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Nulla poena sine culpa and corporate personhood*

Zusammenfassung

Im deutschen Strafrecht gibt es (bis jetzt) keine Unternehmensstrafbarkeit. Der Hauptgrund besteht darin, dass eine strafrechtliche Verantwortlichkeit von Unternehmen einem der zentralen Prinzipien des liberalen und verfassungsgemäßen Strafrechts widersprechen würde: *nulla poena sine culpa*. Unternehmen gelten als unfähig, einer Straftat schuldig zu werden (culpa); Schuld wird dabei verstanden als die freiwillige Willensbildung zu unrechtmäßigem Verhalten. Erwachsene Personen ohne ernsthafte kognitive oder motivationale Defizite (wie z.B. schwere psychische Erkrankungen), die unter normalen Umständen handeln, gelten als autonome und damit strafrechtlich verantwortliche Personen. Sie können auf soziale, moralische und rechtliche Normen ansprechen, sie erkennen und verstehen und ihr Handeln danach ausrichten. Daher sind sie in der Lage, die Verletzung von Rechtsnormen zu vermeiden – und wenn sie es gleichwohl nicht tun, dann ist es angemessen, dass Dritte darauf mit Tadel und Zurückweisung reagieren, also mit dem performativen Akt des Verantwortlichmachens für die Normverletzung. Grad und Umfang der Schuld bestimmen im nächsten Schritt die Schwere der strafrechtlichen Reaktion. Unternehmen fallen nicht unter diese Beschreibung eines Menschen mit den Fähigkeiten einer autonomen Person, die sich eines Unrechts schuldig machen könnte. Der Beitrag wird die unter diesem Aspekt vorgebrachten Einwände gegen eine Unternehmensstrafbarkeit genauer untersuchen, um dann verschiedene Konzepte des korporativen Akteurs auf ihre Vereinbarkeit mit der Beschreibung einer autonomen Person hin zu prüfen.

Résumé

La doctrine du droit pénal allemand ne prévoit pas d'incrimination pénale des entreprises. La principale raison à cela est qu'une telle incrimination porterait atteinte à l'un des principes fondamentaux d'un droit pénal libéral et constitutionnel : *nulla poena sine culpa*. Les entreprises sont jugées incapables de se rendre coupables d'un crime (culpa); la culpabilité est ainsi perçue comme une décision volontaire de commettre un acte illégal. Les adultes ne présentant pas de grave manquement de leurs facultés cognitives et motivationnelles (en raison par exemple d'une maladie mentale) et agissant dans des circonstances normales sont considérés comme des individus autonomes. Ils sont sensibles aux normes sociales, morales et juridiques et aptes à les reconnaître et à les comprendre ainsi qu'à adapter leur comportement en fonction. Ils sont capables d'éviter les actions qui violent ces normes et lorsqu'ils ne le font pas, il est normal que les autres

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réagissent par la sanction ou le ressentiment, lesquels constituent l'aspect performatif du fait de les considérer comme coupables. La portée de leur culpabilité détermine dans un second temps celle de la sanction qu'ils méritent. Le droit allemand considère que les entreprises ne répondent pas à la description d'un être humain disposant des facultés d'un individu autonome qui peut se rendre coupable d'une violation de la loi. Cet article examinera de plus près les arguments opposés à l'incrimination des entreprises à l'égard de la signification du terme « coupable », qu'il confrontera au concept juridique de personnification des entreprises afin de se demander si les éléments qui composent cette notion de « coupable » sont plutôt de nature à empêcher ou à permettre son transfert à la personnification des entreprises.

According to German criminal law doctrine, there is no criminal liability of corporations.[1] The main reason is that such a liability would violate one of the fundamental principles of a liberal and constitutional criminal law: *nulla poena sine culpa*. Corporations are considered to be unable to become guilty of a crime (*culpa)*; guilt is thereby understood as a voluntary will formation to unlawful behaviour. Adult human beings without any serious lack of cognitive and motivational capabilities (e.g., because of mental illness) acting under normal circumstances are considered as autonomous persons. They are sensitive to social, moral and legal norms, able to recognize and understand them, and to direct their behaviour according to these norms. They are able to avoid actions which violate the norm – and when they do otherwise, it is appropriate for others to react with censure or resentment, which is the performative aspect of treating him or her as *guilty* of violating the norm. The scope of their guilt determines the scope of deserved punishment in the next step. Corporations are not considered as falling under the description of a human being with the capabilities of an autonomous person who can become guilty of violating the law.

Of course, a liability of corporations does exist in administrative or police law (§ 30 Ordnungswidrigkeitengesetz) where the sanction consists in an administrative fine which could be very severe – even more severe than a financial penalty in criminal law. But a fine is different from criminal punishment, because it does not require "guilt" as a necessary prerequisite, and it is not accompanied by a censure of the person´s criminal act which is punished.[2] The meaning of this kind of sanctions is purely functional as a steering medium for the realization of a certain policy, its aim is purely preventive.

Another argument against corporate criminal liability refers to the kind of punishment which could be considered as an adequate and proportional sanction of criminal behaviour. The question is whether corporations could become a proper subject of criminal punishment.[3] Because it is impossible to put a corporation in jail, the only available alternatives would be financial penalties or acts of public shaming like a "black-list" or

1 For an excellent summary and review of the German law as well as the discussion about corporate criminal responsibility see: Thomas Weigend, *Societas delinquere non potest*? A German Perspective, in: Journal of International Criminal Justice (JICJ) 6, (2008), 927-945, in particular for the discussion about the notion of "guilt", see pp 938-941.

2 For differences between fine and punishment, see: Joel Feinberg, The Expressive Function of Punishment, in: Feinberg, Doing and Deserving (1970), pp 95-118.

