

Possessing Endowment : Comparative Study Of Imam Syafi'i Perspectives, Government Regulation Number 28 Year 1977, And Constitution Number 41 Year 2004

by :

Yedi Purwanto,

Halal Center Salman ITB, Lecturer of KIK-FSRD, Institut Teknologi Bandung
Hari Utomo,

Badan Wakaf Salman ITB

and

Rasyida Noor,

(Graduate from University of Groningen)

ملخص

ملكية الوقف ترجع إلى جمعية التي تعمل على الأموال الموقوفة كي تدار وتطور طبقاً للهدف من القانون (رقم 41 عام 2004 الفصل الأول الآية الرابعة). ومن منظور الإمام الشافعي إن ملكية الوقف تتكون من الواقف أو الموقوف عليه أو الحاكم. وفي اللائحة الحكومية رقم 28 عام 1977 أن ملكية الوقف يجب أن يديره الفرد أو الجمعية وهذا خلاف ما قاله الإمام الشافعي.

بناء على القانون رقم 41 عام 2004 فصل 9 تبين أن ملكية الوقف هي: (أ) الفرد، (ب) المنظمة، (ج) الوكالة القانونية. هذا البحث تبين عن بعض الفكرة الأساسية الآتية. أولاً، المفهوم من الإمام الشافعي، واللائحة الحكومية رقم 28 عام 1977، والقانون رقم 41 عام 2004 عن الوقف للأراضي الملكية؛ ثانياً، حالة الملكية من منظور الإمام الشافعي، واللائحة الحكومية رقم 28 عام 1977، والقانون رقم 41 عام 2004 عن الوقف للأراضي الملكية. إن الهدف من هذا البحث هو: أولاً، الحصول على البيان عن ذلك المفهوم من الإمام الشافعي، واللائحة الحكومية رقم 28 عام 1977، والقانون رقم 41 عام 2004 عن الوقف للأراضي الملكية. ثانياً، الحصول على الوصف عن حالة ملكية الوقف حسب فكرة الإمام الشافعي، واللائحة الحكومية رقم 28 عام 1977، والقانون رقم 41 عام 2004 عن الوقف للأراضي الملكية. ثالثاً، الحصول على البيان عن تأثير فكرة الإمام الشافعي في اللائحة الحكومية رقم 28 عام 1977 والقانون رقم 41 عام 2004 عن الوقف للأراضي الملكية، خاصة عن حالة ملكية الوقف. افتتح هذا البحث بدراسة المراجع للإمام الشافعي التي تتعلق بالوقف وباللائحة الحكومية رقم 28 عام 1977، والقانون رقم 41 عام 2004 عن تطبيق الوقف بإندونيسيا. نتيجة هذا البحث تعطي النظرة عن تأثير فكرة الإمام الشافعي على اللائحة الحكومية رقم 28 عام 1977 والقانون رقم 41 عام 2004 عن تطبيق الوقف بإندونيسيا. وغالبية المسلمين الإندونيسيين متحمسون على تطبيق فكرة الإمام الشافعي بما يتعلق بتطبيق ملكية الوقف.

كلمات مفتاحية: الوقف، الملكية، اللائحة الحكومية.

Abstract

Possessing endowment refers to an association that cope the endowment properties from the endower in order to be managed and developed based on its intentions (UU no. 41 year 2004 article 1 section 4). According to Imam Syafi'i, possessing endowment can be comprised by wakif, or mauquf 'alaih, or hakim. Dissimilarity with the constraints in the government regulations Number 28 Year 1977, possessing endowment should be managed by individuals or institutions in contrast with the constraints that are mentioned by Imam Syafi'i. Evenly,

