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Shahādah Istifādhah (*Testimonium De Auditu*) in Isbat Waqf Cases in Religious Courts from the Perspective of Fiqh and Civil Law

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ABSTRACT

This paper examines how exactly the application of Shahādah Istifāḍah (the testimonium de auditu) in the case of wakaf determination which is brought to the Religious Court as a special Islamic civil judicial institution under the Supreme Court of the Republic of Indonesia. This research was analyzed using descriptive analytic method. In the discussion it is explained the comparative analytic the concept of Shahādah Istifāḍah with the concept of testimonium de auditu and its legal force in the case of proof in Court especially in the case of waqf determination. This paper concludes that the Shahādah Istifāḍah can be used as a means of proof in waqf determination.

A. Introduction

Waqf as a form of Islamic philanthropy has begun to be seen as a strategic means of national economic development. In this case, waqf actually has a significant role after zakat, especially in terms of empowering weak communities. Moreover, the characteristic of waqf is that the nominal amount of goods

represented must be fixed, in contrast to other than waqf which runs out immediately after use.[1]

The philosophy of waqf which is obliged to maintain its waqf assets that are different from zakat, infaq and shadaqah is considered superior. With the survival of waqf assets, the benefit of the community in a sustainable manner can be achieved. From the aspect of the permanence of objects and values, waqf can provide the widest possible benefits to the general imagination in the long term. In addition, the results of waqf management can be distributed or used by rich people who are not entitled to receive zakat.2

Various studies have discussed a lot about the potential of waqf in Indonesia. Based on data compiled by the Ministry of Religion as of March 2016, the number of waqf land in Indonesia reached 4,359,443,170 m2 spread across 435,768 locations in 33 provinces. This number increased by almost 100 percent when compared to the data on waqf land in 2007 which amounted to 2,686,536,657 m2 and spread across 366,595 locations.3

This amount does not include cash waqf collected by zakat institutions in Indonesia. According to the records of the Indonesian Waqf Board, the waqf assets that have been collected in Indonesia as of December 2013 have only reached 145.8 M. This number will continue to grow considering the potential for waqf money in Indonesia is 120 trillion per year.4

This dynamic development and soaring potential is not without consequences. The more rampant waqf transactions that occur, the higher the potential for disputes that occur. Evidently in the last five years, waqf dispute cases that have entered the Religious Courts have shown an increasing trend, although there are indeed not as many inheritance cases, let alone divorce.

The problem of waqf disputes in religious courts is rarely discussed, one of which is because few disputes regarding waqf are resolved through litigation channels. Although Article 62 of Law Number 41 of 2004 concerning Waqf and its Explanation states that the settlement of representation disputes through adjudicative channels to religious courts / syar'iyah courts is the last step (not an

[1] A. Zamakhsyari Baharuddin and Rifqi Qowiyul Iman, "Nazir Waqf Professional, Standardization and Its Problems," *Li Falah: Journal of Islamic Economics and Business Studies* 3, no. 2 (2018), http://ejournal.iainkendari.ac.id/lifalah/article/view/1197.

[2] Ulya Kencana, *Indonesian Waqf Law History Of Legal Foundations And Comparisons Between Customary Western Law And Islam* (Malang: Setara Press, 2017). thing. 5.

[3] Directorate of Waqf Empowerment of the Ministry of Religious Affairs of the Republic of Indonesia, "Data on Waqf Land throughout Indonesia," The Indonesian Waqf Agency, 2016, https://bwi.or.id/index.php/ar/tentang-wakaf/data-wakaf/data-wakaf-tanah.html. Retrieved 15 April 2018 At 8:22 p.m.

[4] Muhammad M Noor, Ade Firman Fathoni, and Achmad Cholil, "Portraits of Waqf Disputes in Indonesia," *Religious Justice Magazine* (Jakarta, April 2017), https://badilag.mahkamahagung.go.id/pengumuman-elektronik/pengumuman-elektronik/majalah-peradilan-agama-edisi-xi-april-2017. thing. 13.

option) after the mechanism of deliberation, mediation and arbitration fails to resolve disputes. It is predicted that in the future waqf disputes will increase and become more complex. This is coupled with the fact that 34 percent of all waqf land in Indonesia does not yet have a certificate. In fact, one of the most common causes of disputes in representation is the absence of proof of a valid certificate on the waqf land.5

The legal acts of waqf in the current era must be proven by the existence of a waqf pledge deed. The deed of waqf pledge in this case serves as authentic evidence as well as a guarantee so that there is no misappropriation or invasion of rights. In fact, in society there are many waqf deeds found in the past that do not or do not have written evidence. Among the reasons for this is because the representation in the past was only based on a sense of sincerity in striving to raise the religion of Islam without the need for written evidence, in addition to the perspective of past jurisprudence also does not require written evidence in every act of the law of representation. This is what prompted today many to apply for the determination of waqf isbat in religious courts.

