

The Registration of Waqf Land in Realizing Legal Certainty in Indonesia

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Article Info

Article history:

Received Jan, 2026

Revised Jan, 2026

Accepted Jan, 2026

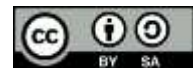
Keywords:

Land Registration, Land Ownership Waqf, Waqf Land, Legal Certainty, Indonesia

ABSTRACT

Waqf is one of the acts of worship of Muslims. Law Number 41 of 2004 stipulates that waqf is a legal act by a waqif to separate and/or transfer part of his property to be used forever or for a certain period of time in accordance with his interests for the purposes of worship and/or public welfare in accordance with sharia. The waqf of land ownership in Indonesia requires professional management so that it can become a religious institution as well as an institution that can help the economy of Muslims. Waqf requires legal certainty to avoid conflicts in the future. Legal certainty is obtained by registering the waqf at the Land Office so that a certificate is obtained which serves as proof of ownership of the waqf land. The method used in this study is the normative juridical method. The data sources are secondary data. The data collection method was conducted through a literature study. Data processing was carried out using descriptive analysis. The registration of Waqf Land in the National Land Law System is carried out through the Land Registration mechanism regulated in Government Regulation Number 24 of 1997 in conjunction with Government Regulation Number 18 of 2021.

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1. INTRODUCTION

Law Number 5 of 1960 concerning Basic Agrarian Principles regulates land tenure rights. Land tenure rights include the rights of the Indonesian people to land, the state's rights to land, the customary rights of indigenous peoples, land rights, waqf land, and mortgage rights. Land ownership rights originate from the Indonesian people's rights to land as the highest land ownership rights. Land ownership rights contain a series of authorities, obligations, and/or prohibitions for rights holders to do something with the

land they own. What is permissible, obligatory, and/or prohibited to do is the distinguishing factor between the various rights of control over land regulated in the Land Law of the country concerned. Land ownership rights can also be interpreted as a legal institution if they have not been linked to specific land and subjects. Land ownership rights can also be a concrete legal relationship (*subjektief recht*) if they have been linked to specific land and specific subjects as the holders of the rights [1]–[4].¹

One of the rights of control over land

¹Boedi Harsono, 1997. *Hukum Agraria Indonesia*, Penerbit Djambatan, Jakarta hal. 232.

is the right to land. A person who has the right to land is called the subject of the right to land or the holder of the right to land. The holder of the right to land can be an individual Indonesian citizen, a foreigner residing in Indonesia, a private legal entity or public legal entity, a legal entity established under Indonesian law and domiciled in Indonesia, or a foreign legal entity that has a representative in Indonesia [5]. The authority of land right holders is stipulated in Article 4 paragraph (2) of the Basic Agrarian Law, namely to use the land rights in question, including the earth, water, and space above it, as necessary for purposes directly related to the use of the land within the limits set by the Basic Agrarian Law and other higher laws and regulations [6]–[8]. Land rights holders have the authority to use land rights for the purpose of constructing buildings; utilizing land rights for agricultural, livestock, fishery, or plantation purposes; using the earth's body; or using the space above the land rights. One of the powers of land rights holders over their land rights as stipulated in the Basic Agrarian Law is to donate their Freehold land for religious, educational, and social purposes.

Article 49 paragraph (3) of the Basic Agrarian Law stipulates that:

"The endowment of privately owned land is protected and regulated by Government Regulations"

Article 1 paragraph 1 of Law Number 41 of 2004 concerning Waqf states that:

"Waqf is a legal act by a waqif to separate and/or transfer part of his property to be used forever or for a certain period of time in accordance with his interests for the purposes of worship and/or public welfare according to sharia."

The transfer of land by the owner for the purposes of worship and/or public welfare in accordance with sharia (wakif) results in the transfer of control over the

Freehold Land to the nazhir. Article 1 paragraph 4 of Law Number 41 of 2004 concerning Waqf stipulates that Nazhir is the party who receives waqf property from Wakif to be managed and developed in accordance with its intended purpose.

