

Financing Cooperation Agreement of Commercial Building Construction on Land Waqf: Legal Analysis based on Indonesia Law

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Abstract: The construction of commercial building on land waqf is one way of empowering waqf economically productive in Indonesia. To build commercial building on land waqf requires cooperation in the development and management. However, commercial building development on waqf land is not only related to economic aspects, but also how are the regulations to build it based Indonesian waqf Law? This article examines legally the cooperation of utilization and management of land waqf for commercial building construction. The method used is normative juridical which refers to the legislation, which is analyzed descriptively analytically. Based on article 5 of Indonesian waqf law, that waqf functions and realizes the economic potential of waqf property for the public interest and to promote general welfare. Based on the article 43 of Indonesian Waqf Law, the development of property waqf by Nazhir (the management of waqf) is implemented in accordance with sharia principles and is carried out economically productively. Some models to finance the construction of Commercial Building on Waqf Land based on Indonesian Waqf Law; financing by cash waqf, build transfer operation system, partnership with other institute like Hajj Savings, and other forms of development as long as not contrary with sharia principles and laws in Indonesia. The need for partnership synergy especially with the business partners in the development of land waqf for commercial building construction, so waqf are strived not only intact, but also productive and growing, so the value and benefits are also increasing.

1 INTRODUCTION

Waqf is very closely related to improving human benefit. It is also closely related to the aim of the Islamic Shari'ah for human benefit. Al-Maslahah as a legal argument implies that the foundation and yardstick in establishing the law. Jumhur ulama argues that every law set by the nash or ijma 'is based on wisdom in the form of gaining benefits or benefit and avoiding mafsadah (mudharat) (Ali Hasbullah in writing Abd. Rahman Dahlan;2011).

Waqf in Islam are known along with the era of the Prophet Muhammad, marked by the construction of the Quba Mosque. Then followed by the construction of the Nabawi Mosque which was built on the orphaned land of Bani Najjar purchased by the Messenger of Allah. The Messenger of God endorsed the land he bought to build a mosque, and then the companions gave support in the form of waqf to complete the construction of the mosque (Mundzir Qahaf in writing Suhrawardi K.Lubis:2010).

The using of property waqf is not solely for the interest of religious and social facilities but also to

advance the general welfare by realizing the potential and economic benefits of property waqf. The development of property waqf requires other innovative financing mechanism and sources of funding (Mohamed Asmy Bin Mohd Thas Thaker and Anwar Allah Pitchay: 2018). It allows the management of waqf properties are executed by economic activity in a broad sense as long as the management is in accordance with Shariah management and economic principles.

Waqf is part of the economic distribution effort in Islam which has special characteristics that distinguish between zakat or other types of alms. The characteristics of waqf are not merely a detention of the waqf object itself, but also must be made an effort to develop the benefits or results of the management of the object, so as to provide maximum results for the benefit of the waqf recipient. Thus, this greatly affects the development of the waqf management institution itself in order to achieve maximum results.

Waqf institutions are an economic potential in Islam very closely related to socio-economic problems of the community. Waqf has a role in the

distribution of welfare to the community. In some countries, waqf institutions has been successfully implemented, including in the countries of Egypt and Singapore. In Egypt, the assets of waqf buildings and agricultural lands that are leased or divided up to those who are willing to do it with a profit sharing system, giving shares in various business fields (Wakaf di Singapura dan Mesir: 2011).

To secure the property waqf from the interference of third parties harmful to the interests of waqf, it is necessary to enhance the professional capacity of Nazhir. Nazhir is the party that receives waqf property from wakif to be managed and developed according to its designation, meanwhile the waif is the party that give his property as waqf.

Regarding the empowerment of waqf land for the development of commercial building can be a form of waqf management that is economically beneficial, where the results can be used to improve the welfare of the community. This is a form of developing the management of waqf assets that can be carried out based on the waqf law. However, in its implementation requires a more in-depth legal study that does not merely examine positive legal provisions, but also the sharia aspects of the management of commercial building itself.

This research needs to be done, how is the regulation according to Indonesian law provisions. Therefore, a legal review in the article will be studied on how the arrangement of cooperation in the development of commercial building on the waqf land.

2 METHODOLOGY

The method used in this research is normative (legal research). Normative (legal research) is done with the approach of legislation and analytical descriptive. Normative legal research with a legislative approach is carried out by inventorying all applicable and binding laws and regulations related to waqf. The specification of this research is analytical descriptive, which is to make systematic, factual and accurate information about the facts.

