

Commercialization of Waqf Assets in the Perspective of Legislation and Islamic Law

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ABSTRACT

The purpose of this study is to analyze the problem of commercialization of waqf assets according to laws and regulations and Islamic law. This research uses qualitative research with descriptive analysis method. The type of data source used in this study is a secondary data source. Based on the results of the analysis, it can be concluded that according to the legislation in Article 1 paragraph (1) Government Regulation No. 28 of 1977 and Law No. 41 of 2004 concerning waqf as well as in the view of Islamic Law that commercializing waqf assets with the aim of obtaining profits that will be used to develop the waqf property itself is permissible (Mubah), because there is no evidence that forbids it. The results of this study also show that waqf assets may not be traded, therefore waqf assets are prohibited from being sold, donated and inherited, while producing waqf assets in the form of commercializing them is not prohibited.

ABSTRAK

Tujuan dari penelitian ini adalah untuk menganalisis masalah komersialisasi harta wakaf menurut peraturan perundang-undangan dan syariat Islam. Penelitian ini menggunakan penelitian kualitatif dengan metode analisis deskriptif. Jenis sumber data yang digunakan dalam penelitian ini adalah sumber data sekunder. Berdasarkan hasil analisis dapat disimpulkan bahwa menurut peraturan perundang-undangan dalam Pasal 1 ayat (1) Peraturan Pemerintah Nomor 28 Tahun 1977 dan Undang-Undang Nomor 41 Tahun 2004 tentang perwakafan serta dalam pandangan hukum Islam bahwa Mengkomersialkan harta wakaf dengan tujuan memperoleh keuntungan yang akan digunakan untuk mengembangkan harta wakaf itu sendiri diperbolehkan (Mubah), karena tidak ada dalil yang melarangnya. Hasil penelitian ini juga menunjukkan bahwa harta wakaf tidak boleh diperjualbelikan, oleh karena itu harta wakaf dilarang untuk dijual, dihibahkan dan diwariskan, sedangkan memproduksi harta wakaf dalam bentuk dikomersialisasikan tidak dilarang.

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I. INTRODUCTION

Islam is very concerned about social problems. Islam teaches its people to help each other among themselves. Taking sides with members of the community who are economically disadvantaged is one of the initial agendas of this religion (Rusydia & Rahayu, 2019). Islam also makes efforts to strengthen and empower their position so that there is no big social inequality in society (Setiadi & Sulistiani, 2021; Qodariah et al., 2020). Islam also pays attention to the welfare of the community in a broad sense so that they can be equal to other people, both in the economic, social, political, educational, and other fields. One of the instruments of Islamic teachings regarding this issue is

waqf. From the beginning, waqf was intended to spread goodness in the form of economic benefits to other people or society. In recorded history, waqf has played a major role in improving people's welfare in various fields (Scientific, 2020; Rosadi, 2019).

The practice of waqf has not been known in history before the arrival of Islam. Even at the beginning of Islam, he was not well known, he only became the center of attention after the Prophet PBUH received a question from Umar bin al-Khathab who obtained very fertile land that had never been encountered before in Khaibar. The Prophet PBUH said to Umar "In Syi'ta Habbasta Ashlaha wa Tashaddaq biha" (if you want, make the property eternal, do not transfer its ownership and give the results for the benefit of good deeds). Since then, the practice of waqf has continued to develop in the course of Muslim history, even playing a very significant role in various fields such as social, economic, educational and cultural fields. Waqf institutions have actually carried out some of the government's tasks in the social field, educating the nation's life, improving people's living standards, because waqf is one of the instruments of Islamic economics. From this hadith, several principles of waqf can be drawn, namely, (1) waqf is a sunnah alms which is different from zakat; (2) waqf is lasting because waqf may not be traded, inherited, or donated; (3) waqf must be managed productively; (4) the obligation to donate the proceeds of waqf objects for a good purpose as desired by the wakif; and (5) the waqf manager or nazhir gets a fair share of the waqf proceeds (Martinelli et al., 2019; Disemadi & Rosiah, 2019).

