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ORIGINAL ARTICLE

INTERNATIONAL LAW AND PRACTICE: SYMPOSIUM ON BUSINESS AND HUMAN RIGHTS: FROM SOFT TO HARD LAW

A game of cat and mouse: Human rights protection and the problem of corporate law and power

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Abstract
Human rights violations by corporations are widespread and have a broad spectrum: damage to people's health through pollution, environmental accidents and health and safety failures, forced labour or child labour, underpaid workers, displaced communities, contaminated water sources, use of excessive force, and discrimination, for example by race, gender or sexuality. Corporate violence, resulting from a long history of corporate power and colonialism continues today as corporations have grown into powerful global conglomerates. Through complex and opaque multinational groups and supply chains, use of corporate law concepts such as the corporate veil, as well as other actions such as tax avoidance and lobbying of national and international political institutions, corporate actors remain free to pursue their goals. Despite efforts to combat corporate harm through the development of a business and human rights movement success has been limited and significant gaps remain in the global governance required to ensure protection. This article argues that, similar to a cat and mouse game, corporations find new ways to defend themselves against those seeking to dismantle their power or to prevent human rights infringements. The problem is rooted in structural and systemic inequalities within the international legal framework and in company laws that maintain corporate structures that obstruct the human rights movement's progress. The current drive towards a more sustainable business agenda requires a just transition, including transformation of global and corporate structures to tackle human rights violations and the inequalities of power and wealth that facilitate such violations.

Keywords: company law; corporate power; corporate structures; hard law; human rights

1. Introduction

Human rights violations by corporations are widespread and have a broad spectrum: damage to people's health through pollution, environmental accidents and health, safety failures, forced labour or child labour, underpaid workers, displaced communities, contaminated water sources, use of excessive force, and discrimination, for example by race, gender or sexuality.[1] Corporate violence,[2] resulting from a long history of corporate power and colonialism[3] continues today as

[1]S. Ullah et al., 'Multinational Corporations and Human Rights Violations in Emerging Economies: Does Commitment to Social and Environmental Responsibility Matter?', (2021) 280 *Journal of Environmental Management* 111689.

[2]Business and Human Rights Resource Centre, at www.business-humanrights.org/en/.

[3]W. Dalrymple, *The Anarchy: The Relentless Rise of the East India Company* (2019); L. Neti, '"If you Were an Animal you Would have Eaten Me": Animal's People and the History of Corporate Colonialism', (2021) 15(1) *Law and Humanities* 25; J. McLean, 'The Transnational Corporation in History: Lessons for Today?', (2004) 79(2) *Indiana Law Journal* 363, at 365.

corporations have grown into powerful global conglomerates.[4] Through complex and opaque multinational groups and supply chains, use of corporate law concepts such as the corporate veil, as well as other actions such as tax avoidance and lobbying of national and international political institutions, corporate actors are free to pursue their goals. A business and human rights movement has responded with a 'wave of law-making and standard setting at the national, international, and corporate level'[5] but with limited success. Significant gaps remain in the global governance required to ensure protection, with human rights laws and policies still focusing predominantly on state actors rather than on global corporations. This article argues that the problem is rooted in structural and systemic inequalities embedded in the international legal framework and in company laws that obstruct the human rights movement's progress. Similar to a cat and mouse game, corporations find new ways to defend themselves against those seeking to dismantle their power or to prevent human rights infringements. Until a stronger counterweight to corporate power, including hard and soft law reform, is established, corporations will continue to profit whilst the global poor and oppressed suffer. Legal and organizational structures relating to corporations must be addressed to stamp out such abuses.

The article is presented as follows: Section 2 describes a background of corporate violence and the structural imbalances that enhance corporate power and the inadequacy of the legal responses to contain the use of such power, resulting in a continuation of corporate abuses of human rights. Section 3 shows how company laws and corporate governance harness structural inequalities and inhibit challenges against corporate abuse and disrespect of human rights. Section 4 observes a drive towards a more sustainable business agenda and confirms that this requires a just transition, including transformation of global and corporate structures to tackle human rights violations and the inequalities of power and wealth that facilitate such violations.

2. Corporate power, human rights violations and inadequate legal responses

Early English and European corporate activity was characterized by colonialism, wealth extraction and violence.[6] The East India Company is a notorious example of many companies trading internationally, as 'an aggressive colonial power'[7] engaging in 'military conquest, subjugation and plunder of vast tracts of southern Asia'.[8] Such corporate violence is unique neither to the East India Company nor to the 1600s, nor to the continent of Asia.[9] Human rights narratives are littered with examples of abuse and violations, including murder, violence, and land devastation, carried out by corporate actors or in which corporations globally are complicit, historically and today.[10] Scholars from the Third World observe that, since the fifteenth century, multi-national Companies (MNCs) have 'moved like poltergeists' internationally, with sometimes devastating impacts on land and lives of people.[11] Widespread plundering

[4]J. A. Eze and A. C. Akpunonu, 'Are "Modern" Corporations and Their Directors Becoming Too Powerful, Contributing Little To Their Non-Shareholding Stakeholders?', (2022) 2(3) *Law And Social Justice Review* 138.

[5]S. R. Ratner, 'Introduction to the Symposium on Soft and Hard Law on Business and Human Rights', (2020) 114 *American Journal of International Law Unbound* 163, at 163.

[6]See, e.g., A. Phillips, 'Company Sovereigns, Private Violence and Colonialism', in R. Abrahamsen and A. Leander (eds.), *Routledge Handbook of Private Security Studies* (2016), 39.

[7]See Dalrymple, *supra* note 3, at xxvi-xxvii; P. J. Stern, 'The English East India Company and the Modern Corporation: Legacies, Lessons, and Limitations', (2016) 39(2) *Seattle University Law Review* 423, at 433.

[8]See Dalrymple, ibid.

[9]D. Lustig, *Veiled Power: International Law and the Private Corporation 1886-1981* (2020).

[10]S. Khoury and D. Whyte, *Corporate Human Rights Violations: Global Prospects for Legal Action* (2017), at 1 (introduction, footnotes 1–4 and surrounding text).

[11]S. Agbakwa, 'A Line in the Sand: International (Dis)Order and the Impunity of Non-State Corporate Actors in the Developing World', in A. Anghie et al. (eds.), *The Third World and International Order; Law Politics, And Globalization* (2003), 1, at 3–4. See also Neti, *supra* note 3; M. Fagbongbe, 'The Future of Women's Rights from a TWAIL Perspective', (2008) 10 *International Community Law Review* 401.

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of natural resources has been pursued.[12] Today, financialized colonialism and corruption continues as poverty blights the lives of people in much of the Third World.[13]

Effective progress in protecting human rights from corporate infraction is hindered by a globally systemic and structural socio-economic inequality within and between countries.[14] Third World Approaches to International Law (TWAIL) scholars observe the structural failings of international law[15] with the emergence of human rights 'in an era of substantive colonialism', such rights developed 'under the shadow of imperialism and its shared attributes of "colonial" international law's subjugation and oppression of Third World peoples'.[16] These structural problems have been made worse by globalization, as multinational companies increasingly invested in developing countries, many becoming economically more powerful than some states.[17] These powers may be economic or non-economic, direct or indirect and are shaped by resource dependency, social exchange, and social network arrangements with their subsidiaries or their suppliers, as well as in their relationships with their workers, customers, communities, and governments.[18]

The structural advantages enjoyed by corporations have contributed to 'deeply concerning' human rights outcomes.[19] The Corporate Human Rights Benchmark project, reveals the average score across all companies since 2017[20] as only 24 per cent. In 2020, of 229 companies assessed, 104 had at least one allegation of a serious human rights impact with 225 such allegations in total.[21] Evidently, few companies demonstrate willingness to take human rights seriously, and commitments and processes do not necessarily lead to improved performance.[22] International efforts to protect against corporate human rights abuse appear to have been limited by international law structures and apparatus that continue to rely heavily on the endeavours of home states[23] and attempts to use international law against corporations have typically failed because corporations are not parties to treaties that may be enforced by international courts.[24]

[12]T. Burgis, *The Looting Machine: Warlords, Tycoons, Smugglers and the Systematic Theft of Africa's Wealth* (2015).

[13]For an explanation of the term 'Third World' in international human rights discourse see P. Simons, 'International Law's Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights', (2012) 3(1) *Journal of Human Rights and the Environment* 5, at footnote 23, citing from within the TWAIL scholarship, e.g., M. Mutua, 'What is TWAIL?', (2000) 94 *ASL Proc* 31, at 35; B. Chimni, 'Third World Approaches to International Law: A Manifesto', in A. Anghie et al. (eds.), *The Third World And International Order; Law Politics, And Globalization* (2003), 47, at 49.

[14]United Nations Department of Economic and Social Affairs, World Social Report 2020: Inequality in a Rapidly Changing World (2020). See also, J. Hickel, *The Divide* (2017).

[15]See Simons, *supra* note 13.

[16]See Fagbongbe, *supra* note 11, at 404; B. Chimni, 'The Past, Present and Future of International Law: A Critical Third World Approach', (2007) 8 *Melbourne Journal of International Law* 499.

[17]S. R. Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility', (2001) 111 (3) *Yale Law Journal* 443, at 461–2; Global Justice Now, '69 of the Richest 100 Entities on the Planet are Corporations, Not Governments, Figures Show', *Common Dreams*, 17 October 2018, available at www.commondreams.org/newswire/2018/10/17/69-richest-100-entities-planet-are-corporations-not-governments-figures-show.

[18]S. Chen, 'Multinational Corporate Power, Influence and Responsibility in Global Supply Chains', (2018) 148 *Journal of Business Ethics* 365.

[19]World Benchmarking Alliance, 'Corporate Human Rights Benchmark and World Benchmarking Alliance: Key Findings 2019', available at assets.worldbenchmarkingalliance.org/app/uploads/2021/03/CHRB2019KeyFindingsReport.pdf.

[20]Ibid.

[21]World Benchmarking Alliance, Corporate Human Rights Benchmark and World Benchmarking Alliance, 2020 Results of the Corporate Human Rights Benchmark, 16 November 2020, available at www.ohchr.org/Documents/Issues/Business/Slides.pdf. See slide 8 of this Powerpoint Presentation for these statistics.

[22]Ibid.

[23]J. Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities of International Law* (2009), at 299.

[24]See, e.g., *SERAP v. Federal Republic of Nigeria & Others* Suit, Judgment of 30 November 2010, ECW/CCJ/JUD/07/10, ECOWAS, cited by A. Okoye, 'Corporate Personality under International Law and Justice Gaps: Could Delocalisation Prompt a Potential Role Within African Regional Courts Frameworks?', (2021) *Afronomics Law*, available at www.afronomicslaw.org/category/analysis/corporate-personality-under-international-law-and-justice-gaps-could.

