

THE ESSENCE OF OWNERSHIP RIGHTS OF COLLEGE FOUNDATION IN SOCIAL JUSTICE PERSPECTIVE

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ABSTRACT

This research is based on the essence of the ownership rights of higher education foundations in the perspective of social justice. By looking at several facts related to ownership rights and institutions and their management. This research method is normative with a philosophical approach, laws, theories/concepts, and cases. The data used are secondary data in the form of primary and secondary legal materials. The results show that ownership rights to tertiary institutions are public/community ownership rights that are responsible for trust, not those of the founders, supervisors, administrators, and supervisors. The ownership rights of this foundation are pseudo or imperfect because it is only limited to the right to use or benefit from the existence of the higher education foundation. The ownership rights of the student community over foundations have implications for the management of foundations and universities with the foundation's obligation to provide academic services and economic assistance for underprivileged students.

Key Words: ownership rights; foundations; universities; implications; social justice.

INTRODUCTION

The spirit of the content of Article 31 paragraph (4) of the 1945 Constitution of the Republic of Indonesia is a form of the state's basic obligation to provide education by determining the minimum education budget and state finances. This shows that the provision of education is oriented socially or does not become an economic and social burden on citizens. Article 3 letter d of Law Number 12 Year 2012 concerning Higher Education (Higher Education Law), stipulates that one of the principles of higher education is justice. Article 6 point (i) of the Higher Education Law emphasizes that the obligation of higher education is in favor of the less fortunate.

Theoretically, the principle of justice is in accordance with one of the substances of Jhon Rawls's theory of distributive justice, which states that social and economic inequality must pay attention to the different principles and the principle of fair equality of opportunity. This principle of justice requires the provision of equal opportunities for all parties, including those who are less fortunate (Fauzan & Prasetyo, 2006). Therefore, every citizen has the right to education without having to be limited by his social and economic conditions.

The constitutionality provisions in the field of education and the spirit of the Higher Education Law cause legal, social and economic problems at the normative level and practice in relation to the existence of foundations that organize private universities (PTS) as their business. Foundations as social bodies are given juridical space to carry out education together with the government to organize higher education efforts which are constitutionally a basic obligation of the state. Article 60 of the Higher Education Law determines the establishment of higher education institutions, PTN is established by the Government. PTS is established by the community by forming a non-profit legal entity that is obliged to obtain a permit from the Minister. Organizing bodies may take the form of foundations, associations, and other forms in accordance with the provisions of laws and regulations.

In the field of business, foundations that organize higher education are bound normatively with legal provisions regulating aspects of higher education administration, but on the other hand, the existence of legal entities also refers to legal provisions that specifically regulate foundations, namely Law Number 16 of 2001 concerning Foundations as referred to has been amended by Law Number 28 of 2004 concerning Amendments to Law Number 16 of 2001 concerning Foundations (Foundation Law).

Legal, social and economic problems at the normative and practical level related to the existence of a foundation that organizes private universities as a business, among others, can be seen from the side of ownership of higher education foundations and deviating from the essence of

its philanthropic philosophy. These problems emerged or occurred before and since the enactment of the 2001 Foundation Law.

In the Foundation Law, there is no clear normative formula (that does not cause multiple interpretations) or by Gijssels calls it "vege begrippen" or "vage normen" or "open normen" regarding foundation ownership (Borahima, 2002). The juridical implication of organizing higher education foundations can be interpreted variously or at least as a legal loophole for parties with direct interests, for example founders, supervisors, administrators, foundation supervisors, PTS business managers who are foundations and the general public (students).

On the juridical side, it does not emphasize the ownership of the foundation and its implementation based on the principle of justice. Suryarama's identification that PTS established by a foundation is similar to a family company, with a dominant business-profit orientation (Suryarama, 2009). A number of foundations that carry out business activities with a profit orientation pay the management and record profit and loss in books (Untung, 2002). The foundation's articles of association even stipulate the position of the founder that is eternal, can be inherited, has veto rights, and so on.

The legal problems in terms of ownership, which are part of the civil law aspects above, are almost endless. In the era of contemporary Indonesia as an era of advancing economic growth, in the midst of free markets and the acceleration of advancement of higher education in almost all fields of science, legal cases are increasingly emerging in relation to the ownership rights of higher education foundations in their implementation/management. In addition, the business-profit orientation is increasingly visible in a number of private universities. The cost of education in private universities is often not affordable for the poor. The principle of justice mandated by the Higher Education Law and the social values of non-profit foundations are increasingly difficult to materialize. A number of cases have emerged, including the case of one university and two rectors. Another case of dispute over university ownership. The same case is in the struggle over

educational foundations (Zulkarnain, 2015). There is no normative provision that clearly determines who actually owns the foundation, in this case a tertiary institution, because it can influence the organization of the foundation concerned. Therefore, the ownership rights of foundations and the management of their assets are relevant to law based on philosophical values that can provide justice for all parties with direct interest in the administration of higher education foundations (founders, trustees, administrators, supervisors, and students).

