

Albin Eser/Günter Heine/Barbara Huber (eds.)  
Criminal Responsibility of Legal and Collective Entities

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für ausländisches und internationales Strafrecht, Freiburg i.Br.

Herausgegeben von Professor Dr. Dres. h.c. Albin Eser, M.C.J.

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# **Criminal Responsibility of Legal and Collective Entities**

International Colloquium

Berlin, May 4-6, 1998

Edited by

Albin Eser • Günter Heine • Barbara Huber



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## Preface

If in the coming century the question should be posed as to which were the main issues dominating the development of criminal law in the last decade of this millennium, the question of whether and to what extent corporations or equivalent collective entities hold penal responsibility would certainly be mentioned at a prominent place. As this discussion is not limited to national borders but led almost world-wide, there were solid reasons for carrying out an international conference facilitating an overview of models already existing in various countries, experience they met as well as further developments in this area.

As elaborated in my opening address (following *infra*), the Max Planck Institute for Foreign and International Criminal Law in Freiburg was prepared to accept this challenge and to carry out an international colloquium on "*Criminal Responsibility of Legal and Collective Entities*" from May 4-6, 1998 in Berlin in cooperation with the International Centre for Criminal Law Reform and Criminal Justice Policy, Vancouver. At the conclusion it was generally agreed that the papers presented at the conference deserved to be more generally accessible. We therefore present the proceedings of the conference herewith as a basis for carrying forward the debate on a number of fundamental issues in this field.

The completion of such an anthology is not possible without the help of many, whereby an expression of gratitude to those who made decisive contributions as early as in the initiating phase and carrying-out of the colloquium holds top priority. This holds particularly for both of my co-publishers: Professor *Günter Heine*, who brought in his special expertise in the field of "corporate responsibility" into the draft of the scientific programme and drew up the finally passed Recommendations, and for Dr. *Barbara Huber*, who had entire responsibility for the organisational preparation of the colloquium as well as the editorial management of this volume. We were pleased to be able, now and again, to take advantage of the advice of the co-organiser, the International Centre for Criminal Law Reform in Vancouver, in particular *Daniel Préfontaine*. With respect to organisation, we were blessed with the support of, above all, my secretaries *Martina Hog* and *Gabriele Lang*, as well as Rechtsreferendarin *Katja Langneff* during the colloquium.

Furthermore a note of thanks to *Vivienne Chin* and *Yvon Dandurand*, Vancouver, for the thorough editorial revision of those contributions delivered by non-English-speaking authors. Finally, we thank *Christa Wimmer* and *Petra Lehser* of the Max Planck Institute for their usual efficiency in preparing the scripts for publication.

Not lastly, we would like to use this opportunity to again express our deepest gratitude to the *Federal Ministry of Justice of the Federal Republic of Germany* for its financial support.

Freiburg, August 1999

*Albin Eser*

## Table of Contents

<b>Preface</b>	V
<i>Albin Eser</i>	
<b>Abbreviations</b>	XI
<b>Opening Address: Aim and Structure of the Colloquium</b>	1
<i>Albin Eser</i>	
<b>Subject I</b>	
<b>Forms of Criminal Responsibility of Organisations and Reasons for its Development</b>	7
Keynote address: <i>John C. Coffee</i>	9
Commentaries:	
<i>Koniji Shibahara</i>	39
<i>Klaus-Dieter Benner</i>	53
<i>Gerd Eidam</i>	59
<i>Harald Kolz</i>	67
<i>Liu Jiachen</i>	71
<b>Subject II</b>	
<b>National and International Developments: An Overview</b>	81
Keynote addresses: <i>Gerhard Fieberg</i>	83
<i>Manfred Möhrenschrager</i>	89
Commentaries:	
<i>Michael Faure</i>	105
<i>Mark Pieth</i>	113
<i>Celia Wells</i>	119
<i>Jürgen Meyer</i>	129
<i>Peter Wilkitzki</i>	135

---

<b>Subject III</b>	
<b>Establishing a Basis for a Criminal Responsibility of Collective Entities</b>	141
Keynote address: <i>Heiner Alwart</i>	143
Commentaries:	
<i>Gerry Ferguson</i>	153
<i>Vincenzo Militello</i>	181
<i>Gorm Toftegaard Nielsen</i>	189
<i>Ferdinand van Oosten</i>	195
<i>Teresa Serra</i>	203
<i>Celia Wells</i>	217
<i>Bernd Schünemann</i>	225
<b>Subject IV</b>	
<b>Sanctions</b>	235
Keynote address: <i>Günter Heine</i>	237
Commentaries:	
<i>Silvina Bacigalupo</i>	255
<i>Yvon Dandurand</i>	267
<i>Daniel Préfontaine</i>	277
<i>Cristina de Maglie</i>	285
<i>Bernd Schünemann</i>	293
<b>Subject V</b>	
<b>Procedural Law</b>	301
Keynote address: <i>Hans Nijboer</i>	303
Commentary:	
<i>Gorm Toftegaard Nielsen</i>	321

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<b>Subject VI</b>	
<b>Alternatives to Criminal Responsibility</b>	331
Commentaries:	
<i>Ronald L. Gainer</i>	333
<i>Gerald Spindler</i>	341
<b>Subject VII</b>	
<b>Evaluation of Experiences with Existing Regulations</b>	361
<b>Comparative Observations</b>	
<i>Albin Eser</i>	363
<b>Recommendations</b>	367
<b>Conference Programme</b>	373
<b>List of Participants</b>	377



## Abbreviations

A	Appèlafdeling
ABl.	Amtsblatt
Abs.	Absatz
A.C.	Appeal Cases
AD	Appellate Division
a.F.	alte Fassung
afft.	affidavit
AG	Aktiengesellschaft
AIDP	Association Internationale de Droit Pénal
AktG	Aktiengesellschaft (Company by Shares Act)
A.L.I.	American Law Institute
All SALR	All South African Law Reports
Alta.	Alberta
a.m.	ante meridiem
Am.	American
Am.Crim.L.Rev.	American Criminal Law Review
Am.J. of Crim.L.	American Journal of Criminal Law
App.Cas.	Appeal Cases
approx.	approximate(ly)
A.R.	Alberta Reports
ARSP	Archiv für Rechts- und Sozialphilosophie
Art.	Artikel
art., arts.	article, articles
Aufl.	Auflage
AUS, Aust.	Australia
BBl.	(Schweizerisches) Bundesblatt
B.C.	British Columbia
B.C.C.A.	British Columbia Court of Appeal
B.C.S.C.	British Columbia Supreme Court
Bd.	Band
BGB	Bürgerliches Gesetzbuch

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BGBI.	Bundesgesetzblatt
BGH	Bundesgerichtshof
BGHSt	Entscheidungen des Bundesgerichtshofs in Strafsachen
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen
BML	Businessman's Law
BOE	Boletín Oficial del Estado
BT-Drs.	Bundestagsdrucksache
BVerfG	Bundesverfassungsgericht
BVerfGE	Entscheidung des Bundesverfassungsgerichts
c.	chapter
CA, C.A.	Court of Appeal
Can.	Canadian
CC	Constitutional Court
C.C.C.	Canadian Criminal Cases
C.E.L.R.	Canadian Environmental Law Reports
cert.	certiorari
cf.	confer
C.F.R.	Code of Federal Regulations
Chp.	Chapter
C.H.R.R.	Canadian Human Rights Reports
Cir.	U.S. Circuit Court of Appeal
C.L.R.	Canada Law Reports
Colum.L.Rev.	Columbia Law Review
Comm.	Commentary
Conn.	Connecticut
Conn.J.Int'l L.	Connecticut Journal of International Law
Conv.	Convention
cp.	compare
c.p.	Codice penale
CPA	Civil Practice Act, New York
CPD	Cape Provincial Division
C.P.R.	Canadian Patent Reporter
C.Q.	Cour de Quebec
C.R.	Criminal Reports

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Crim.L.Forum	Criminal Law Forum
Crim.L.Q.	Criminal Law Quarterly
Crim.L.Rev.	Criminal Law Review
crit.	critical
C.R.N.S.	Criminal Reports (New Series)
Ct.App.	Court of Appeal
Cth	Commonwealth
CTRs	Currency Transaction Reports
CuCGPJ	Cuadernos del Consejo General del Poder Judicial
D	Durban en Kus Plaaslike Afdeling
D	Deutschland
D.C.	District of Columbia
Dist.Ct.	District Court
DK	Denmark
D.L.	Decreto Legge
D.L.R.	Dominion Law Reports
DM	Deutsche Mark
EC	European Community
ECHR	European Convention on Human Rights
ECOSOC	Economic and Social Council of the UN
ECSC	European Coal and Steel Community
ECU	European Currency Unit
ed., eds.	editor, editors, edition
éd.	édition
EDL	Eastern Districts Local Division
E.E.C.	European Economic Community
e.g.	exempli gratia
EG	Europäische Gemeinschaft
Eng.Rep.	English Reports
E.R.	English Reports
et al.	et altera
etc.	et cetera
et seq.	et sequentes

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EU	European Union
EURATOM	European Atomic Energy Community
EWG	Europäische Wirtschaftsgemeinschaft
F	France
f., ff.	following, forthfollowing
F.2d	Federal Reporter, Second Series
f.i.	feri facias
fn.	footnote
F.Supp.	Federal Supplement
Georgia L.J.	Georgia Law Journal
Geo.Wash.L.Rev.	George Washington Law Review
GW	Griekwaland-Wes Plaaslike Afdeling
H	Supreme Court
Harv.L.Rev.	Harvard Law Review
H.C.J.	High Court of Justice
HEUNI	Helsinki Institute for Crime Prevention and Control affiliated with the United Nations
H.L.	House of Lords
i.e.	id est
ibid.	ibidem
IntBestG	Gesetz zur Bekämpfung internationaler Bestechung
Int'l & Comp.L.Q.	International and Comparative Law Quarterly
ITM	Investitionsgüter- und High-Tech-Marketing
J	Japan
JBL	Juta's Business Law
J.Crim.L. & Criminology	Journal of Criminal Law and Criminology
J.E.L.P.	Journal of Energy Law & Policy
J.Legal Stud.	Journal of Legal Studies
JZ	Juristenzeitung

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K	Kaapse Provinsiale Afdeling
K.B.	Law Reports, King's Bench Division
KH	Konstitutionele Hof
Ky.L.J.	Kentucky Law Journal
L.	Legge (Law)
Lith.	Lithuania
L.J.	Law Journal
L.R.	Law Reports
Man.	Manitoba
Mass.	Massachusetts
McGill L.J.	McGill Law Journal
Mich.L.Rev.	Michigan Law Review
Minn.	Minnesota
mio.	million(s)
Mod.Rep.	Modern Reports
N	Norway
N	Natalse Provinsiale Afdeling
n.	note
N.E.2d	Northeastern Reporter, Second Series
NJW	Neue Juristische Wochenschrift
NL	The Netherlands
NLR	Natal Law Reports
NPD	Natal Provincial Division
N°, n°, no., No., nr., Nr.	Nummer, number, numéro, numero
N.S.	Nova Scotia
NStZ	Neue Zeitschrift für Strafrecht
N.W.2d	Northwestern Reporter, Second Series
N.W.T.S.C.	Northwest Territories Supreme Court
N.Y.	New York
N.Y.U.L.Rev.	New York University Law Review
N.Z.L.R.	New Zealand Law Reports

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O	Oranje-Vrystaat Provinsiale Afdeling
OECD	Organization for Economic Cooperation and Development
OK	Oos-Kaapse Provinsiale Afdeling
OLG	Oberlandesgericht
Ont.	Ontario
Ont.Gen.Div.	Province of Ontario General Division
Ont.Prov.Ct.	Province of Ontario Provincial Court
OPD	South African Law Reports
O.R.	Ontario Reports
OWiG	Ordnungswidrigkeitengesetz (Regulatory Offences Act)
P	Portugal
p., pp.	page, pages
para, paras	paragraph, paragraphs
PFI	Protection of the Financial Interests (of the Community)
PL	Poland
Prot.	Protocol
Q.B./Q.B.D.	English Law Reports, Queen's Bench Division
Que.	Quebec
R (88)	Council of Europe Recommendation concerning liability of enterprises for offences committed in the course of their activities (Number)
R.	Regina
RAD	Rhodesian Appellate Division
rec.	recommendation
resp.	respective
RGBL	Reichsgesetzblatt
RGZ	Entscheidungen des Reichsgerichtes in Zivilsachen
RMB	Renmin bi (term for Chinese currency)
Rn.	Randnummer (margin no.)
ROA	Regulatory Offences Act
R.S.B.C.	Revised Statutes of British Columbia

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R.S.C.	Revised Statutes of Canada
R.S.S.	Revised Statutes of Saskatchewan
S	Sweden
s., ss.	section, sections
SA	South African Law Reports
SALJ	South African Law Journal
SC, S.C.	Supreme Court
S.C.	Statutes of Canada
S.Cal.L.Rev.	Southern California Law Review
S.C.C.	Supreme Court of Canada
S.C.R.	Supreme Court Reports
S.D.N.Y.	United States District Court for the Southern District of New York
SFr.	Swiss Francs
SEC	Securities and Exchange Commission
SFS	Svensk Författningssamling
Sp	Spain
SPD	Sozialdemokratische Partei Deutschlands
StGB	Strafgesetzbuch
subs., subsec.	subsection
Sup.Ct.	Supreme Court Reporter
supp., suppl.	supplement
Sydney L.Rev.	Sydney Law Review
T	Transvaalse Provinsiale Afdeling
TNC	The Transnational Corporation
TPD	Transvaal Provincial Division
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
U	Ugeskrift for Retsvæsen; The Weekly Courts Report
u.g.	under guardianship
UK, U.K.	United Kingdom
UmweltHG	Umwelthaftungsgesetz
UN	United Nations

UNICRI	United Nations Interregional Crime and Justice Research Institute
U.S.	United States
U.S.C.	United States Code
U.S.S.C.	United States Supreme Court
U.S.S.G.	United States Sentencing Guidelines
v.	versus
V.A.T.	Value Added Tax
VO	Verordnung
vol., Vol.	volume
VuR	Verbraucher und Recht
W	Witwatersrandse Plaaslike Afdeling
WED	Wet op de Economische Delicten
WiKG	Gesetz zur Bekämpfung der Wirtschaftskriminalität
wistra	Zeitschrift für Wirtschaft, Steuer, Strafrecht
W.L.R.	Weekly Law Reports
WpHG	Wertpapierhandelsgesetz
W.W.R.	Western Weekly Reports
ZfRSoz	Zeitschrift für Rechtssoziologie
ZPO	Zivilprozeßordnung
ZStW	Zeitschrift für die gesamte Strafrechtswissenschaft

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## Opening Address: Aim and Structure of the Colloquium

Albin Eser, Freiburg i.Br.

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"Habent sua fata libelli". This fatefulness of books, as observed in earlier colloquia also holds true for this colloquium. And so it was in this case as well that various impulses joined to finally lead to the colloquium I have the pleasure of opening here.

At the beginning there was an exchange of thoughts I led at a conference of the Society for the Reform of Criminal Law in August of 1996 in Vancouver (British Columbia) with *Vincent del Buono* as former Interregional Adviser to the United Nations Crime Prevention and Criminal Justice Division at Vienna. Border-crossing corruption and the battle against it played a special role here. As at that time our Max Planck Institute was devoting itself to a comparative study on bribery offences,<sup>1</sup> it seemed the obvious thing to do to search for better ways to fight crime on an international and supranational level, based on this comparison of various national laws. As then further conversations took place, not least with representatives of the Federal Ministry of Justice of the Federal Republic of Germany, in particular with Ministerialdirigent Peter Wilkitzki and Ministerialrat Dr. Manfred Möhrenschrager, it became more evident that corruption is indeed an important, though solely a sub-aspect in both national as well as border-crossing crime in the economic sector. Even as far as corruption is provable in individual cases, it is, in most countries, part of an entire criminal network in which, apart from certain individuals, the backing collective unit can play an important role as well. However, as long as solely individuals can be made criminally responsible, not the bodies or collective entities in and for which the single persons are "working", the instruments of penal sanctioning will remain blunt. Thus our mutual conversations in which, based on long-standing relations, we also involved the International Centre for Criminal Law Reform and Criminal Justice Policy

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1 Now published by *A. Eser/M. Überhofen/B. Huber* (eds.), *Korruptionsbekämpfung durch Strafrecht. Ein rechtsvergleichendes Gutachten zu den Bestechungsdelikten im Auftrag des Bayerischen Staatsministeriums der Justiz (Implementing Criminal Law in Fighting Corruption. A legal comparative study on bribery offences on request of the Bavarian State Ministry of Justice)*, edition iuscrim S 61, Freiburg 1997; the comparative cross section is also available in Spanish: *M. Überhofen*, *La corrupción en el derecho comparado*, Konrad Adenauer Foundation/CIEDLA, Buenos Aires 1997.

Vancouver, in particular Professor *Peter Burns* and Director *Daniel Préfontaine*, moved us to focus the international colloquium on "Criminal Responsibility of Legal and Collective Entities". This was also in the special interest of the German Federal Ministry of Justice as, particularly in Germany as well, the traditional rejection front regarding the penal responsibility of legal persons had begun to crumble.<sup>2</sup> It thus seemed appropriate to have a critical look at possible models and the respective experience made with them. The financial promotion of the colloquium through the Federal Ministry of Justice is owed not lastly to this special interest, support for which we use this opportunity to express our most obliging gratitude.

Therefore, we considered and still consider the subject of this conference extremely topical. Whereas quite a few countries already have provisions for criminal sanctioning of corporations and similarly organised entities, other countries - such as Germany and Italy - are still having their difficulties taking this step. Even in these countries, however, we can observe political movements in favour of sanctioning corporations, partly in the same way as with individuals, partly by testing new types of liability and sanctions. In this situation it is particularly important to exchange experiences and views on an international level. Therefore, the aim of the conference is to examine existing forms of collective responsibility and to discuss improving methods of sanctioning. As so far the main obstacles in making organisations criminally liable seem to lie in traditional concepts of individual punishability, special attention should be given to the question of possible models of collective responsibility, both effective and compatible with the main aims and principles of criminal law.

In order to reach these goals, we have structured our colloquium in seven steps: Following an introductory session on the more general background of the phenomenon of corporate crime and its penal sanctioning, we will conduct five sessions partly devoted to surveys on national and international developments, later focusing on more specific issues of corporate liability, concluding with a session in which we will attempt to summarise and evaluate our results in form of a general discussion.

In our introductory Subject 1 "*Forms of Criminal Responsibility of Organisations and Reasons for its Development*" we deal with two main questions: In being aware of the fact that "corporate crime" as a synonym for criminal offences committed by, within or for different types of corporations, legal persons ("juristische

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<sup>2</sup> Cf. in particular the contribution by *J. Meyer* in this volume.

Personen") or any other "collective entity" appears in manifold variations, it should first be clarified which forms of "corporate crime" must be differentiated and eventually dealt with by different means and sanctions. As you may have observed, it is not uncommon that "corporate crime" is quite frequently simply confused with, if not even identified with "organised crime". Although there are certainly some common characteristics, I consider it necessary to distinguish between at least four different phenomena in the realm of "corporate crime": *a*) activities in the organs of collective entities; *b*) illegal activities or illegal developments within collective entities, *c*) the formation of collective enterprises for criminal purposes, and *d*) organised activities aside from particular legal formalities (such as gangs and similarly organised entities). To avoid misunderstandings in our discussions, every speaker is asked to make clear which of these types he or she has in mind when speaking of "corporate crime". In a second step we will search for reasons for why special sanctioning of legal entities has become (or seems to be) necessary: Is it because leaving corporate crime unsanctioned might lead to "organised individual non-responsibility", thus, thwarting the purposes of punishment? Or do we need corporate sanctioning due to the fact that "structural individual non-responsibility", as is the case with "corporate crime", goes beyond the traditional boundaries of criminal law as it is oriented to the individual? In this case, however, the traditional criminal law faces new challenges, particularly in the areas of organised crime, product responsibility and the environment, this mostly resulting from faulty corporate developments over a period of time, not to mention the minimisation of individual responsibility in the network of collective and organised bodies. Not least we must be aware of special problems caused by globalisation and new forms of organisations and products, such as collective entities operating world-wide, outsourcing or lean management.

In Subject 2 on "*National and International Developments*" overviews will be presented on new legislation or reform discussions in various countries, for the most part, but not exclusively from Europe. International organisations, such as the European Union and European Council, the OECD or Non-Governmental Organisations such as the Association Internationale de Droit Pénal (at its Rio de Janeiro Conference of 1994) and the UNICRI/HEUNI-Conference (at Portland/Oregon 1994) have contributed as well.

After having learned of the different approaches to corporate responsibility in various countries, it will be necessary to find out whether and to what extent certain national differences are more or less accidental or of basic significance. The first step in this search for structural features shall be taken in the rather broad

Subject 3 on *"Establishing a Basis for a Criminal Responsibility of Collective Entities"*. In order not to lose perspective in the complexity of manifold details, utmost attention must be paid to typical principles and models which - explicitly or silently - may be behind the various national regulations. Thus, one model could be based on an identification theory by which the misconduct of representatives, etc. is directly imputed to the collective entity on behalf of or within which the natural person commits a crime. Crucial questions in this model will be on which group of representatives (organs, managerial agents, any member of the enterprise) the imputation of their conduct to the collective entity may be based and whether additional requirements (e.g. the enterprise's own interest and/or economic benefits of it) must be given. Another model could follow precisely the opposite principle by being based on the original responsibility of collective entities: this approach, however, will be confronted with the question as to whether a collective entity can be held guilty or blameworthy in the same way as a natural person, and, if not, how this element may be substituted (e.g. by organisational blame for negligence of duties or specific ethical collective responsibility), or whether additional or even entirely different requirements could provide a basis for collective responsibility; if this is the case, however, the question arises as to what ground the liability might be founded on: on the organised creation of social risks or on the simple reason that without the "initiation" by the mere existence of the corporation, the final crime could not have been committed?

In order to avoid these doctrinal as well as practical difficulties, a further model could be based on a sort of collective liability *sui generis* by means of employing non-punitive sanctions, such as civil forfeiture, confiscation of property, civil penalties or administrative fees. In this case, however, the question arises as to whether it is not a mere "swindling of etiquettes" to "rescue" a sanction "punitive" in nature by simply calling it "civil". Whatever model might be chosen - and this is by no means a closed list of possible principles and approaches -, a great variety of further details needs to be answered: which type of social disturbances should collective responsibility entail: for all offences somehow conditioned by the enterprise or only those somehow benefiting from it? or only specific offences such as economic crimes? Another question concerns the subject of responsibility: should all collective entities (enterprises, associations and even state-owned entities) be made criminally liable? or only special collective entities, such as "juristische Personen" (independent legal persons in their own right)? or could certain members or levels of the management, majority shareholders or persons holding voting majority also be made liable?

Even if, however, this or the other model may appear necessary and feasible for reasons of criminal policy and from a practical point of view, another question is the compatibility with "classical" categories of criminal law, such as the capacity of non-natural entities to act at all, the capacity to be found blameworthy and to be "punished" in the true sense of the word. If these doctrinal problems cannot be overcome, the question arises as to whether there might be other "tracks" for responsibility of collective entities, be it outside "classical" criminal law or perhaps even inside a broader scope of criminal law. There is no question that the numerous points of discussion reveal that this subject must take a central position in our contemplations.

Subject 4 is devoted to "*Sanctions*". In this regard, three questions will need separate attention. Firstly, should primarily repressive or preventive objectives be pursued by sanctioning collective entities? Or should it be mainly oriented towards compensation? Secondly, which types of sanctions would be suitable: fines, administrative fees, prohibition of certain activities, exclusion from economic advantages and subsidies, appointment of provisional care-takers, management by the judicial authority, sequestration, compensation and/or restitution to the victim, publication of the decision, closure of the enterprise? Thirdly, with regard to sentencing, should the relevant criteria be prescribed by law or would sentencing guidelines suffice, and, if so, what should they contain? To be sure, however, all these and further questions concerning sanctioning cannot be answered without being aware of the basic model the respective collective responsibility is founded on.

In Subject 5, special attention will be given to "*Procedural Law*". As in the case at hand not a natural person, but a "non-personal entity" is the defendant, it is evident that procedural rules originally designed for human beings cannot be easily applied to non-human entities. This holds true both with regard to the guiding principles of procedure and the practical organisation and jurisdiction. With regard to the first ones, for instance, the question must be raised as to whether in the investigative proceedings the public prosecutor requires special powers for search and seizure, whether privileges against self-incrimination, developed for human beings, may in the same way be invoked by organisations, in which way plea bargaining should be or have to be modified, and, not lastly, in which manner and to whom rights of appeal should be given. With regard to the organisation and jurisdiction in proceedings against collective entities, the question of special agencies for prosecution and investigation or for specialised courts may arise. And even more so than in the case of individual persons as defendants, criminal prosecutions against collective entities could eventually be substituted, accompanied or

followed by class actions or public inquiries initiated by groups affected by corporate conduct.

The all too great dedication to a cause can make one blind. This also goes for the preoccupation with penal sanctioning of collective entities. Before taking this definitive step, one should once again ensure its necessity. In accordance, in Subject 6 "*Alternatives to Criminal Responsibility*" should yet again be object of discussion. This should happen two-fold: on the one hand through questions concerning developments outside criminal law, such as measures against offences committed by collective entities by means of special public safety laws, economic administration or special devices of private law (e.g. strict product liability or liability for environmental damage according to European Community law). On the other hand, one could examine how advantageous specific structural differences could be: Thus, aside from the public prosecutor, private persons (particularly possible victims) may also be at a better advantage, in the same fashion that more space is left for models based on the co-operation principle.

In Subject 7 we look forward to an "*Evaluation of the Experience with Existing Regulations*". We will attempt to achieve this through a general discussion, introduced by various comparative observations and hopefully concluding with the resolution of recommendations.

As shown in our conference programme (published in the annex), we shall proceed in such a way that each subject is introduced by a keynote address, followed by various commentaries. Whereas the keynote presentations should give a general overview of the respective problems, not necessarily limited to the respective national law of the speaker, the commentaries may either deepen or question specific points made by the main speaker or open the subject to new aspects. In any case, all presenters should leave us sufficient time for discussion.

The exchange of experiences and ideas is indeed the main goal of this international gathering. Each of us may be an expert in his or her respective national law. Here, however, we have the chance to look beyond the borders and to learn from each other. More than 40 participants coming from more than 12 countries spread throughout the world provide a well-mixed and qualified forum, giving hope for enriching presentations and fruitful discussions. Let's live up to these expectations!

## **Subject I**

# **Forms of Criminal Responsibility of Organisations and Reasons for Its Development**



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## **Corporate Criminal Liability: An Introduction and Comparative Survey**

**John C. Coffee, Jr., New York**

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### **Introduction**

During the last decade, the long-standing international debate over corporate criminal liability has shifted dramatically - from a controversy over whether it should exist at all to a dialogue about how it should be defined and structured. Once, Western legal systems could be placed on a continuum that ranged from the French position that guilt was personal, and never vicarious, to the American position that corporate liability was necessary because complex organizations could engage in criminality that was beyond the responsibility (or knowledge) of any single individual. Since the mid-1980s, a significant convergence has occurred that has shrunk the distance between these positions. On the surface, Western legal systems today differ chiefly as to the level of the corporate agents whose conduct can be imputed to their corporation so as to create corporate criminal liability. For example, in the United States (both on the federal level and in some states), the law continues to be that any actor (whether a corporate employee, officer or agent) who acts within his normal scope of responsibility and violates the criminal law with an intent to benefit the organization thereby creates liability, both for himself and his corporate employer. This approach, which will be called "vicarious corporate liability", follows the usual rules of respondeat superior in the civil law. In contrast, in the United Kingdom and much of the British Commonwealth, an alternative approach has long governed under which only the acts of certain very high-ranking corporate executives can be attributed to the corporate for purposes of creating corporate criminal liability. This approach - which can variously be called "alter ego theory" or "identification theory" - has been the dominant approach for much of this century. Despite these continuing differences, however, much has changed. In the United States (at least at the federal level), the magnitude of the penalty that a convicted corporation faces will largely depend on its degree of organizational negligence in failing to prevent the criminal behavior. Similarly, in Canada and Australia, criminal liability, itself, will often depend upon evidence of organizational negligence. On the continent, The Netherlands

and Denmark have also seemingly codified a *de facto* negligence standard that looks to the sufficiency of corporate monitoring efforts. To be sure, in a minority of Western legal systems (Germany being the most notable example), the corporation remains beyond the reach of the criminal law (although other punitive civil sanctions are typically authorized). But how long this will continue is open to serious doubt.<sup>1</sup>

From a policy perspective, any discussion of corporate criminal liability must consider much more than simply the definition of the individual actors whose conduct can result in criminal liability for the corporation. Among these related issues, the following stand out and have been recently the subject of extensive debate:

### **1. Collective Knowledge**

Can information known in part to multiple actors within the corporation, but not known in full to any one actor, be aggregated and imputed to the corporation for purposes of corporate criminal liability? For example, suppose a specific crime requires proof of mens rea (or criminal intent) with regard to three elements (elements A, B, and C). Assume further that element A is known to officer A, element B to officer B, and element C to officer C, but officers B and C do not have knowledge with regard to element A. One important American federal case has suggested that there can be corporate criminal liability on these facts (although the scope of that decision is hotly debated by others).<sup>2</sup> If corporate criminal liability can exist in such cases of aggregated knowledge, its rationale has moved beyond traditional theories of vicarious liability and into a new realm of organizational liability.

### **2. The Role of Due Diligence: Is It an Affirmative Defense, a Negligence Standard, or What?**

U.S. commentators often assert that the role of corporate criminal liability is chiefly to induce the corporation, as principal, to monitor its agents. Suppose then

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1 The effort to harmonize European law has resulted in a directive to member states from the Council of Europe to consider enactment of corporate criminal liability *or* some non-criminal alternative that would similarly yield appropriate deterrence. See "Liability of enterprises for offences," Recommendation No. R (88) 18 adopted by the Committee of Ministers of the Council of Europe on 20 October of 1988 (discussed *infra* at page 35 and note 66).

2 See *United States v. Bank of New England*, 821 F.2d 844 (1st Cir.), *cert. denied*, 484 U.S. 843. This case is discussed *infra* in the text and notes 44-52.

that the corporation does so - and diligently -, but still a crime occurs because of actions by an agent that may have been at least partially motivated by the agent's own interests. Of what relevance is this diligent monitoring by the corporation? Should it give the corporation an affirmative legal defense? Or, should the prosecution bear the burden of proving that the corporation negligently failed to monitor its agents reasonably? Alternatively, should corporate monitoring efforts be no more than a sentencing consideration that can mitigate the penalty but not avert criminal liability?

It must be emphasized that such an affirmative defense is not recognized by the United States today (although a number of commentators have urged that it be adopted). Instead, United States law (at least at the federal level) creates a strong incentive for such monitoring by the corporate employer by gearing the criminal fine to whether the corporation has engaged in such monitoring. That is, if the defendant corporation has adopted and implemented an effective compliance plan designed to prevent and detect corporate wrongdoing (and no other aggravating factors are present), then under the United States Sentencing Commission's Guidelines that apply at all sentencing in federal court, the corporation's criminal sentence (which will, of course, principally be a fine) will be presumptively reduced by as much as 90 % - depending on the degree to which the corporation cooperates in its own prosecution.<sup>3</sup> The elaborate seven factor test for an "effective program to prevent and detect violations of law" (which is set forth in Exhibit A hereto) has become in reality the operative definition in the United States of organizational negligence. Even when such a compliance plan is adopted, the corporation may still be convicted, but its penalty will likely be nominal if it has adopted and followed specified compliance and monitoring safeguards (which are set forth in Exhibit A).

Interestingly, a degree of functional equivalence between the U.S. system of vicarious liability and the British system of *alter ego* liability becomes discernible once one further feature of the American system is noted: the very substantial sentencing credit that the corporation receives for an effective compliance plan

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3 It needs to be clarified that two different sentencing credits must be earned before the fine will be presumptively reduced by as much as 90 %: (1) the credit for an "effective" compliance plan (which alas did not work in the instant case), and (2) a separate credit for self-reporting which must occur prior to the point that the authorities are "hot on the trail" of the defendant. The requirements for an "effective program to prevent and detect violations of law" are specified in U.S. Sentencing Guidelines Manual, Chp. 8, § 8A1.2, application note 3(k) (1998) (defining an "effective" compliance plan and specifying seven factors). For a brief review, see Note, The Role of Corporate Compliance Program in Determining Corporate Liability: A Suggested Approach, 96 Colum.L.Rev. 1252 (1996).

under U.S. law is not available if a member of the corporation's senior management group participated in or tolerated the criminal behavior. Hence, it seems roughly accurate to generalize that, while in the United Kingdom only high level officials can create corporate liability, in the U.S. only high level officials can engage in conduct that results in high financial penalties. Of course, this statement as to U.S. law is only accurate if the corporation has adopted an effective compliance plan (as most publicly-held corporations in the United States have attempted to do). In the absence of an effective compliance plan, corporations in the United States will face substantial criminal liability for misconduct by even low-level agents.

This claim that there is more in common between many contemporary Western legal systems on the issue of corporate criminal liability than initially meets the eye is subject, however, to one critical qualification: substantially similar systems may still give rise to very different incentives on the part of potential defendants. For example, consider again the differences between British and U.S. law. Because U.S. law clearly creates a corporate obligation to monitor the corporation's agents (and holds out significant sentencing concessions to encourage such monitoring), it may deter misconduct that British law (or the law of any other "alter ego" jurisdiction) invites. Indeed, British "identification theory" may even create an incentive for superiors not to monitor, because knowledge can create liability (while ignorance is bliss). Thus, the real difference is that, from the *ex ante* perspective of the economist, U.S. law seeks to minimize organizational misconduct by encouraging monitoring, while legal regimes based on identification theory make no such effort and indeed may discourage monitoring.

### 3. Perverse Effects

Although corporate criminal liability is intended to deter corporate misbehavior, some commentators believe it creates a disincentive for the corporation to detect past wrongdoing by its officers or agents - because such wrongdoing will result in automatic liability for the corporation. This thesis, which will be called the "perverse effects thesis", has become popular within the field of law and economics in the United States,<sup>4</sup> and is cited as a justification for why the prosecution

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4 There is a sizeable and growing "law and economic" literature in the United States that believes corporate criminal liability is unjustified. See *Khanna*, Corporate Criminal Liability: What Purpose Does It Serve? 109 Harv.L.Rev. 1477 (1996); *Parker*, Doctrine for Destruction: The Case of Corporate Criminal Liability, 17 Managerial and Decision Economics 381 (1996). This survey will not attempt to respond to these articles, because they have not yet discernibly influenced any U.S. court or agency.

should bear the burden of proving negligence, or a failure of care, by the corporation in monitoring its employees and agents.

This survey memorandum will examine each of these general topics in succession. Initially, however, Part I will survey the historical development (with a primary focus on this century) of corporate criminal liability and then will examine recent developments in the major Western legal systems. Part II will focus on the debate over particular elements in a theory of corporate criminal liability and will review the policy debate.

### **Part I: A Brief Look at History**

As of the early 16th and 17th centuries, the consensus of commentators agreed that corporations could not be held criminally liable. *Lord Holt* wrote simply and decisively in 1701 that a "corporation is not indictable, but the particular members of it are."<sup>5</sup> As this author has detailed elsewhere, there were at least four significant obstacles at that point to the recognition of corporate criminal liability:

- It was difficult for courts to attribute acts by individuals to a juristic fiction, the corporation.
- Corporations, being soulless, did not seem capable of moral blameworthiness to an age still dominated by religious convictions and morality.
- The ultra vires doctrine seemingly denied corporations the power to commit crimes, because their powers were strictly limited by their charters; and
- The corporation did not fit well within the then existing system of criminal procedure, which depended on the defendant to plead before the court (and usually confess).<sup>6</sup>

Gradually, these obstacles gave way - at least partially. The first step was the imposition of criminal liability in cases involving nonfeasance by quasi-public bodies (such as cities or municipal bodies) that resulted in public nuisances. For example, the failure to maintain a bridge or a road might result in such a finding of

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5 *Anonymous Case* (No. 935), 88 Eng.Rep. 1518, 1518 (K.B. 1701). Although this decision does not truly state its rationale, it has been widely cited and relied upon by commentators no less eminent than *Blackstone*. For the fullest treatment of the development of English corporate criminal liability, see *L.H. Leigh*, *The criminal liability of corporations in English law*, London 1969.

6 For a fuller discussion of these problems, see *Coffee*, *Corporate Criminal Responsibility*, in: S. Kadish (ed.) *Encyclopaedia of Crime and Justice*, vol. 1, New York 1983, at 253.

public nuisance. As these operations were gradually moved into the hands of commercial corporations, the same principles were carried over - at least with regard to public nuisance offenses. Doctrinally, these cases presented less difficulty for the courts of the time to accept because no individual agent was responsible for the obligation to prevent a public nuisance from continuing, and hence there was no imputation of liability or guilt from the individual agent to the corporation.

By the mid-19th century, courts began to generalize and extend corporate criminal liability from the limited context of public nuisance offense to the broader context of all offenses that did not require proof of criminal intent. The driving force behind this process seems to have been the appearance of the railroad, which disrupted the social equilibrium, caused accidents, killed livestock, and resulted in innumerable petty transgressions which inevitably found their way into the courts. In 1846, the Queen's Bench ruled in the case of *The Queen v. Great North of England Railway Co.*,<sup>7</sup> that corporations could be criminally liable for acts of misfeasance. American courts reached similar results extending the scope of corporate liability from nonfeasance to misfeasance within a decade.<sup>8</sup> But, at this point, the subsequent behavior and positions of U.S. and British courts diverged dramatically.

## 1. The U.S. Experience

The principal barrier to the growth of corporate criminal liability was the sense of early courts and commentators that a corporation could not be held liable for a crime that required proof of intent. To most European courts, this remained an insurmountable barrier until only very recently. But in the United States, which had earlier lagged behind the United Kingdom, this barrier was crossed in 1909 in the U.S. Supreme Court's decision in *New York Central & Hudson River Railroad Co. v. United States*.<sup>9</sup> Two facts are important to understand about this case: First, the statute involved (the Elkins Act) clearly and specifically intended to impose liability on corporations and expressly stated that the acts of officers, agents and employees of a common carrier were to be deemed the acts of the carrier, itself. Thus, the legal issue in *New York Central* was the constitutionality of that provision. Second, because railroad regulation had been at the heart of a turbulent political debate in the United States throughout the Progressive Era, the Supreme

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7 115 Eng.Rep. 1294 (Q.B. 1846).

8 The early history of American corporate criminal liability is well treated in *Elkins, Corporations and the Criminal Law: An Unusual Alliance*, 65 Ky.L.J. 73 (1976).

9 212 U.S. 481 (1909).

Court was familiar with, and indeed explicitly endorsed, the policy argument that the statute's intent to preclude rebates by railroads to preferred shippers would have been frustrated unless corporation could be held criminally accountable. Hence, to deny corporate criminal liability was in its view to deny the legislature power to forbid railroad rebates, which was a central aim of legislatures in this reform-minded era.

In this light, it might have been possible to limit the application of *New York Central* to those statutes that unequivocally expressed a desire to impose criminal liability on corporations and expressly imputed the agent's conduct to the principal. But American courts did not so limit the decision in *New York Central*. Rather, federal courts in the United States read *New York Central* expansively to apply to all crimes, at least where the agent acted within his normal scope of responsibility and had the intent to benefit the corporation at least in part. Thus, even in cases involving specific intent crimes, federal courts in the United States have upheld corporate liability, and they have generally refused to consider evidence that corporate bylaws or policy forbade the crime, or denied authority to corporate officers to engage in the crime.<sup>10</sup> In short, the answer of U.S. courts to the claim that corporations lacked the requisite intent to commit a crime (and particularly a crime of specific intent) was that because the legislature created the corporation, it had the right to deem the corporation to have the capacity to hold whatever intent was required for the crime.<sup>11</sup>

## 2. The Experience in the United Kingdom

British courts (unlike most of their European brethren of this era) also have found the corporation capable of committing crimes of intent, but they have done so without explicitly imputing the conduct of the agent to the principal (which is the essence of vicarious liability). In contrast to the general American rule (at the federal level) of vicarious liability, British courts developed the alternative doctrine of "identification", which equated the corporation with certain high-ranking personnel who acted on its behalf. The difference seems highly formalistic: one did not impute liability from agent to principal; rather, one decided that agent and principal were the same person. When these high-ranking agents engaged in the requisite elements of a crime with the requisite intent, then the corporation would also be held criminally liable. As in the case of the American rule, it would also be

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<sup>10</sup> See *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1992).

<sup>11</sup> See *United States v. MacAndrews & Forbes Co.*, 149 F.823, 835 (S.D.N.Y. 1906).

necessary that these agents acted within the scope of their normal employment and with the intent to benefit the corporation. Still, even if an intellectual rationalization, this approach spared British courts the distasteful prospect of holding an entity criminally liable for the acts of its agents by instead identifying the "directing mind" of the corporation with its senior-most officers. From a legal realist perspective, this formalism permitted British courts to engage in a doctrinal leap from which they otherwise would have pulled back.

The classic statement of this rationale was given in a non-criminal case, but its language has been frequently quoted in criminal decisions. In *H.L. Bolton (Engineering) Co. v. T.J. Graham & Sons, Ltd.*,<sup>12</sup> Lord Justice Denning wrote:

"A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with direction from the centre. Some of the people in the company are mere servants and who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the *directing mind and will* of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such." (emphasis added)

In 1971, the House of Lords explicitly adopted this approach in the most important British decision on corporate criminal liability, *Tesco Supermarkets, Ltd. v. Nattrass*,<sup>13</sup> which stated:

"Normally the board of directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company. Their subordinates do not. They carry out orders from above and it can make no difference that they are given some measure of discretion."<sup>14</sup>

The *Tesco Supermarkets* decision can be criticized (and has been) on a variety of levels. It may be a shallow theory of organizational behavior to believe that only the top of the organization makes decisions. In the modern decentralized firm, with operations spanning continents and a range of markets, decisions about whether or not to obey the criminal law may be made at all levels. For example, while at the time of the *Tesco Supermarkets* decision, environmental crime was not a major area of judicial concern, today it is evident that environmental criminal violations will occur principally (and perhaps only) at the middle to lower management levels. Chief executive officers simply are not organizationally posi-

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12 1 Q.B. 159, 172 (C.A. 1956).

13 1972 App.Cas. 153 (1971).

14 Ibid. at 171.

tioned to make fast-paced decisions as to whether to pollute local streams or waterways, or release pollutants into the air, or otherwise violate environmental rules or regulations. Although lower level officials can be criminally prosecuted as individuals, it remains indeterminate who can pressure them more - the corporation or the state - if the corporation is not criminally liable, itself, for the resulting misconduct. That is, the risk of criminal prosecution may be more remote and less certain (and even potentially lesser in magnitude) than the risk of employment termination to a middle level official or plant manager (which risk he may plainly face if he does not violate certain regulatory laws to benefit the corporation). The mid-career or older official may accurately perceive that he will not be employable elsewhere if he is fired by his corporation. Hence, even if a criminal sentence is a greater, more potent sanction, it is less certain of application, whereas corporate detection of the official's failure to follow explicit or implicit directions is virtually certain. Moreover, the corporate can quietly signal its preferences - and the likely consequences if they are not honored. Hence, with regard to some crimes (of which environmental and regulatory violations supply the paradigm), modern courts may be in the same position in which the U.S. Supreme Court saw itself in the *New York Central* case: the statute cannot be effectively enforced absent corporate liability.

Even if these abstract reasons about why corporate criminal liability should extend to at least the level of the middle and junior corporate officers are not accepted, it is still clear that *Tesco Supermarkets* decision imposed an extremely restrictive standard that went no lower than the "superior officers" of the corporation and may even have stopped at the chief executive level. Even in the common law system, this test has proved too rigorous for most subsequent commentators and legislative bodies. In 1989, the Law Commission for England and Wales proposed a statutory test that may marginally expand the scope of persons whose conduct can create corporate criminal liability:

"Controlling officer' of a corporation means a person participating in the control of the corporation in the capacity of a director, manager, secretary or other similar officer (whether or not he was, or was validly, appointed in any such office)."<sup>15</sup>

Although it is debatable whether this 1989 proposal would have any material impact on the U.K. standard for corporate liability, it seems clear that, in the absence of some change, corporations in the U.K. are unlikely to be convicted of serious felonies even when even gross organizational negligence can be shown. One ex-

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15 See Law Commission for England & Wales, *Criminal Law: A Criminal Code for England and Wales*, Report No. 177, at 30 (1989).

pert has estimated that to date there have been only two recorded convictions of a corporation for manslaughter in the U.K.<sup>16</sup> Nonetheless, the English position may not be as static as this data suggests. A 1996 Law Commission Report has proposed the enactment of a new separate offense, called "corporate killing", which would constitute an additional offense independent and apart from the traditional crime of manslaughter (for which a corporation could still be convicted under the principles established in *Tesco Supermarkets*). As proposed, corporate liability would exist under the following standard:

- "(1) A corporation would be guilty of corporate killing if -
- (a) management failure by the corporation is the cause of or one of the causes of a person's death; and
  - (b) that failure constitutes conduct falling far below what can reasonably be expected of the corporation in the circumstances."<sup>17</sup>

This formula seems to propose a gross negligence standard, but surprisingly the critical term "management failure" is not defined, except by a backhanded statement, elsewhere in the draft, which reads as follows:

- "2 (a) There is management failure by the company if the way in which its activities are managed or organized fails to ensure the health and safety of persons employed in or affected by those activities."<sup>18</sup>

Conceivably, this standard, if adopted, could make the corporation a virtual insurer under pain of criminal liability for any accidental killing. In any event, this 1996 proposal by the Law Commission suggests a high degree of cognitive dissonance within the British legal community; on the one hand, the prevailing legal rule on corporate criminal liability is understood to be very narrow and, on the other hand, the appropriate legal standard proposed by the leading law reform group is extremely broad.

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16 This estimate has been made by Professor *Celia Wells*, who cites the cases of *R v. Kite* (1994) and *R v. Jackson Transport (Ossett) Ltd.* (1996). See *Wells*, *A New Offence of Corporate Killing - the English Law Commission's Proposals* (p. 119). In another, much publicized case involving the *Herald of Free Enterprise* disaster in which an ocean-going ferry capsized, killing 188 persons, the prosecution was dismissed, based largely on the *Tesco Supermarkets* precedent, before the prosecution had even presented all its evidence. See *P&O European Ferries (Dover) Ltd.*

17 See Law Commission, *Involuntary Manslaughter*, Report 237 (1996) at 5.1 Draft Involuntary Homicide Bill, Clause 4.

18 *Ibid.*

### 3. The Commonwealth Experience

Several Commonwealth countries have endorsed the *Tesco Supermarkets* theory of identification, but then significantly expanded its scope of application. Most notably, the Supreme Court of Canada has agreed with the *Tesco* court that a "directing mind" of the corporation can be identified, but then rejected the idea that a corporation has a single directing mind, which holds and wields centralized authority. Instead, it observed in *Canadian Dredge & Dock v. R.*,<sup>19</sup> that:

"[A] corporation may... have more than one directing mind. This must be particularly so in a country such as Canada where corporate operations are frequently geographically widespread. The transportation companies, for example, must of necessity operate by the delegation and sub-delegation of authority from the corporate center; by the division and subdivision of the corporate brain; and by decentralizing by delegation the guiding forces in the corporate undertaking. The application of the identification rule in *Tesco* may not accord with the realities of life in our country, however appropriate we may find to be the enunciation of the abstract principles of law there made."<sup>20</sup>

Two years after *Canadian Dredge*, the Law Reform Commission of Canada in 1987 recommended the adoption of a much broadened definition of the "directing mind" concept for purposes of intentional crimes. In its view, the persons whose conduct could create corporate liability were those "with authority over the formulation or implementation of corporate policy".<sup>21</sup> Under this expanded definition, a plant or division manager could seemingly create corporate liability for many operational crimes (e.g., environmental or work safety violations or other regulatory crimes).

Australia and New Zealand have also followed *Tesco Supermarkets* on the common law level,<sup>22</sup> but Australia has adopted a radical legislative departure from it. The Australian Criminal Code Act, 1995, enacted a special provision on corporate criminal liability (Part 2.5 - Corporate Criminal Responsibility), which attributes the physical conduct of an agent, employee, or officer to the corporation.<sup>23</sup> In addition, for *mens rea* crimes, the fault requirement of the criminal law is deemed satisfied if the corporation "expressly, tacitly or impliedly authorized or permitted

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19 [1985] 1 S.C.R. 662 (Can.).

20 Ibid. at 693.

21 Law Reform Commission of Canada, Recodifying Criminal Law, Report No. 31 (1987) at 26.

22 See *Hamilton v. Whitehead*, 166 C.L.R. 121, 127 (1988) (Aust.); *Nordik Indus. Ltd. v. Regional Controller of Inland Revenue*, [1976] 1 N.Z.L.R. 194, 199 (Sup.Ct. 1975).

23 See Criminal Code Act, 1975, Part 2.5, s. 12.2.

the commission of the offense".<sup>24</sup> This concept of tacit acquiescence opens up all the original issues of who within the corporation can "authorize" or "permit" corporate crime. But, here, in its most innovative provision, the Australian Criminal Code provides that such authorization or permission can be shown by any of the following means:

- "(a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorized or permitted the commission of the offence; or
- (b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorized or permitted the commission of the offence; or
- (c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to noncompliance with the relevant provision; or
- (d) proving that the body corporate failed to create and maintain a corporate culture that require compliance with the relevant provision."<sup>25</sup>

The concept of "corporate culture" is, of course, inherently ambiguous, but Section 12.3(4) of the Australian Criminal Code provides some guidance as to how the above subparagraphs (c) and (d) are to be interpreted:

- "(3) Factors relevant to the application of paragraph (2)(c) or (d) include:
  - (a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and
  - (b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorized or permitted the commission of the offence."<sup>26</sup>

In short, even if a low-level agent was not authorized to commit the crime, it is sufficient, that he had a "reasonable expectation" that he would have been permitted to engage in the crime by a superior who is a "high managerial agent." Presumably, this "expectation" standard looks to past statements or behavior by that senior official. Unlike even the American rule of vicarious liability, the Australian Model Code would seemingly permit the imposition of criminal liability upon the corporation where the agent acted without sufficient *mens rea*, but the corporation had a "corporate culture ... that ... encouraged, tolerated or led to non-compliance". Effectively, despite the inherent ambiguity in the concept of corporate cul-

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24 Ibid. at s. 12.3(1).

25 Ibid. at s. 12.3(2).

26 Ibid. at s. 12.3(4).

ture, this seems a negligence standard in terms of whether the corporation took appropriate precautions to minimize the risk of the crime. Thus, the corporation would not be strictly liable (as it is in the United States) for the agent's misconduct, but it could have liability for negligent or non-knowing conduct by the agent (whereas it might *not* have such liability in the United States).

Such a negligence based system approximates the results that a number of American states have reached. Although vicarious corporate criminal liability applies at the federal level in the United States, many American states have adopted the American Law Institute's Model Penal Code, which in most cases holds a corporation criminally liable for the conduct of its board of directors or any "high managerial agent" acting on behalf of the corporation.<sup>27</sup> This formulation does not seek to identify any "directing mind," but it defines a "high managerial agent" as an officer or any other agent "having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation ..."<sup>28</sup> The "high managerial agent" need not direct or command the crime; rather, it is sufficient in most cases that he or the board "recklessly tolerated" the offense. Although "recklessly tolerated" can be distinguished from ordinary negligence, it is far from clear that American state courts have done so. Either, as a common law matter in some states (which have not codified the Model Penal Code), or as a construction of the Model Penal Code Provision (in those state that have codified it), these courts have permitted the jury to consider whether management "tolerated" the criminal activity.<sup>29</sup>

#### 4. Continental Europe: Divergent Approaches

*The Netherlands.* The Netherlands probably comes the closest among European nations to approximating the American rule of vicarious liability. With the enactment of art. 51 of the Dutch Criminal Code in 1976, criminal charges may be brought against corporations for apparently any crime. In principle, if it was within the corporation's power to determine whether an employee did the particular act and if the corporation accepted the act or the benefits that flowed from the

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27 A.L.I. Model Penal Code, § 2.07 (Proposed Official Draft 1962). See, e.g., N.Y. Penal Law § 20.20 (1994).

28 Ibid. at § 2.07 (4) (c).

29 See, e.g., *State v. Christy Pontiac-GMC Inc.*, 354 N.W.2d 17, 19-20 (Minn. 1984); see also *Commonwealth v. Beneficial Financial Co.*, 275 N.E.2d 33, 72-74 (Mass. 1971).

act, then corporate liability follows.<sup>30</sup> These references to "power" and "acceptance" have led Dutch courts to analyze the style of institutional decision-making within the organization and determine whether it was deficient. For example, in 1987, a Dutch hospital was prosecuted and convicted for negligent homicide where out-of-date anesthetic equipment contributed to the death.<sup>31</sup> The court emphasized the inadequacies in the corporate entity's system of supervision and control. Again, this approach seems to reflect a negligence standard not that different from Australia's.

In this regard, Dutch law is dramatically different than that of the U.K. in that Dutch law both (1) rejects the "identification" or "directing mind" concept, and (2) accepts the "collective knowledge" or "aggregation" approach under which the knowledge of multiple individuals can be aggregated to establish corporate guilt, even though no single individual possessed the requisite *mens rea* for individual liability.<sup>32</sup>

*Germany.* In contrast to the Netherlands, Germany has probably the most skeptical and restrictive view on corporate criminal liability of the principal European nations. Generally, liability is imposed on the corporation by governmental authorities only for administrative offenses.<sup>33</sup> Whether such penalties should be considered criminal in nature or only morally neutral administrative penalties has been much debated. The German system of administrative penalties - known as "Ordnungswidrigkeiten" - enables both administrative agencies and criminal courts to impose administrative fines (Geldbußen) both on natural persons and corporations.<sup>34</sup> Because these penalties are successors to an earlier and decriminalized system (Übertretungen) for fining largely petty offenses, they appear not to be perceived (either by the defendant or the public) as criminal sanctions even when imposed by criminal courts.

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30 *S. Field/N. Jong*, Corporate Liability and Manslaughter: Should we be going Dutch? 1991 *Crim.L.Rev.* 156.

31 *Ibid.* at 164-165 (citing *Rechtbank Leeuwarden*, December 23, 1987, partially reported at 1988 *Nederlandse Jurisprudentie* 1981).

32 *Ibid.* at 133 (citing *ATO, Hoge Raad de Nederlanden*, January 27, 1951, 1952 *Nederlandse Jurisprudentie* 474).

33 *L.H. Leigh*, The Criminal Liability of Corporations and other Groups: A Comparative View, 80 *Mich.L.Rev.* 1508, 1522-1523 (1982).

34 This discussion is largely based on *Stessens*, Corporate Criminal Liability: A Comparative Perspective, 43 *Int'l & Comp.L.Q.* 493 (1994).

Although high fines can be imposed under the German system, § 30 of the Ordnungswidrigkeitengesetz (OWiG) limits the class of natural persons whose acts may make the corporation liable. Liability is basically limited to instances in which the corporation's legal representatives or directors have acted. However, negligence, including a failure to monitor by the board, may be deemed action by that corporate organ. Hence, the failure by an officer who falls within the scope of § 30 OWiG or by the board to supervise adequately a low-level "rogue" employee, who is himself outside the scope of § 30, can apparently amount to a requisite failure to monitor that triggers corporate liability. Thus, while the German system seems on its statutory face to resemble British "identification" theory, its actual operation may more closely resemble the negligence system of Australia or the American states. But, it is at most a quasi-criminal system of sanctioning.

*France.* The 1992 adoption of the Nouveau Code Pénal in France (effective as of 1994) marked a major revision of that country's position on corporate criminal liability.<sup>35</sup> Since 1810 and the passage of the Napoleonic Code, French law had repudiated the idea that corporations, as legal fictions, could be criminally liable. Indeed, the French position that, because guilt was personal, not vicarious, corporations could not be criminally liable had long dominated Europe (and still seems the dominant rationale in nearby Belgium). The traditional maxim "societas delinquere non potest" (or literally, "corporations cannot commit crimes") has now been abandoned in principle by France.

But whether it has been abandoned in practice is more debatable. Under art. 121-2 of the Nouveau Code, legal entities - or "personnes morales" - may be held liable for crimes along with natural persons. However, two qualifications must be immediately noted: First, there is no general principle of entity liability in the Nouveau Code; entities are criminally liable only when the provision defining the offense explicitly declares the provision applicable to entities. Second, under art. 121-2, conduct by an officer or corporate organ generally (but not always) is a prerequisite to entity liability. Unauthorized or "rogue" conduct by an employee does not lead to entity liability,<sup>36</sup> but, under some limited circumstances, omissions and failures to supervise by senior managers can lead to entity liability.<sup>37</sup>

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35 *L. Orland/C. Cachera*, Corporate Crime and Punishment in France: Criminal Responsibility of Legal Entities (Personnes Morales) Under the New French Criminal Code (Nouveau Code Pénal), 11 Conn.J.Int'l L. 111 (1995).

36 See Circular of May 14, 1993, at 147-149; *Orland/Cachera* (note 35) at 124.

37 Circular (note 36) at 147.

It remains too early to assess how these provisions will work out. Some commentators have feared that only conduct by senior officers will be permitted to trigger corporate liability, thereby making the French position extremely conservative (and indeed as restrictive as the British "directing mind" approach).<sup>38</sup> Others have viewed the French approach as more advanced and expansive than even the traditional American model.<sup>39</sup> But at present, it is difficult to predict (1) the level of managerial involvement necessary to trigger corporate liability in France; (2) the significance of collective knowledge within the organization; and (3) the possibility that due diligence (or more generally, an absence of negligence) will constitute an affirmative defense.

*Other European Countries.* Denmark is probably the European country with the longest experience with corporate criminal liability under a negligence standard. Since 1926, criminal liability for corporations and other legal persons has been recognized, and prosecutions for manslaughter have occurred. A negligence standard seems to be the prevailing rule, and some cases have also upheld prosecutions of controlling shareholders for corporate misconduct - apparently simply on a theory of vicarious liability.<sup>40</sup>

Since the early 1980s, Portugal has drawn a distinction between "nuclear" criminal liability and "secondary criminal liability." In the latter context - consisting largely of economic crimes and environmental offenses - corporate criminal liability is recognized and enforced. Apparently, the conduct of any agent who acts in the corporation's name can be imputed to the corporation.<sup>41</sup>

## 5. The Asian Experience

Both China and Japan recognize corporate criminal liability in principle, but employ it infrequently in practice. Because China has only recently authorized private corporations, its criminal code speaks instead of the criminal liability of the "danwei" which term translates as "working unit" and referred to organization that predated the current privatization experience. Still, there is apparently little doubt

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38 See *Stessens* (note 34) at 507 (describing the Nouveau Code as "the most restrictive model of the jurisdictions researched").

39 See *Orland/Cachera* (note 35) at 126.

40 This summary is based on the comments of Professor *Gorm Toftegaard Nielsen* in this volume, p. 189.

41 See *T. Serra*, *Establishing a Basis for Criminal Responsibility of Collective Entities*, in this volume, p. 203.

that the term extends to both private corporations and partnerships.<sup>42</sup> In 1993, China enacted a new Company Law, which explicitly creates criminal liability for private companies, but appears to be focused primarily on securities fraud offenses.<sup>43</sup>

## **Part II: The Policy Debate: What Should Be the Elements of an Optimal Theory of Corporate Criminal Liability?**

Much commentary has recently focused on three issues: (1) the collective knowledge or "aggregation" issue; (2) the alleged desirability of a defense of adequate care or non-negligence; and (3) the alleged "perverse effects" of existing rules on corporate liability. Each is reviewed below.

### **1. The Collective Knowledge Issue**

The leading U.S. case, *United States v. Bank of New England*,<sup>44</sup> involved a money laundering effort by an individual who wished to withdraw substantial sums from an account without triggering any obligation for the bank to file reports (known as Currency Transaction Reports - CTRs) with the U.S. Treasury Department. CTRs are required to be filed for any cash withdrawal greater than \$10,000. Hoping to evade this notice to the Treasury, the individual simultaneously presented a series of checks, each made out for less than \$10,000, but collectively totaling well over that amount. The Bank's defense was that it had not acted "willfully" to violate the law, because under the Currency Transaction Reporting Act "willfulness" required (1) the defendant's knowledge of the reporting requirement, and (2) a specific intent to commit the crime. At trial, the district court instructed the jury that "the knowledge of individual employees acting within the scope of their employment is imputed to the Bank."<sup>45</sup> Thus, it added, if any individual employee knew that the tendering of multiple checks on the same day would require the filing of a CTR, the bank would be deemed to know this as will. In fact, certain bank employees - their internal lawyers - were aware of this requirement, although none of the tellers were. On appeal, the defendant Bank contended that the collective knowledge instruction that had been given the jury effectively held it liable for

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42 See *V.Ch. Yang*, *Corporate Crime: State-Owned Enterprises in China*, 6 *Crim.L.Forum* 143, 146-147 (1995).

43 *Ibid.* at 155-157.

44 821 F.2d 844 (1st Cir.), *cert. denied*, 484 U.S. 843 (1987).

45 *Ibid.* at 855 (quoting the trial court instruction).

"negligently maintaining a poor communication network that prevented the consolidation of information held by its various employees".<sup>46</sup> Nonetheless, the appellate court upheld the conviction, ruling that corporations must accept responsibility for employees' knowledge, because any other rule would allow corporation to compartmentalize information and thereby evade criminal liability.<sup>47</sup> Hence, it found the trial court instruction "not only proper, but necessary".<sup>48</sup>

The *Bank of New England* decision remains controversial even within the United States, and some have argued that on a close construction of its facts it is better read as a case involving willful avoidance of knowledge.<sup>49</sup> For present purposes, it is not necessary or important to dwell further on the facts of *Bank of New England*, but the debate over its scope frames the two most likely options for a modern criminal code provision on corporate intent and knowledge:

*Option One:* The corporation has liability for all knowledge acquired by agents or employees acting within the scope of their employment and seeking to benefit the corporations;<sup>50</sup> or

*Option Two:* The corporation will have knowledge imputed to it that it has deliberately sought to insulate itself from receiving; this is the corollary of the standard "willful blindness" charge that is given in criminal trials when an individual deliberately avoids learning a potentially culpable fact (such as, for example, whether a suitcase contains cocaine).

The case for the second option is that it is consistent with statutes that require proof of purpose, specific intent, or knowledge, whereas a simple "collective knowledge" instruction tends to reduce the mens rea level specified in the statute down to the level of negligence. Conversely, the case for the first option is that the search for culpability in the case of the corporation may be thought a futile search for the "ghost in the machine". Negligence may be the only standard that is meaningful. This debate will no doubt continue.

## 2. Intent

Many statutes require proof not only of knowledge, but also of some level of intent (frequently, U.S. statutes require a "willful" intent or state that the act must

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46 Ibid. at 856.

47 Ibid. at 856.

48 Ibid. at 856.

49 See *Th. Hagemann/J. Grinstein*, *The Mythology of Aggregate Corporate Knowledge: A Deconstruction*, 65 *Geo.Wash.L.Rev.* 210 (1997).

50 This would exclude knowledge acquired by what agency law calls "adverse agents" (for example, co-conspirators seeking to defraud the bank).

have been done "willfully"). Some U.S. courts have deemed this specific intent requirement to require that at least one agent of the corporation have had the requisite specific intent.<sup>51</sup> Conversely, in the *Bank of New England* case, the First Circuit Court of Appeals found the willfulness requirement in that statute satisfied because of the "flagrant indifference to [the bank's] obligations imposed by the ... Act".<sup>52</sup> This is a holding distinct from its collective knowledge holding and was based on evidence of deliberate inattention by corporate superiors to monitoring problems that were foreseeable.

### 3. The Relevance of Corporate Monitoring and Compliance

Under the vicarious liability regime in the United State's federal courts, the use of compliance programs will not shield the corporation from criminal liability<sup>53</sup> (although their use will greatly reduce the financial penalty that is imposed, at least in the absence of other aggravating factors). Stating or publishing instructions and policies that bar the conduct also does not protect the corporation from criminal responsibility.<sup>54</sup> One early case, however, has found that elaborate compliance efforts could suffice to rebut a statutory requirement of willfulness, at least where the low-level employees who engaged in the conduct were unaware that they were violating a judicial order.

In contrast to the American federal rule, the A.L.I. Model Penal Code, which applies in a number of American states, generally requires that the conduct be authorized, requested, performed, or "recklessly tolerated" by "a high managerial agent".<sup>55</sup> Such language plainly makes compliance efforts relevant, but the involvement of any "high managerial agent" in authorizing, performing, or requesting unlawful conduct would presumably overcome diligent efforts by others to prevent such conduct. Thus, the aggregate level of corporate monitoring efforts is not alone decisive.

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51 See *United States v. LBS Bank - New York, Inc.*, 757 F.Supp. 496, 501 n.7 (1990).

52 821 F.2d 844, 857.

53 See *United States v. Twentieth Century Fox Film Corporation*, 882 F.2d 656, 660 (2d Cir. 1989) (corporation's compliance program, however extensive, does not immunize the company from liability); *United States v. Basic Construction Co.*, 711 F.2d 570, 573 (4th Cir. 1983).

54 See *United States v. Beusch*, 596 F.2d 871, 878 (9th Cir. 1979).

55 A.L.I. Model Penal Code, § 2.07 (1)(c).

Due diligence efforts by the corporation have even greater relevance under the negligence based regimes of Australia and The Netherlands. Even in some of the "identification" regimes, such as that in Canada, compliance efforts might be relevant to show that unlawful conduct was not permitted or negligently overlooked by a sufficiently high level officer so as to trigger corporate liability.

#### 4. The Policy Debate: Should Corporate Liability Be Absolute or Duty-Based?

Given the diversity of legal regimes regarding corporate criminal liability, it may seem surprising that there has been relatively little policy debate in terms of which approach works most efficiently to minimize the social costs of corporate criminality. The debate, however, has recently been joined by the "law and economics" scholars, who note the following arguments in favor a strict or vicarious liability regime:<sup>56</sup>

1. Only strict vicarious liability will induce the corporation to consider the full social cost of its actions.
2. A duty-based regime (under which the firm is liable only if it failed to take appropriate actions to discourage criminality) may under-deter by allowing the firm to avoid liability for the full costs of its employees' actions simply by acting "reasonably" or taking "due care".

Still, the trade-offs between vicarious liability and a duty-based regime (e.g., negligence) are complex and uncertain. Even given the foregoing advantages of strict liability, some "law and economics" scholars have argued that a duty-based regime has other, greater advantages. While recognizing that "strict liability is clearly the better regime for inducing firms to sanction culpable agents",<sup>57</sup> Professors *Arlen* and *Kraakman* suggest that a duty based regime, or a mixed version of the two regimes, produces less perverse effects. Their analysis involves drawing a basic distinction between "preventive measures" and "policing measures". The former are measures that deter misconduct by agents without increasing the probability that the firm will be sanctioned. Typically, these measures operate on an *ex ante* basis and consist of the usual screening, accounting, monitoring and record-keeping measures that inhibit agent misconduct. In contrast, policing measures are *ex post* investigative procedures that seek to detect misconduct by agents; they, therefore, increase the probability that the agent will be sanctioned. Here, the

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56 See *J. Arlen/R. Kraakman*, Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes, 72 N.Y.U. L.Rev. 687, 692-700 (1997).

57 *Ibid.* at 701.

special problem of a strict liability regime is that by detecting and sanctioning the agent, the corporation also makes itself vulnerable, because the agent's liability in a strict liability regime will almost invariably imply that the corporation is also liable. Hence, because under a strict liability regime policing measures increase the risk of corporate liability, *Arlen* and *Kraakman* argue that this factor makes a duty-based regime preferable to a strict liability regime. That is, the firm has little incentive to detect past misconduct by its agents under a strict liability regime (even if such detection will prevent future misconduct) because detection of culpable agent inherently increases the corporation's potential liability. However, under a negligence or other duty based regime, policing is not similarly discouraged, because detection of agent misconduct tends to evidence the overall strength of the corporation's monitoring program. *Arlen* and *Kraakman* also argue that a duty-based regime makes the commitment of the corporation to monitoring more credible. While this can be debated, their view is that the corporation's commitment to monitoring is suspect under a strict liability regime, but is stronger under a duty-based regime because under the latter the corporation must be able to convince the ultimate fact-finder that it has diligently monitored.

*Arlen* and *Kraakman* have also argued that under an optimally designed corporate liability regime, even criminal misconduct by a high-ranking senior executive should not necessarily result in corporate liability. Thus, they would similarly find "identification theory" inefficient because such a system chills the incentive for the firm to investigate misconduct by high-ranking executives.<sup>58</sup> Nonetheless, few are likely to have confidence in the ability of internal corporate monitoring to detect misconduct at the highest executive levels (where the investigator will normally be a subordinate of the target of the investigation).

On the practical policy level, it can be doubted that the alleged "perverse effects" of strict liability are as severe as *Arlen* and *Kraakman* allege. Given that strict liability creates a greater incentive to expend corporate funds on preventive measures (in order to actually prevent crime, rather than simply appear to have tried earnestly), the loss from reduced "policing" measures under a strict liability regime would have to be significant in order to make a duty-based system preferable. Here, the American experience with sentencing guidelines may be instructive. The U.S. Sentencing Guidelines Manual provides that a corporation will receive a substantial mitigation credit off its fine if it reports criminal misconduct before the government has detected evidence of the misconduct. This gives an

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58 This claim was first made in *J. Arlen*, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 *J.Legal Stud.* 833 (1994).

incentive to detect and report misconduct before the government discovers it. To date, there have been very few instances of such self-reporting by corporations, and this may imply that the incentive to "police" (i.e., to detect past misconduct by officers) is relatively weak, even when large financial rewards are held out for such behavior. If so, the alleged social loss from chilling policing under a strict liability regime may be modest at most.

### 5. The Response of the Philosophers: The Normative Basis for Corporate Criminal Liability

The last decade has also seen an explosion in the literature on corporate criminal liability by scholars working primarily from a non-law and economics direction. Among these writers, *Peter French*,<sup>59</sup> *Brent Fisse* and *John Braithwaite*,<sup>60</sup> *Celia Wells*,<sup>61</sup> and *Meir Dan-Cohen*<sup>62</sup> stand out, and their common inquiry has been under what circumstances a corporation merits being subjected to criminal responsibility. Their common insight has been that organizations for a variety of reasons cannot be equated with one or more individuals, but are coalitions of often competing subgroups, each with their distinct and usually conflicting interests. As a result, the most obvious implication of this school is that the equation between a corporation and a single "directing mind" is false; organizations are more accurately described as an equilibrium of contending coalitions than as a dominant group or as a hierarchy of contending subgroups. Much of the doctrinal efforts of this school has been directed at the development of a consensus definition of corporate blameworthiness.<sup>63</sup> In overview, the upshot of these efforts has been a variety of definitions of "corporate fault" that, from a distance, seemingly resemble a negligence standard. However, from an internal perspective that respects the need for continuity in judicial law-making and the strong distaste of courts for major conceptual discontinuities, the major achievement of these efforts has been a reasonably common definition of fault that respects the classic, binary definition of a crime as having two elements: *actus reus* and *mens rea*. This redefinition of cor-

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59 See *P.A. French*, *Collective and Corporate Responsibility* (Columbia University Press 1984).

60 *B. Fisse/J. Braithwaite*, *The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability*, 11 *Sydney L.Rev.* 468 (1988); see also *B. Fisse*, *Reconstructing Corporate Criminal Law: Deterrence, Retribution Fault, and Sanctions*, 56 *S.Cal.L.Rev.* 1141 (1983).

61 *C. Wells*, *Corporations and Criminal Responsibility*, Oxford 1993.

62 *M. Dan-Cohen*, *Rights, Persons and Organizations*, Berkeley 1986.

63 For a review of these efforts, see *J.A. Quaid*, *The Assessment of Corporate Criminal Liability on the Basis of Corporate Identity: An Analysis*, 43 *McGill L.J.* 67 (1998).

poration criminal liability has placed the topic within the possible range of judicial law-making. Whether these efforts have produced the optimal answer is not the relevant question; rather, they have sought to redefine the criteria in a way that permits courts to refashion their answer - just as British courts earlier moved from a rule of no criminal liability for corporation to a rule justified by "identification theory." Only time will tell if courts will again accept this invitation to engage in low-visibility law-making.

## **6. Implementation Problems**

If the trend is toward a broader definition of organizational fault that essentially resembles a negligence standard, a number of practical problems arise concerning the implementation of such a standard. In common law legal systems where the jury is the ultimate fact-finder, a negligence standard broadly expands the issues that the jury will have to consider and may arguably strain its capacity. That is, where today a criminal trial focuses on issues relating to the criminal misconduct (did or did not certain acts occur with the requisite intent?), a negligence standard opens up the trial to a broader consideration of the corporation's overall monitoring system and conceivably its standards of corporate governance. This both disadvantages the prosecution (and entitles the defendant to introduce expert testimony on its monitoring and governance standards) and may overload the jury (which must expand its focus). Even the identification theory followed in British courts does require this expanded focus (and in fact the issue of the identity of the "directing mind" of the corporation has largely been resolved by the judge in British cases).

In view of these procedural problems, there may be an advantage in the American system's postponement of the negligence issue until the sentencing stage where it is exclusively resolved by the court. American prosecutors report, however, feeling disadvantaged even at this stage because they are ill-prepared for a battle of experts over the sufficiency of the corporation's compliance plan.

Under the Anglo-American standard of proof beyond a reasonable doubt, deferral of the negligence issue until sentencing also aids the prosecution by freeing it from such an obligation to prove negligence beyond a reasonable doubt. Instead, the burden of proof can be shifted to the defendant. Proof of organizational negligence beyond a reasonable doubt may arguably be an unwise burden to place on the prosecution.

These considerations are, of course, far less relevant under Continental criminal procedure where the magistrate would conduct the proceeding and presumably make the organizational fault or negligence determination.

### **Part III: A Proposal for the German Context**

If the desirability of corporate criminal liability were to resurface in the United States today as a political issue, the issue would probably be framed in terms of whether deliberately punitive civil sanctions were not a more efficient alternative. Some obvious arguments can be made in favor of civil punitive sanctions: they are probably easier to administer and enforce, place less of a burden on the prosecutor, and involve less collateral consequences. Although countervailing arguments can be made that the criminal law carries a unique stigma and naturally attracts greater attention (thereby allowing the public enforcer to use the criminal law as a unique moralizing and educational force), the immediate point is that the German and American contexts are very different. What might work well (or at least adequately) in one context will not necessarily do as well in another.

Between the U.S. and German contexts, there are many relevant differences, but two stand out as critical for purposes of this discussion: First, civil legal rules are typically enforced in the United States by private enforcers (namely, plaintiffs attorneys who bring class actions for substantial damages). Second, to the extent public enforcement of civil legal obligations is relied upon in the United States, it is chiefly entrusted to powerful administrative agencies (such as the Securities and Exchange Commission - SEC). The German context is thus different in that (1) the class action is not recognized (nor is the contingent fee which rewards and fuels such litigation), and (2) although administrative agencies are certainly recognized in Germany, they have less pervasive jurisdiction or powers. For example, there is no counterpart to the SEC.

Of course, criminal prosecutors could seek civil penalties against corporate offenders, but this is not a counterpart to the U.S. system and the willingness (or motivation) of public prosecutors to pursue such civil options against the corporation is open to doubt. Instead, public prosecutors may prefer to prosecute the corporation in the same criminal proceeding in which certain of its individual officers are prosecuted. These factors are not cited to imply that greater use should not be made of punitive civil sanctions, but they do suggest that from a deterrent standpoint arming the prosecutor with corporate criminal liability might be even more useful in Germany than in the United States.

If so, what should such a statute look like? Although the Law Commission of England and Wales chose in its 1996 proposal to focus on certain specific crimes (i.e., "corporate killing"), the simpler approach is to draft a general standard for corporate criminal liability (as both Australia and the American Model Penal Code have done).

Most modern codification efforts have adopted an "organizational negligence" approach, but this approach may be unduly complicated in the case of the closely held corporation where the act of a high official can be attributed to the corporate entity with greater fairness. Arguably, a statute can sensibly provide the prosecutor with both options: (1) attributing the acts of certain officials to the corporation (and such attribution need not be limited to those few officials whose conduct or knowledge can give rise to criminal liability under the restrictive British "identification" theory), and (2) establishing criminal liability based on a more systematic failure to install recognized monitoring controls.

Such a statute might read as follows:

*Proposed Corporate Criminal Liability Provisions*

Section 1.01. Liability of Legal Entities as Persons

A legal entity, including a corporation, partnership, union, or other form of business association, may be convicted of an offense if:

- (a) the offense is an offense (i) for which a legislative purpose to impose liability on such entity is plainly evident or (ii) in absence of such liability, there is a significant risk that the legislature's purpose would be frustrated;
- (b) the commission of the offense was performed, authorized, requested, commanded, or recklessly tolerated by a senior managerial agent of the entity acting on behalf of the entity within the normal or foreseeable scope of such agent's authority and with an intent to benefit the entity; or
- (c) the offense was a proximate and foreseeable consequence of the entity's failure to devise and implement reasonable preventive, monitoring, or safety controls or precautions, or to adopt and maintain a reasonable compliance program, which failure under the circumstances constituted a serious departure from the standards or procedures then observed by similarly situated entities or that should have then been observed by any such entity.

This provision obviously relies in part on Section 2.07 of the American Model Penal Code and would use its definition of "high managerial agent" for its term "senior managerial agent".<sup>64</sup> Still, it also seeks to generalize a concept of liability

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<sup>64</sup> See A.L.I. Model Penal Code, § 2.07 (4)(c).

based upon organizational negligence - but without using ineffable and subjective terms, such as "corporate culture" (which the new Australian code uses).<sup>65</sup>

A responsible approach to the problem of defining corporate criminal liability also requires that the "collective knowledge" be addressed. Many different answers to this issue are possible, but an intermediate compromise might read as follows:

Section 1.02. Knowledge and Intent in the Case of Legal Persons

A legal person shall be deemed to have the knowledge and intent possessed by one or more of its agents, employees, or directors (even if no single person has knowledge of each requisite element of an offense) in the following instances:

1. such person or persons are senior managerial agents of the legal person;
2. such person was acting within the normal scope of the person's responsibilities or activities and had the intent of engaging in the conduct constituting the offense or was aware that such conduct was being engaged in by other employees or agents of the legal person;
3. such person is a director or trustee of the legal person, or was, either alone or with others, able to exercise control over the legal person's policies or management; or
4. the legal person avoided knowledge of the fact or circumstance by intentional conduct or by unreasonably failing to inquire when the circumstances had alerted a senior managerial agent to the possibility that the fact or circumstance existed.

Under this definition, persons below the level of a "senior managerial agent" have their knowledge attributed to the corporation only if they were aware of the existence of all requisite elements of the offense. Thus, a low-ranking employee who engaged in environmental dumping would have his knowledge attributed to the corporation so as to create corporate liability under Section 1.02(2). But if this low-ranking person were aware of only a single element (i.e., that the corporation possessed a certain chemical) but did not know that it was being stored in an impermissible manner, this knowledge would not be attributed. In these cases, the prosecution would either have to rely on Section 1.02(4) and prove in effect "willful blindness" or show that a senior managerial agent had such knowledge (or was similarly "willfully blind" to it).

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<sup>65</sup> See text at note 25.

## Conclusion

The modern policy debate is shifting the focus of reform from a choice between the former U.S., British, or French rules *per se* to a choice between strict liability versus a duty-based (or, most typically, negligence) regime. Increasingly, it is recognized that, absent liability on the corporation as principal, corporate agents will predictably commit crimes at a higher rate and inflict greater social injury. Although the debate has just begun over whether substantial mitigation credits should be given for compliance plans, the focus of the debate is increasingly moving from formalistic issues to the key functional issues: how to influence complex organizational behavior? Increasingly, the search for the "directing mind" of the corporation seems dated and likely to be abandoned by courts as a pre-scientific inquiry that grew out of an earlier anthropomorphic view of the corporation. Today, the clear statutory trend seems to be toward a negligence-based regime - whether implemented through sentencing guidelines (as in the United States) or through special defenses and the amorphous concept of corporate culture (as in Australia).

Against this backdrop, Recommendation No. R (88) 18, adopted by the Committee of Ministers of the Council of Europe, seems also to favor a negligence-based approach to corporate criminal liability. Its Appendix states that:

"The enterprise should be exonerated from liability where its management is not implicated in the offence *and* has taken all the necessary steps to prevent its commission" (emphasis added).<sup>66</sup>

This language frames a question: what are the "necessary steps to prevent" corporate crime? The earlier quoted Australian statute and the American sentencing guidelines' definition of an effective compliance plan (attached hereto) are relevant possible answers. But there can be no fixed answer. Criminal law has long placed a normative evaluation of the defendant's conduct at center stage: was the defendant "justified" in using violence? Was his behavior "excusable" because of extenuating circumstances or special deficiencies? Organizational negligence involves similar questions that, while difficult, are not qualitatively different. They belong at center stage, and if they are incorporated into the definition of corporate criminal liability, the simple vicarious liability feared by some critics of corporate criminal liability does not result. Rather, a critical element of culpability remains in the definition of corporate criminal liability, and this article has attempted to offer such a definition.

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<sup>66</sup> See "Liability of enterprises for offences" (note 1) at 7. I recognize, of course, that this Recommendation acknowledges the possibility of non-criminal alternatives to sanctioning the corporation.

## Sentencing Guidelines\*

The precise actions necessary for an effective program to prevent and detect violations of law will depend upon a number of factors. Among the relevant factors are:

- (i) Size of the organization - The requisite degree of formality of a program to prevent and detect violations of law will vary with the size of the organization: the larger the organization, the more formal the program typically should be. A larger organization generally should have established written policies defining the standards and procedures to be followed by its employees and other agents.
- (ii) Likelihood that certain offenses may occur because of the nature of its business - If because of the nature of an organization's business there is a substantial risk that certain types of offenses may occur, management must have taken steps to prevent and detect those types of offenses. For example, if an organization handles toxic substances, it must have established standards and procedures designed to ensure that those substances are properly handled at all times. If an organization employs sales personnel who have flexibility in setting prices, it must have established standards and procedures designed to prevent and detect price-fixing. If an organization employs sales personnel who have flexibility to represent the material characteristics of a product, it must have established standards and procedures designed to prevent fraud.
- (iii) Prior history of the organization - An organization's prior history may indicate types of offenses that it should have taken actions to prevent. Recurrence of misconduct similar to that which an organization has previously committed casts doubt on whether it took all reasonable steps to prevent such misconduct.

An organization's failure to incorporate and follow applicable industry practice or to the standards called for by any applicable governmental regulation weighs against a finding of an effective program to prevent and detect violations of law.

An "effective program to prevent and detect violations of law" means a program that has been reasonably designed, implemented, and enforced so that it generally will be effective in preventing and detecting criminal conduct. Failure to prevent or detect the instant offense, by itself, does not mean that the program was not

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\* U.S. Sentencing Guidelines Manual, Chp. 8, § 8A1.2, application note 3(k) (1998).

effective. The hallmark of an effective program to prevent and detect violations of law is that the organization exercised due diligence in seeking to prevent and detect criminal conduct by its employees and other agents. Due diligence requires at a minimum that the organization must have taken the following types of steps:

1. The organization must have established compliance standards and procedures to be followed by its employees and other agents that are reasonably capable of reducing the prospect of criminal conduct.
2. Specific individual(s) within high-level personnel of the organization must have been assigned overall responsibility to oversee compliance with such standards and procedures.
3. The organization must have used due care not to delegate substantial discretionary authority to individuals whom the organization knew, or should have known through the exercise of due diligence, had a propensity to engage in illegal activities.
4. The organization must have taken steps to communicate effectively its standards and procedures to all employees and other agents, e.g. by requiring participation in training programs or by disseminating publications that explain in a practical manner what is required.
5. The organization must have taken reasonable steps to achieve compliance with its standards, e.g. by utilizing monitoring and auditing systems reasonably designed to detect criminal conduct by its employees and other agents and by having in place and publicizing a reporting system whereby employees and other agents could report criminal conduct by others within the organization without fear of retribution.
6. The standards must have been consistently enforced through appropriate disciplinary mechanisms, including, as appropriate, discipline of individuals responsible for the failure to detect an offense. Adequate discipline of individuals responsible for an offense is a necessary component of enforcement; however, the form of discipline that will be appropriate will be case specific.
7. After an offense has been detected, the organization must have taken all reasonable steps to respond appropriately to the offense and to prevent further similar offenses - including any necessary modifications to its program to prevent and detect violations of law.



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## **Le droit japonais de la responsabilité pénale en particulier la responsabilité pénale de la personne morale\***

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### **I. Introduction**

Le Code pénal de 1880, premier Code pénal moderne du Japon (l'ancien Code pénal) fut fondé sur le projet de loi rédigé par *Gustave Boissonade*. Ainsi la loi maternelle de l'ancien Code pénal est le Code pénal français de 1810, mais il fut également influencé par l'école néoclassique du droit pénal.

Cependant, peu après la mise en vigueur de l'ancien code, les partisans de la théorie moderne du droit pénal commencèrent à le critiquer pour la raison qu'il fut peu efficace face à l'augmentation du récidivisme, causée par le développement industriel accéléré. En 1908 l'ancien code fut remplacé par le Code pénal actuel, influencé fortement par la doctrine allemande de droit pénal. Ce nouveau code contient également plusieurs règles relatives à la politique criminelle. En même temps il retient un bon nombre de règles de l'ancien Code pénal.

En ce qui concerne la doctrine de la responsabilité pénale au Japon, influencée fortement par celle de l'Europe, il existait une opposition entre la théorie classique et la théorie moderne. Cependant, actuellement, peu d'auteurs soutiennent la théorie moderne. L'opposition actuelle la plus importante repose sur la question de savoir, dans la théorie classique, si la nature de la responsabilité pénale est le reproche moral, c'est-à-dire le reproche socio-éthique ou le reproche juridique est à l'écart de la question morale à un certain degré.

La majorité de la doctrine actuelle au Japon, qui représente la théorie classique, considère que, du point de vue théorique, le fondement de la peine est l'imputabilité, c'est-à-dire qu'on peut punir une personne seulement quand son acte est imputable. Les grandes lignes de cette doctrine sont les suivantes: le comportement

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d'une personne est, plus ou moins, déterminé par ses facultés et son milieu. Malgré cela elle possède également une volonté. Au moins, dans notre existence quotidienne, on mène sa vie en supposant qu'il existe une liberté de la volonté. Quand on a commis une infraction, au moment de cet acte, il existait une possibilité de se comporter autrement que de commettre cette infraction, c'est-à-dire une possibilité d'agir selon un certain comportement légal au lieu de commettre l'infraction. Cette "possibilité de faire autrement" est le fondement de l'imputabilité: le fondement de la responsabilité pénale.

Selon une doctrine plus récente, qui s'intitule la doctrine de la responsabilité matérielle, on souligne la fonction de prévention du droit pénal. On regarde la responsabilité pénale comme la possibilité d'empêcher des personnes en général dans la société de ne pas commettre une infraction, en infligeant la souffrance de la peine. Il n'est pas certain que cette doctrine essaye d'expulser de la peine la notion de reproche, comme l'ancienne doctrine de l'école moderne.

En même temps, du point de vue pratique, on considère que les buts de la peine sont: 1) la prévention spéciale: but d'intimidation; et 2) la prévention générale: but de réadaptation. Donc, la question est de savoir comment on peut harmoniser la notion d'imputabilité, qui est plutôt une question théorique, et celle de la prévention générale et spéciale.

Dans le cas où 1) la quantité de la peine qui correspond à son imputabilité est plus grande que 2) la quantité de la peine nécessaire pour la prévention générale et spéciale, la quantité de la peine à infliger à ce délinquant doit être dans la limite de 2), parce que le rôle de la peine dans la société est la prévention générale et spéciale. Au contraire dans le cas où 2) est plus grand que 1), la quantité de la peine à infliger doit être dans la limite de 1), parce qu'on ne peut infliger plus de peine que celle qui correspond à son imputabilité.

