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THE PENAL ABILITY AND RESPONSIBILITY OF THE CORPORATE BODIES

PROF. DR. ERVIN HACKER¹

I. In contrast with the predominant opinion, that against the corporations a repression of criminal law is not possible, lately we meet with the idea of their penal responsibility more and more. Now this later change of opinion is predominant only in the English-American law.

And the reason for this change is, that we see more and more the ability of acting. The situation is similar to that when we give some the realization of the greatest purposes of the human race; but if we use it for evil ones, then danger arises.

The social, political, mental and economic power and value of the human race increases enormously by organizing. That which one man when alone cannot even dream of realizing becomes possible when allied with others. In life we see often such purposes, which appear inaccessible, and in our imagination we often dream of such objects. Think, for example, of the possibilities which Kellermann has conjured in his novel, "The Tunnel," which are useful to the highest aims of the human race. Only allied with others have we the hope to be able to obtain these aims. The duration of the life of one individual is too short for realizing such purposes.

And especially in economic life there are many such possibilities. In the capitalistic system of economy it is very important to bring together the economic powers.

But not only in economic life can we see the great importance of organization. To realize scientific, political and other purposes of civilization is often impossible for one single person, but if many men form an organization by uniting their powers, it becomes possible.

But the gathering of the power would be successful in such cases only if these united powers are governed by one center which exists separate from the single man and his interests.

By discussing the penal ability and the responsibility of the corporations the thought might occur that this problem is in connection with the theory of the corporate bodies. We think the opposite. Especially the English law and doctrine is most convincing that they are not in connection. Because, although the English law as well as the

¹Miskolcz, Hungary.

English doctrine has accepted always the fictitious theory of the corporate bodies, it remains stationary by their penal responsibility. And in the universal literature of law Garraud,² van Hamel,³ and Lilienthal⁴ are of the same point of view, that the theory of the structure of the corporate bodies is not in connection with their penal responsibility.

And we should not forget that legislation grants more and more rights to the corporate bodies, and gives them always greater and greater legal protection. We refer only to the conception of most laws, that corporate bodies can be offended and that they can be the passive object of an injury and libel. Therefore it is absolutely necessary that their duties should be extended also.

The further course of development can end only with this one result, that in future the corporate bodies receive not only more and more rights, but that their duties should be determined also in comparison. And on account of their expanding power, we cannot be contented with their liability to pay damages by private law alone; but as their power often injures such interests, which are defended by criminal law, we had to demand their penal responsibility also. Only in this way could we counterbalance the criminality, which is a sequel to the extension of capitalism.

II. The history of the problem Gierke has described in his fundamental work: *Das deutsche Genossenschaftsrecht*.⁵

We will remind our readers only of the fact that in the middle ages the German law especially accepted the penal ability and responsibility of the corporate bodies.

And so did the "ordonnance criminelle" of Louis XIV in 1670—and the law passed in the year IV Vendemaire 10 of the French republic also.

And besides these laws, which are only of historical importance, we refer to some which are valid now. The article 718, no. 13, of the penal code of New York, 1881, and the article 2 of the English Interpretation Act, 1889—52 and 53 Vict. Ch. 63, decree also, that in the construction of every enactment relating to an offense punishable on indictment or on summary conviction the expression "person" includes

²Garraud, *Traité théorique et pratique du droit pénal français*, Paris, 1913, Vol. I, p. 536.

³Van Hamel, *Inleiding tot de studie van het nederlandsche strafrecht*, Haarlem, 1913, p. 199.

⁴*Die Strafbarkeit juristischer Personen, Vergleichende Darstellung des deutschen und ausländischen Strafrechts, Allgemeiner Teil*, Berlin, 1908, Vol. V, p. 97.

⁵Four volumes, appeared Berlin, 1868-1913. See also Mestre: *Les personnes morales et le problème de leur responsabilité pénale*, Paris, 1899.

a body corporate, too. And the commission to codify the criminal law of the United States of America has proposed the same, sec. 458.

And in Algiers the responsibility of the corporate bodies is accepted by a law passed in the year 1874, and the Spanish project of 1884 has planned this also.

III. The first task is to study and inquire into the life of the corporate bodies.

The corporate bodies are juridical beings separated from individuals. Corporate bodies are not the result of human speculation, but they are the product of the social instinct of the human race and are a necessity to modern life. The law regards them as separate juridical beings as well as if they were one single man. And the private and administrative law and the public law also approve of their separate existence.

