

Legal Consequences Embedded on the Charity Institution Due to Uncompleted Synchronization Based on Constitution Number 28 Year 2014

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Abstract: *The purpose of the study is to analyze how Ratio Legis on chapter 15A Government Rule No. 2 year 2013, the study also try to reveal the impact of the corresponding institution when they do not do synchronization. The normative methodology is used to collect the data within the constitution and conceptual approach. The data collection technique used in this study is by managing the primer law resources, secondary, and tarsier. The collected data is then going to be collected based on the corresponding law issues. The result of the study shows that, Ratio Legis based on constitution number 15A Government Rule number 12 year 2013, against another constitution, chapter 71 about Charity Institution that creates another normative conflict which does not meet any excuse nor purpose of the corresponding constitution. As a result, any activities of the institution will be considered as illegal for the sake of law continuity. Thus, on the unsynchronized institution, this phenomenon would make the institution will be dismissed, although there is another weaker law that does not give much impact on the previous constitution.*

Keywords: Law Impact, Charity Institution, Constitution

1. Introduction

As the time enacted of Charity Constitution law, all of charity institution must obey and follow the new rule even though they already follow the old ways of the older constitution. This new coming constitution will result in differences felt by society in terms of order and defines of law. In the Charity Constitution, the institution will earn the law protection after their registration form has been approved by the ministry based on constitution chapter 11 number 1. Charity Constitution also states that the founding of the institution must be done by the notary and it must be in Indonesian Language (chapter 9 number 2).

According to constitution chapter 71 about the change of Charity institution, there are two legal statuses for the institution which already built before the law is legalized as follows:

- 1) Old Institution (the institution which already operated before the Charity Constitution was founded) which is already in legal status.
- 2) Old Institution (the institution which already operated before the Charity Constitution was founded) which is not already in legal status.

The legalized old institution is arranged on the order of chapter 71 number 1 and 3 which already changed into Charity Constitution chapter 71 number 1 stated:

In the time this order is legalized, the old charity:

Which is already registered in state court and had been published on common additional news of Republic of Indonesia; or already registered in the state court and it already has licensed from the corresponding activity; is still legalised as formal institution, within expired date of 3

(three) years after the constitution was legalised, the institution must synchronise their basic administration status by using this constitution order.

In order to get the legal status, the institution is not only processing their basic administration but also they need to report it to the ministry according to chapter 71 number 1. According to chapter 7 number 3 of Charity Institution, the corresponding institution must submit their administration report on the date of 1 (one) year after the process is started. By legalising the Government Rule number 2 year 2013 which already started on January the 2nd 2013, as the result of Government Rule number 63 year 2013 change, there is a slight difference that will bring different result of the status of the institution, the constitution state that the using of the word "Institution" is prohibited as the first name of it. This phenomenon will create a clash between Charity Constitution and Government Rule chapter 63 year 2008, this will make another institution to revise their basic administration report.

When Government Rule number 2 year 2013 is legalized, the government along with constitution developer have a good intense to help the old institution to re-create their basic administration report according to the new law, Charity Constitution. As a result, the old institution which is not allowed to use the word Institution will have another chance to follow the new rule and make the new basic administration report.

The change on order 71 about Charity Constitution, it has a significant purpose of it. Does the change have the purpose to postpone and make the synchronization time longer or, according to Government Rule no 2 year 2013, this has another purpose to banish or delete the date time.

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Hierarchically, it is important to state whether the lower rank law could determine the higher one.

Thus, there will be a normative conflict if the order in Government Rule number 2 year 2013 is founded to banish or change Charity Constitution chapter 71. This constitution state that if the informal institution does not meet the requirement on time, it must be dismissed for the sake of law continuity. This means that the institution will have no authority as a legal institution does. It is better to change the old law in order to give a space-time for old institution to re-arrange their basic administration than to make another law that would have a clash on other constitutions. So that, the notary will find no difficulties while arranging the data

2. Theoretical Framework

Based on the prior statement, this work proposed three theoretical framework as the basic guidelines for charity institution. The concept and the theory of this study are:

2.1 Charity Institution Concepts

As one of legal institution of state, it has an independent right and obedience which is separated from right and obedience of its members or the founders (Gunawan, 2002:04). Charity Constitution is the institution that plays its role on social purposes within clear vision (Ibid, 59). By the Charity Constitution starts its order, the legal status of the institution will be earned after it completes the build registration phase and the requirements of it.

In the court of justice, the legalization of an institution is done by completing the acknowledgment letter from the founders or by using the demand letter forwarded to notary. Within the letters, it contains the purposes, names, structure of organization, and the sources of the riches of the institution (Chatamarrasjid, 2006:88). Thus, in the court of justice, it is the combination of two aspects, they are material and formal aspects.

