HISTORICAL DEVELOPMENT OF THE IDEA OF THE TRANSITION FROM CIVIL TO CRIMINAL LIABILITY OF CORPORATIONS

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Introduction

The Industrial Revolution, which took place between 1760 and 1840, marked the transition to mechanization and innovative manufacturing processes in Great Britain, mainland Europe and the United States. The transition has led to many innovations in most areas of life, including culture, economics and law. The age of industrialization, brought with it the corporate institution known as an independent legal entity under the law for rights and obligations.

While the beginning point for both Common Law and Civil Law was similar, holding no corporate liability, this had changed during the 18th and 19th centuries. The criminal liability of corporation as known today, evolved during the second half of the 19th century, borrowing legal theorem from civil law.

A Brief History on the Development of Corporation

The emergence of corporations, dates back to Middle Ages in European monarchs, when businesses were small and required little capital. In need of capital or long-term investment, a collaboration of partnership was the common form. A major drawback, was the ability of each investor to withdraw his investment at any time, which resulted in limited capacity to conduct business.[1]

During the 16th and 17th century, long-distance trade development increased the demand for long-term capital investment, which required more risk-bearing capacity. the answer came in a form of „joint stock company“ – a single business unit established by royal charter, guaranteed monopoly rights in exchange for long-term capitol and labor investment. Although it was a purely-secular instrument, by the 17th century, many hospitals and universities were incorporated that way.

[1] Robert W. **Hillman**, *Limited Liability in Historical Perspective*, 54(2) Washington and Lee Law Review 613, p. 625 – 621 (1997).

The modern corporation, evolved during the industrial revolution of the late 18th century and the 19th century. The accumulation of technological, economic and long-distance trade and commerce developments, gave rose to a new demand – a separation of liability for the corporation. During that time, a legal framework laid down in-order to regulate the legal relationship of the corporation with its owners (– shareholders), and with other entities such as creditors, employees, etc.

Since then, corporations were recognized as a distinct and separate entity from its owners, with legal capacity for duties and rights, capable of owning property. Gradually, civil liability of corporations formulated when corporations began to cause interference, damages and otherwise harm. Although corporations civilly sued, judgment against a corporation could be executed only against the property of the corporation, not that of its shareholders or employees.[2]

From Civil To Criminal Liability

The main approach of civil law, towards legal liability, laid in the codification of Roman law ("Corpus Iuris Civilis"). Under the Roman law, any liability required direct action that produces the harm, e. g. – perpetrator. To some extent, Roman law acknowledged legal entities other then humans, but ruled out any liability. Inspired by christian-catholic religion, it was held that a non-human legal entity could not be responsible under civil nor criminal law, because such conduct requires a soul.

The Roman law introduced two main concepts of criminal law as known to us today: *Actus Reus*, the actual, physical element, the deed itself, and *Mens Rea*, the mental element, namely the intent to do the deed or at least the knowledge that one is committing the criminal act. In light of that, It's easy to understand the civil law approach, since a fictitious entity cannot hold properties of mental or physical.

The corporate criminal liability as we know it today, evolved during the Victorian period. During the 18th and 19th century, the „joint stock company" structure was misused by various entrepreneurs, who trade in shares for dubious purposes, namely fraud. One famous example occurred In 1814, when an individual by name De-Branger dressed in a soldier's uniform, and Publicly announced the victory of the British kingdom in its war with France. This has led to a rise in the price of UK government bonds, and allowed De-Bringer and his partners to sell them at a large profit. When the scam was discovered, a part of the punishment was to be tied to a pillar in front of the Royal Stock Exchange for an hour a day for disgrace.[3]

By the early 19th century, corporations had become more dominant in the public space, and with it the potential to cause significant harm to others increased. However, corporations were deemed incapable of committing crimes, due to the lack of physical and mental capacity.[4]

A major setback was found in the doctrine of *Ultra Vires*, which asserted that a corporation can not commit or authorize others to commit actions outside the scope of

[2] Famous cases: Salomon v. Salomon & Co. [1897] A.C.22 (H.L.).

