

WAQF AS PERMANENT TRANSFER OF COMMUNAL LAND IN MINANGKABAU COMMUNITY

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Abstract:

The customary law in Minangkabau that applies today is a compound of Customary law and Islamic law called "*Adat Basandi Syarak, Syarak Basandi Kitabullah*" (ABSSBK). According to Article 4 paragraph (1) of the Indonesian Agrarian Law, the legal relationship of the Minangkabau people with land (earth's surface) is a non-individual communal relationship, which has been arranged on three levels called the land of clans (*tanah kaum*), land of tribes (*tanah suku*) and land of *nagari*. The communal legal relationship gives rise to shared ownership rights. In the agrarian legal concept, communal rights are regulated in Article 3 of the Indonesian Agrarian Law. All land rights must be registered (according to article 19 of Indonesian Agrarian Law). Land registration is carried out with Government Regulation No. 24 of 1997, however customary land is not included as the object of registration (Article 9 of the Government Regulation No. 24 of 1997). Land Waqf in Indonesian law is not only regulated in the Qur'an and Al Hadith but also in the Agrarian Law (Article 49 paragraph 3), which states that only land rights can be an object of waqf. However it does not provide confirmation that *ulayat* right can be object to waqf. While in the reality of Minangkabau customary law, *ulayat* land can be object to waqf. The transfer of *ulayat* land waqf is permanent, because it cannot be revoked again and cannot with certain conditions be return to *ulayat* land. Indeed, according to Minangkabau customary law, *ulayat* land cannot be bought and sold, this is stipulated in the customary fatwa "*jua indak dimakan bali, gadai indak dimakan sendo*", it means that it cannot be sold, only by pawning land with very strict requirements, which are temporary, not making customary rights disappear. Through in-depth research it is found that with waqf of ulyat land, the communal rights of the Minangkabau customary community can be transferred permanently.

Key words: 1.Waqf of Communal Law, 2.Minangkabau costumary law, 3. Communal Land Transfer.

I. Introduction

Indonesian agrarian law has religious and communal philosophical concepts, so the reform of Indonesia's agrarian legal system is based on customary law, which relies on religious law (Article 5 of the Indonesian Agrarian Law). This results in the concept of communal land ownership being

recognized in Indonesia (Article 3 of the Indonesian Agrarian Law). Likewise in the agrarian law from the sociological point of view^[1]the implementation of this concept applies in various fields.

The Indonesian state is given the authority to regulate land (Article 33 paragraph 3 of the 1945 Constitution junto Article 2 of the Agrarian Law), but the state does not have ownership rights to land in Indonesia, because all of Indonesia's earth at the highest level belongs to the Indonesian Nation which is endowed by God Almighty (Article 1 of the Indonesian Agrarian Law). The basis of religious life is the basic legal concepts for the Indonesian people in their lives.

One of the legal actions between humans and the land that has been regulated in Islamic law is waqf. In terminology waqf comes from Arabic waqafa, according to the language means to hold or stop. In Islamic law waqf means giving up a durable property right to someone (called Nadzir) in the form of an individual or a legal entity, provided that the results or benefits are used for various things in accordance with the Islamic law. Waqf property from the legal act of the endowment (wakif), comes out of his property, but acceptance by Nadzir does not also make Nadzir as its owner, but is returned to the Right of Allah. This concept is actually embraced by the Indonesian Agrarian Law. This is confirmed in Article 1 paragraph 2 and 3 of the Indonesian Agrarian Law.^[2]The implication is that the land endowment is regulated explicitly in Article 49 paragraph (3) of the Indonesian Agrarian Law, and then its implementation is determined in Government Regulation Number 28 of 1977 on Land Ownership Endowment. Further it is also regulated in Presidential Instruction No. 1 of 1991 on Compilation of Islamic Law, especially Book III, and now it is regulated in Law Number 41 of 2004 (Waqf Law), supplemented by Government Regulation Number 46 of 2006 on the Implementation of the Waqf Law. Of the various provisions governing land waqf, there are no visible provisions for communal land waqf, but the community has carried out communal land waqf, even though the administration of communal land waqf has not been carried out properly. Compounded by the endowment of

communal land waqf equated with individual land waqf (Government Regulation No. 24 of 1997 replacing Government Regulation No. 10 of 1961). For the subject of communal rights holders the most prominent in communal land waqf is the worship side, done in the name of Allah alone, and infrequently done verbally without making a pledge of waqf or without being supported by making an authentic deed of the waqf. Sometimes they do not even pay attention to administrative provisions concerning ownership documents and other provisions that normatively provide legal certainty of waqf and waqf assets.

