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ORIGINAL ARTICLE

INTERNATIONAL LEGAL THEORY: SYMPOSIUM ON THE LAW AND POLITICAL ECONOMY OF BUSINESS AND HUMAN RIGHTS: A TURN TO ROOT CAUSES?

The Law and Political Economy of Business and Human Rights: From governance gaps to root causes

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Abstract
Business and Human Rights (BHR) scholarship has long recognized the exercise of corporate power as resembling functional sovereignty, advocating for the extension of the rule of law to private actors, establishing accountability regimes, and providing remedies for victims. With the proliferation of binding BHR instruments, such as human rights due diligence legislation, the BHR project finds itself at a critical juncture, where calls for hard obligations are no longer sufficient. Our article, and the broader Symposium, seek to push the boundaries of the discourse by interrogating the legal foundations of private power. Drawing from Law and Political Economy scholarship, we challenge the prevailing notion of 'governance gaps' that often frames BHR debates. Rather, we argue that the legal infrastructure itself enables and facilitates the forms of exploitation and structural inequality embedded in the global political economy, leading to predictable patterns of human rights violations. By uncovering the institutional foundations of private power, we also show how efforts to leverage mechanisms of private governance, including human rights due diligence, risk naturalizing corporate power and limiting institutional imagination. However, a critique only focused on institutional design does not sufficiently account for the hardwiring of social relations of global production and the systemic constraints these impose on projects of legal reform. Acknowledging these limitations, we outline two modes of critique: an 'internal' critique, which seeks to reimagine institutional frameworks, and an 'immanent' critique, which emphasizes the role of collective action and social movements in transforming the underlying social relations of production.

Keywords: global political economy; human rights; private power; root causes; transnational corporations

1. Introduction

The business and human rights movement is at a critical juncture. On the one hand, key discursive and agenda points of the past decade have successfully permeated public discourse and policymaking, marking a transition from soft obligations to hard law. A pivotal example is human rights due diligence (HRDD), which was introduced as a soft obligation in the context of the UN

Guiding Principles on Business and Human Rights[1] in 2011 and has now evolved into a legal obligation in several national legislations and in the EU. On the other hand, this 'mainstreaming' of the business and human rights agenda elicits the concern that its impact on the lived realities of global production might be negligeable. The relative ease with which corporate actors appear to be adopting HRDD obligations, even voluntarily, raises questions about the framework's sufficiency or susceptibility to co-optation.[2] Therefore, as monitoring obligations and mechanisms of accountability become legally binding, the business and human rights movement finds itself at an existential crossroad, where mere calls for hard obligations are no longer sufficient. One possible direction is the push for more compliance and enforcement, coupled with targeted reforms addressing particular shortcomings of the various emerging business and human rights frameworks. While this incremental strategy is consistent with the historical trajectory of the movement, our Symposium seeks to push the boundaries of the discourse further, towards new institutional imaginaries and a yet-to-be-articulated substantive agenda on corporate power.

In our attempt to redefine the parameters of the debate, we draw on the emerging scholarship of Law and Political Economy (LPE), while also building on a broader 'disciplinary turn' among international lawyers who are increasingly focusing on questions of political economy.[3] Much like business and human rights scholarship, LPE scholarship has targeted the social ramifications of private power. LPE provides a lens through which to interrogate the sources of private power – giving shape, in turn, to normative implications that may infuse the business and human rights agenda. A centripetal discursive point of LPE literature has been the constitutive role law plays in the economy: how, in other words, legal rules and legal entitlements are not merely an external regulation of supposedly pre-political, 'natural' economic interactions between private actors but rather constitute the very building blocks of the economy. The assertion that law – through both its prohibitions and implicit permissions – constitutes the foundational infrastructure of national and global economies challenges the influential BHR premise of 'governance gaps', which points to a disjunction between the factual reality of economic forces and the limited normative reach of legal regimes.[4] In unpacking the sources of 'economic forces', an LPE perspective to business and human rights goes beyond closing 'governance gaps' by extending the rule of law through new norms of transparency, monitoring, and accountability. Instead, we argue that an LPE approach calls for the identification and transformation of the legal structures that facilitate the accumulation of private power in the first place, which in turn leads to predictable patterns of human rights violations. In this way, our argument critiques the revamped agenda of 'embedded

[1]UN Human Rights Council, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, UN Doc. A/HRC/17/31(2011).

[2]On the EU consultation see EU Commission, Sustainable Corporate Governance Initiative: Summary Report – Public Consultation (2023). For an overarching perspective on the different critiques of HRDD see S. Deva, 'Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?', (2023) 36 LJIL 389.

[3]See, indicatively, J. Haskell and A. Rasulov, 'International Law and the Turn to Political Economy', (2018) 31 LJIL 243; E. Cusato and E. Jones, 'The 'Imbroglio' of Ecocide: A Political Economic Analysis', (2024) 37 LJIL 42; N. Tzouvala, 'International Law and (the Critique of) Political Economy', (2022) 121 *South Atlantic Quarterly* 297; N. Tzouvala, *Capitalism as Civilisation* (2020); A. Chadwick, *Law and the Political Economy of Hunger* (2019); G. Baars, *The Corporation: Law and Capitalism: A Radical Perspective on the Role of Law in the Global Political Economy* (2019); B. S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (2017); M. Fakhri, *Sugar and the Making of International Trade Law* (2014); A. Lang, *World Trade Law after Neoliberalism* (2011).

[4]As discussed in Section 3 in detail, according to J. Ruggie, 'Protect, Respect and Remedy: A Framework for Business and Human Rights', UN Doc. A/HRC/8/5 (2008), para. 3, 'The root cause of the business and human rights predicament today lies in the governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation.'

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liberalism',[5] which shapes instruments like HRDD and promotes embedding business within social institutions, public interests, and social purpose. Rather, we argue that corporate power is not an inevitable fact and an insurmountable reality that needs to be leveraged and harnessed (e.g., through HRDD) but largely the product of deliberate institutional arrangements and, thus, susceptible to fundamentally different orderings. Our ambition is that shifting the gaze to the deliberate legal infrastructure of the global economy, rather than its insufficient reach, may contribute to and enrich the institutional imagination within the BHR field and discourse.

However, our argument also seeks to avoid the danger of halting the interrogation of root causes of human rights violations too soon.[6] While law plays a key role in enabling the kind of socio-economic formations with the propensity to perpetuate human rights violations, it would be naïve to ignore the patterns according to which legal rules themselves unfold. Put differently, the fact that law consistently and predictably enables practices associated with human rights violations can be seen through the lens of a 'false contingency':[7] far from being pure products of contingent legal choice, the regimes that enable human rights violations encompass a kind of necessity resulting from systemic constraints imposed on the legal system. This shifts the attention to the social relations that condition the production of legal text and meaning. The question, then, becomes not only how the institutional environment enables the practices in question but how it reflects their structural necessity for the maintenance of existing social relations of production. Inspired by these two stages of interrogation, the 'legal-institutional' and the 'legal-social', our article outlines two modes of critique: an 'internal' critique that seeks to forge alternative institutional orderings, and an 'immanent' critique that emphasizes the role of collective action and social movements in transforming the underlying social relations of production. We conclude our argument by exploring potential intersections between these modes of critique, focusing on the heuristic of 'non-reformist reforms' as a pathway to modify relations of power, empowering those subjected to corporate power by enhancing democratic control over the economy.

