

The Uniqueness of Waqf Land Disputes Resolution Denied by Some Heirs

(Case Study of Waqf in Pondok Pesantren X Jombang Jawa Timur)

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Abstract:

This paper discusses a handover of land for waqf from Mrs. Setyowati (a pseudonym) to Pondok Pesantren X (a pseudonym) around 1993-1998 in Jombang, East Java which is done not in front of a Waqf Pledge Deed Official or Pejabat Pembuat Akta Ikrar Wakaf (PPAIW). The waqf done by wakif had not been registered as waqf land at Office of Religious Affairs or Kantor Urusan Agama (KUA), a substitution deed is required, because the wakif has passed away. During the certification process, some heirs chose to deny the waqf done by their mother due to economic factor and the waqf around 1993—1998 contain a legal flaw. The nazhir chose nyusuki to the heirs as a form of dispute resolution because it is considered a win-win solution. This research is empirical juridical research. This research shows that the act of nyusuki by the nazhir is an effective form of waqf dispute resolution in an amicable manner due to the denial of the waqf by some heirs of the wakif. Although it violates the waqf rules in Indonesia, there are benefits that arise from the act of nyusuki, namely contributing to the smooth development of new educational unit of Pondok Pesantren X so that waqf purpose can be achieved.

Keyword: Disputes; Waqf Land; Nyusuki; Win-win solution; Masalah

Abstrak:

Paper ini membahas perwakafan tanah dari Bu Setyowati (nama samaran) kepada Pondok Pesantren X (nama samaran) pada tahun 1993-1998 di Jombang, Jawa Timur. Perwakafan tidak dilakukan di depan Pejabat Pembuat Akta Ikrar Wakaf (PPAIW). Perwakafan yang telah dilakukan oleh wakif belum terdaftar sebagai tanah wakaf di Kantor Urusan Agama (KUA), diperlukan Akta Pengganti Akta Ikrar Wakaf (APAIW) karena wakif telah meninggal dunia apabila akan melakukan sertifikasi tanah wakaf. Dalam proses sertifikasi tanah wakaf, beberapa ahli waris wakif memilih untuk mengingkari wakaf yang telah dilakukan oleh ibu mereka dikarenakan faktor perekonomian dan perwakafan yang terjadi sekitar tahun 1993-1998

mengandung kecacatan hukum. Nazhir memilih nyusuki kepada ahli waris wakif sebagai bentuk dari penyelesaian sengketa karena hal tersebut dianggap sebagai win-win solution. Penelitian ini merupakan sebuah penelitian yuridis empiris. Hasil dari penelitian ini menunjukkan bahwa tindakan nyusuki yang dilakukan oleh nazhir merupakan salah satu bentuk penyelesaian sengketa wakaf yang efektif secara musyawarah karena pengingkaran wakaf yang dilakukan oleh ahli waris wakif secara damai. Meskipun hal tersebut melanggar peraturan perwakafan di Indonesia, terdapat manfaat yang timbul dari tindakan nyusuki, yaitu berkontribusi pada kelancaran pembangunan unit pendidikan baru dari Pondok Pesantren X sehingga tujuan dari perwakafan yang dilakukan oleh wakif dapat dilaksanakan.

Kata Kunci: *Sengketa; Wakaf Tanah; Nyusuki; Win-win Solution; Maslahah*

Introduction

Social issues have long been a very important concern in the teachings of Islam. Islam teaches people to help each other among them. One of the social problems that concern Islamic teachings is the welfare of society both in the social and educational fields, politics, economics, and others. *Waqf* is one of the instruments of Islamic teachings related to the welfare of society. *Waqf* has played a major role in improving the welfare of the community in various fields. One of them in the field of education, several educational institutions gave birth to many scholars and scholars such as Al-Azhar University in Cairo, Egypt, Zaitunyah University in Tunis, Nizamiyah University in Baghdad, and thousands of Madaris Imam Lesesi in Turkey. Success in the management of *waqf* as a source of funds that makes these institutions can develop and last a long time. Al-Azhar, for example, successfully manages and develops *waqf* treasures, so that it has a very large *waqf* treasure and other businesses (Djunaidi and Al-Asyhar 2006:5)

Waqf in Indonesia itself has a very large role in providing funds for the development of educational institutions. The *waqf* land handed over to Islamic Boarding School (Pondok Pesantren) has been able to increase the existence of Islamic Boarding School. *Waqf* land is very helpful to be used as a source of funds for the development of an institution or educational institution. Many formal institutions under Islamic community organizations such as Nahdlatul Ulama, Muhammadiyah, and others, are growing and developing from *waqf* land.

