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The Nature of Freedom of Association and Establishment of Political Parties as Political Parties Simplification

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Abstract
Indonesia has guaranteed its people to associate and express their opinions as stipulated in the provisions of Article 28E Paragraph (3) of the 1945 Constitution of the Republic of Indonesia, the advantage of freedom of association lead the citizens to establish a political party in Indonesia, which has been guaranteed by the provisions of Article 24 Paragraph 2 of Act 39 of 199 concerning Human Rights (Every citizen or community group has the right to establish political parties, non-governmental organizations or other organizations to participate in the government and state administration in line with the demands of protection, enforcement, and advancement of human rights in accordance with the provisions of the legislation) as it is known that Indonesia is a state of law (Article 1 Paragraph 3 of the 1945 Constitution of the Republic of Indonesia). It means all forms of governance are carried out based on the law. In another hand, regulation is needed to establish a political party which leads to simplification of political parties, it is done due to create national support balance.
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1. Introduction

The ideals of the Unitary State of the Republic of Indonesia is set out in Paragraph IV of the Preamble of the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution of the Republic of Indonesia). This objective will be realized by the support of good democracy development. Thus, Article 1 paragraph (2) of the 1945 Constitution of the Republic of Indonesia NRI explicitly stated that the sovereignty is in the hands of the people and is implemented according to the Basic Law. It is also emphasized in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia which states that the State of Indonesia is a state of law. Referring to these provisions, it is clear that Indonesia is a country conceived as a constitutional democracy. Miriam Budiardjo argues that: there are several terms of democracy, i.e., constitutional democracy, parliamentary democracy, etc., all of which interpret democracy as power derived from the people power or government by the people, or in Greek demos, it means people and *kratos* or *kratein* which means power.[1]

Indonesia as a constitutional democratic country must place the people as the holder of power, for the people must be involved in every activity of state administration. The people's involvement can be done through freedom of association forums, gatherings and expressing opinions. Therefore, Article 28E paragraph (3) of the 1945 Constitution of the Republic of Indonesia states that "Every person shall have the right to the freedom to associate, to assemble and to express opinions." Parallel to this, Article 24 paragraph (1) of Act Number 39 of 1999 concerning Human Rights (hereinafter referred to as Act No. 39 of 1999) states that "every person has the right to assemble, gather and associate for peaceful purposes." Referring to these provisions, Indonesia has also recognized freedom of association as one of human rights possessed by Indonesian citizens to live a peaceful life.

Mukthie Fadjar believes that freedom of association and assembly, including freedom to establish and become members of political parties is one of the human rights that must be recognized and protected by the state[2]. However, Arief Hidayat argued that the implementation of political life and state administration, the principle of freedom of association and assembly, especially the freedom to establish political parties in Indonesia experienced fluctuating condition in line with the dynamics of the constitutional system and the prevailing political system. The more democratic the political system, the larger opportunity the establishment of political parties, and the more authoritarian the system, the more stringent the formation of political parties. It also means the interpretation shifts of freedom of association and assembly[3].

In the perspective of a democratic state, political parties have significant role, they are even the main pillars of a democratic country. The main characteristic of a democratic state is freedom (liberty), and political parties

[1] Miriam Budiardjo, *Dasar-dasar Ilmu Politik*, Gramedia Pustaka Utama, Jakarta, 2008, p. 105
[2] Mukthie Fadjar, *Partai Politik dalam Perkembangan Ketatanegaraan Indonesia*, Setara Press, Malang, 2012, p. 1
[3] Arief Hidayat, Dissertation, *Kebebasan Berserikat dan Berkumpul di Indonesia*, Undip Semarang, 2006.

are the embodiment of the principle. Thus, democracy and political parties are inseparable, like two sides of the same coin. For, Jimly Asshiddiqqie opines that:

"The political parties have important positions and roles in every democratic system. The party plays a very strategic liaison between the governmental process and citizens. In fact, many people argue that political parties actually determine democracy, Schattscheider as cited in Jimly Asshiddiqie, stated that "Political parties created democracy." Therefore, the party is a pillar to strengthen the degree of institutionalization in any democratic political system. Furthermore, Schattscheider also stated that "Modern democracy is unthinkable save in terms of the parties.[1]

The right to establish political parties is basically classified as basic rights. However, in its implementation the state may provide restrictions for certain reasons, Article 22 of Section 2 of the ICCPR specifies that "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, the protection of public health or morals or the protection of the rights and freedoms of others".

