

JUDICIAL REVIEW: THE DISPUTE SETTLEMENT BY THE COURT INSTITUTION BETWEEN THE FOUNDATION AND ITS MANAGEMENT

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Abstract. This study aims to analyze disputes between foundations and foundation administrators in internal conflicts including the dismissal, replacement and appointment of foundation administrators and procedures for resolving such disputes between foundations and foundation administrators through the general judiciary and state administration. If a board member is found to have acted detrimental to the foundation, then based on the decision of the supervisor's meeting, the board can be dismissed. This is a trigger for disputes that occur within the foundation. This dispute can be resolved by filing a lawsuit by the management who is dismissed on the basis of unlawful acts committed by the foundation. This research is a normative legal research with qualitative analysis. This study concludes that disputes between foundations and foundation management are caused by the implementation of foundation activities that are not in accordance with applicable laws, and the foundation's articles of association. The settlement of disputes between foundations and foundation administrators through judicial institutions is one alternative dispute resolution that can be used, depending on the type and the object of the dispute before the court.

Keywords: foundation, the management, dispute in the court.

INTRODUCTION

A foundation is a non-profit purpose-oriented activity. Foundations can be established by one or more people, where the assets of the founders are separated as the initial assets of

the foundation. The foundation established by a will that conveys a message to establish a foundation is considered an obligation aimed at the heirs or beneficiary to carry out the will.

Foundations were originally not specifically regulated, but based on custom and jurisprudence in certain cases foundations were recognized as legal entities. The foundation is one of the recognized legal entities in Indonesia, and its existence has been known by the Indonesian people since the days of the Dutch East Indies. The term Foundation was originally a translation of the terms “stichting” in Dutch and “foundation” in English (Chatamarrasjid, 2000). The rapid development of foundations that are not supported by clear regulations does not rule out the possibility of causing legal problems, which may involve the interests of the foundation managers and other interested parties in the foundation, including this for the government (Murjiyanto, 2011).

With input and pressure from various parties, the foundation, which was originally just a term in the Civil Code (hereinafter referred to as the Criminal Code) or the *Burgelijk Wetboek* (hereinafter referred to as BW), the government and the House of Representatives adopted the Law no. 16 of 2001 concerning Foundations. It was later amended by the issuance of Law no. 28 of 2004 concerning Foundations which has been in effect until now. The Law no. 28 of 2004 on Amendments to Law Number 16 of 2001 concerning Foundations (hereinafter referred to as Law on Foundations) in Article 1 point 1 explains that a foundation is a legal entity consisting of assets that are separated and intended to achieve goals and objectives in the social, religious and humanitarian fields that do not have members.

In accordance with the principle of the foundation, it has no members, unlike in companies, where the owners of capital in the company are basically members of the company, while in the foundation there are people who manage the foundation, which in the Law on Foundations is called the organ of the foundation consisting of coaches, administrators and supervisors. Based on the Law on Foundations, it is explained that each organ of the foundation is not allowed to hold concurrent positions, i.e. a member of the board of directors may not concurrently serve as a member of the board and/or member of the supervisory board, the board of directors may not concurrently serve as a coach or supervisor, and supervisors may not concurrently serve as coaches and administrators.

The management of the foundation has special powers, duties and obligations based on Article 35 paragraph (1) of the Law on Foundations which explains that the management of the foundation has the right to represent the foundation both inside and outside the court. If the board of the foundation is dismissed at any time by the supervisor based on the decision of the board of directors meeting, the board of the foundation has the right to submit an application to the court for the cancellation of his dismissal no later than 30 days from the date the request for cancellation is submitted.

The dismissed management is the party with an interest in the decision of the meeting regarding the dismissal of the management, because as the party who feels aggrieved by the decision of the supervisory meeting. This can lead to a dispute in the general court with a lawsuit against the law on the decision of the board of directors meeting. Apart from disputes in general courts, the results of the decision of the supervisory meeting regarding the dismissal of the management must be notified to the Minister of Law and Human Rights (hereinafter referred to as Menkumham) and the valid notification must be proven by a

valid receipt. The legal receipt is a state administrative decision, so that there can also be disputes over state administrative decisions that occur in administrative courts.

