

Legal Protection of Students' Interest during Foundation Merger of Private Universities in Indonesia

Kasiani¹, Suhariningsih², Bambang Winarno³, Iwan Permadi⁴

¹Ph.D Candidate, Law Faculty, Brawijaya University, Malang, Indonesia, 65145

²Professor of Agrarian Law, Law Faculty, Brawijaya University, Malang, Indonesia, 65145

³Lecturer, Law Faculty, Brawijaya University, Malang, Indonesia, 65145

⁴Lecturer, Law Faculty, Brawijaya University, Malang, Indonesia, 65145

Abstract: *Foundations merger of private universities might be one of the solution when one specific foundation is not able to manage its universities. By merging with other university foundation, it will be easier for unifying foundation to manage and solve problems of unified foundation. Foundation and university are two different entities in which there three component existing in universities namely lecturers, students and staff. All of them are inseparable component of universities. Therefore, those elements are the most crucial ones in merger. Problems that will be explored in this study is that how can legal protection settlement for lecturers, staffs and students during merger of foundation of universities in case of loss? This is a normative law study by using statutes and conceptual approach. Analysis technique used is analytical prescriptive analysis to produce prescriptive law study. The findings show that Law on Foundation has not given clear regulation on legal protection for those involved in legal enterprise of foundation which in this case is University. In addition, National Law no 12 of 2012 on Higher Education doesn't give sufficient legal protection for lecturers, staff and students. Though, Law no 14 of 2004 on Teacher and Lecturers gives legal protection for lecturers and education staff is under protection of Law No 13 of 2003 on employment. Students do not have legal protection.*

Keywords: Foundation, Merger, Protection for Students

1. Background

Foundations conducting higher education activities are commonly called Foundation of Higher Education. Indirectly, they play crucial and strategic role in implementation of national development programs focusing on educating people and improving prosperity. It is believed that education is the only effective way to support the program.

As far as it concerns, Foundations of Higher Education have shifted from classic higher education to modern one. Higher education should be able to keep up with development of science and technology and Foundation, as founder and host of higher education institution is required to be able to facilitate the needs.

Definition of Foundation is stated in article 1 verse 1 of Law no 28 of 2004 on Amendment of Law No 16 of 2001 on Foundation (it is termed Law On Foundation), stating that "foundation is legal entity having separable asset used to achieve its social, religious objectives. In addition, it has no member.¹ The definition implies several essential elements of Foundation. They are that: a) foundation has asset; b) the asset belongs to foundation, c) the asset is required to achieve certain objectives for having the asset; and d) it is legal entity without member.

As legal entities, franchisor is legal subject having civil right and obligation that may be used or bring about legal action at court. Like other legal entities, Foundation is capable of developing a higher education institution and that should be one of the objectives of Foundation. Foundation having higher education institution should be able to overcome and manage problems. However, Foundation of higher education institution may undergo adverse situation which could be handled. Therefore, the only solution is by organizational restructuring in the form of merger. Foundations may be merged to develop their institution efficiently. However, creating healthy and efficient atmosphere of higher education institution should refer to principle of legal protection for related parties.

There are several elements in higher education institution namely academic group consisting of lecturers and students as well as staff in charge of academic task in the implementation of education. Lecturers are teachers and scientist whose main tasks are to transform, develop, and disseminate science and technology through education, research and community service. Students are learners and the three components should be working together for the operation of higher education institution. In addition, their rights should be taken into serious account when conducting merger.

a) Statement of Problem

Based on the above background, the research problems is that "how is legal protection for lecturers, staffs and students in Foundation merger having higher education institution?"

¹ Article 1 verse 1 of Law On foundation

b) Research Method

This is normative law study because the study background is the focus and main theme of study on merger settlement of foundation stated in Law of Foundation and several related legislations. This study employs statute approach and conceptual approach. Law materials used are legislation, books and articles on settlement of legal protection in merging legal entities in Indonesia. The materials are then analysed by using prescriptive analysis technique to find out the essence of law study based on the nature of law study as applied science.

2. Discussion

a) Definition of Foundation merger

According to Black's Law Dictionary, *merger* is a *fusion or absorption of one thing one thing or right into another*², meaning that the fusion or absorption is conducted by less important subject to more important one. The less important subjects then dismiss themselves. Thus, merger occurs when two institutions fuse in which one of them will be dismissed. In organization law terms, *merger* is action to unify two companies based on prevailing requirements stated in the law. One of them dismisses and the others survive.³ According to Munir Fuady, Merger is a fusion or absorption of one object or object right or another right.⁴ In general, fusion or absorption might be conducted by less important subject to more important one and the first dismisses itself.⁵

Foundation merger is defined quite simple. Article 57 verse (1) of Law on Foundation states that merger is legal act of unifying one or more Foundation to others due to legal reason. Unified Foundation will then dismiss itself. Further, definition of Foundation merger is stated in provision of article 2 no 2 of Government regulation no 53 of 2008 on The Implementation of Law of Foundation as amended by Government regulation no 3 of 2012 on the Amendment of Government regulation no 63 of 2008 on the Implementation of Law of Foundation stating that Foundation merger result in not only legal impact of dismissing unified Foundation but also taking over either passive or active asset of unified Foundation to unifying one without liquidation.

