



Reconstruction of Regulations Regarding Foundation in Indonesia Based on Legal Guarantee Value

Sri Wahyu Jatmikowati; Moch. Isnaeni; Endang Prasetyawati; Krisnadi Nasution

Doctoral Program, Faculty of Law, University of 17 August 1945 Surabaya, Indonesia

<http://dx.doi.org/10.18415/ijmmu.v9i4.3714>

Abstract

Enactment of Foundation Law and its amendments have not fully brought the Foundation into a new era. Issues related to the Foundation are still found in Indonesia. For instance, is related to business activities run by the Foundation coupled with the main aims of foundation which has function as social and business institutions. Due to this condition, further study need to be established to determine the nature of Foundation in its position as a non-profit legal entity. The present research is normative legal research which uses various approaches which are legal, conceptual, philosophy, and historical. The results of the study indicate that the nature of the existence of a legal entity in the form of a foundation is due to the community's need for the existence of a special legal entity to become a forum or institution that has social, religious, and humanitarian purposes. After the Foundation is legally established as a Legal Entity, the Foundation becomes the property of the community and regardless of the founder. Foundations have a special role that is very much needed to support the vision and mission as well as the goals of the formation of the state, namely social justice for all Indonesian people.

Keywords: *Foundation; Reconstruction; Regulation*

Introduction

Human life as individual beings as well as social beings has long been known by scholars as *zoon politicon*. Humans live in groups in a group called society. By forming social group, human will more easily meet their life needs. In maintaining social life, each member of the community has its own strengths and expertise so that each other has a different role. Whether we realize it or not, all members of society are at the same level, especially in terms of economic stability, human as homo hominisocius are eager to help each other. Moreover, Indonesian people is known by history as a nation which hold high value of mutual cooperations. Therefore, it is commonly happened in Indonesia that individuals who feel quite established will help others who are less fortunate from the economic side (Isnaeni, 2016).

Gaits of individuals who move independently will in turn bring them together with other individuals who have the same views and goals. Groups of individuals who have the same vision and views often become so strong that in the next stage they agree to unite to form a forum that organizes their activities so that there is a transition from traditional social generosity to a more recent, organized and coordinated form, more institutional compared to individuals and aims to optimize all available resources. This institution is

expected to be able to stand alone, also has its own identity that is different from the extension of the Founders. In the Indonesian legal system, one of these non-profit institutions is known as the Foundation.

Foundation is a non-profit legal entity which at the time of its establishment by one or more persons who have separated their personal assets as the initial capital for the establishment of the Foundation (Ais, 2000). Since beginning of the establishment of a foundation, it is hoped that it will be independent and able to move as expected because it has owned assets since it was founded. Plato on the eve of his death in 347 BC, distributed the agricultural produce from the lands he owned, forever donated to the academy he founded. This is probably the first educational foundation recorded in history. Since ancient times, foundations have been used as a forum to carry out social, humanitarian, and religious work. People choose foundations as a forum for social activities because compared to other legal forms that are oriented towards the economic and business fields, foundations are considered to have more space to carry out social activities such as education, health and religion that have not been handled by other legal entities.

In Indonesia, on August 6th, 2001, a regulation was promulgated which specifically regulates foundations, Law Number 16 of 2001 concerning Foundations (Law on Foundations). Article 1 point 1 of the Foundation Law states that what is meant by a foundation is a legal entity consisting of assets that are separated and intended to achieve certain goals in the social, religious, and humanitarian fields, which does not have members. Thus, the purpose of foundations is different, some are engaged in social, religious, or humanitarian fields.

The enactment of the Foundation Law has a significant impact on the existence of foundations, namely the legal status of the foundation, which was previously ambiguous, it becomes certain that the foundation must be a legal entity. In addition, there is also an affirmation that a foundation is a legal entity whose purpose is solely in the social, religious, and humanitarian fields as stipulated in Article 1 point 1 of the Foundation Law. The existence of Article 1 point 1 straightens out various kinds of deviations that occurred before the Foundation Law came into effect, the goals in the social, religious, and humanitarian fields which are not explicitly regulated in the regulations themselves lead to deviations from the foundation's non-profit foundation from humanitarian goals to becoming an institution that pursue profit.

