THEORETICAL AND PRACTICAL ISSUES REGARDING THE CRIMINAL LIABILITY OF THE LEGAL PERSON

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ABSTRACT: *It is observed that the criminal norm is vaguely expressed and practical formulas are offered for a systemic interpretation.*
A thesis with practical consequences is defended: criminal liability with repressive effects has no purpose in itself; it is a form of complementary liability, of punishing some recognized subjective civil rights; the purpose of criminal repression is not to destroy the subjective civil right, but to protect it; for this reason, any procedure for prosecuting a legal person must identify and define the subjective rights that are functional under the organization of a subject of collective law and protect them; in order to avoid errors, the interpretation of the uncertain criminal law will be made only in order to fulfill this social purpose.

KEYWORDS: *criminal liability of the legal person, liability for one's own deed, liability for the deed of another, subjective liability, objective liability, uncertainty of the criminal law.*
JEL Code: *K 14*

1. PROBLEMS OF CRIMINAL LEGISLATION

The criminal liability of the legal person has been and remains a controversial doctrinal issue that poses practical problems.

The institution is briefly regulated; problems arise and accumulate, in the end, with appropriate responsibilities, at the expense of those who apply the rules. [1]

The atypical situations that appear in practice leave the impression of a regulation not integrated in all legal institutions; the confusion of those who apply the criminal rule is also increased by the fact that in a relatively short period of time, the rules have been modified - in their wording - on an essential element [2]; in the first version, it was

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[1] Article no 135, paragraph 1 of the Criminal Code provides: "the legal person, except for the state and public authorities, is criminally liable for the crimes committed in the performance of the object of activity or in the interest or on behalf of the legal person"; this, after, in advance, article no 19/1 paragraph 1 of the old Criminal Code provided: "legal persons, except the state, public authorities and institutions that carry out an activity that cannot be subject to private law, are criminally liable for crimes committed in the performance of the activity or in the interest or on behalf of the legal person, if the deed was committed with the guilt provided by the criminal law "

[2] The old regulation is from 15. 07. 2006, Law no. 278/4. 07. 2006, regarding the amendment and completion of the Criminal Code, published in the Official Journal, Part I, no. 601/12. 07. 2007; the new regulation

explicitly mentioned that the liability of the legal person can be engaged only "if the deed was committed with the guilt provided by the criminal law"; In the current formula, this text has been omitted.

Basically, the legislator avoided describing - in detail - the model, exactly in the field of greatest interest, causing confusion among practitioners.

The Constitutional Court - debating an exception related to the conformity of art. 135 of the Criminal Code, precisely from the perspective of the sufficiency of the text [3]. - noted, however, that the expression of the norm is clear enough for the institution to be valid, after which it enunciated some enlightening principles [4] ; but for practitioners, the difficulties of understanding and, especially, of application, have not completely disappeared.

The older Romanian doctrine was very categorical: such a model - of criminal liability of the moral person - would be incompatible with the Romanian legal system which, by tradition, can only accept a form of subjective liability: there can be no criminal liability without guilt (Costin, 1974); all in a context in which the liability of a subject of collective law was associated with an objective liability; recent doctrine (Streteanu & Chiriță, 2007)(Jurma, 2010) has observed the commands - social and political - of the time, explained its purpose and now justifies its existence; therefore, theoretical expressions abound in descriptions of external models, which are otherwise welcome[5]

There was also a relatively intermediate approach: although Romanian law did not allow objective criminal liability, it was not excluded the possibility that hidden forms of it would appear in the practice of the judiciary (which could then theoretically substantiate - in our understanding - a criminal liability of the legal person)) that is, the model - of objective liability - could be produced indirectly, in fact, as a result of a broader understanding of judicial presumptions of guilt and guilt, avoiding the careful investigation of the conditions under which the pursuit of criminal act took place [6](Antoniu , 1995)

The jurisprudence - published and, especially, the unpublished one - is contradictory and so many times, imprecise and inconsistently motivated, in some places, chaotic, if not, sometimes, absurd; the effect of this reality, there are obvious inequities badly perceived, especially in the business environment [7]

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applies from 1st February 2014, Law no. 187/2012 for the implementation of Law no. 286/2009 on the Criminal Code, published in the Official Journal, Part I no. 757 of November 12, 2012.

[3] Article 23, paragraph 12: "no punishment can be established except under the conditions and under the law"

[4] See below under note no. 10.

