
EMERGENCE AND EVOLUTION OF THE CONCEPT “SEPARATE LEGAL PERSONALITY”

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Introduction. *The aim of the present Article is to analyze the emergence and evolution of the concept “separate legal personality” in line with the trends of political and economical changes in Europe.*

Materials and Methods. *The methodological ground of the present Article represents the dialectic scientific method of research of the socio-political, legal and organizational processes with its principles of development, integrity, consistency, etc. The consistency analysis method is used while researching the object of the analysis. Some specific research methods are also used: formal-logical and comparative legal method are used to compare decisions of different courts on the same precedent. The aim of the present article is to find the root of the problem and compare positions of opponents in order to give recommendations for the solution of the problem.*

Results. *The author makes a general conclusion that the precedent court judgment on the case «Salomon v. Salomon and Co. Ltd» raise the issue of corporate liability, including the problem of introducing criminal corporate liability that is of real importance in the light of political and economical transformation of Europe.*

Discussion and Conclusions. *One of the most disputable and controversial issues today in the legal and political society of Europe and the Russian Federation is a question of necessity of introduction of criminal liability for corporations. This issue is particularly troubling in the light of the State Duma of the Russian Federation’s initiative on necessity of criminalization of corporate liability and the Russian Federal Chamber of Lawyers’ strong opposition to this idea.*

Corporate crime is a serious 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 some nation-states has opened theoretical debates in various academic disciplines, such as criminal law, criminology, sociology and social psychology, economic science and others. So, how did it all start?

The article focuses on different theoretical approaches towards the emergence of the concept of “corporation” as a separate entity in the civil relations. The author gives a review of such concept using the example of the precedent «Salomon v. Salomon and Co. Ltd». The present research comes to the following conclusion: exactly at the stage of industrial society the current concept of the corporation as a separate entity emerged with the necessary scope of rights and liabilities in the light of political and economic transformation of Europe.

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Introduction

The transition from pre-industrial to industrial society incurs economic changes inside the society: commodity-money relations are developed, money gets primary role in the overall spectra of values replacing barter transactions, market operations are becoming widely spread [23]. The industrial society is the result of the industrial revolution. The basis for the industrial society is private property. The working force is moving from agriculture to industrial area, people from the countryside come to cities. Urbanization of the society takes place. Capitalist relationships are replacing previous feudal relationships in such countries as Italy, England and Holland. Industrial era begins. This step is also characterized by emergency of monopolies, both private and state monopolies. Joseph Schumpeter marks out the entrepreneur as a driving force of industrial society [24].

Research

Interrelation between the state and the business

At the same time the concept of a "corporation" arises as an entity separated and independent in business environment. A corporation is considered independent in its relations with the state, the owner, shareholders and other stakeholders of the corporation.

At this particular step of development of the society the relationship between the state and corporations come to a new level. All discrepancies between the state and the corporation show how much they depend on each other. The economic growth of the state, increase in the number of working places and export operations are due to the fact of existence and activity of corporations. Such interconnection works both ways. The state legalizes the corporations, educates their employees, creates infrastructure enabling corporations to deliver the goods to the particular place. State projects with huge investment often go commercial by corporations – from satellites to medical equipment. Certain business areas have the state as their major client. These are such areas as defence systems, pharmaceutical goods, construction.

The market which is the controlling force of the economy is more and more adapted to the needs of corporations.

Arising of a concept of "corporation"

The concept and current understanding of "corporation" arise during this period as well. A corporation is understood as a struc-

ture which acts independently in commercial turnover. It acts independently in its relations with the state as well. A corporation acts as a veil for owners from other shareholders and counteragents of corporation. Such concept was elaborated by the court precedent of the House of Lords of the UK in 1896. The case is recorded under the name of "Salomon v. Salomon & Co. Ltd". The concept of this case is of particular interest notwithstanding the decision of the US court "Santa Clara County v. Southern Pacific Railroad Co." taken 10 years before in 1886. The American court applied Amendment Four to the US Constitution to a legal entity. It was for the first time in history when the notion 'person' was applied to a legal entity and not to a physical person.

