Responsibility of Political Parties for Criminal Offences: Preliminary Observations, Challenges and Controversies

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This power, whilst employed for the benefit of the community, and suitably to the trust and ends of the government, is undoubted prerogative, and is never questioned: for the people are very seldom or never scrupulous or nice in the point; they are far from examining prerogative, whilst it is in any tolerable degree employed for the use it was meant, that is, for the good of the people and not manifestly against it.

( Locke 1689, 172)

1. Introduction

The role of political parties in criminal justice systems is usually viewed through their legislative powers when their members act in governments and parliaments as subjects who determinate states’ criminal policies.1 In modern democracies, the constitutional law ascribes them such powers because they are chosen by the people to represent their interests. However, political parties sometimes engage in criminal activities themselves, either by abusing their powers (police power, military power, financial power etc.) as a ruling party or by engaging in delinquent anti-government activities as a party in opposition (political crimes, terrorism, supporting criminal organizations etc.). Thus, the criminality of political parties ranges from practicing violence, engaging in economic crimes to taking part in organized crime.

In periods of war, the international community has laid down important international rules and infrastructure designed to end the impunity of politicians for the violence they commit – constituting war crimes, crimes against humanity or genocide. Furthermore, the latter two are applicable in peacetime as well, which makes it easier to prosecute and punish the most severe forms of “state terrorism.”2 Many authors have made proposals to introduce criminal responsibility of legal entities in international law3 but

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1 See e.g. Bridgmon & Bridgmon 2010, 223–238.
3 See e.g. Engelhart 2010; Stoichkova 2010.
due to significant differences in corporate criminal legislations among countries, the international community is still not ready to adopt such a model.

In periods of economic crisis, there is an intensified public demand for responsibility of politicians and their parties. Dubious political decisions, especially the costly transactions from state’s budget, are being watched and investigated in case of suspicions that crimes have been committed. Politicians connected to illegal markets and corruption are targeted first. It seems that here is a demand and need that goes beyond the responsibility of individuals – we are facing a new era of political responsibility as more and more countries are allowing criminal responsibility of political parties.

One of the central questions is how to attribute criminal responsibility to political parties? A further analysis will demonstrate that this depends on the status of a political party, which can be either “legal” or “illegal”. When a political party is “legal” it normally means that it is registered as such and has a status of a legal entity; while the “illegal” status of a political party is usually attributed to criminal organizations (mostly terrorist organizations). This distinction is crucial for the attribution of criminal responsibility.

Moreover, this opens a more fundamental question that goes deep into the essence of each state: Who should take actions when a ruling party engages in criminal activities? There are many potential actors in this field: various courts (supreme courts, constitutional courts, criminal courts, administrative courts, civil courts, special courts, international courts), the head of state (e.g. by pardoning), the parliament (or parliament’s body) or the people (e.g. in a referendum). The choice of actors depends on the type of measures that we want to impose on political parties. By their nature, they can be classified as: constitutional (e.g. impeachment), criminal (e.g. dissolution), administrative (e.g. fine) or civil (e.g. compensation) measures; and usually it is possible even to apply them simultaneously in parallel proceedings.

Furthermore, it is necessary to be aware of possible obstacles in investigating, prosecuting, convicting and punishing political parties for criminal offences: immunity, abolition, amnesty, pardon, law amendments, political preferences of prosecutors and judges etc. The purpose of aforementioned obstacles is mainly related to preventing the so-called vicious prosecutions, which intend to discredit certain political parties. However, it is necessary to determinate the correct balance in the spectrum of their application in order not to lead to a condition of irresponsible political structures.

Finally, one of the crucial issues in this area is to evaluate different sanctions that can be imposed on political parties as well as its effects. A particular attention must be given to sentence of dissolution (“death penalty”) of a political party, which many states tend to exclude.

Therefore, this paper will first address the phenomenology and the etiology of crimes committed by political parties, i.e. the types of crimes in which political parties are usually involved in, as well as the causes of such involvement. Second, this paper
will address the problem of attribution of criminal responsibility of political parties, in particular discussing different models of criminal liability. Third, since criminal justice intervention is usually considered to be the “ultimate measure” (ultima ratio), it is necessary to observe the alternatives to the criminal law approach. Fourth, criminal proceedings involving political parties face various obstacles regarding the initiation and undertaking of such proceedings, which must be taken into account when searching for an adequate model of responsibility for criminal offences. Finally, one of the crucial points is to evaluate available criminal sanctions for political parties, as well as their (desired and undesired) consequences.

