

JURIDICAL PERSON AS SUBJECT OF CRIMINAL RESPONSIBILITY IN ALBANIA

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ABSTRACT: *Criminal responsibility of a juridical person, represents a particular interest area based on the largest impact that juridical entities, in all forms provided by law, have in various social and economic aspects, as well considering the growing number of these legal entity formats. Additionally to that, Albania is working for the integration in the European family, (including the legislation approach) and that's fore was approved Law Nr.9754 Dt.14.06.2007 "Criminal responsibility of legal entities". Being part of a commercial and economic reality in which the impact and the number of juridical person has increased significantly, we can't ignore the existence of these entities as subjects of criminal responsibility. Actually this kind of responsibility is difficult to be understood applied on a legal entity. The notion of criminal liability is more than understandable applied on physical person and well-known are the provisions that provides this kind of responsibility, while the notion of criminal responsibility of juridical person, will be understood in its best if we first define the meaning of juridical person.*

KEYWORDS: Criminal responsibility, juridical person, Physical person

INTRODUCTION

Based on the theory of criminal law in Albania, the subjects of criminal responsibility are classified into active and passive subjects. An active subject of criminal law is the person who with active actions or inactions consumes a criminal offense; meanwhile a passive subject is considered the person who has been damaged by the criminal offenses. Maybe this is a little hard to be understood applied over the juridical person.

But, how could juridical persons as a community be subject to criminal responsibility?

If we need to get through the juridical responsibility of 'juridical person', it is necessary previously define the notion of the commercial entities as a juridical person. In this case we need the help of the doctrine of law, because the Civil Albanian Code does not give any accurate definition of this, but classifies legal persons in public and private juridical persons. Based on Albanian Civil Code, legal entities are public and private state-owned enterprises that are self financed or financed from the state budget. Civil Code defines juridical person as a private business associations, as foundations or other entities of private character, who have the ability to takes over rights and obligations and to earn the legal personality, as determined by law. This allows the juridical person to be part of legal relationships and to take over rights and responsibilities. This is quite in contrast with a physical person, who wins the legal personality at birth or the full legal personality to act at a certain age (18).The juridical person own it at the moment of his registration. This means that it owns them at the same moment, the moment of the registration. The juridical person may be defined as a

collective body or organization, which always operates through people who are the representative bodies and their expressed will, is the same will of the legal person. The theme of the paper is to assess the importance of criminal responsibility applied on juridical person and at the same time this paper would enable people to easily identify individual and collective criminal responsibility and the penalties obtain in each case.

LITERATURE

Over the past 26 years Albanian Law has been subject to significant legislative changes. Looking back in juridical entities history we can find reflected distant origins of some institutions, but they are state owned and not private subjects. In the framework of the latest Geo-Political changes, Albanian legislation has experienced significant improvements. It is always in a changing process in order to be appropriated to an evolving economy and to the European integration process. In this context the legislation has been modified and new laws have been approved, especially in the regulation of the private sector. Changes have been made in the Constitution, Civil Code, Criminal Code, Administrative Code, etc. This paper aims to identify the innovations in the field of criminal responsibility for the juridical subject of right and to highlight the problems during this process. So the implementation of the measures undertaken by the government to achieve these goals will be in the focus, and going through the provision regarding especially the law 'On Criminal Responsibility of juridical person'.

METHODOLOGY

The object of this research are the problematic on implementing criminal penalties and to be aware of the importance of the criminal juridical person responsibility in Albania. Based on that, this paper is focused in some major particularities affecting and helping to better understand the importance and the needs of criminal responsibility for this entities, being they private or public. This study uses qualitative descriptive and comparative methods. Using these methods, the research is carried out in an understandable way, observing deeply through the provisions defining criminal responsibility, comparing juridical person with physical person and given a good view of the Albanian Legislation in this field. Not only the Doctrine of Law has been in the focus, but even the Juridical Practice during all this years of implementation to these changes. This approach tried to obtain a more in-depth, overall look at the legislation in this context, with the main objective to understand the meaning. Power collection techniques used in this study were, observation and literature study.

RESULTS

Based on the theory of criminal law in Albania, the subjects of criminal responsibility are classified into active and passive subjects. An active subject of criminal law is the person who with active actions or inactions consumes a criminal offense, meanwhile a passive subject is considered the person who has been damaged by the criminal offenses.

Maybe this is a little hard to be understood applied over the juridical person.

But, how could a juridical persons as a community be subject to criminal responsibility?

Based on our legislation, not all the juridical entities recognized by the law can be subject of criminal responsibility. The Penal Code, defines that:

- Juridical person, with the exception of state institutions/ entities, can be responsible for criminal offenses, committed in their name or on their benefit, from their representative bodies.

