Research Article

THE URGENCY OF APPOINTING A NOTARY AS THE OFFICIAL FOR CREATING WAQF PLEDGE DEEDS (PPAIW) FOR SHARES BASED ON LAW NUMBER 41 OF 2004 ON WAQF

Abdul Wahab*, Nandang Sambas, Yeti Sumiyati

Faculty of Law, Islamic University Bandung, Indonesia

ABSTRACT

The object of waqf known to the public up to this point is still synonymous with immovable property (fixed assets). In Indonesia, regulations related to waqf are governed by several laws, including Law No. 41 of 2004 on Waqf. However, there are no specific regulations regarding share waqf. Additionally, concerning the creation of share waqf pledge deeds by a notary as the PPAIW, the regulations on waqf pledges stipulated in Article 27 of the Minister of Religious Affairs Regulation No. 73 of 2013 on Procedures for the Waqf of Immovable and Movable Assets Other than Money state that a notary is appointed as PPAIW by a Ministerial Decree. To be appointed by the Minister as PPAIW, one must meet the requirements of being a Muslim, trustworthy, and certified in waqf competence by the Ministry of Religious Affairs.

These requirements pose a barrier for notaries to become PPAIW because there has been no socialization and implementation of the competence certification requirement. Moreover, the requirement to be Muslim means that not all notaries can become PPAIW. The aim of this study is to understand the implementation of regulations regarding notaries as PPAIW in the creation of Waqf Pledge Deeds. This research is a type of normative juridical research, with a sociological juridical approach. The findings indicate that the regulation and implementation of notaries as PPAIW for shares are not yet clear and firm, necessitating a broader legal review in relation to the principle of the benefits of share waqf for the community.

Keywords: Company, Notary, PPAIW, Share waqf

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Introduction

Waqf is an Islamic philanthropy\(^1\) that needs to be empowered for the benefit of the ummah. In Islamic law, waqf is categorized as social worship. There are many evidences about waqf sourced from the Quran, which scholars use as the legal basis for the practice of waqf, which is considered a continuous charity (amal jariyah), as evidenced by the verse in Al-Quran Surah Al-Baqarah, verse 267:

\[ \text{"O believers! Donate from the best of what you have earned and of what We have produced for you from the earth. Do not pick out worthless things for donation, which you yourselves would only accept with closed eyes. And know that Allah is Self-Sufficient, Praiseworthy."} \]

This verse serves as motivation for a Muslim to engage in waqf because Allah greatly loves His servants who sincerely give a portion of their wealth for the purpose of goodness. Waqf, by another term, has been known since before Islam, as evidenced by special places established for worship activities. This practice aligns with the essence of waqf \[^1\]. There are many forms of assets other than money that can be objects of waqf, including corporate shares.

a. Philosophical Perspective on Waqf:

Philosophically, there are differing opinions on whether the management and development of waqf fall within the realm of ta’abudi\[^2\] or ijtihadi\[^3\]. Those who believe that waqf falls under the ta’abudi realm tend to adhere to classical fiqh understandings of waqf \[^2\], which leads to actions such as making waqf legal transactions verbally based on mutual trust without following administrative procedures for immovable properties intended for waqf. Meanwhile, movable goods are not commonly used as waqf objects because they have not been fully accepted due to concerns that their physical form might be depleted \[^3\]. This is because waqf assets, once donated, are considered the property of Allah, intended for the public, and thus cannot be sold, mortgaged, or pledged, nor can they be exchanged for any reason \[^4\]. Others argue that the regulation of waqf management and development in Islamic law falls within the ijtihadi realm, as there are no explicit Quranic verses or Hadiths that clearly explain the doctrine of waqf.

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\(^1\) The term philanthropy comes from the Greek words philos (love) and anthropos (human). Literally, philanthropy is a conceptualization of the practice of giving, service and association voluntarily to help others in need, as an expression of love. In general, philanthropy is defined as voluntary action for the public interest. In Islam, the concept of philanthropy is known as zakat, infaq, alms and waqf.

\(^2\) Ta’abudi is the teachings contained in the Shari’ah that must be implemented as they are, without being interfered with by human reason and apply universally.

