Transatlantic Doctoral Academy on Corporate Responsibility/International Focus Workshop
St. Gallen, Switzerland, 07-08 June 2012
Allen Radtke
University of Essex

The Ontology and Group Agency of Financial MNCs and their Human Rights Responsibilities.

§I Introduction

I am going to discuss today the effects of multinational corporations (MNCs) on human rights. While practical discussion of what might be done to make the world better is crucial, I will not address the specifics of human rights protections. We will hear other, more competent speakers today and tomorrow about how that might best be done. In the global financial crisis (GFC) since 2007 and its massive impact on economic conditions globally, it is better for me to talk today about how the world is. I will speak theoretically and normatively of how we think about the world, rather than practically and how we act in the world. My intention is to address confusions in selected concepts by which we do our work. In my case the work, as I understand it, is to interpret the world and, by clarifying certain conceptual tools, I intend that others can be more effective in changing the world.

This paper draws on content from chapters of my thesis where I address theoretical confusions about the ontology of corporations and the grounding of responsibilities assigned to them. Today I briefly extend those theoretical issues to address crucial confusions at the heart of the unfolding GFC. Those confusions are whether some minimum of socio-economic stability is a civil and political right entailing negative duties or a socio-economic and cultural right entailing positive duties. This is central in understanding the state's obligation to provide economic stability as a public good. Analysis of the state's obligation to provide economic stability as a public good may offer a way of understanding with greater rigour civil and political human rights and what negative duties attach to MNCs. We can also employ the concepts of corporations, group agency, responsibility, public goods and global economic stability to make our thinking about the actions and entailments of MNCs more rigorous with respect to positive duties that attach to the state to realise and protect socio-economic human rights. This presentation then does not address specific practicalities of human rights. Instead it extends theorisation of negative civil and political rights and positive socio-economic rights to focus on state provision of economic stability as a manifestation of socio-economic human rights.

In my research, I am currently focused on one kind of corporation – financial sector MNCs. These

play the central role in the ongoing crisis and have had two crucial effects on the capacities of sovereign states. One effect is to impair the capacity of the state to ensure socio-economic human rights as defined in §25 and §28 of the Universal Declaration of Human Rights. The second effect is to diminish the ability of the state to provide economic stability as an essential public good. By pursuing short-term private gain, financial MNCs constrain states from providing the long-term public good of economic stability that is necessary for realising the object of certain human rights. Consequently, I will argue that socio-economic stability is a human right and it is also a public good of compelling state interest.

The argument is that socio-economic stability is a compelling state interest.

- The state has a duty to realise and protect secure access to human rights.
- Economic stability at some minimal level is essential for secure access to socio-economic human rights.
- Therefore the state has a compelling interest in the realisation of a minimal level of socio-economic stability as an object of human rights.

§II The Ontology of Corporations

Why does the ontology of the corporation matter for human rights? To address this complex question we must confront whether collective entities such as corporations can be conceptualised as ontological primitives. To be an ontological primitive means that a collective entity cannot be reduced to the individuals of which it is comprised. It has the irreducible nature of a unitary being, although corporations are artificial. The ongoing philosophical debate on corporate personhood has a long history, but in Anglo-American law there are justified reasons for granting rights to corporations as distinct juristic persons. For example, the ability to make contracts and to undertake complex projects of prolonged duration, sometimes lasting decades, are two important reasons to give corporations standing as legal persons. But of course, things are not as simple as that and I can offer only an over-simplified glimpse as the debate rages on.

I will consider only one pair among competing Anglo-American legal, philosophical and political views of corporations. An example is the free-market view versus the mixed-economy view, in which the irresolution about the role and nature of the corporation is clearly visible:

1. In the free-market view or narrow view, the sole purpose of the corporation is to make a profit. Corporations are conceived of as engines of economic efficiency and have a fundamental right to pursue profits regardless of contingent socio-economic outcomes.

Their obligatory interests are known from the constitutions of their creation, i.e., out of their founding documents, and they are limited to those known through their constitution.

2. In the mixed-economy or broad view, the corporation is a creation of the state and is understood as an instrument of state obligation to social goods including human rights. Here corporations enjoy rights only in light of the positive social functions they serve. Under the broad view the relevant interests are everything that the corporation touches and as such incur human rights obligations, either negative or positive, or both.

