

THE FORM OF WAQF DISPUTE RESOLUTION OF COMUNAL LAND BY DISCUSSION (MUSYAWARAH MUFAKAT) IN MINANGKABAU CUSTOM IN WEST SUMATERA

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Abstrak

Fatwa of Minangkabau Custom “Adat Basandi Syara’, Syara’ Basandi Kitabullah (ABSSBK) becomes the philosophy of life to Minangkabau people. Minangkabau custom is rule or law which obtain in social life of Minangkabau society. Adat Law is based on Islamic law and Islamic law applied by order of adat law, it mentioned in “Syara’ Mangato Adat Mamakai” (Application of Islamic law in order of Minangkabau culture(writer)). One of Islamic lesson is waqf, which is one of construction economic development facility for public welfare. By waqf the richer will help the poorer by giving “eternal fund” which is managed and the result will used to help necessity, to build, and raise the level of human.¹ Eternal fund that was managed and more interest are and. The regulation of land in law system of Indonesia in Law Number 5 Year 1960 about Base Regulation of Agraria, called Agraria Agrarian Act. Philosophily Agraria Agrarian Act also have religion concept which is the forming foundation and put into Considerant, Article 5 and the Explanation of Agraria Agrarian Act. Agraria Agrarian Act stated that land is a give from God to Indonesian people (Article 1 Agraria Agrarian Act), by regulation of State (Article 2 Agraria Agrarian Act), give priority to the public interest, one of them is worship facility (Article 14 Agraria Agrarian Act). State guarantee the citizen to do the worship, so the land for worship, arranged and available for it. Beside others rights of land also regulate individually (Article 16 Agraria Agrarian Act) and comunal (Article 3 Agraria Agrarian Act). Agraria Agrarian Act gave the specialty right of ownership because it can be donate (waqf) (Article 49 Agraria Agrarian Act). Communal Right in Article 3 Agraria Agrarian Act is not clearly mentioned as ownership concept (in form of right or just license). Having been free from ambigious of comunal right in Agraria Agrarian Act, in Minangkabau comunal right have been donate (waqf). How if there is dispute in comunal land ? How will the model dispute resolution in waqf comunal land ? The research said that the model of dispute resolution in waqf comunal land was doing by musyawarah mufakat in model adat law of Bodi Caniago and Koto Piliang. Rarely even never used litigation. This is because waqf is one of worship for Moeslem and sinergy with life in Minangkabau in order in ABSSBK.

Keywords : Dispute Resolution Model, Musyawarah Mufakat, Waqf Comunal Land

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A. Introduction

Dispute and Conflict is often similiar, even both of them is note the same. In library review, sociology of law expert more focus to conflict terminology, antropolgy of law expert is tend to dispute terminology.² A dispute happens when the party have a complaint and the complaint have enter public field which is purposely done in purpose to get something that want. Gulliver in Valerine Kriekhof stated that *No dispute exists unless and until the right claimant or someone of his behalf, Agrarian Actively raises the initial*

¹ Al Awaqaf jurnal Waqf dan Ekonomi Islam, Volume IV.Nomor 1 Januari 2011 Badan Waqf Indonesia, Jakarta, p.38.

² Valerine J.L. Kriekhoff, dalam T.O. Ihromi , 1993) *Antropologi Hukum Sebuah Bunga Rampai* Yayasan Obor , Jakarta : Indonesia, p.224.

disagreement from the level of dyadic argument into the public arena, with the express intention of doing something about the desired claim. Nader and Todd and Culiver in Yulia Mirwati³ stated the difference between conflict and dispute, conflict is a condition where two party realize of their dissatisfied, while dispute is a complint of somebody that Agrarian Actively carry them to public domain in purpose to get the certain result. In law field, can said that dispute is a problem between two people or more or between subject of law where both of them debate of certain object. It happened because miscommunication or different opini or perception among them, that make law effect to both of them.⁴

Waqf land dispute that came from comunal land, can make dispute between waqf giver and the nadzir, the property that give for waqf, the use of object waqf, and related institution with legal certainty of waqf, such as Waqf Pledge Deed Official (PPAIW), National Land Authority (BPN) and others.

