

## Aanknopingspunten Antara Hukum Perdata Dan Hukum Islam Dalam Pemanfaatan Tanah Wakaf Untuk Kepentingan Produktifitas Tanah Wakaf

### *Aanknopingspunten Between Civil Law and Islamic Law In The Utilization Of Wakf Land For The Interests Of Wakf Land Productivity*

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**Abstract:** *This research aims to solve legal problems or conflicts that have never been resolved between productivity and users of waqf land, namely with new ideas about land obtained from building buildings on waqf land, by conducting a comparative study in Saudi Arabia. The method used in writing is the library method, namely research used to collect information and data with the help of various materials available in the library, with data collection techniques by reviewing books, journals, literature, notes, and several reports related to the problem you want. Solved. Data were analyzed and presented descriptively. The results of the research, namely Aanknopingspunten between civil law and Islamic law in the use of waqf land for waqf land productivity, can provide a solution to the rigidity of waqf land, which prohibits it from being sold, gifted, or inherited and guaranteed so that waqf land does not become abandoned land because it has been managed appropriately. Fairness.*

**Keywords:** *Aanknopingspunten, Islamic Law, Civil Law, Waqf Land*

**Abstrak :** Tujuan penelitian ini untuk menemukan solusi dari permasalahan hukum atau konflik yang tidak pernah selesai antara produktifitas dan pengguna tanah wakaf yaitu dengan ide baru tentang tanah yang diperoleh dari bangunan gedung di atas tanah wakaf dengan melakukan studi kompare di negara Saudi arabia. Metode yang digunakan dalam tulisan yaitu metode kepustakaan yaitu penelitian yang digunakan untuk mengumpulkan informasi dan data dengan bantuan berbagai bahan yang ada di perpustakaan, dengan teknik pengumpulan data dengan cara menelaah buku, jurnal, literatur, catatan, dan beberapa laporan yang berkaitan dengan masalah yang ingin dipecahkan. Data dianalisis dan disajikan secara deskriptif. Hasil dari penelitian yaitu Aanknopingspunten antara hukum perdata dan hukum islam dalam pemanfaatan tanah wakaf untuk kepentingan produktifitas tanah wakaf dapat memberikan solusi dari rigiditas tanah wakaf yang melarang untuk dijual, dihibahkan atau diwariskan serta dijaminakan, sehingga tanah wakaf tidak menjadi lahan terlantar karena selama ini dikelola secara kewajaran.

**Kata Kunci :** Aanknopingspunten, Hukum Islam, Hukum Perdata, Tanah Wakaf

### PENDAHULUAN

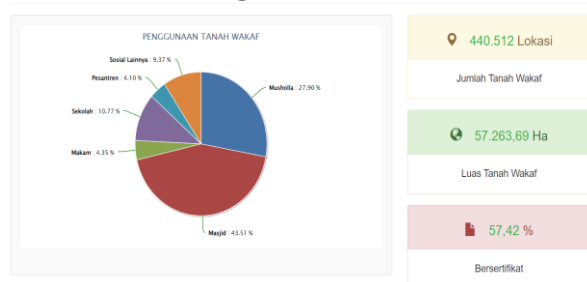
Waqf or Waqf means stopping, holding back, or remaining silent. Waqf is a

derivation of the word waqf, which has the same meaning as Athabasca. Thus, the term al-waqf is synonymous with al-habs, which means to hold back.<sup>1</sup> Waqf is an act of

<sup>1</sup> Ilyas, M. (2016). Istibdal of Waqf Assets from Islamic Law Perspective. *Jurisprudence*, 3(2).

worship that is highly recommended in Islam because the rewards of Waqf will continue to flow even if the person who donated it has died.<sup>2</sup>

