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Legal Consequences of Changes in Utilization of Waqf Land Without the Approval of Waqif Heirs

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Abstract

According to Law No.41 of 2004 concerning Waqf (Waqf Act) that waqf assets (including land) must be utilized in accordance with the stated purpose when the land is donated. The waqif has its own aims and objectives in endowing land rights. Therefore, if it is related to Articles 4 and 5 of the Waqf Act, it can be said that the wakif who endows land is to use the land in accordance with the

purpose and function of the waqf. So that waqf land is prohibited from changing its designation. However, in practice it is still found that Nazhir makes changes to the allotment of waqf land that are not in accordance with the waqf pledge pronounced by the Wakif. This is of course contrary to the Waqf Act.

Keywords: Utilization of Waqf Land, Waqif Heirs

1. Introduction

Government Regulations (PP) No.42 of 2006 as the implementation of Law No.41 of 2004 concerning Waqf (Waqf Act), namely a religious institution known as waqf. Waqf can be used to develop the spiritual life of Muslims and provide material and financial well-being to achieve a just, prosperous society based on Pancasila principles. Waqf is a legal act to move or legally separate part of a person's property with the intention to use it forever or for a certain period of time. The act of waqf separates assets used for public purposes and provides worship. Waqf assets are intended to be utilized according to their purpose and function. This is to ensure the economic value of waqf assets can be realized.¹ The function of waqf itself is to realize waqf assets so that they have economic potential, for the benefit of worship and also to advance public welfare.²

Waqf is an effort to utilize waqf assets for the intended purpose: to utilize waqf assets that are economically useful or generate economic benefits for the sake of worship. Waqf also aims to improve people's welfare by utilizing the potential of economic resources. To fulfill this purpose, a waqif must donate an object that is eternal and cannot be limited by time.³ A nazir manages the waqf while members complete certain tasks as part of the waqf pledge. Furthermore, the wakif grants his assets through making waqf assets such as waqf assets whose members are equipped with a wakif pledge. Thereafter, the waqif members manage these assets through various methods such as allocating a certain amount of resources to each member and setting a specific date for the entire waqf period. The waqf pledge deed requires the waqif (the person who donates the land) to appear before the Waqf Deed Making Officer (PPAIW). Once before PPAIW, the Wakif pawned the waqf, which PPAIW then poured into the Waqf Pledge Deed (AIW). AIW then details why waqf is given and what is its purpose and function.⁴ AIW also includes the purpose and function of waqf. In this case the purpose and function of waqf is to utilize waqf assets in accordance with their function, namely realizing the potential and economic benefits of waqf assets for the benefit of worship and promoting public welfare.

Related to the description above, there are problems regarding waqf land that occurred in Peunaga Rayeuk Village, Meureubo District, West Aceh Regency. In this case, around 1928 the late Raimah bint Panglima Syarif together with Imam Syafi'i donated a plot of land for the Islamic Boarding School and the Kampung Peunaga Rayeuk Mosque, Meureubo District, West Aceh Regency (Meulaboh). During the implementation of the waqf pledge, it was stated that the purpose of the waqf was for Islamic boarding schools and Kampung Peunaga Rayeuk Mosque, Meureubo District, Meulaboh. However, in practice the use

¹ Pasal 4 Waqf Act.

² Pasal 5 Waqf Act.

³ Abdul Halim, *Hukum Perwakafan di Indonesia*, Ciputat Press, Jakarta, 2005, hlm.18.

⁴ Pasal 6 Waqf Act.

of the waqf by Nazhir was changed,⁵ which was not in accordance with the waqf pledge, which was originally for the benefit of the Islamic Boarding School and Kampung Peunaga Rayeuk Mosque to be for the benefit of the Islamic boarding school solely managed by H. Saidi Ansari bin Teungku Muhammad. The change in use of the waqf land was known to the heirs of the late Raimah binti Panglima Syarif and Imam Syafi'i and the change in the allotment of the waqf land was made without their knowledge as heirs. So that the heirs of the late Raimah binti Panglima Syarif and Imam Syafi'i filed objections to the change in the allotment of the waqf land. However, H. Saidi Ansari bin Teungku Muhammad as the manager of the pesantren did not pay attention to the objections raised by the heirs of the late Raimah binti Panglima Syarif and Imam Syafi'i.