Based on Decision of Head of National Land Authority Number 34 Year 2007 about Technical Guidance and Problem Solving of Land, land dispute is the difference of value, interest, opinion, and or perception between individual person and or legal entity (private or public) abot the status of authorization and or the ownership status and or using status or using certain part of land by certain party, or the decision of the state administration (KTUN) status about authorization, ownership, and using of certain part of land.

Nationally, waqf have been known in Indonesia long time ago, which is the mayority of people are moeslem, especially in West Sumatera, until now they still use norm or Islamic law and adat in ABSSBK, but in prAgrarian Actice, waqf and its development still conventional which is generally purpose to support facility and infrastructure of ritual Agrarian Activity only, such as developing place to pray, pesantren.⁵

The role of waqf in Islamic world had been developing well, especially in economic development, social, and culture. The things that important from waqf are the roles in financing every religy Agrarian Activities, health education, social and culture. For example in Egypt, Arabic, Turkey, and others country. The developing of many infrastructure of ritual Agrarian Activity, education, and health financed by the result of waqf development. The continiusly of benefit from waqf result is possibly digalakkannya productive waqf tu hold any social Agrarian Activities and religy.⁶

Although Indonesia is not Islamic country but majority of population are Moeslem, even it is stated that 12,7% of Moeslem population in the world. In 2010, Moeslem in Indonesia is about 205 million people or 88,1% from population in Indonesia. Even with total population about 255 million people, Indonesia is country with big population number 4 in the world⁷, where the large of waqf land almost 5-fold from large of Singapore country. The data in Sub-Directorate Waqf Information System, Ministry of Religy

³ Yulia Mirwati, 2015, *Konflik Tanah Comunal*, Andalas University Pres, Padang, p.34.

⁴ Bernhard Limbong, 2012, *Konflik Pertanahan*, Margaretha Pustaka, Jakarta Selatan, p.48.

⁵ Uswatun Hasanah as quoted by Helza Npva Lta dan Zahera Mega Utama, Waqf Produktif related to Rule Number 41 Year 2004 On Waqf in Jurnal Al Awqaf Jurnal Waqf dan Ekonomi Islam, Volume VII, Nomor 2 Badan Waqf indonesia, Jakarta, p.76.

⁶ Suhrawardi K.Lubis, dkk, 2010, *Waqf dan Pemberdayaan Umat*, Sinar Grafika, Jakarta, p.1.

⁷ <http://www.indonesia-investments.com/id/budaya/penduduk/item67>, visit on Mondat, 15-01-2015 at 12.53 pm,

showed that in 2012, large of comunal land in Indonesia 3.492.045.373,754 m², this data is a result that get by process data collection of waqf land manually in all Indonesia, that done by spaced from district level by Religious Affairs Office (KUA) staff, then recapitulated in Regency/City level by KUA, and so on until national. Waqf land spread in 420.003 location in all Indonesia region.⁸ In 2013 total of waqf land increase 4.142.464.287.906 m² or about 414.246,429 ha spread in 435.395 location. In 2014 increase steadyly 4.142.464.287,91 M² or about 414.246,43 ha spread in 435.395 location. In 2015 increase 4.359.443.170 M² or about 435.944,32 ha spread in 436.768 location.⁹ From all the land area and the location of waqf not rise significant, but move slightly. From all the waqf land area, which comes from West Sumatera about 452,72 Ha spread in 3.897 location.¹⁰

Waqf land that comes from West Sumatera is unmapping, how many land that comes from ownership right that registered (have certified), and that comes from comunal land that cannot registered (not have certified) based on land registration regulation in Indonesia (Government Regulation Number 24 Year 1997 replaced Government Regulation Number 10 Year 1961). In Governemnet Regulation comunal land is not involved as one of object of land registration (Article 9 Government Regulation Year 1997).

In 2004 waqf regulation has been developed by Rule Number 41 Tahun 2004 about Waqf jo Government Regulation Number 42 Year 2006 about Implementing Regulation of Rule Number 41 Tahun 2004 about Waqf still not recognition of waqf object that comes from comunal land. Comunal right of land is comunally (together ownership that undivided). Comunal right explicitly recognized in Agrarian Agrarian Act (Article 3 Agrarian Agrarian Act). But not equip with implementing regulation, so that in prAgrarian Actice it carry out under adat law (law that living in community/living law). The recognition of comunal right in Agrarian Agrarian Act already planned since forming of Agrarian Agrarian Act, provide the special charAgrarian Acteristic in positive law in Indonesia, which rooted from life opinion, philosophy, personal, values that grow and live in adat law community in Indonesia. This concept, value, and norm of adat law form the Agrarian Agrarian Act that based on religy regulation. This things explicitly in considerant, and explanation of Agrarian Agrarian Act, even explicitly community rights of adat law mentioned comunal right (Article 3 Agrarian Agrarian Act).

