

THE COMPLEXITY OF WAQF LAND IN THE CONTEXT OF CUSTOMARY LAW IN INDONESIA

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Abstract

Waqf, an Islamic legal matter, requires detailed examination, especially since the issue of waqf of customary land has been adopted into Indonesian customary law. Despite indications of waqf's pre-Islamic existence in Indonesia, this article aims to provide a comprehensive understanding of waqf's concept, practice, and case studies within the context of Indonesian customary law. Employing qualitative research methods and a normative juridical design, data sourced from literature reviews elucidates diverse perspectives on customary law regarding waqf practices in Indonesian society. Findings reveal that customary waqf involves various types of assets with diverse purposes, including worship and communal interests. The waqf process safeguards land from commercial transactions and establishes clear administrative roles and objectives. Although customary waqf rules lack written documentation, Islamic law serves as a pivotal reference, emphasizing the need for adequate regulations to manage waqf. This recognition is crucial, particularly considering waqf's treatment akin to legal entities within customary law. Across Indonesian tribes and communities, diverse customary waqf practices reflect localized customs and traditions.

Keywords: Customary Land; Customary Law; Waqf Land

Abstrak

Wakaf, sebagai persoalan hukum Islam, membutuhkan pemeriksaan yang mendetail, terutama karena masalah wakaf tanah adat telah diadopsi ke dalam hukum adat Indonesia. Namun, beberapa penelitian menunjukkan bahwa wakaf sudah dikenal di Indonesia sebelum kedatangan Islam. Oleh karena itu, artikel ini bertujuan untuk memberikan pemahaman yang komprehensif tentang konsep, praktik, dan contoh kasus

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wakaf dalam konteks hukum adat di Indonesia. Untuk mencapai tujuan tersebut, artikel ini menggunakan metode penelitian kualitatif dan desain penelitian yuridis-normatif. Data yang digunakan dalam penelitian ini berasal dari tinjauan literatur yang membahas berbagai perspektif hukum adat di Indonesia terkait praktik wakaf dalam masyarakat. Temuan menunjukkan bahwa wakaf adat melibatkan berbagai jenis harta dengan tujuan yang beragam, termasuk untuk ibadah dan kepentingan bersama. Proses wakaf menempatkan tanah di luar transaksi komersial, menetapkan pengurus dan tujuan wakaf secara jelas. Meskipun aturan wakaf dalam hukum adat bersifat tidak tertulis, hukum Islam menjadi sumber acuan yang menekankan pentingnya regulasi yang memadai untuk mengelola wakaf. Pengakuan ini khususnya penting untuk wakaf yang diperlakukan serupa dengan tindakan perkumpulan sebagai badan hukum dalam hukum adat. Praktik wakaf adat telah lama dilakukan oleh berbagai suku dan komunitas di Indonesia, dengan pendekatan yang berbeda tergantung pada adat dan kebiasaan setempat.

Kata Kunci: Hukum Adat; Tanah Milik Adat; Wakaf Tanah

A. INTRODUCTION

Waqf has been known since Islam entered the archipelago and has been well-accepted by the community; even legal expert Ter Haar argued that waqf has been well-accepted and perfect in the customary law system (*gerecipiered*). This is very reasonable, considering that most of Indonesia's population is Muslim. This is one of the parts of customary law that comes from religion (*godsdienstig bestanddeel van het adat recht*).¹ Waqf in Arabic means *habs* (to hold). According to Shara', waqf means to hold property and give its benefits through Allah swt.² Waqf is one of the potential solutions to the need for funds to overcome many people's problems, personally and institutionally, in Islam. The institution of waqf has historically made an essential contribution to Islam's economic welfare and culture.³

Moreover, waqf provides public and social facilities that support the Muslim community, including mosques, Islamic schools, cemeteries, and

¹ Hajar Kusmayanti and Divya Pratiwi Djanuari, "Pengalihan Wakaf Oleh Sarak Opat Di Aceh Tengah Ditinjau Hukum Islam Dan Hukum Adat," *Al-Manahij: Jurnal Kajian Hukum Islam* 15, no. 2 (2021): 263–76, <https://doi.org/https://doi.org/10.24090/mnh.v15i2.3285>.

² Rifqi Fatrizal, "Pelaksanaan Penggantian Tanah Wakaf Menurut Hukum Adat Aceh Ditinjau Dari Undang-Undang Nomor 41 Tahun 2004 Tentang Wakaf Dan Hukum Islam (Studi Di Kabupaten Aceh Besar)," *Premise Law Journal* 13 (2016).

