

Adjustment of the Foundation's Articles of Association Judging from the Law Enforcement Perspective

Fitri Pratiwi Rasyid¹, Audyna Mayasari Muin²

¹ Faculty of Law, Hasanuddin University, Makassar-Indonesia, tiwirasyid@gmail.com

² Faculty of Law, Hasanuddin University, Makassar-Indonesia, audynamasari@gmail.com

ABSTRACT

According to Indonesia Foundation Law, No. 16/2001, as amended by Law No. 28/2001, article 1(1) stipulates that Foundation is a legal entity that has separated assets to achieve specific objectives in the social, religious, and humanitarian fields, which has no members. Importantly, this regulation has required a Foundation to have legal entities status. In fact, some Foundations in Indonesia have existed, and continuously functioning performs the business activity without having legal entities status. This phenomenon should be banned as clearly regulated in the Law that foundations shall not be drawn on as platforms of a business unless through other business entities.

ARTICLE INFO

Keywords:

Foundation; Articles of Association.

How to cite:

Rasyid, F. P., Muin, A. M., (2019). Adjustment of the Foundation's Articles of Association Judging from the Law Enforcement Perspective. *Musamus Law Review*, 1(2), 73-86

Copyright © 2018 MuLaRev.
All rights reserved.

1. INTRODUCTION

The term foundation is not something new in social life. In general, when the community hears the word foundation, it tends to assume that what the foundation means is an educational foundation. In fact, if it refers to legislation governing foundations in Indonesia, the purpose of establishing a foundation is not only about educational foundations. But it also includes, among others, in the social, humanitarian and religious fields.

The foundation in Dutch is called Stichting. Before the existence of regulations specifically regulating Stichting, it did not mean that in Indonesia there were absolutely no provisions governing foundations. Sporadically in several articles the law is called a foundation, such as: Article 365, Article 899, Article 900,

Article 1680 of the Civil Code, then in Article 6 paragraph (3) and Article 236 Rv, and Article 2 paragraph (7) of the Law Bankruptcy (Faillissements-verordening).¹

In Indonesia, there were regulations regarding the foundation after 56 years of independence. Regulations which regulate the foundation specifically, namely Law No. 16 of 2001 concerning Foundations promulgated on August 6, 2001, in the Republic of Indonesia State Gazette of 2001 No. 112 and Additional Republic of Indonesia Gazette No. 4132 and entered into force on August 6, 2002. The Law No. 16 of 2001 concerning the Foundation changes into Law No. 28 of 2004 promulgated on October 6, 2004, in the Republic of Indonesia State Gazette of 2004 No. 115 and Additional Republic of Indonesia Gazette No. 4430, and entered into force on October 6, 2005.

Before the enactment of the Law Foundation No. 16 of 2001 in conjunction with Law No. 28 of 2004, hereinafter referred to as the Foundation Law, the status of the foundation as a legal entity is still weak because it is subject to rules based on habits that live in the community and MA jurisprudence. As Scholten argues (translation) that, "a foundation legal entity can be established in the absence of interference from the authorities and that custom and jurisprudence jointly stipulate that rule."²

In line with this, Anwar Borahima wrote in his book that the founding of a foundation is based solely on the habits of the community, because there are no laws and regulations that regulate the establishment of a foundation, as well as the necessity of establishing a foundation through a notary deed. As a result of the debate about the status of the foundation as a legal entity or not still continues.³

With the enactment of the Foundation Law, it is explicitly stipulated that the foundation must be a legal entity. To obtain the status of the legal entity, the foundation must have a foundation deed (Article 9 paragraph (2) of the Foundation Law) which is approved by the Minister of Justice and Human Rights (Article 11 paragraph (1) of the Foundation Law). Arrangements in Article 1 number (1) of the Foundation Law, "Foundations are legal entities consisting of separated assets to achieve certain goals in the social, religious and humanitarian fields, which have no members."

It is important for a foundation to obtain the status of a legal entity because it has clear provisions governing this. Foundations established before the Foundation Law must make adjustments to the foundation's articles of association. It is intended that all activities carried out by the foundation have a legal basis in accordance with the laws and regulations. However, in reality in the community, there are still many foundations that are not yet legal entities but still exist in carrying out the business activities of their foundations.

There is a tendency for people to choose the form of a foundation, partly because of the simple process of establishment, without requiring authorization from the government, and the perception of the community that the foundation is not a source of tax.⁴ In line with this, concerns arose whether this form of legal entity

¹ Anwar Borahima. (2010). *Kedudukan Yayasan Di Indonesia (Eksistensi, Tujuan, dan Tanggung Jawab Yayasan)*. Kencana Prenada Group. Jakarta, pp. 1.

