

Contract Law in the *Waqf* Land Transfer Practice: Civil Code and Islamic Law Perspectives

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Abstract:

This study examines the legal implications of applying the valid agreement requirements under Article 1320 of the Indonesian Civil Code to *waqf* land transfers, addressing the governance gap between Islamic jurisprudence and Indonesian positive law. Employing empirical legal research with statutory and comparative approaches, the study analyzed fifteen cases in Semarang City through semi-structured interviews with *nādhir*, *wāqif*, *waqf* foundation administrators, and members of the Indonesian *Waqf* Board (BWI) conducted between August and November 2025. Findings reveal that none of the examined transfers met the full legal requirements: all lacked valid *Waqf* Pledge Deeds, *nādhir* registration was deficient, and the transfers were conducted outside the formal *waqf* regime. Applying Article 1320's framework, transfers violating subjective conditions (consent and capacity) render agreements voidable, while violations of objective conditions (object and lawful cause) render them void ab initio. From the *maqāṣid al-sharī'a* perspective, such transfers fail the test of *maṣlaḥa mu'tabara* and undermine *hiḏ al-māl*. These findings imply an urgent need for *nādhir* professionalization, enhanced BWI supervision, mandatory *waqf* certification, and integration of *maqāṣid* principles with civil law governance frameworks.

Keywords:

civil code; contract law; Islamic law; *waqf* land

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Introduction

In Indonesia, the constitutional ideal of public welfare provides an important point of departure for examining *waqf* not only as a religious institution, but also as a legal instrument oriented toward social benefit. In relation to that objective, religious institutions play an important role, particularly when they operate not only within the sphere of ritual devotion but also within the broader framework of social and economic benefits. Among such institutions, *waqf* holds a significant position. In the discourse of Islamic law, *waqf* is generally understood as a form of charitable dedication with a continuing social function (*ijtimā'iyya*), and it is closely linked to the concept of *sadaqa jāriyya*, namely a benevolent act whose benefit is expected to endure beyond the death of the *wāqif*. This conception is not merely ethical in nature, but is also doctrinally connected to the framework of *maqāṣid al-sharī'a*, which places the realization of benefit (*jalb al-maṣāliḥ*) and the prevention of harm (*dar' al-mafāsīd*) at the center of legal reasoning, including in matters related to the protection of property (*hifẓ al-māl*).¹

In Indonesia, the strategic position of *waqf* cannot be separated from the country's Muslim-majority social character and from the formal recognition accorded to *waqf* within the national legal system. That recognition is reflected in Law Number 41 of 2004 on *waqf*, which serves as the principal legal basis for the administration, management, and protection of *waqf* property. Under this regulatory framework, *waqf* is no longer understood solely as an individual religious act but also as a legal institution requiring governance, accountability, and legal certainty.² Accordingly, the sustainability of *waqf* benefits depends not only on the good faith of the parties involved but also on the existence of an orderly system capable of preserving *waqf* assets, ensuring conformity with the donor's objective, and preventing deviations in their use.³

¹ Mohammad Hashim Kamali, *Maqāṣid al-Sharī'ah Made Simple* (London and Washington, DC: The International Institute of Islamic Thought, 2008).

² Muhammad Usman and Asmak Ab Rahman, "Funding Higher Education through Waqf: A Lesson from Malaysia," *International Journal of Ethics and Systems* 39, no. 1 (2023): 107–25, <https://doi.org/10.1108/IJOES-12-2021-0217>.

³ Muhammad Abdullah, "Waqf, Sustainable Development Goals (SDGs) and Maqāṣid al-Sharī'ah," *International Journal of Social Economics* 45, no. 1 (2018): 158–72, <https://doi.org/10.1108/IJSE-10-2016-0295>.

Even so, the implementation of *waqf* in Indonesia still faces several persistent problems. In practice, disputes and irregularities regarding *waqf* assets remain visible, whether due in neglect, inadequate maintenance, misuse, or transfers to third parties in a manner inconsistent with the governing legal norms. Such conditions indicate that the legal protection of *waqf* has not always functioned effectively. The problem is not simply one of technical administration, but also one of legal understanding and institutional capacity. In some cases, the weakness lies in the inability or negligence of the *nādhir* to manage and secure *waqf* property in accordance with the trust attached to the office. In other cases, the difficulty arises from the community's limited understanding of the legal status of *waqf* assets, particularly regarding the conditions under which alteration, exchange, or transfer may lawfully occur.

From the perspective of Islamic legal reasoning, this issue becomes especially important because *waqf* property is not, in principle, intended to circulate in the same manner as ordinary private property. The juristic problem, therefore, lies in determining the boundary between what may still be justified for the sake of preserving benefit and what must be regarded as a violation of the essential nature of *waqf*. In this respect, the concept of *maṣlahat* offers an important analytical approach. It may serve as a doctrinal measure for assessing whether a transfer of *waqf* property constitutes an exceptional legal step taken to maintain the continuity of its benefit, or whether it instead represents an impermissible transformation of *waqf* into an object of ordinary transaction.⁴ The distinction is decisive, since the legal identity of *waqf* rests upon the preservation of its designated function and the continuity of benefit for the beneficiaries, rather than upon the free alienability of the asset itself.

Waqf practices in Indonesian Muslim society were often carried out in a simple and informal manner. The establishment of *waqf* frequently relied on mutual trust between the *wāqif* and the *nādhir*, and was expressed through verbal declarations without adequate administrative registration or documentary proof. Although such a pattern reflected a strong ethical bond within the community, it also created legal vulnerability in the long term. In the absence of formal documentation and institutional safeguards, *waqf* assets could become vulnerable to abandonment, deviation from their intended designation, or contestation by other parties. For that reason, the legal study of

⁴ Asyraf Wajdi Dusuki and Nurdianawati Irwani Abdullah, "Maqāṣid al-Sharī'ah, Maslahah, and Corporate Social Responsibility," *American Journal of Islam and Society* 24, no. 1 (2007): 25–45.

waqf cannot be confined to its normative foundation alone. Still, it must also examine how Islamic legal principles, statutory regulation, and social practice interact in shaping the legitimacy of acts involving *waqf* property, particularly in relation to its transfer.

