

Liability of Legal Persons for Criminal Offences in a Context of Kosovo Legislation

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Abstract:

The issue of liability of legal persons for criminal offences constitutes an object of interest of the theory of criminal legal science. The authors of legal science have different opinions regarding to this issue. Some of them think that a legal person cannot be the subject of criminal offence because it lacks will and aim (mens rea), and some others think that even the legal person is a subject of criminal offence along with natural person. Most of the countries have issued special laws by which they have regulated the liability of legal persons for criminal offences, just like The Republic of Kosovo did. The aim of this scientific paper is to elaborate the liability of legal persons for committed criminal offences, in a context of Kosovo criminal legislation. For preparation of this scientific paper I have used historical, legal, analysis and comparative methods. From the legal liability for criminal offences institution research, it can be concluded that it is a current issue but also questionable in the theory and criminal legal practice.

Key words: Liability of legal persons for criminal offences, criminal offences, legal person, criminal sanctions.

1. Meaning and attributes of legal persons

Legal persons present institutionalized form of joint action of more persons and capital, therefore eventual criminal liability

is collective liability of each member and the punishment that may be imposed by law will affect also each member of the legal person.¹ Legal persons can be defined as artificial creatures of society that state need in order to carry out different affairs. Legal persons along with natural persons are subjects of law, respectively are capable of having legal rights and obligations.

Bearing in mind the fact that as artificial creatures legal persons have no will and consciousness, to these creatures those attributes exercise the natural persons on behalf of legal persons. Usually a natural person who performs actions on behalf of the legal person is the owner, director or the manager of legal person. Consequently, legal persons have four main attributes: possess wealth (capital), have internal organization (foreseen by Statute, Regulation or any other act), exercise certain activities and they are also registered in competent body. Legal persons have legal, acting and committal of criminal offence capacity.

Legal capacity can be expressed by exercising the rights and fulfillment of obligations specified by the legal person. Acting capacity can be expressed by communication of the legal person in an independent way such as binding contracts, performing other duties and services etc. The acting capacity is connected closely with the legal one because legal capacity is a necessary presumption and basis of acting capacity. Committal of criminal offence capacity it may be expressed by the response of the legal person with all his wealth for inflicted damages to other subjects. The existence of committal of criminal offences is a base for its punishment for committed criminal offences.

Law recognizes two types of legal persons, public legal persons which are identified with the state and its forms of organization. Private legal persons are business organizations which are entitled by natural persons because their goal is

¹ Afrim Osmani, *Criminal liability of legal persons in the Republic of Macedonia*, Furkan, Skopje, 2011, page 1.

private material interest.²

1.1. The history of appearance of legal person

The appearance of legal persons has been conditioned from development of relations merchandise-money, when the individual was not able to resist these situations, therefore there was a need to be created some organizational union forms of natural persons and the capital in so called legal persons which as a form of social organization in economy, legal system gives the right to participate in economic circulation and to create economic relations as an independent subject.³

The prediction of corporate criminal liability was born from the industrialization process and manifestation of powerful corporations, that had a big part of the market and also power in home-state economy so their chances to commit criminal offences was bigger.

Industrialization and the manifestation of big corporations in the anglo-saxon market is the reason why these countries are the first ones who had ideas and enforced such laws, and then European countries. This institute has been created by the legal system of Common Law, born during the period of industrialization as a need to punish legal persons, as a result of growth of their importance as main subjects of law-economic life.⁴

The increase of economic crime level in developed countries brought the necessity of sanctioning the criminal liability of corporations. Criminal offences of corruption represent the way through legal persons achieve enormous profits.⁵

² Mehdi J. Hetemi, *Law on basic knowledge of business law*, Prishtina, 2006, page 96.

³ *Ibid.*, page 96.

⁴ Valbona Ndrepepaj, *Criminal liability of legal persons*, Albanian Justice, Tirana, 2012, page 1-2.

