

Waqf Land Certification Postponement for Place of Worship Due to the Obscurity of the Toll Road Expansion Project (Re-overview of Gustav Radbruch's Three Basic Legal Values Theory)

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Abstract

Data from the Ministry of ATR/BPN shows that most *waqf* lands have legal certainty problems. This article wants to look at the case of delaying the certification of *waqf* land for the Baitussalam Mosque in Semarang City due to the unclear toll road expansion project. The discussion is related to Gustav Radbruch's theory of three fundamental legal values. This paper uses an empirical juridical approach with qualitative descriptive-analytical research specification. Data were obtained through interviews with several key informants and supported by legal materials obtained from literature studies. The results showed that the delay in certifying the *waqf* land of Baitussalam Mosque at the Semarang City Land Office was due to legal concerns by residents if the land was affected by the expansion of the toll road project. This article proves that Gustav Radbruch's standard priority teachings, which prioritize justice over expediency and legal certainty, are irrelevant and not ideal. The case of Baitussalam Mosque places legal certainty through *waqf* land certification as a top priority that must be carried out. Thus, this study confirms the teaching of casuistic priority in the theory of modern legal goals.

Keywords: *waqf* land; basic legal values; Gustav Radbruch; standard priority; casuistic priority



Data Kementerian ATR/BPN menunjukkan sebagian besar tanah wakaf memiliki problem kepastian hukum. Artikel ini ingin melihat kasus penundaan sertifikasi tanah wakaf Musholla Baitussalam di Kota Semarang sebagai dampak dari ketidakjelasan proyek perluasan jalan tol. Pembahasan dikaitkan dengan teori tiga nilai dasar hukum Gustav Radbruch. Tulisan ini menggunakan pendekatan yuridis empiris dengan spesifikasi penelitian kualitatif yang bersifat deskriptif analitis. Data diperoleh melalui wawancara dengan beberapa informan kunci dan didukung oleh bahan-bahan hukum yang diperoleh dari studi pustaka. Hasil penelitian menunjukkan bahwa penundaan sertifikasi tanah wakaf Mushalla Baitussalam pada Kantor Pertanahan Kota Semarang dikarenakan timbulnya kekhawatiran hukum oleh warga bila tanah tersebut terkena perluasan proyek jalan tol. Artikel ini membuktikan bahwa ajaran prioritas baku Gustav Radbruch yang mengutamakan keadilan dibanding kemanfaatan dan kepastian hukum tidak relevan dan tidak ideal. Kasus Mushalla Baitussalam menempatkan kepastian hukum melalui sertifikasi tanah wakaf sebagai prioritas utama yang harus dilakukan. Dengan demikian, studi ini mengkonfirmasi ajaran prioritas kasuistik dalam teori tujuan hukum modern.

Kata Kunci: tanah wakaf; nilai dasar hukum; Gustav Radbruch; prioritas baku; prioritas kasuistik

Introduction

Indonesia is a legal state with its national purposes stated in the fourth paragraph of the Preamble of the 1945 Constitution of the Republic of Indonesia, some of which are "to protect the entire Indonesian nation and the entire homeland of Indonesia" and "to promote public welfare". Furthermore, in Article 33 of the 1945 Constitution of the Republic of Indonesia, it is stated that "Earth and water and the natural resources contained therein are controlled by the state and used for the greatest prosperity of the people". This means that the issue of granting and post-compensation land acquisition for toll roads must be based on and guided by the constitution as well as an effort to realize legal values.

Concerning legal values, Gustav Radbruch said that the law must contain 3 (three) identity values: first, the principle of legal certainty (*rechtmatigheid*) which reviews it from the juridical point of view; second, the principle of legal justice (*gerechtigheid*) which reviews it from the philosophical point of view, where justice is equal rights for all before the court; third, the principle of legal expediency (*zwechmatigheid/doelmatigheid/utility*).¹

Historically, at first, Gustav Radbruch was of the view that the legal certainty purpose was at the top of the list compared to other goals. However, after seeing the reality that with his theory, Germany under Nazi legalized inhumane practices during World War II through the law at that time. Gustav then corrected his theory by placing the legal justice purpose above other legal objectives.²

As with the theory of legal purposes, Gustav Radbruch explained that it is necessary to use the priority principle of the three basic values to realize legal purposes. The priority principle must be applied in the following order: legal justice, legal expediency, and legal certainty.³

¹ Lon L. Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart," *Harvard Law Review* 71, no. 4 (February 1958): 630, <https://doi.org/10.2307/1338226>; Diya Ul Akmal, "Indonesian State of Law Is an Aspired Concept," *Nurani Hukum* 4, no. 1 (June 14, 2021): 89, <https://doi.org/10.51825/NHK.V4I1.9265>; Winda Wijayanti, "Eksistensi Undang-Undang sebagai Produk Hukum dalam Pemenuhan Keadilan bagi Rakyat (Analisis Putusan Mahkamah Konstitusi Nomor 50/PUU-X/2012)," *Jurnal Konstitusi* 10, no. 1 (2013), <https://jurnalkonstitusi.mkri.id/index.php/jk/article/view/100>.

² Ahmad Zaenal Fanani, "Berpikir Falsafati dalam Putusan Hakim," *Majalah Hukum Varia Peradilan* (Jakarta, March 2011), 57.

³ Muhammad Erwin, *Filsafat Hukum* (Jakarta: RajaGrafindo Persada, 2012), 123.

