

The Administration of the Waiting Listed Pilgrim Candidates in a Justicial Operation System of Hajj Worship

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Abstract

The high interest of Muslims to perform pilgrimage, especially in Indonesia is not supported with the quota given by the government of Saudi Arabia, that creates a long queue (waiting list). This is of course an obstacle for pilgrim candidates, especially for pilgrim candidates in certain conditions besides any other issues that arose before the departure of the pilgrimage. Based on the legal issues above, this paper attempts to formulate a focus of research related to the setting criteria for pilgrims waiting list in the system of organizing the Hajj to be equitable. To solve the forementioned problem the authors use the theory of maqasid al-shariah, theory of justicial law. On the legal issue of the arrangements for the waiting listed pilgrim candidates, both in terms of philosophical, juridical, and sociological theory, still found a variety of crucial issues which are very interesting to study. Therefore, the authors attempt to examine, test, and analyze the issue on "the fair administration of the criterion of the waiting listed pilgrim candidates" The used method in this research is focused on the normative legal material. The used approaches in this study are the legislation approach, conceptual approach, and philosophical approach. The results of this study indicate that setting criteria for the waiting listed pilgrim candidates waiting list in a fair system of organizing the Hajj is to affirm the principle of legal arrangements for pilgrims who are capable, in accordance with age selectivity principles, and the obligations of performing Hajj worship only once in a lifetime. It is based on the change of situations and condition in the destination (The Holy Land) which can not accommodate the number of pilgrims.

Keywords: Hajj Implementation System, Waiting Listed Pilgrim Candidates

INTRODUCTION

The implementation of pilgrimage in Indonesia until today still faces many emerging problems. The problems in last few years are related to the whereabouts and fate of the regular and non-regular pilgrim candidates on the waiting list, accompanied by other problems that arise before the departure Hajj worship.

The number of regular pilgrim candidates who have registered on the waiting list of pilgrim candidates is increasing. For example, the waiting list in South Kalimantan Province has reached reached up to 24 years. A domino effect on the number of pilgrims is impacting the neglect and piled pilgrims in long queues in many regions. Obviously, there are many more examples of areas experiencing problems such as the Hajj departure waiting list. The number of pilgrims and the long queue of waiting list that is in turn triggered various of new problems especially regarding the lack of adequate legal protection against them, and the rules to shorten the departure queue.

In accordance with Article 1 paragraph 2 of the Act of the Republic of Indonesia Number 13 Year 2008 regarding Hajj Organization (also known as Undang-Undang Penyelenggaraan Ibadah Haji abbreviated, and hereinafter stated, as UUPIH)¹ that Hajj Organization is a series of management activities of Hajj worship implementation that includes coaching, hosting, and providing protection for pilgrims. Based on the article, the waiting listed pilgrim candidates should receive the same legal protection in the event as a pilgrim candidate whose departure is delayed. However, the intended protection of the pilgrims was only limited only to the protection of pilgrims who are already set off departure at the time. State's normatively accountability in address, protect, and resolve the main problem or why the queue of pilgrims is piled everywhere until today is never come to real.² This was seen when the regulation on the implementation of UUPIH, none of the article is governing the condition of the presence waiting listed pilgrim candidates, of course, raises serious problems both in terms of philosophical, juridical, and sociological theory.

The problematic in term of philosophical, injustice and legal certainty in setting criteria for waiting listed pilgrim candidates implicates to the difficulty in realizing a Mabruur, safe, and comfortable pilgrimage that

¹ State's Plate of The Republic of Indonesia No. 60 Year 2008, additional to State's Plate No. 4845

² The preamble of UUPIH states that Coaching for pilgrim is implemented in form of assistance, elucidation, and providing information to the society and the pilgrims. The service is conducted in form of service on administration and document, transportation, healthcare, and also accomodation and refreshments. The protection is implemented in form of safety and security warrant for pilgrims during the Hajj worship.

does not need a long time.

The absence of legal regulation on the criteria of non-quota and waiting listed pilgrim candidates in the construction of law that organize the pilgrimage, exposes their normative-juridical problem in the form of a legal absence (*rechts leemten*).

