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The development of criminal liability for legal entities

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Abstract

The development of a market economy led to the formation of multiple legal entities, which together with individuals became full subjects of economic relations. That is why today's definition of rights and duties of a legal entity and the limits of its liability, including considering his application to the criminal liability is becoming a real necessity.

Keywords

Legal entity, crime, criminal responsibility, problem, activity.

Introduction

The history of society development has proven that such subjects of right as a tribe, clan, family and subsequently rural communities and the state have been acknowledged the original subject of rights, but not individuals. Even before realizing and acknowledging collective entities as subjects of right they already existed in reality[1]. One major feature of the the ancient states establishment is the transition

1 Berner, A.F. (1865), *Textbook of Criminal Law. Vol 1* [*Uchebnik ugolovnogo prava. T. 1*], St. Petersburg, p. 104; Gambarov, Yu.S. (1911), *The course of civil rights. Vol. 1. Common Part* [*Kurs grazhdanskogo prava. T. 1. Chast' Obshchaya*], St. Petersburg, p. 488; Suvorov, N.S. (2000), *On the legal entities of the Roman law* [*Ob yuridicheskikh litsakh po rimskomu pravu*], Moscow, pp. 32-47, 189-217.

from communal rights (taboo) to monopolization of coercion measures and regulation of public relations in the hands of state[2]. This relates to measures of legal regulation. Already in the ancient East, we can see the concentration of criminal jurisdiction in the hands of state, which was aimed at regulating the most important public relations. Gradually, the state begins to restrict communal manifestations of criminal responsibility, replacing vendetta with state coercion. It is the state now that determines wrongful and socially dangerous acts, with their commission inevitably leading to the application of criminal law. The state produces various types of punishment, including ones for collective entities. It applies coercive economic measures to them.

The process of formation and development of the rules of criminal liability for legal entities

Liability of legal entities was used in the countries of the ancient world as well. According to A.L. Dyadkin and Y.I. Bytko, although the Athenians did not develop the concept of a legal entity, they determined its form and liability: Athenian law acknowledged both the responsibility of individuals and the responsibility of collective entities[3].

A clearer legal separation of the collective subject of right from the individual's personality can be observed in Ancient Rome. Due to the development of economic relations the Roman legal life could not ignore the existence of collective subjects of law in the economic life of the country, which necessitated their legal acknowledgment and determination of their status. The Roman classical theory stemmed from the fact that a legal entity can only be a man because he has the will and intellectual interest and can be a holder of subjective rights. It's impossible to find a person in the collective union of people who would own all the rights. Hence the Roman lawyers came to the conclusion that such persons could not actually exist. But due to practical reasons the law still creates the subject here: "the law accepts fiction, assumption that in cases there is a sort of an individual, sort of a person who owns these rights"[4]. Many scientists

2 Klima, I. (1967), *Society and culture of Ancient Mesopotamia* [*Obshchestvo i kul'tura Drevnego Dvurech'ya*], Prague, p. 193.

3 Dyad'kin, A.L., Bytko, Yu.I. (2009), *Criminal liability of legal entities (historical aspect)* [*Ugolovnaya otvetstvennost' yuridicheskikh lits (istoricheskii aspekt)*], Saratov, p. 21.

4 Khvostov, V.M. (1996), *The system of Roman Law: Textbook (1908 reprint)*

have seen the bud of fiction theory in this sense of unified associations, which took acknowledgment in the Middle Ages[5]. Understanding the entity as some kind of fiction, the Roman lawyers came to the conclusion that only a natural person can be the subject of criminal liability.

In the Middle Ages the strengthening of church and it's becoming one of the largest feudal lords led to the need of defining its legal status. According to N.V. Kozlova, "canonists were the first to draw the line between the legal concept of a person in terms of an entity, and the real concept of human. Distinguishing the concept of corporation unity and the body of corporation members, they were first to call union an entity, with this name having been applied only to the church at first. Having given the name scientists started speculating about the nature of that entity"[6].

