

Online Waqf Management in Legal Perspective

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Abstract: This study explores the current phenomenon of online waqf viewed from Indonesian law. Online waqf has several benefits for waqf founders (wakif), moving one step further towards the innovation of technology. However, some problems and risks should be considered, such as administrative matters, waqf statements, and waqf perpetuity. Using Act Number 41 Year 2004 on Waqf, online waqf will be observed closely to avoid mismanagement of waqf. By applying careful online waqf, it is possible to raise Islamic funds through online waqf safely. There are some ways to do, such as understanding the idea of waqf and introducing the government policy on online waqf.

1 INTRODUCTION

Basically, waqf is aimed at establishing wealth for perpetuity. Muslims may distribute their wealth for the sake of Allah through building mosques, providing tomb areas, or completing public facilities (Hasan, 2012; Suhadi, 2002). However, waqf has grown not only in the form of land, but also in the form of cash waqf (Fanani, 2010; Rosalinda, 2010). Land as immovable waqf and cash money as movable waqf may be done via online waqf even though the most popular online waqf is cash waqf through electronic means, such as internet banking facilities (Amin et al., 2014). It is a kind of new fundraising methods to attract people to donate some of their wealth easily.

Furthermore, cash waqf has been accommodated in Indonesian law since 2004. As stated in Act Number 41 Year 2004 on Waqf (Waqf Act), someone who wants to do cash waqf should go to Sharia banks, states his/her intention and hands some money in to a selected manager of waqf (*nadhir*). It is implemented directly in the bank (Hasan, 2011). Nevertheless, the advanced technology may ease people to do cash waqf without their presence in the bank. They can use their mobile phone or computer to do cash waqf. The problem is that this phenomenon is not covered by the regulation.

Some countries that have implemented online waqf are Kuwait and Malaysia (Ahmad et al., 2014). In both countries, online waqf may be a viable

solution to increase the redistribution of wealth among Muslims. However, in Indonesia, online waqf may have serious problems of trust and maintenance. It needs some solutions to avoid the mismanagement of online waqf.

2 METHOD

This study is normative research using several books and Indonesian acts as the main resources (Bisri, 2004; Yin, 2008). It is also a qualitative research (Merriam, 2009; Babbie, 1998). The main resources are some literatures related to contemporary waqf. In addition, Indonesian regulation, Act Number 41 Year 2004 on Waqf, is applied as the tool of analysis.

3 FINDING AND DISCUSSION

3.1 Waqf in Islamic Context

Waqf is derived from Arabic, *waqafa-yaqifu* (وقف-يقف) which means stop, the opposite of *istamarra* (استمر) (Munawwir, 1984). Wehr (Wehr and Cowan, 1994) interpreted *waqafa* as to come to a standstill or to come to stop. Waqf according to Abu Hanifah in al-Hafsaki's (al-Hafsaki, n.d.) is holding property under one's ownership along with the provision of benefits as a *sadaqah*. Furthermore, according to az-

Zuhaili (az-Zuhaili, 2008), waqf is the restraining of possessions which makes it possible to take advantage with the fixed treasure and disconnect the management from the wakif in order to get closer to God (Abu Bakar, 2005).

With the rapid development of society, waqf is no longer only associated with the object of waqf in the form of land, but has penetrated to other forms of waqf, such as moving objects in the form of money (Mansur, 2008). In Indonesia, several new types of waqf have been accommodated by the Waqf Law. This is a completion of the concept of waqf contained in Government Regulation (*Peraturan Pemerintah*) Number 28 Year 1977 on Waqf of Personal Property (GR on Waqf).

The concept of waqf in GR on Waqf mostly adopts the Shafi'i's concept. It can be seen in the scope of waqf limited on immovable waqf, such as land and building. Article 1 states that waqf is "*Perbuatan hukum seseorang atau badan hukum yang memisahkan sebagian dari harta kekayaannya yang berupa tanah milik dan melembagakannya untuk selama-lamanya untuk kepentingan peribadatan atau keperluan umum lainnya sesuai dengan ajaran agama Islam*" (The legal act of a person or legal entity that separates a portion of his/her assets in the form of land property and institutionalizes it for perpetuity for the purposes of worship or other general purposes in accordance with the teachings of Islam). This definition shows that waqf is only in the form of land and should be declared for unlimited time.

