

Juridical Analysis on Waqf Land Certification based on Law Number 41 of 2004 on Waqf

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Abstract: The object in this study is how law provides legal certainty on properties that has been put as waqf such as owned land. Waqf land that hasn't been certified will surely cause problems in the future, this is because the status of waqf land itself has yet to have legal certainty. Numerous waqf land ended up in the hands of other parties because the uncertainty of the waqf land status itself. In the end, waqf land which is expected to boost the economy of the people cannot be materialized, it's because there has been lack of awareness from someone who manages waqf to certify the ownership of waqf land itself. The goal of this research is to identify the role of Indonesian Waqf Board on the development of waqf land, to identify the problems that causes plenty of waqf land that are yet to be certified, also to identify the raise in numbers of waqf land being certified. This research is also regarded to be important, keeping in mind that there are still numerous problems that occurs because of legal uncertainty towards waqf land that may cause dispute in the future, between waqf, *nazhir*, or even between heirs.

1 INTRODUCTION

Waqf land is considered as a social worship and one of the key elements in the teachings of the Muslim faith which has strong relations to agrarian law, this means that it is considered as a set of regulations that regulates how to use and exploit earth for the benefits of the whole society.

With regard to the importance of the waqf land, therefore Law No. 5 Of 1960 On Basic Regulations On Agrarian Principles set a special regulation as was mentioned in Article 49 section (3) stating that: "Waqf land ownership is protected and regulated on Government Ordinance. In principle, Article 49 section (3) is an explanation of the social function of rights on land based on Islamic Law. The importance of waqf also mentioned in Article 4 and 5 of Law No. 41 Of 2004 On Waqf, stated that: "Waqf is intended to utilize the wealth of waqf suitable to its function which is to materialize potential and economic benefits of the wealth of waqf for religious purposes and to drive forward general welfare".

To obtain legal certainty and to prevent waqf land from various problems and disputes, it is needed to certify waqf land. Especially in the City of

Medan, based on the Management of Waqf Land Data Recapitulation in Medan's Ministry of Religious Affairs 2015 mentioned that the amount of waqf land that has been registered has reach 1242 lands. From that sum, 741 lands have been certified, and the rest has yet to be certified (501 lands). (Syafuruddin Syam, 2017) Not to mention the waqf land that has yet to be put into the Ministry of Religious Affairs' database. This predicament shows that the status of waqf land is in a concerning state. This condition sometimes can lead to risks of conflict most likely for heirs of the people who have marked their lands as a waqf land (Syam, 2015).

The main thing that causes problems on waqf land is that in reality waqf lands are mostly done verbally, not followed up by making a pledge of waqf certificate and its registration. With regard to these, waqf land does not have a strong legal basis, and in the future if so happens a conflict between the ownership of waqf land, it will be difficult to find a solution on proving their claim.

As mentioned above, the author feels that it is vital to conduct a deeper analysis on the certification of waqf land in Medan to provide education for all layers of society - mainly on Muslims to mark their lands as waqf so that it would create awareness and legal certainty on waqf.

The problems of this research are what is the role of Indonesian Waqf Board on the development of waqf land, why there are still plenty waqf lands that have yet to be certified, this research is also regarded very important to conduct owing to the fact that there are still plenty of problems that emerge due to the legal uncertainty towards waqf land that may cause disputes in the future, between *wakif*, *nazir*, or even heirs themselves.

2 RESEARCH METHODOLOGY

This research applied a normative legal research. Normative legal research is a research conducted by doing the library research or secondary data as the source data to be analysed, where the analysing of law and literature is related with the research problem conducted.

The secondary data are three primary legal materials, they are binding legal material from The 1945 Constitution Of Republic Indonesia, Law Number 41 of 2004 on Waqf, Government Ordinance No. 42 of 2006 as an implementing regulation on Waqf. Secondary legal material is a legal material that gives an explanation about primary legal material such as books, literature, articles.

3 RESULT AND DISCUSSION

3.1 Literature Review

3.1.1 Waqf According to Islamic Law

The word "*wakaf*" was originated from the word waqf which is a word taken from the Arabic verb *waqafa (filmadi)*, *yaqifu (filmudori)*, waqf *an (isimmasdar)* which means to stop or to stand (Al-Alabij, 2002). Whereas the word "*wakaf*" according to *syara'* is to withhold a property that may be exploited without having to use up or to damage the object (*ainnya*) and to put it to good use (Al-Alabij, 2002).

