

CHAPTER TWO

LITERATURE REVIEW

A. Democracy: An Overview

A political scientist, Juan J Linz and Alfred Stepan stated that to function democracy in a state there are five interlinked and mutually reinforcing that must be compiled with the intention of democracy to be consolidated. The five interlinked are as follow:

1. The condition must exist for the improvement of free and lively civil society;
2. Autonomous political society;
3. All over major of state actor territories, particularly the government and state apparatus, must be effectively subject to the rule of law that protects individual freedom and associational life;
4. There must be institutionalized economic activity; and
5. There must be state bureaucracy that usable by the new democratic government.⁹

All these elements give rights to civil society to access their rights, in order to make democracy run properly.

⁹ Juan J. Linz, Alfred Stepan, 1996, Toward Consolidated Democracies, *Journal of Democracy* 7.2, p. 2.

The existence of CSOs is an essential part of the development of communities in democratic states. Generally, the states allowed the existence of CSOs as the manifestation of freedom of association in that country. Both Indonesia and Turkey are democracy states which guarantee the rights of people that are written on their constitutions, particularly freedom of association among others:

Article 28E The 1945 Indonesia Constitution state that: “Each person has the rights to freely associate, assemble, and express his opinion”

The 1982 Turkey Constitution article 33 state that:

“Everyone has right to form associations, or become member of associations, or withdraw from membership without prior permission, no one shall be compelled to become or remain a member of an association, freedom of association may only be restricted by law on the ground of protecting national security and public order, or preservation of criminal commitment, or protecting public morals, public health.”

Despite there is a constitutional guarantee of associational rights in both states, there is no guarantee that those states will not dissolve CSOs as a manifestation of associational life in democratic states. The government of Indonesia and Turkey shared the experience in the termination of these organizations. For instance, in the past, Indonesia closed down societal organizations in 1987, namely *Pelajar Islam Indonesia or PPI* (Indonesia

Islamic Student) and *Gerakan Pemuda Marhaenis or GPM*¹⁰ (Marhaenis Youth Movement).¹¹ Similar to Indonesia, the dissolution also occurred in Turkey in September 1980, after the Military Coup Turkey took control over trade unions and student associations.¹² Under the state of emergency, Indonesia and Turkey have banned several CSOs after the issuance *perppu ormas* Indonesia government disband societal organization,¹³ which is prejudiced to have an affiliation with *Khilafah* (Islamic teaching in the political matter) namely, *Hizbut Tahrir Indonesia* (HTI) that is not in line with *Pancasila*.¹⁴ While Turkey issuance 31 emergency decrees, five of those decrees influence the existence of CSOs, which has an affiliation with

¹⁰ GPM is organizations found by the Indonesia first president, Soekarno.

¹¹ Pelajar Pemuda Indonesia was dissolved by Decree of Ministry of Home Affairs No.120/1987 while Gerakan Pemuda Marhaehis was by Decree of Ministry of Home Affairs No. 12/1987 available at <http://ip52-214.cbn.net.id/id/arsip/1988/03/19/KL/mbm.19880319.KL26644.id.html>; <http://majalah.tempointeraktif.com/id/arsip/1988/02/06/NAS/mbm.19880206.NAS26288.id.html> accessed on Wednesday, August 1st, 2018

¹² Bali. Rifat N., Sivil Toplum Haretikin iki Zaafi: Isadamiari ve elitism, Brikim, No. 130, 2000, p 33 in Ozum Yesiltas, 2006, *Civil Society and Democratization in Turkey: A Critical Evaluation of Civil Society-Democracy in the context of Turkey-EU Relations* (Unpublished Thesis, The Department of International Relations, Middle east Technical University . P.72.

¹³ See Indonesia Disband Islamic Group Hizbut Tahrir available at <http://www.thejakartapost.com/news/2017/07/19/govt-disbands-hti.html> accessed on Saturday, Februari 24th, 2018 at 12.01 pm.

