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The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality

Phillip I. Blumberg

New York, Oxford: Oxford University Press, 1993,

316 pp.

Reviewed by C. Harrington Jones[†]

Since the nineteenth century the structure of commercial organizations has developed from the lone corporate body into corporate groups that defy national boundaries. The challenge of determining the rights and responsibilities of these powerful new entities has confronted many fields of law. Phillip Blumberg documents this revolution and explores its legal consequences in his accessible book, *The Multinational Challenge to Corporation Law*. His study surveys the pragmatic, though piecemeal, responses that have emerged to accommodate and control the diverse products of corporate conglomeration.

The fundamental characteristic of the corporation is that the liability of its owners is restricted to the extent of their investment. Often the owner controlling a corporation is itself a corporate body. In this situation, strict enforcement of limited liability would enable a single organization to construct watertight compartments within itself, shielding the whole from the liabilities of its subsidiary corporate bodies. The challenge to lawmakers has been to develop coherent jurisprudence that preserves the corporate body as an independent legal entity while preventing abuses of attendant qualities such as limited liability.

With well placed historicism, Blumberg identifies the origin of this dilemma. Neither limited liability nor the ability to control other corporate bodies was initially amongst the attributes of the corporation. "The English experience," he writes, "leaves no doubt that the extension of limited liability reflected a deliberate political decision in response to commercial pressure to achieve

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economic objectives.”¹ The introduction of limited liability was specifically intended to encourage smaller investors to provide the capital necessary for large projects. Distanced from the daily management of enterprises prone to incur large liabilities, small investors found the protection afforded by limited liability an appealing incentive. Before long, this device became fundamental to the notion of a corporate body.

The opportunity for corporations to own other corporations arose later. New Jersey introduced this attribute in the late nineteenth century to enhance its jurisdiction’s appeal to those seeking to incorporate. State officials had accurately identified filing fees as a lucrative source of state revenue that could be dramatically increased by providing corporate bodies with privileges unavailable elsewhere. New Jersey’s success engendered competition between states looking to recover lost income. In a few years the enduring universality of this feature was ensured.

Combined with the ability of corporations to control other corporations, the principle of limited liability manifestly enables investors and the organizations they control to insulate themselves from the consequences of their actions. Protection from liability simply requires that ventures be undertaken by thinly capitalized corporations controlled by holding companies. Strictly enforced, limited liability would ensure that parent companies remained unaccountable for the shortcomings of their subsidiaries. Blumberg explores the initiatives that have been taken to “develop an accompanying corrective doctrine to avoid the grotesque consequences that would otherwise result from the unyielding application of [limited liability].”²

Blumberg identifies the task of balancing the need for accountability against the benefits of recognizing the corporation as an independent legal entity as the struggle to transform entity-based corporate law into enterprise-based treatment. An early effort by American courts was the doctrine known as “piercing the corporate veil”. This proved effective enough in addressing the situation of the sole shareholder who attempted to evade liability through the instrument of incorporation. However, explains Blumberg, its overly formal nature proved inadequate for addressing the com-

¹ P. I. Blumberg, *The Multinational Challenge to Corporation Law: The Search for a New Corporate Identity* (Oxford: Oxford University Press, 1993) at 17.

² *Ibid.* at 65.

plexities of subsidiary and parent corporate relationships. Hierarchical chains of ownership, minority shareholdings that permit *de facto* control, incorporation in different national jurisdictions, and the enduring desire to preserve limited liability for the citizen-owner are amongst the complications that Blumberg identifies as having limited the doctrine's efficacy.

Notwithstanding these challenges, American corporate law is, in the author's estimation, gradually developing an approach that accommodates the complicated realities of contemporary corporate groups. Enterprise law represents "a pragmatic response of the legal and political system to changing political, social and economic realities."³ This doctrine, so far selectively applied in varying incarnations, is meant to be a realistic and flexible approach that assesses a variety of factors to determine the limits of corporate rights and responsibilities. With an emphasis on the controlling force behind the entity, enterprise law focuses the relationships that shape corporate action, as opposed to the form of the underlying legal entities. To best preserve the original purpose of limited liability it attempts to distinguish between corporate owners and citizen shareholders. This emerging doctrine, Blumberg argues, is an appropriate conceptual reform because it effectively treats corporate groups as unified entities.

Another substantial problem is the multinational nature of many corporate groups. National limits to jurisdiction permit enterprises to evade domestic legislation by consigning the offending activities to foreign subsidiaries. Inversely, foreign corporations remain insulated from whatever befalls their domestic subsidiaries. Illustrating his points with clear examples, the author demonstrates the extent to which an enterprise-based approach to corporate law is confounded by national jurisdiction. Blumberg explains that a solution requires nothing short of a dramatic reconceptualization of international law. For its effective application internationally, enterprise law must surmount the legal conflicts between home and host jurisdictions.

The author presents a well written argument that, in light of its brevity, is surprisingly precise and fact-laden. However, two shortcomings are evident. According to Blumberg, American jurisprudence has gone farthest in developing enterprise law. Consequently, American law is overwhelmingly the focus of his study. Other na-

³ *Ibid.* at 253.

tions are mentioned only briefly and referentially. The one page treatment of Canadian law insufficiently details the domestic status of enterprise law, thus undermining the book's appeal to Canadian readers. In light of the fact that Canadians are the largest foreign investors in the United States, Blumberg might have better served his readership by emphasizing Canadian-American conflicts in the chapter exploring the problem of multinational conglomerates. Another weakness is that the emerging body of relational law, within which the author locates enterprise law, is accorded only a few pages near the end of the book. This, unfortunately, is insufficient to adequately contextualize enterprise law within any broader paradigm shift. Nonetheless, Blumberg's book remains an insightful examination of a legal issue whose importance extends well beyond the boardrooms and offices of corporate lawyers.