This provision let us understand that by all juridical subjects provided by Albanian legislation, only state institutions have not criminal responsibility. It refers to legal entities or public institutions, which don't have economic profits activity, but they act in fulfilling their administrative duties. While private juridical persons, business organizations, state-owned enterprises private or public, are certainly subject to criminal responsibility. Analyzing this provision it looks like the Penal Code; restrict criminal responsibility area from all the juridical persons mentioned on the Civil Code. This immunity or this exclusion from criminal responsibility, has its meaning, after it is rather unusual that state, who has the right to punish the offenders, ultimately condemn less than himself.

Despite the immunity that this provision has provided to the government institutions, it has inside an exception too. It predicts criminal responsibility for the local governance.

More concretely:

Local government units are criminally liable only for actions committed during their activity, which may be exercised through delegating public services. In order to clearly understand the right who the local government units are, we need to referee to article 108/1 of Albania Constitution. Likewise we can refer to the Law "On the organization and functioning of local government", where is units of local government are state institutions, but exercising their power within a certain territory, with local competency. Anyway criminal responsibility for local government units is very limited, as it focuses only for criminal offenses committed during the delegation of competences related to public services. The Law "On Criminal Responsibility of juridical person" has provided other restrictions on the application of criminal responsibility, limiting forms of punishment, who can only be applied on local government. It provides certain types of punishment as; fine, prohibition to participate in procurement procedures or to use other public funds, removal of the right to take or use licenses and authorizations for concessions or subventions and the obligation on the publication of the court decision.

Above it was emphasized that the Penal Code seems to institutionalize the first criminal responsibility of legal person in his article 45, but in the last paragraph we can read that:

"Criminal Offenses and punitive provisions that are applied to the respective juridical person, as well as the procedure for their establishment and execution shall be regulated by special laws."

Starting from the content of this provision criminal liability of juridical persons presents some major particulars:

- *First*, the reestablishment of the criminal responsibility of juridical person, should be seen along this responsibility applied for physical person;

- *Second*, the Criminal law of the Republic of Albania is applicable on juridical person when performing criminal offenses from Albanian citizens or foreigners on behalf or for the benefit of legal person so e.g we will have criminal responsibility (Albanian or foreign citizen) in case of counterfeiting financial documents or tax fraud etc.
- *Thirdly*, criminal offenses, or relevant punitive measures applied to juridical person as well as the procedures for the establishment and execution of them, are regulated by a specific law. As was mentioned above, the Article 45 enters into the category of reference provisions, because it does not provide it self the criminal sanctions, but refers to a special law. Actually this provision was preceded by the Law No. 9754, dt.14.06.2007 "On Criminal Responsibility of juridical person", a law that at the time of the existence of such provision was not into force. This law defines the cases of juridical responsibility, criminal prosecution or types of punitive measures related to juridical person, for committing Criminal Offense. Precisely in this paper we will analyze gaps and innovation that brought this law.
- *Fourthly*, it is understandable that in the name of the juridical person, responsible will be the physical person who did the offense and his criminal condempne will be associated with an additional sanction for the juridical persons in the name and the benefit for whom he acted to.

Criminal Liability of juridical persons shall not exclude the individual criminal responsibility of the physical person, (in terms of the Civil Code), who with his actions or inactions committed specifically the criminal offense for which a responsible business organization is guilty too.

Law No. 9754", dt.14.06.2007 " On Criminal Responsibility of juridical persons ", is one of the novelties with significant impact in penal legislation. This law while specifying the terms for criminal responsibility of juridical persons, laid the foundation for the punishment of criminal activity of commercial companies -- activities which already are an incontestable reality.

This law defines that criminal liability of juridical persons arise when persons who have responsible duties representing a legal person, commits criminal acts with the aim of creating advantages for the legal entity, because as we have stated above, the will of representative bodies is the will of the juridical person. Furthermore in the function of this parallel responsibility, the provision of this law provides:

- "Representatives of the juridical person cannot be a person who is called in quality of witness or legally prosecuted for the Same Criminal Act"

The provisions of this law are applied to juridical persons to the extent that it is not otherwise provided in the Penal Code, Code of Criminal Procedure or in other criminal provisions. The juridical person is also subject to the provisions of civil-trade legislation. In support of these interpretations we might quote Article 27 of the Law No. 9754", dt.14.06.2007" On Criminal Responsibility of juridical persons", which provides that:

- "For the criminal offense committed by a juridical person from his representative bodies we shall apply the merging of associated procedures .

It should be emphasized the fact that even though they have passed a few years after the entry into force of this law, it feels a lack of interpretation of its provisions, as well as in the judicial practice and into the legal doctrine.

