

**ANALYSIS OF JUDGES' DECISION REGARDING CANCELLATION OF WAQF
LAND BY WAKIF (STUDY OF ANALYSIS OF DECISIONS IN MALANG
RELIGIOUS COURT NUMBER 6551/PDT.G/2018/PA.KAB.MLG)**



Khairunnisa¹

Universitas Islam Negeri Sumatera Utara, Medan, Indonesia
khairunnisa.uni123@gmail.com

Khalid²

Universitas Islam Negeri Sumatera Utara, Medan, Indonesia
khalid.mhum@gmail.com

Abstract

The research aims to understand or obtain information about the review of Islamic law and positive law on the judge's decision regarding the cancellation of waqf land by the *wakif* (Analytic Study of Decisions of the Malang Religious Court Number 6551/Pdt.G/2018/PA.Kab.Mlg). In this study, a descriptive qualitative approach was used which described and analyzed the review of Islamic law and positive law on the Cancellation of Waqf in the Malang Religious Court Decision Number 6551/Pdt.G/2018/PA.Kab.Mlg. The results of the study show that the juridical review of the waqf laws and regulations regarding the cancellation of waqf by the waqif in waqf disputes that have been decided by the Malang Religious Court in Decision Number 6551/Pdt.G/2018/PA.Kab.Mlg. that the waqf can be canceled because the waqf made at that time did not fulfill some of the waqf elements and requirements listed in Law Number 41 of 2004 concerning Waqf.

Keywords: Cancellation, Consideration, Waqf

INTRODUCTION

Waqf of the owned land is a holy, noble, and commendable act carried out by a (Muslim) or legal entity, by separating a portion of the assets he loves in the form of freehold land and institutionalizing it forever, becoming “waqf-social” land. namely, waqf intended for religious purposes or other public purposes, in accordance with the teachings of Islamic law (Budi Harsono, 2008).

Waqf is an Islamic socio-economic instrument and is a highly recommended charity. The important role of waqf in the development of the social and economic life of society can be seen in supporting various vital issues of life. To realize the purpose of the waqf, its implementation must be in accordance with the applicable regulations, both according to Islamic law and legislation that has been established by the state.

And when waqf assets have been legalized in the Waqf Pledge Deed, as stated in article 3 of Law Number 41 of 2004 concerning Waqf, that waqf that has been pledged cannot be canceled. Indeed, if you look at the provisions of Islamic law stated by *Jumhur Ulama'* (except Imam Hanafi and Imam Maliki), if the land has been pledged for waqf, then it cannot be canceled for any reason (Wahbah Al-Zuhaili, 1985), because since the land has been donated, then the ownership of the land is severed and becomes public property as stated in Government Regulation Number 28 of 1977 concerning Waqf of Owned Land. However, these provisions are different from the practice in society.

As happened in the Malang Regency Religious Court regarding the cancellation of waqf by the *wakif* which began on March 30th, 2017, the plaintiff (Kasiati) and the defendant (Mas'ud Busyiri) made a waqf pledge on land (dry land area of 1858 m²) owned by the plaintiff (*wakif*) who was donated to the defendant (*nadzir*) who was attended by witnesses at the Religious Affairs Office (KUA) Tajinan District, Malang Regency. In the waqf pledge, it was agreed to build an Islamic Education Foundation Annur Al Azhar. In the waqf pledge, it is also stated that the waqf period is “if until January 2018, the defendant cannot carry out the construction of the Islamic Education Foundation Annur Al Azhar, then the plaintiff has the right to withdraw the waqf object”. Because up to the specified time limit, the defendant as *nadzir* could not build a foundation, the plaintiff intended to ask for the cancellation of the waqf, and in the deed of waqf pledge Number

W.2/001/III/2017 issued by the defendant did not mention the waqf period. in accordance with the actual waqf pledge agreement.

REVIEW OF LITERATURE

The word “*al-waqf*” is a masdar form of the expression *waqfu al-syai*’ which means holding something back (Manan, 2014). As for waqf according to the Compilation of Islamic Law found in Article 215 paragraph (1), “a waqf is a legal act of a person or group of people or legal entity that separates some of his property and institutionalizes it forever for the benefit of worship or other public needs in accordance with Islamic teachings”. Meanwhile, according to Law Number 41 of 2004 concerning Waqf, Article 1 paragraph (2) explains that waqf is the legal act of a wakif to separate and/ or hand over part of his property to be used forever or for a certain period of time according to his interests for the purposes of worship and/ or general welfare according to Sharia.