3 Weigend (fn. 1), pp 941-942.

putting the corporation under supervision or guardianship, or finally, to dissolve and terminate it. But it remains an open question whether these sanctions can be considered as an equivalent to punishment based on guilt; in particular supervision and guardianship seem to come closer to those kinds of sanctions which are not punishments but preventive measures against dangerous individuals.[4]

On the other hand, German *civil law doctrine* has become famous for inventing conceptual tools to conceive the corporation as a kind of moral person which has its own reality independent of its individual members (*Otto von Gierke´s* "Reale Verbandspersönlichkeit").[5] But although this concept has a great influence in civil law doctrine until now, it was not adopted by the legislation of the German Civil Code in 1900. The civil code considers legal persons like, e.g., certain types of corporations as a legal fiction which is only able to act by an "organ", i.e., an individual who is acting on behalf of the corporation. Although a corporation as a legal person has legal rights and duties, can become a creditor or debtor of a contract, and is protected by tort law against violations of its rights, it has this civil law status as a fiction only, as an artificial point of reference for rights, duties, and imputations.[6] Consequently, von *Gierke*`s doctrinal invention did also not lead German criminal law doctrine to acknowledge a criminal liability of the corporation: *societas delinquere not potest.*

Recent philosophical research in the theory of collective action and collective intentionality does allow for a more elaborated conception of corporate personhood which entails a kind of "we-intention".[7] Under certain circumstances actions and outcomes may be imputed to a collective when it has such a "we-intention". *Pettit* and *List* very recently have demonstrated that it is possible to speak of "group agency" in a way that does not rely on ontological presuppositions of a mysterious unity.[8]

The contribution shall have a closer look to the arguments against corporate liability in relation to the meaning of "guilt" on the one hand, and confront it with the legal concept of corporate personhood in order to ask whether the elements of "guilt" are of a kind which inhibits or permits its transfer to corporate personhood.

1. Conceptions of corporate personhood

The debate about criminal responsibility of corporations almost always starts with considerations about the relevant properties, elements and functions a corporation were in need of in order to become fit for being held responsible in criminal law. When these

4 According to Friedrich Carl von Savigny, corporations are like minors who never become adults („dass sie nie mündig werden"), and therefore are in need of guardianship, i.e., in need of a person who acts for them as a representative, see: System des heutigen römischen Rechts, vol 2, Berlin: Veit u. Comp. (1840), p 352, and 83, 315- 317.

5 See Markus Dubber´s contribution, this volume.

6 See for the German law of corporations: Friedrich Kübler, Gesellschaftsrecht, 5th ed., Heidelberg: C.F.Müller, 1999.

7 Raimo Tuomela/Kaarlo Miller, We-Intentions, in: Philosophical Studies 53 (1988), p. 367-389; John Searle, Making the Social World. The Structure of Human Civilization, Oxford (OUP), 2010, pp 42-60.

8 Philip Pettit and Christian List, Group Agency: The Possibility, Design and Status of Corporate Agents, Oxford 2011.

features of a corporation fulfil the requirements of criminal responsibility, the conclusion is clear that a corporation should also be considered as responsible in criminal law.

The German debate was characterized by an opposition between two prominent authors and their different views: Friedrich Carl von *Savigny* and Otto von *Gierke*. According to Friedrich Carl von *Savigny* who based his considerations on Roman law and its general mistrust in any kind of. According to him, the corporation as a "legal person" is a mere fiction, an artificial entity which has been invented by jurists for legal purposes only.[9] Creating a fictitious legal subject is like providing a tool for persons to extend and enhance the legal powers they have as individual legal subjects. In civil law, its most important legal purpose is the attribution of assets, its artificial legal capability to bear rights like property rights, or to enter into a legal obligation like a contract, if both are related to assets.[10] Hence his definition: a legal person (in civil law) is an artificially assumed subject capable of bearing assets ("ein des Vermögens fähiges künstlich angenommenes Subject").[11] The will and the action of the organ can be imputed to the legal person by a fiction as its own will and action. Its fictitious nature is the main reason for *Savigny* to deny a legal person those cognitive and motivational capabilities which were necessary for responsibilisation.[12] For German legal doctrine, *Savigny´s* definition of the legal person has become the paradigm for an individualistic account of corporate actors, and was also criticized for this.

The opposite position of a collectivistic or holistic account of the legal person as a real entity independent of its individual members was taken by *Otto von Gierke*. He introduced the concept of a "real joint person" ("Reale Verbandspersönlichkeit"). According to him, legal persons are not only capable of bearing rights and obligations, but they also have a (legal) cognitive and motivational capability ("a will") and a capability to act: "*Die Körperschaft ist als reale Gesammtperson nicht blos rechtsfähig, sondern auch willens- und handlungsfähig*."[13] Criminal punishment of corporations is therefore possible according to the conceptual and doctrinal framework of jurisprudence and because of their "nature". Because of their internal structure, corporations are able to be impressed by punishment. Furthermore, punishment is justified according to principles of distributive justice, when a member of a corporation commits a crime on behalf and for the benefit of the corporation, and when the corporation`s identity was also part of the criminal mind of the acting individual, when she referred to it while committing the

9 Friedrich Carl von Savigny, System des heutigen römischen Rechts, vol 2, Berlin, Veit Comp, § 85, p 236.

10 Ibid, § 85, p 238-39.

11 Ibid, p 239.

12 „Das Criminalrecht hat zu tun mit dem natürlichen Menschen, als einem denkenden, wollenden, fühlenden Wesen. Die juristische Person aber ist kein solches, sondern nur ein Vermögen habendes, Wesen, liegt also ganz außer dem Bereich des Criminalrechts. Ihr reales Dasein beruht auf dem vertretenden Willen bestimmter einzelner Menschen, der ihr, in Folge einer Fiction, als ihr eigener Wille angerechnet wird. Eine solche Vertretung aber, ohne eigenes Wollen, kann überall nur im Civilrecht, nie im Criminalrecht, beachtet werden." (Savigny, vol 2, § 94, p 312).

