

THE POSITION OF WAKAF IN ISLAMIC LAW AND ITS IMPLEMENTATION IN INDONESIA

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ABSTRACT: Waqf is the legal action of the Wakif (the person who gives the Waqf) to separate and/or hand over part 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 general welfare according to sharia. Waqf is a sacred and noble legal act and as shodaqoh jariyah, as long as the items donated can be used by people who need them, the rewards will continue to flow even if the Wakif has died. The problems studied are: a) how to regulate Waqf according to Islamic law; b) how is the implementation of Waqf in Indonesia; c) how to resolve Waqf disputes in Indonesia. In this research, the author uses a normative juridical approach method. In normative legal research, secondary data will be examined which includes primary, secondary and tertiary legal materials, namely statutory regulations, Religious Court Decisions and Books and Journals. The research results illustrate that Waqf has been prescribed and has been implemented by Muslims since the time of the Prophet Muhammad SAW, the order for Waqf is contained in the Al Qu'ran (QS Al-Baqarah verses 261 and 267, QS Al Maidah verse 2, QS Ali Imron verse 92, QS. Al -Hajj verse 77). The implementation of Waqf in Indonesia is regulated in Law Number 41 of 2004 concerning Waqf, its Implementing Regulations and the Compilation of Islamic Law. The pillars of Waqf include: 1)



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Wakif (person who is waqf), 2) Mauquf bih (Wakf assets), 3) Mauquf 'alaih (purpose of Waqf), 4) Shighat (statement or Pledge of Waqif as a will to donate part of his property), 5) Nazhir (waqf manager) and 6) Waqf term. Resolving waqf disputes is achieved through deliberation to reach consensus. If resolution through deliberation is not successful, the dispute can be resolved through mediation, arbitration or the Religious Courts. Several cases regarding waqf have been examined and decided by the Religious Courts in Indonesia.

Keywords: Waqf, Dispute, Religious Court.

A. Introduction

Waqf is one of the Islamic institutions that has a social and social character and is valued at worship and as a service to Allah SWT. From the perspective of Islamic law (fiqh) waqf is an institution of social worship that does not have an explicit reference in the Koran and alSunnah. Ulama are of the opinion that the waqf order is part of the order to do good (alKhayr).¹

Waqf is a sacred and noble legal act, and as shodaqoh jariyah, this means that as long as the items donated can be used by people who need them, the rewards will continue to flow, even though the wakif (the person who gave the waqf) has died. Waqf is an important form of material worship and has no explicit reference in the Holy Quran. However, in several Surahs in the Koran and Hadith, it has been explained about doing good deeds, spending wealth and charity, and these are the basis for conducting waqf. Waqf can cover various objects, although various narrations/hadith say that the issue of waqf is about land, various scholars understand that non-land waqf is also permissible as long as the objects are not immediately destroyed/exhausted when the use is taken. Waqf has taken root and become a tradition of Muslims everywhere. In Indonesia, waqf institutions have become the main support for community development. Almost all houses of worship, Islamic universities and religious institutions are built on waqf land.

Waqf is also an Islamic social institution that is closely related to the social economy of society. Even though waqf is an Islamic institution whose laws are sunnah, this institution can develop well in several Muslim countries. It is true that the existence of waqf is very important for the welfare of the people. In Indonesia, waqf has been known since Islam entered Indonesia, but in general waqf in Indonesia is used for mosques, prayer rooms, schools, Islamic boarding

¹ Khoirul Abror, *Dinamika Perwakafan Dalam Pemikiran Hukum Islam, Peraturan Perundang-Undangan Di Indonesia Dan Negara-Negara Muslim*.

schools and very few waqf are managed in the form of businesses whose results can be used for parties in need, especially the poor.²

Waqf significantly contributes to cultural and intellectual growth, waqf also plays a positive role in upholding social justice, because it encourages those who are rich to establish waqf that will guarantee the poor. In Article 5 of Republic of Indonesia Law Number 41 of 2004 concerning Waqf, it is explained that the function of waqf is to realize potential and economic benefits.

In its development, Muslims have become aware of implementing waqf for their wealth, especially in Indonesia, where the majority of the population is Muslim. The benefits of waqf institutions have been felt by Muslims, especially in educational, economic and social development. However, quite a few problems arise as a result of the implementation of the waqf, one of which is the case of taking back waqf land because the Wakif who handed over the waqf property did not follow the procedures/ procedures for handing over the waqf as regulated in Law Number 41 of 2004 concerning Waqf and Government Regulation Number 42 of 2006 concerning the Implementation of the Waqf Law and several other cases related to Nazhir (waqf property managers).

To find out how Waqf is regulated according to Islamic Law and its implementation in Indonesia, as well as resolving waqf disputes, the author will discuss it in this article. From the description in the background above, the problem under study can be formulated, namely: a) how to regulate waqf according to Islamic law; b) how waqf is implemented in Indonesia; c) how to resolve waqf disputes in Indonesia.

B. Research Methods

In this research, the author uses a normative juridical approach method. In this approach, research aims to identify the nature, values, teachings and legal meaning of data, facts or documents on the problem being studied. Normative legal research is a procedure and method of scientific research to find the truth based on logic legal science from a normative perspective.

In normative legal research, you will examine library materials or secondary data which includes legal materials. Legal material is the basic material that will be used as a reference or foothold in this research. The legal materials in this research consist of 3 (three) parts, namely

² Harry Faishal Aqmal, *Makalah “Hambatan/Tantangan, Potensi Dan Peluang Pengembangan Wakaf Di Indonesia”*.

primary, secondary and tertiary legal materials. Primary legal materials are legal materials that are authoritative, meaning they have authority. (Peter Mahmud Marzuki, 2008). Primary legal materials consist of statutory regulations, official records or minutes in making legislative regulations and judges' decisions. The approach used in this research is the statutory approach. The statutory approach is used to examine and criticize statutory regulations whose norms still contain deficiencies in terms of waqf regulation and waqf implementation in Indonesia as well as legal settlements resulting from waqf disputes.

