Waqf of Trade Secret: An Analysis in Indonesian Legal Perspective

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Abstract. Since 2004, the Indonesian Government has tried to expand waqf assets through Law Number 41 of 2004 concerning Waqf (Waqf Law), one of which is Intellectual Property Rights (IPR). However, the Implementing Regulations of Waqf Law do not contain provisions on the IPR regime that can be used as waqf. The problem is the different characteristics of each IPR regime, especially the Trade Secret. The characteristics of the Trade Secret are that confidentiality is maintained for protection. In its implementation, the Waqf Pledge Deed Maker (PPAIW) must state the assets and information of waqf objects. This study aims to identify criteria for trade secrets that can be used as waqf assets. The results show that waqf with trade secret assets must fulfill the following conditions: (1) Trade secret owned by Waqif legally proven by its use in business activities continuously (2) Trade secrets have economic value (3) Trade secrets can be accounted for in Shari'a (4) Waqif previously made efforts in maintaining confidentiality (5) Transition of trade secrets through waqf accompanied by an agreement to maintain secrecy with Nazhir and the inclusion of clauses on the obligation to keep secrets in the Waqf Pledge Act made by PPAIW. The Indonesian government should revise the regulation of waqf implementers that seem obsolete by including the IPR waqf mechanism.

1 Introduction

In recent years, the practice of Waqf has evolved and serves as a support for improving the social and economic community [1,2]. The development was responded to by the government by issuing Law No. 41 of 2004 concerning Waqf (Waqf Law) and Government Regulation of the Republic of Indonesia Number 42 of 2006 concerning Implementation of Law No. 41 of 2004 concerning Waqf (PP Waqf). The issuance of the Waqf Law is one of the government's efforts to expand waqf assets which were previously limited to increasing immovable objects to movable objects, even intangible objects [3].

One of the expansion objects in the Waqf Law is Intellectual Property Rights (IPR). Even though the Waqf Law regulates IPR can be used as an object of waqf, however, until now the practice of waqf with the object of IPR is still a little done by the parties, both those who accept (wakif) and those who manage the waqf assets (nazhir). This is caused by ignorance of the parties and the lack of a regulation governing the implementation of technically and
administratively on IPR Waqf. In addition, the IPR consisting of 8 (eight) types has its characteristics, and it is not certain that each type is right to be used as a waqf asset. If examined from the perspective of law object, actually Trade Secrets cannot be categorized as IPR. In trade secrets, there is no material element that can be used as a basis for granting legal protection. In other words, there is no known element of material protected by their rights because the essence of their intellectual work is completely kept secret, or at least unknown to people who are not related to the commitment of "confidentiality,". If considered regarding legal certainty, it is safer and more profitable if the Trade Secret is in the process of being asked for a Patent or in the form of a Copyright. But there are weaknesses if the secret is protected under the Patent or Copyright system, the characteristics of the object's substance are no longer a secret. Thus, it can be assumed that it will be difficult to place Trade Secrets as an object of endowments. The main obstacle concerns the potential loss of confidentiality because many parties are involved in the waqf process and utilization of the waqf, such as Nazhir and the Deed of Waqf Pledge Officer (PPAIW) and overseeing agencies such as the Indonesian Waqf Agency and DGIP must know the essence of the represented Trade Secret. Based on these descriptions, this article tries to analyze trade secrets as waqf assets from the perspective of positive law and Islamic law.

2 Research Method

Normative legal research methodology is employed in this study, focusing on the examination of diverse regulations pertaining to both Waqf and trade secrets. In-depth interviews conducted with key stakeholders such as the Indonesian Waqf Board and DGIP (Directorate General of Intellectual Property) are utilized to identify challenges hindering the implementation of Waqf-related intellectual property rights (IPR). The data collected through these interviews are analyzed qualitatively and presented descriptively to provide insights into the subject matter.