As a result of not paying attention to the objections raised by the heirs of the late Raimah binti Panglima Syarif and Imam Syafi'i, finally the heirs of the late Raimah binti Panglima Syarif and Imam Syafi'i filed a lawsuit to the Meulaboh Syar'iyah Court to be resolved. Before the case was examined and tried by the Judge of the Meulaboh Syar'iyah Court, at a trial court, in accordance with the provisions of Article 4 and Article 7 of the Supreme Court Regulation (PERMA) No.1 of 2016 concerning Mediation Procedures in Court, the case was first sought to be mediated or settled amicably between the parties (Plaintiff and Defendant). However, it turned out that the Mediator was not successful in reconciling the two parties, so it can be said that the mediation failed or was not successful. Due to failure in mediation, the case was finally examined and tried by the Meulaboh Syar'iyah Court, which then ended with Meulaboh Syar'iyah Court Decision No.146/Pdt-G/2015/MS.Mbo and an appeal decision, namely the Syar'iyah Court Decision 'iyah Aceh with Decision No.59/Pdt-G/2016/MS.Aceh.

Based on the background stated above, it is interesting to study the legal consequences of changing the use of waqf land without the approval of the wakif heirs as the person who donates the land.

2. Research Method

The appropriate research method for this study is the normative juridical research method, because the focus of the study of this paper is the legal consequences of changes in the use of waqf land without the consent of the wakif heirs, by examining and studying the Ruling of the Meulaboh Syar'iyah Court No.146/Pdt-G/ 2015/MS.MBO and Decision of the Aceh Syar'iyah Court No.59/Pdt-G/2016/MS.Aceh. The primary data was obtained through a study of laws and regulations as a legal basis and juridical analysis, then by examining court decisions, namely the Meulaboh Syar'iyah Court Decision No.146/Pdt-G/2015/MS.Mbo and the Syar'iyah Court Decision Aceh No.59/Pdt-G/2016/MS.Aceh. The results of the review will be analyzed qualitatively and presented prescriptively.

3. Results and Discussion

Previously it has been described above that in principle the waqf of property rights over land must be utilized in

accordance with the purpose and function of the waqf.⁶ In Islam, one of the social institutions that is closely related to the social and economic problems of society is waqf. However, in reality it was also found that there was a change in the designation of waqf land, where the right to waqf land has been used to deviate from the purpose of the waqf as promised by the wakif when the land rights were donated. One of the cases of utilization of waqf land that deviates from the purpose of waqf is waqf land which was donated by the late Raimah binti Panglima Syarif with Imam Syafi'i around 1928. The waqf land was located in Peunaga Rayeuk Village, Meureubo District, West Aceh Regency and when the land was donated This pledge was made by the Wakif, namely the late Raimah binti Panglima Syarif together with Imam Syafi'i for the benefit of the Mosque and Islamic Boarding School in Kampung Peunaga Rayeuk, Meureubo District, Meulaboh.

Meanwhile, Nazhir as the manager of the waqf land, namely H. Saidi Ansari bin Teungku Muhammad, changed the utilization of the waqf land from the interests of the Islamic Boarding School and Kampung Peunaga Rayeuk Mosque to the interests of the Islamic boarding school only. The change in use of the waqf land was known to the heirs of the late Raimah binti Panglima Syarif and Imam Syafi'i and the change in the allotment of the waqf land was made without their knowledge as heirs. So that the heirs of the late Raimah binti Panglima Syarif and Imam Syafi'i filed objections to the change in the allotment of the waqf land. However, H. Saidi Ansari bin Teungku Muhammad as the manager of the pesantren was not willing to return the use of the waqf land for mosques and Islamic boarding schools, but remained for the benefit of the pesantren.

