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A REVIEW OF GOVERNMENT'S CONSTITUTIONAL AUTHORITY IN ISSUING A REGULATION IN LIEU OF LAW ON DISBANDING MASS ORGANIZATION

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ABSTRACT: Disbandment of a mass organization known as Hiszbut Tahrir Indonesia (HTI) has provoked debate over whether the action taken by the government through the minister of coordinating political, legal, and security affairs, Wiranto, to disband Hiszbut Tahrir Indonesia (HTI) complied with the law and did not violate human rights (HAM). The intention to disband the organization was initially due to consideration that its activities are regarded potentially threatening national political sovereignty. Hiszbut Tahrir Indonesia (HTI) adopted *khilafah* ideology, which was basically transnational, oriented towards abolishing nation state. The existence of mass organization (ormas) is essentially an implementation of rights to assemble, associate, and express opinions, in addition to political parties which are protected and guaranteed by the constitution. It needs to bear in mind, however, despite being guaranteed by the 1945 constitution, mass organization ia not expected to hold liberating activities. Disbandment of Hiszbut Tahrir Indonesia (HTI) was undertaken by the government by issuing regulation in lieu of law (Perppu) No. 2 of 2017. The emergence of the regulation has sparked off long debate and polemic. One of the reasons underlying the debate over the regulation in lieu of law No. 2 of 2017 on disbandment of mass organization is critical situation which enforces the government to issue the regulation.

KEYWORDS: Constitutional Authority, Regulation in Lieu of Law, Mass Organization.

I. INTRODUCTION

The existence of mass organization (ormas) is essentially an implementation of rights to assemble, associate, and express opinions in addition to another means such as political parties. It needs to bear in mind, however, that despite being guaranteed by the 1945 Constitution, mass organization is not expected to hold liberating activities. Activities held by mass organization are expected to be based on limitation to respect rights and freedom in order to comply with laws and create justice in national life.

Disbandment of HTI is interesting to investigate from the perspective of constitutional authority given by the constitution to the government to limit human rights, in this case rights to assemble. There are many pros and cons emerging from parties regarding the disbandment of HTI, and they include whether the disbandment infringes rights to assemble, how national authority plays its role in disbanding mass organization, and whether the government are able to disband mass organization without legal mechanism – the current disbandment is considered to infringe the principle of *due process of law*. Therefore, this paper discusses several problems regarding the establishment of the regulation in lieu of law No. 2 of 2017.

Definition of mass organization is stated in the article 1 of the regulation in lieu of law No. 2 of 2017 [1]. Mass organization, also abbreviated as *ormas*, is an organization established and found voluntarily by community based on similar aspirations, wishes, needs, concerns, activities, and purposes in order to participate in development for the sake of achieving the objectives of The Unitary State of the Republic of Indonesia according to Pancasila and the 1945 Constitution.

The regulation in lieu of law No. 2 of 2017 on mass organization brings significant changes, especially the article 59 in which some conditions set out things prohibited to carry out by mass organization, and the changes are further explained as follows.

(1) Mass organization is prohibited:

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a. to use any name, logo, flag, or attribute of government agencies.
b. to use any official name, logo, flag of other countries or international agencies to refer to the name, logo, or flag of mass organization; and/ or
c. to use any name, logo, flag, or emblem which essentially or entirely shares similarities with the name, logo, flag, or emblem of mass organization or political party.

(2) Mass organization is prohibited:
a. to receive or give donation to any party which is against the provisions of legislation; and/ or
b. to set up funds for political party.

(3) Mass organization is prohibited:
a. to perform hostile activities against ethnic group, religion, race, or social group;
b. to abuse, blaspheme, or defile any religion in Indonesia;
c. to perform abuse, disturb the peace, or impair public and social facilities; and/ or
d. to take actions which belong to the authorities of law officer according to the provisions of legislation.

(4) Mass organization is prohibited:
a. to use any name, logo, flag, or symbol which essentially or entirely shares similarities with the name, logo, flag, or symbol used by separatist groups or forbidden organizations.
b. to perform separatism activities which threatens the sovereignty of The Unitary State of the Republic of Indonesia; and/or
c. to adopt, develop, and share beliefs which are against Pancasila.

The definition of mass organization stated in the regulation of lieu of law becomes firmer compared to the one stated in the Law No 17 of 2013 which defines mass organization as an organization established and found voluntarily by community based on similar aspirations, wishes, needs, concerns, activities, and purposes in order to participate in development for the sake of achieving the objectives of The Unitary State of the Republic of Indonesia according to Pancasila. The new definition emphasizes *Pancasila and the 1945 Constitution*. It means mass organization must adhere to the 1945 Constitution, and it is a final decision. In addition, mass organization is prohibited to receive or give donation which is against the law, including setting up funds for political party.