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One might wonder why Ratner sought in 2001 to invoke international law rather than corporate law to provide a framework to hold corporations to account for their human rights abuses or failings.[25] One possible explanation is that, rather than adapting, corporate law is underpinned by and still retains historically-based principles that no longer respond effectively to the complex structures that have evolved. Corporate actors can encroach upon human rights with impunity. Indeed, Philip Blumberg gave an account of how the major source of the problem of corporate accountability 'arises from the ancient concept of the corporate juridical entity that, particularly in the case of large public corporations, departs sharply from the economic reality of modem business enterprise'.[26] For Blumberg the central problem is:

> each individual is a separate juridical entity with his own rights and duties. When the small corporation is similarly conceived as a separate juridical entity with its rights and duties separate from those of its shareholder or shareholders, this theoretical foundation is sorely strained; and when applied to the complex corporate structure of the large multinational enterprise, it breaks down. The legal system that could largely resolve the legal problems presented by the early period of the Industrial Revolution is incapable in its traditional form of dealing effectively with the problems of the multi-tiered multinational corporate group functioning with a parent corporation, sub-holding companies, and scores or hundreds of subsidiary corporations organized under the laws of countries around the globe.[27]

Corporate structures have become hugely complex within a global marketplace that operates speedily, with sophisticated technologies and networks designed to generate high profits for the 'owners' of such entities.[28]

A business and human rights movement has been established in response to these problems and seeks to ensure corporate accountability for human rights violations, inspired largely by the UN *Guiding Principles on Business and Human Rights* (UNGPs), introduced under the 2008 *Protect, Respect and Remedy* policy framework and endorsed by the UN Human Rights Council in 2011.[29] The UNGPs do not impose binding obligations on corporations but they lend support to the Global Compact, a voluntary initiative based on commitments made by corporate chief executive officers to sustainability and adopted by the UN in 2005. The Global Compact contains a set of ten principles of business responsibility including: Principle 1: 'Businesses should support and respect the protection of internationally proclaimed human rights'; and Principle 2: businesses should 'make sure that they are not complicit in human rights abuses'.[30] Yet the real problem is structural as Blumberg's observation shows and it 'has everything to do with the organizing framework of global society'.[31]

This article examines contemporary corporate laws in the context of global corporate activity. Such laws have facilitated a corporate power grab with negative human rights impacts. Baars, thus suggests that 'the modern corporation as "the end of history" in economic organization continues to produce knowledge, policy and legal decisions and instruments, that self-perpetuate capitalism

[25]See Ratner, *supra* note 17.

[26]P. I. Blumberg, 'Accountability of Multinational Corporations: The Barriers Presented by Concepts of the Corporate Juridical Entity', (2001) 24 (3) *Hastings International and Comparative Law Review* 297, at 298.

[27]Ibid., at 300.

[28]G. Morgan, 'Power Relations Within Multinational Corporations', in A. Noelke and C. May (eds.), *Handbook of the International Political Economy of the Corporation* (2018), 262.

[29]UNHRCOR, Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General [SRSG] on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, UN Doc. A/HRC/8/5 (2008).

[30]UN Global Compact, The Ten Principles of the UN Global Compact, Principles 1 and 2, available at www.unglobalcompact.org/what-is-gc/mission/principles.

[31]P. Joseph, *The New Human Rights Movement* (Kindle edition, 2018), at 219.

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and reproduce current socio-economic hierarchies'.[32] This company law dimension is explored in the next section.

3. Company laws as part of the problem: Upholding inequalities and limited accountability provisions

This section will show how company laws may bolster power and exploitation. By providing 'the regulatory infrastructure for companies',[33]and the structural tools that help companies to obtain and maintain power,[34] such laws and regulations uphold inequalities and, for Joseph, they reinforce 'a social view that makes any notion of equality or abundance almost inconceivable and the gravitation toward dominance and exploitation virtually inevitable'.[35] Whilst there are differences between company laws and corporate governance across the world[36] and within regions,[37] on the fundamental aspects and legal characteristics of corporations they adopt a broadly similar focus.[38]

The universal principles are separate legal personality for each company and limited liability for the shareholders.[39] In a corporate group the parent company remains legally separate and independent from its subsidiaries. These principles are accompanied by a generalized company law structural design, particularly in Anglo-American corporate law, that separates the managers and the shareholders,[40] and a hierarchy in which the boardroom decides on business strategy and is accountable to the shareholders in general meetings and, with the aid of employment law, the managers instruct the workers and employees to co-operate with the pursuit of the company's objectives, which are ultimately to make profit. Labour is effectively commodified[41] and is positioned low down in this corporate hierarchy.[42] Some of these structural features may vary across different corporate law systems as they are shaped to accommodate the particular pattern of shareholdings: greater emphasis on protection of shareholders occurs when they are more dispersed and less concentrated[43] whereas in systems with more concentrated shareholdings, stakeholders may be more readily recognized and workers may be represented in the board or supervisory

[32]G. Baars, '"It's Not Me, It's the Corporation": The Value of Corporate Accountability in the Global Political Economy', (2016) 4(1) *London Review of International Law* 127, at 138.

[33]B. Sjafjell, 'How Company Law Has Failed Human Rights - and What to do About it', (2020) 5(2) *Business and Human Rights Journal* 179, at 180.

[34]A. Boggio, 'Linking Corporate Power to Corporate Structures: An Empirical Review', (2013) 22(1) *Social & Legal Studies* 107, at 128.

[35]See Joseph, *supra* note 31, at 52.

[36]K. Pistor et al., 'Evolution of Corporate Law: A Cross-Country Comparison', (2002) 23(4) *Pennsylvania Journal of International Economic Law* 791; L. A. Bebchuk and M. S. Weisbach, 'The State of Corporate Governance Research', (2010) 23(3) *The Review of Financial Studies* 939; C. Palmer, 'Has the Worldwide Convergence on the Anglo-American Style Shareholder Model of Corporate Law yet Been Assured?', (2011) 6 (11) *Opticon1826*.

[37]The African continent has a mix of 'francophone' states with civil law jurisdictions and Anglophone states with common law systems: see Okoye, *supra* note 24.

[38]R. Kraakman, et al., *The Anatomy of Corporate Law: A Comparative and Functional Approach* (2017), at 1.

[39]Ibid.

[40]K. J. Hopt and P. C. Leyens, 'Board Models in Europe-Recent Developments of Internal Corporate Governance Structures in Germany, the United Kingdom, France, and Italy', in L. Timmermann (ed.), *The Verenigde Oostindische Compagnie 1602 – 400 Years of Company Law* (2004).

[41]C. Villiers, 'Corporate Governance, Employee Voice and the Interests of Employees: The Broken Promise of a "World Leading Package of Corporate Reforms"', (2021) 50 (2) *Industrial Law Journal* 159; see Sjafjell, *supra* note 33.

[42]Though one might note the codetermination feature in many continental European corporate law systems such as in Germany which provides workers with boardroom representation, enhancing their position in the hierarchy: for a discussion, see S. Jager, S. Noy and B. Schoeffer, 'What Does Codetermination Do?', (2021) Working Paper 28921 National Bureau of Economic Research, available at www.nber.org/system/files/working_papers/w28921/w28921.pdf.

[43]See Kraakman et al., *supra* note 38, at 27.

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board, as in Germany's 'Rhenish capitalism' model.[44] Across all models boardroom directors are subject principally to the legal duty to act in the company's interest. The predominant regulatory control of corporate activities is reporting and disclosure. This section explores each of these features and their effects.

3.1 Separate legal personality and limited liability

Separate legal personality for the company and limited liability for the shareholders are the cornerstones of company laws across the world.[45] Separate legal personality means that the company, as a legal person, can own property independently of its members, it can enter into contracts and pursue business and it has the capacity to sue and be sued with regard to its own liabilities.[46] Corporate legal personality is stretched toward natural personhood and the company becomes capable of 'enjoying rights, exercising powers and incurring duties and obligations'.[47]

The corporation may adopt 'citizenship'[48] and attempts to establish corporate criminal liability, include allusions to a corporate 'soul'.[49] In the US, constitutional rights normally enjoyed by human persons have also been accorded to corporations by the US Supreme Court, such as the First Amendment right to free speech[50] as well as a limited right to religious freedom, at least for closely held profit corporations.[51] This enjoyment of rights intended for natural persons increases corporate power and influence over the sovereignty of human citizens.[52]

Legal personhood is also stretched in the international law and human rights context to allow corporations to claim rights of their own.[53] Article 1, Protocol 1 of the European Convention on Human Rights, for example, states that 'every natural *or legal person* is entitled to the peaceful enjoyment of his possessions' (emphasis added). Companies have thus claimed protection of their property rights as well as right to a fair trial and the right to free speech.[54] Similarly, the International Court of Justice confirmed in 1970 that a transnational corporation (TNC) has a legal status analogous to an individual state national and a right of diplomatic protection that can be invoked by the state on its behalf.[55] This linkage between state and corporation might be described as artificial given the possibility for the choice of state of incorporation being made based on matters of convenience such as tax, and the potential for injustice is significant as such corporations may enjoy diplomatic protection or states might not exercise their powers sufficiently to control them or hold them to account.[56] Okoye notes, for example, that Nigeria's

[44]See, for example, J. Edwards and M. Nibler, 'Corporate Governance in Germany: The Role of Banks and Ownership Concentration', (2000) 15(31) *Economic Policy* 237; cited in A. Ruehmkorf, F. Spindler and S. Navajyoti, 'Evolution of German Corporate Governance (1995-2014): An Empirical Analysis', (2019) 19(5) *Corporate Governance* 1042.

[45]See Kraakman et al., *supra* note 38, at 2; although see R. Harris, 'A New Understanding of the History of Limited Liability: An Invitation for Theoretical Reframing', (2020) 16(5) *Journal of Institutional Economics* 643.

[46]See further *Salomon v. A Salomon & Co Ltd*, [1897] AC 22 (House of Lords).

[47]S. Worthington, *Sealy and Worthington's Text Cases and Materials in Company Law* (2016), at 62.

[48]S. B. Banerjee, 'Corporate Social Responsibility: The Good, the Bad and the Ugly', (2008) 34(1) *Critical Sociology* 51.

[49]G. Baars, 'Capital, Corporate Citizenship and Legitimacy: The Ideological Force of "Corporate Crime" in International Law', in G. Baars and A. Spicer (eds.), *The Corporation: A Critical, Multi-Disciplinary Handbook* (2017), 419, at 422.

[50]*Citizens United v. Federal Electoral Commission*, 558 U.S. 310, 130 S. Ct. 876 (2010).

[51]*Burwell v. Hobby Lobby Stores Inc*, 573 U.S. 682 (more) 134 S. Ct. 2751.

[52]C. J. Mayer, 'Personalizing the Impersonal: Corporations and the Bill of Rights', (1990) 41 *Hastings Law Journal* 577.

[53]M. Addo, 'The Corporation as a Victim of Human Rights Violations', in M. Addo (ed.) *Human Rights Standards and the Responsibility of Transnational Corporations* (1999), 23, at 187; cf. A. Grear, 'Challenging Corporate 'Humanity': Legal Disembodiment, Embodiment and Human Rights', (2007) 7(3) *Human Rights Law Review* 511.

[54]M. Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (2006).

[55]*The Barcelona Traction, Light and Power Co Ltd Case (Belgium v. Spain)*, Merits, Judgment of 5 February 1970, [1970] ICJ Rep. 3, paras. 33, 70.

[56]F. Johns 'The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory', (1994) 19(4) *Melbourne University Law Review* 893.

