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Criminal Policy on Corporate Criminal Liability – Different Theoretical Approaches

Abstract: *The article focuses on different theoretical approaches towards establishing corporate criminal liability in national legislatures. Corporate crime is a serious criminal phenomenon, which produces high level of social danger in many fields – economy and trade, health and safety at workplace, environmental protection, human rights and others. Introducing criminal liability of legal persons in most of contemporary legislatures has opened theoretical debates in various academic disciplines, such as criminal law, criminology, sociology and social psychology, economic science and others. As a significant criminological discipline, criminal policy is supposed to analyze arguments pro et contra corporate criminal liability as an instrument of prevention and combat against corporate and other forms of white-collar crime. The central part of the article examines different theoretical views and arguments on efficiency and justification of legislative measures towards corporate crime phenomenon. The author stresses economical, sociological and corporate cultural aspects of introducing and implementing criminal liability of legal persons. The author aims to shed light on different dimensions of the matter, pointing to interdependency of various aspects.*

Keywords: *Corporate Criminal Liability, Criminal Policy, Corporate crime.*

Introduction

Corporate crime is a serious criminological problem, which has assumed international proportions and uncovered serious shortcomings of the traditional criminal justice instrumentation. Criminal law, however, has to be in accordance with social reality and open to changes in order to perform its basic functions. Criminal policy, on the other hand, has to give an answer to the question how efficient and valuable certain legal solutions, as well as whether they are in accord with basic social values and moral principles. In

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this sense, criminal justice, as a means of criminal policy, performs protective, guaranteeing and socio-ethical function. (Radulović, 1999: 87, 89).

Criminal justice policy of reducing criminality implies establishing basic goals of criminal law and judiciary; defining principles upon which criminal law is established; reforming criminal law in accordance with requirements of criminal policy regarding decriminalization and depenalization; determining criteria for establishing that certain behaviors are socially dangerous and punishable; directing activities of judiciary; studying and evaluation of the elements of criminal justice policy for criminality reduction. (Milutinović, 1984: 145, 146).

Subjects of criminal policy are nowadays, bearing in mind all the stated tasks of criminal justice which has to reduce criminality as well as the seriousness of corporate criminality problem, facing an important task – finding adequate instruments to confront the problem that wasn't addressed properly in the past, and whose dimensions were not completely taken into consideration. (Stojanović et al., 2010: 25, 26; Simović-Hiber, 2007: 84, 85).

Besides the fact that legal persons perpetrate crimes, which seems indisputable, there is still a question what criminal policy measures (above all, actions of legislative bodies) represent the most adequate reaction. The basic dilemma is whether it is better to introduce the institution of corporate criminal liability or adhere to traditional criminal justice categories which acknowledge only the individual and subjective criminal liability. Even if the dilemma is solved in favor of the former, there is still the question of corporate liability legal nature as well as the sanction system which can be used for collective entities as perpetrators of crimes.

According to various normative solutions in comparative law, there are three basic principles: introducing corporate criminal liability accompanied by sanctions adjusted to its nature; introducing corporate administrative liability for crimes; sanctioning torts only by means of civil law sanctions. (Milošević, 2012: 44).

Selecting one of the offered models depends on the nature of both internal (constitutional and legal principes in the sphere of criminal law) and international law (especially respecting obligations arising from international conventions), as well as from adopting crime policy arguments that support them (Milošević, 2014: 40). There are various ideas in theory about whether and why it should be decided to punish collective entities, and at the same time there are opposing answers to the question what crime policy effects would be produced by such practice.

Effects of deterrence and just compensation – the impact of criminal sanctions

Basic criminal policy arguments for introduction of criminal corporate liability are *effects of deterrence it leads to and an adequate social "labeling" of perpetrators.* (Milošević et al., 2015: 208). In that sense, bearing in mind that the general purpose of criminal sanctions in modern criminal justice systems is general and special prevention, and that criminal sanctions system is developed and well-established, designed in order to efficiently achieve basic goals of criminal policy, introducing the possibility to punish companies which commit crimes proves itself to be a logical and appropriate solution. (Radulović, 1999: 96).

In addition to that, criminal sanctions are stricter than any other legal sanctions and they are a more proportional reaction to grave consequences caused by corporate crimes. Criminal sanctions are *ultima ratio* and their imposition is justified only when it is necessary to protect people and other social values and to the extent necessary (Stojanović, 2012). This means that corporation criminality has been estimated by the subjects of criminal policy as a criminal act which to a great extent jeopardizes basic civil rights and liberties, so that it is completely legitimate to decide to impose criminal sanctions against legal persons. Besides, recorded cases of crimes committed on behalf of and for the benefit of corporations both worldwide and in our country support these arguments. (Banović et al., 2014: 1251, 1252).

