

IMPLEMENTATION AND PROTECTION OF LEGAL LAW ON CASH WAQF TOWARD TABUNG WAKAF INDONESIA OF DOMPET DHUAFA JAKARTA

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Abstract

Waqf institution is an effort made by Muslim community and government to overcome poverty issues. One of the institutions that manage cash waqf is Wakaf Tunai Dompot Dhuafa Jakarta. Article 49 Paragraph 3 of Religious Court Law stated that the ownership of land waqf is protected and governed by the government rules This research aims to examine how the implementation and protection of waqf law on Tabung Wakaf Indonesia of Dompot Dhuafa Jakarta. This research is normative-juridical research using statute approach, conceptual approach and case approach. Then the analysis was qualitatively presented. Based on the results, the implementation of cash waqf in Tabung Wakaf Indonesia was conducted by collecting cash waqf funds to be managed into productive and non-productive activities. Tabung Wakaf Indonesia has provided legal protection to the waqif by certification of cash waqf. However, till present, there is no legitimate legality for individual cash waqf recipients or legal entities as stipulated in government regulations.

Keywords: legal protection, cash waqf, tabung wakaf Indonesia

Abstrak

Lembaga Wakaf merupakan upaya yang dilakukan masyarakat muslim dan pemerintah secara bersama-sama dalam mengatasi masalah kemiskinan. Salah satu lembaga yang mengelola Wakaf Tunai adalah Dompot Dhuafa Jakarta. Pasal 49 ayat 3 Undang-undang Peradilan Agama dinyatakan bahwa perwakafan tanah milik dilindungi dan diatur dengan peraturan pemerintah. Permasalahan yang dikaji yaitu bagaimana pelaksanaan dan perlindungan hukum wakaf pada Tabung Wakaf Indonesia Dompot Dhuafa Jakarta. Penelitian ini merupakan jenis penelitan normatif dengan menggunakan pendekatan undang-undang (*statute approach*), pendekatan konseptual (*conceptual approach*) dan pendekatan kasus (*case approach*). Berdasarkan hasil penelitian, pelaksanaan wakaf tunai pada Tabungan Wakaf Indonesia dilakukan dengan menghimpunan dana wakaf tunai untuk dikelola menjadi kegiatan produktif dan non produktif. Tabungan Wakaf Indonesia telah memberi perlindungan hukum kepada wakif dengan dilakukan sertifikasi wakaf tunai. Namun demikian, sampai saat ini belum ditentukan legalitas hukum bagi penerima wakaf tunai perorangan atau badan hukum yang tertuang dalam peraturan pemerintah.

Kata Kunci: perlindungan hukum, wakaf tunai, tabung wakaf Indonesia

Introduction

Justice is an abstract thing; however, justice essentially demands concrete and positive action and deeds. The implementation of *waqf* is a concrete example of social justice since *waqf* is an act of giving several precious properties freely for good and prosperity.¹

Waqf, according to the perspective of Islamic law (*fiqh*), is a social deed institution

which is not explicitly stated in either Quran or *Sunnah*. Ulama believes that the order of *waqf* is a part instruction to conduct *al-khayr* (literally means virtue).²

Waqf during the Islamic dynasties plays a significant role in state development. During Saljuk Dynasty, the *waqf* treasures were built for shelter of caravans passing through their

¹ Ahmad Syakir, 2016, *Wakaf Produktif*, available on: https://www.researchgate.net/publication/305730287_WAKAF_PRODUKTIF, accessed on April 29th, 2017.

² Miftahul Huda, "Arah Pembaharuan Hukum Wakaf di Indonesia", *Jurnal Ulumuna*, Vol. 16 No. 1, June 2016, Ponorogo: Sekolah Tinggi Agama Islam Negeri Ponorogo, page 126.

territory; they could rest there for three days free of charge along with the available food.³ According to Islamic teachings, *waqf* is recommended to be implemented. *Waqf* is a religious service by giving up the property for the public interest and the results can be used for the social welfare.

