

# **The Precautionary Principle of Running Foundation Activities in the Perspective of the Foundation Law and the National Criminal Code**

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## **Abstract**

This research aims to examine the principle of prudence in managing Foundation activities. The urgency of this research is so that the foundation can maintain its sustainability, develop, and be able to provide broad benefits according to the objectives of its establishment. This research uses qualitative methods with a statutory and conceptual approach. The novelty of this research is that in managing Foundation activities, the precautionary principle is required. The results of this research are the principle of prudence in carrying out Foundation activities consisting of Firstly, in managing the Foundation, it must always be guided by applicable legal provisions to avoid problems, whether problems in the form of civil disputes or criminal violations. Second, it must based on the principle of non-profit oriented, where foundations are not prohibited from running business entities, but the results are aimed at the interests of society and the sustainability of the Foundation to succeed in its social goals, because the Foundation is not oriented towards profit or gain, but rather towards benefit. Third, the organs of the Foundation must avoid conflicts of interest that could harm the interests of the Foundation and other parties. Fourth, foundations must apply the principles of Good Corporate Governance (GCG), namely: independence, transparency, accountability, and fairness.

**Keywords:** Foundation; Precautionary principle; Regulation

## **1. INTRODUCTION**

The establishment of a Foundation was originally based on customary law. In the era of Dutch colonialism, the Foundation was recognized because it was listed in the Judges of the Hoge Raad which was the highest Dutch judicial institution in 1882. The establishment of the Foundation is based on Article 1653 of the Civil Code, which states that the grouping of legal entities according to their existence is divided into three groups, namely: Legal entities formed by the government, legal entities recognized by the government, and legal entities that are allowed for certain ideal purposes, such as Foundations. Currently, the regulation of the Foundation is in Law Number 28 of 2004 concerning amendments to Law Number 16 of 2001 concerning Foundations. The Foundation is a legal entity that has a private and independent nature and is known as a Legal Entity. Ali Rido in his book mentions the requirements of legal entities, among others.<sup>1</sup> There are separate property rights, clear objectives, an interest, and a regular organization. The law limits the purpose of establishing the Foundation in the field of social, religious, and humanitarian fields. The Foundation also acts as a legal subject that is burdened with responsibility. The establishment of the Foundation has a noble goal for

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<sup>1</sup> Ali Rido, *Badan Hukum Dan Kedudukan Badan Hukum Perseroan, Perkumpulan, Koperasi, Yayasan, Wakaf*, Cetakan Ke IV (Bandung: Alumni, 1986).

benefits, so it must be managed responsibly, therefore, Foundation managers must understand what principles must be carried out, to maintain the sustainability of the Foundation so that the Foundation can develop properly to realize its goals.

There have been several previous studies related to this research, including Research conducted by Ningrum Natasya Sirait (2022)<sup>2</sup> which found that non-profit organizations such as foundations are currently getting more attention, after the occurrence of cases in the spotlight, including the case of the Aksi Cepat Tanggap Foundation (ACT) and the Justice for All Foundation (YKUS) which became the media for money laundering. This act of money laundering threatens the integrity and stability of the financial system and institutions including the Foundation. The weakness of this research lies in the narrow object of research. Furthermore, research by Zaini (2022)<sup>3</sup> resulted in the conclusion that in the management of the Foundation, maximum supervision from external parties is needed so that there are no deviations from the regulations of the Foundation, this is because the Foundation in its management is also responsible to the community or public. Research by Afifi (2023)<sup>4</sup> concluded that the Foundation's liability can be in the form of civil liability and criminal liability, while the misappropriation of Foundation funds in the ACT case is in the realm of criminal law which must be accounted for by the board of trustees and management. Foundation management that is not transparent and professional can also cause the Foundation to become bankrupt.

From these previous studies, it can be seen that the management of a Foundation must be guided by regulations, and the management of the Foundation is incorrect. raises the potential for violations of the law. This research wants to answer the question, of what must be done by the Foundation's organs in the management of the Foundation, in order to avoid problems both civil and criminal, so that the Foundation can maintain its sustainability and develop properly so that it can realize its objective. The purpose of this research is to examine the principle of prudence in the management of Foundation activities.

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<sup>2</sup> Ningrum Natasya Sirait, Liza Hafidzah, and Yusuf Rangkuti, "Organisasi Non-Profit Sebagai Media Tindak Pidana Pencucian Uang," *AML/CFT Journal: The Journal of Anti Money Laundering and Countering the Financing Terrorism* 01, no. 02 (2023): 132–45.

<sup>3</sup> Zulfi Diane Zaini and Putri Septia, "Pertanggungjawaban Pengurus Dalam Pengelolaan Badan Hukum Yayasan Di Indonesia," *Justice Voice* 1, no. 1 (2022): 35–44, <https://doi.org/10.37893/jv.v1i1.65>.

<sup>4</sup> Guntur Afifi, "Akibat Hukum Atas Penggunaan Dana Yayasan Yang Digunakan Untuk Kegiatan Usaha Yayasan. (Studi Kasus Yayasan Aksi Cepat Tanggap)" Universitas Islam Indonesia, 2023.

