



## **Criminal Liability of Legal Persons Under Positive Law congolese Law. Comparative Approach to Belgian and French law**

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### **ABSTRACT**

Is there a criminal liability of legal persons in Congolese positive law?

The decree of January 30, 1940 on the Congolese penal code as amended and supplemented by law n° 06/018 of July 20, 2006, is silent on this issue. However, case law is divided on this notion. For a long time, only the leaders were prosecuted since the legal person was struck by absolute criminal irresponsibility. This question which creates a great doctrinal controversy has aroused our attention in the present reflection.

As a result, on the one hand, we have supporters of the criminal irresponsibility of legal persons forming the minimalist tendency based on the theory of fiction, thus highlighting the fictitious character of legal persons in order to finally defend their argument of the 'irresponsibility. For them, the condition of accountability requires that the author have the intelligence and will. This accountability is only possible to natural persons. Because no moral person has a real existence to possess an intellectual faculty, let alone a will. In addition to the supporters of criminal responsibility: the moral persons are not only fictitious and abstract beings, but have a real existence, which is manifested by concrete structures, of these structures will emerge a will. And this decision of will must be considered as specific to the legal person and distinct from the will of the natural persons who compose them. And if that decision constituted an offense, then the legal person will be held criminally responsible. Proponents of this criminal responsibility form the maximalist tendency and advocate the criminal liability of legal persons on the basis of the theory of the reality of the legal person. In taking part in the debate in our turn, we have considered caressing the maximalist tendency which, on the basis of the theory of the reality of the legal person, recognizes the criminal liability of legal persons, since they are subjects and rights and obligations. Especially since these legal persons are deemed to commit all kinds of offenses as well as natural persons.

**Keyword:** Criminal liability, Legal person, conscious negligeance, Judicial attribution, Artificial responsibility, Fiction theory, Reality theory.

## 1. Introduction

For nearly a century, non-criminal law has recognized the existence of these people who are not individuals. They are called "moral" because they have neither material nor tangible existence. They nevertheless have a patrimony and can be the holders of rights and obligations<sup>4</sup>. These legal persons have neither flesh nor blood; yet they have organs. They have no feelings; yet they have a will. They are invisible; yet they act and can even be reproached for their inaction. They have no home; yet they have a headquarters, etc. They have become a major and daily component in modern society in such a way that they form our economic, industrial and social environment. We get our hands dirty with them, we are solicited by them.

However, this status of a legal personality is in principle attributed only to any group provided with the possibility of collective expression for the defence of lawful interests, and therefore worthy of protection<sup>5</sup>. Indeed, from the moment that the rest of the law accepts these legal persons, and then formally admits their existence, the question of their criminal liability must then be raised. However, their growth in society has allowed them to also engage in criminal action, in the same way as natural persons.

This innovation has given rise to much controversy and doctrinal effervescence, without however claiming to upset our repressive system of criminal liability. This criminal liability recognized to legal persons undoubtedly represents a most significant event both with regard to the penal code and with regard to the legislative field, of the law in general, especially at the level of the major principles that govern our law. For it nevertheless disturbs an order of the usual thoughts of criminal lawyers, thus giving rise to doctrinal tendencies that we will try to discuss in this reflection.

Indeed, in view of their increasingly dominant role in daily life, it seems to be recognized that legal persons constitute a criminal reality in criminal law, as well as natural persons.

However, from the point of view of criminal law, such a finding is not sufficient. The offence committed must then be criminally imputable to its perpetrator, who is only a legal person here. Given that the imputability of an act or an act of offence is considered to be the fundamental problem in the criminal liability of a legal person. Thus, certain questions deserve to be asked in order to shed light on the reflection carried out by this article. Who is a legal person and what are the acts or acts of offence attributable to a legal person? What is the state of Congolese legislation with regard to criminal acts committed by legal persons? Can we speak of the criminal liability of legal persons in the same force as that of natural persons? How do Belgian positive law and French positive law address the issue of the criminal liability of legal persons in relation to Congolese positive law?

It is in this perspective that we have deemed it imperative to speak, in this study, in a comparative approach of Belgian and French law; of the criminal liability of legal persons in Congolese positive law.