On the social and economic side, it can be seen that the high cost of education at both public and private universities is currently making parents scream. For those who are smart but do not have enough money to pay for education, they are forced to hang on to their hopes, even children who have even passed the exam (Denura, 2012). In addition, the search for a philosophy of justice in this context shows its significance, namely a philosophy of justice that can be adapted to the development of civilization in which the economic aspect is one of the main pillars without neglecting the philosophy of the foundation. Based on the description above, this research is interesting to examine how the substance of foundation ownership rights and its implications for the implementation of higher education foundations with the aim of social education.

RESEARCH METHODS

This research uses normative legal research methods through philosophical, statutory, conceptual/theory approaches, cases concerning foundations that run universities. The data used is secondary data that comes from legal materials. The data analysis used was descriptive qualitative.

DISCUSSIONS AND ANALYSIS OF RESULTS

1) Higher Education Foundation Ownership Rights Substance

Discussion on the ownership rights of higher education foundations, can be initiated through several theoretical reviews that explain what a foundation is. In the Black's Law Dictionary it is

explained that: "Permanent funds are established and maintained by contributions for charitable, educational, regional, research, or other benevolent purposes. An institution or association given to rendering financial aid to colleges, schools, hospitals, and charity and generally supported by gifts for such purposes. The founding or building of a college or hospital. The incorporation or endowment of college or hospital is the foundation; and the who endows it with land or other property is the founder" (Black, 1990). The description of a foundation above can be interpreted as a person or group that has a permanent fund that is established and managed as a contribution to charity, regional education, hospitals, research or humanitarian purposes. Black's Law Dictionary defines foundation as: "Having the character or purpose of a charity. The word "charitable" in a legal sense includes every gift for a general public use, to be applied consistently with existing laws for benefits of on indefinite number of persons, and designed to benefit them from an educational, religious, moral, physical or social standpoint" (Black, 1990).

The philosophy of the foundation according to Lemaire is to separate an asset for purposes that do not expect profit (*altruistic goal*) and the arrangement of an organization (along with the board), in which the objectives can be realized with these tools (Ali, 1987). A foundation is an agency that carries out various social activities and has ideal goals. That the foundation must have social and humanitarian aims. Foundations must be social and humanitarian and idealistic and certainly not allowed to conflict with statutory regulations, public order, and/or morality (Soeroredjo, 2005). This concept is similar to Soemitro (Soemitro, 1989) and Chidir Ali (Ali, 1987), whose philosophy that is not profit oriented is emphasized specifically regarding foundations (Borahima, 2002).

Thus the foundation must at least include the following: (1) Must have social and humanitarian aims; (2) The objective is not to conflict with statutory regulations, public order and morality; (3) Foundation funds come from the assets of the founders separated from public donations; (4) The wealth separated by the founders to establish a foundation must be in accordance

with the objectives the foundation wants to achieve; (5) Facilities obtained and funds raised by the foundation must be used or utilized in accordance with the objectives of the foundation, not for the benefit of its founders, foundation management or third parties except for social purposes; (6) A foundation may carry out a business or activity that generates profit, but earning a profit is not the goal and the profit earned must be used for social (non-commercial) purposes; (7) The foundation must be open to the participation of the wider community, as well as its employees.

Chatamarrasjid assessed that foundations could carry out various activities or businesses. More firmly, foundations could carry out profit-making activities, but pursuing profit was not the goal. Activities with the aim of pursuing profit must not be allowed to choose the form of a foundation legal entity, but other forms of legal entity available for the purpose of pursuing profit such as Limited Liability Companies, for example. In addition, continued Chatamarrasjid that foundations may earn profits by carrying out various business activities, as far as the profits are obtained used for idealistic, social and humanitarian purposes (Chatamarrasjid, 2002). This profitable business is necessary so that the foundation does not depend forever on aid and donations.