Based on the description above, it is necessary to have a juridical review of dispute resolution in the general court and state administrative court between the foundation and the foundation's management who were dismissed based on the decision of the supervisory meeting. Based on the description above, the problems of the study is as follows:

1. How does the dispute between the foundation and the management of the foundation occur?
2. How is the disputes between the foundation and the management of the foundation through the judiciary settled?

RESEARCH METHOD

Normative legal research is legal research that puts the law as a building system of norms. The norm system that is built is about principles, norms, rules from laws and regulations, court decisions and doctrines (Fajar & Achmad, 2017). The research approach is used to determine from which side an object of research will be studied (Suteki & Galang, 2018). This study uses several research approaches, namely: the statutory approach is used by looking at several regulations related to dispute resolution between the foundation and the foundation's management, and the case approach is used by conducting research that identifies court decisions who have qualified jurisprudence regarding disputes that occur in the foundation. The study is carried out on court decisions that use theoretical foundations, such as theories or teachings, legal principles, legal concepts, and legal adages (Diantha, 2016).

Sources of legal materials in normative research are primary, secondary and tertiary, thus this research uses the legal materials studied, including (Efendi & Ibrahim, 2018): primary legal materials, secondary legal materials and tertiary legal materials. The technique of collecting legal materials, namely all legal materials in this study, was carried out by literature study. The literature study, both primary and secondary legal materials, will be collected through recording in the form of documents using a file system (Suwitra, 2009). The technique of analyzing legal materials is descriptive analytical, where primary legal materials and secondary legal materials are analyzed which will later reveal the weaknesses, shortcomings and strengths of a law or regulation under study, and seek to find the relationship between the formulation of a legal concept or legal proposition between articles in the legislation same invitation (Ali, 2013).

RESULTS AND DISCUSSION

The Dispute Between the Foundation and Its Management

The enactment of the Law on Foundations is intended to provide legal certainty for foundations, even the Law on Foundations can be used as a basis for taking action in case of irregularities. One of the obstacles to professionally managing the foundation is the existence of problems that must be addressed both internally and externally by the foundation. Running a foundation's activities is not as easy as one might think, because the non-profit character of the foundation requires a lot of support from various parties. A

good collaboration between external and internal parties brings tremendous impact both in terms of finance and in terms of realizing the vision and mission of the foundation itself as an organization.

Organizing is the basic activity of management, carried out to manage all the resources needed, including the human element. Humans are the most important elements in organizing; humans can carry out tasks that are interconnected. The main purpose of organizing is to guide people to work together effectively (Tery, 2984). The management of a good foundation, of course, cannot be separated from a good managerial system, which is carried out by humans who run the managerial system. Humans who run the managerial system in the foundation are the organs of the foundation consisting of coaches, administrators and supervisors. This requires good cooperation between all the organs of the foundation in order to run the foundation as well as possible. The authorities, duties and functions of each organ of the foundation are regulated in the provisions of the legislation governing the foundation and in the articles of association and by-laws of the foundation itself.

Based on the authority possessed by each of these organs, it is related to the theory of authority. Indroharto, stated that there are three kinds of authority that come from the laws and regulations. The authority includes attribution, delegation and mandate (Ridwan, 2008). Within the Foundation, supervisors, administrators and supervisors are prohibited from holding concurrent positions in order to avoid the possibility of overlapping authorities, duties, and responsibilities between the organs of the foundation. At the same time, this regulation is aimed to prevent harm to the interests of the foundation or other parties because the authorities of the foundation organs are interrelated and the positions cannot be held concurrently. The authority is the ability to carry out certain legal actions.

Authority is also defined as the right possessed to make decisions, attitudes or actions based on the responsibilities given. Elements of authority or authority, as stated by Philipus M. Hadjon (2005), include:

According to the Law on Foundations, a builder is an organ of a foundation that has authority that is not delegated to the management or supervisor by law or by the articles of association. Those who can be appointed as supervisors are the founders of the foundation or who based on the decision of the members' meeting are considered to have high dedication to achieve the aims and objectives of the foundation. Trustees may not hold concurrent positions as administrators or supervisors, whose authorities include: decisions regarding amendments to the articles of association, appointment and dismissal of members of the management and supervisory members, determination of general policies of the foundation based on the articles of association of the foundation, ratification of work programs and the draft annual budget of the foundation as well as making decisions regarding the merger or dissolution of the foundation.

