

Regulation Of Waqf Land Managed By Institution In Indonesia : A Comparative Study

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ABSTRACT

The wakaf, a charity for the good of the fellow follower of islam are regulated by Law No. 41 of 2004 of Wakaf in Indonesia. in practical the wakaf which is usually managed by Nazhir, people who are given the trust to manage the wakaf by wakif, the one who gave the wakaf are contradicting with the Law No. 28 of 2004 of Institution regulation as seen in the land management for example. wakif are usually individual person therefore based on the Indonesian law can not participate in a complex bussiness as employing people, collect and managing money, not to mention the huge sum of asset needed to manage the land. seeing these lack still makes many wakif not hesitant to donate their land to nazhir, making their land "dead" as its use is limited. based on that, it should be analysed further by making comparisons with other countries in managing wakaf land thru analyzed data from field data and several regulations supported with relevant journals processed using data triangulation so that the results are relevant.

The result based on the Indonesian regulation and comparison with several countries shows that the disharmony shows in how Nazhir could only have limited right on managing the wakaf land therefore the law number 16 of 2001 on wakaf regulation should be recalculated as Law No. 41 of 2004 on Institution regulation prove to be the best waqf land management system that can be applied in Indonesia , Therefore the advice that can be given is the need for effective management of Nazhir Institution which aims to ensure the objectives of waqf can be achieved, dissemination to the public regarding the use of donated land that is still consumptive and traditional and having the wakaf repossession system concept in order to minimize the wakaf land deserted and pushed Nazhir Institution for not shirking his duties.

Keywords: Wakaf, Land, Nazhir, Institution, Comparison

1. Introduction

Wakaf (Waqf, derived from Arabian etimologies) are islamic charity or Endowments, specifically regulated in Law No. 41 of 2004 concerning wakaf where the meaning of the wakaf itself, as stated in Article 1 (1) of Law No. 41 of 2004 on Wakaf is a legal act that wakif, those who commit wakaf to separate and or give up some of their wealth either permanently or for a specified period in accordance with their purposes for worship and or general well-being of fellow ummat according to sharia law.

As mandated by Article 1 points (4) of Law No. 41 of 2004 on wakaf, then an institution or person in charge on receiving wakaf from wakif tasked to manage the land which is generally called as Nazhir. Nazhir role is appointed by the wakif so powerful in its duties and functions for the management of waqf land that is maintaining and managing the wakaf land in accordance with the purpose of wakaf mandated by the wakif. However, as there are also some Nazhir negligent in their duties, resulting in the donated land is unproductive coupled with Nazhir status of legal standing as a mere individual that makes it difficult to carry out the mandate that Wakif gave especially for commercial purposes.

in order to solve the above problems then the use of Institution as manager of Wakaf became apparent because of its status as a legal entity under Law No. 16 of 2001 as amended by Law No. 28 of 2004 on the Institution, makes it suitable to fulfill the mandates given by the wakif.

problem rose when the law clashed with Law No. 41 of 2004 about wakaf as the existence of individual wakif is still recognized but because of the limitation makes managing the land in bussiness term impossible. From here the question arises, when wakif bequeathed individual Nazhir a wakaf land but he does not have the capability to perform legal acts and ask the assistance of the Institution, then how does the Nazhir status? it departs from the fact that Article 11 of Law No. 41 of 2004 on Wakaf does not include the authority of Nazhir in terms of pointing, giving orders or delegate management tasks of wakaf property to another party on behalf Nazhir. without legal standing, makes the individual nadzhir in delegating the management tasks of wakaf land to another party, in this case a Institution would overshadow the individual nazhir itself and with the Institution managing the land itself would violates the mandates given as the law No.41 of 2004 gives the individual nazhir strong position in managing the wakaf property.

the Institution Nazhir role in the management of wakaf land hampered by the rules of the Law No. 41 Year 2004 about wakaf that still recognized individual nazhir is an object of interest to study. and to further sharpen the analyse, a comparison is made with the donated land management system in other countries as a matter to further enhance the study.

2. Methode Of Research

The the approach method on this research is the method of juridical sociological or socio-legal research. According to Mardzuki, a socio-legal research simply put the law as a social phenomenon. Therefore, in this study, the problem of Law are placed or associated in to social problems. According to sociological juridical approach, the source of the data in this study is only a secondary data, which form the primary legal materials, secondary and tertiary. To obtain the materials necessary legal, done by searching, collecting and studying the materials of literature, legislation, research, scientific works and written documents other than legal materials that have been collected in accordance with problems studied and analyzed in qualitative, which can lead to a conclusion that is used to address the problems discussed.

