

THE POTRAIT OF WAQF (RELIGIOUS ENDOWMENT) IN THE MUSLIM SOCIETY: A Socio Legal Perspective

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ABSTRACT : *This article concentrates on the potrait of waqf (religious endowments) relating to the management of waqf itself, the disputed waqf property, and the settlements of waqf dispute in the Muslim society of North Sumatra. The findings of this research are: Fistly, the majority of properties of waqf which become object of dispute are lands of mosque, cemeteries, and Islamic school (madrasah). However, the lands on which the mosques were built are the majority of waqf properties. It is worth noting that due to the deviation of the objectives of waqf, it turns to be object of disputes among the Muslims in North Sumatra, although waqf property in terms of quantity there should be able to raise the social welfare. Secondly, the dispute of waqf taking place in there due to the denial the volume of the land of waqf, that of the function of waqf, and the claim of a person's right to the land of waqf. Thirdly, that the settlements of waqf dispute in the province have not been completely carried out in compliance with Law Number 41/2004 Relating to Waqf, which render a person the optional right to the institutions of law. By the virtue of section 62 of the Law of Waqf, it is prescribed that the dispute of waqf shall be settled through discussion to reach consensus (musyawarah), mediation, arbitrate, and adjudication*

KEYWORDS - *Islamic Law, Law of Waqf (Religious Endowment)*

I. Background

In relation to the existence of waqf institution, in Indonesia there are some rules of positive law which shall be complied with by those involved in transaction and the management of waqf. Prior to the legislation of Law No. 41/2004 and the Government's Rule No. No. 42/2006 Relating to Waqf and the Imposition of the Law No. 41/2006 respectively, there are some rules legislised to regulate waqf which are still valid as long as it is not contradictory to the latest rule. They are the Government's Rule No. 28/1977 Relating to the waqf of land, and Compilation of Islamic Laws on which shall be based by governmental institutions, including Religious Court, when deciding any case relating to the Muslim private laws in accordance with the legal basis of President's Decree No. 1/1991.

In Indonesia lands have become the most common forms of waqf properties since Islam penetrated in this archipelago country. This case still takes place, although the Compilation of Islamic Law and the Law of Waqf Number 41/2004 have prescribed that either moving or unmoving properties could be the object of waqf. This is certainly due to the mainstream understanding of religiosity or *fiqh* of the Muslim jurists in Indonesia, and it has been a religious practice as a living law, particularly in the practice of waqf as philanthropy in the Muslim society. And this practice was accommodated in the legislation of law by the Government of Nederland, and continued in the era of independence by the Government of Indonesia Republic as provided in the Law Relating to Land, Number 5/1960 and Government Regulation Relating to Waqf Number 28/1978, that the object of waqf shall be of unmoving properties of land. So, no doubt that land as the most properties of waqf is because of the common practice of Muslim in Indonesia. This is also particularly practiced by the society of Muslim in North Sumatra. In fact, the transaction of waqf of lands is a reflection of understanding and the practice of religious precept.

In North Sumatra, the waqfs of unmoving properties of lands are utilized as the places where cemeteries, mosques, and Islamic schools are located. In line with the development of the society, as urbanization or the expansion of city to the rural areas, the urbanized areas are inevitably influenced in several aspects like the increase of economic value of lands. The lands which had been previously located in villages

would have changed to be parts of town areas, which have also adjusted to possess the highly economic value. Being the previous tradition of waqf transaction without authentic evidence -like certificate of waqf issued by the authorized institution- the legal status of waqf properties have been weak. Thus, the heirs of *waqif* (benefactor), *nazir* (beneficiary), or other persons who are interested in claiming the right to the property of waqf could have chance to do so in the hope to obtain the attractive economic value. Such cases have taken place and become the cause of dispute of waqf in the society.

The main questions put forward for this research is, “How is the potrait of waqf in North Sumatra”; and this question is fragmented in detail as follows: how is the management of waqf, what is the kind of waqf properties and the fuction of waqf which have been managed in the Muslim society of North Sumatera; why the disputes of waqf have taken place in the Muslim society; and how the disputes of the waqf have been settled in the Muslim society in North Sumatra?

