THE DEVELOPMENT OF WAQF MANAGEMENT THROUGH WAQF ACT IN INDONESIA
(Note on Republic of Indonesia Act Number 41 of 2004 on Waqf)

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Abstract: The Development of Waqf Management Through Waqf Act in Indonesia (Note on Republic of Indonesia Act Number 41 of 2004 on Waqf). Waqf is an Islamic endowment of property to be held in trust and used for a charitable or religious purpose. The development of waqf law in Indonesia, as one of religious institutions, is the realization of Muslim community needs to fulfill their religious life. The object of waqf that formerly was focused on immovable objects, with the presence of the Act has been broader to movable property, especially money waqf. This paper describes the urgency of civilization and the dynamics of waqf both from the side of law and its management in the context of people prosperity. By using library research that use qualitative data, this paper found the existence of waqf, normatively lies not only in the individual obligations, but also in social meaning in the context of collective obligations involving mawqūf bih (the property), wāqif (the person creating a waqf), nazir (the supervisor/manager of waqf), mawqūf 'alayh (waqf users), and the government through legislation. Basically, the Republic of Indonesia Act Number 41 of 2004 regarding Waqf is based on the philosophical, socio-historical, and juridical foundation.

Keywords: waqf; wâqif; nazir; legislation.

Abstrak: Pengembangan Manajemen Wakaf melalui Undang-Undang Wakaf di Indonesia (Telaah terhadap Undang-Undang RI Nomor 41 Tahun 2004 tentang Wakaf). Wakaf adalah sumbangan kekayaan dalam Islam yang pelaksanaannya diyakini berdasarkan keimanan dan digunakan untuk tujuan amal berbasis keagamaan. Pengembangan hukum wakaf di Indonesia, sebagai salah satu prana keagamaan, merupakan realisasi kebutuhan masyarakat muslim untuk memenuhi kebutuhan kehidupan keberagamaan mereka. Objek wakaf yang sebelumnya terfokus pada benda-benda tak bergerak, dengan keberadaan undang-undang, telah meluas dan kini juga mencakup harta tak bergerak, terutama uang wakaf. Tulisan ini menggambarkan urgensi pembudayaan dan dinamika wakaf baik dari sisi hukum dan manajemennya dalam konteks perwujudan kesejahteraan masyarakat. Dengan menggunakan penelitian pustaka, yang menggunakan data kualitatif, tulisan ini menemukan bahwa wakaf, secara normatif, tidak hanya terletak pada kewajiban individu, tetapi juga dalam arti sosial dalam konteks kewajiban kolektif yang melibatkan mawqūf bih (hak milik yang diwakafkan), wāqif (orang yang mengeluarkan wakaf), nazir (supervisor/manager wakaf), mawqūf ‘alayh (pengguna wakaf), dan pemerintah melalui undang-undang. Pada dasarnya, UU RI Nomor 41 tahun 2004 tentang Wakaf didasarkan pada landasan filosofis, sosio-historis, dan yuridis.

Kata kunci: waqf; wâqif; nazir; legislasi.

Introduction

The development of waqf (endowments) in Indonesia, as one of religious institutions, is the realization of Muslim community needs to fulfill their religious life. The Islamic Law (Sharia), as implied in the Quran and the Sunnah, urged the Muslim community to separate and set aside, or give away some of their belonging for the
common interest. However, the Quran does not contain specific references on waqf. Its legal parameters were further developed by jurists (fuqahā') throughout history.

The basic idea lies in the belief that performing kindness is part of duty and form of devotion to God. The Muslim community develops the pillars and terms of waqf implementation. In this sense, its implementation is linked and bound by norms about what should and should not be done in waqf implementation. This waqf regulation is an inseparable part of Islamic Law (Sharia). It is closely linked to other areas of law and society, such as inheritance, will, grant, and marriage. Those areas are usually incorporated into the Civil Law.

Generally, there are two basic forms of waqf. Those are family waqf (wāqif ahli/dhurri) and common waqf (wāqif khayrī). In the family waqf, profit that gained from waqf property is intended for the family wāqif benefit, as long as the waqf denoted theirs exist. The common waqf (wāqif khayrī) forms eternal allocations on waqf purposes. Although waqf beneficiaries may come from family members, the philanthropic ethos of waqf institution leads to a larger portion of waqf for general welfare. In today’s welfare-state context, waqf has great potential to support state’s expenditures on public services.

Most people donate waqf in form of land. This is related to the waqf conditions that it has to be secure and permanent as a shape of jāriyah charity (the never stop flowing virtue). Some movable property can also be used as waqf property. Waqf supervisor/manager (nazir) is required to perform their duties and functions in accordance with the prevailing provisions, as well as general provisions regarding attitudes and actions that have been established by Islamic teachings.