Technically, sharia waqf is often defined as assets allocated to benefit the people where the substance or principal is retained. In contrast, the benefits can be enjoyed for the public interest.<sup>3</sup> Currently, waqf land management still needs to be optimized, so the problem has become a phenomenon. Even though the government has formed the Indonesian Waqf Board, it still needs to maximize the productivity of waqf land. Based on data accessed from the official Siwak website, [menage.go.id](http://menage.go.id), on December 10, 2023, the potential for land waqf in Indonesia reached 440,512 locations with an area of 57,263.69 hectares; more details can be seen in Figure 1 below:



**Fig. 1 Data on the Use of Waqf Land in Indonesia August 24, 2022 (data collection year 2019-2021)**

Then, according to the Indonesian Waqf Board (BWI), the potential for cash waqf in Indonesia reaches IDR 180 trillion per year. And what is utilized is around 27%. The Indonesian Waqf Board recorded cash waqf revenues reaching 1.4 trillion rupiah as of March 2022. This figure has increased compared to cash waqf revenues collected throughout 2018 - 2021, amounting to 855 billion rupiah.<sup>4</sup>

Some challenges that cause many waqf lands to remain abandoned include the need for optimal waqf regulations, low waqf literacy, low nazir capacity, and the inadequate use of waqf land mapping and data collection technology. As a result, the vast potential of Waqf cannot be optimized to reduce poverty and inequality in Indonesia. Waqf is a potential instrument for overcoming these two problems.<sup>5</sup> Currently, waqf land is generally intended for mosques, cemeteries, and schools. As a result, nazhirs cannot optimize the waqf land.

There is a new paradigm that waqf land can be productive through the development of a land legal system, where waqf land can be included in the category of Islamic-based Management Rights because the land is not to be owned but optimized and used for the benefit of the people. In Article 67 paragraph (1) of Law Number 41 of 2004 concerning Waqf, that waqf land may not be donated, sold, inherited, or transferred its rights and may not guarantee it; in fact, anyone who deliberately pledges waqf land is threatened with a maximum penalty of 5 (five) years and a maximum fine of 500 million.

In condominium law, buildings can be built on waqf land, and they can be owned and have material rights, namely ownership rights to the building, to guarantee and utilize the building, and to use the building to make it more productive.

This research aims to solve legal problems or conflicts that have never been resolved between productivity and users of waqf land, namely with new ideas about land obtained from building buildings on waqf land, by conducting a comparative study in Saudi Arabia. It is hoped that this article can make a political contribution to the development of waqf land law through a

<sup>2</sup> Falahy, L. El. (2016). Transfer of Function of Waqf Land in View of Islamic Law and Law Number 41 of 2004

concerning Waqf. *Al Istinbath: Journal of Islamic Law*, 1(2).

<sup>3</sup> Harahap, ND, & Syam, S. (2023). Utilization of Waqf Land by Profit Sharing According to the Imam Syafi'i School (Case Study in Simalagi Village, Hutabargot District, Mandailing Natal Regency). *Journal of Legal*

*Preferences*, 4(2), 220-226.

<sup>4</sup> <https://www.bwi.go.id/8706/2023/04/16/index-wakaf-nasional-2022/>

<sup>5</sup> <https://kneks.go.id/isuutama/29/pengembangan-digitalisasi-dan-integra-data-wakaf-nasional#:~:text=Based>

on%20data%20sistem%20Information%20Waqf, reaches%20Rp180%20trillion%20pe

business law system. Based on this, the identification of the problem in this paper is how the legal position and rights to buildings on waqf land can be given any rights, as well as how to develop material law so that buildings on waqf land can have material rights.

### METODE PENELITIAN

This research uses the library method, which is used to collect information and data with the help of various materials available in the library, with data collection techniques by reviewing books, journals, literature, notes, and several reports related to the problem you want to solve. Data were analyzed and presented descriptively.

### PEMBAHASAN

Regulations regarding waqf management in Indonesia before the arrival of the colonialists were implemented based on Islamic teachings from the Shafi'i school of jurisprudence. Because the issue of Waqf is closely related to social and customary problems in Indonesia, the implementation of Waqf is adjusted to the customary law that applies in Indonesia without reducing the values of Islamic teachings in Waqf itself.