In relation to the purpose of this research, the writer would like to draw information regarding with “How the potrait waqf have existed in North Sumatra”; which will be described in detail about the kinds of waqf properties and the fuction of waqf in the Muslim society of North Sumatra; why the disputes of waqf have taken place in the Muslim society; and how the disputes of the waqf have been settled in the Muslim society in North Sumatra.

II. Research Method

This qualitative research concentrates on phenomena of the the management of waqf and the settlement of waqf disputes in a certain social setting which is based on the data collected from the knowledgeable informants. In term of approach used to analyze socio-legal phenomena, this research employs anthropological perspective, that is how the society in reality performs Islamic law, particularly in the managing waqf and the settlment of waqf disputes in North Sumatera.

The data sources of this research consist of prime and secondary data. As an empiric-juridical study, this research takes prime data from the society as the research subject, who has information about the events of the management of waqf and the settlement of waqf dispute in North Sumatra. Meanwhile, the secondary data source consists of law materials. As this is an empiric-juridical study, the material of law is in position of secondary data source. While the material of law consists of prime law material, secondary law material, and third law material.

III. The Description of Religious Endowment (*Waqf*) in North Sumatra

Waqf has been implemented with its variety in term of the procedure. In spite of the fact many transactions conducted have followed the procedure stipulated by the law, which regulates that waqf should be registered to the authorized offices, however a lot of waqf transactions were still carried out orally between the *waqif* (benefactor) and *nazir* (beneficiary)

With respect to the portrait of waqf and of the cases of dispute occurring with the assets of waqf in Nort Sumatra, could be described in term of various aspects as follows:

- 1. Waqf properties are under the management of social religious organisations and persons’ authority as nazir .**
- 2. The Status of Property as Waqf is Unregistered at the Office of Religious Affairs (KUA)**

This case should be taken into consideration as an urgent thing by those who would like to perform waqf transaction. By the registration of waqf status of a property at the concerned institution, the objective of waqif

along with the asset of *waqf* will be safe, and faraway from the disturbance by anyone or party who wants to deviate the status of *waqf*, and is interested in dominating the *waqf* property for uncertain purpose.

In North Sumatera the lands of *waqf* amount to 100. 899.713 m., situated at 15.702 locations. The utilised lands of *waqf* still amounts to 4.414.817 m., meanwhile 96.483.896 m.(96%) have not been utilised. Out of the total 15.702 locations of *waqf* lands have only 3.564 locations been utilised, and 12. 138 (77.30 %) locations still have not yet functioned.

Furthermore, in relation to the evidence of *waqf* legal status, the certified *waqf* lands are only 31. 670. 409 m, and this is too negligible compared to the total 100. 899.713 m of *waqf* lands.

3. Indifference of the Authorized Board to the Waqf Administration.

The administration of *waqf* shall be initiated from the process of registration, certification, management and developing the *waqf* itself. The registration is processed at the Office of Religious Affairs of the District where the property of *waqf* exists. Here the authorized officer conducts the registration by noting the declaration of Endowment (*Ikrar Waqf*) which includes the types of the property to be *waqf*, the objective of the *waqf*, the volume of land of *waqf*, and then it proceeds to the Regional Office of Religious Office. If the property is land, then the process shall go on to the National Land Board (BPN) to issue the certificate of *waqf*. By following this stage, the *waqf* status of the property has authentic evidence.

As the matter of fact, the implementation of the administration is not in line with procedure determined. It commonly takes place that the property which has many years been declared to be *waqf* in the front of registrar of *waqf* declaration, the certificate of *waqf* has still been not issued for unnecessary stuck of the process and for dubious reason. Thus, such a case makes the *nazir* of *waqf* who is declared on the paper of *waqf* declaration (*Ikrar Waqf*) have not valid proof and a strong base to defend the *waqf*. It is unclear why the process has not run so well that the certificate of *waqf* is not yet issued by BPN. However, based on the information given by a staff of a concerned institution that there is no enough budget provided by the government to process the issue of *waqf* certificate. Meanwhile, adequate finance should be available for it, which include the financial need to measure the size of the land, which is the competence of BPN to execute it in order that they could reach the accurate data relating to the volume of the land to be *waqf*. According to the information given by the office staff mentioned above, the budget needed for that objective is not so much. Actually, he said that there will be discretion to have the *waqif* provide that budget. And the writer also thinks that a *waqif* will not be objection to the discretion. It is not expensive if compared to the value available at the property to be *waqf*. And it is a rational way to make the property safe as *waqf* in the future. Nevertheless, the discretion has not been implemented either. This condition generates also from the factor of no good coordination and cooperation between the concerned state institutions, namely between Religious Affairs Office and National Land Board (BPN). Moreover, according to an informant from the concerned institution that BPN still does not give a response which indicates good cooperation to handle the process to issue certificate of the land to be *waqf*.