3 Result and Discussion

3.1 Trade Secrets in Indonesian Law

Business and technology information in a business activity sometimes has high added value [4]. The added value generated in business information and technology can provide an edge on a product or service. Other added values of business information and technology can increase company assets, especially those that are intangible assets [5]. Based on this potential, business people try to keep the business and technology information in order not to leak to other parties.

Many ways can be done to maintain business and technology information, one of them is the application of trade secrets law. The Trade Secret Law is part of an intellectual property rights regime that is oriented to giving exclusive rights to business or technology information that has economic value and is kept confidential. The term trade secret is used in the context of protecting trade secrets in the United States. Meanwhile, the term used in the TRIPs Agreement is undisclosed information [6]. The Uniform Trade Secret Act of 1985 states: "Trade secret is that the subject is reasonable under the circumstances to maintain its secrecy." [7]. In the TRIPs Agreement, undisclosed information is an effective means of preventing unfair competition [8]. Article 39 paragraph (2) of the TRIPs Agreement states [9]:

Natural and legal person shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by by, others without their consent
in a manner contrary or honest commercial practices so long as such information: (i). is secret in the sense that it is not, as a body or in the precise configuration and assembly of its component, generally know among or readily accessible to persons within the circles that normally with the kind of information in question; (ii). Has commercial value because it is secret, and; (iii). Has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

In Indonesia, undisclosed information is termed a Trade Secret. This can be found in the Trade Secret Law. According to Article 1 number 1, the Trade Secret Law states: information that is not known by the public in the field of technology and/or business, has economic value because it is useful in business activities, and is kept confidential by the owner of the Trade Secret. From this understanding, it can be argued that trade secrets are confidential information. The information must meet the following elements: (1) Information is information on technology and/or business; (2) Information has economic value; and (3) Information is kept confidential.

When information fulfills the above three elements, the information can be given an exclusive right called the right to trade secrets. Article 1 number 2 of the Trade Secret Law states that Trade Secret Rights are rights that arise under this Law. From this understanding, trade secret rights are not born based on the registration (first to file principle) but are more focused on fulfilling the criteria of information intended as trade secrets in the Trade Secret Law.

3.2 The Subject of Trade Secret Rights

Trade secret rights can be possessed as an exclusive entitlement by legal entities. These legal entities may include individuals, groups of individuals, or corporate entities. The ownership of trade secret rights entails certain rights and responsibilities. Regarding obligations associated with trade secret rights, owners are obligated to uphold the confidentiality of the information. Failure to maintain the confidentiality of the information may result in the loss of rights to the trade secret itself. On the other hand, the rights conferred upon the owner of trade secret rights comprise the authority to (a) utilize their own trade secrets and (b) grant licenses to or prohibit other parties from utilizing or disclosing the trade secrets to third parties for commercial purposes.

3.3 The Object of Trade Secret Rights

Trade secret rights are a component of the intellectual property rights framework, aimed at safeguarding confidential information known as trade secrets. These protected trade secrets are characterized by their confidentiality, economic worth, and maintenance through reasonable efforts. Information is deemed confidential if it is known only to specific parties or is not generally accessible to the public. Economic value is attributed to information when its confidential nature can facilitate commercial activities, enhance business operations, or contribute to economic gains. Moreover, information is considered to be kept confidential when appropriate measures have been taken by its owner or controlling parties. Examples of business or technological information with economic value encompass production techniques, processing methodologies, sales strategies, and other proprietary knowledge within the realms of technology and business, which offer economic benefits and are not publicly known.
3.4 Trade Secret Rights as Intangible Assets

The concept of objects in Indonesian positive law refers to the provisions of Article 499 of the Indonesian Civil Code. Article 499 states: objects are each item or every right that can be controlled by property rights. From this legal basis, two objects can be distinguished, namely; goods and rights. Through this distinction, there are two concepts of matter, namely; (1) tangible objects, meaning they can be touched with the five senses; and (2) objects that are intangible, meaning cannot be touched. Related to this condition, Indonesian positive law recognizes the existence of rights as an object. It becomes very logical if trade secret rights can be controlled by property rights. Consequently, trade secret rights can be transferred and made as an object of the agreement.

