



REVIEW ON THE LEGALITY OF LEGAL ENTITY STATUS IN THE FOUNDATION BASED ON LAW NUMBER 28 OF 2004: THE PERSPECTIVE OF SIYASAH DUSTURIYAH, AND MASLAHAH MURSALAH

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Abstract

This research aims to examine the legalization of the legal entity status of Foundations in Indonesia after the enactment of Law No. 28 of 2004 about "Yayasan" with a review of Siyasa Dusturiyah and Maslahah Mursalah. This research used the approach method is the normative juridical in the form of library research, with a legal doctrine. The results of this in this research found that the legalization of the legal entity status of the Foundation had three stages, namely the establishment of the Foundation, the ratification of the foundation deed, and the announcement of the Foundation as a legal entity. Then Law No. 28 of 2004 concerning the legal entity legalization system of Foundations after being tested in a material juridical manner, article by article, is considered to have met the eligibility standards in state administration and has complied with the legal principles in the AAUPL. However, based on the study of Siyasa Dusturiyah theory with eight legal principles, there are two principles that are not contained in the Foundation Law, namely the principle of monotheism and the principle of social balance. And likewise, based on the theory of Maslahah Mursalah, the Foundation Law does not fulfill the principle because there are more harm that result from the benefits obtained.

Keywords: *Legality, Foundation, Siyasa Dusturiyah, Maslahah Mursalah*

Abstrak

Penelitian ini bertujuan untuk menelaah pengesahan status badan hukum Yayasan di Indonesia setelah diberlakukannya Undang-Undang Nomor 28 tahun 2004 dengan tinjauan *Siyasa Dusturiyah* dan *Maslahah Mursalah*. Metode pendekatan yang digunakan dalam penelitian ini adalah pendekatan yuridis normatif berbentuk penelitian kepustakaan, dengan pendekatan doktrin hukum. Adapun hasil penelitian ini menemukan bahwa pengesahan status badan hukum Yayasan mempunyai tiga tahap yakni pendirian Yayasan, pengesahan akta yayasan, dan pengumuman Yayasan sebagai badan hukum. Kemudian Undang-Undang Nomor 28 tahun 2004 mengenai sistem pengesahan badan hukum Yayasan setelah diuji secara yuridis materiil pasal per pasal dinilai telah memenuhi standar kelayakan dalam administrasi negara serta telah memenuhi Asas-Asas Umum Pemerintahan Yang Layak (AAUPL). Namun berdasarkan telaah teori *Siyasa Dusturiyah* dengan delapan asas hukum, terdapat dua asas yang tidak termuat dalam Undang-Undang Yayasan yaitu asas *tauhidullah* dan

asas keseimbangan sosial. Dan begitu pula berdasarkan teori *Maslahah Mursalah* Undang-Undang Yayasan tidak memenuhi asas dikarenakan lebih banyak *kemudharatan* yang diakibatkan dari pada manfaat yang didapatkan.

Kata Kunci : Legalitas, Yayasan, *Siyasah Dusturiyah*, *Maslahah Mursalah*

INTRODUCTION

Law grows together with developments in society. The role of law as a means of reform is accommodated along with changes in social phenomena. Even so, in reality legal developments tend to be left behind by developments occurring in Indonesia society (Darmodiharjo & Shidarta, 1995: 12). One example of the form of underdeveloped law in Indonesia is the legal arrangement regarding foundations. Historically, the foundation as an organization that has existed since the Dutch East Indies era, whose arrangements have experienced dynamic development from time to time (Suhardiadi, 2002: 152).

The existence of foundations has been familiar to the public for a long time, but the legality of foundations only refers to the customs of society and the jurisprudence of the Supreme Court. The Government of the Republic of Indonesia passed Law Number 16 of 2001 concerning Foundations. In its development, some of the articles have been amended by Law Number 28 of 2004 concerning Amendments to Laws that were previously in force (Supramono, 2007: 21). And the administrative implementation was made Government Regulation Number 63 of 2008 changed to Government Regulation Number 2 of 2013. As for the latest development, the minister of Law and Human Rights issued Regulation of the Minister of Law and Human Rights of the Republic of Indonesia (*Permenkumham*) Number 2 of 2016 concerning submission of applications for legalization of legal entities and approval of amendments to the articles of association and delivery of notification of amendments to the articles of association and changes to foundation data. Based on Pindri (2021) and Mahastoro (2019) Foundations that are recognized as legal entities and have never made adjustments to the Law on Foundations, as well as foundations that are not recognized as legal entities and have not made adjustments.

