

A Juridical Study of Land Waqf in Indonesia in Realizing the Rule of Law

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Abstract. Land waqf, which is continuously developing, requires a juridical basis to be orderly and orderly. The research describes the juridical development of land waqf law in Indonesia and analyzes it with law theory. The benefits of research can broaden the understanding of the dynamics of the development of land waqf law in Indonesia. This type of research is Library Research, taking data from literature studies on land waqf and its legal basis. Juridical normative research approach. The research specification was descriptive analysis, and the research data were analyzed qualitatively. The research results explain that the juridical study of land waqf law in Indonesia is an attempt to elaborate the statutory regulations on land waqf established by the state, which is divided into three terms. Namely; During the Dutch colonial period, after independence, and the third period, after the issuance of the Basic Agrarian Law No. 5 of 1960. The state establishes regulations for land waqf to provide protection and legal certainty for land waqf to minimize disputes. The government establishes land waqf regulation, showing that Indonesia is a state of law, not mere power, meaning that legal provisions regulate every behavior of the rulers and the people.

Keywords: Juridical Study, Land Waqf, Indonesia, Rule of Law

1 Introduction

Land waqf is a legal action to transfer land benefits and ownership rights from an individual property to public property for interests following Islamic sharia. Islamic law commands Muslims to donate land because the donated land can be built as a place of worship, education, a hospital, a tomb, and others. According to its principle, Waqf land may not be sold, inherited, removed, granted, secured, and withdrawn/canceled. However, it must be preserved to become evidence of the history of Islamic civilization in the world (Article 40 of the Waqf Law No. 41 of 2004).

Even though the land price is getting more expensive, the Muslim community's enthusiasm for land waqf increases. The reasons are, among others; utilizing abandoned land as a form of *amal jariyah* ordered by religion, wakif already feels secure and sufficient, to make it easier for the community to worship and practice their religious teachings, as a means of fostering social relations and a spirit of togetherness among community members. Furthermore, as a form of inheritance, the community and their descendants can utilize the land. In ancient times, property owned by the community was land and as a means of realizing obedience to parents through their will [1][2][3].

According to data from the Directorate of Waqf Empowerment of the Ministry of Religion, the above phenomena, making donated land assets increase every year, show that in 2016, the national land waqf assets reached 4.359 billion m² in 435,768 locations. In 2017, it reached 4.364 billion m², and in 2018 it reached 4.4 billion m² [4]. Based on SIWAK data (Waqf Information System), it shows that the amount of donated land assets in 2019 shows 50,200.38 ha, spread over 372,322 locations [5]. The development of the waqf land assets above can be seen in the following figure:

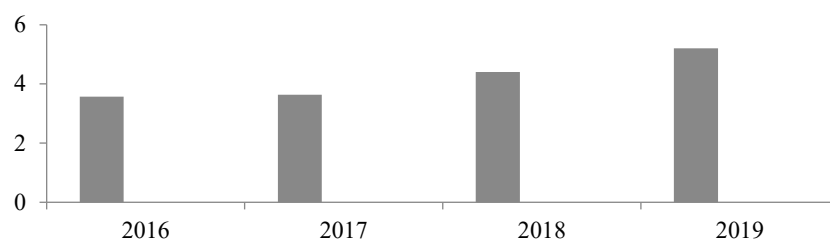


Fig. 1. Development of Waqf Land Assets in Indonesia.

The land waqf community goes through several stages, among others; intention to donate land, complete the documents and requirements for land waqf (proof of land ownership and certificate of waqf land not in dispute), coordination of wakif with manager (*nadzir*) and two witnesses, as long as pledge waqf in front of PPAIW [6][7]. Furthermore, PPAIW provides a report to the Waqf and Zakat Sector at the City Ministry of Religion, and *Nadzir* or the Municipal Ministry of Religion takes care of the status of changing property rights to waqf land to the National Land Agency (BPN). This BPN issues the waqf land certification on behalf of *Nadzir* as the custodian and manager of the waqf assets (Article 10 Government Regulation No. 28/1977).