By these provisions, basically the right to form political parties must not be limited or restricted, except for determined conditions by law, and things that are needed by the democratic society such as the interests of national security or public security, public order, protection of health and morality of citizens, or protection of the rights of freedom of others. Democracy does not only concerned with rights, but it also has obligation to guarantee the implementation of the principles of constitutional democracy. In this regard, Hilaire Barnett states that:

> The existence of political parties is a manifestation of the right to freedom of association and assembly and the right to express opinions. However, these rights and freedoms can be limited by making arrangements, including the dissolution of political parties. Freedom of association, as a human right, contains restrictions needed in democratic societies for national security and public safety, to prevent crime, to protect health and morals, and to protect other rights and freedoms.[2]

Restrictions on the right to establish political parties are regulated in Article 28I paragraph (2) of the 1945 Constitution of the Republic of Indonesia Juncto Article 70 of Act No. 39 of 1999. These provisions stipulate that in performing rights and freedoms, every person is obliged to obey the limitations set forth in the law to guarantee acknowledgment and respect for the rights of freedoms and to fulfill fair demands in accordance with moral, religious values, security and public order consideration in a democratic society. However, in regulating political parties, there are number of regulations which are principally contrary to the freedom of association of people.

These regulations include: heavy requirements to establish political parties as determined in Article 2 and Article 3 of AC Number 2 of 2011 concerning Amendments to Act Number 2 of 2008 concerning Political Parties (hereinafter) called Act No. 2 of 2011). Article 2 paragraph (1) of Act No. 2 of 2011 stipulates that a Political Party is established and formed by at least 30 (thirty) Indonesian citizens who are 21 (twenty one) years old or are married from each province, meaning that to form a political party 1020 people are needed.

On the other hand, other burdensome requirements contained in 3 paragraph (2) letter c of Act No. 2 of 2011 which determines that "To become a legal entity as referred to in paragraph (1), Political Parties must have: c. Management in each province and at least 75% (seventy-five percent) of the number of regencies /cities in the relevant province and at least 50% (fifty percent) of the total number of sub-districts in the relevant regency/ city". These requirements are hard and costly, for it causes difficulties to establish new political parties. By these requirements, in 2012 there were 11 new political parties failed to gain the legal status, because they did not have management in each province.[3]

The regulation of Political Parties as an embodiment of the right to association and assembly should not lead to such severe restrictions that limits the people to access their rights. Excessive imposition of procedures to establish political parties will be an obstacle to the implementation of the rights of the people. By this requirement, as contained in Article 2 paragraph (3) letter b of Act Number 31 of 2002, it will directly interfere the rights of citizens, since these requirements are not easily applied.

The legislators do not explicitly state the basis to limit the establishment of political parties as stated in Article 2 paragraph (3) letter b of Act Number 31 of 2002 to fill the provisions of Article 28J paragraph (2) of the 1945 Constitution of the Republic of Indonesia, when the freedom is unreasonably restricted, this requirement has harm the essence of democracy. In addition, the complicated to establish political parties has prevented citizens to participate in General Election as a form of public participation in governance. Freedom of association to form political parties as stipulated in Act no. 2 of 2011 has not shown the true nature of freedom

[1] Jimly Asshiddiqie, *Dinamika Partai Politik dan Demokrasi*, p.1, www.jimly.com, accessed on March 20, 2016.
[2] Hilaire Barnett, *Constitutional & Administrative Law*, Fifth Edition,: Cavendish Publishing Limited, London-Sydney-Portland, Oregon, 2004, p. 589
[3] http://politik.news.viva.co.id/news/read/273625, accessed on April 25, 2016.

of political parties.

It is caused by heavy requirements to form political parties and the dominance of government interference related to the existence of political parties. Both conditions severely obstructed the right of citizens to form political parties as a manifestation of the right to freedom of association. The purpose of "conditioned the formulation of simple multiparty" cannot be done by tightening the establishment and formation of political parties.

It should be done naturally through selection in general elections conducted periodically by establishing an electoral threshold, and should not be conducted through administrative selection by the government. Or else, administrative selections as stipulated in the Act No. 2 of 2011 will reduce the right of association, assembly, and express opinions, especially in the establishment and formation of political parties that have been guaranteed by the Constitution of the Republic of Indonesia.

Based on the above legal issues, this study will further discussed these issues, namely First, the nature of the principle of freedom of association in the establishment and formation of political parties in Indonesia, secondly the regulations for the establishment of political parties in the context of political parties simplification.

2. Research Methods

This study is a normative and doctrinal legal research. Normative is used due to the distinctive character of legal science that lies in the method of research which is normative.[1] Doctrinal research is used to analyze the principles of law (civil procedure law), legal literature, expert opinion (doctrine).[2]

In this study, there are 5 (five) approaches applied, namely: (a) the statute approach, i.e., laws on political parties and human rights;. (b) the conceptual approach, i.e., examining legal concepts, legal sources, legal functions and legal institution on establishment and formulation of political parties based on the principle of freedom of association; (c) case approach, through Constitutional Court decisions relating to the review of the Law on political parties using *ratio decidendi*; (d) the comparative approach through comparison with other countries that adopt a presidential and multiparty system of government, between the Philippines and France (d) a philosophical approach, which is to examine the nature of the principle of freedom of association in the establishment or formation of political parties.

3. Results and Discussion

3.1 The nature of freedom of association in the establishment and formation of political parties

Indonesia as a rule of law *(rechttstoat)*[3], *one* of the characteristics that must be fulfilled by the State is the protection and guarantee of human rights for all its citizens. The guarantee of human rights is one of the objectives of law enforcement, because humans have a central position in law enforcement. Human is the object and subject of the enforcement. Indeed, human rights are related to problems of human life, concerning individual or collective human rights.

