European Developments in Corporate Criminal Liability

Introduction
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On September 18th-19th 2009, a conference was held in London entitled "European Developments in Corporate Criminal Liability." Organised by the editors and supported by grants from the Arts and Humanities Research Council (AHRC) and the British Academy (BA), the conference was hosted by and held at the offices of Clifford Chance, LLP. At the outset the editors would like to express their appreciation of the generous support provided by the AHRC, the BA, Clifford Chance, and the University of Essex. Videos of conference presentations can be found on our Corporate and White Collar Crime website: www.essex.ac.uk/CWCN/.

Our speakers included distinguished scholars and practitioners from the UK, Europe, Canada, and Australia. The geographic diversity reflected a widespread recognition that corporate crime has become a global challenge. Both large industrialised nations where corporations have their headquarters and small developing countries where they locate their subsidiaries are affected by corporate crime, even if the crimes may be of a different nature.

The speakers also varied in their range of academic backgrounds. These included law, sociology, criminology, philosophy, economics, and the environment. This diversity of speaker background was not accidental. Corporate crime is a multi-dimensional problem. The very concept of a company needs to be understood in legal, philosophical and economic terms, and in light of the pragmatic policies which gave rise to the concept of a limited company.

The roots of corporate criminality are economic, sociological and criminological; human psychology also plays a major role in shaping the sources and forms of corporate crime. Addressing this multi-faceted challenge requires resort to laws underpinned by an appreciation of the ethical, economic and social policies at stake. An understanding of specific substantive areas is essential to craft individual laws that can address each of the variety of harms that corporate misconduct may cause.

In the absence of a polymath versed in the multitude of academic disciplines necessary to understand corporate crime, it makes sense to pool our collective knowledge. It is why the conference and this book have taken a multi-disciplinary approach to the topic. The book consists of the thematic papers presented at the conference and country reports setting out the law of corporate criminal accountability throughout Europe. It is the latter dimension of our project that led us to include 'European' in the title of the conference, but in truth the thematic papers are of more general applicability. The book is divided into four parts. Parts I-III contain the thematic papers from the conference, and Part IV consists of country reports which were mainly prepared in the year leading up to the conference.

The chapters in Part I address theoretical issues, largely divorced from particular crimes and the specific laws of any country. The themes are social, political and philosophical, and the authors bring to their task a diverse range of backgrounds – Celia Wells and Rick Sarre are professors of law; Steve Tombs, Laureen Snider, and Steven Bittle are sociologists/criminologists; and Dr. Ana-Maria Pascal holds both a Ph.D. in Philosophy and an MBA in International Finance. Professor Wells' keynote speech touches on a wide range of issues and sets the stage for some of the more in-depth analysis contained in subsequent chapters.

Part II addresses the question of whether the blame for corporate misconduct rests primarily with companies or with their directors/officers/senior managers. Maurice Punch presents the case for focusing on organisational liability; while Neil Foster argues why the focus should be on individuals' duties. Both would agree that individual and organisational liability should not be mutually exclusive; their papers reflect more a difference of emphasis than a disagreement as to where fault lies. James Gobert, too, begins from the premise that organisational and individual liability are not incompatible. His chapter offers a legal analysis of the relationship between individual and organisational fault and, more specifically, how individuals can be held liable as accessories to the offences of their companies, and companies as accessories to the offences of their directors and officers.

Part III provides an empirical analysis of some discrete dimensions of corporate liability in different areas. Nigel South examines environmental offences; Michael Levi, white collar and organisational fraud; and Anne Alvesalo-Kuusi, health and safety violations. This selection of topics barely scratches the surface of the breadth of different offences that companies can commit. As it would have been impractical to cover all corporate crimes in this book, we have chosen to present a representative sampling of subject matter areas that feature the problems commonly encountered when states attempt to hold companies to legal account.

