



RELIGIOUS PRACTICES OF LAND ENDOWMENT: EXAMINING REFORM AND DISPUTE RESOLUTION ALTERNATIVES OF LAND WAQF IN INDONESIA AND MALAYSIA

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ABSTRACT

Article History

Received: 9 May 2022

Revised: 5 October 2022

Accepted: 2 November 2022

Published: 28 November 2022

Keywords

Comparative law
Dispute resolution
Indonesia
Land
Malaysia
Waqf.

The research aimed to analyze the land waqf dispute resolution mechanisms in Indonesia and Malaysia to provide the Indonesian government with ideas regarding land waqf dispute resolution laws. The approach adopted was a comparative study that highlights the mechanisms and models of waqf dispute resolution in Indonesia and Malaysia. The results show that the Indonesian waqf dispute resolution mechanism comprises two approaches: juridical and sociological. The juridical approach is based on Waqf Law No. 41 of 2004, Article 62. Meanwhile, the sociological approach is based on local wisdom and policies derived from Islamic law. In comparison, the mechanism for resolving waqf land disputes in Malaysia consists of two routes: the non-litigation channel, which consists of negotiation, mediation, and arbitration, and the litigation path, via the sharia court. In the Malaysian mediation pathway, the mediator and the advocacy institution are State Islamic Religious Councils (SIRCS), assisted by waqf managers and experts. An arbitration mechanism is often chosen because the management of waqf land is, for about 40 percent, associated with business, commerce, industry, and property. The similarities between the two countries are that they are committed to resolving waqf land disputes based on applicable law, the concept of justice, and the desire to protect human rights, minimize expenses, build good relationships after disputes, and provide advocacy for the rescue of the donated land assets.

Contribution/Originality: By comparing studies in Malaysia and Indonesia, this research contributes to the study of waqf law, especially the law governing the settlement of waqf land disputes. In addition, this research provides recommendations to improve the legal mechanism for resolving waqf land disputes in Indonesia.

1. INTRODUCTION

Land waqf has spread throughout the world from the birthplace of waqf law in Saudi Arabia, and the management of waqf land has consequently advanced rapidly (Azhaa, Baharuddinb, Sayurnoc, & Afandie, 2013; Ismail, Salim, & Hanafiah, 2015). Land that has been entrusted to waqf management can be used to build places of worship, public facilities, Islamic boarding schools, hospitals, and graveyards, fund scholarships, and help people in need (Dogarawa, 2009; Thaker & Bin, 2018). The concept of land waqf has spread to various countries, including Turkey, Egypt, Iran, Pakistan, Malaysia, Bahrain, Bangladesh, and others. It has been shown to improve the quality

of asset management (Ghazali, Sipan, Mohammad, & Ab Aziz, 2021; Hapsari, Thaker, Mohammed, & Duasa, 2022; Puspitasari, 2017; Shafiai, Moi, & Ahmad, 2015). Furthermore, in Turkey, since 1924, waqf land has been used as agricultural land, of which 75 percent is rented by the community under a profit-sharing system (Indonesia & Unair, 2016). Likewise, waqf assets in some Muslim countries have been distributed to optimize the benefits to the community. In Algeria, 50 percent of waqf assets take the form of agriculture and plantations, compared with 33 percent in Tunisia, and 12.5 percent in Egypt. To optimize waqf land management, certain countries, such as Kuwait, have established waqf institutions that are in charge of administering waqf objects and professionally managing waqf assets (Khalil, Ali, & Shaiban, 2014).

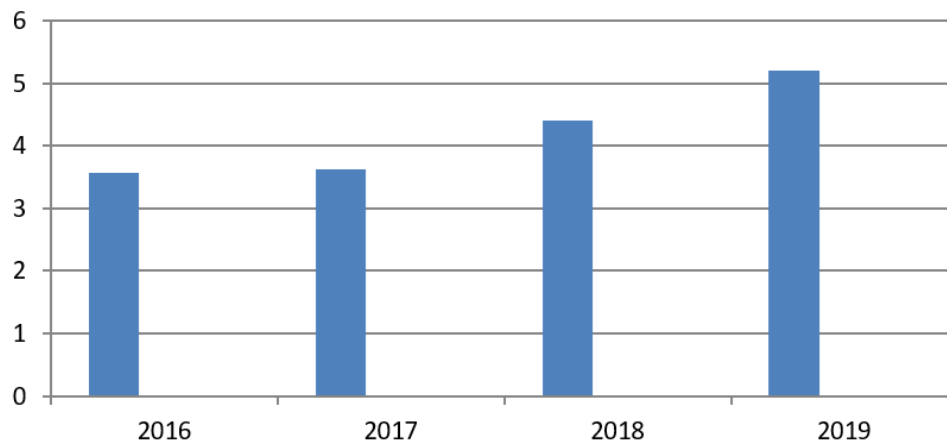


Figure 1. The development of the number of waqf land assets in Indonesia.