Individual human rights concern on individual interests and human rights collectively concerning the interests of the nation and state. Human right is inherently attached to human as human. It is not granted by the community or the law, but it is based on human's dignity as human being. It means, thought everyone is born with different skin tone, gender, language, culture and citizenship, he has these rights. These rights are universal and inalienable[4].

Human right is basic right inherent in human nature. It is universal and eternal as a gift of God Almighty. It includes the right to live, to have family and generation, self-development, justice, to be independence, security, and the right of welfare to maintain the integrity of the existence, thus it cannot be ignored and deprived by anyone. The formula clearly recognizes that human rights are gifts from God, and the State of Indonesia recognizes that the source of human rights is the gift of God.

Explicitly, human rights, including the right to freedom of association, are not a gift from the state, but the gift of God. Today the majority of legal scholars, philosophers, and moralists, regardless of culture or civilization, agreed that every human being has the right for some basic rights.

In the agreement to establish the United Nations (UN), all States agree to achieve "Universal respect for, and absent as to race, sex, language, or religion." On the Universal Declaration of Human Rights (1948), the countries representatives agreed to support the rights contained in it "as a common standard of achievement for

[1] Peter Mahmud Marzuki, *Penelitian Hukum*, Kencana, Jakarta, 2009, p.35
[2] *Ibid.*
[3] The rule of law (rechttstaat or the rule of law) is the concept of the State idealized by the founders of the nation that discusses and formulates the 1945 Constitution, as outlined in the explanation of the 1945 Constitution before the amandment of affirmation as a rule of law is strengthened in the 1945 Constitution after the amandment to article 1 paragraph (3) which stated "Negara Indonesia adalah Negara Huku (Indonesia is the rule of law)" in Jimly Asshiddiqie, *Implikasi Perubahan UUD 1945 Terhadap Pembangunan Hukum Nasional*, the Constitutional Court of the Republic of Indonesia, Jakarta, 2005, p.21
[4] Satya Arimanto*, Hukum hak Asasi Manusia*, Pusat Studi Hak Asasi Manusia, Yogyakarta, 2008, p.11

all peoples and all nations."[1] And in 1976, the International Covenant on Economic, Social, and Cultural Rights and International Covenant on Civil and Political Rights which was approved by the UN General Assembly in 1976, was declared valid .

The human rights (HAM) is a relatively new term, and it is common since World War II and the formation of the United Nations in 1945. The term replaces the natural rights term, because of the concept of natural law relating to the natural rights term has become a controversy, and the phrase the rights or man that arose afterwards does not include women's rights[2]. The history of the recognition of human rights and their arrangement in a document, declaration of human rights, is inseparable from the history of mankind[3].

The issue of human rights (HAM) raised worldwide, as the most important matter in a democratic state or a country that will to achieve its democracy. To carry out the duty of human rights, the United Nations established a Commission on Human Rights. The commission established by the UN is stipulated in the Charter of the United Nations, to state an international statement on human rights[4].

The Charter reaffirms "the belief on basic human rights, the human dignity, equal rights of men and women as well as between large and small states. Signatories pledge themselves to take joint and separate actions in cooperation with organizations to fight for universal respect, and adherence to human rights and fundamental freedoms for all humans, regardless of race, gender, language, or religion.

The Commission of Human Rights prepared an international statement on human rights approved by the General Assembly on December 10, 1948. This statement known as Universal Declaration of Human Rights (hereinafter referred to as UDHR), which was announced as "a general standard of achievement for all people and States" The rights they express, are spread through teaching and education and through national and international progressive measures, to ensure acknowledgment, and universal and effective adherence to them[5] The rights and freedoms set forth in the UDHR include a group of complete rights, both civil, political, cultural, economic, and social rights of each individual as well as some collective rights[6].

As previously stated, the rights tabulated in the UDHR eventually developed into two international covenants which is legally bound, namely the international covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights[7].

Broadly speaking, the 1948 UDHR stipulates the rights and freedoms of each person that must be recognized and respected as well as the obligations that must be recognized and respected as well as to be fulfilled by everyone. 1948 UDHR are divided into three groups of arrangement, namely:[8]

a. Civil and political rights (Article 3-Article 21);
b. Economic, social and cultural rights (Article 22-Article 27), and
c. Closing Provisions (Articles 28-30)

The Universal Declaration of Human Rights (UDHR) remains the root of international human rights instruments. At the regional level, many instruments reflect the value of the declaration and recognize the importance of the UDHR in its preamble statements. At the national level many countries have adopted elements of the declaration in the Bill of Human Rights contained in their Constitution.[9]

The historical origin of the conception of human rights can be traced back to the Greeks and Romans Era, where it has close connection with the pre-modern natural law doctrine of Greek Stoicism, the philosophical school founded by Zeno in Citrum, in which argues that power universal work encompasses all creation and human behavior. Therefore it must be judged based on - in line with - the natural law.[10] It is undeniable that like other normative traditions, human rights traditions are also products of their time. It reflects the continuing process of history and the changes which at the beginning and as a result of cumulative experience helped to provide substance and form.

