

## **Settlement of Waqf Disputes and its Asset Protection in East Java, Indonesia**

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### **Abstract**

*Waqf is commonly defined as an endowment made by Muslims to a religious cause. By this definition, waqf is a spiritual practice with a divine aspect for Muslim people. In Indonesia, the implementation of waqf is regulated in national law and adjacent to a kind of private law. Because waqf is similar to a sort of private law in Indonesia, it is possible for waqf in the future to have a dispute around property rights dissatisfaction. This article determines a determinant factor of waqf disputes in Indonesia, especially East Java. This article is an empirical legal study by looking at phenomena background of the waqf dispute and mapping out a model of waqf dispute resolution overcome by several parties. This article finds that waqf disputes in Indonesia are caused by several determinant factors, such as recognition of ownership of the founder's family (wāqif), changes in the aims and objectives of waqf assets, and abandonment waqf assets. The result of this study reveals that maşlahah – as a principle of Islamic law objectives – becomes a consideration in formulating a model of waqf dispute resolution. Efforts to resolve waqf disputes are often taken in two ways: first, legalizing waqf assets through religious courts. Second, the conflicts are usually resolved through either formal or informal mediation processes. Thus, litigation and non-litigation of legal process play an active role in resolving waqf disputes in Indonesia.*

**Keywords:** *Waqf, settlement of waqf dispute, maşlahah, waqf assets in Indonesia.*

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## Introduction

According to *Undang-Undang Republik Indonesia* (UURI, the Law of the Republic of Indonesia) Number 41 of 2004 concerning *Waqf*, *Waqf* (Endowment) is a *waqif* (*waqf* contributors) legal act to separate and/or hand over part of his property to be used forever or for a certain period following its interests are for the purposes of worship and/or general welfare according to sharia. Therefore, it can be said that activities that have a worship background (*ibadah*) and public transactions (*muamalah*) include *waqf*.<sup>2</sup> Ruhul Syahid Thoha stated that the *waqf*, which has potential and economic benefits, needs to be managed effectively and efficiently to benefit worship and public welfare.<sup>3</sup> Even though there are legal instruments that regulate *waqf*, sometimes some problems occur in the community related to *waqf* matters. These problems are related to the management and protection of *waqf* assets. Therefore, in other words, there is a need for handling and settlement.

*Waqf* is part of the implementation of religious law, therefore there is an element of obedient (*ubudiyah*) on it. On the other hand, the *waqf* is considered a general transaction (*muamalah*) related to relinquishing ownership rights. In this realm, *waqf* also contains elements of humanity (*basyariah*). This economic practice tends to potentially lead to disputes related to dissatisfaction with ownership rights which are the realm of civil matters. Among the polemics that have arisen include claims to ownership, both from heirs and other

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<sup>2</sup> Al-Kabisi asserts that - according to Shafi'i, Maliki, Hanbali, and Zaydi schools - the pillars of *waqf* (endowment) are the founder (*waqif*), beneficiaries (*mauquf 'alaih*), the assets (*mauquf*), and the expression that indicates the establishment of a *waqf* contract (*sigat*). See Muhammad Abid Abdullah Al-Kabisi, *Hukum Wakaf*, Translator: Ahrul Sani Fathurrahman, (Jakarta: Kuwais Mandiri Cahaya Persada, 2003), p. 87.

<sup>3</sup> Ruhul Syahid Thoha, *Revolusi Perwakafan dalam Perspektif Hukum Agrarian Indonesia*, (Surabaya: LWP NU Jawa Timur Press, 2010), p. ii.

parties. Various efforts have been taken in settlement of *waqf* disputes. The principle of deliberation to reach consensus is always put forward so that the benefits of *maqāṣid shari'ah* (the purposes of shariah) can be realized.

For instance, *waqf* disputes that occurred in East Java, including in Jombang, Surabaya, Sidoarjo, and Ponorogo, were settled in the realm of the judiciary. Likewise, the *waqf* dispute that went to the Central Indonesian *Waqf* Agency (BWI) in Jakarta, namely the dispute over the *waqf* of Musholla SAS or the Tanah Abang Daerah Sulit Air area in Central Jakarta which turned into a shop owned by PT. Multi Cipta Permai Wirasta. Another dispute is the request for personal replacement of *Nazhir's* organization in Adisana village, Bumiayu sub-district, Brebes district, Central Java. Another case is about the *Nazhir (waqf organizer)* dispute at the Islamic Da'wah Mosque and the Islamic Da'wah Foundation in Utan Kayu Matraman, East Jakarta.

In 2001, there was also a *waqf* case decided by the Kendal Religious Court (PA), Number 957/Pdt.G/2001/PA.Kendal dated April 1 2002. In the 1990s, a *waqf* case was decided by the Religious Court (PA) Lhoksukon, Number 1/P/1990/PA-LSK, dated February 21, 1990. Also, *waqf* land for tombs/graves was determined by the South Jakarta Religious Court Number 311/Pdt.G/2006/PA.JS dated October 16, 2006.<sup>4</sup>

The occurrence of various *waqf* dispute events illustrates the number of *waqf* disputes that occur in connection with the humanity (*bashariyah*) and divine (*ilahiyah*) aspects. Until there are concerns about *waqf* assets in the reality of *waqf* in the community. In other words, the lack of security and protection for these assets can threaten the existence of *waqf* status, assets, and productivity. It is necessary to have various *waqf* legal instruments to avoid, prevent, or at least minimize the occurrence of disputes. Reasonable settlement efforts are

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<sup>4</sup> Jaih Mubarak, *Wakaf Produktif* (Bandung: Refika, 2008) 184.

needed while remaining oriented to the sustainability of the assets and benefits of *waqf* property. Further discussion is on the benefits side of dispute resolution, especially for the disputing parties. This dispute resolution refers to *al-adillah at-tashri'iyah* (the arguments for determining the Islamic law) as *turuq al-istinbat* (methods of deductive reasoning in Islamic law), which refers to the Islamic legal arguments surrounding *al-maslahah*.

In this case, the occurrence of a dispute is *waqf* – which requires settlement, demands a proper and correct solution, can be through deliberation to obtain a peace agreement between the parties to the dispute.<sup>5</sup> Another alternative is to resolve through the mediation process as regulated by the Regulation of the Supreme Court of the Republic of Indonesia (PERMA RI) Number 01 of 2008, which was updated with PERMA RI Number 01 of 2016 concerning Mediation Procedures in Court. Another way is through legal route (litigation) –settlement of cases through judicial institutions–, namely entrusting the judiciary to resolve the dispute. This way of resolving *waqf* conflict is regulated in the Law of the Republic of Indonesia (UURI) Number 7 of 1989 concerning the Religious Courts and UURI Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning the Religious Courts.

Dispute resolution can also be made by arbitration, as regulated in Law Number 30 of 1999 concerning

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<sup>5</sup> As the interpretation of the words of Allah SWT QS. Ash-shura [42] verse 38), says: "... their affairs are (decided) by consultation between them..." (Khadim al-Haramain, 1411 H), p. 789; Other verses QS. Ali-Imran [3], verse 159 says: "... and consult with them in the matter. then when you have made up your mind, then put your trust in Allah..." (Khadim al-Haramain, 1411 H), p. 103. The affairs in question are war and other worldly matters, such as political, economic, social, and other affairs. The verse that commands peace is QS. An-Nisa` [4] verse 128, says: "...and peace is better (for them) even if the man is stingy according to his nature..." (Khadim al-Haramain, 1411 H). 143.

Arbitration and Alternative Dispute Resolution. Disputes resolved through this arbitration are usually business disputes that occur in trade traffic. This dispute resolution is made when there is no word of peace, and legal norms in society have regulated the event.

Regulations that regulate *waqf* in Indonesia and are expected to be able to resolve *waqf* disputes and protect their assets include the Republic of Indonesia Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles, Presidential Instruction (INPRES) RI Number I of 1991 (Book III, Compilation of Laws). Islam), Law of the Republic of Indonesia Number 41 of 2004 concerning *Waqf*, Government Regulation (PP) Number 28 of 1977 concerning *Waqf* of Owned Land, Government Regulation Number 42 of 2006 concerning Implementation of Law of the Republic of Indonesia Number 41 of 2004 concerning *Waqf*, Regulation of the Minister of Religion (PMA) Number 1 of 1978 concerning the Implementation of Government Regulation Number 28 of 1977 concerning The *waqf* of Owned Land, and several Regulations of the Indonesian *Waqf* Board (BWI).

