

Implementation of Out-of-Court Mediation in the Settlement Of Waqf Land Disputes in Indonesia (An Analysis from Traditional Law to Modern Law)

"Islamiyati Islamiyati¹, Umaira Hayuning Anggayasti²

^{1,2}*Faculty of Law, Diponegoro University, Semarang, Indonesia*
Jl. Prof. Sudarto No. 1, Tembalang, Semarang

Abstract: Most waqf land disputes in Indonesia are resolved through out-of-court mediation. However, in practice, mediation frequently fails and the law has not been effectively enforced in a fair and just manner. Based on this condition, research on the implementation of out-of-court mediation in the settlement of waqf land disputes in Indonesia—an analysis from the perspective of traditional law toward modern law—becomes highly significant.

This study aims to describe the implementation of out-of-court mediation in resolving waqf land disputes and to analyze the legal foundations applied in such processes, particularly in the transition from traditional legal practices to modern legal frameworks. The findings of this research are expected to provide insights for the government and relevant stakeholders in optimizing the settlement of waqf land disputes through out-of-court mediation mechanisms.

This research employs an empirical juridical approach using both primary and secondary data. Primary data were obtained through interviews with officials of the Land Deed Official for Waqf Pledge (PPAIW), the Indonesian Waqf Board (BWI), the Ministry of Religious Affairs, as well as religious and community leaders. Secondary data were derived from primary legal materials (statutory regulations), secondary materials (literature on waqf land disputes and mediation), and tertiary materials (non-legal references). The data were analyzed qualitatively, and conclusions were drawn using a deductive approach.

The results indicate that the implementation of out-of-court mediation in resolving waqf land disputes has not yet been optimal. Several legal problems persist, particularly in the juridical and institutional aspects. As a consequence, mediation often fails, and the enforcement of out-of-court mediation law has not been able to ensure fairness within society. Therefore, it is essential for the government—particularly the Ministry of Religious Affairs (KEMENAG) and the Indonesian Waqf Board (BWI)—to undertake legal reform regarding out-of-court mediation, transitioning from traditional legal practices to a modern legal framework codified in statutory regulations. Such reforms should include clearer rules and legal principles governing out-of-court mediation, enhanced mediator knowledge regarding their duties, functions, and authority, as well as stronger institutional arrangements. Ultimately, these measures aim to ensure that waqf land disputes can be resolved comprehensively and contribute to the establishment of legal order.

Keywords: Implementation; Out-of-Court Mediation; Dispute Resolution; Waqf Land; Modern Law.

I. Introduction

Waqf land refers to the legal act of transferring land ownership rights from private ownership to public ownership for the benefit of the community in accordance with Islamic law. A person who donates land as waqf (waqif) is expected to fulfill several requirements before making the endowment. One of these requirements stipulates that the land to be endowed must be free from disputes with heirs, which must be evidenced by a certificate declaring that the land is free from dispute. In addition, written evidence (documents) regarding the ownership of the land to be endowed must also be available, along with the appointment of a nazhir who will be responsible for maintaining and managing the waqf property so that it can provide benefits to the community.

Once these requirements have been fulfilled, the waqif and the nazhir submit the waqf registration to the Official for Waqf Pledge Deeds (PPAIW), whose office is typically located within the Office of Religious Affairs (KUA). The waqf pledge is then formally declared before the authorized official, namely the PPAIW, in the presence of two male witnesses who are fair, legally competent, and of sound mind. Subsequently, the PPAIW issues a Waqf Pledge Deed (Akta Ikrar Wakaf) as written evidence of the waqf land transaction. Therefore, written documentation plays a crucial role in preventing disputes in the future, whether between the waqif and the nazhir, between the waqif and the heirs, or between the nazhir and the heirs.

Waqf land disputes arise when the legal status of waqf land lacks clear legal certainty, thereby generating grievances from one party and legal problems for another. When such grievances cannot be resolved internally through amicable settlement, the issue may escalate into an open dispute known to the wider community. Consequently, waqf disputes must be resolved in accordance with the mechanisms provided under Article 62 of Law Number 41 of 2004 on Waqf, which include deliberation for consensus (*musyawarah*), mediation, arbitration, and judicial proceedings before the Religious Courts.

Mediation constitutes one of the alternative mechanisms for dispute resolution when the parties are unable to resolve their differences through deliberation due to conflicting positions that are difficult to reconcile. In such circumstances, the disputing parties may agree to appoint a neutral third party as a mediator to assist in resolving the dispute. Mediation may take two forms: out-of-court mediation and court-annexed mediation. Out-of-court mediation refers to a dispute resolution mechanism facilitated by mediators who may come from community leaders, religious leaders, village officials, or other individuals deemed capable of assisting the parties in resolving the dispute. In contrast, mediation within the court system involves mediators appointed from judges of the Religious Courts or other individuals who meet the qualifications required to serve as mediators.