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economic dependence on multinational oil companies undermines that state's ability and willingness to control or regulate them effectively.[57]

Separate legal personality gives to the company an autonomous legal status,[58] and a protective barrier from legal responsibility for its members or for other companies within a corporate group, shielded by a 'veil of incorporation'. Directors and members are protected against personal liability and, through limited liability, they are protected against liability for the company's losses. Similarly, in a corporate group, liability belongs only to the company found to have done wrong. If the company is not solvent, none of the other solvent companies within the group will be held liable in its place. An important but limited exception to this general principle is found in the 'controlling enterprise concept' applied to the corporate group as is seen in Germany and in some other states such as Portugal, Italy and Brazil.[59] Generally though, the corporate group is not regulated as a complete legal entity for the purpose of legal liability.

Rarely, this 'veil of incorporation' is lifted or pierced and the members (or the parent company) then take on the liability; a court may seek to identify the members or parent company or its subsidiaries and look to them for recovering relevant losses.[60] In civil law jurisdictions, for example, exception to the status of separate legal personality is found in cases of misuse, fraud, malfeasance or evasion of legal obligations.[61] A rare example can be seen in the Lago Agrio litigation (discussed below) in which the Ecuadorian Superior Court rejected the defence made by Chevron based on its separate existence from its predecessor Texaco Petroleum Inc.[62] Similarly, in the English courts, case law confirms that 'it is appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere façade concealing the true facts'[63] or evades an existing legal obligation or liability.[64] Nevertheless, the UK Court of Appeal in *Adams* v. *Cape industries plc* made clear the corporate veil could only be disregarded where it was being used for a deliberately dishonest purpose.[65] Subsequently, in the UK Supreme Court in *VTB Capital plc* v. *Nutritek International Corpn*,[66] Lord Neuberger confirmed that any doctrine permitting the court to pierce the corporate veil must be limited to cases where there was a relevant impropriety.[67]

3.1.1 Litigation obstacles

The separate legal personality has significant effect in the international human rights litigation context. Indeed, a growing, already sizeable, body of litigation concerned with tort liability and human rights[68] has made only limited progress in holding parent companies to account

[57]See Okoye, *supra* note 24, citing K. Soremekun and C. Obi, 'The Changing Pattern of Private Foreign Investments in the Nigerian Oil Industry', (1993) 18(3) *Africa Development/Afrique et Développemen* 5.

[58]See *Salomon v. Salomon, supra* note 46.

[59]V. Harper Ho, G. Berger-Walliser and R. Chambers, 'Corporate Groups: Toward Corporate Group Accountability', in M. Petrin and C. Witting (eds.), *Handbook of Corporate Liability* (forthcoming), at footnote 4 and surrounding text.

[60]See further, A. Michoud, 'Aiming for Corporate Accountability's Heart: A Discussion on the Relevance of Corporate Veil Piercing', (2019) 6 *Bristol Law Review* 134.

[61]Per Lord Sumption in *Prest v. Petrodel Resources Limited,* [2013] UKSC 34, para. 17.

[62]*Aguinda v. Chevron*, Case No. 2003-0002 (2011 Corte Provincial De Justicia De Sucumbios, Ecuador). See also A. Yilmaz-Vastardi and R. Chambers, 'Overcoming The Corporate Veil Challenge: Could Investment Law Inspire The Proposed Business And Human Rights Treaty?', (2018) 67(2) *International and Comparative Law Quarterly* 389.

[63]Per Lord Keith of Kinkel in *Woolfson v. Strathclyde Regional Council,* [1978] House of Lords 90, para. 96.

[64]See *Prest v. Petrodel Resources Limited*, *supra* note 61, para. 35.

[65]*Adams v Cape Industries plc,* [1989] Ch 433, (UK Court of Appeal, Civil Division), per Slade LJ, paras. 539–540.

[66]*VTB Capital plc v. Nutritek International Corpn*, [2013] UKSC 5.

[67]Ibid., paras. 128, 145.

[68]See Business and Human Rights Resource Centre Lawsuit Database, which to date has tracked 209 cases: www.business-humanrights.org/en/from-us/lawsuits-database/. For a comprehensive multi-jurisdictional overview see R. Meera and J. Meeran J (eds.), *Human Rights Litigation Against Multinationals in Practice* (2021).

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for the harmful operations of their subsidiaries.[69] Much of the case law reveals the procedural advantages enjoyed by corporations as the litigation is characterized by claimants invariably facing high costs, informational asymmetries and tactical delay manipulations by corporations and their representatives,[70] again highlighting power imbalances that favour the corporations. Many such problems are not unique to the UK but pervade this legal landscape across all jurisdictions.[71] Most often the cases end up being dismissed or settled out of court[72] leaving the claimants perhaps with some financial redress, but rarely a declaration of fault. In her discussion of the *Monterrico* case, a lawsuit challenging human rights abuses committed in the context of an industrial mining project in Peru, Lindt remarks that the eventual settlement 'impeded the search for justice and determination of the truth'.[73] A settlement may not reflect the true extent of the wrong-doing or the harm caused. Claimants may feel cornered into accepting the settlement compromise or continue with the litigation and all the risks that entails.[74] Even more concerning, a settlement may be used to enhance the corporation's reputation as though it had been generous to the victims of its wrongdoing.[75]

The economic unity of the multinational firm does not generally provide a reason for lifting the veil, leaving a significant gap in obtaining redress for human rights abuses, whilst ensuring that the multinational enjoys, 'power, authority and relative autonomy'.[76] Human rights infringements frequently occur in jurisdictions in which legal protections are weak, or the harm will have been caused by a subsidiary with limited financial assets, sometimes as an accessory to torts or violence committed by state authorities.[77] The victims will seek to pursue their claim against the financially resourced parent company located in a developed jurisdiction with a strong legal system. Unfortunately for such victims, separate personality and limited liability often mean that the 'wrong' company is being pursued – the parent company, independent from the wrongdoer, has no legal obligation to compensate the victims for the harms suffered, and, as a shareholder of the subsidiary, the parent is also protected by

[69]See, e.g., French litigation brought by 11 former Syrian employees and two NGOs against Lafarge in 2016: account of the ongoing litigation in Business and Human Rights Resource Centre, 'Lafarge Lawsuit (Re Complicity in Crimes against Humanity in Syria)', available at www.business-humanrights.org/en/latest-news/lafarge-lawsuit-re-complicity-in-crimes-against-humanity-in-syria/.

On limited progress see J. Schrempf-Stirling and F. Wettstein, 'Beyond Guilty Verdicts: Human Rights Litigation and Its Impact on Corporations' Human Rights Policies', (2017) 145(3) *Journal of Business Ethics* 545.

[70]See *VTB Capital plc v. Nutriek International Corp*, *supra* note 66, para. 82, per Lord Neuberger, noting the tactical behaviours of the richer litigants designed to wear down the poorer party; in C. Bradshaw, 'Corporate Liability for Toxic Torts Abroad: Vedanta v Lungowe in the Supreme Court', (2020) 32(1) *Journal of Environmental Law* 139, at 143; A. Schilling-Vacaflor, 'A. Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?', (2021) 22(1) *Human Rights Review* 109.

[71]See, e.g., the German case, *Jabir v. KiK Textilien und Non-Food GmbH*, dismissed because the statute of limitation under Pakistani law, which applied to the case under German conflict of law rules, had expired. Case No. 7 O 95/15, Landgericht Dortmund [LG] [District Court Dortmund] Jan. 10, 2019 (Ger.), reported in Business and Human Rights Resource Centre, www.business-humanrights.org/en/latest-news/kik-lawsuit-re-pakistan/, cited in Harper Ho, Berger-Walliser and Chambers, *supra* note 59.

[72]A. Lindt, 'Transnational Human Rights Litigation: A Means of Obtaining Effective Remedy Abroad?', (2020) 4(2) *Journal of Legal Anthropology* 57, at 58; E. Aristova, 'Tort Litigation against Transnational Corporations in the English Courts: The Challenge of Jurisdiction', (2018) 14(2) *Utrecht Law Review* 6, at 20.

[73]See Lindt, ibid., at 73.

[74]As observed with the Bhopal example below see also J. Cassels, 'The Uncertain Promise of Law: Lessons from Bhopal', (1991) 29(1) *Osgoode Hall Law Journal* 1.

[75]G. Barzilai, 'The Ambivalent Language of Lawyers in Israel: Liberal Politics, Economic Liberalism, Silence, and Dissent', in T. C. Halliday, L. Karpik and M. M. Feeley (eds.), *Fighting for Political Freedom* (2007), 247.

[76]J. G. Ruggie, 'Multinationals as Global Institution: Power, Authority and Relative Autonomy', (2018) 12(3) *Regulation & Governance* 317, at 321.

[77]*Kadie Kalma & ors v. African Minerals Ltd & ors*, [2020] EWCA Civ 144.

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the principle of limited liability.[78] The consequence for the victims, unless the corporate veil is pierced, or the parent company is found to have breached its duty of care to the victims, is to be left without recompense.

A notorious example of the law failing victims in this way is found in the litigation that followed the disaster arising from a toxic gas leak at the Union Carbide of India Ltd factory in Bhopal in India in December 1984, killing more than 5,000 people and poisoning approximately 575,000. One major barrier to recompense from the parent company, Union Carbide Corporation, headquartered in the US, was the legal device of the corporate veil behind which the parent company distanced itself from the actions of the Indian subsidiary.[79] The parent company agreed to pay a miniscule settlement of approximately US$470 million in 1989 conditional on legal claims against the company being extinguished. A wide consensus concludes that the victims were denied true access to justice.[80] The Lago Agrio litigation against Texaco and its successor, Chevron, is another example in which plaintiffs tried to sue an oil corporation in its home state – the US – only to get referred to the host state – Ecuador – where they won a US$8 billion judgment in compensation for massive oil pollution arising from oil development during the 1970s, but then were effectively refused relief as the company no longer had assets in Ecuador, and other countries refused claims for execution of the judgment (also impugning Ecuadorian standards of justice).[81]

Whilst the US was previously regarded as a 'mecca' for this type of litigation that status ended when the US Supreme Court in *Kiobel* v. *Royal Dutch Shell*[82] and *Jesner* v. *Arab Bank*,[83] made clear that the US courts had limited jurisdiction over corporate human rights cases and prioritized extraterritoriality concerns over access to effective legal remedies, giving way to more cases being heard in Europe and in Canada and Australia.[84] There has been a recent shift, at least in principle, towards increasing the possibility of liability for breach of a duty of care by English domiciled parent companies, identified as 'anchor defendants', where they have exercised sufficient control over their subsidiaries operating in foreign countries. Yet, difficulty arises when seeking to establish that there is sufficient control being exercised. In *Vedanta Resources Plc* v. *Lungowe*,[85] the Supreme Court decided upon the issues of jurisdiction but also signalled the factors that would give rise to a duty of care on behalf of the parent company. The Supreme Court rulings in both *Vedanta* and the later decision of *Okpabi* confirm that the test regarding the imposition of a duty of care depends on the extent to which, and the way in which, the parent intervened in, controlled, supervised or advised the management of the relevant operations of the subsidiary.[86] These two rulings open the door just a little more to potential claims against parent companies but there is still insufficient clarity on the question of how much control or influence will be 'enough' to find a duty of care. For parent companies, the lawyers' advice may be to ensure 'competent, autonomous and empowered local management of foreign subsidiaries, whilst making clear to those

[78]Economic and Social Council, International Committee on Economic and Social and Cultural Rights, General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities UN Doc. E/C.12/GC/24 (2017).

