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## Responsibility of Foundation Organs As a Result of Unlawful Acts in The Organization of Higher Education Foundations

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**Abstract:** This research focuses on the Responsibilities of Foundation Organs as a Result of Unlawful Actions in the Implementation of Higher Education Foundations. The research method used is Normative Juridical with a statutory, theory/concept, case approach, which is related to the implementation of higher education foundations. Then the data used is secondary data in the form of primary and secondary legal materials. The results of this research show that a form of unlawful action by foundation organs related to the management of Higher Education Foundations is accepting the distribution or transfer of foundation assets as intended in Article 70 paragraphs (1) and (2) UUY No. 16 of 2001 which has been amended by Law. No. 28 of 2004, embezzling money from foundation assets as regulated in Article 372 of the Criminal Code, making agreements with organizations or other parties affiliated with the founder or other foundation organs without the approval of the Trustees the foundation, deviated from its duties and authority as a foundation organ, as regulated in the UUY and in the foundation's AD/ART. Actions against the law by foundation organs harm the foundation and related third parties. As for The responsibilities of Foundation Organs related to unlawful acts in the management of the foundation are criminal responsibility in the form of imprisonment and/or/ fines, and civil responsibility in the form of compensation both individually and jointly, as well as administrative responsibility in the form of reprimand sanctions up to dismissal from position as a foundation organ. It is recommended not to establish a higher education foundation if the founder or foundation organ wants to seek personal or group profit because it conflicts with the aims and objectives of the foundation. Suitable means for seeking personal or group profits are through Limited Liability Companies (PT), Firms, Trading Businesses (UD) and the like.

**Keyword:** Foundation organs, administration, higher education foundations, unlawful acts, consequences and responsibilities.

### INTRODUCTION

The existence of foundations in Indonesia has been recognized since the Dutch colonial era in Indonesia. Many established foundations with various characteristics can be found today. The establishment of the Foundation has a noble aim, namely social and

humanitarian in nature. The words social and humanitarian have a broad meaning so that its activities are not only in the religious, social, health, educational and cultural fields, but can also be in the fields of legal aid, legal counseling, consumer protection, environmental preservation, life, etc<sup>1</sup>. Establishing foundations in the name of non-profit organizations, it turns out that many foundations, including foundations operating in the field of higher education, have deviated from the aims and objectives of their establishment. The state's efforts to return the organization of foundations to the aims and objectives of their original founding resulted in Law Number 16 of 2001 concerning Foundations which was later amended by Law Number 28 of 2004 concerning Amendments to Law Number 16 of 2001 concerning Foundations. . NRI Constitution of the Year 1945. in this article abbreviated as UUY.

These provisions are the basic obligations of the state and are the rights of the community in terms of social education. The constitutional obligation of the state (government) to promote its implementation shows that education is a basic need for every human being and its implementation is directed at philosophical values such as religious values and civility which implicitly emphasize the principle of justice. Apart from that, the spirit of the content of Article 31 paragraph (4) of the Constitution of the Republic of Indonesia Year 1945 as form obligation base country For maintenance education by determining a minimum budget education and state finances show that the provision of education is socially oriented or does not become an economic and social burden on citizens country. In fact, in Article 3 of the Law of the Republic of Indonesia Number 12 of 2012 concerning Higher Education (State Gazette of the Republic of Indonesia of 2012 Number 158 And Addition Sheet Country Republic Indonesia Number 5336) And furthermore abbreviated as UU Education Tall determine that wrong one principle education tall is justice.

The constitutionality provisions in the education sector and the spirit of the Higher Education Law give rise to legal, social and economic problems at the normative and practical levels in relation to the existence of foundations that organize Private Higher Education (PTS) as their business. Foundations as social bodies are given juridical space to organize education together with the government in carrying out higher education efforts which are constitutionally a basic obligation of the state. This is determined in Article 60 of the Higher Education Law<sup>2</sup>.

In its business sector, foundations that provide higher education are bound by normative with provision law Which arrange aspect maintenance higher education, but on the other hand the existence of a legal entity also refers to the legal provisions that specifically regulate foundations, namely Law Number 16 of 2001 concerning Foundations (State Gazette of the Republic of Indonesia of 2001 Number 112, Supplement to the State Gazette of the Republic of Indonesia Number 4132) as stated in amended by Law Number 28 of 2004 concerning Amendments to Law Number 16 Year 2001 about Foundation (Sheet Country Republic Indonesia Year 2004 Number 115, Supplement to the State Gazette of the Republic of Indonesia Number 4430) hereinafter referred to as the Foundation Law. Other irregularities that occurred in its implementation appeared, for example, from Suryarama's identification results that private universities (PTS) were founded by foundations are similar to family companies. The dominant orientation is business-profit<sup>3</sup>. This opinion is relevant to

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<sup>1</sup> Chatamarrasjid, Tujuan Sosial Yayasan dan kegiatan sosial bertujuan laba, Citra Aditya Bakti, Bandung, 2000, Hal.208.