Basically, the implementation of waqf is almost the same throughout the Islamic world. However, there is diversity in theory, practice, and legal approach from one school of thought (mazhab) to another. State intervention in waqf law formulation has resulted to the diversity of waqf implementation among Islamic countries. Therefore, the research results of waqf in the

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1 The utilization of waqf properties is various in the world. Generally, it is categorized into five categories, which are: foods, housing, health, education, and religious purposes. Further read: “Deden Effendi, Penegakan Hukum Wakaf di Indonesia”, Ph.D. Dissertation of UI (Universitas Indonesia Negri) Sunan Gunung Djati, Bandung, 2011, pp. 4-6.

2 One of the most referred histories of waqf is “Musadad, Yazid Ibn Zuraij, and Ibn ‘Awn relayed from Nâfi’ and Ibn ‘Umar, he said: ‘Umar (may Allah be pleased with him [ABPWH]) endowed the land, so it was not for sale, grant, and inherited. The property was donated to the poor, families, slaves, guest of Allah, and traveller; and for the property managers, they are allowed to consume the harvest from the land but in sufficient manner” Abû Bakr Ahmad Ibn al-Husayn Ibn ‘Ali al-Balhaq. (1352 H). al-Sunan al-Kubrâ. 1, VI, Al-Hamid: Mathba’ahDâ’irah al-Ma’ârif al-Uthmaniyya. p. 163.

3 Due to the volunteer nature of waqf, it always separated from grant/donation (sha’dāqah) and zakāt. Jaih Mubarok limits waqf based on: (1) legal acts, (2) waqf object; and (3) duration of property ownership. Even if waqf is related to zakāt and sha’dāqah, there are some dimension of waqf that can be utilized as perimeters. Jaih Mubarok, Wakaf Produktif, Bandung, Simbiosa Rekatama Media, 2008.


Muslim world show historical distortions.

This is due to several events that occurred during the nineteenth century.\textsuperscript{9} Colonialization and nationalization have led to the weakening of this institution. Even the vast majority of people barely have basic knowledge of \textit{waqf}. In many cases, colonial powers want a status quo on \textit{waqf}\textsuperscript{10}. It was intended that the colonial policy can provide guarantee for social stability and legitimacy. At the same time, a large amount of unrecorded \textit{waqf} property could be easily overrun by colonial rulers\textsuperscript{11}.

After the colonial period, most Muslim countries tend to nationalize \textit{waqf}s\textsuperscript{12} property\textsuperscript{13}, even abolishing them. Most Muslim countries, either directly or indirectly, administer \textit{waqf} under special directorate or ministry, thus tend to end non-governmental \textit{waqf} identity. The state’s attempts to control \textit{waqf} as one of means to extend power have always existed in Islamic history. At the same time, the efforts to make \textit{waqf} as autonomous institutions are always challenged.

The lasting nature of the property in \textit{waqf} \textit{ahlî} \textit{dhurrî} has meaning and related to the transition from one generation to the next generation. A number of benefits increase to the point where the benefits of \textit{waqf} are no longer significant to fulfill individual necessities. In this sense, the suggested argument is that sustainability is not always an absolute requirement in \textit{waqf} implementation\textsuperscript{14}.

\textsuperscript{9} After the revolution in 1952 and the adoption of socialist system, the social and financial capitals were taken over by the ruling regime. On that time, the \textit{waqf} institutions faded. The government abolished \textit{waqf} \textit{ahlî}, and at the same time controlled \textit{waqf} \textit{kharî}. Afterward, \textit{waqf} culture in Egypt people gradually vanished, and the number of new \textit{waqf} was not significant. Muhammad Amin Tawfiq, “The \textit{Awqâf} in Modern Egypt”, The Islamic Quarterly, vol. XLII, No. 4, 1998, pp. 257-265.


\textsuperscript{11} Siti Alawiah and Ismail, Yusof “Strategic planning and accountability of \textit{waqf} management in Malaysia” 4\textsuperscript{th} International conference on Inclusive Islamic Financial Sector Development, 17th-18th Nov. 2015, International Islamic University Islamabad, (Unpublished).


\textsuperscript{15} Mehmet Babaca, “Economics of Philanthropic Institutions, Regulation, and Governance in Turkey”, \textit{Journal of Economic and Social Research}, Vol. 15, (2), 2011, pp. 61-89.


\textsuperscript{17} Haimt Suleiman, “The Islamic Trust \textit{waqf}: a Stagnant or Reviving Legal Institution?” \textit{Electronic Journal of Islamic and Middle Eastern Law (EJIMEI)}, Vol. 4, 2016, pp. 27-43.


\textsuperscript{19} Lukman Raimi, Ashok Patel and Ismail Adelopo, “Corporate social responsibility, \textit{Waqf} system and Zakat system as faith-based model for poverty reduction”, \textit{World Journal of Entrepreneurship, Management and Sustainable...}
The achievement of these goals is determined by the management efficiency and effectiveness. Consequently, the waqf management becomes the medium that bridges the potential and realization of the waqf implementation. From another angle, waqf is a “legal act.” Waqf institutions determine the obligation and prohibition of every factor that related to the waqf implementation, such as wâqif and nazir.

