

An Analysis of Business Entity Elements as Business Actors in Relation to Foundations: A Review of Indonesian Government Regulation No. 5 of 2021

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Abstract

This research aims to analyze the elements of business entities in relation to Foundations. The designation of Foundations as legal entities or non-legal entities has been a subject of discourse in the field of law because Law No. 28 of 2004 stipulates that Foundations cannot directly engage in business activities but must do so through business entities they establish. This has led to differing opinions: one group believes that Foundations are not legal entities, while another group argues that Foundations are business entities since they engage in profit-seeking activities. This research employs empirical legal research methods, with the research conducted in South Sulawesi, utilizing primary and secondary data collected through interviews and literature studies. The findings reveal that in analyzing the elements of a legal entity in relation to Foundations, one element is not fulfilled, namely the profit-seeking objective. Foundations engage in activities to increase profits not as their ultimate goal, but solely to ensure the sustainability of the Foundation so that its purposes and objectives can be achieved.

Keywords: Foundations, Business Entities, Non-Business Entities, Business Actors, Business Entity Elements

INTRODUCTION

A business entity with legal status is a type of private legal entity established with the primary objective of seeking maximum profit or gain. Examples include Limited Liability Companies, Cooperatives, and State-Owned Enterprises (SOEs). In this context, a foundation is not considered a business entity because its purpose is not to seek profit but to achieve goals in social, religious, and humanitarian fields. However, during the New Order era, many foundations deviated from their original purpose and engaged in commercial activities, despite the principle that foundations are intended to be non-profit. Sanzo-Pérez, et.al., (2022) claim such deviations from the foundational objectives were, and still are, prevalent among social foundations operating in the education sector, particularly those established and/or managed by private entities. Fici (2022) defines a foundation is a legal entity comprising separated assets designated to achieve specific objectives in the social, religious, and humanitarian fields, and it does not have members. From this definition, it can be concluded that the establishment of a foundation is not based on capital contributions from members or founders, as is the case with other business entities, but rather on separated assets, meaning there is no owner of the foundation. In accordance with Law No. 16 of 2001 on Foundations and its amendment, Law No. 28 of 2004, a foundation is prohibited from engaging directly in business activities; instead, it must do so through business entities it establishes or by investing its assets in other business entities. Prior to the implementation of Indonesian Government Regulation No. 24 of 2018 on Integrated Electronic Business Licensing Services, which was later replaced by Indonesian Government Regulation No. 5 of 2021 on Risk-Based Business Licensing Administration, the establishment requirements for business entities were governed by the respective regulations for each legal entity. The final step in establishing a business entity, the deed of establishment, required approval from the Ministry of Law and Human Rights. Following the enactment of Government Regulation No. 24 of 2018 and its subsequent replacement by Regulation No. 5 of 2021, after the deed of establishment has been approved by the Ministry of Law and Human Rights, the business entity must register with the Online Single Submission (OSS) System for Integrated Business Licensing and apply for a Business Identification Number (NIB), which serves as the identity of the business actor, issued by the OSS Institution responsible for risk-based business licensing administration.

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Article 170 paragraph (6) of Government Regulation No. 5 of 2021 mandates that foundations, among other business entities, must obtain a Business Identification Number (NIB). This requirement is at odds with the foundational principle that prohibits foundations from directly engaging in business activities. Consequently, foundations should not be categorized as business actors under the business entities regulated by Government Regulation No. 5 of 2021. Initially, under Government Regulation No. 24 of 2018, the business entities were those established by foundations, which was consistent with the principle governing foundations. However, the repeal of Regulation No. 24 of 2018 by Regulation No. 5 of 2021 altered the classification, designating foundations themselves as business actors rather than the business entities they establish, thus suggesting that foundations are a type of business entity.

Moreover, the Foundation Law does not explicitly classify foundations as business entities. It merely stipulates that foundations may engage in business activities by establishing business entities and/or investing in business entities, but cannot engage directly in such activities. The enactment of Government Regulation No. 5, which classifies foundations as business entities, has led to diverse interpretations regarding the nature of foundations and whether government regulations conflict with the Foundation Law. This discrepancy necessitates further scholarly investigation and analysis.