The Waqf Law regulates essential matters regarding the development of Waqf, especially regarding nazir issues, donated property, the allocation of waqf assets, as well as the need to form an Indonesian Waqf Board (currently already formed), and also regarding cash and productive Waqf. In this law, waqf objects are not only immovable objects but also include movable objects such as money, precious metals, securities, vehicles, intellectual property rights, rental rights, etc., by the provisions of Islamic law and regulations. Valid invitation.<sup>6</sup> The rule of Islamic law states: "taghyiraalahkami bitaghoiru andzarmintai wa alginatet wanna

wal Hawaii," which means "Changes in the law occur due to changes in time and space, intentions and benefits."<sup>7</sup>

Land waqf can become a productive waqf because there is awareness among the Muslim community of the importance of land waqf, so rehabilitation increases the existing Waqf and develops it into a productive waqf. Land waqf is an alternative for improving the welfare of society; this is by the objectives of Islamic law, *mashed al-shari'ah* put forward by the ulama, namely: high al-din (maintaining religion), high al-nafs (self-preservation), high al-'aql (maintaining reason), high al-mal (maintaining wealth), high al-nasl (maintaining generations), and added with high al-ummah (maintaining the ummah).<sup>8</sup> While productive Waqf is relatively new and is known for its objects as movable objects, this type of Waqf has a more significant economic impact than Waqf for immovable assets.

Based on the Waqf Law, changes in the status of waqf property are accommodated in Chapter IV, Article 40, and Article 41. Article 40 states that there are prohibitions on Tasharruf of waqf property, such as the prohibition on being used as collateral, confiscated, given away, sold by inheritance, exchanged, or transferred in other forms of transfer of rights.

Article 41 of the Waqf Law has an exception allowing the exchange of waqf assets to maintain benefits. Still, there are several restrictions on the ability to exchange waqf assets. However, scholars differ in their opinions; some allow it, and others prohibit it. Some Shafi'iyah scholars (ulama with the Shafi'i school of thought) and Malikiyah (Illumas with the Maliki school of thought) think that waqf objects that are no longer functioning should still not be sold, exchanged, replaced, or transferred because the basis of the Waqf

<sup>6</sup> Abdul Manan, *Various Islamic Civil Law Problems in Indonesia* (Jakarta: Kencana, 2006), p. 253.

<sup>7</sup> Juhaya S. Praja, *Philosophy of Islamic Law* (Tasik Malaya: Faculty of Sharia, IAILM, 2004), p. 99.

<sup>8</sup> A. Djazuli, *Hifzh Al-Ummah (Aims of Islamic Law)* (Bandung: Sunan Gunung Djati State Islamic University, 2009), p. 16–17.

itself is eternal, so the condition Whatever the waqf object is, it must be left as is. However, on the other hand, if waqf objects are no longer functioning or are no longer by the intended use of wakif, then Imam Ahmad Ibnu Hanbal, Abu Tsauro, and Ibn Taimiyah think that it is permissible to sell, modify, replace, or transfer these waqf objects to obtain more significant benefits for the public interest, especially Muslims.

According to the Indonesian Ulema Council, waqf objects must be exchanged with a replacement with equivalent or better value. "The last consideration can be replaced but provided that the benefits continue and the value is equivalent or better. Be it economic value, social benefits, or historical value. Another thing regulated in this fatwa is that waqf objects are allowed to be sold with conditions there is a need to maintain the purpose of the Waqf. The proceeds from selling waqf objects must be used to purchase other assets as replacement waqf. Furthermore, the transfer of the function of waqf objects is permitted as long as the perceived benefit is more dominant.<sup>9</sup>

The exchange of waqf assets is a change in the form of waqf assets from their original form to another form. These changes can be made by exchanging or selling them first and then replacing them with other goods or moving their location.