UU no. 41 Year 2004 article 9 has mentioned that possessing endowment may include: a. individuals, b. organizations, c. institutions. The main notions discussed in this study are: first, the concept of Imam Syafi'i, government regulation no. 28 Year 1977, and UU no. 41 Year 2004 about The Endowment of Land Properties; second, the position of possessing endowment according to Imam Syafi'i PP no. 28 Year 1977 about The Endowment of Land Properties, and UU no. 41 Year 2004. In addition, the aims of this study are: First, getting a description about the concepts delivered by Imam Syafi'i, government regulation no. 28 Year 1977, and UU no. 41 Year 2004 about The Endowment of Land Properties; Second, gaining a description about the position of possessing endowment according to Imam Syafi'i, PP no. 29 Year 1977, and UU no. 41 Year 2004; Third, gaining a description about the influence of Imam Syafi'i perspectives in government regulation no. 28 Year 1977 and UU no. 41 Year 2004 about The Endowment of Land Properties, especially about the position of possessing endowment. This study is started by literature review of Imam Syafi'i works that relate to endowment appraisal and a review of government regulation no. 28 Year 1977 and UU no. 41 Year 2004 about the practice of endowment in Indonesia. The conclusion of this study gives an affecting description from Imam Syafi'i perspectives towards PP no. 28 Year 1977 and UU no.41 Year 2004 about the practice of endowment in Indonesia. In addition, the majority of Indonesian Muslims is enthusiastically involved in applying the concept of Imam Syafi'i in relation to the notion about possessing endowment in its practices.

Keywords: Endowment, Possessing, Government Constitutions

A. Introduction

Etymologically, the term waqf means to stop or stand still. As for the terminological meaning, waqf means to restrain possessions, to gain benefits from it, without damaging the possession (Ash-Shan'ani.1991.III 167). According to PP no. 28 year 1977 regarding the Endowment of Land Properties, article 1 section (1): A lawful action of an individual or an institution which separates a part of its land property possessions and institutionalizing it for good, for the sake of religious interests or other general deeds according to the Islamic principles (Ministry of Religion RI.1984. 91). On the basis of the above-mentioned section 1, it is indicated that the waqf property comprises of various types of goods that are not easily damaged during utilization. However, there are also ulama that regards waqf as limited to a plot of land.

The legal basis of waqf is not explicitly mentioned in Al-Quran however there is an implicit reference, as explained by Imam Syafi'i, Imam Malik and Imam Ahmad ibn Hanbal (Hasbi Ash-Shiddiqie: 1978. 179). There are several verses

in Al Quran that describes the essence of waqf, accordingly: Al An'am 38, Al Hajj 77, An Nahl 97, Ali Imran 92. (Hadits2 Nabi SAW) indicates that: "“When a man dies, his deeds come to an end except for three things: Sadaqah Jariyah (ceaseless charity); a knowledge which is beneficial, or a virtuous descendant who prays for him (for the deceased).” (H.R. Muslim).

A waqf institution has only been recognized during the Islamic period. Previously, there was bahirah, saibat, washilat and ham. As can be read in Al Maidah: 103 "Allah has not appointed (such innovations as) bahirah or sa'ibah or wasilah or ham. But those who disbelieve invent falsehood about Allah, and most of them do not reason." (Al-Syafi'i 1990. IV. 54).

There are four elements of waqf, namely: wakif, mauquf 'alaih, mauquf bih and shigat or pledge. In this case, the positioning of nadzir endowment which has a responsibility to take care and to manage the endowment, is not discussed. On one hand, during that time the role of nadzir endowment was a direct responsibility of wakif, maukuf alaih or hakim, as explained by Imam

Syafi'i. On the other hand, in H.R. Ibnu Umar, the positioning of nadzir endowment is explicitly emphasized as follows: "It is not sinful for a nadzir endowment to consume a part of the endowment in a righteous manner and without the intention to possess it." (Al-Majmu.t.t. XIV: 573).

The positioning of a nadzir endowment becomes more prominent when the location of the endowment is in a very strategic location with a high selling price. In some cases, this condition leads to the endowment property trading, organized by the nadzir endowment which is clearly against the religious principle. Emphasizing the importance of a nadzir endowment, this research will examine the positioning of a nadzir endowment, according to Imam Syafi'i, Government Regulation (PP) no.28, year 1977, and UU no. 41 year 2004.

