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Human Rights in the Corporate Context

The Challenge of Accountability

Society may subsist, though not in the most comfortable state, without beneficence; but the prevalence of injustice must utterly destroy it.

—Adam Smith (1759, p. 64)

It might be surprising that a book about business-related human rights abuses would begin with a quote from Adam Smith, the so-called “father of economics” or “father of capitalism.” Yet, capitalistic systems are rife with challenges for human wellbeing; Smith knew this. Even before he wrote his best-known *The Wealth of Nations* (1776), he had already published a book 17 years earlier titled *The Theory of Moral Sentiments* (1759). While others have explored his seemingly paradoxical texts,¹ the quote above is an important admonition that the “father of capitalism” thought deeply about the ways in which (informal) rules of morality and (formal) rules of the market keep one’s self-interests in check and ensure individual rights are respected. Smith understood the fundamental idea that for a society to function, economic relationships need to foster individuals’ opportunity to thrive and that, without such, the public order may be at risk. Smith’s first book, like this one, is about how people engage with one another when individual rights come into conflict with economic activity. Both books underscore the importance of redress or justice for wrongdoing and, quite significantly, the great danger for our existing political and economic systems if we allow injustices to persist.

Consistent with Smith’s observations, human exploitation is ubiquitous in our modern economy. This exploitation constitutes human rights abuses when it violates the standards that recognize and protect the basic freedoms and dignity that all humans are guaranteed by virtue of being human (e.g. physical integrity rights, political and civil rights, as well as economic, social,

¹ See Otteson (2002); Roberts (2015).

and cultural rights).² Many people may think of human rights abuses as an unusual, worst-case scenario in business. Yet, individuals are regularly injured, trafficked, enslaved, forcibly displaced, or killed in the corporate context. Recent examples include enslavement of migrant workers across agricultural communities in Argentina; over 4,500 employees working in a sweatshop in Peru, some of whom were dismissed for trying to form a union; and forced displacement of communities by paramilitary forces in Colombia on behalf of a palm oil company. Claims such as these are widespread, suggesting that businesses abuse, neglect, or fail to protect the basic human rights of workers and communities.

Such human rights abuses occur in a context of increasing interest in, and activism around, improving corporate human rights conduct. The challenge of improving corporate behavior is frequently summarized by scholars and policymakers as the need to close the “governance gap,” or the oft-cited idea that states are weak relative to large, multinational enterprises that span the globe. In response to this gap, there has been a marked rise in international- and industry-specific voluntary initiatives, monitoring bodies, and global campaigns. Such efforts have attempted to redress human rights abuses and mitigate future occurrences by engaging states, firms, and civil society to address concerns about corporate misconduct. Initiatives include well-known multi-stakeholder efforts like the Extractive Industry Transparency Initiative or the Kimberley Process and newer efforts, such as the Equitable Food Initiative. In 2011, the United Nations (UN) Human Rights Council unanimously endorsed the UN Guiding Principles on Business and Human Rights (UNGPs) to improve companies’ respect for human rights, including a framework for remedy provision, when human rights are not respected. A decade later, the UN Working Group on Business and Human Rights launched the “UNGPs 10+” project to assess what has been done and create a road map for the next decade of work on business and human rights.³

That human rights abuses can occur is well understood, but *what* happens – and to whom – is not well explained by existing perspectives. The governance gap does not explain the wide variation in victims’ access to remedy mechanisms, defined as judicial or non-judicial efforts that seek to redress corporate wrongdoing. From the examples above, Adecco Argentina and Manpower – the human resources companies in Argentina that provided staffing services for Monsanto contractors – denied enslaving migrant workers and stated that

² A more detailed explanation as to how human rights are defined in this analysis is provided in Chapter 3.

³ See OHCHR (2021b).

they comply with “all applicable regulations relating to agricultural work” (*La Voz* 2011). A Monsanto spokesperson vowed the company has always “respected human rights” (Associated Press 2012). Even so, victims did not have access to remedy. On the other hand, in Peru, one of the world’s largest fashion retailers, Inditex (Industria de Diseño Textil, S.A.) engaged in negotiations with labor representatives, other buyers, and its supplier, Topy Toy, where employees endured sweatshop conditions. Inditex’s code of conduct requires suppliers to sanction worker exploitation and meet local and international labor laws (Just Style 2007). As such, Inditex led a negotiation in which all parties agreed to what labor representatives called a “historic agreement” that allowed employees to form a union and reinstated ninety-three employees who were wrongfully dismissed (CCOO 2007). And, in the final example, a Colombian court convicted five palm oil company employees in October 2014, and in June 2017 convicted a majority shareholder of the company, Antonio Nel Zuñiga-Caballero, for colluding with paramilitaries in the forcible displacement of Afro-Colombian communities (Ballvé 2009; *El Espectador* 2017).⁴ The focus of this book, thus, is to explore and understand the variation in access to remedy mechanisms for corporate human rights abuse. As I argue, the business and human rights literature, in general, needs to adopt a more victim-centered approach to better understand access to remedy mechanisms and the possibilities of improved democratic practices through claim-making.