Several studies have been conducted regarding *waqf* disputes and alternative dispute resolutions, among others by Sukarto, with the theme "Resolution of *Waqf* Land Disputes in Kendal Regency".<sup>6</sup> The study revealed a case of settlement of *waqf* disputes that occurred in the Patebon sub-district, Kendal. This case demonstrates the existence of a mosque *waqf* land claim. The land was finally released and returned to the *waqif* heirs due to the lack of authentic (written) evidence regarding the status of the *waqf* (verbally) pledged.

In contrast to previous research, the object of this study is *waqf* managers in East Java in some particular cases. This discussion is intended to find various triggers for the emergence of the *waqf* dispute and the *al-maslahah* used to resolve it. Further, the types of disputes that occur and the settlement model and efforts

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<sup>6</sup> Sukarto, (unpublished thesis, 2006), *Resolusi Sengketa Tanah Wakaf di Kabupaten Kendal*, Semarang, PPs Walisongo Press.

to protect *waqf* assets for the benefit of the people can be known. The discussion raised is limited to *waqf* dispute resolution and measures to preserve *waqf* assets as an anticipatory step as well as an alternative solution. This study highlights the juridical-implementation aspects of the National *waqf* law regarding asset protection and *waqf* dispute resolution. It also looks at the intensification of the application of mediation in settlement of *waqf* disputes and the principles used in resolving *waqf* disputes from the perspective of *al-adillah at-tasyri'iyah* (the postulates of legal stipulation). This study meets with a relevant issue on *waqf*. Usually, the implementation of *waqf* has been more oriented to management (management) aspects and development of *waqf* assets towards productive *waqf*. This condition has not been discussed clearly on *waqf* cases that have undergone legal processes and their resolutions and efforts of his protection. Therefore, this study can complement existing research related to the dynamics of *waqf* in Indonesia.

The focus of the study is to reveal *waqf* disputes that occur in the community and the forms of resolution—Furthermore, the pattern of protection of *waqf* assets in the *waqf* management institution. The answers to the two problems above need to be revealed so that later they can be helpful for the process of *waqf* continuity in the community, especially in terms of resolving *waqf* disputes and asset protection which are the study of Islamic law.

### **Potential of *Wakf* Disputes, Settlements, and Benefits Principles**

Before reviewing the issue of *waqf* disputes, the following paragraph will discuss the meaning of disputes. Achmad emphasized<sup>7</sup> the word dispute with its various derivations, including the invented noun – dispute- which

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<sup>7</sup> As for In Arabic, the terms commonly used for dispute are *al-khilaf* (الخلاف) and *al-tanazu*'(التنازع).

more or less has the same meaning as dispute or conflict.<sup>8</sup> In practice in the courts, this term is equated with disputes. Salim also expressed a similar opinion that some use the term dispute, but others use conflict. The word “dispute” is translated from English, namely *dispute* or *lawsuit* or *legal action*. The meaning of dispute is also explained by launching the opinion of Richard L. Abel, who defines *dispute* as a public statement regarding an *inconsistent claim* for something of value.<sup>9</sup> The meaning of dispute resolution (resolution) refers to language as a decision or unanimity of opinion in the form of a request or demand determined by a meeting, both trial and deliberation. The nature of *waqf* assets or *waqf* assets refers to the Law of the Republic of Indonesia Number 41 of 2004 concerning *Waqf*, Article 1, namely *assets that have long-lasting durability and/or long-term benefits and have economic value according to sharia which is donated by the waqif*.

The reality of *waqf* opens up great opportunities for *waqf* disputes (conflicts). Regarding several things that are potential for the<sup>10</sup> emergence of *waqf* disputes,<sup>11</sup> Jaih Mubarak stated that currently, *waqf* disputes are caused mainly by legal ambiguity because the *waqf* carried out is not accompanied by authentic evidence.<sup>12</sup>

The trigger for the emergence of other *waqf* problems is due to several factors. For instance: the scarcity of land, higher prices, the depletion of religious awareness, people who have *waqf* have donated all or most of their

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<sup>8</sup> M. Mukhsin Jamil, “Resolusi Konflik: Model dan Strategi,” dalam M. Mukhsin Jamil, (Ed.), *Mengelola Konflik Membangun Damai; Teori, Strategi dan Implementasi Resolusi Konflik* (Semarang: WMC IAIN Walisongo, 2007). 31.

<sup>9</sup> Salim HS, *Perkembangan Teori dalam Ilmu Hukum* (Jakarta: Rajawali Press, 2010). 81.

<sup>10</sup> Potential is the ability, power, latent ability to develop.

<sup>11</sup> Supreme Court of the Republic of Indonesia, *Providing Justice to The Justice Seeker: A Report on The Indonesian Religious Court Access and Equity Study-2007, Summary of Research Findings*, (Jakarta: Supreme Court and AusAID, 2008). 9.

<sup>12</sup> Jaih Mubarak, *Wakaf Produktif* (Bandung: Refika, 2008). 181.

assets so that their descendants feel they have lost their source of sustenance and become neglected. Another aspect is the lack of awareness about the concept of 'eternity' of the property being *waqf* even though they have religious knowledge<sup>13</sup> and the lack of sincerity<sup>14</sup> of the *waqif* heirs.

*Waqf* disputes are also due to violations of *waqf* law<sup>15</sup> and the loss of *waqf* assets. The disappearance of the property is due to 'taking' by other people, as well as *waqif* heirs; or inheritance lawsuits. A lawsuit on *waqf* assets is due to not being accurately documented and because *nazhir* is not optimal in managing *waqf* assets so that it is less productive.

To the settlement of *waqf* disputes, several ways could be made. Those ways are deliberation for consensus, litigation, and non-litigation processes. The following is a description of how to resolve *waqf* disputes:

a. Deliberation for consensus.

Settlement of *waqf* disputes and its alternatives has been regulated by Law of the Republic of Indonesia Number 41 of 2004 concerning *Waqf* Article 62, paragraph (1). Settlement of *waqf* disputes is carried out through deliberation to reach a consensus. Basically, the principle of deliberation to reach an agreement is prioritized in any dispute/conflict resolution that occurs in the community. If the effort is not successful, other steps can be taken, as stated in

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<sup>13</sup> Delivered by H. Muhsin KS, senior manager of Pondok Pesantren Tebuireng Jombang East Java, when speaking about the *waqf* dispute that the Pondok Party had experienced. Wednesday, September 29, 2010, from 17.00-17.45 WIB.

<sup>14</sup> Informed by Saifullah Yusuf, Chairman of BWI East Java at the PW LWP NU East Java Regional Working Meeting at the Pasuruan Regency Parliament Building, Sunday 03 October 2010, at 11:30 WIB.

<sup>15</sup> M. Irhas Syairozi, regional chief of the Wakaf and Land Institution of PWNU East Java, confirmed that this was also due to the lack of maximum dissemination of Law Number 41 of 2004 on Wakaf. (Presented at the meeting of LWP PWNU JATIM managers, 25 September 2010 at the PWNU JATIM Office, 16.30-17.15 WIB).



paragraph (2). If the dispute resolution referred to in paragraph (1) is unsuccessful, the dispute can be resolved through mediation, arbitration,<sup>16</sup> or court.

b. Non-Litigation

Abu Rohmad stated that dispute resolution in the community could be classified into 2 (two) channels, namely through court and out of court.<sup>17</sup> These two terms are understood differently by experts, Abu Rokhmad explained the views of Kubasek and Silverman regarding the use of the term litigation (*litigation process*) for dispute resolution in court, and *extrajudicial settlement of disputes* or popular with the term *alternative dispute resolution* (ADR)<sup>18</sup> for settlement disputes out of court.<sup>19</sup>

c. Court Process (Litigation)

Concerning the settlement of *waqf* disputes in Islamic law, the Religious Courts have the power to decide the case. According to Asmu'i Syarkowi based on *Staatblad* 1882 Number 152 concerning the Religious Courts in Java and Madura, the competence of the

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<sup>16</sup> Sufriadi (paper: 253) states the opinion of Suhrawardi K. Lubis (2000: 186) that arbitration (Islamic perspective) can be matched with the term *tahkim*. in Arabic which is the masdar of the verb *hakkama*. Technically means to make someone the deterrent of a dispute. The meaning is closely related to the technical meaning. In terminology, *tahkim* can be defined as the reliance of two disputing people on someone they pleased to resolve their dispute. Another word that also describes the method of dispute resolution according to Abdul Azis Dahlan (2001: 740) and 'Abdul Qadir Audah (2000: 773) is the term *as-solh*

<sup>17</sup> Abu Rohmad, *Paradigma Resolusi Konflik Agraria* (Semarang: Walisongo Press, 2008). 116.

