



A Comparative Analysis of Legal Products on the Development of Productive Waqf in Indonesia and Malaysia

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Abstract

Indonesia and Malaysia generally have the same Islamic character and history, so the development of Islamic law also has the same roots. Then there were differences in the development of Islamic law, including the law on waqf, which was caused by differences in colonial history. The Dutch colonized Indonesia, and Malaysia was colonized by the British. Therefore, they have different systems and state administrations. This study aims to explain how much support for positive legal products that regulate waqf impacts the development of productive waqf instruments in Indonesia and Malaysia, although with different legal systems. This research is literature research with a juridical-normative approach with a qualitative model. Analysis of the data used is the interactive analysis model of Miles and Huberman. The study results in show that in Indonesia and Malaysia, waqf legal products have existed since the sultanate era, colonial era, and independence era. Waqf legal products in Indonesia regulate more about waqf of immovable objects, which are regulated in different legal products. However, since the birth of the Waqf Law in 2004, waqf has not only focused on immovable objects but also movable and productive objects following the development of the financial world. And business. Likewise, in Malaysia, the legal product of waqf is included

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in family law which is regulated in the law in each different country, including the territory of the alliance. Productive waqf has also penetrated productive economic efforts by the purpose of waqf.

Keywords: *Indonesia; Legal Product; Malaysia; Productive Waqf*

INTRODUCTION

Indonesia and Malaysia are two countries with a majority Muslim population which makes Islam not only limited to individual community ritual worship activities but also makes Islam an inseparable source of law from state life. From the aspect of the constitution, the foundation for applying Islamic law in Indonesia is based on Article 29 of the 1945 Constitution, which explains the existence of religious freedom. Meanwhile, in the Malaysian Constitution, Islam is positioned as the only official religion of the State. The two constitutions of the two countries are a basic description of the position and development of Islamic law (Abdullah, 2021; Amani, 2019; Ibrahim et al., 2016; Jamil, 2010; Moustafa, 2013).

However, the position of Islamic Law between Indonesia and Malaysia in the legal system is different. Indonesia uses a legal system inherited from the Dutch colonial era (Lev, 1985; Astutik & Trisiana, 2020), which tends to prioritize form over content, paying little attention to the content of morality. Meanwhile, Malaysia is a former British colony. Thus, Malaysian law is influenced by the British Common Law tradition. However, Malaysia did not abandon or overhaul its entire basic legal order, which had existed long before British law became the country's legal order. This was because Malaysia kept the law to the fundamental values of its people (Soh, 2020; Tew, 2011).

Malaysian law sources consist of three; national law, Islamic law, and customary law (Kamaruddin, 2012; Sharmin, 2012; Somadiyono, 2020). The colonial historical background of these two

countries is a differentiating factor in the constitutional system. Malaysia is a country that adheres to the type of federal State, which includes federal and State states with a democratic monarchy system of government. Meanwhile, the State of Indonesia is in the form of a unitary state which includes the central government and autonomous regions with a republican system of government with the principles of constitutional democracy (Umar, 2013). Likewise, waqf legal products between Indonesia and Malaysia have their characteristics with the legal and State systems typology. The point of similarity between the two countries is the Islamic legal framework based on the Shafi'i school of thought (Islamiyati, 2019).

Waqf legal products have very significant similarities and differences in their implementation, legal basis, system, and settlement of waqf disputes. In terms of waqf productivity, Indonesia and Malaysia have reached the world of business, trade, and other sectors (Prihatna et al., 2006). Therefore, the focus of this research is the support of legal products regarding waqf for the development of productive waqf in Indonesia and Malaysia, intending to explain how much the support of positive legal products governing waqf has an impact on the development of productive waqf instruments in Indonesia and Malaysia.

METHOD

This is literature research with a juridical-normative approach and a qualitative analysis model. The primary data source of this research is secondary data with the main ingredients of positive legal products in Indonesia and Malaysia, specifically regarding waqf. Analysis of the data used is the interactive analysis model of Miles and Huberman, which includes data reduction activities, data, data display, and conclusion drawing or verification.

