

Build Operate Transfer Development Model of Waqf Land for Providing Affordable Houses



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ABSTRACT: As the largest Muslim country in the world, Indonesia, waqf land is calculated at approximately 4.2 billion square meters and cash waqf has a value of at least 180 trillion rupiahs per year. The huge potential of waqf has pushed the government to make it as one of the supporting elements of the national economy. The purpose of this paper is to contribute ideas to the government and other stakeholders such as the Indonesian Waqf Board (BWI) and the nazhirs to see the potential of waqf land in providing affordable housing for communities around the waqf land and utilizing waqf land as sources of land provision. The research method used was normative juridical by approaching the legislation governing waqf land, housing, and civil law, especially contract law. Comparative studies were also used in order to sharpen the analysis in order to develop existing models through the Build Operate Transfer (BOT) approach. The results showed that with the Build operate transfer system, the use of waqf land involving nazhir components, BWI, and investors supported by professional institutions such as notaries/PPAT, lawyers, accountants, bankers, and appraisals will open more opportunities for utilization to make positive contributions, both for the waqf land itself, nazhir and the benefit of the people. This needs to be supported by increasing the professionalism of BWI for the development of BWI organizations, which is carried out by developing the waqf legal system through regulations at the Presidential Regulation level that regulate the management of abandoned waqf lands.

KEYWORDS: Build operate transfer, Land Waqf Law, Property Rights, Affordable Houses

I. INTRODUCTION

The welfare state modifies the impact of the market, by providing some kind of minimum guarantee of reducing poverty; covering a wide range of social and security risks, and providing certain services (such as health care, child and parent care, etc.) of the best available standard (Andersen, 2012, p. 4). With the basic concept of the welfare state, all the potential possessed by the state must be directed to the fulfillment of the basic needs of citizens, both physically and psychologically. The state is not only a physical security guard for its citizens as the state night watchman or *nachtwächterstaat* (Jhon, 2019), but the state must ensure the physical and spiritual well-being of its citizens.

Regarding the concept of a welfare state, Mohammad Yamin at the Investigative Agency for the Preparatory of Indonesian Independence (BPUPKI) session on May 29, 1945 said: "...that the state to be formed is solely for the entire people, for the benefit of the entire nation that will be established strong in the country to which it belongs", then it was also said that "the welfare of the people is the basis and goal of an independent Indonesia". (Saafroedin Bahar, 1992)

Based on the philosophical foundation of the welfare state, the regulation of waqf in law is an effort by the state to realize the welfare of the people. In the context of the welfare state, waqf as one of the instruments in Islamic law is used as a strategic alternative to building a society that is physically and mentally prosperous, through the use of waqf property. The legal politics of waqf in this context is clearly and unequivocally stated in the General Elucidation of Law Number 41 of 2004 concerning Waqf (hereinafter referred to as the Waqf Law), which states that the objectives of the Unitary State of the Republic of Indonesia as mandated in the Preamble to the Constitution are: The State of the Republic of Indonesia in 1945, among others, is to promote the general welfare.

To achieve this goal, with the provisions of Article 22 letter e of the Waqf Law states that waqf assets can be used for the advancement of other public welfare which does not conflict with sharia and statutory regulations. The allocation of waqf assets is not only concerned with religious and social interests, but waqf property can be used for other things other rather than the designation of religious activities only, as long as the use does not conflict with sharia as the basic basis for waqf implementation, and does not conflict with laws and regulations as the formal legal basis for positive waqf enforcement in Indonesia.

Several countries in the Middle East have applied the concept of using waqf land as productive land by involving the owners of capital who make agreement texts to be able to generate profits for each party. One form of agreement in question can

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be done with a Build Operate Transfer (BOT) agreement system (Tam, 1999). In Saudi Arabia, one example of the development of a popular waqf property is the construction of the Zam Zam Tower in the city of Mecca. The development of this waqf was carried out on a plot of waqf land managed by King Abdulaziz Endowment Waqf (KAEW) through a build-operate-transfer (BOT) agreement. KAEW (nazhir) leased the managed waqf land to an interested developer (ie Munshaat Real Estate Projects KSC) under an ijarah contract. (Nizar, 2017)

This study aims to find out how Build operate transfer as an agreement in general can be developed to increase the productivity of waqf land for the provision of affordable housing and how the concept of material rights due to build operate transfer on waqf land to obtain financing from banks.