² R. Ali Rido. (2004). *Badan Hukum dan Kedudukan Badan Hukum Perseroan, Perkumpulan, Koperasi, Yayasan, Wakaf*. PT. Alumni. Bandung, pp. 109.

³ Anwar Borahima, *op. cit.*, pp. 22.

⁴ Setiawan. (1992). *Aneka Masalah Hukum dan Hukum Acara Perdata*. Penerbit Alumni. Bandung, pp. 483-484.

foundation would only be used by the community to facilitate them in carrying out their business activities with the intention of being "veiled".

In fact, there are still many foundations that continue to carry out their foundation activities but have not made adjustments to the foundation's articles of association regarding the status of legal entities. As the results of previous studies carried out by researchers in the framework of completing the final writing of the Law Faculty Law Hasanuddin University Masters Program in 2013 with the title *Existence of Foundations as Parties in Implementing Business Activities Viewed from the Foundation Law*, researchers obtained data that from 6 (six) samples the foundation studied, there is only 1 (one) sample foundation that has a legal entity. Whereas the other 5 (five) samples of the foundation have not been legal entities but continue to carry out the business activities of the foundation. Furthermore, based on the results of the research, it is known that there is no government agency appointed to supervise the existence of foundations in Indonesia, especially related to the status of legal entities of a foundation, whether a foundation already has a clear legal umbrella when using the name "foundation".

Based on the above, it is important to conduct this research, because, with the existence of accurate data relating to legal entities and foundations that are not legal entities, foundations can be identified that implement the founding objectives of the foundation in accordance with their founding deeds and foundations. foundations that use the name "foundation" are only to be used as a cover for collecting wealth and forget about the idiosyncratic goals of establishing a social, religious and humanitarian foundation.

Seeing the problems stated above, makes the writer to examine, study and analyze the implementation of the function of a tool of social control on adjusting the foundation's articles of association and applying sanctions to foundations that have not made adjustments to the foundation's articles of association.

2. METHOD

Socio-legal research, which is legal research conducted by examining and examining the facts based on observations at the location of the study which is then reviewed based on legislation related to the reference to solve the problem. The data used are primary, secondary and tertiary legal materials.⁵ The method of data collection is done by using interview techniques, namely data collection efforts carried out by holding questions and answers directly with a list of questions that have been prepared in advance relating to the object of research. In addition, data is collected through a review process of documents relating to the object of research from each sample of the foundation.

3. RESULTS AND DISCUSSION

3.1. Implementation of the A Tool of Social Control Function on Adjustment of the Foundation's Articles of Association.

The function of law as a social control tool is to establish the behavior that is considered to be from the rule of law. In addition, to determine sanctions or actions

⁵ Julianto Jover Jotam Kalalo, Chyntia Novita Kalalo. (2018). Legal Protection Against Health Workers in Taking First Aid Medical Measures. *Musamus Law Review*, 1(1), pp 40-52

taken by law in the event of a deviation.⁶ The legal function as a social control tool, that:⁷

- a. The function of law as a social control tool does not run alone in the community, but together with other social institutions;
- b. The function of law as a social control tool is a passive function, meaning that the law adapts itself to the reality of society.

Whether or not the legal function is implemented as a social control tool, is determined by 2 (two) things, namely:⁸

- a. The factor of the rule of law itself; and
- b. Acting factor (person) is legal.

Associated with the rule of law as a social control tool that regulates the foundation, as described in the explanation of the previous chapter concerning the understanding of the foundation after the existence of the Foundation Law Article 1 point (1), namely the Foundation is a legal entity consisting of assets separated and destined for achieve certain goals in the social, religious and humanitarian fields, which have no members.

Based on the above understanding, several important elements can be identified from the Foundation, which is as follows:⁹

1. The foundation is a legal entity;
2. Foundations established or formed from wealth separated from the wealth of the founder;
3. Foundations have goals in the social, religious and humanitarian fields;
4. Foundations do not have members.

The position of the foundation as a legal entity before the existence of the Foundation Law is still weak because it is only subject to rules based on habits that live in society and MA jurisprudence. But with the enactment of the Foundation Law, the status of the foundation as a legal entity is clear.