<sup>2</sup> Pasal 60 UU Pendidikan Tinggi menentukan bahwa: Pendirian Perguruan Tinggi, PTN didirikan oleh Pemerintah. PTS didirikan oleh Masyarakat dengan membentuk badan penyelenggara berbadan hukum yang berprinsip nirlaba dan wajib memperoleh izin Menteri. Badan penyelenggara sebagaimana dimaksud pada ayat (2) dapat berbentuk yayasan, perkumpulan, dan bentuk lain sesuai dengan ketentuan peraturan perundang-undangan.

<sup>3</sup> Suryarama, *Peran Yayasan Dalam Pengelolaan Bidang Pendidikan Pada Perguruan Tinggi Swasta*, (Jurnal

Budi Untung's opinion that a number of foundations carry out business activities with a profit orientation. pay the management and record profits and losses in the books. The foundation's Articles of Association even stipulate that the position of the founder is eternal, can be inherited, has veto rights, and so on<sup>4</sup>. Legal problems in terms of foundation administration are related to acts of lawlessness by foundation organs which are part of the legal responsibility aspect which can give rise to civil, criminal and administrative consequences. In the contemporary Indonesian era as era growth promotion economy, in middle market free and an acceleration advancement education high in almost all fields of science, cases law Certain popping up related with the issue of administering higher education foundations. On foundation education tall in implementation/management by foundation organs often deviate from business-profit orientation Also the more visible on it 's cool PT foundation disputes related to the control and ownership of the foundation which is based on personal or group interests which are indicated as unlawful acts by the foundation organs and other affiliated parties in the implementation. Lots case law which happen later related with matter This. For example dispute case between One University and Two Chancellors for the Veterans University of the Republic of Indonesia Case in Makassar And case University Pepabri Makassar. So as, dispute two educational institutions between Foundation University AI-Asyariah Mandar (Unasman) with Darud Da'wah Wal Irsyad Executive Board (PB DDI). Another case is a case of ownership dispute Trisakti University Jakarta. Academy Case Maritime Djadajat (AMD) Jakarta with the Foundation Education Cruise Djadajat (YPPD) 1963. The same case in the conflict over the Bondowoso Mutual Cooperation Education Foundation as the organizer of Bondowoso University Java East<sup>5</sup>.

It is different from the legal side, which can be identified regarding the ownership of foundations, for example in Court Decisions great Republic Indonesia (LET) Number 1943 K/PID/2010 on cassation request Prosecutor General on Prosecutor's Office Country Tual to decision District Court. By categorical, Decision the is decision criminal Which related directly with ownership of higher education foundation assets. In criminal cases Accordingly, the Chairman of the Muhammad Thaha Foundation (M Husni Ingratubun) which oversees the Umel College of Economics (STIE) was criminalized on charges of damaging the campus nameplate. Finally go out Decision Cassation Court great Republic Indonesia (LET) Number 1943 K/PID/2010 which acquitted the defendant (Chairman of the Foundation). In its consideration, MARI is of the opinion that legally ownership on movable and immovable property of the Mohammad Thaha School Foundation Higher Economic Science (STIE UMEL) is the property of the Defendant and legally he cannot take or damage his own property be punished as long as it does not disturb or harm interests or conflict with the rights of others<sup>6</sup>.

Based on this description, it can be seen that the problem of irregularities in the management of higher education foundations, which are unlawful acts committed by foundation organs and other affiliates, still occurs today. Therefore, the author is interested in studying it

## **METHOD**

This research uses normative research methods through legislative approaches, concepts/theories, cases regarding the responsibilities of foundation organs in relation to

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Organisasi dan Manajemen, Volume 5, Nomor 1, Maret 2009), Hal.59.

<sup>4</sup> Budi Untung, *Karakteristik Yayasan dan Badan Hukum Lain di Luar yayasan Suatu Solusi* dalam Untung, H. Budi, et. al., *Reformasi Yayasan Perspektif Hukum dan Manajemen*, (Andi Offset: Yogyakarta, 2002), Hal.7-8.

<sup>5</sup> A. Zulkarnain, 2015, *Penyelenggaraan Yayasan Pendidikan Tinggi Dalam Perspektif Keadilan Sosial Ekonomi*, Disertasi, PPS Unhas, hlm 9-10.

<sup>6</sup> Ibid hal 9-10.

unlawful acts in the administration of higher education. The data used is secondary data sourced from legal materials. The data analysis used is qualitative descriptive.

## **RESULTS AND DISCUSSION**

### **Duties and Authorities of Foundation Organs**

Foundation organs consisting of supervisors, administrators and supervisors have the duties, respective authorities and responsibilities in realizing the aims and objectives of the foundation. This is explained as follows:

#### **1. Guardian .**

The existence of a supervisor is very important and influences the continuity of a foundation. A person who will be appointed as a supervisor must meet the following qualifications:

- a. The founders, they are very suitable to be supervisors because they are the ones who designed the goals and intentions of the foundation founders.
- b. People who are assessed as having high dedication, whose assessment is carried out at a meeting of supervisory members.
- c. Not an administrator or supervisor of the foundation. This is intended to ensure that there is no overlap in carrying out authority and duties.