Articles 2 and 3 of Law Number 41 of 2004 concerning Waqf which contain that waqf is valid if implemented according to Sharia and waqf that has been pledged cannot be canceled. This shows that the assets have been donated and cannot be withdrawn by the waqf, provided that the implementation of the waqf pledge is valid according to Sharia provisions. However, if you look at the definition of waqf issued by Law Number 41 of 2004 concerning Waqf, it is possible that the waqf is withdrawn to become the property of the waqf by endowing its assets for a certain period of time.

RESEARCH METHOD

The type of research used in the preparation of this journal is normative juridical (Legal Research), namely, the type of research used to examine the principles or norms in positive law (Marzuki, 2010). This type of normative juridical research (Legal Research) is carried out by examining various formal legal rules such as laws, regulations, and literature containing theoretical concepts which are then linked to the issues to be discussed.

This research is descriptive-analytical research. Descriptive, namely parsing facts, situations, or events (Soekanto, 1986). Here, the researchers describe and analyze the review of Islamic law and positive law regarding Waqf Cancellation in the Malang Religious Court Decision Number 6551/Pdt.G/2018/PA.Kab.Mlg. by collecting data and compiling the data obtained. Data analysis in this research uses qualitative descriptive

analysis, meaning that the results of this research are described in the form of explanations and sentence descriptions that are easy to read and understand to be interpreted and draw general conclusions based on facts that are specific to the subject matter being studied. Conclusions are drawn inductively, namely drawing conclusions based on specific matters and then general conclusions and then suggestions can be made from these various conclusions (Hadi, 2000).

RESULTS AND DISCUSSION

Review of Islamic Law and Positive Law on the Decision of the Malang Religious Court Number 6551/Pdt.G/2018/pa.Kab.Mlg

The decision of the Malang Religious Court Number 6551/Pdt.G/2018/PA.Kab.Mlg which explains the dispute over the cancellation of waqf by the waqif due to non-fulfillment of the terms and conditions at the time of the pledge of waqf, namely the time period not recorded in the waqf pledge deed made by PPAIW. Whereas the land object donated by the plaintiff (*wakif*) to the defendant (*nadzir*) is a piece of dry land with an area of 1858 m² located in Gunungronggo Village, Tajinan District, Malang Regency, as stated in the grant deed Number 353/2014, parcel certificate Number 32 DII village class.

In the waqf pledge, it was agreed that the object of the land was donated and used for the construction of the Islamic Education Foundation Annur Al Azhar by the defendant (*nadzir*). The waqf pledge also stated the waqf period, namely “if until January 2018, the defendant (*nadzir*) cannot carry out the construction of the Islamic Education Foundation Annur Al Azhar, then the plaintiff (*wakif*) has the right to withdraw the waqf object. Because up to the specified time limit, the defendant (*nadzir*) did not immediately build the foundation even though the signs of the building had not yet appeared, and the waqf period was not stated in accordance with the actual waqf pledge agreement, the plaintiff (*wakif*) intends to submit a lawsuit to the Malang Regency Religious Court regarding the cancellation of the waqf.

In Islamic law (the definition of Islamic law in question is KHI and school of law) waqf is the relinquishment of ownership of assets that can be useful without reducing the objects to be handed over to individuals or groups (organizations) so that they are used for purposes that do not conflict with the Sharia, forever (Rofiq, 1995).

In this case, there is also what is called temporary waqf (*muaqqat*), namely waqf that is given temporarily, either for only two or five years. However, the majority of scholars are of the opinion that waqf must be given permanently (forever). It must be indicated by a statement specifying that meaning. Therefore, waqf that is limited to a certain period of time (*muaqqat*) is invalid (Abdullah, 2004). Whereas in Law Number 41 concerning Waqf, in Article 1, what is meant by waqf is the legal act of *wakif* (waqf) to separate and or surrender part of his property to be used forever or for a certain period according to his interests. Waqf aims for the benefit of worship or general welfare according to Sharia.

In accordance with Article 22 of Law Number 41 of 2004 concerning Waqf, to achieve the objectives and functions of waqf, waqf assets can only be divided between: a) Religious facilities and events; b) Educational institutions and events, and healthcare; c) Assistance for the poor, orphans, abandoned children, scholarships; d) Progress and improvement of the national economy and/or; e) Improving other general welfare that does not conflict with Sharia, statutory regulations.

