

8-14-2023

Corporate Law's Threat to Human Rights: Why Human Rights Due Diligence Might Not Be Enough

Barnali Choudhury

Osgoode Hall Law School of York University, bchoudhury@osgoode.yorku.ca

Source Publication:

Business and Human Rights Journal (2023), 8, 180–196 doi:10.1017/bhj.2023.29

Follow this and additional works at: https://digitalcommons.osgoode.yorku.ca/scholarly_works



Part of the [Business Organizations Law Commons](#), and the [Human Rights Law Commons](#)

Repository Citation


Choudhury, Barnali, "Corporate Law's Threat to Human Rights: Why Human Rights Due Diligence Might Not Be Enough" (2023). *Articles & Book Chapters*. 3074.

https://digitalcommons.osgoode.yorku.ca/scholarly_works/3074

This Article is brought to you for free and open access by the Faculty Scholarship at Osgoode Digital Commons. It has been accepted for inclusion in Articles & Book Chapters by an authorized administrator of Osgoode Digital Commons.

SCHOLARLY ARTICLE

Corporate Law's Threat to Human Rights: Why Human Rights Due Diligence Might Not Be Enough

Barnali Choudhury 

Professor, Osgoode Hall Law School, York University, Canada; Director, Nathanson Centre on Transnational Human Rights, Crime & Security, Canada; Honorary Professor, University College London, UK
Email: bchoudhury@osgoode.yorku.ca

Abstract

The take-up of mandatory human rights due diligence (HRDD) initiatives by states is continuously gaining momentum. There are now numerous states adopting some form of HRDD laws. While corporations being duly diligent in respecting human rights is a positive step towards addressing problems of business and human rights, these HRDD initiatives on their own may only be a form of window-dressing, that is, enabling states to put a smart spin on their efforts to address business and human rights issues without addressing some of the root causes of that predicament. As a result, HRDD laws are likely to be a helpful, but insufficient tool for addressing corporate abuse of human rights. One reason for this is because the root cause of many business and human rights problems is the structural elements and goals of corporate law facilitates corporate violations of human rights. So long as states fail to transform the way in which corporations operate – in part, by reconceptualizing corporate law – even the best drafted HRDD laws will be inadequate to halt corporate harms.

Keywords: corporate law; corporate purpose; fiduciary duty; human rights; shareholders

1. Introduction

With an increasing number of states enacting or proposing to enact different forms of mandatory human rights due diligence (HRDD) laws, one might begin to think that problems of the business and human rights (BHR) field are well on their way to being addressed. Certainly, being duly diligent, along with a corporate responsibility to not harm human rights, was all that John Ruggie, the chief architect of the United Nations Guiding Principles on Business and Human Rights (UNGPs), expected of corporations as part of their role in addressing business-related adverse human rights impacts. The growing uptake by states of HRDD initiatives, thus, should herald the beginning of the end of BHR problems.

Yet, HRDD initiatives, while laudable, may simply be a form of window-dressing. They can put a smart spin on state efforts to address BHR problems without addressing some of the root causes of that predicament. In that vein, they are a helpful step forward, but are, in and of themselves, insufficient.

This is because the root cause of many BHR problems is the way in which corporations operate, a *modus operandi* that is supported by state-sanctioned corporate law. So long as states fail to transform the way in which corporations operate – in part, by reconceptualizing

corporate law – even the best-drafted HRDD initiatives will be inadequate to halt corporate harms. This is because the structural elements of corporate law as well as the goals towards which it is oriented facilitates corporate violations of human rights. Unless HRDD initiatives adequately address these structural elements and goals, they will be insufficient to stop corporate human rights abuses. Because of this shortfall in HRDD initiatives, this article argues that HRDD initiatives are not enough. Rather, a state truly committed to addressing BHR problems must also reconceptualize corporate law.

The article begins in section II by presenting a case study of the Rana Plaza disaster. The focus of this case study is to highlight how corporations, engaging in their normal course of action, contributed to one of the deadliest garment factory disasters in history.¹ This section also briefly refers to the Bhopal gas disaster, a case study that shows how corporations misuse the principles of limited liability and separate corporate personality. The article then moves in section III to unpack the features of corporate law that enable corporations like those involved in the Rana Plaza disaster to commit human rights harms. This section explores the unique characteristics of corporate law and examines why these features facilitate corporate abuse of human rights. Section IV of the article discusses how corporate law can be reconceptualized to minimize the gaps within which corporate abuse of human rights is perpetuated. Section V provides concluding thoughts.

II. The Rana Plaza Tragedy and the Bhopal Gas Disaster as Case Studies

In 2013, an eight-storey commercial building, known as the Rana Plaza, collapsed in Dhaka, Bangladesh, killing over 1,100 people and injuring more than double that number.² Rana Plaza housed a number of garment factories, where around 5,000 workers were employed.³ The factories produced clothing for numerous Western corporations such as Walmart, Mango, Primark and Benetton.⁴

The day before the building collapsed, cracks appeared in the walls of the building causing the banks and the shops located on the ground floor to be evacuated. Yet despite the safety risks, the owners of the garment factories ordered their employees to continue to work, in part because of the increased pressure the owners faced from these sourcing corporations.⁵

Corporate pressure on the garment factory owners is common in Bangladesh, home to one of the world's largest garment producers. Corporations have been drawn to having their garments produced in Bangladesh for several reasons. One reason is the low wages paid to employees in Bangladesh. Many corporations prefer to have their clothing produced in Bangladesh over China – the world's leading garment producer – due to the rising costs of

¹ Ashley Westerman, '4 Years After Rana Plaza Tragedy, What's Changed For Bangladeshi Garment Workers?', *NPR Parallels* (30 April 2017), <https://www.npr.org/sections/parallels/2017/04/30/525858799/4-years-after-rana-plaza-tragedy-whats-changed-for-bangladeshi-garment-workers> (accessed 19 January 2023).

² Tansy Hoskins, 'Reliving the Rana Plaza Factory Collapse: A History of Cities in 50 Buildings, Day 22', *The Guardian* (23 April 2015), <https://www.theguardian.com/cities/2015/apr/23/rana-plaza-factory-collapse-history-cities-50-buildings> (accessed 19 January 2023).

³ Syed Zain Al-Mahmood and Rebecca Smithers, 'Matalan Supplier Among Manufacturers in Bangladesh Building Collapse', *The Guardian* (24 April 2013), <https://www.theguardian.com/world/2013/apr/24/bangladesh-building-collapse-kills-garment-workers#:~:text=A%20spokeswoman%20for%20Matalan%2C%20which,any%20current%20production%20with%20them>. (accessed 19 January 2023).

⁴ Ibid; Julfikar Ali Manik and Jim Yardley, 'Building Collapse in Bangladesh Leaves Scores Dead', *The New York Times* (24 April 2013), <https://www.nytimes.com/2013/04/25/world/asia/bangladesh-building-collapse.html#:~:text=Police%20officials%20put%20the%20death,searching%20for%20survivors%20and%20bodies> (accessed 19 January 2023); Westerman, note 1.

