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THESIS SUMMARY

AN EXPLORATION INTO LIABILITY OF CORPORATE GROUPS: A COMPARATIVE PERSPECTIVE

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Abstract

There is no doubt that corporations are the key players in the world and local economies today. The emergence of corporate groups is a phenomenon of these days. Along with the active growth of group corporations, the legal environment was supposed to be established and regulated, but the development of the law has lagged behind. This is a global problem in general.

Although some jurisdictions have taken initiatives to improve corporate group law, this area od the law is still insufficient. The issue of corporate groups is not only in respect of corporate law but also intersectional. Thus, group corporations are often incompletely regulated by the laws of their respective sectors. Even in the academic literature, there is still a lack of consensus upon main aspects of corporate group law. These unresolved issues cannot be resolved without addressing the underlying issue, that is the corporate group's liability. One of the basic principles of corporate law is the principle of limited liability, originated in the era of a single, solo corporation, however, it is still in force today in the context of polycorporation's liability.

This research examines the liability of corporate groups in a comparative law perspective. It discusses different ways of imposing corporate liability, reviews the application of fundamental corporate law principles to a group, and examines the relative merits of doctrinal approaches and principles in light of a collection of separate corporations. It also reviews the regulation of corporate groups and cases in various jurisdictions and the extent to which those jurisdictions' experiences and practice.

Subsidiaries of a group are also difficult to legally regulate because of their complex nature of being independent and dependent, separated and controlled. So that, it may also require dual-mode regulating strategy because of its dual nature. Enterprise liability doctrine proposes to expand the liability of the parent corporation and to hold it accountable on behalf of its affiliated corporations by neglecting separate personality of a corporation. In this study, we propose partial enterprise liability approach. This approach is based on the concept of due diligence principle which have recently been proposed by international governing bodies and the concept of control which is one of factors of the enterprise principle. The research recommends that corporate groups be regulated by a legal control test in limited areas, namely mass tort, human rights, environment and insolvency.

1. **Introduction**

1.1. Introductory Note: Background to the Study

One of the key factors that contributed to the expansion and development of economic and business relationships alongside modern industrial, technological and scientific development is the establishment of a business corporation as a channel to participate business relationship locally and globally. There is no doubt that corporate groups have been shaping the world's economy these days. Nowadays, corporate groups (most of them are multinational/transnational corporations) are much more powerful than some countries; their employees outnumbering the labour force and revenue surpassing Gross Domestic Product of an entire country. Those large corporations are designated by their subsidiaries. The vast majority of current business participants are involved through the form of a legal entity called a corporation, many of them conduct their business under the structure of a corporate group. The continuous growth of corporate group is considered a legal and business, economic and social phenomenon. The group has also mostly become conglomerates, multinational and transnational corporations. In 1970, there were approximately 7,000 transnational corporations in the world; that number grew to 30,000 by 1990, to 63,000 by 2000, and to 82,000 by 2009. Today, there are more than 100,000 multinational corporations with over 900,000 foreign affiliates.[1]

So that it can be said that most of these giant corporations are multinational ones running business cross borders. Generally, multinational corporations are organised in group structure.

Thus, the question is that while multinational and national large corporations have been dominating business world, conglomerates have been replacing simple, single corporations what is ruling and regulating them. Are the present corporate law and its basic principles able to fulfil their role in today's business world? These are motivation of this study.

This study concerns the most common form of modern business that is called corporate groups. Corporate law is one of the most converged fields of law throughout the world. The fundamental legal principles and issues around corporation are generally similar in most countries, so it is common for corporate law to be studied within the scope of comparative law. However, in the most of the countries, the research on the corporate law of the group is relatively less and so far, it has not reached an efficient legal solution. Generally, its fundamental issues still have not been resolved at the legislative, judicial and doctrinal level in world jurisprudence.

It would be said that all systems of corporate law resolve similar issues. Comparative perspective provides us an opportunity to analyze diverse approaches to the same issue, while considering of legal and cultural backgrounds for those differences.

In today's globalised corporate world, the same issues, the same aspirations, the same global corporate bodies, and connected businesses etc. all encourage a comparative study of corporate law and a search for common solutions to the common ground. A citation from Professor Hansmann and Kraakman expresses this convergence like that 'although some differences may persist as a result of institutional or historical contingencies, the bulk of legal development worldwide will be toward a standard legal model of the corporation. For the most part, this development will enhance the efficiency of corporate laws and practices'[2].

It seems that there is still no a systematic change and reform in this field. In recent years, some countries have made gradual

[1] Skinner.G, *Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law* (72 Wash. & Lee L. Rev. 1769, 2015), p.1795

[2] Hansmann, Henry and Kraakman, Reinier H., *The End of History for Corporate Law* (Law and Economics Working Paper No. 235, 2000), Working Paper No. 235; NYU Working Paper No. 013; Harvard Law School Discussion Paper No. 280; Yale SOM Working Paper No. ICF - 00-09.

improvements in this field, although there is still no consistent and comprehensive approach to the regulation on corporate groups. Although nearly every jurisdiction follows traditional corporate laws principle on corporate groups there are pioneers starting some changes over groups.