As a result, apart from the introduction and the conclusion, two major points will be the subject of a comparative analysis in this study. The first point will focus on the notion of the criminal liability of legal

persons under Congolese positive law (first point) and the second will be limited to establishing a comparative analysis of said liability from the point of view of Belgian and French law (second point).

## **1.CRIMINAL LIABILITY OF LEGAL PERSONS UNDER CONGOLESE POSITIVE LAW.**

### **1.Principle of Congolese law on the criminal liability of legal persons**

Where an offence has been committed by a natural person acting, not for himself and on his own behalf, but in the exercise of his duties, as an organ or representative of a legal person; in particular as an association, company, trade union, etc., the personal criminal liability of the natural person who has committed the offence may be retained. He is prosecuted and convicted personally and not in his "capacity"<sup>6</sup>. The question is whether, in addition to the personal criminal liability of the body or representative of the legal person, which has materially committed the offence, by acting for the legal person whose will he has carried out, the legal person itself may be held liable. <sup>7</sup>

Given that criminal liability is the obligation for a person involved in an offence to assume the penal consequences, which means to suffer the penalties that the law attaches to this offending behaviour. <sup>8</sup> It should be noted, however, that certain causes prevent persons involved in an offence from being punished. This is the case for causes of non-responsibility.

However, for him to be criminally responsible, an offence must first be committed. Then, the perpetrator of the offence must be considered in order to know whether or not he will be held responsible for his unlawful behaviour. Because liability is the rule and non-responsibility the exception, it is therefore necessary to control the causes that exonerate the perpetrator of an offence from his criminal responsibility<sup>9</sup>. Hence the question here would be to know whether the legal person under Congolese law is criminally liable? And what does Congolese legislation say?

In the Democratic Republic of Congo, it is a principle that the legal person cannot incur criminal liability<sup>10</sup>. However, in the face of this non-criminal liability of legal persons, certain specific laws advocate the criminal liability of legal persons, in particular:

1.Article 8 (1) of Ordinance Law No. 68/71 of 1 May 1968 on the requisition of Congolese doctors punishes any person who hires a doctor or keeps him in his job. Paragraph 2 of the law provides that if the culprit is a legal person, the penalties shall be applied to the persons responsible for the direction or administration of the establishment. According to this law, the liability of the legal person is recognized, but the natural person supports it as its representative or organ.

2.Article 11 of Ordinance Law No. 67/272 of 23 June 1967 on foreign exchange provides that the infringement of the foreign exchange regulations is deemed to exist in the hands of all natural and legal persons directly or directly involved in the exchange of foreign exchange regulations.

indirectly in the act that characterizes it. In this particular law, the criminal liability of the legal person is independent of that of the natural person its representative.

3. Ordinance-Law No. 68/010 of 6 January 1968 on consumption rights and the regime for alcoholic beverages, as amended by Ordinance-Law No. 68/192 of 2 May 1968, which provides in its article 29 (4) that any natural or legal person is liable for offences committed by members of his staff.

4. Ordinance Law No. 69/009 of 10 February 1969 on scheduled contributions on income, which is specific in tax matters, provides in its articles 147 and 148 that a legal person may be subject to financial penalties. This is already a criminal conviction because it is effectively the application of the fine penalty.

5. Ordinance Law No. 66/68 of 14 March 1966 on the Maritime Navigation Code also provides for a fine for the legal person who intentionally allows a ship to sail whose condition does not meet the safety conditions. It is a criminal liability based on the notion of the potential endangerment of others in a conscious carelessness.

6. Law No. 74/003 of 5 March 1974 on the compulsory deposit of publications is applicable to any natural or legal person. It should nevertheless be stressed here that penalties such as fines, forfeiture of a purchaser and his removal from the register were applied to natural and legal persons in the context of the measures for the execution of decisions relating to Zaireanization.

7. Article 4 of Law No. 04/016 of 19 July 2004 on combating money laundering and the financing of terrorism stipulates that it apply to any natural or legal person acting in the context of his or her profession and expressly provides for specific penalties for legal persons in Articles 36 and 42.

