

# Dispute Resolution through Mediation in Endowments Cases in the Legal Effectiveness Theoretical Perspective

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## Abstract

The development of endowment land in Indonesia is very rapid which is directly proportional to the problems that occur regarding endowment. The resolution of this endowment dispute is based on the charity law, carried out by deliberation and mediation. In some cases, the mediation conducted was not following the existing mediation rules so that eventually the resolution of the endowment dispute became ineffective. It is important to study the problem of the resolution of endowment disputes through mediation from the perspective of the theory of legal effectiveness. This study aims to understand and analyze the problematic of endowment dispute resolution through mediation from the perspective of the theory of legal effectiveness in Central Java. The research method used is socio-legal research, with an empirical juridical approach and includes qualitative research. The results of this study are the settlement of endowment disputes through mediation outside the court according to the theory of legal effectiveness, not yet effective, because there are no formal legal rules. It is necessary to make regulations for the implementation of non-litigation mediation, to provide practical guidance for the implementation of mediation in the community.

**Keywords:** Charity, Mediation, Dispute Revolution.

## Introduction

The endowment is developed or empowered by the community<sup>1</sup>. Land Endowment is always associated with public interests and economic value. This is what often causes problems that cannot be resolved internally, thus becoming a dispute. Objects that are used as land endowment disputes, usually associated with the legality status, management, and changes in the function and use of land endowment assets including buildings on it, which are adjusted to the needs of the community in utilizing endowment property. The parties to the dispute can occur between the community and *nadzir* (endowment manager), *waqif* (people with endowment)

with *nadzir*, and *nadzir* with the heirs<sup>2</sup>. Factors causing the appearance of endowment disputes, among others; there is a misunderstanding about the understanding of endowment between *nadzir*, *waqif* and *waqif* heirs, there is a conflict of interest between *nadzir* and *waqif* heirs, the economic value of land prices is higher so that *waqif* heirs sometimes try to seize it, there is no charity land certificate, there is a conflict between religious law and *waqif* and state law regarding the legality of endowment land, *nadzir* defaults (breaking promises and irresponsibility)<sup>3</sup>.

The resolution of endowment dispute has been explained in Article 62 of the Endowment Law No. 41/2004, that is, through deliberations to reach consensus, if it cannot be resolved, then it can be resolved through mediation, if mediation is not successful, then use arbitration or through the Religious Courts. According to Article 49 of Law No. 3/2006 explains that the Religious Courts has the competence to resolve endowment disputes submitted by the disputing parties. This study may be a fairly original study in presenting and examining aspects of endowment and actual problems in the context

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of resolution by involving the religious community and arbitration and ADR. Although this relates to the field of business law, very few previous studies have reviewed ADR in this endowment issue<sup>4,5,6,7,8,9</sup>. This study aims to understand and analyze the problematic of endowment dispute resolution through mediation in the perspective of the theory of legal effectiveness in Central Java. In addition, also to find out the practice of the implementation of mediation in society and its legal problems. The benefit is that it can be used as an effort to develop legal settlement of endowment disputes through effective and optimal mediation in the community.

**Resolution of Endowment Disputes:** Research conducted by<sup>10</sup> explains that the resolution of endowment disputes in the coastal communities of Central Java, uses two pathways, namely the non-litigation route, such as; deliberation (23%) and mediation (60.8%), and litigation path in the Religious Courts (16.2%). According to these data shows that the majority of the people of the coastal regions of Central Java use non-litigation in the resolution of endowment disputes. This is because; faster process, lower cost, informal and final nature, confidentiality guaranteed, can maintain good relations, there is freedom of choice of third parties, certain face-to-face implementation, easier to make improvements, the parties can arrange procedures for dispute resolution. It can be understood that mediation outside the judiciary is the most widely used way of resolving endowment disputes by the parties to the dispute. However, after being criticized, it turned out that mediation was carried out by the parties to the dispute, many of which did not comply with the correct mediation rules, for example; the mediator acts as the party that resolves the problem, the mediator does not know the main tasks and functions so that it is not optimal in resolving disputes, and the parties are not given the opportunity to express their opinions. Thus, this study shows that the implementation of mediation in the resolution of endowment disputes has not been effective.