This book asks the following fundamental questions: Why do victims have access to remedy mechanisms in some instances and not others? More specifically, when corporations are confronted with allegations of past abuse, what characteristics of the contestation (e.g. who is involved and in what context?) explain governance outcomes (e.g. why do some victims have access to judicial or non-judicial remedy mechanisms while others do not)? And to what end does contestation about businesses’ respect for human rights have positive spillover effects for democratic practices in the long term?

⁴ Upon the initial 2014 ruling, the defendants appealed by arguing that they did not directly inflict harm on those who were forcibly displaced (e.g. they had no weapons and did not injure anyone). The court upheld the initial ruling and, what is more, the same tribunal revoked a lower court’s decision and convicted Zuñiga-Caballero, due to his direct links with the paramilitary, a member of which owned the company, Urapalma SA (*El Espectador* 2017). As described in Payne, Pereira, and Bernal-Bermúdez (2020), the innovation in this case was the broader interpretation of the crime of forced displacement to convict company employees and recognize the rights of internally displaced people to return to lands occupied by private actors (p. 261).

Seeking Justice puts forward a novel argument: I develop the “varieties of remedy” approach, which explains when and why victims are likely to obtain access to remedy mechanisms for corporate human rights abuses. This approach explores how specific characteristics of non-violent contestation – who is involved and in which institutional context it occurs – shape the governance of corporate wrongdoing, or access to remedy mechanisms. Every day, victims around the world confront corporate actors for various ills and do so to seek remedy for those abuses. Some victims confront small- or medium-sized locally owned businesses while others confront large multinationals for their role in wrongdoing, including forced labor, environmental destruction, or death. Some victims confront corporate actors in countries with weak institutional frameworks and disregard for rule of law, while others bring these claims to light in countries with more robust institutions. Acts of claim-making are sometimes supported by local non-governmental organizations (NGOs) while other claims are broadcast by international non-governmental organizations (INGOs). Some victims gain access to judicial or non-judicial remedy mechanisms, but many victims are ignored or, worse, further victimized. What unifies all of them, however, is that they engage in non-violent contestation to gain access to remedial mechanisms for corporate wrongdoing. The arguments and analysis in this book seek to shed light as to when and why those efforts are more or less likely to work in democratic contexts.

To begin, the book challenges the widely accepted governance gap narrative.⁵ The governance gap proves to be a useful heuristic to motivate action at the international level, as indicated by the creation of, and a groundswell of activism around, the UNGPs. Yet, it has numerous shortcomings. It overlooks the policies (e.g. neoliberalism) that prompted policymakers and human rights advocates to advocate for improved corporate respect for human rights. A somewhat myopic focus on the governance gap has also led policymakers, scholars, and human rights advocates to pay little heed to local efforts to obtain access to remedy mechanisms for victims. In short, the governance gap framing casts aside the complexity of the business and human rights space.

⁵ Scholars argue that rulers have incentives to maintain, or even weaken, state apparatuses for personal gain (Reno 1997), but this idea has yet to be developed in the context of the governance gap. Instead, the governance gap relates more closely to how state and society scholars depict a “weak state” or, quite simply, that states do not have the capacity to hold corporate actors to account. Though beyond the scope of the book, the arguments herein suggest that the governance gap framing, at best, ignores the paradoxical quality of the state (e.g. not a monolith) or, worse, deteriorates both the practice and image of the state (Migdal 2001), thereby exacerbating the issue at hand (see Olsen and Bernal-Bermúdez 2023 for a study of economic complicity, or state-sponsored abuses in the corporate context).

