

Transfer of Function of Wakaf Land According To Law No. 41 of 2004 (Case Study In Medan City)

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Info Articles	Abstract
<p>Article History Received : 2018-09-06 Revised: 2018-09-15 Published: 2018-09-29</p> <p>Keywords: <i>Waqf Land, Transfer of Function, Islamic Law, Law No. 41 of 2004, Indonesian Waqf Board (BWI).</i></p>	<p>This study examines the legal concept of waqf, the requirements and pillars of waqf, and the transfer of function of waqf land in Medan City from the perspective of Islamic law and Indonesian positive law, particularly Law Number 41 of 2004 concerning Waqf. Waqf is an Islamic legal institution aimed at maintaining the principal value of assets while utilizing their benefits for religious and public welfare purposes. Differences in scholarly opinions regarding waqf demonstrate the flexibility of interpretation concerning ownership, duration, and management of waqf assets. Indonesian regulations have provided legal certainty through Law No. 41 of 2004, Government Regulation No. 42 of 2006, and the Compilation of Islamic Law. This research applies an empirical juridical method through analysis of legislation, legal documents, and cases of waqf land conversion in Medan City, including Toyyibah Mosque, Raudhatul Islam Mosque, Al-Falah Mosque, and Amal Silaturrahim Mosque. The findings indicate that conversion of waqf land is legally permissible only for public interest purposes, provided it complies with spatial planning regulations, receives approval from the Minister of Religion and the Indonesian Waqf Board (BWI), and ensures replacement assets possess equal or greater value. The study also finds that not all conversions comply with applicable laws, as seen in the Toyyibah Mosque case, where conversion relied solely on a local religious decree without fulfilling statutory procedures. Therefore, strict supervision and compliance with legal mechanisms are essential to preserve the sanctity, continuity, and social function of waqf assets for public welfare and sustainable religious development.</p>

I. INTRODUCTION

In Islam, waqf is included in the category of community worship, the law of which is sunnah. The practice of waqf is a great practice because this practice cannot stop or lose its reward if the person dies, so the reward for the practice of waqf will continue to flow and will still be received by the wakif even though he has died.

Throughout Islamic history, waqf has played an important role in development of religious, social, and economic activities. Among the programs funded by waqf proceeds are the construction of mosques, orphanages, book writing, book translation, and book printing. Waqf not only supports the development of science but also provides facilities in the health sector. For example, the construction of hospitals,

development of the pharmaceutical and chemical industry which functions to improve public health (Uswatun 2011).

Waqf assets can be used for religious facilities and activities, educational facilities and activities, scholarships and health, assistance for the poor, abandoned children and orphans, improving the economy of the community and advancing general welfare (Suhrawardi, 2010). In the Islamic economic system, waqf has not been explored to its full potential, even though waqf has great potential as an instrument to empower the economy of the Muslim community, therefore waqf which is intended to empower the community is a continuous charity whose rewards are continuous, even though the waqif (the person who makes the waqf) has died.

The practice of waqf in Indonesia has existed since the arrival of Islam. However, its implementation was limited to verbal expressions. Consequently, in many cases, waqf were not properly maintained or utilized, resulting in many being neglected, displaced, or illegally transferred to third parties. Indonesia has a specific law explaining waqf, namely Law No. 41 of 2004 concerning Waqf. Article 40 explains that waqf assets that have been donated are prohibited from being used as collateral, confiscated, donated, sold, inherited, exchanged, or transferred in any other form of transfer of rights.

However, waqf land exchanges are exempted for public purposes after obtaining permission from the Minister of Religious Affairs through a recommendation from the Indonesian Waqf Agency. Waqf land exchanges must comply with the NJOP (Value-Based Land Value) and must be better than the original land, or at least equal to it.

II. RESEARCH METHODS

This research uses an empirical juridical method with a qualitative approach, examining the implementation of waqf regulations in society, particularly regarding the transfer of function of waqf land in Medan City. Data were obtained through primary sources, including observations, interviews, and field findings related to waqf land conversion, as well as secondary sources consisting of legislation, legal documents, books, journals, and literature concerning waqf law in Islam and Indonesian positive law. The research applies descriptive-analytical techniques to analyze the conformity between legal provisions and their implementation in society. The legal materials analyzed include Law No. 41 of 2004 concerning Waqf, Government Regulation No. 42 of 2006, the Compilation of Islamic Law, and other relevant regulations.