The legal regulation of *waqf* in Indonesia requires that every *waqf* act be formalized through proper legal procedures. In general, the creation of a *waqf* must be expressed in a *Waqf* Pledge Deed, registered before the competent authority, and publicly recorded in accordance with the applicable statutory framework. As a legal act, the establishment of a *waqf* must also satisfy the general requirements of validity under Article 1320 of the Indonesian Civil Code. At the same time, Islamic legal doctrine recognizes the possibility of *istibdāl*, namely the substitution of *waqf* property, but only in exceptional circumstances. Such substitution may be justified when the original *waqf* asset can no longer function productively, provided that it is replaced by another asset that continues to bear *waqf* status and is capable of serving the intended benefit more effectively.⁵

This restrictive approach is consistent with the basic orientation of *waqf* law, which places the preservation of endowed property at the center of legal protection. For that reason, Article 40 of the *waqf* Law prohibits *waqf* assets from being pledged as collateral, confiscated, gifted, sold, inherited, exchanged, or otherwise transferred. Any departure from that rule is allowed only under narrowly defined conditions as regulated in Article 41. In this sense, the Indonesian regime reflects a broader tendency in *waqf* legislation to regard the safeguarding of *waqf* assets as the primary legal concern, rather than treating such assets as freely transferable property.⁶

Several studies have examined the legal consequences of the transfer of *waqf* land, particularly in the Indonesian context. One study by Islamy on the juridical consequences and legal protection of unregistered *waqf* land demonstrates that registration constitutes a crucial element in securing legal protection. The study further indicates that unregistered *waqf* land is especially vulnerable when transfer questions arise, as the absence of formal registration

⁵ S Hisham, Hazel Adria Jasiran, and Kamaruzaman Jusoff, "Substitution of Waqf Properties (Istibdāl) in Malaysia: Statutory Provisions and Implementations," *Middle East Journal of Scientific Research* 13 (2013): 23–27.

⁶ Mohammed Obaidullah, "A Framework for Analysis of Islamic Endowment (Waqf) Laws," *International Journal of Not-for-Profit Law* 18, no. 1 (2016): 54–64.

creates significant legal obstacles.⁷ A similar concern appears in the work of Ismail and others on the *istibdāl* method in relation to sustainable development. Their analysis of the doctrinal basis and practical implementation of *waqf* substitution shows that *istibdāl* cannot be carried out loosely or merely on pragmatic grounds. Rather, it must comply with strict procedural requirements so that the objectives underlying *waqf* remain intact and are not displaced by interests external to the original endowment purpose.⁸ The study of Mohammed Noor A. and colleagues on the implementation of *istibdāl* of *waqf* property in Peninsular Malaysia provides further insight. Their research identifies several factors shaping the implementation process, including land acquisition by state authorities and requests from outside parties. At the same time, the study highlights continuing issues of governance and procedural compliance, indicating that the permissibility of substitution in doctrine does not eliminate the need for strong institutional control in practice.⁹

Although previous scholarship has largely discussed *waqf* land transfer within a normative and doctrinal framework, the dominant concern has been with statutory prohibitions and the legal consequences of transfer as a matter of legal theory. Such scholarship has not yet sufficiently explored how *waqf* land transfer is actually practiced at the empirical level. Even studies addressing the validity of contracts from the perspective of Islamic law and civil law remain limited in explaining how the requirements of Article 1320 of the Indonesian Civil Code operate when they intersect with the *waqf* regime, particularly in situations where transfer is carried out through informal or irregular arrangements, including the placement of *waqf* property under the label of “foundation assets” to avoid formal *waqf* procedures.¹⁰ In a similar vein, the principle of good faith in Islamic contract law underscores honesty, fairness, and propriety in transactional conduct.¹¹ Yet there remains limited empirical

⁷ Shendy Rianti Islamy, “Juridical Consequences and Legal Protection for Unregistered Waqf Land,” *Legal Brief* 12, no. 1 (2023): 166–78.

⁸ Magda Ismail Abdel Mohsin, “Revitalization of Waqf Administration and Family Waqf Law,” *US-China Law Review* 9, no. 4 (2012): 192–95.

⁹ Mohammed Noor Afiffudin et al., “Analysis of Issues and Solutions on the Implementation of Istibdāl Waqf Property in States of Peninsular Malaysia,” *Qualitative Research in Financial Markets* 15, no. 3 (2023): 423–44, <https://doi.org/10.1108/QRFM-04-2021-0071>.

¹⁰ Afrasiab Ahmed Rana, “Essentials of a Valid Contract: A Comparative Study of Islamic Law and the Contract Act, 1872,” *SSRN Electronic Journal*, 2020, <https://doi.org/10.2139/ssrn.3753738>.

¹¹ Muhammad Khan, “Good Faith Principles in Islamic Contract Law: A Comparative Study with Western Contract Law,” *SSRN Electronic Journal*, 2019, <https://doi.org/10.2139/ssrn.3555503>.

evidence showing how that principle is actually reflected in disputes or practices involving the transfer of *waqf* land. It is within this unresolved area that the present study is situated. By drawing on field research in Semarang City, this article examines concrete cases in which land claimed as *waqf* has in fact been transferred through sale and purchase mechanisms without compliance with the formal *waqf* legal framework.

Prior scholarship on *waqf* land transfers has approached the subject predominantly from a single-framework perspective: studies such as Suhartini's analysis of transfer validity under Islamic law and Silmi's examination of *waqf* assets as foundation assets both offer valuable insights but do not systematically apply both frameworks simultaneously to empirical case data. The present study addresses this gap by conducting the first empirical multi-case analysis in Semarang City that integrates the normative requirements of Article 1320 Indonesian Civil Code, the *waqf* regime under Law No. 41/2004, and the *maqāṣid al-sharī'a* framework in a unified analytical design. While integrative approaches have appeared in the literature, the combination of empirical case-level evidence, dual-system normative testing, and governance implications constitutes this study's distinct contribution.

The contribution of this research lies in its attempt to connect two analytical frameworks that are often discussed separately. On the one hand, the study employs the perspective of *maqāṣid al-sharī'a*, with particular attention to *ḥifẓ al-māl* and the doctrine of *maṣlaḥa*.¹² On the other hand, it places equal emphasis on the positive law requirements governing the validity of legal agreements in the Indonesian legal system. Through this dual approach, the study seeks to evaluate *waqf* land transfer not only in terms of procedural legality but also in terms of its substantive legitimacy within the broader normative structure of Indonesian law.

This study is directed toward two principal objectives. First, it seeks to analyze the legal implications of applying the requirements for valid agreements under Article 1320 of the Civil Code in relation to the statutory framework governing the transfer of *waqf* land under Law Number 41 of 2004. In addressing this issue, the analysis also incorporates the *maqāṣid al-sharī'a*

¹² Mohd. Syakir Ishak Ishak, "Maqāṣid al-Sharī'ah in Islamic Finance: Harmonizing Theory and Reality," *Journal of Muamalat and Islamic Finance Research* 18, no. 1 (2021): 1–20.

perspective as developed in contemporary principles of *waqf* governance.¹³ Second, the study examines empirical evidence on the implementation of *waqf* land transfers in Semarang City, including patterns, procedures, and the legal consequences that arise when transfers occur outside the formal *waqf* mechanism. These empirical findings are then considered in light of broader standards on effective *waqf* operation and supervision.¹⁴ The analytical framework developed in this study brings together principles of comparative contract law¹⁵ and the perspective of *maqāṣid al-sharī'a*. In this respect, the analysis draws on classical Islamic juristic views concerning *istibdāl*¹⁶ and contemporary scholarship on *waqf* governance¹⁷ to assess *waqf* land transfer practices not only in terms of procedural compliance, but also in terms of their substantive legitimacy within the Indonesian national legal system.