Theoretically, Merger which is based on business activities classification might be divided into four categories: *horizontal Merger*, *Vertical Merger*, *Kon-Generic Merger*, and *conglomerate Merger*.⁶ Based on the classification,

² Henry Campbell Black, *Black's Law Dictionary*, (St. Paul Minn: West Publishing Co., 1991), hlm. 682

³ *ibid*

⁴ *Munir Fuady*, Law On merger, 1st print, (Bandung, PT. Citra Aditya Bakti, 1999), page 2.

⁵ *Loc.Cit.*, Munir Fuady, hlm. 2

⁶ 1) horizontal merger is merger between two or more companies in which all of them have similar line of bussiness. 2) *vertical merger* is unification between two or more companies in which one of them is supplier for the other. 3) *Kon-Generic merger* is a merger in which merging companies are closely related to each other, they have similar nature of production. However, they are not supplier for similar product (horizontal) and there is not also producer-supplier (vertical) relationship. 4) *Conglomerate merger* is combination between two companies or more and their line of

Foundation merger might be classified based on similar activities. In addition, Foundation merger of higher education institution might be only conducted if it is unified into other Foundation having higher education institution. As stated in provision of Foundation merger requiring that the activities are stated in article 57 verse (2) no 2 of Law on Foundation.

On Foundations merger, deeds of merger is the basis for relation between unifying and unified Foundations⁷. The deeds is also crucial merger agreement functioning as proof of evidence just like contents of agreement and also as proof of supervisory board meeting to approve Foundations merger without which merger could not be completed. Agreement of Foundations merger should fulfil prevailing requirements for merger to be eligible as stated in article 1320 of Indonesian Civil Code. As also stated in article 1338 verse (3) of Indonesian Civil Code, if the requirements have been fulfilled, then the agreement turns to be prevailing rule for unifying and unified Foundations.⁸

Basically, Foundations merger is a kind of friendly merger. It means that merger is required for the sake of Foundations' interest, because their inability to handle their business activities. It also belongs to friendly merger because one of the requirement for unified Foundations to merger is that they have never violated the articles of incorporation, prevailing general norms and ethics.⁹

Based on the above descriptions, it is found out that Foundations merger of higher education institution results in the termination of legal status of unified Foundations. In addition, it is followed up by taking over of all active and passive asset of unified foundation by unifying foundation.

b) Legal Foundations of Foundation Merger

Foundations of higher education institution are those in charge of higher education sector. It is legal entity having separable asset whose aim and objective is to operate higher education institution and it has no member. Viewed from organization aspect, Foundation and higher education institution are two organizations or separable medium which are under similar legal basis, namely legal entities of Foundation. Therefore, when certain Foundation has higher education institution, it should refer to law on foundation and Law on Higher education, namely Law no 12 of 2012 on Higher Education.

c) Merger Arrangement of higher education institution

Foundations are partially under regulation of several article in Indonesian Civil Code; and it doesn't cover the arrangement of merger. However, when reviewing the provision of article 58 of Law of Foundation, we found out that merger process should be initiated with agreement, as implicitly stated in article 58 verse (1) that process of Foundation merger is conducted by executive board of

bussiness are not related one to another. In Munir Fuady, *Law On Merger*, (Bandung: Citra Aditya Bakti, 1999). Page 85.

⁷ Article 58 of Law on Foundations .

⁸ Article 1338 verse (3) of Indonesian Civil Code "all agreement is valid as prevailing rule for those who make it".

⁹ Article 57 verse (2) of Law of Foundations

unified and unifying foundation by composing merger plans.¹⁰ Therefore, agreement on Foundation merger should also refer to provision of article 1320 of Indonesian Civil Code¹¹. The substance of 4 (4) requirements of agreement validity is that there should be agreement from those involved. The substance of agreement refers to content of treaty containing freedom for each determine contract object. However, due to different background of unifying and unified foundation either in terms of financial condition and public trust, then it is hard to decide the fair content of agreement especially for unified Foundation.

Viewed from other perspectives, crucial aspect of Foundation merger is related to whom the benefit of agreement. In this case, agreement is made for third party (*derdenbeding*). Basically, agreement should not cause loss and benefit of third party except it is already stated in article 1317 of Indonesian civil code. It is that that¹²

“It is allowed to determine commitment for the sake of third party, if it stated in the commitment made by certain person. Who makes the commitment should not withdraw it if the third party intends to make use of it.”

