

The Existence of Cash Waqf Law: Yuridical Analysis about the Undang-Undang Nomor 41 Tahun 2004 on Wakaf

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Abstract: The existence of cash waqf law in the Undang-Undang Nomor 41 Tahun 2004 on Wakaf, in its implementation there is a significant gap between the formulation of cash waqf and its implementation in society. In waqf practice in Indonesia, most people only do waqf in immovable properties such as land and buildings, so that this situation seems to rule out the existence of waqf movable property, such as money or cash waqf. In addition, there are some crucial problems in the application of cash waqf, which implies the stagnation of the implementation of cash waqf, so that the rule has not been followed by whole of Indonesian Muslim community. This research is focused on the discussion about the management system, problematics and weakness of cash waqf law in The Undang-Undang Nomor 41 tahun 2004 on Wakaf. This study is a normative legal research which attributed by descriptive analytical, with normative juridical approach. The Undang-Undang Nomor 41 tahun 2004 on Wakaf as a source of legal material as well as its derivative regulation as well as other related references collected by library techniques. The method of analysis of legal materials used is normative analysis.

1 INTRODUCTION

Cash Waqf is a waqf done by a person, group of people, institutions, or legal entities in the form of money. The term cash waqf is not known at the time of the Prophet. Cash waqf has only been practiced since the beginning of the second century hijri. Imam az Zuhri (died 124 H) was recommended that the dinar and dirham waqf be used for the construction of Islamic da'wah, social and educational facilities. Besides al-Zuhri, the early generation of Hanafi school also allowed the waqf of dinar and dirham as an exception, on the basis of Istihsan bi al-'Urf.

In the practice of waqf in Indonesia, most people only do waqf of immovable objects such as land and buildings, so that this situation seems to override the existence of waqf of movable objects, such as cash waqf. Cash waqf has only been implemented since the Majelis Ulama Indonesia (MUI) issued the fatwa that the cash waqf was jawaz (permissible). Although in Indonesia the majority of Muslims are Syafi'i schools, but it seems that in this cash waqf, Islamic scholars and economic thinkers choose opinions that allow cash waqf. This is reflected in

The Undang-Undang Nomor 41 tahun 2004 on Wakaf.

But on its way there are some crucial problems in the implementation of cash waqf, which have implications for the stagnation of the implementation of cash waqf, even though the rule has not been followed by the Indonesian Muslim community as a whole.

2 METHOD RESEARCH

2.1 Types and Nature of Research

This research is a library research that uses 3 (three) legal materials, namely primary legal materials, secondary legal materials and tertiary legal materials.

The nature of this research is analytical descriptive. That is research that is intended to provide data that is as accurate as possible then analyzed by not getting out of the scope of the problem and based on the theory or concept of law.

2.2 Sources of Legal Material

The data in this study are secondary data or legal material, namely library material which includes official documents, library books, legislation, scientific papers, articles, and documents relating to the research. The secondary legal material includes three parts, namely:

2.2.1 Primary Legal Material

Primary legal material, namely binding legal materials. The primary legal material in this study is legislation on waqf, namely The Undang-Undang Nomor 41 tahun 2004 on Wakaf.

2.2.2 Secondary Legal Material

Secondary legal material, which provides an explanation of primary legal materials, namely legal material that can provide an explanation of primary legal materials. Secondary legal materials can be: derivative regulations of The Undang-Undang Nomor 41 tahun 2004 on Wakaf such as The Peraturan Pemerintah Nomor 42 Tahun 2006 on Pelaksanaan Undang-Undang Nomor 41 tahun 2004 on Wakaf, law books, legal journals, and papers law or the views of legal experts contained in mass media and the Internet.

2.2.3 Tertiary Legal Material

Tertiary legal material, namely material that provides guidance and explanation of primary and secondary legal materials; examples are dictionaries, encyclopedias, cumulative indices and so on.

2.3 Techniques of Legal Material Collection

The collection of legal materials is carried out through document study (literature study) which includes primary legal materials, secondary legal materials and tertiary legal materials, namely by conducting an inventory and identification of a number of laws and regulations, legal documents, legal records, results of scientific research and literatures of legal science such as books, articles, journals and research results that are related to the research.

