CORPORATE RESPONSIBILITY FOR CRIMES – THINKING OUTSIDE THE BOX

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ABSTRACT

Since the 19th century when corporations were first made the subject of criminal law, there has been an ongoing controversy regarding the theoretical basis of this. The crux of this debate is whether criminal liability can exist without moral blameworthiness, or put another way, whether corporations not being human or natural persons can be held responsible for a crime which ostensibly connotes fault or moral wrongdoing. In spite of this however, there is increasing use of criminal sanctions to regulate corporate behaviour. Public opinion is also increasing in favour of criminalising corporate wrongs. This has been more so in the latter part of the 20th century, when the power and influence wielded by corporations and the harm they can cause has been highlighted in several high profile incidents involving corporations. It is therefore unlikely that corporate criminal liability will go away in the near future if at all.

Against this background, this paper, after reviewing the current debate and developments in corporate criminal liability theory, argues that although there are apparent theoretical problems in the current methods of attribution of criminal liability to corporations, this is more to do with limiting such thinking within the confines of existing criminal law theory. Criminal law theories applicable to natural persons obviously have constraints when applied to a non natural person. Nevertheless, law, just as the society it serves, is dynamic and therefore criminal law theories have to adapt to the realities of the modern world. Corporate criminal liability is here to stay for the foreseeable future and therefore what is needed is perhaps a pragmatic approach which seeks to make its application more effective.

In this regard, there are already attempts to develop alternative models for attributing liability to corporations. These are far from perfect theories at this stage. Nevertheless, they are pragmatic in their approach and a worthwhile focus of academic attention.

1. INTRODUCTION

Corporations have always played an important role in national and global economy. However in recent times, this has become even more so as a result of globalisation.

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Globalisation, fuelled by liberalisation and technological breakthroughs, particularly in the area of information technology has led to interconnections in all areas of economic, cultural and social life. The main drivers of globalisation and therefore global economy are corporate bodies, especially the multinational corporations, who through mergers and acquisitions and through the huge capital and resources at their disposal have gained access to markets and resources in both developed and developing countries.

While both international and national legal systems have historically assumed the altruism of corporate bodies, often granting them privileges, widespread publication of serious corporate wrongdoings in recent times such as the Bhopal gas leak disaster in India, the Zeebrugge boat disaster in the United Kingdom, the Exxon Valdez oil tanker spill in the US, the role of Shell in the Ogoni crisis in Nigeria, the collapse of Enron and WorldCom in the United States and HIH and OneTel in Australia, and the bribery scandals of Halliburton, have all put this rose coloured view of corporations to the test. This has informed a much more proactive attempt at both corporate governance issues as well as developing liability regimes for corporate wrongdoing. One of the tools utilised in legislation under international and national law is criminal liability.

However, corporate criminal liability has been a controversial issue, with one of the fundamental questions being the theoretical basis for making corporations subjects of criminal law. This paper analyses this issue, highlighting areas of

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1 This has entailed "the removal of impediments to competition, both border barriers such as tariffs and exchange controls, as well as internal restrictions, such as directed credit and preferential purchasing. In many ways this has entailed deregulation, especially the reduction of state ownership (privatisation) and of structural controls (such as distinctions between banks and other types of financial intermediaries)." See S. Piccioto, "What rules for the world economy," in S. Piccioto and R. Mayne, (eds), Regulating international business: Beyond liberalization, London, Macmillan (1999), at pp. 1-2.

2 UNCTAD, World investment report 2000: Cross-border mergers and acquisitions and development, New York/Geneva, UN Publications (2000), at pp. 6-8. See also UNCTAD, World investment report 2004: The shift towards services, New York/Geneva, UN Publications (2004), at pp. 8-9, which states, "UNCTAD’s data show that international production is carried out by over 900,000 foreign affiliates of at least 61,000 TNCs worldwide... These affiliates account for an estimated one-tenth of world GDP and one-third of world exports, and their shares are increasing."

3 Protection of foreign investment using various mechanisms is recognised under customary international law and under modern Bilateral and Multilateral Investment Treaties (BITs and MITs). Indeed, more innovative mechanisms such as the investor state dispute mechanism (ISDM) have been developed under modern MITs such as Chapter 11 of the North America Free Trade Agreement (NAFTA) 1994. This gives an investor the right to institute binding arbitral proceedings against the host government independent of the home state. This process has been further aided by dispute settlement rules of the World Bank’s International Centre for the Settlement of Investment Disputes (ICSID), the United Nation’s Commission on International Trade Law (UNCTRAL), and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, which came into force in June 1959.

4 The inability to address corporate fault has been described as "the blackest hole in the theory of corporate
development in the theory of corporate criminal liability and recommends a functional approach in the light of the existence and continued use of criminal sanctions against corporations. Owing to the fact that corporate criminal liability originated from and is more firmly established in the United Kingdom and other common law jurisdictions, the focus of the discussion below is on common law countries. However, as other legal jurisdictions increasingly embrace the concept of corporate criminality, these are issues they too will have to grapple with and hence the paper will be of relevance to them.

2. COMMON LAW CHALLENGES TO CORPORATE CRIMINAL LIABILITY

Although corporate criminal liability is now entrenched in most common law and even some civil law jurisdictions, it is a relatively new phenomenon with the first conviction being in the case of *R v Birmingham and Gloucester Railway Coy.* As criminal liability was focussed on the individual from its origin in the 12th century, it was difficult to apply several legal principles and customs which evolved in the field of criminal law to a corporate body, which though was a legal person, was merely an abstraction.

