THE LEGAL POLITICS OF THE DISSOLUTION OF MASS ORGANIZATIONS: AN ANALYSIS OF GOVERNMENT REGULATION IN LIEU OF LAW NO. 2 OF 2017 (PERPU ORMAS)

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Abstract: *Government Regulation in Lieu of Law No. 2 of 2017 (Perpu Ormas) is contrary to the rule of law, especially in relation to the principle of due process of law. Under this Perpu, the dissolution mechanism of mass organizations carried out directly by the government without going through the judicial process potentially leads to abuse of power and is contradictory with the basic principles of the rule of law. In a country with the rule of law, which respects human rights, the dissolution of any organization should be in accordance with the due process of law. Government restrictions on freedom of association and assembly should be measured by considering the legitimacy and social needs of the level of restrictions on the rights, which is the duty of the court and not the government. In addition, the grounds for dissolving mass organizations as regulated in Law No. 16 of 2017 are dangerously multi-interpretative. These multi-interpretative grounds make the government able to easily dissolve any existing mass organization under the pretext of conflicting with Pancasila, and so on. The legal politics behind the issuance of Perpu Ormas cannot be separated from government's political interest to exercise control over its political opponents and to maintain the regime from pressures coming from its political opponents, particularly Islamic groups that are in opposition to the government. It appears that the democratic process in Indonesia does not necessarily have a positive impact on the protection of human rights in the country.*
Keywords: *Dissolution of mass organizations, human rights, freedom of association and assembly, rule of law, legal politics, Hizbut-Tahrir Indonesia, constitution, democracy.*

INTRODUCTION

The democratic process in Indonesia does not necessarily have a positive impact on the protection of human rights in the country. Normatively, the amendments of the Indonesian 1945 Constitution recognize human rights as an important part of the

constitution, but in practice, various human rights restrictions arbitrarily imposed by the state continue to occur today. One serious problem in limiting the human rights of citizens happening today is the restrictions on their freedom of association, assembly, and to organize.

The issuance of Government Regulation in Lieu of Law No.2 of 2017 concerning Amendment to Law No.17 of 2013 on Mass Organizations (Perpu Ormas) which has now been ratified by the Parliament into Law No.16 of 2017 concerning the Establishment of Government Regulation in Lieu of Law No.2 of 2017 concerning Amendments to Law No.17 of 2013 on Mass Organizations has caused resistance among the public. Perpu Ormas is now considered a threat to protection of freedom of association and assembly in Indonesia.

The government's rationale for issuing Perpu Ormas is that there are urgent, emergency situations and conditions due to the existence of a number of mass organizations in Indonesia considered being in conflict with the State's ideology, Pancasila, and which embrace radicalism, consequently endangering the integrity of the state. In addition, the government also perceived Law No. 17 of 2013 on Mass Organizations to be no longer sufficient to prevent the spread of ideologies that are contrary to the Pancasila and the 1945 Constitution (https://news.detik.com/berita/d-3557090/ini-alasan-pemerintah-terbitkan-Perpu-ormas).

The implication of the issuance of Perpu Ormas is the dissolution of Hizbut-Tahrir Indonesia (HTI). On July 19, 2017, the government officially dissolved HTI through the revocation of its legal entity status based on the Decree of the Minister of Law and Human Rights No.AHU-30.AH.01.08 of 2017 concerning the Revocation of the Decree of the Minister of Law and Human Rights No.AHU-0028.60.10.2014 on the Ratification of the Establishment of the Legal Entity of the Association HTI (http://nasional.kompas.com/read/2017/07/19/10180761/hti-resmi-dibubarkan-pemerintah).

In addition, the government is currently reviewing and discussing a ban on the Islamic Defenders Front (Front Pembela Islam or FPI). President Jokowi said in an interview with the Associated Press (AP) that it was "entirely possible" to ban FPI in the last five years in office. Jokowi also stressed that the prohibition of FPI might be done if FPI is not in line with the ideology of the state (Pancasila) and threatens the security of the Republic of Indonesia (https://news.detik.com/berita/d-4642436/jokowi-bicara-pelarangan-ormas-fpi-ini-bukan-soal-yuridis-tapi-politis).

The country's efforts in dealing with intolerant groups are indeed necessary. However, the government's firm steps in doing this would still have to be within the rule of law and the corridors of a democratic country, which respect human rights. The wrong step in addressing this problem of radicalism will lead to an arbitrariness that potentially threatens the freedom of association and assembly in Indonesia.

This paper will explain the legal politics of the dissolution of mass organizations that are based on the regulations within Perpu Ormas as well as their implications on human rights. Before discussing the Perpu in details, this paper will first discuss the essence of freedom of association and assembly in a democratic country and the possible limitations on human rights in a democratic country as a basis for dissecting and analyzing the Perpu Ormas itself.

LEGAL MATERIALS AND METHOD

The method and type of research used in this paper are normative law research, which is similar to a doctrinal research. Such legal research puts legal studies as a normative study, which examines the law as a normative system with a legal dogma or legal system. The approach used in this paper is statute approach, which is done by examining laws and regulations related to freedom of association and the dissolution of mass organizations, as well as case approach, which is done by examining a specific case related to the issue of limitations on freedom of association, such as the dissolution of mass organizations by the government (Amirudin & Asikin, 2016).

In addition, this paper further analyzes the perspective of legal politics behind the issuance of this regulation. The law is seen as a political product, which perceives the law as a formalization or crystallization of political interests that interact and compete with each other (Mahfud MD, 2009). The law is not autonomous or free from intervention of political interests. For that reason, the issuance of Law No. 16 of 2017 on Mass Organizations cannot be separated from the political interests surrounding it, which are responsible for the emergence of the Law in the first place. The study of legal politics encompasses three things: First, the state policy (official line) regarding the laws, which will be enforced in order to achieve the political objectives of the state. Second, the political, economic, social, and cultural backgrounds behind the formulation of a legal product. Third, the implementation of law enforcement ((Mahfud MD, 2009).