Part IV of the book examines the laws of corporate criminal liability throughout Europe. In the year preceding the conference, the editors, supported by a grant from the British Academy, commissioned reports on the law of corporate criminal liability throughout Europe. The reports were written by a mix of academics, practitioners and students. We tried to recruit authors from the country about whose laws we were concerned, but this was not always possible and some of the reports were written by postgraduate students from City University, London, researching the law of a foreign country as best they could without direct access to primary sources. The reports provided the foundation for what turned out to be a wide-ranging and lively roundtable discussion at the conference, with significant input from members of the audience setting out the specific problems relating to corporate crime encountered in their home states.

Although our original aim was to write a report on the law of each European state, we quickly discovered that in some states corporations were not deemed to be appropriate subjects of criminal law, while in others existing laws seemed to be limited to a narrow range of offences (i.e. bribery) and too little information was available beyond that. In-depth reports could only be written about countries where companies are potentially liable for a wide range of offences.

Several caveats about the country reports should be made. The law of corporate criminal liability frequently is in a state of flux: long-standing laws prove inadequate and are replaced by new statutes; legislation is enacted in states which previously had no laws on point; and amendments to existing laws are passed as states come to recognise the loopholes and gaps in their legislation. International treaties and EU directives force states to consider new laws in areas which were not previously the subject of legal regulation, and dramatic harm-causing events traceable to corporate fault can give rise to new legislation. In the latter category, for instance, the impetus for the enactment of the Corporate Manslaughter and Corporate Homicide Act 2007 can be traced back to the capsize of the Herald of Free Enterprise some 20 years earlier.

Because the scope of corporate criminal liability often resembles an accordion, expanding or contracting, one cannot do much more than present a snapshot of the law at a particular point in time. Ours is a snapshot of the laws circa mid-2009. Even then, in some instances the research of our contributors was constrained by a lack of access to original sources, ambiguous translations, and an inadequate appreciation of how laws in various states had been classified (as an example, in the UK laws imposing criminal penalties on corporations can be found in many regulatory statutes and Company Law provisions).

The editors have reluctantly accepted that a completely up-to-date, comprehensive compilation of European statutes on corporate criminal liability would be a virtually impossible task. Our more modest aim in Part IV is to give the reader a sense of the diversity of laws that have been enacted with the hope that these can serve as a catalyst for legislators and policy-makers who seek to reform their own state's laws. As indicated previously, all countries are faced with the damages wrought by corporate misconduct and it is invaluable to see and learn from solutions that have been tried in other jurisdictions, whether they have succeeded or failed, with an eye to adapting the laws of these other states to one's own country's legal system and culture.

We hope that our collective research has produced a rich tapestry from which corporate directors and officers; lawyers and criminal prosecutors; workers and trade unionists; NGOs and public interest groups; legislators and policy-makers in the fields of business, government, and regulation; academics and students; and members of the public can all benefit.

Background

Events in recent years have heightened awareness of the harm that companies which carry on their business in a reckless or grossly negligent manner can cause. The result of substandard risk management may be economic loss on a massive scale, as evidenced by the collapse of such previously well-regarded companies as Enron, Lehman Brothers, Bear Stearns and Barings Bank. Highly risky decisions by financial institutions have plunged the world into a fiscal crisis not seen since the Great Depression.

Sometimes, however, the costs are measured not in financial loss, but in loss of life and serious injuries. One need only look at the casualties that occurred as a result of Bhopal, Chernobyl, the crash of the Concorde, the capsize of the Herald of Free Enterprise and innumerable rail 'accidents' in Britain to see that companies can cause far more harm than a serial killer or lone gunman on a rampage.

Multi-national companies (MNCs), once seemingly impervious to legal constraint, such as the Ford Motor Co., Continental Airlines, and Goldman Sachs, now find themselves in the criminal spotlight. Once culpability is recognised, however, prosecuting authorities have discovered that traditional criminal laws are often inadequate to lead to a successful prosecution. Legal concepts such as *actus reus*, *mens rea*, and causation were developed with natural persons in mind and do not easily lend themselves to fictitious (in law) entities such as corporations. Even today, there remain state legislatures and courts which do not accept that an inanimate entity such as a company can commit a criminal offence because it lacks a "guilty mind" in the conventional legal sense of the term. What is indisputable, however, is that companies are capable both of causing immense social harm and preventing such harm. The challenge is to create laws that address the former and encourage the latter.

