

NORAMTIVE ANALYSIS OF THE PILLARS AND CONDITIONS OF WAKAF IN POSITIVE LAW IN INDONESIA

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Abstract

This study aims to analyze in depth the pillars and conditions of waqf in the perspective of classical Islamic law and its implementation in the positive legal system in Indonesia. This study uses a juridical-normative approach with a literature review method, through tracing primary legal materials such as Law Number 41 of 2004, as well as fiqh literature from four main schools of thought. The analysis is carried out qualitatively with an interpretive approach to legal norms and the reality of practice in society. The results of the study show that the four pillars of waqf (wakif, mawquf bih, mawquf 'alayh, and shighah) have been adopted into the national legal system, but their implementation faces significant obstacles. Problems such as low legal literacy of the community, minimal capacity of nadzir, and overlapping administration are the main obstacles. Comparison with waqf practices in countries such as Egypt, Malaysia, and the UK also shows the need for institutional innovation and cross-sectoral approaches. This study provides an important contribution in proposing a more adaptive reformulation of national waqf policy that is oriented towards maqāsid al-syarī'ah. Thus, waqf is not only an instrument of worship, but also a motor of sustainable and equitable socio-economic development.

Keywords:

*Pillars of Waqf ,
Waqf Conditions ,
Classical Islamic Law,*

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INTRODUCTION

Waqf is an Islamic legal institution that not only has a spiritual dimension as a continuous charity, but also plays a role as a mechanism for fair distribution of wealth in society. In the international context, the pillars and conditions of waqf have received widespread attention from both religious authorities and legislative institutions in various Muslim-majority countries. Countries such as Saudi Arabia, Egypt, Turkey, and Pakistan have developed formal regulations governing the waqf mechanism by referring to the classical fiqh doctrine of the Sunni schools of thought. (Mohsin et al., 2016a).



Egypt, for example, through *the Ministry of Awqaf*, legally stipulates the structure of the pillars of waqf in national legislation that explicitly details the status of the waqf, the object of waqf (*mawquf bih*), the beneficiaries (*mawquf 'alayh*), and the statement of the waqf contract (*ṣighah*). In that country, waqf law has been codified in a binding form and has administrative implications, even in the context of civil courts.

In contrast, non-Muslim countries with significant Muslim populations, such as the UK and Canada, apply a different approach through the principle of *charitable trust* (Peucker & Kayikci, 2020). In this model, the substance of the pillars and conditions of waqf are adopted in the framework of Western civil law, while maintaining the basic principle that assets cannot be withdrawn and must be used for the public interest. Waqf in this context undergoes a process of legal formalization that adapts to the principle of non-discrimination and *the principle of legal certainty*, but still recognizes the theological value inherent in the waqf contract (Mohiuddin, 2024). In these countries, waqf regulations are not theological in nature, but are recognized through secular legal instruments that guarantee legal protection for waqf objects and implementation. This phenomenon shows that the pillars and conditions of waqf can be legally expressed in various state systems, as long as the basic principles of continued benefit and non-commercialization are maintained normatively.

In Indonesia, the existence of waqf has a strong legal position, because it has received formal legitimacy in the national legal system through Law Number 41 of 2004 concerning Waqf (Mustaffa et al., 2023). In this law, the four main pillars of waqf are explicitly adopted, namely wakif, waqf property, nadzir (manager), and waqf pledge. The addition of the nadzir element as a pillar of waqf in the Indonesian context is the result of contextualization of classical Islamic legal theory, which adjusts to the needs of a modern institutional supervision and governance system. In addition, the requirements for the validity of waqf have also been regulated in detail in implementing regulations such as the Regulation of the Minister of Religion Number 73 of 2013, which regulates administrative procedures, recording, and reporting of waqf in an orderly manner (Mohsin et al., 2016b). However, in practice, many waqf have not been officially registered due to limited access to information and public understanding of these regulations.