⁵ Manik and Yardley, note 4.

labour in China.⁶ The average monthly wage for a garment worker in Bangladesh is around one-third of what it is in China, and that reflects a recent substantial wage increase. Previously the average wage in Bangladesh was only 17 per cent of the wage of a Chinese worker, which is already much lower than wages paid to workers in the West.⁷

A second reason for the corporate interest in Bangladesh is because of the economic model of these companies. Many companies in the garment sector follow the practice of fast fashion, wherein clothing is produced cheaply and quickly to reflect a fashion trend before that trend gives way to a new one.⁸ This model is premised on the production of high turnover at the cheapest price possible.⁹ Companies are able to achieve this goal by outsourcing garment production to developing countries, using contract and accelerated labour.¹⁰ They outsource production in supply chains to countries in which labour laws are non-existent or rarely enforced; contract labour enables the suppliers to pay the workers even lower wages and withhold benefits, thereby lowering the costs to the corporation even further; while accelerated labour models enable rapid turnover. At the same time, these practices exploit pre-existing poor labour conditions in the country, create precarious working conditions and exacerbate suppliers' ill treatment of workers, all the while minimizing or shielding the corporation from risk and liability.¹¹

Finally, while this was not the model used in the Rana Plaza disaster, a third common reason for corporations to set up a subsidiary in jurisdictions outside of their home country, such as in Bangladesh, is because they can rely on lax labour or environmental laws to reduce costs of production¹² or benefit from more favourable tax laws that work towards increasing their profit.¹³ At the same time, if a Rana Plaza-type disaster occurs, the corporation can be assured that because of the use of a subsidiary structure, any ensuing liability from the disaster will not be attributed to it.¹⁴ One of the most prominent examples of reliance on such a model has been the Bhopal gas disaster. In that case, an American corporation, Union Carbide Corporation, shielded itself from the liability that arose from an

⁶ 'Made in Bangladesh' to Overtake the 'Made in China', *Pime Asia News* (6 November 2019), <https://www.asianews.it/news-en/Made-in-Bangladesh-to-overtake-the-Made-in-China-47254.html> (accessed 19 January 2023).

⁷ Business & Human Rights Resource Centre, 'China – Impacts of COVID-19 on China's Garment Sector', <https://www.business-humanrights.org/fr/de-nous/covid-19-action-tracker/bangladesh/> (accessed 19 January 2023).

⁸ Dana Thomas, *Fashionopolis: The Price of Fast Fashion and the Future of Clothes* (New York: Penguin Press, 2019); Sarah Labowitz and Dorothee Baumann-Pauly, 'Business as Usual is Not an Option: Supply Chains and Sourcing after Rana Plaza', NYU Stern Center for Business and Human Rights (April 2014), http://www.stern.nyu.edu/sites/default/files/assets/documents/con_047408.pdf (accessed 19 January 2023).

⁹ Victoria Stafford, 'Factory Exploitation and the Fast Fashion Machine', *Green Business Network* (8 August 2018), <https://www.greenamerica.org/blog/factory-exploitation-and-fast-fashion-machine> (accessed 19 January 2023).

¹⁰ Global Labour Justice, 'Gender Based Violence in the GAP Garment Supply Chain – Workers' Voices from the Global Supply Chain: A Report to the ILO 2018' (2018), <https://globallaborjustice.org/wp-content/uploads/2018/06/GBV-Gap-May-2018.pdf> (accessed 19 January 2023); Global Labour Justice, 'Gender Based Violence in the H&M Garment Supply Chain – Workers' Voices from the Global Supply Chain: A Report to the ILO 2018' (2018), <https://www.globallaborjustice.org/wp-content/uploads/2018/05/GBV-HM-May-2018.pdf> (accessed 19 January 2023).

¹¹ Global Labour Justice, 'GAP', note 10; Global Labour Justice, 'H&M', note 10; Georgia Bynum, 'The Impact of Fast Fashion in Bangladesh', *The Borgen Project* (26 May 2021), <https://borgenproject.org/fast-fashion-in-bangladesh/> (accessed 19 January 2023).

¹² Peter T Muchlinski, *Multinational Enterprises and the Law* (3rd edn) (New York: Oxford University Press, 2021), 38; Frank Pyke, 'Multinational Enterprises and Inclusive Development: Harnessing National Social Dialogue Institutions to Address the Governance Gap', International Labour Office Working Paper (Geneva: ILO, 2017), 4.

¹³ Muchlinski, note 12, 263.

¹⁴ See the discussion in section III, 'Corporate Law: Structural Elements and Goals'.

accident that occurred at its Indian factory run by a subsidiary and resulted in the deaths of thousands, and injuries to over half a million people.¹⁵

III. Corporate Law as a Facilitator of Corporate Human Rights Violations

As the Rana Plaza example demonstrates, such disasters can occur because of the continuing drive by corporations to maximize both the cutting of costs as well as the generation of revenue, thereby maximizing their wealth. This is accompanied by efforts to minimize their risk and liability, all the while turning a blind eye to the impacts of their demands and practices. Yet why do corporations embrace such a model for business?

Financialization

The most likely reason is because corporations embrace the notion of financialization. Financialization is the practice of financial motives and financial markets becoming central to the operation of the economy.¹⁶ At the firm level, this manifests itself by corporations maximizing shareholder wealth and giving primacy to shareholder interests.¹⁷ This also reflects the law and economics movement, which similarly argues in favour of primacy of shareholder interests, based upon the view of the corporation as a nexus of contracts in which shareholders are presumed, as residual risk bearers, to have negotiated for their interests to be given priority.¹⁸

Corporate embracing of financialization is further reinforced by the widescale 'cultural acceptance of shareholder primacy as a desirable objective for the firm'.¹⁹ This norm has been perpetrated through teachings at business and law schools, where the importance of shareholder primacy is a recurrent theme in the curriculum,²⁰ and reflected in the media,²¹ which have grabbed onto shareholder primacy as an 'easy-to-explain, sound-bite description of what corporations are and what they are supposed to do'.²²

One of the impacts of an increased focus on financialization has been short-termism or corporate 'decision making based on short-term earnings expectations'.²³ This has been driven by a long-standing practice of corporate managers reporting quarterly earnings to shareholders, as well as compensation plans for executives being tied to yearly increases in stock prices.²⁴ Together, both of these activities have tended to reorient corporate managers' priorities from long-term activities to short-term ones.²⁵ This short-term

¹⁵ Surya Deva, 'Bhopal: The Saga Continues 31 Years On', in Dorothee Baumann-Pauly and Justine Nolan (eds), *Business and Human Rights: From Principles to Practice* (New York: Routledge, 2016), 22.

¹⁶ Gerald A Epstein (ed), *Financialization and the World Economy* (Cheltenham: Edward Elgar Publishing, 2005), 3; Gerald F Davis and Suntae Kim, 'Financialization of the Economy' (2015) 41 *Annual Review of Sociology* 203, 205.

¹⁷ Davis and Kim, *note 16*, 205; Christopher M Bruner, 'Corporate Governance Reform and the Sustainability Imperative' (2022) 131:4 *Yale Law Journal* 1062, 1242.

¹⁸ Frank H Easterbrook and Daniel R Fischel, *The Economic Structure of Corporate Law* (Cambridge: Harvard University Press, 1991), 34–39; Bruner, *note 17*, 1231.

¹⁹ Dorothy S Lund and Elizabeth Pollman, 'The Corporate Governance Machine' (2021) 121:8 *Columbia Law Review* 2563, 2606.

²⁰ *Ibid*, 2603.

²¹ *Ibid*, 2605.

²² Lynn A Stout, 'New Thinking on "Shareholder Primacy"' (2012) 2:2 *Accounting, Economics, and Law* 1, 3.

²³ Dean Krehmeyer, Matt Orsagh and Kurt Schacht, 'Breaking the Short-Term Cycle', CFA Institute, Business Roundtable Institute for Corporate Ethics, Position Paper (July 2006), 4.

²⁴ *Ibid*; John Graham, Campbell R Harvey and Shivaram Rajgopal, 'The Economic Implications of Corporate Financial Reporting' (2005) 40 *Journal of Accounting and Economics* 3.