Thus, agreement for third party should not result in right or obligation on the part of him, unless it is agreed for the sake of third party's interest. Conditions for the interest of third party is made by those making them and put in agreement in which the third party will have certain right for certain achievement. Then, for Foundation merger, those who are taking part in business enterprise of Foundation should be part of agreement or they don't rely on the result of agreement between executive board of each Foundation.

d) Legal Impact of Foundation Merger

Merger is legal action committed by one Foundation or more to unify themselves to other Foundation resulting in taking over all active and passive asset of unified foundation and the unified one dismisses itself without liquidation.¹³ From the definition, we are able to find out the element of Foundation merger as stated below

- 1) Merger at least involve two Foundations, unified and unifying foundations.
- 2) Unifying foundation will receive or take over all right and obligation, active and passive asset of unified foundation.
- 3) Unified foundation will lose its status as legal Foundation due to the law.

Regarding legal impact stated above and the reason to conduct merger is to tackle inability of certain foundation to run its business activities, then Foundation merger should

¹⁰ Article 58 verse (1), Law of Foundation

¹¹ Requirement of agreeent, article 1320 of indonesian Civil Code: 1. Agree; 2. Competent, 3) certain object, and 4. Eligible cause.

¹² Setiawan, Setiawan, **Legal Principle of Engagement** (Bandung, Bina Cipta, 1986), page 122.

¹³ Article 57 verse (1) Law of Foundation, jo article 1 no 2 government legislation no 63 of 2008 on The Implementation of Law of Foundation as amended by government legislation no 2 of 2013 on amendment of legislation no 63 of 2008 on the implementation of Law of Foundation. Satjipto Rahardjo, Ilmu Hukum (Bandung: Citra Aditya Bakti, 2000), page 53

take related parties' interest into serious account to prevent loss.

e) Legal Protection for Lecturers and Staff

Satjipto Raharjo states that law is written to integrate and coordinate various interest. The coordinating effort is conducted by limiting and protecting the interest.¹⁴ Law protects people's right by granting him power to act and to fulfil his interest. The right should be implemented in such a way that its scope might be measured.

Therefore, Foundations merger may not be conducted only to serve the needs of certain parties. Merger can only be completed by taking stakeholders' such as lecturers, students and staff interest into serious account. As elaborated above, Foundations merger should be based on agreement made by executive board of related foundation and it doesn't give enough guarantee for the protection of lecturers' staffs' and students' interest. However, it is not stated in Law of Foundation, their rights are still ensured by other legislation. For instance, in case of layoff due to merger, the right of lecturers are still under protection of Law No 14 of 2005 on Teacher and Lecturers as stated in article 1 no 8 stating that “layoff is termination of work contract of teachers or lecturers due to certain causes resulting in termination of right and obligation at certain education institution or school based on prevailing legislation”.

Article 75 of Law no 14 of 2005 on Teacher and Lecturers states that central government, regional government, society, profession organization, and/or school are required to ensure their security on conducting their job the protections are legal protection, profession protection, and work and safety protection. In addition, it also includes protection from violence, threat, discriminations, intimidation, unfair treatment from students, parents, society, and/or other parties. Profession protection also covers protection on lecturers as professional from layoff which is against prevailing legislation, unfair salary, limitation on academic aspects, academic forum and professional autonomy as well as other limitation hindering lecturers in conducting their duty.¹⁵

Legal protection for academic staffs is stated in Law no 13 of 2003 on Employment namely on article 131 verse (2) and (3). It states that:

- (1) In case of merger and each company has common agreements, then the prevailing agreement should be the one which is advantageous for employees.
- (2) In case of merger between companies having common agreements with companies having no agreement, then the common agreements are valid for unified companies' up to the termination of agreement.

f) Legal Protection for Students

Legal protection might be also defined as an effort to protect people from arbitrary treatment from government which is

¹⁴ Satjipto Rahardjo, Ilmu Hukum (Bandung: Citra Aditya Bakti, 2000), page 53

¹⁵ Article 57 verse (1), (2), (3), (4), (5) of Law on Foundation.

against the law in order to create social order enabling people to obtain their right as human being.¹⁶

Education is primary right for all people as stated in article 31 of Indonesian Constitution of 1945. Furthermore, it is realized that education is crucial and fundamental element of human rights and there are economic, social and cultural right as well as civil and political right containing in right for education.