[5] However, a commited practitioner will always ask the same question: what foreign model fits our legal system, if we take into account the diversity of approaches and substantiations?

[6] "Objective liability may be hidden when, in the current interpretation, the judiciary empties the forms of guilt of any content or transforms them into mere labels, without a thorough analysis of the psychic processes underlying them."; for a successful synthesis in the field see: Laura Maria Stănilă, *Discuții referitoare la un subiect tabu: răspunderea penală obiectivă*, Dreptul, 1/2013, pp. 152 - 178.

[7] For example: it is difficult to understand and explain why, in identical, not similar situations, in terms of tax evasion, in most cases, companies are not sued along with fraudulent directors; in rare cases, by way of exception, in isolated contexts, when the damage is less, the company is accused and tried; similar situations are encountered in cases in which crimes related to work-related accidents, occupational accidents, followed by personal injury or death are investigated or prosecuted; unpublished practice gives the impression - all too

2. THE EXPLANATORY FORMULATIONS OF THE CONSTITUTIONAL COURT

Whatever the theory holds, however, the nature of the legal person's criminal liability is vaguely described by law; the text is limited to indicating that legal persons may be criminally liable for crimes committed "in the performance of the object of activity or in the interest or on its behalf"; it is specified, then, that the liability of the collective entity does not exclude "the criminal liability of the natural person who contributed to the commission of that deed".

The Constitutional Court noted [8] that the model of accountability corresponds to a need for current criminal policy [9]; the institution was connected - through the expressions of motivation - to the theoretical explanatory and justifying concepts of the time: the moral person has a direct responsibility, for his own deed, for a deliberate policy of the enterprise, which would allow him to be held criminally liable whenever a crime has been committed, without it being mandatory to identify the natural person who caused the harmful action (inaction); this, in opposition to the theory of indirect responsibility, which understands the responsibility of the collective entity "by ricochet": the objective and subjective manifestation of the suspected represents "the objective and subjective manifestation of the moral person himself".

Moreover, it was noted that "not every crime can attract criminal liability of the legal person"; the distinguishing criterion is given by the concept of "corporate crime": it is necessary to have "a link between the deed and the legal person held accountable for its commission"; that is, in the court's understanding "a personal connection cannot alone justify the criminal liability of the legal person", so that it must be doubled by a real, objective connection, which is related to the attributions or purpose entrusted functions ".

Therefore, the criminal liability of the moral person is general, and can be attracted by any of its activities in which "one can identify a subjective element of its own, different from that of the natural person who actually performs the material act."

More precisely, the court of constitutional contentious develops some working hypotheses:

First, liability can be exercised "by any natural person acting on its behalf, not just by the governing bodies"; however, "it is necessary that the offenses be committed in the performance of the object of activity or in the interest or on behalf of the legal person"; that is, there is criminal liability if "a body, agent or representative has committed an offense on the occasion of carrying out the activities that, according to the law, the articles of incorporation or the organization and functioning, the legal person

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often - that suing a legal person is the result of an intellectual enterprise venture rather than the result of a legal logic.

[8] Decision no. 156/27. 03. 2018 of the Constitutional Court, published in the Official Journal, Part I, no. 474/8. 06. 2018

[9] In the words of the constitutional court: "by virtue of the free choice of criminal policy" of the legislator who "decided to waive the requirement of personal connection and to condition the criminal liability of the legal person exclusively by the existence of a real, objective link between the legal person and the crime which is imputed to him "..

may carry out"; that is, there is criminal liability if "*a body, agent or representative has committed an offense on the occasion of carrying out the activities* that, according to the law, the articles of incorporation or the organization and functioning, the legal person may carry out".

The liability is also incurred in all cases where "*the benefit* - material or moral - obtained by the crime belongs, in whole or in part, to the legal person, although the crime is not committed in the achievement of the object of activity"; if the moral person has benefited, at least in part, from the benefit of the crime - which has also benefited, in part, the author, the natural person - "it becomes possible that the criminal liability of the legal person may be incurred *by other individuals*[10]

The interpretation is further summarized and, equally, explanatory, so that there is no ambiguity, in another case: an offense "is committed on behalf of the legal person if the natural person who performs the material element of the act acts as body, agent or representative of the legal person, officially invested (legal or conventional), without the act being committed in the performance of the object of activity or for the benefit of the legal person concerned"; in other words, in order to incur the criminal liability of the legal person - as we understand it, when operating outside the object of activity or without the entity benefiting - it is necessary that the one acting acts as a "employee", ie " body "or" representative "of the legal person.