Eventhough part of the waqf property has been abolished, nationalized, or mismanaged; there is an emerging proof of the awakening of attention, promotion, and rethinking of waqf as a social institution. A number of community organizations, socio-political groups, and business units seek to utilize the waqf model in financial collection and management.

There is enormous international support for the awakening of waqf. It becomes part of the agenda Organization of Islamic Conference (QIC), the Islamic Development Bank (IDE), and The Islamic Educational, Scientific and Cultural Organization (ISESCO). In line with the world’s political change, some ideologies emerge and change the perceptions of waqf recipients’ and donors’ groups.

For centuries, waqf has been the subject of legal mechanisms study. The findings show that waqf can be well managed when local actors have contribution to the management. The future of this institution’s resurgence will depend on the role of local actors, equipped with the ability to empower waqf. There are many examples of the adaptation of modern management and regulatory frameworks on waqf.

Innovative approaches to waqf property, including state’s property, open wider access for people. There is a special rule in the sharia regarding derelict property, which is not owned or utilized by any person or group of people, as in principle there should be no land being neglected. For example, the case of land in Medina, Saudi Arabia, which allows people to cultivate land that appears neglected.

**Waqf Institution in Indonesia**

In Indonesia, the waqf institution has been embedded in Muslim societies’ traditions. In fact, the age of this institution is as old as the age of Islamic history in this country. The
historical proof of Islam arrival in Indonesia is determined through archaeological finds, such as graves or mosques ruins. Until now, the cemetery and the mosque became the object of waqf designation.

The development of waqf institutions has changed. It crossed through the era of the sultanate, the colonial, the independence, and the reformation. At the sultanate time, it was governed by local customs. In the colonial period, there were various interpretations on waqf regulations. In the independence era, it governed by various regulations. However, the vertical and horizontal relationships between regulations are not questioned. At the reformation era, when demands of regional and religious identities grew stronger, the formation of Waqf regulation was done by the Government (Act Number 41 of 2004). Based on philosophical, socio-historical, and juridical foundation, waqf has become one of living laws in Muslim society in Indonesia.

For Muslim communities in Indonesia, waqf is align with the ideals of law, engrained in social life, and legally confirmed. Although it has fulfilled the living law criteria, it does not necessarily mean it becomes an "enforced law". The enforcement of the provisions contained in the "Waqf Act", will only be possible if the law is systematic, either vertically or horizontally, in Indonesian legal system, enforced by a clean and lawful official, and supported by a high legal awareness of those legal proponent. Without those conditions, the act will never be upright, but instead leads to sleepingordonatie or even a dode regel (death law or death regulation).

By using library research that use qualitative data, this study will evaluate of the waqf management and its coherences with laws and regulations. This study is not intended to test a particular hypothesis or theory. However, it focuses more on searching new discoveries about phenomena, as they relate directly to the social realities. This research uses descriptive method with qualitative approach, also known as naturalistic. This is because in general the collected data is qualitative. Sources of obtained data, among others, are books that discuss about waqf. The normative aspect is based on Republic of Indonesia Act Number 41 of 2004 regarding waqf.

Data analysis was performed through three steps activities, which are classification, theorization, and interpretation. These steps are normative descriptive. This is related to the analized data's characteristics, which is qualitative. Finally, it will arrive at the conclusion part, which is the stage of inference as well as the answer to the question that was generated based on the analysis and interpretation of the collected sources.

**Waqf Regulation in Indonesia**

Waqf regulation in Indonesia exists since the enactment of Act Number 5 of 1960 regarding the Basic Regulation of Agrarian Principles or also called as the Act of Agrarian Principles, promulgated in the State Gazette Number 104 of 1960. Article 49 of the Act states: (1) the right to the property of religious and social bodies to the extent that they are used for religious and social activities are recognized and protected. These bodies are also guaranteed to obtain sufficient land for their buildings and businesses in the religious and social field, (2) for the worship and other sacred purposes, the property under
direct state possession may be given with title the right of use, (3) the waqf of ownership-rights is protected and regulated under Government Regulation.

In order to carry out Article 49 paragraph 3 of the Act of Agrarian Principles, the Government Regulation Number 28 of 1977 regarding the Rights of Ownership waqf was passed. After the birth of GR Number 28 of 1977 which regulates land waqf, the Presidential Instruction Number 1 of 1991 regarding the Compilation of Islamic Law (KHI) was enacted. It regulates waqf in more comprehensive manner, along with marriage and inheritance regulation. In this compilation, the waqf object is not limited to the land with the rights of ownership title. 13 years from the KHI, the government legislated Act Number 41 of 2004 regarding waqf. Besides bringing some new ideas, this Act specifically discusses more detail about waqf and its management.

