ALBIN ESER
FELIX RETTENMAIER

Criminality of organizations: lessons from domestic law
- a comparative perspective

Criminality of organizations: lessons from domestic law – a comparative perspective

ALBIN ESER*

IN COOPERATION WITH
FELIX RETTENMAIER**

I. Introduction

As very simply and decisively stated by Lord Holt in an anonymous case of 1701, over many centuries it was common belief that ‘a corporation is not indictable, but the particular members of it are’.¹

Nowadays, when dealing with the criminal responsibility of organizations, that statement cannot be upheld any more.² In fact, as already called for at the outset of the last century by one of the then leading German-Austrian criminal law professors, Franz von Liszt,³ criminal responsibility for legal and collective entities has been widely achieved, though only to varying degrees and in different forms.

In most European countries the national legislatures have created possibilities to hold legal and collective entities criminally responsible. In so far, one can witness an approximation to the Anglo-American

* Professor Dr. Dr. h. c. mult., M. C. J., Director Emeritus of the Max-Planck-Institute for Foreign and International Criminal Law, Freiburg, Germany, Former Judge at the International Criminal Tribunal for the Former Yugoslavia in The Hague.

** Lawyer with Knierim & Kollegen Rechtsanwälte, Mainz, Germany, Former Research Fellow at the Max-Planck-Institute for Foreign and International Criminal Law, Freiburg, Germany.

¹ Cited by J. C. Coffee Jr, ‘Corporate criminal liability: an introduction and comparative survey’, in A. Eser, G. Heine and B. Huber (eds.), *Criminal Responsibility of Legal and Collective Entities* (edition iuscrim, Freiburg 1999), p. 13.

² G. Britz, ‘Rechtsfolgen gegen das Unternehmen’, in K. Volk (ed.), *Verteidigung in Wirtschafts- und Steuerstrafsachen* (Verlag C. H. Beck, Munich 2006), p. 152 with reference to G. Eidam, ‘Die Verbandsgeldbuße des § 30 Abs 4 OWiG – eine Bestandsaufnahme’ (2003) wistra 448.

³ Cf. R. Scholz, ‘Strafbarkeit juristischer Personen?’ (2000) ZRP 435, with reference to F. von Liszt, *Lehrbuch des Deutschen Strafrechts* (18th edn., Guttentag, Berlin 1911), p. 128.

jurisdictions, which have known a form of 'corporate criminal liability' since the beginning of the last century.⁴

With introducing criminal responsibility of legal and collective entities, many legislatures of the large industrial nations paid tribute to the ever increasing economic development followed by an increase of 'corporate crimes'.⁵ At present, hardly a day passes without media reports of criminal offences committed by enterprises and their executive personnel.

There is no doubt that many legislatures are both aware of this criminal conduct and determined to fight this by new legal measures and sanctions. It is, however, equally true that the legal and procedural problems involved are still far from having been solved in a satisfying and uniform manner. Instead of offering an all-encompassing solution, which would not be possible here anyhow, we will reflect on some comparative lessons that can be drawn from the various legislative efforts undertaken in the past.

We will proceed in four steps. First, by offering an empirical typology, we will illustrate and organize different ways and degrees of organisational formats in which crimes can be committed (section II). Second, we will provide an overview of the main approaches and types of legislation in this field (section III). Third, as there remain countries sceptical of direct punishment of juristic persons, we will present some of the principal arguments pro and contra. For this purpose, we will focus on the German perspective, since the legal issues have been most intensely debated in Germany (section IV). Finally, we will propose a new approach to collective criminal liability (section V).

II. Empirical typology of criminal responsibility – normative classifications and transgressions

When speaking of 'criminality of organizations', everybody supposedly knows what is meant by this terminology. At a closer look, however, it is much less clear which type of crimes committed by or within an organizational structure and of what form and degree shall be covered. Should any cooperation of a certain number of individuals suffice? Should some sort of organizational network be required? Or should only immediate corporate criminality in terms of illegal acts of legal persons or similar collective entities be comprised? Since one can never be sure, when looking at the relevant literature, what people have in mind when they

⁴ Scholz (n. 3) 435.