⁵ Zoran Stojanovic, *Liability of legal persons for criminal offences*, Kolasin, Montenegro, 2009, page 12.

1.2. Theories regarding legal person

Regarding legal person in the theory of legal science are present **fiction theory** and **real theory**. According to the **fiction theory**, legal person is a legal fiction and only natural persons are subjects of law, but the law certain groups of persons does recognize the attribute of the law subject.⁶ According to the followers of this theory a legal person in reality does not exist, he is always under the surveillance of natural persons which carry out functions acting on his behalf.

Only natural persons have the will and as such are subjects of law. Legal person does not have personal will therefore cannot be responsible for its members. Consciousness, will and the culpability of legal person cannot be ascertained.⁷ The acceptance of this theory makes possible the collective punishment of legal person members and this is in contradiction to the individual criminal liability principle and impunity of innocent people. Based on these facts against legal persons for criminal offences may be imposed administrative, civil and material sanctions but not criminal sanctions. According to the **real theory** legal persons are real forms of society that have legal and acting capacity. The will of legal person is expressed through natural persons by performing activities in accordance with the given authorizations by establishing act and its goal.⁸ According to this theory legal persons are real participants in economic and social life.

2. Legal person treatment in criminal law aspect

Legal person is a collective body that the law has recognized it as a special subject, by giving the ability to have legal rights

⁶ Afrim Osmani, *Criminal liability of legal persons in the Republic of Macedonia*, page 1.

⁷ *Ibid.*, page 1.

⁸ Mehdi J. Hetemi, *Law on basic knowledge of business law*, page 116.

and obligations.⁹ In the article 120 (paragraph 6) of the Criminal Code of Kosovo no. 04/L-082, (hereinafter: CC) and in the article 2 (paragraph 1, subparagraph 1.2) of the Law no. 04/L-030 on Liability of Legal Persons for Criminal Offences, (hereinafter: LLLPCO) so principled it has been defined that in criminal law aspect a legal person is considered to be each national or foreign law subject that according to the legislation can be considered as a legal person. Regarding the liability of legal persons for criminal offences in the history of criminal law were present different solutions.

In Roman Law legal persons were not considered to be subjects of criminal offences according to the principle *societas delinquere non potest* it means *that legal persons cannot be subjects of criminal offences*. In Middle Ages legal persons were considered to be subjects of criminal offences and they were punished through collective liability.¹⁰

Thanks to modern developments of criminal law science, legal persons now are considered to be an active subject in cases when they are perpetrators of criminal offences and passive subject in the cases when a certain right or interest have been compromised or damaged from committal of criminal offence (as victims). The issue of liability of legal persons for criminal offences has been regulated by provisions of the article 40 and 119 of Criminal Code of Kosovo and LLLPCO.

2.1. International legal acts that regulate the liability of legal persons for criminal offences

Liability of legal persons for criminal offences is foreseen in a considerable number of international acts. Consequently, in the article 10 of the Convention against Transnational Organized Crime, it is specified the obligation of member states to foresee the criminal liability of legal persons for participation in serious

⁹ Dana Rone, *On institute of criminal liability of legal entities in Nordic and Baltic Countries*, Riga, 2006.

¹⁰ Ismet Salihu, *Criminal law, general part*, Prishtina, 2008, page 190.

crimes, and those in criminal organized groups etc. Similar solution is also provided in the article 18 of Penal Convention for Prevention of Corruption, which specifies the obligation of states to foresee criminal liability even for legal persons.