The presence of this Law, Government Regulation and Regulation of the Minister of Law and Human Rights of the Republic of Indonesia is a step forward for the Indonesian government in managing foundations for the irregular management of foundations in Indonesia, and also provides answers to the debates of legal experts about whether foundations are legal entities or not (Ais, 2015: 54). The form of legal protection from the establishment of the Foundation is by setting up a mechanism for validating its legal entity status in Article 11, Article 12, Article 24, and Article 71 of Law Number 28 of 2004. Based on data recorded at the Ministry of Law and

Human Rights, after Law Number 28 of 2004 concerning Foundations was promulgated and became effective on October 6, 2004, applications for legalization of the establishment of foundations and requests for approval of amendments to the articles of association of foundations made by a notary or administrator foundation to Minister of Law and Human Rights as a legal structure (Standar Akta Yayasan Dan Undang-Undang Yayasan, 2004: 78).

However, in practice there were many obstacles in the process of validating the Foundation, including copies of the deed attached to the ratification process, many of which were returned by the Minister of Law and Human Rights to the Notary as the attorney of the founder, due to wrong name, name similarity with other Foundation names, and also caused by errors in making deed. In fact, from Minister of Law and Human Rights data, almost more than 60% of the foundation deed submitted must be returned to the applicant because the deed of establishment which contains the foundation's articles of association drawn up with a notary deed does not meet the standards of a deed as stipulated in the Foundation Law. So this has resulted in the process of validating the Foundation taking a very long time and being less efficient (Cahyono, 2016: 43).

The implementation of Law No. 28 of 2004 resulted in many difficulties in ratifying the legal status of foundations compared to previous legal regulations. As is the case in Article 11 paragraphs 3. This article makes it difficult for Foundation Founders and Notaries, because making a Foundation deed also takes a long time, more than 10 days. As a result, many foundations are left behind in submitting foundation deed files to the Ministry of Law and Human Rights and can be returned or not accepted by the Ministry of Law and Human Rights. Article 71 paragraphs 1 and 2 also makes it difficult to ratify foundations that have long existed before this law was passed, which only provides a grace period of one year after this law comes into force to adjust the statutes (Supriono, 2015: 97).

Apart from these obstacles, the Law on foundations has brought about many significant changes in the arrangements for foundations that have existed in Indonesia for a long time until now, about legality of entity (Prasetya, 2012: 62). However, the effectiveness of this Foundation Law must be on an ever-increasing graph, bearing in mind the increasingly advanced legal culture in society regarding the establishment of foundations and the many problems faced by both long-established and newly established foundations, namely regarding the issue of validating the status of a foundation's legal entity. as legal substance. So that future legal reforms can go hand in hand with social changes in society.

Based on the description that has been explained, this study aims to further examine the ratification of the legal entity status of the foundation with the perspective of *Siyasah Dusturiyah* and *Maslahah Mursalah*. *Siyasah*

Dusturiyah perspective's to examine how state laws can be in line with shariah values and can bring people closer to benefit. Then the perspective of *Maslahah Mursalah* is to examine how the law on foundations has considerations for the benefit or purpose of the interests of human life which provide and maintain benefits and avoid harm.

RESEARCH METHODS

The type of research used in this research is library research, which is a research activity by collecting information that is relevant to the topic or problem that is the object of research (Surachman, 2010: 35). While this information can be obtained from books and scientific papers. The research is analytic descriptive in nature, namely a study that seeks to describe and describe a symptom or event that occurs. After the required data is collected then the data is described in sentences (Ghozali, 2013: 90).

This study uses primary and secondary legal data, namely, Primary Legal Data Law No. 28 of 2004 concerning legality of "Yayasan" pasal 11, 12, 24, and 71 concerning the system of validating the legal status of foundations. Secondary Legal Data References from related books and journals which include foundation legal entities, as supporting primary data.

The approach used in this study is normative juridical research in the form of research on legal principles, namely using the *Siyasah Dusturiyah* theory and the *Maslahah Mursalah* theory in analyzing the Law on Foundations. The data analysis used in this study is qualitative data analysis, namely analyzing data by organizing the data, sorting it into manageable units, then synthesizing it with theory and in the end finding patterns from the data.