RESULTS

Legal Products on Waqf

From a historical perspective, the practice of waqf in Indonesia and Malaysia includes the sultanate era, the colonial era, and the independence era. Waqf management in Indonesia has existed since the entry of Islam into the archipelago, especially after the establishment of Islamic kingdoms. However, waqf activities only became apparent around the 15th and early 16th centuries AD. The practice of waqf currently is only limited to the waqf of immovable objects. It is intended to benefit physical development, such as mosques, prayer rooms, Islamic boarding schools (pesantren), cemeteries, and others (Dar, 2020; Nugraha et al., 2022; Suryani & Isra, 2016).

Many historical evidences suggest that during the sultanate waqf was practiced. The evidences can be traced from historical relics, both in the form of land and mosque buildings, madrasa buildings, tomb complexes, both wet and dry land found in almost all of Indonesia, especially those in the sultanate era or has been ordered by the Regent who is Muslim. The evidence includes land that includes mosques such as Kauman Mosque in Cirebon, waqf from Sunan Gunung Jati; Demak Mosque waqf from Raden Patah; Menara Masjid in Kudus waqf of Sunan Muria; Jamik Mosque waqf base of Sultan Abdul Qodirun; Semarang Grand Mosque waqf from Prince Pandanaran; Ampel Mosque in Surabaya waqf from R. Rochmat Sunan Ampel; The Great Mosque of Kauman in Yogya waqf from Sultan Agung; Kauman Great Mosque in Solo waqf from Susuhunan Paku Buwono X; and in East Java there is also a "Perdikan," which is a piece of land which is a gift from a king to a person or group of people in the village who have served the king or the state (Djatnika, 1982).

In the Colonial Era, the practice of waqf can be seen from the legal products issued by the Dutch colonial government in Indonesia by issuing various regulations governing waqf issues, including:

- a. Circular of the first Governor's Secretary dated January 31, 1905, No. 435, as contained in Bijblad 1905 No. 6196, on *Toezicht op den bouw van Muhammedaansche bedehuizen*. This circular is addressed to regional heads in Java and Madura except for areas in the Swapraja area, where as long as this has yet to be done so that the Regents make a list of Islamic houses of worship in their respective districts. The list must note the origin of each house of worship, whether it is used for Friday prayers or not, whether there is a yard or not, and whether there is a waqf.
- b. Circular Letter of the Secretary of the Governor dated June 4, 1931, No. 1361/A, as contained in Bijblad 1931 No. 12573, on *Toizich Van de Regeering op Mohammedaan schebedehuizen, Vrijdagdienstten en waqf*. Although there have been slight changes in this second circular, there are still reactions from movements from Muslims, arguing that according to Muslims, waqf is a private legal act (material privaatrecht).

In the era of independence, the regulation of waqf property starts from the legal product that regulates the Waqf of owned land, which is regulated in several legal products. The legal products are as follows:

- a. Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles, article 49 paragraph (1) indicates that "Owned land waqf is protected and regulated by Government Regulation."
- b. Government Regulation No. 10 of 1961 concerning Land Registration because this regulation is generally applicable. It also includes the registration of waqf land.
- c. Minister of Agrarian Regulation No. 14 of 1961 concerning requests and grants of permission to transfer land rights. This regulation was issued on September 23, 1961

- d. Waqf in the Compilation of Islamic Law (KHI) As contained in Book III KHI. Waqf, as regulated by KHI, basically has similarities to what has been regulated by previous legislation (PP No. 28 of 1977 concerning Land-Owned Waqf). It is just that this Government Regulation is limited to the Waqf of owned land. At the same time, the KHI contains general Waqf, which includes movable objects and immovable objects that have a durability that is not only disposable and has value, according to Islam ([Itang & Syakhabyatin, 2017](#)).

Unique legal products only regarding Waqf were born in 2004, in the legal form, namely Law No. 41 of 2004 concerning Waqf, followed by an explanation in Government Regulation No. 42 of 2006 concerning the Implementation of Law No. 41 of 2004. There was a change to Government Regulation of the Republic of Indonesia No. 25 of 2018 concerning Amendments to Government Regulation No. 42 of 2006 and its explanation. The derivative regulations of the waqf law mentioned above are the rules governing cash waqf, including:

- a. Regulation of the Minister of Religion of the Republic of Indonesia No. 4 of 2009 concerning Administration of Cash Waqf Registration.
- b. Regulation of the Minister of Religion of the Republic of Indonesia No. 73 of 2013 concerning the procedures for Waqf of immovable and movable objects other than money.
- c. Decree of the Director General of Islamic Community Guidance No. DJ. II/420 of 2009 concerning the Model, Form, and Specification of the Cash Waqf Form.
- d. Attachment to the Decree of the Director General of Islamic Community Guidance DJ. II/420 of 2009 concerning the Model, Form, and Specification of the Cash Waqf Form.
- e. Decree of the Director General of Islamic Community Guidance No. 800 of 2014 concerning the Implementation of the Minister of Religion Regulation No. 73 of 2013

- concerning the procedures for Waqf of immovable and movable objects other than money and their attachments.
- f. List of PWU LKS Based on the Decree of the Minister of Religion of the Republic of Indonesia (Kementerian Agama RI, 2013).

The regulations governing waqf land are further regulated in the Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency No. 2 of 2017 concerning Procedures for Registering Waqf Land. In addition to legal products in the form of laws, KHI, and related Ministerial Regulations, regulations regarding Waqf to promote and develop Waqf nationally, the Indonesian Waqf Board (BWI) was established, which, in carrying out its duties issued derivative regulations from the Waqf Law.

In Malaysia, waqf management's legal and technical products vary according to the respective federal laws. However, exceptions in the Johor area and the federal territory are used to establish Waqf in the form of cash funds and bank accounts. The state does not allocate a particular budget for waqf management, but funding for waqf management can use bank credit. For example, the Malaysian Islamic Bank, founded in 1983, has opened opportunities for borrowing funds to develop Waqf ([Prihatna et al., 2006](#)).

The British Common Law system strongly influences legal products in Malaysia. This model enters and becomes an inseparable part of the Malaysian legal system. Even though many political parties are based on Islam, the sociological circumstances forced them to adopt the British legal system to further compromise with the provisions of Islamic Law when formulating the Islamic Family Law Act. This combination eventually became the process of forming the Islamic Family Law, including waqf law. Since its independence in 1957, each State has had its own Islamic Family Law (Enakmen)

Law. The following laws are closely related to waqf arrangements ([Haron, 2002](#); [Mahsun, 2011](#)).

- a. In the State of Selangor, there is an amendment to the Law on the Administration of Islam in the State of Selangor No. 3 of 1952.
- b. The Federal Territory contains the 1988 Baitul al-Mal Rules and the 1993 Islamic Law Administration Deed.
- c. The State of Melaka has the 1991 Melaka Syarak Law Administration Enforcement.
- d. Kelantan has an Islamic Religious Assembly and the Kelantan Malay Customs and Tradition 1994.
- e. Negeri Sembilan had an Islamic Religious Council Enforcement in 1957, a 1960 Islamic Law Administration Enforcement, and a 1991 Syarak Law Administration Enforcement.
- f. Pulau Pinang has the 1959 Islamic Law Administration Enforcement.
- g. The country of Perak has the 1959 waqf control regulation and the 1992 Islamic Religious Administration Enforcement.
- h. Johor, Administration of Islamic Law Enactment, 1978.
- i. Kedah, Administration of Muslim Law Enactment, 1962.
- j. Perlis, Administration of Muslim Law Enactment, 1964.
- k. Sabah, Administration of Islamic Law Enactment, 1992.
- l. Sarawak, Majlis Islam (Incorporation) Ordinance, 1954.

In the 1990s, there was much pressure from several parties to keep the Islamic tradition alive, so the amendment on waqf was revised so that it gave birth to the 1991 Enforcement for the Administration of Sharia Law, the 1992 Enforcement for the Administration of Islamic Law, and the 1993 Deed on the Administration of Islamic Law ([Mahsun, 2011](#)). The authority to regulate waqf in Malaysia is in the hands of the Syari'ah Court, although it may also be delegated to the (Secular) District Court. The parameters of waqf property are considered correct and valid if they are by the provisions of Islamic Law ([Rahmany, 2019](#)). The regulation

of waqf in Malaysia has a disparity of opinion and interpretation among legal entities with the competence or authority to make and interpret regulations and managerial waqf. One interpretation that has been decided by the State Legislative Body automatically becomes raw when the Federal Council (Parliament), which has a higher degree of authority, decides otherwise. Responding to this, [Hokker \(1984\)](#) considered that ideally, the Federal Court should refrain from interfering too much in matters under the authority of the Lower Court because it would imply the existence of a dictatorial system in waqf regulation. At least there will be additional regulations in Malaysia.