For the theoretical issue, the absence of principle of priority in determining the criteria of *istitha'ah* on pilgrims and multi-functional authority given to the government as a regulator, operator, and evaluator implicates on the non-fulfillment of human rights where the government is conditioned to the obligation to respect, protect, fulfill, enforce, and promote,

While the sociological issues is the high desire of Muslim society in Indonesia to perform Hajj worship, whereas the quota and regions of the pilgrimage is limited. The large number of pilgrims has resulted in the increasing of heavy burden for the state because the organization of the pilgrimage is an activity that keeps ongoing, routine, technical, and functional, meanwhile it solely let the rise of living standards and critical power of society that leads to a higher demands on the quality of pilgrimage service. The relation to state's policy is that this thing raises various views and problems, namely:

1. A sign that the state is very concerned to the improvement of the awareness of religious communities as a positive outcome of proselytizing;
2. The increase in the number of pilgrims is assessed with regard to the success of economic development. The increasing number of people who are able to perform Hajj worship is an indicator of increased public revenue
3. The increasing number of Indonesian pilgrims as a challenge.

The weak surveillance system in the organization of Hajj pilgrimage also increases the complexity of the problem. These phenomena caused implications in term of sociological chronicle, which leads to vulnerability of the misuse of authority on the organization of pilgrimage, particularly related to the operation and implementation of regulations related to the Hajj policy.

Someone who wants to join the pilgrimage must be registered as a prospective pilgrims. Hajj pilgrim registration is valid after receiving the relevant portion number (Article 6 paragraph (1) of the Regulation of Religion Minister 14/2012). namely the serial number of registration issued by the Ministry of Religions for Hajj pilgrim Candidates who has registered (Article 1 point 16 of the Regulation of Religion Minister 14/2012). The portion number applies only for the assembly in question and can not be replaced (Article 6 paragraph (2) of the Regulation of Religion Minister 14/2012). Because of the Hajj quota, then not everyone can immediately set out on a pilgrimage in the current year. There are so-called "waiting list". Namely pilgrims who have signed up and get a number and wait for the departure portion to perform the pilgrimage (Article 1 point 17 of the Regulation of Religion Minister 14/2012).

In addition to the absence of a quota, a person who also be inserted into the waiting list for some of the followings: (Article 9 paragraph (1) and (2) of the Regulation of Religion Minister 14/2012)

- a. In the event that the pilgrims do not pay off BPIH, concerned automatically become waiting listed pilgrim candidates for the next Hajj season.
- b. Pilgrims who had repaid BPIH and can not set off on the pilgrimage season of the current year, which concerned automatically become waiting listed pilgrim candidates for the next Hajj season.

If after two (2) Hajj seasons pilgrims could not depart the registration of Hajj is automatically concerned as canceled (Article 9 paragraph (3) of the Regulation of Religion Minister 14/2012).

In connection with the problem, this paper identifies legal issues as follows: There is weakness in the organization of Hajj administration for the absence of any concrete norms related to legal arrangements for waiting listed pilgrim candidates. This led the government to be unable to take action in directing sanctions, and so on. This resulted in many victims of neglect and failure on the departure of pilgrims, where they do not get protection, justice, and legal certainty.

Based on the legal issue above, this paper attempts to formulate a focus of research related to setting criteria for waiting listed pilgrim candidates in the system of organizing the pilgrimage to be more equitable. To resolve the forementioned problem the authors used *maqasid al-shariah* theory, the theory of justice.

RESEARCH METHOD

This study is normative, which is the study of the principles of law, the legal norms of the rule of law, and the legal system.¹ This research uses several approaches, such as: Legislation Approach, conceptual approach, and philosophical approach.²

¹ Sudikno Mertokusumo, *Penemuan Hukum*, (Yogyakarta : Liberty, 2009, Page 29

² Peter Mahmud Marzuki, *Penelitian Hukum*, (Jakarta : Kencana Prenada Media Group. 2008) Page. 93

RESULT AND DISCUSSION

Maqasid al-Sharia Hajj

The purpose of making pilgrimage as syariat is to form a mabrur Muslim as a complement to the pillars of Islam. A mabrur Hajj is a pilgrim procedure to make people after doing so, have a stronger spiritual and social commitment. So that increasing social commitment is actually what makes indication of a mabrur Hajj, i.e. after performing the pilgrimage, someone should be a good human being, the range of charity and worship are further foresight and contains social dimensions.¹

One of the Hajj condition is istitha'ah. First, istitha'ah mubasyarah, means the power to perform pilgrims by himself. In this istitha'ah mubasyarah there are requirements, they are: a). let gained enough stock for the travel; b). obtaining vehicle for commuting. c). Similarly their required supplies and the cost of vehicles and financing in connection with supplies and vehicles over the payment of debt to Allah as votive/nadzar and kafarah or payable debt to humans, even if it is delayed or deferred debt payment. Second, Istitha'ah tahshilihi bi ghairihi the ability of performing Hajj and Umrah through another person.

