

## LEGAL STUDY ON THE ESTABLISHMENT OF A FOUNDATION AS A LEGAL ENTITY LEGAL ANALYSIS NUMBER 28 OF 2004 CONCERNING FOUNDATIONS

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### Abstract

*This research was carried out with the aim of finding out the objectives of a foundation as a private legal entity according to Law Number 28 of 2004 and what are the requirements for establishing a foundation as a legal entity. By using normative juridical research methods, it can be concluded: 1. The aims of foundations as private legal entities according to Law Number 28 of 2004 are social, religious and humanitarian. Social goals: establishing formal and non-formal education, orphanages, retirement homes, nursing homes, hospitals, polyclinics and laboratories. Religious objectives: establishing facilities for worship, receiving and distributing alms. Humanitarian goals: providing assistance to victims of natural disasters, providing assistance to the homeless, the poor and homeless, preserving the environment. What are the requirements for establishing a foundation as a legal entity? How is the legal study aimed at establishing a foundation as a legal entity? Analysis of Law Number 28 of 2004 concerning Foundations? namely: founded by one or more people; there is wealth that is separated from the wealth of the founder; must be done with a notarial deed and made in Indonesian; must obtain approval from the Minister of Law and Human Rights; announced in the Supplement to the State Gazette of the Republic of Indonesia; must not use a name that has been legally used by another foundation, or is contrary to public order and/or morality; The name of the foundation must be preceded by the word "Foundation".*

**Keywords:** *Legal Studies, Foundations, Legal Entities*

### INTRODUCTION

The growth of Foundation Legal Entities is quite rapid in Indonesian society. The existence of a foundation basically fulfills the needs of people who want a forum or institution that has a social, religious and humanitarian nature and aims. With the existence of a foundation, all social, religious and humanitarian desires can be realized in an institution whose existence has been recognized and accepted. Law no. 28 of 2004, confirms that a foundation is a legal entity that has aims and objectives of a social, religious and humanitarian nature, established by taking into account the formal requirements specified in this Law. The establishment of a foundation is carried out by means of a notarial deed and obtains legal entity status after the deed of establishment is approved by the Minister of Justice and Human Rights.

These provisions are intended so that the administrative arrangements for ratifying a foundation as a legal entity can be carried out properly in order to prevent the establishment of a foundation without going through the procedures specified in Law no. 28 of 2004. In reality, the motive for establishing a hospital with the legal form of a foundation is no longer purely social, ideal/philanthropic, but there is a compulsion factor, so that in its activities it is very possible that the social, ideal/philanthropic goal is not prioritized. One piece of evidence, if you look at readers' letters in newspapers, is that people often complain about hospital costs. In fact, it is not uncommon for patients to die due to late treatment because the patient has not been able to pay the down payment (guarantee) for treatment. The impression that emerges is that both educational institutions and health service institutions prioritize profit over social and humanitarian goals.

In fact, foundations operating in the fields of education and health (polyclinics and hospitals) are not solely aimed at making a profit. After the issuance of Law Number 16 of 2001 in conjunction with Law Number 28 of 2004 concerning Foundations, determining the legal entity status of a foundation must follow the provisions contained in that Law. The law states that a foundation obtains legal entity status after the deed of establishment is approved by the Minister of Law and Human Rights. Based on these provisions, it can be seen that foundations become legal entities because of the law or based on law, not based on an open system, namely based on customs, doctrine and jurisprudence. The initial capital is in the form of the founder's wealth which is separated from his other personal wealth. Having a specific goal, which is the concretization of religious, social and humanitarian values, does not have members. A foundation as a legal entity has independent rights and obligations, which are separate from the rights and obligations of the person or body that founded the foundation, as well as the management and other foundation organs. A foundation is an entity that carries out various activities of a social nature and has a purpose.

### **FORMULATION OF THE PROBLEM**

1. What are the requirements for establishing a foundation as a legal entity?
2. How is the legal study aimed at establishing a foundation as a legal entity? Analysis of Law Number 28 of 2004 concerning Foundations?

### **RESEARCH METHODS**

The research used in writing this scientific work is library research. This method is used by studying literary materials (books) from various authors, regulations and laws. To support this scientific work research, there are legal research sources in the form of primary and secondary legal materials.