The problem that arises related to the waqf isbat case is about the use of witness istifāḍah as a basis for granting waqf isbat. It is known that waqf in ancient times was only done orally and the witnesses and perpetrators of both the wakif and nazhirnya had all died. So that the proof is based on the testimony of witnesses who did not directly see, hear, and experience the waqf contract but were sourced from information he got from other people commonly called "de auditu" testimony.

Based on this, it is certainly necessary to understand in depth what exactly the concept of witness (Sh*ahādah Istifāḍah)* is in terms of the determination of the waqf isbat case and the degree of strength of *the evidence testimonium de auditu* dnature of the discourse of jurisprudence and its application in religious courts.

B. Metode Research

This research uses *a library research* method that emphasizes the source of information from law books, journals, papers, and examines from various kinds of literature thathave a relationship between rel evan and the problem under study. Meanwhile, when viewed from its nature, this research includes normative juridical legal research. This research was analyzed using a descriptive analytical method, namely by analyzing the data studied by explaining these data, then conclusions were obtained.

[5] Rahmat Arijaya et al., "The Dynamics of Waqf and the Challenges of Religious Justice," *Religious Justice Magazine* (Jakarta, April 2017), www.badilag.mahkamahagung.go.id. thing. 3.

C. Results and Discussion

1. Isbat Waqf

Isbat waqf consists of two Arabic syllables namely *ithbāt* and *waqaf*. *Al-ithbāt* etymologically means to assume that something is always upright/fixed and true. Whereas in terminology [6]*al-ithbāt* as stated by the fuqaha means the submission of legal evidence (*a l-dalīl a l-shar'i*) before a panel of judges (*qādī*) for a certain truth or event. Whereas in the Great Dictionary Indonesian the word "*ithbāt*" is defined as the determination of the truth (validity) of a matter.[7]

While waqf linguistically means to restrain (al-habsu), it can also be interpreted as forbidding (*al-man'u*). The word waqf in Arabic can also be interpreted as the object of waqf.[8]

In terms, waqf has varied definitions as the author will explain below:

a) The faqihs of the Hanafi madhab state that waqf is to withhold material property on the basis of the law of God's possession and distribute the benefits to whomever is desired. This definition was stated by two companions of Abu Hanifah.
b) Abu Hanifah stated that waqf is to withhold property material under the law of ownership of the wakif and to endow the benefits even though they are thorough.9
c) Ibn Arafah a faqih from maliki madzhab gave the definition of waqf by classifying the word waqf as the word masdar and waqf as the word isim. Waqf as a masdar means providing benefits from an object during the period of the existence of the object while maintaining the ownership of the giver even though it is limited to recognition. Meanwhile, waqf isimically means as much as it is given its expediency as long as something is still there.10

[6] Muhammad Ibn Mukrim Ibn 'Ali Abu al-Fadhl Jamāluddin Ibn Mandzūr, *Lisān al-'Arab* (Beirut: Daar Shadir, 1968). Vol. 2: 20.

[7] "Kamus Besar Indonesian Dalam Jaringan (KBBI Online)," Ministry of Education and Culture of the Republic of Indonesia, 2016, https://kbbi.kemdikbud.go.id/entri/isbat. Retrieved April 23, 2018 At 5:59 p.m.

[8] Kuwaiti Ministry of Waqf and Religious Affairs, "al-Mawsu'ah al-Fiqhiyah al-Kuwaityah," 2 ed. (Kuwait: Thibā'ah Dzāt al-Salāsil, 1983). Vol. 1: 323.

[9] Muhammad Amin Ibn Umar 'Ābidīn, *Rad al-Mukhtār 'alā ad-Dur al-Mukhtār Hāshiyah Ibn 'Ābidīn* (Riyādh: Dār 'Ālam 'al-Kutub, 2003). Vol. 6: 519.