The structure of this research suggests a need of a comprehensive both theoretical and case study analysis. Literature dealing with responsibility of political parties for criminal offences practically does not exist, which means that a new theoretical approach needs to be developed. On the other hand, there are hardly any cases dealing with criminal responsibility of political parties as legal entities. The first case of convicting a political party as a legal entity took place in Croatia, which is, therefore, of crucial importance for this research. As other countries in the region have similar legal systems and have had similar experiences in the past, this research will also reveal certain cases and approaches to the criminality of political parties from the Balkan countries.

2. The Phenomenology and the Etiology of Crimes Committed by Political Parties

2.1 The Types of Crimes Committed by Political Parties

There are several ways to categorize the types of crimes committed by political parties. In relation to whether a political party’s activity is “authentic” i.e. whether it represents the will of the people, the political parties’ delinquency is two-sided. First, they sometimes fail to represent their voters’ or supporters’ interests by abusing the given powers (e.g. engaging in corruption, practicing violence, illegal wiretapping etc.). Such criminal behaviour is particularly dangerous because it is difficult or impossible to investigate while the party is in power – practical obstacles of investigating a ruling party are inevitable no matter how democratic is the legal system (e.g. prosecutors have no political support; major actors enjoy immunity from prosecution; there is always a possibility that the party in power would amend the law in order to avoid responsibility by applying the lex mitius, there is a possibility of granting an amnesty, etc.). Second, sometimes the interests of the political party’s voters or supporters are illegal per se, which means that in such case the party is faithful to the population it represents, but by doing so it violates the law (e.g. activities of terrorist groups or neo-Nazi parties). However, as it is often difficult to bring political parties’ actions in relation to the popular attitudes, in the forthcoming paragraph a more complex categorization of political parties’ criminality shall be given.
Already from the foregoing paragraphs, one could notice that the phenomenology of criminal activities of political parties is somewhat specific due to the particularity of the position they have in states and societies. The preliminary research of the criminality of political parties demonstrates that their criminal behaviour is mainly limited to: economic crimes (corruption, tax evasion etc.), election crimes (unlawful campaign financing, election fraud etc.), political crimes (lèse-majesté, treason, sedition, espionage), international crimes (genocide, crimes against humanity, war crimes, crime of aggression, terrorism), crimes against privacy (illegal wiretapping, illegal data interception), hate speech, unlawful imprisonment and torture. The foregoing crimes can be divided depending on three major circumstances: (a) whether they are in power or in opposition, (b) whether they act in a totalitarian, transitional or democratic environment, and (c) whether they act in peace or in warfare.

The need of a better understanding of national legal systems, as well as of the political environment at the same time, suggests that it would be appropriate to focus this research primarily on countries that belong to the same region, share similar legal tradition and have a long history of political ties. As most Balkan states (former Yugoslav Republics) have recently gone through a transition from a totalitarian regime to a period of war, and ultimately to democracy and peace, such a variety of external influences make it an adequate geographical area for conducting an empirical research of this kind. The second group of Balkan states have changed their totalitarian regimes for democracy without war (Bulgaria, Romania and Albania). Greece and Turkey had different paths – the former being an EU member currently facing a severe economic crisis, while Turkey being an EU candidate experiencing an armed struggle with Kurdistan Worker’s Party (PKK). The political violence has been one of the major characteristics of this region. Such violence tends to radicalize from mere discrimination and hate speech (verbal violence) to terrorism, guerrilla struggle and warfare. Furthermore, the historical background of this region reveals intriguing events relevant for this research: the assassination of Archduke Franz Ferdinand of Austria in 1914 in Sarajevo organized by a political party Young Bosnia triggered the First World War; the assassination of King Aleksandar I of Yugoslavia in 1934 in Marseilles was organized by a political party called Internal Macedonian Revolutionary Organization (IMRO); the Romanian Communist Party (PCR) was responsible for decades of terror of its people that ended by executing its leader Nicolae Ceaușescu and his wife after a 60-minute kangaroo trial in 1989 (while the members of the PCR never faced trial nor punishment, but instead, a lustration law was passed 20 years later). However, all these violent acts occurred in the era of impunity of ruling political parties.

