



CENTRE FOR LAW
AND DEMOCRACY

Indonesia

Note on the Draft Law Pertaining to Mass Organizations

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Introduction

This Note contains comments by the Centre for Law and Democracy (CLD) on the draft Law Pertaining to Mass Organisations (draft Law) which currently before the Indonesian House of Representatives.¹ It aims to provide interested stakeholders with an assessment of the extent to which the draft Law conforms, and does not conform, to international standards and better comparative practice regarding freedom of association. It provides recommendations for reform as relevant, with a view to helping interested stakeholders in Indonesia to promote a law in this area which respects, as fully as possible, the right to freedom of association.

The draft Law is intended to replace the existing regime for regulating civil society organisations (CSOs), Law No. 8 of 1985. This Law, which was passed during the Suharto regime, contains rules and standards which are manifestly inappropriate in a democracy. We therefore welcome the initiative by the Government of Indonesia to replace it with a more appropriate and democratic law. At the same time, the draft law fails to conform fully to international law in important respects, as outlined below.

This Note is based on international standards relating to the right to freedom of association, in particular as guaranteed by the *International Covenant on Civil and Political Rights* (ICCPR),² a treaty ratified by 167 States, including Indonesia,³ as of February 2012. Article 22 of the ICCPR provides, in relevant part:

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

The right to freedom of association extends to the establishment and operation of associations and it applies to ‘everyone’, thereby protecting the association rights of foreigners as well as citizens.⁴ At the same time, the right is not absolute.

¹ This note is based on an English translation of the November draft of the law, which has been recommended to us as the draft which best reflects the areas of consensus between the House of Representatives and the Government. CLD is not responsible for errors based on mistranslation.

² UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976.

³ Indonesia ratified the ICCPR on 23 February 2006.

⁴ The United Nations Human Rights Committee, the body tasked with oversight of the ICCPR, has noted that foreigners enjoy the rights to freedom of expression and association within the territory of a State Party to the ICCPR. See General Comment 15, The Position of Aliens under the Covenant, 4 November 1986.

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Restrictions, however, must be justified by reference to the three-part test which is implicit in Article 22(2), namely by (i) being prescribed by law; (ii) having as its aim the protection of one of the interests listed in Article 22(2); and (iii) being necessary in a democratic society to protect that interest.

1. Restrictions on Scope of Activities

One of the important attributes of the right to freedom of association is that individuals and groups may form associations to carry on any activity that is otherwise legal. In other words, if an activity is legal, it is also legal to form an association to carry it out. This includes social purposes – such as protecting the rights of workers or helping the poor – and mutual benefit purposes – such as forming a soccer club.

The draft Law, appears to impose some limitations beyond the above on the scope of activities which associations may carry out. Article 1(1) starts by defining ‘mass organizations’ (or Ormas) as groups which aim to “participate in the development towards reaching a Unitary State of the Republic of Indonesia based on Pancasila”. Article 5 lists a number of objectives of Ormas, which are broad but which are largely focused on social purposes, rather than mutual benefit purposes, and which may also exclude some social purposes. Article 6 lists the possible functions of Ormas, which again seem to be more focused on certain high-profile social purposes, although they also accommodate mutual benefit purposes. Article 7 provides a long list of activities of Ormas, which includes a catchall for “other activities”, and is therefore technically comprehensive.

We understand that the structure of the draft Law follows a common legal drafting approach in Indonesia. The categories listed within this structure should, however, be broadened so as to include the full range of objectives and activities which Ormas may wish to identify for themselves.

More problematical are the positive responsibilities placed on Ormas in Article 20, which include preserving the ‘unity’, ‘integrity’ and ‘oneness’ of the State, preserving the values of “religion, culture, moral, ethics, and norms of decency”, providing a benefit for society, ensuring public order and peace, and participating in “national objective achievement”. This is simply not legitimate. As noted above, associations should be allowed to pursue whatever (legal) objectives they please. It is also simply not reasonable. A soccer club may not harm national unity or religious values, but it is hard to see how it would necessarily promote them. Even social purposes such as education or income generation do not obviously promote national unity. The

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provisions in Article 20 that relate to the general functioning of Ormas – such as limiting its activities to those in line with the objectives of the organisation – are already found in different parts of the law (and so are unnecessary).

Article 50 sets out a number of prohibitions on the activities of Ormas. In most cases, these rules repeat prohibitions which already apply generally pursuant to either the Indonesia criminal law or other legal regimes. For example, Indonesian law already generally provides for remedies for defamatory statements and prohibits violence or causing damage to public facilities. There is no need to repeat these statements here, as though they were especially relevant for Ormas. At the most, it might be necessary to provide generally for the application of other legal rules to Ormas, as relevant, although this is presumably already the case (for example through the criminal law prohibition on collusion to commit crimes or civil rules on contributory responsibility).