Changes in European criminal legislation stimulated new determinations of European Union oriented in roughening criminal liability of bodies and the representatives of legal persons and positioning criminal liability of legal persons.¹¹

Also in the article 9 (paragraph 2) of European Convention for Protection of Environment, it is foreseen that criminal liability of legal person for criminal offences against environment does not exclude individual criminal liability of the natural responsible person. In the article 26 (paragraph 4) of United Nations Convention against Corruption, it is foreseen the obligation of member states to undertake measures to incriminate the liability of legal persons for criminal offences and sanctions against perpetrators. Criminal sanctions and the measures that may be imposed to legal person are foreseen in the article 6 of the Recommendation no. R.(88) 18 of Council of Ministers of the European Council.¹²

Most of the states have regulated the issue of liability of legal persons for criminal offences with special laws. The first place in Europe that has foreseen the liability of legal persons for criminal offences is Netherlands since 1975 had regulated within the criminal code, and later on also Sweden in 1986, Norway in 1991, France in 1994, Finland and Spain in 1995, Denmark in 1996, Switzerland in 2003, Austria in 2006 etc.¹³ Such laws have been approved even from the region places of Balkan such as: Slovenia, Croatia, Serbia, Macedonia and

¹¹ Afrim Osmani, *Criminal liability of legal persons*,..., page 2.

¹² Dana Rone, *On institute of criminal liability of legal entities*,..., page 2.

¹³ Zoran Stojanovic, *Liability of legal persons for criminal offences*, Kolasin, 2009, page 14 and Lukas Bohuslav, *On selected aspects of criminal liability of legal entities in the legal systems of various European Countries*, Ad Alta, no. 1, Hradec Kralove, 2011, page 16.

Montenegro.

2.2. Legal basis regulation of liability of legal persons for criminal offences in the Republic of Kosovo

The liability of legal person for criminal offences is an institution of material criminal law, therefore it is regulated by criminal legislation. The liability of legal persons for criminal offences is a huge and special topic of criminal law. Consequently, the issue of liability of legal persons for criminal offences is so principled it is regulated by provisions of criminal code. Criminal Code provisions in the affairs related to the liability of legal persons for criminal offences refer to LLLPCO provisions. According to the article 119 of Criminal Code, criminal offences for which legal person may be criminally liable, the criminal liability of legal persons, criminal sanctions that may be imposed against legal person and the provisions that regulate criminal procedure against legal person are foreseen by Criminal Code or a special law. The liability of legal persons for committal of criminal offences it is regulated by the following acts:

1. Criminal Code no. 04/L-082 of Kosovo;
2. Criminal Procedure Code no. 04/L-123;
3. Law no. 04/L-030 on Liability of Legal Persons for Criminal Offences.

By provisions of LLLPCO it is regulated the definition of the legal person, criminal liability, criminal sanctions and punitive measures that may be imposed to defendant legal person, procedure that should be applied as well as execution of criminal sanctions against legal person. According to the article 32 of LLLPCO it is specified unless this law expressly provides otherwise, in the proceedings for the criminal liability of legal persons and the execution of penal sanctions, shall be applicable accordingly the provisions of Criminal Procedure Code no. 04/L-123 and the provisions of the Law no. 03/L-191 on Execution of Penal Sanctions.

2.3. Legal person as a subject of criminal offence and criminal offences which may be committed from a legal person

In criminal law science and in criminal legislation a long time has dominated the opinion that legal persons cannot be subject of criminal offences, according to the Roman principle *Societas delinquere non potest* or *Legal persons cannot be subjects of criminal offences*. This concept has changed because even legal persons may commit criminal offences during the exercise of their activity such as cases when because of the low quality of production or disrespect of certain standards they endanger people's health, safety at work, commit different frauds, carry out illegal constructions by putting in danger people's lives etc. In these cases legal persons reasonably are considered liable for criminal offences.¹⁴ According to the article 40 of Criminal Code, a legal person is liable for criminal offence of the responsible person, who has committed the criminal offence acting on behalf of the legal person within his authorizations, with the purpose to gain benefit or has caused damages for that legal person. The liability of legal person exists even when the actions of the legal person were in contradiction with the business policies or the orders of the legal person.