Mass organization is also prohibited to perform hostile activities against ethnic group, religion, race, and social groups. Performing abuse, blasphemy, or defilement is prohibited. Mass organization is not allowed to perform abuse, disturb the peace, or impair public and social facilities. Moreover, mass organization is prohibited to take actions which belong to the authorities of law officer according to laws. Strict sanctions are also applied to mass organization that violate the regulation. In addition to administrative sanction, the regulation, the regulation also involves criminal sanction, which is a new part and did not exist in the previous regulation. Conditions on criminal actions in the regulation on mass organization are written in Chapter XVIIA, article 82A which states:

(1) any member or administrator of mass organization who intentionally and directly or indirectly violates the provision as referred to the article 59 paragraph (3) letter c and d shall be punished with minimum imprisonment of 6 months and maximum 1 year.
(2) any member or administrator of mass organization who intentionally and directly or indirectly violates the provision as referred to the article 59 paragraph (3) letter a and b, and paragraph (4) shall be punished with minimum imprisonment of 5 years and maximum 20 years.
(3) in addition to the imprisonment as referred to paragraph (1), the suspect is given additional punishment as stated in the criminal legislation.

Based on those revised articles, it can be seen that decision to suspend or disband a mass organization can be taken by the related ministry, in this case the Ministry of Home Affairs and the Ministry of Law and Human Rights. Submission or appeal to the court is not required anymore as stated in the previous provisions. However, the decision to give criminal punishment is taken by court. The maximum punishment is 20 years, and it is addressed to those abusing, blaspheming, or defiling any religion in Indonesia or those adopting, developing, and sharing beliefs which are against Pancasila.

II. RESULT AND DISCUSSION

Freedom to assemble is guaranteed by the nation as a part of the principles of democratic nation. Freedom to assemble also becomes part of human rights guaranteed by the constitution as stated in the article 28E paragraph (3) of the 1945 Constitution. During the new order, the freedom to assemble was stated in the Law No. 8 of 1985 on mass organization regarding the dynamics developing at that time. The government, then, revised the law with the Law No. 17 of 2013 which aimed to regulating mass organization in terms of its transparency and accountability. However, the existence of mass organization can be limited as rights to

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assemble, associate, and express opinions as stated in the article 28E paragraph (3) of the 1945 Constitution are included as human rights which can be limited in terms of its implementation. In the contrary, rights to live, rights to be free from prosecution, rights of thought and conscience freedom, rights of religion, rights to be free from slavery, rights to be recognized as an individual, and rights to not to be prosecuted, according to the article 28I paragraph (1) of the 1945 Constitution, are included in non-derogable rights.

With regard to the regulation on mass organization, any mass organization is supposed to comply with the law established by the government. As argued by Jimly Assidiqie, the one giving command within the dynamics of national life is law [2]. Once mass organization infringes the regulation and violates the law, the government have authority to take an action regarding the violation. In order to balance the implementation of rights to assemble, associate, and express opinions from being arbitrarily misused, the limitation taken by the government such as disbandment needs to be according to particular criteria. The criteria are stipulated in the article 28J paragraph (2) of the 1945 Constitution in which the limitation is stated through the constitution and taken in order to guarantee acknowledgement and respect for the rights and freedom as well as serve fair functions based on moral, religious, safety, and public order considerations within democratic society.

Government's authority in disbanding mass organization infringing the regulation is written in the Law No. 17 of 2013 [3] in which it is stated that theoretically the government issuing permits in establishing a mass organization according to the principle of *contrario actus* is also entitled to revoke the permit once there is a violation committed by particular mass organization. [4]. Ridwan HR in his book also reveals the theory of authority proposed by F. P. C. L Tonner, who argues that the government's authority in this case is regarded as the ability to perform positive law so that legal relationship can be established between the government and the citizens. [5] Disbandment of HTI by the government is based on 2 reasons. *First*, HTI is considered to have violated the regulation on mass organization. And the *second* reason is the critical situation. HTI is regarded to have violated the regulation based on the following facts [6]:
First, HTI violated the obligation in the article 21 letter b in which mass organization is obliged to maintain the unity of the Unitary State of the Republic of Indonesia. Activities held by HTI, in fact, adopted *khilafah* ideology, which means abolishing the Unitary State of the Republic of Indonesia (NKRI), and it obviously violated the obligation. *Second*, HTI violated the obligation in the article 21 letter f in which mass organization is obliged to participate in achieving the nation's goals. This participation can be achieved if mass organization relies on nation state system adopted by NKRI since August 17, 1945. It is impossible to participate in achieving the nation's goals while mass organization denies NKRI and replace the existing system with the new one.

Third, HTI violated the prohibition in the article 59 paragraph (2) letter c in which mass organization is prohibited to carry out separatist activities potentially threatening the sovereignty of NKRI. The definition of separatism according to the Great Indonesian Dictionary (KBBI) is "people (groups) who want to separate from a unity/ group (nation) to draw support". The notion of separatism does not necessarily mean taking up arms to separate themselves and establish a new state. Public campaign to persuade people or community to replace the system of NKRI with another one (*khilafah* ideology) is essentially included as separatism that threatens the sovereignty of NKRI. Regarding the violation on the article 21 and 59 of the regulation on mass organization, the government, based on the article 60 paragraph (1) of the regulation on mass organization, is given authority to impose administrative sanctions. Types of administrative sanctions, according to the article 61 of the regulation on mass organization, consist of: a. written warning; b. termination of assistance and/ or grant; c. temporary suspension on any activity; and/ or d. revocation of the registered certificates or status of legal entity.