⁵ Cf. E. von Bubnoff, 'Ein eigenständiges Verbandssanktionsrecht' (2004) ZEuS 449, speaking of complex and wide-ranging phenomena of criminal activity.

speak of organized crime, of criminality of organizations or of collective responsibility, it seems helpful to identify certain steps within the continuum in which crimes can be committed by a multiplicity of persons. This continuum may begin with parallel action taken independantly beside each other, run through various forms of participation and organization and end in collective action. Different normative-legal formulas apply to each of these stages.

At least three stages can be distinguished in this continuum, as follows.

*1. Various individuals in parallel, but independent
commission of a crime (group 1)*

Various individuals may commit a crime in parallel, but independently of one another. This is the case when, for instance, a bank account is electronically invaded and plundered by different hackers at the same time who may or may not know of each other but who, at any rate, do not cooperate in any form of 'participation' in legal terms.

This would be a clear case of individual responsibility: although the crime is committed in parallel time and way and by more than one person, each individual will be dealt with by the 'classical' norms of single perpetratorship.

2. Cooperative criminality (group 2)

Acts of cooperative criminality fall into a second group. Although this type of criminality has some sort of cooperation between various individuals in common, this connection may appear – and correspondingly be legally dealt with – in at least three different forms:

- (a) The most intensive mode of cooperation exists in 'co-perpetration'. This is, for instance, the case where two individuals jointly rob a bank (group 2a).
- (b) Less closely connected, but still in some sort of cooperation that, yet, does not amount to 'co-perpetratorship', criminal cooperation may exist in terms of 'participation'. This is the case where an individual is involved into the crime of another individual (the main perpetrator) as instigator or aider and abettor, as, for instance, when the participant is watching the scene while the main perpetrator is robbing the bank (group 2b).

- (c) Finally, more or less tightly knit, cooperative criminality may occur in the form of some organizational network. An example would be the cooperation among drug producers, traffickers and dealers with a bank employee for money laundering (group 2c).

With regard to these different modes of cooperative criminality, the legal treatment in the various jurisdictions is much less homogeneous than in the case of parallel individual responsibility (group 1). In fact, not even the classical distinction of co-perpetration (group 2a) and participation (group 2b) is universally recognized. In international criminal justice, the new figure of 'joint criminal enterprise' complicates matters even further.⁶

Not surprisingly, national divergences go even further when it comes to organized crime in form of criminal networks (group 2c): whereas most countries still rely on the traditional rules of perpetration and participation, other countries, such as Germany, explicitly incriminate the 'formation of a criminal organization' and the 'formation of a terrorist organization' with special provisions.⁷ This last form of organized cooperative criminality, however, still needs to be distinguished from an even higher level of supra-individual criminality.

3. *'Collective criminality' of organizations in terms of legal entities (group 3)*

At this third stage, it is not, or at least not only, the responsibility of the natural persons involved in a crime that is at stake, but rather the own direct liability of the collective entity on whose behalf or for whose benefit the crime is committed. Again, the criminal involvement of the legal entity may result from different purposes or causes. Just to mention two varieties:

- (a) in the less serious mode, the legal entity may, as a rule, act in accordance with the law and is merely occasionally abused by agents or employees for the commission of crimes (group 3a); or
- (b) in the more serious version, the legal entity has been established for the very purpose of committing crimes (group 3b).⁸

⁶ See H. van der Wilt, 'Joint criminal enterprise and functional perpetration', this volume, Chapter 7 and E. van Sliedregt, 'System criminality at the ICTY', this volume, Chapter 8.

⁷ Section 129 and section 129a German Penal Code.

