The Boundaries of Corporate Responsibility: Editorial Introduction

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Abstract

This short editorial introduces the collection of papers presented and discussed at the UCL Centre for Ethics and Law-European Corporate Governance Institute Symposium on the Boundaries of Corporate Responsibility, 10 November 2023, UCL, London. The Symposium brought together a collection of perspectives from corporate law, business and human rights enforcement as well as broader thoughts on soft law and the future of 'Environmental, Social and Governance' expectations for companies.

Keywords

Corporate due diligence, vicarious liability, duty of care, enterprise liability, extraterritorial liability, corporate ownership, business and human rights, ESG, corporate transparency, stewardship, sustainability, EU Corporate Sustainability Due Diligence Directive

Introduction

The Symposium's theme relates to the debates regarding corporations' roles in detecting and preventing, as well as redressing mischief/harm caused by third parties to which they are related, for example, in the supply chain, or within a corporate group, business network or alliance. These mischiefs or harms relate to labour/human rights abuses in supply chains, harms to community/environment in relation to climate change, conflict minerals, misinformation leading to harms, such as online harms, etc. These risks, which the Symposium terms as 'boundary risks', often take place beyond the firm's structural or control boundaries, but for which the firm may be regarded as having some extent of responsibility. Such responsibility can be *ex post* in nature, in terms of corporations being liable for compensation, but can also be preventative or governance-based, framed in terms of corporate due diligence and monitoring. This issue is especially topical in light of the debates surrounding the

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passage of the proposed European Commission Corporate Sustainability Due Diligence Directive. A call for papers was issued in early 2023 which attracted more than 80 submissions. Only 12 Symposium papers have been accepted after a highly competitive process of selection. The Symposium took place at UCL, London on 10 November 2023.

Integration of Strands of Discourses

The Symposium featured an equal number of papers from two main fields of legal research and inquiry. One is the field of corporate law, in terms of corporate group liability, as well as how corporate actors and constituents, such as management and shareholders may be able to exert influence or decisive action within the framing of the law in order to address 'wider' harms and externalities. The second is the field of business and human rights, relating to the effective enforcement of human rights claims against corporations. There have not been many fori where these two discourses are placed alongside each other in order for synergistic themes and perspectives to be teased out and the Symposium hopes to have achieved some integration of these conversations.

The business and human rights field of literature and discussions are often seen as 'external' to corporations, and legal redress channels are internationally fragmented as national points of contact enforcing the Ruggie United Nations Guiding Principles for Business and Human Rights are not necessarily effective or seen as comparable to judicial enforcement. Further, enforcement in the Global South may be effective from a justice point of view but may be practically useless due to the realities of asset partitioning by large corporate groups. Mixed welcoming signals for enforcement in the Global North, particularly in common law jurisdictions, may seem imperialistic, distant and disempowering for the development of justice in the Global South (Heyvaert, in this volume). The realities of international fragmentation and overall challenges to business and human rights enforcement may result in the perception by corporations that such legal risks are only to be peripherally managed, and it remains uncertain to what extent this concern has travelled into the core of corporate culture and governance. Corporate governance and law are often more insularly focused on management-investor relations and it remains highly debated whether the for-profit purpose of companies should be conflated with broader goals of sustainability or social development (which are often seen as falling within the province of public goods or policy).

However, the introduction of the French duty of vigilance and other similar legislation in Germany and Norway, as well as the proposed European legislation on a corporate duty of due diligence, increasingly show policy-makers' endeavours at regulating the business operations of corporations in relation to establishing their wider responsibilities. In this manner, regulatory provisions are catching up with wider external expectations on how corporations should govern and manage themselves and their risks 'within' the corporate veil. The Symposium provides a forum

for the discourse on whether perspectives from corporate law and governance are being transformed by externally imposed forces which endeavour to work from within the corporation to meet social and public expectations as to corporate behaviour and its impact on the environment and society. This goes beyond merely seeking redress from corporations for externalities in an ex post manner.

The Symposium's keynote address by Lim explores transformation in corporate law doctrine in relation to powerful state-based corporate owners that are controlling shareholders. A strong argument is made to subject such controlling shareholders to fiduciary duties, in order to address the state-owned enterprises' management of environmental and climate risks. While Lim examines the role of the government controlling shareholder, the role of institutional investors has been doubted, as Masconale's paper questions the legitimacy of investors' ESG influences on companies, as being insufficiently representative of the democratic polity. Eccles, Havard-Williams and Manning argue that there is potential for investors such as institutions to make a difference to corporate behaviour, but they crucially need to be supported by sufficient quality in corporate transparency. Moreover institutional investors adopt different intensities and preferences for their stewardship on ESG matters, a matter that is inevitable due to their privately shaped mandates.