The theoretical contribution developed here tells a new story. It draws together two streams of political theory – pragmatism and agonism – to make sense of the simultaneous, complicated, and dynamic nature of domestic-level efforts to provide access to remedy mechanisms for corporate human rights abuse. Pragmatism – distinct from its more common use (e.g. pragmatic action or, even, Ruggie’s (2006, 2010) “principled pragmatism”) – is an approach that allows for knowledge to evolve, rather than assume it is immutable, waiting to be discovered. My use of pragmatism is ontological (the origins of our knowledge about the world) and not epistemological (the ways in which we know about the world), though the latter is making a resurgence in international relations scholarship.⁶ Pragmatism-as-ontology avoids the dualisms and parsimony that define much of the political science scholarship (see Pratt 2016 for a thorough review). Pragmatism is not precise, by design, in that it embraces “complexity, intersubjectivity, and contingency in social relations” (Gould and Onuf 2009, p. 27). This approach upends the way mainstream analyses have, thus far, understood the governance gap and access to remedy. Pragmatism leaves open the possibility that while there may be similarities in corporate human rights violations, local contingencies make a parsimonious theory in this domain unlikely. In other words, we learn the value of stepping away from the false dichotomy of “gap or no gap” and begin to investigate the multiple, sometimes circuitous, ways in which victims may access remedy mechanisms, while also discovering that new claims continue to emerge.

The second stream of political philosophy upon which I draw is agonism. Agonism is a philosophical orientation that stresses the central role of contestation in democratic contexts and underscores that contestation can be productive, leading to greater institutional legitimacy. This literature challenges traditional notions of consensus through deliberation and, instead, integrates confrontation into an understanding of institutional change and democratic endurance.

Taken together, pragmatism as an ontology encourages the reader to consider an alternative approach to much of the mainstream BHR literature, by questioning the parsimony of the governance gap narrative and considering the complexity of the business and human rights landscape. Meanwhile, agonism encourages the reader to consider the potentially productive role of non-violent contestation. This theoretical framework is a key contribution of this book, as the governance gap narrative risks prioritizing parsimony over precision – even

⁶ See Bauer and Brighi 2002; Sil and Katzenstein 2010.

when the latter reveals multiple, possibly circuitous or synonymous pathways. These literatures are discussed at length in the next chapter.

This foundation sets the stage for the book's second contribution, which is the development of the varieties of remedy approach. The name of this approach is a play on – and, quite possibly, a needed complement to – Hall and Soskice's (2001) *Varieties of Capitalism*, in which the authors compare how variation in actors' engagement shapes national economies. Alternatively, this book compares how actors' engagement and the institutional context shapes access to varieties of remedy for some of the more serious ills of capitalism (e.g. corporate human rights abuse). While Hall and Soskice (2001) illustrate how institutional infrastructure facilitates a nation's comparative advantage, the elaboration of the “varieties of remedy” approach improves our understanding as to how the characteristics of contestation (e.g. claim-making) shape governance outcomes (e.g. access to judicial or non-judicial remedy efforts).⁷ Thus, by building on research in political science, management, and human rights, the varieties of remedy approach develops three potential pathways to remedy efforts: *Institutional Strength*, *Corporate Characteristics*, and *Elevating Voices*. These pathways, described later, challenge assumptions associated with the governance gap. They also contribute to related sets of scholarship that seek to address corporate human rights abuse, but only apply what we know about states' respect for human rights to the corporate context (Risse, Ropp, and Sikink 2013; Bauer 2011), or consider the legal responsibility firms might face for human rights abuses (Martin and Bravo 2016; Karp 2014; Bird, Cahoy, and Prenkert 2014; Deva and Bilchitz 2013; Gatto 2011). Instead, this book takes a victim-centered approach through which “remediation turns into one of the most important, if not the most important element, of corporate responsibility because it addresses the plight of those who have already suffered harm” (Schrempf-Stirling, Van Buren, and Wettstein 2022 pp. 26–27).

To answer the questions posed here I utilize unique, newly collected data, the Corporations and Human Rights Database (CHRD), which is the third

⁷ Chapter 2 includes an in-depth discussion of governance, which is defined as “the traditions, institutions and processes that determine how power is exercised, how citizens are given a voice, and how decisions are made on issues of public concern” drawn from the Institute on Governance (IOG). Other scholars' research corroborates this definition (Amin and Hausner 1997; Avant, Finnemore, and Sell 2010; Newman 2001; Pierre 2000), which departs from the traditional notion of bureaucratic administration, previously used in governance research.