\(^3\) The problem of ijtihadiyah is a problem that there is no shari’ah (firm) text that shows it. The scope of ijtihad is a text that is dzanniyu al-wurud wa al-dilalah (a text whose source is still dzanni and also the meaning content indicated by the text is not clear), a text that is qat’iyu al-wurud wa dzanniyu al-dilalah (a text whose source is qat’i but the dilalah is not yet clear) or dzanniyu al-wurud wa qat’iyu al-dilalah (the text that comes zanni even though the dilalah is clear). Ijtihad is also needed in events where there is no text, in this case the mujtahid has a free field. They can accommodate new problems to find legal solutions using the qiyas, istihsan, istishhab, urf and maslahatul murlah methods.

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for the possibility of new developments both in concept and in practice [5].

The purpose of waqf, which is utilized for the welfare of the ummah, aligns with Jeremy Bentham, who first developed the theory of utility or utilitarianism as a reaction against the concept of natural law in the 18th and 19th centuries. Bentham criticized the concept of natural law, considering it vague and inconsistent. He introduced a periodical movement from the abstract, idealistic, and apriori to the concrete, materialistic, and fundamental. One of the purposes of the law is to provide utility to achieve happiness [6]. The measure for determining the goodness or badness of an action is the extent to which it produces happiness [7]. Bentham believed that utilitarianism should be applied quantitatively because the quality of pleasure is always considered the same. He also defined utility as something that can provide benefits, advantages, pleasure, and happiness, as well as something that can prevent harm, displeasure, evil, or unhappiness. This value exists at the individual level, generating individual happiness, and at the community level, generating communal happiness [8]. For Bentham, the morality of an action is determined by its utility in achieving the happiness of all people, not just the selfish happiness of the individual as in classical hedonism [9]. Utilitarianism is a view that explains where actions need to be evaluated based on the benefits and costs imposed on society. The issue faced is how to evaluate public policies, that is, policies that have moral consequences for the interests of many people.

Bentham then stated that the most objective basis is to see whether a particular policy or action provides benefits or useful outcomes or, conversely, harm to the people involved. Bentham did not recognize individual human rights; therefore, he placed justice only as a subordinate to utility. This utility theory can be used as a reference by the government in every policy it issues. Government policies are issued to provide benefits to the community with the aim of promoting public welfare. Each country has different policies based on its situation and conditions. Government policy is understood as a series of actions issued by the government that have essential impacts on many people, meaning that government policy consists of various structured actions or activities by the government, and these activities or actions affect many people. Every policy issued by the government will have an impact on society. These impacts can be either positive or negative. The government is expected to provide positive impacts to society through its policies by considering the certainty, utility, and justice of each policy, and by discussing it in-depth to minimize negative impacts when issuing a policy. Bentham described several factors that determine the level of pleasure and pain arising from an action, namely intensity, duration, certainty, and propinquity of the feelings of pleasure or pain. For example, the government’s authority in issuing policies such as the Indonesian government’s policy on share waqf other than money.

b. Waqf from a Juridical Perspective;

In addition to the Officials for Creating Waqf Pledge Deeds (PPAIW) already regulated, Article 37 paragraphs (4) and (5) of Government Regulation Number 42 of 2006 (PP 42/2006) also set conditions for notaries to become Officials for Creating Waqf Pledge Deeds. Article 37 paragraphs (3) and (4) further clarify that wakif can create their waqf pledge deeds before a notary, and it does not have to be done before the Office of Religious Affairs (KUA).

As stated in the provisions of Article 15 paragraph (3) of the Notary Office Law, a notary has other authorities regulated by legislation. The notary as an Official for Creating Waqf Pledge Deeds (PPAIW) is administratively very important and strategic for securing waqf assets from a legal standpoint, particularly from disputes and irresponsible actions by third parties. Therefore, PPAIW must always act faithfully in performing their duties. This provision is explained in Article 27 of the Minister of Religious Affairs Regulation Number 73 of 2013 on Procedures for Waqf of Immovable and Movable Assets Other than Money, stating that a notary is appointed as PPAIW by a Ministerial Decree. The requirements for a notary to be appointed as PPAIW are:

a) Being a Muslim;

b) Being trustworthy;
c) Holding a waqf competency certificate from the Ministry of Religious Affairs.