The modern corporation evolved essentially as a business necessity for the purpose of furthering trade and therefore enjoyed the support of the state on whose behalf, it sometimes acted. To this end, legal rules and principles evolved which enabled

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5 Corporate criminality as a concept is traditionally unknown in non common law countries owing to the classic doctrine of *societas delinquere non potest* (i.e., that only individuals can be responsible for crimes). However, as evidenced in recent studies, there are examples of departures from this traditional approach in countries such as Japan, Korea, France etc. See Wells, “The millennium bug and Corporate Criminal Liability” (1999), 2 JILT (No page numbers available for this paper) [http://www2.warwick.ac.uk/fac/soc/law/eljl/jilt/1999_2/wells/ (Referred to after now as C. Wells, “The Millennium Bug and Corporate Criminal Liability”) (Last visited 10 March 2005); Sea-also, G.Heine, M. Prabhu, A. Alvazzi del Frate (eds.) *Environmental protection -Potentials and limits of criminal justice: Evaluation of legal structures*, Rome, UNICRI. (1997), at p. 456.


8 For a very concise analysis of the development of the modern corporation and the legal developments favouring corporate entities, see Slapper and Tombs, *op. cit.*, pp.22-26. See also C. Wells, “Cry in the dark: Corporate manslaughter and cultural meaning” in I. Loveland, (ed.) *Frontiers of criminality*, London, Sweet and Maxwell (1995), at p.110, where the author states that “legal structures and mechanisms facilitate rather than hinder the operation of corporations. The legal system within which they operate largely serves
the corporation to effectively carry out its activities just like a natural person and yet shielded it from some of the liabilities of a human person. While this existed to some extent in civil law, under the criminal law, there was a complete exemption from liability. Although a corporation is made up of an aggregation of persons, and can only act through its officers, by law it was vested with legal personality distinct and separate from its constituent members. This separation of the abstract or fictional personality of the corporation from its constituent members and officers lay at the root of the problem with application of criminal liability to corporate bodies.

The most fundamental obstacle and one which still dogs the corporate crime debate is with respect to the fault requirement for criminal liability. Traditionally, criminal liability requires fault, or a blameworthy or guilty mind as well as the physical act. A corporation not being a physical person and acting only through its officials lacked the ability to form this required mental element and therefore, it was argued, could not be responsible for crimes. Consequently, although the constituent members could be held criminally liable, the corporation itself could not. This was particularly so, because at this time, even with the development of vicarious liability in civil law, this was inapplicable to criminal law as it was a fundamental principle of the common law that a person could not be held vicariously liable for the crime of another. Also, the nature of the main penalties evolved under the criminal law, i.e. imprisonment and the death penalty could not be applied to the corporation. Thus since a corporate body “had no soul to damn

their interests, corporate personality protects their owners from the full consequences of failure, and the regulation to which they are subject assumes their beneficence.”

9 For instance separate legal personality, ownership of property, entering into contracts in its own name, perpetual succession, etc.

10 Civil law is used here as a distinction from criminal law and not as a reference to legal jurisdictions. Some of the ways civil law shielded corporations include the ultra vires doctrine, contributory negligence, the veil of incorporation, volenti non fit injuria, etc. See Slapper and Tombs, op. cit., at pp.25-26.

11 A principle which existed prior to, but made popular in the famous case of Salomon v Salomon, [1897] A.C. 22.

12 Leigh, The criminal liability of corporations in English law, loc. Cit., argues that corporate personality is an abstraction, not a fiction.

13 Very generally referred to as mens rea.

14 Referred to as the actus reus.

15 Slapper and Tombs, op. cit., at p. 26 refers to a statement accredited to Holt C.J. in 1701 that “a corporation is not indictable but the particular members are.”

16 For instance in Pearks, Gunston and Tee Ltd v Ward [1902] 2 KB 1, at p. 11, Channel J., said, “By the general principles of criminality, if a matter is made a criminal offence, it is essential that there should be something in the nature of mens rea, and therefore, in ordinary cases a corporation cannot be guilty of a criminal offence, nor can a master be liable criminally for an offence by his servant”.

17 Referring to this limitation, in R v City of London (1682) 8 St. Tr. 1039 at 1138, an advocate asked “What! must
and body to kick,” it could not be a proper subject of the criminal law.

It was further argued, that a corporation not being a natural person was limited in its powers by the incorporation documents. A corporate body could only act legally within the purposes for which it was created and any act outside this was ultra vires the corporation and therefore not its acts. Obviously, since a corporation could not be established for the commission of a crime, it could not be liable for such.

Finally, by a technical rule, the practice of the criminal courts did not permit appearance by an attorney, but rather required the accused person to stand at the bar personally. Since a corporation was an abstraction, there was no person to so stand.

3. THE EVOLUTION OF CORPORATE CRIMINAL LIABILITY

Changes in the socio economic landscape, particularly increased numbers and importance of companies following the industrial revolution, was perhaps the impetus for the change in perception of corporate bodies as agents of crime. Furthermore, judicial and legislative definitions of a person to include corporations further paved the way for application of criminal liability to non natural persons.

they hang up the corporate seal?”

18 This statement is attributed to Lord Chancellor Thurlow, and is quoted in Leigh, op. cit., at p. 4, and also formed part of the title of J.C. Coffee’s article, “‘No soul to damn: No body to kick’: An unsandalized inquiry into the problem of corporate punishment,” 79 Mich. L. Rev., (1981), at p. 386.

19 Section 33 of the Criminal Justice Act 1925 of the UK finally dealt with this problem.


21 For instance, in Royal Steam Packet Co. v Braham (1877), 2 App. Cas. 381, the Privy Council opined that in a legal sense, the word “person” in a statute, depending on its object could apply to a corporation.

