

# Legal Protection on Share Transfer Owned by a Foundation to the Affiliated Company

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**ABSTRACT**--*The foundation's management in transferring, transferring and selling the foundation's wealth is limited in accordance with article 5 paragraph (1) of Law Number 28 of 2004 concerning Amendments to Law Number 16 of 2001 concerning Foundations. And also in article 38 paragraph (1) it is stated that foundations are prohibited from entering into agreements with organizations affiliated with the foundation, the builder, the management and / or supervisors of the foundation, or someone who works for the foundation. This research is a study of legal protection for the sale of shares owned by the Kartika Eka Paksi Foundation to the company conducted by the foundation's management which is affiliated with the company and its legal consequences. Research method used in this search is an descriptive analytic research by using juridical normative approach, namely research that puts an emphasis on the secondary data and data used are secondary and tertiary data, namely data obtained through library research and other supporting data related to the topic of discussion. Basically the foundation's executive board is prohibited to enter into an agreement with an organization affiliated to the company, governing board, executive board and/or supervising board of the foundation, or someone working to the company, except if the agreement is useful for the foundation/does not harm the foundation in order to achieve the foundation's objectives. Legal consequence of an agreement which does not meet the objective requirements should be null and void by the law, however if the agreement is in form of authentic deed irrevocably and may be considered non-existent, however the annulment must be submitted to the court.*

**Keywords:** *legal protection, foundation, affiliated*

## I. INTRODUCTION

Foundations in the Big Indonesian Dictionary are legal entities that do not have members are managed by a board and are established for social purposes (seeking services and assistance such as schools, hospitals). In the Indonesian Civil Code (KUHperdata) applicable in Indonesia there are no specific regulations discussed in a separate article in regulating foundations, but in the Indonesian Civil Code articles the term foundation is mentioned in several articles including Article 365, Article 899, Article 900 and Article 1680.[1]

The legal basis for the Foundation is Law Number 16 of 2001 concerning Foundations which has been amended by Law Number 28 of 2004 concerning amendments to Law Number 16 of 2001 concerning Foundations (hereinafter referred to as Foundation Law).

Article 1 number 1 of the Law Number of Foundations states that the foundation is a legal entity, consisting of assets that are separated and destined to

achieve certain goals in the social, religious, and humanitarian fields, which do not have members.[2]

Foundations may carry out investments in various forms of prospective efforts provided that all investments include a maximum of 25% (twenty-five percent) of the total value of the foundation's assets.[3] The capital investment can be done by a foundation in a limited liability company.

This has been done by the Kartika Eka Paksi Foundation, which has a 50% stake in a company. The stock dividend is used by the Kartika Eka Paksi Foundation to fund the foundation's activities in order to achieve its objectives.

In Article 5 and Article 38 of the Foundation Law regulates the prohibition on the transfer of wealth of the foundation and entered into an agreement with an organization affiliated with the foundation. However, this was done by the management of the Kartika Eka Paksi Foundation who at that time transferred the wealth of the foundation to the company whose management, directors and commissioners were the same person, so that the foundation's management was affiliated with the company's directors and commissioners which resulted in harming the foundation.

Based on the explanation above, the researcher will analyze the sale of the foundation's shares in the company by the management affiliated with the buyer of the shares. Matters to be analyzed in this study are in accordance with the title Legal Protection of the Sale of Foundation Owned Shares to Affiliated Companies. Researchers are interested in conducting such research because there are legal issues regarding the transfer of the foundation's shares in the company, which then becomes a case in a court whose decision has permanent legal force.

### A. Formulation of the problem

Based on the above background, several issues can be drawn as follows:

1. What is the legal protection on the transfer of shares owned by the foundation to affiliated companies?
2. How does the notion of "benefit the achievement of the aims and objectives of the foundation" as referred to in Article 38 paragraph (2) of the Foundation Law?

## II. RESEARCH METHODS

Research to be conducted by the author is a form of normative legal research. In the form of scientific

activities based on certain methods, systematics, and reasoning aimed at studying one or several specific legal phenomena. then by analyzing and also conducting an in-depth examination of legal facts to then hold a solution to the problems contained in this study. Here the author will conduct research by applying a Normative juridical approach, where the library materials to be used by the author are sourced from primary legal sources and secondary sources.

