

**BARRIERS TO THE IMPLEMENTATION OF ARTICLE 43 SUB-SECTION  
(2) OF LAW NO.41 FROM 2004 REGARDING WAQF PROPERTY  
MANAGEMENT AND OPERATION OF THE PRODUCTIVE WAQF  
(Cash Waqf Management Studies at Baitul Maal Hidayatullah Malang)**

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**BARRIERS TO THE IMPLEMENTATION OF ARTICLE 43 SUB-SECTION  
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**ABSTRACT**

The emergence of a new discourse in exploring the potential of people who can be utilized to build communities solidarity through cash waqf concept. Cash waqf practice is relatively new in Indonesia. This type represents waqf object other than land and building waqfs that are immovable. It started with the introduction of waqf cash waqf certificate (*cash waqf certificate*) as well as the establishment of the *Social Investment Bank Limited (SIBL)* body, which function as an agency that raises funds from the wealthy people through cash waqf certificate.

This study has the objective to be achieved at the end of this research, which is to describe and analyze the implementation of Article 43 paragraph (2) of Act 41 of 2004 in the management and development of waqf properties conducted productively, to identify, describe, and analyze the distribution system of cash waqf funds received by the Baitul Maal Hidayatullah Malang providing benefits to the community, to identify, describe, and analyze the enabling and inhibiting factors experienced by Baitul Maal Hidayatullah Malang in receiving and managing cash waqf.

This research is a juridical-empirical study on barriers for the implementation of Article 43 Paragraph (2) of Act 41 of 2004 on Waqf in the management and implementation of cash waqf property in a productive manner. The research approach used in this study is the juridical-sociological approach. It examines the problem in accordance with facts gathered from the field that could be linked to the prevailing legal norms, and the legal theories that exist.

In effort to raise funds from the public in form of cash waqf, BMH Malang who directly or indirectly act as *nadzir waqf*, has taken several steps in the approach to potential benefactors in cash waqf program, through a religious approach and the social approach. Distribution of cash waqf funds that have been collected by BMH Malang put into a special fund group, because BMH realize that integrity of these waqf assets must be maintained. In promoting these cash waqf program, BMH Malang realizes that there are some things that support as well as hinder BMH Malang measures.

## **A. INTRODUCTION**

Indonesia has many practice in waqf area, but in reality, the public's understanding of waht waqf is, is still limited. Waqf is still seen in form of imovable objects, like land, making people think that waqf can not be donated in any other form, because they think that they should have to donate first land and the other immovable objects. In essence, it aims to collect cash waqf endowment funds derived from the people, which can then be utilized for the maximum benefit of the people socially. So the cash waqf provides an opportunity for everyone to conduct shadaqah jariyah and to get reward, an uninterrupted without waiting to became land owner and wealthy first. With this cash waqf concept benefactors can simply buy a piece of cash waqf certificate issued by the institution or cash waqf management institutions.

Cash waqf in Indonesia received attention in recent years, and now it has its legal basis through the Fatwa Council of Ulama Indonesia (MUI) on May 11, 2002. Not only that, the government has also issued a legal instrument governing waqf, namely Law no. 41 year 2004 concerning the Waqf, which is then reaffirmed by a Government Regulation. 42 Year 2006 on Implementation of Law no. 41 year 2004 on Waqf, regulating complete set of cash waqf. Pasal 16 paragraph (2) of Act 41 of 2004 on waqf, stipulates that waqf property consists of immovable objects and objects movable objects. Immovable wealth includes rights to land, buildings, plants, ownership rights to the apartment units and others. On other hand moving objects, under Article 16 paragraph (3), are a things that can not be destroyed trough consumption, like: cash, precious metals, securities, vehicles, intellectual

property rights, leases, and other moving objects in accordance with sharia law.