III. RESULTS AND DISCUSSION

A. Definition and Legal Basis of Waqf

The waqf institution is an institution that originates from Islamic law, therefore when discussing the problem of waqf In general, and land endowments in particular, it is impossible to separate ourselves from discussions about the concept of waqf according to Islamic law. However, in Islamic law, there is no single concept of waqf, as there are many very diverse opinions (Rachmadi, 2013).

The word "Wakaf" or "Waqf" comes from the Arabic word "Waqafa". The word "Waqafa" means "to hold" or "to stop" or "to stay in place" or to remain standing". The word "Waqafa-Yaqifu-Waqfan" has the same meaning as "Habasa-Yahbisu-Tahbisan". The word al-Waqf in Arabic has several meanings: To hold, to hold assets to be donated, not to transfer ownership.

According to the syara', holding certain movable assets that can be utilized without the object being lost and the right to use the assets to be used for a good cause is terminated, as a form of getting closer to Allah Ta'ala (Ibnu Qasim, 2000).

However, Islamic jurists differ in their views on the more detailed definition of waqf. Consequently, they also differ in their views on the nature of waqf itself, both in terms of its temporal continuity (pledge), the waqf object (the waqf object), and the empowerment and utilization patterns of waqf assets. Therefore, the views of these scholars related to these discourses will be outlined below:

1) According to Imam Abu Hanifah

Holding assets by determining the law of ownership of assets remains in the possession of the wakif, what is donated is the benefit for the good or public interest.

2) Imam Malikiyah

A waqf is the act of a waqif (donor) who allocates the benefits of his/her assets for the benefit of the waqf recipient, even if the proceeds are in the form of wages, or uses them for other uses, such as cash. A waqf can be made with the

owner's consent for a specified period of time, according to the owner's wishes (Burhanuddin, 1985).

3) Imam Shafi'i

Waqf is holding assets that can be used for profit while keeping their value intact and the item is released from the owner of the waqf, and is used for something that is permitted (Az-Zuhaili, 1985).

4) According to Hanabilah

The owner retains his property where he has the authority to control it, the property can be used for its benefits/results and is not exhausted, then all rights to control the property are cut off, both from him and others. The results of the property are retained for the purpose of good deeds in order to get closer to Allah (Syarbini, 1958).

5) Dhahiri

Al-muhalla also discusses waqf. Logically, waqf is the same as freeing or emancipating slaves, known as al-'itq. According to them, waqf that is permissible and valid according to law is limited, namely, objects that may be donated are buildings, land, land for recreation known as arhal, mushaf, books, slaves, weapons, or other objects worn for sabilillah or jihad like armor (al-adra'), or silah. Likewise, the only vehicles that can be donated are which can be used in war, namely al-qira' (a horse to ride for war).

The above opinion, particularly regarding the permissibility of donating war horses as a riding horse, would present difficulties if applied in today's context. For example, donating war vehicles other than riding horses is invalid. Yet, today's war vehicles use engines and technology with far greater capacity and utility than horses.

6) Imamiyah

The principle of waqf in the Imamiyah school of thought is "Retain the principal and donate the benefits" accompanied by the wakif's pledge clearly and firmly, such as by using the word waqiftu. If other words are used, they should be

accompanied by an upward sign indicating the meaning of waqf or an indication (qarinah) which clearly shows the meaning of waqf. Waqf is valid if there has been a transfer of objects waqf to the recipient, namely when acceptance or acceptance occurs. However, acceptance can also be interpreted as "control over the waqf object." The forms of waqf include everything that brings to the benefit of the people. Meanwhile, the waqf manager or nazir must be an adult according to the law. If the waqf is handed over to a minor, the nazir is the child's guardian. It is required that the waqf must be direct (tanziz) and not may be postponed (mustabal).