2.4 Analysis of Legal Material

After the legal material has been collected in full, the next stage the researcher processes and analyzes

the legal material. Legal material analysis will use normative analysis method, which is a way of interpreting and discussing research results that based on the understanding of law, legal norms, legal theories and doctrines relating to the subject matter of the research.

Legal norms are needed as a major premise, then correlated with relevant facts (legal facts) which are used as a minor premise and through the syllogism process conclusions will be obtained against the problem.

3 RESEARCH RESULT

3.1 Management System of Cash Waqf

Basically cash waqf is a breakthrough in The Undang-Undang Nomor 41 tahun 2004 on Wakaf in which cash waqf management involves three main parties: wakif, nazhir who can act as investment managers at the same time, and the mauquf alaih (beneficiary) is distributed to the right parties. In the Article 28 to Article 31 of The Undang-Undang Nomor 41 tahun 2004 on Wakaf is explained as follows:

- (1) Wakif can endorse movable objects in the form of money through Islamic financial institutions appointed by the Minister.
- (2) A movable waqf in the form of money is carried out by Wakif with a statement of Wakif will be carried out in writing.
- (3) A movable waqf in the form of money is issued in the form of a cash waqf certificate.
- (4) Cash waqf certificates are issued and submitted by Islamic financial institutions to Wakif and Nazhir as proof of the delivery of waqf assets.
- (5) Islamic financial institutions in the name of Nazir register money waqf assets in the form of money to the minister no later than 7 (seven) working days since the issuance of the cash waqf certificate.

The practice of cash waqf is done through the LKS-PWU (Lembaga Keuangan Syariah Penerima Wakaf Uang/ Sharia Financial Institution Receiving Money Waqf). After the Wakif handed over the cash waqf, then the LKS-PWU will issue and deliver the cash waqf certificate to Wakif and nazhir as proof of the delivery of waqf property (Article 29 paragraph (3)).

Related to the management of cash waqf, in Article 48 of The Peraturan Pemerintah Nomor 42

Tahun 2006 on Pelaksanaan Undang-Undang Nomor 41 tahun 2004 on Wakaf has explained as follows:

- (1) Management and development of waqf assets must be guided by BWI (Badan Wakaf Indonesia) regulations;
- (2) Management and development of cash waqf property can only be done through investments in LKS products and / or sharia financial instruments;
- (3) In the event that the LKS-PWU receives cash waqf for a certain period of time, Nazhir can only carry out the management and development of cash waqf property in the said LKS-PWU;
- (4) Management and development of cash waqf assets carried out in Islamic banks must follow the program of deposit insurance institutions in accordance with the laws and regulations; and
- (5) Management and development of cash waqf assets in the form of investment outside Islamic banks must be insured on Islamic insurance.

One important aspect in the management of cash waqf is The Lembaga Keuangan Syariah Penerima Wakaf Uang (LKS-PWU). LKS-PWU is a shari'ah Financial Institution recommended by The Badan Wakaf Indonesia and approved and appointed by the Ministry of Religion, LKS-PWU is obliged to report how much is the profit sharing of cash waqf to BWI and the Ministry of Religion, and the issues and deliveries of Cash Waqf Certificates to Wakif and Nazhir as proof of the delivery of waqf property, as stated in the Articles 28 and 29 of the Undang-Undang Nomor 41 tahun 2004.

The task of the LKS-PWU is as follows:

- (1) Announcing to the public its existence as The LKS of Cash Waqf Receiver;
- (2) Providing the form of Cash Waqf Certificate;
- (3) Receiving cash waqf in cash from Wakif on behalf of Nazhir;
- (4) Placing waqf money in a deposit account (wadi'ah on behalf of Nazhir who is appointed by Wakif);
- (5) Receiving a statement of intent of the Wakif which is stated in writing in the form of Wakif's will statement;
- (6) To Issue The Cash Waqf Certificate and submit the certificate to the Wakif and submit a copy of the certificate to the Nazhir who appointed by the Wakif; and
- (7) Registering cash waqf to the Minister on behalf of Nazhir.