The act of waqf must be done with the waqf pledge from the person who gives the land to the nadzir made by the Public Officials of the Waqf Pledge in front of witnesses, a minimum of two people. After the waqf certificate was made by Public Officials of the Waqf Pledge, the waqf was registered in the name of nadzir at the Land Office and a proof of waqf rights was issued in the form of a wakaf certificate.

In the concept of Islamic law the land that can be the object of waqf are lands owned by the Wakif with the concept of property rights. With regard to customary rights, where proof of land rights does not exist, besides that the concept of communal property that is not shared is not found in any legal concept in the world. The concept of law regarding common property rights is indeed what is called collective ownership but the shared property can be divided based on the person who owns it. However, the concept of communal land in Minangkabau is undivided and undistributed common property. It holds in the hands of womens called "*bundo kanduang*" and their use is organized by men called "*mamak*". Mamak is a male leader in the clan, tribe and nagari in Minangkabau. As the leader, this mamak was given the title "*Datuak*", and not all the men who had the title *Datuk*, but the men chosen from his clan. This Datuk uses the *sako* (title of leader) according to Minangkabau custom. This sako is derived or inherited based on the legal relationship of blood laces from materilinal kinship. In addition to sako, there is also a *pusako* owned by Minangkabau women (*bundo kanduang*), where the *pusako* is related to wealth, and in legal science it relates to legal objects. One of these *pusako* is *ulayat* land,

for its preservation, *ulayat* land cannot be sold and transferred, but in an urgent situation it can be mortgaged by deliberation and with strict conditions. Dalam menjaga kepemilikan komunal dari kaum materilinal ini maka digariskan dalam aturan adatnya yang tidak tertulis, bahwa tanah *ulayat* “ *jua indak dimakan bali gadai indak dimakan sendo*) artinya tanah *ulayat* tidak boleh hilang, namun kalau untuk peningkatan pemenaftn maka disebutkan dalam fatwanya “*kabau pai kubangan tingga* “ dimanfaatkan tidak boleh menghilangkan haknya. In maintaining the communal ownership of the materilinal people, it is outlined in Minangkabau unwritten customary rules that *ulayat* land " *jua indak dimakan bali gadai indak dimakan sendo*" means that *ulayat* land should not be lost, but for increasing its utilization it can be used however may not deprive its right as the costumary fatwa said that " *kabau pai kubangan tingga*".

It is still sturdy that *ulayat* land cannot be sold, if it is pawned it must be redeemed. In the concept of Islamic law, the act of waqf of *ulayat* land, with the procedures carried out both verbally and in writing after consensus of all members of the clan, then *mamak* pledges waqf and then transferring the use of waqf in its execution by nadzir, the customary rights are lost, and are no longer communally owned but already belong to all Muslims in improving their lives.

II. Research Method

This research was conducted using empirical and normative juridical methods. Empirical research based on field research^[3] and normative research based on literature^[4] and legal materials review.^[5]Legal materials collected through literature review include primary, secondary and tertiary legal materials,^[6] such as encyclopedias, dictionaries, legal magazines and so on.^[7]This research is analytical descriptive, that is, research that illustrates the only legal concept that is justified by adat to redistribute land rights or customary land. Data collection tools used is in-depth interviews. Besides, the Survey method is also used, which is limited observation (moderate participant).^[8]The research location is Minangkabau region. The study population is a whole or a set of objects with the same characteristics.^[9] The population in this study is the waqf of *ulayat* land. Samples are smaller parts of a population.^[10] The way to take the sample is done by purposive

sampling, that is, with choices based on specific objectives. Data analysis was carried out qualitatively. Analysis is interpreted as a process of breaking down systematically and consistently on certain symptoms.^[11] Considering that this is legal research, the analysis of legal material is carried out with normative analysis,^[12] for various provisions of waqf law and customary provisions concerning waqf of *ulayat* land associated with the legal system carried out qualitatively.^[13]