The foundation law determines that the supervisor is an organ of the foundation have authority that is not delegated to management or supervisors by the Foundation Law and/or the Foundation's Articles of Association, which include authority regarding:

- a. Make decisions regarding changes to the articles of association;
- b. Appoint and dismiss management members and supervisory members;
- c. Determine the general policies of the foundation based on the foundation's articles of association;
- d. Ratify the foundation's work program and annual budget draft;
- e. Determine decisions regarding the merger or dissolution of foundations.

Apart from having authority, supervisors also have obligations, including:

- a. Conduct an evaluation of the foundation's assets, rights and obligations for one financial year. The evaluation is carried out at an annual meeting which is held at least once a year.
- b. Appoint a liquidator if the foundation is dissolved.

Even though authority is very influential and decisive for a foundation, there are things that trustees should not do, namely holding multiple positions. The dual position referred to is being a supervisor and also a member of the management or supervisor. If there is a vacancy in the position of supervisor, what must be done is: Supervisory members and management members must hold a joint meeting to appoint a new supervisor. The meeting is held no later than 30 days after the vacancy in the supervisory position occurs: Supervisory members and Management members are required to hold a joint meeting to appoint new supervisors. The meeting is held no later than 30 days after the supervisor vacancy occurs (article 28 paragraph 4 UUY). The decision to appoint the supervisor is declared valid if it complies with the provisions regarding the attendance quorum and decision quorum for changes to the AD (article paragraph 5).

#### **2. Management.**

The management structure of foundations is not much different from the management structure of organizations in general. The structure consists of: Chairman, Secretary and Treasurer. For the composition of foundation management, the minimum number of personnel is one person for each position. Meanwhile, the qualifications required to sit as a foundation administrator are:

- a. Able to manage the foundation
- b. Able to carry out legal actions

c. Not a member of the supervisor or supervisor

As regulated in Article 31 of the Foundation Law as follows:

Paragraph (1) : management is a foundation organ that carries out the management of the foundation.

Paragraph (2) : Those who can be appointed as administrators are individuals who are capable of carrying out legal actions.

Paragraph (3) : administrators may not double as supervisors or supervisors.

The appointment of foundation administrators is carried out by the supervisors at a supervisory meeting. The appointed administrators will manage the foundation for 5 (five) years and can be appointed again to manage the foundation within the time frame regulated in the AD (article 32 paragraph 1).

There are 4 main duties of foundation administrators which are regulated in several articles such as Article 35 paragraph (1), paragraph (3), Article 58 paragraph (1) and Article 63 paragraph (2), namely:

- a. Fully responsible for management to achieve the interests and goals of the foundation.
- b. Appoint and dismiss the daily activities of the foundation.
- c. Prepare a proposed merger plan if a merger will occur.
- d. Cleaning up the foundation's assets if the foundation is disbanded due to the provisions of the AD.

Apart from carrying out their duties, administrators also have obligations. The management's responsibilities include:

- a. Representing the foundation inside or outside the court (unless there is a case between the foundation and members of the management concerned or there is a conflict of interest between the management and the foundation).
- b. Carrying out duties in good faith and with full responsibility for the interests and goals of the foundation.
- c. Jointly and severally responsible if bankruptcy occurs due to an error by the management members and the foundation is unable to cover the losses.
- d. Create and maintain records containing information regarding rights and obligations as well as other matters relating to the foundation.
- e. Prepare a written annual report regarding: (a) conditions and activities during the previous financial year and the results achieved; (b) Financial position at the end of the activity period, cash flows and financial statement notes (article 49 paragraph 1); and (c) the foundation's rights and obligations as a result of transactions with other parties (article 49 paragraph 2).
- f. Create and store foundation financial documents in the form of bookkeeping evidence and supporting financial administration data.
- g. Notify the Minister when there is a change of supervisor.

Even though the administrator is fully responsible for the management of the foundation, he must comply with statutory regulations and the foundation's articles of association in carrying out his duties and responsibilities. In this case, the management's authority is limited as regulated in Articles 36, 37 and 38 of the Foundation Law, namely:

- a. Guarantee debt to the foundation.
- b. Transferring foundation assets with the approval of the trustees.
- c. Enter into agreements with organizations affiliated with the foundation and foundation apparatus.
- d. Represent the foundation in court in cases between the foundation and the management and there is a conflict of interest between the management and the



foundation. Unless the authority to represent is stipulated in the Foundation's Articles of Association.