LITERATURE REVIEW

In legislative theory, which is focused on achieving clarity, comprehension, and exactness of meaning, and is cognitive in essence, the emphasis lies on the construction of sound and accurate legal statutes rather than the procedural aspects of legislation formation. On the other hand, Rubin (1989) defines legislation as written directives embodying obligatory legal norms, enacted or promulgated by authorized officials or state entities following procedures outlined in legislative statutes. According to Randall Henning & Pratt (2023), norms have a hierarchy and layers in a hierarchical structure, meaning that lower norms originate from and are based on higher norms. These norms continue to arrange themselves, forming levels up to the highest norm, where this norm cannot be further traced, often being hypothetical, fictitious, or typically serving as the fundamental or ground norm. Consequently, laws are continually enacted and repealed by authorized institutions in accordance with superior norms. This process permits the creation of subordinate norms derived from these higher norms, culminating in a hierarchical and stratified legal system (Tamanaha, 2021). The high and low order of legislative regulations correspond to the hierarchy of their legal strength, so that lower legislative regulations must not contradict higher legislative regulations. In the theory of legislative hierarchy, there is a principle of legal preference where the legal principle points out which law takes precedence in enforcement if a legal event is related to or subject to several regulations (Zambrano, 2020).

Furthermore, according to Law No. 6 of 2023, which establishes Government Regulation in Lieu of Law No. 2 of 2022 concerning Job Creation as law, business entities are defined as either legal or non-legal entities that are established within the territory of the Unitary State of the Republic of Indonesia and engage in business and/or activities in specified sectors (Fernando, et al., 2022). Business entities are a group or organization that conducts activities using financial resources, goods, intellect, or labor to achieve the goal of seeking profit (Abbas, et. al., 2024). Within a business entity, there are individuals or a business entity itself engaging in activities in specific fields, referred to as business actors (Tykkyläinen & Ritala, 2021).

During the New Order government era, numerous foundations were established by governmental institutions and agencies at both central and regional levels. This included State-Owned Enterprises (SOEs), Regional-Owned Enterprises (ROEs), and private entities, many of which engaged in various activities with a tendency towards commercial ventures. The establishment of foundations by the government has had significant legal consequences. Part of the state finances has been "separated" in the sense of "released from its control" to establish these foundations. Once the finances are "separated" or "released from its control" by the state, they are no longer considered state property. Consequently, the state no longer possesses actual authority over these separated funds. However, the establishment of foundations by government institutions, including SOEs and ROEs, generally also involves the utilization of facilities provided by the government institutions or the respective SOEs and ROEs, whether in the form of infrastructure, facilities, or the public authorities inherent in these government institutions or SOEs and ROEs (Kim & Sumner, 2021).

After the enactment of Law No. 16 of 2001 concerning Foundations and Law No. 28 of 2004 amending Law No. 16 of 2001 concerning Foundations, it is further emphasized that Foundations are not legal entities aimed at seeking profit and are not used as business entities. Foundations cannot engage in business activities directly but must do so through the business entities they establish or through other business entities where the foundation invests its assets. Regarding the investment of its assets, Foundations require that the investment in other business entities not exceed 25% (twenty-five percent) (Reiser, D. B., & Dean 2023).

After the enactment of foundation legislation, there is no longer any provision for individuals seeking personal economic gain by using foundation institutions. Individuals seeking profit can utilize existing business entities, such as limited liability companies or partnerships, or other forms of business allowed by the law. Consequently, According to Bruder (2021), individuals intending to establish a foundation must have the intention of founding it for social, humanitarian, and religious purposes, which are non-profit, and are prohibited from deriving economic gain from the foundation they establish. One of the material requirements that must be fulfilled for the establishment of a foundation is a specific purpose, where the purpose must be idealistic, not contradictory to the law, public order, morality, and public interest. Furthermore, the purpose of the foundation must not be directed towards achieving profit or other material interests for its founders. Segrestin, et.al., (2021) claim the establishment of a foundation aimed primarily as a commercial business entity is not permitted. Engaging in commerce entails not only the hope of gaining profit but also the possibility and risk of suffering losses, whereas incurring losses is not within the rights of a foundation (Sharkey, 2023).