In consequence of that the corporate bodies have a separate juridical existence, too. They are able to make contracts separately from their members; they can give and take credit. And they have duties and rights which are distinguished from those of their members.

Undoubtedly they can violate their duties outside the domain of criminal law; for example, in that of private law.

But it is a sequel of their nature that their personality reaches only to the borders of their capabilities. Beyond their capabilities lie, for example, the family rights, which are dependent on the existence of a natural person.

A sequel of their separate existence is that they lead a separate life, that they are willing and acting apart from their members.

To prove this, we refer only to the fact that corporate bodies can be summoned before a law court and carry on a lawsuit, not only separately from their members, but also against their members. But in criminal law these questions are not quite settled.

That their willing and acting is often quite different to that of every single member proves in the best manner their existence as separated from the members. For example, if the members pass a resolution by a compromise, every single member is obliged to give way and he cannot exercise his own will, because only by this means it becomes possible to produce a common will and act. In such cases we can see in the best manner the separate will and act of the corporate bodies.

And the separate existence of their will and act produces important differences in comparison with the willing and acting of human beings.

IV. By persons the event of willing takes place in the inward man; and the external world does not observe this connection of events. Whereas by the corporate bodies the situation is quite different. Their willing is settled in the most cases by a common resolution of the members and the external world can observe this course of events. In persons we cannot separate the event of willing from that of acting; while in the corporate bodies it is possible to separate one from the other.

The will of the corporate bodies is the result of the wishes of the members. This common will can be settled unanimously, or by absolute majority. To find the first, one meets with no obstacle.

But quite different is the formation of resolutions by majority, which is the most frequent. This is especially the case if the number of the members is great, and therefore it is very seldom that resolutions are settled unanimously, or even if the number of the members is small, but their manner of thinking is more independent and it would not be so easy to suggest their way of thinking. The formation of resolutions by majority takes place by the help of the principle of majority, and those members who have another opinion remain in minority.

To realize the principle of majority, it is necessary to find the real will of the greater part of the corporate body. This is only possible by calling into existence an organ; for example, the chairman of the general meeting of the members. And only by the juridical regulation of the activity of this organ, the existence of societies and corporate bodies becomes realized and the multitude of members, which were till now unorganized, are guided by themselves.

To give effect to the principle of majority, undoubtedly it would be committing violence against the minority. But everyone has to calculate for that if he enter into a corporate body.

To transform the psychological event, i. e., the single wills of the members into the resolution of the corporate body and to express it, is possible only by the aid of an organ.

But the corporate body needs an organ not only to be able to express its will, but it needs one mostly for the realization and execution of it also.

Whereas a corporate body can express its will only the state manner through an organ, the realization of the will is possible not only by an organ, but also by anyone who is not an organ of the corporate body. Hafter⁶ gives the following striking example, that a society of

⁶Hafter, *Die Delikts—und Straffähigkeit der Personen—verbände*, Berlin, 1903, p. 85.

students of a university brings the resolution to insult such a colleague, whom they all hate, and they hire a very strong railway porter for realizing this resolution.

Naturally it is not excluded that the whole of the members realize the resolution of a corporate body, although this is a very seldom case. Generally an organ who is in constant relation with the corporate body does so.

Undoubtedly the realization of the will would be possible only: either by the whole of the members, or by a few, or by an organ, or by someone who is not even a member of the corporate body.

And we speak of the will and the action of one corporate body not only in that case, when the members have brought such a resolution unanimously or by majority, but even when it is the action of an organ alone.

But the deed of an organ would be looked upon as the deed of the corporate body only in such a case when the persons are acting in their quality as an organ.

We must know that corporate bodies need organs in every case. To express their will in every case they need organs and they could realize their will and act in the most cases only by organs. Although undoubtedly the organs express by acting not only the will of the corporate bodies, but their own will also. In the most cases the organs could not realize along, without the help of the corporate bodies, the act they intend; often the organs have not the instruments and expedients to realize their intentions; for example, if a person has not the capital to carry on usury; or if the person not even knows the real facts which are the basis of a crime, so in that case cited by Hafter the railway porter did not even know the existence of that student whom he had to insult.

To recognize and to know that, it is very important. Because only in this case can we recognize the acts of the corporate bodies and separate them from those of persons. And only in this way can we come to the conclusion that the organs acting for the corporate bodies not only acquire profits and gains for the same, but they enter into engagements; they undertake penal responsibility also.

Therefore only in that case have corporate bodies a real existence, if they have the required organs.