Management can be temporarily dismissed by the foundation supervisor if there are clear reasons and strong evidence that the management members are not carrying out their duties properly (Article 43 paragraph 1 UUY). The dismissal procedure is:

- a. Report the temporary dismissal of the management to the supervisor no later than 7 (seven) days after the temporary dismissal occurs.
- b. After receiving a report from the supervisor, the supervisor gives the slicer in question the opportunity to defend himself. The deadline for calling members of the management who are temporarily dismissed is 7 (seven) days.
- c. The supervisor must make a decision within 7 (seven) days, whether to revoke the decision to temporarily dismiss or permanently dismiss the management concerned.

The dismissal of the management is determined and decided at the supervisory meeting. There are two reasons for dismissal of foundation administrators, namely:

- a. The management stops when their term of office ends.
- b. The management quit because he was dismissed. This means that the management quits while still in office. Generally, the dismissal of the management is carried out because the management concerned is deemed no longer capable of carrying out their duties and/or often makes mistakes that bring losses to the foundation (Article 32 paragraph 2).

Dealing with the law is a form of management responsibility when the management and all of its staff cause the foundation to go bankrupt. In other words, the foundation suffered losses due to errors and negligence of the management in carrying out their duties and obligations. This happened because the management had deviated and violated the provisions stipulated in the foundation's AD. Risks are borne jointly by management members. Another sanction is that the administrator concerned cannot be appointed as a foundation administrator anywhere (Article 39 paragraph 3 UUY).

Management members who are found guilty in carrying out the management of the foundation and causing losses to the foundation, society or the State based on a court decision, within a period of 5 (five) years from the date the decision obtains permanent legal force, cannot be appointed as Management of any Foundation (Article 30 paragraph 3).

### **3. Foundation Supervisor .**

To serve as a foundation supervisor, a person must meet the following qualifications:

- a. Have the ability to control and advise others. This is related to the yayawan's duties to supervise and advise the management in carrying out the foundation's activities (Article 40 paragraph 1 UUY).
- b. Ability to carry out legal actions (Article 40 paragraph 3 UUY). This concerns the status of the foundation as a legal entity so that everything is legally related.
- c. Not a member of the management and supervisors (Article 40 paragraph 4 UUY). This aims to ensure that there is no overlapping of duties, responsibilities and authorities which could be detrimental to the foundation (explanation of Article 31 paragraph 3 UUY).

The supervisory members of the foundation are appointed by the supervisors at the supervisory meeting. Supervisory members are appointed to control and advise the management in carrying out their duties. These supervisory members are appointed for a term of 5 (five) years and if they are deemed to have dedication in carrying out their duties, the supervisor is given another opportunity to supervise the foundation within the time period stipulated in the AD.

When someone has become a foundation supervisor, what is required of him is to carry out the obligations stipulated in the relevant provisions. The obligations of a supervisor include:

1. Must carry out duties in good faith and with full responsibility.
2. Must be jointly responsible with fellow members if bankruptcy occurs due to negligence and the foundation is unable to cover the losses.
3. Must exercise the authority to temporarily dismiss management members by stating the reasons (Article 42 and Article 43 paragraph 1 UUY).

The supervisor's dismissal is determined and decided at a supervisory meeting. There are two reasons for dismissal of foundation supervisors, namely:

1. The supervisor quits because his term of office ends.
2. The supervisor quit due to being dismissed. Generally, supervisors are dismissed because they are deemed no longer able to carry out their duties and often make mistakes that bring losses to the foundation (Article 32 paragraph 3 UUY).

Supervisors in carrying out their duties and authority if there is a violation of the law as regulated by the Foundation Law and the Foundation's Articles of Association will face legal risks. The legal risks referred to here are the risks borne by supervisory members if the foundation becomes bankrupt due to errors and negligence. Supervisory members are required to compensate for losses and even be sued in court. The risks borne by supervisors are multiplied because they are not permitted to be appointed as supervisors at other foundations.

### **Unlawful Acts by Foundation Organs**

According to the Common Law system until the end of the 19th century, torts were not considered an independent branch of law, but were only a collection of writs (standard lawsuit models) that were not connected to each other<sup>7</sup>. The use of this writ then gradually disappeared along with the disappearance of the writ system in the United States, then unlawful acts began to be recognized as a separate field of law, until finally in the Anglo Saxon legal system, an unlawful act consisted of three parts: a. Actions with elements intentional (with an element of error); b. Acts of negligence (with an element of error); c. Actions without fault (absolute responsibility)<sup>8</sup>.

Absolute Article 1365 of the Civil Code, what is meant by an unlawful act is an unlawful act committed by a person who, through his fault, has caused harm to another person. Legal science recognizes 3 (three) categories of unlawful acts, namely: a. Deliberate unlawful act; b. Acts against the law without fault (without elements of intention or negligence); c. Acts against the law due to negligence<sup>9</sup>.

Thus, there is an element of unlawfulness in Article 1365 of the Civil Code, so that Article 1366 of the Civil Code confirms that "every person is responsible not only for losses caused by his actions, but also for losses caused by negligence and carelessness."

