MODEL OF CRIMINAL CORPORATE LIABILITY IN RUSSIA: SUBJECT OF CRIME OR SUBJECT OF LIABILITY TO PROSECUTION?

Roman V. MININ[1], Lilia V. IVANOVA[1], Galina V. PEREZHOGINA[1]
[1]Department of Criminal Law and Procedure, Tyumen State University, Tyumen, Russian Federation

Abstract: *In the Soviet period of development of legal science, ideas of criminal corporate liability could not be considered justified, because all the organizations of that time were completely state-owned. The reactive approach could negate the essence of criminal legal relations, since it would seem absurd that the state should prosecute the state. Adjusting the criminal legislation to modern social and economic requirements, progressive-minded lawyers, developing a new criminal law, proposed to form an institution of criminal corporate liability. The problem of forming an institution arose in the Russian Federation due to the destruction of the Soviet Union legal system and the transition to the construction of new legislation based on the principles of a market economy, in which legal entities are full-fledged subjects of economic relations. Consequently, legal entities are not recognized as the subject of a crime. The purpose of this work is the justification of the concept. The result of the study is a concept based on the idea of a legal entity as a subject of a crime.*

Keywords: institute of criminal corporate liability, criminal law, market economy, legal system of the USSR, legislative structure.

The problem of forming of institute of criminal corporate liability arose in Russia due to the destruction of the legal system of the Soviet Union and the transition to forming of new legislation based on the principles of a market economy in which legal entities are full-fledged subjects of economic relations[1]. In such conditions corporations can not only act on their own behalf when concluding civil-law dealings, but also do harm. Actions associated with causing such harm can often be qualified as a crime. However, in Russia legal entities are not recognized as the

[1] H.T. Van, A.T. Huu, D. Ushakov, "Liberal reforms and economic growth: Current issues and interrelations", in *Journal of International Studies*, 2017, vol. 10, no. 4, p. 109-118.

subject of a crime. There is no legislative framework that allows criminal-law impact on corporations[2,3].

The purpose of this work is to offer a rationale for the concept, which is based on the idea of a legal entity as a subject of a crime. With the change in the structure of economic relations and the transition of Russia to a market economy the new Constitution was adopted in 1993, which established a new system of law. Firstly, the principles of private property and freedom of economic relations were proclaimed and guaranteed[4]. In the new conditions, private organizations appeared that are fully engaged in in the economic rotation. Scientists note that the processes associated with the change of socio-economic formation, caused "the intensification of economic crime, the purpose of which is reliably concealed enrichment"[5]. The establishment of broad rights required the establishment of appropriate duties and responsibilities. In this regard, the question about criminal corporate liability arose. Losses caused by this activity have to be calculated. In such circumstances, a legal entity can be represented not only as an instrument for carrying out economic activity[6], but also as a capable subject of economic relations, possessing a certain freedom, independence and responsibility, including public law.

Adaptation of criminal legislation to modern social and economic requirements

In the Soviet period of development of legal science, ideas of criminal corporate liability could not be considered justified, because all

[2] O.V. Takhumova, M.A. Kadyrov, E.V. Titova, D.S. Ushakov, M.I. Ermilova, "Capital structure optimization in Russian companies: Problems and solutions", in *Journal of Applied Economic Sciences*, 2018, vol. 13, no. 7, p. 1939-1944. Natalia Viktorovna Bulanova, Anatoly Alexandrovich Abramenko, „Features of the Prosecutor's Participation in Countering Corruption and the Problem of Optimizing its Criminal Procedure: the Experience of the PostSoviet States", in *Astra Salvensis,* VI (2018), no. 12, p. 130.

[3] M.I. Ermilova, D. Ushakov, S.V. Laptev, "Financing the Russian housing market: Problems and the role of the state", in *Opcion*, 2018, vol. 34, no. 17, p. 1074-1087.

[4] I. Kalaur, N. Fedorchenko, "Normative and individual regulator in the mechanism of regulation of legal relations under transfer of property in use", in *Transformations in Business and Economics*, 2018, vol. 17, no. 1, p. 38-49.