²⁵ FCLTGlobal, *Moving Beyond Quarterly Guidance: A Relic of the Past* (October 2017), <https://www.fcltglobal.org/wp-content/uploads/Moving-Beyond-Quarterly-Guidance-A-Relic-of-the-Past.pdf> (accessed 19 January 2023);

myopic focus has presented a challenge for directing corporate activity towards sustainability issues.²⁶

Corporate focus on financialization has also led to corporations valuing activities and impacts that can be reflected on a financial statement and discount, negate or externalize those activities and impacts that do not. While this means that corporations must consider their liabilities, as their wealth is a product of increased assets and decreased liabilities,²⁷ it also means that they can ignore the costs of doing business that can be outsourced or externalized as these will not be reflected in a financial statement. Because of this practice, financial statements do not reflect the costs of environmental harms or the costs borne by workers or communities, and they also do not reveal whether a company has been involved in a human rights violation. In effect, the true costs of corporate activities remain hidden.²⁸

Corporate Law: Structural Elements and Goals

The effects of financialization – that is, the ability for corporations to hide the true costs of their activities – are rooted in corporate law. Corporate law provides businesses with a legal form that facilitates business participants' ability to transact easily through the corporate entity.²⁹ It shapes the 'regulatory infrastructure' within which businesses that choose this legal form can operate, providing them with benefits and advantages to facilitate and ease their path in engaging in transactions.³⁰

One view of corporate law sees it only as a vehicle for reducing agency costs and it is upon this view that financialization has found a home within corporate law. As commentators have noted, corporate law must provide corporations with core attributes such as legal personality and limited liability because they respond 'to the economic exigencies of the large modern business enterprise'.³¹ Corporate law is also designed to reduce 'the ongoing costs of organizing business through the corporate form'.³² If the only function of corporate law is to address the economic impacts of business, then a natural outcome of this view will be corporate law rooted in ideas of financialization.

Still, an exclusive financialized view of corporations and corporate law could potentially be a workable proposition if there was a regulatory infrastructure *outside* of corporate law that could adequately protect those that are negatively impacted by corporations. Indeed, some scholars advocate for review of corporate impacts only *outside* of corporate law

Krehmeyer et al, [note 23](#); Dominic Barton and Mark Wiseman, 'Focusing Capital on the Long Term', *Harvard Business Review* (January 2014), <https://hbr.org/2014/01/focusing-capital-on-the-long-term> (accessed 19 January 2023); Dean Krehmeyer, Matt Orsagh and Kurt Schacht, 'Short-Termism Revisited: Improvements Made and Challenges in Investing for the Long-Term', CFA Institute, Business Roundtable Institute for Corporate Ethics, Position Paper (September 2020).

²⁶ UN Global Compact, 'Coping, Shifting, Changing: Strategies for Managing the Impact of Investor Short-Termism on Corporate Sustainability', <https://www.unpri.org/download?ac=4215> (accessed 19 January 2023) 3. For a contrary argument, see Mark J Roe, 'Stock Market Short-Termism's Impact' (2018) 167 *University of Pennsylvania Law Review* 71.

²⁷ Bruner, [note 17](#), 1243.

²⁸ Kent Greenfield, *The Failure Of Corporate Law: Fundamental Flaws and Progressive Possibilities* (Chicago: University of Chicago Press, 2006), 129.

²⁹ Reinier Kraakman et al (eds), *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd edn) (Oxford: Oxford University Press, 2017), 1.

³⁰ *Ibid*; Beate Sjaafjell, 'How Company Law has Failed Human Rights – and What to Do About It' (2020) 5:2 *Business and Human Rights Journal* 179, 182.

³¹ Kraakman et al, [note 29](#), 1.

³² *Ibid*, 2.

because they believe that reforms to corporate law will weaken government efforts to strengthen external laws.³³

Yet despite years of efforts, and notwithstanding any corporate law reforms, an external regulatory infrastructure to address the human rights impacts of corporations has yet to be developed. This could be because international human rights law, which is expected to be the primary regulatory vehicle for human rights abuses, is directed at states and not multinational corporations and therefore international law has, traditionally, not envisioned such regulation; or because the countries in which corporate human rights violations tend to occur are unable or unwilling to provide such regulation;³⁴ or because efforts to create such a regulatory infrastructure have often been thwarted by corporations themselves.³⁵ If the 'desirability of using corporate law to protect' human rights victims depends on how it 'fares compared with regulation by other fields of law',³⁶ given the potency of corporate law versus the relative impotency of other areas of regulation, reforming corporate law to bring in human rights considerations seems to be a solution even the sceptics would agree with.

Thus, if the aim is to ensure that corporations cannot offload or externalize the true cost of their activities, for example, by imposing human rights harms on rights-holders, then corporate law, itself, must be reformed. That is, both the structural elements of corporate law – such as principles of limited liability and separate legal personality – as well as the goals towards which corporate law is oriented, also known as corporate purpose, must be reoriented.

Separate Legal Personality and Limited Liability

One of the key elements of corporations provided by corporate law is separate legal personality. This feature enables the corporate entity to be considered a legal entity separate from its shareholders and also from those who manage the entity. In creating an entity that is separate from other legal personalities, separate legal personality ensures that the assets of the corporation belong to it alone and cannot be used by the shareholders or others.³⁷ Once the corporation has legal personality, it then possesses the same rights as other legal persons: namely, the ability to enter into contracts in its own name, own property, and sue and be sued.³⁸

Alongside separate legal personality, a second key element of corporations is limited liability. In guaranteeing limited liability, corporate law enables shareholders of a firm to be shielded from liability. As a result, the claims made by creditors of a firm are limited to the assets owned or held by the corporation; creditors cannot pursue claims against any assets held by the corporation's shareholders.³⁹

Working in tandem, separate legal personality shields the assets of the entity from its shareholder's creditors, while limited liability ensures that the shareholder's assets cannot

³³ See, e.g., Mariana Pargendler, 'The Corporate Governance Obsession' (2016) 42 *Journal of Corporation Law* 359, 402; Matteo Gatti and Chrystin Ondersma, 'Stakeholder Syndrome: Does Stakeholderism Derail Effective Protections for Weaker Constituencies?' (2021) 100 *North Carolina Law Review* 167, 171.

³⁴ Barnali Choudhury, 'Balancing Soft and Hard Law for Business and Human Rights' (2018) 67:4 *International and Comparative Law Quarterly* 961; John G Ruggie, 'Multinationals as Global Institution: Power, Authority and Relative Autonomy' (2018) 12 *Regulation & Governance* 317.

³⁵ Leo E Strine and Nicholas Walter, 'Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and Citizens United' (2015) 100:2 *Cornell Law Review* 335, 379–387.

³⁶ Kraakman, note 29, 107.

³⁷ *Ibid.*, 5.

³⁸ *Ibid.*, 8.

³⁹ *Ibid.*

be pursued by the firm's creditors. Together, these shields are known as asset partitioning as they ensure that the firm's assets are kept separate from the assets of its shareholders. Asset partitioning offers the firm several benefits. These include reducing the cost of capital⁴⁰ and enabling it to form subsidiaries or otherwise act as a group company.

A group company operates by using a group structure. Typically, this involves a parent company owning shares, wholly or partially, in a group of subsidiaries. The subsidiaries may, in turn, hold shares in or be intermediary holding companies for other subsidiaries and, in a multinational group, the subsidiaries operate in different countries.⁴¹

But how does a corporation operating as a group rely on corporate law to externalize its human rights costs? Simple. Limited liability ensures that the parent company is not responsible for any of the debts of the subsidiary, while separate legal personality confirms that the subsidiary is to be treated separately from its parent company. Once these two parameters are established, the corporation is free to channel its risky ventures into a subsidiary or otherwise enable the subsidiary to engage in hazardous or other dubious acts that results in human rights harms. Then, once the harm has been committed, the corporation can hide behind the asset partitioning benefits of corporate law and absolve itself of any of the subsidiary's liability, apart from its investment in the subsidiary (which is often very little). In the end, the rights-holders' human rights can be infringed, but the corporation will not bear the cost of any of it.

