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Wakaf Properties Used As Guarantee For Debt Are Reviewed In Law Number 41 Of 2004 Concerning Wakaf And The Compilation Of Islamic Law

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ABSTRACT

Land is one of the most common objects used as collateral. Waqf will be valid as a continuous charity after the owner truly declares the assets he has donated to be public assets and he freezes his rights for the benefit of the community. The identification of the problem in this study is How is the view of Islamic Law and Law Number 41 of 2004 regarding waqf assets used as collateral for debt? As well as the Legal Consequences of waqf land used as collateral According to Law Number 41 of 2004 The methodology used in this study uses normative juridical, The conclusion of this study is based on Article 40 of Law Number 41 of 2004 concerning Waqf that waqf assets are prohibited from being used as collateral, confiscated, donated, sold, inherited, exchanged, transferred in other forms of transfer of rights. And in Article 225 of the Compilation of Islamic Law, objects that have been donated cannot be changed or used other than those intended in the waqf pledge. The agreement with collateral in the form of waqf land does not meet the requirements for a lawful cause, thus the agreement is null and void by law. The criminal provisions are regulated in Article 67 of Law No. 41 of 2004.

Keywords: Waqf, Guarantee, Debts and Receivables

INTRODUCTION

Muslims constitute the majority in Indonesia. Internationally, Indonesian Muslims can even be considered the largest Muslim community within a single national territory. Therefore, the legal system in Indonesia is influenced by Islamic law.

Islamic law is a legal system that has similarities and differences with other legal systems. These legal systems consist of legal provisions that serve as norms of obligation and prohibition for every individual, limiting their behavior and relationships with other human beings by imposing legal sanctions on those who

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violate them.[1]

Waqf, as a legal act, has long been institutionalized and practiced in Indonesia. Waqf, as a vehicle or waqf, is a normative process in Islam, understood as a very important religious institution alongside other Islamic institutions such as banking, zakat, infaq, and shadaqoh. Waqf was practiced by pre-Islamic peoples, although it was not yet called waqf.

In Islam, Allah has prescribed waqf, recommended it and made it a way to get closer to Allah SWT. The ignorant people do not know about waqf, but waqf was created and called for by the Prophet because of his love for the poor and needy.[2].

A waqf will be valid as a continuous charity (charity jariyah) once its owner has declared the donated asset to be a public asset and frozen its rights for the benefit of the community. A waqf will not be considered a continuous charity (charity whose rewards and benefits continue to flow) until it is truly utilized productively, growing or providing benefits without depleting the principal waqf asset.[3]

According to Article 16 of Law Number 41 of 2004 concerning Waqf, assets that can be waqfed include immovable and movable objects. Movable objects include:[4]

a. land rights in accordance with the provisions of applicable laws and regulations, both those that are registered and those that are not;
b. buildings or parts of buildings standing on land as referred to in letter a;
c. plants and other objects related to land;
d. ownership rights to apartment units in accordance with the provisions of applicable laws and regulations;
e. other immovable objects in accordance with sharia provisions and applicable laws and regulations.

Meanwhile, moving objects include:

a. Money;
b. precious metal;
c. securities;
d. vehicle;

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[1]Daud Ali, Islamic Law Based on the Curriculum Provisions of the Legal Studies Conservatory, Mandar Maju, Bandung. 2002, p. 45
[2]Sayyid Sabiq, Sunnah Jurisprudence Volume 14. PT. Al-Ma'arif, Bandung, 1988, p: 148
[3] http://www.tabungwakaf.com
[4]Article 16 of Law Number 41 of 2004 concerning Waqf

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e. intellectual property rights;
f. lease rights; and
g. other movable objects in accordance with sharia provisions and applicable laws and regulations.

Land is one of the most common assets used as collateral. Collateral is a contract between a creditor and a debtor, where the debtor pledges a certain amount of their assets to repay a debt, according to applicable laws, if the debtor defaults on the debt within a specified time.[5]

Referring to Law No. 4 of 1996 concerning Mortgage Rights and Objects Related to Land, Mortgage Rights are security rights for the repayment of certain debts, which are imposed on land rights as referred to in Law No. 5 of 1960 concerning Basic Agrarian Principles. This also includes other objects that are an integral part of the land. The existence of Mortgage Rights (HT) will provide legal authority to the creditor or the grantor of the mortgage to carry out seizure and auction if the guarantor fails to pay. In other words, the owner of the land rights will change if the debtor or guarantor fails to pay, and the land is auctioned.[6]

Then what about waqf land which is used as collateral considering that the purpose and function of waqf is based on Law No. 41 of 2004 Article 4 that the purpose of waqf itself is to utilize waqf property in accordance with its function, Article 5 of Law No. 41 of 2004 states that the function of waqf is to realize the potential and economic benefits of waqf property for the purposes of worship and to advance public welfare. Meanwhile, Article 216 of the Compilation of Islamic Law states that the function of waqf is to preserve the benefits of waqf objects in accordance with the purpose of the waqf. Thus, the function of waqf here is not to preserve the objects of the waqf, but rather to preserve the benefits of the property that has been donated in accordance with the purposes of the waqf in question.