Legal philosophy of pilgrimage in the perspective maqashid Sharia is a reflection of the improvement of Islam as a slave by continuously self-improving to become an Insan Kamil (perfect man) after erforming the pilgrimage, creed, prayer, fasting, and charity.

Government policies which oriented as maslahat

Government policy should be oriented to the benefit of society. Similarly, in setting the criteria for pilgrims. The government is obliged to make a policy which is oriented on the benefit of pilgrims in form of protection for pilgrims in performing Hajj worship obligation. This is in accordance with the principles of fiqh rules:

تَصَرُّفُ الْإِمَامِ مَعَ الرَّاعِيَةِ مُنْطَبًا لِلْمَصْلَحَةِ

Meaning: the policy of a leader for his people should be oriented to maslahat (benefit for the people).²

Based on the rules of fiqh, government's policy should always be oriented to the benefit of the people. In the context of the implementation of pilgrimage, the government shall take into account the criteria on the pilgrims by setting policies that cancel pilgrims who had ever perform Hajj worship, prioritization for the elderly pilgrims as the must prioritized, multiply Haj quota by conducting bilateral political diplomacy with the government of Saudi Arabia, and suspend the registration of pilgrims to avoid over limit pilgrim candidates which causes long queues (waiting list).

Based on the formulation of the rules of fiqh above, it is known that the policy of the state is an act that can produce a benefit to the community that could be included, namely perceived usefulness specifically by pilgrims. This shows that the obligations of the government in determining policies must always be oriented to the benefit of society, especially in providing protection to pilgrims, more specific on the responsibility of the state to provide legal protection against criteria for pilgrims in the Hajj organization system that is based on justice.

To realize the responsibility of the state to provide legal protection against criteria for pilgrims in the Hajj organization system that based on justice, it is necessary to conduct a reformulation of the law in setting up criteria of pilgrims. As the rules of fiqh about the government's policy that substantially towards the benefit of pilgrims in an integrated manner, in order to reject the mudharat/harmness for pilgrims to pivot on the rules of fiqh: "Refuse mafsadah precedence to achieve maslahat".³

The government is obliged to create policies that provide benefit for pilgrims. The government's policy in the Act No. 13 Year 2008 on Hajj (PIH) and the Act No. 34 Year 2014 concerning Financial Management of Haji (known as Pengelolaan Keuangan Haji, for hereinafter abbreviated and mentioned as PKH) needs reformulation of the law, because the guarantee, certainty, and legal protection of the fulfillment and setting for the pilgrims have not been adequately protected, both in coaching, service, departure, repatriation, health, and comfort, as well as determination of pilgrims in form of regulation that is constructive and reformulative.

The State's responsibility in setting the criteria of pilgrims

The functions and responsibilities of state in setting the criteria for pilgrims which is to see the conditions and circumstances that cause the waiting list of pilgrim candidates. So the government should take the country through policy setting and determination of pilgrims. In a period from 2014, the quota of pilgrims amounted to only 168 thousand, is inversely proportional to the number of queues that 2.6 million pilgrim candidates. This also led to a waiting list that ranges from 10-25 years. Besides, there is the potential amount of funds for Hajj program, which recorded up to Rp 60 trillion, as the provisions of the initial deposit to sign up Hajj program which was set at Rp25 million. On the other hand, we are often dealing with people who is capable to pay the

¹ Nurcholish Madjid, *Perjalanan Religius 'Umrah dan Haji*, Jakarta: Paramadina, 1997, p. 68

² A. Djazuli, *Kaidah-kaidah Fikih*, p. 15.

