



Position of Authority and Responsibility of Foundation Organs According to Law No. 28 of 2004 Concerning Foundations

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Abstract This study analyzes the authority and responsibility of foundation organs as regulated in Law No. 28 of 2004 concerning Foundations in Indonesia. Foundations as non-profit legal entities play a central role in playing various social, educational, and humanitarian aspects in this country. Due to their crucial role, a comprehensive understanding of the position and responsibility of foundation organs is essential. The results of this study are expected to provide a deeper understanding of the role played by foundations in Indonesian society and their significant contribution to national development efforts. In addition, this study also has the potential to provide valuable input for improving regulations related to foundations in the future.

Keywords : Authority, Responsibility, Organ, Foundation, Law No. 28 Of 2004, Governance, Legal Analysis, Social Role.

1. INTRODUCTION

Referring to Law Number 28 of 2004 concerning Foundations, it is stipulated that foundations can obtain legal entity status after the Minister approves its articles of association through a process involving the founder or attorney of the foundation. The foundation itself is a legal entity established for social, religious, and humanitarian purposes. The foundation has three main organs, namely the management, the patron, and the supervisor. Each organ has clear functions, authorities, and responsibilities in accordance with the provisions of the Law. This is important to ensure that the foundation can carry out its mission effectively and comply with applicable laws. In addition, the relationship between the foundation and third parties must also be clearly regulated to maintain transparency and accountability in various foundation activities. , can harm the interests of the Foundation or other bodies, this is intended to avoid conflict. The organs of this foundation are instruments that aim to manage the foundation.

In order to achieve its aims and objectives, the foundation represented by its management has the ability to engage in business activities by establishing its own business entity or participating in an existing business entity. Specifically, the direct management of the foundation, both internally and externally, is carried out by the management. In essence, the foundation and its bodies are closely related. The existence of a foundation depends entirely on the organs it has, but the existence of a foundation also depends heavily on its organs in carrying out operations and carrying out its functions (Article 3 of the Foundation Law). (Arie Kusumastuti, 2012)

Since the monetary crisis in mid-1997, the echo of demands for reform in all fields, especially in the fields of economy, politics, social, culture and law, has continued to roll. (Al-Received: September 25, 2024 Revised: Oktober 28, 2024 Accepted: November 02, 2024 Online Available: November 04, 2024

Chaidar, 1998). Each field tries to break down and change unhealthy practices that cause misery for society in general.

One of the demands in the social field is to seek the owner/ruler of a social activity, namely a business entity in the form of a Foundation. During the New Order, so many Foundations developed, but the management of the Foundation depended entirely on its organs. In other words, in the management of the foundation, the organs have a very important role. Although many foundations are managed properly and correctly, the reality shows that there are not a few deviations carried out by the foundation organs, which manipulate the social function and legal nature of the foundation for personal gain. It is common knowledge that the tendency of people who establish foundations often misuse the purpose of establishing the foundation itself. Foundations are not only a means to develop social or religious activities, but also to provide benefits to the founders, administrators, and leaders who act as organs of the foundation's legal entity.

Given the complexity of the relationship between the foundation and its organs, a correct understanding of the breadth of duties, authorities and responsibilities of each is required. A clear and straightforward division of authority will make it easier to know the burden of responsibility of each organ towards the foundation and the formulation of a clear scope of duties and responsibilities will facilitate the creation of *good foundation governance*, which is a reform of the life of foundations in Indonesia to better reflect the transparency and accountability of foundation organs to the public.

Because past practices that exploited foundations were actually for personal and group interests, to prevent such practices, the most important thing is that foundations may not change their stated objectives and may not transfer wealth, including providing wages, salaries or fees to foundation organs.

Based on the main ideas regarding the importance of correct understanding of the position, authority and responsibility of each organ, the author will compile a thesis with the title: **"Position, Authority and Responsibility of Foundation Organs According to Law Number 28 of 2004"**

2. METHODOLOGY

Before the research process, the author first determines the method to be used. The following are the methods chosen by the author in this study:

A. Approach Method

This thesis research applies information from library research and field research of normative legal research methods that are analytical-descriptive. Data are processed qualitatively by considering laws and regulations, jurisprudence, doctrines and various legal theories concerning the existence of foundations.