3 FINDINGS

3.1 Definition and Purposes of Waqf

Waqf is one form of economic distribution that is very potential to be developed. Significantlt, it is

undeniably true that waqf is unique concept of Islamic product economically (Zunaidah Ab Hasan,et.all :2015). In Islamic culture, waqf is as one of the successful entrepreneurship patterns or permanent Islamic almshouses that require using simultaneously business skills and enterpreneurial inovation and using the profits for eliminating poverty and social welfare strata (Habibollah Salarzehi,et.all : 2010).

In Islamic economic transactions, waqf is one of economic investment for social welfare. According to Abdurrahman Raden Aji Haqqi that "Transactions, according to Islam, are system for a happy life on the basis needs of the people. Islam has laid down principles for each, thus, the rule and methods have been enunciated relating to people, state affairs,etc. Such principle provide a kind of social solidarity. There is freedom and right to work, to own property and to enjoy other property rights. Nevertheless, these principle are bound by the langer interests of the community in Islam. In fact, the right of private ownership in the shari'ah is owned by God, man is to enjoy its benefits, in other words his tittle is limited to the benefits accruing on the property, but the legal tittle vest in God. The exercise of this right is circumscribed by the larger interest of the community and, thus, the principle of social solidarity prohibit exploitation under which the economic system of the shariah exist (Abdurrahman Raden Aji Haqqi: 1999).

Muhammad Ibn Isma'il as-San'any, a waqf is holding back the treasures that might be taken without spending or destroying the object ('ain) and used for good (Muhammad Ibn. Isma'il as-Sa'any, Subul as-Salam, (Muhammad Ali Sabih: 2005). Imam Taqiy al-Din Abi Bakr ibn Muhammad al-Husaeni in Kifayat al-Akhyar argues that what is meant by wakaf is the containment of possessions which allows to be utilized with eternal objects (substances), is forbidden to classify the substance and managed its benefits in the goodness to get closer to Allah (Abi Bakr ibn Muhammad Taqiyal-Din, Kifayat al-Akhyar: t.t). Ahmad Azhar Basyir is of the opinion that what is meant by waqf is to withhold the treasures that can be taken away from the benefits not destroyed instantaneously, and for the permissible use, and is intended to obtain Allah's approval (AhmadAzhar Basir: 1987). Idris Ahmad argues that what is meant by waqf is to withhold the treasures that might benefit people, its eternal substance ('ain) and to surrender it to the places specified syara', and prohibited freely on the objects it utilizes (Idris Ahmad:1986).

According to Article 1 number 1 of Act Number 41 of 200, waqf is "legal actions to separate and / or surrender some of his property to be used forever or

for a certain period of time in accordance with his interests for the purposes of worship and / or welfare general according to sharia ". Based on article 6 of the Waqf Law, waqf are carried out by fulfilling the following elements of waqf:

- Wakif; is the party that endorses his property.
- Nazhir; is the party that receives waqf property from waqif to be managed and developed in accordance with its purposes Nazhir has job of administering waqf
- property, managing and developing waqf, supervising ,protecting, and reporting on the implementation of duties to the Indonesian Waqf Board.
- Waqf Assets ; Waqf assets based on article 1 of Waqf that have long - term durability and /or long-term benefits and have economic value.
- Waqf Pledge; is statements of wakif will can be stated spoken verbally and/or writing to Nazhir to endow his property
- Purpose of Waqf ; based on Article 22 of waqf Law, waqfs can only be used for:
 - Worship facilities andactivities;
 - Education and health facilities and activities;
 - Assistance to the poor, neglected children, orphans, scholarships;
 - Improvement of the people's economy;ad/or
 - Improvement public welfare that is not in contrary with sharia principles and legislation in Indonesia.
 - Waqf Term; as stated in Article 1 of the waqf Law that waqf property is to be utilized forever or for a certain period of time.

Based Indonesian Waqf Law, the assets that may be represented under the Waqf include immovable property and movable objects such as money, precious metals, securities, vehicles, intellectual property rights, leases and other movable goods in accordance with the provisions of shari'ah and applicable laws and regulations. Based on Article 16 of Government Regulation Number 42 of 2006 concerning the Implementation of Law No. 41 of 2004 on Waqf , Immovable objects that can be waqf includes:

- Rights to land in accordance with the provisions of both existing and unregistered Legislation
- Buildings or parts of buildings on the land referred to in letter a above;
- Plants and other objects related to the soil

- Ownership rights of apartment units in accordance with the provisions of the Laws and Regulations; and
- Other immovable property in accordance with the provisions of shariah principles and Laws.

