

Rethinking Corporate Criminal Liability

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Abstract In this chapter, Joachim Vogel reflects on open questions and future research topics in the field of corporate criminal liability. In his view, four areas materialized in which future research on corporate criminal liability might be promising: empirical studies, criminal policy studies, constitutional law studies, and legal studies both in the field of substantive corporate criminal liability and of criminal proceedings against corporate bodies.

1 Introduction

The Third AIDP Symposium for Young Penalists on Corporate Criminal Liability has certainly been a success. Once more, I would like to thank the organizers *Dominik Brodowski* and *Manuel Espinoza* and all the others who contributed to the success.

We have heard many, and manifold, rich and deep contributions which mirror the complexity of the issues at stake here. It is a sheer impossibility to do justice to these contributions in my short concluding remarks. What I would like to do instead is to look at open questions, at future research topics in the field of corporate criminal liability. Indeed, I feel that a major result of our work has been to identify these questions and topics and start the discussion about them.

In my view, four areas materialized in which future research on corporate criminal liability might be promising:

- empirical studies;
- criminal policy studies;
- constitutional law studies; and

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- legal studies both in the field of substantive corporate criminal liability and of criminal proceedings against corporate bodies.

2 Empiricism

Notwithstanding around 70 years of empirical and theoretical research in white collar, corporate and/or occupational crime, it has become clear that we still lack data on corporate criminality as such—in the sense of criminality attributed to corporations: How many corporations are reported with how many offences? Which is the level of crime in which branches of the economy? How many corporations are indicted, convicted, acquitted, sentenced, and which is the rate of settlements or agreements? Which are the typical or predominant offences? Are there certain types of corporations—young or old, small or big, successful or failing—which are more prone to offending than others? Which is the rate of reoffending? Which are the dark figures? Indeed, these are very basic questions very well established in the criminology of individual crime, and we have ample statistical material in the crime and sentencing statistics for individuals. It seems that comparable statistics for corporations do not yet exist, at least not across all countries which recognize corporate criminal liability.

As we have seen this very morning, we are better off with theoretical insights in deviant behavior of and in organizations. The keywords “organizational structure”, “organizational culture” have been discussed, and we have also had eye-opening insights into the psychology and economic analysis of corporate criminal liability. These theoretical insights should guide a rational and evidence-based criminal policy.

3 Criminal Policy

Again and again, we have touched the criminal policy question which should be the public policy or rationale behind corporate criminal liability, particularly in comparison with civil and/or administrative corporate liability on the one hand and managers’ or employees’ individual criminal liability on the other hand. I do not feel that we have already achieved a comprehensive or systematic analysis of public policy. It might be useful to start on settled ground, that is to say the general rational discussion on retribution (“just desert”), rehabilitation, incapacitation etc. Indeed, what we see is a focus on rehabilitation—therefore compliance is such a big topic here, as we have seen yesterday afternoon. But we should also investigate if, how far and why retribution and incapacitation might guide a rational and evidence-based criminal policy concerning corporate criminal liability. Of course, we must keep in mind that criminal policy in that field is inherently intertwined with economic and financial policy—no rational legislator would accept a criminal policy which would destroy, or severely damage, or which would even offend corporations on a large scale. Again, the tendency towards lenient sentences and

settlements or agreements is not irrational. Rather, the keyword “regulated self-regulation”, which has often been mentioned, might well be a key towards a sound criminal policy analysis.

Criminal policy questions of a particular nature arise in the context of international criminal law: Should corporations that aid and abet international crimes be held criminally liable under international criminal law and before the International Criminal Court, and should we recognize “ecocide”—a crime often committed by transnational corporations exploiting natural resources and causing widespread and/or systematic damage to the environment and, consequently, to civil populations—as a fifth international crime? Here, the peculiar features and exigencies of international criminal justice dominate the answer, in particular the everlasting battle between realism and idealism in international law.