The alternative formulation of Article 50 is even more problematical, prohibiting Ormas from engaging in any activity which falls within the scope of the duties and jurisdiction of government. An enormous range of activities undertaken by social purpose Ormas could be deemed to fit within this category, such as providing for the poor, promoting education, facilitating sports and so on, and it is clearly inappropriate to prohibit them from doing this work. The alternative formulation would also impose a highly controlling rule that Ormas may only conduct activities where they have the approval from the government for them. There is absolutely no justification under the three-part test for requiring government approval for specific activities of associations.

Recommendations:

- The definition, objectives and functions of Ormas should be defined broadly so as not to exclude any legal objectives and functions of Ormas.
- Article 20 should be removed from the law.
- Article 50 should be reviewed and rules that simply repeat pre-existing civil or criminal rules should be removed.
- The alternative formulation of Article 50 should be dropped.

2. Risk of Government Interference

It is established, under international law, that government should not be able to exercise control over the operations of associations, at least beyond the purely technical function of registering them. If government bodies are able to exercise control over associations, there is a risk that this will be done to achieve political or

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other illegitimate ends, rather than in the public interest, and this would, in turn, undermine the right to freedom of association.

Articles 11 and 16-17A provide for the legitimation and registration of Ormas by the government (ministers, governors, regents/majors or Camat or Lurah/District heads, as relevant. It seems that the process is, properly, one of technical registration, with no power to refuse registration as long as the documentation is proper, but it would be preferable to make this quite clear in the law.

Article 44(3) provides for the ‘supervision’ of Ormas by the government, while Article 47 clarifies that this may be by way of reporting or providing support. It is not clear from the text, but it would seem that reporting refers to the power of the government to require Ormas to provide it with reports. If so, this is too broad a power; the scope of any power to require Ormas to report should be spelled out in detail in the law.

The most serious problem in this area are the sanction powers exercised by government pursuant to Articles 51 and 52 for breach of Articles 20 and 50 (which, as noted above, are already problematical). The problem with these powers is that they are exercised directly by government and that they include very serious sanctions, such as a fine, a “ruling of termination of empowerment” (it is not clear what this means but it may be a revocation of Ormas registration), and even the power to freeze the activities of Ormas for up to 90 days, while a court decides on the matter, which may include a 30-day period before the case is even referred to the courts. These rules are in clear breach of the requirement that government should not be in a position to exercise control over associations.

Recommendations:

- The rules relating to legitimation and registration of Ormas should make it clear that there is no discretion on the part of officials to refuse to legitimate or register Ormas as long as the documentation is in order.
- If Articles 44(3) and 47 are intended to give the government the power to require Ormas to report, the scope of this power should be spelled out clearly in the law.
- The power of the government to sanction Ormas, pursuant to Articles 51 and 52, should be removed and instead given to the courts (at a minimum for the more serious powers of sanction).

3. Unduly Prescriptive Rules

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Any structural and organisational rules that are imposed on associations must also meet the three-part test. This means that these should be limited to the minimum conditions that are necessary to ensure the sound operations and governance of associations, and to protect the public against abuse. To this end, most democracies impose certain limited rules on the way associations must be established and run, and how decisions should be made, and this is also the case with the draft Law. It may be noted that this is not about good practice but about the minimum legal rules which may legitimately be applied to all associations. Many associations go far beyond the minimum legal requirements to promote such issues good governance, participation and financial accountability, but if such standards are imposed on all associations, this would represent a breach of the right to associate.

At the same time, several of the rules in the draft Law go beyond what is generally considered a necessary minimum of such rules. The requirements for legitimation and registration in Articles 11 and 16, for example, are very onerous, requiring the submission of such details as the proposed work programme for the association, its sources of funding and a letter attesting to its readiness to produce an activities report. These issues can be expected to change from time-to-time and it is not necessary for Ormas to provide these to achieve the objectives noted above.

Articles 22A-C require both membership and non-membership Ormas to have members or activities, respectively, in at least 25% of the relevant regions of the country (for example, provinces for national Ormas). There is no reason at all why this should be imposed. Ormas whose activities are relevant nationally should be able to register as a national organisation even if it has only limited presence in the different provinces of the country. And Ormas which have members in more than one province should be able to obtain national registration.

Article 24 requires the management of Ormas to be appointed “through deliberation and consensus” and to include at least three positions, a chairperson, a secretary and a treasurer. Neither of these rules is necessary. There is no reason why larger Ormas should not make appointments through a system of voting (i.e. a non-consensual mechanism), while smaller Ormas may lack the personnel to have all three positions (and may, for example, wish to combine them). The same applies to Article 30, which again calls for decisions to be made by consensus.

Article 26 prohibits anyone who has resigned or been terminated from the management or membership of an Ormas from taking up a similar position later. This is simply not reasonable. There is no reason why a member should not be able to re-join after having left (perhaps because he or she was temporarily unable to pay the membership fee) or why someone who was voted out of management should not be able to run again later.

Article 29(1) provides that every member of an Ormas shall have the “same rights and obligations”. Once again, this is unduly prescriptive. There is no reason, for example, why a golf association which ran a golf course should not offer different benefits to members (such as increased access to the golf course for members who pay more fees). Almost by definition, Ormas will have special rules (and rights and obligations) relating to the governing body and management; to give just one example, it is very common to give the chairperson a casting vote in case of a tie vote, in addition to his or her original vote.