Conversely, the analysis of the latter alternative requirement leads to a conclusion identical to the first, since only the person having a mandate can act "on behalf of" the legal person, being either its "body" or "representative".

Therefore, a number of rules are enunciated, of landmarks, however of great generality, detached by interpretation, which then become rules for understanding the provisions of art. 135 Criminal Code; regardless of the doctrinal source, the formulation of the norm, such rules become operational, mandatory.

3. CONCEPTUAL CLARIFICATIONS NECESSARY FOR INTERPRETATION

From our point of view, this model of criminal liability cannot be deeply analyzed outside the general system of Romanian law - with its particularities - nor outside the civil logic that substantiates the institution of the legal person.

Providing a credible answer means - practically - connecting to the very mechanisms essential to the Romanian legal system.

1. I have always insisted on the idea that repression, intimidation, by operationalizing the criminal liability - whatever its ideological origins, whatever the concrete needs of an effective criminal policy[11], in any historical period - cannot be done in an abstract way, in an independent formula, torn from the reality and flexibility of the private law; for this reason, I understand that repressive approaches cannot - in

[10] Can we also be held responsible for the deeds of the persons other than those who have the quality of governing body, representative, employee?

[11] For developments on the European commands of a criminal policy that would also explain formulas of objective criminal liability, see: Gheorghe I. Ivan, *Răspunderea penală subiectivă din perspectivă comunitară,* Dreptul nr. 7/2008, pp. 254 – 260.

essence - distort the significance of civil norms, much less the achievement of their economic and social objectives; special prevention is promoted and carried out only for the fulfillment of the purpose of private order, indicated by the protected subjective right; practically, the norm of criminal law - its application - becomes subsequent to the one of private order, complementary to it: the criminal model is imposed as a judicial instrument, with particularities of operation - along with others - which will aim to sanction a certain subjective law [12]

Therefore, the criminal liability of the legal person - whatever its fixed international or national purpose, whatever its doctrinal substantiation - cannot be more than what it is: an instrument of sanctioning a recognized, protected, guaranteed subjective right.

2. Analytically, we see the legal system of private order as a complex set of obligatory models in which the basic cell is the relation of obligation that substantiates a certain subjective right[13]; the subjective right - whatever it may be - is born of a manifestation of will, expressed as the effect of a motivation (in the protection of an interest); the interest is the means by which the subject achieves his goal(Deleanu, 1988), and the goal foreshadows the orientation towards a certain social value(Dogaru, 1986)

The subjective right cannot be realized unless it is sanctioned by legal constraint[14]; practically, the creditor cannot fulfill his purpose if he does not have judicial instruments - provided by the authority - that force the debtor to execute his assumed or imposed task (Djuvara, 1995)

The criminal mechanism is, therefore, only one - of so many instruments to ensure coercion - indisputable, organized in a special way, which will ultimately lead to the implementation of government policies - established to fulfill the purpose for which the subjective right is recognized.

The legal relationship of criminal liability overlaps, therefore, with the initial obligatory relationship and joins other sanctioning mechanisms of subjective law; practically the model envisages a complex ensemble, but which preserves the constituent legal cells, which are in an interconditional relationship and to which a limited autonomy must be recognized (the fundamental report of obligations situated at its turns in complex assemblies as well as overlapping liability reports); at the same time, the constituent cells - in the functioning of the whole mechanism - receive a certain preference, one in relation to the other, depending on the value towards which each (cell) tends to fulfill it.

A legal person - public or private - cannot exist outside such a mandatory model; it is established for a purpose, has specific functional autonomy, engages in mandatory relationships, by performing legal acts or operations, and, very importantly, has a legal regime adapted to the needs for which it appeared.(Rizoiu & Nicolae, 2016)

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[12] For details, Vasile Luha, *Fundamentul obligațional al încadrării penale pentru faptele de producere și deținere în afara antrepozitului de mărfuri accizabile*, conference prepared for the scientific communications session of Sapienția University, March 18-19, 2020, Cluj Napoca.

[13] For theoretical developments and application of the model in other areas, see Vasile Luha, *Pensia de serviciu a magistraților. Consecințe practice rezultate dintr-un examen obligațional*, Dreptul nr. 6/2020, pp. 97-77.