Some examples of educational institutions that utilize the management of waqf assets as a source of funds are the Pondok Pesantren Modern (Modern Islamic Boarding School) Gontor Ponorogo Waqf Agency, the Indonesian Islamic University Waqf Agency (BWUII) Yogyakarta, Daarut Tauhid Bandung Foundation, and The Kyai Haji Mohammad Hasyim Asy'ari's Pondok Pesantren Tebuireng Jombang (Hermawan 2014:148)

Most Indonesians carry out waqf based on shafi'iyah understanding and local customs. Before the enactment of Law No. 5 of 1960 on The Basic Rules of Agrarian Principals and Government Regulation No. 28 of 1977 on Land Acquisition, Indonesian people still use religious habits such as the habit of doing legal acts of land administration orally based on mutual trust in a certain person or institution, the habit of viewing waqf as a pious deed that has noble value before God without having to go through procedures. Administrative and waqf property is considered to belong to Allah alone and that anyone will not dare to interfere with the defendant without Allah's permission (Djunaidi and Al-Asyhar 2006:47). The implementation of waqf land orally without recording can cause disputes, such as land ownership disputes. This is because after the Ijab Kabul waqf is done, the land itself has switched ownership. Due of the absence of administrative or recording processes, the waqf land is very easy to manipulate. As a result, the existence of waqf land that has been submitted by wakif, both to religious institutions and social institutions, cannot be known by the public, because it is not recorded on the waqf pledge deed and is not registered with the competent government agency. Likewise, the results of waqf land that should be used for the development of education, society, places of worship, and the economy of Muslims cannot be implemented. This happens because there is no data on waqf land transparently and the waqf lands are disputed in the community (Abdullah 2019:2). In the past, the arrangement of the representation of this property was not regulated in such a way in the form of a law that facilitated deviations from the nature and purpose of waqf itself. The main deviation of waqf purpose is caused by the form of representation (family waqf, general waqf) and the absence of the obligation to register waqf property. This caused many waqf treasures that are no longer known to exist. In addition, there is a case of the property that is represented as if it already belongs to the heirs of the waqf treasure manager himself (*nazhir*) (Halim 2005:92–93).

Research on the case of representation, especially representation on the withdrawal of waqf with the comparison of four schools on the withdrawal of waqf land conducted by Huriyah Mawaddah, with the title "Analisis Perbandingan Empat Madzhab tentang Penarikan Wakaf" (Mawaddah 2018:4). The difference between this research and Huriyah Mawaddah lies in the object of the research and the problems raised. Huriyah Mawaddah analyzed waqf in general, while this study focuses on analyzing waqf withdrawal cases that occurred at Pondok Pesantren X in Jombang. Huriyah Mawaddah raised the issue of the comparison of four madzhab related to the recall of waqf while this study focused on the uniqueness of the settlement of waqf cases outside the court using *nyusuki* methods. Research on the withdrawal of waqf property was also conducted by Putri Mega Lestari, under the title "Tinjauan Hukum Islam dan Hukum Positif terhadap Penarikan Harta Wakaf (Studi di Kelurahan Kasemen Kecamatan Kasemen)" (Lestari 2021:5). The difference in this research with Putri Mega Lestari is related to the research object and the issues raised. The object of Putri Mega Lestari's research is in Kasemen Village of Kasemen Subdistrict, while this study takes a case study of representation that occurred in Pondok Pesantren X. The issues raised by Putri Mega Lestari are related to the view of Islamic law and positive law on the withdrawal of waqf property, while this research focuses on the uniqueness of settlement of cases waqf outside the court using the *nyusuki* method. In addition, there is a journal written by Muhammad Rifqi Hidayat and Parman Komarudin with the title "Penyelesaian Sengketa Wakaf melalui Jalur Litigasi dan Non-Litigasi" (Hidayat and Komarudin 2020:184). The difference between this study with Muhammad Rifqi Hidayat and Parman Komarudin is that this study focuses on resolving waqf disputes outside the court related to the denial of waqf land carried out by some heirs by *nyusuki* method, while Muhammad Rifqi Hidayat and Parman Komarudin discuss waqf land disputes in general and their settlement in general, litigation or non-litigation.