⁸ Cf. A. Eser, 'Comparative observations' in Eser, Heine and Huber (n. 1) 364–5.

4. *Criminality of organizations as distinct from the other forms of crimes committed by a multiplicity of individuals*

Although a multiplicity of persons is involved in all of the modes of criminality mentioned above, differences arise with regard to certain legally relevant features.

First, whereas the parallel commission of a crime by several persons (group 1) can be handled with the same criteria of criminal responsibility that apply to any normal case of 'sole' perpetratorship, cooperative commission of a crime (group 2) may require additional rules for attributing the acts of one co-perpetrator or participant to the others.

Second, while in these cases of classical cooperative perpetration (group 2a) and participation (group 2b) the core of wrongdoing still lies in the finally procured crime (as, for instance, a joint tax fraud by a couple), in the case of the 'formation of a criminal organization' (group 2c) the focus of wrongdoing shifts from the eventually committed crime to the formation of or participation in the illegal organization: as, for instance, in the case that a network of several intermediaries is set up for money laundering of illegal profits gained by drug dealing. Even if in such a setting it never comes to a successful money laundering and, thus, the intended main crime fails, the formation of the criminal organization as such and, thus, the 'front ground' of the true crime is already considered dangerous enough to be penalized as a wrongdoing of its own.

Third, whereas the 'criminal organization' the formation of which is prohibited (group 2c) does not have to be a legal entity but can be any organizational conjunction of a number of at least three persons following a common purpose intended for a certain duration,⁹ a new dimension is reached when the particular organization is formed as a legal or equivalent collective entity (group 3). With regard to these – and only these – organizations, the question arises whether they should be held criminally responsible themselves – in addition to or even instead of the individuals acting on their behalf.

5. *The grey zone between 'organized crime' and 'criminality of organizations'*

What does this typology imply for the relationship between 'organized crime' and 'criminality of organizations'?

⁹ For more details with regard to section 129 German Penal Code, see T. Lenckner and D. Steinberg-Lieben, in A. Schönke, H. Schröder, T. Lenckner *et al.*, *Strafgesetzbuch* (27th ed., C. H. Beck, Munich 2006) § 129, margin no. 4, 1278.

If we understand 'organized crime', as it was defined by the European Commission, as 'two or more persons' participation in the same criminal scheme for the purpose of obtaining power and profits, for a prolonged or indefinite period of time, each being responsible for specific tasks within the organization',¹⁰ then the natural individuals involved can be held responsible for co-perpetration of, or participation in, the actual crimes committed, or, if the main crime was not completed, for the 'formation of a criminal organization'.¹¹ On the other hand, the criminal organization as such can be held responsible only if it fulfils certain criteria as, in particular, the requirements of a legal entity.

If this is the case, a further distinction is appropriate: On the one hand, a principally law-abiding corporation (group 3a) on whose behalf merely occasionally some illegal profits have been made, can, if at all, be held responsible only for the accomplished crime (such as, for instance, tax evasion). On the other hand, in case of a corporation purposefully founded for illegal activities (group 3b), criminal responsibility would not only comprise the individual perpetration and/or participation of the individuals/agents involved and the eventual attribution to the legal entity, but also the fore-field to the 'formation of a criminal organization'. In this situation, 'organized crime' and 'criminality of organization' would overlap. At any rate, this analysis suggests to keep in mind that the scope of 'criminality of organizations' is much more complex and broader than commonly expected.

III. Development of criminal responsibility of legal, corporate or otherwise collective entities in Europe

In this section, we will focus on the own criminal liability of organizations in terms of legal entities, as distinct from the individual responsibility of natural persons who act on behalf or for the benefit of the 'juristic person'.