Corporate Purpose

The goals toward which corporate law is oriented are known as the corporate purpose debate. This focuses on determining in whose interests corporate managers should act. Some commentators argue that shareholders should be the only beneficiaries of corporate acts, while others contend that the purpose of corporations should be broader than only focusing on shareholders' interests.⁴² While to some extent the debate has been resolved in jurisdictions where legislation has been enacted to clarify the corporate purpose, in other jurisdictions the debate remains.⁴³ Yet, defining the purpose of the corporation in corporate law is vital as corporate purpose influences the direction of other elements of corporate law. Some examples of this influence are reflected in directors' fiduciary duties and the governance priorities of firms. Both of these examples are discussed below.

One of the most important influences of corporate purpose is defining the beneficiaries of fiduciary duties. All corporate managers have fiduciary duties, as a means of reducing agency costs,⁴⁴ but it is not always clear to whom these duties are owed. Defining the beneficiaries of fiduciary duties is important as it can drive the direction of corporate action in one way or another. For example, if fiduciary duties are defined only with reference to shareholder interests, directors may not be able to pursue a corporate action that does not benefit shareholders or risk being in breach of their duties. Conversely, a broad corporate purpose may facilitate directors' abilities to undertake corporate activities that are not focused exclusively on financial aims, including the prevention of human rights harms.

⁴⁰ Ibid, 9.

⁴¹ Martin Petrin and Barnali Choudhury, 'Group Company Liability' (2018) 19 *European Business Organization Law Review* 771.

⁴² For a discussion on this, see Barnali Choudhury and Martin Petrin, *Corporate Duties to the Public* (Cambridge: Cambridge University Press, 2019), 37–60.

⁴³ For instance, in the UK corporate purpose is clarified in section 172 of the Companies Act, while in the US the debate persists.

⁴⁴ Cynthia Williams, 'Fiduciary Duties and Corporate Climate Responsibility' (2021) 74:6 *Vanderbilt Law Review* 1875, 1879.

For instance, corporate purpose under UK law is defined by reference to an enlightened shareholder model. Under section 172 of the UK Companies Act, directors have a duty to promote the success of the company for the benefit of its shareholders, while having regard to stakeholder interests such as the interests of employees, the environment and other interests.⁴⁵ This provision was designed to ensure that directors would be obliged to take into account non-shareholder interests, albeit with the ultimate aim of shareholder value generation.⁴⁶ Similarly, under Canadian law, directors are obliged to discharge their fiduciary duties with 'a view to the best interests of the corporation' and in so doing may consider stakeholder interests.⁴⁷ Conversely, under US law, the highly influential Delaware courts posit that fiduciary duties are owed by corporate managers to shareholders only.⁴⁸ This is likely because shareholder primacy is presumed to be the default norm under Delaware corporate law.⁴⁹

These differing versions of corporate purpose can result in different levels of consideration for human rights harms. Thus, UK directors would be required to consider the issue of preventing human rights harms in deciding whether to pursue a particular corporate transaction, so long as the act of preventing the human rights harm would not impinge on shareholder value generation. A Canadian director could, but would not be required, to consider human rights harm prevention even if it negatively impacted on shareholder value generation so long as the directors could justify the harm prevention as being in the best interests of the corporation. Finally, a US director would not be required to consider human rights harm prevention, nor would the director be able to engage in preventing human rights harms if it infringed on shareholder interests, unless such a decision could be protected by the business judgment rule.⁵⁰

A second influence of the corporate purpose is the priority of shareholders in the governance of the firm. Indeed, in most instances, the only stakeholder in the corporation with powers to influence the governance of the firm are shareholders. Shareholders are the only ones who can elect directors or remove them from the board. They are also given exclusive power to amend articles, vote on by-laws and transactions where directors have a conflict of interest, and approve mergers and substantial transactions. Moreover, shareholders are the only stakeholders with information rights, meaning that the corporation has an obligation to disclose financial and non-financial information to them on a regular basis.⁵¹

In addition, in many jurisdictions the only stakeholder with the power to enforce directors' duties are shareholders. The derivative action permits shareholders to

⁴⁵ Companies Act 2006 (UK), sec 172. For a discussion of fiduciary duties under UK law, see Charlotte Villiers, 'A Game of Cat and Mouse: Human Rights Protection and the Problem of Corporate Law and Power' (2023) 36 *Leiden Journal of International Law* 415.

⁴⁶ Lorraine Talbot, 'Trying to Change the World with Company Law? Some Problems' (2016) 36 *Legal Studies* 513, 515, 529.

⁴⁷ Canada Business Corporations Act, sec 122(1.1).

⁴⁸ See, e.g., *Revlon Inc v MacAndrews & Forbes Holdings Inc*, 506 A.2d 173, 182 (Del Ch 1958); *Trenwick American Litigation Trust v Ernst & Young, LLP*, 906 A.2d 168, 201 (Del Ch 2006); *LC Capital Master Fund Ltd v James*, 990 A.2d 435 (Del Ch 2010); *eBay Domestic Holdings Inc v Newmark*, 16 A.3d 1 (Del Ch 2010).

⁴⁹ Leo E Strine, 'Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit' (2012) 47 *Wake Forest Law Review* 135; Edward B Rock, 'For Whom is the Corporation Managed in 2020? The Debate over Corporate Purpose' (2020) 76:2 *The Business Lawyer* 363, 373.

⁵⁰ *Aronson v Lewis*, 473 A.2d 805, 812 (Del 1984). See also Williams, note 44, 1889.

⁵¹ See, e.g., Delaware General Corporation Law, secs 109, 211, 251; Canada Business Corporation Act, secs 103(1), 106(1), 173(1), 183(5), 189 and 155(1). For a full list of shareholder rights under UK corporate law, see Shareholder Rights, 'The Complete List of Shareholder Rights' (2019), <https://www.shareholderrights.co.uk/sites/sr/files/2019-12/Complete%20List%20of%20Shareholder%20Rights.pdf> (accessed 19 January 2023).

'commence litigation in the company's name ... as a means of redressing wrongs done to the company'.⁵² Corporate law codifies the ability of shareholders to pursue such actions.⁵³

To some extent, the priority for shareholders in corporate governance matters is surprising as the corporation's productivity is dependent on more than just shareholders. Employees, consumers, creditors, the community and other stakeholders, all make important contributions to the corporation which is essential for its success.⁵⁴ Yet, for the most part, there is no role for these stakeholders in the corporation's governance, which suggests that the interests of these stakeholders will similarly not be reflected in the firm.

From a human rights prevention perspective, as the role for non-shareholder stakeholders is practically non-existent in the firm's governance, the only possibility for human rights issues to be considered as part of governance issues is if a shareholder takes up the cause.⁵⁵ This is because the existing model of corporate governance only supports shareholder interests. Human rights considerations will therefore rarely factor into corporate decision-making.

That being said, in jurisdictions where corporate law contains the business judgment rule, directors are given increased protection within corporate law to consider human rights issues. The business judgment rule provides directors with a degree of discretion to engage in business activity that will be free from judicial scrutiny, as long as directors act in good faith and with the honest belief that the act will be in the best interests of the company.⁵⁶ Because of the business judgment rule, directors could, theoretically, pursue a human rights abuse prevention strategy, so long as they could justify it as being in the best interests of the company.