2.2 Hierarchy of Constitution Theory

Hirarki theory was introduced by Han Kelsen which stated that order of the law has the same function as leader board works with several phases. The connection between one norms to another could be stated as sub-ordinate and super ordinate in the terms of Space (Jimly, 2006:10). The norms which controls another norms is embedded as superior. In the other hand, the norms made by higher norms are called inferior norms. The production by a higher norms become the reason of validity about the hierarchy of all laws that create the unity of source of the law.

As Kelsen stated *“The unity of these norms is constituted by the fact that the creation of the norm—the lower one—is determined by another—the higher—the creation of which is determined by a still higher norm, and that this regressus is terminated by a highest, the basic norm which, being the supreme reason of validity of the whole legal order, constitutes its unity”* (Kelsen, 2009:124). So that, the low rank norms must be based on the higher one, and the higher constitution must be based on the basic or the founder of the

constitution itself. According to Kalsen, the grundnorm law is not on its abstract form, for example the form of Pancasila.

2.3. Body of the Law Theory

Whereas, according to Friedmann, there are five theoretical frameworks that study about the body of law, they are fiction, concession, zweckvermogen, Ihering theory, and realist theory.

3. Finding And Discussion

3.1 Ratio Legis based on chapter 15A Government Rule number 2 year 2013

Within the Charity constitution started and the change of it has been applied, all institution which already started or the institution which is not yet stated must obey the requirements of institution base on the corresponding constitution. After the founding of charity constitution, not all the institution could have legal status by the government.

Although, for the constitution that still not have permission and do not arrange the administration until the expired date to the minister of law and civil rights, according to chapter 71 number (1), (2), and (3), the status of the institution will no longer have a state right, also it can not use the name of institution in front of its name. The institution could be banished by the demand of government or another group that have significance between them.

As the expired date comes to nearly time, it is found that there are still many institutions that do not register their self to the ministry, but, they still demand for the legality of their institution or the ministry of law and right. That is why, in order to give another chance to an institution which has not completed the registration yet, the government publish another order which is Government Rule number 2 year 2013 which state changing of Government Rule number 3 year 2008 about the process of charity constitution.

On 2nd January 2013, the Government Rule number 2 year 2013 has been started. It consists of the requirements of the institution which would like to legalize their status again to the ministry of law and civil rights. According to chapter 1 number 1 Government Rule number 2 year 2013 stated that between chapter 15 and 16, there is a slight of chapter 15A which arrange the documents must not use the word “institution” on its documents. So that, the re-legalizing process would run smoothly without any troubles later on.

From all chapters of Government Rule number 2 year 2013, this series of laws is only proceeded for the institutional which running out of time or no longer have legal status according to constitution number 16 year 2001 juncto. Constitution number 28 year 2014 about the institution. As the time Government Rule number 2 year 2013 has started, the old institution or the institutions that do not use the word “institution” could revive its legal status.

Government Rule no 2 year 2013 is founded to finalize the other orders like in chapter 63 year 2008 about the process

of Charity institution. Unfortunately, the orders in Government Rule number 2 year 2013 does not only add some details for the perfection of Government Rule chapter 63 number 2008, but also to change the policies in Charity Constitution. Specifically, it does change the details on the expire date of the basic administration process which is conducted on chapter 71 Charity Constitution.

The problems reveal when two constitutions which are the change of Charity constitution and the Government Rule number 2 year 2013. The Government Rule number 2 year 2013 change the policy that had been arranged on Charity constitution. Hierarchically, the Government Rule number 2 year 2013 is on the bottom of the constitution itself.

In the law environment, certainty is an aspect that is a must and independent as law is a tool to give faith and certainty among people. One of the important aspect to earn definite law is the source of law itself. The source of the law is very important to be complemented. Because, nowadays, the legality of law become more formal among people. In this situation, an issue would rise "which sources that considered as a legal source?" becomes very crucial when we talk about the legality of a law. According Hans Kellen, an expert on Law Philosophy, found a certain theory about the range of law hierarchy, he stated:

"Norms of law has its own rank which is different in its hierarchy system when the low-rank law is applied, it will have the source of the higher rank law. While the higher rank law will be based on the higher rank of its legal system. This system would continue as it will find no higher norms, it is hypothesis and fictive, it is called Grundnorm (Suprpto, 1998:25)"

According to Normaini hierarchy, the ideology of a nation becomes the grundnorm of its law or, in common tongue, it is called *staatsfundamentalnorm*. Grundnorm is the highest rank of norms in a nation. On the below of its level, there are several lower rank norms, these groups of lower norms would create a significance norms called Discipline Law. In his book, Ahmad Ali stated:

"All order of laws are coming from the basic norms as the top of pyramid, as it goes lower, the norms will spread with more varieties. The top basic norm is abstract, the more it dives, the more it becomes concrete. On its process, there is a change on a term from a 'must be' into a 'could be' " (Ali, 2009:62).