The present law still fails to appropriately regulate corporate groups. Piercing the corporate veil has been used as only single exception to the limited liability. It seems that there are not many exceptional countries of this situation, it is one of multinational challenges.

The research has been attempting to reveal that the effects of applying traditional corporate law and doctrine on modern corporate groups' liability are causing the gap between the laws and the reality. The existing doctrines and paradigms need to be reevaluated in light of the new global economic era.

1.2. Concept of the Research

Current corporate groups laws of most jurisdictions have not been able to response efficiently corporate groups boom which is called as modern time phenomenon. Liability of corporate groups is still considered as one of the unresolved jurisprudential issues. The motivation of this study is to explore the reason behind the 'stuck' and analyze current legal environment and practice in some jurisdictions by focusing on the issue of liability and its influence and provide possible options to improve the current situation.

There is a need to review and introduce main approaches and principles developed up to today. Without reaching out the fundamental limited liability paradigm there will have been ineffective efforts continuously among academics and legislatures. The original legal theories, doctrines, principals of corporate law have been outdated over the realities of this modern business development, so it is necessary to scrutinise them and seek new theories and principles. In response to the issues, at first, determining what the core cause of this legal backwardness is crucial.

It is need to be simply noted that the exigencies of commercial activity and practical problems corporations presenting that are roughly similar in market economies throughout the world. Thus, the study reflects on the general international legal approaches to the liability of corporate groups and the key theoretical principles recommended by commentators in some legally and economically powerful jurisdictions, from a comparative law perspective. We will review current doctrinal trends with examples from prominent jurisdictions including German, the EU, France, the U.S., etc.

Corporate groups law is interrelated with other areas of law such as labour, insolvency, tort, environment and so on but the range of this research falls within the only limited liability of corporate groups law through exploring doctrinal references and legal approaches.

Aim and Objects of the Research

The aim of the research is to explore the current situation, facing problems, controversies on corporate groups' responsibility through analysing legislations, jurisprudences and academic literatures in order to recommend suitable theoretical background and legal framework. This research attempts to propose the most potential principle for the legislation and will contribute to global corporate law field new knowledge and understanding of current perspectives and expectations on corporate group law through its comparative study.

Research Question

The study focuses on the opportunities, challenges and importance in regard to corporate groups liability through selected jurisdictions' experiences. It sets out to address the following research questions:

- What is currently regulating and governing corporate groups, while those large companies are ruling the world economy?
- Why have corporate groups been still so far free from responsibility? Where is the root of this situation? Is there any possibility to fix it?

- Which kind of judicial and statutory response must be there to the emergence of corporate groups?
- Is it possible to adopt enterprise liability, if so what can be its framework?
- Where and how limited liability can be extended to a parent corporation?

1.3. Research Methodology and Hypothesis

The research methodology is based on literature, case study and empirical study in the context of comparative legal perspective. With comparative approach considering positive and negative foreign jurisdiction's experience, the research's scientific findings will contribute knowledge to global corporate law field beyond the constraints of national frontiers.

Research findings are analysed in accordance with four main sources of information: firstly, the current literature, secondly, laws and regulations, thirdly, court cases, fourthly, statistic and data. The methods employed to develop this study involving comparison in historical and foreign jurisdiction's context, analyzing case and legislation, normative, perspective, explicative and descriptive legal characters on academic literatures, legislative documents, judicial decisions and empirical data.

To accomplish as objective a testing of the corporate group's liability related theory as possible, case studies examine the performance the effectiveness of the theory and principle and comparative analysis that explores the concepts developed in a comparative legal scholarship. During the research 95988 district civil courts' decisions of Mongolia between the year of 2015 and 2020 studied and analysed. The purpose of conducting a case study survey using quantitative methodology is to analyse the current situation of corporate group law awareness with the findings and to propose the most efficient and effective theoretical and regulatory framework further. Some cases from different jurisdictions are chosen as an example and compared to other jurisdictions.

The research assumptions are that the issue of group corporate liability remains unresolved under the laws of most countries; there is no controversy in literature review in the implementation of enterprise theory, but only in the practical and judicial context; due to the diversity of groups' structures, internal relationships and communications, the principle of holding the parent company accountable cannot be applied over limited liability; and the principle of entreprise liability might be implemented only in certain preconceived legal areas but not as a common, fundamental legal characteristic of a corporation.

The Innovative Side of the Research

In the context of the present regulation, the corporate groups' relations are governed by positive laws such as civil code and corporation act, other sector's laws and case law, respectively. Regulations that are considered internationally innovative and advanced are generally based on the principle of a type of enterprise law approaches.

The most important standpoint of this study is to find an optimal recommendation through the analyses in corporate groups law environment that will contribute the development of corporate groups law. Liability is the foundation of many of the legal issues relating corporate groups such as minority shareholders' protection, governance, transaction and so on. The novelty of this study is that it proposes a new partial enterprise principle. This principle based on enterprise theory within certain branches of law, and the main difference from the previous principles is that it is not attributed by the structure, types of control, or form of the group, but on the fact that it is defined by law as a corporate group generally.

