

The Role of Notary on Waqf Land Issues in Bekasi City, West Java

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ABSTRACT

Waqf in Indonesia still has many problems because it has not been implemented properly. In fact, many waqf lands do not have waqf land certificate, which can lead to dispute in the future. Based on the regulation, waqf land certificate is issued under the condition that there is waqf pledge deed made by the official maker of waqf pledge deed (PPAIW) which is the head of religious affairs office (KUA) or notary. However, in practice, there is no notary that has been appointed as PPAIW, so this issue needs further investigation. Using literature study supported by interviews, it is found that the appointment of notary as PPAIW has not been carried out because there is no implementing regulation specifically regulating this matter. With the appointment of notary as PPAIW, it is expected that notary can play a role in reducing waqf land disputes.

Keywords: *waqf land, notary, official maker of waqf pledge deed (PPAIW)*

1. INTRODUCTION

One of Islamic economic instruments that still has a number of problems is waqf. In practice, waqf has not been well implemented, even there are numerous disputes over waqf lands. This is very unfortunate since waqf is an Islamic economic instrument which has great benefits for Muslims. The problems are caused by a lot of factors, both regulations regarding waqf and the implementation of regulations regarding waqf, as well as poor knowledge about waqf in the society.

Waqf itself comes from the word *waqafa* which in Arabic means to stop, keep on staying in place, or holding something. The waqf which will be discussed in this paper has an understanding relating to wealth, that is 'holding something'. Completely, waqf to be discussed means to hold something for its benefit in accordance with Islamic teachings.[1]

As a state whose residents are Muslim majority, Indonesia regulates waqf in laws and regulations, that is Law Number 41 of 2004 concerning Waqf (Waqf Law). The Waqf Law consists of 11 chapters and 71 articles which among others regulates the basics of waqf, the registration, announcement, change of status, management, and development of waqf property, the Indonesian Waqf Board (BWI), dispute settlement, guidance and supervision, as well as criminal provisions and administrative sanctions. In its General Elucidation, the Waqf Law makes us realize that the waqf practices in the people's lives has not been fully implemented in an orderly and efficient manner.

In the Waqf Law, the waqf procedure starts from the implementation of the waqf pledge by the waqif to nazir in the presence of official maker of waqf pledge deed (PPAIW).[2] Then the pledge of waqf shall be

entered into waqf pledge deed.[3] After waqf pledge deeds are signed, PPAIW registers and the Minister and BWI make an announcement.[4] In favor of waqf land itself, the procedure is further regulated in Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency Number 2 of 2017 concerning the Procedures for Registration of Waqf Land at the Ministry of Agrarian Affairs and Spatial Planning/National Land Agency (Regulation of the Minister of Agrarian Affairs Number 2 of 2017). In Article 2 paragraph (2), it is explained further that the registration of waqf land to be sought to the land office.[5] After the registration, the head of the land office issues a waqf land certificate on behalf of nazir and going on record as needed.[6]

Regulations regarding waqf procedures, especially waqf land, indicate that the government tried to establish a system that can improve the legal certainty and order through laws and regulations. In its General Elucidation, the Waqf Law stipulates that waqf legal actions should be recorded and set forth in waqf pledge deed, to be registered, and to be announced in support of waqf legal order and administration, with the objective to protect waqf properties. It can be concluded that the final goal to be achieved is the protection of waqf properties.

In its practice, the protection mandated by the Waqf Law has not yet been totally realized. The implementation of waqf land remains difficult, especially relating to procedures that must be followed. This is proven by many waqf lands which do not have the waqf land certificates, even waqf was not stated in waqf pledge deed and was only conducted verbally. Waqf lands which do not have certificates can certainly cause various problems in the future, especially ownership disputes, because the

certificate is used as evidence that there has been a transfer of “ownership” of the land—in this case, the waqif relinquished ownership of the land and institutionalized the land into waqf land managed by the nazir. The ownership of land as waqf property should be protected in accordance with the mandate of the Waqf Law becomes uncertain, so that will be great possibilities of seizure for land in the future by the party(ies) who are not in good faith.

