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## Legal liability of deed-making officer of *Waqf* agreement (PPAIW) in the making of unqualified deed of *Waqf* agreement (AIW)

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### Abstract

The protection and legal certainty of those who have the right of *waqf* land is the purpose of the Land Registration Law to protect matters related to the rights attached to the *waqf* certificate. PPAIW as the officer charged by the *Waqf* Law, Article 1 paragraph (6), is required to be able to carefully examine the administrative requirements of the *waqf*, in this case including the physical condition of the objects to be waived by the community. Practically that meticulousness of PPAIW is still found, resulting in a *waqf* lawsuit through the courts. What would be the problem in the future how is the legal responsibility of the *waqf* Deed-making Officer (PPAIW) who have made the unqualified deed of *Waqf* agreement. The Method of this research is juridical-normative. The conclusion is that sanctions both administratively and criminal penalty can be imposed, if there is misappropriation in PPAIW's responsibility in making AIW and APAIW as enacted in Article 41 paragraph (1) of Government Number 42 of 2006 concerning the Implementation of Law Number 41 of 2004 related to *Waqf*. As amended by Government Regulation Number 25 of 2018 concerning to the change of Government Regulation Number 42 of 2006 concerning to the Implementation of Law Number 41 of 2004 about *Waqf*.

**Keywords:** responsibility, PPAIW, AIW, *Waqf* Law

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### Introduction

The protection and legal certainty of rights on land as stated in Government Regulation Number 24 of 1997 concerning to the Government Regulation on Land Registration which includes proprietary rights, rights of use for business, rights of building, rights of use over land, land management rights, *waqf* land and proprietary rights to units of flats. For *waqf* land, particularly regulated by government regulation number 42 of 2006 concerning to the implementation of law number 41 of 2004 relating to *waqf*. *Jucnto* Government Regulation Number 42 of 2006 concerning to the Implementation of Law Number 41 of 2004 about *Waqf*. As amended by the Government Regulation Number 25 of 2018 concerning to the changes on the Government Regulation Number 42 of 2006 concerning to the Implementation of Law Number 41 of 2004 about *Waqf*. (PP *Waqf* Implementation).

The purpose of the land registration as stated in the Land Registration Regulation, in Article 3 which states that the land registration provides legal certainty and legal protection to those who have rights, provides information to the interested parties and for the implementation of orderly land administration. As has been affirmed in Article 19 paragraph (2) letter c of Law Number 5 of 1961 concerning to the Basis of Agrarian Principles Regulations and Article 32 paragraph (1) of Government Regulation on the Land Registration.

The assurance of certainty in the form of a certificate of rights on lands which constitutes to be strong initial evidence, the certificate provides legal certainty of land ownership for the person whose name is stated in the certificate, The issuance of a land certificate can prevent land disputes, the ownership of the certificate will give a feeling of calm and tranquility because it is protected from arbitrary actions. Secondly, the granting of certificates is intended to prevent land ownership disputes, and thirdly with the ownership of certificates, landowners can carry out any legal act as long as they do not conflict with law, public order and decency (Adrian Sutendi, 2014) <sup>[13]</sup>.

The third, the important reason of land certificates which is as a guarantee of ownership of land rights issued in accordance with good and correct procedures and methods so that the issuance of land certificates can be conducted as appropriately. The problem on land, especially in the issuance of land certificates, is increasing, as seen from the list of cases of the Banda Aceh State Administrative Court from 2019 - 2021 there were 31 cases related to the cancellation of land certificates. And data from 2016-2021 there were 4 (four) cases of claims for cancellation of *waqf* at the Shariah Court in Banda Aceh.

Practically the problem on the certification of land is in the form of administratively defective and the errors of the subjects, namely incorrect information from the applicant. In this case, any defect in the conflicting procedure Indicates to a legal defect or it also shows any imperfection and incomplete law in processing or managing land registration applications, it still enables the possibility of issuing a rights certificate of *waqf* land. Land becomes one of the objects that are waived, Therefore, *waqf* based on Article 1 of Law No. 41 of 2004

concerning *Waqf* (*Waqf* Law) states: "*Waqf* is a 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 in accordance with the interests for the purposes of religious matters and or general welfare according to Shari'ah".