22 Section 14 of the Criminal Law Act 1827 of the UK provided that in the absence of a contrary intention, the word person in statutes applied to corporations. This definition was repeated in section 2 (1) of the Interpretation Act, 1889 of the UK with particular reference to offences. The section provides “[I]n the construction of every enactment relating to an offence punishable on indictment or on summary conviction, whether contained in an Act passed before or after commencement of this Act, the expression ‘person’ shall unless the contrary intention appears include a body corporate”. A similar provision is now contained in section 5, schedule 1 of the Interpretation Act, 1978 of the UK. Similar provisions can be found in the laws of some other countries. For instance, section 1, Title I of the U.S Code Collection provides that in an Act of Congress, “the words person’ and ‘whoever’ includes corporations, companies, associations, firms, partnerships, societies, and joint stock companies as well as individuals”. See further, Leigh, op. cit., at chapter 3, particularly pp. 20-24. Most other countries currently have similar interpretations. For instance in Nigeria, section 18 (1) of The Interpretation Act, Cap 192, LFN, 1990 provides, “ ‘person’ includes any body of persons corporate or unincorporated.”
The earliest application of the criminal law to corporations was for failure to satisfy absolute duties, in instances where it was considered that the statute imposes the duty directly on the company. Since there was no mental requirement, and the duty was directly on the company, no individual officer or agent of the company was liable, and the courts did not have to deal with the fundamental issue of intent. Consequently, in *R. v Birmingham and Gloucester Rly Co.*, Patterson, J., held that a corporation "could be indicted for a breach of duty imposed on it by law, though not for a felony, or crimes involving personal violence as for riots or assaults". Although this decision initially led to suggestions that corporations could only be indicted for nonfeasance but not for misfeasance, this argument was however laid to rest in the latter case of *R v Great North of England Rly. Co.* The court was able to do this by aid of the doctrine of vicarious liability developed under the law of torts by holding the corporation liable for the acts of its agents. The court held further that the fact that there were identifiable persons who could be proceeded against under the criminal law was irrelevant.

While these were major leaps in the development of corporate criminal law, it appears that economic reasons, i.e. to avoid interruption or damage to the economic infrastructure, necessitated the change in judicial attitude to corporate crime.
3.1 Corporate criminal liability extended to crimes of intents

Although rules developed for individuals have been the basis of attribution of criminal liability to corporations in the United States of America and the United Kingdom, nevertheless, different approaches were adopted in both jurisdictions in holding corporations liable for crimes of intent or mens rea. The US has relied on broad agency principles, while the UK has a much narrower principle of attributing liability known as the identification theory. These separate approaches are discussed below.

3.1.1 The United States - Agency principle

As noted earlier, the courts relied on the doctrine of vicarious liability to hold corporate bodies liable for crimes of nonfeasance and misfeasance.\(^\text{31}\) In the UK and most other common law jurisdictions, the use of vicarious criminal liability was restricted to absolute or strict liability offences.\(^\text{32}\) This was however not the case with the US, especially under federal law, as vicarious liability otherwise referred to as the doctrine of respondeat superior, was used as the basis for holding corporations liable even for crimes of intent.\(^\text{33}\) Since the case of Hudson River Railroad Co. \textit{v} US,\(^\text{34}\) the courts have in all but a few exceptions\(^\text{35}\) attributed criminal liability to corporate bodies on the basis of the doctrine of respondeat superior. In that case the constitutionality of the Elkins Act,\(^\text{36}\) which prohibited payments to shippers, was challenged on the grounds that “congress has no authority to impute to a corporation the commission of criminal offenses; or to subject a corporation to a criminal prosecution by reason of the things charged,” and that doing so would be to punish innocent stockholders.\(^\text{37}\)

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\(^{32}\) For instance, in Canada, vicarious liability is restricted to strict liability or absolute liability offences. See M. Prabhu, “Criminal liability of organisations in Canada”, in G. Heine, M. Prabhu, A. Alvazzi del Frate, \textit{op. cit.}, at p. 469.


\(^{34}\) 212 U.S. 481 (1909).

\(^{35}\) Such as rape, bigamy and murder. See Khanna, \textit{op. cit.}, at p. 3; Wells, \textit{Corporations and criminal liability, op. cit.}, at p. 131


The court held that the Act was constitutional based on pragmatic and public policy. It recognised that Congress obviously intended to hold corporate bodies liable and further that this was necessary to effectively enforce such statutes. Furthermore, the court could see “no valid objection in law, and every reason in public policy, why the corporation which profits by the transaction, and can only act through its agents and officers, shall (not) be punishable... (for) the knowledge and intent of its agents to whom it has intrusted (sic) authority to act ... because of the old and exploded doctrine that a corporation cannot commit a crime...”

3.1.2 The United kingdom – Identification theory

Extension of criminal liability to cases requiring intent took a while longer in the UK. According to Wells, the doctrine of precedents contributed to this as it hampered courts from applying corporate criminal liability even after the initial procedural difficulties had been removed. However, in 1944, three cases decided within months of each other paved the way for corporate criminal liability in cases requiring intent. While the reasons why these decisions so close to each other were made at this particular time is uncertain, the effect has been said to be revolutionary. In all three cases, the courts indicted a company for an offence requiring intent to deceive, conspiracy to defraud and using a document with intent to defraud respectively. The courts were able to do so by attributing the intent of its officers to the company itself, so that the officers were acting as the company and not/or the company. It was therefore the company itself which was liable and not merely being liable for the acts of its officers as under the vicarious liability doctrine.

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34 Ibid, at pp. 495-496.
35 See for instance, R v Cory Bros, [1927] 1 KB 810. Although as discussed above, in the US and Canada, the courts had successfully applied criminal liability to corporate bodies for mens rea offences much earlier. See New York Central & Hudson Railroad Company v US 212 U.S. 481 [1909]; R. v Union Colliery Company (1900) vol.31 S.C.R. 81.
36 Wells, Corporations and criminal liability, op. cit., at p. 93. There is support for this for instance in the case of Cory Bros, supra, where Finlay J, obviously was restricted in extending liability to offences of mens rea because of the earlier cases which he reviewed.
37 These are DPP v Kent and Sussex Contractors [1944] KB 146; R v ICR Haulage Ltd [1944] KB 551; and Moore v Bresier [1944] 2 All ER 515.
38 Violations of wartime regulations have been suggested as a reason. See Leigh, The criminal liability of corporations in English law, op. cit., at p.1.
40 Moore v Bressler, supra, seems a bit odd because the officers whose intent were taken as that of the company and for which the company was convicted for tax evasion were also defrauding the company.
In *DPP v Kent and Sussex Contractors*, Viscount Caldecote, after reviewing a long line of cases, concluded, that “[T]he officers are the company for this purpose … There was ample evidence on the facts … that the company, by the only people who could act or speak or think for it had done both these things.” While this was not expressly stated in any of the three cases, the attribution of the intent of the officers of the company to the company itself emerged in the law of torts and the courts may have been influenced by the reasoning of the court in the earlier case of *Lennards Carrying Co. v Asiatic Petroleum*. In that case Viscount Haldane said:

“… a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directive will must consequently be sought in the person of somebody who for the same purposes may be called an agent: but who really is the directing mind and will of the corporation. If Mr Lennard was the directing mind of the company, then his action must, unless a corporation is not liable at all, have been an action which was the action of the company itself …. [I]n such a case as the present one the fault or privity of somebody is not merely a servant or agent for whom the company is liable upon the footing *respondeat superior* because his action is the very action of the company itself.”

