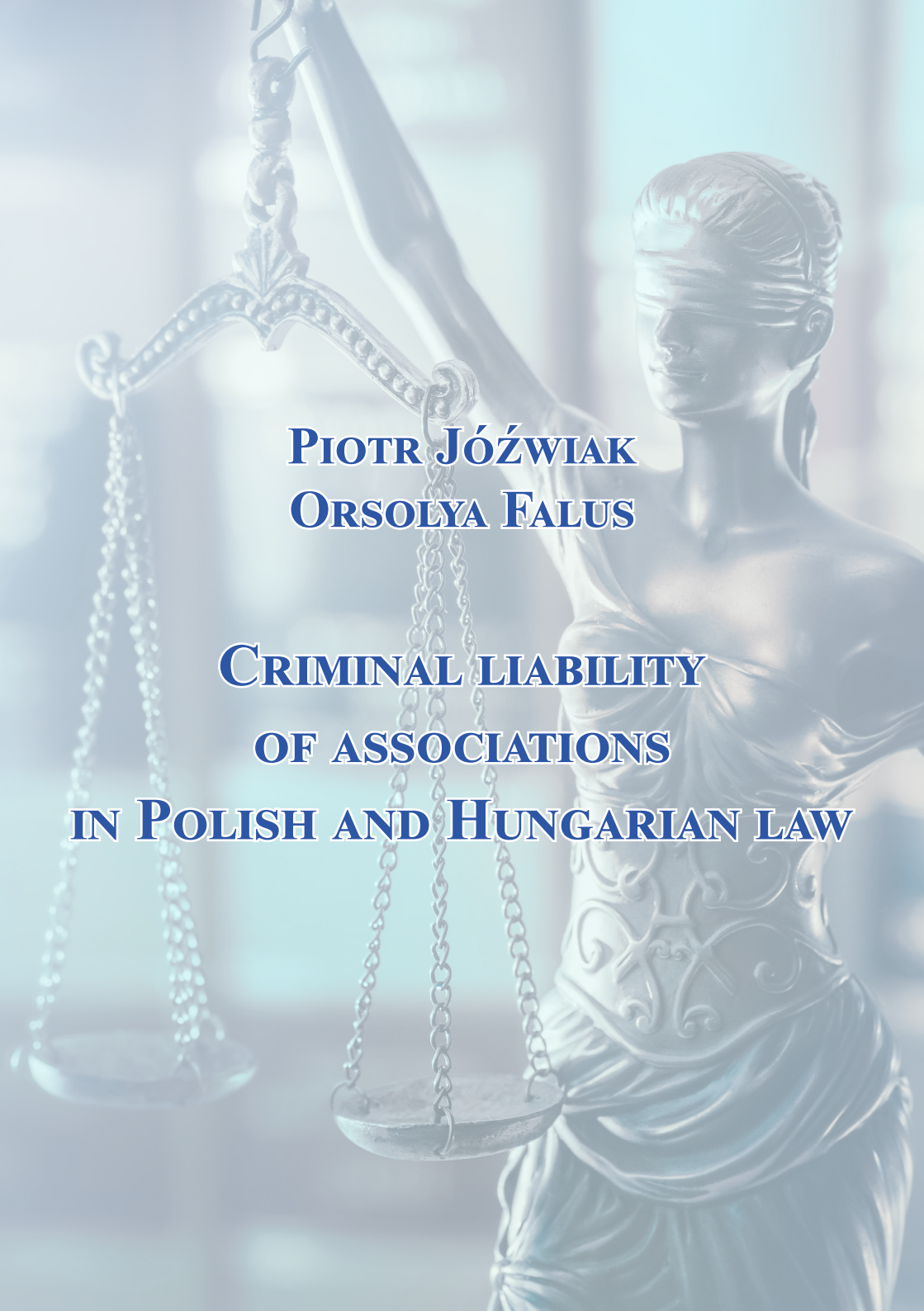

Piotr Jóźwiak
Orsolya Falus

Criminal liability of associations in Polish and Hungarian law

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Introduction

Nowadays in Europe there is a debate related to the necessity of creating legal regulations which could also hold collective entities, especially legal persons, accountable for their actions in terms of criminal liability. However, there is a lack of consistent regulations in this respect. Meanwhile, it occurs that one of the first scholars in Europe to deal with this subject was a Hungarian professor Ervin Hacker, who as early as in 1922 published a book on this subject entitled: *The criminal capacity and liability of associations: a study from the field of substantive criminal law*[1]. In the same year, a small brochure written by this professor on the same issue was released (*The criminal liability and capacity of associations*)[2]. Our book aims at promoting professor Hacker and his ideas, therefore we would like to undertake the task of translating his brochure into English. Translating a book of over 200 pages is not feasible, yet translating a brochure of 15 pages seems purposeful. On the one hand, it will allow us to present that the ideas which currently all Europe is pondering over were present in Hungary as early as at the beginning of the 20th century. At the same time (i.e. at the beginning of 20th century) Juliusz Makarewicz, a prominent Polish professor of criminal law, also wrote about this matter. In his book written in German, included in the European criminal law canon, stated that it was possible, considering the contemporary regulations in Poland, to execute criminal liability of legal persons[3]. He also believed that such a liability should not be excluded by lawyers, since it is feasible to introduce it through particular legal regulations. Excellent works on the criminal liability of associations, which are still relevant

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1 Hacker, Ervin, (1922): *Az egyesületek büntetőjogi cselekvőképessége és felelőssége: tanulmány az anyagi büntetőjog köréből.* Pécs: Grill Károly Udvari Könyvkereskedése, p. 228.

2 Hacker, Ervin (1922): *Az egyesületek büntetőjogi cselekvőképessége és büntethetősége*. Budapest: A Magyar Jogi Szemle Könyvtára, p. 15.

3 Makarewicz, Juliusz (1906), *Einführung in die Philosophie des Strafrechts auf entwicklungsgeschichtlicher Grundlage*, Stuttgart: F. Enke. The book was reprinted in 1967. However, the Polish-language version did not appear until 2009 (Makarewicz, 2009). The present work is based on this translation.

today, were also written in the interwar period by Helena Wiewiórska, the first woman in Poland who become an advocate.

Therefore, we strongly believe it is worth showing that in both Poland and Hungary the solutions which many lawyers in Europe currently deliberate on, were investigated a long time ago (see more Toth, 2019, p. 178-179);

One of the purposes of this book is to bring to recollection the views of the Polish and Hungarian lawyers who wrote about the criminal liability of associations more than a hundred years ago. We endeavour to demonstrate that the views expressed by Professor Ervin Hacker, Professor Juliusz Makarewicz, and by Helena Wiewiórska over a century ago have lost nothing of their relevance over the course of time and can still provide an excellent basis for formulating a whole number of *de lege ferenda* proposals addressed to national legislators. This is the main thesis of this work. In addition to a brief recapitulation of the views expressed in the interwar period by some prominent Polish and Hungarian theorists of criminal law (Ervin Hacker, Juliusz Makarewicz, Helena Wiewiórska), the book contains an English translation of a 1922 brochure by Professor Ervin Hacker on the criminal liability and criminal capacity of associations. We believe that his work can be an excellent source for academic research on the criminal liability of associations.

A significant part of our book is devoted to an analysis of the current Polish and Hungarian legislation governing the criminal liability of associations. The discussion of Polish law extends beyond the liability of associations for punishable offences to cover the subsidiary liability of associations under the fiscal penal law and their liability related to the imposition of administrative fines by public administration bodies. The broadly defined criminal liability of associations (criminal liability *sensu largo*) also includes disciplinary liability in sports, enforced against sports clubs operating in the form of associations and against federations and other unions of sports associations.

Our research is primarily based on the doctrinal method, especially when it comes to the analysis of the existing Polish and Hungarian legislation on the criminal liability of associations. As we discuss the legal systems of two different countries, our research has naturally involved elements of the comparative method. The historical method,

often underestimated in legal research, has also played an important role in our study. While the comparative and historical methods are often seen as supplementary to the doctrinal method,[4] they should not be underestimated, considering that comparative and historical research often contributes to the introduction of constructive changes in the legal system (Hutchinson, 2015, p. 135). The proposals for legislative innovations contained in this book have been formulated, in a large measure, precisely on the basis of these two research methods.

Both Poland and Hungary have a long tradition of legal literature related to criminal liability of collective entities. Nowadays, in Europe the discussion on the legal possibilities of using criminal law provisions to execute the liability of collective entities, including especially legal persons, is reviving again. In Poland the debate on this subject has been for years and various solutions are proposed. The possibility to benefit from patterns developed in Hungary could constitute a significant element of Polish-Hungarian cooperation in terms of the legal basis. The aim of the research will also be to determine whether executing criminal liability from collective entities, especially associations, may constitute an instrument enabling fighting with traditional crimes (for example, economic crimes, crimes against property, subsidy scam or crimes against the environment), but also new negative phenomena such as designer drugs or crimes related to new technologies. The book is a continuation of the authors' research into the issue of criminal liability of collective entities (see Jóźwiak, 2021a; Jóźwiak, 2021b; Falus & Jóźwiak, 2021).

Ervin Hacker, writing about the criminal liability of associations, pointed out that: "hereinafter, we will constantly use the term 'associations', understanding here – actually in addition to the formation of 'associations' – corporate entities, such as above all joint stock companies, cooperatives – and excluding foundations – public institutions and bodies of a public law nature". Our book, on the other hand, will focus on associations as traditionally understood: as voluntary organisations bringing together natural or legal persons (under the freedom to associ-

[4] M. Minow sees the historical and comparative methods as 'an intellectual contribution' of legal scholarship to the development of science. Historical legal studies describe earlier times within a single legal system, while comparative studies offer an analysis of different, often contrasting, legal system (see M. Minow, 2013, p. 68).

ate in organisations), excluding commercial companies or foundations. However, the criminal liability of all these collective entities is similar. More than a hundred years ago a learned judge said that "the idea that these companies occupy some undefined and undefinable ground midway between a partnership and a corporation has practically faded away" (Wormser, 1916).

We would like to conclude this foreword with a special word of gratitude to Professor Teresa Gardocka, Director of the Law Institute at the SWPS University of Humanities and Social Sciences in Warsaw, without whose support this book would not have appeared. It is thanks to Professor Gardocka that this book is published in English.

We would also like to thank Professor Janusz Poła, Rector of Jan Amos Comenius Academy of Applied Sciences in Leszno. Were it not for the cooperation between the university led by Professor Poła and the University of Dunaújváros, the authors of this book would probably not have had an opportunity to make one another's acquaintance. The idea for a joint research project on the criminal liability of associations arose and took shape during the annual international conferences organised by the University of Dunaújváros, at which the authors had the pleasure to present their papers. In this connection, we would like to extend thanks to Professor István András, Rector of the University of Dunaújváros.

Last but not least we would also like to thank to the reviewers of this book: Professor Wojciech Maciejko from Andrej Frycz Modrzewski Kraków University and Professor Dr. h.c. Antal Visegrády from University of Pécs and Hungarian Academy of Sciences. Their positive reviews and substantive comments had a major impact on the final content of the book.

Chapter I.
Criminal liability of associations in Polish law

1. On the origins of associations and their relations with the criminal law

The association law is a relatively young field of legal theory and practice. If one disregards the antiquity,[5] its origins can be traced to the 16th century, when intellectuals started to gather in the first social clubs in Britain and France (Romul, 1965, p. 37-38). On Polish soil, the first laws regulating associations appeared in the partitioning states. The Poles soon took advantage of this substitute of freedom, establishing a number of mass associations whose aim was to cultivate Polishness. These associations were active in many different areas of life: research and education (e.g. the Poznań Society of Friends of Learning, 1857), sports and fitness ('Falcon' Polish Gymnastic Society, 1867), business (e.g. the Międzyrzecz Economic Society, 1802), and even tourism (the Galician Tatra Mountains Society, 1873). Unfortunately, many of those associations were later dissolved by the authorities of the partitioning states, as the prevailing rule at that time, contrary to the principle of freedom of association, was that no association could be established without the consent of the state authorities. The authorities not only had to approve the creation of every single association but also exercised an unlimited right to supervise and dissolve all and any associations.

In an independent Poland, the first legislative act relating to associations was the Decree on Associations of January 3rd, 1919 (Legal Gazette of the Polish State [*Dziennik Praw Państwa Polskiego*] No. 3, it. 88), which was later replaced, by ordinance of the President of the Republic of October 27th, 1932, with the Associations Act (Journal of Laws [*Dziennik Ustaw*] No. 94, it. 808, as amended). The latter

[5] Some authors suggest that the origins of associations should be sought in ancient Rome, where there were e.g. associations of clients and low-income quirites, associations of freedmen grouped together around powerful patrons, as well as associations of a religious, political or economic nature. It may be argued, however, that, in ancient Rome, the existence of associations was determined by custom, and not by law (see more Sowa, 1988, p. 33-34).

act, albeit with numerous amendments, survived until 1989, when the Associations Act of April 7th, 1989 entered into force (see Journal of Laws of 2020, it. 2261). The 1989 Associations Act has remained in force up to the present moment.

The right of association is one of the fundamental constitutional rights. Under Art. 58 sec. 1 of the Polish Constitution, "The freedom of association shall be guaranteed to everyone." One of the forms of exercising this right is the freedom to create and operate societies and other voluntary associations (Art. 12 of the Polish Constitution). Pursuant to Art. 2 sec. 1 of the Associations Act, 'An association is a voluntary, self-governing, non-profit group operating on a permanent basis.' An association independently determines its objectives, agenda, and organisational structures, adopts internal acts concerning its activities, and bases its operation on the voluntary work of its members. An association may hire employees, including its members, for the purposes of conducting its affairs (Art. 2 sections 2 and 3 of the Associations Act).

The limited scope of this work does not allow us to discuss in detail the significance of individual elements that make up an association. Suffice it to say that certain characteristics, such as: voluntariness, permanence, and not-for-profit objectives of operation have remained unchanged for almost a hundred years.

From the point of view of the subject-matter of this book, the issue of the 'not-for-profit objectives of operation' is of particular importance. It is worth emphasising that, in many cases, this premise is a condition for receiving subsidies from public administration bodies. The not-for-profit nature of operation is a condition for obtaining a grant under, *inter alia*, the Public Benefit and Volunteer Work Act of April 24th, 2003 (see Journal of Laws, year 2019, it. 688, as amended) and the Act on Sports of June 25th, 2010 (see Journal of Laws, year 2020, it.1133, as amended). To wit, pursuant to Art. 3 sec. 1 of the former Act, "*Activity for the public benefit is defined as work performed to the benefit of the public by non-governmental organisations within the sphere of public tasks specified herein*". In section 2 of that article, it is specified that the term 'non-governmental organisations' shall mean entities that are not part of the public finance sector as described in the Public Finance Act of August 27th, 2009; in particular, they are not enterprises, research institutes, banks, or commercial-law companies that are legal persons

owned by the national or local governments. Further, they are not-for-profit legal persons or organisational units without legal personality, vested with legal capacity by a separate legislative act, including foundations and associations.

The not-for-profit character of activities as a condition for obtaining a subsidy is even more evident from Art. 29 sec. 1 of the Sports Act, according to which, "*A not-for-profit sports club operating in the area of responsibility of a given local government unit may receive a targeted subsidy from the budget of that unit on the basis of a resolution referred to in Art. 27 sec. 2, with the application of the provisions of the Public Finance Act of August 27th, 2009 (Journal of Laws, year 2019, it. 869, as amended) with regard to awarding targeted subsidies for not-for-profit entities that are not part of the public finance sector*". One can safely assume that the vast majority of sports clubs in Poland operate in the form of associations, and that, in many cases, subsidies obtained from public administration bodies account for a sizable proportion of their budget; this is especially true for amateur clubs or those playing in minor leagues.

It goes without saying that subsidies may only be used for strictly defined purposes. Misapplied funds must be returned to the respective public administration body. In addition, the misapplication of a subsidy by an association may result in legal liability, in particular, the criminal liability of its members (e.g. representatives). Possible criminal liability of the association itself is another question. As for the criminal liability of representatives of associations, the issue has been widely discussed in the Polish legal literature, and therefore we leave it outside the scope of this work (see e.g. Zawłocki, 2013).

An unlawful acquisition of a subsidy by an association may involve, among others, the following criminal infractions: offences against documents, in particular under Art. 270 of the Penal Code (falsification of a document)[6], economic offences, in particular under Art. 297 § 1 of the

[6] Art. 270 (Forgery)
„§ 1. Anyone who forges, counterfeits or alters a document with the intention of using it as authentic, or who uses such a document as authentic, is liable to a fine, the restriction of liberty or imprisonment for between three months to five years.
§ 2. Anyone who fills in a form with someone else's signature, against the signatory's will and to his or her detriment, or who uses such a document, is liable to the same penalty.

Penal Code (obtaining subsidy by fraud)[7], or offences against property (e.g. fraud – Art. 286 of the Penal Code)[8].

Even if a subsidy has been received in full conformity with the law, it often happens that offences occur at a later stage, in particular, when the subsidy is being put to use or accounted for by the association. At this stage, various offences against the credibility of documents or against property may come into play. Also, it is not uncommon for the activities of an association to result in criminal offences against the environment or in fiscal crimes.

