

4-30-2016

PROMOTING REGIONAL INTEGRATION THROUGH HIGHER EDUCATION: LEGAL ANALYSIS ON THE EMPOWERMENT OF FOUNDATION IN PRIVATE UNIVERSITIES

Ariawan Gunadi

Follow this and additional works at: <https://scholarhub.ui.ac.id/ijil>

Recommended Citation

Gunadi, Ariawan (2016) "PROMOTING REGIONAL INTEGRATION THROUGH HIGHER EDUCATION: LEGAL ANALYSIS ON THE EMPOWERMENT OF FOUNDATION IN PRIVATE UNIVERSITIES," *Indonesian Journal of International Law*: Vol. 13 : No. 3 , Article 4.

DOI: 10.17304/ijil.vol13.3.657

Available at: <https://scholarhub.ui.ac.id/ijil/vol13/iss3/4>

This Article is brought to you for free and open access by UI Scholars Hub. It has been accepted for inclusion in Indonesian Journal of International Law by an authorized editor of UI Scholars Hub.

PROMOTING REGIONAL INTEGRATION THROUGH HIGHER EDUCATION: LEGAL ANALYSIS ON THE EMPOWERMENT OF FOUNDATION IN PRIVATE UNIVERSITIES

Ariawan Gunadi

Abstract

Higher education holds an important role in developing nation to build the manpower capacity of young generation and generate intellectual property. The same case applies in Indonesia as the most populous country in South East Asia with unmanaged higher education. Originally set out as a social entity which is engaged in nonprofit activities, some foundations have engaged in higher education. However conflict arises when the purpose of foundation is skewed for personal use that ended up disparaging other good foundations and the society in general. These issues prompted the government to promulgate Law No. 16 of 2001 regarding the Foundation and Law No. 28 of 2004 regarding the Amendment of Law No. 16 of 2001 regarding the Foundation. With this legislation, the foundation is expected to carry out specific standard and policies in managing their activities especially in order to prevent internal and external interference This article discusses on four parts: i) the theoretical legal background of foundation in Indonesia compared to other legal entities; ii) the exposition of organs on the foundation in such as the Board of Trustees, Board of Executive and Board of Supervisory; iii) The analysis of role between foundation and universities, including examples of internal and external conflict as study case; and iv) the role of foundation to enhance Indonesia's regional position in the international community.

Keywords: Indonesia, Higher Education, Foundation, Board of Trustee, Board of Executive

I. INTRODUCTION

A. BACKGROUND

Society life as an individual and part of community has long been the object of review by scholars. Aristotle described inter human relationship with the term *zoon politicon*. Further roles as a social creature finds that individual will correlate with each other, study upon its existence or other and seek philosophical definition in every day life.

In turn, people then realize that society comprised of layers of personality. This occurrence may happen since society often differentiates between level of economic sustainability, tribe, race, education, role in

* Law Faculty, Maranatha Christian University

government or other differences that is mainly decided from the person's economic capability.

Due to the inherent form in the Indonesian public society, some then chose the form of Foundation which grew, live and associate with every non profit activity in accordance with the law.

Prior to the promulgation of Law No 16 Year 2001 regarding Foundation, the institution was regulated in the Indonesian Civil Code as described as the following:

365: *“Dalam segala hal, bilamana Hakim harus mengangkat seorang wali, maka perwalian itu boleh diperintahkan kepada suatu perhimpunan berbadan hukum yang bertempat kedudukan di Indonesia, kepada suatu Yayasan atau lembaga amal yang bertempat kedudukan disini pula, yang mana menurut anggaran dasarnya, akta – akta pendiriannya atau reglemennya berusaha memelihara anak – anak belum dewasa untuk waktu yang lama”.*

899: *“Dengan mengindahkan akan ketentuan dalam Pasal 2 KitabUndang – undang ini, untuk dapat menikmati sesuatu dari suatu surat wasit, seorang harus telah ada, tatkala si yang mewariskan meninggal dunia”.*

900: *“Tiap – tiap pemberian hibah dengan surat wasiat untuk keuntungan badan – badan amal, lembaga – lembaga keamanan, gereja atau rumah – rumah sakit, tak akan mempunyai akibatnya, melainkan sekedar kepada Pengurus badan – badan tersebut, oleh Presiden atau oleh suatu penguasa yang ditunjuk Presiden, telah diberi kekuasaan untuk menerimanya.*

1680: *“Penghibahan – penghibahan kepada lembaga – lembaga umum atau lembaga – lembaga keagamaan, tidak mempunyai akibat, selain sekedar oleh Presiden atau penguasa – penguasa yang ditunjuk olehnya telah diberikan kekuasaan kepada para Pengurus lembaga – lembaga tersebut, untu kmenerima pemberian – pemberian itu”.*

The Indonesian Civil Code mentioned the existence of Foundation in general, but did not specify the details such as definition, establishment, intent and purpose in order to delegate the freedom of management to the society. Indonesia's philanthrophist community have grown for the past five years and found its momentum in prolonged economic crisis and natural disaster that struck the nation. It is evident that individuals who were fortunate enough were eager to contribute on the nation' welfare and assisted in human development. Survei by Public

Interest Research and Advocacy Center (PIRAC) revealed that crisis condition does not deter the intent to donate. 61% respondent showed that economic crisis did not affect the desire to donate, while 21% respondent donated even more before crisis and only 27% respondent claimed to have reduced the quantity and quality of donation due to the crisis.

