ANALYSIS OF CRIMINAL LIABILITY OF POLITICAL PARTIES IN INDONESIA

Nani Mulyati* and Topo Santoso*

*Faculty of Law, Universitas Andalas, *Faculty of Law, Universitas Indonesia

Article Info
Received: 2019 | Received in Revised Form: 27 August 2019 | Accepted: 27 August 2019
Corresponding author’s email: nanimulyati@law.unand.ac.id

Abstract
In Indonesia, according to civil law, a political party can be a separate legal personality from its members, and can be vested with the same legal rights and duties as a legal citizen. Political parties can participate in economic, political, legal, and social relationships. If these parties violate the law, they can also be held responsible. Despite their critical function in the democratic political process, as acknowledged by the Indonesian Constitution, whether they can be liable in criminal law remains doubtful. This study examines the position of political parties in terms of criminal liability that is, whether they can be prosecuted and sanctioned. The scientific methodology used in this study is doctrinal legal research, which involves scrutinizing theories, regulations, and legal cases, and analyzing legal theories on corporate legal personalities. This study examines regulations and cases that describe the conditions when a political party can or cannot be prosecuted as an entity. Political parties do have certain peculiarities that ordinary private corporations do not, such as important roles in constitutional life as they can contest election results and hold power in government. Some countries treat political parties differently when it comes to criminal law. This study aims to provide valuable information for judges, other law enforcement officers, and academia in understanding the position of political parties in criminal liability.

Keywords: corporate legal personality, corporate criminal liability, legal person, political party.

Abstrak

Kata kunci: kepribadian hukum korporasi, pertanggungjawaban pidana korporasi, badan hukum, partai politik.

DOI: http://doi.org/10.15742/ilrevw8n1.383
I. INTRODUCTION

Political parties play highly important roles in political, social, and legal arenas. They are called the most important organizations in modern politics and democratic life.\(^1\) In this context, democracy may be perceived as a mechanism by which voters delegate policy making authority to a set of representatives, and political parties are the main organizational vehicle by which such delegation takes place.\(^2\)

As legal entities, political parties hold an independent personality separate from their members. As legal citizens, these parties have the same legal rights and obligations as all citizens. At the same time, political parties may violate laws, and their actions are punishable by criminal sanctions. The categories of crime that may be committed by political parties are economic, election, political, and international crimes, as well as hate speech, crimes against privacy, and others.\(^3\)

In Indonesia, generally legal persons are not subject to criminal law because the Criminal Code only recognizes a natural person as subject to criminal law. However, specific laws created outside the Criminal Code regulate offenders who are not limited to natural persons but may also include corporations. Some examples are the laws on the Eradication of Corruption, Information and Electronic Transactions, and Eradication of Terrorism. These specific laws define a corporation as a group of organized people or wealth with a legal personality or without a legal personality.

The enormous role of political parties and the possibility that they might violate criminal law raises questions about their criminal liability. This study examines the capacity of a political party to be criminally liable in the Indonesian criminal justice system. This study aims to explore the relationship between political parties and the definition of a corporation as embraced by the specific laws mentioned. What specific political party functions authorize them to be treated differently from ordinary private corporations? How do other countries regulate political parties in response to criminal law violations? To answer these questions and draw conclusions about these issues, the authors conducted doctrinal legal research on some theories, regulations, and legal cases. This study also examined regulations and cases that determine conditions in which a political party can or cannot be criminally prosecuted. Additionally, the authors analyzed legal theories on corporate legal personalities.

After the Introduction, the rest of this paper is organized in four sections. Section II defines the meaning and nature of a political party. Section III examines political parties as legal entities in Indonesia. Section IV provides a discussion on the peculiarities that separate political parties from corporations. Section V summarizes the criminal offenses that can be committed by a political party. Finally, Section VI concludes the paper with an analysis of political parties in the context of criminal law, how their role in democracy differentiates their treatment from that of corporations according to criminal law.

---

\(^1\) Kaare Strom and Wolfgang C. Müller, “Political Parties and Hard Choic- es,”* Policy, Office or Votes* (1999): 1-35.

\(^2\) Ibid.

II. NATURE OF POLITICAL PARTIES AS LEGAL ENTITIES

Article 1 (1) of Law No. 2 of 2011 (Amendment of Law No. 2 of 2008) sets the definition of a political party as “a national organization formed voluntarily by a group of Indonesian citizens on the basis of equality of will and aspiration to fight and defend the political interest of its members, society, nation, and state, and to maintain the integrity of the Unitary State of the Republic of Indonesia based on the Pancasila and Constitution Act of 1945.”

