

# The Shifting of Foundation Law Principle from Non-Profit to Profit

Ayih Sutarih<sup>1</sup>, Moch. Bakri<sup>2</sup>, M. Fauzan<sup>3</sup>, Iwan Permadi<sup>4</sup>

1. Doctorate Candidate at Law Faculty, Faculty of Law, Brawijaya University, Malang

2. Professor of Law, Faculty of Law, Brawijaya University, Malang

3. Professor of Law, Faculty of Law, Jenderal Sudirman University, Purwokerto

4. Lecturer at Doctorate Law Studies Program, Faculty Of Law, Brawijaya University, Malang

## ABSTRACT

The shifting of Foundation law principle from non-profit to profit is representing a fundamental issue relating with the essence of social goal of Foundation. The issue needs to be explained to obtain proper understanding about Foundation in pursuance of the goal of establishing Foundation stated in Foundation Act. The effect of Law No.28/2004 about Amendment to Law No.16/2001 about Foundation (hereafter called as UUY) has changed the characteristic of Foundation, for example, concerning with its law base, its status as law body, and business activity. This change signifies the shifting. Foundation is initially emphasizing on habit and jurisdiction without law certainty about the status as law body. Foundation is also a merely social organization. The shifting may force Foundation to develop into a law body with law base, usually laws and regulations, with law certainty through the conferral of law body status, and more importantly, with the ability to conduct business activity. The shifting of Foundation from social activity – non-business – to business activity is reflecting the conversion of Foundation law principle from non-profit to profit.

UYU does not explain the social character, or the sociality interest, of Foundation and not differentiate strictly the presence of these two activities (social and business) in terms of meaning and character. Social activity is aimed for social, religion and humanity goals, while business activity is to achieve profit goals. In Section 14 Verse 2b UUY about Foundation Activity, it is shown that Foundation Statutes does not accommodate business activity. Therefore, it leads to the presence of the problematic of philosophy, jurisdiction, theory and sociology. Philosophical problematic is concerning with the essence of goal, participation, and autonomy of Foundation to produce social welfare that is previously remaining under the responsibility of the State. Juridical problematic is related with normative fuzziness about social and business activities which put Foundation into confusion between achieving non-profit and profit goals. Theoretical problematic is talked about different interpretation of Foundation activities and the reason behind this is usually related to the confusion between two goals of Foundation. Section 14 Verse 2b only explains the activity to achieve Foundation's purpose and objective. Sociology problematic indicates that UUY does not secure the people from obtaining benefit from Foundation because Foundation begins to be individually oriented and therefore, it is hardly potential to grow kinship principle as the means to achieve social welfare. Taking these matters above into account, problems of research are then formulated such as: (1) What is the manifestation of law principle shifting from non-profit to profit in the law politic arrangement for Foundation?; (2) How is the law consequence on Foundation as law body with the shifting from non-profit to profit?; and (3) Can the shifting from non-profit to profit encourage Foundation to be autonomous as the means to develop kinship/mutual help principle in achieving social welfare.

**Keywords:** Social Character, Sociality Interest and Foundation Law Principle

## 1. Introduction

The law within the national frame of the developing countries is one dimension which must be understood to achieve public welfare as national aspiration that is given already in the mandate of National Constitution (UUD 1945) and also to incarnate national law system as law aspiration which is stated in Section 1 Verse 3 of UUD 1945. Any sections in the body of UUD 1945 are written base laws which structurally have fundamental values that contain principle rules and that can be used as the next law bases for instrumental and practical values. The manifestation of public welfare is driven toward the fulfillment of human base demands for law orderliness, law certainty, sense of justice and sense of utility. The demand for information is one human base demand. The most basic moral demand is the right of human to obtain the necessity to undergo the humane life (Arief Sidharta: 1989). A manifestation of national aspiration through law aspiration is by the release of laws and regulations about Foundation. Law No.16/2001 about Foundation (LN No.112, TLN No.4132) has been amended with Law No.28/2004 about Amendment to Law No.16/2001 about Foundation (LN No.115, TLN No. 4430), and all of these laws are hereafter called as UUY.

The effect of UUY has changed the essence, the form, the substance, and the law principle of Foundation as the base or guidance of law rules of Foundation which previously help people to recognize Foundation existence. Such law change, in pursuance of Indonesia law, can be seen in law arrangements which regulate Foundation in period before and after the effect of UUY. Before UUY, the arrangement for Foundation is recognized based on the past and still various. In non-written form (implicitly), Foundation has lived and developed among the people based on law habit and jurisdiction of Supreme Court. In its written form (explicitly), the arrangement of Foundation is related to Netherlands-Indies colonialism and remaining submissive to European law.

The legacy of such explicit arrangement is Civil Code (KUHPPerdata) although it is only partial, as shown in Section 365, 899, 900 and 1690 KUHPPerdata. Section 6 Verse 3 and Section 236 Rv, and Section 2 Verse 7 of Bankruptcy Act (*Faillissementsverordening*) (Natzir Sid : 1987). The essence and the base character of Foundation is focused upon sociality interest which means that main goal of Foundation is delivering social activities and not attempting for profit, or thus Foundation is called as *non-profit*. This distinctive marker of Foundation is born, growing and developing from the sense, spirit and motive of people philanthropy. The philanthropy itself is the actualization of the senses of giving, serving and associating with the interest of the needing people (S.Bamualim : 2014). Both sense and spirit are the principles

underlying Foundation activity to achieve the purpose and objective at sociality interest because Foundation is not looking for profit or thus is advocating non-profit. In juridical term, Foundation is a social organization ( General Explanation of Law No.16/2001). It means that Foundation, with its law principle, is not undergoing efforts or activities for profit, and therefore, Foundation is always non-profit.