The research method under consideration is the qualitative method, specifically a literature research or book survey. Main reference sources include: kitab al-Umm, PP no.28 year 1977, and UU no.41 year 2004 regarding endowment in Indonesia. In addition, other book reference serves as a secondary source to enrich this study.

B. Short History of Imam Syafi'i

Imam Syafi'i was born in the month of Rajab, 150 H (767 M), in the city of Guzah (Palestine). His father has already died when Syafi'i was still in his mom's womb. The name 'Syafi'i was taken from his father's family "Ibn Idris ibn Abbas ibn Utsman ibn Syafi'i ibn Saib ibn Yaizd ibn Hasyim in Abdul Muthalib ibn Abdi Manaf." It means that Imam Syafi'i is part of the family tree of Nabi Muhammad SAW. This is rooted back to their great great grandfather, Abdi Al-Manaf the third grandfather of Nabi SAW. From his mother side, Syafi'i is the son of Fatimah ibnt Abdillah ibn Hasan ibn Husain ibn Abi Thalib.

Since he was 9 years old, Syafi'i is used to memorize the 30 juz of Al Quran, mastering

the Arabic language from Banu Hudzail (in Makkah), including literature and Arabic poetry. Furthermore, Syafi'i studied fiqh from Imam Muslim ibn Khalid al-Zanny, a teacher and a mufti in Makkah, during the time. He learned hadith from Imam Sufyan ibn Uyainah, a muhaddith in Makkah. Lastly, he studied Al Quran under the supervision of Imam Ismail ibn Qashtanthin, in Makkah.

His journey in attaining knowledge was accomplished by going to Madinah, in order to learn under the supervision of Imam Malik. In the age of 10, Syafi'i was able to memorize kitab Al-Muwaththa written by Imam Malik. When he arrived in Madinah, Imam Malik cheerfully welcomed him, because Imam Syafi'i has succeeded in memorizing his kitab. In addition, Imam Malik even gave money for Imam Syafi'i as a form of support of his good intention in continuing his study in Iraq. In that place, Syafi'i met Imam Muhammad ibn Hasan and Imam Abu Yusuf. Both ulama are close friends of Imam Abu Hanifah, a famous Imam Madzhab Hanafi in Iraq. Syafi'i spent two year studying in Iraq before he continued his study to Persia, Yemen, Egypt and other cities.

The famous works of Imam Syafi'i are including: Al-Risalah, Al-Umm, Ikhtilaf al-Hadits, and al-Musnad. Imam Syafi'i died on Thursday, 29 Rajab year 204 H (820 M) in Egypt.

C. Waqf and Nahzir endowment

According to jumhur ulama, a waqf needs to fulfil four requirements, including: wakif (a person who gives waqf), mauquf alaih (a person who receives waqf), mauquf bih (the endowed property) and shighat or pledge (the statement). (Juhaya S.Pradja:1993.27). In the above-mentioned notion, the positioning of a nadzir and a witness of waqf is not mentioned, although those two aspects are crucial in the implementation. It seems that

the two additional elements are emphasized as an evidentiary function of waqf, not as a legitimate requirement of waqf. Imam Syafi'i explained nadzir endowment as follows: If there is a contract (akad) of waqf while the nadzir is not mentioned, then the wakif automatically serves as a nadzir. This function can also be done by maukuf alaih or hakim which sets a wakif as a nadzir endowment. (Imam Syafi'i:1990.IV.63)

As contained in PP no. 28 year 1977, the elements of waqf comprise of: wakif, a property/possession, waqf khairi, a pledge, nadzir, a witness, and the officials which is responsible for the creation of the endowment pledge. In that case, based on PP there is a clear position of nadzir endowment. The elements of waqf are described in detail, while the elements of waqf as established by jumhur ulama is not as detailed. This condition could lead to a misunderstanding in the Muslim community, especially in understanding the essence of waqf. Based on the writer's analysis, the explanation as contained in PP provides a more general interpretation which is more operational and accommodative with regard to the development of Indonesian Muslim community's understanding of waqf. Consequently, there is an insignificant possibility that there will be a misunderstanding regarding nadzir endowment. However, the position of nadzir endowment needs to be formally determined in order to avoid the practice of trading or abuse of waqf endowment, which could be the result of the increased value of waqf endowment or other factors.

