

## NOTARY COMPETENCY AS AN AWQAF DECLARATION DEED MAKER IN SHARE ACQUISITION

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**Abstract** —Minister of Religious Affair Number 73 of 2013 on Procedure to Endow Movable Objects Other Than Money Through Awqaf (MoRA Regulation on Movable Awqaf governs notary may act as Awqaf Declaration Deed Maker (ADDMF) once he obtains permit from MoRA after mastering competency in awqaf sector proven by certification. However, to date no notary has ever acquired that certification because the MoRA has not yet set and issue any regulation relating to that competency. This aim of this research is to explore the competencies that must be mastered by notary to act as an ADDMF and to explore the impact if the Awqaf Declaration Deed is not made in form of notarial deed using juridical-empirical methodology. This research indicates as a PPAIW, notary must master in 5 competencies, namely: 1. Shariah and positive law competency of awqaf, 2. Company Law, 3. Capital Market, 4. Awqaf Declaration Deed Drafting and, 5. Money Laundering. Further, if an acquisition happens but the Awqaf Declaration Deed is not made in notarial form, then Ministry of Law and Law will not accept any amendment of articles of association or company data from the shareholders whose acquisition are not obtaining approval from Ministry of Law and Human Rights.

**Keywords :** *notary, awqaf, acquisition*

### I. INTRODUCTION

Awqaf is one of Islamic philanthropies which encourages individual to release part of his asset for divine right purpose like general charity (sadaqah), zakat and so forth. However, different with sadaqah which does not require the eternality of charity object, in awqaf scheme, the donated object remain bequeathed forever while the beneficiary can take benefit from the waqf assets forever. Therefore, awqaf is often called as a charitable trust. In Indonesia, Awqaf is associated as an action of donating a building, plot of land and any kind of immovable assets. Pursuant to data released by Indonesia Awqaf Board (BWI) in 2019, total of land which already endowed through awqaf scheme reached 4,900,000,000m<sup>2</sup> (four billion nine hundred metres squares) which located in 355.111 (three hundred fifty-five thousand one hundred eleven) locations. Unfortunately, the utilization of awqaf land arguably does not reached the purpose of awqaf according to sharia law which is to support and develop community economic development. This is because the considering the utilization is mainly for consumptive interest such as for Islamic prayer room (51%), mosque (32%), Islamic boarding school (8.7%), cemetery (0.3%), and any other social activities (0.1%). According to BWI, if the awqaf lands are managed productively professionally it may have potential to provide fund for ummah welfare up to IDR180,000,000,000,000 (one hundred eighty trillion rupiah). Given with this situation, the BWI encourages people to make a productive awqaf which is a method to endow an asset which has investment value so that the asset may be invested and the return of the investment of the awqaf object may continue to generate benefits for the beneficiary. One of types of awqaf objects that has investment value is shares of closed company as governed in Law No.41 of 2004 concerning Awqaf (Awqaf Law) and Government Regulations No.42 of 2006 pertaining to the Implementation of Law No.41 of 2004 concerning Awqaf (Awqaf Government Regulation). Shares in this context means a portion, act or right granted to people or shaholders that vested rights to the shares owner to have possession and may supervise the company. Shares may be transferred through different ways of transaction for example sale transaction, grant and also awqaf. In connection to awqaf, the shareholder may transfer a part or all of his shares to closed of public company so that the company may be the

shares awqaf custodian which manage the awqaf object and distribute the benefit of awqaf to the beneficiary.

One notable issue arising in the implementation of shares awqaf is the absence of Awqaf Declaration Deed Maker (ADDM) especially it the shares awqaf resulting in acquisition process. Acquisition means an action that resulting transfer of control in a targeting company to acquiring company which mainly caused by the transfer of certain number of shares in the company. The shares transferred may be 50%+1 shares or any number of shares that is lower than simple majority but it can be proven that the holder may directly or indirectly control the company.

In case of acquisition, Company Law governs that the ADDM must be drawn up by Indonesian notary. However, to date no writer could find any notary which may act as an ADDM. This problem exists because the MoRA has not give permit to notary due to absence of awqaf competency indicator as required by MoRA Regulation No.73 of 2013 concerning Procedure to Endow Objects Other Than Money Through Waqf (MoRA Regulation on Movable Awqaf). Under Article 27 of MoRA Regulation, a notary may act as an ADDM once he obtains permit issued by MoRA after mastering certain competencies in awqaf field. This is an unfortunate condition given that according to Global Waqf Foundation in 2017 at least thirty shareholders in closed company were willing to endow their shares in a company. Consequently, the ADDM shall be made in under hand form that arguably may damage the rights to be protected by the government over their transaction.

In regard to abovementioned matter, the author is eager to formulate the competency in awqaf field that should be mastered by the notary in order fulfilling certification requirement. The researcher also tries to find out the consequences if the ADDM of shares awqaf in context of acquisition is not made in notarial deed.

