

On the Enactment of Corporate Arrangements^{*}

Bert van den Brink

Can we hold corporations responsible for actions? Professor Pettit's investigation into that question starts with the example of the disaster with the *Herald of Free Enterprise*, the ferry that sank in 1987 just off the coast of Belgium – with nearly two hundred deadly victims as a consequence.

The official inquiry found that the company running the ferry was extremely sloppy, with poor routines of checking and management. But the courts did not penalize anyone in what might seem to be an appropriate measure, failing to identify individuals in the company or on the ship itself who were seriously enough at fault.¹

Pettit challenges the idea that identifying responsible individuals – sufficiently autonomous, faced with a moral choice, capable of making moral judgments, and capable of sticking to these judgments in subsequent action – is necessarily the way to go when looking for a responsible agent. Indeed, he claims that, under certain conditions, corporations can be held responsible. The idea is that if an organization can be seen as an autonomous agent, has morally relevant quality X (operational sloppiness, in this case), and an accident happens, and X can be seen as causally related to the accident, then the organization with quality X may well be a candidate for responsibility and thus blame.

It is clear that, if convincing, Pettit's argument could be of great help in the prosecution of organizations for serious crimes, the chief responsibility for which cannot be traced back to single individuals. In civil law, it is possible to hold corporate legal persons such as banks, insurance firms, the state, companies, *et cetera*, responsible for actions that damage other legal persons. In criminal law, this is not always the case. The example of the *Herald of Free Enterprise* is a good one. Intuitively, it seems deeply unjust that, in the absence of persons who can be identified as clearly responsible for the enactment of what led to the disaster, the company cannot be held responsible in which apparently sloppy decisions were being made, sloppy guidelines were in place, and sloppy actions were performed that seem to have resulted in the accident.

I am sympathetic to much of Pettit's overall argument. Most importantly perhaps, I agree with his argument as to why groups can qualify as autonomous agents (...) and, therefore, I have no fundamental objections against the idea that they can be held responsible for actions as well. I do think, however, that Pettit's largely implicit conceptualization of a corporation as made up of roughly free and equal members, more or less like members of a genuinely democratic organization, does not fit well with many corporations. As a consequence, it remains unclear how useful Pettit's conception of corporate responsibility really is. To come back to the example: does

* The author should like to thank Catriona MacKenzie, Hans Lindahl, and an anonymous referee for helpful suggestions.

1 Philip Pettit, "Responsibility Incorporated", in this issue.

Pettit's argument apply to the company that ran the ferry, or is it rather an ideal theoretical notion that is not particularly worried by problems of application to complex and unruly corporate practices?

Pettit makes frequent reference to the "constitutions" of corporations or organizations. He thinks of these as patterns of coordination "whereby the members of a group might each be assigned roles in the generation of an action-suited body of desire and beliefs in the performance of the actions that it supports". Groups form beliefs, desires, and intentions on such patterns, "and will do so appropriately endorsing a corresponding proposition. The group will form its beliefs, then, by forming on-off judgments over propositions that members put before it. And it will form desires and specific intentions in a parallel manner by forming on-off preferences over such propositions". So the formation of beliefs, desires, and intentions is structured by what Pettit calls the constitution of the corporation. Individuals within the corporation may be held accountable for decisions that they would not necessarily support as private persons or even as individual members of a corporation. This, he rightly stresses, is a result of the circumstance that group attitudes are not simply majoritarian functions of group members' attitudes. The "constitution" of a financial institution will help form beliefs, desires, and intentions that its employees – from board members to cashiers – probably would not have if they were not part of the corporation in the first place. Furthermore, as individual employees they may well be loyal to the corporation even though they will most likely not agree with every last detail of all its policies. Indeed, the ability to live with that tension between individual beliefs, desires, and intentions, and the beliefs, desires, and intentions of the group agent one is part of, seems a necessary presupposition of most forms of group membership.²

Now, the crux of Pettit's argument is that in thinking about individual and group responsibility we have to distinguish between individual enactors of a corporate action and the corporate entity that makes the actions of such enactors possible.

We can hold the enactors responsible, so far as their circumstances allow this, for the harm that their voluntary acts and omissions occasioned. We can hold the corporate entity responsible for the harm that it arranges to have done, given the decisions it licenses and the constitution by which it channels those decisions.

Or put in a slightly different way: "The regime I envisage would hold individual enactors responsible for any harm that they might have refused to do and didn't. And it would hold the corporate agent responsible for having organized things so that such harm was likely or inevitable."