### III. FRAMEWORK

The function of the theory in this study is to provide direction or guidance and predict and explain the observed symptoms, and because this research is a normative juridical study, the theoretical framework is directed specifically to the science of law. This study seeks to understand how the legal protection of the sale of shares of the foundation to affiliated companies, to answer the formulation of the problem, the theoretical framework that will be used in this study are the theory of protection and legal certainty as Grand Theory, legal entity theory as Middle Range Theory, settlement theory dispute as Applied Theory, and theories that support the principle of good faith.

#### 1. *Legal protection and legal certainty.*

The teaching of legal certainty comes from the Dogmatic Juridical teachings which are based on the positivistic school of thought in the legal world. This flow tends to see law as something that is autonomous, independent, and for adherents of this flow the purpose of law is nothing but guaranteeing the realization of legal certainty, and legal certainty is realized by law by its nature which only makes a general rule of law. The general nature of the rule of law proves that the law does not aim to realize justice or expediency, but merely to realize certainty.[4]

Legal certainty is not only in the form of articles in the law but also the consistency between the decisions of one judge and the decisions of other judges for similar cases that have been decided.

#### 2. *Legal entity theory*

A legal entity in Dutch called "Rechtspersoon" is a body that has assets, rights and obligations like an individual person.

Various theories and definitions have been conveyed by many scholars about what a legal entity is, this is due to what the actual nature of the legal entity is so that it is equated as humans, namely having rights and obligations, proposing several legal entity theories from several scholars, including Fiction Theory, Theory The reality or theory of equipment or Organ Theorie, Theory of Assets due to the Position or the theory of Leer van ambtelijk vermogen, taught by Holder and Binder, Common Wealth Theory, Aims of Wealth or Zweck vermogen, Theory of Juridical Wealth and Theory of Leon Duguit.

Actually the theories of legal entity are centered on two views, namely:

- a. which considers that the legal entity is a tangible form, meaning that it is real with the five human senses as a result the legal entity is equalized or identical to humans. Legal entities are considered to be identical with the organs that administer are the managers and they are considered by law as person;
- b. which considers that the legal entity is not a tangible form, but the legal entity is only a human who stands behind the legal entity, the legal entity makes the mistake is the mistake of the humans who jointly stand behind the legal entity .

#### 3. *Theory of Dispute Resolution.*

Dean G Pruitt and Jeffrey Z. Rubin put forward a theory about dispute resolution. There are 5 (five), namely:

First, contending, which is trying to implement a solution that is preferred by one party over the other party. Second, yielding, namely lowering one's own aspirations and willing to accept the shortcomings of what is actually desired. Third, problem solving, which is looking for satisfying alternatives from both parties. Fourth, with drawing, which is choosing to leave the dispute situation, both physically and psychologically. Fifth, in action, that is not doing anything. [5]

### IV. ANALYSIS OF COURT DECISIONS OF 2013-2019.

1. Decision of the Central Jakarta District Court Number 85 / Pdt.G / 2013 / PN.JKT.Pst.
2. Decision of the South Jakarta District Court Number 433 / Pdt.G / 2015 / PN.JKT.Sel.
3. Decision of the Jakarta High Court Number 304 / Pdt / 2014 / PTDKI.
4. Decision of the Jakarta High Court Number 372 / Pdt / 2016 / PTDKI.
5. Decision of the Supreme Court of the Republic of Indonesia Number 2680 K / PDT / 2014.
6. Decision of the Supreme Court of the Republic of Indonesia Number 196 PK / PDT / 2016.
7. Decision of the Supreme Court of the Republic of Indonesia Number 1800 K / PDT / 2017.

### V. DISCUSSION.

#### 1. *Legal Protection on Transfer of Foundation Owned Shares to Affiliated Companies*

Foundations deposit their wealth or incorporate foundation capital into various business entities or companies, but may not exceed 25% (twenty-five percent) of the total foundation wealth. This condition is in accordance with the provisions in Article 7 paragraph (2) of the Foundation Law.

In Article 38 paragraph (1) of the Law, the foundation foundation may not enter into agreements with organizations affiliated with the Foundation, the Trustees, the Management, and / or Supervisors of the Foundation, or someone who works for the Foundation, however the

Foundation Act provides exceptions as referred to in Article 38 paragraph (2). The exception can be made if the agreement is intended to achieve the goals and objectives of the Foundation.

Kartika Eka Paksi Foundation in carrying out activities to achieve its goals has a stake in PT Indotruba Tengah which is engaged in plantations. PT Indotruba Tengah owns 12,400 shares and the composition of shareholders in PT Indotruba Tengah is 6,200 shares owned by the Kartika Eka Paksi Foundation, 3,100 shares owned by PT Minamas Gemilang and 3,100 shares owned by PT Anugerah Sumber Makmur.