No one contests the point that only natural persons are subject to criminal liability in the strict sense of the word (criminal liability *sensu stricto*). The question then arises as to whether associations can also be held criminally liable. This issue is not only of theoretical but also, and above all, of practical importance. There have been cases where the profits obtained by associations from the criminal activities of their members were so large that these entities decided to 'compensate' natural persons (board members, employees, attorneys, etc.) for the financial penalties they had to pay as a consequence of the prohibited

§ 2a. If the act is of less significance, the offender is liable to a fine, the restriction of liberty or imprisonment for up to two years.

§ 3. Anyone who makes preparations for the offence specified in § 1 is liable to a fine, the restriction of liberty or imprisonment for up to two years".

7 Art. 297 (Financial fraud)

„§ 1. Anyone who, in order to obtain a bank loan, a loan, a guarantee, a letter of credit, a subsidy, subvention, confirmation from a bank of a liability under a guarantee or a similar monetary allowance for a specified economic purpose, electronic payment instrument or public procurement order for himself or for another person, from a bank or an organisational unit conducting similar business activities on the basis of an act of law or from a body or institution disposing of public funds, submits a forged or altered document or a document stating an untruth, an unreliable document, or an unreliable written statement regarding the circumstances that are significant for obtaining the financial support mentioned above or a payment instrument or order is liable to imprisonment for between three months and five years".

8 Art. 286 (Fraud)

„§ 1. Anyone who, intending to achieve a material benefit, causes another person to unfavourably dispose of his or her property, or the properly of a third party, by misleading the person, or by taking advantage of a mistake or an inability to properly understand the action undertaken, is liable to imprisonment for between six months and eight years"

acts they had committed. The profits derived by the associations from the criminal activities of their representatives exceeded by far the financial losses of the individuals involved, which made this kind of conduct profitable. For this reason alone, the issue of the criminal liability of associations deserves careful consideration by legal theorists. As we have mentioned before, one of the first studies on this problem was published over 110 years ago by Juliusz Makarewicz, an eminent Polish professor of criminal law.

2. A historical survey of the criminal liability of associations in Polish law

As far as the current legislation is concerned, the issue of criminal liability of associations is regulated in the Act on Liability of Collective Entities for Punishable Offences of October 28th, 2002 (see Journal of Laws, year 2020, it. 358). Within the meaning of this Act, a collective entity is a legal person or an organisational unit without legal personality, vested with legal capacity by separate regulations, to the exclusion of the State Treasury, local government units and their associations. It is uncontroversial that the notion of the collective entity extends to associations, which can therefore be held criminally liable under this Act.

The issue of the criminal liability of collective entities has been around ever since Roman law.[9] At later stages of history, the criminal liability of public-law persons did not raise any controversies. Over the centuries, it was perfectly normal for guilds, towns, villages, settlements, corporations, and associations to bear this kind of liability. The criminal liability of public-law and private-law legal persons was commonly accepted (see more Namysłowska-Gabrysiak, 2003, p. 24-41). It was not until the early 19th century that most authors took the view that imposing criminal liability on collective entities was inadmissible (Hirsch, 1993, p. 10). Another major change of attitudes in this regard was seen

[9] As early as the third century AD, *Ulpian* wrote that a charge can only be made against those who rule a city, and not the city itself. However, certain fragments of Roman law clearly indicate the existence of collective liability, with specific reference to civil-law compensations or reparations of damage. Cited after: Namysłowska-Gabrysiak, 2003, p. 23.

in the second half of the 20th century, when the necessity of applying criminal liability to legal persons became increasingly recognised in the legal doctrine.[10] Already at the beginning of the 20th century, Professor Makarewicz wrote, 'The question posed by the theory of law is not whether the criminal liability of legal persons is possible but whether it is necessary at the present moment and how to properly construct its basis and theoretically justify its application. The criminal liability of corporations, including associations, has become very debated topic since the 20th century (see more Riihijärvi, 1995, p. 204; Sepioło, 2016, p. 135-136).

In the interwar Poland, the criminal liability of associations was strongly advocated by H. Wiewiórska, the first woman in Poland to become an attorney. As she pointed out, penalties that can be imposed on associations in their essence are similar to those applicable to individuals, namely: 1) the dissolution of an association is the equivalent of death penalty; 2) prohibiting an association from operating in a given location is the equivalent of banishment. Other possible penalties would include police supervision, reprimand, publication of the sentence, deprivation of certain rights, and a monetary penalty (Wiewiórska, p. 1192). In her very extensive study, which, although published some 90 years ago, is still a highly relevant read, Wiewiórska invoked the notion of collective psychology to argue against the views propounded by Makarewicz. According to her, Makarewicz is mistaken in his belief that " (...) a corporation is but the sum of individuals, the collective will is a nonentity, and only the sum of individual wills is real. In mathematics, *a* plus *b* plus *c* = (*a*+*b*+*c*), but in social life *a*+*b*+*c* can equal <<*p*>>" (Wiewiórska, p. 1189). In reaction to Makarewicz's observation that, in legal practice, an association as a whole is punished without regard to whether innocent members of the association (e.g. those who constituted a minority in the vote) would also suffer as a result (Makarewicz, 2009, p. 371). Wiewiórska argues that, by the same token, a criminal punishment meted out to an individual very often affects innocent persons. For example, a monetary penalty affects the entire family of the convicted person; similarly, the imprisonment of

[10] According to B. Namysłowska-Gabrysiak (2003, p. 33), the first country in Europe to introduce the criminal liability of legal persons into the penal code was the Netherlands in 1976.

a father of family, in the vast majority of cases, will be more painfully felt by the family members of the offender than by the offender himself (Wiewiórska, p. 1191).

Makarewicz took a different stand on this issue. As mentioned above, he saw no legal impediments to the introduction of criminal liability against associations but, at the same time, he found no rational justification for it and was opposed to its introduction into the Polish criminal law. According to him, the problem of punishing associations belongs to the domain of administrative law and should be handled by administrative bodies rather than criminal courts (Makarewicz, 2009, p. 382).

One of the first acts regulating the criminal liability of legal persons was the Act on Cartel Agreements of July 13th, 1939 (Journal of Laws, year 1939, Iss. 63, it. 418), which introduced liability for failure to notify the Cartel Register of concluding or amending a cartel agreement. The penalty prescribed for this offence was a monetary fine imposed by the Minister of Industry and Trade. At the same time, Art. 15 sec. 4 of the Act on Cartel Agreements provided for the joint and several liability of the representatives of a legal person for any fines imposed on it. In the period after World War II, this kind of liability was basically limited to the liability of collective entities for offences related to water pollution.[11] Monetary penalties could be imposed on establishments, which were to be understood as enterprises, offices, institutions or other workplaces. In 1960s, there was no doubt that the liability of these entities must be based on culpability (see W. Brzeziński, 1971, p. 192; K. Podgórski, 1974, p. 145). For years, liability related to the imposition of administrative fines on collective entities has been regarded as a classic example of the criminal liability of legal persons (see about it Radecki, 1996, p. 79-96; Longchamps, 1986, p. 100-103).

It was not until November 28th, 2003 that the Act on the Liability of Collective Entities for Punishable Offences came into force, which regulates, among other things, the criminal liability of associations. In what was a revolutionary move, the Polish legislator introduced into the Polish legal system an exception to the principle that only natural persons may be subject to criminal liability (Czyżak, 2004, p. 38-39).

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[11] Act of January 31st, 1961 on the Protection of Waters against Pollution (Journal of Laws, year 1961, Iss. 5, it. 32 and 33).

In civil law, the issue of the liability of associations has never been particularly controversial. As pointed out by J. Dąbrowa, the civil law recognises that certain social entities, under some or other conditions, can be treated as subjects of law on a par with individuals. This recognition is consistently reflected in the way such social entities are generally treated in the civil law. This does not mean, however, that there are no restrictions as to the legal situation of legal persons as compared to natural persons (Dąbrowa, 1970, p. 3). Still, apart from a few caveats (e.g. those relating to the age of majority), civil-law regulations are in principle not differentiated depending on whether they are to be applied to natural persons or to entities vested with legal personality. This is also true with respect to the liability of legal persons for civil infractions (torts). The various civil infractions defined in the Civil Code are not really differentiated for natural and legal persons, so 'whoever' behaves in a certain way, regardless of whether it is an individual or an entity vested with legal personality, is responsible for any damage incurred (Dąbrowa, 1970, p. 3-4).

A similar situation exists when it comes to liability under administrative law and, in particular, the imposition of administrative fines by public administration bodies. In the doctrine, this phenomenon is referred to as 'the administrative power to punish,' since this type of liability is enforced by public administration bodies rather than the courts. In certain cases, this kind of liability can be incurred by natural persons and collective entities (including associations) alike. There are more than a hundred legislative acts in the Polish legal system providing for the possibility of administrative fines being imposed by various public administration bodies.

3. The basic principles of the criminal liability of associations in Polish law

In itself, the fact that associations can be held criminally responsible is not controversial. However, the moment one tries to define the structure of the criminal liability of associations, serious theoretical problems arise. As W. Lang wrote, "A complicated theoretical problem arises when the subject of subjective liability is a person other than

a natural person, especially, when it is a legal person. The issue of guilt of legal persons and other entities other than natural persons, which emerges mainly (but not exclusively) in civil law, requires theoretical elaboration" (Lang, 1969, p. 55). This statement is of direct relevance to the issue of the criminal liability of associations.

The task is not made any easier by the fact that, in the current Polish literature on the subject, there is no categorical view on the legal nature of the liability of collective entities for punishable offence. We shall return to this problem at a later point.

Some very helpful guidance for resolving such doubts can be derived from the rulings of the Constitutional Tribunal, which has classified the liability of collective entities, similarly to disciplinary liability, as criminal liability in the broad sense of the term (also referred to as criminal liability *sensu largo*).[12] Indeed, no one challenges the stance that criminal liability in the strict sense of the term, that is to say, liability provided for in the Penal Code and the Code of Petty Offences, can only be enforced in connection with the perpetration of an act classified as a crime or a petty offence. The prevailing doctrinal view is that only a natural person can be a bearer and creator of moral processes that can generate an act within the meaning of criminal law (Filar, 2006, p. 163). The question then arises about the position of the criminal liability of associations in Polish law.

As already noted, the legal doctrine is dominated by the opinion that the notion of an act can only refer to natural persons. However, some authors argue that, in many respects, an association resembles a human body. It has a 'brain' and a 'nervous system' to control its activities and the 'hands' that carry out the commands of the control centre. Such a collective entity is thus able to produce collective acts of mind and acts of will (Jankowska, 1996).

Other authors, while rejecting the possibility of recognising that collective entities are capable of producing an act of their own, at the same time allow for the possibility of holding them liable, criminal liability included, by attributing to them an act perpetrated by a natural person and, more specifically, by attributing to them the activities of the

[12] See Constitutional Tribunal of the Republic of Poland, Judgment of 3 November 2004, OTK-A 2004, no. 10, item 103.

bodies representing them as their own activities. This concept, known as the theory of equation, consists in equating the governing bodies of a collective entity with the entity itself by way of accepting the pretence that the governing bodies, constituting the 'brain' of a collective entity, represent it and express its will, being a kind of 'ego' of the respective collective entity (Nagy, 2008; Nita, 2009, p. 69-70).

Now, since it is possible for associations to be held liable under civil or administrative law, one has to assume that an association, which is a collective entity and has legal personality, may also incur broadly defined criminal liability (criminal liability *sensu largo*). After all, an association benefits from various forms of legal protection and enjoys a set of rights guaranteed by law; correspondingly, it must also have certain legal obligations incumbent upon it, a violation of which must give rise to legal liability (being held legally liable). Again, nowadays no one questions the possibility of bringing an association to civil or administrative liability. An association is able to produce an act that is subject to assessment not only under civil or administrative law, but also under the broadly defined criminal law.

The criminal liability of associations should therefore be explicated proceeding from their specific role in society. When speaking of an association, categories such as 'grants,' 'subsidies,', 'subventions' are usually applied to the association as a whole, and not just to its managing board, its members, or other natural persons that can be held criminally liable. Hence, only penalties that directly affect the association as a whole can be considered adequately punitive.

One would also be justified in stating that the activities of collective entities, including associations, involve the phenomenon of 'team spirit', which, as pointed out by M. Filar, boils down to a sense of a transpersonal community of interests of their members. This phenomenon plays a significant role in the motivation of individuals who, inspired by team spirit, commit punishable offences as part of their activities carried out in the interests of the respective collective entities (Filar, 2006, p. 163).

While the limited scope of the present work does not allow us to develop a more detailed analysis of these arguments, one can contend that they are convincing enough. This suggests that an association is capable of producing an act within the meaning of the civil, administrative, and criminal law.

Another important issue that should be considered is the question whether an association can be held culpable for a punishable offence. This issue gives rise to serious doubts under both the administrative and criminal law. To a lesser extent, these doubts also emerge in relation to the concept of guilt in civil law. One should note, however, that there has been a strong tendency in the civil-law doctrine to regard the concepts of guilt in criminal and civil law as categorially analogous. It will be recalled that, within the doctrine of criminal law, two main theories of guilt have been developed: the psychological theory and the normative theory. The latter theory also prevails in the current doctrine on civil infractions. If we were to view the concept of guilt from the vantage point of the psychological theory, then the very notion of guilt would be highly questionable in the case of actions performed by an association. This is because an association is not capable of generating internal psychological experiences, nor can it create psychological links between the perpetrator and the act, as both these categories are of a personalistically individualised nature. The normative theory of guilt, which is based on the external reproachability of a given conduct, offers more possibilities for a fruitful discussion. Following an external assessment of a decision generated inside an association by its collective will, one could conceivably allege the impropriety of that will, i.e. that the collective entity in question wishes for something it should not wish for, since a professional, exemplary association, acting in accordance with the principles of fairness, would not have acted in this way in a given situation. From this perspective, one could speak of the association's guilt (Filar, 2006, p. 165-166).

At this point, we would like to remind that the purpose of the present section is to offer an analysis aimed at identifying grounds within the theory of law for the enforcement of criminal liability against associations. In practice, the application of this type of liability to associations, from the point of view of substantive law, usually amounts to establishing, as it were, the unlawfulness of a given act. To put it differently, there is an undeniable tendency in judicial practice to objectivise the criminal liability of associations, confining the issue to whether a given act constituted an infringement of the law.

Some reservations notwithstanding, this approach seems to be adequate to the current needs. The question remains whether, in this

situation, one can still speak of liability in relation to punishment, which cannot be based on any principle other than the principle of guilt (if only in the special meaning applicable to associations), or whether we are dealing with a typical objective liability based solely on the principle of strict liability (risk). When answering this question, it should be made clear that the criminal liability of an association – just like any liability that leads to a punishment being imposed on a given entity – must be based on the principle of guilt. Treating this kind of liability as strict liability, based on the principle of risk, would be in contradiction with the Polish Constitution. The Polish Constitutional Tribunal has emphasised on more than one occasion that any repressive liability, i.e. liability that envisages the imposition of a penalty on the perpetrator, must be based on the principle of guilt. This also applies to the criminal liability of associations, based on a peculiarly construed notion of guilt derived from legal constructions typical of civil law. In essence, this peculiar construal of guilt amounts to an attempt to transfer the classic forms of civil-law guilt onto criminal-law guilt (D. Habrat, 2005, p. 100).

One kind of guilt that may come into play is the so-called fault in selection (*culpa in eligendo*), related to the lack of due diligence in selecting a natural person (Bartosiewicz, 2004, p. 41-42). When translating the doctrinal views on this type of guilt in civil law (with reference to the liability of collective entities for punishable offences) to the criminal liability of associations, it should be stated that the liability of an association arises when there has been a failure to select the right person to act on behalf or in the interests of the association within his/her authority or duty to represent it and to make decisions on its behalf, or when the person exceeds this authority or fails to fulfil this duty.

Another type of guilt that can be attributed to an association is the so-called fault in the supervision (*culpa in custodiendo*), which is characterised by the failure on the part of a governing body or representative of an association to duly supervise a natural person or persons whose actions, under the applicable regulations, constitute a criminal offence for which the association can be held criminally liable. In this case, the association's obligation to exercise supervision must follow from a specific authority, such as a legislative act, the association's charter or bylaws, a contract or resolutions adopted by the association. One could cite as an example the disciplinary liability of a sports club for

the lack of supervision over its supporters, club activists or players who commit actions that are categorised in the disciplinary regulations as disciplinary offences of the sports club. The association failure to exercise proper supervision over an individual is therefore indicative of its own fault, since it is obliged to exercise such supervision (Filar, Kwaśniewski, Kala, 2006, p. 56-57).

Another possible premise for the criminal liability of an association is related to the so-called organisational fault. The rationale behind imposing liability on the basis of this premise is a kind of aiding and abetting in the perpetration of prohibited acts on the part of a person who is required, within the scope of their competence, to counteract infractions of the law. In the case of associations, aiding and abetting consists in taking an indifferent, passive stance towards applicable regulations, which facilitates the perpetration of a prohibited act by the 'actual' perpetrator. In the case of an association, the so-called organisational fault may consist in a passive attitude towards the association's duty to supervise the activities of a certain individual (the 'actual perpetrator').