[79]On the legal limitations for the victims see Cassels, *supra* note 74. See also S. Deva, 'Bhopal: The Saga Continues 31 Years On', in D. Baumann-Pauly and J. Nolan (eds.), *Business and Human Rights: From Principles to Practice* (2016), 22.

[80]J. K. Krishnan, 'Bhopal in the Federal Courts: How Indian Victims Failed to Get Justice in the United States', (2020) 72(3) *Rutgers University Law Review* 705. See further U. Baxi, 'Human Rights Responsibility of Multinational Corporations, Political Ecology of Injustice: Learning from Bhopal Thirty Plus?', (2016) 1(1) *Business and Human Rights Journal* 21.

[81]R. V. Percival, 'Transnational Litigation: What can We Learn from Chevron–Ecuador?', in V. Heyvaert and L. Duvic-Paoli (eds.), *Research Handbook on Transnational Environmental Law* (2020), 318; D. Khatam, 'Chevron and Ecuador Proceedings: A Primer on Transnational Litigation Strategies', (2017) 53(2) *Stanford Journal of International Law* 249.

[82]*Kiobel v. Royal Dutch Shell*, 569 US 108 (Sup.Ct.2013), at 14.

[83]*Jesner v. Arab Bank,* 584 US (Sup.Ct. 2018), at 27.

[84]R. Chambers and G. Berger-Walliser, 'The Future of International Corporate Human Rights Litigation: A Transatlantic Comparison', (2021) 58(3) *American Business Law Journal* 579, at 582.

[85]*Vedanta Resources Plc v. Lungowe* [2019] UKSC 20.

[86]Ibid. See also *Okpabi v. Royal Dutch Shell Plc*, [2021] UKSC 3, paras. 150–152, rejecting the Court of Appeal's approach.

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subsidiaries that they remain responsible for implementing group policy frameworks'.[87] A similar outcome was achieved in the recent Netherlands based judgment of the Court of Appeal in The Hague, *Four Nigerian Farmers and Milieudefensie* v. *Shell*, finding, on the facts, that, alongside the negligence of the subsidiaries, the parent company was also in breach of its duty of care towards the claimants for failing to ensure that a Leak Defence System had been installed.[88] Undoubtedly, these recent decisions will lead corporations to become cautious around their organizational structures, their documentation and publicity materials as they seek to avoid the risk of parent company liability. Commentators are wary that 'as the duty of care of parent companies hinges on factual control', they could 'escape liability' by maintaining clear operational division[89] and 'a separate relationship with their subsidiary companies'.[90]

Given the above, the odds of victims winning a claim in the courts, establishing that the company has violated their human rights and obtaining full remedy for the harm suffered, remain small. Shareholders (and directors) 'will never pay the full costs of the social harms caused'[91] but they will retain their power in the corporation.

3.2 Shareholder primacy and corporate structure

Stakeholder value remains a well-recognized model in jurisdictions such as Japan[92] or Germany and other civil law and continental European systems such as France and Belgium.[93] However, the shareholder primacy model appears still to have a relative, though not complete,[94] global dominance with laws, regulations and codes of countries across the world having converged to differing degrees towards it during the early 2000s. In this way, Samanta observes, using a Bayesian methodology, that countries like Germany, UK, Chile, Iran, Nigeria, and Colombia have shifted very slightly towards shareholder primacy; countries like El Salvador, Hong Kong, Poland, Argentina, and India have shown larger shifts; Brazil, Pakistan, Indonesia, Peru, and the Philippines there have shown 'major shifts', and Vietnam, China, Russia, South Africa, and Kenya have shifted significantly towards adopting shareholder primacy corporate governance principles.[95] Samanta remarks that 'corporate governance regulations across the world have never looked so similar'.[96]

[87]G. Jones, 'Putting Jurisdiction in its "Proper Place"', *Addleshaw Goddard LLP*, 15 April 2019, available at www.addleshawgoddard.com/en/insights/insights-briefings/2019/litigation/putting-jurisdiction-in-its-proper-place/.

[88]*Four Nigerian Farmers and Stichting Milieudefensie v. Royal Dutch Shell plc and another* [2021] ECLI:NL:GHDHA:2021:132 (Oruma), ECLI:NL:GHDHA:2021:133 (Goi) and ECLI:NL:GHDHA:2021:134 (Ikot Ada Udo).

See English version of the report, available at www.uitspraken.rechtspraak.nl/inziendocument?id = ECLI:NL:GHDHA:2021:132; see further L. Roorda and D. Leader, 'Okpabi v Shell and Four Nigerian Farmers v Shell: Parent Company Liability Back in Court', (2021) 6(2) *Business and Human Rights Journal* 368.

[89]L. Horne and L. Roberts, 'Vedanta v Lungowe & Others: Liability of a UK Parent Company', *McFarlanes*, 12 June 2019, available at www.macfarlanes.com/what-we-think/in-depth/2019/vedanta-v-lungowe-others-liability-of-a-uk-parent-company/.

[90]W. Tiruneh, 'Holding the Parent Company Liable for Human Rights Abuses Committed Abroad: The Case of the Four Nigerian Farmers and Milieudefensie v. Shell', *EJIL:Talk!*, 19 February 2021, available at www.ejiltalk.org/holding-the-parent-company-liable-for-human-rights-abuses-committed-abroad-the-case-of-the-four-nigerian-farmers-and-milieudefensie-v-shell/.

[91]D. Whyte, 'The Autonomous Corporation: The Acceptable Mask of Capitalism', (2018) 29(1) *King's Law Journal* 88, at 90.

[92]S. K. Vogel, 'Japan's Ambivalent Pursuit of Shareholder Capitalism', (2019) 47(1) *Politics & Society* 117.

[93]See, e.g., the Accountable Capitalism Act introduced by Elizabeth Warren in the US in 2018; see also S. Cools, 'The Real Difference in Corporate Law between the United States and Continental Europe: Distribution of Powers', (2005) 30(3) *Delaware Journal of Corporate Law* 697.

[94]See Palmer, *supra* note 36.

[95]N. Samanta, 'Convergence to Shareholder Primacy Corporate-Governance: Evidence from a Leximetric Analysis of the Evolution of Corporate-Governance Regulations in 21 Countries, 1995-2014', (2019) 19(5) *Corporate Governance: The International Journal of Business in Society* 849.

[96]Ibid., at 869.

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Ultimately, whilst there is still debate about the extent to which shareholder primacy has been adopted in corporate laws around the globe, with many jurisdictions still holding on to their stakeholder-oriented credentials,[97] it is quite clear that shareholder primacy may be viewed as dominant, having been promoted by international financial institutions such as the Organization for Economic Cooperation and Development, the International Accounting Standards Board, the International Monetary Fund and the World Bank, perhaps lending to it a powerful influence over globalized markets.[98] The OECD's Principles of Corporate Governance,[99] for example, supported by the OECD's Guidelines for Multinational Enterprises,[100] encourage the board to ensure the strategic guidance of the enterprise, the effective monitoring of management and to be accountable to the enterprise and to the shareholders, while taking into account the interests of stakeholders.[101] The Principles emphasise the shareholders' interests and highlight an Anglo-American approach[102] and, whilst they encourage recognition of stakeholders, such recognition is limited to rights those stakeholders have been granted outside the corporate domain.[103] The International Accounting Standards Board's Conceptual Framework for Financial Reporting is clear about its prioritizsing the financial investors, stating expressly: 'The objective of general purpose financial reporting is to provide financial information about the reporting entity that is useful to existing and potential investors, lenders and other creditors in making decisions relating to providing resources to the entity.'[104] Similarly, the IMF's Global Financial Stability Report in 2016 showed adherence to a value maximization approach to corporate governance highlighting the need for emerging markets to 'bolster the rights of outside investors'[105] and the World Bank's annual *Doing Business* reports highlight shareholder primacy and the common law models of corporate law.[106] The impact of these international institutions has perhaps been to push an agenda based on the Anglo-American, shareholder primacy model onto developing economies regardless of their preferences, and has helped to entrench this model globally and establish barriers to adoption of CSR or stakeholder models.[107]

From both the stakeholder and human rights perspectives, shareholder primacy is a problematic norm. The consequence is to shut out other stakeholders (despite claims to recognize them) from important company law decision-making processes and for the shareholders and the directors to benefit at the expense of those other stakeholders who have contributed to the company's success and/or endured the cost of externalities arising from the corporation's activities. The corporation becomes, for Chomsky, a 'dictatorial power' which is the 'inverse of democratic control': 'all authority necessarily proceeds from the top to the bottom and all responsibility from the bottom to the top'.[108] In this structural arrangement employees are generally situated low down in the corporate hierarchy and yet, with their firm specific investments and efforts that enhance the value

[97]D. Gindis, J. Veldman and H. Willmott, 'Convergent and Divergent Trajectories of Corporate Governance', (2020) 24(5) *Competition & Change* 399.

[98]S. Soederberg, 'The Promotion of "Anglo-American" Corporate Governance in the South: Who Benefits from the New International Standard?', (2003) 24(1) *Third World Quarterly* 7, at 9. See also S. M. Jacoby, 'Shareholder Primacy and Labor', (2022), available at ssrn.com/abstract = 4047194 or dx.doi.org/10.2139/ssrn.4047194.

[99]G20/OECD Principles of Corporate Governance, OECD (2015).

[100]OECD Guidelines for Multinational Enterprises, OECD (2011).

[101]Ibid., Commentary on General Policies, para. 8.

[102]P. Ireland, 'Financialization and Corporate Governance', (2009) 60 (1) *Northern Ireland Legal Quarterly* 1.

[103]U. Nwoke, *Neoliberal Corporate Governance, Oil MNCs and the Niger Delta Region: The Barriers to Effective CSR* (2015), Doctoral dissertation, University of Kent, available at core.ac.uk/download/pdf/30708383.pdf, at 232.

[104]International Accounting Standards Board, Conceptual Framework for Financial Reporting (2018), para 1.2.

[105]International Monetary Fund, Fostering Financial Stability in a Low-Growth Low Rate Era, Global Financial Stability Report (October 2016), Ch. 3, at 81.

[106]World Bank Doing Business Reports, e.g., Protecting Minority Investors: Achieving Sound Corporate Governance (2017); see also L. Mélon, *Shareholder Primacy and Global Business: Re-clothing the EU Corporate Law* (2019).

[107]See Nwoke, *supra* note 103.

[108]N. Chomsky and B. Pateman, *On Anarchism* (2005), 364, cited by Joseph, *supra* note 31, at 111.

