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Klaus Tiedemann · Joachim Vogel *Editors*

Regulating Corporate Criminal Liability

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Editors

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Preface

Dedication to our co-editor, Professor Dr. *Joachim Vogel*†
On 17 August 2013, a family of five lost its father in a tragic boating accident in Venice, Italy—and the world of criminal justice lost one of its brightest stars, *Joachim Vogel*. As a professor at the University of Munich and as a judge at the Oberlandesgericht Munich, he built bridges between academia and the judiciary; as an inspiring mentor and enthusiastic academic teacher, he bridged the gap between legal systems and between generations. Without him and without his dedication to regulatory aspects of corporate criminal justice, this book would never be.

Munich, Germany — Dominik Brodowski
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Regulating Corporate Criminal Liability: An Introduction

Dominik Brodowski, Manuel Espinoza de los Monteros de la Parra, and Klaus Tiedemann

Abstract Corporate criminal liability is on the rise worldwide: More and more criminal justice systems now include criminal sanctions against legal entities; other jurisdictions contemplate to introduce new legal provisions on this matter. The regulatory approaches taken are manifold—even in otherwise similar criminal justice systems. Therefore, many lessons can be learned by providing an international and comparative, topical outlook on the different paths and their implications to criminal justice, to the regulation of the corporate world, and to the economy in general. In this volume, specific emphasis is put on procedural questions relating to corporate criminal liability, on alternative sanctions such as blacklisting of corporations, on common corporate crimes and on questions of transnational and international criminal justice.

1 On the Need to Regulate Corporate Criminal Liability

Societas delinquere non potest is clearly on its way out. This principle consecrated by Pope Innocent IV originally aimed at preventing the papal excommunication of civil or business corporations, cities and legal entities for offenses committed by one of its members—but it is no longer a dogma in secularized and enlightened

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criminal justice, and it does not provide a constitutionally binding barrier[1] to corporate criminal liability.

The current, worldwide trend to corporate criminal liability has its origin in the common law countries, most notably in the US, where the Supreme Court stated in its 1886 decision in Santa Clara County v. Southern Railroad that a corporation can be treated like a natural person; 20 years later—in 1909—the Supreme Court, in its landmark decision on New York Central v. Hudson River Railroad Co., gave birth to the concept of "*societas delinquere potest*". Historically, the liability *ex crimine* of corporations may adequately be explained as a reaction to the increasing importance of legal entities, particularly in the economic field, which also lead to more and more delinquency originating in legal entities, or to more and more crimes committed for (financial) gains of legal entities. But why did it take over around hundred years until corporate criminal liability spread worldwide?[2]

One historic—but regionally limited—facet is that the Soviet Union and other socialist countries did not require implementing a criminal liability for legal entities, since all corporations were closely regulated by—or even belonged to—the state. Another explanation is that the US increasingly made use of corporate criminal liability against foreign corporations,[3] causing pressure in the home states of these corporations to introduce a better—and criminal—regulation of legal entities. Most importantly, though, the corporate world has changed dramatically over the past 30 years: In a globalized world, where corporations grow ever larger, operate world-wide, and make use of the differing regulatory frameworks not only to save taxes, but also to elude public regulation and even to commit corporate wrongdoings detriment to public interest, the need to regulate corporate behavior—also by the *ultima ratio* of criminal liability—becomes ever more pressing.[4] This is underlined by corporate scandals like Enron and WorldCom in the US or Parmalat and Siemens in Europe which served as a catalyst towards establishing or reforming corporate criminal liability.

This trend to corporate criminal liability can not only be seen at the national, but also at a supra- and international level. Numerous international instruments, standards and initiatives require or recommend a liability of corporations; legally binding instruments, though, so far only envisage that States Parties shall adopt the necessary measures to establish the liability of a legal person for the commission of offenses laid down in those instruments, but do not express a position whether the liability of legal persons should be administrative, civil or criminal in

[1] On (German) constitutional barriers on corporate criminal liability or the lack thereof, cf. Vogel (2012); see also Tiedemann (2013); Tiedemann, in this volume, pp. 11ff.; Vogel, in this volume, pp. 337ff.