Furthermore, social reality shows that although the waqf legal system in Indonesia has been codified, its implementation has not been fully optimized. Many waqf objects, especially land, do not yet have a clear legal status because they have not gone through an official registration process before the Waqf Pledge Deed Making Officer (PPAIW). This has given rise to ownership disputes that not only weaken the social function of waqf, but also create legal conflicts between heirs, nadzir, and state institutions. Another challenge is the emergence of contemporary waqf forms such as cash waqf and waqf through digital platforms, which have not been fully accommodated in the existing regulatory system. Therefore, it is important to review the effectiveness of norms on the pillars and conditions of waqf in Indonesian legal practice, as well as to ensure that the existing legal system is able to respond to social and technological developments.

Contemporary academics such as Abdullah al-Naim and Khaled Abou El Fadl emphasize that the structure of the pillars of waqf needs to be reconstructed to suit the needs of modern society without ignoring the basic principles of sharia. In the international arena, various countries have developed *waqf board* or *waqf commission*

institutions that are responsible for validating and supervising the formal requirements of waqf (Ghazali et al., 2021). In Malaysia, for example, the Selangor Waqf Institution and the Zakat and Hajj Waqf Office (JAWHAR) have developed a digital waqf documentation and mapping system based on sharia and administrative requirements. This approach shows that updating the pillars and requirements of waqf is not only possible but also necessary in response to the demands of the times.

Meanwhile, in Indonesia, recent legal studies have begun to direct discourse on the importance of *reconceptualizing* the concept of pillars and conditions of waqf. Research by institutions such as the Indonesian Waqf Board (BWI) and the results of studies from universities show the need for integration between normative, sociological, and administrative approaches in regulating waqf. This is where the importance of the legal position of waqf as a hybrid entity that contains elements of worship and muamalah so that it requires a multidisciplinary approach in formulating regulations. In fact, most modern Islamic legal thinkers encourage *maqāṣid al-syarī'ah* to be the basis for formulating pillars and conditions of waqf in the contemporary era, so that it is not only legally valid, but also brings real social benefits.

The need to discuss the pillars and conditions of waqf normatively arises from the urgency of harmonization between legal texts and social reality. In the context of globalization, waqf values can be a strategic alternative in development based on justice and sustainability. However, if the basic elements such as the pillars and conditions are not formulated clearly and applicatively, then the potential of waqf will be reduced to just a symbol of spiritual generosity. Normative studies are important to ensure that waqf law is not only valid according to sharia, but also functions effectively in the context of national law. Thus, research on the pillars and conditions of waqf is not only relevant in theoretical aspects, but also has an urgent practical dimension.

Moreover, this discussion has strategic consequences in the development of a pluralistic national legal system that is responsive to the needs of the people. By making the pillars and requirements of waqf part of the national legal discourse, the state not only recognizes religious norms, but also encourages the creation of laws that are just and oriented towards the public interest. In a complex and dynamic social situation, waqf law can be a bridge between spiritual values and the needs of contemporary society. Therefore, the main motivation of this study is to strengthen the normative foundation of waqf law so that it remains relevant and adaptive amidst changing times, without losing the roots of sharia principles which are its main source of legitimacy.

METHOD STUDY

This study uses a juridical-normative approach with a library research method, which is the main method in legal studies to understand, analyze, and interpret legal norms systematically. This approach focuses on tracing primary and secondary legal materials to examine in depth the pillars and conditions of waqf from an Islamic legal perspective and its implementation in the Indonesian national legal system. The primary legal materials used include laws and regulations such as Law Number 41 of 2004 concerning Waqf, Government Regulation Number 42 of 2006, and Regulation of the Minister of Religious Affairs Number 73 of 2013. In addition, the secondary legal materials used consist of classical fiqh literature from four schools of thought (Hanafi, Maliki, Syafi'i, and Hanbali), scientific journals, previous research results, MUI fatwas, and publications from authoritative institutions such as the Indonesian Waqf Board and

the Indonesian Ministry of Religious Affairs. The data obtained were analyzed qualitatively through normative interpretation techniques, namely by reading legal texts contextually and teleologically to find coherence between written norms and the values underlying them.

