

REGISTRATION OF WAQF OF COMMUNAL LAND IN WEST SUMATERA

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ABSTRACT

Land waqf has an important position for the existence and life development of mankind. In the concept of Islamic law, waqf or religious contribution is a devotion to give someone's possession for the sake of good by taking its benefit while the land possession is unalienable (handover is not possible). Thus, waqf demands necessity and willingness from a Muslim to give a part of his or her possession (in the form of land) for religious importance and virtue. In Indonesia, with majority of people who are Muslims, the practice of waqf, especially in the form of land, seems fairly significant, especially in West Sumatera where communal lands are dominant. Indonesian Waqf Board's record states that the number of land waqf in Indonesia is 559,945 locations, up to March 2015, ranging in every corner of Indonesia as wide as 4,142,464,287.91 m². From that total number, 414,246.43 locations have been certified while the other 145,699 have not, with this specification: 104,691 in the process of AIW and 41.008 not yet in the process of AIW. In West Sumatera, Regional Office of Ministry of Religious Affairs recorded 6,721 locations of land waqf as wide as 57,761,212.25 m². From that total number, 4,554 locations have been certified; 2,167 locations are unregulated equivalent to 32.24%. Many waqfs certified come from communal land and the non-certified ones do too. Communal lands that still exist in Indonesia are from West Sumatera and Kalimantan. However, in West Sumatera, there are levels of the communal lands, hence this study was conducted in West Sumatera. Certification of waqf land, except for certification of waqf of communal lands, is conducted with Government Regulation Number 24 of 1997 (PP No. 24 of 1997) as a replacement for Government Regulation Number 10 of 1961 on Land Registration. Waqf certification of communal lands is not regulated in Indonesia's laws although in its practice in West Sumatera waqf of communal lands widely exists. This contributes to legal certainty for waqf of communal lands, even leads to conflicts.

Key Words: Waqf Certification, Communal Land.

A. Introduction

In Minangkabau (West Sumatera), before the arrival of Islam, there existed cultural customs influenced by Hinduism and Buddhism. Islam came along with law called "syariah" based on Al Qur'an and Al Hadis. Both have become the way of life and guidelines for Islam community in achieving happiness both in this world and beyond this world.¹ According to Nasroen², culture of Minangkabau is a view of life that stands alone – original, which is neither based on Buddhism, Hinduism, nor Islam. In Al Qur'an itself, there are many words of God which are also found in the nature, for those who understand it, thus Islam perfects culture of Minangkabau.³ Assimilation between culture and syara' (personality) into become a philosophy attached to the life of society of Minangkabau is called "adat bersandi syara', syara' bersendi Kitabullah." (ABSSBK), which means 'culture hinged on syara', syara' hinged on Kitabullah.'

One of Islamic institutions having an important role in people empowerment is waqf. In history, waqf has taken a role in the development of social, economy and people culture. Conspicuous things from waqf is its roles in helping many religious (Islamic) activities, education and health. For instance, in Egypt, Saudi Arabia, Turkey and some other countries, development of various facilities and infrastructures, education and health care are funded by waqf development. Continuity of benefit of waqf is very likely because of the empowerment of productive waqf to support many social and religious activities.⁴

Indonesia has 86 per cent Islam citizens or roughly 12,7 per cent of total of Muslims in the world. In 2010, devotees of Islam in Indonesia were approximately 205 million people or 88.1 per cent of total number of Indonesian citizens.⁵ In 2012, it was recorded in Sub-directorate of Waqf Information System of Ministry of Religious Affairs that the extent of waqf lands in Indonesia reached 3,492,045,373.754 m². The data was as an outcome of process of waqf land data collection conducted manually all over Indonesia, performed progressively started from district level by KUA workforce, which was then recapitulated in county/city level by office of Ministry of Religious Affairs, and proceeded to national level afterwards. Such extent of waqf lands ranged in 420,003 locations all around Indonesia.⁶ In 2013, the number rose to become 4,142,464,287.906

¹ Amir Syarifuddin, *Pelaksanaan Hukum Kewarisan Islam dalam Lingkungan Adat Minangkabau*, Gunung Agung, Jakarta, 1984, p. 170

² M. Nasroen, *Dasar Falsafah Adat Minangkabau*, Pasaman, Djakarta, 1957, p. 52

³ Ibid p. 52

⁴ Suhrawardi K.Lubis, dkk, 2010, *Wakaf dan Pemberdayaan Umat*, Sinar Grafika, p.1