[3] R v de Berenger & others (1814) 105 ER 536.

[4] Kathleen F. **Brickey**, Corporate Criminal Accountability: A Brief History and an Observation, Washington University School of Law, Volume 60, issue 2, p. 393, 396 (1982).

it's charter. Consequently, the physical or mental state of other can not be attributed to the corporation.[5]

Changes begin to occur in the middle of the 19th century. At first, criminal liability of a corporation was limited to crimes of non feasance, or misfeasance, such as – abstracting traffic on highway, blocking revere stream, and otherwise failure to satisfy a duty required by law or improper performance of a legal act.[6]

One of the first cases, was The Queen v. Great North of England Railway (1846), in which the company was indicted for cutting through an existing highway and then strewing it with debris. In this case, the House of Lords established the criminal liability of wrongdoings of the corporation which defeat the purpose for which the corporation was established.

By the late 19th century, many corporations accumulated fortunes because of criminal activities, including – bribery, stock manipulation, exploitation of labour, unsafe working conditions, and more. courts struggled to reach conviction, because corporation considered to be an abstraction, a legal fiction. Due to lack of mental capacity nor malicious intent, corporations deemed incapable to commit crime.

The Change

the late 19th century, represents a major shift in approach towards corporate criminal liability, embracing two legal doctrines in two separate legal systems – U.K. and U.S.A.: the Identification doctrine, embraced by U.K. courts, and the vicarious liability doctrine embraced by U.S.A. courts.

The Identification doctrine, hold a link between the corporation to a human operating in its behalf, thereby supplying a body and mind to the corporation. The acts and omissions of a corporation, are committed by the people who work for the benefit of them self, of the owners and the organization as a hole. Under the identification doctrine, a corporation has a mind, hands and a nerve center which controls it's actions.[7]

The vicarious liability, holds the corporation liable for an individual conduct, if that individual operated within the scope of the corporation, generally by employment, and for the benefit of the corporation.[8] Under those conditions, courts held corporations criminally liable even for the illegal actions conducted by low-level employees, and even if it was contrary to company's policy or direct instructions from the directors and managers.

Conclusion

corporate liability evolved over time, in direct consequence to the conducts of the people who run it. Criminal liability of corporations as we know it be today, has evolved

[5] In U.K.: Ashbury Ry Carriage and Iron Co. v. Riche, LR 7 HL 653 (1875) ; In U.S.A.:People v Rochester Ry & Light Co, 195 N.Y. (New York Court of Appeals) 102, 107, 88 N.E. 22, 24 (1909).

[6] *ibid*, at p. 409.

[7] HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd, 1 QB 159, (1956) 3 All ER 624 (1957).

[8] NY Central & Hudson River RR Co v United States 212 US 481, pp. 492 – 496 (1909).

over a period of more then 4 centuries. The evolution can be divided into three stages: At the first stage, corporations were exempt from liability by reason of incompetence – it has no physical dimension and „no soul“ to constitute mental intent. At the second stage, corporation were liable for actions or omissions that do not require any stat of mined. At the third stage, the action, omissions and mental stat of a person can be attributed to the corporation if that person operated within the scope of the corporate.

Bibliography:

1. Robert W. Hillman, *Limited Liability in Historical Perspective*, 54(2) Washington and Lee Law Review 613, p. 625 – 621 (1997).
2. Salomon v. Salomon & Co. [1897] A.C.22 (H.L.).
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Abstract: This paper will discusses corporate liability and the historical transition from civil to criminal liability. Over the centuries, corporate liability has transformed from non-existence onto full-capacity. In the process, there was a profound changes of understanding about the roll of corporations in society, and the nature of criminal law. Reviewing the major aspects of corporate criminal liability, can help us re-think the guidelines for innovations in the law of corporate.

Keywords: corporation; corporate liability; corporate criminal liability; civil law; roman law; legal entity; industrial revolution; middle ages; joint stock company; ultra vires; Identification doctrine; vicarious liability doctrine.