

Juridical Analysis of the Status and Legal Basis of Land Waqf

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Abstract. In Indonesia, the guidelines with respect to waqaf are contained in Regulation Number 41 of 2004 concerning Waqaf. Assemblage of Islamic Regulation (KHI) and Unofficial Law Number 42 of 2006 concerning the Execution of Regulation Number 41 of 2004 concerning Waqaf. Aside from that, in Regulation Number 5 of 1960 concerning Fundamental Agrarian Guidelines (UUPA) 24 September 1960, to a limited extent XI in Article 49 section (3) expresses that: land is for sacrosanct and social purposes. Waqfan of claimed land is managed by unofficial law PP Number 28 of 1977, regarding *Waqfan* of Owned Land. Meanwhile, *waqafan* other than owned land is not yet regulated in it. Waqf land is a transfer of personal rights, property rights, or certain legal entities, transferred to waqf rights, the purpose of which is for social purposes, worship, and other public purposes. The deed was made after the *Dusturiah* Journal was carried out. VOL.8. NUMBER 1. (January-June) 2018. 16- E-ISSN. 2580-5363. P-ISSN. 2088-5363 18 measurements together with the waqif, nadir, BPN employees, and KUA employees to carry out measurements of the land being donated, before the *Waqaf* Pledge Deed (AIW) is made.

Keywords: Legal Status, Land Rights, Waqf.

1 Introduction

The need for land today is increasing in line with the increase in population and increasing other needs related to land. Land is not only a place to live, and a place to farm but is also used as collateral to get a loan at the bank, for buying and selling and renting. It is so important that the use of land for public purposes for individuals or legal entities requires a guarantee of legal certainty over the land.[1]

In Indonesia, the guidelines with respect to waqaf are contained in Regulation Number 41 of 2004 concerning Waqaf. Assemblage of Islamic Regulation (KHI) and Unofficial law Number 42 of 2006 concerning the Execution of Regulation Number 41 of 2004 concerning Waqaf. Regulation Number 41 of 2004 concerning Waqaf, states that "waqf is the lawful demonstration of waqif, to isolate or potentially hand over piece of one's property to utilize perpetually or for a specific period by one's inclinations for love as well as broad government assistance as per sharia".[2]

According to "Article 22 of the Law, it is stated that to achieve the aims and functions of waqf, waqf assets can only be intended for:[2]

1. Places and activities for worship.
2. Facilities and activities related to education and health.
3. Scholarships; aid to the underprivileged; orphans; abandoned children.
4. Development and strengthening of the populace's economic and/or
5. Promotion of further general welfare in accordance with legislative norms and sharia.

September 24, 1960, is a noteworthy day on the grounds that on that date Regulation Number 5 of 1960 concerning Fundamental Agrarian Standards for all districts of Indonesia was proclaimed and pronounced powerful. With the order of Regulation Number 5 of 1960 concerning Essential Guidelines on Agrarian Standards (hereinafter alluded to as UUPA) there have been key changes to Agrarian Regulation in Indonesia, particularly in the land area.[3]

Law Number 5 of 1960 concerning Basic Agrarian Regulations (UUPA) 24 September 1960, in part XI in Article 49 paragraph (3) states that: land is for sacred and social purposes. *Waqfan* of owned land is regulated by government regulation PP Number 28 of 1977, regarding *Waqfan* of Owned Land. Meanwhile, *waqafan* other than owned land is not yet regulated in it. Waqf land is a transfer of personal rights, property rights, or certain legal entities, transferred to waqf rights, the purpose of which is for social purposes, worship, and other public purposes. Land *waqafan* as progress occurs in society, is carried out in front of the *nadzir* or body authorized to make *Waqaf* Pledge Deeds (AIW), in every Religious Affairs Office (KUA), authorized to make *Waqaf* Pledge Deeds (AIW) together with the National Land Agency (BPN), The deed is made after joint measurements are taken with the waqif, nazir, BPN employees and KUA employees to measure the land being donated, before the *Waqaf* Pledge Deed (AIW) is made.

