

# PROPORTIONALITY TEST IN THE 1945 CONSTITUTION: LIMITING HIZBUT TAHRIR FREEDOM OF ASSEMBLY

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## Abstract

In May 2017, Jokowi's administration announced the intention to dissolve Hizbut Tahrir Indonesia (HTI). HTI is an Islamic organization that aspires to establish caliphate government based on the claim of Islamic teaching. The Government considers HTI as a threat to Pancasila. The announcement has created controversy. It has divided Indonesian into pro and contra camp. The dissolution pro camp argues HTI ideology is against Pancasila, Indonesia political ideology. Furthermore, they pointed out HTI's idea of Caliphate that based on religion would disintegrate the nation. Conversely, the cons argues the government move is against the constitutionally guarantee freedom of association as stipulates in the 1945 Constitution of the Republic of Indonesia (hereafter the 1945 Constitution). The move would create precedent that threatens freedom of assembly if the government failed to enact due process procedure and provide justifiable reason for the action. This controversy is not new to human rights and democratic discourse. Karl Popper describes the debate as a paradox of tolerance, democracy, and freedom in an open society. This paper examines how the 1945 Constitution can be utilized to resolve the paradox. This paper argues that Article 28 J par.2 of the 1945 Constitution requires the balance between human rights protection and limitation in its proportion. Thus, the limitation clause should be used as a parameter to solve HTI issue. This paper explores the use of proportionality test in interpreting the limitation clause and applies it not only to the question of HTI issue but also broader issues to evaluate recent government moves in amending the Law Number 17 Year 2013 on Societal Organisation. This paper employs a doctrinal method in its analysis.

**Keywords:** Article 28 J par.2, Dissolution, Hizbut Tahrir, Indonesian Constitution, Proportionality Test, Societal Organisation Law

*Less well known is the paradox of tolerance: Unlimited tolerance must lead to the disappearance of tolerance. If we extend unlimited tolerance even to those who are intolerant, if we are not prepared to defend a tolerant society against the onslaught of the intolerant, then the tolerant will be destroyed, and tolerance with them (Karl Popper)<sup>1</sup>*

## I. INTRODUCTION

The quotation above describes paradox between maintaining open/free society against the tendency to protect openness by adopting ways that against the principle of open society. Popper defines open society as a society in which a person allows to base their decision on the authority of their intelligence. Conversely, closed society is a society that still believes in magical taboo. Thus, individual in closed society take their decision based on authority outside of themselves.<sup>2</sup> The closed society disallows individuals to think freely and to accept every aspect of life as it is, including government policy. Popper equates this type of society with a totalitarian regime.<sup>3</sup> In a political context, an open society allows citizen or individual to evaluate the consequence of government policies critically. The open society protects the right to criticize, and the difference between people on societal policy will be resolved by critical discussion and argument rather by force. In short, open society refers to liberal and democratic society, whereas the closed society relates to the totalitarian society.

The open society embraces rights and freedom of the individual as the fundamental basis of its community. The freedom than formalizes and guarantees through a constitution with the adoption of human rights. The human rights operate within a legal system that embraced the rule of law. The guarantee of freedom creates a paradox when facing with person or organization that wants to destroy the freedom itself.

Indonesia as a young democratic country is also facing similar paradox. This paradox manifests in the existence of *Hizbut Tahrir Indonesia* (hereafter, HTI)

<sup>1</sup> Karl Popper, *The Open Society and Its Enemies* (Frome & London: Buttler & Tanner Ltd, 1945), 226.

<sup>2</sup> *Ibid.*

<sup>3</sup> Blackburn S, "The Oxford Dictionary of Philosophy: Open Society/Closed Society", (Oxford: Oxford University Press, 2016).

movement. HTI is a part of a larger transnational Islamic movement of *Hizbut Tahrir*<sup>4</sup> that advocates the establishment of a caliphate as a form of government. Caliphate model of government is a world imperium government that governs and applies *sharia* laws. HTI rejects democracy and the nation-state in favor of caliphate system of government.<sup>5</sup>

In May 2017, Indonesian's government stated that they would dissolve and prohibit HTI to operate in Indonesia. The government cited three reasons for their decision: first, HTI as a societal organization has not contributed positively to the development of society. Second, there is a strong indication HTI's activities are against with the goals, principles, and character of *Pancasila* and the 1945 Constitution as stipulated in the Societal Organisation Law. Finally, HTI's activities have created friction and brought threat to public order and security as well as jeopardizing the national unity. The HTI dissolution possesses similar to a paradox as describes by Karl Popper. The question rests in the limit of how far a democratic government can use coercion to suppress closed ideology proponents.

This paper focuses on the utilization of the limitation clause in the 1945 Constitution to resolve the paradox. This paper argues that the paradox of tolerance can be resolved by applying a proportionality test in the interpretation of the limitation clause. The argument is based on the proposition that the government have the power to limit freedom of assembly under the limitation clause. The proportionality test requires government in exercising its power to limit freedom of association should be proportional to the threat posed by the organisation in question. Thus, the government measures in limiting freedom of association should be constructed in the spectrum of sanctions, starting from minor sanction such as notification of the breach, revoking grants, limiting organisation activities, administrative supervision, to the ultimate sanction, the dissolution.

It employs doctrinal analysis. The analysis focuses mainly on the interpretation of the primary source of laws that consists of laws and judicial decisions.

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<sup>4</sup> In this paper the term of HTI as Indonesia chapter and HT as the transnational affiliation of HTI is used interchangeably.

<sup>5</sup> Burhanuddin Muhtadi, "The Quest for Hizbut Tahrir in Indonesia", *Asian Journal of Social Science* 37 (2009): 631 - 632

Additionally, it also analyses secondary source, namely, scholarly journal articles, government reports, and other government official report. Thus, this paper gives systematic exposition to the interpretation of the limitation clause based on proportionality test.<sup>6</sup> The aim is to give systematic understanding on the use of the proportionality test in interpreting the limitation clause and how it can be used to solve HTI issue without violating the principle of open society.

This paper consists of five sections. The first section is the introduction that discusses the background and context of HTI dissolution. The second section examines the relevant conceptual, political and historical context of *Pancasila* and HTI's Caliphate ideology. The third section elaborates the incompatibility between *Pancasila* and HTI's Caliphate ideology. The fourth section discusses government reasons for dissolving HTI. The fifth section elaborates the idea of applying the proportionality test to the limitation clause in Indonesia constitutional context. Finally, the sixth section summarizes the paper and provides recommendations.

## II. *PANCASILA* AND CALIPHATE IDEOLOGY

This section describes the foundational idea of *Pancasila* and HTI's Caliphate Ideology. Some important historical and philosophical elements of both ideologies are highlighted. Additionally, this section summarizes each key fundamental character of both ideologies.