[14] For details on the specific legal relationship of coercion, see Dumitru Cornean, *Constrângerea în drept*, Editura „Dacia Europa Nova", Lugoj, 1999

4. FUNDAMENTAL CIVIL RELATIONSHIP

1. Therefore, we note that the legal person is a reality - which consists of a community recognized as a subject of distinct law - but which, in its functioning, uses a legal device; his will is a fiction and, in the logic of this fiction, its birth and expression (of the will) occur through its governing bodies(Rizoiu, 2019)(Deleanu, 2005)

The mechanism of the birth of the will is complex; there are a number of governing bodies which, in turn, are made up of several persons, natural or legal; finally, those who effectively express the will of the collective entity are also individuals, the only ones capable of a psychic evaluation and expression, producing will; these individuals are involved - by their will - in an organizational set that indicates their position and how they issue the manifestation of will; the fiction consists precisely in the fact that the manifestation of the natural person (organ) is not considered as a personal will but as a will belonging to the community recognized as such; we are dealing with a transfer of will, voluntarily assumed, from a subject with its own psychology to a community, to an abstraction, to a concept (indicating by content the collectivity); everything, with a well-defined purpose and only within the limits of its realization (of the purpose); the operationalization of the idea - of formulating the will of the community - is done by going through a procedure known in advance, by those belonging to this community or by third parties.

Hence the result: legal acts, operations, performed by the individual body organ - is the product of the community itself; and vice versa: the accompanying responsibility - whatever it may be - corresponding to the expression as an organ - should be borne by the whole community.

2. The model of civil liability is regulated more broadly, by versions; the law describes it unequivocally; the wording of the texts did not pose special problems of application: the legal person is civilly liable for the result of certain acts, deeds, in the following situations: 1) for the acts, the deeds, committed by its governing bodies, its own deeds (article no. 218 paragraph 1-2 Civil Code), 2) is responsible for others, for the deeds of its agents (art. 1373 Civil Code)[15] or 3) in very particular conditions if its acts (of the moral person) were assumed through a civil operation of representation (art. 1295 - 1314 Civil Code)[16]

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[15] Art. 218 of the Civil Code: provides: "(1) The legal acts made by the administrative bodies of the legal person, within the limits of the powers conferred on them, are the acts of the legal person itself. (2) In relations with third parties, the legal person is employed by the acts of its bodies, even if these acts exceed the power of representation conferred by the deed of incorporation or statute, unless it proves that third parties knew it at the date of conclusion. The mere publication of the deed of incorporation or of the statute of the legal person does not constitute proof of knowledge of this fact. "
Article 1373 para. 1 of the Civil Code: "The principal is obliged to repair the damage caused by his superiors whenever the deed committed by them is related to the attributions or to the purpose of the entrusted functions"; al. 2: "is the principal one who, by virtue of a contract or under the law, exercises the direction, supervision and control over the one who performs certain functions or tasks in his or another's interest".

[16] The mechanisms for which the representative performs the task signed by the representative - the limits, the regime of assumption, the nuances, the theoretical details, the practical implications - are developed by the civil doctrine; recently, see: I. F. Pop, *Limitele reprezentării voluntare și opozabilitatea*, Revista română de drept privat nr. 2/2018, p. 89; Valeriu Stoica, *Despre puterea de reprezentare*, Revista română de drept privat, nr. 2/2019, p. 35.

When we consider the behavior of the governing bodies, the law specified the conditions of liability both for the situation in which the governing bodies manifest themselves within the limits of their powers and for the situation in which the manifestations are excessive

The civil doctrine detailed and the practice confirmed: the governing bodies have the power of decision, even if this power is not a power of representation; their legitimate manifestation is the manifestation of the legal person[17].

When analyzing the civil liability for the exercise of the power of the representatives of the legal person or of the tasks of the foremen, the doctrine has developed the concepts that designate the prerogatives of power and authority(Avram, 2019)

The power consists in the possibility of acting in the name or on behalf of another(Nicolae, 2018); the authority designates a prerogative that indicates the inequality, the superiority - through control and direction -of the bearer of the authority over the subject subjected to it(Avram, 2019); in both situations - in obviously different conditions - one subject exercises attributions for another; beyond the will of the one who exercises it, there is an interest of another that makes necessary the manifestation of power, of the exercise of authority(Avram, 2019)

These concepts - governing body, holder of power, authority - substantiate the functioning of the legal person, explain the fiction of its will and, implicitly, prefigure the framework of the legal regime of civil liability.