Problems regarding waqf land can be observed in the following cases. In 2015, out of 1,700 mosques and musallas in South Jakarta, only about one percent had the waqf certificates and building permits (IMB).[7] Meanwhile, in the same year in Semarang, it was suspected that there were still a lot of mosques and musallas which do not have waqf certificates.[8] In 2019, President Jokowi frequently delivered waqf certificates for mosques, musallas, Islamic boarding schools, and other educational institutions in several districts in West Java,[9] Ponorogo, East Jawa,[10] Bekasi, West Java,[11] and Bengkulu,[12] which rose the suspicion that there were remained lots of mosques, musalla and other religious institutions that does not have waqf land certificates.

In preventing disputes as well as to afford waqf property under the protection from difficult waqf land procedures in accordance with the mandate of the Waqf Law, a notary may in practice make an initial agreement between the waqif and nazir before waqf pledge deed drawn up. This agreement contains the statement that the waqif would represent waqf of the land in the future which will be managed by nazir. The written statement of waqif made before a notary is expected to secure the land to be represented waqf from the party claiming as the owner of the land.

Based on Article 37 paragraph (4) and (5) of Government Regulation Number 42 of 2006 concerning the Implementation of Law Number 41 of 2004 pertaining Waqf (Government Regulation Number 42 of 2006), a notary may also perform a role as PPAIW under conditions stipulated by the Minister,[13] whereas actually PPAIW for waqf land is the head of the religious affairs office (KUA) and/or the official who organizes waqf affairs.[14] This was then regulated in Regulation of the Minister of Religious Affairs Number 73 of 2013 concerning Procedures for the Waqf Endowment of Immovable and Movable Items Other Than Money (Regulation of the Minister of Religious Affairs Number 73 of 2013). In this case, the notary who takes the role as PPAIW can help overcome the problems regarding waqf land because the notary must know more about all matters relating to the deed making and land registration at the land office or the National Land Agency (BPN) than the head of KUA. In handling waqf, the notary also naturally prioritizes his/her client’s interests first because of the professional relationship. However, in practice, no notary has been appointed as PPAIW, so the matters regarding this issue needs further investigation.

2. CONTENT

A. Waqf

As explained earlier, waqf is derived from the word *waqafa* which in Arabic means stopping, keep on staying in place, or holding something. The meaning of ‘stopping’ relates to the science of reading the Qur’an (*tajwid*), which means to stop reading, either onwards or taking a temporary breath. The notion of ‘dwelling in a place’ relates to *wuquf* at Arafat on the 9th of Dhulhijah while performing the Hajj. Meanwhile, the notion of ‘holding something’ relates to wealth and properties, which means holding something for its benefit in accordance with Islamic teachings.[1] Waqf to be discussed in this paper is waqf relating to assets.

Furthermore, various kinds of understanding of waqf will be explained according to the expert and the Waqf Law as follows.

- a. Imam Nawawi of the Shafi’i School defines waqf by “withholding property that can be taken for the benefit not for himself, while the object is still there, and used its benefits for the goodness sake and drew closer to Allah”.
- b. Imam Sharkhasi of the Hanafi School defines waqf by “withholding property out of the reach of other people’s possessions”. The phrase “out of the reach of someone else’s possession” means the assets to be represented must not be used for the benefit of the waqif, as well as for sale and purchase, grants or guaranteees.
- c. Ibn Arafat from the Malikiyah School defined waqf by “giving something useful, within the time limit of its existence, the waqf along with the owner even though it was only an estimate (presupposition)”. In this case, the phrase “although only an estimation (presupposition)” indicates that Malikiyah scholar allow waqf to be hung (conditional).
- d. Al Bajuri defines waqf by “holding certain assets to transfer benefits to the recipient by determining the origin of the object and the path of circulation for the sake of goodness to draw closer to Allah.”
- e. Hilman Hadikusumo defines waqf by “giving, providing something that is of eternal nature, such as land to be enjoyed and utilized its benefit for the society according to Islamic teachings”.
- f. Imam Suhadi defines waqf by “the separation of a person’s legalized property(ies) and the object(s) being withdrawn from assets belonging to a person, whose usage being diverted to the path of goodness blessed by Allah Almighty, so that these objects may not be lent, reduced or eliminated”.[15]
- g. The Waqf Law defines waqf with “the waqif’s legal action to separate and/or surrender a part of his/her property to be utilized forever or for a certain period of time in accordance with its purposes of worship and/or public welfare according to sharia”.[16]