II. METHOD

Legal research is a scientific activity based on certain methods, systematics, and thoughts, which aims to study one or several certain legal phenomena by analyzing them, and also conducting an in-depth examination of legal facts to then seek a solution to the problems that arise in the symptom in question (Sunggono, 2002). According to Peter Mahmud Marzuki, "Legal research is a process to find the rule of law, legal principles, and legal doctrines in order to answer the legal issues faced" (Marzuki, 2005, p. 35) as he also referred to Morris L. Cohen who stated that: "Legal Research is the process of finding the law that governs activities in human society."

This research uses doctrinal legal research or also known as normative juridical research, which is legal research focusing on jurisprudential dogmas, namely legal principles and rules (Roestamy, 2020). The jurisprudential dogmas, namely the principles and legal rules in this study are associated with customary law or Islamic law, civil law, land law, building law, and contract law by analyzing empirical facts in society, in order to examine causal relationships, the consequences or *conditio sine quanon* (Ryckman, 1991) of each legal postulate, to find the root of the main problem and make a positive contribution to the science of law between legal systems (Hubungan antara Tata Hukum, HATAH) (Sidharta, 1976), in this case between Islamic law, civil law and positive law which is expected to be useful for the benefit of other stakeholders.

III. RESULTS

It is known that the development of waqf land leads to abandoned land, namely land that is neglected and underutilized so it becomes redundant. In this case, the author desires to harmonize with the thoughts of Gustrav Radbruch (Radbruch, 2005) who developed the theory of legal expediency, which states that there is a priority scale that must be implemented, where the priority that must be carried out is justice, then expediency, and finally legal certainty. The law carries out its function as a means of conserving human interests in society.

The theory of benefit in the version of Islamic law will find the primary link point in seeking optimization of waqf land to avoid waste and avoid harm, not only on waqf land but also on the Nazhir who was given the mandate by the waqif. The author puts forward the Stufenbeau theory (Kammerhofer, 2016) as a positive legal theory, as stated by Hans Kelsen (2020) to measure the development of the paradigm that will be meant to remain in the legal order of Pancasila as the source of the law. For example, in the 1945 Constitution, Article 33 paragraph (3) regarding the maximum use of land for prosperity. The people become the basis for Stufenbeau where legislation is made in accordance with the positive legal order. Thus, between waqf law based on Islamic law and civil law based on Dutch East Indies law, it can still operate in harmony as mandated by Hans Kelsen's positive legal theory. (Rigaux, 1998)

Descriptively, this article is expected to obtain a comprehensive and systematic picture of the focus of the research, namely the relationship between waqf land and the law of engagement which gives birth to new legal actions to increase the productivity of waqf land through innominate engagements known as Build Operate Transfer. Thus, a prescriptive can also be built as a consequence of developing the concept of the waqf land benefit system from the perspective of civil law and property law.

In the descriptive research, the explanatory analysis (Elman, 2009) will not only explore the law of engagement which will build legal links with the benefits of waqf land in the perspective of Islamic law but will also explore the realm of collateral law because the results of civil law actions will have a perspective towards the development of legal linkage communication. The second is between legal systems, namely Islamic law and civil law, where the result of BOT's actions will give birth to a material right that will be built using the theory of the principle of horizontal separation. That is, how BOT has an impact the emergence of separate rights containing material rights from buildings built on waqf land whose ownership by land law and customary law can be separated according to Article 48 UURS.

Such legal exploration is due to the fact that there are no statutory regulations that regulate how flats, for example, which can be built on waqf land can have independent rights known as Building Rights which can be guaranteed in the future, without having to violate Islamic law as an independent variable in this study. Therefore, as a consequence, a legal link is needed between waqf law based on Islamic law and agreement law based on western civil law in order to avoid legal uncertainty (Sihombing & Aden, 2020) and also provide legal literacy for waqf land managers or nazhirs so that it can provide benefits for the people as the stakeholder of waqf in Indonesia.

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By its nature as an unnamed agreement specifically regulated in Book III of the Civil Code, BOT as a form of the agreement remains generally bound to the provisions in the provisions of Book III of the Civil Code which regulates the engagement born of the agreement. Regarding this matter, Article 1319 of the Civil Code stipulates that all agreements, both those with a special name and those not known by a certain name, are subject to the general regulations contained in the legislation.

A. Build Operate Transfer (BOT)

BOT is an unnamed agreement or an agreement whose title is not mentioned in the Civil Code having the flexibility to enter the field of law and other socio-economic activities as long as it does not conflict with the provisions of laws and regulations, customs, and decency, which are also Islamic religious principles. Thus, the legislators have limited the willingness of the parties to enter into contracts with the provisions of the Civil Code itself, meaning that freedom of contract is not without limits.