The change of opinions, that corporate bodies had to receive more and more rights, is proved in the best manner by the fact—that is already acknowledged—that corporate bodies are capable to have a

possession, and that they can be the passive subject of an offense and defamation, too.

V. To solve our problem we have to decide two questions. First, if the corporate bodies have a penal ability, and secondly, if their penal responsibility is possible.

The first question is, if near and independent of persons, corporate bodies can bring about such a consequence, which is important from the point of view of criminal law and if persons could realize it without the help of corporate bodies?

Bishop⁷ gives the example that a society brought the resolution to barricade a carriage road and therefore there happened a great misfortune. And such an example we have seen in the case of the students also; without the acting of the corporation or the students this could not have been achieved.

In life such cases happen very often, and then we always have to do with the result of the act of a corporate body and not with that of a person. And we cannot call a person to account for these results, because corporate bodies or societies have caused those events. Often persons, who have acted as an organ, have not even known the real facts or they have not had the instruments with which to realize the crime. So, for example, in the case of the students the railway porter did not even know of the existence of the young man whom he had to insult; and similar is the situation if a corporate body has given the capital to realize a usury. In these cases it would be impossible to commit a crime without the action of the corporate body. In all such cases we see the penal ability of corporate bodies.

Such cases, when we see the separate will and action of corporate bodies, furnish the conviction that they have penal ability also. We do not assert that their penal ability is unlimited as in the case of persons; we state only that corporate bodies can produce such results also, which are of importance from the point of view of criminal law.

In the literature of law we often meet the following opinion: Corporate bodies are created for legal purposes and therefore it is impossible that they could commit crime; their ability is limited by their own legal purpose; if they should bring about such an event, which lies outside their legal purposes, this event would be only an action of those persons who have realized it. But all these who are of this opinion forget that the possibility of acting differs from the ability of acting. The situation is similar to that when we give somebody arms for realizing some noble aim, but he uses them for bad

⁷Bishop, Commentaries on the criminal law, Boston, 1868, Vol. I, p. 289.

and detestable purposes. When a corporate body realizes something which lies outside its legal purposes this action and its result does not cease to exist, and that is the case with its crime also.

Therefore we had to accept the criminal ability of the corporate bodies.

VI. But through the decision of the penal ability of the corporate bodies the question of their penal responsibility is not yet settled. For instance, among persons there are also very many whom we cannot bring to account for their deeds. We have to decide the question also, if the responsibility of corporate bodies, which brought about important results from the point of view of criminal law, can take place. We have to study this problem from two points of view. First from the point of criminal politics, and secondly, of that of the dogmatics of criminal law.

1. From the point of view of criminal politics there is only one reason why we are against the penal responsibility of the corporate bodies. By punishing corporate bodies we punish its members also who did not take part in the crime. In case of the penal responsibility such members who did not take part in the crime often indirectly have to suffer punishment, even if they were not yet members of the corporate body at that time, when the crime was realized, or even if they themselves were against committing of the crime.

This objection is quite just. But everyone has to take this possibility into account when entering such a society.

On the other hand, it is necessary to accept the penal responsibility of the corporate bodies, for only in this way can we punish the real author of many crimes, and we are not obliged to punish in the place of the real criminal his instrument, who is often quite innocent, or who often acts only by pressure, under the influence of his employer, namely, the corporate body, which gives him his daily bread. If we do not accept the penal responsibility of the societies, justice too often has to leave the real criminal unpunished.

And they say that corporate bodies receive more and more rights, therefore it is necessary also that their duties are proportioned according to that, and if they have penal ability, they have to abide by the consequences also.

And they say, too, that without the penal responsibility of the corporate bodies it would be quite impossible to defend the state and society against their influence. Especially against such corporate bodies which have very many members and a severe and strict organi-

zation, and against the great economical companies and associations, against the trusts and cartels.

And often it is difficult to examine the persons who have realized the crime as the organs of a corporate body. If we can call corporate bodies to account for such a crime, these difficulties are removed.

Last of all, from the point of view of criminal politics, they say that if we do not accept the penal responsibility of the corporate bodies, though, we need—in order to defend the state and society—other measures against them, namely, measures of administrative law. Their nature and the manner of their application would be much more satisfactory if they were of the nature of criminal law, and if their use took place under guarantee of the criminal procedure, and the parties were called before justice and examined. But the citation of the corporate bodies before a law court makes difficulties.