In the field of education, there are several educational institutions that are very influential because they have given birth to many scholars and scholars. For example, Cairo's al-Azhar University in Egypt, the Zaitunyah University in Tunis, the Nizamiyah University in Baghdad, and thousands of Madaris Imam Lisesi in Turkey. These institutions can develop and last a long time because they have succeeded in managing waqf as a source of funds (Hiyanti et al., 2020). Al-Azhar, for example, succeeded in managing and developing waqf assets so that they had very large waqf assets and other businesses. In fact, before Nasser issued a policy of nationalizing waqf assets, the budget for these educational institutions exceeded the Egyptian state budget itself. Al-Azhar University in Egypt which is the oldest university in the Islamic world was raised with waqf assets, as well as several Islamic educational institutions such as Islamic boarding schools in Indonesia developed from waqf assets (Lubis, 2020; Fuadi, 2018).

Meanwhile, regarding the definition of waqf according to the term, there is a fairly wide debate among fiqh experts. This is because they have different opinions regarding the nature of waqf. Among them Ahyani & Muharir (2021) and Laelah (2020) who wrote scholarly debates on this matter, he arrived at a choice that the most appropriate action is to return the definition of waqf to what is contained in the hadith of the Prophet, as was done by Ibn Qudamah, a Hambali scholar, namely: "Tahbis Al-Asl wa Tasbil Tsmaratihi" (holding hope and flowing the results).

In Indonesia, waqf has played a very large role in providing funds for the development of education. According to Manfred Ziemek, as quoted by Fitri & Wilantoro (2018) and Yuliana & Hadi (2019), waqf land handed over to Islamic boarding schools has been able to increase the existence of Islamic boarding schools. For the size of an agrarian society at that time, land waqf was certainly very helpful as a source of funds. Likewise, many formal institutions, especially those under Islamic community organizations such as NU, Muhammadiyah, Persisi, and others, have grown and developed from waqf assets. Among the few examples of educational institutions that are considered quite successful in managing waqf assets are: Badan Wakaf Pondok Pesantren Modern Gontor Ponorogo, Badan Wakaf Universitas Islam Indonesia (BWUII) Yogyakarta, Badan Wakaf Universitas Muslim Indonesia (BWUMI), and Daarut Tauhid Foundation Bandung (Balqis & Sartono, 2019).

In Indonesia, after the issuance of Government Regulation No. 28 of 1977 concerning the waqf of owned land, Presidential Instruction (Inpres) No. 1 of 1991 concerning the Compilation of Islamic Law (KHI) the third book of the field of waqf, and Law No. 41 of 2004 concerning waqf and PP no.42 of 2006, the legal certainty for waqf is getting stronger. Assets in the form of land, buildings and other

assets that were waqf orally in the past must be registered to obtain a waqf land certificate issued by the Official Making the Waqf Pledge Deed (Pejabat Pembuat Akta Ikrar Wakaf /PPAIW).

In its history, there are several traditions such as waqf in Indonesia. In Banten, for example, there is what is known as 'Huma Serang', namely in the form of fields which are managed jointly every year and the results are used for common interests. In Lombok there are 'Tanah Pareman', namely state land that is exempt from landrente tax, the proceeds of which are handed over to villages, subaks, and temples for the common good. While in East Java there are 'Tanah Perdikan', namely the king's gift to a person or group that is considered meritorious which should not be traded (Purwaningsih & Susilowati; Ali et al., 2018; Syahputra, 2020).

After Islam entered the territory of Indonesia, waqf began to be known in Indonesia. The strongest early evidence can be traced from the role of the Walisongo in introducing Islam. To spread Islam to the palace environment, it usually started by establishing pesantren and mosques in the sultanate (palace) environment. This pattern was followed by Syekh Maulana Malik Ibrahim (p.a1419) and Sunan Ampel (p.a1467), which was then followed by other Walisongo figures. Mosques and Islamic boarding schools, in addition to being the center of the spread of Islam, are also the first institutions that become the seeds for the development of the next future waqf (Alam & Hidayati, 2020; Dikuraisyin, 2020).

The success of Muslim countries is proof that waqf is able to contribute in unraveling economic problems in a country. Egypt is able to prove that waqf is a source of community welfare. This is because waqf in Egypt is managed in various fields; property, agriculture and land reclamation, and economics. Even the United States also has productive waqf assets, namely an apartment project worth US\$85 million on land owned by the Islamic Cultural Center of New York (ICCNy) in 2017. Waqf in the United States is managed by the Kuwait Awqaf Public Foundation (KAPF).), which is a professional Islamic financial institution. Waqf is managed professionally, so that the results obtained are also maximal.