4. The Property Legal Status as Waqf is Obscure among the Benefactor's (Waqif) Family Members.

The unclear status of *waqf* property among the members of the benefactor's family has frequently given rise to a serious dispute of *waqf*. For instance, that a man, as a father to some children, has given away his land as *waqf* for the place of Mosque without informing his heirs. Thus, such a case may lead the heirs to prosecute the *nazir*, to claim the property which has been declared as *waqf* by their father as the benefactor (*waqif*).

Therefore, it is common that those who will make waqf transaction shall let his/her family members know the fact in order that the potential of dispute generated from the obscurity of legal status of waqf can be avoided in the future.

5. Competition for Social and Economic Values existing at the Waqf

A phenomenon has recently taken place in the society that the post to manage the institution of waqf, no matter whatever the type of property of the waqf is, is regarded as a prestigious position, thus the involvement in managing the Mosque, such as nazir has become the object of competition. So it has commonly happened that when the period time is over the persons who were involved in the management of waqf before are not in harmony with the new personnels involved at the present management of waqf. Such a case has frequently occurred although the nature of mosque and waqf status as a holy institution shall not be treated as the disputed object to seek the popularity and worldly reputation. It should be conducted as the medium to perform pious activities, benevolence and worship.

Furthermore, the economic value of the land has continuously increased along with expansive urbanization. The land which was previously situated at rural area has turned to be a valuable property situated in the city, and thus it has changed into an asset with a highly economic value. This is the case which has happened to the land of waqf. When the land was orally declared to be waqf by waqif, it was still situated in rural area and still has low economic value. However, after the rural area has developed and turned to be part of city area, then the heirs of waqif, due to low moral integrity, could take advantage from the absence of authentic evidence of waqf legal status, and claim the land by giving testimony that the land is not waqf but the inheritance left by their father.

Therefore, to anticipate the safety of objectives of waqf, the potential of conflict shall be prevented as early as possible. The way thereto is to improve the administration of waqf transaction which shall be registered to the concerned institution. Moreover, the perspective toward waqf shall be straightened as the instrument to perform and piety and worship not to be object of competition to get power, popularity or worldly prestige.

IV. The Type of Waqf Dispute and its Settlement

This research finds three types of waqf dispute namely, the dispute involving waqf of mosque, land and education indtitution (*madrassa*). Furthermore, the three types of disputes occurred to tent cases of waqf disputes. Five of the cases relate to mosques dispute and this is as the first type, three cases as the second type relate to the abrogation of the status of waqf land and the status of public cemetery, meanwhile the third type relates to the waqf legal status of *madrassa* along with its land.

Based on the ten cases the writer draws conclusion relating to how the effort of the parties involved in disputes could have settled the cases. Whether they to cope with the disputes in compliance with the provision which is laid down by the virtue of section 62 of Law number 41/2004 relating to Waqf or in other way to solve their problems.

In fact, there are several techniques' used to settle the dispute of waqf properties in North sumatra. Obviously, the Law of Waqf should be early based on to settle the waqf dispute. Because this Law of waqf shall be the prime normative to regulate waqf after it has been legislated. Moreover, this law lays down the regulation on whole aspects relating to the procedure of transaction and the management of waqf.