Failed prosecutions, and the practical problems involved in mounting a prosecution, have prompted many states to re-think their criminal laws as they relate to companies. The diversity of approaches taken by European countries bears witness to the complexity of the problem. Finding a suitable doctrinal basis for holding companies to account has proved elusive.

Many states impose vicarious liability, imputing to companies offences committed either by *any* of their employees (e.g., the US) or by *only* their directors, officers and senior managers (e.g., the UK). Vicarious liability, however, lacks a principled basis. A company can be convicted despite having taken not only reasonable but exemplary steps to prevent the offence in question.

Some states, such as Germany and Sweden, have eschewed criminal liability in favour of an administrative approach to liability. However, even here one can discern differences in the form that administrative liability takes. Other states, such as France and Italy, have developed hybrid models, or a *tertium genus*, that draws on both administrative and criminal law principles.

'Designer' statutes, addressed specifically to the unique situation of companies, have also been enacted. Frequently the relevant offence will impose strict liability, thereby sidestepping the need to prove *mens rea*. However, strict liability offences too pose the danger of liability without fault, and may have little deterrent effect if the fine for violating the law can effectively be passed on to the company's customers. Regulatory offences, another alternative, may lack the stigma associated with a conviction for a crime.

Legal reform often raises as many questions as it answers. Indeed, the law may be a 'red herring', the real obstacle being the lack of political will to bring criminal charges against powerful companies. In the country reports included in this volume we have, where statistics are available, sought to show the extent to which laws addressed to corporate criminal liability are enforced, and the level of penalties imposed in cases when a conviction is obtained. The record on these matters does not instil confidence in the ability of criminal justice systems to tackle corporate crime.

If there is to be criminal liability, the ancillary question arises as to whether the focus should be on the liability of the organisation, or the liability of individuals. The Corporate Manslaughter and Corporate Homicide Act 2007 (UK) specifically absolves individuals from criminal liability for complicity in their company's offence. Conversely, many European states focus exclusively on prosecutions of individual directors and managers while rejecting prosecution of their companies.

These are but some of the many questions which will be explored in this book.

Book Outline

PART I: Thematic Issues

1. Celia Wells, *Containing Corporate Crime: Civil or Criminal Controls?*

This chapter (the keynote address at the conference) examines the often skewed thinking that corporate crime can engender. One of the reasons that corporate criminality is so challenging a field is that the law must deal with businesses of different sizes, variety and reach.

Economic logic and political imperatives affect both *the nature o*f corporate wrongdoing and *the legal responses* to it. The chapter begins with a short account of the kinds of wrongdoing with which the debate about corporate liability has been infused and then looks at the range of legal mechanisms commonly used to address such wrongdoing. In the course of her analysis Professor Wells offers insights into the nature of the corporation as a legal person. This foundation paves the way for the last part of the chapter where different models of corporate criminal liability are critically examined.

2. Ana-Maria Pascal, *A Legal Person's Conscience: Philosophical Underpinnings of Corporate Criminal Liability*

Criminal liability, unlike administrative liability, carries a deep moral weight, thereby suggesting the presence of moral agency. This chapter examines the qualities that allow an abstract entity (such as a 'legal person') to qualify as a moral agent and identifies three potentially *sine qua non* conditions: a sense of the self, a free will, and a moral conscience. Dr. Pascal provides an in-depth analysis of the extent to which legal persons (companies) have these characteristics, asking whether this might depend on the size and structure of the company, and if the 'moral conscience' of a parent company can be transferred to its subsidiaries and franchises. The ultimate question of whether a company should be criminally liable if it fails to display any or all of the three *sine qua non* characteristics of moral agency leads to an alternative hypothesis – that perhaps the criminal justice system should revise its understanding of what 'criminal' means.