[10] Shālih Abd al-Samī' al-Abī Al-Azharī, Jawāhir al-Iklīl Sharh Mukhtashar al-'Allāmah as-Shaikh Khalīl fi Madzhab al-Imām Mālik Imām Dār at-Tanzīl (Beirut: al-Maktabah al-Tsaqāfiyah, 1332).

d) The Shafi'iyah scholars stated that waqf is the withholding of property that can be utilized on matters allowed, as well as eternal materially by terminating the management rights of its owner.11
e) The 'alim madzhab Hambali stated that waqf is to withhold the property of a person who can be utilized while maintaining the permanence of the material and cutting off the management rights of the owner or other parties and utilizing them on good things as a form of self-approach to Allah Almighty.12
f) Based on Article 215 paragraph (1) of the Compilation of Islamic Law , waqf is the legal act of a person or group of people or legal entities that separate part of their belongings and institutionalize them for eternity for the benefit of worship orother public kepe r luan in accordance with Islamic teachings.

Based on the above explanation, it can be concluded that the waqf isbat means to establish and corroborate the identity of the object represented by the wakif for which there was no written evidence such as the waqf pledge deed or the certificate.

2. Shahādah *Istifāḍah*

a) Definition

Shahādah is etymologically valid information (*al-khabar al-qa ṭ'i*), confession/testimony (*al-iqrār*). Epistemologically the word [13]*shahādah* has several different meanings. Among the definitions of *shahādah* include the following:

1) *Shahādah* means confession (*al-iqrār*)
   In this case the 'alims give the definition of *shahādah* as a declaration of a truth over oneself to another.[14]
2) *Shahādah* means testimony
   In this case the 'alim gives the definition of *shahādah* as a statement of a truth over the other party to the other party before a panel of judges.[15]

[11] Muhammad Ibn Khatīb Al-Sharbīni, *Mughni al-Muhtāj ilā Ma'rifat Ma'āni Alfādz al-Minhāj* (Beirut: Dār al-Minhāj, 1997). Vol. 2: 205.
[12] Manṣūr Ibn Yūnus Ibn Idrīs Al-Buhūti, *Sharh Muntahā al-Irādāt Daqā'iq Uli an-Nuhā li Sharh al-Muntahā* (Beirut: Mu'assasah al-Risālah Nāshirūn, 2000). Vol. 4: 329.
[13] Kuwait, "al-Mawsu'ah al-Fiqhiyah al-Kuwaityah." Vol. 6: 215.
[14] Kuwait. Vol. 6: 215.
[15] Kuwait. Vol. 6: 215-216.

This discussion will focus on the definition of *shahādah* i.e. telling the truth of one's one to another before a panel of judges (*ikhbārun bi haq li al-ghayr 'alā al-ghayr fi majlis al-qadhā*).

Whereas *istifāḍah* comes from the word *fādha* which means abundant. This word is commonly used to describe water that is abundant to overflowing from where it flows. The word *istifāḍah* is also biaseda meaning *intaṣara* and *dhā'a* (widespread) in which case Ibn Mandzur describes it as a speech that has spread widely (*istafāḍah al-hadīth*).[16]

Based on its etymological meaning, *istifāḍah* can be expressed as a state in which the object of accession has become widespread in an audience where each listens to each other's information. [17] *Istifāḍah* usually occurs in some special matters that cannot be known except on the basis of what is heard.

b) Shahādah Istifāḍah

In fiqh terminology, *Shahādah Istifāḍah* is often referred to using the term *a l-shahādah bi al-tas āmu'* (testimony of the results of listening to each other). In this case the scholars categorize it into several levels, including the following:[18]

1) Testimony with a valid and factual level of truthfulness of information, testimony is likewise called *shahādah a l-simā' al-mutawā* tir (testimony based on hearing that is mutawatir). Among the examples are the testimonies of the existence of cities called Makkah, Medina, Cairo etc. In this case the information is certainly indisputable even though it comes from a person who has never seen these places in person. In this case, the testimony must be accepted and have the same standing as the actual testimony.
2) A testimony with a strong degree of prejudice to the point of approaching the truth. In this case, information (rumors) has spread widely in communities with a considerable amount. For example, if the hilal of Ramadan can be seen by many people and there has been widespread news about it among the inhabitants of a country, it is mandatory for those who see it or who do not see it to fast. In these

[16] Mandzūr, *Lisān al-'Arab*. Vol. 7: 212.