RESULTS AND DISCUSSION

Freedom of Association and Assembly and the Limitation of Human Rights

In general, freedom of association can be interpreted as "the right of people to be together and to form and join organizations that serve a common, lawful purpose (Rohde, 2005)," while freedom of assembly is defined as "the individual rights or ability of people to come together and collectively express, promote, pursue, and defend their collective or shared ideas" (McBride, 2005). Freedom of association and assembly (often abbreviated as FOAA) are part of human rights protected by various national and international legal instruments. In the perspective of international law, freedom of association and assembly are protected among others by the Universal Declaration of Human Rights (article 20), International Covenant on Civil and Political Rights (articles 21 and 22), European Convention on Human Rights (article 11), and the American Convention on Human Rights (articles 15 and 16).

While in the context of national law, freedom of association and assembly which are guaranteed in the International Covenant on Civil and Political Rights (ICCPR), are protected by Indonesian law as Indonesia has ratified the ICCPR through Law No. 12 of 2005 on the Ratification of International Covenant on Civil and Political Rights, especially article 21 relating to freedom of assembly and article 22 paragraphs (1) and (2) regarding freedom of association.

The freedom of association and assembly are often referred to as an "extension" of freedom of speech and expression (Bresler, 2004), as they are an important part of a person's right to express themself. In expressing themselves, people as political beings

(*zoon politicon*) tend to gather (assemble) and unite themselves with other people who have the same ideology or objective and thus forming a union (association).

Freedom of association is substantial in preventing the establishment of an authoritarian or a tyrannical state. It has become "a necessary guarantee against the tyranny of the majority" (Tocqueville, 2000). Freedom of association also provides two important instruments to a stable democracy, which are "social reciprocity" and "citizen efficacy". Both of these things, if integrated into the cultural system of a society, are effective tools in countering various disruptions to the state (Bresler, 2004).

In a democratic life, freedom of association and assembly are a vessel or a tool for a person (citizen) to express himself or herself and interact with other elements of the society (freedom of association and assembly in relation to freedom of speech and expression). In essence, democracy means a political freedom to speak, to organize, as well as freedom of the press. In a democratic country, everyone has the opportunity to express himself or herself based on his or her rights as a citizen, both the right to speak and to organize. Without these two rights, democracy simply does not work (Sorensen, 2003).

Although it has an essential meaning, freedom of association is not an absolute human right. In human rights perspective, there are two classifications of human rights: derogable rights and non-derogable rigthts. From the perspective of international law, certain human rights are considered to be so important that they cannot be reduced under any conditions or circumstances and categorized as non-derogable, which is based on the principle of peremptory norm or jus cogens (ius cogens) in international legal norms.

In the International Covenant on Civil and Political Rights (ICCPR), there are four human rights that are classified as non-derogable: 1) the right to life, 2) the right to be free from torture and other inhumane or degrading treatment or punishment, 3) the right to be free from slavery or servitude, and 4) the right to be free from retroactive application of penal laws. On the other hand, other human rights that go under "derogable" classification include the right to liberty and security, freedom of association and assembly, as well as freedom of speech and expression, which means that these rights are not absolute and can be limited by the state in certain situations and conditions.

In human rights perspective, the limitation of some human rights is possible in certain circumstances or situations. Based on the International Covenant on Civil and Political Rights and the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, the limitation of human rights can indeed be imposed, although it must be done under very strict rules: if it is necessary in a democratic society, it must be prescribed by law, and it must be done on the basis of national security, public health, public safety, public order, public morals, as well as the rights and freedoms of others.

The government's limitations on freedom of association and assembly must be measured by considering the legitimacy and social needs of the limitation itself with the level of limitations on these rights, which is the duty of the court (Bresler, 2004). In a country with the rule of law like Indonesia, any limitations on the rights of citizens must be carried out through due process of law to guarantee the objectivity as well as to prevent arbitrariness of the state. The state as an entity that has legitimacy coming from the people (citizens) thus has a moral and constitutional obligations to protect the rights of its citizens.

The limitation of human rights, as mentioned earlier, must be based on the principles of legality, necessity, and proportionality. The principle of legality requires that

any limitation or restriction on human rights by the state to be based on the law (prescribed by law). This means that such limitations have passed through the legislative process in parliament and thus having the legitimacy which comes from the people (citizens) themselves, not is not based on the arbitrariness of the state. On the other hand, the principle of necessity states that any limitation of a right must be necessary in a democratic society. This means that any limitation of human rights are only justified if they are needed to maintain the survival of a democratic society. Furthermore, the principle of proportionality requires any limitation or restriction on human rights to be in proportion to the purpose of the limitation itself. In Indonesia, a limitation of this freedom can be done by the state for certain reasons as intended in article 28J of the 1945 Constitution and article 22 paragraph (2) of the International Covenant on Civil and Political Rights (ICCPR).

Accidents The Regulation for the Dissolution of Mass Organizations under Perpu Ormas

In less than five years, the Indonesian government amended Law No. 17 of 2013 on Mass Organizations through the issuance of Government Regulation in lieu of Law No. 2 of 2017 concerning Amendments to Law No. 17 of 2013 on Mass Organizations, or better known as Perpu Ormas. The issuance of the Perpu was carried out under the consideration that the existing Law No. 17 of 2013 had not comprehensively regulated the mass organizations that were in conflict with Pancasila and Indonesia's 1945 Constitution. Thus, the government's argument that there had been a legal vacuum. In addition, the existing Mass Organization Law (Law No. 17 of 2013) was also deemed insufficient to crack down on organizations adhering to radical ideologies. Consequently, Government Regulation in lieu of Law No. 2 of 2017 has been passed by the DPR into Law No. 16 of 2017.