Muhammad Asy-Syarbini al-Katib believes that what is meant by waqf is: Holding assets that allow them to be utilized is accompanied by the immutability of the substance of the object by severing (cutting) the tasarruf (classification) in the custody of the mushrif (manager) who is permitted to exist (Suhendi, 2008).

Ahmad Azhar Basyir is of the opinion that what is meant by waqf is holding property that can be used for benefits and is not destroyed when, and for permissible use, and is intended to gain Allah's pleasure.

Idris Ahmad is of the opinion that what is meant by waqf is to retain property from which the benefits can later be taken, its substance (ain) remains eternal and it is given to places determined by the syara', and it is prohibited to freely dispose of the objects used.

The diversity of waqf formulations presented by scholars demonstrates that waqf has many meanings. Indonesia has laws governing waqf. PP.No. 28 of 1977 Article 1 paragraph (1) Waqf is a legal act by a person or legal entity that separates part of their wealth in the form of land and institutionalizes it forever for the purposes of worship or other public needs in accordance with the teachings of Islam.

In Presidential Instruction No. 1 of 1991, Compilation of Islamic Law Book III concerning

waqf, Chapter I, Article 215 Waqf is a legal act by a person or group of people or legal entity that separates part of their property and institutionalizes it forever for the purposes of worship or other public needs in accordance with Islamic teachings (Pagar, 2015).

Law no. 41 of 2004 Waqf is a legal act of a waqif to separate and/or hand over part of his property to be used forever or for a certain period of time according to its interests are for the purposes of worship and/or general welfare according to sharia.

PP No. 42 of 2006 concerning the Implementation of Law no. 41 of 2004 regarding waqf Article 1 paragraph (1) Waqf is a legal act of a waqif to separate and/or hand over part of his property to be used forever or for a certain period of time according to his interests for the purposes of worship and/or general welfare according to Sharia.

From several definitions of waqfabove, can the scope of waqf is drawn, including:

- 1) Property belonging to a person or group of people.
- 2) These assets are eternal in substance, they do not run out when used.
- 3) The ownership of the property was released by its owner.
- 4) Treasure Which released ownership the, No Cangiven as a gift, inherited, or bought and sold. The benefits of these assets are for the public interest in accordance with Islamic teachings (Rofiq, 1998).

Meaning: Umar obtained land in Khaibar, then he asked the Prophet, saying: O Messenger of Allah, I have obtained land in Khaibar which is of high value and I have never obtained anything of greater value than it. What did you order me to do? The Messenger of Allah said: "If you want, keep the source and give it in charity for its benefit or usefulness." Then Umar gave it in charity, it cannot be sold, given away, or made into an inheritance. Omar give alms to the poor, to the

family, to freed slaves, to those who fight in the way of Allah, travelers and guests. However, it may be used in an appropriate way by those who care for it, such as eating or feeding friends without making it a source of income. Rawi said, in the hadith of Ibn Sirrin it is said, without keeping it as property. (HR. Bukhori, No. 2737).

Based on the hadith containing the waqf of Umar ra, the following provisions can be obtained:

- 1) Waqf assets must remain permanent (cannot be transferred to another person), whether sold, donated or inherited.
- 2) Waqf assets are independent of the ownership of the person who donated them.
- 3) The purpose of waqf must be clear and include good deeds according to Islamic teachings.
- 4) Waqf assets can be delegated to a supervisor who has the right to participate in the waqf only to meet needs and not to be excessive.
- 5) Waqf assets can be in the form of land and so on, which are long-lasting and not destroyed when used.

B. Conditions and Pillars of Waqf

There are four pillars for waqf, namely: (al-Baqri, 1989)

- 1) Wakif (person who makes a waqf).
Waqifis the owner of the assets who donates his assets. The requirements for a Wakif (person who donates) are to have legal competence or *kamalul ahliyah* (legal competence) in spending his assets. The competence to act here includes four (4) criteria, namely:
 - a. Independent
 - b. Common Sense
 - c. Adult (Public Age)
 - d. Not under pardon (wasteful/negligent)
- 2) Endowed assets
Endowed assets are considered valid if they meet the following conditions:
 - a. The assets donated are not damaged or used up (they retain their essence) when they are taken for use.

