



Original Article

Criminal Prosecution Against the Crime of Legal Entities in Vietnam

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Abstract: This article focuses on the study of the current state of criminal law and criminal procedure law in Vietnam on the criminal prosecution of legal entities in order to find out the problems, thus proposing to ensure the effective implementation of criminal prosecution of legal entities in Vietnam. In order to solve these problems, the article will compare the laws of Vietnam with the legal regulations of some countries in the world on the criminal liability of legal entities and analyze the current situation of Vietnamese law to indicate the incompatibility with the laws of other countries and their inadequacies, problems, and feasibility. Accordingly, the author will make recommendations to amend the Vietnamese law on the criminal prosecution of legal entities and recommend measures to ensure the implementation of the rules.

Keywords: Criminal liability, legal entities, prosecutions, Vietnamese law, Criminal Code 2015.

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1. Introduction: Globalization is Now an Indispensable Tendency and is Increasingly Expanding

The indispensableness of globalization is evident in the indispensable economics. Economic globalization is the most important aspect of globalization; it is greatly influencing other fields like politics, law, humanities, and social science. Besides creating opportunities, globalization poses several big challenges for Vietnam, including economics lagging, unemployment, lack of employment, wealth inequality, social ills, and the increase in economic crimes,... The solution for such problems is not to isolate ourselves from the world; instead, Vietnam has to actively seek international integration, adjust our policy and law and create necessary legal corridors to protect the legal rights and benefits of individuals, organizations, and juridical people participating in economic relations in Vietnam. We also have to prevent criminals that seriously affect the legal benefits of our government, organizations, and individuals domestically and internationally. Criminal responsibility and its prosecution against the juridical person are not new problems in criminal laws in many countries.

Regarding national law, criminal responsibility and its prosecution against a juridical person have been regulated in the criminal law and criminal procedure law of different countries. In order for Vietnam to effectively effectuate regulations of international conventions and receive agreements from countries in the field of crime prevention, especially in the prevention of transnational organized crime, we have to guarantee the compatibility of Vietnam's legal system with the world and other countries. Also, acquiring experience from other countries in the regulatory setup of criminal responsibility and investigation of criminal liability of legal entities is of utmost

importance. There have been many papers by Vietnamese authors concerning the criminal liability of legal entities. However, all of these articles are only available as a comment before the Criminal Code and the Criminal Procedure Code come into force on 1 January 2018. After the provisions of the law on investigating criminal liability for legal entities, no study has ever investigated the feasibility of these regulations.

In the process of studying these new regulations, we find that some contents of Vietnamese law are incompatible with the laws of other countries. Some regulations are still formal or inadequate and consistent, considerably affecting the applicability in Vietnam. From such demands and facts, we need in-depth studies in this field in order to have more effective solutions to improve the law and to have quick deployment, bring these regulations into effect, and ensure that the enforcement of the law on criminal prosecution of legal entities is practically accurate, objective, comprehensive and complete.

This paper focuses on the following major issues, including research methodology, conclusions, reference materials, and gratitude: *Firstly*, a comparison of regulations on criminal liability for legal entities in Vietnamese criminal law with some countries in the world. In this context, we focus on the following issues: Are the new regulations of Vietnamese law on criminal liability for legal entities compatible with the laws of other countries? What can Vietnam learn from and adapt to the laws of other countries? *Secondly*, the current situation of criminal law and criminal procedure law in Vietnam on the prosecution of criminal liability for legal entities. Concerned issues that needed to clarify: Has the criminal prosecution of Vietnamese legal entities been comprehensive and ensured the feasibility? *Thirdly*, some proposals for the finalization of criminal law and criminal procedures law in order to ensure the effective implementation of criminal prosecution of legal entities in

Vietnam. We will make recommendations on amending and supplementing the regulations on criminal prosecution, and criminal enforcement of legal entities and recommending some measures to ensure that the implementation of these regulations, in fact, is fast, accurate and effective.