Regarding who owns the foundation, among various possibilities such as the founder, the recipient of donations, and the community; then, philosophically, it is the people who are most likely to be the owners of the foundation. The founders and recipients of donations cannot possibly own the foundation. The founder of his will was most likely the owner of that foundation. The founders and recipients of donations cannot possibly own the foundation. The founder of his own will has separated a part of his wealth for the foundation, while the recipient of the donation is limited to what is given by the foundation and must be used in accordance with the objectives of the foundation, as determined by the founder / articles of association of the foundation. In the event that the foundation is dissolved, the remaining assets of the foundation, namely after deducting its obligations, for the foundation, while the recipient of a limited contribution for what is given by the

foundation and must be used in accordance with the objectives of the foundation, as determined by the founder/articles of association of the foundation. In the event that the foundation is dissolved, the remaining assets of the foundation, namely after deducting its obligations, debts and so on, must be given to other foundations with the same or almost the same purpose, or become the property of the State (Chatamarrasjid, 2002).

Another thing that is often questioned is whether the foundation has an owner, and if the foundation has an owner then who actually owns the foundation. This question arises because of the assumption that a foundation as a legal entity (*recht person*) cannot be owned by legal subjects, either human (person) or legal entity (*recht person*). However, the researchers did not find a theory that asserts that legal entities cannot be owned by legal subjects (humans and legal entities). On the contrary, researchers found the fact that legal entities can be owned by human legal subjects as well as fellow legal entities.

The subject of human law is clearly very different from the legal subject of legal entities, humans are natural legal subjects who have a will created by Allah the Creator, while legal subjects of legal entities are human-made legal subjects which certainly do not have a will, the result of human creation that is made as if it is the same as the subject of human law created by Allah the Creator, so that in his theory of Fiction, Von Savigny states that only humans have a will (Rido, 1984). From this viewpoint, it can be categorized as ownership of legal subjects to other legal subjects, including: first, humans as creators of legal entities, then humans can have legal entities, on the other hand, legal entities cannot own humans because humans are the creators. Second, legal entities can have fellow legal entities with the will of humans as their creators, just as a state (public legal entity/public *recht person*) can have a legal entity, for example: establishing State Universities which are state-owned legal entities. Third, a legal entity can be owned by a human legal subject as in the practice of establishing a Limited Liability Company (PT), it is known that the owner is the founder, so there is a PT whose naming uses the name of the owner. Legal entities can be owned by

legal entities as in Law Number 19 Year 2003 concerning State-Owned Enterprises, that BUMN is a legal entity while the owner is a state which is also a legal entity (public legal entity). Likewise, it can be seen in Government Regulation Number 152 of 2000 concerning the Establishment of the University of Indonesia (UI) as a State-Owned Legal Entity and Government Regulation Number 155 of 2000 concerning the Establishment of the Bandung Institute of Technology (ITB) as a State-Owned Legal Entity. The two government regulations show that UI and ITB are legal entities owned by the state (public legal entities).

This description indicates that the legal entity of the foundation has an owner. Then who is the real owner of the Foundation?

If it is based on the theory of legal entities regarding purposeful wealth as stated at the beginning of this paper, it is clear that the purposeful wealth belongs to the objective. This is related to the establishment of a legal entity with assets that have been separated from the assets of the founders. In principle, the assets of a legal entity are already tied to the specific objectives and purposes of the legal entity concerned. In other words, the assets belong to the "Purpose and Purpose" of a legal entity. This is where the relationship between objective wealth theory and legal entity foundations appears. It is known that the Foundation has idealistic, social and humanitarian goals. Therefore the wealth of a foundation is a tool that should only be used to achieve the goals and objectives of the foundation itself.

The ownership of higher education foundations by belonging to its purpose, namely the Educational Society, can also be confirmed by the Propriete Collective Theory by Marcel Planiol, this theory according to Jimly Asshiddiqie is a variation of the Aimed Wealth Theory (Zweckvermögen Theorie) by A.Brinz. According to Planiol, with the purpose of serving certain interests, the intended assets are legitimate to be organized (Salim, 2010), so that the foundation organs are only managers and legal entities of higher education foundations as organizational means to achieve their goals.

The founder is clearly not the owner because he has separated the wealth to belong to the foundation legal entity and the management is not the owner because he is only appointed to manage the foundation organization. In the context of higher education foundations, the purpose of the foundation is social education, which means that the education community (students) is the owner. In this context, ownership has its own meaning in relation to community life where it is accepted as a legal concept. When starting to talk about it in such a meaning it means questioning ownership in a social context, no longer as a juridical context (Rahardjo, 2000).