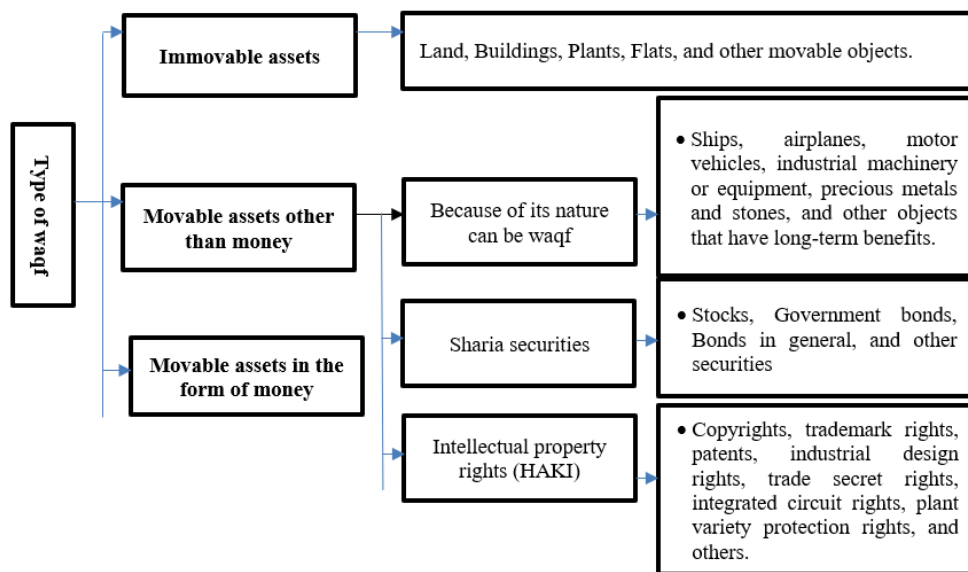
The institution that has full authority to manage waqf assets is the Islamic Religious Council in each country ([Rahmany, 2019](#)). Judging from the laws (Enakmen) in various countries, this shows that Malaysia in the post-independence period has been quite advanced in formulating its Islamic Family Law Law, including those relating to waqf issues. It should be noted that although using the terms "Islamic law" (Islamic Law), the substance of the material is not pure (genuine) and is based on sharia. It has been mixed with Western legal traditions (written laws), judicial decisions, and customary Law. Anderson's paradigm of legal reform and legal material in Malaysia can be categorized as the third type of the 'trilogy' typology, combining rules in Islamic Law, adat, and positive (secular) Law, including those regarding procedures and administration in property management ([Mahsun, 2011](#)).

Productive Waqf Legal Products in Indonesia and Malaysia

In Indonesia, the basis for determining productive waqf is seen in Law Number 41 of 2004. This law is a development and improvement of waqf material regulated by previous laws and regulations. Development is limited to regulating the waqf of

immovable objects and the waqf of movable objects, including regulating the management and development of waqf property. Operationally, this law was followed up by Government Regulation Number 42 of 2006 concerning the Implementation of Law Number 41 of 2004 concerning Waqf (Syibly, 2021).

Figure 1
Types of waqf in Law No. 42/2004



Source: Syibly (2021).

As stipulated in Law No. 41 of 2004, the methodological construction of waqf law tends to use the *ijtihad intiqai*' approach. The determination of *fiqh* law is carried out by revealing the opinions of previous scholars and their arguments, then comparing and choosing opinions with stronger arguments and more in line with current conditions (Al-Qaradhawi, 1994, p. 115). This can be noted in Article 1, related to the existence of waqf, Article 16, related to waqf objects, and Article 40, related to changes in the status of waqf assets. The legal construction in the three articles tends to use the pattern of choosing the legal opinion of the classical

jurisprudence relevant to the development conditions and needs of modern society in the world of waqf (Islamy et al., 2021, pp. 43-59).

Productive waqf, which explicitly uses other productive words, is Article 43, namely: “(1) The management and development of waqf property by Nazhir as referred to in Article 42 are carried out by sharia principles. (2) The management and development of waqf assets, as referred to in paragraph (1), is carried out productively. (3) If the management and development of waqf assets as referred to in paragraph (1) requires a guarantor, then a sharia guarantor institution is used” (Law No. 41 of 2004).