However, the business judgment rule runs alongside the governance priorities given to shareholders. For some commentators, that means that using the discretion afforded by the business judgment rule must still coincide with the best interests of shareholders,⁵⁷ while others have argued that the best interests of the company includes the interests of non-shareholder stakeholders as well.⁵⁸ The Supreme Court of Canada has agreed with this latter assertion, arguing that the best interests of the corporation includes the interests of

⁵² John Armour, 'Enforcement Strategies in UK Corporate Governance: A Roadmap and Empirical Assessment', Law ECGI Working Paper 106/2008 (April 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1133542 (accessed 19 January 2023) 10.

⁵³ See, e.g., Companies Act 2006 (UK), secs 260–64; Federal Rules of Civil Procedure 2000 (US), rule 23.1; Canada Business Corporations Act, secs 238–240.

⁵⁴ Margaret M Blair and Lynn A Stout, 'Team Production Theory' (1999) 85 *Virginia Law Review* 247, 249–250; Roberta S Karmel, 'Implications of the Stakeholder Model' (1993) 61:4 *George Washington Law Review* 1156, 1171–1173.

⁵⁵ Caroline Flammer, Michael W Toffel and Kala Viswanathan, 'Shareholder Activism and Firms' Voluntary Disclosure of Climate Change Risks' (2019) 42:10 *Strategic Management Journal* 1850; McCarthy Tétrault, 'An Inconvenient Truth about Climate-Related Shareholder Activism' (June 2022), https://www.mccarthy.ca/sites/default/files/2022-06/An_inconvenient_truth_about_climate-related_shareholder_activism_june_2022.pdf (accessed 19 January 2023). At the same time, shareholder activism has significant limits in being able to achieve material change. See, e.g., Virginia H Ho, 'The Limits of Enlightened Shareholder Activism' (2021) 4 *International Journal for Financial Services* 37.

⁵⁶ *Aronson v Lewis*, 473 A.2d 805, 812 (Del 1984); Companies Act 2006 (UK), sec 172; *Re Smith & Fawcett Ltd* [1942] Ch 304.

⁵⁷ Rock, note 49, 377–378; Lori McMillan, 'The Business Judgment Rule as an Immunity Doctrine' (2013) 4:2 *William & Mary Business Law Review* 521, 528, 565.

⁵⁸ Blair and Stout, note 54, 301–304; Lynn A Stout, 'The Toxic Effects of Shareholder Primacy' (2013) 161:7 *University of Pennsylvania Law Review* 2003, 2013; Beate Sjäffell et al, 'Shareholder primacy: the main barrier to sustainable companies' in Beate Sjäffell and Benjamin J Richardson (eds), *Company Law and Sustainability: Legal Barriers and Opportunities* (Cambridge: Cambridge University Press, 2015), 119.

shareholders, employees, creditors and the environment, among others, and that under the business judgment rule, directors can consider all of these stakeholder interests.⁵⁹

Between these two positions lies a third intermediate one. This is that even if the business judgment rule does not require directors to act solely in the interests of the shareholders, a corporate law model that enables only shareholders to participate in the corporation's governance holds the directors accountable to shareholders. This necessarily limits the discretion directors have to consider non-shareholder interests.⁶⁰ As a result, even if the law does not require it, the reality is that directors must secure the support of shareholders if they wish to engage in promoting non-shareholder interests.⁶¹

Thus, the discretion afforded to directors by the business judgment rule to pursue a human rights abuse prevention strategy will likely still be constrained by the traditional corporate governance model that prioritizes the interests of shareholders. As a result, directors will not be able to engage in a human rights abuse prevention strategy without securing the support of important shareholders.

Corporate Law as Reflected in Practice

The combination of limited liability and separate legal personality, alongside corporate purpose as it is reflected in fiduciary duties and the prioritization of shareholders in the firm's governance, work towards both emboldening the power of corporations as well as incentivizing the board of directors away from human rights protection. These elements and goals of corporate law can be seen in operation both in the Rana Plaza and the Bhopal disasters.

For instance, the Rana Plaza disaster exemplifies the corporations' focus on financial interests to the detriment of other interests. The economic model of these companies of relying on high turnover and low costs suggests that corporate managers have focused their fiduciary interests only on the financial interests of shareholders and are confident that they need only be concerned with the interests of shareholders. Corporations' focus solely on financial interests, rather than any other interest, is further confirmed by a study on Rana Plaza, which found that despite the Rana Plaza disaster, firms continue to engage in exploitative purchasing and other financial practices with these suppliers that are the root cause of labour problems in Rana Plaza.⁶²

Similarly, as mentioned earlier, it is limited liability and separate legal personality working in tandem that shielded the Union Carbide Corporation from any liability in the Bhopal disaster. Because of separate legal personality, the Indian subsidiary (Union Carbide India Limited) was considered to be separate from the parent company, Union Carbide Corporation, headquartered in the US, despite the fact that it owned a majority interest in the Indian subsidiary. Moreover, because of limited liability, the victims of the Bhopal disaster could only pursue claims against the Indian subsidiary.

IV. Reorienting Corporate Law to Prevent Human Rights Harms

States should be mobilizing to strengthen their human rights, environmental and other laws – outside of corporate law – to address the adverse impacts of corporations. However, as

⁵⁹ *BCE Inc v 1976 Debentureholders* [2008] 3 SCR 560, para 40.

⁶⁰ Martin Lipton and William Savitt, 'Stakeholder Governance – Issues and Answers', Harvard Law School Forum on Corporate Governance (25 October 2019), <https://corpgov.law.harvard.edu/2019/10/25/stakeholder-governance-issues-and-answers/> (accessed 19 January 2023); Sjøfjell et al, note 58, 120–125.

⁶¹ *Ibid.*

⁶² Natasja Sheriff Wells and Chana Rosenthal, 'A Broken Partnership: How Clothing Brands Exploit Suppliers and Harm Workers – And What Can Be Done About It', NYU Stern Center for Business and Human Rights (2023).

corporate law, itself, makes a noticeable contribution to the actions of corporate managers in incentivizing and facilitating corporate abuse, reforms to non-corporate laws are insufficient. Rather, corporate law must, itself, be reoriented towards the prevention of human rights harms as well. This can be done by limiting limited liability and reorienting corporate purpose (that is, expanding fiduciary duties for directors and broadening governance priorities for corporations beyond just shareholders).

Limiting Limited Liability

As we have seen, two of the structural elements of corporate law, separate legal personality and limited liability, work together to offer the corporation the prime benefit of asset partitioning, which provides a shield for the corporations to hide behind and evade liability for human rights harms. One way to ensure that corporations cannot asset partition, as a way of evading liability for human rights harms, is to limit limited liability.