Based on the background that has been described previously, the problem identification in this research is:

1. What is the view of Law Number 41 of 2004 and the Compilation of Islamic Law regarding waqf land used as collateral for debt?

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[5]Gatot Supramono, Banking and Credit Problems, Rineka Cipta, Jakarta, 2010, p. 75
[6] Irma DevitaCan Waqf Land be Granted a Mortgage?Irmadevita.com, accessed on September 10, 2025

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2. What are the legal consequences of waqf land being used as collateral according to Law Number 41 of 2004?

METHOD

This research is normative in nature with several approaches, namely the statute approach, conceptual approach, case approach, with the sources of legal materials used being primary and secondary legal materials (literature studies), with prescriptive analysis.

RESULTS AND DISCUSSION

What is the view of Law Number 41 of 2004 and the Compilation of Islamic Law regarding waqf assets used as collateral for debt?

In Law No. 41 of 2004 concerning Waqf, it is stated that waqf is a legal act of a waqif to separate and/or hand over part of his property to be used forever or for a certain period of time according to his interests for the purposes of worship and/or general welfare according to sharia.[7]In the Compilation of Islamic Law, it is stated that waqf is a legal act by a person or group of people or legal entity that separates part of their property and institutionalizes it forever for the purposes of worship or other public needs in accordance with Islamic teachings.[8]

Waqf is declared valid if the terms and conditions have been fulfilled. The pillars of waqf as agreed by the ulama are:[9]

a) *Shighat*(statement or pledge of the wakif as a will to donate his property)
b) *Waqif*(person who donates property)
c) *Mauquf*(goods or objects donated)
d) *May Allah bless you*(the party given the waqf/waqf allocation)

Meanwhile, Article 6 of Law No. 41 of 2004 concerning Waqf stipulates that waqf is implemented by fulfilling the following elements:

a) Waqif
b) Nadzir

[7]Article 1 of Law Number 41 of 2004 concerning Waqf
[8]Article 215 paragraph 1 of the Compilation of Islamic Law
[9]Siti Nurul Amaliah, Rukun Waqf in the Validity of Waqf According to Law no. 41 of 2004 concerning Waqf, Al-Akhbar (Islamic Scientific Journal) Vol. 8, no. 2, 2022, p. 67

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c) Waqf property
d) Waqf pledge
e) Allocation of waqf assets
f) Waqf period

Among the elements above, the nadzir is the party most responsible for the management of waqf assets because waqf assets are a trust from Allah that rests in the hands of the nadzir. According to the provisions of Article 9 of Law Number 41 of 2004, the nadzir can be an individual, an organization, or a legal entity. If the nadzir is an individual, it will be a group consisting of at least three people, one of whom is chosen as the chairman. Furthermore, if the nadzir is an organization, then the management of the organization in question must meet the requirements for an individual nadzir and must be domiciled in the district/city where the waqf property is located. Then, if the nadzir is a legal entity, the requirements are the same as for the nadzir in the form of an organization, plus the requirement that the legal entity has a representative in the sub-district where the waqf land is located.[10]

The Wakif, as the party who donates his assets, has the right to determine where and for what purposes his assets will be donated. The wakif can express this desire in one of the elements of waqf which is called the waqf pledge.[11]A pledge or sighat is a statement of the will of the waqif made verbally and/or in writing to the nazhir to donate his/her property. The waqf pledge is made by the waqif to the nazhir before the Waqf Pledge Deed Making Officer (PPAIW) witnessed by two witnesses and stated verbally and/or in writing and set out in the waqf pledge deed by the PPAIW.[12]

Article 4 of Law Number 41 of 2004 states that the purpose of waqf is to utilize assets according to their function. The function of waqf itself, as outlined in Article 5 of the Waqf Law, is to realize the potential and economic benefits of waqf assets for the purposes of worship and to promote public welfare.

In Article 22 of Law Number 41 of 2004 it is stated thatIn order to achieve the objectives and functions of waqf, assets can only be allocated to:

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[10]Faishal Haq. Indonesian Endowment Law, PT Raja Grafindo Persada, Jakarta, 2011, p. 48
[11]Ahmad Azhar Basyir. Principles of Muamalat Law (Islamic Civil Law), UII Press, Yogyakarta, 2012, p. 68
[12]Article 1 number 3 and Article 17 of Law Number 41 of 2004 concerning Waqf

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a) worship facilities and activities
b) educational and health facilities and activities
c) assistance to the poor, abandoned children, orphans, scholarships
d) progress and economic improvement of the people
e) other general welfare advancements that do not conflict with sharia and statutory regulations.

