

Juridical Review of Submission of Waqf Land by Foreign Dwellers in Indonesia

Onny Medaline, Siti Nurhayati

Faculty of Social Science, Universitas Pembangunan Pancabudi, Medan, Indonesia
 onnymedaline@dosen.pancabudi.ac.id, sitinurhayati@dosen.pancabudi.ac.id

ABSTRACT

In the legal provisions in Indonesia, waqf is defined as a legal act of a person or legal entity that separates a portion of his property in the form of land belonging and institutionalizes the interests of worship or other public purposes in accordance with the teachings of Islam. From this definition, it is not mentioned about waqf limitation in the handover of waqf, both Indonesian citizens and foreigners who reside in Indonesia. The study on the granting of waqf land by foreigners residing in Indonesia can be seen from several different points of view, ie, both from the population administration law, from the various regulations governing the residence of foreigners residing in Indonesia, and from legal review of waqf that exist in Indonesia. On the basis of UUPA and regulations concerning the administration of residence for foreigners, foreigners with a land tenure with Right to Use may be located as waqif. Since the right to use is a right to participate on the land of the right of the State, or land of management rights, or land of property rights, then with the expiration of the term of tenure, will result in the expiry of the expiration of waqf land use.

Keywords: *waqf land, foreign Dwellers in Indonesia*

1. INTRODUCTION

In the history of Islamic development in Indonesia, waqf institutions became a basic foundation of the entry of Islamic values into the joint of positive law. Waqf land is part of a social function that earned its initial protection in the national land law. The Protection of "waqf" found in laws of land affairs in the article of 49 verse 3 No.5, 1960 about the Fundamental Regulation of Agrarian Affairs which stated that "The "waqf" of one's land is protected and regulated by government regulation". To conduct this, on May 17th, 1977, the government notarized the government regulation No. 28 in 1977 about the "waqf" of land ownership.¹

Government Regulation of 1977, is a form of realization of special representation arrangements to the land of property that can be used and institutionalized forever for the interest of worship or other public interest in accordance with the teachings of Islam.

The genesis of Law No. 41 of 2004 on Endowments and PP No. 42 of 2006 regarding the implementation of the Waqf Act is part of a renewed spirit and scope of the object

endowments and management in order to bring the maximum benefit. Therefore, productive waqf endowments are considered as a new paradigm in Indonesia,² part of the spirit of renewing and expanding the scope of waqf and management objects to bring maximum benefits. Specific objects of endowment of immovable property in the form of land, not only limited to land owned only, as the restriction given by Government Regulation no. 28 Year 1977. But the object of waqf on the land can be all the rights to the land as regulated in the Basic Agrarian Law No. 5 of 1960, this is affirmed in Article 17 of Government Regulation Number 42 of 2006, states that: Indirectly from the contents of the aforementioned article gives an idea that the object of waqf can be given to all forms of land ownership, either land of ownership rights, right of use, right of use of building, including the right of use land which in fact can be given to foreign citizen. Of the rights to land which may be owned by individual as well as legal entity, only the right of use may be granted to foreigners domiciled in

¹Onny medaline, The Development of "Waqf" on the "Ulayat" Lands in West Sumatera, Indonesia, Journal of Social Science Studies, Microthink Institute, ISSN 2329-9150 2018, Vol. 5, No. 1, Page. 109

² Achmad Djunaidi, dkk., Paradigma Baru Waqf di Indonesia, Cet. Ke-4, Jakarta: Direktorat Pengembangan Zakat dan Waqf Depag RI, 2007. Onny Medaline, Cash Endowment (Waqf Tunai) Development In The Era Of The Asean Economic Community, ADDIN, Volume 10, Number 2, August 2016, page. 415.

Indonesia and foreign legal entities having representation in Indonesia. This matter is affirmed in Article 42 of Law no. 5 of 1960 (hereinafter referred to as UUPA).

Although the UUPA prohibits foreigners from owning land, but according to AP Protection, the UUPA does not entirely cover the opportunities of foreign nationals and foreign legal entities to own land in Indonesia. Foreign nationals may own land rights in Indonesia, but only limited, ie only with the status of the use rights, can not be another type of right. So from the principle of this nationality, the more clearly the interests of Indonesian citizens above all things for the economic, social, political, and from the point of security.³

Based on the above explanation, it is better to study about the giving of waqf land by foreigners residing in Indonesia, can be seen from several different viewpoints, namely either from the law of population administration, various regulations governing residence ownership for foreigners who are located in Indonesia, and especially from legal representation in Indonesia. Therefore this paper reviewing how Indonesian legislation regulation technically the implementation of land awareness given by foreign nationals residing in Indonesia

2. DEFINITION AND BASIC LEGAL RIGHT USE

In Article 4 Paragraph (1) of the UUPA states that on the basis of the right of control of the State, it is determined that there are various kinds of land rights which can be granted to and owned by persons either alone or together with other persons or legal entities. The various forms of land rights mentioned in Article 16 of UUPA are in the form of property rights, cultivation rights, building rights, usage rights, and some other rights.