3. Discussion

3.1. The Current Regulation Of Land Wakaf Management In Indonesia

Generally, wakaf in Indonesia is the same with all other islamic countries as it is based on Q.S. al-Baqarah (2): 267 verse as seen below :

يَا أَيُّهَا الَّذِينَ آمَنُوا أَنْفِقُوا مِنْ ثَمَرِ مَا كَسَبْتُمْ وَمِمَّا
أَخْرَجْنَا لَكُمْ مِنَ الْأَرْضِ وَلَا تَتَّبِعُوا التَّبِعَاتِ مِنْهُ تُفْسِدُونَ وَلَسْتُمْ
بِقَائِدِهِ إِلَّا أَنْ تُحْجِطُوا فِيهِ وَأَعْلَمُوا أَنَّ اللَّهَ عَزِيزٌ حَكِيمٌ ﴿٢٦٧﴾

“O ye who believe! Spend (in Allah) part of the business you are doing well, and most of what we remove from the earth for you.”

This verse has become the Institution of islam believer to do wakaf, including land wakaf which is different than ordinary wakaf like fund wakaf which dont have any certificate (Nasution,2001), donating Land as a wakaf would result a certificate. In Indonesia where the government acknowledged the wakaf. they regulate it to Law No. 41 of 2004 about wakaf and regulated further with government act no. 42 of 2006 where the requirement for the land to be able to be donated is:

- Hak milik atas tanah (land property rights) whether it's have or still in process of registration;
- Hak guna bangunan, (building use rights) that is government land's use rights;
- Hak Guna Usaha, (Building rights or rights of use over management rights or property rights). holders must obtain written permission management rights or property to use it as a wakaf.;
- hak milik atas satuan rumah susun (flats or apartment use rights).

the Implementation of wakif endowment is to give substance to the declared Nazhir by making a pledge wakaf deed-made and confirmed by official deed-affirmation wakaf (Articles 28-33 Regulation No. 42 of 2006), this wakaf deed of pledge which serves as a proof of the land ownership is as strong as the land certificate of land property rights (the highest tier of land ownership in Indonesia) as evidence of rights on land where the land has been bestowed with the status of irrevocable except in the public interest because of the provisions of waqf land remains subject to the Constitution.

The problem then is to be discussed is the disharmony, namely the inconsistency between two different regulations, which in this case endowments and Institutions, it is necessary to know in advance about how the rule of law in Indonesia. Law Number 12 Year 2011 on the Establishment of Regulations sets out on the order of the hierarchy of law in Indonesia. Under the terms of this Act, the type and the hierarchy of legislation of the Republic of Indonesia is as follows:

- 1) the Constitution of the Republic of Indonesia Year 1945;
- 2) MPR;
- 3) Law / regulation has;
- 4) Government Regulation
- 5) Regulation of the President;
- 6) Provincial Regulation;
- 7) the Regency / City law.

As can be seen, the hierarchy of laws and legislative in Indonesia stipulates that the supreme law is the Constitution of the Republic of Indonesia Year 1945 so that when there is a conflict between, say 33 paragraph (3) of the Constitution NRI 1945, which stated that the Earth and the water and the natural riches contained therein shall be controlled by the state and used for the greatest prosperity of the people

by law or regulation has the strata beneath the disharmony has occurred vertically, ie between existing rules and rule on it. The hierarchy are important as it is one of the factor that form good governance (Kaihatu,2006).

For setting the endowment by the Institution, it should be seen that both are in the same strata (Law No. 41 of 2004 on Wakaf By Law No. 28 of 2004 concerning Institutions) so that when there are rules that are contradictory to say the disharmony that is horizontal, or are in the same strata. But why the two settings is said to occur disharmony?

This disharmony occurs from the fact that it was found in a field that is often ranked Nazhir singles under Institution for Nazhir individual can not perform legal acts. This can be seen from the results of interviews with Abdullah H. Nazhir as individuals who were given the will to set up orphanages by wakif. Because of its status so that individuals are not financially strong enough, then he give the land to Orphan Institution "Al-Amin" which is by Abdullah, give trust to manage and administer the host and / or caring for children orphaned in accordance with the purposes and provisions of the endowment. Nazhir in this is outside the structure of the Institution.

Institution board then move to organize and set up a charity collection activities are assisted by Nazhir and society. The results are collected to build buildings and procurement of facilities and other infrastructure to support the activities of the orphans. Shortly thereafter in 2003 stood at around buildings complete with facilities and infrastructure necessary for activities in accordance with the provisions of the endowment. Since it is also normal activities as expected to accommodate nearly 100 orphans from the neighboring areas where the Institution is located.