- b. The form and boundaries must be clear. Therefore, it is not valid to donate property that is not clearly defined. This requirement is intended to avoid future disputes after the property is donated (Djunaidi, 2005).
 - c. Waqf assets, as mentioned above, must truly belong to the waqif. Assets that are owned by others can also be waqfed, just as they can be donated or leased (according to the Hanafi school of thought, waqf is for the benefit).
 - d. Assets donated as waqf can be either fixed assets (such as land) or movable assets. In movable waqf (such as money), the security of the capital must be maintained to allow it to grow and generate profits, which can then be used for the waqf's intended purpose.
- 3) Waqf recipients
 - 4) Shighat or pledge

A pledge is a statement of the will of the waqif to donate his property. (Article 215 paragraph (3) KHI). (Pagar, 2015).

Article 5 of Government Regulation Number 28 of 1977 in conjunction with Article 218 of the Compilation states:

The party who donates his land must pledge his will clearly and emphatically to Nazir in front of the Official Who Makes the Waqf Pledge Deed as intended in article 9 paragraph (2) who then sets it down in the form Waqf Pledge Deed, witnessed by at least 2 (two) witnesses.

In certain circumstances, deviations from the provisions referred to in paragraph (1) may be implemented after first obtaining approval from the Minister of Religion (Rofiq, 1998).

Every statement/pledge of endowment is carried out by the waqif to *nadzirin* front of the Waqf Pledge Deed

Making Officer (PPAIW) witnessed by 2 witnesses. The Waqf Pledge Deed Making Officer (PPAIW) based on the Minister of Religion Regulation Number 1 of 1979, the Head of the Religious Affairs Office (KUA) is appointed as PPAIW.

Nazir Waqf. Nazir is a group of people or legal entities who are entrusted with the task of maintaining and managing waqf objects. Article 215 paragraph (5) KHI (Pagar, 2015).

Types of Waqf

1) Expert

Expert waqf is also called family waqf or special waqf. The meaning of expert waqf is waqf which is addressed to certain people, someone or say, either the waqif's family or other people. Waqf like this is also called *Dzurri waqf*.

2) General (Khairi Endowment)

Namely waqf which from the beginning was intended for public interests and was not directed to certain people. This *khairi waqf* is truly in line with the practice of waqf which is highly recommended in Islamic teachings, where it is stated that the rewards will continue to flow until the *wakif* dies, as long as the assets can still be used.

3) Syuyu' Endowment

Waqf *syuyu'* is a waqf which is carried out through mutual cooperation, meaning that several people group together (join together) to donate a piece of land (property) jointly and in association.

C. Transfer of Function of Waqf Land in Medan City According to Law no. 41 of 2004 concerning Waqf

The vastness of Medan City accompanied by the increasingly growing progress in Medan City and the increasing number of buildings, shophouses and housing to be built in the city center, means that something that cannot be

avoided is that waqf land that already has a waqf pledge and certificate is also being converted.

The conversion of waqf land in Medan is due to social changes within the community, encompassing both historical space and time. The spatial dimension refers to the region where the conversion of waqf land occurs.

The conversion of function that occurred in the city of Medan is the Toyyibah Mosque on Multatuli Street, Hamdan Village, Medan Maimun District. Raudhatul Islam Mosque on Yos Sudarso Street/Adam Malik Street, Warning Alley, Environment XI, Silalas Village, West Medan District. Al-Falah Mosque Jl. Cemara No. 287 Link. V, Pulo Brayan Village, Bengkel Baru, East Medan District, Medan City. And the Amal Silaturrahim Mosque in Angrek Alley/Melur Alley, Sukaramai Village, Medan Area.

In the provisions of Article 40 of Law No. 41 of 2004 concerning Waqf, it is stated that: "Waqf assets that have been donated are prohibited from:

- 1) Used as collateral,
- 2) Confiscated,
- 3) Granted,
- 4) For sale
- 5) Inherited,
- 6) Exchanged, or
- 7) Transferred in the form of other transfer of rights.