Based on the provisions of Article 20 paragraph (2) UUPA relating to the transfer of ownership rights to land, namely that ownership rights can be transferred and transferred to another party. The words transfer and transfer mean that they are a transfer of ownership rights to land. The definition of the word "transfer" is a transfer of rights where because the owner of the rights has died, his rights automatically transfer to his heirs. Article 20 paragraph (2) UUPA states that ownership rights to land can be transferred and can be transferred. Transfer of ownership rights to land can occur due to legal actions and legal events. Transfer of ownership rights to land due to legal actions can occur if the holder of ownership rights to land deliberately transfers the rights they hold to another party. Meanwhile, the transfer of ownership rights to land due to legal events occurs when the owner of the ownership rights to the land dies, then automatically or without any deliberate legal action from the rights holder, the ownership rights are transferred to the rights holder's heirs.[4]

According to the ATR/BPN ministry, from the 2018-2021 period, 3,145 land dispute cases had not been resolved. RB's Director General for Handling Land Disputes and Conflicts, Widjayanto, said that there were 8,625 cases of defense disputes and conflicts for the 2018-2020 period. Currently, 5,470 cases, or around 63.5 percent have been resolved. There are still 3,145 cases that are still in the process of being resolved.[5]

The high number of cases of land disputes, due to the use of waqf land which is not by its initial intended use, has so far been inseparable from the weak State protection of people's rights and access to land and other natural resources as part of guaranteed economic, social and cultural rights. constitution. In Law Number 41 of 2004 concerning *Waqaf*, Article 3 states that "*waqaf* that has been pledged cannot be cancelled." The land that has been donated must be by the waqif's intentions.[2]

The release and transfer of *waqaf* land is carried out only for general purposes and must obtain permission from the Ministry of Religion of the Republic of Indonesia regarding changes in the use of waqf land or those that are not by the *Waqaf* Pledge. The practice of *waqafing* land which is usually carried out in advance in the *Nadzir* community is that the waqif will donate his land, the *Nadzir* will report to the District Religious Affairs Office (KUA), from the District KUA he will report to the Regency/City Ministry of Religion Office. Then from the Regency/City Ministry of Religion office, it is registered with the Regency/City Land Office (BPN) for certifying the waqf land to obtain valid legal force.

The problem in this paper is What is the Legal Status of Waqf Land Rights?

2 Methods and Approaches

2.1 Method

The method used in writing this applied paper is a descriptive-analytical method, namely by using data that clearly describes problems directly in the field, the analysis is carried out, and then conclusions are drawn to solve a problem. The data collection method is through observation and literature study to obtain solutions to problems in preparing this paper.

In line with the research objectives to be achieved, the domain of this research is included in the realm of qualitative research, thus a qualitative method will be used. According to Soerjowinoto et al., qualitative methods are methods that emphasize the researcher's understanding process of problem formulation to construct a complex and holistic legal phenomenon.[6]

2.2 Approach

The normative juridical approach is carried out on certain statutory regulations or written law, which relate to the Legal Status of Waqf Land Rights Based on Law Number 41 of 2004 concerning *Waqaf*. [7] This research describes the situation of the object under study, namely focusing on the regulation and legal status of Waqf Land Rights in practice. As for regulations regarding *waqaf*, they can likewise be tracked down in the Assemblage of Islamic Regulation (KHI) and Unofficial law Number 42 of 2006 concerning the Execution of Regulation Number 41 of 2004 concerning Waqaf.

3 Discussion

3.1 Legal Basis and Validity of Waqf

Waqf is a strict foundation that can be utilized as a way to foster strict life, particularly for Muslims, to accomplish profound and material flourishing towards a fair and prosperous society in light of Pancasila. [8] The word waqf itself comes from the verbs *waqofa* (*fiil madi*), *yaqifu* (*fiil mudori*), and *waqfan* (*isim masdar*) which means to stop or stand. Meanwhile, *waqf* according to sharia' is holding assets that may be useful without consuming or destroying the object (*ainnya*) and used for good. [9]

The validity of waqf, as previously explained, is the pronunciation or expression which constitutes the pillars of waqaf can be done in lafdzi speech or fi'li, however, the most important legal basis for waqaf is in the Qur'an, namely in *Surah al-Baqarah* verses 262, 267, *Ali-Imran* verse 92 and *al-Hajj* verse 77. The scholars understand this worship as waqf worship, after the Qur'an is the hadith, waqf in the hadith of Rasulullah SAW can be found in more or less 45 *hadiths* relating to waqf, as a source of the three *ijtihad* of the ulama (interpretations of fiqh scholars) contained in the fiqh books.