The doctrine of profit planning is always not consistent with the objectives of sociality interest and humanity interest (Chatamarrasjid : 2000). By avoiding the pursuit of profit (being non-profit), the founder of Foundation only uses the asset for social interest (due to the status of non-profit). After the effect of UUY, Section 1 Verse 1 of Foundation Act determines that Foundation is a law body which the asset is separated and aimed for certain interests of sociality interest, religiosity and humanity, and which is organized without membership. This Section only explains in general term the objectives of Foundation at sociality interest, religiosity and humanity interests, but the objective of Foundation at sociality interest is not clearly defined. Pursuing for the purpose and objective at sociality interest, then social or charity events are held. The essence and objective of Foundation is for social activity at sociality interest, religiosity and humanity interests. The activity that can achieve Foundation's purpose and objective is stated already in Section 14 Verse 2 Letter b UUY. This Section 14 Verse 2b has stated that: "Statutes (Anggaran Dasar) must at least contain; a. ....; b. purpose and objective, and activity to achieve this purpose and objective; c. ....; d. ....". Supporting the achievement of Foundation's purpose and objective, the business activity is then conducted by establishing a business organization or by participating into a business organization. The activity to support the achievement of Foundation's purpose and objective, and also the utilization of this activity, are arranged in Section 3 (Verse 1), Section 7 (Verse 1 and Verse 2), Section 8, and Section 26 (Verse 4) of UUY. Section 3 Verse 1 has said that "Foundation can do business activity to support the achievement of Foundation's purpose and objective by establishing business organization and/or by participating into business organization". Section 7 Verse 1 states that "Foundation can establish business organization which the activity still conforms to Foundation's purpose and objective". Section 7 Verse 2 suggests that "Foundation can participate into various prospective businesses by condition that the enclosure is at least 25 % of Foundation asset total". Section 8 asserts that "Business activity of business organization required in Section 7 Verse 1 must be consistent to Foundation's purpose and objective, and shall not contravene general orderliness, morality or any prevailed laws and regulations". Section 26 Verse 4 declares that "The asset mentioned in Verse 1 and Verse 2 is used to achieve Foundation's purpose and objective". Section 26 Verse 1 explains that "Foundation asset is coming from asset that is separated into the form of money and article". Section 26 Verse 2 clarifies that "In addition to the asset in Verse 1, Foundation asset can also derive from: (a) Contribution or unconditional aid, (b) Islamic Donation, (c) Grant, (d) Bequest, and (e) Other gains that are consistent to Foundation Statutes or the prevailed laws and regulations".

In pursuance of the stipulations above, there is an opportunity for Foundation to do business activity to support the achievement of Foundation's purpose and objective, but this activity may not achieve Foundation's purpose and objective itself. In other words, UUY provides an opportunity for Foundation to do business activity to support the achievement of Foundation's purpose and objective, by which Foundation can obtain profit but the utilization of profit is not for the interest of the Founder, and therefore, Foundation remains still non-profit.

The arrangement of Foundation activity before and after UUY has witnessed the shifting of values underlying Foundation activity from those emphasizing on sociality interest and non-profit toward those looking for profit. This profit is not utilized for the interest of the Founder, and consequently, the sociality interest of Foundation is ambiguous. Business activity of Foundation to support the achievement of Foundation's purpose and objective is a reasonable and simple thing. However, in deep review, such value shifting has impacted the existence of Foundation's purpose and objective at sociality interest. Although business activity to support the achievement of Foundation's purpose and objective has been arranged by laws and regulations, it remains uncertain whether business activity is used to achieve Foundation's purpose and objective because it is possible if this activity is used for the interest of Foundation and peoples within Foundation.

The reason is that the arrangement of Foundation sociality interest is unclearly defined and there is no strict separation between two activities of Foundation although both have different meaning and character. Therefore, different interpretation of Foundation activity is easily emerging. There is not only the activity to achieve Foundation's purpose and objective at sociality interest, but also business activity to support the achievement of Foundation's purpose and objective at profit interest. Section 14 Verse 2 Letter b only explains the activity to achieve Foundation's purpose and objective at sociality interest, and this is validated by the Founder in Foundation Statutes. Business activity to support the achievement of Foundation's purpose and objective at profit interest usually has not been written into Foundation Statutes. It seems that Foundation's purpose and objective are overemphasized, and business activity is a merely to support the achievement of Foundation's purpose and objective. The dominant arrangement within the sections of UUY is related with the activity to support the achievement of Foundation's purpose and objective. It may lead to the understanding that business activity is positioned as if it is primary activity of Foundation, and that business activity is done to achieve Foundation's purpose and objective. To be sure, main activity of Foundation is to achieve purpose and objective at sociality interest. Unclear arrangement about sociality interest of the activity to achieve Foundation's purpose and objective may induce normative fuzziness due to two different activities in Foundation, with one activity is to achieve Foundation's purpose and objective at sociality interest and other is business activity to support the achievement of Foundation's purpose and objective which is mostly profit oriented. No differentiation is made for the arrangement of both activities within Foundation Statutes.

Sociality interest that supposes to be the main goal of Foundation is becoming unclear and the profit from business activity will return again to business activity rather than be utilized for social activity. It is always considered as a missing topic, but deeper review may help to find that it is fundamental problematic to the existence of Foundation with sociality interest. Philosophically, business activity to support the achievement of Foundation's purpose and objective cannot be said anymore as the supporter because the arrangement for the essential existence of Foundation's purpose and objective at sociality interest remains unclear. The fuzziness of arrangement causes different interpretation which in turn produces various interpretations about value shifting in Foundation law realm. This fuzziness represents juridical problematic. Therefore, in formal term, it is not consistent to the principle of establishment for laws and regulations which is stated in Section 5 Letter f about the clarity of formulation (Law No.12/2011 about Establishment of Laws and Regulations). Thus, it is also very

important to have further research to obtain the correct understanding which may alleviate interpretation differences about sociality interest of Foundation as the main activity of Foundation, or which can help to separate between the activity to achieve Foundation's purpose and objective and the activity to support the achievement of Foundation's purpose and objective.

