

## CHAPTER TWO

### LITERATURE REVIEW

#### A. President Authority

The constitutional law expert explains the authority of President is divided into several categories. Ismail Sunny said that the authority of the President based on 1945 Constitution is divided into several categories:

1. Authority in administrative field;
2. Authority in legislative field;
3. Authority in judicial field;
4. Authority in diplomatic field; and
5. Authority in emergency field.<sup>1</sup>

The highest responsibility of government in Indonesia is held by President. The strong position of President shall be based on Constitution as regulated in Article 4 paragraph (1) the 1945 Constitution of the Republic of Indonesia which stipulates that: "The President of the Republic of Indonesia shall hold the power of government in accordance with the Constitution".<sup>2</sup>

Every country in the world has a different constitution, some have written or unwritten Constitutions. The function of the constitution is to

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<sup>1</sup>Ismail Sunny, 1986, *Pergeseran Kekuasaan Eksekutif*, Jakarta, CV Calindra, P.28

<sup>2</sup>Siti Marwiyah, Sudarsono, Isrok, Jazim Hamidi, "Constitutional Authority of The President of Enacting the Government Regulation In Lieu Of Legislation of State of Emergency", *Journal of Law, Policy and Globalization*, XXXIV (2015), P.106

prevent the absolute power that is the accumulation of power in one person or institution/agency.<sup>3</sup>

The authority of President in modern state is based on the Constitution prevailing in that country. Since independence until now the Indonesian people have changed the constitution several times. Starting from the 1945 Constitution (Period of 18 August 1945 – 27 December 1949), the Constitution of the United States of Indonesia (Period of 27 December 1949 – 17 August 1950), Provisional Constitution (Period of 17 August 1950 - 5 July 1959), returned to the 1945 Constitution Presidential Decree (Period of 1959-1971), 1945 Constitution (Period of 1971 - 1999), and last of the 1945 Constitution (Period of 1999 – 2002).<sup>4</sup>

Before the amendment of the 1945 Constitution, there was considerable authority of the President, then the abused of authority and corrupt government during the time of President Soekarno and President Soeharto could not be avoided. Consequently, the amendment of the 1945 Constitution was made.<sup>5</sup>

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<sup>3</sup>Aldri Frinaldi dan Nurman S, “Perubahan Konstitusi dan Implikasinya pada Perubahan Lembaga Negara”, *Jurnal Demokrasi*, IV (2005), p. 9.

<sup>4</sup>JazimHamidi, 2010, *Hukum Lembaga Kepresidenan Indonesia*, Bandung, PT Alumni, p.53

<sup>5</sup>Moh. Mahfud.MD, 1993, *Demokrasi dan Konstitusi di Indonesia*, Yogyakarta, Liberty, p. 6.

## B. State Emergency Law

In normal circumstances, the system of legal norms must be enforced under applicable laws and regulations to regulate various aspects relating to the implementation of activities in daily life. However, it will be possible that there will be other abnormal circumstances in which the legal system cannot be used effectively in realizing the goal itself. Abnormal circumstance here is referring to the prevailing legal system that cannot realize the effectiveness of legal system.<sup>6</sup>

State Emergency Law is a regulation governing the authority of state institutions in extraordinary and special way to eliminate emergencies or dangerous in a short time to be applied in everyday life to create welfare of the state under the regulations and applicable laws.<sup>7</sup>

In Indonesia the law of emergency is divided into two categories; subjective and objective Law.

1. Subjective State Law in Dutch terms called as *subjective staatsnoodrecht*, in the subjective meaning is the right of the state to act in a state of emergency or abnormal circumstance by way of deviating from the provisions of the Law.

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<sup>6</sup>Jimly Asshidiqie, 2007, *Hukum Tata Negara Darurat*, Jakarta, PT. RajaGrafindoPersada, p.1.

<sup>7</sup>Herman Sihombing, 1996, *Hukum Tata Negara Darurat di Indonesia*, Jakarta, Djambatan, p. 1.

2. Objective in Dutch terms called as "*objective staatsnoodrecht*" in the sense objective is the law applicable in the period of the state in the event of an emergency.<sup>8</sup>

The subject of hazards and state emergency are the basis of the President to take action in issuing Government Regulation in Lieu of Law in Indonesia, in order to safeguard the interests of the nation and state as regulated in the 1945 Constitution which contains in Article:<sup>9</sup>

1. Article 22 Paragraph 1 of the 1945 Constitution states that, "In compelling crisis situations the President shall have the right to issue government regulations in Lieu of Law"
2. Article 12 states of the 1945 Constitution states that, "The President declares the state of emergency. The conditions and consequences of a state of emergency shall be regulated by Law"

Based on the above provisions, it can be seen that there are two categories of abnormal circumstances from state of emergency. The first one is state of emergency or abnormal circumstances and the second one is the matter of compelling crisis situations. Both have the same meaning as emergencies in state emergency, but both have differences in emphasis that the terms state of emergency has more emphasis on the structure (external

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<sup>8</sup>Jimly Asshiddiqie, Op.Cit, p. 111.