III. Literature review

1. Land Waqf

The concept of waqf is derived from Islamic law, which is derived from the word *waqafa* (hold, stop, stay) which is used for public purposes. According to syara 'waqf means to hold back the origin of the object and use the results / benefits in the way of Allah.^[14] According to Wahbah Al-Zuhaily^[15] which cites several meanings: 1. Abu Hanifah states that waqf is holding an object, which according to law remains the property of *waqif* in order to use benefits for good, in this case the waqf is justified to withdraw it and may sell it. 2. According to Jumhur waqf is holding an object that allows its benefits to be taken while the object is not disturbed. The right of ownership of the waqf property has been separated from the wakif and belongs to Allah SWT, 3. According to Malikiyah waqf is a waqf act that makes the benefits of his property to be used by mustahiq (waqf recipient). In other words, the owner of the property retains the object from the use of ownership, but allows the use of the results for good purposes. The validity period is not forever but only for a certain period of time in accordance with the wishes of wakif when saying the waqf shighat and therefore not required as an eternal waqf.

The legal basis of waqf in Islam is the Qur'an, Al Hadith, and ijtehad of the mujtahid^[16]. Al Qur'an related to waqf has been formulated by the ulama as follows: a. Surah Al-Baqarah verse 261, b. Surah Al-Baqarah verse 267, c. Surah Ali Imran verse 92, d. Surah Al-Nahl verse 97, d. Surah Al-Hajj verse 77, while Al-Hadith^[17] governing concerning waqf includes: a. From Abu Hurairah r.a, that the Messenger of Allah. said: When a human dies, his deeds are cut off except for three things, namely *amal Jariyah*,

spread knowledge, or prayers from righteous children (H.R Muslim)^[18]. Imam Muslim put this hadith in the chapter of waqf because the scholars interpret the term *amal jariyah* includes waqf^[19]b. Narrated from Ibn Umar r.a. that Umar bin Khattab obtained a piece of land at Khaibar. Then he faced the Messenger of Allah to ask for directions, what should be done for the land. Rasulullah SAW said, if you want, hold the substance (the origin) of the object and give the results, Umar gives it and said that the land should not be sold, not be granted and not be inherited.^[20] Related to the mujtahid ijtihaad, among others, is the description of the nuances of Islamic law reform in Indonesia. This as stated by Amir Syarifuddin, that the re-actualization of Islamic law can be categorized into four, namely: 1) Administrative policy; 2) Additional rules; 3) Taking the talfiq way, which is concocting some thoughts or the results of ijtihaad in a particular problem into a form that looks like new; 4) Reinterpretation and reformulation, namely reviewing the propositions and parts of jurisprudence that are no longer actual in certain situations and conditions, then compiled new interpretations and formulations.

The elements or pillars of waqf according to most scholars are: 1) People who do waqf (*waqif*). 2) Assets represented (*mauquf*). 3) The purpose of waqf (*mauquf 'alayhi*), must not be in conflict with the values of worship and its designation must be clear; 4) A contract / statement of waqf (*shighat*), can be expressed in writing, orally or by a gesture that can be understood only for those who cannot use written or oral means.

In connection with changes in the use of waqf objects, Ibn Taymiyyah stated two reasons, namely a) because of necessity, for example a damaged mosque and no longer possible to enliven, the land was sold and the price was used to buy what could replace it; b) renovation towards a better one, built another mosque that is more suitable for the community, then the old mosque is sold^[21] Thus, the main point in replacing and selling waqf property is its benefit and usefulness. Waqf is a separate legal act which is viewed from a certain angle is dual, because on one side the act is a legal act, which is done with an oath and made authentically, which causes the object to move and obtain a special position, while on the other hand the act gives rise to a legal

person, in traditional law that can participate in legal life as a legal subject.^[22]
In the concept of customary law relating to the growth and development of waqf in social relations. This can be stated as a social institution in the community, as stated by Juhaya S. Praja^[23], that the study of waqf as a social institution refers to: a) waqf as a religious institution; b) waqf as institutions governed by the state; c) waqf as a social institution that lives and grows in society.