Islamic law determines that there are four elements of agreement that must be fulfilled in waqf, i.e.:

- a. the existence of person who represents waqf (waqif);
- b. the existence of object represented;
- c. the presence of waqf recipient (nazir);
- d. the existence of a statement of surrender for waqf from the waqif's hand to the person receiving or the place of waqf.[17]

In the Waqf Law, waqif is the party who represents his/her property,[18] while nazir is the party who receives the waqf property from waqif to be managed and developed according to its purpose.[19] Whereas, waqf property is the property represented by waqif that has long-lasting durability and/or long-term benefits and has the economic value according to sharia.[20] A contract in the Waqf Law is called the waqf pledge, i.e. the statement of will of the waqif that is spoken verbally and/or in written to nazir to represent his own property for waqf.[21]

Waqf property consists of immovable and movable items. Immovable items include:

- a. land rights in accordance with the provisions of the applicable laws and regulations, both registered and unregistered;
- b. building or part of a building that stands on the ground as referred to in letter a;
- c. plants and other objects related to the ground;
- d. strata title of the storeyed housing unit in accordance with the provisions of the laws and regulations in force;
- e. other immovable objects in accordance with sharia provisions and applicable laws and regulations.

Movable items include:

- a. money;
- b. noble metal(s);
- c. securities;
- d. vehicles;
- e. intellectual property rights;
- f. rental rights; and
- g. other movable rights according to the sharia provisions as well as laws and regulations in force.[22]

Waqf has its own body provided in Waqf Law, namely Indonesian Waqf Agency (BWI) which is an independent institution to develop waqf affairs in Indonesia.[23] BWI has duties and authorities:

- a. provide guidance to nazir in managing and developing waqf properties;
- b. managing and developing waqf properties in national and international levels;
- c. giving approval and/or permission for changes in the allotment and status of waqf properties;
- d. terminate and replace the nazir;
- e. giving approval for the exchange of waqf properties;
- f. providing advice and consideration to the government in the formulation of policies on the field of waqf affairs.[24]

B. Waqf land

Waqf land was first regulated in Law Number 5 of 1960 concerning the Basic Regulations on Agrarian Principles (Agrarian Law). Prior to the Indonesian independence era, actually there had already existed several circular letters regarding waqfs issued by the Dutch colonial government and remained in effect until post independence era. After that, only a few directions were issued by the Ministry of Religious Affairs, for example on December 22, 1953 pertaining the directions concerning waqf.[25] In the Agrarian Law itself, the waqf land is regulated in Article 49 paragraph (3) which set forth that the waqf land is protected and regulated by government regulations.[26] Government regulations governing waqf land were later issued on May 17, 1977, i.e. Government Regulation Number 28 of 1977 concerning the Waqf Affairs on Land Ownership (Government Regulation Number 28 of 1977).

Before it was regulated in the Agrarian Law and then Government Regulation Number 28 of 1977, there were many deviations from the nature and purpose of the waqf itself. Many waqf objects are no longer in the recognizable condition, even the waqf objects turned as if they belonged to the nazirs'. In addition to the regulations that have not yet been improved, this is mostly due to the various forms of waqf, such as family waqf, general waqf, etc.[27] With the stipulation of the Agrarian Law and then Government Regulation Number 28 of 1977, the implementation of waqf land has become more orderly because there have been already the legal protection.