The Foundation Law is intended to provide the public with a correct understanding of Foundations, ensure legal certainty and order and restore the function of Foundations as legal institutions to achieve certain goals in the social, religious, and humanitarian fields. This law confirms that a foundation is a legal entity that has social, religious, and humanitarian purposes and objectives, established by considering the formal requirements stipulated in the Foundation Law.

The regulations regarding Foundations underwent a change in 2004. In 2004, Law Number 28 of 2004 concerning Amendments to Law Number 16 of 2001 concerning Foundations was promulgated (Change Foundation Law). The existence of these changes because in its development the Foundation Law has not accommodated all the legal needs and developments in society. Moreover, there are various interpretations of the substance of the Foundation Law in society, so that it can create legal uncertainty and disorder. Amendments to the Law on Foundations are intended to further ensure legal certainty and order, as well as provide the public with a correct understanding of Foundations, so as to restore the function of Foundations as legal institutions in the context of achieving certain goals in the social, religious, and humanitarian fields. In addition, considering that the role of foundations in society can create community welfare, the revision of the Foundation Law is also intended so that foundations can continue to function to achieve their goals and objectives in the social, religious and humanitarian fields based on the principles of openness and accountability.

The existence of the Foundation Law and its amendments have not fully brought the Foundation into a new era. Issues related to foundations are still common in Indonesia, one of which is related to

business activities run by foundations and there are still many who confuse foundations as social and business institutions. Regarding these conditions, a more in-depth discussion of the nature of the Foundation in its position as a Non-Profit Legal Entity is required.

Methods

The present study uses a normative legal research method that is conducted in finding solutions for legal matters (Isnaini & Utomo, 2019). The research approach used is the statute approach, conceptual approaches, historical approach and philosophical approach.

Discussion

Foundations have been around for a long time and have been known to man since the dawn of history. Since the beginning, the foundation has been known as a non-profit legal entity where an asset has been separated from a person's personal assets which is then used for a social and religious purpose, and the management is handed over to a management body to be managed properly and responsibly. In the United States and the United Kingdom, the foundation is called the Foundation, while in the Netherlands it is known as *Stichting*.

Foundations with special goals such as "religion and education" have been around for a long time. More than a thousand years before the birth of Prophet Isa, the Pharaohs have separated some of their wealth for religious purposes. Xenophon maintained the foundation by donating land and buildings to the temple for the worship of Artemis, giving food and drink to the needy, and animal sacrifices. Plato, before his death in 347 BC, gave agricultural produce from the land he owned to donate forever to the academia he founded. This is probably the first educational foundation in the world (Ais, 2000). It shows that more than a thousand-year BC social and humanitarian figures in the past have applied the universal principles of foundations.

Emerson Andrews stated: "*A nongovernmental, nonprofit organization having a principal fund of its own, manage by its own trustees or directors, and established to maintain or aid social, educational, charitable, religious, or other activities serving the common welfare*" (Andrews, 1985). According to Emerson, a foundation is a non-governmental organization whose non-profit organization owns its own assets, is regulated by the board of the foundation itself, is established for the benefit of social, educational, charitable, religious, or other activities aimed at serving the welfare of the community.

Lemaire also provides a description of the foundation where according to him "foundations are created by a legal act, namely by separating an asset with a non-profit purpose and the existence of an organizational structure in which the purpose can actually be realized with these tools." (Borahima, 2010). Furthermore, Bregstein is of the view that "a foundation is a legal entity established by a legal act which does not aim to distribute its wealth and/or income to the founder or his control in the foundation or to other people except as long as the latter is for the use of an ideal purpose" (Tobing, 1990).

Scholten also has an opinion regarding the foundation. According to him "a foundation is a legal entity that was born by a unilateral statement". The statement must contain the narration of a property for a specific purpose, by showing how the wealth is managed and used. Meanwhile, Rochmat Soemitro stated in his paper that a foundation is a business entity that is usually engaged in the social sector and is not the goal to seek profit, but its purpose is to conduct a social business.

