The legal position of adjustment of the deed made without involving one of the founding parties of the foundation (Case Study of Decision Number 1/Pdt. G/2020/PN. Bau)

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Abstract
The Articles of Association of the Foundation in its rules can be changed except regarding the purpose and objectives of the foundation. Amendments to the foundation’s articles of association are carried out with the application submission procedures. They are regulated in Article 15 to Article 23 of Law Number 16 of 2001 concerning foundations. The foundation’s founder is one of the parties that plays an important role in every action. Moreover, Article 28 paragraph 4 of the Foundation Law states that if the Foundation for any reason no longer has a Trustee, no later than within 30 (thirty) days from the date of vacancy, the Management members and Supervisory members must hold a joint meeting to appoint a Trustee by taking into account the provisions referred to in paragraph (3). Such an event requires the role of a Notary to make a Deed of Minutes of the Meeting to record the changes in the deed to replace the management in the deed of amendment or adjustment of the foundation.

I. Introduction

The deed of establishment is an instrumental document established and authorized by a notary. The foundation law states that the deed of establishment of a foundation must contain the articles of association and some other information recorded in the deed of establishment of the foundation. The foundation deed is authentic and becomes evidence that can be used in court. Article 1868 of the Civil Code states, "An authentic deed is a deed made and determined by law made before an authorized public official."¹

A well-established foundation must comply with the transitional provisions contained in the Foundation Law where the existing foundation is still recognized as a legal entity if it has fulfilled the requirements stated in Article 71 paragraph (1) and paragraph (3) of the Foundation Law. One or more persons establish the foundation by separating part of the founder's assets as initial wealth, which is done by notarial deed and established by the laws and regulations stipulated by the Government. The establishment of the foundation is considered valid if it fulfills the requirements, namely 2: The deed of establishment of the foundation is registered with the Registrar of the District Court, whose jurisdiction covers the domicile of the foundation; finally, the deed of establishment or articles of association of the foundation are published in the Supplement to the State Gazette of the Republic of Indonesia.

The foundation must have a specific and clear purpose and be ideal and not contrary to decency, public order, the rule of law, and public interest. The foundation is a legal entity with social, religious, and humanitarian purposes and objectives, consisting of Trustees, Management, and supervisors. The strict separation between the functions is done to affirm the strict separation between the functions, authorities, and duties of each organ regarding the relationship between the parties to avoid internal conflicts of the foundation that could result in losses between the interests of the foundation and other parties related to the foundation.3

The founder of the Foundation is one of the parties that plays a vital role in its establishment. This is because the founder of the Foundation separates his wealth to become the initial wealth of the Foundation. Likewise with the role of the Foundation's coach, especially in Article 28 paragraph 4 of the Foundation Law states that if the Foundation for any reason no longer has a coach, no later than within 30 (thirty) days from the date of the vacancy, the Management members and Supervisory members must hold a joint meeting to appoint a coach by taking into account the provisions referred to in paragraph (3). In this case, it requires the role of a Notary to make a Deed of Minutes of Meeting to record the changes in the deed to the replacement of the management in the deed of amendment or adjustment of the Foundation.

Another case occurred in Decision Number 1/ Pdt. G/2020/PN. Bau originated from a lawsuit from one of the founders, namely HSU, one of the founders of the Qaimuddin Islamic Education Foundation, based on deed number 55 dated September 28, 1993 made before Notary AKS. As the Plaintiff, HSU and several administrators intend to open a high school of tarbiyah science by taking care of campus licensing up to the recruitment of school office staff and

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2 Undang-Undang Republik Indonesia Nomor 16 Tahun 2001 Tentang Yayasan (Indonesia).
new students. After the STIT was running smoothly and limited only to the science of tarbiyah, in 1995, HSU and other administrators carried out school development until the establishment of STAI, which was in the Qaimuddin Islamic Education Foundation. After 2004 STAI was led by Rihmadi until 2005 then from 2005 to 2009 was led again by HSU; accumulated financial handover from HSU to STAI amounting to Rp. 2,100,000,000.

According to HSU’s testimony as one of the founders, the defendants in this case in 2010 did a deed to remove HSU as a board member before HP Notary with deed Number 10 dated July 09, 2010. HSU only learned of the existence of this deed a few months into the year in which this lawsuit was made and then tried to confirm by visiting the HP notary and the deed that was made.

That with the existence of the deed, according to HSU, the deed of establishment does not follow the procedures stipulated in the rules of the Foundation Law and the Regulation of the Minister of Law and Human Rights regarding the procedures for submitting the Articles of Association and submitting the Notice of Articles of Association and Changes in foundation data, Government Regulation Number 20 of 2013 concerning Amendments to Government Regulation Number 63 of 2008 concerning the implementation of the Foundation Law. The deed made before the HP Notary is not a deed of change. However, the deed of establishment of the foundation made and HSU provides certainty that since 1993 the Qaimuddin Islamic Education Foundation until 2020, there has never been a meeting of the Founders / Trustees of the foundation to discuss changes in the composition of the management or changes in the deed of the foundation.

