

## CHAPTER FOUR

### FINDING AND ANALYSIS

#### A. Brief Description of the President Authority in Enacting the Government Regulation in Lieu of Law on Community Organization

Before discussing the President's authority in issuing the Government Regulation in Lieu of Law, the author explains the meaning of the authority. The term of authority or power is similar to "authority" in English and "*bevoegdheid*" in Dutch. Authority in Black's Law Dictionary is defined as legal power; a right to command or to act; the right and power of public officers to require obedience to their orders lawfully issued in the scope of their public duties.<sup>1</sup>

Kamal Hidjaz argues that according to the Indonesian Dictionary hereafter KKBI, the word "authority" is the right and power to act, the right and the power to make decisions, the right to govern and delegate responsibility to other persons or bodies.<sup>2</sup>

Meanwhile, according to Bagir Manan, the authority itself has the meaning of rights and obligations. The rights mean that the freedom to commit or not to perform certain acts or to prosecute individuals or groups to perform

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<sup>1</sup> Henry Campbell Black, 1990, *Black'S Law Dictionary*, West Publishing, p. 133.

<sup>2</sup>Kala Hidjaz, 2010, *Efektivitas Penyelenggaraan Kewenangan dalam Sistem Pemerintah Daerah di Indonesia*, Makassar, Pustaka Refleksi, p. 35

certain actions. An obligation means that to require individuals or groups to perform or not to take certain actions.<sup>3</sup> So, the authority is a right to perform particular action or to prosecute another individual or group, whereby within the authority there is power to make decisions, the right to govern and delegate responsibility to others, and the ability to act which is given by legislation to conduct legal capacity.

However, there are powers granted by Legislation have the legitimacy to restrict the state organizers in carrying out their duties and functions and to prevent state officials from carrying out arbitrary acts. The president in obtaining an authority has three ways to obtain authority derived from legislation that is as follows:

1. Attribution is the granting of authority by the legislator to governmental organ, either existing or new altogether.<sup>4</sup> It means that authority is attached to the organ of government that is directed to the position and authority given to the organ of government.
2. Delegation, namely the transfer of authority possessed by a government organ to another organ.<sup>5</sup> In the delegation contains a handover, i.e. the authority originally possessed by the first organ to become the second organ's authority.

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<sup>3</sup>Bagir Manan, 2000, *Wewenang Provinsi, Kabupaten, dan Kota dalam Rangka Otonomi Daerah*, Bandung, Fakultas Hukum Unpad, p. 1-2.

<sup>4</sup> Ridwan HR, 2008, *Hukum Administrasi Negara*, Jakarta, Raja Grafindo Persada, p. 104.

<sup>5</sup> *Ibid*, p. 105.

The authority granted by the delegate further becomes the responsibility of the recipient of authority.

3. Mandate is defined as a delegation of authority to subordinates. The delegation is intended to authorize subordinates to make decisions on behalf of the state administration official who mandates.<sup>6</sup>

The authority of the President to enact Government Regulation in Lieu of Law is the authority obtained by means of attribution, namely the granting of government authority directly given by the legislator to the organ of government. With the existence of such an authority, then the responsibility of the implementation of the provision is in the President as a state organ authorized directly by the 1945 Constitution of the Republic of Indonesia.

In the Indonesian constitutional system, the President has the authority in the legislative field based on the 1945 Constitution and the President as the head of state has role to support state progress. The President has authority to filed bills with the House of Representatives.<sup>7</sup> The statement supported by Article 5 paragraph (1) of the 1945 Constitution “The President shall be entitled to submit bills to House of Representatives”. Therefore, every legal product shall be approved by House of Representatives and reinforced by Article 20 Paragraph;

(1) The DPR shall hold the authority to establish laws.

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<sup>6</sup>Philipus M. Hadjon, “Tentang Wewenang Pemerintahan (*Bestuurbevoegdheid*)”, *Pro Justitia Tahun XVI*, Nomor 1, Januari 1998, p. 90.

<sup>7</sup>Abdul Ghoffar, *Op.Cit*, p. 78.

- (2) Each bill shall be discussed by the DPR and the President to reach joint approval.
- (3) If a bill fails to reach joint approval, that bill shall not be reintroduced within the same DPR term of sessions.
- (4) The President signs a jointly approved bill to become a law.
- (5) If the President fails to sign a jointly approved bill within 30 days following such approval, that bill shall legally become a law and must be promulgated.

In the Indonesian constitutional system, prior to the amendment to the 1945 Constitution, the legislative power is not only taken by House of Representative (Article 21 paragraph 1 the 1945 Constitution) but also provides the legislative power to the President (Article 5 paragraph 1 the 1945 Constitution).<sup>8</sup> Pataniari Siahaan argues;

“This provision is ambiguous, because it will lead different interpretations and lead the President to commit arbitrary action. Because of pressure from the public, the 1945 Constitution in the amendment and the authority in the legislative field are reduced”.

If viewed from the position of House of Representatives as a representative body of the people, the President cannot legalize the bills of law unless it is approved by House of Representative but it has the obligation to approve the

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<sup>8</sup>Putera Medea, “Kekuasaan Presiden RI dalam Bidang Legislatif Setelah Amandemen UUD 1945”, *Lex Administratum*, II (June,2013)

bills from the President in abnormal circumstances. This is due to the position of the President as the head of state and head of government, which is also the holder of the power to form a law based on the 1945 Constitution.

