

WAKAF LAND POST TSUNAMI

By International Development Law Organisation, 2007

Post tsunami, land has become one of the most critical issues in Aceh. Cases include loss of land ownership records, destruction and displacement of land boundary markers and destruction of land parcels. Some of these cases have led to disputes which concern not only individually owned land parcels but also *wakaf* land.

Article 1 paragraph (1) of the Law (*UU*) No.41 year 2004 on *Wakaf* provides that *wakaf* (a charitable trust/endowment) is the legal act of a *Wakif* (the donator) in dividing and/or transferring part of their wealth either permanently or for a set period of time for religious purposes and/or public welfare in accordance with *Syar'iyah* (Islamic Law). Article 215 of the Compilation of Islamic Law (*Kompilasi Hukum Islam/KHI*) gives a similar definition. *Wakaf* is a legal act whereby a person or a group of persons or a legal body donates part of their wealth permanently for religious purposes and/or other public purposes in accordance with Islamic teachings.

Under Acehese customary law, as quoted from the book *Pola Penguasaan Pemilikan dan Penggunaan Tanah secara Tradisional Propinsi Daerah Istimewa Aceh* (Syamsidah and Sugiarto Dakung, 1984-1985, p.46), *wakaf land* or *tanoh wakeuh* in Acehese is defined as a religious instrument, whereby an individual donates part of their land for other individual purposes or for public purposes in accordance with Islamic law. Such donations are usually presented to the *geuchik* (head of village) and the *imam meunasah* (village religious leader), who will later be responsible for the management of the *wakaf* land.

In Aceh Besar, *wakaf* may be performed not only by individuals but also by community members in a *gampong* (village). In the latter situation, community members buy a piece of land close to the *meunasah* and donate it as *wakaf* to be used as the place for *Langgar kaluet*, the place where religious teaching can be conducted for children.¹

In Article 213 paragraph (4) of the Law on Governing Aceh (*Undang-Undang Pemerintah Aceh*) No. 11 year 2006, it is stipulated that the Government of Aceh and/or district/municipal government authorities are obliged to protect *wakaf* lands and other religious property and necessities.

In principle, land donated in the form of *wakaf* cannot have its status changed or be used for any other purposes than that specified in the *Ikrar Wakaf* (document detailing the terms of the *wakaf*). Article 40 of the *Wakaf* Law No.41 year 2004 further requires that *wakaf* land cannot be:

- a. Used as collateral
- b. Confiscated
- c. Bestowed
- d. Sold
- e. Inherited
- f. Exchanged, or
- g. Transferred into other forms

¹ T.I. El-Hakimy, 1993, "Tentang Penguasaan Tanah pada Masyarakat Pedesaan di Aceh" in Herman Slaats and A.A. Trouwborst (eds), *Tiga Model Pendekatan Studi Hukum Adat: Suatu Laporan Penataran*, Banda Aceh:Syah Kuala University Press, pp. 84-85

An exception applies to point f, where exchange of *wakaf* land can be made possible for the public interest in accordance with the General Spatial Planning (*Rencana Umum Tata Ruang/RUTR*), in line with prevailing legislation and not in contradiction to *Syar'iyah*. This exception is stipulated in Article 41 paragraph (1) of the *Wakaf* Law.

A deviation to the above mentioned stipulations can only occur with the written agreement of the Head of the Religious Affairs Office (*Kantor Urusan Agama/KUA*) at the *kecamatan* (sub-district) level, upon recommendation by the *Majelis Ulama* (Council of Islamic Scholars) at the *kecamatan* level and the *camat* (head of sub-district) based on the following circumstances, (taken from Article 225 paragraph (2) of the KHI):

1. Where land can no longer be used for the objective intended by the *wakif*
2. For the public interest

An instance of such divergence occurred among the Paya Bili community in Langsa. The Legal Aid Institute (LBH) of Banda Aceh noted that the community is involved in a dispute with a construction developer who is building a school. The dispute began when the school building was planned to be built on *wakaf* land without any arrangement for compensation. Following mediation by LBH Banda Aceh, reconciliation was reached and another piece of land was accordingly given as compensation.