Other factors that are explained in PP no.28 year 1977 while have not been set by jumhur ulama are including these additions: waqf khairi, the witness and the officials which is responsible for the creation of the endowment pledge. One could say that the three elements serve an important role in waqf, hence, if one of those is missing, the implementation of waqf cannot be

said as legitimate, according to the constitutional law and the Islamic religious law in Indonesia.

Nadzir endowment according to PP no.28 year 1977 is categorized into two groups, namely individual nadzir and institutionalized nadzir. An individual nadzir needs to adhere to the following requirements:

1. A citizen of the Republic of Indonesia
2. A Muslim
3. Be an adult
4. Be sound of mind
5. Not under an amnesty
6. Resident in an area where the endowment is located

For an institutionalized nadzir, the requirements are:

1. A legal Indonesian firm and located in Indonesia
2. Has a representative in a district where the plot of land (waqf) is located

Every nadzir endowment is obliged to register to the Office of Religious Affairs to be legalized.

The number of nadzir endowment in every district is determined by the Minister of Religious Affairs.

The requirements for a nadzir according to article 219 KHI (Kompilasi Hukum Islam) as referred to in article 215 section (4), consist of individuals who needs to fulfil the following conditions: a citizen of Republic of Indonesia, a Muslim, an adult, possess physical and mental health, currently not under an amnesty and resides in an area where the endowment is located. If it is an institutionalized nadzir, the following conditions are applied; a legal Indonesian firm and located in Indonesia and it needs to have a representative in a district where the plot of land (waqf) is located.

1. Obligations and Rights of nadzir

Obligations and rights of nadzir is regulated in

article 220 KHI and section 7 of PP No.28/1977, as follows:

- a. Nadzir is obliged to arrange and be responsible of the waqf property and the execution of the waqf procedure on the basis of its objectives, as regulated by the Minister of Religious Affairs.
- b. Nadzir is obliged to make a regular report to the local head Office of Religious Affairs (Kepala Kantor Urusan Agama) and a copy to the local Majelis Ulama Kecamatan and the local Head of District (Camat), regarding all of its responsibilities, as indicated in section 16 (1).
- c. The procedures of writing the report as mentioned in section (2) is executed according to the regulations of the Ministry of Religious Affairs.

Furthermore, in article 22 KHI and article 8 PP No.28/1977 it is explained that nadzir has the right to acquire an income and supporting facilities in which the amount is determined based on the decency consideration as advised by the local Office of Religious Affairs (KUA). Emphasizing that both individual and institutionalized nadzir has a limited tenure both because of a hindrance of samawi or kasbi, it is important to have a clear regulation. Therefore, article 221 indicates that:

- 1) Nadzir is stopped by the Head of local Office of Religious Affairs because of the following reasons: death, an appeal from the individual, inability to continue the obligation as a nadzir and committing a crime.
- 2) If there is a vacant position for a nadzir because of one of the reasons mentioned in section (1), the successor will be appointed by the Head of the Office of Religious Affairs or according to the local religious authority (Majelis Ulama Kecamatan).

- 3) If a nadzir has been demoted, as explained in section (1), he will automatically be replaced by one of his heir.

Nadzir endowment in UU No.41 year 2004 article 9 is explained as Nadzir comprises of: (i). Individuals; (ii). an organization; or (iii). a legal entity

Article 10

- 1) Individuals as mentioned in article 9a, can only be a nadzir if the following conditions are met:
 - a. A citizen of Republic of Indonesia
 - b. Be a Muslim
 - c. Be an adult
 - d. Amanah
 - e. Physically and mentally healthy
 - f. Unrestrained from conducting any legal activities
- 2) An organization as mentioned in article 9b can only be a nadzir if the following conditions are met:
 - a. The management of the corresponding organization fulfils the requirements of individual nadzir as explained in section(1); and
 - b. An organization that is actively involved in social activities, education, society development and/or Islamic (religious) activities.
- 3) A legal entity according to article 9c can only be a nadzir if the following conditions are met:
 - a. The management of the corresponding organization fulfils the requirements of individual nadzir as explained in section(1); and
 - b. An Indonesian legal entity which is shaped in accordance with the prevailing legislation.
 - c. The corresponding legal entity is

actively involved in social activities, education, society development, and/or Islamic (religious) activities.

