

Legal Protection of Uncertified Waqf Land in Indonesia

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ABSTRACT

This study aims to determine the legal protection of uncertified waqf land in Indonesia. This research uses descriptive analysis, which describes the fact or certain legal events that occur in society. The result of this research is that waqf land that does not have a certificate can be protected by law. It is a waqf land that meets the terms and conditions and can be proven, judges of the Religious Court are of the opinion that the waqf land without a certificate can be guaranteed its protection with the Wakaf Pledge Deed and witnesses and evidence. other written documents that clearly explain the position of the donated land. The public is of the opinion that a waqf will be guaranteed protection when it has been used for religious purposes or other public interests. This research is descriptive, descriptive legal research is descriptive in nature and aims to obtain a complete picture of the legal conditions prevailing in a certain place and at a certain time, or regarding existing juridical symptoms, or certain legal events that occur in society. This type of research is normative law (normative juridical), using normative legal case studies in the form of legal behavior products. In the future, it is hoped that all parties will have a correct understanding of the procedures and processes of waqf, that waqf is not only up to having AIW but waqf land must be registered with the National Land Agency and have a certificate to guarantee its legal protection.

Keywords: Waqf; Certificate; Religious Court.

ABSTRAK

Penelitian ini bertujuan untuk mengetahui perlindungan hukum tanah wakaf yang tidak bersertifikat di Indonesia. Penelitian ini menggunakan deskriptif analisis yaitu menggambarkan kenyataan atau peristiwa hukum tertentu yang terjadi dalam masyarakat. Hasil dari penelitian ini adalah tanah wakaf yang tidak memiliki sertifikat dapat dilindungi oleh hukum adalah tanah wakaf yang memenuhi rukun dan syarat serta dapat dibuktikan, hakim Pengadilan Agama berpendapat bahwa tanah wakaf tanpa sertifikat dapat terjamin perlindungannya dengan Akta Ikrar Wakaf dan saksi-saksi serta alat bukti tertulis lain yang secara jelas menerangkan kedudukan dari tanah wakaf. Masyarakat berpendapat bahwa suatu wakaf akan terjamin perlindungannya ketika telah dimanfaatkan untuk kepentingan ibadah atau kepentingan umum lainnya. Penelitian ini bersifat deskriptif, penelitian hukum deskriptif bertujuan untuk memperoleh gambaran yang lengkap tentang kondisi hukum yang berlaku di suatu tempat dan waktu tertentu, atau mengenai gejala yuridis yang ada, atau peristiwa hukum tertentu yang terjadi di masyarakat. Jenis penelitian yang digunakan adalah hukum normatif (yuridis normatif), dengan menggunakan studi kasus hukum normatif berupa produk perilaku hukum. Kedepannya diharapkan semua pihak memiliki pemahaman yang benar tentang tata cara dan proses perwakafan, bahwa wakaf tidak hanya sampai memiliki AIW tetapi tanah wakaf harus didaftarkan ke Badan Pertanahan nasional dan memiliki sertifikat sebagai jamin perlindungan hukumnya.

Kata kunci : Wakaf, Sertifikat, Pengadilan Agama

Introduction

Waqf is a practice in Islamic teachings which has a spiritual and social dimension. The spiritual dimension because waqf is a religious doctrine that is motivated by reward (goodness in the hereafter). Meanwhile, the social dimension is due to the provision of waqf having an impact on social and economic welfare. Waqf assets have a high social function and are very valuable in development.¹

Property that has been donated by the owner becomes the property of the people or public assets. As a public asset, waqf must be legally protected in order to avoid fraud such as turning into personal assets. Various laws and regulations have been made by the Government of Indonesia to provide legal protection for waqf. According to Islamic law, waqf does occur instantly with the statement of wakif (the person who waits) which is an agreement, because the implementation of waqf is seen as a one-sided legal act.