[5] V.Yu. Burov, N.I. Atanov, V.N. Andriyanov, T.M. Sudakova, "The shadow economy and corruption as a form of manifestation of economic crime", in *Criminological Journal of the Baikal State University of Economics and Law*, 2014, no.4, p. 65-74.

[6] V.A. Gnevasheva, "The specifics of the economic activity of modern Russian corporations", in *Espacios*, 2019, vol. 40, no. 4, p. 21.

the organizations of that time were completely state-owned. The reactive approach could negate the essence of criminal legal relations, since it would seem absurd that the state should prosecute the state. Adjusting the criminal legislation to modern social and economic requirements, progressive-minded lawyers, developing a new criminal law, proposed to form an institution of criminal corporate liability. These proposals were reflected in one of the projects of the Criminal Code by 1994 edited by professor S.G. Kelina[7]. However, they remained only in the form of the project and were not embodied in the law.

From the very beginning, the discussion center around the fundamental problems of the institute of criminal corporate liability. The dispute took place in relation to the principle of guilt, the principle of personal responsibility, the objective aspect of crime committed by a legal entity, the range of crimes for which the organization could be convicted of a criminal offence, the system of punishments, etc. Currently, there are also studies, the authors of which believe it is possible to counteract the antisocial activities of legal entities by means of civil and administrative procedures. Such scholars argue that a legal entity "cannot be recognized as a subject of criminal responsibility, since it is not a subject, but an instrument of crime"[8]. According to other scholars, the institution of criminal corporate liability is inconsistent with other institutions of criminal law, traditionally focused on the personal responsibility of individuals, namely the concept of action and the guilt of legal entities, which cannot be represented as physical development of the crime and psychological attitude to it as well as the notion of punishment, which is person-centered[9].

At the same time, the initial categorical rejection of the institution of criminal responsibility, which, according to some scholars, was due to inertia of thinking, which traditionally connects criminal responsibility

[7] S.G. Kelina, *Responsibility of legal entities in the draft of the new Criminal Code of the Russian Federation. Criminal law: New ideas,* Moscow, Institute of State and Law of the Russian Academy of Sciences, 1994, p. 50-60.

[8] E.V. Bogdanov, D.E. Bogdanov, E.E. Bogdanova, "The question of introducing criminal liability for legal entities: Arguments against IT", in *Russian Journal of Criminology*, 2017, vol. 11, no. 2, p. 370-379. Natalia Viktorovna Bulanova, Anatoly Alexandrovich Abramenko, „Features of the Prosecutor's Participation in Countering Corruption and the Problem of Optimizing its Criminal Procedure: the Experience of the PostSoviet States", in *Astra Salvensis,* VI (2018), no. 12, p. 130.

[9] A.V. Shesler, "Problems of establishing criminal liability for legal entities in russian criminal law", in *Russian Journal of Criminology*, 2017, vol. 11, no. 2, p. 361-369.

only to individuals[10], was replaced by a more constructive approach. A lot of research has been done in this area, an increasing number of scientists were inclined to recognize the dependence of the criminal law prohibition of socially dangerous actions of legal entities. Attempts to substantiate the theoretical background of the possibility of establishing the criminal corporate liability for committing crimes that infringe, including international environmental safety were made[11,12,13]. One of the means of countering corruption was to establish criminal corporate liability in the field of corruption crimes[14,15].

In March 2014, the draft of Federal Law N 750443-6 "On Amendments to Certain Legislative Acts of the Russian Federation in connection with the introduction of the institute of criminal liability of legal entities" was introduced to the State Duma of the Russian Federation[16]. This project envisaged comprehensive changes in the Criminal Code of the Russian Federation, the Criminal Procedure Code of the Russian Federation, the Criminal Executive Code of the Russian Federation, the Code of Administrative Offenses of the Russian

---

[10] A.S. Nikiforov, "Legal entity as a subject of crime and criminal liability", Center YurInfoR, Moscow, 2002.

[11] V.V. Grebennikov, B.V. Sangadzhiev, E.V. Vinogradova, "International environmental safety as object of crimes, leading to possibility of legal entities' criminal liability", in *International Journal of Environmental and Science Education*, 2016, vol. 11, no.18, p. 13015-13021.