In this research, the deductive analysis method is used, namely an analytical method by analyzing the laws and regulations related to the problem (problem formulation) contained in this research and then correlating it with several principles and theories which become the basis or analysis tool in writing research. This is a step to find conclusions, solutions and ideal conceptions about the things being discussed.

The analysis used in this research is qualitative and comparative analysis which produces analytical descriptive data. The data obtained was analyzed using the content analysis method, while the data obtained from statutory regulations was constructed qualitatively using the grammatical interpretation method.

C. Results and Discussions

1. Waqf According to Islamic Law

a. Understanding Waqf

Waqf comes from the Arabic word "*Waqafa yaqifu waqfan*" which means to hold, stop, remain, stand or stay in place. Waqf, which means "holding", means holding back assets from which the benefits are taken without being destroyed immediately, and using them for things that are permitted by the Sharia' with the aim of gaining the pleasure of Allah. By releasing the waqf assets, legally the wakif has lost his ownership rights so that he no longer has the authority or right to use them for personal interests and the right to transfer or transfer ownership to other parties, such as selling, donating, including bequeathing to heirs.³

³ Departemen Agama Republik Indonesia (2005). *Fikih Wakaf*, Direktorat Pengembangan Zakat dan Wakaf, Jakarta.

Lexicographically, the word al-waqf has the same meaning as at-tahbis and att-asbil, namely al-habs'an attasarruf, "to prevent from managing". The word waqf is limited in its use to certain objects, namely waqf objects, so that the word al-waqf is equated with al-habs. This word in Umar Ibn Khottab's *Mausu'ah Fiqh* is interpreted as holding back the origin of wealth and carrying out the results. In the Islamic jurisprudence, waqf is interpreted as holding and preserving the integrity of an object which still allows it to be used in the path of truth or use the proceeds in the path of goodness and truth in order to get closer to Allah SWT. In the fiqh books, scholars have different opinions in giving meaning waqf.⁴ M. Abdul Mujieb said, in the Dictionary of Fiqh terms, waqf is transferring private property rights that belong to an entity that provides benefits to society. This is based on religious provisions and the aim of taqarub to Allah SWT, to obtain goodness and God's pleasure.⁵

In the Islamic Encyclopedia, waqf is defined: "the transfer of ownership rights to a useful and long-lasting property by handing over the property to the manager, whether family, individual or institution to be used for public purposes in the way of Allah".⁶ In Islamic Fiqh, it is stated that Waqf is holding an object whose substance is eternal, whose benefits can be taken to be given on the road of kind.⁷ Waqf has been prescribed and implemented by Muslims since the time of the Prophet Muhammad SAW. However, waqf which is very popular among Muslims, especially in Indonesia, is still limited to land and buildings intended for places of worship and education, or other social buildings. Recently, there have been waqfs in the form of cash, or movable objects whose benefits are for education, research, hospitals, empowering the economically weak and so on. Cash waqf for Indonesian Muslims is still relatively new, so its implementation is not yet optimal and has not yet been felt in real terms by the general public.⁸

b. Legal Basis of Waqf

Waqf is not explained explicitly in the Al-Qur'an, however, general instructions regarding waqf are found, although implicitly. In Surah Al-Baqarah verse 267, it means:

⁴ Junaidi Abdullah dan Nur Qodin, *Penyelesaian Sengketa Wakaf Dalam Hukum Positif* Dosen STAIN Kudus, Jurnal Zakat dan Wakaf, ZISWAF, Vol. 1, No. 1, Juni 2014;

⁵ M. Abdul Mujieb et.al., (1994). *Kamus Fiqh Islam*, PT Pustaka Firdaus, Jakarta.

⁶ Abdul Aziz Dahlan (1989). *Ensiklopedi Islam*, Ichtiar Baru Van Hoeve, Jakarta.

⁷ Sulaiman Rasyid (2009). *Fiqh Islam*, Cetakan ke-42, Sinar Baru Algensindo, Bandung.

⁸ Tasrir MA (2019). *Wakaf Tunai Dalam Perspektif Hukum Islam*, CY . Zigie Utama, Bengkulu.

"Hi you who believe, spend (in the way of Allah) some of the good results of your efforts and some of what We have brought out from the earth for you. And don't choose the bad things and then spend on them, even though you yourself don't want to take them but by narrowing your eyes towards them. And know that Allah is Most Rich, Most Praiseworthy."

The meaning of the words "spend wealth in the way of Allah" in the sentence above includes spending for the purposes of jihad, development of education, hospitals, scientific research and so on.

In the Qur'an Surah Al - Maidah verse 2, it means:

"... And you should help each other to do good deeds and be pious and do not help in committing sins (immorality) and enmity or disasters of destruction."

This indicates that Muslims must pay attention to the fate of their less fortunate brothers. To realize this ta'owun principle. Islam issues several regulations relating to social security for disadvantaged communities, including economic development based on waqf.

Following the majority of ulama, apart from Hanafiah, circumcision is legally a waqf, because it is a recommended virtue (*al-tabarru'at al-mandubah*), the reason is the Word of Allah SWT in Surah Ali Imron verse 92, which means:

"You will never reach (perfect) virtue, until you spend part of the wealth you love, and whatever you earn, Allah knows it."

QS. Al-Hajj verse 77, meaning:

"Hi you who believe, bow down, prostrate yourself, worship your Lord and do good deeds, so that you may gain victory."

QS. Al-Baqarah verse 261, meaning:

"The parable of (the income spent by) those who spend their wealth in the way of Allah is similar to a seed that grows seven spikes, in each spike a hundred seeds. Allah multiplies (rewards) for whom He wills, and Allah is All-Encompassing (His bounty) and AllKnowing."