## II. LITERATURE REVIEW

### 2.1. *General Understanding of Awqaf Under Sharia and Awqaf Law*

Awqaf within sharia law perspective is an action to donate an asset by holding the essence of the asset to be perpetual so it would not be traded, secured as collateral, inherited, or undergone any action that might destroy the asset. The purpose of awqaf is to distributing the benefit generated from awqaf object for community without taking into account the economy status of the beneficiary. To ensure the benefit of awqaf may be distributed for long period, the person who endowed his asset or known as waqif shall appoint awqaf trustee (nazhir). Nazhir shall professionally take care the awqaf object and distributing it to the beneficiaries set out by wakif while declare his awqaf purpose before him. Mundzhir Qahaf argues that waqf is one of philanthropy instrument in Islamic economy which purposes is to obtain pleasure from Allah Swt. Awqaf is similar with general charity in Islam or known as sadaqah because waqf encourages people to release his asset for divine and social purpose. Therefore, most of provision apply to sadaqah should also apply to awqaf. The author is of the view that Mundzhir Qahaf's argument regarding the imposition of sadaqah under sharia law to awqaf is vital to find out the awqaf's legal basis. This is due to the fact that Koran does not specifically mention awqaf in any verses of it.

Further, according to Mundzhir Qahaf, the first awqaf action can be traced back to Prophet Muhammad (pbuh) hadith narrated by Imam al-Bukhari which read as follows:

*Caliph Omar r.a. said: Oh Prophet! I got wealth that I never got it before and I want to be closer to Allah through it. After that the Prophet answered: You tried to keep the origin wealth and making charity (by giving it to the needy people). Then the Caliph Omar r.a. donate his land which he get from the battle of Khaibar, seems the land can't be sell, even to bought as well as to inherit it.*

Thought that hadith it can be learned that concept of Awqaf forms a strong mechanism to arrange and change as well as manage the state of richness and wealth in Islamic society. Aside from it also can be concluded that the awqaf share the same value with sadaqa. Therefore, any action of awqaf will also obtain reward as promised by Allah in QS. Al-Baqarah: 267 and QS. Ali Imran; 92.

The concept of awqaf is also shares same idea with endless charity (Sadaqa Jariah) explained in Prophet Muhammad (pbuh) narrated by al-Bukhari, which said that when human is passed away, his good deeds will be ceased except for three things: the first is Sadaqa Jariah, the second is knowledge which benefit the people and the last one is the good son who always pray for his parents.

From abovementioned sources, it can be concluded that Awqaf is a philanthropic action which has specific characteristic of holding the essence of the awqaf object in order to continually generate and distribute benefits to the benefit in even after the death of the original owner (wakif). According to Mundzhir Qahf, Awqaf is developed by four pillars which determining the validity of awqaf or widely known as Awqaf *Rukn*, Namely:

1. Owner of awqaf object (Wakif)  
Wakif is the one who released his asset to be endowed under awqaf mechanism. The wakif must be the owner of the asset and has legal capacity according to sharia law for disposing the asset.
2. Awqaf object  
Awqaf object is also known as *Mauquf Ilaihi*. Awqaf object must be valuable from shariah perspective and may be in form of tangible, intangible, movable or immovable asset. Awqaf object also durable and perpetual so it can be managed nazhir and its continuous benefit may be bequeathed for long period to the beneficiaries.
3. The beneficiaries (Mauquf Bih)  
Under awqaf scheme, the main beneficiaries of the awqaf is for public interest which further must be specified by the wakif through awqaf declaration. The wakif can specify which beneficiaries are eligible for benefit such the founder's family, entire community, only the poor, travelers, etc. The beneficiaries may be able to enjoy the benefit of awqaf through the management of awqaf object conducted by awqaf custodian (nazhir)
4. The declaration  
Sharia law does not require specific form of awqaf declaration. Therefore it can be executed in oral or writing. The awqaf declaration is one party's action in which acceptance from the beneficiaries is not required.

The *Awqaf Rukn* our pillar of awqaf mentioned above are also adopted by Indonesian law while governing awqaf under positive law. Awqaf is mainly governed by Awqaf Law and Awqaf GR while the implementation of awqaf is regulated in various provision ranging from MoRA Regulation, BWI regulation to National Sharia Council of the Indonesian (DSN-MUI). Article 2 of Awqaf Law states that an awqaf is legally valid once it fulfills requirements set out by shariah law which is wakif, awqaf object, beneficiaries and declaration. However, different with shariah law, the Awqaf Law put emphasis on the form of awqaf declaration. Article 17 *jo.* 21, Awqaf Law required awqaf declaration to made in form of Awqaf Declaration Deed made before an ADDM, two witnesses and nazhir. The ADDM in this context is a public officials who are determined as the maker of ADD (Article 1 point 8 Awqaf Law). Therefore, the ADDM shall meets requirements set out by the Awqaf Law and its derivative regulations. Article 37 Awqaf Regulation is classified ADDM into three categories, namely:

1. ADDM of immovable object in form of land is Head of Religious Affairs Office (Head of KUA) or any other officer appointed by the Minister of Religious Affairs,
2. ADDM for movable object other than money is Head of KUA and/or another officer appointed by the Minister of Religious Affairs
3. ADDM for immovable object in form of money is Shariah Financial Officer appointed by the Minister of Religion,

Further, Article 27 MoRA Regulation on Movable Awqaf governs that notary may also act as an ADDM for any movable object, including shares in a closed company once obtained from MoRA if he satisfy the following requirements:

1. Moslem
2. Trusted (*amanah*)
3. Obtaining competency certificate in awqaf field issued by the Ministry of Religious Affairs
4. Submit an application to obtain the license to RA Minister.

Unfortunately, MoRA has not released the list of competencies in awqaf field that should be mastered by notary. This condition creates vacant of ADDM for share awqaf. In the context of shares acquisition this vacancy arguably will affect the ability of nazhir to manage the shares awqaf because of the failure to complete administrative requirements of shares acquisition set out by Company Law and its derivative regulations.

### ***2.2. Shares Acquisiton from Doctrinenal Perspective***

Acquisition is a process to take a control in a company by an individual or company. The purpose of acquisition is vary depending on business plan of the acquiring company over the target company. Kamaludin argues that the main purpose of acquisition is to overcome financial difficulty of a company. However, if the company is financially healthy then acquisition would be beneficial to maximizing company income as a result of obtaining new line of business. According to Indonesia Financial Accounting Standard (IFAS), an acquisition is an action to merge business which make the acquiring company obtaining control over net asset and operational of target. As a return the acquiring company will give compensation to the shareholders of the target company in many forms. Therefore, according to IFAS, the acquisition may be divided into two types namely: 1. Asset acquisition, 2. Shares acquisition. Asset acquisition is an action to buy target company's assets which generally is aimed to avoid rejection from some of shareholders in the target company. Meanwhile, shares acquisition is defined as an action to buy certain amount of share in the target company to take control of the target company by still maintaining the existence of the target company.

According to Kamaludin and Muchtar Yara, the underlying transaction of shares acquisition is sale and purchase agreement. The purchase of shares by the acquiring company over shares in the target company causing the transfer of control. However, Felix Oentoeng argues that the sale and purchase agreements shall not set as the exceptional indicator in transfer of control. The author agrees with Felix Oentoeng because in many companies, it can be found that the shares transfer might happen because of other transaction, for example inheritance, grant, debt to equity swab, and even awqaf. This idea is arguably also adopted by the Company Law.<sup>1</sup> According to Article 1 paragraph (11) Company Law defines acquisition as follow:

*A legal action conducted by a legal entity or an individual to acquire the shares of the Company, resulting in the transfer of control of such Company.*

That definition shows that Company Law does not limit the type of underlying transaction of acquisition. Therefore, awqaf as one of forms of transaction potentially may create an acquisition if it is caused transfer of control. Therefore, it is vital to understand the indicator of control transfer from Company Law perspective.

### ***2.3. Shares Acquisition under Company Law***

As mentioned on heading 2.2 the Company Law does not specifically limit underlying transaction of acquisition. It also does not mention what kind of transaction which can be applied.

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<sup>1</sup>Author: some of provisions under Company Law has been amended by the Job Creation Law. However, the definition and procedure of acquisition of acquisition in the Company Law is not amended by the Job Creation Law.

The absence of type transactions as underlying of acquisition is arguably closely related with the purpose of legislation of Company law in which to build a good governance within a company as recommended by the Asia Asset Management (AAM) in 2004.

Therefore, the Company Law may acknowledge any transaction as an underlying of acquisition as long as it is caused transfer of shares and the transactions is acknowledged by Indonesian laws and regulations, for example any transaction set out in the ICC. Since the purpose of Company Law is to create good governance, then in terms of acquisition the Company Law specifically set measures that should be taken by the acquiring company and target company when acquisition happen. One of notable requirements is an obligation to make transfer of shares in form of notarial deeds if the shares directly taken from the shareholders of the target company. This deed shall be reported to the MoLHR to obtain receipt of notification letter from the Minister of Law and Human Rights so that the new shareholders/target company may be registered in Company List in MoLHR system.

