

REGULATING THE MANAGEMENT OF PRIVATE HIGHER EDUCATION BASED ON THE VALUES OF JUSTICE

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ABSTRACT

The concept of non-profit in education is always controversial. On the one hand, education is established by non-profit legal entities such as foundations, but on the other, education is a professionally managed business that requires considerable funds and labor to develop an educational business. The gap condition between the ideal goals of education and the reality of the implementation of education, of course, becomes a problem that must be answered. This research is a non-doctrinal study with a normative and empirical juridical approach. The results of the study stated that the current regulatory principle regarding the Legal Entity Organizing for Education in Higher Education, Legal Entities, and Private Universities was directed to the principle of non-profit. Based on the non-profit principle, the implementation of private higher education is directed through a foundation legal entity as regulated by Law No. 12 of 2012 concerning Higher Education. Reconstruction of Legal Entity Arrangements for the Education of Private Higher Education based on justice value can be done by making changes to changes in the form of educational legal entities; the Government provides options for forms of Private Higher Education institutions that can be in the form of foundations, associations or Limited Liability Companies. Profit and non-profit need to be changed, which is to become the principle of affordability.

Keywords: Private Higher Education, Foundations, Non-profit, Value of Justice.

INTRODUCTION

The 1945 Constitution of the Republic of Indonesia mandates the Unitary State of the Republic of Indonesia, in this case, the government to strive for and implement a national education system by increasing the faith and piety of the Supreme God and having a noble character governed by law. Education in Indonesia is projected on the ideology of Pancasila and the constitution of the 1945 Constitution of the Republic of Indonesia as its philosophy, therefore the purpose of education is generally aimed at producing whole people, namely humans whose attitudes and behavior are always inspired by Pancasila values (Wangsa & Gandhi, 2011). Article 53 of Law No. 20 of 2003 on National Education System regulates that the organizers and/or formal education units are established by the government or by the community in the form of educational legal entities. Educational legal entities function as organizers to prepare all

educational facilities and services for students, with a nonprofit principle and manage funds independently to advance the education units they organize. Article 60 paragraph (2) of Law No. 12 of 2012 on Higher Education says that the establishment of private educational institutions is organized by a legal entity that has a non-profit principle and must obtain the Minister's permission.

Strictly speaking that education must be non-profit in Article 53 of Law No. 20 of 2003 on the National Education System. Article 90 paragraph (1) Law No 12 of 2012 on Higher Education, Article 220E Government Regulation No. 66 of 2010. With the limitations of the two laws, it is increasingly clear the prohibition for educational foundations that aim solely for profit, in principle the form of legal entities for educational institutions is a non-profit oriented legal entity. The principle of ays non-profit is the principle of activities whose purpose is not to seek profit, so that all the remaining proceeds of the activities of the activity must be reinvested in the Higher Education so that they can increase the capacity and/or quality of education services. The Private Higher Education administering body is allowed to form foundations, associations and other forms in accordance with the provisions of the legislation. PTS is established by the community by establishing a legal entity that has a nonprofit principle and must obtain the Minister's permission. The National Education System Law and the Higher Education Law do not require that they be in the form of a foundation legal entity, can be in the form of associations or other legal entities in accordance with laws and regulations, but most private education providers are foundations.

On August 6, 2001, the Law which regulated the Foundation was born, namely No. 16 of 2001 and was revised by Law No. 28 of 2004 on Amendment to Law No. 16 of 2001 on Foundations. When promulgating Law No. 16 of 2001, various polemics arose, because one of the provisions contained a provision that it should not divert the wealth of the foundation either directly or indirectly, in the form of salaries, wages, honorariums or other forms that could be valued with money (not allowed to provide the remaining proceeds) / coach, manager and supervisor. Except for the management of the foundation that is not affiliated with the founder, coach, and supervisor. UU no. 16/2001 juncto Law No. 28/2004 would like to convey the message that *"if you want to establish a foundation, the meaning must be ikhlas lillahita'ala without expecting any reward because its function is for social purposes only."* In 2002 there was a big change from the control side of the foundation. Many foundations engaged in the hospital sector change their status to become a Limited Liability Company (PT), including foundations in other health fields such as foundations in the field of clinics/pharmacies.