³ Rifqi Awati Zahara, "Perkembangan Hukum Wakaf Di Indonesia," *Legitima* 2, no. 1 (2019): 18–39, <https://doi.org/https://doi.org/10.33367/legitima.v1i2.918>.

public roads.⁴ It is an essential institution that contributes to the development of Islam and society in various aspects of life.⁵ The Indonesian government actively encourages the development and management of waqf assets to enhance their productivity and social impact. According to the Badan Wakaf Indonesia (BWI), the development of the waqf sector in Indonesia experienced tremendous growth in 2022. According to the Ministry of Religious Affairs' Waqf Information System (2022), waqf lands in Indonesia are spread across 404,512 points with a total area of 57,263.69 hectares.⁶

The legislative framework pertaining to waqf in Indonesia is underpinned by several normative foundations, including Law No. 41 of 2004 concerning Waqf, Government Regulation No. 42 of 2006 concerning the Implementation of Law No. 41 of 2004 concerning Waqf, Government Regulation No. 28 of 1977 concerning Waqf of Owned Land, and Law No. 5 of 1960 concerning Basic Agrarian Principles. These legal instruments collectively serve as pillars in delineating the legal framework surrounding waqf and its administration, offering a comprehensive regulatory structure to govern the intricacies of waqf affairs. In Indonesia, waqf is not only understood through formal legal aspects.⁷ But also through various local practices and traditions that surround the concept

⁴ Ahmad Lukman Nugraha et al., "Waqf Literacy: The Dynamics of Waqf in Indonesia," *Journal of Islamic Economics and Finance Studies* 3, no. 2 (2022), <https://doi.org/10.47700/jiefes.v3i2.5082>.

⁵ Danu Chandra Saputra, Laily Dwi Arsyianti, and Imam Teguh Saptono, "Development Strategy of Islamic Boarding Schools-Based Waqf (Case Study: Islamic Boarding Schools of Daarut Tauhiid, Bandung)," *Journal of Consumer Sciences* 6, no. 2 (2021), <https://doi.org/10.29244/jcs.6.2.129-149>; Alfiqri Hasriandi, "Peran Tokoh Adat Dalam Penyelesaian Sengketa Wakaf (Studi Kasus Tentang Penarikan Kembali Tanah Wakaf Di Kecamatan Laut Tawar Kabupaten Aceh Tengah)" (UIN Ar-Raniry Darussalam, 2022).

⁶ Fanny Muhammad Hanafi and Eds et al., "Implementasi Wakaf Tunai Dalam Meningkatkan Stabilitas Ekonomi Dan Kesejahteraan Masyarakat Di Indonesia," *Digital Bisnis: Jurnal Publikasi Ilmu Manajemen Dan E-Commerce* 2, no. 2 (2023): 182-91, <https://doi.org/https://doi.org/10.30640/digital.v2i2.1069>.

⁷Zahrul Fatahillah, "Perlindungan Hukum Tanah Wakaf Yang Tidak Memiliki Sertifikat (Studi Terhadap Putusan Wakaf Di Mahkamah Syar'iyah Aceh)," *Kalam* 7, no. 1 (2019), <https://journal.lsamaaceh.com/index.php/kalam/article/view/56>; Adi Nur Rohman and Eds. et al., *Seri Buku Saku: Hukum Wakaf Indonesia*, Cet ke-1 (Bekasi: Ubharajaya, 2020), 4.

of waqf in society⁸. While there are unique customary waqf practices among different tribes and communities, the fundamental principles of waqf as a form of religious charity and public good remain consistent, albeit within different cultural frameworks.⁹ The implementation of waqf in Indonesia is based on Islamic law and accommodated within favorable legal rules through statutory regulations.¹⁰

Numerous studies have addressed various aspects of waqf, encompassing productive waqf,¹¹ customary land waqf¹², digital waqf¹³, waqf governance¹⁴, and waqf resources transcending Indonesia's borders¹⁵, alongside case studies on customary waqf in Liaro Village,

⁸ Firman Muntaqo, "Problematika Dan Prospek Wakaf Produktif Di Indonesia," *Al-Ahkam* 1, no. 25 (2015), <https://doi.org/10.21580/ahkam.2015.1.25.195>.

⁹ Muntaqo.

¹⁰ Nu'man Anunuh et al., "Registration of Nadhir at the Ministry of Religion of the Republic of Indonesia (Concept Study of Legislation in Indonesia)," *KnE Social Sciences*, 2022, <https://doi.org/10.18502/kss.v7i15.12142>.

¹¹ Syaakir Sofyan and A. Syathir Sofyan, "Pemanfaatan Tanah Wakaf Produktif: Pendekatan Praktis," *Tadayun: Jurnal Hukum Ekonomi Syariah* 4, no. 1 (2023), <https://doi.org/10.24239/tadayun.v4i1.94>; A. Ascarya, M.N. Hosen, and S. Rahmawati, "Designing Simple Productive Waqf Models for Indonesia," *International Journal of Ethics and Systems* 38, no. 3 (2022): 380–401.

¹² Abdul Hamid Usman, "Perlindungan Hukum Hak Milik Atas Tanah Adat Setelah Berlakunya Undang-Undang Pokok Agraria," *Jurnal Kepastian Hukum Dan Keadilan* 1, no. 2 (2020), <https://jurnal.um-palembang.ac.id/KHDK/article/viewFile/2593/1925>.

¹³ Muhammad Fachrurrazy, Dirah Nurmila Siliwadi, and Nur Herlina, "Potential for Digital-Based Productive Waqf Development (Case Study of Datuk Sulaiman ModernIslamic Boarding School and Muhammadiyah Boarding School) in Palopo City, South of Celebes," *AL-FALAH: Journal of Islamic Economics* 7, no. 1 (2022), <https://doi.org/10.29240/alfalah.v7i1.3840>.