The provisions in Article 40 letter f (exchange) are exempted if the waqf assets that have been donated are used for the public interest in accordance with the general spatial planning (RUTR) based on the provisions of applicable laws and regulations and do not conflict with sharia. Implementation of these provisions may only be carried out after obtaining written permission from the Minister with the approval of the Indonesian Waqf Board (Undang-undang No.41 Tahun 2004).

Apart from the considerations as referred to in Article 41 above, permission for changing the

status/exchange of waqf assets can only be granted if the replacement assets have a certificate or proof of legal ownership in accordance with statutory regulations (Article 49 paragraph 3) of the Government Regulation of the Republic of Indonesia Number 42 of 2006 concerning the Implementation of Law Number 41 of 2004 concerning Waqf:

Apart from the considerations as referred to in paragraph (2), permission to exchange waqf assets can only be granted if:

- 1) The exchanger's assets have a certificate or proof of legal ownership in accordance with statutory regulations; and
- 2) The value and benefits of the exchange assets must be at least the same as the original waqf assets.

The value and benefits of the exchange assets as referred to in paragraph (3) letter b are determined by the regent/mayor based on the recommendations of the assessment team whose members consist of the following elements:

- 1) District/city regional government;
- 2) District/city land office;
- 3) Indonesian ulema council (mui) district/city;
- 4) District/city office of the department of religion; and
- 5) The nazhir of the waqf land in question.

Article 50

The value and benefits of exchange assets as intended in Article 49 paragraph (3) letter b are calculated as follows:

- 1) The exchange assets have a Taxable Object Sales Value (NJOP) that is at least the same as the NJOP of the waqf assets, and
- 2) Exchange assets are located in strategic areas and are easy to develop.

Article 51

- 1) Exchange of waqf assets whose status will be changed is carried out as follows:
- 2) Nazir submits an exchange request to the Minister through the local District Office of

- Religious Affairs, explaining the reasons for the change in status/exchange.
- 3) The Head of the District KUA forwarded the request to District/city Department of Religion Office;
 - 4) The Head of the Regency/City Department of Religion Office, after receiving the application, forms a team with the composition and purpose as in Article 49 paragraph (4), and then the local regent/mayor issues a Decree;
 - 5) The Head of the Regency/City Department of Religion Office forwards the application, accompanied by the results of the team's assessment, to the Head of the Provincial Department of Religion Regional Office and then forwards the application to the Minister; and
 - 6) After obtaining written approval from the Minister, the exchange can be carried out and the results must be reported by Nazhir to the land office and/or related institutions for further registration.
- The Indonesian Waqf Board (BWI), which grants approval and/or permission for changes to the designation and status of waqf assets, does not grant it immediately. This means that the BWI takes numerous steps to grant approval or permission for changes to the designation of waqf assets.
- The Indonesian Waqf Board (BWI) checks documents for the application process for the exchange/change of waqf assets, which include:
- 1) Letter application change status / swap exchange signed by Nazhir;
 - 2) Power of attorney from Nazhir (if point a is not fulfilled);
 - 3) Letter of support/statement of approval of Mauquf Alaih/Wakif;
 - 4) Photocopy of the ID card of the Nazhir/Nazhir's Power of Attorney/Mauquf Alaih/Wakif who signed;
 - 5) Nazir's work plan after status change / exchange
 - 6) A statement that the old waqf assets will not be used for things that are contrary to Islamic law;
 - 7) Recommendation from the Head of the District Office of Religious Affairs (original document)
 - 8) Recommendation Head Office Department Religion district/city (original document)
 - 9) Recommendation from the Regency/City Spatial Planning/Settlement Service (original document)
 - 10) Regent/Mayor Recommendation (original document)
 - 11) Recommendation from the Head of the Regional Office of the Ministry of Religion of the Province (original document)
 - 12) Regent/Mayor's decision letter regarding the formation of a team to assess the balance of changes in the exchange status of waqf assets (original document)
 - 13) Minutes of the meeting of the team assessing exchange assets for waqf assets
 - 14) Regional spatial planning/detailed spatial planning
 - 15) Letter of request for consideration from the Directorate General of Islamic Community Guidance, Ministry of Religion
 - 16) Disposition of the chairman of BWI.
- The Indonesian Waqf Board (BWI) carries out an assessment of status changes, including:
- 1) Reason for change of status/exchange of waqf assets;
 - 2) Current condition of waqf assets;
 - 3) Utilization of waqf assets;
 - 4) Area of waqf property
 - 5) NJOP of waqf assets
 - 6) Market value of waqf assets;
 - 7) The purpose of waqf;
 - 8) Productive assessment of waqf assets (including location and prospects, field visits can be carried out if necessary);
 - 9) Condition of the exchanger's property;
 - 10) Ownership status of the exchanger's assets