The Act Number 41 of 2004 becomes a strategic breakthrough for the future development of waqf in Indonesia. So called because this Act covers important points, including: the law emphasizes the necessity of waqf empowerment as a religious institution that has economic potential and benefits for the worship importances and promotes public welfare; the law regulates broader implementation of waqf, which are: the permissibility to waqf movable-objects, whether in form of money, shares, securities, intellectual property, precious metals, and others. The arrangement of cash waqf turns out to be an enormous opportunity for the future development of waqf. Since money is flexible, the empowerment plan will be more attainable; nazir (waqf manager or waqf supervisor) as the backbone of waqf management is divided into individual, organization, and legal entity. This arrangement is intended for more professional waqf management, and to avoid the occurrence of violation on the objects of waqf; the role of selected sharia financial institutions, in Islamic financial system, should be based on Islam fully, not just the name and label only. It must reflect the philosophy, values, ethics and objectives of Islamic Shariah, appointed by the Minister of Religious Affairs, as a place to entrust waqf money and entitled to issue a Certificate of Endowments/Waqaf (Sertifikat Wakaf Uang); to optimize Waqaf management and development, an independent Indonesian Wakaf Board (Badan Wakaf Indonesia) is established and may inaugurate a representative at province and district level if deemed necessary; in the management and development of waqf property, nazir may cooperate with third parties and pledge to sharia insurance; disputes settlement over waqf property, shall use mediation, arbitration, or legal trial/litigation.

The existence of general criminal provisions against waqf property and management violation as follows:

a. For those who deliberately pledge, grant, sell, inherit, and other forms of rights transference without permission will be convicted with imprisonment for a maximum of 5 (five) years and /or a fine of not more than Rp 500.000.000,00 (five hundred million rupiah).

b. For those who deliberately change the designation of waqf property without permission will be convicted with imprisonment for a maximum of 4 (four) years and /or a fine of a maximum of Rp. 400,000,000.00 (four hundred million rupiah).

c. For those who deliberately use or take the facilities resulted from waqf revenue beyond the prescribed amount, shall be convicted with imprisonment for a maximum of 3 (three) years and/or a fine of not more than Rp 300,000,000.00 (three hundred million rupiah).

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This law, as outlined in the Act explanation, is based on two reasons. First, the objective of the Unitary State of the Republic of Indonesia as mandated in the Preamble of the 1945 Constitution of the Republic of Indonesia is to promote the general welfare. To achieve these objectives, it is necessary to explore and develop the potentials that exist within religious institutions that have economic benefits.

One of the strategic steps to improve general welfare is to increase the role of waqf as a religious institution that not only aims to provide various religious and social facilities, but also has economic power potential to promote the general welfare. Thus, its utilization should be developed in accordance with sharia principles.

Secondly, the practice of waqf that occurs in society has not been fully run orderly and efficient. Many cases show how waqf property is not properly preserved, abandoned, or unlawfully handed to third parties. Such circumstances are not solely due to the negligence of inability of nazir in managing the waqf property but also because of people's ignorance or unawareness of waqf status, where it should be protected for the purpose of general welfare, in accordance with the purpose, function, and allotment of waqf.

Based on the above considerations and to meet legal demand in the framework of national law development, the “Act on Wakaf” was created. Basically, the previous waqf provisions, both from sharia and national regulations, are re-enacted in this Act. In addition, there are some new issues as follows: first, to create the order of law and waqf administration to protect waqf property, this Act affirms that waqf legal acts must be recorded and written in the deed of waqf pledge, registered, and announced which its implementation is performed in accordance with the procedures regulated in the waqf regulations. This law does not separate between the waqf-ahlî (dhurri) and Waqf khayrî. Waqf-ahlî (dhurri) is applied when the waqf management and utilization is limited to the waqf's heirs, while waqf-khayrî is intended for public benefit, in accordance to the purpose and function of waqf; second, In the past, people understood that waqf is limited on immovable objects such as land and building. Based on the Act, wâqif can also endow their movable wealth, whether tangible or intangible, such as money, precious metals, securities, vehicles, intellectual property rights, rights to lease, and other movable objects; third, in the case the movable objects is money, wâqif may endows through Sharia Financial Institutions. Sharia Financial Institution is an Indonesian legal entity established based on Islamic finance laws and regulations, for example a sharia bank. The waqf of movable object in form of money through a Sharia Financial Institution is intended to facilitate wâqif to donate their money; forth, waqf property is not solely proposed for religious and social facilities, but also directed to promote general welfare by reaching the economic potential and benefits of waqf property. It allows the waqf properties management to enter of economic activities in a broad sense, as long the activities use sharia economic and management principles as foundation.

To secure the waqf property from third parties interference that harming waqf purposes, it is necessary to improve the nazir professional capacity. The Act also regulates the establishment of Indonesian Wakaf Board (BWI [BadanWakaf Indonesia]) that may assemble local representation as needed. The Board is an independent institution that performs duties in waqf matters, gives guidance to nazir, conducts the management and development of national and international level waqf properties, gives
approval on any proposed alteration of waqf property status and designation, and provides advice and consideration to the government in formulating policies that related to waqf.\textsuperscript{46}

The provisions in point one above, although claimed as new, are basically similar to Article 5 of the Government Regulation of the Republic of Indonesia Number 28 of 1977 regarding the Rights of Ownership waqf that stipulates:

(1) The party who endows (gives waqf of) his/her land must pledge his/her will clearly and firmly to the nazir before the Official of Waqf Pledge Deed as referred to Article 9 clause (2) whom then record it on Waqf Pledge Deed, witnessed by at least 2 (two) witnesses.