By provisions of Criminal Code and LLLPCO is not expressly defined the types of criminal offences which may a legal person commit but based on logical interpretation of the article 3 (paragraph 2) of LLLPCO results in that a legal person may commit and be criminally liable for all criminal offences foreseen in a special part of Criminal Code, if criminal liability conditions are fulfilled provided by LLLPCO. Having this kind of solution on liability of legal persons for criminal offences, our legislator is in favour of the concept of supposed liability of the legal person for body actions or his representatives. In the future would be good to expressly foresee criminal offences that a legal person may commit just like Slovenia did in the article

¹⁴ See: Ismet Salihu, *Criminal law*,..., page 191.

25 of Law no. 63/94 on Liability of Legal Persons for Criminal Offences expressly has foreseen criminal offences that legal person may commit, as well as Estonia.

In practice criminal offences that most often are committed by legal persons are: giving and taking the bribe, tax evasion, frauds, falsification of documents, bankruptcy, money laundering, environmental pollution, trafficking of arms and narcotics, false bankruptcy etc.¹⁵ Criminal offences that may be committed by the legal person are mostly those that in a way are related to activity which they exercise. Since legal persons mostly are part of the economic life, they commit more criminal offences related to economic field.

2.4. Liability of legal persons for criminal offences

Liability of the legal persons for criminal offences is built on so called supposed liability which does not exclude responsibility and punishment of the natural person who is the perpetrator of the criminal offence, by which is accepted punishment and collateral liability system for the same offence even to the natural person as a direct perpetrator, if it is guilty, but also to a legal person where after committing the offence lies collective decision of the governing body.¹⁶

In issues concerning liability of the legal persons for criminal offences is not fully implemented the principle *Ne bis in idem*.¹⁷ Basis for constructing the liability of the legal person for criminal offences is criminal offence committed by natural person acting on behalf of the legal person. According to the article 120 (paragraph 5) of Criminal Code and the article 2 (paragraph 1, subparagraph 1.1) of LLLPCO a liable person is considered to be the natural person within legal person, to whom certain duties are entrusted or which is authorized to act

¹⁵ Zoran Stojanovic, *Liability of legal persons*,..., page 12.

¹⁶ See: Afrim Osmani, *Criminal liability of legal persons*,..., page 2.

¹⁷ Jean Ginter, *Criminal liability of legal persons in Estonia*, *Juridica International*, no. 1, Tartu, 2009, page 155.

on behalf of the legal person.

Liability of the legal person for committal of criminal offences is specific because does not exclude criminal liability of natural persons who have participated in committing criminal offence. For criminal offences committed by the legal person there is double liability, because for the same criminal offence liable is the legal person and the natural person which has committed the criminal offence or participated in committal of criminal offence acting on behalf of the legal person.¹⁸

In accordance with the article 5 (paragraph 1) of LLLPCO a legal person is considered liable for criminal offences of the responsible person which by acting on behalf of the legal person has committed the criminal offence with the purpose to get any benefit or in cases when he has caused damages by his actions. For committed criminal offences, legal persons are liable with all their wealth in a solidary way, because the members of the legal person apart from having benefits from legal person they have also responsibilities for their actions.

3. Punitive rules of procedure of legal person

Procedure rules that should be applied for adjudication and conviction of legal person are specific. Basis for raising accusatorial act is finding the liability of the responsible person who has committed the criminal offence acting on behalf of the legal person.

Criminal procedure against defendant legal person can be initiated from every subject when exists the reasonable doubt that he has committed the criminal offence through submitting a criminal report by which the criminal offence is reported at State Prosecution, along with the evidences they have. In accordance with the article 18 (paragraph 1) of LLLPCO, criminal procedure against the defendant legal

¹⁸ Ismet Salihu, *Criminal law*,..., page 194.

person is unique because it is applied against the legal person and also against the responsible natural person within legal person. Also in this procedure a unique judgment shall be issued. For representing the interests in criminal procedure, in accordance with the article 20 of LLLPCO, the defendant legal person shall have authorized representative who can take all actions that a defendant may undertake in criminal proceedings. The authorized person must have written authorization given by legal person.