The use of donated land for the benefit of social and religious administered by the Institution, such as the example above can reasonably be accepted by society and not much question that arises then. But that problem will arise when the donated land is used for commercial purposes although in accordance with the provisions of wakaf land itself. as examples of donated land for the purpose of hospitals, educational institutions or other financial business requirements. according to the observations of the author, it also can not be separated from the role of managing the Institution as a legal entity. Nazhir individuals have no role so far although it has legal protection under Law No. 41 of 2004.

The data obtained from the interviews were also reinforced by data from the Ministry of Religious Endowments Directorate of the Republic of Indonesia in March 2016 in the quotation of the Badan Wakaf Indonesia (Indonesia wakaf bodies), the data on wakaf land across Indonesia are summed to be total of 4,359,443,170 square meters in the 33 province. The total area of wakaf land consists of 435,768 parcels of land. Plot of land donated 287,160 already certified while the remaining 148,447 have not been certified.

Wakaf land that has not been certified due to the donated land entrusted to Individual Nazhir even though considering the status of the individual Nazhir that certainly not as strong as the Institution would have posed its own difficulties in managing the wakaf land. The existence of this conflict of interest where Institution Nazhir based on Law No. 28 of 2004 on the Institution with the interests and position of the Individual Nazhir based on Law No. 41 of 2004 on the Wakaf, as can be seen in the results of the above interviewis a manifestation of disharmony in question and should be reexamined its effectiveness

3.2. Finding The Ideal Form Of Practice For The Wakaf Land Management By Institution Using Comparison Law From Various Countries.

In order to determine the ideal land management practices of wakaf it needs to be Compared with the system management of wakaf in other countries.

Firstly in Malaysia, the Applicable law of Wakaf in Malaysia includes the law on property which is quite comprehensive and clear, one of the substantive content of the law on wakaf, is Wakaf Supervision Regulations 1959 of Negeri Perak (Peraturan Kawalan Wakaf 1959 Negeri Perak). It is the regulation that regulates about donated property which should not be more than one-third of the inheritance property. However some region like Kelantan and Trengganu may donated more than one third property only if the legitimate heir agreed to it(Al-mabsud,2011). After the Enactmen of the country being valid, the document recording the original wakaf had originally been deemed strong enough and valid even though it only witnessed by two witnesses, it should get an endorsement from the King or the Council of State.

Wakaf in Malaysia itself are divided into the wakaf ' am, wakaf khas, nadzar 'am and amanah (Hoker,1991) which is set by the Council of religion, and immediately indicated as a single mandate holders of all the property of the Wakaf. In practice the Council is obliged to follow all the terms syara" (Requirements). The second section state the existence of accountability of wakaf property to the

Majlis. For wakaf property, nazar 'am or amanah that all this time still being regulated by the private sector should be left to the Council.

In Malaysia, in order to develop property of wakaf it is then carried out through the investments made through sukuk instruments and capital market which is published by Suruhanjaya Malaysia Securities in February 2001. The published of shares of the Wakaf perpetrated by some country like Johor, Melaka, and Selangor. This is done in accordance with the decision of the Majma ' Fiqh Islami on November 24, 2005.

To ensure the management of Wakaf money in countries such as Malaysia, Takaful Wakaf Slowly formed by Syarikat Takaful Malaysia Berhad which stood since 1997. Syarikat Takaful operated based on mudharabah principles. Profit from investments in financial portfolio of Shariah is the sum of the four portfolios i.e. deposits of Islamic bonds, Islamic banking and Islamic capital market. The advantage will be merged with other portfolio profits that are then distributed to the poor.

Procedures and measures to donated property all this time are as long as it goes through the following stages: (i) Niyat Peristirahatan i.e. wakif party of written notice to the Council. it should be written with a clear goal and purpose wakaf; and also the attachment of the form (a kind of certificate of land) which is justify that land or property in question belongs to wakif; (ii) examination of the Property i.e. the examination of property referred to by wakif as a Waqf made by the Council with the intention to meke he/she is certain of its existence, so an endorsement made certain circumstances; (iii) the Council of the assignment property i.e. an endorsement done by wakif in front of the Council with two witnesses testified on paper, Borang Lafadz Wakaf in detail it's exposure the kind of treasure, its purpose, and the place of signatures for the endorsement of the involved parties; (iv) the process exchange of property Property i.e. rewriting and completes administrative paperwork done by the Baitulmal after the Council handed to him. Baitulmal propose formally to officials of the land (a kind of Agrarian Agency) to take care of the land property rights certificate; (v) the development process of the Wakaf Property, i.e. the implementation of the construction of the Wakaf property in accordance with the plan of Baitulmal by following the objectives that have been set.