In Indonesia, there are various types of waqf, such as cash waqf, intellectual property rights waqf and other movable objects waqf, but waqf in the form of land still dominates. This is because for the Indonesian people, land occupies an important position in their daily life, especially for rural people whose main jobs are farming, gardening and farming, so land is where they depend for their life.² In addition, the more complex the times are, the more complex problems that arise in society, including land issues. This then encourages a waqf land to also be certified.

Compilation of Islamic Law (KHI) is a regulation that is used as Islamic Law in Indonesia which explains

that actually the process of waqf must be done in writing or the land has a certificate. This explanation is contained in the provisions of PP No. 28 of 1977 and its implementing regulations that the waqf land must have a waqf certificate in order to create certainty and guarantee its protection. So that if the donated land does not have a certificate, it can become a dispute.³

Although the issue of waqf land has been clearly regulated in the law, the fact remains that uncertified waqf land is still found as a source from the Directorate of Waqf of the Ministry of Religion of the Republic of Indonesia dated March 2016, the number of donated land in Indonesia is spread across 435,768 locations throughout Indonesia. 148,447 certificates.⁴

According to Islamic law, waqf has indeed occurred instantly with the statement of wakif (the person who has endowed) which is an agreement, because the implementation of waqf is seen as a one-sided legal act.⁵ However, to ensure legal certainty in Indonesia, it requires that waqf be made verbally and in writing in front of the Official Waqf Pledge Deed (PPAIW), made a Waqf Pledge Deed (AIW), registered, certified, and announced to the public. If the waqf object is in the form of owned land, based on AIW, the land is registered and a certificate change is submitted to the National Land Agency (BPN) to be converted into waqf land in the name of nadhir (waqf manager). This is stated in Law Number 41 of 2004 concerning Waqf, and Government Regulation Number 42 of 2006 concerning

³ Depag-RI, Tim Dirjen Bimas Islam. *Panduan Pemberdayaan Tanah Wakaf Produktif Di Indonesia*, 2007.

⁴ Hasanah, Uswatun. "Urgensi Pengawasan Dalam Pengelolaan Wakaf Produktif." *Al-Ahkam: Jurnal Pemikiran Hukum Islam* Vol. 22, no. No. 1 (2012): h. 61-80.

⁵ Hamzani; Irwan, A. *Perkembangan Hukum Wakaf Di Indonesia*. Brebes: Diya Media Group, 2015.

¹ Fikri, Dimas Fahmi, and Afif Noor. "Reformasi Hukum Wakaf Di Indonesia." *Al-Ahkam* 22, no. 41 (2012): 43-60

² Al-Alabij, Adijani. *Perwakafan Tanah Di Indonesia Dalam Teori Dan Praktek*. Cet. 1. Jakarta: Rajawali Pers, 1989.

Implementation of Law Number 41 of 2004 concerning Waqf.

The pledge of waqf must be stated in the AIW to prevent disputes caused by unclear status and position of the waqf, both between the wakif and his heirs and Nazhir or between the wakif family and the general public. AIW is proof of legal protection for authentic waqf assets in the event of a dispute in a case where after the wakif dies, the heirs do not recognize and ask for the waqf that has been done. In addition, AIW also protects and ensures the sustainability, sustainability and development of the waqf object itself.

Based on this data, the problems can be formulated as follows: 1). How is the legal protection for donated land that is not certified? 2). How is the income of religious court judges on uncertified waqf land?

Research Method

This research is descriptive, descriptive legal research is descriptive in nature and aims to obtain a complete picture of the legal conditions prevailing in a certain place and at a certain time, or regarding existing juridical symptoms, or certain legal events that occur in society.⁶ This type of research is normative law (normative juridical), using normative legal case studies in the form of legal behavior products. The data source used in this research is secondary data consisting of related laws, research results and scientific works from the legal community, which are related to research problems. Data collection through, literature review, and data analysis. After the data is collected, an induction analysis is carried out which includes the activities; reduction, presentation and drawing conclusions.

⁶ Arifin, R, W Waspiah, and D Latifiani. "Penulisan Karya Ilmiah Untuk Mahasiswa Hukum." *Semarang: BPFH UINNES*, 2018.