RESEARCH METHODS

The research method utilized in the preparation of this thesis is empirical legal research. According to Mitchell (2023), empirical legal research is a method of legal research aimed at observing law in real terms and examining how law operates within the community. The research location includes the Investment and Integrated One-Stop Service Office of South Sulawesi Province, Notaries in the South Sulawesi region, and the Ministry of Law and Human Rights Office in South Sulawesi, utilizing both primary and secondary data sources collected through interview techniques, document studies, and literature reviews.

RESULTS AND DISCUSSION

In business entities, the term "business actor" is used. According to Law No. 6 of 2023 concerning the Determination of Government Regulation in Lieu of Law No. 2 of 2022 on Job Creation, Storbacka, et.al., (2016) state a business actor is an individual or a business entity engaged in business and/or activities in specific fields. In addition to referencing legislative regulations and government regulations, the author also conducted interviews with legal experts at the Ministry of Law and Human Rights regarding the definition of a business actor. The interviewees defined a business actor as an individual or business entity engaged in business activities with the aim of seeking profit. In Article 170 of Government Regulation No. 5 of 2021 concerning Risk-Based Business Licensing Administration, foundations are included in the category of business actors in the form of business entities, alongside limited liability companies, cooperatives, limited partnerships, and other business entities. According Mende (2023), a business actor based on Government Regulation No. 5 of 2021, a business actor is an individual or business entity engaged in business and/or activities in specific fields. Subsequently, Government Regulation No. 5 of 2021 categorizes foundations as business entities, thereby allowing foundations to be classified as business actors under this regulation for the purpose of applying for business licenses. However, in reality, the question arises whether foundations truly meet the criteria of business entities as stipulated by Government Regulation No. 5 of 2021, which classifies foundations as business entities.

In the explanation above, the elements of a business entity have been outlined. In this context, the researcher examines whether a foundation can be categorized as a business entity by aligning the elements of a business entity with those of a foundation, as follows:

Business Entities in the Form of Legal Entities or Non-Legal Entities

In addition to individuals as rights holders (legal subjects), the law also recognizes entities or associations that can possess rights and perform legal actions similar to individuals. These entities and associations have their own assets, participate in legal transactions through their managers, can be sued, and can also sue before a judge. Such entities or associations are called legal entities or "rechtspersoon," which means persons created by law (Putra & Imanuddin, 2020). Fundamentally, there are four ways in which a legal entity can be established:

The Concession System or the Approval System

Under this system, an institution attains its position or status as a legal entity through approval from an agency specified by relevant legislation. For example, a limited liability company becomes a legal entity upon receiving approval from the Department of Justice/Minister of Justice, as stipulated in Article 36 of the Commercial Code.

Determined by Law

Under this system, the law designates certain institutions referenced in the relevant legislation as legal entities. For instance, Article 19, paragraph (2) of Law No. 16 of 1985 concerning Apartment Buildings specifies that an association of apartment residents established in accordance with this law is conferred legal entity status.

Mixed System

The status of a legal entity is acquired as stipulated by the law itself and upon approval from the appropriate authority. For example, Article 9 of Law No. 25 of 1992 concerning Cooperatives states that Cooperatives obtain legal entity status once their establishment deed is ratified by the government, specifically the cooperative department or the Minister responsible for cooperative affairs.

Through Jurisprudence

Article 1, number 1 of Law No. 16 of 2001 defines a foundation as a legal entity composed of separated wealth with the purpose of achieving specific goals in social, religious, and humanitarian fields, and it does not have members. Additionally, Article 11, paragraph (1) of Law No. 28 of 2004 stipulates that foundations obtain legal entity status once the establishment deed, as referred to in Article 9, paragraph (2), receives approval from the Minister. Article 9, paragraph (2) specifies that the establishment of a foundation must be carried out by notarial deed in the Indonesian language. From these provisions, it can be concluded that a foundation becomes a legal entity upon receiving ministerial approval for its establishment deed. This process involves a mixed system as outlined by the foundation law, which requires both compliance with legal stipulations and ministerial approval to achieve legal entity status. Thus, foundations are categorized as legal entities.