<sup>18</sup> Suyud Margono (2004: 40-43) asserts that there are several advantages that often appear in alternative dispute resolution (ADR), such as voluntary nature in the process, speedy procedures, non-judicial decisions, control over organizational needs, confidential procedures, flexibility in designing problem-solving requirements, time and cost savings, relationship maintenance, high likelihood of executing agreements, control and easier estimation of outcomes, and decisions last all the time.

<sup>19</sup> Kubasek, NK, and GS Silverman, 1997, *Environmental Law* (New Jersey: Prentice Hall Upper Saddle River, 1997). 36.

Religious Courts is broader in this regard, including inheritance, *mal* inheritance, grants, wills, shadaqah, and *waqf*.<sup>20</sup> The authority of the Religious Courts Outside Java, Madura, and South Kalimantan is stated in Article 4, paragraph (1) of PP Number 45 of 1957, namely that the Religious Courts/Sharia Courts examine and decide disputes between husbands and wives who are Muslim, and all cases according to living law are arranged according to the relevant Islamic religion, including *waqf*. In a legal aspect, Religious Courts is an authoritative institution in judging *waqf* cases among Muslims.

d. Mediation as an Alternative for Resolution of *Waqf* Disputes

Regarding mediation, it has been emphasized in the Elucidation of the RI Law Number 41 of 2004 concerning *Waqf*, Article 62, paragraph (2) that what is meant by mediation is the settlement of disputes with the assistance of a third party (mediator) agreed upon by the parties involved conflict.

The existence of mediation in Indonesia is regulated by Supreme Court Regulation Number 2 of 2003 concerning Mediation Procedures at the Supreme Court of the Republic of Indonesia. Achmad Gunaryo, in his study of mediation, emphasized that the role of a mediator is usually played by those who have power, whether that power is built based on charisma or formal power, namely government officials.<sup>21</sup> If it is a *court-mandated mediation*, then the mediator is the judge.

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<sup>20</sup> Syarkowi, Asmu'i, 2003, "Kompetensi Peradilan Agama di Indonesia (Sebuah Tinjauan Singkat dari Aspek Sejarah Hukum)," *Mimbar Hukum*, No. 59 Year XIV, January-February, ISSN: 0853-3687, 36-38.

<sup>21</sup> Achmad Gunaryo, "Mediasi Peradilan di Indonesia," dalam Musahadi HAM, (Ed.), *Mediasi dan Resolusi Konflik di Indonesia dari Konflik Agama hingga Mediasi Peradilan* (Semarang: WMC IAIN Walisongo, 2007). 97.

Regarding the typology of mediators, Moore, as quoted by Abu Rokhmad, classifies them into 3 (three) categories.<sup>22</sup> First, the *social network mediator* is chosen because of the relationship or social network. In other terms, social relations mediators come from people known and trusted by the parties. Second, an *authoritative mediator* is a mediator chosen because the person concerned has the authority or authority. That authority can be read as those who have authority to regulate and govern, such as mediators from officials, legislature members, and the like.

### ***Al-Maslahah Issues in Settlement of Waqf Disputes***

According to academic discussion, Law Number 41 of 2004 concerning *Waqf* has not been entirely orderly and efficient. Therefore, in various cases, property *waqf* is not adequately maintained, abandoned, or turned into the hands of a third party in a way that is against the law.<sup>23</sup> Such a situation is not only due to Waqif's negligence or inability to manage and develop *waqf* property but also the attitude of the people who are less concerned or do not understand the status of *waqf* property, which should be protected for the sake of public welfare in accordance with the purpose, function, and designation of the *waqf*.

There are also various considerations in the regulations that hint at some principles of *waqf* dispute resolution. Among other things, it is explained in the *waqf* law that in order to create legal order and *waqf* administration in order to protect *waqf* property, *waqf* legal actions must be recorded and stated in *Akta Ikrar Wakaf* (AIW, *Waqf* Pledge Certificate) and registered and announced whose implementation is carried out in accordance with the procedures regulated in the legislation. This regulation does not separate *expert waqf*,

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<sup>22</sup> Abu Rohmad, *Paradigma Resolusi Konflik Agraria* (Semarang: Walisongo Press, 2008), p. 136.

<sup>23</sup> Ministry of Religion, Directorate General of Guidance for the Islamic Community, Law Number 41 of 2004 on Wakaf (Jakarta: DEPAG, 2007), p. 40.

namely the management and use of limited *waqf* property for relatives (heirs) and *khairi waqf*, which is intended for the benefit of the general public in accordance with the purpose and function of the *waqf*. Furthermore, it was also emphasized that to secure the *waqf* property from the interference of third parties that harm the interests of the *waqf*, it is necessary to improve the professional abilities of *waqif*.<sup>24</sup>

After describing the principle of *waqf* settlement from a legal aspect, it is important to discuss it through the *maqasid ash-shari'ah perspective*. Manan argues that Islam maintains a balance between overestimating opposites. Not only by recognizing private property rights but also by ensuring the most comprehensive and most beneficial distribution of wealth through the institutions it establishes and moral warning.<sup>25</sup>

Concerning the concept of ownership, the Qur'an clearly states that Allah is the absolute owner of everything. This is stated in QS. Ali 'Imran [3] verse 189, the translation: "*To Allah belongs the kingdom of the heavens and the earth, and Allah is Mighty over all things*".<sup>26</sup> Likewise in QS. Al-Baqarah [2] verse 29, the translation: "*He is Allah, who created all that is on earth for you and He willed (created) the heavens, then He made the seven heavens. and He knows all things.*"<sup>27</sup>

These two verses have essential meanings, essentially emphasizing that what has been created by Allah SWT is owned collectively by the entire human community. Legally, according to M. Abdul Manan, individual property rights are the right to hold, enjoy and transfer wealth that is recognized and maintained in

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<sup>24</sup> Ministry of Religion, Directorate General of Guidance of the Islamic Community, Law..., 40.

<sup>25</sup> Abdul Manan, *Teori dan Praktek Ekonomi Islam*, Editor: Sonhadji, dkk, (Yogyakarta: PT. Dana Bhakti Wakaf, 1995), p. 64.

<sup>26</sup> Tiba'ah al-Mushaf asy-Syarif, *Al-Qur'an Dan Terjemahnya* (Madinah: Mujamma 'Khadim al-Haramain asy-Syarifatain al-Malik Fahd, 1411 H). 109.

<sup>27</sup> Tiba'ah al-Mushaf asy-Syarif, *Al-Qur'an ....* 13.

Islam, on the other hand, they have a moral obligation to donate their wealth because that wealth is also a community right.<sup>28</sup> This is in line with QS. Al-Zariyyat [51] verse 19, the translation: "*And in their wealth there is a right for the poor who ask and the poor<sup>29</sup> who do not get a share*".<sup>30</sup>

These various guidelines lead to the realization of human benefits. According to Imam Shatibi, as quoted by Mustafa Edwin Nasution, *maslahah* is the nature or ability of goods and services that support the basic elements and goals of human life on earth.<sup>31</sup> There are five basic elements, namely belief or religion (*ad-din*), soul (*an-nafs*), intellect/intellectual (*al-'aql*), lineage and family (*an-nasl*), and property (*al-mal*).

According to him, the characteristics of *maslahah* are as follows:

- a. *Maslahah* is subjective because each individual becomes a judge in determining whether an action is a *maslahah* or not for him. Criteria of *maslahah* have been set by sharia and are binding on all individuals.
- b. *Maslahah* per person will be consistent with *maslahah* many people.
- c. The concept *maslahah* underlies all economic activities in society, including production, consumption, exchange, and distribution.<sup>32</sup>

According to the author in this study of *waqf*, both dispute resolution and efforts to protect *waqf* property (assets) are also included in the *hifz ad-din*, because the practice of *waqf* is part of the practice of Islamic teachings (shari'ah). Likewise, including *hifz al-mal* because, in principle, the property that has been *waqf* has become the property of the people whose status is higher in terms of maintenance than private property. Moreover, *waqf*

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<sup>28</sup> M. Abdul Manan, *Teori ....* 65.

<sup>29</sup> The poor who do not get a share means the poor who do not beg.

<sup>30</sup> Tiba'ah al-Mushaf asy-Syarif, *Al-Qur'an ....* 859.