Article 1 paragraph 3 of Law Number 41 of 2004 concerning Waqf stipulates that a waqf pledge is a statement of intent made verbally and/or in writing by the waqif to the Nazhir to donate his property as waqf. Article 21 of Law Number 41 concerning Waqf stipulates that the waqf pledge shall be set forth in a Waqf Pledge Deed. Then, Article 17 paragraph (2) of Law Number 41 concerning Waqf stipulates that the waqf pledge as referred to shall be declared verbally and/or in writing and set forth in a Waqf Pledge Deed by an official called Official Issuing Waqf Deeds. Article 1 paragraph 6 of Law Number 41 of 2004 concerning Waqf stipulates that Official Issuing Waqf Deeds is an authorized official appointed by the Minister to draw up a waqf deed. The Waqf Pledge Deed serves as initial evidence² of the existence of a waqf legal act that is valid both religiously and under positive law in Indonesia, as clearly stated in Law Number 41 of 2004 concerning Waqf.

Article 32 of Law Number 41 of 2004 concerning Waqf stipulates that the Official Issuing Waqf Deeds on behalf of Nazhir shall register waqf property with the competent authority no later than seven working days after the waqf deed is signed. Then, Article 34 of Law Number 41 of 2004 concerning Waqf stipulates that the competent authority shall issue proof of registration of waqf property. The purpose of the process of recording and administering waqf deeds at the Office of Religious Affairs and the Land Office is to provide legal certainty and protection³ with regard to waqf property, especially waqf land, the existence of waqf land is officially recognized by the state, and the purpose of recording and administering waqf deeds at

²Faisal, Akibat Hukum Ketidadaan Akta Ikrar Wakaf Atas Perwakafan Tanah, Jurnal Delega Law: Jurnal Ilmu Hukum, Fakultas Hukum Universitas Muhammadiyah Sumatera Utara, Vol. 3, Nomor 2, 2018.

³Fatimah, Pendaftaran Tanah Wakaf Dalam Konteks Kepastian Hukum Hak Atas Tanah, Jurnal Hukum Samudra Keadilan, Fakultas Hukum Universitas Samudra, Volume 13, Nomor 2, 2018, hlm. 290.

the Office of Religious Affairs through the creation of an Deed of Waqf Pledge is to determine the legal status of land as waqf land⁴ which cannot be transferred or inherited and guarantees that the use of the land is in accordance with the intentions and objectives of the waqf [9]–[12].

The process of registering waqf land at the Land Office will result in the issuance of a waqf land certificate. This certificate serves as authentic proof⁵ and legally valid in relation to the status of the donated land. With the existence of the waqf certificate, the legal status of waqf land becomes strong so that it cannot be sold, inherited, or transferred to other parties outside the provisions of the law [13]–[17].

In daily waqf practice, many waqf issues arise. The causes of these issues include waqf pledge that do not meet the proper requirements. The wakif, or endower, donates his property only verbally to the nazhir (usually a religious teacher or religious leader), sometimes even without any witnesses. As a result, after the death of the endower and/or nazhir, problems arise between the nazhir and the family or heirs of the endower⁶, or conversely, if the nazhir passes away, the waqf property is controlled by the family or heirs of the nazhir. As a result, there are many cases where the status and whereabouts of waqf property are unclear. In this study, the issue is how the Registration of Waqf Land can provide legal certainty in Indonesia.

2. METHOD

This study is a normative legal study. Normative legal studies are legal studies that focus on positive legal norms in the form of legislation using secondary data. This study describes how the registration of Waqf Land provides legal certainty in Indonesia. The data sources in this study are secondary data. The secondary data in this study consist of

primary and secondary legal materials. These primary and secondary legal materials correlate with research in the Republic of Indonesia, which is related to the registration of Waqf Land in providing legal certainty in Indonesia. Data was collected through a literature study. Data collection through a literature study is the collection of secondary data conducted by studying primary legal materials, including laws and regulations, and secondary legal materials, including legal and non-legal opinions obtained from books, legal journals, previous research results, the internet, and official documents related to the issues that form the basis of the research. Data analysis was conducted on primary legal materials related to the Implementation of the Waqf Land Registration Process in Realizing Legal Certainty in Indonesia and secondary legal materials in the form of legal and non-legal opinions obtained from expert opinions through books, legal journals, and internet media, regarding the Implementation of the Waqf Land Registration Process in Realizing Legal Certainty in Indonesia. A comparison was then made between the primary and secondary legal materials, and the gaps between the two were identified. The secondary legal materials were used to examine the primary legal materials. In this case, the Theory of Legal Utility was used. The Theory of Legal Utility aims to examine the functions of law that apply to society. In this study, the Theory of Legal Utility aims to examine the implementation of Waqf Land Registration in realizing legal certainty in Indonesia. The thinking process used is inductive thinking, which is a thinking process that starts from general propositions whose truth has been proven through research and ends with a conclusion [18]–[20].