The three basic legal values above often have the potential to cause tension (*spannungsverhältnis*) between the three, consequently, something must be sacrificed. The priority principle as mentioned by Gustav Radbruch⁴ was carried out to anticipate tensions, through "standard priority doctrine" which prioritizes justice over legal expediency and certainty. However, the complexity of interests in life makes this doctrine less ideal and rises to a more relevant doctrine of casuistic priorities. The casuistic priority doctrine views the possibility that the three basic legal values can alternately, according to the context of the problem, become the dominant element.⁵ The existence of standard priority teachings sometimes contradicts legal needs in certain cases, because sometimes legal certainty is prioritized over justice and benefit.⁶

The teaching of standard priority and the teaching of casuistic priority are part of the modern teaching that exists in the theory of the objectives of Western law. Standard priority teachings place legal objectives in a hierarchical frame: justice, expediency, and legal certainty. Meanwhile, the casuistic priority teaching places the purpose of the law in accordance with the casuistic character faced.⁷

The three basic legal values should also serve as guidelines for finding solutions, including in the context of legal issues at the Baitussalam Mosque. The issue is the certification postponement of *waqf* land at the Semarang Land Office as a result of the obscure toll road expansion project. This has implications for fading legal certainty and will have an impact on the usefulness and justice of the law itself.

In various parts of the world, *waqf* has become the research object, especially in its role as an instrument of development and improvement of the socio-economic problems of the people with all their respective advantages and disadvantages. In Indonesia, there is a lot of research on *waqf*. There are

⁴ Robert Alexy, "Gustav Radbruch's Concept of Law," in *Law's Ideal Dimension* (Oxford: Oxford Scholarship Online, 2021), <https://doi.org/10.1093/oso/9780198796831.001.0001>; Torben Spaak, "Meta-Ethics and Legal Theory: The Case of Gustav Radbruch," *Law and Philosophy* 28, no. 3 (March 2009): 261–90, <https://www.jstor.org/stable/40284672>.

⁵ M Muslih, "Negara Hukum Indonesia dalam Perspektif Teori Hukum Gustav Radbruch (Tiga Nilai Dasar Hukum)," *Legalitas: Jurnal Hukum* 4, no. 1 (May 12, 2013): 149–50, <https://doi.org/10.33087/LEGALITAS.V4I1.117>.

⁶ Achmad Ali, *Menguak Tabir Hukum* (Bogor: Ghalia Indonesia, 2008), 68.

⁷ Pradikta Andi Alvat, "Teori Tujuan Hukum," *Jurnal Bengkulu.com*, January 29, 2021, <https://www.jurnalbengkulu.com/teori-tujuan-hukum>.

also many in Southeast Asia, for example in Malaysia and Singapore.⁸ Besides, in the Middle East Region, such as Saudi Arabia and Egypt,⁹ and in other parts of the world such as Turkey¹⁰ and Bangladesh.¹¹

Miriam Hoexter's study of Haramayn *waqf* in Algeria during the reign of the Ottoman Empire showed that *waqf* is a legal institution that is fully developed and functioning as well as an alternative income for the state.¹² *waqf* can be a supporting instrument in carrying out some of the functions and duties of the government.¹³ Various studies showed that *waqf* can function as an instrument for driving the people's economy,¹⁴ an instrument for community welfare,¹⁵ alternative funding for economic development,¹⁶ an accelerator for achieving the quality of education,¹⁷ as well as other social

⁸ Fahrurroji Fahrurroji and Jaenal Arifin, "Pengembangan Harta Wakaf di Singapura," *Equilibrium* 3, no. 1 (January 2015): 104–25, <https://doi.org/10.21043/equilibrium.v3i1.1274>.

⁹ Muhsan Muhsan, "Wakaf di Saudi Arabia dan Mesir (Tinjauan Manajemen dan Terapan Wakaf Produktif)," *Al-Majaalis: Jurnal Dirasat Islamiyah* 1, no. 1 (November 20, 2013): 151–68, <https://doi.org/10.37397/ALMAJALIS.V1I1.11>.

¹⁰ Abdurrohman Kasdi, "Dinamika Pengelolaan Wakaf di Negara-Negara Muslim," *Ziswaf: Jurnal Zakat dan Wakaf* 4, no. 1 (February 15, 2017): 73–86, <https://doi.org/10.21043/ZISWAF.V4I1.3032>.

¹¹ Nilna Fauza, "Rekonstruksi Pengelolaan Wakaf: Belajar Pengelolaan Wakaf dari Bangladesh dan Malaysia," *Universum* 9, no. 2 (2015), <http://repository.iainkediri.ac.id/378/>.

¹² Miriam Hoexter, *Endowments, Rulers, and Community: Waqf Al-Haramayn in Ottoman Algiers*, ed. Ruud Peters and Bernard Weiss (Leiden: Brill, 1998).

¹³ Tim Penyusun Direktorat Pemberdayaan Wakaf Dirjen Bimas Islam, *Paradigma Baru Wakaf di Indonesia* (Jakarta: Direktorat Pemberdayaan Wakaf Dirjen Bimas Islam Kementerian Agama RI, 2008).

¹⁴ Zainal Arifin Munir, "Revitalisasi Manajemen Wakaf sebagai Penggerak Ekonomi Masyarakat," *De Jure Jurnal Hukum dan Syariah* 5, no. 2 (June 30, 2013): 162–71, <https://doi.org/10.18860/DFSH.V5I2.3007>.

¹⁵ Miftahul Huda and Lukman Santoso, "Masjid Wakaf dan Transformasi Sosial Umat di Masjid Besar Imam Ulomo Sampung Ponorogo," *Tapis: Jurnal Penelitian Ilmiah* 1, no. 01 (July 14, 2017): 84–109, <https://doi.org/10.32332/TAPIS.V1I01.731>.