Several stages of the land waqf regulation as above, are based on the land waqf legal rules based on Government Regulation No. 28 of 1977 concerning Ownership of Land Owned, in which this rule is an implementing regulation of Article 49 of the Basic Agrarian Law No. 5 of 1960, which explains that the state protects the waqf land because it has social and religious functions. Since UUPA No. 5 of 1960 was stipulated by the government, so the juridical rules regarding land waqf have obtained the principle of legal certainty [8][9]. Land waqf, which is one of the practices of Islamic law teachings, its legal basis also comes from the values and principles of Islamic legal teachings that are believed to be accurate and adhered to by its adherents. Thus, there are two sources of land waqf law, sourced from Islamic law, which is the law that lives in the community and comes from laws established by the state.

Based on the explanation above, when analyzed, it shows that the community's legal awareness in land waqf is very high because land waqf is always related to religious, economic, social, and political values, which can potentially cause conflict in the community. Therefore, we need a legal basis for land waqf law to anticipate the above conditions so that people can donate land easily and in an orderly manner, not violating religious and state regulations. It is crucial to research the legal, judicial study of land waqf in Indonesia in realizing the rule of law. The research objective is to describe the development of land waqf rules in Indonesia and analyze it by linking it to law theory. The benefits of research can provide insight into a comprehensive understanding of the dynamics of the development of land waqf law in Indonesia, since its inception until now, which is associated with the rule of law theory.

2 Research Methods

Research on the juridical study of land waqf in Indonesia in realizing the rule of law is library research. Data was collected through a literature reference review of land waqf and its legal basis. The research approach uses a historical approach to land waqf legislation formation. The data needed is secondary data through primary, secondary, and tertiary legal materials related to the research theme. The research specification is descriptive analysis, which means to describe the research results on the juridical study of land waqf in Indonesia and to analyze it by linking the rule of law theory. The research data were analyzed qualitatively, using explanations in the form of theories and concepts related to land waqf's legal basis, and concluded deductively.

3 Results and Discussion

3.1 Research Result

Land waqf in Indonesia began to be implemented along with the entry of Islam in Indonesia. From the end of the 12th century AD to the beginning of the 16th century AD, waqf had become a religious institution and had a tradition in people's lives [10]. Waqf has been implemented by the aristocracy of Islamic kingdoms in the archipelago, for example, Islamic kingdoms in Aceh, Tidore, Ternate, Banten, Demak, Solo, Banjarnegara, Yogyakarta, and Ampel Surabaya. At that time, donated land assets were in places of worship, educational institutions, Islamic boarding schools, and graves.

Since Indonesia was colonized by Dutch colonialism in 1596, the waqf rule has been subject to the Islamic political rationality of the Dutch East Indies. The colonial government established several land waqf rules to ensure waqf land maintenance. However, due to the different understanding of waqf between Muslims and the Dutch colonialists, the waqf regulation is oriented towards fulfilling the formal administrative aspects of waqf [8]. During the colonial period, the first waqf law regulation was enacted in 1905, based on a Circular of the Secretary of the Government dated June 31, 1905, and contained in *Bijblad* 1905 Number 6196. This regulation stipulates that land waqf deeds must obtain permission from the Regent.

This regulation from the Dutch colonial received a negative response from the Muslim community so that the prevailing waqf law was largely derived from the principles of Islamic law. The 1905 waqf regulation was then replaced and refined based on the Government Secretariat Circular Number 1361/ab contained in *Bijblade* Number 12573 of 1931 concerning *Toeziç van de Regering op Mohammedaansche Bedehuizen, Vrijdagdiensten en Wakaps* issued January 4, 1931, which regulates the registration of waqf land to the Regent of the area where the waqf land is located. In addition, the Dutch colonial government also issued a Government Secretariat Circular No. 3088/A contained in the *Bijblade* No. 13390 issued on December 24, 1934, which stipulates that the Regent is willing to settle waqf land disputes if requested by the disputing parties. Furthermore, the Dutch Colonial Government issued a Circular Letter of the Secretariat of Government Number 1273/A which was contained in the *Bijblade* 1935 Number 13480, on May 27, 1935, concerning *Toeziç van de Regeering op Mohammedaansche Bedehuizen En Wakaps*, which stipulates that Muslims when going to waqf do not need to apply for waqf permit, but it is sufficient to notify the government/Regent.