The regulation of waqf land in Government Regulation Number 28 of 1977 can be considered quite adequate. The government regulation among others regulates the definition of waqf, the elements and conditions of waqf, the procedure for waqf representation and its registration, changes in waqf affairs of land ownership, even criminal provisions. The procedures regulated in the government regulation can be concluded as follows:

- a. the party intending to represent waqf of his/her land makes the waqf pledge before the PPAIW and brings and submits the required documents to PPAIW;
- b. PPAIW on behalf of nazir submits an application to the the regent/mayor of the district cq. the head of the local agrarian sub directorate to register the waqf of the land ownership;
- c. the regents/mayors of district cq. the head of the local agrarian sub directorate records the waqf of land ownership in the land book and the certificate;
- d. nazir reports the recording to officials appointed by the Minister of Religion.[28]

At present, the procedure for waqf land is regulated in the Waqf Law and Regulation of the Minister of Agrarian Affairs Number 2 of 2017, which can be concluded as follows:

- a. waqif makes the pledge of waqf to nazir in the presence of PPAIW witnessed by two witnesses;[29]

- b. PPAIW writes down the waqf pledge in waqf pledge deed containing the name and identity of waqif and nazir, data, information, and allotment of the waqf property, as well as the period of waqf;[30]
- c. PPAIW on behalf of nazir registers the waqf land to the land office by submitting waqf pledge deed and other documents required no later than 30 days since the signing of waqf pledge deed;[31]
- d. the head of the land office issues the waqf certificate on behalf of nazir and goes on records in the land book and certificate of land rights with the phrase "This land right is deleted based on the Waqf Pledge Deed/Substitute of Waqf Pledge Deed dated ... Number ... and issued the Waqf Land Certificate Number .../... according to the Measurement Letter dated ... Number ... area of ... m²;"[32]
- e. the Minister and BWI announce the waqf properties registered to the people.[33]

This elucidation shows that the role of PPAIW is very integral in the implementation of waqf land procedures. In Article 37 of the Waqf Law, PPAIW is regulated according to its properties of the waqf:

- (1) PPAIW of immovable waqf property in the form of land is the head of the KUA and/or officials who arrange waqf affairs;
- (2) PPAIW of movable waqf property other than money is the head of the KUA and/or other officials appointed by the Minister;
- (3) PPAIW of movable assets in the form of money are the Sharia Financial Institution officials at the lowest level of the LKS section head appointed by the Minister.[34]

Therefore, in waqf land, those who have the authority to become PPAIW are the head of the KUA and/or officials conducting waqf affairs.

C. The Problems of Waqf land

Based on an interview with the Chairperson of the Bekasi City Religious Council (MUB), Mr. Ustaz Asmat, there is actually no significant problem in the waqf of mosque land in Bekasi City if the mosque administrators were serious and intensively following the procedure for making waqf pledge deed at KUA and the certificate of waqf land at BPN. He stated that the process also did not require a long time and could be possibly completed in less than one year. In practice, the mosque administrator is often less serious in following the necessary procedures, so the process becomes long winding. Nevertheless, he added that the procedure for making waqf land certificates at BPN was easier indeed if it was assisted by a notary because the notary would certainly be familiar with BPN.

Mr. Ustaz Asmat further explained that the problem occurred when the mosque had been established long ago, nevertheless have not yet had waqf pledge deed and waqf land certificate. Several decades ago, when waqf regulations were inadequate, waqf pledges were only made verbally between waqif and nazir, so there

was no authentic evidence that could indicate that the waqf pledge had been taken place. The problem arising becomes more complicated if the waqif and witness who witnessed the waqf pledge had already died. Moreover, when the mosque administrator came to the heirs of the waqif to make the deed of the waqf pledge, the heirs refused and did not want to admit the existence of waqf. The heirs may keep on assuming that the waqf land was the inheritance which becomes their right. This obviously results in land disputes which are difficult to settle. On the one hand, waqf have indeed taken place by the verbal waqf pledge. However, on the other hand, there is no authentic evidence could be shown that the waqf pledge has taken place, therefore heirs cannot be blamed as well, bearing in mind that they do have inheritance rights to the land.

In practice, waqf land disputes caused by the absence of waqf pledge deed and waqf land certificate are commonly occurred indeed. This can be found in several courts' verdict, for example Pontianak Religious Court Verdict Number 916/Pdt.G/2011/PA.Ptk. In the said verdict, the Plaintiff was a third party who bought the land from an heir. He did not know that in fact the land had been represented waqf. According to the Plaintiff's claim, the heirs were not even aware of the existence of waqf, even though there was a waqf pledge deed, there was never a waqf land certificate. In the Decision of the Supreme Court Number 372 K/AG/2012, the Plaintiff as the heir to sue the other heirs who secretly and without the consent of the other heirs represented waqf on the land which was the inheritance. The waqf had been drawn up in a deed of waqf pledge, a waqf land certificate, and the nazir approval letter, but subsequently the Plaintiff claimed the annulment of the documents.