In Islamic history, waqf has been known since the time of the Prophet Muhammad because waqf was prescribed after the Prophet saw emigrated to Medina in the second year of the Hijriyah. According to some scholars, the first person to implement waqf was Rasulullah SAW, waqf land belonging to the Prophet SAW to build a mosque. Then the waqf law was carried out by Umar bin Khathab, followed by Abu Talhah who donated his favorite garden, namely the Bairaha garden, followed by other Companions of the Prophet, such as Abu Bakr who donated a plot of land in

Mecca, Ali bin Abi Talib donated his fertile land. Mu'az bin Jabal donated his house to the popular name "Dar al-Anshar" then the implementation of the waqf was followed by Anas bin Malik, Abdullah bin Umar and 'Aisyah, the wife of the Prophet Muhammad.⁹ Rasulullah SAW once said, which means:

"In fact, Umar had obtained a plot of land in Khaibar. Umar asked the Messenger of Allah, 'What are your orders to me regarding this land that I got?' 'So with his instructions, Umar donated the benefits with the agreement that the land should not be sold, it should not be inherited (given), and it should not be given away.'"(HR. Muslim and Bukhori). (Sulaiman Rasyid, 2009).

This is the beginning of Waqf which is famous in Islam. According to Imam Syafii, "after that 80 friends in Medina continued to sacrifice their property as waqf". (Sulaiman Rasyid, 2009). Waqf has an advantage over other charities, according to the words of Rasulullah SAW, it means:

From Abu Hurairah, "Indeed the Prophet, peace and blessings be upon him, said, When a person dies, his deeds are cut off (there is no increase in the goodness of his deeds), except for three things: (1) charity (waqf), (2) useful knowledge (either through teaching as well as by composing and so on), (3) a pious child who prays for his mother and father" (History of the Jama'ah of hadith experts, apart from Bukhari and Ibn Majah). (Sulaiman Rasyid, 2009). From the Hadith it is clear that giving waqf is not just like normal charity, but the rewards and benefits are greater for the person who makes the waqf himself, because the reward of the waqf continues to flow as long as the waqf items are still useful. Also for the community, it can be a path for the widest possible progress and can hinder the flow of damage. Islamic countries in the past, because of waqf, Muslims were able to progress, even until now, the results of their waqf are still permanent and beneficial for people.¹⁰

c. Pillars and Conditions of Waqf

1) Pillars of Waqf

- a) The scholars' views on the pillars of waqf are categorized into four important things, namely: Wakif (a person who endows his property)
- b) Mauquf Bih (endowed property)
- c) Mauquf 'alaih (people who receive waqf)
- d) Shigat (wakif statement as a will to endow his property)

⁹ Ibid

¹⁰ Sulaiman Rasyid (2009). *Fiqh Islam*, Cetakan ke-42, Sinar Baru Algensindo, Bandung.

2) Waqf conditions

- a) Conditions of Wakif Scholars agree that in order to meet wakif standards, they must meet several criteria in performing the act of worship, including: a) Independent, b) Sound minded, c) Adult and d) Not under supervision

- b) Mauquf bih conditions (waqf property)

- i. Scholars of the Hanafi School require the property to be waqf that:

Property must be valued according to syara' and is an immovable thing. Therefore, alcoholic beverages cannot be waqf, because alcoholic beverages and the like are not classified as property in the 7 views of syara'. In addition to that, haqq al-irtifaq (the right to benefit from other people's property) cannot be waqf, because such rights do not include property for them and movable property cannot be the object of waqf, because the object of waqf must be permanent.

Definitely and clearly.

Legally owned by the wakif, during the contract and not related to other people's rights to the property.

- ii. Scholars of the Maliki School require the endowed property: Own, not related to others; Certain and clear property; and Can be used

For this reason, property that is being used as debt security, and property that is being rented out cannot be waqf. However, the scholars of the Maliki sect allow the endowment of the benefits of animals for use and the endowment of food, money, and other immovable objects.

- iii. Scholars of the Syafi'i School and the Hanafi School require the endowed property:

- Something clear and certain
- Perfectly owned by wakif and not related to people another
- Can be used in accordance with local custom.
- The property can be used continuous without time limit.

When the use of the property is not permanent, such as food, the waqf is not valid.

In addition, according to them, both movable property, such as cars and livestock, and immovable property, such as houses and plants can be waqf.¹¹

3) Conditions of Mauquf 'Alaih (purpose of waqf)

Waqf should be used within appropriate limits and permitted according to Islamic Shari'a. Because basically waqf is a form of worship to get closer (taqarrub) to Allah SWT. The purpose of waqf (mauquf 'alaih) is the authority of the wakif, whether the property that is waqf is to help his own family as a family waqf (Wakaf Ahli), or for the poor and others, or for the public interest (*Wakaf Khairi*). The conditions and purpose of waqf is for good and to seek the pleasure of Allah SWT and to draw closer to him. (Ahmad Rofiq, 2004). Therefore, the purpose of waqf cannot be used for immoral purposes or to help support and/or for immoral purposes. However, there are differences between jurists regarding the type of worship here, whether worship according to the wakif's beliefs or both, namely according to the Islamic view and the wakif's beliefs.

¹¹ Putra, T. W., & Fildayanti, D. A. (2021). Revitalization of Waqf Management for Social Economic Development of East Luwu. *Al-Risalah: Jurnal Studi Agama dan Pemikiran Islam*, 12(2), 297-311.