Before the amendment made the position and role of House Representative is weak and the authority of president to filed bills are reinforced by the explanation of Article 20 of the 1945 Constitution, which requires the House of Representatives to approve the bills. The House of Representatives has no choice except to approve the bills proposed by the President."<sup>9</sup> It is clear here that the authority of the President in proposing the bills is enormous before the amendment.

In running the rights and duties, the President has authority often called as “President’s Prerogative Rights”. President's prerogative rights are privilege possessed by the President to do something without seeking the approval of other institutions.<sup>10</sup> However, in the field of legislation or the formation of legislation the President must obtain approval from the House of Representatives. The prerogative rights given to the President are in the form of consequence of the legal state.<sup>11</sup>

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<sup>9</sup>Pataniari Siahaan, 2012, *Politik Hukum Pembentukan Undang – Undang Pasca Amandemen UUD 1945*, Jakarta, Konstitusi Press, p. 280

<sup>10</sup>H. Kaharudin, dkk, “Hak Prerogatif Presiden dalam Pengangkatan dan Pemberhentian Kepala Kepolisian Negara Republik Indonesia Berdasarkan UUD 1945”, *Jurnal Media Hukum*, XXIII, Nomor 2, Desember, 2016, p. 140.

<sup>11</sup>Moh. Mahfud MD, 1999, *Hukum dan Pilar-Pilar Demokrasi*, Yogyakarta, Gama Media, p. 259.

According to Bagir Manan, the President has some in legislative field. While, the authority to participate in forming laws such as Government Regulations, and Presidential Regulations is called as ordinary authority.<sup>12</sup>

On the one hand, the President has enormous rights to enact Government Regulation in Lieu of Law and the principal of requirement should be under abnormal circumstances. The 1945 Constitution is the legal basis in Indonesia. The 1945 Constitution not only regulates the duties and authorities of state institution such as executive, legislative and judiciary but also controls human rights and rights of citizen in Indonesia.

The authority of President as head of government is regulated in Article 4 paragraph (1) 1945 Constitution, "President of the Republic of Indonesia holds the power of Government accordance with the Constitution".<sup>13</sup> The 1945 Constitution has given a strong position to the President.

The President in exercising executive power also establishes legislation and powers relating to law enforcement. After the 1945 Constitution of the Republic of Indonesia was changed four times, the President's power has significant reduction. Society believes that there has been a shift in power towards the strengthening of parliamentary institutions (legislative heavy).<sup>14</sup>

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<sup>12</sup>Bagir Manan, 2003, *Lembaga Kepresidenan*, Yogyakarta, FH UII-Press, p. 153

<sup>13</sup> Article 4 paragraph (1) 1945 Constitution

<sup>14</sup>Ni'matul Huda, 2003, *Politik Ketatanegaraan Indonesia: Kajian Terhadap Dinamika Perubahan UUD 1945*, Jakarta, FH UII Press, p. 86.

After the 1945 Constitution changed for four times, the President's power as follows:<sup>15</sup>

- a. The power of government administration is the power of the President as the holder of the high power of government contained in Article 4 paragraph (1), (2) of the 1945 Constitution;
- b. The Power in the field of legislation is the power of the President to draft bill and discuss it with the House of Representatives, the authority to issue Government Regulation in Lieu of Law. Included in article 5, paragraph (1), (2), and Article 22 of the 1945 Constitution of the Republic of Indonesia;
- c. The Judicial power is the power of the President to grant pardons and amnesties that consider the Supreme Court's consideration, and in granting amnesty and abolition the President takes into account the considerations of the House of Representatives. Included in Article 14 paragraph (1), and (2) of the 1945 Constitution;
- d. The power in foreign affairs, the President has the power to enter into agreements with other countries, the power to declare war with other countries, the power to make peace with other countries, and the power to appoint and receive ambassadors and consuls. Included in article 11 paragraph (1), (2), (3), and article 13 of the 1945 Constitution;

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<sup>15</sup> Achmad Fauzi, 2007, *Hukum Lembaga Kepresidenan*, Semarang, Fakultas Hukum Universitas 17 Agustus 1945, p. 69.

- e. The power to declare state emergency, the President can declare state emergency without requiring prior approval from House of Representatives. Included in Article 12 of the 1945 Constitution;
- f. The supreme power to handle the armed force, the President has supreme authority to handle over the Army, Navy, and Air Force. Included in Article 10 of the 1945 Constitution;
- g. The President has the power to give titles and other honors. Included in Article 15 of the 1945 Constitution of the Republic of Indonesia;
- h. The President has the authority to appoint and dismiss ministers. Included in Article 17 paragraph (1), (2), (3), and (4) of the 1945 Constitution;
- i. The power to appoint, assign, or inaugurate other state officials. Included in article 23 F paragraph (1), (2) and article 24 paragraph (1), (2), and (3);
- j. The power to appoint, assign, or inaugurate other state officials. Included in article 23 F paragraph (1), (2) and article 24 paragraph (1), (2), and (3);

Thus, the authority of the President after the amendment of the 1945 Constitution has significant. It is expected to prevent abuse of authority, centralized and to create state free from corruption, collusion and nepotism.