The order of positive law is arranged pyramidically (stages). Started from the top, grundnorm is on the top of its pyramid system, it spreads into a lower stages which become more concrete than the top itself. Grundnorm holds the highest and strongest authority, it is also the legality of the positive law. Hans Kelsen stated:

Started by grundnorm, abstract norms, it constructs several norms that become more concrete than its previous. In this second level stage, it arranged a stack which concretely phased as Basic Constitution (UUD), there will be lower rank and more concrete level which is called Constitution (UU), it comes into Government Rule (PP), and etc. In the

end, the judges will demand individually (based on the connection between the need), (Christine, 2011:380)

Stufentheorie Hans Kelsen, and its developer which stated that norms have stages in order, so the low-rank law must not against the upper norm, it is already stated in basic constitution UUD 1945. The application of Stufentheorie Hans Kelsen, it will be provided into state institution which plays its role in hudging a certain case, in this case, it is Supreme Court (MK) and Mighty Court (MA), they earn a special right from the basic constitution to test the blueprint of a law. This activity is commonly known by people as a "Judicial Review". The object that will be examined is not merely only a product of law, but also the order of law on the bottom of the constitution (Asshiddiqie, 2005:04).

According to the theory of Law Hierarchy by Hens Kellen, Norms of law has its own rank which is different in its hierarchy system, when the low-rank law is applied, it will have the source of the higher rank law. While the higher rank law will be based on the higher rank of its law system. This system would continue as it will find no higher norms, it is hypothesis and fictive, while the highest rank is called grundnorm. This system of law is also adopted by Indonesia, it does arrange the system of which the low and high rank is on Paragraph 7 number 1 Constitution Number 12. 2011 about the creation of Constitution. Started from top to the bottom, Fundamental Constitution year 1945, MPR Decision, Constitution/ Government Rule as the change of Constitution, Government Rule, Presidential Order, and the lowest rank law is Regional Order. This ordinance arranges and decides the authority of each rank and each order, it is stated that the higher rank law will ignore the lower rank law. If in any case, there is a clash between two different ranks, the media between its clash is the higher rank of both ordinances.

As also stated in prevention principle, it also becomes a media if the clash between two different ranks occurs. Among three prevention principle, Lex Superior derogate Legi Inferiori principle would answer this first problem. Lex Superior derogate Legi Inferiori is a constitution that has a lower rank. If the clash between low and high rank occurred, this principle will be the method to slice the problem out.

The government should apply the positive and confidence principles for this situation, more specifically, they must have a strong principle of law certainty and the justice principle when they come into the creation of law situation. In the previous study, it will use the certainty of law principle. Because, "law certainty principle becomes the basic of principality as it follows the constitution order, the justice and order on every law that has been made, law certainty principle possess two aspects, they are formal and material aspects. The material aspects are bind strongly with certainty law principle to retreat the order when the government decides on a certain decision" (Tjandra, 2008:75).

In other words, this principle covers and protects a right that has been earned by an individual given by the government. Thus, every decision made by government into individual will not be easily ceased as it must wait for the next court to

be done. While the formal aspect of this norms is that every word must be formed carefully by using legal and formal diction. This aspect will make people that include in this situation to have the same perception about something that they read, that is why law certainty must be certain on its form.

The certainty of law principle must be applied on every state occasion that is based on the basic constitution, the obey, and the justice of its order. Every state occasion must follow this principality. Without using this principle, there will be many problems in the future. It will create a situation in which the human right has no value anymore. "the true justice comes from God. As a human being, we have gifted an ability to sense or look for as close as the justice presence" (Kansil, 1979:76).

The process and the justice in law must be built with the exact idea and by using solid evidence to realize the justice itself, the content of law must be built on a certain and solid belief when deciding a certain case. The case will be well handled if the humans dealing with this case does their duty by law. So that, there will be no obedience to against and break the law systematically. This means that they use codification and unification law in order to achieve the certainty and justice of law (Sukowathy, 2003:35).