¹⁴ Hizbut Tahrir Indonesia is one of largest Hizbut Tahrir Organization, founded in Jerusalem by Islamic Scholar, namely Sheikh Taqi Al-Din Al-Nabhani which is promoting islamic values, particularly islamic politics. Hizbut Tahrir itself means party of liberation that is found to create the governmental system namely *Khilafah Islamiyyah*. See Mohamed Nawab Mohamed Osman, “The transnational network of Hizbut Tahrir Indonesia”, South East Asia Research, Vol.18, No.4, Special issue: Islamic Civil Society In South East Asia –Localizations and Transnationalism in The Ummah, December 2010, p. 736.

Fethullah Gulen Terrorist Organizations (FETO) which is proven by 1447 Association and Foundation closed after the coup of 2016.¹⁵

The dissolution of CSOs may affect the ongoing democratic process in Indonesia and Turkey because those CSOs are more popular day-to-day in the democracy process. The participation of CSOs is good for democracy which is articulated in current development states that embrace democracy as their government system. The positive participation of CSOs is by strengthening democracy quality through their participation to control the state power in improving political system within the state.¹⁶

B. Civil Society Organizations (CSOs)

Civil Society is derived from the words *politike koinonia* in Latin or also known as *societas civilis* which means political community. This term was proposed by Aristotle in the eighteenth century. *Politike koinonia* was defined as a public ethical-political community that is equal and free under the system of law.¹⁷

While the term “organization” is derived from “*Organon*” in Greek and “*Organum*” in Latin which means parts, tools, or body. According to Bedudu Zain, the organization is a collective of persons who have the same

¹⁵Civic Freedom Monitor: Turkey, The International Centre for Non-Profit Law, available at <http://www.icnl.org/research/monitor/turkey.html> accessed on Thursday, July 19th, 2018 at 10.16 a.m.

¹⁶ Anders Uhlin, 2009, “Which Characteristic of Civil Society Organizations Support What Aspect of Democracy? Evidence from Communist Letvia”, Vol.30. No.3 p.272

¹⁷ Cohen, et al, 1992, *Civil Society and Political Society*, Cambridge, MIT Press p.366

ideology and objectives.¹⁸ Chester I. Barnard stated that the organization is a system and interrelation cooperation activity performed by two persons or more. He proposed three characteristics of organizations, as follows:

1. There is a collective person.
2. There are inter-relation and harmony cooperation.
3. The cooperation is based on rights and obligations or responsibility of each member.¹⁹

Besides, Sondang P. Siagian stated that organization can also be viewed from three angles, that is a container, as a process and as well as collective of person.²⁰

For a deeper understanding of the definition of CSOs organizations, *Pusat Penelitian dan Pengembangan Sistem Hukum Nasional Kementerian Hukum dan HAM* or Research Center and Development Legal National Legal System under The Ministry of Law and Human Rights summarize four characteristics:

1. It must be a voluntary society.
2. As the tool of struggle and services for communities interest.
3. As the container of civil society expression in the community, nation, and country.

¹⁸ Badudu-Zain, 1994, *Kamus Umum Bahasa Indonesia*, Jakarta, Pustaka Sinar Harapan p.65

¹⁹ M. Manulang, 1983, *Dasar-dasar Manajemen*, Jakarta, Ghalia Indonesia, p. 68

²⁰ Sondang P. Siagian, 1980, *Filsafat Administrasi*, Jakarta, Gunung Agung p.68

4. No political activity but have an important role in the politic²¹

There are several categories of CSOs work proposed by United Nation Development Program (UNDP).²² The type of CSOs works may engage in:

a. Advocacy

An activity that is related to public matter as CSOs strives hard to change, for instance, to change the policies through campaigning, lobbying, etc.

b. Funding

CSOs give fund to other organizations to support the democratic process.

c. Networking

To strengthen CSOs functions, particularly by coordinating one CSO to another.

d. Policy

Activities and processes are related to policymaking or activities to formulate specific policies.