Today we are facing a shift in paradigms: the new era introduces criminal (or at least misdemeanour) responsibility of legal entities, including political parties. The first
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The case of criminal conviction of a political party took place in Croatia. The case has nothing to do with political violence, but it is more related to political corruption. In April 2012, a Croatian county court began a trial against one of two major political parties in Croatia, the Croatian Democratic Union (HDZ) and against the former Prime Minister Ivo Sanader. The state attorney’s office accused Sanader, HDZ and several accomplices of conspiracy and abusing power by making illegal transactions with Fimi Media company and by receiving illegal donations, in the period between 2003 and 2009, through which HDZ illegally gained at least 31.6 million kuna (€ 4.1 million), while Sanader himself illegally obtained at least 15 million kuna (€ 2 million). On 11 March 2014, HDZ was convicted and fined with 5 million kuna (€ 650,000) and is ordered to pay 24.2 million kuna (€ 3.1 million) of reparations. The case is now on appeal and the outcome of this procedure will be a real “experiment” for evaluating the concept of criminal responsibility of political parties as legal entities.

Some countries have not passed laws establishing criminal liability of legal entities. Greece is one of them. However, this did not prevent Greek police to arrest in September 2013 several members of Golden Dawn, a neo-Nazi political party, which was categorized as a criminal organization. Golden Dawn’s leader Nikos Michaloliakos was charged with heading a criminal organization, which has been linked to a number of violent acts directed mostly against immigrants and leftists. This case demonstrates the possibility of holding political parties responsible as criminal organizations.

Turkey took another path in “punishing” political parties. There are many active illegal political parties in Turkey, which have been dissolved by the Constitutional Court. Several cases have been brought before the European Court of Human Rights (ECtHR) which addressed the question whether the dissolutions of these political parties ordered by the Turkish Constitutional Court were in violation of Art. 11 of the European Convention of Human Rights (ECHR). The analysis of the ECtHR’s jurisprudence on political parties is crucial for setting the criteria in which cases a sanction of dissolution of a political party is sound with current human rights standards.

The experiences from Balkan countries in combating criminal activities of political parties could have relevancy in searching for global solutions of this problem. However, in order to understand the background of criminal legislation in these countries, it is necessary to observe the legislative “role-models” (such as Germany, France,

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5 Former Prime Minister Sanader was involved in several corruption affairs in the 1990s and 2000s, including the first war profiteering case in which the new Croatian Law on Non-Applicability of Statutory Limitations for War Profiteering and Crimes Committed in the Process of Ownership Transformation and Privatization has been applied (see Novoselec, Roksandić Vidlička & Maršavelski forthcoming 2014).

6 County Court of Zagreb, Croatia, Case No. 13 K-US-8/12, Judgement of 11 March 2014.
U.K. and the U.S.) in order to evaluate the effects of “legal transplants” taken from these countries. Furthermore, since international criminal justice has had important impact in the major part of this region (former Yugoslav states) in the past two decades, it is necessary to analyse the relevant international criminal law standards, especially the ICTY’s case law, which attempted to criminalize whole governments through the controversial concept of joint criminal enterprise.7

The foregoing paragraphs have revealed that violent crimes, behaviour as criminal organizations and financial abuses are often features of political parties’ criminality. Therefore, this topic fits in the wider concept of the Max Planck Partner Group research focuses, while being in particular related to the “Research Focus I”, dealing with violence, organized crime and illegal markets.

2.2 The Causes of Political Parties’ Criminality

There is no empirical research on the causes of political parties’ criminality. However, at this point we can establish certain hypotheses that can be used as guidelines to answering the question why political parties engage in criminal activities. Of course, in order to verify their accuracy, it requires further research and testing their applicability in case studies.