Based on the case, it is known that the decision states that before the enactment of the Foundation Law, there was no legislation explicitly regulating the Foundation in Indonesia. The word Foundation does exist in several articles in the Civil Code (Articles 365, 899, 900, 1680) and Rv (Article 6 paragraph 3, and Article 236), but in these articles, there is no clear definition or "rules of the game" about the Foundation.4

In the case, the Plaintiff, HSU, asked the Panel of Judges to cancel the deed made by Notary HP but was rejected because the judge thought that it was impossible to be granted because the foundation was required to amend the articles of association following the provisions of Article 71 of Law Number 28 of 2004 and considered that the YPIG Foundation in the STAI college was not yet a legal entity in the deed made by Notary AKS.5 While this is different from the jurisprudence of the Supreme Court Decision dated June 27, 1973 Number 124K / Sip / 1973, which considers the position of a foundation as a legal entity. Therefore, based on the previous explanation, the problem in this study is the

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2. Research Method

The research used in this research is doctrinal research that specifically examines the law and systematizes written legal materials such as legislation and law books. Normative juridical research will refer to the analysis of legal norms to find validity based on scientific logic from the normative side. The approach in this form is carried out in the form of an effort to find the truth by looking at the principles contained in various laws and regulations, especially those related to laws and regulations related to foundations, foundation establishment, and foundation registration systems to become legal entities.

By using this method, it is expected to be able to answer the problems contained in this research, namely regarding the legal position of the deed of establishment of a foundation that has been made previously and made adjustments or changes back by existing legal principles, positive law related to the problem, and several other supporting theories.

3. Results and Discussion

Existence of Foundation Arrangements After the Enactment of the Foundation Law

Before the enactment of the Law on Foundations in Indonesia, there was a tendency for people to prefer the form of foundations because the establishment process was simple without authorization from the government and there was a wrong perception from the public that foundations were not tax subjects. The rules regarding foundations are also based on the customs that exist in the community and the jurisprudence of the Supreme Court. The Law was passed to ensure legal certainty and order so that the foundation functions in accordance with its purpose and objectives based on the principles of openness and accountability. Along with its development, the Law has yet to be able to accommodate all legal needs and developments in society. There are still many interpretations of the foundation, giving rise to uncertainty and legal disorder, ultimately providing opportunities for foundation founders to not comply with the provisions of the Foundation Law. Therefore, the Indonesian government changed Law No. 16 of 2001 with Law No. 28 of 2004.

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6 Soerjono Soekanto; Sri Mamudji, Penelitian Hukum Normatif Suatu Tinjauan Singkat, Cetakan Ke-11 (Jakarta: PT Raja Grafindo Persada, 2009).
The foundation is a legal entity that has the purpose and objectives of a social, religious, and humanitarian nature established by taking into account the formal requirements specified in the law, which in its amendment, if summarized, from the regulation states that starting from the establishment of the foundation that requires ratification to be required from the Ministry and the organs of the foundation have a period of service and are not allowed to hold positions concurrently and the foundation can be bankrupted.\(^8\)

The formulation of Article 11 paragraph (1) of the Foundation Law strengthens that the foundation, to obtain the status of a legal entity, must make a foundation establishment deed authorized by the Minister of Law and Human Rights for the validity of the existence of a legal entity so that the legal entity has feasibility, namely how far or not it conflicts with existing statutory provisions, especially the foundation. This formulation certainly carries the consequence that as a legal entity, the foundation has the characteristics and ability to act as befits a legal subject.

There is a change in Article 11 paragraph (1), which reads: "The foundation obtains the status of a legal entity after the foundation's deed of establishment as referred to in Article 9 paragraph (2), obtains authorization from the Minister." The amendment to Article 11 paragraph (1) of the Foundation Law has removed the authority of the Regional Office (kanwil) in providing ratification of a foundation legal entity and emphasized that the authority to authorize a foundation as a legal entity is in the hands of the Minister of Law and Human Rights\(^9\). Apply to become a legal entity, and the Notary who does the deed must apply for the foundation to become a legal entity. This is possible because many foundations unintentionally applied to become legal entities in the past.

Article 34 paragraph 1 of the Foundation Law Number 28 Year 2004 has been amended and reads, "The foundation management can be dismissed at any time based on the decision of the supervisory meeting." Based on the explanation of this article, there is an addition that the decision of the supervisory meeting can dismiss the foundation management. In article 38 paragraph (1) of the foundation Act No. 28 of 2004 has been amended and reads: foundations are prohibited from entering into agreements with organizations affiliated with the foundation, trustees, management or supervisors of the foundation as well as someone who works for the foundation.