Achieving cash waqf up to now has not reached the maximum target and there are still many

problems that need to be addressed again. This is due to many factors, including the lack of socialization, the incompatibility of related institutions such as the BWI and the LKS-PWU which all this time should be aligned but in fact running partially. LKS-PWU has its own rules and BWI also has its own rules. The next factor is that the LKS-PWU has not looked at cash waqf as a good and attractive product so that the socialization is less and little. In its implementation, the LKS-PWU still has obstacles that affect its management. Remembering the best potential of waqf fund, it is necessary to have professionalization in its management (in this case the Nazhir council). Therefore in this regard, the existence of Islamic banks is considered as an alternative institution that is quite representative in managing the trust fund. The role of Islamic banking in waqf investment has at least several advantages that are expected to optimize the operation of waqf investment as follows:

- (1) Office network.

The office network of Sharia banking is relatively broader when compared to other Islamic financial institutions. The network reaches 174 offices in almost all regions of Indonesia and the growth rate of the number of sharia bank offices reaches 2.1% per month. Therefore, this phenomenon is an important factor in optimizing the socialization of waqf fundraising and distribution.

- (2) Ability as Fund Manager

Banking institutions are public fund management institutions. By itself, the institution must be an institution that has the ability to manage funds and is expected can play a role as an alternative institution that has capability in managing of waqf funds that can be accounted for to the public, especially to the waqif.

- (3) Experience, Information Network and Distribution Map.

Sharia banking is a banking institution that has experience, information, and wide distribution maps so that the management of cash waqf is expected not only to optimize the management of funds, but also to streamline the distribution as desired.

- (4) Positive image.

With the three things above, it is hoped that it will create a positive image on the cash waqf movement itself and in Islamic banking in particular.

According to Antonio, Sharia Banks are more appropriate if they are appointed to be investment managers of cash waqf on the reasons that the sharia bank is able to:

- (1) Access Wakif prospective;

- (2) Invest in waqf funds;
- (3) Administer the beneficiary;
- (4) Distribute the proceeds of waqf investment; and
- (5) Sharia bank has credibility in the public, and is controlled by strict regulations.

Another aspect that also has an important role in the cash waqf management system is Nazhir. At present the efforts carried out by Nazhir in the management, development and the allotment of waqf property in order to realize the purpose and function of waqf are very adequate, it's just possible in the implementation still needs control and supervision.

However, in addition to the efforts made by Nazhir in his duties and responsibilities, improving the quality of Nazhir and his empowerment is still very much needed. Because Nazhir in the context of management is human resources which is an important factor in economic-business activities.

Furthermore, waqf must be handed over to people or a special institution that has adequate competence so that it can manage professionally and trustworthy. The special institution which is intended in The Undang-Undang Nomor 41 tahun 2004 on Wakaf is the Badan Wakaf Indonesia (BWI). This institution is expected to manage waqf productively and professionally, especially cash waqf. In the management of cash waqf, the Badan Wakaf Indonesia (BWI) must cooperate with professional institutions and sharia banks. Thus, the waqf property can develop well and the results can truly be felt by the people.

BWI in carrying out its duties and functions as an embodiment of the implementation of cash waqf that has been mandated by The Undang-Undang Nomor 41 tahun 2004 on Wakaf, has done the following:

- (1) Collection of cash waqf at BWI
- (2) Acceptance of cash waqf
- (3) Management and allocation of cash waqf

Remembering the urgency of the benefits of cash waqf in order to achieve the effectiveness and efficiency of the implementation of cash waqf, a strategy is needed in its management by the waqf management institution, in this case the Badan Wakaf Indonesia (BWI).

The management and development of waqf in Indonesia requires the commitment of the government, ulama and the people. In addition, it must also be reformulated various matters relating to waqf, including the assets endorsed, the designation

of waqf and Nazhir and the management of waqf professionally.