According to Locke,8 once a political party is employed to participate in the legislative or executive branch of the state power, it has a duty to act for “the good of the people, and not manifestly against it.” However, political parties often fail to obey this duty. The main reason for this is one of the main driving forces in humans that Nietzsche9 calls: “the will to power” (der Wille zur Macht) – the “danger” and the “end of good and evil”. In other words, political parties’ main goal is often not the welfare of the people, but to obtain and keep the power. The “danger” of the will to power has two possible criminal manifestations. On the one hand, it exists when the political party is in power – in form of the possibility to abuse the given powers (abuse of office, bribery, torture, election fraud etc.) in order to expand or maintain political power or to achieve financial power. On the other hand, the danger also exists when political parties are in opposition, because they can be driven by ambition to use unlawful means in order to gain power (terrorism, espionage, bribery etc.). Since political parties in opposition are not in power, argumentum a contrario, they need not necessarily act for “the good of the people,” however, they are still obliged not to engage in criminal activities.

Political parties are capable for what Merton (1938) calls “innovation” and “rebellion”. They tend to be innovative when driven by their will to achieve or maintain

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7 See Damaška 2005; Damgaard 2008; Derenčinović et al. 2011.
8 Locke 1689/2003, 172.
9 Nietzsche 1884/2006, 88.
political or financial power, which are considered to be the main “culturally induced success-goals” in capitalist societies.\textsuperscript{10} Since the institutionalized legitimate means for achieving those goals are often limited (e.g. the national budget cannot be used for financing political campaigns apart from amounts regulated by law; the election rules require transparent and free elections etc.), political parties seek “innovative” means to achieve their goals – corruption, tax evasion, election fraud et cetera. On the other hand, when in opposition, political parties tend to be rebellious, especially when they do not have the legitimate means to overthrow the ruling political party. Thus, political parties in opposition may sometimes recourse to crimes such as terrorism, treason or espionage in order to achieve their political goals.

In most countries, what is considered to be a crime when committed by other (natural or legal) persons, the state does not consider it as a crime when committed by a political party – either due to absence of provisions on criminal responsibility of political parties or because of unwillingness to prosecute political parties. There is some paradox in such state of affairs, because the political parties have the highest responsibilities when ruling the state, however, they bare very little responsibility when they abuse the given powers – the main sanction is to be overthrown by another political party (either through elections or by means of force). Even for politicians, who bare the primary criminal responsibility, there are many obstacles for prosecutions such as immunity, amnesty, abolition and pardon.\textsuperscript{11} The reasons of this “discrimination” are well explained by critical criminologists such as Quinney (1977).\textsuperscript{12} Political elites, as the creators of the legal framework that governs their activities, are in position to minimize the possibility of sanctions for the wrongdoings they commit throughout their mandates. This “vicious circle” creates a state of “responsibility without accountability”, i.e. it provides power and functions to political elites, but the risks of sanctioning their misbehaviour are minimal.

\textsuperscript{10} Merton (1938, 678) uses U.S. society as an example: “The extreme emphasis upon the accumulation of wealth as a symbol of success in our own society militates against the completely effective control of institutionally regulated modes of acquiring a fortune. Fraud, corruption, vice, crime, in short, the entire catalogue of proscribed behaviour, becomes increasingly common when the emphasis on the culturally induced success-goal becomes divorced from a coordinated institutional emphasis.”

\textsuperscript{11} See infra Part 5.

\textsuperscript{12} In his book “Class, State, and Crime“, Quinney (1977) argued that crime is a function of society's structure, that the law is created by those in power to protect and serve their interests (as opposed to the interests of the broader public), and that the criminal justice system is an agent of oppression designed to perpetuate the status quo. Furthermore, he argues that corporate and state violation of the law is “natural” and “necessary” to secure the capitalist system.
3. Attribution of Criminal Responsibility to Political Parties

One of the hypotheses of this research is that the attribution of criminal responsibility to political parties usually depends on the legality of their status. A political party is “legal” when it is registered as such and legal systems of most countries provide them a status of a legal entity (corporation). An “illegal” political party is in most cases a criminal organization. In the forthcoming paragraphs different theories of liability of legal entities and of criminal organizations shall be evaluated and applied to political parties. A complete assessment of different models of criminal liability of political parties as legal entities requires an analysis of historical developments of these models.

3.1 The Models of Liability of Political Parties as Legal Entities

Corporate liability evolved from the recognition of corporations as legal persons capable of holding rights and obligations separate to those of their human stakeholders. Throughout history, private law doctrines have been more advanced in comparison with criminal law doctrines because they originated in the highly developed Roman private law. Two private law scholars of 19th century developed two opposing theories of corporate personality: (1) the fiction theory by Savigny, and (2) the reality theory by Gierke.