¹⁶ Nasrul Fahmi Zaki Fuadi, "Wakaf sebagai Instrumen Ekonomi Pembangunan Islam," *Economica: Jurnal Ekonomi Islam* 9, no. 1 (July 31, 2018): 151–77, <https://doi.org/10.21580/ECONOMICA.2018.9.1.2711>.

¹⁷ Miftahul Huda, "Wakaf dan Kemandirian Pesantren dari Tebuireng Hingga Gontor," *Islamica: Jurnal Studi Keislaman* 7, no. 1 (September 3, 2012): 211–31, <https://doi.org/10.15642/ISLAMICA.2012.7.1.211-231>.

functions.¹⁸ *Waqf* has enormous potential in alleviating poverty, especially in developing countries with very limited economic resources.¹⁹

However, *waqf* also faces many problems. In the context of land *waqf* development in Indonesia, *waqf* land certification is one of the most important challenges. In addition, there are several problems, starting from low public trust, unprofessional *nāzīr* (*waqf* manager), many idle *waqf* lands, and abandoned *waqf* land. That was why, Fauzi et.al. (2022) proposed several main priorities as a solution, namely socialization and education to the public, *nāzīr* certification, and the use of information technology for the administration of *waqf* land management, *waqf* land certification, and innovation of *waqf* land development projects.²⁰

Medaline's study showed that customary *waqf* land in West Sumatra also left many problems. The land *waqf*, which was generally intended for the construction of mosques or places of worship, was still unclear regarding its registration with the National Land Agency.²¹ This was closely related to the legal awareness of the community to certify *waqf* land.²²

Umi Supraptiningsih (2012) stated that providing legal certainty for *waqf* land is an effort to perpetuate the benefits of land for the public interest. Even so, the implementation of *waqf* on property rights as happened in Pamekasan was still rarely registered until the *waqf* Certificate was issued. The register data at the Office of Religious Affairs (KUA) showed that there were 58 *waqf* property rights carried out by *wāqīf* with limited use of places of praying, mosques, and education houses, some of which had been carried out orally or had made a *waqf* pledge deed. However, this data differs greatly from the

¹⁸ Amelia Fauzia, *Filantropi Islam: Sejarah dan Kontestasi Masyarakat Sipil dan Negara di Indonesia* (Yogyakarta: Gading, 2016).

¹⁹ Abulhasan M. Sadeq, "Waqf, Perpetual Charity and Poverty Alleviation," *International Journal of Social Economics* 29, no. 1 (2002): 135–51, <https://doi.org/10.1108/03068290210413038/FULL/XML>.

²⁰ R. M. Qudsi Fauzi et al., "The Challenges of Empowering Waqf Land in Indonesia: An Analytical Network Process Analysis," *International Journal of Ethics and Systems*, 2022, <https://doi.org/10.1108/IJOES-03-2021-0061/FULL/PDF>.

²¹ Onny Medaline, "The Development of 'Waqf' on the 'Ulayat' Lands in West Sumatera, Indonesia," *Journal of Social Science Studies* 5, no. 1 (July 13, 2017): 114, <https://doi.org/10.5296/JSS.V5I1.10419>.

²² Sudirman Sudirman and Ramadhita Ramadhita, "Kesadaran Hukum Masyarakat dalam Akselerasi Sertifikasi Tanah Wakaf di Kota Malang," *De Jure Jurnal Hukum dan Syariah* 12, no. 1 (June 15, 2020): 35–50, <https://doi.org/10.18860/J-FSH.V12I1.9087>.

Pamekasan Land Office, from 2000 to 2011 there were 13 *waqf* land certificates in Pamekasan which had been processed and issued.²³

Elia Apriatin (2019) also conducted a study on *waqf* problems regarding problems in maintaining *waqf* assets: a study in Kemranjen District, Banyumas. This study showed that in terms of safeguarding implementation of *waqf* in the Kemranjen District, Banyumas, there were still many *waqf* assets that had not been registered at PPAIW due to the lack of public understanding and *nāzir*'s performance that was not optimal and was passive in carrying out his duties. In addition, the lack of human resources in the KUA of Kemranjen Sub-district, This situation led to unequal socialization regarding the protection of *waqf* assets.²⁴

Furthermore, the Loka Oktara Study (2019) examined the problems of *waqf* land certification in Pematang Bengkulu, Muara Bangkahulu District, Bengkulu. This study showed that first, most of the *waqf* land designated for mosques was not yet certified; second, the process of certifying *waqf* land was following the law; third, the obstacle to the certification process was that the *nāzirs* have not completed the requirements to certify *waqf* land, the incomplete documents at the beginning of the *waqf* process, and both *nāzir* and his *wāqif* had passed away and the whereabouts of the heirs were unknown. As for *nāzirs*, who deliberately did not register the *waqf* land, was caused by their feelings that there had never been any problems so far, constrained by costs, and the process took a long time.²⁵

The problem of *waqf* land certification was also studied by Eki Apriliasari (2021) who stated that the results of her research in Jemur Wonosari Village based on KUA data in 2019 showed that most of the *waqf* land designated for mosques had not been certified. Constraints on *waqf* land certification were caused by several things, namely: first, *nāzir* has not completed the requirements because of the incomplete documents at the beginning of the

²³ Umi Supraptiningsih, "Problematika Implementasi Sertifikasi Tanah Wakaf pada Masyarakat," *Nuansa: Jurnal Penelitian Ilmu Sosial dan Keagamaan Islam* 9, no. 1 (January 5, 2012): 75–92, <https://doi.org/10.19105/NUANSA.V9I1.22>.

²⁴ Elia Apriatin, "Problem dalam Penjagaan Aset Wakaf: Studi di Kecamatan Kemranjen Kabupaten Banyumas" (Universitas Islam Negeri Walisongo, 2019), <http://eprints.walisongo.ac.id/id/eprint/10287/>.