Requires Capital in the Form of Money, Goods, and Ideas

Capital consists of assets such as money, goods, and other resources that can be utilized to generate wealth (Langley, 2020). Consequently, business capital is a crucial component of a company, typically comprising funds or goods used to operate the business. Foundations also require initial wealth (initial capital) to begin fulfilling their purposes and goals. Unlike other legal entities, a foundation's wealth does not originate from the founders' capital but from the assets separated by the founders, which means the founders relinquish their rights to these assets. This separation results in the foundation having no owner, as the founders' separated wealth becomes the foundation's initial capital, used to pursue and support its objectives.

Additionally, a foundation's capital may be sourced from non-binding donations, endowments, grants, testamentary bequests, and other acquisitions that comply with the foundation's Articles of Association and relevant laws and regulations.

Engaging in Business Activities

Business activities or enterprises are actions designed to satisfy the needs and desires of individuals, organizations, and society overall (Carroll, 2021). According to Article 3, paragraph (1) of Law No. 16 of 2001,

foundations are permitted to engage in business activities to further their objectives and goals by establishing business entities or participating in existing ones. As stipulated by the law, foundations can undertake business activities indirectly through business entities they establish or in which they participate, rather than engaging in such activities directly themselves.

Aimed at Seeking Profit

The primary goal of a business entity is to generate profit and financial gain. This pursuit of profit can be viewed in two dimensions: as an ultimate "objective" and as a "means" to achieve broader aims and objectives (George, et al., 2023). In the context of a business entity itself, profit-seeking is the central purpose; companies are established with the aim of maximizing profit (Mayer, 2021). In contrast, a Foundation's primary objective is not centered on profit-seeking; instead, it focuses on social, religious, and humanitarian endeavors.

Foundations may engage in activities aimed at generating profit. For instance, a nursing home foundation may collect monthly fees or contributions from residents, which can be considered revenue for the Foundation. However, the establishment of the nursing home Foundation is not driven by profit-seeking; rather, any profit generated serves as a means to sustain the Foundation's operations in pursuit of its broader aims and objectives. Moreover, any profit acquired is not distributed or enjoyed by the Foundation's stakeholders.

Located in the Republic of Indonesia

According to Law No. 6 of 2023, both business entities and foundations must be established within the territory of the Republic of Indonesia. Article 4 of Law No. 16 of 2001 specifies that foundations must have a domicile within Indonesia as defined in their Articles of Association. Among the criteria that align business entities with foundations, only four are applicable: having a legal or non-legal entity form, requiring capital in the form of money, goods, or ideas, engaging in business activities, and having domicile in Indonesia. However, foundations cannot fulfill the essential element of aiming to seek profit, which is fundamental for business entities. As foundations cannot meet all the criteria of a business entity, the conclusion drawn is that foundations do not fall under the category of business entities. Therefore, according to Government Regulation No. 5 of 2021, which categorizes business actors as individuals or business entities, foundations cannot be classified as business actors.

As per Tamvada (2020), foundations classified as business entities and business actors under this regulation are those that exhibit a business nature. Hence, a foundation that does not engage in business activities, seek commercialization, or generate income or profit is not covered by this regulation. However, currently, nearly all foundations engage in business activities. For example, an Educational Foundation collects tuition fees from students, and a Social Foundation deducts a percentage from funds distributed for administrative purposes, thereby generating profit, which qualifies as business activities for the Foundation (Hammett, et al., 2023).

Fundamentally, it is the business entity established by the Foundation that conducts business activities, not the Foundation itself. Article 3, paragraph (1) of Law No. 16 of 2001 states that a Foundation may engage in business activities by establishing or participating in a business entity to support its objectives. This underscores that the Foundation does not directly engage in business activities but does so through its established business entity or by investing in other business entities. This principle is further clarified in the explanation of Article 3, paragraph (1) of Law No. 28 of 2004, emphasizing that a Foundation cannot conduct business activities directly but only through business entities it establishes or invests in.