Juridically, *waqf* is a legal act which may bring about the existence of separated and purposeful assets managed *nazhir*. Furthermore, according to Law Number 41 Year 2004 on *waqf*, it is stated that the legal act of *wakif* to separate and/or to give some of their property in order to be used forever or in a certain course of time based on the interest of worship and/or public welfare in accordance with *sharia*. Even though *waqf* plays a pivotal role to social life and has been implemented for years, in reality, *waqf* is not effectively functioned. These days, *waqf* is limited to immovable properties and intended for physical development interest such as mosque, *mushalla*, *pesantren*, graveyard and others.⁴

Significant number of poor people becomes proof of this. Several factors make *waqf* ineffectively implemented. In fact, the fundamental aim of *waqf* is to share virtue and kindness in terms of economic benefit for others.⁵

Recently, term *cash waqf* appears. The practice of *cash waqf* is confirmed with the existence of Law Number 41 Year 2004 on *Waqf*. It stated that *waqf* is not only for immovable objects but also movable objects like money. Thus, *cash waqf* has been recognized by positive law in Indonesia. With the existence of law on *waqf*, this has become a touch stone for conductive *waqf* empowerment.

On the other hand, the perception of Indonesian people who are *syafi'iyah fiqh* ori-

ented hold the old understanding in the management of *waqf* by assuming that *waqf* is solely the possession of Allah, which should not be altered or final. Thus, many public figures or Muslims do not allow *waqf* to be managed productively except to *mahdlah* worship.⁶

The author selected *Tabung Wakaf* Indonesia as an object of research because it is qualified in raising and managing *waqf* resources productively and reliably. Article 49 Paragraph 3 Law of the Religious Court, states that *waqf* in ownership of land is protected and regulated by government law, then issued Government Regulation Republic of Indonesia Number 28 Year 1977 on land owned *waqf* (*PP PTM*) to follow up the mandate of Law of the Religious Court. However, the implementation of Government Regulation Number 28 Year 1977 is not effective since until now there are still many *waqf* lands that do not have a certificate indicating that they do not have a secured legal status.

Problems

Based on the above-mentioned introduction, the question is formulated in how the implementation of *cash waqf* in *tabung Waqf* Indonesia Dompét Dhuafa Jakarta. Does it already have legal protection, what kind of type are they and what is the form of its legal protection?

Research Method

This research is a normative juridical research. The approach includes statute approach, conceptual approach and case approach. This study is a deductive research that attempts to describe the legal events and legal consequences associated with the implementation of *cash waqf* in *Tabung Waqf* Indonesia. In order to understand the *in concreto* incident, an interview was conducted to the fund manager of *waqf* at *Dompét Dhuafa Jakarta*. The data obtained were collected and analyzed qualitatively.

³ P. M. Holt, Ann K. S. Lambton and Bernard Lewis, dalam Ahmad Suwaidi, "Wakaf dan Penerapannya di Negara Muslim", *Economic: Jurnal Ekonomi dan Hukum Islam*, Vol. 1 No. 2, Banyuwangi: STAIN Darul Ulum, page 16

⁴ Suryani, "Wakaf Produktif (Cash Waqf) Dalam Perspektif Hukum Islam Dan Maqasid Al-Shari'a". *Walisongo: Jurnal Penelitian Sosial Keagamaan*, Vol. 24 No. 1, May 2016, Semarang: Universitas Islam Negeri Walisongo, page. 23.

⁵ Wawan Hermawan, "Politik Hukum Wakaf di Indonesia", *Jurnal Pendidikan Agama Islam - Ta'lim*, Vol. 12 No. 2, 2014, Bandung: Universitas Pendidikan Indonesia, page 147.

⁶ Jainal Arifin, "Problematika Perwaqfan di Indonesia (Teori Himpunan dan Sosiologis)", *Zizwaf: Jurnal Zakat dan Waqf*, Vol. 1 No. 2, Desember 2014, Kudus: Sekolah Tinggi Agama Islam Negeri Kudus, page 260.

ively with descriptive-analytical model, so the result can be described which related to the concept of cash *waqf* in *Tabung Wakaf* comprehensively, inclusively and systematically.

Discussion

Implementation of Cash Waqf In *Tabung Wakaf* Indonesia Dompot Dhuafa Jakarta

Tabung Wakaf Indonesia employs the legality of Dompot Dhuafa Republika Foundation (Dompot Dhuafa), with the Decree of the Minister of Religion of the Republic of Indonesia Number 439 Year 2001 on the Ratification of Dompot Dhuafa Republika as the National Amil Zakat Institution. Referring to Law of Republic of Indonesia Number 41 Year 2004 on *Waqf*, Dompot Dhuafa Republika Foundation has also been registered in Indonesian *Waqf* Board as *Nadzir*.

Tabung Wakaf Indonesia manages cash *waqf* distributed by the community through implementing the Law Number 41 Year 2004 on *Waqf*. However, it should be noted that implementation in Islam must be in accordance with the provisions in Islamic sharia, as well as implementation of cash *waqf*.