³ *Id*, p. 29

initial cost to join the hajj program for more than once, even on some television interviews, there was a Jamaat/pilgrim which has performed pilgrimage for almost 10 times.¹

Functions and responsibilities of the state in the implementation of the pilgrimage is to create a policy on setting up criteria of pilgrims candidates, which is namely by set regulations, such as:

- 1) Pilgrim candidates who has already performed Hajj worship should not be prioritated for the Hajj program, it aims to provide opportunity for other pilgrim candidates who have not perform Hajj worship.
- 2) Establish policies regarding to the age of pilgrim candidates. Elderly people with restrictions on certain criteria must receive priority to perform pilgrimage.
- 3) Stop the registration of pilgrim program for a while. With the aim to avoid the increasingly long waiting list which can create chaos in the implementation of the pilgrimage.
- 4) Conducting bilateral political diplomacy abroad with the government of Saudi Arabia, to add the quota of pilgrims, for pilgrims from Indonesia is the most pilgrims in the world.

The function of the government in the implementation of the system and setting up the criteria of Hajj pilgrim

The fundamental problem of organizing the Hajj is when the organizer has not been optimal in providing best services including provide protection for the pilgrims. One of the contributing factors that often become a topic of public discussion is when the issue of organizing the pilgrimage to the highlight of the authority of the organizers who are still overlap. The overlap of the pilgrimage organizer in this case is the Ministry of Religious Affairs, in fact has some functions of which as the regulator, operator, and evaluator. The implementation, indeed, practices the authority of executive that branch out on the boundaries of publishing arrangements. In addition to the function of regulator, of course there are many more other functions of executive agencies for the Ministry of Religion such as surveillance and empowerment and others, which function should be capable in upholding justice and prosperity, while precisely the opposite happens.

Before find out more about the functions of government, it will be clarified in advance about the function of the state. Goodnow, an American political scientist, defines the function of the country into two basic tasks, ie policy making and executing policy. Policy making is the wisdom of the state at a specific time for the whole community, while executing policy is the wisdom that must be implemented to achieve the policy-making. The next expert who is also concerned about the role and function of the state is Moh. Kusnardi, an expert in constitutional law, declared that a state's function is divided into two parts, namely carrying out policing (law and order) and desiring welfare. That is, the state must carry out policing to prevent clashes in the community in order to achieve common goals and desires the welfare and prosperity of its people.²

In addition to the function of the state as the driving wheel empowerment of the people, would technically be supported through the organs of government. The organ of government as executive agencies have a crucial function in realizing the goal of a country.

The theory of the functions of government have a various understanding. Many experts on government seek to explain the function and role of government. One of them is Kaufman,³ who said that the function of government is to serve and organize society. Then explained further that the mission must place greater emphasis on altruistic, facilitate public affairs and give satisfaction to the public, while the task of organizing is further emphasizes the power of inherent in bureaucratic positions.

In addition, thinking about the functions of government in administrative law as described by John Locke and Montesquieu that talk about the Trias Politica, the functions of the executive power which is presented as Chief of State, Head of Government, Party Chief, Commander in Chief, Chief Diplomat, and Chief Legislation. Another opinion is expressed by Rashid,⁴ who describes six general duties of the government, among others, ensuring the country's security from any possible attack from the outside, and make sure to avoid a revolt from within to overthrow a legitimate government through violent means, to maintain order and ensure that the changes, whatever happens in society, can take place peacefully, ensure the application of equal treatment for all citizens, making efforts to improve social welfare, implement economic policies that benefits wider community, and implementing policies to preserve natural resources and the environment. Based on the expert's opinion, the function and role of government is to function as a regulator, dynamisator, allocation, distributor, supervision, and facilitator.

¹ <http://lifestyle.kompasiana.com/catatan/2014/09/25/haji-berulang-kurban-dan-ibadah-sosial-681021.html>. accessed on February 20, 2015.

² Id.

³ Thoha, 1995: Page. 101.

⁴ Ryaas Rasyid, 2000: Page. 13.

Regulatory Function

The regulatory function of central government functions is establish and publish a variety of settings as a derivative of the Act. This function also plays a role in facilitating the region in the field of regulation through effective communication. The government's role as regulator is to set the direction to stabilize the implementation of development (publish regulations in the framework of development effectiveness and orderly administration) .As regulator, the government provides basic reference which further decrypted by the community as an instrument to regulate every activities on the implementation of empowerment in society. the empowerment of the society in economic terms would be associated with a policy that supports the efforts tin the development. As for policies which is directed as the policies in the management, organization, and capitalization are directed to support business activities and granted for the community as APBN (National Fund)/APBD (Regional Fund) and policies in the field of licensing the effort of establishments to simplify the licensing process to become more effective and efficient.