The practice carried out in the BOT so far is in accordance with the documents that the author has examined, especially the documents at the notary office where there is not a single provision that regulates the delivery of loose land (leveraging). The handover of land is carried out with the obligation of the investor to return it after a certain period of time as will be referred to following this.

As previously described, the application of the Civil Code Article 1234 reads that: "every engagement is to give something, to do something, or not to do something." The element of giving something referred to in this case is that if there is a party who hands over the land in this case, waqf land to the investor, then the investor after building the object of the agreement after a certain period of time gives back the land and the buildings that have been built on it. So, the handover made by the landowner to the investor will be followed by achievements by giving back the land along with everything that has been built on it, and the element of "doing nothing" (deliberate) is meant to limit the intentions of the parties.

According to the law in force in Indonesia, there are basically no specific provisions governing the BOT agreement. However, in several government regulations and ministerial regulations, the arrangement of BOT activities is contained in several separate laws and regulations, including PP No. 27/2014 concerning Management of State/Regional Property and Permendagri No. 19/2016 concerning Guidelines for the Management of Regional Property. Specifically, both government regulations and ministerial regulations are intended to regulate how to optimize regional assets, also known as regional property, so there are no specific regulations that specifically regulate BOT. Thus, the author notes that the basis of this BOT agreement is the principles that apply to the Third Book of the Civil Code as mentioned before.

The definition of BOT can be seen from the Government Regulation of the Republic of Indonesia Number 27 of 2014 Article 1 point 14 Juncto of the Regulation of the Minister of Home Affairs Number 19 of 2016 concerning Guidelines for the Management of Regional Property Article 1 Number 36 stating that: "Build operate transfer is the use of State Property or the area is in the form of land by another party by constructing buildings and/or facilities along with their facilities. Then it is utilized by the other party within a certain agreed period of time. Then the land and buildings and/or facilities and facilities are handed over after the end of the period.

Doctrinally, the Build operate transfer (BOT) agreement has 2 (two) legal aspects. Namely, firstly BOT is seen from the legal aspect of the agreement, and secondly, BOT is seen from the legal aspect of the state treasury. The two legal aspects are in two legal regimes, namely the private law regime and the public law regime. In the legal aspect of the agreement (contract law), BOT is a form of agreement that was born based on the principle of freedom of contract, where in general the arrangement regarding BOT is subject to the general rules of agreement arrangement in Book III of the Civil Code. Meanwhile, in the legal aspect of the state treasury, the BOT agreement is one of the mechanisms used in the use and utilization of state or regional property, in this case state/regional property in the form of land.

There are two legal aspects that regulate BOT in Indonesia, namely (1) Legal Aspects of Agreement (Contract Law), and (2) Legal Aspects of the State Treasury, which are contained in several provisions including (a) Law Number 1 of 2004 concerning the State Treasury, (b) Government Regulation Number 28 of 2020 concerning Amendments to Government Regulation Number 27 of 2014 concerning Management of State/Regional Property, (c) Regulation of the Minister of Home Affairs Number 19 of 2016 concerning Guidelines for the Management of Regional Property, and (d) Regional Regulation by referring to the provisions of Permendagri Number 19 of 2016.

B. Aanknopingspunten

The law on engagement or the law on buying and selling, grants, leasing; so that civilly it seems that Indonesia is still enjoying colonial law which in this paper the author must admit that because there is no law governing agreements in general, especially regarding BOT, then one of the secondary points of connection is civil law as regulated by the Code of Civil Law. In finding the novelty of this paper, the author still uses the law of objects as regulated by the Civil Code of the Second Book About Objects. This is what the author means in this paper by using the term "link point" or Aanknopingspunten (Bimasakti, 2021), using the second and third books of the Civil Code due to BOT, in this case, will give birth to material rights.

It can be added that in the civil law system after independence in 1945, the Republic of Indonesia had to deal with a pluralist legal system consisting of a combination of colonial heritage, various kinds of customary law, and the influence of

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Islamic law. Apart from the reality of legal pluralism, Indonesian legal scholarship is dominated by a legalistic approach that focuses on a centralized statute-based legal system. According to Peter Burns, Indonesian contemporary literature which systematically investigates the debate on legal unification versus legal pluralism is very thin. The uncritical attitude towards the legal system as a colonial legacy continues to persist among academics and practitioners of Indonesian law (Burns, 2004). Systematic efforts to identify problems in the Indonesian legal system ironically come from western scholars such as Adriaan Bedner (2008), Sebastian Pompe (2005), and Daniel S. Lev (2000).