## **B. Analysis of the Presidential Authority in Enacting Government Regulation in Lieu of Law on Community Organization**

### **1. The Consideration of President in Enacting Government Regulation in Lieu of Law on Community Organization**

President Joko Widodo signed Government Regulation in Lieu of Law Number 2 of 2017 on Community Organization at 10<sup>th</sup> July 2017 through the Coordinating Ministry for Political, Legal and Security Affairs announced the issuance of Government Regulation in Lieu of Law Number 2 of 2017 on Amendment to Law Number 17 of 2013 on Community Organizations.

The announcement of the issuance of the Government Regulation in Lieu of Law on Community Organization was explained by the Coordinating Minister for Political, Legal and Security Affairs, Wiranto in a press conference at the Coordinating Ministry for Political, Legal and Security Affairs Office, Jakarta on Wednesday at 12<sup>th</sup> July 2017.

The Coordinating Minister for Political, Legal and Security Affairs, Wiranto argues that "The role of Community Organization is crucial in many areas of life. The government and other components of the nation should support each other to achieve the ideals of independence, realizing social justice for all Indonesian people, within the framework of the Unitary State of the Republic of Indonesia

based on Pancasila national ideology and the 1945 Constitution of the State of the Republic of Indonesia.<sup>16</sup>

The Coordinating Minister for Political, Legal and Security Affairs, Wiranto also denied that the government wanted to act arbitrarily in order to organize Community Organizations, thus the issuance of Government Regulations in Lieu of Law Number 2 of 2017 on Community Organization. According to Wiranto, the government has a strong foundation to issue Government Regulation in Lieu of Law to amend Law Number 17 of 2013 on Community Organization. Wiranto also explained three government considerations in the issuance of the Government Regulation in Lieu of Law Number 2 of 2017 on Community Organization.

First, the government's actions are in accordance with the decision of the Constitutional Court Number 138 / PUU-VII / 2009. "The President can issue its regulation based on the basis of compelling crisis situations to resolve legal issues quickly under the Law

Secondly, there are terms of due to inadequate regulations. According to Wiranto, its regulation can be issued to provide a solution to avoid a vacuum of law. "The required law does not exist in previous legislation so there is vacuum of law and there is a law but is not sufficient to resolve legal issues.

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<sup>16</sup>Fabian Januarius Kuwado, Ini Tiga Pertimbangan Pemerintah Menerbitkan Perppu Ormas, 12<sup>th</sup> July 2017 taken from <https://nasional.kompas.com/read/2017/07/12/12232051/ini-tiga-pertimbangan-pemerintah-menerbitkan-perppu-ormas> accessed on 16<sup>th</sup> March 2018, at 2:59 a.m.

Thirdly, the Government Regulation in Lieu of Law can be issued if the vacuum of law can not be overcome except with amend or make a new regulation.

Government Regulation in Lieu of Law Number 2 of 2017 on Community Organization contains the principle of *contrario actus*, the institution that gives permission and legalizes the organization granted the right and authority to revoke the permit at the time the organization concerned violate the provisions that apply when given permission. Previously, it has not been regulated in Law Number 17 of 2013 on Community Organization. In addition, the principles of *contrario actus* there are several reasons the government to issue Government Regulation in Lieu of Law number 2 of 2017 on Community Organization. The reason as follows:

- a. As the legal basis of the government to protect the whole nation and state;
- b. To prevent actions that violate public interest committed by Community Organization which have activities in all fields, both at the national and local levels, should be empowered and maintained;
- c. Law Number 17 of 2013 community organization urges immediate change because it has not been regulated comprehensively about community organizations that conflict with Pancasila and the basic law of the republic of Indonesia so here is a vacuum of law in the effective implementation of sanctions;
- d. To apply the principle of *contrario actus* is the legal principle that the institution issuing the permit or give the authority to institution they have

rights to revoke or cancel the permit it's institution which is does not contain in Law Number 17 of 2013 on Community Organization;

- e. To dissolve Community Organizations that adhere to the teachings and acts contrary to Pancasila is narrowly defined that is only limited to the teachings of Atheism, Marxism and Leninism, whereas Indonesian history proves that other teachings can also and against the Pancasila.<sup>17</sup>

Government Regulation in Lieu of Law is the legal basis for the government to be more flexible in guaranteeing, empowering and fostering Community Organizations. The existence of the principle of *contrario actus* which means authorized institution gives permission and legalize the organization is given the right and authority to revoke the permit when the community organization concern to be contrary with the ideology of state violate the applicable law.

The objectives and activities of community organization should be focus more on the scope of humanitarian social activities but nowadays evolving in other life activities. The existences of the development causes the internal conflict in community organization, conflicts between community organization and even friction between Community Organization with other community components and misuse the function of Community Organization itself.<sup>18</sup> It is the

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<sup>17</sup> Kominfo, Pemerintah Keluarkan Perppu No. 2/2017 tentang Perubahan atas Undang-Undang Ormas, 13<sup>th</sup> July 2017, [https://kominfo.go.id/index.php/content/detail/10094/pemerintah-keluarkan-perppu-no-22017-tentang-perubahan-atas-undang-undang-ormas/0/artikel\\_gpr](https://kominfo.go.id/index.php/content/detail/10094/pemerintah-keluarkan-perppu-no-22017-tentang-perubahan-atas-undang-undang-ormas/0/artikel_gpr), accessed on April 18<sup>th</sup> 2018 at 2:36pm.