contribution of this research.⁸ My team and I created the CHRDR, which includes over 1,300 allegations of corporate human rights abuse across Latin America from 2000 to 2014.⁹ Importantly, the dataset includes a broad range of corporate human rights abuse: physical integrity (i.e. murder, disappearance, illegal detention, torture); development (i.e. exploitation of land, license to operate); environment (i.e. water, air, land contamination); health (i.e. health consequences of corporate activity); and labor (i.e. child labor, substandard working conditions). The empirical chapters systematically and longitudinally explore allegations of corporate human rights violations in the modern era, which is a relatively understudied phenomenon (Payne, Pereira, and Bernal-Bermúdez 2020; Wright 2008). The data facilitate new learning about victims' access to remedy, which is of great import and interest to practitioners and scholars.¹⁰ For example, in 2014 the UN launched an Access to Remedy Project which is aimed at “continuing the work to facilitate the sharing and exploration of the full range of legal options and practical measures to improve access to remedy for victims of business-related human rights abuses” (United Nations OHCHR 2014). And yet, existing business and human rights scholarship tends to focus on single firms (Reygadas 2003; Taylor 2004; Wheeler, Fabig, and Boele 2002), particular countries (Hamann et al. 2009; Chesterman 2008; Santoro 2000), and small-N comparisons of firms or business sectors (Chandler 1998; Drimmer 2010; Handelsman 2003; Woolfson and Beck 2003). Anecdotal evidence alone can result in uninformed decisions or policy.¹¹ The CHRDR avoids that pitfall.

⁸ In this book “corporation” is used interchangeably with “business,” “firm,” or “company,” and defined as the group of individuals who legally engage in commerce with the goal of making a profit.

⁹ Note that the data used in this book are a subsample of the data included in the CHRDR, which covers all countries in the world between 2006 and 2018. I am grateful to the University of Denver for initial seed grants for this project and, ultimately, the National Science Foundation (Award ID #1921229) for making the data collection possible. This analysis, however, began with the pilot project of the CHRDR, which focused on Latin America. Thus, this book analyzes those countries that transitioned to democracy since the so-called “third wave” of democratic transitions or were already democratic: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, and Uruguay. Microstates (those with a population under one million) were omitted from this analysis because consistent information from other data sources was unavailable.

¹⁰ See, for example, the OHCHR's recent work on access to remedy: “Accountability and Remedy Project: Improving accountability and access to remedy in cases of business involvement in human rights abuses.” www.ohchr.org/EN/Issues/Business/Pages/OHCHRaccountabilityandremedyproject.aspx

¹¹ Note that this book does not address whether such mechanisms make the victim whole. Though that line of inquiry would be a valued and welcomed contribution to the literature, this book helps us understand when victims have access to such remedy mechanisms – a

Seeking Justice unlike many books about political economy, business ethics, or business and human rights, narrows in on the act of contestation, whereby actors express an alternative vision to the status quo or articulate a social criticism about the conduct of others to seek remedial mechanisms for, in this case, corporate wrongdoing. Contestation is a fruitful focus because it is the source of both interesting variation and important pathways to remedy. Institutional scholars, for example, might focus on the rules or norms (structure) to determine whether they facilitate access to remedy. Those studying collective action or contentious politics (agency) might focus only on the people who bring these claims to bear. Neither approach would be satisfactory here because, as I argue, greater respect for human rights in the corporate context is not only about structure or agency, but something much more complex. A focus on contestation, however, accomplishes two things: first, it facilitates a deeper look at who participates and in what context; it allows us to build a more robust understanding as to when it is more or less likely to shape governance outcomes while recognizing the multiple ways in which this may occur. Second, contestation brings into focus the foundational and fundamental need to recognize the irresoluteness and continuity of discord. The perennial nature of contestation has consequences not only for communities living in the sphere of influence of corporations but also for the longevity and health of our political and economic systems, generally.

In summary, this book provides a novel theoretical framework with which to understand the relationship between contestation and governance in the business and human rights arena. Below, I situate the book by outlining the business and human rights agenda and current policy discussions in this arena. Next, I introduce the varieties of remedy approach, which is empirically examined throughout the book, to develop a multilevel perspective that identifies three key pathways to judicial and non-judicial remedy mechanisms. Contrary to narratives about the governance gap, this book uncovers how contestation-level dynamics create pathways to governance outcomes – institutional strength, corporate characteristics, and elevating voices. Using unique data to test hypotheses in the literature, this book presents new findings and provides the first systematic study of access to remedy in the contemporary business and human rights context. The overall framing supports an exploration of how local forces of contestation shape access to remedy, whether provided by states or corporations, and what that

foundational and necessary step to subsequently understand whether remedy addresses the harms and satisfies victims' needs. In other words, this project lays the foundation for future work assessing the quality and effectiveness of such remedy mechanisms.

might mean for enhancing the future protection of the most vulnerable in our global economy. Finally, I provide an overview of the book and end with a brief discussion of the broader implications of the varieties of remedy approach.