This does not mean that hospitals are not permitted to be formed in a foundation, which is prohibited from sharing profits or transferring assets of the foundation, directly or indirectly. Whereas the establishment of educational institutions by the laws and regulations *"forced"* must be in the form of a foundation. The foundation's provisions raise problems in the practice of administering education. The provisions of Article 1 and Article 5 of the NGO Law raise interpretations and views in the community regarding the property of the foundation which is considered as belonging to the government/business entity. The entire assets of the foundation from the initial assets to the assets produced by the business entity are not owned by the founders/administrators/supervisors of the foundation and the NGO Law prohibits duplicate positions between the organ of the foundation and the organs of business entities/leaders of Higher Education. The operation of the business entity is fully implemented by the organs of the business entity, while the organ of the foundation is only as a policymaker. The concept of non-

profit in education is always controversial. One side of education is established by non-profit legal entities such as foundations, but on the other hand in real terms education is a professionally managed business that requires considerable funds and labor to develop an educational business.

The gap condition between the ideal goals of education and the reality of the implementation of education, of course, becomes a problem that must be answered. The regulation of the Private Higher Education Organization's Legal Entity needs to be reconstructed because Private Universities are a place where the educational process has a complex and dynamic system. Until 2018 even now in Indonesia, there are no specific provisions regarding Private Higher Education such as neighboring countries, Europe and America, even though there are so many the No. of Private Higher Education in Indonesia, so Private Higher Education as an organization that requires separate management is different from the management of the State University. Based on the aforementioned reality, the authors are interested in researching and studying in depth, the application of regulatory principles regarding the Educational Legal Entity, the factors that influence it, and the reconstruction of the regulation of Legal Entities Education of Private Higher Education based on justice.

RESEARCH METHODS

This is non-doctrinal research, which implies that the law is not conceptualized philosophically/morally as an *ius constituendum* norm (law as what ought to be) as the norm of *constituendum* (law as it is in the books) empirically observed in the realm of experience (Soetandyo, 2013). Non-doctrinal research is a scholarly pattern of relationships that are either correlational or causal between the various symptoms that manifest the presence of law in the realm of reality, as can be seen by the senses of observation. The problem approach method used in this study is juridical empirical nature, namely a legal study on the enforcement of normative legal provisions on any particular legal event. The method used in data analysis is qualitative analysis, which describes the data in quality in the form of sentences that are orderly, collapsed, logical, not overlapping, and effective, thus facilitating the interpretation of data and analysis (Soetandyo, 2013).

RESULTS AND DISCUSSION

Regulation of Private Universities' Legal Entity

The implementation of Higher Education as an inseparable part of the implementation of national education cannot be separated from the mandate of Article 31 paragraph (3) of the 1945 Constitution of the Republic of Indonesia. In addition, in order to face the development of a world that prioritizes the basis of Science, Higher education is expected to be able to play a strategic role in advancing the civilization and welfare of mankind. The establishment of Private Universities arrangements can be found in Article 60 paragraph (2) and paragraph (4) of the Higher Education Law, namely PTS established by the Community by establishing a legal entity with a nonprofit principle and must obtain the Minister's permission. Explanation of Article 60 paragraph (2) of Law No. 12 of 2012 on Higher Education states that, what is meant by "nonprofit principle" is the principle of activities whose purpose is not to seek profit, so that all remaining proceeds from the activity must be reinvested into Higher Education to improve the

capacity and/or quality of education services. Explanation of Article 63 letter c also explains that what is meant by "*nonprofit principle*" is a principle of activity whose purpose is not to make a profit, so that all remaining proceeds from the activity must be reinvested in the Higher Education to increase the capacity and/or quality of education services. Strictly speaking that education must be non-profit in Article 53 of Law No. 20 of 2003 on the National Education System. Article 90 paragraph (1) Law No. 12 of 2012 on Higher Education, Article 220E Government Regulation No. 66 of 2010. The requirement to establish a university (PTS) is regulated in Article 60 of Law 12 of 2012 on Higher Education, namely:

1. Private tertiary institutions are established by establishing a legal entity that has a non-profit principle and must obtain the Minister's permission;
2. The organizing body may take the form of a foundation, association and other forms in accordance with the provisions of the laws and regulations.

Private Higher Education administering body is allowed to form foundations, associations and other forms in accordance with the provisions of the legislation. The National Education System Law and the Higher Education Law do not require that they be in the form of a foundation legal entity, can be in the form of associations or other legal entities in accordance with the laws and regulations, but most private education providers are foundations. The National Education System expects the organizing body to be social; therefore more foundations for higher education are incorporated into the foundation.

