

## INTELLECTUAL PROPERTY RIGHT (IPR) AS AN OBJECT OF *WAQF* ACCORDING TO LAW NO. 41 YEAR 2004 ON *WAQF*\*

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### ABSTRACT

*Waqf, one of the institutions accommodating Islamic laws, has been known and lived in Indonesia society for such a long time. However, the practice and development of waqf run in the community, are still very conventional; generally they are only intended to support facilities and infrastructure for ritual worship of Islam, such as the construction of Masjid and Pesantren; a place where people study Islam comprehensively. The provisions of Article 16 of Act No. 41 of 2004, describes that waqf may consist of movable and immovable properties. Furthermore, learning from the formulation of Article 1 of Act No. 19 of 2002, it can be understood that a copyright may be regarded as a property right. Based on this assumption, the Intellectual Property Right registered as property of waqf at Directorate General of IPR may be suggested to be able to be handed over. When it happens, it must be clearly stated the type of IPR including the aims of the waqf in accordance with the provisions of waqf. After handing over, the possession of IPR established by the authority shall be owned in accordance to the deal agreed by the first owner of waqf as a wāqif.*

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## INTRODUCTION

The system of Islamic economy constructs social welfares by distributing the fund commonly entrusted to the institutions of *zakāh*, *infāq*, and *waqf*. Responded to the issue, Miriam Hoexter argues that among various forms of Islamic philanthropy – that are *zakāh*, *infāq*, and *waqf* – only *waqf*, the legal institution, is fully developed (Hoexter, Miriam, 2006: xiii). *Waqf*, along the history of Islam, has taken important role in the development of the social, economic, and cultural activities of Islam society. The history has led to the fact that the *waqf* institution has given many contributions to execute some government-tasks (The Minister of Religion of Republic of Indonesia, 2008: 10). Besides, *waqf* has become an alternative that can be applied as an effort to eliminate poverty. Along this argument, Abdul Hasan M. Shadeq (2002: 135-151) determines that:

*“There are many ways to handle the poverty problem, starting from preventive to curative measures. An important way to alleviate poverty is charity, which has been playing a role and can be potentially be an effective means to overcome the poverty problem. Charity is again many forms, but a long-lasting form of charity is one that has the characteristic of perpetuity. The Institution of waqf is such a perpetual charity in the Islamic ethical system.”*

It may be restated that *waqf* is one of institutions which has an effort to alleviate poverty possessing the characteristic of perpetuity and continuity. The government of Indonesia has extensively supported to the development of *waqf*. It is proven by establishment of Law No. 41 Year 2004 regarding to *waqf* (hereafter called *Waqf Act*) and the Indonesian Government Regulation No. 42 Year 2006 regarding to the implementation of Law No. 41 Year 2004 (hereafter called *PP waqf*). As noted, *waqf* institution, as one of Islam principles, is closely related to the socio-economic problems of society. Many countries with developed *waqf* have successfully managed their socio-economic problems. In Indonesia itself, unfortunately, *waqf* is only understood as charity on immovable property alone especially charity on land. To make it worst, there was only the Indonesian Government Regulation No. 28 Year 1977 in which the object of *waqf* regulated was only land. The *waqf* involving movable property began discussing in the late of 2011 (Hasanah, Uswatun, 2008: 1).

In the section 16 of *Waqf* Act, it is explained that the objects of *waqf* involve immovable and movable properties. The immovable properties are determined as the ownership of the land in accordance with the published provisions of laws and regulations – registered and unregistered – buildings or parts of buildings, plants and other things related to the land, the ownership of a unit of an apartment in accordance with the published provisions of laws and regulations, other immovable properties in accordance with the published provisions of shariah and the published regulations. In the other hand, the movable properties are specified as properties that cannot be run out such as money, precious metal, obligation, vehicles, and intellectual property right, leases, and other movable properties in accordance with the published provisions of shariah and the published regulations.

*Waqf* objects are the possessions. Legally, there will be things categorized as tangible and intangible properties. In tangibles themselves, there will be things classified as movable and immovable properties. Furthermore, the intangibles may be identified either rights or obligation. Intellectual Property Right (IPR) itself is considered to be a thing, and in that case IPR may be the object of *waqf*. For that reason, there is an effort to extent the jurisdiction of objects of *waqf* that allows covering IPR as an object of *waqf* as mentioned in the section 16 of *Waqf* Act and Article 21 of *Waqf* Regulation.