### **DISCUSSION**

#### **Requirements for Establishing a Foundation as a Legal Entity**

- 1) Founded by one or more people. The first condition shows that everyone can establish a foundation, either individually or together. The person referred to in this provision is both an individual and a legal entity. According to Tumbuan, the legal act of establishing a foundation is basically a unilateral legal act. If a foundation is established by two or more founders, the nature of the legal act in question is essentially different from the legal act of establishing a limited liability company. The establishment of a foundation also does not look at a person's nationality, so that both Indonesian citizens and foreign citizens can establish a foundation. However, there are different requirements if the foundation is established by a foreign party. In the event that a foundation is established by a foreigner or jointly with foreigners, the conditions and procedures for establishing the foundation are regulated by government regulations. Foundations established by foreign individuals are required to fulfill the provisions contained in Government Regulation Number 63 of 2008 as follows:
  - 1) Founder's identity as proven by a valid passport
  - 2) Foundations founded by foreigners or foreigners together with Indonesians, one of the management members who serves as chairman, secretary or treasurer must be an Indonesian citizen.
  - 3) Members of the management of foundations founded by foreigners or foreigners together with Indonesians are required to reside in Indonesia
  - 4) Members of foundation management who are foreign nationals must be holders of permits to carry out activities or business in the territory of the Republic of Indonesia and holders of temporary residence permit cards. This provision does not apply to diplomatic corps officials

- b. There is wealth that is separated from the wealth of the founder. The second condition requires that there is wealth that is separated from the wealth of the founder. The act of a legal or legal entity as the founder of a foundation to separate assets which are then used as the initial assets of the foundation is an important element in establishing a foundation. With the separation of assets, the relationship between the founder and his assets is severed. 16 The founder of the foundation is not the owner of the foundation being established, so that in the Foundation Law the term owner (ownership) is not recognized, which is different from the separation of assets in the establishment of a limited liability company, because in the establishment of a limited liability company, this separation is at the same time contains participation in the company as a capital partnership. This fellowship aims to make a profit. The opinion that has developed over time is that it is as if the foundation has an owner, namely the founder, so that the founder often takes actions like a foundation owner, for example selling or bequeathing the foundation. In Law no. 28 of 2004 requires a minimum limit of assets that must be separated to establish a foundation.
- c. This must be done with a notarial deed and made in Indonesian. The third requirement regarding the requirement to make a deed to establish a foundation has been in place long before Law no. 28 of 2004 was promulgated. The deed of foundation establishment is made by the founder or another person who has the power of attorney from the founder. The foundation's deed of establishment establishes the articles of association and other information deemed necessary. Such as: name, address, occupation, place and date of birth, as well as the nationality of the founder, supervisor, administrator and supervisor.
- d. Must obtain ministerial approval. The ministerial approval intended by this fourth condition is the Minister of Law and Human Rights. The foundation obtains legal entity status after the deed of establishment is approved by the Minister of Law and Human Rights. All legal actions carried out by the management on behalf of the foundation before the foundation obtains legal entity status are the responsibility of the management jointly and severally. To obtain approval, the founder or his proxy submits an application to the minister via a notary who makes the deed of establishment of the foundation. The notary is required to submit a request for validation to the minister within a period of no later than 10 days from the date the deed of establishment of the foundation is signed. In ratifying the deed of establishment of a foundation, the minister may request consideration from the relevant agency within a period of no later than 7 (seven) days from the date the application is received in full. The relevant agency requested for consideration is obliged to submit an answer no later than 14 (fourteen) days from the date the request for consideration is received. An application for ratification of the deed of establishment can be obtained if the founder or his proxy submits a written application to the minister. Approval of the application is granted or rejected no later than 30 days from the date the application is received in full.
- e. Announced in the State Gazette of the Republic of Indonesia. Application for this announcement is submitted by the foundation management or their proxies. As long as the announcement has not been made, the foundation management is jointly and severally responsible for all losses to the foundation. If you read the provisions in Article 25 of the Foundation Law, it will raise doubts because it states that, as long as the announcement has not been made, the foundation management is jointly and severally responsible for all losses to the foundation. The announcement system in the State Supplement is a requirement that is commonly required so that it can apply to the public. The provisions of Article 25 mean that if one person fulfills his responsibilities, the others are free, making the provisions of Article 11 Paragraph (1) unclear. It could even be said that the legal entity status obtained with the approval of the Minister of Justice becomes completely meaningless, without an announcement. In the explanation of Article 25, it is not stated how the solution will be if this happens, but only states that, this Article regulates civil sanctions against the management if