According to Article 56 paragraph (3), the failure to report the changes of shareholders as a result of acquisition will make the MoLHR rejects any application for approval or the notification based on the composition and the names of shareholders which have not yet been reported. Since the Company Law provide a clear-cut explanation over the failure to submit notarial deed in shares acquisition, the remaining questions is the amount or percentage of transferred shares so it can be classified an acquisition?. The author is barely found any literature discussing this matter since the assessment might be different for each types of business. While conducting this research, the author only founds two regulations describing the shares percentage in acquisition. Under Bank Indonesia Regulation No. 14/24/PBI/2014 on Single Ownership in Indonesian Banking Sector, an acquisition happens when the acquiring company take 25% of shares issued by the target company or if the target company takes less than 25% of shares issued by the target company but it is proven may directly and indirectly control the target company. Meanwhile, Financial Services Authority No. 9/POJK.04/2018 on Listed Company Acquisition governs that an acquisition might happen if the acquiring company obtains more than 50% of paid-up shares with complete voting rights or if the acquiring company obtains less than 50% of paid-up shares with complete voting rights but it shall be proven that acquiring company may directly and indirectly in any forms of action may control the company. The fact that there is no uniformity of shares percentage and action that can be qualified as an acquisition leaves a homework to notary to decide when they shall use acquisition procedure to conclude a transaction.

#### **2.4. Authority and competency of notary as an ADDM**

As a law state (*maachstaat*) operating under a civil law, Indonesian Constitutional Law values a legal certainty in its people's life. The law certainty provides a predictability of laws and consequently enables people to plan their future. One of measures to obtain legal certainty is to have public official to serve public with clear duties and authority. According to Fayakundia and Rusdianto, there are two types of public officers operating under Indonesian Law, namely:

1. Government Employees  
Government Employees are Indonesian citizen who satisfy certain requirements that consequently may serve as government employees in the government. The Government Employees works under Law No.5 of 2014 concerning Law and State Civil Administration (Government Employees Law). As a result of doing their duties, the Government Employees received salary from the Indoensian Government.
2. Non-Government Employees  
The Non-Government Employees are public officer who are fulfil implicit characteristic set out by Article 1868 Indonesia Civil Code (ICC), namely:
  - a. Obtain authority to act as public official from specific laws,
  - b. Have an authority to draw a deed in specific location set out by the Law.

One of non-government employee which act as public officer is notary. As a public official, the notary firstly obtain his authority to make authentic deed through Staatblad 1860 Number 3

concerning Notary Regulation Position in Indonesia (Reglement op het Notary Ambt in Indonesie) Article 1 paragraph 1 which reads as follows:

*“notaries are public officer who drawn authentic deed over any agreement and provision delegated by specific law or instructed by specific parties which will be evidenced by an authentic writing, guarantee over the date and storage of the deeds including all of its excerpts as long as such action does not assign to another public officer by the law”*

Salim HS argues that Article 1 paragraph (1) Staatsblad 1868 Number 3 concerning Notary Regulation governs two essentials elements of notary profession, namely: 1. Position of notary as public official, and 2. Authority of notary to make authentic deeds and make another deeds as intended by his client. The role and authority of notary set out on Staatsblad 1868 further adopted by Law No.2 of 2014 concerning the Amendment of Law No.30 of 2004 concerning Position of Notary (Notary Law). Article 15 Notary Law elaborates the role and authority of notary as follows:

*A Notary Public shall be authorized to draw up an authentic deed on all actions, agreements, and decisions required by the laws and legislation and/or the relevant parties to contain in an authentic deed, guarantee the certain date of drawing up of deed, keep deed, give tenor, copy and excerpt of deed, as long as the drawing up of the deed is not assigned or excepted to another official or person stipulated by the law.*

According to elaboration of Article 1 paragraph 1 and Article 15 Notary Law it can be concluded that: 1. notary is a public official, 2. notary has an authority to make authentic deed, and 3. notary also has another authority set conduct any legal action set out Notary Law or by laws or assigned by his client.

The author is of the view that the maintenance of role and authority of notary as public official is good measure. This is because the notary part of private function of a state in which to serve public interest and guarantee the certainty of private law in the community. One thing to be highlighted is notary does not received salary from the government or the state, but he receives fee from his client. Although the notary obtained fee from the client, however notary is an independent and impartial profession. Impartial in this context means notary shall conduct its profession with impartiality and independency principles to avoid misuse of his profession that can violate private rights of his clients.

#### ***2.4.1. Role and authority of notary from doctrinal perspective and Notary Law***

Role is an action that should be exercised or been assigned to be exercised that consequently become someone's responsibility. Role is also defined as a liability vested to a party. Meanwhile, authority is a rights and power possessed to conduct actions. H.D Stout argues that authority is compilation of regulations related to acquisition and implementation of authority in government used by public law subject which fall within the ambit of public law. Definition of authority set out by H.D Stout consists of two elements, namely: 1.the existence of laws, and 2. the existence of legal relationship. This means, the authority may exist if it is vested by law that and consequently create a legal relationship. In the context of notary profession, notary obtains its authority from Notary Law and another law one of them is set out in the Awqaf Law.