3. RESULTS AND DISCUSSION

⁴Zafran N., Moh. I., Khamim, Nuridin, Tinjauan Hukum Tanah Wakaf Yang Belum Tercatat Di PPAIW (Pejabat Pembuat Ikrar Wakaf). KUA Kecamatan Margadana, Jurnal Studi Islam Indonesia, Vol. 2, Nomor 1, 2024.

⁵Salim H., Ahmad R., Pengelolaan Tanah Wakaf Masjid Di Kota Manado, Jurnal AQLAM; Journal Of Islam And Plurality, Fakultas Ushuluddin, Adab dan Dakwah, Institut Agama Islam Negeri Manado, Vol. 3, Nomor 2, 2018.

⁶Faisal, loc. cit.

Waqf is one of the acts of worship of Muslims whose rewards continue until the end of life and even after death. Therefore, waqf is classified as a form of ongoing charity. The word “waqf” or ‘waqf’ comes from the Arabic word “waqafa”. The origin of the word “waqafa” means “to hold back” or “to stop” or “to remain in place” or “to stand still”⁷. Waqf is basically property that is deliberately separated by the waqif from economic circulation and is intended solely for amal jariyah.⁸ Article 1 paragraph 1 of Law Number 41 of 2004 concerning Waqf, it is stipulated that waqf is a legal act by the waqif to separate and/or transfer part of his property to be used forever or for a certain period of time in accordance with his interests for the purposes of worship and/or general welfare according to sharia. in accordance with syariah. Based on Article 1 point 1 of Government Regulation Number 42 of 2006 concerning the Implementation of Law Number 41 of 2004 on Waqf, waqf is defined as a legal act by a waqif to separate and/or transfer part of his property to be used forever or for a certain period of time in accordance with his interests for the purposes of worship and/or public welfare according to Syari’ah law.

In Section 1 of the General Provisions of Law Number 41 of 2004 concerning Waqf, it is stated that waqf legal actions must be recorded and stated in a Waqf Deed, registered at the Religious Court, and announced publicly. Furthermore, in positive law in Indonesia, waqf legal actions are also regulated in Government Regulation Number 25 of 2018 concerning Amendments to Regulation Number 42 of 2006 concerning the Implementation of Law Number 41 of 2004 concerning Waqf.

Law Number 41 of 2004 on Waqf also explicitly regulates the establishment of the

Indonesian Waqf Board as an independent institution tasked with promoting and developing national waqf in Indonesia. Article 48 of Law Number 41 of 2004 concerning Waqf stipulates that Indonesian Waqf Board is based in the capital city and may establish representatives in provinces and/or regencies/cities as needed, provided that the Indonesian Waqf Board has consulted with the local government beforehand.⁹

Basically, all of these regulations govern the use of waqf property in accordance with its function, one of which is the economic benefit of the waqf property for the purposes of worship and also to promote public welfare. Regarding when waqf comes into existence, according to Islamic law, waqf comes into existence at the moment when the person donating their property makes a pledge¹⁰. A different situation occurs in positive law, namely in Article 17 of Law Number 41 of 2004 concerning Waqf, which stipulates that the implementation of waqf must be carried out with a pledge made before the Waqf Pledge Deed Official and two witnesses, and must be made in the form of a Waqf Pledge Deed.

