

A COMPARATIVE STUDY OF WAQF LAND FOR COMMERCIAL USE IN INDONESIA

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ABSTRACT

This study attempts to examine the use of Waqf land from the perspective of Islamic law to compare to Indonesia Land Law in which allows Waqf land to be used for commercial interests. In Jakarta itself, there were some areas of Waqf land but are currently in used for commercial, such as: office buildings and/or apartments. Different opinions often arise as most people in Indonesia agree that Waqf is merely for social and should be performed in ways determined by Islam. This paper focuses on how Islamic law constitutes the rules and the function of Waqf itself, its social use and its possibility to be used commercially. The study will also expose the land law in Indonesia to compare if both instruments are in the same line. Theoretical approach and content analysis of the Islamic law and land law in Indonesia will be conducted as the tool to answer the problems on what Waqf is and if commercial use has been according to the Islamic law.

Keywords: Waqf land, Islamic Law, Indonesia Land Law, Comparative Law

Introduction

Article 215 point number 1 of the Complitaion of Islamic Laws (Kompilasi Hukum Islam) of the republic of Indonesia defines Waqf as a legal action by someone or a group of people or legal entity to separate the property owned and put it for religious purpose for the entire time or for another public needs based on Islam. This definition has stipulated that Waqf as constituted is performed merely based on Islam. Indonesia declares itself as a state of law as stipulated in article 1 section 3 of the constitution, which arises question on how to implement laws which are originated from Islam in a state of law, particularly Islamic Laws on Waqf as constituted by Islam and its application in Indonesia as a positive law which has binding and forcing power.

Another definition as given by article 1 point number 1 of the law of the republic of Indonesia No. 41 of 2004(Undang-undang Republik Indonesia No. 41 tahun 2004, 2004) concerning on Waqf, is a legal action by Waqif (Person who performs waqf) on waqf to separate and/or give away some of the properties owned to be used for the entire time or specific period of time with the purposes of religious use and/or public welfare based on *Syari'ah*. The difference between the two definitions on Waqf as constituted in the two different legal instruments is that the law No. 41 of 2004 allows Waqf to be used for a specific period of time, while Compilation of Islamic Laws constitutes Waqf to be used the entire time. This has shown that legal instruments in Indonesia, one which is made according to Islamic Law, and the other one which is made as an aspiration of the *Dewan Perwakilan Rakyat Republik Indonesia* (hereinafter referred to as DPR RI – People's Representative Council of the republic of Indonesia) have different perspective on Waqf.

Waqf land comes in as another issue in Indonesia regarding its rules as constituted by land law in Indonesia, law no. 5 of 1960 (Undang-undang No. 5 tahun 1960, 1960) concerning on Basic Regulation for Agrarian Affairs. Laws regulating land and related property under and/or in accordance to the land law in Indonesia is made by the legislative and/or executive board which may not always put Islamic Law as the priority has been seen to be vulnerable when constituting something which is also regulated by Islam. This issue is probably the one affecting Waqf land in which Islamic perspective has its own regulations which may not always be on the same line with the national land law in general.

This paper specifically explores whether or not Waqf as constituted by Islam, is allowed to be used commercially in Indonesia. Seeing the purposes of Waqf which should be done according to Islam, this study focuses on a comparative analysis between Waqf from the perspective of Islamic law and the positive law applied in Indonesia, particularly on Waqf land. The objective of this study is to find whether or not, Waqf Land can be used for commercial purposes due to many cases in religious courts in Indonesia regarding this issue.

A comparative result of discussion are also explored to see how the laws (Islamic and Positive) in Indonesia are implemented on a case which refers to Waqf. This study is essential to gather legal considerations regarding Waqf which shall be done according to Islam, while in fact another legal instrument may be there which constitutes other than Islamic Law.

Indonesia itself is chosen as the object of this study considering many aspects which become the reasons of the importance of this study. First, it has to be agreed that Indonesia has the majority of Muslims from the total citizens in the country which demands issues related to Islam to be deeply explored considering the practice of Islam as guaranteed by the constitution of Indonesia. Second, Waqf on land has become a major issue in Indonesia which is essential to be taken into a further-developed study on what and how waqf particularly land as the object to be implemented considering Islamic law as well as positive laws applied in Indonesia.

This study aims to provide a detailed insight through the result of the research to contribute as an academic review to waqf related issues in Indonesia which can add to current existing literature on the same areas. As a state of law which also legally acknowledges Islam, this study becomes important to be brought with a critical analysis on relevant instruments, particularly on waqf which involves properties to perform. This study can become another new literature to on the issue to understand comprehenly on waqf land in Indonesia.