Associated with the Ministry of Religious Affairs' function as regulator, it should make pilgrimage organizer organ merely only provides regulations related to the management of the Hajj worship, not co-hosting either entirely or partially of that implementation. The function of the Ministry of Religious Affairs in the implementation of the pilgrimage is still problematic in the context of this regulator function. This problem in the later stages is turned out to have an impact on poor governance in the organization of the pilgrimage such as the potential for corruption, intransparence, and not professional. Moreover, if related to the functions of the Ministry of Religious Affair which also became the operator in organizing pilgrimage.

In order to realize the good and appropriate way of Hajj administration as to the regulatory function, the Commission recommends to the need for action in revising the Act of the organization of Hajj. Primarily, questioning the need for separation between regulator and operator.

The separation of functions between the regulator and the operator seems to be a necessity in the organization of the pilgrimage to be better. The Ministry of Religion Affairs becomes the regulator and other functions in addition to the function of the operator so there will be no overlapping functions which causes negative impact like what had happened until now. Obviously, only when the operator function is removed from the Ministry of Religious Affairs function, it does not mean the private sector operators are free to occupy the function. The operator function should not be transferred to private sectors, because it has been proven that when the function is delivered precisely the cost and quota of pilgrim are getting out of control and the private sectors tend to charge as they wish with the excuse reason on the quality of service, lodging, and others. Therefore, there is a need for the development of new legal norms in the form of development of Public Service Agency (PSA) that specifically regulate hajj funds and other instruments in organizing the pilgrimage.

Function Of Dynamicator

Government as the dynamicator is functioning in moving the occuring stagnation when multi-stakeholder participating in the development process (push and keep the dynamics of development in national and regional level). As a dynamicator, the government takes role through the provision of guidance and direction that intensive and effective to the public. Guidance and direction are indispensable in keeping the dynamics. Government through the assistance at specific teams and institutions provides guidance and training to the community.

Related to the role and functions of the Ministry of Religious Affairs in the field of organizing the Hajj, the government should provide awareness of the importance of pilgrimage in Islam in the arrangement as a whole person. Until now, the fame of the pilgrimage was outstanding. That's why the queue is really long, that in Indonesia which majority is moslem, it become incredibly remarkable. As happened in South Kalimantan, for example, the queue is up to 25 years, that the queue length indicates the phenomenon that pilgrimage is a very famous than other pillars of Islam. Therefore, a passion to provide guidance and awareness on the importance of other pillars of Islam and the Hajj itself can be carried out proportionately and not excessive.

Allocation Functions

The allocation function of the endowment's people functions as a perennial source of income to finance for then allocated to routine expenditure for the facilitation and implementation of the pilgrims. This budget should be directed to reducing unemployment and waste of resources and to improve the efficiency and effectiveness of the economy. The allocation Function of community endowment funding that sourced from Hajj funding, it is interesting to be studied further as many people trust that there is a big amount of fund that is not absorbed by the madrassas. Currently utilized the remaining pilgrimage fund in the allocation of development plans such as buildings at the Islamic universities in Indonesia. The allocation of these funds is not a problem, but if it is a source for community endowment to organize the pilgrimage, then it should be prioritized for the implementation of the Hajj in advance which strived, so that the service included also overcome the unresolved problem of long waiting list.

The Distribution Function

The distribution function of government is that the responsibility of redistributing income and wealth in society. Only State that can "force" the rich community groups to set aside income by requiring them to pay taxes according to their ability. Dispel the functions of government in a very strong spirit in absolute is required. The function of distribution becomes important when the government has a strong nails and establishes criteria in selecting prospective pilgrims to set loose the long queue. The government is less sensitive in addressing this long queue. Yet, through owned distribution function, the government is quite easy to organize and select based on the selective principle of fairness. For example, prioritize elderly who still physically strong, prioritize those who have never performed Hajj worship, which is able to prioritize both physical and financial.

The Function Of Supervision

Supervisory function is related to the organization of the Hajj, the government exercised control over the Public Service Agency of Hajj worship organizer. Supervising quota and tariff costs of pilgrimage implementation, both regular program and that Hajj plus program which implemented with special services and also special prices. Supervision system in organizing pilgrimage is of course not only for the Ministry of Religion, but more as an integrated supervision across all sectors, such as the KPK, PPATK, Ministry of Finance, Ministry of Foreign Affairs, and other related parties.

