

The Legitimacy of Legal Actions of Heirs as Substitute *Waqifs* in the Context of Registering Heirs' *Waqf* Land

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Abstract. *This study aims to determine the position of the heirs in terms of settlement of endowments on land by their deceased parents; and to find out the legality of the heirs' legal actions as substitute Waqf in the context of registering the heir's Waqf land. This study uses a normative juridical method. The position of the heir in terms of settlement of Waqf on land by his deceased parents is the most prioritized to replace the Waqif (heir) to carry out the Waqf pledge procession before the Waqf Pledge Deed Making Officer (PPAIW), without having to transfer inheritance rights to land .*

Keywords: Heirs; Legal; Position; Waqf.

1. Introduction

Muslims now live in an era of approximately 1400 years since the birth of the religion brought by the Prophet Muhammad SAW. Guided by the teachings conveyed to the Prophet, Muslims are material in nature and are challenged to be able to live in material and spiritual prosperity. For this reason, various teachings of the Prophet must be empowered and improved for the progress and welfare of Muslims.

Allah SWT created humans and jinns nothing but to worship Him. Devotees who devote themselves to Him as a whole, both in their attitude of life and human life individually, as well as members of society and as a unitary being in general.

Various improvements (re-actualization) must be carried out within the limits that are possible. The glory of Islam in the past could not be separated from the empowerment of religious teachings that existed at that time. Among these teachings is the Shari'a relating to *Waqf*. This is where the urgency of *Waqf* land comes to the fore, as a solution for Muslims to be able to strive to fulfill the needs and needs of the community in matters relating to religious activities.

Thus, *Waqf* requires a community solution that does not necessarily have a similar concept in other societies.

Waqf is a form of policy through property. So that the scholars also understand that the verses of the Qur'an which command understanding wealth for wisdom, are also sufficient for policies through *Waqf*. Therefore, in fiqh books there is an opinion that says that the legal basis of *Waqf* is concluded from the word of Allah SWT in the letter Ali-Imran verse 92:

لَنْ تَنَالُوا الْبِرَّ حَتَّى تُنْفِقُوا مِمَّا تُحِبُّونَ ۚ وَمَا تُنْفِقُوا مِنْ شَيْءٍ فَإِنَّ اللَّهَ
بِهِ عَلِيمٌ ﴿٩٢﴾

Meaning: *You never come to virtue (which is perfect), before you spend some of the treasures that you love. and whatever you spend then verily Allah knows it*

Waqf issues in Indonesia have been regulated in positive law, including Act No. 41 of 2004 concerning *Waqf*, Regulations of Government (PP) Number 42 of 2006 concerning the Implementation of Act No. 41 of 2004 concerning *Waqf*, PP Number 28 of 1977 concerning Owned *Waqf* Land, and Act No. 5 of 1960 concerning Basic Agrarian Regulations. The issue of *Waqf* land is closely related to social and customary issues, so the implementation rules for *Waqf* are carried out in accordance with customary law that applies in society without reducing the Islamic values contained in the *Waqf* law itself.

According to Government Regulation Number 28 of 1977 concerning *Waqf* of Owned Land, the *Waqf* procedure alone is not enough for *Waqf* contracts to be carried out only orally. *Waqf* pledge deed, then a *Waqf* pledge deed is drawn up. Based on the *Waqf* pledge deed, the right to change ownership of land is handed over to the National Land Agency after fulfilling the administrative requirements to become a *Waqf* certificate.

There is a *Waqf* process on land with property rights number 2728/Source in the name. H. Mochamad Sholeh to build a mosque (Masjid Al Mukarom), before registration of *Waqf* land occurs, the *Waqif* dies first, by the heirs of the *Waqf/Waqif* the *Waqf* registration process will be resumed. Because they are aware that the land *Waqf* is a worldly matter for their parents that has not yet been resolved, and as a service to their parents and based on good faith, they intend to complete the *Waqf* process.

The *Waqf* arrangement was initiated by one of the heirs by seeking information

at the Religious Affairs Office of Banjarsari District as the authorized official who would later draw up the *Waqf* Pledge Deed, and from this information obtained information that for *Waqf* requirements one of the heirs would be represented as *Waqf*. From this description, the heirs assume that there must be a process of transferring inheritance of land rights, so that from the inheritance process several names of heirs will appear, which in turn will become one name, there will be a process of separating rights over the land again into the name of one of the heirs.

In the above case, seen from the side of justice and legal certainty, should there be a process of transferring inheritance rights to the land to the heirs of the *Waqf*, then registration of the *Waqf* land is carried out in order to guarantee legal certainty, if this is carried out, will there be justice for the real *Waqf*, namely their parents who have died. So in this study it will be discussed about how the legitimacy of the legal actions of the heirs in terms of settlement of endowments on land by their parents who have died and what are the legal responsibilities of the heirs who become *Waqif* in lieu of the implementation of the *Waqf*.