Not all notaries can automatically become Officials for Creating Waqf Pledge Deeds; only those who apply to be appointed as PPAIW by submitting an application to the Minister first. The requirement to have a competency certificate and the lack of socialization about this, as well as the requirement to be a Muslim, create specific barriers to becoming PPAIW. Authentic deeds as a product of a notary in court are categorized as documentary evidence (Article 1 number 1 of the Notary Office Law). In civil cases, authentic deeds issued by a notary are binding and compelling evidence, meaning the judge must accept these authentic deeds. This relates to the existence of the waqf pledge deed. The authority to create authentic deeds is based on the request of the parties, as long as it does not conflict with Article 1320 of the Civil Code. Based on this authority, a notary is required to provide guarantees of legal certainty and professional services.

One of the essential elements in waqf is the waqf pledge, which is a declaration by the person making the waqf (wakif) to the waqf manager (nazir) about their intention to donate their property for specific purposes. Waqf without a waqf pledge would result in the non-fulfillment of the waqf element. If this element is not fulfilled, then legally, the waqf can be considered non-existent. Therefore, Law Number 41 of 2004 on Waqf regulates that the Official for Creating Waqf Pledge Deeds (PPAIW) is an authorized official appointed by the Minister of Religious Affairs of the Republic of Indonesia to create the Waqf Pledge Deed (AIW) by a notary. In practice, there are still very few notaries who have the authority as Officials for Creating Waqf Pledge Deeds because no notary has the PPAIW certification yet. The rules of Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Notary Office, which have been in effect, have not been properly implemented according to the applicable legal regulations.

Regarding the waqf of company shares, the existing regulations have not yet provided legal certainty. Article 60 paragraph (1) of the Company Law (UUPT) states that shares are movable property. Ownership of shares as movable property grants property rights to the owner. These rights can be upheld against anyone. The full transfer of ownership of shares is a characteristic of corporations that distinguishes them from civil partnerships and other similar legal entities. The transfer of shares can also be carried out for waqf purposes. Article 16 of the Waqf Law and Article 21 of the Waqf Government Regulation state that shares are included in the category of movable property that can be donated as waqf. Article 1 point 4 of the Waqf Law states that a Nazir is a party who receives waqf property from the wakif to manage and develop it according to its intended purpose. Furthermore, Article 11 of the Waqf Law states that the Nazir has the duty to record the administration of waqf property, manage and develop the waqf property according to its purpose, function, and allocation, and also to supervise and protect the waqf property, then report the implementation of these duties to the Indonesian Waqf Board.

c. From a Sociological Perspective;

In a sociological context, waqf is considered part of the wealth resources that can be utilized as a means to carry out activities for the common good, both in terms of worship (ibadah mahdah) and social welfare [10]. Therefore, from a legal sociology perspective on waqf, it can be understood that the legal actions of society, which have long been practiced by entrusting property to individuals or groups as a form of social concern for the general welfare of the community. The legal functions within society can be seen as [11]:

a) Legal function as social control within society;
b) Legal function as a tool for transforming society;
c) Legal function as a symbol of knowledge;
d) Legal function as a political instrument;
e) Legal function as an integration tool.

Based on the above description, the problem statements are defined as follows:

1. What is the philosophical basis of stock waqf as a part of waqf assets, in addition to money, for the benefit of society?
2. What is the role of a notary and the implementation of the provisions regarding the recipient of stock waqf in changing the ownership status of shares in a corporation?

**Research Method**

This research is of a normative juridical type, thus employing three research methods: the statute approach, the conceptual approach, and the historical approach. In collecting legal materials, the author uses methods of classification, categorization, and inventory of legal materials used in analyzing and solving the formulated problems. The aim of this research is to find the implementation of legal certainty in the regulation of stock waqf as part of waqf assets, in addition to money, within a private limited company, carried out by a notary who has the authority granted by legislation, namely as an official authorized to make waqf declarations. The implementation of the new authority of the notary as an official authorized to make waqf declaration deeds in the creation of waqf declaration deeds has not yet been fully realized. This research uses a qualitative research type with a sociological juridical approach.

