LEGAL PERSON AS A PERPETRATOR: DEVELOPMENTS FROM COMPANY LAW TO CRIMINAL LAW

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One of the main problems of the criminal law is being analysed in the present article, i.e. the possibility of a legal person to be a perpetrator. The author seeks to substantiate the statement that there exist theoretical as well as practical possibilities for the company to be held as a person that committed a crime. The main doctrines that define the essence and the features of a legal person as well as their evolution are discussed in the present article for this purpose. The assumptions for the implementation of the postulates of these doctrines in the criminal law are analysed as well.

Introduction

The ancient doctrine of societas delinquere non potest dominated almost in every legal system as well as in criminal law of many countries for ages [8, p. 26; 12, p. 16]. The advocates of this doctrine argued and even still argue fervently that legal persons (corporations) cannot act blamefully nor have their own mind and will.

A famous German lawyer Friedrych Carl von Savigny once told that „criminal law has to do with natural persons as thinking and feeling persons exercising their free will. A legal person, however, is not such a person but merely a property owning being [...]. Its reality is based on the representative will of certain individual persons, which, by way of a fiction, is attributed as its own will. Such a representation [...] can be acknowledged everywhere only in civil law, but never in criminal law. Everything which is considered as a legal person’s crime is always only the crime of its members or organs, this means of single human beings or natural persons [...]. If a legal person were to punished for
a crime, the basic principle of criminal law, the identity of the offender and of the sentenced person, would be violated" [13, p. 310].

However, the situation has changed dramatically. Corporate criminal liability emerged as one of the leading legal subjects in both the law doctrine and in the judicial practice during the last decades [14; 26; 37; 39; 40; 41; 42]. The lawyers of Common law as well as of many continental law countries shifted their legal thinking concerning the availability of corporate criminal liability and recognized the possibility of holding the legal person criminally liable for the commission of the offence.

Nevertheless, the question of whether the legal person might be considered as a perpetrator and what are its features still remains problematic. The theoretical and practical issues related to the mentioned subject have not been exhausted by the scholars yet. That is why a doctrinal discussion on that subject as well as pragmatic analysis of the problem is very topical nowadays.

The subject of this article is the analysis of only a private legal person as a perpetrator. The main features of a legal person, which is able to commit a crime, will be discussed and analysed. Moreover, there will be argued that a legal person has its own personality and is able to act wrongfully as well as to commit almost any crime. The legal development of the conception of a corporation in company law and respectively in criminal law will be reviewed.

The corporate criminal liability and punishment doctrines and theories, punishments for corporations as well as the purpose of the criminal liability of legal persons are outside the scope of this article and will not be scrutinized therein.

The article consists of two parts. The conception of company and the significance as well as the development of the doctrine of corporate personality will be analysed in the first part of the article. The features of the legal person as a perpetrator will be examined in the second part of this work. Conclusions are provided at the end of the article.

The primary sources used writing this article are the case law, the legal doctrine concerning the subject, the legal acts and the international agreements.

I. The Realm of Corporate Personality in a Modern Company Law

The doctrine of company law of almost every civilised legal system provides the conception of a legal person and its personality. It is obvious that it is impossible to examine the features of a legal person as a perpetrator without analysing the conception and features of a corporation in company (or in civil) law. Moreover, it might be mentioned beforehand that the corporate personality in company law and in criminal law is to be deemed almost the same. Thus, the concept and features of a legal person in company (civil) law must be scrutinized first.