Selon la doctrine du droit pénal japonais, une infraction se compose de trois éléments suivants: 1) le principe de la légalité: ledit fait tombe sous une règle pénale; 2) l'illégalité: ce fait est illégal; 3) l'imputabilité: ce fait est imputable. Une personne n'est pas punissable, même si son acte est illégal, à moins qu'il ne soit imputable (principe de la responsabilité pénale). Une personne n'est pas punissable, même si son acte est illégal à moins qu'il ne soit imputable (principe de la responsabilité pénale). Une personne n'est pas punissable à moins qu'elle ne commette une infraction sciemment ou par imprudence. Elle n'est également pas punissable si elle n'a pas la possibilité de discerner le bien et le mal ou de se contrôler elle-même suivant ce jugement à cause d'une maladie mentale au moment de l'infraction.

tion. La question de la punition de la personne morale est une des questions les plus importantes dans le problème du principe de la responsabilité pénale.

## II. "La règle de la double sanction" (Ryobatsu-Kitei)

Au Japon une personne morale n'est pas punissable pour des infractions prévues dans le Code pénal. Mais elle l'est dans le cas d'infractions prévues par des lois particulières, en particulier les lois administratives, comme la loi tendant à réprimer les infractions relatives à la pollution de l'environnement, la loi sur la Bourse ou la loi antitrust, s'il existe une règle spéciale qui peut punir une personne morale dans cette loi. En général, la forme de cette règle est très semblable: quand un représentant d'une personne morale, un suppléant, un ouvrier ou tout autre employé d'une personne morale ou d'une personne physique a violé l'article n, dans l'exercice des affaires de cette personne, celle-ci sera punie, en plus du représentant ou de l'employé, d'une amende prévue par chaque article. Cette prescription s'appelle "la règle de la double sanction" (Ryobatsu-Kitei), parce que cette règle permet de sanctionner l'employeur et son employé. Le texte de cette règle est compliqué, mais on peut le simplifier comme suit: dans le cas où l'employeur est une personne morale, par exemple une société anonyme, quand un employé de cette société a commis une infraction dans l'exercice des affaires de cette société et s'il existe "une règle de la double sanction" applicable à cette infraction, cette société (personne morale) est punie par cette règle. Le maximum de l'amende imposée à la société est le même que celle prévue pour l'employé, relative à cette infraction! Cette règle spéciale s'applique également au cas où l'employeur est une personne physique, et la structure est la même que pour la personne morale. Cependant, parce qu'au Japon presque toutes les entreprises importantes sont des personnes morales, on discute ici, en principe, seulement des cas où l'employeur est une personne morale. En tout cas, on ne peut punir une société (une personne morale) qu'au cas où existe "une règle de la double sanction" applicable à ladite infraction. Parce que cette règle n'existe pas dans le Code pénal, on ne peut punir une personne morale pour les infractions prévues dans le Code pénal.

Comme il est indiqué ci-dessous, autrefois la forme de la règle de punir l'employeur fondée sur l'infraction commise par son employé était celle de punir l'employeur seulement, sans punir son employé. Cette règle s'appelle "la règle de punir en remplacement" (Daibatsu-Kitei), parce que par cette règle on punit un employeur au lieu d'un employé. Actuellement presque toutes ces règles sont remplacées par "les règles de la double sanction."

Par exception, il existe un petit nombre de règles par lesquelles on peut punir un employé, un employeur (une personne morale) et son représentant. Par exemple, la loi antitrust contient une règle qui prévoit que pour l'infraction de cartel, en plus de l'employé et de la société, le représentant de cette société sera puni, quand il connaissait le projet de cette infraction mais n'a pas pris les mesures nécessaires pour la prévenir, ou quand il savait que cette infraction était commise, mais n'a pas pris les mesures nécessaires pour la corriger. Cette règle s'appelle "la règle de la triple sanction" (Sanbatsu-Kitei). Cependant, dans la pratique on n'utilise presque jamais une telle règle, parce que le chef d'entreprise et ses représentants peuvent être punis comme coauteurs y compris conspirateur, instigateur ou complice accessoire de l'employé qui a commis une infraction dès lors qu'ils remplissent les conditions nécessaires exigées par le Code pénal (art. 60-62).

### **III. Historique de "la règle de la double sanction"**

Comme nous l'avons dit, une personne morale est punissable au titre d'une règle particulière, "la règle de la double sanction", qui peut sanctionner un employé et en même temps son employeur (une personne morale) en se fondant sur l'infraction commise par l'employé.

Une règle sanctionnant une personne pour le comportement d'autrui apparut, pour la première fois en 1880, dans la loi sur les impôts pour la production de boisson. Par cette règle, seul l'employeur, et non l'employé, était punissable pour un acte de l'employé (la règle de punir en remplacement). De plus, la personne physique même, et non la personne morale, était punissable. L'article 38 de cette loi prévoyait que quand un membre de la famille ou un employé d'un producteur de boisson violait cette règle, l'employeur était puni. Cette règle était destinée à imputer la responsabilité pénale d'un employé à son employeur. La raison pour laquelle on introduisit cette règle fut que, sans punir l'employeur, il était impossible d'atteindre l'objet administratif. On introduisit cette forme de règle dans d'autres lois administratives, comme la loi sur le contrôle des brocanteurs de 1883, la loi sur le contrôle des monts-de-piété de 1883 et la loi concernant le monopole des tabacs de 1896.

Toutes les règles mentionnées ci-dessus sont destinées à punir les employeurs personnes physiques. En 1900 parut pour la première fois une loi visant à punir un employeur personne morale, sur le fondement du comportement de son employé. Cette loi appelée "la loi sur les infractions concernant les impôts commises par une personne morale" prévoyait que "quand un représentant d'une personne mo-

rale ou son employé a violé la loi sur les impôts et le monopole des tabacs (c'est la loi pour punir une personne physique) dans l'exercice des affaires de cette personne morale, cette dernière est condamnée à la peine prévue par cette loi. Cependant, si cette loi ne prévoit que la peine de détention, s'y ajoute une amende de 300 Yen". A la suite de cette loi, des règles semblables furent introduites dans plusieurs lois administratives.

La première règle "de la double sanction" parut en 1931 dans "la loi pour prévenir la fuite des capitaux", ancienne loi relative au contrôle des changes. La forme de cette règle fut en principe la même que celle d'aujourd'hui. Depuis lors elle fut introduite dans beaucoup de lois administratives. En même temps presque toutes "les règles de punir en remplacement" furent remplacées par ce type de règle.

#### **IV. L'imputabilité des personnes morales**

Selon la doctrine traditionnelle de droit pénal, il est impossible d'imputer la responsabilité pénale aux personnes morales, parce que:

1. La personne morale ne peut réaliser l'élément matériel de l'infraction, parce qu'un comportement qui peut être l'objet de la peine doit être le mouvement d'un corps, et une personne morale qui n'a pas de corps ne peut commettre une infraction.
2. La personne morale n'a pas de volonté personnelle, tandis que le comportement mentionné ci-dessus doit être le mouvement d'un corps fondé sur la volonté.
3. La nature de la peine est une condamnation éthique. Elle ne peut être imposée qu'à la personnalité qui peut avoir une détermination éthique. La personne morale n'a pas une telle autonomie.
4. La peine la plus importante dans le système pénal actuel est la peine privative de liberté. Même pour la peine d'amende, dans le Code pénal actuel, il existe une règle de la détention pénitentiaire en cas de non-paiement d'une amende. Ces peines ne sont pas applicables à la personne morale.
5. Si on punit une personne physique qui est un représentant de la personne morale et la personne morale elle-même en se fondant sur le comportement de la personne physique, cela signifierait une double condamnation.

Cependant, à l'heure actuelle, la majorité de l'opinion soutient l'idée de l'imputabilité de la personne morale:

1. On peut reconnaître le comportement et la volonté de la personne morale, parce qu'il est possible de considérer un acte de son représentant comme un comportement imputé à celle-ci, et la volonté de cet organe représentatif comme sa volonté. On peut donc considérer qu'une personne morale peut faire un acte propre mis en oeuvre par son organe représentatif.
2. La personne morale a une autre existence que les organes de la société (les personnes physiques). Ce n'est pas une double punition que de punir la personne morale et son organe représentatif.
3. La peine n'a pas nécessairement la nature de reproche éthique, mais elle peut avoir une nature de reproche social.
4. Il est naturel que la peine privative de liberté ne puisse être imposée à la personne morale. Cependant les autres peines comme l'amende ou la confiscation le peuvent. Dans les lois actuelles par exemple la suspension d'exercer certaines professions, qui est une sanction convenant aux personnes morales, n'est pas une peine criminelle, mais une sanction administrative. Cependant dans l'avenir, il sera possible de l'ajouter au système des peines criminelles pour l'imposer à la personne morale.

Cette opposition n'est pas très importante du point de vue pratique. En réalité, au Japon, une personne morale est punissable pour un grand nombre d'infractions au titre de "la règle de la double sanction". Une question plus importante est de savoir comment justifier la punition qui lui est infligée sans contradiction avec le principe de la responsabilité de droit pénal.

## **V. Fondement de la punition de la personne morale par "la règle de la double sanction"**

Quand la "règle de la double sanction" fut créée pour la première fois, la responsabilité de l'employé était rejetée sur l'employeur (la société). Selon cette conception la personne morale était punissable sans qu'il y ait faute. La personne morale était punissable dans le cadre du droit pénal administratif, et on admit qu'il était nécessaire de la punir sans faute pour atteindre les buts administratifs concernés.

Cependant, à partir d'environ 1940, on commença à soutenir que même dans le domaine du droit pénal administratif le principe de la responsabilité devait s'appli-

quer. Selon cette opinion, même pour punir une personne morale, l'existence d'une faute de sa part est nécessaire. A propos de cette opinion, il existe trois avis différents.

La faute de l'employeur est une supposition préalable pour punir la personne morale. Cependant en cas d'application de "la règle de la double sanction", on reconnaît toujours l'existence de la faute de la part de l'employeur comme une fiction légale. On n'a pas besoin de prouver son existence. Par conséquent, dans la pratique, cette opinion revient à punir la personne morale sans qu'il y ait faute.

1. La faute de l'employeur est une supposition préalable. Par conséquent, le Ministère public doit prouver son existence. A cette occasion, la faute de l'employeur est considérée comme une imprudence dans la désignation et la surveillance de l'employé qui a commis l'infraction.
2. Il est évident que cette position est compatible avec le principe de la responsabilité pénale. Cependant dans la pratique, il est souvent difficile pour le Ministère public de prouver l'existence d'une imprudence de la part de l'employeur. Donc, afin d'harmoniser le principe de la responsabilité pénale et l'efficacité administrative, on privilégie la troisième conception.
3. La faute (l'imprudence) de l'employeur est la supposition préalable, mais le fardeau de la preuve doit incomber à l'accusé. Par conséquent, c'est l'accusé qui doit prouver qu'il n'y a pas eu d'imprudence dans la désignation et la surveillance dudit employé. Cet avis est partagé par la majorité de la doctrine actuelle. La Cour Suprême du Japon soutient également cette opinion.

La Cour Suprême se prononça sur cette question pour la première fois en 1957. C'était un cas de violation de la loi sur les impôts. L'employeur qui était une personne physique, fut puni au titre de "la règle de la double sanction". La Cour indiqua que cette règle présumait l'existence d'une imprudence de la part de l'employeur qui n'avait pas pris le soin nécessaire pour désigner ou surveiller ledit employé, ou pour prévenir l'infraction commise par l'employé. Par conséquent, à moins que l'employeur prouve qu'il a pris un soin suffisant sur ce point, l'employeur est puni par cette règle.

En 1965 dans un cas de violation de la loi relative au contrôle des changes, où l'employeur était une personne morale, la Cour Suprême décida que l'opinion exprimée dans sa décision de 1957 était également applicable au cas où l'employeur (la société anonyme) était une personne morale.

Par conséquent, le Ministère doit prouver: 1) que l'employé a commis une infraction. (Il est nécessaire pour l'employé de violer ladite loi illégalement, mais il n'est pas toujours nécessaire qu'il soit imputable, par exemple, l'employeur est punissable même si l'employé n'est pas punissable à cause de la minorité ou de la maladie mentale); 2) que l'employé a commis cette infraction dans l'exercice des affaires de l'employeur (de cette société).

Le Ministère public n'a pas besoin de prouver l'existence d'une imprudence de la part de l'employeur. Si l'accusé a réussi à renverser cette présomption, il sera acquitté.

Comme mentionné ci-dessus, il faut qu'existe "une règle de la double sanction" applicable à ladite infraction. Cette règle n'existe pas dans le Code pénal.

## **VI. Punition de la personne morale et principe de la responsabilité pénale**

Comme nous l'avons dit, la majorité de la doctrine actuelle et la Cour Suprême considèrent que l'imprudence de la part de la personne morale est présumée en cas d'application de "la règle de la double sanction". Par conséquent, exceptionnellement, le fardeau de la preuve concernant cette question incombe à l'accusé, et non pas au Ministère public. Cependant, cette règle n'est pas sans critique du fait qu'elle est contradictoire avec le principe fondamental de la procédure pénale et le principe de la responsabilité pénale. En pratique aussi, une fois que le Ministère public a réussi à prouver que l'infraction était commise par l'employé dans le cadre des affaires de sa société, il est généralement presque impossible pour l'accusé de prouver qu'il n'y a pas eu de faute concernant la surveillance dudit employé. Par conséquent, une proposition existe selon laquelle dans ce cas aussi le fardeau de la preuve devrait incomber au Ministère public: il suffirait à l'accusé de présenter provisoirement une preuve indiquant *en apparence* qu'il n'y avait pas d'imprudence dans la surveillance dudit employé, et après la présentation d'une telle preuve par l'accusé, ce serait au Ministère public de prouver définitivement l'existence d'une imprudence de la part de l'accusé.

Une autre question porte sur le fondement de l'imprudence de la part de la personne morale quand elle est punie par "la règle de la double sanction", ou sur le niveau (le critère) de l'imprudence à cette occasion, est-elle la même que l'imprudence exigée dans les cas ordinaires du droit pénal, par exemple, le cas d'homicide involontaire? Dans les cas ordinaires, pour prouver l'existence d'une imprudence

pénale, il faut prouver qu'il y avait, pour l'accusé, une possibilité de prévoir le résultat concret de l'infraction, c'est-à-dire, en cas d'homicide involontaire par accident automobile, pour prouver l'existence de l'imprudence de l'accusé, il faut prouver qu'il aurait pu prévoir le décès de la victime au moment de l'accident, et que malgré cela il a continué à rouler sans le remarquer.

Cependant, en particulier dans une grande entreprise, il est presque impossible à l'employeur (le chef d'entreprise et ses organes physiques représentatifs) de prévoir chaque violation concrète faite par un employé. En général, l'organe de la personne morale ne surveille pas ses employés directement, mais les surveille par le biais de la création d'un "système" au sein de la société pour prévenir les infractions faites par ses employés et en veillant à ce que ce système fonctionne bien. Ainsi, une proposition prévaut selon laquelle la nature de l'obligation exigée en cas d'imprudence pénale en application de "la règle de la double sanction" doit être considérée comme celle de créer et maintenir un tel système dans l'entreprise pour prévenir les infractions des employés, et non pas de prévoir ladite infraction comme cela est exigé en cas d'imprudence pénale ordinaire.

## **VII. Les activités économiques actuelles et "la règle de la double sanction"**

Selon les décisions de la Cour Suprême, quand une personne morale, comme une société anonyme, est punissable par "la règle de la double sanction", le fondement en est l'imprudence de la part de l'employeur (la société) dans la désignation et la surveillance de l'employé qui a commis l'infraction. A cette occasion la nature de la responsabilité de cette personne morale est considérée comme celle de la surveillance de son employé. Cependant, "la règle de la double sanction" s'applique non seulement au cas où l'employé a commis une infraction, mais également quand un représentant de cette société (le chef d'entreprise ou un autre organe physique) a commis une infraction. Dans ce cas la relation de la société avec son représentant n'est pas celle où la société surveille son représentant, mais où l'acte et la volonté sont considérés comme ceux du représentant. Par conséquent, à cette occasion, on considère que la nature de la responsabilité pénale de la personne morale n'est pas une responsabilité de surveillance mais une responsabilité fondée sur son propre comportement, l'acte fait par le chef d'entreprise ou tout autre organe physique pour cette personne morale pouvant être regardé comme celui de la personne morale. La Cour Suprême relève ce point aussi et limite explicitement

l'application de sa décision de 1965 au cas où "l'employeur est une personne morale et celui qui a commis l'infraction est son employé, pas son représentant".

Selon l'avis ci-dessus, quand un employé a commis une infraction concernant des affaires de la personne morale, la nature de la responsabilité pénale imposée à cette personne morale (la société) est fondée sur l'imprudence de n'avoir par surveillé son employé suffisamment: la responsabilité de la personne morale est toujours celle de l'imprudence. Au contraire, si c'est un organe de la personne morale, il est puni sur le fondement de l'acte de la société, c'est-à-dire que si l'organe de la société a commis une infraction sciemment, l'infraction commise par la personne morale est regardée comme une infraction intentionnelle, et si l'organe l'a commise involontairement, son infraction est considérée comme une infraction par imprudence.

Cependant, particulièrement dans une grande société anonyme, le chef de l'entreprise et ses organes physiques ne décident que les lignes fondamentales des activités de la société. Concernant des décisions plus concrètes, une large délégation est confiée aux directeurs des succursales régionales ou aux directeurs de chaque usine. Cependant, selon l'avis traditionnel ci-dessus, même au cas où le directeur d'une succursale ou d'une usine d'une grande société anonyme, investi d'une large délégation de pouvoir pour les affaires de sa société, a commis une infraction comme la violation de la loi antitrust ou de la loi de la Bourse, cette société n'est punissable que pour son imprudence de n'avoir pas porté une attention suffisante à la surveillance dudit directeur. Cependant, en réalité, beaucoup d'infractions économiques sont faites en tant qu'activité de l'entreprise elle-même, et les profits obtenues par ces infractions appartiennent à cette dernière. Si on fait face à la réalité de telles activités économiques actuelles des grandes sociétés anonymes, il est convenable de considérer l'acte accompli par ces directeurs de succursales régionales ou de grandes usines pour la société comme l'acte de la société elle-même, donc une infraction commise sciemment par ces directeurs pour leur société doit être regardée comme une infraction intentionnelle commise par la société elle-même. Ainsi, actuellement, la punition d'une personne morale comme une grande entreprise par "la règle de la double sanction" paraît déjà désuète.

Nous avons discuté ci-dessus, selon la doctrine traditionnelle sur la punition de la personne morale, et sa responsabilité pénale est donc fondée sur une infraction commise par son représentant ou son employé. Par conséquent, pour punir une personne morale, il faut déterminer la personne physique (un employé ou un représentant) qui a commis ladite infraction pour cette personne morale. Cependant,

par exemple dans le cas d'infraction relative à la pollution, il arrive parfois que, du point de vue social, il soit certain que la société elle-même a violé la loi concernant la pollution, mais qu'il soit difficile de déterminer l'employé précis qui, dans cette société, a provoqué réellement cette pollution. Dans un tel cas, selon la doctrine traditionnelle, on ne peut punir cette société.

Une proposition est faite de considérer l'infraction de la personne morale elle-même sans déterminer la personne physique qui en est membre, en coupant la chaîne entre comportement de l'employé et le fait de la société. Comme il est mentionné ci-dessus, en réalité, la plupart des infractions économiques importantes peuvent être regardées comme des infractions faites par l'entreprise elle-même. En particulier, dans les cas d'infractions par omission et par imprudence, dont la nature est la violation d'obligations objectives, il est possible de punir la personne morale sans déterminer le fait de l'employé.

Une proposition similaire considère que l'ensemble des comportements des membres de la société, soit des directeurs, soit des employés, constitue un acte de la société elle-même. Selon cette proposition, dans une situation où un tel ensemble de comportements d'une société semble violer une règle pénale, on peut considérer que la société elle-même a commis une infraction et la punit sans avoir à déterminer quel membre de la société a violé cette règle. Selon cet avis, même l'acte d'un employé subordonné de la société peut être regardé comme celui de cette entreprise, si cet acte a été fait pour les activités de cette entreprise comme une partie du comportement de la société elle-même.

Cependant ces propositions semblent incompatibles avec le principe de la responsabilité pénale. Même s'il semble exister une violation objective en tant que fait de la personne morale, pour la condamner, il faut déterminer si ce fait pouvait être évité, par quelques mesures que ce soit, par cette société ou s'il s'agissait d'un cas de force majeure. Dans le second cas, on ne peut imputer la responsabilité pénale à cette personne morale. Et pour décider de ce point, il faut trouver quels organes physiques ou quels employés de cette entreprise étaient en situation de prévenir cette violation. Ainsi, pour distinguer le cas de force majeure de celui où on peut impliquer la personne morale, il faut déterminer l'élément subjectif du fait de la personne morale aussi, et pour cela il est indispensable de déterminer un comportement quelconque du membre de cette personne morale.

Un autre type de propositions admet que, en maintenant le rapport entre le fait de la personne morale et celui de son membre, non seulement le fait d'un organe

physique, mais également le comportement de l'employé doit être regardé comme l'acte de la société elle-même sous certaines conditions.

Une de ces propositions affirme que, si un cadre supérieur de la société, à qui a été confié une large compétence discrétionnaire pour décider d'affaires importantes, a commis une infraction au cours des affaires de sa société, on peut regarder une telle infraction comme celle de la société elle-même.

Une autre proposition élargit le champ jusqu'à tous les employés à certaines conditions: (i) l'employé doit avoir commis ladite infraction pour les activités de sa société; (ii) il a dû avoir ce comportement avec l'intention de le faire pour la société, et (iii) cette infraction doit avoir été commise sous la direction ou la surveillance de l'organe de la société. Ces propositions sont compatibles avec le principe de la responsabilité pénale, mais il faut introduire une nouvelle loi pour les réaliser.

### **VIII. La révision récente de la loi sur la bourse et de la loi antitrust concernant la punition de la personne morale**

Comme il est mentionné ci-dessus, par "la règle de la double sanction", la personne morale est punissable par une amende dont le maximum est égal à celui déterminé pour la personne physique. Par exemple, selon la loi de la Bourse, la peine imposée à une personne physique pour infraction de manipulation était un emprisonnement de trois ans ou une amende de 3.000.000 Yen. Dès lors le maximum de l'amende imposée à une personne morale par l'application de "la règle de la double sanction" était de 3.000.000 Yen.

Cependant cette chaîne entre la personne physique et la personne morale pour le maximum de l'amende est vivement critiqué, car il n'est pas toujours raisonnable d'imposer une amende dont le maximum est le même entre un employé et une société, en particulier quand cette société est une grande entreprise.

En 1992, le texte de révision de la loi sur la Bourse a été adopté. Désormais le maximum de l'amende imposée à une personne morale pour cette infraction est de 300.000.000 Yen, cent fois plus élevé que celui imposé à la personne physique.

Egalement en 1992, le texte de révision de la loi antitrust a été adopté pour porter le maximum de l'amende imposée à la personne morale à vingt fois plus que pour la personne physique.

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**Forms of Criminal Responsibility of Organisations  
and Reasons for their Development.  
A Description of the Legal Practice in Germany**

**Klaus-Dieter Benner, Frankfurt a.M.**

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Ladies and gentlemen,

I feel very honoured to have the opportunity to share with you some of my own experience with legal practices in Germany as they relate to the criminal responsibility of organisations.

My comments are based on my own 18 years of experience working at the Office of the Public Prosecutor in Frankfurt, the financial Capital of Germany, and my more recent experience as State Commissioner at the Frankfurt Stock Exchange. As part of the Stock Exchange Supervisory Authority, under German federal law, my responsibilities include the supervision of the Central German exchanges which account for over 80 percent of all security trading transactions and all of the financial and stock futures and options trading transactions in Germany.

Given the comparative focus of this colloquium, I should also preface my comments by clarifying one particular point. Although everyday activities in German criminal courts are affected by Anglo-American defence practices and style, due in part to the strong influence of American news media, this style is very much in conflict with the German tradition and practices as they relate to the respective roles of the judges, the public prosecutors and the defence counsels. I note, however, that at least in the sector of the economy in which I am now involved, there is a greater receptivity than in other sectors to some of the approaches inspired by the Anglo-American legal culture. This may in part be the result of the considerable pressure exerted on the Federal Republic of Germany by the European Union to adhere to some new international standards.

My own approach to the question of preventing crimes committed by legal entities is based on a very pragmatic premise. It is simply that crime should not pay. My experience, however, as the few cases that I am about to relate to you will illustrate, is that crimes committed by or on behalf of legal entities can indeed be very

profitable in this country and that they will remain profitable as long as the law, as it relates to the criminal liability of legal entities, remains what it currently is in Germany.

## **I. Some Examples Drawn from my Experience in Public Prosecution**

I have been involved in the prosecution of international cross-border commercial and financial fraud, as well as serious fraud involving phoney future options and financial stocks. At the time, penny-stock crime had reached Europe by mail, telephone, telex and eventually through the internet.

In such cases, even when the organisation involved was, contrary to statements contained in its prospectuses, contracts or agreements, structured around the profit derived from the criminal activities of its employees, there was no provision in German law under which the organisation itself could be prosecuted. The prosecution had to focus on the traders, not the organisation they used for their criminal purposes. As a result, the only assets or profits that could be confiscated were those of the individuals involved, after their own expenses in conducting the illegal scheme were deducted from the total. The other part of the proceeds, the organisation's own profit from the scheme, remained out of the reach of justice.

I was also involved in the prosecution of new forms of crime relating to the protection of the environment. Frankfurt is the city of famous chemical industrial giants whose names I need not mention. The cases which had to be prosecuted went well beyond the usual small infractions involving something like dumping motor oil into a sewage drain or discarding an old refrigerator in a public park. Such cases frequently involved various serious infractions relating to the disposal of industrial waste and the illegal disposal of huge quantities of that dangerous and often poisonous waste into the water of the Main and Rhine rivers. The sums of money that companies can save by failing to comply with environmental protection legislation can be substantial. These companies can continue to benefit from their criminal and dangerous practices by ensuring that individual employees plead guilty to the offence. In that context, crime remains very profitable for the corporation and carries few if any consequences for the company itself. Future offences are not effectively prevented.

My first example concerns the legal responsibility of the District Government with respect to unlawful acts committed by one of its officials responsible for a

soiled-water purification plan. The plant's first basin containing sewage periodically had to be cleaned after stormy rains to get rid of accumulated stones and scree. This operation was normally carried out without emptying the basin, although the removal of the stones presented a special problems for the special pump used to that effect. The task usually required that a special pump be brought to the plant and necessitated six to eight hours of work from three or four persons. The usual cost of the operation was DM 1,000 per hour.

At one point, the plant's vice director decided to hire a one-man company operated by one of his relatives to do the cleaning work. The total cost of the work was DM 3,500. To facilitate the work and to allow the one-man company to finish the work in less than two hours, the plant's Vice-Director or the Director diverted the sewage through the emergency pipe directly into the river.

The one-man company obviously was very well paid for what had then become a simple job (DM 1,750 per hour per person versus DM 1,000 per hour for three persons). That company or its owner could not be found guilty since they had nothing to do with diverting the sewage and since it could not even be proven that they were aware of it. Their profits were out of reach. The district government was prosecuted and fined, but the fine imposed by the court was calculated on the basis of the salaries paid to the Director and Vice-Director of the plant. The total cost to the District Government, including the fine and the costs of presenting a defence, was less than the amount it saved by perpetrating the crime (i.e., between DM 2,500 to DM 4,500 per clean up).

Other similar cases involve large chemical companies. The production of many chemical products often results in large quantities of by-products, toxic and very dangerous substances with no commercial use or value. These substances, under current environmental law, must be treated to make them less harmful and then safely stored. Both of these operations are expensive and can reduce the overall profit derived from the production process. In one case, the pollution of the water of the Rhine was first noticed in the Netherlands and investigators were able to trace the source of the dangerous substance found in the water to a plant operated by one large chemical production company in Frankfurt. It was impossible to determine how much of the substance had been dumped into the river Main. It was quickly found out that the person in the plant who was responsible for conservation and for the emergency drain of the holding basin to the river Main was one of the company's lowest paid persons. Under German law, only individual persons can be held criminally liable. The employee in question was, therefore, quickly

presented as the guilty party and was sentenced to a fine commensurate with his wages. The fine was paid by the company itself and was obviously far less than the amount it had saved through the criminal action of its employee.

In my opinion, there is no doubt that companies can and do organise themselves in a way that minimises the legal and financial consequences of the crimes that are committed on their behalf by their employees. To allow such practices to continue is to ensure that crime remains profitable for organisations and legal entities.

## **II. The Temptation in the Financial World**

Enterprises which provide services relating to securities are legally bound to perform these services in the interests of their customers. Criminal law provisions contained in the Securities Trading Act define insider-trading and trading-ahead as criminal offences. The guilty party can be punished by imprisonment for up to five years or a fine. In addition, any person who, for the purpose of affecting the stock exchange or market price of securities or derivatives, uses deceptive means (prices manipulation) is liable to imprisonment for up to three years or a fine. Are these measures really effective?

In practice, most offenders do not work on their own but are employees of large banks, brokerage firms or other financial institutions. The profit derived from their criminal activities goes to their employer. Their own profit tends to be more indirect and is usually not found in direct connection to the criminal offence itself. In the case of offences committed by such employees, the employee is the one charged with the offence and usually fined after having been found guilty. The fine is calculated on the basis of the salary of that particular employee and, even when the fine is paid by the employer, the remaining profits realised by the employer through the criminal activity of its employee stay out of the reach of the law. Again, as you can see, crime can become very profitable for some financial institutions.

The next speakers will no doubt remind us of some rules under German criminal law which allow to the prosecution to reach some of the criminal proceeds in the possession of a company. They will allude to §130 Ordnungswidrigkeitengesetz (OWiG), the dispositions of which presuppose the establishment of a personal individual guilt on the part on the company's manager, not the shareholders. The guilt of the individual manager is a prerequisite basis of that particular offence. We will no doubt be reminded on Chapter 7 of the German Criminal Code and we

will see how limiting criminal liability to that of the individual person ensure in fact that certain kinds of crime remain indeed very lucrative for corporations and other legal entities.

In Germany, both the law and its enforcement demonstrate the need for new legislation. A new Criminal Liability of Legal and Collective Entities Act is obviously required. However, beyond mere legal reform, some cultural changes must also take place.

Some of us may consider it important for Germany to be the home of big financial centres in comparison to and competition with Paris, London, and one day also with New York, Chicago or Tokyo. The German population may not be of the same opinion. In contrast to the United States where about 40 to 50 percent of the population hold stocks or financial funds investments, there is only between five and seven percent of the German population owning stocks. Public attitude towards imposing fines on companies, subjecting them to ethical standards or imposing other measures to prevent crimes committed within or by companies may well be different in a society dominated by a large class of shareholders.

In the early nineties, the German public found out that insider trading, in the form of trading-ahead, was apparently common within the country's financial institutions. The truth is that the so-called "Frankfurt insider trading scandal" was investigated only as a case of tax fraud. In fact, there was no prohibition of insider trading in Germany until July 1994. The investigation showed that trading-head was part of common practice for compensating traders. Overdraft credits on the personal speculation account of a manager and that of his superiors gave them free hand to use their knowledge of their customers' trading positions. Part of the gains went to the trader, part of it to his or her manager. In the desk of one of the managers, the investigators found lists of the gains registered by the various managers' personal accounts, one trader listed next to the other, with a trader's relative good performance on such a record constituting the basis for future promotions. In that particular case, the traders paid their taxes and fines, but no one else could be proven personally guilty.

Misuse of the computer systems of the computer-driven exchanges in Germany is always the result of individual acts by traders. Practices such as wash sales, covered order crossing, so-called compensation orders without delivery or payment in order to manipulate the prices, can all contribute to raising the profits made by the company or financial institutions. It can usually not be proven that the individual trader benefits from these practices, even indirectly by obtaining a bonus or a

promotion. Manipulating the price of the underlying to knock out a digit or a barrier option can only benefit the issuer. Yet it is usually impossible to attach guilt to the conduct of other persons within the organisation since most company or financial institution can usually produce a professional contract they entered into with the trader which stipulates that the trader agrees not to manipulate the prices of underlying.

The above mentioned case against the head of a government soiled water purification plant also had an interesting epilogue. The ridiculously low fine imposed by the court in that case was calculated, as it should be under German law, on the basis of the personal salary of the Director of the plant. The Lord Mayor of the town who was ultimately responsible for the plant, authorised the payment of the cost of the defence, the cost of the case and, in the end, the fine, out of public funds. The Office of the Public Prosecutor prosecuted the Director because of "Vereitelung der Vollstreckung einer Strafe" (§ 258 Abs. 2 German Criminal Code). The Mayor was also arraigned as accessory after the fact. The court in Frankfurt sentenced the Mayor to a fine for having paid the fine imposed on the Director. The judgment, however, was repealed by the Federal Supreme Court (BGH 37, 226).

That particular acquittal against the jurisprudence up to that day gave birth to a new German way of dealing with criminal responsibility of legal and collective entities in the country. The latter now feel that they are responsible for all legal expenses and fines or the offenders they employ.

Lawyers have been holding seminars throughout Germany to advise boards of directors of chemical production companies on how to avoid or limit expenditures related to offences committed by their employees on their behalf. For example, I was taught during one of these seminars how to transfer certain responsibilities into the budgets and under the notional authority of the lowest paid persons in the company.

Some crimes involving legal entities are definitely lucrative. It really should not come as a surprise to realise that the same interests that are protected by the current regime which are so strongly opposed to introducing the concept of criminal responsibility of legal and collective entities within the German legal system.

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## **Forms of Criminal Responsibility of Organisations: Aspects of Legal Practice in Germany**

**Gerd Eidam, Burgwedel**

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I am going to tell you a story. It is a story behind the story.<sup>1</sup>

Monday, 10:00 a.m. Throughout Germany corporate boards are meeting. The weekly executive session. Today, Monday the fourth of May, the results of the first four months of the current fiscal year are to be revealed. In most major corporations, the annual financial statement 1997 begins to take a clear shape. Meetings of the supervisory boards are upcoming.

Let us participate in the board meeting of a company. Let us call it the Black Company.

The results have been discussed, the chairman summarises: "Sales of product A decreased by 10 % compared to the previous year. Unfortunately, this serious trend has continued this year. In the same period of time, the production costs for our product B have increased beyond all proportion and, as such, the financial statement for 1997 and the trend for the financial year is not making us or the shareholders very happy. The shareholder value of our company has worsened considerably.

We are all aware that the reasons for this development do not lie within our own company. Four million unemployed, high taxes, people just do not have any money to buy our products.

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1 The following of the three complicated imaginary cases shows, in an example, three from four major case groups in which the criminal acts can be subdivided into different business fields. These tortuous business hazards are, more specifically: 1. Product risks, 2. Environmental risks, 3. Business Establishment risks, 4. Transport and Transport economy risks: See on these points *Eidam, Unternehmen und Strafe, Köln 1993* (2<sup>nd</sup> ed. in preparation), p. 179 et seq. Very often criminal offences occur in different forms in businesses (*Eidam, Unternehmen und Strafe*, p. 328 et seq.). The earliest best known example of an offence for encroachment of risks is the so-called "Methods for Wood-Protection" case, in which the case groups Product risks and Environmental risks were equally involved. Regarding this case see *Eidam, Straftäter Unternehmen, Munich 1997*, p. 1 et seq., for more examples.

But on the other hand, I have found out that our main competitor wants to increase dividends. Now that is what shareholder value means.

Gentlemen,<sup>2</sup> it looks bad. Either we boost sales of product A and lower the production costs for product B very soon - or drastic measures will be necessary: shut down of production and fire employees. And please bear in mind that, several of the board members' contracts are up for renewal this year. According to this year's business results, our *tantième* fares poorly. The chairman of the supervisory board has already made that quite clear to me. So let us gear up for battle, gentlemen."<sup>3</sup>

Monday afternoon: Meeting of the sales managers. Subject: Results of the board meeting and the sluggish sales of product A. The board member for sales reports about the dramatic situation to his staff. "What can we do?"

The comment is made: "We urgently need the big contract from Green City. We have to do everything in our power to land it. Who will arrange a meeting with the purchaser for Green City very soon?"

A staff member rings up in Green City and reports: "The purchaser was quite open. He said that he had actually been planning on coming to Berlin next week to see his favourite football team play a match, and he has always wanted to stay at the Hotel Adlon. But he did not get a ticket for the football match, nor did he manage to get a room in Adlon, so he had to cancel the trip."

Laughter. "Ahh, listen to that, will you?" "Who will get the tickets? Who will arrange things with the Adlon?"

Everybody in Black Company has understood the signals given by the corrupt purchaser. They see their opportunity to be awarded the major contract. The purchaser must be won over.

Nobody thinks a thing about legalities:

- not the staff member who gets the tickets for the match,

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2 Note: There are almost always exclusively men on corporate boards.

3 The Chairman does not actually ask for the relevant legal proceedings from his colleagues, on the other hand, he does not expressively exclude the methods of legal proceedings. Decisive will be, what weight his colleagues (and later, the members of the company) will place on the hierarchy of the top managers? See *Kenneth R. Andrews, Moral fängt ganz oben an - Charakter und Wertesystem der Topmanger prägen gute wie schlechte Sitten im Betrieb* (Morals start from the top - Characters and values of top managers show the good and bad sides of business), in *Harvard manager* (1990) p. 26 et seq.

- nor the secretary who books the hotel room,
- nor the manager who signs the payment order,
- nor the accountant who enters the transaction so no one can find it,
- nor the staff member who leaves the tickets at the hotel,
- nor the manager who just happens to be in the seat next to the purchaser in the stadium.<sup>4</sup>

Change of scene: The company division "Production Sector B" meets at the same time as the sales staff. Of course the subject is the necessary reduction in costs. Where can they save, and on what?

"If we use coarser nozzles, we can save 5 % on purchasing costs," is one suggestion.

"Why have we not used these nozzles before?"

"The product risk was too high."

"How high?"

"1 %! We now have 1 or 2 reject nozzles a year."

"What can happen?"

"If a user breathes in a larger amount of the gas, he can be poisoned."<sup>5</sup>

"Oh, come on now, who would be so stupid as to breathe in that stuff? But ask the nozzle supplier if he sees any risk anyway."

Regardless of the supplier's reply,<sup>6</sup> the managers of Production Sector B decided unanimously to accept the risk and to use the coarser nozzles.

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4 See *Eidam*, Korruption als Betriebsmodus (Corruption as a way of business), in: *Kriminalistik* 1996, p. 543 et seq. The growing number of disclosed corruption offences in Germany led to a reinforcement of the relevant parts of the Criminal Act, §§ 331-338 StGB, and because of the Act, to the fight against corruption, effective since 20 August 1997. The disclosure of several spectacular bribery cases, has, as a consequence, since some years now, also in Germany, led to the trend for the introduction of fines for enterprises. Compare examples by *Eidam*, Straftäter Unternehmen, p. 78 et seq.

5 The case illustration reminds one of the famous, even if otherwise presented, "Erdal Leather Spray" case, which was brought to the Federal Supreme Court of Justice, in 1990, BGHSt 37, p. 106 et seq., and which, since then has been argued critically in the literature, chiefly because of the causality demands which had been prepared by the BGH. See the comparative examples from *Eidam*, Straftäter Unternehmen, p. 7 et seq.

6 Note: The nozzle supplier relies upon his major customer, Black Company. He has already suffered from the decrease in sales with the Black Company in 1997. He can sell this company only what they need. So what answer is the nozzle supplier going to give?

The chairman of Production Sector B asks: "Does anybody have any other ideas as to how we could save even more?"

"If the disposal of all the waste arising from production weren't so ridiculously expensive, we could produce much more cheaply."<sup>7</sup>

The board member for Product B turns to one of the managers. "Mister Müller, that's your field. Look into what can be done. Give us a report on Thursday so we have enough time to decide here on Friday what I can say at the board meeting on Monday. Mister Müller - bear in mind our problem - securing jobs."

Manager Müller goes back to his department and tells his staff about the seriousness of the situation. Everybody is worried. One employee says: "There is a transport agency that is considerably cheaper than the others. But it does not really have a very good reputation. They say that when it comes to waste disposal, things are not always on the up and up. Should I ask him to give us a bid?"

"Of course," is the reply, "doesn't cost anything to ask!"

Note: five years ago I confronted the board of a large German company with an advertisement in a well-known newspaper:

Waste disposal 1 ton:

in Germany	5,000 \$
in Poland	500 \$
in Angola	50 \$ <sup>8</sup>

I asked a board member of this large company what his decision would be. He cursed about the strict German laws. I asked further, he laughed evasively and replied, "Produce less waste!"

Back to the brainstorming session of the Production Department.

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7 The number one offence of all environmental criminal offences in Germany has been, since 1991 (increasing annually) the disposal of refuse, § 326 StGB. In 1991 there were 9,724 recorded offences according to § 326 StGB, and in 1997, with reference to the police criminal statistics, (bulletin No. 37 of 29.5.1998) 29,501 new offences according to § 326 StGB were registered.

8 Quote from "Der Spiegel", 19 April 1993, No. 16, p. 37: "The more it costs for the disposal of waste in Germany (e.g., waste disposal for the domestic household costs approx. DM 300, paint waste approx. DM 2,000 and pesticides approx. DM 10,000), the more challenging it will be to try to smuggle poisonous wastes across the border."

Another worker says, rather hesitating, "I know the manager of the refuse dump in Garden City. If we were nice to him, I am quite certain that he would be willing to meet us half way. Should I talk to him?" "Of course!"

All the staff members who are involved are very aware of what they are doing. But it is a matter of the future of the company, the competitiveness of the team, and of one's very own job. The pressure to perform is immense, especially the pressure placed upon the staff at the very bottom of the company's hierarchic ladder. The last ones at the bottom will be the first ones to go when it comes to "saving costs".

On the other hand, the staff members are bothered only in extremely seldom cases by the fact that they might be breaking the law by their actions. In their efforts to be competitive, companies have their own laws, rules and corporate ethics. This also includes the term "borderline morals", which is not to be found in moral doctrine.

*"Borderline morals"* : the corporate activities on the border between the legal and the illegal.

Since the 1977 *Brenner and Molander* study entitled "Is the Ethics of Business Changing"?,<sup>9</sup> we have been aware that many managers - 43 % - are prepared to do things in their professional life that they would reject in their private life.<sup>10</sup> They accept any risk to ensure that the success of the company and, therefore, their personal career is not endangered.<sup>11</sup>

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9 Harvard Business Review, January/February, 1977, p. 57 et seq.

10 See *Posner, B.Z. & Schmidt, W.H.*, Values and the American Manager: An Updated Update, in: *California Management Review* (1992), vol. 34, p. 80 et seq. There was a rise in the USA in the percentage of the managers who experienced a degree of guilty conscience at work. In the period 1981-1991 from 29 % to 38.6 %. The argumentum e contrario (reversal of argument) showed however, that 61.4 % of the managers who were questioned had reason to be cautious in the carrying out of their professional activities.

11 In 1970, more than 65 % of the questioned German managers answered the question "Do you feel pressurised, in your professional activities to carry out certain dealings which could bring you in conflict with your conscience?" These managers admitted that they sometimes, or often, were pushed into dealings which led them into a battle of conflicts. A further questionnaire in 1984 showed that 50 % of the questioned managers had a guilty conscience when carrying out business transactions. The apparent conflict tension can be traced back to a lowering of morals. Compare with the detailed arguments in: *Gerhard Blickle*, *Kommunikationsethik im Management*, Stuttgart 1994, p. 3 f.

The typical German environmental offender is highly competent when it comes to planning and performance and is strongly profit orientated. Normal characteristics of corporate directors and officers.<sup>12</sup>

And this willingness to personally enter into illegal risks for the sake of the company does not contradict the fact that 50 % of all criminal proceedings within the corporate world are initiated by current or former staff members.

This willingness to press charges is much rather a sign of a poor corporate climate, of jealousy, hate or revenge.

And just as foreign as the term "borderline moral", a differentiation of ethics into internal and external is unknown in ethics doctrine.<sup>13</sup> That is, a separation between the behaviour of the employees in and towards their own company and the behaviour on the market. Outside, *Darwin's* Law of Evolution applies: "Survival of the fittest." The "invisible hands" of *Adam Smith* are mainly on the side of the stronger ones.<sup>14</sup>

Essentially, criminal laws do not affect the members of a company until actual proceedings have been initiated against them. But these criminal proceedings in the corporate world are often just a question of how fit one's nerves are.

German criminal law proves to be quite ineffective in this regard. We Germans undertake a lot regarding the field of Company Law, but we are seldom successful. Our warnings are usually harmless warnings. Blunt arrows in the hands of incapable warriors. Only in extremely few cases are convictions actually achieved.<sup>15</sup> And if there is a conviction, usually only fines are issued, and the

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12 Compare *Klumbies/Borchardt*, Ernstfall Umwelt, Hilden 1993, p. 224.

13 Detailed in *Eidam*, Unternehmenshaftung und Wirtschaftsethik - Rahmenbedingungen oder unternehmerische Handlungsgrundlage? In: Investitionsgüter- und High-Tech-Marketing (ITM), Publisher: *R. Hofmaier*, 2 ed., Landsberg/Lech 1993, p. 589 et seq. (603 et seq.).

14 In an interview with the "Stern" magazine 1991, No. 25, *Werner H. Dieter*, who was at that time the Chairman of Mannesmann AG, explained that "For business to grow, the employees must exert themselves. This means he has to get out on the market, he has to be on the ball, he has to seize the opportunities." - Thereto, the reporter's remark: "The survival of the fittest." - *Dieter*: "Absolutely. That's the way it is."

15 It could well be implied that the one who is aware of the higher penalty will generally be more careful than the one who can assume that his offence will be covered quasi by the company. (This last argument is often heard by the company's representative, when the discussion is narrowed down to the amount of the fine to be paid by the defendant.) However, if the risk "offence" is minimal, then the court will issue a warning. According to the figures in the judgement statistics of the Federal Office of Statistics in Wiesbaden, only approx., 4 % of Environmental offences prosecution proceedings actually lead to a conviction.

company then usually reimburses the convicted for these fines. There are legal expenses insurances to cover the attorney and court costs incurred. I do admit that I invented legal expenses insurance for criminal cases of Corporations in 1981.<sup>16</sup> Hence the cost/benefit analysis for the company encourages the perpetration of the crime.<sup>17</sup>

One could almost assume that the company would understand the meaning of the word "risk", under the criminal law, as being a term of guidance. If the interpretation of "risk" which is derived from "risicare", the sailor's jargon in the era of the Roman Empire, this could be translated as "the obstacles have been removed".

The investigators are usually faced with the problem of producing evidence. Often, the question of causality and guilt within companies organised into various divisions cannot be answered with absolute clarity. Whodunnit?

Criminal offences in companies are usually a result of teamwork, the action of a legal entity. Many organs and body parts are involved in such an offence. Due to numerous individual acts and tasks delegated within the company, it is extremely difficult to pin the responsibility on any natural persons - and it may even be impossible.

The contribution of each individual employee is usually just a trifle. But it is the sum of all these individual acts which constitutes the offence.

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tion; see *Eidam*, Straftäter Unternehmen, p. 1 f. The reasons for the questionable results from these criminal proceedings are due to lack of evidence. There is no conviction because the offender in this confusing labyrinth "Company" cannot be determined, or, because his guilt cannot be sufficiently proven. Because of complex organisation structures, it becomes more and more difficult to pinpoint the persons responsible who delegate the numerous business activities. (One only has to think of the big business concerns such as Daimler Chrysler AG.) This is particularly valid for those on the outside, to which the police, the courts belong.

16 See *Eidam*, Industrie-Straf-Rechtsschutzversicherung, Commentary, Köln 1994. This insurance policy has been taken out by the majority of companies in Germany.

17 According to the *California Criminal Liability Act of 1990 (Pinto Bill)*, businesses and managers who are aware of a "Serious concealed danger" in their business are legally bound, in writing, to inform the employees and the relevant U.S. authorities of the danger. This law came into effect through a civil proceeding in which documents were produced which showed that the Ford Motor Company apparently considered recalling the Pinto cars already produced, because of a construction error which could be a possible fire-cause, nevertheless, the recall was not activated because of an internal cost analysis which concluded that the expected costs of the recall would be higher than the expected compensation demands and procedural costs; compare *Eidam*, Industrie-Straf-Rechtsschutzversicherung (Vol. No. 1.1.1990 f.).

Current German law is not set up to deal with such criminal offences. This would be different, if under German criminal law there was an organisation responsible for the imposition of fines in cases of a breach of an administrative offence, if the company was in breach of an offence criminally, and not only civilly. This would be reserved for cases in which the true offender could not be pinpointed, but it could be proved that the offence had been carried out by someone in that company and for that company.

Such an administrative action is already legal practice in the majority of countries in the western world, and there the punitive action taken can lead to cancellation of a company's licence, should the company be found guilty of an offence. This would be a helpful means to encourage companies to adhere more to a reputable business culture within their companies. However, this seems more realistic than merely waiting for the invisible hand of Adam Smith to reach out and take the "misguided sheep" from out of these companies and lead them onto the right track.

Therefore, it would be an act of fairness to the actual person as criminal offender if, in the future, the company as criminal offender is also prosecuted.<sup>18</sup>

Thank you for your attention.

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18 This is becoming increasingly demanded: compare literary examples by *Eidam*, *Straftäter Unternehmen*, especially: *Heine*, *Die strafrechtliche Verantwortlichkeit von Unternehmen*, Baden-Baden 1995, and *Ransiek*, *Company Law: Strafrecht, Verfassungsrecht, Regelungsalternativen*, Heidelberg 1996.

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## **Forms of Criminal Responsibility of Organisations: Aspects of the Legal Practice in Germany**

**Harald Kolz, Wiesbaden**

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### **I.**

What Mr. *Benner* related,<sup>1</sup> corresponds to my own experiences, as well as the knowledge gained by public prosecutors in large business centres such as Frankfurt/Main.

As a result of these experiences, I have observed that in many criminal areas, mainly in the wide-ranging area of white-collar crime, there are numerous cases in which a company is identified as the actual "perpetrator" of a crime, leaving our traditional individual criminal law incapable of dealing with this problem.

However, these are not normally cases where the commission of criminal acts is the main company aim, in which the organisation, as it were, is acting as a "criminal association". It is true that this occasionally occurs; for example, we have witnessed a whole series of such cases involving the sale of fraudulent capital investment. However, in these instances, it is relatively simple to determine and prosecute the individual who is criminally responsible, and the company will normally cease to exist once the legal investigations have commenced. The main problem is principally posed by those criminal acts which are committed by trustworthy and, in part, noted companies. They often result from undesirable trends within the companies, which in turn are a consequence of the development over the years, of a particular "corporate culture". As far as these companies are concerned, the responsible persons cannot be adequately identified, not only due to a generally lengthy developmental process but also because of ever changing responsibilities; work is designated and done in teams, and also due to the fact that the persons who carry the ultimate responsibility are found at the managerial and middle-management levels and simply cannot be identified.

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1    Supra p. 53.

Examples of this type, illustrate the inability of a criminal law based on individual responsibility to guarantee the protection of legal interests. Several such examples can be found in the field of environmental criminal law. I only need to refer to the case from the prosecution service of Hesse which Professor *Alwart* mentioned in his inaugural lecture last year at Jena:

"One of the worst incidents involving chemical substances in the history of the Federal Republic of Germany resulted in 11.8 tonnes of a poisonous chemical substance raining down onto an entire suburb. The result was that 153 persons suffered from damage to their health and the damage to property was immense. Although extensive organisational and control deficiencies were identified, the criminal proceedings against the works manager, the manager and other company employees had to be suspended; only a simple worker who stood at the operating level was subjected to a penal order."

There are numerous analogous, if less spectacular, cases not only in the field of industrial environmental contamination, but also in the field of the manufacture and sale of products posing health hazards. In recent years, there has also been a large increase in industrial waste disposal. As far as the latter group of waste disposal cases is concerned, they are unique in that they are normally caused intentionally rather than negligently. Immense profits can be gained by making false declarations, in order to reduce the disposal costs. Nevertheless, criminal sanctions often tend to be imposed on the lower hierarchical levels, on those who are most directly and immediately involved in the incident.

It is also evident that the limits of individual criminal law in all white-collar crimes result in an unsatisfactory process. As examples, I would mention tendering fraud and corruption cases, as well as contraventions of export prohibitions and embargo stipulations. All major proceedings which took place in previous years as a result of tendering fraud for example, only concerned the prosecution of subordinate clerks, such as cost accountants, although it was obvious that pertinent basic decisions had been made by the management. Corruption proceedings are often instigated against subordinate company employees such as planners or canvassers, who gain almost no advantage as a result of the corruption while the payment of bribes continues to be considered to be part of normal business practice, and stays outside the reach of criminal law.

I would like to bring one more group of cases to your attention, namely criminal proceedings against bank employees for tax evasion by customers who avoided declaring as income, interest received from a foreign territory:

- In an extremely large number of cases, bank customers have had domestic assets transferred to other countries, in order to avoid the payment of tax on interest. Generally this was possible only with the compliance of banks which concealed the cash flows and names of the beneficiaries. Numerous criminal cases of this nature are pending in almost all public prosecutor departments in Hesse.
- I would like to stress that I do not want to make sweeping accusations against all banks concerning illegal or even criminal actions (as *Bertolt Brecht's* famous motto goes, "what is the breaking into a bank when compared to the founding of a bank"). This notwithstanding, bank crime remains a common phenomenon.
- When criminal investigations are carried out against bank employees, typically, employees such as customer advisors are first to be targeted as they deal directly with the customer. However, when large amounts of money are transferred through internal bank accounts, in contravention of what is known as the "truthfulness of accounts", and anonymous deposit and withdrawal slips are issued, then presumably the responsible persons are to be found at the higher managerial or board levels.

In such a situation, where the responsible persons cannot be determined and ultimately only the company profits from the criminal offence, the purpose of punishment disappears into thin air. Even when the attempt to identify the responsible individual, often a subordinate, is successful, the force of the law can often no longer be secured. The penalty for the individual must inevitably take into account his or her personal and economical situation, and it is even considered a mitigating factor if the individual has "altruistically" assumed responsibility for the violation of the law in the interest of the company. Furthermore, the punished actor will often not even be burdened by the punishment, as under German law the company may reimburse the actor for the imposed fine. Often, the amount has been included in the company's calculations when committing the offence.

## II.

The discussion draft issued by the Ministry of Justice and European Matters in Hessen aims at establishing criminal responsibility of legal entities and other corporate associations by attributing individuals' actions and faults to them, in which case the starting point for criminal responsibility is based on an action carried out for the association which constitutes a violation of corporate duty.

The regulation has the following basic prerequisites:

- The penalisation of the individual perpetrator and the corporation are not mutually exclusive. Both perpetrators can be made responsible for the offence in question and both can be penalised.
- Penalisation of an association is not restricted to commercially active companies, but extends to all legal entities and other corporations as a whole, as pertinent offences can be committed even in corporations with non-material objectives.
- The group of persons whose acts can result in the penalisation of the corporation is not restricted to the management level. Rather, the corporation, as is the case according to European Community law, is to be made legally responsible for offences committed by all employees which act in its name. Derelictions of duty and company mistakes are to form the basis and justification for the penalisation of the corporation; a case in point would be faults in the supervisory and control system which encourage individual employees to act against the law, and have an effect on all employees.
- The individual perpetrator need not be identified; it suffices to determine that the actor is a company employee.
- Criminal liability of the association depends on the initial offence committed by the employee which must stem from a neglect of duty which is "company based". This should exclude cases where the offence is unconnected to the tasks generally allotted to the employee, but carried out upon occasion (such as the commission of a traffic offence on the way to a business appointment).

The draft provides for two types of sanctions: a pecuniary penalty, and the dissolution of the association, together with two kinds of disciplinary measures: the issuing of instructions, and a compulsory supervision order.

A pecuniary fine is especially effective against profit-orientated associations and should obviously be favoured. The dissolution of an association should only be considered when the corporation's aims or activities are directed at committing criminal offences.

Regarding disciplinary actions, which can also be connected to an order imposing a fine on an association, the emphasis is to be placed on directives which result in appropriate restorative measures being taken including perpetrator-victim compensation and reparation for damages. In accordance with the principle of proportionality, a compulsory supervision order should only be imposed when directives appear to be insufficient.

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## **The Legislation and Judicial Practice on Punishment of Unit Crime in China**

**Justice Liu Jiachen, Beijing**

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I am very pleased to have the opportunity to exchange experiences with counterparts from various countries on the suppression and prevention of unit crime. Your experiences and practices are a very beneficial source of information to China. I would like to give a brief introduction to the legislation and judicial practice as they relate to unit crime in China.

### **1. Introduction on Legislation Regarding Unit Crime in China**

For a long time, the issue of whether a unit could be the subject of crime was not settled among theorists in China.

Due to the historical conditions of that time, the first criminal law which was promulgated in 1979 defined the criminal responsibility of a natural person, but did not cover unit crime. Since the period of reform, the opening of the country to the outside world, and the political and economic development in China, crimes committed by or on behalf of units have become increasingly serious. It has been especially so in the area of smuggling. In 1985, customs tracked down and made seizures in more than 2,000 smuggling cases by units of a value of 670 million RMB, and in 1986, 1,810 such cases of the value of 510 million RMB, making up 83 % of the total amount of all such smuggling cases. In 1987, the Customs Law of the People's Republic of China stipulated for the first time that "enterprises, institutions, state organs or public organisations" could be guilty of a smuggling crime that was the beginning of our criminal legislation on crimes committed by units, and the end to the speculation about whether a unit could commit a crime. Since then, more than 50 kinds of unit crimes have been stipulated in over 20 criminal, civil, economic and administrative regulations.<sup>1</sup> These stipulations,

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<sup>1</sup> For example, Supplementary Provisions of the Standing Committee of the National People's Congress Concerning the Punishment of the Crimes of Smuggling and Decision of the

though supplementing criminal law to some extent, are still weak in the following ways:

- (a) the lack of general stipulations on unit crime leads to a vagueness of the responsibility of individuals in the context of unit crime;
- (b) too many different designations of entities involved in a "unit crime". Some regulations refer to "enterprises, institutions, organs or public organisations", others to "enterprises and institutions", and some to "units" - that can lead to some confusion in the relevant legal definitions;
- (c) inconsistent stipulations relating to the punishment of unit crimes, some provide for a "dual-punishment system", while others rely on a "single punishment system".

In the latter system, for certain cases, only the unit is punished, whereas in other cases only the persons who are directly responsible in the unit are punished. That situation has, to a certain degree, influenced the application of laws on unit crime. In 1997, the Criminal Law was amended. In light of the practical need for controlling unit crime, and referring to successful experiences of legislation from foreign countries, the concept of unit crime was included in both the General Provisions and Special Provisions of the Law Section 4 of Chapter 2 of the General Provisions of Criminal Law which define the concept and principle of punishment for unit crime, while the Special Provisions clarify the types of crime which may be committed by a unit as well as the conditions and criminal responsibility for each unit crime. This represented a great breakthrough in China's Criminal Law and provided powerful legal means for judicial organs to severely punish the offending unit.

Prior to the adoption of a clear definition of unit crime in our Criminal Law, our judicial organs dealt with the unit crime as a crime committed by an individual. Since the implementation of laws on punishment of unit crime, e.g. Customs Law of 1987, the judicial system has fully implemented legal means to severely punish unit crime. For example, in 1993, the Commercial Bureau of Rushan City, Shandong Province, sought exorbitant profits for itself, committed acts of bribery and colluded with armed law enforcement personnel, to smuggle more than 9,900 boxes of cigarettes. In 1994, the Shandong Provincial High Court, in its final judgement in the case, fined the Commercial Bureau of Rushan City the amount of 100,000 RMB Yuan, and severely punished the Director of the Bureau, Liu

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Standing Committee of the National People's Congress on the Prohibition against Narcotic Drugs, etc.

Qishan, and 10 other persons who shared criminal responsibility. According to statistics, between 1992 and 1994, 91 criminal cases of speculation (those which severely disturbed the economic order) by units were sentenced by the Chinese courts; between 1995 and 1997, 444 criminal cases involving financial fraud, value added tax (V.A.T.) fraud, making and selling of counterfeit and poor quality products, committed by units were sentenced by the Chinese courts, thus guaranteeing the establishment and development of the socialist market economic order. With reference to unit crimes which have been investigated and prosecuted by judicial organs in China, the following observations can be made:

- (a) Unit crime spreads very quickly, covering a wide range of activities, but mainly in the areas of economic crimes including smuggling, tax evasion, falsification of information for illegal gain, illegal management, making and selling counterfeit and poor quality products, fraud, offering and accepting bribes, etc.
- (b) The number of criminal cases involving units increases as more and larger companies enter the financial system. For example, in 1995, the case of illegal fundraising by Xin Xing Corporation of Industry and Commerce in Wuxi City, Jiangsu Province which went before the Supreme People's Court in a case which involved some 3.2 billion Yuan.
- (c) Units which have been found guilty of a crime cover a wide range of entities, including state-owned corporations, enterprises and institutions, a good number of private corporations, enterprises, three kinds of investment enterprises (i.e., enterprises owned exclusively by foreign capital, Chinese-foreign joint ventures and cooperative enterprises), foreign enterprises, as well as state organs and armed forces.
- (d) Unit crimes are extremely difficult to investigate and prosecute. The subject of unit crime law mainly refers to legal entities established in accordance with the law, and to state organs, and refers to crimes committed under the pretence of "serving the unit", and being fraudulent in nature. In addition, due to the fact that most of the persons who are directly responsible are state officials or have some officials as superiors, there are great obstacles to such investigations and prosecutions. Given the current state of unit crime, it is my opinion that unit crime will become increasingly more difficult to detect and more complex in nature. The task for the judicial system will become more arduous.

## 2. Main Content of the Chinese Law Regarding Unit Crime

### *Elements Comprising a Unit Crime*

Art. 30 of the Criminal Law stipulates that "Any company, enterprise, institution, state organ, or organisation that endangers society, which is prescribed by law as a crime committed by a unit, shall bear criminal responsibility". According to this provision, unit crime refers to an act by the company, enterprise, institution, state organ or organisation, for the purpose of "illicit benefit for its own unit", which endangers society as a result of a decision made by a unit collectively or by a person in a position of responsibility, and which shall receive a criminal punishment in accordance with the law. The essential elements of unit crime are as follows:

(a) The subject of unit crime is the company, enterprise, institution, state organ or organisation. Although variations of the word "unit" are commonly used, and which are not clearly defined in Criminal Law, it only refers to a company, enterprise, institution, state organ, or organisation, i.e. limited-liability company, limited stock company, enterprises of various forms, administrative organs, judicial organs, armies at different levels, and all kinds of public and social organisations established legally. What should be noted is that in China, crimes committed by parties other than natural persons are not limited to the unit which has the qualification of a legal person, but also includes organisations and branches of non-legal persons. If the subject of unit crime is to be determined only on the basis of whether the unit has the qualification of a legal person, it would be more difficult to implement the punishment and prevention to this kind of crime. This is why such crime in China is called "unit crime" instead of "crime of a legal person".

(b) The purpose of a unit crime is to obtain "illicit benefit for its own unit". Here "illicit benefit" refers to the benefit prohibited by national laws, administrative laws and regulations, local laws and regulations, as well as other related stipulations. If a unit obtains a legitimate benefit by an act which violates the law, it will not have committed a unit crime. The question of whether an illicit benefit was gained or not is an important criterion for determining whether a unit crime was committed. Unit crime is committed only if the illicit benefit is for "its own unit". If a staff member of a unit commits a crime in the name of the unit in order to obtain illicit benefit for him or herself, it would not be a unit crime, but only an individual crime committed by a staff member within the unit.

(c) A unit crime is committed as a result of a decision made by the unit collectively or by a person in a position of responsibility, and reflects the will of a unit.

"The decision made by a unit collectively" refers to the decision made by an agency which has the authority to act on behalf of a unit in accordance with the law or the constitution of that unit, e.g., decision made by staff and workers' representative assembly, shareholder's assembly, board of directors, and special leader's agency. "The decision made by a person in a position of responsibility" refers to the decision made by an individual who has the authority to act on behalf of a unit in accordance with the law or the constitution of the unit, e.g., decision made by a factory director, chairman of the board of a corporation, general manager, or the persons who are responsible in organs and institutions. If an ordinary staff member within the unit decides, without any authorisation, to undertake to commit a crime in the unit's interest and in the name of that unit, except where the crime is committed with the agreement of the person in charge of the unit, it is deemed to be an individual crime of the person in charge and not a unit crime. The offending person has gone beyond his authority of his own free will, and cannot, therefore, represent the will of the unit, and consequently the crime cannot be investigated as a unit crime.

(d) Unit crime must be clearly stipulated by Criminal Law. Art. 30 of China's Criminal Law stipulates the specific criteria which determine when a unit is subject of a crime, thereby limiting the scope of the application of the law. "Prescribed by law as a crime" refers not only to the stipulations contained in Special Provisions of the Criminal Law, but also includes the circumstances which are prescribed in other laws. Chinese laws generally adopt the legal rule that after prescribing the criminal responsibility of an individual, a single section will stipulate as "While a unit commits a crime prescribed before, it shall be punished to ...". It is also the case that unit crime is directly prescribed in rules and regulations, e.g. art. 137 of the Criminal Law provides that "Where any building, designing, construction or engineering supervision unit, in violation of state regulations, lowers the quality standard of a project and thereby causes a serious accident, the person who is directly responsible for the accident shall be sentenced to fixed-term imprisonment of not more than five years or criminal detention and shall also be fined" etc.

#### *Scope of Unit Crime*

According to the Special Provisions of the Criminal Law, there are 129 infractions that can lead to prosecution as a unit crime. Among them, one pertains to endangering state security (Chapter Two), 80 pertain to undermining socialist market economic order (Chapter Three), one pertains to infringing upon the rights of the

person and the democratic rights of citizens (Chapter Four), 32 pertain to disrupting the order of social administration (Chapter Six), three pertain to endangering the interest of national defence (Chapter Seven), five pertain to corruption and bribery, one pertains to the dereliction of duty (Chapter Eight); all these amount to 31.2 % of the total charges of 413 in the Special Provisions of Criminal Law. Noteworthy features of these provisions are as follows:

(a) Most unit crimes belong to the category of economic crimes, and the majority of the economic crimes can be committed by a unit. According to the Criminal Law, there are 80 types of unit crimes in the single category of actions undermining socialist market economic order. This represents 62 % of the total number of the unit crimes, and 84.2 % of the total crimes in the relevant Chapter. Unit crimes prescribed in other chapters are mostly concerned with the purpose of profit.

(b) Most unit crimes belong to the category of intentional crimes. In China's Criminal Law, unit crime is mostly intentional. Several articles clearly stipulate that only the intentional crime committed by a unit shall be punished; as to the negligent act of a unit which has caused serious consequences, it shall not be investigated and prosecuted for criminal responsibility. For example, the stipulations on providing substandard weapons or equipment or military installations through negligence in section 3 of art. 370 of the Criminal Law, refer only to natural persons as subjects of the law. However, in the interest of society, a number of articles do stipulate that the negligent act committed by a unit resulting in serious consequences shall be investigated and prosecuted for criminal responsibility, e.g. the stipulations on illegal leases or loans of guns in section 2 and 3 of art. 128 of the Criminal Law, the crime can be committed either intentionally or negligently. The crime of causing a serious accident in a project, prescribed in art. 137 of the Criminal Law, can only be committed out of negligence.

(c) Most unit crimes can be committed by a unit as well as by an individual, e.g. the crime of fraudulently raising funds as stipulated in art. 192 of the Criminal Law. However, a few crimes may only be committed by a unit and not by an individual, e.g., the crime of secretly dividing up state-owned assets, fines or confiscated money or property as stipulated in art. 396 of the Criminal Law.

#### *Criminal Responsibility for Unit Crime*

Art. 31 of the Criminal Law provides that "Where a unit commits a crime, it shall be fined, and the persons who are directly in charge and the other persons who are directly responsible for the crime shall be punished. Where it is otherwise pro-

vided for in the Special Provisions of this Law or in other laws, those provisions shall prevail". According to the stipulation mentioned above, the "dual-punishment system" is the general principle in our Criminal Law for punishing the unit crime. If a unit, as an independent subject of a crime and of its own will, commits a crime which seriously endangers society, the unit ought to receive criminal punishment. At the same time, the intention of committing the crime and the act of endangering society shall be deemed to be conscious actions by the person who is responsible within the unit. If no person is responsible, there is no crime committed by a unit. Therefore, at present, most of the countries in the world follow the "dual-punishment system". Art. 31 of the Criminal Law reflects an input from foreign legislation, including the principle of the "dual-punishment system" for unit crime. However, the exception is also regulated, i.e. "Where it is otherwise provided for in the Special Provisions of this Law or in other laws, those provisions shall prevail", reflecting the combination of principle and flexibility.

There are two main features about the "dual-punishment system" in the Special Provisions of the Criminal Law. Firstly, for most unit crimes, the unit shall be fined according to the provisions of the Criminal Law, and the persons who are directly in charge and the other persons who are directly responsible for the crime, shall be punished according to the law as it relates to a natural person. For example, section 2 of art. 152 of the Criminal Law provides that "Where a unit commits the crime as mentioned in the preceding paragraph, it shall be fined, and the persons who are directly responsible for the crime shall be punished in accordance with the provisions of the preceding paragraph". Secondly, for the smaller group of unit crimes, while the unit is fined according to stipulations of the Criminal Law, the punishment for the persons who are directly in charge is the legally-prescribed penalty provided for in other laws which is lighter when compared with the crime committed by a natural person, e.g. the stipulations on smuggling goods or articles in art. 153 of the Criminal Law. In this provision, the first section stipulates the legally-prescribed punishment for a natural person who commits this crime, and the second section provides for punishment for the unit which commits this crime. The latter punishment is lighter in comparison to the previous one.

"Where it is otherwise provided for in the Special Provisions of this Law or in other laws, those provisions shall prevail", mainly refers to the stipulations on "single-punishment system". The "single-punishment system" is that of unit crime, i.e. only the persons who are directly responsible in the unit or the unit itself shall be punished. All stipulations on "single-punishment system" in our

Criminal Law only punish the persons who are directly responsible in a unit. For example, it is stipulated in art. 137 of the Criminal Law that "Where any building, designing, construction or engineering supervision unit, in violation of state regulations, lowers the quality standard of a project and thereby causes a serious accident, the person who is directly responsible for the accident shall be sentenced to fixed-term imprisonment of not more than five years or criminal detention and shall also be fined; if the consequences are especially serious, he shall be sentenced to fixed-term imprisonment of not less than five years and shall also be fined".

### **3. Suggestions for the Punishment and Prevention of Unit Crime**

There are various reasons for the existence and spread of unit crime. The punishment and prevention of unit crime is a systematic process and needs to be addressed in a comprehensive manner. China is willing to work jointly with other countries of the world, to reduce the harmfulness of unit crime. To this end, some suggestions follow:

(a) Further improve the laws and regulations on unit crime. At present, although there are differing views among legal theorists on the issue of criminal responsibility and related issues, it is generally accepted that unit crime poses a great danger to society, and criminal punishment should be imposed. Therefore, it is an urgent task to punish and prevent unit crime by determining the criminal responsibility of unit crime through legislation. Even in countries like China, where the unit crime has been prescribed in legislation, the laws regarding this issue need to be further improved. For example, the means of punishment of unit crime are limited to fines, and appear confined to singular measures. The law should create a system of criminal punishment appropriate to the unit based on the nature of the unit as well as widen the scope of criminal punishment to include winding up a business, limiting the scope of professional activities, compulsory dismissal, etc., so as to improve the efficiency of punishing and preventing unit crime. Meanwhile, the litigation process for unit crimes should also be improved. Facts show that inappropriate procedures to deal with unit crimes are obstacles to effective punishment of this kind of crime.

(b) Set up an efficient mechanism for preventing unit crime. Punishment is only one means of crime prevention. To prevent unit crime, in addition to imposition of severe punishment on the unit which committed a crime, the economic ethics and

business morality of legal persons should also be strengthened. Greater importance should be attached to the role played by professional organisations and other sectors of society in the development of stronger business ethics. The system of legal persons should be improved. The macro control function of government should be strengthened, especially its supervisory and regulatory functions in the financial sector. The fight against corruption should be further strengthened so as to dismantle the political culture which encourages unit crime.

(c) Strengthen international cooperation in the area of unit crime sanctions. Unit crime is mainly an economic phenomenon, which, with the development of international trade and the gradual establishment of a unified world market, has also grown to become a transnational crime. This requires close cooperation among the governments and judicial organs of all nations in maintaining contact, sharing experiences on legislation, supporting each other in judicial circles, strengthening exchanges in theoretical research. I am confident that through our joint efforts, a better way of punishing and preventing unit crime will be achieved.



## **Subject II**

### **National and International Developments: An Overview**



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## **National Developments in Germany: An Overview**

**Gerhard Fieberg, Bonn**

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1. German law contains no provisions for criminal liability for legal persons or associations of persons. Criminal penalties can only be imposed on natural persons.

Criminal liability for the former cases has, however, been the subject of intensive discussion in German legal circles in recent years arising out of complaints of the lack of sanctions in cases of economic and environmental crimes, as well as in organised crime. Crimes committed by associations, in particular corporate crime, account for 80 % of serious economic crime cases. Annual estimates of the resulting damage amount to some 20 billion DM.

The question of whether there is a need to introduce new criminal punishment for associations or whether legal institutions can be brought into line within the existing system of criminal law, is the subject of controversy.

2. Despite the views of legal theorists, criminal liability for associations has been recognised throughout German legal history. Associations were punishable in Germany until the end of the 18th century. This accorded with the practical needs of criminal law, which at that time, served the needs and secured the power of the nobility. Only with the advent of the Enlightenment, and the concomitant loss of power of the traditional nobility coupled with the growing importance of associations, did the momentum change and the view that collective entities could not be punished adopted. This view subsequently gained acceptance and remained - in spite of some opposing views - predominant in German criminal law theory until recently. Thus, the criminal law section of the 40th Congress of German Lawyers, which met in Hamburg in 1953, unanimously declared its opposition to criminal liability for associations. In addition, a clear majority of the members of the Grand Criminal Law Commission voted against the inclusion of criminal liability for legal persons in the German Criminal Code. In the Special Committee on Criminal Law Reform, the Federal Ministry of Justice expressed the view that, on the basis of the criminal law of culpability, there was no possibility of introducing a criminal penalty for legal persons. This problem was to be dealt with under

the law relating to regulatory offences, the Ordnungswidrigkeitengesetz (OWiG). The Special Committee finally decided in favour of providing for pecuniary sanctions for legal persons. However, the proposal attributing criminal penalties to these pecuniary sanctions was rejected.

3. Although German criminal law does not currently provide for criminal liability for legal persons or for other associations of persons, there are a number of other criminal law and non-criminal law measures which may be imposed on associations:

- the regulatory fine (pursuant to § 30 OWiG);
- forfeiture and confiscation (§§ 73 s. 3, 74 et seq., 75 of the Criminal Code, § 29, 29a OWiG);
- transfer of surplus proceeds (§ 10 s. 2 of the Economic Crime Act);
- so-called "black lists";
- restrictions on activities pursuant to the law on economic administration (e.g., §§ 35, 51 of the Trade Code, § 16 s. 3 of the Handicrafts Code, § 20 of the Federal Emission Control Act);
- the dissolution of associations (e.g., pursuant to § 396 of the Public Companies Act, § 62 of the Private Limited Liability Companies Act, § 81 of the Cooperatives Act, § 17 s. 1 in conjunction with s. 3 of the Associations Act, § 38 of the Credit Act, § 39 s. 2 of the Federal Constitutional Court Act, and § 43 of the Civil Code).

4. Proponents of the introduction of criminal sanctions for associations have put forward the following criminal policy reasons in support of their position:

- *The inadequacy of existing sanctions*

*De lege lata* sanctions for legal persons and associations of persons are often regarded as being insufficient. The Regulatory Offences Act has proven to be ineffective in practice because of its strict prerequisites. It has been said that forfeiture, confiscation, and transfer of surplus proceeds can only be applied against associations in exceptional cases and that the deterrent effect of these three measures is negligible because they only aim at restitution of the status *quo ante*. Dissolution of an association pursuant to administrative or company law has also been claimed to be insufficient as a substitute for criminal law measures against associations. On the one hand, the relevant prerequisite elements are said to be very narrowly worded, and, on the other hand, the dis-

solution of a corporation in cases of less serious offences cannot be invoked due to the principle of proportionality.

- *The inadequacy of the deterrent effect of punishment on individual offenders who have committed an association crime*

Attention should also be given to the view that an individual considers a questionable action to be less morally objectionable if it serves to protect common interests. Moreover, a certain way of thinking develops in every community a kind of "esprit de corps" or "company spirit". In such a situation, the threat of individual punishment would hardly have a deterrent effect, because the individual feels more committed to the company than to the more remote sphere of the state. It is said that an employee's dependence on his job also encourages such an attitude.

- *The inadequacy of the retributive effect of individual punishment*

It is further stated, that in order to impose criminal liability on corporate entities, the culpability of individuals who act jointly in committing a corporate crime is frequently negligible and bears no relationship to the often grave consequences of the offence. Hence, particularly in the field of economic crime, it is difficult to assess the detrimental effects of the crime when determining the punishment for the offence, since a fine has to be assessed in terms of the financial capacity of the individual offender, and not with regard to that of the association (§ 40 of the Criminal Code).

- *The problem of "organised absence of responsibility"*

To substantiate the criminal policy need for introducing the punishment for corporate entities, attention is often drawn to the problem of the so-called "organised absence of responsibility". By this, supporters of the punishment for corporate entities argue that the individual offender cannot be identified within a whole range of company staff members who may all have borne some responsibility. The reason for this is said to lie in the particular corporate structure of a large number of modern companies which provides favourable conditions for the commission of certain crimes.

5. In essence, the following arguments are presented for the retention of the existing provisions:

- *The lack of capacity to act*

Legal persons and associations of persons are, according to a prevailing opinion, unable to act in a criminal law sense because, in order to act, human conduct, based on will, is indispensable. It is further maintained that the legislature is unable to change the current situation because an act is a natural phenomenon which the law is confronted with as a fact. Furthermore, the act of a natural person cannot be attributed to an association, e.g., a corporate entity, since the attribution of an act differs from the act itself.

- *The lack of criminal capacity*

Another dominant argument found in criminal law theoretical literature against the punishment of associations is that legal persons and associations of persons are not capable of being culpable. According to this opinion, the inherent reason for attributing culpability, is the notion that people are endowed with a free will, and that they are responsible for making moral determinations, and are, therefore, capable of deciding what is right and what is wrong (the so-called "normative concept of culpability"). The prevailing opinion, therefore, denies criminal capacity on the part of associations of persons on the ground that a socio-ethical reproach can only be made against the moral personality of an individual human being and not against an association.

- *The lack of capacity to undergo punishment*

Another objection to the notion of criminal liability for associations is that criminal sanctions are essentially unsuitable as corporate penalties. A criminal penalty that is imposed on an association is considered not to fulfil its purpose because a legal person does not have the capacity to behave in conformity with the relevant norms.

- *Violation of the principle "non bis in idem"*

Opponents of the concept of criminal liability for associations sometimes maintain that punishment of an association can lead to double punishment of the individual offender. The offender is said to be punished not only directly, but also indirectly when a sanction is imposed on the association.

- *Considerations of justice*

Finally, there are objections on the ground that the punishment of associations is unjust due to the possibility of punishing innocent members of the association (e.g., through the loss of their jobs).

6. Various models have been proposed as criminal law sanctions that can be imposed on associations. These suggestions have mainly been made when the offence is committed by the association and a connection exists with an offence committed by an individual. However, the proposals that have been put forward differ sharply in their definition of the type of association that would be the subject of criminal liability, as well as to the group of individual offenders whose acts would give rise to liability on the part of the association. There are also differing opinions on the kinds of offences which may be considered as criminally liable for the association itself. Moreover, there are also proposals for sanctioning associations which dispense with the necessity to link corporate liability with individual culpability.

Independently of the theoretical substantiation provided for by the various proposals relating to the punishment of associations and their organisational configuration, there is also discussion surrounding the question of which sanctions are effective *vis-à-vis* associations. The various proposals can partly be characterised as genuine criminal penalties, partly as measures of correction and prevention, or as preventive measures *sui generis*. It should be noted, however, that this kind of theoretical classification does not necessarily determine the eventual structure of a system of sanctions for future application against associations. The following sanctions are the focus of discussion:

- *Association fine under criminal law*

Supporters of corporate sanctions see the criminal fine as the most important type of sanction. In the domain of company delinquency, it appears effective due to its preventive nature since enterprises are typically profit-minded and conscious of costs.

- *Conditions and instructions*

In addition to, or in lieu of, the criminal fine there is also support for imposing certain conditions and instructions upon an association. Such orders may be concerned with internal reforms, e.g., "disqualification" of management staff, or imposition of community service or indemnification for the damage

caused, as well as the cancellation of subsidies and public contracts, or even direct state control of the enterprise concerned.

- *Restrictions on activities*

Restrictions on activities may be made in the form of permanent or temporary withdrawal of operating permits, licences or concessions, the closure of businesses or parts of businesses, a ban on marketing certain products or on marketing them in particular sales areas, a ban on employing certain persons, or appointment of a trustee.

- *Security deposit*

There has been a proposal to impose a "security deposit" as a sanction modelled after the Swiss "Friedensbürgschaft". This is a preventive measure where the association is instructed to pay a security deposit contingent on it not committing a specific wrongdoing during a period to be specified by the court.

- *Dissolution of the association*

There is unanimous consent that compulsory dissolution of the association, as a repressive sanction, would have to be confined to extreme cases. One proposal called for the application of the dissolution of a corporate entity on ideological associations but not on business enterprises. The latter are considered to be less dangerous and their dissolution would mean sanctioning too many innocent staff members of the business.

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## Developments on the International Level

Manfred Möhrenschrager, Bonn

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### I. Introduction

In 1840 *Friedrich Carl von Savigny*, one of the most renowned German lawyers of the 19th century, who had at that time already been professor at the Wilhelm von Humboldt University in Berlin for thirty years and two years later became Prussian Minister for the Revision of Law, published the first parts of his great work "System of the present Roman Law".<sup>1</sup> Dealing with the subject of the Conference he stated in clear terms:

"Criminal law has to do with natural persons as thinking and feeling persons exercising their free will. A legal person, however, is not such a person but merely a property owning being ... Its reality is based on the representative will of certain individual persons which, by way of a fiction, is attributed as its own will. Such a representation ... can be acknowledged everywhere only in civil law, but never in criminal law.

Everything which is considered as a legal person's crime is always only the crime of its members or organs, this means of single human beings or natural persons ... If a legal person were to be punished for a crime, the basic principle of criminal law, the identity of the offender and of the sentenced person, would be violated."<sup>2</sup>

In 1840 this was, for a long time, the final word in the movement, starting in the second half of the 18th century,<sup>3</sup> against the concept of criminal liability of towns, villages and other corporations, which had developed in the late middle ages in Italy<sup>4</sup> and spread all over the continent in the following centuries (expressly laid

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1 *Friedrich Karl von Savigny*, System des heutigen römischen Rechts, Vol. II, Berlin 1840.

2 *Savigny* (note 1), p. 310 et seq. (English translation of the German original).

3 Express abolition of this concept in the *CODEX IURIS BAVARICI CRIMINALIS* (First Part, First Chapter, § 42) of 1751, reprinted in: *Arno Buschmann*, Textbuch zur Strafrechtsgeschichte der Neuzeit, München 1998, p. 188.

4 Cf. the references in: *Robert von Hippel*, Deutsches Strafrecht, Vol. II, Berlin 1930, p. 122 and *Ernst Heinitz*, Gutachten in: Verhandlungen des 40. Deutschen Juristentages, Vol. I, Tübingen 1953, p. 67 et seq. (leading lawyer in this respect *Bartolus de Sasoferrato*; acknowledged in the Reichskammergerichtsordnung 1555, Part II, Title 10 § 1 [*Heinitz*, p. 69]); *Walter Seiler*, Strafrechtliche Maßnahmen als Unrechtsfolgen gegen Personenverbände, Freiburg (Switzerland) 1967, p. 8 et seq.; *Bruni Ackermann*, Die Strafbarkeit juris-

down e.g. in the "Ordonnance Criminelle" of Louis XIV in 1670).<sup>5</sup> There was then an ever decreasing necessity for the use of such a measure by the territorial powers. On the other hand, the notion of individual responsibility became increasingly acknowledged in criminal law as well as a consequence of the development of human rights and individualistic ethics as part of the Enlightenment.<sup>6</sup> From as early as 1700,<sup>7</sup> the common law had taken the same view: a corporation could not be guilty of crime: it had no mind, and thus was incapable of criminal intent; it had no body, and thus could not be imprisoned, or in the words of *Baron Thurlow II*: "it has no soul to be damned and no body to be kicked".<sup>8</sup>

The paradox is, whilst the question seemed to be settled in Germany and in other parts of the Continent, there was at the same time a gradual change in England. Corporate criminal liability was applied in the 1840ies e.g. in a case against a railway company as having violated duties imposed.<sup>9</sup> This concept was then extended further, especially in this century, in the United States even in a more radical way. The growth of private corporate entities in particular, together with the development of industry, commerce and trade, created new dangers to the economy, to citizens and to the state with a challenge to develop and use new counter-measures. The forces underlying this change were, however, not so strong and overwhelmingly convincing for continental countries to give up so easily their basic concepts and structures of criminal law developed over a long time. There-

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tischer Personen im deutschen Recht und in ausländischen Rechtsordnungen, Frankfurt/Main 1984, p. 23 et seq.; *Hans Joachim Hirsch*, Die Straffähigkeit von Personenverbänden, Opladen 1993, p. 6 et seq.; *Anne Ehrhardt*, Unternehmensdelinquenz und Unternehmensstrafe, Berlin 1994, p. 26 et seq.

5 Cf. *Didier Matray*, in: Commission Droit et Vie des Affaires de l'Université de Liège (ed.), *Le risque pénal dans la gestion des entreprises*, Brussels 1992, p. 9, 44; *Gaston Stefani/Georges Levasseur*, *Droit pénal général*, 10ème éd., Paris 1978, no. 245; *Heinitz* (note 4, p. 70 n. 18).

6 Reflected in the express denial of criminal responsibility of collective entities e.g. in art. 49 Bavarian Criminal Code of 1813, reprinted in: *Buschmann* (note 3), p. 458 (but only in principle, as a reservation was made in relation to possible exceptions in specific regulations !), in art. 56 of the General Criminal Code of Hannover of 1840 and in art. 44 of the Criminal Code of Darmstadt of 1841. In the 19th century, however, most German states, the Legislature of the North German Federation in 1869 and of the German Reich in 1871, held such provisions not any longer necessary when revising or introducing new criminal legislation (expressly in this sense the Prussian Law Revision Commission in 1827, cf. *Goldammer*, *Die Materialien zum Straf-Gesetzbuche für die Preußischen Staaten*, Part I, Berlin 1851, p. 331 et seq.).

7 *Card, Cross & Jones*, *Criminal Law*, 13th ed., London 1995, p. 575 et seq.

8 *Ibid.*

9 Cf. on the "Development of Corporate Liability" *Celia Wells*, *Corporations and Criminal Responsibility*, Oxford 1993, p. 94 et seq.

fore, continental supporters of this new approach, like *von Gierke*, *von Liszt*, *Prins*, *Hafter* and *Max Ernst Mayer*<sup>10</sup> remained a minority. Only in exceptional areas like those of tax evasion crimes<sup>11</sup> did legislators sometimes make a few exceptions. The statement of the famous English lawyer *Frederick William Maitland* in the introduction to his translation of a part of *Gierke's* work in 1900 that "even *Savigny* could not permanently prevail when the day of railway collisions had come"<sup>12</sup> was too premature and seems to become true only in recent times on the continent.

## II. International Resolutions and Recommendations

Given the contrasts between the Anglo-American approach and the continental criminal law orientation towards the individual on the academic level and in legislation, which still dominates today, it is not surprising that the subject of corporate criminal liability and sanctions against legal entities at the international level, too, was tackled with some delay. It was not until the late twenties that the subject was discussed at the *Second AIDP Congress in Bucharest* (6 to 11 Oct. 1929).<sup>13</sup> Thereafter the international debate gained momentum only after the Second World War, mainly from the late seventies onward. On a national level, a new orientation had taken place in an number of European countries, first in the Netherlands, later e.g. in Yugoslavia and then in Scandinavian Countries and in France, as well as in certain areas also in other countries.<sup>14</sup> With this a new phase of international

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10 *Otto Gierke*, *Die Genossenschaftstheorie und die deutsche Rechtsprechung*, Berlin 1887, p. 734 et seq., 771 et seq.; *Franz v. Liszt/Eberhard Schmidt*, *Lehrbuch des Deutschen Strafrechts*, Vol. I, 26th ed., Berlin 1932, § 28 I 2 n. 4, p. 155 et seq.; *Max Ernst Mayer*, *Der Allgemeine Teil des Deutschen Strafrechts*, 2d ed., Heidelberg 1923, p. 95 et seq., each with further references; *Prins* according to *Radulesco*, 6 *Revue Internationale de Droit Pénal* (1929) p. 291 and *Jean Pradel*, *Droit pénal comparé*, Paris 1995, N° 216, citing *Prins*, *Science pénale et droit positif*, 1899, p. 120.