Article 22 of Law 41 of 2004 on Waqf, the function of waqf properties in addition to its usage for places of worship, education, health, help poor, scholarships, is used as well for advancement and economic improvement or advancement of the people and the general welfare that do not conflict nor sharia neither formal legislation. Similarly, the management and development of waqf properties should be conducted in a productive manner, contained in Article 43 paragraph (1 and 2), even if necessary to guarantor for risk, and guarantor is from sharia agencies (verse 3).

## **B. PROBLEM FORMULATION**

Based on the problems explained in background of this paper, the formulation of the problems should be made, associated with this study, in order to answer the problem. The formulation of the problem in this study are as follows:

1. How is the implementation of Article 43 paragraph (2) of Act 41 of 2004 on Waqf in the management and development of waqf properties conducted in a productive manner?
2. How does the system of cash waqf fund distribution is conducted by the Baitul Maal Hidayatullah Malang that benefit society?
3. What are the enabling and inhibiting factors experienced by Baitu Maal Hidayatullah Malang in receiving and managing cash waqf?

### C. RESEARCH METHODS

This research is legal juridical-empirical study, the legal research that is focused to a rule of law or regulations which are then linked to the reality in the field. As mentioned by Soerjono Soekanto that a study aims to find the mere fact (*fact finding*). Such research continues to conduct in effort to find problems (*problem identification*), to then proceed with a study to address the issue (*problem solution*).<sup>1</sup>

This research is an empirical research, since it is focused on studying barriers to the implementation of Article 43 Paragraph (2) of Act 41 of 2004 on Waqf in the management and implementation of cash waqf assets productively. The research approach used in this study is juridical-sociological approach. This study examines the issues in accordance with the facts on the ground which is then linked to the norm of law, and theories of law. Juridical sociological research approach, for reviewing the implementation of management and administration of cash waqf by Baitul Maal Hidayatullah Malang productively, conducted in accordance with article 43 paragraph (2) of Act no.41 of 2004 on Waqf.

Types and data sources include primary data and secondary data. The primary data in this study are based on interviews and questionnaires with board Baitul Maal Hidayatullah (BMH) Malang. Secondary data include books, records / documents from the Baitul Maal Hidayatullah (BMH) Malang, Legislation, as well as material from the internet.

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<sup>1</sup> Soerjono Soekanto, *Pengantar Penelitian Hukum*, UI-Press, Jakarta, 1986, hal 10.

The technique used in obtaining data its purpose is to gather information. The primary data are obtained through interviews, either structured or unstructured, observations and Focus Group Discussion (FGD) with the parties who are in a management structure Baitul Maal Hidayatullah (BMH) Malang, as Primary Data Sources research. Secondary data are obtained through the study of documents important files from the institution under study and researching legislation from multiple sources, browsing websites on the internet, newspaper clippings and others.

The population in this study are related parties or the authorities in the implementation of cash waqf management which include Baitul Maal Hidayatullah Malang and Ar-Rohmah Foundation for Women. While the sample in study done, is conducted by the purposive sampling technique that is done by taking a subject based on specific goals associated with situations or problem studied. Sampling is based on the expertise and authority of each respondent was in this study, is a branch head BMH Malang, Malang BMH Finance Division Chief, Administrative utilization Division Chief and Head of Dorm House Malang BMH Ar-Rohmah Putri.

#### **D. RESEARCH FINDINGS AND DISCUSSION**

1. Person that is Serving in the Management of Waqf Property, as regulated by Law 41 of 2004 on BMH Waqf in Malang, Law No. 41 Year 2004 on

Waqf established that the party receiving waqf property from benefactor to be managed and developed in accordance with the

designation is called the *Nazhir*,<sup>2</sup> who is one of the pillars of waqf, beside benefactors and duration of waqf. Principal duties and obligations of the Nazhir are to productively manage and develop the waqf in accordance with the objectives, functions, and purposes, which is implemented in accordance with Islamic principles. Management and development of productive waqf object is implemented by way of collecting, investing, investment, production, partnerships, trade, agriculture, mining, industry, technology development, construction of buildings, apartments, flats, supermarkets, shops, offices, of education or health facilities and the businesses that do not conflict with sharia.<sup>3</sup> So, Nazhir, is a waqf property manager whose job is managing and developing waqf property as intended.