The success of several countries, both Muslim and secular countries, proves that waqf has excellent potential to be developed. The benefits generated also contribute more or less to realizing the economic independence of the people, and waqf can certainly be counted as an Islamic economic instrument in a country (Baharudin & Iman, 2018; Hasyim & Nurohman, 2021). The ruler's policy towards a legal case is usually directly proportional to how the ruling regime sees the potential of the law, both in terms of its interests and the interests of the community. The ruler's policy towards a legal product can have ups and downs along with changes in the pattern of relations between the ruler and the public who have an interest in the legal product. That is because politics or power, to borrow the term Mahfud MD (1998), is a determinant of law. Based on this framework, it can be understood how the development of waqf legislation in the history of the Indonesian nation's journey.

Meanwhile, in its current development, at the time the issue of registering waqf assets can be overcome slowly through legislation products. Other problems arise, for example, the waqf property manager (nadzir) finds it difficult to find funds to develop the waqf property they manage. It may be that the waqf property manager is thinking of borrowing some money from a financial institution (bank) by mortgaging the waqf property certificate. If the waqf property is in the form of an ambulance, for example, the management burdens everyone who uses the ambulance with a large enough cost so that it seems like an attempt to commercialize (business) the waqf property (Said & Amirudin, 2019; Paksi et al., 2018).

Another problem, for example, is that the waqf property manager finds it difficult to utilize the waqf property in accordance with the will of the person who is waqf (wakif) as written in the waqf pledge deed. For example, the person who is waqf (wakif) wishes that a mosque or orphanage be built on the waqf land and his will is written in the waqf pledge deed. However, in reality, the wakif's intention could not be carried out because it faced obstacles, such as a lack of funds, or after a feasibility study it turned out that the location of the waqf land was not suitable for the building

desired by the wakif. Can the waqf property be converted to another building not as desired by the person who is waqf (wakif).

II. RESEARCH METHOD

This research uses qualitative research with descriptive analysis method. The type of data source used in this study is a secondary data source. The analysis begins by explaining the meaning of waqf according to Islamic law and legislation, then the legal basis of waqf and Islamic legal views on the commercialization of waqf. Data and analysis will be presented using qualitative methods.

III. RESULT AND DISCUSSION

The Meaning of Waqf According to Islamic Law and Legislation

The word "waqf" comes from Arabic Waqafa–Yaqifu–Waqfan which means to hold back, to stop something and to stay in place. According to the term Hanafiyah scholars as explained by al-Sarakhsyi in the book al-Mabsuth, waqf is holding property which according to law belongs to the wakif (person who is waqf) and uses the benefits (services) for virtue (Habs al-'ain 'ala hukmi Milki al-Waqif wa al-tashadduq bi al-manfa'at 'ala jihat al-khair). Based on that definition, the waqf property still belongs to the wakif (there is no transfer of ownership), even the wakif may withdraw the waqf or sell it (Bina'an 'alaih La yalzam Zawal al-mauquf 'an milki al-waqif wa tashihhu lau al-ruju' 'anhu wa yajuzu bai'uhu).

According to the scholars of al-Shafi'iyah and Hanabilah, waqf is the holding of an object/property that may be used for its benefits, while the object is still there, by severing the legal ability to act from the wakif and others on the property that has been waqf, the results The benefits of these objects are used for virtue in order to get closer to Allah SWT (Habs Malin Yumkinu al-Intifa' bihi, ma'a baqo'i 'ainihi, biqath'i al-tasharruf fi raqabatihi min al-wakif wa ghairihi, 'ala musharrafim mubahin maujudin, 'ala jihati al-birri wa al-khair Taqarruban ilallahi Ta'ala). Thus, the waqf property has changed its ownership from the wakif so that it is retained to belong to Allah, the wakif may no longer take legal action on the waqf property (wa 'alaihi yakhruju al-mal min milki al-waqif wa yashiru habsan 'ala hukmi milki Allah, wa yamtani'u 'ala al-waqif al-tasharrufu fih).