In Indonesian law, waqf provisions have been regulated starting from the Dutch Government in 1905, which were then revised several times in 1931, 1934, and 1935. These provisions only govern the authority and procedures for licensing and registration of waqf land. In Agrarian Law, (Article 49 Paragraph 3), which is implemented with Government Regulation Number 28 of 1977, and registered with Government Regulation Number 10 of 1961. Furthermore it is regulated in the Compilation of Islamic Law, and finally in the Waqf Law and Government Regulation on the Implementation of the Waqf Law.

2. Ulayat Land

Land law regulates juridical aspects in the form of tenure rights over land arising from legal events or due to legal actions. Article 4 of the Agrarian Law states that the surface of the earth is land, and types of land rights are determined on land according to Articles 16 and 13 of the Agrarian Law. In addition to the types of individual rights as affirmed in Article 16 of Agrarian Law, communal customary rights are also possible as stipulated in Article 3 of Agrarian Law. Even though the existence of *ulayat* land is recognized in the Agrarian Law, it is not followed up with the terms of its implementation, so that there are those who consider conflicts often arise. Therefore the Government issues Minister of Religion Regulation No. 5/1999 relating to the resolution of communal land conflicts. As if this customary right is recognized as a condition with conflicts and disputes. Various formulations of customary rights arose from scholars, such as Boedi Harsono, stated that customary rights are a series of authorities and obligations of an indigenous community related to land located within their territory.^[24] Djaren Saragih said that *ulayat* rights are in the form of rights and obligations rather than legal alliance as a whole over a certain area, namely the area where they live^[25]. Dt. B. Nurdin Yakub states

that *ulayat* land includes lands that have not been cultivated by community members and belong to the nagari with boundaries in accordance with the surrounding natural situation. The traditional word "*kabukik bagulung aie, kalurah baanak river*"^[26]Yulia Mirwati said that *ulayat* rights are the concept of legal rights that contain the authority and obligations of community groups^[27]. In addition, *ulayat* land is also used as a symbol of social status in society, especially in matrilineal communities. In Minangkabau the dignity and authenticity of a person is inherent in the *ulayat* property. If a group does not have *ulayat* land (*pusako*) even though they are rich, they are not seen as a native person but is referred to as a "coming person" or malakok in one of the clan, because the *ulayat* land is a binding factor between them^[28]

IV. Results and Discussion

1. Waqf on Ulayat Land in West Sumatra

The waqf institutions in the West Sumatra region have been integrated into the fabric of their people's lives, because since Islam entered West Sumatra it was welcomed by its customs, with a strong unity known as *adat manurun syarak mandaki*, meaning the arrival of Islam in Minangkabau unifying customs with Islam, this is called the *Adat Basandi Syarak Syarak Basandi Kitabbullah* (ABSSBK). The native people of West Sumatra call themselves the Minangkabau, which uses a materilinal kinship system, with a marriage system of *semenda*. This also continues until now. Regarding the concept of waqf in Islamic law goes hand in hand with the entry of Islam into its *adat*, and is implemented by the Minangkabau people. The concept of customary law expresses the concept of togetherness in groups that are not divided; both the smallest groups called clans, then tribes and then called nagari. This clarity is emphasized that the formation of the nagari is a minimum of four tribes (*Nagari bamapek Suku*). At the beginning of the formation of Minangkabau culture by Datuak Katumanggungan and Datuak Parpatih Nan Sabatang, there were only four main tribes from two *kalarasan*; that is^[32] *Koto, Piliang, Bodi, and Caniago*. And in its development became more or less 100 tribes^[33]The communal *ulayat* land in Minangkabau at the lowest level is called *ulayat kaum* or *pusako tinggi*. The most dominant waqf in Minangkabau is *ulayat waqf*, and its use is generally intended to

support religious facilities and infrastructures, such as the construction of mosques, mushallas, Islamic boarding schools and so on.^[34] The area of waqf land in West Sumatra is 452.72 Ha, spread over 3,897 locations^[35] From the area of waqf land, it has not yet been mapped, how much comes from customary land and how much land is from personal ownership. Besides, there are still waqf of *ulayat* land that have not been registered at all, In Government Regulation Number 10 of 1961, it is not apparent that *ulayat* land must be registered / certificated, what is stipulated is only ownership rights, cultivation rights and building use rights (Article 10), and registration of the transfer of rights and collateral for a debt (Article 12). The development of land registration in Government Regulation 24 of 1997 also does not stipulate that customary land can be registered (Article 9). In the Waqf Law and Government Regulations on the Implementation of the Waqf Law, *ulayat* land is not recognized as an object of waqf (Article 16). The development of waqf objects in Waqf Law is land, movable objects including cash.