## 2. Fund-raising strategies and mechanisms of Cash Waqf Pledge conducted by BMH Malang

In an effort to socialize waqf cash as an instrument of social welfare, it requires intensive socialization by the authorities in order for cash waqf can be accepted more quickly by the community. It must be admitted that the cash waqf discourse is still fresh in Indonesia people's understanding, and even today cash waqf is still not well understood by many parties or even by waqf existing institutions, because among the Muslims themselves it is still popular waqf of land. To change this paradigm of new waqf, it is necessary to build cooperation between the various agencies managing waqf.

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<sup>2</sup> Pasal 1 angka 4 Ketentuan Umum Undang-Undang Nomor 41 Tahun 2004 tentang Wakaf.

<sup>3</sup> Bagian Penjelasan Pasal 43 ayat (2) Undang-Undang Nomor 41 Tahun 2004 tentang Wakaf.

a. Cash Waqf fund raising strategies

From the research that has been done, the data obtained can be used to answer the problem formulation mentioned previously in this paper, associated with the strategy undertaken by BMH Malang in cash waqf fund raising. So it can be seen that there are some strategic steps undertaken by the BMH Malang, which are as follows:

- 1) Deploying a proposal for the cash waqf;
- 2) Through Regular al Qur'an studying (Bina Imam Muslim);
- 3) Deploying brochure;
- 4) Bulletin.

Conceptually, the strategy of cash waqf fund raising conducted by BMH Malang is enough to meet the standards in the empowerment of cash waqf. Seeing that cash waqf is still relatively new and not widely understood by the public, many have not even accepted by the community, in an effort to maximize the potential of extracting cash waqf is indeed required special strategies. There are several steps that can be used to introduce cash waqf in the community, to those who do not understand the existence and potential of this waqf, namely:<sup>4</sup>

- 1) religious approach;
- 2) social approach;
- 3) Evidence approach to successful management of waqf.

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<sup>4</sup> Departemen Agama RI, *Strategi Pengembangan Wakaf Tunai* (Jakarta: Direktorat Pemberdayaan Wakaf, 2007) hal. 17-19



b. Distribution of Cash Waqf Fund by BMH Malang

The maximal distribution of the funds in question is the cash waqf funds received from donors by BMH Malang, ensuring that the cash waqf funds are channeled to the right people, can provide broader benefits, and guaranteed integrity waqf assets. Initial assumption of the writer, associated with the distribution of waqf funds is to fund empowerment efforts through the economy. However, the results showed that the cash waqf funds received by BMH Malang are mainly allocated for land acquisition in case of Ar-Rohmah Putri Education Institution located in the Dau.

Waqf cash collected by BMH Malang was placed in to a special funds, and distributed to the empowerment of Ar-Rohmah Putri educational institution. Expected long-term target is that this institution would become the institution that is not only great in terms of quantity, but also in terms of quality, attracting rich people to send their children to study in this institution latter on the outgrowth of the school will be used for many purposes, helping the less fortunate, like giving scholarships. Accordingly, cash waqf funds channeled into the institute can keep rolling and provide benefits, particularly in the field of education.

c. Mechanism of Cash Waqf Pledge conducted in Malang BMH

Basically waqf pledge can be expressed in the oral and written form.<sup>5</sup> This pledge is a *sighat* waqf, waqf statement that

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<sup>5</sup> Pasal 17 ayat (2) Undang-Undang No.41 Tahun 2004 tentang Wakaf.

clears ones understanding. Regarding waqf pledge, especially cash waqf, in Malang BMH waqf pledge is not done verbally, but in writing direct pledge by completing the application form given to BMH Malang donors. In this form donors identity is listed, and also the type of program which is owned BMH Malang. For example, if one aims to donate money, he just crosses column labeled chash waqf. Thus, it is understood that donor desires cash waqf.