(2) Under certain circumstances, any deviation upon the provisions referred to in article (1) may be applied under approval of the Minister of Religious Affairs.

The waqf pledge is stipulated in articles 17 - 21 as follows:

(1) Wakaf pledge was performed by wâqif to nazir in front of the Official of Waqf Pledge Deed (PPAIW [Pejabat Pembuat Akta Ikrar Wakaf]), witnessed by 2 (two) witnesses.

(2) The endowment (waqf) pledge as referred to in paragraph (1) shall be declared verbally and/or written and stipulated in the deed of waqf pledge by Official of Waqf Pledge Deed (PPAIW).

**Article 18**

In the case of wâqif are unable to express waqf pledge orally or unable to present in the waqf pledge recital for reasons justified by law, wâqif may designate his proxy by a power of attorney, and reinforced by two witnesses.

**Article 19**

To be able to perform waqf pledge, wâqif or their attorney submits a letter and/or ownership proof of waqf property to PPAIW.

**Article 20**

Witnesses in the waqf pledge must meet the following requirements:

a. adult;
b. muslim;
c. sensible;
d. not hindered to perform legal action.

**Article 21**

(1) The waqf pledge is stated in the deed of waqf pledge.

(2) The deed of waqf pledge as referred in paragraph (1) shall at least contain:

a. Name and identity of wâqif;
b. Name and identity of nazir;
c. Data and information of waqf property;
d. Allotment of waqf property;
e. Waqf duration.

(3) Further provisions concerning the deed of waqf pledge as referred in paragraph (2) shall be regulated by Government Regulation.

**The Substance of Act Number 41 of 2004**

**a. The systematic of Act Number 41 of 2004**

The Act Number 41 of 2004 on Waqf is recorded in the Republic of Indonesia State Gazette Number 159 and Supplement to the State Gazette Number 4459 of 2004, came into force on 27 October 2004. The Systematic of the Act is as follows:

CHAPTER I: General Provisions (1 article: 1)

CHAPTER II: Principles of Waqf

A. General (2 articles: 2-3)

B. Purposes and Functions of Waqf (2 articles: 4-5)

C. Elements of Waqf (1 article: 6)

D. (2 articles: 7-9)

E. Nazir (6 articles: 9-14)

F. Waqf Property (2 articles: 15-16)

G. Pledge of Waqf (5 articles: 17-21)

H. Allotment of Waqf Property (2 articles: 22-23)

I. Endowment (Waqf) through Testament (4 articles: 24-27)

J. Waqfon movable objects in form of money/cash (4 articles: 28-31)

CHAPTER III: Registration and the Announcement of Waqf Property (8 articles: 32-39)

CHAPTER IV: Changes in the Status of Waqf

\textsuperscript{46} Explanation of Act No. 41 of 2004
Property (2 articles: 40-41)
CHAPTER V: Management and Development of Waqf Property (5 articles: 42-46)
CHAPTER VI: Indonesian Waqf Board
A. Position and Duties (4 articles: 47-50)
B. Organization (2 articles: 51-52)
C. Member (2 articles: 53-54)
D. Appointment and Dismissal (4 articles: 55-58)
E. Financing (1 article: 59)
F. Implementation Conditions (1 article: 60)
G. Accountability (1 article: 61)
CHAPTER VII: Dispute Resolution (1 article: 62)
CHAPTER VIII: Development and Supervision (4 articles: 63-66)
CHAPTER IX: Penal Provisions and Administrative Sanctions
A. Penal Provisions (1 article: 67)
B. Administrative Sanctions (1 article: 68)
CHAPTER X: Transference Provisions (2 articles: 69-70)
CHAPTER XI: Closing Provisions (1 article: 7)

b. The Concept of Waqf and Its Elements

According to Act Number 41 of 2004, waqf is a wâqif legal act to separate and/or bestow some of their property to be utilized forever or for a certain period for the purposes of worship and/or general welfare based on sharia (article 1, paragraph 1). The elements of waqf in this Act are 5 (five), namely: (1) wâqif, (2) nazir, (3) waqff property, (4) pledge of waqf, (5) Allotment of waqf property, and (6) period of waqf (article 6).

Wâqif is the party who donates their property (article 1, paragraph 2). Wâqif may be individuals, organizations, or legal entities (art. 7). Individual wâqif must meet the following requirements:

a. Adult,
b. Sensible,
c. Not hindered to perform legal action, and
d. The rightful owner of waqf property (article 8, paragraph 1).