Immediately we see a confusion revealed in these two conflicting views of the corporation. Recall that the primary focus of human rights protections is on the obligations of the state. Human rights bind the state and are designed to control the acts of states. They are aimed at different objectives than the rights of corporations. It is still a matter of debate whether the state can legitimately force a corporation to participate such that the state can realize a certain distribution of social goods, and thus make its obligation attach to the corporation. If this is so, then it is arguable that states then bind corporations for human rights in which corporations act as non-state secondary agents of justice (O'Neill, 2005, p. 39).

Following human rights theory an obligation to negative civil and political rights requires that as legal persons corporations ought not to act to cause harm. Thomas Pogge, for example, contends that under an institutional understanding of human rights, this entails negative claims on an institutional order and on all persons who contribute to the imposition of that order, presumably including corporations (Pogge, 2000, pp. 54, 64). However, there is another view of whether there are negative duties in the case of economic stability. Maurice Cranston argues that socio-economic rights are aspirations, and hence are not traditional human rights because they cannot be justified as negative claims to justice (Cranston, 2001, pp. 163-173). I think it is possible to argue that there are negative rights claims against the state on the grounds of failing to meet its fiduciary duty if it does not protect its subjects from excessive socio-economic instability and its consequences (Fox-Decent and Criddle, 2009, pp. 301-336). It follows that negative duties are implicated in the issue of economic stability with respect to human rights and these are a compelling state interest.

Thus there is a conceptual confusion about MNCs in the current global context. Socio-economic human rights are theorised as positive, but financial sector MNCs can be understood as under an obligation, being creations of the state, to protect negative rights by refraining from actions that create excessive economic instability. However, while civil and political human rights are negative

claims, protecting subjects against the power (and failures) of the state, at the same time the state is required to act to positively to protect, respect and remedy the human rights of its subjects against wrongful actions including those of corporations.

The pernicious consequences of this confusion about the nature and obligations of MNCs are manifold. Over the past 20 years or so, the intentional risk-taking and highly leveraged trading of structured financial products by some financial MNCs have resulted in the GFC, with many millions of innocent people now suffering from conditions of economic instability not experienced since the Great Depression of the 1930s. These conditions are found in both developed and developing nations and have caused many deprivations and violations of human rights.

Following the GFC and subsequent austerity measures imposed on many developed countries constituencies have become increasingly socially and politically distressed. Some democratic governments can no longer provide essential public goods and in a few cases elected governments have been ousted and replaced by caretaker technocratic regimes. Ongoing damages and losses from underemployment, unemployment, homelessness, lack of medical care and nutritional deficiencies are nearly incalculable in either financial or social terms. However, in neither view of the corporation sketched above is it normatively permissible for improperly regulated financial MNCs to foster economic instability to realise private gains at massive costs to global society.

Yet in the face of this worsening disaster financial sector institutions at the root of the problem continue to speak as persons and on the grounds of the narrow view assert that they are entitled to engage in systemically risky trading and investment as they steadfastly resist regulation and supervision. Most have escaped the consequences of their actions under the conceits of being "too big to fail" and are impelled by moral hazard, in which there is no penalty for excessive risk and using others' money as a means to their own ends. They persist in heedlessly maximising profits not only through systemically risky, imprudent trading, but by intentionally promoting economic instability through hedging as an arena of speculative profits even while provoking growing social and political disorder. Dangerously speculative commodity trading and more specialized aspects of international finance, including proprietary and high speed trading, shadow banking, and poorly understood algorithmic trading make up the bulk of financial activity. However, there is no straightforward way of applying classic human rights methodologies to these practices. Those methods require transparency and reasonably direct traceability of harm from financial MNCs to human rights victims. The profile of growing systemic complexity and risk across the financial

markets at any given point is dynamic and conditional on the activities of millions of actors spread throughout the system. It is increasingly difficult to disentangle. Clearly, there is a need to develop conceptual tools that can map an understanding of human rights values onto technical aspects of financial MNCs' actions so that we can demonstrate how risk management or capital adequacy, for example, are relevant to human rights and how that relevance may change the way these practices are structured (Dowell-Jones, 2011). One of those conceptual tools is group agency.