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of the firm, they are usually most at risk when the company encounters financial difficulties. They cannot diversify their interests as shareholders can, they do not enjoy dividend pay-outs and they face management squeeze on their wages as well as risk of job loss.[109] Globalization has further complicated these arrangements as companies operate in groups or in supply chain structures. Workers in these supply chains, who might suffer from exploitation or damaging externalities, or human rights abuse victims, face barriers to establishing legal liability, similar to those explored above vis-à-vis parent companies[110] resulting in risk of injustice[111] to the extent potentially that their 'legal consciousness' is altered and they start to turn away from rights discourse, as has been observed in Thailand.[112]

3.3 Directors' duties and shareholder primacy

Within these hierarchical and complex corporate structures, the directors play a pivotal role. Company laws impose duties upon directors. The English law is illustrative with directors' duties found in statute but largely deriving from directors' fiduciary position. Directors have a duty to act within the powers granted to them in law and in the company's constitution, to exercise those powers for a proper purpose, to promote the success of the company, to exercise independent judgement, to exercise reasonable skill, care and diligence, to avoid a conflict of interests, not to accept benefits from third parties and to declare an interest in transactions or arrangements with the company.[113] The directors' fiduciary duties are owed to the company, though rarely, in 'special factual circumstances' a fiduciary duty might be owed directly to the shareholders, such as in the context of an acquisition or disposal of shares, if the directors hold themselves out as agents for shareholders, make material representations to shareholders, fail to make material disclosures to shareholders, or provide specific information and advice on which shareholders rely.[114]

The duty to promote the company's success has been recognized by the UK's National Contact Point for the UN's Guiding Principles.[115] This duty, in section 172 of the UK's Companies Act 2006, requires directors, to consider what is likely to promote the company's success 'for the benefit of its members as a whole', having regard to the interests of a range of stakeholders. The provision still prioritizes the shareholders' interests, even though other stakeholders' interests are at least recognized as relevant.[116] Notably, large companies are required to publish a Strategic Report under section 414A of the Companies Act to demonstrate how directors have discharged their section 172 duty. Section 414C guides companies on what information is to be disclosed which unsurprisingly refers to the stakeholder interests identified in section 172. Nevertheless, section 414C also provides discretion and a degree of autonomy about how and what is to be disclosed as companies need only disclose that information 'to the extent necessary for an understanding of the development, performance or position of the company's business'. The discretion granted to companies about what to disclose and the lack of legal standing for interested stakeholders other than

[109]G. M. Hayden and M. T. Bodie, 'The Argument from the Residual', in G. M. Hayden and M. T. Bodie (eds.), *Reconstructing the Corporation: From Shareholder Primacy to Shared Governance* (2021), 88.

[110]C. Terwindt et al., 'Supply Chain Liability: Pushing the Boundaries of the Common Law?', (2018) 8(3) *Journal of European Tort Law* 261.

[111]See Okoye, *supra* note 24.

[112]D. Engel, 'Globalization and the Decline of Legal Consciousness: Torts, Ghosts, and Karma in Thailand', (2005) 30(3) *Law & Social Inquiry* 469.

[113]UK Companies Act 2006, Part 10, Ch. 2.

[114]For a recent clarification see *Vald Nielson Holding A/S v. Baldorino* [2019] EWHC 1926 (Comm).

[115]UK Foreign & Commonwealth Office, 'Good Business: Implementing the UN Guiding Principles on Business & Human Rights', May 2016, Cm 9255, available at assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/522805/Good_Business_Implementing_the_UN_Guiding_Principles_on_Business_and_Human_Rights_updated_May_2016.pdf.

[116]A. Keay, 'Moving Towards Stakeholderism? Constituency Statutes, Enlightened Shareholder Value, and More: Much Ado About Little?', (2011) 22(1) *European Business Law Review* 1.

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the shareholders through a derivative claim, mean that section 172 is likely to disappoint stakeholders. Evidence presented in a qualitative data analysis of the Annual Reports of eight retail companies in the FTSE100 by Keay and Iqbal suggests that the Strategic Report is unlikely to be of much use. Keay and Iqbal found that the Reports they studied showed 'no significant evidence of attempting to link the reporting to the s.172 duty, and no material information was provided on the decision-making process of the directors while attempting to comply with the s.172 duty'.[117]

The UK's section 172 is different from what was enacted in India's section 166(2) of the Companies Act 2013 which presents superficially a pluralist approach in which the shareholders and other stakeholders are to be given equal consideration:

> A director of a company shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, *and* in the best interests of the company, its employees, the shareholders, the community and for the protection of environment(emphasis added).

The Indian provision appears more strongly to pursue a stakeholder orientation, reinforced perhaps by that company law regime's support for corporate social responsibility,[118] as manifested in section 135(1) of the same legislation which requires companies of a certain size to establish a CSR Committee and to spend 2 per cent of its average net profits over three years on CSR activities.[119] Despite the apparently different systems, in practice these duties in sections 172 (UK) and 166 (India) have a similar impact: the duty is rather vague as is the range of stakeholders covered. In both jurisdictions the stakeholders have no means of redress if the directors breach their duty to act in their interests or have regard to them: only the shareholders may act by pursuing a derivative action, which offers no guarantee of protection and no effective remedy available to the stakeholders.[120]

Overall, company laws grant to shareholders, with their voting rights, and to directors, dominance in the company's decision-making and accountability mechanisms. The boardroom answers to the shareholders in general meeting and the shareholders, assisted by the auditors, monitor how the company is directed.[121] Increasingly, shareholders, and especially institutional investors, are identified as 'stewards' with the expectation that they will engage and monitor the impacts of their investee companies.[122] The UN's Principles for Responsible Investment present a set of environmental, social and governance-related investing principles consistent with a duty to act in the best long-term interests of institutional investors' beneficiaries.[123] The UN's voluntary Principles offer a light touch regulatory stance towards investors perhaps dampening their positive potential impact.

Alongside this regulatory architecture, the precedence of the shareholders and the directors is reinforced by the financial benefits they enjoy. In his well-known book, *Capital in the Twenty First*

[117]A. Keay and T. Iqbal, 'The Impact of Enlightened Shareholder Value', 2019(4) *Journal of Business Law* 304.

[118]W. Chapple and J. Moon, 'Corporate Social Responsibility (CSR) in Asia a Seven-Country Study of CSR Web Site Reporting', (2005) 44(4) *Business & Society* 415.

[119]See, e.g., A. Jain, M. Kansal and M. Joshi, 'New Development: Corporate Philanthropy to Mandatory Corporate Social Responsibility (CSR)—A New Law for India', (2021) 41(3) *Public Money & Management* 276.

[120]On Section 166(2) of India Companies Act 2013 see M. Naniwadekar and U. Varottil, 'The Stakeholder Approach Towards Directors' Duties Under Indian Company Law: A Comparative Analysis', in M. Pal Singh (ed.), *The Indian Yearbook of Comparative Law 2016* (2017), 95.

[121]Introduction to the UK Corporate Governance Code 2018.

[122]UK Stewardship Code 2020; I. H. Chiu, 'Institutional Shareholders as Stewards: Toward a New Conception of Corporate Governance', (2012) 6(2) *Brooklyn Journal of Corporate, Financial & Commercial Law* 387; M. R. Ivanova, 'Institutional Investors as Stewards of the Corporation: Exploring the Challenges to the Monitoring Hypothesis', (2017) 26(2) *Business Ethics: A European Review* 175.

[123]UN Principles for Responsible Investment, available at www.unpri.org/pri/about-the-pri.

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Century, Piketty has placed 'super-managers' and some shareholders within the top 0.01 per cent of wealth holders globally, emphasizing the part played by company law and financialization in creating and maintaining economic inequality.[124] The reality remains that with the shareholder-oriented model of the corporation and its emphasis on shareholder primacy, the distribution of wealth has become more concentrated; such primacy is enjoyed by what Ireland identifies as 'a small privileged elite', an increasingly powerful shareholder class.[125]

3.4 Corporate detachment from social impacts

Ratner observes that 'corporations clearly exercise significant power over individuals in the most direct sense of controlling their well-being'.[126] Despite the power they enjoy, some company laws appear to have supported business leaders and managers to act with minimal regard to their stakeholders as they prioritize growth and maximum shareholder value. In practice, the success of their corporate activities arises 'through decontextualised competition, which occurs on stock exchanges throughout the world'.[127] A separation from society arises. On a global level, as manufacturing and extraction industries move their operations to the Global South to seek lower operational and wage costs and less intrusive regulation, the harm those industries cause to the victims thousands of miles away in other countries is effectively distanced into obscurity, hidden from the corporate headquarters and from the view of consumers and citizens in western nations within the Global north.[128] The extent of any human rights violations in this context may be difficult to identify and evaluate.[129]

This corporate detachment has the potential to blind corporate actors to their destructive impacts and the suffering they inflict on those they exploit. They do not experience life in the same way as those who feel their impact. This detachment is exacerbated by corporate lawyers who adopt a compliance orientation focusing on risks to their corporate clients rather than on risks to rights holders.[130] Some business lawyers thus adopt a game-playing approach to regulation in the way they advise their clients.[131] The effects are described graphically by Evans:

> Right now the small proportion of the world's population who either hold significant shares in large corporations or sit on their boards are completely divorced from the on-the-ground environmental and human rights consequences of a company's decisions. The toxic chemicals from a manufacturing plant pouring into a town's river, or discrimination against migrant workers in the factories of their suppliers, are issues these stakeholders may never witness or experience. They do not feel the human or environmental toll of squeezing margins or producing faster, cheaper, more.[132]

[124]T. Piketty, *Capital in the Twenty-First Century* (2014); H. Glasbeek, *Wealth by Stealth: Corporate Crime, Corporate Law, and the Perversion of Democracy* (2002).

[125]P. Ireland, 'Shareholder Primacy and the Distribution of Wealth', (2005) 68(1) *Modern Law Review* 49, at 52.

[126]See Ratner, *supra* note 17, at 462.

[127]N. Connolly and M. Kaisershot, 'Corporate Power and Human Rights', (2015) 19(6) *International Journal of Human Rights* 663.

[128]See Baars, *supra* note 32, at 153.

[129]D. Altman, 'Managing Globalization: Realizing Human Rights at a Distance', *New York Times*, 13 March 2007.

[130]M. C. Regan Jr and K. Hall, 'Lawyers in the Shadow of the Regulatory State: Transnational Governance on Business and Human Rights', (2016) 84(5) *Fordham Law Review* 2001.

[131]C. E. Parker, R. E. Rosen and V. Lehmann Nielsen, 'The Two Faces of Lawyers: Professional Ethics and Business Compliance with Regulation', (2009) 22(1) *Georgetown Journal of Legal Ethics* 201.

[132]A. Evans, 'How to Eradicate Human Rights Abuses? Change the Corporate Model', Business and Human Rights Resource Centre, 13 January 2020, available at www.business-humanrights.org/en/blog/how-to-eradicate-human-rights-abuses-change-the-corporate-model/.