### 2.1. *Pancasila*, the “Imagined Order”, that Unites Indonesia

*Pancasila* is Indonesia state ideology that was proclaimed by Soekarno on 1 June 1945. Soekarno introduced *Pancasila* in his speech in front of “Investigative Body for the Preparation of Independent of Indonesia” (*Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan Indonesia* hereafter, BPUPKI).<sup>7</sup> BPUPKI convened between 29 May 1945 – 17 July 1945. In the first session of BPUPKI, Soekarno suggested five basic principles that should

<sup>6</sup> Paul Chynoweth, “Legal Research” in *Advance Research Methods in the Built Environment*, ed. Andrew Knight and Less Ruddock (Chichester: Wiley-Blackwell, 2008), 30

<sup>7</sup> Saafroedin Bahar, et.al., eds., *Risalah Sidang Badan Penyelidik Usaha-Usaha Persiapan Kemerdekaan Indonesia [Minutes of Meeting of Indonesia Independence Attempt Investigation Agency]*, (Jakarta: Indonesia State Secretariat, 1995), 389.

become the foundation (*weltanschauung*) of the Republic of Indonesia to be. They are (1) Indonesian nationalism; (2) internationalism-humanitarianism; (3) unanimous consensus-democracy, (4) societal welfare; and (5) belief in one god. Subsequently, BPUPKI established a small committee (*panitia kecil*) to discuss further related to Soekarno's five principles proposal. The committee consisted of nine members of BPUPKI, namely, Abikoesno Tjokrosoejoso, Kiai Haji Wachid Hasjim, Mr. Muh. Yamin, Soebardjo, Tuan Maramis, Kiai Abd. Kahar Moezakir, Drs. Mohammad Hatta, Hadji Agoes Salim, and Soekarno, himself.<sup>8</sup> The small committee reported their work in the 2<sup>nd</sup> session of BPUPKI. The small committee produced a constitution draft. In the process, the small committee reformulated Soekarno's five principles.<sup>9</sup> In the final formulation, BPUPKI agreed to a final version that stipulates : belief in one God (*Ketuhanan Yang Maha Esa*), a justice and civilized humanitarianism (*Kemanusiaan Yang Adil dan Beradab*), the unity of Indonesia (*Persatuan Indonesia*), the people governed by wise policies through a process of consultation and consensus (*Kerakyatan yang Dipimpin oleh Hikmat Kebijaksanaan dalam Permusyawaratan/Perwakilan*) and social justice for all the Indonesian people (*Keadilan Sosial bagi Seluruh Rakyat Indonesia*).

There are three important aspects of *Pancasila* related to HTI's issues. First, *Pancasila* has been used to fend off Islamic political aspiration. Second, *Pancasila* aims to unify diverse religions, ethnics, and race within nation state framework. Finally, *Pancasila* is an ideology that put sovereignty to the people.

Since its inception, *Pancasila* has been designed and used to fend off the formalization of Islam into Indonesia state. This conclusion can be found from close reading to the debate between secular camp with political Islam camp on the discussion of the first pillar of *Pancasila*, the belief in one God. The interpretation of the first pillar has always become a contentious debate

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<sup>8</sup> *Ibid*, 94.

<sup>9</sup> *Ibid*, 86.

between Indonesia secular political groups and Islamic political aspiration. The principle of one God is a fundamental proclamation to the religious characteristic of Indonesia. Initially, the principle of belief in one God comes with the stipulation of obligation of *sharia* law for its adherents (Muslim). The stipulation is known as “the seven words” of Jakarta Charter (hereafter, the seven words). The reformulation of belief one God principle that included the seven words had invited opposition from non-Muslim camp. On 11 July 1945, Latuharhary, a prominent non-Muslim leader from Ambon, eastern of Indonesia, objected the stipulation of the seven words.<sup>10</sup> The reason for his objection was that *sharia* law potentially created domination to other laws, especially *adat* law (customary law). Latuharhary elaborates that the stipulation could potentially create conflict between Muslim and Christian in Ambon. He explained in Ambon, Muslims and Christian often come from the same family. The seven words created a problem when amongst member of family with different religion try to split the inheritance property. If Muslim used *sharia* law, it would be refused by their brother of other faith.

Consequently, it potentially creates conflict between them. In addition, the so-called secular Muslim camp also rejected the seven words stipulation. For instance, Wongsonegoro and Hosein Djadjadiningrat pointed out the possibility of creating a religious fanaticism.<sup>11</sup> Another objection from non-Muslim is the potential discrimination that might pose to all minority groups. In the heat of debate, the non-Muslim threatened not to join the Republic of Indonesia if the seven words remain. The result of this debate was the elimination of the wording of the seven words as the first pillar of *Pancasila* and in the Constitutional Preamble. Mohammad Hatta played a substantial role in the omission of the seven words. In private meeting with Ki Bagus Hadikusumo, Wahid Hasjim, Kasman Singodimedjo and Teuku Hasan, Hatta convinced them to discard the clause in favour of the unity of a new

<sup>10</sup> Faisal Ismail, “Islam, Politics and Ideology in Indonesia: A study of The Process of Muslim Acceptance of The Pancasila” (Ph.D. diss, McGill University, 1995), 53, [http://digitool.library.mcgill.ca/R/?func=dbin-jump-full&object\\_id=39924&local\\_base=GEN01-MCG02](http://digitool.library.mcgill.ca/R/?func=dbin-jump-full&object_id=39924&local_base=GEN01-MCG02).

<sup>11</sup> *Ibid.*

nation that they try to establish.<sup>12</sup> In Hatta's memoirs, he said that one of the Japanese officers delivered a message from his counterpart in eastern part of Indonesia, saying majority of the people refused to join the state to be, if the seven word remain in the constitution.<sup>13</sup>

For some political Islam proponents, despite the disappearance of explicit stipulation on *sharia* obligation for Muslim, the acknowledgment of one God still perceived as an ideological justification for implementing *sharia* in Indonesia.<sup>14</sup> Throughout history, the above context has overshadowed relation between political Islam in Indonesia that advocates the complete formalization of *sharia* and their secular-nationalist opponent that rejected any notion of Islamic morality incorporation to the state, both formally and informally. After 1945, there were several attempts from political Islam camp to incorporate *sharia* into Indonesia legal system. In 1950's, the political Islam proponents tried to formalize through "Konstituante". *Konstituante* is an ad hoc organ to formulate definitive constitution to replace the Temporary Constitution of 1950 ("*Undang-Undang Dasar Sementara 1950*"). Soekarno ended this venture with Presidential Decree of 1959.

In the early Soeharto era, the confrontation between *Pancasila's* secular camp and Islamic politic aspiration was high.<sup>15</sup> One of the notable controversies was the application *Pancasila* as "single principle" (*asas tunggal*) to be adopted by all societal organisation in Indonesia. The application of a single principle in societal organisation policy preceded with the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat* hereafter, MPR) Decree Number II/MPR/1978 on Guideline on Comprehension and Implementation of *Pancasila* (*Pedoman Penghayatan dan Pengamalan Pancasila [Ekaprasetia Pancakarsa]*). The Decree gave an interpretation on the meaning of *Pancasila*. It affirms the exclusion of political Islam aspiration for *sharia* law in its interpretation of the belief in one God principles. It

<sup>12</sup> *Ibid.*, 54.

<sup>13</sup> Mohammad Hatta, *Sekitar Proklamasi* [On The Proclamation], (Jakarta: Tintamas), 1970.

<sup>14</sup> See Ismatu Ropi, *Religion and Regulation in Indonesia*, (Singapore: Palgrave Macmillan, 2017), 89.

<sup>15</sup> Jamie Mackie, "Patrimonialism: The New Order and Beyond" in *Soeharto's New Order and its Legacy Essays in honour of Harold Crouch 2*, ed. Edward Aspinall (Canberra: Australian Univesity Press, 2010), 81.

also interprets *Pancasila's* first principle as to guarantee freedom of religion, non-compulsion in the exercise of religion, and emphasize the cooperation among the religious group to obtain harmony in the society.<sup>16</sup> The emphasizes on the freedom of religion, and non-compulsion in the practice of religion is in direct contradiction to political Islam aspiration.