## THEORY FRAMEWORK

*Waqf* is derived from Arabic verb, ‘*waqafa*’, meaning restrain or stop. In Islamic law, *waqf* is defined as giving away a long-lasting property (substance) to other or to *nadzir* (*waqf* keeper), either individual or institution, under the provisions of the agreement; the results or benefits are manifested for the welfare in accordance with Islam values. The assets for charity in the *waqf* act may no longer belong to the previous owner, but it does not mean that the assets belongs to *nazir*. The assets belongs to Allah in terms of public rights (Khalil, Jafril, 2008). The significance of *waqf* development as an institution, may be learnt from *al-Qur’ān* in Surah Āli-‘Imrān verse 92: “*You never get to righteousness (perfectness) before you spend some of your properties that you love, and what you spend, Allah knows.*”<sup>1</sup>

Similarly, the Prophet Muhammad SAW had said in the *ḥadīth* narrated by Muslim, “*If the son of Adam (human) dies, the charity will be end, except for three cases jariyah charity, beneficial knowledge, and righteous children*

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<sup>1</sup> See also Surah al-Baqarah 2: 261 and Surah al-Ḥajj 22: 77.

*who pray for the prayer of parents.*” In this *ḥadīth* according to the scholars categorized as charity *waqf* (Manan, M.A., 2001: 31).

As a social concept with dimension of worship, charity in the form of *waqf* is also called *sadaqah jariyah*, in which the *wāqif*, person who gives the charity, may keep obtaining the rewards as long as the properties still benefit the society. For that reason, the properties that have already been the objects of charity may be no longer possessed by the *wāqif* and the benefits will be contributed to the receivers of *waqf*. Thus, the properties belong to Allah and are entrusted to a person or legal entity (who acts as a *nazīr*) to manage them. Along the development of *waqf* institution, the object of *waqf* considered to be a thing covers IPR. The term IPR itself is described as rights of an intellectual property which is legally reserved (Krisnawati, Andriana & Gazalba Saleh, 2005: 12).

Substantively, definition of IPR means the rights to property as a result intellectual abilities of human. Another statement, however, claimed that IPR is such a recognition and respect to individual or institution for his/her/its invention or design of intellectual achievement; giving the social or economical rights as a result. IPR is suggested to be exclusive legal rights possessed by the inventors or designers. The rights result from intellectual and creative activities classified unique and brand new. These intellectual properties may be creative works on science, arts, literature, and technology. The works are products that come from a hard work, consuming times, thoughts, feelings, intuition, inspiration, and consciousness (Hariyani, Iswi, 2010: 16). Early intellectual rights reserved are protections appraised the thoughts and works of the citizens (Widjaja, Gunawan, 2011: 11). The protections serve the interest of the owner owning the exclusive rights and the protection from unauthorized parties.

## **THE METHOD OF THE RESEARCH**

The approach of the study is a normative juridical approach. Normative judicial reviews and tests secondary data to the primary legal materials in the form of regulations, secondary legal materials in the form of experts' opinions and scientific scholars, and tertiary legal materials that can be newspapers, magazines and internet sites. The specification of the study is analytic descriptive. The research was conducted through the Library Research to determine primary and secondary legal materials. Data collection technique used is a document study. Study was conducted on secondary data to obtain theoretical base. Analysis of the data and conclusions was conducted by using qualitative methods that was followed by analytic descriptive.

## THE RESULTS OF THE RESEARCH

Based on *Waqf* Act, *waqf* objects are long-lasting properties and/or perpetual properties to be benefited, and those with economical values in according with the agreements agreed by *wāqif* (article 1 paragraph 5 of the *Waqf* Act). In this provision, it is expressly stated that the object of *waqf* is “property”, so the meaning of the word need to be defined properly. Copyright can be said as property. This may be inferred from the formulation of Article 1 of Law No. 19 of 2002; that copyright is a privilege for the designer and the recipients of the rights to publish or reproduce the designs and to give permission on it without reducing the restrictions under laws in force. This shows that copyright can only be owned by the designer or individual/institution who receives the rights. The name is only given to the designer or the recipient. The one who deserves to have the rights is the one who has the privilege. Furthermore, the one with the privilege is protected in using the rights to the property from the other subjects interfering or using by breaking the law (Saidin, Ok, 2006: 50).