Research conducted by<sup>11</sup> about the Effectiveness of Mediation in the Settlement of Endowment Disputes (Case Study of the Endowment Land of the Baitul Qudus Mosque on Gebanganom Genuk Sari Semarang Central Java) explains that the effectiveness of mediation depends on the type of endowment dispute, the motivation of the parties to form the Baitul Qudus Mosque Endowment Case on Gebanganom Genuk Sari Semarang Central Java), agreement in dispute resolution, relating to basic/ideological values, the ability of mediators to assist in

the resolution of disputes, and the availability of funds<sup>11</sup>. Furthermore, the research shows that the implementation of mediation in the resolution of endowment disputes in the above case has not been effective, because the mediators are not sincere in helping the parties resolve endowment disputes and there is no awareness of the parties in having a good commitment to resolving endowment disputes.

The effectiveness of the resolution of endowment land disputes through mediation is an attempt to explain whether the rules of mediation law can apply or be implemented by the community in the resolution of endowment disputes. If the rules of mediation law can be carried out by the community in the settlement of endowment disputes, then the law is effective. In this study, what is used as a benchmark for the effectiveness of mediation in the resolution of endowment disputes are five factors as stated by<sup>14</sup> in the theory of legal effectiveness. Five factors that influence the effectiveness of law in society are; statutory regulations (formal juridical), law enforcement (institutional), facilities or facilities for law enforcement (human resources), society (degree of community compliance with law), legal culture (customary law that applies in society). By using the theory of legal effectiveness is used as a benchmark for the implementation of the effectiveness of mediation in the resolution of endowment disputes in Central Java society, it is revealed that factors of statutory regulations, which means rules in written form (legal formal). Rules for the resolution of endowment disputes through mediation have been explained in Article 62 Paragraph (2) of Law No. 41 of 2004 concerning Endowment, ie if the resolution of an endowment dispute cannot be resolved by deliberation, then it can be resolved through mediation. Mediation is a dispute resolution mechanism that cannot be resolved internally by parties, thus requiring other parties to resolve it<sup>15</sup>. Law no. 30 of 1999 concerning Arbitration and ADR are often used by parties in dispute resolution in general, but for the resolution of endowment disputes it still needs to be tested, whether the law can be used as a guideline or not, given the act of endowment has characteristics.<sup>16</sup> The characteristics of endowment acts are the responsibility of endowment property is intended for the community and endowment property must not be lost, damaged, but preserved for the benefit of eternity. If there is a change in objectives and benefits, it must be licensed by PPAIW and BWI as an institution responsible for endowment acts in Indonesia.

## Research Method

This is a field research, its object in the Central Java region, which took samples in the cities of Semarang, Demak, Kendal and Klaten. This type of research includes socio-legal research, because it analyzes the problem of implementing procedures for the resolution of endowment disputes through mediation in the community and legal problems, so that its effectiveness can be known. This research is a qualitative research which aims to develop theoretical concepts based on data and research sources. The approach method uses empirical juridical. Juridical means research that seeks to examine matters concerning the legal basis of the legislation used, namely Law No. 41/2004 Regarding Endowment, Gor. Reg. No. 42/2006 concerning Regulations for Implementing Endowment. Empirical is research on the application of legal rules for the resolution of endowment disputes in the community, legal relations with the community. The research data needed is primary and secondary data. Primary data come from interviews with endowment service agencies in the community, namely; PPAIW (3 people), District BWI (4 people), Provincial BWI (2 people), and Religious Court judges (2 people). Secondary data obtained through literature study and documentation, secondary data includes primary, secondary and tertiary legal materials. This study uses a case study analysis that occurred in the research object area, drawing conclusions using the inductive method and the data was analyzed descriptively and analytically.

## Research Result

The results showed that the resolution of endowment disputes through mediation really helped the parties in realizing a peace agreement, because mediation has several advantages, namely; there is no coercion for the parties to the dispute, instead they are protected and directed so that the dispute is quickly resolved, saves time and money, is flexible and does not seem formal/rigid, confidential is guaranteed, and creates good relations after the dispute.