Government Secretary Circular 1931, 1934, and 1935. These regulations stipulate that the act of waqf land does not have to obtain permission from the Regent, but it is sufficient to inform the government represented by the Regent. This regulation is accepted and applied in the community because it aims to collect data and avoid disputes in the future [11][12][13].

After Indonesia's independence in 1945, waqf's legal regulation underwent developments in the institution of waqf. On January 3, 1946, Government Regulation No. 33 of 1949, jo Government Regulation No. 8 of 1950 in conjunction with Government Regulation No. 9 and 10 of 1950 concerning the Ministry of Religious Affairs which is obliged to investigate, determine, register and supervise the maintenance of waqf land. Based on the Ministry of Religion Circular Letter No. 5/D/1966, waqf affairs were handed over to the Office of Religious Affairs (KUA) located in each district. Also, the Ministry of Religion has drawn up rules on land waqf procedures, in which the wakif (who has waqf) should make a pledge of waqf in front of a *nadzir* and two male witnesses, then the KUA shall write it down in the waqf pledge deed. After that, the KUA notified the Regent to be ratified. Then, the inauguration of the waqf was carried out, witnessed by the *pamongpraja*, *waqif*, *nadzir*, and witnesses. Furthermore, the KUA or *nadzir* registers the donated land with the *pamongpraja* and the Registration Office [8].

On September 24, 1960, the Indonesian government enacted the Basic Agrarian Law, namely Law No. 5 of 1960. Article 49 of Law No. 5 of 1960 states that waqf land used for religious and social purposes is recognized and protected by the state. Waqf land can be controlled directly by the state, and the community gets use rights. Furthermore, the state regulates the representation of owned land through a Government Regulation. After 17 years, the government issued Government Regulation No. 28 of 1977, which regulates the clear and detailed representation of owned land.

With several regulations regarding ownership of land waqf, it is hoped that land waqf implementation can be more accessible, orderly, and safer from the emergence of disputes in the future. Concerning waqf land disputes' settlement, the government has given the Religious Courts authority as the institution that resolves waqf land disputes. It is contained in Article 49 of Law No. 7 of 1989 in conjunction with Law No. 3 of 2006 concerning Religious Courts.

Along with the increasing awareness of waqf for Muslims, which is shown by the increase in waqf assets every year, the government has established waqf legal rules for Muslims in the Compilation of Islamic Law (KHI) Presidential Instruction No. 1/1991 Book III, which regulates the Law of Waqf. The existence of Presidential Instruction No. 1/1991 strengthens the implementation of land waqf law in Indonesia. It makes it easier for people to waqf because the understanding and implementation of waqf have been explained in detail.

In connection with the increasingly rapid development of waqf law in Indonesia and the benefits of waqf land in various aspects, the government has further strengthened the land waqf's legal rules. With the formation of Law No. 41 of 2004 concerning Waqf, which Government Regulation complements No. 42 of 2006 in conjunction with Government Regulation No. 25 of 2018 concerning the Implementation of Law No. 41 of 2004. The legal substance of land waqf in the Waqf Law is (See the introduction to the explanation of the Waqf Law No. 41 of 2004):

1. For the sake of legal order, the act of waqf land must be registered with PPAIW, and PPAIW issues proof of the waqf pledge deed to register the donated land at BPN in order to issue a certificate of waqf land.
2. The allocation of waqf land is not only in the religious and social sectors. However, it is also directed at management with economic value to promote public welfare as long as it is in accordance with Sharia economic management principles.

