Mediation As Resolution Of Waqf Dispute Through The Indonesian Waqf Agency Representative Of East Java

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Abstract
Badan Wakaf Indonesia is the organization that forms by government to advance and develop waqf. As an organization that arranges the waqf road system in Indonesia, Badan Wakaf Indonesia is expected to provide parties who can meet the waqf requirements through non-litigation in advance in accordance with Article 62 of Law Number 41 Year 2004 Regarding Waqf, consensus agreement and alternative dispute resolution becomes an effort first. The subject of the matter that the author takes is the transition from mediation organized by the Badan Wakaf Indonesia and protection over the obstacles in the mediation process. The results of this study are an explanation of mediation in the Badan Wakaf Indonesia Perwakilan Jawa Timur and also its analysis. In addition, it also includes an analysis of negotiations conducted by the Badan Wakaf Indonesia Perwakilan Jawa Timur in the resolution of waqf disputes.

Keyword : Waqf, Badan Wakaf Indonesia, Mediation

I. Introduction

One implementation of Islamic economic teachings in Indonesia itself is the practice and implementation of Waqf. Waqf is a gift that is carried out by holding its principal assets and giving the results or benefits to. What is meant by ‘holding principal’ is holding goods that are represented from various transactions that are transferring rights such as traded, granted, mortgaged, leased and the like. Whereas the method of its use or utilization is oriented to the sectors of virtue and benefit in accordance with the wishes of waqf as set out in its vow without expecting anything in return.1

Along with the increasingly widespread development of waqf science accompanied by community knowledge about waqf theory, the desire of the people to carry out the teachings of waqf is in accordance with the Shari’a and existing regulations. In this way, the government’s view of waqf which was originally limited to religious teachings for alms has changed. Waqf is transformed into a more complex worship activity because it

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1 Mukhlisin Muzarie, Hukum Perwakafan dan Implikasinya Terhadap Kesejahteraan Masyarakat (Implementasi Wakaf di Pondok Modern Darussalam Gontor), Kementerian Agama RI, 2010, Cet ke-1, hlm. 2
is related to the management of property whose interests are related to the interests of the people. Where if the properties of this waqf can be managed properly and according to procedural, it can create new jobs that automatically increase the welfare of the surrounding community.

Knowing that the management of waqf could be misused, the Government decided that interventions related to waqf were needed so that misuse and misappropriation of waqf property could be overcome and avoided. Because it does not rule out the possibility that after waqf access is getting wider it will be inevitable that disputes related to waqf management will arise. Thus waqf which was originally one of the forms of the relationship of the people to his Lord, became a relationship which requires the Government as a third party to provide signs so that misappropriation of the management of endowment property can be avoided and overcome.

Waqf in Indonesia is seen as a public benefit institution since the colonial era has been regulated by the government. After independence, the decree began to be regulated since the birth of Law No. 5 of 1960 concerning Basic Agrarian Regulations better known as the LoGA, then followed up with Government Regulation No. 28 of 1977 concerning Land Ownership Representation. Next was born Inpres No 1 of 1991 which anticipated the enactment of the Compilation of Islamic Law, and finally Law No. 41 of 2004 concerning Endowments. The birth of these laws and regulations aims to legalize waqf institutions so they have legal certainty. The development of waqf is more evident with the ratification of the Compilation of Islamic Law (KHI) through Presidential Instruction No. 1 of 1991. In this KHI, the issue of waqf has a special place, namely in Book III. The content of Book III which consists of five chapters and 14 articles (215-228) is adopted from PP No. 28 of 1977. Among them is the definition of waqf which necessitates the perpetuation of the goods and for an indefinite period of time (article 215). The end of the twentieth century was a new chapter in the history of Indonesian representation with the emergence of the discourse of money waqf which then crystallized into a desire

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2 Ibid hlm. 3
to reform the waqf law. This desire was realized with the birth of the Waqf Law Number 41 of 2004.³

The formation of the Indonesian Waqf Board is based on Article 47 paragraph (1) of the Law on Waqf which states that in the context of promoting and developing national representation, the Indonesian Waqf Board is formed. One of the goals of the need for the establishment of the Indonesian Waqf Board is to advance and develop national representation. In carrying out its duties the Indonesian Waqf Board (BWI) is independent. To support this role, the Indonesian Waqf Board must be supported by strong and stable institutional elements to be more effective and efficient in carrying out its duties.⁴ The presence of the Indonesian Waqf Board is expected to be an extension of the government in order to supervise and assist the running process of the waqf system in Indonesia.

