

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

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Ida Bagus Bayu BRAHMANTYA

Faculty of Law, Udayana University, Denpasar-Bali, Indonesia (ORCID: 0000-0002-2575-3426)

I Nyoman SUYATNA

Faculty of Law, Udayana University, Denpasar-Bali, Indonesia (ORCID: 0000-0003-3719-9335)

Gde Rudy DEWA

Faculty of Law, Udayana University, Denpasar-Bali, Indonesia (ORCID: 0000-0002-1318-1002)

keprabayu.fhud@gmail.com

Abstract: *The organ of the foundation legal entity runs the function of the foundation; therefore the management action should not be based on their personal matters, but supposed to be for and on the behalf of as well as under the responsibility of the foundation. The problem of the research, first, how is the dispute between the foundation and its management? Second, how is the dispute settlement between the foundation and its management by the court institution? The purpose of this research is to know the dispute between the foundation and its management during the internal conflict of the dismissal, replacement and appointment of the foundation management and the procedure of the dispute settlement between the foundation and its management by District Court Institution and the State Administrative Court. If it is found that one manager committed an act which possibly harm the foundation, then according to the agreement of the council meeting, the manager should be dismissed, this matter trigger the internal dispute in the foundation. This settlement should be resolved by filing a lawsuit from the manager who had been dismissed based on the unlawful act of the foundation. This is normative research with qualitative analysis. The summary of this research is that the settlement between the foundation and its management caused by the implementation of the foundation activities is not in accordance with the applicable laws and is not based on the implementation of the article of the association of the foundation, resulting in violation, the dispute settlement between the foundation and its management by the court institution is one of the alternative that can be used and it mentioned in the provision of the foundation, depending on the types of the dispute, the object of the dispute to be settled in front of the court.*

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

Introduction

Foundation conducts the activities with non-profitable orientation. Foundation can be established by one person or more, in which the assets of the founder are separated between his/her assets and parts of the prior assets of the foundation. The foundation established by the will in which the message of the will said if the foundation should be established, in this case it is considered as the obligation of the appointed beneficiary to execute the will. In the beginning, foundation is not specially regulated in any regulation,

but only based on the common practice and jurisprudence in certain cases, it is indeed that the foundation is considered as a legal entity. Foundation is one of the forms of the legal entity recognize by the Indonesian government, and its existence had been well known by the Indonesian society since the Dutch Colonization. The term of the foundation is a translation from the term “stichting” in Dutch language and “foundation” in English (Chatamarrasjid, 2000). The rapid development of the foundation is not supported by any clear regulation, resulting in any possibilities of the legal dispute, which can involve the interest of the management as well as any other parties who have their concern for the foundation, in this case, it includes the government (Murjiyanto, 2011).

Based on the recommendation and the pressure from various parties, it is finally that the foundation in which at the beginning only a term and only can be found in the Indonesian Civil Code/KUHPer (hereinafter referred to as KUHPer) or *Burgelijk Wetboek* (hereinafter referred to as BW) then the government together with the House of Representatives formed Law no. 16 of 2001 concerning Foundations, was later amended by the issuance of Law no. 28 of 2004 concerning Foundations which has been in effect until today. Law Number 28 of 2004 concerning Amendment to Law Number 16 of 2001 concerning Foundations (hereinafter referred to as Law on Foundation). Article 1 point 1 explains that a foundation is a legal entity consisting of assets, separated and intended to achieve certain goals and objectives in the social, religious and humanitarian fields, in which it does not have any members.

In accordance with the principle of the foundation that the foundation has no members, unlike companies, in which the party who put his/her capital in the company are basically members of the company, or the owners 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 counsel, management and supervisor (Murjiyanto, 2011). Based on the Law on Foundations, it is explained that each organ of the foundation is not allowed to have more than one positions, for example the member of council may not serve as a member of the board and/or member of the supervisory board at the same time, the management may not serve as counselor or supervisor at the same time, and the supervisor may not serve as a counselor and manager at the same time.

In relation to the authority of each organ of the foundation, the management of the foundation has special powers, duties and obligations based on Article 35 paragraph (1) of the Law on Foundations which stipulates that the management of the foundation has the right to represent the foundation both inside and outside of the court. If the management of the foundation dismissed at any time by the supervisor based on the decision of the council meeting, then the management of the foundation has the right to submit the application to the court for the cancellation of the dismissal no later than 30 days from the date request of the cancellation submitted.