In fact, there are a number of scholars who are otherwise ardent supporters of limited liability, but are in favour of limiting limited liability in instances where companies hold shares in other companies, such as in the case of group companies. Commentators have argued that corporate managers may be less inclined to guard against risks in subsidiaries because of limited liability.⁶³ Others have found that limited liability encourages shareholders to transfer business risks to creditors⁶⁴ and that by operating through minimally capitalized subsidiaries, corporate managers may be incentivized to engage in risky behaviour.⁶⁵ Still others have noted that the traditional justifications for limited liability, such as reducing agency costs or risk avoidance, are less relevant in the group company context.⁶⁶

There has also been explicit recognition by many of these limited liability proponents that limited liability in group companies ‘cannot be rationalized’ when it comes to corporate torts.⁶⁷ As these commentators note, limited liability incentivizes the underspending of precautions to avoid accidents and facilitates cost externalization.⁶⁸ Corporate use of subsidiaries further enables corporations to contractually structure their operations in a manner that facilitates their ability to be judgment proof against torts.⁶⁹ Limited liability may also may prevent corporate managers’ interests from aligning with the interests of society at large.⁷⁰

These reasons suggest that one way both to disincentivize corporations from committing human rights harms and to better allow for society to hold corporations accountable when such rights are violated would be to eliminate limited liability as one of the structural elements of corporate law when corporations are operating as a group company. To some extent, this is one of the shortcomings of corporate law that has been addressed by at least one form of HRDD. France’s *Devoir de Vigilance* eliminates limited liability for French corporations that fall under the legislation by requiring the French parent company to

⁶³ Easterbrook and Fischel, *note 18*, 56–57.

⁶⁴ Paul Halpern, Michael Trebilcock and Stuart Turnbull, ‘An Economic Analysis of Limited Liability in Corporation Law’ (1980) 30:2 *University of Toronto Law Journal* 117, 148–149.

⁶⁵ Easterbrook and Fischel, *note 18*, 56–57.

⁶⁶ Phillip Blumberg, ‘Limited Liability and Corporate Groups’ (1986) 11 *The Journal of Corporation Law* 573, 623–636; David W Leeborn, ‘Limited Liability, Tort Victims, and Creditors’ (1991) 91 *Columbia Law Review* 1565, 1616–1617; Stephen M Bainbridge, ‘Abolishing Veil Piercing’ (2001) 26:3 *Journal of Corporation Law* 479, 526–534.

⁶⁷ Henry Hansmann and Reinier Kraakman, ‘Toward Unlimited Shareholder Liability for Corporate Torts’ (1991) 100:7 *Yale Law Journal* 1879, 1880.

⁶⁸ *Ibid*, 1882–1885.

⁶⁹ See Bainbridge, *note 67*, 529–531, citing the model developed in Lynn M LoPucki, ‘The Essential Structure of Judgment Proofing’ (1998) 51 *Stanford Law Review* 147.

⁷⁰ Leeborn, *note 66*, 1617.

include in its HRDD efforts the activities of its subsidiaries as well, even if they are located outside of France.⁷¹ Some courts have also recognized that parent companies owe duties of care to those that have been affected by the acts of their subsidiaries, thereby indirectly eliminating limited liability between parent companies and subsidiaries.⁷² Other courts have disregarded limited liability by engaging in veil piercing, although such a practice is often unprincipled and rare in tort cases.⁷³

Another approach would be to focus on limited liability for the entire group company. Thus, whenever a subsidiary is unable to provide redress to a human rights rights-holder, the rights-holder could be given the right to pursue a claim against any entity within the group company, not just the parent company.⁷⁴ This would eliminate not only limited liability between parent and subsidiaries but also between corporate entities with common ownership.

Regardless of the precise approach taken, limiting limited liability in corporate law – at least, in the group context – could work towards incentivizing corporate managers away from corporate activity that involves channelling risky ventures into under-capitalized subsidiaries. With the asset partitioning protection shield removed, the parent company or other corporate entities within the group would suddenly become responsible for the debts of the subsidiary or entity. As a result, corporate managers would be prompted to better manage risk. They would also be more likely to take preventative steps to reduce the likelihood of human rights harms at the subsidiary or entity level. Not only does such an approach ensure that rights-holders have greater likelihood of a remedy, but it also forces corporations to internalize their risks and costs, instead of the current practice of having society bear these costs for them.

Corporate Purpose

As the purpose of the corporation determines, to some extent, how corporate managers act, a reorientation of corporation towards the prevention of human rights harms would naturally suggest that the corporate purpose be reformed. This has been the widely adopted approach of numerous organizations. They have, for example, advocated for the corporation to benefit shareholders, while also benefitting society and the environment and reducing harms on them as well;⁷⁵ to 'profitably solve the problems of people and planet, and not profit from causing problems';⁷⁶ or to create general public benefit, such as by having a material positive impact on society and the environment or by operating in a responsible and sustainable manner.⁷⁷ However, while defining the corporate purpose can

⁷¹ Loi Relative au Devoir de Vigilance des Sociétés Mères et des Entreprises Donneuses d'Ordre, No. 2017-399 (27 Mars 2017) (Law on the Duty of Vigilance of Parent Companies and Ordering Companies, No. 2017-399) (27 March 2017).

⁷² See, e.g., *Okpabi v Royal Dutch Shell plc* [2021] UKSC 3; *Vedanta Resources v Lungowe* [2019] UKSC 20; *Four Nigerian Farmers and Stichting Milieudedefensie v Royal Dutch Shell plc and another* [2021] ECLI:NL:GHDHA:2021.

⁷³ See Cheng Han Tan et al., 'Piercing the Corporate Veil: Historical, Theoretical and Comparative Perspectives' (2019) 6:1 *Berkeley Business Law Journal* 140; Robert B Thompson, 'Piercing the Corporate Veil: An Empirical Study' (1991) 76 *Cornell Law Review* 1036.

⁷⁴ For a greater discussion of this topic, see Petrin and Choudhury, note 41.

⁷⁵ Better Business Act, 'Example Amendment to Section 172 of the Companies Act' (2021), sec 1, <https://betterbusinessact.org/wp-content/uploads/2021/02/Companies-Act-2006-Amendment.pdf> (accessed 19 January 2023).

⁷⁶ British Academy, 'Principles for Purposeful Business' (2019) 16, <https://www.thebritishacademy.ac.uk/documents/224/future-of-the-corporation-principles-purposeful-business.pdf> (accessed 19 January 2023).

⁷⁷ B Lab, 'Benefit Corporations – What is a Benefit Corporation?' (2022), <https://usca.bcorporation.net/benefit-corporation/> (accessed 19 January 2023).

work towards countering the shareholder primacy norm, by itself, a revised corporate purpose does not delineate corporate action. As a result, it has limited effect unless it can be coupled with other features of corporate law such as those described below.

Fiduciary Duty

A director's fiduciary duty defines the standard of conduct expected of a director in taking a particular course of action.⁷⁸ Defining a fiduciary duty in a specific way can therefore be integral to delineating the manner in which a director will pursue a particular course of action. Further specification of fiduciary duties can also work towards clarifying the standards of conduct expected of directors, even if the law already provides these expectations.⁷⁹

As the UK and Canadian examples described above demonstrate, including non-shareholder considerations in a director's fiduciary duty can – at least theoretically – prompt a director to consider non-shareholder issues. This is especially true in the UK, where directors are not only urged to have regard to non-shareholder interests, but are also required to report on how they have considered these interests.⁸⁰ Yet, studies have found that the UK's fiduciary duty provision has had little impact on corporate behaviour.⁸¹ While some of the studies did find that directors had become more aware of non-shareholder interests due to the provision, overall they found this was insufficient to influence directors' decision-making.⁸²

In part, the lack of efficacy of the fiduciary duty under UK law to change corporate behaviour may be because the provision itself has two major shortcomings. First, the provision still ultimately prioritizes shareholder interests over stakeholder interests. As the section provides, the ultimate beneficiaries of directors' acts are the 'members', otherwise known as the shareholders. Thus, while directors may consider stakeholder interests, they are only obliged to do so for the benefit of the shareholders. A strict reading of the provision would therefore suggest directors should consider a stakeholder interest *only* if it would benefit shareholders.