As a body established to advance and oversee the functioning of the waqf system in Indonesia, the Indonesian Waqf Board is expected to be able to become a party that can resolve waqf disputes through non-litigation in advance in accordance with Article 62 of Law Number 41 of 2004 concerning Endowments which states that if there is a case waqaf dispute, then consensus agreement and alternative dispute resolution becomes the first attempt and if the first attempt is declared unsuccessful then litigation or court becomes the second option. The alternative dispute resolution chosen by the Indonesian Waqf Board itself is mediation. Mediation related to waqf disputes is carried out by the Indonesian Waqf Board as a third party that helps both parties who disagree can find agreement and maintain relations that are ongoing and for the future.

II. Method

This research method used by the author in this paper is Empirical juridical research. That is the type of sociological legal research and can be referred to as field research, which examines the applicable legal provisions and what happens in reality in society. According to Soetandyo Wignjosoebroto, empirical juridical research is research in the

form of empirical studies to find theories about the process of occurrence and about the process of working of law in society.

III. Main Heading of the Analysis or Results

A. Mediation Mechanism in the Settlement of Waqf Disputes in the Indonesian Waqf Board of Representative in East Java

Mediation is a way of resolving disputes through a negotiation process to obtain the agreement of the parties with the assistance of the mediator. In accordance with Article 62 of Law Number 41 of 2004 concerning Waqf, it is stated that the first attempt made in the event of a waqf dispute is through deliberation to reach consensus and alternative dispute resolution such as mediation and arbitration.

Article 62 paragraph 2 of Law No. 41/2004 states that mediation is the settlement of disputes with the help of a third party or mediator. In the case of waqf disputes, the Indonesian Waqf Board of Representative in East Java is a third party or mediator agreed by the disputing parties. If mediation is declared unsuccessful in resolving the endowment dispute, the dispute will be brought to the arbitration line through the Sharia Arbitration Board. Then, if the arbitration is still unsuccessful then the dispute will take the last resort, namely the effort to settle the dispute through litigation or a court where in accordance with Law Number 3 of 2006 concerning amendments to Number 7 of 1989 concerning the Religious Courts affirm that the Religious Court has the right and authority to examine, decide upon and resolve the case or dispute of waqf.

The Indonesian Waqf Board itself as a body formed to oversee the running of the Indonesian waqf chose an alternative path The Indonesian Waqf Board felt that Mediation was a path of dispute resolution without any winning and losing options. The mediation of this waqf dispute is carried out by the Indonesian Waqf Board as a third party which helps both parties in disagreement to find an agreement and maintain relations that are ongoing and for the future. It is hoped that with the Indonesian Waqf Board, various issues regarding waqf can be resolved. The following is the mechanism for implementing Mediation in the Settlement of Waqf Disputes in the Indonesian Waqf Board of Representative in East Java:
1. Parties who feel cheated submit a report letter to the Indonesian Waqf Board of Representative in East Java
2. Reporting Letter goes to the Indonesian Waqf Board
3. Indonesian Waqf Board Representative in East Java invites parties involved in the management of disputed waqf property
4. There will be a process of deliberation or discussion between the parties in dispute with the Indonesian Waqf Representative Body of East Java as a third party
5. The Indonesian Waqf Board concludes the results of the discussion then provides neutral input as a third party, then the conclusions are returned to the parties to the dispute

B. Mediation Analysis in the Settlement of Waqf Disputes in the Indonesian Waqf Board of Representative in East Java

In accordance with Article 62 paragraph 1 and paragraph 2 of the Law of the Republic of Indonesia Number 41 of 2004 concerning Waqf, it is stated that if there is a dispute, the main route of waqf in the settlement of a dispute is through deliberation then mediation and arbitration. While the litigation route is the last resort taken in the resolution of waqf disputes because the dispute is expected to find a way out without the need to damage the relationship between the parties in this case between the waqf and also nadzir.

The majority of waqf disputes occur because nadzir who have been trusted by waqif do not carry out their duties properly or violate the stipulated provisions. One of the most fatal examples is when nadzir guarantees waqf property that has been entrusted by the waqif to be a guarantee for a loan for nadzir’s personal needs. Even though it is clear that this violates Article 40 (a) of Law Number 41 Year 2004 Regarding Waqf. Waqf property cannot be traded, either the transfer of rights or burdened with rights, let alone used as collateral. If the waqf property is still used as collateral, it has violated the deed of the endowment pledge agreed between the waqif and nadzir. The agreed goal in the endowment pledge is to make endowment property as a worship facility as well as a tool for the welfare of the community. Credit agreements that place material guarantees using waqf certificates, according to aspects of Article 1320 of the Civil Code regarding the legal requirements of the agreement, can cause the contract to be canceled. That is because the debt and credit agreement using the waqf certificate does not meet the fourth
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requirement, namely the legal (halal) basis. Means that in this agreement, the law does not allow collateral objects (waqf land) to be used as a debt guarantee agreement.⁵