In the case study raised in this study, the Pondok Pesantren X (pseudonym) has a Notary Establishment Deed No. 134 on April 28, 1983 (Abdul Ghofar, personal communication, November 2020). Around 1993-1998 Pondok Pesantren X received agricultural waqf land from Mrs. Setyowati (pseudonym) covering an area of 1.5 hectares located in Kesamben Village, Kesamben Subdistrict, Jombang Regency which is still in the

form of petok D. Waqf carried out by Mrs. Setyowati as a person who represented the land (*wakif*) to Pondok Pesantren X as the recipient of waqf (*nazhir*) was not done in front the Officer of The Waqf Pledge Deed (PPAIW). In 2019, Pondok Pesantren X plans to set up a new education unit on the waqf land of Mrs. Setyowati. Because at the time of the representation is not in front of PPAIW and 2019 *wakif* has died, it must be issued a Deed of Replacement of waqf Pledge Deed (APAIW) by Article 31 of Government Regulation No. 42 of 2006 concerning The Implementation Regulation of Law No. 41 of 2004 on Waqf as an administrative condition of waqf land certification. At the time of the waqf land certification process carried out by *nazhir*,³ (three) of the 11 (eleven) heirs of *wakif* wanted the land that had been represented by *wakif* to be used as an inheritance that could be divided based on the rights of each heir of *wakif*. The reason 3 (three) heirs who want the withdrawal of waqf land or waqf denial and used as heritage land is an economic problem that is being experienced by the three heirs. Pondok Pesantren X as a *nazhir* chose to resolve the dispute by *nyusuki* (Javanese word meaning to replace with money on waqf land that are on dispute) by the 3 heirs because they wanted the problem to be resolved immediately for the construction of a new education unit Pondok Pesantren X (Abdul Ghofar, personal communication, November 2020). Based on the problems that have been described above, an interesting thing to study further is the uniqueness of the settlement of waqf cases in a way that prioritizes benefits even in violation of applicable laws and *regulations*.

Research Methods

Empirical juridical law research is research that uses secondary data as preliminary data then continued with primary data or data obtained directly in the field or against the public (Soekanto 1986:52). This research was conducted by combining primary data obtained through interviews with sources and respondents followed by secondary data sourced from library materials (Soekanto and Mamudji 2007:13). Secondary data in this study were obtained from primary, secondary, and tertiary legal materials (Soekanto 1986:52). Furthermore, the primary data is further analyzed with secondary data. Secondary data consists of primary, secondary, and tertiary legal materials. Primary legal materials are legal materials that are binding, namely basic norms or rules, basic rules, laws and regulations, uncodified regulations, jurisprudence,

treaties, legal materials from the Dutch colonial period that until now are still valid (Soekanto and Mamudji 2007:52). Secondary legal material is material that provides further explanation of primary legal materials e.g., draft legislation, research results, and the work of practitioners or academics in the field of law (Soekanto 1986:52). Tertiary legal material is a material that provides instructions and/or explanations of primary and secondary legal materials (Soekanto 1986:52). The data collection techniques use literature research and field research. Literature research is done by examining literature obtained from the library both in the form of books, journals, archives, and documents, so that the problem can be resolved through research after understanding existing theories. Field research is conducted through in-person or face-to-face interviews with related parties to collect data. The data analysis technique used in this research is qualitative analysis. Qualitative analysis techniques are a way of research analysis that produces descriptive analysis data. Meanwhile, descriptive analysis data is data expressed by respondents both orally and actions that are further studied as a whole entity. In this case, it must be determined which data and legal materials have quality as data and which cannot be used as data because it is not relevant to research (Mukti and Yulianto 2010:192). This research combines field data and literature. The results of the study are then presented in a descriptive way that explains the results of data obtained in the field and then studied with laws and regulations, books, journals, thesis, and thesis that has been there before. The results of combining these data resulted in a conclusion from the study.

Finding and Discussion

Waqf has enormous potential to be managed and developed for the benefit of the people. But this great potential has not been directly proportional to the orderly and professional management of waqf administration. Therefore, waqf that is not properly registered administratively has the potential to generate potential conflicts or disputes in its management. Land representation in Indonesia is regulated in Law No. 41 of 2004 on Waqf, Law No. 5 of 1960 on Basic Rules of Agrarian Principals Article 49 paragraph (3) which reads "Land acquisition is protected and regulated by Government Regulations". In addition, waqf arrangements are also supported by Government Regulation No. 28 of 1977 on Land Acquisition.