²⁵ Loka Oktara, "Problematika Sertifikasi Tanah Wakaf di Kelurahan Pematang Gubernur Kecamatan Muara Bangkahulu Kota Bengkulu" (Institut Agama Islam Negeri Bengkulu, 2019), <http://repository.iainbengkulu.ac.id/2707/>.

waqf process; second, the *wāqif* had passed away and the whereabouts of the heirs cannot be identified; third, the problem of costs and processes that took a long time.²⁶

The problem of *waqf* land certification is a real problem and urgently requires legal certainty. This fact was also conveyed by the Director-General of Determination of Rights and Land Registration, Ministry of ATR/BPN, Suyus Windayana who said that until September 2021 the data in the BPN system was only 173,000 areas or about 40% of *waqf* land that had certificates of *waqf* land from around 411,333 areas/locations of the total amount of *waqf* land in Indonesia.²⁷ It means that most of the *waqf* land, which is around 60%, does not have a certificate of *waqf* land. Whereas *waqf* land certificates are letters of proof of rights that apply as strong evidence.

On the other hand, the times have shown that *waqf* plays a very important role in economic development in Indonesia, especially with the issuance of Law Number 41 of 2004 concerning *Waqf* (*Waqf* Law) in which the *waqf* sector can have a function towards increasing the economic welfare of the people.²⁸ The *Waqf* Law also provides space for productive *waqf* empowerment because there is a comprehensive understanding that is balanced with the latest management reference for empowering *waqf* capacity which includes *waqf* administration arrangements that provide legal certainty for *wāqif*, *nāzir* (manager), *mawqūf 'alayh* (*waqf* object), and encourage efficient and effective use of *waqf* properties.²⁹

This current study analyzed the problem of *waqf* after the provision of compensation for land acquisition of places of worship for toll roads based on the perspective of Gustav Radbruch's three basic legal values. The research

²⁶ Eki Apriliasari, "Problematisasi Sertifikasi Tanah Wakaf di Kelurahan Jemur Wonosari Kecamatan Wonocolo Kota Surabaya" (Universitas Islam Negeri Sunan Ampel Surabaya, 2021), <http://digilib.uinsby.ac.id/51096/>.

²⁷ Vandy Yhulia Susanto, "Hingga September 2021, Baru 40% Tanah Wakaf yang Telah Bersertifikat," Kontan.co.id, September 9, 2021, <https://nasional.kontan.co.id/news/hingga-september-2021-baru-40-tanah-wakaf-yang-telah-bersertifikat>.

²⁸ Nurhidayani, Muaidy Yasin, and Busaini, "Pengelolaan dan Pemanfaatan Wakaf Tanah dan Bangunan," *Maqdis: Jurnal Kajian Ekonomi Islam* 2, no. 2 (2017): 163–76, <http://journal.febi.uinib.ac.id/maqdis/article/view/126>.

²⁹ Waskur Waskur, "Pembuatan Akta Ikrar Wakaf di Kecamatan Rasau Jaya (Tinjauan Regulasi dan Implementatif)," *Al-Adl: Jurnal Hukum* 14, no. 1 (January 18, 2022): 154, <https://doi.org/10.31602/al-adl.v14i1.5797>.

questions addressed in this study were: 1) how is the problem of *waqf* after the provision of compensation for the acquisition of land for places of worship for toll roads in the Baitussalam Mosque? 2) What is the problem with *waqf* land certification based on Gustav Radbruch's theory of three basic legal values? The aim of the current study was to review Gustav's theory based on an empirical case of the certification postponement of *waqf* land for places of worship due to the obscurity of the toll road expansion project in Ngaliyan Semarang-Indonesia.

The approach in this research was the empirical juridical method, research that used empirical facts based on human behavior, both "verbally" through interviews and "real behavior" through direct observation.³⁰ The research specifications used were descriptive-analytical. There were 2 (two) types of data, first, primary data which were obtained from research conducted directly in the field.³¹ Data was collected by using surveys through interviewees to conduct observations and interviews with an empirical approach.³² Interviews were conducted with key informants, namely community leaders at Permata Ngaliyan Housing, the chairman of the Baitussalam Mosque management (*ta'mīr*) who is also a *nāzīr al-waqf* of the Baitussalam Mosque, and the attorney for the *wāqif*. Second, the secondary data were obtained from official documents, books related to the object of research, research results, and statutory regulations from the literature study.³³ The data analysis method used was qualitative analysis in which the data was processed and described in words.

The Problem of *Waqf* Land Certification Postponement for Baitussalam Mosque

The construction of the Batang-Semarang toll road involved a lot of people's land being affected by land acquisition. One of them was the

³⁰ Kornelius Benuf and Muhamad Azhar, "Metodologi Penelitian Hukum sebagai Instrumen Mengurai Permasalahan Hukum Kontemporer," *Gema Keadilan* 7, no. 1 (April 1, 2020): 27–28, <https://doi.org/10.14710/GK.7.1.20-33>.

³¹ Mukti Fajar and Yulianto Achmad, *Dualisme Penelitian Hukum Empiris & Normatif* (Yogyakarta: Pustaka Pelajar, 2010), 163.

³² F. C. Susila Adiyanta, "Hukum dan Studi Penelitian Empiris: Penggunaan Metode Survey sebagai Instrumen Penelitian Hukum Empiris," *Administrative Law and Governance Journal* 2, no. 4 (November 8, 2019): 697, <https://doi.org/10.14710/ALJ.V2I4.697-709>.

³³ Zainuddin Ali, *Metode Penelitian Hukum* (Jakarta: Sinar Grafika, 2009).