As for the objects that can be used as *waqf* objects based on Article 15, Government Regulation on *Waqf* Implementation are immovable objects, movable objects other than money and movable objects in the form of money. One of the immovable objects that can be waived is the right on the land Article 17 paragraph (1) letters a, b, c and d Governmnet Regulation on the Implementation of *Waqf*, namely, among others:

- a. Proprietary on land whether it has been or has not been registered
- b. Collective proprietary on land from units of flats in accordance with the provisions of laws and regulations.
- c. Rights of use for business, rights of building, or the rights of use over land that are on the state's land
- d. Rights of building or the rights of use that are on the land of under personal or private management rights or private proprietary rights that must obtain written permission from those who have the management rights or proprietary rights.

The land as an immovable object, is one of the *waqf* objects that are most often used as *waqf* objects carried out by people in Indonesia, especially in Aceh Province. The issue of *waqf* land, it is closely related to social problems and local custom, so the rules of *waqf* are implemented in accordance with customary law in force in the community by not reducing Islamic values in the *waqf* law itself (Ahmad Rafiq, 2003).

The *Waqf* Law and the Regulation of the Minister of Agrarian and Spatial Planning/The Head of the National Land Department of the Republic of Indonesia Number 2 of 2017 concerning to the Procedures for Registration at the Ministry of Agrarian and Spatial Planning of the National Land Department in Article 1 number 6 states that "The *Waqf* Deed Making Officer (PPAIW) is an authorized official appointed by the minister to make a *waqf* deed". In accordance with the *Waqf* Implementation Regulation in Article 37 number 1, it is explained that PPAIW, of immovable *waqf* objects in the form of land is held by the Head of the District KUA or officers who organize *waqf* affairs.

As the official party given the trust in carrying out the land certification process, therefore PPAIW is required or demanded to be able to carefully examine the administrative requirements of the *waqf*, in this case including the physical condition of the objects to be waived by the community. There are four conditions for legal valid fulfillment of *waqf*, namely: The existence of a *wakif* (person who waive his property). *Mauquf bih* (goods or property waived) *Mauquf alaih* (party given *waqf/waqf* designation), *Shighat* (statement or *ikrar wakif* as a will to waive a part of his property). (Ahmad Mujaidin, 2021) <sup>[7]</sup> These four conditions are the legal requirements in every *waqf* law action in Indonesia. This is to prevent any lawsuit in the future.

The current implementation shows that some land conflicts caused by errors in the terms and procedures that have been regulated, and resulting in legal defects dong by PPAIW in making AIW, PPAIW must provide accountability both morally and legally for direct or indirect errors that result in the AIW becoming an underhand deed that has the consequence of being cancelable (*vernietigbaar*) due to non-fulfillment of subjective conditions, consequently the parties who feel aggrieved by the issue of the certificate file a lawsuit through the judicial institution, So that the cancellation of the land rights certificate is very detrimental to the parties and the third parties who have good will in the acquisition of land rights.

The handover of objects by the *wakif* constitutes to be a juridical one (*juidische levering*) which must be in accordance with the ones regulated by law, such as terms, procedures, valid documents, and made before PPAIW. PPAIW's mistakes resulted in the cancellation of the *waqf* certificate certainly has legal consequences for both civil, and criminal law as well as other administrative sanctions that have been regulated in legislation related to the *waqf* law. Cancellation of the *waqf* certificate in Banda Aceh Sharia Court has already permanent legal force (*in kracht van gewijsde*). Therefore, based on the background mentioned above, the problems in this writing will include: What is the Legal Responsibility or liability of the *Waqf* Deed Making Officer (PPAIW) in making the *Waqf* Agreement/declaration Deed (AIW) that does not meet or fulfill the *Waqf* Requirements?

## Research Methods

This research method uses the normative juridical method which based on a literature research (library Research), while the approach to be used is the statute approach and the conceptual approach (Jhonny Ibrahim, 2006), as well as case approach. The material is analyzed qualitatively, then to be studied with inductive logical thinking so that the output produces abroad descriptive analysis. (Soerjono Soekanto, 2010).

## Results and Discussion

### Legal Liability of the Deed-Making Officer of *Waqf* Agreement (PPAIW) in making of Unqualified Deed of *Waqf* Agreement (AIW)

PPAIW's mistakes in making AIW in the absence of a statement of the *wakif* representing a will to waive some of his property. The inaccuracy includes the absence of a *shighat* written statement of the *wakif* on the *waqf* object to waive, and the absence of family or relative members who witness the *waqf*'s legal actions that resulted in the denial from the heirs in the case plus unsynchronized data of the *waqf* that caused the cancellation of the *waqf* certificate.