<sup>31</sup> Mustafa Edwin Nasution, *et. al, Pengenalan Eksklusif Ekonomi Islam* (Jakarta: Kencana, 2006). 62.

<sup>32</sup> Mustafa Edwin Nasution, *et. al, Pengenalan ....* 63.

property is essentially property handed back to Allah SWT, which means it belongs to Him.

### **The Concept of Legal Protection**

Activities related to *waqf* are always related to other people (society). Some efforts to organize people's lives, among others, by law. In general, there are 2 (two) kinds of legal protection in Indonesia, namely, preventive legal protection and repressive legal protection.<sup>33</sup> Preventive legal protection aims to prevent disputes, while repressive legal protection seeks to resolve conflicts. The role of law in Indonesia is in line with national development. As stated by Rahardjo, the law is considered an institute capable of coordinating, controlling, and protecting national development needs.<sup>34</sup>

According to Azhary, the protection of the Islamic legal perspective has 2 (two) principles, namely recognizing human rights and protecting human rights.<sup>35</sup> This concept includes the safety of the position of rights to objects, which, according to Islamic law, should balance individual interests and social interests.

In accordance with the purpose and function of *waqf*, that *waqf* is intended for the general welfare or commonly called for the benefit of the people. The main purpose of *waqf* contains *al-maslahah concept*. According to al-Ghazali, the purpose of *al-maslahah* is also the goal of the creature or servant for his good. Al-Ghazali further specified the meaning of *al-maslahah* on the protection (protection) of 5 (five) things that are the goals of *sharia* towards creatures. Those five protections are religion

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<sup>33</sup> M. Philipus Hadjon, *Perlindungan Hukum Bagi Rakyat di Indonesia* (Surabaya: Bina Ilmu, 1987). 2.

<sup>34</sup> Satjipto Rahardjo, *Pendidikan Hukum Sebagai Pendidikan Manusia* (Yogyakarta: Genta Publishing, 2009). 202.

<sup>35</sup> Muhammad Thahir Azhary, *Negara Hukum; Suatu Studi Tentang Prinsip-Prinsipnya dilihat dari Segi Hukum Islam, Implementasinya Pada Periode Negara Madinah dan Masa Kini* (Jakarta: Kencana, 2010). 130.

protection, soul, mind, lineage and property protection.<sup>36</sup> The point is that everything that contains the protection of these five things is said to be *masalahah*, and vice versa everything that ignores it is called *mafsadah* (damage or the opposite of *masalahah*).

### **Several Cases of Waqf Disputes and Its Settlements**

In this study, several incidents of *waqf* disputes and their resolution efforts in the community are presented. In general, the resolution of the *waqf* dispute is divided into 2 (two), namely through litigation (settlement in court) and non-litigation (looking for a solution outside the court). Those cases have been processed by the *Pengadilan Agama* (PA, Religious Courts), *Pengadilan Tinggi Agama* (PTA, Religious Appeal Courts), and *Mahkamah Agung* (MA, Supreme Court). The *waqf* dispute incident is based on data from PTA Surabaya.<sup>37</sup>

As for *waqf* disputes, the resolution through non-litigation is to depart from the information source for the *waqf* institution manager. The majority of *nazhir* who have experienced *waqf* problems are individuals or have no legal entities yet.

Implicitly, it seems that there is no established legal awareness among *waqf* managers to legalize their *waqf* institutions. This condition is shown by Jati Hamlet case, Katerban Village, Baron District, Nganjuk Regency.<sup>38</sup> This case happened because the *waqf* event took place in 1910, long before the legalization of national *waqf* regulation in Indonesia. Similar cases also happened to *nazhir* in Gampeng Village, Gampengrejo District, Kediri Regency.

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<sup>36</sup> Muhammad bin Muhammad Abi Hamid Al-Ghazali, *al-Wajiz fi Fiqh Mazhab al-Imam al-Syafi'i* (Beirut: Dar al-Fikr, 1993). 284.

<sup>37</sup> Information derived from Dra. Hj. Chairussakinah Ady, Law Committee of Religious Appeal Court Surabaya, February 8, 2011

<sup>38</sup> Religious Court (PA) Decision Number: 116/Pdt.P/1991/PA.NGJ dated 6 May 1991. Religious Appeal Court (PTA) Decision Number: 40/1991/Pdt.G/PTA.SBY dated 25 March 1992. Supreme Court (MA) Decision Number: 61 K/AG/1993 dated 30 March 1994.

*Waqf* Disputes also occurred by *nazhir* of an organization with no legal entities yet, such as in mosque management. For example, case of *waqf* dispute in Jami' Cukir Jombang mosque, the mosque is located at Cukir village, one of villages in sub-district Diwek Jombang District. Another case is *nazhir* in Babus Syuro mosque, Jrebeng Lor Village, Kedopok District, Probolinggo City. Several cases also occurred in religious organizations, such as in *Majelis Wakil Cabang Nahdlatul Ulama* (MWCNU, branch representative assembly of Nahdlatul ulama) in Tulangan District, Sidoarjo Regency, and MWCNU NU in Babadan District, Ponorogo Regency.

Social foundation institution also an object where case of dispute settlement has occurred. The cases are found the Keta'miran Masjid Paneleh Foundation, the *Waqf* Foundation Secha Noer bint Salim bin Aboed Alkatiri with the Al Irsyad Education Foundation. Besides, the case also happened in al-Ma'arif Education Foundation, Sananrejo Village, Turen District, Malang Regency. The last Hasyim Asy' Foundation, Tebuireng, Jombang Regency.

The following is the decision on the *waqf* land of the Paneleh mosque in Surabaya in three courts institutions: *Pengadilan Agama* (PA) Surabaya at the first level, *Pengadilan Tinggi Agama* (PTA) at the second level, and Supreme Court at the last level of legal case appeal. *Pengadilan Agama* Surabaya asserts that the lawsuit contains formal deficiencies. Therefore, it must be unacceptable. The basis legal decision is the Supreme Court Jurisprudence Number: 378.K/Pdt/1985 dated March 11, 1986, and Article 17 paragraph (3) of UURI Number 14 of 1970 in *conjunction* with Article 59 paragraph (3) of UURI Number 7 of 1989. The consideration of the PA is Article 210 paragraph (1) KHI, and Article 49 UURI Number 7 of 1989, as well as HR. Bukhari-Muslim from Sa'ad bin Abi Waqash regarding the will of a maximum of 1/3. The *Religious Appeal Court* decision intends to accept the appeal and cancels the



Surabaya PA Decision. The basis is the existence of a grant deed under the hand, and Article 163 HIR. Meanwhile, the Supreme Court decided to grant the appeal by declaring that the house/land *waqf* was valid (November 5, 1991), and canceling the decisions of the *Religious Appeal Court* and *Religious Court* Surabaya. Those decisions are based on UURI Number 14 of 1970, UURI Number 14 of 1985, and Indonesian Law Number 7 of 1989.<sup>39</sup>

The journey of the birth of this final decision reflects the guarantee of the security of *waqf* property from outside parties who try to seize it. At that time, the reason for taking over the *waqf* assets was that it had been granted. It is possible that in the future, there will be many excuses and alibis for other parties, either personally or institutionally, who will seize the *waqf* assets, considering that in the future, the price of immovable *waqf* assets will be more economically fantastic. So that in the discussion of the disputed decision, it legalizes the *waqf* pledge from the *waqif*, so that the *nazhir* just continues to take care of the completeness of the requirements to issue a *waqf* land certificate, or not only to have a copy of the Supreme Court decision. As a juridical basis for the establishment of the *waqf* pledge is the Republic of Indonesia Law Number 41 of 2004 concerning *Waqf*. Chapter II, First Part Article 3. Also Part Seven Article 17 paragraphs (1) and (2).<sup>40</sup> Meanwhile, Government Regulation Number 42 of 2006 concerning the Implementation of Law of the Republic of Indonesia Number 41 of 2004 concerning *Waqf* regulates the minutes of the handover of *waqf* assets, as in Article 36 paragraphs (1) and (3).

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<sup>39</sup> Religious Court (PA) Decision Number: 996/Pdt.G/1996/PA.Sby dated 28 July 1997; Religious Appeal Court (PTA) Decision Number: 04/Pdt.G/1998/PTA.Sby dated February 16, 1998; Supreme Court (MA) Decision Number: 57 K/AG/1999 dated 20 April 2000.

<sup>40</sup> Ministry of Religious Affairs, Directorate General of Islamic Community Guidance, 2006, regulation of waqf (Jakarta: MORA Press, 2006). 12.