The management dismissed previously is the significant party in which the decision to conduct the meeting regarding the dismissal should be held, because they are the parties affected by the damage of the council decision meeting. This matter can cause dispute in the state court, this type of lawsuit is categorized as an act against the law for the decision of the meeting council. Besides the dispute in the state court, the result of the council meeting regarding the dismissal of the management must be reported to the Minister of Law and Human Rights (hereinafter referred to as Menkumham) and the valid notification must be proven by a valid report. The legal report is the state administrative court' verdict,

therefore it also triggers another dispute for the verdict of the state administrative court which happen in the state administrative court.

Based on the explanation about us, then it is needed to conduct a judicial review regarding the dispute resolution in the state court and state administrative court between the foundation and the management of the foundation dismissed by the decision of the council meeting. Based on the introduction above, the problems of the study this research can be stipulated as below:

1. How is the dispute between the foundation and its management?
2. How is the dispute resolution between the foundation and the management of the foundation by the court?

Research method

Normative legal research is legal research in which the legal foundation is in the form of norm system scheme. This is norm system made to define the principles, norms, the rules in the regulations, court verdict and doctrines (Fajar & Achmad, 2017). This approach is used to determine from which side the object of the research that will be evaluated (Suteki & Gaang, 2018). This research used several research approaches, namely: statute approaches in which this approach was used to review some regulations regarding the settlement between the foundation and the management, and case research approach was used to identify the jurisprudence qualified court verdict regarding the dispute in the foundation. This research was conducted by reviewing the court verdict which used theoretical foundations, such as theory or doctrine, legal principles, legal concepts, and legal adages (Diantha, 2016).

The resources for the normative legal research consist of: primary, secondary and tertiary resources, therefore this research used some legal resources, including: primary legal resources, secondary legal resources, and tertiary legal resources (Efendi & Ibrahim, 2018). The technique used to collect the legal data in this research is the technique of literature study in which this technique is used to collect all of the legal data in this research. During the implementation of the literature study technique, the researcher collects the primary and secondary legal data by recording the data in the form of the document by using filing system (Suwitra, 2009). The technique of analysis for the legal data in this research used descriptive analysis technique, by analyzing the primary and secondary legal data (Ali, 2013). It shows the weakness, the flaw, and the strength of any regulation or rules that was being studied. It is also trying to find the correlation between the pattern of a legal concepts or legal proposition between the terms stipulated in the same rules or regulations.

Results and discussion

A. 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 any legal actions in case of irrelevancy. One of the obstacles to manage the foundation professionally is that there are still some issues regarding the foundation that should be solved both internally and externally. It is not easy as imagine to run a foundation, this is because of

the nonprofit character as the basis of the foundation in conducting their activities. It needs a lot of support from various parties. A good collaboration between external and internal parties could bring massive impact for the financial situation of the foundation. It also impacts the future vision and mission of the foundation as an organization.

Organizing is one of the basic activities from the management, it is needed to manage all of the resources needed including the human element. Human is the most important part of in organizing and through it, human can do their duties which are related. The main purpose of the organization is to guide human to be able to work together affectively (Terry, 1984). A good management of the foundation could not separate from a good managerial system, in which humans do to run the managerial system. Human who run the and managerial in the foundation is the organ of the foundation, consist of councils, management and supervisors. It requires a good cooperation between all of the foundation's organ to run the foundation as well as possible. The authorities, duties and functions of each organ in the foundation regulated in the provisions of the regulation which govern the foundation as well as in foundation's article of the association.

The theory of authority related to the authority possessed by each organ. Indroharto, stated that there are three types of authority from the regulation. Those authorities including: attribution, delegation and mandate (Ridwan, 2008). It is prohibited for the council, management or supervisor to have more than one position in the foundation. This is to avoid the possibility of the overlapping authority, duties, and the responsibility between the organ in the foundation. It is also to prevent the bad impact from the benefit of the foundation or any other parties. Because the authorities of the foundation's organ related to each other, then it is not possible to get more than one position in the foundation. Authority is the capability to carry out certain legal actions.

We can also define the authority as the right that we have to take decision, or to do some action based on the responsibility that had been given. The element of the authority, as stated by Hadjon (2005), included:

According to the Law on Foundations, council is an organ in which their authority cannot be delegated to the management or to the supervisor by law or by the articles of association. Those who can be appointed as supervisors are the founders of the foundation or the one who is considered having high dedication based on the decision of the members meeting to achieve the target and the objectives of the foundation. The council is not allowed to have more than one position nor as the management or as the supervisor. The authorities of the council are: to decide the amendment of the article of the association, the appointment and the dismissal of the foundation's members as well as the members of the supervisor, to enact the general policy of the foundation based on the article of the association of the foundation, to ratify the work program and the draft of the annual budget of the foundation as well as to enact the policy the merger and the dissolution of the foundation.