they do not fulfill the obligations specified in Article 24, then the management is jointly and severally responsible for all legal actions that bind the foundation. Perhaps this weakness was based on the law makers so that in the revision of the Foundation Law, this article was deleted. Then, so that it is truly known to many people or the public, apart from the announcement in TBN, it also needs to be announced in one or several daily newspapers whose circulation covers the national level, not local.

- f. You may not use a name that has been legally used by another foundation or is contrary to public order and/or morality. This provision is intended to prevent similarities in names with other foundations. This is also related to brand protection. This prohibition is intended not to mislead the public or other parties who have an interest in or are connected with the foundation. So far, we often find the same names of several foundations even though their activities or objectives are different.
- g. The name of the foundation must be preceded by the word Foundation. This requirement is intended to further confirm the identity of the foundation. This provision is the same as that for a Limited Liability Company (PT), Firm (Fa), or Limited Liability Company (CV). 19 In the provisions of Law Number 16 of 2001 in conjunction with Law Number 28 of 2004, the announcement is made by the Minister of Law and Human Rights. , is no longer carried out by foundation administrators. This is because in the past many foundations deliberately did not submit applications to become legal entities nor did they make announcements in the State Gazette of the Republic of Indonesia. After the foundation obtains legal entity status, the deed of establishment which has been ratified by the Minister of Law and Human Rights must be published in the Supplement to the State Gazette of the Republic of Indonesia. The purpose and objective of this announcement is so that the establishment of a foundation is known to the public or the public. According to Article 24 Paragraph (2) of Law Number 16 of 2001 concerning Foundations, it is stated that an application to be published in the Supplement to the State Gazette of the Republic of Indonesia can be submitted by the management of the foundation or their proxies to the state printing office of the Republic of Indonesia no later than 30 days from the date of the deed. the establishment of a foundation is ratified or changes to the articles of association are approved. 20 This article has been amended in the Foundation Law Number 28 of 2004 which states that the announcement in the additional state gazette is made by the Minister within a period of no later than 14 days from the date of the deed of establishment. The foundation is authorized by the minister. The law only takes 14 days because the announcement is the minister's obligation, so the announcement is carried out without going through the procedures for submitting an announcement request, because the announcement is made automatically by the Minister.

### **How to Study Law for the Purpose of Establishing a Foundation as a Legal Entity Analysis of Law Number 28 of 2004 concerning Foundations**

Generally, foundations are established by several people or can also be done by just one person, both Indonesian citizens and foreign citizens by separating assets from one or several people who founded them, with an ideal or social purpose that does not seek profit, and have administrators who are required to manage and manage them. everything related to the survival of the foundation.<sup>6</sup> A specific objective is one of the material requirements that must be met for the establishment of a foundation. The goal must be ideal or social and must not conflict with law, public order, morality and interests. This goal must not be directed at achieving profits or other material interests for the establishment. It is not permitted to establish a foundation which essentially aims as a trading business entity. Trading contains not only the hope of making a profit, but also contains the possibility and risk of suffering a loss, whereas obtaining a loss is not included in the foundation's rights. Initially, this foundation was established with ideal or social goals, and did not seek profit. The founder is completely free to organize it according to his wishes. The

important thing that must be maintained is that the foundation must not turn into an association. The aim of a foundation can be directed at achieving something in the field of general welfare or something in the field of public interest.