Law Number 41 of 2004 on Waqf has given expansion to the function of waqf, which in addition serves to fulfill the interests of worship as well as to promote the common prosperity. In this case as one of the strategic steps to improve the general welfare, it is necessary to increase the role of waqf as a religious institution that not only aims to provide various religious and social facilities, but also has potential economic power, among others to promote the general welfare, in accordance with sharia principles.

3.2 Financing Agreement of Commercial Building Construction on Land Waqf

In general, the establishment of commercial buildings on land waqf in Indonesia, especially in the area of Jakarta is built for mosque, which is also included with other development managed and leased commercially, where the rent is utilized for mosque and social activities others according to pledge of waqf.

Based on Article 42 Waqf Law states that Nazhir is obligated to manage and develop the property waqf in accordance with its purpose, function and appropriation. Assets waqf are strived not only intact, but also productive and growing, so the value and the results are increasing. Because basically the better and productive a nazhir in maintaining and managing asset waqf, the greater the benefits gained by mauquf a'laih or waqf recipients. Furthermore, in Article 43 of the Waqf Law that the management and development of property waqf by Nazhir is carried out in accordance with sharia principles and carried out economically productively.

Based on Article 43 of the Waqf Law, the management and development of property waqf by nazhir must be implemented in accordance with the principles of sharia, it also has consequences in the preparation of cooperation agreements for the management of assets waqf, including cooperation agreements and financing of commercial building development on land waqf. Based on the provisions of Article 1233 of the Indonesian Civil Code stated "Each contract is born either by agreement, or by law". This Article explains that 2 (two) sources of the engagement:

- Agreement; and

- Laws.

Based on article 1313 of the Indonesian Civil Code states "a covenant is an act by which one or more persons commit themselves to another or more persons. This chapter explains simply the notion of a covenant which describes the existence of two binding parties. Agreement as the source of engagement, when viewed from its form, may be either a written agreement or an unwritten agreement. Similarly, waqf contract based on Waqf Law can be oral or written. However, for the protection of a better legal force, pledges and contracts should be executed in writing. The concept of financing agreement of commercial building development on land Cooperation / Sharia Financial Institution. To increase the benefits of land waqf according to pledge of waqf, nazhir cooperates with banking partners or sharia financial institutions.

The management system of waqfs through Furthermore related to the provisions of the Indonesian Waqf Law, that the activities of the management of wassets waqf must be in harmony with the principles of sharia. It also demands financing and management of flats on land waqf through a sharia-based financing system. musharaka or mudaraba. The use of sharia system is intended for the management of waqf in accordance with Islamic values. Management and development of waqf goods carried out in accordance with sharia principles, among others, is specifically regulated in the provisions of Article 43 of Law Number 41 Year 2004 regarding Waqf.

The cash waqf can be one of financing source to build a commercial building in land waqf. The cash waqf may be raised by issuing waqf certificates of different denominations against the planned project, so that a number of individuals or institutions as wakif may buy them and thus join together to finance the planned projects (Abulhasan Msadeq: 2002). Cash waqf is the best way for a joint waqf, thus it can attract finance for the development of diverse economic activities, and therefore greater revenue can be expected (Mohammad Tahir Sabit Haji Mohammad: 2011).

Based on Article 28 of the Indonesian Waqf Law, it is stated that waqif can grant movable objects in the form of money through sharia financial institutions appointed by the Minister. Nazhir in this case cooperates with Islamic banks in Indonesia to collect cash waqf which can then be used to finance commercial building development cooperation on waqf land.

In operation of waqf development, nazhir is at the forefront of keeping these waqf assets protected and

increasing the results. Therefore, in the development of waqf is required waqf professional management. The first finding from the study is related to the personal experience of the participant in the waqf related knowledge. It is very crucial as human capital and man power plays important role in realising the institutional objective. Thus, as a waqf manager and administrator for the institution Mutawalli, personal experience can portray a good management practice (Hasyeilla Abd Mutalib: 2016). Based on Article 11 of Waqf Law, Nazhir must do administer, manage and develop wakaf property, including supervising and protecting waqf properties, and reporting on the implementation of duties to the Indonesian Waqf Board.

3.3 Cooperation to Build Commercial Building on Waqf Law with Built Operate and Transfer (BOT) System

In the development of waqf through partnerships can also be implemented with the pattern of Built Operate and Transfer (BOT). Some studies on developing waqf in the form of development capital need to be implemented in private partnership policies or partnerships with the private sector (investors). One of the project financing models is the BOT system.