Foundation organs (Guardians, Management and Supervisors) in carrying out their duties and authority are responsible for the unlawful acts they commit. In carrying out its business activities, foundation organs may or may carry out various acts against/violate the law or fraudulent acts.

In relation to acts against/violating this law, Article 1365 of the Civil Code states that every act that violates the law results in loss. Thus, there is an element of unlawfulness in Article 1365 of the Civil Code, so that Article 1366 of the Civil Code confirms that "every

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<sup>7</sup> Munir Fuady I, 2005, *Perbandingan Hukum Perdata*, Citra Aditya Bakti, Bandung, hlm.82.

<sup>8</sup> Ibid, hlm .83

<sup>9</sup> Munir Fuady II, 2002, *Perbuatan Melawan hukum*, Citra Aditya Bakti, Bandung , hlm.3.

person is responsible not only for losses incurred." caused by his actions, but also for losses caused by negligence and carelessness.

Thus, there is an element of unlawfulness in Article 1365 of the Civil Code, so that Article 1366 of the Civil Code confirms that "every person is responsible not only for losses caused by his actions, but also for losses caused by negligence and carelessness."

Foundation organs (Guardians, Management and Supervisors) in carrying out their duties and authority are responsible for the unlawful acts they commit. In carrying out its business activities, foundation organs may or may carry out various acts against/violate the law or fraudulent acts. In relation to acts against/violating this law, Article 1365 of the Civil Code states that every unlawful act that causes harm to another person requires that the person, because of his fault in causing the loss, compensate for the loss. Furthermore, Article 1366 of the Civil Code states that every person is responsible not only for losses caused by their actions, but also for losses caused by negligence or carelessness.

The definition of unlawful acts includes both acts and omissions that violate the rights of other people, or are in conflict with legal obligations, or are contrary to morality or due care in social interactions regarding the life or property of other people.

Foundation organs, especially administrators, in carrying out their duties and authority must pay attention to and be based on: a. Principle of Ultra Vires ; b. Fiduciary duty ; c. Duty of Skill and Care ; d . Statutory Duty , described as follows:

### 1. Principle of Ultra Vires.

An action or legal act carried out by a foundation organ that is contrary to the aims and objectives of the foundation as outlined in the Foundation's Articles of Association is called an Ultra Vires act . So in principle an Ultra Vires act is an act of a foundation organ that does not bind the foundation, but only binds the person of the foundation organ against whom carry out transactions. So third parties must be careful whether the foundation's organs carry out these actions in accordance with the foundation's articles of association.

According to Gunawan Widjaya, there are 2 (two) related to the foundation's ultra vires actions . **Firstly** , actions which according to the provisions of the applicable laws and the foundation's articles of association are actions outside the aims and objectives of the foundation, and **secondly** , are actions by the foundation management which are outside the authority given to them based on the applicable provisions, including the Foundation's Articles of Association<sup>10</sup> .

To find out how far an act is said to have deviated from the aims and objectives of the foundation so that it is categorized as an Ultra Vires act , it can be seen from the habits and practices that occur in practice. Likewise, the Foundation Law clearly stipulates regarding ultra vires actions that each management organ is personally fully responsible if the person concerned in carrying out their duties does not comply with the provisions of the foundation's articles of association, which results in losses to the foundation or third parties (Article 35 paragraph (5) UUY ). Even if bankruptcy occurs due to the error or negligence of the management and the foundation's assets are not sufficient to cover the losses resulting from the bankruptcy, then each member of the management is jointly and severally responsible for the losses (Article 39 paragraph (1) UUY).

### 2. Fiduciary Duty.

Management in carrying out their duties based on the trust given by the Trustees/Founders must act in the interests of the foundation as a whole, not in the interests of individuals or foundation organs, this is in accordance with the aims and

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<sup>10</sup> Gunawan Widjaya, *Suatu Panduan Komprehensif Yayasan di Indonesia*, (Jakarta, Elek Media Kompetindo, 2002) , hal.38.



objectives of the foundation. This means that the management has restrictions on acting on behalf of and in the interests of the foundation. Therefore, the management is the fiduciary duty of the foundation.

This is in line with the concept of fiduciary duty by Paul L. Davies in Gower's Principles of Modern Company Law<sup>11</sup>, states that In applying the general equitable principle to company directors, four separate rules have emerged. These are ... (1) That directors must act in good faith in what they believe to be the best interest of the company; (2) That they must not exercise the powers conferred upon them for purposes different from those for which they were conferred; (3) That they must not exercise their discretion as to how they shall act; (4) That, without the informed consent of the company, they must not place themselves in a position in which their personal interests or duties to other persons are liable to conflict with their duties. These four principles essentially show that by analogy, foundation administrators carrying out their management duties must always:

- a. Act in good faith;
- b. Pay attention to the interests of the foundation and not the interests of the foundation's supervisors, administrators or supervisors; 3) The management of the foundation must be carried out properly according to the duties and authority given to it, at the level reasonable accuracy.
- c. Provided that the management is not permitted to expand or narrow the scope of its own movements;
- d. It is not permitted to take actions that could cause a conflict of interest between the interests of the foundation and the interests of the foundation management (the conflict interest).