METHODS

A comparative analysis through statute approach on Islamic Law and Land Law in Indonesia is employed as the tool to achieve the objective of this study. In-depth analysis of laws relating to Waqf from both perspective are employed in this study to prove whether or not Waqf land is allowed to be used commercially.

Primary statutes used in this study are the compilation of Islamic Laws which contains of Waqf in its third chapter to find how waqf is constituted in this legal instrument based on Islamic perspective that has been legalized in Indonesia.

Law of the republic of Indonesia No. 5 of 1960 and its related legal instruments are the statutes used to analyse the perspective of national law which is made through a legal drafting process in DPR RI.

Finally, a comparative perspective over the two kinds of legal instruments are analyzed to find whether or not each of the laws has its own regulations and differ to the other, and to find which laws is implemented if the laws are not supporting the same regulations on waqf land in term of commercial use.

DISCUSSION

Waqf as constituted by law no. 41 of 2004

Generally, the definition of waqf as given by article 1 point number 1 of the law no. 31 of 2004 has shown two significant terms that should be explored. The first one is the use of waqf which may be only for a specific period of time. The phrase 'or' as in the article¹ refers to an option that can be chosen or determined on a waqf. Based on its original language, which is Indonesia (*Bahasa Indonesia*), the word 'or' means 'atau' is defined as a conjunction which stipulates several options (Setiawan, n.d.). Furtermore, the use of 'or' has been defined by the Ministry of education and culture through its official website which refers to an optional action that should be decided as offered by the sentence in which 'or' is used (Penggunaan Dan/atau, n.d.). This can be concluded that the use of 'or' as in the article discussed refers to give option to decide whether 'the entire time' or 'specific period of time' will be applied to the waqf object. Explanation as given by the elucidation part of the article itself states the article to be 'clear enough'. This stipulates that the law itself does not determine the agency or the person whose authority to determine the choice of time as given by the article. Government Regulation No. 42 of 2006 (Peraturan Pemerintah No. 42 tahun 2006, 2006) concerning on the implementation of the law no. 41 of 2004 which is made as a legal instrument to implement waqf law, explains further regarding the matter of time from a waqf in which article 18 constitutes that waqf land shall be for the entire time unless being in certain conditions². This can reflect the uncertainty of law as no definitive decision is stipulated in the regulation regarding the period of the use of waqf.

The second term which is used by the article 1 point number 1 of the law is 'public welfare'. Public welfare as mentioned is required to be done based on Shari'ah as clearly stated in the article. The seventh edition of Black's Law Dictionary defines public welfare as 'a society's well being in matters of health, safety, order, morality, economics and politics. This definition stipulates many aspects affected by the term 'public welfare' which can be either one of the matters as stated in the definition, or the combination of some or all of the matters. The use of 'based on shari'ah' which comes following 'public welfare' stipulates that any matter as explained shall be based on Shari'ah. Wide coverage of aspects is provided through the use of the term 'public welfare' which requires further clarity on its implementation, yet this is not determined in the elucidation part of the article.

The two significant terms as discussed in the first and second paragraph of this section has shown the vulnerability of the waqf law no. 41 of 2004 which still applies in Indonesia today. Another regulation of the law also comes as an issue in which article 12 stipulates that *Nazhir* (person or legal entity that is in charge of the property given as waqf) can earn of not more than 10% of the nett profit from managing and developing the waqf object. This remuneration comes as the result of the responsibility of the nazhir in organizing the waqf received. The concept of the remuneration has the potential to reflect financial matter in waqf. If waqf land can also be used to make profit in which a nazhir has a part of, this can be seen as an commercial interest.

Waqf Regulation under the Compilation of Islamic Laws and Islam

Article 215 point number 1 of Compilation of Islamic Laws has shown significant terms used from the ones constituted in waqf law no. 41 of 2004. This article determines that waqf shall only be used for the entire time. There is no option of the duration for a waqf to be employed. Clear and definitive regarding time matter is set in this article which has no potential in reflecting other interpretations which may result in uncertainty of law. Another regulation set by this article is the purpose of waqf which shall be for 'public needs' based on Islam. Merriam-webster dictionary defines 'need' as 'necessary duty: obligation' (Merriam-webster,

¹ See paragraph 2 line 4 in the Introduction which gives option between 'for the entire time *or* specific period of time'

² Article 18 refers to article 17 section 1 part c limits the certified land of Rights to build (*Hak Guna Bangunan*) and Rights to use (*Hak Pakai*) which are obtained from Right-to-manage (*Hak Pengelolaan*) or Freehold (*Hak Milik*) to be used the entire time.

n.d.) which can be concluded as basic part of living. The combination of public and needs in the article stipulates the purpose of waqf shall be the very necessary part of public based on Islam.

