

## Corporate Power over Human Rights

David Birchall, Lecturer in Law, London South Bank University

### Introduction

The business and human rights (BHR) movement has developed rapidly since the 1990s, in lockstep with spiralling corporate size, wealth and influence. BHR attempts to hold corporations to account for human rights abuses. As such it does not address corporate power directly, and it is not of fundamental importance to BHR whether corporations are growing more powerful in relation to governments, society, or smaller businesses. Rising corporate power, does, however, have marked effects on access to human rights.

Corporations evidently hold the power to abuse human rights and to avoid accountability for these abuses. This is clear from numerous major cases, from the Bhopal gas leak to the collapse of Rana Plaza in Bangladesh, both of which resulted in major fatalities and demonstrated the failures of current practices, regulation and remedy. Environmental degradation with fatal consequences, modern slavery, and complicity with oppressive regimes are all examples of corporations using their power to further their profits through rights abuse.

But corporate power over human rights goes beyond these direct interactions. With the growth of vast multinational corporations, quasi-monopolistic tech firms, and financialized companies such as private equity and hedge-funds, a new threat to human rights through business has developed. Here, the risk is less of the overt, egregious case of human rights abuse, and more of corporate power systematically denying access to rights to large groups for the purposes of investor profit.

This can occur through a multitude of ways. One important way is large investment firms influencing the price and/restricting the supply of essential items. Investor speculation on food commodity derivatives was designated as a major cause of the global food crisis, beginning in 2007. A major topic today, highlighted by Rory Hearne (2020) and others, is that of ‘corporate landlords’. Corporate landlords refer to companies – mainly private equity firms – that buy entire apartment blocks to rent them to tenants. Because of the scale at which this occurs it has a major impact on housing prices, greatly restricting the ability of individuals to purchase a home, or to rent affordably. Deleterious effects on access to rights also occur in investor-owned healthcare, prisons, and other essential services.

The issue in each of these cases is one of power. The investment firm has the capacity to make investments – in foodstuffs, housing, hospitals – on such a scale as to affect access to the relevant right. With some exceptions, such as cases of medical negligence and illegal evictions, the actions of these companies cannot be said to ‘violate’ rights, at least in interpersonal sense. From a human rights theory perspective this presents an interesting problem, as insidious price rises in essential items and retrogressions of access to essential resources in the name of maximizing shareholder value reshape societies, but there is no clear act of human rights violation.

#### Main Text: Analysing Corporate Power

For this reason, corporate power is an interesting lens on access to human rights (Mikler, 2018). To study the issue more systemically, in an article for the Business and Human Rights Journal published in 2021, the author delineated four sites of corporate power over human rights: first, power over individuals; second, power over materialities; third, power over institutions; and fourth, power over knowledge. The framework captures four key ways in which corporations may influence access to rights. Human rights are inherent in individuals and can be transgressed

through direct interaction. Human rights, and particularly socio-economic rights, rest on a material foundation that corporations as economic actors have a significant ability to affect. Human rights are legal standards and are implemented through governance structures that corporations may also influence. Finally, corporations can influence the epistemic framework through which we understand human rights, including the form, scope and limits of responsibility.

The framework draws on the work of Barnett and Duvall (2005), applying their generalist typology of power to the specific issue of corporations and human rights. They disaggregate power into compulsory, institutional, structural and productive elements to provide a comprehensive categorization of power in its totality. Business has power over human rights insofar as it can influence, violate, retrogress, reshape, realize or restrict those rights, and propose a moderated version of the four forms of power identified by Barnett and Duvall to capture the specifics of corporate power over human rights. The first is the direct, unmediated or weakly mediated power that corporations can wield over rights-holders. The next three are mediating sites through which corporate power can be used to affect human rights. Human rights are underlain by material foundations, whether land, supply of essential goods, personal wealth, or state funding, and therefore materialism is crucial. They are overarched by law and institutions that enforce and structure the rights. They are also affected at the meta-level by social norms which constitute knowledge around the right, most importantly the scope, limits and form of the responsibilities inherent therein. This captures realist, Marxist, institutionalist, and constructivist priorities.

The aim of the framework is to allow a categorization of different forms of corporate power. But there was also a normative aim based in a concern that BHR as a field was too narrowly focused on a selection of direct interpersonal violations and/or egregious acts of wrongdoing,

to the marginalization of more insidious uses of corporate power. The framework is, as such, designed to open space to discuss a wider range of corporate influences over human rights.

