THE ORIGIN OF THE IDEA OF CORPORATE CRIME RESPONSIBILITY

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INTRODUCTION

In this article I will address the origin of the idea of imposing criminal liability on corporations. Corporate law has undergone significant upheavals over the years, and today all forms of corporate responsibility are recognized, including – administrative, civil and criminal. In the past, however, the situation was very different. The existence of the artificial legal entity lasts only until the 16th and 17th centuries.

At that time, the law did not recognize the existence of any responsibility imposed on corporations. During the 18th and 19th centuries, however, a significant leap began in the understanding of the flawed legal situation, and the legal system began to gradually develop aspects of criminal liability toward corporations, which will be discussed below.

RECOGNIZING THE PROBLEM

The corporation model we know today, has evolved significantly through the 18th and 19th century, during the industrial revolution. The economic and technological developments, led to long-distance and bilateral trade, which increased the demand for long-term capital commitment.

The overall demands marked the transition from partnerships, between family members or friends, to a collaboration between capital and labor providers under one business unit, known as a „joint stock“ company. each „joint stock“ company formed by specific legislation, a charter, which detailed it’s purpose and scope of business. For example – The Great North of England Railway Company:

„Sect. 11 authorises the company, „for the purposes and subject to the provisions and restrictions of this Act,“ to enter lands, &c., and, among other powers, to construct in, upon, across, under or over the railway, or in, upon, across, under, or over any lands [...]“.[1]

[1] The Queen v Great North Of England Railway Co [1846] 115 E.R 1294, 803. at: https://vlex.co.uk/vid/the-queen-against-the-803396521.

The charter gave to the new-established company, authorization do operate as a single unite carryout the government's will, much like an extension of the state. To that extent, a „joint stock" company was legally limited in it's power, and any breach of the law fall into the Ultra Vires doctrine.

The meaning of Ultra Vires is that a company lacks the legal power to be involved in unlawful conduct, and can not authorize it's managers, employees or officers to be involved in actions that breaches the company's charter. Consequently, the actions and behaviors of an officer or employee cannot be attribute to the corporation.[2]

At that time, judicial systems throughout European continent and new colonies of America, employed Civil Law, which based on Roman Law and catholic religious aspects. In combination with monarchical aspects, a company deemed incapacitated to hold liable for criminal conduct.[3]

Civil Law system draws a distinct line between humans and corporations. Unlike humans, corporations were perceived as an artificial entity created by humans, in-order to serve a human-purpose. Therefore, it cannot control any physical actions or hold any „knowledge" about committing a crime. In a religious perspective, artificial entity have no soul required for carrying liability before god.[4]

Inheritance from Roman law, is a key aspect of criminal law known as Actus Reus – the commission of the forbidden act, and Mens Rea – criminal intent. Given the fact that a corporation has no physical dimension to operate and no mind (or soul) to hold intent, then no criminal liability of any kind can be imposed on it.

FIRST STEPS IN CORPORATE CRIMINAL LIABILITY

The transition from artificial entity, subjects to non or limited criminal liability, to a full independent legal entity eligible for rights and obligations under the law, was gradually. In the early 18th century, the „joint stock" company was misused by various entrepreneurs, who seek to profit in dubious activities.

One major case was the South Sea Company, which was involved in bribery and inside trading which artificially raised the share price. The expected profits of the South Sea Company's trade monopoly rights, with South America countries, didn't fulfill, causing a loss of £7,500,000.5 The crash caused one of the worst financial crashes at that time. This resulted in the Bubble Act against those who acted „as if they were corporate bodies", while had in fact conducted no legitimate business.[5]

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[2] 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).

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

[4] See e.g. Global Compliance News – Baker McKenzie, Corporate Liability in Germany, in: https://globalcompliancenews.com/white-collar-crime/corporate-liability-in-germany/.

[5] William **McColloch**, „A shackled revolution? The Bubble Act and financial regulation in 18th century England", University of Utah, Department of Economics, *Working Paper,* No. 2013-06, p. 6 – 7 (2013).

As „joint stock“ companies become more common, their involvement in activities which conflicts with public interests increased.[6] Consequently, courts struggled to convict corporation of a crime which requires a specific intent, and enforce liability for crimes of nonfeasance or misfeasance – failure to satisfy a duty required by law or improper performance of a legal act. such misconducts varies from obstructing traffic and blocking river streams, to fraud and stock manipulation.[7] By the mid-19th century, it was clear that the criminal justice system lacked the paradigm needed to treat the corporation in a more appropriately manner.

The new conditions enabled the formation of two major and separate doctrines. Regarding the continent countries, U.K. courts developed the Identification doctrine, which compere the corporation to a human body. The acts and omissions of a corporation, are committed by the people who operate in the name of and for the benefit of the organization as a hole.