[12] D. Ushakov, L. Kharchenko, "Environmental factors of national competitiveness in modern MNCs' development", in *International Journal of Ecological Economics and Statistics*, 2017, vol. 38, no. 2, p. 141-149.

[13] O.Y. Voronkova, L.A. Iakimova, I.I. Frolova, C.I. Shafranskaya, S.G. Kamolov, N.A. Prodanova, "Sustainable development of territories based on the integrated use of industry, resource and environmental potential", in *International Journal of Economics and Business Administration*, 2019, vol. 7, no. 2, p. 151-163. Natalia Viktorovna Bulanova, Anatoly Alexandrovich Abramenko, „Features of the Prosecutor's Participation in Countering Corruption and the Problem of Optimizing its Criminal Procedure: the Experience of the PostSoviet States", in *Astra Salvensis,* VI (2018), no. 12, p. 130.

[14] A.V. Makarov, A.S. Zhukova, "Criminal liability of legal entities: Questions of implementation of the international standards and introduction of financial sanctions for corruption crimes in the domestic criminal legislation", in *Criminology Journal of Baikal National University of Economics and Law*, 2015, vol. 9, no. 1, p. 154-163.

[15] R.A. Abramov, M.S. Sokolov, "Theoretical and methodological aspects of the formation of anti-corruption mechanisms in the system of higher education of the Russian Federation", in *International Journal of Environmental and Science Education*, 2016, vol. 11, no. 15, p. 7431-7440.

[16] Draft of federal law N 750443-6 "On Amendments to Certain Legislative Acts of the Russian Federation in Connection with the Introduction of the Institute of Criminal Liability of Legal Entities". Available at: http://base.garant.ru/57718349/.

Federation, Federal Law of March 6, 2006 N 35-FL "On Counteraction to Terrorism" and actually had to establish an institution of criminal corporate liability. However, the matter didn't go further than the legislative initiative, and the project was never adopted.

Despite the fact that there are still opponents of the criminal law impact on legal entities, the Investigative Committee of the Russian Federation expressed its interest in resolving this issue. The head of this department, A.I. Bastrykin said in an interview that "this kind of responsibility will be a powerful incentive for organizations to take measures to prevent the commission of crimes by individuals under its control"[17]. On the official website of the Investigative Committee of the Russian Federation, the draft Federal Law "On Amendments to Certain Legislative Acts of the Russian Federation in Connection with the Introduction of the Institute of Criminal and Legal Impact on Legal Entities" is posted on the Internet information and telecommunications network[18]. This document has been published for discussion purposes and is not subject to formal legislative initiative. Thus, it can be stated that the discussion about the criminal corporate liability from the discussion of its reasonableness and expediency turned into the plane of searching for a legislative framework that could fit into the existing system of law of the Russian Federation.

Foreign experience of introducing the institute into action

In foreign legislation, the institution of corporate criminal responsibility has existed and is used for a long time. The concepts of criminal corporate liability vary by country and legal systems. Thus, in the Anglo-Saxon countries, the basis of corporate criminal responsibility is based on the model of "strict" liability, which allows not to take into account the guilt of legal entities, because the harm from corporate criminal acts exists regardless of intention. This approach is increasingly being criticized by scientists. It is alleged that "for both corporations and corporate executives, strict subsidiary liability is unfair, is a bad

[17] *Website of the Russian newspaper, 2019*. Available at: https://rg.ru/2014/01/21/bastrykin.html.

[18] *Website of the Investigative Committee of the Russian Federation – Documents – Texts of draft laws*. Available at: http://sledcom.ru/documents/Obsuzhdenija_zakonoproektov/item/1133.

government policy and should be abolished"[19]. In this regard, some Anglo-Saxon lawyers are calling for legislative reform[20].

In the countries of continental Europe, despite the unity of the Romano-Germanic legal system, approaches to the regulation of the institution of criminal corporate liability are different. For example, the French model recognizes an organization as a full-fledged subject of crime[21]. Such a position makes it possible to fully protect the interests of a legal entity brought to criminal responsibility, since it requires the establishment of not only a material element, but also a moral element, that is, guilt. The disadvantage of this concept is a very rare law enforcement practice, which, in our opinion, is due to the complex mechanism of accountability.