Furthermore, Black's Law Dictionary defines fiduciary duty as a duty to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other person (such as the duty that one partner owes to another person)<sup>12</sup>. From this definition, it can be said that a fiduciary relationship arises when one party does something for the interests of another party while ignoring their own personal interests.

In connection with this, the management's authority is limited as regulated in Articles 36.37 and Article 38 of the Foundation Law, namely: 1) Guaranteeing debts to the foundation; 2) Transfer the foundation's assets with the approval of the supervisor; 3) Encumbering the foundation's assets for the benefit of other parties. 4) Enter into agreements with organizations affiliated with the foundation and foundation apparatus; 5) Representing the foundation in court in cases between the foundation and the management and where there is a conflict of interest between the management and the foundation. Unless those entitled to represent the foundation are specified in the articles of association. If a foundation organ violates fiduciary duty, then the foundation organ that benefits from the violation is obliged to do so hold him accountable as a person trusted ( trustee ) by the foundation for the position held by the management.

### **3. Duty of Skill and Care .**

The term duty of skill and care is not easy to provide an accurate and short translation in Indonesian. The word "duty" includes the meaning of duties and obligations. Skills include the meaning of ability, ability and professionalism. The word "care" includes the meaning of not being negligent, caring, careful, diligent and working hard (diligence). Each administrator is fully personally responsible if the person concerned carries out their duties not in accordance with the provisions of the

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<sup>11</sup> Davies, Paul L, Gover's Principles of Modern Company Law, (London: Sweet Maxwell, 1997), hal.601.

<sup>12</sup> Paul L. Davies in Gunawan Widjaya, A Comprehensive Guide to Foundations in Indonesia, PT. Alex Media Komputindo Gramedia Group, Jakarta, 2002 p. 39.

foundation's budget, resulting in losses to the foundation or third parties ( duty of skill and care). The duties and obligations of management in relation to the " duty of skill and care" originate from contracts, decency/fairness and from statutory regulations and articles of association<sup>13</sup>.

The problems that arise are regarding the authority to act of foundation organs and the responsibility of the foundation as a legal entity or actions carried out by foundation organs against third parties. Foundation administrators represent the foundation inside and outside the court. In terms of whether a foundation organ has committed negligence or negligence which resulted in a breach of duty, his actions are measured on 2 (two) grounds:

1. Standard of care . This is an objective standard where a foundation organ is expected to act or act according to propriety and fairness in carrying out its duties and authority.
2. Management actions are measured based on a " standard of skill" which depends on the requirements to become a foundation administrator/organ.

#### **4. Statutory Duty.**

The power and authority of the foundation organs is based on and limited by the articles of association of the foundation concerned. The authority of the foundation organs to act is similar. The authority to act by the organs of a legal entity is formulated in its articles of association. The articles of association are positive law that binds all organs of the Foundation. The binding force of the Articles of Association cannot be waived in case of wish in the Foundation Law and the Articles of Association itself. Thus, the Foundation's organs exercise what is known as statutory representation , that is, representation based on the articles of association.

It should be added that the authority of the Management does not arise from statutory regulations, so it is only based on the articles of association, it cannot be enforced by third parties or other parties.

The Foundation Law itself limits the authority of the Foundation Management organ in the event that a case occurs between the Foundation and members of the relevant Foundation Management organ or in the event that the member of the relevant Management organ has interests related to the interests of the Foundation (read: Article 36 of the Foundation Law).

The Foundation Management Organ has no authority to bind the Foundation as a debt guarantor, transfer the Foundation's assets except with the approval of the Trustee organ, and encumber the Foundation's assets for the benefit of other parties. If the Management organ carries out legal actions for and on behalf of the Foundation (read: Article 37 of the Foundation Law). The Articles of Association can limit this authority by determining that certain legal actions require prior approval from the Trustees and/or Supervisors, for example to guarantee the Foundation's assets for building purposes. school or hospital.

Management Organs are prohibited from entering into agreements with organizations affiliated with the Foundation, other Foundation Organs, and Foundation employees unless this is beneficial for achieving the Foundation's objectives. Members of the Management organ who are found guilty in managing the Foundation which results in losses to the Foundation, society or the state based on a Court decision, within a period of 5 (five) years after the decision cannot be appointed as Management of any Foundation (Article 38 of the Foundation Law).

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<sup>13</sup> Chatamarrasjid , Badan Hukum Yayasan (suatu analisis mengenai Yayasan sebagai Badan Hukum Sosial, Bandung,Citra Aditya Bhakti,2002 :98).

Management whose error or negligence causes the foundation to go bankrupt and the foundation's assets are insufficient to cover losses resulting from the bankruptcy, are jointly and severally liable for these losses unless the management members can prove their innocence and negligence. (Article 39 paragraphs 1 and 2 of the Foundation Law) .