- a) The Hanafi Madzhab requires that Mauquf 'alaih (who is given waqf) be intended for worship according to Islamic views and according to waqif beliefs. If one of them does not materialize then the waqf is invalid, therefore:
 - i. Islamic waqf is valid for all Islamic principles and benevolent parties, such as poor people, hospitals.
 - ii. shelters and schools. As for waqf other than Islamic syi'ar and parties whose legal benefits are not valid, such as gambling clubs.
 - iii. Non-Muslim waqf is valid for public goods such as places of worship in the Islamic view, such as building mosques, mosque costs, aid to Hajj pilgrims and so on. As for those other than public benefices and places of worship from a religious point of view, such as building a church, the costs of managing a church are legally invalid.
- b) The Maliki Madzhab requires Mauquf 'alaih (waqf allocation) for worship according to the waqif's view. Muslim waqf is valid for all Islamic traditions and general social bodies. and non-Muslim waqf to mosques and Islamic shari'ah are invalid.
- c) The Syafi'i and Hanbali schools require that Mauquf 'alaih is worship according to Islamic views only, regardless of the waqif's beliefs. Because of this, it is valid for Muslim and non-Muslim waqf to social bodies such as shelters, resting places, benevolent bodies in Islam such as mosques. And it is invalid for Muslim and non-Muslim waqf to social bodies that are not in line with Islam, such as churches. Specifically, fiqh experts from the Syafi'i Madzhab (Syafi'iyyah) divide the distribution of waqf into two parts: certain people (either one person or a certain congregation) and not certain.¹²

In Islamic Fiqh, several conditions for waqf are stated, namely :¹³

- a) Forever, meaning not limited by time
- b) Cash and no khiyar conditions, because waqf means transferring property at that time
- c) It should be clear to whom the waqf is being donated.

4) Shigat (Waqf Pledge)

There are differences of opinion between Madzhab Ulama in determining the terms of shigat (pledge). According to the Hanafi Madzhab and Hambali Madzhab scholars, the terms and conditions of the waqf agreement and pronouncement of the waqf are sufficient. However, according to the scholars of the Syafi'i Madzhab and Maliki Madzhab, in the waqf contract there must be consent and acceptance, if the waqf is addressed to a certain party/person.¹⁴

¹² Muhammad Al-Khathib, *al Iqna'* (Bairut : Darul Ma'rifah) dan Dr. Wahbah Zuhaili (2006). *Al-Fiqhu al-Islami wa 'Adillatuhu* (Damaskus : Dar al-Fikr al-Mu'ashir), dikutip oleh Direktorat Pemberdayaan Wakaf, *Fiqih Wakaf*, Departemen Agama RI, Jakarta.

¹³ Sulaiman Rasyid, 2009

¹⁴ Wahbah Zuhaili, *Al-Fiqh al-Islami wa Adillatu*, Juz VIII, Daar al-Fikr, Wahbah Zuhaili, *Al-Fiqh al-Islami wa Adillatu*, Juz VIII, Daar al-Fikr, Beirut.

2. Implementation of Waqf in Indonesia

a. Legal Basis Waqf in Indonesia

The implementation of waqf in Indonesia has been regulated in a number of laws and regulations, namely:

- 1) Law Number 5 of 1960 concerning Agrarian Principles
- 2) PP Number 28 of 1977 concerning Waqfation of Owned Land
- 3) Compilation of Islamic Law (KHI)
- 4) Law Number 41 of 2004 concerning Waqf
- 5) Government Regulation Number 42 of 2006 concerning Implementation of Law Number 41 of 2004 concerning Waqf
- 6) Government Regulation Number 28 of 2018 concerning
- 7) Amendments to the Implementation of Law Number 41 of 2004 concerning Waqf.
- 8) Waqf in Law Number 5 of 1960 concerning Agrarian Principles
- 9) Article 14 paragraph (1) letter b and Article 49 paragraph (3) of Law Number 5 of 1960 regulate that the Government, within the framework of Indonesian socialism, makes a general plan regarding the supply, allocation and use of earth, water and space as well as natural resources that contained therein for the purposes of worship and other sacred purposes, in accordance with the basis of Belief in the Almighty God. Article 49 paragraph (3) regulates that the waqf of owned land is protected and regulated by government regulations. The contents of Article 14 paragraph (1) letter b and Article 49 paragraph (3) indicate that the government recognizes the existence of waqf institutions.
- 10) Government Regulation Number 28 of 1977 concerning Waqfation of Owned Land.
- 11) In this Government Regulation, the definition of Waqf has been regulated, namely the legal action of a person or legal entity which separates part of its assets in the form of land and institutionalizes it forever for the purposes of worship or other public purposes in accordance with the teachings of the Islamic religion. From the definition of waqf in this Government Regulation, it is clearly illustrated that waqf in this case is the legal action of a person or legal entity that separates part of its assets in the form of land. In its development, the definition of waqf which only related to assets in the form of land was further developed to include other assets.

3. Waqf in the Compilation of Islamic Law

In the Compilation of Islamic Law, waqf is regulated in BOOK III, namely WAQF LAW. The formulation contained in Article 215 paragraph (1) of the Compilation of Islamic Law states that waqf is "the legal act of a person or group of people or legal entity which separates part of its property and institutionalizes it forever for other public purposes in accordance with Islamic teachings".¹⁵

¹⁵ Kompilasi Hukum Islam, Pasal 215 ayat 1

According to the Compilation of Islamic Law, waqf objects are all objects, whether movable or immovable, money, that have a durability that is not only used once and have a value according to Islamic teachings.

The party giving the endowment must pledge his will clearly and emphatically to the Nazhir in the presence of the Official Making the Waqf Deed who then sets it down in the form of a Waqf Pledge, witnessed by at least 2 (two) witnesses. Nazhir is a group of people or legal entities who are entrusted with the task of maintaining and managing waqf objects. Nazhir is obliged to manage and be responsible for the waqf assets and their results, and the implementation of the waqf in accordance with the objectives according to the provisions regulated by the Minister of Religion. Nazhir is required to make regular reports on all matters for which he is responsible to the Head of the local District Religious Affairs Office with a copy to the District Ulama Council and the local sub-district head.