In the Islamic view, land ownership when the land has been represented no longer belongs to the person in charge (*wakif*) or moved into the property of the person who received waqf. Waqf assets have been separated from *wakif* ownership since the waqf pledge was implemented, which then belongs to Allah SWT whose benefits can be managed for the benefit of the people. Thus, waqf assets become the mandate of Allah SWT to individuals or legal entities to manage for the benefit of the people (Wicaksono 2020:329–30).

Since 2000, waqf has attracted great attention from the Indonesian community, from practitioners, academics, and the government. This condition is seen from the emergence of discussions in printed and electronic mass media related to the importance of waqf empowerment for various purposes of the ummah such as education, health, community economic empowerment, and many other sectors. Indonesia has regulations following the provisions of Islamic law, such as Law No. 41 of 2004 on Waqf. There are several important advances in the development of waqf in Indonesia after the regulation, namely:

- a. Expansion of waqf objects, including cash waqf in the form of money that is expected to be a potential source of waqf wealth that can synergize with property waqf
- b. Establishment of the Indonesian Waqf Agency (BWI) as an independent institution responsible for the management and development of national waqf.

Indonesia waqf land data according to the Indonesian Waqf Agency or Badan Wakaf Indonesia (BWI) in 2019 covering an area of 111,481,173 square meters. Unfortunately, the waqf asset has not been utilized optimally because there is no Waqf Pledge Deed or Akta Ikrar Wakaf (AIW) or has not been recorded administratively. Therefore, most waqf land leads to conflict between *waqf* heirs with *nazhir* or *nazhir* management conflicts with the community (Rosadi, Effendi, and Busro 2013:12–13). There are three main causes of problems in representation in Indonesia, namely regulators, *nazhir*, and *wakif*. *Nazhir* is considered the most problematic part of waqf. Regulators are considered problematic due to the lack of legal socialization related to waqf. *Wakif* is considered problematic because there are still many Indonesian people who do not have good knowledge about waqf and the regulations governing it in Indonesia (Huda 2017:50).

1. Waqf Dispute Resolution According to Laws and Regulations

a. Dispute resolution through litigation

Waqf dispute resolution is the jurisdiction of the Religious Court. This is based on Law No. 3 of 2006 concerning Changes to Law No. 7 of 1989 Article 49 which states that the Religious Court is in charge and authorized to examine, decide, and resolve cases at the first level between people who are Muslim in the field of:

- 1) Marriage;
- 2) Heirs;
- 3) Will;
- 4) Grants;
- 5) Waqf;
- 6) Zakat;
- 7) Infaq;
- 8) Shadaqah; and
- 9) Sharia economy.

The table below shows how to resolve disputes based on other waqf laws and regulations applicable in Indonesia

Table 1

Waqf Dispute Resolution Based on Waqf Laws and Regulations in Indonesia

Laws and Regulations	Explanation
Law No. 41 of 2004	<p>Article 62 paragraph (1): The resolution of the dispute is taken through deliberation to reach a consensus.</p> <p>Article 62 paragraph (2): If the resolution of the dispute referred to in paragraph (1) is unsuccessful, the dispute may be resolved through mediation, arbitration, or the court.</p>

Government Regulation No. 28 of 1977	Article 12: Resolution of disputes if the issue of land acquisition is distributed through the local Religious Court by the provisions of applicable laws and regulations.
Compilation of Islamic Law	Article 226: Settlement of disputes if the issue of waqf and <i>nazhir objects</i> , submitted to the local Religious Court by the provisions of applicable laws and regulations.

Note. Reprinted from *Law No. 41 of 2004, Government Regulation No. 28 of 1977, and Compilation of Islamic Law.*

Based on Table 1, it can be seen that Government Regulation No. 28 of 1977 concerning The Representation of Property and Compilation of Islamic Law does not provide the option of resolving waqf disputes outside the Court. This is different from Law No. 41 of 2004 on Waqf which prioritizes the resolution of waqf disputes by consensus deliberation. If it does not reach an agreement, it is resolved through mediation, arbitration, and court by Article 62 paragraph (1) and (2) of Law No. 41 of 2004 concerning Waqf. This is in line with Law No. 7 of 1989 concerning Religious Justice Article 56 states that (1) the Court should not refuse to examine and decide a case filed on the pretext that the law is not or is less clear but is obliged to examine and break it. (2) the provisions referred to in paragraph (1) do not rule out the possibility of peaceful settlement of the case.

b. Dispute resolution through non-litigation

Out-of-court dispute resolution methods that result in agreements from the parties involved are considered capable of maintaining good relations that run between the parties before the dispute occurs, during the dispute until after the dispute occurs. Settlement of disputes through the courts places the parties to the dispute on two opposing sides, namely placing one party as the winner and the other party as the losing party. The winning position of defeat does not cause peace and tranquility but arises resentment and hatred. Thus, out-of-

court dispute resolution is an effective and efficient alternative to resolving disputes. The parties to the dispute sit together, formulating a way out to end differences in interests.