A foundation is a body that carries out various activities that are social in nature and have idiomatic goals. The Foundation Institute has been known since the days of the Dutch East Indies and has been well known in the community. This continues until Indonesia becomes an independent and sovereign country. Because of its inherent form in the wider community in Indonesia, the form of the Foundation grows lives and develops so that every institutionalized non-profit activity will use the Foundation's institution. Before the birth of Law No. 16 of 2001 on the Foundation, the position of the Foundation as a Legal Entity (*rechtspersoon*) has been recognized, and was applied as a legal entity, but the status of the foundation as a Legal Entity was seen as weak, because it was subject to internal rules society or jurisprudence. The articles of the Civil Code that have been mentioned, are not regulated more explicitly about the definition of the Foundation, the status of the Foundation as a legal entity or not, how the organization's organization's structure or foundation, so that the Foundation is considered a closed and exempt organization, in particular, the tax laws, even some consider that a foundation is an alternative business entity after a Limited Liability Company, CV and Firm.

On August 6, 2001, the Law which regulated the Foundation was born, namely No. 16 of 2001 and was revised with Law No. 28 of 2004 on Amendments to Law No. 16 Year 2001 on Foundations, Objectives of this Law, providing separation between the role of the foundation and the role of an established business entity, so that there is no conflict of interest and overlapping interests, especially if there is a problem that arises if there is a ban on the organ of the foundation (Boedi & Wahyono, 2001). Article 3 The Law of the Foundation says that the position of the foundation is only the founder of a business entity, and its position is also merely the founder of a business entity.

The foundation as the founder cannot manage the business entity. The Foundation Law strictly forbids members of the board of directors, administrators and supervisors of the

foundation and concurrently a member of the board of directors (management) or commissioner (supervisor) of the business entity established by the Foundation, and the provisions regarding not to divert the wealth of the foundation either directly or indirectly, namely in the form of salaries, wages, honorariums or other forms that can be valued with money (not allowed to provide the remaining proceeds) to the founders/coaches, administrators, and supervisors. except for the management of the foundation which is not affiliated with the founder, supervisor, and supervisor and implements direct and full management of the foundation.

In Indonesia, according to research conducted by Chatamarrasjid it was revealed that out of 150 (one hundred and fifty Foundations) it turned out that, only 5 (five) Foundations (3.3%) included in their Articles of Association, articles which stated that to Founders and Managers not given material rewards or benefits from the foundation. This gives a veiled impression that there are founders/administrators who obtain counter-achievements from the concerned foundation (Chatamarrasjid, 2002). In addition to Suryarama's research, 80% of foundation administrators participated in the administration and financial affairs and were fully responsible for the interests and objectives of the foundation and the right to represent the foundation both inside and outside the court. Each administrator carries out duties in good faith and is responsible for the interests and objectives of the foundation (Suryarama, 2009). This Law No. 28 of 2004 does not replace Law No. 16 of 2001. Changes only change part of Article Article of Law No. 16 of 2001. The dynamics of the development of regulations regarding the fast Foundation shows that the Foundation's problem is not as simple as many, where this law is intended to provide the community with a correct understanding of the Foundation, guarantee certainty and law and restore the function of the Foundation as a legal institution in order to achieve certain objectives in the social, religious and humanitarian fields.

Regulating the Management of Private Universities based on the Values of Justice

The national education aims to develop Indonesian humanity into a person of faith and devotion to God Almighty, noble character, mastering science, technology and art, having physical and spiritual health, having life skills that are blessed and dignified, have a solid and independent personality, and has social and national responsibilities in order to be able to realize the life of an intelligent nation. Education will always change along with the changing times, every time education is always the focus of attention and is not even the target of dissatisfaction because education concerns the interests of all people, not only concerning investment and living conditions in the future, but also the conditions and atmosphere of life now, that is why education always requires efforts to improve and improve in line with the high needs and demands of people's lives.

Foundations, as legal entities have rights and obligations. Implementing the foundation's operations requires an organ of the foundation, even though the Foundation is a subject of independent law, but a foundation is an artificial person who performs legal actions with the intermediaries of the foundation's organs. Legal theory, Organ Theory was proposed by German scholar Otto von Gierke (1841-1921), a follower of the history and in the Netherlands adopted by L.G. Polano. The teaching is called the *leer der volledge realiteit*, the teachings of perfect reality. According to this theory, legal entities are like humans, becoming truly incarnations in legal relations, namely *eine leiblichgeistige Lebenseinheit*. The legal entity becomes a *verbandpersoblich keit* which is a body that forms its will through the means or organs of the

body, for example, its members or administrators such as humans who say their will through their mouths or through their hands if the intention is written above paper.