Second, the provision requires directors to 'have regard' to stakeholder interests. The explanatory notes to the provision indicate that this requires directors to do more than 'pay lip service' to such an interest, but does not provide any further guidance.⁸³ Companies are given an opportunity to show how they have regarded stakeholder interests under related reporting requirements, but these requirements do not offer further prescriptive information

⁷⁸ Melvin Aaron Eisenberg, 'The Divergence of Standards of Conduct and Standards of Review in Corporate Law' (1993) 62 *Fordham Law Review* 437, 438; Julian Velasco, 'The Role of Aspiration in Corporate Fiduciary Duties' (2012) 54 *William & Mary Law Review* 519, 562.

⁷⁹ For instance in the UK, the government defined directors' fiduciary duties with greater specificity because it found that the law, which already enabled directors to consider non-shareholder interests, was 'not well recognised and understood'. Company Law Reform, *Modern Company Law for a Competitive Economy: Strategic Framework*, URN 99/654 (February 1999), paras 5.1.20 and 5.1.22.

⁸⁰ Companies Act 2006 (UK), sec 414C.

⁸¹ Andrew Keay and Taskin Iqbal, 'The Impact of Enlightened Shareholder Value' (2019) 4 *Journal of Business Law* 304; Samantha Fettiplace and Rebecca Addis, 'Evaluation of the Companies Act 2006', Infogroup ORC International, URN 10/1360 (2 August 2010) 62, <https://webarchive.nationalarchives.gov.uk/ukgwa/20121205013304/http://www.bis.gov.uk/assets/BISCore/business-law/docs/E/10-1360-evaluation-companies-act-2006-volume-1.pdf> (accessed 19 January 2023); David Collison et al, 'Shareholder Primacy in UK Corporate Law: An Exploration of the Rationale and Evidence', ACCA, Research Report 125 (2011), <https://www.accaglobal.com/content/dam/acca/global/PDF-technical/business-law/rr-125-001.pdf> (accessed 19 January 2023).

⁸² Keay and Iqbal, note 81; Fettiplace and Addis, note 81.

⁸³ Companies Act 2006 (UK), 'Explanatory Notes: Commentary on Individual Duties', para 238.

on the ways in which directors should consider stakeholder interests.⁸⁴ It is therefore not surprising that many companies report that they are unsure as to how to properly give due consideration to stakeholder interests.⁸⁵

These shortcomings indicate some of the problems in drafting a fiduciary duty that would better take account of human rights issues. The first problem in the UK law, the continued prioritization of shareholder interests over stakeholder interests, perpetuates the effects of financialization over corporate law. To address this issue, fiduciary duties should specify that the duties owed by directors are to the company, not the shareholders. While some directors may continue to conflate the company's interests with the shareholder interests, specifying that the ultimate beneficiary of a director's acts is the company, is more likely to focus the director's attention on the entirety of the corporation and all of its stakeholders, rather than just on shareholder interests.

There are already examples of this type of wording in fiduciary duty regulations. Both Canadian and Australian legislation specify that directors must discharge their duties in the best interests of the corporation,⁸⁶ while Dutch law provides that directors have duties to the business enterprise.⁸⁷ An earlier version of the EU's proposed Corporate Sustainability Due Diligence Directive similarly provided that directors should act in the best interests of the company.⁸⁸ A study by DLA Piper on Director's Duties further confirms that in numerous jurisdictions (including Austria, Belgium, Denmark, Ireland, Japan and Italy) directors' duties are framed in terms of 'the interests of the company'.⁸⁹ Thus, framing director duties in terms of the best interests of a company is already a well-accepted idea and should, therefore, form a minimum basis for a redrafted fiduciary duty.

Yet, beyond a fiduciary duty oriented towards the corporation, states may also want to consider broadening their fiduciary duties by specifically including specified stakeholders. The UK and Canadian models explored above provide some examples of how to do this by enabling directors to consider or 'have regard' to stakeholder interests. However, a more innovative approach is found in the EU's study of directors' duties and sustainable corporate governance.⁹⁰ One of the options the EU study proposed for directors suggested that directors should: 'properly balance the following interests, alongside the interest of shareholders: long-term interests of the company (beyond 5–10 years); interests of employees; interest of customers; interest of local and global environment; [and] interest of society at large'.⁹¹ In addition, unlike the Canadian or UK models, it suggested that the

⁸⁴ Companies Act 2006 (UK), sec 414CZA requires companies to provide 'a statement (a "section 172 (1) statement") which describes how the directors have had regard to the matters set out in section 172(1)(a) to (f) when performing their duty under section 172'. A recent best practices guide by the UK's Financial Reporting Council suggests that companies can consider how they build and maintain strong relationships with stakeholders and performance and metrics with relation to specific stakeholders. Financial Reporting Council, 'Guidance on the Strategic Report' (June 2022), para 8.16, https://www.frc.org.uk/getattachment/343656e8-d9f5-4dc3-aa8e-97507bb4f2ee/Strategic-Report-Guidance_2022.pdf (accessed 19 January 2023).

⁸⁵ Key and Iqbal, note 81; Fettiplace and Addis, note 81.

⁸⁶ Corporations Act 2001 (Australia), sec 181.

⁸⁷ Civil Code (Netherlands), art 2:9.

⁸⁸ European Commission, '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 (23 February 2022), art 25.

⁸⁹ DLA Piper, 'Global Guide to Director Duties' (2022), <https://www.dlapiperintelligence.com/directorsduties> (accessed 19 January 2023).

⁹⁰ Ernst & Young, *Study on Directors' Duties and Sustainable Corporate Governance*, Final Report Prepared for the European Commission Director-General for Justice and Consumers (Luxembourg: Publications Office of the European Union, 2020).

⁹¹ *Ibid*, 51.

duty should be mandatory.⁹² While the proposal was ultimately rejected,⁹³ it does indicate an alternative model for defining fiduciary duties.

Indeed, the EU study addresses some of the shortcomings of existing expanded fiduciary duty model. First, it suggests that shareholder interests should not supersede stakeholder interests but rather should be balanced alongside other interests. As commentators have argued, because shareholder support is often integral to securing support for directors' pursuit of other stakeholder interests,⁹⁴ a balancing approach may enable directors to more easily pursue stakeholder interests as financial (shareholder) interests are factored into the pursuit of stakeholder interests as part of the balancing exercise. Second, a mandatory approach ensures that directors are required to consider stakeholder interests, whereas under a voluntary approach, directors can easily negate (or just box-tick) such interests. Third, the EU study suggested a second director's duty, which would require directors to identify and mitigate 'sustainability risks and impacts ... connected to the company's business operations and value chain'.⁹⁵

The idea of a fiduciary duty that advocates balance is not new⁹⁶ and one that offers a prudent approach to addressing both stakeholder and shareholder interests without necessarily elevating one over the other. Even better, though, is the idea of holding directors accountable for failing to properly consider stakeholder interests. This idea seems to build on the French due diligence law which holds companies liable for failing to be duly diligent in preventing human rights or environmental harms.⁹⁷ Corporate law could incorporate a similar duty by prescribing a director's duty to be duly diligent in preventing human rights and environmental harms. Such a duty would trigger an obligation on directors to institute proper mechanisms to identify, prevent and mitigate such harms, and they would be liable – under corporate law – for failing to institute such mechanisms. This type of duty would bring human rights (and environmental issues) into the corporate decision-making sphere and could lead to knock-on corporate governance effects which would further prevent human rights or environmental harms.⁹⁸ For instance, introducing a due diligence director duty in corporate law could prompt corporate management to appoint a dedicated officer overseeing such issues, such as a Chief Sustainability Officer. Alternatively, the board of directors might look for a board member with sustainability experience or be more likely to consult with human rights or environmental experts. Such a duty could also prompt boards or officers to consult with affected stakeholders in advance of certain corporate transactions or even constitute permanent (or *ad hoc*) stakeholder committees with dedicated sustainability experts.

