

LEGAL PROBLEMS OF BUILDING ON WAQF LAND BELONGING TO OTHER PEOPLE BASED ON LAW NUMBER 41 OF 2004 CONCERNING WAQF (CASE STUDY OF DECISION NUMBER 21/PDT.G/2021/PN/BNA)

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ABSTRACT

Legal Problems of Erecting Buildings on Waqf Land Owned by Others Based on Law Number 41 of 2004 concerning Waqf (Case Study of Decision Number 21/Pdt.G/2021/PN/BNA) Waqf land is a form of giving movable or immovable property for the benefit of worship and general welfare by Muslims. And the purpose of waqf procurement should not be changed in any form to deny the pledge of the waqf deed itself. The normative research method is used in this study to study the social and moral values of the community about changes in the function of waqf land without permission from the waqf and the Indonesian waqf body. This research uses several data collection results from a collection of legislation, Government Regulations, books, doctrines, documents and various other secondary legal sources. The results of the study stated that: 1) in this case, the erection of buildings that should not be allowed was only decided to dismantle the fence because it had cost a considerable amount. 2) in the legal considerations of the judge in the decision of case Number 21/Pdt.G/2021/PN/Bna, it is not appropriate because it tends to lean towards the elements of justice and legal certainty so that the element of usefulness is ignored and denies the fulfillment of obligations contained in article 5 of Law Number 48 of 2009 concerning the power of judges.

KEYWORDS Waqf, Unlawful Acts, Judge's Consideration



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INTRODUCTION

Waqf is an act of waqf or the property owner handing over his property to the nazir, namely the recipient of waqf property from the waqf who is in charge of

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managing and maintaining waqf property as mandated by the waqf in his pledge stated in the waqf certificate or Waqf Pledge Deed (AIW) obtained from the authorized officer who regulates Waqf activities (Suryamah & Lita, 2021). In waqf itself, some regulations must be obeyed by waqf actors and waqf recipients, which, if violated, there will be sanctions that overshadow them. The regulation is Law Number 41 of 2004 concerning Waqf (Supriyadi, 2023).

In Law Number 41 of 2004 concerning Waqf, it is stated in one of the articles that if the waqf has pledged the allocation of a waqf property in a deed or waqf certificate, the allocation is not allowed to be changed in any form other than for the sake of the public interest because every act of waqf is intended for the public interest (Khosim & Busro, 2018).

Also, the agreement that occurs between the waqf and the nazir when there is a waqf activity contained in the waqf certificate and signed by the parties and the presence of witnesses will cause an unlawful act if the agreement is violated as stated in the elements of unlawful acts, namely Article 1365 of the Civil Code (Mulia, n.d.).

Based on the explanation above, in the laws and regulations, it is indeed possible to change the waqf object as regulated in Government Regulation (PP) Number 28 of 1977 Article 11 and Law Number 41 of 2004 Article 41 by the Nazir as the manager of the waqf property without convincing reasons. Where this will certainly cause a reaction from the community, especially from those who are directly interested in the land waqf (YUANGGA, n.d.). Then how do you respond if something like the one mentioned above happens? The matter regarding the change in the function of the waqf land allocation can be categorized as an act of unlawful act in the chapter that has violated what has been agreed upon in the waqf certificate. So, in this case, the researcher formulated two problem formulations, namely, how is the relationship between the results of the judge's decision related to the unlawful act and the execution of the decision, and whether there are clear rules between the decision of action and the obligation to dismantle it as stated in the final decision of the decision case Number 21/Pdt.G/2021/PN/Bna.

According to a study conducted by (PRATAMA, n.d.) entitled Establishment of Buildings on Waqf Land Belonging to Others (Study of Decision Number 380 K/Ag/2014), examining the legal issues surrounding construction on waqf land owned by other parties. This study explores the various legal complications and court decisions related to such actions, similar to the case you are analyzing. This study contributes to understanding the broader implications of construction on waqf land and serves as a basis for analyzing current judicial practices.

