

# Comparative legal analysis of the criminal law of some developed countries from the standpoint of regulating the liability of legal entities

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## ABSTRACT

This article discusses the possibility of introducing into the criminal legislation of Uzbekistan the institution of criminal liability of legal entities, in particular, examples are given from the criminal law of countries such as France and Spain. In addition, based on an analysis of the norms of the Criminal Code of these countries, the author has submitted proposals and draft rules for introducing the responsibility of legal entities in the Criminal Code of Uzbekistan.

## Keywords

Criminal liability, legal entity, punishment, guilt, subject of crime, security measure.

*Article Received: 10 August 2020, Revised: 25 October 2020, Accepted: 18 November 2020*

## Introduction

The formation in Uzbekistan of a legal democratic state with a strong civil society in the context of globalization and a rapidly changing modern world stimulates the activation of the economic component of public life, the responsibility of state bodies for the implementation of the tasks of the country's socio-economic development, including by optimizing regulatory and prohibitive norms.

With the implementation of the judicial reform, the structuring of the law enforcement system, and the specialization of its elements, the need to develop the theoretical foundations of law enforcement, especially in the field of prevention and prevention of economic crime, becomes more obvious, since today it is this area that is most developed, and the fight against it is only by forces law enforcement agencies have almost exhausted themselves; it is necessary to create new legal mechanisms for counteraction.

## Research Methods.

The main research method, which was used in the preparation of this scientific article - comparative legal analysis, methods of studying normative acts, logical methods (induction, deduction, synthesis) were also applied.

## The regulatory framework for the criminal liability of legal entities

As the Head of our state rightly notes, "...there are various threats and challenges that we have not previously encountered..."[1]. One of such threats is that the scientific and technological progress of the 21st century created new technologies (biological, space, nuclear, radiation, chemical, industrial, etc.), the widespread use of which (often uncontrolled) by legal entities creates an environmental threat to humans and its habitat on planet Earth. Negative consequences affect the social sphere of society, reflecting on the spiritual climate of society, the moral and

psychological state of a person, the rule of law, and the rule of law in the state. The "activities" of other legal entities may be in clear conflict with the constitutional rights and freedoms of both the individual and the interests of the whole society and the state. And the question here is not only and not so much about ecology, but about the "activity" of political, religious, extremist, terrorist and criminal associations, parties, movements, hiding under the guise of legal entities. They can cause considerable harm to the individual, his rights and freedoms, the interests and values of civil society, peace, law and order in the state.

It is quite understandable why the issue of the criminal liability of legal entities for harm and for illegal activities that could cause such harm to an individual, society and the state began to be discussed more and more persistently in the world community of different countries of the world and in world legislative systems. Moreover, some legislative systems in the world positively resolve this issue and regulate the criminal liability of legal entities in their legislation (for example, the USA, France, Spain, China). Other legislative systems, including those of our country, do not contain provisions on the criminal liability of legal entities.

In this regard, certain shifts are already being planned in the Republic of Uzbekistan to change this situation. So, in the Decree of the President of the Republic of Uzbekistan dated May 14, 2018 No. PP-3723 "On measures to radically improve the system of criminal and criminal procedure legislation"[2], one of the main drawbacks of the existing practice is the lack of implementation of criminal law institutions recognized in international practice, including the lack of criminal liability of legal entities.

In addition, an important incentive for the introduction of norms regarding the criminal liability of legal entities in the national legal system of Uzbekistan is the need for the republic to fulfill its international obligations. This circumstance is caused by the fact that an increasing number of international acts in various areas of the fight against crime directly or indirectly affect the criminal liability of legal entities, which, in turn, is explained by the sharply increasing globalization of criminal threats.

For example, the United Nations Convention adopted on October 31, 2003 is the normative basis of international anti-corruption policy. It was ratified by the Republic of Uzbekistan in 2008, in 2010, Uzbekistan joined the OECD Istanbul Anti-Corruption Action Plan.