The writer views that there has been a deviation or public deception on the practice of political practices by

[1] Satya Arimanto, *Sejarah HAM dalam Perspektif Barat*, *Disminasi Hak Asasi Manusia,* Jakarta, CESDA LP3ES, 2000, p.3
[2] The Universal Declaration of Human Rights (UDHR) was agreed by the General Assembly of the United Nations (UN) on December 10, 1948. Which was later known as International Human Rights Day. This declaration has been transposed into 375 languages and dialects. http://sekitarkita.com/2009/06/deklarasi-universal-hak-asasi-manusia was downloaded on November 8, 2010.
The National Commission of Human Rights (Komnas HAM), human rights, State responsibilities, the role of national institutions and society (Jakarta, Komnas-HAM, 1999). P.7
Adnan Buyung Nasution, *Implementasi Perlindungan Hak Asasi Manusia dan Supermasu Hukum,* presented at the VIII National Law development entittled Penegakan Hukum dalam era pembangunan berkelnajutan held by National Legal Development Agency of the Ministry of Justice and Human Rights, Denpasar July 4-8, 2003
[5] Romli Atmasasmita, *Pengatar Hukum Pidana Internasional* , PT.Refika, Bandung, 2000, p.54
[6] Satya Arimanto, *Hukum Hak Asasi Manusia*, Pusat Studi Hak Asasi Manusia Universitas Islam Indonesia, Yogyakarta, 2008, p. 89
[7] *Ibid*, p.98-91
[8] Enny Soeprapto, *Instrumen Pokok HAM Internasional, Pengesahan dan Implementasinya di Indonesia*.http://www komnasham.go.id/portal/files/Es Intrumenpokok HAMdiIndonesia,pdf downloaded on January 28,. 2010.
[9] Satya Arinanto, *Hukum dan hak Asasi Manusia,* Op.cit., p. 11
[10] Satya Arinanto, *Hak Asasi Manusia dalam Transisi Politik di Indonesia*, Jakarta Pusat, Pusat Studi Hukum Tata Negara Universitas Indonesia, 2003, p. 81-83

political elites towards political parties by individuals to gain power. Positioning political parties as organizations to lead people to get power has reduced the importance of political parties in Indonesia. Political parties that were expected to be the driving force of new ideas for the welfare of the people have turned into a battle of individual egoism for power.

Political parties that had become the foundation of great hopes to produce quality national leaders have turned into an opportunist arena for external parties who are waiting to be nominated as legislative or executive. It is not surprising that, the image of political parties has become negative. The writer hopes that this section can foster collective awareness in assessing the position of political parties as moving spirit. Democracy and its contribution will be felt directly by the wider community. In addition, this situation will also reduce public scorn and all the negative image of political parties that have been shaped.

There has been a collective-individual-domination by politicians over political parties. The author supports Aldrich who opined that "the major political party is the creature of the politician, the ambitious office seeker and the office holder. They have created and maintained, used or abused, reformed or ignored the political party when doing so the political party is thus an "endogenous" institution shaped by these political actors".

Political parties are indeed established by politicians to achieve political goals. But the political parties need to bring back its nature since it is formed. Organizationally, political parties have a mission, vision, long-term and strategic goals. In addition, political parties are also equipped with all the rules and regulations that can guarantee the growth of certain behaviors of politicians as well as to guarantee the dynamics of the interests of the politicians. However, it does not mean that political parties must always submit to the political interests of each politician .

Regarding its long-term goal, a political party must instead be a living organism that continuously adapts to its environment. It needs to facilitate the interests of politicians, but it cannot be manipulated for individual or group interests.

Massive exploitation of political parties only occurs when individuals are considered super and become raison-d'etre of the political parties concerned. The biggest risk is when the political party is left by the super individual. Conflicts and divisions will inevitably occur, that can damage the credibility of the political parties.

In addition, the dominance of individuals over political parties has created political leaps that can move from one political party to another without any hindrance. Political parties, politicians and the public have considered this kind of phenomenon as normal and taken for granted. Indeed, this attitude that causes political leap intended for self-interest. The basic problem in this case is the absence of a certain ideology adopted by political parties. In fact, the ideology of the party becomes the filter (screen) to select qualified politicians to be recruited.

The ideology adopted by the political party provide clear identity to its politician, because the public identify a politician based on the ideology he adhered. Thus, the politician cannot easily move from one party to another. Because each political party has its unique, different and distinct characteristics.

Therefore, incompatibility may arise between the ideology of the politician and the political parties. For instance, a free market politicians will find it difficult to get in socialist parties. All elements of the new party quickly identified these discrepancies which can eventually led to rejection.