In addition to that, effects of resocialization are greater than in case of conventional criminality due to the fact that legal person can change and reorganize itself more easily than an individual under the influence of the imposed criminal sanction. So, both general and special prevention are attainable goals of corporate torts incrimination. A corporation as an entity cannot be reduced to a mere sum of individuals who comprise it, so punishing an individual instead of an entity proves itself to be inappropriate. Finally, the restitution to victims and wider social community is, thanks to economic capacities of corporations, a real goal of criminal policy. (Braithwaite: 1985, 290, 291; Geis, DiMento: 1995, 76, 77).

The literature recorded an example of the American Environmental Protection Agency (EPA) which heavily relied on civil penalties for violation of environmental protection regulations by corporations up to 1982. By means of using legal basis for criminal sanctions and thanks to changes in personnel (introduction of crime investigators), EPA brought about more frequent and stricter punishing of legal persons (and other pollutants) for committing torts. The result of higher criminalization of pollution acts was the following: the total amount of fines paid as sanctions for environmental

pollution was $198 thousand in 1984, while in 1989, several years after the change in “criminal policy” - $1.1 million. (Simpson: 2002, 16, 17).

The final stated argument does not necessarily prove the necessity for introducing corporate criminal liability, because sometimes damages can be obtained through civil penalties. Still, criminal sanctions are perhaps more efficient instrument than civil penalties. Wells emphasizes that criminal sanction is used as a foundation for establishing property claim thus making it more likely to obtain damages than in case when damages claim is made only through civil procedure. (Wells: 2001, 17). On the other hand, if we observe from the perspective of compensating a wider social community which is often an indirect or a direct corporate criminality victim, criminal sanctions provide a more appropriate compensation mechanism because apart from compensating specific damage they also enable compensation, at least to some extent, of social cost of their criminal activities via certain activities such as community service. Such restitution is more realistic if a sanction is imposed on legal person instead of natural person. *Corporate criminality produces greater damage to the society than criminality of an individual, but at the same time the possibility of reduction and elimination of its consequences by means of criminal sanction is also greater.*

Social cost of corporate criminality and proportional effects of criminal sanctions

The starting point of the approach which takes into consideration the economic cost of corporate criminality is the idea that stricter criminal sanctions and their regular imposition will have a greater effect on crime rate reduction. In this case, a formula according to which the severity of a sanction should depend on the relationship between social cost of a criminal activity and the probability of detection, in order to deter a company from involvement in crime. Considering the fact that social cost of corporate criminality is, historically, far greater than prescribed punishments, vicarious liability of legal persons should be introduced and far stricter sanctions imposed that would fit into the already mentioned formula and produce deterrent effects. (Arlen, 1994: 833 - 835).

There is an interesting approach according to which corporate criminal liability is the best possible replacement for individual criminal liability of corporate agents who are actual perpetrator and beneficiaries of a crime, but whose liability is hard to prove. The starting point of this hypothesis is that the corporation itself will as a consequence “punish” its agents after the state imposes a criminal sentence on it. This means that a corporation discards actual perpetrators or reduces their salaries due to business losses resulting from paying high fines. (Arlen, 1994: 835). Fisse has a contrasting argument.

He believes that criminal sanctions against a corporation do not lead to a desired effect – developing inner disciplinary system in corporations which would result in internal sanctioning. By analyzing benefits and shortcomings of different approaches, the author emphasizes that one of key strategies is "designing" provisions so that they efficiently affect development of internal sanctioning system. (Fisse, 1995: 378-386). Corporate criminal liability is, in this sense, justified as the way of achieving an indirect effect of reducing white-collar crime.

A concept according to which a corporation is a superindividual entity whose guilt can be determined independently of individual liability can be used as an argument for introducing corporate criminal liability, although it is more oriented towards proving that the model of autonomous criminal liability of a collective entity is optimal. (Đurđević, 2003: 741). According to this standpoint, a situation like this is possible: criminal liability for a particular premeditated crime requires establishing the existence of the intention which includes three elements (A, B, C). It is possible that the element A is known to a member of the corporation, the element B to another, and the element C to the third, with the difference being that the second and third member are not aware that there is the element A.