11 Example: § 357 *Reichsabgabenordnung* of 13 December 1919, *Reichsgesetzblatt* (Reich Federal Law Gazette) p. 1993, 2076.

12 *Frederic William Maitland* in his introduction to *Otto Gierke*, *Political Theories of the Middle Age*, Cambridge 1900, p. XXXIX.

13 The opinions adopted are reprinted in: 7 *Revue Internationale de Droit Pénal* (1930), p. 10 et seq.

14 *The Netherlands*: art. 15 *Wet op de Economische Delicten* of 1951; § 51 *Wetboek van Strafrecht* (introduced in 1976); *Yugoslavia*: § 10 of the *Federal Act N° 10/86 on Economic Crimes* of 1977 (cf. *Stojanovic*, in: Heine [ed.], *Umweltstrafrecht in osteuropäischen Ländern*, Freiburg 1995, p. 89, 143 et seq., p. 153); *Icelandic Act in respect of Prevention of Marine Pollution N° 32/1986*; Chapter 36 §§ 7 et seq. of the *Criminal Code of Sweden* (non penal enterprise fine - "företagsbot" - introduced by Act SFS 1986: 118; cf. also § 54 of the *Environmental Protection Act*); §§ 48a, b of the *Criminal Code of Norway*, intro-

statement began, which taken together do not always show coherent development as regards their content, but which in the last analysis have indeed contributed to the development of relevant provisions in international legal instruments (cf. *infra*).

More and more national and international organisations and institutions decided to take up the topic of the criminal liability of corporations and enterprises, especially in the context of debates related to a more effective fight against economic and environmental offences. To be mentioned here<sup>15</sup> are e.g., the AIDP Con-

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duced by Amending Act N° 81 of 11 June 1993; *France*: art. 121-2 (Nouveau) Code Pénal (in force since 1 March 1994; Premier Bilan de l'application des dispositions du nouveau Code pénal concernant la responsabilité pénale des personnes morales, Circulaire-98-1/F1 - 26.1.1998, published in the Bulletin Officiel: 100 convictions from 18 november 1994 through 23 october 1997); *Denmark*: §§ 25 to 27 of the Criminal Code (introduced in 1996); *Belgium*: Various draft proposals since 1991, cf. the report for this conference *Michael G. Faure*; *Finland*: Government Bill 95/93 of June 1993; *Portugal*: art. 11 of the Código Penal (Criminal Code) of 1995 allows exceptions to the principle of individual criminal liability; only non penal monetary sanctions like in Germany are foreseen in art. 7 of the Regime Geral das Contra-Ordenações (Law on Administrative Regulatory Offences); Criminal penalties, however, are provided in art. 3 of the Decreto-Lei N° 28/84 of 20 January 1984 ("Infracções contra a economia e contra a saúde pública" - crimes against the economy and public health); art. 7 of the Decreto-Lei N° 376-A/89 of 25 October 1989 ("Infracções fiscais aduaneiras" - crimes related to customs); art. 7 of the Decreto-Lei N° 20-A/90 of 15 January 1990 ("Infracções fiscais nao aduaneiras" - fiscal crimes not related to customs); art. 3 of Lei (Act) N°109/91 of 17 August 1991 ("Criminalidade informática" - computer crime); art. 258 of the Decreto-Lei (Statutory Decree) N° 16/95 of 24 January 1995 ("Infracções contra a propriedade industrial" - crimes against industrial property), cf. the report for this conference *Teresa Serra*; *Switzerland*: Non penal monetary sanctions for minor offences, art. 7 of the Federal Law on Administrative Penal Law of 22 March 1974; art. 181 of the Federal Law on Federal Taxes; for criminal sanctions art. 100 quater and quinquies of the Predraft of the Swiss Justice and Police Department of 11 March 1991; for a comparative analysis cf. e.g. *Günter Heine*, *Die strafrechtliche Verantwortlichkeit von Unternehmen*, Baden-Baden 1995 p. 213 et seq., and "Criminal Liability of Enterprises and New Risks, International Developments - National Consequences" in: 2 Maastricht Journal of European and Comparative Law, p. 107 et seq. (1995) and the country reports, edited by him in the series of the Max Planck Institute for Foreign and International Criminal Law, Freiburg, Germany: "Arbeiten zum Umweltrecht" (being to a great extent the basis for the references to foreign law *supra*).

- 15 VIth AIDP Congress in Rome in 1953 (under the topic "Le droit pénal social-économique"; cf. 25 *Revue Internationale de Droit Pénal*, p. 252 et seq. [1954]); XIIth AIDP Congress, 16-22 September 1979 in Hamburg (under the topic "The Protection of the Environment through Penal Law", cf. *Jescheck/German National Group of the AIDP* (ed.), *Congress Proceedings*, Baden-Baden 1980, p. 151 et seq., *passim*, with Recommendations 6 and 8, p. 546); XIIIth AIDP Congress in Cairo in 1984 (under the topic "Concept and Principles of Economic and Business Criminal Law including Consumer Protection", Resolution in: 56 *Revue Internationale de Droit Pénal*, p. 506 et seq. and in: *Egyptian Association of Criminal Law* (ed.), *Proceedings of XIII. International Congress on Penal Law*, Cairo 1984, p. 261, 263 (N° 13); XVth AIDP Congress in Rio de Janeiro in 1994 (under the topic "Crimes against the Environment", Resolution in: 66 *Revue Internationale de Droit Pénal*

gresses of 1953 in Rome, of 1979 in Hamburg and of 1994 in Rio de Janeiro, the International Congresses of Comparative Law of 1978 in Budapest and of 1994 in Athens, and the 8th International Conference of the Society for the Reform of Criminal Law of 1994 in Hongkong; in addition, references can be made to meetings organised by the Taiwanese AIDP Section in 1991 in Taipei and seminars and colloquia like those in Messina in 1979, in Lauchhammer in 1992 and in Portland in 1994. International and supranational organisations like the United Nations, the OECD, the Council of Europe and the European Union became more and more involved.

There is no uniform approach concerning the question of criminal liability but rather an increasing attempt to overcome and bypass the differences in the basic attitudes, and to concentrate on the issues of the prerequisites of corporate liability, the relationship between corporate and individual liability, the extent of corporate liability and the scope of sanctions and measures to be used.

- The first resolutions and recommendations of the Council of Europe between 1979 and 1982 were very cautious in their references only to (re)examine the possibility of introducing the concept of (criminal) liability (*R (77) 28 on the Contribution of criminal law to the protection of the environment*,<sup>16</sup> *R (81) 12 on Economic Crime*<sup>17</sup>) ("or at least of introducing other arrangements serving the same purposes ...") or to consider the advisability of introducing such a concept (*R (82) 15 on the Role of Criminal Law in Consumer Protection*). Even weaker was the recommendation of the AIDP Congress in Cairo 1984

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1995, p. 50 et seq. and in: 108 ZStW [1996], 691); 10th International Congress for Comparative Law in Budapest in 1978, Topic VA 3/1; 14th International Congress for Comparative Law in Athens in 1994 (cf. the Report of *de Doelder/Tiedemann*, La Criminalisation du Comportement Collectif/Criminal Liability of Corporations, Den Haag 1996); The Taiwan/ROC Chapter, International Association of Criminal Law (ed.), International Conference on Environmental Criminal Law, Taipei 1992, p. 433 et seq. (*Schünemann*) and 474 et seq. (*Triffterer*); European Seminar on Environmental Crime in Lauchhammer (Brandenburg, Germany), 25-29 April 1992, organised by the Helsinki Institute for Crime Prevention and Control affiliated with the United Nations (HEUNI) and the Max Planck Institute for Foreign and International Criminal Law, Freiburg, Germany (topic: "The Policy of Criminal Law in the Perspective of Nature and the Environment in a European Perspective", Publication by *Hans Jörg Albrecht/Seppo Leppä*, Criminal Law of the Environment, 1992; summary with reprint of the Conclusions (N° 11 on corporate liability), too, by *Möhrenschlager*, in: *wistra* 1996, Heft 2, p. VI-VIII); partially similar the Draft Resolution of an UN Ad Hoc Expert Group on More Effective Forms of International Cooperation against Transnational Crime, including Environmental Crime, as a result of a meeting in Vienna, 7-10 December 1993 (summary by *Möhrenschlager*, in: *wistra* 1994, Heft 4, p. V/VI); 8th Annual International Conference of the Society for the Reform of Criminal Law, 4-8 December 1994 in Hongkong, Report by *Mäder*, in: 107 ZStW (1995), 689.

16 Published separately by the Council of Europe, Publication Section, Strasbourg 1981.

17 Published separately by the Council of Europe, Publication Section, Strasbourg 1983.

- which went no further than to state that "countries which do not recognize ... criminal liability" of corporations and other legal entities, "may wish to consider the possibility of imposing other appropriate measures on such entities".
- A stronger and more concrete commitment is contained in the pertinent part of the Lauchhammer resolution on the policy of criminal law in the protection of nature and the environment in a European Perspective. In Resolution 1993/28, ECOSOC took note of these conclusions annexed in the appendix. They stated, inter alia, that "support should be given to the extension of the idea of imposing (criminal or non-criminal) fines on corporations (or possibly even other measures) in Europe."; the UN Crime Prevention Commission which took over the substance of this wording, however, weakened the commitment in its recommendation proposal.
  - Also not very far reaching was the Resolution of XIIth AIDP Congress in Hamburg in 1979 on "*The Protection of the Environment through Penal Law*", which, with respect to the experience that "serious attacks on the environment being most frequently committed by juridical persons and private, public or state enterprises," held it "necessary either to admit the penal responsibility of these, or impose on them respect for the environment by civil or administrative sanctions".
  - Astonishingly, the emphasis on the introduction of criminal responsibility reached an agreement on the UN level adopted as part of the "*Guiding Principles for Crime Prevention and Criminal Justice in the Context of Development and a New International Economic Order*", by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders in Milan, 26 August to 6 September 1985, and was endorsed by the General Assembly in its Resolution 36/21.<sup>18</sup> According to the 9th principle, "Due consideration should be given by Member States to making criminally responsible not only those persons who have acted on behalf of an institution, corporation or enterprise, or who are in a policy-making or executive capacity, but also the institution, corporation or enterprise itself, by devising appropriate measures that would prevent or sanction the furtherance of criminal activities."
  - A milestone in the international development is, however, *Recommendation (88) 18 of the Committee of Ministers [of the Council of Europe] to Member States concerning Liability of Enterprises having Legal Personality for Of-*

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18 Published separately by the United Nations, Department of Public Information.

*fences committed in the Exercise of their Activities*,<sup>19</sup> being inspired by the desire to overcome difficulties rooted in legal traditions with a view to making enterprises as such answerable. This recommendation has sometimes been misunderstood as if it recommended the (re)introduction of criminal liability. The preamble and the text itself show that this is a too far-reaching conclusion, although a tendency favouring a criminal law solution may be inferred. This may be the reason for the express reservation of the representatives of the Federal Republic of Germany and of Greece of the right of their government to comply with the recommendation or not.

The preamble stresses the point that "the principle of criminal liability ... is not the only means of solving ... difficulties and does not exclude the adoption of other solutions ... Accordingly "consideration should be given", by way of example, on the one hand,

"a. applying criminal liability and sanctions to enterprises, where the nature of the offence, the degree of fault on the part of the enterprise, the consequences for society and the need to prevent further offences so require";

and,

on the other hand, using the model of the German system

"b. applying other systems of liability and sanctions, for instance those imposed by administrative authorities and subject to judicial control, in particular for illicit behaviour which does not require treating the offender as a criminal."

Other details of the Recommendation are still important for the on-going discussion, e.g. the recommendation that "the enterprise should be so liable, whether a natural person who committed the acts or omissions constituting the offence can be identified or not" and that "the enterprise should be exonerated from liability where its management is not implicated in the offence and has taken all the necessary steps to prevent its commission." (E.g. in the case where an employee pursues an illegal activity in violation of instructions).

A comprehensive list of suitable sanctions is enumerated including, besides pecuniary sanctions, warnings and reprimands, confiscation, prohibition of certain activities, in particular exclusion from doing business with public authorities, exclusion from fiscal advantages and subsidies, prohibition of advertising, annulment of licenses, removal of managers, appointment of a provisional caretaker management, closure and winding-up of the enterprise

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<sup>19</sup> Published separately by the Council of Europe, Publications and Documents Division, Strasbourg, with the title "Liability of Enterprises for Offences" together with an explanatory memorandum (English version), 1990.

- and publication of decisions. A forerunner in this respect had already been the AIDP Congress in Rome in 1953.
- A further reference is made to the XVth AIDP Congress in Rio de Janeiro in 1994 which, in its resolution on the protection of the environment through criminal law devoted a great deal to the problem: "... National legal systems should, wherever possible under their constitution or basic law, provide for a variety of sanctions and/or measures adapted to private and public entities ... Emphasising the need to force managers and directing authorities to exercise their duty of supervision in a manner to prevent occurrence of harm, criminal responsibility should be imposed in case failure in the proper discharge of supervisory responsibility causes "serious harm results". As in the last-mentioned Recommendation of the Council of Europe, "proceedings against an ... entity should be possible ... even if responsibility for (environmental) offences cannot be directly attributed to any identified human agent of such an entity" (but only in the limits of constitutional possibilities).
  - Finally a recommendation of the Financial Task Force (FATF) should be mentioned, too. The purpose of this intergovernmental body is the development and promotion of policies to combat money laundering. This is reflected in 40 Recommendations drawn up in 1990 and revised in 1996. In the recommendations concerning the scope of the criminal offence of money laundering it is stressed that each country should extend the offence of drug money laundering to one based on serious offences. In addition, it is stated that "where possible, corporations themselves - not only their employees - should be subject to criminal (!) liability" (N° 6).

### **III. The Development of International Legal Instruments**

#### **1. Level of the European Union**

##### *a) EC Antitrust Law*

The first international legal instruments in Europe providing the basis for binding provisions on the liability of enterprises were the Treaty establishing the European Coal and Steel Community [cited ECSC] of 18 April 1951,<sup>20</sup> which entered into force on 25 July 1952, and the Treaties establishing the European Economic Community<sup>21</sup> [cited after changes by the treaty on the European Union as EC] and

20 Published in the Federal Law Gazette (Bundesgesetzblatt) 1952 Part II, p. 445.

21 Published in the Federal Law Gazette (Bundesgesetzblatt) 1957 Part II, p. 753, 766.

the European Atomic Energy Community [cited EURATOM],<sup>22</sup> both of 25 March 1957 and both in force since 1 January 1958.

The ECSC Treaty provides directly for fines<sup>23</sup> according to art. 47 par. 3, art. 54 (6), art. 58 (4), art. 59 (7), art. 64, 65 par. 5 and art. 66 (6) and (7). Enterprises exceeding their steel production quotas are liable to fines under art. 12 of Decision No. 1831/81/ECSC of 24 June 1981. The Commission imposed e.g. in fall 1981 a fine of 2 151 150 ECU on Klöckner Werke AG for such an offence committed in the first quarter of 1981. By the end of the seventies there had been over sixty decisions to fine enterprises for offences against ECSC rules.

Art. 83 of the EURATOM Treaty introduced certain penalties for infringements of obligations of safety control imposed on persons or enterprises which the Commission is entitled to impose:

- a warning;
- the withdrawal of special advantages, such as financial or technical assistance;
- the placing of an enterprise, for a maximum period of four months, under the administration of a person or board appointed jointly by the Commission and the State having jurisdiction over such enterprise;
- the complete or partial withdrawal of source materials or special fissionable materials.

The Member States were obliged to ensure the enforcement of the penalties.

More important in practice are the *EC Rules*. Art. 87 (in future art. 83, Amsterdam Treaty)<sup>24</sup> par. 2 (a) of the EC Treaty introduced fines or penalties to ensure observance of the prohibitions in art. 85 and 86 (in future art. 81, 82), inter alia, on undue restriction of competition and abuse of a dominant position by an enterprise within the Common Market. These provisions are implemented by Council Regulation 17 of February 6, 1962, First Regulation implementing art. 85 and 86 (shorter: Regulation 17/62 on competition),<sup>25</sup> which is the most important, and by Council Regulation 1017 of July 19, 1968, Applying Rules of Competition to

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22 Published in the Federal Law Gazette (Bundesgesetzblatt) 1957 Part II, p. 1014.

23 Cf. for the following *Hans-Jürgen Schroth*, Economic Offences in EEC Law with special reference to English and German Law, Kehl 1983, p. 144 et seq.

24 Published in the Federal Law Gazette (Bundesgesetzblatt) 1998 Part II, p. 387 (consolidated version of the EC Treaty on p. 465 et seq. with the new art. 81 to 86, replacing art. 85 to 90, on p. 478 et seq.).

25 Official Journal, English special edition 1959-1962, p. 87.

Transport by Rail, Road and Inland Waterways (shorter: Regulation 1017/68 on competition in transport).<sup>26</sup> In addition, there is a third regulation which already entered into force on 1 July 1961, the Council Regulation 11 of June 27 1960, Concerning the Abolition of Discrimination in Transport Rates and Conditions, in Implementation of art. 79 (3)<sup>27</sup> of the EC Treaty.<sup>28</sup>

According to art. 15 s. 2 (a) of Regulation 17, the Commission may impose fines on undertakings and associations of undertakings for intentional or negligent infringement of art. 85 [81] par. (1) or art. 86 [82] of the EC Treaty. Art. 22 (2) of Regulation 1017 contains a parallel provision concerning prohibitions in the transport sector (cf. art. 79 EC Treaty). Art. 17 and 18 of Regulation 11 simply speak of "penalties". Objections against the sanctioning of enterprises for such violations were met by the addition in these three instruments that "*decisions imposing fines shall not be of a criminal law nature*", a formulation which, however, did not end the discussion on the true nature of EC fines. Despite this statement there are still scholars like *Hans-Jürgen Schroth* who nevertheless consider such fines, due to their purpose and their effect to be a criminal law sanction, an opinion which I do not share.

When imposing fines for violation of competition, the Commission and the Court proceed from the assumption of the capacity of the enterprise to act and to be culpable. In order to make the imposition of fines effective, the group of persons who are considered as acting for the enterprise was defined very broadly. Obstacles to proof of evidence when attributing conduct and guilt could be reduced as a result of this. Thus, the culpable conduct of persons in the enterprise is sufficient, as well as that of agents and representatives outside the enterprise who are authorised to act on behalf of the enterprise. A tendency towards establishing the culpability of the enterprise itself can be observed which is obvious if the culpability is seen in relation to the field activity, the size, the market position and the affiliation to a combine and if reference is made to the violation of supervisory responsibilities or organisational mismanagement.

According to Council Regulations 17 and 1017, the Commission may impose, in the case of infringements, fines ranging from 1,000 to 1 million ECU, or in a sum in excess thereof but not exceeding 10 % of the turnover in the preceding business

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26 Official Journal, English special edition 1968, p. 302.

27 Official Journal, English special edition 1959-1962, p. 60.

28 Cf. for the following e.g. the studies of *Schroth* (note 23) and of *Gerhard Dannecker/Jutta Fischer-Fritsch*, *Das EG-Kartellrecht in der Bußgeldpraxis*, Köln 1989.

year. The "policy of high penalties" made possible by such provisions has been applied by the Commission especially since the eighties<sup>29</sup> which had, I think, at least a certain effect on large and multinational companies. In January 1998 the Commission, promulgated new guidelines for the imposition of fines based on art. 15 par. 2 of Regulation 17 and on art. 65 par. 5 of the ECSC Treaty,<sup>30</sup> which are less oriented to the turnover, but which divide the violations in three groups according to the seriousness of the offence. This change met considerable critics by lawyers of the Federal Cartel Office in Berlin.<sup>31</sup>

*b) Protection of the Financial Interests of the European Communities*

With the entry into force of the Treaty of the European Union on 1 November 1993, Chapter VI, the so-called third pillar of this Treaty opened new possibilities to deal with our problem. In 1994 the United Kingdom and the Commission undertook new initiatives in the fight against fraud to the detriment of the financial interests of the European Communities. Their proposals also included provisions for the liability of legal persons. As a first step the Council under German Presidency adopted a Resolution on the legal protection of the financial interests of the Communities on 6 December 1994.<sup>32</sup> It requested the elaboration of a legal instrument taking into account certain guiding principles. One of them stated that "it should also be possible, under conditions to be defined, to impose appropriate criminal or other sanctions on legal persons".

This part of the resolution was implemented by the Second Protocol of 19 June 1997 to the Convention on the Protection of the European Communities' Financial Interests of 26 July 1995.<sup>33</sup> It has not yet entered into force; it has not even been ratified. The Explanatory Report was published in March 1999.<sup>34</sup> This is for the

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29 Cf. the recent decisions of the European Court of Justice in Luxemburg of 14 May 1998 (in the cases *Sarrío SA/Commission*, T-334/94; *Mayr-Mehrhof Kartongesellschaft mbH/Commission*, T-347/94, and other cases, partially published in: *Tätigkeiten des Gerichtshofes und des Gerichtes erster Instanz der Europäischen Gemeinschaften*, N°13/98, p. 34 et seq.).

30 Published in the Official Journal C 9 of 14 January 1998, p. 3.

31 *Claudia Korthals/Annette Bangard*, Die neuen Leitlinien der Kommission zur Bußgeldbemessung in Kartellverfahren - eine Kritik, 53 *Betriebs-Berater* (1998), p. 1013.

32 Official Journal C 355 of 14 December 1994, p. 2.

33 Official Journal C 221 of 19 July 1997, p. 11 (overview by *Möhrenschlager*, in: *wistra* 1997, Heft 8, p. VI/VII).

34 Official Journal C 91 of 31 March 1999, p. 8.

time being the main reason for the Federal Government's postponement of the presentation of the Bill for ratification and implementation.

According to art. 3 par. 1 and art. 1 of the Protocol, each of the Member States of the European Union shall take the necessary measures to provide that legal persons - not including "States and other public bodies in the exercise of State authority and ... public international Organisations" - can be held liable for fraud or active corruption and money laundering committed for their benefit, that damage or are likely to damage the European Communities' financial interests.

The term "fraud" is defined by reference to the definition in the mother convention covering on the one hand subsidy fraud and on the other hand evasion of customs and other European duties. "Corruption" means, according to the first protocol referred to, bribery of European officials and of officials of the Member States of the European Union related to the violation of their duties. "Money laundering" means the conduct as defined in the Money Laundering Directive of 1991; the predicate offences are fraud, at least in serious cases, and active and passive bribery as mentioned.

As a further prerequisite for corporate liability the relevant offence has to be committed by a "person, ... who has a leading position within the legal person, based on

- a power of representation ...
- an authority to take decisions ...
- an authority to exercise control within the legal person".

The last alternative makes it necessary to amend the provision on corporate liability in § 30 Ordnungswidrigkeitengesetz (OWiG).

In addition, a legal person shall be held liable "where the lack of supervision or control by a person in a leading position as described has made possible the commission of ... fraud ... corruption or money laundering for the benefit of the legal person by a person under its authority". In the first alternative at least criminal or non-criminal fines have to be provided as sanctions whereas other sanctions such as exclusion from entitlement to public benefits, disqualification from the practice of commercial activities, placing under judicial supervision and a judicial winding-up order are optional. In the second case, the violation of supervisory duties, the Protocol speaks only of "effective, proportionate and dissuasive sanctions or measures".

The debate revealed that already a majority of countries were - on the basis of existing law or envisaged changes - prepared to accept the Commission's proposal for criminal liability, an approach which was followed also in the so-called CORPUS-IURIS Project,<sup>35</sup> also initiated by the Commission. Other countries, including Germany, considered this to be at least premature. They favoured for the time being the solution of the Protocol with non-penal sanctions. In this context Austria, in addition, was given, by way of a reservation declaration, for a limited period, the possibility to implement this part later, but not later than five years after the adoption of the Protocol.

c) *Other Areas*

aa) *Combating Trafficking in Human Beings and Sexual Exploitation of Children*

A Joint Action of 24 February 1997 concerning action to combat trafficking in human beings and sexual exploitation of children,<sup>36</sup> adopted by the Council of the EU in response to an initiative of Belgium, also contains a regulation on the liability of legal persons. Every state must review existing law and practice with a view to providing that legal persons may, where appropriate, be held administratively liable for criminal offences within the meaning of the Joint Action or be held criminally responsible if these offences were committed on behalf of the legal person in accordance with modalities to be defined in the national law of the Member State.

bb) *Combating Corruption*

The Luxembourg presidency submitted in 1997 a supplementary draft Joint Action to make corruption in the private sector a criminal offence, which also contains a regulation on the liability of legal persons. On 22 December 1998 the Council adopted a Joint Action<sup>37</sup> with a provision related to bribing in the private sector, being framed in parallel to the provisions in the Second Protocol.

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35 Published in English and French by *Mireille Delmas-Marty* (ed.), *Corpus Iuris*, portant dispositions pénales pour la protection des intérêts financiers de l'Union Européenne, Paris 1997 (here art. 14, p. 70 et seq.). German translation by *Yvonne Kleinke/Marc Tully*, *Corpus Juris der strafrechtlichen Regelungen zum Schutz der finanziellen Interessen der Europäischen Union*, Köln 1998.

36 Official Journal L 63 of 4 March 1997, p. 2.

37 Official Journal L 358 of 31 December 1998, p. 2.

## 2. Level of the OECD

On 17 December 1997 29 OECD Member States and five other countries agreed on the adoption of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.<sup>38</sup> As one of the first countries, the Federal Government of Germany introduced the Bill for the ratification and implementation of this Convention at the end of March.

Although the Convention includes only a very general clause on the "Responsibility of Legal Persons", it is most important because it forces all ratifying countries to introduce at least the possibility to impose non-criminal monetary sanctions on legal persons for the bribing of foreign public officials as far as covered by the Convention. This is a real breakthrough because other countries than Anglo-American or EU-countries are also addressed. The prerequisites for attributing such a bribery offence to the legal person were left open due to the differences in national legislation. Therefore, the Convention simply says that each Party has, "in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official".

## 3. Level of the Council of Europe

Influenced by the general new discussion on corporate liability and inspired by Recommendation (88)12, the Council of Europe has in recent years also started to include this topic when developing new criminal law instruments:

a) *Draft Convention on the Protection of the Environment through Criminal Law*

After adoption in September 1998, the Committee of Ministers of the Council of Europe opened the Convention on the Protection of the Environment through

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38 Published in: International Legal Materials, p. 1 (1998) and (with a German translation) as part of a Bill of the Federal Government of 27 March 1998 (Entwurf eines Gesetzes zu dem Übereinkommen vom 17. Dezember 1997 über die Bekämpfung der Bestechung ausländischer Amtsträger im internationalen Geschäftsverkehr (Gesetz zur Bekämpfung internationaler Bestechung - IntBestG), Bundestags-Drucksache (Federal Printed Matter) 13/10428; Ausschlußbericht (Committee Report), Bundestags-Drucksache 13/10973 of 16 June 1998. The Federal Parliament (Deutscher Bundestag) and the Federal Council (Bundesrat) adopted the Act on 24 June (Bundesrats-Drucksache 560/98) and 10 July 1998 (Bundesrats-Drucksache 560/98 - Beschluß). As Act of 10 September 1998, it was published in the Federal Law Gazette Part I (Bundesgesetzblatt Teil I), p. 2327.

Criminal Law<sup>39</sup> for signature on 4 November 1998 which was initiated by the former German Federal Minister of Justice *Engelhard*. The Convention signed on this day by Germany, France and other four Member States also includes a provision on corporate liability in relation to the environmental criminal offences of the Draft:

According to art. 9 a contracting Party "shall adopt such appropriate measures as may be necessary to enable it to impose criminal or administrative sanctions or measures on legal persons on whose behalf" an environmental offence has been committed by their organs, by members thereof or by another representative of the enterprise. As the concept of the representative seems to be influenced by the French Penal Code, the implementation of this provision would possibly require a change of the German relevant provision. However, the Draft includes a general reservation clause, as in 1996, when the Draft was finalised in the expert committee, no agreement on a binding provision could yet be reached.

*b) Criminal Law Convention on Corruption*

Based on a general commitment of the European Ministers of Justice in 1994 and a comprehensive Program of Action against Corruption of 1996, the Committee of Ministers adopted on 4 November 1998 also a "Criminal Law Convention on Corruption". Opened for signature on 27 January 1999, it was signed immediately by 27 Member States, including Germany. Its provisions on the liability of legal persons in relation to corruption offences follow closely the EU model.

#### **4. Level of the United Nations**

The change of attitude reflected above also has an impact on negotiations on the level of the United Nations. Proposals to include a provision on liability of legal persons in the future UN Convention against Transnational Organized Crime<sup>40</sup> are being discussed intensively. Its acceptance would have a worldwide impact.

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39 Overview of the content by *Möhrenschlager*, in: *wistra* 1999, Heft 1, p. VI et seq.

40 Cf. Commission on Crime Prevention and Criminal Justice, Report on the Seventh Session (21-30 April 1998), Economic and Social Council, Official Records, Supplement No. 10, New York 1998, p. 82, 87 et seq.



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# Criminal Responsibilities of Legal and Collective Entities: Developments in Belgium

Michael G. Faure, Maastricht

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## 1. History

Traditional Belgian criminal law did not recognise the criminal liability of the corporation. *Societas delinquere non potest* was the traditional saying. This has been amended by a decision of the Cour de Cassation of 1946, which held that legal entities can commit crimes, but cannot be punished: *societas delinquere potest, sed non puniri potest*. The reason was that punishment required the personal guilt of the wrongdoer, a trait impossible to ascribe to a corporation. This doctrine remained in existence for almost 50 years. The practical consequence was that, when a crime was committed within a corporate entity, it became the task of the judge to identify who, within or outside the corporation had in fact acted on its behalf. Accordingly, this was referred to as the doctrine of "judicial imputation".<sup>1</sup> In this respect, the Belgian system resembles that of France before the introduction of criminal responsibility of legal persons in the *Nouveau Code Pénal* in 1992.

This system led to an elaborate legal doctrine and case law, establishing criteria for determining to whom the responsibility for a certain crime could be imputed.<sup>2</sup> Some general lines of thought emerged from this case law. Judges held that managers of a corporation had a general responsibility for major policy areas within the firm, such as ensuring that a firm possesses the necessary environmental permits before commencing an operation, and were also expected to ensure that the corporation can comply with all the conditions of the regulations, although some of these matters could be delegated to other employees. In turn, lower-ranked individuals, who have no power to make decisions, for instance, with re-

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1 A term invented by *Legros*, who also referred to contractual imputation or statutory imputation, when the imputation would have been laid down by contract or by statute (*Robert Legros, Imputabilité pénale et entreprise économique, Revue de Droit Pénal et de Criminologie, 1968-69, 372-385*).

2 An overview of these criteria is among others presented by *Michael Faure, De strafrechtelijke toerekening van milieudelicten, Antwerp 1992*.

spect to investments, were normally only liable for fulfilling their duties correctly and adequately informing the management. This was typically the case for the environmental coordinator within a firm. While unable to make such decisions as the purchase of a costly water treatment plant, a coordinator can, however, inform the management that such a purchase is necessary in order to comply with regulations.<sup>3</sup>

Although these jurisprudential criteria largely clarified what could be expected from various partners in the firm based on the corporate division of responsibility, this system had various drawbacks for both the prosecution and defence. Understandably, the prosecution could sometimes find it difficult to establish who was responsible for a particular decision. For example who decided, within a company of 1,000 employees, not to invest in a water treatment plant. In some cases the courts held that no individual could be identified, since the crime was in fact the result of a collective decision of a board of managers or trustees. As a result, a number of rather spectacular environmental cases where, clear and almost undisputed violations of the regulations had occurred nevertheless ended in acquittals by the Antwerp Court of Appeals.<sup>4</sup>

In order to avoid these kinds of uncertainties, the public prosecution sometimes chose to prosecute almost everyone who had some competence within the firm, however remote. The effect was that in some major environmental cases, ten or more corporate directors or other agents of the firm were prosecuted, while the court was merely required to ascertain each individual's actual contribution to the crime. This is highly unsatisfactory from a rule of law perspective. Thus, despite the fact that their contribution to the crime may have been minimal, individual defendants were faced with recurrent court appearances and unwanted newspaper publicity. In addition, the outcome was often highly uncertain, since courts tended to accept the idea that everyone with a certain capacity within the corporation was criminally responsible<sup>5</sup> and hence could be convicted. The lack of any formal cor-

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3 See *Michael Faure*, De strafrechtelijke aansprakelijkheid voor milieuverontreiniging, in: *Paul Morrens* (ed.), *Milieurecht voor bedrijfsleiders en hun adviseurs*, Gent 1993, 81-115.

4 As an example see the well-known AMOCO-FINA case (Court of Appeals of Antwerp, 26 March 1993, *Tijdschrift voor Milieurecht* 1993, 239) and the Petrochim case (Court of Appeals of Antwerp, 24 April 1992, *Tijdschrift voor Milieurecht* 1992, 17-27).

5 Although this was contrary to the criteria developed by the Cour de Cassation, since the Court had decided that it should be examined how the defendant contributed to the criminal behaviour of the corporation (Cour de Cassation, 9 October 1984, *Pasicrisie Belge* 1985, I, 194 and *Arresten van het Hof van Cassatie*, 1984-85, 225) there could, hence, not be an "automatic" imputation, merely because someone had a certain capacity within the firm.

porate liability scheme in Belgium also placed managers at risk. This is still the current regime in Belgian law today.

## 2. Legal Doctrine

The main proposals to introduce criminal responsibility of legal persons were not advanced by the corporate world even if it could arguable have been in its interest to do so, but on the basis of legal doctrine as well as by the public prosecution. A major role has been played in this respect by scholars such as *Jules D'Haenens*,<sup>6</sup> who argued in favour of corporate criminality. These views have been followed by younger Belgian scholars, whose ideas were influenced by the Dutch experience. In this respect, we should refer to the doctoral dissertation of *Filiep Deruyck*.<sup>7</sup>

## 3. Various Proposals

These views did indeed lead to a variety of proposals, including some suggested amendments to the Belgian penal code.<sup>8</sup> One such proposal put forward in 1976 by a commission on which *Jules D'Haenens* had exerted much influence, suggested the introduction of the criminal liability of corporations.<sup>9</sup> Yet, a subsequent position, *Avant-propos du Code Pénal*, proposed ten years later by *Robert Legros*, firmly rejected the same concept.<sup>10</sup> *Legros* relied on the traditional argument according to which assigning a criminal responsibility to corporations violates long-held views that the criminal law should be based on guilt. He also argued that criminal liability was unnecessary.<sup>11</sup> Nothing came out of *Legros'* proposal for a

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6 *Jules D'Haenens*, Sanctions pénales et personnes morales, *Revue de Droit Pénal* 1975-76, 731-755.

7 *Filiep Deruyck*, *De rechtspersoon in het strafrecht*, Gent 1996. Pleas in this respect have also been formulated by *Faure* (note 2), 115-116 and by *Michael Faure/David Roef*, Naar een wettelijke formulering van de strafrechtelijke aansprakelijkheid van de rechtspersoon, *Rechtskundig Weekblad* 1995-96, 417-432.

8 Unfortunately, not all of them can be mentioned within the scope of this report.

9 See Commissie voor de Herziening van het Strafwetboek, *Verslag over de voornaamste grondslagen voor de hervorming*, Brussels, Ministry of Justice, juni 1979, and for a discussion of this proposal *Francis Van Remoortere*, La question de la responsabilité pénale des personnes morales en droit de l'environnement, *Revue de Droit Pénal* 1991, 314-315. For details concerning this proposal, see also *Faure/Roef* (note 7), 418.

10 See *Robert Legros*, *Voorontwerp van Strafwetboek*, Brussels, Ministry of Justice, 1986, 137-142.

11 These proposals are also discussed by *Faure/Roef* (note 7), 418-419.

penal code, but his firm position against introducing criminal responsibility for legal entities did little to advance the debate on this issue.

The first proposal to introduce corporate liability was formulated by the Inter-University Commission for the Reform of Environmental Law in Belgium. Art. 7.3.19 provided for environmental crimes which have been committed within a corporation.<sup>12</sup> Although limited to the environmental field, this proposal contained the first formula to determine the responsibility of legal entities, including specific criminal sanctions for companies.<sup>13</sup>

At the federal level, the first proposal to introduce corporate criminal liability was introduced on November 29th 1994, but it contained many shortcomings.<sup>14</sup> While introducing the principle of criminal liability of the corporation, it was limited to crimes committed by so-called "organs" of the corporation.

#### 4. The Proposal 1996-1997

Recently, a formal proposal was put forward by the Department of Justice with the aid of a small group of scholars,<sup>15</sup> and was endorsed by the Federal Council of Ministers on July 25th 1997.<sup>16</sup> This draft provides that every legal entity will be criminally responsible for the crimes which have been committed in pursuance of the goals, interests and financial gain of the corporation.<sup>17</sup> Based on these criteria, corporate liability precludes personal liability, except in case of a personal and

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12 For comments see *Michael Faure*, Criminal Sanctions, in: Hubert Bocken/Donatienne Ryckbost (eds.), *Codification of Environmental Law. Draft Decree on Environmental Policy*, London 1996, 202-207.

13 Art. 7.3.19 § 3 provides:

"An indictable offence shall be deemed to have been committed by a legal person where the offence was committed in order to achieve its purpose or of furthering its interests, and  
1) the indictable offence was committed by someone representing the legal person, or  
2) the indictable offence was ordered, led or authorised by someone who has a leading function in the legal person." See *Bocken/Ryckbost* (note 12), 94.

14 Some of which are discussed in *Faure/Roef* (note 7), 417-432.

15 Their influence on the actual contents of the proposal has been minimal.

16 For further details, see *Filiep Deruyck*, Naar een strafrechtelijke aansprakelijkheid van de rechtspersoon in België, in: Michael Faure/Kid Schwarz (eds.), *De civielrechtelijke en strafrechtelijke aansprakelijkheid van de rechtspersoon en zijn bestuurders*, Antwerp 1998 (forthcoming).

17 "Toute personne morale est pénalement responsable des infractions commises en vue de la réalisation de son objet, de promouvoir son intérêt ou pour son compte."

intentional fault of the natural person.<sup>18</sup> The proposal also provides for a number of new sanctions which could specifically be applied to legal entities. Further, it explicitly excludes federal, regional, provincial and municipal governmental bodies, hence most of the public legal entities.<sup>19</sup>

## 5. Critical Remarks

Compared to the previous draft proposal of 1994, the present formulation expands upon the kind of crimes which can be imputed to the corporation. Like the French model, the 1994 draft only imputed to corporations those crimes which would have been committed by the managers or representatives of the company.<sup>20</sup> This formulation had been criticized because it only allowed corporations to be held liable vicariously through its representatives. The new scheme recognizes that the corporation itself is capable of committing the crime. As such, the criteria which are now proposed to impute blame to a corporation (serving its end, being in its interest or acting on its account) could be discussed as well, but seem largely to correspond with the proposals made in the literature.<sup>21</sup>

There are, however, two major points of criticism. One is that the proposal apparently does not accept cumulative criminal responsibility of legal entities and natural persons. This would only be possible in cases of personal wilful misconduct (*faute personnelle commise sciemment et volontairement*). This seems strange, since the concept of personal wilful misconduct is as such not found in the criteria for subjective criminal liability under Belgian criminal law. In addition, one fears that such personal wilful misconduct will be very hard to prove. As a result, a situation may arise in which only the legal entity can be prosecuted, thus excluding the liability of individuals in such areas as negligent behaviour. To my under-

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18 "Lorsque la responsabilité de la personne morale est engagée à raison de l'intervention d'une personne physique identifiée, la personne physique et la personne morale ne pourront être condamnées pour les mêmes faits, sauf en cas de faute personnelle commise sciemment et volontairement par la personne physique."

19 "Ne sont pas considérées comme des personnes morales pour les besoins de cette loi: l'état fédéral, les régions, les communautés, les provinces, l'agglomération bruxelloise, les communes, la commission communautaire française, la commission communautaire flamande, la commission communautaire commune et les centres publics d'aide sociale."

20 See art. 121-2 Nouveau Code Pénal, which provides:

"Les personnes morales, à l'exclusion de l'État, sont responsables pénalement, selon les distinctions des articles 121-4a, 121-7 et dans les cas prévus par la loi ou le règlement, des infractions commises pour leur compte, par leur organes ou représentants."

21 See for instance *Faure/Roef* (note 7), 423.

standing, this would seriously limit the reach of the criminal law in cases when crimes have been committed in the corporation. Presumably, this was the price to be paid for the endorsement of the Belgian business world. Its support for the proposal to obtain the criminal liability of legal entities was conditioned on creating a guarantee of immunity for managers, with the exception of illegal acts personally and wilfully committed.

Another criticism concerns a proposed immunity clause for most of the public legal entities. This has been heavily criticized in the literature, notably by *David Roef*.<sup>22</sup> *Roef* has advanced several powerful arguments for the inclusion of public legal entities under the corporate criminal regime. He argued that some of the dangers of criminal prosecution (for instance, the endangerment of the continuity of public service) can instead be remedied by accepting specific grounds of excuse or justification for public legal entities rather than criminal immunity. One advantage of holding public corporations criminally liable is that, even if their behaviour is deemed to be justified or excused, they will still have to defend their actions in a public criminal trial.

## 6. Epilogue

In short, the proposed scheme is undoubtedly useful and important. For more than 30 years, legal doctrine has advocated the criminal liability of the corporation. At last there is now a serious proposal by the Belgian Federal Department of Justice to introduce such a solution. Belgium finally seems to be following the international trend towards criminal liability of corporate entities.<sup>23</sup>

The fact that it has taken so long to introduce criminal liability for the corporation in Belgium can undoubtedly be attributed to heavy lobbying by the business world, although the current system may not really be in its best interest. As far as the current proposal is concerned, it too appears to have been influenced by corpo-

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22 See *David Roef*, Kan de staat in zijn eigen staart bijten? *Delikt en Delinkwent* 1995, 332-348; *David Roef*, De strafrechtelijke aansprakelijkheid van publiekrechtelijke rechtspersonen voor milieuverontreiniging, *Tijdschrift voor Milieurecht* 1997, 87-103 and *David Roef*, De strafrechtelijke aansprakelijkheid van overheden voor milieuverontreiniging in rechtsvergelijkend perspectief, *Ius Commune en Milieurecht*, Antwerp 1997, 243-290.

23 On this trend, see *Günter Heine*, Criminal Liability of Enterprises and New Risks. International Developments - National Consequences, *Maastricht Journal of European and Comparative Law* 1995, nr. 2, 107-128 and *Günter Heine*, Die strafrechtliche Verantwortlichkeit von Unternehmen. Von individuellem Fehlverhalten zu kollektiven Fehlentwicklungen, insbesondere bei Großrisiken, Baden-Baden 1995.

rate lobbying. According to that proposal, corporations would only be held criminally liable if the individuals involved get "off the hook". That was apparently the price to be paid to obtain the support of the business world.

Since 1996, some serious discussion concerning the necessity to introduce the concept of the criminal liability of corporations into Belgian criminal law has taken place at the level of the Ministry of Justice. However, since 1997 the country has been unfortunately side-tracked by the criminal activities of Mr. *Marc Dutroux*, who apparently monopolized the attention of the legal community. This, combined with the fact that *Stefan Declerk*, the only Minister of Justice who had dared to introduce a proposal to make corporations criminally liable, had to step down from office in the Spring of 1998 because of the escape of *Dutroux*, should not lead to optimism. The criminal liability of legal entities is an issue which is unlikely to receive high political priority in Belgium in the coming months, and as a consequence, any such proposal may be shelved for a while.

*After the final version of the text had been handed in to the publisher, the draft of the statute to introduce the criminal responsibility of legal entities in Belgian law was - rather unexpectedly - excepted by the Belgian parliament and turned into a formal statute to introduce this criminal responsibility of legal entities on 4 May 1999. The statute was published in the Moniteur Belge on 22 June 1999. The main principles remain largely the same as explained above: the legal entity is considered criminally liable for crimes which are connected to the purpose of the legal entity or which have been committed in its interest or for its account. The criminal liability of the legal entity in principle excludes the liability of the individual person, unless the latter knowingly committed a fault.*

*In sum: after many years of debate in legal doctrine, the Belgian legislator apparently chose to introduce the criminal liability of the legal entity through the Act of 4 May 1999. The main principles have been incorporated into the Belgian penal code. Many practical aspects remain, however, unclear and will have to be resolved through case law. This considers, for instance, the important point of the possibility of a cumulation of the criminal responsibility of the legal person with the liability of individuals."*

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## **Criminal Responsibility of Legal and Collective Entities: International Developments**

**Mark Pieth, Basel**

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1. We are experiencing a strong drive towards international harmonisation of criminal law. The issue of criminal responsibility of organisations clearly is one of the central issues of the current debate. There is a lot of talk on transnational organisational crime. Authors argue that legally operating businessmen and crime-entrepreneurs alike benefit from globalised markets and mobility. Our insistence on nationally organised criminal justice systems and diverging substantive law seriously impedes efficient law enforcement. Current international efforts to combat transnational crime, however, go far beyond fostering co-operation and the rapprochement of substantive approaches. To counter organisational crime new concepts are being introduced on a multilateral basis: On the one hand, in the area of organised crime new offences like money laundering and conspiracy as well as new sanctions like the confiscation of ill-gotten gains have been implemented in most jurisdictions. On the other hand, efforts to combat transnational corporate crime have put new forms of collective responsibility on the international law reform agenda: Corporate financial or environmental crimes are used as examples where the traditional criminal law, focused on individual persons, seems clearly inadequate.

2. Already in the Europe of the eighties the recommendations of the *Council of Europe*<sup>1</sup> had nourished legal policy discourses, which, however, remained academic, since the motives for harmonisation were rather vague: Was one seeking harmonisation for the "abstract beauty of convergence" - a politically not very obliging concept - or, on a more practical level, was the aim to facilitate mutual legal assistance, a goal that could also be achieved through alternative means like the modification of strict requirements of dual criminality?

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1 Cf. Council of Europe Recommendation concerning liability of enterprises for offences committed in the course of their activities (R 88).

3. The discussions received a new boost in the nineties, when on the one hand the *European Union* decided to go into the "Maastricht Process": On its way from an economic treaty to supra-nationality a new quality of legal harmonisation seemed desirable, including some basic co-ordination on sanctioning concepts by member states. Of course we all know that genuine criminal law still remains the "game reserve" of what is left of nation states and could at the current level of development of the Union only be harmonised through separate multilateral agreements (in the context of the so-called third pillar).

4. On the other hand, *in a wider area* the logic of globalised world-markets requires agreement on fair trade conditions, including rules specifically outlawing transnational corruption. Again criminalisation and criminal responsibility of organisations were addressed.

5. The development of harmonised rules in the parallel area of fighting organised crime, has most probably encouraged a more confident attitude towards co-ordination of criminal corporate responsibility since it in turn involved creating new forms of *criminal liability for collective behaviour* (conspiracy, participation in criminal organisations) as well as rather unscrupulous methods of forfeiture and confiscation of ill-gotten gains. It becomes increasingly clear that the topics of organised and corporate crime do not remain merely in parallel, they interact in many respects (e.g. the financial management of "off-the-books-transactions" of corporations, frequently executed by the same operators as money laundering; furthermore, both types of organisations might resort to corruption).

6. So far, the attitude especially of the German speaking countries, spearheaded by Germany in many forums, has, however, been to *veto genuine criminal corporate liability* on the grounds that it would be in breach of fundamental concepts of domestic law. The typical international compromise was to agree that punitive sanctions against legal persons and other collective entities should be made available to authorities, the exact legal construction and categorisation however, should be left to the individual country.

This approach - which has for instance been introduced into the Second Protocol of the EU-Convention on the Protection of Financial Interests of the Community - has so far allowed Germany to use its art. 30 OWiG when implementing multilateral criminalisation conventions requiring sanctions for legal persons.

7. From the perspective of an international go-between in the context of OECD *anti-corruption efforts*, I hold that this approach could be perfectly valid as long

as it meets the basic requirements, especially the standard of an "effective, proportionate and dissuasive" sanction. As a minimum, non-criminal sanctions have to include substantial monetary sanctions, but a whole list of additional measures has also been suggested.<sup>2</sup> Examples are for instance: the "exclusion from entitlement to public benefits or aid, temporary or permanent disqualification from participation in public procurement or from the practice of other commercial activities, placing under judicial supervision and judicial winding-up orders".

8. It needs to be pointed out, however, that the choice of *administrative* sanctions instead of genuine criminal liability will raise serious questions when it comes to meeting the standards of mutual *legal assistance*. Not under all systems "quasi-criminal" liability and sanctions receive the same attention as criminal provisions when it comes to legal assistance.<sup>3</sup>

9. What may be sufficient in the current OECD framework may not be satisfactory on the long run in all international contexts:

The mechanisms of the OECD on criminalisation of transnational economic bribery are not really aimed at legal harmonisation, let alone "unification".<sup>4</sup> *Coordination* in the sense of establishing a level playing field of commerce amongst major trading nations, that is to ensure overall comparable severe reactions to corruption in practice, is the goal of this initiative. Peer pressure in this context merely seeks to achieve "*functional equivalence*".<sup>5</sup> In such a wide mixed political and legal evaluative process, sanctions technically at different ends of the spectrum as confiscation and fines could be weighted against each other. And certainly this forum does not favour a specific construction of corporate criminal liability - be it absolute or duty based. However, a preference has been expressed in the deliberations to go beyond the traditional view that only top management implicates a company. The OECD anti-corruption initiatives are oriented towards fostering preventive steps "in-house", towards generating adequate structures of *corporate governance* and self control of entire business sectors. They are open towards the rationale behind the U.S.-sentencing guidelines and similar approaches.

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2 Cf. Comm. 24 to art. 3 § 4 of 1997 OECD Convention on Bribery; art. 5 of Prot. II to EU Conv. on the Protection of the Financial Interests of the Community (PFI) and already Council of Europe R 88, appendix II § 7.

3 Cf., however, art. 9 of OECD Conv.; art. 9 ss. Prot. II to EU Conv. PFI.

4 *Delmas-Marty*, Corpus Juris, portant dispositions pénales pour la protection des intérêts financiers de l'Union européenne, Paris 1996.

5 Cf. Comm. 2 to OECD Conv.

10. The focus of harmonisation is, however, different where supra-nationality is at stake. It is understandable that in the EU framework concepts have been put forward, suggesting a far greater degree of uniformity. The *corpus juris* - code word for a core criminal and procedural code, developed from rules that were originally meant to protect the financial interests of the Community, but widened to cover fraud, abuse of power, embezzlement, corruption and money laundering, makes no allowances for "quasi-criminal" law. Even if this project has only just reached the level of political discourse,<sup>6</sup> the German speaking world should seriously consider whether the dogma of *societas delinquere non potest* merits to be upheld under all circumstances.

11. As in many countries scholars argued historically that criminal responsibility depends upon the notion of *personal guilt or blameworthiness*. This naturalistic approach is, however, *not* meant as an abstract *petitio principii* for the sake of "purity of criminal law". Rather, the fear is that essential safeguards of both substantive and procedural law would be put at risk, if this principle had to go. Furthermore, the derogation of the concept of individual responsibility on one end of criminal law could open it up for further weakening of principles in more central areas.

12. The treatment of legal persons in civil and administrative law and, more recently also in *quasi-criminal law* (OWiG), especially in Germany, demonstrates that there are no fundamental objections to subjecting companies and other legal entities to sanctions, including monetary sanctions. The sensitivity really reduces itself to the use of the term *criminal* responsibility. Why should the world be "safe and sound" as long as traditional criminal law is left untouched and pure and "impurities" transferred into *para-criminal law*? A similar tendency can be observed with authors violently defending a *lean criminal code* on the one hand and advocating a kind of intermediate law of interventions on the other for all innovations that seem at odds with the traditional approach.

13. It might also be argued that the established criminal law already allows for sanctions independent of individual guilt, code named *measures* in the German legal terminology, to take measures of security against persons, but also *in rem* (seizure/confiscation). This has by the way been one of the approaches used by the Swiss legislator to suggest corporate criminal liability focusing also on organ-

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6 The European Parliament requested the European Commission in its resolution of 12 June and 22 October 1997 to conduct a follow up to the *corpus juris* and carry out a study on its feasibility.

ised disresponsibility, the approach has however not yet found the acceptance of the wider population.<sup>7</sup>

**14.** It is certainly correct that the creation of responsibility of organisations in the criminal law context and otherwise is not an easy issue and that the rules applicable to the responsibility for individual persons cannot simply be adapted: The architects of such new models will have to determine, in which way the responsibility should be linked to wrong-doing of company officials. Furthermore, the issues of intent and negligence show that the dogmatic categories of responsibility will have to be redefined.

If we come to the conclusion that "quasi-criminal" law and criminal law are not so far apart and that there seems little objection to include corporate liability in such a code of administrative sanctions, we might as well accept the general principal as the anglo-saxon and french legislators have.

**15.** The really interesting issue to me is the choice of construction. Most international texts either leave the question undecided (OECD, EU-Prot. II) or opt for the more traditional *vicarious* liability presupposing the wrongdoing (not necessarily, however, the culpability) of an employee or company official (R 88 of Council of Europe; Corpus Juris art. 14). We are familiar with the discussion whether every employee or only senior officials can engage the company's responsibility - I will not pursue this point.

Rather, I would like to advocate focusing on an alternative. Already some "vicarious" systems add a rule for "*criminal disorganisation*" in case no single employee is found to have committed a crime, where serious damage is, however, found to be the result of - maybe long-term - mismanagement. This approach should *not* be identified with a *simple strict liability* for losses. Moreover, such a rule would have to define in *objective terms* which kind of deficiencies in organisation would entail corporate liability. The advantage of this model is that companies actually step in for their own specific "culpable" mismanagement and not in lieu and depending upon the gravity of the wrongdoing of another person.<sup>8</sup>

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7 Botschaft des Bundesrats über die Änderung des Schweizerischen Strafgesetzbuches und Militärstrafgesetzes vom 30. Juni 1993, BBl. 1993 III 227 ff.

8 These suggestions are made by *Günter Heine*, Die strafrechtliche Verantwortlichkeit von Unternehmen, Baden-Baden 1995.



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# A New Offence of Corporate Killing - the English Law Commission's Proposals

Celia Wells, Cardiff

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## I. Introduction

This paper discusses the recommendations of the Law Commission of England and Wales in respect of a separate offence of corporate killing.<sup>1</sup> The Government has expressed the intention to introduce legislation to implement this proposal.<sup>2</sup>

The corporate killing proposal, which is contained in a report on the law of involuntary manslaughter,<sup>3</sup> represents the first occasion on which the Law Commission has given serious attention to the place of corporate criminal liability in English criminal law. It may seem odd that the Commission did not address this issue in one of its earlier excursions into general principles of criminal responsibility. A Working Paper on corporate liability was issued in 1972, yet nothing further came of it,<sup>4</sup> and when the Criminal Code project was revived in the 1980s, the corporate liability provisions were unadventurous.<sup>5</sup> Two possible explanations for this earlier lack of interest are suggested. The first is that neither regulatory enforcement nor prosecutions of companies for manslaughter were high on any political agenda at that time. Pressure to enforce more rigorously regulatory provisions on safety at work and on environmental matters has greatly increased. This is a reflection of changing attitudes to safety and risk, and to differing perceptions of transport and other disasters, which have led to the now familiar history of calls for corporations to be prosecuted for manslaughter. The present proposals testify to the contemporary social and symbolic importance of corporate accountability and demonstrate

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1 *Law Commission*, *Legislating the Criminal Code: Involuntary Manslaughter*, Report No. 237, London 1996.

2 See *Celia Wells*, *Corporate Killing* (1997), 147 *New Law Journal* 1467 et seq.

3 The category of homicide where there is no "malice aforethought" (that is, intention to kill or cause serious bodily harm) for murder.

4 *Law Commission*, *The Criminal Liability of Corporations*, Working Paper 44, London 1972.

5 *Law Commission*, *A Criminal Code for England and Wales*, Report No. 177, London 1989, Draft Criminal Code, clauses 29, 30.

in a clear fashion that legal institutions respond to fluctuations in the cultural climate. A considerable section of the Report is given over to explaining how the proposals will overcome the substantive legal difficulties which frustrated the prosecution of P&O European Ferries (Dover) Ltd. following the *Herald of Free Enterprise* disaster. Although the prosecution of P&O was ultimately unsuccessful, and there are only two recorded convictions of a company for manslaughter,<sup>6</sup> *the idea* of corporate manslaughter now has a clear place in popular vocabulary. This cultural recognition is reflected in the Commission's Report, almost half of which is occupied with this issue.

A second reason for the earlier reluctance to engage in debate about corporate liability is that the Commission's commitment to subjective principles of fault made any suggestion of extending corporate liability to serious offences incongruous as well as challenging. Since manslaughter is the one serious offence which at common law can be based on negligence or a non-subjective fault element, the Commission was faced with a dilemma: should they keep faith with subjective fault or maintain the lower threshold for unlawful homicide.<sup>7</sup> Choosing the latter course paved the way for a more flexible approach to corporate killing.

## II. Models of Attribution

It was not until the middle of this century that English law contemplated a form of corporate liability which could apply to serious offences such as fraud, theft or manslaughter.<sup>8</sup> One of the objections to finding corporations liable for such offences was that they required proof of a mental element of intention, recklessness or negligence. For the purposes of corporate liability for this type of offence, the courts developed the *alter ego*, or identification theory, under which certain key personnel are said to act as the company (rather than on behalf of it, as is the case with vicarious liability). The underlying theory is that company employees can be divided into those who act as the "hands" and those who represent the "brains" of the company. The House of Lords confirmed in *Tesco v. Natrass*<sup>9</sup> that the relevant personnel were limited to those at the centre of corporate power, such as the board of directors and other superior officers. It is a matter of law for a court to

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6 *R. v. Kite and others*, *The Independent*, 9 Dec. 1994; *R. v. Jackson Transport (Ossett) Ltd*, Health and Safety at Work, November 1996, p. 4.

7 Report 237 (note 1), Part IV.

8 *R. v. ICR Haulage Ltd* (1944), 30 Criminal Appeal Reports 31.

9 [1972] Appeal Cases 153.

establish in any given case who is to be identified as the "directing mind and will" of the company.

Neither of the two legal forms which has evolved to deal with corporate defendants, the agency and the identification models, can be seen as satisfactory. The agency model developed to ensure that corporations were liable for a range of regulatory (mainly strict liability) offences.<sup>10</sup> It regards all employees as acting vicariously on behalf of the corporation while the identification model developed later to allow corporations to be prosecuted beyond the regulatory sphere. Under this model, which will apply by default to all offences other than those to which vicarious liability attaches, only the conduct of a small number of key officers and directors will be regarded as relevant, as representative of the "directing mind" of the company itself.<sup>11</sup> Critics of vicarious liability see it as both too wide (in attributing the wrongdoings of any employee to the company) and too narrow (in leaving no opportunity to explore company policies); while identification is seen as insensitive to the diversity of corporate organisation and size.<sup>12</sup>

A further problem is that the principles by which offences are classified as susceptible to the one model or the other are rarely articulated.<sup>13</sup> While it is clear that the identification model will apply to manslaughter, it is important to note that the discernible judicial trend in favour of a stricter approach to corporate liability is being played out on the categorisation field (with some regulatory offences being shifted into the vicarious category)<sup>14</sup> as well as on what we might call the identification field.

In particular, the restrictive interpretation of identification liability bestowed by *Tesco v. Natrass*<sup>15</sup> has been challenged recently by the Privy Council in *Meridian Global Funds Management Asia Ltd v. Securities Commission*.<sup>16</sup> What is particularly interesting about this development is that it parallels the thinking of the Law Commission about the appropriate form of attribution to apply to corporate manslaughter. However, the reasoning in *Meridian* and the Commission's Report suf-

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10 It has been retained for all federal offences in the United States.

11 *Tesco v. Natrass* [1972] Appeal Cases 153.

12 See *Eric Colvin*, Corporate Personality and Criminal Liability (1995), 6 Criminal Law Forum 1, 8.

13 See *Celia Wells*, A Quiet Revolution in Corporate Liability for Crime (1995), 145 New Law Journal 1326.

14 See *Celia Wells*, Developments in Corporate Liability in England and Wales, *infra* p. 217.

15 See note 9.

16 [1995] 3 Weekly Law Reports 413.

fers from lack of specificity and I suggest that determining the appropriate threshold of liability for deaths caused by otherwise lawful activities will remain a troubled area.

### III. Corporate Killing

The Commission proposes three offences to replace the current single offence of manslaughter. For individual offenders two offences are proposed. The first, reckless killing, is based on advertent or subjective risk-taking while the second, killing by gross carelessness, will replace gross negligence manslaughter. It is envisaged that a corporation could also be indicted for either of these offences through the existing identification principle. In addition, however, the Report proposes a separate offence of "corporate killing" which could only be committed by a corporation. The offence is intended to be the corporate equivalent of killing by gross carelessness, and the Commission seeks to overcome the problems of the identification principle by introducing a tailor-made test of corporate culpability based on "management failure".<sup>17</sup>

The key to the Law Commission's thinking in proposing this separate offence lies in the collapse of the prosecution for manslaughter of P&O Ferries in respect of the deaths in the *Herald of Free Enterprise* disaster. Recall that P&O were indicted for manslaughter following the drownings of 188 people when their roll-on roll-off ferry capsized as a result of leaving Zeebrugge harbour with its bow doors open. The assistant bosun who was responsible for shutting the doors had fallen asleep and the Chief Officer who was responsible for ensuring that the doors were shut had failed to do so. The official shipping inquiry found that no reference was made in the company's Ship's Standing Orders to the closing of the doors and that this was not the first occasion on which the company's ships had gone to sea with doors open.<sup>18</sup>

The trial judge directed an acquittal of the company and the directors before the prosecution had presented all its evidence. The law applicable at the time presented three potential hurdles to a successful prosecution of P&O. First, it was unclear whether a corporation could commit manslaughter? That question was

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<sup>17</sup> Report No. 237 (note 1), Part VIII.

<sup>18</sup> *Department of Transport, MV Herald of Free Enterprise: Report of the Court* (No. 8074), London 1987, para 10.9; see Report No. 237 (note 1), paras 8.45-8.48.

resolved as an initial point of law.<sup>19</sup> Secondly, the restrictive, anthropomorphic identification doctrine of corporate liability meant that the company could be liable only through its directing mind, in this case represented by some of its directors. Thirdly, the substantive law of manslaughter at that time relied on a test of whether the defendant (here one or more of the directors) should have realised that there was an "obvious and serious risk" of such an event occurring.

Before the Commission's Report was published the last difficulty was removed by the re-introduction of the somewhat vaguer "gross negligence" test for manslaughter. As explained in the case of *R. v. Adomako*:

"The jury will have to decide whether the extent to which the defendant's conduct departed from the proper standard of care incumbent upon him, ..., was such that it should be judged criminal."<sup>20</sup>

The Law Commission's version of this test is "gross carelessness". I do not think we need to concern ourselves with the details of that offence other than to note the definition proposed in the draft Bill appended to the Report:

- (1) A person who by his conduct causes the death of another is guilty of killing by gross carelessness if -
  - (a) a risk that his conduct will cause death or serious injury would be obvious to a reasonable person in his position;
  - (b) he is capable of appreciating that risk at the material time; and
  - (c) either -
    - (i) his conduct falls far below of what can reasonably be expected of him in the circumstances; or
    - (ii) he intends by his conduct to cause some injury or is aware of, and unreasonably takes, the risk that it may do so.

The Law Commission proposes the separate offence of corporate killing in the belief first, that it is difficult to apply the identification principle especially to large corporations with diffuse management structures and secondly, that it would be difficult to apply an alternative "holistic" theory of attribution to the gross carelessness offence. It would be clumsy to speak of a company "failing to realise that a risk was obvious". This then explains why the Commission thought it necessary to propose a specially styled offence with both a different definition of culpability and a new route to attribution.

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<sup>19</sup> *R. v. P&O European Ferries (Dover) Ltd* (1991), 93 Criminal Appeal Reports 73.

<sup>20</sup> *R. v. Adomako* [1995] 1 Appeal Cases 171, 187, per *Lord Mackay of Clashfern*, Lord Chancellor.

#### IV. The Corporate Killing Proposal

Clause 4 of the Draft Involuntary Homicide Bill appended to the Commission's Report states:

- (1) A corporation would be guilty of corporate killing if -
  - (a) management failure by the corporation is the cause or one of the causes of a person's death; and
  - (b) that failure constitutes conduct falling far below what can reasonably be expected of the corporation in the circumstances.
- (2)
  - (a) There is a management failure by the company if the way in which its activities are managed or organised fails to ensure the health and safety of persons employed in or affected by those activities.
  - (b) Such failure may be regarded as a cause of a person's death notwithstanding that the immediate cause is the act or omission of an individual.

Before I move to my main comments which deal with the concept of "management failure", it can be noted that the conflation of causal issues with culpability questions is unfortunate. For the purposes of corporate liability, employees *act* on behalf of their employer. Just as we accept that the Law Commission has published the Report, so there should be no difficulty in attributing the acts of employees to the company. The struggle is with determining the responsibility element.

Is "management" failure the answer? The Commission believes that the outcome in the P&O case might have been different had this test been applied but my own view is that this faith could be misplaced. The judge in the aborted P&O trial gave as his reason for directing an acquittal that evidence had been heard from P&O's own employees that no-one had thought that there might be a risk of the ferry sailing with an open door and that the evidence of non-P&O employees did not suggest that other ferry companies (the "prudent" comparator) were concerned about that risk either.

"I do not understand" the judge said "that the statements of any of these witnesses condescend to criticism of the system employed by the defendants in this case as one which created an obvious and serious risk, *except to the extent that any legitimate deduction may be made from the fact that they took precautions other than those employed by any of these defendants.*"<sup>21</sup>

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<sup>21</sup> *R. v. Stanley and others*, 10 October 1990 (Central Criminal Court), transcript, p. 17 D-F, quoted in the Law Commission Report No. 237 (note 1), para 6.54, emphasis added.

This really is the key to the whole case. On the one hand, it might be naive to think that other ferry companies would want to testify too strongly against P&O ("there but for the grace of God" is a powerful deterrent in such circumstances, and who knows, they might themselves be in the dock when the next accident occurs). On the other hand, it is not easy to understand why the italicised passage above did not lead the judge to the opposite conclusion, that other companies had taken the precautions so evidently lacking in P&O. The judge's decision was all the more surprising since the official shipping inquiry into the disaster (itself conducted by a High Court judge) had concluded that all concerned in the company's management shared responsibility for the failure in their safety system:

"[F]ull investigation into the circumstances of the disaster leads inexorably to the conclusion that the underlying or cardinal faults lay higher up in the Company [than the Master and officers junior to him]. The Board of Directors did not appreciate their responsibility for the safe management of their ships ... All concerned in management, from the members of the Board of Directors down ... were guilty of fault in that all must be regarded as sharing the responsibility for the failure of management. From top to bottom the body corporate was infected with the disease of sloppiness ... The failure on the part of the shore management to give proper and clear directions was a contributory cause of the disaster."<sup>22</sup>

Thus, the Law Commission in accepting uncritically the trial judge's analysis of the evidence, was led to believe that the obstacle to translating this damning criticism of P&O into a manslaughter conviction lay in legal principles. Their new culpability test based on management failure would, they believe, have allowed a jury to conclude that

"even if the immediate cause of the deaths was the conduct of the assistant bosun, the Chief Officer or both, another of the causes was the failure of the company to devise a safe system for the operation of the ferries; and that that failure fell far below what could reasonably have been expected."<sup>23</sup>

The reason the judge gave for halting the prosecution was that a prudent master would not have perceived that there was an obvious and serious risk that the ferry might sail with its doors open. How then could it be regarded as a management failure that no system was devised to avoid it? The old test (was there an obvious and serious risk) and the new test (management failure to ensure safety) are very similar ways of putting the same question. True, the new test substitutes "management" for "directing mind" of the company, as to which see more below, but it was the obviousness of the risk, not the beholder of the risk which was ap-

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22 Above note 18, para 14.1.

23 Report No. 237 (note 1), para. 8.50.

parently the problem. If we apply the new test to P&O we will ask whether the failure of the company's management to provide a safe system fell far below what was reasonably expected. If the risk of open-door sailing would not have been obvious even to a prudent ferry master, as the judge concluded, why should we expect the company to devise a safe system to prevent it?

It is not my purpose here to defend the identification doctrine, and of course a test based on "management failure" at least begins to address some of the shortcomings, allowing us to speak of "management" rather than look to individual directors. However, the belief that the new test would entirely solve the problems inherent in corporate manslaughter cases is misplaced. The reasons for dwelling on the P&O case are two fold: first, it has played a pivotal role in stimulating the Commission to consider corporate manslaughter, and secondly, it is then used as an example against which to test the new model. My view is that the P&O case could have proceeded to a jury, and that the difficulties presented by the substantive law of manslaughter and identification theory were not insuperable. The reasons for the failure of the P&O trial are rooted in a broadly based legal or judicial resistance to corporate manslaughter and in the socio-political realities of corporate dominance. The trial is a good example of *Galanter's* "repeat players" thesis.<sup>24</sup> In the converse of the usual balance of power in a criminal trial, for once, the prosecution was out numbered by an extensive defence team, and was necessarily unfamiliar with corporate attribution theories. Because the Law Commission proceeds from the wrong premise, taking the trial's failure at face value, they pay too little attention to the meaning of "management" in their proposed test of "management failure".

In many cases, looking to "management" will provide a more effective method of capturing the essence of a company's decision-making framework than the identification theory allows, especially where an offence requires a subjective mental element, as in *Meridian*. However, many of the conundrums which corporate liability presents still remain, in particular that tricky question "who is the company?" While speaking of management and failures of systems is an advance on the identification doctrine, much more work needs to be done. It is not enough to speak of "management" or "the way the company's activities are managed or organised" without resurrecting the same old problems: which employees and which systems can be said to be those of the company? If there is one lesson from the P&O and other corporate killing sagas, it is that corporate defendants are highly

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24 *Mark Galanter, Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change* (1974), 9 *Law and Society Review* 95-160.

motivated and well-placed to exploit the metaphysical gap between "the company" and its members.

This cannot be fully explored in detail in this short paper, but the Australian Criminal Code Act 1995 does appear to provide a more detailed consideration of organisational liability than the Law Commission's draft Bill. The Australian Act provides that, for offences of intention, knowledge or recklessness, the "fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence".<sup>25</sup> Authorisation or permission can be shown in one of three ways - the first echoes the *Tesco v. Natrass* version of identification liability, and the second extends the net wider to "high managerial agents". It is the third which represents a clear endorsement of an organisational or systems model, based on the idea of "corporate culture". This is defined in much more detail than is found in the English Law Commission's "management failure" provision. "Corporate culture" can be found in an attitude, policy, rule, course of conduct or practice within the corporate body generally or in the part of the body corporate where the offence occurred. Evidence may be led that the company's unwritten rules tacitly authorised non-compliance or failed to create a culture of compliance. The President of the Australian Law Reform Commission summarises the proposals thus:

"This approach quite clearly seeks to address the significant criticisms of the 1972 *Tesco* decision, which restricted corporate criminal liability to the conduct or fault of high-level managers or a delegate with full discretion to act independently of in-house instructions, an approach ironically appropriate to the small and medium-sized business, with which large national and multi-national corporation [sic] have almost nothing in common."<sup>26</sup>

## V. Conclusion

While there is much of value in the Law Commission's Report and it provides the scholarly foundations for a shift in the legal form of corporate liability in England and Wales, four comments are appropriate on the proposed new offence of corporate killing. First, there are shortcomings in the definition of management failure. Secondly, a separate corporate offence may well lead to more marginalisation of corporate killing rather than less. Many of the arguments for corporate liability for

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25 Criminal Code Act 1995 (Cth), s. 12.3. Note that the provision for negligence offences is even less corporation-friendly.

26 *Alan Rose*, 1995 Australian Criminal Code Act: Corporate Criminal Provisions [1995], 6 Criminal Law Forum 129.

criminal offences proceed from the premise that corporate persons should be subject to the same regime as human persons. Thirdly, the question of individual liability of directors and senior managers requires further attention. Many commentators on corporate regulation recognise that enforcement against corporations is most effective when accompanied also by action against high-level managers at the same time.<sup>27</sup> A prosecutor could charge a company and or its directors with killing by gross carelessness but is unlikely to do so with the custom-made corporate offence beckoning. This cannot be applied to a director. And lastly, the Commission has failed to develop a generic model for corporate liability which can apply to non-homicide offences.

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<sup>27</sup> See, for example, *Susan Smith*, *An Iron Fist in the Velvet Glove: Redefining the Role of Criminal Prosecution in Creating an Effective Environmental Enforcement System* (1995), 19 *Criminal Law Journal*, 12, 14.

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## **Criminal Responsibilities of Legal and Collective Entities: Comments on Developments in Germany**

**Jürgen Meyer, Bonn**

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Legal and collective entities (business enterprises and other corporate bodies) carry their own rights and duties and participate in legal matters in the same way as natural persons.

Their position in our modern industrial society is of great significance compared with individuals. The "globalisation" of the economy, which we have witnessed in recent years, has substantially influenced this development. Company mergers in particular have given rise to numerous international giants, so-called "global players", with enormous potential for exercising power in both economic and social terms. With regard to this development, and considering the increase in criminal offences committed by companies which we have seen over the past few years, particularly in the field of economic and environmental offences, the introduction of corporate criminal liability is a matter of central importance nationally and throughout Europe.

The term "corporate criminal liability" takes in all criminal acts committed by employees for or in the interest of their company.

The following case groups provide clear examples of what are currently the main areas of corporate crime:

- Fraudulent tenders and corrupt practices
- Capital investment fraud
- Tax evasion by way of capital transfers by foreign banks
- Breach of export bans and embargo regulations
- Manufacture and distribution of products harmful to health
- Industrial environmental pollution
- Dumping of waste
- Money laundering by investing profits of crime in legal financial areas.

Unlike civil law, German criminal law does not recognise the responsibility of the company itself. Under criminal law, liability must, therefore, always be shifted to the individual employee. The current criminal law is linked to individual liability. Punishment requires individual fault.

This individualistic approach to attributing responsibility, taken by classical criminal law, whereby an individual offender and an individual victim, i.e. natural persons, confront each other, means that crime committed by legal and collective entities cannot be combated effectively. Even in cases where the prosecuting authorities have established without a doubt that a criminal offence has been committed by and in the interest of a company, illegal dumping of waste or water pollution for example, complex organisational structures and company hierarchies mean that it is often not possible to ascertain with sufficient certainty who the individual offender is and to call them to account. To an increasing degree, we are seeing an "organised" or structural lack of individual responsibility.

The consequences of this development become clear in the field of offences committed against the environment for example.<sup>1</sup> The number of cases solved is continuously sinking. According to a study, carried out a few years ago by a criminological research group at the Max Planck Institute for Foreign and International Criminal Law in Freiburg, the dismissal of criminal proceedings by the public prosecutor's office in the field of environmental criminal law has established itself as the standard method of dealing with offences.<sup>2</sup>

In the relatively rare cases where charges are brought the risk of conviction in the case of corporate offences or offenders is very small. The majority of these criminal proceedings are dismissed by the courts. Real risk of conviction mainly arises in the case of simple matters concerning private or smaller commercial operations, i.e. in cases concerning (large) industrial operations a positive risk of punishment becomes less and less likely.

The current need for the greatest possible economic efficiency and the huge number of individual tasks mean that a flexible system of decentralisation is necessary particularly in large companies. This, in turn, means that many decisions, having effects outside the company, are made, not by the top management, but at lower levels. In addition, companies are increasingly shifting their production areas (so-

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1 §§ 324-330a StGB (Penal Code).

2 Cf. *Günter Heine*, Die strafrechtliche Verantwortlichkeit von Unternehmen (The Criminal Liability of Companies), Baden-Baden 1995.

called out-sourcing). If this makes it more difficult to attribute responsibility, the problems multiply when operations are transferred abroad.

In the rare cases where the prosecuting authorities succeed, despite these complex structures, to ascertain the individual offender or offenders, the preventative effect of the threat of punishment or the penalties imposed on the individual is very small. The reason for this is complex. According to current criminal law, the punishment of an individual has to take account of his personal and financial circumstances. This punishment measured according to the offender's assets (§ 40 StGB) usually bears no relation to the advantages which the offence would have afforded the company or, despite its discovery, has afforded the company. Often, those affected internally are freed, by their company, from the fines imposed on them - a practice which the Bundesgerichtshof (Federal Court of Justice)<sup>3</sup> has judged to be generally non-punishable. Employees convicted of a crime committed for or in the interest of their company are often subsequently even rewarded for their offences by the company by way of commendation, promotion or other privileges.

An effective approach for combating these particular forms of crime must start at the cause i.e. the company concerned. Only the company can steer away from such activities, in particular, by ensuring that there is a functioning system of supervision and information and by making an effort to foster a culture within the company in which criminal behaviour cannot take root.

Disruption within a company is often the result of systematic errors of development which cannot be traced back selectively to individual decisions but which correspond to a lack of risk awareness and risk protection, usually over many years. Thus the German criminal law relating to individuals is pushed to its limits because all its prerequisites for liability are selectively tailored to the specific situation of a personal decision, i.e. it requires an error to be made by an individual in certain decision-making situations.

Thus we not only need to be able to call the employees of a company to account for crimes but also the company itself. This would also lessen the pressure from criminal policy which currently weighs solely on the criminal law relating to individuals.<sup>4</sup>

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3 Cf. Judgement by the 2nd Divisional Court for Criminal Matters dated 7th November 1990, reported in BGHSt 37, 226 (229).

4 Cf. BGHSt 37, 106 et seq. - Leather Spray Case, OLG Frankfurt, VuR 1992, 40 et seq.

With the Law on Combating Economic Crime,<sup>5</sup> which came into force on 1.8.1986, the legislator took the first step on the way to the introduction of independent corporate criminal liability by introducing, among other things, an independent collective fine within the framework of § 30 Ordnungswidrigkeitengesetz (OWiG).

Further important steps for implementing this goal have not been taken however. So far, the German Federal Government has seen no need for action in this respect. The view of the Federal Government contradicts developments seen in neighbouring European countries. Many countries already have a modern system of corporate criminal law.

For example, the criminal liability of a company has been firmly established in art. 51(1) of the Penal Code of the Netherlands and in art. 121-1 of the new French Code Pénal. In the meantime, Finland and Denmark have followed the example of the Netherlands and France. Furthermore, other European countries, e.g. Switzerland, Belgium, Portugal, Spain and almost all of the East European countries are considering the introduction of corporate criminal liability along similar lines.

These developments have been brought about, in the main, by the recommendations to EU member states made by the Council of Europe's Committee of Ministers dated 20.10.1988 (Recommendation No. R (88) 18), concerning "the liability of enterprises having legal personality for offences committed in the exercise of their activities".

These recommendations make clear the necessity of introducing corporate criminal liability and also list many possible sanctions and measures, especially tailored towards companies, e.g. ranging from a reprimand, warning, ban on advertising, exclusion of tax advantages and subsidies, compensation and/or damages payments to victims, publication of a reprimand or judgement etc. to liquidation or closure of a company.

Such a wide ranging list of sanctions and measures allows for the criminal behaviour attributed to a company to be punished appropriately. It should be particularly emphasised that a list of sanctions and measures such as this, allows the rightful interests of the affected company's employees in keeping their jobs to be taken into account.

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5 2. WiKG - BGBl. Part I 1986, No. 21, 721 et seq.

Under the supranational law of the European Union (EU) currently applicable, the possibility already exists of imposing a fine against companies and groups of companies. Although the EC Treaty (Treaty for the Foundation of the European Community [EC]) does not itself impose any sanctions, it does empower the Council in art. 87(2)a, in conjunction with art. 1 EC Treaty, to introduce fines and penalties by way of appropriate directives. On the basis of this authorisation, the Council issued Directive No. 17 (VO 17/62) in 1962. Pursuant to art. 15(1) and (2) of this directive, the Commission may impose fines against companies if they have intentionally or negligently breached art. 85(1) EC Treaty (ban on anti-competitive agreements and resolutions) or art. 86 EC Treaty (misuse of a dominant market position). In the field of competition and cartel law, a fine may be imposed on a company amounting to 10 % of its entire yearly turnover.

The group of individuals, whose conduct may be attributed to a company, is restricted not only to the statutory representatives of a company but also includes all those authorised to act for a company.

More far reaching developments have been seen at European level, at least in some areas, in the battle against corporate crime. On 20.11.1997, the Council submitted to the EU, the "Draft of a Community Measure relating to Corruption in the Private Sector" (No. 12350/97). art. 5 of this draft regulates the criminal "liability of legal entities" and art. 5a the "sanctions for legal entities". It should be emphasised that the list of sanctions in art. 5a (1) a) - d) is not exclusive but only sets out examples of possible sanctions.

Against the background of the foregoing developments and considering the efforts of our European neighbours towards effectively combating corporate crime, the SPD parliamentary party has, under my leadership, carried out a wide survey on the subject of "Corporate Crime - Criminal Responsibility of Legal and Collective Entities" (BT-Drs. 13/9682 dated 15.1.1998).

This survey forms the subject matter of discussions by the Commission for the Reform of the Penal System, which began work with its constitutive assembly on 21.1.1998, headed by the Federal Ministry of Justice. As the minutes of this meeting show, the Commission decided:

"The subject 'Criminal Responsibility of Legal Entities' will be dealt with later so that we may await the results of the International Colloquium of the Max Planck Institute in Freiburg ...".

As member of the Commission, I was happy to support this resolution and, for this reason, I look forward to a fruitful discussion. Furthermore, I would be grateful to hear any recommendations on legal policy which (as has often been the case in the past where the Max Planck Institute is concerned) would once more inspire or support the legislator in his work.

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## Comments on Developments in Germany\*

Peter Wilkitzki, Bonn/Berlin

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I would like merely to add a few observations to the keynote addresses made by my colleagues from the Ministry relating to national and international developments from three points of view:

### I.

Mr *Fieberg* has presented to you the arguments which are being put forward in the present discussion in Germany both for and against a reform of the law as it applies at present, and has listed the sanctions which are proposed by the authors as conceivable legal consequences of criminal acts committed by collective entities. I think that his description was comprehensive and clear, and I would now like to simply briefly illustrate it by allowing the proponents of the pros and cons in the German reference material to speak, permitting each side two particularly typical, pointed and in some cases also polemic *quotes*.

The classical doctrine of the *societas delinquere non potest* continues to be represented by the doyen of German criminal law studies, *Hans-Heinrich Jescheck*, who puts it as follows in his text book, which has now been continued by *Thomas Weigend*:

"The punishability of associations would be incompatible with the theoretical structure of German criminal law, in particular with the definition of acts and guilt. ...

The justified goal of criminal policy, namely that of depriving associations, with their legally independent assets, of those profits which they have obtained by virtue of criminal offences committed by their bodies, must and can be achieved in other ways than through punishment. ....

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\* The text that follows is an amended and up-to-date version of the author's written paper, including those parts that were left out during the oral presentation for want of time, and to avoid overlappings with Professor *Meyer's* paper.

... fines too (are) only justifiable in respect of natural persons, and cannot simply be added to the individual punishment, or be imposed as its replacement, unless one wishes to subject oneself to accusations of juggling with names".

Calling on this tradition, in an article which appeared several weeks ago, *Rainer Hamm* accuses the Hesse Minister of Justice, who called for the introduction of criminal law governing associations, a point to which I will return later, that his proposal was

"... likely to ... tear down essential pillars of the criminal law of a state based on the rule of law [the principle of guilt and the recognition of the individual as a subject of the proceedings within criminal proceedings which were designed around this principle.]"

and that his supporters were concerned to create

"a criminal law ... which interferes things which are none of its concern".

This sharp criticism is contrasted by the evaluation of *Klaus Tiedemann*, to wit:

"... the war of religion being fought in Germany over aspects of criminal policy is likely to remain undecided for quite some time..."

but it nevertheless appeared

"... that the time has come to cease regarding associations ... under criminal law as a fiction, but to recognise that they are real, and to adapt the criminal law system in line with this reality..."

otherwise,

"the present role of German criminal law as a world leader ... could easily be gambled and lost by clinging on to positions which have been handed down ...".

And *Günter Heine*, whose monograph made a considerable contribution towards the development of new ideas and models, sums it up:

"It is a matter of making newly-arising problems of the modern risk society liable for trial in court to the extent to which this is justifiable;

... individual criminal law (reaches) its limits...;

... the liability elements of classical criminal law (reveal themselves to be) dysfunctional;

... the principle of individual guilt for offences (loses) more and more of its sense and justification;

... The retreat of criminal law ... is not a viable alternative".

## II.

The word "polemics" establishes a link with the word "politics" (please do not ask me why). In his presentation *Fieberg* consciously confined himself to giving an account of scientific statements and he omitted the political field. Let me just add a few facts perhaps illustrating for our foreign guests in particular how current German legal policy deals with our topic.

1) To start with, there is the *Conference of Ministers of Justice* who has also been dealing with this topic. The ministers of justice of the 16 constituent states of the Federation, the so-called German "*Länder*" - as you know, justice affairs are basically a matter for the *Länder* under our constitution - meet at regular intervals at this Conference to discuss current topics of common interest in legal policy *inter se* and with the Federal Minister of Justice. About a year ago, the Minister of Justice of *Hesse* proposed the subject entitled "Introduction of criminal responsibility for juristic persons and associations of persons" as an item on the Conference agenda in June 1997.

The ministers of justice of the *Länder* decided at the Conference to deal with this subject at greater length and, for the purpose of further preparation, they requested the Federal Minister of Justice to submit an opinion on the subject particularly from the point of view of comparative law and of European law. In the meantime, we have met this request; we have submitted two comprehensive reviews (200 typewritten pages long) of the ongoing discussion in German criminal law science and on the inter- and supranational level.

On 17 June 1998 the Conference of Ministers of Justice will be meeting again. If the Conference deals with our subject again, it is to be expected that it will refer to a link with relevant deliberations of the "Sanctions Commission" set up at the Federal Ministry of Justice.

Let me come back to the twin concepts of "politics/polemics". The contributions made by our colleagues from Hesse in connection with the Hesse draft and the criticism voiced by Professor *Meyer* made visible the tip of the iceberg of political discussion which was unleashed by this Draft and which, unfortunately, seems to be marked more by Pavlovian reflexes than by the search for proper solutions. No sooner was the outline, sketched by the Hesse Ministry of Justice and expressly stated to be an initial draft for discussion purposes, "on the market" than it became flattened by the millstones of party politics - "the fight against group abuse of power" on the one hand and "the defence of the German economy against assaults

from the green camp" on the other. I am confident that meetings like ours will help lead discussion back to objectivity.

2) The *Commission on the Reform of the Criminal Law Sanctioning System*, which will be taking up and extending the discussion begun at the Conference of Ministers of Justice, is a body consisting of a total 12 representatives of the Federal Parliament, of the justice departments of the Federation and the *Länder*, of criminal law science, of court and public prosecution practice and of the associations representing professionals from the administration of justice. Independently of the discussion referred to in the framework of the Conference of Ministers of Justice, the Federal Minister of Justice set up this Commission at the end of last year, and it was given the ambitious mandate of sifting through the General Part of our Criminal Code to see whether, and to what extent, new scientific and practical developments make legislative reform measures necessary.

One of its altogether 16 subjects is "Criminal liability for juristic persons", which the Commission will probably be dealing with next year. If the Commission reaches the conclusion that there is a need for action in this domain, it would propose the relevant legislative measures - irrespective of the political scenery in Germany after the federal elections in September this year.

3) The discussion starting in Germany "on a broad front" in the legislative and executive domain has received another impulse from the "*major interpellation*" submitted in the *German Federal Parliament* by the parliamentary group of the German Social Democratic Party, also at the beginning of this year, on the subject of "Special responsibility of enterprises - problems of criminal law responsibility of juristic persons and associations of persons". It now has to be answered by the Federal Government.