The management of the Kartika Eka Paksi Foundation (Foundation organ), namely Mr. Darsono as General Chairperson, Mr. Wahyu Widayat as Secretary, and Mr. Joso Prijitno as Treasurer and Mr. Siswanto as Chair of the Funds Division, in 2008 sold or transferred shares owned by the Kartika Eka Paksi Foundation in PT Indotruba Tengah with a total of 6,200 shares to PT Mulia Agro Persada.

Based on the Company Establishment Deed of PT Mulia Agro Persada, share ownership and management positions at PT Mulia Agro Persada are as follows: Mr. Darsono has 100 shares and serves as Commissioner, Mr. Siswanto has 200 shares and serves as President Director, Mr. Joso Prijitno has 200 shares and serves as Director.

Then Mr. Darsono, Mr. Wahyu Widayat, and Mr. Joso Prijitno and Mr. Siswanto (as the Management of the Kartika Eka Paksi Foundation for the 2004-2009 period) legalized the transfer of the shares of the Kartika Eka Paksi Foundation to 6,200 shares in PT Indotruba Tengah to PT Mulia Agro Persada by issuing the Circular Decision of PT Indotruba Tengah Shareholders on 15 September 2008.

Based on Article 91 of Law Number 40 Year 2007 concerning Limited Liability Companies, the PT Indotruba Tengah Shareholder Circular Decree should be signed by all shareholders, in this case PT Minamas Gemilang and PT Anugerah Sumber Makmur as other shareholders of PT Indotruba Tengah, however, the PT Indotruba Tengah Shareholder Circular Decree was only signed by the Management of the Kartika Eka Paksi Foundation which was not signed by PT Minamas Gemilang and PT Anugerah Sumber Makmur as PT Indotruba Tengah shareholders, so the circular decision was not valid and contradictory to Article 91 of the Law of PT.

Pursuant to Article Article 38 paragraph (1) of the Law the Foundation may not enter into an agreement with an organization affiliated with the Foundation, the Trustees, the Management, and / or the Supervisor of the Foundation, or someone who works for the Foundation, unless the said agreement is beneficial for the achievement of the purpose and the goals of the Foundation.

Article 38 Paragraph (1) has clearly prohibited the foundation's management from entering into agreements with organizations affiliated with foundations, governing board, executive board and supervisory board, moreover to transfer the wealth of the foundation to an

organization that is obviously officials in the organization as well. management of the foundation.

According to the theory of Otto Von Gierke explains that the legal entity is a reality in fact the same as the nature of the personality of human nature in the association of law. Here not only is a real person, but the legal entity also has its own will or will that is formed through its equipment (management, members). What they decide is the will of the legal entity. This theory describes the legal entity as something that is no different from humans.

For legal entities that wishful are the management, then in the legal entity all rights are covered by the management. In their quality as management they are entitled, therefore they are called *ambtelijk vermogen*.

Based on this theory, the transfer of 6,200 shares owned by the Kartika Eka Paksi Foundation to PT Indotruba Tengah carried out by the administrators of the Kartika Eka Paksi Foundation to PT Mulia Agro Persada was their own will or will based on bad intention from the management in the transfer of shares due to arising from the bad faith from the management with the aim of controlling or benefiting from the transferred shares of the Kartika Eka Paksi Foundation.

Darsono as Chairman of the Kartika Eka Paksi Foundation as well as Commissioner at PT Mulia Agro Persada, Br. Siswanto as Chair of the Funding Foundation for the Kartika Eka Paksi Foundation as well as the President Director at PT Mulia Agro Persada, Br. Joso Prijitno as the Treasurer of the Kartika Eka Paksi Foundation as well as a Director at PT Mulia Agro Persada, in this case it is impossible to separate and objectively apply between acting as a person and acting as an official in accordance with the position attached to him without personal interests.

2. *How is the definition of "beneficial for the achievement of the aims and objectives of the foundation" as referred to in Article 38 paragraph (2) of the Foundation Law*

Article 38 Paragraph (2) of the Foundation Law states that the prohibition of entering into agreements with organizations affiliated with the Foundation, the Trustees, Managers, and / or Supervisors of the Foundation, or someone who works for the Foundation, does not apply if the agreement is beneficial for the achievement of the purpose and the goals of the Foundation. Article 38 paragraph (2) of the Foundation Law provides exceptions to the actions of the management that has an agreement with another organization affiliated with the foundation, provided that the agreement made by the foundation's board is useful in order to achieve the goals of the foundation, in the sense of an agreement made by the foundation's management it does not harm the foundation.