As record shows, at the time of the hearing in the Parliament (DPR), a number of factions stated that, they refused to ratify the Perpu into law. These factions are the Gerindra Party Faction, the Prosperous Justice Party (Partai Keadilan Sejahtera or PKS) Faction, and the National Mandate Party (Partai Amanat Nasional or PAN) Faction. However, during the voting process, a number of factions agreed to ratify the Perpu albeit "with notes" that certain subtances of the Perpu to be immediately revised. They were the Democratic Party Faction, the National Awakening Party (Partai Kebangkitan Bangsa or PKB), and the United Development Party (Partai Persatuan Pembangungan or PPP). Therefore, there were only four factions that agreed to fully ratify the Perpu at the time, i.e. the Indonesian Democratic Party of Struggle (Partai Demokrasi Indonesia Perjuangan or PDIP), Golkar Party, Democratic National Party (Partai Nasional Demokrat or Nasdem), and the Hanura Party.

Under Perpu Ormas, the government reclassifies the grounds for dissolution and prohibition of a mass organization within article 59. The prohibitions set in article 59 paragraph (1-4) are as follow:

- using the same name, symbol, flag, or attribute as the name, symbol, flag, or attribute of a government institution;
- using without permission the name, symbol, flag of any other country or international institution/body to become the name, symbol, or flag of the mass organization; and/or
- using the name, symbol, flag or image that have similarities in principle or in whole with the name, symbol, flag, or image of any other organization or political party;

- receiving from or giving any contribution in any form to any party that is contrary to the provisions of the law; and/or
- raising funds for political parties.
- conducting acts of hostility towards ethnicity, religion, race, or groups;
- committing abuse, sacrilege, or blasphemy against religions practiced in Indonesia;
- committing acts of violence, disturbing public peace and order, or damaging public and social facilities;
- and/or carrying out activities which fall under the duties and authority of law enforcement in accordance with the law;
- using the name, symbol, flag or symbol of organization that have similarities in principle or in whole with the name, symbol, flag or symbol of a separatist movement or banned organization;
- conducting separatist activities that threaten the sovereignty of the Unitary State of the Republic of Indonesia (NKRI);
- and/or adhering to, develop, and spread any teachings or ideologies that are contrary to Pancasila.

Mass organizations that violate these provisions are subjected to administrative and/or criminal sanctions as affirmed in article 60 of Perpu Ormas. This type of administrative sanction is also shortened compared to the previous law (Law No. 17 of 2013) which regulates written warnings to mass organizations allegedly violating the provisions in the Ormas Law. On the other hand, under this Perpu, administrative sanctions in the form of written warnings are only given for a period of 7 (seven) days as stipulated in article 62 of Perpu Ormas (Government Regulation in lieu of Law No. 2 of 2017 on Mass Organizations).

Perpu Ormas clearly intends to summarize the mechanism for dissolution of mass organizations by removing all provisions regulating the stages of it, including through due process of law. In total, there are nineteen articles within Law No. 17 of 2013 that were removed by Perrpu Ormas, ranging from article 63 to article 81.

Under the Perpu Ormas, the government can dissolve mass organizations directly without going through a judicial process. This is different from the previous law (Law No. 17 of 2013) in which the mechanism for dissolution of mass organizations with legal status must be done through court. Article 61 paragraph 3 points a and b jo article 80A of Perpu Ormas states that the dissolution of any mass organization is carried out by the government through the Minister of Law and Human Rights by revoking its legal status. Most importantly, article 80A states that the revocation of legal status of an organization as referred to in article 61 paragraph 1 also automatically means its dissolution. Meanwhile, for mass organizations that do not have legal status, article 60 paragraph 2 regulates the revocation of their registration certificate by the Minister of Law and Human Rights.

Under Perpu Ormas, the provisions on criminal sanctions are also expanded to be life imprisonment or imprisonment for a minimum of five years and a maximum of twenty years. Article 82A paragraph 1 of Perpu Ormas regulates “any person who is a member and/or organizer of a mass organization that intentionally and directly or indirectly violates the provisions as referred to in article 59 paragraph 3 letter c and d, namely carrying out acts of violence, disturbing public peace and order, or damaging public and social facilities; and carrying out activities which fall under the duties and authority of law enforcement in accordance with the provisions of the legislation, shall be sentenced to a minimum of 6

(six) months and a maximum of 1 (one) year in prison."
Moreover, article 82A paragraph 2 of Perpu Ormas regulates the punishments: "any person who is a member and/or organizer of a mass organization who intentionally and directly or indirectly violates article 59 paragraph 3 letter a and b, i.e. it is prohibited to carry out acts of hostility based on ethnicity, religion, race, or groups; committing abuse, sacrilege, or blasphemy against religions practiced in Indonesia; and paragraph 4, which is carrying out separatist activities that threaten the Unitary Republic of Indonesia and/or adhering to, developing, and spreading teachings or understandings that are contrary to Pancasila, according to this Perpu, is convicted with a life sentence or imprisonment for a minimum of 5 (five) years and a maximum of 20 (twenty) years".

THE PRETEXT OF "COMPELLING URGENCY"

Legislation is one of the principal elements within the national legal system of the Republic of Indonesia that is arranged hierarchically and culminates in the Constitution as the highest law. In every phase of the constitutional history of Indonesia since the proclamation of its independence on 17 August 1945, there have always been constitutional provisions containing rules for establishing a type of statutory regulation, which is enforced only when the country is in a state of "compelling urgency". This type of statutory regulation is now commonly known as the Government Regulation in lieu of Law (Perpu) in Bagir Manan (2003).