## 2. METHOD

According to Morris L. Cohen,<sup>5</sup> legal research is the process of finding law that governs activities in human society. It involves locating both the rules which are enforced by the states and commentaries that explain or analyze these rules. Legal research is the process of discovering the laws that govern human activity in society. This involves searching for rules enacted by the state and commentaries that explain or analyze these rules. In line with this opinion, starting from the rules relating to the Foundation, this research focuses on finding what principles must be implemented in the management of the Foundation. This research is qualitative research with a statute approach and a conceptual approach. The research is carried out by examining regulations related to the legal issues handled, to be able to find answers to the problems faced, and by studying the views that have developed in legal science, to produce legal concepts that are relevant to the issues at hand<sup>6</sup>. The data collection technique uses literature study by collecting primary legal materials and secondary legal materials.

## 3. RESULTS AND DISCUSSION

### 3.1 Accountability and Obligations of Foundation Organs

According to data from a corruption case monitoring report conducted by ICW (Indonesia Corruption Watch).<sup>7</sup> The private sector is the second largest contributor to corruption cases in Indonesia. One of these private sectors is the Foundation. There are several problems related to the Foundation that have become the center of public attention. One of them is the case experienced by the Aksi Cepat Tanggap Foundation. This philanthropic foundation, which was launched in 2015, is engaged in the social and humanitarian fields. It was formed with the mission of organizing and managing funds collected from generous people, as a form of action to deal with humanitarian issues both on a local and global scale. However, the misappropriation of funds by former members of the founding board, chairman of the board, and members of the board of trustees of Aksi Cepat Tanggap Foundation was revealed. In a criminal trial, they were found guilty of money laundering (TPPU) and embezzlement in office and were sentenced to imprisonment.<sup>8</sup> In the management of the Foundation, there is also the potential for criminal acts of corruption. Indonesia Corruption Watch has mapped Indonesia's corruption cases in 2021, based on this research, in 2021 there were 3 cases with CSO/NGO/Foundation actors with a state loss value of IDR

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<sup>5</sup> Peter Mahmud Marzuki, *Penelitian Hukum*, 2nd ed. (Jakarta, 2006).

<sup>6</sup> Marzuki.

<sup>7</sup> Diky Anandya, Kurnia Ramadhana, and Lalola Easter, "Laporan Pemantauan Tren Penindakan Kasus Korupsi Tahun 2021," *Indonesia Corruption Watch*, 2022, 34.

<sup>8</sup> Husnul Khatimah, "Pelanggaran Organ Yayasan Dalam Pengelolaan Kegiatan Yayasan Berdasarkan Undang-Undang Tentang Yayasan" (Universitas Sebelas Maret, 2023).

441,681,750 and the value of bribery/gratuities/illegal levies. Rp250.000,-.<sup>9</sup> Foundation management that is not transparent and professional can also cause the Foundation to become bankrupt.

The examples of cases above show that mistakes in the management of the Foundation have a huge impact on the sustainability of the Foundation. Improper management of the Foundation causes Foundation organs to face legal problems. Foundations that stumble over legal problems will be hampered, stop their activities, or even die. In such conditions, the real loser is the community or the public, because the purpose of establishing the Foundation is for social benefit.

The Big Indonesian Dictionary gives the definition of a Foundation as a legal entity in which there is no membership but has a management structure established to achieve social goals.<sup>10</sup> The Foundation is a legal entity that does not prioritize profit or anti-profit oriented. C.S.T Kansil in his book defines a foundation as a legal entity that has activities and focuses on the social field,<sup>11</sup> Other legal experts such as Prof. Subekti define a foundation as a legal entity, which is located under the leadership of a management structure, and has a legal foundation for social purposes.<sup>12</sup> The opinions of the experts above are in line with the definition of the Foundation in Article 1 paragraph 1 of the Foundation Law which stipulates that the Foundation is a legal entity consisting of separated assets, has no membership, and is intended to achieve a goal in the social, religious and humanitarian fields.<sup>13</sup> The Foundation is regulated in Law No. 16 of 2001 concerning Foundations, which was later enhanced by Law No. 28 of 2004 concerning amendments to Law No. 16 of 2001. Both laws remain a reference in the management of the Foundation because both are generally still valid, but there are several articles in the old law that become invalid because they have been revoked and regulated in the new law. Some things have not previously been regulated in the old law, then regulated in the new law. The amendment to the Foundation Law has the consequence of the emergence of three new paradigms in the management of the Foundation, among others, namely managerial aspects; financial aspects; and taxation aspects.<sup>14</sup>

The emergence of a foundation can be said to be a form of fulfillment of the needs of society, this can be used as a vehicle or institution that is social, religious, and

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<sup>9</sup> Anandya, Ramadhana, and Easter, "Laporan Pemantauan Tren Penindakan Kasus Korupsi Tahun 2021."

<sup>10</sup> Ebta Setiawan, "Kamus Besar Bahasa Indonesia," kbbi.web, accessed August 12, 2023, <https://kbbi.web.id/yayasan>.

<sup>11</sup> C.S.T Kansil, *Kamus Istilah Aneka Hukum* (Jakarta: Pustaka Sinar Harapan, 2000).

<sup>12</sup> Subekti; R. Tjitrosoedibio, *Kamus Hukum*, 2nd ed. (Jakarta: Pradnya Paramita, 1969).

<sup>13</sup> Pemerintah RI, "UU NO 16 Tahun 2001 Tentang Yayasan," 2001, 1–39.