The role of the Council of State in Malaysia is more or less the same as the legal Body Nazhir or institution in Indonesia so it can be said that Malaysia does not recognize the existence of individual Nazhir.

The same thing can also be seen on the system management of wakaf in India with the Wakaf Act 1954, which is the main Legislation is set for the entire field of Wakaf Administration across India. Waqf Act 1954, it intended to provide a better administration and supervision of wakaf. However, it does not produce the desired results and the condition of the Waaf in the rest of India. This attracted the attention of the Central Government and the paramilitaries. then a Committee referred as the wakaf Inquiry Committee appointed. He made a number of recommendations that include a restructuring of the Waqf administration designed to improve the financial position of the Wakaf for closing weaknesses of Wakaf law. (Salman,2014)

what Waqf Inquiry Committee meant is basically has the same functionality as majlis Religion in Malaysia although basically waqf system in India is more complex because it emphasizes the utilization of waqf property in broadly separated three sections, namely;

- (A) Waqf Fixed Account, keep your account endowment goal is to ensure that the endowment fund can be sustained continuously.
- (B) Risk Waqf Fund Account, Interest from endowments risk fund account is to give the claims.
- (C) Wakalah Fee, for takaful operators.

After seeing the comparison with the State of Malaysia and India, a few things can be noted about how to built the ideal system of management of wakaf land in Indonesia.

First, data from the Ministry of Religious Endowments Directorate of the Republic of Indonesia in March 2016 quoted from page Indonesian Wakaf Board, a data of wakaf land throughout Indonesia summed total 4,359,443,170 Square Metres spread in 33 provinces. The total area of wakaf land consists of 435 768 Sector of land. empty Plot of 287 160 sector have been certified as wakaf land while the remaining 148 447 has not been certified yet. This suggests that the land entrusted to individual nazhir can not be maximized because individual Nazhir can not take legal action, as the Institution can do.

Second, related to the management of the donated land, as mentioned previously that the individual Nazhir prove to be difficult to take legal actions for the sake of management of land, as an example of a mosque built on waqf land in the middle of the business center and offices. The mosque is built on the initiative of a traditional endowment with maintenance cost obtained from the contributions of the various parties, both from businesses, government institutions as well as the charity box placed

and circulated around the construction of the mosque. Because the land only built mosque, which takes no account to the strategic local, hence resulting in Nazhir endowments, among others: the financing requirements of the mosque such as: electricity, running water, telephone, payroll management, maintenance tools and building mosques, improved infrastructure mosque could not be met, because cash funds obtained from mosque charity boxes every Friday prayer does not meet the needs of every month.

If the average income of the charity box which was circulated only collected about 30-40 per cent of the requirement entirely. Consequently nazhir endowments or mosque officials seek additional financing to meet the operational ends for the mosque. To meet the operational needs of the mosque every month is not sufficient, then the mosque only serves as a mosque for worship and religious activities. Finally, this mosque only serves as a load for the caretaker and can not contribute much more to the interests of Muslims, such as: compensation to orphans who can not afford, scholarships, provision of Islamic education, and so on.

This condition is quite alarming given that based the Central Statistics Agency (BPS) data, in 2009 the number of poor people in Indonesia as much as 14.15% or approximately 32.53 million people. among these, the majority are Muslims.

as 87% of the total poor population of Indonesia is Muslim. it means that about 28.3 million poor people are Muslims. Based on these data, it can be concluded that wakaf has not been able to effectively participate in the socio-economic empowerment of the muslim people in the sector of Indonesia.

what stated above is more or less the result of mismanaged wakaf lands because of the limited things the Individual Nazhir can do. Therefore, to enhance the benefits of donated land. some sectors needs to change.

First, is the elimination of the role of individuals Nazhir as based on data obtained individual Nazhir is not effective enough in managing wakaf land and consequently there should be an increase of Nazhir Institutions and Wakaf Agency Indonesia as an authorized institution must manage the Nazhir Institutions well. For those reasons, there are some issues that need to be assessed. The first settlement of disharmony between the settings of Institution Nazhir, as specified in Article 3 paragraph (1) law number 16 of 2001 on Institutions. it give way to the Institution in carrying out its objectives can conduct business activities to support the achievement of its goals and objectives by establishing a legal entity and / or participate in a body business.