Article 3 of the Law No. 9754", dt.14.06.2007" "On Criminal Responsibility of Legal persons", determines the conditions that must be met in order that the juridical person will be subject of criminal responsibility :

A juridical person is responsible for criminal offenses committed :

- a. On behalf or for its benefits by state bodies and its representatives;*
- b. On behalf or for its benefits by a person who is under the authority of the representative person in charge to administrate the juridical person;*
- c. On behalf or for its benefits, due to the absence of control or surveillance by the person entitled to lead, represent and manage the juridical person.*

Regardless that the provision is not easily understandable, the legislator has determined the criteria that must exist in order that a juridical person can be criminally liable. Based on the criteria set by this provision we share them in two groups and more concretely:

- Circle of physical person, whose legal action will make juridical person criminal liable.
- Commitment of a criminal offense in the name or for the benefit of a juridical person.

DISCUSSION

Before going through these two criteria, it should be emphasized that criminal responsibility stems from an illegal action, which by penal legislation is considered as a criminal offense. The provisions of the criminal code, actually defines and provides the remaining attempt of criminal offense a criminal act. In the case of an action remained in tentative the perpetrators goal is to carry out the criminal act if nothing will not hold up to the realization of this objective, therefore he begins the preparatory efforts for the commitment of the offense.

- *What about a remaining attempt from the juridical person? In this case is it subject of criminal responsibility?! Worth attempts as criminal liability of a juridical person?*

The penal code, does not provide a definition of the criminal offense, but the theory of criminal law has defined the criminal actions as an illegal act, socially dangerous, provided by the legislation as criminal offenses. The figure of a criminal offense consists in four main elements, which are listed below in analogy when this elements are faced on the juridical person act.

- *The object of the criminal offense are legal relations, as kind of social relationships*

which are specifically protected by the state through the law, in place to ensure the integrity of important values of a person, society, state, affected by the offense. This means that the object of the criminal offense is quite independent from the characteristics of the subject of the

criminal act. Any person, being physical or juridical person, in case violates these important social relations has violated the object of criminal offense.

- *The subject of the criminal offense.* Based on the Criminal Code of the Republic of

Albania subject of the criminal offense may be a physical or juridical person, who has reached the age of criminal responsibility and is aware of his actions. The figure of the subject of the criminal offense, is not regulated in only one provision. The responsibility of a physical person when is subject of the criminal offense is regulated by article 12 of the Criminal Code, while in Article 45 is defined the criminal responsibility of a juridical person. According to the law 'On criminal responsibility of the juridical person', everyone who acts on behalf or for the benefit of a legal person, or by law is in charge for representation, direction or control of the aim of a juridical person, is subject of Criminal offense.

- *The objective side* of the criminal offense, is the complexity of actions or inactions

done by the subject which led to the criminal act. This is valid not only for the physical person but even for the juridical person.

- *The subjective side* of criminal offense determines the form of guiltness in

the commitment of a criminal offense. Criminal Code of the Republic of Albania defines two forms of guilt: intention and negligence.

The Article 3 /c of the law "On Criminal Responsibility of Juridical Person." defines the case when we have to deal with criminal responsibility and when the action or inaction is as below:

- *On behalf or for the benefit of the juridical person due to the absence of controlling and monitoring by the person in charge to lead, represent and manage the legal person.*

IMPLICATION TO RESEARCH AND PRACTICE

Most of the practice cases of criminal responsibility, are based on the negligence of the juridical person. As we see most of elements of the criminal offense, in the case of criminal responsibility of a juridical person, are the same, it changes only the subject of the criminal offense.

To illustrate the point c of Article 3 of this law we can go through the Law nr. 9901 dt.14.04.2008 "On Entrepreneurs and Commercial Companies" in the provisions that regulate the powers of representative bodies of the commercial companies.

Failure to perform the activities defined by the law or statute by the administrator of the company or the person in charge as representative body, can lead to violation of the law, which according to the case could constitute a criminal offense or criminal offense committed intentionally or by negligence.

We find the same interpretation on the legal doctrine. The Consumption of criminal acts that led to criminal responsibility of a commercial juridical persons can be caused by:

- Unfamiliarity or low appreciation by the administrator of the legal requirements applicable to the activities of society and the misinformation of the employees related to this;
- Inadequacy by administrators or board members to manage the employees to respect and to be in compliance with all the requirements
- The absence of early warning mechanisms of risk, including the risk of non-fulfillment of legal requirements;
- Lack of supervision on implementing prudent policies for the company related to the the law enforcement.