2. Comparison of Regulations on Criminal Liability of Legal Entities in Vietnamese Law with Those of some Countries in the World

The criminal liability of legal entities, initially established in countries with a common law model, such as the US, England and Australia, is already a reality in European Criminal Law and constitutes a trend that, sooner or later, will be part of the global reality, including Latin American countries [1]. Currently, In Europe, the criminal liability of legal entities is provisioned for in countries like Spain, Belgium, Denmark, Slovenia, France, Finland, Portugal, Sweden, and Switzerland [2]. From the point of view of Vietnam, penalties apply only to individuals; according to the principle of individualization of criminal liability, a criminal is a particular human being; thus, a legal entity can not be prosecuted. At the same time, in order to explain this point of view, it is considered that the criminal prosecution must go through a complicated and prolonged legal process, thus greatly affecting the production and business activities of economic law, in which the administrative treatment with quick procedures will have a less negative impact on the legal entity [3].

However, in the current stage of development of Vietnam, regarding the theoretical and practical experience of criminal liability of legal entities in Vietnam and abroad, there are sufficient theoretical and practical grounds for the recognition of criminal liability of the legal entity. The addition of the provisions of criminal liability to the law will not change the legal system of criminal law but will make the science more diversified than the theory of crime and punishment. In addition,

these regulations have met requirements in the trend of international integration, including legislative activities. On the other hand, with the process of international integration and the strong development of the market economy, the situation of legal violations conducted by legal entities has become more and more complicated. This leads to the fact that there is a law-abiding legal status. Meanwhile, the fine in the Law on Handling Administrative Violations is low, not enough deterrent. The maximum level applicable to legal entities shall not exceed 2 billion VND. With this level of punishment, many legal entities, particularly large corporations, or multinational corporations, can accept fines for further violations [4]. In addition, the provision of criminal proceedings against legal entities is a common trend in the world, currently, there are 119 countries in the world that have specified criminal liability of the legal entity. In the Association of Southeast Asian Nations, 5 out of 10 countries have official regulations, and 2 out of 10 countries (Laos and Brunei) are in the process of reviewing [5]. Thus, the Criminal Code 2015 has provisions on criminal liability of the legal entity not only in accordance with international practice but also in accordance with the practice of crime prevention, meeting the requirements of handling extremely dangerous crimes caused by legal entities in economic and trade activities, which have negatively impacted the living environment recently. In Vietnam now, the Criminal Code 2015 approved by the XIII National Assembly will take effect from 1 January 2018, amended, and supplemented in 2017, with the addition of one chapter (Chapter XI from Articles 74 to 89) on "Regulations for commercial legal entity offenders". From a comparative perspective, the difference between the criminal liability of legal entities in Vietnamese criminal law and those of other countries can be seen as follows:

Firstly, a commercial legal entity is a subject of criminal liability. In general, the criminal law of many countries stipulates that the subject, which is subjected to criminal

responsibility and is conducting crimes, is not only legal entities but also other organizations and institutions without the status of legal entities. They can include public and private legal entities and may be organizations without legal entities, such as groups or associations. Private legal entities include commercial legal entities and non-commercial legal entities. A commercial legal entity is a legal entity whose main objective is to seek profits and dividends for its members, including businesses, companies, and other economic organizations. In contrast, a non-commercial legal entity is a legal entity whose main goal is not to seek profit; if there is a profit, it shall not be distributed to members, including state agencies, people's armed forces units, political organizations, socio-political organizations, social organizations, socio-professional organizations, social funds, charity funds, and social enterprises. In Vietnam, criminal responsibility is only applicable to commercial legal entities. Article 2 of the Criminal Code 2015 on the establishment of criminal liability: "Only commercial legal entities who commit a crime... shall be subjected to criminal responsibility". This provision implies that the subject of the application of criminal liability in the criminal law of Vietnam is narrower than that of the Criminal Code in other countries. Starting from the purpose of a commercial legal entity is a legal entity that seeks profits and profits are distributed to its members. These are organizations established for the purpose of carrying out profitable operations - profitability is the primary goal of these organizations. In the meantime, the purpose of establishing a non-commercial legal entity depends on the specific organization, but commercial legal entities do not have a primary goal of seeking profit. If there is a profit to be made, it will be used to maintain the activities of the organization without distributing it to members. Therefore, the Vietnamese Criminal Code only regulates criminal liability only applicable to commercial legal entities.