In Section 2, we recount how the hegemonic approaches in business and rights have focused on filling 'governance gaps' and creating more accountability for corporations' negative effects on human rights. In Section 3, we critically examine this key, action-underpinning concept of 'governance gaps', drawing on its conceptualization in John Ruggie's influential work. We problematize the ensuing normative agenda of embedded liberalism, using the analytical lenses of LPE scholarship. Our critique aspires to expose the institutional foundations of private power, drawing attention to how attempts to 'publicize' private actors and harness private governance operate in conditions of 'false necessity' that present corporate power as an inevitable fact, masking the historicity of the arrangements that have made it the reality that it is. In Section 4, we move from the 'legal-institutional' to the 'legal-social' stage of interrogation and we nuance the argument presented in Section 3 by delving deeper into the imbrication of law within global social relations of production. This also leads to the emergence of the two directions of critique, 'internal' and 'immanent', as well as to some initial reflections on how these directions of critique may be bridged. The Conclusion briefly summarizes our findings.

[5]For the original vision of 'embedded liberalism' as the integration of liberal free trade with a commitment to an interventionist programme of governmental social action see J. Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order', (1982) 36(2) *International Organization* 379 and more extensively, Section 3, *infra*.

[6]See S. Marks, 'Human Rights and Root Causes', (2011) 74(1) MLR 57; M. Anner, J. Bair and J. Blasi, 'Toward Joint Liability in Global Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks', (2013) 35 *Comparative Labor Law and Policy Journal* 1.

[7]See S. Marks, 'False Contingency', (2009) 62(1) *Current Legal Problems* 1.

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2. Business and Human Rights against corporate power: Filling 'governance gaps', expanding accountability

The BHR movement emerged as a somewhat belated response to the significant, and crucially, what was perceived as *unchecked* power of transnational corporations and their capacity to negatively impact human rights.[8] Pointing to the example of the Atlantic slave trade, Nadia Bernaz emphasizes that while many scholars view modern globalization as the impetus for the movement, corporations have long been responsible for harmful conduct.[9] Anita Ramasastry points to more contemporary examples such as so-called conflict diamonds, the use of child labour and the level of working conditions in the apparel industry, and the role of technology companies in human rights abuses as triggering often multistakeholder initiatives to reduce the negative impact of companies.[10] Ultimately, the combined impact of many such situations and responses to individual crises led to the emergence of a more coherent BHR movement, which has focused on addressing 'governance gaps' and efforts to create more (legal) accountability for corporations' negative effects on human rights.[11]

The backdrop of the discourse around 'governance gaps' has been the state-centric framework of international human rights law[12] established after the Second World War to prevent recurrence of the atrocities perpetrated by states.[13] This framework does not allow for the direct application of human rights treaties at the international level: businesses can neither be party to international human rights treaties nor be the subject of complaints before international courts and UN human rights treaty monitoring bodies. In other words, international human rights law was developed with a vertical framework, to regulate the relationship between individuals and the state rather than relationships between private actors (e.g. businesses and individuals).

In the confines of this state-centric framework, BHR theory and practice has regularly proceeded from a conceptual division between material facts on the ground – corporate power – and the normative reach of legal regimes.[14] By way of response, various theories have emerged to extend the rule of (international human rights) law to corporations. In particular, theories of direct and indirect horizontal effect have been proposed that envisage, or allow, human rights law to be applied in cases concerning human rights abuse in which businesses are implicated to different extents.[15] *Direct* horizontal effect would comprise the direct applicability of human rights law provisions to businesses (substantive direct horizontal effect) and allow for their enforcement by victims (procedural direct horizontal effect).[16] Rather than focusing solely on businesses, some

[8]See, e.g., J. Schrempf-Stirling, H. J. Van Buren III and F. Wettstein, 'Human Rights: A Promising Perspective for Business & Society', (2022) 61(5) *Business and Society* 1282; A. Ramasastry, 'Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability', (2015) 14 JHR 237.

[9]N. Bernaz, *Business and Human Rights - History, Law and Policy: Bridging the Accountability Gap* (2017), 17–42.

[10]UN General Assembly Resolution 55/56, The Role of Diamonds in Fuelling Conflict, UN Doc. A/RES/55/56 (2001); D. O'Rourke, 'Outsourcing Regulation: Analyzing Nongovernmental Systems of Labor Standards and Monitoring', (2003) 31(1) *Policy Studies Journal* 1; I. Brown and D. Korff, 'Global Network Initiative: Digital Freedoms in International Law: Practical Steps to Protect Human Rights Online', 2012, discussed in Ramasastry, *supra* note 8, at 241–2.

[11]See Ramasastry, ibid., at 242–3. See also A. Clapham, *Human Rights Obligations of Non-State Actors* (2006).

[12]E.g., N. Carillo Santarelli, *Direct International Human Rights Obligations of Non-State Actors: A Legal and Ethical Necessity* (2017).

[13]M. Nowak and K. M. Januzewski, 'Non-State Actors and Human Rights', in M. Noortmann, A. Reinisch and C. Ryngaert (eds.), *Non-State Actors in International Law* (2015), 113.

[14]On John Ruggie's influential conceptualization of 'governance gaps' as the gaps 'between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences' see Ruggie, *supra* note 4, and more extensively, Section 3, *infra*.

[15]The theories do not always focus on corporations specifically but often on 'private' or 'non-state' actors.

[16]G. Phillipson, 'The Human Rights Act, "Horizontal Effect" and the Common Law: A Bang or a Whimper?', (1999) 62(6) MLR 824, 826; P. van Dijk, and G. J. H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (1998), 23; L. Lane, 'The Horizontal Effect of International Human Rights Law in Practice: A Comparative Analysis of the General Comments and Jurisprudence of Selected United Nations Human Rights Treaty Monitoring Bodies', (2018) 5(1) EJCL 8, 16–17.

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theories propose the notions of 'shared responsibility' or 'multi-duty bearer regimes' to account for the contribution of both states and private actors to human rights abuses.[17] Justifications for direct horizontal effect vary, with some commentators pointing towards the limitations of the state-centric approach in international human rights law[18] and others finding a basis in our understanding of human rights themselves rather than human rights law.[19] Yet other theories of direct horizontal effect are grounded in the 'characteristics of corporate activity' and the relationship between a business and duty-bearers and rights-holders under the current legal framework.[20]

In contrast, *indirect* horizontal effect theories are often grounded in positive state obligations that require domestic regulatory efforts to ensure that businesses '"indirectly" comply with human rights duties by requiring private actors to refrain from interfering with individual rights'.[21] Other approaches to indirect horizontal effect rely on the recategorization of private actors as public actors in situations where private actors fulfil public functions usually conducted by the state, such as the provision of public services.[22] Additionally, particularly in the context of national private law, 'value-driven' and 'weak' indirect horizontal effect as well as 'background horizontality' have been discussed, which involve courts interpreting private law in a way that invokes the values protected by human rights.[23]

Pockets of practice applying a degree of indirect horizontal effect exist at the national level,[24] in the jurisprudence of the European Court of Human Rights,[25] the Inter-American Court of Human Rights,[26] and in the individual communications and general comments of UN human rights treaty

[17]See, e.g., J. D'Aspremont et al., 'Sharing Responsibility Between Non-State Actors and States in International Law', (2015) 62 NILR 49; W. Vandenhole and W. van Genugten, 'Introduction: An Emerging Multi-Duty- Bearer Human Rights Regime?', in W. Vandenhole (ed.), *Challenging Territoriality in Human Rights Law: Building blocks for a plural and diverse duty-bearer regime* (2015), 1.