According to Art. 26 of this Convention, each State Party shall take such measures as, taking into account its legal principles, may be required to establish the liability of legal entities for participation in crimes recognized as such in accordance with the Convention. It is also expressly stated that, subject to the legal principles of the State Party, the liability of legal entities may be criminal. Each State Party, in particular, shall ensure that legal entities prosecuted in accordance with the said article are provided with effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary ones.

Also, the UN Convention against Transnational Organized Crime (ratified by the Republic of Uzbekistan in 2003) in Art. 10 expressly admits that, subject to the legal principles of the State Party, the liability of legal entities may be criminal, civil or administrative.

In paragraph 1 of Art. 5 of the International Convention for the Suppression of the Financing of Terrorism of 12/09/1999 (entered into force for the Republic of Uzbekistan on 05/12/2001), it is noted that each state party, based on the principles of its internal law, takes all necessary measures to attract a legal entity located on its territory or established by its laws, to liability in the event of the commission by an individual responsible for managing this legal entity, which acts in its official capacity, of a crime. The article specifically notes that such liability may be criminal, civil or administrative in nature.

Thus, a course has now been taken towards the gradual study of the possibilities of introducing the responsibility of legal entities and the rejection of the views established in theory regarding the impossibility of holding accountable without real and objective guilt.

### **Scientific controversy regarding the issue at hand.**

According to the currently widespread criminal law doctrine of Uzbekistan, like many post-Soviet countries, it is impossible to prosecute legal entities. Since one of the main elements of the crime is missing - the subjective side (guilt in the form of intent or negligence). At the same time, some scholars point out another reason - in their opinion, those types of punishments that can be applied to legal entities (monetary fines, confiscation of property, as well as the prohibition of certain activities) should be applied in administrative order. The administrative procedure for applying punishment is faster and no less effective[3].

Many scholars who advocate introducing the institution of criminal liability of legal entities into the legislation (S.G. Kelina, A.V. Naumov, A.S. Nikiforov, V.S. Ustinov, S.I. Nikulin, and others) especially addressed attention to the significant harm that is caused, for example, when environmental crimes are committed. The emphasis was on the fact that existing sanctions in civil and administrative legislation are ineffective, and therefore it is necessary to resolve this issue in the framework of criminal law. They did not reject the prosecution of crimes committed and specific individuals. So, about this A.S. Nikiforov writes

that for all crimes that are prepared, committed or sheltered by the participants (members) of the criminal organization, the latter bears criminal liability directly. At the same time, this does not exclude, but presupposes the criminal liability of participants in a criminal organization for crimes personally committed according to the organization's plan[4].

Nevertheless, there is no doubt that the criminal prosecution of a legal entity found guilty of a crime has a specificity in terms of procedural protection of its interests. So, the procedural aspects of the defense of the accused, examined by some scientists, by conducting a forensic medical examination (for recognition as insane) are, of course, not applicable to a legal entity[5].

At the same time, despite, at first glance, quite original and interesting thoughts and ideas about criminalizing legal entities considered as subjects of a crime in our criminal law, they did not have universal support, both among legal scholars and practical workers. And nowadays, supporters of the non-recognition of the criminal liability of legal entities as subjects of a crime have quite a lot of compelling arguments against fixing this institution in the current criminal law. So, Russian scientists N.F. Kuznetsova, M.I. Bazhanov, L.D. Ermakova, T.V. Kondrashova, L.K. Saviuk et al. Emphasize that the criminalization of legal entities does not comply with the cornerstones of criminal law - the principles of personal and guilty liability. Criminal law connects responsibility with the ability of the person who committed the crime to give an account of their actions and to manage them, which only people possess.

"It is impossible to combine the principles of guilt and personal responsibility with the innocent and collective responsibility of legal entities," Professor N.F. Kuznetsova. - Guilt is always nothing but a mental attitude of a person to his deed. Legal entities do not have this fault"[6].

It should also be noted that many scientists believe that bringing a legal entity to criminal liability involves great risks. Firstly, out of the blue, you can lose huge amounts, which will lead to bankruptcy of the enterprise. Secondly, the negative consequences can lie on ordinary workers who are not related to the criminal activities of managers. Thirdly, the criminal liability of legal entities can be used as a way of political repression against opposition parties and public organizations[7].