Secondly, offenses committed by legal entities will be considered crimes. In general, the criminal law of many countries provides those legal entities bound by criminal liability under court judgments or decisions for all crimes defined in the national criminal law. This principle is found in the criminal law of many countries such as England, Belgium, Netherlands, Canada, China,... Article 31 of the 1997 Chinese Criminal Code states: "Companies, enterprises, non-business units, and mass organizations shall bear criminal responsibility for cases where Penal Code,... regulates". The Criminal Code of France is more specific when defining a legal entity that is subjected to the provisions of the specialized law or specialized decree. In France, in addition to the Penal Code enacted in 1992, the criminal liability of a legal entity is also determined for certain crimes set out in laws such as the Military Code, the Code of Conduct, the Code of Intellectual property,... or in specific legal documents on the fields of environment, labor, construction, sports, recreation, health, and consumption,... That crime in the criminal law of The French Republic is also regulated by specialized legal documents expresses the diversity of the criminal law, making it easy for people to find out when they are involved in specific areas of social life... For example, Article 221 of the Criminal Code of the Republic of France 1992 lays down the legal entities which are subjected to the sanctions of criminal liability for murder,... [6] According to the existing law, legal entities may be held liable only for criminal offences that are listed in the Act on Criminal Liability of Legal Entities (total of 73 criminal offences); the new law extends the list of criminal offences for which a legal entity may be held liable to nearly all of the criminal acts that are listed in the Criminal Code, except for criminal offences expressly excluded by the Act on Criminal Liability of Legal Entities (Section 7) [7]. In Vietnam, the Criminal Code 2015 stipulates 31 counts, including 22 offences. There are crimes of infringing on economic management orders

and 09 offences of Chapter XIX Environmental crimes; if one of these offences is committed, the commercial legal entity is liable to criminal responsibility (Article 76). This stipulates that the type of crime that the legal entity is subjected to in the Criminal Code is narrower than that of the Criminal Code in other countries.

Thirdly, penalties apply to legal entities. The choice of penalties for legal offenders is also carefully considered by legislators; because prison sentences cannot be used to limit or deny the freedom of legal entities as applicable to illegal individuals. Thus, criminal law in some countries mainly states that penalties imposed on criminally legal entities are mainly financial penalties as the principal punishment. This is widely applicable in many countries of the Common Law system such as the United Kingdom, Australia, and Canada,... and many countries of the continental European legal system, such as France, Belgium, and Germany. In addition to monetary penalties, some jurisdictions that typically include countries in the continental European legal system apply certain penalties, such as dissolution directly or indirectly of many professional activities within a certain period of time; the closure of one or more of the legal entities used by the entity to carry out criminal activities within a specified period; confiscation of material used in the commission of crimes; list of judgments and decisions that have been pronounced by the Court on the offence of legal entities on the mass media [8]. These penalties are applied as principal or additional penalties, depending on the criminal law of each country. In general, these penalties apply to legal entities as a “preventative” purpose, aiming at preventing crimes from occurring, eliminating the causes and conditions of crimes [9]. In Vietnam, according to the Criminal Code 2015 for each offence, the commercial legal entity committing crimes shall be subjected to only one principal penalty and may be subject to one or more additional penalties. Major penalties include monetary penalties (Article 77), suspension of

operation for a definite term (Article 78), and suspension of operation permanently (Article 79). Additional penalties include Prohibiting business, prohibiting activities in certain sectors (Article 80), prohibiting the raising of capital (Article 81) and judicial measures applicable to commercial legal entities (Article 82). This provision implies that the penalties applicable to offenders in Vietnam are similar to criminal law in other countries. Most countries in the world agree that the monetary penalty to a legal entity committing the crime is the most effective penalty and has the most deterrent effect.