There are many doctrines in company (civil) law on the existence of the company and on its social purpose [21, p. 1-36; 22; p. 287-295; 2, p. 254-256]. These theories reflect the doctrinal and practical development of the concept of a legal person in every modern legal system as well as they show what role the companies play in the society life. There is no legal system, which had adopted only one or other conception of a legal person. Usually it is shaped by various doctrines and the needs of economical development of the nation (society). But still it might be stated that there are two most important legal theories in the background of criminal law concerning the essence of a legal person: it is the theory of fiction and the reality (organic) theory. These theories have always competed between each other in the doctrine of corporate liability in civil as well as in criminal law.
The father of the fiction theory is F. C. von Savigny. The fundamental statement of the theory is that a legal person is nothing more than a fiction. According to the advocates of this doctrine the corporation does not have a separate legal personality. It should be considered only as a tool for economic development of its owners as well as the creation of a legal technique. Accordingly, the legal person, as maintained by the representatives of the fiction theory, cannot take part in the civil relationship and the owners of the company are namely these subjects who realise the legal personality of themselves as well as of the company. As Max Radin pointed out „these are persons in the proper sense of the term. Law exists for them to express their relations and subserve their needs“ [34, p. 665]. Thus, the legal person in the view of the advocates of fiction theory is understood merely „as a symbol for, or brackets around, the names of its members“ [29, p. 142].

By contrast the supporters of the reality (organic) theory of a legal person (O. Gierke, F. v. Liszt, etc.) argued that it has a legal personality and that the company and its owners cannot not be identified [9, p. 734; 10, p. 95; 11, p. 155]. Moreover, they state that the legal person exists as a social reality. Consequently, it has its own interests and purposes, which might be different and even not to coincide with the goals of its owners (incorporators). As F. W. Maitland observed a legal person is a „real person, with body and members and a will of its own“ [30, p. xxv–xxvi].

Thus, there are two completely different doctrines related to the concept of a legal person. It should be noticed that supporting of one or another theory by the state policy and legislative measures has a significant importance for the development of corporate criminal liability in the particular state as well as throughout the world legal systems. For this reason it is important to investigate the main trends of the theory and judicial practice in the area of corporate personality and to find an answer to the question of what model of the above – mentioned is more common in a modern company law. The answer could be found only after the examination of corporate features and the main trends of the company law doctrine.

The features of a legal person, which helps us to identify the company as a subject of law, are provided in modern company law of both the common law and the continental law systems. In continental law systems those features are usually divided into a primary features and derivative features of a legal person [3, p. 93–96]. In common law systems such a classification is rather unusual. That is why the classification of features of a legal person pursuant to the continental law system will be analysed first.

The primary features of a legal person are considered to be the corporate unity and the material and procedural legal capacity of a company, i.e. its locus standi. Corporate unity means that a company has its own structure (it has its branches, departments, organs, etc.) that comprises the whole unity of the company irrespective of the level of compartmentalization of a legal person. Material and procedural capacity of a legal person largo sensu means its possibility to be the subject of law and to obtain rights and obligations as well as to sue and to be sued. It should be noticed that companies in the modern company law legal systems have the absolute locus standi what means that their legal capacity is equal to the legal capacity of an individual with the exceptions, which are determined by the essence of the personne morale.

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1 The main reasons why modern company law legal systems envisage an absolute legal capacity of a legal person are twofold: firstly, due to the legal development of the company law doctrine; secondly because of the requirements of EC law, namely the first EC company law directive; see Dorrestijn, Addriaan, Kruiper, Ina, Morse, Geoffrey, European Corporate Law, Kluwer Law and Taxation publishers. 1994 at 37 – 40.
For example, Art. 2.74(1) of the Civil Code of the Republic of Lithuania states that the private legal person may obtain any rights and obligations except those, which requires such individual (human) features as age, gender and affinity [1]. Thus, the mentioned statement enables the legal persons in Lithuania to obtain any rights and obligations except those, which could not be obtained due to the essence of a legal person. Moreover, the mentioned statement of the Code together with Art. 1.82(1) and Art. 2.83(1) restricts the possibility of application of ultra vires doctrine in Lithuania what maintains the development of corporate personality in the national law of the mentioned country.

Derivative features of the company are considered to be its corporate veil, the ability to have its own property and to use it independently from the property of its members, corporate distinctiveness, etc. It should be noticed that the primary and derivative features of a legal person are the subject of every particular legal system. This means that in every country the mentioned features of a legal person may differ though the basic trends of a modern company law seems to show that usually these features more or less are the same in most continental law countries.