The theory of fiction was one of the first attempts to define the essence of the legal entity. Its authorship is attributed to the Pope Innocent IV. It was developed on the basis of questions the canon law was interested in: Can a corporation be excommunicated, allowed to swear, be a godparent for children at baptism – he said that the corporation has no soul, and exists only in the imagination of people being persona ficta, i.e. fictitious, a person which does not exist in reality and can not be responsible for its actions, including criminal liability[7]. However, soon another Pope – John XXII – admitted that although the corporation as a legal entity had no soul and no real personality, it still had a fictious personality by virtue of a legal fiction, and by virtue of the same fiction it should have a soul, and therefore could commit offenses and might be punished[8]. The similar stand took Olradus and Bartol, who said that the legal entity was created by virtue of fiction, and in terms of the latter they could have the will and commit crimes

[*Sistema rimskogo prava: Uchebnik (po izd. 1908 g.)*], Moscow, p. 115.

5 Budzinskii, S. (1870), *Origins of criminal law* [*Nachala ugolovnogo prava*], Warsaw, p. 71; Tagantsev, N.S. (1874), *Course of Russian criminal law* [*Kurs russkogo ugolovnogo prava*], St. Petersburg, pp. 6-15.

6 Kozlova, N.V. (2003), *Concept and nature of legal entities (essays on the history and theory). Study guide* [*Ponyatie i sushchnost' yuridicheskikh lits (ocherki istorii i teorii). Uchebnoe posobie*], Status, Moscow, p. 116.

7 Sukhanov, E.A. (1998), *Civil law: textbook. In 2 vols. Vol. 1* [*Grazhdanskoe pravo: uchebnik. V 2 t. T. 1*], Moscow, p. 172.

8 Sumskoi, D.A. (2006), *Status of legal entities. Study guide for institutions of higher education* [*Status yuridicheskikh lits. Uchebnoe posobie dlya vuzov*], Yustitsinform, Moscow, p. 5.

and be held criminally liable[9]. This concept has been dominant for several centuries. The idea of legists on criminal responsibility was reflected in the legislation of many countries at that time. In Russkaya Pravda (Russian truth), as well as in European truths, the community is the subject of law and holds criminal liability for the committed crime by means of a fine or in case the offense was committed on the territory of the community, people who committed crimes shall be in a frank-pledge with community members, or the community does not disclose the name of the offender[10].

But, unlike the European law, Russian scientists do not acknowledge the rural community as a perpetrator. When analyzing the collective responsibility of the community, N.S. Tagantsev comes to the conclusion that this punishment is not criminal and is only of fiscally and police nature[11]. In addition, he provides the community only with the right of administrative justice. However, according to Vladimirskii-Budanov, the community was given not only the right of administrative justice, but by that time, the right of prosecution, moreover, the penalty being applicable to the community was exclusively of criminal nature[12].

The fiction theory gained a further momentum in works of F. Savigny. According to him it was only natural person who really had the will and consciousness, could independently make actions and take responsibility for them that was the subject of law. But in view of the vital necessity and feasibility the state can create and use collective personality by the means of law (fiction). According to F. Savigny legal entity is a fictitious, artificial entity, created to meet the collective interests[13]. As a legal entity is a fiction

9 Bratus', S.N. (1947), *Legal entities in Soviet civil law (concept, types, public entities)* [*Yuridicheskie litsa v sovetskom grazhdanskom prave (ponyatie, vidy, gosudarstvennye yuridicheskie litsa)*], Yurid. izdat., Moscow, pp. 72-73.

10 Grekov, B.D. (1940), *Russkaya Pravda. Texts. Vol. 1* [*Pravda russkaya. Teksty. T. 1*], AN SSSR, Moscow; Leningrad, pp. 72, 80, 93, 301; Grekov, B.D. (1947), *Russkaya Pravda. Comments. Vol. 2* [*Pravda russkaya. Kommentarii. T. 2*], AN SSSR, Moscow; Leningrad, pp. 132-148, 255-275; Vladimirskii-Budanov, M.F. (1995), *Review of the history of Russian law* [*Obzor istorii russkogo prava*], Rostov-on-Don, p. 327.