After the Waqf Pledge Deed is implemented, the Head of the District Religious Affairs Office on behalf of the Nazhir concerned is required to submit an application to the District Head to register the waqf of the object in question in order to maintain its integrity and preservation. Dispute resolution as long as it concerns the issue of waqf objects and Nadzir is submitted to the local Religious Court in accordance with the provisions of applicable laws and regulations. Supervision of the implementation of Nadzir's duties and responsibilities is carried out jointly by the Head of the District Religious Affairs Office, the District Ulema Council and the religious court in his area.

4. Waqf according to Law Number 41 of 2004 concerning Waqf and Government Regulation Number 42 of 2006

Waqf institutions as religious institutions that have potential and economic benefits need to be managed effectively and efficiently for the purposes of worship and to advance general welfare. Waqf is a legal act that has been around for a long time and has been implemented in society, the regulation of which is incomplete and is still scattered in various laws and regulations. Based on these considerations, it is deemed necessary to establish a Law on Waqf. Furthermore, the Government issued Law Number 41 of 2004 concerning Waqf.

In Article 1 paragraph 1 General Provisions of Law Number 41 of 2004 regulates:

"Wakf is the legal act of a wakif to separate and/or hand over part 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 general welfare according to sharia."

From the contents of this provision, it is clear that the Government has emphasized that the implementation of waqf is in accordance with sharia. Waqf must be pledged, the Waqf Pledge is a verbal and/or written statement of the wakif's will to Nazhir to donate his property. Nazhir is the party who receives waqf assets from the Wakif to be managed and developed according to their intended use. This Law regulates the Indonesian Waqf Board, which is an independent institution to develop waqf in Indonesia.

In Government Regulation Number 42 of 2006 concerning the Implementation of Law Number 41 of 2004 concerning Waqf, it is regulated that waqf assets must be registered in the name of Nazhir for the benefit of the parties referred to in the waqf pledge deed according to its designation. The registration of waqf assets in Nazhir's name does not prove Nazhir's ownership of waqf assets. Nazir's replacement does not result in a transfer of the waqf assets in question. Nazir includes: a) individuals; b) organization; or c) legal entity.

5. Pillars and Terms of Waqf

a. Waqf Pillars

Waqf is declared valid if the terms and conditions have been fulfilled. There are four pillars of waqf, namely:

- 1) Wakif (person who has waqf)
- 2) Mauquf bih (waqf assets)
- 3) Mauquf 'alaih (purpose of waqf)
- 4) Shighat (statement or pledge of wakif as a will to donate part of his property).

However, Law Number 41 of 2004 in Article 6 adds the pillars of waqf, namely:

- a) Nadzir (waqf manager)
- b) Waqf period

The addition of the Nazhir element in the implementation of waqf is very important, considering that Nazhir is the waqf manager, and in PP Number 42 of 2006 concerning the Implementation of Law Number 41 of 2004 concerning Waqf, it is regulated that waqf assets must be registered in the name of Nazhir for the benefit of the parties referred to in the deed of pledge. waqf according to its intended purpose. b. Waqf Terms

For each of the pillars of waqf above, the following requirements must be met:

1. Requirements for Wakif (person who has waqf)

People who donate (wakif) are required to have legal skills or kamalul Ahliyah (legal competence) in spending their assets.

Action skills here include four criteria, that is : (Depag, 2005).

- a. Independent
- b. Be sensible
- c. Adult (baliqh)
- d. Not under pardon.

Wakif includes: a) individuals; b) organization; c) legal entity. In Article 8 of Law Number 41 of 2004, it is stated that individual wakifs can carry out waqf if they meet the requirements of being an adult, of sound mind, not prevented from carrying out legal actions, and are the legal owner of waqf property. Meanwhile, waqifs who come from organizations can carry out waqf if they fulfill the organization's provisions for donating waqf assets belonging to the organization in accordance with the articles of association of the organization concerned. Then, waqifs who come from legal entities can carry out waqf if they fulfill the legal entity's requirements for fulfilling the waqf assets belonging to the legal entity in accordance with the budget of the legal entity concerned.

In Article 217 paragraph (1) Compilation of Islamic Law Articles, it is explained that:

"Indonesian legal entities and persons or individuals who are adults and of sound mind and who are not prevented by law from carrying out legal acts, can of their own free will donate their property by taking into account the applicable laws and regulations."

2. Terms of Mauquf bih (waqf assets)

Waqf assets can only be donated if they are legally owned and controlled by the Wakif.

In Article 16 paragraph (1) of Law Number 41 of 2004, waqf assets consist of: a) immovable objects; and b) moving objects. Immovable objects include: a) land rights in accordance with the provisions of applicable laws and regulations, whether registered or not yet registered; b) buildings or parts of buildings standing on the land as stated in letter a); c) plants and other objects related to land; d) ownership rights to apartment units in accordance with the provisions of applicable laws and regulations; e) other immovable objects in accordance with sharia provisions and applicable laws and regulations.

Abdul Hamid determined the conditions that must be fulfilled by waqf assets, namely:

- a. Waqf items can be used for the long term, they are not used up once.
- b. Waqf objects can belong to groups or legal entities.
- c. Waqf objects are perfect property, free from all encumbrances, ties, confiscations and disputes. Waqf objects cannot be bought and sold, given away or used otherwise waqf. (Abdul Hakim, 2005).

At the beginning of waqf, it was prescribed, namely in the time of the Prophet, that the nature of waqf property was that it was long-lasting and useful, such as land and gardens.

But then the scholars argued that assets other than land and gardens could also be used as long as they were useful and long-lasting.

In KHI Article 217 paragraph (3) it is stated that waqf objects must be owned objects that are free from all encumbrances, ties, confiscations and disputes.

Waqf movable objects are assets that cannot be used up due to consumption, including: Money, Precious metal, Securities, Vehicle, Intellectual property rights, Rental rights, Other movable objects in accordance with sharia provisions and applicable laws and regulations, such as books and scriptures.