With regard to terminology, however, we have the problem that different countries use different concepts and terms when declaring certain organizations criminally liable. In order to be as open and neutral as possible, the terms 'juristic person' and 'legal/corporate/collective

¹⁰ Kriterien des K.4-Ausschusses, Beilage C zur Ausarbeitung einer gemeinsamen Ordnung für die Sammlung und systematische Analyse von Meldungen über international organisierte Kriminalität, Brüssel (28 February 1995), cited according to W. Gropp and B. Huber (eds.), *Rechtliche Initiativen gegen organisierte Kriminalität* (edition iuscrim, Freiburg 2001), p. 8.

¹¹ Provided, of course, that such a prohibition exists in the relevant country.

entities' equally apply to organisms which enjoy a certain independence from their members, organs or other agents and are thus to a certain degree vested with legally acknowledged rights and duties in legal affairs.

Before addressing the various models by which the acts or omissions of individuals may be attributed to a juristic person, it appears appropriate to present a short survey – with particular focus upon Europe – of the various countries which meanwhile have introduced some sort of criminal responsibility of legal entities.¹²

Although the recommendation of the Council of Europe for 'liability of enterprises for offences'¹³ can be understood as an impetus for establishing corporate criminal responsibility, so far different ways have been pursued to achieve that end. While some countries locate criminal responsibility of legal entities within 'core' criminal law or other countries prefer quasi-criminal liability in terms of 'regulatory' or 'administrative offences', a growing number of countries is turning to a new model of 'collective liability *sui generis*'.

1. Regulations in genuine criminal law

Though notwithstanding certain variations in detail, most European countries have introduced criminal liability of legal entities or corporations in terms of criminal offences. This has been – in chronological sequence – the case with Great Britain (middle of the last century), Ireland (middle of the last century), Netherlands (1951), Norway (1991), Iceland (1993), France (1994), Finland (1995), Denmark (1996), Slovenia (1996), Belgium (1999), Switzerland (2003) and Turkey 2004, limited to safety measures

The same course is taken outside of Europe, in particular, by the USA and Japan. In this connection notice must also be taken of Sweden (1986), Spain (1995) and Romania (2006). In these states, the regulations, however, differ from those of the aforementioned group by providing sanctions

¹² For a comprehensive comparative survey with more details and references than can be given here, and with partly different classifications, cf. the country reports in: Eser, Heine and Huber (n. 1); furthermore, cf. G. Heine, 'Unternehmen, Strafrecht und europäische Entwicklungen', in (2000) 23/24 ÖJZ 871–881; A. Quante, *Sanktionsmöglichkeiten gegen juristische Personen und Personenvereinigungen* (Lang, Bern 2005), p. 175 *et seq.* For a comparative survey on 'organized crimes' as distinct from 'criminality of organizations' in question here (section II. 5) cf. the country reports in W. Gropp and A. Sinn (eds.), *Organisierte Kriminalität und kriminelle Organisationen* (Nomos, Baden-Baden 2006).

¹³ See Gropp and Huber (n. 10) 8.

against juristic persons and corporations merely in terms of 'additional consequences' *sui generis*.¹⁴

2. *Regulatory offences and administrative sanctions*

Countries which, for principal reasons, consider genuine punishment not feasible against non-natural persons, try to proceed on a lower level by treating corporate liability in terms of 'regulatory offences' (*Ordnungswidrigkeitenrecht*), sanctioned with non-punitive fines ('*Geldbuße*'), as in the case of Germany (§ 30 OWiG) and Portugal (1995), or in terms of administrative liability, as in Poland (2003), and in a similar way for the area of economy and competition in Luxemburg (1993) and Greece (2000).

These models, in spite of official terminology, may in substance still be considered 'quasi-criminal'.

3. *Collective liability sui generis*

Different from the traditional approach of merely modifying or expanding ordinary criminal or administrative sanctions to cover offences by or on behalf of collective entities, some countries chose to try out new avenues by criminalizing offences of collective entities by a regulation of its own, both by special provisions for substantive criminal law and for procedure. This is the case with Croatia, Italy (2001) and Austria (2006).¹⁵

4. *Retainment of traditional individual criminal responsibility*

Since quite a lot of countries which, in one way or the other, have adopted some sort of liability of legal entities have already been mentioned, there seem not many countries left which would restrict punitive sanctions to natural persons. Provided that the sources which have been available at the time being are still valid, the following countries within the European Union have not been reported as having introduced some sort of collective criminal responsibility: Cyprus, Estonia, Hungary, Malta and Slovakia.