[18]E.g., see Carillo Santarelli, *supra* note 12; G. Teubner, 'The Anonymous Matrix: Human Rights Violations by "Private" Transnational Actors', (2006) 69(3) MLR 327, 329. Teubner notes that it becomes increasingly difficult to hold states responsible for the conduct of private entities within the current legal framework. See Lane, *supra* note 16, at 7; S. R. Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility', (2001) 111(3) *Yale Law Journal* 443.

[19]E.g., I. Kanalan, 'Horizontal Effect of Human Rights in the Era of Transnational Constellations: On the Accountability of Private Actors for Human Rights Violations', in M. Bungenberg et al. (eds.), *European Yearbook of International Economic Law 2016* (2016), 423.

[20]E.g., Ratner, *supra* note 18, states that businesses 'will have duties both insofar as they cooperate with those actors whom international law already sees as the prime sources of abuse – states – and insofar as their activities infringe upon the human dignity of those with whom they have special ties'.

[21]M. Hesseman and L. Lane, 'Disasters and Non-State Actors – Human Rights-Based Approaches', (2017) 26(5) DPM 526, discussing T. Gammeltoft-Hansen, 'Private Actor Involvement in Migration Management', in A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (2017), 527; see Lane, *supra* note 16. See also, J. Knox, 'Horizontal Human Rights Law', (2008) 102(1) AJIL 1 on correlative duties; see below.

[22]This is seen at the international level and the national level, especially in the United Kingdom. See L. Lane, 'The Horizontal Effect of International Human Rights Law: Towards a Multi-Level Governance Approach', PhD thesis, University of Groningen, 2018.

[23]This is very evident in the United Kingdom. See, e.g., Phillipson, *supra* note 16; G. Phillipson and A. Williams, 'Horizontal Effect and the Constitutional Constraint', (2011) 74(6) MLR 878; A. Young, 'Mapping Horizontal Effect', in D. Hoffman (ed.), *The Impact of the UK Human Rights Act on Private Law* (2011), 16, discussed in Lane, *supra* note 16. For critical discussion see, e.g., H. Collins, 'On the (In)Compatibility of Human Rights Discourse and Private Law', (2012) *LSE Law, Society and Economy Working Papers 7/2012*.

[24]E.g. the UK's case law applying the Human Rights Act 1998, which allows for private actors fulfilling public functions to be subject to human rights standards found in the ECHR, and the 'weak' horizontal effect mentioned above. See Phillipson, *supra* note 16; Phillipson and Williams, ibid.; Young, *supra* note 23.

[25]The Court has frequently applied due diligence obligations of states that indirectly require or (more commonly) prohibit certain conduct of non-state actors, including businesses. See, e.g., J.-F. Akandji-Kombe, *Positive Obligations under the European Convention on Human Rights* (2007).

[26]E.g., *The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights)*, Advisory Opinion OC 23/17 of

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monitoring bodies.[27] Various approaches are taken but the most common at the international and regional levels is the application of states' positive obligations with broad interpretations of law and creative legal bases within the confines of applicable legal frameworks.[28] At the national level, various approaches are taken. One interesting strand of case law on foreign direct liability within European countries has seen several efforts to hold businesses directly accountable for contributing to human rights abuse through the duty of care.[29] Such cases are grounded in tort law rather than human rights law[30] and the judiciary has been careful not to 'lift the [corporate] veil without a legislative mandate'.[31] However, in a significant climate change case against Shell in 2021, a Dutch court relied on the UN Guiding Principles on Business and Human Rights (UNGPs) among other soft-law initiatives to interpret Dutch tort law on the duty of care,[32] giving human rights a significant role in judicial decision-making.

Beyond the courts, the attempt to fill in the 'governance gaps' that emerge from the disjunction between social realities and the normative reach of legal regimes has also influenced policy, with the most recent development being the proliferation of HRDD instruments and the aspiration to internalize human rights compliance within corporate structures. At the EU level, the European Commission's draft Directive on Corporate and Sustainability Due Diligence (CSDDD) envisages obligations for businesses falling under its scope. This includes various provisions on HRDD, including the adoption of human rights policies and human rights impact assessments. Nationally, several countries have adopted or begun the legislative process for binding national legislation containing mandatory HRDD standards. Despite the varied content and scope of different HRDD legislation, there is undeniably a growing momentum for hard law obligations for businesses regarding human rights at the national level. The impact of such legislation remains largely to be seen, but concerns have been voiced that the instruments focus too much on procedure to the detriment of substance and rely too heavily on a market-based model of accountability.[33]

Despite partial victories and the clear success in mainstreaming the BHR discourse, prevailing approaches centring around the impetus to fill in the governance gaps created by processes of globalization have not provided a 'silver bullet regulatory solution to corporate unaccountability'[34] nor fundamentally challenged the underlying roots of corporate power.[35] A first level of critique draws attention to the sociological dimension of corporate power. For instance, theories and practice of indirect horizontal effect do not account for the authority that multinational businesses

15 November 2017, [2017] IACHR; L. Lavrysen, 'Positive Obligations in the Jurisprudence of the IACHR', (2014) 7 *Inter-American and European Human Rights Journal* 94.

[27]Notably: UN Committee on Economic, Social and Cultural Rights, General Comment No. 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, UN Doc. E/C.12/GC/24 (2017). See Lane, *supra* note 16.

[28]See Lane, ibid.

[29]E.g., *Okpabi and others v. Royal Dutch Shell plc and another*, [2021] UKSC 3; *Four Nigerian Farmers v. Shell* (29 January 2021) ECLI:NL:GHDHA:2021:1825, English translation. See L. Roorda and D. Leader, '*Okpabi v Shell and Four Nigerian Farmers v Shell*: Parent Company Liability Back in Court', (2021) 6 BHRJ 368.

[30]E.g., *Vedanta Resources PLC v. Lungowe and others* [2019] UKSC 20.

[31]R. Mares, 'Regulating Transnational Corporations at the United Nations: The Negotiations of a Treaty on Business and Human Rights', (2022) 26(9) IJHR 1522, 1532.

[32]*District Court of The Hague, Milieudefensie et al. v. Royal Dutch Shell PLC* (26 May 2021) C/09/571932/HA ZA 19-379, English translation, discussed in C. Macchi and J. van Zeben, 'Business and Human Rights Implications of Climate Change Litigation: Milieudefensie et al. v Royal Dutch Shell', (2021) 30(3) *Review of European, Comparative & International Environmental Law* 409.

[33]R. Chambers and A. Y. Vastardis, 'Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability', (2019) 21(2) *Chicago Journal of International Law* 323.

[34]See Mares, *supra* note 31, at 1525.

[35]S. Joseph and J. Kyriakakis, 'From Soft Law to Hard Law in Business and Human Rights and the Challenge of Corporate Power', (2023) 36(2) LJIL 335.

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can hold over states – particularly those with a keen interest in foreign direct investment.[36] Additionally, the movement has experienced powerful pushbacks from businesses against efforts to achieve corporate accountability on all levels, with effective resistance to the adoption and content of hard law (e.g. by the extractive industry in Canada and by European businesses[37]) and policies (e.g. by the tobacco industry).[38] The lobbying power of businesses over corporate responsibility initiatives has extended on all levels,[39] including their role in global human rights governance[40] and influencing the content of laws and policies as well as their enforcement.[41] Further, although initiatives such as the UNGPs have been a crucial stepping stone to hard law, their impact in practice has been questionable.[42] Finally, the 'orthodox view' and application of international human rights law simultaneously fails to consider the relative power of corporations in comparison with states[43] and to sufficiently clarify standards of behaviour expected of businesses vis-à-vis human rights.[44] Ultimately, despite a now significant global BHR movement, we still witness countless negative human rights impacts implicating businesses.[45]

Yet, a deeper level of critique extends to the very diagnosis of 'governance gaps' and the ensuing normative agenda of 'embedded liberalism' through corporate accountability and the currently prominent instrument of human rights due diligence. In the following section, we will unpack this direction of critique, drawing from the scholarship of Law and Political Economy.