Law is a tool to protect humans right and it must be done by professionals. The execution of law process could be done smoothly, tranquillity, and well. The execution of law must be based on the certainty of law. Law certainty is called Yustisiable as protection from people who would like to break the rule of the order of law. So that, people will have true and pure protection from the government. People will expect the true function of how the law will do its process. As it says, law is a tool to give people protection, thus, law is not, on the other hand, to make people worry about their safeness. "safe citizens are the people that earn maximum and true protection from law, the protection from law in concrete and does not in the form of abstraction. Within solid law, it will gain the general vision of law which are, discipline, safeness, welfare, peaceful, justice, and the certainty" (Sukowathy, 2003:295)

The certainty of law is not merely on the paragraphs in the constitution, but also in the decision made by the judges, the decision of judges within the same case must be in solid form. The normative of law's certainty applied correctly when the orders on constitutions are in the logical and legal form. So that, there will be no doubt (multi-perspective) and there will be no clash or minimum clash between one norm to another (Marzuki, 2008:158).

If there are several norms that manage the same substance, but they have a different way of how to handle a problem, one of the norm must dismiss for the importance of society, thus there will be only one rule to be followed by them. In order to overcome of the clash problem, prevention principle could be as a knife to slice the problem out.

Superior derogat Legi Inferiori principle is the basic rule in creating the preparation of basic constitution (UUPPPU) which is in paragraph 7 number (2) UUPPPU stated that the

hierarchy system conducted in paragraph 7 number (2) is the norms/rank separation of every rule in constitution which is based on a certain principle that a lower rank constitution must not precede after the higher rank of constitution.

In one hand, according to Norms Hierarchy System, *Lex Superior derogat Legi Inferiori* principle, and the preparation of the creation of constitution, the clash between The Charity Constitution Change and Government rule number 2 year 2013 could be overcome by dismissing the government rule number 2 year 2013 which is, hierarchically, under the Charity Constitution Change. Systematically, the constitution is much higher than Government Rule. Thus, if the government would like to make a revision in charity constitution, they must make a revision on the constitution and do not change the government rule. Moreover, on Charity constitution paragraph 71 and the Change, there is no single clause that stated there will be a carbon copy which is forwarded into government rule. The government rule number 2 year 2013 should be limited its function only on whether to change or add the details on government rule number 63 year 2008, it must not deal with the charity constitution that against its substance. That is why, the substance of government rule number 2 year 2013 does against the charity constitution and its change, and it must be dismissed its legality.

3.2 The law impact for unsynchronised action

The application of Government rule number 2 year 2013 about the changing of government rule number 63 about the execution of Charity Constitution, the old constitution which have already operated before the publishing of this constitution, is considered as a decayed institution. Because it already has no legal right as a state institution nor it must not use the word institution in front of its name. As stated in chapter 71 Charity Constitution, the decaying institution could be revived.

This old institution could be back revived by re-arranging the basic administration report and it must ask for a recommendation letter to the ministry of law and civil right in order to get the legal right. The institution could use the service of notary to write the basic administration arrangement, as the administration is complete, it could be forwarded into the ministry of law and civil right. Thus, the institution would earn the legal right back. According to government rule number 2 year 2013, the institution must attach the documents that has been written on chapter 15A of the government rule.

On the government rule 37A number 2 year 2013, is firmly stated that for those institution who has not acquire the legal right to use the word institution, it could use the word back as the institution must regularly operate for, at least, 5 years along with its basic administration and it never be dismissed before. Thus, the institution could use the word again by following the rule stated above.

Hierarchically, according to government rule number 2 year 2013, by coordinating with the notary, the decayed institution or the institution that could not the word institution in front of it, are already considered as decayed

institution as the government rule 2008 fully operated, the registration form could also be cancelled by the state court. The government rule number 2 year 2013 could not change what is already arranged in government rule chapter 71. If the government would like to give an easier way to the society who would like to revive their institution within a limited time, the government must make a revision on the government rule, partially chapter 71 which arrange the expired date for legalizing the documents.

The problem will be faced by the notary when the clash of two corresponding law could not be avoided. If the notary still uses the government rule number 2 year 2013 as its basic of law on its report, the institution would have still not able to acquire the legal status. Thus, the government must make a revision on government rule chapter 71 of Charity Constitution in the changing of charity constitution. On the other hand, it is no use to make a revision government rule number 63 year 2008 and government rule number 2 year 2013.

In foreign tongue, the terminology of body law is taken from Dutch language (*rechtspersoon*), it is also known in Greece tongue as *Persona Moralis*, Legal Person (English). According to Black's Law Dictionary, Legal person means "An entity such as corporation, created by law given certain legal rights and duties of a human being; a being, real or imaginary, who for the purpose of legal reasoning is treated more or less as a human being" (Garner, 2004:1178)

According to E. Utrecht, a legal person is the state institution that has authority to support the right, soulless or it does not possess the human form. Legal person as the phenomenon of society is the solid/concrete phenomenon although it does possess another dead thing form, such as wood or rock (Imaniyati, 2009:124).