This research is not only descriptive-analytical, but also explorative-critical, with the aim of exploring the theoretical and normative dimensions of the concept of pillars and conditions of waqf and testing its relevance within the framework of positive Indonesian law (Muthoifin et al., 2024). In the data collection process, a strict literature selection was carried out by considering academic quality, author authority, and publication actuality, so that the research results have validity that can be scientifically accounted for. The reasoning techniques used include legal deduction from sharia principles to concretization in the national legal system, as well as normative comparisons to waqf practices in other countries such as Egypt, Turkey, and Malaysia. With this approach, it is hoped that the research will be able to produce a normative synthesis that not only describes the legal position of the pillars and conditions of waqf, but also contributes to strengthening the national waqf legal system based on *maqāṣid al-syarī'ah*, responsive to the needs of society, and in line with the dynamics of legal globalization.

RESULTS AND DISCUSSION

Pillars and Conditions of Waqf According to Classical Islamic Law

In the framework of classical Islamic law, the pillars and conditions of waqf are the fundamental structure that guarantees the validity and effectiveness of the waqf contract. In general, the four main pillars of waqf include *the wakif* (donor of waqf), *mawquf bih* (property that is donated), *mawquf 'alayh* (beneficiary), and *ṣighah* (declaration or pledge of waqf) (Adwi & Syibly, 2019). These four pillars are interdependent and cannot be separated because the absence of one of them will invalidate the validity of the contract. The Hanafi school, for example, emphasizes the importance of the continuity of benefits from waqf property, while the Maliki school is stricter in terms of the determination of the wakif's intention which cannot be withdrawn. On the other hand, the Shafi'i and Hanbali schools pay great attention to the existence of witnesses in *ṣighah* to avoid disputes in the future.

The principle of *maqāṣid al-syarī'ah* is an important foundation in understanding the function of these pillars. The main purpose of waqf is to maintain the sustainability of social benefits from the waqf property and to create distributive justice in society. Pillars such as *mawquf bih* must meet the requirements that the property has value, can be used sustainably, and must not be used up in one use (Ambrose et al., 2015). This is the reason why classical fiqh is very strict in determining the types of property that are legitimate to be waqf. In addition, the intention or pledge of the wakif must be absolute and not dependent on conditions that can invalidate the waqf.

The historical relevance of these pillars and conditions not only persists in legal texts, but is also reflected in the social practices of Islamic societies since the Middle Ages. Waqf became a vital instrument in the construction of madrasahs, hospitals, and other public facilities. Therefore, the enforcement of these conditions is not merely a matter of legal compliance, but also part of an effort to realize the values of social justice, protection of community rights, and the continuity of benefits from a gift intended for the good of the people.

Formal Regulation of Waqf in Indonesia

In the Indonesian national legal system, waqf has gained explicit recognition as part of the positive legal system through Law Number 41 of 2004 concerning Waqf (Rimanto et al., 2021). This law is the main legal basis for regulating the process, implementation, and

management of waqf, and re-elaborates the four main pillars of waqf in a modern administrative framework. One important aspect of this regulation is the existence of nadzir as a party that manages and develops waqf assets, which in the context of classical Islamic law is not always positioned as a separate pillar. However, the addition of the nadzir element in the Indonesian positive legal system reflects the need to bridge the spiritual aspects of waqf with modern governance that demands accountability, professionalism, and transparency.

This regulation is strengthened by Government Regulation Number 42 of 2006 and Regulation of the Minister of Religious Affairs Number 73 of 2013 which technically regulates the procedures for registration, recording, and reporting of waqf assets (Mohsin et al., 2016a). One important provision is that the waqf pledge must be made before the Waqf Pledge Deed Making Officer (PPAIW) to ensure legal validity and facilitate land administration. However, in practice, many people still carry out waqf informally without official registration. This raises legal risks such as ownership disputes, misuse of assets, and loss of sustainability of waqf benefits that should be maintained forever.

A report from the Indonesian Waqf Board (BWI) in 2021 stated that of the more than 430,000 waqf land locations throughout Indonesia, around 52% were not yet certified (Nofianti et al., 2024). This condition is exacerbated by the lack of legal literacy at the community level, the lack of socialization from the government, and limited public access to land services and waqf institutions. In various regions, cases of conflict between heirs and nadzir are still often found due to the absence of a waqf oath deed or other written evidence. This situation emphasizes the need for revitalization of waqf law, not only from the regulatory aspect but also from the aspect of institutional implementation, development of nadzir human resources, and legal education at the grassroots level so that the pillars and requirements of waqf do not stop at the legal text alone, but are present functionally in the social life of the community.