Implementation of cash *waqf* should be based on the Islamic principle as suggested in the hadith namely: "Narrated from Ibn Umar *r.a.* that Umar bin al-Khathab *r.a.* obtained the land (garden) in Khaibar, then he came to the Holy Prophet to ask for clues about the land.

He said: "O Messenger of Allah, I have acquired the land in Khaibar; which I have never acquired better treasures for me than that land, what is your command (toward me) about it?"

The Prophet replied: "If you will, you will keep the base (the land) and you give away (the yield) of it".

Ibn Umar said: "So Umar gave away the land, (by requiring) that the land was not sold, not granted and not inherited. He gives the yields of the land to the fuqara".⁷

In the hadith above, it explains that the principles of cash *waqf* property managed by *Ta-*

bung Wakaf Indonesia is a form of *waqf* investment funds.

Economically it can be said that *waqf* (Islam) is building productive property through investment activity for those who are in need set out in pledge of *waqf*. In the framework of developing productive *waqf*, money is as venture capital then the outcome will be distributed proportionally.⁸ Therefore, the outcome or product of *waqf* property can be distinguished in two parts; direct *waqf* and productive *waqf*. Direct *waqf* is *waqf* property which produces service in terms of goods to be consumed by the rightful person of *waqf*, such as hospital, school, orphanage, and settlement. Productive *waqf* on the other hand is a *waqf* managed for investment, production of goods and services which are permitted by Islamic law. In this matter, the capital (*waqf* property) is invested, and then the outcome will be distributed to those in need.

The management of *waqf* property, either immovable or movable *waqf*, has been successfully conducted by Dompot Dhuafa Republika since 2001. It can be seen from its success which raised *waqf* funds in the amount of 86.968.000 rupiah. This fundraising increased in 2002 by gaining approximately 822.451.600 rupiah. This increase is seemingly affected by MUI fatwa on *waqf* money on May 11th 2002. This condition remains the same in 2004 until present.

Money *waqf* managed by Dompot Dhuafa, is done by investment, whether using the profit sharing principle (*mudhârabah* and *musyârahah*), rent (*ijârah*), or *murâbahah*. Referring to financial management, it seems like *waqf* investment management and funding is easier than investment. As asserted by Monzer Kahf, a new form of money *waqf* development through investment company refers to the money *waqf* of investment management in the discourse of *fiqh*, money *waqf* can be managed by the *mu-dhârabah*, *musyârahah*, *ijârah* as well *murâbahah* investment scheme.

⁷ relatives, *riqab* (slave, oppressed), *sabilillah*, *ibn sabil*, and guests. (H.R. al-Bukhari, Muslim, al-Tirmidhi and al-Nasa "i).

⁸ Nawawi, "Implementasi Wakaf Produktif di Indonesia Pasca Berlakunya UU No. 41 Tahun 2004 tentang Wakaf". *At-Tahrir*, Vol. 13 No. 2 November 2013, Ponorogo: Sekolah Tinggi Agama Islam Negeri Ponorogo, page 397.

In performing duty as *nadzir*, *Tabung Wakaf* Indonesia manage and develop *waqf* property which is collected based on the purpose, function and allocation using *Shari'a* Islam principles. The management of money *waqf* which is proclaimed by *Tabung Wakaf* Indonesia is done based on three approaches including productive approach, non-productive approach, and integrated (combination of productive approach and non-productive approach in one object of *waqf*).

Firstly, productive approach. *Tabung Wakaf* Indonesia allocates the *waqf* fund for livestock business, plantation, provision of commercial facilities business and others. Based on the results from those businesses, the profit will be used for economic empowerment of the poor. According to Zaim Saidi, *Tabung Wakaf* Indonesia Director, allocation of money *waqf* to productive sectors is made to realize "*tahan pokok dan nikmat hasil*" principle, as said in hadith of the prophet. *Waqf* funds from waqif is the "primary", meanwhile the surplus from the funds is the "result". This result is allocated for program such as the construction of mosque and school. Therefore in *waqf*, the thing that must be carefully noticed is the fixed value of property which is represented. At the same time the *waqf* should produce something that can be distributed to *mauquf alaih*.

Secondly, non-productive approach. Based on this approach, *Tabung Wakaf* Indonesia manages the *waqf* property for unprofitable (non-productive) things. The benefit of the related *waqf* property is because the value can be felt by people as beneficiaries of *waqf*.