The number of waqf land assets is increasing every year. Figure 1 shows that the frequency of waqf practices in Indonesia is very high, meaning that it has the potential to cause problems or waqf disputes. In Malaysia, the law for resolving waqf disputes is regulated in detail in the ulema fatwa (Fatwa Committee Meeting of Sharia) in each state, since Malaysia is a federal nation consisting of 14 states. The rules for resolving waqf disputes are recorded/administered so that waqf disputes can be resolved in an orderly manner with legal certainty (Rani, 2015). Thus, it is very important to empirically compare the legal mechanisms for resolving waqf land disputes between Indonesia and Malaysia. Indonesian Law No. 41 of 2004 concerning waqf describes the mechanism for settling waqf disputes using deliberation, mediation, arbitration, and the religious court. However, in reality, this regulation has not been effective, because it has not been able to completely resolve land waqf disputes. Therefore, it is very urgent that a study comparing the legal land waqf dispute settlement mechanisms of Indonesia and Malaysia be conducted.

The purpose of this study is thus to analyze and compare the legal mechanisms for resolving waqf land disputes in Indonesia and Malaysia. The results of this research can be used to develop the science of waqf law, especially the law of settlement of waqf land disputes, and can inform further research in this area. This novel research can be used to improve the legal mechanism for resolving waqf land disputes in Indonesia.

2. LITERATURE REVIEW

2.1. Land Waqf Management in Indonesia

In Indonesia, land waqf was first practiced by Muslims because, at the time, the most valuable property owned by Muslims was land (Sukmana, 2020). Land waqf is very useful in the community because the land can be used to build places of worship, education, hospitals, graveyards, meeting places, and more. This is why the state provides legal protection for waqf land, preventing it from being usurped or misused by unauthorized parties. This legal protection takes the form of the stipulation of the Basic Agrarian Law (BAL) No. 5 of 1960. It explains that the state protects waqf land originating from *waqif*. Before the issuance of BAL, waqf was carried out in the form of lessons, meaning that there was no authentic evidence that waqf had taken place.

Furthermore, the state regulates the procedures for the implementation of land waqf in Gov. Reg No. 28 of 1977. The government regulates land waqf the purpose of which is for the general public. In addition, it also regulates the duties of the waqf manager, procedures for waqf property, and registration and certification of waqf land. The purpose of the stipulation of Gov. Reg No. 28 of 1977 is to provide legal certainty for land waqf acts, considering the very high level of community enthusiasm for land waqf. The frequency of waqf in Indonesia has increased significantly. According to data from the Directorate of Waqf Empowerment of the Ministry of Religion, waqf land assets increased from 2016 to 2019. In 2016, the national land waqf assets reached 4.359 billion m² in 435,768 locations throughout the archipelago. In 2017, they reached 4.364 billion m², and in 2018 they reached 4.4 billion m² (BPS, 2018). Based on Waqf Information System data, in 2019 waqf land assets covered 50,200.38 ha, spread over 372,322 locations.

Waqf disputes are problems that occur between the parties due to differences in interests that cannot be resolved internally. Waqf disputes can occur between *nadzir* (waqf manager) and *waqif*, *nadzir* and *waqif* heirs, *nadzir* among one another (between *nadzir*), and between the community and *nadzir*. In Bangladesh, the settlement of first-level disputes for mediation and arbitration in the waqf council is mandated, before proceeding to court (Ahmad & Karim, 2019). The purpose of waqf dispute resolution is to allow the community to secure and utilize the assets so that waqf law can be enforced (Jahar, 2019). The settlement of waqf disputes initially used the Islamic law that was common in the community. However, due to the increase of waqf in Indonesia, the law for resolving waqf disputes has been regulated in Article 226 of Presidential Instruction No. 1 of 1991 on the Compilation of Islamic Law on waqf, Article 62 of Law No. 41 of 2004 concerning Waqf Law, and Government Regulation No. 42 of 2006 in conjunction with Government Regulation No. 18 of 2020 concerning regulations for implementing waqf. Furthermore, according to Indonesian law, the *ulama's fatwa* is one of the products of Islamic law. The fatwa is the answer to a problem of Islamic law asked by a person and/or institution and posed to the *ulama*. A fatwa can also be issued by a fatwa institution, the MUI (*Majelis Ulama Indonesia/Indonesian Ulema Council*), which is responsible for establishing Islamic law.