Several critical elements have been proposed by this Act. The first is that it must be a “national organization,” a term that first appeared on Law No. 2 of 2008. This clause did not exist on Law No. 31 of 2002, which was the earlier law on political parties in Indonesia. No further explanation is given on the meaning of the clause “national organization” in the 2008 law or its 2011 amendment. Literally, a national organization is an entity at a national scale whether in size, management, and administration. If the current definition is associated with the provisions of Article 3 (c) of the Law No. 2 of 2011, then one of the requirements for a political party to be able to register as a legal person is stewardship in all provinces, and at least 75% of the number of districts (kabupaten) and cities in a province, and at least 50% of the number of sub-districts (kecamatan) in a district or city. The conclusion is that the purpose of developing a specific definition for the national organization clause is to assert that its management must exist throughout the territory of Indonesia.

The next element of the definition of a political party is the designation of the organization as “formed voluntarily by a group of Indonesian citizens” with the specific intention to “fight and defend the political interest of its members, society, nation, and state.” Thus, this definition limits a political party’s goal to defending the political interests of its members and society.

According to Monroe, “a political party is an institution through which elites coordinate their activities in elections and government as they attempt to satisfy the interests of their support base.” Monroe associates political parties with the theory of a “party organization” as proposed by Downs, who stated that a party organization cannot be separated from its main objective, which is to gain broad political influence, and thus, to gain political power.

Generally, competitive political party behavior includes three models: vote seeking, office seeking, and policy seeking. However, according to Strøm, pure vote seekers, office seekers, or policy seekers are unlikely to exist. To fulfill their objectives, political parties are designed to meet three needs: (1) information about the electorate and its choices, (2) campaign mobilization of supporters, and (3) implementation of party policy in various institutions to which the party gains access. The costs of meeting these three needs are highly tangible. Parties need considerable resources to compensate activists and professionals such as pollsters and advertising agencies. Thus, political parties are prone to corrupt behavior.

---

5 Ibid.
7 Ibid., p. 570.
8 Ibid., p. 575.
9 Jonathan Hopkin, “Political Parties, Political Corruption, and the Economic
One can conclude that political parties generally have two main interests: first is defending the political interests of its members and society, and second is to gain political power. To be successful, political parties must be able to balance these two interests, which can be mutually supportive but can sometimes be contradictory. When these interests contradict each other, the political party is faced with the choice of preferring to act for the benefit of the people or the will to gain political power.10

Pursuant to Article 3 of the Law No. 2 of 2011 on political parties, a political party may be awarded the status of a legal person by registering with the Ministry of Justice and Human Rights and fulfilling requirements specified in Article 3. If a political party acquires the status of legal person, then it is considered as having an independent legal personality separate from that of its members. According to Subekti, a legal person is created as a function of the law. Along with having the accountability described, a legal person can own property registered in its own name, and may sue and be sued in the same manner as any individual.11 Ridho holds the same opinion about the meaning of a legal person.12

In the hierarchy or classification of legal entities, political parties exist between public and private legal entities. Political parties are categorized as quasi-public legal entities. According to Ridho, a public institution (Instelling) is a public legal entity, while Sri Soedewi calls it a constitutional law entity.13 A legal entity can be a public legal person if it has power as a ruler or public authority, can make autonomous decisions, and can enact regulations that bind the general society. A legal entity or public legal person can be established or occur through the construction of a public law as established by a ruler or legalized by regulation. The Civil Code, Article 1653 describes this legal entity as “an organization formed by general authority.” The types of activities undertaken by public legal entities involve exercising public interest.14

A public legal entity may administer one or more territories; examples are the Republic of Indonesia as the central government, or the Daerah Khusus Ibukota Jakarta, the city of Depok, and others as decentralized governments. In addition to public legal entities that regulate certain territories, public legal entities that have no territory but are established for a particular governmental purpose also exist.15 Some examples are the central bank for regulating monetary policy, the army for national defense, and ministries charged with performing certain functions of the government. Public legal entities are not only state institutions that operate executive functions but also state institutions that perform legislative and judicial duties.

The next category of legal person is private legal person, which is an organization established based on the will of the members.16 The forms of private legal person are governed by the Civil Code and the Commercial Code. They can be for-profit or nonprofit organizations and can be organized as corporations and foundations. Ali


10 Monroe, loc.cit.
13 Ibid., p. 3.
15 Ibid.
16 Ibid.
defined a corporation as an organization that has members, whereas a foundation is an asset separated to pursue particular purposes;\(^\text{17}\) thus, according to Ali, the fundamental difference is that foundations do not have actual human members. However, a foundation does have administrators (*bestuur*) who manage the assets and implement its objectives. The meaning and nature of foundations, as described by Ali, is in accordance with the meaning and nature stipulated in **Law No. 16 of 2001** concerning foundations, as amended in **Law No. 28 of 2004**.