3. The Indonesian Waqf Board (BWI) establishment as an independent institution to develop Indonesian land waqf.
4. There is a *nadzir* fee (salary) for developing the waqf assets, amounting to 10% of the income from the waqf land management.

Based on the explanation above, it can be understood that the formation of land waqf regulations has existed since the Dutch colonial era, the era after independence, and until now. The explanation above can be concluded through the following table:

Table 1. History of the Establishment of Land Waqf Regulations in Indonesia

No.	Description	Period I (Dutch Colonial)	Period II (Post Independence)	Period III (Nowadays)
1	Name of Legislation	<ul style="list-style-type: none"> - Circular Letter of Governor's Decree Number 435 contained in Bijblade Number 6195 of 1905 - Circular Letter of Governor's Decree Number 1361/ab, contained in Bijblad Number 6196 of 1931 - Circular Letter of Governor's Decree Number 3088/A is the oldest in the Bijblade Number 13390 of 1934 - Circular Letter of Governor's Decree Number 1273/A is contained in the Bijblade Number 13480 of 1935 	<ul style="list-style-type: none"> - Government Regulation No. 33 of 1949, in conjunction with PP No. 8 of 1950 in conjunction with PP No. 9 and 10 of 1950 - Ministry of Religion Circular No. 5/D/1966 	<ul style="list-style-type: none"> - Basic Agrarian Law No. 5 Year 1960 - PP No. 28 of 1977 concerning Waqf of Owned Land - UU No. 7 of 1989 in conjunction with UU No. 3 of 2006 concerning Religious Courts - KHI Inpres No. 1 of 1991 Book III on Endowments - UU No. 41 of 2004 concerning Waqf - PP No. 42 of 2006 concerning Regulations for the Implementation of Waqf
2	Substance	Licensing and registration of waqf land to the Regent	The Ministry of Religion is obliged to investigate, determine, register, supervise and maintain waqf land. Waqf affairs are handed over to PPAIW, which is under the Office of Religious Affairs at every district	<ul style="list-style-type: none"> - State protected waqf land - Registration and certification of waqf land - Administration of waqf land - Optimization of institutions that manage waqf land (BWI) - Waqf dispute settlement institution - Management of waqf land that has economic value

				- Waqf land tax
3	Characteristics	The formation of waqf rules was in accordance with colonial politics which limited the act of land waqf	The state regulates service institutions and the legality of land waqf	The state makes waqf as one of the achievements of national development from the aspects of religion, economy, social, state politics, and international relations
4	The institution that sets the rules for land waqf	Dutch Colonial	President, Ministry of Religion.	President with DPR, President
5	Legal consequences	Land waqf already have rules, namely obtaining a permit and being registered with the regent, but it is not perfect, in practice land waqf uses Islamic law	The legality of land waqf is carried out at KUA through PPAIW, if it is in accordance with religious/Islamic law	Leads to strengthening the legality of waqf land, optimizing management and development institutions. Complete settlement of waqf land disputes
6	Social Consequences	Land waqf is worship that has an impact on social life	Waqf land must be recorded, managed and utilized to foster social relations	Development and empowerment of land waqf management to meet social needs

3.2 Discussion

Based on the explanation of the research results above, it can be analyzed that historically the land waqf law in Indonesia has developed in accordance with the existing social construction of the community. Initially, the law of land waqf originated from the laws that lived and were practiced by the community in carrying out their religious teachings (Islamic law). However, because waqf land is a treasure with high economic value and there are many varied interests in it, the state is trying to regulate land waqf implementation by enacting land waqf regulations. The goal is that the waqf land has protection and legal certainty so that the donated land benefits can be felt in the community.

The government stipulated a donated land regulation, indicating that the Indonesian state was based on a constitutional state. In accordance with the rule of law theory that explains that the state is based on law, the state runs government based on the law and aims to carry out legal order [14][15]. The term the rule of law in Indonesia is often translated *Rechtsstaats* or Rule of Law to denote the same thing. It is reflected in the 1945 Constitution of the Republic of Indonesia (UUD NRI). Fourth Amendment to Article 1 Paragraph (3) explains that Indonesia is a constitutional state. The consequence is that the highest power in the state is the law. Law is defined as a rule contained in the legislation.