<sup>14</sup> Suryarama, "Peran Yayasan Dalam Pengelolaan Bidang Pendidikan Pada PTS," *Jurnal Organisasi Dan Manajemen* 5 (2009): 55–62.

humanitarian in nature.<sup>15</sup> The separate wealth of the foundation is reaffirmed in Article 9 of the Foundation Law, which explains that the foundation is established upon the initiation of one or more persons, by separating part of the founder's wealth, as initial wealth. This arrangement implies that the personal wealth of the founder of the foundation and the wealth of the foundation are two different things because the wealth given to become the initial wealth of the foundation has been separated from the founder's wealth. As a consequence, the founder no longer has rights to the wealth and also does not become the owner of the foundation.<sup>16</sup> The foundation's wealth apart from the founder's separated assets can also come from donations and assistance from other parties, such as waqf, grants, wills, and so on. The Foundation has no obligation to return the assistance that has been given by other parties, and the Foundation can use the assistance as desired by the party providing the assistance.<sup>17</sup>

The Foundation has an organizational structure called the management organ, which consists of trustees, administrators, and supervisors. The division of roles between members of the Foundation is a manifestation of foundation governance. Foundation governance can be interpreted as a set of Foundation rules that provides instructions regarding the relationship between the trustees, management, and supervisors so that their functions, duties, responsibilities, and authorities are clear.<sup>18</sup> The aim is that the Foundation can be managed properly to carry out its mission and achieve its vision.<sup>19</sup> Regulations regarding management in the Foundation legal entity are listed in Article 28 to Article 47 of the Foundation Law.

Trustees are a part of the management of the foundation and have the highest position in the management structure of the foundation. Some authorities are given only to the trustees and not given to other foundation organs. Based on Article 28 paragraph (2) a of the Foundation Law, the authority possessed by the coach, among others, is to compile a series of provisions regarding whether or not there is a revision of the Articles of Association. The Articles of Association as the basic guidelines of a Foundation can only be amended by the board of trustees. The Trustees also have the authority to appoint and dismiss the management and

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<sup>15</sup> I Gusti Agung Wisudawan, Fakultas Hukum, and Universitas Mataram, "Aspek Hukum Dalam Pengelolaan Yayasan Menurut Undang - Undang Nomr 16 Tahun 2001 Jo Undang - Undang Nomor 28 Tahun 2004 Tentang Perubahan Atas Undang - Undang Nomor 16 Ahun 2001 Tentang Yayasan," *GaneÇ Swara* Vol. Vol 10, no. 2 (2016): 69–77.

<sup>16</sup> Hatimah, "Pelanggaran Organ Yayasan Dalam Pengelolaan Kegiatan Yayasan Berdasarkan Undang-Undang Tentang Yayasan."

<sup>17</sup> Badan Pembinaan Hukum Nasional, *Kompedium Hukum Yayasan* (Kementiran Hukum dan HAM RI, 2012).

<sup>18</sup> T Musahiddinsyah, Sanusi Sanusi, and Teuku Ahmad Yani, "Pengelolaan Yayasan Menurut Asas Keterbukaan Dan Akuntabilitas (Studi Pada Yayasan Kemanusiaan Di Aceh)," *Jurnal IUS Kajian Hukum Dan Keadilan*, 2020, <https://doi.org/10.29303/ius.v8i1.681>.

<sup>19</sup> Bramantyo Djohanputro, "Pembagian Peran Organ Yayasan," *TopBusinnes.id*, 2022.

supervisory members. In addition, the trustees have the authority to make provisions regarding the general policies of the Foundation based on the Articles of Association, approve various work programs and budget drafts, and provide provisions regarding the merger and dissolution of the Foundation.<sup>20</sup> The responsibility of the Trustees in relation to their duties and authority is contained in the Articles of Association (AD) and Bylaws (ART) of the Foundation, and there is a prohibition on concurrent positions as Management and Supervisors in Article 29. Determination of the functions and authority of the Trustees is carried out by holding a meeting of the members of the Trustees.<sup>21</sup> The Foundation Law regulates that based on the decision of the founders of the Foundation and the general meeting of the trustees, the trustees can appoint people who have shown high commitment to the realization of the purpose and objectives of the Foundation as members of the Trustees (article 28 paragraph (3)).<sup>22</sup> Assessment of the dedication of a prospective Trustee is very necessary considering that the Foundation has a nonprofit purpose, where every result of the management of the foundation must be used for social interests, not for the benefit of the Foundation's organs.

The importance of the role of the coach, causing the Foundation is not allowed to be in a condition of not having a Supervisory organ. If for some reason the Foundation does not have a coach, then the management and supervisors are required to hold a joint meeting to appoint a coach within a period of no later than 30 days from the occurrence of the vacancy. Meeting decisions are considered valid if taken in accordance with the provisions of the Foundation Law and the Articles of Association that have been determined. The Foundation Law in Article 30 regulates that, the trustees must hold a meeting at least once a year. The annual general meeting will discuss the evaluation of the Foundation's assets rights and obligations over the past year. This evaluation is taken into consideration in determining the Foundation's development guidelines for the following year.