With the recognition of the Foundation as a legal entity as in the provisions of Article 1 number (1) of the Foundation Law, where the status of the foundation legal entity was originally obtained from an open system of determining a legal entity (*het open Rechtspersonen van system*), turned into a closed system (*de Gesloten van Reschtspersonen system*). This means that now the foundation becomes a legal entity because of laws or based on laws, no longer based on an open system based on customs, doctrines and supported by jurisprudence.¹⁰ The matter concerning when the Foundation obtains the status of its legal entity, namely after the deed of the establishment has been approved by the minister who has the authority to do so in this case authorized by the Minister of Justice and Human Rights (Article 11 paragraph (1) Law No. 28 the Year 2004).

It is important to know the legal certainty of a foundation whether the foundation is a legal entity or not a legal entity. This is because in Article 3 paragraph (1) of the Foundation Law stipulates that, "The Foundation can conduct business activities to support the achievement of the aims and objectives by establishing a business entity and/or participating in a business entity."

⁶ Ahmad Ali. (2008). *op.cit.*, pp. 71.

⁷ *Ibid.*, pp. 72.

⁸ *Ibid.*

⁹ Mulhadi. (2010). *op.cit.*, pp. 194.

¹⁰ Chatamarrasjid Ais. (2006). *Badan Hukum Yayasan (Edisi Revisi)*. Pt. Citra Aditya Bakti. Bandung, pp. 2.

The social body if doing business, the goal is not to seek profit, but to do something that is idiomatic or philanthropic or charitable even though it is not impossible that the foundation benefits. In line with the description above, in his book Chatamarrasjid writes that, in business activities carried out by foundations, foundations may still benefit as long as the profits obtained are used for idealistic purposes which are social, religious and humanitarian. Businesses that obtain this benefit aim that the foundation does not depend on assistance and donations.¹¹

The concern arises, whether this form of legal entity foundation will only be used by the community to facilitate them in carrying out their business activities with the purpose of "covert". As described by Rudhi Prasetya in his book that, there are 3 (three) types of foundations, among others:¹²

1. The first type, the foundation's activities are solely collecting funds from benefactors, for the funds collected are donated to social activity agencies, such as providing scholarships, donating orphanages, hospitals, and others, with the foundation does not interfere at all in social administration such as educational institutions, nursing homes, hospitals, etc. concerned social institutions. This type is an ancient classic type of foundation.
2. The second type is that the foundation directly organizes the relevant social institutions themselves, the foundation establishes educational institutions, universities, hospitals, while at the same time seeking excess results for the excess of these results reinvested to intensify social activities.
3. The third type, the foundation establishes a limited liability company that runs businesses such as factories, profit-seeking business entities, for the results of dividends earned donated to social activities organized by other parties or organized by the foundation itself. This type is further regulated in Article 7 of the Foundation Law.

However, there is one more type of foundation that cannot be justified, because this type is actually a type of "hidden foundation". How in the Netherlands before the Stichtingen Wet op, flourished like mushroom abuse stichting. Various verkapte / pseudo stichtingen (covert stichting) arise. Even at that time stichting was established which was established for various business ventures, such as press exploitation, savings banks, and other activities that should be carried out in the form of B.V.¹³

¹¹ Chatamarrasjid Ais, *op. cit.*, pp. 78.

¹² Rudhi Prasetya. (2012). *op.cit.*, pp. 62-63.

¹³ *Ibid.*, pp. 64

In 2013, the authors carried out preliminary research on foundations to research the completion of the Law Faculty of Law at Hasanuddin University's master's program, with the research theme The Existence of the Foundation as Parties in Implementing Business Activities Viewed from the Foundation Law. In the study, the focus of the research was on the business activities carried out by the foundation whether or not it was in accordance with the regulations in the Foundation Law. However, in the study data was also obtained that in an institution that uses the name "foundation" in terms of carrying out its business activities must fulfill the requirements set by the laws and regulations concerning the requirements to become a foundation, one of the conditions intended is that the foundation is a legal entity. Data obtained in 2013 out of the 6 (six) foundation samples studied, it was found that only 1 (one) sample was incorporated. While 5 (five) samples of other foundations have not been incorporated. Based on the results of a 2017 study conducted in Makassar City on 3 foundation samples consisting of 1 (one) social purpose-based foundation sample, 1 (one) sample religious purpose foundation, 1 (one) sample of charity-based foundations, data still obtained that of the 3 (three) samples of this foundation, only 1 (one) sample was a legal entity, namely the Bakti Bumi Persada Foundation which obtained its legal status in December 2014. While for 2 (two) other foundation samples it was still not a legal entity.