3.5 Trade Secret as Waqf Assets

Regulations on Trade Secrets in Indonesian law are not explicitly stated in the Trade Secret Law. However, in Article 5 the Trade Secret Law states that Trade Secret Rights can be transferred because:

a. inheritance;
b. Grant;
c. Will;
d. written agreement; or
e. other reasons justified by the laws and regulations

The provisions in letter (e) of the article above are justified that Trade secrets can be used as waqf assets. This is based on the provisions of Article 16 of the Waqf Law which states that IPRs (as a whole) can be used as waqf assets. In addition, the Fatwa of the Indonesian Ulama Council (MUI) Number 1 / MUNAS VII / MUI / 15/2005 dated 29 July 2005 concerning the Protection of Intellectual Property Rights states that IPR is a movable object and can be used as a waqf asset. There are several patterns of opinion among scholars regarding objects that are legal for waqf. This difference of opinion is inseparable from the conception of each ulama concerning the nature of waqf. In the Hanafi school. The criteria of waqf objects set by this school are things that cannot be moved and changed, such as aqar and similar, it is not permissible to manqûl waqf, and property that can be shared. Wahbah states that aqar is something that cannot be moved and changed from one place to another, such as building and land. Wahbah further explained the notion of manqûl according to the Hanafiy school by saying [10]: Manqûl is something that can be moved and changed from one place to another, whether it is in its original form or condition, or there is a change in its shape and condition because of the process of displacement and change. These include currencies, trade assets, various types of animals, objects that can be measured and weighed. Looking at the Hanafi opinion, then waqf with trade secret assets are not permitted because trade secrets are included in immovable assets. Secondly, the Mâlikiy School determines the criteria for trade secrets as waqf assets to be something that can be owned (al-mamlûk).

The ulama of the Mâlikiy school explains the nature of things that can be owned is "Something that includes ownership of the property and ownership of benefits." Thus the criteria for trade secrets as waqf assets can be accommodated through Maliki's opinion. Third, the Syafi'i School states that the requirements of the waqf object must be in the form of certain objects that can be owned by ownership that can be moved, can be availed of or benefits with the fixed state of the object, valid for rent and can be used for a long time [11]. Several requirements can be seen from the Syafi'i's opinion, namely (1) waqf objects owned by wakif and can be transferred, (2) Having benefits, (3) They have long durability. The Shafi'i school allows waqf aqâr (immovable objects such as land and buildings), al-manqûl (movable objects such as clothing and books) and al-musyâ' (shared assets), both in the form of aqâr
and manqûl. Fourth, the Hanbalîy school. The Hanbalîy School determines the criteria for an object to be an object of waqf by stating that waqf objects are objects that can be traded, can be used for a long period with the fixed state of the object, such as animals, immovable objects and swords. According to the Hanbalîy school, the criteria for waqf objects must meet two criteria. First, the lawful objects to be traded. Therefore, it is illegal to accept dogs, pigs, pawned goods and other things that are not legal to be traded. Second, objects that can be utilized for a long period with the condition of the object remain, therefore it is not valid to represent something that cannot be used for a long time such as food and fragrances. Like the Shafi'i school, the Hanbalîy school also allows waqf aqâr (immovable object) al-manqûl (movable object) and al-musyâ’ (shared assets, both in the form of aqâr and al-manqûl).