After the Suharto down fall, political Islam once again attempted to formalize sharia during the amendment of Constitution in 2000 – 2010. The aspiration was to return the seven words in to *Pancasila*, the Constitutional Preamble and Article 29 of the Constitution. This venture also met with failure.<sup>17</sup> The second aspect is the status *Pancasila* as Indonesian “imagined order.” Yuval Harari defines imagined order as a myth that created to enable people to cooperate or united in a polity. The imagined order is shared among people within the polity that believe in certain idea/ideology.<sup>18</sup> *Pancasila* as an ideology has been successful to become the imagined order of Indonesian people. It becomes the unifying narrative for millions of Indonesian people to work together within a polity of Indonesia state. There are several reasons for *Pancasila* success in function as imagined order: first, the success is due to vigorous *Pancasila* proponents in campaigning it.<sup>19</sup> They staunchly defended *Pancasila* as the means of ensuring mutual tolerance and freedom of belief to maintain national unity. The efforts were sustained by intellectual environment and the bureaucracy.<sup>20</sup> One of the key successes of *Pancasila* as unifying narrative was the description of *Pancasila* as indigenous ideology derived from the essence of Indonesian people as opposed to the imported foreign ideology of those western or in HTI context as Arab's ideology. Secondly, *Pancasila* is a consensus ideology, in which elements of Indonesia nation come to agree to overcome differences.

<sup>16</sup> MPR Decision Number II/MPR/1978 on the Guideline on The Observant and Implementation of *Pancasila* (Republic of Indonesia)

<sup>17</sup> Denny Indrayana, *Indonesia Constitutional Reform 1999 - 2002 : An Evaluation of Constitution-Making in Transition*, (Jakarta: Kompas, 2008), 183.

<sup>18</sup> See Yuval Harari. *Sapiens A Brief History of Humankind*, (London : Vintage Books, 2014).

<sup>19</sup> R.E. Nelson, “Nationalism, Islam, ‘secularism’ and the state in Contemporary Indonesia, *Australian Journal of International Affairs* 64, No.3 (2010) : 329.

<sup>20</sup> *Ibid.*



Furthermore, they also agreed to unite under *Pancasila* banner. The idea of *Pancasila* as unifying ideology is apparent in the phrase of “*Bhinneka Tunggal Ika*” (unity in diversity). This motto has been an essential part of the national emblem (*Garuda Pancasila*). Many Indonesian, especially non-Muslim and secular Indonesian, sees *Pancasila* as unifying narrative because of its success in overcome the narrative of the Islamic group. As a majority group in Indonesia, some Muslims element demanded that the foundation of the state-to-be is Islam. However, the aspiration had been staunchly rejected by secular Muslim and eastern Christian groups, notably, Latuharhary. In the deliberation process, three issues discussed extensively in rejecting Islamic political aspiration, starting from trivial issues such as the title of the preamble of the constitution, in which the Islam politician suggested Arabic word of “*Mukaddimah*” that rejected by the secular camp that prefer a native language of “*Pembukaan*.”<sup>21</sup>

The much substantive debate was on the seven word of sharia application for Muslim that resulted in the removing the seven word from the first pillars and Article 29 of the Constitution of 1945. Another important element of non-Muslim rejection toward political Islam aspiration is that the requirement of the President must be Muslim. The stipulation was rejected not only by the Christian elements but also secular muslim citing discrimination to non-Muslim as rejection.<sup>22</sup> Another important aspect of *Pancasila* that relevant to the discussion is the narrative of *Pancasila* was framed within nation state and nationalism. It rejects internationalism and cosmopolitanism that challenged nation state border. Sukarno emphasizes this in his famous speech of 1 June 1945 that the goal of BPUPKI meeting is to establish a nation state country based on nationalism (*kebangsaan*). Borrowing from the famous French historian, Ernest Renan, definition of a nation, Sukarno defined a nation as the unity of people based on the share of fate.<sup>23</sup> Sukarno also attacked Liem Koen Hian that rejected nationalism

<sup>21</sup> Ismail Faisal, *Islam, Politic*, 55.

<sup>22</sup> *Ibid.*, 245.

<sup>23</sup> Saafroedin Bahar, et.al., eds., *Risalah Sidang*, 71.

in favour of cosmopolitanism.<sup>24</sup> Finally, *Pancasila* put people as the centre of its legitimacy. People are sovereign, in which government must be elected and accountable to the people. The people sovereignty was embodied in MPR, in which all of the state organs must answer to MPR.<sup>25</sup> In conclusion, it can be said that the acceptance of *Pancasila* as Indonesian ideology, especially for those of non-Muslim majority in eastern part of Indonesia was primary due to guarantee of equality and non-discrimination from the majority (Muslim). After seeing the BPUPKI and PPKI deliberation, it can be concluded that *Pancasila* and the Constitution of 1945 were designed to deliver such promises. Failed to deliver the equality and non-discrimination promise would mean disintegration to the nation.

## 2.2. HTI's Goal to Create Islamic Imperium

HTI's ideology is based on the idea of Taqiyuddin an Nabhani. An Nabhani is a Palestinian born cleric. He was born in 1909 from Ottoman's judge's father and Islamic scholar mother. An Nabhani family background came from long line of Ottoman judicial officers and prominent figures in the Ottoman caliphate. An Nabhani grandfather was a prominent judge in the Ottoman state that oversaw judicial matters in Palestine.<sup>26</sup> An Nabhani background potentially impacted profoundly on his preference to Caliphate model of government, where other Islamist ideology are still willing to fight their cause (the application of *sharia*) within the nation state framework.<sup>27</sup> An Nabhani produced a substantial number of books that cover topics related to Islam politics and way of life. One of his greatest works is *Al-Shakhsiyya al-Islamiyah* that consisted of three volumes on Islamic jurisprudence.<sup>28</sup> Nonetheless, the most important book related to the idea of HTI's Islamic state and its ideology can be found in *Dawlyah al-Islamiyah* (The

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<sup>24</sup> *Ibid.*, 75.

<sup>25</sup> Article 1 Pre-Amendment Constitution of 1945.

<sup>26</sup> "Sheikh Muhammad Taqiuddin al-Nabhani", Hizb Ut Tahrir Australia, accessed March 20, 2018 <http://www.hizb-australia.org/2016/02/sheikh-muhammad-taqiuddin-al-nabhani/>,

<sup>27</sup> See Noman Hanif, "Hizb ut Tahrir : Islam's Ideological Vanguard", *British Journal of Middle Eastern Studies* 39, No.2 (2012) : 201-225

<sup>28</sup> *Ibid.*

Islamic State), *Muqimat al-Dustor* (Introduction to the Constitution), and *Mahafeem Hizb Ut-Tahrir* (Concepts of *Hizbut-Tahrir*). HTI political goal is to implement An Nabhani idea of an Islamic imperium under a Caliphate leadership. HT ideology importation to Indonesia came with the arrival of Australian-Palestinian, Abdurrahman Al-Baghadi, to Bogor, West Java in 1982. Subsequently, Al-Baghadi managed to spread HT idea to the nearby prominent public university, Bogor Agriculture Institute (*Institut Pertanian Bogor*, IPB).<sup>29</sup> From there, HT spreads to other campuses via campus religious unit and established networks that led to the formation of Indonesian chapter of HT (HTI).<sup>30</sup> One of the distinct characters of HTI's ideology from other Islamist ideology is the transnational character of its movement.<sup>31</sup> HTI aims to establish an *ummah* (single political, economic, and societal society) that unified all Muslim majority countries in the world. In *dawlah al-Islamiyah*, An Nabhani asserts "the point at hand is not establishing several states, but one single state over the entire world".<sup>32</sup>

Burhan Muhtadi summarizes three ideological cores of HTI. First, HTI advocates the re-establishment of a Global Caliphate and *sharia*. Second, HTI also advocates the idea of Islamic State under God's sovereignty. Finally, HTI advocates global world order through caliphate.<sup>33</sup> The Global caliphate is a political-religious state comprising Muslim community and other non-Muslim community under its dominion. The caliphate system is a system that aspire transnational Islamic government under one leadership (the caliphate). As a global imperium, caliphate rejected nation-state and nationalism that they considered as *asabiya* (segregate/disunity).<sup>34</sup> The second HTI ideological core is God's sovereignty. For HTI, the caliphate does not produce any law. The caliphate or government is simply adopting and implementing *ahkaam shari'iyah* (the divine rules).<sup>35</sup> Consequently, HTI does not accept

<sup>29</sup> Burhanuddin Muhtadi, *The Quest*, 626.