#### Four Locations of Corporate Power

Power over individuals includes overt compulsory power, and covers the direct interactions that occur between corporations, including managers, and individuals. Power over individuals is the most likely to be directly regulated or prohibited form of power and most work in the BHR field addresses this form. Human rights violations are, paradigmatically, defined by this direct connection, in which the violator actively wrongs an individual, potentially leading to judicial remedy. Power over individuals includes the direct power that employers have over individuals, and the power to influence vulnerable individuals, such as children, through marketing and other means.

Power over materialities relates to the underlying material conditions on which rights rely. Corporations frequently control access to, or shape, these materialities. This is evident with corporate landlords, privately-owned hospitals, prisons, nursing homes, and pharmaceutical companies, global agribusiness, and privatized utilities, such as water. Corporations also have an outsized impact on climate change, and through investments and finance on many other avenues of life (Macchi, 2021). Corporations, generally run according to the principle of shareholder primacy, are often incentivized not towards universal access – the basic human rights obligation of states in relation to material rights – but towards constructed scarcity or reduced services. Because human rights materials are, by their nature, essential and rarely conducive to truly competitive markets, profit can be earned through restricting access. In housing this occurs through corporate landlords owning so many properties in a region that they have a controlling influence over prices (Birchall, 2021b). In healthcare, it may come from ‘hidden fees’ or reduced levels of care.

Power over institutions relates to how corporations shape institutional priorities and evade accountability. Corporations have been growing in size, wealth and importance for decades. Particularly since globalization accelerated around the 1970s, corporations have been able to wield their fleet-footed global citizenry to bargain for pro-business policies, including lower taxes and reduced labour rights. This is a structural power stemming from states being territorially-bounded and corporations free-moving entities. More directly, corporations engage in lobbying, particularly in the US, where business-funded politicians and parties is a deeply established norm. Perhaps more directly still, privatization sees states hand legitimate authority directly to a business actor (Fuchs, 2007). This can create a delineated area of corporate authority, such as corporations running immigrant detention facilities, but it also ties these corporations to the state. G4S, for example, which runs Manus Island for the Australian government, has numerous contracts with governments around the world. The greater the involvement a firm like G4S has in running detention centres and other governmental functions, the more expert and legitimate its views may appear to those governments. This will shape some big decisions, such as whether violence by a detainee is treated with confinement and loss of privileges or by providing social care. G4S's desire for profit may in turn shape its choice of recommendations. Finally, powerful corporations have numerous means to evade accountability, primarily based in the power imbalance between corporation and victim, such through the use of Strategic Litigation Against Public Participation (SLAPPs), used to silence critics, and the use of legal waivers to avoid liability.

Finally, corporations have power over knowledge and norms within human rights (O'Kelly, 2019). This is epistemic influence over how human rights are understood, the form and scope of business responsibilities and the role of corporations within global governance. This works along numerous lines, from corporations distancing themselves from certain responsibilities – such as unions – to legitimizing themselves as activist voices through support for certain civil

rights causes. It also includes acting as partners through funding and lobbying at global governance institutions such as the UN. Assuming corporations may have specific self-interested priorities dictated by shareholder value, it may follow that corporations engaging in human rights discourse are motivated by a desire to help in ways that improves, or at least does not harm, their profits. Greater corporate involvement in human rights discussions may therefore lead to a redirecting of human rights priorities that follows profit-oriented maxims.

The purpose of this framework is both to understand how corporations influence human rights and to help develop the field of BHR beyond the most egregious and overt acts of business wrongdoing. It is hoped that the framework may be useful in developing future BHR-related regulations and laws, such as the BHR treaty that is under discussion (Bernaz, 2021), and in improving analysis of the more structural elements of business control of human rights.

## References

1. Barnett, Michael, and Raymond Duvall. "Power in international politics." *International organization* 59.1 (2005): 39-75.
2. Bernaz, Nadia. "Conceptualizing corporate accountability in international law: Models for a business and human rights treaty." *Human rights review* 22.1 (2021): 45-64.
3. Birchall, David. "Corporate power over human rights: an analytical framework." *Business and Human Rights Journal* 6.1 (2021): 42-66.
4. Birchall, David. "Challenging the commodification of human rights: the case of the right to housing." *Santa Clara Journal of International Law* 19 (2021): 1.
5. Fuchs, Doris A. *Business power in global governance*. Boulder, CO: Lynne Rienner, 2007.

6. Hearne, Rory. *Housing shock: The Irish housing crisis and how to solve it*. Policy Press, 2020.
7. Macchi, Chiara. "The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of 'Climate Due Diligence'." *Business and Human Rights Journal* 6.1 (2021): 93-119.
8. Mikler, John. *The political power of global corporations*. John Wiley & Sons, 2018.
9. O'Kelly, Ciarán. "Human Rights and the Grammar of Corporate Social Responsibility." *Social & Legal Studies* 28.5 (2019): 625-649.