[17] Ibrāhim Ibn Muhammad Ibn Sālim Ibn Dhawyān, *Manār al-Sabīl fi Sharh ad-Dalīl 'ala Madzhab al-Imām al-Mubajjal Ahmad Ibn Hambal* (Damascus: Manşūrah Mu'asssah Dār al-Salām, 1959). Vol. 2: 483.

[18] Abu al-Wafā Ibrāhim Ibn al-Imām Shamsuddīn Abu 'Abdillah Ibn Farhūn, *Tabşīrāt al-Hukkām fi Uşūl al-Aqdhiyah wa Manāhij al-Ahkām* (Riyādh: Dār 'Ālam al-Kutub, 2003). Vol. 1: 295.

circumstances, no testimony before a judge is required and validation of the information provided is no longer required.

3) Testimony with a strong level of prejudice but not like the prejudices already mentioned in terms of the appropriateness of the source of information.

c) Conditions of Acceptance of Shahādah Istifāḍah

After explaining the definition and levels of *Shahādah Istifāḍah*, the fuqaha furthermore gave some conditions for the acceptance of *Shahādah Istifāḍah*. In this paper, the author will briefly describe some of the requirements that are considered important. Among these conditions are the following:[19]

1) The testimony should come from two just men (*shāhidayn 'adlayn*) on a well-known opinion. However, some argue that testimony like this should come from four fair witnesses.
2) The testimony is not dubious. For example, if there are three eighteen-year-old teenagers giving a testimony while in that community there are hundreds of teenagers who are their age but do not know anything, then the testimony is rejected immediately. But if the doubt has vanished, then the testimony is acceptable.
3) Let the news or information provided have spread widely and become the knowledge of many people.
4) The one who will bear testimony should first take an oath.

d) Things That Are Allowed to Use Shahādah Istifāḍah

Indeed, there is no difference of opinion among the fuqaha about the validity of *Shahādah Istifāḍah* although in this case the witnesses did not witness the matter themselves. For the purpose of this kind of testimony is fame and dissemination, which is the principle which replaces the position of personal witnessing of the matter at hand.[20]

It's just that the fuqaha have different opinions about what matters can be done by this method. Here are some scholars' opinions on this issue:

1) There is a cross-section of opinions in Maliki's madzhab about what matters can be established with *Shahādah Istifāḍah*. Al-Qadhi Abdul Wahhab narrated that the *Shahādah Istifāḍah* applies only to matters that do not change their circumstances, nor do they have any

[19] Farhūn. Vol. 1: 296.

[20] Abu Bakr Ibn Mas'ūd Al-Kasāni, *Badā'i' as-Ṣanā'i' fi Tartīb al-Syarā'i'* (Beirut: Dār al-Kutub al-'Ilmiyah, 1986). Vol. 6: 266.

ownership therein such as the establishment of nasab, death, waqf, and marriage. Meanwhile, Ibn Rus[21]hd al-Jādd has four opinions in this regard. First opinion*: Shahādah Istifāḍah* is acceptable in all kinds of things, *second: Shahādah Istifāḍah* is not acceptable at all, *third: Shahādah Istifāḍah* is accepted in all things except nasab, *qaḍa'*, marriage, and death , and *the four Shahādah Istifāḍah* are inadmissible except in the four things mentioned earlier. Furthermore, Ibn Shas, Ibn Hajib and the majority of fuqaha state that [22]*shahādah Istifāḍah* is allowed in some cases that have been restricted. Some limit it to 20 (twenty) cases, some limit it to 21 (twenty-one), some limit it to 32 (thirty-two) and some limit it to 49 (forty s cases). In the matter of nasab and birth, scholars as proffered by Ibn al-M[23] undzir have consensualized on the ability of its determination through *Shahādah Istifāḍah*.[24]

2) The scholars of the Hambali madzhab and some fuqaha from among the Shafi'iyahs declared the ability of isbat with *Shahādah Istifāḍah* against nine things namely; marriage, absolute possession, waqf and its distribution, death, liberation of slaves, relations for freeing slaves, guardianship, and relinquishment of office.[25]
3) Others of the Shafi'iyah fuqaha stated that testimony with *istifāḍah* could not be used in waqf matters, relationships due to the liberation of slaves, freeing slaves, and conjugal ties.[26]
4) Abu Hanifah in this matter states that testimony with *istifā ḍah* is unacceptable except in matters of marriage, death and nasab.[27]

3. The Meeting Point of *Testimunium De Auditu* and *Shahādah Istifāḍah*

In language *testimonium* means *witness.* [28] Campbell in his dictionary defines *testimony* as "*Evidence given by a competent witness,*

[21] Ahmad Ibn Idrīs Ibn Abd al-Rahmān al-Ṣanhāji Al-Qarāfi, *al-Furūq al Musammā bi Anwār al-Burūq fi Anwā' al-Furūq wa bihāmishihi Tahdzīb al-Furūq wa al-Qawā'id as-Saniyah fi al-Asrār al-Fiqhiyah* (Kuwait: Dār al-Nawādir, 2010). Vol. 4: 499.