3. Waqf Pledge

The Waqf Pledge is a verbal and/or written statement of the wakif's will to Nazhir to donate his property. The waqf pledge was carried out by the Wakif to Nadzir in front of PPAIW witnessed by 2 (two) witnesses. The Waqf Pledge is expressed verbally and/or in writing and is stated in the waqf pledge deed by PPAIW.

Waqf Pledge Deed Making Official, hereinafter abbreviated as PPAIW, is an authorized official appointed by the Minister to make waqf pledge deeds. In the event that the Wakif cannot declare the waqf pledge verbally or is unable to attend the implementation of the waqf pledge for reasons justified by law, the Wakif can appoint his proxy with a power of attorney strengthened by 2 (two) witnesses. The waqf pledge is stated in the Waqf Pledge Deed. The Waqf Pledge Deed contains: a) the name and identity of the Wakif; b) Nazir's name and identity; c) data and information on waqf assets; d) allocation of waqf assets; e) waqf period.

4. Purpose and Function of Waqf

To achieve the goals and functions of waqf, assets can only be allocated for: a) Worship facilities and activities, b) Education and health facilities and activities, c) Assistance to the poor, abandoned children, orphans, scholarships, d) Advancement of general welfare others that do not conflict with sharia and statutory regulations.

The determination of the allocation of waqf assets is carried out by the Wakif during the implementation of the waqf pledge. If the Wakif does not determine the allocation of waqf assets, the Nazhir can determine the allocation of waqf assets which is carried out in accordance with the objectives and functions of the waqf.

In fact, waqf leads to very important goals, namely cadre formation, regeneration and development of human resources, because people pay waqf for the purpose of doing good, all of which is not outside the corridor of the intentions of Islamic law, including:

- a. Religious enthusiasm, namely doing charity for the safety of servants on the last day. So, the waqf becomes a cause of salvation, increase in reward, and forgiveness of sins.

- b. Social spirit, namely human awareness to participate in community activities. Thus, the waqf issued is proof of participation in community development.
- c. Family motivation, namely protecting and maintaining the welfare of the people in their lineage. A person donates his property to ensure the survival of his descendants, as a reserve when they need it.
- d. Conditional encouragement, which occurs if someone is abandoned by their family, so there is no one to support them, such as a migrant who leaves his family far away. With waqf, the waqif can channel his wealth to support the people. (Muhammad Abid Abdullah Al-Kabsi, 2004). In Article 216 of the Compilation of Islamic Law, it is stated that the function of waqf is to maintain the benefits of waqf objects in accordance with their objectives. Furthermore, in Article 5 of Law no. 41 of 2004 stipulates that waqf functions to realize the potential and economic benefits of waqf property for the purposes of worship and to realize general welfare. Thus, the function of waqf according to Article 216 of the Compilation of Islamic Law and Article 5 of Law no. 41 of 2004 means that with waqf the creation of facilities and infrastructure for the public interest so that shared prosperity can be realized both in terms of worship and in terms of mu'amalah. In this way, people whose lives are below the poverty line can have their welfare helped by the existence of waqf. Furthermore, other Muslims can use waqf objects as public facilities and can also take them benefit. (Depag, 1997).

The description of the Waqf Pledge in the Compilation of Islamic Law as regulated in Article 223 basically regulates the same things that have been regulated in Law no. 41 of 2004.

In the Compilation of Islamic Law, the content and form of the Waqf Pledge are determined by the Minister of Religion. In making the Pledge, the endowment party is required to submit to the Official the following documents:

- 1) Proof of ownership of property
- 2) If the object being donated is an immovable object, it must be accompanied by a certificate from the Village Head, confirmed by the local sub-district head, explaining the ownership of the immovable object in question.
- 3) Letters or written documents which constitute the completeness of the immovable object in question. Based on Minister of Religion Regulation Number 1 of 1979, the Head of the Religious Affairs Office (KUA) is appointed as the Official for Making the Waqf Pledge Deed (PPAIW).

Conditions for Nazhir (Party receiving waqf assets).

In Article 6 paragraph (1) in Law Number 41/2004, Nadzir is listed as one of the elements or pillars of waqf. Nadzir can be an individual, organization or legal entity. Meanwhile, the conditions that must be met for individual Nazirs are: Indonesian citizen, Muslim, Mature, Trustworthy

- 1) Physically and spiritually capable
- 2) Not prevented from carrying out legal actions

Even though there have been regulations regarding waqf since 1977 through Government Regulation Number 28 of 1977, there are still obstacles, namely the habit of people wanting to make land waqf verbally based on mutual trust in a particular person or institution, the habit of viewing waqf as a pious deed that has value, noble before God without going through administrative procedures, and waqf assets are considered to belong to Allah alone and no one will dare to disturb them without Allah's permission. The strength of the old Muslim paradigm regarding this understanding means that many figures or Muslims do not recommend that waqf be empowered so that it has a broader social function and is not limited to worship of *Mahdhah*.¹⁶ This kind of waqf practice raises issues regarding the legal validity of waqf assets which leads to disputes due to the absence of evidence that can show that the objects in question have been donated.

In the last centuries, the instinct of waqf studies has been towards waqfs that provide greater prosperity. This means that apart from the positive value of the form of the waqf object itself, other productivity is also required that can be felt and has a positive correlation with the mission of da'wah for the welfare of the people from an economic perspective. More concretely, waqf leads to money that has more real productivity, because it can be an effective investment instrument.¹⁷

Cash waqf is a waqf made by a person, group of people, and institution or legal entity in the form of cash. The law on cash waqf has become a concern of Islamic jurists (*fuqaha'*). Several sources say that cash waqf has been practiced by people who adhere to the Hanafi school of thought. There are differences of opinion regarding the law on cash waqf, Imam Al-Bukhari revealed that Iman Az-Zuhri is of the opinion that dinars and dirhams (both currencies applicable in the Middle East) can be donated. The way to do this is by using the dinars and dirhams as business (trading) capital, then channeling the profits as waqf.¹⁸

In PP Number 42 of 2006, Waqf money that can be donated is the rupiah currency. In the event that the money to be donated is still in foreign currency, it must be converted

¹⁶ Suhrawardi K. Lubis (2010). *Wakaf & Pemberdayaan Umat*, Sinar Grafika, Jakarta.