The fiction (or “nominalist”) theory says that corporation is merely a legal construct that does not exist in reality, which means that it can only act through its human representatives. The effects of this theory on criminal liability of corporations correspond to what in common law later developed as the identification (or “alter ego”) model of corporate criminal liability, which says that a legal entity may bear criminal guilt through its identification with the human beings who serve as its “directing mind and will.”

The reality (or “organic”) theory recognizes the corporation as possessing a distinct personality, which manifests its will through actions of its organs. This theory is largely rejected as being “unrealistic”, because legal entities do not exist without the legal norms that regulate their status. However, some of its features have been adopted in the aggregation theory (or the doctrine of collective knowledge), which constructs the actus reus and mens rea out of the conduct and knowledge of two or more individuals acting as the corporation. Furthermore, the theories of autonomous

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13 Wells 2010, 10.
14 Savigny 1840.
15 Gierke 1881.
16 Savigny 1840.
17 Tesco Supermarkets Ltd v Nattrass 1972, AC 153.
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Corporate culpability also have their roots in the reality theory because they observe the legal entity’s criminal responsibility separately from the liability of natural persons.

However, in spite of the fact that corporate law doctrine first developed in civil law countries, the criminal liability of corporations was first introduced in the U.S. and U.K. The tort law jurisprudence in common law countries, which substantially influenced their criminal law, also developed a model of vicarious criminal liability of corporations for crimes of their servants, derived from the respondeat superior doctrine. In civil law countries, the introduction of criminal liability of corporations came later – after first being introduced in the post-World War II period in Belgium, Denmark and France – the real expansion of this concept began in the 1990s.

Thus, a comprehensive evaluation of relevant theoretical models of responsibility of legal entities in comparative law and their application on political parties will be provided: identification theory, aggregation theory, organic theory, corporate guilt theory, corporate ignorance theory and compliance theory. Furthermore, the scope and limits of the statutory exceptions that exclude criminal liability of political parties shall also be evaluated.

3.2 The Models of Liability of Political Parties as Criminal Organizations

A criminal organization in a broad sense is a structured enterprise of three or more persons existing for a period of time with the aim of engaging in criminal activity. There are two main types of criminal organizations depending on their major purpose: (1) organized criminal groups, which aim at obtaining material benefit; and (2) terrorist organizations, which are mainly politically motivated; and (3) other criminal organizations, aiming at committing serious criminal offences.

The main purpose of legislation related to combating criminal organizations is primarily to prosecute their members, while no sanctions can normally be imposed on criminal organizations as such because they are usually illegal enterprises. However, there are many examples of political parties acting as criminal organizations (in most cases as terrorist organizations), sometimes even when they are legally registered as political parties.

18 The most notable among them is the German theory of “culpability for organizing” (Organisationsverschulden) of Tiedemann (1988). He argues that a corporation can be held culpable only for its organizational failures that caused the commission of an offence.


20 For general observations on the liability of criminal organizations see e.g. Albrecht 1998.
A wider comparative perspective reveals that there are essentially three models of attribution of criminal responsibility to criminal organizations: (1) criminalization of participation in a criminal organization; (2) attribution of responsibility for the crimes committed by a criminal organization to its members through strict liability/foreseeability standard; and (3) accomplice liability (co-perpetration, perpetration-by-means, accessories). In the first model, the law criminalizes various acts of participation in a criminal organization as such: forming or being a member of a criminal organization, recruiting members for it or providing support to a criminal organization, which are punishable regardless of whether the actor himself perpetrates, aids or abets in a crime committed by the organization. The second model also criminalizes participation in a criminal organization, but under this concept a crime committed by the organization is attributable to all members (e.g. if a political party organizes kidnapping and torture of a member of the opposition, all party members may share criminal responsibility). The third model is quite different from the previous two, because it essentially cannot be used to condemn the whole political party, unless all of its members are involved in its criminal activities as co-perpetrators, perpetrators-by-means or accessories.