Perpu is a type of statutory regulation in Indonesia's legal norm system that reflects the power of the executive in dealing with a state of "compelling urgency". The Perpu is stipulated by the executive power, in this case the President, when and as long as the state administration system is in an abnormal condition (exceptional condition) in Taliziduhu Ndraha (2005). The abnormal state administration, which in article 22 paragraph (1) of the Indonesian 1945 Constitution is referred to as "compelling urgency", can generally be caused by situations of legal crisis, socio-political crisis, economic crisis, or natural disasters.

Under article 22 paragraph (1) of the Indonesian 1945 Constitution, it is stated, "In the case of a compelling urgency, the President has the right to establish government regulations in lieu of laws". Furthermore, it is also regulated in article 22 paragraphs (2) and (3) that "such government regulation must obtain the approval of the Parliament in the following session" and "If the government regulation does not obtain such approval, it therefore must be revoked".

Based on article 22 of the Indonesian 1945 Constitution above, there are special characteristics of xPerpu, which distinguish it from other types of legislation, which among others require certain conditions, are subjectively stipulated by the President, and has a relatively short period of validity. In practice so far, the benchmarks of "compelling urgency" as the basis for the establishment of a Perpu are very dependent on the subjectivity of the President. This results in the background for the stipulation of a Perpu that is generally different from one another and often not clearly drawn for either the stipulation of a Perpu that is generally different from one another and often not clearly drawn either under the "weighing" consideration or for general explanations of each of the Perpu. This leads to the slogan among the public that Perpu is sometimes established not

because of "compelling urgency", but because of "compelling interests" instead (Febriansyah, 2009).

Constitutional Court Decision No.145/PUU-VII/2009 further provides three objective conditions for a state of "compelling urgency": first, there is an urgent need to swiftly resolve a legal issue under the Law, second, the required Law does not yet exist therefore, there is a legal vacuum, and third, the required Law exists but it is inadequate to resolve such issue. Such legal vacuum cannot be tackled by passing the law under a normal procedure, as it would require much longer time, while the urgent situation needs to be swiftly resolved. In that context, the pretext of "compelling urgency" for the issuance of Perpu Ormas has in fact not been fulfilled, as the government already had Law No. 17 of 2013 on Mass Organizations, which already regulates the reasons as well as the process of dissolving mass organizations, including in dealing with organizations considered to be in conflict with Pancasila.

Article 59 of Law No.17 of 2013 regulates the reasons for dissolving mass organizations, including for carrying out acts of hostility towards tribes, religions, races, or groups; committing abuse, defamation, or blasphemy against religions adhered to in Indonesia; conducting separatist activities that threaten the sovereignty of the Unitary State of the Republic of Indonesia (NKRI); committing acts of violence, disturbing public peace and order, or damaging public and social facilities; carrying out activities which fall under the duties and authority of law enforcement in accordance with the provisions of the legislation; and adhering to, developing, or spreading the teachings or understandings that are contrary to Pancasila. Furthermore, regarding the dissolution process of a mass organization, Law No. 17 of 2013 has also already set the procedure for it, which is done through the court and not by the government (article 68 paragraph (2)).

It was very likely for the Parliament and the administration to revise Law No. 17 of 2013 on Mass Organizations through a normal procedure at the time. On the other hand, it was easy to refute the notion that it was not possible for the Parliament to pass or revise a law under the normal procedure for a number of reasons: first, the Parliament was still in session at the time and there was sufficient time to discuss a bill, second, there was no disruption whatsoever to the functions of the Parliament, and third, there was no shift in power within the Parliament in the near future. In fact, when the Perpu was issued by the President, the Parliament was actually in session, not on recess. This means that there was actually enough time for the President to propose an initiative bill to the Parliament to discuss the revision of Law No. 17 of 2013 on Mass Organizations if it was deemed insufficient.

The Legal Politics of the Government Regulation in Lieu of Law No. 2 of 2017 on Mass Organizations (Perpu Ormas) and Law No.16 of 2017

In the study of legal politics, law is valued as a form of political product that cannot be separated from various interests. Law is not something that is autonomous (Raharjo, 2008) or free from the intervention of the interests of power. Instead, law is a political product that perceives law as the formalization or crystallization of political wills which interact and compete with each other (Mahfud MD, 2009). Consequently, the establishment of Perpu Ormas is also heavily influenced by these interests.

Perpu Ormas and Law No.16 of 2017 Are Inconsistent with the Rule of Law and Threaten Freedom of Association

The rule of law or *rechtstaat* theory emerges as the antithesis of the power-state *(machstaat).* A state with the rule of law has certain characteristics, namely 1) the existence of a constitution containing written provisions concerning the relationship between the authorities and the people, 2) there is a division of power, and 3) the freedoms and rights of the people are recognized and protected (Huda, 2005). In the rule of law, one of the most important elements is the guarantee and upholding of the principle of legal certainty. The principle of legal certainty as a foundation of the rule of law is affirmed in article 1 paragraph (3) and in article 28D paragraph (1) of the Indonesian 1945 Constitution.

Article 6 paragraph (1) letter i of Law No. 12 of 2011 states that "The material contained in the legislation must reflect the principles of legal certainty and order". Furthermore, this provision is later elaborated in the general explanation section as follows: "What is meant by "the principle of legal certainty and order" is that each material contained in the legislation must be able to implement order in the society through the guarantee of legal certainty". In a state with the rule of law, the legal norms contained in a regulation must be clearly formulated *(lex stricta),* which means that any written law must be rigidly interpretated and it should not be extended to harm the subject of the act. Unclear norms will potentially lead to the violation of rights of the people, as state tends to interpret norms in accordance with its own interests.