Therefore, categorizing foundations as business entities under Regulation No. 5 of 2021 contradicts Foundation Law. In the hierarchy of legislation, the principle of *lex superior derogate legi inferiori* applies, meaning higher legislation should prevail over lower legislation (Borowski, 2022). Consequently, Regulation No. 5 of 2021 should be revised to specify that it is the business entity established by the Foundation that engages in business activities, aligning with Foundation Law. Initially, Government Regulation No. 24 of 2018 addressed this licensing issue by considering business entities established by foundations as business actors, thereby avoiding

conflicts with foundation laws. However, Regulation No. 5 of 2021 replaced Regulation No. 24 of 2018 and incorrectly classifies foundations as business entities, creating inconsistencies with foundation laws.

CONCLUSION

Essentially, the Foundation Law does not explicitly define whether a Foundation qualifies as a business entity. It specifies that a Foundation may participate in business activities through establishing or participating in a business entity, without directly engaging in business activities itself. However, with the issuance of Government Regulation No. 5 of 2021 on Risk-Based Business Licensing, the interpretation has evolved towards categorizing Foundations as business entities acting in business roles. Consequently, there are now varied interpretations regarding whether Foundations should be classified as business entities. For a Foundation to be classified as a business entity, it must satisfy the criteria defined for business entities. However, a Foundation does not fulfill one of the key elements of a business entity, which is the intent to seek profit or gain. The income generated by a Foundation from its activities does not serve as an ultimate "goal" for its establishment but rather as a "means" to sustain its operations in achieving its objectives. This differs from typical business entities, which are established primarily to pursue profit or gain. Furthermore, if a Foundation decides to engage in business activities, it is not the Foundation itself that directly undertakes these activities. Instead, such activities are conducted by the business entity established by the Foundation or in which the Foundation has invested.

REFERENCES

- Abbas, A., Ekowati, D., Suhariadi, F., & Anwar, A. (2024). Human Capital Creation: A Collective Psychological, Social, Organizational and Religious Perspective. *Journal of Religion and Health*, 63(3). <https://doi.org/10.1007/s10943-022-01665-8>
- Borowski, M. (2022). Constitutional limits on legal interpretation. In *Rule of Law in Crisis: Constitutionalism in a State of Flux*. <https://doi.org/10.4324/9781003349501-14>
- Bruder, I. (2021). A Social Mission is Not Enough: Reflecting the Normative Foundations of Social Entrepreneurship. *Journal of Business Ethics*, 174(3). <https://doi.org/10.1007/s10551-020-04602-5>
- Carroll, A. B. (2021). Corporate Social Responsibility: Perspectives on the CSR Construct's Development and Future. *Business and Society*, 60(6). <https://doi.org/10.1177/00076503211001765>
- Fernando, Z. J., Pujijono, P., Susetyo, H., Candra, S., & Putra, P. S. (2022). Preventing bribery in the private sector through legal reform based on Pancasila. *Cogent Social Sciences*, 8(1). <https://doi.org/10.1080/23311886.2022.2138906>
- Fici, A. (2022). Social Enterprises and Social Cooperatives in the New Italian Legal Framework for Third Sector Organizations. In *Perspectives on Cooperative Law: Festschrift In Honour of Professor Hagen Henry*. https://doi.org/10.1007/978-981-19-1991-6_8
- George, G., Haas, M. R., McGahan, A. M., Schillebeeckx, S. J. D., & Tracey, P. (2023). Purpose in the For-Profit Firm: A Review and Framework for Management Research. In *Journal of Management* (Vol. 49, Issue 6). <https://doi.org/10.1177/01492063211006450>
- Hammett, D., Hoogendoorn, G., & Masutha, M. (2023). 'Whispered in corridors': Intra-national politics and practices of knowledge production in South African Human Geography. *Transactions of the Institute of British Geographers*. <https://doi.org/10.1111/tran.12640>
- Kim, K., & Sumner, A. (2021). Bringing state-owned entities back into the industrial policy debate: The case of Indonesia. *Structural Change and Economic Dynamics*, 59. <https://doi.org/10.1016/j.strueco.2021.10.002>
- Langley, P. (2020). Assets and assetization in financialized capitalism. *Review of International Political Economy*, 28(2). <https://doi.org/10.1080/09692290.2020.1830828>
- Mayer, C. (2021). The Future of the Corporation and the Economics of Purpose. *Journal of Management Studies*, 58(3). <https://doi.org/10.1111/joms.12660>
- Mende, J. (2023). Business authority in global governance: Companies beyond public and private roles. *Journal of International Political Theory*, 19(2). <https://doi.org/10.1177/17550882221116924>
- Mitchell, M. (2023). Analyzing the law qualitatively. *Qualitative Research Journal*, 23(1). <https://doi.org/10.1108/QRJ-04-2022-0061>
- Putra, P. S., & Imanuddin, M. (2020). Tracing the Logic Fallacy in Formulating the Norms of "Everyone" and Its Application to Criminal Actions Committed by Corporations. <https://doi.org/10.2991/assehr.k.201209.318>
- Randall Henning, C., & Pratt, T. (2023). Hierarchy and differentiation in international regime complexes: a theoretical framework for comparative research. *Review of International Political Economy*, 30(6). <https://doi.org/10.1080/09692290.2023.2259424>
- Reiser, D. B., & Dean, S. A. (2023). For-Profit Philanthropy: Elite Power and the Threat of Limited Liability Companies, Donor-Advised Funds, and Strategic Corporate Giving. In *For-Profit Philanthropy: Elite Power and the Threat of Limited Liability*