In addition to fulfilling the requirements of the restrictions (formal and substantive conditions), the restrictions should also be carried out proportionally to avoid excessive restrictions on human rights, that may harm human rights essence. The principal of proportionality has become a major problem on human rights restrictions legitimately without reducing the essence of human rights[1]. In other words, the principle of proportionality is a form of human rights protection.

As a comparison, the following is an example of the application of principle of proportionality on human rights restrictions in other countries. The first case is Irvin Toy Ltd, v, Attorney General of Quebec (1989), Canada. in this case, the Supreme Court of Canada adopted two types of tests to assess whether the application of restrictions on human rights has been carried out in accordance with the Charter of Rights and Freedoms which allows restrictions on human rights on the basis of "only such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The tests used by the Supreme Court of Canada are: The first part involves asking whether the objective sought to be achieved by the impugned legislation relates to concerns which are expressing and substantial in a free and democratic society. The second part involves balancing the number of factors to determine whether the means chosen by the government are proportional to its objective".

The first test focuses on questioning the relevance or importance of carrying out restrictions which must be naturally urgent and substantial. The second test focuses on the way taken or used in carrying out restrictions that must be proportional to obtained the objectives. The Supreme Court of Canada defines the principle of

[1] See E.Thomas Sullivan & Richard S.Frase, *Proportionality Principles in American Law. Controlling Excessive Government Actions*, Oxford University Press, Oxford, 2009, p.53

proportionality: *the limiting measures must be carefully designed, or rationally connected, to the objective; they must impair the right as little as possible; and their affects must not be severely trenched on an individual or group right that the legislative objective, albeit important, is nevertheless outweighed by the abridgement of rights*[1].

Thus, even though the substantive reason to carry out the limitation is filled, i.e., because the limitation is indeed needed, the principle of proportionality still applies as one of the factors in assessing whether the limitation is really necessary by looking at the means taken to carry out the limitation and its results. The European Commission of Human Rights in the Rassemblement Jurassien & Unite Jurassienne v.Switzerland (1980) case considers the application of the principle of proportionality as follows: the proportionality principle requires that a balance be struck between the requirements of the interests sought to be protected and the essential elements of the recognized right. The pursuit of a just balance must not result in individuals being discouraged, for fear of disciplinary or other sanctions, from exercising their rights [2].

One of the results assessed from the implementation of these restrictions is the effect on a person in performing his rights without fear. If it happens, it means that the restrictions imposed are disproportionate, and is considered a violation of human rights. Another cases is Ezelin v.France, the European Court of Human Rights (1991). This case is about an avocet (and at the same time the head of a trade union) who received a warning from the court for conducting a breach of discretion amounting to a disciplinary offence.

This person participated in the demonstration by bringing a placard together with the trade union and the independence movement Guadeloupe to protest the two court decisions that sentenced three militants to imprisonment and fines for the crime of destroying government buildings. In this case the European Court of Human Rights presupposes the consideration that: "the freedom to take part in a peaceful assembly in this instance a demonstration that had not been prohibited was of such importance that it could not be restricted in any way, even for an avocet, so long as the person concerned did not himself commit any reprehensible act on such on occasion."

The freedom to conduct demonstrations cannot be limited because they are part of the freedom of assembly. Except, if the participants do despicable act. Thus, a restriction on human rights is permissible, which is considered necessary only if the limitation is done in response to the "apprising of public and social needs in democratic society" has a legitimate aim and the restrictions are proportional to that goal.[3]

The freedom of association and political participation is similar to other types of rights, in which the restriction should be conducted based on the principle of proportionality by considering this condition: the act of restriction should be supported with clear and legitimate purposes; should have minimum impacts on human rights, or do not scare people to perform their rights.

To restrict human rights based on the principle of proportionality, the method used is proportionality analysis or PA. This method means: "the preferred procedure for managing disputes involving an allaged conflict between two rights clains, or between a rights provision and a legitimate state or public interest[4] the application of this analysis is performed into four stages.

First, legitimacy to confirm the legitimacy of the government to take restrictive measures, secondly, the suitability to verify whether the action taken is suitable for its purpose. Third, the necessity to ensure that the restrictive measures undertaken by the government do not sacrifice the right to exceed the objectives to be achieved. Fourth, after the three stages have been exceeded, balancing is to measure the costs of restrictive measures carried out among competing constitutional principles: individual rights vs. public interests. For more details, the following is the cited opinion of Alec Stone Sweet & Jud Mathews on the concept of proportionality analysis:

First in the legitimacy stage, the judge confirms that the government is constitutionally authorized to take such a measure. Put differently, if the purpose of the governments meansure is not a constitutionally legitimate one, then in violates a higher norm (the right being pleaded. The second phase suitability is devoted to judicial verification that, the means adopted by the government are rationally related to stated policy objections. The third step necessity has more bite. The core of necessity analysis is the deployment of a last - restrictive means (LRM) test : the judge ensures that the meansure does not curtail the right any more than is necessary for the government to achieve its stated goals. PA is s balancing framework if the governments measure fails on suitability or necessity, the act is per se dirpoportionate, it is outweighed by the pleaded right and therefore unconstitutional. The last stage, balancing in the strict sense, is also known as proportionality in the narrow sense. if the measure under review passes the first three lests, the judge procced to balancing strict senso. In the balancing phase, the judge weighs the bonefits of the act-wich has already been determined to have been