Table. Legal Entity Foundation Status at Research in 2017

No.	Name of Foundation	Legal Status	Date of Establishment
1	Bakti Bumi Persada Foundation	Incorporated	22 April 2003
2	Islami Center Foundation	Not yet legal	11 Maret 1994
3	Nirwana Indonesia Foundation	Not yet legal	7 Desember 2004

Secondary data: September-October 2017

Based on research data, the Bakti Bumi Persada Foundation obtained its legal status with a Decree of the Minister of Law and Human Rights No. AHU-10390.50.10.2014 Regarding Ratification of the Establishment of the Legal Entity of the Bakti Bumi Persada Foundation on December 10, 2014.

Based on the results of the interview with Andi Mustaman¹⁴, that the Bakti Bumi Foundation made adjustments to the foundation's articles of association using the notary deed of establishment which was adjusted to the Foundation Law because the management of the Bakti Bumi Persada Foundation wished to obtain the status of a legal entity so that the foundation in carrying out its business activities had a clear legal basis and the third can trust the foundation.

Andi Mustaman¹⁵ explained, that currently the procedure for obtaining ratification of the status of a legal entity foundation from the Ministry of Law and Human Rights is no longer complicated. The Bakti Bumi Persada Foundation only conducts the process of adjusting the founding foundation's articles of association

¹⁴ Interview with Andi Mustaman, Chairperson of the Bakti Bumi Persada Foundation, September 21, 2017 at the Office of the Bakti Bumi Persada Foundation.

¹⁵ *Ibid.*

as stipulated in the Foundation Law in the notary's office, then the notary conducts a request for ratification of the notary deed of the establishment of the Bakti Bumi Persada Foundation to the Ministry of Law and Human Rights and the approval process from The Minister of Law and Human Rights occurs in a relatively short time, ie less than 1 (one) month.

At present, there is indeed a path for the application for ratification of the status of a legal entity that facilitates all parties, especially the management of the foundation. This is because the application process can be done online via the AHU website page at <http://ahu.go.id> then clicking on the "SIMPADHU" menu. After that, it will appear on the computer screen. Check Booking Voucher Numbers that must fill in some data. In the Legal Services Service column can be selected, for example, "Legal Entity". In Sub-Legal Services Sub-Services can be filled, for example, "Approval of Use of Foundation Name". Then for the Name of Applicant column, the applicant or subscriber can be done by the general public who wants to ratify the name of the foundation or can also be by a notary appointed by a foundation.

The procedure for establishing a foundation as a legal entity is further regulated by Government Regulation No. 63 of 2008 concerning the Implementation of the Foundation Law. Based on Article 3 paragraph (1) letter (a) PP No. 63 of 2008 concerning the Implementation of the Law of this Foundation regulates that foundations are recognized as legal entities as referred to in Article 71 paragraph (1) of the Foundation Law.

Article 71 paragraph (1), (2), (3), and (4) regulate that:

- (1) When this law comes into force, the foundation is:
 - a. Registered in the District Court and announced in addition to the State Gazette of the Republic of Indonesia; or
 - b. has been registered with the District Court and has permission to carry out activities from the relevant agencies; continue to be recognized as a legal entity provided that within a period of no later than 3 (three) years from the date this Law comes into force, the foundation is obliged to adjust its Articles of Association to the provisions of this Law.
- (2) A foundation that has been established and does not fulfill the conditions as referred to in paragraph (1), can obtain the status of a legal entity by adjusting its Articles of Association to the provisions of this Law, and submit an application to the Minister within a period of 1 (one) year from the date this Law comes into force.
- (3) The foundation as referred to in paragraph (1), must be notified to the minister no later than 1 (one) year after the implementation of the adjustment.
- (4) Foundations that do not adjust their Articles of Association within the period as referred to in paragraph (1) and the foundation as referred to in paragraph (2), cannot use the word "Foundation" in front of their names and can be dissolved based on Court decisions at the request of the Prosecutor or interested parties.

Based on Article 71 of the Foundation Law both paragraphs (1), (2), (3), and (4), the whole stipulates that for foundations that exist before the Foundation Law, it is obligatory to adjust the Articles of Association with the provisions of the Act - About this Foundation. Provisions for foundations registered in the District Court and announced in the Supplementary State Gazette of the Republic of Indonesia are given within 1 (one) year at the latest to notify the minister after the foundation

has adjusted the Articles of Association. This provision is different for foundations that have been registered in the District Court and have permission to carry out activities from related institutions, are still recognized as legal entities provided that within the period of 3 (three) years from the enactment of this Foundation Law, foundations are required to adjust their Articles of Association with the provisions of the Foundation Law. Furthermore, the provisions for foundations which have been established and do not fulfill the provisions referred to in paragraph (1) can also be obtained by obtaining the status of their legal entity by adjusting their Articles of Association with the provisions of the Foundation Law and submitting requests to the minister for the longest period of time. (one) year from the Foundation Law comes into force. In the provisions of Article 71 paragraph (4) of this Foundation Law, it is affirmed that for foundations which do not adjust their Articles of Association within the period as stipulated in paragraphs (1) and (2), they cannot use the word "foundation" in front of their names and can be dissolved based on court decisions at the request of the prosecutor's office or other interested parties, in this case the party concerned is a party directly concerned with the foundation.¹⁶ The arrangement of Article 71 paragraph (4) of the Foundation Law clearly confirms that the right to be a "foundation" will fall if the foundation does not make adjustments as stipulated in the Foundation Law.¹⁷