DISCUSSION

Analysis of *Siyasah Dusturiyah* Theory toward the Foundation Legality System in Law No. 28 of 2004

The law that is built in constitutional life in Islam or in *siyasah* is to regulate the interests of the state and organize the affairs of the people in line with the soul of Islamic law and in accordance with universal principles (*kulli*) to realize its societal goals. Meanwhile, the government is the organizer of the state and manages state administration, regulates state affairs, decides state problems in various political policies of a country and government in relations between nations and countries. So that law and government have a close relationship in regulating the affairs of a country (Abdullah, 2012: 80).

Siyasah Dusturiyah itself discusses the issue of state legislation, regarding basic principles related to forms of government, rules related to people rights, and regarding the distribution of power. *Siyasah Dusturiyah* also understands the ins and outs of managing the affairs of the people and the state with all forms of laws, regulations and policies made by those in power that are in line with the basic teachings and spirit of Islamic law to realize the benefit of the people (Pulungan, 2006: 65).

After the enactment of Law No. 28 of 2004 which regulates foundations in Indonesia, it can provide an overview of the government's progress in managing the affairs of the people or society to realize the benefit of the people as is the goal of *Siyasah Dusturiyah*. With the passing of the Foundation Law, it creates legal certainty for the public in establishing a foundation and provides an understanding of the correct rules regarding foundations (Nira, 2017: 76).

This is the case with the system for legalizing the status of a foundation legal entity which consists of the establishment process, then validating the foundation deed, and the announcement of the foundation as a legal entity, which has been regulated in the Foundation Law articles 11, 12, 24 and 71, thus providing clarity regarding the legal rules for people who want to establish a Foundation.

The Effectiveness of Law No. 28 of 2004 which specifically talks about the system for validating the legal entity status of the Foundation can be seen from the framework of the legal system which consists of three points (Siahaan, 2020: 154). The first, the legal substance, namely the applicable laws and regulations (Law No. 28 of 2004 articles 11, 12, 24, and 71). Secondly, the legal structure, namely law enforcers whose job is to ensure that the law runs smoothly, which in this law are the Ministry of Law and Human Rights, the courts and the prosecutor's office (Ayu, 2021: 242). And the third is the legal culture that applies in society, namely the value system that exists in society that determines that the law should apply, which in this case is the culture of the community in establishing foundations which are divided into two, namely foundations that were established before the Law on Foundations and Foundations which was born after the Foundation Law (Khalid, 2020: 43).

The rules in Law No. 28 of 2004 in articles 11, 12, 24, and 71 regarding the system for legalizing foundation legal entities in more detail can be analyzed using the *Siyasah Dusturiyah* theory, which discusses actions that can bring people closer to benefit or the problem of how state legislation can be in line with Sharia values.

There are *Siyasah Dusturiyah* principles to assess how appropriate a law or policy can be applied and accepted by society (Abdullah, 2012: 65). First, the principle of legality requires that every government or state administrative action must have a written regulation that underlies it. Thus,

every government action, like the Ministry of Law and Human Rights, in legalizing and announcing the legal status of a foundation has a legal basis in Law No. 28 of 2004.

Second, the general principles of good governance are an essential part of the implementation of state administrative law and are also an important part of the realization of state governance in a broad sense, including in the formulation of public policies. One of the AAUPB is the principle of legal certainty, namely the principle of a rule of law that prioritizes the basis of laws and regulations, decency and justice in every policy of state administrators (Solechan, 2019: 80). Whereas Law No. 28 of 2004 has fulfilled the principle of legal certainty which can be seen from what is stated in the point of remembering, namely having a legal basis from article 5 paragraph 1 and article 20 of the 1945 Constitution which contains the president and the DPR having the authority to make this law (Gurmansyah, 2017: 120).

Third, the principle of monotheism, namely the principle which in the Islamic constitutional system has a correlation with the faith that underlies it, so that in dealing with moral, economic and social issues both are sourced from the faith which has direct accountability to Allah. In Law No. 28 of 2004 what is referred to as caliph or government is the Ministry of Law and Human Rights, thus the Ministry of Law and Human Rights has a direct responsibility to Allah in matters of managing the people, namely in terms of validating the status of a foundation legal entity. However, the legal material of the Foundation Law is neither explicitly stated nor does it contain elements of the monotheism principle, so this law does not fulfill the monotheism principle in *Siyasah Dusturiyah*.