[2] See also the criminal policy analysis by Vogel, in this volume, pp. 337ff.

[3] See also Ishii, in this volume, pp. 237ff.

[4] See also Laufer, in this volume, pp. 19ff.

nature, and thus leave this decision to the states.[5] Similarly, at the European level, there are a multitude of instruments calling for a direct responsibility of legal persons for crimes, but none of those do yet call, with binding force, for corporate criminal liability.[6]

Besides this legal and political reasoning, psychology has shown that there indeed is a strong relation between a "corrupt corporate culture" and to crimes such as corruption being committed by employees.[7] This may serve as empirical evidence for the need of actively shaping a compliant "corporate culture", which may be encouraged by the state by the threat of corporate criminal liability—and by the "carrot" of honoring effective compliance programs.[8] However, other empiric research has shown that punishment against corporations is lower than against individuals;[9] and economists warn that decision-making processes in (top) management may not be adequately influenced by a corporate liability, but only by an effective individual liability.[10] In our opinion, though, this does not speak against introducing corporate criminal liability. Instead, it should serve as a warning to consider corporate criminal liability as an addition to individual criminal liability, but not as a replacement.[11]

Like in the theory of evolution, in legal systems only the principles, rules and institutions that best adapt to new circumstances can survive in the long run. In these days, we see an evolution of the criminal justice systems, which began in the US and which is clearly influenced by European and international (soft) law, and which uses criminal liability of legal entities as a regulatory strategy to prevent and sanction offenses committed by corporations—and in this evolution, we are nowadays experiencing the end of the juridical dinosaur that *societas delinquere non potest*.

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[5] For example, the United Nations have addressed this matter of liability of legal entities in the International Convention for the Suppression of the Financing of Terrorism (Art. 5), in the Convention against Transnational Organized Crime (Art. 10) and, more interestingly, in the Convention against Corruption (Art. 26); for measures in the framework of the Organization for Economic Co-operation and Development (OECD), just see their Anti-Bribery Convention and the Recommendations of the Financial Action Task Force (FATF).

[6] For the Council of Europe, just see recommendations R. (77) 28, R. (81) 12, R. (82) 15 e R. (88) 18; for the European Union, the Second Protocol of the Convention on the protection of the European Communities' financial interests from 1997 may be seen as the starting point for its efforts to introduce and shape corporate liability. On European regulations on corporate criminal liability in general cf. Engelhart (2012); and also the overview by Engelhart, in this volume, pp. 53ff.

[7] See Campbell and Göritz (2013).

[8] On the procedural implications of compliance programs as a mitigating factor see Gimeno Beviá, in this volume, pp. 227ff.

[9] See Tyler and Mentovich (2011); Mentovich and Cerf, in this volume, pp. 33ff.

[10] See Bernau, in this volume, pp. 47ff.

[11] See also Richter, in this volume, pp. 321ff., on the relation between individual and corporate criminal liability in the new German Ringfencing Act.

2 Diverging Regulatory Approaches in Corporate Criminal Liability

At a national level, despite the clear tendency towards the introduction of criminal liability, there are notable differences in the way that states legislate this issue. There are considerable differences regarding the nature and the scope of the liability, the attribution criteria, the procedural aspects and the sanctions applicable to corporations.[12] While much speaks for considering corporate criminal liability as a third track to punishment of individuals and to incapacitation of individual offenders *de lege ferenda*,[13] the diverging current approaches in corporate criminal liability *de lege lata*—even in otherwise similar criminal justice systems—require scrutiny.

2.1 Attributing Corporate Crimes to Corporations and the Sanctioning of Corporations

In this volume, selected models in attributing criminal liability to corporations are highlighted[14] and underline the options at this fundamental bifurcation of regulating corporate criminal liability. Closely related to this question are, however, matters of substantive criminal law and of sanctioning. As to the first issue, certain crimes which are typically committed in a corporate context or to the profit or detriment of a corporation, such as corruption,[15] money laundering[16] and market manipulation,[17] but also labor exploitation[18] need to be highlighted and are thus addressed in this volume. Regarding the second issue of sanctioning, fines are only one of many answers,[19] and agreements, bargains or "deals" to introduce effective[20] compliance structures and to change out the board of directors may be both more punitive and more preventive than classical approaches of criminal sanctioning.