This major interpellation, based *inter alia* on *Günter Heine's* post-doctoral thesis - to which repeated reference has been made during this Colloquium - and the data that will have to be collected and collated by the Federation and the *Länder* in preparation for an answer will, just like the results of our Colloquium, be included in the work of the Sanctions Commission and of the Conference of Ministers of Justice and, hopefully, will contribute towards a proposal being made at the end of the difficult and often controversial discussion - a proposal based on a theoretically consistent conception, accepted by the politicians and workable in practice.

### III.

Finally, a rather aphoristic "interjection" on *Möhrenschlager's "international"* expositions.

When I approached our topic today from a comparative law angle for the first time, I assumed - as probably most of you do - that, at least in more recent criminal law science in continental Europe, the theoretical implications of genuine criminal law responsibility of juristic persons had been discussed at a deeper level only over the last 40, at the most 50, years as a result of developments in the economy and in society.

But having then discovered that the venerable Association Internationale de Droit Pénal (AIDP) had already devoted a section to the topic of "Responsabilité pénale des personnes juridiques" at its Second International Congress on Criminal Law held in *Bucharest* in 1929, I do feel I want to share my astonishment with you. So, in my "additional job" as Deputy Secretary General of the AIDP, I am taking advantage of this useful opportunity to convert my comment into a "commercial" for this Association: how wonderful it would be if today's event were to receive, in another 70 years, the same laudatory mention in scientific circles as the Bucharest Congress has today.



## **Subject III**

### **Establishing a Basis for a Criminal Responsibility of Collective Entities**



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# Establishing a Basis for Criminal Responsibility of Collective Entities\*

Heiner Alwart, Jena

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## 1. Introduction

The following presentation will attempt to put the international discussion on the criminal responsibility of legal persons on an appropriate scientific basis. Is it possible to formulate common concepts pertaining to this complex subject and to find a solution to legal problems in a generally binding way?

The substantial part of the following deliberation is, therefore, applied to methodological questions. Subsequently, differentiations are developed, to which each conceivable concept of criminal liability of collectives must take a position. Thus, it is not intended to advocate a certain liability model or a combination of several models - neither *de lege lata* nor *de lege ferenda*, but to search for definite criteria.

One may criticize such an extended approach for being long and exhausting given the urgency of standardizing the global legal system. However, I don't believe there is a simple compromise between vicarious liability on one hand and individual criminal principles on the other hand. Nevertheless, further questions can be raised if one is prepared and willing of consequently transcend one's own positive legal system.

## 2. On Method

Let me begin with a few personal preliminary remarks. You may initially be puzzled by these comments as at first glance they appear to have little or no relevance to our theme. I teach criminal law at the Friedrich-Schiller-University in Jena. In addition to the fact that *Schiller* himself was a professor at this university, we are reminded of the extraordinary flourishing time around the year 1800 in

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\* Revised version. I wish to thank *Hans A. Alwart*, Vancouver, B.C., for translating the text and *Kathleen Mittelsdorf*, Jena, for first review.

Weimar and Jena; *Goethe, Schiller, Fichte, Hegel*, to mention only the best known poets and philosophers of that time. In addition, towards the end of the 18th century, Jena was a capital of the philosophy of *Immanuel Kant*. "Early romantic" and "German Idealism" were also profound visions which permeated this small university town at that time.

I want to remind you of a totally different tradition, a tradition, which while it has its roots in Jena, does not allow a single newly erected campus building nor the University itself to bear the name of its outstanding representative. Incidentally, at this international colloquium, special mention has to be made of the fact that this other tradition which I will now go into in more detail, does not only represent a continental European or even a typical German syndrome but is also a part of the whole English speaking world. In future, it has to be increasingly be included in human sciences worldwide. As far as I can see, amongst the many voices of present-day philosophy, *Friedrich Kambartel's* work "Philosophy of the Human World" portrays this most decisively.<sup>1</sup>

I am referring to the "Fregische" tradition. So, I have lifted the veil of secrecy off the "outstanding representative", after whom we have so far been unable to name a modern building in the complex of the Friedrich-Schiller-University in the center of Jena which was part of the headquarters of the Carl Zeiss Company. *Gottlob Frege* lectured for a number of decades at the University in Jena. He died in 1925 and is regarded today as one of the greatest philosophers or at least one of the greatest logicians of all time. His name is mentioned in the same breath as that of *Aristotle*, the founder of the classic logic. You will know by November 8th at the latest that 1998 is a "Frege-year" as his birthday 150 years ago will be remembered publicly.

Unfortunately, *Frege* left a diary behind ... out of its contents, some interpretations have caused people to take the right to label him, who as mentioned died in 1925, an antisemite and even the possessor of a mindset of that of *Hitler*. I don't have to tell you that *Frege* would not be suitable for a German university to be identified with at the end of the 20th century. The democratic public at large would respond under this kind of provocation by ignoring the reasoning behind modern logic and pass judgement on the person and his political aberration. Yes, people would simply be convinced that they are fully familiar with *Frege*, if the media published from the diary the following (according to present day con-

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1 *Friedrich Kambartel*, Philosophie der humanen Welt. Abhandlungen, Frankfurt/Main 1989.

science unbearable) quote: "How can one with certainty differentiate between a Jew and a Non-Jew?"<sup>2</sup>

But it gets much worse. *Frege* helped a young philosopher to get established. His name was *Ludwig Wittgenstein* who is presently in the headlines and getting very bad publicity. While we recovered without any problems some years ago from the publication of *Wittgenstein's* erotic obsessions, we have to now read in the news-media, not only, that *Wittgenstein* and *Hitler* attended together for a short while, the same secondary school in Linz, Austria, we already knew this (although without knowing what to make of it), but also that the highly gifted and ambitious *Wittgenstein*, who came from an assimilated Jewish family, fell into being the target of the "very average" fellow student *Hitler*: *Wittgenstein* caused *Hitler's* hate for the Jews. Finally the little *Ludwig* from Vienna may be held responsible for the genocide of the 20th century!<sup>3</sup>

Why do I tell you these stories? I do not tell them because I fear, that some day criminal law will begin to ascribe guilt in a similar primitive way as our news-media sadly sometimes tends to do. I rather tell these stories because I am afraid that none of us is untouched by this phenomenon of the insidious semantic exploitation. Therefore, I am urged to ask whether we have at our disposal sufficient intellectual power that can question the traditional structures of responsibility. For behind the problem of a moral and criminal responsibility of collective entities is a hidden fundamental question of virtually monumental proportions.

This - more or less metaphysical - basic question is as follows: How do we even personalize crime in the world? Who shall bear or share the responsibility? the individual? the family or the whole clan? the corporation or the sole manager himself? the society? the whole population? the Germans? the Serbs? the political leader? the whole nation? etc.

One could attempt, to give a nominalistic answer to the basic question of personalizing the crime. Particularly, the legislators could provide explicit decisions, after it has been tried to determine the smallest common denominator of all existing regulations as they pertain to the criminal responsibility of legal and collective entities. We are indeed capable today to network all information, at least in a superficial form, worldwide.

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2 "Wie kann man sicher Juden von Nichtjuden unterscheiden?" *Gottlob Frege*, Tagebuch. With introduction and commentary edited by *G. Gabriel/W. Kienzler*, (1994) 42 *Deutsche Zeitschrift für Philosophie* 1092.

3 I am referring to the local and national daily press from spring 1998.

To proceed in this fashion, would totally misjudge the fundamental element of the basic question. A legislative machinery without real format and real structure would be nothing more than a hatchet. Structures of responsibility constitute a common praxis over which we cannot dispose as we like and while we can communicate them, we can actually not really agree about them. Because of their implied character, authoritative regulations can only be determined through subtle analysis.

As there is much discussion presently about Europeanization and globalization, I feel challenged, in the context of the personification of the crime, to give thought to the deeply entrenched structures of responsibility, to perhaps modify under certain circumstances corresponding culturebound rationalizations and to put them on a broader and more homogenous new basis. This would not be a quick process, but a gradual development, perhaps the odd progress on an international basis, a process, therefore, which must not be finalized by the legislators ax, prior to getting properly under way.

For the international dialogue, it would present itself, to find guidance from analytic hermeneutics and it would be valid to regard *Wittgenstein* as its father and *Frege* as its grandfather. The concept of family resemblance is part of the philosophy of hermeneutics. It has discarded any form of essentialistic arrogance and has the sensitivity to react to any fundamental shift in society, i.e. it does not depend on an abstract position of superiority regarding a concrete world of life and experience. You will excuse the following summarizing question: Why shouldn't *Wittgenstein* and family resemblances play the role for us, which *Plato* and the eternal idea played for the Greek polis?

At this point, it can finally be argued that criminal law and philosophy are two different pairs of shoes. Criminal law exhausts itself in the functionality of society and does not require deep philosophical detail. The reflections presented so far express a typical German viewpoint of legal dogma.

I do not believe that this is the case. As proof, we are directed, within the framework of our debate, to the U.S. Federal Sentencing Guidelines for Organizations.<sup>4</sup> There, specific liability structures along with the inner context of imputation on one hand and expurgation on the other and the relationship between individual and collective responsibility are illuminated in detail and are more acceptable than

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4 United States Sentencing Commission, Guidelines Manual, Washington D.C., undated (1994).

is the case elsewhere. The Sentencing Guidelines may constitute mere technical rules to their inventors, but they are more. The German criminal lawyer, however, will have noticed in U.S.-American practice that decisive questions of responsibility are answered through the sentence and not through the application of penal provisions.

Now I have arrived at the end of my preliminary personal remarks. In truth, these were not just introductory remarks, not simply because of the lengthy detail, but an attempt at a methodological foundation.

Furthermore, my declared preliminary deliberations contained a message, which I consider to be most important at this time. This is: The basis for a criminal responsibility of collective entities cannot be established in any casual way. On the contrary, the substantial brain power of a whole generation, which is constantly under threat from nonsensical influences, is required to tackle this task. A task which is closely connected with the fundamental problem of the personification of the crime. It follows that this problem can hardly be solved through explicit definitions, nor through legislative determination. Sadly, in the course of the rejuvenation of political attitudes during the current election year in Germany almost every political party has noticed that strategies pertaining to criminal law which are directed towards corporate crime, are "cool", that means to appeal for the willingness to put an end to an antiquated practice and to infer, therefore, that German criminal justice should finally abandon its reservation to punish legal entities. It is precisely this attitude which meets which powerless resistance by scientists.

The remainder of the time at my disposal, I will attend to the possible models of collective criminal liability. I expect that your following deliberations will mainly attend to particular models of liability already discussed or presently fixed in current statutes. Therefore, I plan to continue in the direction of this paper and keep dealing with the problems in the most abstract form. I will not advocate a concrete model of liability, rather I will introduce a few concepts which will assist us through the broad spectrum of liability and structure and classify the models for better clarity. In the following comments, we meet with three practical differentiations, to which each substantial suggestion of criminal responsibility of legal and collective entities has to take a position. The referred concepts are not at all new. They are already reflected in current interdisciplinary and international discussions. And of course they overlap.

### 3. Direct or Indirect Control of the Economy through the Criminal Justice System

In my opinion, these opposites are central to the future development of collective criminal responsibility. We are dealing with the question of a sensible interconnection of the legal and economic system, which can only be adequately answered through relevant interdisciplinary cooperation, due to the complexity of precise and subtle analysis of modern conditions.<sup>5</sup> Are there ways and means to involve the powerful companies in the development of political strategies of crime prevention? Or can criminal law merely attempt to define important rules of conduct including management liability - even if it runs the risk of evasive action by affected parties or to provoke organized non-responsibility? Collective criminal law does not have to function according to the same control method and be arranged like individual criminal law.

Of course, the unlawfulness of murder for individuals does not only exist because judges impose punishment for killings of fellow human beings but because this prohibition is entrenched in society - in other words, the individual digests this fact through the mother's milk. Nevertheless, in this context, the basis of judicial conviction is built by a strict principle of legality: The individual can, in borderline cases with expert advice, exactly determine from the criminal law the extent of his loss of freedom. In a moderate sense one can formulate that criminal law dictates and the individual obeys. Each punishment of an individual by a criminal court which is not supported by legal rules would be purely arbitrary.

To obtain an appropriate shaping of the criminal law for collective entities it could be a requirement to modify this starting point of criminal responsibility. Incidentally, this is not as dramatic, when one considers that the individual who poses the question which is of most interest, does not often get a ready answer directly derived from the law to the question: Which precise punishment applies to a particular crime?

It, therefore, appears appropriate and sensible in criminal law for collective entities to appeal to the rationality of the corporation and to lend predictability to a specific degree of punishment. The criminal justice system should, roughly according to the model of the Sentencing Guidelines create incentives for the corpo-

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<sup>5</sup> For further information, see *Heiner Alwart* (ed.), *Verantwortung und Steuerung von Unternehmen in der Marktwirtschaft*, with contributions from *Steinmann, Dannecker, Swenson, Wieland, Gröschner, Heine* et al., München 1998.

ration to prevent potential in-house criminality and then cooperate with the prosecution authority if a misdemeanor has been committed. As a *quid pro quo*, a settlement of proceedings in form of a dismissal or reductions of sentences even including acquittal could be anticipated. Modern business ethics offer the criminal justice system standards and starting points which can be realized without resorting to formal laws. If necessary, such criteria should be objectified through knowledgeable economic institutions and be made available for the jurisdiction.

The criminality of collective entities can be fought not only effectively but also most fairly in the aforementioned way. So it is not out of the question that the theory of collective responsibility will, from the outset, put the question of liability into a totally different context compared to what we are used to in Central Europe from our individual criminal justice traditions.

#### **4. Subsidiary or Parallel Liability**

The above reflections are important also for the following aspect: Collective criminal law cannot avoid to dovetail with individual criminal law at an appropriate point. It has to find a regulation, for instance, for a case where an ecological disaster was caused, in fact, by the production site of an industrial entity, while it is impossible to determine if the disaster was at all avoidable.

Surely, this regulation would require the establishment of very vague liability provisos. However, I cannot visualize any mature corporate liability law, which capitulates at this point and which would not be prepared to confront with determination organizational irresponsibility. Only the reality of subsidiary liability would provide corporate leadership with sufficient incentive to avoid exceeding acceptable risk levels through application of utmost care and laudable vision. Only this responsibility model has the measures to catch those situations which repeatedly cause complaints among the public about loopholes in the liability law, causing demands for a legislator to establish criminal responsibility of collective entities.

Accordingly, it would be too one-dimensional to draft criminal law for collective entities in a way, that the corporation would be held liable only for relevant misdemeanors of individual employees or for identifiable organizational deficiencies. Conversely: In extreme cases the corporation would suffer a repressive sanction if individual liability fails. If the collective entity attempts to pass the individual responsibility around or to make it disappear at all, then the public will intervene

by putting the blame on the corporation itself. Looking realistically at this, at first glance it appears to be that this decisive process may finally avoid individuals being labeled arbitrarily the guilty party by stretching the liability assumptions of individual criminal law.

The subsidiary liability of the corporation leaves the responsibility of control where it belongs, namely with the experts of industry. It includes all social areas, where individuals can form collective bodies and a high level of liability can be hidden under generally acceptable forms of organization. In this respect, subsidiary liability serves to realize an advanced responsibility model as it establishes liability where it escapes primary levels of liability in individual criminal law. It follows that in this sense, the corporation appears from a strictly criminal legal viewpoint as the offender above the offender.

The species of offender above offender fits into the subtle grammar of crime and punishment - with which I am familiar - without loss of rationality. I know of no authentic philosophical doctrine dealing with the personification of crime which would be capable of convincingly contradicting this concept.

## **5. Accessorial or Non-Accessorial (Direct, Immediate) Liability**

There is no easy answer to the question of whether or not the attribution of an individual's misdemeanor to the corporation has a valid basis for a collective criminal law. Is it not rather more important, to establish criteria of liability, which are directly aimed at the corporation?

On one hand we have to consider that a transfer of repressive sanctions from the actual offender to a different subject does not represent a matter of course in criminal justice. For instance, civil law can easily sanction certain liability consequences on to a legal person; criminal law in contrast must always assert the identity between the offending and the liable party.

On the other hand, there are no strong reservations to hold corporations liable - also criminally - in case there is an infringement of a norm pertaining to the corporation. Why should a collective entity be in a superior position over an individual, for example, as it pertains to the requirement, not to abuse liberty or to adhere to regulations of competition?

In Germany, a relevant rule can be found in the section of criminal law which is called "Ordnungswidrigkeitengesetz" (OWiG).

Here, the regulation pertaining to collective criminal responsibility, which according to its structure follows individual offences, as in the case of the corporate manager who violates anti-competitive laws, requires an answer to many detailed questions. The most important one deals with that circle of people, whose conduct, in general, may be subject to causing sanctions directed against the collective entity. From the point of view of establishing the provisos of liability, we can only deal with those senior officers with which the corporation must identify itself.

The trend, however, is in the direction to enlarge this circle of individuals to include more employees at a lower level of seniority. Difference in corporations emerge from this: Should a company be held criminally responsible for the action of employees with whom it must not *per se* identify itself? With this you develop the condition of tension between individual and collective responsibility, upon which the directive model of the Sentencing Guidelines builds. Those who choose the supranational management sanctions in the EU or even certain phenomena of the American criminal law, as a model, transform the accessorial liability model into a direct responsibility in objective events, leading to those, originally liability-causing violations by individuals to be almost meaningless.<sup>6</sup>

This at the outset, rather generous view of criminal liability of the corporation does, obviously, not fit into the traditional scheme of the exact description of criminal conduct by law and the corresponding doctrine of criminal responsibility. But should there not be a functional equivalent for foundations of repressive sanctions? As far as the, rather difficult to grasp, collective entities are concerned, is it not reasonable to gain tight responsibility rules and factual reference particularly in determining the sentencing under recourse to eventual organizational liability while on the other hand granting the possibility for comprehensive excuse and even acquittal?

Why should a corresponding revision of the middle-European law be inadmissible? Criminality should not be played down anywhere, it has to be taken seriously everywhere.

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<sup>6</sup> Andreas Ransiek, Unternehmensstrafrecht, Heidelberg 1996.

The fiction of the transparency of organizational structure, which, for instance, forms the responsibility model of the German Ordnungswidrigkeitenrecht, misses the reality of the global player and the networks. In this context, it is not decisive that our "offender above the offender" has no physical form, upon whose movements the interpretation of individual criminal law rests. The defining point of view rather holds that corporate boundaries, that is the corporate entity as such, are uncertain and that the problems of legal guidance, which result out of this circumstance are not yet sufficiently formulated. At least, we can learn from the previously mentioned European sanctions practice, which is not afraid and must not be afraid to hold the "mother" responsible for the offences of the "daughter".

## 6. Short Summary

In contrast to the beginning, I will keep the end to a minimum. The summary must not overflow as the preliminaries were so rambling.

Let me close with a word from *Herbert Hart*. It originates from *Hart's* criticism directed at the still to this day topical recognition of the "Naturrecht" by *Gustav Radbruch*. *Hart* writes:

"Like nettles, the occasions when life forces us to choose between the lesser of two evils, it must be grasped with the consciousness that they are what they are."<sup>7</sup>

Admittedly, I cannot say that, with reference to the criminal responsibility of legal and collective entities, we have the choice between two evils. However, I am sure of one thing, that we shall deal with this whole matter only when we are really sure what we are doing.

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7 *Herbert Hart*, Positivism and the Separation of Law and Morals, (1958) 71 Harvard Law Review 620.

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# The Basis for Criminal Responsibility of Collective Entities in Canada

Gerry Ferguson, Victoria

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## I. Introduction

Although corporations and other collective entities are subject to criminal liability in Canada, as I believe they should be, that does not mean that criminal law should be the primary mechanism for controlling corporate misconduct and harm. There are often more effective responses. The criminal law is a blunt instrument with limited deterrent, rehabilitative and retributive capacities. As such it should be used on both individuals and corporations with restraint, perhaps as a last resort rather than a first resort.<sup>1</sup> That said, there is nonetheless a limited need, and a limited role for criminal law. In Canada, that role is in my view overutilized for minor social harms committed by individuals and underutilized for serious harms committed by corporations.

The purpose of this paper is very modest indeed. It focuses on one issue - the basis for criminal responsibility of collective entities in Canada. Other important and related issues - enforcement, procedural and evidentiary issues, sanctions and alternatives - are for the most part beyond the scope of this paper.

## II. Collective Entities

What type of collective entities are subject to criminal law in Canada? Section 2 of the Canadian Criminal Code<sup>2</sup> extends criminal liability to corporations and certain other collective entities by defining the words "every one" and "person" to include "public bodies, corporate bodies, societies and municipalities in relation to the acts and things that they are capable of doing."<sup>3</sup> This definition of "every one"

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1 This view may also be found in *Law Reform Commission of Canada*, Working Paper 16, Criminal Responsibility for Group Action, Ottawa 1976, at 62. See also *D. Stuart*, Punishing Corporate Criminals with Restraint, (1995) 6(2) Criminal Law Forum 219.

2 Revised Statutes of Canada, 1985, c. C-46, as amended.

3 Corporations are not capable of marrying so bigamy is often cited as an example of an offence which a corporation can not commit. Caution should be exercised in regard to such

and "person" does not specifically refer to partnerships. Likewise, s. 35 of the Interpretation Act,<sup>4</sup> which applies to all *federal* laws and offences, defines "person" as including a corporation, but specifically provides that the word "corporation" does not include a partnership. On the other hand, partnerships can be prosecuted and convicted for offences against *provincial* laws, at least in the province of British Columbia.<sup>5</sup>

Partnerships occupy a significant role in the Canadian economy. In 1994, in Ontario (Canada's largest province), close to 18,000 new general partnerships were registered, while close to 40,000 new share corporations were incorporated.<sup>6</sup> Whether it is necessary or desirable to be able to prosecute both the partners as individuals and the partnership remains debatable.

Examples of the types of collective entities which have been charged or convicted of criminal offences in Canada include

- (1) business corporations,<sup>7</sup>
- (2) municipal corporations,<sup>8</sup>
- (3) non-profit corporations (including religious corporations),<sup>9</sup>
- (4) incorporated associations,<sup>10</sup>
- (5) trade unions,<sup>11</sup> and
- (6) societies.<sup>12</sup>

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a generalization. It is true that a corporation can not be the principal offender in bigamy, but a corporation which is engaged in the business of helping persons find partners or spouses could easily be guilty of bigamy by aiding, abetting or counselling bigamy.

4 Revised Statutes of Canada, 1985, c. I-21, as amended.

5 Section 29 of the British Columbia Interpretation Act, 1996 Revised Statutes of British Columbia, c. 238, provides that the word "person" includes a corporation and a partnership for the purposes of British Columbia laws and offences. A partnership is an agreement between two or more persons to carry on business together with a view to profit. A partnership is not a separate legal entity. General partners have unlimited liability jointly and severally for all the debts and obligations of the partnership (although the law also authorizes the establishment of a class of *limited* partners).

6 *J.S. Ziegel et al., Cases and Materials on Partnerships and Canadian Business Corporations*, vol. 1, Toronto 1994, at 3.

7 *Canadian Dredge and Dock Co. Ltd. v. The Queen* (1985), 19 C.C.C. (3d) 1 (S.C.C.).

8 *R. v. City of Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353 (S.C.C.).

9 *R. v. Church of Scientology* (1997), 116 C.C.C. (3d) 1 (Ont.C.A.).

10 *R. v. Electrical Contractors Association of Ontario* (1961), 131 C.C.C. 145 (Ont.C.A.).

11 *United Nurses of Alberta v. Attorney General of Alberta*, [1992] 1 S.C.R. 902.

12 *R. v. B.C. Professional Pharmacists' Society and Pharmaceutical Association of British Columbia*, [1971] 1 W.W.R. 705 (B.C.S.C.); *R. v. Nova Scotia Pharmaceutical Society* (1992), 93 D.L.R. (4th) 36 (S.C.C.).

Although various types of collective entities are subject to criminal law, the vast majority of criminal prosecutions of collective entities relate to business corporations. The discussion and analysis of criminal liability of collective entities in both the case law and the academic literature has been almost exclusively focussed on business corporations. My analysis in this paper will likewise focus on business corporations.

### III. Corporate Criminal Liability: To Be or Not to Be

The purpose of this paper is not to analyze what might be called the threshold question: should corporations and other collective entities be subject to criminal liability?<sup>13</sup> Although this question has been vigorously debated in the academic literature, the practical reality is that corporate criminal liability is an established doctrine in Canada and it is virtually inconceivable that Canadian courts or Parliament will abolish it.

In short, the opponents of corporate criminal liability argue that the various aims of the criminal law are better served by prosecuting responsible corporate officers rather than the corporation.<sup>14</sup> Proponents of corporate criminal liability argue that prosecution of the corporation better achieves the aims of criminal law and that individual corporate officers should only be held criminally liable when their conduct is particularly egregious and results in serious physical harm to others.<sup>15</sup> Both proponents and opponents advance their cases on a complex mix of theoretical and practical arguments regarding the nature of corporations, the nature of corporate crime, the aims and objectives of criminal law, and the purposes and

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13 The arguments for and against corporate criminal liability are summarized in *M.B. Metzger*, Corporate Criminal Liability for Defective Products: Policies, Problems and Prospects, (1984) 73 Georgia L.J. 1, 332-349.

14 For an elaboration of some of the views of opponents, see *M.W. Caroline*, Corporate Criminality and the Courts: Where are They Going? (1985) 27 Crim.L.Q. 237; *E. Lederman*, Criminal Law, Perpetrator and Corporation: Rethinking a Complex Triangle, (1985) 76 J.Crim.L. & Criminology 285; and *H. Glasbeek*, The Corporate Responsibility Movement - The Latest in Maginot Lines to Save Capitalism, (1988) 11 Dalhousie L.J. 363.

15 For an elaboration of some of the views of proponents, see *J.C. Coffee*, Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions, (1980) 17 Am.Crim.L.Rev. 419; *B. Fisse*, Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions, (1983) 56 S.Cal.L.Rev. 1141; *H.M. Silets/S.W. Brenner*, The Demise of Rehabilitation: Sentencing Reform and the Sanctioning of Organizational Criminality, (1986) 13 Am.J. of Crim.L. 329; and *C. Wells*, Corporations and Criminal Responsibility, Oxford 1993.

efficacy of corporate criminal sanctions. Disagreements as to the efficacy of corporate criminal sanctions seem to be at the heart of most of the debate.

My own view is that the optimum solution is to allow for the prosecution of both the corporation and responsible individuals within the corporation, while at the same time providing courts with a broad range of sanctions to impose on the corporate offender. Current Canadian law does allow for the prosecution of both, but the range of sanctions used against corporations is still too narrow. Prosecuting the individuals who actually run a company may be the best way to produce substantial deterrence in the case of closely held corporations. On the other hand, in large, diffuse, public companies, prosecuting the company may be the more effective mechanism for pursuing corporate deterrence.

#### **IV. Common Law and Statutory Basis**

Although Canadian statutes specify that corporations and other collective entities are "persons" for the purposes of the criminal law, those statutes do not specify how the law will or should attribute criminal liability to such collective entities. This critical issue - the basis for imposing criminal liability - originally arose and is still dependent today on common law principles developed by judges on a case by case basis. Although Canadian criminal law is for the most part codified in the Criminal Code, there are still some general principles such as the rules of causation, the definition of *mens rea* and the basis for corporate criminal liability, which remain a matter of common law development. Section 8 of the Canadian Criminal Code provides that these common law rules and principles apply unless or until they are altered by statute.

To leave important criminal law principles (such as the basis for imposing criminal liability on corporations) to the uncodified common law is to lay one's legal system open to all the scathing criticisms which *Jeremy Bentham* vigorously espoused 200 years ago. *Bentham* argued that uncodified criminal law is undemocratic since it is created and altered by unelected and unrepresentative judges; it is unfair because judges thereby engage in *ex post facto* or retrospective law making; it is also unfair and undemocratic because common law rules which are buried in cases are not accessible, intelligible or easily ascertainable to ordinary citizens; and finally it is unsystematic in the sense that it is an unruly sea of single deci-

sions rather than an organized, rational and comprehensive body of law built up from first principles.<sup>16</sup>

Despite these telling criticisms, the common law has one significant advantage or characteristic for those who are reform minded. The common law permits, with relative ease and flexibility, the creation of new or adjusted principles of law to meet changing social conditions. The judicial creation this century of corporate liability for *mens rea* offences is one such example. This feature is especially significant today when it is very difficult to get Parliament to tinker with or reform the general principles of criminal law. Canada's first Criminal Code was enacted in 1892 and many of its imperfections still remain 100 years later. Reform of the general principles of criminal law is not considered a high profile political issue. Governments are, therefore, very reluctant to assign Parliamentary priority to such reform. Ironically this neglect is tolerable because Parliament knows that common law courts can, and sometimes do, fill in the gaps. In the past 25 years, Canadian courts have done much more than Parliament has to reform the general principles of criminal law. Useful as this has been, the courts efforts have nonetheless been unsystematic and incomplete. There is still much room for improvement.

The general principles of *actus reus* and *mens rea* were developed, and to a large extent still remain, a product of the common law. However, those general principles were developed by courts with individual offenders, not corporate offenders, in mind. Courts should more readily recognize this fact and should show less reluctance to alter general principles of criminal liability for corporations if the existing principles which were designed for individual accused do not work efficiently, fairly and justly when applied to corporate accused.

## V. Classification of Penal and Regulatory Offences

The nature and scope of corporate criminal liability is tied to the classification of offences in Canada. In *R. v. Sault Ste. Marie*,<sup>17</sup> the Supreme Court of Canada divided offences into three categories:

- (1) *mens rea* offences
- (2) strict liability offences, and
- (3) absolute liability offences

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16 See generally *J. Bentham*, The Works of Jeremy Bentham (generally published in 1843 under the superintendence of his executor, *John Bowring*), New York 1962.

17 *Supra* note 8.

### **(1) Mens Rea Offences**

*Mens rea* offences refer to offences which require proof of both an *actus reus* and a *mens rea* in the sense of some culpable state of mind. Such states of mind are usually subjective, such as intentionally, recklessly or knowingly (or "wilfully blind" which in law is treated as equivalent to "knowingly"). The expression "mens rea offences" is also used by some courts and commentators to include offences which require a *mens rea* determined on an objective basis such as criminal or penal negligence (which also includes the concept of penal carelessness). Penal negligence requires a "marked or substantial" departure from the conduct which could be expected of a reasonable person in similar circumstances.

### **(2) Strict Liability Offences**

In strict liability offences, the Crown must prove the accused committed the *actus reus*. The accused will then be found guilty unless the accused can establish on a balance of probabilities that he or she took reasonable care or exercised due diligence to avoid the prohibited consequence or circumstance. Thus strict liability offences involve a fault level of ordinary civil negligence (i.e., ordinary absence of reasonable care) as opposed to criminal or penal negligence (i.e., a *gross* absence of reasonable care). Secondly, the burden of establishing reasonable care is on the accused.

### **(3) Absolute Liability Offences**

Absolute liability offences are sometimes referred to as "no fault" offences. Once the Crown proves the *actus reus*, the accused will be found guilty even if the accused shows that he or she is free of any fault. The fact that the accused did not intend the harm and took all reasonable steps to avoid the harm is no defence.

### **(4) Rules for Classifying an Offence**

In Canada, the courts have developed some interpretative principles to help determine into which category an offence falls. The first principle for classification of offences is obvious. One must look at the statutory language of an offence to see whether the legislature has "expressly" indicated what category or level of fault, if any, is intended. For example, the legislative definition of the offence may include words such as intentionally, recklessly, negligently, strictly or absolutely. However, surprisingly, a vast majority of crimes, and especially regulatory of-

fences, define the *actus reus* but are silent as to the requisite *mens rea* or fault, if any, for that offence.

Where the legislature has been silent on the issue of fault for a particular offence the courts have been required to fill this gap. In filling the gap, the courts apply the following general rules:

- (i) If an offence is considered a "true crime", courts will presume Parliament intended the offence to require subjective *mens rea* (i.e. intent, knowledge, recklessness or wilful blindness measured subjectively, but not negligence), unless the words of the statute suggest otherwise. "True crimes" are generally found in the *Criminal Code* and they are to be distinguished from "regulatory offences".<sup>18</sup>
- (ii) There is a presumption that all "regulatory offences" are offences of strict liability. Regulatory offences will only be classified as *mens rea* offences if the statute clearly includes *mens rea* words. And regulatory offences will only be classified as absolute liability offences if the legislature has made it *clear* by express language or necessary implication that the offence is intended to be an absolute liability offence.
- (iii) Since absolute liability involves no fault liability, it is normally reserved for offences where the stigma and penalty are very minimal and where the regulatory regime in question requires absolute liability to operate effectively.<sup>19</sup>

## (5) The Significance of Regulatory Offences

Regulatory offences are, at least statistically, of much greater relevance to corporations than are true crimes. While there are only a few hundred "true crimes", there are perhaps 40,000 or more regulatory offences in Canada.<sup>20</sup> Many regulatory offences deal with various forms of pollution and violations of health and safety standards in the work place and in the production and sale of goods and

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18 There is a general presumption that all offences in the *Criminal Code* are true crimes: *R. v. Prue* and *R. v. Baril*, [1979] 2 S.C.R. 547. For offences in federal statutes other than the *Criminal Code* the distinction between true crimes and regulatory offences does not have a clear, bright line. The nature of the prohibited conduct (i.e. morally repugnant) and the severity of the penalty (for example, imprisonment for more than two years) will be strong indications of its "criminal" character. On the other hand conduct which is permissible (i.e. production and sale of goods and services) but subject to regulated conditions to protect public health and safety will normally be classified as regulatory offences, and not crimes, especially where the penalty for violation of the offence does not include a long term of imprisonment.

19 The Supreme Court of Canada has held that an absolute liability offence which involves any possibility of imprisonment is contrary to principles of fundamental justice and therefore unconstitutional and of no force and effect: *Reference re Section 94(2) of the Motor Vehicle Act (B.C.)* (1985), 23 C.C.C. (3d) 289 (S.C.C.).

20 *Law Reform Commission of Canada, Studies in Strict Liability*, Ottawa 1974, at 56.

services. Penalties normally involve fines and the possibility (but infrequent use) of imprisonment, which might range from a few days up to two years. Because corporations are integrally involved in commercial activities, their conduct can often run afoul of these regulatory offences. For example, nearly half of the 324 convictions for environmental offences in Ontario in 1993 involved corporations.<sup>21</sup>

## VI. The Basis of Corporate Criminal Liability

### (1) Introduction

In this paper I use the expression "criminal" liability to refer to a corporation's liability for both true crimes and regulatory offences. It is undeniable that a corporation has its own legal identity. A corporation's legal identity is separate from that of its shareholders, directors and officers. A corporation can hold property, enter contracts and can sue and be sued. Owners or shareholders enjoy the benefit of limited liability; they are not personally liable for the debts or obligations of the corporation. And a corporation is perpetual in the sense that its existence is not altered by the addition of new members or the retirement or death of existing members.<sup>22</sup>

Legal theorists have provided various theories for treating corporations as responsible actors and thus fit subjects for penal sanctions: *Fauconnet's* theory relies on a corporation's distinct legal personality;<sup>23</sup> *French* argues legal personality alone is inadequate and he articulates a theory of a corporation as a moral or intentional actor;<sup>24</sup> and *Fisse* and *Wells* argue that it is unnecessary to frame corporate responsibility in terms of moral notions that apply to humans, that a corporation can and often does exceed the sum of its individual parts (i.e., the organic

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21 *Stuart* (note 1), at 220.

22 See *Ziegel* (note 6). It should also be noted that when two companies amalgamate, no new company is created and no old company is extinguished by the amalgamation. Consequently, the newly amalgamated company continues to be criminally responsible for the offences of the old companies committed prior to the amalgamation: *R. v. Black & Decker Manufacturing Co.*, [1975] 1 S.C.R. 411.

23 *P. Fauconnet*, *La responsabilité: étude de sociologie*, Paris 1920, as described by *J.A. Quaid*, *The Assessment of Corporate Criminal Liability on the Basis of Corporate Identity: An Analysis*, (1998) 43 McGill L.J. 67.

24 *P.A. French*, *Collective and Corporate Responsibility*, New York 1984, as discussed in *Quaid* (note 23).

theory) and that a corporation's true responsibility can be located in its organizational structure, policy, procedures and culture.<sup>25</sup>

Canadian courts have avoided any analysis of these competing theoretical basis for corporate criminal liability. Instead they have simply contented themselves with imposing corporate criminal liability on the basis of the fault of senior corporate managers who are identified for such purposes as the corporation. Canadian courts' discussion of the basis for corporate criminal liability has mostly focused on the problem of articulating a test or mechanism for locating a corporation's "directing minds" so that the *mens rea* of the directing minds can be attributed to the corporation. There has been surprisingly little judicial analysis of the basis for attributing an *actus reus* to the corporation.

It is worth observing at this stage that the extremely wide variation in the form and structure of corporations may make it most appropriate to have more than one basis for corporate criminal liability, any one of which will suffice for liability. There is little in common between the small, single-owner corporation and the large-scale, and perhaps multinational, corporation where responsibility for conduct or policy is more diffuse and harder to locate in one or more individuals. While the identification doctrine may be quite adequate for the former, something closer to *Fisse's* corporate culture doctrine may be most appropriate for the latter. It is also worth noting that although a relatively few, large-scale corporations dominate economic activity in Canada,<sup>26</sup> it has been estimated that approximately 97 % of all businesses (whether incorporated or not) can be characterized as small businesses.<sup>27</sup>

## (2) Historical Context

For a long time, the common law of England and Canada did not generally permit a corporation to be convicted of a crime (as opposed to a regulatory offence). There were exceptions and these exceptions were based on the doctrine of *respondeat superior* (or vicarious liability). Under this doctrine the master is liable for the conduct of his servant in the course of the servant's employment. This

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25 *Fisse* (note 15) and *Wells* (note 15).

26 For example, it has been estimated that one half of all corporate assets in Canada are owned by the 100 largest, non-financial corporations. *W.T. Stanbury*, *Business-Government Relations in Canada: Grappling with Leviathan*, Toronto 1986, at 3.

27 *Ontario Ministry of Industry and Tourism*, *A Small Business Development Policy for Ontario*, Toronto 1980.

doctrine was created in the law of tort in the 17th century in order to provide compensation to third parties who were injured by a master's servant while the servant was carrying out the master's business. This doctrine was justified on the ground that since the master acquired the benefits of the servant's work, he should also carry the burdens. And as a practical matter, servants were impecunious and, therefore, if compensation was to be forthcoming, it would have to be obtained from the master.

While the common law recognized the appropriateness of vicarious liability for tort compensation, it rejected vicarious liability for crimes since crimes required *mens rea* or personal fault.<sup>28</sup> The mere existence of the master-servant relationship was not a sufficient basis for imputing personal fault to the master. There were however three common law crimes - public nuisance, criminal libel and contempt of court<sup>29</sup> - where the courts did not require *mens rea*. Nor was *mens rea* required for a number of regulatory offences created by statute which the courts held to be absolute liability offences. In these four categories of offences, where no *mens rea* was required, the courts applied vicarious liability, allowing the master to be convicted for offences of his servant. The master could be either an individual or a corporation. Apart from these four vicarious liability exceptions, corporations were immune from liability under the criminal law.

Early in the 20th century, courts began to dismantle this corporate immunity from criminal law. Courts held that words such as "everyone" in criminal statutes could include corporations,<sup>30</sup> that corporations could be punished by common law fines for offences where the only penalty specified for such offences in the Code was imprisonment.<sup>31</sup> And courts specified procedural rules for how a corporation could be summoned and appear for trial. These procedural and evidentiary rules were later codified. Courts also rejected the argument that corporations can not be held criminally liable for offences committed by their officers because committing crimes would be *ultra vires* (i.e., beyond the scope of the officers' employment) unless those employees were expressly ordered to commit the act in question.

The last and most challenging obstacle to imposing criminal liability on corporations was the difficulty of attributing *mens rea* (i.e., a blameworthy state of mind)

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28 *R. v. Huggins* (1730), 92 E.R. 518.

29 See, e.g. *R. v. Great North of England Ry. Co.* (1846), 115 E.R. 1294 and *R. v. Stephens* (1866), L.R. 1 Q.B. 702 (public nuisance); *R. v. Holbrook* (1878), 4 Q.B.D. 42 (criminal libel); and *R. v. Evening Standard Co. Ltd.*, [1954] 1 Q.B. 578 (contempt).

30 *Union Colliery Co. v. The Queen* (1900), 31 S.C.R. 81.

31 *R. v. Great West Laundry Co.* (1900), 3 C.C.C. 514 (Man.Q.B.).

to an abstract, non-human entity called a corporation. Ironically the breakthrough on this point came from a civil liability case decided by the House of Lords in 1915 entitled *Lennard's Carrying Co. Ltd.* That case concerned a corporation's civil liability for damages under a statute which afforded the corporation a defence if the damage occurred without its fault. The issue was whether the fault of a director, who was actively involved in the operation of the company, was in law the fault of the corporation. In holding that it was, Viscount *Haldane* laid down a general principle - the directing mind principle - for attributing fault to a corporation. Viscount *Haldane* stated:

"[A] corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation ... For if Mr. Lennard was the directing mind of the company, then his action must, unless a corporation is not to be liable at all, have been an action which was the action of the company itself ...".<sup>32</sup>

The "directing mind" theory was subsequently applied in Canada to the prosecution of corporations for true crimes. For example, in *R. v. Fane Robinson Ltd.*, the corporation and two directors of the company who were its active managers were, on appeal, convicted of the crimes of conspiracy to defraud and obtaining money by false pretences. The Court held that there is no reason why a corporation which can enter into binding agreements with individuals and other corporations cannot be said to entertain *mens rea* when it enters into an agreement which is the gist of a conspiracy and a false pretence. The Court concluded that:

"[The two corporate officers] were the acting and directing will of Fane Robinson Ltd., generally and in particular in respect of the subject-matter of the offences with which it is charged, that their culpable intention (*mens rea*) and their illegal act (*actus reus*) were the intention and the act of the company and that conspiracy to defraud and obtaining money by false pretences are offences which a corporation is capable of committing."<sup>33</sup>

## VII. Current Law of Corporate Criminal Liability

### (1) Traditional Devices

Two devices have been used, in different contexts, to hold corporations criminally liable for true crimes and regulatory offences. The first device is vicarious liability and the second device is the identification theory. A third device - locating fault in

32 *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co.*, [1915] A.C. 705, at 713 (H.L.).

33 (1941), 76 C.C.C. 196, at 203 (Alta.C.A.).

the corporation's organizational structure, policies, culture and ethos which permitted or encouraged the commission of the crime - has been advocated by legal theorists such as *Fisse* and *Wells*, but has not as yet been adopted by Canadian courts.

As previously noted, the traditional doctrine of vicarious liability holds the master (or employer) liable for the acts of the servant (or employee) in the course of the master's business without proof of any personal fault on the part of the master. The master can be either an individual or a corporation. Because vicarious liability does not require proof of personal fault on the part of the master, it is only used in exceptional circumstances in Canadian penal law.

By way of contrast, in the United States, corporate criminal liability for federal offences (which are largely but not exclusively regulatory offences) is based on vicarious liability.<sup>34</sup> On the other hand, corporate liability for many state offences, which include most traditional crimes, is premised on the identification theory similar to that used in England.<sup>35</sup>

Under the second device, the identification theory, the acts and state of mind of certain senior officers in a corporation - the directing minds of the corporation - are deemed to be the acts and state of mind of the corporation. The directing minds are identified as the corporation. The corporation is considered (fictionally) to be *directly* liable, rather than *vicariously* liable. The difference between the Canadian and English identification theory is that Canadian courts are apparently prepared to locate the directing mind at a lower level in the corporation than are the English courts.<sup>36</sup>

The Canadian Supreme Court has recognized the relationship between the vicarious liability and the identification doctrine.<sup>37</sup> The identification doctrine is actually a modified and limited version of vicarious liability. The identification doctrine holds corporations liable only for the fault of senior corporate employees or

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34 See, e.g., *United States v. Basic Construction Co.*, 711 F.2d 570, at 573 (4th Cir.C.A., 1983) where the Court stated: "[A] corporation may be held criminally responsible for antitrust violations committed by its employees if they were acting within the scope of their authority, or apparent authority, and for the benefit of the corporation, even if ... such acts were against corporate policy or express instructions".

35 See, e.g., *Canadian Dredge & Dock* (note 7), at 18-19; *Wells* (note 15), at 116-120.

36 Compare *Canadian Dredge & Dock* (note 7), with *Tesco Supermarkets Ltd. v. Natrass*, [1972] A.C. 153 (H.L.), discussed below in Part VII (4)(d).

37 See *Canadian Dredge & Dock* (note 7), at 22.

officers (i.e., directing minds), rather than for the fault of all employees as occurs under vicarious liability. The identification theory is used to attribute *mens rea* to the corporation itself, whereas in the case of vicarious liability, no distinct or separate "corporate" *mens rea* by those who control or run the corporation is required.

## (2) Absolute Liability Offences

Absolute liability offences are no fault offences. In Canada, they are few in number; they are only appropriate where the penalty is relatively trivial, where there is no real stigma attached to a conviction, and where requiring proof of fault would seriously impair enforcement procedures. Automobile parking meter violations are a good example of offences where absolute liability may be appropriate.<sup>38</sup>

Both individuals and corporations can be convicted of absolute liability offences. The Crown need only prove the *actus reus* of the offence. But how does a corporation commit the *actus reus*? There has been surprisingly little judicial comment on this question. In *Canadian Dredge & Dock*, the Supreme Court of Canada correctly observed that an absolute liability offence requires no blameworthy state of mind. The Court stated that individuals and corporations are on the same footing in that regard. The Supreme Court, therefore, concluded that a corporation is treated as a natural person and that there is no need to establish a special rule or rationale for corporate liability for absolute liability offences.<sup>39</sup> But surely these comments only refer to *mens rea*. Before a corporation can be convicted of an absolute liability offence, the court must still find that the corporation committed the *actus reus*. Although seldom discussed, it is clear from the case law that a corporation will be guilty of an absolute liability offence if any employee or agent of the corporation commits that offence in the course of their employment.<sup>40</sup> Notwithstanding the Supreme Court's claim that the corporation's liability is primary, it seems in fact to be more like vicarious liability.

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38 See *R. v. Budget Car Rentals (Toronto) Ltd.* (1981), 57 C.C.C. (2d) 201 (Ont.C.A.) which involved a type of vicarious liability for owners of automobiles for parking meter violations, regardless of whether the owner was the driver who actually violated the parking meter regulations.

39 *Canadian Dredge & Dock* (note 7), at 8, where the Supreme Court states: "Where the legislature by the clearest intentment establishes an offence where liability arises instantly upon breach of the statutory prohibition, no particular state of mind is a prerequisite to guilt. Corporations and individual persons stand on the same footing in the face of such a statutory offence. It is a case of automatic primary responsibility. Accordingly, there is no need to establish a rule for corporate liability nor rationale therefor. The corporation is treated as a natural person."

40 See, e.g., *R. v. Pierce Fisheries Ltd.*, [1970] 5 C.C.C. 193 (S.C.C.).

There is a conceptual way by which the corporation's liability could be considered primary rather than vicarious. If all absolute liability offences were interpreted by the courts as imposing a legal duty on a corporation to absolutely prevent its employees or agents from committing the offence, then if the offence is committed by an employee or agent, the corporation (i.e., its directing minds) has on its own account committed the offence by omitting to fulfil its legal duty. This is probably what the Supreme Court had in mind when it said that the corporation's liability is primary, not vicarious.<sup>41</sup> But isn't this creation of a legal duty on the corporation a fiction? Does the statutory language of the absolute liability offence in question really warrant the court's imposition of a legal duty?

### (3) Strict Liability Offences

#### (a) *Actus Reus*

For strict liability offences, the Crown prosecutor need only prove the *actus reus*. The accused will be convicted unless the accused establishes due diligence on a balance of probabilities. Once again, the accused may be an individual or a corporation. As previously noted, almost all regulatory offences in Canada are strict liability offences. These regulatory offences deal with an extremely broad range of individual and business activities. As such, they are of great significance to corporations.

How does a corporation commit a strict liability offence? Once again, the Supreme Court in *Canadian Dredge & Dock* states that the corporation and individual accused are in the same position and that in both cases their liability is not vicarious but primary, in the same way as it is in the case of absolute liability offences.<sup>42</sup> But, at least in regard to the *actus reus* of the offence, the Supreme

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41 In *Canadian Dredge & Dock* (note 7), at 21 the Supreme Court stated: "Corporate responsibility in both strict and absolute liability offences has been found to arise on the direct imposition of a primary duty in the corporation in the statute in question, as construed by the court."

42 *Canadian Dredge & Dock* (note 7), at 9, where the Supreme Court states: "As in the case of an absolute liability offence, it matters not whether the accused is corporate or unincorporate, because the liability is primary and arises in the accused according to the terms of the statute in the same way as in the case of absolute offences. It is not dependent upon the attribution to the accused of the misconduct of others. This is so when the statute, properly constructed, shows a clear contemplation by the legislature that a breach of the statute itself leads to guilt, subject to the limited defence above noted. In this category, the corporation and the natural defendant are in the same position. In both cases liability is not vicarious but primary."

Court's conclusion is suspect for the reasons already indicated. It seems more accurate to say that the *actus reus* of strict liability offences is attributed to corporations on a vicarious liability basis. In other words, the corporation commits the *actus reus* if it is committed by any employee or agent of the corporation acting within the scope of his or her employment or authority.<sup>43</sup>

There is another conceptual way in which one could argue that the corporation's liability for the *actus reus* is primary, not vicarious. One could argue that the corporation is liable for the *actus reus* as a party or accomplice. By hiring an employee or agent and by providing the equipment, environment and opportunity to carry out the employment activities, the corporation has in fact aided or facilitated the employee's acts. In that sense, the corporation is an accomplice or party to the *actus reus* committed by an employee.<sup>44</sup> Whether the corporation has aided or abetted the *actus reus* with the requisite *mens rea* is a separate issue.

(b) *Due Diligence Defence*

Although the *actus reus* of a strict liability offence which is committed by an employee or agent is attributed to a corporation directly or vicariously, a corporation is not guilty of a strict liability offence if the corporation used due diligence or reasonable care to avoid the offence occurring. This is made very clear in the leading strict liability case of *R. v. Sault Ste. Marie* where the Supreme Court stated:

"The due diligence which must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be ... whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on *whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself*."<sup>45</sup> (Emphasis added.)

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43 In *R. v. City of Sault Ste. Marie* (note 8) the pollution offence in question was characterized as a strict liability offence. The *actus reus* of the pollution offence was committed by a garbage disposal company whom the city had hired to dispose of the city's garbage. The company was convicted. The issue in this case was whether the city was also liable for the act of its agent. The Supreme Court held that it clearly was responsible, unless the City used due diligence or reasonable care to avoid the offence occurring.

44 Ss. 21 and 22 of the Criminal Code provide that every one is a party to an offence and guilty of that offence who actually commits it, or who intentionally aids, abets or counsels another person to commit it.

45 *R. v. City of Sault Ste. Marie* (note 8), at 377-378.

The Supreme Court is clearly indicating that the fault element (lack of due diligence) will be attributed to the corporation on the basis of the identification doctrine, not on the basis of vicarious liability. In other words, absence of due diligence on the part of the employee committing the act is not sufficient. There must be an absence of due diligence on the part of the directing minds. The inquiry into whether the directing minds of the corporation have exercised due diligence is focussed on whether the corporation "has established a proper system to prevent commission of the offence" and has taken "reasonable steps to ensure the effective operation of the system". This emphasis on systems and procedures is consistent with the idea that corporate fault can be found in a corporation's organizational structure, culture and ethos. It is worth noting that the requirement that a corporation must establish due diligence or reasonable care to prevent the commission of strict liability offences has spawned a new growth industry. There are now a wide array of due diligence experts who advise corporations on how to establish due diligence systems for the host of regulatory offences which a corporation may brush against in carrying on its business.<sup>46</sup>

#### **(4) Mens Rea Offences**

##### *(a) Introduction*

In most cases, *mens rea* offences require a subjective state of mind such as intention, knowledge or wilful recklessness; in a few crimes, an objective state of mind such as penal negligence will suffice.<sup>47</sup> For the most part in this discussion, I will assume we are dealing with subjective *mens rea* offences.

The identification doctrine arose out of the perceived need to find a way to hold corporations liable for *mens rea* offences. As the Supreme Court said in the leading case of *Canadian Dredge & Dock*, "the corporate vehicle now occupies such a large portion of the industrial, commercial and sociological sectors that amenability of the corporation to our criminal law is as essential in the case of the corporation as in the case of the natural person".<sup>48</sup>

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46 See generally *J. Swaigen*, *Regulatory Offences in Canada: Liability and Defences*, Scarborough, Ontario, 1992, at 237-240 for a "due diligence checklist".

47 Criminal Code, ss. 219-221 make it an offence to cause death or bodily harm by criminal negligence.

48 *Canadian Dredge & Dock* (note 7), at 22.

The identification doctrine was created as a pragmatic median rule between the extremes of total vicarious liability for all criminal acts and no corporate liability unless the Board of Directors expressly authorized the criminal acts. The identification doctrine, as a median rule, states that the actions and mental state of the corporation will be found in the actions and state of mind of employees or officers of the corporation who may be considered the directing mind and will of the corporation in a given sphere of the corporation's activities. The crucial question under this doctrine is which employees or officers of a corporation are its directing mind for the purpose of the identification doctrine.

(b) *Attributing Actus Reus to the Corporation*

*Canadian Dredge & Dock* is the leading Canadian case on the use of the identification theory to convict corporations of *mens rea* offences. In that case, several corporations, and senior officers in those corporations, were convicted of the *mens rea* offence of conspiracy to defraud. The convictions arose out of "bid rigging" for dredging contracts for the government. As a result of the accused's collusion, the government paid more for the dredging than it should otherwise have paid.

The collusion or bid rigging was done by the persons in charge of making bids for each corporation; in each case, those persons were at the very top of the corporate ladder holding titles such as vice-president or general manager. Thus on the facts of this case, both the *actus reus* and the *mens rea* of the offence was committed by the directing minds of the corporation. In describing the identification theory, the Supreme Court did not carefully distinguish between the process for attributing *actus reus* and the process for attributing *mens rea* to the corporation. At some stages in its judgment, the Supreme Court states that the identification doctrine was devised as a method to attribute *mens rea* to the corporation. But on most occasions the Supreme Court speaks of the identification doctrine as the method for attributing both the *actus reus* and the *mens rea* to the corporation. Both the actions and the intent of the corporation's directing minds are identified as the corporation's actions and intent.<sup>49</sup>

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49 See, e.g., *Canadian Dredge & Dock* (note 7), at 15, where the Supreme Court states: "It [the identification theory] produces the element of *mens rea* in the corporate entity, otherwise absent from the legal entity but present in the natural person, the directing mind." Later in the same paragraph, the Court adds: "This establishes the 'identity' between the directing mind and the corporation which results in the corporation being found guilty for *the act* of the natural person [who is the directing mind]." (Emphasis added.)

The *mens rea* and the *actus reus* of an offence will normally be located in the same person, as they were in the fraudulent acts and intent of the senior corporate officers in the *Canadian Dredge & Dock* case. But the Supreme Court seems to have inadvertently erred when it suggested that to trigger the identification doctrine, and through it corporate criminal liability for the actions of the employee, "the actor-employee who *physically committed* the offence must be ... its 'directing mind'" (emphasis added).<sup>50</sup> The directing mind must commit the *actus reus* with the appropriate *mens rea*, but he or she need not be the person who physically commits it. In Canada, ss. 21 and 22 of the Criminal Code make a person a party to an offence and guilty of that offence if that person actually commits it, or aids, abets (i.e., encourages) or counsels another person to commit it. Thus, if a directing mind "knowingly" assists, encourages or counsels another person (who is not a directing mind) to actually commit the *actus reus*, then the directing mind, and, therefore, the corporation, have committed the offence. In the context of corporate liability, the directing mind need not *physically* commit the offence as long as the corporation's directing mind is "a party" to the offence.

(c) *The Identification Doctrine in Canada*

As already noted, the leading statements on the identification doctrine in Canada are to be found in the Supreme Court of Canada's judgment in *Canadian Dredge & Dock*. In that case, the Supreme Court described the characteristics of the identification theory, which characteristics may be summarized as follows:

1. It is a court-adopted, pragmatic, but fictional device used to attribute a human element (mental states of mind) to an equally abstract entity called a corporation, for the purpose of including corporations within the control of the criminal law in much the same way that natural persons are.<sup>51</sup>
2. If a corporate employee (or agent) is, in the Court's assessment, virtually the directing mind and will of the corporation in the sphere of duty and responsibility assigned to the employee by the corporation, then the employee's action and intent are the action and intent of the company itself, provided the employee is acting within the scope of his/her authority either express or implied.<sup>52</sup>

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50 *Canadian Dredge & Dock* (note 7), at 15.

51 *Canadian Dredge & Dock* (note 7), at 22-23.

52 *Ibid.* at 14, citing *R. v. St. Lawrence & Corp. Ltd.*, [1969] 3 C.C.C. 263 (Ont.C.A.).

3. The essence of the test is that the identity of the directing mind and the company *coincide* when the directing mind is acting within his/her assigned field of corporate operations. That field of operations may be geographic, or functional, or it may embrace the corporation's entire operations.<sup>53</sup>
4. The identity doctrine merges the board of directors and all persons who are delegated the governing executive authority for a sphere of the corporation's business. The conduct of any of the merged entities is thereby attributed to the corporation.<sup>54</sup>
5. A corporation may have more than one directing mind. Where corporate activities are geographically widespread or diffuse, it will be virtually inevitable that there will be delegation and subdelegation of authority from the corporate centre and, therefore, there will be several directing minds.<sup>55</sup> On this point, the Supreme Court suggested that the application of the identification doctrine in the English case of *Tesco Supermarkets Ltd.*<sup>56</sup> was too narrow for Canadian realities.<sup>57</sup> In that case, the House of Lords held that the manager of one of the supermarkets owned by Tesco was not a directing mind of the corporation in the context of selling goods at a higher price than the advertised price.
6. Because the actions and intent of the directing mind within his or her assigned field are merged with and become the actions and intent of the corporation, it is no defence for a corporation
  - a) to claim that the Board of Directors or other corporate officers issued general or specific instructions prohibiting the criminal conduct; the corporation and its directing mind are one, and thus the prohibition from one controlling arm of the corporation to another controlling arm can have no effect in law;<sup>58</sup> nor,
  - b) to claim the Board of Directors had no awareness of the criminal conduct and did not authorize or approve it.<sup>59</sup>

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53 Ibid. at 17.

54 Ibid. at 23.

55 Ibid. at 23.

56 [1971] 2 W.L.R. 1166 (H.L.).

57 *Canadian Dredge & Dock* (note 7), at 23.

58 Ibid. at 27, where the Supreme Court stated: "If the law recognized such a defence, a corporation might absolve itself from criminal consequence by the simple device of adopting and communicating to its staff a general instruction prohibiting illegal conduct and directing conformity at all times with the law."

59 Ibid. at 17, where the Supreme Court stated: "It is no defence to the application of this doctrine that a criminal act by a corporate employee cannot be within the scope of his

7. The merging of the corporation and its "directing mind" will only cease where the actions of the "directing mind" in his or her assigned sector of operations are *totally* in fraud of the corporation, or where the actions of the "directing mind" are intended to, and do result in, benefit exclusively to the "directing mind"; in such circumstances, the Supreme Court has held that "it is unrealistic in the extreme" to consider that such persons are still "directing minds" of the corporation and, therefore, their acts in such circumstances can not be attributed to the corporation.<sup>60</sup> Thus the identification doctrine only operates where the Crown demonstrates that the action taken by the directing mind (a) was within the field of operation assigned to him; (b) was not totally in fraud of the corporation; and (c) was by design or result partly for the benefit of the company.<sup>61</sup>
8. Although the directing mind and the corporation merge as one for the purposes of allowing the corporation to be convicted of an offence, both the directing mind and the corporation can each be prosecuted, convicted and punished for the offence.

(d) *Examples of the Application of the Identification Doctrine*

The determination of which corporate employees are in sufficient *de facto* control of a sphere of corporate operations so as to make them directing minds of the corporation involves a fairly wide ambit of judicial discretion. It will depend at least in part upon the court's analysis of the organization of the corporation, its command structure, the extent of delegation and the nature of the misconduct. *Hanna* lists the following examples of the application of the identification test in Canada:<sup>62</sup>

- a used-car sales manager who was not a director or officer of the corporation and who defied orders of senior officials by turning back odometers was held

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authority unless expressly ordered to do the act in question. Such a condition would reduce the rule to virtually nothing. Acts of the ego of a corporation taken within the assigned managerial area may give rise to corporate criminal responsibility, whether or not there be formal delegation; whether or not there be awareness of the activity in the board of directors or the officers of the company; and, as discussed below, whether or not there be express prohibition."

60 Ibid. at 38-39.

61 Ibid. at 38.

62 *D. Hanna*, Corporate Criminal Liability, (1988-89), 31 Crim.L.Q. 452, at 464.

- to be a directing mind and will for the purpose of holding the corporation liable for fraud;<sup>63</sup>
- transactions of a salesman which required only *pro forma* approval by a corporate official were held to be acts of the corporation making it liable for fraud;<sup>64</sup>
  - in a company of four thousand employees, permit issuers with authority to implement safety procedures were held not to be the directing mind and will of the corporation as they were simply carrying out a policy already in place;<sup>65</sup>
  - bid-rigging on a road surface treatment contract by a company superintendent, held to be a directing mind and will, was sufficient to ground liability of the corporation;<sup>66</sup>
  - theft by an accountant was held to be an act of the corporation;<sup>67</sup>
  - the only employee of a realty company who was responsible for renting properties was held to be a directing mind and will for the purpose of holding the company liable under the *Ontario Human Rights Code*;<sup>68</sup>
  - and gas price-fixing by a regional supervisor of marketing representatives was held to be the conduct of the company.<sup>69</sup>

The above examples show that the Canadian application of the identification doctrine allows for the directing mind of the corporation to reside in a broader and lower-level group of corporate officials than appears to exist in England under the leading case of *Tesco Supermarkets Ltd.* However, there has been a recent Supreme Court of Canada case, *The Rhone v. The Peter A.B. Widener*,<sup>70</sup> which, al-

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63 *R. v. Waterloo Mercury Sales Ltd.* (1974), 18 C.C.C. (2d) 248, 27 C.R.N.S. 55, [1974] 4 W.W.R. 516 (Alta. Dist. Ct.).

64 *R. v. P.G. Marketplace* (1979), 51 C.C.C. (2d) 185 (B.C.C.A.).

65 *R. v. Syncrude Canada Ltd.*, [1984] 1 W.W.R. 355, 48 A.R. 368, 28 Alta. L.R. (2d) 233 (Q.B.).

66 *R. v. J.J. Beamish Construction Co.*, [1967] 1 C.C.C. 301, [1966] 2 O.R. 867, 50 C.P.R. 97 (H.C.J.), afft. [1968] 2 C.C.C. 5, 65 D.L.R. (2d) 260, [1968] 1 O.R. 5 (C.A.).

67 *R. v. Spot Supermarket Inc.* (1979), 50 C.C.C. (2d) 239 (Que. C.A.).

68 *Karen Reese v. London Realties & Rentals* (1986), 7 C.H.R.R. D3587 (Ont. Bd. of Enquiry).

69 *R. v. Shell Canada Products Ltd.* (1990), 75 C.R. (3d) 365 (Man. C.A.).

70 [1993] 1 S.C.R. 497.

though it is a civil damages case, at least implicitly suggests that in future cases directing minds will only be found at higher levels of authority.

In *The Rhone*,<sup>71</sup> a barge towed by four tugs collided with a ship moored in the port of Montreal. The liability issue turned on whether a tug captain, who had been negligent, was the directing mind of the company. This captain was master of the flotilla and a "troubleshooter" for the other tugs; moreover, his superiors exercised very little control over him. Nonetheless, the Supreme Court found that he was not a directing mind of the owning company. The Supreme Court interpreted *Canadian Dredge* to find that the "key factor which distinguishes directing minds from normal employees is the capacity to exercise decision-making authority on matters of corporate policy, rather than merely to give effect to such policy on an operational basis, whether at head office or across the sea".<sup>72</sup>

*The Rhone* was recently applied by the Ontario Court of Appeal in the criminal case of *R. v. Safety-Kleen Canada Inc.*<sup>73</sup> In that case, the employee and the corporation were charged with a *mens rea* offence of "knowingly" giving false information on a waste disposal form. The company owned and operated a fleet of waste oil collection trucks, several waste oil transfer stations, and a facility for refining waste oil for resale. The employee, Mr. Howard, was a truck driver for the company. He was also its sole representative in a very large geographical area. He was responsible for collecting waste, completing necessary documentation, maintaining the appellant's property in the region, billing, and responding to calls from customers and regulators. When he was on holidays, the company did not do business in the region. However, Mr. Howard did not have any managerial or supervisory function. He took no role in shaping any aspect of the company's corporate policies. The Court stated that Mr. Howard had many responsibilities and was given wide discretion in the exercise of those responsibilities. Those who dealt with the company in that geographical area equated Mr. Howard with the company. But the Court held that neither of these facts established the kind of governing executive authority that must exist according to *The Rhone* before the identification theory will apply. Mr. Howard had extensive authority over matters arising out of the performance of tasks he was employed to do. But he had no authority to devise or develop corporate policy or to make corporate decisions that went beyond those arising out of the transfer and transportation of waste.

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71 As summarized in *Stuart* (note 1), at 235-236.

72 *The Rhone* (note 70), at 526.

73 (1997), 114 C.C.C. (3d) 214 (Ont.C.A.).

The Court held that Mr. Howard's position was much like that of the tugboat captain in *The Rhone*. Both had extensive responsibilities and discretion, but neither had the power to design and supervise the implementation of corporate policy. Thus, the company was acquitted on the charge of knowingly giving false information, because Mr. Howard's *mens rea* in committing the offence could not be attributed to the company under the identification theory. (The corporation was convicted of a separate, strict liability offence on the basis that it had not exercised due diligence to avoid the commission of that offence.)

On the other hand, *The Rhone* application of the identification doctrine was not applied in the recent case of *R. v. Church of Scientology of Toronto*<sup>74</sup> which was decided by a different panel of Ontario Court of Appeal judges. In that case the Church of Scientology of Toronto and Jacqueline Matz, a senior member of the Church, were each convicted of two counts of breach of trust, a *mens rea* offence in the Criminal Code. The church, a non-profit religious corporation, authorized members to seek employment and thereby infiltrate and obtain confidential information from government and other agencies who were perceived to be enemies of the church. Members did secure such employment and took confidential documents from the agencies in breach of their oaths of secrecy as public officials. These infiltration activities were run by Matz out of the Intelligence Bureau, which was a branch within the Guardian's Office of the church. The Guardian's Office was one of the two arms which controlled the church and its activities. Matz was "the Director of Operations" and was responsible for supervising the agents who had been planted in the agencies. The church argued that it was not responsible for the actions of "renegade members". The Crown argued that the church was liable under the doctrine of corporate criminal liability.

The Court of Appeal held that *The Rhone* did not apply to this case, stating:<sup>75</sup>

"The discussions by *Iacobucci J.* in *The Rhone* and *Estey J.* in *Canadian Dredge & Dock* are premised on a corporate structure in which ultimate executive authority lies with the board of directors. The identification doctrine renders the corporation liable as a result of the acts, in addition to those of the board of directors, of those persons to whom the board has expressly or impliedly delegated executive authority. That, however, was not this case. The Church operated in the context of a rigid command structure in which the board of directors was irrelevant. The board of directors did not appoint, much less delegate to, the senior officials of the Church. In fact, the members of the board were themselves required to sign undated letters of resignation. The evidence is clear that the appellant's board of directors had no ex-

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74 (1997), 116 C.C.C. (3d) 1 (Ont.C.A.).

75 Ibid. at 85-88.

ecutive authority. Thus, it is beside the point to attempt to apply principles relating to the degree of delegation of that authority.

In the command structure of the Church of Scientology generally and the Church of Scientology of Toronto in particular, *de facto* control was divided between the Executive Director and the Assistant Guardian Toronto. The Board of Directors was, on the evidence, irrelevant. Accordingly, once the jury found that the Guardian's Office Toronto was not an autonomous body (i.e., that it was a part of the Church), they were bound to find the appellant liable for the unlawful acts committed by the persons in that office, inasmuch as *de facto* control resided there."

In *Canadian Dredge & Dock, Estey J.*<sup>76</sup> said that the identification theory was "inspired in the common law in order to find some pragmatic, acceptable middle ground which would see a corporation under the umbrella of the criminal law of the community but which would not saddle the corporation with the criminal wrongs of all of its employees and agents". This pragmatic approach dictates that the corporation be liable for the acts of persons in *de facto* control of the corporation, be it the board of directors, or, as in this case, the persons in control of the board of directors. The *dicta* from *The Rhone* was, in my view, not intended to apply to a case where there is no issue of delegation.

(e) *Criticisms of the Identification Doctrine*

(i) *Lack of Precision*

As the above discussion illustrates, the identification doctrine, or at least the "directing mind" component of it, is still in a state of flux in Canada. *Canadian Dredge & Dock* and *The Rhone* leave a choice between

- (i) a decentralized notion of who in the corporation should be held in law to have sufficient *de facto* control of an aspect of the corporation's business to justify identifying that person's actions as the corporation's actions; and
- (ii) a highly centralized notion that directing minds of a corporation are those relatively few senior corporate officers who have "governing executive authority" in the sense of designing corporate policy, but not relatively senior officials who simply carry out such policy.

In my opinion, the latter approach is wholly inappropriate to bring corporations under the control of the criminal law in a fair and rational way. This is especially so when the highly centralized model is applied to increasingly large, complex

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<sup>76</sup> *Canadian Dredge and Dock* (note 7), at 701.

corporations where corporate policy may be centralized but corporate operations are geographically and functionally diffuse.

Apart from the current uncertainty of where the identification test is headed in Canada, there will always be a degree of uncertainty in the specific application of the test regardless of whether the ultimate test is the centralized or decentralized version. The application of the test must occur on a case-by-case, fact-specific basis. The organizational and command structure and complexity of corporations is so varied between small corporations and multinational corporations that a certain degree of flexibility is essential in both the wording and the application of the identification theory.

(ii) *The Fallacy of Identification*

The identification doctrine is used to attribute criminal responsibility to collective entities. These entities function by group effort not by individual effort, yet the identification theory seems to assume that responsibility for the behaviour of the collectivity can be assigned by looking at the behaviour of key individuals within the group. In simple, hierarchical groups that assumption is less suspect than in large, diffuse groups. More importantly it masks the reality that some acts may flow from group norms and policy and may be difficult to attribute to any particular individual within the group.

Professor *Wells* aptly describes one aspect of the identification fallacy in the following words:

"The idea that only certain people act *as* the company presents a problem over and above the difficulties attending any such line-drawing exercise. While the company is regarded as a fiction, it is none the less real. Whatever the managing director does as an individual will be entirely different in its scope and effect from anything a managing director does within the company. The same goes for other workers. It is true that they could engage in a fight in the canteen which would be no different in its impact than a fight in the local pub. But once the individual in the company does anything which is part of the greater enterprise of which she is a part, then she contributes to the corporate effect. Whatever the branch manager of Tesco did with special offers (the subject of this prosecution) he was only able to do because the company had invested in and maintained the shop, the supplies to it, the posters advertising the offer, and so on. The idea that some people within a corporation act as that corporation while others do not is fundamentally flawed."<sup>77</sup>

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77 *Wells* (note 15), at 109-110.

The conceptual flaw in the identification theory is magnified on a practical level by the *possible* judicial tendency not to recognize aggregate behaviour for the purposes of corporate criminal liability. The clearest illustration of this failure to date can be found in *Wells'* description of the reckless manslaughter prosecution of *P & O European Ferries (Dover) Ltd.* for the deaths arising out of the capsizing of its ferry, the *Herald of Free Enterprise*.<sup>78</sup>

There is no reason in principle why aggregation should not be accepted by the courts. It has been accepted in at least one case from United States.<sup>79</sup> In any event, application of general principles of causation and party liability (complicity) in Canada are very broad and should keep the need to rely upon aggregation to a minimum. For example, the test for causation in Canada is met if the accused's conduct contributed to the criminal harm *in any way which is more than trivial*.<sup>80</sup> The accused's conduct does not have to be the sole cause or the primary cause; it need only be a contributing cause which is beyond the *de minimus* range. Likewise, by the very act of employing persons and providing the facilities for carrying out the corporation's business, the *actus reus* of aiding, encouraging or facilitating an offence is easily met. The *mens rea* can be met by intention, recklessness or wilful blindness of directing minds to wrongful or risky conduct. In the context of corporations, ignoring dangers which have been brought to the corporation's attention either through previous incidents, or otherwise, constitutes wilful blindness.

Another conceptual weakness in the use of the identification theory for establishing corporate criminal liability is the potential difficulty of taking notions of fault which are designed for human behaviour and applying them to a non-human entity with its own unique structure and modes of functioning. This and other inherent weaknesses in the identification theory have encouraged theorists such as *Fisse* and *Wells* to create a separate theory or doctrine of genuine corporate fault.

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78 *Ibid.* at 44-48, 68-72 and 111-113.

79 *United States v. Bank of New England*, 821 F.2d 844 (1st Cir.C.A.), cert. denied, 484 U.S. 943 (1987).

80 *R. v. Smithers* (1977), 34 C.C.C. (2d) 427 (S.C.C.).

### VIII. A Canadian Proposal for the Codification of Corporate Criminal Liability

In 1993, the Federal Government tabled a White Paper in Parliament. The White Paper contained proposals for a recodification of the general principles of criminal law. The White Paper proposals have to date been ignored by Parliament, including a proposal to codify a definition of corporate criminal liability. Section 22 of the White Paper provides:

A corporation commits a *mens rea* offence if

- (a) one or more of its representatives, acting under its express, implied or apparent authority, do or make, individually or collectively, the act or omission specified in the description of the offence, and
- (b) one or more of its representatives
  - (i) knows that the occurrence described in paragraph (a) is taking place, has taken place, might take place or will take place;
  - (ii) has its express or implied authority to direct, manage or control its activities in the area concerned; and
  - (iii) has, while executing that authority, the state of mind required for the commission of the offence,

whether or not the representatives referred to in paragraph (a) and those referred to in paragraph (b) are the same person or persons, whether or not any of them is identified, and whether or not any of them has been prosecuted for or convicted of that offence.

The proposal defines "representative" as including "a director, officer, employee, member or agent" and "corporation" includes "a public body, body corporate, society, company, partnership and trade union". The White Paper also includes a similar provision on corporate liability for negligence offences in which fault depends not on knowledge of the criminal act but on lack of reasonable care to prevent the offence.

The above White Paper proposal does attempt to go beyond the narrow application of vicarious liability for *actus reus* and the identification doctrine for *mens rea*. First, the proposal expressly recognizes that corporate criminal liability can be based on aggregate behaviour. Secondly, the proposal states that corporate criminal liability can be imposed provided the *actus reus* and *mens rea* are proven, even if the Crown can not establish which specific employees or agents in the corporation committed the *actus reus* and *mens rea*. Thirdly, the proposal specifically recognizes that the directing mind who has the *mens rea* for an offence does not have to be the person who physically committed the offence.

Fourthly, the proposal uses language which is broader than that used in *The Rhone* in describing which persons in a corporation are its directing minds - persons who have express or implied authority to direct, manage or control its activities in the area concerned.<sup>81</sup> Although the White Paper proposal shows some recognition of the complex and diffuse organizational structure of modern corporations, there is no real effort to base corporate criminal liability on a truly separate notion of genuine corporate fault such as those which are espoused by commentators like *Fisse* and *Wells*.<sup>82</sup>

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81 *Stuart* (note 1), at 245-246. Professor *Stuart* suggests that the White Paper proposal has not captured the pragmatic essence of the approach in *Canadian Dredge & Dock*. The proposal requires representatives of the corporation to be acting under the "express or implied authority" of the company, but Professor *Stuart* suggests that it "is not clear why a corporation should necessarily be immune from punishment if an employee acted without authority but for the corporation's benefit. He says the problem may be that the corporation has not addressed the question of authority to act and that is the very reason why harm has occurred. That criticism may be accurate but the courts also have a lot of discretion when it comes to declaring or stating what a person's "implied" authority was.

82 See *supra* text at note 15.

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# The Basis for Criminal Responsibility of Collective Entities in Italy

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## 1. The Normative and Judicial Framework

The growing complexity of social subjects which are capable of committing criminal offences in various ways represents a trend which is common in the majority of legal systems. The capacity to adapt respective penal systems depends on the role that the traditional model of the criminal offence plays, in that the perpetrator of the crime as much as the victim can be considered as two distinct individuals both of whom possess human features. In Italy, for example, this "bipolar" model of the criminal offence is of such authority that it even influences the conditions of the constitutional framework of the penal system. The meaning of concepts such as the "personality of criminal responsibility" and the "re-education of the offender", which are expressly used in art. 27, paragraphs 1 and 3 of the Constitution, are essentially related to persons, that is individuals.

The classical construction of criminal offences based on a human scale is increasingly unable to deal with the emergence of new, collective or complex entities, the latter of which prevail ever more in the most characteristic sectors of modern crime, for example, organized and economic crime.<sup>1</sup> We can see a different reaction of the Italian system, especially in these fields, to the crisis of the classical model of the criminal offence. The degree of such a reaction depends to a great extent on the seriousness by which the danger of each criminal problem is perceived.

Concerning organized crime, the Italian Parliament has responded to the Mafia challenge with a long and varied series of repressive instruments, including many elements of criminal procedure. Most significantly, this has involved an increase in the number of offences relating to criminal associations and an increase in the

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<sup>1</sup> The criminogenetic effects of this complexity of modern economic entities is underlined in the Recommendations No R (81) 12 of the Council of Europe: see *Council of Europe*, Economic Crime, Strasbourg 1981, p. 24.

seriousness of these offences. This was made possible with the introduction in 1982 of a special definition of "Mafiosa criminal association" (art. 416 bis c.p.) to the criminal code.

No less important have been the efforts of judges to highlight types of criminal responsibility which are more in line with the complexity of modern criminal organizations. The clearest example of this was given by the criteria of "implicit consent" which the Court of Cassation elaborated upon in 1992. This was done in order to attribute a series of brutal murders not only to the members of individual criminal gangs, forming the "Mafia-holding", but also to the bosses who made up the upper echelons where the real decision-makers were located.<sup>2</sup> Apparently, the aforementioned criterion of "implicit consent" has respected the traditional, theoretical framework which, as regards the collective achievement of offences, distinguishes between principles and accessories. In reality, the fundamental reason for a link between Mafia bosses and individual murders is the objective interest of the Mafia organization to create a climate of intimidation for whomsoever opposes their actions, and more generally for society as a whole. And since the danger of the Mafia can be efficaciously fought, striking not only at the executive arms of the organization, but more directly at the real perpetrators of operating strategy, the juridical solution (the criterion of implicit consent) is probably not rigorous on a technical-legal level, but it is certainly important in satisfying the aforementioned needs of criminal policy.

The theoretical obstacle to admitting forms of collective criminal responsibility in the Italian legal system is obdurate. Indeed, this kind of responsibility has not only been labelled - and recently - "more than heresy, judicial blasphemy",<sup>3</sup> but it also remains excluded from the two drafts of recodification in 1992 and 1995 of the Italian penal system.<sup>4</sup> The importance of this general theoretical position is particularly observed when referred to the theme of criminal responsibility (in the strict sense) of judicial persons (corporations). Not only is such a negation exceed-

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2 *Corte di Cassazione*, 30 Gennaio 1992, in: *Foro Italiano*, 1992, Part II, p. 15. As to this leading case see my analysis: *Mafia-Kuppel-Fall*, in: *Albin Eser/Barbara Huber/Karin Cornils* (eds.), *Einzelverantwortung und Mitverantwortung im Strafrecht*, Freiburg 1998, p. 418 ff.

3 *Francesco Antolisei*, *Manuale di diritto penale. Leggi complementari - I. I reati societari, bancari, di lavoro e previdenza*, *Conti* (ed.), 10th edition Milano 1997, p. 83.

4 For the Italian Draft-1992, compared with other new European penal codes or drafts (France, Great Britain, Spain), see *Vincenzo Militello*, *Il diritto penale nel tempo della "ricodificazione"*, *Rivista italiana di diritto e procedura penale* 1995, p. 796 ff. For the Draft-1995 see *Roland Riz*, *Per un nuovo codice penale: problemi e itinerari*, *Indice penale* 1995, p. 5 f.

ingly common among Italian criminal scholars but it stands out in legislation where the traditional anchorage of Italian law to the principle of *societas delinquere non potest* has still not been impaired. When a direct responsibility of corporations was envisaged, it was not criminal (in the strict sense) but administrative-criminal, even in the growing sector of recent economic legislation.<sup>5</sup>

It is sufficient to mention here the example of the anti-trust system, which was introduced in Italy by Law No. 287/1990 and which follows the European model (art. 85-86 of the E.E.C. Treaty). A special administrative controlling authority has the power to impose fines, the amount of which cannot exceed a predetermined limit of the annual turnover of the offending company. Moreover, we cannot escape the structural analogy between these fines and those which are envisaged for corporations in the penal systems of common law. On the one hand, this indicates that types of direct responsibility for collective bodies exist also in countries which are still tied to a traditional negation of the criminal capacity of corporations. On the other hand, this analogy expresses the uncertainty of labelling the nature of sanctions, thereby confirming the necessity of reconsidering the bases of criminal responsibility for collective subjects.

## 2. Various Approaches to the Problem of the Criminal Responsibility of Collective Bodies

Until now, we have stated that in Italy the prohibition of criminal responsibility for collective bodies operates in a less rigid way in relation to organized crime and, conversely, more rigidly as regards economic crime. These differences are probably connected to the seriousness of the phenomena in the collective perception and the consequent politico-criminal demands in making available instruments which can oppose and prevent such phenomena. This fact permits the highlighting of at least three more general ways by which we can tackle the theoretical problem of the fundamental principles of the criminal responsibility of collective entities. I would like to label the first approach deductive-idealist, the second inductive-empiricist and the third dialectical-critico.

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5 For further comment on this situation in the Italian penal system see *Vincenzo Militello*, Die strafrechtliche Haftung des Unternehmens und der Unternehmensorgane in Italien, in: Schünemann/de Figueiredo Dias (eds.), Bausteine eines europäischen Strafrechtssystems - Coimbra Symposium für Claus Roxin, Köln-Berlin-Bonn-München 1995, p. 321 f.; *Carlo Enrico Paliero*, Criminal Liability of Corporations - Italy, in: Hans de Doelder/Klaus Tiedemann (eds.), La criminalisation du comportement collectif - Criminal Liability of Corporations, The Hague 1996, p. 268 f.

The deductive-idealist viewpoint departs from the basic principles of liberal criminal law from which is derived the absolute incompatibility of any type of criminal responsibility (in the strict sense) of collective bodies.<sup>6</sup> The demands of a human perpetrator determine essential elements of the offence, like the action, the *mens rea* and the nature of the punishment. More generally speaking, the entire foundation of criminal law has been modelled on the person and could only be extended to include collective bodies with difficulty. The same constitutional limits of criminal law take on a 'personalistic aspect' which is incompatible with the criminal responsibility (in the strict sense) of legal persons. Many references demonstrate this aspect: the 'sense of humanity' as regards the punishment, the 'aim of re-educating the offender' and, more generally, the 'personality of criminal responsibility', all of which are contained in art. 27 of the Italian Constitution.<sup>7</sup>

In contrast, the inductive-empiricist approach underlines the seriousness of the social danger of economic crime and demands a suitable response to this phenomenon. In this way, criminal law must not limit its protection to that of micro-aggression, which may have been committed by socially-disadvantaged persons, but it must direct its forces against the vast sector of 'economic crimes' whose seriousness is growing not only quantitatively but qualitatively. It is sufficient to think of environmental crimes but also more varied offences, such as money laundering, corruption and others which are often linked to organized crime. Furthermore, the criminal capacity of collective bodies remains intact, notwithstanding the punishment of individual managers, and because the real decision-makers of such acts are exceedingly difficult to track down and they are, in any case, easily replaced. One conclusion then appears to be obligatory: a serious opposition to crime, as specifically linked to collective subjects, does not exclude a direct recognition of criminal responsibility and the use of suitable sanctions.<sup>8</sup> It is interesting to

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6 For an example of this traditional point of view in Italian scholarship see *Giuseppe Maggiore*, *Principi di diritto penale*, I Parte generale, 2nd edition Bologna 1937, p. 310.

7 On this constitutional norm as an "insurmountable obstacle" for the introduction of criminal responsibility of corporations in the Italian penal system, *Mario Romano*, *Societas delinquere non potest*, *Rivista italiana di diritto e procedura penale* 1995, p. 1036. See also *Alberto Alessandri*, *Commento all'art. 27 comma 1*, in: *Alberto Alessandri et al.*, *Commentario alla Costituzione. Rapporti civili (art. 27-28)*, Bologna-Roma 1991, p. 150 f.; *Agata Castellana*, *Diritto penale dell'Unione Europea e principio "societas delinquere non potest"*, *Rivista trimestrale di diritto penale dell'economia* 1996, p. 789 f.

8 See *Paliero* (note 5), p. 252 f.; *Klaus Tiedemann*, *La criminalisation du comportement collectif*, in: *Hans de Doelder/Klaus Tiedemann* (note 5), p. 14 ff.; *Günter Heine*, *Kollektive Verantwortlichkeit*, in: *Albin Eser/Barbara Huber/Karin Cornils* (note 2), p. 114 f.; *Bernd Schünemann*, *Plädoyer zur Einführung einer Unternehmenskuratel*, in: *Bernd Schünemann* (ed.), *Deutsche Wiedervereinigung*, Bd. III, Köln 1996, p. 129 ff.

note that exactly this type of reasoning has been adopted by the new French penal code to introduce the criminal responsibility of *personnes morales* (art. 122-2).<sup>9</sup>

In these two opposing approaches it is, however, difficult to deny a common element, a sort of unilaterality in the coherent development of respective conceptual starting blocks. This can be avoided using a dialectical-critical approach which tests the current validity of the traditional framework of criminal responsibility, despite historical differences between liberal criminal law and new demands of protection. If we recognise that the gravity of a corporate crime is the basic political-criminal idea, we can admit that the framework of the legitimacy of criminal intervention has not been 'carved out of stone'.

On the contrary, it is precisely the efficacy of the criminal system, in opposing the more serious offences of social interest, which must ensure a protecting role. The efficiency of the criminal legal system, therefore, represents a condition of its own legitimacy, provided that it is capable of culturally orienting the collectivity towards its most important values. The clash between tradition, dogmatic principles and the political-criminal needs of protection requires careful balancing in order to guarantee the adaptation of the traditional framework of criminal law to the different reality of collective crime. Personally, I believe that this may be a preferable theoretical approach, even if the delicacy of such an operation only permits a brief example in this paper.

### **3. The Adaptation of Basic Theoretical Categories of Crime to the Characteristics of Collective Entities: the Example of Culpability**

The easiest way to reconcile the limits of penal intervention and the political-criminal efficiency of collective subjects is to try to adapt traditional categories to these collectivities. An interesting development in this field can be found in a recent and authoritative German doctrine which considered the organizational structure of the corporation as the real basis of its economic crime. In particular, this basis has been identified in omitting preventive measures to avoid an offence, which was carried out by individuals. On a more dogmatic level, we must point out that this idea is connected to the ascription model which already exists in many criminal systems. It provides sanctions for crimes of persons whose inca-

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<sup>9</sup> On this innovation, see *Giulio De Simone*, Il nuovo codice penale francese e la responsabilità delle *personnes morales*, *Rivista italiana di diritto e procedura penale* 1995, p. 191 ff.

capacity has been voluntarily caused by themselves. If many scholars have been able to identify in these cases the necessary component of the *mens rea* in voluntarily pre-determining natural incapacity, we can analogically accept a 'culpability' which is the foundation of the responsibility of this collective body.<sup>10</sup>

It is certain that the attempt to apply such an ascription model to an event which comprises two subjects can be problematic, even though it may be tied to an organic relationship (like the corporation and its management). This "pre-guilt model" has been constructed with the aim of explaining the very different phenomenon of the blameworthiness of an individual person. In this latter case, it is necessary to ensure that the commission of a crime and the subjective component occur at the same time.<sup>11</sup> In a corporate context, however, the concept of pre-guilt is not important in a temporal dimension but it is useful in overcoming (the defect of) the criminal subjectivity of collective entities. Moreover, in this theory, the concept of organizational culpability, more than limiting any criminal responsibility which must be constantly verified, seems exclusively to constitute a "principle of the ascription of responsibility". In the first expounding of this theory, to excluding responsibility of the corporations it was not sufficient to assert that it had done all it could do to avoid the organizational defects which had caused economic crime.<sup>12</sup>

However, in my opinion, it is essential to verify if and at what point excuses can be recognized as regards a collective subject and, moreover, which of these can operate specifically in the economic field. For example, and drawing on a recent Italian experience, one should verify that the widespread practice of corruption in a specified sector of the market could constitute a situation of 'necessity' for the corporation which wants to insert itself or survive in that sector. In this case, this necessity would be made up of the payment of a sum which, although not owed,

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10 See *Klaus Tiedemann*, Die "Bebußung" von Unternehmen nach dem 2. Gesetz zur Bekämpfung der Wirtschaftskriminalität, NJW 1988, p. 1172 f. More recently, discussion about an "organizational mistake" or "defect" *Schünemann* (note 8), p. 137, 140.