Function Fasilitator

The function of government as a facilitator is that the role of government who should be able to create a conducive conditions for the implementation in organizing the pilgrimage. As a facilitator, the government sought to create or facilitate an orderly, comfortable, and safe atmosphere, including facilitating the availability of facilities and infrastructure for development.

Six functions of government in the organization of the Hajj systems are of course boils down to one goal, that is mabrur. Mabrur as pilgrim's destination makes the government carries out its 6 respective functions.

Analysis on the legal formulation in setting up an equitable criteria of pilgrim

The increasing awareness of Hajj and Hajj quota limitation had caused the waiting list to become increasingly longer that ranges from 5-25 years. The organization of pilgrimage in 2015 was prioritized for pilgrim candidates who have never fulfill the pillars of Islam. In addition, the government also prioritizes pilgrims who have qualified healthcare. These restrictions is the impact of Hajj quota cuts that stated by the Government of Saudi Arabia to Indonesia by 20 percent. The policy that eventually leads Indonesia to be able transmit only as much as 168 thousand pilgrims in 2015. Therefore, according to the Minister of Religious Affairs Lukman Hakim Saifuddin, the selection process for pilgrimage will be tightened. "The Implementation of the pilgrimage this year will be prioritized to those who have not performed Hajj worship and meet health requirements." This policy was taken in addition to the reduction of quota haj by the Government of Saudi Arabia, as well as the renovation process of Masjidil Haram which is unfinished yet, and the impact on the lack of capacity. Therefore, , for people who have to perform the pilgrimage, are encouraged to give chances to those who want to set off this year. "this is solely for the sake of fairness".¹

However, this policy is admittedly not easy to implement. Therefore, the government is now preparing a rule that will be used as a legal protection. In these rules, there will be sanctions to disobedience. In addition, according to the Minister of Religion: "The government will also maximizes the function of Integrated Hajj Computerized System (known as acronamed into Siskohat) in order to list those who have ever perform Hajj worship and those who have not. "This verification is important while pending the legal protection".

Strict requirements for people who have performed pilgrimage and come again for pilgrimage is considered very necessary in order to register queues of pilgrims on the wane. Therefore, the high interest of people who want to make a list of Hajj queue is also higher, and not comparable with the available limited quota of pilgrim.

Philosophical Ground

The implementation of pilgrimage should be implemented in a great shade goal, that is to make real the Muslim-muslimat Mabrur. However, if we see the fact on the organization of pilgrimage that is, of course, all hopes and prayers to realize the main purpose of Hajj, which is the mabrur pilgrim is still difficult to grasp and far from these ideals. The existence of injustice in the mechanisms of implementation of Hajj organization is also marked when the State has not been able to ensure the optimization of the organization of pilgrimage. It is of course contrary to the principle of "ma la yatimmul wajib illa bihi fahuwa wajibun", i.e. something that is obligatory, then the means (wasilah) towards which the obligation is also to be taken in the best way. As the rules of

¹ <http://www.harnas.co/2015/01/21/syarat-haji-diperketat>. Accessed on August 11, 2015.

jurisprudence:

Meaning: "Something is imperfect in the implementation of obligation, except in the presence of all things, it is something that is obligatory anyway."¹

The purpose of the rules above is related to the state's responsibility in the organization of Hajj worship pilgrimage that the implementation will not be perfect in the execution except by their deeds or other things, the implementation of such actions must also be implemented. In this case the act is legal protection for pilgrims in the Hajj worship.

Based on the rules of Jurisprudence above, carrying legal protection against pilgrims in the implementation of the pilgrimage is an obligation, with the state that carries out the legal protection for pilgrims. For essentially, hajj worship is a duty for Muslim who is capable to perform, once for a lifetime, then the means on the embodiment of the implementation and management, and the best service for pilgrims, which must not be improvised, are also obligatory to be taken.

Viewed from a philosophical perspective, the religious teachings are expressly guaranteed and protected by state as reflected in the Preamble to the Constitution of 1945, in the fourth paragraph, in particular the first principle of Pancasila, namely the principle of, "God, The Almighty". Furthermore, in the Preamble of the Constitution of 1945 also clearly recognize that the Unitary Republic of Indonesia is based on the five principles of Pancasila, one of those is the first principle, "God, The Almighty". It became the philosophical foundation of the state and the people of Indonesia in organizing the state and based on the analysis of the author that the author has described before, a reformulation of the law in setting up the criteria of pilgrims is obliged to be done by justice and enforced in order to provide legal protection and legal certainty in the setting of equitable implementation of pilgrimage.