<sup>30</sup> *Ibid.*

<sup>31</sup> Noman Hanif, *Hizb ut Tahrir*, 206.

<sup>32</sup> Taqiuddin an-Nabhani [English Translation], *The Islamic State* (London: Al-Khalifah Publications, 1998), 2.

<sup>33</sup> *Ibid.*, 629-634.

<sup>34</sup> *Ibid.*, 633.

<sup>35</sup> Hizb ut-Tahrir, "The Draft Constitution of the Khilafah State, accessed March 3, 2018 <http://www.hizb.org.uk/wp-content/uploads/2011/02/Draft-Constitution.pdf>, Article 3.

democracy since the creation of law in democracy is based on the will of people. Although in its constitutional structure HTI adopted parliamentary institution (*Majlis ul-Ummah*) similar to those of parliamentary democracy and its members are elected by people, the institution only has the power to check *Caliphate* in the form of consultation, without to pass legislation.<sup>36</sup> The power to implement legislation is under the Caliphate, in which theoretically only adopt the divine rule.<sup>37</sup> The idea operates on the proposition that the sovereignty to pass law belongs to *yamlik al-iradah* (the highest will). *Sharia* is the embodiment of the highest will that cannot be decided on majority and minority opinion, it should be grounded upon legal texts (*Quran* and *Sunnah*), since God, not the people who created law.<sup>38</sup>

The third ideological core of HTI is against nation state and nationalism. HTI considers nation state and nationalism as one of the major obstacles to the party's attempt at the establishment of the Caliphate. HTI considered nationalism as "modern *jahiliyah*". *Jahiliyah* is a concept in describing era before the time of Prophet Mohammad. The *jahiliyah* era or the ignorant era is associated with corruption and moral decay. In political aspect, one feature that characterizes *jahiliyah* era is *asabiya*, where the Arab pre-Islamic society was bound by their primordial tie. One of the Prophet Muhammad mission was to unify those fragmented society in one *Ummah* that overcome race, ethnic, cultural, and geographic affiliation. For HTI, nationalism and nation state is *jahil* because it brings back *asabiya* into Muslim community, especially, tribal fanaticism based on geographical affiliation.<sup>39</sup>

Finally, the most important aspect of the HTI's ideology for this paper is the HTI's strategy in advancing its cause. The strategy aspect is important to determine the government measure in limiting HTI's freedom of assembly. Muhtadi outlines three stages of HTI's strategy in establishing Caliphate: culturing stage (*marhalah al-tathqif*), interaction stage (*marhalah tafa'ul*

<sup>36</sup> *Ibid.*, Article 101 – 107.

<sup>37</sup> *Ibid.*, Article 35.

<sup>38</sup> Burhanuddin Muhtadi, *The Quest*, 632.

<sup>39</sup> *Ibid.*

*ma'a al-naas*), and revolution (*istislam al-hukmi*).<sup>40</sup> The culturing stage is an initial stage in where HTI activist educates a large section of Muslim society by various means. At this stage, HTI actively focuses on recruiting and fostering ideological character of its cadres.<sup>41</sup> On the second stage, HTI expands the movement to interact with other elements of society, especially, of those public officials and state apparatus. Muhtadi describes in this stage HTI members will infiltrate key political institutions, and military/security officers and provoke them to conduct a revolution. Finally, the last stage is to create a momentum, to do actual revolution, in which non-Caliphate regimes are toppled.<sup>42</sup>

In Indonesia, there are compelling evidence that at this stage HTI has entered the second phase of its strategy, that is, the interaction phase. Some evidences have suggested HTI has tried to establish interaction with government institutions, both at local and national government institution, through various means and activities. For instance, HTI activist actively approach local Indonesian military branches, such as in Bogor district or invited other key government elements to their activities, such as, in the opening ceremony of its office.<sup>43</sup> Additionally, Muhtadi indicates that since 2003 many HTI activists have joined Muhammadiyah after leading conservative figure, Din Syamsudin, took the organisation leadership. Furthermore, HTI has also managed to infiltrate to Indonesian Islamic Scholars Council (*Majelis Ulama Indonesia*, MUI), in which one of the prominent members, Al-Khaththath, held a key position in the council.<sup>44</sup> The most recent compelling evidence was HTI activist speech that provokes military to take power from the government.<sup>45</sup>

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<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> Vento Saudale, "Ini Jawaban Bima Arya Terkait Peresmian Kantor HTI" [Bima Arya Responses to HTI's Office Opening Ceremony], *Berita Satu*, 11 Februari 2016, <http://www.beritasatu.com/nasional/348691-ini-jawaban-bima-arya-terkait-peresmian-kantor-hti.html>. See also Wisnu G and Amir, "Dandim Terima Kunjungan Silaturahmi Pengurus DPD 2 HTI Kota Bogor" [Bogor Military Commander Accepts HTI Courtesy Call], *Bogorplus*, 2 October 2013, 2018 <http://bogorplus.com/index.php/bogor-arya/item/1916-dandim-terima-kunjungan-silaturahmi-pengurus-dpd-2-hti-kota-bogor>

<sup>44</sup> Burhanuddin Muhtadi, *The Quest*, 632.

<sup>45</sup> Editorial Team, "Deretan Kudeta oleh Hizbut Tahrir" [List of Hizbut Tahrir Coup de etat], *Kumparan*, 02 May 2017, <https://kumparan.com/@kumparannews/deretan-upaya-kudeta-oleh-hizbut-tahrir>.

### III. *PANCASILA* V. CALIPHATE'S IDEOLOGY

This section examines the incompatibility of *Pancasila* as an ideology with Caliphate ideology offered by HTI. Based on the discussion in its previous section, it can be concluded that *Pancasila* and HTI's caliphate ideology are two competing ideologies. The incompatibilities rest in three aspects: first, the pluralistic and inclusive nature of *Pancasila* ideology as opposed to monolithic and exclusive nature of HTI's ideology. Second, *Pancasila*'s popular sovereignty as opposed to HTI's God's Sovereignty. Finally, the Indonesian nationalism as opposes to HTI's trans-nationalism.