¹⁴ Abdelkader Laallam et al., "Intellectual Capital in Non-Profit Organisations: Lessons Learnt for Waqf Institutions," *ISRA International Journal of Islamic Finance* 12, no. 1 (2020), <https://doi.org/10.1108/IJIF-10-2018-0111>.

¹⁵ Salama Samid Lampatan, "The Role of Waqf Resources in Empowering the Bangsamoro Communities in the Philippines," *International Journal For Multidisciplinary Research* 5, no. 6 (2023), <https://doi.org/10.36948/ijfmr.2023.v05i06.9295>; Asma Hakimah et al., "The Implementation of Land Waqf Law in Indonesia and Malaysia as a Stage to Land Waqf Law Reform in Indonesia: A Comparative Study," *Law Reform: Jurnal Pembaharuan Hukum* 18, no. 2 (2022), <https://doi.org/10.14710/lr.v18i2.46673>; Muhammad Iqmal Hisham Kamaruddin and Mustafa Mohd Hanefah, "An Empirical Investigation on Waqf Governance Practices in Waqf Institutions in Malaysia," *Journal of Financial Reporting and Accounting* 19, no. 3 (2021), <https://doi.org/10.1108/JFRA-03-2020-0055>; Anwar Allah Pitchay et al., "Cooperative-Waqf Model: A Proposal to Develop Idle

North Maluku.¹⁶ While existing studies have furnished valuable insights into waqf practices and governance, several areas warrant further scrutiny. In this context, a pressing need exists to delve deeper into the concepts, practices, and case studies of endowments within the framework of Indonesian customary law, with a particular emphasis on the Bacan and Minang ethnic groups. This research endeavors to significantly augment the understanding of waqf practices in Indonesia by meticulously investigating the fundamental aspects of customary law. By focusing on two discrete case studies in North Maluku and West Sumatra, this research will elucidate the evolution of waqf practices within societies that steadfastly uphold traditional values. Furthermore, this study aims to further deepen comprehension of this phenomenon by accentuating the administrative procedures entailed in registering waqf land. The interdisciplinary approach adopted is poised to furnish profound insights into the nexus between law, culture, and religion in Indonesia's waqf practice domain.

B. METHOD

This study uses a qualitative methodology, employing the literature review technique to explore the various perspectives of customary law in Indonesia regarding the practice of waqf within communities. The primary data sources include scholarly publications such as books and articles on the subject matter, as well as relevant documents. The study aims to expound upon the conceptualization, implementation, and illustrative cases of waqf within the customary legal context, using a legal and normative research framework. By focusing on the customary law dimension, the objective of this research is to understand the concept of waqf in Indonesia not only from the perspective of formal legislation governed by statutory law but also through the lens of Indigenous practices and cultural traditions that influence the societal interpretation of the waqf concept.

Waqf Lands in Malaysia,” *ISRA International Journal of Islamic Finance* 10, no. 2 (2018), <https://doi.org/10.1108/IJIF-07-2017-0012>; Mohamed Al Amine Sano and Salina Kassim, “Waqf Governance in the Republic of Guinea: Legal Framework, Issues, Challenges and Way Forward,” *ISRA International Journal of Islamic Finance* 13, no. 2 (2021), <https://doi.org/10.1108/IJIF-03-2020-0064>.

¹⁶ Muhammad Tarik Ahmad, “Tinjauan Hukum Islam Dan Hukum Adat Terhadap Sistem Perwakafan (Studi Kasus Di Desa Liaro, Kecamatan Bacan Timur Selatan, Kabupaten Halmahera Selatan)” (Repository UIN Datokarama Palu, 2022).

C. RESULTS AND DISCUSSION

1. Waqf from the Perspective of Customary Law

According to Soepomo, customary law is a word that can refer to an unwritten law, living law, law derived from judge-made law, or law that lives as customs that are upheld in everyday social relations (customary law). On the other hand, Soekanto gives his view on the understanding of customary law, which, in essence, is only one type of custom that has legal consequences or sanctions (*das sein das sollen*). Therefore, all unwritten social norms that exist in society as morals, habits, or conventions that have legal consequences or sanctions are considered part of customary law.¹⁷

Waqf has long been governed by unwritten customary law, with Islamic law as its primary source. This is evident in the assimilation of the Islamic institution of waqf into Indonesia's indigenous customary law over time.¹⁸ Legal scholars commonly concur that one of the challenges within Indonesian customary law pertains to the issue of waqf. This complexity arises from the dual nature of waqf as a distinct legal act, which can vary depending on its interpretation. On the one hand, waqf facilitates many individuals' access to specific spaces. On the other hand, it establishes a legal entity under customary law capable of conducting legal affairs as a legal subject. This duality stems from the multifaceted nature of waqf when viewed from different perspectives.¹⁹

Ter Har's perspective is that Indonesian Muslims, adhering to Islamic law, have embraced waqf as an Islamic legal institution, better known as "*Vromestichting*" in Dutch. However, Soesoema Atmadja argues differently in his dissertation at Leiden University in 1992 concerning the institution of waqf. He suggests that although waqf is rooted in Islamic law,²⁰ its prominence within the institution was recognized in Indonesia prior to the arrival of Islam in the country. The presence of several types

¹⁷ Marhaeni Ria Siombo and Henny Wiludjeng, *Hukum Adat Dalam Perkembangannya*, 1st ed. (Jakarta: Universitas Katolik Indonesia Atma Jaya, 2020), 5.