According to the Law on Foundation, the management is the organ of the foundation who manage the foundation. One can be appointed as the manager of the foundation who have the capabilities to take legal action and he or she is not allowed to have more than one position both for the council nor the supervisor. Foundation manager appointed by the council based on the result of the council meeting for the terms of 5 years, and can be reappointed for another 1 more term, in the other word for another 5 years. The management consist of the chairman, the secretary and the treasurer. They must carry out

their duties in accordance with the aims and the objectives of the foundation. If in any occasions, it is found that the member of the management department takes any action which harm the foundation, then based on the decision of the council meeting, the manager should be dismissed. Basically, the manager is responsible for the management of the foundation or to carry out the duties for the benefits and based on the objectives of the foundation, as well as to represent the foundation inside and outside the court. Nevertheless, the manager is not allowed to represent the foundation if there is a dispute in front of the court between the foundation with the members of the management department or if the members of the management department have any other conflict of interest regarding the foundation. Besides, the foundation is not allowed to put the assets of the foundation as a collateral, and is not allowed to transfer the assets of the foundation except with the approval of the council and also is not allowed to burden the assets of the foundation to any other parties. According to the article of the association, the authority of the management department restrains the authority of the management department in executing legal act on the behalf of and under the name of the foundation. And if in any cases that the foundation bankrupt caused by the negligence or any failure of the manager, and if the asset of the foundation is not enough to cover the loss, then the managers must be responsible together to cover the loss.

The supervisor is the organ in the foundation which responsible to supervise and to advise the management department in conducting any duties for the foundation. The supervisor is not allowed to have more than one position in the foundation both for the council nor for the manager, and the supervisor can be dismissed any time based on the decision of the council meeting. The supervisor organ in the foundation can have this position for 5 (five) years. It is the same with the terms for the manager and can be reappointed based on the provision mentioned in the article of the association. This is to avoid the time gaps in carrying out the duties between the supervisor and the manager, appointed and dismissed at the same time to avoid the extensive time gap, unless it is not stipulated in the provision, the organ of the foundation who resigned or pass away (Panggabean, 2007).

The supervisor has the authority to dismiss the members of the management with the status of temporary dismissal, then the supervisor is obliged to summon the members of the management to defend themselves. The supervisor then can revoke or approve the dismissal. It is the same case with the supervisor that if there is any cases about bankruptcy regarding the foundation caused by the mistake or the negligence of the supervisor, in which the asset of the foundation is not enough to cover the cost of the bankruptcy, then every member of the supervisor must be responsible together to cover the losses, unless it can be proved that the bankruptcy is not caused by the mistake or negligence of the supervisor.

According to the provisions of the Article 31 paragraph (2) and Article 40 paragraph (3) the appointment of the management's members and supervisor's members should meet certain requirements that is the member is a person who are capable in taking any legal action. In this case it means that anyone can be appointed, but by considering various aspects, such as the education and experience, capabilities and responsibilities, managerial and professionalism (Margono, 2015).

Practically there are some foundations in Indonesia indeed have different purposes with the philosophical objectives of the foundation establishment. This is because it is

difficult to define what does it meant by social activities. For example, the foundation run their activities in the field of education and hospital. Whether the education and health, what it meant by social activity, nevertheless, in practice there are many health and education institution which run for profit, and even we have a saying that to get a good education and healthcare one must pay for a very expensive price. Besides, foundation was established to meet a company standard. This kind of foundation was established to get profit directly or indirectly. This kind of foundation was categorized as company which expect to get tax relaxation. This is not only the misconduct on the purpose of the foundation that is a non-profit organization but basically this is also a misconduct to make an organization in the form of foundation. This is happened to the foundation in which they do not reflect an activity which open and accountable. There are many significances from one party and/or a group reflected on the significance of the aims and purposes of the foundation.

The supervisor is an organ who have duties to supervise and suggest the manager in carrying out their duties, they also have the authority to temporary early dismiss the manager. This temporarily dismissal must have a clear reason and it obligate to report it in writing to the council. After the report is received, the supervisor is obliged to summon the member of the management department who is being on the case to defend him/herself, therefore the council might revoke the temporary dismissal or dismiss the member. If the supervisor does not implement the mechanism, the temporary suspension is null and void by law.