B. Types of research

This type of research is descriptive analysis. This type of writing aims to provide detailed and precise data by emphasizing the theoretical basis which then strengthens old theories and concludes new theories.

C. Data source

Based on its compilation, the data sources used are from the literature, but to complete the compilation of this thesis, the author also conducted field research. So there are two stages of research, namely:

1. Literature research, which focuses on secondary data as follows:
 - a. Primary legal materials, especially laws such as the Foundation Law, documents and research results, can help in finding legal bases, concepts and theories relevant to the topic.
 - b. Secondary legal materials are materials that are closely related to primary legal materials, such as textbooks and legal scientific works that are relevant to the topic of discussion.
 - c. Tertiary legal materials are references that provide guidance and clarification on primary legal materials and secondary legal materials. These materials can be found in legal dictionaries, Indonesian dictionaries, newspapers, magazines and *online articles* related to the research topic.
2. Field research is a data source that is carried out to refine secondary data.

D. Data collection technique

Data were collected through a literature study covering relevant legal literature and legislation. This approach ensures that the research is based on authoritative and reliable sources.

E. Data Analysis Methods

All data that has been collected is analyzed using a qualitative legal method because this research is based on legislation as positive law and qualitative means that the data obtained is arranged and analyzed into sentence descriptions without using formulas or numbers.

3. ANALYSIS AND DISCUSSION

Position and Authority of Foundation Organs According to Law Number 28 of 2004

Position and Authority of the Guiding Organs

Before the adoption of Law Number 28 of 2004 on Foundations, a foundation generally had an entity responsible for its establishment that played an important role in its management. However, with the enactment of Law Number 28 of 2004 on Foundations, the regulation stipulates that the legitimate organs of a foundation consist of the Patrons, Management, and Supervisors. Therefore, the concept of founding organs is no longer used.

According to Chatamarrasjid, the presence of the Board of Trustees as a substitute for the Founder has a strong reason. This is due to the fact that in practice, the founder of the foundation at one time can be completely absent or absent. This situation can occur because the founder dies or decides to resign. In a situation where there is no founder at all or only one founder remaining, there is a potential risk of misuse of the foundation for personal gain by the remaining founder. Something similar can also happen if the management becomes dominant in the absence of the founder.

Therefore, the presence of the Supervisory Organ is expected to maintain the stability of the foundation and ensure that the foundation continues to operate in accordance with the original intent and purpose of its establishment. This Supervisory Organ provides the continuity and control needed so that the foundation continues to function in accordance with its designation without depending on the presence or actions of a single founder.

Article 28 paragraph (1) of the Foundation Law confirms that the Trustees in a foundation have special authority that is not given to the Managers or Supervisors by this Law or the foundation's Articles of Association. Details regarding this authority are summarized as follows (paragraph 2):

- a. Formulate decisions regarding changes to the foundation's Articles of Association.
- b. Responsible for the appointment and termination of members of the Management and Supervisory Board.
- c. Establish general policies of the foundation in accordance with the provisions in the Foundation's Articles of Association.
- d. Approve the foundation's annual work program and budget plan.
- e. Taking decisions regarding the merger or dissolution of foundations.

The main role of the Trustee is to monitor the efforts made to achieve the aims and objectives of the foundation. Therefore, Article 30 of the Foundation Law states that the Trustee must hold at least one meeting per year. In this annual meeting, an evaluation is made

of the foundation's assets, rights and obligations in the previous year, which becomes the basis for considering the development of the foundation in the coming year. This evaluation is of great importance, in line with the great authority held by the Trustee as stated in Article 28 paragraph (1) and (2) of the Foundation Law.

At the meeting, there is also an examination and approval of the annual report by the Board of Trustees, which means giving approval and releasing the Management and Supervisors from their responsibilities during the relevant financial year, for which the report has been prepared by the Management and Supervisors.