Regarding the establishment of foundations, Article 12 paragraph (1) of Law No. 28 of 2004 has been amended to read, "Application for ratification as

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\(^9\) Gunawan Widjaja, *Yayasan Di Indonesia Suatu Panduan Komprehensif* (Jakarta: Elex Media Komputindo, 2002).
referred to in Article 11 paragraph (2) shall be submitted in writing to the minister." This rule abolishes the regional office in legalizing foundations, and foundations must submit their application to the minister to obtain legalization as a legal entity. Article between Article 13 and Article 14 becomes Article 13 A and reads "Legal Acts committed by the management on behalf of the foundation before the foundation acquires the responsibility of the management jointly and severally." This article makes the foundation's management by the foundation's organs have full responsibility to avoid irregularities against the foundation's organs.

Regarding the founder of the foundation, the Compendium of Foundation Law, compiled by the National Law Development Agency of the Ministry of Law and Human Rights in 2012, states that in practice, there are many legal smuggling in the form of transferring or distributing the results of business activities or other gains directly or indirectly to the Foundation's Trustees, Management, and Supervisors. The Trustees are the highest organ of the foundation, having veto rights. The appointment of members of the board of trustees is based on a meeting of the board of trustees or founders of the foundation. Members of the board of trustees are prohibited from holding concurrent positions as administrators, supervisors, and members of the board of directors' commissioners (in Limited Liability Companies where the foundation establishes or invests its shares). Trustees cannot act out on behalf of the foundation. In general, the Trustees are the foundation's founders, but there can also be other parties based on the decision of the Trustees' meeting.

**Legal Position of Deed of Amendment to the Articles of Association of the Foundation in Decision Number 1/Pdt. G/2020/PN. Bau Jo Decision Number 51/PDT.G/2020/PTKDI**

The formulation of Article 11 paragraph (1) of the Law that a foundation to obtain the status of a legal entity must make a deed of establishment of the foundation authorized by the Minister of Law and Human Rights made in the presence of a Notary where a strict separation of the functions, authorities, and duties of each organ of the foundation is intended to prevent internal conflicts of the foundation that can harm the interests of the foundation and other parties related to the activities of the foundation. The management of the wealth and the implementation of the foundation's activities are carried out entirely by the foundation's management.

To make it easier for people to register changes to the articles of association of their foundation to adjust to changes in the Foundation Law, the government issued Government Regulation Number 2 of 2013 concerning amendments to Government Regulation Number 63 of 2008 concerning the implementation of the Law on Foundations. This deed adjustment is to adjust the deed of establishment or articles of association with the laws and regulations related to
the foundation. If the adjustment is facing a notary after the enactment of Government Regulation Number 02 of 2013, then there are 2 options, in accordance with Article 15 A of the Government Regulation, it is adjusted by submitting an application for the deed of establishment of the foundation which attaches a copy of the deed, a report on the foundation's activities for at least the last 5 years signed by the foundation's management, attaching a statement letter of the foundation's management and a statement that the foundation has never been dissolved voluntarily, a copy of the Taxpayer Identification Number, a statement of the foundation's position and address, a written statement of the management about the value of assets at the time of adjustment, and proof of depositing the cost of validation and announcement of the foundation.10

The explanation of Article 15, it is explains that the holding of foundation deed adjustment rules is a treatment for foundations established before the enactment of the foundation law where previously foundations were not recognized by legal entities. However, it will be recognized as a legal entity after the adjustment because it does not adjust to the Foundation Law. Article 15 mentions the attachments that must be completed by foundations that cannot use the word 'foundation' in front of their name or foundations that have been deemed no longer exist because they have obtained the ratification of the foundation establishment deed by the Minister to obtain the status of a legal entity.

Then, the members are obliged to hold a joint meeting related to the appointment or dismissal of the coach. However, looking at history to be able to see the position of the foundation which is legally considered a legal entity since the enactment of Law Number 16 of 2001 concerning Foundations, the foundation is considered a private legal entity that is independent of the legal subject position of the founders or administrators. The foundation as a legal subject means that the foundation can perform legal acts, which can result in the existence of rights and obligations that are born and can become debtors and creditors.11 That way, the foundation is considered a private legal entity in the form of a legal entity with a strong juridical basis and can conduct business to have residual or permanent business results.