[12] Just see the overview by Engelhart, in this volume, pp. 53ff.

[13] See Tiedemann, in this volume, pp. 11ff.

[14] De Bock, in this volume, pp. 87ff.; Cravetto and Zanalda, in this volume, pp. 109ff.; Lehner, in this volume, pp. 79ff.; Salvina Valenzano, in this volume, pp. 95ff.

[15] See Aiolfi, in this volume, pp. 125ff.

[16] See Saad-Diniz, in this volume, pp. 135ff.

[17] See Blachnio-Parzych, in this volume, pp. 145ff.; Blumenberg, in this volume, pp. 159ff.

[18] See Van Damme and Vermeulen, in this volume, pp. 171ff.

[19] See De Bondt, in this volume, pp. 297ff.; Aydin, in this volume, pp. 311ff.

[20] See Gimeno Beviá, in this volume, pp. 227ff.

2.2 Corporate Criminal Procedure

Specific emphasis has to be put on matters of procedural aspects of corporate criminal liability, as procedural aspects—which are often predetermined by fundamental rights and constitutional law—shape how the substantive rules (the "law in the books") can actually be worked with in practice, and whether the approaches taken by the legislator in the field of attributing criminal liability to corporations are actually effective to the aim of regulating corporations. In this volume, it is shown that diverging constitutional, fundamental rights and criminal justice system frameworks may actually mean that corporate criminal liability is a tool to prosecution in one country, but an obstacle in another.[21] In addition, while the fundamental rights protections for corporations in criminal procedure may be lower from a constitutional and fundamental rights perspective, there are sound reasons to actually provide similar protections to corporations as compared to natural persons.[22]

2.3 Transnational and International Corporate Criminal Justice

Inasmuch as the classic theories of jurisdiction also apply—or can be made to apply—to corporate criminal liability,[23] conflicts of jurisdiction present a most pressing issue in corporate criminal justice, as it not only may lead to a multiplication of punishment whenever there is no *ne bis in idem* protection,[24] but also to multiple—and diverging—regulatory frameworks being applicable to the same corporations. Therefore, the extra-territorial enforcement of criminal justice, such as it is common practice by the United States, warrants a close look;[25] but it also calls for more harmonization in the field of criminal justice, which could start with a limited catalogue of common crimes typically committed in a corporate context. Some also consider that there is a need for a genuinely international enforcement of corporate criminal liability.[26]

[21] See Neira Pena, in this volume, pp. 197ff.

[22] See Brodowski, in this volume, pp. 211ff.; see also Neira Pena, in this volume, pp. 197ff.

[23] See Schneider, in this volume, pp. 249ff.

[24] On ne bis in idem in the context of the European Union see Tzouma, in this volume, pp. 261ff.

[25] See Ishii, in this volume, pp. 237ff.

[26] See Hellmann, in this volume, pp. 273ff.; Verrydt, in this volume, pp. 281ff.

3 Rethinking Corporate Criminal Justice

All this shows a need to re-think corporate criminal justice and to look far beyond the question of whether corporate criminal justice is in line with criminal law dogmatics:[27] A multi-faceted, topical approach is necessary to understand the challenges and choices of corporate criminal liability, and to understand the effectiveness of non-criminal and of criminal sanctions in a corporate context. Questions of psychology, economy and of regulatory theory must be taken into account; the existing theories of corporate criminal liability must be validated by empirical studies; and strong focus must be put on the procedural implications of corporate criminal justice, as they shape how the law in the books works in practice.[28] Within this large analytical scope, this volume can be nothing more than one building block;[29] it is our hope that it serves as one starting point for future interdisciplinary and international research on the regulation of corporate criminal liability.