While wâqif organizations or legal entities may perform waqf if they meet the provisions of the organization or legal entity to denominate property owned by the organization or legal entity in accordance with their respective article of association (article 8, paragraphs 2 and 3).

Parties who receive waqf property from wâqif to be managed and developed in accordance with its designation are called nazir. Nazir may be an individual, an organization, or a legal entity (art. 9). Individual nazir must be an Indonesian citizen, Muslim, adult, trustworthy, able both physically and spiritually, and not hindered to perform legal action.

Nazir organization consist of managers who meet the requirements of the individual nazir above. The organization engages in social, educational, civic, and/or islamic activities (article 10, paragraph 2). Likewise, the legal body entity consists of legal body executives who meets the requirements of an individual nazir, and the legal entity shall be established in accordance with Indonesian laws and regulations, and engages in social, educational, civic and Islamic activities (article 10, paragraph 3). The task of nazir covers:

a. administering waqf property;
b. manage and develop the waqf property in accordance with the purpose, function, fund allocation;
c. supervise and protect the properties of waqf;
and
d. reports the completion of duties to the Indonesian Wakaf Board (BWI) (article 11).

To perform the above duties, nazir shall be entitled to receive rewards from the net return on the management and development of waqf property 10% (ten percent) in maximum, and shall be entitled to obtain training and education from the Minister and the Indonesian Wakaf Board (articles 11 and 12). In the meantime, to obtain the above education, nazir must be registered in the Minister and the Indonesian Wakaf Board (BWI).

Waqf properties in this Act include immovable objects and movable objects. Immovable objects are:

a. rights upon land, based on the existing regulations, both registered and non-registered land;
b. buildings or parts of buildings standing on
the land as referred in letter (a);

c. plants and other objects related to the land;

d. ownership of a flats property in accordance
   with the existing laws and regulations; and

e. other immovable property in accordance
   with the provisions of sharia and existing
   laws and regulations.

Movable objects are property that can
not be depleted from consumption, namely:
money, precious metals, securities, vehicles,
intellectual property rights, lease rights, and
other movable objects in accordance with the
provisions of sharia and existing legislation
(Article 16, paragraphs1-3).

The next element of waqf is the vow of
waqf. The Pledge is recited by wâqif to nazir in
front of PPAIW witnessed by 2 (two) witnesses.
The pledge may be verbally or in writing, and
transcribed in the deed of waqf pledge, or if
waqif is unable to attend, may designate its
proxy by a power of attorney reinforced by 2
(two) witnesses. Waqf pledge can be performed
if wâqif can submit a letter or ownership proof
of waqf property to PPAIW (chapters 17-19).

To achieve the purpose and function of waqf,
waqf property is designated for:

a. worship facilities and activities;

b. education and health facilities and activities;

c. support to the poor, abandoned children,
orphans, and scholarships;

d. development and improvement of the
people’s economy;

e. other general welfare improvement that are
not contrary to sharia, laws and regulations
(article 22).

Endowments of movable objects in the
form of money can be performed by wâqif
through sharia financial institutions appointed
by the Minister. Waqf money is acted with a
written statement of wills, and then issued
in form of waqf money certificates, issued by
Islamic financial institutions to wâqif and nazir
as a proof of waqf property bestowal (articles
28-29). Islamic financial institutions on behalf of
nazir register the waqf money to the Minister at
least 7 (seven) working days since the issuance
of Certificate of Waqf Money (article 30). Waqf
property that has been bestowed are prohibited
to be used as security, confiscation, donation,
sale, inheritance, exchanged or transferred in
other form of rights transference.

The dismissal and replacement of nazir is
executed by the Indonesian Wakaf Board (BWI).
Related to this, nazir may be dismissed or
replaced if:

a. deceased, for the individual nazir;

b. dissolved or being dissolved, for the
organization or legal entity nazir;

c. upon their own request;

d. does not fulfill their duties as nazir and/or
violates waqf management and development
regulations;

e. Sentenced to a criminal by a court that
has had permanent legal force (article 45,
paragraph 1).

Guidance and supervision upon the
implementation of waqf is performed by the
Minister by involving the Indonesian Wakaf Board
(BWI) and by taking into account the suggestions
and considerations of the Indonesian Council

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47 Siti Mariam Malinumbay S. Salasal, The Concept of Land
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Akademik Fakulti Kejuruteraan & Sains Geoinformasi,), Jld. 2 No.2,
ms. 285 -304, December 1998

48 Nor Asiah Mohamad, Sharifah Zubaidah Syed Abdul
Kader & Zuraidah Ali, “Waqf Lands and Challenges from the
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49 Hussein Elasrag, Towards a new role of the institution of
waqf, Online at https://mpra.ub.unimuenchen.de/80513/ MPRA
Paper No. 80513, posted 1 August 2017 05:31 UTC.
of Ulama (MUI) (article 63 verses 1-3). In the framework of the aforementioned guidance, the Minister and BWI may cooperate with public organizations, experts, international bodies, and other deemed necessary parties, including the use of public accountants (articles 64 and 65).