In the context of Law No.16 of 2017 on Mass Organizations, there are multi-interpretative articles that can cause legal uncertainty. One of them is related to the reasons for dissolution. Based on article 60 of Law No. 16 of 2017, any mass organization can be dissolved if it violates article 21 and 59 of the Law. Article 21 of Law No. 16 of 2017 states that any mass organization is under obligation to: a) carry out activities in accordance with organizational goals, b) maintain the unity and integrity of the nation as well as the integrity of the Unitary Republic of Indonesia (NKRI), c) preserve religious, cultural, ethical, and moral values and provide benefits to society, d) maintain public order and peace in society, e) conduct financial management in a transparent and accountable manner, and f) participate in achieving the objectives of the state.

On the other hand, under Perpu Ormas (Government Regulation in lieu of Law No. 2 of 2017 on Mass Organizations), the government reclassifies grounds for dissolution and prohibition of a mass organization with article 59 paragraph (1-4) as follow:

- sing the same name, symbol, flag, or attribute as the name, symbol, flag, or attribute of a government institution;
- using without permission the name, symbol, flag of any other country or international institution/body to become the name, symbol, or flag of the mass organization; and/or
- using the name, symbol, flag or image that have similarities in principle or in whole with the name, symbol, flag, or image of any other organization or political party;
- receiving from or giving any contribution in any form to any party that is contrary to the provisions of the law; and/or
- raising funds for political parties;
- conducting acts of hostility towards ethnicity, religion, race, or groups;
- committing abuse, sacrilege, or blasphemy against religions practiced in Indonesia;

- committing acts of violence, disturbing public peace and order, or damaging public and social facilities;
- and/or carrying out activities which fall under the duties and authority of law enforcement in accordance with the law;
- using the name, symbol, flag or symbol of organization that have similarities in principle or in whole with the name, symbol, flag or symbol of a separatist movement or banned organization;
- conducting separatist activities that threaten the sovereignty of the Unitary State of the Republic of Indonesia (NKRI);
- and/or adhering to, develop, and spread any teachings or ideologies that are contrary to Pancasila.

The grounds for dissolving a mass organization as regulated in Law No. 16 of 2017 are numerous and multi-interpretative. These numerous and multi-interpretative grounds make the government able to easily dissolve any existing mass organization under the pretext of conflicting with Pancasila, not participating in achieving the state's objectives or in maintaining religious, cultural, ethical, and moral norms, providing benefits to the community, and others. These grounds for dissolution do not have clear indicators, making it very vulnerable for the government to unilaterally and arbitrarily dissolve any mass organization.

In addition, the mechanism for dissolution of a mass organization which is carried out directly by the government (not through the judicial process) as regulated by Law No. 16 of 2017 also potentially leads to abuse of power and is contrary to the basic principles of the rule of law. In a state with the rule of law that respects human rights, the dissolution of any organization must be in accordance with the principal of due process of law (Johnson, 2015). Due process of law is a principle, which aims to guarantee the procedural, and substance rights in order to obtain justice, where justice is not limited by procedures (Pennock, 1977). "Due process" must be interpreted as a principle that can encourage a number of specific rights, procedures, and practices (Resnic, 1977). There is no justification for the state to reduce the "due process" right.

Government limitations on freedom of association and assembly must be measured by considering the legitimacy and social needs of the level of restrictions on these rights, which is the duty of the court (Bresler, 2004). In a state with the rule of law, all restrictions on the rights of citizens must be carried out based on due process of law to guarantee the objectivity and to prevent arbitrariness of the state. The state as an entity, which has legitimacy that comes from its people (citizens), thus has a moral and constitutional obligation to protect the rights of its citizens.

In addition, several Constitutional Court decisions have also interpreted the terms and mechanism of restrictions on human rights. Constitutional Court Decision No.13-20/PUU-VIII/2010 states, "That in a country with the rule of law such as Indonesia, there absolutely needs to be due process of law, which is the supremacy of law through the justice system. If there is an act categorized as an act against the law, the process must go through a court decision so that the prohibition of the circulation of an item, for example, a printed material considered to be able to disturb the public order, cannot be submitted to any agency without going through a court decision."

The ruling also affirms that the state's act of depriving or limiting civil liberties in the form of a ban carried out by the government without going through a judicial process

is an act of a power-state (*machstaat)*, not a state with the rule of law like Indonesia, as affirmed in article 1 paragraph (3) of the Indonesian 1945 Constitution that Indonesia is a state with the rule of law. The Constitutional Court also states that the act of prohibiting or limiting civil liberties, "... especially without going through a judicial process, is an extra judicial execution which is strongly opposed in a state with the rule of law which requires the due process of law. Due process of law as elaborated above is the supremacy of law through the justice system". In addition, under the consideration section of its decision, the Constitutional Court clearly states that, "The granting of authority to prohibit something that constitutes a limitation of human rights without going through due process of law is clearly not included in the definition of freedom limitations as referred to in article 28J paragraph (2) of the 1945 Constitution".

Thus, it can be concluded that the dissolution of any mass organization by the government without going through the judicial process (court) is contrary to the principle of the rule of law as stipulated by the Constitution itself. A state with the rule of law should uphold the principles of supremacy of law as well as due process of law as the core objective of human rights protection. In a state with the rule of law, the act of dissolving an organization as a form of limitation of freedom of association (which is a form of civil liberty) must fully abide by the principle of due process of law, where the court plays a key role in the process.

Under Law No.16 of 2017, the government's argument that any organization dissolved by the government can submit objections to the Administrative Court, arguing that the judicial mechanism is therefore is available, is incorrect. The legal mechanism and dissolution process should have been carried out by the judiciary branch since the beginning and not only available after the organization has been dissolved. This is related to the principle of due process of law.