According to Malikiyah scholars, waqf is the owner of the property refraining from taking legal action on the assets he owns, the benefits of the property, although in the form of wages/results are used for virtue, are given to those who are entitled for a certain period according to the wishes of the wakif, it is not required forever (ja'lu al-malik manfatan mamlukatan au ja'lu ghullatahu ka dirhamin limustahiqqin bishighat muddata ma yarahu al-Muhbis, Ay annal malik yahbisu al-'ain 'an ayyi tasharrufin wa yatabarru'u 'ala jihat al-khairiyah tabarru'an laziman, ma'a baqo-i al-'ain 'ala milki al-wakif, muddah mu'ayyanah min al-zaman, fa la yusytarathu fih al-ta'bid). Based on the three definitions above, it can be said that waqf is deliberately withholding a person's legal actions against some of his wealth whose benefits are given (as charity) for virtue in order to get closer to Allah.

It's just that according to the Syafiyah and Hanabilah scholars, the ownership of the waqf property has changed from the owner (wakif) to God's which is managed by the manager (nadzir waqf), it cannot be sold, it cannot be inherited or donated, it cannot even be withdrawn. Waqf is done forever. In contrast to the opinion of the Hanafiyah Ulama who stated that the property still belongs to the wakif, he can still withdraw it and sell it, while according to the Malikiyah Ulama, the waqf does not have to be forever, it may be within a certain period of time. Waqif rights become lost after he pledged the waqf contract and his ownership moved to belong to Allah with the meaning for the public interest in accordance with Allah's provisions (Faujiah, 2018).

If the waqf property already belongs to Allah, then the waqf property manager (nadzir) only has the right to manage it and take its benefits. The question that can be raised is if the waqf property already belongs to Allah, to whom does Allah delegate the ownership? If we look at the letter al-Nisa'

verse 59 which mentions the order of obedience to Allah, the apostle and ulil Amri (government), it can be said that if the waqf property is not managed properly by the manager or is not used for the public interest in accordance with the provisions of shari'a. at, then the government (Ulil Amri) may take it so that it can be used for the public interest. If it is understood broadly, then anyone who manages, manages something for the public interest in accordance with the provisions of the Shari'a can be referred to as Ulil Amri on behalf of the institution, such as religious institutions (Foundations) that manage waqf assets. Thus, the government is actually not allowed or cannot take over waqf assets managed by religious community foundations because both are included in the Ulil Amri category. The next issue is whether the waqf property management foundation utilizes the waqf property in accordance with the provisions of Islamic law and applicable laws or not? Or are there still many waqf assets that are not used (idle) properly?

Waqf according to legislation

Law No. 41 of 2004 concerning Waqf Article 1 states that waqf is a legal act of wakif to separate and or surrender part of his property to be used forever or for a certain period of time in accordance with its interests for the purpose of worship and or public welfare according to Sharia. In article 1 paragraph (1) Government Regulation No. 28 of 1977 it is stated that waqf is "a legal act of a person or legal entity that separates part of his assets in the form of owned land and institutionalizes it forever for the benefit of worship or other public interests in accordance with Islamic teachings. " In the third book of Islamic Law Compilation it is stated that waqf is "a legal act of a person or group of people or a legal entity that separates part of his property and institutionalizes it forever for the benefit of worship or other public purposes in accordance with Islamic teachings". When analyzed the laws and regulations, it appears that the Compilation of Islamic Law requires waqf for ever, as is the opinion of the al-Shafi'i school, while Law No. 41 of 2004 concerning waqf allows waqf for ever or for a certain time.

The author of the book *Outlines of Muhammadn Law*, Asaf A.A Fezzy from his book stated that waqf also includes state land that cannot be given to anyone and is intended for charitable purposes, such that it is a sacred gift (pious endowments).

Legal Basis of Waqf

The word "waqf" is not found clearly and unequivocally in the Qur'an and Sunnah. The legal basis that is usually used as the basis for waqf is general verses, for example, Surah Ali Imran 3, verse 92: "You will never get (perfect) virtue until you spend some of the wealth you love, and what what you spend, then verily Allah knows it."

Hadith which is usually used as a legal basis for waqf, among others: When a human dies, his deeds are cut off, except for three things, namely shadaqah jariyah (alms whose reward continues to flow), useful knowledge and prayers for pious children "(H. Muslim history). The word "alms Jariyah" in the hadith is understood as waqf. In addition there is a hadith that explains Umar bin al-Khathab's question to the Prophet PBUH about how the Apostle's message regarding the fertile land he obtained in Khaibar. Ibn Umar narrated that Umar bin al-Khathab got a plot of fertile land that had never been obtained before, Umar went to the Messenger of Allah PBUH to ask: O Messenger of Allah I got land in Khaibar and I got a lot of results, what do you think about the position of the land (what is your suggestion about the land)? replied: If you want to hold on to its origin (make the property eternal, not transferable to the owner) n) and donate the proceeds for charity." After receiving the Prophet's explanation, Umar made the land of wealth as charitable property, it should not be sold, not gifted and not inherited, even the land was used for the benefit of the poor, freeing people from