3.2 Problems and Weaknesses of Cash Waqf Law in the Undang-Undang Nomor 41 tahun 2004 on Wakaf

3.2.1 Problems of Cash Waqf Law

Waqf has played a very important role in people development, but the results of the study on waqf management lately indicate that there are still waqf that do not have a positive impact because it is not managed properly. Waqf that are developing today are more for ritual worship purposes in the form of mosques and mushalla, while waqf for economic empowerment of the people is less popular. There even tends to be an assumption that waqf in the non-mosque and mushalla lacks the value of its kindness. This is partly due to mismanagement, and it is not uncommon for misuse of waqf assets. So that the result of the management of waqf assets decreases and is not even enough to maintain the assets of existing waqf assets, moreover to provide benefits to the poor, or in other words cannot achieve the goals set by the wakif.

According to Mustafa E. Nasution, the waqf institution in the scope of the economy still has a relatively small role, this is due to several things, including:

- (a) Various problems related to the management of waqf institutions;
- (b) The public is still tempted by the non-sharia economic system;
- (c) The absence of waqf legals that comprehensive-integral: and
- (d) Various problems related to fiqh waqf.

Professionalism in the management of waqf is actually not easy, it requires an expertise, seriousness and intense tenacity. For that, related to the management of waqf in Indonesia, there are several problems that we still encounter, including: First, philosophically, it is related to the basics of the permission of cash waqf in Islam, where it is never regulated in Al-Qu'ran and Hadith, so that it becomes dissent among ulama. Then the establishing of cash waqf law was only based on Istihsan bil 'urf which was conceived by Hanafiyyah School, while sociologically there is still a standard community paradigm of waqf in the immovable objects which arised from the difference of schools adopted by the majority of Indonesian Muslims. The difference in this school has resulted in many Muslims, who have the Shafi'iyah School, who partially still have not

participated in this cash waqf, because the cash waqf was initiated by scholars from the Hanafiyah School. Second, recognition of the existence of cash waqf that is still not strong, lack of legal certainty in several articles, and there are several articles that still have not embodied the justice values, such as the existence of Nazhir where there is injustice to Nazhir in his status as the waqf manager, but his legality as Nazhir is not accommodated by the State or by the BWI, then Nazhir has no burden of accountability so that it is appropriate in its implementation there are still many Nazhirs who are not serious in working. In addition, lack of Nazhir's human resources also impacted Nazhir's professionalism itself, and ultimately had a negative impact on the empowerment of the cash waqf itself. Third, the rules of cash waqf in the Waqf Law and other things that are closely related are still weak and unclear. These weaknesses can be found in the rules of cash waqf in The Undang-Undang Nomor 41 tahun 2004 on Wakaf which only amounts to 5 (five) articles, which are considered less representative.

3.2.2 Weakness of Cash Waqf Law in the Undang-Undang Nomor 41 tahun 2004 on Wakaf

If we look at the application of the cash waqf law in the lives of Indonesian people, it cannot be denied that the implementation is still not fully successful, as is the expectation of cash waqf positivisation itself so that it is regulated in the Waqf Act. Cash waqf should be accepted by the Indonesian people as a whole, because it is a rule in the Act which must be addressed by all Indonesians. If not, then it is certainly reasonable to assume that this Waqf Act still has significant lacks and weaknesses that are difficult to implement.

Cash waqf as law which works in the community, must have at least 3 (three) perspectives from the legal function, namely:

First, as social control. In this perspective the main function of a legal system is integrative because it is intended to regulate and maintain social regulation in a social system. Therefore, Bergers said, that there is no society that can live forever without the social control of the law as a means. Furthermore according to Parsons, as quoted by Campbell, so that the law can carry out the control function, suggests there are 4 (four) functional prerequisites of a legal system, namely:

- (1) The basic problem of legitimacy, which concerns the ideology that is the basis for the arrangement of the rule of law;
 - (2) The problems of the people rights and obligations that are subjected to legal regulation of the legal process;
 - (3) The sanctions and institutions that implement these sanctions, and
 - (4) The authority to enforce the rule of law.
- Second, as social engineering. Satjipto Rahardjo, stated that there were 4 (four) main requirements that had to be fulfilled so that a rule of law could direct a society, namely hearing ways:
- (1) A good depiction of a situation faced;
 - (2) Analyze assessments and determine levels of values;
 - (3) Verification of hypotheses; and
 - (4) There is a measurement of the effectiveness of the applicable law.