Civil liability - a means of sanctioning a subjective civil right - operates only on the basis of such conceptual premises: there is a personal liability for one's own deeds and a liability for the deeds of the another; this, because, there are personally assumed acts (personally committed deeds), effect of the expression of a direct will; and there are acts, deeds, signed (committed) by another, bearer of power or subject to authority; in principle, liability is based on (subjective) guilt, due to the fact that the source of the obligation (of subjective law) is the result of a manifestation of direct will; however, the model also admits the existence of an objective civil liability - from cause (fact) to effect (damaging result, damage to the protected value), without examining the guilt of the responsible subject; this, for the hypothesis in which the protected right is born through the exercise of a power or authority in the name, in the interest or on behalf of another or in special contexts indicated by law[18]

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[17] For details on this model, see: : Valeriu Stoica, *Despre puterea de reprezentare*, …op. cit…. pp. 27-55

[18] Objective civil liability - its justification - continues to be debated; in essence, it is debated whether such liability really exists because what we call objective liability describes only a legal presumption, established for practical reasons, of protection, for the purpose of guarantee, in favor of the victim; after the bearer of the "objective" liability compensates the victim, he can return in retreat - invoking and proving guilt - against the guilty party; in essence, what we would call objective liability would be nothing more than a liability relationship superimposed on the initial mandatory relationship (fundamental relationship) in which the rules of guilt operate; it should be noted, however, that the objective liability model is built to the advantage of the victim: she (the victim) must prove only the unlawful act and the harmful consequence, located in a causal relationship; the formulations from: L. Pop, I. F. Popa, S. I. Vidu, Civil Law Course are significant in this sense. Obligations, Universul Juridic publishing house, Bucharest, 2015, p. 371, in which it is noted that the principal's liability (for the deed of the person in charge) is an objective liability, in its own right, which is based on the idea or obligation of guarantee; details on the objective civil liability also in L. R. Boilă, *Fundamentarea obiectivă a răspunderii comitentului în noul Cod civil*, în Dreptul nr. 2/2020, pp. 57 – 58; in the older doctrine, see M. Eliescu, *Răspundere civilă delictuală*, Editura Academiei, Bucureşti, 1972, p. 20.

We aim, therefore, to establish to what extent the obligatory model described or, sequentially, the concepts or even the models of civil liability have or do not have significance in the field of criminal liability of the legal person.

5. THE SIGNIFICANCE OF THE CONCEPTUAL PREMISES FOR THE INSTITUTION OF CRIMINAL LIABILITY OF THE LEGAL PERSON

In relation to the previous theoretical observations[19], we stop at some formulations of the decision of the constitutional court, which constitute real landmarks of analysis and operationalization

1. First of all, it is explicitly noted that the text of art. 135 Criminal Code maintains the option of the model of direct liability of the legal person, enshrined in Belgian and Dutch[20] law; it is a direct responsibility *for one's own deed.*

From the beginning, the hypothesis of criminal liability for the act of another[21] comes out of the discussion - as we understand it; this, even if the mechanisms of committing the deeds - given the abstract nature of the idea of legal person - inevitably presumes that the deed was committed in its materiality by a natural person on behalf of the collective entity; that is, the crime - for which the liability must be fixed - is committed by the collective subject, not by the natural person who actually produced it; civil fiction, in the same logic - the effect of the expression of the constitutional court - becomes operational also in terms of criminal liability for the legal person.

The formula imposes, however, other questions to which the court - inexplicably - did not answer: how many perpetrators committed the crime?

Do we have a criminal participation, if the deed is committed by two persons (the responsible legal person and the operating natural person)?

If the participation thesis is admitted, what would be the form of participation? Do the aggravating factors - of whatever nature - related to the existence of multiple subjects - when they count the surplus brought by the fictional subject - become operable? If so, why? And vice versa, if not, why?

In this context, the express criminal norm cannot be disregarded, which holds that the criminal liability of the community does not exclude the criminal liability of the natural person who contributed to the commission of the same act (art. 135 para. 3 of the Criminal Code); basically, we have a contest of facts, the deed of the legal person and the deed of the natural person, even if the harmful effect is the same.

2. Secondly, the motivation states another essential idea: the criminal liability of the legal person can be attracted "by any of its activities in which a subjective element of its own can be identified, different from that of the natural person who actually executes the material act".