Therefore, even though the BOT legal event referred to is the result of human action, not due to natural causes as in international law, the application of the search for legal links applies in the Indonesian legal system as the primary link point of the analysis of the link points as intended, but the Indonesian legal system referred to in this research is the result of a given plural legal system, which is caused by the limited ability and lack of willingness of the legislators to provide guidance to the public in order to build a law that is oriented to the prospect of developing the law itself. Thus, the secondary link point that becomes the choice of law may vary with the legal basis using Islamic law, contract law, and land law. Why are the three laws applicable? Due to the qualifications carried out, the secondary link point cannot find a choice of only one legal system. However, because the object is waqf land, waqf law in the Islamic legal system is embraced by positive law, namely the Waqf Law and civil law. Islamic law was used because indeed since the colonial era, Islamic indigenous groups were enforced by Islamic law, then considering that the average principle of waqf law is waqf as applicable in Islam which was later developed by the positive legal system as intended above. The two legal systems in terms of this are applied because the Waqf Law cannot abolish or cancel waqf as referred to in Islamic law. Hence, the rigidity of waqf is adopted in Islamic law as long as it is not prohibited and according to the author's opinion, there can be a marriage between waqf law in Islam and waqf law in positive law. Both of these legal systems will be faced with civil law, because they have the same affinity for the same interest (Connecting Law), namely how to describe the civil law system in developing Islamic business law that remains shari'a but civilly does not conflict with the law, religion, decency and propriety as limitations on the principle of freedom of contract (*partij autonomy*) (Mensch, 1980).

Civil law events in BOT contracts that are in a state system, namely the Republic of Indonesia, are not international civil law events, but are legal actions that are within the scope of law between groups involving Islamic religious law and civil law. Therefore, the theory put forward by Sayuti Thalib (1980) as referred to as *receptio a contrario*, is a tool to link the law between groups as intended, as long as BOT legal actions are not carried out by foreign citizens or foreign companies, meaning companies domiciled abroad.

In the 1970s, the legal teaching system in Indonesia introduced a course called "Law Between Groups" or Intergentile Law (Domke, 1960), which is now not taught in general, if any, it is only used as elective courses. Therefore, the link point theory as described above is within the scope of the Law between Groups, not only in the scope of International Private Law, because the scope of law brought together by the primary point of contact is national law, in contrast to international civil law which solves international law. a legal event or civil law action that has foreign elements or two legal systems from one country to another to link the events of legal actions between people and people, people with the state, people with companies, countries with companies.

C. Rights of Objects Resulting from the BOT Agreement

The question that will be answered in this section is how to build a concept that is acceptable to stakeholders on which objects have material rights attached to the rights to each object which is the result of the BOT agreement on waqf land. It is necessary to sort out and select the material rights owned by the developer or investor in the event that the BOT object is the construction of a flat or other objects such as a commercial center or mall or office, as follows:

1. HGB has a high probability, considering the management rights system can be analogous to BOT on waqf land for the development of commercial areas, for example, investors can be given HGB (HGB for a maximum period of 30 years with an extension of one time for a maximum of 20 years, as regulated in PP Number 40 of 1996 concerning Land Use Rights Article 25 Paragraph (1) which states: "Article 22 is granted for a maximum period of thirty years and can be extended for a maximum period of twenty years."), then if the right to expire for BOT is seen as management rights, then the HGB land which is the object of the agreement, in this case, BOT is handed over to the HPL holder. With the HGB perspective, if the development of the concept of the BOT agreement on waqf land can be analogized to the BOT agreement, then the material rights attached to the HGB generally have a perspective to be granted to HGB originating from the BOT agreement on waqf land, namely with restrictions on separation. In the author's opinion, HGB can be traded and pledged as collateral with a letter of approval from Nazhir as "the holder of the management right of the waqf land." Thus, collateral rights or *droit de preference* (Johan, 2021) can be granted to investors.
2. Lease rights can be granted to anyone, whether investors or end-users, both end-users who hold ownership rights to the place of business after paying compensation to investors or can be tenants directly related to investors or building managers, or in the apartment system. known as building management.

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3. A flat building basically has a clear type of rights, namely the certificate of ownership of the building. However, many doubt the ownership of the building, because the building registration system has not materialized, even though Article 49 of the UURS has mandated that building registration requires a government regulation that regulates the building registration system. However, legally, legal experts and researchers must also think about what kind of property rights can be enjoyed by end-users in terms of investments made to build flats on waqf land? The author is of the opinion that in addition to the right of enjoyment under the *droit de'suite* principle, the right to the building in question can also be guaranteed (*droit de'preference*).