Endowment Financing with Build Operate Transfer (BOT) is a contract between Nazhir and the project sponsor where sponsors (investors) finance, design, build, operate and manage facilities from the project until a certain concession period. In more straightforward language, BOT is a partnership between Nazhir and investors with a cooperative pattern; build, manage, and transfer ownership. During the concession period, the sponsor earns income from operating the project to close the investment and make a profit. As long as the concession period expires, the ownership of the project is handed over at no cost to Nazhir (Waqf Directory of Religion Ministry of Indonesia, 2012).

The parties participating in the financing system with the BOT system are granting authority, usually project sponsors; one or more financial institutions. The role of Granting authority is to identify the needs and requirements of the project, set a concession period, find a bidder or auction, and submit a contract. Project sponsors can be individuals, companies, joint ventures or consortia that have experience implementing and implementing projects. All matters relating to rights and obligations in terms of administrative financing, profit sharing, interest transfer, termination and other problems are set forth

in the form of an agreement (Sudarto in Waqf Directory of Religion Ministry of Indonesia:2012). Capital investment can be obtained from commercial banks, insurance companies, multilateral organizations, or the sale of bonds.

Example of BOT Model Practices in the Collaboration of Commercial Building Construction on waqf land on the construction of the Raudha Building, productive waqf assets at Kuningan Barat II Street, South Jakarta. The Raudha Building is a productive waqf asset that stands on Jalan Kuningan Barat II. This building is rented for offices. There are some private companies with offices in the building. This building provides commercial benefits that are used to finance the educational operations of the Raudhatul Muta'allimin Foundation (YRM) in Jakarta. YRM manages 3 (three) education units, namely Raudhatul Athfal (RA) at the level of kindergarten, Islamic elementary school (MI) at the elementary level, and Madrasah Tsanawiyah (MTs) at the junior high school level. The number of children studying in the three educational institutions was 420 students, while there were 40 employees and teachers (Nurkaib: 2015)



Figure 1: Raudhah Building, Productive Waqf Assets



Figure 2: Raudhah Building, Productive Waqf Assets

3.4 Use of Hajj Savings Funds for Construction Commercial Building on Waqf Land

Law No. 34 of 2014 concerning Financial Management of Hajj, is very relevant if invested through cooperation in the development of waqf assets productively, in essence is very synergistic with the provisions of the Waqf Law Number 41 of 2004. Because between the two the rule of law is very synergistic and in accordance with the aim of its purpose for the benefit of Muslims.

Pursuant to the provisions of Law 34 of 2014 concerning Hajj Financial Management (PKH Law), Hajj funds are funds for the cost of organizing Hajj pilgrimage, funds for efficient hajj administration, community endowments, as well as the value of benefits controlled by the state in order to administer Hajj and implementation activity program for the benefit of Muslims.

Related to the purpose of waqf for social justice mentioned in the provisions of Article 5 of Law Number 41 of 2004 that the Waqf serves to realize the economic potential and benefits of property for the sake of worship and to promote general welfare. This provision is also affirmed in Article 22 of Law Number 41 of 2004 that in order to achieve the objectives and function of waqf 1, waqf property can only be used for: worship facilities and activities, educational and health facilities and activities; assistance to needy neglected children, orphans, scholarships; progress and improvement of people's economy; and / or other public welfare advances.

Waqf Law reflects efforts to meet the need to realize prosperity in society as a form of implementation of social justice in Islam.

In the provisions of the Waqf Law, it is regulated so that waqf assets are managed productively which can improve their results economically. The provisions in Article 5 of the Waqf Law which states that waqf serves to realize the economic potential and benefits of waqf property for the sake of worship and for the benefit of the general welfare. This provision shows that waqf assets are managed productively so as to provide economic improvement in an effort to improve the welfare of the community. The provisions of Article 5 of the Waqf Law are very much in line with the implementation of the waqf principle itself, which not only contains the principle of immortality (*ta'bidul ašli*), but also the principle of benefit (*tasbilul manfāh*), how to make waqf assets to be enjoyed by the wider community, so that it is needed optimal and productive management efforts. Because the increasing results of the management of waqf assets, the greater the benefits that can be given to the community. Thus the use of waqf will greatly contribute to efforts to realize social welfare in society.

Based on the provisions of Article 3 that the financial management of Hajj aims to improve the quality of Hajj implementation, rationality and efficiency of the use of BPIH, and the benefits for the benefit of Muslims. Furthermore, in Article 4 of the PKH Law, the Hajj finances include revenues, expenses and wealth. More details in Article 10 specifically for Hajj financial expenditures include Article 10 letter g for the benefit of Muslims.

Hajj Financial Management Agency (BPKH) pursuant to Article 22 of the PKH Law, BPKH has the authority to place and invest Hajj finance in accordance with sharia principles, prudence, security, and value benefits, as well as to cooperate with other institutions in the framework of Hajj Financial management.