¹⁴ See G. Heine, 'Kollektive Verantwortlichkeit als neue Aufgabe im Spiegel der aktuellen europäischen Entwicklung', in D. Dölling (ed.), *Jus humanum. Festschrift für Ernst-Joachim Lampe* (Duncker & Humblot, Berlin 2003), p. 579.

¹⁵ Heine (n. 14) 580.

Whether two other countries which had prepared drafts, namely Czech Republic (1997) and Lithuania (1996), have finalized the legislation, was not possible to ascertain.

IV. Rationales and models of collective criminal liability

Although there are thus rather few countries left still trying to fight corporate crime exclusively with the instruments of individual criminal responsibility, the picture of a vast majority of 'progressive' countries with some sort of collective criminal liability should not make us overlook important differences with regard to the underlying rationale and the respective models of collective liability.

1. *Rationales to legitimize criminal liability of 'juristic persons'*

(a) 'Representation theories'

Still most common is the proposition that the conduct of organs or other representatives of a juristic person can be attributed to it. In this way, by being represented and acted for by an agent, the legal entity is considered as having acted itself.

This approach which, for example, is prevalent in Belgium, Finland, France, Germany, Iceland, Croatia and – in combination with aspects of 'genuine' liability of the collective entity – in Austria,¹⁶ results in a complete equation of the individual with the collective criminal responsibility. As a consequence of this 'anthropomorphic model',¹⁷ the responsibility of the legal person is doomed to fail when and where responsibility of a natural person cannot be proven.

(b) 'Genuine' recourse to the juristic person

Other jurisdictions, such as Great Britain and Switzerland, try to establish criminal liability of the juristic person by going back to the true 'origin' of the corporate offence (in German termed as *originäres Haftungsmodell*). In so doing, this theory rids itself completely from the requirement of the act of a natural person.

¹⁶ Cf. section 5 to § 3 section 3 n. 1 and 2 *Verbandsverantwortlichkeitsgesetz* (Bundesgesetzblatt für die Republik Österreich, 23 December 2005) 1–10.

¹⁷ As it was termed by Heine (n. 14) 585.

As a consequence, Switzerland does not even allow representatives of an enterprise to function as defendant in the same proceedings.¹⁸ As criminal liability primarily rests with the enterprise itself, it suffices to prove that the legal norm has been violated, that this violation is attributable to the economic activity of the enterprise, and that it results from malfunctioning organization of the enterprise.

(c) Risk-based liability

While the aforementioned foundation of criminal liability still rests on proof of some sort of mismanagement, some states – such as Denmark, Sweden and Poland – have gone a step further by treating the juristic person *per se* as a source of risk. In consequence of this *Veranlassungshaftung* (as it is called in German), the legal entity is held responsible if an offence occurs in the course of establishing or running the organization.¹⁹ As a result, any violation of a criminal provision may trigger liability of the entity.

2. Basic deficiencies of ‘juristic persons’

Although each of the aforementioned rationales lend some support to collective liability, juristic persons are alleged to suffer from deficiencies which seem to shield them from criminal responsibility. Objections of this sort are raised especially by those countries which are reluctant to impose genuine criminal sanctions on non-natural persons.

As vehemently discussed, particularly in Germany, juristic persons allegedly lack at least two capabilities that are considered fundamental to hold them criminally liable on their own.

The first is the lack of capacity to act. If criminal wrongdoing is based on an act the punishment is supposed to react to, criminal liability requires that an act was committed. As a juristic person has neither hands nor a mouth, it is unable to act by its own. The rights and duties it may be vested with must be exercised by natural persons acting as organs or agents.