The findings of this study indicate that, in practice, the resolution of waqf land disputes in society predominantly relies on out-of-court mediation. From a total of 38 sampled cases, 24 cases (63.16%) were resolved through out-of-court mediation, while 7 cases (18.42%) were settled through litigation in the court system, and another 7 cases (18.42%) remained unresolved. The preference for out-of-court mediation is largely attributed to its emphasis on familial and communal values, including mutual protection, compassion, collective harmony, and respect. In addition, mediation is considered more efficient in terms of time, cost, and effort, promotes win-win solutions, and helps maintain social relationships after the dispute has been resolved. By contrast, litigation is often perceived as formal and rigid, relatively costly, time-consuming, and potentially capable of generating resentment between the parties because one party inevitably loses the case.

However, the research data also reveal that approximately 18.42% of waqf land disputes mediated outside the court remain unresolved and are eventually left without further settlement. Several factors contribute to this situation. First, mediators may not demonstrate sufficient commitment or seriousness in facilitating dispute resolution. Second, fundamental differences in perspectives or personal characteristics among the disputing parties may hinder agreement. Third, the parties may prefer to avoid prolonged conflicts, both physically and psychologically. Fourth, certain actions by one party may provoke emotional responses from the other. Finally, one party may become discouraged and eventually surrender the matter to the passage of time rather than pursuing further resolution.

Referring to these findings, it can be analyzed that although out-of-court mediation is the most widely used mechanism for resolving waqf land disputes within society, the legal framework governing its implementation remains largely traditional in nature. As a result, approximately 18.42% of waqf disputes remain unresolved, primarily due to the absence of clear legal certainty, thereby leaving both the disputing parties and

the waqf assets without adequate legal protection. These conditions underline the importance of examining the implementation of out-of-court mediation in the settlement of waqf land disputes in Indonesia from the perspective of the transition from traditional law to modern law.

Accordingly, this research focuses on analyzing the legal basis underlying the implementation of out-of-court mediation in resolving waqf land disputes, particularly in the context of the transformation from traditional legal practices to modern legal frameworks. The objectives of this study are to describe the implementation of mediation in the settlement of waqf disputes and to analyze the legal foundations applied in such processes. The findings are expected to provide practical contributions for the government and relevant stakeholders in enhancing the effectiveness of waqf land dispute resolution through out-of-court mediation, thereby ensuring comprehensive dispute settlement and the realization of justice.

Previous studies on the settlement of waqf disputes through mediation outside the court system have been conducted by several scholars. First, Asep Riyadi, in his study *Settlement of Waqf Disputes through Mediation*, examined the juridical review of mediation as an alternative dispute resolution mechanism for waqf disputes both outside and within the court system. Second, Siti Nur Umariyah Febriyanti and Widya Kusuma Ningasih, in their study *A Philosophical Review of Out-of-Court Mediation as an Alternative Dispute Resolution Mechanism*, discussed the background, historical development, and philosophical foundations of out-of-court mediation as well as its effectiveness. Third, Harwalis, in his study *The Role of Mediation in the Settlement of Waqf Disputes: A Juridical and Normative Analysis in Indonesia*, highlighted several normative challenges, including the absence of clear and detailed regulations governing mediation in waqf dispute resolution, limited public understanding, and the shortage of competent mediators.

Based on the analysis of these previous studies, it can be concluded that research specifically examining the implementation of out-of-court mediation in resolving waqf land disputes in Indonesia, particularly focusing on the legal problems and their solutions, has not yet been conducted. The distinctive characteristic of this research lies in its focus on describing the practical implementation of out-of-court mediation in the settlement of waqf land disputes, identifying the legal problems encountered, and proposing possible solutions.

II. Research Methods

This study constitutes field research employing an empirical juridical approach. The juridical approach is used to examine the legal framework governing the settlement of waqf land disputes through mediation, particularly Law Number 41 of 2004 on Waqf and its implementing regulations. Meanwhile, the empirical approach is applied to analyze the actual practice of out-of-court mediation utilized by disputing parties in resolving waqf land disputes.

The data used in this research consist of primary data and secondary data. Primary data were obtained through interviews with officials from the Official for Waqf Pledge Deeds (PPAIW), the Indonesian Waqf Board (BWI), the Ministry of Religious Affairs, as well as other relevant stakeholders involved in the settlement of waqf land disputes. Secondary data were derived from several sources, including primary legal materials, such as statutory regulations; secondary legal materials, including literature on waqf land disputes and their resolution (books, academic journals, legal dictionaries, and previous research findings); and tertiary materials, consisting of non-legal references relevant to the research topic.

Primary data were collected through in-depth interviews conducted directly with respondents, including officials from PPAIW, BWI, the Ministry of Religious Affairs, religious leaders, and community leaders. Secondary data were obtained through library research and document analysis.

The data were analyzed using qualitative analysis, which involves comprehensive explanations supported by logical argumentation. The conclusions of the research were drawn using a deductive method, whereby specific findings obtained from the research are subsequently generalized to reach broader conclusions.