The identification doctrine submits that the body, the mind, and the nerve center of those people controls and navigates the corporation actions. Therefore, in the eyes of the law, the corporation is an individual much like any other person, culpable and liable for criminal conduct.[8]

U.S.A. took a different approach in submitting corporate criminal liability. Borrowed from tort law, the doctrine of Vicarious Liability asserted that the elements of Actus Reus and Mens Rea of a person can be attributed to the corporation, if there is a relevant relationship between them, such as employment or other contractual relation.[9]

Under the Vicarious Liability doctrine, a corporation may be criminally liable for crimes requiring intent, if that person actions or omissions were requested, authorized, or otherwise tolerated by a high managerial officer in the corporation. vicarious liability requires two elements: 1) The individual must act within the scope of the corporation and the nature of his employment. 2) The cation must be related to benefit the corporation. 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.[10]

PERSONAL OPINION

The reasons for imposing criminal liability on corporations are mainly pragmatic – the centrality of corporations in economic activity and the fear that non-recognition of corporate criminal responsibility will allow offenses to be sheltered under the veil of corporate structure.

Eeven though, the recognition of the importance of this principle, should not detract from the fact that criminal law is fundamentally designed to direct people's be-

[6] Brickey, note 3, p. 409.

[7] Case example: R v de Berenger & others (1814) 105 ER 536. ; R. v Great North of England Rly Co (1846) 9 Q.B. 315.

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

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

[10] United States v Hilton Hotels Corp., 467 F.2d 1000, p. 1004 (9th Cir. 1973).

havior and to deter them – both at the level of deterring the individual and at the level of deterring the many.

The principle of guilt is a fundamental principle in criminal law, which establishes a common requirement for all offenses as to offenses – there is no act without doing and no one bears responsibility for acts that are not under his control. Another important principle is the public warning whereby the law must be publish for all to know how to behave and fear the punishment of crimes.[11]

The usual purposes of punishment are: retribution; Deterring the offender; Deterring society; Protecting public peace and rehabilitating the offender. The purpose of rehabilitating a criminal, is to ensure the protection of public safety by the fact that on his return to society he will not commit criminal acts again.

This reason is integrated with the restorative justice approach to justice, according to which repairing the harm created by the offense while involving the victim of the offense also requires treatment of the offender. If so, the deterrence consideration increases the punishment, while rehabilitation reduces the punishment. The question of which of the first considerations.

In light of this perspective, there is no place for imposing criminal liability on a corporation for offenses that require malicious intent, and it is right to settle for imposing liability on the officers and managers only. The reason lies in the idea, that the whole function of criminal responsibility is to influence human behavior, which is a purely human virtue.

Obviously, a corporation lack the mental capacity to understand the law, to fear from punishment or to feel anything, guilt or otherwise. Therefor, the purpose of criminal punishment is absent in the legal fiction of corporations.

However, in light of all pragmatic reasons for recognizing and imposing criminal liability on corporations, The consideration of deterrence prevails over rehabilitation, in cases where the offenses carry a particularly severe criminal offense. It is in my opinion that, filing indictments against corporations would be justified for the purpose of enforcing criminal law and fulfilling the purposes of punishment, in cases of serious offenses or in serious consequences due to offenses.

CONCLUSION

In this article I have discussed the sources of the idea of imposing criminal liability on corporations. This issue has begun to gain momentum in direct proportion to the proliferation rate of corporation use in civilized societies across continental Europe and the new settlement in North America.

During the 18th and 19th centuries, there was a great development in the position of the corporation and there was an increase in the quantity and power accumulated through it. In line with this, the people involved in the management of the corporation began to engage in dubious activities, including fraud and manipulation of stock prices, in order to rake in large profits.

[11] S. Z. (Shneur Zalman) **Feller**, FUNDAMENTALS OF PENAL LAW, Vol. 1, p. 213 – 214 (1984).

Initially, the courts found it difficult to convict corporations of criminal offenses, and at most they were held liable for minor offenses that did not require criminal intent. Subsequently, beginning in the mid-19th century, two major doctrines developed with the aim of imposing such criminal liability.

The British kingdom adopted the identification doctrine, according to which he body, the mind, and the nerve center of those people controls and navigates the corporation actions. Therefore, in the eyes of the law, the corporation is an individual much like any other person, culpable and liable for criminal. The American legal system has taken an approach of vicarious liability according to which the person who acted on behalf of and for the corporation, acted as a messenger of the corporation. Therefore, the human characteristics and attributes necessary to establish a conviction can be attributed to a corporation.

In my humble opinion, there is an undoubted difficulty as to the manner in which the various jurisdictions have been used to impose criminal liability on corporations. Since this is a legal fiction, there is no practical basis for attributing a will or thought to a corporation. Therefore, it is difficult to confuse the purpose of imposing nightly responsibility with the purpose of punishment, since only a person is able to internalize the punishment, fear and shy away from it. At the same time, there is considerable value in imposing criminal liability on corporations, including so that they do not serve as a refuge for criminals. Thus, it is appropriate to impose criminal liability on a corporation only for serious offenses or in causing serious consequences.

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Abstract: Legal systems have not always recognized the existence of criminal liability of corporations. This phenomenon is largely modern, and was founded sometime in the 19th century. The rationale for rejecting the recognition of this responsibility rests on two grounds – legal and religious, which were perceived as one system. Over time, changes in perception began to emerge, in the face of corporate abuse and dire consequences that occurred to broad interests.

Keywords: Corporate law, Criminal liability, Joint stock company, Ultra Vires, Actus Reus, Mens Rea, Identification doctrine, Vicarious Liability doctrine.