3. The Current State of the Regulations on the Prosecution of Criminal Liability of Legal Entities in the Criminal Law and Criminal Procedure Law of Vietnam

The provisions on the criminal prosecution of legal entities in Vietnamese criminal law and criminal procedure law are still incomplete, incomprehensive, and contradicting. Although currently in Vietnam the provisions on prosecution for criminal liability are stipulated in the Criminal Code and the Criminal Procedure Code and came into effect on 1 January, 2018, researching these regulations, we find it still incomplete or still in conflict with other legal documents. This problem will cause many difficulties in the implementation process in practice. From our research on the consistency of legal documents, we have some opinions as follows: Clause 1 of Article 75 of the Criminal Code 2015 stipulates the conditions necessary and sufficient to determine criminal liability for legal entities. This shows that the Criminal Code 2015 has applied the conditions for the prosecution of criminal liability of legal entities under the doctrine of homogenization of criminal liability.

However, in order to apply smoothly and uniformly in the practice of trial, prevention and combating crimes, since in our country, despite the resolution of the Supreme People's Court,

the judges of the Supreme People's Court have not yet issued a case law. According to some points of view, in order to solve this problem, it is necessary to classify the criminal liability according to the specific behavior form of the legal entity in three cases: i) The legal entity may be subject to criminal liability for the conduct of not to perform obligations directly prescribed for legal entities; ii) the legal entity may be subject to criminal liability for the offence committed in the name and for the benefit of the organization; iii) the legal entity is liable for criminal liability in the case that an individual of legal entity has committed a crime while performing a task assigned by that legal entity and the offence is attributable to that legal entity [10].

Aguably, this determination may be appropriate for the criminal prosecution of legal entities and in particular, in accordance with the scientific reasoning of the criminal law of Vietnam. Clause 2, Article 75 of the Criminal Code 2015 stipulates those commercial legal entities shall be liable for criminal liability and not exclude criminal liability of individuals. This provision raises questions: Whether an individual and a commercial legal entity together committing a crime are considered to be accomplices in the same case? How to identify the defects and roles of individuals and commercial legal entities in a criminal offence of a commercial legal entity? In a criminal case of a legal entity, will an individual be held liable for the same offence, or will he be subjected to another offence? What is that other offence, if any? In case of being tried on the same offence, is there an accomplice issue? [11]. All the answers to these questions are not clearly defined in the Criminal Code 2015.

Performing comparative study, we find that Belgian criminal law has specific provisions on this issue. For intentional crimes, the criminal liability of legal entities and individuals is homogenized: as a legal entity is prosecuted for any offences, individuals shall also be prosecuted for that offence. For unintentional

crimes, the criminal liability of the offender in criminal offences may be attributed to the main offender (an individual or a legal entity) but without the homogenization of criminal responsibility. Paragraph 1 of Article 434 of the Criminal Procedure Code 2015 should provide specific guidance on the legal representative of the legal entity and the person authorized by the legal entity to act as its legal representative in the procedure. At present, this provision is quite general: "In the case that the legal representative of a legal entity is investigated, prosecuted, tried or failed to participate in legal proceedings, the legal entity must appoint another person acting as their legal representatives to participate in the proceedings". Who is mandated by the legal entity to be the legal representative of that legal entity? According to the Law on Enterprises, the legal representative of a legal entity must ensure the procedures for recognition, for example: According to Clause 2, Article 13 of the Law on Enterprises, a limited liability company, and a joint stock company may have one or multiple legal representatives. The company charter specifies the quantity, managerial titles, and rights and obligations of the legal representative of the enterprise. And Clause 2 of Article 134 of this Law provides: "If there is only one legal representative, the Chairperson of the Board of Directors or the Director/General Director shall be the legal representative; unless otherwise prescribed by the company's charter, the Chairperson of the Board of Directors shall be the legal representative of the company". The appointment of the legal representative of the enterprise is the internal work of the enterprise. On the basis of the provisions of the law, in cases where the company's charter does not specify the title of the legal representative, the provisions of the enterprise law shall apply: the chairman of the board of directors shall act as the legal representative of the company if the company has a legal representative, or the chairman of the board of management and the

director or general director is the legal representative of the company if the company has two legal representatives.