4 Constitutional Law

Constitutional law limits criminal justice, and basic principles and guarantees of criminal law and criminal procedure have constitutional and even human rights status. It is very clear that human rights *sensu strictu* do not apply to corporations as such, as they are not human beings but legally recognized entities. Nevertheless, fundamental rights may well apply to corporations if the nature of the respective right allows for that. The tension between non-application of human rights and application of fundamental rights determines the possibility and shape of corporate criminal liability. German constitutional fundamentalists argue that it would violate human dignity to punish without proof of personal guilt which does not exist in a corporation—and therefore they argue that corporate criminal liability would be unconstitutional in Germany. It is the other way round: Because corporations cannot invoke human dignity, it is possible to punish them for attributed or organizational culpability—which would not be possible in human beings. However, basic guarantees such as the principle *nullum crimen, nulla poena sine lege*, the presumption of innocence, the right to a fair and speedy trial and perhaps also the privilege against self-incrimination do apply to corporations—in principle. However, *Dominik Brodowski* has—in my view correctly—pointed out that such guarantees might be modified insofar corporations are concerned because corporate criminal liability is not “core criminal law” but—as Professor *Tiedemann* called it—a “third track” (individual punishment being the “first track” and “core” of criminal law, measures of rehabilitation and incapacitation the “second track”).

5 Criminal Law Proper, and Criminal Procedure

I believe that our symposium has brought to light three basic methodological insights which should lie at the base of future research about corporate criminal liability: Firstly, corporate criminal liability is a new or third track of criminal law

which does not necessarily follow the rules we have developed for the other tracks. Secondly, we should be well aware that the law in the books and the law in practice might largely differ. I believe that Dr. *Moosmayer's* presentation made it very clear that although the German law in the books does not recognize corporate criminal liability, the German law in practice has long passed the threshold towards such a liability. Thirdly, we should keep in mind the interaction between substantive and procedural law, in particular evidence law because the substantive rules of attribution of offences to a corporation may well be influenced by evidentiary standards, and *vice versa*.

As to substantive law, we have seen the major regulatory options but not all of them—so let me shortly recapitulate:

- It is an open and tricky question which entities should be criminally liable, and how we can cope with the question of insolvency, bankruptcy, mergers and acquisitions and other legal successions.
- We have seen the options concerning the question which offences should trigger corporate criminal liability. The rational answer might be: Except offences against the corporation, any offence might qualify if and insofar a compliance responsibility of the corporation can be justified.
- We have also seen the options concerning the question which individuals' criminal conduct should trigger corporate criminal liability. The solutions range from very restrictive ones—only top management qualifies—to very extensive ones—any person acting for the corporation (including third parties) qualifies. However, we have also seen that the problem is deeply interwoven with the question if, and to which extent, we should recognize a compliance defense.
- We have not spoken much about defenses, in particular Dr. *Moosmayer's* proposal to have some sort of “crown-witness rule” under which a corporation that voluntarily comes forward with criminal misconduct will be spared criminal prosecution.
- In the area of sanctions or—speaking more generally—legal consequences, we have seen the tendency to complement traditional financial sanctions (fines) with confiscation, rehabilitation and incapacitation measures—which raises questions of coordination, proportionality and sentencing guidelines. Indeed, a modern and comprehensive set of legal consequences enables us to strive for consensual solutions, settlements or agreements where compliance organization plays an overwhelming role.

As to procedural law, we have discussed the question of a public trial against corporations and, to some extent, the privilege against self-incrimination. Indeed, criminal proceedings against corporations are, as a rule, regrettably under-regulated, also concerning the vital question of evidence transfer between individual and corporate proceedings. I repeat it again: It's procedure, stupid! A possible follow-up to this symposium might focus on proceedings against corporations. And we might take up what has been rightly said concerning transnational investigations and prosecutions against corporations.

Biography

Professor Dr. Joachim Vogel, Professor of Criminal Law, Criminal Procedure and Economic Crimes, University of Munich, Judge at the Higher Regional Court of Appeal Munich (1963–2013). Joachim Vogel died in August 2013 before having the chance to revise the manuscript of his oral presentation on the last day of the Third AIDP Symposium for Young Penalists; therefore, his manuscript is printed here as is.