2.2. Land Waqf Dispute Management in Malaysia

The mechanism for resolving waqf land disputes in Malaysia is based on rules derived from the Federal Conference that apply in each state. At the Federal Conference, it was generally established that the waqf dispute settlement mechanism has three stages: negotiation, arbitration, and judicial institutions (Donner & Greenwald, 2006). The stage of negotiation between the two parties is facilitated by the SIRC (State Islamic Religious Council), which has a mandate as an advocacy agency for the settlement of waqf disputes and the regulation of disputing parties. Negotiation is recommended because it is considered the first step in the resolution of any dispute, including waqf disputes (Manaf, 2017). This negotiation is assisted by waqf officers who look for details of the violations committed. Waqf officers provide facilities for both parties that enable them to communicate and participate properly. In negotiations, the parties can gain a better understanding of the strengths and weaknesses of their position and that of the other party. In addition, negotiations are best suited for this stage because they can be carried out quickly, at no cost, and without the need for specialist advice, before continuing to the mediation stage.

Mediation refers to the mechanism for resolving waqf disputes through the assistance of third parties – waqf officers and SIRC – as mediators (Ab Halim, Hambali, Manap, & Masran, 2019). The mediator (or third party or intermediary) will seek details of the violations committed, and, as the waqf officer knows and understands waqf land disputes, they will act wisely. Waqf officers are government-trained mediators, meaning that they have skills that increase their success rate in mediating. Ideally, the mediation results in a peace deed being drawn up. However, if it is unsuccessful, the case is processed through procedural law in court (Laila, Ratnasari, Ismail, Mahphoth, & Hidzir, 2022). Mediation through non-litigation is carried out by the disputing parties after

negotiation efforts are unsuccessful and the parties appoint a mediator to help resolve the waqf dispute (Menkel-Meadow, 2001).

Arbitration, or the private court stage, refers to dispute resolution using expert arbitrators (Jeong, Lerche, & Susnjic, 2008), including in the field of waqf land disputes. However, the process can use procedural law when both parties agree to it. Arbitration is a mechanism for resolving waqf land disputes through the Alternative Dispute Resolution (ADR) procedure, which is a series of procedures that function as an alternative form of dispute resolution through private courts. This mechanism is mostly applied in waqf land disputes where the waqf land is used for trade or commercial or industrial purposes, and the profits go to the entrepreneurs, not the community. The arbitration mechanism is used because the process does not take long, costs little, and produces a win-win solution through a deliberation approach. The final result of the agreement is a decision, the legal force of which is the same as the decision of a judicial judge.

When the parties cannot agree on a settlement through a non-litigation mechanism in the form of negotiation, mediation, or arbitration, the dispute must be settled through legal channels in the form of a sharia court. The court that resolves waqf disputes is the sharia court because land waqf is one of the implementations of Islamic law. However, in reality, some waqf land disputes are resolved in the general court. This has an impact on land waqf cases as they may experience extensive delays and, therefore, high costs, even though these costs must be borne by the waqf property (Mat & Abdul Aziz, 2010).

3. RESEARCH METHODS

This study included field research, which was conducted in Indonesia and Malaysia. The Indonesian sample was obtained through snowball sampling. The data sources were chosen based on the need to obtain data on waqf land disputes and their resolution, for example, the BWI (*Badan Wakaf Indonesia*/Indonesian Waqf Board) Central Jakarta and BWI Central Java, Central Java Religious Courts, and several Regency BWIs. Several considerations were kept in mind. First, in each selected area, the number of waqf acts was very large; many waqf assets were managed for the welfare of the people. Second, there were cases of waqf that caused disputes. The research area in Malaysia was determined by an academic of the Faculty of Law, Universiti Kebangsaan Malaysia (UKM), who was an expert in Islamic civil law, particularly waqf law.

The research method was an empirical juridical study, relating to the law as explained in the legislation and its realization in society. The data analysis was based on a comparative methodology, comparing and analyzing the legal systems for resolving waqf disputes in Indonesia and Malaysia. Comparative law is a research method that aims to compare laws with one another, through an exploration of the similarities and differences of the objects being compared (Doron, 2015). The required data was primary data from interviews with research respondents, and secondary data from primary legal materials, secondary legal materials, and tertiary legal materials. Primary legal materials were sourced from the laws governing waqf dispute settlement in both Indonesia and Malaysia. Secondary legal materials were sourced from the literature related to the research theme, and tertiary legal materials complemented the two prior legal materials. Qualitative methods were then used to analyze the data to answer the research questions.