This basis for corporate liability for crimes of intent is the most popular in common law jurisdictions, including several states in the US as a result of their laws being modelled after the Model Penal Code which subscribe to the identification doctrine as the basis of attribution of liability to a corporation.

4. **THEORETICAL BASIS FOR CORPORATE CRIMINAL LIABILITY**

Although the underlying policy considerations for corporate criminal liability could be gleaned from the decisions, the courts at the time gave no clear theoretical

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45 Supra., at pp 155-156.
46 This has variously been called the identification or alter ego doctrine or theory.
47 (1915) A.C. 705.
48 Ibid at pp. 713-714.
49 In modern times especially in certain aspects of criminalization of corporate activities, public welfare considerations play a significant role. However, in its origins, ensuring that companies observed laws and that their agents and servants did the same appear to be more significant. Also as highlighted in the anti trust laws, it was also to ensure that the corporate form was not used in the commission of crimes. See Leigh, *The criminal liability of corporations in English law*, op. cit., at p. 113.
basis for the application of corporate criminal liability.\footnote{According to Mueller, "[m]any weeds have grown on the acre of jurisprudence which has been allotted to the criminal law. Among these ... is corporate criminal liability ... Nobody bred it, nobody cultivated it, nobody planted it. It just grew." See G.O.W. Mueller, "Mens rea and the corporation", 19 U. Pitt. L. Rev., (1957), p. 21.} With respect to the identification doctrine, there were no clear criteria for identifying those officials whose intent could be taken as being that of the company for the purposes of criminal liability.\footnote{Understandably, this latter issue may have been a lot less important then considering the relatively simple structure and organisation of companies at the time. For instance, in the ICR Haulage it was relatively easy to identify the managing director of a family company of two directors as being an alter ego of the company.} It was over two decades later, in the case of \textit{Tesco Supermarkets Ltd v Natrass},\footnote{[1972] AC 153. In this case, \textit{Tesco} were prosecuted for advertising outside their shop, prices which were less than those for which the goods were being sold in the store, an act which was in contravention of section 11(2) of the Trade Descriptions Act 1968. \textit{Tesco}, in defence, argued that the act, which was a fault of the local manager, was the act of another person, and not that of the company. In other words, they argued that the \textit{mens rea} of the local manager could not be imputed to the company.} that the House of Lords attempted to give some guidance as to the category of persons who would be considered as the alter ego of the company and therefore whose \textit{mens rea} would be considered as that of the company. In that case, Viscount Dilhorne, approving the dictum of Lord Denning, in \textit{H.L. Bolton (Engineering) Co. Ltd v T.J. Graham & Sons}\footnote{[1957] I QB 159.} stated that the persons whose \textit{mens rea} could be attributed to the corporation were those "in actual control of the operations of a company or of a part of them and who is not responsible to another person in the company for the manner in which he discharges his duties in the sense of being under orders."\footnote{\textit{Tesco, supra}, at p.187.}

In the \textit{H.L. Bolton (Engineering) Co. Ltd} case, Lord Denning had likened a company to a human body. He said, "It has a brain and a nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with the directions of the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what it does. The state of mind of these managers is the state of mind of the company and it is treated by law as such."\footnote{\textit{Supra}, at p.172.} In the instant case, i.e., \textit{Tesco v Natrass}, although their Lordships approved the reasoning of Lord Denning in \textit{H.L. Bolton (Engineering) Co. Ltd}, that the...
managers of the company who were in charge of the daily running of the company, as opposed to the directors who only met once a year, were the controlling mind of the company, they however held that the manager of the local Tesco stores was not a controlling mind and his mens rea could not be imputed to the company. More recent cases such as Attorney General’s Reference (No.2 of 1999) and R. (on the application of Rowley) v DPP, have continued to give a restrictive interpretation to persons whose mens rea can be attributed to the company.

This highlights the problem with the identification doctrine. First, there are no clear criteria for determination of persons whose mens rea could be attributed to the company for purposes of criminal liability. Although the decision in Tesco v Natrass gives a restrictive interpretation by limiting these individuals to senior management officers nevertheless leaves room for confusion in its approval of the holding in H.L. Bolton (Engineering) Co. Ltd, that recognised managers of the company who were in charge of the daily running of the company as being persons whose mental state can be attributed to the company.

Secondly, even without such confusion, this restrictive interpretation of the doctrine greatly reduces the chances of successfully attributing liability to the company as it poses the rather difficult problem of finding a responsible officer high enough in the corporate hierarchy whose actus reus coincides with the requisite mens rea to be attributed to the company. This is particularly so, in the light of large modern corporations, and particularly multinational corporations, with complex company structures and intricate policy and decision making processes. In such companies, the mens rea of a lowly manager, who in reality is in charge of the day to day decisions for the running of the company, may not be considered a controlling mind of the company in light of the Tesco decision.