In short, mandating that boards balance non-financial interests with financial interests enables the corporation to continue its expertise as an economic being but without economic considerations being the sole focus in leading its activities and operations.

⁹² *Ibid.*

⁹³ Council of the European Union, 'Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937 – General Approach', 15024/1/22 REV 1 (30 November 2022), paras 30–32.

⁹⁴ Lipton and Savitt, [note 60](#).

⁹⁵ Ernst & Young, [note 90](#), 51. This proposal was ultimately rejected. See Council of the European Union, [note 93](#), paras 30–32.

⁹⁶ Choudhury and Petrin, [note 42](#), 44.

⁹⁷ Law on the Duty of Vigilance, [note 71](#).

⁹⁸ For other commentators' views on incorporating human rights into board duties, see Cynthia A Williams and John M Conley, 'Is There an Emerging Fiduciary Duty to Consider Human Rights?' (2005) 74 *University of Cincinnati Law Review* 75; Jena Martin, 'Business and Human Rights: What's the Board Got to Do With It?' (2013) *University of Illinois Law Review* 959.

However, countering the financialization view that corporate law has enabled would be even better served by introducing a director's duty to identify, prevent and mitigate human rights and other related harms. This is because such a duty would not only prompt directors' meaningful consideration of human rights and environmental issues but also because of the ripple effects that such a duty could have on other aspects of corporate governance, which could more holistically change corporate decision-making for the better.

Governance Priorities

A second approach to decreasing the financialization of corporate law would be to reallocate or redistribute corporate law's governance priorities away from just shareholders. One way of doing this could be by enabling stakeholders, other than just shareholders, to elect members of the board. Some jurisdictions already allow employees to elect members from their workforce to the board and this could act as a precedent for allowing other stakeholders to appoint members from their groups to the board as well.⁹⁹ For instance, a community that will be impacted by the corporation's activities could be allowed to elect a member of their community onto the board to enable the community to have a direct voice in corporate decision-making.

Alternatively, a firm's governance priorities could be broadened by bringing different voices into the board room. The board could appoint an independent director to act as a representative for a stakeholder group, who would be tasked with voicing the stakeholders' concerns to the board. Alternatively, it could set up advisory councils to act as permanent or *ad hoc* 'panels of stakeholder representatives, who provide ongoing advice to management'.¹⁰⁰ Such panels could offer a 'structured and robust approach' to stakeholder engagement and facilitate the board's ability to directly engage with multiple stakeholder representatives.¹⁰¹ Expanding the voices or input into the boardroom could also broaden directors' reliance on the business judgment rule for more than just shareholder or financial aims.

The board could further be incentivized to focus on a broader range of priorities if a wider class of persons, beyond just shareholders, were able to enforce director duties. While in some jurisdictions, such as the US, only shareholders can enforce directors' duties, in others, enforcement of directors' duties is open to other stakeholders. In Canada and Singapore, for instance, any person is able to commence a derivative action against a company, including for breach of director's duties, so long as the court considers them a 'proper person' to do so.¹⁰² Thus, a rights-holder could, in theory, bring a derivative action against a director for breach of his or her duties in these jurisdictions.

Director's duties can also be enforced by public bodies. In some civil law jurisdictions, an investigator can hold directors accountable for poor corporate conduct, albeit at the request

⁹⁹ Michael Gold and Jeremy Waddington, 'Introduction: Board-Level Employee Representation in Europe: State of Play' (2019) 25:3 *European Journal of Industrial Relations* 205; Tom C Hodge, 'The Treatment of Employees as Stakeholders in the European Union: Current and Future Trends' (2010) 38 *Syracuse Journal of International Law and Commerce* 91.

¹⁰⁰ Brett H McDonnell, 'Stakeholder Engagement', Minnesota Legal Studies Research Paper No. 22-16 (2022) 34, <https://ssrn.com/abstract=4262976> (accessed 19 January 2023). See also Heiko Spitzack, Erik G Hansen and David Grayson, 'Join Management–Stakeholder Committees: A New Path to Stakeholder Governance?' (2011) 11:5 *Corporate Governance: International Journal of Business in Society* 560.

¹⁰¹ Katarzyna Chalackiewicz-Ladna, Irene-Marie Esser and Iain MacNeil, 'The Workforce Engagement Mechanisms in the UK: A Way Towards More Sustainable Companies? (Part 2)' (2022) 12–13, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4296944 (accessed 19 January 2023).

¹⁰² Canada Business Corporations Act, secs 238 and 239; Companies Act 1967 (Singapore), sec 216A.

of a shareholder.¹⁰³ In Australia, a public regulator can hold directors accountable for breaches of directors' duties that are considered to be in the public interest.¹⁰⁴

Enabling any affected party to hold directors accountable for breach of their duties is likely to better ensure that a corporation's governance priorities are not myopically focused on shareholders. However, a better approach is the use of a public regulatory body for enforcement. A public regulator that can hold directors accountable for breaches of their duties can offer an independent enforcement vehicle for director's duties, a support for 'good corporate governance and compliance' and a prompt for corporate improvement of internal measures to prevent and monitor corporate impacts.¹⁰⁵ Reliance on a public body for enforcement also better positions corporations as not entirely private vehicles, but rather entities that have a relationship with, and therefore impacts on, the public.

V. Conclusion

The introduction of various forms of HRDD is a promising counter to the impacts that corporations have had on human rights for years. Yet to be effective, HRDD needs to be mandatory, broad in its coverage of human rights and environmental issues and be accompanied by an effective enforcement mechanism. Unfortunately, many current versions of HRDD do not exhibit such characteristics.¹⁰⁶ This leaves corporations with the ability to continue to commit human rights violations with ease.

At the same time, by reflecting the perils of financialization, corporate law facilitates the commission of corporate harms of human rights. The grant of separate legal personality and limited liability, its orientation of fiduciary duties only towards shareholder interests, and its prioritization of shareholder interests in governance work together to create an incentive structure for corporations away from human rights interests. With little room for the consideration of human rights interests in corporate decision-making, it is not surprising that corporate abuse of human rights continues to occur.

Without its reform, corporate law will continue to facilitate corporations' ability to either commit Rana Plaza-style harms or to silently benefit from the occurrence of such harms. HRDD alone is unlikely to counter this practice. It is, therefore, essential that corporate law be reformed to reduce the commission of such harms.

Acknowledgements. The author acknowledges the excellent research assistance provided by Sofya Cherkasova.

Competing interest. The author declares none.

Financial support. Financial support for the work of Sofya Cherkasova was partially provided by the Nathanson Centre for Transnational Human Rights, Crime & Security and is gratefully acknowledged.

¹⁰³ See, e.g., Civil Code (Netherlands), arts 2:344–2:359; Stock Corporation Act 1985 (Austria), art 130(2); Stock Corporation Act 1965 (Germany), art 140(2) as cited in Robert McCorquodale and Stuart Neely, 'Directors Duties and Human Rights Impacts: A Comparative Approach' (2022) *Journal of Corporate Law Studies* 1, note 32.

¹⁰⁴ Australian Securities and Investments Commission Act 2001, sec 50.

¹⁰⁵ Jean J du Plessis and Niklas Cordes, 'Claiming Damages From Members of Management Boards in Germany: Time for a Radical Rethink and Possible Lessons from Down Under?' (2015) 36:11 *The Company Lawyer* 335, 350.

¹⁰⁶ Surya Deva, 'Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?' (2023) 36 *Leiden Journal of International Law* 389.