Mazhab Syafi'I mentioned that waqf is to withhold a property that could be exploited while keeping it in one piece, and the person who owns that property has lost its ownership to a "*wakif*", that property is also to be exploited on something that is allowed. Mazhab Syafi'I's definition mentioned above has shown a firm stance on the ownership status of a waqf property. When a waqf is

considered legitimate, therefore the ownership will be shifted from the owner to Allah Swt., with the understanding that a property that has been put as waqf belongs to the society, it is no longer belongs to the person who put that property as waqf. Therefore, the relationship between the people who put their property on waqf and with that very property have ended or finished. With the ownership ended, it also marks the beginning of a new relationship between them and Allah owing to the fact that they have done waqf. It is expected when their relationship with a property has ended it will make people more sincere to put their property as waqf and they do not have to think that their property will be returning to them (Lubis, 2010).

Al-Kabisi under the teachings of Hanafi mentioned that waqf is to withhold an object under the ownership of *wakif* and donate its benefits to the poor while not damaging the object. This definition is considered as an addition to the definition that has been mentioned by Imam Abu Hanifah saying waqf is to withhold the property of wakif and what is only been given to them is merely the benefits (Manan, 2006).

3.1.2 Waqf According to the Laws

Indonesia is regarded as a country that observes this matter of waqf keenly, this is evident from the seriousness of the government on making regulations that regulates waqf. The government also issued Law. No. 41 of 2004 on Waqf which is one of the newest form law on waqf. In this constitution, it is clearly mentions the definition of waqf itself. According to article 1 section 1 stated that "Waqf is a *wakif's* legal action to separate and/or to give part of their property to be exploited forever or for a period of time according to their interest due to religious purposes and/or for the welfare of the people based on *syariah*".

While the "Government Ordinance No. 28 of 1977 on Land Ownership Waqf" gave a different definition of waqf compared to Law. No. 41 of 2004 According to article 1 section 1 stipulated that: "Waqf is a legal action of an individual or a legal entity that separated parts of their property which is in a form of land they owned and institutionalizing them forever for religious purposes or for other public usage in line with the teachings of Muslim faith".

From these two definitions we can identify the differences which are: According to Law No. 41 of 2004 waqf has a limited amount of time as it deemed fit, whereas the Government Ordinance No. 28

mentioned that a property that has been put as waqf is forever. However, the regulation that is applied today is the Law No. 41 of 2004, this is because other than this constitution is a more recent one, it is also ranked higher in the level or degree of the constitutions itself.

3.2 Commandments and Conditions of Waqf

According to Islamic *fiqh*, therefore on the perspective of Compilation of Islamic Law there are 4 conditions that has to be met in order for someone to put something as waqf, namely:

1. Someone who put their property on waqf (*wakif*) as an object of waqf
2. There is an object that has been put as waqf (*mauquf*)
3. There is an individual who received waqf (as a subject to waqf) (*nadzir*)
4. An *aqad* or *lafaz* is presenter a statement of handing over waqf from *wakif* to a person or a place to conduct waqf (*mauqufala'ih*). (Rachmadi Usman, 2009)

Law No. 41 of 2004 also regulates the conditions and principles of waqf, however under this constitution it is stated as the elements of waqf. The article 6 mentioned that a waqf can be conducted if it fulfils the elements of waqf namely:

- a. *Wakif*;
- b. *Nazhir*;
- c. Waqf property;
- d. *Ikrar Wakaf*;
- e. The allocation of waqf property;
- f. Waqf time period.

Whereas for one of the conditions to be met, according to Islamic Law the conditions of someone who conducted waqf and the property that is put as waqf are:

1. The entity that is able to receive waqf is an individual or person.
2. The ones who has the right to receive waqf must have a general characteristics, such as an Islamic social institutions. (Abdurahman, 1990)

3.3 The Certification of Waqf Land based on Positive Law

3.3.1 Land Registry According to Islamic Law Perspective

During the time of apostles, waqf is actually been ordered to be registered or administrated, although there has never a law that regulates firmly stating

that particular thing. However, it is noted that the apostles asked the companions to conduct a registration and asked to be announced on waqf land. Umar bin Khattab the second caliph on *khulafarasyidin* decided to create a written document on his waqf in Khaibar, he invited some of the companions to witness the making of that document. On that written document, as mentioned by Ibnu Nawar, Umar bin Khattab has agreed to donate his lands to the less fortunate, his relatives and to free the slaves, for the benefit of being in the way of Allah, deserters and guests. This type of waqf can be identified as family waqf (Syam, 2015).