The characteristic of waqf in the spirit of the 2004 law, waqf productive value, are listed in article 43. No exact word states productive waqf –perhaps because the meaning has been understood. According to the Indonesian Dictionary, the productive word means being able to produce, able to produce results, generate benefits and be profitable. In the context of waqf, productive means professional waqf management to increase or increase the benefits of waqf itself (Mubarok, 2021). For example, waqf land, in economic terms so that the land is valuable, must be appropriately managed as a factor of production (Mannan, 1989; Salman, 2021; Zaman, 2022)

Waqf in Malaysia, as in Indonesia, the practice of waqf is not a new thing in society in Malaysia. The practice of waqf in Malaysia at this time is a development of the practice of waqf that has been carried out for a long time as part of the implementation of religious spirit along with the entry of Islam into Malaysia. There are many waqf institutions in Malaysia and they are widespread. For the type of productive waqf management in Malaysia, it has developed since 2008, which was marked by the establishment of a 34 (thirty-four) storey building with 2 (two) levels below ground and 7 (seven) levels of vehicle parking built on waqf land covering an area of 52,838 m². The land is a waqf of a wealthy man of Gujarat descent, India, in

1980. This building is known as the Imara Waqf Tower. This Waqf building is rented and intended for *mauquf alaih* for the purpose of the waqf (Jaharuddin & Dhewayani, 2020).

In addition, productive waqf can also be seen with waqf hospitals that provide relatively low costs, the development of orphanages, and the funding required for their education. Waqf in the form of a corporation that is the model is Johor Corporation Berhad (Jcorp). This company innovatively develops the concept of stock waqf. The success of this institution became the first example of the implementation of corporate stock waqf, often referred to as corporate waqf. JCorp synergizes this waqf program with implementing Corporate Social Responsibility (CSR) (Jaharuddin & Dhewayani, 2020).

Productive waqf management in Malaysia is also implemented by Yayasan Dakwah Islamiah Malaysia (YADIM), which manages waqf schemes based on the concept of waqf implementation according to Islam. YADIM has offered 14 million waqf shares, the total price of the YADIM Training Center in Semunggis, Hulu Langat. These Waqf shares are offered to the general public at a price of RM1/share. YADIM also bought buildings in strategic trade centers to continue the waqf scheme (Rahmany, 2019).

Substantively, several articles (sections) in the Enactment show how the authority body's work pattern (Majlis) should be in dealing with waqf procedural processes. Among them, Law No.1 of the Islamic Law Administration Act (Federal Territories) 1993 (Act 505) Part 1 Sec. 2- Interpretation according to government regulations chapter of charitable trust section 61 waqf and vows. P.U (A) 352/85. Act A585. Among them are articles 61 and 62 of the Islamic Law Administration Act (Federal Territories).

DISCUSSION

Indonesia and Malaysia are neighboring countries with a Muslim majority population with the same history. The practice of Waqf existed before European colonization, namely in the Sultanate Era. The difference occurred after European countries with different legal systems colonized the two countries. In Indonesia, waqf rules existed during the Dutch colonial period, namely Staatsblad No. 605. Besluit Government General Van Ned Indie ddp. August 12, 1896, No. 43, jo ddo. November 6, 1912. No. 22 (Bijblad 7760) and the circular of the first Governor's Secretary dated January 31, 1905, No. 435, as contained in Bijblad 1905 No. 6196, on Toezicht op den houw van Muhammedaansche bedehuizen (Rosyid, 2014; Itang & Syakhabyatin, 2017; Nissa, 2017; Ibad et al., 2018). In the independence era, waqf rules were more on land affairs and immovable objects. However, in 1981 with the Islamic Law Compilation (KHI), there were rules regarding the Waqf of movable objects. All the legal products regulating Waqf are still mixed with other civil rules. Indonesia has a particular legal product for Waqf independently marked by Law no. 41 of 2004 concerning Waqf.

Institutionally, the Indonesian Waqf Board (BWI) is an institution that stands on the mandate of the Waqf Law that the duty and authority to; guide nazhir in managing and developing waqf assets, carry out the management and development of waqf assets on a national and international scale; give approval and or permit for changes in the designation and status of waqf property; dismiss and replace nazhir; give approval for the exchange of waqf property; provide advice and consideration to the Government in formulating policies in the field of Waqf (Dahlan, 2016; Aziz, 2017; Hasanah et al., 2020).