Results & Discussion

A. Legal Protection for Uncertified Waqf Land

Indonesia has considerable and extensive waqf assets, however, the management and management of waqf in Indonesia is still not optimal. As a result, many waqf assets are neglected in their management, and there are even waqf assets whose status has been lost.⁷ According to the Directorate General of Islamic Community Guidance, donated land institutions in 2016, throughout Indonesia totaled 435,768 (Four Hundred Thirty Five Thousand Seven Hundred Sixty Eight) locations of waqf land, with a total area of 4,359,443,170.00 (four billion three hundred fifty-nine million four hundred forty-three thousand one hundred and seventy) square meters.⁸ The data is certainly very encouraging. However, some of the waqf lands are still problematic because only 56% have been successfully certified while the other 44% are not yet certified . This means that most of the waqf land is prone to various issues of waqf disputes.⁹

If in Indonesia we know waqf, then actions that are almost the same as waqf that are known in other countries call it endowment, corporation, trust and others which essentially mean for others or do good for others, or provide public benefits. According to Article 6 of Law Number 41 Year 2004, waqf is implemented by fulfilling the following elements of waqf: 1). There are people with waqf, 2). Nadzir, 3). Waqf property; 4). Waqf pledge; 5). Allocation of waqf property 6). Waqf period. Then

⁷ Al-Alabij, Adijani. *Perwakafan Tanah Di Indonesia Dalam Teori Dan Praktek*. Cet. 1. Jakarta: Rajawali Pers, 1989.

⁸ Hasanah, Uswatun. "Urgensi Pengawasan Dalam Pengelolaan Wakaf Produktif." *Al-Ahkam: Jurnal Pemikiran Hukum Islam* Vol. 22, no. No. 1 (2012): h. 61-80.

⁹ Yamin, Muhammad, and Rahim Lubis. *Beberapa Masalah Aktual Hukum Agraria*. Pustaka Bangsa Press, 2004.

regarding the certification of waqf land, it is further explained in Government Regulation Number 28 of 1977 concerning Land Representation.

Legal certainty for waqf property is a necessity as a guarantee that there has been an event in the law of waqf. Among the manifestations of legal certainty is evidence of recording (written evidence) in an authentic deed.¹⁰ As a marriage can only be proven by a marriage certificate, and if it cannot be proven by a marriage certificate, the marriage certificate can be submitted to the Religious Court, as well as in the case of waqf. If there is no waqf pledge deed or waqf certificate, it should also be able to submit the wakaf isbat to the Religious Court to obtain legal certainty (Ministry of Religion). In the context of realizing legal certainty for waqf assets in the explanation of Law Number 41 of 2004 concerning waqf it is stated that every legal act of waqf must be recorded and set forth in a pledge deed and registered and announced, the implementation of which is carried out in accordance with the procedures stipulated in the prevailing laws and regulations.

Law Number 41 Year 2004 regarding Waqf in article 17 describes the Waqf Pledge Deed, it can be understood that the deed is an authentic deed that can be used in resolving disputes that may arise at a later date regarding waqf land.¹¹ This is in line with Article 1868 of the Civil Code, which is "An authentic deed is a deed made in the form prescribed by law by or before the public officials who have the power to do so, at the place where the deed was made".

From this explanation, it can be understood that a waqf with the Waqf

Pledge Deed is valid and can be protected by law. AIW is an authentic deed made by an authorized official which is evidence that a waqf has been issued. The implementation of the Waqf Pledge is witnessed by at least two witnesses, this is the perfect condition for the delivery of waqf.

Therefore, in a process of waqf pledge it is considered imperfect if the role of the witness is not involved. The role of the witness is also as a person whose testimony is asked in the future in the event of a dispute over the donated land, both outside and inside the court. The witness's position is one of the things that can guarantee the protection of the waqf land as it is understood that the witness is a person who knows the events or circumstances he has seen, heard and experienced. This witness is the one who can provide information if in the future something untoward happens to a waqf land.