¹⁸ Sunuwati, *Hukum Perwakafan*, 1st ed. (Parepare: IAIN Parepare Nusantara Press, 2022), 18.

¹⁹ Ahmad Sudirman Abbas, *Perwakafan Tanah Milik Di Indonesia Dan Seluk Beluk Wakaf Di Mesir*, 1st ed. (Bogor: CV Anugrah Berkah Sentosa, 2017), 29–30.

²⁰ Abbas, 30–31.

of waqf, whose ownership is beyond the purview of Islamic law, is exemplified by the following instances:

- a. The Badui tribe from Cibeo (South Banten) acknowledges the existence of "*Huma Serang*" as a waqf institution in their region. This institution is responsible for managing jointly cultivated fields each year, with the proceeds allocated for communal purposes.
- b. Waqf institutions in Bali oversee lands and other assets, such as jewelry for ceremonies, which belong to temples or residing deities.
- c. *Tanah Pareman*, recognized as customary land in the Lombok region, involves the exemption of state lands from *laundrette* tax granted to villages and temples for communal use.²¹

In some areas of Indonesia, Islamic law can be harmonized with customary law, as illustrated in the examples above. Similar rules also apply when there are specific institutions of expert waqf or family waqf (private) in Islamic law, where the waqf is directed to particular individuals, some of whom may be family members of the waqf, in accordance with customary law. Certain regions, such as highland ancestral lands in Minangkabau, *Dati* lands in Ambon, *kelakeran* items in Sulawesi, and others, still maintain collective property recognized by familial lines, which cannot be inherited by individual descendants according to customary law.²²

Legal experts have differing opinions on the issue of waqf, with some arguing that such actions are only justified for specific purposes that are considered righteous worship. Customary law stipulates that only agricultural land can be waqf, but assets that can be donated include movable (*roerend*) and immovable (*onroerend*) property, provided that the intention behind the donation does not violate religious law. However, the majority of waqf is used for the construction of mosques or prayer rooms, often combined with gardens to provide employment opportunities for staff or clerics. On the other hand, waqf also intends for

²¹ Junaidi Abdullah and Nur Qodin, "Penyelesaian Sengketa Wakaf Dalam Hukum Positif," *Ziswaf* 1, no. 1 (2014), <https://doi.org/http://dx.doi.org/10.21043/ziswaf.v1i1.1524>.

²² Fazrul Rahman Mukhsin and Muhamad Iqbal Hasbi, "Sistem Kewarisan Kolektif Masyarakat Adat Minangkabau Dalam Perspektif Hukum Dan Pelestarian Budaya Indonesia," *Jurnal Hukum Dan HAM Wara Sains* 2, no. 12 (2023): 1116–25, <https://doi.org/https://doi.org/10.58812/jhhws.v2i12.842>.

the family to benefit from the waqf and enjoy the proceeds of the waqf property. Therefore, it is not permissible for waqf property to be transferred through donation, sale, or any other legal means. Hence, waqf is a permanent designation made by the landowner regarding their property that cannot be altered.²³

According to customary law, the owner of the waqf must possess complete rights and authority over the waqf. As the owner holds full authority over the waqf asset, only the right of ownership can be transferred through another legal act. Consequently, the waqf asset being donated must be precisely and unequivocally defined and may not be utilized in any manner contrary to Islamic law. Hence, Ter Haar contends that the terms of the waqf implementation must be explicitly stated from the outset of the contract, with the recipient of the waqf asset also being distinctly identified. Furthermore, the appointment of an individual responsible for managing the waqf implementation is crucial. In the absence of such an administrator, the customary law mandates that the head of mosque management, known as *takmir* or *marbot*, assumes this responsibility. Thus, customary law governs the legal status of waqf assets once the waqf has been fully executed. Consequently, the administrator (*nazir*) bears responsibility for all matters pertaining to the asset, including the legal authority to initiate legal proceedings.²⁴

Where the waqf pertains solely to customary law, it suffices for it to be managed by a legal entity referred to as *rechtsfiguur*. This entity is an ownerless entity with a clearly defined purpose that can be fully executed by the waqf creator through specific regulations stipulated in relevant waqf laws. Hence, under customary law, there is no necessity for a particular individual to oversee the waqf. Instead, a person is appointed to manage or possess all assets, both movable and immovable. This contrasts with current customs, where informal legal relations are often intertwined with codified law. Consequently, the individual responsible for administering the waqf assets should be deemed as the waqf

²³ Nazila Alvi Lisna and Yuriska, "Wakaf Dalam Sistem Hukum Adat," Sayap Bening Law Office, 2021, <https://bantuanhukum-sbm.com/artikel-wakaf-dalam-sistem-hukum-adat>.