13 Otto von Gierke, Die Genossenschaftstheorie und die deutsche Rechtsprechung, Berlin: Weidmann 1887, p 603.

crime.[14] Criminal punishment of corporations is therefore not only possible but also just, and not a purely preventive issue.[15]

According to *Gierke*, a corporation has a life of its own because of its internal structure, a life of a "higher order".[16] The concept of "life" in general gained the position of a leading concept for science and humanities in the end of the 19th century. [17]Although it is not quite clear what *Gierke* really meant when he spoke of the higher order life of a corporation, the context of its usage allows for an observation of its functions. Primarily important is the fact that "life" is considered as a *self-reproductive* force that makes it possible for the corporation to have a continuous existence over time as a unity in an (changing) environment. Although it is built of different parts and becomes effective in the individual operations and achievements of its parts, the life of the unity as such remains constantly independent from the individual existence of its parts, it emerges from, but cannot be reduced to them.[18] In social organisations, effects of the corporate unity on its parts are mediated by psychic forces.[19] As far as these forces penetrate the corporal existence of the parts, they perform a real psycho-corporal unity ("reale leiblich-geistige Einheit der menschlichen Verbände").[20] The organ is not a representative who acts on behalf of the legal person which cannot act by itself, but he or she is like the mouth and the hand of the legal person so that the legal person is actually and directly present.[21] The legal person acts itself by its organ – it is not, like in *Savigny´s* theory, the organ who acts and whose act is then imputed to the legal person.

Gunther Teubner tries to detach the existence of a separate corporate actor from any material condition like *Gierke´s* life of a higher order or *vis vitalis*.[22] On the other side he tries to save the core idea associated with the concept of life – continuity and self-reproduction – from its dissolution into a mere fiction. He draws upon a methodological innovation in biology which allows for a better explanation of the mysterious force of life and which was transferred which some important modifications to sociology by many prominent authors like *Durkheim*, Parsons, and *Luhmann*. On a more abstract level, living creatures are systems which are primarily concerned with the protection of their borders in a changing environment, and they do this by taking anything they need out of their environment in order to use it for their reproduction according to their own identity. This is true for living systems as well as psychic systems and social systems. Whereas psychic systems are based on and made of consciousness (e.g., the mind of an individual human being), social systems are based on and made of communication.

For *Teubner* the corporate actor is not just one communication system among others, but one of a special kind. It is characterized by an internal self-description of an action

14 Ibid, 774.
15 Ibid, 774; von Gierke, Das Wesen der menschlichen Verbände, Berlin. Schade, 1902, 5., 27.
16 Gierke, Wesen, 10 ("ein Leben höherer Ordnung").
17 Ibid, 19.
18 Ibid.
19 Ibid., 22.
20 Ibid., 23.
21 "Durch das Organ offenbart sich also die unsichtbare Verbandsperson als wahrnehmende und urtheilende, wollende und handelnde Einheit" (Ibid., 27).
22 Gunther Teubner, Unternehmenskorporatismus. New Industrial Policy und das "Wesen" der Juristischen Person, in: Kritische Vierteljahresschrift für Rechtswissenschaft, 1987, 61-85.

system which becomes relevant and effective in communication. What constitutes the corporate actor is a "reflexive communication" within the action system about its own identity and capability to act.[23] One could say that it is the ongoing process of communication within the system about its "self" which constitutes its identity. The self or the identity is not given in advance and not set by the environment, but it is a self-description which is artificially made by the communicate acts of the system. To the extent that this internal self-description effectively guides and orients the organisation-related actions of its members, the corporate actor becomes real. It is a reality of a different kind than the organisation itself, because it consists in nothing else than the semantic artefact of the organisation´s self-description which becomes operative in real actions. In *Teubner`s* next step, this semantic artefact also becomes the point of reference for the imputation of actions of individual members as actions of the system or the corporate actor. *Teubner* calls it a "cyclical conjunction" of the action with the collective identity or, in the language of systems theory, a conjunction of the self-referential identity of the system with the elements of the system.[24] Unlike *Savigny*, for whom the imputation of the organ´s action to the legal person was an artificial attribution made by the law, *Teubner* bases the imputation on an operation which does already take place within the system itself. The law only makes sure that this imputation is effective and has the relevant consequences for all those who are affected by the corporate actor.

By attributing legal personhood to this conjunction the law grants the autonomy of the corporate actor in relation to its external environment of markets and politics as well as its internal autonomy in relation to the members of the organisation and their particular interests. The law contributes to the evolutionary process of functional differentiation of society by strengthening the operative closure of the corporate actor and its cognitive openness towards its environment.[25] Unfortunately, *Teubner* says nothing about corporate criminal liability. One can only presume that his interpretation of the social reality of a self-reflexive corporate actor as a cyclical conjunction of action and identity does also allow for the imputation of crimes to the corporate actor.

In their recent book, *List* and *Pettit* have tried to find a different path between the reductionist view of methodological individualism in the tradition of *Savigny´s* scepticism about the reality of a corporate actor and the ontological or metaphysical assumptions in the tradition of *Gierke*.[26] Their purpose is to demonstrate that a non-metaphysical concept of group agency is conceptually possible and can be rationally justified. Different to *Teubner*, they do not rely on systems theory – which would have made it easier to identify collective social entities beyond individuals, but had to bear the burden of unclear metaphysical and ontological assumptions associated with the core concept of "system" and which result, in the end, from its transfer from biology to sociology. Although they make use of the term "system" too, they stay within the conceptual framework of action theory by analysing the agent as a system. And they do not disregard the requirements of methodological individualism but want to avoid ontological and

23 Ibid, 68.
24 Ibid., p.70.
25 Ibid., p.74.
26 See above, fn. (8). For an extensive book review and discussion see the contribution of Vincent Chiao, List and Pettit on group agency and group responsibility, in: University of Toronto Law Journal, 64 (2014), 753-770.

psychological assumptions associated with individual human beings, like.e.g. "the will". This shall lead them to a concept of group agency which can be traced back to individuals but cannot be reduced to them.