In accordance with the article 25 (paragraph 1-3) of LLLPCO, to ensure proper representation and professional defense of the rights in criminal procedure a defendant legal person may engage a lawyer, but the defendant legal person and responsible person within legal person against whom criminal procedure is applied, they cannot engage a joint defense counsel. For the defendant legal person shall not be applicable the institute of mandatory defense, foreseen by provisions of Code no. 04/L-123 of Criminal Procedure. As a defense counsel can be assigned a qualified and licensed lawyer who offers professional legal services in accordance with the Law no. 03/L-117 on the Bar and Chamber of Advocates Statute.¹⁹

In accordance with the article 3 (paragraph 1) of LLLPCO, at main trial against legal persons shall be applicable provisions of Criminal Code and Criminal Procedure Code, unless this law expressly provides otherwise. At main trial it is proceeded with the presentation of trial judge, criminal issue and also the defendant. On this course, according to the article 28 (paragraph 1) of LLLPCO, a word is given to the responsible person and then to the defendant legal person. The responsible person is heard without the presence of the legal person (authorized person). When the court finds controversies in both defendant's declarations, may order their confrontation. The

¹⁹ Milot Krasniqi, *The system of free legal aid in the Republic of Kosovo*, Albanian Justice, Tirana, 2013, page 11.

defendants shall present evidences by which they prove relevant facts that go in favour of their defense. Upon completion of the evidentiary proceedings, the word is given to the plaintiff and to the injured party, and then to the defense counsel of the defendant legal person and in the end to defense counsel of the defendant responsible person and to the defendant responsible person itself. Parties in this phase should present a summary of the main facts that go in their favour who have affect on the decision. In criminal procedure against legal person is rendered a judgment. A written judgment shall contain the elements provided in the article 29 of LLLPCO. The entry of judgment shall contain among others also the appointment of the legal person, establishment date and residency, registration number, the address, the name and surname of the representative of the legal person etc. The judgment should be based on facts and presented evidences at main trial. Form and the content of judgment shall be in compliance with the article 370 of Criminal Procedure Code.

4. Criminal sanctions for committal of criminal offences by legal person

According to the article 8 (paragraph 1) of LLLPCO, to legal person for committal of criminal offence may be imposed the following criminal sanctions:

1. *Punishments;*
2. *Suspended sentence;*
3. *Security measures.*

According to the article 8 (paragraph 2) of LLLPCO, within the punishments are: punishment by fine and cessation of work of the legal person. Within the punishments the central role plays punishment by fine which varies from 1.000 to 100.000 Euro, depending from the type and gravity of the criminal offence. According to the article 10 of LLLPCO, court imposes the punishment by fine within the limits of the punishment,

considering aggravating and mitigating circumstances in each concrete case such as: *the type, the gravity, the consequences and circumstances under which the criminal offence was committed, the economic power and the competencies of the legal person, the function and the number of responsible persons in a legal person who have committed a criminal offence, the conduct of a legal person after the criminal offence has been committed, the measures that were taken by the legal person with the purpose to omit and report the criminal offence, rapport with the victim of the criminal offence, the conduct of the legal person for the criminal offence including the acceptance of responsibility for the committed criminal offence.*

According to the article 9 (paragraph 2, subparagraphs 2.1-2.4) of LLLPCO, for criminal offences where the punishment provided for is by imprisonment from fifteen (15) days to three (3) years, the court may impose the punishment by fine, from one thousand (1.000) to five thousand (5000) Euros; for criminal offences where the punishment provided for is by imprisonment from three (3) to eight (8) years, the court may impose the punishment by fine from five thousand (5000) to fifteen thousand (15.000) Euros; for criminal offences where the punishment provided for is by imprisonment from eight (8) to twenty (20) years, the court may impose a punishment by fine from fifteen thousand (15.000) to thirty five thousand (35.000) Euros; and for criminal offences where the punishment provided for is by long term imprisonment, the court may impose a punishment by fine, from thirty five thousand (35.000) Euros to one hundred thousand (100.000) Euros. In compliance with the article 10 (paragraph 3) and the article 12 (paragraph 1) of LLLPCO, in cases when there are mitigating circumstances the court may impose the punishment under the provided measures for the criminal offence (a more lenient punishment) when this is provided for by law or provisions. Another type of the punishment is cessation of the legal person. In accordance with the article 12 (paragraph 1) of LLLPCO, the