In the Czech Republic, criminal liability of legal entities was introduced on January 1, 2012. This institute is new and has received extensive discussion in the science of the criminal law of this state[22]. The concept of liability of legal entities for the commission of crimes by them in Germany was called "quasi-criminal"[23]. The essence of this approach is that the organization is not recognized as the subject of the crime. The German penal code does not provide for the application of criminal sanctions against corporations, but measures to influence the organization that committed the crime are carried out within the framework of the criminal procedure legislation and include confiscation and fines. This concept has a certain compromise: on the one hand, the law enforcer has the possibility of influencing a legal entity in the framework of criminal procedures, on the other hand, there is no need to establish complex and difficult-to-prove grounds for criminal liability. This approach does not

[19] J.D. Greenberg, E.C. Brotman, "Strict vicarious criminal liability for corporations and corporate executives: stretching the boundaries of creviinalization", in *American Criminal Law Review*, 2014, vol. 51, no. 1, p. 79-98.
[20] A. Nwafor, "Corporate Criminal Responsibility: A Comparative Analysis", in *Journal of African Law*, 2013, vol. 57, no. 1, p. 81-107.
[21] K. Deckert, "Corporate Criminal Liability in France", in *Comparative Perspectives on Law and Justice*, 2011, vol. 9, p. 18.
[22] V. Kalvodova, "Legal entities and criminal law-principles of sanctioning", in *Acta Universitatis Agriculturae et Silviculturae Mendelianae Brunensis*, 2013, vol. 61, no. 7, p. 2261-2268.
[23] M. Böse, "Corporate Criminal Liability in Germany", in *Comparative Perspectives on Law and Justice*, 2011, vol. 9, p. 227-254.

suit everyone. There are calls for the setting of criminal corporate liability for corruption crimes[24].

In the legal science of the post-Soviet space, there is also a discussion around the institution of the criminal corporate liability. Scientists of the Republic of Kazakhstan focus on the need to consolidate the legal concept of crimes against environmental safety and the introduction of the institution of criminal corporate liability in order to create effective mechanisms to counter environmental crimes[25]. In Ukraine, in 2013, amendments to the criminal code were made, which established the criminal corporate liability for certain crimes (12 elements of a crime in total). At the same time legal entities are not punishable. Criminal law measures are taken against them[26].

Working theories of influence on legal entities of the Russian Federation

In the criminal law science of Russia at the present time there are two concepts of legislative regulation of the criminal law impact on legal entities. The first is the classical theory, according to which a legal entity should be recognized as a full-fledged subject of crime, the second is a theory of responsibility, suggesting the impact on organizations through other measures of a criminal law nature, that is, through security measures[27]. The latter approach certainly has certain practical advantages. The most important of them is that the implementation of such a construction does not require systemic changes in the criminal law, it is enough only to supplement the criminal law with a separate chapter and to make concomitant variation to the procedural and ministerial legislation[28].

---

[24] J. Van Genugten, "Eliminating Schmiergeld: Lessons learned from the enforcement of foreign anti-bribery laws in the United States and Germany", in *Georgetown Law Journal*, 2019, vol. 107, no. 3, p. 767-793.

[25] G.R. Rustemova, A.M. Bytymbayev, "Ecological offence: Legislative review of the post-Soviet countries, Europe, the USA, Japan", in *Mediterranean Journal of Social Sciences*, 2015, vol. 6, no. 5S2, p. 85-92.

[26] S.J. Lihovaja, "Criminal responsibility of corporate entities according to legislation of Ukrainian", in *Criminology Journal of Baikal National University of Economics and Law*, 2014, no. 2, p. 155-161.

[27] V.I. Mishchenko, S.V. Naumenkova, O.A. Shapoval, "Consumer loans securitization", in *Actual Problems of Economics*, 2016, vol. 186, no. 12, p. 311-321.

[28] M.T. Abzalbekova, R.M. Zhamiyeva, B.A. Zhakupov, "Principles of acceptance and mistakes in the implementation of criminal procedural decisions", in *Journal of Advanced Research in Law and Economics*, 2018, vol. 9, no. 5, p. 1519-1527.