***Maqāṣid al-Sharī'a* and *Maṣlaḥa* as Analytical Framework**

This study is based on three related analytical frameworks for examining the legal implications of the requirements for valid agreements in the transfer of *waqf* land. The first is the framework of *maqāṣid al-sharī'a* and *maṣlaḥa* as the principal foundation in Islamic legal reasoning. The second concerns the doctrine of valid agreements within Indonesian civil law. The third is the normative framework governing *waqf* under the Indonesian legal system. These three frameworks are brought together because the issue under examination cannot be understood solely from the standpoint of positive law or solely from the standpoint of Islamic jurisprudence. Rather, the problem lies precisely in the tension between the permanent character of *waqf* (*ta'bid*) and

¹³ World Zakat and Waqf Forum, "Technical Notes on Good Nazir Governance" (Jakarta: World Zakat and Waqf Forum, 2022).

¹⁴ International Working Group on Waqf Core Principles, *Core Principles for Effective Waqf Operation and Supervision* (Jakarta: Bank Indonesia, Badan Wakaf Indonesia, dan Islamic Research and Training Institute Islamic Development Bank, 2018).

¹⁵ Elly Erawati and Herlien Budiono, *Penjelasan Hukum tentang Kebatalan Perjanjian* (Jakarta: National Legal Reform Program, 2010).

¹⁶ Musyifikah Ilyas, "Istibdal Harta Benda Wakaf Perspektif Hukum Islam," *Jurisprudentie: Jurusan Ilmu Hukum Fakultas Syariah dan Hukum* 3, no. 2 (2016): 138–50, <https://doi.org/10.24252/jurisprudentie.v3i2.2822>.

¹⁷ Fathullah Asni, Mohd Amirul Mahamud, and Jasni Sulong, "Socio-Economics and Management of Muslim Cemetery Waqf Using Istibdal and GIS Method in Penang State," *Journal of Islamic Accounting and Business Research* ahead-of-p (January 2020), <https://doi.org/10.1108/JIABR-01-2019-0026>.

the practical demands that may arise in the management and control of *waqf* assets.

In this study, *maqāṣid al-sharī'a* serves as the main analytical point of departure. Within this framework, Islamic law is understood as being directed toward the realization of benefit (*jalb al-maṣāliḥ*) and the prevention of harm (*dar' al-mafāsīd*), particularly in relation to the protection of essential human interests (*al-ḍarūriyyāt*).¹⁸ Both classical and contemporary scholars generally explain that these essential interests encompass five principal protections, namely the protection of religion (*ḥifẓ al-dīn*), life (*ḥifẓ al-nafs*), intellect (*ḥifẓ al-'aql*), lineage or honor (*ḥifẓ al-nasl*), and property (*ḥifẓ al-māl*).¹⁹

In the context of *waqf*, *ḥifẓ al-māl* occupies a particularly central place. This is because, in its juristic understanding, *waqf* is based on retaining the principal asset (*ḥabs al-'ayn*) while directing its usufruct toward a designated benefit. From this basic construction emerges the principle of perpetuity (*ta'bīd*) as well as the obligation to honor the conditions laid down by the *wāqif*. Accordingly, any discussion on the transfer, exchange, or substitution of *waqf* assets, including *istibdāl*, must be assessed not merely in formal terms, but also in relation to the objectives of *maqāṣid al-sharī'a* and the broader principle of preserving *waqf* property.²⁰

Alongside *maqāṣid al-sharī'a*, the concept of *maṣlaḥa* also provides an important analytical instrument. In the tradition of *uṣūl al-fiqh*, *maṣlaḥa* functions as a rational and doctrinal basis for assessing whether a legal policy or legal act may be justified within the broader objectives of the Sharia. Classical jurists commonly distinguish *maṣlaḥa* into three categories. First, *maṣlaḥa mu'tabara*, namely interests that are recognized by the *sharī'ah* and supported by textual indications. Second, *maṣlaḥa mulgha*, namely interests that must be rejected because they conflict with established texts or legal principles. Last, *maṣlaḥa mursala*, namely interests that are not expressly mentioned in the texts

¹⁸ Kamali, *Maqāṣid Al-Sharī'ah Made Simple*.

¹⁹ Jasser Auda, *Fiqh Al-Maqasid: Insha' Al-Ahkam Bi Maqasidiha* (International Institute of Islamic Thought, 2007).

²⁰ Vika Annisa Qurrata et al, "Institutional Economics from Islamic Perspective: With Special Reference to Waqf," *SAGE Open* 15, no. 2 (2025), <https://doi.org/10.1177/21582440251397178>; Miftahul Huda, "Mekanisme Penggantian Harta Benda Wakaf (Analisis Istibdāl Dalam Perspektif Hukum Islam Dan Hukum Positif Indonesia)," *Ahkam: Jurnal Ilmu Syariah* 21, no. 1 (2021): 1–24, <https://doi.org/10.15408/ajis.v21i1.20745>.

but remain compatible with the objectives of the Sharia and its general rules.²¹ This classification is important in the present study because it provides a basis for determining whether the transfer of *waqf* land may be regarded as a justified exception aimed at preserving the continuity of *waqf* benefit, or whether it instead constitutes a departure that reduces *waqf* into an ordinary object of transaction.²²

Theory of Valid Agreements under Indonesian Civil Code

The second analytical framework employed in this study is the doctrine of valid agreements as regulated in Article 1320 of the Indonesian Civil Code (*Burgerlijk Wetboek*). Under this provision, the validity of an agreement depends upon the fulfillment of four cumulative elements. These consist of: the parties' consent, which must be free from coercion, mistake, or fraud; legal capacity to agree, as further reflected in Articles 1329 and 1330; a definite object, as regulated in Articles 1332 to 1334; and a lawful cause in the sense required by Article 1337.²³

In civil law doctrine, those elements are commonly divided into two categories, namely subjective requirements and objective requirements. Consent and capacity belong to the former, while object and lawful cause belong to the latter. The distinction is legally significant because non-fulfillment of a subjective requirement renders the agreement voidable (*vernietigbaar*), whereas failure to satisfy an objective requirement causes the agreement to be null and void by operation of law (*nietig van rechtswege*).²⁴ For this study, that distinction is particularly important in assessing the transfer of *waqf* land, especially where the object's legality and the legal cause's permissibility become questionable because the property involved has already acquired *waqf* status.

The analysis is further reinforced by several general principles of contract law that help clarify the legal consequences of agreements involving *waqf* property. One of these is the principle of freedom of contract (*partij autonomie*),

²¹ Abū Hāmid Muḥammad ibn Muḥammad al-Ghazālī, *Al-Mustasfā min 'Ilm al-Uṣūl* (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, 1997).

²² Ibrāhīm ibn Mūsā al-Shāḥibī, *Al-Muwāfaqāt fī Uṣūl al-Fiqh* (Beirut: Dār Ibn 'Affān, 1997).

²³ Subekti and Raden Tjitrosudibio, *Kitab Undang-Undang Hukum Perdata* (Jakarta: Balai Pustaka, 2017).