3. Rethinking 'governance gaps': A critique of 'embedded liberalism'

Emerging in a context of accelerating social crises, LPE scholarship has also recognized the pernicious role of private power.[46] Rather than an artefact of horizontal, social relations, private power is understood to be a product of law and institutional arrangements, manifesting through legally constituted forms of coercion. Think, for example, of social relations of employment and wage labour, the possibility to use and exclude others from accessing productive resources, or regimes of limited liability associated with incorporation: the private power inherent in these institutionalized interactions is underpinned by legal rules and allocations of legal entitlements

[36]I.e., the structural power of corporations as discussed by D. Birchall, 'Corporate Power over Human Rights: An Analytical Framework', (2021) 6 BHRJ 42.

[37]P. Simons, 'Developments in Canada on Business and Human Rights: One Step Forward Two Steps Back', (2023) 36(2) LJIL 363; 'How German Members of the European Parliament are Adopting the Demands of the Business Lobby for the EU Corporate Sustainability Due Diligence Directive', *Global Policy Forum,* 21 January 2023, available at www.globalpolicy.org/en/publication/copy-paste-method.

[38]See, e.g., M. I. Jongenelis, 'The Fight with Industry over Tobacco Controls in Australia', *East Asia Forum*, 16 March 2023, available at www.eastasiaforum.org/2023/03/16/the-fight-with-industry-over-tobacco-controls-in-australia/.

[39]See also Birchall, *supra* note 36, at 58 on 'power over institutions'.

[40]J. Mende and A. Hoff, 'The Governance Authority of Non-State Actors in the Business and Human Rights Regime', (2022) 21(5) JHR 593.

[41]E.g., self-regulation.

[42]L. Smit et al., Study on Due Diligence Requirements through the Supply Chain: Final Report (2020), 243; Corporate Human Rights Benchmark, 21 November 2022, available at worldbenchmarkingalliance.org/publication/chrb/, discussed in Joseph and Kyriakakis, *supra* note 35, at 8.

[43]See Joseph and Kyriakakis, ibid.

[44]See Lane, *supra* note 16.

[45]See Mares, *supra* note 31, at 1525, commenting on the draft treaty on BHR.

[46]J. Britton-Purdy, A. Kapczynski and D. S. Grewal, 'Law and Political Economy: Toward a Manifesto', 2017, available at lpeproject.org/blog/law-and-political-economy-toward-a-manifesto/; J. Britton-Purdy et al., 'Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis', (2020) 129 *Yale Law Journal* 1784; A. Harris and J. J. Varelas, 'Law and Political Economy in a Time of Accelerating Crises', (2020) 1(1) *Journal of Law and Political Economy* 1; P. F. Kjaer (ed.), *The Law of Political Economy: Transformations in the Function of Law* (2020); A. Chadwick, *Law and the Political Economy of Hunger* (2019); I. Kampourakis, 'Bound by the Economic Constitution: Notes for "Law and Political Economy" in Europe', (2021) 1(2) *Journal of Law and Political Economy* 301; I. Kampourakis, S. Taekema and A. Arcuri, 'Reappropriating the Rule of Law: Between Constituting and Limiting Private Power', (2023) 14(1) *Jurisprudence* 76.

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that confer state-backed coercive power.[47] Indeed, legal rules and entitlements, such as property rights or the advantages of the corporate form, confer to their holders the power to restrict socially available choices of other parties.[48] Contrary to the liberal defence of markets as freedom- and utility-maximizers,[49] the legal realist insight underpinning LPE stresses the zero-sum nature of rights, where an allocation of an entitlement to one imposes an onus on another.[50] Seen through this lens, market exchanges, including the selling of labour power, are exposed as voluntary only within the confining and coercive framework set by law and in a landscape defined by a prior distribution of property rights. For example, the owner's right to exclusively benefit from productive resources, a fundamental aspect of property rights, implies a legal obligation for non-owners to refrain from accessing these resources without the owner's consent.[51] As Robert Hale underlines:

> unless, then, the non-owner can produce his own food, the law compels him to starve if he has no wages, and compels him to go without wages unless he obeys the behests of some employer. It is the law that coerces him into wage-work under penalty of starvation.[52]

This analysis positions the state and its public power as both the source of such entitlements, and as their ultimate guarantor through its monopoly on the use of force. The centring of public power is manifest in Hale's further critique of property rights:

> Ownership is an indirect method whereby the government coerces some to yield an income to the owners. When the law turns around and curtails the incomes of property owners, it is in substance curtailing the salaries of public officials or pensioners.[53]

The assimilation of property owners to public officials or pensioners is indicative of the institutionalist mindset that sees private property as an artificial construct and product of state power. While this account halts the analysis at the level of state power,[54] it marks an important step in demystifying private power. By denying property – and by extension private power – a

[47]S. Deakin et al., 'Legal Institutionalism: Capitalism and the Constitutive Role of Law', (2017) 45(1) *Journal of Comparative Economics* 188; K. Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (2019).

[48]R. L. Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State', (1923) 38(3) *Political Science Quarterly* 470. According to O. Wendell Holmes, 'It always is for the interest of the party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is a characteristic of duress properly so called', *Union Pac. R.R. Co.* v. *Pub. Serv. Comm.*, 248 U.S. 67, 70 (1918). Crucially, legal rules include rules of permission. See D. Kennedy, 'The Stakes of Law, or Hale and Foucault!', (1991) XV(4) *Legal Studies Forum* 327.

While LPE scholarship stresses how law structures social relations of production, there is increasing emphasis on the nuances and limitations of legal constructivism – an approach to which this article also subscribes. For example, see Y. Benkler, 'Structure and Legitimation in Capitalism: Law, Power, and Justice in Market Society', highlighting how law functions in conjunction with other social norms and ideology, and how it represents settlements inherited from prior struggles, including struggles played out beyond the legal terrain. See, also T. Syed, 'Legal Realism and CLS from an LPE Perspective'.

[49]See A. Lang, 'Market Anti-Naturalisms', in J. Desautels-Stein and C. Tomlins (eds.), *Searching for Contemporary Legal Thought* (2017), 312.

[50]W. N. Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning', (1917) 26(8) *Yale Law Journal* 710.

[51]J. A. Sempill, 'What Rendered Ancient Tyrants Detestable: The Rule of Law and the Constitution of Corporate Power', (2018) 10 *Hague Journal on the Rule of Law* 219, at 231.

[52]See Hale, *supra* note 48, at 473.

[53]R. L. Hale, 'Rate Making and the Revision of the Property Concept', (1922) 22 *Columbia Law Review* 209, 214.

[54]For Syed, *supra* note 48, the legal constructivist understanding of property as a state construct is incomplete insofar as it fails to interrogate how property involves irreducibly social relations and competing claims, regardless of whether state coercion is in play. On how property rights structures generate their own specific 'rules of reproduction', their own specific sets of rules with which economic actors have to comply in order to self- reproduce, see P. Ireland, *Property in Contemporary Capitalism* (2024), 237.