<sup>18</sup>Kementerian Dalam Negeri, "Ini Landasan Sosiologis Dikeluarkannya Perppu Ormas", 17<sup>th</sup> October 2017, <http://www.kemendagri.go.id/news/2017/10/17/ini-landasan-sosiologis-dikeluarkannya-perppu-ormas>, accesed on 8<sup>th</sup> November 2017 at 4.54 a.m.

purpose of government that wants to overcome and prevent, the government regards the control of social order will be realized.

In formal jurisdiction, the issuance of Government Regulation in Lieu of Law Number 2 of 2017 on Community Organization is the prerogative right of the President. The enacting Government Regulation in Lieu of Law on Community Organization is a form of government efforts to eliminate radicalism which threatening the unitary of state by a number of Community Organizations.

Radicalism demands fundamental changes in accordance with its interpretation of social reality and ideology to be applied. In this case, radicalism is an act of violence, extreme, and anarchist as form of rejection by the individual/groups.<sup>19</sup>

The radicalism group is in contradiction with Indonesian government and forces its view, refuses to sing the national anthem, and refuse to honor the flag of Merah Putih.<sup>20</sup>

The content of Government Regulation in lieu of Law on Community Organization is related to the prohibition and sanction against Community Organizations in Indonesia. The details of Government Regulation in Lieu of

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<sup>19</sup>Ismail Hasanidan Bonar Tigor Naipospos, 2010, *Radikalisme Agama di Jabodetabek & Jawa Barat: Implikasinya terhadap Jaminan Kebebasan Beragama/Berkeyakinan*, Jakarta, Pustaka Masyarakat Stara., p. 19.

<sup>20</sup>Ahmad Syafi'I Mufid, *Peta Gerakan Radikalisme Di Indonesia*, Makalah Presentasi Workshop Membangun Kesadaran dan Strategi Menghadapi Radikalisasi Agama, Palu, 22<sup>nd</sup> May 2012.

Law Number 2 of 2017 on Community Organization in Article 59 are amended to read as follows:

1. In paragraph 1 Community Organization are prohibited to:
  - a. Use the same name, symbol, flag, or attribute with the colors, emblems, flags, or attributes of government institutions;
  - b. Use without permission the name, emblem, flag of another country or international institution / body becomes the name, symbol, or flag of the Community Organization; and
  - c. Use names, symbols, flags or markings which have their essence in common or in their entirety with the names, symbols, flags or signs of other Community Organization or political parties.
2. In Paragraph 2 Community Organization are prohibited to:
  - a. Receives from or give to any party donations of any kind that are contrary to the provisions of the laws and regulations; and
  - b. Accepts funds from political parties.
3. In paragraph 3 Community Organization are prohibited to:
  - a. Committed hostility towards a tribe, a religion, a race, or a class;
  - b. Commit abuses, defamation, or blasphemy of religion held in Indonesia;

- c. Commit violence, disrupt public interest and peace, or damage public facilities and social facilities; and
  - d. Carry out activities which are the duty and authority of law enforcement in accordance with the provisions of legislation.
4. In paragraph 4 Community Organization are prohibited from:
- a. Using names, symbols, flags, or organizational symbols that have the same or substantial equivalent with the names, symbols, flags or symbols of the organization of separatist movements or forbidden organizations;
  - b. Involved in separatist activities that threaten the sovereignty of the Unitary State of the Republic of Indonesia; and
  - c. Following, developing, and disseminateing the teachings or understandings that contradict with Pancasila.

Government Regulation in Lieu of Law Number 2 of 2017 on Community Organization Article 60 regulates:

1. In paragraph 1 regulate Community Organizations that violate the provisions referred to in Article 21, Article 51, and Article 59 paragraph (1) and paragraph (2) shall be subject to administrative sanctions
2. Community Organizations that violate the provisions referred to in Article 52 and Article 59 paragraph (3) and paragraph (4) shall be subject to administrative sanctions and / or criminal sanctions.

Government Regulation in Lieu of Law Number 2 of 2017 on Community Organization also regulates Article 61 as follows:

1. The administrative sanctions as referred to in Article 60 paragraph (1) consist of:
  - a. Written warning;
  - b. Cessation of activities; and
  - c. Revocation of registered certificate or revocation of legal entity status.
2. Against Community Organization established by foreign nationality as referred to in Article 43 paragraph (2), in addition to administrative sanctions as referred to in paragraph 1, point a and b shall also be subject to immigration sanctions in accordance with the provisions of laws and regulations.
3. The administrative sanctions as referred to in Article 60 paragraph (2) shall be in the form of:
  - a. Revocation of certificate registered by the Minister; or
  - b. Revocation of legal entity status by minister who carries out government affairs in the field of law and human rights.
4. In the revocation as referred to in paragraph (3), the Minister of Legal Affairs in the field of law and human rights may request the consideration of the relevant authorities.



Government Regulation is in Lieu of Law Number 2 of 2017 on Community Organization provisions. The provisions of Article 62 are amended to read as follows:

1. The written warning as referred to in Article 61 paragraph (1) is given only 1 (one) time within 7 (seven) working days as of the date of issuance of the warning.
2. In the event that Community Organizations do not comply with the written warning within the period referred to in paragraph (1), the Minister and the minister holding legal affairs in the field of law and human rights in accordance with their authority shall impose sanctions for termination of activities.
3. In the event that Community Organizations do not comply with the sanction of termination of activities as referred to in paragraph (2), the Minister and the minister holding legal affairs in the field of law and human rights in accordance with their authority to revoke the registered certificate or revocation of legal entity status.

