Problems of Criminal Liability of Political Parties in Corruption Offences

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**Abstract**

This paper discusses the problems in criminal liability that can then be given criminal penalties against political parties suspected of committing corruption through their representatives as political party administrators and figures affiliated with political parties that commit corruption. Even though the existing legislation is sufficient as a basis for holding political parties accountable for committing acts of corruption, there are ideological problems and problems of legal application that until now, especially after the reformation, there has not been a single political party that can be held criminally responsible for it. This research uses normative legal research. The problem approaches used in this research include the statute, conceptual, and case approaches.
1. Introduction

Political parties are a means for citizens to participate in state management. The birth of political parties was originally the result of an ideological battle between forces in society that emerged as a representation of the interests of citizens. In the concept of representative democracy (indirect democracy), political parties play an essential role; there is no democracy without politics and no politics without parties. Executive and legislative institutions are born from parties and are elected by the people through elections. Political parties play an essential role in the country’s democratic process. Given its role as a political infrastructure to produce cadres of state leaders in the executive and legislative branches, it is a public superstructure.

Political parties play an essential role in the country’s democratic process. Given its role as a political infrastructure to produce cadres of state leaders in the executive and legislative branches, which is a public superstructure, political parties as pillars of democracy need to be organized and refined. To realize a democratic political system that supports an effective presidential system, the Government regulated political parties as stipulated in Law Number 2/2008 jo. Law Number 2 the Year 2011 on the Amendment to Law Number 2 the Year 2008 on Political Parties (from now on abbreviated as "Political Party Law").

Regarding criminalization, the discourse on the criminal liability of political parties in terms of post-reform corruption crimes has basically "finished." Based on the stadia of existing laws and regulations, political parties as a corporation can be held criminally liable. This is reflected in Law No. 31/1999 in conjunction with Law No. 20/2001 on the Amendment to Law No. 31/1999 on the Prevention and Eradication of Corruption (from now on referred to as the "Anti-Corruption Law") and Law No. 2/2008 on Political Parties in conjunction with Law No. 2/2011 on the Amendment to Law No. 2/2008 on Political Parties (from now on referred to as the "Political Party Law"). However, at the application level, it turns out that it is tough to hold a political party criminally accountable and, even further than that, to provide criminal penalties for a political party suspected of committing a criminal offense.

However, several things make it difficult for criminal law to criminally account for political parties suspected of committing a criminal offense as determined by the law. The first reason is related to ideological issues, while the second is problems in applying the law.

Many cases of corruption and money laundering involve not only political party cadres who occupy core political party positions but also state officials, such as ministers or ministerial-level officials, members of the House of Representatives (DPR), governors or deputy governors, members of the Provincial People's
Representative Council (DPRD), Regents or Deputy Regents, Mayors or Deputy Mayors, and Members of Regency / City DPRDs.

In illustrative cases, as revealed, for example, in the indictment of the Corruption Eradication Commission (KPK) Public Prosecutor against Andi Narogong, who has been convicted, it is stated that the e-KTP corruption money of Rp. 520,000,000,000 (five hundred and twenty billion rupiah) was divided into several political parties. The Golkar Party and the Democratic Party received Rp. 150,000,000,000 (one hundred and fifty billion rupiah) each, the PDIP received Rp. 80,000,000,000 (eighty billion rupiah), and other parties received Rp. 80,000,000,000 (eighty billion rupiah) billion. Even in the trial of Setya Novanto, who has also been convicted as a defendant in the e-KTP corruption, it was revealed that there was a flow of funds of Rp. 5,000,000,000 (five billion rupiah) flowing to the Golkar Rapimnas, which was later stated that the money had been handed over to the KPK.

Judging from the examples of existing cases, almost all those who bear or are responsible for the cases addressed to them are only litigants, never to the party that receives the proceeds of corruption and money laundering. So far, almost all parties have had cadres with problems resolving their cases, at least from the party enough to provide lawyers for those litigants so that the cadres affected by the case can resolve their cases without involving political parties. However, in the historical record to date, even though political parties can be held accountable for criminal offenses that have been committed, all legal processes are fragile, stopping at the personal responsibility of the defendant, who is the top management of a political party.

In connection with the description above, the problem is that there has yet to be a single political party as a legal entity that can be held criminally liable. However, various legal facts show that political parties enjoy the proceeds of criminal acts of corruption. Law enforcers argue that the involvement of political party administrators or political party cadres in corruption offenses is not an official policy of the political party, so the responsibility is personal, and it is even affirmed that there is no precise mechanism to determine criminal responsibility for corruption offenses against political parties.

