CHAPTER 4

The Offences in General

1 Punishable Behaviour

1.1 Human Behaviour?

In modern legal doctrine it is often said that an offence is, in principle, a form of human behaviour. This assertion aims at indicating two restrictions on the criminal law, the first of which is inherent in the word 'human': the only actions that are punishable are those undertaken by people, or, to put it differently, people are the only subjects of criminal law. In this manner, modern criminal law first and foremost opposes the animal trials which occurred until well into the eighteenth century. During these trials, animals like horses, cows, pigs, donkeys and dogs were taken to court because they had injured or killed someone, often a child. They were convicted of the death penalty, just as in the Old Testament (Exodus XXI, 28). The aldermen of Courtrai, for example, had two pigs decapitated on 2 September 1562 because they had killed and half eaten a three-month-old infant. The pigs’ heads were displayed on stakes and their trunks were buried in a gallows-field. Their owner had previously renounced possession of them. On 3 July 1587 the feudal court of Ingelmunster convicted a bull of murder. The animal, which had gored a woman, received the same punishments as the Courtrai pigs.

These animal trials occurred only sporadically. Scholars of criminal law were already censuring them in the sixteenth century, because animals cannot experience guilt. Legal historians propose two explanations for the occurrence of animal trials, neither of which is entirely satisfactory. According to the demon theory, people thought that an animal could be possessed by an evil spirit, which they then wanted to destroy by means of punishment. Other historians prefer a personification theory according to which the mediaeval sense of justice demanded that a punishment be imposed whenever severe damage was inflicted. If a man or woman could not be held responsible, the punishment was meted out to the animal involved in the case.

Most Ancien Régime jurists had no regard for the punishment of animals, but did carefully discriminate between animals that had done damage of their own accord and animals which had been incited by their owners or keepers. In the former case the owner was neither civilly nor criminally liable if he renounced possession of the animal for the benefit of the community. In the latter case the animal had merely been the means to carry out an offence,
the actual perpetrator being its owner or keeper. This view also applied to bestiality: the animal with which someone had had (perverse) sexual relations was burned together with the sodomite not because it was guilty, but because it had served as a means for an offence committed by a human.

In modern criminal law, the emphasis on human behaviour also implies that, as a rule, only natural persons are punished and not aggregates of persons or goods – irrespective of whether these have a legal personality or not. The punishment of communities (‘universitates’) was controversial in the Ancien Régime criminal doctrine. The majority of scholars of the criminal law defended the liability for punishment of communities in certain cases, such as insurrection against the monarch and fiscal offences. Other scholars opposed this view, because it enabled the indictment of people who had unwittingly become involved. Until the eighteenth century, the practice of criminal law subscribed to the former view and easily imposed fines on guilds, tradesmen, towns or rural communities, whose privileges were also sometimes withdrawn.

The Council of Brabant, for example, imposed a fine on the inhabitants of the village of Asse, because of their violent reaction to the arrest of a fellow villager by a public prosecutor. The villagers had broken into the local prison and had threatened the life of the public prosecutor. Charles V withdrew all of Ghent’s privileges after some of its inhabitants had revolted against his authority in 1539. The ringleaders of the rebellion were decapitated and a large number of other burghers were forced to wear a noose during a humiliating procession.

Under the influence of Roman law, which only punished natural persons, most nineteenth century scholars of criminal law held to the adage: ‘Universitas delinquere non potest’. In accordance with this postulate, both the 1791 and 1810 versions of the ‘Code pénal’, as well as the 1867 Belgian Penal Code only sentenced individual, natural persons, and not communities, associations or artificial persons.1 Whenever artificial persons or associations committed offences, it was only their directors who were – individually – punished, rather than the artificial persons themselves. Members or shareholders who had profited from the unlawful actions, or whose approval, tacit agreement, moral pressure or vote in the general meeting had incited the directors or their employees

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1 The only exception was article 2 of title IV of the law of 10 vendémaire, Year IV, regarding the responsibility of municipalities in cases of unlawful assembly. This law stated that whenever the inhabitants of a municipality participated in offences on its territory, the municipality had to pay a fine equalling the compensation for the damages to the state. Article 39 of the 1867 Belgian Penal Code abolished this provision.