8. Law No. 08/011 of 14 July 2008 on the protection of the rights of people living with HIV/AIDS and those affected, which punishes a legal person guilty of stigmatizing or discriminating against a person living with HIV/AIDS and those affected.

The existence of specific laws rejecting and affirming both the criminal liability of legal persons under Congolese positive law has allowed legal scholars to share opinions on the analysis of this notion.

In the context of the present scientific reflection, we have divided them into two doctrinal tendencies presenting a real controversy in terms of the criminal liability of legal persons.

### **1. Minimalist trend**

According to this minimalist trend based on the theory of fiction represented by P. MORVAN, he thinks that holding the legal person criminally liable would be a worse mistreatment of the latter. The criminal lawyers of this tendency ignore the reflections undertaken in other branches of law and have thus redoubled their efforts to demonstrate that legal persons cannot commit offences. These abstract beings cannot act badly since they are devoid of any conscience and any moral sense<sup>11</sup>. As such, recognizing their criminal responsibility would be "nonsense". Because, based on the question of imputability, these criminal lawyers maintain that it is

legally impossible to impute a fault to a legal person that has neither material existence nor will of its own<sup>12</sup>. And yet, criminal liability presupposes a personal fault which consists in the possibility of attributing the fault to the person who committed it. They make the same observation in terms of the effectiveness of the punishment and sanctions of legal persons, that the penalties established by law for natural persons, in particular custodial sentences and restrictive sentences of liberty, are inapplicable, and thus, if they were applied to legal persons, natural beings would inevitably be imposed; namely, the members or representatives of the legal person and yet not involved in the offence, which goes against the effectiveness of the application of the principle of the personality of penalties, according to which the penalty can only be imposed on the person who has personally committed an offence. Hence, the authors of this trend reinforce their opinion by arguing that the texts of the Criminal Code were aimed only at natural persons. And consequently, the authors of this trend therefore advocate the non-criminal responsibility of legal persons.

## **2. Maximalist tendency**

The maximalist tendency, on the other hand, is based on the theory of reality. According to this theory, legal persons are understood as abstract legal entities to which rights and obligations are recognized by possession of a personality legal personality. This legal personality is distinct and autonomous from that of its members or representatives and it is acquired by law, after the completion of an administrative formality or because it corresponds to a reality. It is from this point of view that the maximalist tendency makes us observe that legal persons are no longer fictitious beings, but that they constitute a legal reality, that they have a collective will of their own, distinct from that of their members and that they engage their civil liability. And the material impossibility of applying criminal sanctions such as prison sentences to them is only an argument that is not decisive either. For if a legal person cannot be imprisoned, it is at least possible, since it has a patrimony, to impose a pecuniary penalty on it; in particular a fine or confiscation and even to condemn it to a penalty such as dissolution which will put an end to its existence or create the incapacity to carry out its activity. This is how V. WESTER-OUISSE reflects by asking himself the following questions: how can we explain that legal persons can be liable for an accident at the civil level and not at the criminal level? And how can we explain that they can be victims of damage for which they can claim compensation not only before the civil judge but also before the criminal judge when this damage results from an offence? How can we explain that they can have a sense of business and distinguish, in this context, what is lawful from what is unlawful by adopting the means best suited to the objectives they pursue? <sup>13</sup> Thus, to act in this way would be to ignore the functioning of these legal persons because any offence can be committed on their behalf by its organs or representatives. Because they can act or refrain from acting on behalf of the legal person, they can distinguish between good and evil, what is permissible and what is forbidden, what is profitable and what is not.

The Democratic Republic of the Congo slightly accepts this position with regard to the concept of the criminal liability of legal persons because, although it is recognized and applied separately to the criminal liability of its

members or its members by the Congolese courts, no provision of its penal code is designed exclusively to punish offences committed by legal persons to date.

### **3.Our position in the debate**

It is true that both tendencies have really raised the real problems of law, thus fuelling their debate. On the one hand, the minimalists, basing themselves on the impossibility of a fictitious being being able to personally delinquent in order for his offending act to be imputed to him, find in their minimalist tendency that the legal person is criminally irresponsible. For the latter has neither a material existence, nor a will of its own distinct from that of its members.