The issue of waqf is not merely a religious issue or a personal matter, but also a societal and individual issue as a whole. Waqf is also one way to acquire land rights under Islamic law, in addition to acquisition through sale, bequests, and exchange. The practice of waqf in society has not been fully orderly and efficient, resulting in various cases where waqf assets are not properly maintained, are neglected, or are transferred to third parties unlawfully. This situation is caused not only by the negligence or inability of the nadzir (manager) to manage and develop waqf assets, but also by the status of waqf assets, which should be protected for the public welfare in accordance with the purpose, function, and designation of waqf.[13]

Based on Law Number 41 of 2004 and Government Regulation Number 42 of 2006, changing the status of waqf assets through exchange is prohibited, except under certain conditions where the change or exchange of waqf assets is permitted. The exchange of waqf assets may only be carried out with written permission from the Minister, in this case the Ministry of Religious Affairs, based on the consideration of the Indonesian Waqf Board. Meanwhile, according to Article 225 paragraph (1) of the Compilation of Islamic Law, which explains that basically, objects that have been donated cannot be changed or used other than those intended in the waqf declaration.

Based on Article 40 of Law Number 41 of 2004, waqf property that has been donated is prohibited from:

a) used as collateral
b) confiscated
c) granted
d) for sale
e) inherited

[13]Rachmadi Usman, Endowment Law in Indonesia, Sinar Grafika, Jakarta, 2009, p. 121

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f) exchanged
g) transferred in the form of transfer of other rights

This is also in line with Article 2 paragraph 1 of Government Regulation No. 28 of 1977 concerning the Endowment of Land Ownership, which regulates the prohibition on making changes or other transfers to endowed land. In other words, endowed land is permanent and may not be used as collateral or transferred, including through sale, donation, or inheritance. If the intended use of endowed property is changed or exchanged, the nazhir is required to re-register the endowed property with the authorized agency in accordance with applicable regulations. Waqf is something that is bindingThe reason waqf assets are not permitted as collateral is the fear that the assets will be confiscated due to inability to repay debts properly. This would stifle the practice of waqf and violate its purpose and function. Waqf assets are for the public, not for individuals, legal entities, or others. Based on this, Law Number 41 of 2004 regulates the prohibition on waqf assets being used as collateral for debt, because pledging waqf assets for debt is the same as changing the purpose for which the waqf assets were intended.

Legal Consequences of Waqf Land Used as Collateral According to Law Number 41 of 2004 and the Compilation of Islamic Law

Waqf land is land that has been handed over to its owner, or waqif, to a nazhir (deed beneficiary) for use in accordance with social and humanitarian objectives based on Sharia principles. Law Number 41 of 2004 provides a clear legal basis for the waqf process, management, and protection of waqf assets. Furthermore, the basis and guidelines for implementing waqf are also contained in the Compilation of Islamic Law (KHI).

When donating land, the waqif must have a clear objective that benefits the community. This is explained in Article 22 of Law No. 41 of 2004, which states that the objectives of waqf are:

a) worship facilities and activities
b) educational and health facilities and activities
c) assistance to the poor, abandoned children, orphans, scholarships

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d) progress and improvement of the people's economy, progress of other general welfare that does not conflict with sharia and statutory regulations.

Article 40 of Law Number 41 of 2004 states that: "Waqf assets that have been donated are prohibited from being used as collateral, confiscated, donated, sold, inherited, exchanged, transferred in other forms of transfer of rights. This prohibition aims to protect waqf assets so that they can continue to be used according to their original purpose. If waqf land is used as collateral, it will violate the law and will also eliminate the social benefits contained in the waqf land. In addition, another impact that arises is that it can cause disputes between nadzhir and third parties who claim rights to the land.[14]

Meanwhile, Article 41 of Law No. 41 of 2004 states that:

a. The provisions as referred to in Article 40 letter (f) are exempted if the waqf assets that have been donated are used for public interests in accordance with the general spatial planning plan (RUTR) based on the provisions of applicable laws and regulations and do not conflict with sharia.
b. Implementation of the provisions as referred to in paragraph (1) may only be carried out after obtaining written permission from the Minister with the approval of the Indonesian Waqf Board.
c. Waqf assets whose status has been changed due to the exception provisions as referred to in paragraph (1) must be regulated with assets whose benefits and exchange value are at least the same as the original waqf assets.
d. Provisions regarding changes in the status of waqf assets as intended in paragraph (1), paragraph (2), and paragraph (3) are further regulated by government regulations.