The company law theory and case law of the common law countries usually do not distinguish the above – mentioned types of company features. As a rule it is merely being observed that a legal person has a perpetual succession, it owns property, it can sue or to be sued in its own name, a company can create a floating charge, it has a corporate veil, etc. [24. p. 79; 31, p. 3 – 9]. However the legal doctrine and case law in the mentioned legal system countries pays much of attention to corporate personality as well as recognizes it. It is being held that a company is "therefore a person in the eyes of the law quite distinct from the individuals who are its members" [32, p. 39; 33, p. 2203]. The "corporate persona" is widely acknowledged in the case law of England. The leading case is Salomon v. Salomon & Co Ltd. [43] where The House of Lords indicated that a company has its own personality, which cannot be identified with the personalities of its members. The doctrine of corporate personality was upheld and developed in many other cases by English courts such as Lee v. Lee's Air Farming Ltd.[44], Macaura v. Nothern Assurance Co [45], Gramophone and Typewriter Co Ltd. v. Stanley [46], Lonrho Ltd. v. Shell Petroleum Co Ltd. [47], Tunstall v. Steigmann [48], etc.

Although Lithuanian case law is not that rich of cases where the question of corporate personality was scrutinized it may be noticed that there are cases where the corporate distinctiveness was mentioned and analysed. In UAB „Kerūle“ v. Papelkių žemės ūkio bendrovė, Raseinių rajono savivaldybė, Žemės ir kito nekilnojamojo turto registro įmonės Tauragės filialas [38] The Supreme Court of the Republic of Lithuania ruled that there is a corporative distinctiveness between the company and its shareholders and that the company has its own property which does not belong to the shareholders and that the company has its own property which does not belong to the shareholders of the company. Accordingly, it may be stated that the doctrine of corporate personality is recognized in the case law of Lithuania though very indirectly.

It should be noticed that the corporate personality doctrine was developed not only within the national legal systems but also in the arena of international as well as the European Community law. Art. 44(1) (ex Art. 54) of the EC Treaty [17] envisaged the equal right of establishment for both natural and legal persons. As A. Looijestijn – Claire observed, for the purposes of the right of establishment the Treaty "assimilates companies and firms meeting certain requirements to natural persons"[28, p.625].
The latter observation is definitely correct because the European Court of Justice (ECJ) in the leading case on the right of establishment of companies *Centros Ltd and Erhvers – og Selskabsstyrelesen* [49] ruled that „companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community are to be treated in the same way as natural persons who are nationals of Member States“ [49]. The same position of the ECJ was provided in other cases such as *Commission v France* [50], *Commerzbank* [51] and *ICI* [52] case.

Thus, it is obvious that in the European Community law the legal person is considered to have its own legal personality as well as the legal status. The possibility for a company to move throughout the Community realising the right of primary or secondary establishment and the acknowledgement of this right by the ECJ allows us to state that a legal person is almost equal to an individual pursuant to that supranational law of the Community.

The theoretical analysis of the corporate personality doctrine and of the features of a legal person, which have become common in most of the legal systems of the world as well as in the EC and international law enables us to observe that a nowadays company is considered to be a person, which has its own personality as well as the absolute legal capacity that makes the company the subject of law equal to an individual (omitting some exceptions). Moreover, companies are supposed to be not only the frame for the economical development of their owners but the subject of law as well, which can act on its own will. There should be finally acknowledged that a legal person is even able to obtain the fundamental rights and freedoms of a human being, which comprise the catalogue of human rights (e.g. right of speech, free movement, etc.). It is not a problem that a company has no „body to kick and no soul to damn“. Its mind is entrenched in the minds of its representatives and its „body“ are the persons who act on behalf of the legal person. The investigation of the above-mentioned doctrines and the features of legal persons shows the legal existence of the possibilities for the company to have its own will, goals and objectives. Consequently it should be noted that the era of the fiction theory in a modern company law ended. The examination of the mentioned doctrine as well as the case law enables us to state that the reality (organic) theory is the one, which realised in practice and adopted in most legal systems.