Considering the explanation above, the shifting of Foundation law principle, pursuant to UUY, is a matter of shifting from non-profit to profit. It means that in the beginning, Foundation is a law body with certain organization and without intention for business activity or for profit seeking (non-profit), but later Foundation does business activity to gain wealth (profit). Under law perspective, this shifting induces several problematic. First is philosophical problematic concerning with the essence of objective and role of Foundation to produce social welfare that is previously remaining under the responsibility of the State. Second is juridical problematic that is related with normative fuzziness about sociality interest and also with the absence of separation between two activities of Foundation. Third is theoretical problematic which talks about different interpretation against Foundation activities during the preparation of Foundation Statutes because of the absence of separation between the activity to achieve Foundation's purpose and objective and the activity to support the achievement of Foundation's purpose and objective. Section 14 Verse 2b in UUY only explains the activity to achieve Foundation's purpose and objective. Fourth is sociology problematic which indicates that UUY does not yet secure the people from obtaining benefit from Foundation (as required by Foundation Statutes) especially when Foundation begins to be individually oriented and therefore, it is hardly potential to grow kinship principle as the means to achieve social welfare. By taking account all problematic above, problems of research are determined such as: (1) What is the manifestation of law principle shifting from non-profit to profit in the law politic arrangement for Foundation?; (2) How is the law consequence on Foundation as law body with the shifting from non-profit to profit?; and (3) Can the shifting from non-profit to profit encourage Foundation to be autonomous as the means to develop kinship/mutual help principle in achieving social welfare.

## 2. Research Method

Research type is normative law research. It is a research which investigates law principles and law rules, especially those relating with concrete law and law system (Sudikno Mertokusumo: 2009). A system of rules comprises of principles, norms, theorems, laws and regulations, court verdict and doctrine (teaching) (Mukti Fajar : 2010). System of rules embedded into laws and regulations and also within judicial verdict is a positive law, and such law can be understood by observing general characteristics of concrete rules (Sudikno Mertokusumo : 2006). Several approaches are used such as historical approach, statute approach, and conceptual approach. *Historical approach* is used to review laws underlining Foundation and to examine the shifting from non-profit to profit by scrutinizing the arrangement before and after the effect of UUY. *Statute approach* is used to review and to emphasize on primary laws and regulations about Foundation and other secondary or additional ordinances about Foundation. *Conceptual approach* attempts to understand the abstract substances within the mind, and also to review Foundation law principle that underlies the shifting of non-profit to profit, the context of fundamental policy about law direction and law base of Foundation, the law consequence of the shifting on the essence of Foundation objective, and the shifted law principle that drives Foundation to become the means to grow the principle of togetherness to achieve social welfare. Law material used in this research includes primary, secondary and tertiary law materials. All these law materials are obtained from literature research. These materials are then analyzed with normative method. It is a method that is closely related with normative research. It involves inventorying positive laws in preliminary research (Ronny Hanitijo Soemitro : 1989) respectively laws and regulations about Foundation, Foundation activity, and Foundation's purpose and objective. Both activities, which one to achieve Foundation's purpose and objective at sociality interest and other to support the achievement of Foundation's purpose and objective at profit interest, are also considered within this normative method. The collected law materials must be verified for their validity, and then processed through classification, categorization, systematization, and interpretation based on the discussed problems or issues. It means that after all law materials are collected, it goes to processing and selection based on its relevance to the temporary framework. The processed law materials are analyzed, discussed and displayed in order to reconnect framework and objective of research to obtain the conclusion as the result of research.

## 3. Result of Research and Analysis

The word "shift" is literally meant as "slide". It is a metaphor for "dispute", "change", "replacement", and "transfer". Shift is more equal to the word "displace" which finds its utilization in the word "displacing" (W.J.S Poerwadarminta : 1987). In the context of Foundation Law, shifting means to change or to aim for certain direction. In other words, the shifting calls for the change of Foundation's purpose and objective based on Foundation Law to others. The change may be the increment or the displacement of law principle underlying Foundation activity. In linguistic terminology, the word "principle" is the synonym of the word "tenet" which means the truth as the underlining base of thought, action and others. There are two definitions for the word "principle". First definition relates to base and guidance. Meanwhile, second definition corresponds with the truth as the stepping stone of thought and others (W.J.S Poerwadarminta : 1987). Law experts have said that "a principle is a broad reason which lies at the base of rule of law". This proposition contains two meanings. First, the principle is an abstract (*broad reason*) which may cover thought, consideration, extended cause and general cause. Second meaning is that the principle underlies the norm of law (*the base of rule of law*) (Tan Kamelo : 2006). It can be understood that there are two concepts to integrate which comprise of truth and thinking or taking action. The link is "base" concept because the activity of thinking or taking action is always based on the truth. Indeed, truth is not only the principle just like that. To ensure that truth is the principle, it is then the principle shall also be the base of thinking or other deed (A. Rahmat Budiono : 2010). Law principle is the measure to ensure that ethical law is giving a proper direction for law establishment. Thereby, in the context of Foundation Law, law principle is connected with values that must be used as the base or guidance of thinking which provides direction for the establishment of Foundation Law. The shifting of Foundation law principle is, hereby, signified as the change, increment or displacement of matters that have been size, base and guidance of mindset about rules within Foundation as law body. Rules within Foundation are denoted to the increment of Foundation

activity. It may be initially oriented toward purpose and objective at sociality interest, but now will be aimed for purpose and objective at profit interest.