Foundation is an agency that carries out various social activities and has an ideal purpose. That a foundation must have social and humanitarian goals is very clear from Hayati Soeroredjo's point of view.

According to him, foundations must be social and humanitarian in nature, realistic and not allowed to breach the laws and regulations, public order, and/or decency.

People set up foundations to carry out social activities. This social activity is not based on compassion, but because of the sense of humanity it has. As theories of social value say that humans are creature's which is known as *homo homini socius*. By establishing a foundation, individual can play a role, be morally responsible for the surrounding environment. Tom Lloyd stated that "*the foundation may be described as an instrument for the contribution of private wealth to public purpose*" (Lloyd, 1993). Above mentioned statement means that by establishing a foundation, human play a moral role to improve the dignity of others. The existence of a foundation is a necessity for the community, who wants a forum or institution that is social, religious, and humanitarian in nature and aims. With the foundation, all social, religious, and humanitarian desires are realized in an institution that is recognized and accepted for its existence.

Basically, the Foundation Law adheres to the principle of not-for-profit or non-profit. The law explicitly regulates establishing foundations not for the purpose of seeking profit, however, as stated in Article 1 point 1 of the Foundation Law which states the definition of a foundation, that the purpose of the foundation is based on social, religious, and humanitarian fields. This principle is also seen in Article 3 paragraph (2) which states that a foundation may not share the results of its business activities with the Trustees, Management and Supervisors. In line with the non-profit or non-profit principle, the foundation is not a company.

Along with the enactment of the Foundation Law and the Change Foundation Law, it has been expressly determined that a Foundation is a legal entity consisting of separated assets and is intended to achieve certain goals in the social, religious, and humanitarian fields, and has no members. Although the law does not explicitly determine that a Foundation is a non-profit/non-profit legal entity, it is because of its social, religious, and humanitarian objectives that make the Foundation a non-profit/non-profit legal entity (Rinaldiansyah, 2017).

The principle of non-profit or non-profit is not looking for profit or profit. An advantage can occur if a capital if cultivated turns out to get results that exceed the capital. For non-profits or non-profits, the existing capital is not processed for profit, but to carry out activities that are beneficial to the community (Supramono, 2008). In line with the non-profit principle, the rights of the foundation are not as a company. Foundations in carrying out their activities are not looking for profit, while the company is aiming for profit. Several institutions such as Firms, CVs, Limited Liability Companies, and Cooperatives are companies. The description above shows that the foundation where its domicile is not a company, because the foundation's activities do not run a company and do not pursue profit (Supriono, 2015).

Foundations in carrying out their activities are not looking for profit, while the company is aiming for profit. In the foundation there is no capital, but the term that used is wealth. Wealth is not used for the production process or trade but is used for the benefit of activities in the social, religious, and humanitarian fields. In addition, the foundation does not recognize any profit and there is no distribution of profits to the management of the foundation. Foundations may establish a business entity, the legal basis of which is Article 3 paragraph (1) of the Foundation Law which states that a foundation can carry out business activities to support the achievement of its goals and objectives by establishing a business entity and/or participating in a business entity. Then the provisions appear to be confirmed in Article 7 paragraph (1) which reads, foundations can establish business entities whose activities are in accordance with the aims and objectives of the foundation.

In its activities, foundations may and should carry out commercial activities like ordinary companies, but the surplus or profits obtained are intended for the achievement of goals and objectives in

the social, religious, and humanitarian fields. Thus, the meaning of non-profit or non-profit becomes clear that the surplus or profit of the foundation may not be distributed or distributed to anyone but is intended for the benefit of the foundation itself in achieving its goals and objectives.

Establishing a business entity means establishing a company. The foundation established a company, with the intention of that company seeking profit. Foundations seek profit through established companies. The foundation is located as the founder of the company. The Foundation does not manage or directly manage the company. The company is managed by another party in running its business. The company established can be in the form of an individual company such as opening a shop or trading business, firm, CV, or limited liability company. Related with that, Article 8 of the Foundation Law provides a limitation that the business activities of the company established must be in accordance with the aims and objectives of the foundation, and do not conflict with public order, morality, or applicable laws and regulations.