Based on the description above, it is necessary to elaborate further on the issue of political parties being held criminally liable for corruption offenses and the issue of the absence of political parties being held criminally liable for corruption offenses.

2. Research Method

This paper uses normative research methods conceptualized as a symptom that can be observed in real life. In this research, a statute approach is used through a
review of the laws and regulations related to the issues being discussed, and in this case, the various rules of law are the focus and central point of the research. The conceptual approach is another approach used in this research. This research begins by describing legal facts and then looking for solutions to a legal case to resolve the legal case. In this research, legal materials are used as contained in the law. Then, secondary legal materials in the form of books, journals and other literature related to discussing criminal liability of political parties in Indonesia. The collection technique used is a document study conducted by examining legal materials relevant to the discussion of the research.

3. Results and Discussion

Political Parties Can Be Held Criminally Liable in Corruption Offences

Criminal responsibility is also known as "toerekenbaarheid," "criminal responsibility," or "criminal liability." Regarding what is meant by the ability to be responsible (toerekeningsvatbaarheid), the Criminal Code (KUHP) does not formulate it explicitly, so it must be sought in doctrine or Memorie van Toelichting (MvT). Furthermore, for criminal responsibility, a necessary condition is that the perpetrator must be responsible; in other words, there must be the ability to be responsible for the perpetrator.

For criminal liability to exist, it must first be clear who is accountable. This means that it must first be ascertained who is declared the author of a particular act. This issue concerns the subject matter of the criminal offense, which, in general, has been formulated by the legislator for the criminal offense in question. In short, by quoting Alf Ross, Roeslan Saleh answered that being responsible for a criminal act means that the person concerned is legally liable to be punished for that act.

In criminal law's criminal liability context, Moeljatno firmly separates criminal acts from criminal liability. The basis of criminal acts is the principle of legality, and the basis of criminal responsibility is no punishment without guilt. The principle of legality in Indonesian criminal law, as stated in Article 1 paragraph (1) of the Criminal Code, reads: "No act can be punished, except based on the strength of the provisions of criminal legislation that has existed before." The concept of guilt is often described as geen straf zonder schuld; there is no punishment without guilt as the basis for holding someone accountable. Fault is an essential element in determining criminal liability. In this concept, there are two requirements to be able to convict someone. Namely, there is an outwardly prohibited act or criminal offense (actus reus), and there is an inner attitude of evil/default (men's rea).

Corporate responsibility can be criminal, civil or administrative without ignoring the criminal responsibility of individuals who commit criminal offenses. Corporate crime is a criminal offense in which the perpetrator is a corporation. Sutan Remy Sjahdeni explains that corporate crime is a criminal offense that the corporation itself does not
commit because the corporation does not have a body and soul but is committed by the controlling personnel of the corporation, the actus reus and mens rea of the controlling personnel of the corporation are attributed as actus reus and mens rea of the corporation.

Even though several provisions in the existing statutory regulations allow political parties to be held criminally liable and, therefore, punished, several problems make it difficult for them to be held criminally liable. This is based on specific reasons, namely ideological reasons and reasons for the application of the law.

Ideologically, it is known that a political party is a legal entity generated by general elections. The concept of general elections adopted in a democratic country like Indonesia is one of the main pillars of accumulating the people's will. Elections are a democratic procedure to elect leaders. Through elections, the people elect their representatives; then, the representatives are given the mandate of the people's sovereignty in organizing the state. Through general elections, the people demonstrate their sovereignty in choosing leaders such as the president and vice president, as well as members of the DPR, DPD, and DPRD. Through local Pilkada elections, the people also show their sovereignty by electing governors and deputy governors, regents and deputy regents, or mayors and deputy mayors. The process of organizing elections must be distinct from the role of political parties.

The role of political parties almost dominates in all democratic life. Its implementation can be seen in the presidential and vice-presidential election process, which requires management to accommodate political parties. This has been regulated in Article 6A paragraph (2) of the 1945 Constitution of the Republic of Indonesia stipulates, "The presidential and vice-presidential candidates are proposed by a political party or a coalition of political parties participating in the general election before the implementation of the general election." In order to fulfill the needs of democracy, namely accommodating and conveying aspirations, political parties have a significant role as a forum for the participation of every citizen in government policy.

Thus, general elections are a tangible manifestation of procedural democracy; although democracy is not the same as elections, elections are one very important aspect of democracy that must also be held democratically. Therefore, as is common in countries that call themselves democracies, Indonesia has also traditionalised elections to elect public officials in the legislative and executive fields at the central and regional levels. Democracy and democratic elections are "condition sine qua non; the one can not exist without the other." In the sense that elections are understood as a procedure to achieve democracy or to transfer the sovereignty of the people to specific candidates to occupy political positions.