Eventhough it was recognize in Agrarian Agrarian Act, but the existence of comunal right still not provide the legal certainty of land right to adat law community because in registration land regulation not known comunal land registration. The recognition of comunal land seems ambigious, whether the ownership right concept or just in license concept.

Related to waqf explicitly in Agrarian Agrarian Act only allowed the ownership right of land, it can not be with the other rights, even the comunal right (Article 49 of Agrarian Agrarian Act), that explicitly stated the implementation was regulated by Government Regulation, so in 1977 Government Regulation was issued to carry out the waqf land of

⁸<http://bimasislam.kemenag.go.id/informasi/berita/35berita/600-luas-tanah-waqf-di-indonesia:3492045373754-m2.html>

⁹ Data from Director Empowerment of Waqf, Waqf Board of Indonesia, Jakarta.

¹⁰ http://siwak.kemenag.go.id/gp_jumlah.php accessed on 15 January 2017 at 2.00 AM

ownership right. Then it also confirmed in Presidential Decree Number 1 Year 1991 (Islamic Law Compilation or KHI). In both these provisions waqf of land must be registered with the registration requirements of land (Government Regulation Number 24 Year 1997), then the provisions of waqf enAgrarian Acted by Waqf Agrarian Act which also determines that waqf land must be registered. The aim is to ensure legal certainty regarding waqf land.

There is a fundamental difference between Waqf Agrarian Act with Agrarian Agrarian Act, Government Regulation Number 28 Year 1977 and Islamic Law Compilation, in Waqf Agrarian Act object of waqf not only in the form of ownership rights, but it is possible for other rights in accordance with the types of land rights legislation, included the land management rights, but did not include communal land. In prAgrarian Actice communal land can be made as the object of waqf in Minangkabau / West Sumatera.

B. Problem

Based on the explanation above, the problem is : How was the waqf disputes of comunal land happened and how is the resolution pattern that used in the area of West Sumatera?

C. Research methods

The method used is a normative juridical or doctrinal legal research. Known doctrinal legal research, as this study prioritizes secondary law or contained in the library.¹¹ This research is descriptive / prescriptive namely paints / portrait of customary land disputes waqf and penyelesaiannya models in the Minangkabau / Sumatra Barat. The main data used are secondary data is the data that is already available in the form of books and other documentation, which is usually provided in the library, or private property.¹² Material legal literature which includes; legal materials relating to legislation and policy, as it also used other secondary law. Secondary legal materials include textbooks, research, papers, articles, journals, and other documents relating to the object of carrying out the research.¹³ Besides, it is also used tertiary legal materials, ie materials that provide instructions and an explanation of the primary legal materials and secondary law. Legal materials include dictionaries, encyclopedias, magazines, legal and etc.¹⁴ As additional data field data collection performed well, both from respondents and informants. Data collection tool in this research is to study the document,¹⁵ to support field data conducted in-depth interviews (depth inerview) to the respondents and informants, as determined by purposive. The sources (informants) that determined, the Chairman of the National and Local Waqf of Indonesia, the Supreme Court, Chairman of the Religious Court in West Sumatra, Nadzir, PPAIW. For more falidity, data was also observed (observation). Data was analyzed using qualitative. Analysis is defined as a process of decomposition of

¹¹ Suratman, *Metode Penelitian Hukum*, Alfabeta, Bandung, 2012, p.51.

¹² Hilman Hadikusuma, *Metode Pembuatan Kertas Kerja atau Skripsi Ilmu Hukum*, Mandar Maju Bandung, 1995, p.61

¹³ Peter mahmud Marzuki, *Penelitian Hukum*, Cet.VI, Kencana, Jakarta, p.35.

¹⁴ Nico Ngani, *Metodologi Penelitian dan Penulisan Hukum*, Pustaka Yustisia, Yogyakarta, p.78.