In addition, based on Government Regulation in Lieu of Law, Community Organizations whose legal status are revoked as well as declared to be dissolved, namely the sounding of Article 80A "The revocation of the status of a legal entity as referred to in Article 61 Paragraph (1) letter c and paragraph (3) letter b at the

same time declared dissolved under the Government Regulation in Lieu of this Law".<sup>21</sup>

Roberto M.Unger argues that the public life process that the public desires is empowered democracy and the development of transformative politics, a planned activity undertaken on the basis of "the protection of individual rights, through destabilizing methods against undemocratic legal structures or systems".<sup>22</sup> If the people's sovereignty is respected, all political issues and community organization can be resolved through deliberation, then the atmosphere of the state life can be said to be democratic.

Thus, the allegation of the issuance of Government Regulation in Lieu of Law Number 2 of 2017 on Community Organization is a form of tyranny of power, it can be ignored the true democracy of the Indonesian style is what we crave together. Sudjito argues that community and the government play an important role in the enactment of Government Regulation in Lieu of Law Number 2 of 2017 on Community Organization, the enacting its regulations does not cause negative implications at all, in some fields will give benefits for state as follows:

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<sup>21</sup> Government Regulation in Lieu of Law Number 2 of 2017 on Community Organization

<sup>22</sup>Roberto M.Unger, 1976, "*Law and Modern Society: Toward a Criticism of Social Theory*", The Free Press, p. 11.

1. Differences of interests between political parties, Community Organizations and other related parties shall be discussed openly and intensively. With the spirit of national tolerance based on the motto of Bhineka Tunggal Ika, different interests need to be managed and controlled together through deliberation to prevent splits and conflicts;
2. Government Regulation in Lieu of Law Number 2 of 2017 or other legislation governing Community Organizations at the level of concept, implementation and law enforcement need to be addressed critically, so that the dominance of elite political power or confrontational attitude of others to him, can be controlled and harmonized with the constitutional rights of every citizen.
3. In this era of reformation, political turbulence is a phenomenon that continues to threaten the wholeness of the life of the nation.<sup>23</sup>

The hot issue of Government Regulation in Lieu of Law Number 2 of 2017 needs to be addressed critically and wisely, with high tolerance, value of Pancasila.<sup>24</sup> It is expected to not challenge or replace Pancasila with other ideologies and did not use Pancasila for political purposes.

The Chairman of the Department of Law Republics Political Institute, Fathuddin Kalimas who considered that without any restrictions through Government Regulation in Lieu of Law then the existence of identity politics will continue to strengthen. Further identity of politics will further enhance the notion

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<sup>23</sup> Sudjito, "Memaknai Perbedaan", Analisis KR, Kedaulatan Rakyat ,on 8<sup>th</sup> August 2017

<sup>24</sup>Sudjito, "Toleransi Kontekstual", Opini ,Kedaulatan Rakyat, on 29<sup>th</sup> September 2017

of extremism and radicalism in the community. Such unlimited freedom would be a threat to democracy.

If such a situation is not addressed, it is feared to undermine the concept of a unitary state that has been agreed upon by the founders of the nation. However, the counter party regards the presence of Government Regulation in Lieu of Law is considered as the authoritarian attitude of the government and hampers the freedom of the common people. Community Organization as an organization<sup>25</sup> serves as a means of public participation in the development of the nation and state, which therefore should not be prohibited. Thus, the content of the rules in the Government Regulation in Lieu of the Law on Community Organization which allows the government to revoke the Ordinary Organs of the Community without going through a court process is considered to have injured the democracy itself.

Government Regulation in Lieu of Law is assumed in contradictory with the principle of state, democracy. After raising the pros and cons, in the end, Government Regulation in Lieu of Law was brought to the House of Representatives to be decided to become Law or not.

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<sup>25</sup>Hari Budiyanto, Dkk. (2008), Organisasi Sosial, Seminar FKIP UMS Surakarta, taken from <http://www.scribd.com/doc/9406552/Organisasi-Sosial-Masyarakat>, accessed on October 23<sup>rd</sup> 2017, p.10.

## **2. Critical Analysis on the Constitutional Basis of the Issuance of the Government Regulation in Lieu of Law Community Organization**

Before the enacting Government Regulation in Lieu of Law Number 2 of 2017 on Community Organization The dissolution of Community Organizations can only be done after a verdict of permanent legal force from the District Court. Against this District Court Decision can only be applied to the Supreme Court appeal. While the revocation of organizations in the form of legal entities for Community Organizations with legal entities conducted by the Ministry of Justice and Human Rights.<sup>26</sup>

The issuance of Government Regulation in Lieu of Law Number 2 of 2017 on Community Organization amendment Law Number 17 of 2013 on Community Organization raises responses from various parties. According to the Chairman of the Council of Islamic Da'wah Indonesia (DDII), Mohammad Siddik argues that currently no crisis situations that force the Government Regulation in lieu Law have to be issued and enacted to be Law. According to him, there is no real threat like war or riots that endanger the state.<sup>27</sup>

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<sup>26</sup>Imas Sholihah, "Menyoal Organisasi Kemasyarakatan (ormas) Anti-Pancasila", *Jurnal Rechtsvinding*, I, (June, 2016), p. 1.