While offering the partial enterprise principle, the study also investigate other principles and doctrines which provide the general background information regarding corporate groups accountability including historical and international approaches to the issue whereas some more detailed analyses on particular matters such as newly enacted acts, regulations on liability.

1.4. The Scope of the Research

This study argues for alternative approach of the corporate group liability rather than rejecting current principles altogether by reviewing and analysing them. Because it pursues in accordance with literatures which have proposed enterprise liability only in certain circumstances. This is not mean separating the notion of limited liability in all circumstances. On the other words, the principle of limited liability is not intended to be denied in all areas.

It is not intended to examine all different types of corporate groups' structure, different regulatory strategies and types of controls in detail, but mainly tried to focus on enterprise liability for a parent corporation considering more interdisciplinary context. The study not only examines current situation but also provide some possible options regarding the issue in question from the legal and socio-economic point of view. Briefly, the focus of the research will be liability corporate groups controversies while considering the experience of some jurisdictions.

Having reviewed the leading literatures which proposal various options from a revolutionary to flexible reform, and analysing from international law to national judicial decision, this research argues in favour of enterprise approach for corporate groups with revised and modified partial enterprise liability. It is worthy to note that the recommendations are intended to update the liabilities of the parent for the corporate group and are not for piercing the responsibility of the natural person- shareholders since within the law of the corporate group.

While considering the difference of exemplified jurisdictions, I argue for the common core and ultimate cause of global regulatory shortcomings lies in the liability issues.

1.5. The Structure of the Research

The dissertation consists of introduction, 4 other chapters, conclusion, bibliography and appendices. These chapters are divided into sub parts and conclusions of each chapters, the first chapters deal with the legal, social, economic and political situations shaping the development of corporate world in most jurisdictions and furthermore explores the evolution of corporate groups' legal environment. The final chapters are more about theoretical inference and propositions.

1.6. Corporate groups and Limited Liability

The fundamental legal features of a corporation, such as limited liability and separateness, have greatly contributed to the development of corporate business, but it is not such a suitable legal principle for the group structure-collective corporations. Therefore, in the case of a group corporation, the question arises as to whether there are grounds and opportunities to establish a different liability principle from a single corporation. There are a number of reasons for holding the group's parent corporation accountable: the shareholder of the corporation becomes its parent corporation, which is protected by its own limited liability and is again protected by the limited liability of its affiliated corporations; using this legitimate opportunity to get rid of responsbility, the affiliate or subsidiary is used for fraudulent activity; as a final result, the rights of the subsidiary's involuntary and outside creditors are left out of the law, justice is in doubt.

Yet the core of the corporate groups problem is still unresolved and the results achieved so far are still unsatisfactory, as is expressly recognised by the doctrine itself.[3] One reason to believe that considering disparately the relationship of one corporate's ability to control the other peers from the one as a natural person to be a shareholder is that the parent is part of the organisation of the so-called 'group' legal person, as well as its involvement in business operations.

Creating subsidiaries and controlled units might be used as a vehicle to avoid and ignore liability. Parent companies use limited liability by

[3] Jose.E.Antunes, *Liability of Corporate Groups*, (Kluwer Law and Taxation Publisher, 1994), p.209

incorporating a controlled unit to run a risky business. Most frauds and fails vis-à-vis corporate groups in banking, finance and insolvency case. Parent corporations externalise the risk of tort liability on intention through legally formed, separate, controlled subsidiaries.

It is regarded that there has been still no systematic change and reform in corporate group law worldwide. It has been clearly seen from the literature review that commentators representing different jurisdictions have acknowledged the same situation. There are some countries which are relatively successful in the field of regulating and studying corporate group law such as the EU, the U.S and Australia, academic literatures regarding those jurisdictions are considered as primary research sources. For example, German would be a great example since it has the most developed regulation on corporate groups that recognises dualist approach for liability.

The enterprise principle that contrasts with traditional principle suggests considering of a parent and its controlled corporations as one business unit.

2. Legal Theories of Corporate Groups' Liability

To achieve the main purpose of the present study, by reflecting on the topic of corporate groups liability in a comparative law context, by providing a systematic survey of the current regulatory strategies on a worldwide scale, by critically scrutinizing their shortcomings, and at the same time to propose a path for future legislature reforms in this important area of modern corporation practice and law. Differences of detail being left aside; three major types of regulatory strategies have so far been developed in comparative law. These strategic are: the traditional strategy of the entity law approach, the revolutionary strategy of the enterprise approach and the intermediate strategy of the dualist approach[4].