Within the scope of evaluating the application of each of these models to political parties, it is necessary to take into account certain provisions in some countries that exempt political parties from the application of criminal organization statutes. A good example is § 129 (2) of the German Criminal Code, which explicitly says that the criminal offence of “forming criminal organizations” (Bildung krimineller Vereinigungen) shall not apply to political parties which the Federal Constitutional Court has not declared to be unconstitutional. The purpose of this so-called “parties’ privilege” (Parteienprivileg) is to protect the “operation of a political party as such.”21

4. Alternatives to Punitive Reactions on the Political Parties’ Delinquency

Regardless of the fact whether it is possible to impose a punishment of dissolution, the consequences of criminal proceedings against a political party can be fatal for its political future. Furthermore, we have witnessed throughout history a number of criminal prosecutions of political opponents. For example, the political opponents in former Yugoslavia ranged from Nazi collaborators, Stalin’s supporters to progressive democratic proponents, and had been subjected to prosecutions, imprisonment

21 See e.g. Schäffer 2012, Rn 70.
and death penalty. Such trials are referred to as “political trials” and they are still taking place in many countries, especially those in transition.\(^22\)

Therefore, a comprehensive assessment of the concept of criminal responsibility of political parties cannot be done without an analysis of possible alternatives to criminal law approach. Namely, the criminal law provisions are considered to be the \textit{ultima ratio} measures in a legal system, which means that when more lenient measures in other branches of law are available with the same effect, they should be used. These include: constitutional liability, political liability, civil liability and administrative liability, lustration laws, peace and reconciliation commissions. Each of these forms of liability requires a detailed analysis and comparison in order to assess the limits of criminal responsibility of political parties.

5. **Obstacles in the Application of Criminal Law against Political Parties**

This chapter has the purpose to reveal a legal realist perspective of the criminal responsibility of political parties, i.e. to demonstrate how politics particularly influences legal framework and decision-making related to the application of criminal law against political parties. As noted before, there are several obstacles in the application of criminal law against political parties. These obstacles are sometimes difficult to overcome due to the two opposing interests at stake: interests of justice vs. interests of democracy. On the one hand, there is a need of punishing the wrongdoer. On the other hand, there is a need of ensuring the effective functioning of the democratically elected bodies.

Investigations or prosecutions of politicians can \textit{per se} have negative effects (especially in cases of so-called vicious prosecutions) that ought to be avoided by ensuring the immunity of high-ranking public officials. Most states do recognize such immunity as well as the possibility to lift the immunity upon the authorization of the body whose official is under investigation. However, leaving aside the fact that in totalitarian systems the ruling parties enjoy absolute immunities, the states normally do not formally recognize the immunity of political parties or the possibility to lift such immunity. The laws regulating criminal responsibility of legal entities sometimes just exempt the political parties from liability, which is \textit{de facto} an absolute immunity.

Another problem in investigating, prosecuting and convicting political parties for crimes is that many countries recognize abolition, amnesty and pardon. These acts

\(^{22}\) The most recent examples include Ukraine (Tymoshenko), Russia (Navalny), Rwanda (Ingabire), Kazakhstan (Kozlov), Bangladesh (Chowdhury), Malaysia (Anwar Ibrahim), Djibuti (Abdirahman Bashir, Abdirahman God and Guirreh Meidal), Kuwait (Musallam al-Barrak), Lagos (Tinubu), Côte d’Ivoire (84 Popular Front members), etc.
are usually given in competence of the head of state or the parliament. The controversy lies in the fact that the ruling party usually has a majority in the parliament and it is also possible that the head of state is also a member of the same party. Such conflicts of interest are obvious. The most notable example of such “self-pardoning” occurred in 1974 when the U.S. President Gerald Ford pardoned his Republican colleague Richard Nixon for Watergate scandal.

Furthermore, a ruling political party may amend the laws in order to avoid criminal responsibility. For example, this was done by Forza Italia, which passed several amendments in the Italian Parliament in order to save its leader Silvio Berlusconi from prosecution. However, once he lost power, first convictions appeared.

Moreover, in most countries public prosecutors are considered to be a body of the executive branch or at least highly influenced by the executive (especially through the cooperation with police authorities). This means that, if public prosecutors work for the government, they are obviously in conflict of interest while investigating crimes of the ruling party, which makes independent and impartial investigations impossible. The same conflict is even more evident with respect to the police, which is usually a body of the Ministry of Interior, whose minister is a member of the ruling political party.