Article 38 Paragraph (2) of the Foundation Law does not explain the requirements regarding matters intended to benefit the foundation or not, so that this becomes multiple interpretations resulting in the absence

of legal certainty because it can be interpreted to vary according to their respective interests.

According to the researcher, the interpretation of whether or not it is beneficial and detrimental to the actions carried out by the board of the foundation must be looked at carefully about the condition of the foundation at the time of the affiliated agreement. Especially the financial condition of the foundation at the time. If the condition of the foundation "financial condition" at that time was in an "unhealthy" condition or lack of funds which if there were no funds at the time could cause the foundation to become bankrupt, the act of transferring or selling its assets by making agreements with organizations affiliated with the foundation can be justified in accordance with Article 38 paragraph (2) of the Foundation Law. However, if the condition of the foundation at the time of the agreement with parties affiliated with the foundation is in a "healthy" condition in the sense that there is no urgent funding shortage, then the act of selling / transferring the assets of the foundation to an organization affiliated with the foundation cannot be justified in accordance with the intent of Article 38 paragraph (2) of the Foundation Law.

According to Philipus M. Hadjon argues that Legal Protection is the protection of human dignity, as well as recognition of human rights owned by legal subjects based on the legal provisions of arbitrariness. Based on the theory, the wealth of the foundation must be protected from the arbitrariness of its management based on the Law on Foundations.

In the case analyzed in this study it is related to Article 38 paragraph (2) of the Foundation Law, to determine whether the actions taken by the management of the Kartika Eka Paksi Foundation in the form of selling the foundation's shares to PT Mulia Agro Persada are beneficial or not for the Foundation to be seen from the financial condition through the balance sheet of the Kartika Eka Paksi Foundation, which at that time was in good / healthy condition.

Based on research and analysis of the financial condition of the Foundation through the Foundation's balance sheet at the time of the sale of shares owned by the Kartika Eka Paksi Foundation conducted by its management to PT Mulia Agro Persada, the financial condition were in good / healthy condition, so according to researchers the requirements as intended in Article 38 paragraph (2) Foundation Law. Because the required conditions as stated in Article 38 paragraph (2) of the Foundation Law were not fulfilled, the management of the Kartika Eka Paksi Foundation was not allowed to enter into agreements with organizations affiliated with the foundation.

## VI. CONCLUSIONS.

Based on the discussion above, the following conclusions can be drawn :

1. That the legal protection of the wealth of the Foundation from its management that will transfer its assets to a company affiliated with the Foundation has

been regulated in Article 5 and Article 38 paragraph (1) of the Foundation Law, namely the board may not enter into agreements with organizations affiliated with the Foundation, the Trustees, Management and / or Trustee of the Foundation, or someone who works for the Foundation, unless the said agreement is beneficial for the achievement of the Foundation's aims and objectives.

2. Interpretation of Article 38 paragraph (2) of the Law on Foundations which is beneficial for the achievement of the aims and objectives of the Foundation must meet the requirements that is not detrimental to the Foundation that can be seen from the condition of the foundation at the time the affiliated agreement was held, especially the financial condition of the foundation at the time.

If the financial condition of the foundation at that time was in an "unhealthy" condition or lack of funds which if there were no funds at the time could cause the foundation to become bankrupt, the act of selling its assets by making agreements with organizations affiliated with the foundation could be justified in accordance with Article 38 paragraph (2) of the Foundation Law, but if the foundation's financial condition is in a "healthy" condition, the act of selling / transferring the assets of the foundation with an organization affiliated with the foundation cannot be justified in accordance with the purpose of Article 38 paragraph (2) Foundation Law.

## VII. SUGGESTION

1. The foundation's management must understand and carry out both its duties and obligations in accordance with applicable laws and the Foundation's Statutes and Bylaws, so as not to harm the foundation as a legal entity that has very noble objectives because the foundation is a non profit oriented legal entity, which engaged in Social, Religious and Humanitarian.
2. Whereas Article 38 paragraph (2) of the Foundation Law regarding "useful for the achievement of the aims and objectives of the Foundation" must be interpreted clearly in its explanation, namely by one of the conditions is not detrimental to the Foundation which can be seen from the foundation's financial condition so that it is not misinterpreted by the management the foundation for his personal benefit.

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