The minimalist tendency has certainly forgotten that the legal person lacks a soul, but the offence is not a sin of which it should repent.

And on the other hand, the maximalists, based on the theory of reality, find it impossible to establish the criminal liability of legal persons, especially since they are endowed with autonomous legal personality and make them holders of rights and obligations in the same way as natural persons. And also, to the minimalist argument according to which it is impossible to apply certain criminal penalties such as imprisonment to legal persons; the maximalist tendency has shown that legal persons do indeed have more rigorous sanctions, including dissolution, temporary or permanent closure, fines. These sanctions fulfil the same interest in terms of prevention and intimidation as equivalent measures pronounced against natural persons and have the same legal scope.

However, from the point of view of Congolese positive law, the principle is that legal persons cannot incur criminal liability. If there are criminal acts that make legal persons look like, then only their directors, who are natural persons, will be able to answer for criminal proceedings. This is the expression of the general principle of law " *societas delinquere non potest* " to say that companies cannot commit an offence, unlike natural persons<sup>14</sup>. This principle in the Democratic Republic of Congo is justified by the following elements:

- 1.a society does not have a faculty of discernment of its own, a free and conscious will, which excludes any fault from being imputed to it;
- 1.a society is a fiction: it necessarily acts through agents, being incapable of itself to commit the slightest reprehensible act;
- 2.Some penalties traditionally provided for in our criminal provisions (deprivation and restriction of liberty,...) do not apply adequately to legal persons;
- 3.the educational role of punishment does not adapt well to the reality of a legal person (can it understand the scope of a sanction?);
- 4.The principle of the individuality of penalties states that when a legal person is sanctioned, natural persons who are not involved in the offence suffer the consequences indirectly.

However, despite the fact that it is the principle of non-responsibility that is advocated by the Congolese penal code by referring only to natural persons, but practice on the basis of specific laws and several ratified treaties and agreements, leads us to accept the recognition of the criminal liability of legal persons in certain circumstances by Congolese positive law.

### **1.Areas of Establishment of Criminal Liability of Legal Persons**

Given that in Congolese positive law, the principle would be the non-criminal responsibility of legal persons, since the Congolese Criminal Code only applies to offenders, who are natural persons, certain specific laws as described above admit the possibility of criminal liability of legal persons.

Indeed, originally, the idea of the criminal liability of legal persons was considered in a general way. Without listing the offences that could be attributed to legal persons and then leaving it to the magistrates to determine which offences could or could not be attributed to legal persons. This position was not taken up. Thus, liability is not general but special. That is to say, it can only be implemented on the condition that it is provided for by a text that defines the offence, whether it is a law or a regulation.

And from there, it is therefore up to the legislator to provide for this liability offence by offence within the limits of what is probable. It should also be noted that there is no particular criterion or criteria for determination, because there is no particular dwelling. However, when we are asked about the origin and the acts or acts of offences attributable to a legal person, it must be said that the offences that can be attributed to a legal person appear in the Congolese Penal Code, we will situate them in the context of involuntary offences, which take care to specify in each text providing for an offence that it may be held against a legal person. This will then lead us to say that, on reading the Penal Code and the specific laws mentioned above, a legal person can be guilty of all kinds of offences. That is to say, it can commit all types of offences through their organs or representatives, who are natural persons.

As a result, to the question of who is a legal person and which legal person can incur criminal liability? It should be noted that all legal persons, excluding the State, may be held criminally liable. These include:

- 1.Those under private law with a for-profit purpose (civil or commercial company, economic interest grouping, etc.)
- 2.Those under private law on a non-profit basis (associations, political parties or groups, trade unions, staff representative institutions, etc.)
- 3.Those under public law, with the sole exception of the State (local authorities and public establishments).

The criminal liability of local or territorial authorities or their groupings is limited to offences committed in the exercise of activities that may be the subject of public service delegation agreements (i.e. in the exercise of activities of an industrial and commercial nature).