[22] Muhammad bin Ahmad Ibn Rushd Al-Qurthūbī, *al-Bayān wa al-Tahshīl wa al-Sharh wa al-Ta'līl fi Masā'il al-Mustakhrajah* (Beirut: Dār al-Gharb al-Islāmi, 1988). Vol. 10: 153

[23] Kuwait, "al-Mawsu'ah al-Fiqhiyah al-Kuwaityah." Vol. 26: 235.

[24] Muwaffaq al-Dīn Abdullah Ibn Ahmad Ibn Qudāstomach *al-Mughni wa yalīh al-Sharh al-Kabīr* (Beirut: Dār al-Kutub al-'Arabi, 1983). Vol. 12: 23.

[25] Qudāmah. Vol. 12: 23.

[26] Qudāmah. Vol. 12: 23.

[27] Al-Kasāni, *Badā'i' as-Ṣanā'i' fi Tartīb al-Sharā'i'*. Vol. 12: 23.

[28] "Big Dictionary of Indonesian in the Network (KBBI Online)," Ministry of Education and Culture of the Republic of Indonesia, 2016, https://kbbi.web.id/testimonium. Retrieved April 23, 2018 at 5:07 p.m.

under oath or affirmation." Furthermore, Campbell defines [29]*de audity* as "*Evidence not proceeding from the personal knowledge of the withness, but from the mere repetition of what he has heard others say*". [30] That is, *de auditu's* testimony is a testimony obtained not from one's own knowledge, observations, and experiences, but rather from what he hears from others. Sudikno Mertokusumo stated that *testimonium de auditu* is a witness statement obtained from a third party. For example, the third party knew firsthand that the two parties who were then in the subject matter of the case were referred to as plaintiffs and defendants had entered into a debt receivables agreement. Then the third party told his knowledge to the witness, the witness testified that he heard from the third party and gave the information he obtained from the third party. Whereas Yahya Harahap defines it as testimony or testimony because it hears from others, it is also called indirect testimony or not an eyewitness who experiences. In this regard, Subekti discussed it with "testimony from hearing". Meanwhile, Mukti Arto defines [313233]*testimonium de audito* as testimony obtained indirectly by seeing, hearing and experiencing it for yourself but through others.[34]

There is a cross-section of opinions among civil law experts about the legal power of *testimonium de auditu.* ***The first opinion*** states that *the testimonium de auditu* was rejected as evidence. Rejecting or not accepting witness de *auditu* as evidence is a *general rule* that is still adhered to by practitioners today. This is motivated by the rule that states that witnesses who do not base their testimony from the source of knowledge as stated in article 171 paragraph (1) of the HIR and article [35]1907 paragraph (1) of the Civil Code are *inadmissible* as evidence. In section 171 of the HIR it is stated that: "(1) Each testimony shall be accompanied by the causes of the witness's knowledge, (2) Special opinions or prejudices which occur as a

[29] Henry Campbell Black, "Black's Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern," *West Publisihing Co.*, 1968, https://doi.org/10.2307/1066423. thing. 1646.

[30] Black. thing. 852

[31] Sudikno Mertokusumo, *Indonesian Civil Procedural Law* (Yogyakarta: Liberty, 2009). Thing. 172.

[32] Harahap M. Yahya, *Civil Procedural Law on Suits, Trials, Foreclosures, Evidence, and Court Decisions* (Jakarta: Sinar Grafika, 2005). thing. 661.

[33] R. Subekti, *Law of Proof* (Jakarta: Pradnya Paramita, 1999). thing. 42.

[34] A. Mukti Arto, *The Practice of Civil Cases in Religious Courts* (Yogyakarta: Pustaka Pelajar, 2004). thing. 164.