[4] Jose.E.Antunes, *Liability of Corporate Groups,* (Kluwer Law and Taxation Publisher, 1994), p.479

Figure 1. Theories of Corporate Groups Liability

Theory	**Single corporation**	**Corporate group**
Entity	Limited liability	Limited liability
Enterprise	Limited liability	Unlimited liability
Dualistic	Limited liability	De facto/contract

The focus of this chapter is to summarize doctrines and principles on corporate group's liability and provide primary understanding on sake for seeking further resolutions to problems relating corporate group. There are needs to be some reform of the law to acknowledge the reality of large corporate groups, especially with the potential for abuse existing. Exactly what doctrine and principle can be taken is subject to debate as shown above. Limited liability is not a rule of natural law. If it is inconsistent with the root of law, fairness and justice, an adjustment must be considered. Yet corporate groups law's problems are still unresolved, and the results achieved so far are still unsatisfactory and ineffective. It might be deemed that corporate groups' legal concerns left in disarray because states are unable to control these main actors of the economic system. Without resolving the limited liability issue as a foundation at first, it is completely futile trying to settle other areas of corporate group law for a complex result. Developing dedicated legal doctrines to be effective in the sense that, absent such doctrines, the corporate group could not be regulated convincingly. In most jurisdictions, lawyers, researchers and law-makers only look at traditional legal issues over the corporate but are not paying enough attention to addressing the legal issues of modern corporates that are organized as a group. The fact that the group of corporates that was left behind in the legal framework of the corporate has begun to consider the relative importance of the 1990s since then, but theoretically it is still controversial and practically inapplicable.

The principle of separate corporate legal personality has been a foundation stone in the development of corporate law in common and civil law countries, with investors being protected by the concept of limited liability. The evolution of the corporation as a vehicle for investment has been credited by some with underpinning modern economic development. The argument in favour of limited liability is stronger with its longstanding classical doctrine. There is hesitation like neglecting of the traditional legal protection of the corporate as its main feature will negatively affect the economy and the business sector. This is the reason behind this backwardness.
The weakness of the entity law is related to the corporate legal personality and limited liability- which of regarding the corporation as a separate juridical person with its own rights and obligations distinct from those of its shareholders, presents obvious opportunities for manipulation, particularly where the corporation is owned and controlled by a single shareholder.

The enterprise approach pleads for a new and revolutionary regulatory strategy and has found its most expressive statement in the EU original. The following table summarizes the general characteristics of the types of enterprise theory which has been discussed in the previous sub parts.

Figure 2. Types of Enterprise Liability

Type	**Area**	**Strategy**
Veil lifting (in some way)	All	Due to tests
Konzernrecht	Corporate law	Codified law, contract
Rozenblum	All	Due to tests
Due diligence	Human rights	International document
Vigilance	Human rights, environment	Positive law
True enterprise	Tort, insolvency, tax, labour	Positive law

While the entity approach is still the dominating regulatory strategy in the majority of common and civil law systems, the enterprise doctrine has not been universally accepted so far. According to the doctrine, corporate group liability problems would be decided according to the fundamental principle that the parent corporation shall be liable for all the unpaid debts and acts of its subsidiaries for the reason that the former controls the latter, forming thereby a unitary economic enterprise. While not yet having become positive law in corporate law, such an approach holds an deniable interest and actually since it symbolizes in a worldwide context the strongest reaction and the most far-reaching institutional undertaking against the prevailing traditional entity law approach. Having decided to overcome the formalism of the traditional posture and conceiving the filling of the gap between law and reality as its major regulatory task in this particular area, it pleads then for a general coupling between the power of control and liability. Liability issues should not be decided according to the formal legal fiction of the separate corporateness but according to the economic reality of the allocation of power of control[5].

Even though criticized as being too radical, disseminating the enterprise approach would be most helpful in breaking traditional, fixed and predominant attitude. There is a tendency to regard the enterprise law approach relatively in some jurisdictions, but not responding with the complexity of the corporate legal regulatory framework to the phenomenon makes it difficult to apply the law. As previously stated, this principle can be seen in a few restricted areas, rather than completely disregarding the group's limited liability. Nevertheless, we should consider at least the principle of denying limited liability in the field of liquidation, bankruptcy, and

[5] Jose.E.Antunes, *Liability of Corporate Groups,* (Kluwer Law and Taxation Publisher, 1994), p.479

environmental damages of the highest legal entity. When introducing these theoretical principles into legislation, it is important to coordinate closely with the 'real control' of the parent and the business integrity of participants. Because internal communication, management and control of corporate groups are different, how the subsidiary corporation is dependent on the parent and whether the activities are carried out in a vertical management group, should be addressed. Christian A.Witting asserted that 'theory aside, it is unsurprising that courts prefer to work with established legal concepts in the regulation of corporate groups, assigning especial importance to the concept of separate legal personality'[6].

When raises the issue of corporate group liability, it is often mistaken that there is a principle of lifting the veil and that there is sufficient legal regulation. On the contrary, it is now clear that this strategy has been ineffective. This is because the strategy is implemented by the courts only in the most extraordinary cases and in exceptional circumstances, and there is no unified standard or understanding of what constitutes an extraordinary case. Therefore, lifting is a common law doctrine but none in any legislature.

One of the innovative initiations to improve corporate responsibility is the French Corporate Duty of Vigilance Law, placing the onus on domestice and multinational corporations in France to identify and prevent risks to human rights and the environment that could occur as a result of their business activities. This tendency has been supported by other European countries. For example, Swiss has been preparing mandatory due diligence law.

The French law on the corporate duty of vigilance for parent and instructing companies sought to reflect in law the political, social and economic importance of multinational corporations, and strengthen the accountability of parent companies. It is a legislative innovation, building on both the existing soft and hard legal frameworks, thus challenging its observers on their conceptions of law and legal theory. In particular, the Law introduces into substantive law some apparently unidentified legal objects, which can be new to lawyers[7].