Perpu Ormas (Government Regulation in Lieu of Law No.2 of 2017 on Mass Organizations) which was then passed into law as Law No. 16 of 2017 that provides a vast and absolute power for the government to register, control, oversee, even dissolve any organization is contrary to the principle of protection of freedom of association, which is the heart of the democratic system. The issuance of Perpu Ormas and the passing of Law No. 16 of 2017 bring back the essence of Law No. 8 of 1985. Law No. 8 of 1985 was a notoriously repressive instrument of the New Order to unilaterally dissolve any organization, done by the government without going through the judicial process. This undoubtedly threatens the freedom of association and assembly in Indonesia.

THE PRINCIPLE OF CONTRARIUS ACTUS

One of the government's rationale in establishing Perpu Ormas, which was passed into Law No.16 of 2017 that gives the government to dissolve any mass organizations directly without going through a court, is based on the principle of *contrarius actus*. The literatures who focus on this subject mainly use Philipus Hadjon's book entitled Legal Arguments as their main reference. In the book, unfortunately, there is no comprehensive explanation of this principle. The book simply explains that under the principle of *contrarius actus*, the state administration body or official, which issues the state administration decision, is also authorized to cancel it (Hadjon, 2005). This principle is

then used as a basis for the government to regulate the dissolution of mass organizations directly by the government and not through the judicial process.

The principle of *contrarius actus* is a principle that has the meaning of formality or a procedure followed in the process of forming a decision and by the revocation or cancellation process. However, a principle is not a product of legislation that is absolutely binding (https://hukumonline.com). The government's argument that there is an absence of the *contrarius actus* principle within Law No. 16 of 2017 is incorrect, and even unfounded. There is no legal requirement for the institution, which approves the legal status of a mass organization to automatically have the authority to revoke or cancel it. There are many cases where institutions, bodies, or legal entities cannot be dissolved by the institution, which approved their legal status. On the contrary, the mechanism for dissolution or the revocation of legal status must go through a judicial process.

The principle of *contrarius actus*, which gives the government great authority in ratifying and revoking the legal status of a mass organization, is dangerous and cannot be legally justified. This is because granting a legal status is not merely related to administrative validity, but it also forms a new legal subject, while the mechanism for revoking rights and obligations attached to a legal subject must be carried out through a court decision. When comparing all regulations in Indonesia, which regulate the mechanism of dissolution of other organizations outside of mass organizations, then it is very clear that the dissolution of any organization should be carried out through the court and not directly by the government. These regulations include Law No.16 of 2001 on Foundations which states that the dissolution of foundations should be carried out by the court, Law No. 2 of 2008 on Political Parties which states that dissolution of any political party should be done through the Constitutional Court, Law No. 21 of 2000 on Trade Unions stating that dissolution of trade unions should be conducted through the court, and Law No. 40 of 2007 which also states the dissolution of a company *(Perseroan Terbatas)* should be carried out by the court.

THE LEGAL POLITICS OF PERPU ORMAS: ENCOUNTERING THE OPPOSITION GROUP

The issuance of Perpu Ormas cannot be separated from the two important events that preceded it. First, the protests against Basuki Tjahaya Purnama or Ahok as governor of Jakarta by particularly Muslim Indonesians related to the blasphemy accusation, which he allegedly did, which led to his defeat in the Jakarta regional election of 2017. Second, Ahok's verdict on aforementioned case by the South Jakarta District Court. As a former governor and vice governor of Jakarta, Jokowi and Ahok, respectively, have a strong political closeness. The Muslim Indonesians' protests against Ahok were so massive, occurred repeatedly, and were not only seen in Jakarta. They were widespread and happened in several regions outside of Jakarta, allegedly contributing to a disturbed public trust in President Jokowi. A number of Islamic organizations largely took part in the protests, including Hizbut-Tahrir Indonesia (HTI). These protests, if left unfettered, were feared to lead to a political crisis, which could disrupt the government's political agenda, especially concerning the 2019 presidential and vice presidential elections.

Prior to the protests, there was no intention whatsoever by the government to establish any new regulations concerning mass organizations. In the National Legislation

Program *(Prolegnas)*, which is set together by the administration and Parliament and serves as the basis for the government to establish laws within the five-year legislative period, the bill on mass organizations was not included. Therefore, the issuance of Perpu Ormas is seen as a way for the authorities to put an end to any movements that could cause a prolonged crisis against the authorities, especially several particular Islamic groups that oppose the government.

The issuance of Perpu Ormas by the government cannot be separated from the its desire to dissolve HTI. However, the substance of the Perpu does not specifically target the dissolution of HTI, but it rather regulates all mass organizations in general. Legally, if the government wanted to dissolve HTI, it could have used the existing Law No.17 of 2013 to do so. Coordinating Political, Legal and Security Affairs Minister Wiranto himself had actually told the public that he would dissolve HTI through the court as according to Law No.17 of 2013 (https://news.detik.com/berita/d-3495286/wiranto-pemerintah-ambil langkah-hukum-untuk-bubarkan-hti). However, the government took a different path and did not use the dissolution mechanism as specified in Law No.17 of 2013 to dissolve HTI. It issued the Perpu Ormas instead.

In the context of security, HTI at that time was not an organization which use force, was carrying out an armed uprising, or had control over a territory of Indonesia so that it could jeopardize the state's security or sovereignty in the near future. The government saw the organization seen simply as wanting to establish an Islamic Khilafah State in Indonesia (https://nasional.kompas.com/read/2018/05/07/15542341/hakim-hti-terbukti-ingin-mendirikan-negara-khilafah-di-nkri?page=all). Therefore, the government had in fact enough time to take legal actions to dissolve HTI through court proceedings as regulated in Law No.17 of 2013.