In literature we find the opinion that the fact that it is possible to find an autonomous basis for corporate criminal liability, is a strong criminal policy argument in favor of the hypothesis that it is necessary and legitimate to punish a corporation as an individual entity with its own liability. If it would be decided in favor of the system of punishing individual perpetrators exclusively, the deterrent effect would be significantly lesser than in the system of corporate criminal liability. The author explains this by stating that determining individual criminal liability, although potentially poses a greater risk to a specific individual because they face a possible serious prison sentence or a fine, is less probable, so that it does not have such deterrent effect in comparison to corporate criminal liability which is, especially in the system of autonomous criminal liability of a collective entity, easier to determine, and it consequently leads to a probability of internal disciplinary penalty against a manager who did not respect prescribed measures and regulations. There is an important criminal policy argument which is implied in the fact that it is often very difficult to determine not only the identity of a perpetrator but also the actual beneficiaries of illegal profits and who are, in many cases, masterminds behind criminal actions (or at least instigators, or perhaps, tacit beneficiaries aware of the illegality of obtained profits). The author gives a good example for already analyzed problem of internal sanctioning persons which are held accountable. He states that the experience in cases of environmental crime shows that actual perpetrators and those who order environmental crimes are junior and middle managers because making short-term and

“swift” decisions about pollution of, for example, a local stream or water flow, or, emission of toxic industrial substances into the air, remains at their level of responsibility and usually does not reach the board of directors. The result would be that the manager gets fired, loses reputation and practically any possibility to find a job in that industry in future. (Coffee, 1998: 10 – 18).

Paternoster and Simpson emphasize that the decision on potential involvement in crime depends on three factors: prescribed sanctions, moral inhibitions and organizational factors. They think that in cases in which members of a collective have strong moral principles, the probability of involvement in criminal activities is lesser. So-called cost/benefit analysis is concluded by the idea that the cost of criminal activity is too high. When moral inhibitions are weaker, the role of the imposed sanction becomes greater and it turns into the main deterrent factor (together with organizational factors). Authors conclude that it is necessary that criminal policy implies instrumental (threat with a sanction) and deontological factors (appeal to moral values, raising moral awareness of potential crime actors). (Paternoster et al., 1996: 549). The role of moral perception as an crime prevention factor is also considered in connection with other types of white-collar crime. (Mrvić-Petrović, 2013: 15).

Factors of sentence severity, sanction certainty and selective implementation of provisions

A very serious argument against implementation of corporate criminal liability can be observed in the problem of insufficient protection of corporation personnel not responsible for the committed crime, but has to suffer the consequences of attributing guilt to the whole collective entity. Here the author states an effective metaphor by Bierce about a corporation as a “profit maximization and responsibility minimization machine”. A good example to illustrate negative consequences of such an approach is the case of EF Hutton and Co., a brokerage company which performed a large-scale fraud in which 400 banks suffered loss. The company accepted plea bargain and paid $2.75 million, but no manager was held responsible for this crime although the US Department of Justice found that there was basis for charges against two managers. (Fisse, 1995: 382).

Bearing in mind that criminal law implies socio-ethical function which requires that it should be used not only as a reaction to a committed offence, but also as a very important means of raising awareness about what behaviors are socially undesirable and inacceptable from the standpoint of basic ethical principles, letting individuals who are not directly involved in crime suffer from the consequences of criminal sanctions seems paradoxical. Ethical imperative of punishing crime perpetrators in this case means indirectly punish-

ing “the innocent”, thus practically undoing positive ethical effects. Also, it is not a rare case of “transferring” liability to those who are placed at a lower corporate hierarchical level, in order to avoid liabilities of the management and the legal person itself. The impact of corporate cultural aspects on potential corporate criminal conduct is also interesting field of research. (Keković et al., 2011; Ljuština, 2013; Petrović et al., 2012). This is an inherent trend in societies such as British which are based on the identification theory, so that actions of employees cannot be attributed to the corporation even if they have been performed for its benefit and as part of business activities.

Braithwaite concludes that criminal law in itself is not an ideal instrument for solving corporate crime problem, and that the process of negotiating between regulatory bodies (the state) and corporations is a key strategy and that criminal law is an instrument which is supposed to serve as a strong negotiating argument in the hands of the regulators – the ultimate sanction which can be implemented if a corporation refuses other possibilities offered in the negotiation process. He believes that the main aim of regulatory bodies should be developing efficient mechanisms of internal control within corporations. (Braithwaite, 1984: 290). The similar opinion is expressed by some other researchers (Gruner, 2007).