3. Case Study on Corporate Groups' Liability

The study used cases from different jurisdictions as examples. The cases reveal a lack of systematic and consistent application of corporate theory even within discrete doctrinal arenas. At present, inconsistent understandings within even a single case can lead to incoherent decisions if not recognized and weighed in reaching a conclusion. Relatedly, these cases illustrate the need for clearer standards for delimiting the bounds of the corporate group.

It is stated in literature and recent international documents that limited liability becomes a problem when victims and creditors cannot obtain a remedy against a subsidiary of a multinational corporation in their own country. In that situation, they are left with bringing suit against a parent corporation in the parent's jurisdiction as their only form of potential remediation and compensation. But limited liability basically restrict to reach them. This is problematic for any harm. When the liability issue comes with multinational corporate groups, governing and controlling become even more difficult. Skinner wrote about that as 'in many situations of tortious conduct by a corporate subsidiary, victims are left in a quandary. Even though the parent corporations, as shareholders, receive great economic and tax benefits from their foreign subsidiaries' activities, they are able externalize the risks of their operations through their subsidiaries—such as environmental

[6] Christian A.Witting, *Liability of Corporate Groups and Networks*, (Cambridge University Press, 2018), p.184.

[7] Stéphane Brabant et al, *French Law on the Corporate Duty of Vigilance*, (Revue Internationale De La Compliance Et De L'éthique Des Affaires – Supplément À La Semaine Juridique Entreprise Et Affaires N° 50 Du Jeudi 14 Décembre 2017, p.1

risks and violations of international human rights law—and avoid liability, leaving victims with no remedy'.[8]

To conclude with these cases, it is absolutely inevitable to agree with the statements of scholars from all over world that such investment often results in increased wages, import of technology, developments and investment in infrastructure, and even a decrease in poverty. However, where those subsidiaries cause or are involved in even the most egregious torts, the harm is absorbed by vulnerable populations. Given this juxtaposition, there is increasing recognition that it is unfair that corporations receive tax and other benefits from their use of wholly-owned subsidiaries while being able to avoid liability when those wholly-owned subsidiaries engage in human rights violations, regardless of the fault of the parent corporation.[9]

4. Statutory Study on Corporate Groups' Liability

The study investigates some of the jurisdictions and international governance bodies that have adopted some version of enterprise liability as part of their statutory or common law or have drawn on the theory as part of a proposed amendment to existing laws or guidelines. These examples provide context for a discussion of enterprise principles. Collectively, they demonstrate that enterprise liability has some possible forms, from which lessons may be drawn in crafting enterprise principles in these jurisdictions. Moreover, these examples show that enterprise principles are beginning to surface in foreign jurisdictions and international governance documents in a globalising economy while attempting to over the greatest shortcomings of limited liability.

Antunes summed up the general state of corporate legislation more than two decades ago as the following, and we still agree with this conclusion.

> We do not have any group law, but we have indeed groups, both nationally and internationally' such was Gebler's verdict on the general position of legislatures regarding the problem of the corporate group in the overwhelming number of countries. In comparative law, apart from the existence of what could be called 'partial regulations' on corporate groups, only four national legal orders have implemented a specific law on groups of companies (Germany, Brazil, Portugal and Hungary) and the international initiatives on legal harmonization on the problem have not yet become positive law (namely, EU directives on company law)[10].

Except from Germany, only Latvia, Portugal and Italy have a systematic regulation of corporate groups within the EU, probably in the world. The former is the most studied, while the last three are the least studied in comparative corporate law studies.

Although some researchers believe that innovative principles such as due diligence / vigilance are not against limited liability of corporation or it is not kind of enterprise liability, it are invincible in the sense that the principles make the parent corporation responsible for its subsidiary and penetrate the barrier of independent legal entity of the parent corporation from our point of view. So, it is our supporting point of view in which as some commentators stating that 'the business and human rights movement also requires taking a stance with regard to a new way of doing business in the 21st century, in a context where the trend in many countries is leading towards the emergence of new expectations regarding companies' contributions to society, whether through sustainable investments or corporate

[8] Skinner.G, Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law (72 Wash. & Lee L. Rev. 1769, 2015), p.1777

[9] Skinner.G, Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law (72 Wash. & Lee L. Rev. 1769, 2015), p.1780

[10] Jose.E.Antunes, Liability of Corporate Groups, (Kluwer Law and Taxation Publisher, 1994), p.225

citizenship. Furthermore, in jurisdictions that subject companies to obligations related to the respect of human rights, compliance with these requirements represents a competitive advantage'[11].

As corporate group issues have become more and more of an interdisciplinary law, the recent major reforms and driving forces behind the handling of this phenomenon may rely upon not only corporate law as well as other sectors of law.

The most developed of the enterprise systems, the konzernrecht, fails to address the problem of tort creditors because its system of liability is primarily internal, meaning that the subsidiary accrues a cause of action against the parent, but outside creditors do not. The ideal test for enterprise liability should follow in the line of jurisdictions that have explicitly remedied this deficiency by providing a direct cause of action to tort creditors, thus acknowledging and remedying limited liability's deficiency in this area[12].