In addition, a study of the procedural aspects of criminal prosecution, for example, in the CIS countries, indicates that these codes contain only a procedural procedure for criminal prosecution of individuals[8].

Nevertheless, we believe that the above opinions and ideas are already somewhat outdated, since they do not take into account the current trends of the foreign criminal law doctrine, which provides for flexible ways to hold legal entities accountable[9]. Today, this institution is more than successfully working in many foreign countries.

### **Criminal Law Review of foreign countries**

Currently, the legislation of many countries criminalizes legal entities, and the number of such countries is growing[10].

So, according to the French Criminal Code, legal entities can also be subjects of criminal liability. The introduction of

the latter into the field of criminal law was associated with a number of reasons, which will be discussed below.

In French criminal law literature, the authors do not, as a rule, single out a special section on the characteristics of the subject of a criminal act. This is due to the fact that the subject as such is not an element of the act (in contrast to national criminal law, where the subject of the crime is an element of *corpus delicti*). Matters of age of criminal liability, insanity, etc. analyzed by French lawyers in relation to the characterization of the moral element of a criminal act.

The Criminal Code also does not contain any special chapter on the subject of the crime. True, in the chapter of the first section II "On criminal liability" of Book I of the Criminal Code, there are a number of norms that are relevant to one degree or another, in particular: Art. 121-2 - on the liability of legal entities, Art. 121-4 - on the perpetrator of the criminal act, Art. 121-7 - about accomplices. The issues of insanity are regulated in another chapter, "Grounds for not criminalizing or mitigating criminal liability," where insanity is called, along with coercion, a legal error, execution of an order, necessary defense, etc., a circumstance that excludes criminal liability[11].

In accordance with the Criminal Code of 1992, any legal entity, with the exception of the state, can be prosecuted. First of all, we are talking about legal entities of private law: commercial companies, various associations, foundations, and the like civil-law associations, as well as private groups of legislative origin, and trade unions. Foreign legal entities of private law can also be held liable in cases where the jurisdiction of the French courts extends to committed acts. This is the first category of legal entities.

It is interesting that legal entities can be prosecuted both along with individuals and independently. Article 121-2 of the Criminal Code indicates that the liability of a legal entity does not exclude the liability of an individual, "an executor or accomplice of the same actions". In this case, one can see here a violation of an important principle of criminal law: one cannot be punished twice for the same thing. However, French lawyers do not see a violation of this principle in the case when, along with the legal entity, the direct executor of criminal acts (inaction) is also responsible. For example, as a result of fraud of one of the representatives of the bank, which is not its head, the bank receives a large profit. Here, joint responsibility of both the bank and the representative, the objective performer of the criminal act, is quite possible. French lawyers see a violation of the above principle only when, despite the commission of fraud by a representative, his manager is liable along with the legal entity due to the manager's responsibility in France for the actions of his subordinates (responsibility for other people's actions)[12].

The liability of legal entities, according to the Criminal Code, is determined by the presence of two circumstances: 1) a criminal act must be committed in favor of a legal entity and 2) its head or representative. The commission of a crime "in favor", or, in other words, "into the account" of a legal entity means that as a result of the commission of a criminal act, the legal entity receives certain benefits, as a rule, this is a property benefit, although the other "benefit".

A prerequisite for the criminal liability of a legal entity is the commission of a criminal act by its head or representative. The commission of an act, although in favor

of a legal entity, but by other persons: technical workers, maintenance personnel, ordinary employees who are not, according to regulatory enactments and constituent documents, representatives of a legal entity, does not entail criminal liability for the latter.

The responsibility of legal entities in France does not occur for all criminal acts, but only for those that are expressly stated in the normative act. An analysis of the norms of the Criminal Code allows us to conclude that the French legislator has criminalized legal entities for a wide range of criminal acts: for crimes against humanity, unintentional encroachments on life, encroachments on the inviolability of a person, direct putting a person in danger, illegal distribution of drugs, discrimination, pandering, conducting experiments on people, infringement of privacy, false denunciation, "computer" crimes and misconduct, all types of theft, evil the use of trust, the organization of battle groups, attacks on the fundamental interests of the nation, terrorism, counterfeiting and some others. For any of the listed acts committed in favor of a legal entity by its head (representative), it is subject to criminal liability[13].