4. COMPARISON OF LAND WAQF DISPUTE SETTLEMENT MECHANISMS

The above discussion informs our exploration of the similarities and differences between Indonesia and Malaysia regarding the model and mechanism of dispute resolution in land waqf management. There are certain similarities between Indonesia and Malaysia in resolving waqf land disputes. Both countries are committed to resolving waqf land disputes, which is evidenced by the implementation of regulations by the state. Malaysia regulates the settlement of waqf disputes through the Waqf Enactment, which applies in each state. Indonesia regulates it through Article 62 of Law No. 41 of 2004 concerning waqf. The article explains that the dispute

resolution mechanism comprises both non-litigation and litigation channels. The two countries seek to provide an alternative for resolving disputes over waqf land that is easy, cost-effective, convenient, and leads to win-win solutions. The alternative takes the form of socialization of the law on the settlement of waqf land disputes through non-litigation mechanisms or outside the court. Efforts are aimed at educating the public to not use the judiciary as the first means of resolving waqf land disputes. Both countries advocate for waqf land disputes to be settled entirely in the community, through the establishment of waqf institutions, such as SIRC (Malaysia) and BWI (Indonesia), to protect and provide legal certainty regarding waqf land in the form of waqf land certification so that waqf land disputes can be prevented and land waqf law can be enforced fairly. The two countries also have similarities in their efforts to provide citizens with human rights when carrying out the teachings of Islamic religious law, specifically land waqf law. Land waqf is one of the teachings of Islam that concerns the administration of property; land waqf is thus a social dimension of religion, meaning that any institution for resolving waqf land disputes is under the authority of the religious/sharia court.

There are, however, legal differences between Indonesia and Malaysia concerning the mechanisms for resolving waqf land disputes and the legal rules governing these mechanisms. The State of Indonesia explains that the mechanism for resolving waqf land disputes comprises deliberation, mediation, arbitration, and the religious courts (Article 62 of the Waqf Law). Meanwhile, the Malaysian state Waqf Enactment explains that the mechanism for resolving waqf land disputes comprises negotiation, mediation, arbitration, and the sharia courts. The difference lies in the fact that in Indonesia the settlement of waqf land disputes first involves deliberation, while in Malaysia it involves negotiation. There are certain differences in the meaning of deliberation and negotiation; deliberation is the internal settlement of waqf land disputes, whereas negotiation is deliberation with the involvement of a referee who leads the dispute resolution and mediates when the parties bargain in an effort to resolve the dispute. The results of the negotiation agreement are stated in the minutes of the dispute resolution. Given this understanding of the difference, negotiation is stronger than deliberation. Negotiation can be used to create written agreements and authentic evidence, which keeps the parties from deviating from the agreements they made together. Furthermore, the mechanism for resolving waqf land disputes through mediation differs in terms of the identity of the mediator. In Indonesia, the mediators are Waqf Pledge Deed Officials (*Pejabat Pembuat Akta Ikrar Wakaf/PPAIW*), village officials, community leaders, and religious leaders. Mediators are appointed based on their character and influence in the community. In Malaysia, the mediators are SIRC, assisted by waqf managers. SIRC and waqf managers are state agencies/institutions that were established in 1957 and are tasked with mediating waqf land disputes in the community. The agency officials have been trained by the state to become professional mediators.

Institutions for resolving waqf land disputes through mediation mechanisms differ in Indonesia and Malaysia. In Malaysia, mediation institutions are under the authority of SIRC, while in Indonesia there is no professional mediation institution, although the BWI does exist. However, so far, mediation in Indonesia is based on community traditions, in which mediating bodies are formed incidentally and dissolved when the mediation is completed. From an institutional perspective, therefore, the settlement of waqf land disputes through mediation is still weak. In Malaysia, waqf land disputes are often settled through arbitration in the community, because waqf land is mostly (40%) used for economic activities, business, and property development. The mediation mechanism is like a legal process in a court of law but is carried out in a familial manner; therefore, arbitration is often referred to as a family court. In Indonesia, in contrast, people rarely use arbitration as a waqf dispute resolution mechanism, because waqf land in Indonesia is rarely (20%) used for business, trade, industry, or property.