Nevertheless, the concept of waqf has been revised significantly through the Act Number 41 Year 2004 on Waqf, signed by the President Yudhoyono on 27 October 2004. Article 1 in this Waqf Act shows that waqf is "*perbuatan hukum wakif untuk memisahkan dan/atau menyerahkan sebagian harta benda miliknya untuk dimanfaatkan selamanya atau untuk jangka waktu tertentu sesuai dengan kepentingannya guna keperluan ibadah dan/atau kesejahteraan umum menurut syariah. (wakif legal acts to separate and/or give a portion of his/her property to be used forever or for a certain period of time in accordance with their interests for the purposes of worship and/or public welfare in line with sharia)*" In this definition, waqf is not limited to a certain property. Waqf is also can be stated for a limited period of time.

The fundamental difference between the definition of Waqf in Waqf Act and GR on Waqf is that waqf is not always referred to perpetuity but it can be for a certain period of time. Therefore, one can donate the land or money within a month or a year. He/she can take his/her property back to full ownership when the agreed deadline has been exceeded. In addition, the other difference is that the

form of waqf is not only restricted to immovable objects but also movable ones.

From some characteristics of waqf above, it can be inferred that the essence of waqf is to maintain and manage the treasures that have been submitted for the benefit of religion and the benefit of people. Waqf aims to provide the benefits of the property for people who are entitled in waqf statement and used in accordance with the teachings of Islam. This is in line with the waqf function mentioned in Article 5 of the Waqf Act which states that waqf function is "*mewujudkan potensi dan manfaat ekonomis harta benda wakaf untuk kepentingan ibadah dan untuk memajukan kesejahteraan umum*" (to realize the potential and economic benefits of waqf property for the sake of worship and to promote the general welfare.) The more waqf objects collected, the greater the possibility to prosper community. Of course, it is with the condition that the managers possess high trust and creative thinking in developing waqf property.

Several institutions of philanthropy have introduced different kinds of waqf. Dompot Dhuafa, for instance, has some programs of modern waqf such as cash waqf, plants, vehicles, and precious metals (Dompot Dhuafa, 2014). In addition, Global Waqf promotes some programs such as minimarket and plantation areas (Aksi Cepat Tanggap Dompot Dhuafa, 2017). These facts indicate that waqf can be modified to be more productive and more suitable with the needs of society.

3.2 History of Cash Waqf

In the history of Islam, cash waqf has been practiced since the beginning of the second century of Hijri. Narrated by al-Bukhari (al-Bukhari, n.d.), that az-Zuhri (d. 124 H) one of the leading scholars and the founder of the *tadwin al-hadis* (compilation of prophetic tradition) said that waqf of the dinar and dirham was recommended for the construction of social facilities, *da'wah* (proselytizing) and Islamic education by making it as business capital to collect the profits.

Cash waqf is also known during the Ayyubid dynasty in Egypt. At that time, the development of waqf was quite advanced because it was not only limited to immovable objects, but also moving objects including cash waqf. In 1178, to raise the welfare of the ulama and to implement the mission interests of the Sunni followers, Salahuddin al-Ayyubi introduced the policy that Christians who came from Alexandria to trade were obliged to pay customs. Unfortunately, there was no explanation whether the Christians who came from Alexandria paid customs duties in the form of goods or money.

But generally, the customs were paid in cash (Djunaidi, 2007).

In this modern era, cash waqf has become popular due to the idea of M. A. Mannan (Mannan, 2001) with the establishment of an institution called Social Investment Bank Limited (SIBL) in Bangladesh. SIBL introduces the first Cash Waqf product in the world. This institution collects funds from the rich people to be managed professionally to produce profits channelled to the poor people (Djunaidi, 2007).

In Bangladesh, cash waqf has been managed by Social Investment Bank Ltd (SIBL) by developing The Voluntary Capital Market. Islamic financial instruments that have been developed include Waqf Properties Development Bonds, Cash Waqf Certificates, Family Waqf Certificates, Mosque Device Development Bonds, Mosque Community Share, Qard-e-Hasana Certificate, Zakat/Ushar Payment Certificate), and Hajj Saving Certificate (Djunaidi, 2007). This breakthrough shows that waqf can clearly make a real contribution to improve the welfare of people (Ansori, 2006).