Position and Authority of Management Organs

The management is fully responsible for the management of the foundation for the interests and purposes of the foundation. They also have the right to represent the foundation in all matters, both inside and outside the court, and have the authority to bind the foundation in agreements with other parties and vice versa. However, there are several limitations to keep in mind, namely:

- a. Administrators are permitted to transfer the foundation's assets, borrow or provide loans in the name of the foundation, or provide guarantees for the foundation's assets, provided they obtain prior written approval from the trustees.
- b. The management is not permitted to make the foundation a guarantor of debt or encumber the foundation's assets for the benefit of other parties.
- c. Administrators are prohibited from entering into agreements with organizations that have a relationship (affiliation) with the foundation, patrons, administrators, or staff of the foundation, unless the agreement has benefits for achieving the aims and objectives of the foundation and its business activities, and must be accompanied by prior written permission from the patron or obtain approval from the patron.

The role of the management in the foundation is very vital because they have full responsibility for the smooth running of the foundation, both to achieve goals and to protect the interests of the foundation. The management also has the authority to represent the foundation, both in and out of court. They are responsible for ensuring that every action they take is in accordance with the foundation's Articles of Association and applicable regulations. The management is also responsible for keeping the foundation away from illegal actions or actions that violate regulations and agreements with other foundation organs.

In carrying out its duties, the management also has the authority to appoint and remove the implementation of the foundation's activities. The terms and procedures for this are usually regulated in the foundation's Articles of Association. The person responsible for the

implementation of the foundation's daily activities is often referred to as the Foundation's Daily Management, and they are tasked with managing the foundation's daily activities are usually referred to as the Foundation's Daily Management, and they are tasked with carrying out the foundation's daily activities based on the authority given to him by the Management with a power of attorney.

The management has the authority to represent the foundation, both in and out of court. This is in accordance with the principle of *persona standi in judicio*, which recognizes that the management is a party that has the legitimacy to act on behalf of the foundation in legal proceedings or other representations, which means that the management has the right to represent the foundation in all forms of legal action, including lawsuits or lawsuits. However, this authority does not apply in two specific situations:

- a. If there is a legal dispute in court between the foundation and the relevant management member; or
- b. If the member of the management concerned has interests that conflict with the interests of the foundation (as regulated in Article 36 paragraph (1)).

In both situations, the determination of the person entitled to represent the foundation will refer to the provisions contained in the foundation's Articles of Association.

Each member of the Board of Directors is responsible for carrying out their duties with good intentions and full responsibility, for the interests and goals of the foundation. They will be personally responsible if in carrying out their duties they violate the provisions contained in the foundation's Articles of Association and cause losses to the foundation or third parties (in accordance with Article 35 paragraph (5) of the Foundation Law).

Position and Authority of Supervisory Organs

Supervisors in foundations have an important role that involves supervision and providing advice/consideration to the Management in implementing foundation activities according to Article 40 paragraph (1).

Like the Management, the supervisors also have fiduciary duty obligations based on Article 42 of the Foundation Law. This article mandates the Supervisors to carry out their duties with good intentions and responsibly for the benefit of the foundation.

The supervisor is also authorized to temporarily suspend members of the Board of Directors by stating certain reasons. This temporary suspension must be carried out within a maximum of 7 (seven) days from the date of suspension, and reported in writing to the Supervisor. Furthermore, within the same time limit, the Supervisor must invite the members of the Board who have been temporarily suspended to provide them with an opportunity to

defend themselves. Within a maximum of 7 (seven) days from the date of defense, the Supervisor must take one of the following actions:

- a. Revoking the decision of temporary suspension; or
- b. Carry out official dismissal of the members of the Management Board.

However, if a decision is not taken immediately regarding the individual who is temporarily suspended, then the dismissal action is considered legally invalid. In this situation, the temporarily suspended board member has the right to return to his previous position and continue his duties and authorities as a foundation administrator.

Supervisors, as administrators, have the responsibility to be accountable in bankruptcy situations that arise due to errors or negligence in carrying out supervisory duties. If the foundation's assets are insufficient to replace the losses that arise as a result of the bankruptcy, then each member of the supervisory board will be responsible for the losses.