The shifting of Foundation law principle from non-profit to profit has been regulated by UUY. Fundamental policy of the government is to achieve national aspiration of people welfare as stated in Paragraph IV UUD 1945 and also to attain law aspiration to create national law system based on Five Principles (Pancasila) and UUD 1945. UUY is then made to fulfill the interest of national aspiration, which is realized by to protect the nation and lineage, to forward public welfare, to enlighten national life, and to maintain world orderliness based in independence, eternal peace and social equity. UUY is a law product under law renewal framework to fulfill law aspiration based on national law system. In consistent to the mandate in the Preamble of UUD 1945, UUY gives an opportunity for Foundation to do business activity through which Foundation can help the government to achieve social welfare. Other fundamental policies of the government to empower law base on the behalf of social welfare achievement are in the form of laws and regulations, such as Law No.17/2013 about Community Organization (UU Ormas), Law No.13/2011 about Management of the Poor (UUPFM), and Law No.11/2009 about Social Welfare (UUKS). All these laws and regulations are not anymore positioned Foundation as a merely participant in social welfare achievement, but becoming the actor or the organizer at social welfare. Business activity is the effort of Foundation to play the role as the actor or the organizer for social welfare achievement such that Foundation's purpose and objective at sociality interest will not rely on the others but be achieved through Foundation's business activity such as in education and hospital sectors.

In law political review, the shifting of Foundation law principle from non-profit to profit has involved law base, role and autonomy of Foundation. The explanation is given as follows. (1) Concerning with *law base*, UUY is a law product in the form of laws and regulations, and it helps to fulfill national aspiration and law aspiration based on Pancasila and UUD 1945. To fulfill national aspiration, the law must be oriented toward governmental implementation of economic development based on national law, which means that the development is oriented toward the achievement of national objective. The law as the object of development can be understood as that law is developed within the frame to create national law system. It is important step to create National Law to replace law product of Netherlands Colonial Government or to produce new law, in form of laws and regulations, pursuant to the sense of independence as the product of Indonesia National Law.

The thought about law and its role within community has emerged with two factors, with one related to the interest to remove colonial law legacy and other related to the interest of community to achieve the independence (Mochtar Kusumaatmaja : 2002) .National law system to achieve national aspiration must be formally built based on UUD 1945 to fulfill the aspiration of law state, and be materially aimed to meet national goal of social welfare. Fundamental policy as law politic is quite necessary because the development of national law system is always requiring fundamental policy that determines the direction, shape and content of the law (Padmo Wahyono :1986) .Fundamental policy in national life has been started in term of formal and juridical on the Preamble of UUD 1945 at Paragraph Fourth which mentions the goal of the nation as fundamental law. After UUD 1945 is amended, the spirit to establish National Law System, which is initially guided by Stipulations of People Assembly Council (TAP MPR) and which the material and direction are regulated by National Course Broad Lines (GBHN), is now manifested in the order of national law establishment which is strictly suggested in Section 22A UUD 1945. Indeed, Section 22A UUD 1945 has stated, "Further stipulations about the procedure of the establishment of laws and regulations will be regulated through laws and regulations". Submitting to this order, Law No.10/2004 about Establishment of Laws and Regulations (UUP3) is then established.

However, weakness is still shadowing and it cannot accommodate the development of people demand for better laws and regulations. Therefore, Law No.10/2004 is replaced by Law No.12/2011 about Establishment of Laws and Regulations. By the presence of Law No.10/2004, and its replacement by Law No.12/2011 about Establishment of Laws and Regulations, both shall remind the setter of laws and regulations to give attention to the principle of establishment and the principle of content. Both principles are the stepping stones which must be considered by the setter of laws and regulations and the policy-maker in setting laws and regulations. Considering this illustration, it seems that the State is required to undergo governmental intervention within community life aspect to ensure the achievement of people welfare as national aspiration. As constitutionally stated in the Preamble of UUD 1945, Indonesia gets its independence by the struggle and the blessing from Mighty God. There is a noble aspiration to create the Independent State in form of Indonesia State Government with the goals to protect Indonesia nation and lineage, and to forward public welfare, to enlighten national life, and to maintain world orderliness. The body of UUD 1945 (Section 1 Verse 3) indicates law aspiration signifying that Indonesia State is a State based on law. Indonesia Law State is a kind of welfare law state (with specification of Pancasila/Indonesia) and it is not a merely night watcher law state (*Nachtwachterstaat*) which only maintains orderliness and security but also expected as one that shall be responsible to achieve public welfare and public prosperity pursuant to noble values of Indonesia nation. National mandate to achieve people welfare has been explained in sections of UUD 1945 at Chapter XIV, Section 27, Section 31, Section 33, and Section 34 of UUD 1945. Section 27 UUD 1945 has stipulated that "every citizen is entitled to reliable employment and wellbeing for the humanity". Section 31 UUD 1945 explains that every citizen is entitled for the access to education. Section 33 UUD 1945 asserts that "the utilization of the management of asset and environment is aimed for people prosperity". Section 34 UUD 1945 states that "the State is responsible for the wellbeing of the poor and the neglected child". Section 34 UUD 1945 also insists that: (1) The poor and the neglected child must be under treatment of the State; (2) the State must develop social security system for all people and empower the weak and the incapable based on humanity prestige; (3) the State must be responsible for giving reliable public service; and (4) Further stipulations about the procedure will be regulated through laws and regulations". Constitutional base of national economic has been given in Section 33 Verse 1 and Section 33 Verse 4 of UUD 1945. Section 33 Verse 1 UUD 1945 is stipulating that "Economic is managed as the collective work based on kinship principle". Section 44 Verse 4 UUD 1945 determines that "Indonesia economic is organized based on economic democracy by attending to the principles of togetherness, efficiency, equity, sustainability, environmentally friendly, autonomy and also by maintaining balance, progress, and national economic unity". Section 33 Verse 1 UUD 1945 provides economic base which distinguishes national economic system from liberal capitalism and etatism world systems.