The most important legal basis for *waqf* is in the Qur'an, namely in *Surah al-Baqarah* verse 262, which means

"The people who spend their abundance in the method of Allah, they don't go with what they spend by referencing their gift and by not harming (the sensations of the beneficiary), they get a prize with their Master, there is no concern for themselves and there is no (nor) they are miserable."

Surah Al-Baqarah verse 267, meaning:

"O you who accept, spend (in the method of Allah) a portion of the consequences of your benevolent acts and some of what We bring out from the earth for you. Furthermore, don't pick the terrible things and afterward spend on them, despite the fact that you would rather not take them yet by squinting your eyes towards them. also, Realize that Allah is Generally Rich, Generally Excellent."

Surah Ali-Imran verse 92 means:

"You won't ever reach (great) excellence until you spend part of the abundance you love. also, anything you acquire, Allah knows."

Surah Al-Hajj verse 77 means:

"O you who accept, kneel, prostrate yourself, love your Ruler, and carry out beneficial things, with the goal that you might acquire triumph."

The Qur'an mentions it in general, but in the Hadith, there are specific and general mentions. The hadiths that touch on the second legal basis for which waqf is prescribed are al-Hadith. If the issue of waqf is also the legal basis for waqf, it is the Hadith relating to charity, such as:

"From Abi Hurairah, may Allah be pleased with him, the Prophet SAW said: "When a human being (son of Adam) dies, his deeds are finished except for 3 things, namely almsgiving, useful knowledge and pious children who pray for him." (Muslim History Hadith).

The following are several regulations in the collection of *waqfan* legislation published by the Ministry of Religion of the Republic of Indonesia as follows:[9]

1. Law Number 41 of 2004 concerning Waqf;
2. Government Regulation Number 42 concerning the implementation of Law No. 41 of 2004;
3. Minister of Home Affairs Regulation No. 6 of 1997, concerning Land Registration procedures regarding the *waqfation* of owned land;
4. Guideline of the Clergyman of Religion No. 1 of 1978, concerning Executing Guideline PP No. 28 of 1977, concerning waqfation of claimed land;
5. Joint instructions from the Minister of Religion and the Department of Home Affairs No. 1 of 1978 regarding the implementation of PP No. 28 of 1977;
6. Joint instructions from the Minister of Religion of the Republic of Indonesia, and the Head of the National Land Agency, No. 4 of 1978, No. 25 of 1990, concerning Waqf Land Certificates;

7. Pronouncement of the Chief General of Islamic People group Direction and Hajj Undertakings No. 15 of 1990 concerning upgrades to the Structures and Rules for Executing Guidelines concerning the Blessing of Claimed Land;
8. Fatwa of the Indonesian Ulema Council regarding cash waqf 11 May 2002;
9. Regulation of the Minister of Home Affairs Number 6 of 1977 concerning Land Registration Regarding the *Waqafan* of Owned Land;
10. Guideline of the Chief General of Islamic People group Direction Number Kep/D/7578, concerning structures and rules for carrying out guidelines concerning Waqfan of Claimed Land;
11. Regulation of the Minister of Religion Number 73 of 1978, concerning Delegation of Authority to the Heads of Regional Offices of the Department of Religion at Provinces/at the same level throughout Indonesia to appoint/terminate each Head of the District Religious Affairs Office as an Official for Making the *Waqaf* Pledge Deed (PPAIW).