The second is the lack of culpability. Even if the lack of a capacity to act may be substituted by natural persons as representatives, a juristic person will hardly meet a second basic requirement of criminal responsibility: the

¹⁸ M. Pieth, ‘Strafverfahren gegen das Unternehmen’, in J. Arnold *et al.* (eds.), *Menschengerechtes Strafrecht, Festschrift für Albin Eser zum 70. Geburtstag* (C. H. Beck, Munich 2005), p. 609.

¹⁹ For details see Heine (n. 14) 586.

principle of culpability.²⁰ It requires that the perpetrator can be socially and morally blamed for his wrongdoing as he decided to violate the law in spite of his capability to comply with it.²¹ Culpability so construed may rest with the individual actor, but not with the juristic person he or she is acting for.

Consequently, as argued by critics of immediate criminal responsibility of legal entities, since non-natural persons lack the 'capacity of acting differently' – in terms of a choice between law-abiding or norm-deviant conduct – a juristic person cannot be the addressee of criminal norms and commands and, thus, cannot be held criminally responsible on its own.²²

This insight, however, is not the end of the story. Different efforts have been undertaken to overcome these deficiencies.

3. *Basic models of collective criminal responsibility*

Even if it is generally accepted that juristic persons and similar collective entities are, as such, neither capable of acting in criminal terms nor of doing so in culpable manner, there remain basically three options to sanction collective entities for criminal conduct.

(a) 'Imputation model'

The model that still rather closely keeps in line with traditional propositions of individual criminal responsibility, in particular by way of engaging aspects of the earlier mentioned 'representation theory', would impute the acts of natural persons who are authorized to represent the corporation (as, in particular, members of the board of directors or other leading executives) to the legal entity as such. This way, the natural person acting on behalf of the legal entity also serves as a basis for culpability.²³ The required connection between the natural actor and the juristic person, without which the imputation from one to the other would be hardly

²⁰ Cf. K. Tiedemann, 'Die "Bebußung" von Unternehmen nach dem 2. Gesetz zur Bekämpfung der Wirtschaftskriminalität' (1988) NJW 1172.

²¹ Cf. J. Peglau, 'Unbeantwortete Fragen der Strafbarkeit von Personenverbänden' (2001) ZRP 407.

²² Cf., in particular, G. Dannecker, 'Kollektive Verantwortlichkeit als neue Aufgabe im Spiegel der aktuellen europäischen Entwicklung' (2001) GA 109.

²³ Cf. J. Peglau, 'Bericht an die Kommission zur Reform des strafrechtlichen Sanktionssystems', in M. Hettinger (ed.), *Reform des Sanktionsrechts* (Berliner Wissenschafts-Verlag, Berlin 2002), p. 20.

justified, may be found in the legal duty addressed to the legal entity and breached by its representatives.

Obviously, if the legal entity is to be sanctioned, the 'classical' criminal penalties need certain modifications and adjustments. For, as rightly noticed by Heine, 'the absence of a human subject to whom individual responsibility can be assigned seems to have reduced the range of options in sanctioning enterprises',²⁴ or, as drastically phrased by Coffee: 'No soul to damn, no body to kick.'²⁵ At bottom, these phrases merely acknowledge that legal or collective entities cannot be imprisoned. Nonetheless, corporate entities used to be susceptible to the prospect of severe losses or denial of rights and privileges, be it in form of monetary fines or foreclosure from markets. Thus, an impressive range of sanctions could easily be developed.

(b) 'Evasive model'

Other ways to avoid conflicting with or deviating from the principle of culpability might be sought in inventing a new sanctioning system that would abandon the traditional requirements of culpability in favour of a lesser degree of personal moral reproachability.