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3.5 Reporting

Reporting could be one way of providing distant shareholders with information on the risks and impacts of corporate activities. Moreover, reporting is the predominant regulatory mechanism arising as a 'price to pay' for the two fundamental principles, also recognized as 'twin privileges', of separate legal personality and limited liability.[133] Company reporting now responds to an extensive range of non-financial reporting requirements covering the company's environmental and social responsibilities and relationships including matters such as employee relations, carbon emissions, gender equality, as well as anti-corruption and bribery policies and human rights impacts.[134] Such reporting can be costly and time-consuming to produce, and requires considerable effort for shareholders (and others) to read and respond to it in order to hold boardrooms to account. Greenwashing is also a notorious problem in ESG disclosure.[135] Such reports do not provide human rights abuse victims with the information they require to bring challenges confidently. They still struggle to obtain the disclosures needed for successful claims as companies hold that information back.[136]

An important reporting legislation is the EU's Non-Financial Reporting Directive.[137] This was widely regarded as a progressive measure when it was adopted in 2014. The Directive combines disclosure of human rights information with other disclosures, thereby potentially diluting the impact of human rights-related disclosure. Covering a limited range of companies (approximately 5,000 companies only), the Directive, together with Guidelines published in 2017, gives companies significant flexibility to disclose relevant information in the way they consider most useful; such corporations have choice on what and how they will report. In addition, auditing is very limited, focus is on disclosure rather than on remedial action, and it lacks adequate provision for enforcement mechanisms.[138] The Directive was adopted and implemented by member states across the EU,[139] but there has been little uniformity in its application and the limitations described have led to it being described as a 'paper tiger'.[140] However, the Directive has provided a solid foundation for a raft of new initiatives under the EU's current Sustainability Project, including a new Corporate Sustainability Reporting Directive (CSRD) and a sustainable corporate governance initiative to 'help companies to better manage sustainability-related matters in their own operations and value chains as regards social and human rights, climate change, environment, etc'[141] as well as proposals for a new directors' duty to stakeholders and a directive requiring environmental and human rights due diligence. The new CSRD will replace the old NFRD. From January 2023, the Directive will apply to a much larger number of companies, will require published reports to be published in accordance with mandatory standards developed by the European Financial Reporting Advisory Group, verified and subject to third party audit. It is more specific about

[133]L. Sealy, 'The Disclosure Philosophy and Company Law Reform', (1981) 2 *Company Lawyer* 51.

[134]EU Non-Financial Reporting Directive: Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 Amending Directive 2013/34/EU as regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups Text with EEA Relevance, OJ L 330 (2014), 1–9 (NFRD).

[135]See, e.g., C. S. de Silva Lokuwaduge and K. M. De Silva, 'ESG Risk Disclosure and the Risk of Green Washing', (2002) 16(1) *Australasian Accounting, Business and Finance Journal* 146.

[136]See Bradshaw, *supra* note 70, at 147.

[137]See NFRD, *supra* note 134.

[138]International Peace Information Service (IPIS), The Adverse Human Rights Risks and Impacts of European Companies: Getting a Glimpse of the Picture (November 2014).

[139]I. Alvarez-Vega and C. Villiers, 'Sustainability and Implementation of the Non-Financial Reporting Directive in the UK, Germany and Spain – End of the Beginning?', in B. Sjafjell et al. (eds.), *Sustainable Value Creation in the EU: Towards Pathways to a Sustainable Future through Crises* (2022), 115.

[140]B. Spiesshofer, 'De Neue Europäische Richtlinie Über Die Offenlegung Nichtfinanzieller Informationen – Paradigmenwechsel Oder Papiertiger?', (2014) 17 *Neue Zeitschrift für Gesellschaftsrecht* 1281, at 1281.

[141]See European Commission summary of the Sustainable Corporate Governance Initiative, available at www.ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance_en.

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the human rights details but one danger is that the human rights information published could get swamped by the myriad other matters to be reported upon.

The UK introduced the Modern Slavery Act 2015 which contains a reporting requirement in section 54. That provision requires commercial organizations operating within the UK to supply a slavery and human trafficking statement describing steps taken to ensure that slavery or human trafficking is not taking place in any part of its supply chain or in any part of its own business, or a statement that in the organization no steps have been made. The statement may include information about due diligence processes in relation to slavery and human trafficking within the organization. The Act has had limited effect overall.[142] It does not require organizations to guarantee absence of slavery or human trafficking but only that they be transparent about what they are doing (or not doing) with regard to dealing with such risks. Similar legislation has been introduced in Australia with its Modern Slavery Act of 2018 (Commonwealth Act), which requires large Australian entities (and foreign entities carrying on business in Australia) with a consolidated annual revenue of AU$100m to report annually on the risks of modern slavery in their operations and supply chains and any actions they have taken to address such risks. A New South Wales Modern Slavery Act 2018 also applies to commercial entities with revenues above AU$50m and non-compliance (either by failure to report or by providing false or misleading information) may incur a penalty of up to AU$1.1m.

Whilst disclosure laws require (usually larger) companies to provide details in their annual reports of their specific human rights risks and how they are addressing such risks,[143] many such laws are still too soft, with inadequate penalties for non-compliance.[144] In addition, there has grown a raft of industry-led voluntary standards and certification schemes, but these often focus on selected issues (child labour or conflict minerals, for example) rather than on the key human rights and environmental issues affected by corporations and their supply chains, and such corporations are neither comprehensively monitored nor consistently held to account. Industry-led standards do not necessarily lead to broad, meaningful differences in behaviour.[145]

Ultimately, it is not clear what the disclosure requirements are really for – to eradicate, mitigate or put a positive gloss over what are, in practice, negative human rights and other impacts? Such laws reflect overall a light touch approach to regulating corporate activity and they fail to challenge the power enjoyed by corporations.[146]

3.6 Human rights due diligence

Given the limits of reporting, a new legal phenomenon has begun to develop in the form of due diligence, requiring parent companies to identify human rights risks in their businesses among their subsidiaries and throughout their supply chains, to take steps to prevent or mitigate against such risks and to report on the measures they are taking.[147] Due diligence is at the heart of the UNGPs by which companies identify, prevent, mitigate, and account for how they address their adverse human rights impacts. Enterprises should manage proactively the potential and actual

[142]L. K. E. Hsin et al., 'Effectiveness of Section 54 of the Modern Slavery Act 2015: Evidence and Comparative Analysis', *Modern Slavery and Human Rights Policy and Evidence Centre*, February 2021, available at modernslaverypec.org/assets/downloads/TISC-effectiveness-report.pdf.

[143]E.g., UK Modern Slavery Act, the UK Companies Act, the California Transparency in Supply Chains Act of 2010, and the EU's Non-Financial Reporting Directive.

[144]B. Stauffer, 'Holding Companies to Account: Momentum Builds for Corporate Human Rights Duties', World Report 2020, *Human Rights Watch*, available at www.hrw.org/world-report/2020/country-chapters/global-2.

[145]Ibid.

[146]See Sjafjell, *supra* note 33.

[147]E.g., French Law on the Corporate Duty of Vigilance 2017, Loi no 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, 0074 *Journal officiel de la République française*d'ordre, 28 March 2017, Art. 1; Dutch Child Labor Due Diligence Law 2019, Wet zorgplicht kinderarbeid, 24 October 2019, Arts. 4, 5.

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adverse human rights impacts of their business activities.[148] The OECD added to its Guidelines for Multinational Enterprises with *Due Diligence Guidance for Responsible Business Conduct* in 2018.

Whilst the UNGPs' due diligence provisions remain voluntary, several jurisdictions have introduced *mandatory* due diligence requirements targeting specific issues. The Netherlands has introduced the Dutch Child Labour Due Diligence Law[149] and both the US and the EU have introduced Conflict Minerals legislation.[150] Broader human rights due diligence legislation has been introduced by France with its Vigilance Law in 2017,[151] Germany has enacted its Supply Chain Due Diligence Act,[152] and Norway also adopted its Transparency Act in 2021, effective from July 2022, which requires large enterprises regularly to conduct due diligence on issues of fundamental human rights and decent working conditions and to report annually on the results of their due diligence.[153] Switzerland rejected a proposed broad Responsible Business Initiative, which included a requirement for due diligence and would have included the possibility of sanctions for non-compliance. Despite gaining 50.7 per cent of the vote, it did not reach the required majority threshold in the cantons to be brought into force. The less comprehensive and sanction-free counter-proposal entered into force in 2021.[154]

These due diligence measures have varying features, focusing on different specific aspects of human rights, and some carry sanctions whilst others do not. The most comprehensive is the French Vigilance Law 2017 which establishes a legally binding obligation for parent companies with at least 5,000 employees in France or 10,000 employees worldwide to identify and mitigate adverse human rights and environmental impacts resulting from their own activities, from activities of companies they control, and from the activities of subcontractors and suppliers with whom they have an established commercial relationship. The process involves the corporation collaborating with trade union representatives, a risk mapping exercise, regular assessment of impacts of subsidiaries, suppliers, and subcontractors, mitigation of risks, prevention of serious human rights violations, and establishment of an alert and warning system.[155] Corporations may incur periodic penalty payments if they do not publish or implement vigilance plans, and civil actions are available against parent companies for failure to implement a plan.[156] However, the law carries no

[148]D. Birchall, 'The Consequentialism of the UN Guiding Principles on Business and Human Rights: Towards the Fulfilment of "Do No Harm"', (2019) 24(1) *Electronic Journal of Business Ethics and Organization* 28, at 33.

[149]See Dutch Child Labor Due Diligence Law, *supra* note 147, available at www.eerstekamer.nl/trefwoord/wet_zorgplicht_kinderarbeid.

[150]US Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 21 July 2021, Section 1502; Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 Laying Down Supply Chain Due Diligence Obligations for Union Importers of Tin, Tantalum and Tungsten, Their Ores, and Gold Originating from Conflict-Affected and High-Risk Areas, OJ L 130 (2017), 1–20.

[151]See French Law on the Corporate Duty of Vigilance, *supra* note 147.

[152]Act on Corporate Due Diligence Obligations in Supply Chains, BGBl I 2021, 2959, Sorgfaltspflichtengesetz. Official English translation available at www.bmas.de/SharedDocs/Downloads/DE/Internationales/act-corporate-due-diligence-obligations-supplychains.pdf; see further M. Krajewski, K. Tonstad and F. Wohltmann, 'Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?', (2021) 6(3) *Business and Human Rights Journal* 550.

[153]Act Relating to Enterprises' Transparency and Work on Fundamental Human Rights and Decent Working Conditions, LOV-2021-06-18-99, entry into force 01 July 2022. Unofficial English translation available at www.lovdata.no/dokument/NLE/lov/2021-06-18-99#:~:text=The%20Act%20shall%20promote%20enterprises,fundamental%20human%20rights%20and%20decent. See Krajewski et al., ibid.

[154]'Switzerland: Responsible Business Initiative Rejected at Ballot Box Despite Gaining 50.7% of Popular Vote', Business and Human Rights Resource Centre, 28 November 2020, available at www.business-humanrights.org/en/latest-news/swiss-due-diligence-initiative-set-for-public-referendum-as-parliament-only-opts-for-reporting-centred-proposal/.

[155]French Law on the Corporate Duty of Vigilance, *supra* note 147, Art.1, inserted into the French Commercial Code at Art. 225-102-4. See further, Sherpa, 'Vigilance Plans Reference Guidance: A Legal Analysis on the Duty of Vigilance Pioneering Law', 2019, available at www.asso-sherpa.org/wp-content/uploads/2019/02/Sherpa_VPRG_EN_WEB-VF-compressed.pdf.