The tradition of waqf are mostly done verbally, without registering the property formally to an authorized party, this created complicated predicaments. Plenty of a waqf property has been lost to or created dispute with a third party, owing to the fact that there was no written proof, such as *ikrar* waqf, waqf certificate and so on. Issues like the loss of waqf property because the ownership becomes a dispute amongst heirs, the object of dispute between parties who vested their interest upon, the uncertainty of a waqf property status, therefore, it causes waqf to be mismanaged. Therefore, the effort to register and to certify waqf land on lands that has yet to be certified is a form of a new understanding in Muslim society in Indonesia (Departemen Agama RI, 2005).

3.3.2 Land Registry on the Perspective of Laws

According to the constitutions, properties that has been put as waqf is in a form of owned lands, and it also could be properties in a form of money or objects with an economic value. However, in this research the main subject is an owned land waqf. Lands that have been put as waqf surely has to fulfill certain stages. In terms of the *wakif* ownership until the process of certifying the waqf land to an owned waqf land.

Prior to the introduction of Law. No. 41 of 2004 on Waqf the Government has issued Government Ordinance No. 28 of 1977 on Land Ownership Waqf and it is explained more comprehensively on Home Ordinance No.6 of 1977 on Land Registry Procedures of Land Ownership Waqf. For the purposes of registering lands that will be put as waqf, there are documents that has to be attached to the Land Registry Office, those documents are:

- a. A land certificate of the parties involved;
- b. The deed of *Ikrar Wakaf* that is issued by *Ikrar Waqf Deed Official*;

c. A validation letter issued by District Religious Affairs Office regarding the appointed *nazhir* (Usman, 2009).

A land that has a status of the right of ownership essentially doesn't have a time span, therefore it could be put as waqf. If a land that will be put as waqf isn't an owned land or has yet to be certified as the right of ownership, therefore that very land should be upgraded firstly to the right of ownership (Harsono, 1997). On lands that has been put as waqf but have yet to certified, the registry will be conducted after that land is certified. After that lands have the right of ownership, then that land may be put as waqf to be managed or developed by the concerned *nazhir*.

According to article 4 on "Peraturan Menteri Dalam Negeri Nomor 6 Tahun 1977", an application of lands that has been put as waqf but has yet to be registered on Land Registry Office or has yet to be certified, is to be conducted simultaneously with the application of registering its rights to Land Registry Office according to Government Ordinance No, 10 of 1961 which later replaced and perfected in Government Ordinance No. 24 of 1997.

After receiving the application to register the owned land that will be put as waqf, Head of Land Registry Office record the concerning owned land that will be put as waqf on the land registry and its certificate. With registering and recording of waqf at National Land Authority Office on a right of ownership of land that has been put as waqf on a certificate, therefore that land has a legal certainty status, which is a waqf certificate.

The certification of waqf land is a national program as a form of responsibility of both government and society. Hence, to find out a definite amount of waqf land in Indonesia a definitive data collecting must be conducted. There are still plenty of people that has put their lands as waqf without *Ikrar* and registration (Sutedi, 2007).

A record keeping was conducted, therefore that existence of waqf has been recognized formally juridical. Hence, a waqf is considered legitimate if it meets two conditions which are:

1. It has fulfilled the requirements of material law, which is a waqf has been conducted and has fulfilled the conditions according to Islamic law.
2. It has fulfilled the requirements of formal law, which is that it has been recorded by *Ikrar Waqf Deed Official (PPAIW)*, and has been recorded to an authorized institution.

Waqf is not based only on the fulfilment of the conditions according to Islamic teachings, but it also has to fulfil formal conditions as mentioned on the

applied constitutions (Hamami, 2003). Waqf that has fulfil the material law requirements but has yet to fulfil its formal law requirements is not considered as a waqf. Whereas when a waqf has fulfill the formal law requirements but has yet to fulfill the material law requirement, a waqf cannot be conducted.