In accordance with the Law of Waqf by the virtue of section 62 providing that the settlement of waqf dispute shall be conducted by consultation to gain a consensus, and if it fails, the settlement shall be by mediation, arbitrage, or adjudication. The cases of dispute of waqf along with the settlement attempted are as elaborated in the table below:

The settlement of waqf Dispute in North Sumatra

No	Cases	Settlement of Dispute				Progress of Cases
		Discussion to reach Consensus	Mediation	Arbitrate	Adjudication	
1	Mosque of Nurul Iman Street of Timbang Deli Kec. Amplas.	Attempted	Not Attempted	Not Attempted	Attempted	Appeal Proceed to the Religious High Court of North Sumatra. But the first plaintiff filed the appeal to the Supreme court
2	Mosque od Dermawan Street of Rajawali Kel. Sei Sikambing B. Medan	Attempted	Attempted	Not Attempted	Attempted	The judgment has been given by the the Religious Court
3	Mosque of Toyyibah, Street of Multatuli	Attempted	Not Attempted	Not Attempted	Not Attempted	The dispute deescalated
4	Mosque of Djamik, Street of Marelan Kel. Enam Ratus Labuhan	Attempted	Not Attempted	Not Attempted	Attempted	The judgment has been given by the Religious Court
5	Masjid Al Hasanah di Jalan Gatot Subroto	Attempted	Not Attempted	Not Attempted	Attempted	The Process is in the Court of the State Administration (PTUN)
6	Land of Cemetery, Street of Jalan Sutomo	Attempted	Not Attempted	Not Attempted	Not Attempted	The case deescalated
7	Land of Waqf Street of Layang-layang Kel. Pandau Hilir Timur	Not Attempted	Not Attempted	Not Attempted	Attempted	The judgment has been given by the Religious court
8	Land of Waqf, Street of Brigjen Katamso Titi Kuning	Not Attempted	Not Attempted	Not Attempted	Attempted	The judgment has been given by the Religious court
9	Land and Madrasah of Ibtidaiyah Sigulang	Attempted	Attempted	Not Attempted	Not Attempted	The dispute deescalates
10	Madrasah and land of NU Siborang Padangsidimpuan	Attempted	Attempted	Not Attempted	Not Attempted	The dispute deescalates

The table above shows majority of waqf dispute settlements were carried out through consultation then continued to the adjudication without prior to the stages of mediation and arbitration.

V. The Choice of Legal Institutions in the Dispute Settlement of Endowment

As explained by the Law of Waqf at the section 62 that the effort to settle the waqf dispute shall be through (1) discussion to obtain consensus (*musyawarah*): (2) if this way fails, the settlement shall be conducted through mediation, arbitrage, or adjudication.

Based on the two sections regulating the settlement of waqf dispute, it could be comprehended that the dispute of waqf shall be carried out through the following stages:

1. Discussion to reach consensus, namely the effort of dispute settlement between the disputing parties in relation the existing waqf. Through this way the problem can be solved and no escalation of the conflict might take place.
2. Mediation, that is an effort to settle the dispute by using a third party who is knowledgeable in relation to waqf and could give deep explanation for it, and such information would be helpful to raise solution to the related problem.
3. Arbitrage, that is a simple process chosen by the parties who would like their problem to be settled by a neutral side in accordance with their hope, and in which the decision is based on the evidences obtained in the case. And the disputing parties are agreed to accept the decision as a final and binding resolution.
4. Adjudication, in this case the Religious Court is the competent institution to give decisive effort to settle the dispute of waqf, as a decision which has law certainty and enforcement.

The four instruments of dispute settlement mentioned above are the optional ways of law which shall be used by the disputing parties through the four stages. the option of the law is actually not such rigid, that any party deserves to determine which way to settle the waqf dispute. However, to comply with the stages of settlement offered by the section 62 of the waqf Law might be giving rise to an effective solution.

It is noteworthy to know the fact that the settlements of waqf dispute have not been conducted through the stages to be followed according to the instruction of the Law of Waqf. Actually the discussion to reach a consensus (*musyawarah*) as the first stage to seek a solution has been done in the settlements of some cases of waqf dispute in North Sumatra, however the effort by discussion to have the consensus cannot be a peaceful and effective way in attempting the solution between the disputing parties. Due to the failure of the parties to reach the consensus and cannot take advantage from it to get win-win solution for both sides of the disputing parties, so the solution for the settlement of waqf dispute is attempted by another way which is generally called, in literal meaning, mediation

Among the eight cases of waqf disputes are six cases which have been settled through discussion for reaching consensus by the two sides of the disputing parties. However, such effort remained failing to bring about good solution for both sides of the parties, so that they attempted to seek another way to solve their problem such as the religious leaders of Indonesian Ulama Council (MUI) to consult the problem. In this stage of consultation the parties however had neither met a delightful solution for the problem. Thus, the case of the dispute proceeded to the formal institution of Religious Courts in North Sumatra.