4 On the Third Symposium for Young Penalists

This volume largely builds on contributions to the Third Symposium for Young Penalists of the International Association of Penal Law (IADP/AIDP),[30] hosted by the German national group of the AIDP[31] and by the University of Munich.[32] In June 2013, academics and practitioners from five continents and from more than 20 different countries discussed corporate criminal liability in its substantive, procedural, constitutional and international facets, as well as interdisciplinary aspects of corporate criminal liability. The minutes of the symposium[33] as well as the closing remarks by *Prof. Peter Wilkitzki*[34] shall therefore contextualize the other contributions to this volume. The symposium was organized by *Dominik Brodowski*, *Manuel Espinoza de los Monteros de la Parra* and the late *Prof. Dr. Joachim* Vogel—his encouragement, his enthusiasm and his expertise were essential building blocks in framing both the symposium and this volume.

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[27] Just see Tiedemann, in this volume, pp. 11ff.; Vogel, in this volume, pp. 337ff.

[28] See also Vogel, in this volume, pp. 337ff.

[29] The diverseness of the issues addressed by our international and interdisciplinary group of authors has led to certain differences in style in their contributions. This we did not seek to inhibit, but to strengthen, as we consider diverseness in legal reasoning to be rather a tool than an obstacle.

[30] http://www.penal.org/ (12.2.2014).

[31] http://www.aidp-germany.de/ (12.2.2014).

[32] http://www.uni-muenchen.de/ (12.2.2014).

[33] Lamberigts, in this volume, pp. 345ff.

[34] See Lamberigts, in this volume, p. 359f.

Acknowledgments We thank Roxin Alliance for their generous donation which made the symposium and this volume possible, and the moderators—*Prof. Dr. William S. Laufer*, *Prof. Dr. Holger Matt*, *Prof. Dr. Helmut Satzger*, *Alexander Schemmel* and *Prof. Dr. Petra Wittig*—for shaping the symposium, and *Dr. Klaus Moosmayer* for his valuable contributions from a practitioner's perspective. We are grateful to *Franziska Kahlbau*, *Hannah-Sophie Aures*, *Christiane Junken*, *Benedikt Linder* and, last but not least, *Anke Seyfried* and *Dhivya Geno Savariraj* for their support in furtherance of the symposium and the volume.

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Part I
Regulatory Options in Corporate Criminal Liability

Corporate Criminal Liability as a Third Track

Klaus Tiedemann

Abstract For this book project, a topic was chosen which causes quite a stir internationally—from Japan to Argentina and Mexico, from Finland to Turkey. This topic indeed has lead and is leading to numerous debates and reforms all over the world. In Germany, however, the topic is categorically rejected both by the *lex lata* and by the majority of—mostly older—scholars. The European Union has long been calling for dissuasive and effective sanctions against corporations. Apart from Germany, only Greece, Italy and a few Eastern-European member states of the European Union still think that these supranational demands may be met by administrative sanctions.

As to my thoughts on the liability of legal persons and corporations: After a brief historical introduction, my contribution will start with a question of both European law and of European criminal policy—a question which is too rarely asked: Do administrative sanctions actually deter economic actors, and which conditions influence the effectiveness of such sanctions? Then, I will address in more detail the main question; specifically, I will explain the opportunities given by a comparative analysis by criminal law scholars in order to properly solve the issue at stake. Finally, I will conclude with a brief summary, which takes the form of a legislative model.

1 Historical Introduction

Globalization and the interconnection of economies, the consequences of modern technology, and the catastrophic threats to the environment have strengthened the view that not only the individual actors—the individuals—but also corporations

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must face criminal liability for the harm they cause to legal interests which are internationally recognized.

