
**WAKAF COMMUNAL LAND DISPUTE RESOLUTION IN WEST
SUMATRA WITH REGARD TO NATIONAL LAW**

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Abstract

West Sumatra as the main pillar of the existence of communal land, which is officially recognized in the Article 3 of the Basic Agrarian Law. Indonesian agrarian reform has a special characteristic of "concept of rights" called "ulayat". This can be seen from the history of the establishment of the Basic Agrarian Law, which protects customary rights. The existence of customary rights is in line with the concept of customary law, which is used as the basis for the establishment of the Basic Agrarian Law (Article 5). The concept of customary law and ulayat with in the Basic Agrarian Law shows the values, norms, religious and communal aspect of the Indonesian people. This has been integrated in the Pancasila and the 1945 Constitution. The state is given the highest authority to regulate agrarian affairs based on Article 33 paragraph 3 of the 1945 Constitution in conjunction with Article 2 of the Basic Agrarian Law. One of these characteristics is found in the property rights of wakaf. In the implementation of wakaf faces several problems including inability of the community to understand the provisions and administrative processes of wakaf and the lack of provisions on communal land wakaf. This can be trigger wakaf disputes. This paper shows that norms, values, interests, needs, relationships and information including structures are some of the factors of the wakaf of ulayat land disputes. The dispute resolution model is carried out with customary deliberations, and bringing it to court is the last strategy of dispute resolution, which rarely takes place in West Sumatra.

Keywords: Dispute Resolution Model, Wakaf, Tanah Ulayat.

Introduction

Legislation on wakaf represent is crucial to Indonesia due its dominant Muslim community. Land occupies an important position in sustaining life and development. In Indonesian society, especially in rural areas, farming is the main occupation, hence the importance of land tenure for economic, social, religious and political purposes. From an economic viewpoint, land is seen as a source of production while from a social angle, land is considered as a glue of social relations, religious aspect of the land is related to beliefs and the political side of land relates to values, norms, and interests in state life. Furthermore, human development has caused the decrease of land. The concept of rights and land use is seen from a legal perspective. In order for the law to be obeyed by the community, a highest organization, the state, is needed. The state is given the authority

to regulate land.^[1] Indonesian agrarian law has a philosophical concept from the religious and communal views of the Indonesian people as it is based on customary law^[2]. This resulted in the concept of communal land ownership being recognized and implemented in the economic, religious, legal, and political fields seen from a sociological viewpoint ^[3]. Wakaf is the Islamic Law arrangement over land between individuals. It derives from the Arabic word *waqafa* (hold or stop). In Islamic law *wakaf* means giving up a property to an individual (nadzir) to manage in the form of an individual or legal entity, provided that the results or benefits are used for matters that are in accordance with the teachings of Islamic law. In such a transfer of property, the owner of the property turned into wakaf is Allah ^[4], not the *nadzir*. This concept has been adopted by the Basic Agrarian Law ^[5]. However, legislation on *wakaf* does not exist at the national lever. This has resulted in the lack of administrative processes of *wakaf* ulayat land, and worse, its ownership has been associated with regular land ownership. The growth of the population increases the need for land while *wakaf* lands are not clearly defined by law. This gives rise to vulnerability and facilitates disputes. In order to anticipate and minimize the emergence of wakaf communal land disputes.

Method

This research was conducted by using empirical^[6] and normative juridical methods. Empirical data was conducted from surveys^[7] and in-depth interviews and court observations while normative data was gathered through law books, articles, legislations^[8] or personal material, ^[9] as well as tertiary data ^[10] such as dictionaries, encyclopedias, and law magazines. ^[11] This research is descriptive in nature as it describes *wakaf* communal land dispute resolution. The research was carried out with purposive sampling with choices based on specific goals in West Sumatra, home to the *Minangkabau* people. The research population is the whole or set of objects with the same characteristics.^[12] The population in the research model of *wakaf* communal land dispute settling is associated with the legislative system. The sample consists of small part of the population.^[13] Analysis is defined as a systematic and consistent decomposition process for certain symptoms. Observe research is legal research, so the analysis of legal material is carried out with normative analysis ^[14], against various existing legal provisions, especially those relating to the model for resolving disputes over ulayat land associated with the legislative system carried out qualitatively^[15].