In addition to indicators regarding the status of legal entity foundations, there are also other indicators used to measure the effectiveness of the Foundation's Law, including the purpose and purpose of establishing foundations and organ foundations that should be adjusted as stipulated in the Foundation Law. However, based on the research data as described above, that of the 3 (three) samples of the foundation, only 1 (one) sample is a legal entity. Therefore, the data obtained in the study is that only 1 (one) foundation has made adjustments in the founding articles of association of the foundation as stipulated in the Foundation Law, both in terms of adjusting the intent and purpose of founding the foundation and organ of the foundation.

The purpose and purpose of establishing the Bakti Bumi Persada Foundation after the foundation's articles of the association made adjustments to the Foundation Law, it was seen that the purpose and purpose of the foundation, namely in the social, humanitarian and religious fields. This is in line with the regulations in the legislation. As for supporting the achievement of the aims and objectives of the founding of the foundation, it is further stipulated in Article 3 paragraph (1) of the Foundation Law, which allows the foundation to conduct business activities by establishing a business entity and/or participating in a business entity.

Based on the research also obtained data that between arrangements regarding the purpose and purpose of establishing a foundation stipulated in the Foundation Law with the intent and purpose of establishing YIC contained in the Notarial Deed of Establishment of YIC No. 18 of 1994, there is no conformity of the intent and purpose as stipulated in the Law of the Foundation, namely the foundation aimed at the social, humanitarian and religious fields. This can also be

¹⁶ Fitri Pratiwi Rasyid. (2013). *Tesis "Eksistensi Yayasan Sebagai Pihak Dalam Melaksanakan Kegiatan Usaha Yayasan Ditinjau dari Undang-Undang Yayasan"*. Makassar, pp. 79.

¹⁷ *Ibid.*, pp. 80

understood because remembering the notary deed which was used as the YIC statute was made long before the Foundation Law was currently in force in Indonesia. However, according to the researcher, it cannot be used as justification by the management of the foundation, especially the Islamic Center because the duties and obligations of a foundation organization must carry out its obligations in managing the foundation well including adjusting the status of the foundation it manages in order to have a clear legal status as a legal entity. The intent and purpose of establishing the Nirwana Indonesia Foundation are also not very different from the Islamic Center Foundation, it is known that the purpose and purpose of establishing the Nirwana Indonesia Foundation are not as stipulated in the Foundation Law. Whereas to obtain and manage the status of a legal entity a foundation, things that need to be adjusted to the Foundation Law also relate to the conformity of the purpose and purpose of establishing a foundation with the arrangements contained in the Foundation Law.

The organ structure of the foundation as attached in the Decree concerning the Establishment of the Legal Entity of the Bakti Bumi Persada Foundation has also been in accordance with its composition as stipulated in the Foundation Law, which consists of Trustees, Managers, and Supervisors. The Bakti Bumi Persada Foundation consists of 1 (one) supervisor, 3 (three) administrators, and 1 (one) supervisor of the foundation. Based on research, that the people who become the organ of the foundation in the Bakti Bumi Persada Foundation still have close family ties. This can be seen from the appendix of the notary deed of the establishment of the Bakti Bumi Persada Foundation, which is the supervisor of this foundation is the wife of the chairman of the foundation's management. The researcher argues, that the Bakti Bumi Persada Foundation still carries out overlapping management practices as happened when researchers conducted research in 2013 even though the notary deed of founding the foundation and in the Decree of Ratification of the Legal Entity of the Bakti Bumi Persada Foundation was arranged more systematically. Andi Mustaman¹⁸ explained that the organ of the foundation was indeed arranged according to what was desired by the Law of the Foundation, but in carrying out the operations of the foundation, especially in carrying out one of the business activities of the Bakti Bumi Persada Foundation, namely STIE Wira Bhakti, there was no clear separation between the management of the foundation and management of STIE Wira Bhakti. This was acknowledged by Andi Mustaman because the foundation was a family foundation and the number of people was limited so that the management still involved the closest people.