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naturalistic foundation, the realist position pre-empts critiques of regulation as an infringement on private autonomy. Instead, it reframes regulation as a re-balancing of the rights, duties, and coercive power of different actors.

Framing the economy, and the private power accumulated therein, as legally constituted can be transposed to the global level.[55] Critical perspectives on the global economy emphasize that it is predominantly shaped by a complex assemblage of rules and institutions.[56] This warns against an exclusive focus on the institutions of international economic law as the supposed rules of the *global* political economy. Instead, the global political economy encompasses national private law, corporate law, conflict of rules regimes, etc.[57] Centring public power manifesting through legal institutions signifies a shift in perspective concerning the nexus between law and economy: it accentuates the primacy of the former in shaping the latter. For example, while it is acknowledged that changes in the global economy, such as the shift to offshore outsourcing, have profound implications for public governance, it is often forgotten that these changes did not occur in a vacuum but were largely a product of new institutional arrangements – in this case, reforms of trade and market liberalization, intellectual property protection, or labour under-regulation associated with export-led growth.

A portrayal of the global economic order as replete with law challenges the influential BHR premise of governance gaps. John Ruggie has eloquently posed the terms of the debate:

> The root cause of the business and human rights predicament today lies in the *governance gaps* created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge.[58]

A key analytical tool that underpins the 'governance gaps' diagnosis and conditions the normative agenda that follows it is the Polanyian notion of embeddedness/disembeddedness. In his early and influential work, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, Ruggie explicitly draws from Karl Polanyi to outline an agenda of 'embedded liberalism'. More specifically, he uses the dynamic of Polanyi's 'double movement' to explain the ascendance and subsequent constraint of market rationalities in the global economic order. According to Polanyi, 'double movement' denotes the deliberate push for free markets and trade that disembedded the economy from social life and relations, only to be followed by a spontaneous reaction of society seeking to constrain and re-embed the economy through regulation and forms of economic planning.[59] Ruggie returns multiple times to this ideal of 'embeddedness', arguing at a later point in time that 'markets work optimally only if they are

[55]LPE and LPE-adjacent scholarship has been attentive to these dynamics: For example, on how the legal constitution of money is not only domestic but transnational see A. Chadwick, 'States, Markets, and Transnational Law: A Re-evaluation of the Legal "Constitution" of Money', in I. Feichtner and G. Gordon (eds.), *Constitutions of Value: Law, Governance, and Political Ecology* (2023), 151; on how the legal structures of trade and finance encase the global political economy and hinder democratic contestation see Q. Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (2018); on how the transnational component of the laws of informational capitalism are integral to the solidification of platform power see J. Cohen, *Between Truth and Power: The Legal Constructions of Informational Capitalism* (2019).

[56]D. Kennedy, 'Law and the Political Economy of the World' (2013) 26(1) LJIL 7.

[57]See also, The IGLP Law and Global Production Working Group, 'The Role of Law in Global Value Chains: A Research Manifesto', (2016) 4(1) *London Review of International Law* 57.

[58]See Ruggie, *supra* note 4 (emphasis added).

[59]K. Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (2001), 147, 'laissez faire was planned; planning was not'. On the question whether the liberal constitutional model, founded on the public-private divide and the protection of property rights contains inherent dynamics of 'disembeddedness' see A. Chadwick 'The Constitutional Disembeddedness of Markets?', in A. Chadwick et al. (eds.), *Markets, Constitutions, and Inequality* (2022). See also S. Frerichs,

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embedded within broader social and legal norms, rules, and institutional practices'.[60] However, while Ruggie acknowledges Polanyi's historical contextualization of disembedding the economy as an intentional and deliberate process (per Polanyi, 'laissez-faire was planned'), he differentiates his analysis by underplaying this element of deliberate design and by focusing, instead, on the social dynamics that shape institutions (i.e., the political ascendance of the middle class).[61] This creates an explanatory formula that can be replicated in the context of globalization. In other words, for Ruggie, the mobility of global capital and the rise of multinational corporations has led the economy to be disembedded from social life, threatening the global social fabric as societies lack the tools to control such centrifugal dynamics. In this account, market expansion follows its own expansionary logic.

We argue that this portrayal overlooks the institutional preconditions for the social dynamics it describes. Polanyi's powerful claim that 'laissez-faire was planned' requires addressing the public power that made the emergence of such dynamics possible in the first place. Indeed, our analysis challenges the concept of 'governance gaps' and highlights the *deliberate institutional design* that underpins globalization. From our perspective, it is precisely *legality* – and not the lawlessness that 'governance gaps' allude to – that facilitates the forms of exploitation and structural inequality that shape our political economy.[62] In other words, attributing, for example, instances of unfree labour at the base of supply chains to the disjunction between private corporate power of transnational corporations and local enforcement capacities misses the target by omitting how this private power ('economic forces') is generated in the first place. The emergence of such private power is neither a natural given nor historically contingent and accidental.[63] Rather, it is a historical product of existing legal regimes and institutional constellations and the global social relations of production these enable. As such, instances of unfree labour are not an inadvertent and unfortunate product of governance gaps but rather the symptomatic expression of deliberate institutional arrangements that generate 'economic forces' with both the propensity and the relative capacity to maximize exploitation. Unfree labour, then, unfolds as the predictable result of legal and contractually permissible price pressure exerted to suppliers in the global periphery by transnational lead firms structured around shareholder primacy and profit-maximization, which maintain their globally dominant position through regimes of incorporation and limited liability, investment protection, robust intellectual property rights, labour under-regulation, contractually circumscribed modes of conflict resolution, etc.

'The Rule of the Market: Economic Constitutionalism Understood Sociologically', in P. Blokker and C. Thornhill (eds.), *Sociological Constitutionalism* (2017), 241.

[60]J. Ruggie, *Just Business: Multinational Corporations and Human Rights* (2013), 172.

[61]See Ruggie, *supra* note 5, at 386, 'And unless one holds that ideology and doctrine exist in a social vacuum, this ascendancy of market rationality in turn must be related to the political and cultural ascendance of the middle classes … In sum, this shift in what we might call the balance between "authority" and "market" fundamentally transformed state-society relations, by redefining the legitimate social purposes in pursuit of which state power was expected to be employed in the domestic economy. The role of the state became to institute and safeguard the self-regulating market.'

[62]Along these lines, in different contexts, see also J. Bakan, 'The Invisible Hand of Law: Private Regulation and the Rule of Law', (2015) 48 *Cornell International Law Journal* 279; M. Elliot, 'Problematising the "Governance Gap": Corporations, Human Rights, and the Emergence of Transnational Law', (2021) 12(2) *Transnational Legal Theory* 196; C. Samaradiwakera-Wijesundara, 'Reframing Corporate Subjectivity: Systemic Inequality and the Company at the Intersection of Race, Gender and Poverty', (2022) 7(1) *Business and Human Rights Journal* 100. For non-legality as a key structuring device of the contemporary legal order see F. Johns, *Non-Legality in International Law: Unruly Law* (2013). For example, 'the precise character of the "vacuum" understood to surround targeted killings, especially those carried out by drone, escaped careful scrutiny in the report … Yet that "vacuum" remained nonetheless structured by legal norms and normative practices to which Alston's report paid relatively little attention: technological code-architecture and user practices; intellectual property and contractual norms; norms governing executive power and decision; norm-governed and norm-making practices of modelling and prediction' at 6, 11–12.

[63]Following Susan Marks' concept of 'false contingency', the emergence of private power can be understood as partially corresponding to historical necessity and, thus, contingent only within the parameters enabled by systemic constraints and pressures, see Marks, *supra* note 7.