²⁴ M. Cholil Nafis, *Wakaf Pilar Peradaban: Dinamika Perwakafan Dari Masa Ke Masa Di Indonesia*, 1st ed. (Jakarta: Mitra Abadi Press, 2014), 5–6.

property's owner. By streamlining administration in this manner, the waqf trustee facilitates more straightforward legal procedures, such as the smooth sale of waqf assets without complications.²⁵

According to this perspective, waqf is regarded as having a similar autonomous status in customary law as incorporated organizations. Although not universally recognized as a legal entity, waqf was categorized as an *inland rechtspersoon*. With the presence of waqf within the state, the Colonial Government enacted various regulations to govern waqf affairs. These regulations included requirements for obtaining a license from the Regent to establish land waqf, focusing on the location and purpose of the assets. Additionally, waqf land had to be registered at the office of the Raad Agama, detailing boundaries, donor information, duration, and purpose. These regulations persisted until independence, as new legislation had not yet been enacted. Despite subsequent provisions and guidelines issued during the independence period, such as Ministry of Religious Affairs instructions from 22 December 1953 and Circular Letter No. 3/D/1956, many colonial laws and regulations were considered inadequate and outdated in light of societal advancements.²⁶

2. Management of Customary Land under Customary Law in Indonesia

The concept of customary land encompasses two types. First, former customary land, also known as *girik* land, is land previously used for customary purposes and has not been converted into land with specific rights (such as ownership rights or building rights). Second, land owned by customary law communities, including types like titian land, irrigation land, village treasury land, and bengkok land.²⁷

According to Article 16 of the Basic Agrarian Law (UUPA), ownership rights based on customary law are recognized if the land has been

²⁵ Abbas, *Perwakafan Tanah Milik Di Indonesia Dan Seluk Beluk Wakaf Di Mesir*.

²⁶ Mura P Hutagalung, "Beberapa Catatan Tentang Kedudukan Dan Pengaturan Perwakafan Tanah Milik Dalam Sistem Hukum Di Indonesia," *Jurnal Hukum Dan Pembangunan* 12, no. 5 (1982), <https://doi.org/https://dx.doi.org/10.21143/jhp.vol12.no5.930>.

²⁷ Burhanuddin, "Tanah Adat Dapatkah Di Sertifikat Wakafkan?," Situs Resmi Badan Wakaf Indonesia, 2020, <https://www.bwi.go.id/5374/2020/08/26/tanah-adat-dapatkah-disertifikatwakafkan/>.

continuously and hereditarily managed with the consent of the customary community.²⁸ R. Roestandi Ardiwilaga states that customary ownership can be obtained after marking boundaries and through the rights to collect yields and select uses. Such land can be inherited, pawned, or transferred. Boedi Harsono argues that the more effort someone puts into a piece of land, the stronger their rights to that land become. However, communal rights (*hak ulayat*) tend to weaken when common land is increasingly claimed by individuals, eventually disappearing. Amrah Muslimin adds that when a family continues to individually cultivate the land over several generations, communal rights become blurred. Land rights are special rights that give the holder the ability to manage, utilize, and/or derive benefits from a particular piece of land. Therefore, customary law continues to regulate such land ownership to this day.²⁹

According to the Regulation of the Minister of Agrarian Affairs and Spatial Planning/ Head of the National Land Agency of the Republic of Indonesia No. 2 of 2017 on Procedures for the Registration of Waqf Land, waqf land can include property rights or unregistered customary land. To implement a waqf on unregistered land, a Waqf Pledge Deed (AIW) must be created, witnessed by two individuals, and signed in front of the Waqf Pledge Deed Official (PPAIW). The document must then be registered at the local land office in compliance with prevailing regulations and expert advice.

Every customary land turned into waqf must be registered at the local land office under the name of the nazir (trustee). Necessary documents include valid land ownership documents, land maps, application letters, physical possession documentation, statements from neighboring landowners, and the AIW or its replacement deed (APAIW). The sub-district religious authority must provide an affirmation letter from the nazir, accompanied by statements from the waqf donor, the

²⁸ Latifah Ratnawati and Sri Hartini, "Proses Pelaksanaan Kepemilikan Tanah Wakaf Bekas Milik Tanah Adat Oleh Yayasan," *Yustisi* 3, no. 2 (2016), <https://doi.org/https://doi.org/10.32832/yustisi.v3i2.1103>.