According to Dearborn, the definition of "mass tort" should be narrow, encompassing only mass torts, human rights disasters, and environmental harms. And she explained that this narrow scope helps alleviate the inevitable concerns of the business community that enterprise liability would cause the end of investment capitalism. The anecdotal evidence presented by the examples of India, the konzernrecht, as well as the regulatory statutes in the United States shows that enterprise principles need not be at odds with a robust investment economy. Limiting the scope of the doctrine helps to ensure that it is merely a tool to check the most egregious and socially harmful of corporate behaviors-not a tool for frivolous litigation. And more importantly, enterprise liability's advantage is that it helps to reorder the decision-making structure in the corporate conglomerate's nerve center in order to prevent foreseeable disastrous harms. The harms that enterprise liability has the best chance of preventing are, therefore, those costly legal judgments that stand to harm the parent corporation from a public relations and economic standpoint, because the larger the threatened judgment and public relations scandal, the more likely that the corporation will wish to prevent the harm in the first place. The imposition of joint and several liability provides an incentive for the corporate nerve center to take preventative measures that ensure these costliest of corporate torts do not occur, and enterprise liability is in a good position to shift those costs. From a perspective of equity and justice, the prevention of mass torts, human rights violations, and environmental harms would provide the type of important regulatory goal that limited liability should not, from a policy perspective, be able to subvert[13].

5. Towards Partly Enterprise Liability

Since we investigated the existing theories and principles that impose liability on parent corporations, an exploration of developing them further to reach the study's aim.

Even though the scope of this study does not consider regarding how the law would recognise the organisational form and control related to the definition of corporate group, because of two reasons, the issues around control are briefly addressed: 1. the proposed approach in this study is legal control-based; 2. in order to clarify that there is no need to obscure the issue of accountability due to the complexity of the controls as discussed in previous literatures.

[11] Law on Corporate Duty of Vigilance-Contextualised Approach, (Revue Internationale De La Compliance Et De L'Éthique Des Affaires – Supplement À La Semaine Juridque Entreprise Et Affaires N° 50 Du Jeudi 14 Decembre 2017), p.4

[12] Dearborn, M, *Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups,* (California Law Review, Vol.97, Issue 1, 2009), p.254

[13] Dearborn, M, *Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups,* (California Law Review, Vol.97, Issue 1, 2009), p.255

In spite of the parent corporation is the sole or dominant shareholder of its subsidiaries, it is not merely an investor. The parent is itself engaged in the business. Along with its subsidiaries, it collectively conducts a common business under its central control[14].

Theoretical researchers have argued that it is difficult to apply the principle of enterprise law directly because control cannot be defined and resolved. For example, Antune observed that it is also impossible to lay down a general borderline between these two basic forms of governance structure since it varies from group to group, from subsidiary to subsidiary, from function to function, from decision to decision. The degree of parent control varies from group to group and it is virtually impossible to generalize due to the variety of factors according to which the balance between autonomy/control can vary and to numberless available combinations[15].

We propose partially enterprise liability, which is in the range of mass torts, insolvency, fraud issues, human rights violations, and environmental harms. Adopting the principle of entreprise liability to be applied directly to certain areas as a basic principle without many tests and criteria it will avoid repeating the metaphors and unpredictability of the veil lifting technique. As noted, this approach focuses not merely on "control," but also not denied like the advocates who concentrate more on economic perspective.

Although commentators who advocate enterprise liability law criticize the principle of veil lifting, they themselves make equally unclear and vague proposals. However, some, especially in areas such as mass tort, bankruptcy, human rights, and the environment, offer more specific and straightforward suggestions. Dearborn stated that a final frequent criticism of enterprise liability is that any test would be too vague. "While enterprise liability may offer some appeal, measuring the extent of an 'economic unit' introduces an intolerable level of uncertainty into the question of liability." This is because courts will be forced to determine the boundaries of the economic enterprise, which will rarely be clear. Of course, this same criticism applies to the doctrine of piercing the corporate veil. There must, however, be some law allowing claimants to recover against the primarily responsible party in a corporate web[16].

The corporate responsibility analysis outlined in this study optimizes enterprise liability theory by imposing liability on a parent corporation in the selected area, based on parent-subsidiary relationship in accordance with regulatory definition. Those areas are namely mass tort, human rights, environmental harm and insolvency. The main reasons for prioritising on these sectors are, as evidenced by the current case study and case law, which are the most challenging in reality. Also, in these areas, social justice is most likely to be lost. However, this does not mean that the scope of application of enterprise principle should be limited to only these areas such as minority shareholders, labour, governance, competition and so on.

[14] Phillip.I.Blumberg, *The Multinational Challenge to Corporation Law,* (Oxford University Press, 1993), p.232

[15] Jose.E.Antunes, Liability of Corporate Groups, (Kluwer Law and Taxation Publisher, 1994), p.207

[16] Dearborn, M*, Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups,* (California Law Review, Vol.97, Issue 1, 2009)

6. Recommendations and Conclusions

I will ultimately draw conclusions based on the lessons and variations of these differing doctrinal approaches to the enterprise issue. By building off the volume of academic literature in this area, learning from the history of limited liability, and looking to the jurisdictions and areas where enterprise liability has crept into the landscape of corporate law, some conclusions can help inform the construction of a new proposal for enterprise liability.