In the case of *waqf* foundation Secha Noer binti Salim bin Aboed Alkatiri, Religious Court decided that the valid *waqf* was a *waqf* pledge from Secha Noer binti Salim bin Aboed Alkatiri, through Achmad bin Ali bin Saleh bin Moetlik Alkatiri, as stated in Deed No. 7, October 3, 1952. The *waqf* in question is *waqf al-Dzurriyyah*. The handover of *waqf* assets from Achmad bin Ali to the Al-Irsyad College Foundation was invalid, so the assets had to be returned to normal. Another thing is that all Deeds of Amendment are frail and have no binding legal force. The basis is Article 49 paragraph (1) letter (c) UURI Number 7 of 1989, then Article 9 paragraph (2), Article 11 paragraph (1) and (2), Article 12 and Article 1 paragraph (1) PP Number 28 Year 1977. Likewise, Article 215 paragraph (7) and paragraph (1) KHI (regarding the meaning of *waqf*), and Article 216 KHI (regarding the function of *waqf*). Another basis is Article 225 paragraphs (1) and (2) and Article 226 KHI. The considerations for the arguments are taken from the Nailul Author book, juz 6, page 134 (Asy-Syaukani, juz 6, tt: 134), and the Fiqh Sunnah book, volume III, page 378 (about *Ahly* and *Dzurry*), also page 387 on the prohibition of *waqf* that impoverishes its descendants (as-Sayyid Sabiq, volume 3, 1983: 378-387). Religious Appeal Court decided that the control of 2 rooms in the house (the object of the dispute) by the Appellant was illegal and against the law. Consideration of the argument is the Book of Fiqh Sunnah, juz 3, p. 379 concerning the discussion of *waqf* ownership rights has turned to Allah SWT (as-Sayyid Sabiq, vol. 3, 1983: 379). The logical consequence is that Secha Noer's *waqf* does not meet the qualifications of *waqf* according to Islam. Therefore, the amendment to the Deed is valid. Meanwhile, the Supreme Court's final decision was to reject the cassation request, with the revision of Religious Appeal Court Surabaya decision, state that the Appellant's appeal was accepted, and annul the Surabaya PA's decision. The basis is Article 30 of UURI Number 14 of 1985 (regarding the

examination of cassation regarding the application of law).<sup>41</sup>

In general, it is known that the decisions of the religious courts tend to maintain the sustainability of the existing *waqf*. In connection with the *waqf* pledge carried out in the early post-independence era and the final decision of the case in 2003, of course, there were many dialectics and dynamics of *waqf*. It should also be contemplated that, when the property is *waqf*, essentially ownership of the rights has shifted to the benefit of the people. Therefore, the concept of *waqf zurriy* (*waqf* for descendants) often triggers problems in the future regarding the consistency of the attachment of *waqf* status to *waqf* property.

The next decision is related to the *waqf* dispute at *Sekolah Dasar Islam* (SDI, Islamic Elementary School) Sananrejo Village, Turen District, Malang Regency. It is known that the Religion Court (PA) in charge of this case decided that the land where SDI Sananrejo was founded (the object of the dispute) as *waqf* property. Likewise, 4 trucks of harvested *waqf* land in the form of teak, mahogany, and waru are also *waqf* property for SDI Sananrejo. For this reason, *waqif* (the donor) and SDI (as beneficial) were ordered to jointly re-declare the *waqf* property properly. The basis for this decision is Article 23 paragraph (1), Article 42 and 45 of UURI Number 41 of 2004 (substitution of waqif). They are confirmed by UURI Number 16 of 2001 and Article 26 paragraphs (2 and 3) of UURI Number 28 of 2004 concerning Waqif legal entities/foundations. Also, Article 5 paragraph (1) of PP Number 28 of 1977, Article 15 sections (1 and 2), and Article 16 of PMA Number 1 of 1978. Likewise, Article 30 paragraph (1) and Article 31 of Government Regulation No. 42 of 2006 examines *waqf* pledges made into Akta

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<sup>41</sup> Religious Court (PA) decision Number: 1140/Pdt.G/1997/PA.Sby dated August 21, 1998; Religious Appeal Court (PTA) Decision Number: 79/Pdt.G/1999/PTA.Sby dated April 22, 1999; Supreme Court's (MA) Decision Number: 473 K/AG/1999 dated 17 April 2003.

Pengganti Akta Ikrar Wakaf (APAIW, Replacement Certificate of *Waqf* Pledge Certificate) for legal and administrative order and protection of *waqf* assets.<sup>42</sup>

Like the religious courts that handle *waqf* disputes, the decisions issued by this institution are also more in favor of the sustainability of *waqf* assets in the community, especially those with *Waqf* Pledge Certificate (AIW). Speculation arose over disputes in *waqf* assets with *Waqf* Pledge Certificate (AIW), namely the possibility of parties trying to 'steal' personal opportunities and benefits from the results of *waqf* assets because they did not understand or did not understand the provisions of *waqf* assets. Therefore, counseling, guidance, and supervision from related parties are essential to maintain the safety of the existence of *waqf* assets.

As control over the use of *waqf* assets during the vulnerable period of polemic among *Nazhir* (*organizer of waqf*), it has been confirmed in Government Regulation Number 42 of 2006 concerning the Implementation of RI Law Number 41 of 2004 concerning *Waqf*. In Chapter I, General Provisions, Article 1 in this Government Regulation explains several terms related to the practice of *waqf*, among others in point (3) regarding the *Waqf* Pledge and (6) regarding the *Waqf* Pledge Deed.<sup>43</sup>

The results of the next litigation decision are presented on *waqf* disputes in Susuhan Hamlet, Gampeng Village, Gampengrejo District, Kediri Regency. The local PA emphasized that for the sake of the preservation of *waqf* assets, the Panel of Judges dismissed the *waqif* and ordered the plaintiff to propose a new *waqif* agreed by both parties. The basis is Article 221 paragraph (1) KHI, Article 49 UURI Number 3 of 2006,

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<sup>42</sup> Religious Court's (PA) Decision Number: 3407/Pdt.G/2007/PA.Kab.Mlg dated 02 September 2008.

<sup>43</sup> Ministry of Religion, Directorate General of Islamic Community Guidance, 2006, *Regulation* .... 63.

Article 226 KHI, and Article 62 paragraph (2) UURI Number 41 of 2004.<sup>44</sup>

It is expressly stated that the Religious Court attitude in dismissing waqif is based on the preservation of *waqf* assets. The condition leads to the behavior of *waqif* (a donor) who, according to *waqif*, had neglected the *waqf* assets. The task should be to manage and develop the waqf property productively. Waqif's ability and professionalism in utilizing *waqf* assets are absolutely necessary. Of course, guidance, direction, and guidance from interested parties for the progress of *waqf* in the archipelago is very much awaited by them. To maintain harmony between *waqif* and the former *waqif*, Religious Court also ordered both parties to propose a new waqif who can preserve the value of the benefits and benefits of *waqf*.

The following display of the decisions of the religious courts is related to the *waqf* dispute at the Jami' mosque, Cukir Village, Diwek District, Jombang Regency. The final decision of the Religious Court was to reject the Plaintiffs' claim, meaning that the land belonged to Tamam which was *waqf*ed to Ta'mir Masjid Jami' Cukir, and the *waqf* was in accordance with the procedure. Then, Religious Appeal Court also upheld the decision of the Jombang PA. The decision is based on Article 49 of UURI Number 03 of 2006. At the highest level, the Supreme Court decided to reject the appeal. The rejection is based on Article 30 of UURI Number 14 of 1985, UURI Number 5 of 2004, UURI Number 3 of 2009, and UURI Number 4 of 2004 (amended by UURI Number 48 of 2009). Then UURI Number 7 of 1989 (amended by UURI Number 3 of 2006), and UURI Number 50 of 2009. Among the considerations of the Supreme Court are that the cassation relates to errors in law application, violations of the law, failure to meet the

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<sup>44</sup> Religious Court's (PA) Decision Number:  
200/Pdt.G/2008/PA.Kab.Kdr dated 18 June 2008.

requirements required by law, and the court is neither authorized nor exceeds the limit.<sup>45</sup>

The efforts of this law-breaking institution clearly show their efforts to protect *waqf* property. What's more, the *waqf* assets have been certified as *waqf* land. As a result, the Supreme Court's decision on this dispute further strengthens the existing *waqf* land certificates. This incident is quite concerning, considering that *waqf* assets that already have a solid legal status are still experiencing disputes in the form of lawsuits. So it can be understood that *waqf* assets that do not have legality yet, could facing various problems that threaten the disappearance of the status of *waqf*. In a particular opinion, securing and protecting *waqf* is part of jihad in the way of Allah SWT or part of guarding religion (*hifz al-din*).