Based on this background, the researcher is interested in writing a study entitled The Legitimacy of Legal Actions of Heirs as Substitute *Waqf* in the Context of Registering Heir *Waqf* Land.

2. Research Methods

The approach method used in this study is a normative juridical research method, namely research that is based on existing legal principles and also looks at the facts that occur, with a research approach referring to secondary data in the field of law which concerns primary legal materials, namely the applicable laws and regulations and secondary legal materials in the form of scholarly works, compare existing data and make the necessary interpretation. Sources of data come from secondary data consisting of library materials in the form of laws and regulations (primary legal materials), and other literature (secondary legal materials) that support primary legal materials, and tertiary legal materials (dictionaries, encyclopedias, etc.) Secondary data collection method is done by literature study. Methods Data analysis was carried out qualitatively, namely describing the collected material in detail.

3. Results and Discussion

3.1. Position of heirs in terms of settlement of endowments on land by their parents who have passed away

Land *Waqf* is a form of worship in Islam that is closely related to agrarian affairs, namely those concerning the issues of earth, water and space as well as the natural resources contained therein. Therefore, apart from being bound by the rules of Islamic law, this *Waqf* issue is also bound by the rules of the National Agrarian Law. Because the issue of *Waqf* land is so important in the eyes of the National Agrarian Law which adheres to the understanding that the earth is a gift from God Almighty.

In general, *Waqf* in Indonesia is used for mosques, prayer rooms, schools/foundations, cemeteries, and orphanages. Utilization seen from a social perspective, especially for the benefit of worship is indeed effective. *Waqf* can be used as an economic institution that has the potential to be developed as long as it can be managed optimally. Because the *Waqf* institution is one of the nation's cultural assets from a social aspect that needs attention as a support for life and national pride. For this reason, the current condition of *Waqf* in Indonesia needs extra attention, especially since *Waqf* in Indonesia is generally in the form of immovable objects.

Waqf practices that occur in people's lives have not fully run in an orderly and efficient manner so that in many cases *Waqf* assets are not properly maintained, abandoned or transferred to third parties against the law. Such a situation is not only due to Nazir's negligence or inability to manage and develop *Waqf* assets but also due to the attitude of people who do not care about or do not understand the status of property that must be protected for public welfare in accordance with the purpose, function and designation of *Waqf*.

Implementation of *Waqf* in Indonesia, before the promulgation of Act No. 5 of 1960 concerning: Basic Agrarian Regulations and Government Regulation No. 28 of 1977 concerning: *Waqf* of Owned Land, Muslim communities in Indonesia still carry out religious customs. 6 As is the custom of carrying out legal acts of *Waqf* land verbally on the basis of mutual trust in a particular person or institution. This was influenced by the paradigm that was developing in society at that time, namely viewing *Waqf* as a pious charity that had noble values in the presence of God without having to go through administrative procedures, and *Waqf* assets were considered to belong solely to Allah, any party who dared to interfere with the lawsuit would be subject to sin from Allah SWT. . Recording of *Waqf* legal acts is still something that is considered foreign and too troublesome.

In fact, according to Islamic law, *Waqf* occurs when there is a *Waqif* statement that is an agreement, because the act of *Waqf* is seen as a unilateral legal act. However legally, the implementation of *Waqf* must be carried out with a pledge made before the *Waqf* Pledge Making Officer (PPAIW) and two witnesses and

must be made in the form of a *Waqf* Pledge Deed. As confirmed in Government Regulation Number 28 of 1977 concerning *Waqf* of owned land which contains legal provisions regarding *Waqf* of owned land. This Government Regulation Number 28 of 1977 serves as the legal basis for *Waqf* assets in Indonesia. *Waqf* rules are further regulated in Act No. 41 of 2004 concerning *Waqf*. The law stipulates that legal acts of *Waqf* must be recorded and set forth in the *Waqf* Pledge deed and registered and announced.

To guarantee legal certainty, Government Regulation Number 28 of 1977 requires that *Waqf* be carried out orally and in writing before the *Waqf* Pledge Deed Making Officer to then make the *Waqf* Pledge Deed. Based on the *Waqf* Pledge Deed, it is then submitted to the National Land Agency to be converted into a *Waqf* certificate. In Article 17 of Act No. 41 of 2004 concerning *Waqf* also states:

- a. The *Waqf* pledge was carried out by the *Waqif* to Nazir before PPAIW witnessed by (two) witnesses.
- b. The *Waqf* Pledge as referred to in paragraph (1) is stated verbally and/or in writing and is stated in the deed of pledge by PPAIW.