Referring to the mention of several meanings of waqf conveyed in the Compilation of Islamic Law, there are several significant differences with the provisions contained in Law Number 41 of 2004 concerning waqf. In some fiqh literature and the Compilation of Islamic Law, it is stated that waqf assets are valid as endowments forever without knowing a certain time limit. Whereas in Law Number 41 of 2004 concerning waqf, it is stipulated that waqf can be carried out temporarily or within certain time limits according to the wishes of the person who donates the property, be it permanent or non-permanent objects.

In Indonesia, the laws and regulations governing waqf include Government Regulation Number 28 of 1977 concerning Waqf of Owned Land, Permendagri Number 6 of 1977 regarding the method of land registration regarding Waqf of Owned Land, Minister of Religion Number 1 of 1978 concerning Implementation Regulations for PP No. 28 of 1977 concerning Waqf of Owned Land, and various decrees of the Minister of Religion and the Director General of Islamic Development of the Ministry of Religion, as well as the Compilation of Islamic Law in Indonesia (KHI). Even more important are Law Number 41 of 2004 concerning Waqf and Government Regulation Number 42 of 2006 concerning

Endowments. In Article 70 of Law Number 41 of 2004 concerning Waqf, it is emphasized that:

In preventing disputes arising in waqf, based on Government Regulation concerning the Implementation of Law Number 41 of 2004 concerning Waqf Article 1 one of the legal pieces of evidence in court is the Waqf Pledge Deed, this is useful to show that the waqf's property has been donated by the party giving the waqf to the party receiving the waqf property so that the waqf can be developed in accordance with the statement of the waqf's will stated in the Waqf Pledge Deed. The impact that arises because there is no written evidence in the form of a certificate or Deed of Waqf Pledge in lieu of a Waqf Pledge which shows that a legal event has occurred will experience difficulties in the verification process if a waqf dispute occurs. In addition to written evidence, the waqf evidence that can be proven in the verification process is people who directly witnessed the waqf transaction, but this can be hampered by limited human age. When a witness dies, it will be difficult to find other evidence. The hierarchy of evidence can be used during the proving process, namely, writings/letters, witnesses, presumptions, and oaths (Munawirsyah, 2020).

According to Article 1 point 3 of Law no. 41 of 2004, the waqf pledge is a statement of the will of the wakif spoken orally and/or in writing to the *nadzir* to donate his property. As for the provisions of the Waqf Pledge, it is further explained in Article 17 of Law Number 41 of 2004 concerning Waqf that: a) The waqf pledge is carried out by the wakif to the *nadzir* in the presence of the Waqf Pledge Deed Making Officer (hereinafter abbreviated as PPAIW) witnessed by 2 (two) witnesses; b) The waqf pledge as referred to in paragraph (1) is stated verbally and/or in writing and is stated in the Waqf Pledge Deed by PPAIW.

Withdrawal of land that has been donated has been expressly and clearly not justified and prohibited according to the applicable laws and regulations on waqf, in this case, stated in Article 3 of Law Number 41 of 2004 concerning Waqf which states that waqf that has been pledged cannot be canceled. or it cannot be withdrawn. A wakif may not revoke his waqf and is also prohibited from demanding that assets that have been donated be returned to his share of ownership.

According to Islamic law, the act of withdrawing waqf assets is also strictly prohibited by religion. In the authentic Muslim hadith, there is no known explanation for

the permissibility of withdrawing waqf. Especially in waqf where the majority of scholars are of the opinion that waqf ownership is aborted and belongs to Allah SWT, then it is reinforced in the hadith of Umar Ibn Al-Khattab about waqf, that waqf assets cannot be traded, cannot be inherited, and cannot be donated. In the provision regarding grants which emphasizes that Rasulullah SAW likens: The parable of a person who withdraws his alms (zakat, infaq, grant, will, and waqf) is like the example of a dog that vomits, then takes the vomit back, and eats it again (Muslim) (Baqi, 2017). Therefore, by enforcing waqf actions with grants, it can be understood that withdrawing waqf assets is illegal because in fact the assets or objects that have been donated will return and belong to Allah SWT.

Judge's Considerations in Deciding Waqf Cancellation Cases in Decision Number 6551/Pdt.G/2018/PA.Kab.Mlg

In the case of cancellation of waqf in decision Number 6551/Pdt.G/2018/PA.Kab.Mlg, the legal fact is that the plaintiff (*wakif*) donated waqf for a certain period of time until January 2018, which shows that there is a change in the concept of Islamic law (fiqh) with the concept in Law Number 41 of 2004 concerning Waqf.