Regulations regarding the management organ are in Articles 31-39 of the Foundation Law. It is explained that the Foundation Management is the organ responsible for managing the foundation. The requirements to be appointed as a board are individuals who are legally capable, namely not underage, physically healthy, and spiritually healthy. The board consists of at least a chairman, a

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<sup>20</sup> Eldo Fransixco Dumanauw, "Kewajiban Dan Tanggung Jawab Organ Yayasan Menurut Undang-Undang Nomor 28 Tahun 2004 Tentang Yayasan," *Lex Et Societatis*, 2019. <https://doi.org/10.35796/les.v7i9.26995>

<sup>21</sup> Murni and Abdul Gani, "Tanggung Jawab Hukum Kepada Pengurus Yayasan Terhadap Failednya," *Pionir LPPM Universitas Asahan*, 2020.

<sup>22</sup> Fajar Rachmad Dwi Miarsa and Cholilla Adhaningrum Hazir, "Rechtsvacuum Atas Tanggungjawab Pembina Yayasan," *Lex Librum : Jurnal Ilmu Hukum* Vol. 8, no. 1 (2021): 91.

secretary, and a treasurer. It is the management that runs the management of the Foundation actively.

The vital function of the Management is the authority to be the representative of the foundation in cases concerning the foundation, both in court and outside the court. This authority is lost if the case is an internal case between the management of the foundation, or the case occurs due to conflict of interest between the foundation management and the interests of the foundation. In such circumstances, who is entitled to represent the foundation will be determined through the Articles of Association (Article 36 of the Foundation Law). In addition, foundation management has full personal responsibility for the Foundation, if the management causes a loss both for the Foundation and parties outside the Foundation, then the Management must be responsible. There are things that are excluded from the authority of the management, namely the Foundation management is not authorized to make the Foundation a guarantor of debt and transfer the Foundation's assets without the approval of the trustees. In addition, the manager is not allowed to encumber the Foundation's assets for the benefit of other parties. In addition to the above prohibitions, the Articles of Association can also make rules to limit the authority of the Management in carrying out legal acts, for and on behalf of the Foundation (Article 37).

Furthermore, Article 38 of the Foundation Law regulates that the Foundation is prohibited from entering into agreements with organizations affiliated with the Foundation, Trustees, Management and/or Supervisors of the Foundation, or anyone who works for the Foundation. However, there are exceptions to this prohibition in the event that the agreement is beneficial to achieve the aims and objectives of the Foundation. The term of the Foundation's management is 5 (five) years and can be reappointed. Provisions regarding the composition, procedures for appointment, dismissal, and replacement of the Management are regulated in the Articles of Association (Article 32).

The foundation is a legal entity that has assets and can go bankrupt or insolvent. Article 39 of the Foundation Law stipulates that if bankruptcy occurs due to negligence or carelessness of the foundation's management, and the foundation's assets are not sufficient to cover losses, then each member of the management is jointly and severally liable for losses caused by bankruptcy. However, if each administrator can prove that the bankruptcy is not due to his fault or negligence, then he is not responsible. If a Foundation administrator is found guilty of managing a Foundation based on a court decision, and the Foundation's mismanagement causes losses to the Foundation, association, or state, then the Foundation Law regulates that the administrator who is found guilty can no longer be appointed as a foundation administrator for 5 (five) years after the date the decision has permanent legal force. The Foundation Law also regulates the

responsibility of the Foundation management to third parties in the management of the Foundation that is not in accordance with the Foundation Law, in the form of personal liability based on the articles of association which bind all foundation organs.<sup>23</sup>

The management is burdened with the obligation to make and keep all documentation about the running of the Foundation. The Foundation Management has an obligation to store and document all records containing information on rights and obligations that have a relationship with the Foundation's finances, business, and administration. Furthermore, all data and documents will be put together to be reported in an annual report which is made a maximum of 5 months after the date the Foundation's books are closed. The annual report must include at least a report on the Foundation's activities along with the Foundation's finances. If the Foundation enters into transactions with parties that create rights and obligations, the transaction must be recorded. This obligation is regulated in Article 49 of the Foundation Law.

Article 40 of the Foundation Law regulates that the Supervisor is an organ of the Foundation whose task is to supervise and advise the management in carrying out the Foundation's activities. A Foundation has at least one supervisor, whose duties, authorities, and responsibilities are stated in the Foundation's articles of association. The requirement to be appointed as a supervisor is to be able to perform legal acts. The law also confirms that the supervisor is prohibited from holding concurrent positions as a supervisor or administrator.<sup>24</sup> Article 43 of the Foundation Law stipulates that the supervisor can temporarily dismiss members of the Management, accompanied by reasons, and must be reported in writing to the supervisor within no later than 7 days from the date of temporary dismissal. Furthermore, the supervisor is obliged to summon the member of the Management concerned to defend himself. The defence will be taken into consideration for the Trustees to make a decision containing revoking the temporary dismissal decision or continuing the process of dismissing the management member. If this is not done by the Trustees, the temporary dismissal is null and void. This is useful to ensure that the Foundation's management structure is not affected by temporary dismissal that is not followed up. Article 44 of the Foundation Law regulates that the Foundation Supervisor is appointed by the Trustees based on the decision of the trustees meeting for a term of office of 5 (five) years. After the expiration of the term of office, the supervisor can re-serve as a supervisor. There are differences in arrangements, where Law Number 16 of 2001 provides a limit on

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<sup>23</sup> Zaini and Septia, "Pertanggungjawaban Pengurus Dalam Pengelolaan Badan Hukum Yayasan Di Indonesia."