In formulating the legislation, the use of words "and/or" in the end of the second point of the article 61 is a form of alternative-cumulative sanction. Consequently, the government is able to gradually all stages of sanctions (cumulative). However, in particular situation or consideration, some stages can be passed, and one of the sanctions are taken (alternative). If the government choose cumulative sanctions, then the sanction given to HTI begins by issuing written warning 1, 2 and 3. Then if HTI does not comply with the warnings, the government continues to terminate assistance and/ or grant; and / or the temporarily suspend any of activities by firstly requesting legal consideration to the Supreme Court. In the contrary, by considering the threat against the national sovereignty, if a mass organization is not immediately disbanded, the government can possibly take alternative sanction based on the article 61 by directly imposing the heaviest sanction, which is revoking the status of legal entity of the organization regardless of 3 previous stages.

If the government decides to impose revocation of legal entity status, it is carried out by using the provisions in the article 70 paragraph (1) of the regulation on mass organization – proposing the disbandment of HTI to the district court by the prosecutor on the written request from the Minister of Law and Human Rights. Through

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this judicial process, the addressee, in this case HTI, are given opportunity to defend themselves by submitting statement and giving evidence in the court. Then, there is a reason "critical situation" used by the Government to issue the regulation in lieu of law as the basis for disbanding HTI. Regulation in lieu of law is a legislation established by the President in the case of critical situation. This is constitutionally regulated in the article 22 of DDU of NRI 1945. The definition of Perpu is also explained in the article 1 number 4 of Law No. 12 of 2011 on the establishment of legislation. According to Maria Farida Indrati Soeprapto [7], since the regulation in lieu of law is a government regulation (PP) that replaces the status of the law, the content remains the same. This is also in accordance with Bagir Manan's [8] statement that argues lieu of law is derived from the same content of the law, or in the normal condition it is regulated by the law. Regulation in lieu of law shares equality with the law as the content is basically regulated by the law. However, due to critical situation it is regulated by the regulation in lieu of law [9].

Viewed from the perspective of legislation, to assess whether the regulation of lieu of law is constitutional or unconstitutional, two benchmarks – formal and material benchmarks – can be used. Formal benchmark emphasizes the context of emergence of regulation in lieu of law – whether it is due to critical situation or not. If the critical situation meets the requirement to establish the regulation, it can refer to the Decision of the Constitutional Court No. 138/PUU-VII/2009 in which interpretation of 'critical situation' is explained. According to the Constitutional Court, critical situation occurs when [10]:

1. There is urgency to solve legal problems quickly based on the law.
2. The required law has not been established so that legal gap exists, or the law is not adequate enough.
3. The legal gap cannot be solved by establishing law through regular procedures due to time-consuming process while the situation needs to be solved quickly.

The interpretation of critical situation from the decision of the Constitutional Court is considered to have fulfilled formal reason and legitimate the regulation of lieu of law on mass organization.[11] For material reason, even though it is mentioned that the existence of mass organization which stands against Pancasila and the 1945 Constitution leads to demand from society to disband it, the old regulation, law No. 17 of 2013, especially the article 54 paragraph 4, cannot disband the organization. It is due to the fact the old regulation defines beliefs contradicting Pancasila only involve atheism, communism/Marxism – Leninism. Then, a question arises regarding mass organization which intends to change the national ideology with the other one, but it is not atheism etc. as referred to the previous statement. Thus, it has not been accommodated in the Law No. 17 of 2013 so that the regulation in lieu of law No. 2 of 2017 emerges. The underlying reason then refers to material reason in terms of the establishment of regulation in lieu of law.

III. CONCLUSION

Based on the explanation above, the existence of regulation in lieu of law should not be regarded as government's attempt to silence the freedom to assemble and associate. This is due to the fact the nation still provides assurance that the community can establish mass organization as long as the purposes and the belief do not contradict Pancasila and the 1945 Constitution as the principles of Indonesia. Disbandment of mass organization does not violate the 1945 Constitution, especially in terms of human rights, due to formal or material legal basis. The revocation of legal entity status formally has been based on the provision in the 1945 Constitution and regulation in lieu of law No. 2 of 2017. The revocation of legal entity status of HTI does not violate human rights, especially rights to assemble, associate, and express opinions as stated and guaranteed in the 1945 Constitution. In this case, rights stated in the article 28E of the 1945 Constitution needs to be laid on the respectful framework of the human rights in realizing social and national life. Moreover, the implementation of human rights in Indonesia must be subjected to the limitations established by laws in order to guarantee recognition and respect on the rights and freedom and to serve fair functions based on moral, religious, safety, and public order considerations within democratic society as stated in the article 28J paragraph 2 of the 1945 Constitution.

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