According To Molengraaff, a legal person is te duty and the right of each member. Within its domain, the wealth belongs to every member which could not be separated. The wealth is not able to be possessed by each member as it plays the role in togetherness. Thus, the owner of the wealth is organized by the rule of groups no individually (Asshiddiqie, 2006:69).

The certificate is the written form of evidence used by the state, according to Asser-Anema, all written form as certification document is *draggers van verstaanbareleestekensdienendeomeengedachteneenheidteov ertaken* which means the developers of written marks which has a function as the depiction of a significance idea (Kie, 1994:09). Within his book, HusniThamrin, stated that the certificates are "a signed written letter which contains a certain case that becomes its basic of right or bound directly as the evidence" (Thamrin, 2011:10). Pitlo assumed certificates as the signed paper used as evidence by other people (applicant) for significance purpose (Pitio, 1979:52).

Thus, within the clash between government rule number 2 year 2013 and the charity constitution, it will make a confusion among society about the expired date of the synchronization of the basic administration report. It could make a result of the termination of certain certificates

according to government rule number 2 year 2013. It does mean that the protection law of this institution is weak as the law that manages the problem is a disorder. The termination of law is considered as legal action as the time of the charity constitution is applied.

For example, an institution in the education field, a school. If this institution is not considered as a legal institution because it does not re-arrange the basic administration report within the expired time in charity constitution. If the academic activity on that institution is still working, such as teaching in class or graduation process, then the legality of the certificates must be identified closely, because there is a slight possibility that the certificates or the fresh graduate could be illegal because the institution does not possess its legal status from the state.

If in the future there will be any problems on the certificates of the graduated problems, then the responsibility must be carried by the decayed charity institution of its school. It does also the responsibility of the member of the institution, it is including the founder, advisor, and the auditor.

The principle of legality as a constitutional principle in which the people must obtain legal protection, as stated by Oemar Seno Adji with "Principle of Legality" is an *essentieel* characteristic, it is suggested by *Rule of Law* concept, or by *rechstaat* idea, or by *socialist* concept (Adji, 1980:21). Therefore the formulation of the legality principle formulated in Latin: *Nullapoena sine lege, nullapoena sine crimine, nullumcrimen sine poenalegali*"on the initial application emphasizes the prohibited acts in the Act. The choice of form This law is expressly shown in the term "*lege*" which designates the Law as the only legal product that may provide for the setting of prohibited conduct and the threat of punishment. Moeljatno explains the consequences of using the term "criminal rule in law" (*wettelijkstrafbepaling*) with the non-recognition of criminal acts derived from the unwritten law (culture) (Moeljatno, 1996:25-26). Criminal (*poena*) is more strictly regulated considering that criminal or criminal penalty is essentially a reduction of the rights of individuals who are also the rights of the community. The founder and organ of the foundation is the party who is obliged to make adjustments to the foundation's articles so that the foundation does not lose its legal status and also has no impact on third parties, which in this case is the student receiving the diploma from the school founded by the foundation. Administratively, the sanctions applied to foundations that do not make adjustments to the articles of association in accordance with the period set forth in Article 71 of the Foundation Law is that the foundation is prohibited from using the word foundation in its name and must liquidate its property and then the remaining liquidation shall be submitted to another foundation whose intent and purpose the same as the foundation that was liquidated. In the legal domain, at the request of the Prosecutor or other interested parties, the court may dissolve the foundation. Parties with direct interest include but are the organs of the foundation (in this case the supervisors, administrators, advisors, and clerks of the foundation). Other interested parties are third parties related to the foundation of legal relationships, for example a foundation established by a corporation, a party who has entered into a partnership

in a company's equity field clearly has a direct interest in dissolving the foundation because it concerns the position of the foundation as a legal entity that affects the responsibility of the institution.

4. Conclusion

In order to overcome this situation, the weaker norms must obey the supreme norms. As stated in the previous chapter, the government rule no.2 year 2013 must be dismissed for the sake Foundation Constitution. Because, if the government rule is still exist, there will be abnormality of the law as it against the Foundation Constitution.

Moreover, the using of word "institution" will be back to its legal status. The old institutions, as it earns its Intitution name back, will receive the protection of law again. Whereas, they must re-arrange their basic administration report and sent it to the ministry of law and civil right as demand letter fo legalising their institution back.

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