Literature Review

1. Wakafin several Legal Concepts

a. Islamic law Concept

The concept of *wakaf* is derived from Islamic law, which means holding something to be taken advantage of and institutionalized for the public interest. Abu Hanifah argues that *wakaf* placing one's property at the disposal of the public for the general interest in accordance with Islamic Law. According to Wahbah Al-Zuhaily^[16] who cited several understandings: 1. AbuHanifah declared that wakaf is holding an object, which according to the law remained a wakif property in order to use benefits for good, in this case the wakif was justified in withdrawing it and allowed to sell it. 2. according to Jumhur, *wakaf* is giving away an object to the Islamic community to take advantage of, and that ownership right of the *wakaf* property is not owned by the person who manages it (the nadzir). Once a *wakaf* property has been given away, it become the property of Allah SWT^[17].According to Malikiyah, *wakaf* is a property donation intended to improve the living condition of its recipient (mustahiq). The validity period is not for eternity but only for a certain period of time in accordance with *wakif*'s wishes. The legal basis of *wakaf* in Islam is the Koran, Al Hadith, and ijihad of the mujtahid^[18]. Verses related to *wakaf* are as follows: a) Al-Baqarah verse 261, b) Al-Baqarah verse 267, c) Ali Imran verse 92, d) Al-Nahl verse 97, d) Al-Hajj verse 77. Ibn Taimiyah argues that several reasons underlie the allocation of a *wakaf* property to the public^[19] i.e., for public necessities such the construction of mosques or the renovation of a damaged one ^[20],the construction of schools Islamic boarding facilities^[21]. *Wakaf* is a separate legal action which is viewed from a dualistic prospective^[22] on the one side it is a legal action done with an authentical pledge. On the other hand, it constitutes a legal entity (rechtperson) derived from customary law^[23].

b. Adat Law Concept

The concept of customary law dealing with *wakaf* is related to the growth and spread of *wakaf* in social relations. Therefore, *wakaf* concept can be referred to as a social institution. Juhaya S. Praja argues that the study of *wakaf* as a social institution refers to: a) *wakaf* as a religious institution; b)*wakaf* as an institution regulated by the state; c) *wakaf* as a community institution or an institution that lives and grows in society^[24]

c. Legislation Concept in Indonesia

In Indonesian law, the provisions of *wakaf* have been regulated starting from the Dutch colonial Government in 1905 which was revised several times in 1931, 1934 and 1935. These provisions only regulate the authority and procedure of licensing and registration of *wakaf* land land is also provided for within the Basic Agrarian Law (Article 49 Paragraph 3) in conjunction with Government Regulation No. 10/1961 and Regulation No. 28 of 1977. It is also regulated in the Compilation of Islamic Laws

2. Tanah Ulayat(communal land)

Tanah Ulayat is regulated by article 3 of the Basic Agrarian Law. Ulayat rights are a series of authority and obligations of a customary law community, which relate to land located in the area of its territory. Although the existence of customary land is recognized in the Basic Agraria Law, there are no organic provisions related to its implementation. There was a provision of customary rights in the Ministerial Decree No. 5/1999, but this regulation is only meant to resolve land related conflicts. Various formulations of customary rights have emerged from scholars, such as Boedi Harsono who argues that ulayat rights are a series of authority and obligations of a customary law community that relates to land located in its territory^[25]. Djaren Saragih, on the other hand, claims that ulayat rights are in the form of rights and obligations rather than legal alliances as a whole of a particular region namely the area in which a community exists^[26]. Dt. B. Nurdin Yakub, too, claims that ulayat land included land that had not been cultivated by the community and belonged to the nagari (village) with boundaries in accordance with the surrounding natural situation^[27]. Customary rights are a concept of legal rights that contain the authority and obligations of community groups^[28]. In addition, ulayat land is also used as a symbol of social status in society, especially matrilineal communities. In *Minangkabau*, a person's dignity and authenticity are inherent in the ulayat property. If a group does not have ulayat land (pusako), it is not seen as a native but they referred to as emigrants. Ulayat land is seen as a binding factor between community members^[29].

3. Wakaf Conflict Resolution

Article 62 of the Wakaf Law stipulates that *wakaf* dispute resolution must be carried out by deliberation to reach consensus. If consensus is not reached, it can be resolved through mediation, arbitration, or court. Article 12 of Government Regulation No. 28 of 1977 says that *wakaf* disputes over land ownership must be dealt with through religious court. Article 226 of the Compilation of Islamic Laws, on the other hand, says that the settlement of *wakaf* disputes relating to Nadzir's duties and responsibilities should be carried out by the Office of Religious Affairs Sub district, District Ulama Council and finally through the Religious Courts. Litigation is a final stage (ultimum remedium) in *wakaf* dispute resolution^[30].