²⁴ Agus Yudha Hernoko, *Hukum Perjanjian: Asas Proporsionalitas dalam Kontrak Komersial* (Jakarta: Kencana Prenada Media, 2014).

as recognized in Article 1338 paragraph (1), which allows parties to determine the content of their agreement. However, such freedom remains limited by law, public order, and morality, as contemplated in Article 1337.²⁵ Another is the principle of consensual, as reflected in Article 1458, under which an agreement comes into effect once mutual consent is reached.²⁶ In addition, the principle of *pacta sunt servanda* under Article 1338 paragraph (1) affirms that an agreement binds the parties as law, while the principle of good faith under Article 1338 paragraph (3) requires that the agreement be carried out in accordance with reasonableness and propriety.²⁷

Normative Framework of *Waqf* in Indonesian Law

The third analytical framework in this study concerns the body of positive law governing *waqf* in Indonesia. The principal sources within this framework are Law Number 41 of 2004 on *waqf* and Government Regulation Number 42 of 2006, as later amended by Government Regulation Number 25 of 2018. Together, these instruments provide the normative structure for the administration of *waqf* and define its essential elements, namely the *wāqif* as the endower, the *nādhir* as the manager, the *waqf* property, the *waqf* pledge, the designated purpose, and the duration of the *waqf*.²⁸

Within that statutory framework, the law adopts a restrictive approach toward the transfer of *waqf* assets. Article 40 of the *waqf* Law lays down a general prohibition against using *waqf* property as collateral, subjecting it to confiscation, granting it, selling it, inheriting it, exchanging it, or otherwise transferring it into another legal form. A narrow exception is recognized in Article 41, which allows exchange or *istibdāl* (*ruislag*) only under stringent conditions and only after ministerial approval has been granted based on a recommendation from the Indonesian *waqf* Board (Badan Wakaf

²⁵ Ridwan Khairandy, "Landasan Filosofis Kekuatan Mengikatnya Kontrak," *Jurnal Hukum* 18 (2011): 36–55.

²⁶ Arthur Stijn Hartkamp, *Contract Law in the Netherlands*, 2nd Edition (Alphen aan den Rijn: Wolters Kluwer Law International, 2015).

²⁷ Purwahid Patrik, *Asas Itikad Baik dan Kepatutan dalam Perjanjian* (Semarang: Badan Penerbit Universitas Diponegoro, 1986).

²⁸ Ahmad Rofiq, *Hukum Perdata Islam di Indonesia*, Revised Ed (Jakarta: RajaGrafindo Persada, 2013).

Indonesia/BWI).²⁹ This arrangement demonstrates that Indonesian *waqf* law seeks, on the one hand, to preserve the enduring character of *waqf* and, on the other hand, to permit limited flexibility when replacement of assets is considered necessary to maintain their function and benefit.³⁰

The same legal framework also imposes administrative safeguards intended to ensure legal certainty in the establishment and protection of *waqf*. Under Articles 17 to 21, a *waqf* pledge must be formally stated in a *Waqf* Pledge Deed (Akta Ikrar Wakaf/AIW) before the competent *Waqf* Pledge Deed Official (Pejabat Pembuat Akta Ikrar Wakaf / PPAIW), and the *waqf* must thereafter be registered with the National Land Agency (Badan Pertanahan Nasional/BPN). These requirements do not serve a merely formal function. Rather, they operate both as evidentiary mechanisms and as legal protections designed to prevent unauthorized acts affecting *waqf* assets.³¹ Where such procedures are not observed, the legal status of the property becomes more vulnerable to dispute, and the possibility of competing claims or unlawful disposition correspondingly increases.³²

Integration of Analytical Frameworks

The integration of these three frameworks enables a comprehensive analysis of the implications of *waqf* land transfers. From the *maqāsid* perspective, any transfer must be evaluated against whether it serves recognized interests (*maṣlaḥa mu'tabara*) or merely facilitates disposition contrary to *waqf* objectives. From the civil law perspective, the validity of transfer agreements must satisfy Article 1320 requirements, with particular

²⁹ Uswatun Hasanah, "Urgensi Pengawasan dalam Pengelolaan Wakaf Produktif," *Al-Ahkam: Jurnal Ilmu Syari'ah dan Hukum* 3, no. 1 (2018): 23–40, <https://doi.org/10.22515/al-ahkam.v3i1.1335>.

³⁰ Ascarya, Muhamad Nadratuzzaman Hosen, and Siti Rahmawati, "Designing Simple Productive Waqf Models for Indonesia," *International Journal of Ethics and Systems* 38, no. 3 (2022): 380–401, <https://doi.org/10.1108/IJOES-07-2020-0101>; Siti Mashitoh Mahamood and Asmak Ab Rahman, "The Concept of Perpetuity (Ta'bid) and Substitution (Istibdāl) of Waqf Property," *International Journal of Real Estate Studies* 9, no. 2 (2015): 1–13.

³¹ Nur Adibah Ghazali et al., "New Framework for the Management of Land Registration System in Malaysia," *International Journal of Islamic and Middle Eastern Finance and Management* 14, no. 3 (2021): 625–40, <https://doi.org/10.1108/IMEFM-07-2019-0289>; Achmad Arief Budiman, "Akuntabilitas Lembaga Pengelola Wakaf," *Walisongo: Jurnal Penelitian Sosial Keagamaan* 19, no. 1 (2011): 75, <https://doi.org/10.21580/ws.2011.19.1.213>.

³² Tuti Harwati, "Sengketa Tanah Wakaf dan Strategi Penyelesaiannya," *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* 4, no. 1 (2020): 237–60, <https://doi.org/10.22373/sjhk.v4i1.6427>.

attention to whether *waqf* property constitutes a lawful object for sale transactions. From the *waqf* law perspective, compliance with statutory procedures and prohibitions determines the legal status of any transfer.³³

This tripartite framework recognizes that *waqf* operates within both Islamic jurisprudential principles and the Indonesian positive legal system. The intersection creates unique analytical challenges: transfers that might appear beneficial from a narrow *maṣlaḥa* perspective may nonetheless violate statutory prohibitions. At the same time, strictly compliant procedures may not always achieve optimal outcomes for beneficiaries. This theoretical foundation will guide the examination of empirical findings in the subsequent section.³⁴

The Problem of *Waqf* Land Transfer: An Empirical Overview

The analytical framework employed in this study operates at the intersection of two legal systems. From the Islamic jurisprudential dimension, the principle of *hiḍz al-māl* (protection of property) within *maqāṣid al-sharī'a* functions as the normative standard against which the permissibility of transfers is assessed: a transfer is jurisprudentially valid only when it constitutes *maṣlaḥa mu'tabara*, a benefit recognized by Sharia, not merely *maṣlaḥa mursalah* of convenience. From the positive law dimension, Article 1320 Indonesian Civil Code provides the formal validity criteria. These two frameworks are not applied in isolation but serve as complementary lenses: the *maqāṣid* framework evaluates substantive compliance with the spirit and purpose of *waqf*, while Article 1320 evaluates formal legal validity. Cases in this study are therefore assessed against both dimensions simultaneously, with the dual framework revealing whether a transfer deficiency is purely procedural, substantively jurisprudential, or both.