D. Role of the Notary in the Problem of Waqf land

In connection with the matter of waqf land, the notary in practice can make an initial agreement between the waqif and nazir previous to the making of waqf pledge deed. Based on an interview with one of the notaries in Bekasi City, West Java, Mr. Jauhar Arifin, those parties who did not want to directly make a waqf pledge deed at the KUA were often facilitated by him to make agreements that had the schemes such as a sale and purchase agreement (PPJB). This agreement contains a statement that the waqif will represent waqf over the land in the future which will be managed by a nazir. The purpose of this agreement is as evidence indicating that the land would have been represented waqf in the future by the waqif, so that third parties who did not have good faith will not become hurdles. In other words, the statement of waqif made in writing before a notary is expected to secure the land which waqf would be represented by parties with good faith.

Furthermore, based on Article 37 of the Government Regulation Number 42 of 2006, a notary may also be

appointed as PPAIW with the terms and conditions determined by the Minister:

- (3) The provisions referred to in paragraph (1), paragraph (2) and paragraph (3) do not close the opportunity for the Waqif to make MW before a notary.
- (4) Notary requirements as PPAIW are stipulated by the Minister.[35]

Paragraph (1) regulates PPAIW for immovable waqf property in the form of land, paragraph (2) regulates PPAIW for movable property other than money, meanwhile paragraph (3) regulating PPAIW for movable property in the form of money. In Article 27 Regulation of the Minister of Religious Affairs Number 73 of 2013, stipulated that the notary was appointed to be PPAIW by the Ministerial Decree which previously filing the application to the Minister. The requirements for the notary to be designated as PPAIW are:

- a. religion of Islam;
- b. mandated; and
- c. having a certificate of competence in waqf affairs issued by the Ministry of Religious Affairs.[36]

It should be noted that the phrases used in the Government Regulation Number 42 of 2006 are “not excluding the possibility”, so this is still an opened possibility, in the sense of not possibly being implemented. Nevertheless, the requirements stipulated in Regulation of the Minister of Religious Affairs Number 73 of 2013 indicated that the government is increasingly serious in making the notary as PPAIW.

Regulation pertaining the appointment of a notary as PPAIW have been existed since 2006, but based on interviews with the Director of Zakat and Waqf Empowerment, Directorate General of Islamic Community Guidance, Ministry of Religion, Mr. Muhammad Fuad Nasar, there has ever been no notary appointed as PPAIW. In other words, this regulation has not yet been implemented. Efforts to realize the implementation of this regulation have been made in 2018 by signing a memorandum of understanding (MOU) between the Ministry of Religious Affairs and the Indonesian Notary Association (INI). This MOU is a commitment of the Ministry of Religious Affairs and INI later could provide training to notaries who will be appointed as PPAIW. The Ministry of Religious Affairs has also drafted a Religious Affairs Ministerial regulation which specifically regulates the appointment of a notary public as a PPAIW. He added that the problem surrounding the drafting of this regulation is that this regulation requires further discussion regarding the training that must be taken by notaries, whether before or after being appointed as PPAIW, many types of waqf that can complicate notaries, and the problem of domicile.

The regulations regarding the appointment of a notary as PPAIW have not yet been implemented, which naturally raises the question, “Why are regulations that almost 13 years old still not implemented properly?” The regulatory function is to be implemented. However, if for 13 years there had been

no significant effort in realizing the implementation of the regulation, this means that the regulation becomes in vain and there has been no legal certainty from the regulation.

This question of mine was later answered by the Head of the Sub-Directorate for Waqf Asset Protection, the Directorate of Zakat and Waqf Empowerment, the Directorate General of Islamic Community Guidance, the Ministry of Religious Affairs, Mr. Zaenuri. Based on interviews with him, so far, the appointment of a notary as PPAIW has not yet implemented because the Ministry of Religious Affairs’ regulation is indeed required as an implementing regulation of the Government Regulation Number 42 of 2006 that specifically regulates this matter. In line with what was said by Mr. Muhammad Fuad Nassar, he stated that currently there is a draft of regulation which is expected to be issued next year. He added that the effort to realize the appointment of a notary as PPAIW had been going on for quite a long time, even the draft of regulation of the Minister of Religious Affairs aimed had been submitted a long time ago, but indeed it could not be issued.