The legal culture of the Indonesian and Malaysians people differs regarding the application of land waqf dispute resolution mechanisms. The legal culture of the Indonesian people is based on Hindu-Buddhist, Islamic, and Dutch colonial cultures. This means that legal culture is strongly influenced by traditions (local wisdom), which are trusted by the community (Syaufi & Zahra, 2021). Meanwhile, the legal culture of Malaysian society is based on a British colonial background, and the country belongs to the British Commonwealth. Malaysia is a federal nation

consisting of states. So, in setting regulations for the settlement of waqf land disputes, the state aims to provide legal certainty, enforce the law through institutions, and turn legal rules into legal norms or ethics set by the state. As a result, the mechanisms for resolving waqf land disputes differ between the two countries, Indonesia tends to rely more on local wisdom and Malaysia on written rules, in part because the typology and causes of disputes also differ. Political will in Indonesia and Malaysia also differs in the application of the law to the settlement of waqf land disputes because the countries are organized differently. Malaysia is an Islamic kingdom. Thus, the Malaysian government's policy in enforcing the law to resolve land waqf disputes is naturally based on the Islamic law contained in the *fiqh* books of the ulama, which has been turned into written laws established by the state. Meanwhile, Indonesia's state legal policies for resolving land waqf disputes only emerged in 1991 through the Compilation of Islamic Law No.1 of 1991 and were further developed after the enactment of the Waqf Law in 2004. BWI, as a new waqf institution, was instituted in several new regions/districts in 2018. It is this government policy that affects the development of waqf in Indonesia, meaning that even in the settlement of waqf disputes, Indonesia still lags behind. The findings described above are summarized in Table 1.

Table 1. Legal differences between Indonesia and Malaysia regarding the settlement of waqf land disputes.

No.	Description	Indonesia	Malaysia
1.	Legal System	Civil law, local wisdom	Common law, towards Civil Law
2.	Legal basis	Waqf Law No. 41/2004, for all citizens	Waqf Enactment, different in every state
3.	Non-Litigation Waqf Land Dispute Settlement Institution	Formed incidentally	SIRC and Waqf Manager
4.	Mediator	Waqf pledge deed official (PPAIW), community leaders, religious leaders	SIRC
5.	Arbitration	Rarely used	Often used
6.	Litigation Waqf Land Dispute Settlement Institution	Civil law: Religious Court Criminal law: District Court Administrative Area: Administrative Court	District Court
7.	Political Will	Since the promulgation of the 1991 Compilation of Islamic Law and refined by the Waqf Law No. 41 of 2004	Since 1954

5. CONCLUSIONS AND SUGGESTIONS

The results showed that Indonesia and Malaysia have both similarities and differences in their mechanisms for resolving waqf land disputes. The similarities include that the two countries are committed to resolving waqf land disputes based on established rules, providing alternatives to resolve waqf land disputes fairly, protecting human rights, making the process affordable and easy, ensuring good post-dispute relations, advocating for the settlement of waqf land disputes for the sake of saving and protecting waqf land assets, both before and after the dispute, and the judicial institution authorized to settle waqf cases. The differences lie in the rule of law, the option of deliberation versus negotiation, the frequency of arbitration, the litigation institution, the culture of the people, and the level of political will. These differences follow from the characteristics of each country in terms of the typology of society, the types of waqf disputes, and the settlement models available based on the social structure of the community.

In addition, the legal systems that apply in Indonesia and Malaysia also affect the mechanisms for resolving waqf land disputes. While the legal system in Indonesia adheres to civil law, the legal system in Malaysia adheres to common law. Civil law is a legal system that uses statutory rules as its legal basis, while common law is a legal system that uses the determination of judges or the law that is accepted in society as its legal basis. This difference affects the operation of the law, including the law as it pertains to waqf dispute resolution mechanisms. Thus, it is understandable that there are similarities and differences between the legal mechanisms for resolving waqf disputes

in Indonesia and Malaysia. The differences between Indonesia and Malaysia are based on the form of the legal system, the judiciary that resolves land waqf disputes, land waqf rules, and government policies on advocating for land waqf dispute resolution.

A policy implication of this research is that both the Malaysian and Indonesian governments need to strengthen their waqf dispute resolution models and educate the public about the available mechanisms. In addition, policies advocating for the settlement of waqf land disputes in the community also need to be strengthened through institutional channels and should involve legal experts or professionals as professional negotiators and moderators, enabling waqf disputes to be resolved completely.

A limitation of this study is that it has not analyzed the disputed waqf land classifications in Indonesia and Malaysia. In addition, the frequency with which the various models and mechanisms are selected by the disputing parties has not been discussed. For this reason, further research is needed to analyze the general types of disputed waqf land as well as the mechanisms that are generally implemented in dispute resolution, both in Indonesia and Malaysia. Further studies are also necessary to compare waqf land management and dispute resolution alternatives in various other predominantly Muslim countries.

Funding: This study received no specific financial support.

Competing Interests: The authors declare that they have no competing interests.

Authors' Contributions: All authors contributed equally to the conception and design of the study.

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