Thus, the criminal liability of associations is based neither on the principle of guilt as construed in the criminal-law doctrine, nor on the principle of risk, typically characteristic of liability under the civil law. Here one should speak of an autonomous concept of guilt which, while pertaining to the liability of collective entities for punishable offences, originates from the civil law.

Introducing the criminal responsibility of associations requires a re-definition of what constitutes a criminal act as well as the concept of criminal culpability (see more Weigend, 2008, p. 927-945).

4. The legal nature of the liability of associations for punishable offences

Ever since the interwar period, there has been a disagreement in the literature as to whether the criminal liability of associations belongs to the domain of criminal law or administrative law. J. Makarewicz, to whose work we have made numerous references above, insisted that the criminal liability of associations must be seen as falling within the domain of administrative law. A different standpoint was taken by

H. Wiewiórska and S. Śliwiński. The latter author was of the opinion that one could conceive of a situation where the perpetrator of a criminal offence would be a collective entity, in particular, a legal person. He indicated the Act on Cartel Agreements of 1939 as an example of the criminal liability of legal persons. According to him, the guilt of a legal person is inextricably linked with the guilt of its representatives. The liability of a legal person will therefore be excluded if no fault can be attributed to any of its representatives (Śliwiński, 1946, p. 73).

Despite the passage of more than a hundred years since Makarewicz brought up this issue in the Polish legal literature, this dispute has retained much of its relevance. Even today, there are serious doubts in the Polish legal doctrine as to the legal nature of the liability of collective entities for punishable offences. Some authors propose that we are dealing with a new category of liability (Mik, 2003, p. 67). Others express the opinion that this type of liability arises from a diffusion of concepts formulated in terms of penal liability under administrative (Skwarczyński, 2003, p. 165-166) and civil law. Still others employ terms that explicitly refer to criminal law, indicating that we are dealing with *quasi*-criminal (Czyżak, 2004, p. 38; Filar, 2006, p. 173) or criminal liability (Zoll, 2004, p. 29-30). Finally, there are those who assert that this type of liability falls within the domain of administrative law and suggest calling it 'public-law liability' (Boć, 2005, p. 31).

At present, the issue of the liability of collective entities for punishable offences is discussed in textbooks on criminal law rather than administrative law, which is a strong indication that it is commonly perceived as falling within the domain of criminal law.

An important role in determining the legal nature of the criminal liability of associations can be played by conclusions drawn from the judicial practice of the European Court of Human Rights and the Polish Constitutional Tribunal. An extremely important criterion for assessing the legal nature of a given type of liability is how the penalties that can be imposed under this kind of liability compare to the penalties and penal measures provided for in the Penal Code.

Sanctions that may be imposed on an association include, in addition to monetary penalties ranging from PLN 1,000 to PLN 5,000,000, the following: forfeiture of material objects proceeding from a prohibited act; forfeiture of financial benefits derived, directly or indirectly, from

a prohibited act; forfeiture of the equivalent of such objects or benefits; a ban on promotion or advertising; a ban on receiving grants, subsidies or other forms of financial support from public funds; a ban on receiving assistance from international organisations of which the Republic of Poland is a member; a ban on competing for public contracts; publication of the sentence.

It is often emphasized in the literature that a penalty imposed on a collective entity should meet the following objectives:

1) it should afflict the perpetrator;
2) it should be imposed for a breach of the law;
3) it should be imposed on the perpetrator of the breach of the law;
4) it should be deliberately imposed by an entity different from the perpetrator;
5) it should be imposed by an authority established within the legal order whose norms have been violated (Namysłowska–Gabrysiak, 2003, p. 47).

The objectives of the sanctions that can be imposed on associations under the existing law are undoubtedly in line with the above criteria. Sanctions in the form of financial penalties, forfeiture, prohibition of promotion or advertising as well as prohibition of applying for public funds and public contracts cannot be levied against any associations or legal persons other than the convicted entity. They will also undoubtedly afflict the perpetrator. The degree of the repressiveness of these measures will depend on the type and nature of the prohibited act. It should also be noted that the punishment is meted out by judicial authorities, that is to say, by an entity other than the perpetrator.

At this point, the question should be raised whether an association can be punished at all, i.e. whether it is capable of suffering punishment or, in other words, whether an association can 'feel' punishment. Of course, as Makarewicz points out, the ability of an association to feel punishment is of secondary importance in terms of the theory and essence of punishment, because, from the point of view of general prevention and moral condemnation, it is completely irrelevant how a convicted person reacts to punishment (Makarewicz, 2009, p. 381). On the other hand, however, there is no doubt that an association possesses a number of material and immaterial assets that can be affected by sanctions, *viz*. property, honour, and good name. All of these assets

are vested directly in the association itself, and not in its individual members, so a punishment directly affects the association as a whole, whereas its members are effected indirectly, at the most *pro rata rate*, to cite Makarewicz (Makarewicz, 2009, p. 381). Since it is unquestionable that a legal person possesses certain assets that may be infringed upon as a result of a criminal offence, it seems reasonable that also penalties imposed on an association may interfere with some legal assets in its possession.

These sanctions are, in essence, similar to the penalties and penal measures imposed on natural persons for crimes or petty offenses (see also Riihijärvi, 1995, p. 224-225). By way of example only, it should be noted that 1) monetary penalties imposed on associations are comparable in their repressive character to fines imposed on individuals; 2) forfeiture as applied to associations is similar to forfeiture as a penal measure under the Penal Code; 3) prohibitions that may be imposed on an association resemble penal or precautionary measures consisting in the prohibition for an individual to conduct a particular type of business activity; 4) making the sentence public is practically identical with one of the penal measures provided for in the Penal Code.

The penal nature of the liability of associations for punishable offences is also confirmed by the fact that, pursuant to Art. 42 of the respective Act, the provisions of the Executive Penal Code of June 6th, 1997 (see Journal of Laws, year 2021, it. 53, as amended) shall apply *mutatis mutandis* to the execution of monetary penalties, forfeitures, prohibitions, and to publication of the sentence. The fact that the execution of penalties imposed on associations is based on the provisions regulating the execution of penalties imposed under the Penal Code is an important argument in favour of the view that this kind of liability is penal in nature.

If we add that, for cases involving the liability of collective entities for punishable offenses, the court of first instance is the district court (criminal division) that has jurisdiction over the district where the offense was committed, and appeals against judgments are heard by the circuit court of jurisdiction defined by the provisions of the Code of Criminal Procedure, it becomes obvious that, in the Polish legal system, the criminal liability of associations falls within the domain of criminal law. However, it should be regarded not as criminal liability

sensu stricto, understood as liability provided for in the Penal Code or the Code of Petty Offences, but as criminal liability in the broad sense (criminal liability *sensu largo*).

Despite many similarities, however, by no means can the criminal liability of associations be equated with the criminal liability under the Penal Code. Therefore, it is inadmissible to apply to the criminal liability of associations, even by analogy, provisions of the general part of the Penal Code, including, in particular, intertemporal provisions, provisions concerning the stages in the commission of an offence, and provisions on circumstances that exclude the criminality of an act.

5. Criminal liability of ordinary associations, unions of associations, and associations of local government units

In addition to traditional associations, Polish law also distinguishes special-status associations, unions of associations, associations of local government units, and so-called ordinary associations.

Not all associations are subject to the provisions of the Act on Associations. Pursuant to Art. 7 sec. 1 it. 1 of the Act, its provisions do not apply to, *inter alia*, social organisations operating on the basis of separate laws or international agreements to which the Republic of Poland is a party. Associations whose activities are based on special laws are called 'special-status associations' and include, among others, the Polish Red Cross, the Polish Allotment Association, and the Polish Hunting Association. The issue of the criminal liability of this type of associations should not give rise to much controversy, since under special laws they have separate legal personality and are criminally liable on the same terms as all other associations.

A similar remark should be made with regard to unions of associations and associations of local government units. Pursuant to Art. 22 sec. 1 of the Act on Associations, three or more associations may establish a union of associations, which can also have legal persons other than associations as its founders and members. Pursuant to Art. 84 sec. 1 of the Act on Municipal Self-Government of March 8th, 1990 (see Journal of Laws, year 2020, it. 713), in order to promote the idea of local self-government and defend common interests, municipalities (*gminas*)

may establish associations, which may also include higher-level units of local government, *viz*. counties (*powiats*) and provinces (voivodeships). Unions of associations or local government units possess legal personality and are subject to criminal liability on the same terms as associations that only include natural persons as their members.

It is worth noting that, in addition to associations registered at the registry court, the Act on Associations provides for a simplified form of association, the so-called 'ordinary association,' which has no legal personality.[13] An ordinary association can be established by just three persons, and no court registration is required. The association comes into being and can commence its activities as soon as it has been entered into records kept by the county governor (*starosta*) of the country where the association has its seat. An ordinary association does not have legal personality but it should be kept in mind that criminal liability applies not only to legal persons but also to organisational units without legal personality vested with legal capacity on the strength of separate regulations. Initially, after the Act on Associations came into force, there were serious doubts as to whether ordinary associations could be treated as organisational units without legal personality. The problem was solved by the amendments introduced in 2016. As amended, the Act makes it clear beyond any doubt that an ordinary association, despite its lack of legal personality, is an entity which has legal rights and is subject to obligations. Pursuant to Art. 40 sec. 1a of the Act on Associations, an ordinary association may, on its own behalf, acquire rights, including property and other rights *in rem*, incur liabilities, sue and be sued. In view of this provision, an ordinary association should be recognised as the so-called handicapped, or imperfect legal person within the meaning of Art. 33^1 § 1 of the Civil Code. It is therefore an organisational unit without legal personality which has been vested with legal capacity (Hadrowicz, 2016). Consequently, it is an entity that may be held liable for punishable offences.

[13] See also about 'unincorporated associations' in Northern Ireland (Glennon, 2000, p 120-138).

6. Other types of liability of associations under the broadly defined Polish criminal law

6.1. Foreword

Elements of the broadly defined criminal liability of associations can be discerned in Polish law not only in the Act on Liability of Collective Entities for Punishable Offences itself. As pointed out by Makarewicz, Polish law exhibits elements of the criminal liability of collective entities in various regulations. He saw as a manifestation of this type of liability any affliction imposed on a legal entity in order to force it to behave in a certain manner. As an example, he cited the regulations of the press law that was in force during the partitions of Poland. Under the law, the publication of a periodical could be suspended in order to enforce the payment of a fine imposed on its editor in connection with the content of a particular article. Makarewicz emphasised that such a suspension constituted a personal affliction for the legal person that might own the publication.

Makarewicz also formulated the concept of 'indirect criminal liability of legal persons,' pointing to the fact that this kind of liability transpired in the Fiscal Penal Act of 1932, which was in force at the time of writing. He specifically referred to the regulations contained in Articles 33 and 36 of this Act, under which any fines and legal costs imposed on a convicted natural person could be transferred onto the legal person in whose lieu the said natural person had acted.

6.2. Subsidiary liability of associations

The kind of indirect criminal liability described by Makarewicz is currently present in the fiscal penal law in the form of subsidiary liability. Pursuant to Art. 24 of the Fiscal Penal Code of September 10th, 1999 (see Journal of Laws, year 2020, it. 19, as amended): "A natural person, a legal person or an organizational unit without legal personality vested with legal capacity by separate regulations shall bear subsidiary liability in whole or in part for a monetary penalty imposed on the perpetrator of a fiscal crime, if the said perpetrator acts in lieu of

the said entity, conducting its affairs as its proxy, manager, employee or in any other capacity, and the said entity has derived or could have derived any material benefit from the fiscal offence committed". From the above, it is clear that an association may also bear subsidiary liability. However, there is been some disagreement in the legal doctrine concerning the issue of the legal nature of this type of liability. On the one hand, the prevailing view is that liability of this type is neither the criminal liability as per the Fiscal Penal Code (criminal liability *sensu stricto*), nor even the criminal liability referred to in Art. 42 of the Polish Constitution (criminal liability *sensu largo*). Instead, its civil-law and fiscal-law nature is emphasised. On the other hand, one cannot overlook the fact that it is nevertheless liability of a strictly personal nature (for example, subsidiary liability does not encumber a decedent's estate). Correspondingly, many of the provisions relating to the suspect, the accused, and the defence counsel apply *mutatis mutandis* to the subject of subsidiary liability and their attorney (Article 125 § 1 of the Fiscal Penal Code). This fact is an important circumstantial indication of the penal nature of subsidiary liability, which may also be borne by associations.

The limited scope of the present work precludes a broader discussion of the legal nature of the subsidiary liability of associations. However, it is necessary to recognise and point out its strong links with the criminal law.

The subsidiary liability of associations is similar in nature to the now defunct institution of reimbursement by a collective entity (and thus also an association) of the proceeds of crime, which was provided for in Art. 52 of the Penal Code. This provision, repealed in 2015, stipulated that, in the event of a conviction for a crime from which a natural person, a legal person or an organisational unit without legal personality had derived a financial benefit, provided the perpetrator had acted on behalf or in the interests of the said entity, the court would order the entity that had derived the financial benefit to return it in whole or in part to the State Treasury.

6.3. Administrative penal liability of associations

It has already been mentioned that administrative fines may be imposed not only on individuals but also on associations, and there are more than a hundred laws in Poland that provide for the possibility of a fine being imposed on the offender. A significant proportion of these laws are applicable to associations. The bodies authorised to impose administrative fines are public administration bodies, including local government authorities. The respective proceedings are conducted in agreement with the principle of two instances. Final decisions on the imposition of fines are subject to judicial review, first by the provincial administrative courts, and then by the Supreme Administrative Court.

It is usually the case that the amount of an administrative fine does not depend on whether the entity subjected thereto is a natural person, a legal person, or an organisational unit without legal personality. This happens when the legislator uses the word 'whoever' to designate an entity subject to administrative penalty without further specifying whether the reference is to a natural or a legal person.

The legal nature of this type of liability in Polish law gives rise to serious doubts. During the period of the People's Republic of Poland, monetary penalties were seen as a measure resembling, to a certain degree, civil damages awarded by an administrative decision (Brzeziński, 1971, p. 193-194). Following the political transformation of 1989, in an attempt to clarify the nature of administrative fines, the Constitutional Tribunal in its judicial practice initially also referred to civil-law concepts, indicating that monetary penalties are the equivalent of what in civil law are knowт as contractual penalties, since they are sometimes used "in public law to impel entities with non-monetary obligations to fulfil those obligations in a timely and proper manner". However, the view that there is a close relationship between administrative fines and contractual penalties did not last for long. The reason is that the imposition of an administrative fine is a unilateral act performed by the authorities, and cannot therefore be treated as a contractual penalty, since it does not result from a mutual declaration of will expressed by both parties to a contract.

In view of the way administrative fines are regulated under administrative law, one cannot but recognise that they belong to the domain

of administrative law. Proceedings concerning the imposition of administrative fines are usually based on the provisions of the Code of Administrative Procedure, and the fines imposed are subject to collection under the provisions on administrative enforcement proceedings.

It should be noted, however, that administrative fines often exceed in their repressiveness the monetary penalties that can be imposed under the Penal Code or the Code of Petty Offenses. Some of them are even more repressive than the monetary penalties that can be imposed on collective entities for punishable offenses. The maximum monetary penalty imposed on a collective entity cannot exceed PLN 5 million, whereas there exist administrative regulations under which an administrative fine can be imposed in an amount that is considerably higher than PLN 5 million (for example, the President of the Office of Competition and Consumer Protection may impose an administrative fine for failure to provide requested information, for providing false information, preventing or obstructing the commencement or carrying out of an inspection in the amount of up to EUR 50 million).

The structure of regulations on administrative transgressions is bipartite. The first part is a disposition of the constituent elements of a particular transgression. The second part describes the sanctions that can be imposed for that transgression, i.e. specifies the administrative monetary penalty for an action exhibiting the constituent elements described in the disposition. Admittedly, this type of structure is typical of the provisions on criminal and petty offences.

The limited scope of the present study does not allow one to address this issue at greater length. What must be kept in mind is that the discussion on the criminal liability of legal persons in Poland began precisely with the issue of the imposition of administrative fines on these entities.

6.4. Disciplinary liability of sports clubs

The origins of the concept of the disciplinary liability of collective entities in sports, just like the origins of the criminal liability of legal persons, can be traced back to antiquity. In Ancient Greece, the Olympic judges, or the *Hellanodikai*, who constituted a body separate from the state authorities, were invested with the exclusive power to

perform judging, settle disputes, and exercise broad supervision over the ancient Olympic Games. The *Hellanodikai* had the right to impose fines not only on individual athletes but also on the entire community represented by an athlete who violated certain rules. Also today, it is impossible to hold a sporting competition without the possibility of enforcing liability, in particular, disciplinary liability, against certain collective entities.

Disciplinary liability is not limited to individual sports clubs, as it extends to national sports associations. The disciplinary liability of national federations seems to stem from the hierarchical (pyramidal) model of membership, characteristic of European and international sports organisations. The charters and disciplinary codes of virtually all international sports organisations contain provisions under which individual national sports federations are subject to disciplinary liability imposed by the international sports organisation, which are located at the vertex of the membership pyramid. Correspondingly, one can make an assumption, perhaps too generalised and simplified, that disciplinary liability in these cases is applicable precisely by virtue of membership in an international sports organisation. The premise is that an international sports organisation operating, as a rule, in the legal form of an autonomous, self-governing association or a union of associations or foundations may establish regulations providing for disciplinary sanctions against its members.