This information leads to the conclusion that a political party cannot be classified as a public legal person because it does not meet the proper qualifications as having public power to administer society at large. Political parties have no power as rulers and no public authority to enact decrees that are legally binding on the public. Nor can a political party be a usual private legal person with or without profit-oriented objectives because it serves as an important instrument in Indonesia's political system according to the 1945 Constitution. Thus, the political party stands between a public legal entity and a private legal entity, which means that it is indeed a quasi-public legal person with peculiar characteristics. This categorization brings various consequences in terms of criminal liability.

**III. PECULIARITIES AND IMPORTANCE OF POLITICAL PARTIES**

In contrast to some important state institutions, such as the People’s Legislative Assembly, decentralized governments, the Supreme Court, the Constitutional Court, or the Central Bank, which have all been established according to the mandates of the 1945 Constitution Act, the formation of political parties is not based on a constitutional mandate. Under Indonesian criminal law, state institutions generally are not criminal law subjects that can be held criminally liable for criminal offenses as legal persons. However, some regulations enable the criminal liability of public institutions, for example in **Law No. 14 of 2008 on Public Information Disclosure**, **Law No. 22 of 2009 on Traffic and Road Transport**. These regulations point out that state institution that commit criminal acts regulated under the law can be held criminally liable as legal persons. Therefore, in general, state institutions are not criminal law subjects unless particular regulation affirms clearly that state institutions may be criminally liable under certain regulations.\(^\text{18}\)

The Constitution of 1945 does explain in some articles the important roles of political parties, such as in **Article 6A (2)**, which explains that political parties or coalitions of political parties propose pairs of candidates for the presidential and vice presidential positions. **Article 8 of the 1945 Constitution Act** also stipulates that should the president and vice president become unable to perform their obligations simultaneously, the People’s Consultative Assembly (MPR) shall convene a meeting to elect a president and vice president from two sets of candidates proposed by a political party or coalition of political parties whose candidates won the first and second most votes in the previous general election. Moreover, **Article 22E** sets out the significant role of political parties in the election of members to the People’s Legislative Assembly and Regional People’s Legislative Assembly.

Furthermore, political parties have a strong influence on the formation of public institutions such as Parliament and other important public governmental institutions

\(^{17}\) Rido, *loc.cit.*  
under the president, such as ministers, chief prosecutors, chiefs of police, and others. Finally, without political parties, no legislative members, either at the central government level or in decentralized territories, can be elected.

Moreover, Sarmah states other important roles of political parties. He affirms that political parties are a unifying force in society as they bring together people from very large and scattered communities in various regions, who live with different cultures, religions, and languages become one, members of these communities can work together for the larger interest of the state as a whole. Sarmah also states that political parties are essential to maintaining governmental stability. Without guidelines from the political party for government policies, legislators can express conflicting or inflammatory opinions about proposed or existing policies such that they risk destabilizing the government. Political parties also act as essential intermediaries between the president and the legislature. These parties can even assume positions as opposition parties to assure checks and balances on government activities initiated by the ruling party.

Furthermore, the 1945 Constitution Act guarantees the freedom of political opinion and freedom of association, including political parties that strive to protect fundamental human rights. Political parties are part of the foundation of communities engaged in developing a democracy to uphold freedom of association. Therefore, a political party’s existence or activities cannot be restricted without a fair trial. Constitutionally, the authority to dissolve a political party under the 1945 Constitution, Article 24C (1) is the authority of the Constitutional Court. Article 68 does grant grounds for a party to submit an application to dissolve a political party, if the rationale for the application is that the party has characteristics that are contrary to the stipulations of the 1945 Constitution Act. However, a political party cannot be dissolved without the decision of the Constitutional Court in full compliance with the rule of law and the full implementation of its right to a fair trial.

IV. POSSIBLE CRIMES COMMITTED BY POLITICAL PARTIES

In performing their activities, political parties may act contrary to laws that carry criminal sanctions, such as violating election laws, namely, unlawful campaign financing and money politics. The impact of money politics in the election process is enormous because voters may be cast based on economic factors and not on the basis of pure awareness. Political parties can also become involved in crimes such as treason, sedition, and espionage; such parties may also be associated with international crimes against humanity, such as genocide, war crimes, crimes of aggression, or terrorism. Furthermore, political parties may commit politically motivated crimes against privacy, such as illegal wiretapping and illegal data interception, and economic crimes such as tax evasion and corruption.