Vicarious liability has the advantage of having a very broad scope of application as well as much lower standard of attribution of liability to the company since

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57 [2003] EWHC 693.
58 In the earlier case of Magna Plant Ltd. v Mitchell (1966) Crim. LR 394, a depot engineer was also held not to be the alter ego for purposes of the identification doctrine.
59 It is capable of being applied to almost any offence. Consequently corporate manslaughter for instance has for a long time been in existence in the US. See for instance the case of US v Van Shaick 1904; US v Nearing 252 Fed. 223 (1918), where the court in a charge for conspiracy to print seditious publications contrary to the Espionage Act, Judge Learned Hand held that there was no distinction between vicarious civil and criminal liability of a company as in each instance, the mental condition of the agent was imputed to the corporation.
the \textit{mens rea} of almost any agent of the company\textsuperscript{60} can be attributed to it as far as it satisfies three basic criteria. These are that the agent committed an unlawful act; that it was committed in the scope of his employment, even if this was in excess of their authority\textsuperscript{61} or the company has specifically forbidden the wrongful activities;\textsuperscript{62} and finally, that it was intended for the benefit of the company whether or not this was the exclusive purpose or it actually benefited the company.\textsuperscript{63} While these factors make vicarious liability very attractive, especially from a law enforcement point of view, the doctrine has however been criticised on grounds that it waters down the aim of criminal liability as it does not take the fault or blameworthiness of the corporation into consideration and rather makes "innocent" shareholders pay for crimes. It is further argued that it ignores the fact that individual persons within corporations could commit crimes independent of the corporate will and makes corporations liable even under circumstances where the company, through management and/or corporate policy have taken steps to ensure that the conduct does not occur.\textsuperscript{64}

5. THE CORPORATE CRIMINAL LIABILITY DEBATE

Owing in part to the issues discussed above, the concept of corporate criminal liability still generates considerable debate in spite of its relatively long history and continued expansion with two very broad schools emerging. The first school argues that corporations are not proper subjects of criminal law on grounds of legal theory and practical considerations. On the other hand, realists, while conceding that there may be some thorny theoretical issues which need to be resolved, see no problem in principle, in making corporations subjects of the criminal law.

While in practice they are all interrelated, the main issues surrounding the debate can very broadly be categorized into three main groups. First, is the rationale of corporations as subjects of the criminal law and consequently whether corporate crimes can, against the backdrop of criminal law theory be considered "real" crimes. A second strand of the debate revolves round the effectiveness and/or

\textsuperscript{60} As opposed to just senior managerial officers under the identification doctrine.

\textsuperscript{61} Egan \textit{v} US 137 F 2d. 369 (1943) cert. den. 320 US 788 (1943).

\textsuperscript{62} Although in instances where it was done to defraud the company, the company would not be liable thus removing situations such as Moore \textit{v} Bressler supra.

\textsuperscript{63} These requirements are quite easily satisfied. See Khanna, \textit{op. cit.}, at p.1490; however, Wells, \textit{Corporations and criminal liability, op. cit.}, pp. 135-136 points out that the relationship between prosecution and sentencing policies soften the broad liability of this regime. See also Leigh, \textit{The criminal liability of corporations in English law, op. cit.}, pp. 115-116.

\textsuperscript{64} See Leigh, \textit{ibid}, pp. 118-119.
efficiency of criminal liability or criminal sanctions as a deterrent to corporations. The third strand of the debate is with regards to the effectiveness of enforcement of criminal liability against corporations. In this paper we focus on the first strand of the debate.

5.1 Can corporations be criminals?

Wells summarises this issue quite succinctly, when she asks, “corporations wield enormous economic power; they are producers, service providers, media manipulators, political campaigners, advertisers, employers, consumers, polluters, tax avoiders…. But are they criminals?” At the crux of this question is the basis of common law theory of criminal liability. In its development, liability under criminal law was based on moral guilt as a result of the strong influence of Roman law and Canon law in the 12th century. This is encapsulated in the Latin maxim, actus non facit reum nisi mens sit rea. For the actus to become a crime, it must be accompanied by a relevant mens rea. Corporations, being abstract legal persons, incapable of moral guilt are therefore, it is argued, incapable of committing a crime. If there must be criminal sanctions for corporate wrongs, then it is the natural persons within the company, possessing the requisite mens rea and who perform the physical act who should be criminally liable and not the corporation.

In contrast, realist or positivist theorists argue that such analysis of criminal law theory is unnecessarily restrictive as it does not take a holistic view of the historical development of criminal liability which show clearly that ideas of group fault or group liability is not unknown to the criminal law. Moreover, the concept of fault


66 For instance, according to C. Allen, “crime is crime because it consists in wrongdoing which directly and in serious degree threatens the security or well being of society, and because it is not safe to leave it redressable only by compensation of the injured party,” quoted in J.C. Smith and B. Hogan, Criminal law, London, Butterworths (2002), at p.16 ; See also Clarkson, op. cit., Chapter 1.

67 Meaning “an act does not make a man guilty of a crime unless his mind be also guilty” per Lord Hailsham in Haughton v Smith [1975] AC 476, 491-492. Consequently, according to his Lordship, “it is thus not the actus which is ‘reus’ but the man and his mind respectively.”

68 There are various mental states such as intention, recklessness, and negligence, with the varying degrees of fault or blameworthiness. See Smith and Hogan, op. cit., at p. 69.


or blameworthiness was a later development in criminal law history. Historically, until the end of the 12th century, criminal law was more concerned with the harm done than with blameworthiness. In fact, it was not until the 15th century that homicide was divided into two separate categories, with lesser punishment for the less blameworthy manslaughter. In any event, the retention of manslaughter as a crime supports the argument that in spite of the heavy leaning towards blameworthiness, much of common law criminal liability was still consequentialist, i.e., a focus on the harm done rather than just the blameworthy conduct. This, for instance, will explain why an attempt to commit murder is punished less than the murder itself. While the mens rea for attempted murder and murder are the same, the consequence makes a significant difference to the type of punishment, a position that would not have been if the punishable conduct was purely, as Lord Hailsham states, the “man and his mind respectively” and “not the actus.”

Even if the reverse were the case, to be restricted in legal thinking by the dogmas developed at a particular point in history is to ignore the dynamic nature of law or indeed its function as a means of social control. Society is dynamic and therefore law which regulates it ought also to be dynamic. Concepts such as wrongfulness, fault or blameworthiness are social constructs which are defined by time. A significant consideration therefore is the purpose of criminal law. As earlier mentioned, criminal law developed as a means of addressing conduct which were considered serious threats to the “security and well being of society”. Several factors including technological and industrial developments influence conducts that could be perceived as a threat. The challenge of criminal law theorists therefore is to interpret those concepts in the light of modern experience to achieve the purpose of criminal law.