As regards the range of entities that can be subjected to disciplinary liability, there is basically no Polish sports federation which would not be able to exercise this type of liability in relation to its member-clubs operating in the form of a non-profit association. Here it should be noted that the vast majority of sports clubs in Poland operate in the form of non-profit associations, as this legal form is, undoubtedly, the most advantageous one for organisational and financial reasons. Sports clubs in the form of commercial companies mainly operate in the most popular sports (football, speedway or basketball), where the top competition divisions (Ekstraklasa Football League, Speedway Extraleague) are run as so-called professional leagues, which can only include sports clubs operating in the form of commercial (limited liability or joint-stock) companies.

It is undisputable that the disciplinary liability of sports clubs is punitive in its nature. Many of the penalties that can be imposed on

sports clubs are just as repressive as punishments or punitive measures provided for in the criminal law. For example, under Art. 7 sec. 1 of the Act on the Liability of Collective Entities for Punishable Deeds, the court can impose on a collective entity a fine in the amount of PLN 1,000 to PLN 5,000,000, but not more than 3% of the revenue generated in the financial year in which the respective prohibited act was committed. At the same time, under the disciplinary regulations adopted in sports, fines imposed on sports clubs are determined with complete disregard for their revenues. Thus, financial penalty can be imposed in an amount that considerably exceeds 3% of the revenue generated by the sports club in the financial year in which the respective disciplinary infraction was committed.

According to some authors, in a democratic state governed by the rule of law, the only bodies empowered to impose fines should be public authorities, in most cases – state courts. In sports, however, monetary penalties are imposed by disciplinary bodies appointed by various Polish sports associations, which, by definition, are not public authority bodies.

There are no provisions in the Polish criminal-law system that would make it possible to ban a given collective entity from conducting a specific kind of business activity. By contrast, the disciplinary regulations of virtually all the sports associations in Poland provide for penalties like the exclusion of a given club from competition or the termination of its membership in the sports association, sometimes even 'for life.' This fact only goes to confirm that disciplinary sanctions used in sports are quite repressive in nature.

Generally speaking, disciplinary regulations in sports are not differentiated with respect to whether they are intended to apply to individuals or to sports clubs. While disciplinary regulations provide for a great number of situations incurring disciplinary liability, they are largely the same for different categories of entities that can be subject to such liability. For precisely specified disciplinary offences, precisely specified penalties are imposed on various subjects (clubs, players, coaches, etc.) regardless of whether a given subject is an individual or a legal person. The unification of circumstances incurring disciplinary liability for the two types of legal entities known to civil law means that, regardless of the legal nature of the liable entity, the manner in which the occurrence of specific premises for the imposition of disciplinary

liability is established must be identical for natural and legal persons (see more Jóźwiak, 2013).

Recently, however, there has been a clear change in this trend. Namely, the disciplinary regulations of the Polish Football Association (*PZPN*) make a clear separation between the disciplinary liability of natural and legal persons, indicating, for example, that clubs bear disciplinary responsibility for the offenses of their players, coaches, instructors, medical staff, football activists, and fans. This solution brings the disciplinary liability of sports clubs closer to the solutions advocated in the legal doctrine. The most prominent Polish expert in the sports law, A. J. Szwarc (2012, p. 531), is of the opinion that "(...) just like the liability of collective entities in criminal law, the disciplinary liability of collective entities in sports should be treated and appropriately regulated as liability incurred by reason of disciplinary transgressions committed by natural persons. Defined in this way, this type of liability can be labelled either 'disciplinary liability' (*sensu largo*) or in a different way (e.g. 'the liability of collective entities for disciplinary transgression committed by natural persons')".

It seems, however, that the implementation of this proposal is possible only in theory. The idea that exactly the same principles should govern the enforcement of the liability of collective entities for punishable offences and disciplinary liability in sports does not seem to be well justified. Pursuant to Art. 4 of the Act on the Liability of Collective Entities, a collective entity is subject to liability if the fact that the prohibited act for which the entity is to be held liable has been committed by a person for whose conduct the collective entity bears responsibility has been confirmed by a final judgment. M. Filar refers to this way of regulating the basis of the liability of collective entities 'derivative,' 'accessory' and 'secondary' (Filar, 2004, p. 107). For the purposes of disciplinary liability in sports, it is hardly reasonable to require that a disciplinary offence of a subject (e.g. a player or a coach) for whose actions the sports club bears disciplinary responsibility, should also be confirmed by a final disciplinary ruling.[14]

[14] Pursuant to Art. 4 of the Act on the Liability of Collective Entities, a collective entity is liable if the fact of the commission of a prohibited act mentioned in Art 16 by a person described in Art. 3 has been confirmed by a final conviction of the said person, a judgement that conditionally discontinues criminal or fiscal criminal proceedings against the said person, a decision allowing the said person to

In fact, confirmation of the disciplinary liability of a sports club by a final judgment convicting players, coaches, and especially fans, does not seem possible, especially if we are dealing with the behaviour of a multitude of people (e.g. in corruption cases or cases concerning breaches of the peace by fans on the occasion of sporting events, for which sports clubs bear disciplinary liability).

As a general rule, a sports club bears disciplinary responsibility not only for the actions undertaken on its behalf by natural persons, but also for the conduct of its players and, most notably, of its supporters, despite the fact that, more often than not, their actions cannot possibly be considered as undertaken on behalf of the sports club.

From the above, it is clear that disciplinary liability in sports is undoubtedly punitive in its nature. However, it is not criminal liability in the narrow sense of the term. Here, one can speak, at most, of quasi-criminal liability. It differs from the criminal liability of collective entities for punishable offences in that the disciplinary liability of sports clubs is enforced by private-law entities (Polish sports associations), and not by state courts. Therefore, under no circumstances can the provisions of substantive criminal law or the Act on the Liability of Collective Entities for Punishable Offences be applied to these proceedings, even by analogy.

6.5. Supervisory measure in the form of the dissolution of an association

As a concluding remark on the broadly defined criminal liability of associations, we would like to note that the most severe measure that can be imposed on an association under the existing legislation is provided for in the Associations Act itself. This measure consists in the dissolution of an association – a kind of organisational 'death penalty.' In the legal literature, only the supervisory (controlling) character of this measure is emphasised, while its repressive function is completely disregarded.

The implementation of its repressive function is often encountered in a situation where the public authorities exercise their power to inter-

voluntarily submit to liability or a decision to discontinue the proceedings against the said person due to circumstances excluding the punishment of the perpetrator.

vene in the activities of entities governed by private law, especially in a way that interferes with their constitutionally guaranteed rights and freedoms. Pursuant to Article 12 of the Constitution, the Republic of Poland guarantees freedom for the creation and functioning of trade unions, social and professional organisations of farmers, societies, civil movements, and other voluntary associations and foundations. Nevertheless, associations are subject to supervision by the county and provincial governors. The provincial governor (*voivode*) supervises the activities of associations of local government units, while other types of associations are supervised by the county governor (*starosta*).

The legal doctrine distinguishes between supervisory measures imposed directly by the supervisory authority and those imposed by the court at the request of the supervisory authority or the public prosecutor. The supervisory measures that can be imposed on an association directly by the country governor (or by the mayor of a city with the county status) basically reduce to the following two kinds (see more Swora, 2003; Dróżdż, 2015).

Firstly, there is the right to demand that an association submit copies of the resolutions of the general meeting of its members (or a meeting of delegates) and to request the necessary explanations from the authorities of the association (Art. 25 par. 2 it. 1 and 2 of the Associations Act). The fulfilment of these obligations is reinforced by the possibility for the supervisory authority to file a motion with the court for a fine to be imposed on the supervised association, should it fail to comply with the abovementioned demands (Art. 26 of the Associations Act). The fine can be imposed in the amount of up to PLN 5,000, i.e. in the same amount as the fine usually imposed under the Code of Petty Offenses (Article 24 § 1 of the Code of Petty Offences). However, an association can be exempted from the fine if, immediately after it has been imposed, the association complies with the demands of the supervisory body.

Secondly, if the supervisory authority finds that the activities of an association are unlawful or violate the provisions of its charter, the supervisory body, depending on the type and degree of irregularities found, may request that they be rectified within a specified period of time, caution the authorities of the sports club or file a motion with the court pursuant to Art. 29 of the Associations Act.

Certain doubts arise concerning the nature and essence of such measures. Admittedly, no one questions the fact that these are measures applied within the supervisory powers of the competent local government bodies. However, in the literature, one can encounter the view that the supervisory measures described above should constitute an adequate (appropriate, necessary, and reasonable) penalty for the act committed, which clearly accentuates the retaliatory (repressive) nature of these measures (Dróżdż, 2015, p. 33).

As for the concept of a caution, it is not defined in detail in the Associations Act. As part of this measure, the supervisory authority points out to the association in question its transgressions. Here the presupposition is that, should the association continue to act in a manner inconsistent with the law or provisions of its charter, the supervisory authority may resort to stricter measures, and in particular those provided for in Art. 29 of the Associations Act.

It appears that cautioning is essentially similar to a reprimand or admonition as used in disciplinary proceedings and is not a particularly severe penalty. Nevertheless, a failure of an association to rectify its transgressions may result in the supervisory authority resorting to stricter measures. The objective of cautioning is to warn the association that it is its last chance to desist from further breaches of the law or provisions of its charter, failing which the supervisory authority may decide to motion the court for more stringent measures.

As for the supervisory measures provided for in Art. 29 of the Association Act, they can only be imposed by a court's decision. As a rule, such a decision is issued at the request of the supervisory authority or a public prosecutor. These measures are as follows: 1) issuing an admonition to the authorities of the association; 2) repealing a resolution of the association that is inconsistent with the law or the association's charter; 3) ordering the dissolution of the association, if its activities result in gross or persistent violations of the law or of its charter and it is not feasible that the association can remedy its activities so that they conform with the law or the charter. The literature emphasises the repressive nature of the measures consisting in the supervisory declaration of invalidity of resolutions adopted by the governing bodies of an association or in the dissolution of an institution or governing body (Podgórski, 1991, p. 32).

It is only proper that the dissolution of an association can only be effected by a court's decision. Since the right of association is one of the basic constitutional rights, it seems obvious that, in a democratic state governed by the rule of law, the only entity authorised to terminate the exercise of this right should be the state court. Note, however, that even a court may not do so on its own motion, but only at the request of the respective supervisory authority or the public prosecutor's office.

Despite the fact that all the measures of supervision over the activities of associations are somewhat repressive in nature, they can hardly be regarded as penalties in the strict sense of the word. Their application cannot therefore be seen as an effectuation of the criminal liability of associations, however broadly defined. Nonetheless, we saw it fit to address this issue in a book on the criminal liability of association, considering that a sanction in the form of the dissolution of an association is not unknown to the existing Polish legislation. This circumstance will be of significance when it comes to formulating *de lege ferenda* proposals to the legislator at a later point.

Chapter II.
Criminal liability of associations in Hungarian law

1. A brief history of the regulation of associations in Hungary

We must look for the predecessors of the associations in Hungary in the Árpád-era (see e.g. Falus, 2015). The forms of association of persons and property were already known in Roman law, and were further developed by canon law, the glossator and commentator schools. With the spread of the Church, which itself promoted the creation of unions by teaching about the mystical body of Christ, these institutions also appeared in Hungary (Domaniczky, 2008, p. 11).

In the broad sense of associations, laws were passed very early on to sanction the illegal operation of such associations. One of these is Act V of 1446 of László V (Habsburg), which states that 'associations or conspiracies formed by anyone to the detriment of the country shall be dissolved and abolished': *"That all treaties, covenants, and covenants, made and entered into between and among themselves, by any high priests, barons, and countrymen, under oath or otherwise, in any manner whatsoever, which shall be prejudicial to the good of the country and the country itself, shall be void, void, and of no effect. § 1 And that the lords high priest and barons shall assist the inhabitants of the country in all that is for the good of the country and the country. § 2 And against all those who violate the laws and ordinances of the country, they shall bring all their power to bear."(Corpus Iuris Hungarici)".*

Article XLIV of 1519, "the alliances of the lords among themselves shall cease", provides for the dissolution of unions against royal power: *"Finally, that all the alliances and obligations which all the Lords have established and agreed upon be henceforth dissolved. § 1 That the affairs of his royal majesty and of all his kingdom may be the more freely and honestly attended to and cared for by all"(Corpus Iuris Hungarici)*.

In the Middle Ages, personalities were understood to be bodies, such as locus credibilis authenticus (Falus, 2019, p. 58-69), as special ecclesiastical authorities, or cities. Within municipal law, we also find bodies of individuals: the guilds, which appear in Hungary from the

14th century in the Western European sense of the word. However, they cannot be considered as the legal predecessor of the modern association, but rather as a public body in which people in the same occupation defended their economic interests in an organised way. The guilds had their own statutes (guild charter), their own assets, could lay down rules for their members (guild rules), could take an active part in the municipal law enforcement and military tasks, and also engaged in relief work and education (training of guild members).

Bootmakers' Guild[15]

However, their primary activity was market regulation, which they carried out in cooperation with the municipal authorities (Mezey, 1998, p. 145-147). These functions were taken over by the industrial corporations in the second half of the 19th century. Guilds are not associations, but they were the background and framework for centuries

[15] The rules of the guild of the bootmakers of Székesfehérvár were first promulgated on 14 January 1695 by the city's inner council. See more Végh, 2020

of self-organisation from which associations could be formalised in the modern age, and if the forerunners of associations can be found in the guilds' relief and funeral societies, singing and acting circles (Horony Pálfi, 1940, p. 9).

The church was the driving force behind these organisations, with the formation of societies within individual congregations, including those made up of the faithful, singers and others. One example of this is the St. Lazarus Catholic Citizens' Aid Society in the city of Bratislava, which dates its foundation to 1380. Its aim was "to help poor citizens and their widows" (Horony Pálfi, 1940, p. 9). Clerics also formed organisations. These included, for example, the 'adventurous societies' (In Hungarian: „Kalandos Társaságok") which initially provided for the burial of priests, about which Géza Supka writes: "...around 1211 a strange association was formed, which at first was more of a table society of priests, and it met every first of the month for a charity feast. Since these priests spoke Latin among themselves, and the first day of the month is called calendae in Latin, they named their society after this calendae.[16] But within a hundred years the Latin word had become completely Hungarized, and in 1348 Archbishop Csanád of Esztergom confirmed this priestly company in the following terms: 'Confraternitas, vulgariter: Adventurous.' King Sigismund, for example, was one of them, and soon women were also admitted to their ranks. The original purpose of the Adventurers' Society was to ensure that priests would mutually ensure each other's honourable burial. So it was a kind of funeral society..." (Supka, 1989, p. 10-12).

[16] They were probably confused with the Hungarian word 'kaland' for 'adventure' because of their similar sound.


A KÜLMAGYAR-UTCAI FÖLDÉSZEK
»KALANDOS«
TEMETKEZÉSI TÁRSULATÁNAK
ALAPSZABÁLYAI.
ALAPÍTVA: 1582-BEN.
A m. kir. belügyminisztérium által jóváhagyva az 1882-ik évben.

Title page of the statutes of the "Adventurous" burial society of the Külmagyar Street farmers of Kolozsvár (now: Cluj, Romania), founded in 1582, from 1882 [17]

NGOs in the medieval and early modern period differed from associations as we understand them today in one important respect, in that they did not have legal personality. They were primarily associations of the 'societas' type, which today would be called civil communities. It is unlikely that these organisations had statutes or accounts, and they certainly could not act independently, but rather had a common purpose: for example, to bring together '*ad hoc*' citizens of a town or, within a town, the better-off members of a particular congregation, to help the poor. This organisation then became formalised over time and, perhaps thanks to the staying power of the local congregation, was able to survive for a long time.

[17] See more Ortutay, 1979.

The historical reality of the well-known lines from the Hungarian hymn "*Left fate who has long been torn, Bring him a merry year, This nation has already chastened for past and the future sin*s" (Kölcsey, 1823)[18] has even left its mark on the civil sector. The Battle of Mohács[19] marked a century and a half of war in the country, which resulted in the militarisation of part of the population. The way of life of the endorsee warriors who defended the borders was already appreciated by contemporaries. According to Endre Domaniczky, this may be the background to the rifle club movement, which was so popular in Hungary between the 17th and 20th centuries and later became a sport and a social form of life (Domaniczky, 2008, p 13). The first rifle clubs were founded in the early modern period: in 1510 in Késmárk, in 1637 in Szepesbela, in 1703 in Pest,[20] but their heyday came later, only in the 19th century.