It will then be a contradiction if the Institution were believed to be Nazhir then violating Article 11 point b of Law No. 41 of 2004 on wakaf which only Nazhir task of managing and developing the wakaf property in accordance with the objectives, functions, and purposes. This means if Wakif do not want to, the Nazhir unable to capitalize further the Wakaf land.

Second, Nazhir as a Institution also did not go unnoticed. In order for the implementation of the management of waqf land could run well. should pay attention to Destinations financial statement audit performed by an independent auditor to certify the fairness of the assessment concerning; financial position, results of operations and cash flows in accordance with accounting principles. Auditing is an important management process, and will have implications for the increased confidence (trust) communities. Thus, the management of productive endowments require professional management involving management system. The use of management aims to ensure the objectives can be achieved endowments. According to Richard L. Daft (Daft, 2011) one of the stages of management is the supervision or control (controlling) the function oversees activity, determine whether your organization can meet its target, and make corrections if necessary. Application of the principle of supervision (controlling) will make the management of waqf run effectively and efficiently. In the institutional aspect, supervision (controlling) will affect the realization of an accountable institution.

The third one, is no less important than the other is socialization. it is important because in general, people do not understand the law or the effective use of wakaf properly, in terms of both the pillars and terms of wakaf, as well as the intent what the wakaf land mandated (Muntaqo, 2015). Understanding the pillars of wakaf for the community is very important, because understanding the pillars of the community wakaf could find out who may do wakaf, what can be wakafed, for what and to whom the wakaf designated to, how to wakaf, and who can be a Nazhir.

the Understanding of society which is still based on consumptive waqf resulted in Nazhir selected by wakif are those who usually have time to keep and maintain the mosque. In this case wakif less considering the Nazhir ability to develop a mosque so that the mosque became the center of people. Thus the wakaf that are limited to only to meet the needs of worship, and very few wakaf oriented to improve people social-economy. In fact, if seen from the history of wakaf in the past, both the Prophet Muhammad and his companions, in addition to a mosque and a place to learn, tewakaf land could also act as a garden where many fruits and vegetables grows to fulfill the people's need.

Lastly, in relation to the status of donated land, it should be considered more of a concept of repossession of wakaf (Awqaf). This is a concept that needs to be considered in view of the number of waqf land in Indonesia displaced so that with the return of the concept of waqf land that proved not neglected to previous owners or heirs will encourage Nazhir Institution for not shirking his duties. As seen in the opinion of Mohd Affandi (Affandi, 2015):

“The law on repossession of waqf lands by force is not explicitly stated in the Quran or in the hadith by the Prophet. This practise also did not occur at the time of the Prophet and his companions. Thus, the implementation of repossession of waqf lands by the authority is included in the discussions on fiqh, as the question on ijthadiyyah arises and reference must be made based on the rules of Fiqh (Qawa'id al-Fiqhiyyah), in order to solve current matters. The law on repossession of waqf lands that has been adapted from the original law exemption requires detailed and concrete procedure so that its implementation does not result in injustice and cruelty, especially towards the land owner whom has been deprived of the rights on the property. Land repossessions by the government are subject to more stringent conditions, as opposed to land repossession by individuals. This is due to the Islamic concept of 'waqf ibadah' and land repossession by the government must meet the goals and interests of the public”.

4. Conclusion

the Discussion of wakaf isn't exactly a new thing. in the span of 2011-2015, there have been 34 national and international journals that discuss management problems of wakaf, followed by 26 journals that discuss the issue of institution of wakaf, 22 journals that discuss the collection of wakaf and 18 journals that discuss the distribution of wakaf. But the problem discussed in these journal is still relatively scarce because of its Complexity in the main problem discussed which resulted in the conclusions that :

1. There is a form of disharmony seen in Article 3 paragraph (1) law number 28 of 2004 on the Institution regulation and Article 11 point b of Law No. 41 of 2004 on wakaf which clashed the Nazhir Institution's and Individual Nazhir task of managing and developing the waqf property in accordance with the objectives, functions, and purposes. the problem is, the Individual Nazhir has limited capability in managing the land which means the land cannot be used further as the wakif mandated.
2. By Looking at the comparison of wakaf management in Malaysia and India. it can be seen that they do not acknowledge the existence of Individual Nazhir. from this, it can be concluded that the best wakaf land management system is only through Nazhir Institution. Thus the necessary effective management in Nazhir Institution, which aims to ensure the objectives of wakaf can be achieved, a dissemination to the public in relation to the use of wakaf land that only consumptive and still traditional is necessary, and one thing to consider that is the concept of repossession of wakaf land or Awqaf in order to minimize the waqf land abandoned and encourage Nazhir Institution for not shirking his duties should be considered.

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