The cause of the change in the designation of waqf land is because the waqf is not registered at the Land Office, so that the waqf land does not receive legal protection. Even though PP No.24 of 1997 concerning Land Registration requires land rights to be registered at the Land Office to obtain a certificate,⁷ including waqf land. The waqf land was not registered, because at the time the waqf land was donated, a Deed of Waqf Pledge (AIW) was not made and there were no provisions requiring it to be registered in order to obtain a certificate. Actually, this cannot be used as an excuse, because in 1977 with the issuance of PP No.28 of 1977 concerning Waqf of Owned Land, these provisions already existed, as well as the issuance of the Waqf Law and its implementing regulations. This is clearly stated in Article 5 (1) of PP No.28 of 1977 which states that: a wakif who transfers his land rights to Nadzir is required to state his intention (declared) explicitly and clearly in front of the Waqf Pledge Deed Making Officer (PPAIW) and at the in front of 2 witnesses.

Likewise, in the Waqf Act, this is contained in Article 17 of the Waqf Act which states that the implementation of the waqf pledge (both verbally and in writing) by the Wakif to Nadzir is carried out in front of PPAIW and witnessed by 2

⁶ Muhammad Alfin Syauqi, Optimalisasi Pengelolaan Wakaf Uang Untuk Kesejahteraan Umum, *Kanun Jurnal Ilmu Hukum*, No. 63, Th. XVI (Agustus, 2014), pp. 369-383, <https://jurnal.usk.ac.id/kanun/article/view/6036/4974>.

⁷ Said Munassar, Suhaimi, Teuku Saiful, Legal Protection Against Ded in Substitute of Wakaf Pledge Deed (APAIW): Analysis of APAIW Number: W3/02/I/1983 Dated 22 January 1983, *International Journal of Advanced Multidisciplinary Research and Studies*. 2022; 2(6): 521-526.

⁵ Idia Isti Iqlima, Syahrizal, Ilyas, Penukaran Harta Wakaf Menurut Hukum Islam Dan Undang-Undang Nomor 41 Tahun 2004 Tentang Wakaf, *Syiah Kuala Law Journal*. 2017; 1(1): 140-156.

witnesses. Furthermore, PPAIW poured the implementation of the Waqf Pledge into the AIW.

In the event that the waqf land does not yet have an AIW or an AIW is not made because at the time it was donated (in 1928) there was no provision requiring that the waqf land be carried out with a Waqf Pledge made before PPAIW and stated in the AIW, then such waqf land can be made a Deed Substitute Deed of Waqf Pledge (APAIW) by PPAIW. This is explicitly stated in Article 31 PP No.42 of 2006 as implementing regulation of the Waqf Law. In this case Article 31 PP No.42 of 2006 states that the land endowment does not yet have an AIW or an AIW has not been made, while the waqif has died or his whereabouts are no longer known, so it is not possible to repeat the Waqf Pledge, so an APAIW can be made for the waqf land. The making of APAIW is of course done with great care, so that in making APAIW there must be Qarinah (various instructions) and the presence of 2 witnesses who really know that the land is waqf land.

Thus, the waqf land donated by the late Raimah bint Panglima Syarif together with Imam Syafi'i was very easy to change its designation by Nadhir, namely H. Saidi Ansari bin Teungku Muhammad as the manager of the pesantren. This was done by making APAIW in accordance with the wishes of H. Saidi Ansari bin Teungku Muhammad. When he was about to make APAIW first, namely on December 20, 1981 H. Saidi Ansari bin Teungku Muhammad made a Certificate of Waqf which explained that the waqf land was truly waqf in 1928 by Raimah binti Panglima Syarif with Imam Syafi'i as his waqif. A Waqf Certificate was made, because the waqf land does not have AIW and is intended to manage or make APAIW at PPAIW. It can be understood that at that time (in 1928) the waqf had not been made before PPAIW and there was no provision stipulating that the implementation of waqf had to be made by AIW. Thus, as stated above, an APAIW must be made for the waqf land. The creation of APAIW as referred to above is intended so that the waqf land can be registered at the Land Office or for processing certificates, so that the waqf land has legal certainty and legal protection.⁸ This is in accordance with the purpose of land registration, one of which is to provide legal certainty and legal protection for a plot of land, the land referred to is of course land parcels that have been registered, because it is impossible for land registration to provide legal protection⁹ for land parcels that have not been registered. In addition, a certificate of land rights is proof of rights that can be used as a strong means of proof.¹⁰