Although there are already regulations governing waqf and waqf registration procedures as in Law Number 41 of 2004 and Government Regulation Number 42 of 2006 . However, there are still waqf lands that are not yet certified, this is because most people are not aware of and do not understand regarding the procedure for registering waqf and the importance of the waqf land certificate. Based on these facts, the Religious Courts discussion team at the National Working Meeting of the Supreme Court of the Republic of Indonesia which was held in Makassar, discussed the number of waqf lands that were still not certified and did not have a waqf pledge deed (AIW). Therefore, it is necessary to have a Court Decree to deal with uncertified waqf.

In addition to the issuance of Law Number 41 of 2004 along with PP Number 42 of 2006 concerning the implementation of Law Number 41 of 2004 concerning waqf and Government Regulation Number 28 of 1997

¹⁰ Santoso, Urip. "Kepastian Hukum Wakaf Tanah Hak Milik." *Perspektif* 19, no. 2 (2014): 71.

¹¹ Parlindungan, A.P. *Pendaftaran Tanah Di Indonesia*. Bandung, Indonesia: CV. Mandar Maju, 1999.

concerning ownership of land owned which is the implementation of Article 49 paragraph (3) of Law Number 5 of 1960 concerning It is hoped that the Basic Agrarian Basic Regulations (UUPA) can further strengthen and protect the waqf land according to its function and purpose. In Government Regulation Number 28 of 1977 (Article 9) it explains that waqf must be done in writing, it is not enough just to make a verbal pledge. The aim is to obtain authentic evidence, for example as a complete document for the registration of waqf land at the Agrarian office or as legal evidence in the event of a dispute at a later date regarding the land that has been donated.

In the Basic Agrarian Law No. 5 of 1960 has also emphasized the importance of legal certainty regarding the status of land, especially land that is designated for social activities (waqf land). In article 19 of the Law it is stated that:

- a. To ensure legal certainty by the Government, land registration is held throughout the territory of the Republic of Indonesia in accordance with the provisions stipulated in Government Regulations.
- b. Registration referred to in paragraph (1) of this article includes:
 - 1) Measurement, mapping and land accounting
 - 2) Registration of land rights and transfer of these rights
 - 3) Providing letters of proof of rights, which act as strong evidence.

This isbat waqf case is the authority of the Religious Courts, this is based on Law No. 14 of 1970 which was amended by Law Number 4 of 2004 concerning Judicial Power and Law Number 3 of 2006 concerning Religious Courts. In Law Number 14 of 1970 as amended by Law Number 4 of 2004 concerning Judicial Powers listed in Article 2 paragraphs 1 and 2, which reads:

“(1) The implementation of Judicial Powers as stated in article 1 shall be submitted to a judicial body and stipulated by law with the main task of receiving, examining and judging and settling every case submitted to it;
(2) Tasks other than those mentioned in paragraph (1) can be assigned to him based on statutory regulations”.

So, the need for a certificate in the waqf land is so that it can solve the problems of the donated land that has not been certified so that it can guarantee its existence and provide strong legal certainty.

B. Opinion of Religious Court Judges on Uncertified Waqf Land

In Law Number 41 of 2004 concerning waqf Article 62 CHAPTER VII concerning Dispute Resolution states that: 1). The settlement of waqf disputes is carried out through deliberation to reach a consensus. 2). If the dispute resolution is not successful, the dispute can be resolved through mediation, arbitration or court. The court institution in question is the Religious Court, which is an institution that is given the power to resolve disputes over waqf and is the last resort taken when the deliberation process for consensus is not resolved. After that then through Mediation on the form of a third party or mediator and also through Sharia Arbitration.¹² The Religious Court regarding absolute authority is the duty and authority to examine, decide and resolve cases of the first degree between people who are Muslims. Several regulations aimed at resolving land waqf disputes in Indonesia with the issuance of certificates have not been fully implemented in the community, as has

¹² Hasanah, Uswatun. “Urgensi Pengawasan Dalam Pengelolaan Wakaf Produktif.” *Al-Ahkam: Jurnal Pemikiran Hukum Islam* Vol. 22, no. No. 1 (2012): h. 61-80.

happened in some of the waqf lands that do not have certificates.