#### 3.1. Incompatibility 1: *Pancasila* Inclusive Society versus Caliphate Exclusive Society

One of the most problematic ideas of HTI's ideology against *Pancasila* is located on the issue of HTI exclusivity. The exclusive nature of HTI's caliphate ideology can be seen as a threat to Indonesian unity, even though it is far away from implementation. It sufficiently creates discontent within Indonesia society and threaten the unification of Indonesia.<sup>46</sup> As discussed previously, the acceptance of *Pancasila* by a large majority of Indonesian as the accepted "imagined order" is due to the pluralistic, inclusive and anti-discrimination promises. The strong pluralistic, inclusive and anti-discrimination commitment reflects in Indonesia motto of unity in diversity (*Bhinneka Tunggal Ika*). In the previous section, it has been explained the promise of pluralistic and anti-discrimination has been designed and reinforced throughout Indonesia modern history starting from BPUPKI decision to reject the seven words to the interpretation of Suharto's *Pancasila* as outlined in the TAP MPR on *Ekaprasetya Pancakarsa*. The idea reflects throughout the pre-amendment of the Constitution of 1945, notably, the Article 29 of the Constitution of 1945 that guarantees freedom of religion without the stipulation of seven words and the Article 6 of the Constitution

<sup>46</sup> Ahmad Khadafi, "Hizbut Tahrir Vs "Pancasila" dan "NKRI"", Tirta, 05 May 2017, <https://tirta.id/hizbut-tahrir-indonesia-vs-pancasila-dan-nkri-cn5x>.

of 1945 that stipulates that Indonesia President is native Indonesia without mention “Muslim” as its requirement. In recent amendment, to further enforce the inclusive character of Indonesia ideology, the native Indonesia stipulation was removed. Consequently, it allows for non-native Indonesia citizens, such as Chinese Indonesia, Arab Indonesia or any other mix background to become President if he/she was born in Indonesia and never accepted other nationality.<sup>47</sup>

In contrast, HTI’s Caliphate ideology promotes exclusivity that based on the religious identity. The discriminatory nature of HTI’s ideology can be found in HTI’s constitution. For instance, it limits non-Muslim participation in government, non-Muslim cannot be elected as rulers, nor he/she can vote for a ruler or served as judges.<sup>48</sup> Furthermore, HTI’s ideology also discriminates women. It limits women in domestic affairs and forbids women to take any official positions.<sup>49</sup>

### **3.2. Incompatibility 2: *Pancasila*’s Popular Sovereignty versus Caliphate’s God Sovereignty**

As an ideology, *Pancasila* legitimacy is based on popular endorsement. It is the people who hold the sovereignty. Thus, any government form under *Pancasila* ideology is elected by the people and accountable to the people. This idea reflects in the fourth pillar of *Pancasila* that stipulates “the people governed by wise policies through a process of consultation and consensus.” Furthermore, the people sovereignty also explicitly affirms in Article 1 par. (2) of the pre-Amendment Constitution of 1945; it stipulates that “the sovereignty is on the hand of people and is implemented fully by MPR”. The decision-making process in MPR is done through the majority vote.<sup>50</sup> The people’s sovereignty is also still accommodated in the Amendment Constitution of 1945 with some changes. The Article 1 par. (2) of the Amendment Constitution of 1945 stipulates the sovereignty is within the people and implemented

<sup>47</sup> Article 6 Constitution of 1945 Third Amendment.

<sup>48</sup> Hizb U Tahrir, *The Draft Constitution*, Article 67.

<sup>49</sup> *Ibid*, Article 111.

<sup>50</sup> Article 2 Par.3 Pre-Amendment Constitution of 1945 (Republic of Indonesia).

based on the constitution. The revision aims to the acknowledgement that democracy needs to go hand in hand with rule of law. For HTI, democracy and people's sovereignty are a *kufar* (unbeliever) system that replaces God as the highest will (*yamlik al-iradah*). Thus, the adoption itself is considered as forbidden (*haram*). HTI asserts that human should be governed by the divine rules that adopted by the Caliphate. In HTI concept, law does not need people endorsement. It is obvious that HTI's ideology is incompatible with the fourth pillar of *Pancasila*. The idea to replace people sovereignty with God sovereignty is not only subversive, but also abolished the essence of Indonesian government as a Republic, in which the legitimacy of government based on the people approval.<sup>51</sup>

### 3.3. Incompatibility 3: *Pancasila's Nation State v. Caliphate's Trans-nationalism*

The third incompatibility between *Pancasila* and Caliphate's ideology is on the issues of nationalism and nation state. As an ideology, *Pancasila* puts nationalism as one of its pillars. It explicitly contains in the third pillar of *Pancasila*, the unity of Indonesia. The nation state and nationalism has always been the foundation of Indonesia republic. On 1 June 1945, Sukarno gave speech that urged BPUPKI members to establish Indonesia nation state based on nationalism.<sup>52</sup> Sukarno then continued to define a nation, by citing Ernest Renan, as a unit based on the share of fate.<sup>53</sup> For HTI, the idea of nationalism is similar to that democracy as un-Islamic and *jahil*. HTI sees nationalism and nation state as its manifestation as part of a western conspiracy to undermine the unity of *umma*. Interestingly, HTI accuses Ernest Renan, the same person that Sukarno quote to define nationalism, deliberately conceptualised nationalism that subsequently led to the emergence of a nation-state. For HTI, Renan assertion of nationalism had contributed to the collapse of Ottoman Empire.<sup>54</sup> Furthermore, HTI's trans-nationalism ideology

<sup>51</sup> Article 1 Par.1 Pre-Amendment Constitution of 1945 (Republic of Indonesia).

<sup>52</sup> Saafroedin Bahar, et.al, eds., *Risalah Sidang*, 71.

<sup>53</sup> *Ibid.*, 72.

<sup>54</sup> Burhanuddin Muhtadi, *The Quest*, 633.



subdues Indonesia as a nation to those of Arab identity. This repression is evidence of the use of Arabic as HTI's official organisational language.<sup>55</sup> For Indonesian, "*Bahasa*" is a national identity that signifies Indonesian nationalism. In conclusion, HTI ideology is incompatible with Indonesia's *Pancasila* ideology. The successful of HTI movement in advancing its idea would eventually threaten Indonesia existence as a nation and its promise for the pluralistic society. Therefore, the government concern over HTI as an organisation is reasonably justified.

#### IV. LIMITING HTI'S FREEDOM OF ASSOCIATION

In the previous section, it has been argued that HTI's ideology is against *Pancasila*. Thus, if it prevails, it will subsequently put an end not only *Pancasila* but also Indonesia as a nation-state. Therefore, there is a reasonable justification for the government to limit the development of HTI in Indonesia. The extent to which the government can limit HTI is bound by the Constitution of 1945. This section evaluates the current government measures in limiting HTI's freedom of association and evaluates the action through the proportionality test interpretation of the limitation clause.

##### 4.1. Government Measures

After the surge of political Islam in recent Jakarta gubernatorial election, Joko Widodo has decided to take affirm measures to the phenomena. Joko Widodo considered the political Islam phenomena in the election as the awakening of radical Islamist to the center stage of Indonesian politic that threaten the unity of the nation.<sup>56</sup> To reduce the political tension caused by political Islam, he creates policy that aims to weaken Islamic hard line societal organisation. One of those societal organisations is HTI. In a press conference, Coordinating Minister for Political, Law and Security Affairs, Wiranto, cited HTI's ideology does not compatible with the 1945 Constitution and Law Number 17 year 2013 on Societal Organisations as a reason for the

<sup>55</sup> Hizb U Tahrir, *The Draft Constitution*, Article 8.

<sup>56</sup> Mawa Kresna, "Pilkada Jakarta Berujung Pemberangusan HTI" [Jakarta Election Resulted in HTI's Dissolution], *Tirto*, 12 May 2017, <https://tirto.id/pilkada-dki-jakarta-berujung-pemberangusan-hti-coxH>.

dissolution.<sup>57</sup> However, the Law has a limitation. One of the limitation is a complicated procedure.<sup>58</sup>

Furthermore, further analyses on the Law reveals that government cannot dissolve HTI. The reason for this is because the Law stipulates strict requirement and procedure to act against societal organisation. The government can only give sanctions to societal organisation, if it violates Article 59 of the Law. Article 59 outlines several prohibitions for societal organisation. Based on Government account, HTI potentially violates Article 59(2)c and (4) of the Law. Article 59(2)c stipulates that an organisation prohibits to conduct any separation movement that threatens the territorial integrity of Indonesia. As Article 59(4) stipulates that societal organisation is forbidden to adopt, develop, and disseminate other ideology/teaching that against *Pancasila*. From the two articles, HTI activity cannot be categorized in both prohibitions. First, it is difficult for HTI to categorise violating Article 59(2)c since HTI does not advocate separation of any part of Indonesia territory. Secondly, even if HTI caliphate ideology is against *Pancasila*, but according to the societal organization law, caliphate ideology or any other ideology apart from communism does not consider as against *Pancasila*. The explanatory memorandum of Article 59 (4) only stipulates that the ideology refers to the article is marxism, communism, and atheism.

