Settlement of Waqf Disputes by Deliberation to Reach Consensus

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I. Introduction

Waqf that occurs in people's lives still causes many legal problems. The transfer of one's property by means of waqf can be done in several forms, but in general the property that is often waqf is land. Waqf land is usually used for public purposes and interests. For example waqf land for the construction of mosques, tombs or to build foundations (https://www.bwi.go.id/pengertian-wakaf).

Waqf is a legal act of a person or group of people or a legal entity that separates or releases part of his property, and institutionalizes it forever for the purpose of worship or other purposes. Releasing property by way of waqf legally, the wakif (the person who waqf his property) has lost his ownership rights, so he no longer has the authority or right to use it for personal interests and the right to transfer or transfer his ownership to another party.

The waqf provisions meant here are of course binding rules of waqf (consisting of pillars, other terms and conditions) that must be fulfilled in the practice of waqf processions. So in this case the provisions as described from the formulation of the definition of waqf, include the pillars (principal elements of waqf) and other aspects of the provisions of waqf as detailed in the following explanation. (Kamal, M et al. 2019)
In fact, waqf functions to realize the potential and economic benefits of waqf property for the benefit of worship and to promote public welfare. So that the waqf property needs to be developed in accordance with sharia principles. However, in reality, there are still problems with the property that has been donated that is not in accordance with its function.

The problems that occur are generally waqf assets are requested or taken back by the wakif or wakif heirs, or vice versa, the waqf property is controlled from generation to generation by nazhir whose use deviates from the waqf contract, is not responsible for his obligation to maintain the waqf property, neglects right or transfer to a third party in an unlawful manner.

This of course raises legal issues (disputes) in the field of waqf. Because the issue of waqf has been regulated in Law Number 41 of 2004 concerning Waqf. The law regulates how to waqf property, develop waqf assets and resolve waqf disputes.

The occurrence of a dispute was preceded by a conflict that was not successfully resolved by deliberation by nazhir and wakif or wakif heirs. So that differences in interests that cannot be reached an agreement through deliberation, will be processed through the courts. Of course this is not desired by both parties, because the settlement through the court process is not profitable than the settlement by deliberation.

Waqf property in principle belongs to the ummah, its benefits must also be felt by the ummah, therefore ideally waqf property is a shared responsibility to maintain its existence. If there is a dispute over the ownership rights of waqf property, then the dispute that occurs is the ummah dispute, not the wakif and nazhir disputes and should be resolved by deliberation to reach a consensus that involves the ummah as a whole. Based on the background that has been stated, it is necessary to study the Process of Settlement of Waqf Property Disputes through Deliberation to Reach Consensus

II. Research Methods

The method used in this study is a qualitative method with a descriptive research approach. The approach is done by describing (illustrating or telling) back in writing from the results of a literature search. Sources of data from secondary data collected through literature study.

III. Result and Discussion

In fact, waqf functions to realize the potential and economic benefits of waqf property for the benefit of worship and to promote public welfare. The use of waqf assets needs to be developed in accordance with sharia principles because the purpose of waqf is to utilize the waqf property according to its function.

The problem of waqf currently being managed is not in accordance with its function and purpose, in fact waqf assets are often taken back by the waqf party or their heirs, change hands, switch functions or are neglected. Waqf assets must be managed properly, especially with regard to its administration.

Chairman of the North Sumatra BWI, Syariful Mahya Bandar, said that waqf administration, especially waqf certification, is urgently needed to be managed so that it can really guarantee the security of waqf assets. Nazhir must be placed in a central position in managing and developing waqf assets. HWaqf assets cannot be static, but must be managed productively for the benefit of the people, the large number of waqf assets that are lost, changed hands, changed functions and were abandoned are the shared responsibility of all Muslims.https://bwisumut.or.id).
Article 40 of Law Number 41 of 2004 concerning Waqf states that waqf assets that have been waqf are prohibited:

a. Guaranteed
b. Confiscated
c. Granted
d. For sale
e. Inherited
f. Exchanged
g. Transferred in the form of other rights transfers.

Non-compliance with Article 40 of the Waqf Law will inevitably lead to disputes and will be legally processed in two ways, namely in court or out of court. Therefore, the manager or recipient of the waqf must be trusted not to transfer the function of the waqf property.

As happened in waqf land which is located on Jl. Independent. gg. Minang Pulo Brayan and allotment for Muslim cemeteries. Since 2005, the community has started to get restless due to the actions of Nazhir's people who secretly want to transfer the function of waqf land to other interests and secretly also move 48 bodies to other places. For almost 9 years of polemic, the Indonesian Waqf Board (BWI) Representative of North Sumatra replaced Nazhir who was not trustworthy, but the dismissed Nazhir sued BWI to the Medan State Administrative Court (PTUN) and after going through a trial for almost 9 months the Medan Administrative Court won BWI Representative of North Sumatra (https://bwisumut.or.id).

The implementation of waqf that occurs is still mostly done on the basis of mutual trust, the wakif only hands over the waqf land to a nazhir without being accompanied by the making of a Waqf Pledge Deed (AIW) or the like. This condition ultimately makes the waqf land not have a legal basis, so that if in the future there is a problem regarding the ownership of the waqf land, the solution will encounter difficulties, especially in terms of proof (Adi Nur Rohman and Sugeng, Settlement of Waqf Disputes in the Religious Courts).

In fact, waqf that occurs in people's lives has not been fully orderly and efficient. This is caused by social changes, shifts in values and social order that affect it. In addition, there is no written evidence stating that the status of an asset is an object of waqf. So that the solution can be done through deliberation led by religious leaders and local community leaders (Ahmad Rofiq, et al, 2019).