11 For a comparison between the Italian solutions and the German solution to this problem, *Vincenzo Militello*, Modelli di responsabilità penale per incapacità procurata e principio di colpevolezza, in: *Alfonso Stile* (ed.), *Giudizio di colpevolezza e responsabilità oggettiva*, Napoli 1989, p. 486 ff.

12 For criticism to the theory of "organized culpability" see *Romano* (note 7), p. 1041 f.; *Castellana* (note 7), p. 809 f.; *Hans Achenbach*, Ahndende Sanktionen gegen Unternehmen und die für sie handelnden Personen im deutschen Recht, in: *Schünemann/de Figueiredo Dias* (note 5), p. 303.

permits the life of the corporation in the market.<sup>13</sup> Until now, the judicial response has been negative, when analogous questions were asked about the criminal responsibility of the top management of important corporations. However, the recognition of similar excuses, excluding responsibility, could contribute to legitimizing 'organized culpability' by establishing the criminal responsibility of the corporation.<sup>14</sup> In this field, the 'modernization' of the classical concept of culpability through a better definition of its exclusion can find its legitimation in the abovementioned growing understanding of the necessity of adequate measures against corporate crime: the limitation of the recognition of excuses depends on the historically changeable normative understanding of the society.<sup>15</sup>

In order to draw a brief conclusion from these notes, it is necessary to go beyond the anthropomorphism of criminal law while not neglecting the fundamental principles which protect the just application of the law. Since this guaranteeing framework has been developed over a period of almost two centuries, it is easy to understand the difficulties which will be encountered in such an operation. As previously stated, this genetic manipulation will occur more rapidly with growing awareness as regards the danger of collective subjects in modern crime. I am confident that an international meeting, such as this here, is an important contribution to developing this conceptual task.

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13 A similar conflict was related to infringements of EU competition law: see *Markus Wage-mann*, *Rechtfertigungs- und Entschuldigungsgründe im Bußgeldrecht der Europäischen Gemeinschaften*, Heidelberg 1992; *Gerhard Dannecker*, *Justification and Excuses in the European Community - Adjudication of the Court of Justice of the European Community and Tendencies of the National Legal Systems as a Basis for a Supranational Regulation*, in: *European Journal of Crime, Criminal Law and Criminal Justice* 1993, p. 232 f.

14 The significance of the excusing conditions for the development of a modern criminal law system, in which culpability plays an important role was emphasized before: *Vincenzo Militello*, *Entschuldigungsgründe in der Neukodifizierung des Strafrechts*, ZStW 107 (1995), p. 978.

15 *Winfried Hassemer*, *Rechtfertigung und Entschuldigung im Strafrecht. Thesen und Kommentare*, in: *Albin Eser/George Fletcher (eds.), Rechtfertigung und Entschuldigung. Rechtsvergleichende Perspektiven*, Freiburg 1987, vol. I, p. 207.



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## **Criminal Liability of Collective Entities - The Danish Model\***

**Gorm Toftegaard Nielsen, Aarhus**

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### **I. Why Criminal Liability for Companies?**

The framing of a penal system must harmonise with the moral notion of its society. And the most important reason for having criminal liability for companies is simply that it is perceived to be just. Ordinary people, the press, have no problems in judging and prejudging companies. One company may be accused of selling spoiled foods, another of polluting a watercourse, a third of underpaying its workers, etc. There is no doubt in my view that the public perceives companies and firms as subjects capable of carrying a responsibility, subjects which society may have an urgent need to penalise with sanctions. In slightly provocative terms, one could say that it takes a lawyer to see a problem in this.

Several arguments speak in favour of letting any criminal liability fall on the companies and not on single individuals who have acted in the name of the company. In ordinary crime, the profits or the benefit of the crime will typically fall to the criminal persons, that is to the natural persons performing the crime. In cases of violation of commercial and industrial legal regulation, the benefit will typically fall to the companies involved. A penal system should adjust itself to reality.

As mentioned, the profits of company violations fall to the companies. Any penalty should fall on the person who benefited from the violation. If the measure of a fine is to be determined by the profits made from the crime, the penalty must fall

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\* Literature in English on the Danish rules is very limited. *Lars Bo Langsted/Vagn Greve/Peter Garde*, *Criminal Law in Denmark*, The Hague 1998 gives an excellent survey of Danish criminal law and criminal procedure, but it does not treat the subject of this article. *Vagn Greve*, *Collective Responsibility from a Danish Point of View*, in: Albin Eser/Barbara Huber/Karin Cornils (eds.), *Einzelverantwortung und Mitverantwortung im Strafrecht*, Freiburg 1998, pp. 117-129. In Danish: *Straffelovsrådets Betænkning Nr. 1289 om juridiske personers bødeansvar* (the Standing Committee for Criminal Law: Report No. 1289 on Legal Persons' Fine-responsibility); and *Gorm Toftegaard Nielsen*, in: *Vagn Greve/Gorm Toftegaard Nielsen/Asbjørn Jensen*, *The Commented Edition of the Criminal Code - The General Part*, 6th edition, Copenhagen 1997, pp. 212-232, with extensive references to Danish literature.

on the company. One could of course adopt a model allowing a person to be penalised, and the profits to be confiscated, from the company. However, no such model would be likely to work effectively.

It is both difficult and highly demanding in resources to launch an investigation which will prove without reasonable doubt that a member of management is behind a violation. Often the responsibility will, therefore, land at too low a level in the company. Any such investigation would also be most unpleasant for the atmosphere within the company. It can only succeed if police succeed in breaking the loyalty of the employees. And to do so is not a reasonable task for the law to perform, except in extreme cases.

If the companies are penalised, the opportunity arises for easing the criminal responsibility of the employees. The presumption of our penal system that everybody knows the law is unrealistic within commercial law. There is no basis in reality for requiring an ordinary employee to be familiar with the environmental protection law, price control law, marketing law, etc. Any sweeping personal criminal liability can, therefore, appear antiquated. In any case, in the event of a price law violation, for example, it would be entirely unnecessary to penalise 20 shop assistants. Conversely, in systems with no company liability, there is a tendency to stretch the rules governing management and board responsibility far beyond reasonable limits. Roughly speaking, in Danish law a leader is responsible if he should have prevented the violation. This can easily lead to charges of negligence being made on no grounds.

The first criminal provision directed at companies was introduced in Denmark with the Butter Act in 1926. Since then, countless acts have been added, and currently more than 200 acts provide criminal liability for companies. When the criminal code was changed in 1996, a general regulation governing company liability was introduced.<sup>1</sup> Liability exists only if provided by the act in question. If so provided, the criminal code regulation applies. The general elements of the criminal code, including *mens rea* and complicity, also apply in case of breaches of other acts. There is no statutory authority for company liability in case of breaches of the criminal code. Thus a company cannot be punished for manslaughter. The converse applies in Norway,<sup>2</sup> but in Denmark we have found that company responsibility is naturally linked to commercial and industrial legal regulation.

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1 Act No. 474 of 26 June 1996 on amendments to Chapter 5 ss. 25-27.

2 *Magnus Matningsdal*, in: Anders Bratholm/Magnus Matningsdal (eds.), *Straffeloven, Kommenteret utgave* (The Criminal Code, Commented Edition), vol. 2, Oslo 1995, p. 911.

## II. Which Legal Persons?

Criminal liability can be incurred by joint-stock companies and other companies with limited liability. Traditionally, co-operative societies, which have played a major role in Danish food production, were included as well. In most co-operatives the shareholders were also personally liable. In 1996, the rules were broadened in scope to provide liability for all entities with more than one owner.

One-person businesses are governed by the law if they are similar to other enterprises in terms of size and organisation. The delimitation is vague, as other enterprises are not characterised by their size and organisation. During the parliamentary hearing of the bill, the Minister for Justice stated that one-person businesses should have 10-20 employees in order to come under the law. Therefore, the courts will probably require 20 employees before applying the law to a one-person business. In Norway, no similar restriction applies; there one employee is enough.<sup>3</sup>

The Danish exclusion of small one-person businesses has meant that the Parliament has had to retain certain rules on strict liability, that is to say, cases where the owner is penalised personally for a breach committed by an employee, simply because he is the owner. No guilt is thus required. This is of course a highly problematic state of affairs. In the labour protection legislation, the strict liability is thus upheld precisely in order to make the owner and the employees of the small firm equal in the eyes of the law with their fellow employees in major companies. If, for example, a truck driver breaks the driving and resting time regulations, his employer who runs his business as a one-person business can be penalised.<sup>4</sup>

In order to ensure equal treatment of private and public entities, criminal liability has also been extended first to local governments and now also to the state. It may seem absurd that the state can be fined. The money is taken from the Treasury and given back to the Treasury, quite apart from the fact that the legal system has of-

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3 Ibid, p. 917.

4 In a decision of 4 November 1994 The Supreme Court approved of the employer's objective liability. The question on whether this liability was compatible with the EU-law was presented to the EU-Court which in case 326/88-Hansen & Søn found that it was. Furthermore, the Supreme Court also found it compatible with the European Convention on Human Rights, cf. art. 6(2). Ugeskrift for Retsvæsen (The Weekly Courts Report) U 1995.9 H (To be read as follows: U = The Weekly Courts Report, year, page, court [H = Supreme Court]).

ten spent the entire amount in deciding whether the money should be taken from the Treasury in the first place. The reason for introducing criminal liability for the state is that to punish private entities alone, and not the state, would distort competition. An example would be if only private railways, but not the state railway, were liable for sanctions.

The purpose of providing criminal liability for public entities is thus to ensure equal treatment with private organisations. Criminal liability, therefore, only affects situations in which the state acts in a manner which is identical to or comparable to the activities of the private sector. In Denmark, an employer must collect income taxes from his employees. This applies to both public and private employers. A public authority can, therefore, be punished for breaking these rules. If, on the other hand, public authorities have acted as authorities and broken the law, they cannot be punished. If, for example, a city council has granted an unlawful building permit, the council cannot be punished for this. The law may allow a civil servant to be punished in any particular case, but it never happens.

### **III. Charge Conditions**

Until the 90s, there was considerable doubt as to whether company liability was a strict liability. In a very important 1984 decision, the Danish Supreme Court termed it strict liability when a company was sanctioned for an employee's willful violation.<sup>5</sup>

The law is now clear: a company can only be penalised if the violation was willful or negligent. Almost all of the relevant legal acts require no more than negligence for applying sanctions to natural persons. In such cases, it is also enough if the company has acted negligently.

The question of guilt is typically satisfied by an employee having negligently broken the rules. This is enough. Whether or not any blame attaches to management is irrelevant under Danish law. The company will also be found guilty in cases where management has been very active in ensuring observance of the law. The fact that it is irrelevant whether management has been active or passive is probably the question attracting most debate. But if, in order to obtain judgment against the company, the prosecutor has to prove that the manager is personally liable, he

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5 U 1984.990 H.

may as well bring the charges against him personally. If managerial negligence must be proved, company liability will lose much of its meaning.

In everyday conversation, it creates no problems to say that a company should have acted differently. The Danish concept is that company liability should be administered in accordance with this ordinary precept. The active employee need not, therefore, be identified. Neither is it required that he has personally acted negligently. Other persons in the company may have ignored their duties. Lawyers can undoubtedly list many different cases and discuss them in depth. In real life it is very rare for any discussion to arise on the question of whether a company's violation was negligent or not.

There are, however, two major limitations to a company's liability. The violation could, for example, be caused by force majeure or a similar situation. If that is so, the company is not guilty. If an employee is injured because the forklift truck which the company bought breaks down because of the fault of a supplier, the company will only be guilty if it has seen or should have seen the fault. Often this will not be the case.

Another limitation is that the company can be penalised if its employee acts in the interest of the company, and not in his own name or that of a third party, and his action is not abnormal. The fact that he is acting contrary to an internal instruction does not make the action abnormal.<sup>6</sup>

In a modern society with a high level of specialisation, a commercial enterprise will often have jobs performed by another enterprise. If the latter firm commits an error leading to a violation, a crucial problem arises. Which firm should be penalised? The law in Denmark is unclear on this point and probably more pragmatic than analytic. In airports where an airline has little activity, the check-in will often be left to the staff of another airline. If such staff miss the fact that passengers are presenting false entry papers, the punishment in Denmark will fall on the company flying the passengers and not on the company which performed the check-in, and which thus made the error.<sup>7</sup> It is easy to see that it can be difficult to enforce any judgment against the check-in airline. Merely obtaining a judgment against it in Denmark can be very complicated. But does that justify placing criminal liability on the other airline?

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6 U 1994.158 H. An employee had used the fork on the fork-lift truck to lift himself, even though there was a basket for this purpose. The High Court acquitted. The Supreme Court convicted, as the act was not unusual enough for a dismissal.

7 U 1991.700 H. There have been no amendments in this area in the 1996-Act.

#### **IV. Identity Problems**

Company liability entails a problem which does not arise in connection with natural persons. A company can undergo changes to the extent where it is doubtful whether it is the same company. Can the company thus changed be punished for the violations committed by the old company? In deciding the size of any punishment, the question may also arise whether account should be taken of the fact that the old company had several previous sentences against it. Such identity problems are not regulated by law in Denmark and are probably too complex to allow any regulation by rule of law.

The main lines are that it is irrelevant whether the company has been transferred to new owners. It is also typically irrelevant whether the company has been merged with another company. The law is less clear on the issue of division, and similarly if the new owners of a company have changed the company's activities completely. Court practice is somewhat opaque in this area.

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# Theoretical Bases for the Criminal Liability of Legal Persona in South Africa

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## I. Introduction

The present paper examines and evaluates the theoretical bases for the criminal liability of legal persona in South Africa. From the point of view of its *sources*, the criminal liability of legal persona is governed by South African statutory law and common law: Section 332(1) of the Criminal Procedure Act<sup>1</sup> makes special provision for the criminal liability of corporate bodies, while legal persona may also be held criminally liable in terms of the doctrines of vicarious responsibility and participation. From the point of view of its *classification*, the issue or problem of the criminal liability of legal persona is usually associated with (i) the act and fault as requisites for criminal liability; and (ii) the doctrine of vicarious responsibility,<sup>2</sup> with an occasional reference to the doctrine of participation. However, the precise nature of the relationship and interaction between the phenomenon of criminal liability of legal persona, on the one hand, and the doctrines of vicarious responsibility and participation, on the other, is anything but clear from the reported cases and legal literature.

## II. Section 332(1)

Section 332(1), which is the main source for the criminal liability of legal persona, reads as follows:<sup>3</sup>

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1 51 of 1977.

2 See *Loubser*, in: Joubert (ed.), *The Law of South Africa*, 6, § 29; *Middleton/Stoker*, in: Joubert (ed.), *The Law of South Africa*, 6, § 385; *De Wet*, *Strafreg*, 53-54, who prefers, however, to deal with the problem under the act; *Snyman*, *Strafreg*, 65: "Die strafregtelike aanspreeklikheid van 'n regs persoon is 'n onderwerp wat nie uitsluitlik tuishoort onder die handelingsvereiste nie, maar ook verband hou met skuld, en veral die kwessie van middel-like aanspreeklikheid"; cf. *Visser/Maré*, *General Principles of Criminal Law Through the Cases*, 606.

3 Section 332(1) was preceded by s. 381(1) of the Criminal Procedure Act, 56 of 1955 and s. 384(1) of the Criminal Procedure and Evidence Act, 31 of 1917 (as amended by s. 117 of the Companies Amendment Act, 23 of 1939), which were similarly worded.

"For the purpose of imposing upon a corporate body criminal liability *for any offence*, whether under any law or at common law -

- (a) any *act* performed, *with or without a particular<sup>4</sup> intent*, by or on *instructions or with permission*, express or implied, given by a director<sup>5</sup> or servant<sup>6</sup> of that corporate body; and
- (b) the *omission*, with or without a particular intent, of any act which ought to have been but was not performed by or on instructions<sup>7</sup> given by a director or servant of that corporate body,

*in the exercise of his powers<sup>8</sup> or in the performance of his duties<sup>9</sup> as such director or servant or in furthering or endeavouring to further the interests of that corporate body*, shall be *deemed to have been performed* (and with the same intent, if any) *by the corporate body* or, as the case may be, *to have been an omission* (and with the same intent, if any) *on the part of that corporate body*.<sup>10</sup>

Inasmuch as it pertains to the topic under discussion, the interpretation given to s. 332(1) can be summarised as follows:

- (a) The words "for any offence"<sup>11</sup> are not free from doubt. Some authorities support the notion that corporate bodies can be held criminally liable for any offence,<sup>12</sup> while other authorities are to the opposite effect.<sup>13</sup>

4 In *Ex parte Minister van Justisie: In re S v Suid-Afrikaanse Uitsaaikorporasie* 1992(4) SA 804(A) 808-809 it was held that the word "particular" is of no consequence and implies any relevant intention with which the act was perpetrated.

5 "[A]ny person who controls or governs that corporate body or who is a member of a body or group of persons which controls or governs that corporate body or, where there is no such body or group, who is a member of that corporate body": s. 332(10).

6 A servant is not defined.

7 In contradistinction with paragraph (a) above, no mention is made of express or implied permission.

8 According to *Barlow*, *The Criminal Liability of a Company, Its Directors and Its Servants*, SALJ 1946, 502, 504-505 the term "power" should be restricted to directors.

9 According to *Barlow* (note 8) 504-505, the term "duties" should be restricted to servants.

10 Italics supplied.

11 Afrikaans text: "weens 'n misdryf". Provided there was the necessary intention, the words "for any offence" presumably include attempt, incitement and conspiracy to commit offences.

12 See *R v Bennett and Co (Pty) Ltd* 1941 TPD 194, 199-200 (cf. *S v Joseph Mtshumayeli (Pvt) Ltd* 1971(1) SA 33(RAD) 34-35); *R v Frankfort Motors (Pty) Ltd* 1946 OPD 255, 256; *R v Van Heerden* 1946 AD 168; *S v Deal Enterprises (Pty) Ltd* 1978(3) SA 302(W); *Imber*, *Of 'n Maatskappy (in Likwidasie) Weens Oortredings van die Strafbepalings van die Insolvensiewet, Nr. 24 van 1936, Aangekla Mag Word, Al Dan Nie?* SALJ 1960, 237, 238-239; *Du Plessis*, *Die Straftelike Aanspreeklikheid van Regspersone: 'n Mensliker Benadering*, TSAR 1991, 635, 636 ff.; cf. *Barlow* (note 8) 508, 511.

13 See *R v City Silk Emporium (Pty) Ltd and Meer* 1950(1) SA 825(GW) 835, in which it was held that the words "for any offence" "cannot be interpreted as meaning more than any of-

(b) The words "with or without a particular intent" refer to intention, negligence or strict liability.<sup>14</sup>

(c) The words "in furthering or endeavouring to further the interests of that corporate body" have the effect of rendering corporate bodies criminally liable not only for the *intra vires* acts,<sup>15</sup> but also for the *ultra vires* acts, of their directors and servants,<sup>16</sup> as well as for the acts of other persons who act on the instructions or with the permission of their directors and servants. In this respect, s. 332(1) fails to remove one of the fundamental objections to the criminal liability of corporate bodies, which is that corporate bodies, generally speaking, authorise *intra vires* acts, and not *ultra vires* acts, by their directors and servants.<sup>17</sup>

(d) The words "shall be deemed" make it clear that the acts and fault of the directors or servants of corporate bodies are simply *attributed*<sup>18</sup> to the corporate body.

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fence for which the corporate body is liable to prosecution" (cf. *R v RSI (Pty) Ltd* 1959(1) SA 414(E) 416-417; *R v Smith* 1960(4) SA 364(O) 375); *S v Sutherland* 1972(3) SA 385(N) 387; *De Wet* (note 2) 59-69; *Burchell*, South African Criminal Law and Procedure, 1, 300; cf. *Barlow* (note 8) 507; *Kahn*, Can a Company Be Found Guilty of Murder? The Criminal Liability of a Corporation - II, BML 1990 (19), 175, 176.

14 See *Ex parte Minister van Justisie: In re S v Suid-Afrikaanse Uitsaaikorporasie* 1992(4) SA 804(A) 808 ff., in which *R v Bennett and Co (Pty) Ltd* 1941 TPD 194 was approved and *S v Suid-Afrikaanse Uitsaaikorporasie* 1991(2) SA 698(W) was rejected, and in which *Grosskopff A.J.* stated: "Ek kan aan geen rede dink waarom die Wetgewer 'n regs persoon sou aanspreeklik maak vir skuldlose misdade en opsets misdade, maar nie vir nalatigheidsmisdade nie. Selfs al sou die bewoording van die artikel minder duidelik gewees het sou ek nie maklik oortuig kon word dat die Wetgewer so 'n ongerymde resultaat beoog het nie" (809); cf. *R v P Hall & Co (Pvt) Ltd* 1966(3) SA 669(RAD) 671.

15 As the words "in the exercise of his powers or in the performance of his duties" indicate.

16 See *R v Bennett and Co (Pty) Ltd* 1941 TPD 194, 200; *R v Van Heerden* 1946 AD 168, 170-171; *Booth Road Trading Co (Pty) Ltd v R* 1947(1) All SALR 34(N) 35-36; *R v Philips Dairy (Pty) Ltd* 1955(4) SA 120(T) 123-124; *R v Barney's Super Service Station (Pty) Ltd* 1956(4) SA 107(T) 108; *R v Meer* 1958(2) SA 175(N) 180; *S v Film Fun Holdings (Pty) Ltd* 1977(2) SA 377(E) 380-381, 386; cf. *S v Banur Investments (Pty) Ltd* 1969(1) SA 231(T) 233-234; *S v African Bank of South Africa Ltd* 1990(2) SA 585(W) 648 ff.; cf., however, *Barlow* (note 8) 506-507, who intimates, on the one hand, that a company can only be held criminally liable for *intra vires* acts and states, on the other, that it matters not whether or not the acts of its directors or servants were *ultra vires* (506).

17 Cf. *R v Oudtshoorn Municipality* (1908) 25 SC 257, 259-260; *R v Bennett and Co (Pty) Ltd* 1941 TPD 194, 198; *R v Philips Dairy (Pty) Ltd* 1955(4) SA 120(T) 122-123; *S v Joseph Mtshumayeli (Pvt) Ltd* 1971(1) SA 33(RAD) 35-36; *De Wet* (note 2) 58; *Snyman* (note 2) 66 fn 8; *Barlow* (note 8) 504, 505; *Matzukis*, Corporate Crimes. Who Must Pay for Them? BML 1987 (16), 215, 216, who advocates a limitation on the criminal liability of corporate bodies: "A company has limited control over the endeavours of its servants, particularly where it employs a large number of persons"; *Du Plessis* (note 12) 640, 648.

18 See *Ex parte Minister van Justisie: In re S v Suid-Afrikaanse Uitsaaikorporasie* 1992(4) SA 804(A) 807 ff.; *De Wet* (note 2) 58; *Burchell* (note 13) 300; *Kahn* (note 13) 146; *Du Plessis* (note 12) 639, 643; cf. *S v Suid-Afrikaanse Uitsaaikorporasie* 1991(2) SA 698(W) 702 ff.

In this way s. 332(1) endeavours to overcome two fundamental objections to holding legal persona criminally liable, to wit that legal persona are, as such,<sup>19</sup> incapable (i) of perpetrating a criminal act<sup>20</sup> or entertaining a guilty state of mind,<sup>21</sup> and (ii) of committing certain crimes, such as rape and bigamy.<sup>22</sup>

### III. Vicarious Responsibility<sup>23</sup>

South African case law and legal literature frequently associate the criminal liability of legal persona with the doctrine of vicarious responsibility. Thus *Burchell* states, albeit somewhat ambivalently:

"Being an artificial rather than a natural person, a corporation cannot commit unlawful conduct, intentionally or negligently. It follows that a corporation can be penalised for crimes committed only by its agents or servants. In a sense, therefore, when criminal liability is imposed upon a corporate body, it is vicarious. However, the criminal liability of a corporate body is wider than that of the vicarious liability of natural persons; and, in truth, it rests upon the imputation to the corporation of the crimes of persons acting on its behalf, rather than upon vicarious liability."<sup>24</sup>

In terms of the doctrine of vicarious responsibility a principal or an employer can be held criminally liable for the intentional or negligent unlawful acts perpetrated or consequences caused by his/her agent or employee. This applies irrespective of the presence or absence of fault on the principal's or employer's part in connection with the unlawful act or consequence, provided the agent or employee acted with the necessary intention or negligence.

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- 19 See *Burchell* (note 13) 299; *Matzukis* (note 17) 216: "[A] juristic person....cannot in reality commit a criminal offence, since it lacks the body to perform a criminal act and the brain to harbour a criminal mind"; *Kahn*, Can a Company Be Found Guilty of Murder? The Criminal Liability of a Corporation - I, BML 1990 (19), 145, 146, who refers to the much-cited expression "[a juristic person] has neither body to be kicked nor soul to be damned" (145); *Du Plessis* (note 12) 639; cf. *Bailes*, Watch Your Corporation, JBL 1995 (3), 24.
- 20 *Sien R v Hewertson (1)* 1937 CPD 5, 26; *S v Ostilly (1)* 1977(4) SA 699(D) 725; *Loubser* (note 2) § 29.
- 21 See *R v Bennett and Co (Pty) Ltd* 1941 TPD 194, 200; *S v Coetzee* 1997(3) SA 527(CC) 606, per Sachs J.; *De Wet* (note 2) 56; cf. *Snyman* (note 2) 65; *Du Plessis* (note 12) 643.
- 22 Cf. *R v Bennett and Co (Pty) Ltd* 1941 TPD 194, 198; *S v Coetzee* 1997(3) SA 527(CC) 609, per Sachs J.
- 23 See generally *Loubser* (note 2) § 29; *Middleton/Stoker* (note 2) § 385; *De Wet* (note 2) 106-107; *Visser/Maré* (note 2) 604 ff.; *Snyman* (note 2) 271-272; *Burchell* (note 13) 298; *Milton/Cowling*, South African Criminal Law and Procedure, 3, 2, 43 ff.
- 24 *Burchell* (note 13) 299; see also *S v Ostilly (1)* 1977(4) SA 699(D) 725-726: "Similarly, theoretically and logically, [a corporate body] cannot commit a crime but, by virtue of statutory provisions, in certain circumstances vicarious criminal liability is attributed to it for the conduct of persons acting on its behalf" (726); *Snyman* (note 2) 65.

However, in the absence of having participated therein, a principal or an employer cannot, by *common law*, incur criminal responsibility for an offence perpetrated by his/her agent or employee. On the other hand, the *legislature* has in numerous instances created vicarious responsibility, either in express terms or by necessary implication.<sup>25</sup> The criminal responsibility of the principal or employer is, however, dependent upon the agent or employee having acted *within the scope of his/her authority or the course of his/her employment*, and an agent or employee acts within the scope of his/her authority or the course of his/her employment *where such power has been expressly or impliedly delegated to him/her*.

Legal commentators, on the other hand, unanimously repudiate the doctrine of vicarious responsibility as representing a departure from the fault requisite for criminal liability,<sup>26</sup> and it will in all likelihood be declared unconstitutional by the constitutional court for the same reason, if and when the matter comes up for decision.

#### IV. Participation<sup>27</sup>

Although it admits of no doubt that legal persona can be held criminally liable under the doctrine of participation, the implementation of the doctrine of participation as a basis for the criminal liability of legal persona has received scant attention in South African case law and legal literature.

A legal person will only incur criminal liability for participation in the offences perpetrated by its directors and servants if (i) the legal person satisfies all the requirements of the definition of the offence in question, in which event the legal person may be convicted as a *perpetrator*; or (ii) the legal person does not satisfy all the requirements of the definition of the offence in question, but intentionally

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25 In determining whether or not vicarious responsibility implicit in a statutory provision, the courts take into consideration the following factors: (i) the wording and context of the statutory provision; (ii) the purpose and scope of the statute; (iii) the nature and extent of the penalty; (iv) whether or not the principal or employer derived profit from the transaction; (v) whether or not the statute imposed a duty upon all or upon specific persons; (vi) whether or not the purpose of the statute would be defeated if vicarious responsibility was not imposed; and (vii) whether or not the statutory provision imposes strict liability: cf. *Middleton/Stoker* (note 2) § 385; *Snyman* (note 2) 271-272; *Milton/Cowling* (note 23) 45. These considerations have evoked the criticism that they are general, nebulous, contradictory and unfair.

26 See the authorities referred to in note 23 above.

27 See generally *Rabie*, in: Joubert (ed.), *The Law of South Africa*, 6, § 115 ff.; *De Wet* (note 2) 191 ff.; *Visser/Maré* (note 2) 675 ff.; *Snyman* (note 2) 273 ff.; *Burchell* (note 13) 305 ff.

and unlawfully associates itself with the commission of the offence by aiding and abetting it, in which event the legal person may be convicted as an *accomplice*.<sup>28</sup>

A *direct perpetrator* being someone who commits the offence *propriis manibus*, it goes without saying that a legal person cannot, as such, be a direct perpetrator. On the other hand, there appears to be no obstacle to holding a legal person criminally liable as an *indirect perpetrator*: It is quite conceivable that a legal person makes use of its directors or servants as instruments in the commission of an offence. Except insofar as indirect perpetrators are at the same time co-perpetrators, it is difficult to conceive of a legal person as a *co-perpetrator*, however: Criminal liability as a co-perpetrator requires both conscious collaboration in the commission of the offence and compliance with all the requirements of the definition of the offence in question,<sup>29</sup> which means that a co-perpetrator who is not also an indirect perpetrator, must be a direct perpetrator. Since a *concurrent perpetrator* is a direct perpetrator who unwittingly participates in the offence, it hardly needs any mention that a legal person cannot be a concurrent perpetrator.

Thus, a legal person who intentionally<sup>30</sup> and unlawfully participates in the commission of an offence by its directors or servants may be held criminally liable as an indirect perpetrator or as an accomplice.

## V. Conclusion

A comparison between the criminal liability of legal persona based on (i) s. 332(1); (ii) vicarious responsibility; and (iii) participation renders the following results:

(a) Unlike criminal liability in terms s. 332(1) and vicarious responsibility for which *negligence* or *strict liability* suffices, criminal liability as an indirect perpetrator or accomplice requires *intentional* participation in the offence in question. In this respect, participation offers a narrower basis for holding legal persona criminally liable than s. 332(1) and vicarious responsibility.

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28 An accessory after the fact is, as the phrase indicates, not a participant in crime, but it is not inconceivable that a legal person may in given circumstances be held criminally liable as an accessory after the fact.

29 Which is possible in crimes with a wide definition, such as murder, but not in crimes with a narrow definition, such as rape.

30 In culpable homicide, as a negligence crime, this does not mean that the legal person must have intended the death of the victim, but that it intentionally participated in the act which caused the victim's death and that it was negligent in respect of the consequence.

(b) In terms of the doctrine of participation a legal person may incur criminal liability as an *accomplice*, whereas s. 332(1) and vicarious responsibility postulate criminal liability as a *perpetrator*. In this regard, participation theoretically offers a wider basis for holding legal persona criminally liable than s. 332(1) and vicarious responsibility. In practice, however, a legal person can be held liable for more or less any offence: (i) In terms of the doctrine of participation an indirect perpetrator is someone who does not commit the offence *propriis manibus*, and an accomplice is someone who does not fulfil all the requirements of the definition of the offence in question; and (ii) in terms of s. 332(1) and vicarious responsibility the offence in question is simply *imputed* to the legal person as a *perpetrator*.

(c) Section 332(1) and participation make provision for the criminal liability of legal persona for the *ultra vires* conduct of their directors and servants, as well as for the conduct of other persons who act on the instructions or with the permission of their directors and servants. Vicarious responsibility, on the other hand, is restricted to the *intra vires* conduct of the agent or employee, and hence offers a narrower basis for the criminal liability of legal persona than s. 332(1).

(d) All in all, s. 332(1) offers a wider basis for the criminal liability of legal persona than vicarious responsibility and participation.

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## **Establishing a Basis for Criminal Responsibility of Collective Entities**

**Teresa Serra, Portugal**

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In Portugal, the concept of criminal liability of legal and collective entities was introduced in criminal law in 1983 by art. 11 of the new Penal Code,<sup>1</sup> which acknowledges that exceptions may exist to the general rule that only individuals can be held criminally liable.

In practice, however, such exceptions can only be found so far in certain cases of economic and customs crimes, crimes against public health and crimes relating to information technology and industrial property, all of which are governed by specific laws that are not part of the Penal Code. Criminal responsibility of collective entities does not exist, therefore, in relation to any of the offences which form the criminal law known as core criminal law, under the Special Part of the Penal Code, including crimes against the environment, nor many of the crimes defined by *secondary criminal law*,<sup>2</sup> including, for example, banking and securities fraud, money laundering and fraudulent or illegal stockmarket transactions.

This article offers a brief description of the Portuguese legal framework establishing the criminal liability of legal and collective entities, including administrative offences; an analysis of the model adopted by legislators for assigning responsibility; and finally, my own suggestions as to how the criminal liability of legal and collective entities could be more effectively enforced.

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1 Art. 11 of the Penal Code states: "Except any contrary disposition, only individuals are susceptible to criminal liability."

2 The expression secondary criminal law distinguishes it from the core criminal law contained in the Penal Code.

## 1. The Legal Framework of Corporative Criminal Liability

### 1.1 The Constitutional Framework

Some recent decisions of the Constitutional Court<sup>3</sup> have confirmed that holding legal and collective entities criminally liable is consistent with the Portuguese Constitution. Those decisions were based on art. 12<sup>4</sup> and 2<sup>5</sup> of the Portuguese Constitution which articulate and affirm the principle of universality. One could argue that those decisions were equally based on other constitutional principles such as equality (art. 13), proportionality (art. 18, no. 2), freedom of association (art. 46), and particularly, as far as corporations are concerned, the principle of free enterprise (art. 61). In addition, there is the principle according to which the state has a duty to ensure that private corporations fulfil their legal obligations, especially when their activities may affect society's economic interests (art. 86). The Constitutional Court's decisions were also clearly influenced by a certain legal tradition<sup>6</sup> and a consistent doctrinal thought<sup>7</sup> recognizing corporate criminal liability mainly within the confines of economic penal law.

3 Decision no. 212/95, of 6/24, no. 213/95, of 6/26, and decision no. 302/95, of 7/29. The cases involved a constitutional review, in the light of art. 280, no. 1, a) and b) of the Constitution, of the dispositions of Decree-Law no. 28/84, of 1/20. The first case concerned the quality and composition of some food products (art. 24) and the second case concerned embezzlement of public funds (art. 36 and 37).

4 Art. 12 of the Portuguese Constitution states: "(1). All citizens have rights and are subject to the duties defined by the Constitution. (2). Collective entities have the same rights and are subject to those duties compatible with their nature."

5 Art. 2 of the Portuguese Constitution defines the Portuguese State as follows: "The Portuguese Republic is a democratic State of Law, based upon popular sovereignty, plurality of democratic political expression and organization, based on the respect and guarantee of all fundamental rights and freedoms, for the purpose of achieving an economic, social and cultural democracy, and the development of participatory democracy."

6 Even before the enforcement of the 1976 Portuguese Constitution, the principle of limiting criminal liability to individuals terms at least with respect to secondary criminal law, was weak or sometimes set aside. This is discussed by *Jorge de Figueiredo Dias*, *Sobre o Papel do Direito Penal na Protecção do Ambiente* (On the Role of Penal Law in Environmental Protection), *Revista de Direito e Economia* 3-12 (1978), where he cites the examples of art. 66, no. 3, of the Law concerning the Press (Decree-Law no. 85-C/75, of 2/26), as well as art. 1 and 3 of the anterior legislations dealing with infractions against public health and national economy (Decree-Law no. 41204, of 7/24/1975). See also *João de Castro e Sousa*, *As Pessoas Colectivas em face do Direito Criminal e do Chamado Direito de Mera Ordenação Social* (Criminal and Administrative Responsibility of Collective Entities), Coimbra 1985, pp. 163 ff., specially pp. 176 ff.; *José Lobo Moutinho/Henrique Salinas Monteiro*, *La Criminalisation du comportement collectif - Portugal*, in: de Doelder/Tiedemann (eds.), *La Criminalisation du comportement collectif - (Criminalisation of Collective Behaviour)*, The Hague 1996, pp. 311-342.

7 See *Eduardo Correia*, *Introdução ao Direito Penal Económico* (Introduction to Economic Penal Law), *Revista de Direito e Economia* 3-35 (1977); *José de Faria Costa*, *A Respon-*

## 1.2 Criminal Law

We must distinguish between core criminal law (the Penal Code/*Kernstrafrecht*), in which corporate criminal liability does not exist, and secondary criminal law within which criminal liability of collective entities is a possibility under several distinct statutes.

### 1.2.1 Core Criminal Law: art. 11 of the Penal Code

In stating that "except under conditions to the contrary, only individuals are subject to criminal liability", art. 11 weakens the notion that Portuguese criminal law is based solely on the principle of individual criminal liability.<sup>8</sup> This particular clause indirectly challenges the rule of *societas delinquere non potest* which provides the foundation of the basic approach to criminal liability adopted by many legal systems.<sup>9</sup> The issue of corporate criminal liability, raises fundamental questions of criminal justice policy which cannot easily be addressed simply through legislation.

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sabilidade Jurídico-Penal da Empresa e dos Seus Órgãos (Criminal Responsibility of Corporations and its Organs), *Revista Portuguesa de Ciência Criminal* 537-559 (1992); *idem*, *O Perigo em Direito Penal (Danger in Penal Law)*, Coimbra 1992, pp. 450 ff.; *Manuel Lopes Rocha*, *A Responsabilidade Penal das Pessoas Colectivas Novas Perspectivas (Criminal Liability of Collective Entities - New Perspectives)*, *Direito Penal Económico*, Coimbra 1985, pp. 108-187; and *Jorge de Figueiredo Dias* (note 6), pp. 12 ff.; *idem*, *Pressupostos da Punição e Causas Que Excluem a Ilícitude e a Culpa (Punishment Basis and Criminal Defences)*, *Jornadas de Direito Criminal*, Lisboa 1983, pp. 43-83; for further details, *idem*, *Para uma dogmática do Direito Penal Secundário (Towards a Theory of Secondary Criminal Law)*, *Direito e Justiça* 7-57 (1989/90). All these followed the line of reasoning developed by *Arthur Kaufmann*, in: *Analogie und "Natur der Sache"*. *Zugleich ein Beitrag zur Lehre vom Typus*, Heidelberg 1982.

8 This interpretation of art. 11 of the Penal Code is not the one given to it by most commentators who usually see it simply as a reaffirmation of the principle of "individual responsibility". See *M. Maia Gonçalves*, *Código Penal Português (Portuguese Penal Code)*, art. 11, 1., 1998; *Manuel Leal-Henriques/Manuel Simas Santos*, *Código Penal Anotado (Penal Code annotated)*, Lisboa 1995, pp. 169 ff.; *Manuel Lopes Rocha* (note 7), p. 110. See also *Manuel da Costa Andrade*, *O novo Código Penal e a Moderna Criminologia (The New Penal Code and the Modern Criminology)*; *Jornadas de Direito Criminal*, Lisboa 1983, p. 218; *José de Faria Costa*, *O Perigo* (note 7), p. 451; *Jorge de Figueiredo Dias*, *Pressupostos* (note 7), pp. 50 ff.; *idem*, *Sobre o Estado Actual da Doutrina Do Crime (Present Situation of the Theory of Crime)*, *Revista Portuguesa de Ciência Criminal* 9-53, 39 (1991).

9 *Hans-Heinrich Jescheck*, *Zur Frage der Strafbarkeit von Personenverbänden, Die Öffentliche Verwaltung* 539 (1953); *Jorge de Figueiredo Dias*, *Pressupostos* (note 7), p. 50.

In both core criminal law and secondary criminal law, art. 11 of the Penal Code<sup>10</sup> suggests that collective entity responsibility could conceivably always be invoked. Whilst as a general rule, art. 11 stipulates that "only individuals are subject to criminal liability", one part of the same art. 11 allows for flexibility in the application of that general rule. In determining corporate criminal liability, one should consider the distinction between core criminal law and secondary criminal law and, corresponding at the constitutional level, such constitutional values as basic rights, freedoms and guarantees and social rights on one hand, and those of the economic organization on the other.<sup>11</sup> However, the prevailing principles contained in the Constitution are those which seek to protect life in the community from every kind of aggressor, in which case the principles of universality and equality, whilst recognizing their different nature, must apply equally to individuals and corporations.<sup>12</sup> The application of art. 11 is dependent on particular criminal policy needs, unless one argues that the core criminal law inherently excludes corporate entities' criminal liability.<sup>13</sup>

Since the Portuguese Penal Code does not contain any provision subjecting a corporate entity to criminal liability, one could say that the principle of individual responsibility prevails within the core criminal law. Mainstream Portuguese legal thought certainly espouses the view that corporate criminal liability has no ground nor justification outside the limits of secondary criminal law.<sup>14</sup> This view originally advanced by *Figueiredo Dias*, is based on a distinction between core crimi-

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10 *José de Faria Costa*, O Perigo (note 7), p. 451.

11 *Jorge de Figueiredo Dias*, Para uma dogmática (note 7), 36 ff.

12 It seems reasonable to state that the Portuguese Constitution guarantees life against any illegal aggression. Therefore, it is difficult to understand how anyone can argue, based on the same Constitution, that the guarantee of life can be withdrawn in the face of a collective entity considered capable of crimes defined by the secondary penal law and yet supposedly incapable in the field of nuclear penal law.

13 *Jorge de Figueiredo Dias* (note 8), pp. 13 ff., does not uphold this view. See also *Arthur Kaufmann* (note 7), pp. 65 ff.; *Günter Stratenwerth*, Das rechtstheoretische Problem der Natur der Sache, Tübingen 1957.

14 *Mário Corrêa Arez*, Da Responsabilidade Penal das Pessoas Colectivas (On Criminal Responsibility of Collective Persons), *Scientia Iuridica* 529 ff. (1962); *João de Castro e Sousa* (note 6), pp. 219 ff., especially p. 226; *Eduardo Correia*, Direito Criminal (Criminal Law), Coimbra 1949, pp. 122 ff.; *idem* (note 7), pp. 19 ff.; *Jorge de Figueiredo Dias*, Pressupostos (note 7), p. 50; *Paulo de Sousa Mendes*, Responsabilidade Criminal das Sociedades Comerciais (Criminal Responsibility of Commercial Companies), Boletim da Faculdade de Direito da Guiné 1993, p. 155; *idem*, Vale a pena o Direito Penal do Ambiente? (Is It Worth the Environmental Criminal Law?), *Lusíada* 338 ff. (1995); *Augusto Silva Dias*, O Novo Direito Penal Fiscal (The New Penal Fiscal Law), *Fisco* no. 22, 22 (1990); *José de Faria Costa*, A Responsabilidade (note 7), p. 541, especially fn. 13; *idem*, O Perigo (note 7), p. 451. See also *José Lobo Moutinho/Henrique Salinas Monteiro* (note 6), pp. 321 ff.

nal law and secondary criminal law which goes far beyond the needs of criminal policy.<sup>15</sup>

It should be noted that the revised 1995 Penal Code now includes crimes against the environment. This and other amendments have important implications for the question of corporate criminal liability,<sup>16</sup> and may have blurred the traditional distinction between core and secondary criminal law.

### 1.2.2 Secondary Criminal Law

Within secondary criminal law, there is now clear recognition of corporative criminal liability. Although the new Press Law does not recognize corporate responsibility,<sup>17</sup> after the enactment of the 1982 Penal Code, further provisions were passed: art. 3 of the Law of Crimes against the Economy,<sup>18</sup> art. 7 of the Law of Crimes Relating to Customs,<sup>19</sup> art. 7 of the Law on Fiscal Crimes Not Related to Customs,<sup>20</sup> art. 3 on the Law of Crimes Relating to Information Technology<sup>21</sup> and art. 258 of the Code of Industrial Property.<sup>22</sup>, <sup>23</sup> There are still, nevertheless im-

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15 See *Jorge de Figueiredo Dias*, Os Novos Rumos da Política Criminal e o Direito Penal do Futuro (New Directions in Criminal Policy and The Criminal Law of the Future), *Revista da Ordem dos Advogados* 17 ff. (1983); *idem*, Para uma dogmática (note 7), pp. 17 ff.; *José de Faria Costa*, O Perigo (note 7), pp. 449 ff. Also *Paulo de Sousa Mendes*, A Responsabilidade (note 14), pp. 154 ff.

16 The inclusion, in the Penal Code, of crimes against the environment raises two kinds of problems: firstly, there is no reference to corporate criminal liability. As *Jorge de Figueiredo Dias* (note 6), p. 12, pointed out long ago, "today, the most serious offences against the environment are committed, not by individuals, but by collective entities". See also *José de Faria Costa*, A Responsabilidade (note 7), p. 541, fn. 13. The second kind of problem concerns the pressure on redefining the distinction between core penal law and secondary penal law. On this issue, see *Jorge de Figueiredo Dias*, Oportunidade e Sentido da Revisão do Código Penal Português (Opportunity and Meaning of the Revision of the Portuguese Penal Code), *Jornadas de Direito Criminal*, Lisboa 1966, pp. 25-26.

17 Set up by Law no. 2/99, January 13th.

18 Set up by Decree-Law no. 28/84, January 20th.

19 Set up by Decree-Law no. 376-A/89, October 25th.

20 Set up by Decree-Law no. 20-A/90, January 15th, modified by Decree-Law no. 394/93, November 24th, and enlarged to social security law offences by Decree-Law no. 140/95, June 14th.

21 Set up by Law no. 109/91, August 17th.

22 Foreseen in art. 258 of the Code of Industrial Property, approved by Decree-Law no. 16/95, January 24th.

23 These rules are as follows:

"1. Collective persons, corporations and mere associations are responsible for the crimes defined in the present law when committed by their organs and executives or by their representatives acting in their name and in their collective interest;

portant areas whose scope does not include corporate criminal liability. Such serious omissions include, for example, laws relating to the banking system<sup>24</sup> and the stock market,<sup>25</sup> where crimes such as money laundering and drug trafficking are defined without reference to corporate criminal liability.<sup>26</sup> Infractions committed by corporate entities in relation to banking and stock market transactions are dealt with as administrative offences.

The most comprehensive penalties applicable to corporate entities are found in art. 7 and 8 of the Law on Crimes Against the Economy and Public Health. Aside from the main penalties of admonition, fines and dissolution, this law contains a long list of accessory penalties applicable to both individuals and corporate entities. These include confiscation of properties, judicial injunction, temporary suspension of certain business activities, and preventing access to public and government grants. It should be noted that such penalties, whether imposed on corporations or individuals, are usually accompanied by stiff pecuniary sanctions and potential recourse to civil action to ensure the payment of fines.

### 1.3 The Law of Administrative Offences

Administrative law<sup>27</sup> includes, as general principle, corporate liability,<sup>28</sup> the main sanctions for which are monetary penalties. In addition, in the case of several ad-

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2. This responsibility will be excluded whenever the agent acts against specific orders or express instructions are given by anyone in authority;

3. The responsibility of entities referred to in no. 1 does not exclude the individual responsibility of the respective agents."

24 In the general law on Financial and Banking Establishments, set by Decree-Law no. 298/92, from December 31st, only individuals can be guilty of illegal banking crimes (art. 200).

25 In the Code of the Stock Market, set by Decree-Law no. 142-A/91, from April 10th, the following crimes are only applicable to individuals: insider trading (art. 666), manipulation of the market (art. 667) and contempt (art. 668).

26 The crime of conversion, transfer and dissimulation of proceeds of crime, defined on art. 23 of the Law Against Drugs (Decree-Law no. 15/93, from January 1st) and, with a larger range, on art. 2 of Decree-Law no. 325, from December 2nd (establishing preventive and repressive measures against money laundering and other profits from those crimes) can only be committed by individuals.

27 Foreseen in the Decree-Law no. 433/82, October 27th, containing the general law on administrative offences (Ordnungswidrigkeitengesetz).

28 Art. 7 of the Decree-Law no. 433/82 establishes: "1. Fines are applicable to individual persons as well as to collective persons and associations without legal personality. 2. Collective entities or comparable entities are responsible for the administrative offences committed by their organs and executives while performing their duty."

ministrative infractions, a broader liability can be established which will be addressed later in the article.<sup>29</sup>

## 2. Range of Corporate Entities

Portuguese law, as that of other jurisdictions, does not confine the responsibility for crimes and administrative offences only to legally established corporate entities. It assumes that criminal liability and other responsibility can be ascribed also to ordinary associations as well as corporate and collective entities which are not legally constituted.

In contrast to the new French Penal Code, Portuguese law makes no distinction between public collective entities and other collective entities. In my opinion, the laws in Portugal should limit the scope of criminal responsibility to certain public collective entities, excluding perhaps state and public legal entities which can be regulated on a territorial basis.

## 3. Forms of Corporate Responsibility/Models of Imputation

Corporate criminal liability and responsibility under administrative law are based on the assumption that a particular offence is committed by an individual.

The broadening of the scope of corporate liability or administrative law is important and depends on three vital elements: the set of delicts relevant as the offence, the persons representing the corporate entity whose actions are attributable to corporate entities, and the relationship between these actions and the corporate entities. The fundamental concept to behold is that the corporation is responsible only for those acts committed by those persons who act in the name of the corporation, as members of the company's administration or its legal representatives.<sup>30</sup> Therefore, the main model of imputation is based firstly on the *theory of identification*, and secondly, on the *theory of the representation*, although there are special cases affecting the limits imposed by those theories.

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29 In the Laws of Competition (Decree-Law no. 371/93, from October 10th), of crimes against economy and public health, of fiscal crimes related to customs and fiscal crimes not related to customs, in the law on the stock market and in the laws establishing preventive and repressive measures against money laundering and other profits from those crimes.

30 In the same way, *Günter Stratenwerth*, *Strafrechtliche Unternehmenshaftung?* Festschrift für Rudolf Schmitt, Tübingen 1992, p. 298.

### 3.1 External Criminal Acts

Criminal liability, as well as responsibility for administrative offences, always presupposes the presence of an offence committed by an individual. Criminal liability relates to crimes and is very different from the kind of responsibility on liability resulting from administrative offences. The two kinds of responsibility are rigorously separated in law, even in those cases where the legislator has decided to resort to both types of liability cumulatively. This is so for all secondary criminal law with the exception only of the special law concerning information technology, where every offence is defined as a crime.

While corporate responsibility is established as a general rule in administrative law,<sup>31</sup> it is an exception within criminal law, where, the rule is still that of individual liability. This fundamental difference has rather important consequences. The legal assumptions underlying art. 7 of the general law of administrative offences are relevant and applicable in every administrative law case. On the other hand, art. 11 of the Penal Code requires that corporate or collective criminal responsibility be expressly established.

This sort of crime or administrative offence rests on the notion of *external criminal act*, a criteria legally relevant to the establishment of corporate liability. The notion of the external act links the individual who commits the act, and the corporate entity to which the act is associated.

### 3.2 Individual Actions Leading to Corporate Liability

As a general rule, only offences committed by a certain group of individuals can be attributed to the corporation. Although the precise definition of this group may be a matter for debate, one could conceive of three different models.<sup>32</sup> In the first model, the corporation or legal entity is directly responsible only for those acts or omissions committed by their organs and/or by their representatives. This model has its origins in civil law as well as in the traditional concept of the corporation in its strictest sense its legal structure. According to the *theory of identification*, acts committed by organs of the corporate entity are proper acts of the corpora-

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31 Art. 7 of the respective General Regimen. On this point, *Jorge de Figueiredo Dias*, *O Movimento da Descriminalização e o Ilícito de Mera Ordenação Social* (The Movement Towards Acquittal and the Administrative Offence), Centro de Estudos Judiciários (ed.), *Jornadas de Direito Criminal*, Lisboa 1983, p. 330.

32 *Klaus Tiedemann*, *La criminalisation du comportement collectif*, in: de Doelder/Tiedemann (no. 6), pp. 27 ff.

tion. The extension of the meaning of organs to include individual representatives would, therefore, count as a concession derived from civil law and supported by the *theory of representation*. In the second model, the acts committed by anyone who acts in the name or on account of the corporation would be sufficient to give rise to corporate responsibility. This more pragmatic definition, although vicarious in my view, would, in most cases, lighten the burden of proof. A third model, a combination of the first two, extends the sphere of individual agents to the top or higher management levels, to those who have supervisory responsibility and control. Sometimes it is further extended to include middle management.<sup>33</sup>

In Portuguese law, instances of all three models can be found. The first model is found mainly in criminal law. In administrative law, the situation is much more complex and rather surprising. Art. 7 no. 2 of the general law of administrative offences establishes that corporate entities are responsible only for those administrative offences committed by their organs when performing specific tasks.<sup>34</sup> This rule is very significant. It applies to any new administrative offences, even if the legislation itself fails to specifically mention corporate liability.

All administrative offences, with the significant exception of environmental crime, refer to special rules concerning the source of corporate liability which widely surpass the general rule. Corporate entities are responsible for administrative offences committed by their organs and representatives,<sup>35</sup> by members of those organs, controlling officers or directing officers or their representatives,<sup>36</sup> or lastly by their employees or their representatives.<sup>37</sup>

The identification of the individuals legally responsible for corporate entities in instances of administrative offences depends on how wide a definition is used. In extreme cases, the actions of any person who had any connection with the corporation may be relevant, as is the case in the law governing the stock market where an administrative offence committed by a single worker in the name of a broker

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33 Klaus Tiedemann, Die strafrechtliche Vertreter- und Unternehmenshaftung, NJW 30 (1986), pp. 1842 ff.

34 This is an unacceptably restrictive definition of corporate liability under administrative law. Collective responsibility is only admissible when those offences are committed by corporate organs. This regime appears to contradict the idea that criminal responsibility of collective entities is more broadly defined.

35 This includes fiscal crimes and crimes committed under the Code of Industrial Property.

36 This relates to banking laws (art. 202) and laws against money laundering and proceeds of crimes.

37 This concerns art. 677 of the law governing the stock market, which has resulted in the greatest number of cases being brought to court so far for administrative offences.

corporation is enough to implicate the corporation, provided the link can satisfactorily be made between the worker and the corporation.

Within secondary criminal law, collective entities are responsible for crimes committed by their organs or representatives. When the question arises as to the definition of the *representative*, art. 12 of the Penal Code,<sup>38</sup> defines it as somebody who acts in its name. This principle extends liability in the case of a person who acts in legal representation of a third party as well as anyone who acts voluntarily in representation of that third party. At first glance, this may appear to broaden the scope of liability, but in relation to art. 12, a representative of a corporation is defined according to his or her specific institutional function or task.<sup>39</sup> Anyone who is only partly responsible for performing a task cannot, according to the Penal Code, be considered a representative of a collective entity.<sup>40</sup>

### 3.3 Relationship between the Offence and the Corporate Entity

Establishing the relationship between the offence and the corporate entity, where the offence has been committed by a corporate representative, is dependent on demonstrating that the act was committed *in the name and interest* of the corporation or when *performing their specific tasks on account* of the corporation. In this sense, given the wide range of individuals who can be described as being repre-

38 Art. 12 of the Penal Code defines someone who acts on behalf of someone or a company as follows: "1. Any person who acts as legal or voluntary representative of a collective entity, corporation or mere association, will be punishable as long as the law governing the crime provides that: a) specific personal identification factors are required; b) the representative commits the act in the interest of the corporation. 2. The invalidity of the act itself does not affect the conditions set out in the previous point ie (1)."

39 Besides, in the special field of administrative offences I have referred to above, this is confirmed by the specific care with which the legislator expressly enumerates every category of persons whose administrative offences involve the responsibility of collective entities.

40 See *Günther Jakobs*, Tätervorstellung und objektive Zurechnung, in: Gedächtnisschrift für *Armin Kaufmann*, Köln 1989, pp. 283 ff.; *Luis Gracia Martín*, El actuar en lugar de otro en Derecho Penal (Acting in the place of somebody else in Penal Law), Zaragoza 1985, pp. 354 ff. More recently, *Luis G. Martín*, La responsabilidad penal del directivo, órgano y representante de la empresa en el Derecho Penal español (Criminal responsibility of the corporation manager, organ and representative in Spanish Penal Law), in: *Hacia un Derecho Penal Económico Europeo*, Jornadas en honor del Profesor Klaus Tiedemann, Madrid 1995, 97 ff. See also *Wilfried Bottke*, Empfiehlt es sich, die strafrechtliche Verantwortlichkeit für Wirtschaftsstraftaten zu verstärken? *wistra*, 82 ff. (1991); *Bernd Schünemann*, Unternehmenskriminalität und Strafrecht, Köln 1979, pp. 137 ff.; *Paulo Saragoça da Matta*, A responsabilidade penal dos "Quadros" das Instituições no domínio da Criminalidade Económica (The criminal responsibility of corporate management in economic crimes), typed copy, Lisboa 1997.

sentative of the corporation, the relationship in question becomes more diffuse in administrative law.

#### 4. Procedural Problems

There is no set procedure either in criminal law or in administrative law for dealing with cases of corporate liability.<sup>41</sup>

#### 5. Conclusion

In general, the way in which Portuguese law deals with corporate liability is largely unsatisfactory and often misguided, with serious consequences for the rights of both individuals and corporations. The legal framework is both too narrow and too wide; too narrow because of the specificity of individual identification requirements, and too wide because once an individual representative is charged, the corporation may almost automatically become liable.<sup>42</sup> The limitations of the legal framework cannot be overcome without suppressing the rights of the individual guaranteed by the criminal law.<sup>43</sup> On the other hand, the corporate

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41 See art. 87 Decree-Law no. 433/82 (general law of administrative offences) and the legal opinion of the Procuradoria-General da República, 28 April 1995, which deal essentially with the problem of representation of the accused in administrative and criminal procedure.

42 Within secondary penal law dealing with corporate criminal liability, it is stated that liability is "excluded whenever the agent has acted against orders or explicit instructions by whoever is entitled to issue those orders or instructions". We find a different situation both in the general legal framework and in the several special rules defining responsibility for administrative offences, except when they coexist with criminal liability of collective entities. In my view, this exclusion is practically unworkable, when, to begin with, ascribing responsibility as based on the theory of identification. Because upper management in corporations and other collective entities issue "orders and explicit instructions", as a rule, offences committed by members of management are those attributed to the corporation as a result of the notion of collective responsibility. This exclusion clause is also incompatible with the modern form of corporations which include complex lines of responsibility and accountability as well as informal and formal channels of communication.

43 As *Stratenwerth* points out (note 30), p. 301, it is not simply a matter of shifting guilt. The deliberate intent to commit a crime, which can only be ascribed from the consideration of external circumstances, may also result in a clear violation of the principle *in dubio pro reo*. It is impossible to decide whether or not an act of negligence, including performing duties without due care, has been committed without reference to the individual's precise role. This problem is accentuated when organizations lack a clear structure. On this point, see *Günter Heine*, *Beweislastumkehr im Strafverfahren*, JZ 651 ff. (1995). In my view, there is only one way to approach this dilemma in certain circumstances, and that is to reverse the burden of proof. The effect of this reversal may result in the imposition of unpredictable punishments on individuals, with implications in other areas of law. Having

entity is in a weak position<sup>44</sup> in that illegal acts of the individual representative are deemed to be those of the corporate entity and to thus create a liability.

What, in my view is required is *an originator model for corporate liability*, which would seek to theorize the way different corporations function and how decisions are taken which affect the issue of corporate liability. The starting point of such a model would necessarily be individual criminal liability, a view put forward by *Günter Heine* in his writings on environmental crime based on extensive comparative legal analyses.<sup>45</sup> This is not a new idea among academics in Portugal or elsewhere. In fact, the demand for an alternative legal approach to the criminal responsibility of legal and collective entities has been repeatedly made by a leading Portuguese legal thinker by the name of *Figueiredo Dias*,<sup>46</sup> who, since 1978, has claimed "the need for analogous thinking on the principles of classical criminal law" in order to build a new model of corporate criminal liability, most particularly in the area of culpability. *Figueiredo Dias* went further to say: "Theoretically, it will thus open the way for the recognition that criminal responsibility in secondary criminal law is parallel to the liability of those individuals who act as their organs or representatives."<sup>47</sup> Aside from the fact that *Figueiredo Dias* confines criminal responsibility of legal and collective entities to secondary criminal law,<sup>48</sup> the significant point he makes concerns the *parallel* nature of the corporate responsibility and that of individuals who act as organs or representatives of the corporations. It is a method which could conceivably be applied to corporate criminal responsibility.

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said this, it should be noted that the state of the current legal framework governing corporate criminal liability is in flux.

44 This problem does not appear resolvable by the proposition put forward by *Hans Joachim Hirsch*, *La criminalisation du comportement collectif - Allemagne*, in: *de Doelder/Tiedemann* (note 6), pp. 57 ff.

45 *Günter Heine*, *Die strafrechtliche Verantwortlichkeit von Unternehmen*, Baden-Baden 1995, pp. 241 ff.

46 See *Jorge de Figueiredo Dias* (note 6), pp. 12 ff.; *idem*, *Pressupostos* (note 7), pp. 50 ff., also *idem*, *Para uma dogmática* (note 7), pp. 48 ff., following the lead of *Arthur Kaufmann* (note 7).

47 *Jorge de Figueiredo Dias*, *Para uma dogmática* (note 7), p. 50.

48 Consider the development of *Jorge de Figueiredo Dias'* legal thought in: *O Código Penal português de 1982 e a sua reforma (1982's Portuguese Penal Code and Its Reform)*, *Revista Portuguesa de Ciência Criminal* (1993), and specially *idem* (note 15), his thinking on how the Portuguese Penal Code has evolved from a position where fiscal laws acquired a central position, moved then to a precarious position and then to a permanent position. New legal issues relating to the environment have also contributed to the enrichment of the Penal Code and continue to affect corporate criminal liability

There are advantages to building a model of corporate criminal liability which parallels that of individual criminal liability. Firstly, it avoids a trade-off between demands for individual punishment and corporate liability. Secondly, it widens the scope of what is termed corporate activity, which itself would lead to a broader range of methods to deal with the problem.

I have earlier alluded to a model of corporate criminal liability, yet one cannot ignore the different realities in which corporations and collective entities must operate. An ideal model is only possible where the economy is based on large corporations and when the existing legal system has no concept of collective responsibility. As *Heine* points out, it has only been tried within the confines of environmental law. To apply such a model in a country like Portugal would be problematic as the economic structure is extremely diverse and the legal system has already incorporated provisions of collective responsibility. A mixed model is perhaps possible, based on a combination of both approaches which would allow the General Part of the Penal Code to offer: (a) comprehensive model of criminal liability which could be formulated by using the "pattern-examples" technique (*Regelbeispieltechnik*),<sup>49</sup> and (b) a clear statement of the sanctions to be imposed on corporations which are found criminally liable, including a means of converting prison sanctions into pecuniary sentences.

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49 See *Jorge de Figueiredo Dias*, *Direito Penal Português, As consequências jurídicas do crime* (Portuguese Penal Law, Legal Consequences of Crime), Lisboa 1993, pp. 203 ff.; *Teresa Serra*, *Homicídio qualificado, Tipo de culpa e medida da pena* (Murder, Type of Guilt and Sentencing), Lisboa 1990, pp. 47 ff.



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# Developments in Corporate Liability in England and Wales

Celia Wells, Cardiff

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## I. Introduction

Legal systems throughout the world appear to be asking similar questions about corporate responsibility for harms caused by their negligent operations, and as a result corporate liability for crime has appeared on the agenda in many jurisdictions over the last ten years. The Council of Europe reached a consensus in 1988,<sup>1</sup> corporate liability was the subject of the International Congress of Comparative Law in Athens 1994,<sup>2</sup> and the Law Commission in England and Wales<sup>3</sup> devoted a significant part of its recent review of involuntary manslaughter to the question of corporate killing.<sup>4</sup>

Before making comparisons with other jurisdictions it is important to recognise that administrative and procedural differences are often as significant as those of substantive law. Most corporate prosecutions in England and Wales arise under regulatory legislation which is technically within the domain of criminal law but in many ways is comparable with administrative regulation in other jurisdictions. Unlike laws against murder, assault and theft, for example, which apply universally to all persons of sound mind, these regulatory schemes have been created specifically to regulate areas of business activity. Trading standards laws, health and safety laws, and environmental protection laws all fit this category. Such regulatory schemes share some characteristics of the criminal law, such as utilising the criminal procedural and penalty structure, yet in other ways, particularly with regard to investigation and enforcement, are quite different. These regulatory offences are perceived as distinct from mainstream criminal law, and the differ-

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1 Recommendation No. R (88) 18.

2 *Hans de Doelder/Klaus Tiedemann* (eds.), *Criminal Liability of Corporations*, The Hague 1996.

3 Scotland shares some but not all of these principles and therefore I confine myself to the jurisdictions of England, Wales and Northern Ireland.

4 *Law Commission*, *Legislating the Criminal Code: Involuntary Manslaughter*, Report No. 237, London 1996.

ences between the two fields are reflected in the rules relating to corporate responsibility.

It should be noted also that the theoretical availability of corporate liability is not always translated into practical enforcement. In relation to both regulatory and more conventional offences discretion in respect of investigation and prosecution reduces the number of instances of corporate wrongdoing which are formally pursued. These discretions exercised by regulatory agencies, the police and the Crown Prosecution Service, shield both companies and their directors from prosecution or other official action.

Let me move now to a more detailed explanation of the system of regulating corporations in England and Wales.

## II. Liability of the Corporation in English Criminal Law

Until recently only two mechanisms for attributing fault to a corporate body were recognised, the vicarious principle and the doctrine of identification. Vicarious liability, a doctrine transplanted from the civil law which grew out of the development of liability of a master (employer) for his servant (employee), facilitated the development of both the civil and criminal liability of corporations. The vicarious principle applied only to some statutory offences in the regulatory field and, by the beginning of this century, a number of regulatory provisions were construed as applying to corporations.

Whether a criminal prohibition could be applied to a corporation in this way was a matter of interpreting the object of the statute. Most offences use the phrase "it is an offence for a person to ..." or something similar and the Interpretation Act of 1889 defined "person" to include "a body of persons corporate or unincorporate".<sup>5</sup> In general, the process of judicial interpretation of the statutory object led to corporate liability being imposed only for regulatory offences, especially those offences which did not require proof of *mens rea* or a mental element. While the general principle that a company can be prosecuted for a criminal offence has long been accepted, the question whether a *particular* statute imposes such liability and whether the vicarious or identification doctrine will apply, is rarely if ever spelled out in legislation, and thus the process of interpretation is on-going.

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<sup>5</sup> See now Interpretation Act 1978. The inclusion of "bodies unincorporate" did not mean that they could be liable in their own name since such bodies are not recognised as juridical persons.

The identification model developed only in the middle of this century. Before that the courts had stuck firmly to the view that it was inappropriate to bring a prosecution against a company for serious offences. An early attempt at a corporate manslaughter prosecution occurred in 1927 but was rejected by the High Court on the ground that it was not possible for a corporation to commit any offence against the person.<sup>6</sup> This case usefully reminds us both that the idea behind corporate manslaughter has a relatively long history, and that common law is capable of changing its mind. By the mid 1940s a different view of non-regulatory offences emerged, although it was another 50 years before the specific question of corporate manslaughter was settled. The identification theory developed from a series of fraud cases and it marked the recognition of corporations as capable of committing offences which required proof of a mental element.<sup>7</sup>

This juridical solution to the conceptual problem of attributing a mental element to a company, imagined the company's senior officers acting *as*, rather than on behalf of, the company. By making so much of the distinction between vicarious liability for all the company's employees and the "direct" liability of the company itself, the courts ensured a limited role for corporate liability for serious non-regulatory offences. Despite the radical decision to extend to corporations liability for traditional offences, there has for a long time been a clear reluctance to give the doctrine any bite. The vast majority of corporate prosecutions are brought in magistrates' courts where sophisticated legal argument is rare. It was not until *Tesco v. Nattrass* in 1971<sup>8</sup> that the emerging identification doctrine came before the House of Lords, which held that only those who control or manage the affairs of a company are regarded as embodying or acting as the company itself for these purposes.

The underlying theory on which the case builds is that company employees can be divided into those who act as the "hands" and those who represent the "brains" of the company. The anthropomorphic approach has its origins in the following observation by Viscount *Haldane* in an earlier civil case:

"[A] corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation."<sup>9</sup>

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6 *R. v. Cory Brothers* [1927] 1 Kings Bench 810.

7 *R. v. ICR Haulage Ltd* [1944] 30 Criminal Appeal Reports 31.

8 [1972] Appeal Cases 153.

9 *Lennard's Carrying Co Ltd v. Asiatic Petroleum Co* [1915] Appeal Cases 713.

Translated into the criminal sphere, this became the basis for the identification principle which essentially meant that a company would be liable for a serious criminal offence where one of its most senior officers had acted with the requisite fault. Expounded in *Tesco v. Nattrass*, this limited the relevant personnel to those at the centre of corporate power. While this case disposed of the conceptual obstacles to the idea of a general theory of corporate criminal liability, ideological and political objections still abounded.

### III. Recent Developments

Only in the last decade has corporate criminal liability emerged as a topic worthy of systematic scholarly or judicial attention. Therefore, it is something of a misnomer to describe these as *new* or *recent* developments; they are the *only* significant developments since 1971. In this paper I concentrate on judicial developments in corporate liability while in a separate paper I discuss the Law Commission's proposals for a new offence of corporate killing. The judicial changes fall into two categories: the classification of offences, and the extension of identification liability.

#### a) *Classifying Offences*

As I have explained two quite different models of attribution apply in England and Wales, the extensive vicarious type and the restrictive identification model. Clearly, the categorisation of any particular offence between these two routes to liability is critical; identification liability stops at wrongdoing in the Boardroom while vicarious liability extends to the corporation responsibility to the acts of all employees. It is surprising that until recently this important categorisation element in considering corporate responsibility has been ignored. Most accounts of the subject seemed to assume that there were only two types of offence, those of strict liability and those requiring proof of a mental element.<sup>10</sup> Only if the offence were one of strict liability would the corporation's liability be determined on the vicarious route. If the offence required proof of a mental element such as intention, or recklessness, then the identification principle applied, even where the offence was part of a regulatory scheme. However, this left a large number of offences out of consideration. Many regulatory offences have a hybrid nature. They are similar to strict liability offences in the sense that the prosecutor does not have to prove

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<sup>10</sup> Note that in English law the term "strict liability" encompasses both the "strict" and "absolute" offences recognised in Canadian criminal law.

knowledge, intention or recklessness, but they contain a reverse onus of proof defence which allows the defendant to prove that she exercised all due diligence in avoiding the offence, or took all reasonable precautions or some similar formulation. Almost by default, it was assumed that identification liability applied to these hybrid offences, with the result that a company which could show that its directors or officers had acted with due diligence, or had taken precautions, could avoid liability.

Several recent cases, variously concerned with hybrid health and safety offences or with consumer trading offences, have now challenged this assumption. As far as distributing offences between the vicarious and the identification types of liability is concerned, the decision which re-opened the issue and no doubt sent shivers down some corporate spines was that in *R. v. British Steel*.<sup>11</sup> Interpreting the duty of employers to ensure "... as far as is reasonably practicable, that employees and non-employees are not exposed to risks to their health or safety..." under the Health and Safety at Work Act 1974,<sup>12</sup> the Court of Appeal held that this imposed vicarious liability. The company could not escape liability by showing that, at a senior level, it had taken steps to ensure safety if, at the operating level, all reasonably practicable steps had not been taken. The company, in other words, falls to be judged not on its words but its actions, including the actions of all its employees.

A number of other cases have taken a similar line.<sup>13</sup> However, it would be a mistake to think that the penalties imposed on these companies are necessarily very steep. For example, the breach of safety rules in the *British Steel* case caused the death of a worker but at the trial the company was fined 100 pounds, against which the company did not appeal. In determining the substantive appeal, the Court of Appeal was powerless to increase the fine but did express the view that it was wholly inadequate.<sup>14</sup>

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11 [1995] 1 Weekly Law Reports 1356.

12 Section 3.

13 *Tesco Stores Ltd v. London Borough of Brent* [1993] 2 All England Law Reports 718, Divisional Court (a case under the Video Recordings Act 1984); *R. v. Associated Octel* [1996] 1 Weekly Law Reports 1543, House of Lords ( a case under the Health and Safety at Work Act 1974, s. 3); *R. v. Gateway Foodmarkets* [1997] Industrial Relations Law Reports 189, CA (a case under the Health and Safety at Work Act 1974, s. 2).

14 The average fine for health and safety breach is 5421 sterling (or 3266 when adjusted for exceptional fines) although exemplary fines of up to half a million pounds have on occasion been imposed (in total only twelve fines have ever exceeded 150,000 pounds), Health and Safety Bulletin, February 1998, p. 266.

These recent cases all point in the direction of the appellate courts taking a far stricter approach than was evidenced in the years immediately following *Tesco v. Natrass*, which itself actually concerned a hybrid trading standards offence. The issue in that case was whether the company was responsible for the lack of due diligence on the part of the supermarket chain's branch manager. Ironically then, the overall effect of the introduction of the identification principle as an additional route to corporate liability, was to reduce the likelihood of a corporate conviction. Prosecutions for serious offences have always been rare, while some of those brought in the regulatory sphere began to be siphoned off into the restrictive identification channel. Opening of the new route of liability for *mens rea* offences in fact led to a diversion of offences which would previously have fallen under the vicarious umbrella. The belated recognition that hybrid offences belong to the vicarious category appears to have halted that process.

How do we explain this outbreak of purposive construction in the appellate courts, for there is nothing new about these hybrid offences? Offences like this have been on the statute book for decades. A number of explanations can be advanced for the issue coming to the fore, most of which are connected with the trend towards blaming corporations, and consequent increased levels of enforcement, and higher maximum penalties especially for health and safety offences. All this promotes a culture in which lawyers are more critical and in which corporations have an incentive to defend health and safety prosecutions more vigorously.

Both regulators and the regulated have a heightened interest in the form that liability takes in an increasingly deterrence orientated enforcement culture. The appellate courts have taken a strong line in maintaining that regulatory legislation, whether safety at work, environmental or consumer provisions, could not possibly work if the company is only liable when a director or officer fails to exercise due diligence (or its equivalent depending on the details of the offence).

#### *b) Extending Identification Liability*

A second development has been the broadening of identification liability itself. So far we have assumed that there are two routes to blaming a corporation, the all-inclusive vicarious principle and the restrictive *alter ego* theory, identifying the company only with its most senior officers.

In addition there is a third, embryonic theory which dissociates the corporation from a human model. The recognition of the emergent doctrine of organisational

or systems based liability has led to a reconsideration of *Tesco v. Natrass* even where it applies to offences requiring proof of a mental element. The main case is a decision of the Privy Council, *Meridian Global Funds Management Asia Ltd v. Securities Commission*.<sup>15</sup>

In *Meridian* Lord Hoffmann showed an appreciation of the need for a more sophisticated and flexible approach to the problem of attributing knowledge (or other mental elements) to a corporate body. An alleged breach of the securities legislation turned on whether the company had knowledge of the activities of its investment managers. Admitting that attribution of knowledge raised difficult philosophical questions, Lord Hoffmann suggested that the directing mind model espoused in *Tesco v. Natrass* should not be regarded as the exclusive tool for attributing culpability to a company. It was relevant to examine the language of the particular statute, its content and policy. Since, in this case, the policy was to compel disclosure of a substantial security holder, the relevant knowledge should be that of the person who acquired the relevant interest.

This purposive construction certainly begins to suggest a promising line of reasoning. The question to be considered is who in the company is actually in charge of x, y or z matters, and their knowledge may be attributed to the company even though they fall well outside the "gang of four" (or five or six) directors whom *Tesco v. Natrass* recognises as the nerve-centre of command. In acknowledging the need for a more sensitive test of corporate attribution *Meridian* introduces a flexibility to the identification model; rather than move the offence into the vicarious category, which would have been a radical step given the proof of knowledge requirement, it allows identification to stretch further into the interstices of the company's decision-making structures. As one commentator states:

"Organisation theory and practice have certainly moved away from the simple vertical command-and-control model of how a company functions. In an age of flatter corporate hierarchies, 'empowered' front-line employees and devolved decision-making, Lord Hoffmann's decision has considerable resonance in the real commercial world."<sup>16</sup>

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15 [1995] 3 All England Law Reports 918. It should be noted that although the judicial personnel are consonant, Privy Council decisions do not have the same precedential effect as those of the House of Lords.

16 *Joanna Gray*, *Company Directors and Ignorance of the Law*, (1996) 17 *The Company Lawyer* 2299.

What is not clear, however, is how the *Meridian* test is to be determined in relation to any particular statutory provision. One objection is that leaving the question open to inference from legislative intent presents a hostage to judicial fortune, and the case provides little by way of guidance other than reference to the purpose of the statute, a matter on which opinions will differ. Another problem is that one of the major criticisms of the identification model, particularly in its current restrictive form, is that it fails to respond to differences in company decision-making structures, not that it is insensitive to various legislative purposes. While *Meridian* could be regarded as the first step taking us closer to a new model of corporate liability, it is too early to predict the direction in which the challenge it has issued will be resolved. The incrementalism and pragmatism of the common law facilitates major shifts in direction such as that seen in *Meridian* but equally allows a quiet return to the *status quo*. As yet there is little evidence that the courts have grasped the theoretical underpinnings of the holistic third model of attribution.

#### IV. Conclusion

The judicial mood undoubtedly currently favours a stricter interpretation of health and safety, consumer protection and other regulatory offences. There is also evidence that *Tesco v. Natrass* is no longer so reverently regarded. Its scope has been narrowed and vicarious liability has reasserted itself in hybrid offences in the regulatory sphere. Even where the identification principle is still invoked (mental element offences), the "directing mind" doctrine is showing signs of expansion, and the seeds of a more generic attribution theory have been sown. Without specific legislation, however, the principles of corporate liability for criminal offences are likely to continue to be explored in piecemeal fashion as a matter of interpretation of specific (usually statutory) offences. The enactment of the Law Commission's proposal of a separate offence of corporate killing would no doubt prompt some fruitful jurisprudence on this question.<sup>17</sup>

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<sup>17</sup> See A New Offence of Corporate Killing, in this volume, p. 119.

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## Criticising the Notion of a Genuine Criminal Law Against Legal Entities

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### I.

The development of corporate criminal law within the leading legal systems of the world during the last decades has been surprising. After all, the problem as such is very old, as can be seen in the Latin phrase "*societas delinquere non potest*" which dominated legal thinking in European jurisdictions over centuries.<sup>1</sup> Also, the standard legal doctrines of corporations are about 150 years old: the theory of fiction by *Friedrich Carl von Savigny* and the theory of a real corporate person by *Otto von Gierke*.<sup>2</sup> The political imperatives have been known as well for at least a century: since the age of industrialisation of the major European countries, the parallel development of capitalism and, for example, in Germany the legal standing of smaller companies with limited liability as the corporate association for almost all economic enterprises since 1892.<sup>3</sup> Despite these facts, the general opinion was for many decades that a genuine criminal law against legal entities was not possible.<sup>4</sup> This opinion, however, cannot be based upon obsolete views or social-economic structures, but must be embodied in the basic principles of criminal law as such.

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1 See for the historical background comprehensively *Busch*, Grundfragen der strafrechtlichen Verantwortlichkeit der Verbände, 1933, p. 32 et seq.; *R. Schmitt*, Strafrechtliche Maßnahmen gegen Verbände, 1958, p. 16 et seq.; *Ehrhardt*, Unternehmensdelinquenz und Unternehmensstrafe, 1994, p. 26 et seq.

2 On the one hand v. *Savigny*, System des Römischen Rechts, vol. II, III (1840), p. 1 et seq. (II), 89 et seq. (III), on the other hand v. *Gierke*, Die Genossenschaftstheorie und die Deutsche Rechtsprechung, 1887, p. 15, 21 et seq., 627 et seq.; v. *Gierke*, Deutsches Privatrecht I, 1895, p. 469 et seq.

3 Gesetz betreffend die Gesellschaften mit beschränkter Haftung vom 20.4.1892 (RGBl. S. 477).

4 See *Busch*, supra (note 1), p. 69 et seq.; *R. Schmitt*, supra (note 1), p. 181 et seq.; *Lang-Hinrichsen*, Festschrift für Hellmuth Mayer, 1966, p. 49 et seq.; *Achenbach*, in: Schünemann/Figueiredo Dias (eds.), Bausteine des europäischen Strafrechts, 1995, p. 283 et seq.; see also the references in footnote 5.

The view expressed unanimously at the German Lawyers Convention (Deutscher Juristentag) in 1953 was that the existence of a criminal offence requires human action and culpability of the offender. Therefore, legal entities are not capable of committing a criminal offence, because collective subjects as such are unable to act culpably.<sup>5</sup>

This conviction has, however, during the last years ceased to exist not only on the European continent in general, but also in Germany. The Anglo-American concept of corporate crime<sup>6</sup> has claimed to have won the battle. One could explain the introduction of corporate criminal law in Scandinavia and the Netherlands<sup>7</sup> with the increasing influence of Anglo-American legal thought in these legal systems in general. But the criminal liability of legal entities in the new French *Code Pénal* from 1992<sup>8</sup> also negates the rule "*societas delinquere non potest*" as one of the fundamental principles of continental European criminal law within Central Europe.

Up to now German Penal Law has not gone as far, but it has taken the first step towards the concept of corporate crime by introducing fines against legal entities similar to fines for administrative offences (Ordnungswidrigkeiten).<sup>9</sup> In most of the countries in Southern Europe, legal entities are treated as subjects of legal

5 See the expertise by *Heinitz* and the contributions of *Engisch* and *Hartung* for the 40. Deutscher Juristentag, vol. I 1953, p. 65 et seq.; vol. II 1954, part E 7 et seq., 43 et seq.

6 See comprehensively *Ehrhardt*, supra (note 1), p. 96 et seq.; *Brickey*, Corporate Criminal Liability, vol. 1, 2nd ed. 1992, vol. 2 and 3 1984; *Coffee* and *Ferguson*, in this volume p. 9 and 152; for the English law see *Leigh*, The Criminal Liability of Corporations in English Law, 1969; *Wells*, Corporations and Criminal Responsibility, 1993; *Wells*, ZStW 107 (1995), 676 et seq.; *Wells*, in this volume p. 119 and 217; further *Healy*, *Harding* and *Wise*, in: de Doelder/Tiedemann (eds.), Criminal Liability of Corporations, 1996, p. 169 et seq., 369 et seq. and 383 et seq. respectively.

7 See *de Doelder*, in: de Doelder/Tiedemann (eds.), supra (note 6), p. 289 et seq.; *Riihijärvi*, *ibid.*, p. 203 et seq.; *de Doelder*, *Greve* and *Rostad*, in: Schünemann/Suarez Gonzalez (eds.), Bausteine des europäischen Wirtschaftsstrafrechts, 1994, p. 311 et seq., 313 et seq., 323 et seq.; *Waling*, Das niederländische Umweltstrafrecht, 1991, p. 104 et seq.; *Torrington*, Strafbarkeit von Rechtspersonen, 1984; *Nielsen*, in this volume p. 189; *Schünemann*, in: Leipziger Kommentar zum StGB, 11th ed. 1993, § 14/76.

8 See *Bouloc*, in: de Doelder/Tiedemann (eds.), supra (note 6), p. 235 et seq.; *Delmas-Marty*, in: Schünemann/Suarez Gonzalez (eds.), supra (note 7), p. 305 et seq.; *Schwinge*, Strafrechtliche Sanktionen gegenüber Unternehmen im Bereich des Umweltstrafrechts, 1996, p. 30 et seq.; *Zieschang*, Das Sanktionensystem in der Reform des französischen Strafrechts im Vergleich mit dem deutschen Strafrecht, 1992, p. 236 et seq.

9 According to § 30 OWiG, see *Brender*, Die Neuregelung der Verbandstäterschaft im Ordnungswidrigkeitenrecht, 1989; *Ehrhardt*, supra (note 1), p. 58 et seq.; see for gaps and proposals *Schünemann*, Unternehmenskriminalität und Strafrecht, 1979, p. 155 et seq.; *Schünemann* (ed.), Unternehmenskriminalität, 1996, p. 168 et seq.; *Tiedemann*, NJW 1988, 1169 et seq.

norms, and, therefore, as potential offenders within administrative penal law (which corresponds with the German "Ordnungswidrigkeitenrecht").<sup>10</sup> Besides this development, the discussion within the legal academic community has been far more extensive. Within the framework of this short commentary, it is not possible, of course, to give an account of the very complicated discussion which took place in Germany during recent years. In addition to the conferences previously mentioned by *Möhrenschlager* and other participants, I want to draw attention to two events, the Coimbra-Symposium 1991 and to the Madrid-Symposium 1992. Both have dealt with the topic in a thorough manner, outlining discussion guidelines for European Criminal Law Reform. The materials of the two symposia have been published in Germany as well as in Spain.<sup>11</sup> Nevertheless, many scholars express the opinion that a genuine criminal law against legal entities is not possible and, therefore, claim that a separate system of sanctions against economic enterprises should be introduced as a third way between criminal law in a narrower sense and measures without the requirement of guilt in the German Penal Code (Maßregeln der Besserung und Sicherung). I made this point in my study "Corporate Crime and Penal Law" ("Unternehmenskriminalität und Strafrecht") in 1979. The monographs of *Heine* and *Ransiek* as well as considerations by *Otto*<sup>12</sup> and art. 129 of the Spanish Penal Code<sup>13</sup> illustrate the same point.

On the other hand, there are two concepts which recognise genuine corporate crimes: they either impute the action and culpability of a person to the legal entity, thus relying on representation (*representation model*), or they rely on a paradigm derived from system theory, which understands human beings only as one case of a general system of actions and thus interprets the normative system of actions of a legal entity not as a special case, but as the general form of a subject of penal norms (*system theory model*). The system theory model of corporate crime has

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10 For Spain, see *S. Bacigalupo*, La responsabilidad penal de las personas jurídicas, 1998, p. 231 et seq.; *Silva Sanchez*, in: Schünemann/Figueiredo Dias (eds.), supra (note 4), p. 307 et seq.; for Italy *Paliero*, in: Schünemann/Suarez Gonzalez (eds.), supra (note 7), p. 245 et seq.; *Paliero*, in: de Doelder/Tiedemann (eds.), supra (note 6), p. 251, 265 et seq.; *Militello*, in: Schünemann/Figueiredo Dias (eds.), supra (note 4), p. 321 et seq.; *Militello*, in this volume p. 181; for Portugal *Faria Costa*, in: Schünemann/Figueiredo Dias (eds.), supra (note 4), p. 337 et seq.; *Serra*, in this volume p. 203.

11 For the Coimbra Congress, see *Schünemann/Figueiredo Dias* (eds.), supra (note 4), and *Silva Sanchez* (ed.), Fundamentos de un sistema europeo del derecho penal, Barcelona 1995; for the Madrid Congress, see *Schünemann/Suarez Gonzalez* (eds.), supra (note 7), and *Hacia un derecho penal económico europeo*, Boletín Oficial del Estado, Madrid 1995.

12 *Heine*, Die strafrechtliche Verantwortlichkeit von Unternehmen, 1995; *Ransiek*, Unternehmensstrafrecht, 1996; *Otto*, Die Strafbarkeit von Unternehmen und Verbänden, 1993.