Waqf Regulation at the International Level

In the international arena, waqf regulations show variations in form and system according to the legal structure and socio-cultural context of each country. In Egypt, the waqf legal system is managed by the Ministry of Awqaf *which* has full authority in the administration and supervision of all forms of waqf (Sano & Kassim, 2021). Regulations in Egypt adopt the Hanafi school of Islamic law, with an emphasis on formal documentation, professional management, and legal protection of waqf assets. Meanwhile, in Saudi Arabia, waqf regulations are under the Supreme Council of Waqf, which coordinates between waqf and beneficiaries through a sharia-based digitalization system. Countries such as Malaysia and Turkey have also shown significant developments in waqf management, where waqf is not only managed by the government but also by semi-public entities and sharia corporations that apply *the principles of good governance* (Haruna & Ibrahim, 2021).

Malaysia is an interesting example with its waqf federalism approach, where each state has its own waqf institution such as MAIWP and JAWHAR. They implement a digital registration system integrated with Islamic banking for cash waqf and productive waqf. Turkey has also developed a documentation and reporting system based on public transparency with full support from financial authorities and higher education institutions. Both countries place the pillars and conditions of waqf as part of the national legal system which is given space for actualization through institutional innovation and information technology. These steps show that waqf law can develop without losing its theological roots.

On the other hand, countries with minority Muslim populations such as the UK and Canada apply a different approach through the mechanism of *charitable trusts* (Cooper et al., 2016). In this context, waqf is equated with the concept of trust law, where the waqf property is administered by the trustee based on civil law, but is still directed towards social and religious goals. This model allows Muslims in the diaspora to practice waqf with full legality without having to conflict with the local legal system. In this system, waqf requirements are adapted to universal principles such as transparency, non-profitability, and sustainability. This adaptation

shows that the pillars and conditions of waqf can be reformulated contextually without eliminating their substantial values, as long as they remain based on the goals of social justice and protection of the rights of the people.

Comparative Analysis

Comparison of waqf regulations in Indonesia with other countries reveals variations in legal and institutional approaches influenced by the political structure, legal system, and socio-cultural conditions of each country. In Indonesia, the approach to waqf tends to be dualistic (Rizal & Amin, 2017), namely combining sharia norms with positive legal instruments that are administrative in nature. On the one hand, Indonesian law recognizes the pillars and conditions of waqf based on sharia provisions; on the other hand, its implementation is monitored by a formal legal system that requires recording, certification, and reporting through official state institutions. This is different from the systems in Malaysia and Turkey, which more integratively combine religious and state aspects through work units that have autonomous authority, and are able to formulate strategic policies related to the use of waqf nationally (Cayamodin & Durakoglu, 2021).

In the context of universalism of the pillars and conditions of waqf, basic principles such as the existence of a legally competent waqif, clarity of the waqf object, sustainable benefits for the recipient, and a valid pledge, appear to be elements that are recognized across jurisdictions. However, its implementation is not uniform. In countries such as Egypt and Saudi Arabia, the waqf pledge has direct legal implications that are binding without requiring the intervention of a civil court (Aleraiq & Asutay, 2023). On the other hand, in Indonesia, the process of legalization and legal recognition of a waqf requires a fairly long and bureaucratic administrative procedure, which sometimes becomes an obstacle in itself in the development of waqf assets. The adaptation of common law legal systems such as in England and Canada also shows that waqf can be equated with trust institutions, while still prioritizing the principles of benefit and continuity.

The social context and legal structure clearly influence the interpretation and implementation of the conditions and pillars of waqf. In countries with high levels of legal literacy and good institutional oversight, waqf becomes a strategic and transparent development instrument. In contrast, in developing countries, information inequality, legal uncertainty, and overlapping regulations cause many waqf assets to be neglected or misused. Therefore, this comparative study concludes that the success of implementing the pillars and conditions of waqf depends not only on how strong the legal text is, but also on the maturity of institutions, the support of public policy, and the legal culture of society that supports the waqf system as an integral part of the country's socio-economic governance.