Responding to this, the author will examine in the form of a legal writing entitled: "Legal Problems of Erecting Buildings on Waqf Land Owned by Others Based on Law Number 41 of 2004 concerning Waqf (Case Study of Decision Number 21/Pdt.G/2021/PN/BNA)"

Based on the above background, the author takes the following problem formulation:

1. What is the relationship between the law of erecting a building on waqf land belonging to another person, which is decided to be an Unlawful Act by the Judge, and the execution of the decision?
2. Is the judge's consideration in the Case of Decision Number 21/Pdt.G/2021/PN/Bna so that it can be considered by the elements in the

Judge's Decision, namely the elements of Justice, Usefulness, and Legal Certainty?.

The purpose of this study is to analyze the relationship between the establishment of buildings on waqf land owned by others with the provisions of applicable laws, especially Article 1365 of the Civil Code and Law Number 41 of 2004 concerning Waqf.

While the benefits of this study are to help wakif and nazhir understand the legal consequences if there is a violation of the waqf pledge, so that they can manage waqf land more responsibly and in accordance with legal provisions

RESEARCH METHOD

By the problems listed above, therefore, the type of research carried out in this thesis is a type of normative juridical law research where the type of normative juridical research is where the problems discussed and described in this study are focused on applying the rules and norms in positive law (Amatahir, 2023). This type of normative research is carried out by examining various kinds of formal legal rules such as laws, literature, and doctrines, which contain theoretical concepts that are then connected to the problems that are the subject of discussion in the research (Marzuki, 2017).

The data used in this research is qualitative in nature, focusing on legal documents, regulations, judicial decisions, and relevant literature. This data includes primary legal materials such as Law No. 41 of 2004 concerning Waqf, Article 1365 of the Civil Code, and Decision No. 21/Pdt.G/2021/PN/Bna. Additionally, secondary legal materials, including books, journal articles, and other academic writings on waqf law and unlawful acts, are utilized to support the analysis.

Data collection is conducted through documentary research. This method involves collecting and analyzing documents related to waqf law, judicial decisions, and other legal texts. The legal texts were obtained from legislative databases, legal textbooks, and published academic research. Court rulings, particularly Decision No. 21/Pdt.G/2021/PN/Bna, were reviewed to understand the judicial reasoning applied in the case of unlawful construction on waqf land. Moreover, doctrinal research was conducted to study relevant legal theories and principles applicable to the issues surrounding the misappropriation of waqf land.

The data analysis method used is normative juridical analysis, which involves interpreting and analyzing legal norms and rules found in the collected legal documents. This analysis focuses on understanding the judicial decisions within the framework of applicable laws and regulations, particularly those governing waqf property and unlawful acts. The research also employs comparative analysis by comparing the findings of previous judicial rulings and literature to the case at hand, ensuring a comprehensive understanding of how the law is applied in different contexts. This method allows for a thorough examination of whether the judge's decision aligns with established legal principles and provides insight into how waqf law is applied in practice.

RESULT AND DISCUSSION

The Relationship Between the Law of Erecting a Building on Waqf Land Owned by Another Person, which is Decided as an Unlawful Act by the Judge, and the Execution of the Decision

According to Article 1365 of the Civil Code, a legal act can be said to be an unlawful act if the four elements contained in Article 1365 of the Civil Code are fulfilled where the four conditions that must be met in a lawsuit based on an unlawful act are:

1. There is an unlawful act, in which case an act that can be said to be unlawful is based on written rules and legal principles that are currently in force in society, such as the principle of propriety or propriety (Dameria et al., 2017).
2. Mistakes, where mistakes were made deliberately, namely the defendant, who is also a nazir or manager of waqf assets in the case of Decision Number 21/Pdt.G/2021/PN/Bna unilaterally erected a building on waqf land whose allocation is specifically for the means of exiting and entering the yard of the Dayah complex or the yard of the house belonging to the Plaintiffs.
3. Losses arise from the obstruction of traffic speed and exit and entry routes for the Plaintiffs, Plaintiff Guests, and the community who participate in using the Dayah Passage.
4. The causal relationship between unlawful acts and losses is clearly illustrated in how the unilateral decision of the nazir or the defendant who commits the act of breach of engagement occurs when the Defendants pledge waqf, which can also be said to have agreed with the Nazhir results in losses where the Plaintiff finds it difficult and disturbed because if the gate built by the defendant is closed so that making it difficult for the Plaintiffs to enter the yard of their own house.