A current legal case of corruption in Indonesia is a procurement project of e-identification cards (e-KTP) that seems to involve several political parties. The

---

20 Ibid.
implications of this case have caused the House of Representatives to invoke its right of enquête (investigation) to the Corruption Eradication Commission (KPK). In the indictment, the prosecutors allege that several prominent politicians from various political parties accepted bribes from an e-KTP fund. In the trial, one of the defendants, a former Ministry of Home Affairs official named Irman, stated that some political parties also took bribes from the e-KTP project, which is estimated to cost the country approximately 2.3 trillion rupiah (US $172 million) from the total project amount of 5.9 trillion rupiah (US $443 million).23

In this case, two different conditions exist, where on the one hand, politicians as individuals can be criminally liable for certain acts. The issue requires no further debate; as long as the requirements of *actus reus* and *mens rea* are fulfilled by the individual, then he/she can be held criminally liable for corruption. KPK has already named eight individual politicians and businessmen who are suspected of corruption in e-KTP case.24 On the other hand, a witness has stated that some political parties as legal entities also receive cash flow from the e-KTP project. This fact brings many legal implications that political parties as legal entities benefited from corruption money. According to the regulations on the Eradication of Corruption, a legal entity is a legal subject that can be held criminally liable for corrupt conduct. However, whether political parties can be identified as part of corporations under the Eradication of Corruption Act remains unclear.

In a case in Croatia, a political party was convicted of political corruption. In 2014, the Croatian Democratic Union (HDZ), the largest political party in the country, was found guilty of conducting illegal transactions involving donations between 2003 and 2009 with the Fimi Media Company. HDZ was alleged to have received approximately 15 million kuna (US $2.3 million). Croatian Court sentenced HDZ to pay the maximum fine prescribed by law in addition to paying back the monetary proceeds. HDZ was fined 5 million kuna (US $75,000) and 24.2 million kuna (US $3.6 million) in reparations. The trial lasted for two years and was depicted as the “trial of the century” by the Croatian media. The country’s former Prime Minister, Ivo Sanader, who was also declared as one of the defendants on a separate trial, was sentenced to 8.5 years of imprisonment for bribery and abuse of power.25 According to Marsavelski, political parties are more likely to commit crimes when the lust for power overcomes the intention to act for the benefit of the greater good.26

V. POSITION OF POLITICAL PARTY AS SUBJECT OF CRIMINAL LAW

Within limits, Indonesia has accepted the concept of corporate criminal liability as part of its legal system to be authorized to impose criminal sanctions for criminal conduct by a legal entity. A heated debate is ongoing about the status of political parties as legal subjects that can be criminally liable. Several cases may lead to further discussion that opens the possibility of making political parties criminally liable for

---

25 Ibid.
26 Ibid.
violations of special laws governing corporations as legal entities that can be held criminally liable. However, the consequences of criminal proceedings against a political party can be fatal to its political future. Thus, a criminal sanction may or may not be applied as an ultimum remedium against illegal behavior by a political party. Alternative mechanisms may include constitutional, political, civil, and administrative liabilities.

In some countries, especially those with civil law background, political parties as subject to criminal law are treated distinctively. For example, Italy excludes political parties from criminal liability on the rationale that they carry out significant functions of the constitution.\(^\text{27}\) France also provides special treatment to political parties when determining criminal punishment for illegal acts. Although France accepts that political parties bear criminal liability, Article 131-39 of the French Penal Code envisages that the toughest sanctions do not apply to political parties. In France, political parties cannot be forcibly dissolved or sentenced with judicial surveillance. Germany’s Criminal Code also has a special provision for political parties. Germany does not correlate a political party’s criminal liability with corporate criminal liability or with forming a criminal organization. According to Article 129 of the German Criminal Code, “forming a criminal organization” (bildung krimineller vereinigungen) cannot be applied against any political party that the Constitutional Court has not declared to be acting contrary to the Constitution.

Indonesian lawmakers have not explicitly defined the position of political parties in terms of liability for infractions of criminal law. This condition is also true with regard to whether a political party can be categorized as a corporation liable for criminal offenses or whether certain special features of political parties should be specifically protected by law when facing criminal prosecution.

Law No. 2 of 2008 and Law No. 2 of 2011 pertaining to political parties do not agree that political parties, as independent legal entities, can be criminally liable. Article 49 of this law explains that criminal sanctions may be imposed when persons, enterprises, or business entities make donations to political parties that exceed a specified amount. However, when regulating political parties that have been found to have received funds that exceed the specified limit, the law does not impose any sanctions on the political party as a legal person. The sanction is imposed on the board member(s) who received the funds. Article 49 (2) states that “political party members who receive donations from individuals and/or companies and/or business entities exceeding the amount stipulated in Article 35 (1) (b)(c) shall be punished by imprisonment of no more than one year and a fine of twice the amount of funds received.” In fact, boards or particular board members who committed the illegal act(s) while acting in the roles and functions of the organization may be held criminally liable even if the act was done for the benefit of the organization. Thus, it is only fair that a political party that receives illegal funds that benefit the organization should be held criminally liable for the act.