Muhammad Mushafa Syalabi explained that the conditions of the waqf object are four conditions: First, the property must be mutaqawwim (allowing it to be maintained and allowing it to be used in a certain way); Second, the assets represented can be known perfectly by the waqf and the manager (recipient) of the waqf when the waqf is pledged; Third, the object that is represented is the property of the wakif perfectly and can change hands when the object is pledged for waqf; Fourth, objects that are represented can be separated expressly without being tied to another [12]. Looking at the above opinions, it can be formulated that the conditions for waqf property are:

- Waqf assets must belong to the wakif and be legally owned
- Waqf assets must be halal assets
- Waqf assets have economic benefits and values
- Waqf assets can be transferred
- Waqf asset has long durability

The five conditions are used as a basis in waqf with trade secret assets. The first requirement regarding proof of ownership of a Trade Secret that must be possessed by wakif is quite difficult to do given the protection of trade secrets does not apply the registration system, meaning that there is no need for a registration process to obtain legal protection for trade secrets. Unlike the case with Trademarks, Patents, Industrial Designs and other Intellectual Property that applies the first to file system and obtains ownership certificates from DGIP. Efforts to prove ownership of trade secrets by wakif can be done by showing evidence of efforts to maintain confidentiality as stated in Article 3 of the Trade Secrets Law which states that information is considered to be kept confidential if the owner or parties who control it have taken appropriate and appropriate steps. The second condition, halalness in trade secrets is carried out by explaining the origin of the trade secret as contained in the Explanation of Article 22 paragraph 3 letter b to guarantee that waqf objects come from halal sources, not contrary to sharia and statutory regulations. The third condition, to be able to say that trade secrets have economic value is that the secret is used in an ongoing business. The fourth condition can be fulfilled through Article 5 of the Trade Secret Law as mentioned above.

### 3.6 Waqf Term of Trade Secret Assets

Provisions in the Waqf Law allow waqf for a certain period except for waqf with immovable objects in the form of land except for land rights (Article 18 Indonesian Republic, 2006). Provisions in the Waqf Law allow waqf for a certain period except for waqf with immovable objects in the form of land except for land rights. The period in this case is intended for waqf property. The Waqf Law regulates the object of waqf property which is generally divided into land rights, money waqf, and waqf of movable objects other than money including Trade Secrets. Not all of the three types of objects of waqf are forever regarding ownership, but some are temporary, such as the use rights of buildings, brands, patents, trade secrets, and
others. So the meaning of waqf can be a period that is attached to the object of waqf objects, not the core activities of waqf [14].

The intended period is to provide an opportunity for the waqf to carry out the waqf of property that has a period even though the period of protection for the Trade Secret lasts forever until the information is not known to the public [15]. This is stated in Article 3 paragraph 1 of the Trade Secret Law that Trade Secrets are protected if the information is confidential, has economic value, and is kept confidential through appropriate efforts. Furthermore, in paragraph 2 it is stated that information is considered confidential if the information is only known by certain parties or is not generally known by the public. Certain parties in trade secrets are one of them who receives a license for the trade secret. License is a permit granted by the holder of the Trade Secret Right to another party through an agreement based on the purchase of rights (permission) to enjoy economic benefits from a trade secret that is given protection in a certain period of time and certain conditions [16].

Regarding information that is publicly known or not, it is determined by the number of people who can access it. For example, many employees of large companies can use customer lists or work procedures. However, this does not cause the information to be known in general, because the company owned by the confidential information does not allow disclosures outside the scope of the company [17]. Disclosure of trade secrets that can eliminate protection against Trade Secrets, for example, is the owner of a trade secret writing secret information through social media or disclosing it in a seminar. Thus, as long as wakif can maintain its confidentiality, so far, the protection of trade secrets takes place.