Simpson thinks that corporate criminal liability system has not achieved expected effects. In the first place, the effect of general prevention by means of deterrence of potential perpetrators (legal persons, that is, their managers) with strict criminal sanctions failed to produce the expected results. The author offers a number of theoretical explanations for the failure of Criminal Las in the field of corporate crime. Firstly the fine amounts are inadequate (powerful companies do not regard it as a serious threat since they are financially dominant), and at the same time the probability that a crime would be detected is small. Mild penalties together with a low percent of sanction certainty lead to comparatively minimal preventive effect of criminal policy. Numerous data testify about comparatively mild punitive crime policies against corporate crime. Thus, 89% out of 228 corporations convicted of crime before the US courts in the period between 1984 and 1987 were fined to pay the amount of $53,974 on the average. 16% of these companies were ordered to pay damages, whose average amount was $239.987.

Proceedings against corporation are lengthy and include a great number of mutually interconnected actors which makes it difficult to detect a crime. The fact that position of the victim is often different than in other types of crime, because victimization process is not so obvious (for example, environmental crimes), and direct consequences are hard to prove, leads to the situation in which the reaction of the victim as basis for starting appropriate formal mechanisms in a great number of cases either comes too late or does not come at all. There is also the problem of performing the efficient

corporate cases investigation, because standard investigative instrumentation which is used in cases of conventional crimes is not appropriate for detecting corporate crimes. Police officers are trained to investigate conventional crimes, and they often do not have investigative skills necessary for unveiling crimes perpetrated by complexly structured corporations. Finally, selectivity in implementation of crime regulations by the authorities leads to the situation that criminal proceedings against the most powerful corporations are rarely initiated. (Simpson, 2002: 45 – 61; Stotland, 1982).

Research carried out by Adler and Lord proved the existence of significant selectivity on the part of state agencies. They studied implementation of criminal justice regulations in the field of environmental crime and concluded that until 1984, there were no criminal proceedings initiated against some of the biggest corporations in the USA. In the period between 1984 and 1989, only 6% out of the total number of processed companies was from the group of 500 most powerful corporations in the USA. In the total sum of corporations against which there were any criminal proceedings for environmental crimes (until 1991, when Adler and Lord's article was published) so-called Fortune 500 corporations (500 of the richest corporations) were represented with 1.6%. A strong contrast to these data is the fact that these 500 corporations produce about 54% national income from non-agricultural (industrial) business. (Adler et al., 1991: 796)

Shortcomings of criminal law instrumentation and factors of organizational structure and business risk estimates

From the perspective of certain authors criminal law is an inadequate mechanism for confronting corporate crime. In this case a difference is made between crimes which are mala in se and those which are *mala quia prohibita*. Thus, in case of the former delict category, whose immorality is indisputable, criminal law is an adequate mechanism because the social condemnation of such crimes is unanimous. Still, so called regulatory offenses, for which corporate agents are usually held responsible according to Anglo-American law, represent the latter category of delicts, whose immorality is disputable. In case of such criminal behaviors, the efficiency of criminal law depends on perception of its legitimacy. When norms according to which certain business practices are forbidden are considered unjustified, deterrent effects of criminal sanctions will be low.

Although, on one hand, it is shown that mild punitive policy in a way "encourages" corporate criminality, on the other hand, punishments which are too severe lead to similar undesirable effects – "closing down" companies for fear of potentially high fines for cooperation with investigation authorities; resorting to mechanisms such as bankruptcy/insolvency in order to avoid

liability; transferring production of illegal goods to other countries, etc. Those possibilities result in "transferring" the effects of high fines from corporations to their customers. (Simpson, 2002: 52). Braithwaite also agrees with this, and emphasizes that, in cases where the financial cost of strict regulation implementation is too high, it is not realistic to expect that a company will act in agreement with legal norms. (Braithwaite, 1985: 125).

Certain research studies deny the hypothesis that deterrent effect of criminal sanctions is greater in comparison with other types of sanctions. Simpson and Copper analyzed 38 cases of corporations which were convicted of violating antitrust law, in the period between 1928 and 1981, in order to investigate whether the implemented sanctions affected reduction of possibility of recidivism. They observed several variables simultaneously – sanction certainty, sanction severity, sanction basis (civil, criminal or administrative law), market changes, economic situation, "criminal opportunities" and motivation. The results of the research show that criminal and civil law sanctions have a greater effect than those based on administrative law. The study proved that sanction severity is a stronger recidivism inhibitor in comparison with sanction certainty and "promptness". In addition to that, the study came to a conclusion that cultural and economic climate ("criminal opportunities", motivation etc.) which surrounded companies, triggered criminal activities which overcame the deterrent effects of other factors. (Simpson et al, 1992: 370 – 375).