On the other hand, the goal can be limited, only to certain groups without naming each individual, but only referred to according to the group or the name of the type, for example for the benefit of the blind, employees, building a school in a certain place or for the benefit of the children and grandchildren of the descendants of its founder. The aim is to educate the nation, advance education, and/or improve the quality of education. In practice, educational foundations charge education fees (SPP) which are not small in amount. For example, for universities in provincial capitals, especially those on the island of Java, the tuition fees are always in the millions of rupiah.<sup>7</sup> The aim of establishing a foundation is not solely to advance education, but most importantly for the future of one's children. By establishing a foundation, it is intended that their children can inherit the foundation. In other words, the foundation provides employment and guarantees the future of their children, if the founder dies. Likewise with hospitals, practice shows that there are hospitals that were established to serve those who want excellent service, not being crowded together, and being in a hospital as if they were in a luxury hotel.

Therefore, it is difficult to determine simply what is understood as a social activity which is truly a social activity which completely avoids the commercial aspect.<sup>8</sup> In the health sector, if they want to establish a private hospital, most of them establish hospitals in the form of foundations. This is because in the Regulation of the Minister of Health of the Republic of Indonesia No.523/Men.Kes/Per/XI/1982 dated 29 November 1982, Article 8 Chapter IV concerning Licensing, states that obtaining a permit to provide private medical services is required or can only be given to applicants who in the form of a legal entity. If you want to choose another legal entity, such as a Limited Liability Company (PT) or other legal entity, you will be faced with the requirements that must be met. Therefore, the form of legal entity that is always chosen is a foundation, for reasons of advantages and convenience when using the form of a foundation compared to other forms of legal entity.

The motive for establishing a hospital with the legal form of a foundation is no longer purely social, ideal/philanthropic, but there is a compulsion factor, so that in its activities it is very possible that the social, ideal/philanthropic goals are not prioritized. One piece of evidence, if you look at readers' letters in newspapers, is that people often complain about hospital costs. In fact, it is not uncommon for patients to die due to late treatment because the patient has not been able to pay the down payment (guarantee) for treatment. The impression that emerges is that both educational institutions and health service institutions prioritize profit over social and humanitarian goals. In fact, foundations operating in the fields of education and health (polyclinics and hospitals) are not solely aimed at making a profit. Therefore, according to Soemitro, foundations should not be associated with a company, but with the aim of not seeking profit or gain.<sup>10</sup> Article 9 Paragraph (1) states that "a foundation is established by one or more people by separating part of the founder's assets, as initial wealth." In the explanation it is said that what is meant by person is an individual or legal entity.

Thus, companies that are legal entities can establish foundations. Once again, it is emphasized that what needs to be understood is that the founder of the foundation is not the owner of the foundation being established, so that neither the individual nor the legal entity who is the founder will have any influence on the existence of the foundation. The assets are used for the purposes of the foundation. This is in line with Brinz's theory, that the assets of a legal entity are bound by a purpose. As a legal entity, of course a foundation has its own assets, which are separated from the founders. Apart from being separate assets, a foundation does not consist of people, so of course it does not consist of legal entities either. A foundation is a legal entity that has no members, only administrators and founders. The main characteristics that describe the relationship between the social goals of a foundation and the foundation's organization include:

- 1) The founders set the goals of the organization and foundation and henceforth the founders are outside the organization or simply it can be said that the founders have seriously separated their wealth for the benefit of the foundation they founded.
- 2) The Foundation does not own its member organizations,
- 3) The administrators appointed by the founders do not have the right to make changes to the goals and organization of the foundation that could have far-reaching consequences
- 4) The realization of goals, especially from capital intended for these goals, both from separated assets and from donors.

The capital provided by the founders is not of a commercial nature, because the separation of assets is such that the person who desires the separation no longer has real power over the separated assets, including the heirs. With this act of separation, the founders cannot take the wealth without other people knowing and without any obstacles. The stipulation that a foundation does not have members means that individuals who work in the foundation, including founders, supervisors, administrators and supervisors, are not members. This is what differentiates foundations from other legal entities such as Limited Liability Companies which consist of shares and have shareholders or cooperatives which have members.

#### **CLOSING**

1. The requirements for a foundation as a legal entity are: established by one or more people; there is wealth that is separated from the wealth of the founder; must be done with a notarial deed and made in Indonesian; must obtain approval from the Minister of Law and Human Rights; announced in the Supplement to the State Gazette of the Republic of Indonesia; must not use a name that has been legally used by another foundation, or is contrary to public order and/or decency; The name of the foundation must be preceded by the word "Foundation".
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