So where the legal representatives of this legal entity (the chairman of the board of directors and the director or general director) fall into the "case of accusation, investigation, prosecution, adjudication or non-attendance" as provided for in Paragraph 1 of Article 434 of the Criminal Procedure Code 2015, the settlement of the participation in the proceedings by the legal representative of the legal entity is resolved. And if the legal representative is the legal representative of "another person", the legal representative of the legal entity or just the legal entity? Where do those "other people" who are nominated refuse to become legal representatives of that legal entity then deal with? In the case of a criminal case (after the prosecution of the case), there are both legal entities and persons involved in the case, the investigation is accordant to the legal procedures of the legal entity or separated into cases to investigate? We think that in this case, a joint investigation should be carried out, but any procedure related to the investigation of the legal entity shall be conducted for that legal entity, and any procedures related to the investigation with the person is applied with the provisions of the Criminal Procedure Code for that person only. After issuing the decision to file the charge of the case, when the defendant for the legal entity is prosecuted and the legal entity submits the application for dissolution or declared bankruptcy, how to solve it? Will the court consider and resolve the application for dissolution or bankruptcy of that legal entity together with the ongoing investigation? If the wrongful decision was made after the Investigation Agency issued a decision to suspend the investigation? What is the compensation level? Does it apply as compensation for the wrong person?

4. Proposals to Ensure the Effective Implementation of Criminal Prosecution of Legal Entities in Vietnam in the Context of Globalization

4.1. Proposing Amendments and Supplements to the Vietnam's Criminal Code and Criminal Procedure Code on Criminal Prosecution of Legal Entities

Firstly, we extend the coverage of the subject of criminal responsibility, which is not limited to commercial legal entities but also subject to non-commercial legal entities and public legal entities. This also appears in the criminal law of many countries such as England, France, the USA, the Netherlands, and China... The practice of trial in France shows that: Of the first 100 sentences of criminal liability for legal entities, there are six judgments related to legal entities under public law.

Secondly, the extension of criminal liability to legal entities is not limited to 31 crimes of environmental and economic management orders; it also extends to crimes related to the infringement of health and human's lives, financial fraud, false or misleading information in transactions of real estate, and forced labor. These offences are relatively common in criminal law in many countries.

Thirdly, investigating agencies, when applying coercive measures to legal entities, such as temporary suspension of operation's duration of legal entities related to criminal acts of legal entities (Article 439 of the Criminal Procedure Code 2015), should consider making this decision only if there is a reasonable basis to determine whether the offender's conduct has caused or is likely to cause damage to human life or health and adversely affect the environment or social order. In addition, the investigation agencies should also clearly determine whether the suspension of the legal entity's activities is related to other legal entities or other units of that legal entity, so as not to

affect the rights and the legitimate interests of these entities and units. Because there are cases where legal entities conduct business in many areas, many divisions, and units (for example, a corporation with many subsidiaries), and these units have a tight connection. Not all of them are criminal offences; however, if one unit is subjected to coercive measures, it will probably involve a lot of activity of other units, seriously affecting the legitimate rights and interests of employees.

4.2. Proposed Measures to Ensure Effective Enforcement of Regulations on Criminal Prosecution of Legal Entities in Vietnam in the Context of Globalization

Firstly, it is necessary to continue the research on provisions of the laws of some countries regarding the criminal prosecution of legal entities and matters related to criminal legal entities in order to acquire the experience of these countries selectively. As a result, Vietnam has gradually improved the regulation of criminal responsibility for legal entities. The procedure for criminal prosecution of legal entities in Vietnamese law is a necessary objective requirement.

Secondly, it is necessary to ensure consistency between legal documents such as the Law on Enterprises, the Criminal Code, the Criminal Procedure Code and other legal documents relating to legal entities, criminal legal entities, and procedures resolving the case against legal entities. There should be guidelines explaining the application of the Criminal Code 2015 and the Criminal Procedure Code 2015 on criminal legal entities, criminal prosecution procedures for legal entities in general and investigation of legal entities in particular to ensure specificity, and clarity when applied.

Thirdly, it is necessary to coordinate with the competent authorities to monitor and supervise commercial legal entities when they are suspended from the investigation in the case of temporary suspension of investigations and

continue to commit the offence. Fourth, we believe that it is necessary to standardize the investigators who are responsible for investigating criminal acts committed by legal entities. Standardization is in the direction of professional training in business fields, tax banks, and foreign languages... for investigators. This is due to the nature of these crimes related to money laundering, and terrorism... Currently the capacity of investigators involved in these crimes is still limited; knowledge of economics, electronic evidence, international cooperation, and foreign language skills, etc. are still weak, resulting in difficulties investigating these cases.