[156]See French Law on the Corporate Duty of Vigilance, ibid., Arts. 1 and 2, inserted into the French Commercial Code at Arts. 225-102-4 and 5.

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criminal sanctions (such sanctions were deemed to be 'unconstitutional' after a challenge in the Constitutional Council).[157] In that respect, the French legislation is broad but not as stringent as the Dutch law, for example, which includes criminal sanctions for failure to carry out the due diligence process and these incur significant fines for non-compliance and even the possibility of imprisonment.

Due diligence legislation has gathered momentum, generating support from legislators, policy actors, academics, corporate actors, and stakeholders and civil society actors.[158] The European Commission, supported by the European Parliament, and observing the diverging standards emerging among member states, is also pursuing plans for introduction of an EU-wide mandatory due diligence law on human rights and environmental issues as part of its Green Deal agenda.[159] Under this proposal, companies will be required to find and evaluate risks throughout their value chains, and to remove or reduce risks of adverse impacts of any breaches of relevant international standards. Due diligence legislation may be an advance on reporting and is stronger than voluntary measures, requiring more proactive and responsive vigilance from the corporate actors; they must probe their internal structures and processes to dig out and minimize or prevent potential negative impacts on people from their business operations throughout their networks. Research evidence at EU level indicates that due diligence is likely to result in reductions in negative impacts[160] though not necessarily to eradicate them nor to encourage co-operative efforts to end abusive practices.[161] One potential positive effect of this growth of reporting and due diligence legislation within member states and at European level is to encourage climate-change and human rights connected litigation both against states and against corporations, referring to the legislation as well as to the softer norms laid out in international principles and standards in documents such as the UNGPs. The Sabin Center Climate Case Database indicates that at least 22 climate related cases had been pursued by 2021 against companies alleging breaches of human or fundamental rights. These claims were made across the world including in the Philippines,[162] Belgium,[163] the Netherlands,[164] the UK,[165] New Zealand,[166] and Australia.[167] Whilst not all cases have been successful, they are growing, raising awareness of corporate activities with potential reputational impact for those corporations. In turn, this may encourage such corporations to change their policies and behaviours to avoid the cost and exposure of litigation. Less positively, however, companies might be driven to retaliate against litigation with their own use of the courts, for example, by pursuing strategic litigation against public participants (SLAPPs) designed to deter activists and

[157]French Constitutional Council, Decision No. 2017-750 DC, 23 March 2017.

[158]González et al., 'Debating Mandatory Human Rights Due Diligence Legislation and Corporate Liability', (2020) European Coalition for Corporate Justice and the Corporate Responsibility Coalition, available at corporatejustice.org/wp-content/uploads/2021/03/debating-mhrdd-legislation-a-reality-check.pdf.

[159]European Parliament Briefing, Towards a Mandatory EU System of Due Diligence for Supply Chains, 22 October 2020, available at www.europarl.europa.eu/RegData/etudes/BRIE/2020/659299/EPRS_BRI(2020)659299_EN.pdf; European Parliament Resolution of 10 March 2021 with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability, 2020/2129(INL) (2021). See also Proposal for a Directive Of The European Parliament And Of The Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM/2022/71 final (2022).

[160]Smit et al., Study on Due Diligence Requirements through the Supply Chain FINAL REPORT, European Commission, Directorate-General for Justice and Consumers (2020).

[161]P. Davies, 'Ending Human Rights Abuses in which Companies and States are Complicit', *Oxford Business Law Blog*, 5 April 2022, available at www.law.ox.ac.uk/business-law-blog/blog/2022/04/ending-human-rights-abuses-which-companies-and-states-are-complicit.

[162]The National Inquiry on Climate Change (NICC): Camarines Sur, Philippines, 2015.

[163]*ClientEarth v. Belgian National Bank*, 21/38/C, 13 April 2021; see further letter from ClientEarth to Christine Lagarde, President of the European Central Bank, 12 April 2021 at www.clientearth.org/media/jtxnhiba/2021-04-12-letter-from-clientearth-to-christine-lagarde.pdf.

[164]*Milieudefensie et al. v. Royal Dutch Shell plc.*, C/09/571932/HA ZA 19-379, District Court of The Hague, 2021.

[165]See *Vedanta*, *supra* note 85; see *Okpabi*, *supra* note 86.

[166]*Smith v. Fronterra Co-operative Group Limitd & Others*, [2021] NZCA 552.

[167]*Sharma v. Minister for the Environment*, [2021] FCA 560.

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stakeholders from raising awareness of irresponsible or harmful corporate activities. The Business and Human Rights Resource Centre counted 355 such actions between January 2015 and May 2021.[168]

Caution around due diligence is necessary in other ways. Birchall, for example, notes that the aspirational quality of due diligence rules means that what constitutes real compliance is unclear; 'there is no single answer' to how businesses should conduct human rights due diligence and it is likely to 'vary greatly with different contexts'.[169] Ultimately, corporations retain significant freedom to conduct their due diligence in ways that remain compatible with their commercial interests, potentially at the expense of more far-reaching improvements.[170]

3.7 Conclusion

It is possible to see in the account in this section how hard law, through its company law legislation provisions and case law, has developed and supported corporate structures that can place significant constraints on the pursuit of a business and human rights agenda. Although different company law regimes accommodate two broad camps – shareholder primacy and stakeholder value – the support for shareholder primacy of major international financial institutions such as the OECD, the IMF and the World Bank, secures its dominance in the global corporate environment and the inequalities and exploitative practices that accompany it.

Globally, companies enjoy power through the ability to escape national and international accountability by moving their trading locations and rearranging their networks,[171] and by operating with complex and opaque structures. Universally accepted corporate law principles such as separate legal personality and limited liability, alongside granting considerable autonomy to corporate actors, put those who suffer the negative impacts from corporate activity in a disadvantaged position. They generally lack standing to enforce directors' duties and rely on shareholders to do so, the constituents who profit from those corporate activities and who are therefore unlikely to be willing to challenge directors in breach of their duties or any other breaches of standards.

Company reporting requirements do little for those at the receiving end of human rights violations since such requirements frequently allow for discretion about the details of what is to be reported. Those at the top of the corporate hierarchy are removed from the impacts of the business and they continue to enjoy freedoms that accompany wealth.[172] The due diligence provisions may bring risks of human rights violations to their attention but the extent to which they will get involved in seeking to remove or reduce such risks remains uncertain. Moreover, the granting of autonomy to the corporation leads to a corporate personification of capitalism, that conceals and protects 'the real faces of the real people that stand behind it'.[173] For human rights advocates in the business context, Bratton sends out a dark message: 'we made up our collective mind during the 1980s to forget about the externalities the bargaining parties inflict along the way'.[174] The result is that existing corporate laws have ensured that states cannot tame corporate behaviour, and so 'corporations require more direct, and expansive, human rights responsibilities'.[175]

[168]N. Zuluaga and C. Dobson, 'SLAPPed but not Silenced: Defending Human Rights in the Face of Legal Risks', Business and Human Rights Resource Centre, June 2021, available at www.business-humanrights.org/en/from-us/briefings/slapped-but-not-silenced-defending-human-rights-in-the-face-of-legal-risks/.

[169]See Birchall, *supra* note 148, at 34.

[170]B. Gregg, 'Beyond Due Diligence: The Human Rights Corporation', (2021) 22(1) *Human Rights Review* 65.

[171]See Boggio, *supra* note 34, at 127.

[172]For a general discussion of corporate related powers see Boggio, ibid. See also Sjafjell, *supra* note 33; W. W. Bratton, 'The Separation of Corporate Law and Social Welfare', (2017) 74(2) *Washington and Lee Law Review* 767.

[173]D. Whyte, 'The Autonomous Corporation: The Acceptable Mask of Capitalism', (2018) 29(1) *King's Law Journal* 88, at 93.

[174]See Bratton, *supra* note 172, at 790.

[175]See Birchall, *supra* note 148, at 33.

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4. How might company law be reformed to become a part of the solution?

Ongoing efforts to establish a binding treaty to regulate in international law the activities of transnational businesses and corporations that impact human rights[176] have highlighted a need for genuine democratic consultation with and to gain consent of those who are affected by those activities and for them to be given access to remedies. However, whilst this treaty building process offers an important contribution to developing the legal and regulatory responses at an international level, the current draft arguably falls short because it does little to tackle the incumbent problematic structures that have given rise to the enormous power imbalances discussed in this article. Indeed, some commentators have argued that more recent drafts have gone backwards in this respect as they address states' obligations rather than directly address the powerful transnational corporations themselves.[177] Furthermore, the drafts have not sought changes to the corporate laws that are perhaps a key underlying source of the structural problems, not least those company laws that effectively protect companies from liability for the activities of their subsidiaries or supply chain partners.

As company laws are part of the framework that has generated structural inequalities, those laws must be changed more meaningfully. All corporate laws should respond to the reality of the corporate structures in place and regulate them so that responsibility will be established rather than averted. A more extensive and practically effective adoption of the concept of group liability could resolve the problems that arise out of application of separate personality. Sjafjell rightly urges law reform to:

> encompass the complexity and opacity of business through locating responsibility for systems of business, including global value chains, within single legal entities of companies. It must go beyond permissiveness to duties and beyond mere reflexive regulation to public enforcement.[178]

Efforts to ensure a transition towards more sustainable business models, such as the European Union's Green Recovery and Sustainable Business Agenda should strive for a *just* transition away from fossil fuels and towards net-zero emissions, ensuring a fair distribution of the benefits and burdens involved.[179] To be just, the transition must also aim to support good quality jobs and decent livelihoods for all workers, creating a fairer and more equal society.[180]

In this respect the suggestions made by Evans are worthy of consideration. Evans suggests replacing ethical conduct requirements with equitable governance and ownership arrangements. She emphasizes two criteria: first, legal and operational accountability to the workers, communities and other stakeholders who are affected by decisions, using democratic boardroom structures and redirecting fiduciary duties to include responsibilities to affected communities; and secondly, ensuring that the workers, local communities and others who contribute to the company's value or are impacted by corporate actions will share ownership rights with an opportunity to shape

[176]The most recent iteration, 2021 Third Treaty Draft, Intergovernmental Working Group, UN Human Rights Council, available at www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf.

[177]Comments And Amendments On The Second Revised Draft Of The Legally Binding Instrument On Transnational Corporations And Other Business Enterprises With Regard To Human Rights, Global Campaign, 6 August 2020, available at www.stopcorporateimpunity.org/wp-content/uploads/2021/06/Comments-and-amendments_Global-Campaign_draft2_ENG.pdf.

[178]See Sjafjell, *supra* note 33, at 186.

[179]A. Savaresi and J. Setzer, 'A First Global Mapping of Rights-Based Climate Litigation Reveals a Need to Explore Just Transition Cases in More Depth', *LSE/Grantham Research Institute on Climate Change and the Environment*, 29 March 2020, available at www.lse.ac.uk/granthaminstitute/news/a-first-global-mapping-of-rights-based-climate-litigation-reveals-a-need-to-explore-just-transition-cases-in-more-depth/.

[180]See 'just transition' as defined by Greenpeace, '*What is a Just Transition?*', available at www.greenpeace.org.uk/challenges/just-transition/.