The New Age, which in Hungarian terms means the period between 1686[21] and 1918,[22] brought the idea of the Enlightenment to Hungary. At the same time, the highly controversial Freemasonry, which was present in Hungary from the 18th century until the communist takeover, appeared here, and its organisational structure and legal status was also similar to that of a modern civil community. The structure and operation of the lodges recalled the main features of the mason's guilds, but here we can discover more of the characteristics of the association as we understand it today. For example, when the lodges were formed, a uniform minimum number of members was set, as long as a lodge could not be formed with fewer than 7 members (Abafi, 1993). Following

[18] In Polish translation: „*Daj nam rok radosnych dni, Niech ten lud ukoi, Co okupił morzem krwi Przyszłość ziemi swojej"*

[19] On 29 August 1526, a bloody battle between the armies of the Kingdom of Hungary under King Louis II and the Ottoman Empire under Sultan Suleiman I was fought in the outskirts of Mohács in Baranya County, which ended in a Turkish victory. The Kingdom of Hungary was then divided into three parts, with the administrative system of the conquering Ottoman Empire in the centre, the Turkish Conquest, in place for 150 years.

[20] CENSUS OF ASSOCIATIONS 1878. XXIII., See more Tóth, 2005, p. 161.

[21] 12 September 1686: recapture of Buda Castle from the Turks.

[22] 13 November 1918: World War I ends for Hungary with the signing of the Belgrade Convention; 16 November 1918: the Hungarian People's Republic is proclaimed, giving Hungary independence from the Austrian Union and the Habsburgs after 400 years.

the example of Freemasonry, the reading circle movement, which had clearly political aims, started in the 1790s and quickly became popular, and the Hungarian Jacobin organisations (Benda, 1965, p. 388-422) were also based on the Masonic tradition. After the death of Joseph II, more and more student societies were formed, in the spirit of the approaching reform era. The first known such society was founded in Sopron in 1790 (Pajkossy, 1993, p. 8).

From that year onwards, the number of associations in Hungary began to increase significantly, according to the legal sources: *"5§. The governmental, ecclesiastical, civil and military authorities are obliged to obtain the data required for the purposes set out in § 1 and to submit them to the Central Statistical Office through themselves. Private institutions, associations and societies engaged in public and general interest activities shall send the data required for the above purposes directly to the Central Statistical Office at the latter's request"*.[23]

The first independent bourgeois government in 1848 did not feel the need to create a separate law on associations. In 1850, the Austrian Minister of the Interior, Alexander Bach, decreed that the establishment of associations should be tightened, and in November 1852, Franz Joseph I regulated the operation of associations by a patent.

In the early years of dualism, the right of citizens to form associations was recognised in the Nationality Act: "*Article 26 As it has been the right of individual citizens of any nationality to establish lower, middle and higher schools, as well as of municipalities, churches and parishes, so it shall be the right of each individual citizen to establish lower, middle and higher schools by his own efforts or by association. For this purpose, and for the establishment of other institutions for the promotion of language, art, science, economy, industry and commerce, the individual citizens may, under the supervision of the State, form associations or unions, and, having formed such associations, may make rules, act in accordance with the rules laid down by the State Government, collect funds, and, under the supervision of the State Government, manage them in accordance with the legal needs of their nationality*".[24]

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[23] Act XXV of 1874 on the organisation of national statistics.

[24] Act XLIV of 1868 on the Equality of Nationalities.

Further concessions were made by Act IV of 1869, which granted exemption from fees in respect of association petitions and documents. The Acts of 1869 and 1871 prohibited the participation of judges and members of the public prosecutor's office in political or workers' associations.[25] Presidential Circular No. 1394/1873 of the Minister of the Interior Gyula Szapáry was the first in Hungary to declare expressis verbis the freedom of associations, but it made the operation of associations subject to ministerial authorisation: *"any association shall be entitled to be formed under existing legislation only after the draft statutes have been approved by the Royal Government".*[26]

The circular of Kálmán Tisza, Minister of the Interior No.1508/1875 BM. prohibited the establishment of political associations for nationalities, they could only establish literary and public cultural institutions, while workers' associations were prohibited from establishing branch associations: *"and associations with essentially different purposes may not be formed under one title with common statutes".* The spirit of the decree was still similar to that of 1873, but the detailed regulations already contained a number of restrictive elements.

The decision to found the Hungarian Tourist Association on an excursion[27]

[25] 1869: IV. 11.§ és 1871: XXXIII. 12.§.

[26] 1394/1873 BM Decree, Introductory Part.

[27] URL: https://magyarturistaegyesulet.hu/az-mte-tortenete-2/az-mte-megalakulasa/ (Accessed: 2022-06-30).

The circular of the Minister of the Interior No. 1136/1898 punished association offences with 15 days' imprisonment or a fine of 100 forints,[28] and Decree 2219/1898 regulated the control of workers' associations (Balla, 2017, p. 27). In later years, only restrictive or prohibitive provisions appeared, the most famous of which is undoubtedly the 1912 law on exceptional measures in the event of war: *"The Ministry may prohibit the formation of new associations or branch associations in the territory of a jurisdiction (county, city) where it is necessary for the security of the state; it may control the meetings of existing associations or branch associations, and restrict or suspend their activities"*.[29]

1908. június 1. II. évf. 6. sz.

Kéretlenül küldött cikkeket csak akkor küldünk vissza, ha bélyeget mellékelnek. Kéziratokat hat hétnél tovább nem őrzünk.

Szerkesztőség: VIII. ker., Elemér-utca 36.

A NŐ ÉS A TÁRSADALOM

A FEMINISTÁK EGYESÜLETE, A NŐTISZTVISELŐK ORSZÁGOS EGYESÜLETE, A PÉCSI, A NAGYVÁRADI ÉS A SZOMBATHELYI NŐTISZTVISELŐK EGYESÜLETEINEK HIVATALOS KÖZLÖNYE.

Cikkeket csak a szerző engedelmével, lapunk egyéb tartalmát A Nő és a társadalom megnevezése mellett szabad átvenni.

Kiadóhivatal: Andrássy-út 83. Telefon 40—75.

The headline of the official gazette of the Pécs Association of Women Civil Servants and Commercial Employees. 1 June 1908.[30]

After the outbreak of the war, Prime Ministerial Decree No. 5479/1914 restricted the operation and establishment of associations in the area near the battlefield, and Decree No. 5735/1914 extended the scope of the above provisions to the whole country. However, the gov-

[28] „1879: XL. t.-cz. 1. of XL. of 1879, I declare the formation of an association contrary to the above-mentioned rules, the participation in the management, meetings or any other activities of an association so formed or duly formed but dissolved or suspended by a lawful decision to be an offence, and I order it to be punished with imprisonment for a term of 15 days and a fine of up to 100 forints."

[29] 1912: LXVIII. tv. 9.§

[30] https://pecsi-notortenet.blog.hu/2012/09/19/egy_pecsi_feminista_egyesulet_es_gyors_bukasa (Accessed: 2022-06-30).

ernment recognised that civilian self-organisations could significantly improve the situation of the population, and subsequently allowed the formation of associations for the purpose of providing military aid as an exception.[31]

The first, albeit not comprehensive, law on associations was the People's Law III of 1919. According to this law, no official permit or registration was required for the establishment of an association:

> *"1.§ Everyone has the right of association and assembly.*
> *2.§ No official authorisation or registration is required to form an association or gathering. Nor is it necessary to declare that the association has been formed or that the meeting has taken place.*
> *3.§ An association may only acquire rights or assume obligations under its own name (a legally constituted association) if it draws up its statutes, elects a management and is registered by the court in the register of associations upon application. The court must enter the association in the register of associations, provided that its lawful purpose is not contrary to criminal law.*
> *4.§ Those provisions of this People's Law which do not require further action for their implementation shall enter into force immediately. The rules necessary for the implementation of the other provisions shall be laid down by the People's Government as a matter of urgency. Such regulations, which may be made by decree, shall not affect the principles contained in this Act".*[32]

In 1922, the Minister of the Interior issued a decree on the use and protection of association badges.[33] The reason for the regulation was that the misuse of association symbols had become common. Under the regulation, only the emblem, the uniform or the uniform of an association or a public security or public authority body could be used. A further condition was a detailed description in the articles of association. The distinctive insignia and uniforms listed below could

[31] Prime Ministerial Decree No 1442/1916 See more Dobrovits, 1936, p. 9.

[32] People's Act III of 1919 on Freedom of Association and Assembly.

[33] 1922/72390 Decree of the Minister of the Interior on the use and protection of association badges.

only be used by members of the association holding an association card and by a specifically authorised member of the association. In case of violation of the regulations, the member was punishable by 15 days' imprisonment and a fine of up to 2,000 crowns.

The secure social background provided by the legislation had its effect: while in 1881 there were 3995 associations operating in Hungary, with an average of 10 years of operation and 169 members per organisation (Reisz, 2007, p. 254-263). In 1932, there were already around 14,000 associations, with a total of approximately 3 million members. As the total population of the country fell to 8.6 million after the Trianon land withdrawal, it can be concluded that one in three Hungarian citizens was a member of an association.[34]

The Men's Guild of Mosonsetpeters in the 1930s [35]

In 1932, the wearing of uniforms by members of political parties was regulated by decree.[36] In 1933, Minister of the Interior Ferenc Keresz-

[34] Statistics on foundations and associations, Budapest, 1994. KSH. p. 19.

[35] https://www.sulinet.hu/oroksegtar/data/magyarorszagi_nemzetisegek/nemetek/janossomorja/pages/012_Janossomorja_muvelodestortenete.htm (Accessed: 2022-06-30).

[36] 115.000/1932 Belügyminiszteri rendelet a politikai pártszervezetek egyenruha viselésének eltiltásáról

tes-Fischer issued a decree ordering the gendarmerie and the police to carry out secret data collection on political formations, the press and small churches. In 1934, a collection was compiled for internal use, listing political parties, associations and civic organisations.[37]

In 1939, in preparation for the war, increased state control was also exercised over the associations. Two important decrees were issued that year regulating the right of association and assembly.[38] The regulation restricting the right of association entered into force on 1 September.[39] Under the decree, no new association, branch association or other association-type organisation could be established. Existing associations were subject to increased police control. In the event of suspicious activities by an association, the Minister of the Interior was obliged to make a proposal for the restriction or suspension of its activities without delay. The ban could also be enforced by force of arms, and violators could be punished with imprisonment.

1940. Photo membership card of the Hungarian Tourist Association [40]

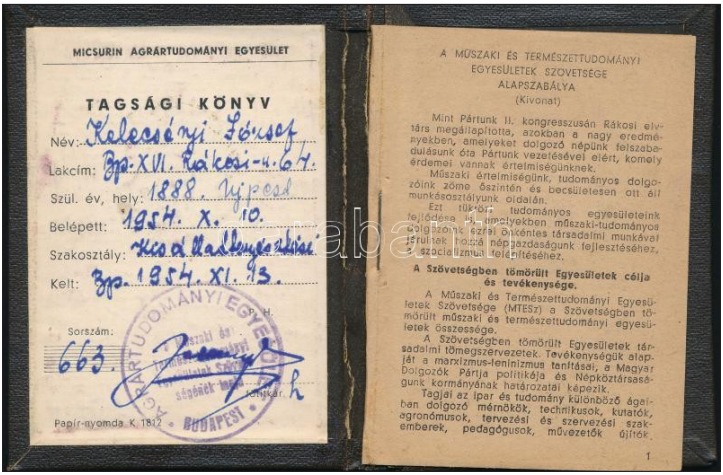
[37] See more Fazekas, (without a year number) URL: http://mek.niif.hu/01100/01169/01169.htm (Accessed: 2022-06-30).

[38] 8120/1939(IX) Prime Ministerial Decree on the restriction of the right of assembly.

[39] 8110/1939(IX.1.). Decree of the Prime Minister on the restriction of the right of association.

[40] https://www.mutargy.com/egyeb-mutargy/cca-1940-magyar-turista-egyesulet-fenykepes-tagsagi-igazolvanya (Accessed: 2022-06-30).

After the World War, the Soviet occupation and its growing political influence also left its mark on the regulation of fundamental rights. The rules on unification in Act I of 1946 and Act XX of 1949, which followed three years later, differed significantly. The basic reason for this is that the form of government changed over the three years: in 1946 it was a republic, and from 1949 it became a people's republic. In its preamble, Act I of 1946 (I. 31.) on the Form of Government of Hungary declared the right of assembly and association as the natural and inalienable rights of citizens. As an important legal guarantee, Act X of 1946 criminalised any action by public officials which unlawfully infringes the inalienable rights of a natural person. Law XX of 1949 regulated the right of association at constitutional level for just over 60 years: *„63.§(1) In the Republic of Hungary everyone has the right to form or join organisations for purposes not prohibited by law, on the basis of the right of association.(2) An armed organisation serving a political purpose may not be formed on the basis of the right of association".*[41]


MICSURIN AGRÁRTUDOMÁNYI EGYESÜLET

TAGSÁGI KÖNYV

Név: Kalecsányi József

Lakcím: Bp. XVI. Rákosi u. 64.

Szül. év, hely: 1888. Nyíregyháza

Belépett: 1954. X. 10.

Szakosztály: Kisállattenyésztési

Kelt: Bp. 1954. XI. 13.

Sorszám: 663.

Papír-nyomda K. 1812 • BUDAPEST •

A MŰSZAKI ÉS TERMÉSZETTUDOMÁNYI EGYESÜLETEK SZÖVETSÉGE ALAPSZABÁLYA (Kivonat)

Mint Pártunk II. kongresszusán Rákosi elvtárs megállapította, azokban a nagy eredményekben, amelyeket dolgozó népünk felszabadulásunk óta Pártunk vezetésével elért, komoly érdemei vannak értelmiségünknek.

Műszaki értelmiségünk, tudományos dolgozóink zöme őszintén és becsületesen ott áll munkásosztályunk oldalán.

Ezt tükrözi tudományos egyesületeink fejlődése is, amelyekben műszaki-tudományos szakmánkat ezrei önkéntes társadalmi munkával segítjük hozzá népgazdaságunk fejlesztéséhez, a szocializmus felépítéséhez.

A Szövetségben tömörült Egyesületek célja és tevékenysége.

A Műszaki és Természettudományi Egyesületek Szövetsége (MTESZ) a Szövetségben tömörült műszaki és természettudományi egyesületek összessége.

A Szövetségben tömörült Egyesületek társadalmi tömegszervezetek. Tevékenységük alapját a marxizmus-leninizmus tanítása, a Magyar Dolgozók Pártja politikája és Népköztársaságunk kormányának határozatai képezik.

Tagjai az ipar és tudomány különböző ágaiban dolgozó mérnökök, technikusok, kutatók, agronómusok, tervezési és szervezési szakemberek, pedagógusok, művezetők, újítók.

1

1954. Membership book of the Micsurin Agricultural Society[42]

41 Act XX of 1949 on the Constitution of the Republic of Hungary.

42 https://www.darabanth.com/hu/gyorsarveres/376/kategoriak~Magyar-filateliaes-postatortenet/Okmanyok~500017/1954-Micsurin-Agrartudomanyi-Egyesulet-tagsagi-konyve~II2207411/ (Accessed: 2022-06-30).

After the change of regime, the detailed regulation of the right of association was included in Act II of 1989, so the right recognised in the Constitution was supplemented by a detailed rule at the level of law. Article VIII of the current Fundamental Law (Constitution)[43] also recognises the right of assembly and the right of association: *"(2) Everyone has the right to form and join organisations".* The Constitution does not use the term 'association', but 'organisation', as an umbrella term that includes many other community activities, such as political parties, trade unions and other interest representation organisations.

Based on the above-mentioned provision of the Fundamental Law, today's legislation is contained in the so-called 'Civic Act'.[44] This deals with organisations formed under the right of association.[45] The source of law is not a cardinal law, but the right of association and the public status of the organisations created under it remain unchanged. The rules of operation of associations are covered by the Civil Code,[46] as are the specific forms of associations: trade unions, political parties and associations. The association is a recent legal institution. It is a special association which *"may be formed and operated by two members and whose members may be associations, foundations, other legal persons, organisations without legal personality or civil associations; no natural person may be a member of an association".*[47] Associations established as federations have so far been registered by the court as federations. The detailed rules for parties[48] and trade unions[49] are regulated by separate laws. Criminal law measures against associations are regulated by Act CIV of 2001.[50]

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43 The Fundamental Law of Hungary (25 April 2011).

44 Act CLXXV of 2011 on the Right of Association, the Public Benefit Status, and the Functioning and Support of Non-Governmental Organisations (hereinafter: the Civic Act).

45 Foundations are not included.

46 Act V of 2013 on the Civil Code.

47 2011.évi CLXXV. tv 4.§. (3).

48 Act XXXIII of 1989 on the Operation and Management of Political Parties.

49 Act XXVIII of 1991 on the Protection of Trade Union Property, Equal Opportunities for Workers to Organise and to Organise.

50 Act CIV of 2001 on criminal measures against legal persons.

2. Capacity and legal liability of associations

Professor E. Hacker was the first person in Hungary to make a significant scientific contribution to the literature on the criminal liability of associations. In 1922, at a time when the spirit of association was on the rise as a result of the permissive and supportive regulation of the People's Law, he raised the idea of the criminal capacity and criminal liability of associations at a meeting of the Hungarian Lawyers' Association (Hacker, 1922). As a tribute to the memory of this pioneering scholar, the current legislation on the capacity of associations to act and the criminalisation of associations is presented following the outline of his speech quoted above, which has also appeared in print.