In the UUPA the provisions on usage rights are briefly provided for in Articles 41 to 43, and further provided for in Articles 39 to 58 of the Government Regulations Number 40 of 1996 concerning cultivation rights, building rights, and usage rights of Land.

Definition of Right to Use in Article 41 of UUPA, mentioned Right to use is the right to use and / or collect proceeds from land directly controlled by the State or the property of another person, authorizing and liabilities specified in the decision of his award by the competent authority to give it or in agreement with the landowner, not the lease agreement rent or land-processing

agreement, everything of origin does not conflict with the spirit and provisions of this Act.

Regarding parties who may own land with the status of Right to Use land is mentioned in Article 42 of UUPA in conjunction with Article 39 of Government Regulation Number 40 Year 1996, among others:

- a. Indonesian citizens;
- b. Legal entities established under Indonesian law and domiciled in Indonesia;
- c. Departments, Non-Department Government Institutions, and Local Governments;
- d. Religious and social bodies;
- e. Foreigners domiciled in Indonesia;
- f. Foreign legal entity having representation in Indonesia;
- g. Representatives of foreign countries and representatives of international bodies.

The right to use can be controlled by foreigners can occur on State land, land rights management, and land property rights. In Government Regulation no. It is stipulated that the term of use rights shall be adjusted to the origin of the land: (1) the right of use to the State land, (2) the right to use the managed land, and (3) the right to use the land of ownership.

As a follow-up to the provisions of the UUPA on foreigners, in order to provide legal certainty regarding the ownership of residential houses or occupancy for foreigners, issued Government Regulation No. 103 of 2015 on Ownership of Residential Homes or Shelters by Foreigners domiciled in Indonesia replacing Government Regulation Number 41 Year 1996. Affirmed in Article 2 of Government Regulation no. 103 Year 2015, that

3. FOREIGN CITIZEN ACCORDING TO THE POPULATION ADMINISTRATION

The definition of a foreigner here can be seen from Article 1 of Law Number 24 Year 2013 regarding the amendment to Law Number 23 of 2006 concerning the administration of population, that foreigners are non-Indonesian Citizens. Similarly, the definition of foreigners contained in Law No. 6 of 2011 on immigration, foreigners are persons who are not Indonesian Citizens.

Adrian Sutadi said that domiciled in Indonesia is a foreigner who conducts economic activities in Indonesia and when conducting activities in Indonesia conducted periodically or at any time, he needs to have a house of residence

³AP. Parlindungan, 1993, *Pencabutan dan Pembebasan Ha katas Tanah Suatu Studi Perbandingan*, Mandar Maju, Bandung page. 81

or occupancy in Indonesia.⁴The meaning of foreigners who are domiciled in Indonesia is a foreigner who has a residence permit in Indonesia. In addition, residency permits for foreigners are required for foreigners who wish to have a residential or residential home in the form of a single house or apartment unit. This matter is regulated in Regulation of Minister of Agrarian and Spatial or Head of National Land Agency Number 13 Year 2016 concerning Procedure of Giving, Release or Transfer of Right to Ownership of Residential Homes or Occupancy by Foreigners domiciled in Indonesia. This residence permit is divided into five residence permits, namely diplomatic residence permit, duty-residence permit, visit-residence permit, limited stay permit, and permanent residence permit.

The definition of residence permit according to Law Number 6 Year 2011 on Immigration is a permit granted to foreigners by an immigration official or an official of a foreign office to reside in the territory of Indonesia. And, in Government Regulation No. 31 of 2013 on the implementation of Law No. 6 of 2011 on Immigration, stipulates that every foreigner residing in the territory of Indonesia is required to have a residence permit. This residence permit is granted to foreigners according to the visa they have. Foreigners domiciled in Indonesia have a residence permit in Indonesia, in accordance with Government Regulation No. 103 of 2015, which also has employment in Indonesia, in this case work as well as investment in Indonesia. The definition of foreigners contained in Government Regulation No. 103 of 2015 provides a message that foreigners who are domiciled in Indonesia must have a job, and can provide benefits in Indonesia, this is certainly in order to prevent foreigners is actually a burden for Indonesia if he does have income while in Indonesia.