Basically IPRs (copyrights) can be categorized into two parts, namely: (1) Copyright which consists of copyright and rights related to copyright (neighboring rights) and (2) Industry-wealth Rights consists of Patent; Trade Mark and Industrial Design. In the General Explanation of the *Waqf* Act, it is stated that the scope of which has been understood in general tends to the restricted *waqf*, immovable properties such as land and buildings. According to this Act, *wāqif* may give some of his property in the form of movable *waqf*-property, both tangible and intangible such as money, precious metal, obligations, vehicles, and intellectual property right, leases, and other movable properties. In Article 16 of the *Waqf* Act, it is stated that the *waqf*-property consists of immovable, and movable property.

In subsection (2), it is stated that the immovable properties as referred to paragraph (1) a cover letter, involves land rights in accordance with the provisions of laws and regulations that are applied, either already registered or not; buildings or parts of the buildings that are constructed on the land referred to point a; plants and other objects related to land; ownership of units of apartment in accordance with the provisions of laws and regulations; and other immovable objects in accordance with the provisions of Shariah and the published regulations. In paragraph (3) of the same article, it is mentioned that the movable objects as described in paragraph (1) point b are properties that cannot run out due to consumption. They are money; precious metals; obligations; vehicles; intellectual-property rights; leasehold, and other movable objects in accordance with the provisions of Shariah and the published regulations.

In Article 3 paragraph (1) Law No. 19 Year 2002, copyright is considered to be a movable object. Copyright under the provisions of Article 3 paragraph (2) of Law No. 19 of 2002 may be handed over either whole or part. In addition, copyright may be handed over and the regulations of aims and procedures are regulated under provisions of Law No. 41 Year 2004 speaking about *Waqf*. Referring to Article 16 paragraph (3) letter e, *Waqf* Act, IPR is a property that may be handed over as a charity; IPR is determined as movable property that cannot run out because of consumption. Furthermore, the provisions of Article 3 paragraph (2) of Law No. 19 Year 2002 state that copyright may be handed over either as a whole or part because of Inheritance; Grant; Wills; Written agreement; and Other causes justified by the regulations. Based on the provisions of Article 3 paragraph (2) letter e of Law No. 19 Year 2002 above, copyright may become *waqf*-object by testament, written agreement, or by other causes which are justified by the regulations.

Similarly to the copyright, brands may become *waqf*-objects. The brands may be handed over under the provisions of Article 40 of Law No. 15 Year 2001, read as follows firstly The right to a registered trademark may be handed over as Inheritance; Wills; Grant; Agreement, or Other causes justified by the regulations. Secondly the transfer of the rights on the brands as referred to paragraph (1) must be registered in the Directorate for a record recorded in the General Register. Thirdly application for transfer the rights of the brand as referred to paragraph (2) accompanied by supporting documents. Fourth the transfer of the rights of the brands that have been recorded as described in paragraph (2) is published officially in the Official Gazette of Marks. Fifth the transfer of the registered brands that are not recorded in the General Register, does not have any legal consequences to third parties and sixth registration of transfer of rights of the brands as referred to in paragraph (1) is charged as provided in this Act.

Furthermore, the transfer of trademark rights in Article 41 of Law No. 15 Year 2001 states that the transfer of the registered mark may be accompanied by the transfer of a good name, reputation, or others associated with the brand and the right of a registered service mark that cannot be separated from the ability, quality or service provider of personal skills, can be transferred under relevant provisions, that is, it must be assured by the quality of the services.

Article 42 of Law No. 15 Year 2001: The transfer of rights to the trademark will be registered by the Directorate-General if it is accompanied by a written statement from the assignee that the brand will be used for trade in goods and/or services. Brand registered under Article 28 of Law No. 15 of 2001 protects legally for a period of 10 (ten) years from the date of receipt and the protection period can be extended. *Waqf* is declared valid if the conditions have been

fulfilled and harmonious. Here are four Pillars *waqf* are *wāqif* (the first owner of property); *mawqūf bih* (goods or property); *mawqūf ‘alayh* (parties given endowments/allocation *waqf*); and *ṣighah* (*wāqif*'s statement or pledge; the statement noted that the property will be handed over).

In Article 6 of *Waqf* Act, *waqf* is done by meeting all requirements of *waqf* as follows *wāqif*; *nazīr*; *waqf* object (property); *wāqif*'s pledge; allocation of the *waqf*-property; and *waqf* period.