One would be wrong if said that the above-mentioned theoretical conclusions are the part of the „pure theory“ and does not have a real reflection in practice. It could be mentioned that not only the law theory examines the companies as the subjects having their own mind and will. For example we could come across the theoretical investigations on corporate culture, which is being recognized as a very significant part of every company and its existence. Richard Hagberg and Julie Heifetz indicate that „the culture of an organization operates at both a conscious and unconscious level […]. Culture drives the organization and its actions. It is somewhat like the „operating system“ of the organization. It guides how employees think, act and feel“ [35, p. 1].

Thus, the pragmatic point view at the analysed problem also enables us to draw the same conclusion: the legal person is not a fiction, it does not simply operate, it acts with its mind and will, believes and thoughts. It has its individual corporate culture, which differs from the culture of the other legal persons. This „culture“ might be the illicit one as well.
II. The Legal Person as a Perpetrator

One of the most problematic questions of the criminal law is whether a legal person can be the perpetrator of a crime. The scholars have argued for many years and still argue about how a company can be guilty of the commission of the criminal offence and how the traditional theories and the perennial judicial practice concerning the intention or negligence as well as the principal of individual liability are compatible with the conception of a legal person in the background of criminal law.

There are many scholars, especially representatives of the Russian classical school of the criminal law (N. S. Tagancev, S. V. Poznysiov), who argue that only a human being can be a perpetrator [6, p. 115–119; 7, p. 369–379]. Russian professor G. N. Borzenkov argues that the criminal liability is strictly personal and that collectives cannot be criminally charged and punished [5, p. 266]. Accordingly, the main arguments why a legal person cannot be criminally liable, as maintained by the scholars who deny the corporate criminal liability, are these: (1) it is difficult to attribute acts by individuals to a legal person, (2) the corporation is soulless and it cannot have a moral blameworthiness, (3) the corporate criminal liability contradicts to the principal of personal liability, (4) it cannot be jailed, thus, it cannot be punished properly and (5) the corporation cannot fit well within the existing system of criminal procedure, where the defendant is supposed to appear before the court in personam [4, p. 3, 10, 19–20; 19, p. 253]. There are many counterarguments to deny the mentioned statements.

First of all it should be mentioned that there are no legal obstacles to attribute the acts of an individual to a corporation. The legal doctrine and practice of most of the common law countries developed the technique pursuant to which the acts of the agent of the company or the acts of the senior representative of it are deemed to be the acts of the company itself. Accordingly it is important merely to realise these models in practice precisely so that the acts of the representative of the company were ascribed to the legal person. One could argue that the doctrines which are related to the criminal liability of a legal person as well as which reflect the gist of the legal reasoning of the law of common law countries could never be applied in the legal practice of the continental Europe. That is not correct. Such European countries as Netherlands and France, which have the continental law legal system, adopted these doctrines successfully. The Art. 51 of the Dutch Criminal Code provides the possibility to bring the criminal charges against the legal persons for apparently any crime that is foreseen in the Code excluding some exceptions [23, p. 157]. Moreover, it should be emphasized that Dutch law rejects the doctrine of identification or the doctrine of direct liability and accepts the concept of „collective knowledge“ or aggregation which is purely the product of common law legal system doctrine and case law or if to be more precise the outcome of the case law of the United States. Thus, the Dutch experience is a fruitful example, which shows how corporate criminal liability doctrines that were elaborated in the common law country may be adopted in the country having a continental legal system. Besides, it is a good illustration for opponents of the corporate perpetrator because through the aggregation model the mind and will as well as acts of the individual are being ascribed to the company pursuant to the Dutch criminal law.

2 The main doctrines are the vicarious liability (respondent superior) doctrine, direct liability doctrine (the doctrine of corporate organs), the doctrines of identification and aggregation.
The scholars of law state that at least theoretically the traditional maxim of *societas delinquere non potest* has been abandoned by France [18, p. 23]. The Art. 121 – 2 of the Nouveau Code [20] provides the legal possibilities to hold the legal persons criminally liable for the commission of crime. Accordingly, it could be stated that a legal person may be deemed as a perpetrator pursuant to the French criminal law and the dilemmas of the attribution of individual’s acts, mind and will to the legal person were perfectly solved by realising the mentioned corporate criminal liability models.

