Lifelike and lifeless in law: Do corporations have human rights?

Anat Scolnicov[1],

"Corporations are people, my friend!"

– Mitt Romney, U.S. Presidential candidate 2011, on the campaign trail.

ABSTRACT:

It is often asked whether corporations have a *duty* to respect human rights, and whether the State has an obligation to enforce this duty in law. The present article asks a correlative question: whether corporations can be the subject of human rights, whether they can possess such rights. This article attempts to offer a general, conceptual analysis of this question, irrespective of the particular legal system.

In this article, I argue that human rights are based on the inherent worth of individuals. Such inherent worth does not characterize corporations, which are always a means to achieving an end, and have no inherent value in themselves. Therefor corporations cannot have human rights.

[1] Professor of Law, University of Winchester

This is an accepted version of a paper to be published in European Human Rights Law Review. It is not the copy of record. Copyright 2022, European Human Rights Law Review

CONTENTS:

I. CORPORATIONS AND HUMAN RIGHTS – A CONCEPTUAL QUESTION

A. Introduction

B. The European Convention on Human Rights and rights of legal persons

II. TWO TYPES OF JUSTIFICATIONS – A PHILOSOPHICAL ANALYSIS

A. Justifications of Intrinsic Value (Internal Justifications)

1. Right of association (Human rights include a right to exercise them in association with others)

2. Equality

3. Privacy and integrity of the person

B. Justifications Based on Value to Society (External Justifications)

1. Betterment of democracy

2. Deterrence of wrongdoers

3. Rule of law

4. Protection of business dealings from government intrusion

5. Symmetry between rights and obligations

6. Modern life

C. Conclusions so Far

D. Coherence and Divergence in the Convention

III. CONCLUSION

This is an accepted version of a paper to be published in European Human Rights Law Review. It is not the copy of record. Copyright 2022, European Human Rights Law Review

I. CORPORATIONS AND HUMAN RIGHTS - A CONCEPTUAL QUESTION

A. Introduction

It is often asked whether corporations have a *duty* to respect human rights, and whether the State has an obligation to enforce this duty in law.[2] The present article asks a correlative question: whether corporations can be the subject of human rights, whether they can possess such rights.[3] [4] This article attempts to offer a general, conceptual analysis of this question, irrespective of the particular legal system.

In this article, I argue that human rights are based on the inherent worth of individuals[5]. Such inherent worth does not characterize corporations, which are always a means to achieving an end, and have no inherent value in themselves. Therefor corporations cannot have human rights.

Any human rights are based on this inherent worth, whether these are rights of humans to express themselves, or rights protecting their physical and moral integrity, or other aspects of their innate personality. This is not to say that the external justifications for rights are not important. Reasons not internal to the rights-bearer, such as social utility, promotion of a better society, advancement of democracy, and rule of law, are persuasive and important justifications for protection of human rights. They are certainly additional reasons for recognizing human rights, but cannot serve in themselves as a basis for recognition of human rights. If human rights can only be justified by internal justifications, corporations cannot have rights. They have no moral integrity, autonomy, or individuality. They are means to an end. Humans are never means to an end, and therefore, all deserve protection of their rights.

Aside from the conceptual reasons for denying the human rights of corporations, there are public policy considerations against according human rights to corporations. A danger exists, that corporate resources, which individuals seldom have[6], will mean that the most prevalent use of human rights instruments will be made to protect companies rather than individuals, and could even lead to the relative marginalization of humans within human rights law.[7]

---

[2] See: S Joseph, *Corporations and transnational human rights litigation* (Hart 2004), G Frynas and S Pegg (eds), *Transnational corporations and human rights* (Palgrave 2005).

[3] In this discussion I use the term 'corporations', more prevalent in US and international usage, but will use the term 'companies' when referring to cases of the European Court of Human Rights.

[4] More generally on legal personality in the international legal sphere see: R Domingo, *The new global law* (Cambridge University Press 2010) 126-128.

[5] Johannes Morsink, in *Inherent Human Rights: Philosophical Roots of the Universal Declaration* (Pennsylvania University Press 2009), shows through historical analysis that this philosophical view is at the basis of the Unviseal Declaration of Human Rights.

[6] Berle and Means, in *The Modern Corporation and private property* (1932) show that the rise of the large corporation in the United States has meant that an enormous economic power is concentrated in a small number of organizations. That has only become more so in the decades since that work was published.

[7] Compare: T Hartmann, *Unequal protection: The rise of corporate dominance and the theft of human rights* (Berrett Koehler 2002).

This is an accepted version of a paper to be published in European Human Rights Law Review. It is not the copy of record. Copyright 2022, European Human Rights Law Review

Indeed, it has been argued that under prevalent paradigms, the recognition of corporate human rights in international law has become a prerequisite for promotion of human rights.[8] This enhancement of corporate human rights has been linked by others to the increasing impact corporations can have on the human rights of individuals[9]. The goal of this article is to provide an analysis of subjacent theoretical principles beside these important policy considerations for reaching the conclusion that corporate human rights should not be recognised. The analysis will show that the same conclusion reached on policy grounds, that corporate human rights cannot be recognized, can rest on sound theoretical principle. An examination of the justifications given for corporate human rights will show that none of them can provide a basis for a human right.

Rights are 'trump cards', they trump mere interest or social good[10] . They are, or might be, counter utilitarian. Corporations are created for a purpose. They are utilitarian, they fulfill a social function. But they are also merely utilitarian, they merely fulfill a social function. If corporations exist for social utility, it is illogical to accord them human rights which trump social utility. Even worse, since rights trump policy considerations and, when rights clash, some rights will necessarily trump other rights, then if corporations can use these 'trump cards' they will be able to use these over policy or even rights of humans. For instance, a privacy right of a company has trumped the enforcement of laws protecting employee safety .

Corporations may need some rights in order to fulfill their social function, such as contract rights, but given that fulfilment of their function is why they have such rights, it makes no sense to give them rights that trump social utility. And it is because human rights are rights that trump utility, that it is "doubly costly" if corporations can claim such rights ultimately at the expense of what would be useful for people - the sort of entities for whom we want living arrangements which respond to their needs.

This analysis in this article will not depend on the conceptual approach by which the corporation is viewed[11], whether as a real entity[12], a ‘nexus of contracts’[13] or a social construct[14]. Even the ‘real entity’ approach, the most favourable to the argument that

---

[8] U Baxi, *The future of human rights* (2nd edn, Oxford University Press 2006).

[9] MK Addo, ‘The corporation as a victim of human rights violations’ in MK Addo (ed), *Human rights standards and the responsibility of transnational corporations* (Kluwer 1999) 187.

[10] As posited by Ronald Dworkin in *Taking rights seriously* (1977). See J. Greene, ‘Rights as Trumps?’, 132 *Harvard L. Rev.* (2018) 28, for discussions of both the uses and some unintended negative consequences of this approach.

[11] See: D. Millon, Theories of the Corporation, *Duke L.J.* (1990) 201.