To sum up proposals and doctrines from the main literature review sources of this study: the classic enterprise theory, proposed by Blumberg and others, based on more functional control, and Dearborn's true enterprise is relied on economic control, and these approaches have not been accepted broadly. But it has not accepted into a positive law; just as it is difficult to define control in a veil lifting approach, it is difficult to define a real economic integration. Yet, Skinner's approach is in line with international and national law concept. The scope is limited by the test based on a country's development. The issue of group liability is viewed in terms of in terms of international human rights and environmental law but not as a problematic issue of corporate law. The approach of duty of vigilance / due diligence adopted in international law is currently applied only to human rights violations and environmental damage, and its main feature is that it does not take into account the specifics of corporate structures, which have so far been unresolved. This is more straight-forward solution.

The approach we propose is that maintaining control based character of the enterprise principle but take parent corporation to extended liability, regardless of the group's type, structure, size. Same as the principle of duty of vigilance / due diligence, this means that the type and structure of the group are not taken into account. In terms of coverage, it would cover areas such as human rights, environmental protection, mass tort, and bankruptcy, in other words, it can be a partial enterprise liability approach. Although it governs other areas of law, the basic principles should be adopted into corporate law. In this way, it can be considered to be one of the principles of corporate law, limiting the dogma of limited liability principle of corporate law.

Proponents of entreprise liability theory have proposed a variety of standardised tests, which may lead to the same criticism as the veil lifting doctrine faces that:

- it is difficult that court distinguish whether the parent corporation has violated a standard of care. Although it remains an option, a test is typically very difficult to satisfy, and impossible to satisfy without showing that the parent controlled the subsidiary.
- It is too vague and inconsistent, relying on high standards of control, the application is too narrow. Similar to lifting the corporate veil, requiring very tight, centralised, close control can actually serve as a disincentive for parents to maintain due diligence over subsidiaries' actions—they will want to distance themselves as much as possible—and any approach should create an incentive for parent corporations to assess risks and do all in their power to prevent abuses.

The major weakness of this new 'enterprise approach' consists in the uncertainty, automatism and rigidity of the solutions worked out for intragroup liability cases. Therefore, the response needs to be relatively flexible.

The principle of entreprise liability must be provided with equal opportunities like limited liability principle that is applied without any restrictions or criteria for any type of corporation, but of course in certain sectors. Subsidiaries of a group are also difficult to legally regulate because of their complex nature of being independent and dependent, separated and controlled. So that, it may also require dual-mode regulating strategy because of its dual nature.

This research's proposal has two meanings: 1. legal control in addition to economic integration 2. limted areas. Legal control means that it refers directly on the control definition provisions set out in the relevant law of the country. This model is adopted in international human rights law and in French due diligence/duty of vigilance law which disregards whether the group has centralised or decentralised structures. To mention again, this study only addresses the issue of joint liability of the parent corporation.

Adopting the principle of enterprise liability only partially to certain areas- mass tort, human rights, environment, insolvency- may make this principle more flexible attribution. It also renders that limited liability, which is a fundamental principle of corporate law, does not need to be modified in its entirety. This does not, however, preclude the application of the principle of enterprise as a fundamental principle in these areas as limited liability. Because the principle of limited liability is applied to the corporate group, regardless of its form, structure or size, so it should be equally serve to the principle of entreprise liability.

Conclusion

Despite the existence of some academic proposals to modify the legal approach, the first of which was made over a century ago, it is important to recall that the group is not recognised as a unified business organisation, nor it is a legal entity, nor does it have its own standing before the courts of any country. There are however some situations for certain limited purposes, the law looks into the corporate groups.

The long corporate group story has been still unfolding. Blumberg and others who support the enterprise law approach concluding that the application of the limited liability principle to a corporate group happened historically unplanned and accidental[17]. Mostly, lawyers, researchers, and legislators pay attention to the traditional legal issues regarding corporations, but they do not look out sufficiently to the legal issues of modern corporations operating through group structure. Even though some regulations and provisions of group relations have been in few countries since the 1960s, they have been discussed only in a few academic studies and court documents. In today's business world, corporate groups have become dominant, we are facing the challenge to develop a compatible regulation with modern reality for the groups. It is complicated to regulate the groups, as the subsidiary corporation has the contradictory features: on the one hand, independent, separate entity but on the other hand, controlled unit. Therefore, legislators might be wary that denying the traditional legal protection of the corporation could adversely affect the economy and business. These are the main reason why the legislation in the corporation is left behind.