Waqf in this condition is prone to disputes at a later date due to the absence of legal protection and guarantees. In addition to guaranteeing legal protection, waqf must have a certificate due to the fact that the land condition has no additions while the human need for land is increasing day by day. Then the economic value of land is increasing day by day which sometimes triggers land disputes, even the waqf land cannot be separated from various possibilities such as waqf land being withdrawn by the waqf, heirs of the waqf or irresponsible people.

Non-certified waqf land in Indonesia is based on Islamic law or also on the basis of mutual trust. Then a case in a religious court is protected with written evidence and also with witnesses described as follows:¹³

"We see evidence as to whether the waqf land has a certificate or is there other written evidence made by the official, be it information from the village. In waqf there is the term deed, apart from talking about letters there are also witnesses. I think a lot of evidence is used to defend."

From this explanation it is understood that other evidence that can be used in protecting the waqf land is the Waqf Pledge Deed made before PPAIW and with witnesses who witness and know clearly and also with other written evidence, if the waqf land is not certified. One example of the waqf case that occurred in Bogor with Number: 246 / Pdt.G / 2010 / PA.Bgr was in the form of donated rice fields in 1938 with an area of ± 5,666 M2 then the results were submitted to finance the activities and development of the Jami Al-Munawwaro

Mosque in Banten. After 1960, the management was taken over by one of Wakif's children. The child of the wakif sells part of the waqf land so that the area becomes ± 2,810 M2 and is used to pay for the pilgrimage. And after the death of the son of waqf, the grandson of the wakif continues to take care of it and as long as it is managed the results of the land are partially given to the Jami Al-Munawwaroh Mosque and last until 2001.

After the death of the grandson of the wakif the land was then managed by Komaruddin bin H. Anwar hereinafter referred to as Defendant I, and during the management period the endowed land products were never submitted to the Jami Almunawwaroh Mosque and also stated that the land was an inheritance and had a decision with Number 08 / PPPHP / 2001 / PA.Bgr. However, after the donation case was filed, the court decided that the land was waqf land and also confiscated the collateral for a portion of the land which had been previously sold by the wakif's son. And the waqf was previously recorded in book C No. 1046 parcel No. 72 S.II, also recorded in book C No: 9/528, persil No: 72 S.II. From this case it is understood that a waqf land with a legally strong certificate and protection for a waqf land that does not have a certificate is recorded properly such as through the KUA and witnessed by at least two witnesses.

Conclusion

Based on the data that has been described above, it can be concluded that the waqf land that does not have a certificate can be strengthened and protected according to its function and purpose, this must be in accordance with Government Regulation No. written, it is not enough just by verbal vows. The aim is to obtain authentic evidence, for example as a complete document for the registration of waqf land at the Agrarian

¹³ Aini, Nur. "Perlindungan Hukum Tanah Wakaf Yang Tidak Bersertifikat Di Kabupaten Enrekang." *Jurisprudentie : Jurusan Ilmu Hukum Fakultas Syariah Dan Hukum* 6, no. 2 (2019): 28.

office or as legal evidence in the event of a dispute at a later date regarding the land that has been donated. And what can be used in protecting the waqf land is the Waqf Pledge Deed made before PPAIW and with witnesses who witness and know clearly and also with other written evidence, if the waqf land is in a state of not having a certificate. In Law Number 41 of 2004 concerning waqf Article 62 CHAPTER VII concerning Dispute Resolution states that: 1). The settlement of waqf disputes is carried out through deliberation to reach a consensus. 2). If the dispute resolution is not successful, the dispute can be resolved through mediation, arbitration or court. The court institution in question is the Religious Court, which is an institution that is given the power to resolve disputes over waqf and is the last resort taken when the deliberation process for consensus is not resolved.

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