[12]See: M. Horwitz, ‘Santa Clara Revisited: The Development of Corporate Theory’, *88 W. VA. L. Rev.* 173 (1985) 173. See the historical development in R. S. Avi-Yonah, 'The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility' 30 *Delaware Journal of Corporate Law* (2005) 767.

[13] M. C. Jensen, W. H. Meckling, ‘Theory of the Firm: Managerial Behavior, Agency Costs and Capital Structure’, 3 *Journal of Financial Economics* (1976) 305. For further analysis see: D. Gindis, ‘From Fictions and Aggregates to Real Entities in the Theory of the Firm’, 5 *Journal of Institutional Economics*, (2009) 25.

[14] M. S. Mizruchi, D. Hirschman, ‘*The Modern Corporation* as Social Construction’, 33 *Seattle University Law Review* 1065.

This is an accepted version of a paper to be published in European Human Rights Law Review. It is not the copy of record. Copyright 2022, European Human Rights Law Review

corporations themselves be rights-bearers, in no way contradicts the argument developed below, that corporations cannot be bearers of *human rights*.

The European Court of Human Rights has assumed that corporate bodies have human rights, without principled discussion.[15] This article will use law of the European Convention on Human Rights to exemplify the conceptual arguments, in part because, in contrast to the vast discussion in US constitutional law of 'corporate personhood'[16] and the recent pivotal advisory opinion of the Inter-American Court of Human Rights,[17] discussion on this subject by the European Court of Human Rights, as well as in academic debate, is largely missing.[18] Therefore, while conceptual, my analysis will be applied to the law of the ECHR.

The main type of incorporated bodies to which this article refers is companies (or corporations in the US). Other bodies might also be incorporated, such as incorporated associations and some charities. These will not be discussed in detail, but the main analysis introduced here will apply to them as well. The basis of analysis offered in this article is not dependent on the commercial or profit-making nature of companies.[19] It is dependent on their non-human nature. Therefore, in principle, it can apply to other legal bodies as well, both incorporated and unincorporated.

The question is conceptual: Do legal persons (i.e. non-natural persons) have human rights?, This must lead to the question: What are human rights? and, indeed, to the question: What is a person in law? As Naffine asks: 'Is law trying to match or capture the nature or quality of life when it personifies, or is it engaged in a quite distinct legal pursuit, coining its own basic

[15] The discussion which follows will be of human rights, but the discussion will apply equally to 'fundamental rights', 'basic rights' or 'constitutional rights' which mean, for the purposes of this discussion, roughly the same thing, the nomenclature depending on the type of legal instrument in which these rights appear (indeed the ECHR is a Convention of 'human rights and fundamental freedoms'). The list of rights is largely the same in different instruments, regardless of the term for these rights, although there are differences between the instruments (not necessarily related to the term used for these rights). For example, freedom of speech is a human right in the European Convention, and a constitutional right in the First Amendment to the US Constitution. The analysis offered here for the question of corporate rights, is not dependent on their being termed 'human' rights, but will be premised on the underlying values and justifications for such rights.

[16] For an historical analysis, see: MJ Horwitz, *The transformation of American law: 1870-1960* (Oxford University Press 1992), ch 3; AC McLaughlin, 'The court, the corporation, and conkling', (1940) 46 *The American Historical Review* 45. For the current debate, see: SK Ripken, 'Corporations are people too: A multi-dimensional approach to the corporate personhood puzzle', (2009) *Fordham Journal of Corporate & Financial Law* 97; D Rubin, 'Corporate personhood: How the courts have employed bogus jurisprudence to grant corporations constitutional rights intended for individuals', (2010) 28 *Quinnipiac Law Review* 523.

[17] Advisory opinion OC – 22/60, Entitlement of legal entities to hold rights, decided 26 February 2016. Series A no. 22.

[18] Of the discussions in academic writings, see in particular: M Emberland, *The human rights of companies* (Oxford University Press, 2006) ; A Grear, 'Challenging corporate "humanity": Legal disembodiment, embodiment and human rights', (2007) *Human Rights Law Review* 511; C Harding, U Kohl and N Salmon, *Human rights in the marketplace* (Ashgate 2008), ch 2.

[19] See generally on the European Convention and commercial matters, the view of the former British judge on the Court: N Bratza, 'The implication of the Human Rights Act 1998 for commercial practice' (2000) *European Human Rights Law Review* 1.

This is an accepted version of a paper to be published in European Human Rights Law Review. It is not the copy of record. Copyright 2022, European Human Rights Law Review

conceptual unit—the person—for its own legal purposes? '[20] More than in any other legal area, when examining human rights we must distinguish the legal fiction – that corporate bodies are 'persons', from the reality – that recognition of legal personhood is merely a construct for assigning them certain legal rights and duties, and only humans possess the quality of humanity upon which human rights are predicated[21].

It will be seen that the European Convention on Human Rights, as interpreted by the European Court, relies on a category of legal personhood, devoid of any humanity. For the accordance of a status of rights-bearer, it will be argued that human rights law must take quite the opposite approach, recognizing as human right bearing person only what has the quality of humanity, not what is devoid of it.

B. The European Convention on Human Rights and rights of legal persons

The European Court of Human Rights has devoted little discussion to questioning whether corporations are capable of possessing human rights as a matter of principle, although it has recognized such rights in its case-law[22]. In the Convention, legal persons are explicitly mentioned in Protocol 1 Article 1 (right to property), and media enterprises are mentioned in Article 10. So, it is uncontroversial that some corporate rights are included within these specific rights under the Eurioean Convention[23] , even if the justification behind these provisions can be questioned.

However, in regard to other rights, the Convention is silent. Article 1 provides that rights must be secured to 'everyone', a term that reveals nothing about whether non-natural legal persons are included within it. The term 'everyone' in Article 10 was interpreted by the Court to mean that it includes all legal persons[24]. But this interpretation seems to presuppose its conclusion. The Court imagines this 'everyone' as including non-natural persons, even though the Convention tells us nothing about who this 'everyone' is. The French *'touttte personne'* is equally inconclusive. The question whether the Convention can be applied to corporate persons remains as a *lacuna* in the Convention text[25].

[20] N Naffine, 'Liberating the legal person', (2011) 26 *Canadian Journal of Law and Society* 193.

[21] The question, what is 'human' in law, is important also for the emerging law on artificial intelligence, see B. Arnold And D. Gough, 'Turing's People: Personhood, Artificial Intelligence And Popular Culture', 15 *Canberra Law Review* (2017) 1.

[22] On the historical development see: S. Steininger, J. von Bernstorff, 'Who Turned Multinational Corporations into the Bearers of Human Rights?', MPIL Research Paper Series No. 2018-25.

[23] Protocol 1 article 1 was applied to companies by the European Court in *Immobiliare Saffi v Italy* 30 EHRR 756. For the application of Protocol 1 article1 to corporations by the House of Lords, see: *Wilson v First County Trust Ltd. (no 2)* [2003] UKHL 40

[24] *Autronic v Switzerland* 12 EHRR 485. Also compare: The Canadian Charter of Rights and Freedoms guarantee of the right to equality in section 15 to 'every individual' was changed from the draft wording 'everyone' so as to exclude legal persons.