They start with a common interpretation of what it means to be an agent by adopting the classical model of the practical syllogism as it has been recalibrated in recent theories of action. An agent is a system of belief and desire that "acts for the satisfaction of its motivations according to its representations" in favourable circumstances.[27] In addition, it has to meet some standards of rationality, i.e., the representations have to fit to reality or at least meet some standards how to look for evidence, the agent´s particular attitude grounded on belief and desire in favour of one action has to be coherent with other attitudes and with other representations of reality (in order to meet standards of means-end rationality in action).[28] Finally, it has to have the capacity of reasoning in order to correct itself when it fails to perform according to the standards of rationality.[29] These criteria of agency can be applied to group agents when they are able to find a form of organisation that ensures that the standards of rationality are satisfied and that they are able to enter into a process of reasoning if they fail to do so. Particularly important is the rationality standard of the internal coherence of attitudes. To distinguish a group agent from a mere collection of individuals or an ad hoc joint intention to perform a single action or a series of several actions, the group members have to become a unified agent. "They each intend that they together act so as to form and enact a single system of belief and desire, at least within a clearly defined scope; they each intend so do their own part in a salient plan for ensuring group agency within that scope, believing that others will do their part too. And all of this is a matter of common awareness."[30] The single, coherently structured and adjusted, unified system of belief and desire becomes the relevant entity which continues to exist independently of the individual member´s mind, although it has to become part of the commonly aware individual belief-desires systems.

A serious problem to be solved for the unified system of belief and desire then is the aggregation of individual intentional attitudes into a rational group agent attitude. How can the individual attitudes be put in and integrated into the group attitude? The question sounds trivial, but with regard to the alternative models of methodological individualism and dubious ontological assumptions about the reality of collective spirits, it seems to be the crucial point. How can individual attitudes be aggregated in a way that does not deny them but that does also allow for the formation of a rational and coherent group agency? The result cannot be that individual attitudes of propositions on the agenda of the group can be mirrored each by each in the group attitude, but only a set of attitudes. Otherwise, a simple aggregation of individual attitudes into a collective attitude (like, e.g., a simple majority vote) could lead to irrational consequences which fail to meet the standards of rationality. Such failures can be avoided when the group attitude depends on the individual attitudes in a holistic manner. The "aggregation function" shall allow for the input of individual attitudes and the output of rational group attitu-

27 List/Pettit, 20.
28 Ibid., 24.
29 Ibid., 31.
30 Ibid., 34.

des:[31] "The set of group attitudes across propositions is determined by the individual sets of attitudes across these propositions"; *List* and *Pettit* call it "holistic supervenience".[32] Equipped with such a "robust rationality" the group agent gains a certain independence of individual attitudes although it nevertheless depends on them. To the extent that a collection of individuals is able to coordinate their contributions so that they form a "single, robustly rational body of attitudes" which guides and orients the actions of the individuals, one can say: "Hence group agents exist."[33]

If a group agent exists, it seems to be natural that it also can be held responsible for actions and omissions. Nobody denies that a group agent can be *causally* responsible for certain actions. But is this also true with regard to praise and blame, approval and censure? Again the authors draw on common ground with regard to three conditions of responsibility: An agent must face "a normatively significant choice", must have an "understanding and access to evidence required for making normative judgements about the options", and finally, needs to have "control required for choosing between the options."[34] If one takes into account the kind of robust rationality exhibited by a group agent that is able to meet certain conditions, nothing prevents it from being held responsible in the more demanding sense of attributing praise or blame. If the members form a single agent as described above, it would also be possible for the group agent to face a significantly normative choice between right and wrong, to understand and to get evidence required for making normative judgements, and to be able to exercise control which is necessary for the choice between several options. In particular, the last condition is in need of some modification compared to an individual agent. The group agent`s responsibility extends to the internal checks and procedures to ensure "the formation and enactment of its attitudes" so that one or more members "perform in the relevant manner", i.e., to make choices based on the normative judgements.[35] Consequently, group agents of this kind are able to live under a normative order of mutual obligations, raise claims to others and being addressed by others. This allows according to *List* and *Pettit* for the attribution of personhood to a group agent. They can speak for their single mind, formed and enacted by the group members, "in a way that enables them to function within the space of mutually recognized obligations".[36] As *Vincent Chiao* has pointed out this conclusion still leaves open the question whether this kind of (moral) responsibility also entails criminal liability of the group agent.[37]

If one compares the different models of group agency they lead to a conception of collective responsibility which might be considered as an analogy to individual responsibility, as far as it is based on basic notions of self-control and rational as well as autonomous will-formation. In the end, this is at least a necessary condition for criminal liability and punishment, if punishment presupposes responsibility of the actor for his/her behaviour. But is it also a sufficient condition?

31 List and Pettit elaborate extensively on this aggregation function in ch. 2 of their book.
32 Ibid., 69.
33 Ibid., 75.
34 Ibid., 155.
35 Ibid., 163, 176.
36 Ibid., 177.
37 Vincent Chiao, above fn. 26.