Articles 44 and 48 impose significant structural requirements on all Ormas. Article 44 requires Ormas to have an “internal board of supervisors” to enforce the organisation’s code of ethics and to decide on the application of internal sanctions. Article 48(1) calls on Ormas to settle disputes through “mechanisms ruled in the Deeds of Establishment”. It may be that this is optional, because the article suggestions Ormas have the discretion to do this, but in that case it is not clear why the rule should be necessary at all, because Ormas do not need a legal rule to allow them to engage in dispute settlement activities.

Otherwise, these rules are simply far too prescriptive. Ormas should be left to decide on their own what the best way is for them to promote professionalism and to resolve disputes. For many Ormas, introducing an internal board of supervisors for this purpose would not only be unduly onerous (especially for smaller Ormas) but would also run against their internal culture and style of operation.

Recommendations:

- The rules on legitimation and registration should require the submission only of information which is strictly necessary to ensure sound operations and governance, and to protect the public.
- The rules in Articles 22A-C on minimum presence in different regions should be removed.
- Ormas should not be required to appoint management or take decisions by consensus or to have at least three management positions.
- Article 26 should be removed from the law.
- Article 29(1) should be removed from the law.
- Articles 44 and 48(1) should be removed from the law.

4. Foreign Organisations

By far the most restrictive rules in the draft Law are those relating to foreign Ormas, defined in Article 1(2) as associations which are registered abroad, or which are founded by foreigners or jointly by Indonesians and foreigners (see also Article 39,

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alternative option). There are two alternative versions of Chapter XIV, which includes Articles 39-43. For purposes of brevity, we address here only the first version of Chapter XIV, while also noting that the second version is even more problematical.

Foreign Ormas must first obtain an operational permit from the Minister of Foreign Affairs (Article 39(1)), which must then be provided to the minister with responsibility for the area in which they intend to undertake activities. The draft Law does not set out clearly what is required to be provided to the Minister of foreign Affairs to obtain this permit, but it is clear that this goes well beyond a system of registration. Among other things, the requirements include having “the foundation, objectives, and organization activities which are suitable to legislation in Indonesia” (Article 39(2)(b)), which, whatever this means, clearly involves an assessment of those characteristics, followed by a decision either to approve or reject the application.

As noted above, foreigners also enjoy the right to freedom of association, and it is not clear what justification there might be for requiring them to apply for the discretionary grant of what is essentially a licence to operate in the country. Should a foreign Ormas engage in activities which are illegal, it would be possible to prohibit them from continuing this through a court order (including an urgent interim order should this be necessary). On the other hand, it is clear that the process envisaged in the draft Law could lead to serious abuses, for example where a foreign Ormas was conducting perfectly legitimate activities, which the government happened to find inconvenient or embarrassing.

Requiring foreign Ormas to register, as is the case with local groups, should suffice to protect any legitimate interests Indonesia may have in supervising them. At the very minimum, if the government wishes to exercise the sort of prior control over foreign Ormas which the current approach provides for, which would be of dubious legitimacy under international law, it should establish an independent body to do this.

The draft Law also imposes unreasonable conditions on the scope of activities of foreign Ormas. The problem of a lack of clarity in Article 39(2)(b), cited above, has already been noted. 39(2)(c) requires foreign Ormas to cooperate with local Ormas which, while perhaps desirable, cannot be justified as a blanket requirement for all foreign Ormas (for example, a foreign Ormas may wish to cooperate with the private sector or with the government, or to conduct activities directly).

Several of the rules on foreign Ormas are unacceptably vague. For example, Article 40(a) requires foreign Ormas to “provide benefit for the society, nation and state of Indonesia”, which is not only vague but also unduly narrow. Article 41 imposes a number of vague prohibitions on foreign Ormas. For example, Article 41(b)

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prohibits activities which “disrupt the stability and oneness” of Indonesia, while Article 41(e) prohibits activities which “disrupt diplomatic ties”. The scope for illegitimate interpretation of all of these rules seems clear; they are simply too vague to meet the prescribed by law standard of the three-part test for restrictions on freedom of association.

Articles 42 and 43 grant the government wide powers to sanction foreign Ormas for breach of Articles 40 or 41 (which, as noted, are already problematical), through the imposition of administrative sanctions ranging from a written reprimand to revocation of their operational permit and diplomatic action. This fails to meet the standard of independence required under international law for the exercise of any power of control over Ormas.

Recommendations:

- The scheme for licensing foreign Ormas envisaged in the draft Law should be removed. It might be replaced with a system of technical registration, along the lines required for local Ormas. If a more intrusive system of regulation is to be retained, at the very minimum it should be overseen by an independent body, so as to avoid abuse of the system for political or other illegitimate reasons.
- The restrictions on the activities of foreign Ormas, found in Articles 39-41, should be carefully reviewed, and illegitimate and unduly vague restrictions, including those noted above, should be removed.
- Any sanctions should not be imposed on foreign Ormas directly by the government but, rather, by court order or by an independent oversight body.