Isolated individual participation eventually will congregate with other individuals based on the similarity of vision and purpose. That condition in overall occurred in Asia, especially in nations that honored unity and cooperation, moreover on current agrarian state. On the next step, those individuals agreed to form a single union that organizes their activities from a social traditional charity business into a more modern, organized, coordinated and legally admitted with the purpose of optimizing every available resource.

On the development, the institution is expected to be independent, endowed with its own identity which is different from the founders. In the Indonesian legal system, such non profit organization is often known as “Foundation”. The term was originally derived from “stichting” in Netherland and “foundation” in English.

From a Dutch literature perspective, foundation have been operated since the Dutch Indies and generated by the society. And this act continues to apply until Indonesia obtain its independent.

Indonesian foundations became renowned in the society along with the participation of the Indonesian National Army on business fields such as working with companies, creating private security companies and public space rentals to gain profit, not mentioning the allegation of being involved in illegal deforestation. Former general, Umar Wirahadikusumah established Kartika Eka Paksi Foundation (YKEP) in 1972 for army veterans and later on PT. TRUBA as one of the business unit under YKEP. Inevitably, the work of such foundation became controversial once it took rumours of businessmen collaborating with army to smooth trade and local protests.

Facing increasing critic by society, the government decided to regulate further about the foundation as a base for understanding the nature of foundation, ensure legal and order, and restore the function of foun-

oundation as agent of change and social entrepreneur in order to achieve certain goals in social, religion and humanity. That law distinctly suggested foundations gave a sense of belonging for volunteers to perform and achieve without getting a paycheck, to contribute to the community. Today's organizational participation extends into formal and informal channels, where collective action maybe the only option where citizens can attain audible and permanent voice in current centralized market economy and heavily saturated socio-political system. So in a sense, foundation may prove as an effective player in public service (i.e higher education) to provide boost to students, generate welfare for its recipients.

On the other hand, foundation should also retain a system that could appreciate public demand and achieve standards on available services. Currently there hasn't been any universal rule about the ideal model of a foundation, which leads to various management organization, even ones copying the profit based organization. In this research, the author intends to evaluate the existing model in order to offer better solution for future foundation.

B. RESEARCH QUESTION

The issues of this research is as the following:

1. The legal background of foundation in Indonesia compared to other legal entities
2. Role of organs in the foundation in such as the Board of Trustees, Board of Executive and Board of Supervisory;
3. The analysis of role between foundation and universities, including cases of internal and external conflict as study case; and
4. The role of foundation to enhance Indonesia's regional position in the international community.

C. RESEARCH METHOD

The data analysis on this research adopts a qualitative approach which involves obtaining data and conducting qualitative analysis to reach conclusion on the current issue. In addition, the research also em-

employs qualitative data analysis is a research method that creates analytic descriptive data from the respondent or empiric whole research.

Research initially demands analytical approach as an explanation and interpretation set in a logic-systematic manner. Logic systematic method displays a deductive-inductive analogy. In a spotlight, these two methods of reasoning provide a very different “feel” to them when conducting research since Inductive reasoning is more open-ended and exploratory at the beginning. Deductive reasoning is narrow by nature and concerned with testing or confirming hypotheses. Even though the particular study of foundation may look purely deductive (especially when testing the hypothesis that foundation tend to serve public in earnest), most social research involves both inductive and deductive reasoning processes at some time in the project.

In this research, the author employs juridical normative method sourced on primary and secondary legal sources. Primary sources utilized by author includes 1945 Constitution, Law No. 16 Year 2001 regarding Foundation (abbreviated as “UUY”), Law No. 28 Year 2004 regarding the Amendment of Law No. 16 of 2001 regarding the Foundation (abbreviated as “UUPY”). Aside from that, the author also utilizes secondary legal resources such as literature, article, paper, national and international journal, and internet.

In order to reach deeper analysis of the research, the author adopts juridic-empirical method as an assistance tool. Juridical approach utilizes secondary data sources to analyze various law, its effect based on elaborations by experts and relevant articles with the issues being analyzed, while the empirical approach utilizes primary data source to analyze the visible law in daily practice whether regarding the foundation, its establishment or responsibility of the Board of Executive.

This research pushes on with the descriptive-analysis approach with the intention of providing detailed data regarding the definition, condition and symptoms to support the systematic and whole regarding the Foundation.

II. THE THEORETICAL LEGAL BACKGROUND OF FOUNDATION IN INDONESIA

A. FOUNDATION AS A LEGAL SUBJECT

Mochtar Kusumaatmaja in Chaidir Ali defined law in a wide term that the law itself does not consist only of principles, but rather reasoning that envelops the institution for process that realize the effect of such principles into daily life.

In addition, Prof C.S.T. Kansil defined legal subject as the following:

“Siapa yang dapat mempunyai hak dan cakap untuk bertindak adalah hukum atau dengan kata lain siapa yang cakap menurut hukum untuk bertindak.”

From the definition, it can be concluded that legal recognition plays a pivotal role since the bearer of right (not always an individual) retains right and individuals. It meant that such party shall be defined as a legal subject (subjectumjuris). This recognition opens the opportunity for the Foundation to become legal subject, due to the fact that such status grants legal certainty to conduct legal acts (trade, establishing company, trademark registration, etc).

1. Legal entity

The understanding of parties with rights and capacity to act has expanded over time. These events in turn also affect people as legal subject. Generally speaking, persons may designate third party in a separate document or by-law. They may be natural persons, companies or charities. This raised a question, of whether the foundation can also appoint a beneficiary based on legal perspective.