⁵ <http://www.anashir.com/2012/05/102159/46553/10-negara-dengan-jumlah-penduduk-muslim-terbesar-di-dunia#ixzz2jCznD4A>, accessed on 20 April 2015, at 16.15 wib

⁶ <http://bimasislam.kemenag.go.id/informasi/berita/35-berita/660-luas-tanah-wakaf-di-indonesia-3492045373754-m2.html>, accessed on 31 October 2013

m² or about 414,246.429 hectare and reached 435,395 locations.⁷ In stipulations of Basic Regulations of Agrarian Affairs (hereafter referred to as UUPA), only lands based on freehold titles can be made waqf, while other titles cannot; so as for waqf of communal lands, no stipulations regulate it.

Although growth of waqf has become significant, there are still many weaknesses such as land waqf in the form of communal land, which is the topic of this study. In the laws and legislation, waqf about land is only about freehold title over lands, then in 2004 it was developed into other types of titles or rights such as cultivation titles, right to use title and managing title. However, there are still no rules of waqf of communal land despite the fact that communal or indigenous land is the object of land waqf.

At first, waqf of lands in Indonesia was regulated in Law No. 5 of 1960 on Basic Regulations of Agrarian Affairs, popularly known as UUPA. In Article 49 UUPA, it is confirmed that freehold titles over lands can be formed as waqf and the implementation is done with Government Regulation No. 28 of 1977⁸. Subsequently, Presidential Directive No. 1 of 1991 on Compilation of Islamic law was made as a reference in implementation of waqf. Then, in 2004, this regulation was then completed by the release of Law of Waqf or Undang-Undang Wakaf (UUW)⁹ and its implementation was in the form of Government Regulation No. 42 of 2006¹⁰. In UUW, an improvement is made in which objects of waqf are not only immovable things such as lands but also moveable things such as money and vehicles.

In UUPA, it is confirmed that only ownership over land can be made waqf. Such freehold title is a devolved right, fully entitled to somebody over a land, by remembering the terms of social function of right over land (Article 6 UUPA)¹¹. In Article 20 Subsection (2) UUPA, it is stipulated that freehold title can move and be shifted to other party. In Article 4, Government Regulation No. 28 of 1977, it is emphasized that lands to be made waqf must be lands of ownership and such lands have to be free from all impositions. In UUPA Article 22 Subsection (1), it is stated that the freehold title according to customary law is regulated by Government Regulation, yet, such regulation does not exist. Besides, it is also stipulated that the existence of freehold title, according to Article 22 Subsection (2), happens because of: a. Government decision, based on terms and conditions stipulated by Government Regulation; b. Laws. Freehold title based on government decision is under the settlement of title or right (*beschikking*) through land registration. In rules about land registration, it appears that communal land is not an object of land registration while the existence of communal land in Indonesia including in West Sumatera is conceded in Article 3 UUPA. In Article 19 UUPA, all titles over lands must completely be registered. The existence of communal land as an object of waqf is not supported by regulations on waqf and its registration. The total number of land waqf in West Sumatera based on Regional Office of Religious Affairs is 6,721 locations as wide as 57,761,212.25 M². From that total, 4,554 locations have been certified, and 2,167 locations have not or about 32,24%, dominated by waqf of communal land.

In UUW, it is specified that waqf possessions can be made waqf if owned and controlled by Wakif validly¹². In UUW, waqf possessions consist of¹³: a. Immovable properties; b. Movable properties. Immovable properties include: 1. Titles over lands according to laws and regulations, for both the registered and non-registered ones; 2. Building or parts of building that stand on lands; 3. Plants and other things related to lands; 4. Freehold titles over units of apartment according to laws; 5. Other immovable properties according to Islamic laws and general laws.