III. Result and Discussions

Legal implementation refers to actions undertaken by society or law enforcement actors to apply and enforce existing legal rules, norms, behaviors, or regulations within social life. The concept of legal implementation is commonly used as a tool to evaluate the effectiveness of legal norms or statutory regulations

within society. When members of society apply such norms in practice, the law can be considered effective; conversely, when the law is not applied, its effectiveness becomes questionable. The primary objective of legal implementation is to translate statutory provisions into practical social activities so that social order and harmony may be maintained.

In the context of the implementation of out-of-court mediation in the settlement of waqf land disputes, the concept refers to the practical application of mediation mechanisms within society to resolve such disputes. Through this application, it becomes possible to assess the extent to which mediation law is actually practiced in the community.

IV. Implementation of Out-of-Court Mediation in the Settlement of Waqf Land Disputes

This section describes the implementation of out-of-court mediation in resolving waqf land disputes, which can be analyzed through several components: the application of mediation within society, community culture in appointing mediators, the legal basis of mediation, mediation institutions, the existence of professional mediators, state policies regarding mediation law enforcement, and the degree of legal compliance.

a. Application of Out-of-Court Mediation in Society

The research findings indicate that the implementation of out-of-court mediation within society is predominantly conducted through informal mediation mechanisms, rather than through formally established mediation institutions. This is reflected in the existence of mediation bodies whose status is informal, meaning that they lack formal legal recognition or written authorization. These institutions are generally non-permanent, do not possess dedicated offices, and operate based on the needs of community members.

Their primary function is to reconcile disputing parties. In Javanese communities, such institutions are commonly referred to as village peace institutions, which are established according to community needs. These institutions represent traditional mechanisms used to resolve disputes in society, including disputes related to waqf land. Similar institutions can be found throughout Indonesia, although they are known by different terms depending on local customs and traditions, such as customary forums, village deliberation councils, village consultative bodies, or *rembug desa* (village consultation forums).

In practice, these institutions are also often referred to as village peace judges. Within informal out-of-court mediation institutions, the village peace judge serves as a mediator who acts as a neutral intermediary. The mediator's role is to facilitate reconciliation among community members during conflicts and to assist disputing parties in resolving their disputes. Additionally, mediators are responsible for bringing disputing parties together to engage in deliberation and dialogue, encouraging them to listen to one another and develop mutual understanding so that disputes can be resolved efficiently and social harmony can be restored.

Accordingly, when waqf land disputes arise within the community, the disputing parties initially attempt to resolve the matter through internal deliberation. However, when differences in opinions, interests, or ideological perspectives prevent the deliberation process from reaching a consensus, mediation becomes an alternative dispute resolution mechanism. In such cases, the parties request the assistance of a mediator to facilitate the resolution of the dispute. In practice, the mediation process follows local traditions and customs and is conducted through institutions formed according to the needs of the community.

b. Community Culture in the Appointment of Mediators

The role of mediators in the settlement of waqf land disputes is crucial, as mediators facilitate the meeting and deliberation of the disputing parties in order to jointly reach a resolution. As neutral and impartial intermediaries, mediators play an essential role in assisting the settlement of waqf land disputes.

According to the results of an interview with PPAIW official Darun, PPAIW is frequently appointed as a mediator in waqf dispute settlement for several reasons. First, disputing parties are often unable to resolve the conflict internally, even though waqf disputes must be settled to prevent further complications. Second, PPAIW is widely trusted as an institution capable of resolving waqf disputes, since unresolved disputes may threaten the preservation of waqf assets. Third, PPAIW is perceived as having expertise in waqf law and in the settlement of

waqf disputes. Fourth, the community strongly relies on the role of PPAIW as a religious authority whose guidance is respected and followed.

Based on the research findings, the community's decision to appoint PPAIW as a mediator is generally grounded in relationships of trust, social ties, religious authority, and kinship, rather than on an assessment of professional competence. In this context, competence may be understood in two aspects: competence in understanding the substantive issues of the dispute and competence in managing the mediation process. Ideally, PPAIW as mediator should possess both forms of competence, as indicated in the Waqf Law, which assigns PPAIW a role in assisting the resolution of waqf disputes, particularly those related to the certification of waqf land.

In practice, however, PPAIW appointed as mediator often possesses expertise in the substantive aspects of waqf law but lacks sufficient capacity in mediation techniques and dispute management. Consequently, the role of PPAIW as mediator sometimes deviates from the fundamental principles of mediation. In many cases, PPAIW actively participates in resolving the dispute rather than facilitating dialogue between the parties. Nevertheless, the community continues to rely on PPAIW because of the limited availability of mediators and the absence of professional mediation institutions. Without such intervention, it is feared that waqf disputes may remain unresolved and that waqf assets may not be properly safeguarded.

The outcomes of mediation vary. Some disputes are successfully resolved, while others remain unresolved. Minor waqf land disputes (micro-level disputes) can generally be settled through simple mediation facilitated by PPAIW. Such cases have been observed in several regions, including Kendal, Klaten, and Semarang. However, in more complex disputes involving multiple parties or larger conflicts, mediation often fails. Examples of such cases have been reported in Solo, Semarang, Sumatra, and Bali.