Even though the supervisors are not active in the preparation of the Foundation's Annual Report, they must still sign the report in accordance with the requirements in the Articles of Association. As previously explained, both management and supervisors will be responsible to parties who may be harmed if the annual report is proven to be false or misleading.

Legal Accountability and Application of Sanctions Against Foundation Organs that Abuse Their Duties and Authorities

The confirmation that the foundation is a legal entity according to Law Number 28 of 2004 has a significant impact on the legal responsibility of the foundation's organs. The applicable legal principle is that the legal entity is authorized to carry out legal acts through its representatives. This means that actions taken by the Foundation's Management for and on behalf of the foundation are considered actions taken by the foundation itself.

Therefore, the foundation organs, such as the Management, are not responsible for the agreements they make for the benefit of the foundation and are not responsible for any losses that may arise for the foundation or third parties. This concept is known as limited liability of foundation organs.

This principle is very important in foundation law because it recognizes a separate foundation as a legal entity. and provides limited protection to its administrators in terms of legal liability. However, it is important to remember that this principle also requires that administrators must act in good faith and in accordance with the interests of the foundation in carrying out their duties. If administrators break the law or carry out their duties with negligence or serious error, they can still be held liable.

The provisions regarding unlawful acts are something that needs to be considered in the discussion regarding the accountability of foundation organs. This is inseparable from the fact that in carrying out its business activities, the foundation has the potential for violations of the law, and determining the perpetrators responsible is often a complex question. This is because its position as a legal entity is a complex organization and must always be represented by its organs in its actions.

Article 1365 of the Civil Code concludes that every unlawful act that results in loss to another party requires the perpetrator of the act to compensate for the loss that arises. Then, Article 1366 emphasizes that every individual is responsible not only for the loss caused by his own actions, but also for the loss caused by his negligence or carelessness.

In unlawful acts, there always needs to be a violation of the obligations that must be fulfilled by the claimant/plaintiff, not merely because of the agreement between the parties, but because it is an obligation according to law.

The three elements of an unlawful act are the existence of a legal obligation from the defendant to the plaintiff, failure to fulfill the obligation (*breach of duty*) ; and causing damage or loss.

The issues that arise relate to the authority of the Management and the legal responsibility of the foundation as a legal entity for actions taken by its Management or foundation organs, especially if there is a violation of the law. Of course this has consequences for the accountability of the foundation organs themselves, to what extent the actions they take bind the foundation as a legal entity, and to what extent they can be asked to be individually responsible for the unlawful actions they have committed.

The Foundation Law itself does not regulate the burden of responsibility that occurs when managers, supervisors or supervisors carry out actions that violate the law and cause losses.

Although different from the Limited Liability Company (PT) Law, it should be realized that as a legal entity, foundations are also often misused by their founders and administrators, especially considering several privileges that foundations receive compared to other legal entities. Therefore, any action that has the potential to trigger losses for foundations or third parties needs to be regulated more firmly.

Likewise, for third parties who suffer losses due to unlawful acts of foundation organs on behalf of the foundation, they must be observant in seeing whether the lawsuit must be directed against the foundation or can be directed against the individual Management of the foundation. If the act that causes losses to the third party is carried out by the Management of

the Foundation still within the framework of the relevant Articles of Association, of course the lawsuit must be filed against the foundation as a legal entity. If the actions of the Management violate the authority in the Articles of Association or are not in accordance with the objectives of the foundation, then the lawsuit can be filed against the individual Management involved.

Article 53 paragraph (1) of the *aquo Law* concerns the tendency to conduct investigations of foundations in cases where they are suspected of having committed unlawful acts or violated the Articles of Association, shown negligence in carrying out their duties, or carried out actions that are detrimental to the foundation or third parties, or the state.

Such an examination can only be carried out if the Court has issued a decision based on a written request from a third party with an interest, which must be accompanied by supporting reasons. The purpose is to determine who should be held responsible in a situation where an unlawful act occurs by a foundation or foundation organ.