In relation to the annual report, the Management must make and keep records properly, and must make an annual report no later than 5 (five) months from the date the Foundation's financial year is closed (Article 49 paragraph (1) UUY).

It needs to be stated that bankruptcy occurs due to the error or negligence of the Supervisor, so like the Management, the Supervisors are also jointly and severally responsible based on Article 47 of the Foundation Law.

### **Responsibilities of Foundation Organs Regarding Unlawful Acts**

Responsibility comes from words responsibility which means the state of being obliged to bear everything (if something happens, you can be sued, blamed in a lawsuit and so on)<sup>14</sup>. Furthermore, the concept of legal responsibility relates to legal responsibility for actions carried out by a person or group that are contrary to the law. According to Hans Kelsen, in his theory of legal responsibility, it states that "a person is legally responsible for a certain act or that he bears legal responsibility, the subject means that he is responsible for a sanction in the event of a conflicting act"<sup>15</sup>. Hans Kelsen further stated that "Failure to exercise the care required by law is called negligence ; and error is usually viewed as another kind of error (*culpa*), although less severe than error which is accomplished by anticipating and intending, with or without malicious intent, harmful consequences."<sup>16</sup> Usually, if sanctions are directed at the perpetrator directly, a person is responsible for his own actions. Hans Kelsen then divided the responsibilities consisting of: 1) Individual responsibility, namely an individual is responsible for self-inflicted violation; 2) Collective responsibility means that an individual is responsible for an offense committed by another person; 3) Liability based on fault, which means that an individual is responsible for the violation he committed because it was intentional and expected with the aim of causing harm; 4) Absolute liability, which means that an individual is responsible for the violation he committed because it was unintentional and unexpected.

In general legal theory, it states that everyone, including the government, must responsible for every action whether due to error or without error. From this theory arises legal responsibility in the form of criminal responsibility, civil responsibility and administrative responsibility.<sup>17</sup> Legal liability relates to unlawful acts. In civil law, unlawful acts can be found in Article 1365 of the Civil Code (Civil Code). Legal liability relates to unlawful acts. In civil law, unlawful acts can be found in Article 1365 of the Civil Code (Civil Code) In connection with the management of higher education foundations by foundations that commit acts against the law, the form of responsibility is as follows:

#### **1. Civil Liability.**

Civil responsibility arises from the existence of an agreement, whether the obligation originates from law or from an agreement (Article 1233 of the Civil Code). According to **Schut** in Anwar Borahima, responsibility can arise from agreements (more precisely,

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<sup>14</sup> (<http://Inspirasi hukum.blogspot.com/2011/4/pertanggung-jawaban.administrasi-negara.23.html>).diakses dari (e-journal.uajy.ac.id) tgl.19 Maret 2024.

<sup>15</sup> Hans Kelsen , A General Theory Of Law and Statute, Teori Umum Hukum dan Negaa, Dasar-Dasar Ilmu Hukum Normatif sebagai Ilmu Hukum Deskriptif Empirik, Terjemahan oleh Somardi, BEE Media Indonesia, Jakarta,2007, hlm . 81.

<sup>16</sup> *ibid* , hlm 83.

<sup>17</sup> Anwar Borahima, implikasi Yuridis Pemberlakuan Undang-Undang No.16 Tahun 2001 Tentang Yayasan,Disertasi,PPS Universitas Air Langga,2002, hal.251.

breach of contract) and from unlawful acts. In the first case, losses must be compensated because the main or secondary obligations based on the agreement are not fulfilled (performance obligations or warranty obligations). Meanwhile in the second, losses must be compensated for violations of a legal norm (commands and prohibitions).<sup>18</sup> In connection with Hoge Raad's previous unlawful actions. in 1919 gave the formulation that *Onrechtmatig is slecht een daad, die inbreuk maakt opeen anders subjectief recht, of die in strijd is met des fathers eigen rechtsplicht*, which means that it is simply an act to violate the law which violates the subjective rights of other people which is contrary to the legal obligations of the creator himself.<sup>19</sup> However, in its development after the Hoge Raad Arrest on January 31 1919, the definition of unlawful acts was expanded to include not only acts that violate the subjective rights of other people, which are in conflict with the legal obligations of the person who made them themselves, also contrary to decency or propriety in society. or other people's objects (*indruist tegen de zorgvuldigheid welke in het maatschappelijk verkeer betaant ten aanzien van eens anders lijf of goed*).<sup>20</sup> Then, in Article 1365 BW which is famous as the article that regulates unlawful acts (*Onrechtmatige daad*) that every unlawful act which thereby causes harm to another person, requires the person whose fault caused the loss to compensate for the loss. So the conditions What must be fulfilled according to Article 1365 BW is that the act is against the law, there must be an error, there must be a loss caused, and there is a causal relationship between the act and the loss.

Furthermore, Article 1366 BW states that every person is responsible not only for losses caused by their actions, but also for losses caused by negligence or carelessness.