According to the law on foundations, the management is the organ of the foundation that carries out the management of the foundation. A person can be appointed as an administrator who can carry out legal actions and may not concurrently serve as a supervisor or supervisor. The management of the foundation is appointed by the supervisor based on the decision of the supervisor's meeting for a period of 5 years, and can be reappointed for 1 term of office,

meaning 5 years later. The management consists of the chairman, secretary and treasurer who during carrying out their duties must be in accordance with the aims and objectives of the foundation. If a board member is found to have acted detrimental to the foundation, then based on the decision of the board of directors meeting, the board can be dismissed. In principle, the management is responsible for the management of the foundation or for the interests and objectives of the foundation, and has the right to represent the foundation both inside and outside the court.

However, the management is not authorized to represent the foundation if there is a case before the court between the foundation and the member of the management concerned or members of the management have interests that conflict with the interests of the foundation. In addition, the management is prohibited from binding the foundation as a guarantor of debt, transferring the assets of the foundation except with the approval of the builder and burdening the assets of the foundation for the benefit of other parties. The articles of association can also limit the authority of the management in carrying out legal actions for and on behalf of the foundation. And if there is bankruptcy due to the fault or negligence of the management, and the assets of the foundation are not sufficient to cover the losses, then the management must be jointly responsible for the loss.

The supervisor is the organ of the foundation in charge of supervising and providing advice to the management in carrying out the activities of the foundation. Supervisors may not double as coaches or administrators, and can be dismissed at any time based on the decision of the supervisory meeting. The term of office of the supervisory organ is 5 (five) years which is the same as the term of office of the management organ and can be reappointed according to the provisions stipulated in the articles of association. This is intended so that there is no time gap in carrying out duties between supervisors and management, simultaneously being appointed and dismissed so that the time gap is not too long unless there are other things outside the provisions, the organ of the foundation resigns or dies (Panggabean, 2007).

The supervisor has the authority to dismiss members of the management with the status of temporary dismissal, then the supervisor is obliged to summon members of the management to defend themselves. The coach can then revoke or approve the dismissal. Just like members of the board of directors, if in the foundation there is a bankruptcy due to the fault or negligence of the supervisor, and the assets of the foundation are not sufficient to cover the losses due to bankruptcy, then each member of the supervisory board must be jointly responsible for the loss, unless they can prove that the bankruptcy was not due to negligence or supervisor error.

The provisions of Article 31 paragraph (2) and Article 40 paragraph (3) require that the appointment of members of the management and supervisors, the condition is that they are individuals who are capable of carrying out legal actions. This means that everyone can be appointed, but by considering various aspects, such as aspects of education and experience, aspects of ability and responsibility, managerial and professional aspects (Margono, 2015).

The development of several foundations in Indonesia seems to have tended to deviate from the philosophical goals of establishing the foundation. This can happen because it is difficult to define what is meant by social activities. For example, foundations can be engaged in education and hospitals. However, in reality many educational and health institutions are

pursuing profit. Therefore, it is often said that to get a good education and health care one has to pay a lot of money.

In addition, the foundation is used as PT. Such a foundation was established with the real intention of seeking profit, either directly or indirectly. Foundations with this category are like companies that aim to get tax breaks. This is not only an abuse in the pursuit of profit, but a more fundamental one is the misuse of the foundation. This is what often happens to foundations that do not reflect an open and accountable foundation's activities. Various individual and/or group interests arise above the interests of the foundation's aims and objectives.

The authorities, duties and obligations of each organ of the foundation, which have been described previously, are one of the triggers for disputes that occur in the internal body of the foundation. When the supervisor has appointed the board, the board must have full responsibility for the management of the foundation and this must be carried out in good faith and full of responsibility for the interests and objectives of the foundation. Moreover, the management is fully responsible personally if the person concerned carries out his duties not in accordance with the provisions of the articles of association. Various factors can cause this board to be dismissed before its term of office. The dismissal is carried out based on the decision of the board of directors meeting, where the board of directors during the course of carrying out their duties is deemed to be detrimental to the foundation.

The supervisor as an organ that has the task of supervising and providing advice to the management in carrying out their duties, apparently also has the authority to temporarily dismiss the management. This temporary dismissal must state the reasons and must be reported in writing to the supervisor. After the report is received, the supervisor is obliged to summon the member of the management concerned to be given the opportunity to defend himself, so that the coach is obliged to revoke the decision to temporarily dismiss or dismiss the member of the management concerned. If the supervisor does not implement the mechanism, the temporary suspension is null and void by law.