This article states that legal persons are liable to the following three categories of offences:

4. Offences against persons (crimes, money laundering, invasion of privacy, slanderous denunciation, etc.);
5. Offences against property (theft, extortion, blackmail, fraud, breach of trust, misappropriation of pledge or seized object, fraudulent organisation of insolvency) and
6. Offences against the Nation, the State and public peace (treason and espionage, terrorist acts, etc.).

Nevertheless, it should also be pointed out that certain areas are excluded from being able to engage the criminal liability of the legal person, such as urban planning, the press, etc. This leads some authors to think that it would have been simpler to organize a general liability of the legal person, thus leaving it to the judge to rule out the situation in which it would be absurd or impossible to prosecute it.

## **2. Conditions for the enforcement of criminal liability**

Here, it is a question of demonstrating how a legal person can commit an offence in order for its criminal liability to be established? The criminal liability of legal persons presupposes that the offence has been committed on their behalf by their bodies or representatives. Just like a natural person, the legal person may be held criminally liable as a perpetrator, co-perpetrator or accomplice depending on whether its body or representative who committed the offence, on behalf of the legal person, did so as a perpetrator or co-perpetrator or as an accomplice. So how can this liability be reconciled with the principle "no one is criminally liable except for his own act?". This makes us specify that the criminal liability of the legal person is that which is incurred by its legal representative under the following conditions:

1. Unintentional offence committed by an employee, employer or worker (on the basis of carelessness, negligence),
2. Fault attributable to the director (indirect perpetrator by omission) in addition to that of the perpetrator of the fault or negligence. Personal fault of the director. Hence a high probability of a cumulation of liability between that of the legal person and that of the natural person who has committed an unlawful act.

## **3. Lack of delegation of authority.**

It is in this sense that the criminal liability of the legal person is an indirect liability, it can only be implemented if an offence has been committed by a natural person. It is not the legal person itself that commits the offence. It is therefore at the level of the natural person that the various constituent elements of the offence must be established. This is the pole of imputation of the offence to the legal person. Indeed, the legal person has no will to act. The legislator therefore had to play with the impossibility for it to materially commit an offence. This implementation of the criminal liability against them is the so-called *delicto* aspect of the system. The rule is that the liability of the legal person requires that the offence has been committed on its behalf, by its organs or representatives. As the law does not distinguish between *de jure* and *de facto* bodies, it seems that *de facto* directors could incur the criminal liability of a legal person. Employees or employees are

excluded from engaging the criminal liability of the legal person regardless of their rank or position, even if they have committed an offence benefiting the legal person itself. This principle is subject to an exception with regard to employees or employees holding a delegation of power, they are considered to be representatives of the legal person and consequently they may engage the liability of the latter.<sup>15</sup> When the delegation of power is going to transfer the representation of the legal person, the delegate may engage the liability of the group. However, the offence in this case must have been committed in the direct or indirect interest of the legal person. This criminal liability does not exclude that of the natural person who is the perpetrator or accomplice of the acts.

In fact, in order to prevent managers or representatives from using the inking agent of the legal person to hide their own criminal liability, the legislator has provided for the possibility of holding them personally liable for the same acts. In such a case, it is a question of establishing the respective responsibilities of each person for an act committed by one and the same person. It is necessary here to distinguish between intentional and unintentional offences. In principle, there should be an accumulation of criminal liability between the legal person and the bodies or representatives in the event of an intentional offence, since it presupposes fraudulent intent at the outset. In the case of an intentional offence, it is possible to establish a cumulation of criminal liability between that of the legal person and that of the natural person carrying out the criminal act.

On the other hand, in the case of an unintentional offence, an offence for which it is not always easy to identify those responsible, the legal person should be prosecuted alone as long as the natural person has not committed any personal fault. Thus, cumulation is only a possibility for the judge and it is not mandatory and only applies in intentional offences, since the legal person is criminally liable for any unintentional faults committed by its bodies or representatives that have caused damage.

On the other hand, the legal person will not be criminally liable for offences committed in the exercise of its duties or in connection with the performance of its duties, as long as the latter has acted on his own initiative, and this being the case even if the commission of the latter may have benefited the legal person.