Based on Articles 40 and 41Law No. 41 of 2004 has explained that waqf land cannot be used as collateral, but an exception is made if the land that has been waqf is used for public interests in accordance with the general spatial planning (RUTR) based on the provisions of applicable laws and regulations and does not conflict with Sharia and can only be done after obtaining written permission from the Minister with the approval of the Indonesian Waqf Board.

[14]M. A Khoirul Mufti and Neneng Nurhasanah, Analysis of the Problems and Legal Impact of Waqf Land Certification Based on Government Regulations, Journal of Islamic Family Law Research, December 22, 2023, p. 59

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Article 36 of Law Number 41 of 2004 stipulates that if waqf assets are exchanged or their use changed, the nazhir must re-register the waqf assets. This means that legal actions resulting in changes to the legal status of the waqf assets cannot be carried out carelessly by the person responsible for the assets themselves, due to the implications of civil, religious, and criminal law if the prohibitions stipulated in the legislation are violated by the person responsible.[15]

Meanwhile, Article 225 of the Compilation of Islamic Law explains that basically, no changes or uses can be made to objects that have been donated other than those intended in the waqf pledge. Deviations can only be made for certain things after first obtaining written approval from the Head of the District Religious Affairs Office based on the advice of the District Ulema Council and the local Sub-district Head for the following reasons:

a) Because it is no longer in accordance with the objectives of the waqf as declared by the waqif
b) Due to public interest

Thus, an agreement with collateral in the form of waqf land is an agreement that violates statutory regulations, namely Article 40 of Law Number 41 of 2004, which prohibits the use of waqf assets as collateral. This means that an agreement with collateral in the form of waqf land is an agreement that does not meet the requirements for a valid agreement according to Article 1320 of the Civil Code, which contains four requirements for a valid agreement, namely:

1. Agreement
2. Skills
3. A certain thing
4. For halal reasons

The first two conditions are called subjective conditions, because they concern the subject or the parties entering into the agreement, failure to fulfill these conditions can result in the agreement being void. While the last two conditions are called objective conditions because they concern the object, failure to fulfill these conditions causes the agreement to be void by law. The agreement with collateral in the form of waqf land does not meet the requirements of a lawful cause, What is

[15]Rahmadi Usman, Op Cit, p. 162

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meant by a lawful cause is that it is not prohibited by law or contrary to good morals or public order, this is based on Article 1337 of the Civil Code.[16]Because the agreement violates Article 40 of Law No. 41 of 2004 concerning Waqf, it can be declared that the agreement is null and void by law.

The criminal provisions regulated in Law No. 41 of 2004 Article 67 are as follows:

a) Any person who intentionally pledges, grants, sells, inherits, transfers in any other form of transfer of rights waqf assets that have been donated without permission to exchange waqf assets that have been donated, shall be punished with imprisonment for a maximum of 5 (five) years and/or a maximum fine of Rp. 500,000,000.00 (five hundred million rupiah).
b) Any person who intentionally donates waqf assets without permission shall be punished with imprisonment for a maximum of 4 (four) years and/or a maximum fine of IDR 400,000,000.00 (four hundred million rupiah).
c) (Any person who intentionally uses or takes facilities from the results of the management and development of waqf assets exceeding the specified amount, shall be punished with a maximum prison sentence of 3 (three) years and/or a maximum fine of IDR 300,000,000.00 (three hundred million rupiah).

With the existence of criminal provisions and sanctions for perpetrators who violate Article 40 of Law No. 41 of 2004, people who commit these violations will be deterred and afraid to commit these violations.

CONCLUSION

Based on Article 40 of Law No. 41 of 2004 concerning Waqf, which stipulates that waqf assets may not be pledged, confiscated or subjected to various other forms of transfer.This is also in line with Article 2 paragraph 1 of Government Regulation No. 28 of 1977 concerning the Endowment of Land Ownership, which regulates the prohibition of changes or other transfers to the land that is endowed. Meanwhile, Article 225 of the Compilation of Islamic Law explains that basically, objects that have been endowed cannot be changed or used other than those intended in the waqf pledge. In other words, waqf land is permanent and may not be used as collateral or transferred to another ownership, including through sale, gift, or inheritance.

[16]Lia Amaliya, Contract Law, Cipta Media Nucantara, Surabaya, 2022, p. 45

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An agreement secured by waqf land violates statutory regulations, specifically Article 40 of Law Number 41 of 2004, which prohibits the use of waqf assets as collateral. This means that an agreement secured by waqf land does not meet the requirements for a valid agreement, as stipulated in Article 1320 of the Civil Code, namely, it does not meet the requirement of a lawful cause.

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