If we examine in depth the objectives of Sharia (Maqasid Sharia), especially regarding muamalah law, it can be concluded that in essence, the law of origin (basic) of waqf is permissible. The panel of judges is of the opinion that there are several new things as well as important clauses in Law Number 41 of 2004 concerning Waqf including, namely, the courage to change the concept of waqf absolutism forever to be relative, the basis of Law Number 41 of 2004 concerning Waqf provides a time limit for waqf fixed objects, namely based on juridical, Maqasid Sharia, benefit, and sociological considerations of society.

In Islamic law provisions relating to waqf are given within a certain period of time including environmental issues of fiqh, not Sharia. This means that all the rules and regulations related to waqf are only fiqh which is the result of human perspective which is subject to sociological determinants. Basically, the substance contained in the provisions of Article 1 Paragraph (1) of Law Number 41 of 2004 concerning Waqf is the beneficial value of waqf assets. So the principle of usefulness of waqf objects becomes the most relevant basis for the existence of the objects themselves. The logical consequence of temporary

waqf is that more and more people are donating their property because eternal waqf is synonymous with eliminating ownership rights.

As well as part of the education process for the public there is an opinion in Islamic law from the Maliki *Mazhab* which states that waqf goods can be handed over at a time according to the wishes of the waqif. According to this school, the waqf property remains the property of the waqf person and may endow him for a certain period of time, and when the specified period passes, the waqf person may take back the donated property. The opinion of the Imam Maliki *Mazhab* is based on the hadith of Ibn Umar when the Prophet said to Umar “if you want, hold on to the original and give the results as charity”. According to Imam Maliki, the Prophet only ordered to give charity to the results. From this explanation, waqf is allowed for a certain period of time (Directorate of Waqf Empowerment, 2007).

Imam Maliki defines “eternity” more in the nature of the goods being donated, both fixed assets and movable assets. For fixed assets, e.g. land, the element of immortality is fulfilled because indeed land can be used as long as there are no landslides or natural disasters that physically remove the land, this is also the case with mosques or madrasas. Besides that, Imam Maliki expanded the waqf land to cover other movable goods, such as waqf of cow’s milk or certain fruit plant waqf. The substances are cows and trees, while the benefits are milk and fruit. It opens up wide opportunities to provide waqf in any type of asset, including the most liquid asset, namely cash (cash waqf).

The background to the plaintiff’s lawsuit in the waqf cancellation dispute case in Decision Number 6551/Pdt.G/2018/PA.Kab.Mlg stems from the non-fulfillment of the conditions and pillars at the time of the waqf pledge, namely the time period not recorded in the waqf pledge deed made by PPAIW, and the purpose of the endowment is not fulfilled. The plaintiff’s lawsuit was finally granted by the panel of judges in their decision ordering the defendant or anyone who had rights from him to hand over the disputed land to the plaintiff in an empty state and free from anyone’s control because the panel of judges was of the opinion that verbally the waqf pledge was spoken by the plaintiff as *wakif* there is a certain period of time: a) Name and identity of the *wakif*; b) *Nazir*’s name and identity; c) Data and information on waqf assets; d) Allocation of waqf assets; e) Waqf period.

As stated by the Malang Religious Court judge, what is essentially waqf can be withdrawn or canceled if the waqf that occurs does not fulfill one of the conditions and pillars. In the case of cancellation of waqf in Decision Number 6551/Pdt.G/2018/PA.Kab.Mlg that in the Deed of Waqf Pledge Number W.2/001/III/2017 issued and signed by the Head of the Office of Religious Affairs in Tajinan District, Malang Regency, it is not mentioning the waqf period as stated by the plaintiff (*wakif*) when the waqf pledge was made and this did not meet the requirements and harmony in the waqf.

The Waqf Pledge Deed (AIW) is the only authentic evidence that can prove that a legal act of waqf has been carried out. Waqf Pledge Deed (AIW) issued by the Waqf Pledge Deed Official (PPAIW) which according to law is legally recognized by the state, so that it can be used to prove the implementation of waqf.

Based on the analysis above regarding the terms and pillars of waqf, it is known that the waqf that occurred at that time did not meet the requirements and pillars, including not including the waqf period on the Waqf Pledge Deed and the purpose of the waqf, which was used for the construction of the Islamic Education Foundation Annur Al Azhar, nor did it can be implemented by the defendant (*nadzir*), so that the waqf is legally invalid and the judge grants the lawsuit from the defendant (*wakif*) to withdraw or cancel the waqf land by declaring the waqf pledge deed no longer has legal force, Therefore, the lawsuit is granted by punishing the defendant (*nadzir*) or anyone who has the right from him to hand over the disputed land to the plaintiff (*wakif*) in a vacant condition and free from anyone's control and ordering parties related to the PPAT and the Land Agency to be able to issue a Deed and to be able to raise the status of the land to a Certificate of Ownership.