What I find attractive about this account of incorporated responsibility is that it allows for a reflection on the man-made social circumstances and pressures (corporate ones, here) under which individual decisions are made and actions performed, without, on the one hand, absolving individual agents from their individual moral responsibility in face of such pressures or, on the other, treating these circumstances or pressures as blind social forces that are beyond our control and cannot be addressed from a moral point of view. Indeed, and in line with much of his

2 See for political membership, Jeremy Waldron, *Law and Disagreement* (Oxford: Clarendon 1999), 102ff.

Bert van den Brink

oeuvre,³ Pettit's project is a refreshing contribution to the perpetual debate in social and moral theory over the freedom of the individual who cannot help but be a socially incorporated agent. Rather than opting for either an atomistic fantasy about the complete and self-sufficient moral independence of the individual or a deterministic scenario that would lose track of the moral autonomy of the individual altogether, Pettit presents the individual agent as in charge of his own actions, yet, at the same time, as always strongly dependent on – and sometimes even threatened in its agential freedom by – the constitutions he acts under.

At several points in his article Pettit seems to suggest that *all* members of the group agent may hold responsibility as part of a structuring social force, shaped by the constitution, behind an action performed by an individual member of the group in the group's name. I find empirically convincing the idea that an individual member may perform an act he or she was under pressure to perform or habituated into performing by the corporation's constitution. And the same goes for the idea that the action would have been performed by another member, had the first member refused and that, again, this performer would have been equally under pressure to perform or habituated into performing. Finally, it seems intuitively right that some agent should be held accountable for the way in which the corporation's constitution structures the actions of individual members. This agent may indeed be the corporation. But what are the exact reasons for *individual members* to be held accountable for the *corporate agent's* beliefs, desires, intentions, actions and the way they are structured by the corporate agent's constitution?

I get the impression that in holding the "corporate entity responsible for the harm that it arranges to have done", Pettit assumes that, on principle, all members of the corporation should be seen as having played an equally influential role in the generation of the constitution and the beliefs, desires, and intentions that made the harmful actions that ensued likely or inevitable. The examples that Pettit uses all make that assumption (discursive dilemmas [100 ff], molecules in boiling water [107 ff], a commercial company owned and run by its employees in a participatory mode [113 ff]). On the one hand, this is understandable. To come back to the example of the *Herald of Free Enterprise*, if the company running the ferry was indeed extremely sloppy, with poor routines of checking and management, it seems right to say that employees, from the CEO to the deckhands, bear responsibility not just for directly harmful actions they may have performed on behalf of the corporation, but also for having failed to identify in time problems with the "constitution" of the corporation, which was a *constitution of sloppiness*, which "programmed" for sloppy action and thus played a causal role in the coming about of the disaster. On paper, this seems right. Yet, in practice, corporate life is hardly ever this transparent, democratic, and egalitarian. A constitution assigns different roles to different corporation members, and the chief responsibility for the quality and monitoring of the procedures and corporate culture that are meant to secure the safety of passengers, crew, and goods would seem to lie rather with the owners, board, and management of the company than with the deckhands. Commercial corporations are hardly every

3 For the foundations of this refreshing approach see Philip Pettit, *The Common Mind* (New York: Oxford University Press, 1993).

participatory and deliberative democracies; they are hierarchical organizations with a clear division of labor with regard to the question as to who leads and who follows. Given the fact that Pettit starts his article with an example from a real world company, I assume that he aspires to answer the question about the corporate responsibility of such real world companies. That makes it surprising that we find no reflection on problems of hierarchy, power distribution, and the functional distribution of roles within corporations in Pettit's paper.

Let us run through Pettit's own example a bit more. It is possible and even likely that some deckhands, managers, members of the board, and owners had warned against sloppiness before the accident happened. As seen from a moral point of view, the responsibility for warning surely lies with all corporation members to the extent that they are sufficiently autonomous agents who can act free from fear, *et cetera* (which often is a problem for whistleblowers, of course). Still, the chief responsibility for the effective uptake of warnings and for reorganizing things within the corporation does not lie equally with all: given the very role-assignments that come with certain positions, it is likely to lie with owners, the executive board, and other management ranks.

I think that this point gives rise to the following questions: Should holding responsible a *corporation* in such cases not rather be holding responsible those individuals who were effectively in charge of its constitution? And would this not mean that although the corporation was held responsible, responsibility for what went wrong at the constitutional level would no so much lie with *all* corporation members but only or mainly with those who had roles and powers within the corporation that could and should have prevented the culture of sloppiness to become as dominant as it seems to have been?

