/ppls/main/page/48-tugas-pokok-dan-fungsi>

²¹ Interview with Lukmanul Hakim, Head of the Coordination in Handling Social Impacts Sub-Sector, Sidoarjo Mud Center of Control (Surabaya, April 12th, 2021).

buildings. As a consequence, at the implementation level, the exchange of waqf land and buildings impacted by the Sidoarjo that are proposed to the government (in this case, the Ministry of Religion) was inhibited by the unclear regulation. Moreover, the fund for the compensation of waqf land and buildings outside of the MIA must be paid using the State Budget. Thus, it must be carried out based on clear juridical and legal bases. Another issue that occurs at the implementation level is the unclear responsibilities of the PT Lapindo Brantas to buy waqf land and buildings in the MIA. Up to now, there is not yet clarity on the “buying” or the “exchange” of the waqf land and buildings in the MIA. This happens even though in 2015, PT Lapindo Brantas obtained a loan from State Budget with the amount of Rp 781.68 billion through the Agreement PRJ-16/MK.01/2015 on The Giving of Anticipation Fund Loan to Repay the Land and Buildings of Sidoarjo Mudflow Victims in the Map of Impacted Area, March 22nd, 2007.²²

The vague norms (*vage normen; vague norms*) in Article 15 clause (1) of PD 14/2007 on the waqf land and buildings may become excuses of PT Lapindo Brantas to not enter the waqf land and buildings as objects that must be bought or given compensation through *ruilslag*. Moreover, PT Lapindo Brantas was never present at inter-institutional meetings on waqf objects impacted by the mudflow.²³ Thus, the position and the responsibilities of this company in buying waqf land and buildings in the MIA

are still unclear. Also, Article 15 clause (3) of PD 14/2007 only regulates the government’s responsibilities to compensate the social and communal fees to the mudflow victims outside of the MIA on March 22nd, 2007. In its implementation, according to Article 15 B clause (3) PD 48/2008, the government is obliged to buy the land and buildings impacted by the mud outside of the MIA. It does not regulate its obligation to “buy” or to “swap” the waqf land and buildings outside of it.

In consequence, in the implementation process, the *ruilslag* of the waqf land and buildings outside of the MIA experience obstacles especially after the disbandment of the Sidoarjo Mud Control Agency based on the Presidential Decree No. 21 of 2017 on the Disbandment of the Sidoarjo Mud Control Agency (PD 21/2017). The agency was then substituted with the Sidoarjo Mud Center of Control whose tasks and authorities have nothing to do with social-communal issues, including the exchange of waqf objects.

According to Article 5 letters a and b of PD 21/2017:

- a. the handling of the social issues through the purchase of *the people’s land and/or buildings* that are impacted by the Sidoarjo mud is carried out with gradual payment according to the Map of Impacted Area March 22nd, 2007, as stipulated in the appendices that are an inseparable part of this Presidential Decree, with the government-validated deed of sale and purchase as proof of the land ownership that contains the area and the location of the land is still carried out by PT. Lapindo Brantas;
- b. the purchase of *the people’s land and/or buildings* that are impacted by the Sidoarjo mud that are outside of the Map of Impacted Area on March 22nd, 2007 is burdened to the State Budget to handle

²² Finance Detik, "Pemerintah Kejar Terus Utang Lapindo," accessed on April 20th, 2021, <https://finance.detik.com/berita-ekonomi-bisnis/d-5552855/pemerintah-kejar-terus-utang-lapindo>

²³ Interview with Moh. Fathoni, S.Ag., Head of the Islamic Boarding House Section, Sidoarjo Ministry of Religion, *ex officio* Sharia Implementation, Sidoarjo Ministry of Religion (2017-2020) (Sidoarjo, May 20th, 2021).

socio-communal issues in that area, and are *State-Owned Objects*;

Stipulations of Article 5 letter a of PD 21/2017 cause multiple interpretations. Does the term, “the people’s land and/or buildings” also include waqf land and/or buildings? It is still vague. Also, stipulations of Article 5 letter b of PD 21/2017 do not state whether or not the “land and/or buildings” also include “waqf land and/or buildings”. It only reconfirms that the land and/or buildings impacted by the Sidoarjo mud that is outside of the MIA that is purchased by the government using the state budget becomes “State-Owned Objects”. Ideally, the legal status of the waqf land and/or buildings impacted by the mud both in and are outside of the MIA on March 22nd, 2007 have the same legal status as the mud victims’ personal-owned land and/or buildings, meaning that both have the same rights to obtain compensation, even though they have different forms and they have different people responsible.