This approach could, without requiring a special sanctioning scheme of its own, also be integrated into a general category of quasi-criminal 'regulatory offences' as has been done in Germany. As it would be restricted to 'regulatory offences', however, this scheme could not comprise more serious crimes (as, for instance manslaughter caused by rotten food), which may have been committed on behalf of the cooperation by its agent.

(c) 'System contingent model'

The models considered so far, remain more or less focused on the action of a natural agent. In the alternative, one might also consider a categorically new approach. As a first step, one would have to leave the natural actor behind and to found the liability of a corporation upon the wrongdoing that was caused by, or possibly due to, deficiencies

²⁴ G. Heine, 'Sanctions in the field of corporate criminal liability', in Eser, Heine and Huber (n. 1) 247.

²⁵ With reference to the then Lord Chancellor of England, Edward, First Baron Thurlow (1731–1806), see J. C. Coffee Jr "No soul to damn: no body to kick": an unsensationalized inquiry into the problem of corporate punishment' (1981) 79 *Michigan Law Review* 386.

in the corporate system.²⁶ In this concept, the act of a natural person becomes more or less irrelevant; instead the focus is rather shifted to the legal entity that is held liable for its defective organization or system and blamed for not meeting ordinary social-ethical standards. Thus, the fault of the collective system can be seen in a sort of 'business management culpability' (*Betriebsführungsschuld*). Consequently, the core of the wrongdoing lies in the neglect of the organizational duty of ordinary care in the performance of its affairs and in the prevention of operational risks. This means that, rather than on (proof of) certain individual acts, liability of a legal entity is primarily based on defaults in its organizational system.

In this way, personal governance of individual actors is replaced by functional-systemic governance of the organization.²⁷

V. Plea for a complementary collective and individual criminal liability *sui generis*

When comparing and evaluating the various rationales and models of criminal responsibility of legal and similar collective entities, none of them is truly convincing. The following observations may suffice to explain this conclusion.

First, the 'imputation model' and, to the same effect, all 'evasive' models requiring that an act of a natural person be attributed to the legal entity, results in impunity if it cannot be determined what natural person behaved illegally and in which way it did so. In short, imputation of liability to a legal entity is always exposed to failure if a certain individual act may not be provable.

These loopholes in holding legal entities criminally liable are widened if liability of legal entities presupposes proof of an intentional act of a formal representative when, in fact, merely negligence or only misconduct of an employee without any representative powers can be proven.

²⁶ See, in particular, Dannecker (n. 22) 111.

²⁷ This proposition is by no means unknown to the German legal system; in particular in the so-called 'Politbüro-proceedings' (*Politbüroprozesse*) the Federal Supreme Court was prepared to accept the principle of 'organizational governance' to be applied in corporate-economic cases; see G. Heine, 'Modelle originär (straf-) rechtlicher Verantwortlichkeit von Unternehmen', in Hettinger (n. 23) Band 3: Verbandsstrafe (2002) 123 with reference to Entscheidungen des Bundesgerichtshofs in Strafsachen, BGHSt 40 [1995] 211ss (236) and 307ss (316), respectively.

Furthermore, if these types of models are to be applied in accordance with the principles of 'classical' criminal law, the juristic person's lack of capacity to act and its lack of culpability appear insurmountable hurdles. Similar problems arise on the sanction side: since 'imprisonment' of the juristic person is out of the question, only monetary penalties seem available.

Second, quite a few of these obstacles could be avoided by applying a 'system contingent model', in which the conduct of natural persons becomes more or less irrelevant while the focus is shifted on organizational deficiencies of the corporate system, resulting in a sort of 'business management culpability'.

The high price which may have to be paid for a complete and one-sided shift of emphasis on systemic faults of the collective entity, however, may be the loss of the ability to give due consideration to the possibly uneven weight of the systemic deficiencies and their causes. So it may, in particular, be difficult to differentiate between intentional or merely negligent conduct of the responsible agents.