The legal terminology of the authority of an official PPAIW is attached to his role and duties as a manifestation in carrying out and optimizing his functions under the *Waqf* Law and similar regulations, as for some of his authorities can be described as follows: Examine the validity of the administration which includes the ownership

of the property to be waived, the identity of the prospective *wakif*, *nazir* and witnesses and other necessary matters. Giving input or Feedback to the prospective *wakif*, and *nazir* in fulfilling the requirements to propose the replacement of *nazir* either on their own initiative or the wakif's or his heirs', and to mediate in case of *waqf* conflict. (Ahmad Mujahideen, 2021) <sup>[7]</sup> As stated in Article 16 of the Regulation of the Minister of Religious Affairs (PMA) Number 1 of 1987 on Implementing Regulations of Government Regulation Number 28 of 1977 concerning the ownership of Property.

PPAIW's liability regulated in the *Waqf* Law Chapter IX on Criminal Provisions and Administrative Sanctions Article 67 and Article 68 of the *Waqf* Law, as for the legal responsibility of PPAIW both administratively and criminally to the deeds containing defects can be described as follows.

### Administrative Responsibilities

PPAIW is the officer who is given legal duties and authority to make a Deed of *Waqf* Agreement (AIW) based on laws and regulations. Therefore, everything about the procedure up to the issuance of a *waqf* certificate has juridical consequences on PPAIW as a form of accountability.

PPAIW's responsibility for mal-administration is due to its inherent duties, functions and authorities as an acting PPAIW which is an unlawful act, this can be in the form of exceeding authority, using authority for other purposes including negligence of legal obligations in the implementation of public services carried out by State Organizers (Sugianto Leliya, 2017) <sup>[6]</sup>.

PPAIW in its task examines the completeness of the administrative requirements of the *waqf* and the physical condition of the *waqf* object which is given the task of making an AIW which constitutes to be the evidence of a statement made by the *Wakif* for the handover of the change in the status of his property to become the property of the *ummah* through the *waqf* managed by the *nazir*. As well as other requirements and completeness as in the Implementing Regulations of the *Waqf* Law. The maladministration carried out by PPAIW in fulfilling the *waqf* requirements can be known through the consideration of a panel of judges who examine and adjudicate in a *quo* case that states: "Considering that in the case of a *quo* the act of inauguration of *waqf* postulated to exist/has occurred by the Defendants over the object of dispute in the form of land of ±area of 400 m2 (four hundred Square meters committed by the Lhong Raya Village apparatus, the Panel of Appellate Judges considered that the village apparatus did not have a legal standing (capacity) over the object of dispute because he was not as the rightful/legitimate owner, it means that the treasure waived must belong to the perfect ownership. Besides, unclear legal event which is important for legal certainty, as well as the confirmation of the *waqf* carried out by the Lhong raya village apparatus / *gampong*, it turns out that none of the *waqf* elements is fulfilled as specified in Article 6 of the *waqf* Law, therefore the act or action he committed is an act of *nuul* or an act of *nuul* and *void*, or an act that is considered to have never existed".

Regarding with the material and formal legal defects to AIW made by PPAIW, it can be used as a basis for punishment, (I Gusti Bagus Yoga Prawira, 2016) <sup>[4]</sup> then as a legal subject (*recht* person) according to the author, PPAIW can be prosecuted both personally / individually and institutionally, in this case there are two theories of official accountability according to Kranenburg and Vegtig, (Ridwan A.R, 2016) <sup>[11]</sup>, namely:

- a. *Fautes Personalles* theory, a theory that states that losses to third parties are charged to the officials because of their actions have caused losses, in this theory the responsibility is directed upon humans as individuals.
- b. *Fautes de services* theory, a theory that states that losses to third parties are charged to the agencies of the officials concerned. According to this theory the responsibility is borne to the office. In its application, the losses incurred are also adjusted whether the mistakes considered as major or minor mistakes which has implications for the responsibility that must be borne.