This perception gained relevance as early as the beginning of the industrialization in England and the United States during the nineteenth century, when new large-scale projects such as railways or the mass-production of foodstuffs and chemicals gave birth to anonymous commercial companies requiring high capital investments. In continental Europe, sanctions against corporations were introduced at latest with the emergence of a new business law regime after the end of the First World War; in Germany, they can be traced back to jurisprudence on the regulation against the abuse of economic power of 1923.[1]

These sanctions against legal persons took many forms. In their weakest form—most prominent in Romance countries—, corporations became *liable in the second degree* to fines and penalties imposed against their employees. The underlying theoretical background is the doctrine on the legal force of final convictions ("Rechtskraftlehre"). This doctrine states that whenever a conviction becomes final, any imposed *fine* is transformed into a mere pecuniary *debt*.

The most severe sanction included in many commercial codes was the compulsory liquidation of companies. Because of its drastic effect, this "death penalty" was rarely imposed on corporations. In recent years, however, this sanction has gained importance in the fight against organized crime.

Historically, administrative sanctions were most prevalent in Central Europe. These root in police fines already known in the nineteenth century, and these notably address tax and tariff violations. They were first introduced into the "main" branch of criminal law only during the 1930s, after the publications by *Carl Stooß* had paved the way for a second track in criminal law, a second track to punishment: *Incapacitation* of offenders who are incapable of contracting guilt. Imposing such measures—in this case in the form of freezing and confiscation of proceeds from crime etc.—had been seen as an appropriate tool in the fight against corporate crime since the AIDP Congress in Bucharest in 1929.[2]

In Germany, this *incapacitation* approach has long influenced the discussion on reforms far beyond the end of World War II; but not only here: The Turkish legislative—which historically has strong ties to the Italian school of thought on criminal law—still opted in 2004 for a system of incapacitation which is independent of guilt.

In most European countries, the second half of the twentieth century gave rise to further development of the law of administrative sanctions, which—under the influence of constitutional law—became a "droit administratif-pénal" (*Delmas Marty*). Today, administrative sanctions are considered—also by the European Court of Human Rights—to be punishment (at least in a broader sense) and to be

[1] Verordnung gegen Mißbrauch wirtschaftlicher Machtstellungen vom 2. November 1923, RGBl I, S. 1067.

[2] Second International Congress of Penal Law, Bucharest, 1929—Section One. The resolutions are re-printed in de la Cuesta (2007), p. 15.

subject to criminal principles and guarantees. As administrative sanctions require only social guilt, but not individual-ethical guilt, they are still considered to be an appropriate means to fight corporate crimes in Germany, Italy, Greece and some Eastern-European countries, but also in Peru, for example.

It is a well-known fact that during the last two decades, numerous European countries have gone much further. Following the early example of England (1842) and later the Netherlands (1952), the Nordic countries were first to introduce a genuine criminal liability for legal persons in the 1990s, followed by France (1994), Belgium (1999), Switzerland (2003), Austria (2006), Portugal (2007) and Spain (2010). Other Eastern-European countries like the Czech Republic (2011) followed this path, as did Chile (2009) in South America.

Considering this short historical background it has become evident that it is primarily a matter of *criminal policy* whether sanctions *similar to* criminal punishment suffice or whether there is a need for genuine criminal punishment against corporations. On this policy basis, criminal law theory has then to decide the question which legal theories and constructions are possible and adequate when implementing the criminal policy decision into national law, or to explain what the legislator has decided. In my general report to the XIV International Congress on Comparative Law (Athens 1994), I had already recalled the words first expressed by the Argentinean pioneer in criminal business law, *Enrique Aftalión* in 1945, and later taken up by *Zugaldía Espinar* in Spain: "If difficulties remain to reconcile criminal liability of legal persons with criminal law theory – so much the worse for the latter!" In a similar vein, the Swiss legislator in its Message from 1998 concerning the amendment of the Swiss criminal code, and *Joachim Vogel*, in his Frankfurt speech in 2011, have given priority to criminal policy decisions and have considered them to be independent of any chains of dogmatic categories.

However, criminal policy and criminal law theory have to be in alignment with constitutional law and also with the criminal law culture—meaning the social values and social circumstances of each society, which themselves are embedded into regional legal cultures, such as the European legal culture.