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The diagnosis of disembeddedness leads Ruggie to a normative agenda of 'embedded liberalism' to constrain free market rationalities and 're-embed' the economy within social life. In Ruggie's earlier work on global trade, this meant embedding the liberalism of free trade within a deeper commitment to an interventionist programme of governmental social action.[64] This privileged the state as an actor of global governance, giving priority to international co-operation. However, fast-forward almost 30 years later, and the vision of embedded liberalism underlaying the UNGPs is very different.[65] Building on the premise that the market follows its own expansionary logic, Ruggie's pragmatic conclusion is that the old hierarchical model resting on comprehensive ex ante regulation is impossible – the state cannot do 'all the heavy lifting' to meet societal challenges.[66] Tapping into the reconstructive impetus of transnational law and into theories of reflexivity and polycentric governance, Ruggie sketched the contours of a vision where social change would take place within the internal functioning of social systems – including private actors who function as global institutions.[67] In such an institutional imaginary, the role of the law cannot be the top-down imposition of substantive rationalities, but rather the enhancement of self-reflective capacities and the promotion of the self-limitation of private actors.[68] Taking the powerlessness of the state as a given and elevating the importance of the 'courts of public opinion'[69] as the overseer of corporate conduct, private governance is tasked with filling the 'governance gaps' through soft law, contractual governance of the supply chain, and private enforcement. It is in this context that HRDD becomes a key component of Ruggie's agenda, as it enables to 'scale up individual Corporate Social Responsibility initiatives to a more systemic level'.[70] Once again, this obfuscates the role of the state in generating its self-imposed impotence and in the expansion of corporate power – a power which is taken as a given, a cause and a cure, in the institutional imagination of the UNGPs. This attempt to use international law not to *plan* and *regulate* but to '*publicize*' private actors has led to the recurrent critique of corporate power entrenchment and expansion of corporate regulatory authority contrary to democratic principles.[71]

Problematizing the notion of 'governance gaps' also triggers a renewed scrutiny of the normative agendas of corporate accountability and HRDD, integral elements of the later agenda of 'embedded liberalism'. As critical legal approaches have repeatedly shown, calls for corporate accountability for specific instances of misconduct may inadvertently legitimate ongoing

[64]A. Lang, 'Reconstructing Embedded Liberalism: John Gerard Ruggie and Constructivist Approaches to the Study of the International Trade Regime', (2006) 9(1) *Journal of International Economic Law* 81.

[65]The roots for the transition in the understandings of the concept of 'embedded liberalism' have to be sought in the broader historical context, namely the shift from a post-war consensus that legitimated state intervention in the economy to a neoliberal economic paradigm that privileged, at least nominally, 'free markets' and private initiative.

[66]J. Ruggie, 'Global Governance and "New Governance Theory": Lessons from Business and Human Rights', (2014) 20 *Global Governance* 5, 8. This is explicitly in line with theories of 'responsive' regulation, reflexivity, and multistakeholder engagement, e.g., K. W. Abbott and D. Snidal, 'Taking Responsive Regulation Transnational: Strategies for International Organizations', (2013) 7 *Regulation and Governance* 95.

[67]See Ruggie, ibid.; J. Ruggie, 'Multinationals as Global Institution: Power, Authority and Relative Autonomy', (2018) 12(3) *Regulation & Governance* 317.

[68]See, indicatively, G. Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (2012); P. Zumbansen, 'Law after the Welfare State: Formalism, Functionalism and the Ironic Turn of Reflexive Law', (2008) 56(3) *American Journal of Comparative Law* 769. In regulatory theory, parallels can be drawn with theories of 'new governance', e.g., O. Lobel, 'The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought', (2004) 89 *Minnesota Law Review* 342.

[69]See Ruggie, *supra* note 4, para. 54.

[70]J. Ruggie, *How to Marry Civic Politics and Private Governance' in Carnegie Council on Ethics and International Affairs, The Impact of Corporations on Global Governance* (2004), 16.

[71]C. Cutler, *Private Power and Global Authority: Transnational Merchant law in the Global Political Economy* (2003); Bakan, *supra* note 62; Elliot, *supra* note 62; I. Kampourakis, 'The Postmodern Legal Ordering of the Economy', (2021) 28(1) *Indiana Journal of Global Legal Studies* 101. See A. Duval, 'Ruggie's Double Movement: Assembling the Private and the Public Through Human Rights Due Diligence', (2023) *Nordic Journal of Human Rights* 1.

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exploitation and violence that is not covered by the scope of the case.[72] This echoes the critique that a human rights framework focused on individual cases of harm and corporate accountability is structurally unsuited to addressing the systemically pernicious effects of corporate power.[73]Addressing a specific instance of harm *ex post* does not, as a rule, fundamentally challenge the legal framework that made it possible in the first place.[74] Instead, the harm, albeit a predictable product of institutional design, is framed as an extraordinary instance of illegality or lawlessness that needs to be mended. This could obscure that the fundamental issue is not, for example, how a company's subsidiary may have once been negligent in its oil pipeline maintenance resulting in environmental damage, but the broader institutional framework that enables the perpetuation of an extractivist economy with the propensity to commit environmental catastrophes again and again. Keeping with current critical accounts of international law, this shifts the emphasis away from new norms of 'transparency and accountability' and towards the various pieces of the legal puzzle that already shape and regulate corporate conduct.[75]

Extending a similar line of critique, HRDD, in its effort to mobilize private governance to prevent human rights violations, does not question the institutional foundations of private power. It takes this power as a given – the formula of 'publicizing' private actors builds on the presupposition of its existence. While this critique does not necessarily dismiss the potential of HRDD to reconstruct market relations – this ultimately depends on the context of its design and enforcement – it draws attention to how it operates in conditions of 'false necessity' that present corporate power as an inevitable fact, masking the historicity of the arrangements that have made it the reality that it is. It is also a critique that problematizes the expansion of the sphere of corporate authority beyond the realm of democratic legitimacy. Not only are corporations tasked with mitigating self-produced harms on the basis of elaborate, *self-produced*, human rights due diligence plans and risk assessments that corporate outsiders cannot substantively oversee. They are also meant to develop these beneficial policies with only a minimal requirement of 'stakeholder' participation that is often unlikely to materialize in the very places where business-related harm takes place, reinstating neo-colonial dynamics and narratives of paternalism.[76] This

[72]G. Baars, '"It's not Me, It's the Corporation": The Value of Corporate Accountability in the Global Political Economy', (2016) 4 *London Review of International Law* 127, 131, 'rather than thinking of [corporate accountability] as restraining corporate value extracting activity, we should think of it as facilitating corporate profit making and corporate capitalism as a whole'. This critique resonates with recurrent patterns of argumentation within Critical Legal Studies, see R. West, *Normative Jurisprudence: An Introduction* (2011). See also D. Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (2005); F. Mégret, 'Where Does the Critique of International Human Rights Stand? An Exploration in 18 Vignettes', in J. Beneyto and D. Kennedy (eds.), *New Approaches to International Law* (2013), 3.

[73]For a recently articulated critique along these lines in the context of private platform power and European social media regulation see R. Griffin, 'Rethinking Rights in Social Media Governance: Human Rights, Ideology and Inequality', (2023) 2(1) *European Law Open* 30. For the more pervasive critique that human rights have abetted, or at least not hindered, the advance of neoliberalism see J. Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (2019); S. Moyn, *Not Enough: Human Rights in an Unequal World* (2019); N. Oudejans, 'The Neoliberal Understanding of Human Rights and the Failure to Protect Refugees', (2024) 4 *Journal of Law and Political Economy* 935.