2. Two problems with the constructivist nature of legal personhood

The debate about the nature of corporate actors is characterized by two argumentative steps which both positions share although they are mutually exclusive. They both start with a first step to look at the nature of groups, corporations or organisations in order to find out whether they have the kind of properties which allow for the assumption of something like an inner self or internal reflexive structure – "system" (in *Teubner´s* as well as *List* and *Pettit´s* terminology) which possesses a conception of its own, is able to revise it with regard to changes of its environment, and is able to exercise control over its elements and members so that they perform in a way that their actions correspond to the self-conception. It is obvious that this approach is guided by the intention to look for an analogy of the autonomy of groups to the autonomy of individuals. Although *Teubner* explicitly rejects such an analogy, his conceptualisation of organisational autonomy leads to the same result. If the first step is concluded with an affirmative answer, the second step is made by asking whether the specific self-reflective structure of a group or a corporation meets the necessary requirements for the attribution of responsibility for corporate behaviour. But even an affirmative answer to the question of corporate responsibility leaves open the next step whether there should be also corporate criminal liability. *Gierke* explicitly draws the consequence of criminal liability, whereas *Teubner* does not say anything about it, and *List/Pettit* argue for moral responsibility but also do not say anything about criminal liability.

There are two problems with such an account of corporate criminal liability. *First*, the status of the internal rational and reflexive structure seems to be unclear. How can it be identified and how can the theory about it be justified? *Secondly*, there is an unclear relationship between moral responsibility which seems to follow from the internal rational und reflexive structure of the agent, and criminal liability.

Prima facie it seems to be obvious to start with the internal reflexive structure of an individual self and then look for an analogy on a higher or trans-individual level. One of the hidden premises of this approach is the presumption that the internal reflexive structure is a necessary condition for a legal order which consists of primary norms (i.e. prohibitions, permissions, and obligations) to operate, and therefore corporations can only become a legal subject if they satisfy the same condition. It is obvious that, according to *Lon Fuller*, the whole „enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults."[38] When group agency is of the same kind as individual agency then corporations as group agents can be subjected to rules, and also to the norms of criminal law. From this point of view, the internal structure seems either to be given or appears to be the result of a self-sufficient development. It denies the fact that the concept of a responsible legal person is always already a legal construction, made for the purposes of an operating legal order. The artificial and fictitious legal person of the group agent or the corporation is as well a construction as the individual or natural person.[39] If one

38 Lon Fuller calls it the salient feature of the „inner morality of law", see: Lon Fuller, The Morality of Law, 1964/69, p. 162.

39 Günter Jakobs, Strafbarkeit juristischer Personen?, S. 560.

leaves the idea behind that the self is somehow given or pre-social, then it becomes obvious that *Fuller`s* view of man is a *view* in the proper meaning of the word: It is like looking at something from a certain angle, and not from an Archimedian point of view.

But to accept the constructivist nature of the person does not mean that one could do anything with it. As always, subjectivism, arbitrariness and relativism are not necessary consequences of social constructivism. The construction of the legal person can be and has to be justified with respect to standards of at least generality and rationality. A usual and prominent justification of the person focuses on its *functional* contribution to a legal system. One could read *Fuller´*s definition in a functionalist framework: If you want to join in the enterprise of law, you need a concept of the responsible person, because otherwise it would not work. With regard to the viability of a legal system, the person is, as *Hans Kelsen* has pointed out, the personification of rights, powers, and obligations, and, on the other hand, the "final point of imputation" ("Endpunkt der Zurechnung").[40] According to him, the internal reflexive structure or the self of the person is necessary for the operation of imputation. Because it treats the autonomous self as the only relevant source of action, it gives legal imputation something like an anchor and prevents the judge from looking endlessly for further causal relations of the action, even if they might be relevant from a psychological or sociological point of view. For *Kelsen* with his *Neo-Kantian* background, the imputation to the person as the final point distinguishes the social and legal practice of normative imputation from the causal analysis of an action with respect to laws of nature in physics, biology, psychology and the social sciences. A functional analysis of the constructivist nature of the person can also be found in systems theory, where the person is considered as a final point of imputation in communication. It makes it possible for social systems to operate with psychic systems (conscious human beings), whose utterances are the communicative units and elements of the social systems. By the "form" of the person the infinite complexity of the psychic system can be reduced to generalized social expectations, it provides some kind of normality in social interaction, in order to reduce the risk of an irritating behaviour which could lead to a stop of communication.[41] Since the legal system is a communication system too, it uses the form of the person for its own purposes.[42]

But the person is, of course, more than a functional element of the legal system´s operations. If it is a form or a social construction and if the rules and criteria of its construction are in need of justification, one has to take into account the entirely normative context of the construction. The person does not only play an essential role in a system of norms, but *it is normative in itself*. The structure which is attributed to an individual (and, correspondingly, to a group) in order to transform it into a person, is not self-evident. This becomes obvious if one realises that the concept of a person, in particular its definition as an autonomous actor with an internal self-reflexive structure, varies with different cultures and in time, like, e.g. between "shame cultures" and "guilt cultures".

40 Hans Kelsen, Reine Rechtslehre, 2nd ed., Wien: Deuticke, 1960, 97, 178.
41 Niklas Luhmann, Die Form "Person", in: Niklas Luhmann, Soziologische Aufklärung, vol 6, Opladen: Westdeutscher Verlag 1995, 142-154, 148-149.
42 Jakobs, 560seq.

The notion of a person is also normative in the sense that it demands certain actions and omissions of the addressee. She has to establish a relationship to herself which enables her to understand a norm and to perform a normative judgement about different options, and she has to control herself according to that judgment. A certain degree of internal self-organisation with regard to the claims of a normative system is an obligation without which the system of norms had to be substituted by a system of external control and manipulation. It is, so to speak, an obligation to subject one´s own judgments and options to an internal regime in order to be free from an external regime of discipline and domination. There is no autonomous subject without *subjectivation*. One of the consequences is the imputation of actions and consequences to a person as the source from which they flow, so that they can be treated as her own actions of her own will – and not the actions and consequences of somebody else and her will, or a causal effect of the laws of nature or of mere fate. On the other side the person can also be considered as a bearer of rights with a certain legal power to create, change and finish a legal relationship only because she has a will of her own.[43] Although this requires the obligation of the participants in the joint enterprise *to recognize* each other as persons with a capability for responsible action at all, the scope and degree of legal responsibility is still undetermined. How they see themselves in the role of a bearer of rights and obligations, and in the role of the "final point" of imputation, how they should see themselves as bearers of legal responsibility has to be determined reflexively by themselves. They have to take responsibility for the determination of their legal responsibility. It might be based on the overall notion of a moral person, but to the extent that it is a participant in the enterprise of law, it is a moral person in the appearance of a legal person.