Furthermore, HTI in its activities is known for adopting peaceful means in disseminating their idea. There are no records that HTI uses any violence, threaten security or disturb public order in doing their activities.<sup>59</sup> The government realizes this hindrance, hence on July 2017, the government passed Government Regulation in Lieu of Law Number 2 Year 2017 on Amendment of Law Number 17 Year 2013 on Societal Organisation (hereafter,

<sup>57</sup> Kristian Erdianto, "Ini Alasan Pemerintah Bubarkan Hizbut Tahrir Indonesia" [Government's Reason in Disbanding Hizbut Tahrir Indonesia], Kompas.com, 08 May 2017, <http://nasional.kompas.com/read/2017/05/08/14382891/ini.alasan.pemerintah.bubarkan.hizbut.tahrir.indonesia>.

<sup>58</sup> Kristian Erdianto, "Wiranto Sebut Pembubaran HTI Pakai Perppu Tak Langgar Prosedur Hukum" (Wiranto Claimed Using Perppu To Dissolve HTI Does Not Violate the Law), Kompas.com, 17 May 2017, <http://nasional.kompas.com/read/2017/05/17/18402491/wiranto.sebut.pembubaran.hti.pakai.perppu.tak.langgar.prosedur.hukum>. See also Eryanto Nugroho, "Can Hizbut Tahrir really be dissolved?", Indonesiatmelbourne (blog), June 2, 2017, <http://indonesiatmelbourne.unimelb.edu.au/can-hizbut-tahrir-really-be-dissolved/>.

<sup>59</sup> Burhanuddin Muhtadi, *The Quest*, 624.

Perpu 2/2017). Perpu 2/2017 has several amendments that overcome the previous law obstacle in dissolving HTI. Those amendments are as follows: first, Perpu 2/2017 has added “Constitution of 1945” phrase in the definition of societal organisation. Second, it has broadened the prohibition clause in Article 59, namely :

- a. Prohibiting to adopt flag or emblems that resembles the flag and emblems of Indonesia Republic as official organisation flags or emblems;
- b. Expanding the definition of “group” to include government officials; and
- c. Expanding the definition of *Pancasila* ideology to incorporate many non-communist ideologies including the Islamist ideologies (explanatory memorandum Article 2c).<sup>60</sup>

Third, Perpu 2/2017 removed all due process in sanctions procedures by removing the role of the court to review the process before the government decided to apply the sanction.<sup>61</sup> Finally, Perpu 2/2017 has included criminal sanction. The penal sanction criminalizes every societal organisation member directly or indirectly involves any offences in prohibitory clauses. The maximum penalty for offences such as promoting and advocating activities that against *Pancasila* is punishable up to 20 years imprisonment.<sup>62</sup> On 24 October 2017, the Parliament approved Perpu 2/2017 to become Law. Perpu 2/2017 has, then, become Law Number 16 Year 2017.

#### 4.2. Government Measures and Proportionality Test

There is no doubt that human rights or any other legal rights always have its limitation. The idea reflects in an English maxim, “you right to swing your arms ends just where the other man’s nose begins.” This maxim indicates that the claim of individual rights ends when other personal rights exist. Article 29 Universal Declaration of Human Rights (UDHR) stipulates clearly the possibility to limit human rights. The article stipulates:

<sup>60</sup> Explanatory Memorandum of Article 59 par. (4) letter c via Article 1 number 2 Government Regulation in Lieu Number 2 Year 2017 on Amendment of Law Number 17 Year 2013 on Societal Organisation (Indonesia).

<sup>61</sup> Article 62 via Article 1 number 5 Government Regulation in Lieu Number 2 Year 2017 on Amendment of Law Number 17 Year 2013 on Societal Organisation (Republic of Indonesia).

<sup>62</sup> Article 82 A via Article 1 number 5 Government Regulation in Lieu Number 2 Year 2017 on Amendment of Law Number 17 Year 2013 on Societal Organisation (Republic of Indonesia).

“the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order, and the general welfare in a democratic society”.

The Constitution of 1945 limitation clause has a similar tone with the Article 29 UDHR. The Constitution of 1945 limitation clause stipulates:

“In exercising rights and freedoms, every person shall be subject to limitation as are determined by law solely for securing due recognition and respect for the rights and freedoms of other and of meeting the just requirements of morality, religious values, security, public order, in a democratic society”

Indonesia Constitutional Court affirms the limitation of human rights. In its Decision Number 14/PUU-VI/2008, MK considers the limitation of rights as inevitably, even without the limitation clauses stipulates in the 1945 Constitution.<sup>63</sup>

Nonetheless, the state power to limit human rights is without no limit. One of the prominent documents that extensively discuss this issue is Syracuse Principle developed by the American Association for the International Commission of Jurists (AAICJ). The introductory note to Syracuse Principle highlighted the abuse by many governments in using human rights limitation clause to arbitrary limit human rights. Thus, the AAICJ developed nine principles in which state can limit human rights under the human rights limitation clause.<sup>64</sup> The principle emphasizes the “necessary”<sup>65</sup> aspect in limiting the rights. The “necessary” wording implies that the limitation, among others, the need to be proportionate to the aim of limitation.<sup>66</sup> Another important document is Human Rights Commission General Comments No. 31 of 2004 that stipulates the state restriction to any rights under International Convention on Civil and Political Rights (ICCPR) “must demonstrate their necessity and only take such measures as *are proportionate*

<sup>63</sup> Indonesia Republic Constitutional Court Decision Number 14/PUU-VI/2008 on Judicial Review Article 310 par. (1) and (2), Article 311 Par.(1), Article 316 and Article 207 Indonesia Criminal Court with respect to Constitution of 1945 (Republic of Indonesia), p.278 – 279.

<sup>64</sup> *Ibid.*

<sup>65</sup> Article 12 Par. 3 International Covenant on Civil and Political and Rights (UN Treaty).

<sup>66</sup> American Association for the International Commission of Jurists, “The Siracusa Principle on The Limitation and Derogation Provision in the International Covenant on Civil and Political Rights”, *Human Rights Quarterly* 7, No.1, (1985), 3-14.

[emphasis added] to the pursuance of legitimate aims to ensure the continued and effective protection of Covenant rights.”<sup>67</sup>

Likewise, the limitation clause in the Constitution of 1945 also gives similar account for the state in limiting rights. The limitation clause outlines two aspects of state power in limit the human rights, namely, the procedural limit and substantive limit. The procedural limit requires that the human rights limitation should be prescribed by law. In Indonesian legal system, law is a type of regulation that needs to be approved by the Parliament (*Dewan Perwakilan Rakyat*, DPR).<sup>68</sup> The substantive limit relates to the government reason to limit human rights. The limitation clause prescribes the basis for limitation that is strictly for the protection of other human rights, the just demand of morality, religious values, security and public order in a democratic society. From that arrangement, the question arises how to create a balance between the need for government to limit rights and the protection of its rights itself. The answer is rests on the wording of “in a democratic society”. The democratic society phrase is important to differentiate limitation between those of a totalitarian society (closed society) with limitation within a democratic society. This phrase encourages to conduct comparative research in order to see other jurisdiction applying the limitation clause. One of the most widely used as an approach to limit right in a democratic society is proportionality test.