In the aspect of legal liability, there is no difference between waqf land and buildings owned by legal entities and those owned by individuals. Ideally, if these waqf objects are damaged, broken, or unfunctional due to the mud disaster, they have the right to obtain compensation. PT Lapindo Brantas must purchase them if they are located in the MIA, meanwhile, the government must be responsible if they are located outside of the MIA. Even though according to the Shafii sect, waqf objects are regarded as cut from the waqif’s ownership since it is pledged to be “owned by Allah”, but the Hanafi and Maliki scholars regard the waqf objects as the ownership right of the waqif, whose usage is carried out by the *nazhir* for the public interest, either forever or for a certain period according to the waqf pledge. Anyhow, the waqf objects impacted by the mud originated from personal ownership that is used for public interest according to the waqf pledge.

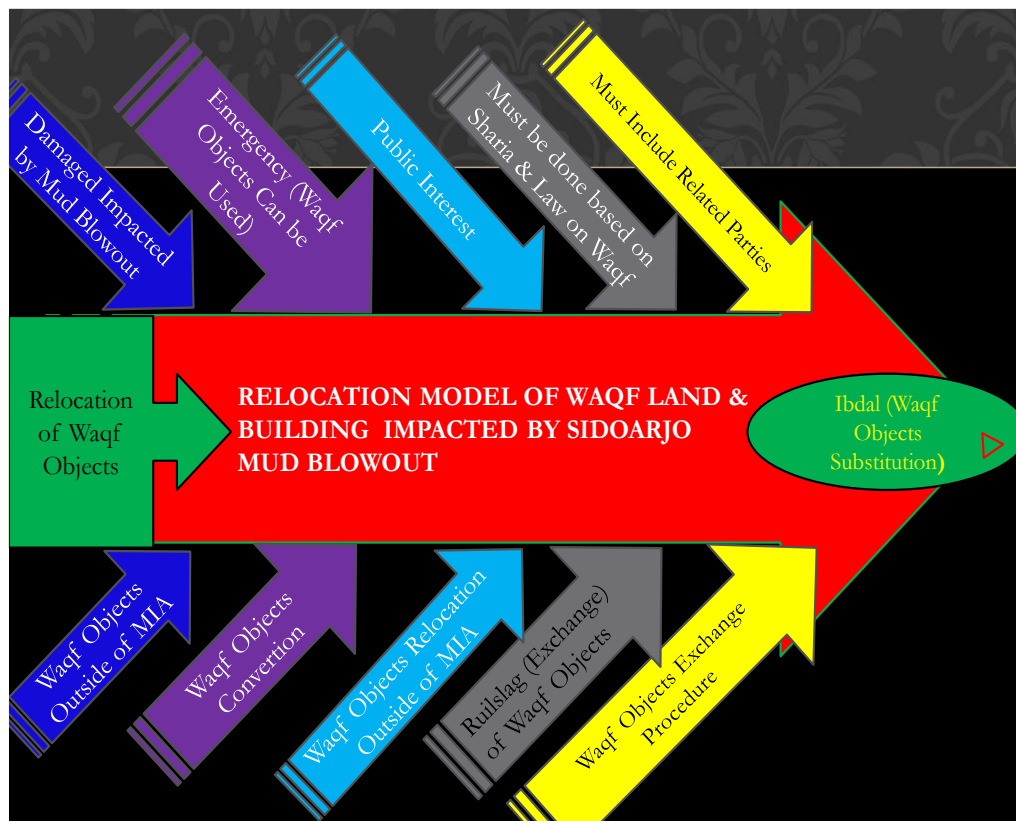
In practice, the waqf land and buildings that are required for the development of public facilities, for instance, to build the Trans Java highway,²⁴ are relocated using the *ruislag* method. Thus, there is no excuse for PT Lapindo Brantas and the government to not exchange the waqf land and buildings impacted by the Sidoarjo mud according to their portions of responsibilities as stated by PD 14/2007.

With the granting of the building swap (*ruislag*) of 8 waqf locations outside of the MIA of March 22nd, 2007, it means that the government has acknowledged the legal status of the waqf land and buildings impacted by the Sidoarjo mud to obtain compensation using the build swap mechanism is basically a result of an extensive interpretation on the mandate of these waqf locations. Even though, up to now, only 8 out of 50 waqf locations outside of the MIA have been carried out based on the exchange permit (*ruislag*) of the waqf land and buildings from the Ministry of Religion, namely for (1) Baitul Khamdi Mosque; (2) Nurul Azhar Mosque and Orphanage; (3). Subulus Salam Musholla; (4) Raudhatul Mutaqin Musholla; (5) Nusantara Vocational High School and Darussalam Kindergarten; (6) Darul Ulum Musholla; (7). Ainul Yaqin Musholla; and (8) Nurut Taqwa Musholla.²⁵

The relocation model of waqf land and buildings impacted by the Sidoarjo mud blowout which is outside the Map of Impacted Area (MIA) can be illustrated in the following fishbone diagram:

²⁴ Ekasari Damayanti, “Pelaksanaan Tukar Guling (*ruislag*) Tanah Wakaf di Kota Semarang Untuk Pembangunan Jalan Tol Trans Jawa”, *Journal of Politics and Government Studies* 8 no. 4 (2019): 2.