We deduce two statements from here; 1) liability is subjective, based on guilt: it (criminal liability) will be attracted only by that "activity in which a subjective element

[19] See Relaționarea civilă fundamentală", pct. 1-2.

[20] Such wording leads us to the idea that it would be very important for practitioners to know better the Belgian and Dutch doctrine and jurisprudence in the field.

[21] For a detailed examination of this issue, see Horia Diaconescu, *Este răspunderea penală a persoanei juridice o răspundere pentru fapta altuia?*, în Dreptul nr. 12/2005, pp. 127 – 136

can be identified"[22] and 2) the subjective element should not be sought anywhere, not anyway, but only in its own activity, of the collectivity: its "own" element.[23]

The constitutional thesis applies punctually, naturally, the civil principle of the functioning of the legal person: the acts, the deeds of the bodies, are the acts, the deeds, of the moral person; more precisely, the application of the criminal rule is not done independently, broken by the reality of private life, but following the civil regime of this type of subject of the legal relationship, the collective subject.

Moreover, the thesis - indirectly - notes that the very definition of the crime - the only basis for criminal liability - includes the concept of guilt[24]; at the same time it is observed that any criminal judicial approach has as finality the overthrow of the presumption of guilt, major value, of constitutional order; concretely, the constitutional court unequivocally states that there is no criminal liability report in which guilt is not established.[25]

3. At the same time, the wording also indicates where the guilt should be sought: only in the acts, deeds, of the legal person itself; and the civil model - which logically justifies the existence of the legal person - shows that such a subject is expressed - factual or volitional - only through its organs.

Operationally, the search for guilt in the behavior of organs involves a description of them (organs), their activity - no matter how complex - their organization - and a clear statement of the guilt component, its description and, above all, its proof.

The statement of inappropriate behavior, as the case may be, excessive, involves the analysis of the management of the management body, on all its components (organization, information, communication, control).

Moreover, it requires the indication of the correct standards of behavior and the description of the deviant, culpable, guilty behavior; as long as the legal person gives tasks to the body or powers of the trustee, as long as it exercises authority over the perpetrators, the determination of guilt can be achieved only by detailed analysis of the exercise of these prerogatives (transfer of powers, effective exercise of authority, assertion of prerogatives).

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[22] The wording obviously excludes an objective liability model, which is based only on the existence of the deed - cause and harmful effect; it also includes something: "a subjective element", guilt; for explanatory developments in this field (defining, explaining and comparing the concepts of objective and subjective criminal liability), see George Antoniu, *Răspunderea penală a persoanei juridice*, în Revista de drept penal, anul III, nr. 1, pp. 9 -17.

[23] From our point of view the expressions of the decision are very clear; it is a question of guilt that must be proved by the judicial bodies with means of probation specific to the common criminal evidentiary system; more specifically, a guilt liability formula is excluded in which guilt is legally presumed and deduced from committing acts or obtaining results; that is, the presumption of innocence is not overturned by creating a legal presumption of guilt, the effect of the provisions of art. 135 Criminal Code; for details on this latest model, see Alexandru Matache, *Inaplicabilitatea principiului nulla poena sine culpa în dreptul european. Tendința spre o răspundere obiectivă*, în Caiete de drept penal, nr. 3/2017, pp. 106 – 123.

[24] On the analysis of the concept of crime that includes the element of guilt, on the significance of the model, see : G. Antoniu, *Vinovăția penală,* Editura Academiei ….op. cit., pp. 53 – 65; Constantin Bulai, *Drept penal român. Partea generală*, vol. I, Casa de editură și presă „Șansa", București, 1992, p. 111 -112.

[25] At. 23 al. 11 of the Constitution: "until the final judgment of conviction, the person - we say, physical or legal - is considered innocent."

In practical terms, the lack of this analysis, the omission to indicate the behavior inconsistent with the correct standards, in turn described - this, at the expense of the body, its components - means the lack of proof of guilt of the legal person.

4. We also note that in all governing bodies - legitimately - there are divergent interests and positions, both within the same body (members of the board vote differently) and in the relations between the bodies[26].

From the perspective of our analysis, however, it is important only to prove the deficiency of the decision, the way in which it was implemented, the insufficiency of control or execution of the decision by the body, representative or supervisor, the standards of the evaluation of that decisions[27]; but the details related to the internal relations have significance only in fixing the guilt of the subjects of the natural person who expressed the will.