Fourth, the principle of equality (*mabda al-musawah*) which means that every individual in society has the same degree as a citizen regardless of origin, race, religion, language, and social status. So that especially regarding politics, it is wide open to anyone without distinguishing certain strata. As for its relation to Law No. 28 of 2004 concerning this Foundation, people who wish to establish a Foundation are treated equally in the eyes of the administrative law, thus there is no difference in treatment from the Ministry of Law and Human Rights as the competent authority, in terms of legalizing or rejecting the legal status of a foundation that has the application is submitted through a Notary as contained in articles 11 and 12 of the Law on Foundations (Mustofa, 2018: 138).

Fifth, the principle of deliberation is a benchmark for mutual respect and detachment from self-claiming truth. By deliberating, differences in interests and diverse goals can be accommodated into great dynamics and energy to achieve an equalized perception. This principle of deliberation is also projected in Law No. 28 of 2004 article 11 paragraph 1 . Asking for consideration in this matter is included in the category of deliberation, so

that the Foundation Law fulfills the principle of deliberation in *Siyasah Dusturiyah*.

Sixth, the orderly principle of economic administration is a *muamalah* activity related to the utilization of assets for the state so that there is no monopoly on it, so that the process of economic administration must originate from the *Qur'an* and *Sunnah* which is called *Siyasah Maliyah* (Edwar, 2021: 79). The establishment of a foundation is also a form of the orderly principle of economic administration which is an asset that is separated and intended to achieve certain goals in the social, religious and humanitarian fields that do not have members as set out in article 1 paragraph 1 of the Law on Foundations.

Seventh, the principle of social balance (*at tawazun al ijtima'i*) has the meaning that there is a balance of standards between individuals in social life, resulting in a rotation of economic welfare so that each individual can live properly. The foundation in this case can create economic equity, because it includes business entities in the religious, social, and educational fields. However, this is not specifically explained in the points of Law No. 28 of 2004 concerning social balance.

Eighth, the responsibility of the state (*al-masuliyah addaulah*), namely in Islamic law the state has an obligation to guarantee the needs of society and intervene directly in regulating relations between these individuals. And the relation between the principle of state responsibility and Law No. 28 of 2004 concerning Foundations is that the Ministry of Law and Human Rights as an agent of the state has the authority to guarantee the needs of its people in terms of granting foundation legal entity status, accepting submissions for amendments to its Articles of Association, and announcing them in additional state news of the Republic of Indonesia, articles 11, 24, and 71.

Thus it can be concluded that Law No. 28 of 2004 has fulfilled the requirements of a law that is appropriate to be implemented and can be accepted by the public because its legal material outline contains the principles of *Siyasah Dusturiyah*. However, there are two *Siyasah Dusturiyah* legal principles which are not contained in the legal substance of this Law on Foundations, namely the principle of *tauhidullah* and the principle of social balance, but if they are related to the foundation material in general these principles are included in the discussion.

Analysis of *Maslahah Mursalah* in the Implementation of Foundation Legality in Law No. 28 of 2004

Maslahah Mursalah is a legal *istinbat* which is based on the aim of avoiding harm and benefiting from legal issues involving the benefit of many people and these legal matters have no basis in the argument of *qath'i*, namely from the *Qur'an* and *hadits* (Khallaf, 2002; 58 dan Syafe'I, 2010: 90).

As for Law No. 28 of 2004 regarding the ratification of the legal status of foundations, this is a law made by the government for the benefit of the people but not based on the *Qur'an* or *Hadits*. Thus this legal issue can be used as an object of study from *Maslahah Mursalah* (Haq, 2021: 225). Then regarding the scope of application of *Maslahah Mursalah* it is divided into three parts, namely The First, *Al Maslahah Ad-Daruriyah*, in the form of interests which essentially concern life (*maqosidus sharia*), such as maintaining religion, soul, mind, lineage and property. Second, *Al Maslahah Al Hajiyah*, in the form of essential interests below the level of *al maslahah daruriyah*, but necessary in human life so as not to experience difficulties and narrowness which if not fulfilled will result in damage and narrowness in life. And third, *Al Maslahah Al Tahsiniyah*, which contains complementary interests, and if it is not fulfilled it will not result in narrowness in his life, because this is only a complement or decoration of his life (Zahrah, 2005: 82).