Settlement of waqf property disputes can be reached with the following stages:

1) Do deliberation to reach the agreement. Deliberations to deal with disputes can also be done simply by only being attended by both parties to the dispute (Islamiyati 2019:233).

The Qur'an is mentioned in QS. Ashura verse 38 has the meaning:

"And (for) those who accept (obey) the cry of their Lord and establish prayers, while their affairs (are decided) by deliberation between them; And they gave them some of the sustenance we gave them."

2) If deliberations do not result in an agreement, the dispute can be resolved through mediation with the help of third parties agreed by the parties to the dispute as mediators.

The mediation referred to here certainly does not include mediation organized by the Religious Court before the first session (Syufa'at 2018:31). Mediation is carried out as the Qur'anic teaching on Islah's efforts against spousal quarrels in QS. An-Nisa verse 35 which has the meaning:

"And if you are afraid of a dispute between the two, then send a hakam from the male family and a hakam from the female family. If the two men intend to make improvements, Allah will tell the husband and wife. Surely Allah knows all the knowledge."

In the implementation of the waqf mediation dispute in the Indonesian Waqf Board of Representatives in East Java there are 5 steps (Widaputri 2020:48) :

- a) Parties who feel cheated submit a report letter to the Indonesia Waqf Board of Representatives in East Java
- b) Reporting letter goes to the Indonesian Waqf Board
- c) Indonesian Waqf Board Representative in East Java invites parties involved in the management of disputed waqf property
- d) There will be a process of deliberation or discussion between the parties in the dispute with the Indonesian Waqf Representative Body of East Java as a third party
- e) The Indonesian Waqf Board concludes the results of the discussion then provides neutral input as a third party, then the conclusion is returned to the parties to the disputes.

3) If the mediation process also does not provide the decision desired by the parties, the next path that can be taken is through arbitration with the help of BASYARNAS or Badan Arbitrase Syariah Nasional (National Sharia Arbitration Agency) as an *Islah* institution that can resolve civil disputes outside the judiciary. The method of settlement through arbitration is rarely done in waqf disputes. Because arbitration is more often used in the resolution of trade disputes (Hendrawati, Dewi, and Islamiyati 2018:75).

The resolution of waqf disputes through non-litigation channels is also contained in Article 62 of Law No. 41 of 2004 on Waqf, but the rule only describes globally related to the settlement of waqf disputes through non-litigation channels. In addition, in general, the procedures or procedures for resolving disputes through non-litigation channels (covering disputes outside of dispute representation) have been regulated in Law No. 30 of 1999 on Arbitase and Alternative Dispute Resolution. Article 1 paragraph (10) of Law No. 30 of 1999 on Arbitase and Alternative Dispute Resolution states that Alternative Dispute Resolution is a dispute resolution institution or difference of opinion through procedures agreed by the parties, namely out-of-court settlement using consultation, negotiation, mediation, conciliation, or expert assessment. The rule does not specifically mention the settlement of waqf disputes. Though waqf has its characteristics such as treasures that have been represented its benefits are used forever and the principle of holding waqf property belongs to Allah SWT. Therefore, Law No. 30 of 1999 on Arbitase and Alternative Dispute Resolution is considered less applicable in the resolution of waqf disputes (Islamiyati 2019:234).

Ijma' ulama as the third source of Islamic law has strengthened the existence of Islamic Arbitration Institutions to anticipate disputes between the parties in various aspects of life. The resolution of disputes after the death of the Prophet (peace be upon him) was done by reconciling the parties through deliberation and consensus between the parties so that it became jurisprudence of Islamic law in some cases. The existence of *Ijma'shababah* or *ulama* is highly appreciated because not all social problems and developments are listed and the Qur'an and Sunnah in detail. Umar ibn Khattab once said, that: "reject hostility until they make peace, for the termination of the case through the court will develop malice between them" (Suwartono 2014) (Anshori 2010:84).