Viewed from international human rights, the fulfilment of right for education falls into positive rights. Positive right might be well manifested without state intervention. Thus, the state must fulfil the right. Right for education is also part of human right prevailing in Indonesia which is not only moral right but also constitutional right. It is stated clearly in provision of article 28C verse (1) of Indonesian Constitution of 1945 that “everyone has right to develop themselves through the fulfilment of their basic needs, fulfilment of their right for education and by taking benefit from science, technology, culture and art, to improve life quality and for the prosperity of men”. In addition, constitution also stated that education is the right of each person. Foundation is legal entities and therefore it is legal subject. Foundations has right and obligation like men.¹⁷ According to Purnadi Purbacaraka, law subject is a subject who is capable of doing legal act, who have responsibility, rights and obligation. It is like individuals having their own asset. Foundations have executive boards and are able to take part in agreement.¹⁸

Foundations with social activities which is allowed to withdraw fund from society and donator is under regulation of article 16 of Law no 35 of 1999 on Human Rights. It states that everybody has right to conduct social work, found organization for that and conduct educational activities as well as to withdraw fund from people to serve objectives as stated in legislation. Therefore, position of Foundations as law subject as well as founder of educational activities is closely related to the fulfilment of basic right. In addition, for that reason, Foundations should respect, protect and guarantee the interest of third parties which are related to their business activities.

Law no 12 of 2012 on Higher education doesn't contain regulation on Foundations merger as organising body of higher education. Inside the law, there is no such term as merger. However, based on prevailing law norm, merger has similar genus to term of private higher education alteration. However, it is still not clear on the alteration that may give legal security as well as the merger concept. Thus, there is no law norm protecting students of university from loss due to merger. Based on the above description, we can draw conclusion that students' rights must be protected. Students must be put as integral part of rights that should be protected, respected, and guaranteed. Therefore, when

¹⁶ Setiono, *Rule of Law (Supremasi Hukum)*, Master thesis, Law Study, Graduate Study of, Universitas Sebelas Maret, Surakarta, 2004, page. 3

¹⁷ I.G. Rai Wijaya. *Hukum Perusahaan* (Jakarta: Megapoint, 2000), page 127.

¹⁸ Prof. R. Subekti, *Hukum Perjanjian*, (Jakarta : Intermasa, 1979), page. 67

higher education institution under certain Foundations undergo certain situation such as merger or moving to other location, right of students are still protected by the law.

3. Conclusion

Students' right as third party of business enterprise founded by Foundations has not been protected by the law. It is because Foundations merger is only based on agreement made by executive board of related foundation. Therefore, it is possible that third parties' right are not covered in agreement. On the other side, there has been clear settlement on how to protect students' right after Foundations merger resulting in loss on the part of students.

4. Recommendation

There must be law norm ensuring protection for third parties' interest involving in business enterprise of foundation such as higher education institution. It might be conducted by adding new article on article 57 verse (2) of Law of Foundation on terms of merger. The article may be stated as follows “Foundations merger should be conducted in such a way to prevent third parties' interest from loss”. There should be also new article in article 60 of Law of Higher Education stating that alteration of status of higher education institution must protect the right of students.

References

Literature

- [1] Munir Fuady, *Hukum Tentang Merger*, Cetakan ke-I, Bandung: PT. Citra Aditya Bakti, 1999
- [2] Henry Campbell Black, *Black's Law Dictionary*, St. Paul Minn: West Publishing Co., 1991.
- [3] Herlien Budiono, *Asas Keseimbangan Bagi Hukum Perjanjian Indonesia*, (Bandung : Citra Aditya Bakti, 2008
- [4] Munir Fuady, *Hukum Tentang Merger*, Bandung: Citra Aditya Bakti, 1999.
- [5] I.G. Rai Wijaya, *Hukum Perusahaan*, Jakarta : Megapoint, 2000
- [6] Prof. R. Subekti, *Hukum Perjanjian*, Jakarta : Intermasa, 1979
- [7] Tuti Rastuti, dkk, *Aspek Hukum Pengelolaan Perusahaan*, Bandung : PT Refika Aditama, 2018
- [8] Satjipto Rahardjo. *Ilmu Hukum*, Bandung : PT Citra Aditya Bakti, 2000
- [9] Setiawan, *Pokok – Pokok Hukum Perikatan*, Bandung : Bina Cipta, 1986

Regulations

- [10] UUD N RI Tahun 1945
- [11] UU No. 16 Tahun 2001 tentang Yayasan
- [12] UU No. 28 Tahun 2004 tentang Perubahan Atas UU No. 16 Tahun 2001 Tentang Yayasan
- [13] UU RI No. 35 Tahun 1999 tentang Hak Asasi Manusia
- [14] PP No. 63 Tahun 2008 Tentang Pelaksana Undang-Undang Yayasan
- [15] PP No. 2 Tahun 2013 Tentang Perubahan Atas PP No. 63 Tahun 2008 Tentang Pelaksana Undang-Undang Yayasan