Humans will live happily and sufficiently when they can utilize lands owned according to the laws, and for the happiness of both earthly life and the hereafter by, among other things, making waqf of their possessions. Humans will live safely and peacefully when they can utilize their rights and duties according to certain limits of laws that regulate the human life in being in a society.¹⁴ In customary laws, there is a close relation between the community and the lands it occupies, i.e. the relation that stems from *religio magis* perspective¹⁵. Rights of indigenous people over the lands are called seigniorial rights or customary rights.¹⁶ Customary rights are rights over lands owned by indigenous people¹⁷. Indigenous communities manage their own lands based on land customary laws operating, under a leadership of a traditional leader. Indigenous people have full sovereignty over their territory, and traditional leaders also have full authority to regulate and manage societal relationship including towards the nature around.¹⁸

In the province of West Sumatera, the existence of lands is still dominated by three stages of communal lands, including *nagari* communal land (*tanah ulayat nagari*), *suku* communal land (*tanah ulayat suku*), and *kaum* communal land (*tanah ulayat*

⁷ Direktur Pemberdayaan wakaf Badan wakaf Indonesia.

⁸ PP 28 Tahun 1977 Tentang Pewakafan Tanah Milik

⁹ Undang-Undang Nomor 41 tahun 2004 (UU Nomor 41 Tahun 2004) tentang Wakaf

¹⁰ Pelaksanaan undang-undang Nomor 41 tahun 2004 tentang wakaf.

¹¹ Pasal 20 ayat (1) UUPA.

¹² Pasal 15 UU Nomor 41 Tahun 2004.

¹³ Pasal 16 UU Nomor 41 Tahun 2004

¹⁴ G. Kartasapoetra dll, *Hukum Tanah jaminan UUPA bagi Keberhasilan Pendayagunaan Tanah*, Bina Aksara, Jakarta, 1985, p. 1.

¹⁵ Pasal 1 ayat (2) Seluruh bumi, air dan ruang angkasa, termasuk kekayaan alam yang terkandung didalamnya dalam wilayah Republik Indonesia sebagai karunia Tuhan Yang Maha Esa

¹⁶ Bushar Muhammad, op.cit

¹⁷ Yulia Mirwati, 2015, *Konflik tanah Ulayat*, Andalas University Pres, Padang, p. 76.

¹⁸ Helmi Panuh, *Pengelolaan Tanah Ulayat Nagari pada era Desentralisasi Pemerintahan di Sumatera Barat*, Raja Grafindo P ersada, Jakarta, 2012, p.87.

kaum) according to customs in every region.¹⁹ There is a development in Local Regulation of West Sumatera in which there is an emergence of *rajo* communal land (*tanah ulayat rajo*), showing up in foreign region in which legal system of indigenous people is affected by Islamic societal community, so leaders of indigenous people come from two legal customary laws, i.e. *koto piliang* and *bodi caniago*. It is mentioned in customary fatwa: ²⁰*Pisang sikalek-kalek utan, pisang timbatu nan bagaiyah, bodi caniago inyo bukan, koto piliang inyo antah (pisang sikalek-kalek hutan, pisang timbatu bergetah*, he is neither *bodi caniago* nor *koto piliang*). This can be found in Pariaman and Kinali (Pasaman) and other regions. *Rajo* communal land is not governmentally talking about *rajo*/king in constitutionalism, but belonging to cultural society. Subsequently, in Local Regulation on Communal Land in West Sumatera, *rajo* communal land is added to the list of communal land.²¹ In this Local Regulation, it is also stated that communal land can be registered with a stipulation: *nagari* communal land is registered into cultivation titles, right to use title, managing title, while *suku* communal land and *kaum* communal land can be registered into freehold title and *rajo* communal land can be registered into right to use title and managing title. Such Local Regulation stipulates the system of registration referring to regulation of land registration such as Government Regulation No. 24 of 1997, the replacement of Government Regulation No. 10 of 1961, however, in both regulations, there is no registration of communal land mentioned. Furthermore, in UUPA, managing right or title is not recognized. In Minangkabau, there exists the combination of the concept of its customary law and Islamic law, through fatwa “*adat basandi syarak, syarak basandi kitabullah*” (culture hinged on syarak, syarak hinged on Kitabullah).²² Both legal systems complete each other, which is by *Snoukhkranye* called by the theory of *reseptio in complotio* (completing in a compound – free translation by the author). With the concept of life of *Adat Basandi Syara’*, *Syara’ Basandi Kitabullah* (ABSSBK), it can be confirmed that Minangkabau society takes Islam as the religion. Based on this, waqf institution grows well in Minangkabau. Ter Haar²³ confirmed that legal institution of waqf has been accepted by people of Minangkabau. Waqf givers have to own (the owners) and control fully the lands or possessions that are about to be made waqf. Freehold titles in UUPA are individual rights whereas communal rights over lands are undivided communal rights. In the implementation of waqf of communal lands – usually *kaum* communal lands – the wakif are supposed to be all members of *kaum*/tribe or can be represented by leaders of tribe called head of inheritance *mamak* or head of tribe *mamak*. This is what motivates the author to conduct the study about registration of waqf of communal lands.