²⁹ Usman, "Perlindungan Hukum Hak Milik Atas Tanah Adat Setelah Berlakunya Undang-Undang Pokok Agraria."

nazir, or community leaders, confirming that the land is not in dispute, under trial, seized, or guaranteed. The Head of the Land Office will then verify and confirm the land as registered waqf under the nazir's name, subsequently issuing a waqf land certificate to the nazir.³⁰

3. Implementation of Waqf under Customary Law in Bacan and Minang Tribe

a. Land Waqf in Liaro Village, North Maluku (Bacan Tribe)

Despite manifold departures from legal formal, the tradition of land waqf in Liaro Village, South East Bacan Subdistrict, South Halmahera Regency, is embraced with enthusiasm. This stems from its practicality within the local customs. The practice of waqf has been ingrained in the community since around 1947, intertwining Islamic law, local customs, and waqf legislation. However, notable disparities exist between these aspects, posing challenges to the waqf system in Liaro Village. According to customary law, the individual who first clears a forest or unoccupied land in Liaro Village claims ownership rights. This deep-rooted process of land ownership reflects ancient customs upheld by the community. Consequently, in line with these traditions, land waqf transactions rely solely on verbal agreements, with community members required to be present during the waqf transfer.³¹

Despite the longevity of the practice, land waqf in Liaro Village remains largely traditional. Many still engage in waqf activities solely through religious habits, fulfilling all pillars and conditions while relying on oral traditions and mutual trust in specific individuals or institutions. They perceive waqf as a virtuous act worthy of divine worship, bypassing the administrative procedures mandated by national laws.

b. Land Waqf in Minangkabau West Sumatra (Minang Tribe)

Minangkabau is an indigenous community in West Sumatra Province that exerts significant influence on the socio-cultural evolution

³⁰ Abdul Hamid Usman, "Wakaf Tanah Hak Milik Belum Terdaftar," *Jurnal Kepastian Hukum Dan Keadilan* 2, no. 1 (2021), <https://doi.org/https://dx.doi.org/10.32502/khdk.v2i1.3047>.

³¹ Ahmad, "Tinjauan Hukum Islam Dan Hukum Adat Terhadap Sistem Perwakafan (Studi Kasus Di Desa Liaro, Kecamatan Bacan Timur Selatan, Kabupaten Halmahera Selatan)," 49.

of the local populace. One pivotal aspect shaped by this influence is the land tenure system, known as 'hak ulayat,' which is governed by indigenous customs. In West Sumatra, waqf activities constitute an integral facet of religious life, arising from the interplay between customary law and Islamic jurisprudence. The advent of Islam within the Minangkabau community is regarded as a boon, perceived as the refinement and fulfillment of pre-existing customs.³²

Overall, the total area of waqf land in West Sumatra Province currently amounts to 675.34 hectares, spread across 5,959 locations. More than 65% of waqf transfers originate from ulayat land.³³ Ulayat land, held collectively through matrilineal descent and inherited through generations without division, constitutes communal property. Tribal leaders oversee these lands, governed by the principle of horizontal separation, stipulating that ulayat land cannot be transferred to external parties. It is regarded as an indivisible entity along with its attachments. Waqf land, referred to as ulayat land, is collectively owned within family circles. This commitment is formalized by the head of the inheritors (*mamak*), following prior approval from clan members, even those residing outside Minangkabau.

The customary doctrine of "*Jua indak makan bali gadai indak makan sando*" asserts that rights over land cannot be permanently transferred through sale, and temporary transfers via pawn are subject to stringent customary conditions. This doctrine implies that ulayat land cannot be alienated from outsiders, and members of the tribe or clan solely have the right to utilize it, borrowing it from their community or tribe.³⁴

The majority of traditional waqf lands are not formally registered or certified according to registration requirements. Commitments are

³² Onny Medaline, "Wakaf Tanah Ulayat Kaum Di Sumatera Barat," *Al-Awqaf: Jurnal Wakaf Dan Ekonomi Islam* 9, no. 2 (2016): 173-88, <https://doi.org/https://doi.org/10.47411/al-awqaf.v9i2.86>.

³³ Sistem Informasi Wakaf Direktorat Jendral Pembimbingan Masyarakat Islam Kementerian Agama Republik Indonesia, "No Title," n.d.

³⁴ Yunimar, "Pensertipikatan Tanah Wakaf Yang Berasal Dari Tanah Ulayat Di Minangkabau Dalam Rangka Mewujudkan Kepastian Hukum," *Jurnal Normative* 5, no. 1 (2017): 16-27, <https://ojs.unitas-pdg.ac.id/index.php/normatif/article/view/44>.

typically made through verbal agreements and occasionally through written wills. Legal clarity over waqf land rights necessitates the authentication of waqf deeds. The implementation of waqf, particularly on ulayat lands still governed by customary law in West Sumatra Province, shows consistency across districts and municipalities. In waqf proceedings, both the Ministry of Religious Affairs and the National Land Agency play crucial roles, directly contributing to the issuance of waqf land ownership certificates.³⁵

Barriers to the use of customary land waqf are very few. Disputes that arise are often settled through customary procedures rather than resorting to legal actions. Conflict resolution involves deliberation and consensus among traditional leaders, beginning with the lowest-tiered leader of the *paruik* group (the core communal unit), known as the head inheritor *mamak*, and advancing to larger communal entities (similar tribes), known as "*ka ampek suku*," Ultimately, intervention by the Kerapatan Adat Nagari (KAN) and the Lembaga Kerapatan Adat Alam Minangkabau (LKAAM) occurs if necessary, consisting of *ninik mamak*, religious scholars, and wise elders, collectively known as "*tali tigo sapilin, toko tigo sajarangan*." Depending on the preferred harmonious method, discussions may take place in Rumah Gadang (traditional Minangkabau houses), customary halls, or other venues. Although customary legal systems have traditionally resolved issues concerning traditional waqf land in West Sumatra, Law Number 41 of 2004 concerning Waqf does not emphasize the use of customary systems in addressing conflicts over traditional waqf land.³⁶