<sup>27</sup> Debora Sanur L, "Pengesahan Perppu tentang Organisasi Masyarakat menjadi Undang-Undang dalam Perspektif Politik", *Majalah Info Singkat Pemerintahan Dalam Negeri*, IV (October, 2017)

Therefore, the issuance of Government Regulation in Lieu of Law will be raise new problems from the people who assume Government Regulation in Lieu of Law this is a restriction on the right of the community to associate and assemble in accordance with Article 28 of the 1945 Constitution.<sup>28</sup>

Representative of PP Muhammadiyah, Iwan Satriawan, stated that the issuance of Government Regulation in Lieu of Law on Community Organization does not conform to Article 22 of the 1945 Constitution of the State of the Republic of Indonesia. In addition, there is no fundamental reason for the crunch of force. Government Regulation in Lieu of Law on Community Organization is considered to violate the principle of check and balance in the state because it has eliminated the role of judicial institution in the process of revocation of a legal body of a Community Organization.<sup>29</sup>

Government Regulation in Lieu of Law is one form of legitimate legislations in Indonesia. In the perspective of critical legal review,<sup>30</sup> all legislation including the Government Regulation in Lieu of Law is never neutral because the formation of Government Regulation in Lieu of Law was made by interest and the favor of strong and powerful parties. The issuance of Government

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<sup>28</sup> Article 28E paragraph 3 the 1945 Constitution explained “Each person has the right to freely associate, assemble, and express his opinions”.

<sup>29</sup> *Ibid*

<sup>30</sup> Sudjito, Sudjito, “Chaos Theory of Law: Penjelasan Atas Keteraturan dan Ketidakteraturan Dalam Hukum”, *Mimbar Hukum*, Volume XVIII, Nomor 2, Juni 2006, p.169

Regulation in Lieu of Law Number 2 of 2017 on Community Organization is an attempt to rationalize and legitimize the actions of ruling elites against other parties which considers to "disturb" its political interests. Hizbut Tahrir Indonesia hereafter HTI or other similar Community Organizations, can be classified as such other parties.<sup>31</sup>

The authority of President in enacting Government Regulation in Lieu of Law on Community Organization is to prevent radicalism in Indonesia. The legal basis of the enacting Government Regulation in Lieu of Law regulates in Article 22 paragraph 1 the 1945 Constitution.

“In compelling crisis situations, the President shall have the right to issue Government Regulations in Lieu of Law”.

Nevertheless, there is no specific explanation what kind of compelling crisis situation in Article 22 paragraph 1 of the 1945 Constitution for the President to issue Government Regulation in Lieu of Law or in other words the President may issue Government Regulation in Lieu of Law only based on the subjectivity of the President.<sup>32</sup> This uncertainty often leads to be multi-

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<sup>31</sup>*Ibid*

<sup>32</sup>Article 22 paragraph (1) 1945 Constitution

interpretation because this article does not clearly regulate the form of compelling crisis situation.

With the unclear explanation of compelling crisis situations in Article 22 paragraph 1 of the 1945 Constitution which does not clearly explain the element compelling crisis situations for the President to issue Government Regulation in Lieu of Law creates various polemic and assumption that, its regulation could be as the tools for President to play a role as the head of government to abuse of his authority with the enacting Government Regulation in Lieu of Law or at least to fulfill his political interests as the decision makers of its regulations to make strength his position as the President.

Jimly Asshiddiqie as the Constitutional Expert in Indonesia argues there are at least three criteria of compelling crisis situations as follows:<sup>33</sup>

1. Dangerous threat
2. Reasonable necessity
3. Limited time

Three elements are requirement for the President to issue Government Regulation in Lieu of Law, there should be a crisis situation need to act (reasonable necessity), the time available is limited (limited time) or crisis of

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<sup>33</sup>Jimly Asshiddiqie, 2007, *Hukum Tata Negara Darurat, Jakarta, Rajawali Pers*, p. 207.



time, and there are no available alternatives or pursuant reasonable (beyond reasonable doubt) that are not expected to be able to overcome the circumstances that occur, so the only way is to issue a Government Regulation in Lieu of the Law.<sup>34</sup>

According to an other expert, Bagir Manan, the element of compelling crisis situations should show two characteristics, namely crisis situations (crisis), and emergency situations (emergency). A situation called as crisis situation, if there is a grave and sudden disturbance. Whereas if urgent circumstances, there are various circumstances that can not be calculated before and demand an action immediately without waiting for consultation first.<sup>35</sup> According to Bagir Manan, as explained by Ni'matul Huda:<sup>36</sup>

“If observe the significance of the crisis and the emergency, a state of compelling crisis situations exists only when there is in fact a disturbance that causes crisis situation to be dealt with immediately without waiting for consultation. In this sense the criteria should be reasonable and if not regulate soon it will cause disruption both for government and society.”

So far in the practice of state administration, the opinion of the two figures mentioned above have been used as the benchmark/measure in the practice of state administration in Indonesia to explain the conditions for the President to issue Government Regulation in Lieu of Law.

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<sup>34</sup> *Ibid*

<sup>35</sup> Bagir Manan, *Lembaga Kepresidenan*, Op.Cit., p. 153.