<sup>9</sup>*Ibid*, p.25

factors) while the matter compelling crisis situations put more emphasis on the contents (internal factors).<sup>10</sup>

Bagir Manan said that the element of "emergency conditions" should be shown two general characteristics: there are crises and emergencies. The state in the disturbance causes the crisis and must be resolved in the state of emergency. Emergency overwhelmed various circumstances that cannot be calculated.<sup>11</sup>

In the enacting Government Regulation in Lieu of Law, there should be clear consideration by the President to prevent abuses his authority to enact the Government Regulation in Lieu of Law.<sup>12</sup> According to Jimly Asshiddiqie, Government Regulation in Lieu of Law as emergency law based on the 1945 Constitution is a legal product that has position as strong as the Law. In terms of form Government Regulation in Lieu of Law is a Government Regulation, but in terms of its contents Government Regulation in Lieu of Law is identical with the Law.

So, Government Regulation in Lieu of Law can be referred as the Law. As legal product Government Regulation in Lieu of Law should be

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<sup>10</sup>M. Syarif Nuh, "Hakekat Keadaan Darurat Negara (State of Emergency) sebagai Dasar Pembentukan Peraturan Pemerintah Pengganti Undang-Undang", *Jurnal Hukum*, XVIII (June, 2011), p. 233.

<sup>103</sup>Jimly Asshiddiqie, Loc. Cit. p. 112.

<sup>11</sup>Bagir Manan, 2006, *Lembaga Kepresidenan*, Yogyakarta, UII Press, p.155

<sup>12</sup>Abdul Ghoffar, Op.Cit., p.103

supervising by House of Representative to prevent abuse of authority by authorized institution.<sup>13</sup>

### **C. Community Organization**

Community organizations have an important role in the pillars of democracy to create a strong civil society and able to fight for people's rights in the life of the state in Indonesia. Community Organizations are organizations founded by individuals or groups on a voluntary basis that aim to support and sustain public activities or interests without the intention of taking financial advantage. Community organizations are legal organizations according to laws that work independently without any dependence from the government, or at least the influence of the government is not given directly.<sup>14</sup>

There are many community organizations established both national and international in order to create prosperity of the society. There are several types of community organizations are formed such as Non-Governmental Organizations, Social Foundations, Religious Organizations, Youth Organizations, and Organizations based on the Profession.<sup>15</sup>

Citizens have the freedom to union, assemble, and express opinions.

The freedom of association and assembly and expression are known as the

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<sup>13</sup>Jimly Asshiddiqie, 2010, *Perihal Undang-Undang*, Jakarta, RajawaliPers, p.83

<sup>14</sup>Ari Ganjar Herdiansah, Randi, "Peran Organisasi Masyarakat (ORMAS) dan Lembaga Swadaya Masyarakat (LSM) dalam Menopang Pembangunan di Indonesia", *Sosioglobal: Jurnal Pemikiran dan Penelitian Sosiologi*, I (Desember 2016), p.1.

<sup>15</sup>*Ibid*

three fundamental freedoms that are part of the concept of human rights it is guaranteed by the 1945 Constitutions. Community organization is a form that rights of citizen to union and assembly are fulfilled by the State.<sup>16</sup>

Community organization aims to deliver opinions and thoughts of citizens and it has an important role in increasing the active participation of all levels of society in implementing the value of Pancasila and the 1945 Constitution in order to ensure the strengthens of national unity and to ensures the achievement of national goals to create welfare state.<sup>17</sup>

In Indonesia, the sustainability of Community Organizations has been regulated in the constitution and the legislation system. Article 28 of the 1945 Constitution that “Every citizen has liberties of association and assembly, the freedom of thought expressed verbally or in writing and similar rights are to be determined by Law”. Everyone has the right to advance himself in his collective struggle for his rights to build society, nation and state. Everyone has the right to freedom of association, assembly, and expression.

The purpose of community organization is to manages the aspirations of society, supports and implements development programs, supports the improvement of people's welfare, encourages community participation in development and oversees the development process.<sup>18</sup> However, it should be underlined that Indonesia is a state of law; freedom of association, assembly,

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<sup>16</sup>Catur Wibowo, Herman Harefa, Loc. Cit.

<sup>17</sup>*Ibid*

<sup>18</sup>Ari Ganjar Herdiansah, Randi, Loc. Cit

and opinion must refer to the principle of Indonesia as a state of law. So, in running their purposes community organization should be based on the applicable rule in Indonesia.