The Vice Head of KUA of Meuraxa, Samsul Hadi, S.Ag gives case. The *wakaf* land was a previously cultivated rice field, from which community members derived benefit. After the tsunami, the land could no longer be cultivated. After a discussion among the *gampong* community members, it was agreed that a mosque should be built on the land. In a later development, many people in this sub-district donated their inheritance lands some of which had been designated for burial grounds to replace damaged burial lands. Some other pieces of *wakaf* lands have also been transformed into residential sites. No dispute arose from this change of use because community members agreed among themselves of the changes.

Many cases concerning *wakaf* land also occurred in other areas quite heavily affected by the tsunami, such as in Kutaraja sub-district, Banda Aceh. The Head of KUA of Kutaraja, Drs.H.Nurdin Ali, says that Merduati Village is one of the villages that have many *wakaf* land parcels. There are at least 90 parcels of *wakaf* land in this village, 78 of which are legally certified. Apart from destroying boundary markers, the tsunami also destroyed many *ikrar wakaf* documents. The process for issuance of new deeds has started and is ongoing.

Among many *wakaf* lands in the area, some are problematic as a result of inhabitation by people who in the past didn't inhabit the *wakaf* land. Drs.H.Nurdin Ali gives an example concerning the case of Kutaraja sub-district, which used to be a swamp area. In the past, a certain Teungku Dianjong donated the lands as *wakaf* to the local people. These local people then dried up the swamps and transformed them into residential areas, which were subsequently affected by the tsunami. Problems arose when the legal heirs to the original inhabitants started to build housing post-tsunami with the help from aid agencies. Some of the villagers refused the presence of the legal heirs on the ground that the latter are building on *wakaf* lands, which are not supposed to be inherited.

Drs.H.Nurdin Ali suggested that the case could be solved through the *musyawarah* or consultation at the *gampong* level with the support of several parties such as the NAD Provincial Office (*Kanwil*) of Religious Affairs as well as a notary. A referral of the case up to the *Mahkamah Syar'iyah* (Islamic Court) is not recommended as it may take time

and many of the witnesses of the *wakaf* lands have died. Out of the five *nadzir* (individuals or legal body recipients of *wakaf* responsible for the maintenance and administration of *wakaf*²) in Kutaraja sub-district, four perished in the tsunami while the remaining one is too old to bear witness if the case is referred to the *Mahkamah Syar'iyah*.

Other cases include the revocation of the right to a piece of *wakaf* land, on which a hall for Quran recital is built, in Peulanghahan village by the legal heirs of the *wakif*. The case has subsequently been solved through the *musyawarah* at the *gampong* level. Cases concerning *wakaf* land are also found in areas not affected by the tsunami, for example in Ulee Kareng sub-district. A dispute arose as a result of the change of use of the *wakaf* land. The Head of KUA of Ulee Kareng, Saifullah, S.Ag., says that despite the agreement in the deeds of the *wakaf* specifying the use of the land for religious purposes, a village clinic has been built on it. In fact, says Saifullah, there is no provision to prohibit the use of the land for other purposes as long as it is for the benefit of the community. Problems arose however because the clinic belongs to the government. An effort to solve the case has been attempted through consultation at the *gampong* level but as no agreement could be reached it has since been referred to the authorities.

From these cases and the many others concerning *wakaf* land, it can be concluded that it is important to sign an *ikraf wakaf* deed before performing *wakaf*. A deed of *ikrar wakaf* before the *Ikrar Wakaf Deed Official (Pejabat Pembuat Akta Ikrar Wakaf/PPAIW)* can be used as evidence of the status of the land as well as for showing the purpose and the period of the *wakaf* to avoid any potential dispute in the future.

² Article 215 paragraph (5) of KHI