There are some articles in Quran, the Holy Book of Islam which contains of actions related to waqf as follows:

Surah Ali Imran (QS 3:92):

Never will you attain the good [reward] until you spend [in the way of Allah] from that which you love. And whatever you spend - indeed, Allah is Knowing of it. (AL'IMRAN (FAMILY OF IMRAN), n.d.)

Surah Al Baqarah (QS 2:267):

O you who have believed, spend from the good things which you have earned and from that which We have produced for you from the earth. And do not aim toward the defective therefrom, spending [from that] while you would not take it [yourself] except with closed eyes. And know that Allah is Free of need and Praiseworthy. (AL BAQARAH (THE COW), n.d.)

The articles of the Quran explicitly declares that a Muslim is advised to spend **in the name of Allah** which researchers of this study believes that the action taken shall be performed in the name of Allah, including waqf itself.

CONCLUSION

It has to be agreed that both laws, law no. 41 of 2004 and the compilation of Islamic laws define and regulate waqf in a different way. The discussion has shown us that law no. 41 of 2004 stipulates several parts which shall be clarified in order to achieve the avoidance of uncertainty of law, while compilation of Islamic laws reflects more clarity on waqf and its Islamic purposes which are based on Islam as a religion.

Commercial use may be employed due to the vulnerability of the law no. 41 of 2004 which is not constituted to guarantee certainty of law in some of the essential articles as discussed. Government Regulation no. 42 of 2006 which is made to support technical procedures of the law does not provide sufficient regulation on waqf. This stipulates a gap compared to the ones constituted under compilation of Islamic laws which is made as a product of Islam which clearly governs waqf under the framework of Islamic purposes only and should be performed in ways as required by Islam.

In summary, current existing legal instruments regulating waqf matters are not sufficient to accommodate waqf on land due to many detailed regulations which are not governed in the laws. This condition may cause different interpretations from related parties on waqf, in which one may take Compilation of Islamic Laws of the reference and basic foundation on performing waqf, while on the other hand, law no. 41 of 2004 jo government regulation no. 42 of 2006 may be used to support certain interests in performing waqf, including land as its object. Consequently, the fact shown by the legal instruments presented in this paper may cause conflict of laws and conflict of interests on which particular law should be followed as the result of relevant laws do not explicitly limit its regulation on certain basis. Eventually, government agency authorized for waqf land matters may define the use of waqf, in which in reality, may not always follow Islamic perspective.

The result of the research has shown that it should be taken into a consideration for future policymakers in creating policy related to waqf, particularly with a clear guidance which consists of comprehensive explanation regarding the use of waqf in the form of regulation to avoid the uncertainty of law or any misinterpretation of the relevant laws itself. This can also contribute as a reference to another countries that regulate waqf and relevant matters to significantly provide clear regulation without any possibility for misinterpretation of the regulation to avoid conflicts between waqf as determined by Quran and positive laws.

REFERENCES

- AL BAQARAH (THE COW), Sahih International. (n.d.). Retrieved December 25, 2016, from Quran.com: <https://quran.com/2:267>
- ALI'IMRAN (FAMILY OF IMRAN), Sahih International. (n.d.). Retrieved December 25, 2016, from Quran.com: <https://quran.com/3:92>
- Kompilasi Hukum Islam. (n.d.). *Kompilasi Hukum Islam*. Republic of Indonesia: Lembaran Negara.
- Merriam-webster. (n.d.). Retrieved December 26, 2016, from www.Merriam-webster.com: <https://www.merriam-webster.com/dictionary/need>
- Penggunaan Dan/atau. (n.d.). Retrieved December 27, 2016, from Badan Pengembangan dan Pembinaan Bahasa, Kementerian Pendidikan dan Kebudayaan: http://badanbahasa.kemdikbud.go.id/lamanbahasa/petunjuk_praktis/638/Penggunaan%20Dan/atau
- Peraturan Pemerintah No. 42 tahun 2006. (2006, December 15). *Pelaksanaan Undang-undang no. 41 tahun 2004 tentang Wakaf*. Jakarta, Republic of Indonesia: Lembaran Negara.
- Setiawan, E. (n.d.). *Kamus Besar Bahasa Indonesia (KBBI)*. Retrieved December 26, 2016, from Kamus Besar Bahasa Indonesia (KBBI): <http://kbbi.web.id/atau>

Undang-undang No. 5 tahun 1960. (1960, September 24). *Peraturan Dasar Pokok-pokok Agraria*. Jakarta, Republic of Indonesia: Lembaran Negara.
Undang-undang Republik Indonesia No. 41 tahun 2004. (2004, October 27). *Wakaf*. Jakarta, Republic of Indonesia: Lembaga Negara.

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