Searching on the Site Search Information System (SIPP) Medan District Court there were two registered cases in 2013 and one case in 2016 (http://sipp.pn-medankota.go.id/list_perkara/search). Meanwhile, in the Case Tracing Information System (SIPP) of the Medan Religious Court there was one registered waqf case in 2015 and two cases in 2019 (http://www.sipp.pa-median.go.id/list_perkara/search). If such a problem occurs, of course, settlement in court should be avoided if settlement outside the court by deliberation and consensus can be carried out.

The process of resolving waqf disputes is regulated in Article 62 of Law Number 41 of 2004 concerning Waqf. Article 62 Paragraph (1) states that the settlement of waqf disputes is taken through deliberation to reach consensus. Paragraph (2) of the article states that if the dispute resolution as referred to in paragraph (1) is not successful, the dispute can be resolved through mediation, arbitration, or court.

Referring to Article 62 Paragraphs (1) and (2) of Law Number 41 of 2004, the settlement process is carried out in stages. There are 4 (four) means of settlement used in resolving waqf disputes. The first process taken is deliberation to reach consensus. If the deliberation process to reach a consensus is not successful, then the next process can be mediation, arbitration or court.
Resolving disputes that occur between one person and another is by way of deliberation. The meaning of deliberation in the Big Indonesian Dictionary is a joint discussion with the aim of reaching a decision on the resolution of a common problem. Another word for deliberation is to negotiate and consult (Ministry of Education and Culture. 1989). Of course the meaning of deliberation is different from mediation. The difference between deliberation and mediation is that there are parties. Mediation emphasizes the existence of a third party to participate in resolving the problem, while the deliberation of the disputing parties is the one who actively resolves the problem because the principle of deliberation to reach consensus is togetherness, which is to unite common opinions in reaching a mutual agreement imbued with love and sacrifice for the common good.

Deliberation means negotiating to unite opinions in solving problems together and producing consensus decisions. Consensus is a unanimous agreement or mutual agreement from a discussion based on kinship. The definition of deliberation to reach consensus, stems from the essence of deliberation to reach consensus to make joint decisions originating from popular precepts led by wisdom in deliberation/representation.https://www.ilmuSaudara.com). So deliberation for consensus means making a decision based on the will of the people, so that unanimity of opinion can be achieved.

The principle of deliberation is enforced in accordance with the legal principles that underlie the democratic system. Deliberations are not bound by a community that is still (government or state) in nature, it touches all aspects related to common interests, problems that have become God's decrees cannot be discussed. Deliberations are only carried out on matters that have not yet been determined, as well as problems of worldly life, both global and without guidance, which have developed and changed (M. Quraisi Shihab, 1996).

National law does not explain in detail the deliberation process to reach consensus. Article 62 of Law Number 41 of 2004 concerning Waqf explains that in resolving problems with waqf assets, firstly, prioritizing the attitude of deliberation to reach consensus. If deliberation to reach consensus is not successful, it can be resolved through mediation or arbitration. If the three methods are also unsuccessful, then the last method that must be taken is through litigation.

The process of amicable settlement in waqf disputes is left to each party. Its implementation must be based on the principle of togetherness with moral considerations that take precedence over legal considerations and opinions or decisions that come from conscience.

Waqf assets are assets that are used for social purposes, the benefits are felt by many people. Article 22 of the Waqf Law states that in order to achieve the purpose and function of waqf, waqf property can only be designated for:
1. Facilities and activities of worship
2. Education and health facilities and activities
3. Assistance to the poor, abandoned children, orphans, scholarships
4. Economic progress and improvement of the people
5. Other general welfare advancements that do not conflict with sharia and laws and regulations

In order to realize the achievement of the objectives and functions of waqf property, it is better if disputes that occur on waqf assets are resolved by deliberation to reach consensus. The method of resolving deliberation for consensus is very wise and wise, because decisions are taken jointly for the common interest. There is no need for a third party to be involved in “mediating” to make a decision.
In Islam, the settlement of peace is referred to as As-sulh (Peace) which means to reduce disputes while according to the term it means a type of contract or agreement to end a dispute/quarrel between two disputing parties peacefully ((Abdul Manan, 2012a). has been agreed cannot be canceled unilaterally. If there are parties who do not agree, then the cancellation of the agreement must have the consent of both parties.

Peace must fulfill 3 (three) pillars, namely Ijab, Qobul and Lafaz. These three things must be fulfilled by the parties so that peace can be realized clearly. Apart from that, the validity of a peace agreement in a waqf dispute consists of:

a. The existence of wakif or his family (his heirs), Nadzir or his descendants, other people who feel interested in the waqf.

b. The waqf property is legally owned or controlled by the wakif.

c. Property that is divided is reconciled only in the form of property disputes that can be assessed and limited to human rights that can be replaced or in other words in the field of muammalah.

d. Peace can be carried out outside the court and inside the court

Peace that is carried out outside the court is carried out by them themselves (who make peace) without involving other parties, or asking for help from others to mediate (referees), that is then called arbitration or in Islamic law called hakam (Abdul Manan, 2012b).

IV. Conclusion

National law does not explain in detail the deliberation process to reach consensus. Article 62 of Law Number 41 of 2004 concerning Waqf explains that in resolving problems with waqf assets, firstly, prioritizing the attitude of deliberation to reach consensus. If deliberation to reach consensus is not successful, it can be resolved through mediation or arbitration. If the three methods are also unsuccessful, then the last method that must be taken is through litigation.

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