B. Problem Formulation

Based on the explanation above, limitations of the problem are as follows:

1. How is the position of waqf of communal land in West Sumatera?
2. How is the implementation of registration of communal waqf in West Sumatera?
3. How is the regulation of waqf registration in the future?

C. Research Method

The research was conducted by using sociological and normative judicial approach. It is normative judicial because the research is more likely to approach secondary data²⁴. This research is descriptive, meaning that it is describing waqf registration of communal land in West Sumatera, by doing field study as a complement to normative study. West Sumatera was chosen as the location of this study because the existence of communal lands in Indonesia until today is only in West Sumatera and Kalimantan area. From these two location, West Sumatera was proportionally chosen because communal lands in West Sumatera Barat have some specialties, which are its tiers and its connection with Minangkabau’s cultures. In Minangkabau, customary law is unified with Islamic law, according to fatwa *adat basandi Syarak, Syarak basandi Kitabullah, Adat mamakai Syarak Mangato*. Types and sources of data are obtained from literature research, documentations, research outcomes, and journals, provided in the forms of books.²⁵ Legal materials collected through literature research include: primary legal materials, secondary legal materials, and tertiary legal materials which give clues or explanation towards primary and secondary legal materials. These legal materials include dictionaries, encyclopedia, law magazines, et cetera²⁶. Instrument of data collection used is study of documents²⁷ which has an aim to collect secondary data from some literature documents such as papers and scientific journals that have relation to theories, legal fundamentals and some understandings regarding waqf registration of communal land in West Sumatera. To support data from study of documents, field research is conducted by using methods of interview, aiming to get further understanding over data of document study. Interviews were conducted with some sources that have connection with waqf registration of communal land. Data analysis will be initiated by choosing relevant data. Then, they will be systematically and consistently elaborated in relation to certain symptoms.²⁸ The analysis is conducted qualitatively towards primary, secondary and

¹⁹ Evo Fauzan, *Pemanfaatan tanah ulayat nagari dalam sistem kembali pemerintahan nagari*, <http://peprints/undip.ic.id> accessed on 15 April 2015, at 11.00, p.66-67.

²⁰ Yulia Mirwati, locit. p. 81

²¹ Perda Sumatera Barat Nomor 6 Tahun 2008, Pasal 6 menyebutkan : Penguasa dan pemilik tanah ulayat rajo adalah lelaki tertua pewaris raja mewakili anggota kaum dalam garis keturunan ibu adalah pemilik tanah ulayat rajo.

²² Helmi Panuh, *Pengelolaan Tanah Ulayat Nagari pada era Desentralisasi Pemerintahan di Sumate-ra Barat*, Raja Grafindo Persada, Jakarta, 2012,p.35.

²³ B. Ter Haar Bzn, *Asas-asas dan susunan Hukum adat*,Mandar maju, Bandung, 2011, p. 123.

²⁴ Suratman,*Metode Penelitian Hukum*, Alfabeta, Bandung,2012,p.51.

²⁵ Hilman Hadikusuma, *Metode Pembuatan Kertas Kerja atau Skripsi Ilmu Hukum*,Mandar Maju,Bandung,1995,p.61.

²⁶ Nico Ngani, *Metodologi Penelitian dan Penulisan Hukum*, Pustaka Yustisia, Yogyakarta,p.78.

²⁷ Studi dokemen merupakan satu alat pengumpulan data yang dilakukan melalui data tertulis dengan mempergunakan *content analysis*.

²⁸ Soerjono Soekanto, 1986,*Pengantar Penelitian Hukum*, UI Pres, Jakarta,p.63.

tertiary legal materials by using law dictionaries in the attempt to understand inconspicuous legal concepts, analyzing them normatively²⁹, and towards many legal regulations related to waqf registration of communal land, all done qualitatively³⁰, through legal theories pertained.