- Companies, Donor-Advised Funds, and Strategic Corporate Giving. <https://doi.org/10.1093/oso/9780190074500.001.0001>
- Rubin, E. L. (1989). Law and Legislation in the Administrative State. *Columbia Law Review*, 89(3). <https://doi.org/10.2307/1122862>
- Sanzo-Pérez, M. J., Rey-García, M., & Álvarez-González, L. I. (2022). Downward accountability to beneficiaries in social enterprises: do partnerships with nonprofits boost it without undermining accountability to other stakeholders? *Review of Managerial Science*, 16(5). <https://doi.org/10.1007/s11846-021-00485-6>
- Segrestin, B., Hatchuel, A., & Levillain, K. (2021). When the Law Distinguishes Between the Enterprise and the Corporation: The Case of the New French Law on Corporate Purpose. *Journal of Business Ethics*, 171(1). <https://doi.org/10.1007/s10551-020-04439-y>
- Sharkey, C. M. (2023). The Irresistible Simplicity of Preventing Harm. *Journal of Tort Law*, 16(1). <https://doi.org/10.1515/jtl-2023-0027>
- Storbacka, K., Brodie, R. J., Böhmman, T., Maglio, P. P., & Nenonen, S. (2016). Actor engagement as a microfoundation for value co-creation. *Journal of Business Research*, 69(8). <https://doi.org/10.1016/j.jbusres.2016.02.034>
- Tamanaha, B. Z. (2021). Legal pluralism explained: History, theory, consequences. In *Legal Pluralism Explained: History, Theory, Consequences*. <https://doi.org/10.1093/oso/9780190861551.001.0001>
- Tamvada, M. (2020). Corporate social responsibility and accountability: a new theoretical foundation for regulating CSR. *International Journal of Corporate Social Responsibility*, 5(1). <https://doi.org/10.1186/s40991-019-0045-8>
- Tykkyläinen, S., & Ritala, P. (2021). Business model innovation in social enterprises: An activity system perspective. *Journal of Business Research*, 125. <https://doi.org/10.1016/j.jbusres.2020.01.045>
- Zambrano, D. A. (2020). Discovery as regulation. *Michigan Law Review*, 119(1). <https://doi.org/10.36644/mlr.119.1.discovery>