13 See the comments of *Jorge Barreiro*, in: Rodríguez Mourullo y otros, Comentarios al Código Penal, 1997, p. 363 et seq., and *S. Bacigalupo*, in this volume, p. 255.

been developed by *Jakobs* and, in a very subtle way, by *Lampe*.<sup>14</sup> The representation model can be found in the monographs by *H.-J. Schroth*, by *Ehrhardt* and, of special note, in a small study by *Hans Joachim Hirsch*.<sup>15</sup>

## II.

I begin my critique with the representation model. It resembles the "identification theory" in common law<sup>16</sup> and, in addition, forms the basis of the new French Penal Code. This concept deals with the problem of whether legal entities (or more generally speaking, collective entities, namely economic enterprises) are capable of actions and culpability by a simple principle of imputation: the legal entity acts through its organs and, therefore, is capable of actions; its culpability is identical with the culpability of the agents. The German Constitutional Court argued similarly in the so-called Bertelsmann-Lesering-ruling.<sup>17</sup> It would be, however, erroneous and illogical to assume from this case that genuine corporate criminal liability and a genuine criminal law against corporations can be justified. In my view, the logic behind the opinions of the German Constitutional Court were faulty, namely with respect to the *quaternio terminorum* of the concept of culpability. The classical concept of criminal culpability presupposes the capability of an individual to act differently (that is the capability to avoid the criminal behaviour), which is an empirical capability and cannot be substituted by a merely normative imputation.<sup>18</sup> The ruling of the German Constitutional Court relies on an imputation of the culpability of the organ which stems from *civil law* and is not compatible with the concept of *criminal* culpability. The concurrent reasoning of *Schroth* is also circular, as he postulates culpability of the enterprise on the basis of legal norms in criminal and administrative law which would presuppose such culpability.<sup>19</sup> Even more evident is the circular reasoning in the work of *Ehrhardt*.

14 *Jakobs*, Strafrecht Allgemeiner Teil, 2nd ed. 1991, p. 148 et seq.; *Lampe*, ZStW 106 (1994), 683 et seq.

15 *H.-J. Schroth*, Unternehmen als Normadressaten und Sanktionssubjekte, 1993; *Ehrhardt*, supra (note 1); *Hirsch*, Die Frage der Straffähigkeit von Personenverbänden, 1993.

16 Known as well as "alter-ego-theory", see comprehensively *Leigh*, supra (note 6), p. 91 et seq.; *Ehrhardt*, supra (note 1), p. 99, 111 et seq.; *Wells*, supra (note 6); *Wells*, in this volume p. 119 and 217; *Ferguson*, in this volume p. 152.

17 BVerfGE 20, 323 et seq.

18 Comprehensively *Schünemann*, Unternehmenskriminalität, supra (note 9), p. 234 et seq.; *Schünemann*, in: The Taiwan/ROC Chapter, AIDP (ed.), International Conference on Environmental Criminal Law, Taipei 1992, p. 433, 453 et seq.; *Schünemann*, in: Jornadas sobre la "Reforma del derecho penal en Alemania", CuCGPJ, Madrid 1991, p. 31, 42 et seq.; *Schünemann*, in: Schünemann/Suarez Gonzalez (eds.), supra (note 7), p. 282 et seq.

19 Ibid. (note 15), p. 203 et seq.

She assumes without further arguments that the legal entity has "to organise its framework in a way as not to give space for criminal behaviour" and concludes that it is legitimate "to impute not only the behaviour of its representatives, but also their culpability (to the legal entity)".<sup>20</sup> *Ehrhardt* does not even require organisational shortcomings of the legal entity<sup>21</sup> (as *Tiedemann* does in his compromise concept of corporate crime).<sup>22</sup> *Ehrhardt* ultimately advocates an imputation of the culpability of a third party, comparable to penal liability of the whole family for actions of one of its members (*Sippenhaftung*)<sup>23</sup> and which resembles the American concept of strict vicarious liability.<sup>24</sup> As a verdict of guilt reproachingly expresses that the offender has committed an illegal act, which he could have avoided, the offender in person has to have had the capacity to avoid the act - as it is stated in § 29 German StGB which holds that the offender is to be punished according to his own and not according to someone else's culpability. This is exactly the crucial difference between the continental European concept of criminal law and the penal concept of common law. The latter has always recognised, at least to a limited extent, vicarious liability and strict liability, and still does.<sup>25</sup> According to the concept of moral and legal culpability, however, which has been shaped on the continent by *Immanuel Kant*<sup>26</sup> there can be no imputation on one person of another person's culpability. The practice of penal liability of the whole family for actions of one of its members during the Third Reich has stressed the importance of this concept and anchored it in the general conscience.

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20 Ibid. (note 1), p. 194 et seq.

21 Ibid. (note 1), p. 194 et seq.

22 *Tiedemann*, Festschrift für Jescheck, 1985, p. 1411 et seq.; *Tiedemann*, NJW 1986, 1842 et seq.; *Tiedemann*, NJW 1988, 1169, 1171 et seq.; *Tiedemann*, in: Eser/Thormundsson (eds.), *Old Ways and New Needs in Criminal Legislation*, 1989, p. 157, 170 et seq.; *Tiedemann*, in: Festschrift für Stree/Wessels, 1993, p. 527, 531 et seq.

23 As for the liability of the whole family for crimes of one of its members during National Socialism, which in this context serves as a warning example for "vicarious liability", see *Ingo Müller*, *Furchtbare Juristen*, 1987, p. 125 et seq.; *Rückerl*, *NS-Verbrechen vor Gericht*, 1982, p. 49 et seq., 72 et seq.

24 Comprehensively *Bähr*, *Strafbarkeit ohne Verschulden (Strict liability) im Strafrecht der USA*, Doctoral Thesis Köln 1974, p. 46 et seq., 62 et seq.; *Brickey*, supra (note 6), vol. 1 p. (172) et seq.; *Kadish/Schulhofer*, *Criminal Law and its Processes*, 5th ed., 1989, p. 234 et seq., 296 et seq.; *Ehrhardt*, supra (note 1), p. 92 et seq.; *Coffee*, in this volume, p. 9.

25 For references see note 22 and *Smith/Hogan*, *Criminal Law*, 7th ed. 1992, p. 99 et seq., 170 et seq.; *Dressler*, *Understanding Criminal Law*, 2nd ed. 1995, p. 125 et seq.

26 For "vicarious liability" would infringe the principle, that "richterliche Strafe ... jederzeit nur darum wider (den Verbrecher) verhängt werden muß, weil er verbrochen hat; denn der Mensch kann nie bloß als Mittel zu den Absichten eines anderen gehandhabt und unter die Gegenstände des Sachenrechts gemengt werden ...", therefore "die Gleichheit der Strafen ... sich daran offenbart, daß dadurch allein proportionierlich mit der inneren Bösartigkeit der Verbrecher das Todesurteil ... ausgesprochen wird" (*Kant*, *Die Metaphysik der Sitten*, 2nd ed. 1798, p. 226 et seq., 229).

That the representation model is not appropriate in penal law can also be shown by a critique of the writings of *Hirsch*. He merely relies on the use of ordinary language which attributes culpability to collectives such as states or companies with respect to events in their sphere of responsibility.<sup>27</sup> *Hirsch* has forgotten to ask, as a supporter of finalism<sup>28</sup> should do, to which ontological structures the penal concept of culpability refers, and if ordinary language is compatible with this. As the culpability of the offender can only legitimise punishment if the offender was capable to act differently, the legitimation is dependent on the capability for action. As corporations are without doubt incapable of actions according to a concept of actions referring to human bodily movements, *Hirsch's* argument that corporations act through another person replaces action with imputation and, therefore, amounts to circular reasoning. Furthermore, *Hirsch* is also wrong by drawing an analogy to the legal construction of the "offender behind the actor":<sup>29</sup> the offender behind the actor is, of course, liable for his own actions, whereas the legal entity does not act at all.

The representation model, therefore, does not give sufficient reasons to justify the imposition of sanctions against corporations as a form of punishment.

### III.

Therefore, the only remaining concept to justify a genuine corporate criminal law is the system theory model. *Jakobs* has developed a version of that model which is generally derived from the terminology used by *Luhmann*,<sup>30</sup> *Lampe* has recently developed a far more elaborate, even more sophisticated version<sup>31</sup> which, nevertheless, is still akin to *v. Gierke's* more metaphorical theory of a real corporate

27 *Supra* (note 15), p. 13 et seq.

28 Finalism refers to the doctrine of *Welzel* claiming that the principles of attribution in penal law have to be derived from the basic ontological structure of final acts. For the defence of this concept see *Hirsch*, in: *Hirsch* (ed.), *Deutsch-Spanisches Strafrechtssymposium 1986*, 1987, p. 47; *Hirsch*, in: *Festschrift der Rechtswissenschaftlichen Fakultät zur 600-Jahr-Feier der Universität zu Köln*, 1988, p. 399; *Hirsch*, in: *Hirsch/Weigend* (eds.), *Strafrecht und Kriminalpolitik in Japan und Deutschland*, 1989, p. 65; *Hirsch*, *ZStW* 93 (1981), 831; *ZStW* 94 (1982), 239; *ZStW* 106 (1994), 746.

29 So-called mittelbare Täterschaft, defined in § 25 s. 1 German Penal Code as committing the crime "through another person".

30 Because, according to his opinion, it cannot be justified "that when determining the subject, the system has always been composed of the ingredients of a natural person and has not included those of a legal entity", therefore "also the constitution and the organs of legal entities can be defined as a system" (note 14, p. 149).

31 *Ibid* (note 14).

person. The legal entity or the association, thus also an economic enterprise, is, according to this theory, more than and something qualitatively different from the mere sum of the individuals who constitute it. There is a great theoretical, but a small practical difference between putting the emphasis on a system of action demarcated against its environment, or on the group spirit, or - less metaphorically expressed - on its specific form of communication and its over-individual content. The dispositions of behaviour of the members, which guide the behaviour of the members inside the association and form the "collective spirit,"<sup>32</sup> can be observed in social reality especially when their effects cause harm to legal goods. They can, at least to a certain degree, be influenced by the threat and imposition of sanctions against the association. As the interest of the association is the dominant motive for the actions of its members, the fear of sanctions against the association can deter members from harming legal goods. The sanction against the association can also have a preventive effect similar to the imposition of a penalty against an individual, for example, when the court appoints a person to a controlling function over the association in order to alter its criminal "attitude".

At first glance, it seems that I have just provided a basis for a genuine corporate criminal law, because I have noted that the sanctions against an association may have the same effects as punishment against individuals: general deterrence, as well as special preventive rehabilitation and incapacitation. However, there remains a crucial difference between the two, specifically in relation to the structure of the norm. The norms of behaviour (*primary norms*)<sup>33</sup> of the genuine criminal law directly prohibit harmful actions of individuals; the culpable breach of the norm leads to punishment. As these actions, which are directly harmful, can only be committed by the individual and not by the association, the norm applied to the association must have a different content. It requires that the association maintain a perfect organisation in order to prevent, in the interest of the association, the

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32 Earlier I have called this "kriminelle Verbandsattitüde", when talking about an association which constantly endangers legal goods, see *Schünemann*, Unternehmenskriminalität und Strafrecht, supra (note 9), p. 22, 253, 266; this means a criminal corporate attitude which resembles the concept of corporate culture mentioned in the lecture of *Coffee*, in this volume p. 9; *Ehrhardt*, supra (note 1), p. 150 et seq.; *Fisse*, Reconstructing Corporate Criminal Law (1983), 56 S.Cal.L.Rev. 1141; *Wells*, supra (note 6); *Ferguson*, in this volume p. 152.

33 See for the category of (primary) norms fundamentally *Binding*, Die Normen und ihre Übertretung, vol. I, 3rd ed. 1916, p. 4 et seq.; *Armin Kaufmann*, Lebendiges und Totes in Bindings Normentheorie, 1954, p. 3 et seq.; *Hart*, The Concept of Law, 1961; in this context it is not necessary to consider attempts denying the existence of primary norms which have recently become popular, see, for example, *Hoyer*, Strafrechtsdogmatik nach Armin Kaufmann, 1997, passim.

development of a criminal attitude and further on the commission of offences through its members. Therefore, the norm addressed to the association does not directly prohibit the harming of legal goods, but has, to that point, only an indirect aim. As a result, the violation of that norm has, as such, no direct consequences outside the corporate framework. Even in the case of an inadequately organised association, the latter would only be subjected to sanctions if the bad organisation caused harm to legal goods.

The structure of the norms applied to the association thus fundamentally differs from that of the primary norms of the genuine criminal law. Therefore, no direct protection of legal goods is achieved, only indirect protection. Furthermore, the association will regularly have several alternatives as to how to organise itself. The organisation norms applied to the association, therefore, are found in *reflexive law* (reflexives Recht) in autopoietic systems, according to which the norm does not demand a certain behaviour, but the achievement of a certain result, whereas the ways and means to achieve it are to be chosen and detailed by the subject of the norm itself.<sup>34</sup>

#### IV.

To summarise, the law of sanctions against associations has to be developed in a unique way and cannot be identical with the traditional criminal law against individuals, albeit there are many common aspects. The combination of general preventive and special preventive effects is much narrower than in the case of traditional punishment; therefore, sanctions against associations are more closely related to sanctions without the requirement of guilt (*Maßregeln*, i.e. measures of rehabilitation and incapacitation<sup>35</sup>) than to punishment and on the whole could represent a third option between punishment and *Maßregeln*. I will return to this point when making my commentary about possible sanctions against associations.<sup>36</sup> On a general level, this third option resembles both *Tiedemann's* com-

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34 For the concept of reflexive law see *Teubner*, ARSP 68 (1982), 13 et seq.; *Teubner/Willke*, ZfRSoz 1984, 4 et seq.; *Teubner*, Recht als autopoietisches System, 1989, p. 87 et seq.

35 Listed in detail in §§ 61 et seq. German Penal Code, see *Jescheck/Weigend*, Lehrbuch des Strafrechts Allgemeiner Teil, 5th ed. 1996, p. 801 et seq. The categorisation as *Maßregel* in German Law points to the need to look for other justifying principles than culpability which justifies punishment. This issue can of course not be ignored in other legal systems which - as in the Anglo-American System - do not know *Maßregeln*, but resort to the concept of strict liability.

36 In this volume, p. 293.

promise solution based on organisational negligence<sup>37</sup> and the American concept of a duty-based or negligence-based regime that has been presented by Professor *Coffee*.<sup>38</sup> In contrast to the model of imputation, the third option does not need to presuppose the culpability of an individual corporate agent so that the theoretical difficulties associated with the *corporate knowledge issue*<sup>39</sup> may be circumvented. On the other hand, the third option is close enough to criminal law to evoke all constitutional safeguards provided under the due process of law. For example, the burden of proof for organisational negligence should be placed entirely on the prosecution. Harsh sanctions like the dissolution of the legal entity, resembling the death sentence in penal law, may only be legitimised within the framework of the third option as a last resort to prevent future harm. That would not amount to the application of an extraordinary retroactive punishment, but simply to an ordinary prospective measure of incapacitation.<sup>40</sup> And a last example for the conclusions which can be derived from the concept behind the third option is that group liability should not be established as an ordinary kind of punishment, but only as an extraordinary measure to prevent a group of companies from shifting its detrimental activities to another legal entity.<sup>41</sup>

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37 See supra (note 22).

38 In this volume p. 9.

39 See *Coffee*, in this volume p. 9 as well as earlier *Schünemann*, *Unternehmenskriminalität und Strafrecht*, supra (note 9), p. 155 et seq., 238 et seq.

40 The general permission to close or dissolve the company according to art. 129 of the Spanish Penal Code in combination with more specific norms referring to this provision (see *S. Bacigalupo*, supra [note 10]; *S. Bacigalupo*, in this volume p. 255) therefore calls for serious doubts as well as the analogous and even less restricted provision in art. 131-39 of the French Code Pénal (see *Bouloc*, supra [note 8], p. 235 et seq.).

41 Concerning the problem of group liability see *Rütsch*, *Strafrechtlicher Durchgriff bei verbundenen Unternehmen?* 1987, p. 25 et seq.; *Dannecker/Fischer-Fritsch*, *Das EG-Kartellrecht in der Bußgeldpraxis*, 1989, p. 260 et seq.; *Schünemann*, in: Breuer/Kloepfer/Marburger/Schröder (eds.), *Umweltschutz und technische Sicherheit im Unternehmen*, 1994, p. 137, 161 et seq.; *Schünemann*, in: *Leipziger Kommentar*, supra (note 7), § 14/67 et seq.; *Schünemann*, *Unternehmenskriminalität und Strafrecht*, supra (note 9), p. 178 et seq.



## **Subject IV**

### **Sanctions**



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# Sanctions in the Field of Corporate Criminal Liability

Günter Heine, Gießen

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## I. Introduction

The absence of a human subject to whom individual responsibility can be assigned seems to have reduced the range of options in sanctioning enterprises. As *Coffee* puts it, there is "no soul to damn, no body to kick".<sup>1</sup> Penalogical wisdom may have been constrained by its anthropomorphic tendencies. A leading work on English criminal law<sup>2</sup> still asserts that "(s)ince a company cannot be put behind bars, the only possible sanction is a fine". Based on such conventional wisdom, any presentation on corporate sanctions would indeed be bound to be a short one. The only outstanding issue would be that of the method of determining the amounts of the fine. And, even that is a relatively simple question since the amount of a fine has traditionally been calculated on the basis of the nature of the unlawful act, the extent of the damage caused by the legal entity and the financial circumstances of the corporation. Indeed, adherence to the principle of retribution has dominated the history of the punishment of corporate crime. It is still the practice in countries such as the United Kingdom, Japan, Finland, Denmark, and it is found in draft legislations in Lithuania and Switzerland. In other cases, where corporate misconducts are addressed in secondary criminal law or are not directly criminalized as in Germany or Portugal,<sup>3</sup> fines are also often the only sanctions provided by law.

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1 *Coffee*, 79 (1981) Michigan Law Review, 386.

2 *Smith/Hogan*, Criminal Law, 7th ed. 1992, p. 182. Cp. also *Frisch*, in: Eser/Huber/Cornils (eds.), Einzelverantwortung und Mitverantwortung im Strafrecht, Freiburg 1998, p. 358.

3 For overview see *Schwinge*, Strafrechtliche Sanktionen gegenüber Unternehmen im Bereich des Umweltstrafrechts, Pfaffenweiler 1996, p. 26 ff.; *Fisse/Braithwaite*, The Impact of Publicity on Corporate Offenses, New York 1993, p. 13 ff.; *Wheeler/Mann/Sarat*, Sitting in Judgement - the Sentencing of White-Collar Criminals, Yale 1986; *Posner*, 17 (1980) Am. Criminal Law Review, 409; *Coffee*, 17 (1980) Am. Criminal Law Review, 419. Germany cp. § 30 Ordnungswidrigkeitengesetz, Portugal art. 7, 1 Decree-Law no. 433/82 of 27 October 1982 (Ordnungswidrigkeitengesetz), Finland see chapter 9:1 Criminal Code, Denmark see chapter 5 § 25 Criminal Code.

The situation has rapidly changed in recent years. An awareness of the existence of influential and dominant large scale enterprises has brought about the promulgation of a broad scope of sanctions. Many new measures have tended to be based on a preventive and proactive approach as opposed to the more reactive ones of the past. These are often aimed directly at preventing or deterring future occurrences of harmful misconducts. However, in most jurisdictions, preventive legislation is uncommon and so is a clear policy in this area. To date, corporate sanctions typically remain reactive rather than proactive.

## II. International Developments

The following is an overview of the new broader spectrum of corporate sanctions available in selected countries. This will be followed, in the last part of this paper, by a discussion of the broad options now available to legislators in addressing the issues of corporate criminal liability.

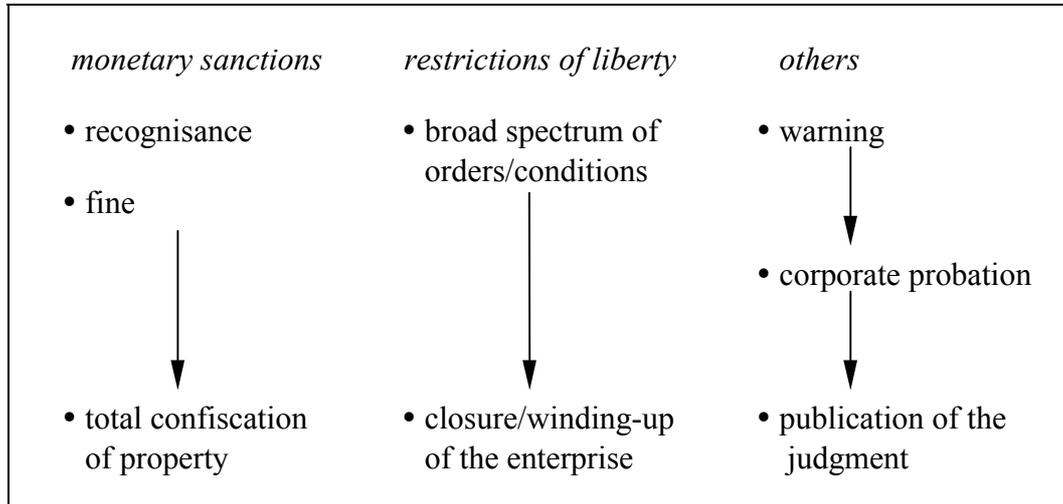
### 1. Broad Spectrum of Corporate Sanctions

Today, a wider range of corporate sanctions is being used (Table 1). The traditional distinction between primarily repressive or preventive sanctions is losing some of its usefulness since most sanctions now tend to be inspired by a proactive purpose.<sup>4</sup> The following tables provide alternative forms of classification listing: monetary sanctions, restrictions on entrepreneurial activities, and other combination sanctions. It should be noted that some sanctions may have some detrimental additional consequences for the corporation to which they have been imposed. For example, the confiscation of a company's properties may result in its ultimate closure. Similarly the effect of bad publicity resulting from the publication of an adverse judgment may, depending on the public reaction, lead to significant losses or even bankruptcy. This was recently illustrated by a case concerning the illegal import of beef from the United Kingdom by a German meat company.

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4 Cp., e.g., the development of criminal policy in the U.S.-Sentencing Guidelines: U.S.S.G. (manual) § 8 states that the sanctions "will provide just punishment, adequate defense, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct". The shift from a purely punitive stance to one of prevention and (direct or indirect) intervention see *Harding*, *Criminal Liability of Corporations - United Kingdom*, in: de Doelder/Tiedemann (eds.), *Criminal Liability of Corporations*, The Hague 1996, p. 381. Cp. also *Nagel/Swenson*, 71 (1993) *Washington University Law Quarterly*, 205 ff.

Table 1 Overview on Sanctions



### 1.1 Monetary Sanctions

Table 2 presents a list of measures on an ascending scale of severity, from a *recognisance* to a total confiscation of property. The latter, which is a kind of "corporate death penalty" is provided for in U.S. legislation against "criminal purpose organizations". It is intended not only to put a corporation out of business but out of action. The purpose of the measure is to confiscate all assets remaining after payment of all legitimate claims against assets by known innocent bona fide creditors (U.S.S.C. § 8 C 1.1. comment n. 1).<sup>5</sup>

<sup>5</sup> For USA see *Wise*, Criminal Liability of Corporations - USA, in: de Doelder/Tiedemann (note 4), p. 394 ff.; *Moore*, 34 (1992) Arizona Law Review, 781; *Steinherr/Steinmann/Olbrich*, The U.S.-Sentencing Commission Guidelines, Wiesbaden 1997, p. 12 f. Cp. also section 6.04 Model Penal Code USA.

Table 2 Monetary and Similar Sanctions

<ul style="list-style-type: none"> <li>• recognisance (<i>EC-rec. 1988, NL, DK</i>)</li> <li>• skimming-off of extra profits (<i>mostly, even in cases of no criminal corporate liability</i>)</li> <li>• forfeiture (<i>U.S.</i>)</li> <li>• compensation (<i>EC-rec. 1988, NL, U.S., AUS, Draft Hessia</i>)</li> <li>• restitution (<i>EC-rec. 1988, NL, U.S.</i>)</li> <li>• exclusion from advantages (<i>EC-rec. 1988, NL, P, F</i>)</li> <li>• fees effecting entrepreneurial ethics (<i>S, PL</i>)</li> <li>• punitive damages (<i>U.S. civil law</i>)</li> </ul>	
	<p>criminal (<i>mostly</i>)</p>
<ul style="list-style-type: none"> <li>• fine</li> </ul>	<p>often including forfeiture</p>
	<p>non-criminal (<i>D, PL, EC anti-trust</i>)</p>
<ul style="list-style-type: none"> <li>• total confiscation of property (<i>U.S.</i>)</li> </ul>	

A recognisance<sup>6</sup> may prevent recidivism, but it is not, properly speaking, a sanction and does little to ensure that "crime does not pay". In some cases, a new offense may still be profitable for the perpetrators even if losing the amount pledged as a security and a new fine are taken into account. *Recognisance* befits legal systems which provide flexibility in their substantive law. In Italy, for example, for some types of crime, it is the repeated offense which constitutes the crime and not the first.<sup>7</sup> Given the relative success of proactive sanctions in such areas as environmental law, a flexible and somewhat lenient legal structure may make sense as long as the role of the criminal is defined in such cases as supporting the implementation of administrative measures which, by nature, must be flexible (in light of the principle of cooperation and others).<sup>8</sup>

Confiscation and forfeiture measures are also widely used. Most jurisdictions have adopted various legal means of confiscating proceeds of crime. This is true even of jurisdictions such as Austria which still formally adhere to the principle "*societas delinquere non potest*". In all instances, an important practical problem which has arisen is that of establishing the proof of the illegal origin of such proceeds. As the approach adopted by the U.S. and the Netherlands has shown, such proof is more easily attainable when the law establishes a reverse onus or burden of proof once the danger to society posed by the profits of criminal organizations has been established.<sup>9</sup> Normally, however, forfeiture procedures are strictly controlled by what is practicable and how to construct a case successfully.

The same argument is true for *compensation* and *restitution*. Full legal compensation cannot be granted in cases where the loss of confidence of consumers in a product or the environmental damage is difficult to quantify in terms of cost. However, in some situations corporate criminal law has achieved some progress,

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6 The recognisance, a sum pledged as security, aims at enforcement of imposed conditions, cp. § 14 C para 2 (3) Criminal Code of The Netherlands. To the low practical meaning see *Waling*, *Das niederländische Umweltstrafrecht*, Freiburg 1991, p. 174. In Belgium, recognisance imposed for preventing perpetrations in future is to be regarded as illegal in cases of criminal sentences, see *Faure*, *Umweltstrafrecht in Belgien*, Freiburg 1992, p. 203. For a law reform proposal see also *Korte*, *Juristische Personen und strafrechtliche Verantwortung*, Bonn 1991, p. 172 ff. Cp. also the recommendations of the Committee of Ministers of the Council of Europe, 20 October 1988, No. R (88) (1988).

7 Cp. *Catenacci*, *Italien*, in: Heine (ed.), *Umweltstrafrecht in mittel- und südeuropäischen Ländern*, Freiburg 1997, p. 291 ff., 311.

8 Cp. *Heine*, in: Schulte (ed.), *Technische Innovation und Recht*, Heidelberg 1997, p. 61 ff.

9 Cp. USA: See *Benseler*, *Die Gewinnabschöpfung in Deutschland und den USA*, Bayreuth 1998; Netherlands: see *de Doelder*, *Criminal Liability of Corporations - Netherlands*, in: *de Doelder/Tiedemann* (note 4), p. 308. For a theoretical approach see *Heine*, *Juristenzeitung* 1995, 655.

that is in the area of victim compensation. The following three cases illustrate this point: *Contergan*, *Erdal* and *Holzschutzmittel* (Germany), *Zeebrugge Ferries* (United Kingdom) and the *Colz-Case* (Spain).<sup>10</sup> Liability and sanctions must be established regardless of the mechanisms selected by the courts or the legislation. The traditional distinction between criminal and civil law is relevant here in three ways: firstly civil remedies may be more readily available in some cases such as those targeted by the EU-incentives where a strict liability is imposed by the laws governing consumer products and environmental protection.<sup>11</sup> Secondly, to some extent, civil law cannot guarantee equal and effective means of redress by victims, at least not in jurisdictions where a civil law action can only be instigated by private citizens.<sup>12</sup> Thirdly, as exemplified in the Netherlands, it is possible to impose the sanction of restitution on a company which has not conducted itself as a "good corporate citizen".<sup>13</sup> Thus, there is legal precedent for imposing certain duties on corporations to ensure that they take the necessary steps to prevent social risk, including investing their own capital for that purpose.

Another kind of sanction takes the form of an *exclusion from advantages* which could include, for example, the withdrawal of tax advantages or subsidies.<sup>14</sup> In the case of centralized states, especially where the state exercises a monopoly role, such *exclusion of advantages* can amount to a compulsory winding up of a company.

As mentioned earlier, the conventional corporate sanction is the *fine*. However, there are many further issues to be considered in imposing an adequate fine. From what can be observed from the range of the fines generally imposed on corporations, there exists an uncertainty about the objectives being pursued by the sanction and the method of calculating the amount of the fine to be imposed or the factors which can be legitimately considered in doing so. It is difficult and complex, in these circumstances, to calculate a fine which is both fair and effective.

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10 *Contergan*-case, District Court of Aachen, *Juristenzeitung* 1971, 507; *Erdal*-case, Federal Supreme Court BGHSt 37, 105 ff.; *Zeebrugge Ferry*-case see *Field/Jorg*, (1991) *Criminal Law Review*, 156; Spanish Salad oil-case see *caso de la colza*, *Cuadernos del Consejo General del Poder Judicial* 1992 (No. 12), translation in German *NStZ* 1994, 37 ff.

11 Cp. *Nagel*, *Der Betrieb* 1993, 2469; *Medicus*, *Natur und Recht* 1990, 148 ff.

12 Cp. also *Spindler* (in this volume 341).

13 Cp. *Oudijk*, *Zeitschrift für Wirtschaft, Steuer, Strafrecht* 1991, 164; *Waling* (note 6), p. 172.

14 Cp. art. 7f. Economic Penal Law (Netherlands); art. 139-39 (5), 131-48 (3) Criminal Code (France); art. 8e) Economic Penal Law (Portugal).

In some jurisdictions, a fine imposed on a company is calculated as a multiple of the individual fine for the same offense, which I term a *totalisator*. In France, for example, the *totalisator* is 5, in the Hessian draft law it is 10, and in Lithuania it is 100.<sup>15</sup> Other legal systems have imposed maximum fines, mostly between one to 20 million U.S. Dollars, yet the figure may be much lower for second offenses, e.g. in Switzerland, a second offense fine amounts to 5.000 SFr.<sup>16</sup> and may be paid over the counter. In other cases, second offense fines can be higher than the original fine, for instance in anti-trust legislation. Some laws do not specify a maximum limit on fines (Canada, Denmark).<sup>17</sup> The EC anti-trust legislation provides for a compromise between fixed limits and the interests of the enterprise concerned, by basing the amount of the fine on 10 % of the enterprise's turnover for the relevant year.<sup>18</sup> This compromise represents a different mode of measuring fines when compared to the *totalisator* model which adheres to the traditional system of quantifying unlawful individual guilt (*verschuldetes Unrecht*). EC legislation paves the way for a more preventive economic approach. The EC model has been incorporated into some legal systems, that is, they have combined the fine with the confiscation of illegal profits or financial *restitutio in integrum*.<sup>19</sup> In that sense, the basis of measuring fines is shifting from the focus on the unlawful act to a focus on the enterprise's financial turnover and the needs of victims and society.

In countries such as the United States, one of the main effects of the threat of large fines is that it encourages plea-bargaining.<sup>20</sup>

The corporate fine can, therefore, be likened to a chameleon. Where a fine is related merely to the unlawful act, it has been argued that the exclusive use of the

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15 Cp. art. 131-39 Criminal Code (France); art. 41 (2)(1) Draft Lithuania; § 76c (1)(1) Draft Hestia.

16 Art. 7 Administrative Penal Code (Switzerland); the Pre-draft 1997 provides a fine up to 5 mio. SFr. (art. 191).

17 § 25 Criminal Code (Denmark); in Canada no maximum for indictable offenses exists, see *Healy*, Criminal Liability of Corporations - Canada, in: de Doelder/Tiedemann (note 4), p. 200.

18 Decision of the Commission "Tetra Pak", ABl. 1991, L 149, 1 ff. Cp. also XXI Bericht über die Wettbewerbspolitik 1991, p. 139 and *Dannecker*, Strafrecht der Europäischen Gemeinschaft, in: Eser/Huber (eds.), Strafrechtsentwicklung in Europa 4.3, Freiburg 1995, p. 2056 f.

19 § 30 Ordnungswidrigkeitengesetz (Germany), art. 6 (1)(4) Economic Penal Law (Netherlands).

20 See *Thaman*, Umweltstrafrecht in den USA, in: Eser/Heine (eds.), Umweltstrafrecht in England, Kanada und den USA, Freiburg 1997, p. 490.

fine is like putting a price tag on an offense; the extra cost is transferred to the consumer, thereby trivializing the seriousness of the crime.<sup>21</sup> Sometimes deterrence is the main purpose of imposing a large fine, in some cases as much as 100 million U.S. Dollars (USA, EC anti-trust). Opponents of this approach complain that massive fines may drive companies out of business which causes suffering to employees and shareholders.<sup>22</sup>

In many countries, fines are low relative to the corporation's financial means and the cost of the damage caused by the offense.<sup>23</sup> In order to improve methods of determining the amount of the fines to be imposed, the law should more accurately define the intention of the penalty, and make explicit its underlying policy on deterrence and compliance. Exclusive reliance on fines assumes more knowledge about their effect than sometimes exists. According to economic theory, deterrence may be achieved by raising the penalty so that it exceeds the expected gain from the misdemeanour. Yet, according to this theory, there are other critical variables also at play, including the offender's perception of the likelihood of apprehension and conviction as it relates to the perception of an expected gain from the crime.<sup>24</sup> In addition, there are other questions to consider: who is the subject of this deterrence? Is it the corporation itself, its divisions or agents? A further consideration is that there is no assurance that individuals would be as deterred by fines as an organization. An organization is more than the sum of its individual employees or representatives. Individuals within an organization are subject to different pressures and incentives and may be responsible for the organization's illegal act. Considering these imponderabilities, exclusive reliance on the fine is crude, and likely limited in its ability to achieve its goal to control and prevent corporate crime.<sup>25</sup>

21 *Harding*, in: de Doelder/Tiedemann (note 4), p. 381; *Box*, Power, Crime and Mystification, London 1983, p. 71.

22 Cp. *Carson*, 10 (1970) *British Journal of Criminology*, 383; *Harding*, in: de Doelder/Tiedemann (note 4), p. 380. For the problems of burdening shareholders and employees see *Gropp*, Modifikation der Zurechnung beim Verhalten mehrerer in Fällen notwendiger Teilnahme, in: Eser/Huber/Cornils (eds.), Einzelverantwortung und Mitverantwortung im Strafrecht, Freiburg 1998, p. 244, and counter arguments see *Heine*, Kollektive Verantwortlichkeit, in: Eser/Huber/Cornils (eds.), p. 106.

23 See *Faure/Heine* (eds.), Criminal Enforcement of Environmental Law in the European Union, II § 1, § 3; III § 3 (in preparation).

24 See *Coffee/Gruner/Stone*, 10 (1988) *Whittier Law Review*, 79.

25 Cp. *Coffee/Gruner/Stone* (note 24); *Harding* (note 4), p. 381; *Geraghty*, 89 (1979) *Yale Law Journal*, 353; *Fisse/Braithwaite*, 11 (1988) *Sydney Law Review*, 501. Cp. also *Wells*, (1988) *Criminal Law Review*, 801; *Gruner*, 16 (1988) *American Journal of Criminal Law*, 30. For a different theoretical position (Structural Reform Model - Economic Model) see *Wray*, 101 (1992) *Yale Law Journal*, 2019. Cp. for the opposite position *Kennedy*, 73 (1985) *California Law Review*, 449.

### 1.2 *Restrictions of Entrepreneurial Liberty*

Rather than merely imposing financial sanctions, legislators and courts have recently resorted to a second group of sanctions called "restrictions of entrepreneurial liberty". Their purpose is to influence corporate behavior directly or indirectly through disincentives (Table 3). The rationales of the various sanctions within this category differ greatly.

*Table 3 Restrictions of Entrepreneurial Liberty*

- broad spectrum of orders/conditions
  - \* suspension of certain rights  
*(NL, F, E, Draft Lith.)*
  - \* Prohibition of certain activities  
*(P, E, F, EC-rec., Draft Lith.)*
  - \* regulating organization and production  
*(NL, Draft Hessia)*
- removal of managers  
*(EC-rec. 1988)*
- sequestration, appointment of a trustee  
*(NL, F, Draft Hessia, Corpus Juris, Draft Thyssen)*
- obligatory sale of a company  
*(J)*
- closure of the enterprise/departments thereof  
*(EC-rec. 1988, US, NL, E, Draft Lith.)*
- winding-up of the enterprise  
*(EC-rec. 1988, P, N, Draft Hessia)*

The U.S. Federal Supreme Court established corporate "imprisonment" in 1988,<sup>26</sup> which according to the Court's judgment is equivalent to "restraint or immobilization". Corporate imprisonment can be accomplished by placing the corporation in custody; restraining the corporation can mean seizing the corporation's physical assets or restricting its action or liberty in a particular manner. The U.S. Federal Supreme Court emphasized that the fine simply represented a cost of doing business which is small in comparison with the potential profits: "Corporate imprisonment, in contrast, prevents the cost-benefit analysis from economically justifying price-fixing. The corporate decision-makers would know that, if caught, the corporation would lose more than they could gain."<sup>27</sup>

The basis of the most serious sanction, the *closure/winding-up* of an enterprise (corresponding to the total confiscation of property) is the protection of the general public.<sup>28</sup> This exceptional remedy is intended to protect society from criminal organizations, enterprises which pose a high degree of practical danger or have failed to prevent serious risk for the public, those which have a history of mismanagement, or those whose new management demonstrates irresponsibility. In a growing number of jurisdictions, the powers of the criminal court are being strengthened to more effectively control corporate crime. In those countries, this trend has led to changes in the traditional powers of the state.

A *variety of orders* is now available to the courts to prohibit business activities which could unfairly affect the market. These include the withdrawal of licenses, prohibition from carrying out certain activities such as participating in public tenders, producing certain goods, contracting, advertising.<sup>29</sup> Such sanctions are very

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26 *US v. Allegheny Bottling Co.*, 695 F.Supp. 856 (1988). Cp. *Wray* (note 25), p. 2025 f.; *Ehrhardt*, Unternehmensdelinquenz und Unternehmensstrafe, Berlin 1994, p. 131.

27 Federal Supreme Court (note 26), 858.

28 Cp. art. 131-39 No. 1 Criminal Code (France) (in the case of serious offenses and a "criminal purpose organization"); art. 7c. Economic Criminal Law (Netherlands); art. 8f) Economic Penal Law (Portugal); art. 129 (1)(a) Criminal Code (Spain) (as "accessory consequences"); legge Mammì (law of 6 August 1990) no. 23 (Italy); art. 49 Draft Lithuania; art. 76f. Pre-draft Hessia. Cp. also for the USA *US v. Allegheny Bottling Co.*, 695 F.Supp. 856 (1988); *Brickey*, Corporate and White Collar Crime, 2nd ed. Boston 1995, p. 742. Cp. also *Heine*, Die strafrechtliche Verantwortlichkeit von Unternehmen, Baden-Baden 1995, p. 302. Sceptical *Gropp*, in: Haeusermann/Ringelmann, Discussion Report, in: Eser/Huber/Cornils (note 22), p. 360.

29 Cp. the recommendations of the Council of Europe (note 6); art. 131-39 No. 2, 131-48 (1), 131-28 Criminal Code (France); art. 8 Economic Penal Law (Portugal); art. 129 (1)(d) Criminal Code (Spain); art. 7f. Economic Criminal Law (Netherlands); art. 41 (2) Draft Lithuania. Further 18 U.S.C. § 218, which gives the power to administrative agencies to rescind any contact, grant or license.

similar in nature to those found in administrative law. In some countries, such as France and the Netherlands, the criminal court is competent to impose these orders on an offender. In other countries, only administrative authorities are competent to do so. In the United Kingdom, the courts can serve prohibition, enforcement or work notices. Contravention of such notices can be an offense in itself.<sup>30</sup>

The order regulating *adequate organization and production* (e.g. Netherlands and the Pre-draft legislation of Hessia)<sup>31</sup> introduces a new dimension to corporate sanctions. In contrast to *removal of managers*<sup>32</sup> which assumes that the identity of the corporation and upper management are the same, this order offers the company a chance to alter its organizational structure and corporate culture. The use of such sanctions leaves several issues unresolved, including that of the potential breach of right to freedom of organization, and that of the unproven ability/capacity of the judiciary to impose adequate organizational orders. Until now, these orders have concentrated on the objective of imposing a modicum of self-regulation by focusing on internal auditing, monitoring responsibilities, and establishing compliance programs. More recently, out of court methods including plea-bargaining have been used and have had a positive effect on corporate risk management.<sup>33</sup>

Similar objectives are envisaged by *sequestration* and the *appointment of a trustee*.<sup>34</sup> These measures avoid going to court and having to deal with inadequate laws. However, they are not without raising difficulties. For instance, where the decisions of appointed trustees are binding on the company concerned, and even if obstacles of constitutional property rights are not an issue, the question arises as to who is responsible for a wrong decision and its consequences. If responsibility lies

30 Cp. Environmental Protection Act 1990 Part 1 Section 13 (UK). To its high practical meaning see *Faure/Heine* (note 23).

31 To the Netherlands art. 8c. Economic Criminal Law, cp. *Oudijk*, *Zeitschrift für Wirtschaft, Steuer, Strafrecht* 1991, 164; *Waling*, *Het materielle milieurecht*, Arnhem 1990, p. 95 f. Cp. also art. 76g Pre-draft Hessia. Cp. also § 8 D.1.1 U.S.-Sentencing Guidelines; 18 U.S.C. § 3563 (b)(6)(1988).

32 Cp. the recommendations of the Council of Europe (note 6); to Italy see *Heine/Catenacci*, *ZStW* 101 (1989), 173; *Schwinge* (note 3), p. 153.

33 To the U.S. see *Ehrhardt* (note 26), p. 134; *Wise*, in: de Doelder/Tiedemann (note 4), p. 396 f.; *Coffee/Gruner/Stone*, 10 (1988) *Whittier Law Review*, 78 ff. To the UK see *Harding*, in: de Doelder/Tiedemann (note 4), p. 378 ff. Cp. also *Heine* (note 28), p. 301 ff.

34 Cp. the recommendations of the Council of Europe (note 6), art. 8b. Economic Criminal Law (Netherlands) (see *de Doelder*, in: de Doelder/Tiedemann [note 4], p. 307). Cp. also art. 9 (1)(b) *Corpus Juris*, Introducing penal provisions for the purpose of the protection of the financial interests of the European Union by *Delmas-Marty*, 1996 (legal supervision), § 76h Pre-draft Hessia (trustee), Thyssen-AK, § 30a-c draft OWiG (see *Schwinge* [note 3], p. 216 ff.).

with the enterprise, then one may question the legitimacy of the decision. If it lies with the trustee, the question arises as to how a company may defend or insure itself against these circumstances.

Recent draft legislation attempts to address these issues<sup>35</sup> by according trustees greater powers of supervision and management. It remains, however, incumbent upon the corporation to perform its business as usual, despite the burden of this sanction, a non too easy task.

### 1.3 Other Kinds of Sanctions

Other sanctions (Table 4) such as reprimands and warnings are more *symbolic*,<sup>36</sup> while yet others are simply *combinations* of groups of sanctions. The *equity fine* avoids, to some degree, some of the disadvantages of extreme fines, such as for example the detrimental effects they may have on debtors by forcing the offending company to issue new equity into a state's treasury.<sup>37</sup> The compulsory winding up of the company can be avoided by diluting its capital stock. However, some jurisdictions steadfastly remain against the imposition of equity fines because such a practice raises the question of whether a state should share in the profits of a company. Instead, they oblige companies to increase their capital stock whilst prohibiting the possession of shares by the company itself.

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35 See *Schünemann* (ed.), *Deutsche Wiedervereinigung, Arbeitskreis Strafrecht Band III Unternehmenskriminalität*, 1996, art. 4 § 1-4 Entwurf eines Gesetzes zur Bekämpfung der Unternehmenskriminalität (at p. 143 ff.). Cp. also art. 131-39 No. 3 Criminal Code (France) (legal supervision over a period of maximum five years). Cp. further *Coffee*, 79 (1979) *Michigan Law Review*, 418 (public interest directory); *Gruner*, 16 (1988) *American Journal of Criminal Law*, 104; *Miester*, 64 (1990) *Tulane Law Review*, 940.

36 Recommendations of the Council of Europe (note 6); *Alwart*, *ZStW* 105 (1993), 770 ff.

37 Cp. *Coffee*, 79 (1981) *Michigan Law Review*, 412; *Kennedy*, 73 (1985) *California Law Review*, 461; *Miester*, 64 (1990) *Tulane Law Review*, 937. Summarizing *Ehrhardt* (note 26), p. 135 ff.; cp. also (crit.) *Ransiek*, *Unternehmensstrafrecht*, Heidelberg 1996, p. 356.

Table 4 Other Kinds of Sanctions

- warning, reprimand  
(*EC-rec. 1988*)
- decision declarating of responsibility  
(*EC-rec. 1988*)
- equity fines  
(*U.S.*)
- corporate probation  
(*U.S.*)
- publication of the judgment  
(*EC-rec. 1988; U.S., F, NL, Draft Lith.*)

*Corporate probation* in the U.S., is a sanction aimed at reforming the enterprise, preventing recidivism, at the same time avoiding the extreme consequence of complete financial ruin.<sup>38</sup> Corporate probation includes the whole spectrum of orders, such as compensation, reorganization etc. Even community service may be imposed. For example, a large bakery may be ordered to supply bread to slums or a company may be ordered to assist, through the transfer of know-how, a non-profit organization in developing re-integration programs for prisoners.<sup>39</sup>

There are several advantages to corporate probation as a sanction: the impact of the measure is largely felt internally, with less punitive emphasis on corporate managers; it can be borne by corporations without causing their financial ruin; and, a corporation can be required to report on its progress in detail during the probationary period, in itself a means of promoting self discipline. In this way, a meaningful link between individual and collective liability can be made, thus

38 See 18 U.S.C. § 3563; § 8 D 1.1 U.S.-Sentencing Guidelines provides under certain circumstances the obligation granting corporate probation (Guidelines Manual 7 - 1 November 1992). Cp. *Brickey* (note 28), p. 764 ff.; *Coffee/Gruner/Stone*, 10 (1988) Whittier Law Review, 79 f.; *Bennett*, 65 (1990) New York University Law Review, 88 f.; *Ehrhardt* (note 26), p. 126 ff. To Australia see *Fisse/Braithwaite*, 11 (1988) Sydney Law Review, 500.

39 *US v. Danilow Pastry Corp.*, 563 F.Supp. 1159 (S.D.N.Y. 1983); *US v. Mitsubishi Int. Corp.*, 677 F.2d 785 (9th Cir. 1982).

piercing the veil of corporate obscurity which may otherwise inhibit effective legal control of corporate delinquency. To a certain extent, the measure may promote the establishment of two levels of accountability: externally, the corporation is answerable to the law, while internally individuals are answerable to the corporation.<sup>40</sup>

Finally, *publication of the judgment* is a measure which seems to be "en vogue".<sup>41</sup> The rationales put forward by its promoters are: that the measure allows the public to become better informed, and that general societal interests, such as fair business competition, are better served because corporations are conscious of their public image through the media.

However, *publication of the judgment* may have unpredictable results,<sup>42</sup> in the sense that it is difficult to quantify the consequences of consumers' reactions to bad press of a company's business affairs. The news media may be reporting the decision anyway. Nevertheless, in many jurisdictions the criminal justice system does its best to take advantage of the influence of the media. In many cases, the simple threat of bringing a matter to the attention of the information media may help criminal justice officials obtain corporate cooperation and possibly also greater compliance with the law. This leaves the issues of whether criminal justice officials should submit to media pressures, and whether the divulgence of criminal justice information to the media in the cases of corporate crime should be regulated through legislation.

## 2. Discretion - Sentencing Guidelines - Unclear Concepts

An important question is that of whether it should be within the court's discretionary power to choose the appropriate corporate sanction. Indeed, in some countries, such as Denmark,<sup>43</sup> the criminal court does have broad discretion in this area.

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40 *Harding*, in: de Doelder/Tiedemann (note 4), p. 382; *Fisse/Braithwaite*, 11 (1988) Sydney Law Review, 501.

41 See the recommendations of the Council of Europe (note 6); art. 7g. Economic Criminal Law (Netherlands) (restricted to specific offenses, such as selling of goods dangerous to human health); art. 131-39 No. 9, art. 131-48 (5) Criminal Code France; art. 47 Draft Lithuania; U.S.: see *Thaman*, in: Eser/Heine (note 20), p. 501. Cp. also *Schwinge* (note 3), p. 169 ff.; *Miester*, 64 (1971) Tulane Law Review, 942; *Fisse*, 8 (1971) Melbourne University Law Review, 107 ff.

42 *Coffee*, 79 (1979) Michigan Law Review, 427. Cp. *Alwart*, ZStW 105 (1993), 770 f.; *Ransiek* (note 37), p. 355; *Eidam*, Unternehmen und Strafe, Köln 1993, p. 399 ff.

43 Chapter 5 § 25 Criminal Code (Denmark), see *Greve*, in: Eser/Huber/Cornils (note 22), p. 125.

Broad discretion seems to function quite well when there is no serious risk of violating the principle of equality (as may be the case in small countries with only a few specialized courts) or if only one sanction (mostly a corporate fine) is available. However, many countries have established formal guidelines for courts, either through law or directives, sometimes generally formulated for all corporate crimes, sometimes providing special criteria for specific corporate crimes (e.g., tax, trade or environmental offenses), as is the case of Australia.<sup>44</sup>

There are some common deficiencies in addressing the substantive prerequisites of corporate criminal liability because of the fact that the determination of sanctions is conventionally the domain of material law, which includes foreseeability, measures to prevent the crime, defenses and others. Sentencing guidelines may help provide a partial solution. The United States has a longstanding experience with *sentencing guidelines* in this areas.<sup>45</sup> Since 1991, corporate sanctions have been governed by guidelines issued by the U.S. Sentencing Commission. A highly complicated scheme for determining sanctions, especially in calculating fines, avoids the disadvantages caused by the lack of guiding principles in both criminal and civil law.<sup>46</sup>

In Australia, general guidelines on fines take into account the nature and extent of the act, any loss or damage caused, the circumstances in which the act took place and previous convictions. They also account for factors such as the size of the company, its market power, whether there was an intent to commit the wrongdoing, the length of the period over which it was committed, whether the wrongdoing was the result of the conduct of senior management or lower levels of man-

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44 See *Hill/Harmer*, in: de Doelder/Tiedemann (note 4), p. 120 f. regarding trade legislation, occupational health, safety legislation and environmental legislation.

45 For sentencing guidelines see *Brickey* (note 28), p. 768 ff.; *Steinherr/Steinmann/Olbrich* (note 5), p. 1 ff. General guidelines are also available in Australia (see *Hill/Harmer* [note 44], p. 120). Directives by law are provided in Finland (chapter 6 subs. 6 Criminal Code) and in Norway (section 41 Criminal Code). To the practice of the EC Court and Commission see *Dannecker*, in: Eser/Huber (note 18), p. 2057.

46 Under the Sentencing Guidelines, the court will: (1) rely upon one of three alternative methods for calculating a base fine, (2) determine the organization's "culpability score" on the basis of designated aggravating and mitigating factors, (3) use the culpability score to determine minimum and maximum multipliers, (4) multiply the base fine by those multipliers to arrive at the range of fines that may be imposed, and (5) select a fine from within that range, using as guidance another set of factors relating to such considerations as in the offense, collateral consequences of conviction, the vulnerability of the victim, and the like. See *Brickey* (note 28), p. 768; *Wise*, in: de Doelder/Tiedemann (note 4), p. 398 f.; *Steinherr/Steinmann/Olbrich* (note 5), p. 12 ff.

agement, or whether the company's policies and "corporate culture"<sup>47</sup> lent itself to comply with federal legislation and cooperate with enforcement authorities.<sup>48</sup> Similar criteria exist in the U.S.-Sentencing Guidelines, as well as in anti-trust case precedents of the European Court.<sup>49</sup>

In addition to noting a growing tendency to adopt policies which attempt to influence corporate culture and internal policy, three generalizations may be made from recent experiences: firstly, the severity of the crime is only one of the important factors to be considered; secondly, the company's size, market position, degree of market power, financial situation, and economic activity may be allowed to influence the degree of severity of corporate sanctions; and thirdly, the wide range of sanctions and their seemingly divergent goals, hinders a clear legal framework of corporate liability.

### III. Findings and General Conclusions

A comparative analysis of relevant laws reveals a broad spectrum of sanctions which may be used against liable corporations. The idea that there may be a single solution to the problem of providing effective and fair sanctions to control and repress corporate crime ignores some basic questions.

1. In my view, the current debate between the imposition of *penalties* on the one hand and *measures* on the other, as exemplified in Switzerland and Germany,<sup>50</sup> is futile. Corporate sanctions, as distinct from individual sanctions, should increasingly be grounded in a *preventive perspective* which leaves room for corporations to amend their ways in the future and bring their practices in full compliance with the law.

This argument raises new questions. Take, for example, the case of a corporation charged with a minor breach of an administrative regulation. Assuming that the

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47 Under Criminal Code Act 1995 Australia, in case of intention, knowledge or recklessness, the fault element must be attributed to a body corporate that authorized or permitted the commission of the offense. Such an authorization or permission can be established by proving that a corporate culture existed within the body corporate that encouraged, tolerated or led to non-compliance with the relevant provision (Part 2.5 section 12.3 (1)(2)(c)).

48 For Trade Practices Legislation see *Hill/Harmer* (note 44) and *de Doelder/Tiedemann* (note 4), p. 120.

49 For U.S. see *Brickey* (note 28), p. 768; to the EC Court see *Gyselen*, *Wirtschaft und Verwaltung* 1993, 570 ff. and *Dannecker*, in: *Eser/Huber* (note 18), p. 2057 f.

50 See the survey of *Lütolf*, *Strafbarkeit der juristischen Person*, Zürich 1997, p. 157 ff.

investigation reveals evidence of disorganization and mismanagement leading to large scale risk to society, should the criminal court close down the company? Where there exists a powerful agency, such as the U.S. Federal Environmental Agency capable of imposing criminal sanctions to avert the risk of danger, a prohibition order could be issued as an additional criminal sanction.<sup>51</sup> In other legal systems, where there is a traditional separation between criminal and administrative law, the key question should be: What are the conditions for imposing criminal sanctions, and what are the goals of the sanctions to be imposed?

2. Any workable legal framework must take into account the relationship between the substantive conditions for imposing corporate liability and the sanctions. For example, implicit in the classical identification theory, is the notion that removing corporate managers, and hence the brain of the company,<sup>52</sup> addresses the issue of corporate responsibility. Strictly speaking, this view refutes any attempt to influence corporate behavior pertaining to the particular offense. It is possible, therefore, as many countries have done, to apply such pressure on a corporation without ignoring the anthropomorphic nature of such an approach.<sup>53</sup>

3. The objectives of preventative corporate sanctions must be clarified. If the aim is general deterrence, economic disincentives may be used. However, deterrent methods may often result in punishing both the guilty and the innocent. Many jurisdictions have leaned towards the use of direct and indirect structural intervention which may amount to incapacitating, supervisory, and remedial sanctions.

This approach, however, requires harmonization between corporate criminal sanctions and other areas of law, including civil law and administrative law. In the United States, for example, the lack of a clear line between criminal law and civil law is often deplored.<sup>54</sup> The function of criminal sanctions, can be rationalized on the basis that they denounce and clarify what constitutes non-compliance with the law, encourage corporate compliance through financial disincentives, impose prohibitive orders, and inculcate the principle of self regulation.<sup>55</sup>

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51 Cp. *Faure/Heine* § 6 (note 23).

52 For different models of corporate liability see *Heine* (note 28), p. 220 ff.; *idem*, *Maastricht Journal of European and Comparative Law* 1995, 115 ff.; *idem* (note 22), p. 102 ff.

53 Cp. Part 2.5 section 12 Criminal Code Act 1995 (Australia); UK: see Draft Involuntary Homicide Bill, clause 4 of the Law Commission, *Involuntary Manslaughter*, report 237, 1996; *Harding*, in: de Doelder/Tiedemann (note 4), p. 374 ff.; *Wells*, 139 (1989) *New Law Journal*, 931; *idem* (1988) *Criminal Law Review*, 788, 801; for other countries see *Heine* (note 28), p. 228 ff.

54 See *Coffee*, 71 (1991) *Boston University Law Review*, 193; *Wise*, in: de Doelder/Tiedemann (note 4), p. 395.

4. It is very doubtful whether one single sanction can guarantee adequate enforcement. A distinction should be made between the kind of organization (for example, criminal organization and others) and the kind of social wrong (e.g., non compliance with administrative law, a variety of economic crimes, environmental crimes, and so on). France<sup>56</sup> and other countries, have, in my view, taken the right path by establishing a general provision offering a spectrum of sanctions from which an appropriate one is selected depending on the particular case in relation to the specific area of criminal law.

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<sup>56</sup> For France see *Bouloc*, in: de Doelder/Tiedemann (note 4), p. 246.

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## **"Accessory Consequences" Applicable to Legal Entities under the Spanish Criminal Code of 1995**

**Silvina Bacigalupo, Madrid**

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Art. 129 of the new Spanish Criminal Code of 1995<sup>1</sup> establishes several so-called "accessory consequences" applicable to legal entities. Based on similar provisions of the Proposed Pre-drafts of the Criminal Code of 1983 and 1992, and of the Draft Criminal Code of 1994, the new Code's art. 129 introduces for the first time, a catalogue of "accessory consequences" for companies, associations and organizations. The fundamental innovation lies in that these provisions are included in the General Part of the Code, under the express title of "Accessory Consequences", though some of them can already be found in the repealed Code.<sup>2</sup>

*Article 129 stipulates that:*

"1. The Judge or Tribunal, in those cases established in this Code and after having heard the owners or their legal representatives, may, establishing the reasons therefore, impose the following consequences:

- a) closure of the company and its subsidiaries temporarily or permanently; temporary closure shall not exceed five years;
- b) dissolution of the company, association or foundation;
- c) suspension of the activities of the company, business, foundation or association for a period not exceeding five years;
- d) prohibition of future activities, mercantile operations or business/transactions of the type which, in their performance, the crime was committed, favored or concealed. This prohibition may be of a temporary or permanent character. If it is of a temporary nature, the period of prohibition shall not exceed five years; and
- e) intervention in the company to safeguard the rights of the employees or of the creditors for the necessary time and without exceeding a maximum term of five years.

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1 Ley Orgánica 10/1995, BOE nº 281, de 24 de noviembre de 1995, approved by Organic Law 10/1995, of November 23, published in the Official State Bulletin number 281 on November 24, 1995 which entered into force and effect on May 24, 1996.

2 See for example arts. 238, 265, 344bis, 452bis c) and d), 546bis f).

2. The temporary closure provided for in subsection (a) and the suspension pointed out in subsection (c) of the previous section may also be decided by the examining magistrate while conducting the case.

3. The accessory consequences established in this article shall aim to prevent criminal activity and the effects of the criminal activity from continuing."

## 1. Legal Nature of the "Accessory Consequences" of Art. 129

Title VI of Book I CC has introduced a group of legal responses called "accessory consequences." The use of the term "accessory consequences", which refers to the legal consequences of committing a crime, was unprecedented in Spanish criminal law until it was expressly used for the first time in the Proposed Pre-draft of the Criminal Code of 1983.<sup>3</sup> Under "accessory consequences" the new Code includes the confiscation of the effects and instruments of the crime and the confiscation of the profits obtained, as well as the measures which can be applied to legal entities. These measures had all been proposed in the Pre-draft of the Criminal Code of 1983.

The term "accessory consequences" probably resulted from the numerous criticisms which the same measures had received when, in the Draft of the Criminal Code of 1980, they were referred to as "security measures" (Maßnahmen).<sup>4</sup> By treating these accessory consequences as different from both punishments and security measures, the legislator apparently intended to clarify that the consequences were of a different nature. Apparently, for the legislator, accessory consequences do not formally constitute punishment or security measures, nor are they intended to repair or indemnify damages.<sup>5</sup>

Academics are disconcerted by the new terminology. Many consider that we are in the presence of a third type of criminal sanctions, which they designate as "peculiar",<sup>6</sup> "hybrid" or "unclassifiable".<sup>7</sup>

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3 *Manzanares Samaniego/Cremades*, Comentarios al Código penal, Madrid 1996, p. 56.

4 *Bacigalupo, Silvina*, La responsabilidad penal de las personas jurídicas, Barcelona 1998, p. 269.

5 *Gracia Martín/Boldova Pasamar/Alastuey Dobón*, Las consecuencias accesorias del delito en el nuevo Código Penal español, Valencia 1996, p. 441, 456; *García Arán, M.*, Derecho penal - Parte general, 2. ed., p. 631; *López Garrido/García Arán*, El Código penal de 1995 y la voluntad del legislador. Comentario al texto y al debate parlamentario, Madrid 1996, p. 81.

6 *Landrove Díaz*, Las consecuencias jurídicas del delito, Madrid 1996, p. 124.

7 *López Garrido/García Arán* (note 5), p. 82.

In light of current academic analyses, there are various ways to interpret the legal nature of art. 129. Some academics understand that the accessory consequences can only be applied if a punishment or security measure is also imposed, since the consequences are precisely "accessory" to the punishment.<sup>8</sup> This interpretation of the consequences, in their opinion, is strengthened by a number of provisions of the Special Part of the Code which require a conviction for art. 129 to be applied.<sup>9</sup> From this perspective, the consequences represent a liability subsidiary to the liability of a person previously convicted.

However, other academics have expressed a different view.<sup>10</sup> They argue not only that the law recognized that legal entities cannot be subject to punishment, but also that they cannot be the object of a post-criminal security measure. They opine, nevertheless, that legal entities can be, to a certain degree, "dangerous" and that the crime prevention requires some sort of measures against such entities.<sup>11</sup> According to these same academics, given the impossibility of applying other criminal consequences, crime prevention provides a rationale for imposing other consequences on the basis of the concept of the "objective danger of the thing".<sup>12</sup>

This criteria of "objective danger" does not refer to the danger of a particular person, but rather to the danger *of a thing*, in this case the danger of the legal entity, which is revealed in the wrongful actions committed by the person who acts for the entity, actions which are symptoms of the entity's danger. Because of the specific organization which characterizes legal entities, they are subject to being used to carry out criminal activities, and therein lies the objective danger of the legal entity.<sup>13</sup>

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8 *Guinarte Cabada*, in: Vives Antón (ed.), *Comentarios al Código Penal de 1995*, vol. I., Valencia 1995, p. 665 f.; *Manzanares Samaniego/Cremades* (note 3), p. 56; *Prats Canut*, in: Quintero Olivares/Valle Muñiz, *Comentarios al Nuevo Código Penal*, Madrid 1996, p. 624; *Silva Sánchez*, *Responsabilidad penal de las empresas y sus órganos en el Derecho español*, in: Silva Sánchez/Schünemann/De Figueiredo Dias, *Fundamentos de un sistema europeo del Derecho penal*, Barcelona 1995, p. 357.

9 *Manzanares Samaniego/Cremades* (note 3), p. 57. In an other sense, *Conde-Pumpido Ferreiro*, *Comentario al art. 129*, p. 1563.

10 *Gracia Martín/Boldova Pasamar/Alastuey Dobón* (note 5), p. 457. *Jorge Barreiro*, *Reflexiones sobre la regulación de las medidas de seguridad en el nuevo Código Penal español*, *Jueces para la democracia*, n° 25, 1996, p. 50.

11 *Gracia Martín/Boldova Pasamar/Alastuey Dobón* (note 5), p. 457.

12 *Gracia Martín*, *La responsabilidad de directivos, órganos y representantes de una persona jurídica por delitos especiales*, Barcelona 1986, p. 104. *Gracia Martín/Boldova Pasamar/Alastuey Dobón* (note 5), p. 457. *Jorge Barreiro* (note 10), p. 50.

13 *Gracia Martín* (note 12), p. 104. *Gracia Martín/Boldova Pasamar/Alastuey Dobón* (note 5), p. 457.

The legislator has not been clear either with respect to the nature of these accessory consequences or the effect they are intended to have. In the Special Part of the Code, these consequences are almost exclusively referred to as "measures".<sup>14</sup> The answer to the question of the legal nature of accessory consequences applicable to legal entities lies in the fact that, above all, they must conform to the Constitutional principles governing sanctioning/criminal law under the Rule of Law (Rechtsstaat). The Constitutional principles require that the consequences be imposed within the corresponding Constitutional guarantees.<sup>15</sup> In this respect, the only way to ensure that the Constitutional guarantees are respected is to consider that the so-called accessory consequences are nothing other than punishments (in the strict sense of the word).<sup>16</sup> The reasons for this are as follows:

- In the first place, accessory consequences are not reparatory civil instruments, given that their purpose is not to reestablish the equilibrium of goods.<sup>17</sup>
- Secondly, the accessory consequences do not have the character of administrative sanctions either, for, although a criminal judge may impose administrative sanctions, it would be "strange" indeed<sup>18</sup> for administrative sanctions to be established in the criminal law for criminal conduct.
- Thirdly, accessory consequences cannot be classified as non-sanctioning preventive-reaffirmative measures either, since if it were so, they would not need to be protected by the Constitutional guarantees which the sanction requires, something which would be inadmissible.<sup>19</sup>
- Fourthly, it also does not seem correct to consider them sanctions when they only deny a person his or her criminal instrument. This would amount to saying that the legal entity is the mere "object"/"tool"/"instrument" of the criminal person. If this were so, the accessory consequences should only affect that person through sanctions which restrict the person's capacity to exercise a particular profession or activity (sanciones profesionales), but in no case should it affect third parties.

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14 *Guinarte Cabada* (note 8), p. 665. *Conde-Pumpido Ferreiro* (note 9), p. 1563.

15 *Bacigalupo, Silvina* (note 4), p. 284. *Zugaldía Espinar*, Las penas previstas en el art. 129 del Código Penal para las personas jurídicas (Consideraciones teóricas y consecuencias prácticas), *Revista del Consejo General del Poder Judicial*, n° 46/1997, p. 331. *Rodríguez Ramos*, Societas delinquere potest! Nuevos aspectos dogmáticos y procesales de la cuestión, *La Ley*, p. 3.

16 *Zugaldía Espinar* (note 15), p. 331; *Rodríguez Ramos* (note 15), p. 4.

17 *Zugaldía Espinar* (note 15), p. 331.

18 *Zugaldía Espinar* (note 15), p. 331.

19 *Zugaldía Espinar* (note 15), p. 331.

In light of this situation, some academics correctly consider accessory consequences as criminal sanctions, and thus, either punishments or security measures. They consider punishments to be those criminal sanctions which require, and are limited by, the principle of culpability. Therefore, accessory consequences amount to true punishment, as the Spanish Constitutional Court has already explained, so long as the sanction is imposed on the legal entity due to its own action (as legal entities have capacity to infringe the law) and due to its own culpability. In short, since the application of accessory consequences requires the legal entity's own culpability, these consequences cannot be anything other than true punishments.<sup>20</sup>

This stance is backed by the argument that these consequences cannot be security measures given that security measures do not require culpability. In this respect, if one were to consider accessory consequences to be security measures, one would not only have to redefine the concept of culpability, but one would also have to take the concept of danger rooted in a bio-psychological basis and redefine it to include the legal entity's specific objective danger.<sup>21</sup> In addition, by being regulated in the same Title as confiscation, which no one to date doubts has the nature of a punishment, the closeness of accessory consequences to confiscation appears evident.<sup>22</sup> Moreover, it is also struck by the fact that there is another punishment established for legal entities in art. 262 CC.<sup>23</sup>

Lastly, even the reference in art. 129-3 CC to these consequences' special preventive purpose and the discretion a judge has in applying them does not make them security measures because punishments can also have special preventive goals and also do not necessarily have to be enforced. Their enforcement can be suspended if, from the point of view of special prevention, enforcement is deemed unnecessary.<sup>24</sup> For all of the above, it can be concluded that the accessory consequences of art. 129 CC are true punishments and that their application should carry the same guarantees which criminal sanctions for people require. This opinion is the most defensible one since it acknowledges the requirement to offer due procedural guarantees before imposing a sanction, guarantees which a legal entity should enjoy as subject of law.<sup>25</sup>

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20 *Zugaldía Espinar* (note 15), p. 333.

21 *Zugaldía Espinar* (note 15), p. 333.

22 *Zugaldía Espinar* (note 15), p. 333.

23 *Zugaldía Espinar* (note 15), p. 333.

24 *Alastuey Dobón* (note 5), p. 334.

25 *Bacigalupo, Silvina* (note 4), p. 286.

## 2. Requirements for the Application of the Accessory Consequences of Art. 129 CC<sup>26</sup>

### *Numerus clausus system*

The accessory consequences of art. 129 are only applicable if the specific offense described in the Special Part so establishes. Thus, they are not of general application.

### *Prior hearing*

For a judge to be able to apply the accessory consequences, the owners/titleholders or legal representatives of the business, company, association or foundation must be given a hearing.

This requirement is superfluous since without a hearing, the application of any type of sanction would violate art. 24-2 of the Spanish Constitution (*tutela judicial efectiva*) (art. 24 Spanish Constitution, similar to the due process).

### *Provision of a discretionary character*

The wording of art. 129 permits one to deduce that it is a provision subject to judicial discretion ("may"), as the verb tense used differs from other provisions of the Code.

### *Expression of the reasons for the resolution*

The requirement of justifying the reasons for the resolution is also unnecessary because, without it, the resolution would infringe art. 24-2 and 120-3 of the Spanish Constitution, as well as constitute a basis for appeal to the Supreme Court for breach of law (art. 849 Criminal Procedure-Act (CPA) and art. 149 and 900 CPA).

### *Preliminary measures (art. 129-2)*

Lastly, the temporary closing and the suspension (maximum of five years) can be applied as preliminary measure.

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26 Bacigalupo, Silvina (note 4), p. 287.

### 3. Unresolved Issues in the Application of the Accessory Consequences<sup>27</sup>

Despite the fact that the provisions of the article establish, various requirements which must be satisfied before imposing accessory consequences. They do not deal with fundamental issues which should be taken into account and which could have been resolved by studying the model which, within this framework, exists in other jurisdictions of the European Union.

In the first place, it is not clear from the legal text whether the application of said consequences should depend on the existence of a judgment where a punishment or security measure is imposed on a person. As can be expected, there are also different points of view on this issue. For some, the fact that these consequences are "accessory" means precisely that they must always be accompanied by a punishment or security measure, beyond the specific requirements in the provision. They argue that the consequences cannot be imposed independently of punishment or security measure, and should only be ordered in the case of a judgment in which a person is sentenced to some punishment or security measure established in the Criminal Code.<sup>28</sup>

According to this view, the application of an accessory consequence should be linked to the imposition of a punishment on a person. If this were so, it would be impossible to apply any accessory consequence where no person has been convicted and sanctioned. Therefore, the accessory consequences should be imposed in the sentence and never at the enforcement stage since judgments must be enforced in their own terms and cannot subsequently be extended.<sup>29</sup>

By contrast, there are those who maintain that to require that the accessory consequence be linked to the imposition of a punishment on a person not only is not established in the law, but would indeed be contrary to the rationale for said consequences.<sup>30</sup> The basis of these measures should be independent of the perpetrator of the culpable acts. It lies precisely in the objective danger of the organization, of the material means, or of the specific activities which are carried out through the

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27 *Bacigalupo, Silvina* (note 4), p. 297.

28 *Guinarte Cabada* (note 8), p. 665 f.; *Manzanares Samaniego/Cremades* (note 3), p. 57. *Mir Puig*, *Derecho penal - Parte general*, Barcelona 1996, p. 789.

29 *Zugaldía Espinar* (note 15), p. 341.

30 *Gracia Martín/Boldova Pasamar/Alastuey Dobón* (note 5), p. 461. *Conde-Pumpido Ferreiro* (note 9), p. 1563.

organization or the business, and not the punitive power.<sup>31</sup> According to this reasoning, which in *Gracia Martín's* view applies to all accessory consequences, it is sufficient, in order to apply the consequences, to establish that in the course of the legal entity's activity, a wrongful offense has been carried out, regardless of whether it was carried out with culpability.

In any event, the existence of a link will not be the reason for the measure's application, but rather the need to respond to its objective danger.<sup>32</sup> *Gracia Martín* understands that, although only art. 300 CC establishes the possibility, as we shall see below, of applying the accessory consequences even when the perpetrator or accomplice of the offense is not criminally liable, or is personally exempt from punishment, this same rule should be applicable to the other cases. An exception would exist, as he understands it, in those cases where the law expressly refers to the judgment and sentence of another person. It is doubtful, however, that it would be considered a general provision since it only provides for its application in the cases of Chapter XIV of Title XIII.

The provisions of the Special Part do not specify anything either in this respect. In some cases, however, the provisions refer to their being imposed in the "convicting judgment", as art. 194, for example, does, or as the references in art. 271 and 276-2 do when they establish that "the closing of the dependant's establishment may be decreed". One has to conclude, however, once again, that accessory consequences cannot be applied to a legal entity without due guarantees, and, therefore, that they shall only be applicable in cases of a conviction,<sup>33</sup> except of course, in cases where they are imposed as preliminary measures.

All of these legislative imprecisions could have been avoided by including a provision such as, for example, sect. 30(4) (German) Ordnungswidrigkeitengesetz (OWiG) does in establishing that "if a criminal or administrative *sanctioning procedure* for the commission a crime or administrative offense is not commenced, or if it is suspended, or if the enforcement of the punishment is suspended, an independent fine may nonetheless be imposed on the legal entity, unless the crime or administrative offense cannot be prosecuted for legal reasons". This German provision involves "indirect proper"<sup>34</sup> liability of legal entities since in certain cases where a person has committed an offense, the offense can also be ascribed to the

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31 *Gracia Martín/Bolodova Pasamar/Alastuey Dobón* (note 5), p. 462.

32 *Gracia Martín/Bolodova Pasamar/Alastuey Dobón* (note 5), p. 462.

33 *Zugaldía Espinar* (note 15), p. 341.

34 *Zugaldía Espinar* (note 15), p. 336.

legal entity with specific sanctions for the entity. Within the framework of that particular method of imposing liability on a legal entity, there is a fundamental debate about the criteria to be used in ascribing liability.

The following elements are found among the accepted criteria for ascribing liability: the "sphere of the legal entity", whether the person's actions were carried out in the corporate or company context of the legal entity; and whether the actions were performed in the name and interest of the legal entity.<sup>35</sup> In *Zugaldía's* opinion, this is the legal entity's liability model reflected in art. 129 of the 1995 Criminal Code.

There are also, from a procedural point of view, several other unresolved issues raised by the new law. For instance, there are the questions of whether general rules concerning the statute of limitations (art. 133) should be applied to accessory consequences, whether non-compliance with the accessory consequences gives rise to the offense of non-compliance (art. 468 CC, through art. 31 CC), and whether sentencing a legal entity to an accessory consequences results in its direct civil liability (art. 116 CC) for the offense which gave rise to the accessory consequences. *Zugaldía* responds affirmatively to all three of these questions.<sup>36</sup>

From this perspective, it has not been established whether it is possible, at the time of sentencing, to determine the nature of the accessory consequences to be imposed while taking into account the period of time during which the legal entity was temporarily closed, or its activities temporarily suspended as a result of the proceedings. In this respect, I understand that through the use of analogy *in bonam parte*, art. 58-2 and 59, should be applied. They refer to the possibility of mitigating the punishment imposed by taking into account the deprivation of certain rights and the impact of preliminary measures already taken.<sup>37</sup>

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35 *Zugaldía Espinar* (note 15), p. 336.

36 *Zugaldía Espinar* (note 15), p. 341 ff.

37 *Conde-Pumpido Ferreiro* (note 9), p. 1568.

#### 4. The Specific Measures of Art. 129<sup>38</sup>

##### *Closing of the company, its premises or establishments*

- Express reference to art. 129 (that is, in art. 288, 294-2 and 520)
- Title VIII: Offenses against sexual liberty
- Title XII: Offenses against family relations
- Title XIII: Offenses against property and the socio-economic order
  - Chapter XI: Offenses against intellectual property, art. 271-(b); industrial property, art. 276-2; offenses related to the market and consumers: common provisions, art. 288.
  - Chapter XIII: Corporate and company offenses, art. 294-2.
  - Chapter XVI: Bribery and other similar related conducts: art. 298-2, 299-2, and 302-(b).
- Title XVI: Offenses related to the territorial order and the protection of historical goods and the environment: art. 327 (art. 325 and 326).
- Title XVII: Offenses against collective security: public health art. 366 (359-65); art. 370 (369-2, 369-6 and 371).
- Title XIX: Offenses related to the public administration
  - Chapter VI: art. 520 (515).

##### *Dissolution of the company, association or foundation<sup>39</sup>*

This consequence appears exclusively in art. 288, 294-2 and 520 which refer in general to any of the measures of art. 129, and in art. 302 and 370-(a) in relation to the conduct prohibited in art. 369-2 and 369-6.

##### *Suspension of the legal entity's activities<sup>40</sup>*

This consequence appears with a number of slight variations in art. 288, 294-2 and 520, which refer in general to any of the measures of art. 129; the provisions prohibit conduct already discussed above in the section corresponding to

38 *Bacigalupo, Silvina* (note 4), p. 300.

39 *Bacigalupo, Silvina* (note 4), p. 300.

40 *Bacigalupo, Silvina* (note 4), p. 303.

closings. Suspension of activities also appears individually in art. 302-(b), 370-(b) and 430.

*Prohibition of carrying out certain activities, operations or transactions*<sup>41</sup>

The prohibition to carry out certain activities can also be permanent or temporary, in which case it may not exceed five years. The measure found in a general reference to art. 129 in the already mentioned art. 288, 294-2 and 520, is also expressly mentioned in art. 302-(c) and 370-(c).

At the same time, it is in this context that the legislator should have introduced the punishment of disqualification from practising a certain profession or activity specified by art. 262. This punishment could correspond perfectly to the prohibition of undertaking a certain activity, above all if one keeps in mind that the provision takes no position with respect to legal entities' criminal liability. Given the view of most academics that the current law will not allow the imposition of a punishment of legal entities, this provision is very surprising. It should be emphasized that the legislator has introduced in a new Criminal Code, a punishment which applies to legal entities, and is expressly designated as such.

For the conduct described in art. 262 (on the alterations of prices in public tenders and auctions) a "punishment of special disqualification" can be imposed on a company, which in all cases, "precludes the right to contract with the Public Administration for a period of three to five years". This prohibition of transacting, as contracting with a Public Administration, amounts in this specific case, to a punishment of disqualification.

*Intervention in the company*<sup>42</sup>

Express reference to this consequence is only made in Title XVI, Chapter III, in its art. 327 on the offense against natural resources and the environment. Otherwise, it shall only be applicable in those provisions which make a general reference to art. 129, that is, in art. 288, 294-2 and 520.

Finally, this accessory consequence also requires that it be imposed for a particular purpose, which differs from the general purpose established in art. 129-3. This consequence can be imposed only for the purpose of protecting employees'

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41 *Bacigalupo, Silvina* (note 4), p. 304.

42 *Bacigalupo, Silvina* (note 4), p. 304.

rights,<sup>43</sup> and for the purpose of protecting the creditors' interests. This second purpose constitutes a novelty and an extension of this accessory consequence to other cases.

## 5. Conclusions

In light of the above, one can conclude that the accessory consequences established in the new Criminal Code are true sanctions of a criminal/penal character. They are repressive in nature, as is made clear in the Code's Statement of Purpose. They in fact constitute a form of punishment, despite the fact they have been presented as "accessory consequences". Indeed, permanent closures and dissolutions are consequences which are, as has often been said, analogous to the death penalty, the only difference lying in the nature of the legal subject.

At the same time, the introduction of the notion of accessory consequences creates certain problems of application of the criminal law. Here, all circumstances (even if they are personal) which preclude a perpetrator's punishment, also preclude the company's or legal entity's liability in general, as, for example, would occur if the legal representative of the guilty legal entity were to die. In addition, in the field of procedural law, the criminal prosecution cannot be pursued independently against the legal entity, as would be the case, for example, in the event of the representative of the legal entity disappearing or failing to appear in court.

Moreover, the principle of legality precludes the possibility of leaving the application of the criminal consequences wholly undefined and exclusively in the hands of tribunals. Therefore, if accessory consequences are to be understood as providing guarantees to legal entities, they should be considered true criminal punishments and included in art. 33 CC under the general range of penalties.

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<sup>43</sup> As was already contemplated in the Proposed Pre-draft of the Criminal Code of 1983 (in its art. 138-2) and in the Projects of the Criminal Code of 1994 and 1995.

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## **Entertaining Realistic Expectations About the Effect of Criminal Sanctions Imposed on Corporate Entities: Canada**

**Yvon Dandurand, Vancouver**

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I would first like to say that it is a rare privilege to find myself in the company of such a distinguished group of jurists and legal scholars as this one. As a criminologist trained in the North American tradition of that discipline, I am inclined to approach the question of criminal sanctions from the point of view of the social sciences. From that vantage point, I have found the theories and arguments presented so far both fascinating and intriguing. Yet, I must also confess that I have also, at least at times, found them somewhat bewildering.

I remain uncertain about whether some of the difficulties we have encountered so far in our deliberations resulted from our struggle to articulate a simple solution to a complex problem, or merely from the pleasure some of us may take in inventing complex solutions to what is in effect a fairly simple problem. In fact, some of the previous speakers have already cautioned us against the possibility that imposing criminal liability on legal and collective entities might not be a "simple solution", but perhaps an overly simplistic one. One which might, the argue, prove in some cases to be counter-productive.

The apparently complex problem is the following: What role can states play, individually or collectively, through their legal and other institutions, and in particular through their criminal justice system, to ensure that legal and collective entities conduct themselves in a socially, morally, environmentally, politically and economically responsible manner?

I take it as obvious that, within the current political and economic context, only states have the power, the authority and the legitimacy to impose a measure of order and collective responsibility upon the often very powerful collective entities in question. In my view, states should not be allowed to avoid assuming their own responsibilities in these matters. At some point, the question of corporate criminality becomes one of political will.

In a recently published book, *The Myth of the Good Corporate Citizen*, *Murray Dobbin* notes that corporations enjoy many of the same "freedom and privileges enjoyed by "flesh-and-blood citizens", but are not really subjected to the same legal, social and moral obligations. As corporations grow larger and more powerful, the regulations governing them seem increasingly weaker.<sup>1</sup>

"The Transnational Corporation (TNC) is a special case, with the status of global corporate citizen whose "rights" are transnational, in effect superseding the cultural and social basis of the citizenship enjoyed by you and me. Of course, it is precisely these features - the excessive power, the refusal to accept responsibility, the distinct international status - that should disqualify corporations from citizenship. What is so astonishing about their continued status is that almost no other entity on earth is less qualified to be a citizen."<sup>2</sup>

*Dobbin* adds:

"Without the state's strict enforcement of the obligations of citizenship, the corporation is exposed for what it is. It is not a citizen, or anything even vaguely resembling such a multifaceted and complex entity. The corporation is strictly one-dimensional, demonstrating only the narrowest of characteristics: greed."<sup>3</sup>

Without re-opening the debate we have already had on the advisability of imposing criminal liability and effective criminal sanctions on corporations, I will simply say that I find the arguments in favor of doing so very persuasive. There is no doubt in my mind that we should, in some cases, resort to criminal law to prevent misconduct by corporations and other legal entities. If I advocate caution in the way and the extent to which we do so, it is certainly not to add my voice to the already impressive chorus of those who are quick to list the many arguments, whether on the basis or doctrine, economic arguments or simple efficiency, in favor of continuing to protect the relative impunity that has been and continues in many instances to be enjoyed by various collective legal entities. Impunity is a problem which the public recognizes and which must be addressed. The question is how this should be done.

Our societies' persistent tendency to over-rely on the criminal law to regulate social activities and to address social problems which would be better addressed by less repressive measures is one which is frequently deplored and decried. Yet, the same legislators who seemingly have so few hesitations to criminalize individual behavior are conspicuously ambivalent about criminalizing and punishing serious

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1 *Murray Dobbin*, *The Myth of the Good Corporate Citizen*, Toronto 1998, pp. 24-26.

2 *Idem*, p. 26.

3 *Idem*, p. 24.

corporate misconduct. In a global economy characterized by intense trade and economic competition between countries, it is not always so obviously in the interest of governments to jeopardize their own financial position by discouraging certain corporate misconduct. Governments are confronted by a public fear that corporations, if they see themselves subjected to a regime of repressive laws and an increased business risk, may simply relocate to a more "hospitable" environment.

In his book, *When Corporations Rule the World*, *David Korten* makes it clear that the objectives of the transnational corporate business agenda include the creation of a global environment where "there is perfect global competition among workers and localities to offer their services to investors at the most advantageous terms".<sup>4</sup> The desired environment is also, he suggests, one where there are no corporate "loyalties to place and community" and where "(c)orporations are free to act on the basis of the profitability without regards to national or local consequences".<sup>5</sup>

*Daniel Préfontaine's* comments<sup>6</sup> alluded to the increased transnational nature of corporate crime and the resulting ability of corporate and collective entities to evade liability or responsibility for their harmful conduct by exploiting the limitations of an antiquated social control system based solely on national institutions. The effectiveness of criminal sanctions, even in the case of corporations, cannot be discussed without reference to the question of "crime displacement" on an international scale. Transnational corporations, with their complex and intricate structures of parent companies, holdings and subsidiaries, are easily able to exploit the weaknesses of the indeed very weak existing global regulatory regime. They will also exploit the lack of effective international cooperation in the investigation and prosecution of corporate crime and in the consistent implementation of sanctions to prevent its occurrence. I believe that this is a problem which we have not had enough time to address during the last two days. It should however receive greater attention because the near absolute impunity which corporations can still enjoy in many jurisdictions can and will defeat efforts made in others to hold corporations responsible for their actions.

In most countries, as we have heard, the law needs to be restructured so that collective entities which do not take their social responsibilities seriously are sanc-

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4 *David Korten*, *When Corporation Rule the World*, West Hartford (Conn.) 1995, p. 131.

5 *Ibidem*.

6 *Daniel Préfontaine*, *Effective Criminal Sanctions Against Corporate Entities* (p. 277 in this volume).

tioned.<sup>7</sup> It is, as Professor *Eser* suggested, a question of giving effective protection to a whole range of "collective rights" often threatened by corporate greed and short-sighted insensitivity to collective well-being. And this, of course, must be accomplished while ensuring that those corporations which act responsibly are neither inadvertently drawn into the net of criminal law or unduly prevented from remaining competitive and financially viable.

### *Defining Corporate Crime*

I have used the words "corporate crime", and this brings me to my first main comment. As a criminologist, I have been somewhat troubled by the fact that, in our discussions, we have so far omitted to define the concept of crime we deem relevant to the question of criminal liability. The normative question of what deserves to be formally stigmatized as a crime and, therefore, punished is one that cannot entirely be avoided. Surely, we cannot possibly be suggesting that all misconducts and infractions should be treated in the same manner, or that all misconducts, no matter how trivial, should be criminalized simply because they happen to have been attributed to a corporate entity.

Both the legislators and the courts must be prepared to address the question of when it can be said that a corporation or other legal entity has acted in a blameworthy manner, as well as the question of what consequences ought to be attached to such blameworthiness.

In defining that "blameworthiness" and in narrowing down our definition of "corporate crime", we can pay attention, as many speakers have already argued, to the need to protect the integrity of certain fundamental principles of criminal law. I would add, however, that it may eventually prove to be much more important to ensure that the overall credibility of the criminal justice system, particularly in the eyes of the population, is not further eroded either by deluding the concept of crime to the point where it becomes meaningless, or by allowing a state of relative corporate impunity to persist.

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<sup>7</sup> See: *International Centre for Criminal Law Reform and Criminal Justice Policy*, Final Report, Meeting of Experts on the Use of Criminal Sanctions in the Protection of the Environment; Internationally, Domestically and Regionally, Portland (Oregon), March 1994.

*Entertaining Realistic Expectations*

A second point upon which I would like to draw your attention is the question of the potential impact that an increased criminalization of corporate misconduct is likely to have on an already over-burdened criminal justice system.