[25] See AH Robertson (ed), Collected editions of the 'Travaux Préparatoires' of the European Convention on Human Rights (Nijhoff 1975).

This is an accepted version of a paper to be published in European Human Rights Law Review. It is not the copy of record. Copyright 2022, European Human Rights Law Review

Article 10(1) is suffixed by a statement that '[t]his article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises'. It is possible to surmise from the inclusion of this statement that the article applies to corporations, but this does not necessarily arise from the article. The statement simply settles a substantive matter – permitting broadcast licensing schemes – and does not determine one way or another the applicability of the article or the Convention to corporations.

The Court has never discussed the possibility that corporate rights do not exist, but simply assumed that they do. The Court assumed that Convention rights apply to corporations, recognizing them on a right by right basis, on the different substantive articles that came before it. So, Article 8, the protection of private life, was applied to corporations in *Société Colas Est v France*[26]. The court recognized that Article 6(1), containing the fair process guarantees, applies to corporations[27], as does Article 11, which protects the freedom of association[28], and Article 7 (1), the prohibition of retroactive criminal laws[29]. Protocol 4 Article 2 of the Convention, which assures the right to freedom of movement and freedom to choose residence, was applied to a company, although with no substantive discussion by the Court and no contestation by the respondent State[30]. The assumption by the Court that corporate rights exist is, however, far from a forgone conclusion.

As the substantive articles of the Convention provide no guidance on the applicability of the Convention to corporations, help can possibly be gleaned from the procedural provision on standing. Article 34 of the European Convention, the *locus standi* provision, which relates to all substantive articles, names any ‘person, non-governmental organization or group of individuals’ as capable of a victim status, able to bring a claim. The Draft Convention referred, in Article 7(a), to ‘any natural or corporate person’, but the phrase was not included in the final text of the Convention. Its exclusion certainly cannot support the view that the Convention applies to corporations[31], pointing, if anything, to an exclusion of corporate persons .

An approach that denies corporate human rights has been taken elsewhere in international and regional human rights systems.

The International Covenant on Civil and Political Rights mandates that States respect rights of all individuals[32]. The Human Rights Committee did not accept a communication of a

---

[26] (2004) 39 EHRR 17.

[27] *Agrotexim v Greece* 21 EHRR 250; *Immobiliare Saffi v Italy* 30 EHRR 756; App. No. 7261/06 *Stavebná v Slovakia; Matos e Silva Lda v Portugal* 24 EHRR 573; (See further: M Emberland, ‘The corporate veil in the case law of the European Court of Human Rights’, (2003) 63.

[28] Application No 9905/82 *A and H v Austria* (1984) DR 187 ; Application No 41579/98 *AB Kurt Kellermann v* Sweden (both concerning non-natural legal persons that were not companies).

[29] Application No 53984/00 *Radio France v France*; Application No 14902/04 *Yukos v Russia*.

[30] Application No 16163/90 *Eugenia Michaelidou Developments Ltd v Turkey*. (Although for the purposes of the friendly settlement in the case (which relied on breaches of other articles of the Convention), the sole owner of the corporation was treated as an applicant).

[31] A view put forward by Emberland (n 9) 4.

[32] Article 2(1).

This is an accepted version of a paper to be published in European Human Rights Law Review. It is not the copy of record. Copyright 2022, European Human Rights Law Review

company[33]. However, it based its decision on the lack of standing of a company to author a communication, leaving undecided the question whether a company had substantive rights under the ICCPR[34].

The American Convention on Human Rights states explicitly that rights under the Convention belong to natural persons[35]. The Inter-American Commission on Human Rights found, therefore, that a corporation had no rights protected by the Convention, including the right to property, and that its shareholders could not sue for such a right on its behalf[36]. The Inter-American Court of Human Rights, in a recent advisory opinion, decided that legal bodies do not bear rights under the American Convention of Human Rights. The decision was based both on the literal meaning of Article 1.2 of the Convention, and purposive interpretation of the preamble to the Convention, which states that "… essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality."

An approach that is neither inclusionary nor exclusionary of the rights of legal persons is the 'nature of the rights' approach. Rather than taking an all-or-nothing approach, the German Basic Law[37] and the South African Constitution[38] require a determination of the applicability of a right to legal persons in view of the content of the right .

Similarly, rights under the Israeli Basic Law: Human Freedom and Dignity can be possessed by a non-human person if the nature of the rights and the nature of the legal person support such a conclusion, determined Barak, P., of the Supreme Court of Israel in *Bank Mizrahi v Prime Minister*[39]. The reasons he gives gave for this are were threefold: one, rights of corporations are reducible to rights of people who make up those corporations; two, non-recognition of corporate human rights is a restriction on individuals' 's right of association; three, modern life cannot function without recognition of corporate human rights. This last argument does not seem to be supported by the facts. While certainly modern life cannot function without corporations, it is not at all obvious why it cannot function without recognition of their human rights. Conversely, there is real potential of harm to society if corporations take over the legal culture of human rights. The other two of these counter-arguments to denting corporate human rights are dealt with in section II below.

Differentiation based on the 'nature of the rights approach', in which the decision whether a corporation can benefit from a right or not would be based in each case on the nature of the right, has some immediate attractions for courts, including the ECHR. However, these

[33] Submitted under the first Optional Protocol.

[34] Communication 360/1989 *A Newspaper v Trinidad and Tobago*.

[35] Article 1 (2).

[36] Case 10.169 *Shareholders of Banco de Lima v Peru*.

[37] Article 19(4) applies rights to artificial persons 'to the extent that the nature of such rights permits'.

[38] Section 8 (4) of the Bill of Rights mandates that rights are guaranteed 'to the extent required by the nature of the rights and the nature of that juristic person'; and see: *First National Bank of S.A. Ltd t/a Westbank v Commissioner South African Service*, 2002 (4) SA 708 (CC).

[39] HCJ 4593/05 *Bank Mizrahi v Prime Minister*, para 10; see further: O Sitbon, 'On men, corporations and everything between them: Should Basic Law: Human Dignity and Freedom apply to corporations?' 8 *Kiriat HaMishpat* (in Hebrew).

This is an accepted version of a paper to be published in European Human Rights Law Review. It is not the copy of record. Copyright 2022, European Human Rights Law Review

seeming attractions are misleading. Allowing only those right which are capable of being applied to a corporation is not really a limitation on corporate rights at all. Some rights, such as the right against torture and ill treatment (Article 3), prohibition of slavery (Article 4), right to life (Article 2), right to liberty and security (Article 5) and a right to marry (Article 12), are obviously simply not capable of being do not applied to corporations. Other rights, particularly the rights to property, fair trial, free speech, freedom of religion and privacy, are capable of being applied to corporate persons. But just because these rights are capable of being applied to corporations, does not mean that it is justified to apply them so. The danger of the 'nature of the right' approach is that it will not achieve any real limitation on corporate rights, but will only exclude rights which are anyway meaningless to corporations anyway.