The Philosophical, Socio-historical, and Juridical Foundation

The birth of Republic of Indonesia Act Number 41 of 2004 regarding waqf is one of qualitative progress of waqf management in Indonesia. Its enactment is based on various foundations. As an act, at least it should be created on philosophical, sociological, and juridical foundation.

Firstly, the philosophical foundation. This foundation is more focused on the ideals of law as set forth in the preamble. The ideals of law in question are law enforcement and justice as reflected in the constitution of the Republic of Indonesia.

Secondly, the socio-historical foundation. This foundation is more focused on dynamics aspects and interaction process of Muslim life which inherent with the implementation of Islamic law in Indonesia. Nevertheless, sociologically the act is not fully reflecting the aspirations

Thirdly, the juridical foundation. This foundation has a solid normative approach, based on the Act Number 10 of 2004 regarding the Formulation of Laws and Regulations. In real terms, the 1945 Constitution becomes the main normative-juridical reference in arranging legislation.

Discussion

Sharia is a sacred law which originates from the will of Allah. In the legal study, sharia is a natural law which remains constant and does not change. However, in the case of waqf, shariah does not define waqf strictly and in detailed way. In this case, the legal provision of waqf is obtained through ushûl al-fiqh, with a deductive reasoning pattern analogy. Furthermore, the provision on waqf mechanism is based on human preference for public good, such as istihsân, mashlahah mursalalah, and so forth. Legal resources are focused more on human thinking and behavior. In this sense, Muslims recognize the legal positivism.

The power of sharia as a qânûn depends on the authority holder. The validity of a law is naturally determined by the holder of political

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authority. Yet, the presence of fiqh (not qânûn) indicates that the norm validity is developed by holders of scientific authority (ʻulamâ’ or fuqâhâ`), and they commonly have an independent position or beyond the political structure. Colonialization and modernization require sharia and fiqh to adopt the modern legal system. Not all sharia norms can be simply adapted into the modern legal system.65 This matter is related to the sharia coverage in human life affairs. The more “neutral” sharia is (with no detailed and strict rules in sharia), the easier the process of adaptation of sharia into the modern legal system will become, as its regulation mechanism will depend on the creativity of scholars.66

The law of waqf is based more on the spirit of law, the spirit of Islamic teaching, and the maqâshid al-shari’ah than the text of sharia, so that waqf is more likely to be developed to respond the demands and needs of community. The law of waqf has a great chance to take place, so that in turn it functions to be a means to increase and empower waqf potential.67

The power and existence of waqf in Indonesia is not merely related to the ideals of law as part of the living law in society. Moreover, waqf has a relationship with the spirit of the implementation of the national legal system in the form of Law on Wakaf Number 41, 2014. In Indonesia, the waqf institution is inherently embedded in the tradition of Muslim society. It is no room for doubt that the age of the institution is as old as the age of Islamic history in Indonesia. The historical evidence of the arrival of Islam in Indonesia is based on archaeological findings, such as graves or ruins of mosques. The graves and mosques have been the object of waqf until the present time.68

The development of waqf institution met some changes as it passed the kingdom period, the colonization period, and the Indonesia’s independence period. In the kingdom period, waqf was governed by local customs. In the colonization period, there were various views on the management of waqf. Meanwhile in the independence period, waqf has been governed by various regulations.69 However, there remain no problems in the vertical and horizontal relationship among regulations.

During the reform period, when the demand of regional and religious identity gets stronger, the Government forms the law of waqf (Law Number 41 year 2004). Based on socio-historical, juridical and philosophical considerations, wakaf has become one of the living laws for Muslim society in Indonesia. For Muslim society in Indonesia, waqf works in line with the ideals of law, which is rooted in social life, and gets juridical confirmation. Although waqf has fulfilled the criteria of living law, it does not necessarily become an “enforced law”. The law enforcement of waqf provisions can be done when the law of waqf has either vertically or horizontally systematic ways within the law of Indonesia, which is supported by clean and prestigious law enforcers and a high legal awareness from law advocates. So, waqf is strongly embedded to the development of Islam and Islamic propagation in Indonesia. There are a lot of religious organizations, mosques, boarding schools, and educational institutions built on waqf land.70

Since 2000, waqf has attracted huge attention in Indonesia, from practitioners, academics and government. This condition is seen from the emerging discussion in printed mass media and electronic media. It is essential for waqf to be developed with various goals, such as education, health, the empowerment of people’s economy, and many other sectors. Indonesia has made adequate regulation as the basis of waqf management that is in line with the provisions of Islamic law, such as Law Number 41 Year 2004.