²⁵ Sidoarjo PU, “Kementerian Agama.”



Based on the description above, the relocation of waqf objects in the form of damaged or destroyed land and buildings affected by the Sidoarjo mud blowout that has been carried out by the government is only limited to waqf objects that are outside the Map of Impacted Area (MIA) which according to PD 14/2007 is the responsibility of the government. Meanwhile, waqf objects that are in the MIA, which according to PD 14/2007 is the responsibility of PT Lapindo Brantas, have never been carried out. The relocation of waqf objects carried out outside the MIA are carried out by the government with the aim of being in the public interest by way of exchanging buildings (*ruislaga*) with new waqf objects in other places as replacements (*ibdal*) in accordance with the provisions of Islamic law (Sharia) and the Law on Waqf.

Based on the description above the relocation model of waqf land and buildings impacted by the Sidoarjo mud both in and outside of the MIA stipulated in the Presiden-

tial Decree revision is carried out using the following principles:

1. The waqf objects are principally owned by Allah/God (for eternal waqf) and personally-owned by the waqif (for waqf with certain periods) whose functions are for the good of the people according to the aim stated in the waqf pledge. Because of that, whoever carries out actions that cause the waqf objects to no longer function according to the waqf aim, they are legally responsible to replace it or paying for its compensation.
2. Referring to stipulations of Article 15 clause (1) of PD 14/2007, PT Lapindo Brantas is obliged to purchase the land and buildings of the mud disaster victims located in the MIA. Because of that, this company also has the responsibility to buy the waqf land and buildings there. The proceeds will be used to buy land and to build waqf facilities in other locations according to the Islamic sharia and the Law on Waqf.

3. Referring to stipulations of Article 15 clause (3) of PD 14/2007, the government is obliged to purchase the land and buildings of the mud disaster victims located outside of the MIA. Because of that, it also has the responsibility to buy the waqf land and buildings outside of it. The proceeds will be used to buy land and to build waqf facilities in other locations according to the Islamic sharia and the Law on Waqf.
4. Exchanges or replacements (relocation) of the waqf land and buildings impacted by the mud may be carried out through build swap (*ruilslag*) based on the decree of the Ministry of Religion, according to the Law on Waqf and the executing regulations.
5. According to the publicity principle in the transfer of land rights, the proposal of build swap (*ruilslag*) of waqf land and buildings impacted by the mud that is proposed by the *nazhir* (waqf managers) must be published to the public and informed to the waqif or the descendants of the waqif (if they are still alive).
6. Due to emergency conditions, the relocation of waqf land and buildings impacted by the mud from the original location may be exchanged or built in a new location, with more strategic and more beneficial values so long as it is carried out according to the Islamic sharia and the Law on Waqf.
7. The loan from the state budget from the government to PT Lapindo Brantas to repay for the land and buildings of the mud disaster victims in the MIA may also be used to “purchase” the waqf land and buildings in the MIA, then, based on the Law on Waqf, its proceeds will be used to relocate waqf land and buildings using *ruilslag* or other manners according to the Islamic sharia and the Law on Waqf.

Conclusion

Based on the discussion of the problems above, the research may be concluded as follows:

1. In Islamic Sharia, there are differences of opinion among the Imam Mazhab regarding the validity of the relocation of waqf land and buildings which cannot be utilized by means of exchange. Some prohibit the exchange of the waqf objects to other locations (relocation) as they are eternal, but some others permit it intending to continue the waqf objects' functions. Meanwhile, according to the Law on Waqf, principally, the exchange of waqf objects is prohibited, unless those waqf objects are used for public interests according to the General Spatial Plan based on the constitutional regulations that apply and without violating the Islamic sharia.
2. Based on field research, the relocation model of waqf land and buildings impacted by the Sidoarjo mud blowout by way of building swaps (*ruilslag*) is difficult, because the legal basis for carrying out the *ruilslag* of waqf land and buildings is not explicitly regulated in PD 14/2007 and its amendments. According to Article 15 clause (1) and clause (3) of PD 14/2007, the relocation model of waqf land and buildings impacted by the Sidoarjo mud blowout, both within and outside the MIA, is carried out with a scheme for selling waqf land and buildings which the results are used for the purchase of land and buildings in other locations as a substitute for waqf objects (*ibdal*), not with an exchange-build scheme (*ruilslag*).