[1] Nihal Jayawickrama, *The Judical Application of Human Rights Law*, Cambridge University Press, Cambridge, 2002. p.185
[2] *Ibid,* p.189
[3] *Ibid* , p. 189
[4] Alec Stone Sweet & Jud Mathews, *Proportionality balancing and Global Contitutionalism*,Columbia Journal of Transnational Law, Vol.47 No.1,2008. p.73

narrowly tailored in American parlance againts the costs incurred by infringement of the right, in order to dtemine which constitutional value shall prevail, in light of the respective importance of the values in tension, given the facts[1]

3.2 The Regulations of the establishment of political parties as an effort of political parties simplification

The Regulations to simplify political parties essentially must contain a juridical character that reflects the principle of respect for human rights and democracy. Therefore, arrangements of political parties simplification should not be of direct intervention, especially in a forced manner (experience of the Old and New Order)

The effect of political parties simplification through regulations that reflect the principle of respecting human rights and democracy is indirect disposition. This arrangement, by design, cause the emergence of simplification of political parties effect as an expected result. This arrangement uses the idiom "social engineering" popularized by Roscoe Pound, which is disincentive arrangement or discourages people's intention to establish a political party with no substantial reason.

The arrangement of the establishment of political parties in simplification of political parties is realized by a number of arguments as follows, First, the use of rights/freedom of association as a basis for legitimacy in the act of establishing political parties must be reasonable. The state is obliged to make arrangements so that the establishment of political parties is not motivated by narrow political interests and short-term political interests, or else it will potentially lead to an abuse of rights / freedom of association.

The examples of narrow and short-term political interests are the establishment of political parties because they are excluded from the internal dynamics of the previous party and need a political vehicle to fight for certain political positions such as president, legislative members, etc. The phenomenon of political parties establishment in Indonesia is not based on an effort of advancing the State or encouraging the State to achieve its objectives, but it is motivated by political revenges.

Second, maintaining the integrity of political parties in the context of sustainability or functional sustainability. The sustainability of political parties is a crucial issue in the establishment of political parties because political parties as legal subjects are legal entities which are theoretically possible to be everlasting. This arrangement is important so that the establishment of political parties is not merely a sudden act which is based on the will to rule, and advance their own interests. Thus, its logical consequence can arise public antipathy against politics and resistance to political parties.

The state through the enactment of the regulation must strive to ensure that the steps to establish political parties are in line with their functions to assist the State in realizing public welfare, and do not accommodate the narrow and short-term political interests of the politician. Every political party that wants to play in a democratic political system must always be concerned that the essence of true democracy is government for the people.

On behalf of democracy, the misuse of the establishment of political parties must be prevented. The foundation of the establishment of political parties is the right to freedom of association / assembly. Therefore the substantive conditions for the establishment of political parties are in the framework of accommodating these rights, the right to freedom of association / assembly, as the main priority on one side and the intrinsic purpose of the right on the other.

Principally, every citizen is acknowledged and guaranteed to have the right to freedom of association/ assembly. However, on the other hand, everyone who wishes to express that right by establishing a political party must obey and comply with applicable legal provisions that have been stipulated into the legislation. The legislators have a policy in determining the regulation. As long as there is no nullification by the authorities, the Constitutional Court, the law applies and must be obeyed by anyone to establish a political party.

Generally, Jimly Asshiddiqie explained that based on the practice of States, there are two regulatory models on political parties. First, countries that are not aware of any arrangements that lead to the banning and dissolution of political parties. These countries are Belgium, Greece, and Austria. Second, countries that regulate the goals and activities of political parties and sanctions for certain violations. The substance of the arrangement can be classified into 12 variations, namely:

(1) the party must actively have activities as a condition of registration;
(2) the party has unlawful or immoral aims, which is not registered or dissolved;
(3) prohibition of party activities that endanger human rights, are totalitarian, contrary to the principles of rule of law and democracy, popular sovereignty, pluralism, equality between parties, separation of powers, and judicial independence;
(4) ban on extremist parties;
(5) parties that spread, teach or fight for hatred, violence or discrimination are also prohibited and threatened with dissolution;
(6) prohibitions of parties that carry out violence, which are anti-democratic;

[1] *Ibid*. p.75-76

(7) prohibitions of parties that threaten the existence and independence of the State;
(8) prohibitions of parties that threaten the territorial integrity of the State;
(9) prohibition of parties advocating crime;
(10) parties may not take over activities that are the duty of the State;
(11) prohibition of activities in certain environments; and
(12) prohibitions on military activities[1]

In 1999, the European Commission for Democracy Through Law (hereinafter referred to as Venice Commission) adopted general principles of political parties to legislations, entitled *Guidelines on prohibition and Dissolution of Political Parties and Analogous measures*. These principles are:

1. The state should acknowledged that every person has the right of association in political parties. This right should also include the right to express political opinions and to obtain and give information without public authorities intervention, and is free from restriction. To establish political parties is required to uphold these rights.
2. If the implementation of basic rights through these political parties is restricted, they must be consistent and relevant to the provisions of the European Union Convention on the Protection of Human Rights and other international treaties, both during normal and emergency times.
3. The prohibition or forced dissolution of political parties may also be justified if the political parties committed acts of violence as a political tool to overthrow the constitutional democratic order, thereby undermining the rights and freedoms guaranteed by the constitution. However, the fact that a party advocates amending the constitution peacefully does not enough to be a reason for the restriction or dissolution.
4. A political party cannot be responsible for individual actions of its participants who are not mandated by the party.
5. Political parties prohibition or dissolution as a certain long-term action should he fully controlled. Before proposing a competent judicial institution to ban or dissolve a party, the government or the State organ must assess by considering the situation of the State, whether the party really poses a threat to freedom and a democratic political order or individual rights, or whether there are no other less radical actions to prevent these dangers.
6. Legal remedies for the legal banning or dissolution of political parties must be a consequence of judicial findings about unusual constitutional violations and are taken based on the principle of proportionality. These efforts must be based on sufficient evidence that both the party and its individual members pursue political objectives by using or preparing to use unconstitutional means.
7. The prohibition or dissolution of a political party must be decided by the Constitutional Court or other appropriate judicial institution with procedures that guarantee due process, openness and fair trial[2]

Subsequently in 2004, the Venice Commission adopted Guidelines and Explanatory Reports on legislation on Political Parties: Some Specific Issues as additional principles that complement the Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures. The principles are:

1. As a guideline, political parties are associations of people whose one goal is to participate in the management of public affairs by proposing candidates for fair and democratic elections.
2. Registration is needed by an organization to be acknowledged as a political party. The party's participation in elections or public financing should not violate the rights protected by Articles 11 and 10 of European Voncention on Human Rights. All registration requirements should relate to the needs of a democratic society. The goals and requirements should be objectively proportional. Countries that implement political parties procedure should avoid excessive requirements (both related to territorial representation or minimum membership).
   The rejection of political parties registration is made when it is proven to have used violence for its political means to overthrow the constitutional democratic order, which means it is violating the rights guaranteed by the constitution. However, a peaceful constitutional changes proposed by the political parties is not sufficient to refuse parties registration.
3. Every political activity required by a party as a condition for obtaining the status of a political party as well as its control and supervision must be assessed according to the measurements needed in a democratic society. Public authorities must limit excessive political control over the activities of political parties, such as membership, number and frequency of congresses or party meetings, certain activity of political parties.
4. The state authorities must be neutral in related o the process of formation, registration and activities of political parties, and limit themselves to perform special privileges to certain political forces and to

[1] As cited in Muchamad Ali Safa't.*Pembubaran Partai Politik :pengaturan dan Praktik Pembubaran Partai Politik dalam Pergulatan Republik*, RajaGrafindo Persada, Jakarta, 2011, p.27
[2] *Ibid*, p. 27-29

discriminate others. All political parties must have equal opportunities to participate in elections.

5. Any interference of public authorities on political parties activities, such as refusal of registration, loss political status when it fails to obtain representation in the legislature, must be motivated, and it should provide an opportunity for the party to take legal action of the decision made.
6. Although the unity of the State can be a considered, the member States should avoid unnecessary restrictions of a democratic society regarding the establishment and activities of an organization, and both national and local political unity.
7. When national legislation declares a status loss of a political party, due to its fail to take part in elections or to win representation in the legislature, they must be allowed to continue their existence and activities based on the law governing the organization in general.
8. Generally, exceptions of foreign citizens or a stateless (*apatride*) people political to be a member of certain political party cannot be justified. These people should be permitted to participate in any political life in the area they are living in, as long as they can participate in the Elections.[1]

The material testing of the provisions of Article 2 paragraph (3) letter b of Act No. 31 of 2002 which regulates one of the registration requirements of political parties at the Ministry of Justice, namely: "having a management of at least 50% (fifty percent) of the total number of provinces, 50% (fifty percent) of the total number of Regencies/Cities in each province concerned, and 25% (twenty-five percent) of the total number of Sub districts in each Regency/ City concerned" is considered to be very burdensome by the Petitioner (Agus Miftach, General Chairman of the Indonesian People's Unity Party, *Partai Persatuan Rakyat Indonesia*). The Constitutional Court stated the following opinions:

The provisions contained in Article 2 paragraph (3) letter b are intended to build quality, independent and deeply rooted political parties in the community. In addition, for it is expected the political parties can grow and become credible which is supported by the spread of its caretakers in Indonesia, as well as having strong and national massive support from its participants;

The above provision is required by a country which is developing its democracy.