Actually the Law 'On Criminal Responsibility of juridical Person, is applied the best and mostly in criminal offenses committed by business organizations, which can bring their negative consequences in many ways: against the employees of the company, who will lose their jobs if the company would be closed as a result of a court decision or will go bankrupt if they will not be able to pay the fine punishment; against other commercial societies, if the company performs actions of unfair competition; to the state, if the works are impinged legal relations established to ensure the proper state in various fields; toward the environment if the act has caused its pollution of over limits permitted by relevant legal provisions and recently toward consumers that benefit products offered by the company, if these products are produced in order to counterfeit or constitute food or other raw material hazardous to health.

In relation to business organizations, mainly, is taken into account the importance of rehabilitating of the reputation, and how important is it in commercial law, Law on Criminal Responsibility of juridical Person, offer the appropriate instruments.

Juridical person is called unconvicted if there is not any another criminal offense committed within the limits of the following:

- a) over the five years from the date of settlement of full fine, in the case of fines
- b) over the three years from the date of their execution, in the case of other penalties.

Criminal punishment, as part of the institutes of criminal law, can be considered one of the most important and as the coronation or finalization of a long process toward of the criminally responsibility. In order that the criminal responsibility of juridical person is effectively enforced is necessary to have an appropriate system of sanctions, considering the special nature and the specifics of the representative bodies of the juridical person. Acknowledging the significance of this system, lawmaker has provided in law clearly and in detail the punitive measures that are provided to legal persons, who have responsibility for committing of the criminal offense.

These punitive measures are divided into the following categories:

- main sentences and • additional penalties

As main sentences are:

- fine • termination of the activity of juridical person

As supplementary penalties the law provides:

- a. the closure of one or more activities or structures of legal person
- b. determining a person to control the administration
- c. prohibition to participate in procurement procedures with public funds
- d. deprivation of the right to obtain or use the licenses, authorizations, concessions or subsidies
- e. prohibition to seek public funds and financial resources
- f. deprivation of the right to exercise one or more activities or operations
- g. the obligation to publish the court decision

Individualization of punishment and the accurate determination of guilty persons is a very delicate moment, to which the court is very careful in order to determine a more effective punishment and within the limits prescribed by law for the criminal offense in question.

Law "On the criminal responsibility of juridical person" provides only a list of the types of punishment for criminal offenses, but they are not covered for each offense. The law further continued, and based on the dangerousness of criminal offense has defined the limits of separate penalties on four levels. Also forecast, the cases when can be applied a major penalty, the termination of the legal entity. Regarding legal entities, in analyse with the Criminal Code is not define criminal offense which may be applied in specific penalties, being distinguished so by setting the punishment for individuals which is ascertainable and let the court less space to interpret .

CONCLUSIONS AND RECOMMENDATIONS

Conclusively, the development of socio-economic conditions, the increasing number of juridical subjects, the consequences of economic crime and the white collar, has made the necessary acceptance of the concept of criminal liability of legal person responsibility that does not exclude forms of other applicable civil and administrative liability that, depending on the endangerment of the legal person. However, the Law Nr. "9754, dt.14.06.2007" For the criminal liability of juridical persons ", there are gaps in its content, gaps which can be supplemented and further improvement of the Criminal Code or the Criminal Procedure Code.

- Criminal Code provisions regulate among other the exemption from criminal liability, termination of criminal prosecution and punishment, the action criminal legislation in space, these applicable to physical persons. The code of Criminal Procedure, among other defines the security measures applied against physical persons, thing that is missing for judicial persons.

- Fulfillment of these gaps may be possible and with the involvement of criminal responsibility provisions of the physical person and legal entity.

- A positive impact in the application of criminal responsibility of juridical person and

achieving the social purpose of this law, there is indisputably and the judiciary, as a very important factor in providing good example of the correct application of these provisions.

- Differently from the determination of the level of dangerousness of criminal offense,

it is the dangerousness of the offender, which is a subjective element and is closely related to the activity of a legal person, the degree of his guilt in the crime and the consequences of the result of his actions. Therefore the court in the case of criminal liability of legal entities must take into account several factors such as the dangerousness of the offense, the author of the crime, aggravating and mitigating circumstances, the contribution of the legal person for society, the number of employees there other similar factors target.

Suggestion

The provisions of the Law No. 9754", dt.14.06.2007 "On Criminal Responsibility of juridical person" do not provide the responsibility of a criminal offenses remained in tentative.

Maybe in the next article 3 of this law, it should be provided even a criminal act remained in tentative, in order to fully respond and to be more effectively against the fight over crime committed by juridical persons.

FUTURE RESEARCH

Future research in this field will be in a wild specter. The focus will be in a comparative method, within the countries applying Civil Law and the Countries applying Common Law. It will be interesting seeing practice versus doctrine in the two different legal system, for the same issue.

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