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The details of the case "Salomon v. Salomon & Co. Ltd" show that for a long period of time Mr. Aaron Salomon ran a successful leather business as a sole trader. Later his son took some interest in business and Mr. Aaron Salomon decided to create a business entity as a limited company Salomon & Co. Ltd. The requirement of English law as of year 1892 stated that at least 7 persons had to participate in a business entity as shareholders [21. P. 15-21]. That made Mr. Aaron Salomon convert all his family members into shareholders. Mr. Aaron Salomon owned 20001 shares and the other six shares were distributed among his six family members (his wife, his daughter and four sons). Mr. Aaron Salomon sold his business to a newly-created business entity for £39000, £10000 out of which were a loan. In this sense Mr. Aaron Salomon was a principal shareholder and a creditor of the corporation Salomon & Co. Ltd.

Later on the political situation in the country and numerous strikes at industrial enterprises led to distribution of government contracts among a number of suppliers. As English government was the main supplier for Salomon & Co. Ltd. the income from sales relatively decreased. When the corporation went into liquidation being a result of the claim of one of bondholders of Salomon & Co. Ltd. in October 1893 the insufficiency of funds to cover all the creditors was discovered.

The concept delivered in the judgment is of current importance: those who gave loans to

the company have priority over general creditors. At the same time the court rejected claims of Mr. Aaron Salomon as a debenture holder. Moreover the court recognized agency and fraud in the actions of Mr. Aaron Salomon making him personally liable before other creditors. The High Court and the Court of Appeal supported the idea that the company and Mr. Salomon is the same person. As the courts stated the only purpose of creating the company was to transfer personal business to the company, which makes the company itself a myth [22. P. 211]. The idea of creating the company by Mr. Salomon had as its object purposes contradictory to the law: to trade with the intention on avoiding liability, to indebt under the name of the limited company and to lead away all assets of the company into debt obligations before himself.

The House of Lords being the highest court in the UK unanimously overturned this decision. Both arguments of fraud and agency were rejected. The Companies Act 1862 had a mere requirement of seven persons participation without the necessity of independence from the majority shareholder. Therefore creating and registering the corporation under the Act Mr. Salomon fulfilled all legal requirements. That makes the corporation Salomon & Co. Ltd and all its legal actions lawful.

*Consequences of recognizing
the concept of limited liability*

The House of Lords recognized a company as a separate person. It was held:

Either the limited company was a legal entity or it was not. If it were, the business belonged to it and not to Mr Salomon. If it was not, there was no person and nothing to be an agent [of] at all; and it is impossible to say at the same time that there is a company and there is not.

The company is at law a different person altogether from the [shareholders] ...; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands received the profits, the company is not in law the agent of the [shareholders] or trustee for them. Nor are the [shareholders], as members, liable in any shape or form, except to the extent and in the manner provided for by the Act [21. P. 15-21].

Thus a doctrine of 'separate personality' was created. Such doctrine of 'separate personality' can be summarized to the following:

- The business entity has separate property. Any business assets are owned by the company itself and not by shareholders. This

is normally a major advantage in that the company's assets are not subject to claims based on the ownership rights of its members.

- 'Property' has broad meaning: things, rights on those things and obligations considering those things.

- Property shall be separated from property of the founders or participants/shareholders of the legal entity.

- The concrete form of separate property is either a legal entity's own financial balance or its own budget.

The recognition of the doctrine of 'separate personality' resulted in further important court precedents stating the following:

- The fact that only one person owns corporation does not infringe its status as a corporation [4. P. 101].

- A business entity has an ability to act on its own behalf, has its own name, can enter into transactions with such name, be a claimant and a defendant in court. A company has a contractual capacity in its own right and can sue and be sued in its own name. Contracts are entered into in the company's name and the company is liable for any such contracts.

- A company has perpetual succession. A company continues to exist until it is wound up or otherwise dissolved, regardless of any changes of shareholders, directors etc. As the corporation exists in its own right, changes in its membership have no effect on its status or existence. Members may die, be declared bankrupt or insane, or transfer their shares without any effect on the company. As an abstract legal person the company cannot die, although its existence can be brought to an end through the winding up procedure.

- A company bears independent property responsibility for the entirety of property in its possession. A company answers not only with the property in its ownership, but as well with advance payments on its bank accounts, loans and other funds, which the business entity does not possess under the right of ownership. Unless otherwise stipulated by law neither administrators, nor participants of the business entity are responsible for debts, and subsequently, the company is not responsible for debts of its founders (participants).

- A company may possess property while no property rights arise for shareholders [7. P. 55].

In case the insolvency (bankruptcy) of a company property of shareholders of the company are not subject to risk as it happens in case of personal bankruptcy.

Thus the concept of limited liability makes

limited liability for shareholders of the company. The only economic risk they have is risk of losing contribution to set up a company. In contrast to the liability of shareholders the company is liable unlimitedly before creditors or other persons: the entire property of the company is answerable on obligations of the company.