Thirdly, integrated approach, which is a program of *waqf* distribution for public service institution combined with *waqf* program in form of commercial facility, property, plantation, trade, agriculture, etc. The surplus of the program is distributed to poor people and/or for the operational of the institution in one program area. In the practice of financial *waqf* management for the productive sector, *Tabung Waqf* Indonesia (TWI) tends to make direct investment to the object of *waqf* rather than the real sector using *mudhârabah*, *muzara'ah*, dan *ijârah* agreement. The donation from this man-

agement is distributed to many sectors such as farming, agriculture, plantation, trade, *dinar* and dirham selling, and trading facility *waqf*.

Based on Article 48 Paragraph 2 Indonesian Government Regulation No.42 year 2006 of The enforcement of Law No. 41 year 2004 of *Waqf*, the management and development of financial *waqf* should make investment on LKS products and/or the islamic financial instruments. From the perspective of TWI management, this article seems to limit the *nadzir* in managing the donation since it only allows the management and development of *waqf* conducted using the islamic bank products such as de-posit or the islamic financial instrument such as mutual funds, share, and islamic obligation. Yet, according to statement of Article 1 of this regulation, the management and development of *waqf* should follow the BWI's rule meaning that this worry does not make sense. The rule of BWI states that the investment of financial *waqf* is aimed for productive projects for people poverty through either the direct investment managed by *nadzir* or the indirect investment through islamic financial organizations such as islamic bank, BMT, islamic cooperative, etc. Thus, it means that *nadzir* can still make a financial *waqf* investment to the real sector.

Undoubtedly, the *waqf* financial investment on the real sector give bigger impact for the people rather than the investment on the financial sectors. Eventhough the islamic economists claim that the investment can be made on islamic financial sectors like islamic share, obligation and mutual funds, the investment on the real sector is the priority. In addition, Ahmad ibn Abdul Azîz al-Hadâd, in his book *Waqf al-Nuqûd wa Istitsmaruhâ*, explained that the best financial *waqf* development is on the trade sector. It is in line with the statement of Dian Masyita who stated that the development can be conducted by making direct investment on big and medium enterprises. The *nadzir* allocates the donation on some big companies in form of shares which then result in capital gain in a long time. This way of investment undoubtedly give more positive impact to the economical empowerment of the society though it has small percentage.

Tabung wakaf Indonesia is the main productive *nadzir waqf* in Indonesia whose duties is receiving *waqf* money from community. In doing their duties as *nadzir*, *Tabung Wakaf* Indonesia manage and develop *waqf* property collected along with purposes, function and their sharia Islamic principle. Asset management in *Tabung Wakaf* Indonesia done by two approaches: productive approach, and non-productive approach. While in *waqf* management, they use asset management pattern, which consider *waqf* to result in surplus. *Tabung Wakaf* Indonesia's slogan is *goose lay gold*. The goose could not be dead; hence, its eggs can be used for community welfare. *Waqf* money will be invested in real sector. Therefore, its result will distribute through productive social programs. What *Tabung Wakaf* Indonesia perform as *nadzir* institution viewed from *maqasid al-Syariah*, enable them to implement three purposes of Islamic law by Syeh Muhamad Abu Zahra in Sapiudin Sidiq, namely: *first*, Guide each individual to be a source of kindness for everyone which can be accomplished through prescribed religious service, such as *shalat*. This is in accordance with Q.S Al Ankabut (29): 45 which means: "...Indeed, prayer prohibits immorality and wrongdoing, and the remembrance of Allah is greater merit."⁹ *Second*, Uphold justice in community either within Muslim or with non-Muslim as stated in Q.S Al-Maidah (5):8 which means: "...Do justice, that is nearer to taqwa. And fear Allah. Surely, Allah is all-aware of what you do."

Viewed from *ushul fiqh Tabung Wakaf* Indonesia *al-kulliyatul khas* (five principal pillars) or *maqasid asy-syariah* (universal sharia purposes), *Tabung Wakaf* Indonesia could help *wakif* to realize *Hifdz al-dien* (*guaranteed religion freedom*) and *Hafidz al-nasl* (*guaranteed generation and honor*). Welfare parameter refers to *ushul fiqh* doctrine which also known as *al-kulliyatul khas* (five principal pillars) or *maqasid asy-syariah* (universal sharia purposes), they are:¹⁰ *first*, *Hifdz al-dien*, guaranteed freedom of religion; *second*, *Hifdz al-nafs*,

maintain life continuity; *third*, *Hifdz al-aql*, guaranteed creativity of thinking; *fourth*, *Hifsz al-nasl*, guaranteed generations and honor; *fifth*, *Hifdz al-mal*, ownership of properties and wealth. Law Number 41 year 2004 of *waqf*, give flexibility for Muslim to participate in *waqf* program even they are not rich yet. They could save some of their wages for *waqf* cash or give their properties gradually. This is a new innovation as a chance to enhance the prosperous Muslims.