The existence of the requirements of foreigners residing in Indonesia must have the work mentioned above, referring to the union of foreign workers as stipulated in Regulation of the Minister of Manpower No. 16 of 2015 on the Procedures for the use of foreign workers, which has been amended by Regulation of the Minister of Manpower Number 35 of 2015 on the amendment to the Regulation of the Minister of Manpower No. 16 of 2015 on the Procedures for the Use of Foreign Workers, in Article 39 Paragraph (2) is one year, and may be extended by a Ministerial Decree. Whereas in Article 39 paragraph (5), Permit to Employ Foreign Workers, in which the foreign worker is a

member of the Board of Directors, as a member of the Board of Commissioners, as a member of the Board of Trustees, as a member of the Board, as a member of the Supervisory, the permit may be granted two years, and can be extended. Extension of Permit to Hire Foreign Workers is based on the Regulation of the Minister of Manpower No. 16 of 2015 on the Procedures for the use of foreign workers, which has been amended by Regulation of the Minister of Manpower No. 35 of 2015 on Amendment to the Regulation of the Minister of Manpower No. 16 of 2015 on the Procedures for the Use of Labor foreigners, in Article 43, may be submitted no later than 30 working days before the expiry of the Hiring Permit on Foreign Workers expires.⁵

4. GIVING WAQF LAND BY FOREIGNERS IN WAQF LAW REVIEW

Government Regulation No. 28/1977 on the representation of Land of Property (PP No. 28 Year 1977) was established. PP no. 28 of 1977 is implemented by the Minister of Home Affairs Regulation No. 6 of 1977 on Land Registration Regarding Ownership of Land Ownership. Enactment of PP. 28 Year 1977 at the same time replace the regulation of land representation that originated from the Dutch colonial government and in principle the government regulation only regulates the problem of waqf of owned land only, does not regulate issues waqf in general.

To that end, in 2004 categorized as a period of professional endowments is a condition where the attractiveness of waqf has started ogled to be empowered professionally and productively. The professionalism that is carried out covers the following aspects: management of the resources of kishiran, the pattern of business partnership, the form of waqf goods in the form of immovable property such as money, stock and other securities, full government political support in the form of the birth of Law No. 41 of 2004 on Waqf, with its Executing Regulation Number 42 of 2006 on the Implementing Regulation of Law Number 41 Year 2004.

With some of the changes emerging in the new rules of representation it opens up new opportunities for the development of representation. Extend the scope of the type of waqf property that is not limited to immovable objects such as land and buildings, but can also do waqf with the object of moving objects. Especially with respect to waqf property in the

⁴ Adrian Sutadi, Tinjauan Hukum Pertanahan, Pradnya Paramita, Jakarta, 2009, Page. 268

⁵ Mira Novana Ardani, Kepemilikan Hak Atas Tanah bagi Orang Asing Di Indonesia, Jurnal Law Reform Volume 13, Nomor 2, Tahun 2017, page. 213

form of land, it is no longer restricted to land of property rights, but includes land with rights to use the building, the right to use, including the right to use. Furthermore it is required that the right to land to be represented above shall be legally owned or controlled by wakif and free from any confiscation, case, dispute, and not guaranteed. In addition, the object of the form of land can only be reproduced for a period of time, except for the building use rights or the right to use the land of management rights and / or property rights, then the immovable waqf objects can be represented as well as the buildings and / or plants and / or objects -other objects relating to the land. Such waqf property, is one of the components that must be fulfilled as an element or rukun waqf that guarantee the validity of waqf legal acts.

Another component that must be fulfilled in the legitimacy of waqf is wakif. According to Article 1 Paragraph (2) of Government Regulation Number 28 Year 1977, Wakif is a person or person or legal entity that represents his property, whereas according to Article 1 Sub-Article 2 of Law Number 2 Year 1999 41 of 2004, wakif is the party who inaugurates his property. Wakif may be either person individually or jointly with another person, or a legal entity that qualifies as the subject of Property. Explains what is meant by individuals, organizations and / or legal entities are individual Indonesian citizens or foreign citizens, Indonesian organizations or foreign organizations and / or Indonesian legal entities or foreign legal entities.

The clarification explains that it is not possible for a foreign citizen, or foreign organization, or foreign legal entity to be domiciled in legal act of waqf by following the existing legal provisions. Especially for waqf objects in the form of land, then foreigners may only use land with the right to use, as defined in the UUPA.

The time horizon of the alien rights granting of land rights is also subject to the limitation of utilization of waqf objects within a certain timeframe, this is as described in Article 1 of the Waqf Law No. 41 In 2004. In the development of waqf in Indonesia, Waqf Law embraces a waqf that can be used forever or can also perform waqf for a certain period.

However, the opportunity for the handover of waqf land for foreign Dwellers in Indonesia, has not yet been accompanied by more detailed regulations regarding the handover of wakaf land use rights for foreign nationals. Because of the need for more technical arrangements governing the handover of wakaf land use rights for foreign nationals residing in Indonesia

5. CONCLUSION

Legal certainty is a feature that can not be separated from the law especially in written legal norms. The law without a certainty value will lose meaning because it can no longer be used as a behavioral guide for everyone. The form of legal certainty for the granting of waqf land by foreigners residing in Indonesia is manifested by various regulations relating to the regulation of population administration for foreigners in Indonesia who are entitled to a house of residence and occupancy on the land of use rights. Since the right to use is a right to participate on the land of the right of the State, or land of management rights, or land of property rights, then with the expiration of the term of tenure usage by foreigners who are domiciled as wakif, will result in the expiration of the expiration of waqf land use.

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