3.4 The Role of Ikrar Waqf Deed Official on Waqf Land Registration

The laws of waqf has regulated the main tasks and functions of each institution on certifying waqf land. *Wakif* that will put their lands as waqf for religious purposes or public interest. *Wakif* on putting their lands as waqf must declare *ikrar* verbally or written. Article 17 section (1) mentioned that: "A waqf *ikrar* is conducted by the *Wakif* to *Nadzir* in the presence of *PPAIW* and being witness by 2 (two) witnesses". Article (2) mentions that "Waqf *ikrar* as mentioned in article (1) is declared verbally and/or written also stated in the deed of *Ikrar Wakaf* issued by *PPAIW* with mentioning the individual's name who was appointed as *nazir*".

After the waqf *ikrar* was conducted in the presence of *PPAIW* and has been stated in the deed of *Ikrar Wakaf*, then, the *PPAIW* on behalf of the *Nazir* registered the waqf property to an authorized institution no later than 7 (seven) days of business days since that deed of *Ikrar Wakaf* was being signed (Law No. 41 of 2004 article 32). Furthermore, article 33 stipulated that: "The registration of waqf property as mentioned on article 32, *PPAIW* submits: a. the duplicate of *Ikrar Wakaf* deed; b. letters and/or proofs of ownership and other related documents. Afterword, an authorized institution in this case, the National Land Authority will issue a proof of registering the waqf property. *PPAIW* must submit those proofs of registration to the appointed *Nazir*".

Therefore, the documents that has to be completed by *PPAIW* on registering a waqf land to Land Authority are:

- a. Application Letter to register/convention/affirmation of rights, to register the lands that has been put as waqf on land registry and the issuing of the waqf certificate;
- b. Letters of proofs of land ownership and other letters of information required;
- c. The deed of *Ikrar Wakaf* or the replacement deed of *Ikrar Wakaf* issued by *PPAIW*; and
- d. Validation Letter of the appointed *Naziri* issued by *PPAIW (Kantor Urusan Agama)*.

Based on the explanation above, it is clear that *Ikrar Waqf Deed Official* or *PPAIW* on Religious Affairs Office plays a vital role on the certification of waqf lands.

3.5 Supervising and Managing Waqf Property

3.5.1 The Task and Authority of Nazhir as an Individual Who Manages Waqf

Nazhir Wakaf or *Nazhir* is an individual who is tasked to manage waqf. The term *Nazhir* is defined as someone or a group of people and a legal entity which are tasked by *wakif* (the person who conduct waqf) to manage waqf. According to the book of *fiqh*, *nazhir* is also called *mutawalli*, an individual who is authorized to manage and look after waqf (Azahary, 2006).

The responsibility of *nazhir* is to manage, supervise, fix, and maintain the waqf property from other individual's claim. If an individual has been appointed as *nazhir*, he/she is authorized to lease and/or develop the waqf property and also to share its payoff to the waqf receiver. In the effort to develop waqf property so it would be more productive, according to scholar Mazhab Hanafi, *nazhir* may be given a reasonable wage (Thaib, 2003).

Nazhir is an individual who has the right to act on the waqf property, to take care of and manage, maintain, and distribute its payoff to anyone who deserve to receive it, or to conduct anything that may lead to a well and eternal growth in wealth. *Nazhir* must also create a report on any activities conducted regarding the waqf land that they're managing. To maintain the waqf property, on *Islamic syari'at* it is a *nazhir* right to receive a form of wages for their hard work in taking care of waqf. The *Rasulullah* has determined the rights of *nazhir* as follows:

"Ibnu Umar Peace Be Upon Them Mentioned: It is not a sin for people who preserve those property and to be fed because of that property (waqf property) in a proper way or to feed their relatives, not to heap rewards or to enrich themselves (*muttafaqun alaih*)" (Halim, 2005).

Nazhir, will be given a sanction in a form of dismissal and replacement if they do not perform duties. This is regulated on article 6 section (4) Government Ordinance No. 42 of 2006, which is: "If a *Nazhir*, did not perform their duties 1 (one) year since the deed of *Ikrar Wakaf* has been issued, the Head of District Religious Affairs Office by their

own initiative or through the *wakif* or its heirs suggestions may conduct a proposal to Indonesian *Waqf* Board to dismiss or replace the appointed *nazhir*".

3.5.2 Managing and Supervising Waqf by Indonesian Waqf Board

Besides *Nazhir*, the ones who has rights and obligations on the waqf property is Indonesian Waqf Board. The existence of Indonesian Waqf Board is considered as a barometer of success on managing waqf in Indonesia. The Law. No. 41 of 2004 on Waqf mentioned that Indonesian Waqf Board is an independent institution to develop waqf in Indonesia. Based on that explanation, it is vital to create Indonesian Waqf Board as an institution to manage and develop the waqf property.