On the basis of the Waqf Certificate made on December 20, 1981, H. Saidi Ansari bin Teungku Muhammad as the manager of the pesantren managed or made APAIW at PPAIW (which in this case was the Head of the District Office of Religious Affairs, abbreviated as KUAKEC). So

that on January 22, 1983 PPAIW issued APAIW with No.W3/02/I/1983. This APAIW was issued with the intention of being able to be registered with the Land Office in order to obtain a certificate of rights over the waqf land. However, in APAIW it is stated that the waqf is intended only for Islamic boarding schools and does not include waqf for the benefit of the mosque, namely for the benefit of the Kampung Peunaga Rayeuk Meulaboh Mosque. This is where the origin of the dispute or change in the allotment of waqf land that is inappropriate or deviates from the purpose of waqf,¹¹ where the purpose of the waqf is pledged for Islamic boarding schools and the Kampung Peunaga Rayeuk Meulaboh mosque, while in APAIW it only lists waqf for the benefit of Islamic boarding schools.

Furthermore, H.Saidi Ansari bin Teungku Muhammad as the manager of the pesantren submitted an application for registration of the waqf land on the basis of APAIW No.W3/02/I/1983 dated January 22, 1983. The importance of APAIW in the process of registering waqf land, because without APAIW the Land Office will refuse register the waqf land. This is as stated in Article 37 (1) PP No.24 of 1997, where legal actions for transferring land rights can only be registered if proven by a deed. Thus, waqf is also a legal act of transferring land rights, so that waqf must also be proven by deed (in this case, APAIW). Likewise, in the Waqf Law, where in Article 33 it is stated that for the purposes of registering waqf land PPAIW submits copies of AIW or other letters, or proof of ownership and other documents.

The end of the land registration process (including waqf land) is the issuance of a certificate of land rights (waqf land certificate) which can be used as a strong means of proof. In this case, a waqf certificate was issued No.5 dated June 23, 1994 which was registered in the name of Raimah bint Panglima Syarif as Waqif. As for its utilization, it is intended for the benefit of Islamic boarding schools only (not listed for the benefit of the Kampung Peunaga Rayeuk Meulaboh Mosque) and the pesantren is managed by H. Saidi Ansari bin Teungku Muhammad.

Because the waqf was not utilized for the mosque, on May 12 2015 the heirs of Raimah binti Panglima Syarif and Imam Syafi'i filed a lawsuit at the Meulaboh Syar'iyah Court. This lawsuit was filed because the management of the H. Saidi Ansari bin Teungku Muhammad Islamic boarding school did not pay attention to the objections raised by the heirs of the late Raimah bint Panglima Syarif and Imam Syafi'i.

As usual, before the case is examined and tried by the Judge of the Meulaboh Syar'iyah Court, in court, in accordance with the provisions of Article 4 and Article 7 of Supreme Court Regulation (PERMA) No.1 of 2016, efforts should be made to mediated or resolved amicably between the parties (Plaintiff and Defendant). However, because the appointed Mediator failed to reconcile the two parties or failed to mediate, the case was examined and tried by the Meulaboh Syar'iyah Court, which then ended with Meulaboh Syar'iyah Court Decision No.146/Pdt-G/2015/MS .MBO and the decision on appeal, namely the Decision of the Aceh Syar'iyah Court with Decision No.59/Pdt-G/2016/MS.Aceh.

⁸ Kamalia, Darmawan, Suhaimi, The Implementation of Land Case Handling Policy at the Land Office of Aceh Besar Regency, *International Journal of Multicultural and Multireligious Understanding (IJMMU)*. 2022; 9(12): 115-125.

⁹ Della Rafiqqa Utari, Suhaimi, Pendaftaran Tanah Yang dikuasai oleh Tempat-tempat Ibadah Umat Islam di Kecamatan Kuta Alam Banda Aceh, *Syiah Kuala Law Journal*. 2020; 4(3): 310-322.

¹⁰Fery Irwanda, Pelaksanaan Wewenang Kantor Pertanahan Dalam Pendaftaran Tanah (Studi Di Kecamatan Kuta Baro Kabupaten Aceh Besar), *Syiah Kuala Law Journal*, Volume 1, Nomor 3, Desember 2017, pp. 137-150.