I am not saying that in this specific case the corporation should not have been held responsible. I don't know the details of the case. But even if it had been held responsible, it seems that there is an important level of responsibility that is missing from Pettit's argument. As we have seen, Pettit distinguishes between what we may call "enactment" responsibility (for the directly harmful act) and "arrangement" responsibility (regarding the constitution through which the formation of beliefs, desires, and intentions are channeled). Pettit seems to assume that "enactment" responsibility is individual responsibility and "arrangement" responsibility is corporate responsibility. If it is true that effective arrangement responsibility often lies with the executive board, owners, and managers, we should acknowledge the existence of a third level of responsibility: the level of *enactment of corporate arrangements* that makes the *enactment of corporate actions* likely or unavoidable. For although it is undoubtedly true that there is a "relative autonomy with which corporate attitudes may form", it seems right to assume that it is exactly the task of some members of corporations – owners, members of the board, and managers, mostly – to see through that relative autonomy in order to keep decent control of the corporate beast. They don't just enact the corporation's autonomously formed policies; they enact the arrangements under which these policies are developed as well. Corporate autonomy is not a social process that is necessarily beyond the control of individuals; rather, it is shaped by a collection of incorporated, social, yet individual actors, who are not just influenced by a corporate constitution, but influence this constitution

Bert van den Brink

themselves by setting certain decision rules; introducing new bonuses for managers; deciding whose voice counts most in corporate decisions, *et cetera*. The set of actors who have the effective power to enact corporate arrangements tends to be much smaller than the set of all actors in a corporation. Those who are part of this often quite small set of people have the kind of responsibility I just mentioned: *responsibility for the enactment of corporate arrangements*. This special kind of responsibility within corporation seems to be slipping through the net of Pettit's argument.

One of Pettit's reasons for holding group agents responsible is that it will help prevent perverse incentives to arrange things so that no member of the corporation can be held fully responsible at the level of enactment. But the very notion of *people arranging things in order to evade being held responsible* poses the question of *who arranges*. If this 'who' is indeed the complete collection of corporation members who work together as equals in a participatory mode, then true corporate agency is at stake, and Pettit's argument can help us in holding them collectively responsible. In many cases, not all members of the corporation will have participated in the arrangement, though. Such members should therefore not be held responsible on the arrangement level – it would simply be unjust to do so. But those who did participate should be held responsible. This is not to say that only those in charge hold responsibility. But it is to say that in complex and hierarchical corporations especially, Pettit's *corporate responsibility* seems to split up into two parts: *individual responsibility* of some corporation members for the enactment of the arrangement of likely or inevitable harm on the one hand, and *corporate responsibility* for the existence of that arrangement on the other. But *corporate responsibility* follows the more individual initiatives of those who enact corporate arrangements; perhaps we may expect that all members of a corporation who are aware of fundamental problems with the arrangement of aspects of the corporation will articulate their worries. But this does detract from the fact that the enactment of problematic arrangements is the underlying problem, and that such an enactment tends not to be a corporate act but rather an act of some influential corporate members.

To explain this in terms of Pettit's example of *The Herald of Free Enterprise*: in the corporation behind the ferry there were no doubt specific positions responsible for monitoring the safety of the ferries and the procedures by which they were run; for translating the insights gained from such monitoring into practical imperatives for board, management, and deckhand levels. If individuals in these positions as well as those monitoring and governing them acted or failed to act in such a way that the necessary safety arrangements were undermined, then they enacted a dangerous and blameworthy corporate arrangement. It would seem that they should be the first to be held accountable for what they did or failed to do. But the exact nature of what they did or failed to do cannot be conceptualized in terms of just one of Pettit's two main categories of responsibility: *enactment or arrangement*. Both categories are involved exactly because the blameworthy act or omission was *the enactment of a fatal arrangement*. Still, even though an *arrangement* rather than the enactment of corporate policy was at stake, the acts or omissions were not corporate in Pettit's sense. We would not primarily hold the corporate agent made up of all corporate members responsible but rather some members of the corporation who made serious mistakes in their functional roles in the corporation.

One consequence of my argument is that corporate responsibility in Pettit's sense is something that will occur only in participatory corporations run by individuals who all have sufficient power over the factors that determine the constitution that structures the formation of the corporate agent's beliefs, desires, and intentions. Speaking of corporate responsibility when the corporation's arrangement or constitution is for the most part under the influence of a limited group of members seems unfair to the many employees who are without much influence on the structuring arrangements or constitution of their behavior. It seems that by speaking of corporate responsibility they are being made responsible for something that was effectively not under their control. Pettit is right that such members still bear responsibility as enactors of corporate deeds that they could have refused to enact. But it seems unfair and unrealistic to think of members without much influence over the constitution of the corporation as no less part of the "reason-sensitive planner" at the source of corporate enactments than those members who have effective influence. So my claim is that part of what Pettit thinks of as corporate responsibility is actually the responsibility of those who are effectively in charge of the corporation, its arrangements, its constitution. Making all members of the corporation equally responsible in cases where it's simply hard to pin down who were *really* in charge seems unjust.