Whereas, regarding concurrent positions, the Foundation Law has been regulated in Article 7 paragraph (3), that members of the Foundation Trustees, Managers and Supervisors are prohibited from concurrently as Members of the Board of Directors or Management and Members of the Board of Commissioners or Supervisors as referred to in paragraph (1) and paragraph (2). The purpose of this prohibition is to double the position, in the Elucidation of Article 31 paragraph (3), to avoid the possibility of overlapping of authority, duties, and responsibilities between the Trustees, Managers, and Supervisors that can harm the interests of the Foundation or other parties.

¹⁸ Interview with Andi Mustaman, Chairperson of the Bakti Bumi Persada Foundation, September 21, 2017 at the Office of the Bakti Bumi Persada Foundation.

As explained in the previous explanation that the Islamic Center Foundation (YIC) is a research sample of foundations that have not been incorporated so that their founding deeds from 1994 have not made adjustments to the Foundation Law until now. The organ structure of the Islami Center Foundation is not yet in accordance with what is stipulated in the Foundation Law. This can be considered reasonable considering that YIC is only based on the founding notary deed made in 1994. Even in the structure of the YIC organ, if you pay close attention, that the people listed in the YIC management structure, most of them have died. Therefore, I strongly recommend that people who are still actively managing the Islamic Center Foundation must immediately adjust the constitution of the latest Islamic Center Foundation so that the Islamic Center can continue to use the name "foundation". Adjustments that must be made are related to the aims and objectives of the founding of foundations, foundation organs and so on so that the Islamic Center Foundation will immediately obtain legal entity status and be able to carry out all its activities as a "foundation".

For the organ structure of the Nirwana Indonesia Foundation, based on interviews with Sulhan ¹⁹, that the Nirwana Foundation is a foundation that was established with the intention and purpose of managing family wealth so that the people involved as administrators of the foundation are people who have a family relationship.

After conducting research and analyzing the 3 (three) foundation samples, the author argues that the Foundation Law is, in fact, ineffective in regulating the foundation. This is due to the fact that both foundations with legal entities and foundations that have no legal entity can continue to use the name "foundation" in carrying out their business activities even though the foundation's articles of association have not been adjusted to the Foundation Law to obtain legal entity status. In fact, in a community, having a legal entity or not having a legal entity does not affect a foundation in the use of the name "foundation" and in conducting business activities. The Foundation can continue to use the name "foundation" even though it has not made adjustments to the foundation's articles of association with the Foundation Law and has not been approved by the Ministry of Law and Human Rights.

Based on the results of the study, out of 3 (three) foundation samples, there was only one (1) sample of legal entities. But from the results of the study it was also known that even though the foundation had a legal entity status, also in its arrangement there were still those that were not as stipulated in the Foundation Law, such as foundations that had legal entities but in the management of the organ of the foundation were carried out in a family and concurrent position. This can occur because there is no oversight function from government agencies which are further regulated in the Foundation Law to carry out the control function. In the Law, the Foundation only regulates procedural matters for registering the status of a legal entity. Likewise with the substance of the implementing regulations of the Foundation Law. However, the researcher regretted that the current Foundation Law with a control function to regulate procedural matters for the registration of legal entities for foundations in Indonesia did not go as expected. This can be seen based on the results of research conducted that there are still foundations that have

¹⁹ Interview with Sulhan, Director of CV. Nirvana, on October 28, 2017.

not been incorporated and still use the name "foundation" in carrying out their business activities.

Legal certainty is a condition for giving birth to order. To achieve legal order, the order is needed in society. Law is defined as a legal order of written positive law. The application of the law in the community is no longer to achieve justice alone, but also must provide certainty. Legal certainty is expected to be a guideline, both for the community and for the legal apparatus in making decisions.²⁰

Until now, legal certainty which is a requirement to give birth to order, especially in the arrangement of foundations, even though there is already a Foundation Law that requires foundations to adjust the foundation's articles of association and get approval from the Ministry of Law and Human Rights to obtain legal status, still not implemented well, so it is not surprising if the community can still be found in the implementation of foundation activities including varied business activities and sometimes not in accordance with the purpose of founding the foundation as stipulated in the Foundation Law.²¹

In addition, the element of legal certainty regarding the obligation of a foundation to adjust the articles of association of its foundation in order to obtain the status of a legal entity is difficult to obtain due to the inconsistency of legislative regulations governing the foundation. This is because the publication of changes to Government Regulation No. 63 of 2008, in January 2013, became PP No. 63 of 2008 jo PP No. 2 of 2013. In Article 37A paragraph (1) PP No. 63 of 2008 jo PP No. 2 of 2013 stipulates that in the event that the amendment to the Articles of Association as referred to in Article 37 paragraph (1) is carried out for foundations which have not been able to use the word "foundation" before their names, the foundation must meet the following requirements:

- a. At least for 5 (five) consecutive years before the adjustment of the Articles of Association still conduct business activities in accordance with their Articles of Association;
- b. Never been dissolved.