Legal Considerations of Judges in Deciding Case Number 21/Pdt.G/2021/PN/BNA

In case Number 21/Pdt.G/2021/PN/Bna, the judge's legal consideration is based on the Law (UU) of the Civil Code (KUHPperdata), especially based on Article 1365 of the Civil Code where this Article is an Article related to the case of Unlawful Acts and does not use the provisions of the Articles of the Regulatory Law related to waqf because it is not the authority of the Banda Aceh District Court, However, because it can be proven by the Plaintiffs through the Evidence of the Waqf Certificate, namely the one contained in the Pledge regarding the allocation of the object of the case, which is the same as the act of engagement between the Plaintiff as the Waqif or the giver of the waqf property to the Defendant as the Nazhir or the Recipient and the manager of the waqf property, it is an unlawful act if the Defendant has agreed to the pledge that the Plaintiff has made from the beginning in the letter the waqf information dated November 25, 2011.

Another legal consideration is based on Law Number 41 of 2004 concerning Waqf, where the law emphasizes that changes in the allocation of waqf objects are not allowed if there is no permission from the authorized waqf institution, namely the Indonesian Waqf Board as well as the agreement of the waqf itself. By making these legal considerations, the judge decided that the party who erected a building on waqf land belonging to someone else must vacate the land because it had violated

waqf rules in Indonesia. In the case, the judge also considered that waqf land is land with a clear purpose, namely for the benefit of Muslims, who must be restored to its function as promised. If the party who erects a building on the waqf land does not vacate the land, then based on these legal considerations, the party who erects the building on the waqf land can be subject to legal sanctions (Arba, 2021).

The unlawful act itself in Article 1365 of the Civil Code is an act where one of the parties to the agreement violates or deviates from its obligations and authority to the agreement that has been agreed so that the result of it results in a loss suffered by the other party in the agreement (Budiman, 2024; Sugiyono, 2017). So even though the object of the passage in dispute is part of the waqf property, the pledge made or the agreement that occurs between the Plaintiff and the Defendant is part of the act of engagement where this is regulated in Article 1352 of the Civil Code in Chapter III concerning Engagement where in essence it is stated that the engagement was born due to an agreement or agreement between the parties where in this case between the Plaintiff and the Defendant Party has agreed that the existence of the object of the passage is only intended as a public road facility and this can also be proven by the existence of a waqf certificate signed by the Plaintiff as the Wakif and the Defendant as the Nazhir who is in charge of managing the object of the case as stated in the waqf certificate. However, with the violation of the provisions in the agreement, an unlawful act occurred due to the defendant not complying with the agreement with the Plaintiff, which had been carried out peacefully together for more than 14 (fourteen) years (Kamagi, 2018).

The Judge's consideration in deciding case Number 21/Pdt.G/2021/PN/BNA was imposed by considering Article 1365 of the Civil Code concerning Unlawful Acts, which considers in terms of the plaintiff's lawsuit, which in every point can be proven by the plaintiff through the evidence listed and has also been proven by statements from witnesses by the facts that occurred in the case that occurred, namely the truth that there is a waqf pledge orally in the form of an object of passage by the Plaintiff to the Defendant where the allocation of the waqf pledge can only be intended as a means of entry and exit from the Dayah complex area which can be proven by the existence of a Waqf Certificate in which there is a signature from Tgk. H. Muhibban as the leader of the Islamic Education Foundation (YPI) Dayah Al Aziziyah, or who is now the Defendant.