2.1. Status and legal personality of associations

E. Hacker gave a detailed and reasoned answer to the question of whether associations have the capacity to act and can therefore be punished. The first aspect is to determine whether these associations of persons have a personality similar to that of a human being, such as to confer on them general capacity to act – as E. Hacker stated: *"The first step is to examine the constitution and substance of associations"* (Hacker, 1922, p. 5).

The Third Book of the 2013 Act V of 2013 (Civil Code) introduces a type requirement for legal persons: only four legal persons may be business companies,[51] cooperatives, associations, societies and foundations may be established.[52] After the general provisions, the Civil Code starts with the basic types of legal persons, namely associations,[53] while the provisions on foundations are placed at the end of the chapter.[54] An association is an association of persons, a body with members, whereas a foundation is more of an institutional type of legal entity (Sárközy,

[51] General partnership, Limited partnership, Limited liability company, Joint stock company.

[52] Strictly speaking, in the Civil Code. 3:402-3:403, the State also acts as a legal person in civil relations, but this is not provided expressis verbis for in the Act, as it is a specific legal instrument.

[53] Civil Code 3:46–3:70. §

[54] Civil Code 3:375–403. §

2013, p. 12-15). Both legal entities are a basic type of organisation in the non-profit sector. The Civil Code, however, only regulates the civil law aspects of these, so their management, legal supervision and public law aspects in general require a separate law. This law is currently the above-mentioned Civil Code. By registering associations and foundations with the civil courts, they acquire their legal personality 'ex nunc' for the future.

The new Civil Code, by abolishing the separate category of non-profit company, but maintaining the rule that neither an association nor a foundation may be established for the purpose of economic activity, has also drawn a greater distinction between profit-oriented and non-profit organisations than the previous legislation. The Third Book starts with a very broad general section, i.e. common rules. Article 3:4 gives all legal persons the possibility to derogate from the rules of the Act, therefore, when establishing an association, it is necessary to examine to what extent the given provision of the association is mandatory and to what extent it is possible to derogate from this rule in the statutes.

The association is a legal person with at least ten members registered in the register of members, which is a common, lasting and continuous pursuit of the non-economic objectives of its members, as defined in its statutes.[55] The association has independent assets separate from the members, the minimum amount of which is not specified in the law, but which, according to the rule in the general part of § 3:2(3), "must be sufficient to enable the association to commence its activities safely". If this requirement is not fulfilled and the association is therefore dissolved without succession, the founding members are jointly and severally liable for the satisfaction of the creditors' claims which remain unsatisfied. The formation of the association does not require a constitutive general meeting, but only the unanimous declaration of ten persons. The register of members must also contain at least ten members during the lifetime of the association, because according to § 3:67 (b) the association shall be dissolved without successor if the number of its members does not reach ten for a period of six months.

A member of the association does not necessarily have to provide a financial service to the association. The Civil Code also does not pro-

[55] Civil Code 3:5.§ és 3:54.§

vide for the payment of membership fees, thus leaving the provision on membership fees to the statutes. However, according to Article 3:9(2) of the General Part, if the founders or members are not obliged to provide the association with services in kind, the members of the association must be jointly and severally liable for the outstanding debts in the event of the association's dissolution (liquidation).

According to the above rules, an association, as a legal person, has a degree of capacity to act that is not exclusively attributable to the individual and that enables this type of organisation to acquire rights and obligations in its own name and to be accountable for the rights and obligations thus acquired.

2.2. The "will" of the association: the majority principle

Free will is a basic requirement for legal liability (Hacker, 1922, p. 6-8). The will of the association is the will of its members. The traditional principle of associative law is "one member one vote", but the Civil Code allows for the definition in the statutes of membership with a special status, such as associate or honorary membership, which does not carry voting rights, and may even provide for additional voting rights.

Membership shall be established for founding members upon registration of the Association and for members joining later upon acceptance of the application for membership by the competent body of the Association. Membership is a personal relationship which ceases on the death of the member. It shall also cease upon the resignation of a member and upon the expulsion of a member.[56]

The decision-making body of the association is the general assembly (assembly of delegates), which must hold at least one meeting a year. The exclusive competence of the general assembly is defined in § 3:57, and § 3:64 specifies the cases in which an extraordinary general assembly may be convened.

The management of the association is carried out either by a board of at least three members or by a one-person managing director, who are appointed by the Civil Code. 'executive officer'. The legal status of

[56] Civil Code 3:53. §

executive officers is regulated by the Civil Code in a general manner, including for associations, among the common rules applicable to legal persons.[57] The executive directors of the association may hold office either on the basis of a civil law mandate or on the basis of an employment contract. In the case of a mandate, they may act for remuneration or even free of charge. The statutes provide that the term of office of an executive officer shall not exceed five years, but that any term of office exceeding five years shall be null and void.[58] The executive officers of the association must be elected from among the members, but § 3:62 (3) allows the statutes to permit the election of up to one third of the executive officers from outside persons, i.e. non-members. However, a managing director may only be a member.

In the case of associations, the establishment of a supervisory board is not compulsory, as the Civil Code. 3:65 of the Civil Code states that a supervisory board must be established if the number of members exceeds 100 or if more than half of the members are legal persons. The special rules do not provide for this, but the general rules also allow for an association to have a permanent auditor.[59] The rules of the association support the will of the majority on the basis of the majority principle, which can be supported professionally by a supervisory board and an auditor.

The provisions on the underlying liability of members, as described above, are similar to those on the liability of directors and officers. If the managing director causes damage to the association, he is liable for such damage according to § 3:21 according to the rules of liability for breach of contract. If the executive officer causes damage to a third party, the association is liable for the damage as a rule. If the association is wound up, the association's managers are jointly and severally liable for the creditors' outstanding debts.[60] In addition, according to the Sixth Book of the Civil Code, if a director causes damage to a third party in his capacity as a director, the director is jointly and severally liable with the association against the victim.[61]

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57 Civil Code 3:18–3:22. §
58 Civil Code 3:62. §
59 Civil Code 3:35. §
60 Civil Code 3:69. § (2)
61 Civil Code 6: 536. §

2.3. Criminal capacity and criminal liability of associations

The criminal capacity and criminal liability of associations (Hacker 1922, p. 8-10) is based on Act CIV of 2001 on Criminal Measures Applicable to Legal Persons, which entered into force on 1 May 2004, when Hungary joined the European Union. The Act was a novelty in the Hungarian legal system, as previously there was no possibility to apply criminal sanctions against legal persons, although the existence of their legal personality and their legal status as defined by other legislation did not dogmatically exclude the establishment of their criminal capacity and criminal liability. If the liability of a legal person can extend to civil and administrative law relationships, that is to say, if it can take decisions on its own behalf which may give rise to liability for damages or the payment of fines, there should in theory be no obstacle to its being held liable for the offences covered by the Criminal Code.

Under this Act, measures may be taken against a legal person only in the case of intentional criminal offences, if the offence was committed with the purpose or effect of obtaining an advantage for the legal person, or if the offence was committed using the legal person, and the offence was committed by the legal person – its manager or member authorised to represent it, employee or officer, company director, member of the supervisory board or their representative – in the course of the legal person's business; – the offence was committed by a member or employee of the legal person in the course of the legal person's business and the fulfilment of the duties of management or control by the manager, the company secretary or the supervisory board could have prevented the commission of the offence.[62]

In addition to the cases set out above, the measures provided for by law may also be applied if the offence was committed for the benefit of the legal person, or if the offence was committed using the legal person and the manager or member authorised to represent the legal person, employee or officer, company director or member of the supervisory board knew that the offence had been committed.[63] If the court imposes a penalty, reprimand, probation, confiscation or forfeiture of property on the perpetrator of the offence, it may also impose a measure of dis-

[62] 2.§
[63] 3.§ (2)

solution, restriction of activity or a fine on the legal person.[64] Although the legislator has in the meantime extended the use of measures to cases where the offender could not be held liable for some reason, the use of measures can only be ancillary.[65] This requires that the offence was committed intentionally and that the offence was related to the activity of the legal person. A further criterion for the application of the measure is that the court must have established the responsibility of the offender in a final judgment.

Thus, the Hungarian legislature did not respond to E. Hacker's 1922 suggestion until about 100 years later, but these responses are in line with those of the great thinker of his time.

2.4. Reasons for and purpose of criminalising associations

2.4.1. From a general point of view

From a general point of view of expediency, agreeing with E. Hacker's argument (Hacker, 1922, p. 10-12) which is still valid and timely today, and referring back to point II.2, we can only raise one argument against the measures to be applied against associations, namely that "the minority opposing the unlawful decision suffers innocently because of the impairment of the association's assets by the penalty" (Hacker, 1922, p. 10). In contrast to this, however, is the fact that anyone who joins an association must reckon with this 'anomaly' (Hacker, 1922, p. 10).

In cases where legal persons are generally given substantial rights by the legislator, similar to those of natural persons, a similar extension of the scope of obligations and associated liability is acceptable. It is important to add to this the criminal procedural aspect that, if the association were not criminally liable, it would be more difficult to identify the natural persons (officers, members) to be held liable and to prove their guilt. Last but not least, it would be more reassuring to ensure public order if such organisations were not subject to administrative

[64] 3-6.§ The law sets the minimum fine at HUF 500,000 and the maximum fine at three times the amount of the financial benefit achieved or intended to be achieved.

[65] E.g.: the investigation has been terminated, the offender is not punishable due to a ground of ineligibility or termination

fines, but to criminal penalties, applied by the courts with appropriate procedural guarantees (Hacker, 1922, p. 10).

2.4.2. From a specific point of view

In the context of the criminal liability of associations, there are obvious difficulties in bringing legal persons to justice, in particular in ensuring the personal nature of the guilt and punishment. In their case, the psychological link between the legal person and the act is not direct. According to E. Hacker, however, the task can be solved with due judicial diligence (Hacker, 1922, p. 11). The Criminal Code contains a number of measures which do not require guilt as a prerequisite; it is sufficient that the offender is dangerous to society, which is mainly expressed through the commission of the offence (Hacker, 1922, p. 12). A measure against an association which is a danger to society and disturbs public order can be taken on this basis.

2.5. Limits on the criminal liability of associations

The criminal liability of associations does not fully correspond to that of individuals: they can only commit offences whose conduct is not exclusively attributable to natural persons (Hacker, 1922, p. 12-13). Even in such cases, however, it is still possible to be an accomplice.[66] However, cooperating individuals who carry out the will of the association can clearly be guilty and liable to prosecution (Hacker, 1922, p. 14). The objectives set out in the statutes are not a limitation on the association's capacity to act, as they also cover the organisation's activities outside the scope of the statutes.

2.6. Nature of the measures applicable to associations

The limited capacity of associations to act, and the direct psychological link between the legal person and the act, as the basis of the guilty

[66] Eg: may be an instigator See more Schwarz,1970, p. 229-235.

conscience (mens rea), the absence of a 'safeguard' mechanism, these organisations should only be subject to so-called 'security measures'. E. Hacker considers it important to emphasise the fact that the aim of the measure in these cases is clearly special prevention (Hacker, 1922, p. 13).

Due to the Act CIV of 2001 on Criminal Measures Applicable to Legal Persons in force A hatályos Jszbt. alapján three types of measures can be taken against the association: dissolution, restriction of its activities or a fine. In addition to these, E. Hacker sees other possibilities as effective instruments, such as: an obligation to provide peace, deprivation of legal capacity, deprivation of privileges, publication of the sentence, and placing under police supervision. He considers that peace-keeping rather than fines is more effective, while in his view, dissolution does not at all lead to the goal of special prevention (Hacker, 1922, p. 14).

Other states also recognise other forms of criminal sanction. Some of these, many of them believe, might be worth considering for Hungarian legislation, such as placing under supervision and publication of the judgment (Kovács, 2019, p. 3-4), which are also listed by E. Hacker.

Conclusions

A century ago, E. Hacker already drew the attention of the legal community to the fact that the regulation of the criminal law of associations and legal persons was likely to be one of the most important issues of future criminal law (Hacker, 1922, p. 15). His prediction was absolutely right. The crises of the 21st century, the financial speculations that trigger crises, the near bankruptcy of certain countries or the movement of international migration flows, the epidemics that paralyse continents, repeatedly draw attention to the questions of the hidden background processes. In more than one case, NGOs driven by economic interests operate in the background under the umbrella of the right of association. The subject is still topical, the task of legislators remains urgent and the academic work of E. Hacker is still relevant today: *"... legislation is the result of a struggle of interests ... and quite often the result is the triumph of the stronger interests. To give the economically weaker the protection of criminal law against the stronger will be the best way to*

prevent the excessive clash of interests and the excessive swinging of passions in the struggle!" (Hacker, 1922, p. 15).

In many countries the regulation of the criminal law of associations and legal persons could be a key issue for future criminal law. Individual national legislators, not only in Poland and Hungary, when formulating certain proposals for legal solutions, can (or maybe should) draw on the views of E. Hacker, H. Wiewiórska and J. Makarewicz, delivered a century ago, as they are still relevant today. The main thesis of the work has therefore been verified positively. It needs to be highlighted that this book refer first of all to the Polish and Hungarian legislation. However it has also aims at proposing particular, general solutions which may successfully be implemented – considering appropriate rules of law – in the majority of European legal systems.

Properly worded legal provisions on the criminal liability of associations may have significant practical consequences, considering that it is often impossible to bring to justice the natural persons responsible for certain punishable offences (e.g. in the case of breach of the peace during public gatherings held by associations). The fact that a prohibited act may go unpunished defies the very purpose of criminal justice, which is to ensure that each and every prohibited act meets with an inevitable reaction. As pointed out by O. Górniok (2006, p. 232) this idea is based on the opinion that even when a reaction to a prohibited act does not involve the direct physical perpetrator, its application to other entities can prompt them to undertake deterrent measures against prohibited behaviour. Applying this reasoning to public associations, one can surmise that the members of a given association, imbued with the so-called 'team spirit,' while conceivably apt to impede the identification of the actual perpetrators of specific violations, can nevertheless be expected to try not to jeopardise the association of which they are members and to cooperate in undertaking measures aimed at preventing violations of the law – if they are aware of the fact that the liability for the violation of the law by member of their association, can also be borne by the association itself.

In Poland, the current legislation pertaining to the criminal liability of associations is not very often applied in practice, although its introduction was seen as a far-reaching innovation. This, unfortunately, creates a certain feeling of impunity. There has been hardly a single

month without media reports on subsidy fraud perpetrated by a public association. However, while individuals acting in a given association are often held criminally responsible, criminal proceedings are almost never brought against the association itself.

This is probably due to the fact that the prerequisite for bringing criminal proceedings against an association is a prior final conviction of a natural person acting on behalf of the association for a criminal offence – and it often takes years for such a conviction to be reached. During all these years, an association whose members have committed crimes from which the association has benefited or may have benefited in some way, very often continues to operate normally and even manages to obtain subsidies without any difficulties. Furthermore, it is often the case that, by the time when the criminal conviction of the natural person becomes final, no criminal proceedings can be launched against the association itself for the simple reason that it has been dissolved and no longer exists.

One way to improve the effectiveness of proceedings against associations would be to abandon the principle that only the final conviction of a natural person provides grounds for initiating proceedings against a collective entity.[67] The only way to effectively punish and battle corporate crime is to criminally punish corporations (Sepioło, 2016, p. 141-142). Obviously, such a solution could lead to a certain arbitrariness of proceedings against collective entities and could raise concerns as to whether prosecutors would not abuse their powers in order to conduct proceedings against particular associations. Therefore, the introduction of such a regulation should be accompanied by a number of procedural guarantees for an accused collective entity. Firstly, it seems reasonable to introduce provisions allowing a complaint to be lodged with a state court against the prosecutor's decision to initiate proceedings against a given collective entity. If the complaint is upheld, the criminal court should be able either to order the discontinuance of the proceedings or to suspend them pending the final conclusion of the criminal proceedings for the prohibited act constituting the basis for the liability of the

[67] Such a solution has been introduced, among others, in the new Polish government bill on criminal liability of collective entities of 2019, which has not yet entered into force as yet. See more https://orka.sejm.gov.pl/Druki8ka.nsf/Projekty/8-020-1211-2019/$file/8-020-1211-2019.pdf (Accessed: 2022-06-30).

collective entity. Secondly, a solution should be introduced enabling the resumption of proceedings against a collective entity that has been found liable for perpetrating a punishable offence by a final court judgement, if, after the judgment becomes final, a final judgment is issued in separate criminal proceedings stating that the criminal offence entailing the collective entity's liability was not committed, or that the offence did not contain the constituent elements of a criminal or fiscal offence.

Another *de lege ferenda* proposal – this time addressed to the Polish legislator – concerns the introduction of a sanction in the form of the dissolution of an association. Unlike the corresponding Hungarian legislation, the existing Polish law on the criminal liability of associations does not provide for this sanction, which, as H. Wiewiórska put it, is a kind of "death penalty' for an association. It is undoubtedly the most severe of all the sanctions that can be imposed on an association and should only be applied in exceptional cases, when no other legal measures seem to be sufficient ('*ultima ratio*'). It goes without saying that, in a democratic country governed by the rule of law, the only authority that should have the power to impose so severe a penalty is a state court. The position that a penalty of this kind should be introduced as part of the criminal liability of associations stems from the belief that only a threat of 'the ultimate punishment' can ensure that the general prevention objectives of criminal justice are achieved. In fact, the Polish legal system already contains regulations that give courts the authority to dissolve associations. However, the regulations are not part of the criminal law; instead, they follow from the supervisory powers over associations, as mentioned earlier. Therefore, there are no legal obstacles to the inclusion of the same solution – this time as a punishment rather than a supervisory measure – into the list of sanctions that may be imposed on an association as a result of criminal proceedings.