[74]Taking note, however, of how strategic litigation could, under certain conditions, provide the tools to overcome this. See, A. Fischer-Lescano, 'From Strategic Litigation to Juridical Action', in M. Saage-Maaß et al. (eds.), *Transnational Legal Activism in Global Value Chains* (2021), 299.

[75]Along these lines, Johns, *supra* note 62, at 9, suggests that 'somewhat less attention might be focused upon the promulgation of new norms to ensure "transparency and accountability". More attention might, instead, be directed towards those normative practices that already regulate critical decision-making surrounding targeted killing: the code-architecture of the relevant technologies and associated user practices; pertinent intellectual property and contractual norms; prevailing practices of modelling and prediction and the like'.

[76]For a TWAIL critique of recent HRDD regulation see C. Omari Lichuma, '(Laws) Made in the "First World": A TWAIL Critique of the Use of Domestic Legislation to Extraterritorially Regulate Global Value Chains', (2021) 81 *Heidelberg Journal of International Law* 497, who highlights the need to 'include the voices of potentially affected Third World peoples in the lawmaking processes of domestic supply chain laws', at 523. On the imagery of 'victims' lacking agency, to be rescued by 'Western saviors', see M. W. Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights', (2001) 42(1) *Harvard International Law Journal* 201.

type of unilateralism goes against the demand of the 'Third World', as a political and juridical project, to subject the conduct of transnational corporations to an international legal framework.[77] Instead, HRDD points to a path where the limits to corporate conduct are not decided in a centric fashion through international negotiations among sovereign states, but are instead concretely fleshed out by corporations themselves. Given the profit-maximizing rationality of corporate actors, the public interest represented by human rights obligations is translated and coded in economic terms, which ultimately means that regulatory reach becomes dependent on market incentives and sanctions, thus privileging the populations that have the market power to enforce such incentives or sanctions.[78] The risk is that HRDD devolves into another version of the 'moral responsibility' of the 'developed West' towards 'the global poor'.[79]

The shared underpinning of the critique emerging from the recognition of the constitutive role of law in the economy and the very conditions that lead to human rights violations is that harms are products of deliberate institution-building – and not its absence. At first, this appears to frame law and institutions as the root cause of human rights violations. Yet, the question emerges: are the laws and institutions that condition the reproduction and perpetuation of business-related harms in some way contingently deficient – and, thus, amenable to reform – or are they themselves the expression of the very historical malcontent we task them with addressing – and, thus, the root causes really lie elsewhere?

4. Root causes once again

Recent critical perspectives into emerging HRDD legislation have identified the risk that the latter's proceduralism may obfuscate root causes of human rights violations, misdirecting remedial energies towards mere symptoms.[80] For instance, Radu Mares seeks to draw attention to root causes at the top of supply chains (corporate conduct), at the bottom of supply chains (supplier conduct), and horizontally (market competition). Mares suggests that the UNGPs were not remiss in directing attention to root causes, as they framed wrongful corporate involvement through causation, contribution, or linkages.[81] The example Mares gives, drawing from the UN Interpretive Guide of the corporate responsibility to respect human rights, is that of a 'buyer company's purchasing practices that squeeze suppliers leading to corner-cutting and infringements of worker rights'.[82]

At first, this might appear identical to the example of unfree labour and price pressure used in the previous section. Our analysis, however, seeks to take the inquiry about root causes deeper. First, the Interpretive Guide's example is already rather limited, referring to 'changing product requirements for suppliers at the eleventh hour without adjusting production deadlines and prices, thus pushing suppliers to breach labour standards in order to deliver'.[83] Implicitly, this example reproduces the logic of exception, framing human rights violations within GVCs as singular events, rather than ongoing, continuous exploitation emerging in predictable patterns. Yet, more crucially, our analysis asks two questions that Mares stops short from asking. Mares asks, 'what are the root causes of worker rights infringements in GVCs' and finds an answer in 'buyers purchasing

[77]S. Pahuja, 'Corporations, Universalism, and the Domestication of Race in International Law', in D. Bell (ed.), *Empire, Race and Global Justice* (2019), 74, at 82.

[78]On how this process of translation opens the way for market capture see E. Christodoulidis, 'On the Politics of Societal Constitutionalism', (2013) 20 *Indiana Journal of Global Legal Studies* 629.

[79]See Pahuja, *supra* note 77, at 86. However, on the openness and plasticity of HRDD see K. H. Eller, 'Pricing and Distribution in Global Value Chain Regulation', in this issue [doi number to be added at proof stage].

[80]See Deva, *supra* note 2; Mares, *supra* note 31.

[81]See Mares, *supra* note 31, at 1526.

[82]Ibid.

[83]Office of the United Nations High Commissioner of Human rights, The Corporate Responsibility to Respect Human Rights - An Interpretive Guide, HR/PUB/12/02 (2012), 17.

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practices'. Taking the inquiry one tier deeper requires asking what enables these purchasing practices in the first place. This leads to the institutionalist dimension of our argument, which, as sketched above, highlights how legal rules of national and international law, including rules of permission, shape the institutional environment that enables such purchasing practices. Yet, if the answer to the question 'what enables such practices' is 'law', this prompts a second tier of inquiry: What makes law consistently and predictably enable such practices? This shifts the attention to the social relations that condition the production of legal text and meaning. Therefore, while our analysis starts by dismissing a simplistic analytical focus on the social that frames law as simply an external regulator (e.g., mere 'purchasing practices'), it only exposes the institutional underpinnings of the social (i.e., 'what enables purchasing practices') to eventually return to a more complicated picture of the social in the inquiry for root causes (i.e., 'what enables the enabler'). This leads to a legal institutionalist account that takes seriously the imbrication of law within social relations of production. As such, the question becomes not only how the institutional environment enables the practices in question but how it reflects their structural necessity for upholding this very institutional environment and the social relations that define it.

Uncovering the constitutive role of law in the business and human rights predicament can then lead critique in two different directions: that of an 'internal' and that of an 'immanent' critique. Internal critique takes the first of the two options laid out in the conclusion of the previous section, staying at the first tier of inquiry of 'what enables such practices'. The constitutive argument lends itself to an understanding of root causes as embedded within legal regimes, with the ultimate ambition to suggest alternative institutional orderings. For instance, attributing unfree labour to regimes of contractual governance, permissible price pressure, intellectual property rights protection, etc., implies that a different institutional setup would be possible and could eliminate the root causes of worker rights infringements. While critique in that vein could assume different degrees of radicality and depth (is the 'root cause' a recent policy shift? Is it the constitutionally articulated property rights regime? Is it a complex and intertwined patchwork of different legal rules and regimes?), the fix is located at the level of institutions. This type of critique accommodates a certain degree of voluntarism, whereby assuming control of legal coding could restructure the economy and rebalance power asymmetries in such ways that would fundamentally address human rights violations.[84]

Yet, this type of internal critique remains vulnerable to an objection, forcefully articulated by Susan Marks in her seminal piece on *Human Rights and Root Causes*: it halts the investigation of root causes too soon.[85] It evades the second tier of analysis, namely 'what makes law and institutions consistently and predictably enable such practices'. While the underpinning legal background plays without a doubt a crucial role in creating the conditions for business-related harms, Marks doubts the implicit message of straightforward institutionalist accounts that 'if only bad procedures, rules and ideas were replaced and good ones adhered to, the miseries with which human rights are concerned would go away'.[86] As Marks correctly notes, this halt of investigation privileges *the state* as the primary agent of change. It thus draws the contours of a critique that is insufficiently material, as it excludes social relations of production both from its analytical scope and from its normative arsenal. In other words, by remaining at the level of legal institutions, such internal critique fails to explain patterns, regularities, and consistency in distributive outcomes, which are seen as the products of presumably contingent institutional arrangements. The effect of this analytical position is to concentrate the effort for social transformation at the level of legal

[84]For example, this is a critique that has been raised to Katharina Pistor's influential *The Code of Capital*. See, indicatively, M. Goldoni, 'On the Constitutive Performativity of the Law of Capital', (2021) 30(2) *Social & Legal Studies* 291; I. Kampourakis, 'Legal Theory in Search of Social Transformation', (2022), 1(4) *European Law Open* 808.