Foundations are generally tied to civil law jurisdiction. Although it may sound possible to transfer assets to another jurisdiction, it is more restrictive than with individuals. In addition, the articles and by-laws may limit this flexibility, if not provide a different perspective to legal entity (rechtspersoon).

Soenawir Soekowati in Chaidir Ali defined legal subject as the following:

“Subyek hukum adalah manusia yang berkepribadian (legal personality) dan segala sesuatu yang berdasarkan tuntutan kebutuhan. Masyarakat

oleh hukum diakui sebagai pendukung hak dan kewajiban.”

From the explanation, legal subject was comprised of:

- a. Nature life person, stated as person in real life.
- b. Rechts Persoon, definition for legal entity or person fictionally created by the law or *persona ficta*.

That legal entity was given status as “person” with the right to conduct business agreement, with ability to obtain assets completely separate from its members. Following after was the legal responsibility to fulfill related administrative and taxation obligation.

E. Utrechtin Kansil explained legal entity (*rechtspersoon*) is an entity, under the authority set out by the law, to act as right, whether without personality or not, to be categorized as a human. Legal entity as a symptom in the nation is an inevitability, a hard fact that appeared in the legal interaction in this modern world. However, the fact is that the legal entity retains asset (*vermogen*) which is completely separate from the rights and obligation of its members. For the business community, this characteristic is a very crucial manner in order to prevent public misconception about using foundation as tool to serve the society.

R. Rochmat Soemitro stated his opinion that legal entity (*recht persoon*) (*rechtspersoon*) is an organization with assets, rights and obligation equal to individual.

Meanwhile, according to Sri Soedewi Masjchoen Sofwan, human is a private entity (in its singularity). Aside from person, legal entity also retains a private position in other form, which is a collective of persons together establishing organizations (gathering) and assets. Both of these are compiled for certain purposes and regulated by the legal entity.

Before the promulgation of foundation as a legal entity (*rechtspersoon*), foundation have long contributed to the society with undisputed reputation to the society. During the time, the legal void has presented obstacles that made it hard for societies to develop. Even so, foundation is treated as a legal entity just the same.

Foundation as a legal entity has been recognized in the Netherlands based on Hoge Raad jurisprudence in 1992. As the Supreme Court in Netherlands, the institution believes that Foundation is a legal entity

valid according to the law and therefore lawfully established. The opinion of Hoge Raad was then followed by Hooggerechtshof in Dutch Indies (now Indonesia) in its 1889 decision.

Due to its popularity, the foundation became research objects of prominent Indonesian scholars such as Setiawan, Prof. Soebekti and Prof. Wirjono Prodjodikoro believes that the entity is lawfully regulated by the law despite being narrowly mentioned in the Indonesian Civil Code.

Setiawan stated that foundation is a legal entity and the absence of written law regarding its legal practice prove that foundation operates in the same level as other legal entities.

Prof. Wirjono Prodjodikoro in its book entitled “*Hukum Perdata Tentang Persetujuan-Persetujuan Tertentu*” revealed that Foundation is a legal entity since its roots was the ownership of asset solely to achieve specific goals. The founders of the foundation may also elect and appoint the Board of Executives. In addition, it can also create job descriptions to fit in the vacancy of Board of Executives. Mainly the duty of the executives would be to ensure the widespread effect of the foundation through programs and charity, but most importantly to drive sustainability of the foundation, either by creating fund raising or managing social units that can bring profit to the society.

According to R. Subekti, legal entity is a body or congregation that can claim rights and conduct legal acts such as to sue or be sued before the court. Purwadi Purbacaraka and Agus Brotosusilo exposed their understanding about foundation as “a legal entity with a separate asset from its members, recognized as legal subjects, capable of legal action, able of bearing responsibility and burdened with rights and responsibilities. In addition the organization has Board of Executives or managers and can represent itself as a party in an agreement.

According J.J. Dormeier, legal terms is defined as the following :

- a. Agreement of parties within its legal scope to act representing a single institution.
- b. Foundation is an accumulation of assets or riches, which is used for distinct purposes and requires a special purpose vehicle (spv).

The above description gives support to the foundation as a legal

entity as the following:

- a. It's supporter has rights and obligation.
 - b. Self possession is limited to the organization itself.
 - c. The entity is comprised of a group of people.
 - d. Legal action is within its capacity.
 - e. It is capable of being sued and to sue before the court.
1. Definition of Foundation according to the Law

The Definition of Foundation according to Black's Law Dictionary is as the following :

“Permanent fund established and maintained by contribution for charitable, educational, religious, research or other benevolent purposes. In institution or association given to rendering financial aid to colleges, school, hospital, and charities and generally supported by gifts for purposes such as the founding or building of a college or hospital. The incorporation or endowment of a college or hospital is the foundation; and he who endow sit with land or other property is the founder.”

From the understanding above, foundation then became the source of fund acquisition and center of research, education, religion, research and other public activities. Meanwhile, the Netherlands Civil Code (Burgerlijk Wetboek), Book III, title 5, article 285 (1) stated that:

“Een stichting is een door rechtshandeling in het leven geroepen rechtspersoon, welke geen leden kent en beoogt met behulp van een daartoe bestemd vermogen een in de statuten vermeld doel te verwezenlijken”

(Yayasan adalah badan hukum yang lahir karena suatu perbuatan hukum, yang tidak mempunyai anggota dan bertujuan untuk melaksanakan tujuan yang tertera dalam statute Yayasan dengan dana yang dibutuhkan untuk itu).

According to F. Emerson Andrews, as stated in his book *Philanthropic foundations*, foundation is defined as the following:

“An organization having a principal fund of its own, managed by its trustees or director and established to maintain or aid social, educational, charitable, religious or other activities serving the common welfare”.