### ***Wāqif***

*Wāqif* in Article 1 paragraph 2 of *Waqf* Act is party who gives his possessions as a charity. Furthermore, in Article 7 of *Waqf* Act, *wāqif* includes: individual, institution, and legal entities. Related to the IPR as a *waqf*-object, *wāqif* is the legal holder of the rights under the provisions of law. According to the provisions of Law No. 19 of 2002 Copyright Holder is the designer or creator of the Copyright, or the party receiving the rights from creators, or others who receive rights from the first receiver. Similar to IPR, *wāqif* of patent *waqf*-object is a legal inventor/patent holders. Related to the Law No. 14 of 2001 concerning on patent, inventor is a person or several persons acting jointly in implementing the ideas that are manifested into the activities that produce the invention (Article 1 paragraph 3). The person with the rights is the inventor or the receiver who receives the rights from the inventor (Article 10/1).

On the other hand, *wāqif* of the rights of brands are the legal holder of trademark rights under the law. Under the terms of Article 1 paragraph 1 of Law Number 15 of 2001 on Trademarks, brand is a sign in the form of images, names, words, letters, digits, color composition, or a combination of these elements, having distinguished characteristics and is used in the trading of goods or services. Furthermore, in Act No. 15 of 2001 it is also mentioned the Right Brand on certain Brand is an exclusive rights granted by the State to the owner of brands listed in the General Register for a certain period of time by using their own brand or to the receiver who receives a permission from the owner of brands.

### ***Nazīr***

*Nazīr*, the one who takes the responsibilities to maintain *waqf*, has an important position in *waqf*. Noted to one of the *waqf*'s aims, that is, *waqf* is a productive source of fund; *waqf* requires *nazīr* who has capability of handling his tasks professionally and responsibly. If *nazīr* fails in performing his tasks, *qadi*

(government) must take in charge with a prior notice. In Article 1 paragraph 4 of the *Waqf* Act, *nazīr* is the party receiving the property rights to be managed and developed in accordance with the designation. In the provisions of Article 9 of *Waqf* Act, *nazīr* may be individual, organization, and legal entities. Furthermore, in Article 11 of *Waqf* Act, *nazīr* performs inventories of *waqf* property, manages and develops *waqf* property in accordance with the objectives, functions, and purposes, monitors and protects *waqf* property, and reports duties to the Indonesian *Waqf* Board.

### **The Property of *Waqf***

In Article 1 paragraph 5 of *Waqf* Act, *waqf*-property is a property that has perpetuity and/or long-lasting benefits as well as having economical value according to Shariah that has been trusted by *wāqif*. Under the terms of Article 15 of *Waqf* Act, property may become an object of charity only if the rights of property belong to the *wāqif*. The property of *waqf* in IPR, according to the provisions of Article 1 paragraph 1 of Law Number 19 Year 2002 concerning copyright, copyright is the exclusive rights for the author or recipient of the right to publish or reproduce the intellectual property or to give permission to others for publishing and reproducing without any reducing the restrictions regulated by the law. Creator or designer is one or several persons jointly constructing a personally inclusive and intellectual property as manifestation of their thoughts, imagination, dexterity, skill or expertise (Article 1 paragraph 2). Creation is the result of each creator's work that shows originality in the field of science, art, or literature (Article 1 paragraph 3).

Referring to Article 1 (1) of Law No. 14 of 2001 on patent, patent is an exclusive rights granted to the inventor by the State as a result of his invention on technology; the inventor who works on his invention in a period of time or who trusts others to do the works. Invention is inventor's idea that is manifested into specific problem-solving activities in the field of technology, either a product or a process, or improvement and development of products or processes (Article 1 paragraph 2). Similarly, *wāqif* for the *waqf* of the brand is the holder of the rights of Brand Right legitimated by the law.

Under the terms of Article 1 paragraph 1 of Law Number 15 of 2001 on Trademarks, it is said that Brand is a sign in the form of images, names, words, letters, digits, color composition, or a combination of these elements, having distinguished and used in the trading of goods or services. Furthermore, in Act No. 15 of 2001, it is also mentioned on Trademarks, Service Marks and Brand Collective. Trademark is a brand that is used on goods traded by a person or



group of people jointly work on the goods or legal institution to differentiate the brand from other similar goods (Article 1 paragraph 2). Brand Services is a brand that is used for services traded by a person or a group jointly works on the service or a legal entity to differentiate the service from other similar services (Article 1 paragraph 3). Collective Brands is a brand that is used on the goods and/or services with similar characteristics traded by some person or legal entity jointly work on the collective brands to distinguish the goods and/or other similar services (Article 1 paragraph 4).