The research findings indicate that among 34 waqf land disputes recorded in Indonesia, 7 cases (18.42%) remained unresolved. These disputes were initially addressed through mediation, but the mediation process ultimately failed due to several obstacles, including the limited capacity of mediators in conducting mediation effectively. This situation often leads to complications in the mediation process because mediators lack a clear understanding of their roles, responsibilities, and strategies in managing waqf disputes in accordance with applicable legal principles.

The research also shows that mediator selection is influenced by institutional considerations related to waqf governance, particularly the Indonesian Waqf Board (BWI) and the Ministry of Religious Affairs (KEMENAG). BWI is an independent institution responsible for developing and managing waqf in Indonesia. One of its programs includes assisting in the resolution of waqf land disputes, particularly when disputing parties formally request mediation.

BWI has been involved in several mediation efforts in waqf disputes, including cases such as the disappearance of approximately 50 hectares of waqf land belonging to the Prince of Sumedang in West Java, the dispute over 47 hectares of waqf land in Labuan Bajo Medan where a church was constructed, and a waqf land dispute in Meulaboh, Aceh, where the absence of certification triggered conflicts among Islamic organizations.

Similarly, the Ministry of Religious Affairs serves as a governmental institution responsible for administering Islamic legal matters, including waqf administration, by appointing the Head of the Office of Religious Affairs (KUA) as the PPAIW. Research findings indicate that officials of the Ministry of Religious Affairs in the field of Sharia Affairs and Islamic Religious Affairs (URAI) are frequently requested to cooperate with PPAIW in resolving waqf land disputes. The community generally perceives both PPAIW and Ministry officials as experts in waqf matters, regardless of whether they possess expertise in dispute resolution mechanisms.

The community expects PPAIW, BWI, and officials of the Ministry of Religious Affairs to assist in resolving waqf land disputes. The research findings indicate that PPAIW and Ministry officials are capable of resolving relatively simple disputes. However, in larger disputes involving multiple stakeholders, the disputing parties often request mediation assistance from BWI as well as government authorities such as the parliament (DPR), municipal governments, regional governments, and the National Land Agency (BPN). If these mediation efforts fail, the parties may ultimately resort to litigation as a final mechanism for dispute resolution.

Overall, the findings suggest that the community's practice of appointing mediators remains largely traditional in nature, based on social proximity, social status, governmental authority, and trust arising from social

relationships rather than professional qualifications. Mediators of this type generally do not receive financial compensation from the disputing parties. Instead, they perform their roles as part of their broader social responsibility as community leaders who serve as protectors and facilitators of peace within society, particularly in resolving waqf-related disputes.

c. **Legal Basis of Mediation**

The legal basis for resolving waqf disputes through mediation is stipulated in Article 62 of Law No. 41 of 2004 on Waqf, which provides that waqf disputes should initially be resolved through deliberation (*musyawarah*) among the parties. If consensus cannot be achieved through deliberation, the dispute may subsequently be resolved through mediation with the assistance of a mediator. However, this provision does not provide detailed technical regulations governing the mediation process.

More detailed procedural provisions on mediation are found in Supreme Court Regulation (PERMA) No. 1 of 2008, as amended by PERMA No. 1 of 2016, which regulates mediation procedures within the judicial system. In contrast, there are currently no specific legal regulations governing the settlement of waqf disputes through out-of-court mediation.

The state has enacted a general legal framework for alternative dispute resolution through Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution (ADR). Article 1(10) of this law provides that disputes may be resolved outside the court system through consultation, negotiation, mediation, conciliation, or expert appraisal. Nevertheless, the law does not regulate mediation procedures in detail, nor does it specifically address mediation in the context of waqf disputes.

In fact, waqf transactions possess distinctive legal characteristics. Waqf assets are intended to be perpetual and inalienable, their benefits are dedicated to social and public welfare purposes, and waqf itself carries both religious and social significance. Due to these unique characteristics, the provisions of Law No. 30 of 1999 cannot be fully applied to the resolution of waqf land disputes.

The research findings indicate that the settlement of waqf disputes in practice predominantly relies on Islamic legal principles, which emphasize that disputes should first be resolved through deliberation aimed at achieving reconciliation. In many cases, the mediation mechanisms used are derived from the practices of religious leaders (*ulama* or *kyai*) or officials such as PPAIW who are involved in waqf administration. However, these Islamic legal principles are generally formulated in broad terms and do not provide detailed procedural rules for mediation. As a result, communities often rely on local customs and traditions as the legal basis for mediation, provided that such practices do not contradict the fundamental principles of Islamic law.

The research also reveals that mediation agreements reached by the disputing parties are often concluded orally, without being formalized in written settlement agreements. Consequently, such agreements lack strong legal enforceability. Ideally, mediation outcomes should be documented in written settlement agreements, as such agreements function as legally binding obligations for the parties under the principle of *pacta sunt servanda*.