The corporation is a creation of law and it is unimaginable that the law which by legal fiat created this abstract person, with powers similar to that of a natural person, is fettered regarding the determination of the forms of liability to which it can be subject. As the court said in Meridian Global Funds Management Asia Ltd. v Securities Commission, “there is no such thing as the corporation as such.”

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72 Haughton v Smith (1975) AC 476, 491-492.
73 Were that the case, criminal law or the criminal justice system may never have developed as private vengeance and later compensation were the historical forms of redress for what are now considered crimes. According to Braithwaite, in Crime, shame and reintegration, Cambridge, University Press, (1989) at p. 148, “A criminology which remains fixed at the level of individualism is the criminology of a bygone era.”
75 (1995) 2 A.C. 500
The corporation is a creation of law and therefore its rights, duties and liabilities are determined by law. Moreover, \textit{mens rea} under the criminal law is "legal" fault as opposed to "moral" fault or blameworthiness. The corporation can therefore be blameworthy under the circumstances which its creator the law provides that it is. Personal liability alone would not address the problem of developing proper internal policy mechanisms to prevent crimes as corporations have been known to employ executives solely for the purpose of accepting criminal liability in the event of a prosecution. Admittedly, it has so far been a challenge developing an efficient means of attributing fault to the company, and this it is suggested ought to be the challenge of criminal law theorists.

A second argument which follows from the above is with respect to the nature of liabilities created. From its early development, corporate offences were either strict or absolute liability offences. Consequently, corporate offences were perceived as "unjust" and inferior to common law offences which required \textit{mens rea}.\textsuperscript{76} Moreover, owing to the somewhat invisible nature of the impact of corporate crimes, they were perceived as somehow less serious, and without the corresponding fear or harm that accompanies common law crimes and therefore less deserving of punishment. A distinction is therefore constantly made between common law crimes which are referred to as "real crimes" or "conventional/street crimes," as opposed to corporate crimes which are referred to as "quasi crimes" or "welfare/regulatory offences." This is reinforced by the veneer of respectability of corporations and corporate officials\textsuperscript{77} and the way corporate crimes are reported in the media. Such reports portray corporate crimes as accidents or disasters, and therefore dissociate the incident from any fault or wrong doing.\textsuperscript{78}

While it may be true that much of corporate offences are strict liability or absolute liability offences, this is usually only with respect to minor offences such as failure to comply with the provisions of a regulation. The issue then is whether or not the appropriate sanction for such breaches should be the criminal law.\textsuperscript{79} However, it must be borne in mind that strict liability offences are not limited to corporate bodies. On grounds of public safety and welfare, modern substantive criminal

\textsuperscript{76} Once again following from the argument that there should be no liability without fault.

\textsuperscript{77} Corporate officers do not fit the mould of the scruffy, rough criminal type that has been created in people's psyche. In the same vein, corporations are set up to perform legal and beneficial acts, are employers, philanthropists and therefore difficult to be perceived as criminals.


\textsuperscript{79} There is a case for treating these kinds of breaches either administratively or under the civil law. See M. Wood and R.M Macrory, \textit{Environmental civil penalties: A more proportionate response to regulatory breach.} A study undertaken by the Centre for Law and the Environment, Faculty of Law, University College London. (June-November 2003) http://www.ucl.ac.uk/laws/environment/civil-penalty/docs/ECPreport.pdf
law contains several strict liability offences, such as drink driving, applicable to natural persons and which society generally accepts as properly within the scope of criminal law. With respect to corporate crime, most of the “serious” offences require some form of mens rea. For instance, as Schiffer and Rumsey argue, federal environmental crimes against corporations in the United States are in the main, mens rea offences. Nevertheless, this impression contributes to the low number of prosecutions by regulators as a result of the perception of their role as enforcers. As mentioned earlier, society’s perception of the seriousness of crime in the modern day is to a large extent determined by what is portrayed in the media. Corporate crime, even when it is reported, is stereotypically couched in very non-threatening language that make such incidents somehow lacking in blame. Furthermore, underreporting hides how much of it actually goes on, and therefore further reduces the perception of the threat. Until Sutherland’s seminal work, there was little known about the crimes of corporations. However, this is changing as there is relatively much more media attention and research into this aspect of criminal law, which in turn is creating a new awareness about corporate conduct and crime.

80 Although it is conceded that there is no clear basis for determining what amounts to seriousness, reference is being made here to offences for which there is a significant physical harm and also significant sanctions.

81 Although as Odujirin, op. cit., pp. 9-76, points out, most analytical theorists are conservative as to what amounts to fault based mens rea, limiting it to intention and recklessness only and not negligence. He however rejects this argument by analysing the basis of the development of fault based liability.

82 In their words, “their characterization of federal environmental crimes as ‘strict liability’ offenses is incorrect. Only the Refuse Act, 33 U.S.C. § 407, contains a strict liability environmental crime, a misdemeanor. One section of the Clean Water Act, 33 U.S.C. § 1319(c)(1), and one section of the Clean Air Act, 42 U.S.C. § 7413(c)(4), provide for criminal penalties (again, in each case a misdemeanor) for certain negligent violations of those statutes. One section of the Safe Drinking Water Act, 42 U.S.C. § 300h-2(b)(2), criminalizes certain ‘willful’ violations of that Act. With these exceptions, all federal environmental statutes containing criminal enforcement provisions require knowing conduct. Under this general intent standard, the government must prove that defendants had knowledge of the nature of their acts and acted intentionally, not as a result of mistake or accident or other innocent reason. This is consistent with the general rule that ignorance of the law is no defense to a criminal prosecution. Such a liability standard clearly recognizes how easy it is for any defendant to claim that he had not read the law or that he did not understand it. Ignorance of the law defenses are especially dangerous in areas touching the public safety, health, and welfare. In such circumstances, persons should be motivated to seek out what the law requires, not rewarded for abdicating such responsibility.” See L.J. Schiffer and A.B. Rumsey, “Criminal enforcement in a cooperative environment,” SB43 ALI-ABA, (1997), p. 301.