11 Tagantsev, N.S. (1874), *Course of Russian criminal law* [*Kurs russkogo ugolovnogo prava*], St. Petersburg, p. 15.

12 Vladimirskii-Budanov, M.F. (1995), *Review of the history of Russian law* [*Obzor istorii russkogo prava*], Rostov-on-Don, p. 336.

13 Suvorov, N.S. (2000), *On the legal entities of the Roman law* [*Ob yuridicheskikh litsakh po rimskomu pravu*], Moscow, pp. 68-69.

of law, it cannot independently perform legal actions; they are committed by its representatives – individuals, so the entity is incapacitated. Thus, F. Savigny concludes that an entity can not commit unlawful acts, as it is not capable of any action on its own, they are committed by people who are representatives of a legal entity, and it is they who should be responsible for the crime.

Subsequently, the theory of fiction has spawned a number of different concepts denying the reality of a legal entity and, therefore, the possibility of considering the legal person as the subject of criminal liability. They include the concepts of:

– R. Ihering, who considered entity to be a technical and legal structure, a special technique of legal engineering by means of which the same rules and regulations are used in terms of relations with third parties in complex organizations as to certain individuals;

– G. Rummel. He considered a legal entity to be a creation of the law, with a concept of a legal person being the center of application of rights and obligations, as well as the notion of a natural person;

– A. Brienz, who believed a legal entity was as a property that belongs to a particular purpose.

In contrast to the theory of legal entity fiction O. Gierke introduced another theory, according to which the entity is considered to be not fictional but rather real subject of law. According to this theory a legal entity is as much real as individuals. Legal entity is a number of individuals that constitute a single complex organism consisting of separate organs, with collective entity acting independently through them. Legal entity unites the interests of many people and acts on their behalf in civil relations, possesses a will, which is formed from the wills of its people. Hence the legal entity is not a fictional person, but the real subject of right. The very concept both of legal entity and natural person is abstract, and therefore legal entities and natural persons are subjects of law, not because they were established by law, but because they were acknowledged by it. Thus, according to O. Gyrke, a legal person has a will and is endowed with legal standing and capacity, not because of the fiction, but because of its real existence.

The theory of O. Gierke, won a considerable number of supporters and branches that considered legal entity to be a real existing subject of right. They include:

– "The doctrine of social reality" (Dernburg, Citelman, D.I. Meyer, N.S.

Suvorov and many others) which considered a legal entity as a real subject of right, although the bodiless one;

– "Theory of condition" by R. Leonhard, which considered a legal person as a really existing entity arose by individuals' allocating the shares of their personal property in order to achieve common goals. After this property being allocated it becomes no man's and is under constant control of administrators;

– Theory of organization by O.A. Krasavchikov, who considered the entity to be a social establishment, i.e. a union, a system of existing social relations through which people unite in a single structurally and functionally differentiated social whole to achieve their goals[14].

Acknowledging a legal entity as an actually existing subject of legal relations that has its own will, purpose and property allowed the legislator to acknowledge the legal capacity of a legal entity and its limited delictual dispositive capacity. A legal entity might participate in legal relations and enjoy its rights on equal terms with individuals, but in case of tort legal entities should not bear criminal responsibility. This provision was clearly reflected in science of that time. However, science's rejecting the possibility of criminal liability for legal persons has not been reflecting in the legislative consolidation of collective entities' liability for certain torts. The pre-revolutionary French law (referring to the revolution of 1789-1794) was known for criminal liability of some legal entities. The French Ordinance for criminal law has devoted an entire section to penalties for legal entities. The various punishments included fines, redemptions and payments which were of property nature. Also there were deprivation of certain rights, privileges, or even complete demolition of them in cities[15]. The Code of criminal and correctional penalties of the Russian Empire for 1885 included provisions on liability of the Jewish community for harboring military fugitives from Jews, of saline administration for failing to perform assigned duties, companies – for secondary furlough of persons, who were not able to earn their keep

14 Kozlova, N.V. (2003), *Concept and nature of legal entities (essays on the history and theory). Study guide* [*Ponyatie i sushchnost' yuridicheskikh lits (ocherki istorii i teorii). Uchebnoe posobie*], Status, Moscow, p. 111.