The government seemed eager to speed up the dissolution process of HTI, so that the mechanism of dissolution of mass organizations is summarized under Perpu Ormas to be directly carried out by the government. This is why the dissolution process of HTI underwent a tug-of-war. First, it was going to be dissolved through the court as stated by the Coordinating Political, Legal and Security Affairs Minister, Wiranto (https://news.detik.com/berita/d-3495286/wiranto-pemerintah-ambil langkah-hukum-untuk-bubarkan-hti), and in the end, it was dissolved directly by the government under Perpu Ormas. Many political and legal scientists consider Perpu Ormas to be a political part of the Jokowi administration in dealing with opposition groups, especially Islamic groups opposing the government. Thomas P. Power perceives the issuance of Perpu Ormas in 2017 as a clear proof of a repressive instrument used by the government to suppress civil society organizations. By misusing the security forces and law enforcement to suppress his political opponents, the Jokowi administration has merged state interests with those of his government's, whereas the existence of an opposition itself is fundamental in a democratic system (Power, 2018).

According to Thomas P. Power, since 2018, the Jokowi administration tends to restore the authoritarian pattern and accelerates the decline in the quality of democracy in Indonesia. This is marked by the rise of politicization of state institutions, such as using more open and systematic legal instruments in suppressing critical groups (Power, 2018). Furthermore, Gregory Fealy argues that the government does not have a compelling reason for issuing Perpu Ormas. In addition, the government cannot sufficiently answer the question of how significant the threat HTI poses so as it requires a legal umbrella at the

level of a Perpu. As a result, the Perpu is seen more as Jokowi's attempt to suppress Islamic groups that do not support him, and the ban on HTI through the Perpu is seen as an abuse of state power for political purposes (https://www.lowyinstitute.org/the-interpreter/jokowi-s-bungled-ban-hizbut-tahrir).

For the government, the issuance of Perpu Ormas and the banning of HTI are efforts with political objectives. However, Burhani argues that one of the potential implications of the issuance of such Perpu is the return of an authoritarian regime. Admittedly, the strengthening of Pancasila by the Agency for Pancasila Ideology Education (*Badan Pembinaan Ideologi Pancasila* or BPIP) is often identified with the New Order policy through the P4 program (*Pedoman Penghayatan dan Pengamalan Pancasila*). In addition, through Perpu Ormas, the government is trying to cut democracy by bringing back the spirit of fighting the danger of latent right and left. This legal umbrella in a form of a Perpu gives the government an authority to prohibit all organizations that are seen to be in conflict with Pancasila without the need to notify or take legal actions (Burhani, 2017).

Edward Aspinal argues that on several occasions President Jokowi used undemocratic methods to manipulate and suppress opposition groups. Political manipulation of laws related to blasphemy, treason, and mass organizations occurred in the Jokowi administration (Aspinall & Warburton, 2017).

The background and objective of establishing Perpu Ormas reflects a political vision of an authoritarian state, where the government ignores the judicial process mechanism (due process of law) in dissolving mass organizations by carrying it out directly through the government (executive power). Even though the political system itself is democratic, the character of power is still thick with authoritarian dimension, where the government feels it can dissolve any groups perceived as interfering with the course of power using Perpu Ormas.

Table 1. Mass Organizational Setting Paradigm

Paradigm	State	Society
Authoritarian	State's control over society	Society is a threat
Democracy	Guaranteed protection of freedom of association and assembly	Society's political participation becomes essential

PERPU ORMAS: ILLIBERAL DEMOCRACY

Many contemporary studies, which have been conducted, argue that although a country has implemented democracy as its political system, it does not necessarily guarantee that the freedoms of its citizens will be protected or its legal products will be responsive. Fareed Zakaria (2007) argues that in a democratic country, civil liberties and human rights protection are not automatically guaranteed, and vice versa – in a country that is not a democracy, it does not automatically mean there is no civil liberties and protection of human rights. Moreover, Samuel P. Huntington (1991) in his book *The Third Wave: Democratization in the Late Twentieth Century* argues:

"Elections, open, free, and fair, are the essence of democracy, the inescapable *sine qua non*. Governments produced by elections may be inefficient, corrupt, shortsighted, irresponsible, dominated by special interests, and incapable of adopting policies demanded by the public good. These qualities may make such governments undesirable but they do

not make them undemocratic." Based on above arguments it can be said that the government formed because of elections (based on the aspirations of the people) does not necessarily produce a government that provides protection for human rights and freedom for its people. Fareed Zakaria (2007) further argues that in contemporary situation, democracy is increasingly embraced by many countries in the world, and yet freedom (especially civil liberties) declines and tends to be imperiled. In some cases, governments that are democratically elected by the people have a tendency to judge themselves as authorities with absolute power. This can result in a centralized authority, which is often obtained through unconstitutional methods. As a result, the products of such government (legislations, situation of pluralism, civil liberties, etc.) are not much different from an authoritarian (dictatorial) government, but with a greater legitimacy as they are elected by the people.

Countries with a democratic system but are not accompanied by a well-established constitutional liberalism are categorized as *illiberal democracies*. Illiberal democracies are often marked by these characteristics: 1) disregard for human rights, 2) failure to protect the freedom of its citizens, 3) a repressive regime, 4) often marked by the rise of identity politics which polarize the society, and 5) there is tyranny of the majority.

In the Indonesian context, the supremacy of law and protection of individual freedoms such as the right to life, the right to have an opinion, freedom of religion and belief, and freedom of association are still realtively fragile. For that reason, even though Indonesia has a free and fair electoral system and the right to vote for all citizens (universal adult suffrage), Indonesia is not a *liberal democracy*. Indonesia is considered to be in the category of illiberal democracies.

