

Limited liability - a fundamental breach of our rights?

[Dan Plesch](#) 18 June 2013

This is drawn from remarks at a meeting in the House of Lords chaired by Lord Phillips of Sudbury on Shareholder Accountability and a Fair Society, as part of a SOAS [project](#). Dr Dan Plesch first articulated the limited liability problem in his book, *The Beauty Queen's Guide to World Peace*.

I want to discuss the question of equality before the law and the right to own property freely. These are the basis of a free society and some conservatives argue that with these provisions in place there is no need for community or state activity outside the realm of security.

Thus - If you get in a car, drive recklessly and kill a group of school children, you will quite rightly be breaking the law. But if you imagine the car a limited liability company where the owners place bets on the fastest, put a driver in the front seat, paid more the faster they go, then if the accident happens you as owner of the car have no liability in law and are not required to take out third party insurance. All you have to do is go out and buy a new car and repeat the process. The best those you have damaged can hope for is part of the scrap value of the car that damaged them.

Thus under Limited Liability, owners are above the law and the injured have no right to have restoration of their property from you. Nevertheless, this 'externalisation of risk' is reputed to be the secret ingredient that makes our economy work. For some. It was Adam Smith who first sounded the alarm against the dangers of limited liability, warning in the *Wealth of Nations* that it was not reasonable to protect one group of society from the general laws simply because they could profit from it. So let's debate this point with the Adam Smith Institute, who strangely have not given much emphasis to this rule of their sage.

The Adam Smith Institute, as with so many of the self-styled 'Free Marketeers', present Limited Liability as a natural good, as obviously essential as money itself some might say. And yet it was not generally adopted until after 1900, well into the industrial revolution. It was sufficiently controversial to be the topic of the Gilbert and Sullivan Operetta, *Utopia Limited*. Perhaps we could ask Stephen Fry, producer and star of the film 'Gilbert and Sullivan', to reprise his role with a new production of *Utopia* – though you can find one on YouTube.

Although today's *Economist* magazine is a standard bearer for limited liability (LL) and two of its editors wrote a hagiographic work called *The Company*, they overlook the fact that this elite journal itself opposed LL because of its violation of the property rights of creditors until the 1920s.

One may ask, why has LL become an unchallenged and unchallengeable good? After 1945, in the west, Limited Liability was acceptable as part of a broadly social democratic mixed economy with a balance of rights and interests and broad social-state ownership. Since the Reagan-Thatcher era, accelerated by the apparent end of competition from Socialism, the demand has grown ever stronger for total corporatisation of society, prisons, public spaces,

the civil service, nationalised industries, and indeed all forms of regulation are seen as obstacles to the market.

Outside the west, the period of a balance of rights in the social contract barely if ever occurred. Instead, limited liability and especially Transfer Pricing and subsidiary company structures became the means of continuing to extract wealth from territories transformed all too often from political colonies into economic ones.

The environment is a key area where the externalisation of risk – especially where it is hard for a polar bear to go to court – produces a legalised recklessness that only strong state action can counterbalance

Now the continuing financial crisis has begun to make a new debate possible. Wealthy interests, however, are using the present situation to destroy what remains of the post-WW2 social contract and produce a new tyranny of totalitarian capitalism – dubbed the ‘total market’. It is a literally totalitarian project in that other forms of economic organisation – through the state in particular – are not to be permitted and more and more forms of social life become a corporate feeding ground.

Now let us be clear, raising the issue of LL is not to be anti-business – but it is to insist on equal rights, not *special* rights for business.

Today, faced with the crisis and the further assault on society, the response has been faltering. One tremendous advance is the pressure for tax justice, for ‘Accountable Accounting’, led in part by Prof. Sikka at the University of Essex.

And yet, one of the key features of the crisis has remained largely unexplored. When the ‘Too big to fail’ banks crashed, limited liability was cast aside, and we all as citizens were forced to take on the liabilities of the banks. But this is ignored.

Instead we see continued calls for the abolition of state regulation of the market. I notice one small indicator - that the British government will no longer regulate what companies will call themselves British, Benevolent or University.

But of course not all forms of government regulation are being removed. For limited liability is by far the greatest government regulated distortion of the market in the interest of one special interest – that of shareholders and their managers. Managers have successfully reduced the actual power of shareholders in controlling the company so that they can exist in a uniquely powerful legal no man’s land – under no practical control by shareholders and protected by LL.

If we find a proposal for deregulation of corporate controls of any sort, the first response should be – if deregulation is the agenda, then let us remove the regulation of limited liability. I think we will find that rather like waving garlic at a vampire, corporations would rather shut up about calling for de-regulation if every time they do so they are asked to deregulate their liabilities.

As an historian studying this topic it gave me far greater insight into how people in other eras meekly accepted that the aristocracy could literally ride across their fields and property as they chose. It seemed natural at the time, but at least Lords and Ladies were in some way

accountable to the Monarch. Today we assume we have all sorts of rights and yet are unaware and accepting of the rights of the modern merchant class that go beyond what even the medieval aristocracy enjoyed.

The issue of business and human rights is another area of debate that would benefit from introducing LL. So far this approach is tackling the worst excesses of business, predominantly in the third world. We need now to engage these communities in debate and ask whether they think that limited liability is consistent with Article 7 of the Universal Declaration of Human Rights which states that, “All are equal before the law and are entitled without any discrimination to equal protection of the law”. And Article 17 – ‘No one shall be arbitrarily deprived of his property’.

The Farepak scandal is a perfect example of the arbitrary removal of people’s investments in Christmas simply in order to benefit the holding company enabled by Limited Liability.

Reasserting the human right of equality before the law need not mean abolishing LL. What it does mean is starting a new debate about values.

Wealth is increased by the privilege of LL. The rich and the corporations should pay more tax and be regulated to balance that privilege. Otherwise it is simply a tyranny of the wealthy.

Corporations enjoy the benefits according to a person under law, they therefore need to be responsible persons; if they will not act like grown ups, but like spoilt teenagers, then we will have to ground them.

Fortunately we have a series of voluntary CSR provisions – at the OECD and in the UN Global Compact. We need these to have the force of law. We need to work globally so that reform proposals begin to be introduced simultaneously in the major legal centres including the EU, the US and China. Thus CSR can become not an optional PR extra but a legal duty to balance the LL rights they enjoy.

In a fair society where we are all in it together, then we need to be equal before the law. Without checks and balances LL has removed our fundamental rights.