Baitussalam Mosque, Permata Ngaliyan Residence, RT 10 RW 03 Ngaliyan Semarang. After getting the compensation money, the replacement land for the mosque was obtained from Drs. Ec. Subur, who was donating one of his houses in the housing estate.³⁴ The land was a Freehold Title Certificate with No. 4854 which was owned by Drs. Ec Subur and Dra. Marita Laksmiwati. The Letter of Measurement also explained that the piece of land was located on Jl. Permata Ngaliyan II Kav. Number 47 RT. 10, RW. 03 with an area of 112 m² (One Hundred and Twelve Square Meters). The borders were as follows: to the north of Sus Hindarto's house, to the south of the road, to the east of Subur's house, and the west of Vishnu's.

Based on *Waqf* Law, *waqf* is defined as a party whom *waqf* property to separate and/or surrender part of the assets forever or for a certain period under their interests for worship and or public purposes according to sharia.

Based on power of attorney issued by Mohammad Abrori, SH. & Partners, Drs. Ec. Subur authorized Abrori to apply for a *waqf* plot of land. Abrori was given the right to appear before the Semarang Land Office officials, asking for good information related to the subject matter of Drs. Ec. Subur, make payments and perform actions with the principal power of attorney. Then Abrori took care of the *waqf* process on the *waqf* land from Drs. Ec. Subur for the Baitussalam Mosque, thus giving rise to legal documents which can be explained as follows:

1. In the management of the *waqf*, it had been ratified in the *nāzīr* Endorsement Letter Number: W.5/KK.11.33.08/08/VIII/2017 signed by the Head of the Religious Affairs Office (Kantor Urusan Agama - KUA) / Official for Making the *Waqf* Pledge Deed (Pejabat Pembuat Akta Ikrar Wakaf - PPAIW) Ngaliyan, Semarang, Central Java on August 31, 2017, where *nāzīr* consisted of 5 (five) people. Looking at the task arrangements in the *Waqf* Law, *nāzīr* has the following tasks: first, administering the *waqf* property; secondly, managing and developing *waqf* assets according to their purpose, function, and designation; third, supervising and protecting *waqf* property; fourth, the task report to the Indonesian *Waqf* Board.
2. The *Waqf* Pledge had been made and the *Waqf* Pledge Deed had also been issued with Number W.2/08/KK.11.33.08/2017 which was written by Drs. Ec. Subur as *wāqif* (the party who *waqf* property)

³⁴ Head of Neighbourhood 10 Permata Housing, Ngaliyan. Interview, January 15, 2020.

and Saminanto as the *nāzir* (the party who receives the *waqf* property from *wāqif* to be managed and developed according to its designation) on August 31, 2017. *Wāqif* had pledged *waqf* to *nāzir* over a plot of land that he owns in the form of Freehold Title Certificate Number 4854, with the area of ±112 m² for the Baitussalam Mosque. The implementation of the *waqf* pledge of the Baitussalam Mosque is following Article 17 of the *Waqf* Law, which was carried out by the *wāqif* to *nāzir* in front of PPAIW, Ngaliyan, Semarang, witnessed by 2 (two) witnesses.

3. Head of District KUA/PPAIW, Drs. H. Usman Effendi, MM also wrote to the Head of the Semarang Land Office by applying for registration of *waqf* land as follows:
 - a) Application for conversion/assertion of rights
 - b) Proof of land ownership
 - c) Deed of Pledge of *Waqf*/Deed of Substitute Deed of Pledge of *Waqf*
 - d) *Nāzir*'s Endorsement Letter

Legally, the land of the Baitussalam Mosque which had been established on the *waqf* land of Drs. Ec. Subur is a legitimate *waqf* land. Based on Article 7 of the *waqf* Law, Drs. Ec. Subur is an individual *wāqif*. While the replacement land for the Baitussalam Mosque in the context of *waqf* property is an immovable object in the form of land rights that are legally owned and controlled by the *wāqif* so it becomes clear that the *waqf* property in question can be *waqf*. However, after going through the *waqf* process, until now there has been no certificate of *waqf* land at the Semarang Land Office.

Based on Abrori's explanation,³⁵ the land for the Baitussalam Mosque has been granted but not yet certified. The mosque's *ta'mir* sees indications of expansion of the second phase of the toll road project, which will involve land that Drs. Ec. Subur has donated. Furthermore, it will affect Permata Ngaliyan Residence. When the mosque's *waqf* land is certified, it will be difficult if it is restored. The mosque's *ta'mir* assessed that the land for the Baitussalam Mosque, which currently has not been certified by the Semarang Land Office, should be postponed for widening the toll road.

Abrori's wish was to directly get a *waqf* certificate for the property. According to him, the land has been legally *waqf* and is counted as *waqf* land,

³⁵ Information obtained from *Wāqif*'s Attorney, through an interview on January 8, 2020

even though the formal legal process of certification has not been implemented. However, because Abrori was asked by the *ta'mir* to postpone the certification process, the certification document which was already in process at the Semarang Land Office was finally revoked.