Indonesian Waqf Board is tasked to develop waqf productively, until that waqf can be used to improve the society's standard of living. Indonesian Waqf Board as an organization has to be independent, whereas the government in this case is acting as a facilitator, regulator, motivator and supervisor. The main task of this institution is to enable waqf, moving objects or non-moving objects in Indonesia so that it could empower the Muslims especially.

The task of Indonesian Waqf Board is to nurture the appointed *nazhir* all over Indonesia. Indonesian Waqf Board alongside Ministry of Religious Affairs will be supervising the management of waqf throughout Indonesia by introducing policies that is heading towards the enhancement of *nazhir's* capability so that they can productively manage waqf that was given to them. Therefore, the operative task of Indonesian Waqf Board is only to manage the waqf property that has been stranded, nationally and internationally. The waqf object then develop through the related institutions (Departemen Agama RI, 2005).

The standing of Indonesian Waqf Board on waqf property is considered an important role to materialize a professional and productive waqf management. This is because article 49 of Law No. 41 of 2004 has regulated the duties and authorities of Indonesian Waqf Board.

4 CONCLUSIONS

The standing of Indonesian Waqf Board on waqf property is considered an important role to materialize a professional and productive waqf

management. This is because article 49 of Law Number 41 of 2004 has regulated the duties and authorities of Indonesian Waqf Board.

To receive a legal certainty and to avoid disputes in the future, therefore the lands that has already put as waqf must be certified and afterwards could be managed well for the benefits of mankind.

Thaib, M. Hasballah. (2003). *Fiqih Waqaf*. Konsentrasi Hukum Islam Program Pascasarjana Hukum Universitas Sumatera Utara. Medan.

Usman, Rachmadi. (2009). *Hukum Perwakafan di Indonesia*. Sinar Grafika. Jakarta.

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REFERENCES

- Abdurahman., 1990, *Masalah Perwakafan Tanah Milik dan Kedudukan Tanah Wakaf di Negara Kita*. Bandung. PT. Citra Aditya Bakti.
- Al-Alabij, Adijani., 2002, *Perwakafan Tanah di Indonesia Dalam Teori dan Praktek*. Jakarta, Raja Grafindo Persada.
- Azhary, Tahir., 2005, *Hukum Islam Zakat dan Wakaf*. Jakarta, Papas Sinar Sinanti.
- Departemen Agama RI., 2005, *Paradigma Baru Wakaf di Indonesia*. Jakarta, Direktorat Pengembangan Zakat dan Wakaf. Cet. Ke 2.
- Halim, Abdul., 2005, *Hukum Perwakafan di Indonesia*. Jakarta, Ciputat Press.
- Hamami, Taufiq., 2003, *Perwakafan Tanah Dalam Politik Hukum Agraria Nasional*, Tata Nusa. Jakarta.
- Harsono, Budi., 1997, *Hukum Agraria Indonesia, Sejarah Pembentukan Undang-Undang Pokok Agraria, Isi dan Pelaksanaannya, Jilid 1 Hukum Tanah Nasional*. Jakarta, Djambatan.
- K. Lubis, Suhrawardi., 2010, *Wakaf dan Pemberdayaan Umat*, Jakarta, Sinar Grafika.
- Manan, Abdul., 2006, *Aneka Masalah Hukum Perdata Islam di Indonesia*, Jakarta, Prenada Media Group.
- Sutedi, Adrian., 2007, *Peralihan Hak Atas Tanah Dan Pendaftarannya*, Jakarta, Sinar Grafika.
- Syam, Syafruddin., 2017, *Status Hukum Tanah Wakaf Masjid dan Sosial Lainnya dalam Perspektif Hukum Islam*, Medan, Makalah Disampaikan Pada Kegiatan Pelatihan Advokasi Pendaftaran Sertifikat Tanah Wakaf Masjid se-Kota Medan, Lembaga Konsultasi dan Siyasaah Syar'iah Majelis Ulama Kota Medan.
- Syam, Syafruddin. (2015). *Sertifikasi Tanah Wakaf di Kota Medan, Analisis Terhadap Pelaksanaan Undang-Undang No.41 Tahun 2004 Tentang Wakaf*. Disertasi Pada Program Sarjana Universitas Islam Negeri Sumatera Utara. Medan.