The theory of enterprise liability posited in this research revitalizes and updates Adolf Berle's groundbreaking theory by

[17] See Phillip.I.Blumberg, *The Multinational Challenge to Corporation Law,* (Oxford University Press, 1993); Phillip.I.Blumberg, *The Transformation of Modem Corporation Law: The Law of Corporate Groups*, (Connecticut Law Review, 2005, Vo.37, No.5)

imposing joint and several liability on corporate groups in the context of mass torts, human rights violations, and environmental harms. A new test for enterprise liability would remedy entity liability's deficiencies with regard to involuntary creditors by providing a direct cause of action against the parent corporation. With regard to the corporate group, the test would address the deficiencies of entity liability's failure to recognize the economic unity and legal control of the corporate family by reference to other jurisdictions' experiments in this area.

Limited liability is a principle recognised by all market-oriented legal systems around the world as promoting optimal economic and enterprise efficiency. However, that recognition has been made indiscriminately for both single independent corporations and dependent subsidiary corporations, without any apparent consideration of the soundness or desirability of that extension.

The corporate law system of most jurisdictions generally, is grounded on entity law—the view that each corporation is a separate juridical person, even when owned and controlled by another corporation with which it conducts a common business enterprise. However, in an era of multinational corporations, where the economies of the world are closely interlocked and major economic activity is overwhelmingly conducted by centrally controlled corporate groups consisting of scores or even hundreds of affiliated corporations functioning in many different countries, entity law—however accurately it reflected the economic society of the early nineteenth century when it developed—has become hopelessly anachronistic. The entity law concept of the corporate juridical personality no longer matches the economic reality. Legal systems the world over are accordingly struggling with the development of new concepts of corporate personality to deal with this urgent problem.[18]

Since separate personality and limited liability is one of the fundamental stone of corporations, this study does not argue for a complete elimination from them but does for some targeted area partly**.** Even though the exaggerated dogma of limited liability has long been a major barrier to corporate liability, gradual changes have succeeded recent years.

This research attempts to advocate the acceptance of joint and shared liability within the corporate group based on the latest and the most innovative jurisprudential principles and doctrines. These pioneering laws will provide the most encouraging building blocks available for future doctrines of enterprise law.

Enterprise law is the conceptual solution being developed by courts and legislatures to respond to the inadequacies of anachronistic entity law inherited from the small-business world of the nineteenth century. It seeks to formulate a legal system capable of dealing adequately with the activities of giant, worldwide corporate groups. It plays a role of increasing importance in the legal systems of the modern world. The acceptance of enterprise law thus far has been incremental, selective, and supplemental. Enterprise law is not intended to replace entity law in whole corporate law, but more like in discrete areas where it better serves the underlying policies and objectives of the law. Entity law continues unchanged in other respects. Enterprise law is a pragmatic response of the legal and political system to changing political, social, and economic realities. In a selective manner, where enterprise principles implement its underlying policies and objectives, the law is

[18] Phillip.I.Blumberg, *The Multinational Challenge to Corporation Law,* (Oxford University Press, 1993), p.100

matching responsibilities to the collective economic activity. Like the evolution of such legal phenomena as derivative liability and successor liability, which it resembles closely insofar as the attribution of responsibilities are concerned, it is part of the continuing process of adaptation of older doctrines of law to accommodate the new challenges of changing realities. Developed to serve the needs of a contemporary economic society so very different from that of the past, enterprise law is an evolutionary development moving beyond the outmoded doctrine of legal entity. Closely resembling other modern legal developments adapting older doctrines to accommodate economic developments, enterprise law is a product of the modern age, an age in which the law is increasingly concerned with multifactor factual analysis, rather than with transcendental legal constructs. In several jurisdictions, certain forms of enterprise liability are recognised.

The limitations and uncertainties of lifting the corporate veil cannot provide the regulation of the corporate groups which need a selective and specific manner. The principle of veil lifting is ineffective and incomplete, and it does not have a proper legal response to the dynamics and the reality of corporate business activities, so it may be more efficient to adhere to enterprise law approach in further legislation. This mechanism has the advantage of flexibility but lacks the certainty that suitable theory-based legislation would present. There is a tendency that countries are beginning to apply the enterprise principle somehow, nevertheless, the corporate group law's failure to formulate comprehensive and coherent group regulations and laws do make it difficult for the court to apply it.

Rather than completely denying the limited liability of corporate groups, because of avoiding adverse economic consequences and radical changes, the tendency to legitimize this principle may be proper today in some areas of the law. It would be recommended to introduce the principle of extended liability in the areas of insolvency, mass tort, compensation for harm and damage to the environment at first. A broader perspective of regulation here is demanded. In doing so, consideration should be given further to when adopting enterprise liability principle, whether there must be criteria for the relationship and structure of the subsidiaries and parent or not. Understanding the distinct mechanisms of corporate groups may be a key to a fresh approach-enterprise liability.

When legal issues on corporate groups raising, law makers and researchers do not look at its regulation as complete, systematic rules must be there but just consider its single part and provision. As a result, lawyers are faced with incomprehensible and irreconcilable court decisions in legal practice. Since no systematic examinations of corporate group law have been undertaken, a full legal analysis of the relevant law at academic level is needed. Academic research based on an appropriate doctrine, with a theoretical approach is the base for solving these legal issues and difficulties.

Ideally, this partially enterprise liability framework would restructure the decisional processes within corporate groups to prevent catastrophic harms, while it enhances the reputation of the business and in compliance with justice.

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