Mediation conducted by the Indonesian Waqf Board of Representatives of East Java is a form of implementation of Article 62 paragraph 1 and paragraph 2 of the Law of the Republic of Indonesia Number 41 of 2004 concerning Waqf. The Indonesian Waqf Board of Representative of East Java positions itself as a neutral third party or mediator between the parties. There are no permanent classifications or provisions regarding the determination of mediators in the East Java Representative Indonesia Waqf Board itself. According to the results of the author’s interview with the chairperson of the Indonesian Waqf Board of Representatives of East Java, the person who can be the mediator in the resolution of a waqf dispute is the person assigned or appointed to be the mediator at that time. So there is no specific classification of who can and cannot become a mediator in the resolution of waqf disputes.

The definition of the mediator himself is a judge or other party who has a mediator certificate as a neutral party that helps the parties in the negotiation process to find various possible solutions to the dispute without using a way to decide or force a settlement.⁶ Where should when the Indonesian Waqf Board has carried out the stage of mediation with the mediator as an intermediary it must be truly competent people who have education and knowledge about mediation. Because again, the purpose of the mediation was to have the two parties in dispute get a way to be mutually agreed upon. Indonesian Waqf Board as a body formed to deal with waqf issues in resolving waqf disputes in accordance with the mandate of Law Number 41 Year 2004 concerning Waqf article 62 paragraph 1 namely by mediation or consensus agreement between the two parties, but if this does not work then use paragraph 2, namely by submitting to court so that there is a solution in resolving a dispute that has been protracted. It is important to remember that mediation is the first path that the Indonesian Waqf Board of Representatives must take as a path for dispute resolution, so it is important for the


⁶ Mohammad Syamsul Arifin, Peranan Badan Wakaf Indonesia dalam Penyelesaian Sengketa Wakaf, PPS UNISMA, Jurnal Hukum dan Kenotariatan Volume 3 Nomor 2 Agustus 2019
Indonesian Waqf Board to have special standards regarding who can be a mediator in mediating waqf disputes.

Therefore, if seen from the list of mediation absences conducted at the Indonesian Waqf Board the East Java Representative mediator who attended was always changing. Although the average majority of the Indonesian Waqf Board of Representatives in East Java entrusted the position of mediator to Mr. Mohammad Budi Pahlawan, S.H. because he felt he knew enough about knowledge and theories about mediation.

The mediation process itself runs according to the existing rules, namely waiting for the disputing parties to come on the appointed day after the invitation is submitted by the East Java Representative Indonesia Waqf Board. This mediation can be carried out anywhere, for example in the location of disputed waqf property or it can be in the location of waqif does not have to be in the office of the Indonesian Waqf Representative Body in East Java at Jalan Raya Juanda Number 26 Semalang Semambung, Gedangan District, Sidoarjo Regency. This is due to adjusting to the parties so that office distance is not a reason not to come during mediation.

Mediation, of course, begins when the two parties to the dispute have come in place with the Indonesian Waqf Board as the mediator. The mediator invites the parties to explain the position case in accordance with their respective points of view. The mediator also functions to maintain order and comfort during the mediation process so that no commotion arises from the parties.

After the process of listening to the case sit down by the parties, the mediator asked the parties’ wishes for the disputed waqf property. After the wishes of the parties came out, the mediator’s function as a neutral party began. Mediators provide solutions and also a middle way so that the desires of both parties can be achieved of course without having to sacrifice the other party. Because it returns to the initial function of mediation, with the existence of a dispute, this waqf does not want any party to win or lose, so that in the future it can lead to a bad relationship because it is related to the profit and loss value.

The ability of a mediator himself actually greatly influences the results of mediation. Not only does an understanding of the theory of mediation be needed, the mediator must also understand the case sitting and the position of the disputed waqf property. To some extent mediation can be successful if the parties to the dispute still think of good
relations going forward without having to resolve the dispute with the intention of hostility to win and lose. After the mediator presents the solution and also a middle ground for the parties to the dispute, the parties are given time to discuss. This discussion aims to keep submitting decisions regarding waqf disputes in full, unanimous and absolute return to the parties without interference from the mediator as the decision maker. Either the decision takes the form of receiving mediation results or proceeding to the litigation path as a last resort for the resolution of the waqf dispute. After that, if the parties agree to accept the results of mediation as a solution to the existing dispute, the parties to the dispute can directly carry out the mediation results without having to register the results with the Religious Court.