This cultural aspect points to a fundamental *bifurcation*. The division is largely in line with the different legal traditions which have evolved historically—and which is a golden thread in analyzing the national models on how legal persons are sanctioned in European countries. On the one hand, there is the classic "dogmatic" view with its close ties to civil law, which focuses on legal persons and its bodies; on the other hand, there is the pragmatic view, influenced by sociology, which focuses on enterprises and their employees instead. Both views converge under the influence of European legislation, but still face frictions because of the differences in the underlying concepts of criminal guilt—that is, a philosophical and metaphysical concept on the one hand, and a sociological and realist concept on the other hand. The first trend corresponds more or less to the German and classical Romance tradition, the second trend to the Anglo-American, Scandinavian and Dutch tradition.

2 Deterring Economic Actors

It is a trilogy often repeated by the EU in many areas of white-collar crime law that corporations must be subject to "proportionate", but also "effective" and "dissuasive" sanctions. In this regard, there can be no doubts that a genuine criminal liability to legal persons is the more *effective solution* as compared to administrative fines, as long as it is embedded into an appropriate framework. Such a framework notably consists of procedural provisions on criminal proceedings against legal persons. Also, criminal prosecution authorities should be empowered—legally and factually—to investigate corporate crimes, as it is the case in many countries which introduced specialized public prosecution offices against corruption and other white-collar crimes.

Moreover, a corporate criminal sanction is more *deterrent* as compared to an administrative fine. In terms of general prevention, this results from the same effect already known from comparing criminal offenses to administrative offenses. Imposing administrative sanctions for crimes is, instead, inconsistent and counterproductive to deterrent effects. Finally, the stronger stigmatization of a corporation by criminal law measures reflects the social role corporations play in the perception of the general public in a much better way.

How much corporations fear any negative impact by criminal proceedings to their *good will* and their position as a *good corporate citizen*, is exemplified by corporations changing their names after serious criminal wrongdoings, as done, for example, by the United Brands Corp. ("Chiquita") in the USA or by Imhausen Chemie in Germany. Moreover, it is illustrated by the long-standing fight of the German construction sector against the criminalization of antitrust violations against cartelizing territories or fixing prices, and even against being named in administrative antitrust proceedings.

The deterrent and preventive effects of criminal liability of legal persons can even be measured empirically by projectively questioning potential addressees, in particular the bodies and legal representatives of corporations. We had already taken such an approach in the mid-1970s (with *Breland*) in a pilot-study concerning sanctions against entrepreneurs.[3] As long as such empirical evidence is missing, however, an effective (!) system of administrative, non-criminal sanctions against corporations cannot be considered as to be in violation of European law. On the subject of effectiveness: It is, without doubt, necessary that trials are *public*—an aspect which classically is, or at least *was* missing in administrative sanctioning proceedings. In particular, trials which concern severe violations in specific areas (such as labor law, competition law and environmental law), which concern serious damages or which concern perseverant repetition should be required to be held in public, also in those EU member states which continue to opt for administrative, non-criminal sanctions against corporations. The European Commission should take steps in this direction.

[3] Breland (1975) and Tiedemann (1976), p. 249 with further references.

3 Regulatory Options in Corporate Criminal Law

In criminal law theory—in particular, in the Italian/Turin criminal law school of thought—some scholars developed a distinct category ("*capacità penale*"/ "*Straffähigkeit*") in order to clarify who may be subject to criminal law. In contrast, within the functionalism view held in (parts of) Germany (*Jakobs*), Spain and Latin America, it is quite easy to ascribe criminal liability to legal persons, same as to natural persons.

The main focus of the classical theory lies on the capacity to act and on the capacity to be culpable. The first aspect should not pose a problem for a modern point of view: In recent criminal law rulings, the German Federal Supreme Court repeatedly refers to company-related actions ("*unternehmensbezogene Handlungen*")—such as distributing dangerous products, disposing of toxic waste, or operating a mountain railway—in a manner that it is the corporation which is acting (and this action is then to be attributed to natural persons, not *vice versa*).