What they (organen) decide, is the will of the legal entity. Legal entities are not abstract (fiction) and not wealth (rights) that are not subject. But a legal entity is a real organism, which manifests seriously in legal association, which can form its own will through the means of it (administrators, members), such as ordinary people who have organs (five senses) and so Trustees, supervisors and administrators are called foundation tools that take care of foundations as legal subjects. These three foundations work together according to their duties based on the laws and articles of association of the foundation so that the foundation can exercise its rights and obligations as a legal subject. Foundations as legal entities have their own characteristics, but there are also similarities with other legal entities, namely the limited company or cooperative.

The same consistent characteristics can be found in PT where there is at least the separation of legal entity assets with founding assets, shareholders or members are very dependent on the law chosen, the existence of certain procedures that require approval to obtain legal entity status and the existence of legal entities. Higher education institutions and foundations are regulated by Law No. 40 of 2007 on Limited Liability Companies and Law No. 16 of 2001 in conjunction with Law No. 28 of 2004 can be compared as follows: Limited Liability Company Organs consisting of General Meetings of shareholders, commissioners, and directors, can be found in foundations in the form of Trustees, Supervisors, and Administrators.

The duties and authorities possessed by the organs in the two legal entities have similarities. Even though there are similarities between organ dividers at PT and the Foundation, there are different arrangements regarding compensation that can be given to each organ. At higher education, there is no prohibition to provide salaries or wages and other compensation to directors and commissioners, so that professional directors and commissioners can be obtained through this mechanic especially there are no restrictions regarding the period of time these directors and commissaries can take office.

Foundation has put in place norms that prohibit the provision of salaries and compensation to administrators and supervisors except for administrators who are directly and routinely involved in a foundation. Based on such arrangements, it is very small that the foundation can be expected to obtain a professional board and be able to run the foundation's activities as well as possible. The dual prohibition of foundation legal positions will also hamper the development of PTS, because the dual prohibition not only occurs in the organ of the foundation but also in the case of between the organ of the foundation and the organs of the business entity within the foundation or the business entity where the foundation engages in participation. The founders of the foundation usually have the capital for the founding of the foundation, in the Law on Foundations, the founders of the foundation can only become Trustees of the foundation, and this is with the Arrangement in the PT that allows investors as directors or commissioners. Based on the aim of the wealth theory Theory of Brinz, according to this theory, only humans can be the subject of law, but there is also no denying the right of rights to wealth, while no one is a supporter of that right. What is called the right of rights of a legal entity is actually a right that no one has and as an agent is a property that is bound by a purpose to the property belonging to a purpose (Rido, 1986).

The achievement of the aims and objectives of the foundation is the essence of the management's good faith. The goodwill of the foundation's management will be seen in the success of the foundation in its mission. From the Exposure, it can be seen that there is no

consistency in the norm for the organ of the foundation when compared with other legal organs. The purpose of the foundation is achieved and as long as the management is in limited liability and duties and achieving the foundation's goals, then that is the actual measure Wealth aiming. Yusuf Kala, the Vice President of Indonesia stated that there were quite a number of private universities in Indonesia, reaching 4,020 PTS. He said that in the end, the management of PTS must also have a business. Without a surplus in management, PTS will not be able to develop and improve its quality. Is it possible for a university? To be managed like a limited company (PT) one day because it also leads to business? (Muhammad, 2004).

This is actually what has been realized by the Vice President of Indonesia, he sees that many of the less competitive Private Universities, with State Universities, therefore, should the Private Universities do mergers. As discussed by the author, Private Universities will always lag behind State Universities both in terms of funding and student interest, this is because Private Universities are always equated with State Universities, but have different funding arrangements. Various laws and regulations can be found that requires the implementation of an activity carried out by the foundation. In the education sector, private universities must be managed by a foundation. In fact, not all educational activities are only social.

For those who want to establish educational institutions for commercial purposes, of course, they have no other choice but to use foundations as required by legislation. As a result, the foundation was established to meet the requirements of the legislation. Even though the foundation is managed as a Limited Liability Company is a legal entity that seeks profit. Private Higher Education clearly does not get funding from the government. Government funding is only allocated for research as of Article 89 paragraph (6) of Law 12 of 2012 on Universities states, which requires that the Government allocates at least 30% (thirty percent) of the funds as referred to in paragraph (5) for funds Research at PTN and PTS. Based on this, the essence of PTS management is no longer the urgency of the philosophy that education must be non-profit. The element of the establishment of PTS with a limited legal entity will make the harmonization of the organizing body with the founder usually occur in conflict. In the context of a limited liability company, the shareholders/commissioners and directors are clearly set up as executing bodies. Based on this, the conflict will obviously be easily overcome, because the company's mechanism is clear, compared to the foundation. Limited Liability Company (PT) is one of the most preferred and preferred forms of business entity compared to other legal entities. In addition, functionally PT can be used as a means to support and carry out national economic wheel activities, without being limited to pre-business actors whether it is contractors, bankers, agents, brokers and so on.