Finally, political preferences of judges may also influence the outcome of trials against politicians and political parties. In order to prevent this, some countries prohibit judges from being members of political parties (e.g. Turkey, Croatia, Macedonia etc.). The influential nature of political preferences of judges has been demonstrated in studies that have revealed how predictable the rulings of the U.S. Supreme Court are.23

6. Criminal Sanctions for Political Parties

When a country decides to introduce criminal responsibility of political parties, one of the most problematic issues is which criminal sanctions should be prescribed for political parties.

In countries that have criminal liability of legal entities, a fine is considered to be the main punishment and it is also the most applied sanction. On the other hand, the sentence of dissolution is considered to be the most controversial, because it may undermine the functioning of the country’s political life (especially in two-party systems such as U.K. and U.S.). The same problem exists in countries that do not have a sanction of dissolution of a political party, but the fines that can be imposed are so high that they can immediately lead to bankruptcy of the political party. Furthermore,

dissolution also has a practical consequence if political party’s members are prosecuted for organized crime and the party is declared to be a criminal organization.

Furthermore, dissolution of political parties may lead to illegitimate limitations of certain political freedoms, especially election rights. This is especially the problem in transitional societies, where the criminal justice system is often subject to political influences. In this respect, a parallel can be drawn with the imprisonment of political leaders of the opposition, as in the outcome of Ukraine’s 2011 corruption trial against Yulia Timoshenko. By putting away the main political opponent, the ruling political structures could secure their political power for a longer period of time.24

There are also other criminal sanctions that states adopt in sentencing political parties as legal entities. The most important among them is confiscation, either as a measure designed to seize the means of perpetration, to seize the illegal benefit from the crime or as a separate punishment. Apart from confiscation, other criminal sanctions mainly include security measures that have the purpose to prevent the danger of repeating the crime (ban on performance of certain activities or transactions; ban on obtaining of licences, authorizations, concessions or subventions; publication of the judgement in the media, placement under supervision, disqualification from public tenders etc.). States that exempt political parties from the punishment of dissolution of a legal entity, also exempt the political party from sanctions of similar effect such as the ban on performance of certain activities (e.g. France, Croatia, Macedonia etc.), because banning a political party to perform certain (political) activities would make it impossible to function.

With respect to certain consequences of conviction that are sometimes referred to as “ancillary measures” (Nebenfolgen), it is worth of observing that in most countries many official positions (e.g. president, governor, mayor etc.) require not to have a criminal record. However, there are no such provisions for political parties.

7. Concluding Remarks

The need of introducing criminal responsibility of legal entities has been recognized among many states, but due to significant differences in corporate criminal legislation, the international law has not been ready to adopt such a model. However, it seems that it is a question of time when it will be adopted in some form on international level, since the sole international criminal responsibility of “individuals” has proven to be insufficient in suppressing certain categories of crimes related to political parties.

24 However, due to strong pressures from abroad and Euromaidan protests, such scenario did not occur in Ukraine: Yulia Tymoshenko was released in February 2014.
The model of attribution of criminal responsibility to political parties in most cases depends on the status of a political party, which can be either “legal” or “illegal”. This dichotomy has theoretical and practical advantages: “legal political parties” are to be prosecuted as legal entities, while the “illegal political parties” are to be treated as criminal organizations. Furthermore, different theories underlying the liability of legal entities (from alter ego to autonomous liability) and criminal organizations (from Pinkerton doctrine to accomplice liability) need further evaluation in order to crystallize adequate modes of liability.

A comprehensive assessment of the concept of criminal responsibility of political parties cannot be done without an analysis of possible alternatives to criminal law approach, which needs to be the ultima ratio. Thus, different forms of liability (constitutional, political, civil, administrative) require a comprehensive analysis in order to assess the limits of criminal law with respect to political parties.

It is also important not to overlook the possible obstacles in investigating, prosecuting, convicting and punishing political parties for criminal offences: immunity, abolition, amnesty, pardon, law amendments, political preferences of prosecutors and judges etc. Finally, a comprehensive evaluation of different sanctions models that can be imposed on political parties – with special focus on the sentence of dissolution of a political party, which many states tend to exclude.

8. Summary in Croatian

Ovaj rad predstavlja rezultate preliminarnog istraživanja o modelima odgovornosti političkih stranaka za kaznena djela. Prije svega, u njemu se otvara opće pitanje ovog istraživanja: Da li je uopće potrebno imati kaznenu odgovornost političkih stranaka?