It seems that criminal liability somehow follows from moral responsibility. If one admits that corporations could be held morally responsible – because they have the required inner structure – then one cannot avoid, *prima facie*, admitting that they could also be held liable according to criminal law. The opponents of corporate criminal liability argue just the other way round. For them (like, e.g., most of the German criminal law scholars), criminal liability is, in the end, a moral concept because it is based on moral self-determination, freedom of the will and rational insight of the subject. It is evident that such a demanding moral concept does not fit to a group agent or corporation. If they are because of their inner structure not a suitable candidate for the attribution of moral responsibility, then the same is true for criminal liability.[44] But it would follow from this that if corporate actors were a suitable candidate for moral responsibility this would also be true for the criminal liability.

But is this equation of moral responsibility and criminal liability convincing? Is individual (or an analogous corporate) moral responsibility alone already sufficient for legitimate criminal liability and punishment? Nobody seems to deny that moral responsibility is a necessary condition of criminal liability; i.e., that a person who should be held responsible according to criminal law has to be treated as a moral person who

43 This is certainly true for will-theories of rights, like Savigny´s.

44 Weigend, above fn. 1, p. 939: "It is easy to see that `moral self-determination´ is not something that can easily be attributed to legal persons. For that reason, the German legislature did not provide for criminal punishment of corporations, but relegated their liability to the law of administrative infractions.".

is capable to make a moral judgment about her intentions and to control her actions according to her own judgement. But is it also a sufficient condition?

3. Criminal liability and democratic legitimacy of criminal law

Fullers characterization of law´s inner morality would be misunderstood if the "view of man" were regarded as a view of a passive subject of rule-following only, or as an agent who is under an obligation to defer the legal rule. This is what law and morality share: that the person is a moral person who is under a moral or legal obligation to respect the law, although the sources of this obligation might be or are different and independent of each other. But with regard to law, the view of man requires more. As Kristen Rundle has pointed out in her interpretation of *Fuller´s* view, the necessary requirement of a responsible agent does also include the notion of an *active* agent whose responsibility does also refer to the rules which he or she is expected to follow. [45] She is not only a rule-follower, but also a rule-maker. As such an active agent he or she participates in the processes of rule-making, rule-change, and rule-application. Again, this is already contained in the performative meaning of the enterprise to subject human behaviour to law. If one takes the meaning of the enterprise seriously then it does also mean that the participants continue to be participants also during the time after they have subjected their behaviour to legal rules. The enterprise of subjecting human behaviour to law is not settled at one moment, but it is a dynamic process of law enactment, interpretation, application and reform. Such an understanding of the enterprise implies the mutual recognition of an individual right to participation already when the enterprise begins. And she has the right to participation as a legal person whose internal structure has to be defined by the participants of that enterprise themselves. What has to be added to the status of a moral person who is legally obliged to defer to a legal norm is the status of a citizen who has an equal political right to participate in legislation.

Citizenship shall be understood as a status which does not only imply membership rights in a political community and obligations following from membership, but also as a status which the members of a political community mutually recognize as participants in the enterprise of subjecting human behaviour to law, i.e., as co-founders of their community´s own constitution. This *status constituens* implies political rights to participate in public legislation on all stages from constitutional to criminal law legislation. As holders of the *status constituen*s, citizens necessarily claim responsibility for their constitutional order. It is just the flip side of legal responsibility. To be a responsible agent of a legal order always means to be a responsible moral person in the role of the law´s addressee, and to be a responsible moral person as the law´s author. These two roles of a responsible agent in law are interdependent – they presuppose each other. One can only be considered as a responsible agent who is subjected to the law, if he or she is also considered as an active participant in the procedures of rule-making.

The interdependence of the two roles becomes obvious if one looks at the consequences of its hypothetical denial. It would be a contradiction, if the same persons who

45 Kristen Rundle, Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller, Oxford: Hart Publ. 2012, p. 99seq.

in the role of the norm addressee attributed to themselves the status of legal personhood and were liable for their actions and statements could not understand themselves also as the co-authors of these norms in the sense that they are equally responsible for the normative order, whose violation in a particular case they attribute to themselves. Such an asymmetry between a lacking or limited participation of citizens in the legislative process and their treatment by the normative legal order as subjects who are responsible for their deference to the law is, of course, factually not impossible, despite its suggested conceptual inconsistency. It occurs quite often and is in a certain way compatible with a *liberal* understanding of freedom as the absence of external coercion and duress. According to such an understanding, freedom consists in a realm of individual free choice which is externally limited by legal prohibitions. The degree of freedom varies with the extent and scope of the legal prohibition. It does not matter who is setting the limits by which procedures and for what reasons. Consequently, criminal liability is based on the individual´s capacity of free choice and the crime is interpreted as the exercise of free choice with regard to the rules of criminal law. Sometimes this is the attitude of a state which treats criminal law similar to police law. It´s main purpose of criminal law is then the security of society and the prevention of risks and dangers. It treats persons not as autonomous citizens but as self-interested or dangerous human beings only.