Article 11

Nadzir has the following tasks:

- a. To conduct the administration of the endowment property
- b. To manage and to develop the endowment property according to its objectives and functions
- c. To supervise and to protect the endowment property
- d. To give report regarding the task implementation of the head of the Indonesian Waqf Organization (Badan Wakaf Indonesia).

Article 12

In carrying out the tasks referred to in article 11, nadzir can receive compensation from the net proceeds for the management and development of waqf property in the amount not exceeding 10% (ten percent).

Article 13

In carrying out the tasks referred to in article 11, nadzir acquires guidance from the Ministry and the Indonesian Waqf Board.

Article 14

(1) In the occasion of development, as referred to in article 13, nadzir must be registered with the Ministry and the Indonesian Waqf Board.

Further provisions of nadzir as referred to in article 9, article 19, article 11, article 12 and article 13 is regulated by the Government Regulation (PP).

NADZIR IN PP NO. 42, 2006

CHAPTER II NADZIR

Part One General Article 2

Nadzir includes:

- a. Individuals;
- b. Organization; or
- c. Legal entity

Article 3

- (1) The property of the endowment must be registered in the name of nadzir for the benefit of the party referred to in AIW (Waqf deed of pledge) as intended.
- (2) A registration of the waqf property in the name of nadzir, does not prove ownership of nadzir on waqf property.
- (3) The replacement of nadzir does not result in the transition of the concerned waqf property

Part Two Individual Nadzir

Article 4

- (1) Individual nadzir is appointed by wakif to meet the requirements by law.
- (2) Nadzir referred to in paragraph (1) shall be registered with the Ministry and BWI through the local Religious Affairs Office.
- (3) In the absence of the local Religious Affairs Office referred to in paragraph (2), nadzir registration is done through the nearby Religious Affairs Office, the Office of Religious Affairs, or a representative of Indonesian Waqf Board at provincial / district / city.
- (4) BWI published a proof of registration for nadzir
- (5) Nadzir individuals should constitute a group consisting of at least three (3) persons, one of whom was a head.

One Nadzir individuals as referred to in paragraph (5) must reside in the district where the endowment is located.

Article 5

Nadzir, as referred to in Article 4 paragraph (1), stops from its position if:

- (a) Passed away;
- (b) Permanently restrained;
- (c) Resign; or
- (d) Dismissed by BWI.

- (1) The cessation of one Nadzir individuals as referred to in paragraph (1) shall not result in the cessation of other Nadzir individuals.

Article 6

- (1) If among Nadzir individuals some one quits from his position as referred to in Article 5, the Nadzir

should report to the Office of Religious Affairs to be forwarded to BWI no later than 30 (thirty) days from the date of cessation of Nadzir individuals, who will then substitute Nadzir as determined by BWI.

- (2) In the case Nadzir quits his position as referred to in Article 5 for the endowments for a limited period and endowments in a period not limited to, the existing Nadzir notify Wakif or heirs Wakif when Wakif had died.
- (3) In the absence of the local Religious Affairs Office, the report referred to in paragraph (1) shall be conducted through the Office of Religious Affairs Nadzir nearby, the Office of Religious Affairs, or representative of BWI in the provincial / district / city.
- (4) If Nadzir within a period of one (1) year from the AIW does not perform their duties, the head of KUA either on its own initiative or at the proposal of wakif or their heirs are entitled to propose to the BWL for the dismissal and replacement Nadzir.