This section sets out the empirical findings together with the analytical discussion on the legal implications of applying the requirements of valid agreements to the transfer of *waqf* land in Indonesia. The discussion is developed through two interrelated legal perspectives. The first concerns the requirements for a valid agreement under Article 1320 of the Indonesian Civil

³³ Hasan Asy'ari Ulama'i, "Integrasi Hukum Islam dan Hukum Positif dalam Pengelolaan Wakaf di Indonesia," *Ijtihad: Jurnal Wacana Hukum Islam dan Kemanusiaan* 20, no. 1 (2020): 41–60, <https://doi.org/10.18326/ijtihad.v20i1.41-60>.

³⁴ Monzer Kahf, "Waqf: A Quick Overview," *Islamic Economic Studies* 26, no. 2 (2018): 7–28, <https://doi.org/10.12816/0052868>.

Code. The second concerns the principles of Islamic jurisprudence governing *waqf*, particularly those associated with *maqāṣid al-sharīʿa* and *maṣlaḥa*. By bringing these two frameworks into a single line of analysis, this study seeks to move beyond the tendency of earlier scholarship to examine *waqf* transfer either from the standpoint of civil law alone or from that of Islamic law alone. In that sense, the present study offers an integrated assessment of both the legal validity and the legal consequences of *waqf* land transfer.³⁵

The field research conducted in Semarang City shows that the transfer of *waqf* land is not merely an incidental irregularity. Still, it reflects a recurring pattern of practice that departs from both statutory regulation and the normative principles of Islamic law. Based on in-depth interviews with foundation administrators, *nādhirs*, *wāqifs*, and representatives of the Indonesian *Waqf* Board, this study documented fifteen instances of *waqf* land transfer. None of those cases fully satisfied the procedural requirements prescribed by Law Number 41 of 2004 on *waqf* and its implementing regulations.

The empirical findings also disclose several recurring weaknesses in *waqf* governance. First, some *waqf* land had never been formalized through a *Waqf* Pledge Deed. Second, certain assets were placed under the name of a foundation rather than being legally recorded as *waqf* property. Third, some *nādhirs* had not been formally registered with the Ministry of Religious Affairs. Fourth, coordination with BWI was often absent. Fifth, the transfer of property was in some instances carried out through ordinary civil sale mechanisms without following the *istibdāl* procedures required by Article 41 of Law Number 41 of 2004. These findings correspond with broader concerns in the literature regarding weaknesses in *waqf* governance across Muslim-majority jurisdictions.³⁶

³⁵ Afiffudin Mohammed Noor et al., “Analysis of Issues and Solutions on the Implementation of Istibdāl Waqf Property in States of Peninsular Malaysia,” *Qualitative Research in Financial Markets* 15, no. 3 (March 2023): 423–44, <https://doi.org/10.1108/QRFM-04-2021-0071>.

³⁶ Roshayani Yakob et al., “Analysis of Enterprise Risk Management Practices in Malaysian Waqf Institutions,” *International Journal of Islamic and Middle Eastern Finance and Management* 15, no. 3 (2022): 569–85, <https://doi.org/10.1108/IMEFM-07-2020-0330>; 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>; Ramdani Ramdani, Tika Widiastuti, and Imron Mawardi, “Implementation of Islamic Values in Waqf Governance: A Systematic Literature Review,” *Journal of Islamic Marketing* 15, no. 8 (June 2024): 1925–41, <https://doi.org/10.1108/JIMA-03-2023-0079>.

The interviews with the administrators of Foundation X revealed an especially serious pattern. Land intended by the donor to function as *waqf* was deliberately placed under the legal name of the foundation rather than formally established and registered as *waqf* property. The reason for doing so was to preserve the possibility of future sale. In legal terms, this practice operates as a way of avoiding the *waqf* regime altogether, since assets recorded as foundation property do not carry the same inalienable status as *waqf* assets under Article 40 of the *waqf* Law. One administrator openly explained that, when land is handed over with a *waqf* designation, the first step taken is to ask the *wāqif* whether the land may later be sold. Where such permission is given, the land is not processed as *waqf* through the formal legal mechanism, but is instead entered under the foundation's name so that its transfer by sale remains possible.

Islamic Legal Requirements versus Civil Law Validity Criteria

From the standpoint of Islamic jurisprudence, the validity of *waqf* depends upon the fulfillment of several essential pillars (*arkān*). These commonly include the *wāqif* as the person creating the *waqf*, the *mauqūf* as the property dedicated as *waqf*, the *mauqūf 'alayh* as the beneficiary, and the *ṣiġhah* as the legal expression of the *waqf* declaration.³⁷ Each of these pillars is accompanied by particular legal requirements whose non-fulfillment may affect the validity of the *waqf* itself. The *wāqif* must possess legal competence (*ahliyyah*), which in classical terms includes maturity, soundness of mind, and the capacity to manage property responsibly. The *waqf* object must be clearly identifiable, lawfully owned by the donor, and of a kind that allows benefit to be derived while the principal asset remains preserved. The *ṣiġha*, moreover, must indicate a binding dedication that is not contingent, is immediately effective, and is directed toward continuity rather than temporality.

Viewed against those requirements, the empirical findings in this study reveal several serious departures. The most problematic element concerns the *ṣiġha*. In several cases, the *waqf* declaration was made only orally and was never supported by proper legal documentation. Even where some form of record existed, the declaration was not processed through the competent *Waqf Pledge Deed Official* as required by Articles 17 and 19 of Law Number 41 of 2004. This

³⁷ Wahbah Al-Zuhaylī, *Al-Fiqh al-Islāmī wa Adillatuh* (Damaskus: Dār al-Fikr, 1985), vol. 8.

deficiency creates uncertainty as to whether a legally cognizable *waqf* has in fact been established. Although classical Islamic jurisprudence generally recognizes the validity of an oral *waqf* declaration, Indonesian positive law requires formal documentation to ensure legal protection and enforceability.³⁸

The Principle of *Waqf* Inalienability and Exceptions under Islamic Law

A central principle in the law of *waqf* is the inalienability of *waqf* property (*'adam jawāz al-taşarruf*). Once a *waqf* has been validly constituted, the property is no longer treated as an ordinary asset that may be transferred through sale, gift, inheritance, or other dispositions that shift ownership. This principle is classically traced to the well-known report on 'Umar ibn al-Khaṭṭāb, in which the Prophet instructed that the property be retained while its yield be distributed in charity, on the condition that the property itself not be sold, gifted, or inherited.³⁹ The four major Sunni schools of law accept this foundational principle, though they differ in the scope of permissible exceptions.

Among those schools, the Shāfi'ī position is generally regarded as the most restrictive, as it does not readily allow *waqf* property to be sold or exchanged even where the asset has ceased to function productively. The reasoning is that the perpetual character of *waqf* is integral to its juristic identity so that the transfer would negate the very nature of the institution. By contrast, the Ḥanafī and Ḥanbalī traditions admit the possibility of *istibdāl* under limited circumstances. Such circumstances include a prior stipulation by the *wāqif* permitting substitution, a condition in which the *waqf* property can no longer serve its intended purpose, or a situation in which replacement would produce greater value and utility for the beneficiaries.⁴⁰ In the Ḥanbalī tradition, Ibn Taymiyyah is often cited as representing a more flexible approach, insofar as he allowed *istibdāl* where public benefit (*maṣlaḥa*) clearly required it.