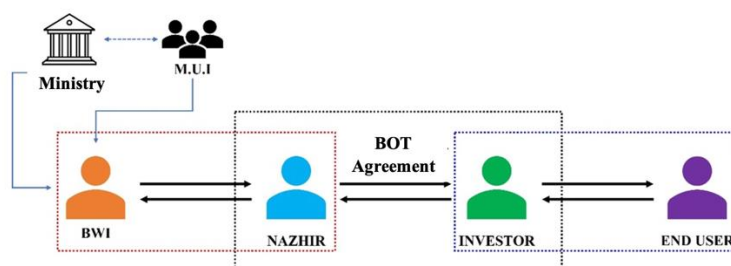


Figure 1. Related Subjects in the BOT Agreement on Waqf Land

In the regime of registration of land and non-land objects (buildings) in Indonesia, there is a dualism of different registration regimes. First, the land registration regime based on PP 24/1997 concerning Land Registration and second, the building registration regime PP 36/2005 concerning the Implementing Regulations for the Building Law. At first glance, the presence of these two different regimes seems to have separated land and buildings on the ground. However, problems arise when PP 24/1997, states in Article 9 that one of the objects of land registration is the Right to Flat Units, while based on the characteristics of the Flat Units being objects located on the ground and qualified in the definition of a building. So thus, this creates confusion in the practice of registering land objects and non-land objects (buildings). In view of Article 8 UUBG jo. Article 12 of PP 36/2005, it gave rise to a new institutional right, namely building ownership. Consequently, the synchronization of the regime of registration of land and non-land objects, in this case buildings, becomes necessary to avoid confusion in the process of registering land objects and non-land objects in the future.

In Indonesia's economic downturn, especially due to the Covid-19 pandemic where many people experience mass poverty and need help from philanthropists, including the Indonesian Waqf Board, Nazhirs, and other stakeholders such as Islamic community organizations and universities built on waqf land, takes real action to develop the paradigm of waqf land productivity. One of the measurable steps is the application of BOT on waqf land. The development of waqf land management paradigm from individual nazhirs to legal entity nazhirs needs to be achieved. The change of status to a legal entity is intended to strengthen the position of supervision over negotiation and transaction activities.

IV. CONCLUSION

1. In the development of a build operate transfer agreement model from a general agreement with the object of land rights, the object can be developed by utilizing waqf land for the purpose of providing affordable housing which has a positive impact on the benefits of abandoned waqf land one of which is making it more productive and at the same time answering the problem of providing affordable housing to overcome the government's failure to fulfill the program to provide one million houses and overcome the backlog, because so far housing developments carried out by developers tend to make houses unaffordable due to limited land supply and commercialization.
2. As a result of the build operate transfer agreement with the object of waqf land in order to build affordable houses, it has given birth to property and material rights, including property rights to flats or property rights to buildings on waqf land and can be transferred in the form of sale and purchase transactions. In addition, it can also be used for building buildings for end-users, especially the economically weak communities who live around waqf land, to get a house supported by definite legal documents and can then be used as collateral for a loan from a bank or financial institution, as well as to solve legal barriers to realizing the mandate of the constitution and the law on flats.

Therefore, the recommendations of this research are formulated as:

1. In order to increase understanding for the use of waqf land, activities related to the reconciliation of waqf management by four pillars, namely: BWI, PPAIW, nazhir waqf, and both central and regional governments need to be initiated by moving a determination as in *fardu kifayah* to overcome abandoned land waqf, which has been a cost-center and has even become a burden to nazhirs, both the individuals and nazhir legal entities. This reconciliation eventually gave birth to a concept in the form of a presidential regulation which was described by BWI to answer the mandate of the UURS and at the same time overcome the backlog as stated.
2. The government and BWI, especially the ministry of religion, need to be considered by issuing a joint decision with BWI to increase the role of PPAIW which is ex-officio held by the Head of the Office of Religious Affairs (KUA) in each sub-district

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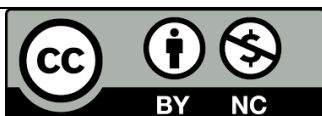
who can act or have additional authority as a nazhir coach for nazhir waqf which is within the scope of its territory. Bearing in mind, the beginning of the submission of the waqf pledge requires the form of a deed made before PPAIW or the Head of KUA. Thus, the head of the KUA can exercise control over either the abuse or neglect of nazhir on waqf land which is considered a cost-center.

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