An urgent question is why the discussion for reaching consensus (*musyawarah*) could not be empowered to raise the solution for the dispute without win-lose solution nor any unnecessary defeated party. So the rule provided at the section 62 of Law Number 41/2004 Relating to Waqf, which stipulates that discussion to reach consensus (*musyawarah*) as the first stage to settle the dispute of waqf has not been effective. In fact that

this regulation is not completely complied with by the society makes the rule is ineffective. Perhaps this is the case due to the vague existing motives leading the disputing parties. It might be related to sociological and psychological condition of societies, which has been more selfish and consumerism along with the persistent change of society to be more urbanized, or it possibly relates to the perspective of certain parties who regard that settlement by the discussion to have consensus (*musyawarah*) is not helpful for him/her to get his/her right or objectives available in the asset of waqf disputed.

Likewise, such a case has taken place with the consultation conducted by the disputing parties who met the heads of village and of the religious leaders of MUI. The consultation with the Religious Leaders of MUI resulted in the issue of written legal opinion (*fatwa*). However the *fatwa* is not complied by the concerned disputing parties, thus it cannot obstruct the escalation of the waif dispute.

This phenomenon, according to one of the persons involved in a waqf dispute, exists due to the fact of their understanding the *fatwa* possessing no legal enforcement, and thus it is not binding the concerned parties. Therefore, there is no obligation on the part of the parties to obey it.

When the way of settlement is referred to the procedure of settlement stipulated by the virtue of section 62 of the Waqf Law Number 41/2004 the jumping steps have obviously taken place in the efforts of the waqf dispute settlement in North Sumatra. In these cases, the dispute settlement through the stages is not entirely implemented, thus the legal instruments to settle the dispute as mediation and arbitrage have not precisely functioned. However, when referred to the literal meaning of mediation and arbitrage, both of law instruments of the dispute settlement have truly been exercised in the waqf dispute settlements. Because both terms literally mean to seek the third party to be involved in attempting a solution to the problem, but this literal meaning is very broad and the third party here means generally to include consultant, facilitator, arbiter, and so on. While both mediator and arbiter of the mediation and arbitrage institutions have been regulated by the Law number 30/1999 Relating to Alternative Dispute Resolution (ADR) and Arbitrage. In addition to this rule, there is the Regulation of the Supreme Court Number 2/2003 which has been amended by the new regulation of the Supreme Court Number 1/2008 Relating to Mediation. So, the writer regards that the effort to involve the third party in the waqf dispute settlement in North Sumatra has not yet fulfilled the accurate meaning of mediation and arbitrage in line with legal terminology as required by the Law of Waqf Number 41/2004.

As a matter of fact, the role of the third party here still means not mediation but consultation, which is also commonly used by the society in attempting settlement to a dispute. According to the classification of conflict settlement techniques, terminology of consultation can be comprehended as an activity which is carried out when the disputing parties attempt to search for help of the third party to give an explanation as to some aspects related to their problem. The involvement of the third party in the conflict actually is minimal. His role in the case does not attempt to compromise between both sides of the disputing parties, but to hear the complaints put forward by both of the sides and the third party functions to give advices in accordance with the truth.

In the dispute settlement system of Muslim society, consultation has frequently occurred. This technique is usually employed through a meeting by one or both of the disputing parties with the third party, for instance a meeting with the apparatus of State Religious Affairs. This way is also exercised by the judges in Religious Court to settle certain conflicts reaching the court prior to the adjudication should be carried out.

Furthermore, when referred to the perspective of shopping forum theory, it is obviously explained that “disputants have a choice between different institutions and they base their choice on what they hope the outcomes of the dispute will be, however vague or ill-founded their expectations may be”.

A finding of a research informs that modern society tends to settle the conflict outside of the court either mediation or arbitrage with the reason of low cost, easiness, and quickness. Likewise, for the businessmen when a dispute case occurring with their business affairs, they prefer the settlement through non-litigation rather than by adjudication in the court. The settlement through the formal institution might bring about destructive impacts to the image of the business institutions. However in this context of waqf dispute settlement in Kota North Sumatra is on the contrary the court as formal institution is the main expectation of the disputants to solve their problems.