The supervisor who in this case has dismissed the management based on the temporary dismissal decision issued by the supervisor and/or the supervisor who immediately dismisses the management must be based on the decision of the supervisor's meeting. In the case of the appointment, dismissal, and replacement of the management, the decision of the supervisor regarding the dismissal of the management, is carried out not in accordance with the provisions of the articles of association. Then, at the request of the interested party or the prosecutor's office, the court may cancel the appointment, dismissal, or replacement in not later than 30 (thirty) days from the date the cancellation request is submitted.

The management who is dismissed as an interested party has the authority to apply for cancellation and replacement for himself and this must be done through a court decision. The management who has been dismissed by the supervisory meeting is not authorized to represent the foundation because there is a risk of the conflict of interests between the foundation and the member of the management.

This condition is one of the internal disputes that occur at the foundation and the settlement is carried out through litigation or courts. Disputes regarding the dismissal of the foundation's management are sensitive matters so that the settlement carried out by a

court process aims to obtain certainty, justice and benefit for all conflicting parties.

Dispute Resolution of the Foundation and the Management of the Foundation by the Court.

Dispute is something that causes differences of opinion, quarrels, disputes, disputes, disputes and cases. Disputes or conflicts are a form of actualization of differences in interests between two or more parties (Sutiyoso, 2006). A situation where two or more parties are faced with different interests, will not develop into a dispute if the party who feels aggrieved only harbors feelings of dissatisfaction or concern. A situation changes or develops into a dispute if the party who feels aggrieved expresses his dissatisfaction or concern directly or indirectly to the party causing the loss or another party (Usman, 2002).

Dispute resolution according to the theory of Dean G Pruitt and Jeffrey Z Rubin (2004) there are 5 (ie):

Contending (competing), which is trying to implement a solution that is preferred by one of the parties.

Yielding, which is lowering aspirations and being willing to accept the shortcomings of what is actually desired.

Problem solving (problem solving), which is a satisfactory alternative from both parties.

With drawing (withdrawing), which is choosing to leave the dispute situation, both physically and psychologically.

In action (silent) i.e. not doing anything.

In the literature, Dispute Resolution Theory is also called Conflict Theory. The definition of conflict itself was formulated by Dean G Pruitt and Jeffrey Z Rubin (2004) that conflict is a perception of perceived divergence of interest or a belief that the aspirations of the conflicting parties cannot be achieved simultaneously (Talib, 2013).

The settlement of disputes between the foundation and the dismissed management is a dispute that can actually be resolved through non-litigation. However, the parties tend to take the litigation route, the differences in the interests of the parties cannot be resolved amicably. The dismissed management took the litigation settlement route also because the decision to dismiss and replace the management had taken place, so that a peaceful settlement would certainly lead to his absolute dismissal.

According to Schut (1988), liability can arise from agreements (more precisely default) and from unlawful acts. In the first case, the damages must be paid because the main or secondary obligations under the agreement are not fulfilled (performance obligations or guarantee obligations). While the second, the loss must be replaced due to a violation of a legal norm (orders and prohibitions).

The Decision Letter for Dismissal and Substitution of Foundation Management is an object of dispute that can be sued in court. This type of lawsuit is a lawsuit against the law. A lawsuit against the law is submitted to the general court that handles criminal and civil cases. The governing body consists of the District Court as the court of first instance and the High Court as the court of appeal. The District Court is domiciled in the Capital of the Regency/City which is its jurisdiction. While the High Court is domiciled in the Capital of the Province with the authority to cover the territory of the Province. This trial is regulated by Law No. 2 of 1986 concerning General Courts jo. Law No. 8 of 2004 jo. Law No. 49 of 2009 jo. Constitutional Court Decision Number 37/PUU-X/2012.

The dismissed management file a lawsuit against the law against the foundation due to the Letter of Dismissal and Change of Management based on the supervisor's meeting in accordance with Article 1365 of the Criminal Code. In this case, an unlawful act must contain the following elements:

1. There is an action
2. The act violates the law
3. There is an error on the part of the perpetrator
4. There is a damage for the victim
5. There is a causal relationship between actions and losses.

Munir Fuady (2005) also argues that the unlawful act can be in the form of doing or not doing something, where the act must be against the law which includes the act of violating the applicable law and the rights of others guaranteed by law, the acts that are contrary to the legal obligations of the perpetrator, actions that are contrary to decency, and actions that are contrary to the interests of others. In terms of proving that the decision of the supervisory meeting is an act against the law, of course, it requires clear evidence.