<sup>24</sup> Sunarmi Sunarmi, "Legal Standing Yayasan Sebagai Badan Hukum," Talenta Conference Series: Local Wisdom, Social, and Arts (LWSA) 1, no. 1 (2018): 264–69, <https://doi.org/10.32734/lwsa.v1i1.174>.



the term of office of the Trustees, Management, and Supervisors for two terms of office, while Law Number 28 of 2004 does not provide a limit on the term of office for the trustees, management and supervisors, but determines that the extension of the term of office can be carried out in accordance with the arrangements in the Articles of Association of the Foundation.

As supervisors, supervisory members cannot be separated from the supervisor's supervision. Article 46 of the Foundation Law regulates that a Supervisor can be dismissed at any time based on the decision of the supervisory meeting. However, if the dismissal and replacement of the supervisor is carried out by a process that is not in accordance with the Articles of Association, then at the request of the interested party or the Attorney General's Office, the court can cancel the decision. This arrangement serves as legal protection for the position of supervisor. In the condition of the foundation going bankrupt, Article 47 of the Foundation Law regulates that if the bankruptcy occurs due to the fault or negligence of the Supervisor in carrying out supervision, then the assets owned by the Foundation are not comparable to the bankruptcy, then the supervisory members have an obligation for the loss. However, if the supervisory members can prove that the bankruptcy is not due to their fault, then they do not have the obligation to be responsible for the bankruptcy that occurs.

### **3.2. Foundation Liability as a Legal Entity**

The Foundation Law states the position of the Foundation as a legal entity, this causes the Foundation to be able to carry out various legal relationships and legal acts. The purpose of establishing the Foundation was originally general in nature, but in the current condition, the purpose of the Foundation is exclusive or specialized.<sup>25</sup> The enactment of the Foundation Law makes every Foundation have goals in the social, religious, and humanitarian fields. To realize its goals and objectives, the Foundation can establish a business entity or participate in a business entity.

Throughout the establishment of the Indonesian state, the applicable criminal law guidelines were Dutch-made laws (*Wetboek van Strafrecht vor Nederlandsch Indie*) or *WvSNI* which was in force in the Netherlands starting in 1918. When Indonesia became independent, in order to avoid a legal vacuum, the *WvSNI* was adopted by Law Number 1 of 1946 concerning Criminal Law Regulations. Efforts to reform the criminal law in Indonesia have begun since 1958, marked by the establishment of the National Law Development Institute/LPHN which held

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<sup>25</sup> Ratna Komala Dewi, "Kedudukan Yayasan Sebelum Dan Setelah Berlakunya Undang-Undang Nomor 28 Tahun 2004" (Airlangga University, 2005).

legal seminars to formulate a new Criminal Code.<sup>26</sup> After a long process, on 2 January 2023, Law Number 1 Year 2023 on the Criminal Code was passed. This new Criminal Code is often referred to as the National Criminal Code, to illustrate that the process of drafting this Criminal Code was carried out by the Indonesian people themselves. The National Criminal Code will come into force 3 (three) years after its enactment, which is in 2026. One of the new things in the National Criminal Code is the regulation of the subject of criminal offenses. If in the Criminal Code, the person who can be held accountable as the perpetrator of a criminal offence is an individual, then the National Criminal Code also regulates the criminal liability of corporations. The so-called corporation in Article 45 of the National Criminal Code includes various forms of legal entities, including foundations.

Under Articles 46 and 47 of the National Criminal Code, corporate criminal liability arises under the following conditions: criminal offenses are committed by administrators who have a functional position in the organizational structure of the corporation; criminal offenses are committed by persons who, by employment or other relationships, act for and on behalf of the corporation, within the scope of the corporation's business or activities; and criminal offenses are committed by commanders, controllers, or beneficial owners of the corporation who are outside the organizational structure but can control the corporation. In Article 48 of the National Criminal Code, corporate criminal offenses can be held accountable if: the criminal offense committed, its activities are included in the scope of business stated in the articles of association or other provisions applicable to the corporation; the criminal offense benefits the corporation unlawfully; the criminal offense is a corporate policy; there are no preventive measures to avoid the criminal offense; and/or the corporation allows the criminal offense to occur. If a corporation commits a criminal offense that fulfills these conditions, based on Article 49 of the Criminal Code, those who must be held responsible are the corporation, the management in functional positions, the commanders, the controllers and/or the beneficial owners of the corporation,

The main characteristic of legal entities lies in the matter of legal liability, where organs in legal entities will not be subject to legal liability if the legal actions carried out cause civil losses to other parties.<sup>27</sup> In terms of criminal liability of the Foundation as a legal entity, those responsible are in accordance with the duties and functions of the organs within the Foundation itself. As mentioned earlier, the

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<sup>26</sup> Yuli Nurhanisah, "Perjalanan Panjang RKUHP Di Indonesia," Indonesiabaik.id, 2021, <https://indonesiabaik.id/infografis/perjalanan-panjang-rkuhp-di-indonesia>.

<sup>27</sup> Benhard Kurniawan Pasaribu, "Pertanggungjawaban Hukum Yayasan Yang Tidak Memenuhi Ketentuan Pasal 71 Ayat ( 2 ) UU Yayasan Terhadap Pelaksanaan Eksekusi Putusan Berkekuatan Hukum Tetap ( The Liability of Foundation Which Does Not Fulfil Article 71 Paragraph ( 2 ) of Foundation Act To" 8, no. 1 (2012): 44–56.