But political heteronomy and the dependence on the authority of someone´s will which determines the degree and scope of their freedom would rob the citizens of what the *republican* tradition of political philosophy perceives as the epitome of freedom: in addition to the absence of coercion and duress, the possibility of self-determination, which also includes the co-determination of the limits and prohibitions under which one lives together and cooperates with others. To the absence of coercion and constraint must be added the absence of arbitrary outside control by and dependence on another's will. An arbitrary outside control would allow some scope for the formation and exercise of one's own will but could at any time decrease, enlarge, or abolish this leeway altogether.[46] If I am treated under such circumstances as a responsible subject of the law, then not as a person who has acted out of its generally recognized own right to her own will, but as someone who does not adequately adjust its natural will (e.g., the exercise of free choice) to the externally imposed norms or whose psychological and biological system is maladjusted and conflicting with the functional needs of a differentiated society.

It would be equally inconsistent on the other hand, if the people understood themselves as politically autonomous citizens and responsible authors of their legal order, but in the role of norm addressees as entities that are not liable for their actions and omissions, whose actions and statements can only be attributed to a natural cause. According to the assumption formulated above that the very enterprise of law itself presupposes an internal point of view and therefore a critical and reflective attitude of autonomous norm compliance by responsible norm addressees, the citizens would not even generate law.[47] Instead of this they would install a monitoring, control and conditioning apparatus like we already have for those who are for medical reasons unable to control themselves.

46 Philip Pettit, Republicanism, Oxford: Oxford UP, 2001; Quentin Skinner, Liberty before Liberalism, Cambridge: Cambridge UP 1998, pp. 82-84.

47 Rundle, above fn. 45, p. 99.

They would again loose common self-determination, which they had claimed in the legislative process, in the practice of attributing criminal liability, and consequently would need to replace it with the heteronomy of dependent persons. The current debate about the implications of neuroscience for the criminal law concept of guilt also largely brackets that a human image of the law addressee which excludes responsible self-control would also exclude the idea of democratic self-legislation. As little as one can make a human being responsible for her individual actions and statements, as little can this be done for her statements and actions as the co-legislator of a commonly shared and recognized legal system. The concept of a citizen, who is co-legislator within a republican constitution, and the concept of a legal person, who is the responsible subject of its statements and actions, explain and justify each other mutually.

The principle of republican legislation by politically autonomous citizens and the principle of responsibility for a person's individual actions and statements both draw on the concept of a person who moves in the logical realm of reasons, who can give, require and criticize reasons, who, in short, responds to and is motivated by reasons and can orient its behaviour towards reasons. This mirrors also the original meaning of the term 'responsible'—to justify one´s behaviour *vis-à-vis* others. As such a deliberative person,[48] I participate in republican law-making in my role as citizen and accept responsibility for my actions with regard to the co-authored legal norms in my role as law addressee. Of course, the right and the opportunity to change between these two roles do not mean that I can switch them arbitrarily. I cannot bypass my responsibility as a norm addressee for the violation of a norm by simply entering into the role of a co-legislator who denies the validity of the norm.

4. Corporations as citizens?

If one accepts the premise that criminal law and criminal punishment require democratic legitimacy and if one accepts the premise that corporations can become responsible agents, it was possible to imagine that group agents like corporations can also participate in the process of rule-making, rule-change, and rule application. If they have all the necessary requirements of a responsible agent, it is not a matter of capabilities whether they can participate in the process of democratic criminal law legislation or not. Because they are deliberative persons they *have* the capacity for such participation.

The question is whether they *should* participate or not. Of course, as a group and corporation which possess the property of group agency they do *in fact* influence, – e.g., as notorious lobbyists in the houses of parliament – democratic legislation. One can even admit – as, e.g., German Constitutional Law does – that they have a right to free speech and are participants of the public sphere.[49] But if one would also admit that they had *a right* to participate in the political process of public will formation and a right to vote

48 Klaus Günther, 'Welchen Personenbegriff braucht die Diskurstheorie des Rechts? Überlegungen zum internen Zusammenhang zwischen deliberativer Person, Staatsbürger und Rechtsperson', in: H. Brunkhorst/P. Niesen (eds.), Das Recht der Republik. Festschrift für Ingeborg Maus, Frankfurt am Main 1998, pp 83 – 104.

49 Art. 5 and 19 sect. 3 German Grundgesetz, see: Stefan Hömig (ed.), Grundgesetz, 9th ed. Baden-Baden: Nomos, Art. 5/3 and Art. 19/7.

and to become a member of the legislative body, one would turn them into citizens like individual persons and would have to treat them equally.[50]

Saskia Sassen once coined the term *economic citizenship* in order to critically denounce the fact that during the era of economic globalization large corporations have become so powerful that they can make governments responsible to them for their policy, in particular their economic policies.[51] The financial crisis we are facing just now is another example for the power of multinational corporations who are able to put governments and citizens under political pressure to make decisions for their advantage. It is part of the transformative process of modern democratic societies which *Colin Crouch* described as *post-democracy*.[52] But should we consider the *fact* of economic citizenship also as a normative *reason* to assign to corporations all those political rights which are a necessary part of citizenship?