The exchange of waqf assets is carried out by selling all or part of the waqf property and then using the money from the sale to buy other waqf assets used for the same purpose while maintaining all the sharia stipulated by the wakif. Istibdal of waqf assets is one way to provide appropriate services in activating waqf assets when an exchange occurs for waqf objects.<sup>10</sup>

In favorable legal terms in Indonesia, it is called waqf exchange, while in Islamic law, it is called Istibdal. In Islamic law, fiqh

scholars have discussed the Istibdal of waqf property issue. Among those who allow it are the opinions of the Syafii school of thought and the Maliki school of thought, but for specific reasons. The Syafii school of thought does not prohibit the Istibdal of waqf assets as long as the waqf assets can't be utilized per the wishes of the wakif. Likewise, the opinion of the Maliki school of thought is that for Waqf in the form of mosques, the Maliki school of law prohibits Istibdal. In contrast, anything other than mosques is permitted if it can no longer be used. This is in line with positive law.

In Indonesia today, there are still many people who believe that waqf assets should only be used for religious purposes. For example, building mosques, cemeteries, orphanages and education. Shopping centers can be built on waqf land, the profits of which will be allocated to orphaned/underprivileged children by providing educational scholarships, free health services, or scientific research. This is also part of worship. There is yet to be a product regulating productive land use. The primary regulation for productive land waqf in the Waqf Law is *ijtihad*. *Ijtihad* is devoting the ability to obtain operational Sharia law through legal Steinbach (excavation) efforts. Because the statutory regulations do not mention the word productive, it can be understood that the meaning of Waqf and productive Waqf itself is holding the substance of objects and making use of the results or holding the substance and giving away the benefits. However, in developing waqf objects productively, you must also pay attention to Islamic production rules/principles.

The development of Waqf in Indonesia is increasing day by day. This can be seen from the increase in the number and objects of waqf assets, in the form of land, money, and others, which are spread in various

<sup>9</sup> Opt Cit, Pg. 121-140.

<sup>10</sup> M. Fachrur Rozi, Collection of Legislative Regulations Concerning Waqf (Sidoarjo: Directorate General of

Islamic Community Guidance Directorate of Waqf Empowerment, 2015), p. 13.

corners of Indonesia. Among others, <sup>11</sup>innovations in waqf management have occurred in Kuwait, Qatar, the Emirates, Jordan, Saudi Arabia, Egypt, Turkey, Bangladesh, Malaysia, Singapore, and even Europe and America. The Saudi Arabian Government established the Ministry of Hajj and Waqf <sup>12</sup>to strengthen the position of waqf assets. This ministry must develop and direct Waqf per the conditions set by the wakif.

For this reason, the Government of the Kingdom of Saudi Arabia made regulations for the Waqf High Council with decree no. 574 dated 16 Rajab 1386 by Royal Decree No. M/35, 18 Rajab 1386. Waqf in Saudi Arabia takes various forms, such as hotels, land, buildings (houses) for residents, shops, gardens, and places of worship. The development project prioritized by the Ministry of Hajj and Endowments is the creation of hotels on waqf land in Makkah al-Mukarramah, especially those near the al-Haram Mosque.

Many waqf development instruments and innovative financing schemes are implemented in developing waqf assets. One form is developing waqf assets using *istibdāl* instruments. *Istibdāl* in waqf jurisprudence is defined as the sale of waqf property to purchase other property as a replacement, whether the replacement property is the same as the waqf property being sold or different. Some interpret that *istibdāl* means removing an asset from waqf status and replacing it with another asset. MUIS widely uses *Istibdāl* in Singapore in building waqf projects.<sup>13</sup>

Compared to neighboring countries, land waqf in Indonesia is mainly used to build mosques, prayer rooms, schools, cemeteries, orphanages, or Islamic boarding

schools. This use, viewed from a socio-religious perspective, especially for worship, is compelling. Still, the benefits have little impact, especially on the community's economic life. Suppose the allocation of Waqf is limited to the things mentioned above without Waqf being managed more productively. In that case, the socio-economic welfare of the community, as expected by waqf institutions in Indonesia, cannot be realized.