Community organizations can be formed by community groups based on some similarities of activities, professions and function objectives, such as religion, education, culture, economics, Law and so on. Community organization is form of community participation in implementing the development to promote justice and prosperity. The existence of community organizations in Indonesia has been known since the beginning of this century and it has important in the development of Indonesian nationality process.<sup>19</sup>

Community organizations have a significant role in society and state. This is because the existence of civil society is an important role for democracy that is not only applicable at the level of the state society, but also at the lowest level of any social status. Community organizations are also useful for helping lower-level society to channel their aspirations and opinions through their own community organizations. The purpose of community organization was regulated in Law Number 17 of 2013 on Community Article 6, explains that community organizations have function as follows:

1. Distribute of activities in accordance with the interests of members and / or organizational goals;

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<sup>19</sup>Nielton Caves Durado, "Peran Organisasi Masyarakat Dalam Mengontro Kebijakan Pemerintah", *Jurnal Eksekutif*, I (October, 2016), p.2



2. Fostering and developing members to realize organizational goals;
3. Distribute of community aspirations;
4. Community empowerment;
5. Fulfill the social services;
6. Community participation to maintain and strengthen unity and national unity; and
7. Nurturing and preserving norms, values, and ethics in community life, nation, and state.<sup>20</sup>

With these functions, community organizations are free to create their program with the purpose to create the welfare of society and should follow the values and norms in society. However, the community organizations are one form civil society which is independent in giving priority to facilitate public interest.

#### **D. Government Regulation in Lieu of Law Number 2 of 2017**

President Joko Widodo on July 10<sup>th</sup>, 2017 signed the Government Regulation in Lieu of Law Number 2 Year 2017 on Amendment of Law Number 17 of 2013 on Community Organizations.<sup>21</sup> The President through the Coordinating Minister for Political, Legal and Security Affairs, Wiranto

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<sup>20</sup>See Law Number 17 of 2013 on Community Organization

<sup>21</sup>Humas, Inilah Perppu No. 2/2017 tentang Perubahan UU No. 17/2013 tentang Organisasi Kemasyarakatan 16<sup>th</sup> November 2017, <http://setkab.go.id/inilah-Government-Regulation-in-Lieu-of-Law-no-22017-tentang-perubahan-uu-no-172013-tentang-organisasi-kemasyarakatan/>, accessed on Friday, 17<sup>th</sup> November 2017 at 5:14 a.m.

argues that Law Number 17 of 2013 on Community Organizations is no longer sufficient to prevent spread the ideology that is against the Pancasila and the 1945 Constitution of the Republic of Indonesia, either from the substantive aspects of norms, restrictions, sanctions or legal procedures.<sup>22</sup>

Law Number 17 of 2013 on Community Organization did not contain the principle of *contrario actus* administrative law is the legal principle that the institution issuing the permit or giving the authorization is an institution that should have the authority to revoke or cancel it.<sup>23</sup>

Government Regulation in Lieu of Law Number 2 of 2017 on Community Organizations, Community organizations prohibits the use of names, symbols, flags or attributes similar to the names, symbols, flags, or attributes of government agencies; the use without permission of the name, emblem, flag of another country or institution international bodies become the names, symbols, or flags of Community Organizations; and using names, symbols, flags or marks of any similarity or in their entirety with the names, symbols, flags or signs of other societal or political parties.<sup>24</sup>

In addition, in the Government Regulation in Lieu of Law affirmed that the Community Organization is prohibited to take hostile action against

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<sup>22</sup>Kominfo, Pemerintah Keluarkan Perppu No. 2/2017 tentang Perubahan atas Undang-Undang Ormas, 23<sup>th</sup> December 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 Wednesday, 23<sup>rd</sup> October 2017 at 4:15 a.m.

<sup>23</sup>*Ibid*

<sup>24</sup>See Government Regulation in Lieu of Law Number 2 of 2017 on Community Organization

the tribe, religion, race or class; commit abuses, defamation, or blasphemy of religion held in Indonesia; commit acts of violence, endure public interest or tranquility, or damage public facilities and social facilities; and perform activities which are the duty and authority of law enforcement in accordance with the provisions of the legislation.

Government Regulation in Lieu of Law Number 2 of 2017 on Community Organization is expected to be the legal basis for the government to be more flexible and able to guarantee and build community organizations in Indonesia today. In Government Regulation in Lieu of Law Number 2 of 2017 on the Community Organization, there is a principle of *contrario actus*, which institution grants permission and authorizes the organization to be granted the right and authority to revoke the permit at the time the organization concerned violates the prevailing provisions when given permission.