Based on the limitation about foundation, it can be concluded that

the organization has its own fund/ assets, managed by Board of Executives, burdened with a single purpose and non profit based.

Legally, the definition of foundation is regulated in article 1 UUY which stated that:

“Yayasan adalah badan hukum yang terdiri atas kekayaan yang dipisahkan dan diperuntukkan untuk mencapai tujuan tertentu di bidang sosial keagamaan dan kemanusiaan yang tidak mempunyai anggota”.

2. Establishment of Foundation based on Law

The Department of Law and Human Rights of the Republic of Indonesia is the representative of state with role as administrator of Foundation Law. Furthermore, the foundation shall retain legal status after the deed of establishment has been promulgated by the Minister of Law and Human Rights of the Republic of Indonesian (abbreviated as “Minister”).

During the duration, the Minister may ask third party opinion from related ministries within 7 (seven) days after the application has been deemed complete.

In the event that the promulgation of the deed of establishment requires further response from related ministries, then the designated ministries shall be given 14 (fourteen) days to respond such request. That being said, the Minister shall have an additional 14 (fourteen) days to provide his answer based upon the written response by related ministries.

However, in the event that the timeline above has expired and the applicant has yet to receive answer from related ministries, then the result of promulgation shall be notified within 30 (thirty) days after the date of request for response.

After the deed of establishment has been promulgated by the Minister, then such deed shall be announced in the Supplement to State Gazette of the Republic of Indonesia.

III.ROLE OF ORGANS IN THE FOUNDATION

A. ESTABLISHMENT OF FOUNDATION

Foundation is a legal entity whereas previous existence is based on customary on jurisprudence and now the current legal status has been determined into Article 1 (1) UUY as the following:

“Yayasan adalah badan hukum yang terdiri atas kekayaan yang dipisahkan dan diperuntukkan untuk mencapai tujuan dibidang social keagamaan dan kemanusiaan yang tidak mempunyai anggota.”

Based on the limitation of foundation and its legal status, the foundation also has other elements of legal entity such as distinct capital, and also intent and purpose to serve public welfare.

Article 9 (1) dan (2) of UUY had set out the condition for establishment of foundation such as:

- “1) Yayasan didirikan oleh satu orang atau lebih dengan memisahkan sebagian harta kekayaan pendirinya sebagai kekayaan awal.*
- 2) Pendirian Yayasan sebagaimana dimaksud dalam ayat(1) dilakukan dengan akta notaris dan dibuat dalam bahasa Indonesia.”*

Simple as it is, the foundation does not automatically attain the legal entity upon the validation of deeds of establishment before the notary. In order to earn that status, the foundation must be approved by the Minister of Law and Human Rights of the Republic of Indonesia as stated in Article11 (1) UUY which stated that:

“Yayasan memperoleh status badan hukum setelah akta pendirian Yayasan sebagaimana dimaksud dalam Pasal 9 ayat 2 memperoleh pengesahan dari Menteri”

The “clean and clear” status obtained by the foundation may become a basic guide for parties interested in creating a foundation or verify the legal status of foundation.

B. SEPARATE ASSET AS CAPITAL FOR FOUNDATION

Article 1 of UUY has set out a strict baseline for the substance of foundation which was the ability to possess its own assets. Externally,

foundation operation is viewed by the society as an independent body with public purposes. And therefore the founders and especially executives who run the daily management are regulated by the legislators to a certain degree of self restraint. Therefore the foundation leadership adopts a limited time type.

From a helicopter view, it is clear that the foundation is a special entity that owns property and also is not restricted to owners such as corporates or special interests.

Foundation' presence is basically a need for society that desires a basin or place of existence for societies to bridge social, religious and humanitarian values whether on local, national or international scale. It is a functional tool and often sought for by talented individuals, private or state alike, to contribute themselves not for profit but to better serve the society in a unanimous vision and mission, not by individuals but dedicated masses.

From a legal perspective, the Foundation maybe established by persons or entities whether nationals or foreigners. This triggered a wave of foreign sponsored foundations (and later associations and societal organizations minus legal entity status) in Indonesia but also created social sentiments among the society due to fear of political intervention or hidden agendas. However, the key remains that either founder or management cannot access the foundation asset for private gain nor can they assign it to third parties without general consent.

As an entity that served different purpose from companies, the foundation is endowed with non profit philosophy since most of its operations will accumulate public funds. Even further, foundations who were set up by companies itself may not conflict with the articles of association nor act as a transit site for save company profits from tax purposes.

Professionally, the Foundation and companies that own them develops a legal subject and legal object relationship whereas both are separated by their respective rights and obligations. Companies will have to appoint founders (either professional members or stakeholders of the company) and foundation will act as a vehicle from which the company can actually improve social standings or image before the media.

C. UNRESTRICTED MEMBERSHIP OF FOUNDATION

Pertaining to its title above, the Foundation does not have any permanent member, in a sense that the Board of Trustees, Board of Executives and Board of Supervisor are continuously replaced over a certain time span. Only employees are permanently hired for administrative purposes.

This character differs from companies whereas leaders invest their ownership in stocks, therefore effectively solidifying monopoly the entity's possession. On the other hand, Board of Executives bring only their expertise to run and expand the foundation. Personal expenses in form of cash and goods are not covered by the foundation.

Substantial theories such as the purposeful asset theory points out that the finances of such entity does not become the property of the manager, so the rights for exercise of capital and assets point out to a single purpose.