Theoretical Basis

The theoretical problem in organizing Hajj is related to the concept of the authority of the Ministry of Religious Affairs as a regulator and operator, as well as supervisory function. The combination of the three functions and power of the Ministry of Religious Affairs is clearly problematic in terms of the state of Administrative law. During this time, the position of the Ministry of Religion Affairs runs 3 functions both as well as the authority of regulators, operators, and supervisor. Theoretically, the concept of a multi authority is in contrary to the professionalism of the organization of pilgrimage.

Furthermore, the absence of provisions that explicitly about the legal arrangement of waiting listed pilgrim candidates also implies the lack of priority in the draft principles in pilgrimage. Legal logic that was built through the concept of legal protection is forced for the stakeholders to immediately protect all the congregation with how to select and prioritize specific pilgrim candidates to be allowed to depart for the holy land. By realizing the principle of priority paradigm that was built through the concept of legal protection that is not built into the concept of organizing thoughts during this pilgrimage.

To provide a theoretical foundation, the legal organization of Hajj in Indonesia should be emphasized to two directions. In public administration theory, it is needed to settle an institutional separation between pilgrimage regulator, operator, and supervisor. There are some deals in a theoretical context, first is by fully devolve the entire Hajj operators to the private sector to organize the Hajj, or the second is by establishing a State Owned Enterprises (SOEs) in the field of sharia pilgrimage.

Submission to the private sector operator to be pure is potential to the freedom of travel services to determine the limits of tariff and potentially leads to a competition of law. But this view is much better, as long as the supervision system that developed by the regulator is accountable and reliable. In the author's opinion, the Ministry of Religion Affairs seems as not ready, implementing regulatory functions such as BI or the FSA in the banking executive under its authority. Because of the condition of their legal culture that is not optimal, and is continuously built up in the Ministry of Religion Affairs. Therefore, the bid from the second conceptual organization of pilgrimage is submitted in the form of sharia SOEs that specified to run the organization of pilgrimage.

Juridical Basis

For the reformulation of law on the setting up of an equitable adjustment of criteria for pilgrims requires legal protection for non-quota and waiting listed pilgrim candidates in the construction of law that organize the pilgrimage program, exposing their normative-juridical problem in the form of a legal absence (*recht leemten*). Legal absence on the legal protection for the waiting listed pilgrim candidates occurs when the Act No. 13 of 2008, and the derivation, and also the Government's Regulation No. 79 Year 2012 on the Implementation of Law No. 13 of 2008, do not accommodate and regulate how the form of legal protection for pilgrim candidates is,

¹ A. Djazuli, *Kaidah-Kaidah Fikih: Kaidah-Kaidah Hukum Islam dalam Menyelesaikan Masalah-Masalah yang Praktis*, Jakarta: Kencana, 2007, p. 95

the regulation only formulate legal protection which is limited to Article 29, that states:

- 1) The protection for Hajj pilgrims and Hajj officers referred to in Article 6 letter j is in the form of insurance and other necessary protection.
- 2) The cost of insurance and other protection necessary for Hajj pilgrims referred to in paragraph (1) may be charged to the BPIH component.
- 3) The cost of insurance and other protection necessary for hajj officers is charged to the Government.

In addition to in Article 1 paragraph 2 UUPIH, the concept of legal protection in UUPIH that also contained in Article 3 is that Pilgrimage is aimed to provide guidance, hospitality, and protection, as fine as possible, for the Hajj pilgrim, so the pilgrim will be able to perform worship in accordance with the teachings of Islam. Pilgrims as defined in Article 3 UUPIH and Article 1 point 3 UUPIH are Indonesian citizens who are Muslims and have signed up to perform the Hajj worship in accordance with the requirements set. Under Article 1 point 3 above, it is increasingly clear that the pilgrims despite having signed up on the waiting list does not get the same protection, because the notion of pilgrims is limited by certain requirements established by the regulations underlying the regulation of the Ministry of Religion Affairs on the departure of pilgrims. As Minister of Religious Affairs Regulation No. 63 of 2013 on Criteria for departures Hajj 1435 AH / 2013 AD, namely Article 1 as follows:

- a) Pilgrims who have paid off the cost of organizing the Hajj (BPIH) year 1434H / 2013M until the 12th of June, 2013; and
- b) Pilgrims who register earlier in accordance with the serial number of servings to the fulfillment of the specified quota in their respective province or district/city.