¹⁵ Study document is one means of data collection is done through the written data by using the content analysis, see further Soerjono Soekanto, *Pengantar Penelitian Hukum*, Jakarta: UI Press,1986, p.21.

systematically and consistently against certain symptoms.¹⁶ The analysis that mean is an analysis of the primary legal materials, secondary and tertiary, as well as supporting data from the field. Keeping in this study is normative,¹⁷ then the analysis of the legal materials do with normative analysis primarily deals with waqf disputes of communal land and settlement models qualitatively¹⁸ analyzed based on legislation and legal theories related to waqf communal land.

D. Results and Discussion

1. The Regulation of Waqf of Communal Land in Legislation System and Policies in Indonesia, including West Sumatra.

Understanding waqf according to the language derived from waqf, which means Radiah (returned), al-tahbis (on hold), altasbil (captive), and al-man'u (prevent),¹⁹ also known as al-habs (al-ahbas, plural). In language, al-habs means al-sijn (prison), silent, prevent, hindrance, obstruction, detention, and security. Combined ahbasa word (al-habs) with al-mal (property) means waqf (ahbasa al-mal).²⁰ From the formula above, it appears that in Islamic law, waqf Agrarian Actually can encompass a variety of objects, although various history / hadith told of the problems waqf are on the land, but various scholars understand that the waqf of non land was allowed if the origin of the object is not indirectly destroyed / discharged when taken advantage.

In Indonesia, including West Sumatra since the entry of the Islamic waqf institutions are already known, but the provisions of which became the legal basis for the sole purpose of the Qur'an and Al Hadith. At this time the implementation of the waqf done individually, unsystematic, not registered even can not count how wide, and how the location and designation for worship only. After Indonesia's independence the Agrarian Act issued,²¹ waqf institutions are officially recognized in the national legal system. It is seen in the Agrarian Act Article 49 (3) which confirms that the land ownership can be waqf and further provisions set in Government Regulation (PP). Then in 1977, Government Regulation Number 28 Year 1997 on Waqf of Property Land. In order to ensure legal certainty waqf must be registered with Government Regulation Number 10 Year 1961 (the provision of land registration). Furthermore, in the Presidential Instruction Number 1 Year 1991 on the Compilation of Islamic Law (KHI) about waqf also be set. In KHI land that can be waqf still land of property rights (Article 20 Agrarian Act). In 1997 provisions concerning land registration that is replaced with Government Regulation Number 24 Year 1997 on Land Registration. In Article 9 is confirmed of the object registration of land. Communal Land does not belong to one of the object. Objects of waqf land remain as set out in Article 49 paragraph (3) Agrarian Act namely property rights to land. Then in 2004

¹⁶ Soerjono Soekanto, 1986, *Pengantar Penelitian Hukum*, UI Pres, Jakarta, p.63

¹⁷ Normative analysis is at the core of the legal analysis, in which the task of legal analysis is analyzing the legal sense, the principle hukum legal norms, the legal system and juridical concepts. Thus, in this normative analysis starting point can not be separated from the juridical provision is based on the legal concept of pure Hans Kelsen, see further in the book; Johnny Ibrahim, *Teori dan Metodologi Penelitian Hukum Normatif*, Bayu Media, Malang, Publishing, 2008, p.311.

¹⁸ Qualitative analysis is the concept of using materials that are not only normative but also related to the concepts of law, philosophy and other areas outside the norm of law, see more in book C.F.G. Sunaryati Hartono, *Penelitian Hukum di Indonesia Pada Akhir Abad ke 20*, Bandung: Alumni 1994, p.166.

¹⁹ Sabiq, Sayid. 1994. *Fiqh al-Sunnah*. (Beirut: Dar al-Fikr), p.61

²⁰ Ibid p.62.

²¹ Agrarian Act recorded on 24 September 1960 TLN Number 104 Year 1960.