Finally, there are five conditions that must be possessed by the waqf object, as reported by al-Kabisi (Al-Kabisi, 2004). The five conditions are that the waqf property has a value, the form of waqf property is clear, the waqf property is under the ownership of wakif, the waqf property can be handed over, and the waqf property must be separated. Cash waqf, which is usually in the form of cash money in this case, conceptually fulfils the five conditions.

3.3 The Legal Status of Cash Waqf

Cash waqf law has been a concern of Islamic jurists. There is different opinion on cash waqf. Al-Bukhari, revealed that az-Zuhri (d. 124 H) argued that the dinar could be managed. The process was to make the dinar a venture capital (trade), then its profit was distributed as waqf. Az-Zuhailly also revealed that the Hanafi sect allowed cash waqf as an exception, based on the sincere nature of al-'urfī (tradition), as it had been done by many. The Hanafi sect argued that the law determined by 'urf (tradition) had the same force as the law set by *nash* (text). The basis of the argument of the Hanafi sect was the hadith narrated by Abdullah bin Mas'ud, "*What is considered good by the Muslims, then in the sight of Allah is good, and what is considered bad by the Muslims then in the sight of Allah is bad.*" The way to do cash waqf according to Hanafi sect is to make it a venture capital with *mudharabah* or *mubadhah*. While the profits are given to the waqf benefit recipients.

In contrast, Ibn Abidin argued that cash waqf was the habits in Roman territory, whereas in other countries, it was not customary. Therefore, Ibn Abidin stated that cash waqf was not permissible (Djunaidi, 2007). The Shafi'i school of thought believed that cash waqf is not permissible as Muhyiddin an-Nawawi said in his book, *Al-Majmu'*. According to him, Shafi'i did not allow cash waqf because dinar and dirham would disappear when it was paid.

The different opinion above is mainly based on the form of money. Does the form of money after being used or paid is still there, maintained, and can make a profit again for a long time? But if we look at the current development of the economic system, it is really possible to carry out cash waqf. For example, the money is used as business capital or invested in the form of shares in a strong company or deposited in Islamic banking. The profits then can be channelled to the needy as a result of waqf.

3.4 Cash Waqf in Indonesian Context

Cash waqf for Muslims is consider new phenomenon. This can be observed with the birth of the fatwa of the Indonesian Ulema Council on Cash waqf. The fatwa committee of the Indonesian Ulema Council (MUI) allows cash waqf (Tim Penyusun, 2003), issued on May 11, 2002. It is stated in the fatwa that cash waqf is a waqf carried out by a person, group of people, institutions or legal entities in the form of cash, including securities. Cash waqf can only be distributed and used for things that are permitted on a shari'a basis. The principal value of cash waqf must be guaranteed sustainability, not to be sold, donated, and/or inherited.

Law Number 41 of 2004 on Waqf also mentions cash waqf. This Act is a new milestone for the management of waqf after the waqf was regulated in Government Regulation Number 28 of 1977 and Compilation of Islamic Law. As a positive law, the rules, including cash waqf, that have been set are forceful and must be implemented.

In detail, the waqf object in Act Number 41 Year 2004 is defined as the waqf property that can only be represented if it is legally owned and controlled by wakif (article 15). Waqf property consists of immovable objects and movable objects. Immovable objects include: (1) Land rights in accordance with the provisions of the prevailing laws and regulations, both those who have and those who have not registered; (2) Buildings or parts of buildings that stand on land as referred to in number 1; (3) Plants and other objects related to land; (4) Ownership rights of apartment units in accordance with the provisions of the prevailing laws and regulations; (5) Other immovable objects in

accordance with the provisions of the Shari'a and the prevailing laws and regulations.

Moving objects are assets that cannot be used up because they are consumed, including: 1) Money; 2) Precious Metals; 3) Securities; 4) Vehicles; 5) Intellectual Property Rights; 6) Rental Rights; and 7) Other movable objects in accordance with the provisions of the Shari'a and the prevailing laws and regulations (article 16).