CONCLUSION

Based on the results of the research and discussion in the previous chapter, it can be concluded that the juridical review of waqf laws and regulations regarding the cancellation of waqf by wakifs in waqf disputes that have been decided by the Malang Religious Court in Decision Number 6551/Pdt.G/2018/PA.Kab.Mlg. that the waqf can be canceled waqf, this is because the waqf that was carried out at that time did not fulfill several elements and requirements of waqf listed in Law Number 41 of 2004 concerning Waqf. Considering that

after confirming and qualifying the legal facts as described above, the panel of judges is of the opinion that in connection with the argument of the plaintiff's lawsuit is in accordance with the nature, quality, and characteristics of the condition of waqf, therefore the plaintiff's lawsuit is grounded and based on law, and it turns out that the Waqf Pledge Deed Number W.2/001/III/2017 does not include the waqf period, so the plaintiff's claim can be granted by canceling the Waqf Pledge Deed and it no longer has legal force.

According to Islamic law, the act of withdrawing or canceling waqf is strictly prohibited by religion. This is in accordance with the hadith narrated by Imam Muslim which confirms that Rasulullah SAW likened "the parable of a person who gives charity and then withdraws his alms is like a dog that vomits, then takes back the vomit, and eats it again (Muslim History)". The opinions of the Imam *Mazhab* also have several differences, including the Maliki *Mazhab*. In the case of waqf, Imam Maliki is of the opinion that the assets that have been donated remain the property of the waqf person and may be withdrawn. In this way, the assets remain the property of the waqf person, only the proceeds and benefits are used for waqf purposes.

REFERENCES

- Anwar, Samsul. (2006). *Studi Hukum Islam Kontemporer*. Yogyakarta: Cakrawala.
- Baqi, Muhammad Fu'ad Abdul. (2017). *Terjemah Sahih Bukhair-Muslim*. Jakarta: Elex Media Komputindo.
- Budiman, Achmad Areif. (2016). Partisipasi Stakeholder dalam Perwakafan: Studi kasus di Rumah Sakit Roemani, Yayasan Badan Wakaf Sultan Agung dan Masjid Agung Semarang. *Jurnal Al-Ahkam*, 26(1), 1-28. [10.21580/ahkam.2016.26.1.604](https://doi.org/10.21580/ahkam.2016.26.1.604)
- Direktorat Pemberdayaan Wakaf. (2007). Direktorat Jendral Bimbingan Masyarakat Islam Departemen Agama RI, *Paradigma Baru Wakaf di Indonesia*, Jakarta: Direktorat Jendral Bimas Islam dan Penyelenggaraan Haji.
- Hadi, Sutrisno. (2000). *Metodologi Research Jilid I*. Yogyakarta: Andi Offset.
- Harsono, Budi. (2008). *Hukum Agraria Indonesia Sejarah Pembentukan Pokok Agraria, Isi dan Pelaksanaannya*. Jakarta: Djambatan, cet.XII.
- Al-Kabisi, Muhammad Abid Abdullah. (2004). *HukumWakaf (Kajian Kontemporer pertama dan Terlengkap tentang Fungsi dan atas Sengketa Wakaf)*. Jakarta: Dompot Dhuafa Republik.
- Manan, Abdul. (2014). *Aneka Masalah Hukum Perdata Islam di Indonesia*. Jakarta: Kencana.

Marzuki, Peter Mahmud (2010). *Metode Penelitian Hukum*. Jakarta: Kencana Prenada Media Grup.

Munawirsyah, Isnain. (2020). Perlindungan Hukum Tanah yang Tidak Memiliki Sertifikat. *Al-Ilmu: Jurnal Keagamaan dan Ilmu Sosial*, 5(2), 24-44.

Rofiq, Ahmad. (1995). *Hukum Islam di Indonesia*, Jakarta, Raja Grafindo Persada.

Soekanto, Soejono. (1986). *Pengantar Penelitian Hukum*. Jakarta: UI Press.

al-Zuhaili, Wabih. (1985). *al-Fiqh al-Islami wa Adillatuhu*. Beirut: Dar al-Fikr, Cet. Ke-2.