Evidently, due to its memberless states, the Foundation shall not distribute its dividends to the Board of Trustees, Board of Executives and Board of Supervisor, as this was clearly stated in UUY, Article 3 (2) of UUY which stated as the following "Yayasan tidak boleh membagikan hasil kegiatan usaha kepada Pembina Pengurus dan Pengawas".

Furthermore, the clause of article 5 of UUY elaborated as the following:

"Kekayaan Yayasan baik berupa uang, barang, maupun kekayaan lain yang diperoleh Yayasan berdasarkan undang-undang ini dilarang dialihkan atau dibagikan secara langsung atau tidak langsung kepada Pembina, Pengurus, dan Pengawas, karyawan atau pihak lain yang mempunyai kepentingan terhadap Yayasan."

Strict interpretation from the Law clearly stated that profits earned by the Foundation in running its business shall be utilized by the organs to attain specific goals designated by the founders. Such was the condition expected by the legislators to prevent unsavory individuals from enriching themselves, their cronies, business groups or even third party interest.

Simply speaking the assets of the foundation shall only be used for social, religious and humanitarian purposes, and general welfare.

IV. ORGANS OF THE FOUNDATION

Foundation has an entity itself has the ability to carry out its purpose through appointed representatives or organs.

In here, its legal status meant that the Foundation needs to be represented by a legitimate instrument to make decisions with legal consequences. Whether its regards operational or certain activities, the Foundation delegates its trust, executive and supervisory function to Foundation organs as stated in Article 2 of UUY as the following:

“Yayasan mempunyai organ yang terdiri dari Pembina, Pengurus dan Pengawas”.

A. BOARD OF TRUSTEES

The Board of Trustee has the highest position in the Foundation, with its legislative function as stated in Article 2 (1) UUY:

“Pembina adalah organ Yayasan yang mempunyai kewenangan yang tidak diserahkan kepada Pengurus atau Pengawas oleh undang-undang ini atau anggaran dasar”

The authority retained by the Board of Trustees is considered of paramount importance due to its roots. Usually, the founder would also act and later form the Board of Trustees. From a legal perspective the Board of Trustees maybe appointed based on the decision of Board of Trustee.

Article 28 (2) of UUY describes as the following:

“Kewenangan sebagaimana dimaksud dalam ayat (1) meliputi:

- a. Kebutuhan mengenai perubahan anggaran dasar.*
- b. Pengangkatan dan pemberhentian anggota Pengurus dan anggota Pengawas.*
- c. Penetapan kebijakan umum Yayasan berdasarkan anggaran dasar Yayasan.*
- d. Penyelesaian program kerja dan rancangan anggaran tahunan Yayasan.*
- e. Penetapan keputusan mengenai penggabungan atau pembubaran Yayasan.”*

At a glance, the Board of Trustee may outshine the performance of other organs and even decide the fate of the Foundation. However, legal analysis showed that the Board of Trustee only has the authorities which are not regulated by the law nor delegated to the Board of Executives and Board of Trustee. While in practice, members of the Board of Trustees are often public figures, entrepreneurs or leaders who cannot be fully engaged in the activity of Foundation. Therefore, the Board of Trustee appointed the Board of Executive and Board of Supervisory with their designated duty and responsibilities.

This was confirmed in Article 29 of UUY as follows: “Anggota Pembina tidak boleh merangkap sebagai anggota Pengurus dan/atau anggota Pengawas.”

The same regulation also applies for the Board of Executives as regulated in Article 31 (3) of UUY: “(3) Pengurus tidak boleh merangkap sebagai Pembina atau Pengawas.”

Article 40(4) of UUY regulated similar prohibition for Board of Supervisor as the following: “Pengawas tidak boleh merangkap sebagai Pembina atau Pembina.”

The function of the Board of Trustee is to evaluate the act of Board of Executive while carrying out activities of the foundation, managing employees of the Foundation and ensuring safe operation in a legal manner.

According to article 28 (1) of UUY, the Board of TrusteeUndangretains an important function whether regulated by the law of Articles of Association. Authority of the Board of Trustees includes :

“Kewenangan sebagaimana dimaksud dalam ayat 1 meliputi:

- a. Keputusan mengenai Perubahan Anggaran Dasar;*
- b. Pengangkatan dan pemberhentian anggota Pengurus dan anggota Pengawas;*
- c. Penetapan kebijakan umum Yayasan berdasarkan Anggaran Dasar Yayasan;*
- d. Pengesahan program kerja dan rancangan Anggaran Tahunan Yayasan; dan*
- e. Penetapan keputusan mengenai Penggabungan atau Pembubaran Yayasan.”*

Those public policy decided by the Board of Trustees in the Foundation are actually representation of the foundation's articles of association and mutual decisions agreed in meetings.

The foundation's specific policies are policies within the authority of the Board of Trustees to decide amendment on the Articles of Association, to appoint and dismiss a member of Board of Executives and Board of Supervisory, promulgate the work program and draft of the foundation's yearly budget; and vote upon the enactment regarding the merger or dissolution of foundation, as regulated in Article 28 (2) a, b, d and e UUY.

Requirements for the members of Board of Trustee according to Article 28 (3) of UUY are as the following:

- a. individuals as founder of the foundation; and/or
- b. people who are appointed based on the results of Meeting of Board of Trustee, with the criteria of having high dedication to achieve the intent and purpose of the Foundation

Elaboration of UUY article 28 (3) has explicitly stated that the founder does not automatically count as Board of Trustee, while the Board of Trustee may propose candidates for the Board of Executive and Board of Supervisory.