Ulayat land entails communal ownership under customary law. The waqf process for ulayat land begins with consensus deliberations among all community members. Any alterations to ulayat land, being communal property, require unanimous agreement from all members, without exception. Agreements are formalized in writing if all clan members

³⁵ Yulia Mirwati, Yontri Faisal, and Zahara, "Wakaf Tanah Ulayat Sebagai Solusi Peralihan Hak Atas Tanah Ulayat Secara Permanen Di Sumatera Barat," *Journal of Indonesian Adat Law* 2, no. 1 (2018), <https://doi.org/https://doi.org/10.46816/jial.v2i1.24>.

³⁶ Mirwati, Yontri Faisal, and Zahara.

consent to waqf their land, and the village customary authority or Kerapatan Adat Nagari in the region must be informed accordingly. Once the waqf land has been agreed upon, a waqf pledge is made, and the nazir (waqf administrator) accepts the land. However, this can also occur before certification, after everyone agrees and notification has been made to the Kerapatan Adat Nagari (KAN). The Waqf Pledge Deed (AIW) must be officially created before the Head of the Office of Religious Affairs (KUA) as the Waqf Pledge Deed Officer (PPAIW). Before the waqf pledge is pronounced, administrative requirements for the waqf land certificate must be prepared jointly by the wakif and the nazir. After the Waqf Pledge Deed Officer (PPAIW) verifies the waqf requirements and certifies the nazir, the wakif pronounces the waqf pledge before the nazir, two witnesses, and the Waqf Pledge Deed Officer (PPAIW), who then creates the Waqf Pledge Deed (AIW).³⁷

When creating a Waqf Pledge Deed (AIW) on certified customary (*ulayat*) land, the following conditions must be met:

- 1) Authentication from National Land Agency (BPN) Certificate: The authenticity of the land certificate from the National Land Agency (BPN) must be verified.
- 2) Confirmation from Local Authorities: A statement confirming that the land is not under dispute, issued by the local sub-district head (*camat*) and the village head, also known as the *Wali Nagari*, and recognized by the Council of Kerapatan Adat Nagari (KAN), must be obtained.
- 3) Land Registration Certificate (SKPT): The Waqf Pledge Deed must include a certificate from the National Land Agency (BPN), known as the Surat Keterangan Pendaftaran Tanah (SKPT).

After that, the wakif is presented to the Waqf Pledge Deed Officer (PPAIW), who then reviews the nazir and issues a certification letter if the nazir meets the necessary qualifications. In the presence of the PPAIW, the nazir, and two witnesses, the wakif makes the waqf pledge. Subsequently, the PPAIW issues three copies of the Waqf Pledge Deed (AIW). Once the waqf pledge deed is issued, the PPAIW, on behalf of the

³⁷ Yunimar, "Pensertipikatan Tanah Wakaf Yang Berasal Dari Tanah Ulayat Di Minangkabau Dalam Rangka Mewujudkan Kepastian Hukum."

nazir, applies to the Regent or Mayor, in this case, the head of the Agrarian Sub-Directorate to register the waqf land with the local National Land Agency (BPN) by submitting the following requirements:³⁸

- 1) The relevant land certificate;
- 2) The Waqf Pledge Deed;
- 3) The Nazir certification letter;
- 4) An application letter for waqf land certification addressed to the National Land Agency (BPN).

Once the requirements are met and the certification fee is paid, the National Land Agency (BPN) issues the waqf land certificate. For ulayat land that is to be waqf but is not yet certified, the procedure for making the waqf pledge deed is as follows:³⁹

- 1) A land ownership letter was signed by the head inheritor (*mamak*) and acknowledged by the KAN.
- 2) A statement from the Lurah or Wali Nagari confirming that the land is not in dispute was acknowledged by the KAN and the local sub-district head (*camat*).
- 3) A statement from the head of the local National Land Agency (BPN) indicates that the land rights have not yet been certified.

The Waqf Pledge Deed Officer (PPAIW) is directly presented with the waqif and nazir after the conditions are met. If the nazir's requirements are fulfilled, the PPAIW reviews these conditions and issues a nazir certification letter. In the presence of the nazir, the Waqf Pledge Deed Officer (PPAIW), and two witnesses, the waqif makes the waqf pledge. The PPAIW then issues three copies of the Waqf Pledge Deed after the waqif has made the pledge.

The Waqf Pledge Deed Officer (PPAIW) submits an application to the National Land Agency (BPN) after the pledge deed is made in the name of the nazir, requesting the certification of the waqf land by meeting the following requirements:

- 1) Land ownership letter;
- 2) Waqf pledge deed;
- 3) Nazir certification letter;

³⁸ Yunimar.

³⁹ Yunimar.