Thus, the legal foundation of out-of-court mediation in waqf disputes largely relies on living law—norms that evolve and develop within society—rather than on formally codified legal rules. Because these norms remain largely unwritten, they do not provide sufficient legal certainty or legal protection for the disputing parties. This situation contributes to the limited effectiveness of out-of-court mediation in waqf disputes and indicates that its implementation has not yet fulfilled the principle of legal certainty.

d. **Mediation Institutions in the Settlement of Waqf Land Disputes**

Mediation institutions are legal entities that assist in resolving disputes within society through the involvement of mediators who possess expertise in dispute resolution. Through such institutions, legal disputes may be resolved in a manner that promotes win-win solutions, thereby satisfying the interests of all parties involved, including disputes concerning waqf land.

In general, mediation institutions can be categorized into two types: court-annexed mediation institutions and out-of-court mediation institutions. Out-of-court mediation institutions themselves may operate either formally or informally. This study focuses specifically on informal out-of-court mediation institutions, as reflected in the empirical findings of the research.

Informal mediation institutions are established and recognized by the community based on traditional legal norms. Their existence arises from the practical needs of society, and the appointment of mediators is usually determined by factors such as social position, personal relationships, and social status within the community.

The research findings indicate that formal mediation institutions specifically dedicated to resolving waqf land disputes have not yet been established. The only formal institution involved in waqf administration is the Office of Religious Affairs (KUA), within which the Official for Waqf Pledge Deeds (PPAIW) operates. The primary function of this institution is to facilitate waqf transactions and address administrative matters related to waqf land, particularly certification and documentation. However, when acting as mediators, PPAIW officials have not yet performed optimally due to limitations in their mediation competencies.

Consequently, when waqf land disputes arise, communities often establish informal mediation mechanisms to resolve them. These mechanisms may take the form of village peace institutions, majlis syuro within religious organizations such as Nahdlatul Ulama (NU) and Muhammadiyah, village deliberation councils, or customary forums. Such institutions operate according to traditional practices that have been maintained across generations and are often led by religious leaders, such as kyai or ulama. The legal basis for these institutions relies on social norms and practices that have developed within the community and are widely accepted as local policy or customary arrangements.

However, these local policies vary across regions, organizations, time periods, and individual actors. As a result, there is no uniform legal framework governing such mediation processes, and legal certainty remains limited. This situation contributes to the ineffectiveness of institutional mediation mechanisms in resolving waqf disputes, as there are no permanent formal institutions supported by professional mediators that can guarantee legal certainty and provide adequate legal protection for disputing parties.

In practice, parties involved in waqf land disputes sometimes seek assistance from formal legal aid institutions, such as Islamic legal consultation and assistance bodies. Nevertheless, these efforts have not yielded optimal results due to financial constraints and the limited institutional capacity of nazhir (waqf managers). This situation is closely related to the distinctive characteristics of waqf property, which is intended to be perpetual, dedicated to public welfare, and imbued with both religious and social values.

Although BASYARNAS (the National Sharia Arbitration Board) has been established as a formal institution for resolving disputes related to Islamic law, its role in resolving waqf disputes has not yet been fully effective or optimal. Therefore, strengthening and optimizing BASYARNAS is essential, particularly in terms of financial resources, procedural efficiency, and the availability of qualified arbitrators. Such improvements are necessary to enable the public to make greater use of BASYARNAS as an effective mechanism for resolving waqf land disputes.

e. State Policy in Relation to the Enforcement of Mediation Law

State policy concerning the enforcement of out-of-court mediation law refers to governmental efforts to support and facilitate the implementation of mediation mechanisms outside the judicial system in order to ensure the effective enforcement of law. Such efforts may include the establishment of regulatory frameworks governing out-of-court mediation, the provision of institutional facilities for mediation bodies, the development of mediator competencies, and the allocation of financial resources to support mediation processes.

The findings of this study indicate that the government has not yet fully developed comprehensive policies regarding the enforcement of out-of-court mediation law. This condition can be observed from several aspects.

First, there have been limited initiatives aimed at enhancing the capacity and competence of mediators, particularly among PPAIW officials, community leaders, religious leaders, and members of the Indonesian Waqf Board (BWI), who frequently act as mediators in dispute resolution. According to an interview with Syamsul Arif, no government program has yet been specifically designed to strengthen mediator capacity in the implementation of mediation law. This situation is problematic, considering that PPAIW officials, religious leaders, community figures, and village authorities are often called upon to mediate disputes within society, including waqf disputes.

Second, mediators appointed by the community often lack adequate understanding of their roles, authorities, and responsibilities in resolving waqf disputes. As a result, some waqf disputes remain unresolved for extended periods due to ineffective mediation processes.

Third, the existence of formal out-of-court mediation institutions, such as the National Mediation Board, faces various challenges, particularly related to procedural complexity and financial constraints. These obstacles make it difficult for communities to seek consultation or assistance in resolving waqf land disputes. Consequently, community members often turn instead to religious leaders, such as kyai or ulama, who are perceived as knowledgeable in waqf law and dispute resolution. In practice, therefore, the mediation mechanisms operating within society remain largely informal and community-based, which do not fully guarantee legal protection for disputing parties due to the absence of clear legal certainty.