[35] Asmuni Asmuni, "Testionium De Auditu Reviews the Perspectives of Procedural Law and Fiqh," *Journal of Law and Justice*, 2018, https://doi.org/10.25216/jhp.3.2.2014.191-202.

result of thought, not witnesses". [36] In this case, Subekti added that the witness *de auditu* as a testimony based on the views of others on something, has no price at all. Sudikno Mertokusumo also expressed a similar opinion that in general [37]*de auditu's* testimony is not allowed because the information is not related to the events experienced by himself. Thus, the witness *de auditu* is not evidence and does not need to be considered.

The second opinion states that testimonium *de auditu* witnesses can be used as evidence based on a variety of applications, including the following:

a) *Testimonium de auditu* is accepted as a stand-alone evidence reaching the minimum limit of proof without requiring the assistance of other evidence if the witness *de auditu* consists of several persons. A witness who has qualified formil and material means that he has the power of free evidentiary value *(Vrijbewijs Kracht).* In a sense, the judge has the freedom to judge the testimony according to his conscience, the judge is not bound by the testimony of the witness because the judge may remove the testimony of the witness as long as it is considered sufficiently based on strong arguments and even the judge can also accept the testimony even though the witness is of the quality *of the testimonium de auditu* as long as there is *an experiential* basis to accept it. When the burden of proof through witnesses is to be present while the main witness in the case does not exist, then the *testimonium de auditu* can be accepted as a stand-alone evidence reaching the minimum limit of proof if the witness *de auditu* consists of several persons or many people. This is contained in the Supreme Court decision Nomor 239 K/Sip/1973 dated November 25, 1975. In that ruling the Supreme Court confirmed *the testimonium de auditu* could be used as materially qualified evidence.

   The testimony of witnesses in general is according to the message, but it must be considered and almost all legal events or deeds that occurred in the past do not have letters, but based on hereditary messages, while witnesses who directly faced the legal acts in the past are no longer alive now, so that thus the hereditary message can be expected as information and according to the testimony and knowledge of the panel of judges themselves such messages by certain societies in general are traditionally considered applicable and correct. However, it must be considered from whom the message was received and the person who gave the information must be the person who received the message

[36] Riduan Syahrani, *Indonesian Civil Procedure Law Association* (Bandung: Alumni, 1991). Thing. 212.

[37] Subekti, *Law of Proof*. Thing. 42.

directly. It turns out that the matter has been fully resolved where the person who explained the message in the trial court was the person who immediately received the message.

There are several factors that are used as the basis for justifying *the testimonium de auditu* as evidence, namely: *first,* the direct witnesses involved in the events or legal acts in question no longer exist because all have died. *Secondly,* the event or legal act cannot be written in the form of a letter or other evidence that can be read or reopened, as well as recordings, documents and so on. *Third,* the information given by *the witness de auditu* is a message from the perpetrator or person seen in the disputed event or legal act and reiterated in the trial as he listened to. In the matter [38]*of testimonium de auditu,* the main problem is not whether or not it is accepted (*admissibility)* as evidence. But there is a more important thing, which is the extent to which the value of the evidentiary force attached to it. In the sense that it is not so important to debate whether or not *the testimonium de auditu* can be recognized as evidence, therefore it is not the time to automatically reject and say it is invalid as evidence. Supposedly, it is accepted first then it is considered whether there is an experiential basis for accepting it. If anything, it is only considered the extent of the strength value of the testimony attached to the testimony of *the witness de auditu*.

b) *Testimonium de auditu* is not used as direct evidence but *testimony de auditu* is constructed as evidence of prejudice (*vermoeden*) with objective and rational considerations and the prejudice can be used as a basis for proving something. The point of being constructed as a presumption here is that the deliberation does not override the whole general *rule (general ruler)* which prohibits accepting *testimonium de auditu testimony* as evidence. The preferred one is the judge's analysis of *de auditu's* testimony which then constructs his testimony as evidence of prejudice, and is carried out on the basis of objective and rational considerations. As seen in the supreme court decision No[39]mor 308 K/Pdt/1959 dated November 11, 1959. Indeed, this judgment still adheres to the general rule that prohibits de *auditu's* testimony from being evidence, but to circumvent the prohibition the testimony is not

[38] M. Natsir Asnawi, *Civil Case Evidentiary Law in Indonesia* (Yogyakarta: UII Press, 2013). Thing. 155.

[39] Asmuni, "Testionium De Auditu Reviews the Perspectives of Procedural Law and Fiqh." Thing. 196.

categorized as witness evidence but is constructed into evidence of presumption *(vermoeden)*.