Liberal capitalism system indicates that economic is not collective work with kinship, but it is individual freedom to have a business. In etatism system, economic is dominated by the State and not by citizen and individual. The function of people welfare is achieved by implementing the development as wide as possible which covers all life aspects including social and economic sectors. In development era, law is the subject and also the object of development. In socio-economic development, law development is also needed. It means that the law is the subject of development which drives, directs, and guards the development in smoothly way. One such law for development is Foundation Law that is legalized through UUY. (2) Regarding to *role*, Foundation helps government to achieve people welfare. In consistent to theory of welfare law state, by the specification of Pancasila law state, it is said that the delivery of people welfare is the duty and responsibility of the State to protect Indonesia lineage and to forward public welfare through actions such as satisfying the right and the base demand of citizen to achieve social welfare. To support the successful social welfare achievement, the principle of participation must be considered, meaning that the government must organize and develop social welfare by involving all components of people, including Foundation. Social welfare must be delivered pursuant to the plan, direction and sustainability. Social welfare can be given by individual and organization. People participation in social welfare delivery is very important. The participant may include individual, family, Religious Organization, Community Organization which also includes Foundation, and business organizations.

The form of participation involves providing facility for social welfare delivery and giving contributions such as idea, initiative, skill, support, activity, effort, fund, goods and services. The effect of UUY is aimed to secure law certainty and law orderliness, and to provide proper understanding about Foundation. It also helps people to recognize the role Foundation in social welfare achievement. A keyword for the successful social welfare achievement by Foundation is the certainty of Foundation sociality interest. Without sociality interest, Foundation is only self-interested. Philosophically, Foundation has an ideal spot to help the government for complex assignment. However, through the passage of time, it seems that sociality interest, social norms and also procedural norms of Foundation are not consistent anymore with commercial profit interest. Foundation sociality interest becomes negligible even in social organization (non-profit) because the consideration of Foundation has been shifted into commercial profit. It is not a deviation because it is reasonable if a law body exercises its constitutional right as law subject. Behind this, the essence of Foundation at sociality interest is the natural gift to Foundation law body which cannot be discarded because without sociality interest, Foundation law body is never born. In other words, Foundation and sociality interest are the unity that cannot be easily separated. Without sociality interest, Foundation never exists. Conversely, without profit interest, Foundation still proceeds. Social welfare delivery with the principle of participation may indicate that social welfare delivery must involve all components of people. Foundation as one such people component (being as Ormas) is supposed to take active role to achieve people welfare with the potentials of autonomy and sociality interest. Being autonomous means the ability to manage the finance of Foundation in self-supported manner without great dependence on others.

Without potential of autonomy, Foundation is not easy to walk on optimum role to achieve people welfare. Although Foundation is at sociality interest, with social activity, the absence of autonomy prevents Foundation from undergoing its social activity. Social activity is the essence of Foundation, but the capacity to realize social activity is quite small because Foundation only depends on others for help. The demand for Foundation active role is strictly voiced such that Foundation can help the government to achieve or to supervise better management of the poor. The effort of central and local governments in directed, integrated and sustainable ways can help the fulfillment of base demand. Base demand of the people is not far from food, cloth, shelter, health, education, employment and social service. Foundation as people institution is also required to have autonomy and sociality interest during the delivery of social service to the poor. Without autonomy in business activity, Foundation can be weak and lacking of economic competence to take action for people. Indeed, without sociality interest, Foundation will concern with the interest of Foundation itself.

Governmental policy has positioned Foundation as the organizer of social welfare to support the achievement of national goal (Ideal of State), which is that the government has a duty to achieve people welfare in pursuance of theory of welfare law state with specification of Pancasila law state. Through UUY, the government has provided Foundation with a policy to do business activity such that Foundation can help to achieve people welfare. Along with the goal to achieve people welfare, in horizontal manner, the government also releases laws and regulations which provide legality to the role of Foundation to achieve people welfare. These laws and regulations include (a) UUPFM (b) UUKS, and (c) UU Ormas. All are elucidated as follows. (a) Concerning with *UUPFM*, the people is allowed to participate into the delivery and supervision in the management of the poor (Section 41 Verse 1). The participation within welfare delivery is what the people is expected. The participation as stated in Section 41 Verse 1 also involves Foundation (Section 41 Verse 2 Letter g). Serious attention must be given because the poor is entitled to the facility and UUY provides this right as one of Foundation's purpose and objective to the people. The right of the poor includes: (a) obtaining food, cloth and shelter in adequate manner; (b) obtaining reliable health service; (c) obtaining education to increase their prestige; (d) obtaining social protection in order to build, to develop, and to empower the self and family based on their cultural character; and (e) improving welfare condition in sustainable manner. The management of the poor involves several activities such as: (a) self-potential development; (b) food and cloth aids; (c) shelter provisioning; (d) health service delivery; (e) education service delivery; (f) employment opportunity; and (g) law and social service supports. The management of the poor which is relatively possible through Foundation is the delivery of health and education services. Both services are not only providing structure but also providing the fund. (b) Related to *UUKS*, to produce a reliable life and prestige and also to fulfill the base demand of people in order to manifest social welfare, the State organizes and develops social welfare in planned, directed and sustainable ways. Section 1 Verse 7 UUKS asserts that social welfare organization is social organization or association that organizes social welfare delivery to the people, either with or without law body. It means that UUKS has positioned Foundation law body as Community Organization (Ormas) that will cooperate with government, local government, professional organization, religious organization, other community organization and other community substances to take obvious steps for social welfare delivery. Section 38 Verse 1 UUKS says that people has wide opportunity to participate into social welfare delivery. This participation may include Foundation as community-based social organization. People participation is important to

support the success of social welfare delivery (Section 38 Verse 2 and Verse 3). Government Regulation No.39 of 2012 about Social Welfare Delivery has declared the importance of this participation. People participation in social welfare delivery may take such forms as idea, initiative, skill, support, activity, effort, fund, goods and services, or even by providing facility for social welfare delivery (Section 52).