The council in this case have dismissed the manager based on the temporary dismissal decree issued by the supervisor and/or in a case in which the council who directly dismiss the manager must be based on the decision of the council meeting. The council decision regarding the dismissal of the manager, in case of the appointment, dismissal and replacement of the management department which conducted outside from the provision stated in the article of the association, then on the request of the interest party or on the request of the state attorney in representing the public interest, the court have the ability to cancel the appointment dismissal, or replacement in no later than 30 (thirty) days since the date when the request of the cancellation submitted.

The management who is dismissed by one party with the interest regarding the authority to apply for the cancellation and replacement for himself/herself, in this case it must be settled by the court's verdict. The manager dismissed by the council meeting has no authority to represent the foundation because if anything happened resulting in a case which must be settle in the court between the foundation with the member of the management department or the member of the management department have conflict of interest with the interest of the foundation. Therefore, in this case, he/she has no authority to represent the foundation based on the provisions mentioned in the article of the association.

This condition is one of the internal disputes occurred in the foundation and the resolution of this case can be settled through litigation process or through the process in the court. The dispute regarding the dismissal of the foundation's manager is sensitive matter, therefore the settlement must be done by the court process in order to obtain the certainty, justice and benefit for all of the parties in the case.

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

Dispute was triggered by differences of opinion, it also leads to fight, disagreement, conflict, problems and legal cases. Dispute or conflict is a form of actualization for the differences of the interest between two parties or more (Sutiyoso, 2006). A situation in which both parties or more was faced by the differences of interest, it will not become a dispute if the losing party only hold the feeling of the dissatisfaction or apprehension. A situation became a dispute if the parties who had been infected confess their dissatisfaction or apprehension both directly or indirectly to the party who caused the losses (Usman, 2002). According to the theory of Pruitt and Rubin (2004), there are 5 resolutions of the dispute, those are:

- a. Contending, which is trying to implement a resolution preferred by one of the parties.
- b. Yielding, which is lowering aspirations and willing to accept the shortcomings of what is actually desired.
- c. Problem solving, which is a satisfactory alternative from both parties.
- d. Withdrawing, which is choosing to leave the dispute situation, both physically and psychologically.
- e. In action (silent) which is doing nothing.

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 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 the disputes between the foundation and the dismissed management is actually can be resolved by non-litigation. However, the party stand to take the litigation process, caused by the differences of the interest between the parties which cannot be resolved amicably. The dismissed management took the litigation resolution process caused by the dismissal decision and the replacement of the management had been occurred, therefore amicable resolution will lead to absolute dismissal. According to Schut, in Dunne & Burght (1988) liability could be resulting from the agreement (precisely define as a default) and from the unlawful act. In the first case, the losses must be covered because of the main or secondary obligation resulting from the violation of the agreement (the obligation of the payment of the performance or the guarantee payment). Meanwhile the second one is the losses must be covered because of the due to a violation of a legal norm (orders and prohibitions).

The Decree of the Dismissal and the Replacement of the Foundation Management is considered a dispute object which can be sued in the court. The category of this lawsuit is a lawsuit against the law. The lawsuit against the law is submitted to the district court which handle criminal case and general civil case. The institution which executed it consist of the district court as the first court level and the High Court as the court chooses for the appeal. Domicile of the District Court is in the capital city or in the capital of the regency which become 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 in conjunction with Law No. 8 of 2004 in conjunction with Law No. 49 of 2009 in conjunction with Constitutional Court Decision Number 37/PUU-X/2012.

The dismissed management should file a lawsuit against the law against the foundation due to the Decree of the Dismissal and the Replacement of the Foundation Management based on the council meeting and the reason is the Article 1365 of the Criminal Code, the unlawful act should meet the following elements:

1. There is an action.
2. The act violates the law.
3. There is a mistake from the doer.
4. There is a loss from the victim.
5. There is a causal relationship between the act with the losses.

Munir Fuady (2005) also believes that the act of the perpetrator against the law can be in the form of both doing something or not doing something. It means that the act must against the law, generally it can be interpreted as, first, the act must against the applicable law. Second, the act against other people's right which is guaranteed by the law. Third, the act contrary with the decency, and fifth, the act against good manner which is considered by the society in which it is supposed to respect other people interest. During the presentation of the evidence in the court, when the meeting council decree violating the applicable law, if indeed it is, then it needs to be proofed in the court.