Based on the above, the existence of political parties is ideologically necessary and
cannot be eliminated in a democratic state resulting from an election process. On the other hand, political parties are like double-edged knives with negative implications in a democratic state.

Meanwhile, in terms of legal application, based on existing legal provisions, political parties can be understood as a legal entity in the form of a corporation that can also be held criminally liable. The concept of corporations applied to political parties as subjects of criminal law follows the principle of no punishment without fault (geen straf zonder schuld). Every criminal act requires the existence of guilt. Four theories can be used to apply the concept of corporation to political parties as subjects of criminal law:

1. Functional perpetrator theory (functioneel daaderschap). Crimes are committed by people with a working relationship with political parties as long as they are still within the scope of the Articles of Association and Bylaws regulated by political parties.
2. Identification theory. Political parties can commit crimes directly through people who have a close relationship with the party or are seen as the party itself.
3. Vicarious liability theory. A theory developed from the employment principle, where the employer is primarily responsible for the actions of the laborer/employee. Political parties are primarily responsible for the actions of their members and cadres.
4. Theory of strict liability. Political parties are held liable if they violate statutory orders.

By following the provisions of Law No. 31/1999 in conjunction with Law No. 20/2001 on the Amendment to Law No. 31/1999 on the Prevention and Eradication of Corruption, the liability of political parties suspected of committing corruption offenses is applied in the following table:

<table>
<thead>
<tr>
<th>No.</th>
<th>Corruption Offenders</th>
<th>Accountability Criminal</th>
<th>Basic Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Party administrators, cadres, and members on behalf of political parties</td>
<td>Crimes against political parties</td>
<td>Article 20, paragraph (1)</td>
</tr>
<tr>
<td>2</td>
<td>Party administrators, cadres, and members on behalf of political parties</td>
<td>Criminal offenses against political party administrators, cadres, and members</td>
<td>Article 20, paragraph (1)</td>
</tr>
<tr>
<td>3</td>
<td>Party administrators, cadres, and members on behalf of political parties</td>
<td>Criminal offenses against political parties</td>
<td>Article 20, paragraph (1)</td>
</tr>
</tbody>
</table>
The limitations on whether a legal entity corporation can be investigated for alleged corruption are regulated in Article 20 of Law Number 31 Year 1999 in conjunction with Law Number 20 Year 2001, namely:

a. If corruption is committed for and on behalf of a corporation, the prosecution and sentencing shall be carried out against the corporation and its management;

b. A corporation commits corruption if the corruption is committed by persons who, either by employment or other relationships, act within the corporate environment either individually or jointly;

c. Criminal charges against corporations are represented by their officers;

d. Another person can represent the manager who represents the corporation;

e. The judge may order the management of the corporation to appear in person before the court, or the judge may order the management representing the corporation to appear before the court;

f. Delivery for a summons to appear for corporations that are criminally prosecuted is delivered to the management at the residence of the management or the office of the management and

g. The main punishment imposed on corporations is only a fine with the maximum penalty plus one-third (1/3).

In addition to the main punishment stipulated in Article 20 paragraph (2) of Law Number 31 Year 1999 jo Law Number 20 Year 2001, additional punishment is also stipulated in Article 18 paragraph (1) of Law Number 31 Year 1999 jo Law Number 20 Year 2001. The additional punishments in question are:

a. Forfeiture of tangible or intangible movable property used for or obtained from the proceeds of corruption, including companies owned by the convicted person where corruption was committed, as well as goods that replace these goods;

b. Payment of restitution in an amount equal to the property obtained from the corruption offense;

c. Closure of all or part of the company for a maximum period of one year; and

d. Deprivation of all or part of certain rights or deprivation of all or part of specific benefits, which have been or may be granted by the Government to the convicted person.

Source: Zainal Arifin Mochtar.
Meanwhile, in Law Number 2 of 2008 concerning Political Parties in conjunction with Law Number 2 of 2011 concerning Amendments to Law Number 2 of 2008 concerning Political Parties, Article 40 paragraph (2), political parties are prohibited:

a. Conduct activities that are contrary to the 1945 Constitution of the Republic of Indonesia and laws and regulations;
b. Conduct activities that jeopardize the integrity and safety of the Unitary State of the Republic of Indonesia.
c. Violating this act will subject the political party to the sanction of dissolution by the Constitutional Court.