D. Outcome And Discussion

In West Sumatera, there are many practices of waqf for communal/indigenous land (*kaum* communal land). Regarding communal land, it is formulated in Article 3 UUPA stating that "By remembering stipulations in Article 1 and 2, implementation of communal/indigenous rights and any similar rights of indigenous people, as long as they exist, must be normally applied according to national and state interest, basing on national unity and not against other higher laws and regulations.

The existence of communal rights is admitted with conditions: a. Such rights do exist in indigenous communities. How do we prove such existence? This can be proved by doing specific research in territories of cultural communities in Indonesia, where the communal rights still live. In West Sumatera itself, they do still exist up to now. b. They must be real so that they correspond with national and state interests. This concept is very abstract. How can we measure such reality? Do the criteria correspond with national and state interests? c. They may not be against higher laws and regulations. This also breeds different interpretation in the implementation of communal rights, even triggering conflicts about concepts, values, and interests. For example, it is firmly confirmed that cultivation rights can only be given after the rights of the state (Article 28 UUPA), but, why on communal lands? It feels rather strange, when in Local Regulation of West Sumatera No. 6 of 2008, it is stated that cultivation rights can be given on communal lands in the forms of *nagari* communal lands. Are this *nagari* communal lands the same as the controlling rights of the state? d. As long as organic terms of communal lands have not been decided, each territory uses communal lands by their own name and policy.

In West Sumatera, regarding communal rights, before Local Regulation No. 6 of 2008, it had been stipulated in Local Regulation No.13 of 1981, about *nagari*, stating that the status of communal rights are strong, and such rights give legal certainty towards the people even though they are not acknowledged through land registration.

Communal rights in West Sumatera also have their own uniqueness where their status is attached to system of Minangkabau's maternal lineage. Furthermore, status of communal rights is also the determiner of a person's authenticity inside the people of Minangkabau. The designation of this authenticity is made under a fatwa and culturally it is called "*sako dan pusako*". *Sako* is an honorary degree in Minangkabau kinship, while *pusako* is wealth owned by a cultural community, based on maternal lineage, and its use is under the authority of *mamak* of *suku* or *nagari* tribal headman/leader, due to the following classification of division and ownership of communal lands in Minangkabau:³¹ *kaum, suku* and *nagari*.

For the people of West Sumatera, communal rights are their source of livelihood, which is very religious, not only for present life but also future descendants, thus the communal rights are neither transferable nor able to generate new ownership over lands. Besides, in the cultural fatwa, it is mentioned that *jua indak dimakan bali gadai indak dimakan sendo* (cannot be traded; can only be pawned under very strict conditions). Concerning utilization outside certain local communities, there must be consent from leader of community by doing procedures of *adat di isi limbago di tuang* (through consent or with certain agreement). in the context of religious, Islamic life system of Minangkabau people, communal lands can be made waqf.

Communal lands in West Sumatera are always defended since dignity (*gezah*) of a tribe will be highly determined by communal lands owned, as well as to determine the authenticity of a person in a tribe. This is relevant to a fatwa that states that the authenticity of a person in a tribe must be designated by: *Ado tapian tampek mandi, Ado basasok bajarami Ado bapandan pakuburan* (having some water for taking a bath; having woven plait and hay; having burial ground)³². Dt. B. Nurdin Yakub states that communal lands include lands not yet worked by communities and become *nagari*'s possessions, with boundaries based on natural surroundings. Cultural saying: "*kabukik bagulung aie, kalurah baanak sungai*",³³ that concerns a person's dignity and authenticity (in order not to be regarded as outsider), also sticks to the existence of communal rights. If a tribe does not own any communal lands, they are not considered indigenous people but outsiders or also called *dagang lalu* (visitors). Minangkabau communities realize that lands is a binding factor among them.³⁴

The next development of formulation of communal rights is in Regulation of Minister of Agriculture No. 5 of 1999³⁵, Article 1 Subsection (1) stating:

²⁹ Analisa normatif merupakan inti dari analisis hukum, dimana tugas analisis hukum ini adalah menganalisis pengertian hukum, asas hukum, kaedah hukum, sistem hukum dan berbagai konsep yuridis. Dengan demikian dalam analisis normatif ini titik tolaknya tidak lepas dari ketentuan yuridis berdasarkan konsep hukum murni Hans Kelsen, lihat lebih lanjut dalam buku; John Ibrahim, *Teori dan Metodologi Penelitian Hukum Normatif*, Bayu Media, Malang, Publishing, 2008, p.311.