Government sees Foundation as partner which will not confront the government. Foundation is a work partner to achieve national goal, which is sociality interest achievement, based on the perspective of welfare law state although it is preceded by socialism. Indeed socialism concept is a matter of how to manage collective people and it is mainly characterized by social redistribution and poor eradication. (c) In relative with *UU Ormas*, Community Organization is the place to exercise freedom of associating, gathering and giving expression. Community organization participates into Indonesia development based on Pancasila. The growth in the number of community organization, and also their distribution and type within democratic life, have been demanding community organization to use the role, function and responsibility to participate into the development for the achievement of the goal of Indonesia Republic. Several sections in *UU Ormas* explain the role of Foundation to achieve national goal. Section 4 *UU Ormas* asserts that Community Organization is voluntary, social, autonomous, non-profit and democracy. Section 5 Letter h admits that Community Organization is aimed to achieve national goal. Section 9 mentions that Community Organization is founded by three peoples or more from Indonesian citizenship except for community organization with Foundation law body. Section 10 Verse 1 explains that Community Organization as stated in Section 9 can be or not be law body. Section 11 Verse 1 determines that Community Organization with law body may take form as: (a) association and (b) Foundation. From these law bases of community organization, it can be said that community organization, including Foundation, is the place to participate into the development to achieve national goal. It is a place where people joins voluntarily and participates into development to achieve national goal. Therefore, *UU Ormas* facilitates people expectation to help the achievement of national goal. Community organization shall be voluntary, social, autonomous, non-profit and democratic. (3) Concerning with *autonomy*, the word "autonomy" is defined as being independent of dependence on others. Autonomy is self-supported without reliance on others. By terminology, autonomy is another word for independent. In English, independent is meant as freedom, alone, standing alone or free soul. Black's Law Dictionary calls *Independent* as *not dependent; not subject to control, restriction, modification or limitation from a given outside source* ( Jhon M. Echols : 1995). In general, the definition of autonomy-independence is free from the influence, instruction/direction or control of others. Autonomy is an important aspect in philosophical life of Foundation as law body at sociality interest.

Clear definition of autonomy is given by Suharto, which is that the asset of Foundation as the initial or genuine asset of Foundation or the asset derived from contributions of grant, bequest and Foundation business, shall be integrated with the asset of Foundation founder. The separation of Foundation asset and Foundation founder is reflecting Foundation autonomy in organizing Foundation business (Suharto : 2009) .Autonomy is emphasized on the substance of "asset separation". *UU Ormas* views autonomy as the character of community organization. Section 20 *UU Ormas* declares that community organization has the right to manage and to take care of the organizational issues in autonomous and open ways. In other words, *UU Ormas* stresses upon autonomy for the management of organizational issues, including business activity and asset management. *UUY* explicitly excludes autonomy, but implicitly emphasizes that the favorable Foundation is one with autonomy which is indicated by the authority to implement business activity. Foundation is one community organization with law body. Being community organization with law body, stipulations about autonomy of community organization are also prevailed for Foundation. To achieve Foundation autonomy, the government provides authorities to Foundation to manage several sectors such as education, health and others with profit substance. Foundation business activity at sociality interest is observed in hospital sector.

Every person has the right to life in welfare either physically and mentally, to have good shelter and to obtain good and healthy life environment, and also, to obtain health service. Reliable facilities for health service and public service are the duty and responsibility of the State but the implementation may take at central and local governments. These are secured by *UUD 1945* through Section 28H Verse 1. Proper institution to implement health service is Hospital. By attending and following the development of health science, technological advance in medical field, and people socio-economic, the Hospital must deliver health service with good quality that is afforded by all peoples to achieve primary health degree. Law No.44/2009 about Hospital (*UURS*) is to position the function of law as a structure at people health sector to improve the quality and affordability of hospital services and to facilitate the arrangement of right and obligation in obtaining health service. The arrangement for hospital is aimed (a) to facilitate the access of peoples to health service; (b) to protect patient safety, people environment and hospital resource; (c) to increase service quality and service standard; and (d) to provide law certainty to the law subject in pursuance of hospital law and also to the hospital human resource. The integration between *UURS* and *UUY* is a law political form at health sector which represents real measure from government and people to achieve national aspiration and duty.

The policy from the setter of laws and regulations, through hospital arrangement, is definitely increasing people participation within hospital establishment pursuant to the type of service demanded. Based on the management, hospital is distinguished into Public Hospital and Private Hospital. Public Hospital is managed by central or local government, and it is non-profit law body. Private Hospital is managed by law body at commercial interest or with profit orientation. The law body is usually Limited Liability (Persero). Under the management by central or local governments, hospital may be either non-profit organization or profit organization. It means that peoples and government can manage this organization to serve base demand of peoples. Hospital managed by non-profit organization can still do business activity, improve service quality, follow the development of science and technology at health sector, and relieve charge of peoples, patients and communities by deducing it from hospital profit on the behalf of sociality interest. It can be said that *UURS* has a framework to apply social and commercial concepts into hospital, which is by positioning hospital as business organization to seek a profit. Empowered by a right of hospital to accept fee from service delivery as arranged in Section 30 Verse 1, it is then declared that hospital can ask for fee for service delivery and determine remuneration, incentive and reward. The promotion of health service at hospital must be pursuant to laws and regulations. Sociality interest is the duty of hospital at least in pursuance of

Section 29 Verse 1 Letter F stating that hospital has social functions such as providing health facility for the poor, giving emergency service without down payment, providing free ambulant, giving service to the survivors of natural disaster or extraordinary event, and undergoing social service for humanity.