Furthermore, in Law Number 2 of 2008 concerning Political Parties in conjunction with Law Number 2 of 2011 concerning Amendments to Law Number 2 of 2008 concerning Political Parties, Article 40 paragraph (3), political parties are prohibited from receiving from or giving to foreign parties donations in any form that is contrary to statutory regulations:

a. Receiving donations in the form of money, goods, or services from any party without stating a clear identity;
b. Receiving donations from individuals and companies/business entities exceeding the limits set out in laws and regulations.
c. Violating this act will be accountable to political party administrators with a maximum imprisonment of 1 (one) year and a fine of 2 (two) times the amount of funds received.

Furthermore, in Law Number 2 of 2008 concerning Political Parties in conjunction with Law Number 2 of 2011 concerning Amendments to Law Number 2 of 2008 concerning Political Parties, Article 40 paragraph (4), political parties are prohibited:

a. Receiving from or giving to foreign parties donations in any form contrary to laws and regulations;
b. Receiving donations in the form of money, goods, or services from any party without stating a clear identity;
c. Receiving donations from individuals and companies/business entities exceeding the limits set out in laws and regulations.

The absence of political parties that can be held criminally liable

Although many political party administrators have served criminal sentences, including but not limited to corruption offenses, all are limited to individual responsibility. However, it is illustrated in several trial facts and indictments that there is a flow of proceeds of corruption enjoyed by political parties, as described in the previous section. Tracing the origin of political party funds that have indications of originating from corruption offenses can be carried out by law enforcement in collaboration with the Financial Transaction Reports and Analysis Centre (PPATK).
Based on a report by Transparency International Indonesia (TII), the Indonesian people perceive members of the House of Representatives, who come from political parties, as the most corrupt institution in Indonesia and political party politicians as the most corrupt actors in Indonesia (www.bbc.com, 2018). Even the Corruption Eradication Commission (KPK) reports that out of 500 perpetrators of corruption, 35% are cadres or administrators of political parties (www.beritasatu.com, 2018). Likewise, the research results of the Centre for Anti-Corruption Studies (PUKAT) of Gajah Mada University (UGM) (www.hukumonline.com, 2018) showed that all political parties that have representatives as members of the board or serve in ministries in the 2009-2014 United Indonesia Cabinet are involved in corruption, (there is no single party that is free from corrupt practices). It was found that the Democratic Party ranked first, with a percentage of 28.40%, followed by the Hanura Party (23.50%), the Indonesian Democratic Party of Struggle/PDIP (18.08%), the Prosperous Justice Party/PKS (17.24%), the Golkar Party (16.03%), the National Awakening Party/PKB (14.28 percent), the United Development Party/PPP (13.16%), and the Gerindra Party (3.85%) (www.hukumonline.com, 2018).

Available data shows that corruption cases committed by political party administrators or figures affiliated with certain political parties in Indonesia are high. The practice of political corruption in Indonesia, as well as in almost all countries in the world, is a “habitus,” which is a meeting of two compounds while creating a corruptive interdependent relationship (symbiotic mutualism): political parties and cadres (elites). Political parties are the dominant entities that influence the emergence of corruption because the findings of political corruption state that corruption is carried out in disguise to finance political activities, both personal party cadres and for party political activities, making it difficult to separate the link between political parties and their cadres in corrupt practices. Political parties are a dominant entity because most of the corruption cases investigated by the KPK involve “political people.” They either wear party attributes (politicians) or are affiliated with parties or politicians. In the political corruption cases that have been raised, there is a common thread that leads to the financing of party political activities. Almost all political party cadres carry out this rent-seeking practice when they occupy essential government positions, both at the center and in the regions.

In state institutions, political party resources are spread across various institutions, from the President, DPR, and DPRD to Ministers. The law requires the president to be nominated by a political party. Similarly, the DPR and the Prop/Kab/City DPRD are all from political parties, including but not limited to the Regional Representative Council (DPD), which is basically also an “entrustment” of a particular political party. Some State Ministers also come from political parties. Similarly, in several strategic BUMN/BUMD, some of the commissioners are from political parties. There is a “contract” with a political party that becomes its political habitus to help find funds to finance the party’s political needs.

Likewise, judiciary institutions such as the Constitutional Court, which basically
consists of Judges who are indirectly "entrusted" by political parties, are indirectly affiliated with existing political parties. As is known, the 9 (nine) Judges of the Constitutional Court come from proposals from the Government, the DPR, and the Supreme Court.