Personal liability/responsibility as PPAIW is included in the principle of liability (the state of being liable) encompasses almost every character of risk or responsibility, which is definitely dependent, possible or responsible for actual matters. It can be concluded that the responsibility for matters that arise at this time, as well as in the future against AIW due to the cancellation of the *waqf* certificate both to the heirs of the community and other related parties. Because of the lack of caution of PPAIW, as an example of the case, in a case No. 147/Pdt.G/2016/MS-BNA, two units have been established on the *waqf* object, this has implications for losses for *gampong* and the community.

Another principle to the responsibility principle (the state of fact being responsibility) (Ridwan A.R, 2016) <sup>[11]</sup>, means that it can be accountable for an obligation and includes judgment, skill, ability, and proficiency) or the obligation to be responsible for the laws implemented and to repair or otherwise compensate for any damages it has caused.

The product or result issued by PPAIW is an authentic deed that is attached to the responsibility/liability fault (based on fault of liability) So that in making an authentic deed, PPAT must be responsible if any fault or violation against the deed he made. (Purna Noor Aditama, 2018) As mentioned in Article 34 letter (b) of Government Regulation Number 42 of 2006 concerning the Implementation of Law Number 41 of 2004 concerning *Waqf* which states "PPAIW examines the completeness of the administrative requirements of *waqf* and the physical condition of *waqf* objects" or known as deeds. This is because in the *Waqf* Law, the task of PPAIW is not only to issue Deeds but rather to provide *waqf* administration and serve the needs of prospective *wakif* who will waive the part of the *waqf*.

The physical condition of the object means that it contains fault responsibility (based on fault of liability). From the two principles of responsibility, responsibility can be divided into 3 (three) responsibilities, namely: Accountability, is a responsibility in related to finances. Responsibility, is a responsibility in carrying burden, and Liability is the obligation to bear the losses suffered (Zainal Asikin, 2016) <sup>[1]</sup>.

PPAIW's liability for the fault/mistakes whether made intentionally or unintentionally in some laws was not found. Administrative sanctions are only applied to Islamic Financial Institutions (LKS) and PPAIW that receive *waqf* of movable objects in the form of money as stated in Article 68 paragraph 1 states "The Minister may impose administrative sanctions for violations of non-registration of *waqf* property by Islamic financial institutions and PPAIW as intended in Article 30 and article 32 of the Governmnet Regulation on Implementation of *Waqf*."

Administrative sanctions in Article 57 paragraph (1) to (4) which state:

- a. The Minister may give a written warning to LKS as a recipients of *Waqf* money who do not carry out their obligations as referred in Article 25 pp number 42 of 2006 concerning the implementation of Law Number 41 of 2004 concerning *Waqf*
- b. Written warnings are given at most 3 (three) times for 3 (three) different events.
- c. Temporary suspension or revocation of the license as LKS-PWU can be done after the LKS-PWU has received written warning letters three times.
- d. Temporary suspension or revocation of the license as LKS-PWU can be made after hearing the defense from the LKS-PWU and or recommendations from the relevant agencies.

Administrative Sanctions for PPAIW literally can be observed are regulated in Article 68 paragraph 2 letter a. and c of the *Waqf* Law which states "letter a, a written warning and letter b, Temporary suspension of officials or termination from PPAIW position", and Article 57 paragraph (2) "written warnings are given at most 3 (three) times for 3 (three) different events."

According to the author of the sanctions against PPAIW, both individuals and legal entities designated as PPAIW are still unclear/strict. These articles in the *Waqf* Law and the Implementing Regulations of the *Waqf* Law in nomenclature do not expressly/strictly regulate the sanctions given against PPAIW in its responsibility as an officials appointed by the minister in this case the head of Religious Affairs Office (KUA) in making the AIW Cancelled.

### **Criminal Liability**

Liability by giving criminal sanctions against PPAIW in making AIW, this depends on the evidence in the trial to impose a criminal charge against a person inseparable from the criteria, whether PPAIW's actions have elements of guilt and have an unlawful nature (*actus reus*) and the actions can be criminally accounted for so that it has no justification or forgiving reason (*mens rea*). (Indriyanto Seno Adji, 2009) <sup>[12]</sup>.