The endowment of privately owned land in Indonesia requires professional management so that it can fulfill two roles: as a religious institution and as an institution that can help the economy of Muslims, who constitute the largest religious/faith community in Indonesia. Land waqf is an institution that is very beneficial for the development of Islamic assets. Land waqf is an asset in the form of land that is handed over by its owner to the Muslim community to be managed for the purposes of worship and economic development of the community, specifically the Muslim community.¹¹ Therefore, this endowment

⁷Defri Aranda, Muhammad Natsir, Siti Sahara, Peranan Nazhir Dalam Transparansi Pengelolaan Tanah Wakaf, Jurnal Ilmiah Mahasiswa Meukuta Alam, Volume 2, Nomor 2, Desember, 2020

⁸Mohammad Machfudh Zarqoni, *Hak Atas Tanah, Perolehan, Asal dan Turunannya, Serta Kaitannya Dengan Jaminan Kepastian Hukum Legal Guarante) Maupun Perlindungan Hak Kepemilikannya (Property Right) Prestasi*, (Jakarta: Pustaka Publisher), hlm. 145.

⁹Dennise R.H. Paputungan, Wakaf Tanah Milik Sebagai Bentuk Peralihan Hak, Jurnal Lex Privatum, Universitas Sam Ratulangi, Vol. 3, Nomor 4, 2015, hlm 59.

¹⁰Aurelia Nadya P. T., dkk., Kedudukan Tanah Wakaf Yang Dikuasai Ahli Waris, Jurnal Perspektif: Kajian Masalah Hukum dan Pembangunan, Vol. 24, Nomor 2, 2019, hlm 107.

¹¹Abdul Hamid U., *Wakaf Tanah Hak Milik Belum Terdaftar, Jurnal Kepastian Hukum Dan Keadilan*, Fakultas

requires legal certainty so that it does not give rise to the possibility of conflict in the future¹². Providing legal certainty regarding land rights for all Indonesian citizens, which is one of the objectives of the enactment of Basic Agrarian Law can be realized through efforts, namely ¹³:

- a. The availability of written, comprehensive, and clear legal instruments that are implemented consistently in accordance with their spirit and provisions.
- b. The implementation of land registration enables land rights holders to easily prove their rights over the land they control, and allows interested parties, such as prospective buyers and creditors, to obtain the necessary information regarding the land that is the subject of the legal transaction to be carried out, as well as enabling the government to implement land policies.

Article 16 paragraph (1) of Law Number 41 of 2004 concerning Waqf states that waqf property consists of immovable and movable objects. Paragraph (2) further stipulates that immovable objects include:

- a. land rights in accordance with the provisions of applicable laws and regulations, whether registered or unregistered;
- b. buildings or parts of buildings standing on land as referred to in letter a;
- c. plants and other objects related to the soil;
- d. ownership rights over apartment units in accordance with the provisions of applicable laws and regulations;
- e. other immovable property in accordance with syariah provisions

and applicable laws and regulations.

The aforementioned Law Number 41 of 2004 on Waqf does not provide a clear explanation of the types of land that can be used as waqf objects¹⁴. The Law only provides guidance to refer to applicable legislation relating to National Land Law originating from the Basic Agrarian Law No. 5 of 1960.

Article 18 paragraph (1) of the Minister of Religious Affairs Regulation Number 73 of 2013 concerning Procedures for the Waqf of Immovable and Movable Property Other than Money stipulates that the waqf of immovable and movable property other than money shall be carried out by means of a statement of intent by the Waqif, made verbally and/or in writing to the Nazhir, to waqf his property. The Wakif's pledge of intent is set forth in the Waqf Deed (Article 18 paragraph (2)) and witnessed by two witnesses before the Waqf Deed Official (Article 19 paragraph (1)). Immovable waqf property in the form of land must be registered, as stipulated in Article 24 of the Minister of Religious Affairs Regulation Number 73 of 2013 concerning Procedures for Waqf of Immovable and Movable Property Other than Money, namely:

- a. Immovable waqf property in the form of land must be registered with the competent authority in the field of land affairs.
- b. The registration of immovable waqf property in the form of land as referred to in paragraph (1) shall be carried out based on the Waqf Deed or the Deed Substituting the Waqf Deed.
- c. Registration of immovable waqf property in the form of land referred to in paragraph (1) shall be carried out by submitting an application in the name of Nazhir, accompanied by:
 - 1) Certificate of land rights or

Hukum, Universitas Muhammadiyah Palembang, Vol. 2, Nomor 1, 2020, hlm 50.