The dismissed management no longer has the authority to represent the foundation inside and outside the court. Thus it can be said that the dismissed management will represent himself as the plaintiff in the dispute. The Law on Foundations explains that the supervisor has the authority to dismiss the management, so that since the issuance of the decision to dismiss and change the management, the dismissed management has ceased to be an administrator at the foundation. Managerial accountability is the most important part of the credibility of management in the foundation. Failure to comply with the principle of accountability can have serious implications.

The substitute manager who has been appointed by the supervisor is obliged to report the dismissal, replacement and appointment of a new management to the Menkumham. The substitute manager who has been elected and appointed based on the supervisory meeting has the authority to act outside and inside the court. Thus, all the authorities, duties and obligations of the dismissed management have been transferred to the new management. Thus, the new management has the authority to represent the foundation in court on the dispute. This is because the supervisors do not have the authority to represent the foundation in court.

Notification of dismissal, replacement and appointment of new management based on the supervisor's meeting submitted to the Menkumham then receiving a notification receipt from the Menkumham for the change of foundation data. This receipt of notification of changes to foundation data is a written determination issued by the Menkumham as State Administration Officer. The definition of written determination must be considered carefully. Because a written stipulation does not mean that it must be stated or made formally like a decision letter or a building permit. However, a written determination is enough just to be written on paper. This is because the written determination is only intended for later proof (Riza, 2019).

The dismissed management if he/she considers that his/her dismissal is not in accordance with the provisions of the applicable laws and according to the articles of association, shall file a lawsuit against the law to the Menkumham. With the issuance of the PTUN decision,

the dismissed management filed a lawsuit with the State Administrative Court. The state administrative court only handles cases of lawsuits against state administration officials due to written decisions that they make detrimental to a person or civil legal entity. This trial is regulated by Law No. 5 of 1986 concerning State Administrative Court jo. Law No. 9 of 2004 jo. Law No. 51 of 2009 jo. Constitutional Court Decision Number 37/PUU-X/2012.

Thus, the settlement of disputes in the Courts, especially regarding the dismissal, replacement and appointment of the foundation's management can be done in 2 (two) ways, namely filing a lawsuit in the general court with the object of dispute over the decision of the supervisor's meeting and filing a lawsuit to the state administrative court for the issuance of a receipt for changes to the foundation data. . The results of the decisions that have permanent legal force from the two courts will determine whether the decision letter of the supervisory meeting in question and the decision of the Menkumham is in accordance with a fixed mechanism, so it can be used as a way to resolve disputes within the internal foundation between the dismissed management and the foundation. Thus, the parties involved in the case must each be able to prove the truth of their respective opinions and then the court will decide on this matter.

CONCLUSION AND SUGGESTION

Disputes between the foundation and the management of the foundation are caused in the implementation of the activities of the foundation that are not in accordance with the applicable laws and regulations and the implementation of the articles of association and the household of the foundation itself is a violation. If there is a dispute within the foundation, then what can happen is to hinder the implementation of the foundation's activities, moreover the activities carried out by the foundation are for social, religious and humanitarian purposes for the benefit of the community.

Settlement of disputes between foundations and foundation administrators through the judiciary is one alternative dispute resolution that can be used and is stated in the provisions concerning foundations. Settlement of disputes through general courts or state administrative courts depends on the type of dispute, what is the object of the dispute and the circumstances in which a person or a party is determined to meet the requirements and therefore has the right to apply for a dispute or dispute resolution or case before the Court..

Disputes between the foundation and the management of the foundation must be resolved. It can be avoided by means of each organ of the foundation carrying out its authority, duties and obligations which have been regulated in the provisions of the legislation and the articles of association of the foundation. The foundation is an organization that is engaged in social, religious and humanitarian fields, so it needs equipment that is able to carry out the duties of managing the foundation properly.

The settlement of disputes between the foundation and the management of the foundation should be resolved peacefully. Litigation settlement requires a lot of time, money and effort, until finally the management of the foundation becomes focused on resolving cases in court. The parties to the litigation need to be aware of whether their obligations have been carried out properly. In addition, awareness is needed since litigating in court will have a significant impact on the survival of the foundation itself.

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