¹¹Tatang Astarudin, Perubahan Status dan Peruntukan Tanah Wakaf, *Perubahan-Status-dan-Peruntukan-Tanah-Wakaf-Tatang-Astarudin-BWI-November-2022.pdf*, Accessed on 09 March 2023.

The Meulaboh Syar'iyah Court examined and tried the case, based on the results of the examination at the trial court, after hearing the statements of witnesses put forward by both parties regarding the arguments and facts that were heard, seen and experienced by the witnesses themselves and the relation between the testimony of the witness and other witnesses and with other evidence, conclude that these witnesses have met the material requirements as witnesses and meet the requirements as stipulated in Article 171 (1) HIR/Article 308 R.Bg, so that these witnesses can be accepted as evidence and has the power of evidence as a witness.

The Meulaboh Syar'iyah Court which examined and tried the waqf land case based on the evidence submitted (both submitted by the Plaintiff and the Defendant) finally decided: in 1928 by Wakif (the late Raimah bint Panglima Syarif and Imam Syafi'i), namely endowments for Islamic Boarding Schools and for Kampung Penaga Mosque Rayek Melaboh (West Aceh). Then the Court stated that it has no legal force and is not worth the Certificate of Waqf made on December 20, 1981 and APAIW No. W3 / 02/ I / 1983 dated January 22, 1983. Finally, the Court also stated and determined the Waqf Land Certificate No.5 of 1994 dated June 23, 1994 which was made on the basis of APAIW No. W3 / 02/ I / 1983 dated 22 January 1983 is worthless and has no legal force.

Based on the considerations of the Meulaboh Syar'iyah Court Judge it can be stated that changes to the designation of waqf land or use of waqf land that are not in accordance with the waqf pledge are in principle not permissible (prohibited), because this is contrary to applicable regulations and also contrary to Islamic Shari'ah. So that waqf land originating from the endowment of the late Raimah bint Panglima Syarif and Imam Syafi'i, whose designation or utilization was changed by H. Saidi Ansari bin Teungku Muhammad as the manager of the Islamic Boarding School is contrary to law, both positive law and Islamic law. Therefore, the Meulaboh Syar'iyah Court Judge canceled the letters showing that the waqf was intended only for the benefit of the pesantren, because when it was pledged in 1928 by the Wakif (the late Raimah bint Panglima Syarif and Imam Syafi'i) the land was for the benefit of the pesantren and for the benefit of the mosque. In this case H. Saidi Ansari bin Teungku Muhammad as the manager of the pesantren and the manager of the waqf land did not use the waqf land as promised by the wakif, but used it to obtain profits generated from the waqf land for personal gain in managing the pesantren, of course this is contrary to Articles 4 and 5 of the Waqf Act.

Furthermore, against the Meulaboh Syar'iyah Court Decision No.0146/Pdt-G/2015/MS.Mbo dated April 27 2016, the defendant H.Saidi Ansari bin Teungku Muhammad did not accept it and filed an appeal to the Aceh Syar'iyah Court. The Aceh Syar'iyah Court which received the appeal was of the opinion that part of the plaintiff's claim as stated in the posita of the lawsuit filed by the plaintiff was deemed appropriate and correct, but there were still considerations that were not in line with the plaintiff's claim. Therefore, the Panel of Judges of the Aceh Syar'iyah Court will take over some of these considerations for their own consideration and correct the incomplete rulings and make them a consideration in deciding cases at the appeal level.

The essence of the Aceh Syar'iyah Court Judge's decision includes:

1. Determined that the Waqf land of the late Raimah bint Panglima Syarif was for the Gampong Peunaga Rayeuk Mosque and Pesantren;
2. Stipulates that Waqf land from the late Imam Syafie Certificate of ownership No.4 of 1994 dated June 23, 1994 is Waqf for Mosques and Pesantren in Gampong Peunaga Rayeuk;
3. Sentenced the Defendants to return the waqf land of the late Raimah binti Panglima Syarif and Imam Syafie for the Darul Hikmah Mosque and Darul Hikmah Pesantren Gampong Peunaga Rayeuk, Meureubo District, West Aceh Regency in accordance with their function;
4. Declare that the Certificate of Property Rights No.5 Waqf dated 23 June 1994 has no legal force.