Similarly, a legal person will not be liable for offences committed by a director in the exercise of his or her duties, if the latter had acted on his own behalf and in his or her sole interest.

Thus, to the question of what are the penalties that may be applied to the legal persons responsible for the unlawful conduct?

As a result of the specific laws presented above, in the Democratic Republic of Congo, all legal persons (public and private law) may incur their liability, subject to the fact that for legal persons governed by public law, the observance of certain derogations laid down by administrative law is necessary, namely; the principle of the prohibition of enforcement against the State.

However, only one category of sanctions is applicable to delinquent legal persons under Congolese positive law. These include: fines, dissolution, temporary or permanent closure, special confiscation, postings, deregistration, etc.

## **1.COMPARATIVE APPROACH TO THE CRIMINAL LIABILITY OF LEGAL PERSONS IN CONGOLESE, BELGIAN AND FRENCH POSITIVE LAW.**

### **1.History of the criminal liability of legal persons**

The acceptance of the principle of the criminal liability of legal persons took place for the first time in England, despite the fact that case law informs that there was initially and many times the rejection of the idea of this criminal liability attributed to legal persons. First, affected by industrialization, which required investments exceeding the financial capacities of one or more individuals, the creation of the fictitious person is a legal instrument par excellence to take account of the desire of this new development. Following an increasing number of offences committed by it, the law English was forced to look for various possibilities in order to be able to reach the responsible author.

Thus, the English courts and tribunals created, as a first step, exceptions to the principle of non-responsibility.

First, for the offence of omission, "no feasance ". Secondly, for the offence of commission, "mis feasance ". However, by introducing these exceptions, the English courts and tribunals have resolved the difficulty related to the non-applicability of the statutes, which only apply to offences committed by natural persons.

Secondly, this led the English legislator to intervene, in particular by implicitly recognising the criminal liability of legal persons in the 1899 interpretation by means of a general provision, according to which the term "person" must be understood in legislative acts as also referring to the legal person. This interpretation was also supplemented by three cases of case law dated 1944 extending the principle of criminal liability to offences falling within the common law, known as Anglo-Saxon law. Thus, the English legislator in turn introduced only a few statutes relating to the procedure to be followed, as well as new offences to be prosecuted.

The idea that will inspire Belgian law since May 4, 1999 and it will recognize the criminal liability of legal persons. Then, French law will follow suit in its turn. While it is necessary to emphasize the unavoidable paternity of Franco-Belgian rights over Congolese positive law.

However, according to Jean SPECTER, the great debate is that for a long time, Belgium has not had this system defended by LEGROS' doctrine. Nevertheless, the draft penal code provided for accessory penalties, but which still required that a natural person be liable. This is then called judicial imputation. This means that the judge looks for the person who had committed the fault that constitutes the offence, even if sometimes the judge does not always succeed. But if the natural person is convicted, it is called a scapegoat. And in such a case, the judge often aims for the top of the hierarchy, which justifies a feeling of injustice. In addition, there was the concern to fight against egran companies, which had a character of organized crime.

Thus, it is only in search of a remedy through this system that the criminal liability of legal persons has appeared under the qualification of artificial liability. This is justified in the sense of criminal law, which is based on the reality of things and not on fiction.

And yet, a legal person is a legal fiction. It is materially unreal. To this end, in a comparative approach, it is appropriate for this article to question Belgian and French law in relation to Congolese law on the criminal liability of legal persons.

## **2.The comparison between Congolese law and Belgian law**

### ***1.The responsible legal person***

The criminal system under Belgian law is characterised by an absurdity of the rule. By excluding all legal persons governed by public law, including the Public Centre for Social Action (CPAS)<sup>16</sup> and all institutions that do not have legal personality, it is necessary to find that only legal persons governed by private law are criminally liable.

### **3.Offences committed by the legal person**

In Belgian law, as well as those of the countries that have served as guides in the criminal liability of legal persons, it is recognised that the legal person may be the author and prosecuted of any offence, with the only difference of the intrinsic link with the object, on behalf of the legal person and its interest is indispensable.