Fourth, there is currently no specific legal regulation governing out-of-court mediation in the context of waqf dispute resolution. This situation contrasts with other areas of dispute resolution that have already been regulated by statutory law. For example, disputes between consumers and producers are regulated under Consumer Protection Law, labor disputes between workers and employers are governed by labor law, environmental disputes are regulated through environmental legislation, land disputes may be mediated through the National Land Agency (BPN), and commercial disputes may be resolved under the Arbitration and Alternative Dispute Resolution Law.

Based on the findings above, it can be concluded that government policy concerning the resolution of waqf land disputes through out-of-court mediation remains limited. In particular, there have been no systematic efforts to enhance mediator capacity through training or workshops for individuals who frequently serve as mediators, nor has the government established specific regulatory frameworks or institutional structures dedicated to mediation in waqf disputes.

As a result, the implementation of out-of-court mediation in waqf land disputes has not yet achieved the principles of justice, utility, and legal certainty. Consequently, the enforcement of mediation law in this context remains ineffective and may not yet provide adequate legal protection for disputing parties or ensure the preservation and security of waqf assets.

f. Relationship between the Disputing Parties and the Mediator in the Implementation of Out-of-Court Mediation

The application of out-of-court mediation law in the settlement of waqf land disputes largely relies on legal principles that develop within society, particularly Islamic legal principles and local customary practices. These principles emphasize values such as familial relations, reconciliation, the restoration of social harmony after disputes, and collective solidarity. Consequently, the mediation practices applied in waqf land dispute resolution are generally guided by advice and direction from individuals who are considered authorities in waqf matters within the community, including officials from the Office of Religious Affairs (KUA/PPAIW), religious leaders, kyai or ulama, village authorities, and other community leaders. The rules governing such mediation practices are typically unwritten, traditional in nature, and therefore exhibit weaknesses in terms of legal certainty.

The research findings indicate that these traditional mediation mechanisms are capable of resolving relatively simple waqf disputes (micro-level disputes). However, in more complex disputes involving multiple parties or broader conflicts (macro-level disputes), such mechanisms often prove inadequate. This limitation becomes increasingly significant given the rapid development of waqf law and administration, which is likely to generate more diverse and complex disputes in the future.

Therefore, effective cooperation and mutual responsiveness between the disputing parties and the mediator are essential in order to achieve successful dispute resolution. Such cooperation may enhance the level of community compliance with applicable legal norms and reduce the likelihood of mediation failure within society.

Based on interviews conducted with village officials in Kajen, Lebaksiu District, Tegal Regency, several factors were identified as contributing to the failure of mediation due to the relationship between the disputing parties and the mediator. These factors include:

- 1) A lack of trust from the disputing parties toward the appointed mediator, which discourages them from openly disclosing the root causes of the dispute. Delays in the mediation process caused by the parties' prolonged emotional involvement in the waqf dispute.
- 2) Rejection of the mediation outcome by one or both parties when the result is perceived as unfavorable or when a win-win solution is not achieved.

- 3) A lack of cooperation from the parties during the mediation process, such as rigid positions, mutual accusations, and a strong belief that one's own position is entirely correct.
- 4) Poor interpersonal relationships between the disputing parties and the mediator.
- 5) Situations in which one party perceives themselves as more knowledgeable or authoritative than the mediator, thereby dominating the mediation process and creating discomfort for the other party.
- 6) These findings suggest that mediation failure is often influenced by the attitudes and behavior of the disputing parties themselves, including distrust of the mediator, prolonged emotional involvement in the dispute, dissatisfaction with mediation outcomes, lack of cooperation during the mediation process, and strained relationships between the parties and the mediator.

Based on the above findings, it can be concluded that the settlement of waqf land disputes in practice generally follows the mechanism provided under Article 62 of the Waqf Law, which stipulates that disputes should first be resolved through deliberation (*musyawarah*), and if no agreement is reached, mediation may be used as an alternative mechanism. However, empirical findings show that communities predominantly rely on out-of-court mediation to resolve such disputes.

The implementation of out-of-court mediation in waqf land dispute resolution is illustrated in the following table.