So, recently the criminal liability of legal entities introduced in Spain. The relevant changes were made to the Spanish Penal Code by Organic Law 5/2010 of June 22, 2010[14]. With this law, the General part of the Criminal Code of Spain, called "Book I" General Provisions on Crimes and Misconduct, Persons Subject to Criminal Responsibility, Punishment, Security Measures and Other Consequences of Criminal Offenses," is supplemented by Art. 31 bis.

Moreover, the Spanish Criminal Code establishes quasi-criminal liability of legal entities, i.e. application of security measures to them. So, Art. 194 of the Criminal Code provides for the opportunity for preventive purposes to close (temporary or permanent) institutions or individual premises intended for public visits, if they were used to commit crimes related to prostitution.

Part of the first art. 31 bis established that in cases provided for by articles included in Book II "Crimes and Punishments" of the Criminal Code of Spain (an analogue of the Special Part of the Criminal Code of the Republic of Uzbekistan), legal entities are criminally liable for crimes committed on their behalf or at their expense or for their benefits (in their favor) by individuals (persons performing managerial functions; legal representatives of a legal entity; as well as by other persons subordinate to the above persons and acting at the expense or in favor of a legal entity individual if it did not provide a sufficient degree of control over their actions, taking into account specific circumstances).

According to the fifth part of Art. 31 bis of the Criminal Code of Spain, the provisions regarding the criminal liability of legal entities do not apply to the state, territorial and institutional authorities, regulatory bodies (organizations), state (public) business bodies and organizations (agencies and institutions), political parties and trade unions, international public law organizations, as well as other organizations that exercise state powers (state power), as well as state-owned companies (commercial organizations), pursuing state policy or providing services of public economic interest.

Article 33 of the Criminal Code of Spain is supplemented by part 7, which establishes penalties that can be applied to

a legal entity. According to the amendments made, in accordance with the Criminal Code of Spain, such measures are:

- a) a penalty proportional to the damage caused or a quota penalty;
- b) liquidation of a legal entity;
- c) suspension of activities of a legal entity for a specified period, but not more than five years;
- d) the closure of divisions, representative offices and institutions of a legal entity for a specified period, but not more than five years;
- f) a ban on future activities in which the crime was committed or favorable conditions were created for its commission or concealment. This prohibition may be final or temporary. If the ban is temporary, then it cannot exceed a period of fifteen years;
- f) deprivation of the right to receive subsidies and assistance from the state, as well as the right to enter into contractual relations with the public sector (the right to conclude transactions in the public sector) and enjoy tax benefits and incentives or benefits and incentives from the social insurance system for a certain period of time, which may not exceed fifteen years;
- g) judicial control to ensure the rights of employees (employees) or creditors for the required period, but not more than five years.

Legal entities are subject to criminal liability only in the event of the commission of certain offenses provided for in Book II of the Criminal Code of Spain, for the commission of which criminal liability has been established for legal entities. Such crimes include, but are not limited to:

- trafficking in persons for the purpose of forced labor, sexual exploitation or organ harvesting (art. 177 bis);
- crimes related to prostitution (arts. 187–189 bis);
- fraud (arts. 248–251 bis);
- punishable insolvency, including insolvent bankruptcy (arts. 257–261 bis);
- crimes related to intellectual and industrial property, with the market and consumers (Articles 270–288);
- crimes against the state treasury and social security (arts. 305–310 bis);
- crimes against natural resources and the environment (arts. 325–328);
- crimes related to nuclear energy and ionizing radiation (Articles 343, 345);
- crimes against public health related to drugs and toxic substances (Articles 368–378);
- falsification of credit or debit cards or traveller's checks (Art. 399 bis);
- terrorism and crimes related to the sale and storage of weapons, ammunition or explosives (Articles 563–580).

Also, the number of crimes for which the Spanish criminal law provides for the possibility of criminalizing legal entities includes drug crimes[15].