developed the provisions of waqf Law Number 41 Year 2004 on Waqf (UUW), equipped with Government Regulation Number 42 Year 2006 on the implementation of UUW. In the UUW object waqf have been developed that not only unmovable goods but also of moving goods (Article 16 (1) UUW). Article 16 (2) confirmed immovable is the following: a. The right of land in accordance with the provisions of legislation that applicable either already or not yet registered, b. buildings or parts of buildings that stood on the land referred to in paragraph a, c, plants and other objects related to the land; d. ownership of the apartment units in accordance with applicable legislation; e. another object that is not moving in accordance with sharia provisions and applicable legislation. UUW still does not have communal right as objects of waqf. In UUW seen that the provision of the objects in the system of civil law (Civil Code). It can be in Book II on Zaken Recht (law bodies), from Article 499 to Article 1232. Article 499 of the Civil Code states that goods are every object and every right that can be the object of property rights. Distribution of goods / items are: 1. goods bodied, and no disembodied goods (Article 503 of the Civil Code); 2. moving goods and the goods are not moving (Article 504 of the Civil Code); In UUW waqf also seen that the objects of movable and immovable goods. Actually, since the release of Agrarian Act Book II of the Civil Code (of objects) are repealed insofar as it concerns about the earth's surface called the land and other agrarian. Agrarian Act is not knows the distinction between movable and immovable goods. Agrarian Act only recognize land rights (land) and other rights. In Article 32 UUW confirmed that the waqf must be registered, in which PPAIW on behalf Nazhir registering waqf property to the competent agency no later than seven (7) working days after the deed of waqf pledge signed. Agencies referred to is the National Land Agency (BPN). Thus can be said that the registration of waqf land should be made under Government Regulation Number 24 Year 1997. While in the Government Regulation was not seen clearly with the registration of waqf derived from communal land, but waqf land indeed included as one of object registration.

In West Sumatra, communal land regularly has been waqf by customary law communities of Minangkabau / Sumatra Barat. Especially the kind of communal land. Other distinctions between UUW with Government Regulation Number 28 Year 1977 was a period of waqf. In Government Regulation Number 28 Year 1977 the period of waqf property is forever. In UUW developed that the waqf can for a certain period of time in accordance with their interests. In Islamic law, the concept of waqf also forever. Implementation of the waqf in the positive law is directed to the written form involve PPAIW and registered by BPN. Registration waqf derived from communal land has not been accommodated by the provision of land registration.

2. Waqf Dispute of Communal Land in West Sumatra.

Dispute is a phenomenon that is universal law that can happen anywhere and anytime, because the dispute is not bound by time and space. As a legal phenomenon, every dispute requires Agrarian Action settlement and no settlement without a dispute. Likewise, the dispute waqf lands which occurred in West Sumatra. Customary rights to land recognized in Article 3 of the Agrarian Act, but not including any of the objects of land registration, as well as waqf communal land is not included as one of the objects of waqf and the object of registration of land, it is one of the causes of the dispute waqf communal land, it more detailed causes are:

a. Disputes concerning the concepts, values, norms and interests.

Judging from the various provisions relating to donations of land in Indonesia only set waqf land "individual rights" (Article 16 (1) of the Agrarian Act, Regulation Number 40 Year 1996, and UUW) without any provision governing waqf derived from communal land (communal). But in reality that occurs mainly in West Sumatra waqf of land that growing dominated by waqf of communal land (communal). Communal Land in West Sumatra are classified in three levels²² namely, villages (nagari), tribes (suku) and peoples (kaum). The Communal Land is often used as objects of waqf. Comunal peoples can be form of inheritance that are owned by a single ethnic group, in a straight line down by the maternal line. The emergence of conflict related to the registration of waqf of communal land. In the Agrarian Act, UUW and organic provisions communal land do not constitute the object of waqf and land registration object. Originally waqf only property rights alone (Article 49 Agrarian Act jo Government Regulation Number 28 Year 1977, KHI), and then developed with all types of land rights and the right apartment units, land that is already registered or not registered, (Article 16 (2) UUW . Conceptually communal land is not registered, if imposed register waqf communal land with the provisions of land registration in force, it is clearly contrary to the concept, values and norms. Contrary to the values (the weight or quality is considered very valuable) contained indigenous Minangkabau ABSSBK. This value is enabled to direct, control, and determine a person's behavior,²³ since the value used as the standard of behavior. If seen in the concept of Islamic law is a religious waqf value on the basis of helping fellow Muslims by giving the benefit of his belongings for the development of Muslim life. Because it is a religious concept that contains the value of the land owned collectively reliquius (communal) in the form of comunal been waqf for the construction of places of worship, orphanages, nursing homes and others in the religious field. In the reality of the communal land been waqf, even without a deed of pledge waqf, waqf can be written and performed by 'mamak kepala waris' (chief beneficiary / head of the clan) after the approval of all members of the tribe. If registered with the registration provisions laid down their own land can not be imposed provisions of the law that do not match. Registration must fit the concept and values of the customary rights. Contrary to the norm seen in a positive emphasis on the rule of law are written on the growing norm in customary law communities. Norms can be defined as rules, guidelines, benchmarks or tools to measure certain Agrarian Acts. With the norm one can assess the goodness or badness of an act.²⁴ Norma contains signs that depict a certain size, which has in it the value of true / false. Indonesia norm in the community there are five, namely (1) the norms of religion, (2) moral norms, (3) norms of decency, (4) the norm habits, and (5) the rule of law, in addition to their other norms. In the legal norms concerning waqf lands which existed in society Minangkabau / West Sumatra, is the norm in Islamic law and customary law norms. In the communal land waqf are not supported by existing legal provisions so that legal certainty regarding waqf communal land can not be manifested.