Management has the right and authority by law to represent the Foundation as a legal entity before the court. This is in accordance with Article 20 paragraph 1 of the Corruption Crime Law which regulates that if there is a criminal act of corruption on behalf of a corporation, then criminal sanctions can be carried out against the corporation or the management of the corporation.<sup>28</sup> In addition, Article 39 of the Foundation Law explains that if a Foundation is bankrupt, the one who is directly responsible for the loss is the Foundation management. Based on the arrangements in the law, it can be concluded that the criminal liability of the Foundation as a legal entity will be represented by the management organ. Therefore, each member of the management organ must have good faith and a full sense of responsibility in carrying out management duties in the Foundation.<sup>29</sup>

In the Foundation Law, there are also criminal rules. Article 5 paragraph (1) in conjunction with Article 70 of the Law on Foundations, regulates that the Foundation's assets may not be transferred or distributed in the form of salaries, wages, and honoraria or other forms that can be valued in money. Violation of the provisions of this article is punishable by a maximum imprisonment of five years, as well as additional punishment in the form of an obligation to return money, goods, or Foundation assets that are transferred or distributed. However, this rule has several exceptions contained in Article 5 paragraph (2) of the Foundation Law, which regulates that the Articles of Association can determine that the management can receive salary, wages, or honorarium if the Foundation management fulfills the following requirements: not the founder of the Foundation and not affiliated with the Founders, Trustees, and Supervisors, and carry out the management of the Foundation directly and fully. Determination of salary, wages or honorarium is determined by the Trustees according to the Foundation's ability. To ensure that the management does not have connectivity with the founders, coaches, and supervisors, it can be proven by population documents such as family cards.<sup>30</sup>

Whether the management of a Foundation is healthy or not is determined by the organs of the Foundation, especially the Foundation management. The occurrence of fraud in the management of the Foundation will be very detrimental to the Foundation. Fraud is a deliberate act by one or more members of management, or managers, or employees, or third parties through fraud to obtain unlawful or unlawful benefits. Fraud (fraud) based on its actions is divided into three types,

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<sup>28</sup> Nicken Sarwo Rini, "Penyalahgunaan Kewenangan Administrasi Dalam Undang Undang Tindak Pidana Korupsi," *Jurnal Penelitian Hukum De Jure*, 2018, <https://doi.org/10.30641/dejure.2018.v18.257-274>.

<sup>29</sup> Zaini and Septia, "Pertanggungjawaban Pengurus Dalam Pengelolaan Badan Hukum Yayasan Di Indonesia."

<sup>30</sup> Nira; Muhammad Ardi Pradana Hustiana, "Pemberian Gaji Kepada Pengurus Yayasan Berdasarkan Undang-Undang Yayasan," *Jurnal Ius Constituendum* 2 (2017): 224–26. <http://dx.doi.org/10.26623/jic.v2i2.662>

namely: 1. Asset misappropriation, namely misuse / theft of assets or company assets; 2. False statements or fraudulent statements which include actions taken by officials or executives of a company (in this case the Foundation), to cover up the actual financial condition through financial engineering in the presentation of financial statements to obtain profits, and 3. Corruption is a type of fraud that involves cooperation with other parties.<sup>31</sup>

There is a theory called the fraud triangle.<sup>32</sup> The theory suggests that there are three conditions that are always present when financial statement fraud occurs, the first is the existence of pressure is the urge or pressure to commit fraud. Pressure can arise in the form of financial difficulties or in some cases comes from greed, for example, a luxurious lifestyle. The second is the opportunity, which is a situation that opens up opportunities to commit fraud. Six main factors can increase the opportunity to commit fraud. Fraud is<sup>33</sup> weak internal controls, inability to assess the quality of work, absence of strict sanctions, lack of access to information, neglect and apathy, and lack of efforts to conduct audit trails. The third condition is rationalization i.e. there is an attitude, character, or set of ethical values that allows management or employees to commit dishonest acts, or they are in a sufficiently stressful environment that they rationalize dishonest acts.<sup>34</sup> These conditions must receive consistent attention to minimize fraud in the management of the Foundation. The Foundation Law regulates the criteria, authority, limitation of authority, disauthorisation, responsibility, and prohibitions for Foundation organs. Compliance with the Foundation Law and other regulations can avoid fraud in the management of the Foundation.<sup>35</sup> Some efforts that can be made by the Foundation to avoid fraud are implementing strict supervision of financial transactions and activities that occur in the organization, implementing strong controls in the form of clear internal policies and procedures, conducting training, independent audits, implementing separation of duties, and most importantly conducting external supervision.<sup>36</sup>

The foundation as an organization engaged in the social, religious and humanitarian fields is needed by society and the state. This is also related to the provisions of Article 27 paragraph (2) of the 1945 Constitution of the Unitary

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<sup>31</sup> Prapti Antarwiyati and Raras Ega Purnomo, "Motivasi Melakukan Fraud Dan Faktor-Faktor Yang Mempengaruhinya," *Jurnal Akuntansi & Auditing Indonesia*, 2017, <https://doi.org/10.20885/jaai.vol21.iss2.art7>.

<sup>32</sup> Antarwiyati and Purnomo.

<sup>33</sup> Antarwiyati and Purnomo.