All these social or charity activities at minimal limit may increase the utilization of hospital to peoples. If the hospital is established by Foundation, social activity in Foundation Statutes is the activity to achieve Foundation's purpose and objective. However, hospital activity in Foundation Statutes is activity to support the achievement of Foundation's purpose and objective. Actually, hospital activity can be considered as that to achieve Foundation's purpose and objective at social-charity interest, but if hospital activity for health service is done by free of charge or without determining the fee. This fact is possible only if the hospital is established by Foundation with adequate funding from the donor, big company, or company owner as Foundation founder.

The consequence of the shifting of Foundation law principle from non-profit to profit on Foundation objective can be illustrated as follows: (1) There are norms which regulate Foundation sociality interest; (2) Foundation must separate two activities; (3) The bonding effect of Foundation Statutes is increasing; and (4) Foundation has more freedoms in preparing Statutes about its activities. These consequences are covered as follows. (1) The norms of UUY arrangement are not regulating clearly the sociality interest of Foundation. Section 1 Verse 1 determines that Foundation may have certain goal at sociality interest, religiosity and humanity interests but it does not mention Foundation objective at sociality interest. UUY is only explaining the interest of Foundation, or attempting to say that the objective of Foundation can be at sociality interest or even at individual interest because Foundation depends on the will of the founder. Section 26 Verse 4 declares that "The asset mentioned in Verse 1 and Verse 2 is used to achieve Foundation's purpose and objective".

Therefore, the asset will always be used for the activity that is consistent to the objective, including the activity without sociality interest. The fact that Foundation is at sociality interest has been explained in UU Ormas. Social activity is Foundation's mandate but if necessary, Foundation can do business activity to support its social activity. (2) Two activities of Foundation are separated. If Foundation encloses two activities within Foundation Statutes, both must be separated, which one is the activity to achieve Foundation's purpose and objective and other is the activity to support the achievement of Foundation's purpose and objective. It is clearly indicated that business activity is to support the achievement of Foundation's purpose and objective at sociality interest. Despite the presence of business activity, sociality interest of Foundation is not changed. However if Foundation is considering business activity as the activity to achieve Foundation's purpose and objective, then sociality interest may change into individual interest. (3) The bonding effect of Foundation Statutes may increase. If both the activity to achieve Foundation's purpose and objective and also the activity to support the achievement of Foundation's purpose and objective are enclosed into Foundation Statutes and the bonding effect is equal to a covenant, then both activities must be implemented but sociality interest does not change. If both activities are considered as the right of Foundation as law subject which can or cannot be implemented, then sociality interest may change or Foundation will change without anymore sociality interest. (4) There is freedom to prepare Foundation Statutes of Foundation activity. If the founder prepares Foundation Statutes by enclosing only one activity, such as business activity, then sociality interest of Foundation can change into profit interest or individual interest which Foundation now has been genuine enterprise that is used only for Foundation interest or peoples inside Foundation. As considered above, the role of Foundation to achieve people welfare, by being the actor/organizer of social welfare as required by UUKS, UUPFM and UU Ormas, has been consistent to sociality interest and also to the essence of Foundation. Profit oriented activity may not displace Foundation sociality interest.

The shifting of law principle from non-profit to profit can encourage the founding of autonomous Foundation as a developmental structure with principle of kinship/mutual help to achieve social welfare. Foundation, according to UUY, undergoes business activity to support the achievement of Foundation's purpose and objective, meaning that business activity is not compulsory. Foundation without business activity does not experience the change of its sociality interest. However, funding source from the donor may not be sustainable or the quantity is not predictable. Foundation without business activity can find difficulty to develop the activity because it is mostly busy to generate funding from the donor and therefore, it is hard to expect Foundation to be autonomous.

The function of such Foundation is only channeling the fund into the needing peoples without further processing and development. UUY gives opportunities to process and develop this funding by allowing Foundation to do business activity by establishing business organization or participating into other business organization. The effect of UUY may secure law orderliness and law certainty, and may give proper understanding about Foundation, especially related to the goal of Foundation as community organization which attempts to develop social solidarity, mutual help and tolerance in community life to achieve national goal. The mechanism of mutual help between strong economic peoples and weak economic peoples is described as follows. (1) Strong or surplus economic peoples can contribute some portions of their asset to establish Foundation; (2) Peoples may give contribution or donation; (3) Grant is given to peoples; (4) Profit of Foundation business activity is dedicated to peoples. The asset is channeled by Foundation to help the poor or the needing peoples. Allowing Foundation to do business activity may increase the opportunities to grow and develop the autonomy.

Foundation is allowed to have business activity such as luxurious hospital with ultimate structures and infrastructures at high cost, or Higher Education in higher quality with luxurious building and also at higher cost. With proper understanding on UUY, the standing of Foundation as business organization at commercial interest is not a problematic. Foundation still takes the responsibility to achieve Foundation's purpose and objective as arranged in Section 1 Verse 1 jo Section 14 Verse 2 b UUY. Through this mechanism, the asset from the wealthy (students and patients) is channeled by Foundation to the weak economic peoples or the needing peoples without being obstructed by law constraint. Such mechanism can also be directly given, such as scholarship and free health service. Mutual help can still be maintained in the model of Foundation through commercial, non-profit and sociality interests which it is truly important among modern peoples with low intensity of direct contact. Foundation may be at commercial and non-profit interests because the profit is not acquired by the founder and UUY facilitates this. However, establishing Foundation as the structure to create and to grow mutual help is difficult because Foundation sociality interest is hard to achieve. Different interpretation is then less

surprisingly emerging because the activity to achieve Foundation's purpose and objective is also considered as the activity to support the achievement of Foundation's purpose and objective.