The settlement of disputes outside the court pursued by *nazhir* is deliberation for consensus. Dispute resolution conducted by *nazhir* is categorized as deliberation for consensus due to the absence of a third party as a mediator or arbitrator in the settlement of waqf land disputes between *nazhir* and *wakif heirs*. The dispute resolution process was carried out with one of the managers of Pondok Pesantren X meeting with the heirs of *wakif* for deliberation related to the waqf land dispute. After going through the deliberation process, the heirs of *wakif* and the manager of Pondok Pesantren X agreed to do *nyusuki*. Then the manager of Pondok Pesantren X conducted deliberations with the caretaker of Pondok Pesantren X in Jombang. After the caretakers of Pondok Pesantren X in Jombang approved *nyusuki* action, the caretaker of Pondok Pesantren X in Jombang and the heirs of *wakif* negotiated the price of land disputed by the heirs of *wakif* (Abdul Ghofar, personal communication, November 2020).

2. *Nyusuki* Method as *Nazhir's* Choice for Waqf Dispute Resolution

The denial of waqf land carried out by some *wakif* heirs (Bu Setyowati) which is three out of eleven heirs is caused by three of the eleven heirs *wakif* is experiencing shortage or economic difficulties. *Nazhir* took the method of replacing waqf land from *wakif* with a sum of money that was equal to *wakif* waqf land to three *wakif* heirs who did denial. The method of replacing waqf land from *wakif* with a certain amount of money is called the *nyusuki* method by *nazhir*. *Nyusuki* method is considered a *win-win solution* between the three *heirs wakif* with *nazhir*. *Nazhir* did *nyusuki* with the intention of alms to the heir's *wakif* because at that time it was experiencing economic difficulties. When viewed from the reasons of the three *wakif* heirs who do the denial of waqf land due to economic conditions, then the *nyusuki* method is one of the most effective ways to resolve this waqf land dispute. In addition, for *nazhir*, this method was chosen as an alternative to out-of-court dispute resolution because it is considered as one way to reduce the problem so that it does not widen to the green table. When viewed from the point of view of *nazhir*, then the *nyusuki* method is considered effective to maintain the good name of the foundation (Masrokhin, personal communication, December 2020). This is in line with Article 62 paragraph (1) of Law No. 41 of 2004 does regulate the resolution of waqf disputes using consensus deliberation. In addition, the *nyusuki* method is considered as the greatest of *nazhir* heart to the heirs so that rights and obligations as *nazhir* can still be

implemented and the waqf land can be immediately managed as one of the new education units of Pondok Pesantren X in Jombang. The *nazhir* action was carried out based on QS. Al-Hujurat verse 9 which means (Anshori 2010:84).

"If two of the believer's fight, peace them. But if one of the two (groups) applies persecution (wanprestasi) against the other, then go the one who persecutes until he returns to the way of Allah SWT. But when he has returned, peace them justly, and act righteously, God loves those who are just."

Nyusuki action which is considered as alms by *nazhir* when reviewed whether *nyusuki* can be categorized as alms or not can be studied through the understanding of alms, the law of carrying out alms, and the virtues of doing alms (Achmad Cholili, personal communication, December 2020). The definition of alms is that every good deed, in general, is both material and non-material (Arifin 2010:185). The understanding of alms is also contained in Law No. 23 of 2011 on Zakat Management which states that alms is property or non harta issued by a person or business outside zakat for public benefit. Almsgiving is not limited by special provisions as is the case with zakat and infak. Law No. 23 of 2011 on Zakat Management also does not regulate special provisions related to almsgiving. The law of almsgiving is a highly recommended circumcision, as the Hadith of The Muslim History, the Prophet (peace be upon him) said (Arifin 2010:185):

"In every morning, in every joint section of you has the right, that is alms, every tasbih is alms, every *tahmid* is alms, every *tablil* is alms, every *takbir* is alms, *amar makruf* including alms, then that prevents from harm including alms, then that is sufficient is the prayer of two *rakaat*."

Virtues of Almsgiving (Arifin 2010:185):

- a. Cleaning up treasures, growing up treasures
- b. Increase age, reject calamity, and reject evil
- c. Saving from hell
- d. To be a member of almsgiving on the Day of Resurrection
- e. Alms can close the error.