§III Group Agency

There is room in this short paper for only a cursory description of group agency, but it is important to suggest how a group as an ontological primitive can make rational judgements in a non-mysterious way. Groups count as agents on the basis of their ability to imitate the rational behaviour of individuals. To qualify, groups must be goal-seeking systems rationally capable of acting to realize their goals both in actuality and prospectively. Group agency emerges at the level of the members of the group, but the relationship is one of supervenience, i.e., the judgements of the group supervene on the judgements of the group's individual members (List and Pettit, 2006, p. 5).

More specifically, if there is a plausible form of epistemological certainty in the supervenience relation so that a group agent is legitimate and therefore responsible, then a MNC as an ontological primitive qualifies as an authentic group agent on the global stage. On this stance, it is feasible to hold MNCs responsible for certain human rights obligations including practical and morally desirable non-interference with states' provision of socio-economic stability (Gilabert, 2009, p. 666). If MNCs can be legitimately conceptualised as juristic persons and are authentic group agents the global consequences of their actions demand coercive regulation and supervision. This obviously conflicts with a narrow view of corporations as having no social responsibilities.

§IV Conclusion

This paper addresses conceptual confusions regarding MNCs and their human rights responsibilities. There is one long-standing confusion in resolving corporate ontology and group agency and another confusion in understanding negative and positive human rights with respect to the state's compelling interest in ensuring economic stability as a public good. I have argued that economic stability as a public good is a moral claim. I conclude that financial MNCs can be held responsible for their actions as unitary agents, and there is a compelling state interest sufficient to require their coercive regulation and supervision. Given the seriousness of the GFC it is now plausible to consider international financial regulation similar to the US Food and Drug

Administration to act as a safety testing mechanism for financial innovations. (Posner and Weyl, 2012). There is the existing reality of international air traffic control to support the feasibility of such measures. We must demand something similar to protect the constituents of sovereign states when financial MNCs are capable of causing economic instability and crisis on a global scale.

References

Cranston, Maurice, "Human Rights, Real and Supposed". In Hayden, Patrick, *The Philosophy of Human Rights*. St. Paul, MN: Paragon House, 2001. Pp. 163-173.

Dowell-Jones, Mary, "The Challenge of Linking Human Rights and Practices Designed to Manage Financial Risk". Notes from Dr. Dowell-Jones' presentation at the Law Society meeting in London, UK, 18 May 2011, "Regulating the Social Impacts of Speculative Financial Practices".

Fox-Decent, Evan and Evan J. Criddle, "The Fiduciary Constitution of Human Rights". *Legal Theory*, 2009. Vol. 15. Pp. 301-336.

Gilabert, Pablo, "The Feasibility of Basic Socioeconomic Human Rights: A Conceptual Exploration". *The Philosophical Quarterly*, 2009. Vol. 59, No. 237. Pp. 659-681.

List, Christopher and Philip Pettit, "Group Agency and Supervenience". Prepublication electronic version for *Southern Journal of Philosophy*, 2006. Vol. 44, Pp. 85-105. Last viewed 03 June 2012 and available at: http://personal.lse.ac.uk/list/PDF-files/GroupAgencySupervenience.pdf

O'Neill, Onora, "Agents of Justice". In Kuper, Andrew (ed.) *Global Responsibilities: Who Must Deliver on Human Rights?* New York and London: Routledge, 2005. Pp. 37-52.

Pogge, Thomas, "The International Significance of Human Rights". *The Journal of Ethics*, Vol. 4, No. 1/2. Rights, Equality, and Liberty Universidad Torcuato Di Tella Law and Philosophy Lectures 1995-1997 (Jan. - Mar., 2000). Pp. 45-69.

Posner, Eric A. and E. Glen Weyl, "An FDA for Financial Innovation: Applying the Insurable Interest Doctrine to Twenty-First-Century Financial Markets". John M. Olin Law & Economics Working Paper No. 589 (2nd Series). The Law School, The University of Chicago. February, 2012. Electronic copy available at: http://ssrn.com/abstract=20100606