Consequently, the profit from Foundation business activity is returned into Foundation to enlarge the asset as business capital, and therefore, this profit is not conferred to the peoples as required by Foundation objective. In other words, Foundation has changed into commercial, non-profit and individual. In this matter, UUY as law rule is failed to become a structure for people renewal, which aims to create people with the sense of mutual help. UUY still contains negative excess, which is the unclearly definition of sociality interest because there is no strict separation of two activities of Foundation. UUY does not meet the purpose and objective of the setter of laws and regulations, which relate to the expectation to channel the deduction of the wealth to the needing people. At last, people welfare cannot be improved and sense of mutual help is hardly developed.

#### 4. Conclusion

By taking the discussion into account, it is concluded that the shifting of Foundation law principle from non-profit to profit is mostly affecting the sociality interest as the essence adhered to Foundation. Indeed, Foundation and sociality interest are one unity that is hardly separated. Without sociality interest, Foundation is never born, but without profit interest, Foundation can still be established as law body. The arrangement of sociality interest remains unclear and there is no strict differentiation of two activities of Foundation within Foundation Statutes which leads to different interpretation about Foundation. UUY still fails to meet the expectation that Foundation can achieve people welfare.

#### Recommendation

1. UUY shall be revised to provide clear definition about Foundation sociality interest.
2. Section 14 Verse 2b must be revised such that Foundation Statutes can enclose two activities which include the activity to achieve Foundation's purpose and objective in the case of Foundation at sociality interest, and the activity to support the achievement of Foundation's purpose and objective in the case of Foundation with business activity.

#### References

- Athoillah, H.M, Hukum Wakaf, Bandung, Yrama Widya, 2014.
- Benard, Arief Shidarta, *Etika Profesi Dan Etika Profesi Yang Sehat, (Artikel)*, Bandung, Majalah Pro Yustitia Tahun VII Vol 2, 1999.
- Chatamarrasjid, *Tujuan Sosial Yayasan Dan Kegiatan Usaha Bertujuan Laba*, Bandung, Citra Aditya Bakti, 2000.
- Echols, Jhon, M, *Kamus Inggris Indonesia*, Jakarta, Gramedia, 1995.
- Husni, Lalu, *Penempatan Dan Perlindungan Hukum Terhadap Tenaga Kerja Indonesia Yang Bekerja di Luar Negeri*, Malang, Disertasi Universitas Brawijaya, 2010.
- Kusumaatmaja, Mochtar, *Konsep Konsep Hukum Dalam Pembangunan*, Pusat Studi Wawasan Nusantara Hukum Dan pembangunan, Bandung, Alumni, 2002.
- Mukti Fajar dkk, *Dualisme Penelitian Hukum Normatif dan Empiris*, Yogyakarta, Pustaka Pelajar, 2010.
- Poerwadarminta. W.J.S, *Kamus Umum Bahasa Indonesia*, Jakarta, Balai Pustaka Cetakan xi, 1987.
- Soemitro, Hanitijo, Ronny, *Perspektif Sosial Dalam Permasalahan Hukum*, Semarang, CV Agung, 1989.
- Sudikno Mertokusumo, *Mengenal hukum*, Yogyakarta, Liberty, 2006.
- ....., *Penemuan Hukum*, Yogyakarta, Liberty, 2009.
- Suharto, *Membedah Konflik Yayasan Menuju Konstruksi Hukum Bermartabat*, Yogyakarta, Cakrawala Media, 2009.
- Tan Kamelo, *Hukum Jaminan Fidusia Suatu Kebutuhan Yang Didambakan*, Bandung, Alumni, 2006.
- Wahyono, Padmo, *Indonesia Negara Berdasarkan Atas Hukum*, Jakarta, Ghalia Indonesia, 1986.
- Republik Indonesia, *Undang-undang Nomor 16 tahun 2001, tentang Yayasan*, LN No. 112, TLN No. 4132.
- Republik Indonesia, *Undang-undang nomor. 28 tahun 2004 tentang Perubahan atas UU No. 16 Tahun 2001 tentang Yayasan*, LN Tahun 2004 No. 115, TLN No. 4430
- Republik Indonesia, *Undang-undang Nomor: 44 tahun 2009 tentang Rumah Sakit*. LN Tahun 2009 No. 153, TLN No 5072,
- Republik Indonesia, *Undang-Undang Nomor : 13 Tahun 2009 Tentang Kesejahteraan Sosial*, LN Tahun 2009 No 12, TLNRI No. 4967.
- Republik Indonesia, *Undang-undang Nomor: 13 Tahun 2011, Tentang Penanganan Fakir miskin*, LN Tahun 2011 No. 83, TLN No. 5235.
- Republik Indonesia, *Undang-undang Nomor: 17 tahun 2013, Tentang Organisasi Kemasyarakatan*, LN Tahun 2013 Nomor. 116, TLN No. 5430.
- Republik Indonesia, *Peraturan Pemerintah Republik Indonesia No. 2 Tahun 2013 tentang Perubahan atas Peraturan Pemerintah No. 63 Tahun 2008 tentang Pelaksanaan Undang-undang Yayasan*.
- Republik Indonesia, Keputusan Direktur Jenderal Administrasi hukum Umum Departemen Hukum Dan Hak Asasi Manusia Republik Indonesia No: C-26.HT.01.10.TH 2004, *Tentang tata Cara Pengesahan Akta Pendirian Dan Persetujuan Akta Peraturan Anggaran Dasar Yayasan*.