Meanwhile, Religious Court has not issued a final decision Regarding the *waqf* dispute at the Babus Syuro mosque, Jrebeng Lor Village, Kedopok District, Probolinggo City. This condition is due to both disputing parties did not attend the summons from the PA during the trial period. When the lawsuit was filed, the Plaintiffs considered Articles 4 and 5, UURI Number 41 of 2004, and Article 216 of the KHI relating to Waqif's efforts that were not in accordance with the aims and objectives of *waqf*. In essence, the PA asked the PA to cancel Defendant's *nazhirah* (*waqf organizer*) status and asked him to return the certificate of the mosque's *waqf* land.<sup>46</sup>

This incident implies that the *waqif* is worried about the misuse of the *waqf* property that is not in accordance with the *waqif*'s intentions. Understandably, there will be a violation of *waqf* law, even though the

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<sup>45</sup> Religious Court (PA) Decision Number: 266/Pdt.G/2008/PA.Jbg dated 15 December 2008; Religious Appeal Court (PTA) Decision Number: 50/Pdt.G/2008/PTA.Sby dated April 14, 2009; Supreme Court (MA) Decision Number: 690 K/AG/2009 dated January 28, 2010.

<sup>46</sup> Case Regitration: 388/Pdt.G/2009/PA.Prob dated November 6, 2009.

*waqf* asset already has *Waqf Pledge Certificate* when its utilization is outside the corridor that should be obeyed. That's presumably; the *waqif* seeks to protect the assets that are *waqf* through these efforts after showing indications of misuse of the use of *waqf* assets.

The subsequent discussion is regarding the decision on the application for ratification of *waqf* as it took place at the Ma'arif NU Educational Institution, Ngunut Village, Babadan District, Ponorogo Regency. The Religious Court determines the validity of the *waqf* carried out by the *waqif* in accordance with the pledge, purpose, and function. Then the *waqf* assets should be registered with the BPN immediately. The basis for the decision is Articles 32-39 of UURI Number 41 of 2004, Articles 9 and 10 of PP Number 28 of 1977, and Articles 15-16 of PMA RI Number 1 of 1978, as well as Articles 215-229 KHI.<sup>47</sup>

Chairman *Waqif's* initiative to secure *waqf* assets is exemplary. As a *waqif* who has duties and obligations for the *waqf* assets entrusted to him, he must take the proper steps to protect them. In this context, it is legalizing *waqf* assets for the sake of order, convenience in managing assets and continuity in reaping the benefits of their use. It can be seen that *waqif's* desire did not only stop after the property was *waqf* orally or verbally seen by witnesses. However, it must be continued so that the *waqf* is also listed in the land history book in the village, then recorded in the form of *Waqf Pledge Certificate (AIW)/Replacement Certificate of Waqf Pledge Certificate (APAIW)*. Furthermore, it is registered with the authorized agency, and in the end, it is administered and *published* for the public to know. This administration will help create a sense of calm and serenity from feeling worried and confused about the loss of *waqf* assets.

In more detail, for *waqf* assets to be legal in the eyes of national law, it is regulated in Government Regulation Number 42 of 2006 concerning the

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<sup>47</sup> Religious Court (PA) Decision Number: 0031/Pdt.P/2010/PA.PO dated 11 May 2010.

Implementation of RI Law Number 41 of 2004 concerning *Waqf*. Chapter III explains the types of *Waqf* Assets, *Waqf* Pledge Deed, and the Official Making *Waqf* Pledge Deed. The second part concerns the *Waqf* Pledge Certificate (AIW) and Replacement Certificate of *Waqf* Pledge Certificate (APAIW).<sup>48</sup>

Next is an effort to protect *waqf* over *waqf* disputes in Modong Village, Tulangan District, Sidoarjo Regency. Even though the dispute was canceled at the Sidoarjo Religious Court, the East Java PWNU's efforts to do *tabayyun* (clarifying) are exemplary.<sup>49</sup> In addition, coordination and confirmation with PBNU in Jakarta via letter Number: 1890/PW/Tanf/L/IX/2006 dated October 5, 2006. Also, letter Number: 2055/PW/Tanf/L/III/2007 dated March 14, 2007 was issued. The *waqf* assets have been handed over to the local NU, which is under the auspices of PWNU as the Regional Administrator. The effort to carry out the benefits of *waqf* property so that the community can reap it is realized by building a health center. This effort was made because Islamic educational institutions have been established around the *waqf* land. It is ineffective if the *waqf* assets are still intended for the *waqif*. Through deliberation, the 'Defendants' have made a statement essentially diverting the purpose of *waqf*. The primary reference for using *waqf* for health is still in line with Article 22 and Article 40 of UURI Number 41 of 2004. These efforts indicate good intentions for the sustainability and lasting benefits of *waqf* property.

The following events are related to reaffirming the ownership status of *waqf* assets in the *Pesantren Tebuireng* (TBI, Tebuireng Islamic Boarding School) Kwaron Village, Diwek District, Jombang Regency. The

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<sup>48</sup> Ministry of Religion, Directorate General of Islamic Community Guidance, 2006, *Regulation* .... 83.

<sup>49</sup> Not registered in Religious Court (PA) of Sidoarjo based on Chairperson's Letter Number: W.13-A-16/2528/HM.01/XI/2006 dated 14 November 2006.



efforts made by TBI Islamic boarding school caregivers to resolve cases amicably deserve appreciation. In addition to gaining benefits in saving *waqf* assets, it can also provide spiritual awareness for managers who were tempted to master them. Finally, the *management returned the waqf assets* to the TBI Islamic Boarding School sincerely. Deliberation efforts using the 'mediator' of the charismatic Kyai are seen as more effective and efficient. This settlement pattern combines the concepts of mediation and *al-tahkim*. According to KH. Muhsin, that in the TBI Islamic Boarding School, since the era of its founder, *Hadhratus Shaykh* KH. M. Hasyim Asy'ari, commits to maintain and protect *waqf*. In the past, there was Mbah Hasyim's will to his descendants and old students; this was reiterated directly by KH. Yusuf Hasyim on November 11, 1980. According to him, there are three principles will of Kyai Hasyim about Tebuireng that had to be implemented. First, all the land had been donated to Muslims (becomes *waqf* for in the name of Muslim). So, even though the children (Mbah Hasyim) are not allowed to live in the cottage. Second, all the children have been given houses and yards not to disturb the cottage land. Third, the tomb of Kyai Hasyim may not be used for *haul* (an annual commemoration of a person's demise).

KH Muhsin also explained that efforts to protect *waqf* assets are realized in building buildings on Pondok land. The Tebuireng Islamic Boarding School cannot build a house for the founders' family because it has been donated to Muslims. That's why all *dzurriyyah* (big family of KH. Hasyim Asy'ari) are domiciled outside the *Persantren*. Currently, almost 95% of *waqf* assets have been certified. So legally it is strong, and the heirs have nothing to do with being regulated (divided). It was clear that there were no more problems, the descents of Kh. Hasyim Asy'ari never mentioned the land of Pondok.<sup>50</sup>

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<sup>50</sup> Said by KH. Muhsin, Manager of TBI Islamic Boarding School of Jombang, East Java, at TBI Islamic Boarding School's Head Office, February 8, 2011, 15.45-16.30WIB.

Globally, from exposure to the pattern of protection of *waqf* assets through dispute resolution, the positive legal basis used by religious courts in deciding *waqf* disputes that are presented to protect *waqf* assets refers to existing regulations.

### **The Idea of *Waqf* Assets Protection**

Protection of *waqf* property is a necessity. There are many problems with the unclear status of *waqf* assets faced by *nazhirs*, especially in (rural) areas. *Before the birth of the legislation governing waqf*, *Waqif* did not really care about black and white evidence. *Waqf* transactions are carried out based on mutual trust. There is no fear of things that are not desirable. There are several possible reasons they feel enough to rely on mutual trust. First, it is not difficult to find trustworthy people. So, it has not been thought that there will be a lousy possibility related to the status of *waqf* assets. Second, the land value (*waqf*) was relatively cheap at that time, and the land was still so large that there were no worries over land grabs or exchanges (*ruislag/istibdal*). Third, there is a lack of knowledge about the importance of clarity on the status of *waqf* land, so it is rare for people to take care of *waqf* land certificates.