Articles 15 and 16 above show that Indonesian law on waqf has adopted the spirit of classical fiqh which is integrated with the needs of society. In the perspective of classical fiqh, like the opinion of As-Shafi'i, waqf is still associated with immovable goods, such as land and buildings. This opinion was actually applied in Indonesia before the Act Number 41 Year 2004, as stated in the Compilation of Islamic Law. Act on Waqf gives Muslims the freedom to participate in the waqf program. They can set aside a portion of their wealth for cash waqf or even be able to give their ownership rights to be represented in the future. This is a new breakthrough that can provide opportunities for improving the welfare of Muslims.

The moving object in the form of money is explained in articles 22 and 23 of Government Regulation Number 42 of 2006 concerning the Implementation Act Number 41 Year 2004 concerning Waqf. Article 22 describes the following procedures for cash waqf : (1) Endowments for money that can be represented are rupiah; (2) In the event that the money to be represented is still in foreign currency, it must first be converted into rupiah; (3) Wakifs who will endorse their money are required to: (a) present at the Shari'a Financial Institution of Recipients of Cash Waqf (LKS-PWU) to declare the will of the cash waqf; (b) explain the ownership and origin of the money to be represented; (c) deposit cash in to the LKS-PWU; (d) fill out the form of the Waqf Declaration which functions as a Waqf Declaration certificate.

Then, article 23 explains that Wakif can endorse movable objects in the form of money through LKS appointed by the Minister of Religion as a Shari'a Financial Institution of Recipient of Cash Waqf (LKS-PWU). Some LKS-PWU which were inaugurated by the Minister of Religion are Bank Muamalat, Bank Syariah Mandiri, Bank BNI Syariah, Bank DKI Syariah, and Bank Mega Syariah.

Technically, the administrative waqf has been set up. Minister of Religion Regulation No. 4 of 2009 concerning Administration of Registration of Cash Waqf was signed on July 29, 2009. The regulation consists of 15 articles. Some important articles related to the discussion of this article include article 1 to article 4.

Article 1 explains general provisions. In this case the important terms that need to be defined are cash waqf, LKS- PWU, and Cash Waqf Certificates. Cash Waqf is a wakif legal act to separate and / or surrender some of his money to be used forever or for a certain period of time in accordance with his interests for the purposes of worship and / or general welfare according to sharia. A Shari'a Financial Institution of Recipient of Cash Waqf (LKS-PWU) is Indonesian legal entities engaged in sharia finance set by the Minister of Religion as a sharia financial institution receiving cash waqf. Cash Waqf Certificate is a proof issued by the LKS-PWU to wakif and nazhir about the transfer of cash waqf.

Articles 2 and 3 describe the Waqf Pledge. The Waqf Pledge is carried out by the waqf to Nazhir in the presence of LKS-PWU or notary officials appointed as PPAIW witnessed by 2 (two) witnesses. The Waqf Pledge was made after the wakif deposited cash waqf to the LKS-PWU. LKS-PWU is obliged to issue a Cash Waqf Certificate (SWU) after giving up AIW.

Article 4 describes the registration procedure. The LKS-PWU in the name of Nazhir registers cash waqf to the minister through the Ministry of Religious office no later than 7 (seven) working days since the issuance of SWU with a copy to local BWI. If there is no BWI representative office, a copy is submitted to BWI Center in Jakarta.

The model, form, and specification of the cash waqf form have been regulated in the Decree of the Director General of Islamic Community Guidance Number Dj.II / 420 Year 2009. The decree was issued on 20 October 2009. A number of sample attachments have been provided to facilitate the process of cash waqf. With this technical rule, it is expected that cash waqf will be implemented without significant obstacles.

3.5 Problems of Online Waqf

Waqf is generally still assumed to be immovable goods, such as land. Land assets are the origin of waqf history in the time of the prophet Muhammad and also in the historical trajectory before Islam. However, with the development of the times, waqf is not only limited to immovable objects, but now has been present a variety of waqf products, such as cash waqf, waqf vehicles, and waqf futures. The term productive waqf is also increasingly widespread. Therefore, the online waqf that increasingly facilitate Muslims to do waqf.

Behind the unique online waqf, the question is whether the online waqf has qualified the pillars of waqf. Waqf according to the Waqf Act is a wakif legal act to separate and / or hand over some of his property to be used forever or for a certain period in

accordance with his interests for the purposes of worship and / or general welfare according to sharia.