²² Yulia Mirwati, *locit*.

²³ <http://coretanseadanya.blogspot.co.id/2012/09/pengertian-nilai-moral-dan-norma-dalam.html>, accessed on Monday 30 January 2017 at 10.00 PM

²⁴ <http://yettihidayah.blogspot.co.id/2011/11/perbedaan-dan-persamaan-hukum-norma.html>, accessed on Monday 30 January 2017 at 09.30 PM

b. Paradigm of Waqf

Other causes of a dispute waqf waqf including communal land disputes is the creation paradigm in society that is always fixed asset waqf, the designation is always for worship and for religious social Agrarian Activities. Therefore many waqf land is not maintained, appropriated by the community or turn to a third party.²⁵ Sometimes the condition is exacerbated by the narrow circumstances waqf land that is just enough used for the purpose of worship, then neglected them more productive. Moreover, values and land prices soaring as it is located in a strategic position, and on the other hand the depletion of religious consciousness, wakif donate (waqf) entire / most of his property so that the ancestry feel losing a source of sustenance and become displaced.²⁶

c. Lack of Nadzir's Role

Nazhir less creative, the land that can be allowed to managed productively, not even the treatment was enhanced benefits should be sought donations from the community.²⁷ In UUW possible to be implemented within a certain period, because the value of land getting more expensive, and the wakif feel a loss if not produced, can trigger disputes. In the implementation waqf nadzir role is very important, because it is the party nadzir is considered the most responsible for the utilization of waqf property entrusted to him, both in terms of maintenance, management, or development. Role Nazhir in the context of empowerment waqf not only mobilize the waqf property and immediately spend it or use it as charity, but seeks a waqf property into an asset / investment, improve asset management more productive, utilizing the results to the interests and welfare / well-being of the surrounding community.²⁸ The necessity for Nazhir empowerment go hand in hand with efforts to empower waqf itself. Waqf will be powerless when nazhir powerless. Based on the results of interviews with the Directorate of Waqf obtained information about initial conditions Nazhir generally administer waqf to the traditional pattern or not professional. This causes the management of waqf that have not been productive. Nazhir tradition in Indonesia is more focused on physical infrastructure such as providing worship.²⁹ Nazhir skills of Indonesia in general only spend waqf property for a social nature, and instead of managing and generating economic value. Sunnah Rasulullah SAW in order to withstand substantially and delivering the results have not been fulfilled well by the Nazhir.³⁰ Although now have been guided the development of coaching nhadzir via Article 53 paragraph (1) PP UUW, which stipulates that Nazhir waqf entitled to receive guidance from the Minister and BWI, paragraph (2) stated that: "Fostering Nazhir referred to in paragraph (1) shall include: (a) preparation of operational support infrastructure waqf Nazhir either individuals, organizations and legal entities; (b) the preparation of the regulation, motivation, facilitation, coordination, empowerment

²⁵ Herman Budianto, Masa Depan Wakaf di Indonesia, Majalah FOZ, edisi Februari-Maret 2007, Melalui <http://www.tabunganwakaf.com>, accessed on 1 August 2016.

²⁶ Satria Efendi, *Analisa Yuriprudensi Peradilan Agama tentang hadhanah, Harta Bersama, Wasiat, Hibah dan Wakaf*, Jakarta: Pusdiklat Tekhnis Balitbang Diklat Kumdil MA RI, 2008, p. 383.