¹⁷ Muh. Fudhail Rahman, *Wakaf Dan Islam*, Fakultas Syariah dan Hukum Jakarta, Retrieved from <https://media.neliti.com/media/publications/194936-ID-wakaf-dalamislam.pdf> pada 7 Mei 20204.

¹⁸ Tasrir MA (2019). *Wakaf Tunai Dalam Perspektif Hukum Islam*, CY. Zigie Utama, Bengkulu.

first into rupiah. The Wakif who will donate his money is required to: a. present at the Sharia Financial Institution that Recipients of Cash Waqf (LKS-PWU) to express their wishes for cash waqf; b. explain the ownership and origin of the money to be donated; c. deposit a sum of money in cash to LKS-PWU; d. fill out the Wakif's statement of will form which functions as a waqf pledge deed.

In the event that the Wakif is unable to attend, the Wakif can appoint a representative or proxy. The Wakif can declare the waqf pledge for movable objects in the form of money to Nazhir in front of PPAIW, after which Nazhir hands over the waqf pledge deed to LKS. Wakifs can donate movable objects in the form of money through LKS appointed by the Minister as LKS Cash Waqf Recipients (LKS-PWU).

Overall, the birth of Law Number 41 of 2004 concerning Waqf provides a glimmer of hope for the dynamic development of waqf in Indonesia. Law Number 41 of 2004 mandates the government to provide guidance to waqf institutions in Indonesia so that they can play a role in improving the welfare of the general public. In Law Number 41 of 2004, this coaching function is not carried out alone by the government, but involves elements in society through the Indonesian Waqf Board (BWI).

5. Settlement of Waqf Property Disputes

Even though it has been regulated in such a way as to guarantee the rights of the parties and legal order, quite a few people still maintain the old way of implementing waqf. One of the cases that often occurs were initially donated for the common good but end up becoming the object of inheritance disputes later on. Various cases of waqf assets include:

- a. Waqf property disputes carried out by wakif heirs;
- b. Withdrawal of waqf assets;
- c. Dispute over changes in waqf designation;
- d. Disputes regarding legalization of waqf or private waqf status;
- e. Nazir is incompetent;
- f. Waqf land is controlled by a third party and several other cases related to waqf.

Waqf disputes require handling and law enforcement both through litigation and non-litigation in order to ensure legal certainty, justice and legal benefits. In Article 62 paragraph (1) of Law Number 41 of 2004, resolution of waqf disputes is carried out through deliberation to reach consensus. If resolving the dispute through deliberation is not successful, the dispute can be resolved through mediation, arbitration or court. Furthermore, in Law Number 7 of 1989 concerning Religious Courts it is regulated in Article 49 that the Religious Courts have the duty and authority to examine, decide and resolve cases at the first level between people who are Muslim in the field of waqf. Thus, waqf disputes must be submitted to the Religious Court.

Some of the cases that have been examined and decided by the Religious Court are:

1) Decision of the Banyumas Religious Court Number: 232/Pdt.G/2022/PA.Bms dated 23 June 2022 regarding the validity of waqf made orally in the presence of Nazhir. The verdict reads:

JUDGE

Exception

- Reject the Defendant's exception in its entirety;

In the Main Case;

- a) Grant the Plaintiff's lawsuit in part;
- b) Declaring the validity of Moh's waqf. Afandi which was carried out verbally in the presence of Nadzir Mr. Cholisun, BA with a land area of 825 M2 for the education of the residents of Nahdiyin Kedungrandu Patikraja forever;
- c) Declare that the Deed of Sale and Purchase Number: 91/PPAT/Ptj/6/1980 dated 8 November 1980 and Certificate of Ownership Number 42 in the name of Cholisun Bachelor of Art do not have binding legal force;
- d) Sentencing the Defendants after this decision has permanent legal force to vacate the objects of the case and hand them over to the Plaintiff for the delay in vacating and hand over to the Plaintiff the Defendants are sentenced to pay forced money (dwangsom) in the amount of RP. 1,000,000,- (one million rupiah) per day;
- e) Declare that the confiscation of collateral carried out by the Banyumas Religious Court is legal according to law;
- f) Reject anything other than that;
- g) Sentenced the Defendants to pay the case costs jointly and severally, which up to now has been calculated at IDR 4,890,000 (Four Million Eight Hundred Ninety Thousand Rupiah).

Based on the ruling in this case, the Banyumas Religious Court has granted the Plaintiff's lawsuit in part, declaring the waqf made verbally by the Wakif before Nadzir valid for 825 M2 of land for the education of the residents of Nahdiyin Kedungrandu Patikraja forever. This decision of the Banyumas Religious Court has been confirmed by the Semarang High Court in Decision Number: 284/Pdt.G/2022/PTA.Smg dated 31 August 2022 and Supreme Court Decision Number 284 K/Ag/2023 dated 5 April 2023.

2) Bima Religious Court Decision Number: 1342/Pdt.G/2020/PA.Bm March 31 2021 regarding dispute over control of waqf land by third parties.