The preferability of interpreting Convention rights in a way consistent with philosophical principles of human rights over interpretation of its provisions in a way consistent with each other is discussed in section D below. To that can be added the consideration that the Convention is a 'living instrument'[40], and the Eurpean Court should not be constrained by its own previous ruling.

A principled approach presented in this article to the analysis of human rights, and to the European Convention, would achieve a different result, which upholds the values and principles of the Convention .

II. TWO TYPES OF JUSTIFICATIONS – A PHILOSOPHICAL ANALYSIS

Justifications that seek to explain why we recognize human rights (or basic rights) are of two categories, two types of rationales. In the first category of rationales (discussed in section A) are all rationales that emanate from the intrinsic value of human beings and the need to nurture and protect the innate value of humanity. These rationales do not seek to justify rights by their contribution to some extrinsic resulting value. Rather, they rely on the intrinsic value of being human. These are *deontological* considerations.[41] They can apply only to natural persons and not to corporations. Corporations have a purpose but no intrinsic value; human beings have no purpose but only intrinsic value

The second type of justification given for recognizing and protecting human rights (discussed in section B) is that of instrumental justifications. Under these justifications, rights are protected because of their resulting value to society. These are utilitarian justifications, a type of a broader category of consequentialist or *teleological* justifications.[42] [43] It is this

[40] App. 5856/72 *Tyrer v. UK* [1978] ECHR 2.

[41] For deontological theories of moral philosophy, see: W Frankena, *Ethics* (Prentice Hall 1963, 2nd edn 1973.). In political philosophy, the prominent contemporary proponent of deontology is J Rawls, in his *Theory of Justice* (Harvard University Press, 1971); and see: W Kymlicka, 'Rawls on teleology and deontology' (1988) 3 *Philosophy & Public Affairs* 173.

[42] Teleological justifications include some non-instrumental justifications as well, any justifications based on resulting external values, for instance religious dictates. However, since the teleological justifications encountered in the debate on the corporate human rights are all instrumental justifications, the terms will be equated for the purposes of the discussion.

[43] See further, on consequentialism in moral theory: B Williams, *Morality* (Cambridge University Press 1972), S Scheffler (ed), *Consequentialism and its Critics,* (Oxford University Press, 1988), T Nagel, *The*

This is an accepted version of a paper to be published in European Human Rights Law Review. It is not the copy of record. Copyright 2022, European Human Rights Law Review

second type of justifications, teleological justifications, which can apply to corporations as well as to individuals.[44]

Teleological values are external and deontological values are internal to the right bearer. Although the pairs of terms teleological-deontological and external-internal are not quite coextensive, they are close enough approximations for them to be used interchangeably here.

This article argues that resulting societal, external justifications cannot stand alone as a basis for a human right. They can only serve as additional, supporting justifications, where deontological justifications exist as well. This must be the case, because justifying rights solely on the basis of their external value to society means that, if this external value can be achieved otherwise, the basis of the right is lost. Basic rights cannot be dependent on such vagaries. Teleological reasons are necessarily empirically justified. If, with time, the empirical result dissipates, or is found to have been erroneously arrived at in the first place, the justification will no longer exist. Say, for example, that a right to property is justified by the claim that acknowledging it leads to greater productivity, once this is shown not to be the case, the justification of this right will cease to exist.

I shall show in Part A that although deontological justifications can, in principle, justify human rights, upon inspection none of the deontological considerations argued for in the case of corporations actually supports the rights of corporations. Teleological justifications will be dealt with in part B, where I will argue that no justification of this type can justify, in itself, a human right, therefore it also cannot justify a right of a corporation.

A. Justifications of Intrinsic Value (Internal Justifications)

Several justifications which have been raised for the human rights of corporations appear to be deontological. Namely, that corporate human rights are simply a manifestation of the right of association (see section. 1 below), and that corporate human rights are justified by a principle of equality (see section. 2 below). But examination of these justifications shows that, although each of these justifications rests on internal values, neither justifies corporate rights. Examination of a principle of integrity, as underpins the right of privacy, will show that it too cannot justify corporate rights (see section. 3 below).

1. Right of association (Human rights include a right to exercise them in association with others)

Rights that can be exercised individually include within their ambit a right to be exercised in association with others (for those rights where it is relevant to do so). The right to freedom of association is recognized by the ECHR Article 11 as well as elsewhere by other national and international law. So, for instance, the European Court has increasingly recognized rights under Article 9 (freedom of religion) exercised by Churches and other religious

possibility of altruism (Oxford University Press, 1970). On consequentialism in political theory, see: RB Brandt, 'Utilitarianism and Moral Rights', (1984) 14 *Canadian Journal of Philosophy* 1.

[44] For analysis along the teleological/deontological divide of legal decisions of a different court and in another context, see: A Albors-Lorens, 'The European Court of Justice: More than a teleological court' (2000) 2 *Cambridge Yearbook of European Legal Studies* 373.

This is an accepted version of a paper to be published in European Human Rights Law Review. It is not the copy of record. Copyright 2022, European Human Rights Law Review

organizations.[45] But this is an individual right of every member of the organization, exercised collectively. Individuals have a right to pray, and they also have a right to pray collectively.

An exercise of other rights, such as a property right, in conjunction with the right of association can include the formation of a commercial company. Acknowledging this is no more than recognizing the full extent of a right of association. But this reasoning cannot justify any human right of the corporation itself, distinct from and independent of any right of its members, the individuals who created it (see paragraph (a) below). The argument from the right of association claims that the right of company founders (and subsequently others) to associate and form a company is infringed if this company is not accorded the same human rights that they would individually be entitled to. The right of association includes a right to form a company, but it does not follow that denying that companies have human rights somehow denies the right of association of their founders.

Furthermore, the rights of corporations are reducible to rights of individuals. Corporations themselves are a product of human endeavor, a product of an exercise of freedom to associate and to contract, protected in law. It has therefore been claimed that every corporate right is derivative of the individual rights to associate.

This argument (raised by Barak, P., in *Bank Mizrahi,*[46] among others) purports to rest on deontological considerations, reverting back and resting on the dignity of the founders, owners, directors and possibly employees of the corporation. But corporate rights are not simply reducible to rights of individuals. As Grear[47] notes, the independent legal personality of corporations should be taken seriously. Corporations can own property that is not owned by their shareholders, founders or directors; they can enter into contractual obligations that are not obligations of their shareholders, founders or directors. It is simply not the case that any rights or duties of companies in law are reducible to rights of individuals. The *raison d'être* of a company is often precisely the advantages achieved from that corporate veil. There is no reason to ignore this where fundamental human rights are concerned.

I have argued elsewhere that, in some cases, human rights of individuals are expressed through companies in which they operate as directors, founders, employees or others.[48] That is the case when a journalist's writing is expressed through the radio station, or a company is treated less favourably because of the ethnicity of its directors. In these cases, recognition of derivative rights of companies must be justified as it is the only way to prevent infringement of *individual* human rights of flesh-and-blood humans. That is different from recognizing human rights of corporations as corporations[49].