Legal Considerations of the Panel of Judges of the Aceh Syar'iyah Court with Decision No.59/Pdt.G/2016/MS-Aceh if analyzed further, this must indeed be the case, because the designation of waqf assets is determined and determined by the Wakif at the time the Waqf Pledge is implemented. In this case, it is the wakif that determines the designation of the waqf property. On the other hand, if the religious and social organization does not specify the purpose and objectives of the religious and social organization's property, Nazhir can freely determine the determination of the religious and social organization's assets according to the purpose and function of the religious and social organization. However, in terms of legal considerations, the Aceh Sharia Court Judiciary also referred to the degree of oversight over the naming and operation of Waqf assets, particularly Waqf lands where the Indonesian Waqf Board (BWI) holds rights. The BWI is here to promote the development of Nazhir so that Waqf assets are better and more efficiently managed so that greater community benefits can be provided in the form of social services, economic empowerment and public infrastructure development benefit. Regarding supervision of the management of waqf assets, it is also contained in Article 56 of PP No.42 of 2006 concerning the Implementation of Waqf Act, namely:

1. The supervision of religious funds is undertaken actively and passively by the government and the community.
2. Active monitoring by direct inspection from Nazhir to Waqf management at least once a year.
3. Passive surveillance by observing various Waqf management reports submitted by Nazhir.
4. In carrying out the oversight referred to in subsection (1), the Government and the public may engage the services of independent auditors.
5. The further provisions of the Waqf supervision procedure referred to in subsection (1) shall be governed by ministerial regulations.

Changes to the designation of waqf assets in this case were made immediately without involving Raimah bint Panglima Syarif and Imam Syafi'i or their heirs. Changes to waqf assets can still be made if the waqf assets cannot or are not allowed to be utilized in accordance with the Waqf Pledge which has been pronounced. In this case, it must involve the wakif or the heirs of the wakif who have donated it.

If all parties understand the provisions contained in Article 42 of the Waqf Act, namely: Nazhir is obliged to manage and develop waqf assets, in accordance with the function and purpose of the waqf assets. Then in Article 44 (1) of the Waqf Act it is also expressly stated that Nazhir is prohibited

from making changes to the designation of waqf assets, in terms of managing and developing waqf assets, unless he has received written permission from the BWI.

4. Conclusion

As previously described, the Waqf Law does not allow the rights to the waqf land to change its designation or use, other than what is stated in the waqf pledge at the time the Wakif donates the land. Therefore, a piece of waqf land that was donated around 1928 by the late Wakif Raimah binti Panglima Syarif together with Imam Syafi'i for the benefit of the Islamic Boarding School and the Kampung Peunaga Rayeuk Mosque, Meureubo District, West Aceh Regency (Meulaboh), then the pesantren manager made changes to its utilization, then this has resulted in the emergence of disputes that must be resolved through the courts (i.e., the Meulaboh Syar'iyah Court). The Syar'iyah Court also annulled letters (Certificate of Waqf and APAIW) containing changes to the use of waqf land for the benefit of Islamic boarding schools, including Land Certificate No.5 Waqf dated June 23, 1994. The Syar'iyah Court made the cancellation because it was based on evidence -Evidence and facts from the trial revealed that the waqf was intended for the benefit of Islamic boarding schools and mosques. Thus, legally it has resulted in a Waqf Certificate dated December 20, 1981, APAIW No. W3 / 02/ I / 1983 dated January 22, 1983 and Land Certificate No. 5 Waqf of 1994 dated June 23, 1994 made on the basis of APAIW No. W3 / 02/ I / 1983 dated 22 January 1983 is worthless and has no legal force.

5. Suggestions

It is hoped that all parties, including the public, can supervise the designation and function of waqf assets, especially waqf land with ownership rights, so that waqf can provide greater benefits to the community, both in the form of social services, economic empowerment, and the development of public infrastructure. So that the objectives and functions of waqf as intended in the Waqf Act can be realized.

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