In addition, PT is also not possible to be separated from the institutional needs of a business. But more than that micro-scale, small-scale, SME (Start-up Company), large-scale business actors and public companies prefer PT as their business vehicle. But what's interesting to explore further is why the choice of fall to the PT legal entity, then what is the legal consideration? PT was chosen as a legal entity because of the clarity of the status of its legal entity. This means that the legal entity of PT has been accepted by all parties (practitioners, academics and entrepreneurs) and this is also confirmed through article 1 point 1 of Law No. 40 of 2007 concerning Limited Liability Companies (UU-PT) which stipulates that PT is a capital partnership legal entity, established under an agreement, conducting business activities with authorized capital which is entirely divided into shares and meets the requirements set forth in the law. With the above provisions, the PT is clear as the status of a legal entity from PT. Second,

as a business organization, the company by itself must have a specific goal to achieve a goal. Third, to be able to run its business, PT must have a regular organization. This is logical because Private Universities cannot develop because the status of the legal entity is a foundation that is difficult to obtain funding when compared to State Universities and the entry of Foreign Universities, and then PTS conditions will be battered and will become extinct (Prasetyo, 2016).

Granting permits for foreign universities operating in Indonesia will threaten the existence of existing higher education institutions. Apart from global competition, changes in the social paradigm of education and health have also changed. When enacted Law No. 44 In 2009, many hospitals in the form of foundations then began to think about changing the status of the foundation into a limited liability company. Likewise, those who will set up hospitals have begun to look to establish hospitals with the form of corporate entities. This is possible because in the law stipulated in Article 7 paragraph (2) Law No. 44 of 2009 concerning Hospitals states that hospitals can be established by the Government, Regional Government, or private sector. For hospitals established by the private sector as referred to in paragraph (2), they must be in the form of a legal entity whose business activities are only in the hospital sector. Reaffirmed in Article 20 paragraph (1) that based on its management, hospitals can be divided into public hospitals and private hospitals. For public hospitals, it can be managed by the Government, Regional Government, and non-profit legal entities. Whereas in Article 21 it is stated that for private hospitals managed by legal entities with the aim of profit in the form of Limited Liability Company or Persero. In the context of health, the government is aware that health cannot be carried out only by the government, thus through Article 7 of Law No. 44 of 2009 concerning government hospitals provides a choice of patterns of administration both government (BLUD), foundations, and limited liability companies.

However, in the context of education, especially government colleges (executive and legislative) through Article 60 paragraph (2) Law Number 12 of 2012 concerning Higher Education is not keen to see the needs in society, by regulating that PTS is established by the Community by forming a body legal entity organizers with a non-profit principle and must obtain the Minister's permission. In this case, it is clear that what is being aimed at is foundations, even though Universities are required to develop according to science and technology, while the container is only a foundation that is difficult to develop; this is an unfair problem (Arie & Maria, 2002). As is known, the legal empire is the empire of reason, intention, and sense of a human child, wherever he lives his life. The government should provide a choice for the community in conducting education, especially private higher education. Justice is the fulfillment of equal liberties. In line with the principle in a dignified theory of justice who cares in taking advantage of the opportunity given by God to help others through thinking activities (Prasetyo, 2015).

CONCLUSION

The current regulatory principle regarding the Legal Entity Organizing Education Institutions, Legal Entities, and Private Universities currently in force is directed at the principle of non-profit. Based on the nonprofit principle, the implementation of private higher education is directed through a foundation legal entity as regulated by Law No. 12 of 2012 concerning Higher Education, and Government Regulation of the Republic of Indonesia Number 4 of 2014 concerning the Implementation of Higher Education and Management of Higher Education. Reconstruction of Legal Entity Arrangements for the Education of Private Universities based on

justice value can be done by making changes to changes in the form of educational legal entities, the Government must provide options for forms of Private Higher Education institutions which can be in the form of foundations, associations or Limited Liability Companies, and Context of Education Legal Entity the profit and nonprofit nature needs to be changed, which is to become the principle of affordability.

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