The Compilation of Islamic Law (KHI) in Chapter II also explains the functions, elements and requirements of *Waqf* in article 218 it states: "The party giving the *Waqf* must pledge his will clearly and firmly before the *Waqf* Pledge Deed Making Official (PPAIW) witnessed by at least 2 (two) witnesses."

The obligation to pledge *Waqf* is also explained in article 223 KHI as follows: "The party wishing to donate must declare the *Waqf* pledge before the *Waqf* Deed Making Officer (PPAIW) to carry out the *Waqf* pledge. The contents and form of the *Waqf* pledge are determined by the Minister of Religion. The implementation of the Pledge, as well as the making of the *Waqf* Pledge Deed, is considered valid if it is attended and witnessed by at least 2 (two) witnesses."

In the theory of legal responsibility put forward by Hans Kelsen states that a person is legally responsible for a certain action or that he bears legal responsibility, meaning that he is responsible for a sanction in the event of a conflicting legal action. In relation to the responsibility of the heir to the dependents and obligations of the heir which have not been resolved, in this case the implementation of the registration of *Waqf* land, the heir acts as a substitute *Waqif*. This is as described in inheritance law in Indonesia, especially Islamic inheritance law. It stipulates that before the distribution of inheritance is carried out, several rights that are related to the inheritance must first be

settled. The rights that must be completed and paid, are:

- a. Zakat; when the time has come to issue zakat, then it is issued for that first.
- b. Shopping; namely the costs incurred for organizing and managing the corpse, such as the price of the shroud, wages for digging graves and so on.
- c. Debt; If the corpse leaves a debt, then the debt must be paid first.
- d. Will, if the corpse leaves a message (will), so that part of the inheritance is given to someone, then this will must also be carried out.

Western civil law contained in the Civil Code (BW) includes "all rights and obligations" in the field of property law that can be valued in money. The inheritance that will be inherited by the heirs does not only include things that are useful in the form of assets or profits, but also includes the debts of the heirs which are the obligations of the assets left behind so that the obligation to pay debts to the heirs, in essence, also passes to the heirs.

In essence, the object being donated belongs to Allah (public rights), no longer the property of the person giving it, nor is it the property of the place of surrender. So that with the pledge of *Waqf*, the legal relationship between the ownership of the object and the owner has been released initially. Because the purpose of *Waqf* is like its syariat, that is, its use must be successfully used in accordance with the philosophy of its syariat, namely to provide good for the social life of mawquf 'alaih (recipient of *Waqf*). This will also be a charity that continues to flow to the *Waqf*, as stated in the argument for the *Waqf* system which is narrated in the Hadith of Muslim history number 1631 which means "*If someone dies, then his deeds are cut off except for three things (namely): charity, knowledge that is utilized, or the prayers of pious children.*"

3.2. The Legitimacy of Legal Actions of Heirs as Substitute *Waqifs* in the Context of Registering Heirs' *Waqf* Land

As the times progress, the interaction of civil rules that occur in the country also develops, the public's knowledge of legal certainty guarantees increases as a result to receive legal certainty guarantees for civil interactions, therefore an authentic deed is needed. 9 To be able to have an authentic deed, it must be made in the presence of an authorized official and a deed is written evidence of an action or legal action committed by any person.

A *Waqf* pledge is a statement of the will of a *Waqif* (a *Waqf* person) spoken

orally and/or in writing to a nazir to endow his property. The making of the *Waqf* Pledge Deed is carried out after the *Waqif* has pledged to hand over the *Waqf* assets.

Waqf is carried out in writing but the *Waqf* Pledge Deed must also be made, because the *Waqf* Pledge Deed is legal evidence of the *Waqf* act that has been carried out. Like the Deed of *Waqf* Pledge, basically the Deed of Substitute Pledge of *Waqf* also functions as authentic evidence that can be used for material (*Waqf* Act No. 41 of 2004, article 17 paragraph 1) for registration at the Regency/City Land Agency Office and for evidence purposes that may arise in the future regarding the donated land.

Based on Article 21 paragraph (3) of Act No. 41 of 2004 concerning *Waqf*, it states that provisions regarding the deed of *Waqf* pledges are regulated in Government Regulations. This Government Regulation is hereinafter abbreviated as PP. According to Article 1 paragraph (6) Government Regulation Number 42 of 2006 concerning Implementation of Act No. 41 of 2004 concerning *Waqf*, states that:

"The Deed of Waqf Pledge, hereinafter abbreviated as AIW, is evidence of a statement of the will of the Waqif to endow his property to be managed by the Nazir in accordance with the designation of the Waqif's assets as outlined in the form of a deed."

According to Article 31 PP Number 42 of 2006, it states regarding the Deed of Substitute Deed of *Waqf* Pledge (APAIW), as follows:

"In the event that the creation of Waqf has not yet been outlined in AIW, while the Waqf acts are already known based on various instructions (qarinah) and 2 (two) witnesses and AIW cannot be made because the Waqif has died or his whereabouts are no longer known, then an APAIW is created."