In Article 37A paragraph (1) PP No. 63 of 2008 jo PP No. 2 of 2013 shows that there is no regulation regarding the setting of deadlines for the foundation to adjust its statutes to immediately obtain legal entity status. The researcher argues that the article provides flexibility for foundations that have no legal entity to be able to continue to use the name "foundation" on the condition that they continue to carry out their foundation business activities in accordance with the articles of association of each foundation and the foundation has never been dissolved. This is different from the arrangement in Article 37 paragraph (1) PP No. 63 of 2008 which stipulates that changes in the foundation's articles of association are recognized as legal entities according to the provisions of Article 71 paragraph (1) of the Foundation Law carried out by the organ of the foundation in accordance with the foundation's articles of association concerned.

In PP No. 63 of 2008, it is regulated that a foundation can obtain the status of a foundation legal entity by following the provisions stipulated in Article 71 of

²⁰ <http://repository.usu.ac.id/bitstream/123456789/18439/4/chapter%201.pdf>, downloaded on November 11, 2017.

²¹ Fitri Pratiwi Rasyid, *op.cit.*, pp. 192-193.

the Foundation Law, which if there is no adjustment to the articles of association of a foundation, then the foundation cannot use the name "foundation".

However, with the change in PP No. 63 of 2008 became PP No. 63 of 2008 jo PP No. 2 of 2013, which does not set a time limit for the foundation to make adjustments to the foundation's articles of association, may result that foundations that are not in accordance with the objectives of the Foundation Law, can continue to use the name "Foundation" and carry out the business activities of the foundation.

3.2. Application of Sanctions Against Foundations that Have Not Made Adjustments to the Foundation's Articles of Association

As explained in the explanation at the beginning of the discussion of the results of the study, that before the Foundation Law there was uncertainty about the legal status of a foundation, whether the foundation must be incorporated or not be incorporated. However, with the existence of the Law, the Foundation provides certainty that a foundation can use the name "foundation" if it has obtained legal entity status. This can be done by means of the foundation having to make adjustments to the foundation's articles of association by regulating the Foundation Law and then obtaining approval from the Minister of Law and Human Rights of the Republic of Indonesia.

However, as the results of research conducted in Makassar City on 3 (three) samples of foundations, each of which consists of 1 (one) sample of social purpose-based foundations, 1 (one) sample foundation aimed at the humanitarian field, and 1 (one) sample of foundation that aims at the religious sector, there is only one (1) sample of legal entity foundations, while 2 (two) samples of other foundations are not legal entities. However, even though the two (two) samples of the foundation have not yet obtained status as legal entities, the foundations remain and still use the name "foundation". The foundations continue to carry out the business activities of the foundation using the name "foundation".

This happens because as described in the explanation above, there is an inconsistency in regulation in regulating the necessity of foundations to obtain legal status. In the Foundation Law Article 71 paragraph (1), (2), (3), and (4) regulate the procedures and stages so that foundations are established, both before the existence of the Foundation Law and after the Foundation Law can obtain legal status as a legal entity. Even in Article 71 paragraph (4) it is explicitly regulated that foundations which do not make adjustments to their basic budget as stipulated in Article 71 paragraph (1), (2) and (3), then their rights fall under the name "foundation".

Arrangements regarding the obligation of the foundation to adjust the foundation's articles of association with the Foundation Law are increasingly emphasized by the regulation in PP No. 63 of 2008 Article 37 paragraph (1), that changes in the foundation's articles of association are recognized as legal entities according to the provisions of Article 71 paragraph (1) The Foundation Law is carried out by the organ of the foundation in accordance with the foundation's articles of association.

However, with the change in PP No. 63 of 2008 became PP No. 63 of 2008 jo PP No. 2 of 2013 specifically Article 37A paragraph (1) which regulates, that in the case of amendments to the Articles of Association referred to in Article 37

paragraph (1) PP No. 63 of 2008 carried out for foundations that have not been able to use the word "foundation" in front of their names, the foundation must meet the following requirements:

- a. At least for 5 (five) consecutive years before the adjustment of the Articles of Association still conduct business activities in accordance with their Articles of Association;
- b. Never been dissolved.