5. From here we derive another idea, expressed in the opposite direction: the legal person is not responsible for the guilty act of the subject; if we admit this, we would admit that it is possible the criminal liability of the legal person for the deed of another, considering the thesis - of civil order - that any subject is different from the legal person.

Our categorical expression seems to get into conflict with two other statements of the motivation of the decision[28].

First, immediately after the criminal liability of the legal person has been qualified as a subjective liability based on its facts - in our understanding - of the guilty acts committed by the governing body, another sentence is recorded: "the criminal liability of the legal person may be trained by any natural person acting on its behalf, not only by its governing bodies ".

The literal expression, the positioning of the sentence - immediately after the statement of responsibility for the guilty behavior of the governing body - leads us to the idea that criminal liability is possible for the guilty act of the agent, the trustee, facts for which - in the civil logic - the legal person is not responsible for himself (but only for another, with all the implications).

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[26] Significant are the legal analyzes that are made, for example, in connection with the way in which the authority of the general meeting of the associates of a commercial company is exercised over the board of directors and the concrete effects that such exercise produces; see, for example, details of: Marek Hassel, Consiliul de administrație al societăților pe acțiuni: controlul prin reprezentare, din Administrarea societăților pe acțiuni în economia de piață și de tranziție, coord. Marek Hassel, Editura All, București, 1997, pp. 19 – 38.

[27] When we talk about standards, corporate management practices force us to make another observation: between shareholders, the executive and the company's censorship there is a significant part of clearly divergent legitimate interests; shareholders want profit and dividends; the administration that implements the general policy of the company has the task of achieving the objectives but respecting the standards of correct and legal economic behavior; each of these organs may engage in guilty conduct (or only one of them); concretely, through inappropriate behavior, all bodies can blame the legal person, or, as the case may be, only one specific one; however, from the perspective of the exercise and completion of the criminal action, initiated against the legal person, in the sense of removing the presumption of guilt, it is mandatory to describe these deviant behaviors - with reference to each of them - with the consequences produced, from the perspective of the idea ; everything, in the specific logic of incrimination.

[28] Decision no. 156/27. 03. 2018 of the Constitutional Court

If we look at the expression in the context of the whole motivation, of the content of the whole decision - the responsibility is subjective, a responsibility for one's own deed committed guilty by the body; I would therefore understand the wording as an additional emphasis that the legal person is criminally liable for any crime, even in connection with an act committed "by any natural person acting on its behalf, not only by its governing bodies"; that is, the legal person is responsible for the inappropriate, excessive behavior of the body in connection with the offenses committed by a subject under its authority (of the legal person).

If we look at the sentence only as an urgent explanation of the immediately preceding statement (the legal person is liable only for his own guilt, expressed only by the guilt of the body) we should accept that - in the view of the constitutional court - criminal liability for another's guilt must be admitted.

Or, this last model of interpretation contradicts any logic; both the decision itself and the civil logic (which admits the principal's liability for the act of the agent only as a guarantee, not for the culpable act of the agent); in other words, it would mean accepting that criminal liability (with special, repressive, intimidating characteristics) be located in a wider sphere of conditioning than the restorative civil liability itself[29].

However, to admit such a thesis would mean violating a logic of the current legal system: criminal liability for intimidation cannot be carried out in conditions wider than reparative civil liability; theoretically, it would mean to accept that - by regulating art. 135 of the Criminal Code, as well as by motivating the decision - the concepts of a state that would have, mainly, a repressive mission and only secondarily a reparative one, were implemented; or, we argue, that all other developments of the decision exclude such an approach, an understanding.

6. Apart from all this, there is another formulation that requires a systemic interpretation.

When the decision explains what is meant by a crime committed in the interest of the legal person, it is referred to the hypothesis that a benefit - moral or material - obtained by the crime belongs, in whole or in part, to the legal person, even if the crime is not committed in the realization of its object of activity; after which, also in an explanatory manner, it is observed that in such situations, it is possible that criminal liability may be also attracted by the act of a third party[30]; that is, we would be dealing again with an expression that would indicate a criminal liability for the act of another, of a third party.