3. Laureen Snider and Steven Bittle, *The Challenges of Regulating Powerful Economic Actors*

In the aftermath of yet another fiscal crisis, this chapter explores the difference in public and legal attitudes to corporate crime and traditional offences such as theft, assault and homicide. The authors examine a triangle of mutually constitutive forms of dealing with offending organisations – through regulation, criminal law and concepts of corporate social responsibility (CSR). The struggle between these three approaches produces a precarious, ever-changing dialectic. The authors conclude that increased corporate accountability requires a re-evaluation of our attitudes to corporate fault – and the value it places on financial and economic power and argue that, without a radical change in the way society views Wall Street, the status quo favouring the corporate capitalist ethic is likely to persist.

4. Steve Tombs, *State Complicity in the Production of Corporate Crime*

There are a series of ways, some well recognised, others less so, in which states are complicit in the systematic, routine production of corporate crimes. First, states are complicit in corporate crime production through their failures to put into place more effective legal regimes, to enforce adequately existing laws, or to respond effectively to violations of such laws, with respect to corporate activity. More actively, states are complicit in their relationships with the corporate sector – as partners in economic activity, as outsourcers and sub-contractors, as purchasers of corporate goods and services – and thus in the production of illegal activities. Finally, and perhaps least recognised, is that once one departs from a view of state-corporate relations as characterised by externality, then it becomes clear that 'the' state – at its various levels – is implicated in the production of corporate crime through the complex inter-dependence of these apparently separate sets of entities. This chapter considers each of these forms of state complicity in turn, with an empirical reference point of safety crimes in the UK. On the basis of this exploration of the role of states in the production of corporate crime, Professor Tombs seeks to develop a more realistic view both of the extent to which illegal and harmful corporate activities can be more effectively controlled, and of the limits upon such control efforts.

5. Rick Sarre, *Penalising Corporate 'Culture': The Key to Safer Corporate Activity?*

In 2004, the Australian Capital Territory became the first – and to date only – jurisdiction in Australia to adopt the recommendations of a national legislative criminal code officers group by enacting an offence of industrial manslaughter by recklessness or gross negligence. Significantly, one way that the fault element of the offence can be established is through proof that a 'corporate culture' existed within a corporation that "directed, encouraged, tolerated or led to noncompliance with the contravened law." Culpability can also be demonstrated if a corporation "failed to create and maintain a corporate culture requiring compliance with the contravened law." This concept of a criminogenic corporate culture has drawn increasing attention in both the academic literature and legislative committee rooms. Corporate directors and executives have also become self-reflective as to their own company's culture or ethos. In this chapter Professor Sarre explores the usefulness of the concept of corporate culture as a means by which corporations can be called to account for deaths in the workplace.

PART II: <u>Organisational v. Individual Liability</u>

6. Maurice Punch, *The Organisational Component in Corporate Crime*

Professor Punch offers a sociological account of deviance in organisations, seen as organisational or institutional crime. Two main issues are discussed: the challenging aspect of empirical analysis of corporate criminality, and the fact that the law typically focuses on individual rather than organisational liability. Several case studies are presented which illustrate the theme of organisational fault. Too many prosecutions of companies, however, seem to end with a failure to secure a conviction. Professor Punch examines the reasons for these apparent breakdowns in the criminal justice system failures and concludes that the problem may lie in the criminal law's inability to recognise collective guilt and its difficulty in applying conventional legal concepts to an organisation institution. His message is that organisations need to be put firmly in the frame of criminal liability.

7. Neil Foster, *Individual Liability of Company Officers*

Companies are run by their directors, officers and managers. It has been recognised for some time that a key strategy in changing corporate behaviour is by holding out the possibility of personal liability for individuals who have the authority to influence corporate policy. This chapter argues for laws imposing such personal liability, and compares the operation of laws imposing such liability in the field of occupational health and safety in the UK and in the Australian State of New South Wales. The comparison and review of the fairly extensive case law which has developed under the NSW provisions illuminates the optimal mix of corporate and individual responsibility in criminal legislation.