Referring to Article 37 of the Waqf Law, as already explained, because the words used are “not exclude the possibility”, Mr. Zaenuri said that the possibility of scope to be covered by a notary is only immovable waqf property in the form of land and movable waqf property other than money. For waqf property in the form of money, it is possibly rather difficult to be implemented. He added that the regulation would also regulate that reporting must be done by a notary on a regular basis. Such an effort to establish orderly manner in waqf. The possible challenge should be differences in tariff charged in the waqf arrangement. So far, the arrangement of waqf in KUA has been being free of charge, while the notary, as a profession, would certainly charge a fee for the waqf arrangement. According to Mr. Zaenuri, this should not be a big problem because people who prefer notaries would certainly existing, with the consideration that they might be trusting more to the notary for their professionalism.

Regarding waqf land issues, for example the waqf land disputes, Mr. Zaenuri believes that the appointment of the notary as PPAIW can reduce waqf land disputes. With the possibly better storage of deeds and the professionalism owned by notaries, the waqf land dispute will certainly be reduced. In my opinion, the ability of the notary as a profession having the legal knowledge that could also help resolve disputes between parties. In this case, the notary would certainly do the best for their clients based on the professionalism they have, so that the dispute wouldn’t be long winding. Moreover, the notary would know more about all matters relating to the deed making and land registration at the BPN than the head of the KUA; does have indeed the authority regulated in the Government Regulation Number 42 of 2006. Thus, the chance of dispute occurrence becomes smaller.

3. CONCLUSION

Waqf land and its procedures are regulated comprehensively in various laws and regulations, i.e. Waqf Law, Government Regulation Number 42 of 2006, Regulation of the Minister of Religious Affairs Number 73 of 2013, and Regulation of the Minister of Agrarian Affairs Number 2 of 2017. The objective of these regulations to provide protection of waqf property as stated in the General Elucidation of the Waqf Law. In practice, the protection mandated by the Waqf Law has not yet been totally realized. Abundant of waqf lands have no clear legality, in the sense of having no waqf land certificates. Waqf lands which do not have certificates can certainly cause various problems in the future, especially disputes over land ownership. This is proven by several courts' verdicts which tried to resolve ownership disputes relating to waqf lands.

In this connection, there are two important roles of the notary. First, based on an interview with one of the notaries in Bekasi City, West Java, the notary could make an initial agreement between the waqf and nazir prior to the entering of waqf pledge deed, with the aim of protecting the waqf land representation by the party not in good faith. Secondly, based on Article 37 of the Government Regulation Number 42 of 2006, a notary may also be appointed as PPAIW. However, based on interviews with source persons at the Ministry of Religion, no notary has been appointed as PPAIW. In other words, this regulation has not yet been implemented because there is no implementing regulation specifically regulating the appointment. This regulation is expected to be issued next year.

The source at the Ministry of Religious Affairs also believes that the appointment of a notary as a PPAIW can reduce waqf land disputes because of the storage of the deed which might be better as well as the professionalism possessed by the notary. In my opinion, a notary who does have legal skills can also help settle disputes between the parties. Moreover, the notary would know more about whole things related to the matters of deed making and land registration at BPN than the head of the KUA who does have the authority regulated in the Government Regulation Number 42 of 2006. Thus, the chance of disputes occurrence becomes smaller.

4. SUGGESTION

In connection with the issue of waqf land, the government, particularly the Ministry of Religious Affairs, should immediately issue a regulation of the Minister of Religious Affairs regarding the appointment of a notary as PPAIW as the implementing regulation of the Government Regulation Number 42 of 2006. This should be done to realize the legal certainty of the Government Regulation Number 42 of 2006 itself. This Regulation of the Minister of Religious Affairs is also expected to help overcome the problems of waqf land.

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