In constitutional law studies, proportionality test has become a generic constitutional law that commonly used in democratic society to balance between rights and legal limitation of rights. The generic constitutional law defines as “a skeletal body of constitutional theory, practice, and doctrine that belongs uniquely to no particular jurisdiction.”<sup>69</sup> The idea of the generic constitutional law indicates that if a theory, practice, and doctrine have been applied in the various jurisdictions, it then becomes a generic constitutional law. The test has been applied in much of civil law and common law countries. Furthermore, it also has been applied by human rights Court in regional level, such as, the

<sup>67</sup> Human Rights Committee, General Comments No.31 (2004) adopted 18<sup>th</sup> session (UN).

<sup>68</sup> Article 20 Par. (2) Constitution of 1945 (Republic of Indonesia).

<sup>69</sup> David S Law, “Generic Constitutional Law”, *Working Paper University of San Diego School of Law*, (2004) : 7.

European Court of Human Rights, the Inter-American Court of Human Rights and the European Court of Justice.<sup>70</sup> The idea behind proportionality test is to balance the means with the end-result. In balancing between means and the end-result, the means should be helpful, necessary, appropriate and most importantly, proportional.<sup>71</sup> Bernhard Schlink gave an example of a disabled man that tries to defend his apples (property) from a child who steals his apple from the tree. The child disregards his shouting not to take his apple. The only means for him is to use a gun that he can reach to shoot the child down. In this example, Schlink elaborates that the means of shooting the child is effective and necessary to protect the man's apples (property). However, to shoot a child for apples is considered as inappropriate or imbalanced because the life of the child is much precious than the value of a couple of apples.<sup>72</sup> Schlink gave a concrete example of a German Federal Constitutional Court case. The Court faced a question of whether the state could extract a defendant's cerebrospinal fluid to determine his/her mental capacity. The court decided that determining mental capacity was a legitimate goal. However, the court recognized that the pain and danger caused by the extraction. Thus, the court sees that the extraction only justifies in a serious case.<sup>73</sup>

In limiting freedom of association, Maina Kiai, a special rapporteur for Human Rights Council, presented a report to the Human Rights Council on 28<sup>th</sup> session of 21 May 2012. In his report, Kiai outlines several important aspects of freedom of association limitation. The report explains that the suspension and the involuntary dissolution of an association are the severest types of restrictions on freedom of association. Thus, it can only be applied when there is a "clear and imminent danger resulting in a flagrant violation of national law". The suspension and dissolution "should be strictly proportional to the legitimate aim pursued and used only when softer measures would be insufficient".<sup>74</sup> Furthermore,

<sup>70</sup> Juan Coanciaro, "The Principle of Proportionality : The Challenges of Human Rights", *Journal of Civil law Studies* 3, (2010) : 178.

<sup>71</sup> Bernhard Schlink, "Proportionality in Constitutional Law: Why Everywhere But Here?", *Duke Journal of Comparative & International Law* 22, (2012) : 291 - 293.

<sup>72</sup> *Ibid.*, 293.

<sup>73</sup> *Ibid.*

<sup>74</sup> Maina Kiai, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of Association. In: Rapporteur UNHRC, editor. New York: United Nation General Assembly 2012, 18.

Kiai highlighted that decision to dissolve an organization, especially labour organization, “should only occur in extremely serious cases, and it needs to be done through judicial decision so that the rights of defense are fully guaranteed”.<sup>75</sup> To evaluate the Law on Societal Organisation, it can be approached by classifying the law into two aspects of rights protection: the substantive rights protection and the procedural rights protection. The substantive rights protection refers to the action of Societal Organisation Law that can be sanctioned. In proportionality test, the action that can be sanctioned needs to be recognized by the relevant article of the Constitution of 1945. The procedural rights protection refers to the procedure in which government applying the sanction. It relates to proportionality of government sanction to the violation done by the societal organisation.

Arguably, the Law has partially complied with the parameter defined in the report and proportionality test interpretation on the limitation clause. The partial compliance is due to issues on the substantive rights protection. The Law contains prohibitory clause that prohibits societal organisation to affiliate with communism and marxism ideology. The Law stipulates several prohibit actions that would result in sanction, if societal organisation breach the prohibition clause.<sup>76</sup> The sanctions are administrative sanction starting from notice of breach, revocation of grants, temporary dissolution, and to the severest punishment of permanent dissolution.<sup>77</sup> In Article 59 (4) of the Law prohibits societal organisation to adopt communism as its ideological foundation. This arrangement violates the freedom of consciences that protects under Article 28E (2) of the 1945 Constitution. ICCPR explicitly categorized that the freedom of consciences as non-derogable rights.<sup>78</sup> Apart from sanctioning communism, there are no substantial issues to the other prohibition clauses. The other prohibition clause includes societal organisation involvement in violence,<sup>79</sup> advocating disintegration and involved in the separatist movement,<sup>80</sup> instigating hatred, contempt on races, ethnicity,

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<sup>75</sup> *Ibid.*

<sup>76</sup> Article 59 Law Number 17 Year 2013 on Societal Organisation (Republic of Indonesia).

<sup>77</sup> Article 60 Law Number 17 Year 2013 on Societal Organisation (Republic of Indonesia).

<sup>78</sup> Article 4 Par.2 International Convention on Civil and Political Rights (UN Treaty).

<sup>79</sup> Article 59 par.2 Law Number 17 Year 2013 on Societal Organisation (Republic of Indonesia).

<sup>80</sup> Article 59 par.2 letter a Law Number 17 Year 2013 on Societal Organisation (Republic of Indonesia).

and religions,<sup>81</sup> conducting vigilante actions,<sup>82</sup> and involve in political party fund raising.<sup>83</sup>

In procedural protection aspect, the Law has sufficiently given protection to the freedom of association. The law guarantees the rights of defence through the involvement of court in imposing a sanction on societal organisation.<sup>84</sup> This is an essential safeguard from freedom of association protection perspective as highlighted in Kiai report.<sup>85</sup> Furthermore, the Law has put dissolution as a final measure, if any other measures have failed to prevent an organization to breach the prohibition clauses.<sup>86</sup> This procedural process indicates the adoption of proportionality approach in limiting rights. The steps are the manifestation of the spectrum of sanctions that control government from arbitrarily giving the ultimate sanctions to societal organisation.

The Law outlines three steps: The first is to give written notice.<sup>87</sup> The second step, if it continues to conduct the violations, the sanction increases to stop aiding and temporary termination.<sup>88</sup> Finally, dissolution and termination declared by the court.<sup>89</sup> Unfortunately, all those features have been removed by the amendment to the Law. The changes as adopt in the amended Law has breached the limitation clause from proportionality test perspective that requires proportionality between the government measures with the threat posed by the societal organisation. The enactment of the amended law is disproportionate because of three stipulations in the amendment law: first, it broadened definition that could potentially use to silence critics to government officials. Secondly, the removal of due process in societal organisation is sanctioning. Finally, it criminalizes the organisation members based on its membership of the organisation, if the organisation violates the prohibition clause. One of the prohibition clauses in the Law of 2013 is a prohibition for an organisation to conduct any sedition toward races, ethnicities,

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<sup>81</sup> Article 59 par.2 letter c Law Number 17 Year 2013 on Societal Organisation (Republic of Indonesia).

<sup>82</sup> Article 59 par.2 letter e Law Number 17 Year 2013 on Societal Organisation (Republic of Indonesia).