Fenomenologija kriminalnih radnji političkih stranaka je donekle specifična zbog posebnosti njihovog društvenog statusa. Preliminarno istraživanje za potrebe ovog rada otkriva kategorije kaznenih djela koje se mogu pripisati političkim strankama. Katalog tih kaznenih djela se uglavnom odnose na: gospodarske delikte, izborne delikte, političke delikte, međunarodne zločine, delikte protiv privatnosti, govor mržnje, protupratno oduzimanje slobode i mučenje.


Dva glavna modela koja su dosad korištena u kaznenim postupcima protiv političkih stranaka ovisila su u načelu o njihovom statusu. Prvi model se sastoji u tretmanu političkih stranaka kao pravnih osoba, dok ih drugi trećira kao zločinačke organizacije. U svakom slučaju, važno je biti svjestan posljedica kaznenog postupka i kažnjavanja političkih stranaka, koje mogu biti fatalne za njihovu političku budućnost. Različite kontroverze povezane s političkim sudjenjima kroz povijest ukazuju na potrebu restrikcije kaznene odgovornosti političkih stranaka u političkim okolnostima u kojima postoji opasnost instrumentalizacije kaznenog pravosuđa u sukobljavanju s opozicijom. Zbog toga je potrebno razmotriti moguće alternative kaznenopravnim pristupu (ustavno-pravni, politički, građansko-pravni, upravno-pravni) s obzirom na to da kazneno pravo treba biti „ultima ratio“. Ovo istraživanje ima zadatak usporediti prednosti i nedostatke različitih modela te predložiti adekvatan pristup kriminalitetu političkih stranaka. Konačno, posebna pozornost posvećena je tipovima sankcija koje se mogu izreći političkim strankama.

References


Responsibility of Political Parties for Criminal Offences: Preliminary Observations, Challenges and Controversies

The paper provides preliminary observations on the models of responsibility of political parties for criminal offences. First of all, it opens the general research question: Do we need criminal responsibility of political parties?

In most countries it is difficult or even impossible to attribute criminal liability to political parties. This is mainly due to legal obstacles to prosecute or convict political parties, or because of the unwillingness of law enforcement bodies to undertake criminal procedures and hold political parties criminally liable. There is some paradox in such state of affairs. Namely, political parties have the highest responsibilities when governing state administrations, however, they bear little responsibility when they abuse the given powers. There are two main reasons for this. The first one is that classical doctrine of criminal law rejects the possibility of holding collectives criminally...
liable. Second is that ruling political parties – being the creators of legal frameworks governing their activities and having to certain extent the political influence on the criminal justice system – are in a position to minimize the possibility of sanctions for the wrongdoings they commit throughout their mandates. This vicious circle creates a state of "responsibility without accountability" i.e. it provides power and functions to political elites, but the risk of sanctioning their misbehaviour is minimal.

The phenomenology of the criminal activities of political parties is somewhat specific due to the particularity of the position they have in states and societies. The preliminary research for this paper reveals the categories of crimes that can be attributed to political parties. They are mainly limited to: economic crimes, election crimes, political crimes, international crimes, crimes against privacy, hate speech, unlawful imprisonment and torture.

One of the hypotheses of this research is that the causes of criminal activities of political parties are linked to the misbalance of two colliding interests: the duty to act for the benefit of the people vs. the will to power. When the prevailing goal of their conduct is to satisfy their will to power – there is a tendency to engage in criminal activities.

The main two models used so far in criminal proceedings against political parties were in principle related to their status. The first model is to treat political parties as legal entities, while the second is to treat them as criminal organizations. In any case, it is important to be aware of the consequences of criminal proceedings and imposed sentences against political parties, which can be fatal for their political future. Various controversies linked to political trials throughout history have demonstrated the need of restrictions to the criminal responsibility of political parties in political settings where there is a danger of instrumentalization of criminal proceedings in confrontations with the opposition parties. Therefore, it is necessary to find an adequate balance between the interests of justice and the need of preserving the functioning of the democratic system. This requires reconsidering possible alternatives to criminal law approach (constitutional, political, civil, administrative) since criminal law ought to be the "ultima ratio". This research has the task to compare the advantages and disadvantages of different models and make proposals about how to address the criminality of political parties. Finally, special attention is given to the types of sanctions that could be imposed on political parties.