In the judgment of the Supreme Court dated November 11, 2011, Nomor 308 K/Sip/1959 it was stated that: "*Testimonium de auditu*" cannot be used as direct evidence, but the use of the testimony in question as a presumption from which the presumption is proved to be something, is not prohibited. [40] In the judgment it is very emphatically stated that *the testiomium de auditu* cannot be used as direct evidence, but the testimony can be applied as evidence of prejudice *(vermoeden),* and that presumption can be used as a basis for proving something.

This may be a question mark, but such legal action is justified. Based on the 1922 article of the Civil Code, article 173 of the HIR, where the judge is given the authority to considerwhether it can be realized as evidence of prejudice, as long as it is done carefully and thoroughly. In the application of *de auditu's* testimony as a presumption, the judge must be careful and thorough. In this regard, it is necessary to observe the provisions as mentioned in article 173 of the HIR which states that: *"the prejudices alone which are not based on certain laws and regulations, should only be considered by the judge in passing his decision, if the prejudices are thorough, certain, and each other is in correspondence"*.

The evidence of prejudice is provided for in article 173 of the HIR, and consists of only one article. So it can be said to be very concise, and does not cover everything that is essential about the application of the evidence. Yahya Harahap outlined the meaning and process of presumption among others; *First,* a presumption that rests on known facts, then a conclusion is drawn towards a concrete certainty that was previously unknown to the facts. *Secondly,* from that fact then a conclusion is drawn that is close to certainty about the proof of other previously unknown facts. Prejudice in article 1915 of the Civil Code is divided into two types, namely prejudice according to law or law [41]*(Presumption of law, rechts vermoeden)* and judges' prejudices *(presumption of fact, feitelijke vermoeden).* [42] The judge's presumption is a presumption based on reality or facts derived from facts proven in the trial. This is done by judges because the law itself gives judges the authority in the form of freedom to formulate prejudices. The strength of

[40] Asmuni. Thing. 196.

[41] Yahya, *Civil Procedural Law on Suits, Trials, Foreclosures, Evidence, and Court Decisions*. Thing. 684.

[42] Asnawi, *Civil Case Evidentiary Law in Indonesia*. Thing. 68.

the evidence of prejudice by the judge is free [43]*(vrij bewijskracht)*, in the sense of being free to the judge how to conclude his presumption. However, it would be strong and perfect its evidentiary and binding power if there were no other evidence that defeated the evidence of the presumption made by the judge. In this regard, the *testimonium de auditu* indirectly falls into the part of the evidence of prejudice that is not based on the law. This is because of the more dominant role of the judge in reviewing what has been explained by a witness [44]*de auditu* in order to complete the evidence of the case in the trial. As for the power of evidence, the judge's presumption is essentially free *(vrij bewijskracht).* If the judge's presumption is not resisted or incapacitated by the other evidence, then the evidentiary power becomes perfect and binding.

c) In fact, the witness must be more than one person and the minimum limit is two people, when it is less, it must be completed. *Unus testis nullus testis (one witness is no witness)* can be found in procedural law in the general and religious courts. In this case, *the testimonium de audito* can be used as evidence to complete the minimum limit of *the nullus testicular unus* given by a witness. Thus the judgment of the Supreme Court Nomor 818 K/ Sip/1983 dated August 13, 1984. The ruling calls testimonium *de audito* a testimonium that can be used to corroborate the testimony of ordinary witnesses. In this case the witnesses who directly participated in the sale and purchase transaction were only the first witnesses, while the second and third witnesses were only qualified as *de audito,* but nevertheless it turned out that in the trial the information they presented was the result of knowledge directly sourced from the defendant himself. Based on these facts, the Supreme Court held that their testimony could be used as evidence to corroborate the testimony of a witness.

Based on the explanation of *the testimonium de auditu* , the author finds several points of similarities and differences between the concepts of *Shahādah Istifāḍah* and *testimonium de auditu,* including the following:

a) Neither *Shahādah Istifāḍah* nor *testimonium de auditu* is a form of testimony obtained not from one's own knowledge, observations, and visions or experiences, but from what he hears from others.

[43] Yahya, *Civil Procedural Law on Suits, Trials, Foreclosures, Evidence, and Court Decisions*. Thing. 696.