<sup>36</sup> *Ibid*. See Ni'Matul Huda, “Pengujian Peraturan Pemeirntah Pengganti Undang-Undang oleh Mahkamah Konstitusi (Studi terhadap Perppu No. 4 Tahun 2009 dan Perppu No. 4 Tahun 2008”, *Jurnal Konstitusi*, Volume 7, Nomor 5, Oktober 2010, p. 76.

However, in 2009, a new norm has emerged that sets objectively as the parameters or conditions for the President to issue Government Regulation in Lieu of Law. This arises because there is a request for judicial review from 13 applicants (Saor Siagan, SH, et al) to the Constitutional Court.

The object of judicial review is in the case of the enacting Government Regulation in Lieu of Law Number 4 of 2009 on Amendment to Law Number 30 of 2002 on the Corruption Eradication Commission which is considered to be contradictory to Article 22 paragraph (1), Article 28D, Article 9 of the 1945 Constitution of the Republic of Indonesia. One point of legal consideration of the Constitutional Judges states that the Government Regulation in Lieu of Law is required if:<sup>37</sup>

1. The existence of a situation that is an urgent need to solve legal problems quickly based on the law;
2. The required legislation is not available so there is a vacuum of law, or there is a law but is inadequate;
3. The vacuum of law cannot be solved by making the law in a normal procedure because it will take a long time while the emergency circumstances need legal certainty to be resolved.

Based on Constitutional Court Decision point 3.9 Number 138/PUU-VII/2009:

"In the event of a vacuum of the Law due to various matters so that the matter of the Law can not be processed to become Law in accordance with the procedures or applicable provisions in the making of Law and

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<sup>37</sup>See point 3.10 dalam Putusan Mahkamah Konstitusi Nomor 138/PUU-VII/2009.

in this case happen emergency situations and conditions and need require rule of law. So, in this case the Law is needed to be immediately used to overcome the problems caused by the vacuum of Law, the Article 22 of the 1945 Constitution provides enormous authority to the President to issue Government Regulation in Lieu of Law.

If the enactment of Law used to fulfill vacuum of law with carry out normal procedures, it will take a long process to the President for draft bills which is regulate in Article 5 paragraph 1 of 1945 Constitution. It will take a long time, starting from submission of draft Bill by the Parliament or by The President until the enactment. So, the emergency situations can not solve quickly.

Based on Constitutional Court Decision Number 138/PUU-VII/2009, the determination of the conditions for the President to enact Government Regulation in Lieu of Law is based on judicial decision not only through doctrine. With this change, the consequences emerge new norms that changes of the norm mentioned in Article 22 of the 1945 Constitution of the Republic of Indonesia. Thus, it can be said that there is a change of the Constitution without going through Article 37 of the 1945 Constitution of the Republic of Indonesia but through judicial practice.<sup>38</sup>

The absolute authority of the President to interpret the meaning of "compelling crisis situations" are enormous, but today the absolute authority of the President which previously subjective becomes objective because there is

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<sup>38</sup> See Article 37 of the 1945 Constitution

another cumulative provision for the President which is determined by the Constitutional Court as mentioned above.<sup>39</sup>

With the stipulation of the conditions for the President in making the Government Regulation in Lieu of Law on the one hand has provided legal certainty in the enactment of Government Regulation in Lieu of Law is expected to the President do not perform action outside of his authority and it will tighten the authority of the President in determine compelling crisis situations.

However, in spite of this, the President in issue Government Regulation in Lieu of Law is expected to pay attention and consider to certain conditions as the parameters that have been determined by both doctrine and constitutional court decision. In order for the President to exercise his authority remains on the right way and must be in accordance with regulation and not arbitrarily as a form of responsibility to citizens.

The government shall be considers and ensures the rights of citizens to associate, assemble and organization can be well protected, in accordance with Article 22 of the 1945 Constitution.<sup>40</sup> Community basically has the right to get freedom of association, assembly and organization, so that the dissolution of community organizations according to Law Number 17 of 2013 on Community Organizations takes a long process and flows through the courts.

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<sup>39</sup>Ibnu Sina Chandranegara, "Pengujian Perppu terkait Sengketa Kewenangan Konstitusional antar-Lembaga Negara" *Jurnal Yudisial*, Volume 5, Nomor 1, April 2012, p. 3

<sup>40</sup> See Article 22 of the 1945 Constitution.

The issuance of Government Regulation in lieu of Law on Community Organizations law is supposed to respond to the strengthening of identity politics today. The Government Regulation in Lieu of Law on Community Organization will ultimately be used to silence critical Community Organizations against the government, and to dissolve Community Organizations without going through the judicial process.<sup>41</sup>

The government decided to dissolve and prohibit the activities undertaken by Community Organizations. Coordinating Minister for Political, Legal and Security Affairs, Wiranto saying that the decision has passed a long process of study and it has been in accordance with the Law and in accordance with the ideology of the state is Pancasila.<sup>42</sup>

The dissolution of Community Organizations that caused a clash in the community, the government needs to absorb the aspirations and respond to issues that develop in the community by doing an action. So, in this case, the government needs to absorb the public aspirations of both religious organizations and Community Organizations based on nationalism. In the case of the issuance of Government Regulation in Lieu of the Law on Community Organization, the

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<sup>41</sup>Debora Sanur L, "Pengesahan Perppu tentang Organisasi Masyarakat menjadi Undang-Undang dalam Perspektif Politik", *Majalah Info Singkat Pemerintahan Dalam Negeri*, IV (October, 2017)