In these circumstances, the law is not merely required to maintain legal order and certainty, but it also play a role of community development.[2]

Based on the above opinions, the right to freedom of association/assembly as a basis for juridical justification for the establishment of political parties is a right of purpose. Therefore, this right must be interpreted according to the context used to legitimize the establishment of political parties. It means that the establishment of political parties is not only legitimized by the context of the right, namely the function and role of political parties in the life of the state to assist the government in realizing the broader goals of the State.

In such context, the author supports the Constitutional Court stating that the regulation of political parties is important to maintain its credibility. It means by these arrangements, it is expected that credible parties and its system are born as a means of political communication, political socialization, political recruitment, and means of regulating conflict.

Based on the above arguments, the implication of the regulation related to the right to freedom of association / assembly means that people do not have absolute freedom to establish political parties because establishment process must be in accordance with the arrangements made by the State in the form of law. The right to establish political parties must therefore be strengthened by procedural provisions so that the resulting political parties will be optimally functioned as expected by the Constitutional Court above. The legislators stated the consideration of Act No. 2 of 2008 concerning political parties are as follows:

a. That the Freedom of association, assembly, and express opinions is the human rights guaranteed by the 1945 Constitution of the Republic of Indonesia;
b. That to strengthen freedom of association, assembly, and express opinions as an effort to realize a strong nation of the Unitary State of the Republic of Indonesia which is independent, united, sovereign, just and prosperous, democratic and based on law;
c. That the democratic principles which uphold the people's sovereignty, aspirations, openness, justice, responsibility and non-discriminatory treatment within the Unitary State of the Republic of Indonesia need to obtain legal basis;
d. That political parties are means of public political participation in developing democratic life to uphold responsible freedom.

The Act No. 2 of 2011 concerning Amendments to Act No. 2 of 2008 concerning Political Parties sharpened the nature of legal politics in the framework of regulating political parties in Indonesia as follows:

Political parties as pillars of democracy need to be organized and refined to create a democratic political system in order to support an effective presidential system. The structuring and refinement of political parties is

[1] *Ibid,* p. 29-31
[2] The Constitutional Court Verdict No. 020/PUU-I/2003, p.35

directed at two main things, namely, first, forming the systemic attitudes and behavior of political parties so as to form a political culture which supports the basic principles of a democratic system. It is indicated by the proper system of membership recruitment, and develop a strong leadership system.

Second, maximizing the functions of political parties both toward the state and the community through political education and effective political recruitment to produce prospective leaders who have political abilities.

There are four points as an efforts to strengthen and streamline the presidential system: first, to organize the establishment of a simple multiparty system, second, to encourage the creation of democratic and accountable party institutions, third, to condition the formation of democratic and accountable party leadership, and fourth, to encourage the basic strengthening and political structure at the community level.

The history of legislative regulations on political parties in the last ten years explicitly shows progressive lawmakers policy to build a strong foundation for the existence of political parties. One of the important arrangements is the spread of the organization management:

Act No. 31 of 2002	Having an organizations management of at least 50% (fifty percent) of the total number of provinces, 50% (fifty percent) of the total number of Regencies / Cities in each relevant province, and 25% (twenty-five percent) of the total number of districts in each Regency / The city concerned (Article 2 paragraph (3) letter b)
Act No. 2 of 2008	Management is at least 60% (sixty percent) of the total number of provinces, 50% (fifty percent) of the total number of regencies / cities in each relevant province, and 25% (twenty-five percent) of the total number of sub-districts in each regency / city in the area concerned (Article 3 paragraph (2) letter d)
Act No. 2 of 2013	The number of management in each province at least 75% (seventy-five percent) of the total number of regencies / cities in the relevant province and at least 50% (fifty percent) of the total number of sub-districts in the relevant regency / city (Article 1 number 3)

The regulation has a legis ratio as stated by the decidendi ratio of the Constitutional Court in Decision No. 020 / PUU-I / 2003, namely: building quality, independent, and deeply rooted political parties in society supported by the spread of management throughout Indonesia, and has a strong massive and national supports.

In short, the nature of substantive conditions for the establishment of political parties is the limitation of citizens' activities in establishing political parties by legislators. Thus, to establish political parties they must comply with the provisions contained in the Act. Although establishing a political party is a continuation of the right to freedom of association/assembly as a human right, but it is not an absolute rights which means it must be sterile from the intervention of lawmakers. As the author has explained before, establishing a credible and quality party system is a legitimate aspiration to become a legislative policy set forth by the law.

4. Conclusion

Based on the result of the research, it is concluded as follows:

1. The nature of freedom of association grants the rights to the people to establish a political party. This freedom is closely related to human rights which is inherently attached to human being.
2. Political party arrangements in the effort of political party simplification is performed by the Law, the objective of this simplification should not deny the basic rights of a person to establish political party as an implication of freedom of association. Simplification of political parties is done to obtain strong and national supports.

5. Suggestion.

The author suggest the legislature (DPR) to re-examine the strict arrangements of political parties establishment by considering the freedom of association of the people. The aim of political parties simplification can be done by considering the principle of proportionality without eliminating the human rights of citizens in establishing political parties.

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