Based on the explanation from the head of *ta'mir*, at first, the *wāqif* gave the land and the process had been carried out. Then there is the issue that Permata Ngaliyan Residence will be affected by all toll roads. In the end, the *ta'mir* did not make his own decisions. *Ta'mir* conveyed to the existing figures that the *waqf* certificate registration process was temporarily postponed at the Semarang Land Office. This fact does not mean the process will not continue, but it is waiting for clarity whether the toll road will indeed affect the mosque or not.³⁶

Ta'mir is worried that if the mosque has a *waqf* certificate from the Land Office, while all residents of Permata Ngaliyan Residence are affected by the toll road expansion project, it is not yet known where the mosque will be moved. If only 1 (one) alley remains in the housing estate, the conditions will be even more difficult. Thus, based on the previous experience of the compensation process for land and buildings of the Baitussalam Mosque, the certification process must be temporarily postponed while waiting for the certainty of the toll road expansion project. With the delay in certification, the *ta'mir* has more choices regarding the status and use of the land. If it is confirmed that the toll road expansion project will have an impact on *waqf* land, then its management will be left to the residents' agreement. Meanwhile, if the toll road expansion is not affected, the certification process will continue.³⁷

Serious problems arise because for more than four years the toll road expansion project has not yet been clarified. Indeed, the houses in the back alley of the mosque had generally received compensation from the toll road construction party, but so far there has been no clear point regarding the expansion of land acquisition for the planned Ngaliyan toll exit. There were concerns from residents regarding the certainty of the status of the land that had been pledged as *waqf* before the PPAIW.

³⁶ Information was obtained from the chairman of the Baitussalam Mosque management Interview, March 8, 2020

³⁷ Information was obtained from the chairman of the Baitussalam Mosque management Interview, March 8, 2020

In *fiqh* literature, *waqf* is indeed declared valid even though it is only done verbally based on trust. Usually, the *waqf* is handed over to a religious leader who is then appointed as *nāzir*. However, the practice of traditional *waqf* often causes problems. Many *waqf* lands eventually became contested by *nāzir*'s heirs or became the object of disputes between interested parties.³⁸ The postponement of land certification for the *waqf* of the Baitussalam Mosque has resulted in unclear land status and the potential for conflict in the future.

The Problem of *Waqf* Land Certification Postponement Based on Gustav Radbruch's Three Basic Legal Values

In legal theory, Gustav Radbruch recognized three basic legal values, namely justice, expediency, and legal certainty which often have the potential to cause tension (*spannungsverhältnis*) between the three. Gustav then anticipated these tensions through the standard priorities doctrine, first, justice; second, expediency; and third, legal certainty.³⁹

Gustav Radbruch said that the law must contain three identity values as mentioned above. First, the principle of legal certainty (*rechtmaticheid*) which review it from a juridical point of view. Second, the principle of legal justice (*gerechtigheid*) which review it from a philosophical point of view, where justice is equal rights for all before the court. Third, the principle of legal expediency (*zwechmatigheid/doelmatigheid/utility*).⁴⁰

The emergence of substitute land in the form of *waqf* land for the Baitussalam Mosque cannot be separated from the context of land acquisition as a series of previous legal events. Gustav Radbruch's three basic legal values in the context of the land acquisition have been transformed into legal principles as stated in Law Number 2 of 2012 concerning Land Procurement for Development in the Public Interest (Law No. 2 of 2012), namely Article 2 letters b, c, and d.

³⁸ Sam'ani Sam'ani, "Paradigma Baru Perwakafan Pasca UU No. 41 Tahun 2004 tentang Wakaf," *Jurnal Hukum Islam* 12, no. 1 (2009), <http://e-journal.stain-pekalongan.ac.id/index.php/Hukum/article/view/321>.

³⁹ Muslih, "Negara Hukum Indonesia dalam Perspektif Teori Hukum Gustav Radbruch (Tiga Nilai Dasar Hukum)," 149–50.

⁴⁰ Alexy, "Gustav Radbruch's Concept of Law"; Spaak, "Meta-Ethics and Legal Theory: The Case of Gustav Radbruch."

To further analyze the three basic legal values in the context of the Baitussalam mosque *waqf*, it will be described as follows:

1. Legal Justice

The existence of Principles of Justice in Article 2 of Law no. 2 of 2012 letter b. provide adequate compensation guarantees to the Entitled Party in the land procurement process so that they get the opportunity to be able to carry out a better life. So, residents also don't have to worry that things will get worse if the Baitussalam Mosque will be affected by the widening of the toll road project.

Islamic law has a mission as a rule to manifest the values of faith and *aqidah* carrying out the main mission to distribute justice to all levels of society, both legal, social, and economic justice. Likewise, *waqf* is also a form of embodiment of social justice in Islam.⁴¹ This means that *waqf* is closely related to the value of justice, the certification of *waqf* Land for Baitussalam Mosque of course will also create justice: first, legal justice is realized by not having to worry about potential conflicts in the form of land disputes in the future; second, social justice is realized through welfare *waqfs* such as community empowerment programs and others in the place of worship, later even if the place of worship land is affected by the toll road expansion project, the replacement land will still be a place of worship; third, economic justice is realized by maintaining the *waqf* property.

2. Legal Expediency

The usefulness of law as a principle or stream of utility contains practical moral teachings that aim to provide the maximum benefit and happiness for as many people as possible.⁴² The Principle of Expediency in Article 2 of Law No. 2 of 2012 letter c can be interpreted that the results of land procurement can provide broad benefits for the interests of the community, nation, and state. This means that the purpose of land acquisition for toll road expansion will not eliminate the orientation of

⁴¹ Abdul Nasir Khoerudin, "Tujuan dan Fungsi Wakaf Menurut para Ulama dan Undang-Undang di Indonesia," *Tazkiya Jurnal Keislaman, Kemasyarakatan, & Kebudayaan* 19, no. 2 (2018): 1, <http://jurnal.uinbanten.ac.id/index.php/tazkiya/article/view/1269>.

⁴² Eliana Eliana, Reni Suryani, and Naib Naib, "Legalitas Kepemilikan Tanah," *Bhakti Hukum: Jurnal Pengabdian kepada Masyarakat* 1, no. 1 (2022): 120, <http://openjournal.unpam.ac.id/index.php/JBH/article/view/17839>.

providing benefits for the wider community, so this should also apply to the *waqf* land of the Baitussalam Mosque.