Based on the previous explanation when looking at this case, the foundation established with deed number 55 dated September 28, 1993, made before Notary AKS after enacting the Foundation Law, is considered not a legal entity anymore. There is an appeal for the organizers of the foundation to be able to adjust the foundation deed and legalize it to the Minister of Law and Human

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10 Peraturan Pemerintah Nomor 2 Tahun 2013 Tentang Perubahan Atas Peraturan Pemerintah Nomor 63 Tahun 2008 Tentang Pelaksanaan Undang Undang Tentang Yayasan (Indonesia).
Rights. Related to the rule that the establishment and changes to the foundation are carried out by notarial deed, referring to the provisions of Article 1868 of the Civil Code, explaining that a deed can be considered as an authentic deed if it has fulfilled the elements of having done a deed in a particular form following the provisions of the law and made by an authorized official who is in his position.\(^\text{12}\)

The notarial deed itself is a deed of partij and a deed of relaas where the deed of partij is a deed made before a notary, one of which is a deed of the statement of the decision of the foundation's board of trustees meeting. This deed is made based on the meeting minutes submitted to the notary, where the meeting results are then poured into the meeting minutes, which are then notarized by the notary as outlined in the deed so that the deed has perfect evidentiary power. Then, if a notary is present at the meeting, the minutes of the meeting will become an authentic deed that is relaas akta / ambtelijkakte. Where the Notary attends the meeting and does a deed in accordance with the contents of the meeting he attended so that he can be held accountable to the parties who are in the contents of the deed for the truth\(^\text{13}\).

The meeting of the foundation's trustees is required in connection with changes to the articles of association and foundation data, which is the basis of this trustees' meeting in the provisions of the Foundation Law and the foundation's Articles of Association. The meeting is carried out if the provisions of the Foundation Law do not carry it out then it cannot be implemented and if it is still implemented, then the results of its decisions become legally flawed.\(^\text{14}\)

The foundation as a legal entity should be implemented by the laws and regulations that have been issued. However, the claim that the foundation was not considered a legal entity before the Foundation Law was refuted by the Supreme Court Decision dated June 27, Number 2124k/sip/2973, which considered the foundation's position as a legal entity.

The respondent parties decided to conduct a general meeting of shareholders as regulated in the Foundation Law. However, the defendant parties did not do so when adjusting the articles of association. They immediately removed HSU's name from the list of founders when it was made before the HP notary. The lawsuit filed by HSU in this case requests the cancellation of the deed of foundation deed Number 10 dated July 09, 2010. The panel of judges


\(^{13}\) Nawaf Abdullah dan Munsyarif Abdul Chalim.

considered that the actions made by the parties were wrong. However, he did not have the authority to cancel the deed because the deed was by the statutory provisions in the Foundation Law.

When looking at the hierarchy of legislation, the highest is 1) the 1945 Constitution; 2) MPR Decree 3) Law; 4) Government Regulation; 4) Presidential Regulations; 5) Provincial Regional Regulations; 7) Regency Regional Regulations. Compared with the Supreme Court Decision dated June 27 Number 2124k/sip/2973, a judge's decision usually creates a new legal norm that previously did not exist. With the judge's decision, a legal subject, either a person or legal entity, who previously had no rights, becomes entitled. When considering the classification of judges' decisions, judges' decisions are included in state decisions, which in other forms are state decisions of a regulating nature (regeling) that have the same position as laws, government regulations, and other regulations.  

For state decisions in the form of laws and regulations, it can be submitted through judicial review or testing through the Supreme Court which can be in the form of laws and regulations under the law and testing to the constitutional court if what is tested is a law. Based on this explanation, it can be seen that the position of the law itself is of a higher level, so after the enactment of the Foundation Law, there is no longer any reason for the HSU to submit a deed cancellation because the deed made and considered an authentic deed, in this case, the truth is the deed made by Notary HP. The reason is that the foundation's position before 2001 was not considered legal, and the word foundation can no longer be used. However, when examined again, the actions of the parties sued, namely the other founders who did not hold a general meeting of the trustees before making adjustments, cannot be justified and can lead to defects in the deed made.

4. Conclusion

The Legal Position of Foundation Deed Adjustment Made Without Involving One of the Founding Parties of the Foundation (Case Study of Decision Number 1/Pdt. G/2020/PN. Bau) The deed made by the founding parties without involving HSU is an authentic deed and a deed that recognizes that the YIG foundation is a legal entity because it has been authorized by the Ministry of Law and Human Rights following the provisions of the Foundation Law. Compared with the Supreme Court Decision dated June 27 No. 2124k/sip/2973,

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a judge's decision usually creates a new legal norm that previously did not exist. With the judge's decision, a legal subject, either a person or a legal entity, who previously had no rights, becomes entitled.

The deed of adjustment made can result in legal defects because it does not make a deed following the provisions of the laws and regulations, namely, holding a meeting between the coaches. So there is no more reason for the HSU to submit the cancellation of the deed because, basically, the deed was made and considered to be an authentic deed. In this case, the truth is that Notary HP made the deed. The reason is that the foundation's position before 2001 was not considered legal, and the word foundation can no longer be used. However, when examined again, the actions of the parties sued, namely the other founders who did not hold a general meeting of the trustees before making adjustments, cannot be justified and can lead to defects in the deed made.

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