15 Abashina, L.A., Nazarenko, G.V. (2009), *Legal entity as the subject of criminal liability: the experience of foreign countries and prospects of Russian legislation: Monograph* [*Yuridicheskoe litso kak sub"ekt ugolovnoi otvetstvennosti: opyt zarubezhnykh gosudarstv i perspektivy rossiiskogo zakonodatel'stva: Monografiya*], ORAGS, Orel, p. 13.

and were caught at asking alms[16]. These rules demonstrate the legislators' understanding of the concepts of delictual capacity and legal entities in respect of acts contrary to the public interest. However, a direct legislative acknowledgment of criminal liability for legal entities took its place much later in some countries.

The wide range of theories of legal entity was developed in the USSR as well. These theories rejected the notion of separate property, for any property, even the property allocated to a legal entity, was owned by the state. These theories include "Theory of collective property" by A.V. Venediktov, "theory of state" by S.I. Asknasya, "theory of administration" by Yu.K. Tolstov, "theory of social reality" by D.M. Genkin.

All the socialistic theories basically proceeded from the fact that the ownership of legal entities primarily belonged to the state, the Soviet people, so the very notion of legal entity was often associated with the concept of the state. It made no sense to consider a legal entity as the subject of criminal law, as it was not a completely free subject of economic relations, because it was still owned by the state and performed its functions.

16 Kelina, S.G., Naumov, A.V. (1994), *Criminal law: new ideas* [*Ugolovnoe pravo: Novye idei*], IGiP RAN, Moscow, p. 44.

Conclusion

At the present stage the development of market economy has led to the formation of many legal entities, which together with individuals became full subjects of economic relations. However, when granting an entity with legal capacity the legislator kept the entity "delictually limited." On the one hand, a legal entity may participate in civil relations through its representatives, have rights and responsibilities; on the other hand, it may bear only administrative responsibility. Modern scientists are confused by this provision. Increasing use of legal persons to commit a crime and avoid criminal liability of individuals made many authors seek ways to counteract this trend. Scientists consider the establishment of criminal liability for legal persons to be one of the solutions to this problem.

Criminal liability of legal entities was acknowledged by many countries in order to effectively deal with the increased criminal orientation of organizations. Over time, with the development of the industry, the attitude to criminal liability of legal entities has been changing. In England of the XIX century, courts started holding judicial decisions on finding legal persons guilty of violat-

ing the statutory obligations. In 1903, the criminal liability of legal entities was acknowledged by the U.S. Supreme Court. Later criminal liability of legal entities was acknowledged by the Netherlands (1976), Norway (1991), France (1992), Finland (1995), China (1997), Slovenia (1999), Hungary (2001), Poland (2002), Romania (2004), Switzerland (2003) and many others.

The issue of criminal liability for legal entities was discussed in Russia as well in the early 90s. It was provided in 2 Model penal codes, but never came to life. However, the issue on its introduction is still relevant today.

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История становления уголовной ответственности юридических лиц

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Аннотация

Развитие рыночной экономики привело к образованию множества юридических лиц, которые стали полноправными субъектами хозяйственных

правоотношений наравне с физическими лицами. Именно поэтому на сегодняшний день определение прав и обязанностей юридического лица и пределов его правовой ответственности, в том числе и рассмотрение возможности привлечения его к уголовно-правовой ответственности, становятся действительной необходимостью.

Ключевые слова

Юридическое лицо, преступление, уголовная ответственность, проблема, деятельность.

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