But there is a further reason why an association right of corporation cannot be seen as a human right. Every human structure of power, including the State, is a product of human

[45] Application No. 302/02 *Jehovah's Witnesses of Moscow v Russia; Church of Scientology Moscow v Russia [2007]* ECHR 258; App. No. 72881/01 *Moscow branch of the Salvation Army v Russia*.

[46] *Bank Mizrahi* (n 27) para 10.

[47] Grear (n 11).

[48] Anat Scolnicov, 'Human rights and derivative rights: the European Convention on Human Rights and the rights of corporations', in Tsvi Kahana & Anat Scolnicov *Boundaries of State, Boundaries of Rights: Human Rights, Private Actors, and Positive Obligations (*Cambridge Univ. Press 2016).

[49]See further: Scolnicov, *ibid*.

This is an accepted version of a paper to be published in European Human Rights Law Review. It is not the copy of record. Copyright 2022, European Human Rights Law Review

endeavor. If a legal system is to say that, since a corporation is created by humans, it has human rights, what is achieved? Since every human structure is a structure of power, the corporation, like the State, is also a structure of power. Human rights are recognized as a limitation on the power of such structures. If, at the same time, human rights are bestowed on corporations, the consequence is that the real value and meaning of human rights is ignored.

Such is the case when corporations rely on their human rights against governmental intrusion, whereas these rights are meant to protect the rights of the employees. So, in the US, corporations successfully relied on the 4th Amendment to the Constitution, to prevent warrantless inspections meant to uncover safety hazards, conducted under the Occupational Safety and Health Act. In the Supreme Court decision, *Marshall v Barlow,*[50] the corporation is cast as the person whose rights are intruded upon by the State. The employees, individuals whose rights should be protected by law from the power of the corporate employer, have no part in this discourse. The shift in the structure of power created by recognition of corporate human rights leaves humans vulnerable and corporations protected.

2. Equality

A principle of equality in according human rights is recognized and inherent to any system of human rights law, because of a need for equal concern and respect.[51] Human rights cannot be considered human rights at all, if they are not equally guaranteed to all. But there can only be 'equal respect' of people. It does not follow from a principle of equal respect that corporations must be treated equally to people.

But equality *has* been used as a justification for according rights to corporations. This justification has been developed especially in the constitutional jurisprudence of the US Supreme Court. Indeed, this appears to be one of the justifications given by the majority in the US Supreme Court *Citizens United*[52] decision. In this landmark decision on constitutionality of election spending limitations, the majority's view was that the First Amendment does not allow for distinctions between speakers, including distinctions between individuals and corporations. Therefore corporations are entitled to First Amendment protection just as individuals.

This decision has divided opinion amongst US constitutional law scholars[53]. In interpreting the principle of equality as a *human rights* principle, the equivalence between

---

[50] 436 U.S. 307 (1978).

[51] The phrase used by Ronald Dworkin to explicate his theory of equality. See: R Dworkin, *Sovereign virtue: The theory and practice of equality* (Harvard University Press, 2000).

[52] *Citizens United v FEC*, 558 U. S 310 (2010), p. 32-40. Further discussion of opinions and consequences of this case is offered in: 'Symposium*: Citizens United V. Federal Election Commission*: Implications for the American electoral process: Corporations, corruption, and complexity: Campaign finance after *Citizens United*', (2011) *Cornell Journal of Law and Public Policy* 643; J Alvarez, 'Are corporations "**s**ubjects" of international law?' (2011) 9 *Santa Clara Journal of International Law* 1.

[53] See, for a critique in US law: A Tucker, 'Flawed assumptions: A corporate law analysis of free speech and corporate personhood in *Citizens United*', 61 *Case Western University Law Review* 495. It is not only academics who were displeased with the Court's decision and its implications. Largely symbolic measures calling on their representatives to vote for a Constitutional Amendment to end corporate personhood were passed this November by voters in Montana and Colorado.

This is an accepted version of a paper to be published in European Human Rights Law Review. It is not the copy of record. Copyright 2022, European Human Rights Law Review

individuals and corporations cannot be right. Equality is a human right inherently connected to human dignity, which applies only to individuals. Indeed, the equal protection provision of the Canadian Charter, Section 15, guarantees the right to 'every individual', not to companies or other artificial persons.[54]

In US law, corporate personhood is entwined with the discussion of equality under the 14th Amendment. Corporate personhood is a concept that emerged from the case-law interpreting and applying the Equal Protection clause of the 14th Amendment, which mandates that no State can deny equal protection under the law to any person. The amendment was historically passed to provide constitutional protection to freed slaves in southern states.[55] Famously, this constitutional provision was later simply assumed to apply to corporations in *Santa Clara v Southern Pacific*[56] without discussion, as reported in the headnote by the court reporter, and has been so applied ever since. This did not pass without controversy. In *Connecticut General Life Insurance Company v Johnson,*[57] the dissenting judge, Justice Black, lamented the application to corporations, made by the Court, of constitutional rights created to protect citizens.

It seems that, just as happened with the application to corporations of the US equal protection constitutional provision, so too with article 14 of the ECHR: the provision drafted to protect humans was then applied by the court to corporations through under-reasoned case-law.

The ECHR does not directly protect equality, but prohibits discrimination. Non-discrimination is a principle included in two different provisions. Article 14 guarantees non-discrimination in Convention rights on grounds such as ‘sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status’. Protocol 12, the more recent provision, is a general non-discrimination article. The Court seemed to follow at times two disparate approaches to the application of Article 14. Although the Court has always stressed that the list of grounds on which discrimination is prohibited by article 14 is non-exhaustive, there have been two approaches in its rulings on what these grounds might be. One of these approaches could only apply to human subjects. The other could, and has been applied to corporations, although with scant discussion.[58]

In *Kjeldsen, Busk Madsen and Pedersen v Denmark,*[59] the Court "points out that Article 14 prohibits, within the ambit of the rights and freedoms guaranteed, discriminatory treatment having as its basis or reason a personal characteristic (“status”) by which persons or groups of persons are distinguishable from each other". This characterization of Article 14 cannot apply to corporations. However, elsewhere, in *National and Provincial Building*

---

[54] PW Hogg, *Constitutional Law of Canada* (Scarborough, Thomson, 2003) 744.

[55] *The Slaughterhouse Cases* 83 U.S. 36 (1872).

[56] 118 U.S. 394 (1886). Preceded in some ways by *Trustees of Dartmouth College v Woodward*, 17 U.S. 518 (1819), before the 14th Amendment.

[57] 303 U.S. 77 (1938).

[58] Recently in Application No 14902/04 *Yukos v Russia*.

[59] 1 EHRR 711.

This is an accepted version of a paper to be published in European Human Rights Law Review. It is not the copy of record. Copyright 2022, European Human Rights Law Review

Society v UK,[60] the Court has viewed the kinds of differences included within 'status' in Article 14 more broadly than its previous characterization, including possibly different banding of building societies for tax purposes (although allowing States a broader margin of appreciation in such matters), and indeed applied Article 14 to corporations.