Actually, such a case generated from various factors. At least it could be understood that the society is informed as to the neither procedure of the waqf dispute settlement which is regulated by the Law, nor the accurate meaning and nature of mediation and arbitrage, nor the *modus operandi* of the implementation in compliance with procedure stipulated by the law, nor the institution which has competence to execute mediation and arbitrage as the instruments of law.

Additionally, in relation to the dispute settlement through mediation and arbitrage, in fact not only the common people is uninformed about the law instruments, but also the officers of the formally concerned institutions, as state apparatus, like the executives of District Office of Religious Affairs (KUA) are still not knowledgeable enough pertaining to the procedure or the stages which should be followed in the settlement of waqf disputes.

VI. Closing Remarks

VI.I. Conclusion

To conclude the discussion above, the writer could put forward some points as follows:

- a. Majority of waqf properties which became object of dispute in North Sumatra consist of lands, which are used for the place of mosque, cemetery, and madrasa (Islamic school). However, the most of them are lands of waqf used as the place of mosques. The dispute of waqf occurred between two dissenting parties of the very heirs of the *waqif* (benefactor), between the heirs of *waqif* and *nazir* (beneficiary), and the family of waqif and the society. This case took place due to the deviation of the objective of waqf which was in the beginning intended for the social interest but it then turned distorted by the deviating party.
- b. The occurrence of waqf disputes among the Muslim society in North Sumatra is triggered by mismanagement, the denial of waqf status to the property by the family of waqif, the denial to the function of waqf, the claim of right to the waqf property. This circumstance stems from the fact that a lot of waqf lands have not been registered at the concerned institution, namely the Ministry of Religious Affairs which is competent to proceed to the National Land Board (BPN).
- c. In relation to the settlement of waqf dispute in North Sumatra, it is not completely in compliance with the Law of Waqf Number 41/2004. The settlement is generally attempted through consultation, as a non formal institution to give alternative settlement, and then the effort of settlement directly proceed to the adjudication of court as formal institution without previous stages of mediation and arbitration. In fact, in relation to this case the society and particularly those involved in the BKM has complied with the Law of Waqf only in case of settlement by consultation. That is the society has begun the effort of dispute settlement by opting either of the institutions of law, in which consultation as the first option of the non formal institution. However, either mediation or arbitration in its terminological meaning given by the Law has not been implemented yet. The settlement of dispute conducted through the third party

in these cases is still in category of consultation. In the settlement by the consultation, the parties involved in the disputes of waqf went to MUI (the Indonesian Ulama Council) and government, although both institutions cannot give an effective solution.

VI.II. Recommendation

There are several points recommended by the writer in relation to this matter of settlement of waqf dispute toward the government and the society for the sake of improving the management of waqf as one of philanthropy institutions in Islam particularly in the Muslim society in North Sumatra.

- a. The competent institution concerning the administration of waqf is hoped to be committed to implementing the rule of law relating to waqf administration in even the earlier process of the registration of waqf declaration (*iqrar waqf*), the management of waqf, developing of waqf property, up to the effort to enhance the capacity of nazir in management of waqf. Likewise, the person to give his own property away for waqf, shall follow the procedure in order that the property of waqf could possess legal evidence of waqf status.
- b. Being the financial problem as dominant factor hindering the cooperation or coordination between the Ministry of Religious Affairs and National Land Board (BPN) to issue the certificate of waqf land, the writer recommends to the government to pay attention to this matter as the waqf institution is part of religious precept of Muslim as major population in this state. Hence, the Ministry of Religious Affairs shall attempt to coordinate with the Indonesia People Representative Council and the Ministry of Finance to raise the budget for waqf administration. So, the Chief of Ministry Religious Affairs Office in the Districts around this state could coordinate with BPN to issue the certificate of waqf land.
- c. Since the fact that a lot of persons in the society have not been well informed in relation to the procedure to conduct waqf and to settle the dispute of waqf compatible with the rule of Waqf Law, it is hoped that the concerned institution to keep informing the society until they could well understand the accurate guidance to follow in doing transaction and managing the waqf institution.

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