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68 Siti Mashitoh Mahamood, Waqf in Malaysia: Legal and Administrative Perspectives, (University of Malaya Press, 2006), p. 43.
70 Asmah Haji Omar, Languages in the Malaysian Education System: Monolingual strands in multilingual settings, Routledge, 2015, p. 75.
on waqf and government ordinance Number 42 Year 2006 on the implementation of Law Number 41 Year 2004. After the ratification of Law Number 41 Year 2004 on waqf, there are some important progresses in the development of waqf in Indonesia, namely: firstly, the recognition of moving object of waqf, including cash waqf in the form of money that is expected to be a source of potential waqf wealth that can be synergized with the property waqf. Secondly, the establishment of Badan Wakaf Indonesia (BWI) as an independent institution in charge of promoting and developing national endowment.

According to data from the Ministry of Religious Affairs of Indonesia in 2010, the number of waqf land in Indonesia reached 414,848 locations with land area of 2,171,041,349.74 M². Meanwhile, in 2016, the Indonesia Waqf Land Data, can be seen as follows:

<table>
<thead>
<tr>
<th>Column</th>
<th>Location</th>
<th>Amount</th>
<th>Certified</th>
<th>Not Certified</th>
<th>Total Amount (M2)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Gresik</td>
<td>38,998</td>
<td>13,790</td>
<td>11,356</td>
<td>47,146</td>
<td></td>
</tr>
<tr>
<td>2. Sumatera Barat</td>
<td>18,256</td>
<td>7,585</td>
<td>8,939</td>
<td>36,649</td>
<td></td>
</tr>
<tr>
<td>3. Sumatera Barat</td>
<td>5,851</td>
<td>6,902</td>
<td>2,225</td>
<td>21,422</td>
<td></td>
</tr>
<tr>
<td>4. Sumatera Barat</td>
<td>2,966</td>
<td>3,371</td>
<td>2,572</td>
<td>8,904</td>
<td></td>
</tr>
<tr>
<td>5. Jawa</td>
<td>3,581</td>
<td>2,841</td>
<td>5,985</td>
<td>11,409</td>
<td></td>
</tr>
<tr>
<td>6. Jawa</td>
<td>2,991</td>
<td>3,785</td>
<td>2,332</td>
<td>8,508</td>
<td></td>
</tr>
<tr>
<td>7. Irian</td>
<td>2,754</td>
<td>1,889</td>
<td>500</td>
<td>5,142</td>
<td></td>
</tr>
<tr>
<td>8. Jawa</td>
<td>1,556</td>
<td>1,973</td>
<td>800</td>
<td>5,229</td>
<td></td>
</tr>
</tbody>
</table>

Unfortunately, those waqf assets do not have optimal utilization that leads to the less socio-economic role of waqf. Because the document pledge of waqf (Akta Ikrar Wakaf [AIW]) not yet owned, it mostly leads to the conflict of waqf land, especially between the waqf inherant and nazir, or the conflict of waqf management between nazir and community.

By seeing the above data, it is imperative that waqf asset should be maximally managed to develop the socio-economic role of waqf in addition to the socialization of land and money waqf because there are still many waqf lands that don not have land certificate and the document pledge of waqf (Akta Ikrar Wakaf [AIW]) leads to the conflict of waqf land, especially between the waqf inherant and nazir, or the conflict of waqf management between nazir and community.  

Waqf as a legal act has been institutionalized and practiced for a long time in Indonesia. It is allegedly said that waqf institution has existed since the arrival of Islam to the Nusantara and it was then developed in line with the development of Islam in Indonesia. The regulation of legal source, technique, procedure, and practices of waqf in the form of regulation is seen to be new, i.e. since the enactment of Law Number 5 Year 1960 on agrarian affairs.

Later on October 27, 2004 President SBY ratified Law Number 41 Year 2004 on waqf. This law covers all matters concerning waqf which includes the definition of waqf, nazir, Officials Pledge Deed of Endowment (Pejabat Pembuat Akta Ikrar Wakaf [PPAIW]), etc. The initial development of waqf is expected to grow more productive and it covers not only land as waqf property but also movable objects such as money, precious metals, vehicles, etc. The fatwa of the Indonesia Ulama Council (Majelis Ulama Indonesia [MUI]) allowed the money waqf on May 11, 2002.

Conclusion

Republic of Indonesia Act Number 41 of 2004 on waqf with its advantages and disadvantages should be addressed with full optimism. This act was born based on the hope that waqf

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71 Muhammad Ishom, “The Effectiveness... p. 110.
72 Mardani, Aspek Hukum Lembaga Keuangan Syariah Di Indonesia, (Jakarta:,PrenadaMedia,2015), p. 9
75 Savran Billahi & Idris Thaha, Bangkitnya Kelas Menengah Santri Modernisasi Pesantren di Indonesia, (Prenada Media, 2018), p. 137.
implementation, which has been known by the Muslim community since old time, should be performed in organized and accountable manner. In addition, the object of waqf that formerly was focused on immovable objects, with the presence of this Act has been broader to movable property, especially money waqf. In general, it can be said that some of the contents of this Act refers to Government Regulation (GR) Number 28 of 1977 regarding the Rights of Ownership waqf. The addition of the content of the GR is due to the Act is broaden the object of waqf is not limited to land. The other addition is about the limitation of waqf duration.

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