Whatever the cause, the unclear status of assets - especially land - *waqf* contains and invites problems. Likewise, there are no documents that prove the status of *waqf*. The witnesses have also passed away (died or moved places and their whereabouts are unknown). *Waqif's* party may not know the exact origin of the *waqf*. Under these conditions, the *waqf* status should not be allowed to float, so immediately, efforts are made to clarify its status.

Muhsin explained the fact, as released by Abdul Manan that there are still many *waqf* lands that have not been certified and do not have a *waqf* pledge deed. While the *waqif* has long died, this *waqf* land needs to be protected. For the sake of benefit, there should be an

*isbat (determination)* that can provide ratification of the *Waqf Pledge Deed* as material for submitting a *waqf* certificate.<sup>51</sup>

As a first step, efforts need to be made to form a team tasked with collecting as complete information as possible regarding the history and origin of *waqf* and the heirs of *waqif*. This information will become an essential document for the next process, namely the certainty of the status of *waqf* assets. Another effort to minimize the occurrence of *waqf* disputes and anticipate the possibility of *waqf* disputes is the legalization of *waqf* assets by developing *Waqf Pledge Certificate (AIW)* or *Replacement Certificate of Waqf Pledge Certificate (APAIW)*.

Complexly, the existence of this *waqf* law requires the implementation of *waqf* in an orderly manner to provide security guarantees for the *waqf* assets. This security guarantee is indicated by the Elucidation of the Law of the Republic of Indonesia Number 41 of 2004 concerning *Waqf* (Supplement to the State Gazette of the Republic of Indonesia Number 4459). The explanation informs that *waqf* practices have not been entirely orderly and efficient in people's lives. In various cases, *waqf* assets are not adequately maintained, neglected, or turned into the hands of third parties in a way that is against the law. Such a situation is not only due to *Waqif's* negligence or inability to manage and develop *waqf* assets, but also because of the attitude of the people who are less concerned or do not understand the status of *waqf* property, which should be protected for the sake of public welfare in accordance with the purpose, function, and designation of *waqf*.<sup>52</sup>

In this law, there are also various new regulatory points, among others in points (1) and (4) which are stated as follows: (1). In order to create legal order and *waqf* administration for protecting *waqf* assets, this law

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<sup>51</sup> M. Abdul Manan, *Wakaf dan Pemberdayaan Umat*, Jakarta: Sinar Grafika, 2010). 172.

<sup>52</sup> Ministry of Religion, Directorate General of Islamic Community Guidance, *Regulations ....* 40.

emphasizes that *waqf* legal actions must be recorded and stated in the *waqf* pledge deed and registered and announced, the implementation of which is carried out in accordance with the procedures regulated in the laws and regulations governing the *waqf* and must be implemented. This law does not separate expert *waqf* whose management and utilization of *waqf* property is limited to relatives (heirs) and *khairi*, which is intended for the benefit of the general public in accordance with the purpose and function of the *waqf*. (4). To secure the *waqf* property from the interference of third parties that harm the interests of the *waqf*, it is necessary to improve the professional ability of *Waqif*.<sup>53</sup>

An explanation of issues related to *waqf* in the community, of course, needs serious attention from all related parties and concrete and systematic efforts so that there is no need to find disputes over *waqf* assets in the future. According to the author, among others, it is necessary to hold *Gerakan Nasional Legalisasi Aset Wakaf* (GN-LEGAWA, the National Movement for Legalization of *Waqf* Assets) and *Gerakan Nasional Legalisasi Pengelola Wakaf* the (GN-LEGALAW, National Movement for Legalization of *Waqf* Managers), as well as optimizing programs in the field of *waqf* empowerment, particularly the national inventory of *waqf* assets and an online national *waqf* asset database program. The public can access the online national *waqf* database program freely through the online national *waqf* database program. A pro-active attitude should also be put in place for all components related to the management, supervision, and development of *waqf*, either directly or indirectly.

Another effort is to reaffirm the duties of the head of KUA as *Waqf* Pledge Certificate's Maker (PPAIW) that protecting *waqf* property is not an additional task but is part of the main task. Several tasks of the Head of KUA can be supported by Religious Extension Workers in the

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<sup>53</sup> Ministry of Religion, Directorate General of Islamic Community Guidance, *Regulations* .... 41-42.

work unit environment. Humaeni emphasized that a religious counselor's existence amid a pluralistic Indonesian society is very much needed. Functionally these religious instructors can help each other and coordinate with *kyai*, religious leaders, and leaders of Islamic boarding schools in the areas that are the targets of their development.<sup>54</sup> Thus, the tasks and efforts of the government to provide religious services and guidance to the community can be carried out optimally.

Next, it is supported by growing awareness among *waqif* heirs regarding the immortality of the property that has been *waqf*, so that there is no re-emergence of ownership claims against it. Likewise, increasing the competence of *waqif* from traditional behavior to professional *waqif* in protecting *waqf* assets through productive *waqf*. This includes taking an inventory of *waqf* assets. The data includes those lost due to sharia (such as natural disasters) to be reported to BWI and the Ministry of Religious Affairs of the Republic of Indonesia. For parties who are trusted to mediate *waqf* disputes, they should improve their performance professionally and proportionally.

## **Conclusion**

Immovable *waqf* assets dominate the objects of *waqf* disputes that occur in the community. The types of disputes are in disputes and lawsuits at the Religious Courts. The contributing factors consist of the recognition of ownership of the founder's (*waqif*) relatives, adopted children, changes in the intention, the purpose of the *waqf*, and the sale of *waqf* assets. Another thing is the abandonment of *waqf* assets and the lack of guidance from related institutions. While the parties to the dispute include, among others, the heirs, adopted children of the founder (*waqif*), the *waqf* manager/manager, *nazhir*, and

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<sup>54</sup> Ayatullah Humaeni, Zaenal Abidin, 2014, "Pemberdayaan Penyuluh dalam Meningkatkan Pelayanan keagamaan di Kabupaten Lamongan Provinsi Jawa Timur," *Harmoni*, Vol. 13, No. 1, Jakarta, January-April, ISSN: 1412-663X, 139-142.

the beneficiaries (*mauquf 'alaih*). Legally, *waqf* disputes occur in *waqf* assets whose status, among others, is still an oral pledge and is only listed in the Letter C book, a statement letter and not a *Waqf* Pledge Certificate (AIW). Also, notarial deed, *waqf* pledge certificate, and *waqf* land certificate. As for the form of settlement, it tends to be pursued through litigation and a non-litigation process. Cases are resolved through deliberation and mediation facilitated by the panel of judges, court-mediation, authoritative mediator, charismatic mediator (a combination of mediation and *al-tahkim*), and social network mediator. In order to minimize the occurrence of *waqf* disputes and anticipate the possibility of such disputes, it is necessary to: a) Ensure the clarity of the status of *waqf* assets, either by creating *database waqf on-line* both those who already have *Waqf* Pledge Certificate (AIW), Replacement Certificate of *Waqf* Pledge Certificate (APAIW), *waqf* land certificates, cash *waqf* certificates, or those who have not yet; b) The National Movement for the Legalization of *Waqf* Assets Program (GN-LEGAWA) by making *Waqf* Pledge Certificate (AIW), Replacement Certificate of *Waqf* Pledge Certificate (APAIW), and *waqf* land certificates and all related parties consistently, especially the Government in this case the Ministry of Religion, National Land Agency, and Regional Governments; c) The National Movement for the Legalization of *Waqf* Management Program (GN-LEGALAW) to become a legal entity, such as the “*Waqf* Foundation” or the like; d) Productivity and empowerment of waqif by increasing the professionalism of waqif; e) If there is a *waqf* dispute, it is necessary to provide assistance in advocating *waqf* property while still prioritizing the best way for the welfare of the people and the common good.

Some efforts to protect *waqf* assets carried out by *waqf* management institutions are divided into two-time patterns. First, before a dispute appears, the related party of waqf interests should apply for registration of waqf

asset legalization. Second, when a dispute arises, the legal decision of *waqf* assets should be made through the litigation process. Other efforts include declaring *waqf* assets correctly, restructuring waqif, rejecting *waqf* claims, and providing spirituality awareness for *waqf* asset managers. Disputes are resolved through optimizing mediation and with the principle of protecting *waqf* assets. The basis for consideration of the Islamic legal perspective is the value of the common good according to the concept of *maqasid ash-shari'ah* in terms of religion and property protection.