If the definition of a corporation stated by some special laws, namely, a group of organized people or wealth whether a legal person or not, is used to measure whether a political party can be identified as a corporation, then political parties can be included in this definition. Thus, political parties can become legal persons with legal rights and duties, and are eligible to participate in legal relations and be accountable

\(^{27}\) Pieth & Ivory, Corporate Criminal Liability (Dordrecht: Springer, 2011), pp. 3–60.
and liable for assessment of legal sanctions for engaging in criminal activities. However, the disciplinary mechanisms they can bear should be clarified because imposing criminal liability on political parties may have devastating consequences. This problem is difficult to resolve because, despite the strong interest in protecting the integrity of the rule of law, compelling interests for the preservation of democracy also exist. On the one hand, offenders have to be punished and, on the other, the role of political parties as important instruments for the functioning of a democratic state should be ensured.

As examined above, political parties have significant roles and functions in conducting their constitutional mandate. However, political parties as a legal subject participating in legal relations must comply with applicable laws. The law as a life guide provides direction on what to do and what not to. The goal is for every citizen to live in peace and harmony so that everyone respects the rights of other citizens and guarantees that everyone performs his/her duties. This principle also applies to political parties that perform social interactions with other legal subjects. Thus, making these parties criminally liable and imposing criminal sanction when they commit a crime are fair approaches. Although political parties have crucial roles and functions in democratic life, this role is not vital enough to exclude them from criminal liability in the context of the state or state institutions.

As political parties have significant functions and roles, and they are vulnerable to be criminalized by political opponents, especially by the ruling party, the specificity that needs to be given to a political party is protection and the assurance that it will not be forcibly dissolved. The process of dissolution of political parties remains a responsibility of the Constitutional Court and not of the criminal court.

VI. CONCLUSION

Indonesian criminal law accepts, to a limited extent that corporations can be criminally liable under special laws such as those on the Eradication of Corruption and terrorism, and the laws governing electronic information and transactions. What remains unclear is whether political parties can be defined as part of corporations that can be held criminally liable under Indonesian criminal law. The fact that political parties play significant roles in society raises questions about their criminal liability, for example, in the e-KTP case. This paper suggests that political parties are legal entities that can be included in the definition of corporation in the context of Indonesian criminal law, and therefore can be held criminally liable for their illegal acts. However, unlike usual private corporations, political parties have significant functions and roles in a democratic government as mandated by the 1945 Constitution Act of Indonesia. Some of their roles have major implications on the presidential, vice presidential, and parliamentary elections, but may not be so vital that political parties should be eligible for immunity from criminal prosecution. In carrying out their activities, political parties may break laws in a manner that entails criminal sanctions. Therefore, they should be held accountable for criminal liability. However, as political parties have significant roles and functions in a democracy, they are vulnerable to being criminalized by political opponents (especially by the ruling party). Thus, political parties must have legal protection against being forcibly dissolved. When dissolution is threatened, the process of dissolution of a political party is conducted in the Constitutional Court rather than in the criminal court.
Bibliography

Legal Documents

France’s Penal Code.

Germany’s Criminal Code.

Indonesia’s Penal Code.

Indonesia’s Civil Code.

Indonesia’s Constitution Act 1945.

Indonesia. Undang-Undang tentang Penetapan Peraturan Pemerintah Pengganti Undang-Undang Nomor 1 Tahun 2013 tentang Perubahan Kedua atas Undang-Undang Nomor 24 Tahun 2003 tentang Mahkamah Konstitusi Menjadi Undang-Undang (Law regarding Government Regulation Replacement Law No. 1 of 2013 on Second Amendment to Law No. 24 of 2003 on Constitutional Court Becoming Law). UU No. 4 Tahun 2014 LN No. 5 Tahun 2014 (Law No. 4 Year 2014, SG No. 5 Year 2014).

---. Undang-Undang tentang Perubahan atas Undang-Undang Nomor 2 Tahun 2008 tentang Partai Politik (Law Regarding The Amendment of Law No. 2 Year 2008 regarding Political Party). UU No. 2 Tahun 2011, LN No. 8 Tahun 2011 (Law No. 2 Year 2011, SG No. 8 Year 2011).

Books


Articles


Websites