Establishing a company cannot be separated from having to provide capital. Therefore, the foundation must set aside funds originating from the wealth of the foundation, for the purpose of depositing capital for the established company. From the invested capital, later if the company makes a profit, the foundation will get a share of the profit. Then in Article 3 paragraph (1) of the Foundation Law above, in addition to establishing a company, a foundation can also participate in a business entity. In this regard, Article 7 paragraph (2) of the Foundation Law provides a limit on the amount of prospective venture capital participation, with a maximum of 25% of the total value of the foundation's assets with these restrictions, it is intended that the foundation's wealth should not be sucked into the interests of the venture capital participation, while the achievement of the foundation's goals will be less noticed.

Regarding the business results or company profits given to the foundation, it becomes the property of the foundation or the wealth of the foundation. Therefore, it belongs to a foundation, in line with that Article 3 paragraph (2) of the Foundation Law prohibits that a foundation may not share the results of its business activities with the Trustees, Management and Supervisors. It aimed to avoid lest members of the foundation take advantage of the opportunity to seek personal gain from the company's profits. In addition, there is a prohibition on the transfer of foundation assets in Article 5 paragraph (1) of the Foundation Law, namely, that the assets of the foundation, whether in the form of money, goods, or other assets obtained by the foundation based on the Foundation Law, are prohibited from being transferred or distributed directly, either in the form of salaries, wages or honorarium, or other forms that can be valued in money to the Trustees, Management and Supervisors.

The Foundation Law provides an exception as stated in Article 5 paragraph (2) that the foundation management can receive a salary, wages, or honorarium if the management which are:

- a. not the founder of the foundation and not affiliated with the founder, coach, and supervisor, and
- b. carries out the management of the foundation directly and fully. This can be done if the provisions are stated in the foundation's articles of association, so that it binds all foundation personnel.

The main aims of foundations are to serve social, religious, and humanitarian fields. The social activities carried out by the foundation are estimated to arise from the awareness of the wealthy who separate their wealth to help people who are experiencing difficulties. The choice of foundations as a forum for social activities is certainly not without reason. Compared to other forms of legal entities that are only concentrated in the economic and business fields, foundations are considered to have more space to carry out social activities such as education, health, and religion which in general have not been handled by other agencies. other legal entity.

Judging from its position, the foundation is not a company because in the company its activities are to carry out a business with the aim of making profit. Foundations have a special role that is very much needed to support the vision and mission as well as the goals of the formation of the state, namely social justice for all Indonesian people (Supramono, 2008).

It is generally understood that a foundation is a legal entity whose activities are not profit-oriented (non-profit). On the other hand, the business entity is for profit. According to Y. Sogar Simamora, there is a contradiction between the above provisions and Article 1 point 1 of the Foundation Law which stipulates that the purpose of the foundation is in the social, religious and humanitarian fields. Foundations need funds to run their activities. If the funds are solely sourced from initial wealth, of course, the purpose of establishing a foundation is difficult to achieve. Funds obtained from business activities are indeed needed to meet the operational needs of the foundation and the development of the foundation. However, if the activity is carried out on behalf of the foundation, then all income earned belongs to the foundation. On the other hand, if the activity creates a payment obligation to another party, then it is the obligation of the foundation (Simamora, 2012).

Rudi Prasetya argues that there are 3 (three) types of foundations. First, the foundation's activities are solely to collect funds from benefactors, for the funds collected are donated to social activity agencies, such as providing scholarships, donating to orphanages, hospitals, and others. The foundation does not interfere at all in social administration, such as educational materials, nursing homes, hospitals, and other relevant social institutions. his type is an ancient classic foundation type. Second, is that the foundation directly organizes the relevant social institutions, the foundation establishes educational institutions, universities, hospitals, while at the same time seeking excess profits to reinvest these excess results to intensify their social activities. Third, the foundation establishes a Limited Liability Company that runs businesses such as factories, profit-seeking business entities, for which the dividends obtained are donated to social activities organized by other parties or organized by the foundation itself (Prasetya, 2012).