Another potentially significant factor in the enforcement of criminal liability against associations is the concept of so-called anonymous guilt, which has not been explicitly provided for in the provisions on the liability of collective entities for punishable offences. It stands to reason that *de lege ferenda* proposals addressed to the legislator should also posit the introduction of the concept of anonymous guilt into the relevant provisions regulating the criminal liability of associations. This concept makes it possible to attribute guilt to a legal person, in our case

an association, if it can be demonstrated that negligence or breach of regulations or other organisational misdemeanours were perpetrated by an unidentified natural person or persons acting within the organisational structure of a given legal person. This concept, while not expressed directly in legal regulations, has been widely used in judicial practice (see more Riihijärvi, 1995, p. 216-219, 229; Mackiewicz, 2020, p. 75-80). There is no apparent reason why it should not find its proper use also in the field of the criminal liability of associations. However, it does not seem justifiable for this kind of regulation to be applied 'as appropriate' (by analogy). One of the basic principles guiding the interpretation of penal regulations is the impermissibility of expanded interpretations, especially to the detriment of the perpetrator (the accused or charged party). For this reason, it seems justifiable to appeal to the Polish – and perhaps also Hungarian – legislator for the introduction of legal provisions that would make it possible to implement the criminal liability of associations based on the concept of the so-called anonymous guilt.

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Biographies

1. Professor Ervin Hacker (1888-1945), lawyer, professor of criminal law and criminology

E. Hacker, as an outstanding representative of the Hungarian criminal law and criminology of the first half of the 20th century, was an eminent jurist, criminologist and law professor. He was born in Pozsony /now: Bratislava, Slovakia/ on 23 March 1888 into a family of Flemish origin. He probably inherited his legal talent from his father, who was an attorney-at law. Ervin Hacker studied law at the Law Academy in Bratislava and after at the University of Budapest, where he obtained a doctorate degree in law in 1909. He started publishing at a very young age, in 1910. In dozens of publications and books, he dealt with many branches of criminal science, such as criminal statistics, criminology and prisons' matters. His academic work in the field of international criminal comparison is particularly significant. Hacker was a follower of the so-called ‚intermediate school', situated between the classical criminal law school and the criminal law reform movements. He studied various aspects of criminal science in England, Belgium, the Netherlands, France, Germany, Italy and Switzerland. On the one hand, he wanted to transfer some of the experience he had gained there to Hungarian criminal law and, on the other he sought to raise awareness of the internationalisation of criminal law. He studied the psychology and living conditions of offenders and convicts. He also formulated ideas for reform in the field of the penitentiary system. He was among the first to turn attention to the criminalisation of legal persons. Between 1909 and 1911 he studied at the Universities of Halle, Leipzig, Berlin and Paris, from 1911 he was a law clerk at the Bratislava Law Court, and in 1914 he passed the bar exam in Budapest. Between 1914 and 1919 he was a court clerk at the Bratislava Court of Justice. From 1919 he was a private lecturer in criminal law and criminal procedure at the University of Bratislava, and from 1923 at the University of Pécs, and from 1925 in substantive criminal law. In 1920, together with Győző Bruckner and Károly Schneller, he became a professor at the Miskolc Law Academy, which was starting its second year of study, and taught criminal law and criminal procedure, also occasionally legal philosophy

and private law until 1942. During his years in Miskolc, he also dealt with criminology in the framework of criminal law, in a unique way in Hungary at that time, and his lectures with projected images were completely innovative. Hacker was sensitive to innovations in teaching methodology. In addition to the usual lecture-centred sessions, his seminars were based on student self-direction, giving them freedom both in the choice of topic and in the way they worked on it. His teaching method, as reflected in his textbooks, was student-centred. He is credited with the introduction of projection-based legal education in Hungarian universities. He collected more than six thousand slides as teaching aids. On the basis of his pedagogical experience, he believed that the teaching of criminal law could be more effective if the instructor used visuals as well as words to influence the students. Hacker was nominated by a majority of the three candidates for the chair of the Department of Criminal Law at the Faculty of Law of the Tisza István University of Debrecen, vacated by the death of Professor Andor Kováts in February 1942. He began his work on 4 May 1943. During his years there he was also a full member of the Debrecen Scientific Society. His teaching career in Debrecen was, however, very short, covering only the academic year 1943-1944. In September 1944, due to the war situation, teaching did not start and Hacker retired to his home in Miskolc. He died on 27 December 1945, after a long illness in Miskolc, and is buried in the local Evangelical Cemetery. The manuscripts of his papers, memoirs and his family history records left behind after his death were bequeathed by his widow to the Evangelical Museum on Deák Square in Budapest. A larger selection of his works was published in 1989 by Miklós Lévai and his former student Ferenc Gárdus.
Source: Library of the Hungarian Parliament. Digitised Legislative Knowledge Base. URL: https://dtt.ogyk.hu/hu/component/k2/item/562-hacker-ervin (Accessed: 2022-06-30)

2. Professor Juliusz Makarewicz (1872-1955), a long-term professor of criminal law at the University of Lviv, senator of the Republic of Poland (1925–1935).

J. Makarewicz was born on 5 May 1872 in Sambir. He initially attended a secondary school in Tarnów, but in 1884 he moved to a secondary school in Kraków, where he passed his final examinations. In

1889, he started studying law at the Faculty of Law and Administration at the Jagiellonian University. He is one of the most famous lawyers in the history of Poland. He is also mentioned in foreign literature, especially in Germany, as well as legal publications in Spanish, English and Russian. When he obtained a Ph.D., he left for supplementary studies to Berlin and Halle, where he attended lectures of professor Franz von Liszt. After his return to Kraków, most probably under the influence of professor Liszt's lectures, he tried to obtain a post-doctoral degree (habilitation) at the Jagiellonian University in 1896 on the basis of a thesis entitled *Das Wesen des Verbrechens*. Due to a critical assessment of the thesis by Edmund Krzymuski, another outstanding Polish professor of criminal law, the thesis received a critical response. Professor Krzymuski, who was a representative of the classical school of criminal law, did not appreciate how significant the sociological school was for criminal law, and J. Makarewicz was one of the precursors of this school. The above-mentioned thesis was a prototype of his life work, published in Stuttgart in 1906 and entitled *Einführung in die Philosophie des Strafrechts auf entwicklungsgeschichtlicher Grundlage.* This work was definitely included in the canon of books on European criminal law, making J. Makarewicz internationally famous. In his work, J. Makarewicz addressed the issue of criminal liability of collective entities, including associations, and wrote: 'The question posed by the theory of law is not whether criminal liability of collective entities is possible, but whether it is currently essential and how to correctly determine its basis and scientifically justify it'. J. Makarewicz finally obtained his post-doctoral degree in 1897 on the basis of a thesis entitled: "*Idealny zbieg przestępstw w ustawie karnej austryjackiej"* (*Concurrence of Offenses in the Austrian Criminal Act*). After a short period of working at the Jagiellonian University, professor Makarewicz was appointed as full professor of criminal law at Jan Kazimierz University in Lviv, with which he was associated for the rest of his life. He was the most active member of the Codification Commission of the Republic of Poland, which worked on a new Polish criminal code after Poland had regained independence in 1918. Because of that, Polish legal academics and commentators commonly refer to the criminal code of 1932 (the first post-war criminal code) as 'Makarewicz's code'. It was thanks to J. Makarewicz that this code was known as one of the best and most

modern criminal codes in Europe. J. Makarewicz was a senator of the Republic of Poland from the Christian Union of National Unity (ChZJN) list of candidates. During the Second World War, he lived in Lviv. He died on 20 April 1955 in Lviv.
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3. Advocate Helena Wiewiórska (1888–1967), the first woman in Poland entered on the list of advocates, a social activist and an outstanding expert in criminal law

H. Wiewiórska was born on 2 September 1888 in Zgierz. After she graduated from secondary school with a gold medal, she started studying law in Saint Petersburg. She also studied music and history at the same time. She knew Russian, French, German, Italian, Ukrainian and Belarusian. At first she taught history in a secondary school for girls in Warsaw. In 1919, she started her advocate apprenticeship supervised by outstanding advocates from Warsaw, Mieczysław Ettinger and Stefan Aleksandrowicz. When she passed the bar examination in 1925, she was entered on the list of advocates as the first woman in Poland. She was a sole legal practitioner. She dealt mainly with criminal and civil cases, but she was also successful in fiscal penal cases. She was one of the co-founders of the Association of Women with Higher Legal Education. In 1934, she became a member of the Disciplinary Court at the Bar Council in Warsaw. She was the first woman in Poland to perform this function. She was a very active member of the National Bar Council. In 1924, she joined the International Association of Criminal Law. She actively participated in numerous international congresses on criminal law. It was possible thanks to her fluency in many languages. When it comes to her academic activity, she specialised in criminal law and criminology. She was the author of numerous academic publications. She was one of the first people in Poland to address the issue of criminal liability of legal persons and published an extensive article on this sub-

ject in *Encyklopedia Podręczna Prawa Karnego* (*Handy Encyclopedia of Criminal Law*), published before the war in 25 volumes and edited by professor Wacław Makowski (in the years 1932-1939). Periodical legal encyclopedias published in the interwar period were unique for Polish science and Polish periodical publications. Apart from *Encyklopedia Podręczna Prawa Karnego*, there were also titles such as *Encyklopedia Podręczna Prawa Publicznego* (*Handy Encyclopedia of Public Law*), *Encyklopedia Podręczna Prawa Prywatnego* (*Handy Encyclopedia of Private Law*) and *Encyklopedia Nauk Politycznych* (*Encyclopedia of Political Science*). Their aim was to provide basic information on a given area of law. They were addressed not only to lawyers. However, the entries were often so detailed that their professionalism was definitely greater than that of many academic articles. The most important lawyers of the interwar period published in such encyclopedias. It is worth emphasising that in the above-mentioned *Encyklopedia Podręczna Prawa Karnego*, entries were prepared by outstanding experts in criminal law, for example many famous Polish lawyers, such as advocate Rafał Lemkin, Ph.D. (who coined the term 'genocide'); professor Wacław Makowski, professor Stanisław Śliwiński, Supreme Court Judge; and professor Władysław Wolter. It is worth noting that among 50 authors who prepared the entries there were only two women. It emphasises the prominent position of H. Wiewiórska in the study of criminal law in the interwar period. During the German occupation, she was arrested by Gestapo. Her life was most probably saved because she suffered from diphtheria, which frightened the Germans, who decided to set her free. After the war, she continued to work as an advocate. She died on 17 May 1967 in Warsaw.

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15.

THE CRIMINAL LIABILITY AND CAPACITY OF ASSOCIATIONS

DELIVERED AT THE SPECIAL CRIMINAL LAW FACULTY OF
THE HUNGARIAN LAW ASSOCIATION

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I. Contrary to the prevailing view that criminal repression of legal persons is unacceptable, the idea of holding them criminally liable is again becoming more common.

The reason for this is mainly to be found in the fact that the power of the organisation is becoming more and more recognisable: and, if directed towards the good, it is enormously conducive to the great aims of humanity, but if directed towards the evil, the danger naturally increases proportionately.

The social, political, spiritual, cultural and economic power and value of the individual increases enormously through organisations. To achieve, to realise what an individual does not even dare to dream of, but together with others, the individual as an organised body can already think of in terms of the possibilities that open up to them. The achievement of individual universal goals of humanity that constitute the public interest for an individual is completely unattainable, but in an organised group it can already become a close and achievable goal that has hitherto seemed unattainable. The goals set in real life, or in our imagination – here we have in mind, for example, Kellermann, who states in his novel The Tunnel that a myriad of things are necessary to realise the wonderful opportunity we face, which we can only achieve through a high degree of organisation that promotes the well-being of the human race. Although the power of the individual and the length of their life are too short to achieve the goals that seem so utopian, when united and organised, we can have more hope of achieving them.

Especially in the field of economic life, we see the great power of the accumulation of economic forces with today's capitalist world order. It may not even be necessary to point to anything else other than Sombarti's great three-volume work on modern capitalism; note Jien's call for an awakening and recognition of the power of capitalism.

In Hungary, there has been a gradual build-up of power in individual legal entities in recent decades. It may suffice to point out in this regard that while in 1867 the total number of credit institutions was 111, their share capital and reserve funds totalled some 29 million crowns, in 1890 the total number of credit institutions was already 1,319 and their equity capital amounted to 361 million, and in 1909 the number of

these institutions had risen to 5,324 and their capital already amounted to some 1 billion 649 crowns[1].

But outside the economic sphere too, we see organisations taking on a similar importance. For individuals, cultural goals, action and research, political aspirations seem unattainable but opportunities to organise and focus on the power of individuals are emerging.

But this joining of forces will only be fruitful if the management of the combined force from a single place, from a place created by the individuals, occurs on the part of the legal entities taking into account the common goals of the individuals – and the rejection of divergent points of view.

From our point of view, from the point of view concerning the criminality of legal persons, we can only refer here to such a formation in which the achievement of an unlawful objective becomes possible with the use of one's own force and the force that is inherent in all persons. Although this is less likely in the case of public law organisations, foundations, public institutions than in the case of associations, including corporation, as well as political, social organisations with non-economic but other objectives and is not limited to them. Precisely for this reason, hereinafter, we will constantly use the term "associations", understanding here – actually in addition to the formation of "associations" – corporate entities, such as above all joint stock companies, cooperatives – and excluding foundations – public institutions and bodies of a public law nature.

In relation to the discussion of the potential for associations to affect criminal law and punishment, the question arises as to whether we should be concerned with theories relating to the nature and creation of legal personality when addressing the issue. According to our undemanding opinion, this issue is already beyond the scope of the problem we are addressing and is not organically related – to the task at hand. Let us therefore refer to a similar position of at least Garraud[2], van Hamel[3] and Lilienthal[4] with regard to this.

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1 With this in mind see 35th Volume of Statistical Reviews: Financial Institutions of the Holy Crown Countries in 1894-1909, Budapest, 1913 ; general report pp. 68-71.

2 Traité theorique et pratique du droit penat francais, vol. 1, Paris, 1913, 536.

3 Inleiding tot de Studie van het nederlandsche Strafrecht, Haarlem, 1913, p. 199.

4 Die Strafbarkeit juristischer Personen, Vergleichende Darstellung des deutschen und ausländischen Strafrechtes, Aligemeiner Teil, vol. 5, Berlin, 1908, p. 97.

Before discussing our problems, it is also important to point out that the legal system is increasingly involved in the protection of legal persons, and we emphasise this only because their personal rights have already become so widespread that in most places judicial practice has already recognised them, or is inclined to the view that a legal person can be a passive subject of an offence committed against honour. Not to mention the fact that their rights in terms of property law are barely restricted.

The further evolution of this development process only leads to the fact that, in future, associations should not be provided with more and more rights, but should also be assigned duties accordingly. And that, in line with their growing power and authority, we should not be confronted with repression only in private law, but should also recognise the ability of associations to affect criminal law and punishment. Only in this way will we be able to combat a new kind of criminal activity that goes hand in hand with the expansion of big capital.

II. The build-up to this problem over the centuries is presented by Gierke in his great four-volume work 'Das deutsche Genossenschaftsrecht'. This can, at most, be supplemented by data on indigenous development of the law.

At this point, we just want to mention that in the past, mainly mediaeval Germanic law, as well as laws influenced by it, recognised the possibility of criminalising associations.

Historically, the criminality of legal persons was addressed by the 1670 Ordinance of Louis XIV and the 10th Act of the Fourth Republic.

Here, in addition to the references to laws of a historical nature, we must also point to the adoption of those laws which now largely resolve the matter, namely the 13th point of § 718 of the New York Penal Code of 1881, as well as Article 2 of the English Interpretation of 1889, and which state that from a criminal point of view, the term of person can also be understood as a legal person. A similar position is presented by Article 458 of the 1891 Declaration of the United States of America.

In addition to the law in force in Algiers until 1874, the Spanish draft of 1884 (Articles 25, 40, 67 to 69 and 296 to 297), which has not yet become final, provided for the criminalisation of legal persons.

III. The first step in our self-imposed task is to analyse the emergence of associations and examine their essence.

An association is a completely separate legal entity made up of individual distinct members who are natural persons, which came into being not as a result of speculation or ingenuity of the human mind, but out of the instinctive need for people to unite and out of their vital needs.

The law usually treats associations as if they were human beings. It is not a worn-out but a real legal entity whose distinctiveness is recognised by private, administrative and public law.

It usually includes previously undefined individuals, is a real entity and its existence must be separate from the existence of each member.