If the intention of *the nazhir* to do *nyusuki* is almsgiving, then the good intentions are not to blame (Achmad Cholili, personal communication, December 2020). Alms themselves

do not have any special provisions as mentioned above. His intention is not only an expression with the mouth but also the existence of a will. If there is no will, then verbal expressions mean nothing. As with the intention in prayer, if only limited to speech without the intention of expecting the pleasure of Allah SWT, then the prayer is completely meaningless (Ghazali 2019:25).

However, there is an opinion that states that *nyusuki's* actions carried out by *nazhir* are not justified even though it includes the resolution of disputes outside the court, namely consensus deliberation. Deliberation to violate the law is not allowed (Haniah Ilhami, personal communication, December 2020). This opinion is reinforced by the Hadith of Tirmidhi, Ibn Majah, al-Hakim, and Ibn Hibban, saying that the Prophet (peace be upon him) said (Anshori 2010:83): "The agreement between the Muslims is permissible, except for the covenant that justifies the haram and prohibits the halal." *Nyusuki* is seen as an act of buying and selling waqf land between *nazhir* and *wakif heirs*. The sale and purchase of waqf land are prohibited by scholars and Indonesian waqf laws and regulations.

Some opinions of scholars related to the law of buying and selling waqf objects there are differences of opinion. Hambali allows selling mosques for reasons that cause the sale and purchase of mosques such as residents around the mosque to move and it is no longer useful, so non-mosque objects have the same law if there are reasons that cause the sale and purchase of non-mosque objects. Shafi'i said that selling and replacing waqf goods under no circumstances should the law, even against special waqf such as waqf for one's descendants, although there are one thousand and one reasons for buying and selling waqf objects are still not allowed. While Maliki said that waqf can be sold in three circumstances, namely:

- 1) Wakif requires that the goods represented be sold so that the requirements he sets must be followed;
- 2) The goods represented include the type of moving goods and no longer fulfill the purpose of their representation. The sale price can be used for similar objects or commensurate with it.

- 3) I motionless goods can be sold to expand mosques, roads, and cemeteries. As for other purposes should not be sold, even until the item is damaged and does not work though (Departemen Agama Republik Indonesia 2013:15).

Imam Hanafi stated the ability to replace all forms of waqf goods, both general and special, except mosques. Imam Hanafi mentions three things:

- 1) The Wakif requires that when it comes to representation.
- 2) Waqf goods have turned into useless items.
- 3) If the replacement is a more useful and more profitable item, and there is no requirement for it (Departemen Agama Republik Indonesia 2013:15).

Imamiyah scholars agree that public waqf objects (*kebhairi*) such as mosques, boarding schools, and cemeteries should not be sold. But there are differences of opinion about the law of buying and selling general waqf (*kebhairi*) and special (*experts*) among imamiyah scholars. Some of the reasons waqf treasures can be sold are:

- 1) When waqf no longer provides benefits following the purpose of its representation.
- 2) Waqf objects are in a state of disrepair.
- 3) If *wakif* requires that if the *nazhir* waqf is disputed or the waqf goods are of little result, should the waqf goods be sold only or suggest things that do not justify the haram or prohibit halal, then the requirement must be followed;
- 4) In the event of a dispute between *the nazhir* which is feared will cause fatalities and is impossible to resolve except by selling the goods.
- 5) If possible, by selling damaged waqf goods can fix other parts of the sales price (Departemen Agama Republik Indonesia 2013:15).

The scholars allow the sale and purchase of land with certain conditions or reasons. Even Imam Shafi'i strictly forbids selling and replacing waqf goods under any conditions, although there are one thousand and one reasons to buy and sell waqf objects are still not allowed. Meanwhile, based on the case of disputes that occurred between *Nazhir* and the heirs of *wakif* (Bu Setyowati) do not meet the conditions or reasons a waqf object can be traded.

Nyusuki's actions fall into the category of unlawful waqf land purchases (Haniah Ilhami, personal communication, December 2020). Such actions violate Article 11 of Government

Regulation No. 28 of 1977 concerning The Representation of Property Land and can be punished with criminal penalties by Articles 14 and 15 of Government Regulation No. 28 of 1977 concerning The Representation of Property Land. Article 14 states that whoever commits an act in violation of the provisions in question as Article 5, Article 6 paragraph (3), Article 7 paragraph (1) and (2), Article 9, Article 10 and Article 11, is punished with a prison sentence of three months or with as much as Rp. 10,000,-. Article 15 states that if the act referred to in Article 14 is carried out by or on behalf of the Legal Entity then criminal charges are carried out and acts of the order are imposed, either against those who give orders to commit such acts or who act as leaders or persons responsible in the act or negligence or against both.