Implementation Challenges and Problems

Although regulations regarding the pillars and requirements of waqf have been clearly stated in the national legal system and in the normative framework of Islam, its implementation in the field still faces various serious challenges. One of the most prominent problems is the low level of legal literacy of the community regarding the concept and procedures of waqf. Many waqfs do not understand the importance of recording and certifying waqf, which ultimately has an impact on the legal status of the assets being waqfed. The absence of a valid waqf pledge deed causes many waqf assets to be in a weak legal position, even at risk of being reclaimed by heirs or other parties. This is exacerbated by the general perception that waqf is merely an act of worship that does not require formal legal procedures, whereas in reality the legal status of waqf assets is highly dependent on state registration and recognition.

Another problem is the lack of institutional capacity and human resources of nadzir in managing waqf assets professionally and productively. A report from BWI in 2022 showed that more than 70% of registered nadzir had not had formal training in waqf management, land law, or sharia investment (Jalili et al., 2024). As a result, many waqf assets are neglected and do not

produce optimal benefits for the community. There are still many nadzir who carry out their duties voluntarily without adequate compensation or structural support. This inequality results in instability in waqf management and reduces public trust in nadzir institutions. In fact, several cases show misuse of waqf assets for personal gain due to a weak supervisory system and the absence of strict administrative sanctions.

Another structural problem is the lack of synchronization of data and waqf recording systems between authorized agencies, such as the Ministry of Religion, BPN, and local governments. Data from AMAN and research from the Epistema Institute state that there are still millions of hectares of customary and waqf land in Indonesia that have not been formally recognized because they have not been recorded in the State administration system (Hasun et al., 2021). This opens up opportunities for vertical conflict between indigenous peoples, customary institutions, and the government, especially in the context of land development and investment. This situation shows that waqf problems are not only normative issues, but also include structural, technical, and cultural aspects. Therefore, legal reform must be carried out comprehensively, not only through regulatory revisions, but also by increasing institutional capacity, carrying out governance reforms, and expanding waqf legal education to the wider community.

CONCLUSION

The four pillars of waqf, *mawquf bih*, *mawquf 'alayh*, and *ṣighah* have a logical relationship that strengthens each other, so that the existence of each element cannot be ignored. The emphasis of fiqh on the clarity of intention, the validity of the object, and the sustainability of benefits shows that waqf law operates in the logic of *maqāṣid al-syarī'ah*, namely maintaining public interest and social justice. Each school of thought emphasizes procedural precision as a form of protection for waqf assets and the rights of their recipients, making these requirements not merely administrative requirements, but the moral and legal foundation of the waqf act itself.

In the context of positive law in Indonesia, the implementation of the pillars and conditions of waqf has been formalized through Law Number 41 of 2004 and various implementing regulations. This formal recognition shows the consistency between national law and sharia principles, although there are adjustments such as the addition of the function of nadzir as a professional manager of waqf assets. However, the facts on the ground show a significant gap between norms and reality. Weak recording systems, low legal literacy, and limited institutional capacity are the main obstacles in achieving the effectiveness of waqf law in Indonesia. Uncertified waqf assets, poorly trained nadzir, and ownership conflicts are challenges that have not been resolved systematically.

International comparative studies show that various Muslim majority and minority countries have succeeded in formulating waqf models that are adaptive to their respective legal systems. Malaysia and Turkey have succeeded in implementing digital-based waqf management systems and public transparency. Meanwhile, in countries with common law systems such as England and Canada, waqf is represented in the form of a *charitable trust* that is able to bridge religious practices and secular legal systems. This shows that the pillars and conditions of waqf are operationally elastic, as long as they maintain the essence of justice, usefulness, and sustainability. This global experience is important as a reference in formulating waqf legal reform in Indonesia.

Overall, the success of waqf implementation does not only depend on the strength of the regulatory text, but also on the capacity of actors, institutional systems, and legal political support. Waqf legal reform must target the root of the problem such

as a weak administrative system, lack of public education, and the lack of synergy between cross-sector actors. There needs to be integration between the sharia approach and the evidence-based public policy approach so that waqf can become a motor of development that is not only spiritual, but also socio-economic. With systematic and participatory steps, the pillars and requirements of waqf will not only become part of religious doctrine, but also a strong and relevant pillar of national law for contemporary society.

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