punishment by cessation of work may be imposed, if the legal person was established for the purpose of committing criminal offences or has used its activities mainly to commit criminal offences. Against legal persons for committal of criminal offences may be imposed also security measures which consist in restriction or prohibition of exercise the activity of the legal person. In accordance with the article 13 of LLLPCO, may be imposed the following security measures: *prohibition of work or certain functions, confiscation of assets, confiscation of material benefit, publication of the judgment.*

Prohibition to conduct activities and certain works may be imposed if during the performance of activities of which was committed the criminal offence by the legal person where from the manner of committing exists the risk of repetition. Only the activity by which a legal person has committed a concrete criminal offence may be prohibited (Release in circulation of harmful food, unfair competition etc). The court imposes such prohibition when evaluates that it is dangerous for a legal person to exercise that activity for a certain period of time.²⁰ Security measures of confiscation of assets have to deal with assets that were used or served for purpose to commit a criminal offence (*Corpora delicti*). Material benefit may be confiscated if it is owned by the legal person even when that is owned by any subject according to the principle that nobody may hold assets acquired unlawfully. Publication of the judgment consists in fully or in extracts disclosure of the judgment by which the legal person has been punished, when it is evaluated that this is for general interest.

According to the article 31 of LLLPCO if special circumstances justify the fear that the defendant legal person shall repeat the committal of the criminal offence or will finalize the committal of the criminal offence if it was attempted previously or shall commit the criminal offence of threat, the court shall impose the following preventative

²⁰ Afrim Osmani, *Criminal liability of legal persons*,..., page 5-6.

measures: *prohibition of carrying out of work or certain functions; prohibition of conducting business with state and local; prohibition of acquiring licenses, authorizations, concessions and subsidies.*

The court may impose these measures when evaluates that the further carrying out of work or certain functions by the legal person would be dangerous for repetition of criminal offences or would endanger the health and general security. The aim of these measures is that through limitation of these rights to prohibit the re-committal of criminal offences (prohibition of recidivism).

5. Conclusions and recommendations

After the research of liability of the legal persons for criminal offences can be ascertained:

- Regarding the liability of the legal persons for criminal offences in criminal law theory there are separated opinions. Some authors support the concept that only natural persons can be subjects of the criminal offences and the others support the opinion that along with natural persons also legal persons are subjects of the criminal offences. Most of the states have regulated with special laws the liability of the legal persons for criminal offences and criminal sanctions that may be imposed to the legal persons as perpetrators of the criminal offences.
- Kosovo in 2011 has approved the Law no. 04/L-030 on Liability of Legal Persons for Criminal Offences which regulates the criminal liability of legal persons, conditions that must be fulfilled for a legal person to be considered liable as well as criminal sanctions and other measures that may be imposed to the legal persons as

perpetrators of the criminal offences. It is not expressly specified by law the criminal offences that may be committed by legal persons, therefore legal persons may commit and be criminally liable for all criminal offences foreseen in the special part of Criminal Code, if the conditions of criminal liability foreseen by LLLPCO are met. Criminal offences that may be committed by legal person are mostly those that in a way are related to the activity they exercise.

- According to the legal solutions incorporated in most laws of the countries in the world, against legal persons may be imposed only the punishments of material nature and measures on limitation and prohibition of work or certain functions. For pragmatic reasons and with the purpose of safeguarding the legal security, it is recommended that in the future to be foreseen expressly criminal offences that a legal person may commit and thus to be implemented the goal for which this institute of law born.

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