According to the draft of the Investigative Committee of the Russian Federation, the basis for the application of measures of criminal law against legal entities is their involvement in the commission of a crime. The term "involvement" is found in the legislation of Russia. In particular, Article 24 of the Federal Law of March 6, 2006 No. 35-FL "On Countering Terrorism"[29] regulates the responsibility of organizations for their involvement in terrorism. At the same time, based on the correct and logical interpretation of this norm, it can be concluded that involvement means, on the one hand, the purpose of the organization or its activities aimed at promoting, justifying or supporting terrorism, as well as committing terrorist crimes, the other hand, involvement can be understood as the implementation of actions on behalf of the organization or in its interests, aimed at organizing, preparing and committing crimes of a terrorist nature. Decree of the Government of the Russian Federation of August 6, 2015 N 804 "On approval of the Rules for determining the list of organizations and individuals in respect of whom there is information about their involvement in extremist activities or terrorism, and bringing this list to the attention of organizations conducting operations with money or other property and individual entrepreneurs"[30] also uses the term" involvement ", but does not contain any definitions that allow revealing the contents of this taking. The Criminal Procedure Code of the Russian Federation does not disclose the notion of involvement, but defines non-participation, which means unidentified involvement or an established non-participation of a person to commit a crime[31] (Article 5 of the Code of Criminal Procedure of the RF).

Thus, the term "involvement" is used in the national legal system, but it does not have a definitive norm that reveals the content of this concept. The authors of the considered Project of the Investigative

[29] Federal law "On counteraction to terrorism". ATP "System Garant" of March 6, 2006 No 35-FZ. Available at: http://www.consultant.ru/document/cons_doc_LAW_58840/.

[30] Resolution of the Government of the Russian Federation of August 6, 2015 N 804 "On approval of the Rules for determining the list of organizations and individuals in respect of whom there is information about their involvement in extremist activities or terrorism, and bring this list to the attention of organizations conducting operations with money funds or other property, and individual entrepreneurs. "ATP "System Garant". Available at: http://www.consultant.ru/document/cons_doc_LAW_184122/.

[31] Criminal Procedure Code of the Russian Federation of December 18, 2001 N 174-FZ. ATP "System Garant". Available at: http://www.consultant.ru/document/cons_doc_LAW_34481/.

Committee of the Russian Federation tried to determine the conditions for the involvement of a legal entity in a crime. There are two conditions:

1) the commission of a crime in the interests of a legal entity by a person performing managerial functions in it or exercising actual leadership in it;

2) use of a legal entity for the purpose of committing, hiding a crime or the consequences of a crime by a person performing managerial functions in it or exercising actual leadership in it, including financing a crime using money or settlement accounts of a legal entity, concluding transactions on behalf of the legal entity for facilitate the commission or concealment of a crime or property derived from the commission of a crime.

An element of the concept developed by the Investigative Committee of the Russian Federation is a system of criminal-law measures, which proposes to include a warning, a fine, decertification, quotas, preferences or benefits, deprivation of the right to engage in a certain type of activity, a ban on activities in the Russian Federation, compulsory liquidation. It should also be noted the correctness of the approach that provides immunity from prosecution to state and municipal authorities.

From a practical point of view, the concept presented by the Investigative Committee of the Russian Federation has a number of positive points. Firstly, law enforcement agencies are granted the right to independently decide on the issue of bringing an accusation about the involvement of a certain legal entity in a crime. This discretion will allow more economical use of organizational and procedural resources, avoiding meaningless actions to bring to justice fly-by-night companies; companies that do not have any assets, actual independence; collective of workers and used only as instruments for the commission of certain crimes of certain individuals. Secondly, the conditions for the application of measures of criminal law impact on legal entities have certain objective characteristics, which will somewhat limit the discretion of the law enforcer and minimize the corruption factor. Thirdly, law enforcement agencies will receive a real lever of influence on the legal entity involved in the commission of a crime. Meanwhile, with all the positive practical component of the concept under consideration, in our opinion, it cannot be taken as the basis for constructing criminal law norms on the liability of legal entities in view of the following.

The nature of criminal and administrative law

Law is a complex system in which all elements are interconnected and interact with each other. In our opinion, terms, concepts and categories cannot be exclusively criminal law, civil or administrative. It is impossible to regulate the same question in different ways depending on sectoral interests. It is necessary to take into account the systemic interaction between norms, institutions, industries and a uniform approach to the definition of the conceptual and categorical apparatus.