However, in the practice of resolving endowment disputes, mediation has legal issues that disrupt the existence of endowment law enforcement. Legal problems/problems in the resolution of the endowment dispute in Central Java. Mediation of endowment disputes using the rule of law as contained in Article 62 of the Endowment Law No. 41/2004. However, the mediation rules in the Endowment Law only explain

globally/generally, do not explain in detail about the technical rules of mediation. Rules for mediation through justice/litigation have been explained in PERMA No. 2/2008 jo PERMA No. 1/2016, but the legal rules for the resolution of endowment disputes through non-litigation mediation have no legal rules. So far, the state has non-litigation dispute resolution rules, namely Law no. 30/1999 concerning Arbitration and ADR (Alternative Dispute Resolution). Article 1 (10) of this Law explains that the settlement of disputes through non-litigation channels is carried out by means of consultation, negotiation, mediation, conciliation, or expert judgment. However, this Act does not specifically mention clauses in the settlement of endowment disputes. Though endowments have their own characteristics, such as; endowment property is eternal must not be lost, the use of endowment property for social purposes, endowments of worship and social value. Thus Law No. 30/1999 cannot be applied in the resolution of endowment disputes. Meanwhile, the community has its own pattern in the resolution of endowment disputes based on Islamic law. Islamic law explains that the resolution of endowment disputes is carried out through deliberations towards peace, mediation and judicial judges<sup>12,13</sup>. The pattern used comes from the practice of Islamic scholars (in the organization of PPAIW) in the resolution of endowment disputes. However, the rules of Islamic law above are still global in nature, not yet explaining the detailed rules, so far there are no written rules established by state institutions, so the rules used are based on local customs that do not conflict with Islamic law. This is what makes the rules for the resolution of endowment disputes through mediation, do not yet have the legal force to protect the parties to the dispute.

In the settlement of endowment disputes, the mediator is usually PPAIW, because PPAIW is seen by the public as an expert in endowment law. If there is an endowment dispute, the task is to resolve the endowment dispute, so that the endowment dispute can be resolved fairly and the endowment property can be saved and the endowment law can be upheld in the community. So, the law in force in society is the law that lives in society. The role of the mediator in mediation is very important, because the success of the resolution of endowment disputes through mediation is very dependent on the mediator. Therefore, the mediator must understand the main tasks and functions so that they are professional so that they can direct the parties to a win-win solution. However, in practice what happens in the community

shows that, the mediator is chosen by the parties because it has close social, religious, kinship relations, and is not based on professionalism. This is what causes problems in mediation, because the mediator does not yet know and understand his position, what must be done and how to manage endowment dispute problems so that they can be quickly resolved.

Legal issues for the resolution of endowment disputes, namely; Article 62 of the Endowment Law only explains globally/generally about the procedure for the resolution of endowment disputes through mediation. Mediation that is carried out in the court already has a rule of law namely PERMA No. 1/2006. However, mediation that is carried out outside the court/non-litigation, there is no legal rule regarding practical instructions, so there is no legal certainty. In addition, the dispute resolution rules contained in Law No. 30/1999 concerning Arbitration and ADR, there are no clauses regarding endowment actions. This is what makes the Act cannot be applied in the resolution of endowment disputes in the community. During this time the community uses a living law derived from Islamic law obeyed by its adherents. However, Islamic law still explains globally it has not been detailed.

### Conclusions and Suggestions

The resolution of endowment disputes through mediation outside the court according to the theory of legal effectiveness has not been effective, because there are no formal legal rules. Although Article 62 Paragraph (2) of the Endowment Law has explained the procedures for the resolution of endowment disputes, but there are no facilities or facilities in the law enforcement for the resolution of endowment disputes, both physical facilities, human resources and their supporters, such as good organization, adequate equipment and legal culture in the community. Based on the conclusions above, it is very urgent if the government makes regulations on the implementation of non-litigation mediation, to provide practical guidance on the implementation of mediation in the community. In addition, it also sets policies in facilitating the main and supporting facilities. This is done so that endowment disputes in the community can be resolved fairly and protect the parties to the dispute and save the endowment assets used by the community.

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