Table 4.5
 Implementation of Out-of-Court Mediation in the Settlement of Waqf Land Disputes

No	Indicator	Description	Legal Implications
1	Implementation of out-of-court mediation in society	Used as a mechanism for resolving waqf disputes because it is simple, inexpensive, and based on a familial approach.	Weaknesses exist in the juridical, institutional, and practical implementation aspects within society.
2	Community culture in appointing mediators	The selection of mediators is traditional in nature, arising from social relationships rather than professional qualifications.	Weak mediator capacity may lead to the failure of mediation.
3	Legal basis of mediation	Based on the Waqf Law; however, in practice it relies on Islamic legal principles and traditions that live and develop within society.	It does not yet fully reflect the principles of legal certainty and legal protection.
4	Mediation settlement outcome	Agreements are often made orally and are not documented in a written settlement agreement.	Such agreements lack strong legal force and do not fulfill the principle of legal certainty.
5	Mediation institutions	Conducted through informal institutions that are temporary, established only when disputes arise, and lack formal legal recognition.	These institutions do not yet provide adequate legal protection for disputing parties and mediators.
6	Existence of professional mediators	Professional mediators have not yet been established.	Mediation failures may occur because mediators do not fully understand their roles, duties, and functions.
7	State policy related to mediation law enforcement	There has been no systematic effort to improve mediator capacity, establish regulatory frameworks, or create mediation institutions.	The implementation of out-of-court mediation remains unsystematic and cannot yet be enforced fairly within society.

No	Indicator	Description	Legal Implications
8	Relationship between disputing parties and mediators	Various problems arise in the interaction between disputing parties and mediators during the mediation process.	Mediation failure may occur due to issues involving both the disputing parties and the mediator.

V. Legal Analysis: From Traditional Law to Modern Law

Based on the table above, it can be analyzed that in practice the implementation of out-of-court mediation in the settlement of waqf land disputes has not yet been optimal. Several legal problems persist, resulting in ineffective application of mediation mechanisms. Consequently, such mechanisms have not been able to resolve waqf land disputes comprehensively nor provide adequate legal protection for the disputing parties.

This situation is caused by several factors. First, there is no clear and comprehensive legal framework governing the implementation of out-of-court mediation in waqf disputes. Second, mediators are often appointed based on religious authority, social relationships, and community trust rather than professional qualifications. Third, mediators—who are frequently religious leaders (kyai) or PPAIW officials—often lack sufficient understanding of their duties, roles, and authority as mediators. Fourth, mediation institutions outside the court system are generally temporary and lack institutional permanence as well as service-oriented structures. Fifth, government support for the development and institutionalization of out-of-court mediation in waqf disputes remains limited. Finally, disharmonious relationships between disputing parties and mediators may arise due to the absence of clear legal rules that ensure legal certainty and protection in the mediation process. These conditions increase the risk of mediation failure.

The above phenomena result in several implications, including weaknesses in the juridical, institutional, and practical aspects of mediation implementation in society. There is also a lack of mediator capacity in performing their duties effectively, and mediation practices often fail to reflect the principle of legal certainty. In addition, mediation mechanisms have not yet provided adequate legal protection for disputing parties or mediators, and the implementation of out-of-court mediation remains unsystematic. As a consequence, mediation processes frequently fail and cannot yet be enforced fairly within society.

From a broader analytical perspective, the implementation of out-of-court mediation in waqf land dispute resolution relies predominantly on unwritten law, particularly Islamic legal principles and social traditions that have developed organically within society and are transmitted across generations. Such legal norms emerge from the community itself (bottom-up) through the influence of religious leaders, community leaders, and customary authorities. This phenomenon illustrates the relationship between legal norms and social behavior, whereby law functions as a living guideline that regulates community conduct based on religious and social institutions. This situation corresponds with the concept of living law, as articulated by Eugen Ehrlich.

According to Ehrlich, a leading figure of the sociological jurisprudence school, law is realized and expressed through the behavior of society. Law emerges from the collective awareness of society regarding its needs (*opinio necessitatis*). In the context of waqf dispute resolution, mediation outside the court system is widely used because waqf transactions may generate conflicts that potentially develop into disputes. Such disputes are initially addressed through internal deliberation aimed at achieving consensus. When such deliberation fails, community leaders or respected religious figures—such as kyai—are invited to mediate the dispute. Consequently, the mediation practices introduced by these leaders gradually evolve into normative patterns of dispute resolution within the community.

Dias, in his work *Jurisprudence*, also notes that Ehrlich, together with Roscoe Pound, revived earlier sociological perspectives on law developed by Émile Durkheim, Max Weber, and Karl Marx. These scholars argued that effective law must correspond with the living law within society. As further explained by Ehrlich in *W. Friedmann's Legal Theory*, legal theory should not be confined to formalistic or legalistic approaches. Instead, law must be understood as part of the broader dynamics of social development. Consequently, the study of law must always consider its social and historical contexts.

Ehrlich further emphasized that the true meaning of law lies in the reality of human relationships, meaning that law essentially reflects social interactions. Society represents a network of social relations, and legal norms

emerge from these relationships. This perspective is supported by Theodor Geiger, who argued that norms become meaningful only when they are manifested in the behavior of members of society. According to Geiger, society is not a static entity but rather a dynamic process (*gesellschaft ist kein Ding, sondern ein Prozess*).

In relation to waqf land disputes, this perspective suggests that the legal norms governing mediation outside the court system are embedded in everyday social practices. Waqf disputes are dynamic and evolve alongside changes in social relations. Their resolution therefore follows social norms that are widely accepted within the community, such as deliberation (*musyawarah*) or mediation.