The verdict reads:

JUDGE

IN COMPENSATION:

- a) Grant the Plaintiffs' lawsuit in part;
- b) Establish that H. Abdurrahman bin Hasan (waqif) died in 1996 in Samili, Woha District, Bima Regency;
- c) Determine the waqf carried out on December 16 1994 by the late H. Abdurrahman bin Hasan, in the form of Garden Land (now turned into rice fields) covering an area of 34

acres located in So Panta Intan, Samili Village, Wohu District, Bima Regency with the boundaries of limits as follows:

- North side: Rice fields belonging to Kasman H. Abdullah/ H. Haer Ismail/ Hj. Nurjannah;
- East side: Garden land belonging to Yusuf Ismail/ H. Hasan Sidik Abu Jena;
- South side: Village Road;
- West: Ibrahim Jafar's house;

It is legal and binding to be used for the benefit of the Al-Hidayah Mosque, Samili Village, District, Wohu, Bima Regency; as a result of this habit is land disputes that unish the Defendant and his co-Defendants to hand over the object to the Plaintiffs, voluntarily, safely and without conditions and if this cannot be done voluntarily and safely then force can be taken if necessary with the assistance of the State Police;

4. Declare the legal and valuable confiscation of collateral carried out by the bailiff of the Bima Religious Court, on February 8 2021. 5. Refuse to do anything else;

IN RECOGNITION:

- a) Rejecting the Counterclaim Plaintiff's Counterclaim;

IN COMPENSATIONS AND RECONPENSIES:

- b) Sentenced the Defendant/Plaintiff to pay the costs of this case in the amount of Rp. 7,042,000.00,- (seven million forty-two thousand rupiah).

From the verdict of this case, the Bima Religious Court has granted the Plaintiffs' lawsuit in part, determining the endowment carried out on December 16 1994 by the late H. Abdurrahman bin Hasan, in the form of Garden Land (which has been converted into rice fields) covering an area of 34 acres located in So Panta Intan, Samili Village, Wohu District, Bima Regency is legal and binding to be used for the benefit of the AlHidayah Mosque, Samili Village, Wohu District, Bima Regency and punishes the Defendant and the Co-Defendants to hand over the object to the Plaintiffs. The Bima Religious Court's decision has been confirmed by the Mataram High Court in Decision Number: 63/Pdt.G/2021/PTA.MTR.

3. Decision of the Tangerang Religious Court Number 1979/Pdt.G/ 2018/PA.Tng., dated 27 March 2019 AD regarding unlawful acts and the replacement of new Nazhir management of waqf objects in the form of land previously located in Bugel Village, Tangerang District, Regency Tangerang, West Java Province, now after the regional expansion occurred, is located on Jalan Galeong, RT. 002, RW. 007, Margasari Village, Karawaci District, Tangerang City, Banten Province. The verdict sounds:

JUDGE

n Exception:

- Rejecting the objection of the Defendant, Co-Defendant I and Co-Defendant II;

In the main case:

- a) Grant the Plaintiffs' lawsuit in part;
- b) Ordered Co-Defendant VI (Chairman of the Indonesian Waqf Representative Body for Tangerang City) to replace and form a new nazhir management for the waqf in this case;

- c) Reject the remaining claims of the Plaintiffs;
- d) Order the Co-Defendants to comply with the contents of this decision;
- e) Sentence the Plaintiffs to pay court costs which up to now amount to IDR 1,541,000.00 (one million five hundred and forty one thousand rupiah) jointly and severally;
- f) Burden on Co-Defendant I to pay court costs at the appeal level of Rp. 150,000.00 (one hundred and fifty thousand rupiah);

Based on the ruling in this case, the Tangerang Religious Court has granted the Plaintiffs' lawsuit in part, and ordered Co-Defendant VI (Chairman of the Indonesian Waqf Representative Body for Tangerang City) to replace and form a new nazhir management for the waqf in this case. This decision of the Tangerang Religious Court has been confirmed by the Banten High Court in Decision Number 0061/Pdt.G/2019/PTA.Btn.

D. Conclusion

1. Waqf in Islamic law, although not explained explicitly in the Qur'an, can be found implicitly in Surah Al-Baqarah verse 267, Surah Ali 'Imran verse 92, Surah Al-Hajj verse 77, Surah Al -Baqarah verse 261. Apart from that, regarding waqf, it can also be seen in the Hadith of Rasulullah SAW, and the words of Rasulullah SAW from Abu Hurairah, "Indeed the Prophet SAW has said, When a person dies, his deeds are cut off (the goodness of his deeds no longer increases), except for three things: (1) alms (waqaf), (2) useful knowledge (either by teaching or by composing and so on), (3) pious children who pray for their parents." (History of the Jama'ah of hadith experts, apart from Bukhari and Ibn Majah).
2. The implementation of waqf in Indonesia has been regulated in a number of laws and regulations, namely as follows:
 - a. Law Number 5 of 1960;
 - b. PP Number 28 of 1977;
 - c. Compilation of Islamic Law (KHI);
 - d. Law Number 41 of 2004 concerning Waqf;
 - e. Government Regulation Number 42 of 2006 concerning implementation of Law Number 41 of 2004 concerning Waqf;
 - f. Government Regulation Number 28 of 2018 concerning Amendments to the Implementation of Law Number 41 of 2004 concerning Waqf.
3. Settlement of waqf disputes must be sought through deliberation to reach consensus. If resolution through deliberation is not successful, the dispute can be resolved through mediation, arbitration, or the Religious Courts. Several cases regarding waqf have been examined and decided by the Religious Courts in Indonesia, including disputes regarding the validity of the verbal implementation of waqf, lawsuits against third parties who controqf land, and regarding the replacement of Nazhir management.

E. Suggestions

1. There needs to be socialization about Waqf so that Indonesian Muslims increase awareness of implementing waqf according to existing regulations.
2. It is necessary to optimize the waqf supervisory institution whose job is to supervise and record the implementation of waqf in Indonesia so that waqf statements are not only verbal

but there must be written evidence so that there are no disputes, and no waqf objects are lost (misappropriated) or deliberately taken by a third party.

3. There is a need to socialize the resolution of waqf disputes through deliberation or mediation.

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2. Decision of the Bima Religious Court Number: 1342/Pdt.G/2020/PA. Bm Jo. Decision Number 63/Pdt.G/2021/PTA. MTR;
3. Decision of the Tangerang Religious Court Number: 1979/Pdt.G/2018/PA.Tng. Jo. Decision Number: 0061/Pdt.G/2019/PTA.Btn.