In addition, *nyusuki* action also violates Article 40 of Law No. 41 of 2004 on Waqf which states that waqf property that has been represented is prohibited to be guaranteed, confiscated, given, sold, inherited, exchanged, or transferred in the form of other transfer of rights. Article 67 paragraph (1) of Law No. 41 of 2004 on Waqf also regulates criminal provisions for any person who violates the provisions of Article 40 which states that any person who intentionally guarantees, grants, sells, bequeaths, transfers in the form of other rights of waqf property that has been represented as referred to in Article 40 or without permission to exchange waqf property that has been represented as referred to in Article 41, convicted with a maximum prison term of five years and/or a maximum fine of Rp 500,000,000.

The incident that occurred between Bu Setyowati (*Wakif*) and Pondok Pesantren X in Jombang (*naẓhir*) which occurred between 1993-1998 is legally Islamic because it has fulfilled the pillars of waqf namely *wakif*, *manquf*, *manquf 'alaih*, and *shighbah*. However, the representation has not qualified the administrative requirements of waqf land certificate registration because it does not have a waqf pledge deed (AIW) and is not done before the Waqf Pledge Deed Making Officer (PPAIW) witnessed by two witnesses as stipulated in Article 17 of Law No. 41 of 2004 on Waqf. Nyusuki's action does not violate the laws and regulations on waqf that applies in Indonesia because the land traded between *naẓhir* and *wakif heirs* is Petok D land on behalf of Bu Setyowati, not waqf land because the land has not been recorded as an administrative waqf land that applies under waqf laws and regulations in Indonesia. In addition, when viewed from the intention of *naẓhir* to do *nyusuki* is almsgiving and *nyusuki* does

not deviate from the main purpose of out-of-court dispute resolution, namely effective and efficient both in terms of time and cost, *nyusuki* becomes a *win-win solution* for both parties, namely heirs who deny immediately get money because that is the main reason. Waqf denial is an economic problem, *nazhir* can immediately utilize and manage waqf land into a unit of Pondok Pesantren X in Jombang, *nazhir* still maintains the good name of the Foundation and prevents the emergence of hostility between *nazhir* and *wakif* heirs so that they can still maintain the friendship between the two parties. Nyusuki's actions have gone through a deliberative process for consensus between *nazhir* and the heirs of *wakif* and have passed various considerations from the caretaker of Pondok Pesantren X in Jombang.

Conclusion

Nyusuki is a method chosen by the *nazhir* as an alternative to out-of-court dispute resolution because it is considered a deliberation to reach consensus. This is in line with Article 62 paragraph (1) of Law No. 41 of 2004 does regulates the resolution of waqf disputes using consensus deliberation and preferably dispute resolution by deliberation according to Islamic Law. Nyusuki action cannot be categorized as buying and selling waqf land in violation of waqf laws and regulations in Indonesia because *nyusuki* is carried out by *nazhir* based on the intention of giving to three heirs who do waqf denial, *win-win solution* for both parties, namely *wakif* heirs who do denial and *nazhir*, resolve disputes effectively and efficiently and prevent the onset of hostility between the two sides to damage the ropes of friendship. In addition, when the land is disputed (2019) the land certificate is still Petok D on behalf of Bu Setyowati so that the *nazhir* action is categorized as a transaction to buy and sell ordinary land instead of buying and selling waqf land because the land has not been certified waqf land. The new waqf certificate is issued in 2020.

The advice that can be conveyed is the existence of an active role from the Ministry of Religious Affairs Department in districts to educate and socialize to *nazhir-nazhir* to receive waqf following waqf laws and regulations applicable in Indonesia. Especially education related to the registration of waqf lands so that it can be managed properly and avoid disputes that will arise in the future due to land waqf that has not been recorded, the Indonesian Waqf Agency

(BWI) should maximize its role related to fostering *nazhir* and supervision of the management and development of waqf property carried out by *nazhir* so that no waqf land is traded or diverted functioned without the permission of BWI, the need for special arrangements related to dispute resolution procedures outside the waqf dispute court considering that waqf has its characteristics such as property that have been represented the benefits are used forever and the principle of holding waqf property belongs to Allah SWT.

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