[44] Yahya. Thing. 665.

b) In the procedural law discourse, *Shahādah Istifāḍah* and *testimonium de auditu* have no legal force unless they are based on some experiential.
c) In a situation where information has become widespread about a particular matter, *the Shahādah Istifāḍah* in the fiqh discourse can be categorized as a stand-alone evidence. Likewise, *the testimonium de auditu* can be used as evidence if the burden of proof through witnesses must be presented while the main witness in the case does not exist and the information that has been spread in the community indigenously can be considered valid and correct.
d) In the case of *Shahādah Istifāḍah* the Muslim intellectuals despite the cross-section of opinion have established some civil cases in which the testimony can be used as evidence while the *testimonium de auditu* has no clear limitations of the case.
e) In some ways *Shahādah Istifāḍah* as it is called *istifāḍah* which means to spread widely requires the knowledge of many parties to the information of the case in order to be categorized as *Shahādah Istifāḍah.* [45] This is different from the concept of *testimonium de auditu* which only requires the non-obtaining of information directly in order to be categorized as *testimony de auditu* as the antithesis of *auditu* testimony. According to the authors, this is what led to the birth of pros and cons about the status of *testimonium de auditu* as evidence.

4. *Shahādah Istifāḍah In The Case Of Isbat Waqf in Religious Courts*

In handling cases of waqf isbat applications, the obstacles often faced by the Court are related to the absence of witnesses who know firsthand the legal actions of waqf that occurred in the past, because the existing witnesses are dead. In this case, the evidence available is usually only witnesses who know indirectly the legal acts of waqf based on information from others that has been widely circulated in the community. Such a testimony can be categorized as *Shahādah Istifāḍah*.[46]

Shahādah Istifāḍah which in some fiqh literature is referred to by several terms namely *shahādah bi al-tasāmu'* (testimony by mutual hearing) or *shahādah bi al-istifāḍah* (testimony with widespread information) or *al-istifāḍah min khalqin ghafīr* (spread massively in wide circles) has the power as evidence. Muslim intellectuals have agreed on this despite

[45] Kuwait, "al-Mawsu'ah al-Fiqhiyah al-Kuwaityah." Vol. 26: 233.
[46] Asmuni, "Testionium De Auditu Reviews the Perspectives of Procedural Law and Fiqh." Thing. 198.

disagreements on civil matters which could use *Shahādah Istifāḍah*. This is of course different from the concept of [47]*testimonium de auditu* which does not require a massive dissemination of information among the crowd. In addition, to be classified as *testimonium de auditu* a witness simply hears information from other people (including from litigants) so that his testimony is not based on his own vision or experience. According to the author such a testimony is not the same as *Shahādah Istifāḍah* where the principle of dissemination of information (*istifāḍah*) is the key to the receipt of a testimony *of bi al-istifāḍah*. In a circumstance *testimonium de auditu* can fulfill the kiteria *of Shahādah Istifāḍah* if the principle of widespread dissemination of such information is fulfilled. But if that principle cannot be fulfilled then testimonium *de auditu* is more suitable to be juxtaposed with the more common *shahādah bi a l-simā'* (testimony based on hearing) where *shahādah bi al-istifāḍah* belongs among this group.[48]

In the case of isbat waqf, some faqihs of Maliki madhabs such as Qadhi Abdul Wahab, the 'alim madzhab Hambali, and some faqih madzhab Shafi'i state that *Shahādah Istifāḍah* is a means of evidence that can be used as long as the conditions set out have been met. Thus in this case, the determination of the application for waqf isbat in the Pendila[49]n Agama with the evidence of the testimony *istifāḍah* is the right decision.

D. Conclusion

Optimalization of waqf as a supporter of national development is a necessity. In this case, the Religious Court as the authorized institution in deciding cases related to waqf has a crucial role. In addition to presenting legal certainty, a Religious Court judge is required to produce decision products that also strengthen the role of waqf, including the determination of waqf isbat applications, of course, while still paying attention to existing legal data and facts.

The establishment of the waqf isbat with the testimony of istifāḍah is quite an impressive breakthrough. This shows that the various legal determination methodologies used by the previous faqihs are still relevant to use today. In this case the author concludes that the legal products of the fiqh of the faqihs need to be kept sacred, but the duty of the judge is not to be fixed on the products of the fiqh. Judges are required to dive into the methodology, explore the scope of the faqihs' studies, so that the benefits that are the goal of the law can be achieved.

[47] Kuwait, "al-Mawsu'ah al-Fiqhiyah al-Kuwaityah." Vol. 26: 233.
[48] Kuwait. Vol. 266: 233.
[49] Kuwait. Vol. 26: 234-235.

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