It is time to prioritize mutual interests and benefits jointly by guarding and securing *waqf* assets. Both from the legal status of assets and *waqf* management institutions. Therefore, the partisanship of law enforcement and legal instruments as well as the concern of all components of society towards the sustainability of *waqf* assets, is a necessity. Likewise, there is a need for regulations that specifically regulate *waqf* dispute resolution and the protection of *waqf* assets, such as presidential decrees or even laws. The development, empowerment, and management of waqf assets will be more dynamic in the future. *Waqf* property and its distribution should be in accordance with its objectives and functions and can be an instrument of religious-based community economic empowerment.

## BIBLIOGRAPHY

- Al-Ghazali, Muhammad bin Muhammad Abi Hamid. *al-Wajiz fi Fiqh School of al-Imam al-Shafi'i*, Beirut: Dar al-Fikr, 1993.
- Al-Kabisi, Muhammad Abid Abdullah. *Hukum Wakaf (Waqf Law)*, Translator: Ahrul Sani Fathurrahman, Jakarta: Kuwais Mandiri Cahaya Persada, 2003.
- Edwin Nasution, Mustafa. *et. al, Pengenalan Eksklusif Ekonomi Islam (An Exclusive Introduction to Islamic Economics)*, Jakarta: Kencana, 2006.
- Gunaryo, Achmad. "Mediasi Peradilan di Indonesia (Judicial Mediation in Indonesia)", in Musahadi HAM, (Ed.), *Agama hingga Mediasi Peradilan (Mediation and Conflict Resolution in Indonesia from Religious Conflicts to Judicial Mediation)*, Semarang: WMC IAIN Walisongo, 2007.
- Hadjon, M. Philipus. *Perlindungan Hukum Bagi Rakyat di Indonesia (Legal Protection for the People in Indonesia)*, Surabaya: Development of Science, 1987.
- Humaeni, Ayatullah & Abidin, Zaenal. "Pemberdayaan Penyuluh dalam Meningkatkan Pelayanan keagamaan di Kabupaten Lamongan Provinsi Jawa Timur" (Empowering Extension Officers in Improving Religious Services in Lamongan Regency, East Java Province". *Harmoni journal*, Vol. 13, No. 1, Jakarta, January-April, 2014 ISSN: 1412-663X, 139-142.
- Jamil, M. Mukhsin. "Resolusi Konflik: Model dan Strategi (Conflict Resolution: Models and Strategies" in M. Mukhsin Jamil, (Ed.), *Mengelola Konflik Membangun Damai; Teori, Strategi dan Implementasi Resolusi Konflik (Managing Conflict Building Peace; Theory, Strategy and Implementation of Conflict Resolution)*, Semarang: WMC IAIN Walisongo, 2007.
- Kubasek, NK, and GS Silverman. *Environmental Law*, New Jersey: Prentice Hall Upper Saddle River, 1997.
- Ma'luf, Louis. *al-Munjid fi al-Lughah*, cet. 36, Beirut: Dar al-Mashriq, 2000



- Manan, Abdul. *Teori dan Praktek Ekonomi Islam (Theory and Practice of Islamic Economics)*, Editor: Sonhadji, et al, Yogyakarta: PT. Waqf Bhakti Fund, 1995.
- Manan, M. Abdul. *Wakaf dan Pemberdayaan Umat "Islamic Endowments and Empowerment of the People"*, Jakarta: Sinar Graphic, 2010.
- Ministry of Religious Affairs of the Republic of Indonesia. Directorate General of Islamic Community Guidance,. *Peraturan Perundangan Perwakafan (Waqf Regulation)*, Jakarta: Depag Press, 2006.
- Mubarok, Jaih. *Wakaf Produktif (Productive Waqf)*, Bandung: Refika, 2008.
- Rahardjo, Satjipto. *Pendidikan Hukum Sebagai Pendidikan Manusia (Legal Education as Human Education)*, Yogyakarta: Genta Publishing, 2009.
- Rohmad, Abu, 2008. *Paradigma Resolusi Konflik Agraria (Paradigm of Agrarian Conflict Resolution)*, Semarang: Walisongo Press.
- Ruhu, Syahid Thoha, 2010. *Revolusi Perwakafan dalam Perspektif Hukum Agraria Indonesia (Revolution of Waqf in Perspective of Indonesian Agrarian Law)*, Surabaya: LWP NU East Java Press.
- Salim HS, 2010. *Perkembangan Teori dalam Ilmu Hukum (Development of Theory in Legal Studies)*, Jakarta: Rajawali Press.
- Sukarto, *Resolusi Sengketa Tanah Wakaf di Kabupaten Kendal (Resolution of Waqf Land Disputes in Kendal Regency)*, (unpublished master thesis). Semarang, PPs Walisongo Press, 2006.
- Supreme Court of the Republic of Indonesia, *Providing Justice to The Justice Seeker: A Report on The Indonesian Religious Court Access and Equity Study-2007, Summary of Research Findings*, Jakarta: Supreme Court and AusAID, 2008.
- Syarkowi, Asmu'i. "Kompetensi Peradilan Agama di Indonesia: Sebuah Tinjauan Singkat dari Aspek Sejarah Hukum," (Competence of Religious Courts in Indonesia: A Brief Overview of Aspects of Legal

History,” journal of *Mimbar Hukum*, Vol XVI, January-February, ISSN: 0853-3687, 36-38. 2003.

Thahir Azhary, Muhammad. *Negara Hukum; Suatu Studi Tentang Prinsip-Prinsipnya dilihat dari Segi Hukum Islam, Implementasinya Pada Periode Negara Madinah dan Masa Kini (The rule of law; A Study of Its Principles from the Viewpoint of Islamic Law, Its Implementation in the Medina State Period and the Present)*, Jakarta: Kencana, 2010.

Tiba'ah al-Mushaf ash-Sharif, *the Qur'an and its translation* (Medina: Mujamma' Khadim al-Haramain ash-Syarifatain al-Malik Fahd, 1411 H), p. 109.

### **Court's Decision on Legal Cases**

Decision of PA Number: 116/Pdt.P/1991/PA.NGJ dated May 6, 1991.

Decision of PTA Number: 40/1991/Pdt.G/PTA.SBY dated March 25, 1992.

Supreme Court Decision Number: 61 K/AG /1993 dated March 30 1994.

PA Decision Number: 996/Pdt.G/1996/PA.Sby dated July 28 1997.

PTA Decision Number: 04/Pdt.G/1998/PTA.Sby dated February 16 1998.

Supreme Court Decision Number : 57 K/AG/1999 dated April 20 2000.

PA Decision Number: 1140/Pdt.G/1997/PA.Sby dated August 21 1998.

PTA Decision Number: 79/Pdt.G/1999/PTA.Sby dated April 22 1999.

Supreme Court Decision Number: 473 K/AG/1999 dated April 17 2003.

PA Decision Number: 3407/Pdt.G/2007/PA.Kab.Mlg dated September 2 2008.

PA Decision Number: 200/Pdt.G/2008 /PA.Kab.Kdr dated June 18, 2008.

Decision of PA Number: 266/Pdt.G/2008/PA.Jbg dated December 15, 2008.

Decision of PTA Number: 50/Pdt.G/2008/PTA.Sby dated April 14, 2009  
Number : 690 K/AG/2009 dated January 28, 2010.  
Registrar of Cases Registrar's Office Number: 388/Pdt.G/2009/PA.Prob dated al November 6 2009.  
Decision of the PA Number: 0031/Pdt.P/2010/PA.PO dated May 11 2010.  
Letter of the Chairperson of the PA Number: W.13-A-16/2528/HM.01/XI/2006 dated November 14 2006.

### **Other informations**

Interview KH. Muhsin, Manager of TBI Islamic Boarding School Jombang, East Java, at TBI Islamic Boarding School Head Office, February 8, 2011, 15.45-16.30WIB and Wednesday, September 29 2010, 17.00-17.45 WIB.

Interview Dra. Hj. Chairussakinah Ady, PTA Law Committee Surabaya, February 8, 2011.

Interview with M. Irhas Syairozi, the regional head of the East Java PWNU Land and *Waqf* Institution, emphasized that this was also due to the lack of socialization of Law Number 41 of 2004 concerning *Waqf*. (delivered at the meeting of the LWP PWNU JATIM management, September 25, 2010 at the PWNU JATIM office, 16.30-17.15 WIB).

Presentation of Saifullah Yusuf, Chairman of BWI East Java at the Regional Working Meeting of the PW LWP NU East Java at the Pasuruan Regency DPRD Building, Sunday October 3 2010, at 11.30 WIB.