83 See Slapper and Tombs, op. cit., pp. 36-84.


85 Perceptions of the seriousness of corporate crime and the fact that the corporation not the individual should be liable have been on the increase since the 1980s. The change in perception over time can be gleaned from the reaction of victims and even law enforcement agents to certain disasters in the UK. For instance the official report on the Aberfan Tip disaster in 1966 raised little or no issues about collective responsibility. The trend however seemed to slowly change from the King’s Cross Fire, the Sinking of the Marchioness, The Piper Alpha Oil rig Explosion, the Clapham Rail disaster, and finally the Herald of Free Enterprise in 1987. The Transco gas explosion at a dwelling house in December 1999 was the subject of prosecution
5.2 Alternative basis for corporate criminal liability

While realists accept in principle the concept of corporate criminal liability, nevertheless as shown in the highlights of the debate above, most concede that there is need to have a clear theoretical basis for corporate criminal liability which will address some of the shortcomings identified above. Specifically one area that has received much attention is the basis of attribution of liability to corporations. Alternative principles or theoretical basis for corporate criminal liability have therefore been put forward. This has involved both the revisiting of existing principles such as the identification doctrine, as well as development of new models of identifying corporate mens rea.

5.2.1. Flexible interpretation of alter ego/controlling mind

One of the criticisms of the identification doctrine is that it is too restrictive, particularly in the light of the intricate decision making process of modern corporations. One attempt at redressing this is to give a flexible interpretation of persons who can be considered as the controlling mind of the company for the purpose of attribution of mens rea to the company.

An example of where this method has been employed is the Privy Council decision in Meridian Global Funds Management Asia Ltd. v Securities Commission,\(^86\) where their Lordships adopted a much more flexible and wide interpretation of the identification doctrine. In that case, the Privy Council held that the mens rea of the chief investment officer of the appellant company would be attributed to the company, even though the managing director and the board of directors were unaware of the actions of the officer. To hold otherwise, it argued, would result in a situation where the managing directors and the board of directors would not pay attention to what their senior officers did in order to avoid liability while at the same time benefit from the actions of such officers.

Also in Canadian Dredge & Dock Co. v The Queen,\(^87\) the Canadian Supreme court articulated the delegation concept, whereby the courts would attribute the mens

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although the accused persons were not found guilty. See Transco Plc v HM Advocate (2004) S.L.T. 41. Similarly, the Great Western Trains crash in 1997 was also subject of prosecution. See Attorney General's Reference (No.2 of 1999) [2000] 2 Cr.App.R. 207. In the same vein, the activities of the oil companies in the Niger Delta received little public attention until the early 1990s. India’s environmental activism also picked up momentum after the Bhopal gas leak disaster of 1984.

\(^{86}\) [1995] 2 A.C. 500

\(^{87}\) [1985] 1 S.C.R. 662
rea of "anyone [to whom] the board of directors ... delegate executive authority of the corporation" to the company for purposes of criminal liability.

Although this broader interpretation is much better as it would make it easier to attribute liability to the company than the Tesco principle, it still does not clearly resolve the problem of identifying who a responsible officer is, or indeed of having to find one before the corporate body can be held criminally liable. This therefore does not address situations where the act might have occurred because there was no official responsible for ensuring that the incident did not happen. Further, while these interpretations may address situations such as that in the Tesco case, in most modern corporations, decision making processes are very intricate and impenetrable, sometimes spanning across different nations.

There are instances in such organisations where very low level officers not carrying out any executive functions whatsoever may be responsible for the actus reus. In such a case, it would be very difficult indeed to identify the responsible officer, whose actus reus would coincide with a requisite mens rea to make the company liable.

This particular problem came to the fore in the Zeebrugge disaster ultimately leading to a situation where no one was convicted. In that case, a ferry capsized off Zeebrugge, resulting in nearly 200 deaths. From the investigation following the disaster, it was discovered that the immediate cause of the accident was the fact that she sailed with her bow doors open. However, the inquiry found that there were a host of institutional and managerial lapses higher up the company which led to the disaster. In spite of this, there was no particular individual high up in the hierarchy of the company who had committed the actus reus together with the requisite mens rea which could be attributed to the corporation. Consequently, at the trial, only the two most junior officers who had actually committed the actus reus could be tried for manslaughter. This led to the prosecution withdrawing the case against both of them as it seemed unfair that they should be the only ones to bear the liability of manslaughter for the policy and operational lapses of the entire company.

88 Per Estey, J, Ibid, at para 50.
90 See R. v H.M. Coroner for East Kent, ex parte Spooner and others (1989) 88 Cr.App.R.10 (QBD)
91 DPP v P&O European Ferries (Dover) Ltd. [1991] 93 Cr.App.R. 73.
5.2.2 Aggregation doctrine

The aggregation doctrine, rather than just identifying a particular officer whose mens rea could be attributed to the company, seeks to aggregate all the acts and mens rea of various persons in the corporation. This doctrine seeks to overcome the obstacle, particularly in large corporations, of finding one relevant individual whose mens rea could be imputed to the company. In the US, the collective or aggregate mens rea of the corporation has been used in some instances to convict a corporation. However, it has not been accepted in the UK. In the Zeebrugge case, the prosecution sought to apply this doctrine in order to indict the company, P&O European Ferries Ltd but was rejected by the court.

Another notable example is the unsuccessful prosecution of a company for a train crash which killed seven people and injured one hundred and fifty. The immediate cause of the crash was the failure of the driver to notice two signals warning of danger ahead. However, the underlying cause was the company allowing the train to be in service in spite of its safety systems being switched off and without a second driver in the cab. The court failed to adopt a more flexible interpretation of the identification doctrine or indeed the aggregation doctrine and hence the company was held not criminally liable.