THE BUSINESS AND HUMAN RIGHTS AGENDA

Historically, most human rights research has been concerned with states' respect for human rights in post-transition or post-conflict settings. Today's human rights regime began in the post-WWII era with the adoption of the Bill of Human Rights in 1948 and codification of such norms through international or regional accountability bodies. Around the globe, the wrongdoing of past state-sponsored human rights abuses has been recognized and, at times, those individuals have been held to account (Finnemore and Sikkink 2001; Olsen, Payne, and Reiter 2010). While a new norm for state respect for human rights has been established, respect for human rights in the corporate context continues to evolve.

Today, an increased focus on business actors as perpetrators of human rights abuse has been driven by multiple factors. First, multinational enterprises have more power and influence today than ever before. Some companies' assets are larger than the GDP of the countries in which they work. For example, General Motors produces more revenue (\$135 billion) than the GDP of Hungary (\$129 billion) where GM opened a plant in 1991. Were Walmart a country, its revenues would have made it the 10th largest GDP globally in 2016 (World Economic Forum 2016). A study by Global Justice, a UK-based non-profit organization, found that the world's top ten corporations have a combined revenue of more than the combined 180 "poorest" countries in the world, which include Ireland, Indonesia, Israel, Colombia, Greece, South Africa, and others (Global Justice 2016).¹²

¹² Those outside of the firm often assume economic power leads to political power; indeed, some of the corporate political activity literature confirms this intuition (on bargaining see Schuler, Rehbein, and Cramer 2002; Schuler 1996; on lobbying see Drope and Hansen 2006; Hillman et al. 2004; Schuler and Rehbein 1997). Even so, I find this view in stark contrast with the firm-perspective as depicted in the strategy literature, where firms operate in a highly competitive environment in which risks lurk around every corner (see discussion in Chapter 4). Again, in the spirit of a pragmatic approach, it turns out both are true – as we will see in Chapters 4 and 5, some corporate characteristics are correlated with impunity while other characteristics, from the corporate perspective, make them at greater risk for accountability. Uncovering this nuance is essential to improving victims' access to remedy.

A second and related point is that many external stakeholders – consumers, civil society organizations, and policymakers – expect improved corporate behavior in general, and seek to apply human rights norms to the corporate context, more specifically. For example, in the United States, Soule (2009) documents that citizens increasingly aim to elicit change from corporations by pressuring them directly. Scholars have documented how repeated confrontations by civil society through boycotts or protests make firms more receptive to such challenges and improve corporate conduct (McDonnell, King, and Soule 2015). Policymakers have also played an important role in creating “soft law” or voluntary mechanisms, such as the Extractive Industry Transparency Initiative, among others (Knudsen and Moon 2017).

More recent efforts include more detailed reporting requirements or direct regulation. For example, the United States Congress passed the Dodd-Frank Act in 2014, which included provision 1502, requiring firms to disclose whether they procure minerals from the Democratic Republic of the Congo.¹³ In addition, the UK’s Modern Slavery Act of 2015 strengthened and reformed existing laws about human trafficking and modern slavery to reduce occurrence and to prosecute those involved.¹⁴ In 2017, France adopted a law on the corporate duty of vigilance which requires large French companies to publish an annual “vigilance plan” that is meant to both identify risks and prevent severe human rights and environmental impacts due to company operations. In 2021, the Netherlands adopted legislation to combat child labor in Dutch companies’ supply chains. In the same year, Germany adopted the Act on Corporate Due Diligence Obligations in Supply Chains, which requires companies to systematically identify and address human rights and environmental risks in their own business operations and in those of their first-tier suppliers.¹⁵ In 2022, the Norwegian Transparency Act took their legislation a

¹³ In 2017, the United States’ Securities and Exchange Commission stated it would suspend enforcement of the due diligence and audit requirements of 1502. Even so, companies are still required to file disclosures about the source of materials in their products. Perhaps more concerning, however, is recent research questioning the effectiveness of this supply chain transparency effort (Stoop, Verpoorten, and van der Windt 2018).

¹⁴ Some observers have expressed frustration with the slow progress of the UK Modern Slavery Act, which was passed in 2015. An NGO, After Exploitation, shows that only one-third of modern slavery victims were referred through the National Referral Mechanism (Bulman 2022). Moreover, non-profit and political leaders are concerned that the Nationality and Borders Bill, passed in 2022, will further limit victims’ access to support. Scholarly research highlights the slow progression, as well (see Mantouvalou 2018).

¹⁵ Importantly, the legislation includes clauses for special litigation and outlines that firms may be fined up to 2 percent of their average annual turnover if they do not take remedial action or implement an appropriate remedial action if a violation is found within their direct supplier.