³⁸ Muṣṭafā Aḥmad Al-Zarqā, *Al-Madkhal al-Fiqhī al-'Ām* (Damaskus: Dār al-Qalam, 2004).

³⁹ Abū Muḥammad ibn Ismā'īl Al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, I (Beirut: Dār Ibn Katsīr, 2002), <https://archive.org/details/waq79565>.

⁴⁰ Hisham, Jasiran, and Jusoff, "Substitution of Waqf Properties (Istibdal) in Malaysia: Statutory Provisions and Implementations."

***Maqasid al-Shari'a* Analysis of *Waqf* Land Transfers**

The framework of *maqāṣid al-sharī'a* provides the broader teleological basis for evaluating *waqf* land transfer. Within the five essential protections commonly discussed in the theory of *al-ḍarūriyyāt al-khams*, namely religion, life, intellect, lineage or honor, and property, the protection of property (*hiḍḍ al-māl*) is the most directly implicated in the governance of *waqf*.⁴¹ On this view, Islamic law is not understood merely as a collection of isolated rules, but as a coherent normative order directed toward the realization of benefit and the prevention of harm.

When this framework is applied to the empirical cases examined in this study, a clear tension becomes visible. Several *nādhirs* justified the sale of *waqf* land by invoking *maṣlaḥa*, arguing that land considered inaccessible, less strategic, or economically unproductive should be converted into assets of greater utility. Yet such reasoning cannot be accepted automatically.⁴² From the standpoint of *maqāṣid al-sharī'a*, the claim of *maṣlaḥa* must itself satisfy doctrinal criteria. It must be real rather than speculative, directed toward general rather than private advantage, and not contrary to express Sharia principles or prohibitions.⁴³ The informal sale practices documented in this study do not satisfy those criteria. They tend to serve institutional convenience rather than the legally protected interests of beneficiaries, are undertaken without adequate transparency and accountability, and bypass the formal *istibdāl* mechanism that would constitute the only legally defensible route for transferring *waqf* property within a Sharia-compliant framework.

Application of Article 1320 of Indonesian Civil Code to *Waqf* Land Transfers

From the perspective of Indonesian civil law, the validity of any agreement is assessed against Article 1320 Indonesian Civil Code, which sets out four cumulative requirements. These are: first, the mutual consent (*toestemming*) between the parties, free from defects of will such as *dwaling*, *bedrog*, or *dwang*;

⁴¹ Kamali, *Maqāṣid al-Sharī'ah Made Simple*.

⁴² Wan Nazjmi Mohamed Fisol, Mohd Akhir Abu Bakar, and Muhammad Faris Afif Yusof, "Waqf Property Management Through the Maqasid Al-Shariah Approach," *Journal of Contemporary Issues in Business and Government* 27, no. 3 (2021).

⁴³ Al-Ghazālī, *Al-Mustasfā min 'Ilm al-Uṣūl*.

second, the legal capacity (*bekwaamheid*) of the parties agreeing; third, the existence of a certain subject matter (*bepaald onderwerp*) as the object of the agreement; and fourth, a lawful cause (*geoorloofde oorzaak*).⁴⁴ In doctrinal terms, the first two elements are categorized as subjective requirements, the breach of which renders an agreement *vernietigbaar*. By contrast, the latter two are classified as objective requirements, and their non-fulfillment results in the agreement being *nietig* or null and void.⁴⁵

When this framework is applied to the transfer of *waqf* land through an ordinary sale-and-purchase mechanism, a serious legal obstacle immediately arises. The central difficulty lies especially in the requirement of a lawful cause. Article 1337 Civil Code makes clear that a cause is unlawful when it is prohibited by law, contrary to *goede zeden*, or incompatible with *openbare orde*.⁴⁶ Once land has validly acquired *waqf* status under Law Number 41 of 2004, its transfer by sale, grant, inheritance, or other forms of alienation is, in principle, prohibited, except through the limited and specially regulated mechanism of *istibdāl* under Article 40 and the related provisions. For that reason, an agreement purporting to transfer ownership of *waqf* land through an ordinary sale cannot be regarded as having a lawful object or a lawful cause. In civil law terms, such an agreement must therefore be treated as *nietig* or null and void.

The Problem of Authority and Object Certainty

The empirical findings in this study also reveal a more complex legal issue: the uncertainty that arises when land has been declared as *waqf* in practice but has not yet been fully formalized in administrative terms. In several cases, the land had already been verbally dedicated as *waqf*, yet no complete registration followed. In other cases, the Deed of *Waqf* Pledge had already been executed, but no *waqf* certificate had subsequently been issued. This situation raises an important legal question: whether the land must already be treated as having entered the *waqf* regime and therefore as inalienable, despite the incompleteness of subsequent administrative steps.

⁴⁴ Subekti, *Hukum Perjanjian*, 21st ed. (Jakarta: Intermasa, 2005).

⁴⁵ Omar Mahasneh, "Dissolution as a Remedy for Breach of Contract in Islamic Law," *McGill Journal of Transnational and International Law* 18, no. 2 (2022): 68–106.

⁴⁶ Erawati and Budiono, *Penjelasan Hukum tentang Kebatalan Perjanjian*.

One interview with a *wāqif* illustrates this problem quite clearly. The *wāqif* confirmed that an Deed of *Waqf* Pledge had in fact been made, yet the *nādhir* later intended to proceed with a sale without the knowledge or consent of the *wāqif*. From the standpoint of civil law, this is not merely a problem of procedural irregularity, but also one of authority. The legal question is whether the *nādhir* possesses any authority to dispose of *waqf* property through sale.

In legal terms, the answer must be negative. Article 11 of Law Number 41 of 2004 places the *nādhir* in the position of a fiduciary with limited authority: the *nādhir* is empowered to administer, manage, develop, and supervise *waqf* assets, but not to transfer or alienate them beyond the scope expressly permitted by law.⁴⁷ In that respect, the role of the *nādhir* may be compared to that of a trustee in common law systems, namely a party entrusted with control over property for the benefit of others, but without unrestricted authority to alienate that property for personal or institutional purposes. Accordingly, where a *nādhir* purports to sell *waqf* property outside the authority granted by law, the act must be regarded as ultra vires. Such a transaction is therefore defective not only because of its unlawful cause, but also because it suffers from a lack of authority on the part of the actor undertaking it.

Integrating Islamic Law and Civil Law: The Dual-Framework Analysis

This study approaches *waqf* land transfer through an integrated analytical framework that brings Islamic jurisprudential reasoning into dialogue with Indonesian civil law doctrine.⁴⁸ This dual-framework approach reveals significant convergences between the two legal traditions: both systems recognize the fundamental inalienability of *waqf* property, both impose strict procedural requirements for any permissible transfer, and both provide for nullity as the consequence of unauthorized transfers. However, the frameworks

⁴⁷ Hidayatul Ihsan and Abdullah Ayedh, "A Proposed Framework of Islamic Governance for Awqaf," *Journal of Islamic Economics, Banking and Finance* 11, no. 2 (2015): 117–33.