However, while it would be easier using this doctrine to indict companies, yet as Clarkson and Keating argue, it merely perpetuates the myth of personification of the company and fails to take cognisance of the fact that in several cases, it is the lack of appropriate corporate policy or structures in place that leads to the crime.

5.2.3 Enterprise theories

In the light of the above problems with attempting to attribute mens rea to companies through its human officials, a much more radical approach is the attempt to locate corporate mens rea within the corporation itself without recourse to its human officials. The problem with the identification and other such doctrines is the attempt to apply mens rea doctrine suitable to a natural person to an abstraction. Rather, what should be done, it is argued, is to find how this legal abstraction could demonstrate mens rea. Consequently, it is suggested that a corporation can

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be likened to an “intelligent machine,” which exhibits its own mens rea through its corporate policy. If this is done, a case like the Zeebrugge disaster would become the liability of the company for not having the relevant policy and structure in place to avoid the incident.

This model of attributing liability was adopted under Part 2.5 of the Australian Criminal Code Act of 1995, which came into force in 1997 and became applicable to all commonwealth offences in 2001. This followed the findings of a special report that the Tesco principle was too narrow and recommended the recognition of independent corporate fault. The most relevant provision is section 12.3(2) (c) and (d), where a corporation will be liable if it is proved that “a corporate culture” existed, which either actively encouraged non-compliance or failed to promote compliance.

Another suggestion has been to create offences specifically for the corporation by taking into consideration the peculiarities of the corporate entity. One such area where it is suggested this can be done is corporate manslaughter. The definition of manslaughter which includes the killing of “another” makes it problematic to apply to a corporation. There is currently a proposal for corporate manslaughter in the UK. The problem with such an approach however is whether or not such specie of crimes will not merely be considered as “regulatory” offences and hence remove the blameworthiness of the conduct as discussed earlier.

Fisse and Braithwaite, suggest an alternative means of allocation of criminal responsibility known as the reactive corporate fault doctrine. Essentially, they suggest that a way of solving the impenetrable nature of the corporate decision making process is to make the corporation itself “activate and monitor [their own] private justice systems of corporate defendants.” What this means is that once the

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liability of the corporation has been determined, the corporation itself should set up an internal mechanism to identify the officer at fault and to "punish" that officer accordingly. This would remove the difficulty and costs involved in identifying a responsible officer by the prosecution.  

First the problem with this is that it shields the corporation itself from liability, and provides for special rules for a corporation thereby perpetuating the "myth" that corporations cannot be criminals or that corporate crime is somehow not serious crime. It does not address the problem of organisational failure that causes corporate crime. It also brings up the question of the "breakfast executive" that is employed solely to be the "fall guy" for corporate wrongdoing. Furthermore, the exact nature of measures that the company will take against the responsible officer that will be considered suitable is unclear. Also, if the court is not satisfied with the action of the company, what would then be the liability of the company? What crime would it have committed, and how do you attribute liability?

5.2.4 A combined approach?

There are obvious merits in each of the approaches discussed above. However, it is doubtful if any of the options can fully address the entire range of scenarios of corporate offending. For instance, while locating corporate mens rea within the corporate culture or policy is very innovative, one wonders what happens where corporations have on paper very good policies and structures without these being actually implemented on the ground. What Australia has done is to actually have a combined approach which adopts the identification doctrine, the flexible interpretation of that doctrine, as well as the aggregation and enterprise doctrines by virtue of the provisions of section 12.3 and 12.4 of the 1995 Criminal Code Act. For offences of intention, knowledge or recklessness, section 12.3 provides that the "fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence." With respect to offences of negligence, section 12.4 provides that negligence may be attributed

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100 D. R. Fischel and A. O. Sykes, "Corporate crime" 25 J. Legal Stud., (1996), at p. 322 where the authors argue against corporate criminal liability says, "Finally, liability at the firm level might be said to have the additional benefit of allowing the state to economize on enforcement costs. Rather than having to invest resources to penetrate the corporate hierarchy and decision-making structure to determine the culpability of particular individuals, the state can simply penalize the firm."


102 This can be evidenced in three ways, the Tesco v Natrass identification doctrine, the more flexible interpretation of officer as in the Canadian Dredge & Dock Co. v The Queen supra, and as earlier stated, the enterprise model, based on the idea of "corporate culture". See further Wells, "The millennium bug and corporate criminal liability" op. cit., and Hill, op. cit., at p. 1.
to a company if its conduct "is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents, or officers)."

6. CONCLUSION

Although the history of corporate criminal liability, compared to the existence of the criminal law is quite young, it has grown quite dramatically, both under national and international law, and especially in common law jurisdictions. This is due in part to changing perceptions about corporate actions in the light of the harm that they can cause. However, the theoretical basis of corporate criminal liability has been far from clear. This became all the more glaring as the scope of corporate criminal liability was expanded to crimes of intent and to the reality of the modern day corporate organisation.

The method of attributing mens rea to the company has been fraught with difficulties and has been relied on to discredit the application of criminal law to corporate entities. Based on criminal law concepts developed in the 12th century, especially that of blameworthiness or fault as the basis of criminal liability, it continues to be argued today that corporations being an abstraction are incapable of having a guilty mind and therefore cannot be liable for crimes.

However, while there is merit in some of the criticisms of corporate criminal liability, the main problem with the theoretical basis of corporate criminal liability really has been in trying to apply rules developed for natural persons to the corporation. Law as a method of social control is dynamic and must change or adapt to meet the needs of changing times. In the same vein the criminal law is dynamic. Consequently, it is not justifiable to judge the "legality" of corporate criminal liability by rules established prior to the existence of corporations as we know them today. Moreover, the corporation being a legal creation can be subjected to any set of rules or liabilities by its creator, the law.

In any event, corporate criminal liability as a concept is very much a part of today's criminal justice system and therefore a functional approach should be taken towards this thorny theoretical issue which would ensure more effective application of criminal liability to corporations. As discussed above, there is already some effort in this regard. While these are not perfect models, they are pragmatic in their approach and a lay the basis for further academic research.