And this is what the legal status of the association corresponds to. An association is an independent legal entity, which in legal life can act as a contracting party, as an owner, as a borrower and from a legal point of view is an independent entity. Separate obligations and rights arise from the obligations and rights of members. If these duties are breached not in the area of criminal law, then they are not in dispute.

On the other hand, it is natural that legal capacity concerns actual capabilities and has certain limits. Outside those limits are family rights, the practice of which usually involves individuals; moreover, they too can be deprived of those rights, as in the case of those unable to marry.

The consequence of being independent, of course, is that the association plays a separate role from the individual, that it declares a will separate from the individual and acts separately.

To confirm this fact unrelated to criminal law, it suffices to say that associations as such can sue or be sued by their members. Their distinct position is best illustrated by the fact that their will and the action as a result of it often differ completely from the individual will of all members. Think, for example, of the case where a resolution of the association has been adopted by way of compromise; each member is forced to deviate from his or her original intention so that a joint resolution of intent can be passed. In such cases, the total distinctiveness of the association in terms of the will of the entity itself is best expressed.

This separateness of human will and action in relation to association leads to profound differences in the functions of the individual.

IV. While in the soul of a human being as an individual there is a process involved in the expression of the will and this is not noticed by the outside world, the situation in an association with regard to this is completely different from when the process of expression of the will in an association results from the will of the collective, in which case the adoption of a resolution by the members is a process noticeable to the outside world. While an individual usually cannot separate the process of will formation from the execution of the will, in the case of an association the two processes can usually be separated.

The will of the association is thus the collective will be filtered through the individual wills of the members, which can arise from a unanimous decision of the members or as a result of a majority decision. The development of these earlier attitudes does not give rise to any difficulties.

In contrast, it is different when the will of the majority is developed, which is relatively more likely to be the case, especially when the number of members of the association is larger and then unanimous resolutions are less frequent or when, with fewer members, there is a greater tendency to think independently.

The rules in the formation of the will of the majority are shaped in such a way that members with dissenting views remain in the minority.

The application of majority rule presupposes a certain procedure for the formation of the will of the majority, the recognition of the will of the association. The only way to do this is to mobilise the governing body to do so. And it is through the legal regulation of this body that the existence of the association will become a reality, the hitherto unorganised mass will govern itself.

There is no doubt that the implementation of majority rule is a rape of the will of the minority, but when joining an association every member must take this into account.

The development of individual human spiritual processes and their transformation into the will of the association and the actual arrival at their expression shapes the association body.

Such a body will be needed in the life of the association not only in the formation of the association's will but also in the further processes of the association's functioning: thus also in the implementation of the will.

However, while the will of an association can only be formed by a properly organised governing body, the execution of a will outside

a duly appointed and organised body can be undertaken not by the governing body but by anyone. Hafter correctly points to the example of a certain students' union who committed malpractice by deciding to recruit a strong railwayman to beat up one of their colleagues, who was hated by all[5]. Of course, the rare case that the will of the association is implemented by the action of all its members is not excluded.

One thing is certain, however, that the execution of the will can only ever be carried out by individuals: by all members, by the governing body, by one member or by a non-member.

Thus, we must speak of the will of the association and its execution, not only when we are dealing with either unanimous or majority resolutions, but also when any of the legitimate governing bodies acts for the association according to this qualification. The projection of such an action and outcome will always depend on the will of the association.

So further we have to be aware that associations need organs in all circumstances, their actions only become possible in this way, and these bodies or mainly non-bodies in the implementation of the will do not express their own will and do not carry out their own actions, but mainly in addition to their own, implement the will and actions of the association; for in most cases, with regard to individuals, they lack even the possibility of acting; consider the example of the conclusion of a usurious contract which would not have been possible without the capital of the usurious financial institution, or, as in the example of Hafter cited above, the poor railwayman would not have become aware of the abuse of the students' union against the student.

It is important to emphasise and recognise the above; only by doing so can we convince ourselves of the distinctiveness, in relation to individuals, of the association's being and role. And we will come to the conclusion that, by performing this function of association, the bodies acquire the rights and duties of persons who are not individuals, but primarily an associative community, which entails not only duties but also behavioural consequences.

Thus, a condition for the viable existence of associations is to have a sufficient number of governing bodies.

Associations are governing bodies; their actions, role and exercise of authority are increasingly recognised, as evidenced by the growing

[5] Die Delikts- und Straffähigkeit der Personen verbände. Berlin, 1903, p. 85.

recognition of the assets of legal entities, and in particular their assets relevant from a criminal law perspective.

V. In the course of substantively addressing the problem facing us, we must consider two issues. Firstly, from the point of view of criminal law, do associations have the capacity to act, and secondly, is it possible to punish them?

We therefore need to address the question of whether associations can have an impact in the field of criminal law on and beyond the individual, whether they can achieve an externally perceptible result that individuals could not or would not have achieved without the association. Here, we have to solve the problem of the capacity of associations to act in the field of criminal law; as well as the question of whether the legal consequences can be referred to the influence of an association in the field of criminal law, to its achievement of effects in criminal law, we have to give an answer with regard to the solution of the question of the punishability of legal persons.

An English bishop cites such an example[6] when an association decides to block a public road, resulting in great misfortune. Or think of the already cited example of the students' union.

In life, such events will occur many times! And then there is always an outcome which is not caused by the individual. And for which we cannot hold individuals accountable. Because here the behaviour is inspired by the association, or one of its governing bodies, which, no matter how you look at it, is an individual: it is 'guilty' towards the social order. It is said in vain that a legal person has no real existence and that neither does an association have such a capacity, only its governing bodies. The question arises as to whether the entity acting as a body would not have been aware of the fact of the offence without the action of the association, whether the entity did not have the tools, e.g. the capital necessary to enter into the usury contract, and whether then the criminal act would not have been carried out without the involvement of the association. In such and similar cases, the will and action of associations as closed units prevail.

The specific will and specific action of the associations towards the perpetration of such a crime is the most convincing evidence of their

[6] Commentaries on the criminal law, I. Tom, Boston, 1868, p. 289.

capacity to act, in relation to criminal law. And it is evidence that these are not hollow words. We accept that their ability to act within the scope of criminal law is limited, but nevertheless, to a certain extent, this has an effect and carries consequences that are subject to criminal law assessment.

Researchers also point out in the literature that, since associations can only be formed for a permitted purpose, they cannot manifest unlawful behaviour because, according to their arguments, their capacity to act is limited by their own existence, and if they commit an act beyond that, it is no longer their act, but rather the act of the person who actually carried out the act. All these arguments overlook the fact that permission to act, the capacity to act and the ability to act are different concepts, the situation is similar to when we give someone a gun and authorise them to use it only for a good, noble purpose; if they use it for something bad, we cannot prevent it. Although the association's actions go beyond its intended purpose, the actions and the result they produce do not cease to exist.

As a result, we need to establish the association's capacity to act in terms of criminal law.

VI. The question of punishability in determining an association's capacity to act under criminal law has yet to be resolved. After all, there are many individuals among the ranks of individuals for whom there are obstacles to holding them criminally liable. So we need to clarify the question of to what extent can associations that are materially in breach of criminal laws be penalised? And we need to address those issues in terms of two aspects: firstly, in terms of the general aspect, and secondly, in terms of the special techniques used in criminal law, and we need to consider the reasons that need to be taken into account when dealing with these problems.

1. From the point of view of the general purposefulness of actions against crime, only one convincing reason can be given: namely, that if the association is punished, the assets of the association are diminished, the association cannot pass resolutions, and always the minority that did not take part in the unlawful decision or even voted against it will suffer. However, contrary to this argument, we must point out that if one joins an association, one must take into account the situation just mentioned.

Let us further note that the summons of the association to the court and its appearance before the court also encounter difficulties.

On the other hand, the argument in favour of criminalising associations is that this is the only way to find out the real perpetrators of many crimes: hold the association accountable and then the wrongdoer will not get away with it and will bypass innocent people who are often providers of families acting for material reasons under the duress of a legal entity giving them the opportunity to earn their bread. When the possibility of punishing legal persons is rejected, the justice system is often forced to let the actual guilty party act!

The researchers also point out that when legal entities are granted significant and increasingly broad powers, the scope of their responsibilities must be adjusted accordingly, as well as ways must be found to hold them criminally accountable.

Finally, they point out that it is becoming increasingly difficult to protect the legal order in the face of a large accumulation of capital on the one hand, and associations with a large number of members and close organisation on the other.

Often, and this is indeed true for associations, in the case of a criminal offence, investigating and proving an individual's guilt and holding him or her criminally responsible encounters great difficulties.

And finally, they also point out that if, in order to preserve public order, we reject the criminalisation of associations, we are only forced to enact certain regulations against associations in the event of abuse, which then take on an administrative character. Admittedly, not only from the point of view of their nature, but also from the point of view of the way in which they are applied, it will be far calmer if they take on a criminal law character and are applied by the courts with procedural guarantees.

2. From a specific – criminal-legal-technical point of view, apart from the fact that the problem is to bring legal persons to justice, the difficulties are mainly caused in the aspects of guilt and punishment.

Today's criminal law is built on the doctrine of guilt. The question that arises in the first place, therefore, is whether legal persons and associations are subject to the criteria of guilt for the offences they commit? Can awareness and will be defined in isolation from the individual? Researchers argue that the injunctions of the criminal law are

not aimed at legal persons, but only at natural persons, and therefore the punishment of associations cannot take place.

As far as we are concerned, we have no doubt that all legal orders: whether criminal or non-criminal, are aimed at everyone without exception: both natural and legal persons because otherwise the legal order would be completely disrupted. However, we also have doubts regarding guilt.

With regard to the personal nature of the provisions applicable to legal entities, in addition to today's advanced punishment techniques, we also find those that, of all punishment tools, most affect individuals in general. After all, by inflicting any punishment on an individual, we are also affecting his or her family to some extent; the same is true of criminal laws applied to associations, which will ultimately have a more direct impact on individual association members. However, if the criminal law provisions applicable to associations are selected with due care, there will be no significant irregularities in that respect.

3. In the final decision on the application of punishment to associations, it should first of all be pointed out that many, e.g. Van Hamel[7], although believing in the possibility of punishment, but because of the lack of psychological motives necessary to establish guilt, find the presumption of innocence of the association disconcerting.

For our part, compared to what has been expressed, we see the capacity to act under criminal law as existing, but we do not consider the question of punishability to be so simple, we undoubtedly do not consider it resolved.

Hafter[8] – in contrast to his earlier position – also develops an idea that was perhaps first suggested by Van Hamel.

For our part, we definitely see the possibility of resolving this issue, through the further development of these possibilities mentioned by the above-mentioned researchers.

And it looks as follows:

In addition to punishments, today's criminal law reform includes a whole range of measures whose application is conditioned neither by guilt nor by ill feeling resulting from moral disapproval; but rather by

[7] The work quoted, p. 199,

[8] Strafrechtlicher Patentschutz gegenüber Aktiengesellschaften, published as a manuscript Zurich, 1919, főleg 33. s köv. old

the offender's sense of threat sufficient for their application, which manifests itself mainly in the realisation that a crime has been committed. We can also see the issue of the punishability of associations along the way: the only way to solve it is through security measures. This will overcome the difficulties that will undoubtedly arise in the association as a result of the lack of a close psychological link between the act and the effect of guilt when an individual commits a crime.

We believe that the issue of the criminality of legal persons can only be sufficiently addressed in this way.

VII. In creating a criminal law on associations, we need to address first and foremost the range of offences they can commit. While, on the one hand, it is certain to us that associations also have criminal law capacity, there is no doubt that their legal capacity is limited in that respect. As perpetrators, they can only commit criminal acts that do not fall into the categories of the most individual human actions. On the other hand, it would be wrong to assume that they cannot realise themselves, play a role in those criminal acts that have their origin in the most individual human characteristics; there is nothing to prevent an action such as the offence described in Section 123 of the Marriage Act from falling into this category and let us relate this, for example, to an association, which fights against the institution of marriage.

Already from what we have said, it can be seen how difficult and sometimes impossible it is to set a general limit to criminal capacity.

In the literature dealing with the criminality of legal persons, we often encounter the opinion that only associations recognised as legally competent by state order are capable of committing crimes. This means confusing the freedom to act with the capability to act.

It is aptly pointed out by Gusztáv Schwarz[9] that if the possibility of criminalising legal persons is accepted, then the most dangerous secret organisations and mafias, which are prone to commit the most serious crimes, will escape.

But it is not only the limits of the capacity of associations that need to be set, it is also necessary to define which formations are covered by the concept of association. Even though their legal capacity, as we

[9] Clarification of the concept of legal entity, Budapest, 1907, p. 107.

have indicated, cannot be a prerequisite for their criminality, there are still other conditions for that, namely a certain kind of organisation, which, however, cannot clearly be covered by the term of association due to the fact that it is only a poorly organised crowd.

And in analysing the nature and details of the criminal acts of associations, it must also be pointed out, finally, that the authorities acting within their legal competence with regard to the commission of criminal acts by associations cannot always meet the condition relating to the criminality of associations. The result of this is to extend the capacity of associations to activities related to objectives beyond those set out in the association's Articles of Association.

VIII. In two respects, we need to address the measures that can be taken against associations.

1. The general nature of those measures stems from what we discussed in connection with the substantive resolution of crime, i.e. we believe that only security measures are justified against associations.

The prerequisites for the application of security measures are usually the commission of a crime, a certain social threat and a greater need for specific prevention; in the case of criminal acts of associations, all these conditions are fulfilled. In contrast, there is a lack of indications that would be relevant for the application of punishment, such as the offender's guilt and the possibility of moral disapproval towards the offender. In view of the above, we believe that the only correct acceptable solution against legal entities is repression in the form of security measures.

With regard to the further need for specific actions, we must first of all point out that, in order to be effective, to be of real benefit to legal entities, they should be appropriate to the nature of the associations and that there should be a degree of gradation between them, so that in each case of its characteristics we can apply appropriate actions adequate to the seriousness of the act.

Among those needs, primarily one deserves attention.

The idea is that the security measures should be personal in nature and really affect the association as such and not its individual members. Obviously, there cannot be a specific person here either; unfortunately, innocent members of the association who did not take part in the unlawful act will indirectly be affected by the measure under certain

circumstances. Any measures recommended to exonerate innocent members of the association would call the effect of the current legislation into question.

2. As for the safety measures we can apply, we must limit ourselves here to just listing them. Those may include dissolving the association, suspending its activities for a certain period of time, limiting its scope of action, depriving it of its non-criminal capacity, obliging it to provide guarantees, confiscating it, revoking its privileges, publishing criminal convictions, forcing the removal of individuals from their positions in the governing body and, finally, placing it under police supervision. The imposition of a fine, however appropriate, desirable and effective it might be, especially when applied in large amounts against the accumulation of capital with a percentage of economic power – is still not justifiable, as the application of penalties for the reasons indicated is, in our view , out of the question. Perhaps the application of a fine up to a certain amount would replace the use of guarantees. We do not believe that the sequence of warnings mentioned in the literature is effective.

IX. Individuals would normally take part in the creation and execution of the will of the association, their individual actions and statements would also take place. No matter how independent and separate the action of the association is from the others, the punishment will still usually be inflicted on the cooperating entities, so we must address the assessment of the individual's acts in the context of criminal law.

The principles expressed in the participation doctrine will apply here.

At this point, attention should be drawn to additional solutions; namely, the provision already accepted in our legislation that participation in officially dissolved or suspended associations qualifies as an offence[10]. And this as a measure that effectively complements the regulations needed in this area.

In order to increase the effectiveness of the regulations applied to individuals, the existing laws, and above all the criminal related laws, in many places give guarantees to natural persons, legal persons in a certain business relationship or a relationship defined by the employer, but this is not really relevant from the point of view of criminal law.

[10] 1136/1898, MSW; l. Rend. Tára I. vol. of 1898, p. 244.

X. The regulation of legal issues of associations, criminal law relating to legal persons in the future will be one of the most important aspects of criminal law. The tremendous economic growth observed, the dominant role and impact of capital accumulation during this period of recovery make it necessary to address this issue.

And finally, we must focus on two points!

The possibility of criminalising legal persons, requiring this and emphasising the importance of these actions do not hold up in the clash with anti-capitalist tendencies. Because, after all, it is the example of the most capitalist countries: England and, even more strongly, the United States of America, indicate that putting capitalism on the right track and at the same time not allowing it to deviate at an early stage means strengthening capitalism, not weakening it.

And we need to pay attention to the fact that one-sided theoretical opinion alone cannot be used to solve this problem! Legislators must never solve the problems facing them solely on the basis of theoretical considerations. Those who think this way are and will remain far removed from the demands of real life!

With an understanding of the aspects and requirements of practical life, we see that the only way forward here can solely be to properly weigh, juxtapose and harmonise 'mutual' interests. We do not even remotely claim that the legislator can undoubtedly impose a legal order on society. However, we acknowledge that legislation is the result of a battle of interests, and the outcome is quite often a triumph of the interests of the stronger. Participation in the defence of the criminal law of the economically weaker against the stronger will be the most effective way to prevent extreme clash of interests and excessive emotional swings in the struggle!

Round seal with the coat of arms of Hungary in the middle and with the inscription: Parliamentary Library.

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Ervin Hacker
The criminal liability and capacity of associations

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