²⁷ Uswatun Hasanah, 1997, *Peranan wakaf Dalam Mewujudkan Kesejahteraan Sosial(Studi Kasus Pengelolaan Wakafdi Jakarta Selatan)*, Disertasi, p.268

²⁸ Wawancara dengan bapak Ahmad Muhajir Al- qadri Kasubdit Penyuluhan dan Kerjasama wakaf Kemenag RI, Tanggal 4 Agustus 2016

²⁹ *Ibid*

³⁰ Wawancara dengan Nani Almuin Divisi Penelitian dan Pengembangan Badan wakaf Indonesia pada tanggal 4 Agustus 2016

and development of waqf property; (c) provision of facilities for certification process waqf; (d) the preparation and provision of blank-blank AIW, (e) preparation educator lighting in the area to do the coaching and development of waqf to Nazhir in accordance with the scope; and (f) the provision of facilities influx of funds from the waqf and abroad in the development and empowerment of waqf.

d. Many Waqf Land not have certificate.

Still many waqf land that has not been certified cause large chance of a dispute in the midst of society especially waqf land in urban areas with prices increasingly fantastic. With the price of land and public necessary of land that higher cause waqf land that has been in waqf by their parents in advance much in the sued by the heirs for reasons it never had happened waqf made by their parents or by their union or by 'mamak kepala waris' / heads of their (traditional leaders). Based on existing data in the Ministry of Religion in 2014 waqf land that has not been certified amounted to 145 699, 2015 waqf land that has not been certified amounted to 148 447. Waqf possessions yet terregister well, it also triggers the emergence of communal land disputes waqf.

3. Communal Land Dispute Resolution Model in West Sumatra.

In the Government Regulation Number 28 Year 1977 on Waqf of Property Land, stated that the settlement of disputes about religious waqf made through the courts. Article 12 of Government Regulation, which states that the settlement of disputes along that the issue of waqf land, distributed through local religious courts in accordance with the provisions of the legislation in force.

Later in UUW mentioned dispute resolution waqf both waqf immovable or waqf moving objects resolved by consensus to reach an agreement (Article 62 paragraph (1) UUW. If settlement of disputes referred to in paragraph (1) does not succeed, the dispute can be resolved through mediation , arbitration or court. In the explanation of Article 62 paragraph (2) UUW affirmed that the definition of mediation is the settlement of a dispute with the help of a third party (mediator) agreed upon by the parties to the dispute. In the event that mediation failed to resolve the dispute, then the dispute can be brought to the the arbitration body sharia. In the case of sharia arbitration board failed to resolve the dispute, then the dispute can be brought to the religious court and / or court Syar'iyah.

Although the waqf is mentioned dispute resolution by consensus to reach an agreement, but did not explain how the discussion reaches consensus, whether by voting also includes the principle of consultation to reach an agreement? In the implementation of waqf of land from the indigenous land dispute settlement is done with consensus principles of customary law system. On Indigenous peoples Minangkabau / Sumatra Barat used ABSSBK system either through 'kelarasan Bodi Caniago and Koto Piliang'. In Minangkabau used legal system called "Lareh" or also called kelarasan. Lareh in Lareh Nan Duo³¹ Minangkabau called the "1. Lareh Bodi and Caniago, 2. Lareh Koto and Piliang, in everyday life called "Bodi Kelarasan Caniago and Kelarasan Koto Piliang". In both these 'lareh' legal system used is democracy and the settlement of disputes with the democratic pattern called "musyawarah mufakat". In both these 'kelarasan' only the procedure that different but the legal concept settlement remains musyawarah and

³¹ <http://chaniagocommunity.blogspot.co.id/2005/09/lareh-koto-piliang-dan-bodi-chaniago.html>
dikunjungi senin 16-1-2017 jam 8.02

mufakat. In 'kelarasan Bodi Caniago' system musyawarah and mufakat with the procedure *duduak samo randah tagak samo tinggi* (horizontal democratic system) whereas in Koto Piliang used procedure *musyawarah and mufakat berjanjang* the fatwa bajanjang naiak batanggo down (resolved with several stages). Based on research in the field, both are used, there is even a mixing system with Koto Piliang and Bodi Caniago, but the settlement in court was nearly happened (data last 5 years). Settlement of disputes through musyawarah and mufakat, involving the traditional authority of the lowest group leader *paruik* (communal nucleus) called *mamak kepala waris*, then newly included communal greater (the same tribe) called "*ka ampek suku*", then also involves the density of indigenous villages (Kerapatan Adat Nagari), and if needed can be involved traditional institutions of nature Minangkabau (LKAAM), in which has included elements "ninik mamak", "alim ulama", and "cadiak pandai" (the scholars and intellectuals are also known as "*tali tigo sapilin, tungku tigo sajarangan*"). The implementation of musyawarah can be done in *rumah gadang* (adat house), customs hall and the hall in accordance with kelarasan used. In general waqf communal land dispute resolved by this pattern.