### **Pledge *Waqf***

In Article 1 paragraph 3 of *Waqf* Act, pledge of *waqf* is a statement represented *wāqif*'s will stated orally or literally to *nazīr* to donate *wāqif*'s property. In terms of Article 17 of *Waqf* Act, pledge of *waqf* is held by *wāqif* to *nazīr* in front of PPAIW before witnessed by two witnesses. Pledge is expressed orally and/or literally and written on the deed of pledge by PPAIW (the officer of state gazette of the pledge of *waqf*). Furthermore, in Article 18 of the *Waqf* Act, it is mentioned that if *wāqif* is not available to state the pledge or absent from the event justified by the law, he may appoint proxies provided legal documents supported by two witnesses. Unfortunately, the regulations of *waqf* and their implementation have not regulated firmly to determine the PPAIW of IPR *waqf* including patents and brands. As a respond to the fact, further provisions should be applied to determine the one who takes the authority to the *waqf* of IPR, patents and brands. However, it is suggested if the authority will be issued to Directorate of IPR himself since the law of *waqf* has cited Indonesia *Waqf* Board (BWI) to take important role in developing Indonesia *waqf*; as a regulator, supervisor, or *nazīr* of the *waqf*. As a regulator, Directorate as a representative of BWI may formulate extensive regulation to determine the authority of the *waqf*.

In respect of the previous description, the provisions of handing over IPR as an object of *waqf* meet the principles of law justified by the published laws that still need improvement in technical regulation yet. After the *waqf* execution, the ownership of IPR, justified by the law, is under new ownership, that is, the receiver's in accordance with pledge of *waqf* approved by *wāqif* as the previous owner of the *waqf* – as a note, before donation, the donated IPR should be registered to IPR Directorate. In the end of the process of *waqf*, the type of IPR as an object of *waqf* and the aims of the *waqf* should be stated clearly and, of course, should be registered in the Directorate of IPR. Unfortunately, there is still no specific regulation on those procedures. Hence, it is suggested that the government of RI takes a certain anticipation to regulate the process of *waqf*

operationally. The extended variants of *waqf* objects, involving movable to fixed properties, give the notion that the variants may led to alleviate poverty and to reach the welfare of the society by an effective means, *waqf*. That notion, as a result, may force the issue to manage the productive management of *waqf*. This management will bring effective regulations that are the refinement of the available regulations of *waqf*; the regulations that allow us to gain productive and professional implementation of *waqf*. Thus, Indonesia will be success to overcome an economic crisis (Djunaidi, Achmad & Thobieb al-Asyar, 2008: 90).

In sum, the practice of *waqf* management, in the future, is fully expected to run efficiently and orderly to reach productive value and effective management. In addition, *nazīr*'s abilities in managing and developing *waqf* properties should be improved, and the active participation of the society should be encouraged. Along those improvement, the monitoring of the government is badly needed to control the relevance of implementation of *waqf* in accordance with aims, functions and goals of *waqf*; the welfare of the society.

## **CONCLUSIONS AND RECOMMENDATIONS**

Provisions of IPR *waqf* can be justified in accordance with the legislation in force. The type and aims of IPR, an object of *waqf* and registered in the Directorate of IPR, should be clearly noticed in accordance with the provisions of the *Waqf* Act by the time the period of transition. The ownership of IPR, after donation, is under new ownership in accordance with the pledge of *waqf* approved by *wāqif*, a legal owner of IPR in accordance with *Waqf* Act. The efforts to extend the jurisdiction of the *waqf* objects – involving IPR as stipulated in Article 16 of the *Waqf* Act and Article 21 PP. 42/2006 – should be taken positively. Because of the extension, the objects of *waqf* vary; it means that the idea of social welfare through the implementation of *waqf* will be happened faster than noticed. In respect of that, the Indonesia Government is expected to be able to anticipate all matters related to the implementation of *waqf* in order to control operationally especially the mechanism of the transition of IPR as an object of *waqf*.

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- Government Regulation No. 42 Year 2006 regarding to the implementation of Law No. 41 Year 2004 On Waqf
- Law No. 14 Year 2001 On Patent.
- Law No. 15 Year 2001 On Merek
- Law No. 19 Year 2002 On Copy Right
- Law No. 41 Year 2004 On Waqf Wakaf