**Result and Discussion**

In this discussion, among the various functions of law as mentioned, the author only considers two aspects related to the act of waqf, namely:

a. The Function of Law as Social Control

The function of law as social control is the normative juridical aspect of social life in society, or it can be called the defining agent of deviant behavior and the consequences of prohibitions, commands, punishment, and compensation [12]. As a tool for social control, the law is considered to function to establish good and bad behavior or behavior that deviates from the law, and legal sanctions against individuals who exhibit bad behavior [11].

b. The Function of Law as a Tool to Change Society

The function of law as a tool to change society, as mentioned by Roscoe Pound, refers to law as a tool of social engineering. This concept suggests that societal changes occur when an individual or a group gains the trust of society as leaders of social institutions [11]. Therefore, when correlated with the issue of waqf, it is hoped that this legal function can synergize effectively. Philosophically, waqf can be understood as outlined in Law Number 41 of 2004, which explains that waqf is a legal act that has long existed and been practiced in society, though its regulations are incomplete and still scattered across various laws and regulations. Socially, waqf plays a strategic role amidst pervasive poverty. Continuous awareness efforts are necessary to encourage property owners to increase their socially-oriented religious activities. Waqf contributes solutions to economic problems within society. By raising awareness of such social problems, potential donors are expected to be more motivated to donate part of their assets as waqf for the benefit of the general public. The social function of land waqf implies that the use of someone’s land ownership rights must benefit society, directly or indirectly. Similarly, stock waqf has an economic social function because its profits are used for social and economic purposes within the community.

Law Number 41 of 2004 on Waqf defines waqf as “a legal act by the waqif to separate and/or transfer a portion of their property to be used permanently or for a certain period in accordance with its purpose for religious and/or public welfare purposes according to Shariah” [13]. The implementation of stock waqf can be done within a closed corporation by individual shareholders as legal entities or by corporate shareholders, and stock waqf can also be implemented in publicly traded companies. Broadly, there are two models [14] in public companies:

1. Waqf from Shareholder Profits: This model involves a percentage of the profits from Shariah-compliant investments being directly deducted from the profits of selling Shariah-compliant shares. An institution is involved to deduct the profits, which are then transferred to the waqf management institution (nazhir). The nazhir converts these profits into productive assets or directly into social assets. Essentially, this model is a form of cash waqf.

2. Waqf from Corporate Profits: This model involves the corporation itself deducting a portion of its profits for waqf purposes. The nazhir then manages these funds as per the waqf regulations.
2. Waqf using Shariah-compliant Shares as Objects: In this model, Shariah-compliant shares purchased by investors are handed over to an investment management institution. The profits generated from managing these shares are given to the waqf management institution (nazhir), which then converts these profits into productive or social assets.

However, there are legal conflicts that undermine legal certainty. Regulatory-wise, neither Law Number 8 of 1995 on Capital Markets nor Law Number 40 of 2007 on Limited Liability Companies includes provisions for the transfer of shares due to waqf. Proof of waqf ownership can be seen from documents issued by the state and/or nazhir indicating that the waqf object has been converted into waqf property. With technological advancements, share ownership proof no longer requires certificates and can be scripless. In the general explanation of Law Number 8 of 1995 on Capital Markets, Article 55 Paragraph (1), book-entry settlement is defined as the fulfillment of rights and obligations arising from a stock exchange transaction by debiting securities from one securities account and crediting them to another at the custodian, which can be done electronically. The transfer of ownership rights to securities in scripless trading on the capital market occurs during the book-entry settlement of securities or funds from the selling broker’s account to the buying broker's account. However, in the case of stock waqf, the transfer of securities from the waqif’s account to the nazhir's account has not yet been recognized as waqf but as a gift. Therefore, stock waqf in public companies cannot be protected as waqf property recorded by PPAIW because the state has not yet recorded the shares as waqf property. Limited liability companies clearly adhere to Law Number 40 of 2007 on Limited Liability Companies (referred to as UUPT), which only permits three methods of transferring ownership of shares in a limited liability company:

- Sale and Purchase;
- Inheritance;
- Gift.