#### ***2.4.2 Role and authority of notary under Awqaf Law***

ADDM is a public official who has an authority to make an ADDM pursuant to provision set out by Minister of Religion. ADDM has a responsibility to create law order in accordance with awqaf object administration. This is possible because the ADDM has an access to examine the formality and materiality aspect of awqaf action. Formality aspect of awqaf action consists of the following elements:

1. ADDM must ensure when Wakif make a pledge of the awqaf, the forum should be attended by the Wakif, Nazhir and two witnesses,
2. ADDM must examine the completion of administrative requirements of awqaf and physical form of awqaf object,
3. ADDM must register awqaf object and submit copy of Awqaf Pledge Deed alongside possession documentation of awqaf object to Indonesian Awqaf Board and another related government authority.

Meanwhile, material aspects of PPAIW is relating to the role of notary to ensure that the Awqaf Pledge Deed must at least contain the following elements: Name and identity of Nazhir, Witnesses, and waif, data of the awqaf object, awqaf purposes and awqaf period.

Awqaf Law and Awqaf Government Regulations do not provide information of consequences if the formal aspects and material aspects could not be satisfied. However, under Company Law, if the shares awqaf does not emanated in form of Awqaf Pledge Deed made by the notary, then the MoLHR does not acknowledge the tranfer of shares. This effect is potentially decrease rights of the citizen especially moslem citizen to obtain protection over awqaf action. Therefore, the existence of notary that may act as an ADDM.

### **III. METHOD**

This type of research is normative -empirical research in which the author examines secondary data and strengthen the research outcome with the primary data. Secondary data sourced from positive laws, court decisions, books, journals which primarily govern about authentic deed, awqaf, public notary authority, and acquisition in Indonesia. To validate the outcome from secondary data, the author conducted a qualitative interview with official representation of Ministry of Religion and Indonesia Awqaf Board as regulators of awqaf in Indonesia. The author also extended the interview to also include practitioners which had handled shares awqaf in the idle of PPAIW. The approach adopted in this research is legal systematic approach and conceptual approach and further analyzing the data by deduction analysis technique.

### **IV. RESULT AND DISCUSSION**

#### ***4.1 Competencies requirements of notary as an ADDM***

As a public official, notary is given an authority to make authentic deed and any another action set out under Article 15 Notary Law as well as another law and regulations in Indonesia which specifically vested the authority to the notary. In context of shares awqaf, Article 13 MoRA of Movable Awqaf provide opportunity to notary to act as a PPAT over shares issued by a closed company. This opportunity comes with a set of requirements which one of them is an obligation to have a certification in awqaf field and this idea is gaining supports from many scholars. Unfortunately, according to interview the author with Mr. Tarmizi Tohor as Director of Awqaf Utilization of MoRA and Mr. Zaenuri as Head of Sub-Directorate of Awqaf Asset Security of MoRA, no notary has obtained certification in awqaf field from Minister of Religious Offer. This is due the fact that MoRA has not yet issued any regulation that may describe the competency that shall be mastered by the notary to become a PPAIW. Given with this situation, Habib Adjie and Maman Sunarya argue that the competencies in awqaf field should encompass the understanding of requirements and procedure of shares awqaf from sharia and positive law perspectives. This understanding might be obtained if the curriculum is made by the Ministry of Religion, Indonesia Awqaf Board (BWI), Islamic State Universities and Indonesia Notary Association. However, Habib Adjie and Maman is not elaborating the competencies.

Given with that condition, Notary Panji Kresna which is frequently received a request to drawn-up Awqaf Declaration Deed (AIW) argues that it is essential to mastering the competencies in awqaf field, however, the notary must also expand their knowledge to also understanding on how

to draft the AIW to ensure the awqaf will keep perpetual although in the future the company increases the capital. Therefore, Notary Panji in of the view that the notary must has skill in drafting the AIW or providing any supporting documents to ensure the shares awqaf can be acknowledged by the government especially when the MoRA has not yet issued more practical regulations on shares awqaf and competency notary as PPAIW. In other words, the notary must be able to conduct legal research and legal reasoning to fill in the gap between the absence of PPAIW of shares awqaf with the enthusiasm of public over shares awqaf. For example, when Notary Panji Kresna received a request from Mr. Bimo Prasetyo to make and proceed his awqaf action over the shares owned by him in PT Solusi Lintas Negeri to PT Global Itqon Semesta (PT GIS) as nazhir, Notary Panji Kresna under consent given by wakif and nazhir provides 3 (three) documents, namely:

1. Under Hand Awqaf Declaration Deed (Under Hand ADD)  
The ADD is made in under hand because Notary Panji has not obtained license from MoRA to act as an ADDM. Therefore, to ensure that the awqaf action is still recorded, the wakif was suggested to sign the Under Hand ADD.
2. Transfer of Shares Deed  
Transfer of Shares Deed is a deed that is intended as a replacement of ADD merely to fulfill administrative purposes set out by Article 27 paragraph (1) GR Approval of Any Amendment in Company. The Transfer of Shares Deed would be attached in the Shareholders Resolutions Deed approving the shares transfer. Notary Panji Kresna argued that the words "Transfer" as a part of the title of the deeds may covering many kind of transaction, including awqaf which tranfer the shares from wakif to nazhir as custodian of shares awqaf.
3. Shareholders Resolutions Deed.  
Shareholders Resolution Deed was been made to satisfy provision under Article 27 paragraph (1) GR Approval of Amandment which governs any changes of shareholders in a company as a result of shares transfer and/or the changes of possession number of shares in a company must be notified to the MoLHR. If the changes of composition of shareholders as a result of share transfer does not been notified to MoLHR, then the MoLHR will reject all amendment and/or any transaction conducted by the shareholders of the company whom the name is not registered in MoLHR system.

Consequently, the transaction from waqif to nazhir was not registered as shares awqaf under Company List managed by the MoLHR, but it was known as the transfer of shares as a result of sale and purchase agreement. Responding to the case of PT SLN and PT GIS, Mr. Zaenuri argues that awqaf action conducted by Mr. Bimo Prasetyo is null and void because it involves two covenants for one object which are prohibited under sharia law. However, Mr. Jurist Efrida as Head of Awqaf Utilization of BWI argues that the awqaf is valid because wakif and nazhir are conscious that the making of Transfer of Shares Deed is for fulfilling administrative requirements.

Given with abovementioned argument, the author is of the view that for current conditions strategy used by Notary Panji, Mr. Bimo Prasetyo and PT GIS is the best way for filling the gap because all parties in the awqaf transaction were well informed and conscious of the scheme used. However, this scheme might not be suitable to be applied continuously. Therefore, it is important to MoRA to issued curriculum of notary competency in awqaf field or even extended the competency to also encompass any subject that has intertwined with shares awqaf. According to Mr. Bimo Prasetyo, competencies that shall be mastered by notary is share transfer within Company Law especially regarding understanding on how secure shares that become awqaf object might be perpetual. Mr. Bimo Prasetyo argues that the notary shall understand Athat in the context of shares awqaf, the object of awqaf is not the nominal of the shares, but the number of sheets of shares. For example, if wakif has 1000 shares in a company with nominal value of IDR1,000,000 and he intends to endow all of his shares under awqaf mechanism, then the awqaf object is not the nominal shares in the amount IDR1,0000,000 but 100 sheets of shares. This understanding is essential because if it would create different result if in the ensuing day the company increase its capital. If in the future the company increase the capital, but the nazhir as the trustee of as shares



awqaf does not increase his capital, then the nominal of the shares awqaf will be diluted and it is no longer fulfill the criteria of awqaf object. Meanwhile, if the notary writes down that the awqaf object is sheets of shares, the dilution would not affect the number of sheets of shares.

Aside from the understanding on how to write down shares awqaf in the deed, Mr. Bimo Prasetyo also emphasized the importance for notary to prohibit the misuse of shares awqaf as nominee arrangement which is an unlawful arrangement in which one person/company agree to act on behalf another person/company to list his name in shareholder list. Notaris Panji Kresna shares the same idea with Mr. Bimo Prasetyo regarding the misuse of shares awqaf especially from the fact that to date there is no obligation to conduct an examination over the utilization of awqaf by government authority. Mr. Jurist Efrida confirmed that to date BWI does not have check and balances tools that may help notary to detect money laundering potential in shares awqaf. However, Mr. Jurist Efrida argues that this problem might be temporary overcome by appointing nazhir in form of limited liability entity so that the entity exercised self-regulation examination in accordance with law governing that entity.

In case of the nazhir is in the form of limited liability company, then the mechanism of check and balances amongst organ in the company, namely General Meeting of Shareholders, Board of Directors, and Boards of Commissioners. However, for sustainable action, Mr. Jurist Efrida also agreed that notary shall have competencies in money laundering sectors. This includes a competency to balance his role as notary which has duty to keep confidentiality of his client and his responsibility to become justice collaborator under Article 40 Law No.8 of 2020 concerning Money Laundering (Money Laundering Law)

The last competencies that should be mastered by the notary is competency in capital market sector. This competency is vital to be comprehended given with condition that sharia law, Awqaf Law and Company Law does not provide definition nor qualification of shares that can be awqaf object. Company Law only state that a limited liability company consist of shares issued by the company which are possessed by the shareholders. Meanwhile the MoRA on Movable Awqaf only mentions that shares might be listed company shares or closed company shares. Author is in the view that the shares that can be an awqaf object is important to be defined and qualified to in order to meet qualification of Principle of Awqaf and ensure validity of the awqaf. In regard of this matter, the author found that a reference to provision under capital market might be helpful. Under Financial Services Authority Regulation Number 35/POJK.04/2017 concerning Issuance Criteria of Sharia Security List (FSA Regulation on Sharia Security) a share might be classified or fulfill shariah criteria if meets the following criteria:

1. Sharia Share  
Sharia share a is a share issued by the company that explicitly state in its articles of association that it works under shariah principles.
2. Share Classified as Sharia Share  
Share Classified as Sharia Share is a share issued by a company which does not state that it works, but the operation of of the company meets the following criteria:
  - a. The company does not commit the following prohibited account/transaction:
    - (1) Gambling or any games classified as a gambling .
    - (2) Uncertainty transaction (*gharar*)
    - (3) If the company carrying on financial services, it does not apply an interest-based transaction.
    - (4) If the company carrying on trading activities, it does not commit fake supply or demand
    - (5) If the company is a manufacturing or service company, it does not produce the following product/services:
      - (i) Haram (prohibited by shariah law) in substance (*haram in substance*),
      - (ii) Haram based on the decision of the DSN -MUI
      - (iii) Any products that has destructive effect to morality and character.
  - b. Meet the following financial ratio:
    - (1) The ratio of interest-based debt to asset shall not more than 45%,

- (2) The ratio interest income and non-halal income to total business income and other income shall not more than 10%.

#### ***4.2. Status and Impact of Under Hand ADDM in Shares Acquisition***

The requirement to make an ADDM sets out by Awqaf Law shares the same idea of the making of authentic deed under Article 1868 ICC in which it requires to be drawn up in legal format by or before the public official who are authorized to do so at the location where this he takes place. In terms of ADDM, the format has been set under Article 21 Awqaf Law and under Article 30 Awqaf GR, the wakif shall declare his awqaf action before the PPAIW. Given with those similarity, it can be deemed that the ADDM serves as a conclusive evidence regarding the contents stipulated on the deed for the parties. Meanwhile, the under hand ADDM shall be classified as under hand deed as stipulated under Article 1875 ICC in which it only serves as a conclusive evidence if the parties in the transaction acknowledge it.

Mr. Bimo argues that the failure to emanate shares awqaf in the form of Notarial Awqaf Declaration Deed would create law uncertainty in terms of awqaf action. This uncertainty happens because even if shares awqaf is considered valid according to sharia law, however, the government could not maximize its protection to the parties because the transaction is not registered. Mr. Bimo's argument is in line with Muhammad Daud Ali which argues that the wakif should declare its awqaf pledge before the PPAIW to ensure the validity and protection over the awqaf action. However, surprisingly, the author found that the awqaf that is not made before the PPAIW is not automatically provide lower protection over the awqaf action. Under Supreme Court Decree No.464/Pdt.G/2020/PA.Bgr, the author finds that the Supreme Court decides that awqaf action of Hj. Arnas Binti H. Thoyib to H. Muhammad Tamim as the custodian of Masjid Al-Munawarah is valid although the awqaf was not emanated in the form of Awqaf Pledge Deed.

In 1938, Hj. Arnas Binti H. Thoyib endowed her land in the area of 5,662 m<sup>2</sup> located at Katulampa Village, Bogor Regency to be built with mosque which currently known as Masjid Al-Munawwarah. However, in 2020, the great-grandchildren of Hj. Arnas Binti H. Thoyib as plaintiffs had filed a claim to Religious Court claimed that their grandfather, H. Subki H. Abdul Madjid make an Inheritance Letter over awqaf land and state that the land shall be possessed by plaintiff's father, H. Anwar bin H. Subki. Therefore, once H. Anwar bin H. Subki had passed away, the awqaf land shall be treated as inheritance asset owned by the plaintiffs other than Masjid Al-Munawwarah and shall not meet qualification as an awqaf object. Aside from that, the plaintiffs argued that the fact that the awqaf action did not come with Awqaf Pledge Deed shall be a consideration to decide that the awqaf action is null and void. Given with the plaintiff's arguments, the Supreme Court give its consideration:

1. The Inheritance Letter is not known in Islam, therefore the transfer of remaining awqaf land is not valid and therefore the plaintiffs does not have any rights over the remaining awqaf land.
2. Awqaf Declaration Deed is not an essential element under shariah law. therefore, the absence of Awqaf Pledge Deed does not give any effect to the validity of awqaf as mentioned in Fiqh Sunnah Book III page 318 and Article 2 Awqaf Law.