The affirmation that a foundation does not belong to the supervisor, manager and / or supervisor is revealed, among others, from the provisions of Article 3 and Article 5 of the Foundation Law which prohibits the giving of profit sharing from the foundation's business to the foundations' organs. Article 3 paragraph (2) states that foundations may not share the proceeds of their business activities with supervisors, managers and supervisors. Whereas Article 5 of the Foundation Law regulates that the assets of a foundation, whether in the form of money, goods, or other assets obtained by a foundation under this law, are prohibited from being transferred or distributed directly or indirectly to supervisors, managers, supervisors, employees, or other parties have an interest in the foundation.

On the other hand, the Foundation Law implicitly shows that foundations belong to the community. This can be seen from the provisions in Article 68 of the Foundation Law that: (1) The remaining assets from the liquidation are transferred to another foundation which has the same aims and objectives as the dissolution of the foundation. (2) In the event that the remaining liquidation is not submitted to another foundation which has the same aims and objectives as referred to in paragraph (1), the remaining assets shall be transferred to the state and its use shall be made in accordance with the aims and objectives of the foundation. The provisions show that the assets of the foundation are the property of the "purpose of the foundation" itself.

Regarding the essence of foundation ownership, Murray Sheard argues that property rights are specific rights over an object of ownership. The rights inherent in it are the right to control or control exclusively, the right to use, the right to enjoy the results, the right to allocate and the right to defend from interference from other parties (Sheard, 2006).

In addition, Sheard argued that property rights are generally divided into 3 (three), namely: private / individual property rights, collective property rights, and public property rights. Private / individual property rights are characterized by the existence of special rights for the owner / holder of the right. private / individual. Meanwhile, collective property rights are characterized by the existence of these rights attached to collective interests as part of society as a whole which are special in nature, but there are no personal / individual privileges. Another case with public property rights is the right to something in which there are no special rights, either individually or collectively. The typology of property rights is the ideal typology of property rights (Sheard, 2006).

In practice, various forms of foundation ownership are found, namely private ownership (individual/family), collective ownership (group of people/organizations) and public/community ownership. This ownership can be known through a statement explicitly or stated tacitly. A firm statement by the founder or family of founders, the chairman of the foundation (which is affiliated with the founder) that the foundation is private property (founding family), collective property (group of people) if the foundation was founded by a group of people or association / organization, public property (community) for people or communities who understand the philosophy of the background and the purpose of establishing the foundation.

Then tacit statements can be seen in the practice of foundation management or foundation management where certain people dominate the decision-making and use of the foundation's assets for personal (family) or group interests without any objection from other parties. This analysis is supported by the findings of the authors that there are 14 foundations from 25 foundations that were the research samples in Kopertis/LLDikti Region IX Sulawesi, which states that the ownership of

the Higher Education Foundation is privately owned by the founder or the founding family. There are five foundations that state collective ownership of the foundation/group of people or institutions. There are six foundations declared to be owned by the public/community (Zulkarnain, 2015).

Individual ownership of the foundation can also be found in terms of the judiciary, which implicitly determines that the "owner of the foundation" is the chairman of the foundation. This can be identified, for example in the Supreme Court Decision Number 1943 K/PID/2010 on the appeal of the Prosecutor / Public Prosecutor to the Tual District Prosecutor's Office against the District Court's decision. Categorically, this decision is a criminal decision that is directly related to the ownership of the assets of a higher education foundation. In this criminal case, the Chairman of the Muhammad Thaha Foundation (M Husni Ingratubun), which oversees the Umel High School of Economics (STIE), was criminalized on charges of damaging the campus nameplate. Supreme Court Cassation Decision Number 1943 K/PID/2010 acquitted the defendant (Chairman of the Foundation). In his consideration, the Judge was of the opinion that legally the ownership of movable and immovable property of the Mohammad Thaha Foundation, Sekolah Tinggi Ilmu Ekonomi (STIE UMEL) is the property of the Defendant and legally taking or destroying one's own property cannot be punished as long as it does not interfere or harm the interests or contrary to the rights of others. This fact is motivated by the understanding that they are the owners of the initial capital and at the same time the founders of the foundation concerned, so that they are more entitled than other people. Thus in the institution and management of foundations, individuals/families who occupy strategic positions are more dominant. This will have implications for the management of foundations that are contrary to their social goals.

2) Implications of Foundation Ownership Rights in Management

In the previous discussion, it was known that the owner of the foundation in accordance with its objectives is the student of the university concerned, its ownership is pseudo or temporary,

meaning that it is limited to the right to benefit while being a student at the university concerned. Organizers of higher education foundations consisting of foundation organs, namely supervisors, administrators and supervisors who have their respective duties and responsibilities based on the Foundation's Articles of Association/Bylaws (AD/ART). In managing foundations and colleges that become their business, they must pay attention to the principles of social justice to students in the form of good academic services and economic assistance (for students with weak economies). Article 6 of the Higher Education Law states that higher education is organized with the principle of taking sides with economically disadvantaged groups of people.