An examination of the non-exhaustive list of characteristics mentioned in Article 14 reveals that they are all personal characteristics, whether mutable or immutable, deeply connected to individual personhood.[61] Comparison to other international human rights instruments would tend to strengthen this view.[62] It would therefore appear that Article 14 should be interpreted as pertaining only to discrimination upon such characteristics deeply connected to personhood, and therefore not to corporations. The same analysis would apply to Protocol 12, the stand-alone equality provision of the Convention, which is not dependent on other Convention rights.

One might ask: Can companies never suffer discrimination? What if a company was discriminated against because its directors were of a certain race, or religion or ethnicity? Those are personal characteristics, but it is the company that is treated a certain way because. These individuals are discriminated against. The answer must be that this is a derivative right of the company, predicated on that of individuals, and as such can be recognized.[63] It is the human dignity of individuals that is harmed. That is a deontological value, which should be recognized and protected.[64]

3. Privacy and integrity of the person:

In some cases, the connection of a human right to a deontological value can show precisely why the right should not apply to corporations. Such is the right of privacy, which is inherently connected to the value of personal integrity (both physical and psychological).

These values can be relevant only to individuals, but in *Société Colas Est v France*[65] the Court applied Article 8 (protection of private life) to a corporation. This decision relied on the recognition in a previous case, *Niemietz v Germany,*[66] that an individual's business premises are capable of falling within the ambit of Article 8.[67] Indeed, prior to *Société Colas Est*, Article

[60] 25 EHRR 127.

[61] Even 'property' in the context of article 14 is such a personal characteristic, historically used as a basis for discrimination in suffrage.

[62] Compare: Article 2 International Covenant on Civil and Political Rights, article 2(2) International Covenant on Economic, Social and Cultural Rights.

[63] More on such derivative rights in Scolnicov (fn)

[64] See more on derivative rights in the discussion of free speech, in Scolnicov (fn).

[65] (2004) 39 EHRR 17.

[66] 16 EHRR 97.

[67] The European Court of Justice, however, took a different approach to interpretation of the same article. (*Dow Benelux v Commission* (Case 85/87 [1989]) and *Dow Chemical Ibérica v Commission* (Joined Cases 97-99/87 [1989] ECR 3165).

This is an accepted version of a paper to be published in European Human Rights Law Review. It is not the copy of record. Copyright 2022, European Human Rights Law Review

8 was applied to companies or commercial activities in a private home.[68] Although both *Société Colas* and *Niemietz* dealt with protection of privacy in a business, in *Niemietz* the law office was connected to the personal surroundings of the lawyer, whereas in *Société Colas* there was no such connection.[69] Therefore, *Société Colas* does not follow from *Niemietz*, and, lacking any connection to personal integrity, no right to private life should have been recognized. While corporate bodies have a legitimate interest in commercial secrecy, they have no human right of privacy. Companies do not have private lives, and so no privacy to protect, a conclusion similar to that reached by the US Supreme Court in *FCC v AT&T,*[70] reasoning that corporations have no 'personal privacy' and cannot be exempt for reason of 'personal privacy' from the Freedom of Information Act.

Under the rationale of privacy examined here, it would be justified to protect, for example, medical information of employees or directors of companies, which are company documents. These are inherently connected to personal integrity, and their protection is justified by this deontological value. But this is not so regarding any claimed right of the company itself. For instance, commercial documents of the corporation are not reducible to rights of individuals in the same way. There may be valid reasons to accord the company commercial secrecy, but this is not a human right.

B. Justifications Based on Value to Society (External Justifications)

Teleological justifications are those justifications based on the value to society rather than the rights-holder value of protecting human rights. Protecting rights is endorsed, under these justifications because it makes for a better society. (On some level, it could be argued that even these justifications are reducible to deontological justifications, as the final value they protect is an inherent value. But, as they all promote values external to the right-bearer, they can be classed here as external, teleological justifications).

These justifications given for corporate human rights are external justifications: the improvement of democracy, the punishment or deterrence of the State that fails to provide these rights, furtherance of the rule of law, symmetry between rights and obligations, and more specifically to the right of privacy – fostering an undisturbed sphere for business dealings[71]. I will now take up these justifications one by one.

1. Betterment of democracy

[68] *Chappell v UK* (1990) 12 EHRR 1.

[69] *Colas Est* later followed, for instance in Application No 3757/97 *Veeber v Estoni*.

[70] 562 U.S. 397 (2011).

[71] Isikel, in his analysis of corporate human rights (T. Isikel, Corporate Human Rights Claims Under the ECHR, 17 *Georgetown Journal Of Law & Public Policy*, (2019) 979) posits public policy considerations against agent based considerations. I would identify his agent-based considerations as deontological (internal) considerations, but teleological (external) considerations are broader than policy considerations. While reason's 2,4 and 6 below are policy considerations, reasons 1,3,5 are considerations of principle which external to the agent.

This is an accepted version of a paper to be published in European Human Rights Law Review. It is not the copy of record. Copyright 2022, European Human Rights Law Review

An undoubtedly important rationale for the protection of freedom of speech is that political speech is needed for democracy to function.[72] The more free speech, the better the quality of democracy. This rationale, espoused by the *Citizens United* majority,[73] could apply to granting this right to corporations as well as individuals. It is a teleological reason: to put it bluntly, under this rationale, we are not granting freedom of speech because we care about the rights of its bearer, but because we need the debate to hone our democratic decisions. This public good can be maximized, so the argument goes, if we accord this right to corporations as well as natural persons.

This argument, that that free speech can be justified by its necessity to democratic deliberation, can be included in what Lafont calls the political approach to human rights, which claims we have rights not merely by being human, but by being subject to political authority.[74]

This is true as a procedural safeguard for enhancing democracy. But it cannot justify the right of the speaker; rather, it can provide a justification for limitation on government. Indeed, as has been argued in the debate on free speech and campaign funding, according absolute free speech to corporations, free from campaign spending limitations, can actually hamper democratic deliberation[75].

2. Deterrence of wrongdoers

When rights are recognized, remedies for breaching these rights can be recognized and justified for teleological reasons, such as deterring the State and its agents from abusing their powers. This is particularly true of non-pecuniary damages. A real question arises: what does compensation beyond quantifiable harm compensate if the injured party is not a flesh-and-blood person?

Emberland[76] suggests that non-pecuniary damages should be available to corporations because of the need to punish wrongdoers for infringing rights protected by the Convention. The need to punish wrongdoers is not the only, or even the main, reason for according remedy to victims. It is an external justification, based on the effect on the right-infringer, not the right-holder. If this is the reason for the existence of non-pecuniary damages, then indeed it does not matter whether an individual or a corporation is the victim. But such an external justification cannot, in itself, be a sufficient basis for a human right, including the right to a remedy such as non-pecuniary damages.

The European Court was split on this issue. In *Comingersoll S.A. v Portugal,* the European Court accepted that this remedy is available to a company. The majority demanded some connection of individuals to the harm suffered in order to merit such damages, while

[72] As was most famously posited by John Stuart Mill in *On Liberty* (1869).

[73] Posited by the majority in *Citizens United* , ibid (n) 20-25.