Considering the authorities owned by the Board of Trustees, we can conclude that the Board of Trustees has the main duty to monitor the progress regarding the intent and goals of the foundation by conducting evaluation regarding the asset, rights and duties for the past year, and to inspect and promulgate the yearly report made by the Board of Executives and signed both by the Board of Executives and Board of Supervisory.

The promulgation of the yearly report based on the decision of the Meeting of Board of Trustee will allow the release of acquit et decharge to the Board of Executives and Board of Supervisory for the following fiscal year.

B. BOARD OF EXECUTIVES

The Board of Executives is considered to be an executive organ in

the Foundation to conduct management duties as stated in article 31 (1) of UUY. From an organization perspective, the organs of Board of Executives is comprised of: i) Chair; ii) Secretary; and iii) Treasurer.

Since the Board of Executives are granted with the duty to represent the Foundation internally and externally, the Board of Trustees is responsible to defend the interest of the Foundation. Some of the issues faced in the management of the foundation is the responsibility mechanism and principles when managing the foundation, whether authorizing activities of asset transfers.

Research shows that an organ of the Foundation that is fully responsible for the interest and benefit of the society with good intentions an responsibility.

The latest update on Law No. 28 of 2004 regarding Amendement of UUY introduced an exception to this prohibition, such that members of the Executive Board may be compensated if they: (i) work directly and full-time for the foundation, (ii) are not the founders of the foundation, and (iii) are not affiliated with the founders, the Governing Board, or the Supervisory Board.

Board in performing its duties should be based on fiduciary duty and statutory duty for the benefit of the Foundation to achieve its goals and objectives of the Foundation. Each member of the Governing actions that are beyond the limits of the authority granted in the Articles of Association Foundation (*ultra vires* action) will only bind the members of the Board who do. And on certain action, the Board can be held accountable individually to a third party if the encroaching authority. Foundation treasures placed in an account on behalf of the Foundation, apart from the owner or founder, demands the Board' accountability in performing its duties based on fiduciary duty and statutory duty for the benefit of the Foundation to achieve its goals and objectives of the Foundation.

Each member of the governing actions that are beyond the limits of the authority granted in the Articles of Association of the Foundation (*ultra vires* action) will only bind the members of the Board who do. And on certain action, the Board can be held accountable individually to a third party if the encroaching authority. Foundation treasures

placed in an account on behalf of the Foundation, apart from the owner or founder, made possible a more transparent accountability.

C. BOARD OF SUPERVISORY

The Board of Supervisory upervisor is the organ of the Foundation which has been tasked to carry out surveillance and provide input to the Board of Executives in carrying out the regulatory activities of the Foundation on the definition of the Foundation is contained in Article 40 UUY.

Supervision in carrying out its duties shall in good faith with the full responsibility of running errands for the benefit of the Foundation as set forth in Article 40 UUY. The provisions of Article 43 UUY gives authority to suspend members of the Supervisory Board if it is proven.

V. ROLE OF FOUNDATION IN INSTITUTION MANAGEMENT

In order to ensure legal certainty and order that the Foundation operates in accordance with the intent and purpose, then on August 6, 2001 the government passed LawNo. 16 of 2001 regarding Foundation which came into force on August 6, 2002 and amended by Law No. 28 of 2004, which was enacted on October 6, 2004 and is valid from the date of October 6, 2005 and the issuance of Government Regulation No. 63 of 2008 with effect from September 23, 2008. Article 1 paragraph (1) UUY jo Law No. 28 of 2004 on the amendment of UUY clearly stated that the Foundation should aim at social, religious, and humanitarian. Then there are some things that need to be considered by the founders and managers of the Foundation.

A. MEETING OF BOARD OF TRUSTEES AND MEMBER OF TRUSTEES

Provisions on the Board of Trustees are set out in Article 30 (1) and (2) UUY. Trustees shall meet at least once in 1 (one) year. During the Annual Meeting, the board evaluates the assets, the rights and obligations of the Foundation in the past as a basis for estimation of the devel-

opment of the Foundation for years to come .

The validity of the decision of the members of the board or the decision of the Joint Meeting when the meeting is conducted in accordance with the provisions of the quorum of attendance and quorum decision to change the Articles of Association in accordance with the provisions of UUY and / or the Articles of Association.

Although UUY did not provide further details about the distinction of the Board of Trustees, the Board of Trustees which is held each year shall be referred to as the Annual Meeting of the board, which discussed and decisions shall be executed by the Board of Executives once every year. Meanwhile during that meeting, the Board of Trustees may plan beyond the annual meeting, for example, to decide important dates and/or urgent matters. As such, usually the Board of Trustees will propose Extraordinary Meeting of the Trustees. Whereas in order to ensure legal certainty, there should be a later date firmly set on meeting as intended by the Board of Trustees.

B. AUTHORITY VACUUM

In certain circumstances that the Foundation may be experiencing vacancy for Foundation Trustees. To overcome this problem in Article 28 (4) UUY, in the event that has determined that in the case of the Foundation for any reason no longer have a Board of Trustee, not later than thirty (30) days from the date of vacancy, the member of the Board of Executive and Board of Supervisory shall hold joint meeting to elect member of Board of Trustee with regard to the provisions of Article 28 paragraph (3) UUY.

In certain circumstances, it may be experiencing vacancy Foundation Trustees. To overcome this problem in Article 28 (4) UUY has determined that in the case of the Foundation for any reason no longer have members of Board of Trustees, the Supervisory Board Member and Member of Board of Executives shall hold joint meeting to lift the board with regard to the provisions of Article 28 paragraph (3) UUY not later than thirty (30) days from the date of vacancy.