In reality, almost all waqifs handed over their land to Nazir without including funds to finance productive business operations; this became a severe problem and obstacle in managing their Waqf. Therefore, a genuine strategy is needed for managing waqf assets, which are already quite numerous and spread throughout all regions in Indonesia, so that they can be quickly utilized to improve the welfare of society as a whole.

The Waqf La, in Article 43 paragraph (2), mandated the productive management of Waqf. The productive management of Waqf can be carried out by building commercial hospitals, mining, building apartments, sharia hotels, shophouses, sports fields, office buildings, etc., the orientation of the use of which or the results are still allocated for the benefit or development of the Muslim community as a goal. <sup>14</sup>Initially, as is the case on waqf land, flats are built, which will later be rented out, and the rental proceeds can be used for public purposes. Because positive law in Law no. 20 of 2011 concerning Flats stipulates that apart from being able to be built on land with ownership rights, building use rights, and specific use rights, it also regulates the construction of flats through the utilization of waqf land, this is

<sup>11</sup>Fauzia Amelia, *The Waqf Phenomenon in Indonesia: Challenges towards Productive Waqf* (Jakarta: Indonesian Waqf Board, 2016), p. 1.

<sup>12</sup>Uswatun Hasanah, 'Innovation in Waqf Development in Various Countries', Article, 2008 <<https://www.bwi.go.id/166/2008/05/13/inovasi-pengembangan-wakaf-di-berbagai-negara/>>.

<sup>13</sup>Fahrurroji, 'Development of Waqf Assets in Singapore', *Equilibrium*, Vol. 3.No. 1 (2015), p. 117.

<sup>14</sup>Directorate of Waqf Empowerment Directorate General of Islamic Community Guidance, *Bunga Rampai Waqf* (Jakarta: Indonesian Ministry of Religion, 2006), p. 81.

regulated in Article 18 of the Condominium Law.

The terms and conditions for utilizing waqf land as regulated in Article 20 and Article 21 of the Flat Law are as follows:

1. Done by way of lease or cooperative use carried out by sharia principles as outlined in the waqf pledge;

2. Changes in the utilization of waqf land, which have been determined in the waqf pledge, require written approval and permission from the Indonesian waqf board, where such changes only apply to public flats;

3. Done in a written agreement before the official who made the waqf pledge deed;

4. The rental period, as specified in letter a, is given for 60 (sixty) years from the signing of the written agreement;

5. The written agreement must be recorded at the land office;

With a large land area and strategic location, Waqf land has the potential to be developed and managed more productively. As is currently the case with many waqf lands which is used to build mosques or prayer rooms, while the remaining land from the waqf land is still significant, the remaining land has the potential to be used to increase the productivity of the waqf land such as building commercial buildings such as shophouses or meeting halls for rent to other parties. The proceeds from the building rental can then be used to maintain the mosque, maintain existing waqf buildings to support activities or empower small or weak economies in the surrounding area.<sup>15</sup>

Therefore, a new paradigm regarding waqf land can be produced through the development of a land law system, where waqf land can be included in the category of Islamic-based Management Rights, then optimized and utilized for the benefit of the people by building shopping centers, sharia hotels, shops and so on. the result of all this is to help improve the welfare of the community, can be one solution to utilize and make productive waqf land.

### KESIMPULAN

(Aanknopingspunten) between civil law and Islamic law in the use of waqf land for waqf land productivity can provide a solution to the rigidity of waqf land, which prohibits it from being sold, gifted, or inherited and guaranteed so that waqf land does not become abandoned land because it has been managed fairly. Waqf land will be more productive by involving several legal professions such as notaries/PPAT, lawyers, accountants, bankers, and appraisers without having to violate the principles of waqf law; this is to open up opportunities for the use of waqf land and make a positive contribution to both the waqf land and for the benefit of the people.

### SARAN

Merupakan saran yang diajukan yang berkoreasi dengan hasil penelitian. Saran ditulis dengan singkat, jelas dan workable.

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<sup>15</sup> Achmad Djunaidi and Thobieb Al-Asyhar, *Towards an Era of Productive Waqf: A Progressive Effort for the*

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