Furthermore, it appears questionable whether at all, and if so to what degree, natural persons involved in criminal results of the collective disorder should be relieved from own individual responsibility.²⁸

Third, in order to establish immediate liability of the collective entity while maintaining possibly provable individual criminal responsibility of agents, a combination of the 'system contingent model' with the 'imputation model' may appear appropriate. To a certain degree, this option was chosen by the new Austrian 'Law of Responsibility of Collective Entities',²⁹ which came into force on 1 January 2006.

According to this recent legislation, in principle, an association is criminally liable for any crimes committed in its favour or in violation of its duties.

This apparently 'system contingent' approach, however, is combined with, and thereby curbed by, elements of the 'imputation model'. This results from the law distinguishing between 'decision makers' and other employees: whereas offences committed by a decision-maker render the corporation liable *per se*, with regard to other employees the corporation

²⁸ See A. Nollkaemper and H. van der Wilt, 'Conclusions and outlook', this volume, Chapter 15, p. 344.

²⁹ Verbandsverantwortlichkeitsgesetz (VbVG) der Republik Österreich (Bundesgesetzblatt für die Republik Österreich 23 December 2005) 1–10. For details and a critical review, see K. Schmoller, *Strafe ohne Schuld? – Überlegungen zum neuen Österreichischen Verbandsverantwortlichkeitsgesetz*, in G. Dannecker et al. (eds.), *Festschrift für Harro Otto* (Carl Heymanns Verlag, Berlin 2007), pp. 453–68.

will be held liable only if the employees' misconduct was enabled by a negligent omission of a decision-maker in technical, organizational or personal respects.

Consequently, collective liability in Austria still requires proof of some sort of illegal acts or omissions by natural persons and, thus, as do other 'imputation models', runs the risk of collective impunity.

With regard to the sanction side, by simply transforming imprisonment into fines and, thus, in fact only allowing monetary impositions, the weaponry against legal and collective entities remains rather poor.

Fourth, the general conclusion which has to be drawn from the pros and cons of these models is that it seems impossible to find a satisfactory solution of collective criminal responsibility within the structural corsetry of 'classical' criminal law.

If, on the one hand, the collective entity shall be held criminally liable for systemic deficiencies of the corporate organization without requiring proof of individual responsibility of a certain natural person, and if, on the other hand, the natural representatives of the collective entity shall not be relieved of their own individual criminal responsibility (if sufficiently proven), and if it shall still be possible to differentiate by means of an adequate variety of sanctions with regard to the weight and degree of 'business management culpability' and individual responsibility, then this cannot be achieved but by a regulation of 'collective criminal liability *sui generis*'.

VI. Outlook

If a visionary conclusion is permitted, we will have to take an even more fundamental step further if we want to avoid that the structure of traditional individual criminal responsibility is becoming overstretched and, thereby, perverted.

To illustrate this point of view we should recall that, at least in Europe, the concept of criminal responsibility has been developed from the proposition of a single acting perpetrator; from there the same principles of responsibility were expanded to include the cooperative actions of multiple individual persons, and in a further step to comprise non-natural collective entities.

Now, instead of attempting to handle these completely different situations of a single actor, a variety of co-perpetrators and participants, and finally collective entities from the same set of single-individual responsibility, we should try to develop a tripartite scheme of (1) individual,

(2) participatory and (3) collective responsibility in criminal law: by treating each of them according to special rules of their own – as it was already suggested in the subtitle of a European Colloquium on ‘Individual, Participatory and Collective Responsibility’ in 1996.³⁰ This challenge, however, would be no small feat.

³⁰ A. Eser, ‘Eröffnungsansprache’, in A. Eser, B. Huber and K. Cornils (eds.), *Einzelverantwortung und Mitverantwortung im Strafrecht: European Colloquium 1996 on Individual, Participatory and Collective Responsibility in Criminal Law* (edition iuscrim, Freiburg 1998), p. 6 and in Diskussionsbericht 360s.