It has long been considered to be a most problematic question whether corporations or legal persons can be culpable. In the US, this question has only gained attention since the introduction of sentencing guidelines at the end of the twentieth century, as its concept of criminal liability of legal person roots in civil law. In contrast, English common law developed the *alter ego* or identification theory that crimes committed by high-ranking employees—those of the "brain area" of a corporation—are also crimes of the corporation itself. From a practical point of view, the same results follow from the theory of *vicarious liability*, as it determines the liability of corporations by attributing the liability of the acting natural persons to the corporation. Such a "classical" approach is more or less self-evident when it concerns misdeeds of bodies or legal representatives of legal persons, and several Constitutional Courts in European countries—also the German Constitutional Court in the body of a ruling—have raised no concerns over such a legislative approach. Also, the jurisprudence of German Higher Regional Courts of Appeal requires culpability of bodies or legal representatives of legal persons in cases on administrative fines ("Ordnungswidrigkeiten").

Such an approach focusing on attribution seems to be in conflict with the notion that criminal guilt is closely linked to human beings, and—in the Christian view on sins and penance—is bound to individuals. Therefore in the thirteenth century's conflict with Emperor Frederick II, the Roman church famously stated: "*societas delinquere non potest*"—arguing against the postglossators' opinion and arguing with the aim of avoiding the Papal excommunication of corporations. *Arroyo Zapatero* commented in an Istanbul conference (2011) on this far-reaching but selfish historic decision by Pope Innocent IV with the irony it deserves.[4]

[4] See Arroyo Zapatero (2012), p. 711.

Aside from Christian culture and tradition, an attributional approach becomes questionable when it concerns actions and guilt of employees in the middle or lower parts of the corporation hierarchy, or when criminal liability of legal persons (as in France, Spain and Switzerland) is extended to all *enterprises*.

The historic and classic limitation of criminal legal systems to *legal persons* seems to be outdated in the light of social reality. Moreover, probably all modern states—and the EU—target their competition law on corporations, as they are the main economic actors. Outdated, too, is the exclusion of mid-level or lower-level employees. Organization models in corporations are highly diverse and complex—different from sector to sector, different in large multinationals and in small- and medium-sized businesses. In addition, it must become impossible to manipulate the organizational structures in a way to secure impunity for the corporation.

One solution in line with criminal policy and criminal law dogmatics can be seen in the regulatory options taken by the USA, England, Spain, most recently by the Czech Republic, and—for administrative sanctions—by Germany as well as (in terms of the outcome) by Italy: Culpable acts by bodies, legal representatives or other decision-makers or supervisors are attributed directly to the corporation. The same natural persons also face oversight and control duties to prevent corporation-related crimes by their subordinates. This means that crimes committed by subordinates may be attributed to a corporation indirectly, if these supervisory duties have been breached with.

An opposing model can be found, for example, in Sweden, Switzerland and—regarding administrative sanctions—in Italy. In their laws, an independent, autonomous guilt of corporations is presupposed, which roots in organizational shortcomings leading to the commission of crimes. Corporations can only exculpate themselves from this guilt if they have taken all necessary and reasonable measures to prevent the commission of corporation-related crimes by their employees. Such necessary and reasonable measures notably include effective *compliance programs* and *corporate codes of conduct* or *corporate codes of ethics*.

However, any model chosen can only become effective if, firstly, the burden of proof for causation is shifted (so the UK Bribery Act of 2010) or if it suffices to prove that shortcomings in the organizational structure or in the supervision have alleviated or facilitated the commission of crimes—in other words: that the shortcomings have increased the risk (so the US and § 130 OWiG in Germany). Secondly, there has to be a statutory presumption—as there is in England and was, until 2010, in the US[5]—that organizational shortcomings are present whenever corporation-related crimes are committed by high-ranking employees, which means that such shortcomings need not to be specifically proven in these cases. Similarly, the Italian law on administrative sanctions only allows for the exculpation of corporations in cases of fraudulent breaches of organizational rules by bodies if the corporation could *not* foresee such acts—a necessary consequence of the concept of autonomous guilt of corporations.

[5] Engelhart (2012), p. 735.