### **4.Sanctions applicables**

In terms of the penalties to be imposed on legal persons who are perpetrators or co-perpetrators or accomplices of an unlawful conduct or act, in Belgian law, there is a complicated regime of conversion. Thus, the prison sentence is converted into a fine and there is no difference with that applied to natural persons. For confiscation, it must be seen whether the assets are confiscable. In the event of dissolution, legal persons under public law are untouchable. Belgian law also penalizes legal persons by closing.

### **5.Conditions for cumulation of liability**

To talk about the possibility of an accumulation of liability in Belgian law, it is necessary to distinguish between whether it is a voluntary or involuntary offence. In the first case, cumulation is possible. That is to say, in the case of a deliberate offence, there is, on the one hand, the criminal liability of the legal person and, on the other hand, the possibility for the natural person who has acted in violation of the law on behalf of the legal person, to incur his own criminal liability. While in the second case, the judge must look for which of the two persons has committed the more serious fault. It is usually the criminal liability of the legal person that is more considered by the judge. In the latter case, the liability of one excludes that of the other.

## **2.The comparison between Congolese and French law**

### **1.The responsible legal person**

French law, like Belgian law, excludes the possibility for the State, in its capacity as a legal person par excellence, to be able to be criminally prosecuted. The same applies to public authorities. Nevertheless, as far

as local authorities are concerned, criminal liability should be sought only if the offence is committed in an economic activity and only when there is no economic delegation to an individual.

## **2. Offences committed by the legal person**

Under French law until 31 December 2005, legal persons could only commit the offences provided for by law, i.e. the Criminal Code and those covered by specific laws. However, since 1 January 2006, French law, as well as English and Belgian law, now recognises that the legal person may commit all kinds of offences<sup>17</sup>.

## **3. Sanctions applicable**

French law has provided for two exceptions in the case of specific offences, namely: the most serious penalties cannot be applied to certain legal persons. And the Criminal Code in its article 7 bis<sup>18</sup> lists the different penalties applicable and better adaptable to legal persons, including: the death penalty which is equivalent to dissolution, publication of the criminal sanction, financial penalty.

It seems wise to recognize that these penalties have several different purposes, including: damage to the reputation of legal persons (the publication or dissemination of the decision), their assets (fines and special confiscation), their activities (the prohibition to carry out an activity falling within the corporate purpose) and finally their very existence (the dissolution and closure of the establishment).

## **4. Conditions for cumulation of liability**

As in Belgian law, French law admits the possibility of cumulation of criminal liability between the legal person and the natural person (body or representative of the legal person). Because French law fears establishing a real decriminalization of the responsibility of natural and legal persons.

## **4. The summary result of the comparison in Congolese, Belgian and French law**

Given that in criminal matters, the person against whom a sentence is pronounced is in principle the person who benefits from the commission of the offence. This fair measure aims to preserve the general interest.

Indeed, the offence, as a prerequisite for any criminal liability, is a material act always carried out with the aim of deriving some interest, whether material, moral, emotional or of any other nature<sup>19</sup>. Thus, with regard to

the different countries studied using the comparative approach, as carried out above between Congolese, Belgian and French law, we summarize our comparative reflection on the question of the criminal liability of legal persons as follows:

In all the countries studied, the legal person is criminally liable. But among them, some have instructed the legislator to formulate a concrete solution like French and Congolese law, with the existence of specific laws, and others have left this task to case law, which is the case in Belgium.

For this purpose, legal persons are assimilated to natural persons. And consequently, the legal person is considered a subject of law who can commit an offence by himself and be criminally liable, and independently of the natural persons who compose him.

In addition, the main thrust of this responsibility is also to combat organized crime, which was once covered by the impossibility of initiating criminal proceedings against legal persons, which often ensured impunity for certain criminal behaviours, despite the often very serious social and economic disturbances they caused.

While Congolese, Belgian and French law belong to the same legal family, in this case the system of "civil and Germanic law", Belgian and Congolese law lightly recognize the principle of criminal liability. Because the latter two, each one manages in a singular way to establish the imputability of the legal person and to sanction it appropriately by specific legal texts.