On the management side, Moon explores the potential potency of the European Corporate Due Diligence Directive upon internal corporate transformations and argues that the Brussels effect can be significant even for Delaware incorporated American companies that need to comply with European legislation for maintaining their market access to the EU. Further, Möslein argues that as multinational businesses are in reality networked and related beyond the legal conception of a corporate group, there is room to consider broader forms of directors' duties, at least in information and monitoring, across a broader range of conduct and effects that are not limited to individual corporate legal personalities.

König's paper explores the variety of legal doctrines under which a multinational parent company can be made liable for its subsidiaries' conduct, and teases open the boundaries for corporate liability by arguing for a wider application of parent companies' vicarious liability for their subsidiaries. This could be superior to the application of the duty of care in English tort law, for example, although the latter benefits from the ability to organically develop from first principles for third party protection as society evolves. Resistance against enterprise liability type doctrines will be mounted by industries, as the benefits of asset partitioning can be rendered uncertain or redundant, creating significant business and legal risks. Ultimately, the examination of the boundaries of enterprise-type liability touches the nerve of a policy question, in terms of whether policy-makers would make explicit forays into limiting corporations' freedom in asset partitioning in the face of third party harms and externalities.

In this respect the voices from business and human rights researchers are poignant as the limits of corporate law and doctrine also limit their causes of action in civil claims and the redress that can be obtained. Emerging researchers such as Agutoli, as well as Krauss and Sood (whose paper will be carried in another future volume of

the Review) examine claims for human rights abuses against corporations documented by the Business and Human Rights Resource Centre. Agutoli analyses in particular the variety of strategies in framing causes of action, which reflect on the emerging and uncertain nature of human rights litigation against businesses. Limited success in varying causes of action show that there are limited channels of corporate liability however framed, whether such actions are framed within corporate law or human rights law. Limited redress is intrinsically related to the doctrinal and perspective limitations in corporate law, but this connection is seldom made. Heyvaert's paper teases out the limitations of enforcement in the courts of the Global South and North, while Buhmann's paper asks the question how fragmented implementations of national contact points' enforcement of the UNGP would sit alongside enforcement of the incoming corporate due diligence duties in the EU. Overall, would the much-vaunted corporate due diligence reforms truly transform corporations from within by regulatory fiat? Ciacchi and Cerqua's paper traces the institutional context in the development of the French duty of vigilance and the Dutch equivalent (which has more limited application). They present less than optimistic findings of continued difficulty in interpretation and enforcement of such regulatory duties, pointing to the limits of even such a regulatory approach.

The editor observes that no submissions looking into the role and effectiveness of corporate regulation, particularly from the lens of regulation theories, have been received. Regulation theories such the 'Open corporation'[1] were very much in vogue twenty years ago, where it is theorised that regulators could work with corporates to delegate the implementation of broad principles and expectations to them, resulting in transformed corporations that also achieve the broader goals regulators intend. The tide of corporate scandals, dating back to the global financial crisis 2008, have deeply affected the traction of idealistic versions of regulation theories.[2] However, the regulatory methodology of delegated implementation or 'meta-regulation' has not been consigned to oblivion, as such a regulatory methodology is in principle a viable means for regulatory intervention into corporations' inner workings to secure change of behaviour.[3] This is not to say that regulatory design is not in need of rethinking and renewal.

Reimagining the design of meta-regulation, such as the corporate due diligence duty, its implementation and enforcement, is imperative, although Korkka-Knuts warns against the use of criminal and administrative laws in a manner that merely fosters cosmetic compliance in corporations. Moreover it may be argued that the transformations within corporate law discourse, such as the embrace of a long-term corporate purpose that is citizenly and socially responsible[4] or transformations of

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[1] Christine Parker, *The Open Corporation* (Cambridge: CUP 2002).

[2] Julia Black, *Paradoxes and Failures: 'New Governance' Techniques and the Financial Crisis* 75 Modern Law Review 1037 (2012), also see Cristie Ford, *Innovation and the State,* chs 4, 5 (Cambridge: CUP 2017).

[3] Ford, ibid.

[4] Colin Mayer, *The Governance of Corporate Purpose* (ECGI Working Paper 2021), https://www.ecgi.global/sites/default/files/working_papers/documents/mayerfinal_1.pdf.

management or shareholder duties and legal responsibilities can go far. This debate is between the role of corporate law and corporate regulation, and needs to take place. Further, the purpose of corporate regulation should be more thoroughly considered in light of the developments already started by the UNGP and the perspectives offered by business and human rights scholars. The Symposium has brought into sharper focus the integrative possibilities and synergies between these perspectives and furthers the editor's vision of opening up existing insularities in the realm of corporate law and its scholarship.