In mediating the resolution of waqf disputes at the Indonesian Waqf Board of Representative in East Java, of course, there are obstacles. The existence of these constraints is because the Indonesian Waqf Board of Representative in East Java itself is still unfamiliar with Mediation. The uneasiness results in mediation carried out by the Indonesian Waqf Board of Representative of East Java, the parties to the dispute sometimes directly choose the litigation path as the dispute resolution path and ignore the results of the mediation that has been carried out.

**C. Constraints in Mediation for the Settlement of Waqf Disputes in the Indonesian Waqf Board of Representative in East Java**

Based on the results of interviews conducted by the author to the resource persons namely Mr. Supriyadi as Chairman of the Indonesian Waqf Representative Body of East Java, the obstacles experienced during mediation of the resolution of waqf disputes in the Indonesian Waqf Board of Representatives in East Java include:

1. Lack of knowledge about mediation
2. Information from parties that are out of sync
3. Bringing the parties together according to the specified schedule
4. Lack of socialization regarding mediation

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7 Hasil Wawancara Penulis dengan Bapak Supriyadi selaku Ketua Badan Wakaf Indonesia Perwakilan Jawa Timur pada Senin 20 Oktober 2019 pukul 09.20
D. Efforts by the Indonesian Waqf Board of Representative in East Java in Overcoming Obstacles that Arise in Mediation for the Endowment Dispute Settlement

With the constraints in the mediation of the resolution of waqf disputes in the Indonesian Waqf Board of Representative in East Java, there is an effort made to overcome these obstacles. Among other things, namely:

1. There needs to be permanent regulations regarding the selection of mediators
2. The mediator's active role as a third party
3. Affirmation of the Indonesian Waqf Board of Representative of East Java towards the parties related to the summons of mediation
4. Socialization related to mediation to the parties

IV. Conclusions

In the implementation of waqf mediation dispute in the Indonesian Waqf Board of Representative in East Java there are 5 steps. First, the parties that were cheated will submit a report letter to the Indonesian Waqf Board of Representative in East Java. Then after the reporting letter came to the Indonesian Waqf Board of Representative in East Java, the parties involved in the dispute were summoned. After that, mediation is carried out with the Indonesian Waqf Board of Representative in East Java as the mediator or third party. The final step is that the Indonesian Waqf Board of Representatives in East Java concludes the results of mediation and then provides neutral input after the conclusion is returned to the parties to the dispute.

In carrying out mediation at the Indonesian Waqf Board of Representative in East Java as mediator, there is no specific classification regarding the selection of mediators who are appointed to become third parties in a waqf dispute. During this time, the majority of the Indonesian Waqf Board of Representatives in East Java chose Mr. Muhammad Budi Pahlawan, S.H as mediator for dispute resolution because he is a graduate of law who feels he understands more and understands the theory and science of mediation.
Acknowledgments

1. Mr. Dr. H. Sutrisno, SH., M.Hum. As Dean of the Faculty of Law of the East Java ‘Veteran’ National Development University.

2. Ms. Mas Anienda Tien F, SH., MH. As Deputy Dean I of the Faculty of Law of the East Java ‘Veteran’ National Development University and also as a supervisor of my thesis proposal.


4. Mr. Fauzul Aliwarman, SH., M.Hum. As Deputy Dean III of the Faculty of Law of the East Java ‘Veteran’ National Development University.

5. Mr. Eko Wahyudi, SH, M.Hum. As Coordinator of the Law Study Program at the Faculty of Law, the National Development University ‘Veteran’ of East Java.

6. Mr. or Mrs. Lecturer in the Faculty of Law of the National Development University of Surabaya ‘Veterans’ who have helped a lot during this education.

7. Ladies and gentlemen of the examiners of the Thesis Proposal seminar team who have provided evaluations, criticisms and suggestions that are important for future writers.

8. Mr. Supriyadi as chairman of the Representative of the Indonesian Waqf Board of Representatives in East Java and also as the author resource in writing this Thesis Proposal.

9. Head of Sub-Division of Administration along with Administrative Staff of the Faculty of Law of the East Java ‘Veteran’ National Development University.

10. To my family, especially my parents, Wisnu Budi Satoto and Lucy Judiciana Irmajanti. Along with my sister, Kinanti Adinda Widiaputri who always provides moral support and prayer in completing this Thesis Proposal.

11. To my friends who have provided support to the author in writing this study.

12. To Muchammad Al Rizal Qilmi, thank you.
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