Settling Islamic waqf issues is the power of the Strict Courts. This is affirmed in the overall clarification of Regulation Number 3 of 2006 concerning Strict Courts and the Second Revision to Regulation Number 50 of 2009 concerning Strict Courts. In Article 1 passage (1) of Regulation Number 7 of 1989 concerning Strict Courts, It is made sense of that the power of the Strict Courts is restricted explicitly to individuals who are Muslim so that waqf issues fall under the power of the Strict Courts whose goal depends on Islamic waqf regulation.[10]

The waqf law is intended to regulate the procedures for registering waqf land so that this does not cause legal problems later.[11] Land waqf procedures must fulfill several very important elements, consisting of the land to be waqf, the existence of waqif, nazir, *waqaf* pledge, allocation of *waqaf* assets, and the period of *waqaf*, if all these elements are present then the conditions are sufficient to carry out *waqaf*, as stated in article 6 of Law Number 41 of 2004, concerning *Waqaf*, *waqaf* is carried out by fulfilling the following waqf elements: a. *Waqif*., b. *Nadzir*., c. Waqf assets, d. Pledge of waqf., e. Allocation of *waqaf* assets, f. Waqf period.

Law Number 41 of 2004 also regulates changes in waqf status, where waqf property that has been donated is prohibited (Article 40), namely:[12]

1. Used as collateral;
2. Confiscated;
3. Granted;
4. Sale;
5. Inherited;
6. Exchanged;
7. Transferred in other forms of transfer of rights.

In Article 1 number 6 of Regulation Number 41 of 2004, it is expressed that the Authority for Making the Waqf Promise Deed, hereinafter condensed as PPAIW, is the approved authority selected by the Pastor to make the Waqf Vow Deed. As is known, donating freehold land is a legal act that must be carried out through a pledge or statement. This requires a special official who is officially appointed. In Government Regulation Number 28 of 1977 Article 5 paragraph (1) it is stated that the Party who donates their land must pledge their will firmly and clearly to the nazhir before PPAIW as Article 9 paragraph (2) which then sets it out in the form of a Waqf Pledge Deed witnessed by at least -at least 2 (two) witnesses.

PPAIW is appointed and dismissed by the minister of religion as stated in Government Regulation Number 28 of 1977 Article 9 paragraph (2). If you read carefully the contents of this article, the scope is still very general and does not specifically explain PPAIW itself. The Minister of Religion further emphasized this matter in Minister of Religion Regulation Number 1 of 1978 which is expressly contained in three articles, namely Article 5 to Article 7. It is stated that the Head of the KUA (Religious Affairs Office) is appointed as PPAIW.

The administration of waqf is carried out by the sub-district KUA and if a sub-district does not have a KUA, the Head of the Regional Office of the Department of Religion appoints the Head of the nearest KUA as PPAIW in that sub-district. Article 6 of the Regulation of the Minister of Religion states that PPAIW is obliged to maintain a register of waqf pledge deeds. Based on the provisions of Article 19 of Law Number 41 of 2004, to be able to carry out the waqf pledge, the wakif or his proxy must submit letters and/or proof of ownership of the assets he has donated to PPAIW. This is intended to obtain certainty about the existence of waqf assets and the veracity of the existence of the wakif's rights to the waqf assets in question.

PPAIW on behalf of Nazhir registers waqf assets with the competent authority no later than 7 (seven) working days after the pledge deed is signed, by attaching a copy of the waqf pledge deed along with letters and/or proof of ownership and other related documents. The authorized agency in the field of land waqf, in this case, the National Land Agency will issue proof of registration of waqf assets and proof of registration will be submitted by PPAIW to Nazhir.

With proof of land ownership in the form of a certificate of title to the land, the transfer of rights can be carried out by completing the specified requirements by attaching the certificate and with a deed made by PPAIW and other requirements.

The agrarian constitution is a constitution that contains the basis for the relationship between the state and citizens regarding land and other natural resources, the agrarian constitution is to see how the constitution in a country formulates agrarian justice and agrarian relations regarding control, ownership, use and utilization and management of land and other natural resources in its constitutional documents.[13] The guideline of lawful relations with individuals in charge of normal assets contained in Article 33 of the 1945 Constitution of the Republic of Indonesia is usually called the option to control the state as a control capability for the state to direct regular assets for the best flourishing individuals.[14] The right to control the state is the only material right explicitly granted by the constitution to the Indonesian state.[15]