C. EVALUATION TO THE BOARD OF EXECUTIVES

Not all the Founders action in accordance with the wishes and the discretion of the Board, as well as during the Foundation has not endorsed the possibility of changes in the composition can occur Board so that it is certainly difficult later in accountability Board. Then the necessary legal measures are appropriate to address the matter.

For that purpose, solutions for such issues are as the following:

- a. With the regulation of legal act performed before the Foundation was established to prevent the problem happening in the future. And as an alternative, the Board of Executives can make a contract agreement in written form as well as text / certified copy of the legal act, so that the Board of Executives cannot arbitrarily execute specific legal actions. As long as it is regulated in a well made script and clearly defined, therefore action itself is the responsibility of the Board of Executives alone and not responsibility of the Foundation.
- b. The Board of Executives shall organize work plan on the draft of yearly budget of the foundation to be promulgated by the Board of Trustees. Aside from that, the Board of Executives will also have to identify its limit of authority, such as:
 - a. To enter into credit agreement with the foundation as the guarantor.
 - b. To transfer asset's of the foundation without written consent of the Board of Trustees;
 - c. To conduct agreement with organization affiliated with the Foundation, Board of Trustees, Board of Executives and/or Board of Supervisory or even employees of the foundation itself, which the agreement does not serve the intent and purpose of the foundation.

The last reasoning was attached by the legislator due to the fact that most disputes in the foundation derive from financial consequences. It is why a competent Board of Executives would often refer to the hierarchy of the organization and function as representative of the foundation from business perspective.

- d. The Board of Executive may not act as Board of Trustee or Board of Supervisory. In accordance with the elucidation of Article 31(3) UUY, the purpose of such regulation is to avoid the

possibility of overlapping authority, duties and responsibilities of the Trustees, Management and Supervisory that could harm the interests of the Foundation or other parties.

D. RESPONSIBILITY OF THE BOARD OF EXECUTIVE AS MANAGER OF THE FOUNDATION

In the event of bankruptcy occur because of errors or omissions from the Board of Executives and wealth is not enough to cover the losses, then any Board Members jointly and severally liable for such loss. If the Board of Executive can prove that bankruptcy through no fault or negligence then it is not jointly and severally liable for such damages. The fact remains that there is a possibility of the Board to commit a legal action. Then the Board resigned after the legal action and replaced by the new Board. It is certainly difficult for new Board when they are asked to account for the old Board legal action.

Every manager is personally responsible if the party concerned in carrying out its duties are not in accordance with the provisions of the Articles of Association, which resulted in the loss of the Foundation or any third party. Conditions Governing responsibility is a consequence of the fiduciary relationship between the Foundation with the Foundation Board as the organ because of the ultra vires act resulting in losses for the Foundation or any third party.

Board error is an error directly for causing loss or errors due contributed to the loss. The Foundation relies heavily on the Board as an organ organ entrusted to undertake activities and carry out its functions. Thus between the Foundation Board are organ fiduciary relationship that gave birth to fiduciary duties.

Board is only entitled and authorized to act on behalf and for the benefit of the Foundation as well as within the limits specified in the Act - Law Foundation and Statutes Foundation. Every action performed outside the Board the authority granted will not be binding on the Foundation.

This means, the Board in performing its duties should be responsible for using its authority based on the Statutes of the Foundation, for the purpose that should, in accordance with the purposes and objec-

tives of the Foundation as stipulated in the Articles of Association of the Foundation. The board does not make a profit for him personally, if the profits gained due to its position as the Foundation's Board.

Compared to private companies, the Board of Executives maybe equal to the Board of Directors. This was proposed by Davies which stated that:

“In applying the general equitable principle to company directors, four separate rules have emerged. These are:

- (1) that directors must act in good faith in what they believe to be the best interest of the company;
- (2) that they must not exercise the powers conferred upon them for purposes different from those for which they were conferred;
- (3) that they must not letter their discretion as to how they shall act,
- (4) that, without the informed consent of the company, they must not place themselves in a position in which their personal interests or duties to other persons are liable to conflict with their duties.”

If applied in the form of foundation, the principles say that the Board in carrying out its duties should always:

1. Act with good intention
2. Attend to the demand of the Foundation and not the Board of Trustees, Board of Executives or Board of Supervisory;
3. The management of the Foundation should be done well, in accordance with the duties and authority given to him, with a reasonable degree of accuracy, with the provision that the Board is not allowed to expand or narrow the scope of its duties;
4. The Board of executives are not allowed to conduct conflicting act between the interest of the foundation and interest of the Board of Executives where personally or collectively..

Board of Executive plays an interdependent relationship with the foundation as the following:

1. The foundation is an organ entrusted by a group of people or the public to carry out welfare purposes;
2. The foundation is the *raison d'être* of the Board of Executives. Without the foundation, the Board of Executives simply do not have any

legal standing. That principle of trust further elaborates that:

- a. The Board of Executive is the internal trustee for foundation (burdened by duties of loyalty and good faith),
- b. Management is the agent for the Foundation in achieving its goals, objectives and interests (duties of care and skill), which are both fiduciary duty in the common law system.