With the arrangement in Article 37A paragraph (1) PP No. 63 of 2008 jo PP No. 2 of 2013 which does not regulate the existence of a time limit for the foundation to adjust its foundation articles of association with the Foundation Law so that the foundation can obtain the status of a legal entity, resulting in regulatory inconsistencies regarding the necessity of a legal entity and many found foundations in the community the foundations carry out all the business activities of the foundation while still using the name "foundation".

The researcher argues that with inconsistencies regarding the arrangement of foundations that must be legal entities, of course, it results in the regulation of sanctions if the foundation is not a legal entity but still uses the name "foundation". There are no sanctions, both administrative sanctions, civil sanctions or criminal sanctions stipulated in the Foundation Law and in government regulations on foundations that can result in a deceased "rights" foundation using the name "foundation" if the articles of association of a foundation have not been adjusted to Foundation Law.

4. CONCLUSION

The presence of the Foundation Law to carry out social control functions about the existence of foundations in community life has not been effective in its implementation. It can be seen that the Foundation Law explicitly regulates the limit that a foundation must be a legal entity. However, in reality, what happens in the community is that there are still many foundations that have not yet obtained the status of a foundation legal entity because they have not adjusted their foundations' foundations under the Foundation Law but still use the name "foundation". Another indicator that becomes a benchmark for the ineffectiveness of the Law's Foundation is the conformity of the aims and objectives of founding foundations with the intent and purpose as stipulated in the Foundation Law. In addition, other indicators based on research data, foundations both foundations and legal entities tend to violate the provisions regarding dual positions by the foundations' organs so that foundations can be found in a foundation that serves concurrently in business activities. established by the foundation. The inconsistency of the regulation regarding the foundation must be a legal entity resulting in the regulation of sanctions on a foundation which if not incorporated is not contained in the Foundation Law. There is no regulation of sanctions, both civil, administrative and criminal sanctions which regulate if a foundation has not yet obtained legal status and has not adjusted its foundation articles of association under the Foundation Law but still uses the name "foundation".

REFERENCES

- Ahmad Ali. (2008). *Menguak Tabir Hukum*, Ghalia Indonesia, Bogor.
- Anwar Borahima. (2010). *Kedudukan Yayasan Di Indonesia (Eksistensi, Tujuan, dan Tanggung Jawab Yayasan)*, Kencana Prenada Group, Jakarta.
- Chatamarrasjid Ais. (2002). *Badan Hukum Yayasan (Edisi Revisi)*, Citra Aditya Bakti, Bandung.
- Chidir Ali. (2011). *Badan Hukum*, Alumni, Bandung.
- Departemen Pendidikan dan Kebudayaan. (1991). *Kamus Besar Bahasa Indonesia*, Balai Pustaka, Jakarta.
- Fitri Pratiwi Rasyid. (2013). *Eksistensi Yayasan Sebagai Pihak Dalam Melaksanakan Kegiatan Usaha Ditinjau Dari Undang-Undang Yayasan*, Tesis, Fakultas Hukum, Universitas Hasanuddin.
- Ichsan, Achmad. (1986). *Dunia Usaha Indonesia*, Pradnya Paramita, Jakarta.
- Julianto Jover Jotam Kalalo, Chyntia Novita Kalalo. (2018). Legal Protection Against Health Workers in Taking First Aid Medical Measures. *Musamus Law Review*, 1(1), pp 40-52
- Kansil, C.S.T., et al, (2005). *Hukum Perusahaan Indonesia (Aspek Hukum Dalam Ekonomi)*, Pradnya Paramita, Jakarta.
- Muhammad, Abdulkadir. (2000). *Hukum Perdata Indonesia*, Citra Aditya Bakti, Bandung.
- Mulhadi. (2010). *Hukum Perusahaan, Bentuk-Bentuk Badan Usaha Di Indonesia*, Penerbit Ghalia Indonesi, Bogor.
- Murjiyanto, R. (2011). *Badan Hukum Yayasan*, Liberty Yogyakarta, Yogyakarta.
- Preasetya, Rudhi. (2012). *Yayasan Dalam Teori dan Prakti*,. Sinar Grafik, Jakarta.
- Rido Ali, R. (2004). *Badan Hukum dan Kedudukan Badan Hukum Perseroan, Perkumpulan, Koperasi, Yayasan, Wakaf*, Alumni, Bandung.
- Setiawan. (1992). *Aneka Masalah Hukum dan Hukum Acara Perdata*, Penerbit Alumni, Bandung.