The reliance on living law in waqf dispute resolution also corresponds with the legal theory of Friedrich Carl von Savigny, who argued that law develops organically within society and forms an integral part of social life. According to Savigny, law reflects the spirit of the people (*Volksg Geist*), and therefore legal development must align with the values, norms, and cultural traditions of a nation. Law is thus a continuous process that evolves over time—from past to present and into the future—through the adaptation of legal rules to the spirit of society.

Nevertheless, when viewed from the perspective of modern legal systems, the mediation mechanisms currently used in resolving waqf land disputes still exhibit several weaknesses. In particular, they lack legal certainty and formal legal protection, as the rules governing mediation remain largely unwritten and insufficiently detailed. As a result, mediation processes may fail to resolve disputes comprehensively, disputes may re-emerge at later stages, or settlements may take a long time to achieve. In some cases, the absence of written documentation may also disadvantage one of the parties.

Therefore, it is crucial for the government to undertake legal reform concerning out-of-court mediation in waqf disputes by transforming traditional unwritten practices into modern legal frameworks codified in statutory regulations. Such reforms should include clear legal provisions regarding mediation procedures, principles governing out-of-court mediation, and the professional competence of mediators in performing their duties, functions, and authority. This reform would also reflect the development of waqf governance following the enactment of Law No. 41 of 2004 on Waqf, which represents a significant milestone in waqf regulation in Indonesia.

In this context, the government—particularly the Ministry of Religious Affairs (KEMENAG) in cooperation with the Indonesian Waqf Board (BWI)—should reconsider and refine the provisions of Article 62 of Law No. 41 of 2004, particularly with regard to the regulation of mediation mechanisms in waqf dispute resolution. In addition, Government Regulation No. 42 of 2006 on the Implementation of Waqf should be revised to provide more detailed technical regulations concerning out-of-court mediation in waqf disputes.

From an institutional perspective, it is also essential to establish a dedicated mediation institution for waqf disputes, operating under the coordination of KEMENAG and BWI as the principal institutions responsible for waqf governance in Indonesia. Furthermore, strengthening cooperation between PPAIW, KEMENAG, BWI, and BASYARNAS (National Sharia Arbitration Board) in resolving waqf land disputes through mediation mechanisms is highly necessary.

Such institutional and legal reforms may draw inspiration from the experience of Egypt, where waqf practices have existed since the early spread of Islam in the region around 628 CE, when the Prophet Muhammad invited the governor of Egypt, Muqawqis, to embrace Islam. Initially, waqf law in Egypt operated as an unwritten legal system based on classical Islamic jurisprudence developed through scholarly interpretation (*ijihad*). However, since 1525, the Egyptian state has undertaken the codification of waqf law, transforming Islamic legal principles into formal statutory regulations enacted by the state.

Therefore, reforming the legal framework governing waqf dispute resolution through out-of-court mediation—both from juridical and institutional perspectives—is essential to ensure that waqf disputes can be resolved comprehensively and peacefully while maintaining legal order. Such reforms would also provide legal protection and justice for disputing parties and safeguard waqf assets. Moreover, legal reform is necessary to align dispute resolution mechanisms with the characteristics of modern law, which emphasizes codified legislation, legal certainty, clarity, and universal applicability. In this regard, transforming traditional mediation practices into modern legal frameworks represents a crucial step in improving the effectiveness of waqf dispute resolution in Indonesia.

VI. Conclusions

The implementation of out-of-court mediation in the settlement of waqf land disputes has not yet been optimal due to several legal problems. These include the absence of clear and definitive regulations that can serve as guidelines for mediation; the appointment of mediators based on religious authority, social relations, and personal trust rather than professional qualifications; and the limited understanding among mediators—who are often religious leaders (kyai) or PPAIW officials—regarding their duties, roles, and authority in the mediation process. In addition, out-of-court mediation institutions are generally temporary in nature and have not yet been established with clear legal status or oriented toward proper institutional service standards. Government support for the development of mediation law outside the court system in waqf dispute resolution also remains limited. Furthermore, disharmony frequently arises between disputing parties and mediators due to the absence of legal rules that ensure legal certainty and protection in the settlement of waqf land disputes, which may ultimately lead to mediation failure.

These conditions have several implications, including weaknesses in the juridical, institutional, and practical aspects of mediation within society; insufficient mediator capacity in performing their primary duties and functions; mediation practices that do not yet reflect the principle of legal certainty; and limited legal protection for both the disputing parties and mediators. Moreover, the implementation of out-of-court mediation remains unsystematic. As a result, mediation processes are prone to failure and the enforcement of mediation law outside the court system cannot yet be carried out fairly within society.

Therefore, it is essential for the government to undertake legal reform concerning out-of-court mediation by transforming traditional unwritten practices into modern legal frameworks codified in statutory regulations. Such reforms should include clear provisions regarding mediation procedures, the legal principles governing out-of-court mediation, the professional competence of mediators in understanding their duties, functions, and authority, as well as the institutional framework supporting mediation mechanisms.

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