[85]See Marks, *supra* note 6, at 70.

[86]Ibid., at 71.

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coding and institution-building. This could side-line the importance of social movements that aim to directly change social relations and not merely their juridical inscriptions.

Furthermore, for Marks, this type of internal critique poses the risk of misconstruing the cause-and-effect relationship by positioning law as the ultimate causative factor. In a provocative reversal, this would suggest that unfree labour should not be understood merely as an effect or by-product of institutional arrangements. Rather, the existing institutional arrangements are in place *precisely to enable* the kind of exploitation that may also take the form of unfree labour – unfree labour is, in fact, the cause. This underscores Marks' critique, for it is one thing to assert that the vulnerabilities of specific communities are caused by legal arrangements, but it is a different thing to suggest that legal arrangements are structurally oriented to reproduce these vulnerabilities.

This analysis lays the groundwork for a critique that confines more narrowly the transformative potential of legal coding. This is a critique which, despite acknowledging the role of the law (rather than its insufficient reach) in defining the business and human rights predicament, it sees law itself as bound by the non-contingent rationalities of global production. Contrary to the prioritization of institutional fixes, this critique reflects a suspicion to instrumental reason and administrative remedies. This is because the instrumentalism evoked by what we named as 'internal critique', where law becomes a means to an end, encounters inherent limitations in becoming purposive and, in the process of seeking legal and administrative outputs, ultimately blunts transformative societal energies.

As such, the second type of critique shifts from the 'legal-institutional' to the 'legal social', focusing on the importance of collective action and social movements in directly challenging (global) social relations of production. This critique is 'immanent critique' in that it derives its critical standards rooted from the historical process, rather than through an idealist 'is/ought' dipole.[87] It is a critique that emphasizes the contradiction between social formations and their legitimating ideology – searching, within this ideology, for the seeds of emancipatory practice. Immanent critique within the realm of business and human rights builds upon the observation that the remedial institutions addressing business-related harms (such as HRDD, grievance mechanisms, litigation, regulation, etc.) fall short of fulfilling their inherent promises of human rights and justice in global production. However, contrary to internal critique, the ambitious is not to sketch out legal fixes or institutional blueprints but to defend an openness to societal energies.[88] This means that immanent critique does not aspire to address specific harms on the basis of given understandings of 'harms' and 'remedy' but to trace pathways for new social formations that seek to democratize global production. Immanent critique recentres social movements and the lived dimension of participating in global production. In its identification of a contradiction between categories of thought (e.g., human rights) and modes of social being (e.g., exploitation in global production), immanent critique remains agnostic to concrete, palpable normative ends.[89]

While there is a tension between the modes of 'internal' and 'immanent' critique, it remains possible to conceive of a tenuous bridge between them. This depends on the resurfacing of a *materialist* element within internal critique, and of a *political/juridical* element within immanent critique. On the one hand, as the internal critique remains committed to social, political, and institutional imaginaries that would actualize the underlaying promises of the business and human rights agenda, it shares a degree of agnosticism about the institutional means that might achieve this. This means what fundamentally matters is not the form through which business-

[87]R. J. Antonio, 'Immanent Critique as the Core of Critical Theory: Its Origins and Developments in Hegel, Marx and Contemporary Thought', (1981) 32(3) *British Journal of Sociology* 330, 332.

[88]Following Christodoulidis' phenomenological reading, the objective of immanent critique is not to capture an existing form, but the generation of a new form on the basis of existing elements, see E. Christodoulidis, *The Redress of Law: Globalisation, Constitutionalism and Market Capture* (2021), 528–38.

[89]See, N. Lacey, 'Normative Reconstruction in Socio-Legal Theory', (1996) 5(2) *Social & Legal Studies* 131, 134, for a discussion on the scepticism of critical legal theory towards institutionalizing change, with prescriptive and utopian thinking being linked to a totalizing impulse that seeks to fix meanings and falling short in its commitment to democratic principles.

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related human rights harms are addressed (i.e., the state, polycentric modes of governance, bottom-up social movements) but rather the *material ends* that are pursued through these forms – in other words, how each of these frames affects social relations of production: who is materially empowered and disempowered, who wins and who loses. On the other hand, immanent critique privileges societal energies that may unbalance and restructure social relations of production. Yet, social relations of production should not be understood as merely economic but rather as necessarily taking the form of particular juridical and political relations – 'modes of domination and coercion, forms of property and social organization' – which are not merely an external reflection but constituents of these production relations.[90] This means that political struggle – including struggle about juridical inscriptions – plays a decisive role in the shaping of social relations of production.

However, the different modes of critique still mean privileging different forms of intervention and political participation: While internal critique is ultimately reliant on the state and public power more broadly, immanent critique focuses on social movements and bottom-up grassroots movements. While it is beyond the purposes of this article to elaborate on this extensively, one way to think dialectically about the relationship between top-down and bottom-up politics is the heuristic of 'non-reformist reforms'. Increasingly employed by activists to 'conjure up the possibility of advancing reforms that aim not to ameliorate the *status quo* but call it into question and facilitate transformational change',[91] 'non-reformist reforms' point to processes of mobilization. Rather than delivering on static, demarcated outputs, 'non-reformist reforms' seek to modify decision-making structures and relations of power. Non-reformist reforms in the field of business and human rights would then extend beyond minimizing risks of abuse for vulnerable communities or providing remedies for victims. Instead, for example, they would concentrate on material ends related to community empowerment, enabling economic democracy, and subjecting profit-oriented production under the kind of social control that would fundamentally address root causes.

5. Conclusion

Our article aimed to uncover the institutional underpinnings of private power, illustrating how efforts to 'publicize' private actors and leverage the regulatory potential of private governance rest on the implicit naturalization of that power. This critique cautions against strategies to merely 'extend the rule of law' or 'fill governance gaps', urging instead a focus on how existing legal frameworks themselves generate and sustain human rights harms. At the same time, we challenged the view of legal regimes as merely contingent and open to any form of reform, redirecting attention to how social relations of production shape and constrain legal institutions. Finally, we demonstrated how these two levels of analysis and differing perspectives on the role of law in structuring the economy give rise to two distinct directions of critique – the 'internal' and the 'immanent' – and explored how these critiques can be reconciled through the concept of 'non-reformist reforms'.

[90]E. M. Wood, *Democracy Against Capitalism: Renewing Historical Materialism* (2016), 27.

[91]A. Akbar, 'Demands for a Democratic Political Economy', (2020) 134 *Harvard Law Review* 90, 97. Akbar draws from A. Gorz, *Strategy for Labor: A Radical Proposal* (1967) who coined the term 'non-reformist reforms'.

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