The Islamic Religious Council of each state in Malaysia acts as Nazhir for their respective regions. Likewise with the Alliance Regional Islamic Religion Council (MAIWP) acting as Nazhir in the territory of the alliance. For example MAIWP became Nazir for the Imara Wakaf Building in Kuala Lumpur. In the construction of the Imara Wakaf building, MAIWP cooperates with Tabung Haji.

The Imara Waqf Building was established on waqf land, where MAIWP is domiciled as Nazhir, cooperating with the Tabung Haji Foundation as a financing provider. The building known as the Imara Wakaf Tower is as high as 34 levels with 2

underground levels and 7 levels of vehicle parking built on waqf land covering an area of 52,838 square meters to become one of the endowments in Malaysia. It is located next to the Petronas Twin Towers which is the artery of the Malaysian Kuala Lumpur bandaraya. The waqf tower was formalized in October 2011, and is fully leased by Bank Islam Malaysia Berhad. The result is intended for waqf mustahik.

The location of the Islamic Bank Tower is in the KLCC shopping center. Its strategic position in the business center of Kuala Lumpur city makes an attractive icon of luxury to be an example of the right development of productive waqf. Likewise, locations that are easily accessible by various access to transportation facilities, and other commercial areas make this building a waqf also has high economic value.



Figure 3: Imara Wakaf, Islamic Bank Building on Waqf Land, Kuala Lumpur.

(<https://web.facebook.com/maiwp.hq/photos/pcb.1097898976935093/1097898856935105/?type=3&theater>)

The success of the construction of the Imara Waqf building in Kuala Lumpur can be an example of the use of Hajj funds in Indonesia. In this case the Hajj Financial Management Agency can cooperate with professional waqf institutions including the Indonesian Waqf Board (BWI), because according to the provisions of the Waqf Law, BWI not only has the authority as a regulator but also as Nazhir. In this case it is appropriate if BWI can cooperate with the Hajj Fund Management Agency in an effort to develop productive waqf assets, including the participation of other related parties, especially Islamic banking. To develop the establishment of commercial building on waqf land, the Ministry of Public Housing (PUPR) has a strategic plan for land representation for flats. However, it is necessary to have a Chief Executive Officer (CEO) specifically involved in the development of waqf land for the construction of this

commercial building, which is more understanding and professionally understood in relation to its fields. Therefore Nazhir waqf must be able to establish synergic cooperation with the parties of the executor (CEO).

Besides that there also needs to be an in-depth legal study of ownership as well as the transfer of ownership from commercial buildings erected on the waqf land. Because this matter is also very vulnerable in its legal protection, for example if the decision is in the form of a foundation, in the provisions of the foundation law, the authority of the Nazhir supervisory board can change this.

Waqf will grow rapidly if it is managed by people who are professional and have superior business skills. However, in practice in Indonesia there are still many obstacles that must be overcome in the development of this productive waqf including; the mindset pattern of traditional waqf thinking is changed towards the thinking of modern and professional waqf development, cultural barriers that require a long time for change, as well as the courage or real action to start something new and different about the development of waqf, and the need for professional human resources and Nazhir who manages the waqf assets themselves.

In general, the establishment of commercial buildings on waqf land in Indonesia, especially in the Jakarta area is still a development of the use of waqf land built by mosques, in this case Nazhir also adds other development which is then leased commercially, where the results obtained are used for operational financing of mosques and other social. The successful development of waqf imara through the use of Hajj tube funds in Kuala Lumpur, can be an example for Nazhir in producing waqf assets in the form of land through the establishment of commercial buildings on waqf land. So that waqf assets are sought not only to be kept intact, but also productive and developing, so that the values and results are increasing. Because basically the better and productive a Nazhir is in maintaining and managing waqf objects, the greater the benefits obtained by mauquf a'laih or the recipient of waqf.

4 CONCLUSIONS

Waqf assets based on Article 5 of the waqf law have economic value and must be managed productively, so that the purposes of waqf can be achieved. Nazhir has a very important role to develop assets waqf economically productive. Based on the provisions of Article 43 of the Waqf Law, the management of waqf

objects must be based on sharia principles. This has the consequence that cooperation in financing agreements and management of waqf must also be based on sharia principles. This implies that the agreement on building commercial cooperation on land waqf should also be based on sharia principles, including in its Financing. There some model to finance the construction of Commercial Building on Waqf Land based on Indonesian Waqf Law; Financing by Cash waqf, Build Transfer Operation System, Patnrship with other institute like Hajj Savings, and other forms of development as long as not contrary with sharia principles and laws in Indonesia.

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