³⁰ Konsep Analisis kualitatif adalah menggunakan bahan-bahan yang tidak semata bersifat normatif tapi juga terkait dengan konsep-konsep hukum, filsafat dan bidang-bidang lain yang di luar norma hukum, lihat lebih lanjut dalam buku; C.F.G.Sunaryat i Hartono, *Penelitian Hukum di Indonesia Pada Akhir Abad ke 20*, Bandung: Alumni 1994, p.166.

³¹ Yuliamirwati, 2015, *Konflik Hak Ulayat*, Andalas university Press, p. 124

³² Firman hasan, *Dinamika Masyarakat dan Adat Minangkabau*, Pusat Penelitian Universitas Andalas, Padang 1988, p.91.

³³ Lihat Dt. B. Nurdin Yakub, *Minangkabau Tanah Pusaka 2*, Pustaka Indonesia, Bukittinggi, 1989, p.55.

³⁴ Syofyan Thalib, BPHN, *Simposium UUPA dan kedudukan tanah-tanah adat di Idonesia*, Bina Cipta, 1978, p.210.

³⁵ Peraturan Menteri Negara Agraria/Kepala Badan Pertanahan Nasional Nomor 5 Tahun 1999, Tentang Pedoman Penyelesaian Masalah Hak Ulayat Masyarakat Hukum Adat

‘Communal rights and other things similar from cultural communities is authority owned by certain indigenous communities over some areas for getting benefits from natural resources, including lands, in those areas, for their continuity of life and livelihood, which continuously emerges from physical and spiritual relationship for generations between the indigenous community and areas concerned’.

Based on this stipulation, it is obvious that communal right constitutes the authority in taking advantages on lands, for the continuity of livelihood of indigenous communities. It is not stipulated if communal rights give either authority or legal rights to the owners, or rights to use and defend the lands from other parties. The other matter is about concept of legal rights, not only about the consent in taking advantage of the communal lands.

As in Government Regulation No. 24 of 1997, replacement of Government Regulation No. 10 of 1961, communal land is not an object of land registration. Waqf of communal land is not an object either, not giving legal certainty.

A. Waqf

The word ‘wakaf’, which is in Bahasa Indonesia, comes from a verb in Arabic *waqafa (fi’il madhy)*, which by etymology means ‘stop’, ‘stand still’, or ‘hold’.³⁶ The Prophet, The Messenger of God, used the word *al-habs* (hold), meaning that to hold some possession which is used for goodness and suggested by religion.³⁷ Later, some definitions of waqf emerged, according to some *fiqh* (study of laws pertaining to ritual obligations) Islamic teachers. According to them, generally, waqf has a definition to restrain some possession, in order to take benefit from it for the sake of religious community and religion. Legal foundation of waqf can be found in some parts of Al Qur’an and Al hadist.³⁸ In Al Qur’an, the legal foundation can be found based on Muhammad Fuad Abd al-Baqi’s books, book of Ash Shaffaat verse 24, book of Al An’aam verse 27 and 30, and book of Saba’ verse 31.³⁹

According to UUW, waqf possessions can be used for religious infrastructures and activities, educational means and activities, scholarship and health, assistance for the needy, abandoned kids and orphans, economic development of religious community and development of public welfare.⁴⁰ Contributing waqf is not done without pure intention but in God’s way (*fi sabilillah*). It is mentioned in book of Al-Baqarah verse 267: ‘Oh, believers, donate (in God’s way) some of your good earnings and some of the things We let out from the earth. And, do not pick the bad ones to be donated, and remember that God is all rich and praiseworthy.’⁴¹ Al-Sa’di says that, in this verse, God motivates his servants to donate things.⁴² Here, the rule of waqf refers to waqf conducted in God’s way for some of earnings or income, and not all of them. This also confirms that everything you produce is known by God.⁴³ By making waqf from possessions you love, this will prove your seriousness. Also, it is mentioned that human will not get the reward for getting into heaven if they do not donate some of possessions they love.⁴⁴ In book of Al-Nahl verse 97, it is stated: ‘For those who conduct charity, We will give them good life and better reward compared to what they have done.’⁴⁵ This definition of waqf is applied into Government Regulation No. 28 of 1997 in relation to Law No. 41 of 2004, and its object and duration have been developed in its implementing Government Regulation.