5. Conclusion

Criminal liability for legal entities and procedures for prosecuting criminal liability for legal entities is a completely new issue in Vietnam's criminal law and criminal procedure law. In the process of researching these regulations, we find that regulations on criminal liability for legal entities in Vietnamese law are not compatible with those of other countries in the world. In the context of globalization today, research for selectively acquiring experiences from these countries to continue to improve Vietnamese law is of utmost importance. Besides, we study the regulations on the criminal prosecution of legal entities in Vietnamese law to find out the contradiction, incompleteness, and incomprehensiveness in order to be suitable with the practical situation of Vietnam. To quickly put these regulations into practice is also an important issue of urgent importance today. Our recommendations focus on proposing amendments and additions to regulations on the criminal prosecution of legal entities to ensure uniformity and effectiveness in the Vietnamese legal system and in practical application. We also recommend some solutions to ensure that these regulations are implemented in a timely, accurate and effective manner. The results of this study are the basis

for Vietnamese lawmakers to study the amendments and supplements to the Criminal Code, Criminal Procedure Code and the criminal enforcement for criminal offences with legal entities. In the forthcoming research, we will continue to study the applicability of these regulations in practice to continue to find the effects as well as inadequacies in the practical application of these regulations.

References

- [1] Bacigalupo, Enrique, *Compliance y Derecho Penal*, Pamplona, Thomson Reuters, 2011, pp. 95.
- [2] Caio Marcedo Cordeiro Antonietto and Rafael Guedes de Castro, *The Criminal Liability of Legal Entities in Brazil in Light of the New Anti-Corruption Law*, *European Scientific Journal*, April 2015/ Special Edition, pp.64.
- [3] D. Truong , *There is not Nough Scientific Basis to Regulate the Criminal Liability of the Legal Entity*, the People's Public Security Newspaper 08/11/2015, pp. 25.
- [4] Law Department of People's Police Academy, *Criminal Liability of Commercial Entities in the Penal Code 2015*, <http://khoaluat-hvcsnd.edu.vn/news/nghien-cuu-khoahoc/Trach-nhiem-hinh-su-cua-phap-nhan-thuong-mai-trong-Bo-luat-hinh-su-nam-2015-49>, (accessed on: November 11th, 2017).
- [5] Ministry of Justice of Vietnam, *The New Basic Points of Regulations of the Criminal Liability for Legal Entities in the Draft of Penal Code*, Hanoi, pp. 8, <http://khoaluat-hvcsnd.edu.vn/news/nghien-cuu-khoa-hoc/Trach-nhiem-hinh-su-cua-phap-nhan-thuong-mai-trong-Boluat-hinh-su-nam-2015-49>. (accessed on: November 11th, 2017).
- [6] P. B. Hoc, M. T. Hieu, *Criminal Liability of Legal Persons Under the French Penal Code*, *Journal of Jurisprudence*, No. 8, 2007, pp. 69.
- [7] řSpousta, MagdaStárková, *The New Regulation is Brought by the Novelization of the Act No. 418/2011 Coll, on Criminal Liability of Legal Entities and Their Prosecution (Act No. 183/2016 Coll.) That will Become Effective as of 1 December, 2016*.
- [8] <https://legalknowledgeportal.com/2016/10/27/new-regulation-of-criminal-liability-of-legal-entities-inthe-czech-republic/> (accessed on: April 15th, 2021).
- [9] T. Q. Toan, *Criminal Liability of Legal Entities in Criminal Law*, Publishing House, National Politics - The Truth, 2011, pp. 90.
- [10] D. Brown, David Farrier, Neal, David Weisbrot, *Criminal Laws*, Published in Sydney by the Federation Ress, 1996.
- [11] N. N. Hoa, *The Criminal Liability of the Subject is the Organization and the Issue of Amending the Vietnamese Penal Code*, *Journal of Law*, No. 12, 2014, pp.16.
- [12] B. N. Du, *Some Issues Regarding the Criminal Liability of Commercial Entities as Defined in the Penal Code 2015*, *Journal of Laws*, No. 4, 2016, pp. 40.