2. Waqf of *Ulayat* Land As a Means In Transferring Rights of *Ulayat* Land Permanently

From the results of the study it is also known that with the endowment of *ulayat* land is one way of transferring *ulayat* rights in an indefinite way. This means that customary rights turn into the rights of God and are used for Minangkabau kinship to maintain the balance of society, and especially to increase worship for the Creator. The customary rights in Minangkabau according to their custom are *jua indak dimakan bali gadai indak dimakan sendo* (can not be permanently transferred due to buying and selling, and for temporary transfers due to pawn also with strict customary conditions). Requirements for *ulayat* land pawns are for covering the shame (due to partial embarrassment from the faith), can be done if *maik tabujua diateh rumah, gadih gadang indak balaki, adat indak barisi, mambangkik batang tarandam* (unburied corpses, unmarried girls, *sako* that have not yet been developed, *sako* that has not been distracted).

Regarding the endowment of *ulayat* land is actually a legal act whose consequences are regulated by a law called a legal act. This legal act includes "special transfer of land rights", because it is not due to buying and selling, grants, exchange or

other rights transfer agreements, but this agreement is classified as a one-sided agreement whereby the will of the waqif is welcomed by nadzir, not for the transfer of rights but for its management. While that right was made a general right because of the transfer of his property to Allah, and the arrangement of its benefits was entrusted to nadzir, the aim was for the benefit of the Muslims. The transfer of waqf rights is not for the purpose of replacing rights with agreed values, or not for the purpose of transferring profit, but the transfer desired by the waqif has no counter-achievements, the waqif has its own interpretation and transfers its rights to the people to be utilized through regulation and management by Nadzir. Then the pledge is a one-sided will is one example of a unilateral agreement even though there are waqif and nadzir, but the meeting of his will for the purpose of transferring rights does not exist because the pledge is only to relinquish ownership rights from the wakif and not transfer to nadzir. Since the waqf pledge was delivered by the wakif to nadzir, actually the wakif rights of the waqf object have expired, the wakif no longer owns, no longer manages, takes advantage of the assets. Utilization will be managed by Nadzir but not Nadzir's property but has become the property of the Ummah. Although Nadzir in this case manages to increase utilization of the land or property, but it is not nadzir who owns it, waqf property cannot be passed on by nadzir to his family either in blood relations or to family in marital relations.

In fact, the permanent transfer of rights from ulayat land is a legal act of waqf, because the wakif since pledging his ulayat land is maintained and taken advantage of by the Muslims applies forever. The external use of the members of the clan is used by the principle of *kabau pai kubangan tingga* (the *ulayat* land after being used must return to ulayat land) In contrast to waqf ulayat land, after being given it cannot become ulayat land.

3. Conclusion

1. The act of waqf law includes an agreement, namely the transfer of rights from the wakif to nadzir with the endowment pledge, which is then set forth in the waqf pledge deed made by the Public Officials of the Waqf Pledge. These legal proceedings were then registered at the Land Agency and the certificate of waqf was made where the original right holder (wakif) was crossed out and replaced with

nadzir names.

2. The act of waqf of ulayat land is a legal act based on the will of the wakif, which binds the nadzir to waive the wakif's rights but does not move into the nadzir's rights. Nadzir is only the manager. Ulayat land that has been represented will not return to ulayat land, thus wakaf is an institution that transfers the ulayat rights permanently.

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 - [11] Soerjono Soekanto, 1986, *Pengantar Penelitian Hukum*, UI Pres, Jakarta, p.63.
 - [12] Normative analysis is the core of legal analysis, where the task of legal analysis is to analyze the legal principles, the legal system and various juridical concepts. Thus in this normative analysis the starting point cannot be separated from juridical provisions based on

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