### 3.7 Efforts to Maintain Confidentiality in the Transition of Trade Secret Rights through Waqf

The Trade Secret Law does not regulate steps in maintaining confidentiality. But in practice, there are several steps that can be used to maintain the confidentiality of trade secrets [18]:

a. Disclose only to people who need to know it by a trade secret agreement;
b. Make trade secret agreements with employees or third parties;
c. Protect confidential data by making secret codes;
d. Store confidential documents in secure places that cannot be easily accessed by employees or other parties;
e. Include the word "secret" on the outside of the confidential document;
f. Limiting the access of employees to enter other units or departments of a company;
g. Prohibiting employees from working outside specified working hours

In addition, according to [19] the steps of a company in maintaining confidentiality include:

a. Make a Written Agreement
   This written agreement is carried out between the owner/holder of the Trade Secret and the third party and is called the Secrecy Agreement. The object of this agreement is not only data and information that is included in the Trade Secret category but also includes technical experience regarding processing, materials, operating procedures, quality control, and information on formulas that have high commercial value. In this agreement, it is also stated that the owner of the Trade Secret as the Provider of Trade Secret is willing to disclose his Trade Secret to the Recipient of the Trade Secret within the stipulated period.
   The Trade Secret Recipient is obliged to keep secret and not disclose the Trade Secret to another person without the written permission of the Trade Secret provider. Therefore, it must be firmly agreed that the information is a property right so that the right recipient will not use it for the benefit of his business. This confidentiality obligation also applies
to further agreements that may be carried out relating to the principal agreement and continue to apply if the term of the agreement has expired.

b. Make a Work Agreement between the Company and Employees

This working agreement is called the Employment Agreement and Confidentiality Agreement. In the employment agreement, it must be strictly regulated that employees may not disclose the company's Trade Secrets outside of their duties, such as when dealing with other parties not bound by the agreement, even in seminars or exhibitions held by the company. This clause is called the Non-Disclosure of Confidential information. In other words, the disclosure of Trade Secrets can only be given to employees in certain fields with certain confidential conditions. In this work agreement, it must also be stated explicitly that if the employee does not work for the company again, then he is still obliged to keep the trade secret of the company from the other party. However, without this work agreement, an employee should not divulge the company's Trade Secret where he works to an unauthorized party because it is his obligation. With the existence of this work agreement, it will guarantee legal certainty for both parties and avoid any dispute in the future.

c. Trade secrets must be included in a group of confidential information or data. Thus, all documents relating to Trade Secrets must be affixed with a "secret" sign, secret codes are made, stored in locked cabinets, and unauthorized employees are prohibited from knowing that information by making a sign "only for certain people." The company must establish a control system for the visitors or guests visiting the company. Therefore, the company needs to record who came to the company.

d. The company contains identification for everyone, such as employees, even directors to avoid the entry of outsiders into the company.

e. The company also make an entry book for anyone who enters the department of the company which is not the place; this provision needs to be given the existence of a relationship between departments within the company.

Some of the above conditions can be carried out by the owner of a trade secret and are considered to have taken appropriate and appropriate steps as stated in Article 3 of the Trade Secret Law. The transfer of the Right to Trade Secret through waqf resulted in the legal transfer of ownership from Wakif to Nazhir. Even though they have switched, the existence of secrecy when these rights are transferred must be maintained. Efforts that can be done by Wakif to maintain confidentiality based on the above steps, one of which is to make confidentially agreement with Nazhir as a waqf manager. In the confidential agreement, a clause is stated that the endowments of the waqf are prohibited from disclosing the trade secrets of Wakif even though they have been transferred through waqf. In addition, another effort that can be done by Wakif is the inclusion of the obligation to maintain confidentiality in the Waqf Pledge Deed made by the PPAIW.

4 Conclusions and Recommendations

Based on the description above, waqf with trade secret assets can be legalized in Indonesian positive law. In addition, trade secret waqf is possible with several provisions, namely (1) Trade secret owned by Wakif legally proven by its use in business activities continuously (2) Trade secrets have economic value (3) Trade secrets can be accounted for in Shari'a (4) Wakif previously made efforts in maintaining confidentiality (5) Transition of trade secrets through waqf accompanied by an agreement to maintain secrecy with Nazhir and the inclusion of clauses on the obligation to keep secrets in the Waqf Pledge Act made by PPAIW. As a recommendation, the Indonesian government should revise the regulation of waqf implementers that seem obsolete by including the IPR waqf mechanism.
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