Part Three

Nadzir Organization / Institutionalized Nadzir

Article 7

- (1) Nadzir organization shall be registered with the Minister and BWI through the local Religious Affairs Office.
- (2) In the absence of the local Religious Affairs Office referred to in paragraph (1), Nadzir registration is done through the Office of Religious Affairs nearest Office of Religious Affairs, or representative of BWI in the provincial / district / city.
- (3) Nadzir organization is an organization engaged in social, educational, social and / or Islamic religious activities that meets the following requirements:
 - a. organization committee must meet the requirements of individual Nadzir;
 - b. one of the organization committee must reside in the district / city where the endowment is located
 - c. to possess:
 1. a copy of the notarial deed of incorporation and articles of association;
 2. The list of board members;
 3. Bylaws
 4. The program in the development of endowments;
 5. The list of assets derived from waqf property separated from other property or that is the wealth of the organization; and
 6. a letter of statement, willing to be audited.
- (4) Requirements referred to in paragraph (3) letter I attached to the application for registration as referred to in paragraph (1).
- (5) The registration referred to in paragraph (1) shall be done before signing

Article 8

- (1) Nadzir organization is disbanded in accordance with the provisions of the articles of the bylaws (Anggaran Dasar) of the organization concerned.
- (2) If one Nadzir raised by the Nadzir organization died, resigned, or unable to keep his position as Nadzir and/or canceled, then the concerned Nadzir must be replaced.

Article 9

- (1) Nadzir regional representatives of an organization that does not carry out the task and/or violates the

provisions in the management and development of waqf property in accordance with the designation contained in Waqf deed of pledge, then the management center of the organization concerned shall resolve the matter regardless of the request from BWI.

- (2) If the central committee is not able to carry out the obligations referred to in section (1), then the Nadzir organization may be dismissed and its right may be replaced by BWI, taking into account the recommendations and considerations of local MUI.
- (3) If Nadzir organization within a period of one (1) year since AIW is established, do not perform their duties, then the head of KUA is either on its own initiative or at the proposal of wakif of their heirs are entitled to propose to Waqf deed of pledge for the dismissal and replacement of Nadzir.

Article 10

If one Nazhir appointed by Nazhir organization dies, resigns, remains incapacitated and / or cancellation of his position as Nazhir raised by Nazhir organization as referred to in Article 8 paragraph (2), the organization concerned must report to KUA for subsequently forwarded to BWI later than 30 (thirty) days after the incident.

Part Four Legal Entity of Nadzir

Article 11

- (1) The legal entity of Nadzir shall be registered with the Ministry and the BWI through the local Religious Affairs Office.
- (2) In the absence of the local Religious Affairs Office referred to in paragraph (1), Nadzir registration is done through the Office of Religious Affairs nearest Office of Religious Affairs, or representative of BWI in the provincial / district / city.
- (3) Nadzir legal entities that carry out the registration referred to in paragraph (1) shall meet the following requirements:
 - a. Indonesian legal entities engaged in social, educational, civic, and Islamic religion;
 - b. board of a legal entity shall meet the requirements of individual Nadzir;
 - c. one of the administrators of legal entities must reside in the district / city where waqf the endowments are located;
 - d. possesses:
 1. a copy of the notarial deed of establishment and articles of association which have been approved by the competent authority;
 2. The list of board members;
 3. By laws (Anggaran Rumah Tangga)
 4. The program/planning in the development of endowments;
 5. A separated list of wealth derived from waqf property or wealth which is a legal entity; and
 6. A letter of statement, stating the willingness to be audited.
- (4) The requirements referred to in paragraph (3) d is attached to the application for registration as referred to in paragraph (1).
- (5) raph (3) d is attached to the application for registration as referred to in paragraph (1).

Article 12

Regional representatives of Nadzir of a legal entity which does not carry out its duties and / or violate the prohibition in the management and development of waqf property in accordance with the designation contained in Waqf deed of pledge, then the central committee of the corresponding legal entity concerned shall finish it, whether requested or not by BWI.