The detailed survey of the existing criminal law legal practice throughout some countries legal systems allows us to state that the attribution of individual’s acts and minds to the legal person is not a legal difficulty any more.

Secondly it has to be emphasized that though the corporation is soulless it nevertheless is able to have its mind and will. There is no need to invent the separate theory of corporate personality in the arena of criminal law as well as it should be understood that the reality (organic) theory of a legal person might be successfully relied on. If a corporation is considered to have its personality in company (civil) law why isn’t it able to have it in the criminal law? Is this department of law privileged or does it have the special immunity from the main trends and legal development? The answer is definitely negative. Seeking to establish the conception of corporate fault and to consider a legal person as a perpetrator all the features of a legal person from company (civil) law to the criminal law should be transferred and it has to be deemed as a separate person, which is able to have its independent will, purposes and objectives. These goals might be legal or even illicit related to the wrongdoing and the commission of crimes. They might differ from the purposes of its members if they are illicit. As C. C. Abbot observed correctly „it follows that a corporation has a personality of its own distinct from the personalities which compose it, a „group personality“ different from and greater than its constituent elements in the sense that the whole is greater than the sum of the parts“ [15, p. 2]. Meanwhile Gary Slapper and Steve Tombs affirm that „organisations are the sites of complex relationships, invested with power and authority, between individuals and wider groups, between these groups themselves, between these groups and something called „organisation“, and between the organisation and its various operating environments, key actors within the latter being other organisations“ [36, p. 17].

Thus, the company is being held as a *sui generis* perpetrator, which may be liable for the criminal behaviour and may be guilty of doing the criminal offence pursuant to the criminal law of both common law and continental law legal systems. In order it to be held that the company committed a crime it must be registered, *i.e.* incorporated as well as its organs must be formed. Otherwise it would not be possible to ascribe the criminal act of an individual to a company because simply it would be impossible to state that it had existed before the individual committed the crime.

Accordingly, in a modern criminal law the doctrine of fiction of a company should be shifted to the theory of reality (organic theory) of a legal person. As R. C. Kramer observed correctly „by the concept of „corporate crime“, then, we wish to focus our attention on criminal acts (of omission or commission) which are the result of deliberate decision making (or culpable negligence) […]“. These decisions are organizationally based – made in accordance with the normative goals […], standard operating procedures, and cultural norms of organizations […]“ [27, p. 18]. It should be also noticed that the science of criminology acknowledges the
corporation as a perpetrator and analyses its criminal personality [36]. John Braithwaite pointed out that „a criminology which remains fixed at the level of individualism is the criminology of bygone era“ [16, p. 148]. This means that the legal person as a perpetrator is being recognized more widely and not only within the realm of the theory of criminal law. That shows the signs of the legal development of criminal law as well as the concept of a legal person as a perpetrator and the recognition of the organic doctrine of a legal person in the mentioned department of law.

The arguments that a legal person cannot be personally liable for the criminal behaviour and that it cannot be punished properly are not well-founded as well. The corporate personality of a legal person enables it to be deemed fully liable for the commission of crime. The further argumentation is not needed bearing in mind the previous legal reasoning provided in this work.

What concerns the proper and justifiable punishment of the criminal behaviour of the company it should be noticed that there are quite enough of forms of criminal punishments in the modern criminal law. These punishments can be realized if a legal person commits a crime as well as they guarantee that the objectives of the criminal punishment will be reached.

The argument provided by the opponents of the concept of a corporate perpetrator that it is difficult to prosecute it is not correct. In the codes of the criminal procedure of many countries this problem has been solved successfully by providing the rules of the prosecution of legal persons. Usually companies are represented by their representatives (managers, members, etc.) or the persons, who are empowered to represent the legal person before the court or investigator. Moreover, Gilbert Geis and Joseph Dimento while discussing the possibilities to prosecute the legal person observed that one of the advantages of the concept of a legal person as a perpetrator is that corporations are easier targets for criminal prosecution [25, p. 81 – 82]. John Coffee argues that there is an axiom which shows that were penalties are high, individuals will fight while firms will settle [25, p. 81]. So this means that when a corporation is being threat with a criminal penalty it usually is induced to cooperate and even to provide the evidence that is important for the investigation. Thus, the legal doctrine and practice acknowledge the fact that in particular cases or even maybe usually the corporate perpetrator is „better“ than the „flesh and blood“ defendants. This analysis denies the statement that the criminal procedure „inconveniences“ form the obstacles for the concept of corporate perpetrator.