VI. CONCLUSION

1. The authority in the hands of the Foundation lies at the Minister of Justice and Human Rights of the Republic of Indonesia. Notary as state officials are obliged to apply for approval to the Minister of Justice and Human Rights of the Republic of Indonesia within 10 days after the Articles of Association has been signed.
2. UUY and UUPY does not regulate the responsibility of the Founder of the Foundation, before the Foundation was established. As a consequence, the responsibility for the actions taken by the Foundation before it was passed as a legal entity in the hands of the Board of Executive. In addition, all the actions performed on behalf of the Foundation after the Foundation was founded shall be the responsibility of Board of Executives.
3. After the Foundation was established, the Founder of the Foundation can be positioned as Trustees of the Foundation. But the other party can be a builder of the Foundation throughout fulfill the requirements under the articles of association of the Foundation and the rule of law prevail.
4. Every legal act by Foundation prior to its establishment as a legal entity must obtain consent from the founder/ Board of Trustees. In addition, the Founder and Board need to have a unified position and outlook for the progress of the Foundation.
5. In the management of the Foundation, the Board of Executives must follow the directions from the Board of Trustees in determining policies and managing capacity in line with the vision and mission of the Foundation so that it can carry out the goals of prosperity for the community.
6. Provisions UUY and UUPY will actually benefit society, because the existing autonomy would make the Foundation carry out profes-

sional management without the intervention of any party. In addition, the quality of management will be secured because the organs of the Foundation will operate efficiently and effectively, so that public concerns about the commercialization of the Foundation to be unwarranted.

REFERENCE

- “Janji tak Ditepati” Kegagalan Mengakhiri Bisnis Militer di Indonesia”. Human Rights Watch. 2010. Available at http://www.hrw.org/sites/default/files/reports/Indonesia_0110ba.pdf
- “Mengapa Saat ini Para Pengusaha Tidak Memilih Yayasan Sebagai Bentuk Usahanya?”. Available at <http://irmadevita.com/2007/mengapa-para-pengusaha-sekarang-tidak-memilih-Yayasan-sebagai-bentuk-usahanya> /<http://konsillsm.or.id/?p=428>
- Adams, India. Indonesia. Council of Foundations. 2014. Available at <http://www.cof.org/content/indonesia>
- Ali, Chaidir. Badan Hukum. Bandung: Penerbit Alumni. 1999.
- Badruzaman, Mariam Darus. Aneka Hukum Bisnis. Bandung: Alumni. 1994
- Black, Hendry Campbell. Black’s Law Dictionary. Cet. 2. St. Paul Minnesota USA. West Publishing Co. 1910.
- Borahima, Anwar. Kedudukan Yayasan Di Indonesia, Eksistensi, Tujuan, dan Tanggung Jawab. Jakarta. Yayasan Kencana. 2010.
- Chatamrassjid. Tujuan Sosial Yayasan dan Kegiatan Usaha Bertujuan Laba. Bandung. PT. Citra Aditya Bhakti. 2000.
- Crouch, Harold. The Army and Politics in Indonesia. Ithaca and London. Cornell University Press. 1978.
- Davies, Paul L and Sarah Worthington. Principles of Modern Company Law. 9th ed UK: Sweet & Maxwell. 2009
- Indonesia. Law Number 16 Year 2001 regarding Foundation
- Indonesia. Law Number 28 Year 2004 regarding Amendment of Law Number 16 Year 2001 regarding Foundation
- Kansil, C.S.T. and Christine Kansil. Pokok-pokok Bahan Hukum. Jakarta Harapan. 2002.
- Kitab Undang-Undang Hukum Perdata (Burgerlijk Wetboek voor Indonesie). Available at http://hukum.unsrat.ac.id/uu/kolonial_kuh_perdata.pdf
- Mamuji, Sri. Metode Penelitian dan Penulisan Hukum. Cet. I. Jakarta: Badan Penerbit Fakultas Hukum Universitas Indonesia. 2005.
- Miru, Ahmadi and Sakka Pat. Hukum Perikatan, Penjelasan Makna Pasal 1233 sampai 1456 BW. Jakarta. PT. Raja Grafindo Persada. 2008.
- Pramono, Nindyo. Bunga Rampai Aktual. Bandung. PT. Citra Aditya Bakti. 2002
- Saidi, Zain and Hamid Abidin. “Filantropi dari Hukum Indonesia”. Sentra Jurnal Hukum. Edition 021. February 2003.
- Schramm, Carl J. “Law Outside the Market: The Social Utility of the Private Founda-

- tion". 30 Harvard Law Journal of Public Policy. 1. 2007.
- Siswono, Soejono Dirdjo. *Asas-asas Sosiologi*. Bandung. Armika. 1983.
- Soeroedjo, Hayati. "Status Hakim Yayasan Dalam Kaitannya Dengan Penataan Badan-badan Usaha di Indonesia". *Temu kerja Yayasan : Status Badan Hukum dan Sifat Wadahnya*. Jakarta. 15 Desember 1981.
- Suhardi, Gunarto. *Peranan Hukum dalam Pembangunan Ekonomi*. Yogyakarta. Universitas Atmajaya. 2002.
- Suhardiadi, Arie Kusumastuti Maria. *Hukum Yayasan di Indonesia*. Jakarta: PT. Abadi. 2002.
- Sutopo, H.B. *Metodologi Penelitian Hukum Kualitatif Bagian II*. Surakarta. UNS Press. 1998.
- Syawie, Hasbullah. "Aspek-aspek Hukum Mengenai Yayasan di Indonesia". *Varia Pendidikan*. Tahun IX. No. 98 November 1993.
- Tutik, Titik Triwulan. *Pengantar Hukum Perdata di Indonesia*. Jakarta. Prestasi Pustaka. 2006.
- Widoyoko, Danang. "UU Yayasan: Legalisasi Bisnis Militer". *Lentera Jurnal Hukum*. Edisi 2 Februari 2003.