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decisions, as well as share the benefits.[181] In this equitable governance and ownership structure the shareholders must be displaced from their position at the top of the hierarchy, especially since, despite positive talk,[182] shareholders, (and investors more broadly) have made few inroads in tackling the very obvious exploitations committed by the companies in which they invest.[183] Sjafjell warns that while involving affected communities, trade unions and civil society is crucial, a mere canvassing of 'stakeholder interests' and giving priority to the ones that make themselves heard the most is insufficient. In her view, it is necessary to take account of the

> interconnected complexities within the relevant social-ecological systems, the vulnerability of the often-unrepresented groups (whether invisible workers deep in the global value chains, indigenous communities, or future generations), and the aim of the "safe and just" space for humanity, now and in the future, within planetary boundaries.[184]

This demands democratic and integrated decision-making and accountability processes. Genuine respect for and involvement of communities, and not mere 'consultation' is essential to gain trust and improved quality of decisions.

It is necessary to challenge shareholder primacy and its promotion by the financial institutions with a redefinition of the purpose of the company and corresponding directors' duties. Sjafjell suggests that a broad company purpose could be 'to create sustainable value within planetary boundaries, respecting the interests of its investors and other involved and affected parties'.[185] Company law could thus be reformed to push companies towards producing products and services that stay within planetary boundaries and that secure the social basis for people and communities, including, for example, a requirement to pay living wages and not undermine the economic bases of welfare states.[186] Pay and profits must be distributed more equitably, with a limited ratio between minimum and maximum pay levels and profit shares.[187] Fair prices should also be paid for outsourced work and the goods supplied and processes developed to create fair distributions of the profits gained throughout the group or supply chain and more democratic decisions.

Company law directors' duties must be rewritten to pursue not a prioritized members' interests, but an overarching goal of social benefit, perhaps through universalization of the principles that drive the goals of the benefit corporation movement.[188] These principles include accountability, performance, standards and transparency.[189] A greater emphasis on human rights might require not just human rights due diligence and reporting obligations but also for company law to include

[181]See Evans, *supra* note 132.

[182]See UN Principles for Responsible Investment, *supra* note 123.

[183]Though these efforts appear to be growing, see P. Barnett, 'Shareholder Litigation as the Next Frontier in Shareholder Climate Action', (2019) Business and Human Rights Resource Centre, available at www.business-humanrights.org/en/blog/shareholder-litigation-as-the-next-frontier-in-shareholder-climate-action/; although see J. T. Mähönen, 'Shareholder Activism: A Driver or an Obstacle to Sustainable Value Creation?', (2021) University of Oslo Faculty of Law Research Paper No. 2021-06, available at ssrn.com/abstract = 3806011.

[184]See Sjafjell, *supra* note 33, at 194.

[185]Ibid., at 195. The planetary boundaries concept presents a set of nine planetary boundaries within which humanity can continue to develop and thrive for generations to come. The concept was created by a group of 28 internationally renowned scientists in 2009: J. Rockström, et al., 'Planetary Boundaries: Exploring the Safe Operating Space for Humanity', (2009) 14(2) *Ecology and Society* 32; W. Steffen et al., 'Planetary Boundaries: Guiding Human Development on a Changing Planet', (2015) 347(6223) *Science (American Association for the Advancement of Science)* 736.

[186]See Sjafjell, *supra* note 33, at 196.

[187]See C. Villiers, 'Executive Pay: A Socially-Oriented Distributive Justice Framework', (2016) 37(5) *Company Lawyer* 139.

[188]F. Alexander, *Benefit Corporation Law and Governance: Pursuing Profit with Purpose* (2017).

[189]C. Marquis, *Better Business: How the B Corp Movement is Remaking Capitalism* (2020). See also J. Lennard, 'Book review: Better Business: How the B Corp Movement is Remaking Capitalism by Christopher Marquis', *LSEUS Phelan Centre*, available at blogs.lse.ac.uk/lsereviewofbooks/2021/04/26/book-review-better-business-how-the-b-corp-movement-is-remaking-capitalism-by-christopher-marquis/.

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a specific duty to respect the human rights of all stakeholders of the company and throughout any connected supply chain. Including such a duty would remind directors of the relevance of human rights for the company's success and the long-term interests of its investors and other stakeholders. Such legislative provisions might be supported by a compulsory inclusion in companies' constitutional documents of an article requiring directors to respect the human rights of all people connected to or impacted by the corporation's activities, directly or indirectly.[190] The duty should perhaps come with the potential for personal liability for those directors who fail to adhere, without benefiting from the corporate veil's protection. Whilst it might be argued in response that such an approach could discourage talented individuals from taking up such directorships, it might also reinforce the fundamental importance of the approach for ensuring that human rights are genuinely respected. Thus, such a provision would bring these issues to more immediate attention of directors when making decisions and considering how they should fulfil their role.

Reporting requirements should insist on genuine transparency, revealing the corporate structures and supply chains and the different actors' contributions. Importantly, it is necessary to seek to create a more level playing field for all interested parties regarding access to relevant information, especially where legal challenges are involved. Advancing blockchain technologies are already assisting with supply chain transparency and traceability.[191] The information these provide should be reported clearly, especially by parent companies or lead undertakings, to show also how they have fulfilled their due diligence requirements and in a way that stakeholders can truly see and understand what the corporations have been doing and their impacts.

Currently, company law enforcement and sanctions are limited resulting in a lack of incentive for corporate actors to change their policies or their behaviours. This was evident in the discussion of the UK's section 172 and India's section 166 directors' duty. More effective enforcement is required whereby stakeholders are given a genuine opportunity to challenge decisions. Effective enforcement and sanctions are also required in the human rights challenges, not least by breaking down some of the barriers to successful legal challenges identified in the discussion above. Further, the Oslo-based international SMART research project[192] suggests that a requirement to provide documentation to the companies registry could lead to the registry imposing sanctions, even potentially dissolving a company, for failure to produce that documentation or evidence of effective due diligence being carried out at regular intervals.[193] Additionally, at least at the European Union level, the SMART project recommends harmonization and codification of the procedural and substantive rules for bringing tort and human rights violation claims that could provide greater legal certainty to affected parties as well as undertakings, and which would also enable claimants to pursue parent companies and lead undertakings of global supply chains.[194] Importantly, these proposed rules could be tied to the due diligence requirements so that there would be a presumption of liability for an undertaking and its board of directors if due diligence had not been completed. If, however, they had completed the required due diligence, that might serve as a defence to any such claims.[195] One might argue for companies to be required

[190]See Sjaffjell, *supra* note 33, at 196, in relation to sustainability, but respect for human rights could be an additional statement.

[191]See, for example, the work of VEChain at www.vechain.com/. See also A. Sulkowski, 'Blockchain, Business Supply Chains, Sustainability, and Law: The Future of Governance, Legal Frameworks, and Lawyers', (2018) 43(2) *Delaware Journal of Corporate Law* 303.

[192]The international SMART research project (Sustainable Market Actors for Responsible Trade), led by the University of Oslo from 2016 to 2020, studied what prevents and promotes sustainability, defined as securing the social foundation for humanity everywhere, now and in the future, within planetary boundaries and made a comprehensive set of reform proposals: B. Sjåfjell et al., 'Securing the Future of European Business: SMART Reform Proposals', (2020) University of Oslo Faculty of Law Research Paper No. 2020-11 and Nordic & European Company Law Working Paper No. 20-08, available at ssrn.com/abstract = 3595048.

[193]Ibid., at 71.

[194]Ibid., at 72.

[195]Ibid.

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to seek co-operation with relevant stakeholders where risks are revealed through the due diligence process, so that they do not simply exit and make room for less risk averse corporations[196] and instead work towards removing the adverse impacts altogether.

A threat of company dissolution for gross human rights violations or for failure to engage meaningfully with the due diligence requirements could be a more significant sanction in addition to compensation payments to human rights victims.[197] This suggestion might seem both dramatic and draconian, and, of course, it could have serious negative repercussions in relation to the economy and jobs, but it has been proposed by others in different settings. Tombs and Whyte, for example, argue that the corporation should be abolished to make way for more democratic and less dangerous business entities.[198] Company dissolution as a threatened sanction has, furthermore, been applied successfully in a different context, that of a gender quota requirement introduced for Norwegian boardrooms in 2004. The existence of this sanction appeared to contribute to almost full compliance rates in Norway when the law came into effect in 2008.[199] A further possible response to exploitative practices might be to impose punitive sanctions along the lines proposed by Fisse and Braithwaite[200] and Whyte,[201] such as demanding that companies pass some of their profits to a regulatory agency or an organization representing the victims of such exploitation or abuse so that these could be redistributed and thus alleviate the inequalities that arise from their practices and discourage them in the future.

5. Conclusion

Company law is at the heart of the structural, political and economic inequalities that have made possible a vast divide in the life experiences of people across the world. Complex corporate group structures and supply chains are difficult to challenge because they are scaffolded by the legal frameworks that prevail, including corporate law mechanisms and principles that have proven to be almost insurmountable in practice. Separate legal personality and limited liability stand in the way of successful claims and the litigation has served only to highlight the unequal resources available for the legal fight.

Inside the corporations there are further structural barriers and unequal distributions of the financial gains made through their (frequently exploitative) business pursuits. A concentrated and privileged few enjoy huge amounts of wealth and power but often at the expense of swathes of others, especially those residing in the global South and at the wrong end of the supply chain. These disparities have been well-documented. They have made possible corporate exploitation and human rights violations that further immiserate those at the bottom of the socio-economic hierarchy. All this, despite a now well-established business and human rights agenda involving efforts to prevent such harms.

Hard law matters and it should not be a barrier to human rights accountability and fulfilment for corporations. Hard law has indeed contributed to inequalities and their further consequences. Softer regulatory approaches, that have generally shown deference to the demands of powerful corporate actors, have had little impact, though they do give rise to normative responsibilities that have helped to shape some of the arguments connecting climate change to human rights in litigation against the corporations. Still, despite evidence of increasing and important litigation activity, the human rights abuses continue, still the poorest and the weakest groups are exploited and

[196]A risk anticipated by Professor Davies in response to the EU's proposed due diligence Directive. See Davies, *supra* note 161.

[197]As suggested by the SMART Project, *supra* note 192, at 71.

[198]S. Tombs and D. Whyte, *The Corporate Criminal. Why Corporations Must Be Abolished* (2015).

[199]C. Villiers, 'Achieving Gender Balance in the Boardroom: Is it Time for Legislative Action in the UK?', (2010) 30(4) *Legal Studies* 533, at 553.

[200]B. Fisse and J. Braithwaite, *Corporations, Crime and Accountability* (2010).

[201]See Tombs and Whyte, *supra* note 198.

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still no shift has occurred in who wins or loses in the economic competition. More radical legal and political reforms are required that will genuinely tackle the destructive structures inside and outside the corporations and that will shift the balance meaningfully. Thus, an ecosystem of hard law, soft law and non-law reforms and efforts is required that will change the business and human rights landscape meaningfully. Until bolder systemic changes are achieved, there is little hope of making life better for those who truly suffer, and little hope of achieving genuine sustainability to protect every person on the planet.

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