Law Number 40 of 2007 on Limited Liability Companies regulates the methods of transferring share ownership, which include sale and purchase, inheritance, and gifts. The method of transferring share ownership can be specified in the company’s articles of association in accordance with statutory provisions. Since the method of transferring share ownership through waqf is not regulated in the Company Law, the articles of association of a limited liability company cannot include provisions for it. The following are some aspects that need to be regulated within the scope of transferring share ownership through waqf:

- The company holds a General Meeting of Shareholders (GMS) or circulates a shareholder resolution in the waqif's company with a clause approving the transfer of share ownership from the waqif to the nazhir.
- Recording this approval in a notarial deed of the GMS minutes or shareholder resolution.
- The notary sends it to the Director General of General Legal Administration (AHU) to obtain a letter of acceptance for the notification of company data changes.
- Signing the waqf declaration in front of the PPAIW notary after receiving the notification acceptance from point (c).
- The PPAIW notary reports the waqf declaration deed to the Indonesian Waqf Board or the Ministry of Religious Affairs and the Ministry of Law and Human Rights.
- The Ministry of Law and Human Rights issues a Share Waqf Certificate.

The steps for transferring shares through waqf in a public company can be outlined as follows:

- The investor first fills out the waqf declaration deed on the securities firm’s website as PPAIW.

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4 The term scripless comes from the words script and less. Scrip has the meaning of a temporary share certificate, while less has the meaning without. Meanwhile, what is meant by trading is trading. According to Indra Safitri, scriptless trading is a trading system that has an electronic stock settlement and electronically mechanism.
b. The securities firm records and administers the waqf shares.

c. The securities firm transfers the shares from the investor’s Customer Fund Account (RDN) to the nazhir’s RDN.

d. The securities firm sends the waqf data to the Ministry of Law and Human Rights.

e. The Ministry of Law and Human Rights will issue the share waqf certificate.

The issuance of a waqf certificate is very important. The concept of a waqf certificate, whether for cash waqf or share waqf, is not yet widely known in society. Cash waqf certificates are regulated in the Government Regulation of the Republic of Indonesia Number 42 of 2006 concerning the Implementation of Law Number 41 of 2004 concerning Waqf (Government Waqf Regulations) which states that a cash waqf certificate is a letter of evidence issued by a Sharia Financial Institution Recipient of Cash Waqf (LKSPWU) which then handed over to the wakif and handed over a copy of the certificate to the nazhir appointed by the wakif regarding the handover of the cash waqf [18]. However, share waqf certificates are not yet regulated by statutory regulations, therefore it is very important to regulate them.

**Conclusion**

a. The philosophy of waqf, both religiously and legally, is positive for the welfare and benefit of the people/society. This of course must also be supported by the role of the government as a policy maker. Therefore, support for the existence of statutory regulations is very necessary in order to create the principle of benefits with legal certainty.

b. The recording of waqf assets is a requirement for legal protection by the state for waqf assets. As regulated in the Waqf Law, the 103 registrars of waqf assets are PPAIW. This registration is carried out in the form of a waqf pledge deed as a form of statement of endowment of assets by the wakif. Because a statement can be revoked at any time by the person declaring the waqf as regulated in the Civil Code, the waqf statement (pledge of waqf) must be made before the PPAIW so that if the statement is to be canceled it must be based on the decision of the religious court. The waqf statement (waqf pledge) is further verified by the state and if it has been verified, a share waqf certificate is issued. Shares that have been donated by the wakif need to be preserved by the nazhir and this has not been regulated well enough by statutory regulations. Legislation can provide legal protection for waqifs, waqf assets and nazhir. The PT Law does not yet regulate the transfer of rights to shares by waqf, while the waqf law also does not regulate the waqf of shares well enough. Legislative regulations do not regulate waqf pledges and waqf certificates which can be implemented for waqf objects in the form of shares, nor has the implementation of notaries as PPAIW been implemented because there has been no socialization and there has been no competency test for notaries as PPAIW. Until this research was carried out, there was not a single notary as PPAIW and there was no notary who was able to make a waqf pledge deed with the waqf object being shares. By not being able to carry out the waqf pledge, shares before PPAIW and it is possible for waqf shares to be transferred in a way that is contrary to the law, so it can be concluded that there is no legal protection for waqf assets, no protection for waqifs and no legal protection for nazhir.

**Suggestion**

From the explanation above, the author provides the following suggestions:

a. Waqf should be one of the doors to improving the economy through the principle of benefit using the theory of law as a tool of social engineering to create a prosperous state as mandated by the 1945 Constitution.

b. The government as the holder of policy control should immediately create a clearer concept regarding share waqf through notaries as PPAIW in the interests of legal certainty for the public.
References