8. James Gobert, *Squaring the Circle: The Relationship between Individual and Organisational Liability*

Building on the previous two papers, Professor Gobert agrees with their authors that organisational and individual criminal liability are not and should not be mutually exclusive. He then takes this analysis to the next level, addressing the legal relationship between organisational and individual fault. Through an analysis of principles of criminal complicity, he concludes that individuals can be accessories to the offences of their companies, and that companies can be accessories to the offences of individuals. However, the law of complicity as currently structured throws up several analytical and precedential obstacles to a successful prosecution which he proceeds to analyse.

PART III: Particular Offences

9. Nigel South, *Environmental Offending, Regulation and 'The Legislative Balancing Act'*

One consistent theme in political and economic considerations of concern about the environment is the search for a reasonable balance between environmental protection and the practical costs of providing such protection. This is particularly evident in legal and regulatory approaches to environmental crimes. Mindful of the difficulties in addressing the relevant issues through regulatory laws, Professor South provides examples of particularly troubling environmental or 'green' crimes and then proceeds to examine issues and problems relating to regulation, prosecution and punishment. The chapter concludes with concerns regarding climate change, and the emphasis it places upon the prospects and problems of a more resource-hungry world.

10. Anne Kaarina Alvesalo-Kuusi, *Investigating Safety Crimes in Finland*

In this chapter Dr. Alvesalo-Kuusi examines how police deal with safety crimes and their effectiveness in combating such offences. Safety crimes fall between the stools of 'violent' crimes on the one hand and 'economic crimes' on the other. Furthermore, a zone of discretion permits police to interpret those crimes in a way that may marginalise their seriousness. The empirical evidence upon which this chapter builds is derived from an analysis of data gathered as part of a survey of police safety crimes in Finland which focused on the perceptions of the police regarding occupational safety incidents and their investigation. The data reveal a marked reluctance to treat such incidents as criminal events. Rather, they are seen as 'accidents', on the one hand, or 'unworthy in terms of legitimate police work on the other. The result is that 'safety criminals' are not recognised as appropriate targets of police intervention. The author also discerns from her empirical research a tendency of the police to engage in "victim blaming".

11. Michael Levi, *Political Autonomy, Accountability and Efficiency in the Prosecution of Serious White-Collar Crimes*

This chapter examines the tensions involved in the prosecution and non-prosecution of serious economic crimes, focusing principally upon the UK but referring briefly to other jurisdictions in Europe and the US. It describes the history of serious fraud prosecutions in England and Wales since the 1970s and the attempts to make them more efficient, and examines the organisational and political tensions surrounding this process. Using some case illustrations, Levi reviews the political dimensions surrounding prosecutions and non prosecutions and asks how and whether we can develop a system that is – and is seen to be – politically impartial, vigorous and fair to defendants.

PART IV: Country reports

IV.1. Countries with criminal liability

Austria: Professor Ingrid Mitgutsch, Johannes Kepler University, Linz
Belgium: Melanie Ramkissoon, City University, London
Denmark: Dr. Ana-Maria Pascal, University of Essex
Estonia: Dr. Ana-Maria Pascal, University of Essex
Finland: Professor James Gobert, University of Essex
France: Professor Pascal Beauvais, University of Poitiers

Italy: Professor Cristina de Maglie, University of Pavia
Ireland: Edward Fitzgerald, City University, London
Lithuania: Dr. Deividas Soloveicikas, Vilnius University
Luxembourg: Dr. Ana-Maria Pascal, University of Essex, and Janis Dillon, City University, London
Netherlands: Melanie Ramkissoon, City University, London
Poland: Dr. Ana-Maria Pascal, University of Essex
Portugal: Dr. Ana-Maria Pascal, University of Essex, and Melanie Ramkissoon, City University, London
Romania: Dr. Ana-Maria Pascal, University of Essex
Slovenia: Janis Dillon, City University, London
Spain: Melanie Ramkissoon, City University, London
UK: Professor James Gobert, University of Essex

IV.2. Countries with administrative liability
Germany: Professor Klaus Rogall, Freie University, Berlin
Sweden: Dr. Ana-Maria Pascal, University of Essex
Czech Republic: Melanie Ramkissoon, City University, London