Cash waqf pledge execution at BMH Malang is conducted in writing, by filing up the blank for allotment of funds provided. Blank in question here is the donors application form in which there is some kind of allocation of funds from donors. Especially for cash waqf, the donor simply writte application format cash waqf, without having to mention the allocation of cash waqf fund utilization.

### 3. Cash Waqf Fund Distribution System of the Funds Received by Baitul Maal Hidayatullah (BMH) in Malang Waqf Management of Property regulated by Act 41 of 2004 on Waqf

The data showed that upto now, cash waqf funds that have been collected by BMH Malang were distributed in the form of empowerment of Ar-Rohmah Putri educational institution, some of them for land acquisition and construction of school buildings. This indicates that operationally, the pattern of distribution of cash waqf fund owned by BMH Malang still tend to be consumptive. However, if you look at the data related to the utilization of funds trough BMH Malang

system, utilization of cash waqf fund can actually be extended again by BMH Malang through the utilization of its own funds, namely KPM3. Each KPM3 have demographic and economic conditions in different regions. The problems faced by the people in the field varieties from religious, economic, as well as educational problems.

The amount of waqf funds spent BMH for 17 Malang Region in 2012 are:

No	Member of KPM3	Total
1	YayasanAr-Rohmah Putra danPutri, Dau	308.132.350
2	SumberBendo, Kucur	12.000.000
3	Krajan, Kucur	16.850.000
4	Kebondari, Tumpang	35.445.000
5	Purworejo, Donomulyo	19.750.000
6	Donomulyo	20.455.000
7	Kasikon, Pakisaji	15.250.000
8	Puthukrejo, Pakisaji	13.850.000
9	Penarukan, Kepanjen	16.210.000
10	SendangBiru, SumberanjingWetan	16.875.000
11	Malangsuko, Tumpang	8.650.000
12	Kesambon	7.980.000
13	Bumiaji, Batu	14.300.000
14	SumberRejo, Batu	15.552.000
15	Kalipare	5.053.000
16	Sidomulyo, Jabung	5.550.000
	<b>JUMLAH</b>	<b>531.902.350</b>

Source: Secondary data from BMH Malang, 2012

The distribution of cash waqf funds in larges ammount have been given to Ar-Rohman Foundation for Putra and Putri, as much as Rp 308,132,350.00. This is because the main purpose of cash waqf funds distribution by BMH Malang is for land acquisition for education and to improve education quality.

4. Supporting and Inhibiting Factors for Managing Cash Waqf by Baitul Maal Hidayatullah (BMH) in Malang

a. Supporting Factors for BMH Malang in Managing Cash Waqf Productively

During interviews with several informants mentioned above, it can be seen a variety of data regarding the steps and efforts of the BMH Malang in cash waqf raising funds from the public and its distribution. In addition, many interesting experiences endured by the officers BMH Malang during fundraising. Not only that, many informants also talked about their views and goals to be achieved in the long term associated with this cash waqf program.

There are several factors that support the performance of the BMH Malang, including the following:

- 1) The existence of SK Institute from Ministry of Religious Affairs, established by Minister of Religious Affairs Decree No.538 of 2008;
- 2) Religion commandements;
- 3) The response from the community;
- 4) The existence of public trust;
- 5) More and more Amil Zakat institutions.

b. BMH Malang Obstacles in Managing Cash Waqf Productively

At this moment peoples understanding of cash waqf is very limited. Its purpose is confined to the mosque, mosque, tomb and the

like, which is strongly felt by the BMH Malang when talking about cash waqf. Therefore, the cash waqf socialization should be a national movement, because cash waqf has the potential to encourage the elimination of poverty, acting as a charity functions.

Lack of waqf laws socialization in society are strongly felt. This is much different than the Zakat socialization. According to available data, zakat socialization has been carried out since the 1980s by Amil Zakat Board, Infaq, and Sadaqah (Bazis) in several areas. Then, zakat socialization is redone by zakat institutions in 1993. The optimal socialization started after government gave its support through Law No.38 of 1999 on Zakat Management issued by the House of Representatives. Meanwhile, despite the existing waqf Act and its Regulation, socialization is very poorly done by the government.