There are at least two reasons which fight against such a consequence. The first objection is an *ad absurdum* argument: If one treated corporations as citizens it would be technically impossible to determine the political weight of their political rights compared to political rights of individual citizens. Should they have more votes than individual citizens or should their vote count more, because they are a collective body? An affirmative answer would then lead to an unequal treatment of individual citizens and corporations with regard to their political rights. Corporate citizens are always in an asymmetrical role to individual citizens. And, as a consequence, a new problem would occur: If I were a member of a corporation which participated in a political election, it could turn out that I have two votes, one which were mediated by my corporation, and another one as an individual citizen. Finally, further problems would arise on the side of the political right of a citizen to be elected. Should a corporation become a member of Congress or of Parliament on an equal standing with individual MPs? And, should a corporation become Prime Minister or President? This does not imply that corporate actors cannot become members of political bodies. History contains many examples where churches, universities and states, even companies were and still are members of a collective body. But in these cases, the collective body consists of corporate actors only. Another example might be the *City of London*, where business corporations can vote and have a say in the council. But the *City of London* is already a corporation with a very close affinity to business. According to its mission statement, the primary aim is "to support and promote London as the world´s leading international financial and business centre and attract new business to the capital and the whole UK."[53]

But there is another reason against an equal treatment of individual and corporate citizens which is more severe: The deliberative process of democratic legislation is based on the principle of impartiality. Participants in a democratic discourse shall be able to

50 For Günther Jakobs, the right to vote is an *ad absurdum* argument: Günther Jakobs, Strafbarkeit juristischer Personen?, in: Cornelius Prittwitz et al (Eds.), Festschrift für Klaus Lüderssen, Baden-Baden (Nomos) 2002, pp 559-575 (562).

51 Saskia Sassen, Losing Control? Sovereignty in the Age of Globalization, New York: Columbia UP, 1996, p. 33seq.

52 Colin Crouch, Post-Democracy, Hoboken: Wiley, 2004.

53 http:www.cityoflondon.gov.uk/about-the-city/about-us/Pages/default.aspx.For the history of the City of London see: Andreas Fahrmeir, Ehrbare Spekulanten: Stadtverfassung, Wirtschaft und Politik der City of London 1688-1900, Berlin: Oldenbourg 2003.

generalize their interests and to change their perspectives on a political issue reciprocally. To put oneself in the shoes of the other is a basic principle of republican legislation – form *Rousseau* and *Kant* to *Rawls*.[54] It shall exclude privileges and discriminations in legislation by forcing the legislators to think about the consequences of a law for everybody who shall be affected by it. *Rawls' veil of ignorance* is tailored for the *homo oeconomicus* who calculates possible gains and losses which would result from a possible basic structure of a future society for him. Because the veil of ignorance deprives him of any knowledge about his future social and economic position in society, it forces him to take the position of the less advantaged in such a basic structure. The requirement of reciprocal role change does not make any sense to corporations. A corporation will never come into the position of an equal standing with an individual citizen.[55] Why should it then take his or her point of view while deliberating on a political issue and a suggestion for a legal regulation? Corporations can act as lobbyists to influence the legislator to favour their interests, while competing with other interest groups, but they shall never become legislators.

Finally, business corporations are designated to promote one interest only, i.e. the benefit of the shareholders. Therefore, they have to act and to vote entirely with regard to their own interest alone, they have an obligation to judge as partially with regard to that interest as they can. The reason for their existence is to serve as a means to a clearly defined and determined end. As *Vincent Chiao* has pointed out, corporations are instrumental, not ends in themselves.[56] Individual citizens are ends in themselves and therefore may not subjected to a purpose that is not determined by themselves. In turn, this is exactly the reason why criminal law individualises by imputing a crime to an individual and by punishing her.[57] In cases where expressive punishment is necessary, i.e., when attribution of responsibility to the offender is important to the victim and to society, when censure is deserved by the offender, criminalization of individual citizens could be more adequate than punishment of corporations. According to *Gierke*, punishment of a corporation is just, because it considers the individual as part of a community and gives the community what it deserves because of its contribution to the criminal behaviour of the individual.[58] But a recent observation in the US reveals that a focus on the punishment of a corporation could result in a bailout of individual offenders who acted on behalf of the corporation. With regard to the *Deepwater Horizon* case, "the government was signalling a return to the practice of prosecuting officers and managers, and not just their companies, in industrial accidents, which was more common in 1980 s and 1990 s."[59]

54 Cf. Markus Dubber, *The Sense of Justice: Empathy in Law and Punishment*, New York/London 2006.

55 List and Pettit use the example of Rawls´original position to deny the equal standing of group agents with individuals: List and Pettit, p 180.

56 Vincent Chiao, (above, fn. 26).

57 The economic system operates on a transpersonal level, whereas the criminal law individualises. See: Hans Theile, Wirtschaftskriminalität und Strafverfahren, Tübingen: Mohr, 2009, 303.

58 Von Gierke, Die Genossenschaftstheorie, above, fn. 13, p. 775.

59 The New York Times, Nov. 16, 2012, B1.

5. Which kind of legal liability for corporations?

When corporations should not become citizens of a republic of free and equal citizens who participate in democratic and deliberative procedures of legislation – then they should not be treated as liable under criminal law. *Societas delinquere non potest* – but not, because they could not become liable for some internal reasons (e.g., lack of intentionality, etc.), but because they *should* not for normative reasons. We do not want them to become citizens of a republic, and therefore we should not treat them as liable according to criminal law.

But this does not mean that they are not liable according to any kind of law. The German solution of subjecting corporations to administrative law and to sanction them with purely preventive measures still seems to be appropriate. As a responsible group agent corporations can be considered as actors who are able to learn according to a preventive policy script.

One can even go one step further. If legal regulation of the economic system becomes a political issue, as it is the case just now with regard to the financial market, powerful economic corporate actors often favour self-regulation and prefer voluntary agreements and self-imposed collective obligations to state legislation. Codes of "corporate (social) responsibility" and the Global Compact of the *United Nations* are prominent examples. In these cases, corporations act as co-legislators of the normative order of their own branch. The codes also include rules of liability of corporations when they violate self-imposed obligations, and, of course, sanctions against those corporations whose liability has been proven. They could, e.g., lose a certificate or a label which publicly assigns the company´s deference to certain standards of environmental protection and by this prestige gain more recognition among consumers. Public naming, blaming and shaming of corporations which violate such obligations could be a further sanction. Such a quasi-moral liability could come close to criminal liability – but is remains a quasi-moral liability only as long as these self-imposed obligations are *not* transformed into law, and, above all, into criminal law.