Foundation as a legal entity that has the goals and objectives of its establishment which are social, religious and humanitarian. Foundations that have been established and are engaged in activities that are outside the aims and objectives in the social, religious and humanitarian fields must adapt and amend their articles of association so that they are in accordance with the permitted aims and objectives (Widjaya, 2004). In general, a Foundation can qualify as a Non-Profit Organization. A non-profit organization is an organization whose objectives do not include the creation of profit for the personal benefit of the owner or manager. Non-profit organizations often seek to achieve these benefits for the social or educational purposes of the organization rather than for personal gain (William G. Nickels; James M. McHugh; Susan M. McHugh, 2009).

As the name implies, a non-profit organization is an organization that in carrying out activities is not oriented to generate business profits (*not for profit organization*). The measure of success to be achieved by non-profit organizations is not material profits, but for social services. But it doesn't mean non-profit organizations can't make a profit. It's just that the profits obtained from the organization's activities are solely intended to cover costs arising from operational activities or the profits obtained will be channeled back to the main activities of the organization.

Conclusion

The essence of the Foundation as a Legal Entity is due to the community's need for the existence of a special Legal Entity to become a forum or institution that has social, religious, and humanitarian purposes. Foundations in society play a role and are morally responsible for matters relating to social, humanitarian and religious matters. The Foundation obtains the status of a Legal Entity after obtaining approval from the Minister. After the Foundation is legally established as a Legal Entity, the Foundation

becomes the property of the community and is independent of its founder. Foundations have a special role that is very much needed to support the vision and mission as well as the goals of the formation of the state, namely social justice for all Indonesian people.

Suggestion

The Foundation Law that is implemented in Indonesia only mentions the purpose of the Foundation in the definition of a Foundation. To clarify the objectives of the Foundation and provide limitations regarding the objectives of the Foundation, it is necessary to stipulate the objectives of the Foundation specifically in a separate Article.

Reference

- Ais, C. (2000). *Tujuan Sosial Yayasan dan Kegiatan Usaha Bertujuan Laba*. Citra Aditya Bakti.
- Andrews, E. (1985). *Philanthropic Foundation*.
- Borahima, A. (2010). *Kedudukan Yayasan di Indonesia (Eksistensi, Tujuan dan Tanggungjawab Yayasan)*. Kencana.
- Isnaeni, H. M. (2016). *Pijar Pendar Hukum Perdata*. Revka Petra Media.
- Isnaini, H., & Utomo, W. (2019). The existence of the notary and notarial deeds within private procedural law in the industrial revolution era 4.0. *International Journal of Innovation, Creativity and Change*, 10(3), 128–139.
- Lloyd, T. (1993). *The Charity Business*. John Murray.
- Prasetya, R. (2012). *Yayasan Dalam teori dan Praktik*. Sinar Grafika.
- Rinaldiansyah. (2017). , Analisis Yuridis Pelaksanaan Prinsip Nirlaba Dala Badan Hukum Yayasan Yang Bergerak Dibidang Pendidikan (Studi Pada Yayasan Teuku Laksamana Haji Ibrahimlueng Putu, Pidie Jaya). *Premise Law Journal*, 10(2), 235–240.
- Simamora, Y. S. (2012). Karakteristik, Pengelolaan Dan Pemeriksaan Badan Hukum Yayasan Di Indonesia. *Rechtsvinding*, 1(2).
- Supramono, G. (2008). *Hukum Yayasan di Indonesia*. Rineka Cipta.
- Supriono, F. (2015). Implementasi Undang-Undang Yayasan Dalam Mencapai Maksud Dan Tujuan Yayasan. *Ilmu Hukum: Legal Opinion*, 3(1).
- Tobing, G. L. (1990). *Peraturan Jabatan Notaris*. Erlangga.
- Widjaya, G. (2004). *Suatu Panduan Komprehensif Yayasan di Indonesia*. Gramedia Pustaka.
- William G. Nickels; James M. McHugh; Susan M. McHugh. (2009). *Pengantar Bisnis (Understanding Business)*. Salemba Empat.

Copyrights

Copyright for this article is retained by the author(s), with first publication rights granted to the journal.

This is an open-access article distributed under the terms and conditions of the Creative Commons Attribution license (<http://creativecommons.org/licenses/by/4.0/>).