²¹ Tirta Nugraha Nursitama *et al.*, 2011, Laporan Pengkajian Hukum tentang Peran dan Tanggung Jawab Organisasi Kemasyarakatan dalam Pemberdayaan Masyarakat, Pusat Penelitian Dan Pengembangan Sistem Hukum Nasional, Badan Pembinaan Hukum Nasional, Kementerian Hukum dan HAM RI, p.25

²² United Nation Development Program.

e. Research

The depth of study and publication through research are important to CSOs.

f. Technical Assistance

g. Legal Assistance/ Serve as Umbrella CSOs.²³

The Economic and Social Committee (ESC) attempts to define civil society in abstract terms as sum of all organizational structures whose member have the same objectives. The actors of CSOs are as follows:

1. The so-called labour market players i.e. trade union.
2. Organizational representing social and economic players.
3. NGO, such as; Human Rights Organizations.
4. Community-Based Organizations(CBOs)
5. Faith-Based Organizations (FBOs) or religious organizations.²⁴

CSOs are the third sector actors between states and markets, basically, CSOs emerge because of the failure of these two sectors (state and market), political constraints sometimes unable to cover people's need as the result of market failure. Additionally, not only five types organizations above, there is

²³Therno Kane, 2006, *UNDP and Civil Society Organizations A Toolkit to Strengthening Partnership*, New York, Merican printing International

²⁴ European Economic and Social Committee, 1999, "The Role and Contributions of Civil Society Organizations in The Building of Europe", Official Journal of The European Communities, OJ C 329, p. 32

CSOs that called as Government Oriented Non-Governmental Organizations or “GONGOs” which cannot completely be separated from states.²⁵

C. Human Rights; Freedom of Associations

Freedom of association is guaranteed under the Constitution, while states have to respect this kind of human rights. In order to respect the freedom of associations, it is compulsory for states to fulfil the rights of citizens’. According to Jenna Macnaughton,²⁶ the constitution is not merely about government political power and its limitation, but there are positive rights and negative rights. Every citizen enjoys positive rights to the government services. While the negative ones, it is the obligation of government not to interference the citizens’ right that is mentioned under the constitution²⁷.

Jean-Jaques Rousseau, a prominent scholar make constitution as social contract document of an association to support one to another member which is the members of a state, within the states. He stated that: “How to find a form of association which will defend the person and goods of each member with the collective force of all, and under which each individual while uniting

²⁵ Fabrice, 2012, *The Role and Structure of Civil Society Organizations in National and Global Governance and Otlook betweent now and 2030*, Challenges for Europe in The World in 2030, AUGUR project, available at http://www.augurproject.eu/IMG/pdf/cso_note_provisional_draft5_june_2012.pdf accessed Sunday, July 22th , 2018

²⁶ Jenna Macnaughton is Juris Doctor Candidate in Law School University of Peninsula

²⁷ Jenna Macnoughton, 2001, “Positive Rights in Constitutional Law No Need to Graft, best to Not Prone”, *Journal of Constitutional Law*, Vol.32, p.753.

himself with the other, obey no one but himself, and remains as free as before? This is the fundamental problem which the social contract holds the solution.²⁸

In addition, besides state respect national instrument in its own territory or domestic protections, the states also bound to the International instrument. In the International Covenant on Civil and Political Rights (ICCPR), the rights of freedom of association are constitute in Article 22:

1. Everyone shall have the rights to freedom of association with others, including the right to form and join a trade union for the protection his interest.
2. No restrictions may be placed on the exercise of this right other than which are prescribed by law and which are necessary in a democratic society in the interest of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedom of others.²⁹

From the protection of domestic and international instrument, associational life of citizens' is granted over the world. So, associational life should be respected within and outside of states.

²⁸ Jean-Jaques Rousseau, 1968, *The Social Contract*(translated by Maurice Cranston) in I Dewa Gede Palguna, 2013, *Pengaduan Constitutions (Constitutional Complaint) Upaya Hukum terhadap Pelanggaran Hak-Hak Konstitusional Warga Negara*, Jakarta, Sinar Grafika,p. 89

²⁹ ICCPR article.22

D. Separation of Power

The separation of power is initially mentioned by Montesquieu³⁰ in his book *L'Esprit des Lois* (1748) then translated into English entitled “ The Spirit of Law”, He stated the power may not only in the hand of the king, because the power may abuse arbitrarily in a tyrannical manner. The power is distributed among several organs of states or also known as *trias politica*: Executives, Legislative, and Judicial.³¹ Further Montesquieu stated; “When legislative and executive powers are united in the same person, or in somebody of magistrates, there can be no liberty; because apprehensions may arise; lets the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.”³²