Granting Land Rights as intended in Article 1 paragraph (8) of Minister of Agrarian Regulation No. 9/1999 is a Government Decree that grants rights to state land, extension of the term of rights, renewal of rights, changes to rights, including granting rights to land with Management Rights. The law of waqf as contained in Article 171 (a) of the Gathering of Islamic Regulation is a regulation that controls the exchange of proprietorship privileges to acquired property (tirkah) of main beneficiaries, figuring out who has the option to be a main successor and how much their particular offers are. As found in instances of move of land privileges because of legacy which makes land freedoms declarations the object of question, testaments can be deciphered as evidence of privileges. This is contained in Article 1 number 20 of Unofficial law Number 24 of 1997 concerning Area Enrollment (hereinafter alluded to as the PP Ashore Enlistment). The issuance of an endorsement of land privileges should go through a few cycles during the time spent getting lawful freedoms. Subsequently, if the most common way

of getting a land title testament isn't by relevant systems, it tends to be known as a legitimately inadequate endorsement.[16]

Granting Land Rights as intended in Article 1 paragraph (8) of Minister of Agrarian Regulation No. 9/1999 is a Government Decree that grants rights to state land, extension of the rights, renewal of rights, and changes to rights, including granting rights to land with Management Rights. Inheritance law as contained in Article 171 (a) of the Gathering of Islamic Regulation is the law that controls the exchange of possession freedoms to acquired property (tirkah) of beneficiaries, figuring out who has the privilege to be a main successor and how much every individual will share. As found in instances of move of land privileges because of legacy which makes land freedoms declarations the object of question, testaments can be deciphered as evidence of privileges. It is contained in Article 1 number 20 of Unofficial law Number 24 of 1997 concerning Area Enrollment (alluded to as the PP Ashore Enlistment). The issuance of a land title certificate must go through several processes to obtain legal rights. Thus, if acquiring a land title certificate is not done by applicable procedures, it can be called a legally defective certificate.[17]

The concept of legal protection for land rights holders cannot be separated from the issue of justice in the implementation of the law itself. Radbruch stated that three basic values want to be pursued and need to receive serious attention from law implementers, namely the values of legal justice, legal certainty, and legal benefits so that with the choice of negative publicity systems (with positive elements) the three basic values themselves will not be possible to achieve. The aim of the land law policy in the choice of negative publicity system (with positive elements) is closely related to the land law system itself, namely the creation of a just, prosperous and prosperous society, the choice of using the land law system in the negative publicity system (with positive elements) should be oriented towards basic legal values, namely realizing order and regularity, peace and justice.[18]

4 Conclusion

Waqf is a legitimate activity done by a wakif or gathering or lawful bodies who separate a piece of their property and systematize it everlastingly for love or other public necessities by Islamic lessons. (KHI, article 215 passage 1). In the mean time, in Regulation Number 41 of 2004, article 1 passage 1, it is expressed that waqf is a legitimate demonstration of wakif to isolate or potentially hand over piece of one's property to be utilized perpetually or for a specific period by one's inclinations for love as well as broad government assistance as per sharia.

The legitimate reason for land waqf depends on the refrains of the Koran and the Sunnah of Rasulullah SAW additionally founded on the Law of the Republic of Indonesia Number 41 of 2004 and furthermore founded on Official Declaration Number 1 of 1991 concerning the Gathering of Islamic Regulation. Waqf must fulfill several elements called the pillars of waqf along with their conditions, namely the existence of a wakif or person who donates, the assets to be donated, the clear and firm waqf objectives, sight or waqf pledge, and the waqf nazir.

Waqf land needs to be registered and certified to avoid undesirable things. Such as a lawsuit from the wakif's heirs or other parties. Waqf land certification can be carried out based

on implementation instructions by the Ministry of Religion (cq. Zakat and Waqf Development Project), divided into two, namely Waqf Land Certification which occurred after the enactment of PP Number 28 of 1977 and waqf land certification which occurred before PP Number 28 of 1977.

Juridically, the exchange of possession freedoms to waqf land is connected to Regulation No. 5 of 1960 concerning "Essential Guidelines on Agrarian Standards Juncto PP No. 24 of 1997 concerning "Land Enlistment ". When transferring land rights due to sale and purchase, gift or inheritance, before carrying out the transfer process, you must check the existence of the land and the origin of the land to provide legal certainty and lawful protection for both the giver of the land rights and the recipient.

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