To remain credible and effective, the criminal law should be used with parsimony and, as many of you would agree, only in last resort. Many of us, in other fora, have probably been critical of society's over-reliance on criminal law to cure all problems. We know that the criminal law is a rather blunt instrument for promoting social change or protecting collective rights. We also know that criminal law is often resorted to as a means of avoiding to face the real challenges created by complex social issues and changing social conditions.

Several empirical studies<sup>8</sup> have drawn attention onto the fact that the criminal justice system's capacity to investigate and prosecute corporate crime is in practice very limited and that so is its capacity to enforce effective sanctions. In many countries, it would seem that the primary obstacle to corporate crime prosecution is not political or even legal, although there are some instances where that clearly is the case, but very practical. It comes from the limited resources available to perform that task, particularly as compared to the sometimes enormous resources that corporate entities can themselves devote to avoiding conviction and defeating prosecutorial efforts. The hidden and complex nature of many corporate crimes makes them very difficult and particularly costly to detect and prosecute. I should note here that the latter argument is also a powerful one against relying on civil and private actions to control corporate conduct as an alternative to imposing criminal liability.<sup>9</sup>

None of the above provides a very good argument against holding corporate and other collective entities criminally liable for certain misdeeds. It offers, however, an excellent one in favour of more carefully circumscribing the nature of the corporate misdeeds which can effectively and legitimately fall within the domain of criminal law. Which behavior should be criminalized? The choices that are and will be made in this respect by the legislator and by the courts are full of consequences for the overall effectiveness and credibility of the criminal justice system.

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8 For a review of some of these studies, see: *Henry N. Pontell/Kitty Calavita/Robert Tillman*, Corporate Crime and Criminal Justice System Capacity: Government Response to Financial Institution Fraud, *Justice Quarterly*, 11 (3), 1994, 384-410, at pp. 392-394.

9 Cf. *Günter Heine*, Sanctions in the Field of Corporate Criminal Liability (p. 237 in this volume).

There are many ways in which an inflation in the criminalization of corporate conduct can be counter-productive. It may obviously hinder legitimate business activities and economic development. It can contribute to trivialize the public concept of corporate crime and of crime in general. It may divert scarce public resources away from effective action against truly harmful corporate misconduct. It may also further paralyze an already over-burdened criminal justice system.<sup>10</sup> Above all, it provides a false and dangerous public sense of security, because it would be totally unreasonable to expect the criminal justice system to cope with such an inflation. It may lead to a deluge of formal criminalizations which are not de facto effectively enforced, prosecuted and punished. The net effect of such a scenario is that a screen is erected behind which collective entities may choose to hide and avoid their social responsibilities.

### *Effectiveness of Sanctions*

Yesterday afternoon, when *Albin Eser* attempted to assist us in narrowing the focus of our discussion, he suggested that the central question for us was: "Whether a collective entity can be held criminally responsible for certain misconducts." With certain qualifications, it would seem that a consensus is emerging around the idea that it is not only possible, but desirable to do so (at least in some circumstances).

If we are prepared to accept that idea, it is presumably because we believe that effective criminal sanctions can be imposed on collective entities, thus not only denouncing<sup>11</sup> the behavior but also producing both a deterrent and a preventive effect.

I will come later to the question of deterrence. I do not propose to comment here in detail on the relative effectiveness of each one of the broad range of sanctions that are either being used or advocated to punish corporate entities. As *Günter*

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10 See also: *Jennifer H. Arlen*, The Potentially Perverse Effects of Corporate Criminal Liability, *Journal of Legal Studies*, 23 (2), 1994, 833-867.

11 For example, *Pearce* argues, with respect to the enforcement of occupational safety standards, that: "For there to be a public recognition of both the avoidability and the seriousness of the harm resulting from business misconduct, it is important that killing and injuring at work can and should be *frequently* (but not exclusively) subject to criminal sanctions." They must be denounced as real crimes, as much real crimes as assault and homicides. Cf. *Frank Pearce*, *Accountability for Corporate Crime*, in: Philip Stenning (ed.), *Accountability for Criminal Justice*, University of Toronto Press 1995, 213-238, at p. 232.

*Heine* just pointed out, exclusive reliance on fines or, for that purpose on any other sanction, assumes more knowledge on their impact than currently exists.<sup>12</sup>

The next question I would like to suggest for your consideration is the following: "Is it really possible to punish a corporation or other legal entity?"

We seem to be taking for granted that it is, but I would hope to convince you that it may not be as easy as it seems. In fact, presentations by *Heine* and *Heineman* this afternoon certainly made it clear that the question is not as frivolous as it may first appear.

It do not ask the question in a theoretical sense, since it is obviously possible, in a formal way, to impose a monetary, disciplinary or other sanction on a legal entity. I mean to ask the question in an empirical sense. Does a sanction necessarily constitute a punishment and does punishment necessarily flow from a sanction? Can the sanction imposed to a corporate entity constitute in fact a punishment in the commonly accepted sense of the word? *Walt* and *Lauffer* argue that both punishments and penalties involve the deliberate imposition of harm, but that punishment, unlike penalties, must necessarily be connected to the notion of wrongdoing.<sup>13</sup> They also argue that for the imposition of harm for a wrongdoing to constitute a punishment, it must be expressive. Their point is that "without its condemnatory aspect, deliberate imposition of harm is not punishment. At most it is a penalty".<sup>14</sup>

It is possible to argue that all sanctions, whether or not they are imposed under the authority of the criminal law, administrative law or some other mechanism, in effect always merely amount to a penalty, a licensing fee, and for the corporation, a mere "cost of doing business". If the sanctions imposed on a legal entity do not amount in fact to a punishment, then what is the point of using criminal law as opposed to some other form of regulatory mechanism?

Of course, many of these questions are not so much matters of legal theory as they are matters for empirical research. However, since empirical research is clearly lacking, legislators around the world often appear to be content to fall back on simplistic assumptions about the effect of criminal sanctions as applied to collec-

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12 Cf. *Günter Heine* (note 9), p. 237.

13 *Steven Walt/William S. Lauffer*, *Why Personhood Doesn't Matter: Corporate Criminal Liability and Sanctions*, *American Journal of Criminal Law*, 18 (Summer), 1991, 263-287, at p. 280.

14 *Ibidem*.

tive entities. They are prepared to assume that rational actors will comply with the law in order to avoid sanctions. In other words, that the decision made by the actors involved are simple and unproblematic ones.<sup>15</sup>

Time does not allow me to go into any detail in the findings of existing empirical research on corporate member's decisions to commit a crime or to comply with the law. However, most of you will already be familiar with some of this work and, in particular, with the research that tests various rational choice models that may explain decision-making and point at the limited deterrent effect of criminal sanctions.

There obviously is at play what *Erhard Friedberg* calls a "rationality deficit". The rationality of corporate actors' behavior is necessarily limited and is always the mixed product of emotions, learned routines, moral and ethical considerations, as well as strategies and instrumental calculations.<sup>16</sup> Corporate crime can obviously not be understood simply on the basis of the a priori assumption that decisions are in line with the interests of the organization. In fact, it is probably fair to say that a genuine understanding of organized behavior and of the role played in it by internal and external rules as well as other structuring factors still eludes us.

### *Corporate Deterrence*

Deterrence is advocated as the central function to be performed by criminal sanctions imposed on legal or collective entities. Because it is assumed that many corporate offenses are instrumental, a notion which is not necessarily consistent with available empirical evidence, it has frequently been assumed also that the threat of formal sanctions decreases the likelihood of corporate offending. Because it was often inappropriately assumed that corporate behavior is always rational and always exclusively driven by a profit motive,<sup>17</sup> it has also often been suggested that corporations are more effectively deterred by sanctions and fines than individuals.

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15 See: *Heine's* discussion of the limitation of the economic model (note 9), p. 237.

16 *Ehrhard Friedberg*, *Le pouvoir et la règle. Dynamiques de l'action organisée*, 2ème éd. Paris 1997, p. 117. See also: *Ehrhard Friedberg*, *Zur Politologie von Organisationen*, in: W. Küpper/G. Ortman (eds.), *Mikropolitik*, Opladen 1992, pp. 39-53.

17 The debate around the effectiveness of criminal sanctions, and in particular pecuniary ones, has assumed that what drives a corporation is profit, pure and simple. Corporations, however, are driven by other goals as well (see: *Kip Schlegel*, *Just Deserts for Corporate Criminals*, Boston, Northeastern University Press 1990, pp. 19-41) and the formal goals of an organization, profit or others, are but ones of the many factors which structure organizational behavior and decision-making within organizations (see: *Friedberg*, *Le pouvoir* (note 16)).

Empirically speaking, however, there is not a lot of evidence to support the assumptions that deterrence is always effectively produced by the sanctions or threat of sanctions against collective entities. According to *Paternoster* and *Simpson*, "the confidence that has been placed in deterrence theory by those studying corporate crime has, however, been somewhat misplaced. With few exceptions, most empirical studies have found either no or very weak and conditional support for the deterrence of corporate crime".<sup>18</sup>

If a deterrent effect is being produced, it would seem on the basis of the limited empirical evidence available, it is largely through the threat of sanctions directed at the individuals involved and not those directed at the collective entity itself. Informal costs of offending and being caught, as perceived by actors, are also important considerations, as are variables such as the moral and ethical values of the actors involved, individual characteristics of decision-makers, and organizational characteristics. What is required, as *Makkai* and *Braithwaite* suggested,<sup>19</sup> probably is a complete reconceptualization of the way we think about the deterrence of corporate misconduct and law breaking.<sup>20</sup>

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18 *Raymond Paternoster/Sally Simpson*, Sanction Threats and Appeals to Morality: Testing a Rational Choice Model of Corporate Crime, *Law and Society Review*, Vol. 30, 1996, pp. 549-583.

19 *Toni Makkai/John Braithwaite*, The Dialectics of Corporate Deterrence, *Journal of Research in Crime and Delinquency*, Vol. 31 (4), 1994, pp. 347-373.

20 I am thinking here of several empirical studies which are already useful even in the absence of a comprehensive and fully articulated theory of corporate offending and deterrence. For example, see: *John Braithwaite/Toni Makkai*, Testing an Expected Utility Model of Corporate Deterrence, *Law and Society Review*, Vol. 25, 1991, pp. 7-39; *Toni Makkai/John Braithwaite*, Praise, Pride and Corporate Compliance, *International Journal of the Sociology of Law*, 21 (1993), pp. 73-91; *Toni Makkai/John Braithwaite*, The Dialectics of Corporate Deterrence, *Journal of Research in Crime and Delinquency*, Vol. 31 (4), 1994, pp. 347-373; *Toni Makkai/Valerie Braithwaite*, Professionalism, Organizations, and Compliance, *Law and Social Inquiry*, Vol. 18, 1993, pp. 33-59; *Raymond Paternoster/Sally S. Simpson*, A Rational Choice Theory of Corporate Crime, in: R. Clarke/M. Felson (eds.), *Advances in criminological Theory, Routine Activity and Rational Choice*, New Brunswick 1993, pp. 37-58; *Raymond Paternoster/Sally Simpson*, Sanction Threats and Appeals to Morality, *Law and Society Review*, Vol. 30, 1996, pp. 549-583; *Sally S. Simpson*, Corporate Crime Deterrence and Corporate Control-Policies, in: K. Schegel/D. Weisburg (eds.), *White Collar Crime Reconsidered*, Boston, Northeastern University Press 1992, pp. 289-308; *Lori A. Elis/Sally S. Simpson*, Informal Sanctions Threats and Corporate Crime: Additive Versus Multiplicative Models, *Journal of Research in Crime and Delinquency*, Vol. 32 (4), 1995, pp. 399-424; *V. Lee Hamilton/Joseph Sanders*, Corporate Crime Through Citizens' Eyes, *Law and Society Review*, Vol. 30, 1996, pp. 513-547.

*Eidam's* presentation yesterday gave us a sense of the complexity of the corporate decision-making processes we are trying to influence through the use of the threat of criminal sanctions.

Once we understand corporate crime as a form of routine activity, we find that, at the very least, an individual decision-maker's intention to commit a crime is influenced in fact by many too many factors for such decisions to be effectively controllable by the sole threat of punishment.

*Paternoster* and *Simpson* have argued that

"the intention to commit corporate crime is a function of the following factors:

- Perceived benefits of the action for oneself
- Perceived formal sanctions directed against oneself
- Perceived informal sanctions directed against oneself
- Feelings of shame or self-imposed punishment
- Moral inhibitions against committing the act
- Perceived benefits of the action for the firm
- Perceived formal sanctions directed against the firm
- Perceived informal sanctions directed against the firm
- Perceived lost of prestige for the firm
- The organizational context of the firm
- Characteristics of the firm."<sup>21</sup>

To this long list, one must surely also add ignorance, emotions, stupidity, greed and countless other situational factors.

There has been several calls in the last two days for a multi-disciplinary examination of all the issues associated with criminal liability for legal and collective entities. It seems essential to me that we do not discuss the effectiveness of criminal sanctions in the abstract, but that we make a determined effort to better understand how they actually influence (or fail to do so) the behavior of individuals within a complex organization.

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21 *Paternoster/Simpson* (note 18), p. 556.

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## Effective Criminal Sanctions Against Corporate Entities: Canada

Daniel C. Préfontaine, Vancouver

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Everyone here today is aware of how slowly the idea of holding corporations and other legal entities criminally liable for their misconducts has gained acceptance. As was made clear by earlier presentations, there are indeed several parts of the world where that idea is still meeting with considerable resistance. In the common law world, corporate entities were historically exempt from criminal liability on the basis that they were artificial bodies with "no soul to be damned, no body to be kicked",<sup>1</sup> and, therefore, without a capacity to be held blameworthy. This is no longer the case, as the laws of many countries have progressively refined the criteria for and extent of that corporate liability with new and still evolving concepts such as that of a deviant "corporate culture" or that of "aggregated collective" responsibility.

Corporations, in particular transnational corporations, now occupy a central determining role in our national and global modern societies. They are a major focal point and the principal players in the global market economy. They wield immense power and influence over our institutions, daily lives and general well being. Because of this, we are confronted with a number of questions relating to accountability and the role of criminal sanctions in securing that accountability.<sup>2</sup> The debate surrounding the issue of corporate accountability, as my colleague *Yvon Dandurand* is about to argue, is far from being simply an academic one. It is perhaps best understood as a power struggle.

At the risk of stating the obvious, I should like to remind ourselves that the whole debate around the criminalization of corporate misconduct and the nature and extent of the sanctions to be imposed on corporate and other legal entities is one

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1 *John C. Coffee*, No Soul to Damn. No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 *Michigan Law Review*, 386, 1981.

2 *Frank Pearce*, Accountability for Corporate Crime, in: Philip C. Stenning (ed.), *Accountability for Criminal Justice*, University of Toronto Press 1995, p. 213.

which powerful corporations have themselves tried to influence. In a thought provoking book published recently on the subject of the influence of transnational corporations on democratic institutions, *Dobbin*<sup>3</sup> discusses how large corporations are actively engaged in efforts to derail governments' attempts to hold them accountable. He cites, for example, the case of General Electric taking concrete steps in the United States to "derail new corporate sentencing guidelines being drawn up for the federal court".<sup>4</sup> *Mason and Herbold*,<sup>5</sup> reflecting on the experience gained during the passage of *Oregon Senate Bill 912*,<sup>6</sup> an environmental crime statute, note how corporations have the political power to participate in and influence criminal policy to a much greater extent than any other group of potential offenders. They wrote: "Ordinary criminals, or potential criminals, do not usually take part in the process of writing laws. Even in the United States, where lobbying is a major industry, bank robbers do not have a trade association."<sup>7</sup>

The latter part of this century has witnessed the growing need for national governments and the international community to find effective means to control and hold corporations and other legal entities accountable for their actions. Governments have intervened with legal and regulatory frameworks to provide occupational, health, public safety, consumer and environmental protections to their citizens. In fact, in many countries where the issue has been taken seriously, we have seen a convergence of several approaches grounded in administrative law, tort law, civil law, and criminal law concepts to determine and delineate the extent and degree of corporate liability with respect to various infractions threatening the pursuit of social, environmental and economic protection objectives. Irrespective of the legal tradition in which a legal system is rooted, whether based on the common law, civil law, Islamic law or any other legal tradition, the safety of the citizens of the "global village" and the health of our global economy demand that basic parameters be established to deal with corporate misconduct. A separate statutory regime of liability should encompass culpability standards, offences that are particular to corporations, procedural and evidentiary rules that are specific to

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3 *Murray Dobbin*, *The Myth of the Good Corporate Citizen. Democracy Under the Rule of Big Business*, Toronto 1998.

4 *Idem*, p. 43.

5 *Thomas Mason/Barrie J. Herbold*, *Three Statutory Innovations to Prevent and Ameliorate Environmental Crime by Corporations*, Paper presented at the Eighth International Conference of the Society for the Reform of Criminal Law, The Corporation and the Criminal Law: Victims and Violators, Hong Kong, December 1994.

6 Oregon, Sixty-Seventh Oregon Legislative Assembly, Senate Bill 912, 1993.

7 *Mason/Herbold* (note 5), p. 7.

such entities, as well as a separate sentencing regime with a full range of sanctions.

A concrete example of such a regime has been in the field of environmental protection.<sup>8</sup> In that regard, the International Centre for Criminal Law Reform and Criminal Justice Policy in 1994 helped organize an international meeting of experts on the use of criminal sanctions in the protection of the environment.<sup>9</sup> At that meeting, the Expert Group recommended a list of elements which should be covered in an international convention to deal with crimes against the environment. It also noted that a viable and effective international regime would have to be predicated on the presence of the requisite criminal statutes in participating countries. The Expert Group noted the presence of deep differences among participants from the various legal systems represented at the meeting. It nevertheless adopted a *Model Domestic Law of Crimes Against the Environment* which attempted to deal pragmatically with both the issue of corporate criminal liability and the question of the sanctions to be applied.<sup>10</sup>

In Canada, the general principles, criteria and procedure for the sentencing of offenders for criminal offences are set out in the *Criminal Code*. The *Code* provides a broad range of alternatives available to the court at the time of sentencing of both individual and corporate offenders. However, in addition to the *Criminal Code*, there are many separate regulatory schemes at both the federal and provincial levels which apply to public health, welfare and safety, labor relations, as well as financial and economic transactions. At the federal level, some examples are the *Food and Drugs Act*,<sup>11</sup> the *Bankruptcy and Insolvency Act*,<sup>12</sup> the *Hazardous Products Act*,<sup>13</sup> *Transportation of Dangerous Goods Act*,<sup>14</sup> the *Income Tax Act*,<sup>15</sup> the *Custom and Excise Act*<sup>16</sup> and the *Canadian Environmental Protection Act*.<sup>17</sup>

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8 For example, see: *Marie-Ann Bowden/Tim Quigley*, Pinstripes or Prison Stripes? 5 J.E.L.P., p. 209-261, October 1995.

9 International Centre for Criminal Law Reform and Criminal Justice Policy, Report, International Meeting of Experts on the Use of Criminal Sanctions in the Protection of The Environment: Internationally, Domestically and Regionally, Portland (Oregon), March 1994.

10 Ibidem.

11 Food and Drugs Act, R.S.C. 1985, c. 42 (4th supp.).

12 Bankruptcy and Insolvency Act, R.S.C. 1985, c. 27.

13 Hazardous Products Act, R.S.C. 1985, c. 15 (4th supp.).

14 Transportation of Dangerous Goods Act, 1992, S.C. 1992, c. 34.

15 Income Tax Act, R.S.C. 1985, c. 1 (5th supp.).

16 Customs and Excise Offshore Application Act, R.S.C. 1985, c. 1 (2nd supp.).

17 Canadian Environmental Protection Act, R.S.C. 1985, c. 16 (4th supp.).

At the provincial level, several other special regulatory schemes also exist in the fields, for example, of securities transactions<sup>18</sup> or environmental protection.<sup>19</sup> In all these various regulatory schemes, which are essentially non-criminal in nature, one finds a 'pot pourri' of sentencing provisions ranging from fines to every type of special order possible, including orders relating to the forfeiture of corporate assets. Fines continue to be the most common kind of sentences imposed, even when other alternatives apparently exist. *Günter Heine*<sup>20</sup> raised some of the important legal and practical issues arising out of a reliance on fines as the principal sanctions applied in the case of legal entities.

Although a sizeable fine imposed on a corporation or its officers may have a clear and easily communicable public denunciation effect, it is not always clear what practical, demonstrable deterrent effect it may have on those concerned. I noted like you the suggestion made some time ago by *Coffee* to introduce the concept of the "equity fine".<sup>21</sup> The deterrent effect of a fine could theoretically be enhanced by such a scheme since the stockholders and officers who also often hold stock options would suffer as a result of some dilution of their own share holdings. The idea is certainly one which deserves some careful consideration.

Notwithstanding the importance and relevance on the current debate on the effectiveness of pecuniary sanctions in the case of corporate offenders, I will focus my own brief comments on other sentencing alternatives which may be used together with or instead of pecuniary penalties or fines.

One such alternative to the imposition of a fine is provided by the use of probation orders. In several jurisdictions, including Canada, they often are creatively applied. They can be imposed separately with reasonable conditions or in combination with other types of orders. Even if probation orders may, in some cases, give the false appearance of leniency, they are in fact potentially powerful instruments in the hands of the courts, particularly when used in conjunction with fines or other measures. When accompanied by strict conditions, probation orders can become more than a rehabilitative substitute to a punitive sanction. They can in fact include punitive elements and are likely in some cases to have a far greater

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18 For example, in British Columbia, see Securities Act, R.S.B.C. 1994, c. 418.

19 For example, in British Columbia, see the Forest Protection Code, or in Saskatchewan, The Clean Air Act, R.S.S. 1978, c. C-12.1.

20 *Günter Heine*, Sanctions in the Field of Corporate Criminal Liability (p. 237 in this volume).

21 *Coffee* (note 1), p. 413-414.

deterrent effect than a simple fine. This is why *Fisse*<sup>22</sup> has recommended that the term "punitive sanctions" be used instead of "probation order" to clearly convey the message that the measure is a punitive one.

One of the greatest advantages of the use of probation orders or "punitive injunctions" is that it allows the courts to structure the order in a way that the burden and cost of enforcement and compliance monitoring is shifted from the enforcement agency to the offender. This can be achieved by the court requiring that the offending corporation help investigate the offence it committed or other issues of non-compliance with the law, undertake the necessary remedial and disciplinary measures, and submit a compliance report. Ultimate enforcement must still rest with the regulatory or prosecutorial authorities. It is nevertheless desirable to ensure that the corporate entity bear the costs of compliance, both from the point of view of equity and because of the limited resources available for inspections and enforcement.<sup>23</sup> *Bowden* and *Quigley*<sup>24</sup> have suggested that, in such cases, the order should specify what particular personnel of the corporation is charged with the responsibility of securing compliance, on pain of individual prosecution for a failure or refusal to comply adequately. They also added that the law should provide a specific authority to designate officials for the purpose of enforcing punitive injunctions or probation orders against corporations.

A central issue with respect to the use of probation orders in the case of corporate entities is that of determining the appropriate terms of the probation orders. There is no particular impediment to including such measures as community service orders, orders directing the company to publicize its transgressions, or orders forbidding the indemnification of fines or other penalties imposed on corporate officers or directors. In Canada, for example, all three of these measures were imposed on the defendant corporation in the *Bata*<sup>25</sup> case as part of a probation order.

An interesting and powerful restorative component of a probation order is a community service order requiring a corporation to undertake some work or activity that is of benefit to the community. Community service orders are frequently used for individual offenders. In the same way, they should be applicable for corporate

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22 *Fisse*, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S.Cal.L.Rev. 1983, p. 1224.

23 See: *Bowden/Quigley* (note 8).

24 *Ibidem*.

25 *R. v. Bata Industries Ltd* (1992), 7 C.E.L.R. (N.S.) 293 (Ont.Prov.Ct.), affirmed (1993), 11 C.E.L.R. (N.S.) 208 (Ont.Gen.Div.).

offenders as well. In Canada, this is entirely possible under the sentencing provisions of the *Criminal Code*. In addition, the *Canadian Environmental Protection Act* provides for explicit authority to impose a community service order. There also is authority in most provincial laws to impose "other reasonable conditions" as part of a probation order. In the *Bata* case, the community service order took the form of requiring a donation to a hazardous waste centre, rather than the direct performance of work.<sup>26</sup>

A more recent addition to the range of sanctions available to the courts is the adverse publicity order. It is used to deter corporate misconduct, especially in relation to the protection of the environment and public health, as well as the control of hazardous products. For example, in the *Bata* case, the trial court ordered the company to publish details of the conviction in its international newsletter, although the appeal court modified this to limit circulation in Canada.<sup>27</sup> The *Canadian Environmental Protection Act* provides explicit authority to require an offender to publicize a conviction under the law. Some may argue that the effect to adverse publicity orders are too uncertain. I note, however, that many corporations rely upon the esteem of the public and their good public image to survive and thrive in the marketplace. In some cases, it is possible for the court to tailor the order to suit the circumstance, specify the location and frequency of the publicity, and the expense to which the corporation may be put, all to introduce some measure of certainty into the process and to monitor the actions of the company.

Probation orders may include, when necessary, the revocation or suspension of licences required to engage in particular economic activities.

The concept of non-indemnification of directors or officers who have also been convicted and fined is another arrow in the judicial bow against corporate offences.<sup>28</sup> This ensures that the officers or directors will suffer a penalty beyond the stigma of conviction. The potential deterrent effect of such a measure should not be underestimated. The prohibition can also ensure that the officers do not ultimately stand to profit personally as a result of an infraction. The prohibition offers an effective incentive to officers and managers not only to improve their own behavior, but also to ensure compliance by the corporation. Furthermore, it is

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26 Ibidem.

27 Ibidem.

28 See: *Peter Bowal*, Expensive Day at the Office: Can Corporations Indemnify Their Agents Who Suffer Personal Liability for Regulatory Offenses? *University of Toronto Law Journal*, 45(3), 1995, p. 247-278.

often possible to ensure that the corporation does not in fact compensated its officers in other ways by requiring and scrutinizing compliance reports from designated personnel.<sup>29</sup>

Other restorative measures that can be part of a probation order come closer to integrating criminal and civil remedies. At present, in Canada, restitution orders are commonly made against individual offenders, often but not necessarily as a condition of probation. In principle, such orders can be made against corporations. In addition to restitution and compensation, there are also some "redress facilitation"<sup>30</sup> mechanisms which may be set in place by legislation or by the courts. Their aim is to facilitate the more expeditious compensation of victims for the harm they suffered. For example, redress for victims may be facilitated by requiring a corporation to provide information to litigants, as an enhanced and more intrusive form of discovery.

On the general subject of increasing the effectiveness and the deterrent effect of criminal sanctions against corporations, I would like to raise a last point. Indeed, it is frequently argued that the imposition of drastic punitive sanctions against a corporation, in an attempt to produce both a specific and a general deterrent effect, may yield very undesirable consequences for innocent parties, for the economic life of a community, for employment opportunities and so on. If the sanction has ultimately for effect to force a company to declare bankruptcy or to cease or limit its operations, its ability to repair the damages it created, to compensate victims or even to perform a service deemed essential to the community can be affected. This argument to which both the legislators and the courts must obviously remain sensitive brings me to observe that there are sentencing mechanisms, such as suspended or conditional sentences which have been used rather routinely in sentencing individual offenders which could be used more systematically in the case of corporate offenders. They would allow courts to impose very punitive sanctions while stating that these sanctions would only be executed if the offender fails to comply with restorative and compliance orders.<sup>31</sup> The recourse to such determinate and explicit threat of punishment, or "Damocles Sword" if you will, may do much to reconcile some of the competing objectives that the courts must necessarily consider at the time of sentencing.

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29 See: *Bowden/Quigley* (note 8).

30 *Fisse* (note 22), p. 1231-1233.

31 *Grummer* discusses this type of measure in terms of "mandated restrictions with enforcement discretion" or "mandated restrictions with defined or presumed sanctions". Cf. *Richard Grummer*, *Corporate Crime Sentencing*, Charlottesville (Virginia) 1994, p. 735-737.

Most of my comments so far have related to the effectiveness of various sanctions in the case of public or private corporate offenders. However, before concluding my remarks, I should also draw your attention upon the fact that there is also a growing trend in Canada to prosecute Crown corporations, government departments, public agencies and authorities for regulatory and statutory type offences. In such circumstances, flexibility in sentencing is important simply because fines only penalize the taxpayer. In Canada, the judiciary has already demonstrated that it is aware of that requirement. *Bowden* and *Quigley* quoted two recent cases illustrating that trend.<sup>32</sup> In a 1992 case, the Canadian Department of the Environment successfully obtained a conviction against the Public Works Department which was ordered to perform community works.<sup>33</sup> In the Northwest Territories, the Commissioner was ordered to pay into a fund for the promotion of conservation and the protection of fish and fish habitat.<sup>34</sup>

If the argument against the criminalization of dangerous and socially detrimental corporate conduct is that effective deterrence through criminal sanctions against corporations is not possible, I hope that my few comments as they relate particularly to the Canadian experience have demonstrated that this is clearly not the case.

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32 See: *Bowden/Quigley* (note 8).

33 *Canada (Environment) v. Canada (Public Works)* (1992), 10 C.E.L.R. (N.S.) 135 (C.Q.).

34 *Canada (Environment) v. Canada (Northwest Territories (Commissioner))* (1993), 12 C.E.L.R. (N.S.) 55 (N.W.T.S.C.).

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# Corporate Crime and Sentencing: The Italian Solution

Cristina de Maglie, Cagliari

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## I. The Model of Corporate Liability in the Field of Administrative Penal Law

The Italian system does not accept the model of corporate criminal liability. Our legislator has instead consistently shown that it considers administrative tort law the preferred ground for confronting corporate criminality.<sup>1</sup>

The basic tenets of this approach are stipulated in art. 6 Legge di Modifiche al Sistema penale<sup>2</sup> which imposes on companies a form of administrative responsibility in cases of infractions to the law. In the case of violations committed by a representative or employee "of an organization in the exercise of his functions or duties", the organization is held jointly liable with the author of the violation for the payment of the sum owed by him. Therefore, we are not dealing with the direct liability but the joint liability of the organization that subsequently has the "right to total reimbursement by the perpetrator of the offense." The rule, therefore, merely provides the corporation with a warranty for the payment of the fine.<sup>3</sup>

More recently, the legislator has constructed five different models of direct corporate responsibility for the more delicate sectors of the economy: the antitrust legislation of 1990, the telecommunications legislation of 1990, the Insider-Trading Law of 1991, the Banking Law of 1993, and the Fiscal Law of 1997.<sup>4</sup>

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1 *Mario Romano*, *Societas delinquere non potest* (Nel ricordo di Franco Bricola), *Rivista italiana di diritto e procedura penale* 1931 (1995); *Carlo Enrico Paliero*, *La sanzione amministrativa come moderno strumento di lotta alla criminalità economica* (The administrative sanction as a modern means to counteract economic crimes), *Rivista trimestrale di diritto penale dell'economia* 1189 (1996).

2 N. 689/1981.

3 *Carlo Enrico Paliero/Aldo Travi*, *La sanzione amministrativa* (The administrative sanction), *Profili sistematici*, Milano 1988, p. 210.

4 *Cristina de Maglie*, *Societas delinquere potest* (forthcoming).

a) The *Anti-trust Law* of 1990<sup>5</sup> in art. 19 establishes that whenever a company violates the laws which are aimed at blocking concentrations or monopolies, the *Autorità garante* (Autorité administrative indépendante; Independent Administrative Authority), which regulates competition, can impose administrative fines between 1 % and 10 % of the turnover of the company which is in violation of the regulations. In cases of continued misconduct, the "*Autorità garante* can call for the suspension of the activity for up to 30 days".

b) The *Mammì Act*<sup>6</sup> provides that the *Garante* of Broadcasting and the Ministry of Post and Telecommunications may impose direct disciplinary sanctions on companies running television networks which have committed unlawful acts. For example, art. 31 subsections 4 and 5 allow the *Garante* to suspend its concession and authorization for a set period of time. For the most flagrant violations of subsections 6 and 7 of the law, the Ministry of Post and Telecommunications can, on the proposal of the *Garante*, decide to revoke the concession.

Finally, in accordance with art. 33 and 34, radical and grave ablative conduct results in the deactivation of operations for those companies which "at the date when the law came into force had already shown unlawful conduct in regard to art. 15 sub-paragraph 2," and which had persisted beyond the maximum limit of 730 days. Further, the law appears to have established a specific sanction for corporations by aiming at the holding company normally managing the business activities: "the forced dissolution of the holding company, its subsidiaries or shares, or the dismantling and liquidation of the holding company or its subsidiaries as defined within the present sub-paragraph."

c) Art. 7 of law 17 May 1991 n. 157 on insider-trading entrusts the *Commissione Nazionale per le Società e la Borsa* (Consob) with the power to enforce its regulations directly with regards to the different forms of publicity in the financial investment market.

Two sanctions are established:

- a reprimand issued by Consob;
- a fine ranging from 10 to 250 million lire imposed by the Ministry of Finance on the recommendation of Consob.

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5 L. 10 October 1990, n. 287, Norme per la tutela della concorrenza e del mercato.

6 L. 6 August 1990, n. 223, Disciplina del sistema radiotelevisivo pubblico e privato.

It is also interesting to note the highly stigmatizing effect achieved by the "publicity of the sanction, at the expense of the subject to whom the offense is attributed, with conditions established by Consob": a North American-style measure which could threaten both the prestige and good name of the company. These sanctions are directly applicable to "subjects who violate the provisions of the regulations"; the generic term "subjects" does not discriminate between the physical person and the company.

d) The *Testo Unico* of the Banking and Credit Law of 1993 permits in art. 144, the application of administrative fines which have a particularly inflicting effect (varying from 1 to 50 million lire; from 2 to 25 million lire or up to 100 million lire, depending on which of the norms set out in the law is violated).

Regarding the fine imposed upon individuals, the banking law has adopted a criterion which is based on the "functions carried out" rather than the title officially held by the individual, so as to reach individuals who, "in some way", influence the activity of the company .

In particular, the law underlining art. 6 of law n. 689/1981 specifies that "the banks, the companies and the corporations with which the individuals responsible for the violations are associated, must pay the fines and pursue their right of total reimbursement by the perpetrator of the offense" (art. 144.5).

e) Finally, art. 11 of the *Fiscal Law* of 1997<sup>7</sup> provides that "in cases where the violation was committed by an employee or legal representative of a physical person, or by an employee, representative, or administrator who exercised in his duties or functions, with or without the authority, those of the company, association or organization, in whose interests the author of the violation acted, is obliged to pay a sum equal to that of the imposed fine; and is accorded the right to total reimbursement."

As can be noted, the common characteristics of these types of liabilities are:

- the roots in the system of administrative penal law;
- the exception to the general rule of joint-liability set out in law n. 689 of 1981;

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7 D.L. 18 December 1997, n. 472, Disposizioni generali in materia di sanzioni amministrative per le violazioni di norme tributarie, a norma del art. 3c 133 L. 23 Dicembre 1996 n. 662 (Fiscal Law).

- the specific competence of the organs delegated to administer the sanctions and their correspondence to the French model of the *Autorité administrative indépendante*.<sup>8</sup>

## II. Sanctions Typology

Anti-corporate crime sanctions can be grouped into three general categories: financial sanctions, structural sanctions and stigmatising sanctions.

- Administrative fines belong to the first group. Of all the measures considered, the administrative fines hold a principal role and are regarded by the Italian legislator as the anti-corporate crime sanctions *par excellence*.
- Structural sanctions, or more precisely, the interdictive ones, strike at the essence of the corporation, paralysing all or part of its business activity in the economic world. These include the temporary suspension or revocation of the concessions or authorizations, and the deactivation or termination of operations, (rather than the dismembering and sale of the activity) or the dissolution of the corporation.
- Stigmatising sanctions affect the image of the corporation and may undermine its public image or credibility. These consist of reprimands and adverse publicity.

## III. Sentencing Criteria

The common weakness of all the rules thus far considered with regard to the Italian sanction system set out to counteract corporate crime, is found in the sentencing, specifically, the absence or scarcity of guidelines for calculating fines and determining sanctions.

The base rule (art. 6 law n. 689/1981) has already been rendered ineffectual by virtue of the criteria of imputation.

The formal requirement of identifying an individual "exercising the functions or duties" seems to impose unreasonable limitations and is inconsistent with the va-

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8 *Carlo Enrico Paliero*, Problemi e prospettive della responsabilità penale dell'ente nell'ordinamento italiano, *Rivista trimestrale di diritto penale dell'economia* 1189-1190 (1996); *Mireille Delmas-Marty*, *Dal codice penale ai diritti dell'uomo*, Milano 1992, published originally in France under the title: *Le flou du droit: Du Code pénal aux droits de l'homme*, Paris 1986.

ried and multiform activities of a company. Further, to limit an organization's responsibility to the conduct of individuals bearing the formal title of representative potentially excludes a significant number of potentially unlawful actors equally involved in unlawful activities, who actually exercise functions which are not formally recognized.

Such inconsistencies are evident, in the area of sentencing in the banking and fiscal laws. While the mechanism of joint liability gives rise to only one sanction and not two fines (one for the physical person and one for the organization), the sentencing structure clearly acknowledges the differences between the economic conditions of the physical person and those of the organization. The sole sanction, that found in art. 1, is carried out with due regard to "the individual conditions" of the author of the offense, that is, the physical person.<sup>9</sup>

The current special laws are not free from criticism either. Only the Anti-trust Law clearly provides for administrative fines to be fixed at "up to 10 % of the business annually invoiced by the company". The law of insider trading incorporates "the eventual recidivism" as a sentencing reference. More often, reference is made in generic terms to the "seriousness of the offense" and of "the more serious circumstances" as a way of measuring administrative fines, without any indication of how the requisite "seriousness" must be calculated.

The legislator of the reform of April 1998 (reform on Administrative Sanctions), has in part, recognized and attempted to remedy its doctrinal awkwardness by providing sentencing criteria which are less flexible and more precise. In this project, an organization must pay any administrative fines issued to "a person holding any administrative or managerial role, or who is employed in any other function, and commits a *latu sensu* economic crime hereby listed, and is fixed at 20 to 300 million lira. The sanction can be increased up to threefold when, in light of the economic conditions of the corporation and the circumstances of a concrete case, the fine is considered insufficient even when applied to a maximum."

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9 *Paliero/Travi* (note 2), p. 216.

#### IV. Perspectives de lege ferenda

"The principle of *societas delinquere non potest* can only persist thanks to the formidable support of criminal policy."<sup>10</sup>

The Italian approach to corporate criminal liability by way of administrative tort law is, in my opinion, inadequate to face the criminal aggressiveness of organizations. The time is right for a radical position in favour of the criminalization of the corporation.

Regarding the sanction system, the optimum structure for targeting organizations as perpetrators of offenses would be multi-faceted and combine criminal and civil sanctions (the American legislation represents the ideal system on this point). The aim would be to achieve a mixed system which provides for a wide range of sanctions (fines, probation, restitution, forfeiture, confiscation, and dissolution) with the dual objective of being punitive and remedial, and formed to govern a many-faceted criminal phenomenon.<sup>11</sup> The most attractive aspect of criminal sanctions is its punitive goal, while civil sanctions, being merely remedial, are directed at satisfying needs which are not able to be carried out by criminal sanctions and have the important task of limiting the potentially expansive excesses of the latter.

This mixed system upholds the criminal sanction as dominant: to be effective this ideal sanction structure must be imposed by means of a criminal process. Only a criminal process, in our system, offers the indispensable guarantee of independence, certainty and equality, while delivering the deterrence and stigma necessary for compliance.<sup>12</sup>

Concerning the sentencing criteria, once again the American system shows itself to be ahead of its time. The *United States Federal Sentencing Guidelines* of 1991 set out explicit criteria in order to avoid the phenomena of deterrence-trap, overflow, and nullification.<sup>13</sup> One only has to think of how the procedure of calculating fines is articulated: base fine, culpability score taking account of aggravating

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10 *Giorgio Marinucci*, *Il reato come azione* (Crime as action). *Critica di un dogma*, Milano 1971, p. 175.

11 *Richard Gruner*, *Corporate Crime and Sentencing*, Charlottesville (Virginia) 1994, p. 683-687; *Franklin Zimring*, *The Multiple Middlegrounds Between Civil and Criminal Law*, *Yale Law Journal* 1901 (1992).

12 *Cristina de Maglie* (note 4).

13 *John Coffee, Jr.*, *No Soul to Damn. No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment*, *Michigan Law Review* 389-407 (1981).

and mitigating factors, and eventually departures.<sup>14</sup> The influence of this sentencing model is represented by the Compliance Programs: sophisticated programs of self-regulation applied to corporations. If the organization shows that it has adopted an effective program to prevent and detect violations of the law, it can obtain a very significant reduction of the fine in the event of a conviction.

The American jurisprudence, as evidenced in the Care-Mark case of 1996 has provided legitimacy to the use of the Compliance Programs within corporations.<sup>15</sup>

It is time for the Italian legislator to overcome the taboo concerning the imposition of criminal sanctions in the cases of legal entities and to recognize the effectiveness of this type of sentencing for organizations. The Recommendation of the Council of Europe R (88) (1988) may provide a new impetus to do so. What is required is a model based on very strict and pervasive controls which penetrates the management mechanisms and internal structures of organizations.

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14 *Cristina de Maglie*, Sanzioni pecuniarie e tecniche di controllo dell'impresa (Fines and corporate crime control). Crisi e innovazioni nel diritto penale statunitense, *Rivista italiana di diritto e procedura penale* 124-130 (1995).

15 *Cristina de Maglie* (note 4).



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## Placing the Enterprise Under Supervision ("Guardianship") as a Model Sanction Against Legal and Collective Entities

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### I.

The search for adequate sanctions to fight corporate crime leads to a dilemma. Neither fines, which are the standard instruments in the Anglo-American criminal law<sup>1</sup> and in the German Ordnungswidrigkeitengesetz (OWiG), nor the numerous sanctions in the new French Penal Code<sup>2</sup> have had, according to their track record, sufficient preventive effects.

1. Fines against legal and collective entities are the standard instrument used today. This is not only true in Anglo-American corporate criminal law, but also in Germany under § 30 OWiG,<sup>3</sup> as well as in the European Union for sanctioning prohibited trusts and other anti-competitive practices.<sup>4</sup> From a functional perspective, punitive damages in American civil law,<sup>5</sup> which have the preventive functions of criminal law should also be included in this list. Fines imposed on corporations have become staggering, not only in the USA but also in Germany. For example, the Heidelberger Zement AG was fined 100 million DM.<sup>6</sup> According to newspaper reports, the European Commission has recently fined Volkswagen AG several hundred million ECU. Remarkably, these astronomically high fines have not often led to any consequences to individuals within these enterprises. The management board of Heidelberger Zement AG had no difficulties in obtaining

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1 See *Smith/Hogan*, Criminal Law, 7th ed. 1992, p. 182 et seq.; *Ehrhardt*, Unternehmensdelinquenz und Unternehmensstrafe, 1994, p. 122 et seq.; *Brickey*, Corporate Criminal Liability, vol. 1, 2nd ed. 1992, p. 31 et seq.

2 See art. 131-39 of the Code Penal and *Koch*, ZStW 107 (1995), p. 405 et seq.; *Bouloc*, in: de Doelder/Tiedemann (eds.), Criminal Liability of Corporations, 1996, p. 235 et seq.; *Schwinge*, Strafrechtliche Sanktionen gegenüber Unternehmen im Bereich des Umweltstrafrechts, 1996, p. 155, 158, 160, 169, 191, 195.

3 Gesetz über Ordnungswidrigkeiten vom 24.5.1968, BGBl. I p. 481.

4 Comprehensively *Dannecker/Fischer-Fritsch*, Das EG-Kartellrecht in der Bußgeldpraxis, 1989, p. 133 et seq., 315 et seq.

5 See *Robertson/Powers/Anderson*, Cases and Materials on Torts, 1989, p. 338 et seq.

6 For citations see *Schünemann*, in: Schünemann (ed.), Unternehmenskriminalität, 1996, p. 132.

formal approval of the board's activities, and the same can be expected for the management board of VW. This demonstrates that fines have a very limited effect on the management of the enterprise: since the fine is paid by the enterprise, it only lessens the profits of the stockholders, but has no impact on the management board or its individual members. When the stockholder meeting chooses not to opt for individual consequences, the managers remain completely unaffected.

The explanation for the low deterrent effect of exorbitantly high fines, from the perspective of the enterprise, is simply the monetary cost factor, which apparently can easily be compensated for by adequate calculations. This is vastly different in comparison to the imprisonment of individuals, which is also seen as a mere cost factor by the economic analysis of law.<sup>7</sup> The cost factor of "imprisonment" can never be compensated for, as the human life span is limited and lost life time cannot be regained. Therefore, the effect of the cost factor "imprisonment" lies in the magnitude "indefinite" and not in the effect of the cost factor "fine". Nevertheless, criminal courts do not hesitate to use the sanction of imprisonment according to the principle of "overkill" with lengthy terms of imprisonment in reaction to serious crimes such as grand theft and sexual assault.<sup>8</sup>

This comparison shows that a corporate fine is in no way equivalent to the sanctions of criminal law against individuals. A fine against an enterprise has roughly the same effect as a fine for a parking offence against a rich individual: it is merely an inconvenience with a very limited deterrent effect.

2. As a consequence, the deterrent effect of corporate sanctions is very weak both in the U.S. and EU. In the U.S., sanctions are usually imposed only on corporations. Individuals acting for a corporation are only additionally or cumulatively sanctioned if their behaviour has been especially atrocious and has led to serious bodily injuries.<sup>9</sup> On the other hand, the EU has no such provision at all, it only has the authority to sanction enterprises and thus cannot call individuals to account for their behaviour.<sup>10</sup> Up to now, the discussion in the field of comparative law has at

7 See *Posner*, *Economic Analysis of Law*, 4th ed. 1992, p. 217 et seq.

8 The usual criticism pointing to the Old Testament-style austerity of *Immanuel Kant's* defence of the talion principle (in: *Metaphysik der Sitten*, 2nd ed. 1798, p. 226 et seq.), neglects completely that to date the harshness of most punishments vastly exceeds the measure of the talion principle.

9 For the narrow conditions to punish corporate executives in addition to the corporation in the U.S. see *Ferguson*, in this volume p. 153; *Brickey*, supra (note 1).

10 Because the addressees of art. 85 and 86 EWG-Vertrag are not persons, but enterprises and associations of enterprises, the commission is not entitled to fine persons, see *Dannecker/Fischer-Fritsch*, supra (note 4), p. 253.

best noted that sanctions against corporations lead to extensive exemptions from punishment for individuals; the whole issue is under-estimated and often not even stressed separately.<sup>11</sup> Nevertheless therein lies, in my opinion, the key issue and the gap between the German and the Anglo-American discussion of corporate crime. In Germany, replacing individual criminal liability with the liability of the corporation is not under discussion, and rightly so: the need for corporate sanctions stems from the fact that the deterrent effect of criminal law on the behaviour of an individual within a group is weakened if and as corporate culture transmits deviant values and rules.<sup>12</sup> This weakening effect can and should be compensated for by sanctions against the corporation itself. The extent to which the individual is exempt from punishment in American corporate criminal law has, however, in my opinion the perverse effect of freeing the acting individual from criminal liability, thus making the deterrent effect dependent solely on the corporate sanction. This means a radical limitation to the use of reflexive law in autopoietic (self-regulating) systems.<sup>13</sup> It neglects the fact that the behaviour of individuals within groups is indeed influenced strongly by group culture, but it nevertheless requires a decision of the individual himself. In order to uphold the impact of penal law with respect to acts within organisations, the *cumulation* of individual and corporate sanctions - according to the Continental-European model - is required.

3. Modern legislation, therefore, has attempted to find more efficient sanctions against corporations. Such attempts are especially noted in both the new French Penal Code and the Spanish Penal Code.

Under art. 129 of the Spanish Penal Code the court can order the closure of the whole enterprise or its premises for a limited period of time, liquidate the legal entity, suspend its operations for a limited period of time or prohibit further activities. Even more extreme is the French Penal Code, which contains, besides fines in art. 131-39, provisions for the liquidation of the legal entity, the prohibition of further activities, supervision by the court, the closure of the premises, the exclusion from public markets, the publication of the court decision and other measures.

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11 The in most aspects thorough book by *Ehrhardt*, supra (note 1), does not even elaborate on this central issue separately.

12 See comprehensively *Schünemann*, *Unternehmenskriminalität und Strafrecht*, 1979, p. 18 et seq.

13 See with further citations my essay in this volume, p. 225.

All these sanctions have advantages and disadvantages which cannot be fully analysed in this article. I would like, however, to mention two drawbacks which in my view preclude the application of the law of sanctions against legal entities on such bases. Firstly, it seems to me that the diversity of sanctions diminishes their deterrent effect as the applicable sanction is unpredictable. The courts seem unwilling to apply the whole range of these sanctions, as exemplified in the French experience. Secondly, sharp attacks on the organisation of the legal entity cannot prevent the development of specific avoidance strategies through organisational changes or the establishment of a new entity - or to use a metaphor, mend the old clothes of the legal entity or exchange them for new ones.

4. The concepts applied so far have thus not led to ideal sanctions which are on the one hand efficient, and on the other hand cautious enough not to generate their own ineffectiveness through reactive avoidance strategies.

## II.

In my view, such an ideal sanction, or the philosopher's stone, could consist of placing the enterprise under supervision (guardianship). By guardianship, I mean specific supervision which leaves the executive power of the managing board untouched, but which guarantees transparency in the dealings within the enterprise and thus reduces the risk of further corporate crimes being committed. The mere threat of this measure also has a general preventive effect due to the loss of prestige connected with it. I would like to illustrate the purpose and content of this sanction on the basis of a draft law which I have recently formulated together with some colleagues.<sup>14</sup> The draft is as follows:

### *(§ 1) Placing the enterprise under guardianship (Unternehmenskuratel)*

(1) If a management member of an enterprise commits a criminal or administrative offence on behalf of the enterprise and if there is the risk of further violations of the law, the enterprise can be placed under guardianship. In general, such a risk can be assumed if the violation was considerable in terms of either the breach of duty or the harm done.

(2) The minimum term of the guardianship is one year, the maximum term three years when it is the first application, five years in cases of repeated application. The term begins when the guardianship enters into force.

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<sup>14</sup> In: *Schünemann* (note 6), p. 145 et seq. with comprehensive reasons to which I have to refer here for more details.

(3) If the enterprise is sentenced to be placed under guardianship for no longer than three years, the court may suspend the enforcement of the measure on probation if it can be expected that the responsible members of the enterprise are deterred by the sentence and will refrain from further criminal and administrative offences without the supervision through the guardian.

*(§ 2) Reach of the guardianship*

(1) An enterprise is placed under guardianship with the purpose to investigate whether the causes within the enterprise relevant to the imposition of the guardianship can be permanently eliminated.

(2) If only parts of the enterprise or separate divisions of the enterprise are affected by the causes relevant for the imposition of the guardianship, the guardianship can be limited to these divisions. This limitation can be ordered subsequently, changed or repealed if the report of the guardian makes the previous extent of the guardianship appear inadequate.

(3) If the guardianship was imposed because criminal or administrative offences were committed within a group of enterprises, the guardianship can be extended to other enterprises of this group as long as it is proven that supervision within the group was inadequate, and that there is the risk that without such an extension the causes relevant to the imposition of the guardianship may shift to other enterprises within the group.

*(§ 3) Enforcement of the guardianship*

(1) If the sentence cannot be appealed, the enterprise has to use the term "under guardianship" ("u.g.") in all legal actions. The court appoints the guardian after hearing the qualified administrative authorities. The guardian can also be a public agency or a legal entity.

(2) The guardian has the right to be present and to obtain information and disclosure in all matters of the enterprise. This includes the right to access to all premises at any time, to inspect all records of the enterprise and to obtain necessary information from all members of the staff. Important changes in the organisational structure of the enterprise have to be reported to the guardian before they are put into effect. The guardian is not allowed to make entrepreneurial decisions. If the guardian is impeded in the fulfilment of his task, the court can inflict a fine on the enterprise.

(3) The guardian has to report to the court on important findings at the end of each business year. He has to report criminal and administrative offences committed by members of the enterprise during the performance of their duties to the office of the prosecutor in charge.

(4) If the guardian neglects the duties listed under (3), the court can inflict a fine on him. The court can dismiss the guardian and replace him with another.

(5) The compensation for the guardian is determined by regulations on fees and payments for certified public accountants. The resulting costs are paid by the enterprise.

(6) Fines mentioned under (2) and (4) of this provision can be repeated. The minimum amount is DM 500, the maximum amount in the case of (4) DM 10,000, in the case of (2) DM 100,000.

### III.

1. In my opinion, the specific advantage of the guardianship concept described above is the unique combination of repressive and preventive components which have an effect at the source, namely the criminal attitude within the entity, but without aiming at the efficiency of the enterprise and thus without harming the stockholder's property rights. To put it briefly, the aim is to place such an enterprise under the sharp eye of a guardian appointed by the court. The role of the guardian would be to make the activities and relations within the enterprise more transparent to the judicial authorities. He would, however, not be able to make decisions himself and thus usurp the genuine executive tasks of the management board. Basically, the guardianship system combines future-related, preventive and repressive measures. It is, therefore, a complex sanction which is partly a typical measure of incapacitation and rehabilitation, but also shows (through its disclosure) repressive elements akin to penalties. Its authority with respect to the corporation itself is derived from the concept of reflexive law by the indirect guidance and control of autopoietic systems.<sup>15</sup> Furthermore, it addresses the necessity for legally protected goods which are endangered by the criminal attitude within the enterprise. With respect to the management, whose activities are based on the

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<sup>15</sup> See *Luhmann*, *ZfRSoz* 1985, p. 1 et seq.; *Teubner*, *Recht als autopoietisches System*, 1989, p. 87 et seq.; *Teubner*, *ARSP* 68 (1982), p. 13 et seq.; *Teubner/Willke*, *ZfRSoz* 1984, p. 4 et seq.; *Willke*, *Entzauberung des Staates*, 1983, p. 9 et seq.; for criticism see *Wagner/Zippryan*, *ZfSoz* 1993, p. 144 et seq.; *Wagner*, *ARSP* 80 (1994), p. 289 et seq.

freedom to choose and carry out one's career as guaranteed by the constitution, the guardianship is also justifiable, as it does not touch the substance of the executive powers of the managing board. The "sharp eye" of the guardian is only a regulation of the exercise of a profession which is permissible according to the principle of proportionality (Verhältnismäßigkeitsgrundsatz). Moreover, stockholders are - in contrast to almost all other sanctions against the enterprise - not at all affected by the guardianship system. On the contrary, they are likely to view the guardian as a protector of their interests against future corporate crime. Should not such a sanction really constitute the philosopher's stone?

2. From a theoretical point of view, the legitimacy of corporate guardianship, as I have mentioned, is based on system theory and reflexive law concept. My proposal would be misunderstood if it was taken as an application of the identification theory, notwithstanding that it presupposes a criminal offence of a management member. The relevance of the latter is simply used as an indicator of the presence of a criminal corporate attitude or, in other words, a detrimental corporate culture.



**Subject V**

**Procedural Law**



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# **A Plea for a Systematic Approach in Developing Criminal Procedural Law Concerning the Investigation, Prosecution and Adjudication of Corporate Entities**

**J.F. Nijboer, Leiden**

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## **I. Prolegomena**

### **1. Purpose: Offering Elements Rather than Holistic Concepts**

It is often said that modern codified criminal procedure in continental jurisdictions is based on the assumption that criminal responsibility is applicable only to individuals (*societas delinquere non potest*). This assumption is based upon the axiom of the individuality of guilt, as one of the aspects of the principle of guilt. As a consequence the provisions regarding criminal procedure in continental jurisdictions - i.e. investigation, prosecution and adjudication - are written from the assumption that such a procedure is directed against defendants, who are physical persons.

It is the purpose of this paper to break new ground in relation to the investigation, prosecution and adjudication of legal or corporate entities. My recommendation to proceed in this field is a step by step approach along analytical lines. As there are so many varieties in organisations which we call legal or corporate entities, it would be very difficult to develop comprehensive general concepts. The result of such an approach will not necessarily be a totally different set of rules and forms, compared to classical criminal procedure. In fact, this might just be one possibility. My recommendation is to systematically analyze the criminal procedure in its stages and on different levels, in order to map the whole area before drafting new chapters for the procedural codes of the various continental countries.

## 2. Background

Inspired by *T.J. Anderson* and *W.L. Twining*<sup>1</sup> I will start with presenting my point of view. The Netherlands, where I was educated and trained, introduced criminal liability for legal entities in 1951 for the socio-economic criminal law and later on in 1976 for legal entities in general. In my scholarly work I have not paid much attention to this area so far. But, being a judge in the Court of Appeals of Amsterdam, I have some practical experience with the adjudication of legal and corporate bodies. This practical background is at least as important for my task as the general reporter on this subject, as a theoretical excursion could have been. In this context it may be of interest that I estimate the proportion of cases against entities still to be 80 percent socio-economic cases, even 22 years after the general introduction of the criminal responsibility of such entities.

## 3. Fact Finding and Proof as a Primary Function of the Procedural System

Let us take for granted that the purpose of a criminal process is to establish the 'truth' in order to promote the application of the criminal law to real offenders, while avoiding such application to innocent legal subjects. The function of the procedural law in this respect is to regulate the process of fact-finding, which is at the very heart of the functions mentioned above. Fact-finding, i.e. investigation and evidence, therefore, is a primary function of the system. In this context it is important to note that this primary function of investigation and evidence is only partially regulated by law. The main normative framework is not the law; instead it is applied rationality itself on the basis of empirical findings. Rules, not articulated as legal rules, concerning valid reasoning together with valid observation, sampling etc., dominate this field:<sup>2</sup> rationality in an empirical context.

Where a step by step approach is preferred for gaining experience in a new terrain, case law becomes important. Here the combination of the allegation (indictment; hypothesis) and the outcome is crucial. In phrasing the probandum, one also structures the probatum. The probandum/probatum at its turn, helps to articulate the substantive norms applied or not applied to the proven facts. Where the content of

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1 *T.J. Anderson/W.L. Twining*, *Analysis of evidence*, Boston 1991.

2 If you make an inventory of rules embodied in procedural codes, you usually find many rules to the exception and to the exception of the exception, but you hardly find rules about the normal case except for some standards and criteria and provisions, which attribute powers to certain persons.

the law, both in an adjective and a substantive sense, has to be articulated, it is important to see that both parts of the law come together under the headings of 'investigation' and 'evidence'. Later on in this paper I will provide some examples from Dutch practice in order to demonstrate this point. Let me briefly conclude here that in the area of evidence, the 'what is' questions about criminal responsibility of entities come close together with questions about 'how to investigate and to prove' such behaviour.

#### **4. Concepts: Corporate Entity, Criminal Organisation, Legal Persons**

Although corporate entities may include criminal organisations, usually the two concepts mean different things. A criminal organisation<sup>3</sup> is an organisation created in order to commit crimes, whereas as a 'normal' organisation can sometimes commit criminal acts without being a criminal entity as such. Another concept has to be highlighted: although, here again, there is an overlap, there is no total identity between 'corporate entities' and 'legal persons'. They vary enormously in structure and size. Legal persons that hardly have any organisational structure are the one extreme; giant enterprises are the other. Not all corporate entities are legal entities. For example, big international company groups usually consist of a large number of different legal entities. The focus of this chapter will be the large scale corporate entity, that also qualifies as legal subject.

#### **5. A Priori: Reasons for a non 'Doctrinal Formalistic' Approach**

There is one more *a priori* remark: I am convinced that our social reality has room for and also need for corporate criminal responsibility. I find three reasons for this point of view: the *first* is the large impact of crimes like fraud and corruption as mass phenomena. The public interest in redressing and preventing the tainting effect of phenomena like corruption justifies an approach that recognizes the responsibility of corporations and other large scale entities. The *second* reason is closely related to the first, and consists of the need to develop enforceable standards of corporate behaviour. This presupposes the idea of 'learning organisations' that are capable of complying with normative requirements. The first two reasons gain in particular with respect to cases of so-called *multipersonal events*. These are for instance disasters that can be attributed to a (i) *lack of due care* or (ii) *insufficient control* or (iii) *improper organisation* of the whole entity, rather than that it can be or should be analysed as the simple addition of a number of individ-

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3 See art. 140 Dutch Criminal Code.

ual acts. Here we see an aspect of the frequently mentioned stereotype of corporate criminal behaviour. The basis for corporate criminal liability is in the absence of what can be expected: the emphasis is on the lack of compliance with relevant norms rather than on concrete acts. It is the lack of care, the insufficiency of control and the inadequacy of organisation that are the points of reference in this respect. Corporate responsibility does not automatically rule out responsibility of individuals.

Here I would like to mention a recent example of a case in The Netherlands, concerning multiple negligent causation of deadly casualties. In July 1996 an aircraft came in on the military airbase of Eindhoven and after a collision with birds it crashed on the runway. Fire equipment and rescue workers were present well in time, but there was a lack of information on the fact that the aircraft, a Hercules C-130 transporter, instead of freight contained about 40 people. The rescue operations were only directed to the four people of the crew in the cockpit. There was no attempt to open the freight room of the aircraft used as passenger room. While the airplane was on fire, more than thirty people died from the heat and toxic gases during about twenty minutes. Many of them could have been saved theoretically, if the aircraft had been opened earlier. Without any doubt this would have been done had the firemen and the rescueworkers known about the passengers inside the aircraft. The reason for *blaming* the airforce basis' organisation *as such*, is that the information that there were several people on board did not pass from air traffic control to the actual helpers, although the relevant communication channels were open. So far the public prosecution service and the investigating magistrate focus on the responsibility of some high officers only, but this might change, depending on the further development of the law in the area of criminal responsibility of the State and its organs.<sup>4</sup>

The *third* reason is the wish to have vicarious liability in cases where there are specific reasons to hold the whole entity responsible for individual conduct within its sphere. This can especially be important to avoid that only scapegoats will be sacrificed as a means to avoid criticism of the whole entity.<sup>5</sup> Here, different from

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4 I do not discuss this topic here in detail. It is a special and very complex problem that is only partially solved at present. See f.i. *J.F. Nijboer/A.M. de Koning*, *De vervolging en berechting van overheden*, *Nederlands Juristenblad* 1998, p. 732-737.

5 When you look at the relation between the individuals and the collective, we see two sides of the same coin: side one is the articulation of responsibility of larger entities or collectives; side two is the blurring effect that collective responsibility can have in relation to individual behaviour.

the context of reasons one and two, the focus of the blameworthiness still is the responsibility of the entity for individual behaviour.

## II. Central Questions - Some Answers

### 1. Dealing with Corporate Crime within the Existing Procedural Framework?

The central question is: If a national system begins to incriminate forms of corporate misbehaviour, can investigation, prosecution, adjudication, execution of a penalty and/or rehabilitation be realized within the existing framework of the common law of criminal procedure?

My answer is: probably not. The problems we face here are connected with the classical assumption: if individual behaviour is central in criminal law, then the *investigandum/investigatum* in the pre-trial context of discovery, pursuit, justification and verdict, is usually perceived as and formulated in terms of individual behaviour. It is often not a simple task to develop rules for the description of corporate behaviour that are precise enough to highlight what was wrong with the organisation. A second problem is that present law of criminal procedure strikes the balance between collective and private interests, rather than between interests that are supra-individual on both sides, like the interests of a company versus the interests of a state. *Infra* (III) will discuss inter alia two connected problem areas, namely the area of coercive means and the area of defence rights. Presently both areas are regulated with view to *human* rights, that is to say *individual* human rights. For instance the right to silence is connected with the repression of torture, and the presumption of innocence is related to the presumed weak position of the individual as opposed to state power. It is not immediately evident, how such individual rights should be interpreted in relation to collective entities when they are involved as suspect/accused/defendant in a criminal procedure.

### 2. The Primacy of the Substantive Law

If we analyse the substantive criminal law from the perspective of the protected interests (*Rechtsgüter*), then there is no *a priori* reason to assume that the norms of criminal law would be very different for entities compared to individuals. When it is forbidden to kill, this norm is relevant for individuals as well as for corporations. Nevertheless, this very abstract type of consideration needs some

precision. In Western countries it is widely accepted that in the socio-economic area specific regulations exist for corporate entities, for instance in relation to the stock market, or in relation to export and import, where violating the regulations is criminalized. And it can be considered as just a product of the particularities of the legal systems whether crimes of this kind can be committed by the entities themselves, or that only agents can commit such crimes.

A next step is that identity of protected interests does not automatically mean that the same behaviour is criminalized according to the responsible entities. 'Behaviour' of an entity is not the same as 'behaviour' of a natural person. Here I come back to my previous thought that in considering criminal responsibility for entities we need to focus on improper organisation, lack of due care, etc.

My last point here is that there is no need to perceive procedural law or adjective law as dependent on substantive law. It is a classical way of continental thinking to regard the process mainly as the application of substantive law; recent times we learned that the process can be a sound vehicle to individualize the norms of substantive law.<sup>6</sup> Here, I think we might invest in the effort to overcome traditional concepts as mental prisons. The mental prisons I have in mind are the almost axiomatic structure of the law in which the substantive law is the main and essential art, which reflects the dominant societal values and order (*feste Wertordnung*), and the view that the application of law is nothing but the interpretation of substantive law. This axiomatic structure leads to top-down reasoning as the dominant form of reasoning within the context of criminal law.

Supposed we have sufficient protection by and confidence in the criminal justice system, we might accept another paradigm: the law always changes and develops over time, and it is not the only reasonable way to attribute the primacy to the substantive part of the law. Such a vision implies the assumption that the procedure and procedural law is more than just a vehicle for the correct application of substantive law. It also performs a more independent role in developing and refining the substantive law itself. According to such view, the process is much more than just a servant. It is the modus in which we can shape the law to be functional and adequate in given situations.<sup>7</sup>

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6 *J.F. Nijboer*, *De doolhof van de Nederlandse strafwetgeving*, Groningen 1987.

7 See for general background and social-science perspectives *F. Haines*, *Corporate regulation*, Oxford 1997.

### 3. Substantive and Adjective Dominant Systems?

Travelling in the Western world during more than a decade, I found it quite striking that the relation between substantive and adjective law and the value that is given to them in the different systems varies largely. On the one extreme we find the so-called substantive dominant systems in which the prevailing opinion about the procedure is the idea mentioned above that it is mainly or only a vehicle to secure the sound application of the pre-set, pre-formulated, substantive law. On the other hand we find systems in which such a vision is less dominant. Especially countries which accept a case by case development of the law by the courts as one of the main methods to alter and build up new parts of the law, the process and the procedural law receive much more respect than in substantive dominant systems. Therefore, I tend to call such systems dominant in an adjective or procedural way. Classic examples on the substantive dominant side are Germany and Spain, examples of procedural dominant systems can be found all over the Common Law world.

### 4. A Side Step: Juvenile Law

If the answer to the question about the sufficiency of classical procedural law as framework for the process relating to entities is 'no', then the next question will be 'what special provisions/rules/practices are needed' with respect to investigative tools and coercive powers and with respect to the representation of the corporation as suspect/accused/defendant/convicted. Here I find a parallel with another area in criminal law. In this other area we find identity of rules for the substantive criminal law (no different norms and crimes; maybe just different accents<sup>8</sup>), but specific rules related to penalties and procedure. I am referring to the area of *juvenile criminal law*, where we have specific penalties like probation and guardianship as well as special procedures (including rules of representation by, for instance, a parent). I find this comparison useful, although no complete parallel can be drawn.

Should the specifications in the area of penalties and procedure be realized in a general regulation like a specific code or a specific part of a code or should there be exceptional rules in combination with the normal rules? This is a complex question, provoking complex answers. Therefore, - again - my advice is that we should first turn to practice, before constructing totally new concepts on the basis of mere theory.

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8 Other aspects of the crime become essential for the application on corporate 'behaviour'.

## 5. Legislation or Case Law? A Dutch Pragmatic Compromise - Disadvantages and Advantages

In most legal systems the principle of legality (or the *nulla poena* principle) requires a legislative basis for criminal responsibility. But the implications of this principle are not the same in all systems. Substantive dominant systems tend to stress the requirement of legislative specification (*Bestimmtheitsgebot*) so, that for each crime an exact definition has to be provided by the written law. This also applies to the law of complicity.

When we look at potential criminal behaviour of entities, the problem arises whether or not it is sufficient to create one or two general provisions and rely on the specific crime definitions that are available for physical persons, when we address corporative entities. An alternative is to create special provisions on specific aspects of corporate crimes, and especially on the procedural and penal consequences of criminal responsibility of entities. In 1994 the French legislator introduced criminal responsibility for legal persons in the Nouveau Code Pénal, with the exception of the State. This was done, not only in the general part, but also in the specific part. For many crimes a special provision is provided indicating whether a legal person can commit this specific crime and if so, which penalties are applicable for legal persons. In the procedural Code (Code de Procédure Pénale 1959), we find new provisions about the prosecution and adjudication of legal entities (personnes morales). It contains provisions on jurisdiction, acceptability of the prosecution (recevabilité de l'action), subpoena (citation), legal representation, the system of sanctions, and the criminal history of the prosecuted legal entity.<sup>9</sup>

Almost 20 years earlier the Dutch legislator did not go that far, when he introduced the criminal responsibility for legal entities in 1976. The Dutch Criminal Code (Wetboek van Strafrecht) only devotes one article in the General Part (art. 51) to the criminal responsibility of legal entities and the responsibility of the actual responsible leaders within the organisation. Apart from that *only a few* separate provisions on the subpoena of 'legal persons' and on their legal representation were added to the procedural Code (Wetboek van Strafvordering 1926).

In my opinion, although formally complying with the legality principle, the Dutch legislation left the whole area to the development by way of case law. That is what

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<sup>9</sup> See *T.H. Dalmasso*, Responsabilité pénale des personnes morales - évaluation des risques et stratégies de défense, Paris 1996.

happened since: by and large the whole area of criminal responsibility of legal entities is case law. One might call this a typical Dutch pragmatic compromise, combining an essential aspect (the statutory basis) of the principle of legality with the pragmatic side of the Common Law. Nevertheless the solution has its obvious disadvantages and weaknesses: not only the lack of predictability in upcoming cases, but also the lack of clarity which crimes can eventually be committed by legal or corporate entities and which penalties are applicable. In this respect, today socio-economic legislation still is more practicable than the general (commune) criminal law.

On the other side disadvantages do not go without advantages. Where an area is so undeveloped and new, the case by case approach has the advantage that the rules that are developed will be closer related to the actual problems in actual cases. At the moment in The Netherlands the issue can be raised whether our experience with case law in this respect should not be substituted by at least partial codification.

## **6. Primacy of the Practice and Democratic Legitimation**

The 'quasi case law' development of the criminal responsibility for entities in The Netherlands leads to the question whether it is acceptable or not, and if so to which degree, the primacy in the development of the law is given to practice, rather than to the legislative power. Where a Common Law system usually leaves the development of case law to the jury, The Netherlands, without a jury in fact leave the development of the law to the legal practitioners in the public prosecution service (Openbaar Ministerie), the bar and the judiciary (Zittende Magistratuur). In relation to the lack of a democratic basis in the form of detailed set of statutory law, which constitutes more or less a constitutional problem, it is very important that to a large extent court decisions are published. Publication of decisions at least provides politicians and the legal community in general with essential information to discuss cases and to comment on decisions. If necessary the legislation can react to the judge made law.

## **7. Proof Between the Particularities of Factual Constellations and the Relative Generality of Normative Requirement for Criminal Responsibility**

As stated before, the area of proof is not only embedded in the procedural structure of a legal system, but on the side of the *investigandum/probandum* it is also

related to the contents of the substantive law. Where in a system like the Dutch, there is a lack of concrete provisions apart from the general crime definitions that set out the requirements for indictment (the probandum), much depends on how in particular cases the actual allegation against the suspect/accused entity is formulated. Whereas the usual direction in legal thinking is from the crime element towards the elements of the probandum, here the opposite direction dominates. It is recommendable systematically to analyse the way different crimes are alleged in cases against entities, in order to see what kind of norms actually govern the cases. One of the probable outcomes is that analysing concrete indictments (probanda) in such cases will confirm that the behavioural elements of the respective crimes will indeed often consist of 'negative behaviour': lack of control, lack of organisation.

The interplay between substantive and adjective law along the lines of the probandum and the proof can best be illustrated by a Dutch example. By the end of the eighties, in the then still peaceful Yugoslavia, a couple of containers were discovered, on their way to both Iran and Iraq, but addressed to fake destinations elsewhere according to the official papers. The contents of the containers were grenades that can be used as ammunition for wide range artillery. According to the imprints, the (jackets of the) grenades were of Dutch origin, produced by a weapon and ammunition factory in Zaanstad. A long pre-trial investigation took place, not only in The Netherlands, but also in Belgium and Austria. It turned out that the actual grenades were assembled in Austria, but that their mantles (jackets) were indeed produced by the Dutch factory. The indictment concentrated on having exported without a license, which constitutes a serious crime. In the course of the whole process, the Dutch factory contended that it had *not* exported the mantles without a licence. Indeed, it was shown that a licence had been issued by the competent authorities, but only for exportation to Austria as the final destination.

In spite of this licence, the factory was finally convicted for exporting parts of ammunition without a licence. (It had to pay a remarkable fine.) The reasoning of the subsequent courts was as follows: the grenades were of a size - and so were their mantles - that can be used for wide range artillery only, a kind of armature that cannot be held and used by the Austrian army. The Austrian army is restricted by the agreement between Austria and the Allies at the end of the allied occupation of Austria in 1955. So the first step in the reasoning of the courts (*District Court Haarlem* and the *Court of Appeals Amsterdam*) was that there are only a few parties in this restricted market and that it is well known among the market parties which army is allowed to use this material. A second step in the reasoning

of the courts was that one of the directors of the factory in an internal report seized during the investigation, had written down that an officer of the Austrian industry involved (to which the mantles were delivered) had said during the negotiations before the contract was made, that the end product (the grenades) would be exported to other countries than Austria as well. The third step in the reasoning was that the actual licence to export the mantles to Austria, was not a ground for justification or excuse to legalize the act or the responsibility of the company, where it was clear that the board of the company *could have known*, that Austria with high probability would not be the final destination of the mantles since *one of the directors knew*. The competent authorities would never have issued the licence, had they known that Austria - for which the licence was asked - in fact would not be the final destination at all.

When we return to the points I am trying to illustrate here, it is clear that the (implicit) norms for the criminal responsibility of the company, have to be found in either the lack of communication within the board of directors, prior to the moment the licence was asked for, or neglecting the very fact that it was generally known in the field that the Austrian army could never use this specific ammunition. The company's criminal behaviour so to say, was not the delivery of the mantles, *but neglecting counter indications as to the final destination of the mantles*.

### III. Particular Problems

#### 1. Implications of the *presumptio innocentiae*

The principle of guilt implies only few procedural principles. At first it implies that the burden of proof is on the State. Here 'the State' is identical to the prosecution. A second implication is that in criminal law the standard of proof should be the highest legal standard of proof, which is that the crime the accused is charged with, should be proven beyond reasonable doubt. A third implication is that the defence should always have the possibility to present or to produce *exculpatory evidence*; and that the prosecution has no title to suppress exculpatory evidence amongst the results of the investigation before the trial. A fourth implication is that in criminal law, irrebutable or irrefutable presumptions of guilt are inconsistent with the legal presumption of innocence.

The underlying thought is that there are good reasons in the enforcement of criminal law to protect the suspect/accused/defendant by procedural means against the

overkill of the stately criminal justice system. But the kind of person perceived as being the suspect/accused/defendant often is a weak, poor and illiterate individual. This perception is totally different from the actual situation in cases against corporate entities.<sup>10</sup> Here the state organs are generally confronted with *powerful organisations* that are able to lock themselves out from the outside world. Here, as a consequence, we are not confronted with a weak suspect/accused/defendant, but with a very powerful one. From this perspective it can be argued that there are no *a priori* reasons to stick to the presumption of innocence in an absolute sense, at least in the classical way we are used to apply it to cases with individual suspects.

## 2. Human Rights versus Rights of the Defence in General<sup>11</sup>

The presumption of innocence is a part of the provisions on procedural rights in the European Convention on Human Rights and Fundamental Freedoms (Rome 1954). For two or three decades we have become familiar with the supranational case law from the European Court on Human Rights. Decisions issued by the ECHR (or national courts when applying the provisions of the treaty or similar provisions in the national constitution) have gained much authority. But it is important to remember the basic perspective of this kind of treaty and similar chapters in national constitutions: it is all about *human* rights. Here, I think, that the parallel between human suspects/accused/defendants and corporate ones already gives a sound argument against an *a priori* applicability of the human rights provisions (such as art. 6 ECHR), which in fact only or almost only deal with the position of individuals. This argument implies that we, in speaking and thinking about criminal behaviour of organisations *as such*, have already left the idea that collective entities such as corporations are merely the sum of individuals. They are not. They have their own dynamics and they act in their own societal reality.

Naturally, there are good reasons to accept that corporate entities as defendants should have time and means to prepare the defence case as well as they should be tried timely and before an impartial tribunal. But again, to my opinion, we should rethink the procedure from stage to stage and the catalogue of defence rights one by one before concluding which rights are consistent with the kind of entities we discuss here.

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10 Apart from the reality that sometimes powerful individuals are involved as accused in a criminal process.

11 See *A.L.J. Van Strien*, *De rechtspersoon in het strafrecht*, Deventer 1996, Chapter 5.

### 3. Right to Silence; Privileges

One of the consequences of what has been said supra under III.2, is that it is not clear whether the right to silence, or the right not to answer questions, which can be exercised by suspects/accused/defendants would be applicable to corporate suspects/accused/defendants. An example: Orange BV in Amsterdam has a chemical plant in the Western Harbours of the city. In the adjacent Noordzeekanaal water pollution is measured on several subsequent days. What, if the investigation concentrates on Orange, and the authorities have to apply the normal procedural rules? They would probably get access to the plant and make superficial observations. But the employees of Orange probably should be given the information that they are not obliged to answer questions. Who would speak? And is it not likely that the management immediately or already preventively - if the problem was already known internally - orders the employees not to speak? The problems that arise here are multiple. What would be the content of the right to silence in relation to the question what relevant statements made by such a suspect/accused/defendant in terms of party declaration or evidential statements are? Another question that arises here is whether factual statements given by board members, directors, or employees of a corporation can be considered as being statements of the corporation itself. A further problem is whether accepting something as a free choice on the side of the suspect to remain silent or to give explanations and other kinds of statements, would imply that everyone inside the corporation could simply remain silent in general when the corporation as such gets involved in a criminal case. Here, the different balance of actual powers compared to a criminal case against an individual becomes very clear, especially when we think of big corporations with thousands of employees, transcending national legal borders.

Something similar can be said about specific privileges, such as client-counsellor privileges or privileges that consist of the absence of a duty to give statements about colleagues or statements that could possibly incriminate the spokesman himself or others close to him.

### 4. Shifts of Burden of Proof

Modern criminal legislators tend to divert from the classical results of a crime, damage or harm or loss of credibility. Instead of such concrete results of the criminal action as elements of the crime, new forms of crime definitions often

imply 'danger' or 'putting at risk' as a reason for criminalisation. Elsewhere<sup>12</sup> I have argued that this kind of legislative tendencies leads to shifts in the burden of proof. If a crime consists of an act that can cause danger to the environment, in a concrete case the proof can simply consist of expert evidence about the existence of a certain *probability* of damage together with the actual fact related evidence. The use of such statistical evidence creates a situation in which the defendant bears *the risk of not being able to rebut* the assumption that what is the case in the vast majority of instances could also have been the case in his particular situation and that, therefore, he has put the environment at risk.

This kind of allegation, which can easily be proven by the prosecution, confronts the defence with a major problem with respect to the burdens of proof. The legislation indirectly shifts a part of the burden of proof to the defence by creating a kind of rebuttable presumption that what statistically is the case in the vast majority, is suggested to be the case in every situation. This implies that the risk of not being able to disprove this allegation is on the side of the defence. This kind of situation, of which many examples can be given, is often criticized in academic debate in relation to the criminal procedure against individuals. However, there may be less reasons to criticize it in cases against corporative entities.

When it is true that the dominant form of criminal corporative behaviour is the lack of information, the lack of due organisation, etc., we will probably have many cases in which concrete assessments of the actual situation are needed, combined with relative high normal standards for the quality of the organisation or for the handling of specific products. Deviance of this relatively high standard can soon be explained as lack of due care, lack of due organisation, etc. The conclusion is that the organisation can in fact soon be presumed guilty and that here, too we see a shift in risks equivalent to a burden of proof.<sup>13</sup> Discussion is needed to see where a balance should be struck between the interests of the society and that of the legal entity.

##### **5. Investigative Tools/Coercive Means (Questioning, Search and Seizure, Audits)**

A field that needs much specific and detailed attention is the field of the investigative powers and especially the coercive means as they are attributed in order to

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12 J.F. Nijboer, *De waarde van het bewijs*, Deventer 1996.

13 R.H. Gaskins, *Burdens of proof in modern discourse*, New Haven 1992, states that in almost all contexts a 'burden of proof' can be replaced by a 'risk not to be able to proof'.

trace crimes and investigate suspect entities. Without going into details, I just call upon the imagination of the reader in order to see that the whole classical arsenal of coercive powers of the prosecution and the police has developed for cases against individuals: search of a person, pre-trial detention, psychological observation and so on. This is not the kind of tools we need here. Maybe here, too the parallel to juvenile law is interesting: we might think of a kind of guardianship or custody for the corporation, or limitations to the extent to which an entity temporarily is allowed to act. But we also need thorough insight into the bookkeeping and other types of administration of the entity. It might be important to be able within the framework of an investigation to penetrate the premises and real property of an entity, in order to visit chemical plants, for instance. My impression is that a whole new catalogue of powers has to be worked out. As an example I point to the special measures which are possible in the Dutch law under the headings of socio-economic crimes<sup>14</sup> and the so-called financial investigation (*Strafrechtelijk financieel onderzoek*).<sup>15</sup>

## 6. The Corporation as a Fortification

It needs not much imagination that large companies, consisting of many subdivisions which transcend national borders, and having many thousands of employees, and enormous amounts of assets, can be quite effective in hiding from the outside world. Within their own internal structure, in which many of their employees are dependent on their position, the company may very well be able to enforce the kind of duty to silence and to not inform anyone outside the company, with the practical effect that it is almost impossible to penetrate any given meaning to the core heart of the entity. I think that there are good reasons to keep in mind the metaphor of the corporation as a fortification when discussing the need for new and different investigative tools in relation to the investigation, prosecution, adjudication of legal and corporate entities.

## 7. Legal Representation at Various Stages<sup>16</sup>

Another complicated matter to be scrutinised is the representation of the corporate entity during the various stages of the process. If we accept that any officer from a certain level within the company can represent the company, a very complicated

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14 Wet op de Economische Delicten (WED), articles 17-24.

15 Regulated in the Code of Criminal Procedure.

16 See *Van Strien* (note 1), Chapter 4.

situation can arise when we allow such a person to testify without taking an oath, or to exercise a privilege to disclose information that could make the corporation vulnerable to competitors, or even to exercise the right to remain silent. An effective strategy of the entity in such a situation could be to make as many people representative as possible, to deprive the prosecution of any possible witness from that area.

Another complex issue is the question whether the person once designated to represent the entity in the process, should be obliged to remain in that capacity and prohibit a replacement. It is important and complicated to think through all possibilities here.

## **8. Role of Witnesses**

The other side of the coin is the position of witnesses. To what extent could witnesses from the corporation be granted privileges or be obliged to tell the truth under oath? Here we find two categories of witnesses who merit attention: the witnesses who have an interest in misleading the investigation and prosecution in order to protect themselves and protect and defend the policy of the company as opposed to the category of witnesses who have no stakes in the company, but their own position, and who can be threatened to remain silent to the outside world. The problem of so-called *whistle-blowers* is well known: people inside a closed social setting who are effectively deprived of any real possibility to come out with their information. With respect to this latter category we might, for instance, think of cases of serious pollution committed by or in the framework of a normal multi-national corporation, on more general, of corruption.

## **9. Council of Europe R (97) 13: Witness Protection and the Rights of the Defence - Organised Crime, Corruption, Crimes Committed within Closed Social Settings**

During 1993-1997 I have been involved in a project of the Council of Europe, as a member of a task force that prepared the Recommendation mentioned above. Widely spoken this Recommendation departs from the need to give the witness his own place as a person with own human rights within the criminal process. The Committee, while preparing the Recommendation, considered in particular two areas: organised crime of the mafia type and vulnerable witnesses in family settings. But the Recommendation is applicable to a larger area than only these two articulated fields. In the explanatory notes it is referred to crimes in or against

ethnic minorities, to the whole area of corruption, to corporate crimes and to vulnerable witnesses in closed social settings in general. The Recommendation calls upon the Member States of the Council of Europe to give more attention than in the past to the well-being and the effective use of witnesses. In this respect it is important to mention that the Recommendation - which was adopted by the Committee of Ministers in September 1997 - draws attention to the position of witnesses who have knowledge of important criminal facts and who are for reasons of threat or intimidation or economic or social dependency not in a position to come forward easily with that information to police or other institutions of the criminal justice system. The states, according to the Recommendation, should set up systems of protection by which such witnesses can effectively be barred from dangerous situations, and be stimulated to come forward with crucial information.<sup>17</sup>

## 10. Special Rules for Investigation and Evidence

It will not be surprising that I think that special rules for investigation are needed. Here I would like to point to an interesting aspect of the procedural law in most countries. If you analyse the procedural rules, you will usually find only a handful of rules for the 'run of the mill' cases and hundreds of rules regulating exceptions. This remark is meant to give a counter argument in discussions about the need to alter the system. Even when developing a new part of a Procedural Code in order to facilitate, enable, regulate and limit criminal prosecution of legal and corporate entities, we are mainly talking about *sets of exceptions*. The main line of thought would be that the basis of the regulation and powers can probably be the same and that we only put an extra set of (complicated) exception rules next to the already existing ones.

Finally, as to the rules of evidence in relation to the substantive law - as far as they exist in the various countries - there might be a good reason to think of changing rules of burden of proof. I can imagine that under certain circumstances a corporation should be obliged to show due care and to show that the internal organisation was adequate.

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<sup>17</sup> The Recommendation R (97) 13 can be obtained from the Directorate of Legal Affairs of the Council of Europe.

#### IV. Final Remarks

In 1997, at a conference in Guadalajara<sup>18</sup> (Mexico) *Reynald Ottenhof* pointed out that in present procedural criminal law, the dogma and case law argumentation are giving their first place away to two other types of argumentation, comparative arguments and constitutional arguments. Maybe, the development of corporate criminal responsibility throughout the European legal area might indicate a way to a less national approach: the *ius commune* perspective.

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18 Association Internationale de Droit Pénal, Section III, procédure (preconference). The proceedings will be published in *Revue Internationale de Droit Pénal* 1999. Cf. also *R. Ottenhof*, *Le mouvement de réforme des systèmes de justice pénale*, *Revue Internationale de Droit Pénal* 1997, p. 195-198.

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# Procedural Law for Corporate Entities: A Danish View

Gorm Toftegaard Nielsen, Aarhus

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## I. Procedural Law

In Denmark, criminal liability for legal persons was introduced in 1926. However, special procedural rules determining how cases against legal persons should be handled were never specified and ordinary procedural rules were adapted as pragmatically as possible. The problem has attracted very little theoretical interest. When I was a public prosecutor dealing with many criminal proceedings against companies in 1987, I had noticed some of the problems.<sup>1</sup> In 1995, a government report was published on the criminal liability of legal persons. Although the report concerned substantive liability and not the procedural aspects, the Danish Standing Committee for Criminal Law, *Straffelovrådet*, nevertheless took the opportunity to discuss the procedural problems in the final chapter of its report. The discussion concluded that there was no need for special procedural rules.<sup>2</sup> The following will focus on, in my view, the most central problems encountered.