B. Registration of Waqf of Communal Lands

Registration of land waqf is stated in Article 9 Government Regulation No. 24 of 1997, without stipulating waqf from communal lands as an object of such land registration. Waqf that can be registered is waqf coming from lands of freehold titles (Article 20 of UUPA) which are individual and can be divided individually. Waqf of communal lands is a concept of collective possession which is not divided in communities of customary law, and clearly not included as an object of land registration in Indonesia.

With or without registration of land waqf of communal lands, this will not give legal certainty. As long as communal lands are not acknowledged as a right, application of waqf of communal lands and their registration will not give legal certainty. Legal certainty discussed here is the certainty concerning rights, legal action in the form of waqf, and distribution of income from such waqf of communal lands in Islamic communities. Verification of rights over communal lands still looks absurd or vague, and

³⁶ Departemen Agama RI, *Wakaf Tunai Dalam Perspektif Islam*, Direktorat Jenderal Bimbingan Masyarakat Islam dan Penyelenggaraan Haji Direktorat Pengembangan Zakat dan Wakaf, Jakarta, 2005, hlm. 13. Bandingkan dengan Ahmad Warson Munna wir, *Kamus Al-Munawwir Arab Indonesia Terlengkap*, Pondok Pesantren Al – Munawwir Krapyak, Yogyakarta, 1989, p.253

³⁷ *Ibid*, hlm. 13- 14, Bandingkan dengan Al- Jarjani, Kitab Al – Ta’rifat, *Al – Haramain li al – Thoba’ah wa al – Nasy wa al – Ta uzi*, Singapura, Jeddah, p. 253

³⁸ Michael Dumper, *Wakaf kaum Muslim di Negara Yahudi*, Terjemahan Burhan Wirasubrata dan dari buku *Islam and Israel : Muslim Religion Endowments and Jewish State*, Lentera Jakarta, 1999, p.2

³⁹ Muhammad Fuad Abd al-Baqi, *Al Mu’jam al Muhfahras li Alfadz Al-Quran Al Qarim*. Cet. II, Dar Al Fikr, Mesir 1401 H/1981 M hlm. 758, dan Al Hasani Al Muqaddasi, *Fath- Al Rahman lithalibi ayat Alqur’an al Matbahah al ahliyyah* Beirut 1323 H, p, 4 75

⁴⁰ Departemen Agama RI, *Tanya jawab Wakaf*, Dirjen Bimas Islam Direktorat Pemberdayaan Wakaf, Departemen Agama RI, Jakarta, 2008, p. 56.

⁴¹ Departemen Agama RI, *Op.cit*, p.67.

⁴² Al-Sya’di, *Op.cit*, p. 125.

⁴³ Di jelaskan bahwa penafsiran terhadap *anfiq* adalah ‘berzakatlah kamu’. Demikian dalam jalaluddin al – mahalli dan jalaludd in al Suyuthi, *Tafsir Al- Jalalain*, Juz . I, Syarikah al – ma’arif li al-thaba’ wa al- nasyr, Bandung- Indonesia, p.42.

⁴⁴ Departemen Agama RI, *Op.cit*, p.91.

⁴⁵ Al – Shabumi, *Op.cit*, p, 217-218.

legal actions of the subject of communal rights also become biased. Besides, in legal system of UUPA, rules of waqf can only be applied on lands of freehold titles, and waqf can only be done by wakif who legitimately owns the possessions of waqf. Concerning waqf of communal lands, their status of ownership is not legitimized yet, thus, registration of waqf of communal lands does not have legal foundation. Although registration of waqf is not stipulated in Islamic legal concept, in Indonesia's legal concept this must be performed to guarantee its legal certainty. Act of waqf must have clear legal basis because it is classified as an agreement (contract) that is performed with authentic certificate and must be created or declared in front of Registrar of Waqf Commitment and with certificate of Registrar of Waqf Commitment (*Pejabat Pembuat Akta Ikrar Wakaf* or PPAIW). Change of collective ownership to the community for the benefit of groups of waqf caretakers (nadzir) and change of status of titles over lands which is from wakif to nadzir must be declared and created in written, with authentic certificate, which later should be registered to National Land Agency, by getting a "proof of right" in the form of waqf certificate of communal lands. By forcing the registration of waqf of communal lands through Government Regulation No. 10 of 1961 in relation with Government Regulation No. 24 of 1997, waqf of communal lands existing up to today in Minangkabau's society of indigenous people does not give legal certainty, conceptual certainty, values and norms.