It is worth noting that in part 2 of article 130 of the Criminal Code of Spain provides that the transformation, merger, acquisition or separation of a legal entity does not lead to the repayment of its criminal liability. The latter transfers to the company or companies into which the legal entity is transformed, with which it merges or with which it is acquired. Including responsibility is transferred to the company or companies resulting from the separation of the

legal entity. A judge or court has the right to mitigate the transfer of punishment to a legal entity depending on the degree of connection of the initially guilty legal entity with the new legal entity.

Fictitious or purely external dissolution of a legal entity does not lead to the repayment of criminal liability. In any case, it is considered that a fictitious or purely external dissolution of a legal entity takes place if its business continues and its customers, suppliers and employees, or a substantial part thereof, are retained.

An analysis of these norms shows that as a result of amendments to Spanish law introduced in 2010, the necessary regulatory framework was created to bring legal entities to criminal liability, which ensures the inevitability of such liability even in cases of attempts to evade it by transforming legal entities.

## Results and conclusions.

Firstly, the introduction of criminal liability of legal entities is objectively determined by changes in the criminal situation throughout the world;

secondly, a legal entity as a subject of criminal liability cannot be recognized as public law entities (state authorities, self-government of citizens, foreign government bodies, international organizations) and state institutions that carry out social functions by special authority;

thirdly, we consider it inappropriate to hold legal entities accountable in the absence of proper internal control measures in the organization, which contributed to the commission of a criminal offense in favor of the legal entity. Because this circumstance can lead to unjustified and unfair criminal prosecution of legal entities.

Fourth, regarding the criminal liability of legal entities in the Republic of Uzbekistan, we believe that it is necessary to talk not about punishments (punishment is possible only if there is guilt), but about security measures.

In view of the foregoing, we propose introducing the following articles into the General part of the Criminal Code of the Republic of Uzbekistan:

### Article 17<sup>1</sup>.

#### Application of security measures in relation to legal entities

With respect to legal entities, with the exception of the state and other public entities, security measures are applied in cases provided for by this law or other legislative acts for criminal acts committed in their favor by bodies or representatives of a legal entity

The application of a security measure in relation to legal entities does not exclude that for individuals - performers or accomplices of the same acts.

### Article 43<sup>1</sup>. System of security measures for legal entities

1. With respect to a legal entity, with the exception of state bodies and institutions, criminal legal measures provided for by this Code may be applied in the event of involvement in a criminal offense, which is committed:

- a) on behalf of, on behalf of, or in the interests of a legal entity in order to acquire a legal entity benefits of a property



nature, including obtaining or increasing profits, avoiding or reducing losses, evading property or other liability prescribed by law, acquiring property rights or discharging property nature;

b) by an individual exercising organizational and administrative or administrative functions on the basis of the powers of a representative office, making decisions on behalf of a legal entity or exercising control within a legal entity, acting individually or as part of a body of a legal entity, as well as carrying out actual management in it;

c) in the absence of proper internal control measures in the organization, which contributed to the commission of a criminal offense in favor of a legal entity.

2. The application of criminal law measures in relation to a legal entity does not exclude:

criminal prosecution of an individual who has committed a criminal offense;

the application of other liability measures in accordance with the law.

3. A legal entity shall be subject to criminal legal measures in the event that a criminal offense has been committed in the interests of the given legal entity or when the criminal offense or its [consequences] [results] have been committed, authorized, approved or used by the body or person administering the legal face.

4. The release of the responsible person from criminal liability is not the basis for the release of the legal entity from the application of criminal legal measures.

5. The application of criminal legal measures to a legal entity does not exclude the criminal liability of an individual for the same criminal offense.

6. The application of measures of criminal law does not relieve a legal entity from the obligation to compensate for the damage caused by a criminal offense, as well as the application of other measures of responsibility established in relation to it by law.

7. In the event of the establishment of circumstances that exclude the guilt or unlawfulness of the act of an individual, the legal entity shall be exempted from the application of criminal law measures.

We believe that the consideration of this issue in the near future will seriously change the criminal situation in Uzbekistan, as well as create opportunities for a more specific and targeted response to criminal facts involving legal entities.

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