2. On the other side the existence of the so-called secondary conditions of punishableness (*Äussere Bedingungen der Strafbarkeit*) is also a reason for accepting the penal responsibility of the corporate bodies. In the case of some delicts, as, for example in those of fraudulent and negligent bankruptcy, the punishableness depends upon the realization of the opening of the bankruptcy proceedings.⁸ Only if those secondary conditions of punishableness are realized is crime liable to punishment. But if we do not accept the penal responsibility of the corporate bodies, it can often happen that the bankruptcy proceedings are opened against a corporate body, and on the other hand criminal proceedings should be taken against persons. If the law does not comprehend particular dispositions, so the person must be discharged, for the bankruptcy proceedings were not opened against him, but against the corporate body; and both criminals, the corporate body as well as the person, get off without being punished.

From the dogmatic point of view the problem of guilt still gives difficulties.

The criminal law of today is founded on the principle of guiltiness. And so arises the question, is it possible to determine the guilt of a corporate body? If they have apperception, separated from persons? And it is also said that the disposals of laws are addressed only to persons and not to the corporate bodies, too.

We do not doubt that the disposals of laws, those of private law as well as those of criminal law, are addressed to the corporate bodies as well as to the natural persons. If it were not so, the order of states and legal security would be endangered.

⁸See for example: German regulation concerning insolvency of the years of 1877 and 1898, art. 239-241—Hungarian penal code of 1878, art. 414-416.

But as regards the problem of guiltiness we have doubts also.

And they say, too, that it would be quite impossible to find such means of punishment which will strike the corporate bodies themselves, and that the effect and consequences will not be personal. But this objection is quite unfounded. The technics of the means of punishment is so developed now that we shall certainly find suitable ones also. In the case of persons the most means of punishment will have also some effect upon the family of the misdemeanant. Similar is the situation in the case of the corporate bodies; the means of punishment which we have used will have some indirect effect upon their members, too. But this is such a drawback which we cannot avoid by persons either. If we would choose suitable means of punishment against the corporate bodies, this drawback will not be greater than by persons.

3. Before the definite solution of the problem of the responsibility of the corporate bodies, we have to refer to the opinions of some, as, for example, of van Hamel,⁹ who, although they accept their penal responsibility, still doubt that it would be possible to determine their guilt; they say that corporate bodies are destitute of psychological abilities.

Although we have no doubt that corporate bodies have penal ability, we are of the opinion that it is impossible to solve this problem in a brief manner.

Even in the law of such countries which accept their penal responsibility—for example, the English-American law—the solution of the problem of their guilt is not quite satisfactory.

Hafter¹⁰ has lately, in contrast with his earlier opinion, further developed this idea, which van Hamel foresaw first, and which later on Kohler¹¹ and Exner¹² have mentioned briefly.

Only in this way do we also see the possibility to solve this problem.

The doctrine of the criminal law of today knows, beside punishment, a long series of other criminal measures, which could be employed without determination of guilt and without ethic disapproval, which corporate bodies are not affected by. These measures can be employed if the dangerousness of the misdemeanant is determined, which is evident by his offense.

We think that it is only possible to solve the problem of the penal

⁹Van Hamel, *Op. cit.* p. 199.

¹⁰Hafter, *Strafrechtlicher Patentschutz gegenüber Aktiengesellschaften*, Zürich, 1919, p. 33.

¹¹Kohler, *Straffähigkeit der juristischen Personen*, *Goldmanns Archiv*, vol. 64, p. 500.

¹²Exner, *Die Theorie der Sicherungsmittel*, Berlin, 1914, p. 53.

responsibility of the corporate bodies by the employment of measures of security. In this way we shall bridge over these difficulties which arise in consequence of that, that corporate bodies are destitute of apperception and psychological moments. Those which, from the point of view of criminal law as regards persons, we qualify with the expressions of "guilt" and "guiltiness."

We think that only in this way is it possible to solve in a suitable manner the problem of the penal responsibility of corporate bodies.

VII. By the further development of the penal law of the corporate bodies our first task is to designate those delicts which corporate bodies can commit. Just as we are convinced that corporate bodies have penal ability, we are also convinced that their penal ability is limited. As the author of the crime they can realize only such delicts, which lie not in the most personal sphere of human beings.

But, on the other hand, it would be a great mistake to think that corporate bodies cannot take part in such delicts which man can commit only in his own most personal sphere. In such countries where marriage before the registrar is yet a young institution and where clerical circles were against it, it was necessary to punish the agitation against the institution of marriage before a registrar; so, for example, the Hungarian matrimonial law of the year 1894, in the article 123, punishes also such offenses. And it is also possible for a corporate body to take part in such an agitation.