Registration of waqf of communal lands includes land registration in the form of maintenance of physical data of lands, affected by a legal action. Due to transfer of freehold titles to legal institution of Islam in the management of land in attempt to improve and develop its benefit, registration of waqf land must be performed with the help of special official, namely Registrar of Waqf Commitment (PPAIW). In Article 9 Subsection (1), Government Regulation No. 24 of 1997, it is specified that object of land registration includes waqf land. By the release of UUW Article 17, it is specified that the rights over lands that can be made waqf have been expanded more than just freehold rights, namely: a. Titles over lands, for both the registered and non-registered ones; b. Building-using rights, cultivation rights or rights to use on state lands; c. Building rights or rights to use on rights of management or freehold, needing written license from the holders of rights of management or freehold; d. Freehold titles over units of apartment. But still, communal rights over lands cannot be made waqf.

The development of types of rights over lands that can be made waqf in UUW can be categorized into movable and immovable properties. Administrative regulations about immovable waqf properties have actually existed since Netherland governmental era in 1905 by the release of *Sirkulair Van De Governemen Secretaris* (Publication Letter released by secretary Governemen) which ordered regional leaders to make a list of Islam's religious places built on waqf lands. Then, in 1931, there was the release of publication letter secretary *Bijblad 1931* No. 12573 about the need of regional leaders' consent for people who wanted to perform waqf. In 1934, *Bijblad 1934* No. 13390 was released, and in 1935, *Bijblad 1935* No. 13480 was released, confirming previous waqf regulations.⁴⁶ In the importance of safety and legal protection of assets waqf, certification of waqf land is a must and a fundamental thing to do. This is why Ministry of Religious Affairs had a program of waqf land certification.⁴⁷ It was system of waqf land registration for waqf lands occurred before Government Regulation No. 28 of 1977, and it is stipulated in Article 15 and 16 in Regulation of Minister of Religious Affairs No. 1 of 1978 jo Regulation of General Directorate number VI. Such system of waqf land registration is stipulated as follows: Towards waqf lands that exist before the release of Government Regulation No. 28 of 1977, nazhir must register them according to the form of Draft of W.D. to local Office of Religious Affairs. If the nazhir is not alive anymore, the wakif or heir, the nazhir's descendants or members of society knowing the problem must register the lands to local Office of Religious Affairs. If no one wants to register them, Head of Village where the lands are, must register them to the local Office of Religious Affairs.

Registration of waqf lands must include certificate of lands, two people witnessing waqf commitment or vow, and certificate of waqf commitment made by PPAIW. After the release of UUW, certificate of waqf commitment can be made by not only Office of Religious Affairs but also notary. Furthermore, registration of certified waqf of communal lands must meet several conditions formulated by legislation, inter alia, license from authorized governmental officials for waqf land from regional government, state-owned company/local-owned company, and village government or other government at the same level. From land-sector officials, regarding authorization of rights or content of the certificate, there exists notes about the need of license of land disengagement or handover.

C. Conclusion

1. Conceptually, communal land cannot be made waqf in the legal system both before and after the birth of UUPA or, even in UUW, because only freehold titles can be made waqf, or in UUW, other titles are developed as an object of waqf. When it comes to waqf of communal lands, legislation system does not stipulate it.
2. In legal system, registration of waqf of communal lands are not regulated in many regulations pertaining to land waqf. Hence, waqf implementation and registration of waqf of communal lands do not give legal certainty. Due to the non-existence of legal regulations concerning waqf of communal lands and their registration, dispute is very likely.
3. In the future, waqf of communal lands must be particularly regulated in order to give legal certainty.

⁴⁶ Farid Wadjdy dan mursyid, *Wakaf dan Kesejahteraan Umat*, (Filantropi Islam yang Hampir Terlupakan), Yogyakarta : Pustaka Pelajar, 2007, p. 39.

⁴⁷ M. Athoillah, *Hukum Wakaf (Hukum Wakaf Benda Bergerak dan Tidak Bergerak dalam Fikih dan Peraturan Perundang-undangan di Indonesia)*, Bandung: Penerbit: Yrama Widya, 2014, p. 224.

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