Results and Discussion

The Implementation of Wakaf Tanah Ulayat in West Sumatera

Wakaf institutions are part of the every day's life of the Minangkabau people in West Sumatra, a province whereby Islam is welcomed by custom under a concept known as *adat manurun syarak mandaki* which means the arrival of Islam is united with its customs and culture. This synergy is also referred to as *Aadat Basandi Syarak Syarak Basandi Kitabullah* (ABSSBK). The concept of *wakaf* in Islamic law goes hand in hand with customary law. At the beginning of the formation of Minangkabau culture and customs by Datuak Katumanggungan jo

Datuak Parpatih Nan Sabatang, there were only four tribes (the initial tribe) of the two narratives, namely Koto, Piliang, Bodi, and Caniago^[31]. And in its development it became more or less 100 tribes^[32] of the *Minangkabau* ulayat Land which was communal in the lowest level called the *ulayatkaum* or *pusakotinggi*. In *Minangkabau* the practice of communal *wakaf* is very dominant and its use is generally intended to support religious facilities and infrastructures, such as the construction of mosques, mushalla, Islamic boarding schools (pesantren)^[33]. The area of *wakaf* land in West Sumatra is 452.72 Ha, which is spread in 3,897 locations ^[34]. Government Regulation No. 10 of 1961 does not specify that ulayat land must be registered / certified. Similarly, Government Regulation No. 24 of 1997 does not provide for the registration of ulayat land. The development of *wakaf* objects with in the *Wakaf* Law is that besides land, movable objects such as money and commodities can also become *wakaf* objects. However, the inclusion of movable things as *wakaf* objects has been dismissed by the Basic Agrarian Law, which also expressly revoked Articles 499 to Article 1232 of the second book of the Civil Code as far as agrarian matters are concerned. The Civil Code is individualized because it does not recognize communal land rights such as tanahulayat despite the fact that it is recognized by both the 1945 Constitution and the Basic Agrarian Law. Article 32 of the *Wakaf* Law says that *wakaf* must be registered by the Nazhir no later than 7 working days after the Deed of Endowments is signed. *Wakaf* ulayat land can be registered at the Office of the Land Agency based on the Government Regulation No.24 of 1997, with the development of *wakaf* land status, namely ownership rights, business use rights, building rights, and use rights on state land, usufructing rights. Buildings or usufructuary rights that are above the land of management rights or private property rights that must obtain written permission from the holder of management rights or ownership rights can be used as an endowment objects. But customary rights as a basic concept of rights in agrarian regulation reform in Indonesia (UUPA) are not included as endowments. The use of ulayat land by the people of West Sumatra is carried out in a familial manner under the authority of clan leaders known as *ninikmamak* who have the approval of the entire community. Ulayat land use rights contracts are often entered into verbally and that is one of the reasons why many of wakaf land are not registered or certified in accordance with the law.

Triggers or causes of disputes over Wakaf communal land

As stated earlier, although ulayat land is recognized in article 3 of the Basic Agrarian Law, its implementation remains ambiguous as there are no organic provisions on its management. Likewise, due to the absence of legal provisions to register or enhance customary rights, the registration / customary rights agreement with the concept of individual property rights violates the concept of customary rights. Customary *wakaf* land that does not have a certificate is a very problematic and dangerous block of land as it could trigger conflicts. Other causes are related to creation of a paradigm in the community that *wakaf* is a fix asset, whose designation is always for worship and for socio-religious activities. The habit of seeing *wakaf* as a pious charity that has noble value represented by Allah without having to go through administrative procedures, as wakaf property is considered to belong to Allah alone, therefore, no one dares to disrupt it^[35]. Another cause is the large amount of untended *wakaf* lands that are grabbed by the community or turned to third parties^[36]. In addition to these problems, there is the lack of professionalism and

creativity of the nadzhir in managing *wakaf* land. Interviews with the Directorate of Endowments Empowerment showed that in general, Nadzhir manage wakaf in a traditional or unprofessional way which contributes in its unproductiveness. Indonesian Nazhir generally use *wakaf* assets only for social purposes rather than economic aims. There is also heirs who deny the existence of a wakaf pledge from their parents, they do not want to give up the *wakaf* land to the appointed nadzhir, or to an official. Conflicts also arise due to the greedy attitude of some heirs. Furthermore, wakaf land disputes are triggered by the distinct interest and needs between developers and the community. Conflict of interest between the wakif heirs who feel entitled to the land that has been represented by the nadzir who has an interest in maintaining the function and allotment of wakaf land as a place of worship or mushalla. Population growth, especially in cities, triggers the government to rearrange zoning plans according to community needs. Development in the public interest as detailed in the Law Number 12 of 2012 on Spatial Planning for Development in the Public Interest, is often also related to pressure for reimbursement, exchange, sale and transfer of *wakaf* land functions. This is in accordance with the benefit of having to open the corridor which concerns the responsibility of Nadzhir even though in a very strict way in positive law must be regulated. It is also possible that the cause of the dispute is a clash between religious values that *wakaf* has been legally valid if it has fulfilled the conditions determined by religion even though it is not registered or there is no Endowment Pledge with positive legal values that instruct and mandate that the *wakaf* land be registered^[37].