Waqf is one of the charities that has an important role in the religious field as an expression of obedience to Allah SWT. In addition, the *waqf* is also a religious institution that can bring prosperity to people if it is managed professionally according to the *waqf* designation. Moreover, the virtue of *waqf* is to instill the nature of asceticism and practice helping the interests of others, professionalism to manage it is important.⁴³ This means that the management of *waqf* that prospers is professional. While the main element in the professionalism of *waqf* management is marked by the prioritization of the principle of accountability.⁴⁴ Likewise in the case of the Baitussalam Mosque, if the ultimate goal of the *waqf* land of the Baitussalam Mosque is welfare, it must be managed professionally. If it is legally required to provide certainty of the legal status of the *waqf* land of the Baitussalam Mosque, then for the sake of welfare benefits, the certification of the *waqf* land must be carried out.

The results of *waqf* can be used for the welfare of the wider community and can be implemented for economic development such as community empowerment programs and so on.⁴⁵ *Waqf* land in the Baitussalam Mosque which has legal certainty will provide benefits for protecting the *waqf* property so that the *waqf* property can continue to exist and provide wider benefits. This means that the certification of the Baitussalam mosque *waqf* land must be carried out immediately.

There is concern about the discourse of the toll road expansion project if it is reviewed from the value of expediency. Dealing with this matter, even if it is moved to another place or even in a place that cannot be reused by the residents of Permata Ngaliyan Residence, the benefits of the Baitussalam Mosque *waqf* land will still exist wherever its replacement is located. Because the allocation of *waqf* property will be following the

⁴³ Hujrman, *Hukum Perwakafan di Indonesia* (Yogyakarta: Deepublish, 2018), 5.

⁴⁴ Achmad Arief Budiman, "Akuntabilitas Lembaga Pengelola Wakaf," *Walisongo: Jurnal Penelitian Sosial Keagamaan* 19, no. 1 (June 7, 2011): 76, <https://doi.org/10.21580/WS.19.1.213>.

⁴⁵ Nufi Mu'tamar Almahmudi, "Implikasi Instrumen Non-Zakat (Infaq, Sedekah, dan Wakaf) terhadap Perekonomian dalam Perkembangan Hukum Ekonomi Syariah," *Al-Huquq: Journal of Indonesian Islamic Economic Law* 2, no. 1 (June 24, 2020): 30, <https://doi.org/10.19105/ALHUQUQ.V2I1.3002>.

previous one, namely the mosque will remain a mosque (if it is affected by land acquisition for toll roads). Other benefits that arise from the certification of *waqf* land at Baitussalam mosque include: providing a sense of security, clear physical and juridical data, realizing orderly land administration, facilitating activities related to land development, and reducing disputes.⁴⁶

3. Legal Certainty

Regarding the Principle of Certainty in the context of land acquisition, there is Article 2 of Law no. 2 of 2012 letter d. which is interpreted as providing legal certainty of the availability of land in the land procurement process for development and providing guarantees to the Entitled Party to obtain appropriate compensation. So, the public should not need to worry, the land of the Baitussalam Mosque which has a *waqf* certificate if it is later affected by a toll road will still be given proper compensation.

A land certificate is a representation of legal certainty as to the main objective in land registration as regulated in Article 19 of Law Number 5 of 1960 concerning Basic Agrarian Regulations (UUPA). The existence of a certificate is not only a facility, but the rights of land rights holders guaranteed by laws and regulations. In the context of *waqf* land certificates, of course, it also functions as legal protection for the *waqf* land. So it can be said that legal protection is the goal of legal certainty and land registration.⁴⁷

The legal protection includes: First, the certainty of the status of the rights registered. It means that with land registration (*waqf* land certification) it will be possible to know the status of the registered rights certainly, namely, in this case, is *waqf* land. Second, the certainty of the subject of rights. It means that with the certificate of *waqf* land it will be possible to know with certainty the holder of the rights. Third, the certainty of the object of rights.⁴⁸ It means that with *waqf* land certification, it is possible to know the location, the border, and the size of the land area

⁴⁶ Eliana, Suryani, and Naib, "Legalitas Kepemilikan Tanah," 116.

⁴⁷ Eliana, Suryani, and Naib, 115-20.

⁴⁸ Maria S. W. Sumardjono, *Kebijakan Pertanahan Antara Regulasi & Implementasi* (Jakarta: Kompas, 2001), 182.

exactly. The holder is given a certificate as proof of rights (evidence of rights).

Furthermore, when looking at Chapter II Article 3 of the *Waqf* Law regarding the basics of *waqf* it is said that "*waqf that has been pledged cannot be canceled*". This means that the *Waqf* Law as a *lex specialis* (special law) has been set in line with the value of legal certainty to anticipate efforts to cancel or "outsmart" *waqf*. Thus, the postponement in *waqf* certification of the Baitussalam mosque *waqf* land is not in line with legal certainty.

Since February 13, 2017, the Minister of Agrarian Affairs and Spatial Planning /Head of the National Land Agency Number 2 of 2017 has stipulated the Procedure for Registration of *Waqf* Land at the Ministry of Agrarian Affairs and Spatial Planning/National Land Agency (Permen ATR/BPN No. 2 of 2017). The promulgation of ATR/BPN Regulation No. 2 of 2017 by considering two important things, namely: first, to provide legal certainty for the registration of *waqf* land, it needs to be recorded and registered with the Land Office under the provisions of PP. 24 of 1997 concerning Land Registration; second, to carry out the registration of *waqf* land certificates following the provisions of Article 39 paragraph (2) PP No. 42 of 2006 concerning the Implementation of the *Waqf* Law.

