International trade in models of corporate liability

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Globalisation, leading to pressures for convergence and harmonisation of laws, constitutes an important factor influencing the modern debate about corporate accountability. Concerns about the reach and power of global corporations, their involvement in fraud, economic crimes, corruption, health and safety breaches and environmental depredations are reflected in the recent appearance of corporate criminal liability on national and international law reform agendas. The growth of transnational corporations, the product of the dismantling of nationalistic anti-competitive measures and the general deregulation movements in the US and other major economies from the 1980s onwards, has transformed the entire architecture of legal control of business activities. National, international and supra national political institutions and legal regimes are all implicated. This complex environment cannot be properly captured in a short comment yet provides the fast moving background to the analysis of corporate liability principles.

Many European jurisdictions have, until recently, made no provision for the criminal liability of non-human agents, and some still do not. Even in England and Wales (and other common law jurisdictions such as the US, Canada, Australia and New Zealand) where corporate bodies have long been subject to the criminal law, it has been a marginal topic, ignored by the major writers and theorists. This short note introduces a 'conceptual toolkit' for corporate liability and legal reforms in European jurisdictions.

The toolkit

Three different theories of corporate blameworthiness have competed for attention in the common law: the Agency; Identification, and Holistic Models. The first theory is based on the principle that a corporation's employees are its agents. The second theory of blame attribution identifies a limited layer of senior officers within the company as its 'brains'; the company is liable for their individual transgressions on the basis that their acts are also the acts of the company. Since agency and identification theories both seek, in different ways, to equate corporate culpability with that of an individual they can be characterised as derivative forms of liability. The Holistic theory, on the other hand, exploits the dissimilarities between individual human beings and group entities; it seeks to locate corporate blame in the procedures, operating systems or culture of a company. English law draws on the first theory only in

relation to strict liability (mainly regulatory) offences; for crimes requiring proof of a mental element, the second much more restricted identification theory has applied. In the United States the federal courts broke away at the turn of the last century to a more general reliance on the first, vicarious theory. In neither jurisdiction has the history been straightforward. Other common law jurisdictions, including many American states, mainly follow the English bifurcated approach. The third way, the Holistic Theory, is deployed for Commonwealth (federal) offences in Australia, and is seen also in the proposed corporate killing offence in England. The Table below maps the broad application of these somewhat fluid categories in selected common law jurisdictions.

If the role of liability is to induce the corporation as principal to monitor its agents, then what should happen to a corporation which does so diligently? The conceptual dividing line between organisational culture theories and due diligence is not necessarily a sharp one. Due diligence may form part of the substantive formula or operate at the stage of decision to prosecute (as happens particularly with regulatory offences in England and Wales) or at the sentence stage as in the US federal scheme.

Developments in Europe

While most civil law systems long eschewed corporate liability, the debate is no longer whether to have corporate liability but what form it should take. The traditional objection to penal responsibility of legal persons in German criminal law culture has begun to crumble. In most jurisdictions administrative sanctions are gradually being replaced by direct criminal (penal) provisions. Not that the aversion was ever shared by all European jurisdictions; it was strongest amongst Germany, Italy, and Spain. Jurisdictions across Northern Europe such as the Netherlands and Denmark have adopted a pragmatic approach for some considerable time.

An amendment to the Netherlands Criminal Code in 1976 stated that corporations may commit offences such as battery and involuntary manslaughter. The criteria for liability are whether the company had the power to determine whether the employee did or did not do the act in question, and whether it usually 'accepted' such acts. The Dutch power and acceptance principle is clearly not as broad as the vicarious principle, nor is it as narrow as identification theory.

In the 1980s and 90s Norway, France, and Finland all incorporated criminal punishments against enterprises in their new penal codes, and Denmark consolidated its existing provision which is based on a negligence standard. The French Penal Code was amended in 1991 to remove the general principle that liability could not attach to *personnes morales* (i.e. non

human entities). All sorts of exceptions to the presumption against liability had developed in the context of individual (non - penal code) statutes and, as in England, strict liability offences were enforced vicariously against corporations. The reformed Code states that legal entities may be liable if the offence provision specifically declares that they should be and if an employee or officer is shown to have acted on the corporation's behalf. The actions of 'rogue' employees would not be imputed to the corporate entity. Sanctions under the new provisions include fines, dissolution, and probation. Fines may be up to three times higher than those imposed on a natural person.

In Germany (and countries such as Italy, Spain, Portugal, Greece and Poland inspired by German doctrines) the imposition of criminal liability on legal entities was 'unthinkable' until very recently. However, this is a matter under active debate in many and Portugal, for example, introduced a limited exception to this in the new Penal Code of 1983. The traditional objection to penal responsibility of legal persons in German criminal law culture has also begun to crumble. Fewer theorists now subscribe to the view that the social and ethical disapproval inherent in criminal punishment makes no sense when applied to a corporation.

Overcoming both of these objections, Italy has introduced in 2002 'administrative' liability for a limited number of offences. Evidence of 'structural negligence' is established if the organisation fails to implement adequate structures and guidelines to counter the risk of specific offences being committed. The Italian law places the onus of proving diligence on the corporation in relation to offences by the officers or chief executive but in relation to offences by subordinates the burden is on the prosecution. In either case corporations cannot evade liability by blaming the aberrance of individual officers or employees if there is no preventive structure in place.

In summary, most European jurisdictions have introduced sanctions in a variety of forms, particularly against violations of administrative regulations, similar to regulatory regulatory offences in England or the United States. These administrative sanctions are gradually being replaced by direct criminal (penal) provisions or by a pragmatic hybrid system, as in Italy. These European civil law developments display a new willingness to move towards corporate liability and reflect cultural shifts in jurisdictions which have until recently been extremely reluctant to contemplate group liability because of its historical association with repressive regimes. Because these jurisdictions have come late to corporate liability they are in a position to develop principles that are less hide-bound than those in the common law countries.

[Drawn from papers presented at conferences: University of Parma *Verso Codice Penale Modello Per L'Europa la Parte Generale*' (2000), Foundation Ius et Lex, Warsaw *Penal Responsibility in Liberal Democratic Systems* (2002)]

TABLE 1 COMMON LAW VARIATIONS – A BROAD TYPOLOGY

AGENCY PRINCIPLE	**IDENTIFICATION DOCTRINE**		**HOLISTIC THEORY**
US - federal offences (including mens rea) South Africa	Pure Form Selected US state offences	Modified Form US Model Penal Code states	
England -regulatory (strict liability and hybrid offences)	England– all other offences	England – some statutory offences	England and Wales – proposed corporate killing offence
Australian states- strict liability offences	Australian states		Australia - Federal Law
New Zealand - regulatory strict liability offences	New Zealand – other offences	New Zealand - regulatory non strict liability offences	