Third, the perspective of public emancipation toward the law. This perspective is the bottoms up view of the law, the law in this perspective includes objects of study such as legal capacity, legal awareness, law enforcement and others.

By adopting the core of these 3 (three) legal perspectives, it is theoretically possible to say that empowering cash waqf in a legal perspective has failed to integrate interests that are a prerequisite for the functioning of a legal system both as a control, and in directing the community in accordance with the objectives law. So that this becomes a fatal weakness for the cash waqf law which is accommodated in the Waqf Act.

We can see that the Waqf Law until now is seen as still closing for the general public to control (social control), because it is not regulated in the contents or articles of the Waqf Act. If something goes wrong, deviations from the management of waqf, both individuals and institutions or legal entities, the community cannot take legal action, such as class action. Furthermore, the rules of the cash waqf have not been given a barometer on the effectiveness of the application of the waqf law which regulates the cash waqf. This is certainly not in accordance with the legal perspective as social engineering. Finally, in terms of the perspective of public emancipation toward the law, rules of the cash waqf still do not have the legal ability to make people aware to the importance of cash waqf for themselves, nation and state.

Based on the description described above, the researcher can assess that the lacks and / or weaknesses of the law of the regulation on cash waqf will have a negative impact on the

management of waqf in Indonesia, therefore the government is obliged to make modifications or reconstruction of the cash waqf law so that it can be accepted and run effectively in the lives of Muslims in Indonesia, which ultimately the benefits can be felt by all Indonesian people. Modification or reconstruction is to find the right solutions, effective and efficient in addressing the waqf problems in Indonesia, especially regarding cash waqf.

4 CONCLUSIONS

1. There are several important aspects in the money waqf management system in Indonesia, among others, is Lembaga Keuangan Syari'ah Penerima Wakaf Uang (LKS-PWU) which is tasked with socializing, receiving and administering cash waqf; Nazhir of cash waqf who has the duty and obligation to maintain, manage cash waqf in accordance with its allotment, and channel the benefits to the rightful community (mauquf alaih), as well as the Badan Wakaf Indonesia (BWI) which is tasked with collecting, managing and developing cash waqf. However, these three aspects seem not to be aligned so that it becomes an obstacle in the development of money waqf.
2. There are several problems in the cash waqf law, among others: First, the basis of the permissibility of cash waqf in Islamic teachings is only based on Istihsan bil 'urf which was initiated by Hanafiyah School, while the majority of Indonesian Muslims are Syafi'iyah so that the Indonesian Muslim community has no intention to participate in this cash waqf. Second, the recognition of the existence of cash waqf that is still not strong, lack of legal certainty guarantee in several articles, and there are several articles that still have not embodied the justice values. Third, the lack of Nazhir's human resources ability also had an impact on Nazhir's professionalism, and ultimately also had a negative impact on the empowerment of the cash waqf itself. Fourth, the rules of cash waqf in the Waqf Law and other things that are closely related are still weak and unclear. These weaknesses can be found in the rules of cash waqf in The Undang-Undang Nomor 41 Tahun 2004 on Wakaf which only amounts to 5 (five) articles, which are considered less representative. Meanwhile there are some weaknesses of the cash waqf law in The Undang-Undang Nomor 41 Tahun 2004 on Wakaf, that is theoretically, this rule fails to integrate the interests which are the

prerequisites for the proper functioning of a legal system as a social control, this is certainly not in accordance with the legal perspective as social engineering. Finally, in terms of the perspective of public emancipation toward the law, the rules of cash waqf stipulated in the waqf law still do not have the legal ability to make people aware of the importance of the cash waqf for the people, nation and State.

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