Within the scope of *Maslahah Mursalah*, the implementation of this Law, seen from its aspect, is *Maslahah Al Hajiyah*, because the laws that are regulated are necessary in human life so that they do not experience difficulties and narrowness which, if not fulfilled, will result in damage and narrowness in life (Faqih, 2018: 154). So that the legal consequences of implementing the Law of Foundation must meet the standards of *maslahah*, is the withdrawal of benefits and avoidance of harm.

Then when analyzed using the *Maslahah Mursalah* theory, there is a negative impact from the application of the law of this Foundation Law. As can be seen from the Minister of Law and Human Rights data, almost more than 60% of the foundation deed submitted must be returned to the applicant because the deed of establishment which contains the articles of association of the foundation made with a notarial deed does not meet the standard of deed as stipulated in the Foundation Law. So this has resulted in the process of validating the Foundation taking a very long time and being inefficient. Thus the maintenance of harm which is the principle of *Maslahah Mursalah* is not fulfilled (Zahrah, 2005: 14).

Not only in terms of implementation which is an obstacle, but in terms of legal content it also creates difficulties in establishing foundations. As contained in article 11 paragraph 3, this article makes it difficult for Foundation Founders and Notaries, because the making of a Foundation deed also takes more than 10 days. As a result, many foundations are left behind in submitting foundation deed files to the Ministry of Law and Human Rights and can be returned or not accepted by the Ministry of Law and Human Rights (Islami, 2020: 127). Article 71 paragraphs 1 and 2 also makes it difficult to ratify foundations that have long existed before this law was passed, which only gives a grace period of one year after this law comes into force to adjust the statutes. And if it does not fulfill these requirements,

this long-established Foundation is not allowed to use the word "Foundation" in front of it and a court decision can be dissolved at the request of the prosecutor's office.

Thus, when compared to legal arrangements prior to the existence of the Foundation Law, the establishment of foundations is relatively easier because it is only based on custom and jurisprudence without going through approval from the Ministry of Law and Human Rights (Astri, 2021: 80). However, from *Maslahah* perspective, the existence of this Foundation Law provides legal certainty for foundations in carrying out legal actions, because they already have a legal basis and legality principle.

With the premises previously stated, it can be concluded that Law No. 28 of 2004 does not fulfill the principle of *Maslahah Mursalah*, even though there are benefits to be derived from the implementation of this Law on Foundations. Because more harm is caused than the benefits are obtained, according to the rules of *ushul fiqh*.

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"rejecting *mafsadat* takes precedence over achieving benefit" (Al-Qardawi, 1997).

When analyzed using the study of *maslahah mursalah* through interviews with experts on the legalization of foundation legal entities, there is a negative impact from the application of the law of this Law on Foundations. As can be seen from the Menkumham data, almost more than 60% of the foundation deed submitted must be returned to the applicant because the deed of establishment which contains the articles of association of the foundation made with a notarial deed does not meet the standard deed as stipulated in the Foundation Law. So this has resulted in the process of validating the Foundation taking a very long time and being inefficient. Thus the maintenance of harm which is the principle of *maslahah mursalah* is not fulfilled.

CONCLUSION

Based on the explanation in several previous chapters regarding the system for validating the legal status of foundations in Law No. 28 of 2004, if examined using the theory of *Siyasah Dusturiyah* and *Maslahah Mursalah* it can be concluded that, The problem with the legal entity legalization system when the Foundation is tested judicially materially article by article is considered to have met the eligibility standards in state administration. Judging from the legal material, it already contains legal principles from the general principles of proper governance, such as the principle of legal certainty, the principle of balance, the principle of equality, the principle of careful action, the principle of motivation for every decision, and the principle of not mixing authority.

Law No. 28 of 2004 specifically in articles 11, 12, 24, and 71 regarding the system for validating legal entity status has met the requirements of a law that is appropriate to be implemented and can be accepted by the public because its legal material outline contains the principles *Siyasah Dusturiyah*. However, there are two *Siyasah Dusturiyah* legal principles which are not contained in the legal substance of this Law on Foundations, namely the principle of *tauhidullah* and the principle of social balance, but if they are related to the foundation material in general these principles are included in the discussion. Then when studied more deeply, this Law of Foundation does not fulfill the principle of *Maslahah Mursalah* because there is more harm caused than the benefits obtained.

As for suggestions, additional legal articles are provided which discuss establishing a foundation process or regarding administrative requirements in establishing a foundation. In addition, it is expected to provide input in the field of constitutional law, especially in the field of drafting and legal drafting. It can be used as material for study and input for academics in the future.

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