<sup>42</sup>Kristian Erdianto, "Ini Alasan Pemerintah Bubarkan Hizbut Tahrir Indonesia", May 8<sup>th</sup>2017 <https://nasional.kompas.com/read/2017/05/08/14382891/ini.alasan.pemerintah.bubarkan.hizbut.tahrir.indonesia>, accessed on February 18<sup>th</sup> 2107 at 2:18 p.m.

government's assessment of the representation of the public only sees from one party, in which it is the majority group of Muslims in the country of Indonesia.<sup>43</sup>

In the process of issuing and enacting Government Regulation in Lieu of Law on Community Organization uses long process. House of Representatives conducts vote system to enact Government Regulation in Lieu of Law on Community Organization is a form of democracy in Indonesia. With the voting process that is still running well in decision making in the House of Representatives to establish Government Regulation in Lieu of the Law is a form of Indonesia is still a democratic state.<sup>44</sup>

With the enactment of Government Regulation in Lieu of Law on Community Organization, the government is expected to protect state in line with the implementation of the regulations itself in order to achieve its objectives. One the other hand, the Government should also be able to take responsibility in issuing, enactment and implementing Government Regulation in Lieu of Law on Community Organization to solve the problem between pros and contra by implementing its regulation properly.

In order to fulfill the government's obligation to carry out democratic state, it is necessary for the government to absorb the aspirations of the community which contains the aspirations of some community groups on the same issue which to represent the public will. It is appropriate to the conception of a

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<sup>43</sup> *Ibid*

<sup>44</sup> *Ibid*

democratic state that leaves not giving space for the behavior of governments that leads to authoritarianism.

There are some community organization which was filed judicial review to revoke Government Regulation in Lieu of Law Number 2 of 2017 on Community Organization. The seven applicants were Hizbut Tahrir Indonesia (HTI) through spokesman Ismail Yusanto, Advokat Cinta Tanah Air (ACTA), Dewan Pengurus Pusat Aliansi Nusantara, Advokat Afriady Putra, Yayasan Sharia Law Alqonuni, Pusat Persatuan Islam, and Advokat Eggi Sudjana. However, the Constitutional Court has declared that does not accept judicial review by those seven applicants concerning Government Regulation in Lieu of Law Number 2 of 2017 on Community Organization<sup>45</sup>

The judge stated that the provisions of the Government Regulation in Lieu of Law on Community Organization have been approved as the Government Regulation in Lieu of Law to amendment Law Number 17 of 2013 on Community Organization by President Joko Widodo. So, the applicants lose the object of the petition. The rejection suggests that many communities are threatened by the existence of Government Regulation in Lieu of the Law. According to Drajat Tri Kartono (Sociologist from Universitas Sebelas Maret),

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<sup>45</sup>Sudjito, "Chaos Theory of Law: Penjelasan Atas Keteraturan dan Ketidakteraturan Dalam Hukum", *Loc, Cit.*

the emergence of Government Regulation in Lieu of Law contains elements of conflict where the government is more dominant in take control over the State.<sup>46</sup>

Government Regulation in Lieu of Law as the form that President wants to control citizens or groups who are considered "opponents" of politics. This is marked with the dissolution of Community Organization without the process of court system<sup>47</sup>

The impact of the enactment of Government Regulation in Lieu of Law on Number 2 of 2017 on Community Organization is horizontal conflict among Community Organization. These social conflicts include the call for a boycott of political parties supporting the adoption of Government Regulation in Lieu of Law. The call at a certain point can lead to radicalism and friction in society.

The dismissal of religious events by certain Community Organization without a clear foundation is also a marked as impact of the enactment the Government Regulation in Lieu of Law Number 2of 2017 on Community Organization. In addition, the banning of religious scholars and the prohibition of religious activities by certain Community Organization is also an impact of its publication of Government Regulation in Lieu of Law. So, the tranquility, peace in religious life, nation and state become a problem. Satjipto Rahardjo argues,

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<sup>46</sup> *Ibid*

<sup>47</sup> Aan, Syaf, "Sosiolog UNS: Sejak Awal Perppu Ormas Bawa Muatan Konflik Sosial", accessed from <http://www.voa-islam.com/read/politik-indonesia/2017/07/24/52189/sosiolog-uns-sejak-awal-perppu-ormas-bawa-muatan-konflik-sosial/#sthash.PXbe2HFP.dpbs>, on November 8<sup>th</sup> 2017 at 5:33 a.m.



people play with the rules and procedures, not run the law to achieve prosperity and justice.<sup>48</sup>

The dynamics of life that occur in Indonesian society today can be taken a valuable lesson for the government to use its power based on the mandate that has been entrusted to him, which protects the whole nation, and the entire blood of Indonesia. Related to it is issue, Sudjito, also conveys his suggestion that all elements of the nation need to be wise, critical and high tolerance based on the values of Pancasila in responding to the formation of Government Regulation in Lieu of Law on Community Organization.

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<sup>48</sup>Sudjito, “Membaca Kepentingan Politik di Balik Perppu Ormas dan Implikasi Sosiologisnya pada Masyarakat” in Seminar Nasional bertema “QUO VADIS PERPPU ORMAS”, Tinjauan Kritis Dari Perspektif Sosio-Politik, Hukum dan HAM at Oktober 19<sup>th</sup> 2017.