Likewise with pilgrims special criteria, as well as the criteria set out above. Determination of criteria as stated in Article 1 PMA No. 63 of 2013 above of course does not reflect their protection and fairness in the administration of pilgrimage in the determination of pilgrims who went to the holy land. Based on that Article, the potential violation of the organization of pilgrimage is very high, as their unscrupulous pilgrims over and over to the Holy Land to annually register with the Ministry of Religion Affairs which will continue to occur, whereas the liabilities of performing Hajj worship only once in a lifetime. This will continue to happen because of the departure of Hajj criteria did not explicitly set how the selection of candidates where the person has been repeatedly performed Hajj worship in the Holy Land.

Legal absence in the regulation of the regulatory implementation of the pilgrimage in order to make the implementation of regulatory norms are not optimal and do not achieve the purpose and nature of the pilgrimage. So that, it needs to be formulated as a new legal norms that regulate the implementation of pilgrimage, moreover, a refuge for non-quota pilgrims. Legal norms that need to be established is to anticipate the waiting list, so that from year to year there will be no buildup of pilgrims that can result in a flood of pilgrims.

Based on the above, the legal absence in the regulation of the protection of pilgrims needed reformulation of the law concerning the establishment of criteria for pilgrims' justice in order to avoid a lengthy waiting list that resulted in a massive, structural, and systematic losses on the implementation of pilgrimage.

Sociological Basis

Sociologically, the implementation of pilgrimage must be carried out once in a lifetime for the Islamic Ummah. It indicates that the pilgrims who had already performed Hajj worship should provide opportunities for those who have not perform Hajj worship, especially for the elderly since, greater harm to the elderly due to physical and health condition that are not prime.

Looking at the fixed qouta of pilgrims for Indonesia as a whole, the trend will continue in the numbers of pilgrims so that waiting listed pilgrim candidates will further increase. The large number of pilgrims has resulted in an increasingly heavy burden on the state as well as the organization of pilgrimage is an activity that keeps ongoing, routine, technical, and functional, let alone increases the living standards and critical power of society, that will lead to a higher demands on the quality of pilgrimage service.

The enactment of the Act of the Republic of Indonesia No. 13 of 2008 on the organization of Hajj, calls for efforts to improve the management system and the organization of the pilgrimage for the implementation of the pilgrimage run safely, orderly and smoothly to uphold the spirit of fairness, transparency, and public accountability.¹

An optimally improved performance at all in the service unit of the Ministry of Religion Affairs on the human resources, facilities, and infrastructure, even to the working system, is absolutely necessary. This is simply an effort to improve the quality of the pilgrimage in order to create good governance.

Weak surveillance system in the organization of pilgrimage also increases the complexity of the problem. These phenomena have implications in term of sociological condition, which led to the vulnerability of

¹ Act on Hajj worship in the perspective of Public Service, article: <http://internusanet.com/http://internusanet.com/archives/1099>, accessed on July 11, 2013.

the authority that organize the pilgrimage, especially those related to the operational implementation of policies and regulations related to the regular pilgrimage program and pilgrim that uses special pilgrimage program.

In term of sociological, setting a reformulation on the law in setting up an equitable criteria or pilgrims needs to be done by prioritizing the elderly to gain primacy in the implementation of the pilgrimage, so did not experience waiting list, because the aged pilgrims are feared to run out of time to perform the Hajj worship as a complement on the pillars of Islam.

CONCLUSION

Based on the analysis, the study concludes that setting criteria for the waiting listed pilgrim candidates in justice system of organizing the pilgrimage is to affirm the principle of legal arrangements only for pilgrims who capable, in accordance to the age selectivity principles, and obeys the obligations of performing Hajj worship only once in a lifetime. It is based on the change of situations and settings (the condition in the Holy Land) which can not accommodate the number of pilgrims.

RECOMMENDATION

- 1) For the government, especially the Ministry of Religion Affairs and the Minister of Internal Affairs, to immediately maps the data of Muslims who had performed Hajj worship and enhance the komponen of SISKOHAT, so when disaggregated the data will be enrolled as those who have performed Hajj worship and those who have not.
- 2) For the Indonesian Ulema Council, to issue a fatwa of the legal provisions on pilgrimage that must performed only once in a lifetime.
- 3) Need a reexamination on the multi functions of government's authority, which is as legislator, operator, and evaluator.

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