Till present *Tabung Wakaf* Indonesia does not have written System Operation Procedure as principal for organization and control the organization performance in doing their target. As admitted by manager program of *Tabung Wakaf* Indonesia, Hendra Jatnika, despite its reality, each manager keep performing their duties as their responsibility. He added that development of money collected by *Tabung Wakaf* Indonesia as asset always increases and successful. As organization that manages public funds as Management Corporation; System Operation Procedure is definitely needed. Hence, organization could reach their purposes and target also control and assessment of organization can be conducted. The function of planning in managing *waqf* funds is the first step of managing activity. Every management activity need planning and function of organization that take a big role in manage *waqf* funds.¹¹

In Islamic law, main *waqf* must exist and everlasting. If it is cash *waqf*, that *waqf* has to be used for beneficial things and its main value must exist; therefore, its benefits can be everlasting. Nowadays Muslim society is still debating on the management of zakat and productive *waqf*. Some Muslims doubt that if zakat and *waqf* are managed productively, they will increase the beneficial value of these two institutions.¹²

Tabung Wakaf Indonesia as *nadzir* (*waqf* administrator) is responsible for keeping cash *waqf* sustainable. Hence, *Tabung Wakaf* Indone-

⁹ Majlis Wakaf dan ZIS Pimpinan Pusat Muhammadiyah, 2010, *Panduan Wakaf*, Jakarta: Majlis Wakaf dan ZIS Pimpinan Pusat Muhammadiyah, page 223-224.

¹⁰ *Ibid*

¹¹ Fahmi Medias, "Paradigma Baru Manajemen Dana Wakaf di Indonesia", *Rasail*, Vol. 1 No. 2. 2014, Yogyakarta: Sekolah Tinggi Ekonomi dan Bisnis Islam, page 166.

¹² Muslihun, "Dinamisasi Hukum Islam di Indonesia Pada Zakat Produktif dan Wakaf Produktif: Sebuah Studi Perbandingan", *Almanahij*, Vol. 8 No. 2 2014, Purwokerto: Institut Agama Islam Negeri Purwokerto, page 14.

sia can conduct the things which are able to protect the managed *waqf* by determining certain necessary strategies. In this case, this institution can conduct it through *ijtihad* way (serious hard effort) without necessarily be attached to the standard law system either in Quran or *As-Sunnah*.¹³ Imam Malik stated "Ratio must be noticed for the consideration of *Al-Mashalih Al-Mursalah* welfare", as it was delivered by Ibrahim Husen that *Mashalih Al-Mursalah* becomes the legal principle. He thought that *Mashalih Al-Mursalah* approach needs to be conducted in legal cases since people welfare is not the same and it has many varieties; moreover, it always develops and changes over time.

Supervision and protection of *waqf* properties are aimed at preventing the value decrease of *waqf* properties either because of *force majeure* events or loss and failure of investment. Prudential principle of investment must be clung firmly; thus, *waqf* properties are managed based on the rule of *waqf* management in Islamic way. The value of *waqf* properties is anticipated not to decrease. Jalaluddin al-Mahally affirmed that in managing and developing *waqf* properties, *nadzir* has to maintain *waqf* properties and their results thoroughly.

Conclusion

The implementation of cash *waqf* in *Tabung Wakaf* Indonesia is performed by collecting cash *waqf* through several ways and its management is done either productively and non-productively. *Tabung Wakaf* Indonesia has given adequate legal protection to *wakif* since certification of cash *waqf* is conducted based on the stipulation regulated in Article 62 of Law Number 41 of 2004. However, law legality for cash *waqf* recipients either individual or legal entity has not been determined in governmental regulation.

Suggestion

A written System Operation Procedure is required as reference and guidance for organization to control organization's performance in achieving goal and target. Therefore, or-

ganization can run well in accordance with the goal and the target that have been determined by the organization itself.

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¹³ Ahmad Suwadi, *Op.Cit*, page 160.