Likewise, with land waqf regulations, the government establishes land waqf regulations to provide legal order. The donated land assets receive protection and legal certainty and avoid

arbitrary actions against waqf assets. The background of the government in stipulating the regulation of waqf land is because the practice of implementing land waqf in the community is often problematic, which is caused by waqf which has a verbal waqf, *nadzir* who do not carry out their duties and obligations so that there are waqf land assets that are abandoned, stalled, and change hands to other parties [16].

In today's world, land waqf is a religious matter and deals with social, economic, legal, and administrative relations. Therefore, harmonization is needed so that the issue of land waqf is in accordance with religious and the rule of law, makes social relations better, and improves social and economic welfare through the management and utilization of the donated land. Thus, the government's efforts to establish land waqf regulations manifest the rule of law.

Although philosophically, the land waqf law comes from Islamic law, the state seeks to establish the law in accordance with the development of society because the law is indeed to regulate human life so that humans are happy and prosperous. The law is derived from Pancasila's values, namely the values of divinity, humanity, unity, democracy, and social justice. Concerning the land waqf regulations set by the state, in reality, it shows that the source of land waqf regulation is in accordance with religious values because the teachings of land waqf originate from the belief in God's rules based on Allah's revelation, namely the Qur'an and Al-Hadith. The state's land waqf regulation also aims to foster humanitarian relationships full of love, cooperation, care for others, and social justice values. It is the case with the management and utilization of waqf land in the community.

The above land waqf rules, when analyzed, show legal dynamics at the time of stipulation of legislation with its implementing regulations. The incomplete and ineffective government regulations indicate this, and the impression is too late with the growth of awareness of waqf in society. To complement these legal needs, people use legal principles derived from Islamic law. Thus, the land waqf law that applies in Indonesia is based on the laws that live in the community, namely Islamic law and laws established by the state. The basic guidelines and procedures for implementing land waqf (material law) come from Islamic law, a tradition in society. Meanwhile, rule of law is related to the formality of implementing land waqf, and a written document of land waqf proves its legal force. Also, it relates to institutions that serve land waqf in the community, such as PPAIW, BWI, BPN, and Ministry of Religious Affairs.

The explanation above can be concluded through the following figure:

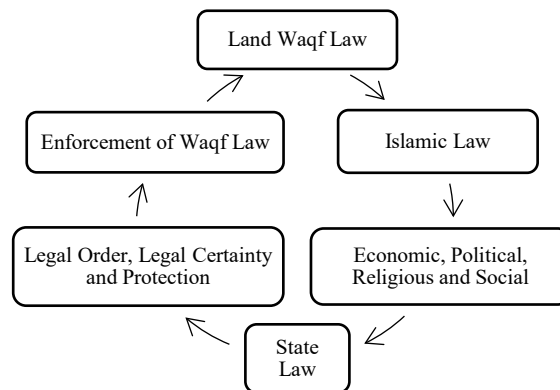


Fig. 2. State Flow Sets Land Waqf Rules.

4 Conclusion

The juridical study of land waqf law in Indonesia attempts to elaborate the statutory regulations on waqf established by the state. The state aims to stipulate land waqf regulation to provide protection and legal certainty for land waqf so that there are no disputes in the future. The government establishes laws and regulations, showing that the Indonesian state is based on law. Every behavior of the rulers and the people is regulated by law, which is based on the values contained in Pancasila. Relating to land waqf law, its juridical rules are based on religious values, social justice, humanity, and society. Guidelines for land waqf law are based on the laws that live in the community (material law) and the laws that are stipulated in the form of legislation (formal law). Therefore, there is an effort to harmonize religious/Islamic law and the rule of law to enforce the land waqf law in Indonesia so that these rules benefit the community.

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