## II. Who Should Be Charged?

Criminal law rules can be framed in a manner which leaves no doubt as to when to penalise a company, or whether or not any sanctions should include persons in the company. The Danish rules governing liability of legal persons use the same legal terminology as the rules governing the liability of persons. Thus the rules only specify the conditions for when but not against whom charges should be brought. Normally, we say that if the procedural legality principle is adopted, every person against whom sufficient evidence has been gathered, must be charged. If, on the

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1 *Gorm Toftegaard Nielsen, Afhøring af ledelsen af A/S som vidne eller tiltalt (Interrogation of the management of limited companies as witness or defendant) U 1987 B, 245-51 (To be read as follows: U= Ugeskrift for Retsvæsen (The Weekly Courts Report), year, B refers to the literary part of the courts report, page).*

2 *Straffelovesrådet betænkning om juridiske personers bødeansvar (The Standing Committee for Criminal Law: Report no. 1289 on Legal Persons' Fine-responsibility), Copenhagen 1995, pp. 177-191.*

other hand, we prefer to allow for the exercise of discretionary powers, the prosecution can be left with discretion to decide whether charges should be brought in any particular case. In Denmark, a discretionary-powers-principle is applied in cases punishable by fines, which includes cases involving companies as well as individual employees.

If, for example, a company is responsible for an unlawful emission, one may ask whether the company manager or ordinary workers should be penalised, or whether they should all be penalised. It may be that the emission was caused by several workers jointly; or that the manager ordered the emission or perhaps merely remained passive, while knowing when the emission would occur. Perhaps, the manager did not know about the emission, but simply neglected his supervisory duties. It is also possible that the emission occurred directly against the manager's orders.

The Danish Criminal Code provides that charges can be brought against any or all contributors to the crime, including workers and members of management, as long as it can be proven that they acted negligently. The question of determining against whom charges should be brought, therefore, almost always arises, given that it is usually highly unlikely that charges will be brought against everybody. The decision to prosecute one party or another is a very important one. Unfortunately, it is also so complex that Denmark has abandoned any attempt to regulate the process. It has been regarded as impossible to provide precise rules on the subject, because different areas of law follow different practices. In many cases, the Danish tax authorities thus adopted a rule of 80 % of the fine to the company and 20 % to management, while in marketing cases, the charges are always brought against the company and not against management. In fisheries cases, the tendency is for charges to be brought against the ship's master, because historically under Maritime Law the main responsibility has rested with him. If a charge of drunk driving is brought against a professional driver, it is brought against him personally. There is no case in which charges have been laid against the driver's employer.

These inconsistencies have led to the conclusion that regulation of this area was more appropriately placed under the general authority of the Director of Public Prosecutions. As a result, various rules have been issued by that office dealing with specific areas such as crimes relating to environmental law and tax law. In these areas, a more coherent pattern is beginning to emerge.

When charges are laid against a company, the principle applied is that the company alone is charged. If members of the company's management have acted with criminal intent or with gross negligence, they will also be charged. However, this happens relatively rarely, since to do so will often complicate the case considerably, both in the investigation phase and in court. Workers on the shop floor can be charged if they have acted wilfully against the law, but that is extremely rare. In most cases, the question, therefore, is whether charges should be brought against both the company and individual persons. Several rules and regulations stress that, if the manager is also the actual owner of the company, the charges should be brought against him personally and not against the company. This view has been sanctioned by Danish courts, but the government report<sup>3</sup> mentioned earlier is critical of this practice on the basis that it is wrong in principle to indict a person on no other grounds than that this person is a majority shareholder of the company. The report also stresses that a company's bankruptcy should not constitute adequate grounds for bringing charges against the individual owner. In any event, a confiscation claim should properly be brought against the company and not against the owner of the company.

When such an important question is left to be regulated by administrative guidelines, an intricate problem arises when the courts take the view that the charges should have been brought against the company and not against the manager personally. In the Danish system, administrative guidelines are internal and not binding on the courts. For instance, a boy belonging to a soccer club was killed because of lack of maintenance of a light pole in the football field. A fault caused a short-circuit in the power supply, killing the boy as he touched the pole. Charges were brought against the chairman of the club, who was found guilty by both the District Court and the High Court, but acquitted by the Supreme Court. Without applying the administrative guidelines directly, the Supreme Court held that the chairman could only be convicted if he had acted with particularly gross negligence, which in its view he had not.<sup>4</sup>

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3 Note 2

4 U 1993.551 H (H= Supreme Court).

### III. Legal Rights, Police Questioning, and Self-Incrimination

Most countries have different rules governing police interrogation of suspects, persons charged, and witnesses. A person charged must first be informed that he has a right to remain silent and that he can demand that his lawyer be present during questioning. In some countries, Norway for example, it is a criminal offence for witnesses to lie to the police. That is not the case in Denmark. Such differences between rules of interrogation of an accused and those of a witness will inevitably have important consequences when applied in cases where persons associated with an accused company have themselves been charged or are merely witnesses.

In Denmark, the police generally perform independent investigations, after which the prosecution will decide whether to bring charges. While the investigation is underway, it may not be clear whether charges will be brought only against the company or also against individuals. In Denmark, there exists no prohibitions against self-incrimination for companies as such, only for persons. The consequences of this are that the police will inform the company's management that the company alone is charged, but will nevertheless grant members of management the same rights as a charged person. They will thus be informed that they have the right to remain silent, and that they can demand that their lawyer be present during questioning. Even if it should already have been decided not to bring charges against the manager personally, the latter will typically be granted the same legal status and protection. When workers on the shop floor are questioned, the practice is less clearcut, but workers are usually not questioned at all, as this is rarely necessary to prove the company's guilt. The above comments apply only to a person's rights. If, on the other hand, a house search is involved, the rules for searching the premises of an accused are more lenient than for others. If the police want to search the manager's private home, the manager would most likely be granted the rights of a person who has not been charged. If an order is sought to force the manager to hand over materials (discovery), he would most probably be granted the same right of refusal as the company. This restraint is very similar to the duty to give evidence, and is similarly restricted by law. This similarity appears to favour granting the manager the same rights as an accused person, and thus the right to refuse to hand over the materials.

#### IV. Framing the Indictment

When a person is charged, his identity is established by giving his name and civil registration number (10 digits, of which the first six indicate the date of birth, e.g. 040374 = 4 March 1974). Companies are similarly identified by the company's name, sometimes combined with the company's registration number used by the customs and tax authorities and the company's address. It is a matter of considerable controversy whether a person within the company should also be named, typically the company's manager or chairman of the board.

For decades the Danish Director of Public Prosecutions has required that such a procedural identification be contained in the indictment, e.g.

Carl's Carts Ltd.  
by Carl Cartwright, general manager  
Havnegade 17  
Århus

The Director of Public Prosecutions has required individual names in order for the judicial system to be able to ensure that the indictment reaches the person in the company with the requisite competence. In civil cases, by contrast, only the company's name and address are stated in the writ.

Several judges have been highly critical of the practice of naming the manager. The arguments against this practice include:

- It may confuse the manager and lead him to believe that he is charged personally. There are even cases in which the judges have been confused and have convicted the manager personally.
- The indictment and the summons to the court hearing must be served at the company's address, and if served on a secretary, for example, the service of the summons would have full validity. If those responsible for serving the indictment believe that the indictment must be served on the manager personally, they will, if he is not present, serve it at his private address. In the case where the manager is charged personally but is not at home, the indictment can be served on his wife at his home address. If the charges are laid against the company, the indictment cannot be validly served on the manager's wife.
- There is unanimous agreement that a company, which is being charged with an offence, can independently decide who should appear in court to speak on its behalf. However, a manager whose name appears on the indictment can

easily form the impression that he is duty bound to appear in court as the company's representative. In large companies it may well be that he has no knowledge of the matter before the court. The case must then be suspended until a representative can be sent who can explain the offence.

- The risk that the indictment will not reach the company's management unless the manager's name is on it, is entirely fictitious.

It is presumed that the next government report on the criminal liability of legal persons will advise that the manager need not be named in the writ, but that he must be named in the summons to the court hearing.

## **V. The Court Hearing**

If, for example, charges are brought against the company and its manager, the manager's legal rights with respect to the trial are clear and unambiguous. If, however, charges are brought solely against the company, problems arise with regard to the manager's legal status.

Typically, when charges are brought solely against the company, it means that the prosecution has decided not to press personal charges. This is not, however, deemed to be a binding waiver of the prosecution's right to do so. The manager will, therefore, already have the same legal rights as an accused during the trial. If charges are brought against both the company and the manager, he will in practical terms also be acting as the company's representative. The report of the Danish Committee for Criminal Law recommends that another representative should be found for the purposes of the trial. The report argues that the manager and the company's interests will often be in conflict. This view does not accord with the way in which managers tend to see their own role.

In some cases, it is clear that no charge will be brought against the company's representative. Even so, it is presumed that the latter has the same rights as a person charged. Where there is such a conflict of interest in a criminal trial, it is essential, for the sake of maintaining balance between these interests, that the company's representative exercise the same rights as those of an accused. He attends court in order to defend the company and not as an impartial witness.

Danish law presumes that counsel for the defendant may not have contact with the witnesses before the trial, although clearly he must be able to speak with the company's representative, and probably with other board and management members as

well. The representative is not giving evidence under penalty of the law. He cannot, therefore, be forced to answer; nor can he be punished for lying.

Witnesses are not allowed to attend the trial before they are questioned. A company's representative can of course attend the trial from the start, as he is the one who must indicate whether the company pleads guilty or not guilty.

The Danish report assumes that, if a public institution is charged, the director's legal rights should be those of a witness. The report does not see that the civil service may have a reasonable need to be protected by the appointment of a procedural representative. Of course, this applies only where there is no risk of charges being brought later against individuals. It seems to me that this view is somewhat superficial. However, cases of this nature are rare, and, therefore, difficult to comment on.

Danish law requires only that an error be committed by the company. It is not necessary to trace the error to management. An ordinary employee can thus incur liability on behalf of the company. Only rarely will employees be charged personally, although they are sometimes called as witnesses. The report takes it for granted that employees have a duty to give evidence under penalty of the law, provided that it is procedurally out of the question that they be charged personally. They can thus be ordered to give an account of their own criminal actions under penalty of the law. In court, this is a very unpleasant situation. The situation leaves a lot of leeway for the prosecutor. For example, a prosecutor need only mention that the possibility of subsequent criminal charges has not been excluded, and the judge will not be able to uphold the witness's protection against criminal liability. In real life, the questioning of ordinary employees is often very difficult. They will often only have a choice between incriminating their company (their employer) or lying. In the first case they risk being fired. In the second, they risk 60 days imprisonment for giving false evidence.

In my view, it is important that procedural rules be realistic. Individuals who are questioned should, to a large extent, be granted the formal status which accords with their own perception of their role. Many prosecutors believe that it is essential that testimonies be given under penalty of the law. This appears to be a somewhat optimistic view.

## VI. The Burden of Proof

As in other criminal cases, the burden of proof rests with the prosecution, and the guilt of the company must be established beyond reasonable doubt. In Denmark, almost all cases involving a company concern charges of negligence.

If the determination of guilt hinges merely on whether a negligent act has been committed by the company, the burden of proof will often be very light. Companies should ensure that they stay within the law. If the company has no in-built checks to ensure that it does, it will typically be found guilty, as long as it is proven that the law has been violated.

In one case, the Supreme Court reversed the burden of proof.<sup>5</sup> Under Danish law, an airline will commit a criminal offence by bringing foreigners into Denmark who do not have valid entry papers. The condition for criminal liability is negligence. The decisive factor could, for example, be whether the foreigner's papers are genuine or forged. If they are forged, the company is guilty if it should have noticed that the papers were forged. This means that the company is guilty if the forgery is so poor in quality as to be visible. The evidence is produced by placing the papers on the bench before the judge, possibly next to genuine papers. In cases where foreigners do not have their papers with them on arrival, the prosecution cannot prove that the airline should have seen that the papers were forged. Equally airlines can protect themselves by taking copies of entry papers as part of the check-in procedure. The Supreme Court found, therefore, that the companies were guilty unless able to prove that their passengers had shown valid papers or a very good likeness of a valid travel document. The company is thus forced to take copies.

## VII. The Location where the Crime Is Committed

For a number of reasons, the location where a crime has been committed is also an important factor. It determines where the case is to be heard, the seat of the competent jurisdiction. In most cases, the violation has occurred at the company's premises. Often, however, companies operate outside their own premises. An engineering firm may, for example, work anywhere in the country, sometimes even abroad. Carriers in particular often have operations abroad.

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<sup>5</sup> U 1991.700 H commented by Supreme Court Justice *Torben Melchior* in U 1992 B, 41.

Thus, when a truck driver employed by a limited company violates the driving/resting time restrictions in Germany, his violation will of course have occurred in Germany. Does that also apply to the company's violation? If the company's liability was caused by managerial negligence, it would seem self-evident that the company's violation occurred in the company's office or a similar place. This answer would imply that the company's liability is independent of possible double liability. The Danish Director of Public Prosecutions has long advocated this view. It is not, however, consistent with Danish law, under which a company's liability does not hinge on an error by management. The Supreme Court has, therefore, arrived at the opinion that the company's violation occurred at the place where the driver broke the rules.<sup>6</sup>

The report of the Danish Standing Committee for Criminal Law argues that if company management has clearly made an error, the implication must be that the place of the crime is both where the violation occurred and where company management is located.

### **VIII. Period of Limitations**

In Denmark, the period of limitation applying to criminal liability is typically prevented from expiring by taking pre-trial measures against the person charged. As mentioned, it is often unclear at the investigation stage who will be charged. In 1996, a special rule was adopted on this question. If the period of limitation is suspended in relation to any individual who has acted on behalf of a legal person, the period of limitation is also suspended in relation to that legal person. If, on the other hand, the period of limitation is suspended in relation to the company, it has no bearing on the period of limitation applicable to persons who have acted on behalf of the company, and in doing so may have incurred personal criminal liability.

This is the only legal rule, of a more or less procedural nature, to have been adopted specifically for criminal proceedings against companies. The absence of special procedural rules for companies has created very few problems.

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<sup>6</sup> U 1995.9 H, where a driver had violated the driving and resting time rules while in the Netherlands. The Supreme Court found that, in this case, the employer had also violated the rules in the Netherlands.



## **Subject VI**

### **Alternatives to Criminal Responsibility**



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## **A Caution Concerning Runaway Criminalization of Corporate Activities**

**Ronald L. Gainer, Washington D.C.**

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The concept of collective criminal liability has been found by many nations to be of considerable utility, but it is important to think very carefully about what kinds of collective conduct should be made criminal. It is particularly harmful conduct that commonly gives rise to consideration of the concept of collective liability. Once the concept is rationalized and absorbed into a nation's law, however, it exhibits a tendency to creep beyond the confines of its original application. If those confines are constructed only loosely, the concept may run away. I would, therefore, like to interject a caution against expanding reliance on the criminal justice process, as opposed to reliance on the alternative of administrative sanctions, for control of the less serious forms of improper corporate behavior.

This caution is predicated largely upon concerns about the experience of the United States, as raised some time ago in an unpublished paper prepared by the Federal Department of Justice.<sup>1</sup> During a reflective period in the late 1970's and early 1980's, when there was a pause in the Department's attempt to enact an entirely new federal penal code, a small group of departmental attorneys was prompted to undertake a review of the extent to which essentially regulatory transgressions by corporations and other entities had gradually become criminalized in the United States. The immediate result of the review was troubling - a recognition both of ineffective corporate regulation and of damage to the general credibility of the criminal justice system as a whole. Although that recognition did not then succeed in spurring an effort to address and resolve the difficulties, it appears that the subject is slowly beginning to attract some interest, and there is hope that soon it may be given some serious attention.

The heart of the perceived problem may be summarized as follows. Conduct regulated by nations may include conduct by individuals and conduct by artificial

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<sup>1</sup> Office of Legal Policy of the United States Department of Justice, *Decriminalization of Regulatory Violations* (1983).

legal entities. Of the regulated legal entities, the corporation is uniquely able to engage in activities of a kind and on a scale far beyond the capacity of individuals, and thus can have an effect upon a nation far beyond that of a natural person. For that reason, many activities of corporations - especially activities in areas where the public risks can be unusually high - are considered particularly appropriate subjects for governmental regulation. Such regulation commonly may be enforced through administrative proceedings or civil judicial proceedings. In the United States, though, as in many other nations, our courts and our federal and state legislatures over time have come to attribute to corporations the capacity for, and the responsibility for, the commission of crimes. With the scope of regulatory proscriptions gradually extending to less serious forms of conduct, and with criminal penalties available for corporate violations of regulatory proscriptions, there has been a tendency in the United States over the past several decades to attempt to achieve regulation, of what previously had been considered non-criminal behavior, through criminal prosecutions as well as through administrative and civil actions. In many instances, criminal prosecutions are the only specified means of control. Many of the "crimes" that have been created by this process are artificial, in the sense that they do not meet the criteria traditionally employed in determining whether particular conduct deserves society's most severe condemnation.

Having thus reached a point at which both perpetrators and their "crimes" can be artificial, we are confronted by some very real problems. The problems reveal themselves as inefficiency in legitimate regulatory enforcement, as unfairness in the application of criminal regulatory sanctions, and as devaluation of the traditional criminal law.

Criminal law coverage historically, of course, has been based on the view that the stigma of criminalization should be reserved for conduct that is both seriously injurious to the most important interests of society, and morally blameworthy because it evinces a rejection of society's values. The coverage has encompassed various combinations of acts, which may or may not cause results, and mental states, which indicate volition or awareness on the part of the perpetrators to the degree that they are deemed culpable.

With regard to acts, the traditional penal law of most nations may be viewed as aimed primarily at conduct that causes or risks three general categories of harm - harm to persons, harm to property interests, and harm to governmental institutions designed to protect persons and property interests. Early regulatory offenses were closely tied to these traditional areas. During the first part of the nineteenth cen-

ture, legislatures in the United States began to apply minor criminal penalties to conduct that directly and materially affected the welfare of the public. Such offenses initially appeared in the field of public health, with proscriptions designed to reduce the likelihood of public exposure to adulterated or unsafe foodstuffs. Although those early regulatory efforts were directed primarily at nonfeasance, it soon became common to include misfeasance. With the rapid growth of the industrial and commercial revolutions, a great increase took place in the means by which conduct might cause serious endangerment of persons and property on a broad scale, and corresponding laws carrying criminal penalties were enacted to protect public safety. The Congress eventually began prescribing minor criminal penalties for violations of regulatory provisions somewhat less directly related to the protection of public health and public safety, and thus somewhat more tenuously connected to the harms traditionally encompassed by the criminal law.

As a concomitant development, courts and legislatures in the United States began to abandon the view, which American law had derived from *Blackstone's Commentaries*, that corporations were incapable of committing criminal offenses. Borrowing from the common-law tradition of civil torts and using the doctrine of *respondeat superior*, the courts found that a vicarious or derivative responsibility could be imputed to a corporation if any corporate agent, acting within the general scope of his apparent authority and for the benefit of the corporation, committed an offense.<sup>2</sup> Eventually the courts adopted variations, permitting, *inter alia*, corporate liability for a criminal offense committed by a senior corporate official acting in furtherance of some general corporate purpose, whether or not the offense appeared to benefit or was intended to benefit the corporation, deeming the corporation to have authorized the act.<sup>3</sup> While these approaches required as a predicate the existence of a criminal offense committed by an individual, that requirement was later eroded by court interpretations permitting conviction of a corporation on the basis of the collective conduct of multiple corporate agents, none of whom may have completed a criminal act.

With the expansion of the scope of acts made subject to regulation and the scope of responsibility attributed to corporations, the Congress began to apply criminal penalties to regulated corporate activities that involved *no* recognizable endangerment of persons or property. This expansion beyond traditional criminal law coverage took place without consideration of the consequences. It was the product of governmental officials and legislators concerned about regulation of industry,

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2 *New York Central and H.R. Co. v. United States*, 212 U.S. 481 (1909).

3 See, e.g., *Continental Baking Co. v. United States*, 281 F.2d 137 (6th Cir. 1960).

not about criminal law, and the particular vehicle for regulatory enforcement was, at most, a secondary consideration. Sponsors of legislation simply observed that violations of other regulatory schemes had been made criminal in the past, and saw no reason to deviate from what they recognized as past practice - especially since, in their view, the regulatory proscriptions they proposed were fully as deserving of serious penalties as those earlier adopted by the Congress. Eventually, the Congress fell into the practice of criminalizing new regulatory provisions on an almost mechanical basis. Today, when a Congressional committee adopts a new set of requirements (concerning commercial transactions, agricultural acreage allotments, welfare programs, or virtually any other regulated activity), it routinely incorporates at the end of the requirements a statement that any deviation constitutes a federal crime. This mechanistic criminalization, together with the lack of an effective Congressional requirement that the legislation pass through the judiciary committees of the Senate and the House of Representatives - which are responsible for keeping any eye on the rationality of the traditional criminal offenses - has led to a gradual absorption of non-criminal law by the criminal law.

As a consequence of this trend, the Department of Justice review found that there existed in the United States about 3,000 examples of regulated conduct that have been made criminal by federal statute. About 1,300 are related to the traditional areas of criminal coverage, but about 1,700 bear no such relationship at all.<sup>4</sup> This figure of 1,700, however, reveals only part of the problem. Many of the 1,700 sections authorize the imposition of a penalty not only upon an entity or person who violates the provisions described in the statute, but also upon one who violates any regulation, rule, or order issued by the governmental agency charged with administration of the statute. Taking into account the numerous, discrete rules and regulations enforceable under such regulatory statutes, the review concluded that there appear to be well over 10,000 regulatory requirements or proscriptions that carry criminal sanctions under the current U.S. law.<sup>5</sup> These include, as an example, over 22 pages of minutia concerning the construction of ladders and scaffolding that have been published by one of our federal agencies - the deviation from any detail of which could subject a manufacturing corporation to a criminal fine and its corporate agents to imprisonment.<sup>6</sup> The Congress has thus added a host of unusual extensions to our criminal law. Almost 300 years ago, Chief Judge *Holt* repeated the English legal maxim: "An act of Parliament can do

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4 Office of Legal Policy of the United States Department of Justice (note 1), p. 25-27.

5 Ibid.

6 See 29 C.F.R. §§ 1926.450 - 1926.452 (1997).

no wrong", but then added "though it may do several things that look pretty odd."<sup>7</sup> Oddities are one thing; oddities carrying criminal penalties are quite another.

With regard to the mental states that must accompany acts if they are to be deemed criminal, the federal law in the United States has developed particularly haphazardly. Most efforts to codify the laws of common-law jurisdictions employ three or four mental states for drafting penal provisions - usually describing purpose, knowledge, reckless indifference to a consequence, and, in a few instances, negligent failure to appreciate a risk. The Congress, however, has not been so modest. Over the past two centuries, the Congress every two and one-half years, on the average, has invented a new term to denote the mental state with which an offense may be committed. A law reform project undertaken 25 years ago found almost 80 such terms in the basic penal statutes.<sup>8</sup> Moreover, the courts have overcome the hurdle of attributing mental states to an artificial corporate entity not only by assigning the mental state of an individual perpetrator to the corporation as a whole, but also by collating sub-parts of mental states from a number of different corporate officials and combining them into collective purpose - or collective knowledge or collective recklessness - on the part of the corporate entity.<sup>9</sup>

In the area of regulatory proscriptions, both the Congress and the courts have treated the subject of culpable mental states with even more abandon than in the traditional penal area. In this instance I use the term "abandon" literally, since frequently liability is assigned without *any* necessity of a blameworthy mental state.<sup>10</sup> Such "strict liability" has crept into our law primarily through areas of corporate activity involving nonfeasance rather than misfeasance, and areas in which the public risk is considered so great that the activity is generally prohibited and governmental permission to engage in the activity is required as an exception. Still, even in such areas, it might be asked whether some degree of culpable mental state might properly be required for a *criminal* prosecution as opposed to an administrative sanction - a very low degree of negligence, for example, when the public risk is especially high (as in the operation of a nuclear power plant), but, correspondingly, a very high degree of culpability, such as specific purpose, when the risk to the public is especially low (as in the failure to retain business records

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7 *London v. Wood*, 12 Mod.Rep. 669, 687-688 (1702).

8 National Commission on Reform of Federal Criminal Laws, Working Papers, 119-120 (1970).

9 See, e.g., *United States v. Bank of New England*, 821 F.2d 844 (1st Cir. 1987).

10 See, e.g., *United States v. Balint*, 258 U.S. 250 (1922).

for the entirety of a prescribed period). Liability without culpability might then be recognized only in administrative or civil proceedings.

Such extensions of traditional concepts of conduct and mental states are problematic, especially when they reach morally-neutral behavior. The problems are particularly severe in those instances - and the Department of Justice review found that there are many in the United States - in which the criminal sanction is the *sole* available sanction, because no administrative or civil alternative is provided.

One problem is inefficiency in regulatory enforcement. Lord *Moulton* once observed that "the measure of a civilization is the degree of its obedience to the unenforceable." Corporate entities as a whole, unfortunately, are not so civilized as to comply with regulatory schemes without some means of encouragement. The most common form of encouragement is negative encouragement - deterrence. But, as effective regulatory schemes depend largely upon deterrence, deterrence itself depends upon the availability of an expeditious means of routinely detecting and punishing violations. Administrative proceedings often can be effective in such a role; criminal proceedings seldom can be. The complexity of criminal procedures in a common-law jurisdiction, and the burden of proving violations beyond a reasonable doubt, make criminal enforcement of regulatory provisions prohibitively cumbersome and expensive. In addition, since violent crimes and drug crimes currently overburden our criminal justice system, most regulatory violations are not accorded a high priority. The consequence of relying solely on criminal law coverage is often lack of enforcement, or at best sporadic enforcement, and thus a loss of needed deterrence.

Another problem is the unfairness of the application of a criminal penalty in the occasional instances in which prosecution is undertaken. While the public has an interest in effective, constructive regulation of particular industries, that interest is not well served when a prosecutor uses the full force of the criminal law to bludgeon an otherwise law-abiding corporation into compliance with a regulation under circumstances in which an administrative or civil penalty - if available - would be fully sufficient. As a result, the criminal law "club" frequently is found by responsible prosecutors to be too big to warrant its use, thereby contributing to the mirror-image problem noted before - under-enforcement and thus a lack of deterrence - when the sole available sanction is through the criminal justice process. It is akin to a nation having a hydrogen bomb, but no counter-guerrilla capability.

The third problem produced by regulatory overcriminalization has broader, more troubling consequences. Routine overcriminalization robs the criminal justice

system of public respect. It leads to a trivialization of the concept of criminality that erodes the perceived importance of, and hence a large measure of the deterrent impact of, the criminal law generally. There is something self-defeating about a society that seeks to induce its members to abhor criminality, but that simultaneously brands as "criminal" not only persons who engage in murder, rape, and arson, but also corporate entities that sell mixtures of two kinds of turpentine, file forms in duplicate rather than triplicate, or post company employment notices on the wrong bulletin board. The onus of the criminal conviction is lost. The perpetrator is socially unscathed. As *Glanville Williams* observed, with understatement, in his treatise on criminal law, "When it becomes respectable to be convicted, the vitality of the criminal law has been sapped."<sup>11</sup>

Certainly there is little doubt today that nations need intelligent regulation of commerce and industry. As some nations newly adopting market economies are discovering, raw, unbridled capitalism can produce excesses that destroy its basic promise, and that seem to confirm the Marxist caricature. In a survey of American corporate managers, over 70 % said that industry could not effectively police itself and that some degree of governmental regulation is absolutely necessary.<sup>12</sup> The principal concern about regulation - other than its extent - is the nature of its enforcement. A means of achieving both reasonable regulatory enforcement and reasonable criminal law coverage of serious corporate offenses should not be perceived as beyond attainment.

The problems with the runaway criminalization in the United States convinced the Department of Justice reviewers that reform was needed in our criminal law as it applies to regulatory offenses. That reform could take several approaches. One of the more modest and more practical approaches would be to enact a statute providing administrative sanctions and procedures for all regulatory breaches. It would be accompanied by a general provision removing all existing criminal penalties from regulatory violations, notwithstanding the language of the regulatory statutes, except in two instances. The first exception would encompass conduct risking serious harm to persons, property interests, and institutions designed to protect persons and property interests - the traditional reach of criminal law - and would balance the degree of potential harm against the nature of the required culpability, permitting prosecution of high-level risks even though the culpability is low, but of low-level risks only if the culpability is high. The second exception

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11 *Glanville Williams*, *Criminal Law*, 2nd ed. 1961, p. 259.

12 *Marshall Clinard*, *Corporate Ethics, Illegal Behaviour, and Government Regulation: Views of Middle Management*, 1982.

would permit criminal prosecution, not for breach of the remaining regulatory provisions, but for a *pattern* of intentional, repeated breaches. Together with the inclusion of a thoughtful rationalization and codification of the theoretical bases for imputing criminal conduct to a corporation, these relatively simple reforms could provide a much sounder foundation for the American approach to regulatory crime than previously has existed, and could resolve most of the perceived problems. The achievement of such reforms, however, will be time-consuming and politically difficult, as precedent and habit are not easily overcome. Avoidance would have been preferable.

A nation should exercise great caution in undertaking to expand the range of the penal law and the definition of those subject to the law. At risk is the integrity of the penal law itself, and hence its fairness and efficiency. There is no substitute for sound analysis and careful structuring of any such expansion, for later corrections in the chosen course are difficult to make.

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# Alternatives to Criminal Responsibility of Corporations Considerations by a Corporate Lawyer

Gerald Spindler, Göttingen

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## I. Introduction

In order to develop criteria for the relationship between criminal and civil liability and to determine how and under which circumstances civil law could substitute criminal law we have to define a common aim that allows us to evaluate the effectiveness of both. It is almost undisputed that the deterrence of corporations to commit crimes or torts is one of the most important goals that should be reached by means of any liability norm, regardless of its criminal or civil character.<sup>1</sup> The most important assumption is that the payment of fines or the imposition of other sanctions will cause the corporation to abstain from criminal offenses as by these sanctions crime will not "pay" any more. We will later see that this assumption has its limits.

## II. A Theoretical Framework for the Comparative Analysis of Liability Norms

The theoretical framework that allows us to analyze the different prevention effects of liability norms is the economic analysis of criminal (and civil) law. As economists focus on economic consequences of criminal and civil sanctions they principally do not distinguish between civil and criminal law. What matters is the economic outcome for the individual resp. the corporations. Thus, criminal sanctions are "translated" into economic terms such as payments, reputation losses or deprivation of the capability to earn money (in the case of imprisonment).<sup>2</sup> The

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1 See *V.S. Khanna*, Corporate Criminal Liability: What Purpose Does It Serve? 109 *Harvard Law Review* 1493, 1494 (1996).

2 Cf. *Jonathan M. Karpoff/John R. Lott*, The Reputational Penalty Firms Bear From Committing Criminal Fraud, 36 *Journal of Law and Economics* 757 (1993); *Michael Adams/Steven Shavell*, Zur Strafbarkeit des Versuchs, 137 *Goltdammer's Archiv für Strafrecht* 342-343 (1990); *Petra Wittig*, Der rationale Verbrecher, Berlin 1993, pp. 85-86; *Richard A. Posner*, An Economic Theory of the Criminal Law, 85 *Columbia Law Review* 1193

important - and in criminal law mostly disputed - assumption of the economic analysis of law is the rational maximization of individual gains.<sup>3</sup> It is easy to grasp that criminal lawyers are reluctant to accept such a behavioral assumption as it encompasses a radical simplification of the human nature<sup>4</sup> and ignores irrational acts.<sup>5</sup> Without going into details of the complex discussion, we can, however, leave this controversy largely aside when concerning the criminal liability of corporations as they are deemed to act rational in the sense of maximizing profits. If not, markets will tend to punish them immediately. There is little reason to believe in irrational behavior of organizations, especially corporations.<sup>6</sup>

Hence, sanctions for corporations should deter them sufficiently from infringements of the law. Sanctions have to be calculated in such a way that they offset the profits derived from a violation of legal rules and add a deterrence factor.<sup>7</sup> If we take into account that the economic analysis of criminal law is deeply rooted in the American legal system which is known for its acceptance of punitive dam-

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(1985); *Michael Faure/Ingeborg M. Koopmans/Johannes C. Oudijk*, Imposing Criminal Liability on Government Officials under Environmental Law: A Legal and Economic Analysis, 18 *Loyola of Los Angeles International & Comparative Law Journal* 554 et seq. (1996) (see also *Faure/Koopmans/Oudijk*, *Ökonomische Analyse der Amtsträgerstrafbarkeit*, 30 *wistra* 121-123 [1992]).

- 3 Summarized for the German discussion by *Wittig* (note 2), pp. 51 et seq., 62 et seq.; *Harald Kunz*, *Kriminalität*, in: Bernd-Thomas Ramb/Manfred Tietzel (eds.), *Ökonomische Verhaltenstheorie*, München 1993, pp. 188-189.
- 4 See for example the works on bounded rationality by *Herbert A. Simon*, *Models of Man - Social and Rational*, New York 1957, pp. 195 et seq.; adopted by *Oliver E. Williamson*, *The Economic Institutions of Capitalism*, New York 1985.
- 5 Cf. *Adams/Shavell* (note 2), pp. 350 et seq.
- 6 Cf. *John T. Byam*, *The Economic Inefficiency of Corporate Criminal Liability*, 73 *The Journal of Criminal Law & Criminology* 586 et seq. (1982); *Bernd Schünemann*, *Die Strafbarkeit der juristischen Personen aus deutscher und europäischer Sicht*, in: Bernd Schünemann/Carlos Suarez Gonzalez (eds.), *Bausteine des europäischen Wirtschaftsstrafrechts*, Köln 1994, pp. 278-279; see, however, *Klaus Lüderssen*, *Law and Economics in der Kriminalpolitik*, in: Klaus Lüderssen (ed.), *Abschaffen von Strafe? Frankfurt/Main 1995*, p. 404; *Klaus Lüderssen*, *Law and Literature als Herausforderung von Law and Economics* in: Manfred Seebode (ed.), *Festschrift Spendel*, Berlin 1992, p. 109.
- 7 Cf. *Byam* (note 6), p. 587; *Michael K. Block*, *Optimal Penalties*, *Criminal Law and The Control of Corporate Behavior*, 71 *Boston University Law Review* 397 et seq. (1991); note, however, that the exact calculation of such an efficient rule is complex as invaluable goods like life have to be assessed as well as the probability of being detected, the costs of prosecution and imprisonment and so forth. Cf. *Gary S. Becker*, *Crime and Punishment: An Economic Approach*, 76 *Journal of Political Economy* 169 (1968), hereafter cited as *Gary S. Becker*, *Kriminalität und Strafe*, in: G.S. Becker, *Ökonomische Erklärung menschlichen Verhaltens*, 2nd ed. Tübingen 1993, pp. 43-44; *G.J. Stigler*, *Optimal Enforcement of Law*, 78 *Journal of Political Economy* 530 (1970); *Adams/Shavell* (note 2), pp. 342-345; *H. Kunz* (note 3), pp. 201-202; *Wittig* (note 2), pp. 81 et seq.

ages in tort law, we may understand that for American legal scholars criminal sanctions could easily be substituted by civil liability. Even more, the role of the state prosecutor in the American system which resembles more to the civil process tends to diminish the differences between criminal and civil law. Thus, it is no wonder that for some legal scholars representing the economic analysis of (criminal) law criminal sanctions are potentially treated the same way as civil liability,<sup>8</sup> at least as far as monetary sanctions are concerned.

### III. Civil Law as an Alternative to Criminal Responsibility: General Potential and Limits

#### A. Potentials

##### 1. Greater Flexibility

In general terms, civil law benefits from a greater flexibility in methodology and in procedural law. As civil law does not interfere so strongly with fundamental constitutional rights of the individual - such as personal freedom - as criminal law does, civil courts feel more at ease to transgress the boundaries of statutes in order to find individually assessed solutions for each case. Thus, a prohibition of analogies like in criminal law is widely unknown in civil law.

Furthermore civil procedural law provides various instruments to overcome problems of proof. By means of *prima facie evidence* or shifts of the burden of proof courts seek to alleviate the task for the litigant to prove organizational defects on the side of the defendant, i.e., the corporation. For example, in product liability cases, once the litigant has shown evidence that the product has been defect and caused damage, it is up to the corporation to exculpate for organizational negligence.<sup>9</sup> Since courts tend to impose on the corporation a detailed proof, like the presentation of a complete documentation of all processes inside the organization, the shift of burden of proof turns out to be a real strengthening of consumers seeking compensation.<sup>10</sup>

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8 G.S. Becker (note 7), pp. 73 et seq.

9 Leading case: German Supreme Court in Civil Cases (BGH), 51 BGHZ 91 et seq. - Hühnerpest -.

10 See for example German Supreme Court in Civil Cases, 47 Versicherungsrecht 469 (1996); more details and references in Gerald Spindler, Unternehmensorganisationspflichten, Köln 1999, pp. 485 et seq.

Even more, a famous problem for criminal courts concerning responsibility for environmental damage could be overwhelmed in civil procedural law: the causal link between certain damage and the wrongdoing of an individual. As civil procedural law provides alleviations of proof<sup>11</sup> - even for legal presumptions of causing damage<sup>12</sup> - it may be up to the defendant corporation to show evidence that the damage has not been caused by its facilities. In contrast to criminal courts which are for constitutional reasons obliged to provide proof beyond reasonable doubt for the individual responsibility civil courts can impose on corporations not only the proof of having organized in a duly manner but also the proof of not having caused the damage.

In sum, civil courts are far more able to react to informational asymmetries in each individual case as criminal courts could do.

## 2. *Efficient Incentives to Pursue Faults*

Moreover, civil law is correlated to market processes as individuals have more incentives to sue corporations for their faults than state prosecutors who at most indirectly benefit from their activities. Hence, a civil law based on individual damage provides the best system to internalize external effects of corporations, thus guaranteeing socially efficient deterrence.<sup>13</sup> Thus the whole system theoretically provides efficient incentives to pursue torts whereas criminal law suffers from a sub-optimal level of activity of state prosecutors.

However, the assessment and attribution of individual damage is the crucial turning point for the whole system: If some elements of this system fail the efficiency of the whole system is under attack and requires supplementary sanctions outside civil law, like criminal sanctions or previsions by administrative law.

## B. Limits

### 1. *The Problem of Public Goods*

Civil law fails to provide for efficient incentives in case of public goods. When environmental goods are harmed, like water or air pollution, there is no individual

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11 Leading case: German Supreme Court in Civil Cases 92 BGHZ 143 et seq. - Kupolofen -.

12 See § 6 Umwelthaftungsgesetz, more details in *Peter Salje/Jörg Peter*, Umwelthaftungsgesetz, München 1993, § 6 UmweltHG Rn. 24 et seq.

13 Cf. *Byam* (note 6), pp. 594 et seq.; for a more detailed analysis of civil process law see *Michael Adams*, Ökonomische Analyse des Zivilprozesses, Königstein/Ts. 1981 with more references.

damage that might be attributed to the harmful acts of corporations' activities. Thus, no plaintiff will see to sanction the negligence of a corporation so that a complete lack of incentives is the result.<sup>14</sup>

The same holds when damages may be claimed by the individual but are too low to be pursued effectively at court.<sup>15</sup> Only when filing a suit is free of charge even trivial damage would be sanctioned by civil liability suits. Especially in environmental cases damage could be atomized into multiple individual, but (too) little parts - the problem of summarized and distant damage.

The only solution to overcome the necessary individualization in civil law - advantage and disadvantage at the same time - is to introduce class actions or derivative suits.<sup>16</sup> Only then the problem of damages that are too low to be pursued effectively in court could be managed. However, these remedies only provide an answer for those cases where the lack of individual action is due to organizational problems but not where there are no incentives at all for individuals to act. When a class action or derivative suit does not lead to any economic outcome for the petitioner then incentives are small or non-existent to sue a tort-feasor.

## 2. *Causal Links and Individual Damage (Market Share Liability and Long Term Damage)*

Moreover, even if individual damage could be stated it is usually doubtful whether the specific damage had been caused exactly by the facility in question. In most cases, various tortfeasors may have caused individually or in sum the damage so that the necessary link between tort and damage cannot be established easily.<sup>17</sup>

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14 See *Thomas Holzheu*, *Umweltpolitik und Haftungsregeln*, München 1994; *Eberhard Feess-Dörr/Gerhard Prätorius/Ulrich Steger*, *Umwelthaftungsrecht*, 2nd ed. Wiesbaden 1992, pp. 97 et seq.; *Stephan Panther*, *Haftung als Instrument einer präventiven Umweltpolitik*, Frankfurt/Main 1992; *Claus Ott/Hans-Bernd Schäfer*, *Unternehmenspublizität, Umweltschadensbilanz und Haftung für Umweltschäden*, in: Claus Ott/Hans-Bernd Schäfer (eds.), *Ökonomische Analyse des Unternehmensrechts*, Heidelberg 1993, pp. 217 et seq.; *Steven Shavell*, *Liability for Harm versus Regulation of Safety*, 13 *Journal of Legal Studies* 363, 368 et seq. (1984); *Gert Brüggemeier*, *Unternehmenshaftung für Umweltschäden im deutschen und nach EG-Recht*, in: Michael Martinek (ed.), *Festschrift Jahr*, Tübingen 1993, pp. 232-233; *Jürgen Klass jr.*, *Zum Stand der Umwelthaftung in Deutschland, Umwelt- und Planungsrecht 1997*, p. 140, all with more references.

15 *Andreas Ransiek*, *Unternehmensstrafrecht*, Heidelberg 1996, p. 385.

16 Cf. *Byam* (note 6), p. 596.

17 See *Peter Loser*, *Kausalitätsprobleme bei der Haftung von Umweltschäden*, Bern 1994.

These phenomena are common in environmental and product liability, even more in capital market cases e.g. insider dealing and its effects on markets.

Modern environmental liability doctrine has tried to cope with these problems. One solution to that problem is to assume the causal link between tort and damage if the facility has not fulfilled all obligations imposed by administrative law or if the facility has transgressed certain emission criteria.<sup>18</sup> However, this may help only when one tort alone, like an emission, is sufficient itself to cause the specific damage. If the damage has occurred only due to a combination of different emissions resp. torts (German) civil liability cannot attribute it to different tortfeasors according to their share (market share). So damage in countries or regions far away from the emitting facility cannot be attributed to certain emissions.<sup>19</sup> Even new solutions like the heavily debated market share liability<sup>20</sup> do not solve the problem of assessing the exact share of liability for each tort-feasor: the market share of one corporation is not necessarily linked to its risky activities. For this reason, market share liability or cumulative liability may lead to inefficient solutions when an enterprise has to pay more than its actual part of the damage.<sup>21</sup> Even the level of the emission activity cannot always be correlated to the damage caused as long distance effects may have also an impact on environmental damage which could not be isolated. Even more, those criteria cannot be applied in capital market or corporate law when losses of shareholders have to attributed to wrongdoings of board members, like in cases of insider dealing.<sup>22</sup>

Moreover, the phenomena of long term damage especially in environmental and product liability cases pose heavy problems for civil (tort) law.<sup>23</sup> As this damage

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18 See notes 11-12.

19 As an example see the problem of compensating damage of woods in: German Supreme Court in Civil Cases 102 BGHZ 350 et seq.

20 Cf. *Michael Kort*, Einschränkungen des Erfordernisses der Herstelleridentifizierung im U.S.-amerikanischen Produkthaftungsrecht, 88 Zeitschrift für Vergleichende Rechtswissenschaft 387 et seq. (1989).

21 *Ransiek* (note 15), p. 384; *Michael Adams*, Zur Aufgabe des Haftungsrechts im Umweltschutz. Eine Abhandlung zur Theorie optimaler Beweislast- und Haftungsregeln bei Unsicherheit, 99 Zeitschrift für Zivilprozeß 148 et seq. (1986).

22 Cf. *Klaus J. Hopt*, Grundsatz- und Praxisprobleme nach dem Wertpapierhandelsgesetz, 159 Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht 158-159 (1995); *Heinz-Dieter Assmann*, in: Assmann/Schneider (eds.), Wertpapierhandelsgesetz Kommentar, Köln 1995, § 14 WpHG Rn. 107 et seq.

23 Cf. *Meinhard Schröder* et al., Die Bewältigung von Langzeitrisiken im Umwelt- und Technikrecht. Dreizehntes Trierer Kolloquium zum Umwelt- und Technikrecht, Berlin 1998 (forthcoming); *Klass* (note 14), p. 139; *Michael Faure*, Economic Aspects of Environmental Liability: An Introduction, 4 European Review of Private Law 96-98 (1996).

only appears after a long time since the harming act, causal links are difficult to assess. Thus, like in the market share liability cases it is almost impossible to attribute special damage to a certain harmful act as multiple unknown factors could have caused or aggravated the damage. Even if a liability by probability could be accepted as a basis for attributing damage, it remains quite uncertain how to calculate the decisive degree of probability. Up to now, tort and procedural law use the concept of probability by means of burden of proof<sup>24</sup> but only in a way that provides in the end for a full liability, and not according to the degree of probability.

Finally, the damage that could be claimed by an individual or an organization may not reach the damage caused in total so that there are no efficient incentives for the corporation to abstain from torts. For example, the damage done to a landlord due to an offset of emissions may not reach the benefits that the corporation has gained by the emission. This further holds for immaterial damage or damage difficult to assess like personal injuries or loss of personal abilities which require a prognosis about potential future activities of the harmed individual. At last, pure abstract endangering of individual goods that does not reach the level of concrete danger is mostly not protected by civil actions.

### 3. *Assets*

Another principal prerequisite for the substitution of criminal law by civil liability concerns the form of sanctions: Whereas criminal law disposes of a vast area of sanctions civil law is restricted in principal to monetary compensations or injunctions. However, monetary compensation may work only when the tort-feasor has enough tangible assets to pay the required compensation. In other words: the incentives for the potential tort-feasor to obey the law are correlated to the assets. Thus, especially corporations with dangerous activities can be shielded from liability by means of limited liability. However, even if civil law does not accept limited liability, the incentives to avoid damage are too weak in case of great potential risks, as nuclear plants, chemical facilities etc., because the assets of individuals or corporations will never be sufficient to pay all damages.<sup>25</sup> These effects

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24 See the concept of *prima facie* evidence in procedural law, *Reinhard Greger*, in: Zöller, *Zivilprozeßordnung*, 20th ed. Köln 1997, before § 284 ZPO Rn. 29, § 286 ZPO Rn. 16; *Dieter Leipold*, in: Stein/Jonas, *Kommentar zur Zivilprozeßordnung*, 21st ed. Vol. 3, Tübingen 1997, § 286 ZPO Rn. 87 et seq.

25 *Steven Shavell*, *Economic Analysis of Accident Law*, Cambridge (Mass.) 1987, pp. 279 et seq.; *Steven Shavell*, *The Optimal Structure of Law Enforcement*, 36 *Journal of Law and Economics* 272-273 (1993); *Shavell* (note 14), p. 361; *Mitchell A. Polinsky/Steven Shavell*,

are aggravated by (German) insolvency law that provides for a ranking of claims which is not primarily designed for incentive resp. prevention purposes. Claims of tort victims are traditionally ranked far below those of tax authorities or social services. Hence, due to insolvency ranking the probability of being sanctioned by tort claims diminishes.

Furthermore, in case of intentional misconduct tort-feasors often establish unfathomable corporate structures that allow them to hide monetary transactions. In practice, such corporate groups impede an effective pursuance of compensation claims.

So, whenever the tort-feasor has no tangible assets or the assets are too few in comparison with the damage, civil liability does not provide for sufficient incentives to comply with legal obligations. There are different ways to overcome this problem: corporations could be required to buy insurances that care for the right preventive measures. Further, administrative law can demand licenses before corporations can start with potential harmful activities. However, all these instruments concentrate on the situation *ex ante*; they cannot impede the so-called final period phenomenon when managers or corporations can reap more benefits out of one misconduct than of carrying on their enterprise. Here, only *ex post* sanctions can deter tort-feasors from offenses.<sup>26</sup> In addition, it is difficult and costly for government or regulatory authorities to detect the optimal level of prevention activity inside the firm as they do not dispose of the informational resources as the firm does.<sup>27</sup>

#### 4. *Procedural Law*

The individual character of civil law shows up in another aspect that contrasts to criminal law: the power of the individual to abstain from pursuing a corporation for a tort. Whereas criminal procedural law provides for a - more or less intense<sup>28</sup> - obligation of the prosecutor to pursue criminal offenses it is up to the harmed individual to file a suit. Thus, torts may not be pursued if the probability of being

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Should Employees Be Subject to Fines and Imprisonment Given the Existence of Corporate Liability? 13 *International Review of Law and Economics* 239 et seq. (1993).

26 See also *Michael Faure*, Some Thoughts on the Role of the Criminal Law in Deterring Environmental Pollution, 3 *Journal of Financial Crime* 276-277 (1995).

27 Cf. *Shavell*, The Optimal Structure (note 25), p. 272.

28 A more detailed analysis of plea bargaining in Germany in *Hans-Bernd Schäfer/Claus Ott*, Plea Bargaining - der "Deal" im Strafprozeß, 15 *Jahrbuch für Neue Politische Ökonomie* 107 (1996).

compensated is too low in comparison with the risk of losing the process; even more, a corporation may seek to compensate the individual in order to avoid negative publicity so that no public suit will be filed against the corporation. In consequence, civil law may not serve as a substitute to criminal law where goods have to be protected in public interest. Especially when individual damage is not equivalent to total social costs offenses may not be prosecuted and the total damage not be compensated as individuals can bargain with the tort-feasor.

One instrument to overcome these shortcomings of civil law is the introduction of public enforcement of civil claims.<sup>29</sup> This concept of a public prosecutor looking after compliance of corporations with civil law is not new, even to German Law. German Stock Corporation Law had a long time provided for a public enforcement of civil law in terms of nullifying illegal decisions of shareholder voting concerning the remuneration of the managing and the supervisory boards (§ 77 s. 3, § 98 s. 4 AktG 1937 a.F.).<sup>30</sup> However, according to German Law the application for public enforcement of civil law is rather restricted as damage that could be imputed to an individual is still required when tort claims are pursued. Even then, it is quite uncertain whether the public prosecutor would pursue each tort claim as the fundamental informational asymmetries between individuals and public institutions remain the same: An individual has far more incentives to *detect* damage and to bring it to court than a public prosecutor who does not benefit directly by successful claims. Hence, the necessary precondition for public enforcement of civil law is simple the *knowledge* of damage which will often lack, thus causing detection costs.<sup>31</sup>

##### 5. *Insurance*

As already mentioned above, corporations may be required to buy insurances. However, the solution to use insurances, be it mandatory or voluntary, is a tricky one:

On one hand insurers seek to improve the capability of their clients to avoid damage so that the probability of payments will be diminished for the insurer. By

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29 See *Khanna* (note 1), pp. 1487-1488, 1521-1522.

30 See *Franz Schlegelberger/Leo Quassowski et al.* (eds.), *Aktiengesetz 1937*, 2nd ed. Berlin 1937, § 77 Rn. 24, § 98 Rn. 19.

31 Cf. *Byam* (note 6), pp. 596 et seq.; *John C. Coffee*, *Paradigms Lost: The Blurring of the Criminal and Civil Law Models - And What Can Be Done About It*, 101 *Yale Law Journal* 1887 et seq. (1992)

means of insurance premiums or special audits insurers provide economic incentives for their clients to comply with legal rules.<sup>32</sup>

On the other hand, insurers suffer from the problems of moral hazard and adverse selection. As their clients know that they have to pay insurance whatever good their compliance organization is, their motivation to diminish the probability of damage is not as high as in the case of direct responsibility. Whereas insurers can try to circumvent that problem by means of a bonus when no damage had occurred still the adverse selection persists. Corporations with a relative high probability of causing damage have much more stronger incentives to seek insurance than other enterprises. Thus, insurers have to establish a system to control the risk structure. In sum, costs of controlling clients may be as high as the monitoring costs for government and courts.<sup>33</sup>

Anyway, the means of mandatory insurance requires a high probability of claims if insurance should work as a substitution mechanism.<sup>34</sup> However, all the classic problems cited above subsist like collective goods, multi-causal damages etc.

#### **IV. Civil Law as an Alternative to Criminal Responsibility of Corporations**

The limits of civil liability as a substitute for criminal responsibility are accentuated when we consider the special case of corporations:

##### **A. Vicarious Liability of Corporations for Damage**

Whereas actual criminal law in Germany is being confronted with a variety of problems when it comes to the punishment of managers and board members for

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32 See *Alfred Endres/Reimund Schwarze*, Allokationswirkungen einer Umwelthaftpflichtversicherung, in: *Alfred Endres/Eckard Rehbinder/Reimund Schwarze* (eds.), *Haftung und Versicherung von Umweltschäden aus ökonomischer und juristischer Sicht*, Heidelberg 1992, pp. 58 et seq.; *Shavell*, *Economic Analysis* (note 25), pp. 228 et seq.; *Gerhard Wagner*, *Umweltschutz mit zivilrechtlichen Mitteln*, 14 *Natur und Recht* 207-208 et seq. (1992).

33 See *Ransiek* (note 15), pp. 382-383; *Adams* (note 21), p. 136; *Wagner* (note 32), pp. 207-208; *Michael Adams*, *Produkthaftung - Wohltat oder Plage - eine ökonomische Analyse*, 30 *Betriebs-Berater suppl.* 20 (1987).

34 Cf. *Faure* (note 23), pp. 104-105; *Michael Faure*, *The Limits to Insurability from a Law and Economics Perspective*, 20 *The Geneva Papers on Risk and Insurance* 456-458 (1995); *Michael Faure/Günter Heine*, *The Insurance of Fines: The Case of Oil Pollution*, 16 *The Geneva Papers on Risk and Insurance* 47 et seq. (1991), analyzing the relationship between insurance and low probability of being detected.

negligence in product liability cases, like causing damage by voting to continue risky production lines<sup>35</sup> etc., civil law benefits from an old tradition of vicarious liability that is unknown to criminal law. For example, contract law provides for a vicarious liability for all wrongs an employee has committed during the contract, § 278 of the Bürgerliches Gesetzbuch (BGB - Germany). Even where tort law offers the corporation the possibility to exculpate for employees by showing evidence of sufficient monitoring (§ 831 BGB) courts tend to hold the corporation liable for negligence of organization by imposing a high standard. Thus, organizational deficits of the corporation substitute the responsibility for individual faults or individual monitoring.<sup>36</sup> It is sufficient to claim that the corporation had neglected its organizational duties. The fact that damage has occurred even may serve as an indication for a unduly organized enterprise.<sup>37</sup> Hence, the complex problems discussed around famous cases in Germany concerning the criminal responsibility of board members are far less acute in civil law. The same could be true if German criminal law introduces vicarious criminal liability.<sup>38</sup> Thus, the problem for criminal law of defining standards which stem from civil law and are more or less flexible,<sup>39</sup> especially organizational standards, is solved.

In sum, civil law can easily attribute damage to the corporation without seeking for individual responsibility inside the organization. Thus, a major problem of current German criminal law could be overwhelmed either by civil law or by the introduction of vicarious liability resp. the criminal responsibility of corporations.

## B. Sanctioning the Wrong Person?

Furthermore, civil liability seems to avoid a major problem related to criminal responsibility of corporations: that sanctioning the corporation strikes the wrong

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35 Leading Case: German Supreme Court in Criminal Cases 37 BGHSt 107 et seq. - Lederspray - intensively debated by *Heine*, Die strafrechtliche Verantwortlichkeit von Unternehmen, Baden-Baden 1995, pp. 109 et seq. and *Ransiek* (note 15), pp. 30 et seq.

36 More elaborated in *Spindler*, Unternehmensorganisationspflichten, Köln 1998 (forthcoming).

37 See Supreme Court of the German Reich in Civil Cases 89 RGZ 137 et seq.; Federal Court in Civil Cases 30.1.1996 VI ZR 408/94, 47 Versicherungsrecht 470 (1996); Regional Appeal Court Köln 10.3.1995 19 U 111/94, 47 Versicherungsrecht 510 (1996), - Leitersprossen - concerning quality controls of products.

38 See *Ransiek* (note 15), pp. 342-343.

39 Cf. *Coffee* (note 31), p. 1878; *Richard Craswell/John E. Calfee*, Deterrence and Uncertain Legal Standards, 2 Journal of Law, Economics, and Organization 279 (1986); *John E. Calfee/Richard Craswell*, Some Effects of Uncertainty On Compliance With Legal Standards, 70 Virginia Law Review 965 (1984).

person. If the corporation is punished not only managers are affected by a criminal sanction but also the shareholders as those who stand "behind" the corporation. As long as shareholders act unanimously one can argue that in economic terms shareholders are equally responsible for the actions (or negligence) of the management as they have elected the board and the management. That, however, does not hold for minority shareholders so that even those who had disagreed with elections are sanctioned for what they had not done.<sup>40</sup> Whereas traditional criminal liability seeks to punish those who can be held individually responsible for offenses like competent managers, vicarious liability ignores actual hierarchies and punishes the whole organization. Even more, constitutional arguments seem to favor a punishment of individuals culpable for torts in contrast to "innocent" organizations in form of the legal entity.<sup>41</sup> On the other side, even civil liability concentrates on the liability of the corporation and not on individuals.<sup>42</sup> Therefore, it seems to be no contradiction to sanction the corporation even when minority shareholders suffer from the punishment as they otherwise benefit from gains the corporation (resp. its management) may realize.<sup>43</sup> Moreover, even the (German) constitution does not provide for a total equivalency of natural persons and legal entities. Instead, art. 19 subs. 3 of the German Constitution merely requires the equal treatment of natural persons and corporations where it is *adequate*.<sup>44</sup>

We have to keep in mind, yet, that civil liability does not impede compensatory claims inside the corporation against managers or employees. In other words: even if corporations have to pay for damage caused by their employees or agents they can seek compensation by suing their agents. By means of reimbursements corporations (and indirectly also shareholders) can shift their damage to the individuals who have acted in fact. The principal aspect of vicarious liability thus is to shift the risk of insolvency to the corporation which can better control and survey the risks implied by employing agents.<sup>45</sup> As a side effect this risk shifting leads to

40 *John C. Coffee*, No Soul to damn: no Body to kick: An unscandalized inquiry into the problem of corporate punishment, 79 *Michigan Law Review* 401 (1981).

41 See the discussion in *Schünemann* (note 6), pp. 279 et seq.

42 Cf. *Schünemann* (note 6), p. 286.

43 *Ransiek* (note 15), p. 336.

44 See, for example, Federal Constitutional Court (BVerfG) 50 *Neue Juristische Wochenschrift* 1841 (1997) = 53 *Juristenzeitung* 300 (1998) concerning procedural law; these subtle differences are neglected by *Schünemann* (note 6), pp. 286 et seq.

45 Detailed analysis in *Alan O. Sykes*, Note: An Efficiency Analysis of Vicarious Liability Under the Law of Agency, 91 *Yale Law Journal* 168 (1981); *Alan O. Sykes*, The Economics of Vicarious Liability, 93 *Yale Law Journal* 1231 (1984); *Alan O. Sykes*, The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrine, 101 *Harvard Law Review* 563 (1988).

a more efficient risk-sharing between principals (shareholders) and agents as the latter (managers) would be too risk-averse in case of direct individual liability. Because shareholders can diversify more easily their risks than managers it is mainly the corporation to which claims should be addressed.<sup>46</sup>

The situation obviously changes when we consider criminal responsibility: As corporations cannot punish their employees or agents with imprisonment due to lack of state-like authority,<sup>47</sup> corporations can seek only monetary compensation by means of civil liability of their agents. Thus, criminal sanctions against the corporation are transformed in civil claims against employees wherever possible. Even when the damage or a tort cannot be attributed to one individual inside the firm, all members suffer from a corporate punishment as their wages will be reduced, *ceteris paribus*. If criminal responsibility of corporations thus serves primarily to relieve the state of the arduous task of attributing to individuals their misconduct and if corporate fines change into civil claims inside the corporation, the suffering of minority shareholders is indeed no argument against criminal responsibility. On the other hand, it offers advantages in contrast to civil liability where tort law fails to compensate for damage of collective goods. Even more, criminal vicarious liability could transform immaterial damage of collective goods into civil claims against managers, agents, and employees by means of reimbursement like contractual fines.

### C. Limited Liability

We had already discussed the problem of tangible assets in order to provide for efficient incentives by means of civil liability. As we had seen the bankruptcy of a corporation or even its mere possibility diminishes the incentive effects of civil liability.<sup>48</sup> Whereas this general decrease of incentives is somewhat balanced by a

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46 *Khanna* (note 1), p. 1496. Whether Directors and Officers Liability Assurance may alter this situation, is left aside here; see however *Polinsky/Shavell* (note 25), pp. 240, 246 et seq., who favor a complementary negligence-based liability rule for corporations and employees as well. They assume more or less ineffective internal sanctions of the corporation towards their employees. This argument depends, however, largely on the volatility of labor markets and may not apply to strongly regulated markets like European continental markets. Moreover, they do not account for differences in the probability of detection of harmful acts and for teamwork problems.

47 Cf. *Polinsky/Shavell* (note 25), pp. 240, 246 et seq.; see also *Steven Shavell*, The Optimal Level of Corporate Liability Given the Limited Ability of Corporations to Penalize Their Employers, 17 *International Review of Law and Economics* 209 (1997) for a more detailed analysis.

48 *Shavell*, Economic Analysis (note 25), pp. 279-280; *Shavell*, The Optimal Structure (note 25), pp. 272-273; *Shavell* (note 14), p. 361.

principal lifelong indebtedness of the individual,<sup>49</sup> the situation deteriorates if we consider corporations. The bankruptcy of the corporation is her legal death, yet, the former owner is not impeded by law to upset another one (according to German Law). Thus, in principal bankruptcy law provides an easy possibility for the owner of a corporation to get rid of debts. Corporate liability may, therefore, fail to set efficient incentives for avoiding damage due to asset insufficiency.<sup>50</sup> Even imposing unlimited liability upon shareholders of a corporation may cause heavy distortion in capital markets as new shareholders never know what risks are pending upon them. Thus, they will ask for risk premiums or abstain completely from new investments in corporations,<sup>51</sup> so that the corporation as a whole becomes unattractive for investors and loses much of its force to gather risk averse capital and to transform it to more risky projects.

In contrast, one of the discussed sanctions for corporations in criminal law concerns the institution of a state commissioner that at least monitors the efforts of the corporation to restructure in such a way that future misconduct is avoided.<sup>52</sup> As civil law concentrates on compensation of risks and damage between individuals, civil liability cannot provide for similar institutions that do not act in favor of a certain individual or a defined group like the creditors in the case of insolvency. Therefore, in all cases where civil law fails to provide for alternative mechanisms such as for harms to collective goods, criminal responsibility seems to be the only means to punish *ex post* misconduct. For reasons already discussed even administrative law has to be complemented by criminal law as administrative law cannot cope with the problem of the final period.

However, the argument of insolvency or of limited liability holds only at first glance. Whereas criminal law seems to dispose of a greater variety of sanctions like the state commissioner their real application in the case of enterprise resp. vicarious liability comes quickly down to economic resp. monetary sanctions. In case of insolvency monetary sanctions fail as well as other sanctions which aim at

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49 Note, however, according to the German Insolvency Law Reform, also individuals benefit from a sort of bankruptcy procedure that will free them completely from their debts. Even then, tort claims or claims resulting out of criminal offense are exempted.

50 Cf. *Block* (note 7), pp. 402 et seq.; *Reinier Kraakman*, Corporate Liability Strategies and the Costs of Legal Controls, 93 *Yale Law Journal* 867 (1984).

51 Cf. the debate between *Henry Hansman/Reinier Kraakman*, Do the Capital Markets Compel Limited Liability? 102 *Yale Law Journal* 427 et seq. (1992) and *Joseph A. Grundfest*, The Limited Future of Unlimited Liability: A Capital Markets Perspective, 102 *Yale Law Journal* 387 et seq. (1992).

52 Cf. *Schünemann* (note 6), pp. 290-291; *Schünemann*, in this volume p. 225.

the board level or the management of the corporation because corporations in insolvency are simply not to be restructured in any way but dissolved. Thus, sanctions like the state commissioner can work only in situations when corporations are *not* endangered by bankruptcy. However, in this case it is not certain why a state commissioner should be more effective than a monetary sanction that compensates the total social cost caused by the tort. On the contrary monetary sanctions leave it to the corporation to choose the most effective solution to monitor effectively the activities of their agents whereas the state agent will always suffer from severe drawbacks due to his lack of insider information.<sup>53</sup> Moreover, it is a common experience that state commissioners inside a corporation tend to adopt the view of the corporation after some time. Hence, in general a fine is believed to be the most efficient instrument as it is easy to administer even when calculation is sometimes problematic.<sup>54</sup>

Criminal as well as civil sanctions suffer, therefore, from the same fallacies, especially the ineffectiveness of pecuniary sanctions with regard to insolvency.<sup>55</sup> In case of insolvency there is nothing to restructure for a state commissioner so that even those sanctions are ineffective. Hence, limited liability is no special argument against civil law substituting criminal punishment of corporations as they both do not differ in their effectiveness. On the contrary, criminal law has to provide for special rules that avoid insolvency traps like the ranking of claims.<sup>56</sup> In addition, a cumulative responsibility of the corporation and its managers has been proposed because criminal responsibility of the corporation alone would not be sufficient.<sup>57</sup>

In sum, it is only the restricted ability of civil law to react to harms of collective goods that favors the criminal responsibility to fulfill the gap.

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53 *Shavell* (note 14), p. 360; see also *Ransiek* (note 15), p. 355 who rejects a state commissioner because he can run risks without being liable for them.

54 *Khanna* (note 1), pp. 1497-1498; *Mitchell A. Polinsky/Steven Shavell*, The Optimal Use of Fines and Imprisonment, 24 *Journal of Public Economics* 89, 95, 98 (1984); *Karpoff/Lott* (note 2), p. 761.

55 Cf. *Block* (note 7), pp. 402 et seq.; *Ransiek* (note 15), p. 353.

56 *Ransiek* (note 15), p. 356.

57 *Bernd Schünemann*, in: Burkhard Jänke/Heinrich Wilhelm Laufhütte/Walter Odersky (eds.), *Leipziger Kommentar zum Strafgesetzbuch*, 11th ed. Berlin 1992 et seq., § 14 *Strafgesetzbuch* Rn. 77.

#### **D. Special Case: Corporate Groups**

Civil law as well as criminal law is in addition confronted with a common problem of corporate law: the complex structures of corporate groups. It is not sufficient to investigate in criminal or civil responsibility of one corporation as often the real headquarters are situated outside the legal boundaries of the firm. Hence, it is necessary to define rules that allow to attribute misconduct of affiliate corporations to holding companies. Yet, whereas criminal vicarious responsibility of the corporation can use the formal concept of the legal person as an entity responsible for all agents there is no overall responsibility of a holding company for all affiliated corporations inside the corporate group.<sup>58</sup> On the contrary, according to German corporate law - roughly spoken - the liability depends on the influence of the holding company that has been exercised. This is exact the opposite idea of criminal or civil liability of a corporation where responsibility in general is not correlated to the actual influence, supervision or monitoring of its agents.

Leaving this complex question aside we can state that corporate groups are not a special problem that discredits civil liability substituting criminal law. As we have seen above both instruments use monetary sanctions that suffer from the same problem of insolvency. Yet, corporate groups with their different layers of limited liability are simply a special case of insolvency where creditors' interests are more endangered than elsewhere in corporate law. Still the corporation remains the center for all claims; there is no general attribution of corporate conduct to the holding company.<sup>59</sup> Hence, monetary sanctions generally are treated the same whether their character is of criminal or civil origin. Only if we accept a general principle in criminal law for corporate groups that declares holding companies liable for misconduct inside the group civil liability rules could not match monetary sanctions in criminal law.

#### **E. Reinforcement of Corporate Governance: Some Issues**

Finally, we have to consider an assumption that is crucial for the effectiveness of all monetary sanctions, criminal or civil: the issue of corporate governance.

If punishing corporations by monetary sanctions should produce sufficient incentives for prevention inside the corporation it is necessary that managers act in the

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58 Cf. *Claus-Jörg Rütsh*, Strafrechtlicher Durchgriff bei verbundenen Unternehmen? Köln 1987.

59 See note 58.

interests of shareholders. In other terms: the concentration on a vicarious liability regime instead of punishing managers directly requires an effective system of corporate governance. Managers who decide on organizational structures and strategic policies have far less incentives to avoid torts or misconduct than shareholders who directly suffer in economic terms from corporate punishments or compensation payments. Thus, only if capital markets work well, if shareholders can replace managers for their wrongdoings or reimbursement clauses could be incorporated in manager contracts, corporate punishment in terms of monetary sanctions will produce the right incentives. If managers are shielded by corporate law from shareholders and from capital market effects - such as take-overs - the chance of being relieved of their position is comparatively low<sup>60</sup> so that the incentives of monetary sanctions to corporations are little in relation to a direct punishment.

Further, markets for managers may create incentives for managers to avoid torts inside their corporations as their reputation can suffer due to criminal offenses. Yet, markets for managers seem to suffer from heavy non-transparencies so that capital market mechanisms obviously are a more effective instrument in assuring compliance with legal rules. Hence, if corporate liability should work well in terms of sufficient incentives to establish preventive measures inside the enterprises, vicarious liability has to be accompanied by an effective corporate law that provides for capital market mechanisms like take-overs etc. Consequently, the issue of corporate governance plays a decisive rule for civil liability of the corporation as well as for its criminal liability. In other words, corporate governance does not favor one instrument or rejects the other. Rules for corporate governance simply are the necessary framework to establish an effective regime of corporate liability.

On the other hand, even if we had a perfect world of corporate governance, we may not rely completely on capital markets to regulate misbehavior inside the corporation. Due to lacking internalization of external effects, especially for environmental and long-term damage, capital markets fail to reflect the risks of activities of corporations in those sectors.<sup>61</sup> Therefore, these corporations benefit from

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60 For summaries of the discussion on corporate governance resp. the economic analysis of corporate law see *Frank H. Easterbrook/Daniel R. Fischel*, *The Economic Structure of Corporate Law*, Cambridge (Mass.) 1991; *Roberta Romano*, *Foundations of Corporate Law*, New York 1993.

61 *Heinz-Dieter Assmann*, *Umwelthaftung in ökonomischer Analyse*, in: Gerd Rainer Wagner (ed.), *Unternehmung und ökologische Umwelt*, München 1990, pp. 201 et seq.; *Shavell*, *Economic Analysis* (note 25); *Andreas Schulz*, *Überlegungen zur ökonomischen Analyse des Haftungsrechts*, 35 *Versicherungsrecht* 608 et seq. (1984); *Wagner* (note 32), p. 205;

well known market failures as they can attract more cheaply capital in relation to their potential risks.

As well we cannot concentrate on monitoring procedures inside the corporation such as a reinforcement of supervisory councils. These monitoring devices suffer from a potential conflict of interests as members of these councils are primarily obliged to serve the interests of shareholders and of the corporation and not of outsiders.<sup>62</sup> Even if special directors have to be appointed at the board such as an environmental director<sup>63</sup> they cannot escape their double obligation as trustees of the shareholders at the same time as representing interests of outsiders.

Finally, the use of external accountants and verifier has been proposed to enhance the compliance of corporations.<sup>64</sup> By means of controlling the compliance systems corporations should be incited to improve their monitoring devices and to avoid misconduct. However, even third party verification suffers from the same drawbacks as civil liability: As external accountants are mandated directly by the corporations which they have to verify, opportunistic behavior is probable. Hence, third party verifiers must be liable for false testifying. Then there is no difference concerning the effectiveness of liability. Especially when external accountants control environmental activities the probability that opportunistic behavior of the verifiers can be detected and pursued is low. Therefore, state authorities have to control third party verifiers closely in order to fulfill the gap left by market failures.<sup>65</sup> In sum, verifying procedures cannot substitute criminal or civil liability.

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*Thomas C. Paefgen*, Imperativer und kooperativer Umweltschutz in wettbewerbspolitischer und unternehmensstrategischer Sicht, 16 *Natur und Recht* 430 (1994).

62 *Ransiek* (note 15), pp. 370 et seq.

63 Cf. *Eckard Reh binder*, Ein Umweltschutzdirektor in der Geschäftsführung der Großunternehmen? in: Jürgen F. Baur/Klaus J. Hopt/K. Peter Mailänder (eds.), *Festschrift Steindorff*, Berlin 1990, pp. 215 et seq.

64 Cf. *Ransiek* (note 15), pp. 378 et seq.; see also *Heine* (note 35), pp. 271 et seq.

65 The argument is more elaborated in *Gerald Spindler*, Umweltschutz durch private Prüfungen von Unternehmensorganisationen, in: Karl-Ernst Schenk et al. (eds.), *Die EG-Öko-Audit-VO*, 15 *Jahrbuch für Neue Politische Ökonomie*, 205 et seq. (1996).

## V. Conclusion

In summary, civil liability can only partially substitute criminal responsibility where

- individual damage is easily to assess;
- individuals have enough incentives to file suits;
- damage is primarily of private concern and does not affect public goods or interests;
- tangible assets are sufficient for compensating damage/mandatory insurance;
- corporate governance works well enough to transmit sanctions to management.

In turn, criminal responsibility of corporations is necessary

- when collective goods are harmed;
- when torts have to be pursued independently of individual intentions.

Civil nor criminal responsibility can play a decisive role in ensuring effective monitoring inside the corporation when liability is limited or the corporation cannot dispose of enough tangible assets in relation to dangerous activities. The proposed framework for future analysis should proceed by the following steps:

- analyze the shortcomings of markets like stock markets, manager markets, external effects;
- analyze alternative regulations and their efficiency with the background of specific market failures;
- analyze criminal law as an *ultima ratio* which should be applied where markets fail to discipline individuals and corporations and where alternatives are not available or too weak to work efficiently.

Whatsoever, we still have to keep in mind the different roles of criminal and civil law assigned by the society. If it is true, that criminal law should be reserved to prohibiting conduct that lacks any social utility, and that civil law should be used to deter forms of misbehavior like negligence, then an economic analysis which simply concentrates on deterrence could be a starting point but cannot wholly substitute ethic and other legal arguments.



## **Subject VII**

### **Evaluation of Experiences with Existing Regulations**



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## Comparative Observations

Albin Eser, Freiburg i.Br.

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It goes without saying that attempting to render a full picture of all empirical facts, theoretical approaches and legal norms which were presented in the course of this extremely enriching colloquium, would be futile. Even an attempt to at least summarise the main steps and results of our presentations and discussions might fail by either becoming boring if too comprehensive and lengthy, or by being full of gaps if too selective. Therefore, instead of pretending the seemingly objective survey, I would rather restrict my concluding remarks to several comparative observations whose subjective character shall not be hidden, but which may nevertheless serve as a fundament for further considerations.

My observations will be made from three different points of view: first, with regard to the basic approaches to the problem of criminal responsibility of corporate entities, secondly, by identifying certain basic distinctions, and thirdly, by searching for alternatives to criminal responsibility.

As the first point, I would like to state that the colloquium revealed three basic approaches to the problem of corporate or collective crime. On the one hand, a school of "pragmatism", which, in sort of an inductive way, would primarily look for the social problem which has to be solved in a just and simple way without, however, first searching for guiding principles. On the other hand, a school of "theorism", which, in a more deductive manner, would start out from basic concepts and constructions which would possibly not function in real life due to its being paralysed in a Procrustes bed of theories and principles; this school seems at times to be more interested in the protection *of* criminal law rather than in protection *by* criminal law. Finally, a school of more "evasive" concepts which - instead of striving for a universal concept, for reasons of equal treatment, applicable to all types of crimes - tries to sidestep difficult questions by, for example, solely penalising economic crimes and not, for instance, manslaughter caused by a corporation.

A second point concerns certain basic distinctions which - at least for the purpose of analysis by identifying all possible relevant variables - have to be made. The

first distinction is related to the problem of legal interests (Rechtsgüter). Here one should distinguish individual, public (concerned with the so-called "victimless"-crimes) and collective or universal and, thus, border-transgressing interests.

The next distinction refers to the type of manner in which different corporations may be involved in criminal activities. One type can be found in corporations which, as such, are law-abiding but which, by illegally acting organs or employees, get involved in crime - a case of abuse of a corporation, therefore "normal" or traditional criminality; a second type of basically law-abiding corporations which occasionally or in some areas do not observe criminal provisions - a case in which it is fair to speak of "corporate" liability; and finally, corporations designed and organised for illegal purposes - a case of not only corporate criminality but of a criminal corporation (for which dissolution may be the only adequate sanction). Aside from these sorts of "crime by organisations" in terms of legally structured and founded entities, however, there is a wide field of "organised crime", in particular by organisations of various persons without being instituted in a form of a legal corporation, or by means of cooperative illegal activities of various organisations or corporations. As long as it is not clear to what degree, if at all, these various types of "organisational crimes" can be legally dealt with in the same way, they are not only of criminological interest, but of normative significance, and thus, must be identified more specifically than is usually done when speaking plainly of "organised" or "corporate crime".

A third distinction to be kept in mind when dealing with "corporate responsibility" concerns the question of the subject to be held liable: only the corporation as such, and/or other agents? And if the latter is the case, which individual person should render the entity liable: only corporate organs such as the directors? Or, in addition, the executive managers and, moreover, all administrative employees or even every worker or servant acting on behalf of or for the benefit of the corporation?

A fourth distinction concerns the conduct from which liability may be derived: only from positive acts or also from omissions? Or even from "corporate knowledge", or the lack of an adequate "corporate culture"?

A fifth distinction may be necessary with regard to the procedural rules to be employed in corporate criminal proceedings: may privileges such as that against self-incrimination be invoked by corporations in the same way as by individuals? Is the presumption of innocence only designed for individuals or may it also be taken advantage of by corporations? These sorts of questions are far from revealed, let alone solved.

A sixth distinction, requiring more consideration than those so far concerns border-crossing corporate criminality. Instead of speaking of "international criminal law" in a commonly superficial and unspecified way, it should be kept in mind that "transnational" crime can basically be approached on three different levels: on the national level by applying the perhaps different laws of the two or more countries affected by a crime (as place of the act or the criminal result, by citizenship of the perpetrator or the victim, as place of detention or extradition or with regard to the principle of universality), direct concurrence and competition of various national laws, which as long as not harmonised, require rules for a conflict of laws. On an "international" level by means of procedural cooperation between various states in the form of extradition or other ways of legal assistance. And finally and possibly on a "supranational" level, if the endeavours for defining "international crimes" and for establishing an international criminal court should succeed.

My third main, though brief point concerns alternatives to criminal law. With regard to "civil commitments", "administrative injunctions" or other means of private or public law, at various instances, our colloquium revealed that there is no "either or" but rather an "as well as" by which further deliberations should be guided. In pursuing a combinative approach, the traditional deep entrenchment between criminal and civil law must be overcome.

Let me conclude by emphasising my belief that law has to cope with social problems and that the different branches of law are no values in themselves but only instruments in coping with these problems. Thus, in my opinion, it is not theory which should come first and social life second, but the other way around.



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## Recommendations

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### Preamble\*

The International Colloquium "Criminal Responsibility of Legal and Collective Entities", organised by the Max-Planck-Institute of Foreign and International Criminal Law, Freiburg/Breisgau, and the International Centre for Criminal Law Reform and Criminal Justice Policy, Vancouver, Canada, sponsored by the German Federal Ministry of Justice, Bonn, held at Berlin May 4-6, 1998,

considering the increasing world-wide importance and influence of legal and collective entities in societies,

considering the potentially serious negative social impact of many of the activities of legal and collective entities,

considering the desirability of holding legal and collective entities responsible for the detrimental social and economic consequences of the activities from which they derive benefit or where specific social risks are caused by the opening and operation of a complex organisational system,

considering the difficulty of identifying, due to complex managerial structures and faulty corporate developments over a period of time in collective entities, the individuals who should be held responsible for the detrimental consequences of the entities' actions,

considering recent trends at the national and international levels towards using criminal law and quasi-criminal mechanisms to sanction and otherwise influence legal and collective entities,

considering the difficulties, rooted in the legal tradition of many states, of rendering legal and collective entities criminally liable,

considering that the introduction in national law of the principle of criminal responsibility of legal and collective entities is not the only means of solving these

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\* Drafted by *Günter Heine*.

problems and does not exclude the adoption of other solutions under national law serving the same purpose,

submits the following

## **Recommendations**

### **I. Framework**

In rendering legal and collective entities criminally or quasi-criminally\* responsible, consideration should be given in particular to

- different types of collective behaviour and organisations, such as entities constituted as a legal person; law-abiding entities/criminal organisations; corporations fully integrated in legal systems (national-supranational); private/public entities, large scale enterprises, etc.;
- different kinds of legal interests protected by core criminal offences, public/collective interests, regulatory offences;
- different kinds of competencies and liabilities of state, collective entities and society with respect to these legal interests;
- different national systems of effectively attributing liability and imposing sanctions, for instance civil penalties imposed by civil courts, or administrative restrictions of entrepreneurial freedom imposed by administrative authorities and subject to judicial control;
- different legal approaches on national and supranational levels, in particular with reference to globalisation and collective entities transnationally engaged.

### **II. Responsibility**

1. International experience and theory presents a broad spectrum of options for attributing responsibility to legal and collective entities. It may be most expedient to refer to three basic models:

- a) an act of representatives as the entities' own misconduct,

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\* Including legal side systems in national laws such as regulatory offences, administrative penal law, "Ordnungswidrigkeiten", etc.

- b) defective corporate organisation and the imputation of the responsibility for the offences,
- c) imputation of the responsibility for the offences on the basis of the causality principle.

2. To adequately allocate criminal or quasi-criminal responsibility, the following should be taken into account: the scope of other systems of liability, the scope of corporate activities, the nature of the offences, the character and degree of fault on the part of the entity, the need to prevent further offences and to influence entities by direct or indirect means, and the consequences for society. In any case, clear prerequisites for responsibility are necessary.

3. Criminal or quasi-criminal responsibility of entities should apply regardless of whether or not one individual person, through whom the entity may have acted, or omitted to act, is identified, prosecuted or convicted. Vice versa, the imposition of responsibility upon the enterprise should not *per se* exonerate from responsibility a natural person implicated in the offence. In particular, criminal responsibility of entities and of natural persons should be adequately balanced, giving consideration to specific duties of individuals performing managerial functions.

4. Conduct that merits imposition of criminal or quasi-criminal corporate responsibility can result from acts or omissions, irrespective of its individual or collective nature.

### III. Sanctions

1. Special attention should be paid to the relationship between the substantive prerequisites imposing responsibility and sanctions.

2. In providing an harmonised range of appropriate corporate sanctions which might be imposed on legal and collective entities, a shift from a more repressive to a more preventive approach is recommended. The latter aims to promote compliance with the law in the future as well as improvements in the structures of the entities' organisation and corporate culture. Therefore, legislators should reconsider and, if necessary, reorganise the national systems of sanctioning, including conventional administrative and civil sanctions, and strengthen the rights of victims.

3. Consideration should be given to the introduction of a broad spectrum of corporate sanctions particularly designed to achieve the objectives mentioned above, including both economic mechanisms and direct or indirect intervention. These may include monetary sanctions, such as fines, confiscation of proceeds, restitution and compensation, exclusion from benefits and restrictions of entrepreneurial liberty, such as injunction orders, appointment of a trustee, corporate probation, prohibition of certain activities, closure of the entity/department and publication of the judgement.
4. These sanctions may be taken alone or in combination, if necessary, in specific areas of law, but should in all cases include special safeguards guaranteeing suspension when the objectives are reached.
5. Where necessary for preventing continuing non-compliance with the law, or for securing enforcement of a sanction, the competent authority should consider the application of interim measures.

#### **IV. Procedure**

1. It should be examined how far conventional principles and rules of criminal procedural law established for natural persons in order to guarantee a fair and just process (such as the privilege against self-incrimination or some rules of evidence) may not apply to cases involving legal and collective entities. Taking into account the different factual circumstances of legal entities and legal issues, such as the monopoly on information about entrepreneurial risks at large scale enterprises, specific procedures have to be developed.
2. Both the investigative and trial phases of proceedings as well as the organisation and competence of prosecutorial and adjudicative bodies should be reconsidered in relation to the sanctioning and influencing of legal and collective entities.
3. In any case, special safeguards must be implemented to insure that the process used for attributing corporate criminal or quasi-criminal responsibility is fair and just in terms of a criminal law and not merely one more appropriate for imposing administrative or civil liability.

## **V. Transnational Level**

**1.** To avoid legal loopholes and to guarantee comparable legal standards, national legislations should harmonise provisions for allocating criminal or quasi-criminal responsibility of legal and collective entities and establish rules for dealing with instances of conflict of law. Legislators should also facilitate, in accordance with the provisions of relevant international instruments, international co-operation and mutual assistance in investigating and prosecuting infractions involving legal and collective entities.

**2.** Where the harm arises to global interests, states should agree on an international convention that would enable them to prosecute the crime. In order to facilitate the prosecution of international crimes, the jurisdiction of supranational and international courts should include corporate crime of transnational concern.

**3.** International conventions, recommendations and resolutions should be harmonised on the basis of these principles and recommendations.



**Max-Planck-Institut für ausländisches und internationales Strafrecht  
Freiburg im Breisgau**

**International Center for Criminal Law Reform and Criminal Justice Policy  
Vancouver**

**INTERNATIONAL COLLOQUIUM  
CRIMINAL RESPONSIBILITY  
OF LEGAL AND COLLECTIVE ENTITIES**

**May 4-6, 1998**

**Conference Centre of the Max Planck Society**

**Harnack House  
Berlin-Dahlem**

**CONFERENCE PROGRAMME**

**Sponsored by the Federal Ministry of Justice  
Bonn**

Professor Dr. Dres. h.c. ALBIN ESER, M.C.J.  
Direktor, Max-Planck-Institut für  
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Strafrecht, Freiburg

Rechtsreferendarin KATJA LANGNEFF  
Max-Planck-Institut für ausländisches und  
internationales Strafrecht, Freiburg

**Monday, May 4, 1998**

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9.00 *Welcome and Opening of the Colloquium*

ALBIN ESER, Germany

9.30 *Subject I*

**Forms of Criminal Responsibility of Organisations  
and Reasons for its Development**

*Chair:* DANIEL PRÉFONTAINE, Canada

*Keynote address:* JOHN C. COFFEE, USA

*Commentaries:* KONJI SHIBAHARA, Japan  
KLAUS-DIETER BENNER, Germany  
GERD EIDAM, Germany  
HARALD KOLZ, Germany  
LIU JIACHEN, People's Republic of China

11.30 *Subject II*

**National and International Developments:  
An Overview**

*Chair:* GÜNTER HEINE, Germany

*Keynote address:* GERHARD FIEBERG, Germany (national)  
MANFRED MÖHRENSCHLAGER, Germany (international)

14.30 *Commentaries:* MICHAEL FAURE, Belgium  
MARK PIETH, Switzerland  
CELIA WELLS, United Kingdom  
JÜRGEN MEYER, Germany  
PETER WILKITZKI, Germany

17.00 *Subject III*

**Establishing a Basis for a Criminal Responsibility  
of Collective Entities**

*Chair:* MARK PIETH, Switzerland/  
CELIA WELLS, United Kingdom

*Keynote address:* HEINER ALWART, Germany

*Commentaries:* GERRY FERGUSON, Canada  
VINCENZO MILITELLO, Italy  
GORM TOFTEGAARD NIELSEN, Denmark  
FERDINAND VAN OOSTEN, South Africa  
TERESA SERRA, Portugal  
CELIA WELLS, United Kingdom  
BERND SCHÜNEMANN, Germany

**Tuesday, May 5, 1998/Wednesday, May 6, 1998**

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9.00 *Continuation of Subject III*

*Subject IV*

14.30 **Sanctions**

*Chair:* FERDINAND VAN OOSTEN, South Africa

*Keynote address:* GÜNTER HEINE, Germany

*Commentaries:* SILVINA BACIGALUPO, Spain  
YVON DANDURAND, Canada  
DANIEL PRÉFONTAINE, Canada  
CRISTINA DE MAGLIE, Italy  
BERND SCHÜNEMANN, Germany

17.00 *Subject V*

**Procedural Law**

*Chair:* RONALD L. GAINER, USA

*Keynote address:* HANS NIJBOER, The Netherlands

*Commentary:* GORM TOFTEGAARD NIELSEN, Denmark

9.00 *Subject VI*

**Alternatives to Criminal Responsibility**

*Chair:* PETER WILKITZKI, Germany

*Commentaries:* RONALD L. GAINER, USA  
GERALD SPINDLER, Germany

11.30 *Subject VII*

**Evaluation of Experiences with Existing Regulations**

*Chair:* ALBIN ESER, Germany

13.30 *End of the Colloquium*

Prof. Dr. HEINER ALWART  
Universität Jena

Ass. Prof. Dr. SILVINA BACIGALUPO  
Universidad Autónoma de Madrid

Staatskommissar KLAUS-DIETER BENNER  
Hessisches Ministerium für Wirtschaft, Verkehr  
Frankfurt a.M.

CARLO BERTOSSA  
Universität Basel

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