Recommendation

PD 14/2007 does not clearly regulate the exchange of the waqf land and buildings im-

pacted by the Sidoarjo mud blowout through exchanges or build swaps (*ruilslag*). Generally, Article 15 clause (1) and clause (3) of PD only regulate the obligation of PT Lapindo Brantas to purchase the land and buildings located in the MIA, and the obligation of the government to purchase the land and buildings located outside of the MIA. Because of that, the relocation of the waqf land and buildings impacted by the Sidoarjo mud blowout should not be carried out through exchanges or build swaps (*ruilslag*) as there are no legal bases. But it should be carried out by selling and purchasing the waqf land and building. Then, the proceeds will be used to purchase land and buildings elsewhere as the subsidiary waqf object (*ibdal*) according to the waqf functions and goals.

Bibliography

Journals

- Damayanti, Ekasari. "Pelaksanaan Tukar Guling (*ruislag*) Tanah Wakaf di Kota Semarang Untuk Pembangunan Jalan Tol Trans Jawa", *Journal of Politics and Government Studies* 8 no. 4 (2019): 2.
- El Falahy, Lutfi. "Alih Fungsi Tanah Wakaf Ditinjau Dari Hukum Islam dan Undang-Undang Nomor 41 Tahun 2004 Tentang Wakaf." *Al Istimbath: Jurnal Hukum Islam, Bengkulu: Sekolah Tinggi Agama Islam (STAIN) Curup* 1, no 2 (2016): 123.
- Ilyas, Musyrikah. "Istibdal Harta Benda Wakaf Perspektif Hukum Islam." *Jurisprudentie* 3 no 2 (2016): 140.
- Rokhim, Abdul. "Perjanjian Tukar Bangun (*Ruilslag*) Aset Negara: Perspektif Hukum Perdata dan Hukum Administrasi." *Jurnal Ilmiah "Dinamika Hukum"* XX, no 38 (2014): 7.
- Sudirman. "Regulasi Wakaf di Indonesia Pasca Kemerdekaan Ditinjau Dari *Statute Approach*." *de Jure: Jurnal Syariah dan Hukum* 6 no 2 (2014): 191.

Books

- Haq, Faishal. *Hukum Wakaf dan Perwakafan di Indonesia*. Pasuruan: PT Garoeda Buana Indah, 1994.
- Manan, Abdul. *Pembaharuan Hukum Islam di Indonesia*. Jakarta: Kencana, 2017.
- Prihatini, Farida, et al. *Hukum Islam: Zakat dan Wakaf, Teori dan Praktiknya di Indonesia*. Jakarta: Papas Sinar Sinanti dan Badan Penerbit Fakultas Hukum UI, 2005.
- Soeriaatmadja, Arifin P. *Penulisan Karya Ilmiah tentang Aspek Hukum Masalah Ruilslag*. Jakarta: BPHN, Departemen Kehakiman, 1995-1996.
- Suhairi. *Fiqh Kontemporer*. Yogyakarta: Idea Press, 2015.
- Wodjowasito, S. *Kamus Umum Belanda Indonesia*. Jakarta: Ichtiar Baru-van Hoeve, 1985.

Websites

- Fauzia, Amelia. "Tukarguling Wakaf Perspektif Sosiologis," accessed on April 10th, 2021. http://bwi.or.id/index.php?option=com_content&view=article&id=710:tukarguling-wakaf-dari-perspektif-sosiologis&catid=27:opini&lang=in.
- Finance Detik. "Pemerintah Kejar Terus Utang Lapindo," accessed on April 20th, 2021. <https://finance.detik.com/berita-ekonomi-bisnis/d-5552855/pemerintah-kejar-terus-utang-lapindo>
- Hasan, Tholhah. "Istibdal Harta Benda Wakaf," accessed on April 11th, 2021. <https://www.bwi.go.id/502/2010/10/27/istibdal-harta-benda-wakaf/>
- Kamus Besar Bahasa Indonesia. "Arti Kata Persil," accessed on April 26th, 2021. <http://kbbi.co.id/arti-kata/persil>
- Sidoarjo PU. "Kementerian Agama Serahkan KMA Terkait Tanah Waqaf Terdampak Lumpur Sidoarjo," accessed on April 4th, 2021. <http://sda.pu.go.id/pusat/ppls/main/p>

[ost/28-kementerian-agama-serahkan-kma-terkait-tanah-wakaf-terdampak-lumpur-sidoarjo](#)

Sidoarjo PU. "Sosialisasi Tukar Menukar Waqaf," accessed on April 4th, 2021.
<http://sda.pu.go.id/pusat/ppls/main/p-ost/20-sosialisasi-tukar-menukar-wakaf>.
[Akses 04 April 2021](#)

Sidoarjo PU. "Tugas Pokok dan Fungsi PPLS," accessed on April 12th, 2021.
<http://sda.pu.go.id/pusat/ppls/main/page/48-tugas-pokok-dan-fungsi>