## **E. CLOSING**

### **1. Conclusion**

In an effort to raise funds from the public cash waqf, BMH Malang who directly or indirectly act as nadzir of waqf, has taken several steps in the approach to potential benefactors cash waqf program, including through religious approach and the social approach. Religious approach is done by providing guidance and insight to prospective benefactor that waqf should be given equal weight with the charity as a form of *tabarru* 'to God. Through the activities of the Muslim Faith Development, BMH Malang attempts to explain the values of the reward

that would be obtained by benefactor when he was running it, so it can touch the hearts of the donator candidates by example in the form of exemplary and trustworthy.

This religious approach not only delivered BMH Malang verbally, but also through the medium of a case of proposal writing and distributing brochures that contains the programs of social approach Malang. At the same time BMH, BMH Malang Party is well aware that the waqf has a strategic role in the midst of poverty and economic hardship in our society, therefore, through this social approach BMH Malang seeks to provide concrete answers to the reality of people's lives around. Understandings of these particular problems have to be deeply planted in the futureWaqfcandidate so they could understand that the property is not enough to be owned alone, but must also be shared.

While the mechanism of this pledge cash waqf, the BMH Malang not implement a concrete pledge. This is because the type of the option program is only one cash waqf. So that each party be it Wakif and nadzir considered equally understand the allocation of cash waqf property, namely provision of school facilities and land acquisition Ar-Rohmah Princess education.

The method of distribution of cash waqf funds by BMH Malang, after the funds collected at BMH Malang, the funds put into the special fund. Because BMH realize that asset waqf should be kept intact. So that BMH did not mix it with funds infaq others. Later, funds were channeled to the Institutions of Ar-Rohmah Princess. Before that the foundation Ar-

Rohmah will first submit a proposal for funding schools. It was only after the proposal is approved, the funds derived from cash waqf is to be distributed specifically for land acquisition Ar-Rohmah Putri education institution, and also the provision of other educational facilities.

In an effort to promote the cash waqf program's, BMH Malang feel a few things that support and hinder BMH step Malang. Supporting factors exist in legalisation of waqf institution by decree of the Minister of Religious Affairs, namely Minister of Religious Affairs Decree No.538 of 2001, through the religious orders, good response from the community, the trust of the community, more and more Amil Zakat education institutions school facilities have been built with waqf funds.

Whereas inhibiting factors experienced by BMH Malang is due to lack of socialization Waqf Act to the public, limited public understanding of waqf assets, lack of confidence of the Muslims to the Islamic Financial Institutions, the lack of synergy between the Institute Amil Zakat (LAZ) on the ground with governments and scholars, the quality of which is formed in the community against people who work at LAZ is less positive.

## **2. Suggestion**

### **a. To Government Agencies**

- 1) Socialization efforts of waqf have to be done more thoroughly and evenly, especially to practitioners institutions that have the

potential to manage cash waqf, to discourse cash waqf can be readily accepted and implemented by the community.

- 2) Immediately take concrete steps to maximize the function and role of waqf institutions that have been formed, namely Indonesia Waqf Board.
- 3) Conduct a more intensive social movements of Law No.41 of 2004 on Waqf and also PP 42 in 2006, so that the implementation of the waqf can run smoothly and uniformly.
- 4) Need to quickly complete the legal and other regulations governing cash waqf in particular, namely Regional Regulation (Perda).

b. To the Waqf Managing Institution

To support the successful development of the productive aspect of cash waqf fund, the management of these funds need to be directed to the productive sector cooperation (networking) with the agency business has a good reputation. So that raised fresh funds to continue to provide benefits and growing.

c. To the Education Institutions

Educational institutions have a duty to educate, but in addition, may also play a role in helping government to socialize Waqf, its laws, especially cash waqf to the academics. Thus the pattern of cash waqf awareness and its spread will be done in co-operation between governments, educational institutions, as well as waqf management institution itself.



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