Coming to such conclusion creates another important issue. Can shareholders, managers or other influential persons in the company abuse their rights using the concept of limited liability? The UK courts have considered the risks and together with the concept of 'separate personality' of a company elaborated a concept of lifting a 'corporate veil'.

Lifting a 'corporate veil'

Such concept of lifting a 'corporate veil' is applied in case there are reasons to look inside the company in order to claim liability of the persons standing behind the company. When the company abuses its limited liability, e.g. in cases of hiding the real agency activity, in case

of fraud and violation of law, in case of group of interconnected companies or in all other cases directly stated by law, such as excess evaluation of the statutory capital or deliberate bankruptcy. In case the insolvency (bankruptcy) of a company has been caused by the participants, by the owner of the legal entity's property or by other persons, who have the right to issue obligatory instructions for the legal entity, or may determine its actions in any other way, if the legal entity's property proves to be insufficient, the subsidiary liability of the legal entity's obligations may be imposed upon such persons.

In case of breach of law persons in charge will not enjoy limited liability of the corporation and its 'separate personality'. They will be answerable on their fraudulent actions. Thus the concept of lifting a 'corporate veil' is the integral part of the concept of corporate personality and independence of the company, the integral part of the concept of 'separate personality' of a company. Such concept leads to another concept - 'corporate crime'. Which is another story to research.

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ВОЗНИКНОВЕНИЕ И ЭВОЛЮЦИЯ ПОНЯТИЯ “НЕЗАВИСИМОГО ЮРИДИЧЕСКОГО ЛИЦА”

Введение. Целью настоящей статьи является анализ возникновения и эволюции понятия «независимого юридического лица» в контексте тенденции политических и экономических преобразований в Европе.

Материалы и методы. Методологическую основу настоящей статьи составляет диалектический метод познания социально-политических, юридических и организационных процессов с его принципами развития, целостности, системности и пр. Объект исследования предполагает широкое использование метода системного анализа. В статье применяются некоторые частнонаучные методы исследования: формально-логический, сравнительно-правовой для сопоставления выводов судов разных инстанций по одному и тому же прецеденту. Целью настоящей статьи является установление корня проблемы и сравнение позиций оппонентов для поиска оптимального варианта решения вопроса.

Результаты исследования. В результате проведенного исследования автор определяет, что исследование английского прецедента по делу «Саломон против Саломон и Ко» ставит вопрос о корпоративной ответственности, включая вопрос введения уголовной ответственности для юридических лиц, что крайне актуально в свете европейских политических и экономических трансформаций.

Обсуждение и заключение. Вопросом, который в настоящее время волнует и раскалывает юридическое и политическое сообщество Европы и России является вопрос о необходимости введения уголовной ответственности для юридических лиц. Данный вопрос приобретает особую актуальность в связи с инициативой Государственной думы Российской Федерации о необходимости

введения уголовной ответственности для юридических лиц и противоположной позицией Федерального союза адвокатов.

Корпоративное преступление - это опасный феномен, представляющий угрозу в различных сферах деятельности: экономики и торговли, здоровье и безопасности на рабочем месте, защиты окружающей среды, прав человека и т.д. Вопрос о введении уголовной ответственности для юридических лиц в некоторых государствах открыл теоретические обсуждения в разных областях: уголовное право, криминология, социология и социальная психология, экономика и иные. Так как же все начиналось?

Настоящая статья посвящена анализу концепции «корпорация» как самостоятельного лица гражданского оборота. Автор рассматривает данную концепцию на примере английского прецедента по делу «Саломон против Саломон и Ко». Автор анализирует этапы прохождения данного процесса и выводы, полученные судами разных инстанций, изменение как резолютивной, так и мотивировочной части судебного решения в зависимости от применяемого толкования. Проведенное исследование позволяет утверждать, что именно на этапе индустриального общества вырабатывается современное понимание корпорации как самостоятельной единицы гражданского оборота со всей совокупностью полномочий и обязанностей в свете европейских политических и экономических трансформаций.

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Ключевые слова:

корпоративная ответственность,
уголовная ответственность, корпоративное
преступление, Саломон, независимое
юридическое лицо, компания, корпорация,
Палата лордов, судебное решение,
прецедент.

Keywords:

corporate liability, criminal liability, corporate
crime, Salomon, separate entity, company,
corporation, House of Lords, court decision,
precedent.

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