To circumscribe in such manner the delicts of the corporate bodies makes no difficulties, but we can never determine absolutely their sphere.

In the literature which treats of the penal responsibility of corporate bodies we find often the opinion that only such a corporate body can realize a delict, whose ability is acknowledged in the sphere of private, administrative and other laws. This is a mistaking the liberty of acting for the ability of acting. Gusztav Schwarz¹³ says, very properly, that if it were so, we should privilege the most dangerous secret societies, the maffias and societies of anarchists, which would never obtain personality.

And it is not necessary that the organs who act for the corporate bodies should remain in their legal and regulated sphere of action; if we make such a condition, a delict of a corporate body could never be realized. It is a sequel of that principle that corporate bodies can realize such actions also which lie outside their legal purposes; if they have the power, they can commit such offenses which naturally lie beyond their legal purposes; therefore the organs act for the corporate

¹³Schwarz, A jogi személy magyarázata, Budapest, 1907, p. 107.

bodies also when they exceed their legal and regulated sphere of action. But naturally the organs must act in the sphere of the vital functions of corporate bodies themselves. This, for example, would not be the case if the manservant of a gambling club turned the key on one of the visitors whom he disliked because he had never received any tips from him, which deed did not take place in the sphere of the vital functions of this corporate body.

VIII. And the measures which can be used against corporate bodies we have to treat with from two points of view.

1. The result of our discussion was that against corporate bodies only measures of precaution can be employed.

The employment of measures of precaution depend upon the existence of some conditions. First, that the misdemeanor is dangerous to the state and to society. And secondly, that special prevention is indispensable to him. All these conditions exist in the case of a misdemeanor of a corporate body. But those conditions are missing which are indispensable for the employment of punishments, namely, the guilt of the misdemeanor, and also the possibility of moral disapproval. Therefore the only one way for solving the problem of the penal responsibility of corporate bodies is to employ measures of precaution against them.

But among the measures of precaution we can employ only those which are suitable to the nature of corporate bodies; which are really effectual against the corporate bodies themselves and not against their members; and these measures must graduate so that in every case we can find such a one which is in proportion with the gravity and the circumstances of the concrete case.

Especially one attribute is of great importance; namely, that the measures be personal; that they be effectual only against the corporate body itself. To attain an absolute personality of the measures would be quite impossible; indirectly the members will feel in every case the sequels of the measures, but to a certain degree it would be possible to make the measures personal.

And for this purpose those procedures are planned by which it becomes possible to free the innocent members from the consequences of measures employed against the corporate body. But all those attempts were unsuccessful; they paralyze the effect of the measures themselves.

2. These measures which can be employed against corporate bodies we will only enumerate; they are dissolution of a corporate body, suspension of their activity for a certain time, restriction of the

sphere of their action, deprivation of their ability in the sphere beyond the criminal law, surety for good behavior, confiscation, ademption of privileges, publication of the sentence, the order to the corporate body that they have to dismiss persons from their service as organs, and lastly, to put the corporate body under police supervision.

Although the employment of fines would be very suitable, especially against such companies which represent concentrations of capitals, and which would feel those heavy fines very keenly, it is not possible to levy fines on corporate bodies, though it is as a rule impossible to employ punishments. But we think that to a certain degree the surety for good behavior will stand instead of fines.

IX. By executing the will of the corporate bodies in the most cases persons take part who express on these occasions their personal will and actions also. Although the actions of the corporate bodies exist quite separately from those of the organs, the actions of these individuals are not consumed. And in the most cases it would be necessary to determine the guilt of these individuals, too.

The norms of complicity are in such cases decisive.

And these rules will complete the penalization of the co-operation in a forbidden society.

X. The penal responsibility of the corporate bodies is one of the most important problems of the penal law of the future. The enormous development in economical life and the rapid growth of the number of the concentrations of capital demands the solution of this problem.

Lastly we will refer to two circumstances:

The demand for the penal responsibility has no tendency against capitalism. Even in the most capitalistic countries, in England and in the State of New York, they have in a like manner accepted the penal responsibility of corporate bodies, which does not enervate capitalism, but it only leads capitalism in the right way.

And by the solution of this problem we must not leave out of account the practical points of view. We can only solve this difficult problem suitably if we do justice to the theoretical points of view as well as to those of life.