⁴⁸ Ahmed Gad Makhlof, "Continuity and Change of Traditional Islamic Law in Modern Times: Tarjih as a Method of Adaptation and Development of Legal Doctrines," *Oxford Journal of Law and Religion* 12, no. 1 (2023): 55–74, <https://doi.org/10.1093/ojlr/rwad010>; Abdur Rohman, Rahmad Nugraha, and Ahmad Siregar, "Construction of Waqf Istibdal Regulations for Empowering Non Productive Waqf in Indonesia BT - Proceedings of the Riau Annual Meeting on Law and Social Sciences (RAMLAS 2019)" (Amsterdam: Atlantis Press, 2020), 134–37, <https://doi.org/10.2991/assehr.k.200529.286>.

also complement each other in important ways: Islamic law provides the teleological foundation (*maqasid*) and substantive ethical principles (*amāna*, accountability), while civil law supplies the procedural mechanisms for enforcement and the doctrine of contractual invalidity.

Table 1.

Comparative Analysis: waqf Land Transfer Requirements		
Requirement	Islamic Law (<i>Fiqh</i>)	Indonesian Civil Law
Legal Capacity	<i>Wāqif</i> must be <i>bāligh</i> , <i>'aqil</i> , <i>rashīd</i>	The parties must have legal capacity (Article 1320, 1329)
Object Certainty	<i>Mawqūf</i> must be <i>mu'ayyan</i> (specific)	A certain subject matter (Article 1320, 1332, 1333)
Lawful Purpose	Must serve <i>maqāṣid/maṣlaḥa</i>	A lawful cause (Article. 1337, 1338)
Authority	<i>nādhir</i> as <i>āmin</i> (fiduciary)	1471, 1792 The ultra vires doctrine applies
Consequence of Violation	<i>Bāṭil</i> (void) or <i>fāsīd</i> (voidable)	Null and void,

Legal Consequences of Invalid *Waqf* Land Transfers

Based on the dual-framework analysis, this study identifies three categories of legal consequences for *waqf* land transfers that fail to comply with applicable requirements. The first category concerns situations in which the *waqf* land has been validly constituted, as evidenced by the Deed of *Waqf* Pledge or a *waqf* certificate. In such cases, any subsequent sale agreement is null and void ab initio for violation of the objective conditions stipulated in Article 1320 of the Indonesian Civil Code. The invalidity arises because the sale involves both an unlawful object, namely, *waqf* property that cannot lawfully be sold, and an unlawful cause, inasmuch as the transaction contravenes the prohibition laid down in Article 40 of Law Number 41 of 2004 on *waqf*. From the perspective of Islamic law, such a transaction is classified as *nādhir* (null and void) because it directly contradicts the explicit prohibition on *waqf* alienation. The consequence of this nullity is that the agreement produces no legal effect whatsoever, and the

parties must be restored to their original positions as though no contract had ever been concluded.

The second category of legal consequences arises where the subjective conditions of a valid agreement have been violated. This may occur, for instance, when the *nādhir* acted without proper authority or when the consent of the *waqif* was vitiated by fraud, error, or duress. In these situations, the agreement is classified as voidable (*fāsid*) rather than void *ab initio*. The *waqif* interview conducted in the course of this research revealed that the *waqif* was unaware of the *nādhir*'s plans to sell the *waqf* land, suggesting a potential defect in consent. This finding indicates that the agreement may be voidable at the instance of the aggrieved party. However, it must be noted that where the defect in consent occurs concurrently with violations of the objective conditions, such as the unlawfulness of the object or the unlawfulness of the cause, the agreement would typically be analyzed as null and void rather than merely voidable, since the more serious defect would take precedence in determining the legal status of the transaction.

The third category concerns the only legally valid route for transferring *waqf* land under Indonesian positive law, namely the mechanism of *istibdāl* (substitution) as regulated in Article 41 of Law Number 41 of 2004 and further elaborated in Article 51 of Government Regulation Number 42 of 2006.⁴⁹ This mechanism is subject to stringent procedural requirements that serve to ensure the legitimacy and transparency of any transfer. Among these requirements are the following: ministerial approval must first be obtained, based on a recommendation from the Indonesian *Waqf* Board; there must be sufficient proof that the original *waqf* property can no longer effectively serve its designated purpose; the substitution must involve property of equal or greater value; and the replacement asset must be formally registered as *waqf* in accordance with the applicable administrative procedures. The empirical findings of this study reveal that none of the fifteen cases examined complied with these legal requirements. In every instance, the transfer was undertaken outside the formal *istibdāl* framework, thereby rendering the transactions legally defective and exposing them to challenge on grounds of both procedural irregularity and substantive unlawfulness.

⁴⁹ Hariyanto Hariyanto and Irham Zaki, "Istibdāl Waqf Relevance on Development of Waqf in Indonesia," *AFEBI Islamic Finance and Economic Review* 4, no. 1 (2019): 44–56.

Governance Implications and Policy Recommendations

The findings of this study reveal systemic governance failures in *waqf* administration that extend beyond individual non-compliance. The Indonesian *Waqf* Board member interviewed acknowledged that supervision mechanisms are ineffective: "BWI supervision is not yet effective in practice (there is no 'intervention'/assistance)." This institutional weakness creates space for the administrative strategies documented in this study, particularly the practice of placing *waqf*-designated land in foundation names to circumvent inalienability requirements.

Based on *maqāṣid al-sharī'a* and contemporary good governance principles, this study formulates several policy recommendations designed to address the systemic weaknesses identified in the empirical findings. The first priority concerns the strengthening of the Indonesian *Waqf* Board's supervisory capacity. This requires the implementation of regular audits of *nādhir* activities, the establishment of mandatory annual reporting requirements, and the introduction of clear sanctions for non-compliance with statutory and procedural obligations. The Good *Nazir* Governance framework developed by the World Zakat and *Waqf* Forum provides a useful and well-tested template for institutionalizing these accountability mechanisms.⁵⁰ Such a framework would ensure that *nādhir* governance is no longer left to informal or discretionary oversight, but is instead embedded within a transparent system that subjects institutional performance to periodic review and public accountability.

The second recommendation addresses the legal ambiguity surrounding informally declared *waqf*. A significant proportion of *waqf* assets in Indonesia exist in a state of administrative uncertainty: they have been verbally pledged or socially recognized as *waqf*, yet they have not been formally registered or documented in accordance with the statutory requirements. This gap creates an opening for circumvention strategies, as administrators may exploit the lack of formal documentation to reclassify *waqf* property as ordinary institutional assets. To address this problem, the study recommends the introduction of a registration amnesty program that would facilitate the formalization of verbal

⁵⁰ World Zakat and *Waqf* Forum, "Technical Notes on Good *Nazir* Governance."

or undocumented *waqf* without imposing penalties on *wāqif* or *nādhir* who act in good faith. Such a program would reduce the administrative ambiguity that currently enables irregular practices and would bring a larger proportion of *waqf* assets under formal legal protection.