Likewise, in Malaysia, before the arrival of the invaders, the applicable law in Malaysia was Islamic law mixed with customary

law, with the enforcement of justice carried out by the Kings or Sultans. The position of the Sultan is very strategic as a religious official as well as the highest political official and symbolizes the Muslim style of the Malay community. Among the laws are the Perpatih custom, the Temenggung custom, the Sarawak Malay Court Law, the Pahang Law, the Kedah Law, and the Johor Law (Busu & Kozako, 2019; Nurozi, 2022; Sulaiman et al., 2022). The texts of these Malay laws are influenced by the Malacca Kanun Law, which is rooted in adat and Islam (Sharia). The thickness of the legal source comes from the shari'ah as evidenced by the discovery of the Ninety-Nine Law, whose contents are similar to the book of al-Ihkam fi Tamzis al-Fatawa by Imam al-Qarafi in Perak.

When controlling Malaysia, the British colonizers gradually introduced and implemented the country's legal system, replacing the laws derived from Islamic law. The problems that are most affected are the problems of marital law. At the same time, the least are the problems of inheritance and matters relating to the transfer of property (Waqf, wasiyat, and zakat). The latter may be due to its association with wealth (money) or the strong tradition of living in the community so that intervention can no longer be carried out (Mahsun, 2011). In particular, productive Waqf is regulated through respective state regulations, such as Articles 61 and 62 of the Deed of Administration of Islamic Laws, Federal Territories.

The laws regarding Waqf in Malaysia include laws on the property which are quite comprehensive and transparent compared to laws regarding the distribution of inheritance, wills, *baitul mal*, and insurance. The parameters of waqf property are considered correct and valid if they are by the provisions of Islamic Law (Bakri et al., 2016; Ismail et al., 2015; Mahsun, 2011). This appendix has tried to regulate and direct the management of the waqf property with a management system that does not distinguish the types of waqf 'am,

typical Waqf, and vows 'am. The authority to regulate it is in the hands of the Shari'ah Court, although it may also be submitted to the (Secular) District Court.

Suppose there is any ambiguity (doubt, lack of understanding) in the wording of the waqf deed. In that case, the State Council, through the Legal Committee (Fatwa Committee), is authorized to interpret and decide the details of the meaning and purpose of the Waqf. This interpretation gained legitimacy after obtaining justification (confirmation) in writing from the King and the State Council. The states of Johor and Perak are the most enthusiastic about making regulations about abstract matters related to the waqf problem by making specific Enactments about it. The Waqf Enactment in Johor contains a particular article (special section) regarding Waqf that does not fall under the general Waqf or *khairat* category (member waqf) where it is considered a proper type of Waqf (*absah*) (Hooker, 1984; Rahmany, 2019).

CONCLUSION

The legal products of waqf in Indonesia and Malaysia are quite adequate. Even the legal products of the two countries have existed since the Dutch and British colonial times. Waqf legal products in Indonesia were initially focused on immovable objects, especially land. They are starting with just administration, leading to the rule of law governing the process of waqf pledges and waqf land certification. Along with the development of types of valuable assets and the development of economic investment, productive waqf legal products were born in Indonesia, regulated in the Waqf Law no. 41 of 2004 along with the accompanying Government Regulations as well as several Regulations of the Minister of Religion which regulate the technical process of productive waqf. Whereas in Malaysia, productive waqf is different for each country.

For example, the alliance's territory accommodates it in Law No. 1 Deed of Administration of Islamic Law (Federal Territories) 1993 (Deed 505) Part 1 Sek. 2- Interpretation according to government regulations chapter amanah khairat sexyen 61 waqf and vows. P.U(A) 352/85. Deed A585. Substantively, there are several articles (sections) in the enactment that show how the work pattern of the authority agency (Majlis) should be in handling the procedural processes of waqf.

Waqf products are initially limited to immovable property. However, legal products support the development towards productivity in accordance with modern forms of business investment, such as cash waqf, shares, sukuk, rental, retail, ships, airplanes, vehicles, motors, industrial machines or tools, precious metals and stones, and other objects that have long-term benefits and so on.

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