¹²Ibid, hlm 288.

¹³Faisal, *Akibat Hukum Ketidadaan Akta Ikrar Wakaf Atas Perwakafan Tanah*, Jurnal Delega Law: Jurnal Ilmu

Hukum, Fakultas Hukum Universitas Muhammadiyah Sumatera Utara, Vol. 3, Nomor 2, 2018, hlm 148.

¹⁴Herlindah, dkk. *Analisis Yuridis Wakaf Tanah Negara dalam Perspektif Hukum Agraria dan Hukum Wakaf*, Peradaban Journal Of Law, And Society, Vol. 4, Nomor 1, 2025, hlm 78.

- certificate of ownership rights to the apartment unit concerned or other proof of land ownership;
- 2) A statement letter from the person concerned stating that the land is not in dispute, litigation, seizure, or pledged, as acknowledged by the village head or sub-district head or other equivalent official, and confirmed by the local sub-district head;
 - 3) Letter of consent from husband/wife if the waqf property is joint property;
 - 4) Letter of approval from the heirs if the waqf property is inherited property;
 - 5) Permission from the authorized official in accordance with the provisions of the legislation in the event that the land is obtained from a government agency, local government, State-Owned Enterprise/Regional-Owned Enterprise, and village administration or other equivalent entities;
 - 6) Permission from the land official if the certificate and decision to grant rights require permission for release/transfer;
 - 7) Permission from the holder of management rights or ownership rights in the case of Building Use Rights or Right of Use that are endowed on top of Management Rights or Ownership Rights.

Article 3 paragraph (1) of Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land

Agency Number 2 of 2017 concerning Procedures for Registering Waqf Land at the Ministry of Agrarian Affairs and Spatial Planning/National Land Agency stipulates that waqf land can be in the form of:

- a) Ownership rights or customary land that has not been registered;
- b) Right to Cultivate, Right to Build, and Right to Use on State Land;
- c) Right to Build or Right of Use on land Right of Management or Right of Ownership;
- d) Ownership Rights to Apartment Units; and
- e) State Land.

Ownership rights to land as referred to in Article 3 paragraph (1) letter a of the Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency Number 2 of 2017 concerning Procedures for Registering Waqf Land at the Ministry of Agrarian Affairs and Spatial Planning/ National Land Agency is the Right of Ownership over land as regulated in Article 16 in conjunction with Articles 20 to 27 of Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles. The definition of ownership rights over land as stipulated in Article 20 of the Basic Agrarian Law is related to Article 6 of the Basic Agrarian Law. Ownership rights are hereditary, strongest and full rights that a person can have over land, bearing in mind that these rights have a social function. The words hereditary, strongest and full are indeed deeply felt by every Indonesian who to have or regard as one's property¹⁵. In fact, it is not only felt but has been widely expressed, although not exactly in those words. The term "hereditary" means that the right of ownership can be continuously passed down to the heirs of each holder. The terms "strongest" and 'fullest' are intended to distinguish it from Rights of Use, Rights of Occupancy, Rights of Use, and others, indicating that among the rights to land that a person can have, only Freehold is "the most" (meaning: the strongest and fullest)

¹⁵*Ibid*, hlm 52.

[21]–[24].

Based on Article 25 letter c of the Minister of Religious Affairs Regulation Number 73 of 2013 concerning Procedures for Waqf of Immovable and Movable Objects Other than Money in relation to the registration of immovable waqf property in the form of land that does not yet have Freehold Title status originating from customary land, it is immediately registered as waqf land in the name of Nazhir. The registration of waqf land originating from customary land is regulated in Article 7 of Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency Number 2 of 2017 concerning Procedures for Registering Waqf Land at the Ministry of Agrarian Affairs and Spatial Planning/National Land Agency, which stipulates: paragraph (1) Waqf land originating from customary land shall be registered as Waqf Land in the name of Nazhir. Paragraph (2) stipulates that the application for registration of waqf on the land referred to in paragraph (1) shall be accompanied by:

- a) letter of request;
- b) Land Parcel Map/Survey Letter;
- c) valid proof of land ownership;
- d) Deed of Waqf Pledge or Deed Replacing the Deed of Waqf Pledge;
- e) a letter of approval for the relevant Nazhir from the agency that administers religious affairs at the subdistrict level; and
- f) A statement letter from the Nazhir/Wakif or a letter of reference from the Village Head/Head of Sub-District/community leader stating that the land is not in dispute, litigation, seizure, or pledged as collateral.