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/herself as the plaintiff in the dispute. The Law on Foundations explains that the supervisor has the authority to dismiss the management, therefore since the issuance of the decree of the dismissal and the replacement of the foundation management, the dismissed management had been released from their duty to manage the foundation. The managerial obligation becoming an important part of credibility of the management in the foundation. When the principle of obligation has not met yet, then it will resulting a bad impact (www.researchgate.net/publication/).

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 Ministry of Law and Human Right (Menkumham). The substitute manager who has been elected and appointed based on the council meeting has the authority to act outside and inside the court. Thus, all of the authorities, duties and obligations of the dismissed management have been transferred to the new management. The new management has the authority to represent the foundation in court on the dispute. Because the councils and the supervisors do not have the authority to represent the foundation in court.

The notification of the dismissal, replacement and the appointment of the new management based on the council meeting submitted to the Ministry of Law and Human Right (Menkumham), then the notification report to the Ministry of Law and Human Right (Menkumham) will be issued resulting in the changes of the data of the foundation. The notification report to the changes of the data of the foundation is the formal legalization document issued by the Ministry of Law and Human Right (Menkumham) as the State Administration Officer. The definition of the formal legalization document should be noted very well. Because this document does not have to be made or stated formally like any other decree or license to build the building. However, legalization document is only put in writing on the paper. This is because the purpose of the legalization document is that it can be used as evidence in the future (Riza, 2019).

If the dismissed management considered her or his dismissal is not in accordance with both the provisions of the applicable laws nor with the article of the association, and if he or she would like to apply for the appeal for the verdict of the Ministry of Law and Human Right (Menkumham), he or she can apply the appeal for the lawsuit against the law to Ministry of Law and Human Right (Menkumham). With the issuance of the PTUN verdict, the dismissed management can file a lawsuit to the State Administrative Court. The State Administrative Court only handles cases of lawsuits against the officials of the state's administration department, resulting from the decree made previously which harm someone or legal entity's civil right. This court is regulated by Law No. 5 of 1986 concerning State Administrative Court in conjunction with Law No. 9 of 2004 in conjunction with Law No. 51 of 2009 in conjunction with Constitutional Court Decree 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 settled in 2 (two) legal mechanism, those are: by filing a lawsuit to the district court in which the object of the dispute is the decree of the council meeting and by filing a lawsuit to the state administrative court for the issuance of the changes in foundation's data. The verdict has permanent legal force for both of those courts. It will determine whether the decree of the council meeting and the decree from the Ministry of Law and Human Right (Menkumham) have met the proper mechanism. It could be used to settle the dispute internally in the foundation between the dismissed management and the foundation. Therefore, the parties involved in the dispute, must provide the real truth of their opinion and later on the court will decide it.

Conclusion and suggestion

A. Conclusion

1. The dispute between the foundation and the management arises from the implementation of the foundation activities which not in accordance with the prevailing laws and regulations and also it is not in accordance with the implementation of the article of the association of the foundation. Therefore, some violations to the terms happened. If in any cases there is a dispute inside the foundation, then it would become a problem to conduct the foundation's activities, especially the activities which must be done by the foundation for the purpose of the society, religion and humanitarian as well as for the community.

2. The dispute resolution between the foundation and the management of the foundation by court is one of the alternatives resolutions for the dispute, in which it can be used as one of the alternatives and it should prevail on the regulation of the foundation. The dispute resolution by the District Court or State Administrative Court depends on the type of the dispute, it depends on the object of the dispute and the situation in which the verdict depends on whether a person or one party will be considered to fulfill the requirements or not, whether he or she has the right to file a petition to the court regarding the settlement for the dispute or the case in front of the Court.

B. Suggestion

1. The dispute between the foundation and the management of the foundation must be resolved as well as possible. It could be avoided in many ways by each organ of the

foundation. They should use their authority, do their duties and obligations that have been mentioned in the provision of the prevailing law and on the article of the association of the foundation. Foundation is an organization for social, religion and humanitarian purposes. Therefore, the organ of the foundation is needed to execute the duties in the management of the foundation as well as possible.

2. The dispute resolution between the foundation and the management should be resolved amicably. The dispute resolution by litigation alternatives takes sometimes, money and a lot of energy. At the end, the management of the foundation only focusing on the settlement of the case in the court. The understanding of the parties who have their case in the court is needed whether they had done their obligations well, tolerance is needed, it is also needed to understand that the case in the court will bring massive impact to the existence of the foundation.

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