Legal certainty in Permen ATR/BPN No. 2 of 2017 relating to what happened in the Baitussalam Mosque case can be explained as Article 2 paragraph (1) "*Rights on land that have been waqf are nullified from the date of the waqf pledge and their status becomes waqf objects.*" Furthermore, in paragraph (2) it is regulated that PPAIW on behalf of *nāzir* submits AIW or APAIW and other documents for registration of *waqf* land on behalf of *nāzir* to the Land Office a maximum of thirty days from the signing of AIW or APAIW. In the context of the Baitussalam Mosque, *waqf* land has been carried out, but there have been attempts to postpone the certification. Article 4 paragraph (2) explains that the separation of certificates with the signing of AIW or APAIW becomes the basis for the issuance of land *waqf* certificates in the name of *nāzir*. This means that if management has carried out the Baitussalam mosque *waqf* land certificate at the Semarang Land Office for registration, it will be in the name of *nāzir*.

The application for registration of *waqf* over the property of Freehold Title land (owned by Drs. Ec. Subur) is registered as *waqf* land in the name

of *nāzir* and is attached with the requirements attached with documents as regulated in Article 6 paragraph (2) of the Minister of ATR/BPN No. 2 of 2017. The Head of the Semarang Land Office will issue a land *waqf* certificate in the name of *nāzir*, as well as do the record in the land book and a land rights certificate in the column provided with a sentence indicating that the Land Right is annulled based on AIW/APAIW so that the *waqf* land certificate is issued.

Therefore, relevant stakeholders, including *nāzir*, for the sake of legal certainty, must immediately carry out their duties to take care of the certificate of *waqf* land for the Baitussalam Mosque at Semarang Land Office. This is also in line with the duties of *nāzir* in Article 11 of the *Waqf* Law, including the effort to protect *waqf* property.

Based on all the explanations above, in the context of efforts to secure *waqf* assets in the form of *waqf* land, it should be carried out as happened in the office of the Ministry of Religion in Batu City. Ministry of Religion in Batu City coordinates with relevant stakeholders, including the Indonesian *Waqf* Board (BWI), *Nāzir* Association Management, Islamic religious counselors, head of KUA, and representatives of legal entities *nāzir*, land offices, city government, headman along with program socialization to the community to overcome the problem of registration congestion of *waqf* land through the cooperation of institutions related to *waqf*.⁴⁹ This can be a cutting-edge solution so that efforts are made to secure *waqf* assets to the fullest.

In addition, to support *waqf* land certification which facilitates public access, a means must be created through the use of technology (such as e-*waqf*). So access to administrative management will facilitate the bureaucracy as long as the (normative) provisions are implemented according to the applicable laws and regulations.⁵⁰

The complexity of the case of certification postponement of *waqf* land for Baitussalam Mosque in the framework of three basic legal values showed that Gustav's standard priority doctrine is less than ideal and proved that the

⁴⁹ Hany Saidah, "Program Percepatan Sertifikasi Tanah Wakaf untuk Pengamanan Aset Wakaf: Studi di Kantor Kementerian Agama Kota Batu," *Sakina: Journal of Family Studies* 3, no. 2 (2019): 11, <http://urj.uin-malang.ac.id/index.php/jfs/article/view/272>.

⁵⁰ Cucu Solihah and Tarmin Abdulghani, "Menuju Sertifikasi Wakaf Tanah Berbasis Sistem Teknologi di Kabupaten Cianjur," *Khidmatul Ummah: Jurnal Pengabdian kepada Masyarakat* 2, no. 02 (January 12, 2022): 157–72, <https://doi.org/10.30868/KHIDMATUL.V2I02.2076>.

casuistic priority doctrine is more relevant. The casuistic priority doctrine reviews the possibility that the three basic legal values can alternately, according to the context of the problem, become the dominant element. In the context of the Baitussalam Mosque, the teaching of casuistic priorities is more convincing. The world of legal practice today also views the teaching of casuistic priority as the most relevant teaching to answer increasingly complex legal problems.⁵¹ Thus, the dominance between legal justice, expediency, and certainty in the context of the Baitussalam Mosque case becomes flexible. However, the various explanations above can show that when legal certainty is prioritized, namely the existence of *waqf* land certification at the Baitussalam Mosque, justice, and legal expediency will be created.

Conclusion

In the theory of legal purposes, Gustav Radbruch introduced the doctrine of standard priorities, the priority principle of the three basic values, that are the goals of the law, namely legal justice, expediency, and certainty. The three basic legal values above often have the potential to cause tension (*spannungsverhältnis*) with one another. Hence, the application of law sometimes has to sacrifice one of the three basic values of the law. To anticipate this tension, Radbruch in his standard, priorities doctrine and justice over expediency and legal certainty. Nevertheless, the development of society and the complexity of interests in life make this doctrine less relevant.

The case of certification of *waqf* land postponement for the Baitussalam Mosque in Ngaliyan, Semarang is proof that Gustav Radbruch's standardized priority doctrine is no longer relevant in realizing the three basic legal values as legal objectives. In the settlement of legal issues related to the Baitussalam Mosque *waqf* land, it appears that the casuistic priority doctrine is more relevant. The casuistic priority doctrine views the possibility that the three basic legal values can be alternated according to the context of the problem.

The context of the problem in the Baitussalam Mosque required legal certainty as a priority, and not the value of justice as Radbruch's doctrine. Precisely, when legal certainty is prioritized through *waqf* land certification, the value of justice and the value of legal expediency will also be created. The

⁵¹ Muslih, "Negara Hukum Indonesia Dalam Perspektif Teori Hukum Gustav Radbruch (Tiga Nilai Dasar Hukum)," 149–50.

application of the casuistic priority doctrine in the Baitussalam Mosque case opens up more opportunities for the achievement of legal objectives.

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