<sup>34</sup> Antarwiyati and Purnomo.

<sup>35</sup> Ety Meikhati and Istiyawati Rahayu, "Peranan Audit Internal Dan Pencegahan Fraud Dalam Menunjang Efektivitas Pengendalian Internal (Studi Kasus Pada Yayasan Internusa Surakarta)," *Jurnal Paradigma*, 2015.

<sup>36</sup> Waleed Hilal, S. Andrew Gadsden, and John Yawney, "Financial Fraud: A Review of Anomaly Detection Techniques and Recent Advances," *Expert Systems with Applications*, 2022, <https://doi.org/10.1016/j.eswa.2021.116429>.

State of the Republic of Indonesia (UUD 1945) which states that ‘Every citizen has the right to work and livelihood worthy of humanity’. The foundation has a role to help realize other rights of the community, such as the right to education, the right to obtain health facilities, the right to be assisted in dealing with legal issues, and others. Foundations and limited liability companies are both in the form of legal entities. The difference between the Foundation and a limited liability company is that the Foundation is social (non-profit oriented), while the limited liability company has a goal to make a profit (profit oriented). The Foundation is not profit oriented and is based on the principle of non-profit. Capital and funds obtained by the Foundation must be intended for the benefit of society. Although the Foundation does not aim to make a profit, the law does not prohibit the foundation from running a business entity and entering into relationships with third parties, in order to achieve the aims and objectives of the foundation, as well as to develop the foundation in order to enlarge its social benefits. The results of business activities (business entities) established by the Foundation must be used to fulfill the purpose and objectives of the establishment of the Foundation.

Foundation organs have authority, functions, and responsibilities that are strictly separated. One of the purposes of this separation is to prevent the emergence of internal conflicts that can harm the interests of the foundation and other parties. Conflicts of interest that can occur include conflicts between foundation organs or founders; conflicts of deviations in carrying out Foundation activities; conflicts of ownership of assets and ownership of the Foundation itself; conflicts due to the Foundation's economy; and conflicts of interest between Foundation organs. The basic principle of the Foundation's business activities is not aimed at the interests of its management, but aimed at the public interest. The importance of the Foundation does not lie in its profits but in its benefits. To keep the Foundation in accordance with the purpose of its formation, the Foundation organs in managing the Foundation must be based on good faith, taking into account the interests of the Foundation, not the personal interests of the administrators. The management of the Foundation must be carried out in accordance with the duties and authorities with a reasonable level of accuracy. In order to avoid abuse of authority, the management is not given the authority to expand and narrow the scope of its authority. This is in line with the board's obligation not to carry out activities that give rise to potential conflicts of interest.<sup>37</sup>

The wealth of the Foundation is separate from the wealth of the founder, besides that the Foundation is an independent legal subject and has no dependence on the

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<sup>37</sup> Ahmad Syarief Iskandar, Hendra Safri, and Ummul Hasanah Sahar, “The Influence of Microfinance, Interest in Entrepreneurship and Business Location on the Development of Micro, Small and Medium Enterprises,” *Jurnal Ad’ministrare*, 2021, <https://doi.org/10.26858/ja.v8i2.29487>.

wealth of the founder of the Foundation. This means that the Foundation organ is not the owner of the Foundation, but the manager of the Foundation's operational sustainability. Foundation organs are fully responsible for the management of the Foundation's assets to achieve the Foundation's goals and objectives. Foundation organs have an obligation to plan, manage and control the Foundation's operational activities which will ultimately create added value, to the Foundation's assets in order to achieve predetermined goals.

### **3.3. Good Corporate Governance (GCG) in Foundation Management**

Regarding the principle of prudence in the management of the Foundation, there are several principles of Good Corporate Governance (GCG) that must be considered and applied by the Foundation's organs in carrying out activities. These principles are The principle of independence; The principle of openness of activities; The principle of accountability to the public; and The principle of non-profit (non-profit oriented). The characteristics of non-profit organizations/institutions (foundations) aim to provide community welfare gradually, both in basic needs, and public services. Starting from education, and health, to food provision. The principles of Good Corporate Governance or GCG must be considered and applied by companies, institutions, or non-profit organizations, this is intended so that activities can run by the provisions in the legislation. These principles are the principles of transparency, accountability, responsibility, independence, and fairness.<sup>38</sup>

The implementation of GCG principles, especially when managing the Foundation, is carried out by applying GCG principles in systems, procedures, and good relationships between those who make decisions and those who supervise. In the implementation of the principles of Good Corporate Governance, there are indicators that can be seen to determine that these principles have been implemented properly.<sup>39</sup> The first indicator is transparency, realized in the production of an annual work plan; Periodic financial reports (quarterly, mid-year, and annual); Accounting system; Information technology in the activity and financial reporting system; Information management system; Incidental activity and financial reports; and Important information about incidental activities. The second indicator of GCG implementation is accountability, which is realized in the preparation of financial reports quickly and accurately; Audit committee and risk management, coordination of work programs; Monitoring of work programs/activities; and Evaluation of work programs/activities. The third

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<sup>38</sup> Ananto Triwibowo, "Penerapan Prinsip-Prinsip Good Corporate Governance Dalam Pengelolaan Wakaf Tunai Pada Badan Wakaf Uang Tunai MUI Yogyakarta," *Tapis: Jurnal Penelitian Ilmiah*, 2020, <https://doi.org/10.32332/tapis.v4i1.1995>.