<sup>83</sup> Article 59 par.3 Law Number 17 Year 2013 on Societal Organisation (Republic of Indonesia).

<sup>84</sup> Article 60 – 82 Republic of Indonesia Law Number 17 Year 2013 on Societal Organisation

<sup>85</sup> Miani Kai, *Report of the Special*.

<sup>86</sup> Article 61 Law Number 17 Year 2013 on Societal Organisation (Republic of Indonesia).

<sup>87</sup> Article 62 Law Number 17 Year 2013 on Societal Organisation (Republic of Indonesia).

<sup>88</sup> Article 64 Law Number 17 Year 2013 on Societal Organisation (Republic of Indonesia).

<sup>89</sup> Article 70 Law Number 17 Year 2013 on Societal Organisation (Republic of Indonesia).



and groups.<sup>90</sup> The Law constructs the definition of races, ethnicities, and groups within the line of common understanding. In common understanding, those categories refer to the identity of a certain group of people that share a common attribute, such as, political, culture or physical attributes. The Amendment to the Law has broadened the definition of “groups” element to include state officials.<sup>91</sup> This provision can potentially be misused to stifle legitimate criticism to state officials. The protection of criticism to government officials is an essential part of freedom of expression.<sup>92</sup> Furthermore, the sanction itself is disproportionate because it adds severe criminal sanction for the member of the societal organisation, if found guilty of violation to this prohibition clause.

The second problem with the Amendment Law of 2017, it has removed all the procedural safeguards existed in the previous Law. The main important feature of societal organisation is a procedural safeguard that is the involvement of judiciary in the sanctioning process (*ex-ante process*). The societal amendment law shifted this approach to *post-factum* process. In *post-factum* process, the government dissolves the organisation first then the organisation can challenge the decision in the court. The shifted mechanism is a serious violation of the human rights principle, where in the severest punishment for rights, due process must be put in place before any government decision can be given. Finally, the most important objection to the Amendment Law is the criminal sanction. The formulation of criminal sanction is vague. It does not meet the standard and criteria of *lex certa*. *Lex certa* principle requires that criminal sanction need to be defined as accurate, specific and precises as possible. The definition of criminal actions in the law has failed the *lex certa* principle. It is notable in the use of “indirect involvement” category as a criminal element in the formulation of the criminal actions. Potentially, such formulation could result in the arbitrary punishment to a member of the organisation that leads to arbitrary mass prosecution to the member of the societal organisation.

<sup>90</sup> Article 59 par (1) letter a Law Number 17 Year 2013 on Societal Organisation (Republic of Indonesia).

<sup>91</sup> Article 59 par (3) letter a via Article 1 Number 2 Government Regulation in Lieu Number 2 Year 2017 on Amendment of Law Number 17 Year 2013 on Societal Organisation (Republic of Indonesia).

<sup>92</sup> Reem Segev, “Freedom of Expression : Criticizing Public Officials,” *Amsterdam Law Forum* [Online], Accessed March 20, 2018 <http://amsterdamlawforum.org/article/view/113/204>.

On July 2017, the government announced HTI dissolution. HTI dissolution is based on the Amendment Law.<sup>93</sup> Arguably, the dissolution is potentially unlawful because it is based on law that its constitutionality is questionable. The enactment of the Law made Indonesia fall to the paradox democracy, in which the government uses undemocratic measures to constrain the development of anti-democracy political force. In a democratic society, the government ought to use democratic approach to limit rights that are to apply proportionality test in limiting freedom of association. The government concern to HTI movement is reasonable and justifiable. The application of proportionality test dictates that government response should be proportionated with HTI's level of threat. Thus, the government needs to focus and assess HTI's action and strategy.

As it has been discussed above, HTI defines its strategy into three stages, in which HTI has entered the second stages. The second stage is interaction and infiltration stage where HTI's activist interact and influence key government and societal organisation.<sup>94</sup> This phenomenon has amplified the level of HTI threat. However, it has not significantly posed "clear and imminent danger" to apply the severest sanction that is the dissolution. Other administrative measures need to be conducted before it can be applied to dissolve HTI as an organisation, such as, limiting HTI activities to interact with key government institutions, or prohibiting HTI to accesses government support including prohibiting the use of public utilities for its activities. The severest form of limitation, such as, the permanent dissolution can only be done, if the government has substantial indication that HTI is about to enter its stage three, that is the revolution.

## V. CONCLUSION

HTI as political-ideological movement is, indeed, against *Pancasila*. The incompatibility between HTI's ideology and *Pancasila* situates in three aspects: HTI's exclusivity against *Pancasila's* inclusivity; HTI's God Sovereignty against

<sup>93</sup> Ambaranie Nadia Kemala Movanita, "HTI Resmi Dibubarkan Pemerintah" [Government Officially Disbanded HTI], Kompas.com, 19 July 2017, <https://nasional.kompas.com/read/2017/07/19/10180761/hti-resmi-dibubarkan-pemerintah>.

<sup>94</sup> Burhannudin Muhtadi, *The Quest*, 629.

*Pancasila's* People Sovereignty; and HTI's trans-nationalism against *Pancasila* nationalism (nation-state). All of the three aspects are important elements of Indonesia existence and integration. For instance, the inclusive character of *Pancasila* is based on agreement from Indonesian founders to establish a state that overcomes the primordial spirit of groups. Thus, the state should not be based on majority nor minority identity. This idea has become the Indonesian consensus that unified Indonesian. Any attempt to replace the consensus, especially, toward the more exclusive state would result in Indonesian disintegration. Furthermore, the trans-nationalism character of HTI's ideology would result in the elimination of the most important essence of Indonesia as a state that is Indonesia nation (*kebangsaan Indonesia*). The HTI's trans-nationalism ideology eliminate Indonesia nation identity under the domination of another foreign identity that is the Arab through the imposition of Arab language as the official language of HTI's state-to-be. The incompatibility of HTI's ideology and *Pancasila* is sufficient to raise justifiable concern for government to the danger of HTI's movement.

Nonetheless, no matter how subversive HTI's ideology to *Pancasila*, the government still cannot limit HTI's rights solely based on its incompatibility to *Pancasila*, since HTI's ideology at the level of ideas fall under freedom of conscience protection clause that cannot be derogated under ICCPR. The government action to limit HTI's rights of association is justifiable if HTI has tried to impose its ideology through revolution. The limitation itself should be justified under the limitation clause of the 1945 Constitution. I concluded that the proportionality test application by the interpretation of the limitation clause of the 1945 Constitution is persuasive. This argument is based on the democratic society phrase of the limitation clause, in which many of today democratic society used the approach to interpret it.

The proportionality test dictates that any action against freedom of association or any other rights limitation should be proportional. Thus, the limitation should be constructed within the spectrum of government measures. In the freedom of association context, the limitation should be initiated from minor administrative measure, such as, notification of breach up to the severest form

of limitation that is the dissolution. The dissolution should be used in the strictest form, in which there is “a clear and imminent danger resulting in a flagrant violation of national law.” The government measure at this point does not reflect the limitation clause of the 1945 Constitution. The Amendment Law of 2017 reflected the use of totalitarian measures as opposed to democratic society measures. The application of proportionality test confirms the compatibility of the previous Law with the limitation clause but rejects the Amendment Law of 2017. In HTI issues, at the current stage, the proportionality test interpretation requires that government can limit HTI’s freedom of association by imposing some restriction in their activities, such as prohibiting the use of public facilities to their activities, prohibiting interaction and cooperation between HTI and key political and government institutions. Additionally, the severest restriction of HTI’s dissolution can only be applied if there is a strong indication of HTI entering its final stage, the revolution.

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