If the foundation's management organ, in the event that bankruptcy occurs due to the error or negligence of the Management and the foundation's assets are not sufficient to cover losses resulting from the bankruptcy, then each member of the management organ is jointly and severally responsible for the loss (Article 39 paragraph (1) of the Foundation Law).

## 2. Criminal Responsibility.

An act can be called a criminal act if the elements of unlawfulness are met. According to Pompe and Post, going against the law (*wederechtelijkheid*) is synonymous with "*instrijd met het recht*" against the law. Going against the law has a broader meaning than just "*in srtrijd met de wet*" (contrary to the law). What is meant by conflict with the law here is any legal product from the legislator which is in written form. Meanwhile, what is meant by being against the law is not only violating written provisions but also going against the sense of propriety appropriateness, decency, justice in society, in other words, it is contrary to the legal feelings that live in society.

According to **Simons** in Syahrul Machmud<sup>21</sup>, going against the law means going against the law, not only with other people's rights (subjective law), but also with objective law, such as civil law and state administrative law. Likewise, according to **Noyon**, against the law means contrary to other people's rights (subjective law). Meanwhile, according to Hugo Raad in his decision dated 18 December 1911 W 9263, against the law means, without authority or without rights.

Meanwhile, Moeljatno believes that breaking the law can be viewed from a formal and material perspective. From a formal perspective, the element of unlawfulness means that every criminal act requires prior legal regulations (Article 1 of the Criminal Code:

<sup>18</sup> Anwar Borahima, implikasi Yuridis Pemberlakuan Undang-Undang No.16 Tahun 2001 Tentang Yayasan, Disertasi, PPS Universitas Air Langga, 2002, hal. 251.

<sup>19</sup> R.Setiawan, Pokok-Pokok Hukum Peerikatan, Binacipta, Bandung, 1994, hal.76

<sup>20</sup> *ibid* hal.81

<sup>21</sup> Syahrul Machmud, Penegakan Hukum Lingkungan Indonesia, Graha Ilmu, Yogyakarta, 2012, hal.133.

principle of *nullum delictum/legality* ). Meanwhile, from a material perspective, an act is categorized as a criminal act if it is an act that is not permissible or appropriate to do. This characteristic is called the unlawful nature of the act ( *wederrechtelijkheid der gedraging* ). So the review is not only from the perspective of formal legislation, but also from a broader angle<sup>22</sup>

In connection with this matter, in the administration of foundations it is regulated that every member of the foundation organ, especially foundation administrators who transfer or distribute directly or indirectly an interest in the foundation is subject to criminal sanctions with a maximum imprisonment of 5 (five) years (Article 70 paragraph 1 of the Law Foundation). In addition to imprisonment, members of foundation organs, who carry out direct or indirect acts of transferring or distributing assets to supervisory organs, administrators or supervisors, employees or other parties who have an interest in the foundation, are also subject to additional penalties in the form of the obligation to return money, goods, or foundation assets that have been transferred or distributed.

### 3. Administrative Responsibilities

A foundation as a legal entity is represented in its activities by an organ with duties and authority stipulated in the Articles of Association. These duties and authorities must be carried out in good faith, transparency and accountability.

administrative responsibility, in the form of a written warning, temporary dismissal, or permanent dismissal from managing the foundation.

The supervisor as a foundation organ who has the duty and authority to supervise the management of the foundation can temporarily suspend members of the management by stating the reasons, for example the management does not carry out their duties properly (Article 43 paragraph 1 UUY). After receiving the report from the supervisor, the supervisor gives the management concerned the opportunity to defend themselves. The time limit for summoning the temporarily dismissed management member is 7 (seven) days. Then the supervisor must make a decision within 7 (seven) days whether to revoke the dismissal. temporarily if the management is not proven guilty, or permanently dismissing the management concerned (Article 43 Paragraphs (3) and (4) UUY). Thus, if the management has been temporarily dismissed or permanently dismissed, this is a manifestation of administrative responsibility for a foundation administrator.

## CONCLUSION

Forms of unlawful acts from foundation organs related to the implementation of Higher Education Foundations include receiving distribution or transfer of foundation assets as intended in Article 70 paragraphs (1) and (2) UUY No.16 of 2001 which has been amended by UU No.28 of 2001 2004, embezzling foundation money/property as regulated in Article 372 of the Criminal Code, making agreements with organizations or other parties affiliated with the founder or other foundation organs without the approval of the Trustees foundations, deviate from their duties and authority as foundation organs, which are regulated in the UUY and in the foundation's AD/ART. Then the responsibilities of the Foundation Organs are related to unlawful acts in the management of the foundation, namely criminal responsibility in the form of prison sanctions and/or/fines, civil responsibility in the form of compensation both individually and jointly, and administrative responsibility in the form of sanctions of reprimand up to dismissal from position as a foundation organ.

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<sup>22</sup> *ibid* hal 134.



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