Taking into account the nature of the legal persons liable to incur their criminal liability, in these three countries, the legal person is excluded from public law.

However, with respect to the different types of offences that can be committed by corporations, the law of all three countries in comparison tells us that corporations can commit all kinds of offences that are committed by individuals.

The same applies to the penalties applicable to legal persons, the penal system applicable by these three study countries in comparison, namely Belgium, France and the Democratic Republic of Congo; calls for the notion of the conversion or adaptation of criminal sanctions intended for natural persons into sanctions specific to legal persons.

However, in other countries not covered by this article, it is noted that all possibilities of conversion are excluded by opting for the application of all the penalties provided for against natural persons to legal persons. This is the case in the Netherlands, for example, and in China too, where the task of setting sentences is entrusted to the discretion of the judge (exception to the principle of the legality of sentences), unlike the Republic Democratic Republic of the Congo, where repressive law is governed by the principle of the legality of crimes and punishments (*Nullum crimen, nulla poena sine lege*).

Finally, with regard to the accumulation of criminal responsibility, apart from Belgian law, which distinguishes

between intentional and involuntary offences in order to see whether cumulation will be allowed, the other two countries, in this case French and Congolese law, allow cumulation of responsibility.

## CONCLUSION

All in all, the criminal liability of legal persons in Congolese positive law in a comparative approach in Belgian and French law has been the subject of our reflection in this scientific article.

It was a question of focusing on how these three countries belonging to the same legal family approach the issue of the criminal liability of legal persons in view of the rise of new criminal realities caused by the development of the intervention of these legal persons alongside those of natural persons.

Thus, five dimensions of comparison served as a benchmark for us. First, it was a question of knowing whether there is criminal liability of legal persons, then what types of legal persons can incur criminal liability. Secondly, it was important to know the types of offences that could be committed by legal persons and finally, it was imperative to finally seek to find out whether the accumulation of criminal liability between that of the natural person and that of the legal person was feasible. At the same time, we wondered about the penalties that could be applied to legal persons in an appropriate manner.

Thus, to do so, two strong points have formed the framework of the present research. The first addressed the notion of the criminal liability of legal persons in Congolese positive law. And the second, on the other hand, strove on the comparative approach to the criminal liability of legal persons in Congolese, Belgian and French positive law.

Congolese positive law has both a strong resemblance and dissimilarity with Belgian and French law on the issue of the criminal liability of legal persons. Their common points can be explained by the fact that in Congolese positive law as well as in Belgian and French law, there is recognition of the principle of the criminal liability of legal persons both by the Criminal Code and by specific laws. And their divergences lie in the texts criminalizing the infringer acts of legal persons.

For French law, the question of the criminal liability of legal persons is already provided for in the Criminal Code and certain specific laws. Whereas for Belgian law, the question remains a matter of case law. However, in Congolese positive law, the question of this liability is dealt with by specific laws and in certain very specific matters, including medical, financial, tax, maritime, money laundering, etc.

However, considering the nature of the legal persons liable to incur their criminal liability, it should be noted that only the legal person under private law can be criminally liable. The same is true for the types of offences that may be committed by legal persons, we have shown that the law of all three countries in comparison informs that legal persons can commit all types of offences that can also be committed by natural persons.

From the point of view of the sanctions applicable to legal persons, the comparison made by us clearly demonstrated that the positive law of some countries, namely, France and the Democratic Republic of Congo, applies the principle of the conversion of criminal sanctions of natural persons and produces sanctions specific to legal persons, with a view to their adaptation. But others have on the one hand a complicated positive law regarding this principle of conversion, this is the case of Belgium where it is the case law that regulates the

question of the criminal sanction of legal persons with the prerequisite of distinction between voluntary and involuntary offences.

Finally, with regard to the accumulation of criminal liability, we have found a concordance between French and Congolese law because, for them, the criminal liability of the legal person does not eliminate that of the natural person who has materially committed the offence. Whereas Belgian law requires the principle of distinguishing between voluntary and involuntary offences as an essential prerequisite for any possibility of cumulation of criminal liability between the natural person and the legal person.

### Footnotes

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