The discourse on criminal sanctions for political parties proven to have received funds from tipi or crimes is not new. There have been many writings and studies that try to encourage the application of criminal sanctions for political parties in the flow of corruption funds. Everyone agrees that political parties must be held criminally liable and given criminal fines, as well as administrative sanctions such as suspension or dissolution through the Constitutional Court (MK) if the scale of corruption is very massive. However, the problem is not that simple; all studies on this issue deadlock on one key question: how to conclude that corruption committed by party elites is at the same time the actions of the political party, considering that so far, when the public demands criminal responsibility for political parties, other elites will argue by saying that it is the personal actions of cadres, not parties, while the facts show that there is a flow of funds leading to political parties. Furthermore, based on the author's previous explanation, the Constitutional Court itself needs to be clarified from political party elements when viewed from the recruitment pattern of its Judges.

Although the legality of the establishment of political parties is the same through the Ministry of Law and Human Rights (Kemenkumham), "genetically," corporations and political parties do have differences. Firstly, corporations have the purpose and intention of seeking profit, while political parties do not. The political party law also does not mention that one of the purposes and functions of political parties is to seek profit. Second, corporations have share ownership, while political parties have no share ownership. Third, the financial sources of corporations are purely from business activities, while political parties can come from APBN / APBD, membership fees, and third-party donations.

Thus, if using the perspective of the Criminal Code (KUHP), the Anti-Corruption Law and the Supreme Court Regulation (PERMA) on Corporate Crime, it cannot or is difficult to include political parties as the same entity as corporations, even though both are legal entities.

It is easy to understand why political parties are not included as legal entities that can be criminally prosecuted. The law is a political product of the House of Representatives and the Government, so the legislator is unlikely to ensnare his neck by including political parties as legal subjects in criminal offenses such as above. In fact, in the teachings of law, legal subjects are persons and legal entities.

Progressively, this difference does not necessarily close the space to include political parties as subjects of the criminal law of tipikor. Progressive interpretation is needed in the field of criminal law, whether by revising the Criminal Code, Anti-Corruption Law, PERMA, Anti-Money Laundering Law, or by expanding the subject of legal
entities to include political parties as subjects of the criminal law of tipi or because it is proven that corporations can be charged with criminal offenses.

The above has been stated by Artidjo Alkostar, the Chairman of the criminal chamber of the Supreme Court, who stated that law enforcers should have the courage to name corporations as defendants in corruption offenses, as the Attorney General's Office has applied to corporations in Kalimantan (www.merdeka.com, 2018). The Attorney General also stated the same thing: that political parties could be held criminally liable and even be dissolved if proven to have received the proceeds of corruption offenses (Merdeka Daily, 2018). The same thought was also conveyed by Tama S. Langkun, a researcher of Indonesia Corruption Watch (ICW) (harian Merdeka, 2018), namely that political parties that enjoy or receive benefits from criminal acts of corruption as stated in the indictment of the Public Prosecutor, the KPK should be able to apply the articles of the crime of money laundering and corruption against political parties. The same thought was also conveyed by Yusril Ihza Mahendra, an expert in constitutional law, who asked the KPK to thoroughly investigate political parties that allegedly received e-KTP bribes (Harian Merdeka, 2018).

Although political parties allegedly commit many criminal acts of corruption, criminal liability is still imposed on individuals, whether cadres or political party administrators. Law enforcers can cooperate with the Financial Transaction Reports and Analysis Centre (PPATK) to trace the flow of funds from corruption crimes committed by cadres or political party administrators to determine whether the proceeds of corruption are also enjoyed for the needs of their political parties. The PPATK report should be strong evidence for the law to hold political parties criminally liable in corruption cases. The assumption that the actions of political party cadres or administrators are not political party policies so that criminal liability can only be imposed on the individual should need to be reviewed because the legal facts show the possibility of political parties receiving transfers of the proceeds of corruption committed by their cadres or administrators. Thus, it is necessary to run the mechanism of criminalizing political parties and taking responsibility for the actions of their legal entities in the context of corruption cases.

4. Conclusion

The discourse on criminal liability of political parties in terms of post-reform corruption crimes has been regulated in the stadia of existing legislation, where political parties as a corporation can be held criminally liable, as evident in Law Number 31 of 1999 in conjunction with Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning Prevention and Eradication of Corruption and Law Number 2 of 2008 concerning Political Parties in conjunction with Law Number 2 of 2011 concerning Amendments to Law Number 2 of 2008 concerning Political Parties.

Although there are criminal provisions that allow for the criminal liability of
political parties suspected of committing a corruption offense, two main reasons cause difficulties in this context: the first is related to ideological issues, and the second is related to problems in the application of the law.

References