In another case, the author finds that the existence of Awqaf Pledge Deed also does not guarantee that the government will protect awqaf action. This is possible if the essential element of awqaf is not satisfied. In case No.19/Pdt.G/2011/pta/PTA.Yk, the Religious Hight Court that the Awqaf Pledge Deed made by KUA Officer in Umbulrejo District was declared null and avoid considering the waqif is under interdiction status and act without guidance of his trust. In 1995, Mrs. RR Fatimah donated her land in area of 2810 m<sup>2</sup> located in Umbulharjo District to PDHI Foundation branch Umbulharjo represented by Mr. Sunardi Syahuri through awqaf mechanism. Therefore, the Head of KUA Umbulharjo made Awqaf Pledge Shares No. W.2/90/K-13/Tahun 1995 tertanggal 11 September 1995 (APD W.2/1995). However, Mrs. RR Fatimah conducted the awqaf without consultation with this trustee which was the authorized person to represent RR Fatimah. The awqaf also did not attended by the nazhir. Therefore, the plaintiffs argue that the

APD W.2/1995 shall be considered null and void. The Religious High Court further declared the APD W.2/1995 is null and void with the following consideration:

1. Pursuant to Article 3 Government Regulations No.28 of 1977 concerning the Endowment of Land Properties, a land is only valid to be transferred if it is fully owned by the wakif that has Indonesian nationality, that already reaches, mature by law, capable of assessing his action and has freedom of choice.
2. If the wakif is incapable in assessing his action, including if he has mental illness, then according to Article 330 ICC, he shall be under guardianship and any of her action shall be represented by her guardian. The fact that RR Fatimah case acted on behalf of herself without any representation of her guardian automatically make the APD W.2/195 is null and void.

Lesson learned from abovementioned cases is it is important to to ensure the elements of awqaf developed by both syariah and positive laws to protect the validity of awqaf project including the parties in the awqaf action may be protected from any issues, conflict, or claim in the future. The absence of ADDM in awqaf transaction would still be make the awqaf action valid if the essential principle of awqaf is satisfied. However, in terms of shares awqaf resulting an acquisition, the under hand ADDM will not been accepted by the MoLHR because article 128 Company Law requiring the shares transfer in acquisition must be made in notarial deed form. Therefore, if the ADDM is made in form of under hand deed, the MoLHR would not register the nazhir as the new shareholders in the company as the valid shareholders under their system. This condition will result in the rejection of any report or submission conveyed by the nazhir as clearly stated under Article 56 paragraph (3) Company Law.

## V. CONCLUSION

Notary is a public official vested with an authority to drawn authentic deed over any action, agreement, and stipulation set out by Notary Law or another laws. In context of shares awqaf, notary may act as an ADDM after acquiring license issued by Minister of Religion. One of requirements to obtain the license according to Article 27 Awqaf Procedure Regulation is mastering competencies in awqaf field evidenced by the issuance of Awqaf Field Certification issued by Minister of Religion. Unfortunately, Minister of Religion has not released the list of competencies in such field. In accordance with that condition, the researcher find out that the competencies in awqaf field should be extended not only to cover competencies in awqaf field but also in another field which has intertwined with awqaf. At least the notary must master 5 (five) competencies, namely:

1. Competencies in Syariah Law and Awqaf Law. The notary must understand that the ultimate purpose as an ADDM is to ensure the awqaf is valid according to Syariah Law and satisfies administrative purpose under an Awqaf Law so that the transfer of shares that become object of awqaf may be enjoyed by the beneficiaries. Competency in Company Law
2. Competencies in Company Law especially in terms of acquisition requirements and procedures is vital because the wakif relies on the notary to check whether his awqaf action may result in acquisition. The notary also become the key person that becomes the party who reports the changes of shares composition as result of acquisition to Ministry of Law and Human Rights.
3. Competency in Capital Market especially relating to notary ability to evaluate whether the share in closed company can be classified as Shariah Shares or Share Classified as Sharia Shares. Since Awqaf Law and Company Law does not provide definition and qualification of both type of shares, the notary must make a reference to Shariah Shares List issued by Indonesian Financial Services Authority.
4. Competency in ADDM Drafting. The notary must take in note that one of characteristic of awqaf is the requirements to ensure the object to be eternal. Therefore, in the context of shares awqaf, the notary must be able to ensure that the awqaf would not be diluted in if the company increases its capital.
5. Competency in Money Laundering Crime. Understanding in money laundering crime is closely related to the concern that shares awqaf will used as an media for money

laundering due to lack of transparency and accountability in awqaf management. In this context, the notary must understand the mechanism of money laundering and try to balance between his responsibility to keep confidentiality of his clients and responsibility to act as justice collaborator under Money Laundering Law if it is required.

As for the status of ADDM which does not made before the PPAIW, the author found that uch condition does not affect the validity of shares awqaf both from Sharia law and Awqaf Law perspective. This is because the notarial form of ADDM share the same nature with authentic deed as governed on Article 1868 ICC in which serves as perfect evidence. However, the failure to make an ADDM before the notary from Company Law perspective may result in the objection from Ministry of Law and Human Rights over any report made by the shareholders whom their name has not yet reported to MoLHR.

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