- 11) The extent of the exchange property
- 12) NJOP of exchange assets
- 13) The market value of the exchanger's assets;
- 14) Productive assessment of the exchange assets (including location and prospects, field visits can be conducted if necessary).

So in accordance with the applicable laws and regulations, the conversion of mosques in Medan City such as Toyyibah Mosque, Raudhatul Islam Mosque, Al-Falah Mosque and Amal Silaturrahim Mosque, only Toyyibah Mosque is the one whose conversion process is not in accordance with the Law. The conversion carried out is only based on the fatwa of the Medan City MUI based on Decree-Number 192/Kep/MUI MDN/IV/2007 dated April 26, 2007, the MUI fatwa cannot be used as a guideline for carrying out the conversion of waqf functions, because the MUI is only a team formed by the Mayor/Regent to conduct a study on the waqf land to be converted.

The Raudhatul Islam Mosque is legal according to the Law for the conversion carried out. Because there is already a permit from the Minister of Religion. The Al-Falah Mosque was converted due to the widening of Cemara Road. The Amal Silaturrahim Mosque was converted due to the rejuvenation carried out by Prum Prumnas, the location of the mosque is land owned by Prum Prumnas.

The conversion of land, particularly waqf land, must be for the public interest based on the spatial planning plan (RUTR) that does not conflict with sharia, and its value must be better than the previous one or at least in accordance with the (NJOP). The public interest here must be in accordance with Presidential Regulation Number 36 of 2005 concerning land acquisition for development implementers for the public interest, article 5:

Development for the public interest carried out Development for the public interest carried out by the Government or Regional Government as referred to in Article 2, which is subsequently

owned or will be owned by the Government or Regional Government, includes:

- 1) Public roads and toll roads, railways (above ground, above ground, or underground), water channels drinking/clean water, drainage and sanitation
- 2) Reservoirs, dams, irrigation dams and other irrigation structures
- 3) Ports, airports, train stations and terminals
- 4) Public safety facilities, such as embankments to prevent flooding, lava flows and other disasters
- 5) Garbage dump
- 6) Nature reserves and cultural reserves
- 7) Generation, transmission, distribution of electric power.

IV. CONCLUSION AND SUGGESTIONS

A. Conclusion

Based on the research findings, waqf is an Islamic legal institution intended to preserve the principal of assets while distributing their benefits for worship and public welfare. Indonesian law has regulated waqf comprehensively through various legal instruments to ensure legal certainty in management and protection of waqf assets. The transfer of function of waqf land is permitted only under specific conditions, particularly for public interest, compliance with spatial planning regulations, and approval from authorized institutions. In Medan City, several waqf land conversions have occurred; however, not all have fulfilled legal requirements. The conversion of Toyyibah Mosque was found inconsistent with statutory procedures, whereas the conversion of Raudhatul Islam Mosque complied with applicable regulations. Therefore, legal compliance is essential to maintain the sustainability and social function of waqf assets.

B. Suggestions

The government and related institutions should strengthen supervision over the

management and transfer of waqf assets to prevent unlawful conversions. Public awareness regarding waqf regulations also needs improvement through legal education and socialization programs. Furthermore, coordination between the Ministry of Religion, Indonesian Waqf Board (BWI), local governments, and waqf managers (nazhir) should be optimized to ensure every conversion process follows legal procedures and protects the original purpose of waqf for religious and public welfare interests.

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