The difference between the *Waqf* Pledge Deed and the Substitute Deed for the *Waqf* Pledge Deed lies in the time when the implementation of the land endowment has been completed.

The Deed of Substitute Pledge of *Waqf* is used for land whose endowment was made before the enactment of Government Regulation Number 28 of 1977, while the Deed of Pledge of *Waqf* is used for lands that were donated after the enactment of Government Regulation Number 28 of 1977. The making of Deed of Pledge of *Waqf* is intended for *Waqf* that at the time of making the *Waqf*

Pledge Deed (AIW) the *Waqif* was still alive, where the *Waqif* handed himself over to the Nazir. Meanwhile, making a Deed of Substitute Pledge of *Waqf* (APAIW) is intended for endowments that at the time the Deed of Pledge of *Waqf* Pledge is to be made, the *Waqif* has died, so a Deed of Substitute Deed of *Waqf* Pledge (APAIW) is made. If the *Waqif* has passed away and the *Waqf* Pledge Deed has not been drawn up, then a Deed of *Waqf* Pledge Deed is made,

If the *Waqif* is an organization or legal entity, the name listed in the *Waqf* Pledge Deed is the name of the management or directors concerned. Likewise, if the nazir is the nazir of the organization or legal entity, then the names of the management of the organization or legal entity concerned are included.

Substitute Deed of *Waqf* Pledge Deed, hereinafter abbreviated as APAIW, is a replacement deed in the event that the *Waqf* act has not been stated in AIW while the *Waqf* act has been known based on various instructions (qarinah) and 2 (two) witnesses and AIW cannot be made because the *Waqif* has died or not known to exist. In the condition that the *Waqif* has actually died or his whereabouts are unknown, then the *Waqif's* heir is the dominant executor who will continue the implementation of the *Waqf* land. This is proven and strengthened by evidence of a certificate of inheritance that is known by Village Head and Sub-District Heads or Determination of Heirs by the Religious Courts. Accompanied by proof of approval and power of attorney for all heirs to the *Waqif* (representing all heirs) to register/implement the *Waqf* pledge.

Thus, in accordance with the provisions of Article 31 PP Number 42 of 2006, which states regarding the Deed of Substitute *Waqf* Pledge Deed (APAIW), the *Waqif* heir is the most prioritized to replace the *Waqif* (heir) to carry out the *Waqf* pledge procession before PPAIW, without having to transfer inheritance rights over land. Because the legal origin is that the *Waqf* is actually the parents of the heir who has died, the heir is only the executor of the administrative settlement of the *Waqf* registration.

Based on the terms and conditions of the *Waqf* mentioned above and in accordance with the provisions in article 31 PP number 42 of 2006, the legal act of the heir becomes a substitute *Waqif* in the event that the implementation of the *Waqf* pledge procession before PPAIW is a legal act based on statutory regulations. -invitation. So that in the implementation of *Waqf* by the heirs of the *Waqf* mandate of their deceased parents, there is no need for a process of transferring inheritance rights to land first. Because the legal position of the heir as a substitute *Waqif* can be proven by the existence of a certificate of inheritance.

Based on the provisions of Article 17 to Article 21 of Act No. 41 of 2004 concerning *Waqf*, the author is of the opinion that the recording of *Waqf* legal acts is mandatory, especially regarding land *Waqf* followed by the implementation of land registration at the Regency/City Land Office for the issuance of *Waqf* land certificates. After the *Waqf* land certificate has been issued, legal certainty regarding the *Waqf* land can be obtained achieved, as stipulated in Article 3 of Government Regulation Number 24 of 1997 concerning Land Registration, the purpose of land registration is to provide legal certainty and legal protection to holders of rights over a parcel of land, apartment units and other registered rights, so that they can easily can prove himself as the holder of the right in question. As well as to provide information to interested parties, including the government, so that they can easily obtain the data needed in carrying out legal actions regarding registered land parcels and apartment units.

4. Conclusion

The position of the heir in terms of settlement of *Waqf* on land by his deceased parents is the most prioritized to replace the *Waqif* (heir) to carry out the *Waqf* pledge procession before PPAIW, without having to transfer inheritance rights to land. Because the legal origin is that the *Waqf* is actually the parents of the heir who has died, the heir is only the executor of the administrative settlement of the *Waqf* registration. This is proven and strengthened by evidence of certificate of inheritance known by the Village Head and Sub-District Heads or Determination of Heirs by the Religious Courts. Accompanied by proof of approval and power of attorney for all heirs to the *Waqif* (representing all heirs) to register/implement the *Waqf* pledge.

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