Studies show that data processing in collective entities has some important specificities. Thus, within a group decision-making process all participants behave differently than they would behave when they decide for themselves. Factors which prevent an individual to decide to commit a crime do not have the same effect in the process of risk estimation process in a group. Simpson believes that the individual perception of risk changes and adapts to the group dynamics, so that most of corporate decisions about committing a crime is a consequence of group decision-making which cannot be reduced to a simple mathematical sum of individual wills. In that way, the deterrent effect which would occur in cases of certain actors disappears in the process of collective decision-making. (Simpson, 2002: 53).

The example for this Simpson finds in General Dynamics, as it was accused for fixing tenders several times during the 1950s. She concludes that marketing and sales managers of the company were prone to deviant subculture, while other departments of the company, probably, operated in accordance with the law. Moore thinks that strict criminal sanctions are more likely to lead to undesired results, than to positively affect corporate crime deterrence, and he suggests turning to alternative ways of legal control of corporations. (Moore, 1987: 379 – 402).

Risk calculations performed by corporations greatly differ depending on numerous external factors. Although there is a hypothesis that corporations which are not financially stable are more prone to violating regulations than those which are financially stable, Yaeger states that various studies do not offer basis for this conclusion. Research studies shed light on the fact that companies with good business results engage in criminal activities less often that those with bad business results, and also that corporations operating in the most developed ad profitable industries commit illegal acts more frequently than the two previously mentioned groups. The author concludes that external factors of risk evaluation, such as predicting global or national future economic trends or state factors reaction, as well as social factors such as deviant subculture shape the process of corporate decision-making and consequently lead to a modest deterrent effect of criminal sanctions. State regulations achieve better results in preventing and combating corporate crime by indirectly influencing cultural and corporate ethics norms of company members than by sanction threat. (Yaeger, 2007: 29).

Conclusion

Analysis of the basic characteristics of corporate crime has led us to the conclusion that it is, even when it is focused on the acquisition of corporate profits, has always as the resultant white-collar crime, because the benefits of it necessarily leads to a particular physical entity. This type of crime is necessarily determined by the desire for material gain, which is formally expressed by increasing the assets of the legal person as a fictitious entity, but is essentially materialized through profit maximization of individuals who stand behind the mask of 'collectivity'. (Milošević et al., 2015: 211). Criminal policy, therefore, should aim to unveil the real nature of corporate crime, and develop measures that will lead to efficient crime prevention.

Summarizing all the arguments pro et contra, we can conclude that criminal law is not the only instrument of corporate crime prevention, but also have in mind that seriousness and social danger of some forms of corporate crime definitely justify imposing the criminal sanctions on legal persons. Radulović correctly concludes that in modern societies the awareness about the necessity of initiating the process of combating crime, and that suppressing criminogenic determinates and that overall results of criminal policy largely depend on the success in this field. (Radulović, 1999: 41). Therefore, if a state does not undertake serious socio-preventive measures in order to affect corporate crime causes, introducing the possibility of imposing criminal sanctions, as well as their implementation, will not lead to desired results. In addition to this, it should also be stated that a systematical legislative ap-

proach is one of the main conditions for providing an efficient response to corporate crime challenges.

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Kriminalnopolitički aspekti odgovornosti pravnih lica za krivična dela – različiti teorijski pristupi

Apstrakt: *Rad se bavi različtim teoretskim pristupima vezanim za utvrdjivanje odgovornosti pravnih lica za krivična dela u nacionalnom zakonodavstvu.*
Kriminalitet korporacija predstavlja ozbiljnu kriminalnu pojavu koja izaziva visok stepen društvene opasnosti u mnogim oblastima – odražava se na ekonomiju i trgovinu, zdravlje i bezbednost na radnom mestu, ekološku zaštitu, ljudska prava i drugo. Uvodjenje krivičnopravne odgovornosti pravnih lica u većinu savremenih zakona otvorilo je teorijske debate u okviru različitih akademskih disciplina, kao što su krivično pravo, kriminologija, sociologija i socijalna psihologija, ekonomske i druge nauke. Kao važna kriminološka disciplina, kriminološka politika treba da se bavi analizom argumenata pro et contra odgovornosti pravnih lica za krivična dela kao instrumenta za pr venciju i suzbijanje korporativnog i drugih vidova privrednog kriminala. Centralni deo rada istražuje različite teorijske poglede i argumente vezane za efikasnost i opravdanost zakonodavnih mera uperenih protiv pojave korporativnog kriminala. Autor naglašava ekonomske, sociološke i korporativno-kulturne aspekte uvodjenja i utvrdjivanja krivične odgovornosti pravnih lica. Cilj autora jeste da prikaže različite dimenzije ove teme i ukaže na njihovu medjusobnu povezanost.
Ključne reči: *odgovornost pravnih lica za krivična dela, politika, kriminalitet korporacija.*