According to David Boucher and Paul Kelly in "Social Justice From Hume to Walzer", explaining the term "Social Justice" is combined with the term "Distributive Justice", namely justice which concerns the distribution of benefits that arise from any cooperation or social relations. formed in society (Kurniawan, 2012). The purpose of every cooperation or social relationship that is formed in society includes foundations established for social purposes. Also by John Rawls in his book entitled "A Theory of Justice" (Theory of Social Justice), formulates two principles of justice that prioritize the principle of rights rather than rights. principles of benefits, as follows: first, the greatest equal principle, that everyone should have the same rights to the broadest basic freedoms, as broad as the same freedom for all people. This is the most basic thing (human rights) that everyone should have. In other words, only with the guarantee of equal freedom for all people, will justice be realized. Second, social and economic inequality must be regulated in such a way that it is necessary to pay attention to the following principles or principles: a. The different principle; and b. The principle of fair equality of opportunity. This principle is expected to provide the greatest benefit to disadvantaged people, as well as to affirm that with equal conditions and opportunities, all positions and positions must be open to everyone. With such a strong emphasis on the importance of providing equal opportunities for all parties, John Rawls strives so that justice is not trapped in the extremes of capitalism on the one hand and socialism on the other. John Rawls said

that principle (1), namely The greatest equal principle, must be prioritized over principle (2) if the two are in conflict. Meanwhile, the second principle of part b, namely The principle of fair equality of opportunity, should be prioritized from section a, namely The different principles (Handoko, 2008).

The principle of social justice in the management of higher education has relevance with student ownership rights to foundations, based on foundation policies that refer to applicable higher education laws and regulations to be implemented with the principles of transparency/openness and accountability to the public. The management of the foundation in a transparent and accountable manner encourages the realization of student ownership rights to the foundation. On the other hand, without the principles of transparency and accountability in its management, the implementation of student ownership rights to foundations is difficult to materialize. In connection with this, Soni Gunawan Somali at the Doctoral Session in the Field of Social Sciences in the Main Study of Public Administration at Pasundan University, Bandung on Monday, 26/10/2020) conveyed the results of his research that the management of the Higher Education Foundation in the city of Bandung turned out to be a lot of implementation that was not in accordance with the rules. In other words, they (foundations) generally have not implemented the contents of the foundation's policies regarding the principles of openness and accountability to the public. He also mentioned if there were still violations or irregularities in the implementation of policies regarding the foundation. With any deviation from the implementation of policies regarding foundations, it will certainly affect the implementation of the rights of students as owners of the foundation. Another case was put forward by Didik Purwadi in his research entitled "Educational Foundation Model in the Perspective of Legal Protection for Students (Case Study at the Surakarta Higher Education Foundation), the results of his research show that the Mitra Husada Foundation pays attention to outstanding and underprivileged students by providing free admission test (as long as the height requirements and medical tests pass) and provide scholarships given each semester for students who excel. Then the

Mitra Insani Foundation also provides medical assistance to students in the form of a Student Health Care Guarantee (JPKM), namely students who are sick get treatment facilities at the Clinic or Hospital owned by the Mitra Insani Foundation by showing a student card. Students who experience disaster will also receive compensation from the Mitra Insani Foundation and from STIKES Duta Gama Klaten. In addition, students also get compensation in the form of cash assistance that will be provided by representatives from the Mitra Insani Foundation and Stikes Gama Klaten. From this description shows that the realization of the principles of social justice by the foundation, which is packaged in various forms of assistance to students. This should be an example for foundation organizers, especially higher education foundations in Indonesia.

CONCLUSIONS

The substance of the foundation's ownership rights is that a Higher Education Foundation is a legal entity created by a unilateral statement by the person or legal entity of the founder, which contains the separation of assets for a specific purpose, namely the social purpose of education. With the separation of assets by the founder, the separated assets turn into the property of his goal. Therefore, the founder, supervisor, administrator, supervisor is not the owner of the foundation, but the education community (student) owns it. The ownership right of the education community is a false or imperfect ownership right because it is limited to the right to use or benefit from the existence of the higher education foundation institution. In several cases there were deviations from the ownership rights of the student community to foundations, namely private / family ownership rights and collective / group ownership rights, which had implications for institutions, wealth, and management of foundations in achieving social educational goals.

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