We understand the records of the decision in the same sense: the legal person is responsible only for its own facts; even if a third party has committed a crime - from

[29] Our wording requires an additional explanation: if we admit that the criminal liability of the legal person is a liability for another - with all the inherent implications - and we make a comparison of this mechanism with the principal's liability for the act of the agent (also liability for another), placing then, in all the functions of the judiciary, we would observe the consequences, the negative implications; the civil model allows, in principle, the principal to go against his agent for the entire damage; if the legal person is punished for the act of the same person, beyond the serious and legitimate repressive effect, the legal person would have the right only - at most - to a partial patrimonial reparation; in other words, the formula of criminal liability for the deed of another indirectly produces – gathering all the logical, immediate or future consequences - reparative effects that the civil law does not accept in principle.

[30] In the wording of the decision: "the criminal liability of the legal person - may - be involved by other individuals, and not only by those who act as bodies or representatives of the legal person."

which the collective subject has benefited - we can only speak of a criminal liability of the community for such a crime if the body knew, had to know and did not refuse such illegitimate benefit[31]; practically, the guilt of the legal person would come from the deed of the body to accept - before or after the commission of the deed of the third party - the use, the benefit of the crime on behalf of the legal person; conversely, only the personal benefit of the member of the management body and apart from inappropriate, non-compliant, excessive behavior, covering any member of the same body, cannot attract criminal liability.

We find the idea in the recent doctrine: "regarding crimes committed by persons other than the organs of the legal person, for the existence of the crime it is necessary that they - we understand, the bodies - knew or should have known about the criminal activity carried out by the natural person".(Hotca, 2016)

7. Fixing the essential characteristics of the criminal liability of the legal person - for his own fault and deed - produces practical consequences.

In case of participation, with the guilty contest and of the legal person too, the collective subject is considered as a separate subject from the natural person whose will is doubled(Hotca, 2016); the legal person can, in principle, have a participation in any of the specific qualities (author, co-author, accomplice, instigator, participant in inappropriate conditions); the same reasoning is valid in the case of aggravating circumstances in which the multiplication of active subjects is significant.

Regulation of the cumulation of the criminal liability of the legal person with the personal criminal liability of the subject member of the management body, representative, supervisor, third party, confirms and legislates this thesis[32].

In the case of committing crimes with a qualified subject, in the hypothesis that "the circumstance concerns a quality that a collective entity cannot have", the legal person cannot be included as author or co-author.(Hotca, 2016)

However, participation is not always mandatory; it is possible that the act of the legal person constitutes a misdemeanor which leads to the offense of the natural person; in the latter situation, the legal classification is made accordingly.

6. CONCLUSIONS

No matter how well-intentioned the motivations of the Constitutional Court would be, it is obvious that the criminal liability of the legal person produces for practitioners numerous and unpredictable challenges.

We do not find the solutions in the literary interpretation of the texts but in their understanding in a systemic, integrative way; that is, we argue that criminal liability with repressive effects has no purpose in itself; it (repression) is - along with other mechanisms - a form of complementary liability, sanctioning, streamlining of recognized subjective civil rights, protection of civil life in general; the purpose of criminal repression is not to destroy the subjective civil right, but to protect it.

[31] The benefit resulted from the crime

[32] For details on cumulation, see: F. Streteanu, R. Chiriță, *Răspunderea penală a persoanei juridice*…. op. cit., pp. 408 – 409.

The legal person was and is established for a social purpose; under its abstract legal formula an organized ensemble of subjective civil rights is produced and protected; in principle, the initiation of a criminal liability against a moral person cannot harm or destroy the civil rights organized by a legally organized collective entity.

For this reason, in our logic, a procedure for prosecuting a legal person cannot be completed without first identifying and defining all the subjective rights that are produced under its organizational dome (of the legal person). and, especially, without observing the concrete, applied purpose of its operation.

More specifically, the prosecution and subsequent trial must indicate concretely - not abstractly - the subjective rights arising from the functioning of a legal person and to investigate whether or not the penalties actually applied infringe these rights and to what extent; then, to indicate whether, in all judicial mechanisms sanctioning civil rights, the punishment is justified; in practice, we argue that in criminal mechanisms of this kind a prior and professional analysis of proportionality is always mandatory; the lack of such an analysis - which would be found in the motivation of the procedural documents issued by the magistrates - genertes huge and impermissible errors.

We argue, therefore, that criminal justice mechanisms in general - much less in the case of criminal liability of a legal person - should not be exercises of public power - of course with necessary and very few exceptions - but complementary instruments for the protection of civil rights, of civil life in general.

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