[74] C. Lafont, 'Should We Take the "Human" Out of Human Rights? Human Dignity in a Corporate World', 30 *Ethics & International Affairs*,(2016), 233.

[75] See the dissenting opinions in *Citizens United,* ibid (n). For further analysis of the case, see L.Tribe, 'Dividing Citizens United: The Case v. the Controversy', 30 Const. Comment. 463 (2015).
[76] Emberland (n 9) 124.

This is an accepted version of a paper to be published in European Human Rights Law Review. It is not the copy of record. Copyright 2022, European Human Rights Law Review

four judges saw this requirement as irrelevant.[77] So, the majority opinion sees non-pecuniary damages as remedying a breach of a derivative right of individuals, which can be deontologically justified, the approach proposed here for the analysis of all human rights. This also accords with the position of the Supreme Court of Canada, which recently decided that constitutional protection from 'cruel and unusual punishment' under the Canadian Charter does not include a right for corporations [78]

3. Rule of law

A justification that has been given for protection of human rights is the rule of law including the requirement that the executive not act in use of arbitrary powers. This includes the requirement that the government not enter private premises except by powers given by law, thus protecting citizens from discretionary, non-judicially-authorized searches by authorities.[79] The need to contain executive power is a rationale that can apply to corporations as well as individuals. This justification has been given for using human rights privacy provisions to prevent search without judicial warrant of corporate premises. Indeed, the Court in *Engel v Netherlands*[80] mentions the 'rule of law' principle as an inspiration for the Convention, and the decision in *Colas Est* to apply Article 8 is read by Emberland as being justified by this reason.[81] But this is an external, teleological justification: it is based on an external result, prevention of excess government power and protection of transparency and equal-handedness in use of government power, both beneficial to society. It is concerned with the actor – government – rather than with the object of its actions. It is a reason external to human rights.

Control of misuse of government power in conducting warrantless searches was dealt with by the US Supreme Court decisions on the application of the 4th Amendment to corporations. The Supreme Court in *Marshall v Barlow*[82] viewed corporations as having 4th Amendment protection, requiring government agencies to obtain a warrant prior to searching their premises, as they would for individuals' premises. The Court's discussion questioned and affirmed the equation of business premises with personal premises. The businessman was equated with the homeowner, thus conjuring up images of two individuals, side by side. But the premises entered were those of 'Barlow's Inc.', not those of Mr. Barlow. The question whether corporate legal persons, rather than natural persons, had rights protected by the 4th Amendment, was not discussed. In this case, it is understandable. The small company was seen as synonymous with the man.

[77] See further analysis of the issue: V. Wilcox, 'The EctHR's Approach to Corporate Non-Pecuniary Loss', in A Company's Right to Damages for Non-Pecuniary Loss (Cambridge: Cambridge University Press, 2016) 62.

[78] *Quebec (Attorney General) v. 9147-0732 Québec inc*., (2020) SCC 3.

[79] *Entick v Carrington* [1765] EWHC KB J98.

[80] 1 EHRR 647. Also: Application No 4451/70 *Golder v UK.*

[81] Emberland (n 9) 141.

[82] 436 U.S. 307 (1978).

This is an accepted version of a paper to be published in European Human Rights Law Review. It is not the copy of record. Copyright 2022, European Human Rights Law Review

Subsequently, the determination in *Marshall v Barlow* was then relied upon in the case of a corporate behemoth in *Dow Chemicals v US,*[83] which determined that the corporation has a 4th Amendment right against warrantless search. Not only was it a corporate giant that was claiming the right, but it did so in regard to photography of its vast external premises. The Court followed *Marshall v Barlow*, and the question whether a corporation could claim such a right at all was no longer raised. The question was whether Dow's external premises as well as internal ones were covered by the 4th Amendment, the majority arguing that they were analogous to open fields with no expectation of privacy. This case exemplifies the far-fetched results of recognition of such corporate rights. It is artificial to speak of a right or expectation of 'privacy' of the Dow Corporation, not only in its fields.

A corporation cannot have a ‘private life’ so there is no ’private life’ to protect. Indeed, the corporation is a social, as well as legal, construct. Different individuals who make up the corporaction – owners, directors, employees – have different and sometimes comflicting privacy interests. Nor is the corporation of fixed nature. It continues to evolve throughout its life. Whet may have been the stated interest of its founders might be differen from that of those individuals in its current make up.

Although a State action such as a warrantless search might appear to breach the same interests when the recipient of this treatment is an individual or a company, there is a crucial difference between the two. When an individual's privacy is breached, his autonomy, physical and mental integrity are jeopardized. The same cannot be said of a breach of 'privacy' of a corporation. There is no such thing as harm to its autonomy or psychological wellbeing.

4. Protection of business dealings from government intrusion:

A specific reason given for protection of the right of privacy for companies is that companies need to function, and enter into business dealings, in a sphere free from public intrusion.[84] This privacy is needed for them to thrive, and provide economic activity beneficial to society. This is an external justification. It can justify protection of contractual rights, indisputably important to a thriving society, but this cannot justify recognition of such rights as being basic, human rights, of achieving that ‘trump’ value we ascribe to human rights[85].

5. Symmetry between rights and obligations

Recognition of corporate rights has been further justified by the argument that symmetry exists between rights and obligations. If corporate bodies have obligations, goes this argument, then they should have rights as well. This is an argument that has been advanced in the debate in international law over recognition of legal persons.[86]

[83] 476 U.S. 227 (1986).

[84] Emberland (n 9) 144.

[85] R. Dworkin, Taking Rights Seriously (1977)

[86] For instance: JE Alvarez, ‘Are corporations “subjects” of international law?’, (2011) 9 *Santa Clara Journal of International Law* 1.

This is an accepted version of a paper to be published in European Human Rights Law Review. It is not the copy of record. Copyright 2022, European Human Rights Law Review

But this symmetry is not a necessary conclusion. Indeed, this argument is flawed. Possession of legal personality does not entail possession of all the same rights and obligations as those of any other legal person. Although possessing legal personality means the ability to have rights and obligations, it does not mean that rights of a certain type, human rights, can be possessed by any and every legal personality.

A line of cases such as *Holy Monasteries v Greece*[87] and *Finska församlingen and Hautaniemi v Sweden,*[88] clarify that under the European Convention a body can *either* be a non-governmental organization, and so capable of being a 'victim', who can bring applications under the Convention, *or* be a part of the State, and then incapable of being a 'victim' and having Convention rights. Therefore, under the ECHR, a body can have either obligations or rights. Symmetry between rights and obligations simply does not exist.