The law of waqf has mentioned several elements of waqf: Waqif, Nazhir, Waqf Property, Waqf Pledge, allotment of waqf property, and waqf period. These six elements will be observed closely.

3.5.1 Waqif

In Waqf online, waqf actors are called waqif. If someone will do waqf, he can directly download online waqf applications in play store. Then, he can follow the instructions. When he will donate his wealth, he is the wakif. He must first browse what the programs and choose an interesting program.

However, the qualification of a wakif is not clearly seen, whether he/she is a qualified person to do waqf or not. Whether he/she is the owner of waqf property or not. To avoid this problem, the manager of waqf (*nazhir*) through the system should provide some questions to the wakif to ensure that he/she is the right person to do waqf.

3.5.2 Nazhir

Nazhir is a person, legal entity, or organization that receives a waqf. He is responsible for managing waqf. Of course, because waqf nature is immortal, nazhir must be clever, amanah so that waqf is not lost. However, it is also still vague whether the nazhir is trustful. It is commonly known that online transaction is blind. The organizer often does not explain their plan and program clearly. Even, they put wrong information online just only to attract people to donate. Therefore, wakif should be careful to choose the nazhir.

3.5.3 Waqf Property

Usually, the property that is represented through online waqf is cash waqf or waqf through money. Cash waqf is a waqf in the form of money to be invested in the banking sector, for example in the form of shares, or real sector such as productive buildings. While waqf through money is a real waqf in the form of goods, such as waqf for Quran or waqf of building, but paid through cash. In this case, there are lots of organizations that attract people to donate their money to be cash waqf but in fact they use that money to buy Quran or car. This act really violates the law.

3.5.4 Wakaf Pledge (*Iqrar*)

To perform waqf, it is required for the wakif to show his intention (pledge). In online waqf, one should be able to apply online transaction. It is a kind of akad

or iqrar. Akad is the bond act between waqif and nazhir. Statement from wakif is called ijab whereas the statement from nazhir is called qabul.

This is the riskiest part of online waqf. In waqf of land, waqif has to go to *Pegawai Pembuat Akta Ikrar Wakaf* (the Officer of Pledge of Waqf) held by the Head of *Kantor Urusan Agama* (Office of Religious Affairs). In contrast, in cash waqf, wakif has to face the officers of *Lembaga Keuangan Syariah Penerima Wakaf Uang* (Sharia Financial Institutions for Cash Waqf). Nevertheless, for the online waqf, there is no face-to-face transaction between wakif and nazhir. This may result in verbal pledges of waqf not being fulfilled. As a result, the use of waqf also cannot be reported directly. This is the weakness of online waqf.

However, this weakness can be covered by two-way communication between wakif and nazhir in the form of proof of receipt of online waqf that can be reported in writing via email or inbox application. It has been done in Malaysia (Yusof et al., 2014).

3.5.5 Allotment of Waqf

This should be listed in the application of online waqf, e.g. waqf of Quran menu. By clicking the type of waqf, the designation must be in accordance with the wakif intention. Again, wakif intentions are like syari'. We must not violate the wakif intention.

3.5.6 Time Period

Since there are types of waqf, wakif can determine whether the waqf is done temporary or forever. If the form of waqf through money, it is usually stated forever. For example, waqf of Quran. There is no waqf of Quran that is recited by wakif. Unlike the case of cash waqf, because it can be used in the form of stocks and banking products such as deposits, then when the time is exceeded, waqf can be withdrawn by wakif.

Finally, the challenge of online waqf is also due to the knowledge of technology. Not many people and institutions have knowledge to use technology for online waqf for the benefit of society. They still need guide for outsider to guide them. The other problem is that some institution which has intention to raise waqf through online waqf has no license from the government. Therefore, they should fulfil the requirements to get the permission.

4 CONCLUSIONS

Finally, online waqf is really challenging in recent years. When online waqf is observed closely in the

perspective of Act Number 41 Year 2004 on Waqf, it can be concluded that online waqf does not fulfil the requirements. The government should introduce the new regulation to manage online waqf. We have to take some consideration into our account to avoid mismanagement of this type of waqf. By applying careful online waqf, we may raise Islamic funds through online waqf safely.

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