A criminal act is a deviant action committed by a person who has first been formulated in a statutory regulation against which is declared an evil action and contrary to the norms that should be threatened with a criminal charge, in which the act is committed based on a mistake. Therefore, an act that is threatened with a criminal charge for wrongdoing, everyone can be held accountable for the wrong acts with a criminal charge (Andi Hamzah, 2001) this is because that mistakes/wrongdoings are an absolute principle in criminal law, namely as a basis for imposing a criminal charge. (Muladi and Dwidja Priyatno, 2012) <sup>[8]</sup>.

The elements of error in Article 67 paragraph (1), paragraph (2) and paragraph (3) of the *Waqf* Law state that:

1. Any person who intentionally pledges, gives away, sells, bequeaths, diverts in the form of transfer of other rights of the *waqf* property that has been waived as mentioned in Article 40 or without permission to exchange *waqf* property that has been waived as intended in Article 41, shall be punished with a maximum imprisonment of 5 (five) years or a maximum fine of Rp. 500,000,000,- (five hundred million rupiah).
2. Any person who intentionally changes the designation of *waqf* property without a permit as stipulated in Article 44 shall be punished with a maximum imprisonment of 4 (four) years and/or a maximum fine of Rp. 400,000,000,- (four hundred million rupiah).
3. Any person who intentionally uses or takes facilities for the results of the management and development of *waqf* property exceeding the amount specified/determined as referred to in Article 12, shall be punished with a maximum imprisonment of 3 (three) years and/or a maximum fine of Rp. 300,000,000,- (three hundred million rupiah).

Element of error in Article 67 paragraph (1), paragraph (2) and paragraph (3) of the *Waqf* Law "Any person who intentionally pledges, gives, sells, bequeaths, diverts in the form of transfer of other rights of *waqf* property... changing the designation of *waqf* property without permission... using or taking facilities for the results of the management and development of *waqf* property".

The element of "any person" or subject of law is everything that can obtain rights and obligations from the law, or what is known as "*recht* person" in civil law the subject of law has the meaning of only a person or individual, while the definition of a subject of law in criminal law can be interpreted as a person and, or legal entity. Therefore, an act that is threatened with a criminal law for a mistake, so everyone can be held accountable/charged for the wrong action with a criminal law (Harumiati Natadimaja, 2009) <sup>[9]</sup>.



Intentional or negligent acts, according to the criminal law intentionally can be interpreted as the widest possible mistake; a mistake in the sense of the form "*dolus/opzet*" mistake in the narrow sense is negligence (*culpa*). Intentionality (*dolus*) is a mistake that he realized, because the prohibition had been intended earlier in the law, while the negligence (*culpa*) is an act committed accidentally caused criminal acts due to intentionality or negligence.

In managing the *waqf* objects PPAIW must be in accordance with the laws and regulations, and in principle that the objects which have been waived cannot be changed, used or other diversion as referred to in the *waqf* pledge/agreement. As stipulated in Article 40 of the *Waqf* Law, that is prohibited to make the waived property to be collateral, confiscated, granted, sold, inherited, exchanged or diverted in the form of other transitioning rights. The exception is in letter (f) "if the *waqf* property that has been waived is used for the public interest in accordance with the general spatial plan (RUTH) Article 41 paragraph (1) Government Regulation of the *Waqf* Implementation. The element of everyone here is PPAIW as the person appointed to issue AIW and APAIW which are included to be subjects of law. Therefore, PPAIW can be held liable for the mistakes he has committed if PPAIW is against with the Article 41 paragraph (1), it is used as collateral, confiscated, given away, sold, inherited and diverted in the form of other transitioning rights. So that the elements of behavior have been fulfilled in the criminal law, therefore PPAIW is included in the Subject of law as referred to in the criminal sanctions article in the *waqf* law.

### Conclusion

PPAIW as a subject of law both in the sense of a civil law and in the criminal concept, namely supporting rights and obligations that are inseparable from liability in the form of administrative sanctions and criminal sanctions, PPAIW's criminal liability to the elements of the article in the *Waqf* Law can be applied to everyone not only to PPAIW, the rule of law regarding with the criminal liability serves to determine the conditions that must exist in a person so that it is valid to get criminally convicted. Whether an appointed PPAIW did violate or ignore the acts against prohibited matters as stated in Article 40 of the *Waqf* Law or not if, PPAIW either intentionally or unintentionally has violated the criminal provisions, then he (PPAIW) is as the person referred to in "Everyone" in the criminal provisions of the *Waqf* Law.

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