Paragraph (3) stipulates that if the registration application referred to in paragraph (2) has met the requirements in accordance with the provisions of laws and regulations, the Head of the Land Office shall issue a decision confirming the land as Waqf Land in the name of the Nazhir. Paragraph (4) stipulates that the decision confirming the

land as Waqf land in the name of the Nazhir as referred to in paragraph (3) shall be made in accordance with the format set out in Appendix I, which is an integral part of this Ministerial Regulation. Paragraph (5) stipulates that based on the decision referred to in paragraph (3), the Head of the Land Office shall issue a Waqf Land Certificate in the name of Nazhir. The requirements for registering waqf land originating from customary land need to be discussed further regarding valid proof of land ownership, especially in the absence of written evidence. Article 24 paragraph (1) of Government Regulation Number 24 of 1997 concerning Land Registration stipulates that for the purposes of registering rights, rights to land originating from the conversion of old rights shall be proven by means of evidence regarding the existence of such rights in the form of -written evidence, statements whose accuracy is verified by the Adjudication Committee in systematic Land Registration or by the Head of the Land Office in sporadic Land Registration, are considered sufficient to register the rights, right holders, and the rights of other parties that encumber them.

Article 24 paragraph (2) of Government Regulation Number 24 of 1997 concerning Land Registration stipulates that in the event that the evidence referred to in paragraph (1) is not or is no longer available in its entirety, proof of rights may be based on the fact of physical control of the land in question for 20 (twenty) years or more consecutively by the applicant for registration and his predecessors, subject to the following conditions:

- a) such control is exercised in good faith and openly by the person concerned as the rightful owner of the land, and is corroborated by the testimony of credible witnesses;
- b) such control, both before and during the announcement as referred to in Article 26, is not contested by the customary law community or the village/sub-district concerned or any other party.

Then, in the Explanation of Article 24

paragraph (2), it is explained that this provision provides a solution if the rights holder cannot provide proof of ownership as referred to in paragraph (1). In this case, the registration of rights can be carried out based on evidence of physical control that has been carried out by the applicant and his predecessor, with the following conditions:

- a) the possession and use of the land in question must have been carried out in good faith for 20 (twenty) years or more consecutively;
- b) the fact that the control and use of the land during that period was not contested and therefore considered recognized and justified by the customary law community of the village/subdistrict concerned;
- c) these things are corroborated by the testimony of trustworthy people;
- d) other parties have been given the opportunity to file objections through public announcements;
- e) Research has been conducted on the truth of the above statements.

In practice, this letter of reference from the village head/sub-district head is used as the primary legal basis for customary land ownership, both for applying for registration of customary land rights and as proof of daily land ownership. This letter of reference from the village head/sub-district head is known in the community as a Letter of Reference for Land Rights. The Letter of

Reference for Land Rights from the village head/sub-district head is then certified by the local sub-district head. In daily practice, Letter of Reference for Land Rights is used by the community as the sole written proof of ownership of former customary land rights, before applying for land registration. On the other hand, in the event of a transfer of rights to former customary land, the parties involved, such as the transferee, the Land Deed Official, and the Land Office official receiving the application for conversion and registration of former customary land, also accept Letter of Reference for Land Rights as proof of land ownership by the rights holder.

4. CONCLUSION

The main purpose of Waqf Land Registration in Indonesia is to provide legal certainty, which includes legal recognition of waqf land status, preventing land disputes, and ensuring its use in accordance with the waqf pledge for the benefit of the community. The registration of waqf land also aims to secure waqf assets, facilitate management, and support social welfare improvement through the optimal utilization of waqf land. The existence of official waqf land certificates can prevent disputes or misuse by unauthorized parties, and ensure that waqf land is used in accordance with its original noble purpose, such as for the construction of mosques, schools, or hospitals.

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