The third recommendation focuses on the procedural dimension of *istibdāl* (substitution of *waqf* assets). While the existing legal framework provides for a formal mechanism by which non-productive *waqf* assets may be exchanged or replaced, that mechanism is widely perceived as cumbersome, opaque, and difficult to navigate in practice. As a result, some *nazirs* resort to informal civil transactions rather than pursuing the lawful *istibdāl* route. To address this difficulty, the study recommends the development of clear, accessible, and practicable standard operating procedures (SOPs) for *istibdāl* that balance procedural rigor with practical accessibility. These SOPs should ensure that *nazirs* who are genuinely faced with unproductive or underutilized *waqf* assets have a clear, feasible, and legally compliant pathway for lawful transfer, thereby reducing the incentive to bypass the formal system altogether.

The fourth recommendation concerns the integration of *maqāṣid*-based performance indicators into the institutional assessment of *waqf* entities. Current oversight mechanisms tend to focus primarily on procedural compliance and asset preservation, but they give less attention to whether *waqf* institutions are actually achieving the welfare outcomes for which they were established. A more substantive approach would evaluate not only whether the assets are being protected, but also whether the benefits derived from those assets are reaching the intended beneficiaries in a manner consistent with the original *waqf* purposes. The development of such indicators has been explored in recent scholarship on *maqāṣid*-based performance measurement, which seeks to operationalize the objectives of the Sharia in a way that can guide institutional evaluation and policy development.⁵¹ By adopting this approach, supervisory bodies would be better positioned to assess whether *waqf* institutions are fulfilling their fiduciary and social responsibilities, rather than merely maintaining formal compliance with administrative requirements.

⁵¹ Roshayani Arshad et al., "Modelling Maqasid Waqf Performance Measures in Waqf Institutions," *Global Journal Al-Thaqafah*, 2024, 157–69, <https://doi.org/10.7187/GJATSI2018-11>.

The Convergence of Islamic and Civil Law Frameworks

This dual-framework analysis demonstrates that Islamic jurisprudence and Indonesian civil law converge in their treatment of unauthorized transfers of *waqf* land. Both traditions recognize that *waqf* property occupies a special legal status distinct from ordinary private property—a status that restricts alienation and imposes fiduciary duties on managers.⁵² Within the framework of *maqāṣid al-sharī'a*, *waqf* is understood as a legal institution directed toward the continuity of charitable benefit (*maṣlaḥa*), so that any transfer undermining that end stands in tension with the core objectives of Islamic law. The civil law framework provides the doctrinal mechanism: Article 1320's requirement of a lawful cause effectively incorporates the *waqf* inalienability principle into the analysis of contractual validity.

The fifteen cases documented in this study represent not isolated incidents but systematic governance failures requiring institutional rather than merely individual responses. The practice of designating land as *waqf* while administratively positioning it as foundation assets reveals a sophisticated strategy for circumventing legal restrictions—a strategy enabled by weak supervision, unclear procedures, and inadequate coordination between religious authorities and civil registries. Addressing these failures requires harmonized enforcement across both Islamic institutional mechanisms (BWI, Office of Religious Affairs) and civil law institutions (land registries, notarial offices), guided by the shared commitment to protecting *waqf* assets for their intended beneficiaries.

The contribution of this study lies in showing that a dual-framework analysis, which brings Islamic jurisprudential principles into conjunction with civil law doctrine, provides a more complete basis for evaluating *waqf* land transfers than either framework when used in isolation. Previous studies examining *waqf* land transfers have typically adopted either a purely *fiqh*-based analysis (focusing on *rukṅ*, *shurūṭ*, and *madhāhib* opinions) or a purely positive law analysis (focusing on statutory compliance).⁵³ This study shows that the two

⁵² Monzer Kahf, "The Role of Waqf in Improving the Ummah Welfare" (Medan: Universitas Islam Sumatera Utara, n.d.).

⁵³ Nanik Shofiatin et al., "Analysis of Waqf Studies: A Hybrid Review," *International Journal of Ethics and Systems*, 2025, <https://doi.org/10.1108/IJOES-11-2024-0378>; AbdulHassan Mohammad Sadeq, "Waqf, Perpetual Charity and Poverty Alleviation," *International Journal of Social Economics* 29, no. 1/2 (2002): 135–51, <https://doi.org/10.1108/03068290210413038>.

frameworks mutually reinforce each other: Islamic law provides the substantive rationale for *waqf* protection, while civil law provides the procedural and remedial mechanisms for enforcement. For Indonesian legal practice, where Islamic law and civil law coexist as parallel sources of normativity for *waqf* transactions, this integrated approach offers a more robust foundation for legal analysis, dispute resolution, and policy development.

Conclusion

This study shows that the transfer of *waqf* land within the Indonesian legal system carries serious legal consequences when examined against the requirements of valid agreements under Article 1320 of the Indonesian Civil Code and the regulatory framework established by Law Number 41 of 2004 on *waqf*. The empirical findings demonstrate a clear disjunction between the normative structure of the law and the way *waqf* land transfer is carried out in practice. Of the fifteen cases identified in Semarang City, none satisfied the full legal requirements for a valid transfer of *waqf* land. The recurring deficiencies included the absence of the Deed of *Waqf* Pledge, incomplete certification procedures, the lack of formally registered *nādhir* status, and the use of ordinary civil transfer mechanisms without proper approval from the Ministry of Religious Affairs or the Indonesian *Waqf* Board. From the standpoint of contract law, non-compliance with subjective terms of the agreement, namely consent and legal capacity, renders an agreement *vernietigbaar*. In contrast, defects relating to subjective terms of the agreement, particularly the object and lawful cause, cause the agreement to be *nietig* or null and void. When read together with the framework of *maqāṣid al-sharīʿa*, especially the principle of *ḥifẓ al-māl*, these findings confirm that unauthorized transfers of *waqf* land are not merely procedurally defective, but also substantively inconsistent with the juridical purpose of *waqf*, because they reduce property intended for perpetual charitable benefit into an object of ordinary transaction.

The study contributes to legal scholarship by providing a dual-framework analysis that bridges Islamic jurisprudence with Indonesian civil law requirements, offering a comprehensive understanding of how both legal systems converge in protecting *waqf* assets. The policy implications are substantial: strengthening *nādhir* governance through mandatory registration and periodic reporting, enhancing BWI supervisory functions, and establishing clearer standard operating procedures for *istibdāl* (*waqf* property substitution)

that comply with both Islamic principles and positive law requirements are essential. Limitations of this study include its geographic focus on Semarang City and the reliance on qualitative case analysis. Future research should expand to comparative regional studies, quantitative assessments of *waqf* transfer compliance nationwide, and deeper exploration of how digital documentation systems might enhance *waqf* governance and prevent unauthorized transfers while maintaining the *maṣlahah* objectives that underpin *waqf* institutions.[a]

Author Contribution Statement

Ery Agus Priyono: Conceptualization; Formal Analysis; Investigation; Methodology; Project Administration; Resources; Validation; Visualization; Writing Original Draft; Writing, Review & Editing.

Muhamad Azhar: Data Curation; Formal Analysis; Methodology; Project Administration; Resources; Visualization; Writing, Review & Editing.

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