slavery, for fi Sabilillah, close relatives, Ibn stable. The manager can enjoy the results and feed others, the important thing is not to use it to accumulate wealth. Based on this hadith, the Prophet's hadith about waqf emerged with the expression "Habbis al-ashla wa sabbil al-Tsamarah (hold the origin and share the result). Imam Al-Nawawi in the book of al-Majmu' Syarah al-Muhazzab juz 16 page 226 explains that this hadith shows the validity of waqf in Islam, waqf assets cannot be sold, cannot be inherited and cannot be given away, but must follow certain conditions. The conditions set by the person who owns the land (wakif). This is the first waqf in Islam.

Commercialization of Waqf Assets

The word "commercialization" comes from the English "Commercial" (adj) which means related to or used in commerce. The word "Commerce" means the buying and selling of goods to make profit. Thus, the commercialization of waqf assets here means the business of waqf assets for profit. Commercializing waqf assets may take many forms. It is mentioned here only in three forms:

- a. To develop waqf property (building waqf land), the manager (foundation) borrows funds from a financial institution (bank) by mortgaging the waqf land certificate as collateral (al-marhun).
- b. Another example, if the waqf property is in the form of an ambulance (hearing car), the manager rents out the ambulance to anyone who needs it by charging a number of funds such as rent, plus fuel oil and driver's fees.
- c. The manager of the waqf land that has not been built cooperates with the developer to build shops on the waqf land with a profit sharing agreement. Then the shops are rented out and the proceeds from the rent are used for virtues such as to finance the operations of mosques or Islamic boarding schools

For the first example, it is actually permissible for the waqf land certificate to be pawned as collateral (al-marhun) in borrowing money from banks, especially sharia banks. The money is used to build waqf land and the manager is willing to pay the debt in installments within a certain time limit. Because "al-Rahnu' (undermining / pawning) is allowed according to the Shari'ah based on surah al-Baqarah 2, verse 283 and other traditions.

However, legal action like this contains risks, namely if the manager is unable to pay off his debt to the Bank, then the guarantee (al-marhun) in this case the waqf land, will be confiscated by the Bank, this means eliminating the nature of the waqf property itself. As it is known that the guarantee will be sold by the lender (the bank) when the debt cannot be paid (Ja'lu 'ainin watsiqatan Lidainin Yustawfa minhu 'inda Ta'uzzur bil Wafa'). Although the original law may be mortgaging the waqf land certificate, but because it will result in the loss of the waqf land when the debt cannot be repaid, mortgaging this waqf land certificate becomes Haram as a preventive measure (saddan Lizzari'ah), because eliminating the existence of waqf land is haram (wa ma yu-addi ilal haram Fahuwa haram) (Nawi & Ismail, 2018).

For the second example, the ambulance manager as waqf property may take rent from everyone who needs an ambulance in a reasonable amount. Because the lease contract (al-ijarah) is permitted by the Shari'ah. Moreover, the ambulance requires fuel, honorarium for the driver, maintenance costs and is depreciated, so it is very reasonable to ask for compensation (al-'iwadh) of each use of the ambulance. This is in accordance with the rules "Al-Kharraju Bidh-Dhaman". This method is actually in order to make waqf assets productive, through commercialization.

For the third example, the waqf land manager may make an MOU (agreement) with the developer to build several figures on the waqf land on the basis of profit sharing. After the shops were

successfully built, they were rented out to other parties and the proceeds were used for the benefit of the people. This method is one way to make waqf assets productive, even though it seems to be commercializing.

IV. CONCLUSION

Based on the results of the analysis, it can be concluded that according to the legislation in Article 1 paragraph (1) Government Regulation No. 28 of 1977 and Law No. 41 of 2004 concerning waqf as well as in the view of Islamic Law that commercializing waqf assets with the aim of obtaining profits (profits) that will be used to develop the waqf property itself is permissible (Mubah), because there is no evidence that forbids it. As it is known above that waqf assets are prohibited from being sold, donated and inherited, while producing waqf assets in the form of commercializing them is not prohibited.

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