<sup>39</sup> Triwibowo.

indicator of GCG implementation is responsiveness, which is realized in: Articles of association and laws and regulations; Social obligations; Partnership with the community or environmental development; Information disclosure in accordance with regulations; and Moral and moral ethics.<sup>40</sup> Independence as the fourth indicator is manifested in the condition of mutual respect for the rights, obligations, and duties of each organ, and the condition that other than the management is prohibited from interfering in the affairs of the institution.<sup>41</sup> The fifth indicator of GCG implementation is the existence of fairness and equality which is manifested by the creation of roles and responsibilities of each board/organ in the institution/organisation; The situation of treating muzaki (donors) and mustahik (recipients of donations) fairly and honestly; Comfortable and safe working conditions for administrators; Conditions allow muzaki to provide input according to the provisions; The existence of regulations that protect the interests of the parties; The existence of institutional implementation regulations; The existence of policies to protect the institution.

There are foundations that have implemented GCG in their management, including the Solo Peduli Ummat Foundation which is engaged in education, health, social humanitarian, empowerment, and da'wah.<sup>42</sup> The Foundation, which was established on 11 October 1999, has implemented GCG in the Foundation's Amil Zakat Institution, by applying the following principles:<sup>43</sup> The principle of transparency is implemented in Solo Peduli Ummat Foundation with the fulfillment of indicators in the form of making the Foundation's annual work plan, making the Foundation's quarterly and annual financial reports, using an accounting system based on accounting standards, namely referring to PSAK 109, using information technology in the form of websites, social media, and magazines, incidental financial management systems by providing information facilities for managing zakat infaq and sadaqah, incidental activity and financial reports based on incidental activities, and important information about incidental activities. The principle of accountability is implemented with the fulfillment of indicators in the form of the presentation of financial reports quickly and accurately, where data is obtained from branch offices and then processed by the head office so as to achieve time efficiency in presenting financial reports. The

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<sup>40</sup> Maylia Pramono Sari et al., "Good Corporate Governance As Moderation On Sustainability Report Disclosure," *Journal of Governance and Regulation*, 2023, <https://doi.org/10.22495/jgrv12i3art2>.

<sup>41</sup> Ni Putu Frishca Ardiani, Lindrawati, and Adi Susanto, "Pengaruh Mekankisme Good Corporate Governance Terhadap Pengungkapan Sustainability Report Pada Perusahaan Yang Terdaftar Di Bursa Efek Indonesia" *Jurnal Riset Akuntansi Mercuri Buana*, 2022.

<sup>42</sup> Solopeduli, "Yayasan Solo Peduli," Solo Peduli, 2022, [solopeduli.com](http://solopeduli.com).

<sup>43</sup> Anggit Kartika Candraningsih, Endang Masitoh Wahyungsih, and Purnama Siddi, "Analisis Implementasi Good Corporate Governance Dan Penerapan PSAK No.109 Tentang Akuntansi Zakat Pada Lembaga Amil Zakat Yayasan Solopeduli Ummat," *Jurnal Ilmiah Edunomika* 4, no. 02 (2020): 386–96, <https://doi.org/10.29040/jie.v4i02.1171>.

foundation uses external audit services and risk management, risk management is analyzed using the Risk Management Plan (RMP). Coordination of work programs, monitoring, and evaluation is carried out once a week, a board of directors meeting once a month, and a plenary evaluation once every six months. The principle of responsibility is implemented by fulfilling indicators in the form of articles of association and activities that meet legality, implementation of corporate social obligations (corporate social responsibility), partnerships with the community or environmental development, information disclosure according to regulations, and the application of moral and moral ethics in Yayasan Solopeduli. The principles of independence and fairness are fulfilled with effective, professional, and responsible governance with the use of accounting standards in financial reporting, where Yayasan Solopeduli has fulfilled Financial Accounting Standards (PSAK) Number 109 concerning Accounting for Zakat and Infaq / Donations issued by the Indonesian Institute of Accountants in its financial reporting. With the implementation of GCG in the management of the Foundation, the effectiveness, efficiency, and sustainability of the Foundation's activities will be better guaranteed, so that the Foundation will be able to carry out the objectives envisioned at the time of its formation.

#### **4. CONCLUSION**

The Foundation must have prudential principles in carrying out activities so that the Foundation can maintain its sustainability and develop to realize the Foundation's objectives. The prudential principles that need to be applied in managing the Foundation's activities are: First, the Foundation organs must always be guided by applicable legal provisions in managing the Foundation, to avoid problems both in the form of civil disputes and violations of criminal law. Second, the Foundation must remain based on non-profit-oriented principles, where the Foundation is not prohibited from running a business entity whose results are intended for the benefit of the community and the sustainability of the Foundation itself to realize its social goals, and the intention of a Foundation's business activities is not to improve the welfare of managers, but on benefits of the Foundation. Third, the Foundation organ must avoid conflicts of interest that can harm the interests of the Foundation and other parties. Fourth, the Foundation must apply the principles of Good Corporate Governance (GCG), namely: independence, openness or transparency, accountability, and fairness. With the implementation of the Foundation's prudent principles, it is expected that the Foundation can develop and maintain its sustainability so that it can realize its goal of providing broad benefits to the community.

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