In international law, there is nothing novel in the idea that the legal personality of corporations, to the extent that it exists, is different from that of both natural persons and the natural persons of international law (states). As Jose Alvarez points out, legal personality in international law is not "one size fits all".[89] He suggests that, in each case, recognition of human rights of corporations will be based on the special nature of the corporate form and the specific right at stake.[90]

In the first case in which the International Court of Justice recognized the legal personality of an international organization (the United Nations), that recognition meant recognition of certain rights and obligations, not all the rights and obligations of a state.[91] So an international organization is capable of having rights and obligations, though not all the rights and obligations of a state. Commercial corporations too can have limited legal personality in international law, particularly under investment treaties,[92] with a set of rights and obligations different from that of states or international organizations[93]. The mere fact that it possesses limited legal personality in international law and some obligations in international law does not mean it also has human rights

6. Modern life

---

[87] Application No. 13092/87; 13984/88

[88] Application No 24019/94, *Finska församlingen i Stockholm and Hautaniemi v Sweden*, (1996) DR85, 94.

[89] J. Alvarez, "Beware: boundary crossings", in T. Kahana and A. Scolnicov (eds.), *Boundaries of State, Boundaries of Rights: Human Rights, Private Parties and Positive Obligations* (Cambridge, Cambridge University Press, 2016).

[90] *Id.* Sec. VIII, near n. 108.

[91] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion 1949 ICJ Rep. 178.

92 *See* The Treaty of Canterbury (English Channel Tunnel Agreement) *and* the BTC (Baku-Tbilisi-Ceyhan) Pipeline. *See also Texaco Overseas Petroleum v. Libya*, 104 J. Droit Int'l 350 (1977), 17 I.L.M. 1 (1978).

93 Usually capability of suing and being sued.

This is an accepted version of a paper to be published in European Human Rights Law Review. It is not the copy of record. Copyright 2022, European Human Rights Law Review

Finally, a consequentialist, not to say practical, argument favouring corporate human rights is that companies are needed in order for modern society to thrive.[94] We need hospitals to our healthcare, factories to make our cars, and banks to enable commerce.

Companies may be needed in modern society, but this does not mean that recognition of their human rights is necessary for companies to exist and function. They have legal rights: to enter into contracts, to enforce them in courts. Even if recognition of their human rights can give companies an added economic advantage, that utilitarian reason cannot serve as justification for their recognition.

C. Conclusions so far:

Human rights are based on the inherent worth of individuals, whether concerning the right to express themselves or protecting their physical and moral integrity, or other aspects of their innate personality. This is not to say that the external justifications for rights are not important. All the reasons discussed here are persuasive and important. These are certainly *additional* reasons for recognizing human rights. But these reasons cannot serve in themselves as a basis for recognition of human rights.

Moreover, commercial purpose of an activity is neither necessary nor sufficient reason for denying the application of human rights to its actor. The commercial purpose of corporations is not the decisive factor in this argument for rejecting human rights of corporations. Humans can work towards a commercial purpose and will still merit the protection of human rights when doing so. Conversely, corporations might not have a commercial purpose (it is possible to incorporate essentially a charitable enterprise as a limited company), but this should not mean that they can possess human rights.

If the conclusion of this chapter is that human rights cannot be premised *solely* on external justifications but must be supported also by internal justification, this means that corporations cannot have human rights. This is so as a matter of abstract principle but also as a proposed course for the application of the Convention.

D. Coherence and Divergence in the Convention

The European Convention has underlying values, emanating from human dignity and the inherent value of all people. Interpreting the Convention articles in a way commensurate with these underlying values should take precedence over interpreting them so that they are consistent with each other.

Regarding the right of property (Protocol 1 Article 1), the Court had no choice but to apply the provision to legal persons, due to the express wording of the article. But did this constraint mean that the Court was obliged to follow the same approach with all other substantive articles of the Convention, or would it risk being inconsistent in its application of Convention rights? Greater coherence is actually promoted by following the underlying values approach and treating the rest of the Convention differently from Protocol 1 Article 1.

---

[94] *Bank Mizrahi* (n 27).

This is an accepted version of a paper to be published in European Human Rights Law Review. It is not the copy of record. Copyright 2022, European Human Rights Law Review

We can compare the question of coherence in the interpretation of rights of legal persons with the interpretation of the property right itself. Thomas Allen shows that the Court has followed two different approaches in its treatment of the property article.[95] One is an 'integrative approach' to property rights, interpreting this right in a fashion integral to the values underpinning all articles of the Convention.[96] The other approach is the 'comparative approach', interpreting the right to property as it is in international law. He shows that, despite rhetoric and occasional application of the integrative approach by the Court in the matter of compensation for property appropriation, the right was generally interpreted by the Court in a comparative manner, not in a way integral to the rest of the convention. One can learn from Allen's analysis, that the property article itself, in the way it was developed and interpreted, is a foreign transplant within the integrative values of the Convention.[97]

Therefore, in the matter of applicability of the Convention to legal persons, I suggest the Court could also have disassociated Protocol 1 Article 1 from the rest of the Convention. The approach to the European Convention on Human Rights suggested in this article is commensurate with Allen’s integral approach. Treating Protocol 1 Article 1 *differently* from other articles of the Convention actually promotes the integrity of the rest of the Convention, as the values underpinning the vast majority of Convention articles do not support its application to corporations.

III. CONCLUSION

The conceptual analysis that corporations are not legal persons capable of possessing human rights was tested on rights of the European Convention on Human Rights. The European Convention and its protocols impose certain textual constraints on the Court’s freedom to determine whether there are corporate rights. But there are policy reasons, as well as reasons of principle, that stand against recognition of corporate human rights. This article has shown that even those rights which present the strongest case for applicability to corporations should nevertheless be applicable to humans only. Therefore, an approach which treats each human right differently, deciding on the suitability of each right to corporations, should be rejected. An approach which denies all corporate human rights should be preferred, not just because it is more conceptually rigorous, but also because it withstands close scrutiny across the spectrum of rights.

Because of the financial ability of corporations to bring claims, there is a danger that more peripheral issues relevant to corporations will become prominent in the court's docket, obfuscating the original view of human rights that guided the framers of the Convention. This is true of the ECHR as it is true of other human rights treaties and instruments.

---

[95] T Allen, ‘Compensation for property under the European Convention on Human Rights’, (2007) 28 *Michigan Journal of International Law* 287.

[96] Application No 7151/75 *Sporrong and Lönnroth v Sweden.*

[97] And see further about the difference in interpretation of the right to property between different fields of international law - international investment law and international human rights law, in L. Cotula, ‘Property in a shrinking planet: Fault lines in international human rights and investment law’, (2015)11 *International Journal of Law in Context*, 113; and E.B. Barrera, ‘Property Rights As Human Rights in International Investment Arbitration: A Critical Appraisal’, (2018) 59 *Boston College Law Review* 2635.

This is an accepted version of a paper to be published in European Human Rights Law Review. It is not the copy of record. Copyright 2022, European Human Rights Law Review

The inquiry into justifications of human rights goes to a much broader concern than the question whether corporations have rights. The principled analysis of the justification of rights has implications for many theoretical and practical questions: who has human rights, how human rights can be justified, and when, if ever, can rights be supplanted. It is important that this conceptual analysis pertains to rights of corporations. In reflecting on the boundaries, indeed existence, of corporate rights, we might address better the legitimate role of corporations in society and within the State.

This is an accepted version of a paper to be published in European Human Rights Law Review. It is not the copy of record. Copyright 2022, European Human Rights Law Review