**Conclusions**

The legal development of corporate personality has gone its long way. From the very ancient times the doctrine of fiction of a legal person was entrenched in the legal reasoning of the scholars of law. It took many years to shift it at least to some extent in order the company could be recognized as having its own corporate personality.

The modern company (civil) law doctrine of the most legal systems acknowledges a legal person as an individual subject of law and as a distinct person from its members. Accordingly, the features of the company are distinguished which enables to deem it as a person having an absolute *locus standi* and to act in its own will.

The analysis of the modern company law doctrine and practice allows us to state that the reality (organic) theory changed the theory of fiction, which was strongly upheld by the scholars. This trend should be considered as a positive one because it satisfies the needs of economical and legal development: a modern
corporation has its own property, if it is a multi-
national or a very big company usually it has the 
economical and even a political influence to the 
life of the society. Consequently, the organic 
doctrine allows us to deem the corporation of 
what it really is: as a *sui generis* person having 
its mind and will as well as purposes, objectives 
and even culture.

The legal personality is recognised in the in-
ternational law as well as in the law of European 
Community. This means that in the nearest future 
the organic conception of a legal person should 
become even more vital than it is nowadays.

The idea of corporate personality is less de-
veloped in the criminal law than in the company 
(civil) law. There are still many opponents of 
the corporate criminal liability.

The main obstacles to shift their legal reason-
ing are the fundamental principles of the crimi-
nal law such as personal criminal liability for 
the commission of crime, moral blameworthi-
lessness, physical existence of a perpetrator, etc.

Analysis of the organic doctrine of legal per-
sons allows us to state that there is a legal tech-
nique, which enables to charge the company for 
the commission of a crime. The theoretical un-
derpinnings of corporate criminal liability are 
successfully used in many legal systems where 
companies can be held criminally liable. These 
doctrines of corporate criminal liability enable 
to base this form of liability both theoretically 
and practically.

The concept of corporate perpetrator and its 
criminal personality is recognized by the crimini-
ology science. These trends reflect the deeper 
development of the concept of the personality of 
corporate perpetrator.

Thus, the legal person may and should 
be deemed as a person which can have the 
will and mind of its own and which is able to 
commit a crime or act illicitly and be the perpe-
trator. It should be emphasised that notwith-
standing the fact that the legal person is repre-
sented by its organs and agents it still must be 
considered that the corporation acts directly and 
that the perpetrator of a crime is a corporation 
itselves, not its members or representatives of or-
gans.

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Santrauka

Straipsnyje siekiama pagrįsti ir toliau plėtoti juridinių asmenų baudžiamosios atsakomybės koncepciją Lietuvos baudžiamojoje teisėje. Straipsnio autorius argumentuoja, kad šiuolaikinė daugelio pasaulio teisinių sistemų įmonių teisė juridinį asmenį laiko teisės subjektu, turinčiu savo identitetą.

Neatsižvelgiant į tai, kad šiuolaikinė įmonių teisė juridinį asmenį laiko teisės subjektu, turinčiu savo identitetą, daugelio valstybių baudžiamojo teisė, ypač kontinentinės teisinės sistemos valstybėse, labai nenoriai priėmė įtaisą faktą, kad įmonė gali turėti lygiai tokią pat identitetą ir baudžiamojoje teisėje. Taigi straipsnio autorius siekia pagrįsti nuostatą, kad baudžiamojoje teisėje juridinis asmuo turėtų būti laikomas subjektu, turinčiu tokią identitetą, koks yra įmonių teisėje. Be to, kaip teigia autorius, kiekviena įmonė turi savo korporatyvią kultūrą ir valią, kuri gali būti pasitelkiama padaryti neteisėtas ir nusikalstamas veikas.

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