- 4) Application letter for certification addressed to the National Land Agency (BPN).

If the requirements are met, the land can be immediately transferred to the nazir's name. If not, the name is changed back to Nazir's name through the process of land rights acknowledgment based on the waqf pledge deed in accordance with Minister of Home Affairs Regulation Number 6 of 1977 on Procedures for Land Registration. For the waqf of owned land, the conversion is carried out through the process of rights acknowledgment, and the issuance of the certificate is recorded promptly. The National Land Agency (BPN) will then issue the waqf certificate after the above procedures are completed.⁴⁰

4. Challenges and Solutions in Waqf Land among the Bacan and Minang Tribes in Indonesian Customary Law

In the context of customary law, several obstacles are encountered in waqf and waqf land certification. Firstly, waqf practices often deviate from existing regulations. Waqf activities are frequently carried out based on religious customs, such as verbally conducting waqf transactions based on mutual trust in an individual (kyai, ulama, ustadz) or a specific institution. Waqf is viewed as a virtuous deed with significant spiritual value before Allah, often bypassing administrative procedures. The assets are considered solely belonging to Allah, and thus, no one dares to challenge the waqf without divine permission. This leads to non-compliance with the formal procedures stipulated by state law regarding waqf land, resulting in legal uncertainty in the ownership and management of the waqf land due to the absence of official documents.⁴¹

Secondly, some heirs may be unaware that their parents have dedicated the land as waqf, making the acknowledgment of heirs crucial in the certification process. However, administrative disorder and a lack of understanding of the waqf concept can complicate this process.

⁴⁰ Yunimar.

⁴¹Proyek Peningkatan Zakat dan Wakaf Direktoral Jenderal Bimas Islam dan Penyelenggaraan Haji Departemen Agama Republik Indonesia, *Panduan Pemberdayaan Tanah Wakaf Produktif Strategis Di Indonesia* (Jakarta: PPZW, 2003), 55.

Thirdly, many lands are uncertified, and there is a general lack of awareness among the community about the necessity of certifying waqf land. Many people may not realize that certifying waqf land is essential for ensuring legal certainty in its ownership and management. Consequently, much waqf land is improperly held by unauthorized individuals, leading to disputes and rendering the land unusable for its intended purposes.⁴²

Fourthly, there is insufficient public awareness about waqf laws, and the lack of professional nazir (waqf administrators) hampers the optimal management and benefits of waqf. Additionally, the costs associated with waqf certification are high, and there is a lack of professionals to handle waqf land management.⁴³

To address these challenges, solutions include providing heirs with a thorough understanding of the significance and importance of waqf in Islam and its impact on the ownership of waqf land. Educating the general public about the benefits of certifying waqf land can also be beneficial. This can be done through outreach programs, seminars, or public campaigns to raise awareness about the importance of waqf land certification in ensuring legal certainty and protecting the rights of the waqif (donor) and their heirs.

Waqf has the potential to empower the community, and thus, it must be managed productively by professional Nazirs. Waqf management in Indonesia still requires improvements, particularly in customary law. Although the legal framework is adequately established, its implementation is often lacking. Active and passive supervision by the government and the community is also necessary. In overseeing waqf management, the government and the community can seek the assistance of independent public accountants. With strict and effective supervision, waqf in Indonesia, especially among customary communities, can be

⁴² Proyek Peningkatan Zakat dan Wakaf Direktoral Jenderal Bimas Islam dan Penyelenggaraan Haji Departemen Agama Republik Indonesia, 70.

⁴³ Kemenag NTB, "Problematika Tanah Wakaf Di Indonesia," Situs resmi Kementerian Agama Republik Indonesia Kantor Wilayah Kementerian Agama Provinsi Nusa Tenggara Barat, 2020.

managed well, ensuring that its benefits contribute to improving the quality of life for the community.⁴⁴

D. CONCLUSION

Customary law views waqf as an Islamic legal structure incorporated into Indonesian customary law. Customary law governing waqf issues is unwritten, but its principles are sourced from Islamic law. Nevertheless, some research suggests that waqf was known in Indonesia before the arrival of Islam. Waqf involves various types of assets, such as agricultural land, movable property, and immovable property, with diverse purposes, including worship or communal interests. The dedication of waqf places the land outside commercial transactions and clearly establishes the administrators and objectives of the waqf. Legal scholars have differing opinions on many aspects, but there is a general consensus that waqf requires proper regulation to ensure effective management, mainly since customary law treats waqf as akin to a group operating as a legal entity.

The management of customary land plays a crucial role in waqf, with a management process that integrates aspects of customary law and positive law. The dedication of customary land as waqf requires specific permits and procedures involving various government agencies. The practice of waqf based on customary law has long been carried out by various tribes and communities in Indonesia, with different approaches depending on local customs and traditions. Waqf practices vary among Indonesian tribes, with examples from the Bacan and Minangkabau tribes. Despite differences in waqf practices, there is a general pattern of resolving matters through deliberation and consensus. These practices are often conducted in a more traditional manner and are less influenced by administrative regulations, yet they remain an essential part of the religious and social life of the community.

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