According to Government Regulation Number 28 Year 1977 *jo* UUW and PPUUW, settlement of disputes through litigation to court religion. It is after the Religious Courts become officers of Judicial Power as stated in Law Number 14 Year 1970 (Agrarian Act No. 14 of 1970) on Principles of Judicial Power, and in 1989 assigned Agrarian Act No. 7 of 1989 on Religious Courts.³² Religious court in charge and authorized to investigate, adjudicate, and the completion of the first level judge Agrarian Actions among people who are Moeslems, among others concerning the waqf. The Supreme Court in carrying out judicial duties in technical guidance Religion judicial felt several weaknesses, even tend confusing. The crux referred to as a result of differences of opinion on an issue of the scholars. To resolve the differences, need to set a law book that collects all applicable laws applied to the Religious Courts environment that can be used as guidelines by the judges in performing their duties, to guarantee the unity and legal certainty.³³ This is where we need a Compilation of Islamic Law (KIH) in the areas of authority of the Religious Courts which clarify the application of the rules of Islamic law jurisprudence.³⁴ In the KHI also stated emphatically that settlement of dispute over waqf objects carried by the Settlement musyawarah conducted jointly with the KUA in the District, Ulama Council and the Religious Courts in its region. This can be seen in Article 226 KHI, which confirms that the settlement of the implementation of tasks and responsibilities nadzir carried out jointly by the head of the District Office of Religious Affairs, Council of District Ulamas. These musyawarah should contain the following principles: neither party feels defeated and no party feels to win (the principle of win-win solution); a decision on the basis of sincerity, so that there is no animosity between the members; The decision must not be contrary to the Shari'a (religious) and customs, the decision was not impartial, even-handed; the decision shall have binding legal force, should not be changed by anyone, except with more musyawarah; decisions must be accompanied by the threat of punishment for those who do not obey. The value of local wisdom known as the cultural values of Minangkabau is the object nonmateriil are difficult to measure with a benchmark that was material. Indeed, the cultural values of indigenous people can be perceived as a guiding everyone

³² Busthanul Arifin, 1996, *Pelembagaan Hukum Islam di Indonesia: akar sejarah, habatan, dan prospeknya*, Gema Insani Press, Jakarta, p.146

³³ *Ibid.*, p.59

³⁴ Abdul Ghafur Anshori dan Yulkarnain Harahab, *Op Cit.*, p. 258

instinctively, intuitively and accurately to virtue. Can improve the quality of someone when worked and enforced in living the life of society and state.

E. Conclusion

In closing this paper some conclusions can be stated as follows:

1. Waqf of communal land is not regulated in the Agrarian Act and other Implementing Regulation, but in indigenous community of Minangkabau / Sumatra Barat waqf of communal land is already a tradition. Waqf of communal land has not been register well. Waqf of Communal Land registration can not be carry out through the provision of land registration Governement Regulation Number 24 Year 1997.
2. Trigger factors of waqf disputes of communal land, can be concepts, values interest / needs, can also relationship and information, structure (structure of power). Can also the role of nadzir less productive, the administration is not regular, land prices are rising, diminishing the religious sense, etc.).
3. Strategy of dispute resolution of waqf land comes from comunal lands in West Sumatra by the pattern of deliberation by 'kelarasan' that use in the village, both kelarasan Bodi Caniago and Koto Piliang, and not through mediation, arbitration, or court. In reality there is no resolution of waqf dispute of comunal land through litigation institutions, but through traditional institutions of Minangkabau with the ABSSBK legal system, and in the end the decision is not in their lost and won, there was no grudge between the parties, and the peace of all parties. In Fatwa customary of Minangkabau mentioned, *Bulek lah buliah digolongkan dan picak lah buliah dilayangkan*. That is accepted by all parties.

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