As the phenomenon, *trias politica* itself can be concluded as a way to create “limited government” which means no one of the state organs may have absolute powers and each organ has its own functions to prevent the violations of individual rights. Scholars commonly do not use the separation of power rather than the distribution of power or division of power terminology. To distinguish them, G.Marshall divided the characteristic of separation of power into five aspects, as follows:

1. Differentiation

³⁰ The full name of Montesque is Charles de Secondat, Baron de La Brede et de Montesqueu

³¹ C.L Montesque, *The Spirit of Law*, 2nd edition (Hafner:1949), in Jimly Asshidique,

³² *Ibid.*,

Every branch of *trias politica* has different functions such as legislative as the lawmaker, the executive is the executor of law and judicial to assess conflict in accordance with regulations and norms.

2. Legal incompatibility of an officer holding

Legislative may not have another position outside his functions in legislative. This applies to other states' branches as well.

3. Isolation, Immunity, and Independent

Each organ cannot intervene with the function of other organs to maintain the independence of one to another branch of *trias politica*; Executive, legislative, and judicial.

4. Checks and Balances

To prevent abuse of power, the organ of state need to control and balance each other.

5. Coordinate status and lack of accountability.

On the other hand, Hans Kelsen contravened the absolute meaning of the separation of power theory by Montesquieu. He stated that administrative functions differ to the judiciary. In certain conditions, the administrator may have authority to give administrative sanctions upon the party who disobey the administrative command, which means the executive

body may impose punishment even though, the power to impose punishment in the separation of power theory belongs to judiciary or court. Additionally, he further explained that administrative or executive have special functions in its relations to judicial, namely organic relations.³³

E. Mechanism of Dissolution

Dissolution is a legal process to terminate a legal entity status of the subject of law. There are various causes why a legal entity might consider dissolution by Public Counsel Law Centre³⁴, namely:

1. An inability to maintain funding.
2. An assessment of the legal entity which no longer serves its stated mission.
3. The leaders or volunteers are unable to maintain the legal entity (non-profit organizations) successful.³⁵

³³ Jimly Asshiddiqie, 2009, *Pengantar Ilmu Hukum*, Jakarta, RajaGrafindo Persada, p. 285-289

³⁴ Public Counsel Law Center is Nation Largest Pro bono Law firm corporate with major law firm.

³⁵ Public Counsel Law Center, 2011, *Guideline for Voluntary Dissolution of California Non-profit Benefit Corporation, Non-Profit Dissolution*, available at <http://www.publiccounsel.org/tools/publications/files/dissolution.pdf> accessed on Sunday, July 23th, 2018 at 02.23 am.

According to The Law Project (TLP)³⁶, organization ends its existence due to two reasons: voluntarily and involuntarily;

1. Voluntary dissolution

Termination of organizations is affected by the representative of organizations (it is including the application or request of organizational representatives to court).

2. Involuntary dissolution

Involuntary dissolution is an initiative of government (through states attorney general official or secretary of states) or interest party (private person).³⁷

The dissolution process of an organization occurs because of the failure of the founder and because of state order. It is from the ability of the founder to maintain the life of organizations internally or externally. Dissolution also may be seen as the result of fair treatment of organizations, including the trial process by the authority.

³⁶ The Law Project (TLP) is the project of Chicago Committee for Civil Rights in 1985. TLP dedicated this project to assist non-profit group and small business entrepreneurs, particularly for non-lawyer who need understand the implication of dissolution process.

³⁷ The Law project, 2013, *A Guide for Non Profit Organizations Dissolution of Illinois Not for Profit Corporation*, available at <https://static1.squarespace.com/static/5871061e6b8f5b2a8ede8ff5/t/592f300e579fb3cc2a2e0f89/1496264721296/Dissolution-Guide-Illinois-Nonprofits.pdf> accessed on Monday, July 23th, 2018 at 08.43 pm.