Ulayat Land Dispute Resolution Model Related to Dispute Resolution Mechnismin Legislation

Wakaf disputes resolution in the laws and regulations in Indonesia has changed since the issuance of the *Wakaf* Law and the government Regulation No. 28/1977, which stipulates that *wakaf* land issues can be resolved through a litigation filed to the local Religious Court while Wakal Law mandates that the conflict should be dealt with through arbitration/mediation. In the event that the mediation fails to resolve the dispute, it can be brought to the Shariah arbitration body. In the event that the Sharia arbitration body fails to resolve the dispute, it is brought to the religious court and / or the Shariah law. Settlement of dispute through court is the last resort. The state provides opportunities for the community to resolve disputes through a pluralistic legal system. *Wakaf* pledge lacks real legal basis as the contract is entered into verbally between the *wakif* and the nadzir. The pledge is only a mere promise. In Civil Code legal system, the formulation of the agreement is stated as a legal act whereby one party binds itself to another. Unlike a normal contract under civil law, in *wakaf* pledge, only the will of the wakif suffices. According to the Article 1338 of the Penal Code, any agreement made in accordance with the law apply as laws for those who make it. It cannot be revoked in addition to the agreement of both parties or for reasons determined by law. From the provisions of the article, it can be stated that in terms of contract, positive law in

Indonesia adheres to an open system, meaning that everyone is free to make an agreement whatsoever as long as it is made in accordance with law, public order and / or decency. Judging from the political and cultural factors, the cooperative spirit in resolving ulayat land disputes is a manifestation of the fourth principle of Pancasila (deliberation for consensus), and the settlement of disputes outside the court is the most effective and efficient alternative in resolving disputes or conflicts of interest in *wakaf* communal land. In West Sumatra, the resolution of *wakaf* communal land disputes is done by deliberation / consensus, using the principle of consensus with family democracy derived from the customary law. In Minangkabau, the customary legal system used is referred to as "Lareh" or solubility. The resolution of disputes through deliberation and consensus involves traditional leaders at all levels including the village Meeting Board or *Kerapatan Adat Nagari* (KAN) and the Minangkabau Natural Customary Institution (LKAAM), which includes clan leaders such as *ninikmamak*, *alimulama* and *cerdikpandai*. Deliberation can be held at a traditional house (*rumahgadang*) or hall. The research revealed that *wakaf* ulayat land is also one way to eliminate communal property rights (ulayat) permanently. This means that customary rights are transferred to God's rights and used by *Minangkabau* people to maintain the balance of society, and especially to improve worship.

Conclusion

Wakaf ulayat land is not regulated in any laws/regulations dealing with land issues in Indonesia. These laws/regulations include the Basic Agrarian Law and Government Regulation No. 28 of 1977 in conjunction with the Compilation of Islamic Laws and the Wakaf Law. This, along with conflict of interests, social and economic conditions, religion and political, constitutes the main factor of *wakaf* communal land disputes in West Sumatra. Wakaf communal land dispute resolution is carried out through a deliberation and consensus according to customary law rather than through mediation, arbitration or court.

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Article 1 paragraph (2) All earth, water and space, including natural wealth contained within the territory of the Republic of Indonesia as the gift of God Almighty is the earth, water and space of the Indonesian people and is a national wealth and paragraph 3 reads

Relations between nations Indonesia and the earth, water and space referred to in paragraph (2) of this article are eternal relationships.

This is confirmed in Article 1 paragraph 2 and 3 of the Basic Agrarian Law. The implication in the BAL is explicitly regulated in the wakaf land in Article 49 paragraph 3, its implementation is determined in Government Regulation No. 28 of 1977 on Land Property Representatives. It is also regulated in Presidential Decree No. 1 of 1991 on Compilation of Islamic Law (KHI). Nevertheless, the provisions governing wakaf communal land do not exist in the Indonesian law.

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Normative analysis is at the core of legal analysis, where the task of legal analysis is to analyze the meaning of law, the principles of legal principles, legal systems and various juridical concepts. Thus, in this normative analysis, the starting point cannot be separated from juridical provisions based on the pure legal concept of Hans Kelsen, see further in the book; Johnny Ibrahim, 2008, Theory and Normative Legal Research Methodology Bayu Media, Publishing, Malang, p.311.

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