It is based on Article 5 of Law Number 48 of 2009 concerning Judicial Power, where the article states that the judge is obliged to adjudicate cases submitted to the court in court fairly and openly, taking into account the existing provisions and evidence, and resolving the case as fairly as possible by the Law. In carrying out the trial process, the judge is not allowed to always meet the requests of the parties to delay the trial process, which will fail to achieve the principle of simple, fast, and low-cost justice. So, in this case, the firmness of the judge must lead the course of the trial, besides that, delaying justice will also reduce and decrease the authority of the court (Tappu et al., 2023).

The elaboration of Article 5 of Law Number 48 of 2009 concerning the Authority of Judges is contained in Article 5 Paragraph (1), namely that Judges are obliged to adjudicate cases submitted to the court in a fair and open trial, taking into account the existing provisions and evidence, and resolve cases as fairly as possible by the law. Article 5 Paragraph (2) In carrying out their duties, judges are obliged to meet the requirements of sanity, fluency, expertise, neutrality, and integrity.

Article 5 Paragraph (3) Judges are obliged to comply with the Code of Ethics and the Profession of Judges. In other words, in making a decision, the judge is obliged to weigh a case by paying attention to the principles of justice, legal certainty, and its usefulness so that the resulting decision can be fair and ideal (Margono, 2019).

Here is the research gap from the results of this study with previous research according to (PRATAMA, n.d.):

Differences in Case Studies

Adriyan's research focuses on Decision Number 380 K/Ag/2014, while this study focuses on Decision Number 21/Pdt.G/2021/PN/Bna. Although both involve construction on waqf land, differences in specific cases and legal considerations used by judges create room for a more in-depth analysis of the differences in the application of law and court decisions.

Legal Approach Used

Adriyan's research examines cases in the context of waqf regulations and Article 1365 of the Civil Code, but does not discuss in detail the aspects of benefit and legal certainty that must be considered in the decision. This study will highlight how judges' considerations related to the elements of justice, benefit, and legal certainty are implemented in court decisions, especially in the context of Law Number 41 of 2004 concerning Waqf.

Management of Waqf Land by Nazhir

Adriyan's research focuses more on the aspect of unlawful acts in the construction of buildings on waqf land. However, this research adds a perspective related to the responsibility of nazhir as a waqf manager, including how nazhir must comply with applicable regulations and the legal consequences if there is a violation of the use of waqf land. This is an aspect that is less discussed in Adriyan's research.

CONCLUSION

Thus, the decision of the Banda Aceh District Court against Case Number 21/Pdt.G/2021/PN/Bna has not been by legal considerations where through Article 1365 related to the existence of Unlawful Acts by the Defendant and has issued a decision fairly and transparently. However, by not granting the whole of the plaintiff's petition even though the evidence is valid and by the *posita*, this shows that the judge has not fulfilled the principle of benefit contained in Article 5 of Law Number 48 of 2009 concerning Judicial Power where in the article it is stated that the judge must make a balanced verdict by justice, utility, and legal certainty. The judge's legal considerations (*Ratio Decidendi*) in deciding case Number 21/Pdt.G/2021/PN/Bna in his decision consider where the Plaintiffs have the right to use the passage that is part of the waqf land given by Plaintiff I to the Defendant. However, the Defendant committed an unlawful act in building a gate and closing access to and from the waqf land by installing an iron shovel. The panel of judges considered that it hindered the parties from using the access properly and affected the security and tranquility of the parties. The judges also considered that the parties should respect each other and allow access to waqf land to anyone in need. Because of this, the judges decided that the construction of the gate and iron shovel on the waqf land by the Defendant was an unlawful act, the Panel of Judges decided that the Defendant must restore the condition of the waqf land as it was by dismantling the gate and removing the iron shovel that had been built. In this case, the

Researcher argues that regarding a part of the Decision that was not granted in its entirety by the Judge, even though the elements of unlawful acts have been fulfilled, it should be fulfilled in its entirety where the judge should also approve the request from the Plaintiffs not to build a gate and close access in any form without going through prior deliberation with the Plaintiffs. This is based on the author's point of view according to Article 22 of Law Number 41 of 2004 concerning waqf related to the allocation of waqf itself, where that waqf land must be used specifically for the common interest and not used as a place for special interests.

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