Based on Articles 39 and 47, a foundation may go bankrupt. If the bankruptcy occurs due to the fault or negligence of the Foundation's Management and Supervisors, then these two organs can be held collectively responsible. However, members of the Management and Supervisors who can prove that the bankruptcy was not caused by their fault or negligence will not have joint responsibility for the losses suffered by the foundation.

In addition, members of the Management and Supervisory Board who are found guilty of carrying out the management of the foundation which results in losses for the foundation, the community or the state based on a Court decision will be prohibited from serving as Management of any foundation for a period of 5 (five) years, starting from the date the Court decision has permanent legal force.

In addition to civil liability, the administrators and supervisors of the foundation can also be threatened with imprisonment if in the bankruptcy process they are proven to have entered into an agreement that provides special benefits to creditors.

Article 70 regulates criminal sanctions for individuals related to foundations, namely they will be subject to imprisonment with a maximum sentence of 5 (five) years. This violation is related to the prohibition on transferring the foundation's assets, including money, goods, or other assets, including providing direct or indirect benefits to all parties interested in the foundation. In addition to imprisonment, individuals who commit violations are also subject to additional penalties such as returning the money, goods, or assets of the foundation that have been transferred or distributed.

In principle, the liability of legal entity organs in criminal law can refer to the provisions of Article 59 of the Criminal Code, namely in a situation of violation that results in

a crime against the Management or members of the Management body or commissioners, members who are not involved in the violation will not be punished. This means that only members who are directly involved in the violation can be subject to criminal sanctions, while members who do not interfere in the violation will not be punished.

Article 15 paragraph (1) of Law Number 7 of 1955 concerning the Investigation, Prosecution and Trial of Economic Crimes explains that criminal prosecution and criminal sanctions can be applied to legal entities, individuals who order the commission of an economic crime, individuals who act as directors of an act or omission, or even both if the economic persecution is carried out by an organization, company, association of individuals or foundation or on their behalf.

In other words, if a foundation organ commits a crime in the name of the foundation, whether the organ directs or leads the act, then the foundation as a legal entity can be subject to criminal charges, as can the individuals involved in the act. This shows that in the context of economic crimes, criminal liability can be imposed on both legal entities and individuals involved in the violation, but personally the perpetrator or the administrator or the person who gave the order to commit the crime must also be held responsible. If the crime is committed against the interests of the foundation, then it is inevitable that the members of the foundation organ who committed the act can be prosecuted and sentenced to criminal penalties.

4. CONCLUSION AND SUGGESTIONS

Conclusion

1. The position and authority of the foundation organization are based on the Articles of Association. The Articles of Association of a valid foundation must comply with Law Number 28 of 2004 concerning Foundations. In carrying out their duties, each foundation entity must comply with the principle of fiduciary obligations which require them to act in good faith and be fully responsible for the interests and objectives of the foundation. This action is necessary to avoid potential conflicts of interest between the foundation and the individual Trustees, Administrators, and Supervisors of the foundation. The Trustees, Administrators, and Supervisors of the foundation must carry out their roles voluntarily, in accordance with the nature of the foundation which is social, religious, and humanitarian.
2. Each organization has limited liability in accordance with the principle of legal entity liability. This means that the members of the supervisory board, management, and advisors of the foundation are not personally liable for the transactions they make on behalf of the

foundation, nor are they liable for any losses that may be suffered by the foundation. However, the Law determines an exception to this limited liability, namely that members of the management and supervisory board can be held jointly liable for losses caused by their errors or negligence, unless the person concerned can prove otherwise. This is known as the collegial liability system of the foundation organization, which is a consequence of the collegial nature of a legal entity.

Suggestion

1. In the Foundation Law, it should be stated in more detail that supervisors must be individuals who are independent from other organizations. This will ensure that supervisors carry out their duties professionally and are not bound by conflicts of interest.
2. The Foundation Law should also regulate the accountability of the Trustees more clearly, considering the very large role and authority that they have and which is different from the foundation's administrators and supervisors. This needs to be done to ensure accountability and transparency in decision-making and actions involving the Foundation's Trustees. A kind of royalty for the foundation's administrators should be regulated, because how can the wheels of the organization run well if the foundation's administrators have to work voluntarily in order to develop the foundation's progress.

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