- (1) In the case of the central committee of legal entities cannot execute the obligations referred to in paragraph (1), then Nazhir legal entity may be dismissed and its right may be replaced by BWI by taking into account the recommendations and considerations of local MUI.
- (2) If Nazhir legal entity within a period of one (1) year from the AIW do not perform their duties, the head of KUA is entitled to propose to BWI for the dismissal and replacement Nazhir, either on its own initiative or at the proposal wakif of their heirs.

Part Five **Tasks and Service Period of Nadzir**

Article 13

- (1) Nazhir as referred to in Article 4, Article 7 and Article 11 shall administer, manage, develop, oversee and protect waqf properties.
- (2) Nazhir shall make periodic reports to the Minister and BWI about waqf activities referred to in paragraph (1).
- (3) Further provisions concerning the procedures for making the report referred to in paragraph (1).
- (4) is regulated by the Minister Regulation (Peraturan Menteri).

Article 14

- (1) The tenure of Nazhir is five (5) years and may be reappointed.
- (2) The reappointment of Nazhir referred to in paragraph (1) is conducted by BWI, if the person concerned has been carrying out a good job in the previous period in accordance with Islamic principles and legislation.

Nazhir is one indispensable element in the implementation of waqf. The task of Nadzir is to maintain prosperity, empowering, lease, and extract the benefits from waqf properties. Because of the above-mentioned task, Ulama Hanafiyah, Malikiyah and Shafi'ites agreed that he was entitled to a reward from the benefits of the waqf objects or wages that have been promised by wakif (Wahbah Zuhaeli, 7694) or from the local government of the state treasury (bait al-mal) (An-Nawawi al-Banteni, 174). Imam Nawawi in the book *Nihayat Zaiyn* mentioned that Nazhir (which is not wakif) are entitled to wages that have been promised by wakif even though it is more than a standard wage minimum (An Nawawi al-Banteni, 273) If Nazhir is resigned or fired, the judge has the right to appoint the person that is ready to manage endowments. This person is paid from the endowment empowerment results. (Wahbah Zuhaeli, al-Fiqh al-Islami Wa Adillatuhu, 7694)

According to Malikiyah, Nazhir is entitled to receive wages from the results of waqf

أي شيء من ذلكي هل اذا فسقوا نم ايش رضان لل لعجي نا يضاقللو

And for judges (government) may not make a wage from the endowment if Nazhir does not have anything.

Legal thought is reflected in the Law of waqf which says that Nadzir has the task:

- a. to undertake administration of waqf property;
- b. to manage and to develop the waqf property in accordance with the purpose, function, and purpose;
- c. to supervise and to protect the property of the waqf;
- d. to report execution of tasks to the Indonesian Waqf Board. (Law No. 41 of 2004 Section 11)

The article reinforces the special authority of Nazhir which has a stronger position than others, according to the rules (kaidah) (Zaenuidin Ibrahim (Ibn Najm), al-Asybah wa al-Ndhair, p. 186.)

تم اعلنا في الاول من يوقا خصا اعلنا في الاول

"Special authority has a stronger position rather than the general rule".

In other methods Ibn Najm disclose:

رطان دوجوعم فقولوا يف فرصتلا يضاولا لئلهمي ال

"The judge does not have the jurisdiction over the existing endowments to manage waqf properties, as long as Nazhir is present".

Nazhir authority is also mentioned in Article 23 that, "In the case of wakif do not specify the designation of waqf properties, Nazhir can assign the designation of waqf property in accordance with the purpose and function of endowments." (Law No. 41 of 2004 Article 23, paragraph 2)

In respect of the wage of Nazhir mentioned in Article 12, which reads, "In carrying out the tasks referred to in Article 11, Nazhir can receive compensation from the net proceeds for the management and development of waqf properties which amount does not exceed 10% (ten percent). (Law No. 41 2004, Article 11).

