

Human Rights for Corporate Persons?

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Turkuler Isiksel, *The Rights of Man and the Rights of the Man-Made: Corporations and Human Rights* (January 7, 2015), available at [SSRN](#).

The *Citizens United* and *Hobby Lobby* decisions have drawn heavy fire from critics of the Supreme Court's ascription of constitutional and statutory rights to corporations. According to Professor [Turkuler Isiksel](#), a political scientist at Columbia, things may be even worse than those critics appreciate. In the paper referenced above, Isiksel illuminates and offers a trenchant critique of disturbing developments in the transnational arena that may be unknown to specialists in U.S. corporate law. Multinational corporations are claiming that, as legal persons, they are entitled to the rights of human persons under international human rights law.

These assertions seek to shield corporations from domestic regulations imposed by host countries in which they do business. Isiksel's primary focus is the international investment regime, consisting of a large web of bilateral investment treaties and regional free trade agreements. These are designed to promote foreign investment by guaranteeing protection from expropriation and excessively costly regulations for corporations that have invested in countries that are parties to these agreements. When disputes arise between a corporation and the host state, they are typically resolved through arbitration. Arbitral tribunals are supposed to apply the terms of the particular investment agreement but "they increasingly also make use of human rights law to assess state behavior toward foreign investors." (P. 38.) Isiksel notes that "[i]nternational human rights law is congenial to firms looking to challenge state measures because it offers a framework for contesting the treatment of private actors by states." (P. 40.)

Arbitral tribunals have yet to declare that corporations as rights-bearing legal persons actually possess human rights. Nevertheless, these tribunals often look to international human rights law as a source for basic rights to property, due process, and access to justice, as well as principles like proportionality and least restrictive means to assess state imposed burdens. At a time when it is difficult to hold multinational corporations responsible under international law for human rights violations, there is irony in the ability of these firms to protect their own economic interests by couching their complaints against state regulation in the rhetoric of human rights. As Isiksel points out, the "moral stature" of human rights discourse is "appealing to firms looking to challenge state measures that prejudice their profit margins while claiming the moral (and legal) high ground." (P. 40.)

Human rights claims asserted by corporations come at the expense of the political autonomy of host countries, including their power to enact regulations aimed at protecting their citizens from harm. For example, in one case a Spanish firm operated a landfill in Mexico that handled toxic substances. The facility was located a short distance from an urban center. It became the target of a local citizens' campaign that eventually resulted in termination of the necessary operating license pursuant to a law already on the books that had previously gone unenforced. An arbitral tribunal sided with the corporation, finding that the public authorities' response was disproportionate in relation to the asserted public health concerns and was contrary to the legitimate expectations of the corporation that the law would not be enforced against it.

While the notion of a corporation as a legal person possessing the same rights as natural persons might seem absurd, at least a first blush, Isiksel is not content with that intuition. Rather, she takes a close look at the three theories of corporate personhood that have dominated U.S. legal discourse about the nature of the corporation. These are the artificial entity, natural entity, and aggregate theories, all familiar to corporate law scholars in this country. She shows convincingly that none of these theories provides a sufficient basis for claims that a corporate person should be thought of as essentially the same as a human person or at least the moral equivalent of one. For example, she is surely right in stating that the idea of the corporation as an aggregation of humans does not imply that the corporation itself is a human being in its own right; while the constituent humans obviously enjoy human rights and those rights might be implicated by state actions taken against the corporation, it does not follow that the corporation itself somehow enjoys human rights. Beyond her effective analysis of the standard theories found in the legal literature, Isiksel does not offer an in-depth exploration of philosophically grounded ontological or metaphysical claims about what corporations are as potential grounds for human rights claims. Given the stakes, we might expect such arguments to be advanced, but whether they will gain traction remains to be seen. For now, though, Isiksel seems correct to reject the idea that sophisticated theories of corporate agency—of which there are thoughtful and persuasive instances—would also support claims of corporate *humanity*.

Isiksel is concerned that the opportunistic use of human rights discourse by corporations threatens to devalue its moral stature. At the end of the day, investment arbitration cases are based on disappointed expectations of financial gain. "Claiming the mantle of human rights is therefore not only a way for firms to offload the risks of doing business to the shoulders of host states, but it also implies a non-existent human right to immunity from investment risk." (P. 60.) Needless to say, these concerns are altogether different from basic rights to be free from torture, enslavement, arbitrary detention, religious persecution, and other kinds of suffering that can only be experienced by human beings. Might expansion of the human rights tent end up problematizing the idea that people enjoy certain freedoms simply by virtue of our shared humanity?

Isiksel ends with a provocative point that I, by no means an expert on human rights law, found quite interesting. She sees the appropriation of human rights discourse by corporations for use against the states in which they operate as based on a notion of human rights as "fundamentally *supranational* and *anti-statist* . . . located above states, making their impact on domestic politics as foreign impositions." (P. 98.) Contrasting with this model is one that links human rights norms to local normative controversies, where norms are "developed, enriched, and transformed through domestic struggles aimed at reforming domestic public institutions, which in turn reverberate across societies and shape international instruments."

(P. 100.) According to this view, human rights norms emanate from local communities, elevating political discourse and providing standards by which states may be held accountable to their citizens. Seen in this light, efforts by multinational corporations to use human rights norms as levers against domestic regulations aimed at protecting a population's well-being threaten the ability of local communities to elaborate and enforce human rights norms.

The deployment of human rights discourse by multinational corporations—like the claims for constitutional and statutory rights under U.S. law—are made possible by the idea of the corporation as a legal person in its own right, existing in the eyes of the law separately from the human beings who constitute it. One might attempt to ground objections to these kinds of rights claims on rejection of the idea of corporate personality, but Isiksel does not do this and she is right not to try. The corporate personality idea is too deeply entrenched in western law and legal theory to be susceptible to that strategy and, in any event, the corporation's separate legal identity serves a socially useful function with respect to capital formation. The challenge therefore is to present strong arguments against particular assertions of rights, whether they are said to arise from international human rights law or domestic constitutions and statutes. In this paper, Isiksel succeeds admirably in exposing the weaknesses of human rights claims in an area of great importance that may not yet be well known to U.S. scholars of corporate law.

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