If one accepts these limitations, there is no practically important difference between these two regulatory options. In particular, attributing the guilt of another is only problematic insofar as it concerns questions closely related to human nature. Besides the capability of contracting guilt (which is equivalent to the legal order recognizing a corporation as such), this relates only to the appreciation of the wrongfulness of the conduct. This question of (not) being aware of (criminal) prohibitions may be answered, however, autonomously from the perspective of a corporation, as is shown by jurisprudence by the European Court of Justice and by some German Higher Regional Courts of Appeals on administrative sanctioning: The legal person has its own duty to align its acts in accordance with the laws and regulations, and to know the law of the land. The same is true of negligence liability.

Attributed guilt differs from own, personal guilt. In both models, though, it concerns the *social guilt* of the corporation. This social guilt primarily reflects the breach of legal, normative requirements on behavior, in line with the traditional concept of negligence liability. Therefore, it is consistent to consider criminal liability of legal persons to be a third track in criminal law, a third track to punishment and to incapacitation of offenders who are incapable of contracting guilt. This view should, as far as linguistically possible, be reflected in a distinct denomination (such as "Verbandsgeldstrafe" in Austria, and especially "coima" in Portugal and "företagsbot" in Sweden, both of which recourse to historic denominations).

4 Conclusions

To summarize: I consider administrative sanctions only to be dissuasive and effective if trials are public, at least in serious cases. I propose to take a mixed approach as a model for criminal law reform which aims at introducing criminal liability of corporations. Within this approach, criminal liability of corporations should be introduced as a third track—a third track to punishment and to incapacitation of offenders who are incapable of contracting guilt. It should be based on a vicarious basis of attributing acts—and *mens rea*—of bodies and legal representatives of corporations; moreover, culpability of the bodies and legal representatives should be attributed to the corporation itself, with two notable exceptions—the awareness of (criminal) prohibitions and negligence—which are to be determined autonomously from the perspective of the corporation. Crimes committed by other employees may be attributed to the corporation based on the (collective) element of insufficient organization or insufficient oversight; however, this attribution ends whenever a corporation has taken all necessary and reasonable measures to prevent or hinder crimes from being committed.

Let me finish this brief contribution by recalling a quotation by *Victor Hugo* which I had already used almost 20 years ago in a conference at the University of Madrid concerning our topic: "Nothing else has the force of an idea the time of which has come!" *Rien ne vaut la force d'une idée dont le temps est venu*.[6]

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[6] Tiedemann (1995), p. 35.

Where Is the Moral Indignation Over Corporate Crime?

William S. Laufer

Abstract Neo-liberalists promise a just and measured response from the state to corporate crime without resort to the force of a "criminal" justice. The argument is that there is more than enough justice done in administrative and civil regulatory regimes. In this contribution, I argue that this promise of justice done is betrayed. Evidence of this betrayal is found in the absence of any genuine moral indignation over corporate wrongdoing. Asking questions such as why there is so little moral disapprobation over corporate crime, and how is corporate moral integrity laundered, lead to a simple but important conclusion. These multi-stakeholder games serve and support a regulatory equilibration. This equilibration maintains the *status quo* of a system tilted in favor of corporations of scale and power, and fails to prompt the emotions necessary to support a strong sense of the wrong in corporate criminal wrongdoing.

Lost in the increasingly popular neo-libertarian account of criminal law in the United States is the kind of moral reflection over corporate wrongdoing that boils the blood of retributivists and calls for the exercise of state power with little reflection. It is difficult to conceive of a corporate harm deserving of criminal punishment according to the hardened liberalist.[1] Murder, rape, and aggravated assault encourage and mobilize the state in ways that the full spectrum of financial frauds, deceptions, and manipulations simply do not. One may ask, who is morally outraged by corporate fraud? Moreover, resort to corporate criminal justice is chock full of externalities. It is misguided, anthropomorphic silliness and, worse, harmful

[1] Hasnas (2005), pp. 187ff.; Hasnas (2006, 2009), pp. 1329ff.

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