D. Conclusion

Based on the results of a comparative study of the positioning of Nadzir endowments, some conclusions can be drawn as follows:

First, the waqf concept as stated by Imam Syafi'i were generally modest, it can be seen from the description of his theory of the elements of endowments, namely: wakif, mauquf 'alaih, mauquf BIH, and the pledge. On the other hand, the provision of endowments established by Regulation No. 28 of 1977 is the development of the basic thoughts of Imam Shafi'i because it has undergone the process of adjusting to the conditions and demands of the people of Indonesia. In the PP it is determined that the elements of endowments consist of: wakif, lands waqf properties, endowments khairi, pledge, nadzir, witnesses, and the Endowment Deed Official Pledge (PPAIW). In Act No. 41 of 2004 under Article 6 stated that the elements of waqf as follows:

- e. Wakif;
- f. Nadzir;
- g. Endowment properties;
- h. Endowmend pledge (ikrar);
- i. Appropriation of the waqf property;
- j. Endowment duration

The gradual improvement regarding the positioning of nadzir endowment has been conducted by the Indonesian government in order to run the 1945 Constitution Article 29, paragraphs 1 and 2.

Secondly, regarding nadzir endowment, according to Imam Syafi'i "when in the pledge it was not mentioned regarding who takes te role of a Nadzir, then it can be concluded that the nadzir will be its wakif, mauquf 'alaih or judges." The aim is to provide legal certainty about who will be the waqf property manager. This allows the waqf property to be maintained properly in accordance to the guidance of the Islamic principles and to meet the expectations to whom the property is beneficial.

Third, the position of nadzir endowment in Government Regulation No. 28 of 1977 has been clearly mentioned in relation to the obligations, rights, and other matters relating to nadzir endowments. This is described in Article 6, paragraph 1 and paragraph 4 and includes individual Nadzir and legal entities. Then in Article 7, the obligations and procedures for reporting nadzir endowment is described. Article 8 mentions regarding the rights of Nadzir to acquire an income and facilities from the waqf

property.

Fourth, endowments nadzir provisions in Law No. 41 of 2004, in Article 1, paragraph 4 states that the party receiving nadzir is Waqf property of Wakif to be managed and developed in accordance with designation. The designation on nadzir endowment mentioned in the articles: Article 9, Article 10, paragraph 1,2 and 3. Article 11, Article 12 on the right nadzir on waqf property of (maximum) 10%. Article 13 nadzir obtain guidance from the Minister and the Indonesian Waqf Board. Article 14 on the necessity nadzir endowments registered with the Ministry and the Waqf Board Indonesia (Article 1), and article 2 states that matters related nadzir endowment as contained in Articles 9, 10, 11, 12, and Article 13, is regulated by the Government.

The Government Regulation (PP) No. 42 of 2006 on Chapter II explains that nadzir endowment consists of Part General Article (2) Nadzir include: an individual, organization or a legal entity. Section 3 describes the need to register the property on behalf of nadzir endowment, while it does not mean that the property belongs to them, and regarding the Nadzir replacement which does not result in the transition of waqf properties. Part two pointed out regarding individual Nadzir, comprised of Articles 4 (No 6, paragraphs), Article 5 of Nadzir replacement mechanism as set out in Article 4 (1) of Article 6 consists of four paragraphs. The third part of the organization Nadzir consist of Article 7 (including 5 sections). Article 8 (consisting of two sections about the dismissal of the organization nadzir). Article 9 on nadzir regional representatives of an organization (consisting of three sections). Article 10 regarding the rules of individual Nadzir appointed by nadzir organization when they resign or die, or when the position is canceled. Part Four discusses the Nadzir Legal Entity. Article 11 consists of four sections. Article 12, second section highlights the

provisions of nadzir regional representative of a legal entity which does not carry out its duties and / or violate the prohibition in the management and development of waqf property in accordance with the designation listed in Waqf deed of pledge. The fifth part explains the tasks and the service period of nadzir. Article 13 consists of four sections. Then Article 14 regarding the service period of nadzir, consists of two sections. In general it can be concluded that the position nadzir endowment in UU No. 41 Year 2004 and Government Regulation No. 42 of 2006 provides details and clarity on the positions, kinds, rights and obligations of nadzir endowments, as well as the service period of Nadzir endowments. It shows that the Indonesian government provides service for the Muslims in relation to the affairs of waqf in Indonesia.

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