S.A. Belousov, who asserts: "... the imbalance of the legislative system, its instability and the varying quality of its various levels and elements, indeed, adversely affect the effectiveness of the legal regulation mechanism, the formation of the sometimes opposite practice of application of normative legal acts, which ultimately affects the legality and the rule of law[32], on the state of security of human and civil rights and freedoms, on the ability to effectively protect rights and interests"[33]. We also agree with Yu. I. Bytyko, who notes that "Russia has developed a certain system of law and there are certain connections and relations between its various branches. The criminal legislation in this system has the closest connection with administrative legislation"[34].

Indeed, by their legal nature, criminal and administrative law are "equal value" branches. In this regard, it seems wrong to ignore the experience of the regulation of the institution of administrative responsibility of legal entities. This experience shows that the legislator did not look for "quasi-administrative" constructions, but rather fully defined the legal entity as the subject of an administrative offense and responsibility, without violating the principle of guilt. Such a mechanism has been successfully used in practice for many years, which allows to maintain a balance of public and private interests. The phenomenon of a legal entity has passed a long evolutionary path from fiction to a really existing subject of economic relations, which has rights and obligations[35].

---

[32] A.V. Kostruba, "The rule of law and its impact on socio-economic, environmental, gender and cultural issues", in *Space and Culture, India*, 2019, vol. 7, no. 2, p. 1-2.

[33] S.A. Belousov, "The balance and the imbalance in the Russian legislation through the prism of the technology of its specialization and unification", in *Legal Technology*, 2016, no.10, p. 336.

[34] Yu.I. Bytko, "Does Russia need such a law (to the question of the draft law on the criminal liability of legal entities)", in *Bulletin of the Saratov State Law Academy*, 2015, vol. 103, no.2, p. 182-193.

[35] N. Fedorchenko, I. Kalaur, "Legal regulation of obligations on service delivery in the context of the development of Ukraine's economy", in *Transition Studies Review*, 2017, vol. 24, no. 1, p. 71-85.

In the legal field, any organization has not only legal capacity, but also delictual capacity, that is, it has an independent responsibility that is distinct from individuals. This subject exists in objective reality and has a will that can suppress the will of individuals, directing them to commit a crime.

Among scientists there is the opinion that the corporation has its own identity. Even the theory of corporate identity is being developed[36]. Some scientists also see in corporations the features inherent only to the person. For example, Rich, S. argues that corporations may feel the fear necessary for justifications claims, but the law should allow fear to justify compulsory corporate actions only in a narrow circle of circumstances[37]. Considering a legal entity as a full-fledged subject of a crime, we can regulate not only the question of bringing him to justice, but also implement other institutions, in particular, exemption from criminal liability. In the US, for example, Department of Justice prosecutors have various instruments at their disposal, including deferred prosecution agreements and non-prosecution agreements as an alternative to legal proceedings[38].

Developing the mechanisms of legal influence on legal entities, we must fully ensure the protection of the rights of these entities, as if we form such a mechanism for individuals. In this regard, the non-involvement of a legal entity in the commission of a crime should determine the criminal law impact on it, and the presence in the organization of all elements of a crime is the same as an administrative offense as the basis of the administrative responsibility of legal persons.

The concept of criminal corporate liability should be formed taking into account systemic industry interaction and be based on the premise that the legal entity is an independent full-fledged subject of the crime. Only such an approach will allow us to fully ensure the implementation of fundamental legal principles, without which the existence of the modern legal system of Russia is impossible.

---

[36] M.E. Diamantis, "Corporate Essence and Identity in Criminal Law", in *Journal of Business Ethics*, 2019, vol. 154, no. 4, p. 955-966.

[37] S. Rich, "Can Corporations Experience Duress? An Examination of Emotion-Based Excuses and Group Agents", in *Criminal Law and Philosophy*, 2019, vol. 13, no. 1, pp. 149-163.

[38] G.A. Jimenez, "Corporate criminal liability: Toward a compliance-orientated approach", in *Indiana Journal of Global Legal Studies*, 2019, vol. 26, no. 1, pp. 353-379.