In Indonesia, the disregard for human rights and civil liberties is marked, among others, by the passing of legislations that suppress the freedom of expression, freedom of religion and belief, and freedom of association. This is seen from the issuance of Perpu Ormas (Government Regulation in lieu of Law No. 2 of 2017 on Mass Organizations) as well as the enactment of the Perpu into law through Law No. 16 of 2017, and also Law No. 11 of 2008 on Information and Electronic Transactions (ITE) which was later revised into Law No. 19 of 2016.

PERPU ORMAS AND THE ABSENCE OF SOCIETY PARTICIPATION

In a democratic country, the role of the society is important to influence the formulation of laws. A broad space of public participation in policy-making tends to produce responsive legal products. Mikuli & Kuca (2016) argues there are many variations of public consultation that can be done at various levels of policy- or law-making, and this public consultation or involvement is a form of evaluation by the public of a decision or policy that has been taken by the government. Therefore, a solitary parliamentary work in formulating the law is not enough. Hoecke (2001) further argues that the formulation of a product of legislation is a collective effort, which cannot be trusted to only one institution. Such public participation would then help lawmakers in providing important information needed in making legislations (Saurugger, 2008).

Moreover, Cohen and Roger (1995) believe the state essentially supports public involvement in the process of policy- and law-making. That way, the public provides their expertise and contribute to improving the efficiency of the process of making a political

product of the state. Even though it does not provide any guarantee of a better legal product, public participation in the process of law-making has four potential impacts on the product quality: a) it would produce *pareto superior* decisions with a better solution, (b) the product would contribute to distributive justice by providing protection to vulnerable groups, (c) it could lead to a wider consensus in decision making, and (d) the product secures additional legitimacy derived from various group (Gambetta, 1998).

In the context of the formulation of a mass organizations law, public participation in the the law-making process gives a positive impact on the substance of the regulation, as seen in the formulation of Law No.17 of 2013 before it was changed through Perpu Ormas. Apart from its weaknesses, Law No.17 of 2013 as a legal product still contains responsive values in which the dissolution mechanism is carried out gradually and in stages. The dissolution mechanism is also carried out through court, especially for organizations with a legal status.

The issuance of Law No.17 of 2013 on Mass Organizations occurred with a substantial society participation in its formulation process. The role of the society in providing input to the discussion of the law was very substantial. It also involved numerous elements of the society, such as Nahdlatul Ulama (NU), Muhammadiyah, academics, and NGOs. This is significantly different from Law No.16 of 2017 which originated from Perpu Ormas that was formulated unilaterally by the government without society participation in the process, resulting in an orthodox legal product.

THE DISSOLUTION OF HIZBUT-TAHRIR INDONESIA (HTI)

After the issuance of Perpu Ormas (Government Regulation in lieu of Law No. 2 of 2017) which was subsequently passed by the Parliament into Law No. 16 of 2017, the Director General of the General Law Administration (AHU) of the Ministry of Law and Human Rights, Freddy Harris, announced the dissolution of HTI on 19 July 2017 through the revocation its legal status based on Decree of the Minister of Law and Human Rights No.AHU-30.AH.01.08 of 2017 concerning The Revocation of Decree of the Minister of Law and Human Rights No. AHU-0028.60. 10.2014 concerning The Ratification of the Establishment of a Legal Status of HTI, (http://nasional.kompas.com/read/2017/07/19/10180761/hti-resmi-dibubarkan-pemerintah).

With HTI being dissolved, consequently, it no longer has any legal rights and obligations. In other words, the dissolution forced HTI to stop practicing their freedom of association, assembly, and freedom of opinion. After the dissolution, HTI offices in several regions were closed, it did not have constitutional rights in front of the Constitutional Court as a legal entity, it was prohibited from carrying out any activities in Indonesia, and various other restrictions on their freedom. The dissolution mechanism of HTI by the government is not limited to administrative issues, but it is a form of punishment resulting in the deprivation of rights and obligations as a legal subject. In a country with the rule of law, the government should go through the judicial process in dissolving HTI if it is considered to be in conflict with Pancasila. The dissolution should not be carried out directly and unilaterally by government.

The dissolution and prohibition of mass organizations during the Reformasi period are carried out directly by the government through no judicial mechanism. The dissolution

of Hizbut-Tahrir Indonesia by the government is contrary to the rule of law because it disregards the due process of law mechanism. Government restrictions on freedom of association and assembly must be measured by considering the legitimacy and social needs of the level of restrictions on these human rights, which is the duty of the court (Bresler, 2004). In a country with the rule of law, any limitations on the rights of citizens must be carried out with regard to due process of law to guarantee the objectivity and to prevent arbitrariness of the state. The state as an entity that has legitimacy coming from the people (citizens) thus has a moral and constitutional obligations to protect the rights of its citizens.

CONCLUSION

The results of writing conducted by the authors in this study, several conclusions that can be submitted are:

- Government Regulation in Lieu of Law No.2 of 2017 (Perpu Ormas) threatens freedom of association, assembly, and opinion, which are vital elements in a democracy. Moreover, Perpu Ormas is also contrary to the rule of law, particularly in relation to the due process of law and the principle of separation or distribution of power.

If the government considers Hizbut Tahrir Indonesia (HTI) to be in conflict with the ideology of Pancasila and to threaten the security and sovereignty of the state, in a country with the rule of law like Indonesia, the government should dissolve HTI through the court as stipulated by Law No. 17 of 2013 on Mass Organizations. The government should not issue Perpu Ormas and use it to directly and unilaterally dissolve HTI.

The legal politics behind the issuance of Perpu Ormas cannot be separated from government's political interest to exercise control over its political opponents and to maintain the regime from pressures coming from its political opponents, particularly Islamic groups which are in opposition to the government..

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