Laws Used to Excessively Impede Naming and Shaming in Business and Human Rights: Elite Power?

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This article explores the use of laws to unduly silence critics of corporate human rights abuses. It considers the hypothesis that state and business elites align their interests, fuelling the employment of regulations to excessively impede naming and shaming activities. This article draws on socio-legal and critical legal studies to demonstrate how laws, while typically perceived as protective, can also serve to empower corporations and suppress dissent. It reviews examples of such collusion and calls for further case studies to better understand the interplay between business interests and regulatory practices.

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I. Introduction

This article concerns laws that are unduly used to silence critics of corporate human rights abuse. In such instances, the freedom of expression, including its core component "access to information", the freedoms of association or the right to peaceful assembly are excessively limited, beyond the exceptions allowed by articles 19, 21 and 22 International Covenant on Civil and Political Rights (1966). Former UN Special Rapporteur on the rights to freedom of peaceful assembly and of association Kiai noted that the employment of laws in excessively restrictive ways "may help a government silence a critic tomorrow, or boost a business' profit the next day — but at what cost next month, next year and for the next generation". [1]

This article specifically aims to review whether state elites align themselves with global corporate forces and/or local business elites hypothesising that laws are used as instruments to impede 'naming and shaming', i.e. the articulation and communication to a target that it violated certain norms and standards, and the exposure of such information and/or

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[1] UN Human Rights Council, 'Report of the Special Rapporteur on the freedom of peaceful assembly and of association Maina Kiai' (2017) UN Doc A/HRC/35/28, para. 90. See also UN General Assembly, 'Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association Annalisa Ciampi' (2017) UN Doc A/72/135, para. 18.

condemnation to audiences that are important to the target.[2] Naming and shaming remains one of the *very few* tools that *can* be effective in halting corporate human rights abuse, as pointed out by constructivists as well as liberal institutionalists. [3]

The literature on naming and shaming corporate human rights abuses has not yet studied that regulation can be used as a counterframe to human rights change. For example, Haufler focuses only on the rights-enhancing constraints that regulation imposes on corporations in her chapter "Shaming the Shameless? Campaigning Against Corporations".[4] And Deitelhoff and Wolf assume that "'denial' does not involve corporate questioning of the validity of human rights norms but rather a denial of the responsibility of corporations to promote them" in their chapter on shamed corporations in the landmark constructivist book "The Persistent Power of Human Rights" by Risse, Ropp and Sikkink.[5] This article does not provide definite answers, but tries to move research on corporate human rights violations into new directions.

As a preliminary note, it needs to be underlined that the business community is not a monolith. There exist many different firms and sectors, and many of them champion human rights and leverage human rights to gain a competitive sustainable advantage. Yet, these facts should not discourage us from examining any links between regulation and corporate disrespect for human rights.[6]

Part II first defines the concept of regulation. Section 1 of this part explains that socio-legal and critical legal studies teach us that the law is *both* "a source of empowerment and disempowerment".[7] It is explained how the law can be used by corporations to silence critics unduly. Section 2 explains that the idea that there can be a synchronisation of state and business interests in the employment of regulation is supported by literature in neighbouring fields, including the emerging political literature on so-called "anti-NGO" laws. Part III gives two examples of such collusion published in previous field studies. First, when examining *local* businesses, I found evidence in the Republic of Korea's (Korea's) electronics industry in a case study published in my book *The European Union, Emerging Global Business and Human Rights*.[8] Second, Gustafsson documented how legislation was created to serve *foreign* business interests at the expense of human rights in the Peruvian mining industry in her book *Private Politics and Peasant Mobilization*.[9] Afterwards, Part III calls for further case studies. Part IV concludes.

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[2] Cf Ann Marie Clark, 'The Normative Context of Human Rights Criticism: Treaty Ratification and UN Mechanisms' in Thomas Risse, Stephen Ropp and Kathryn Sikkink (eds), *The Persistent Power of Human Rights: From Commitment to Compliance* (2nd ed, CUP 2013), p. 126; Richard Friman, 'Conclusion: Exploring the Politics of Leverage' in Richard Friman (ed.), *The Politics of Leverage in International Relations* (Palgrave 2015), p. 204; Virginia Haufler, 'Shaming the Shameless? Campaigning Against Corporations' in Friman (ed.) supra, ibid, pp. 187-188.

[3] E.g. Risse et al. (eds) supra, note 2; Robert Knowles, 'A Realist Defense of the Alien Tort Statute' (2011) 88(5) Washington University Law Review, pp. 1117-1176.

[4] Haufler supra, note 2, 187-188.

[5] Nicole Deitelhoff and Klaus Dieter Wolf, 'Business and Human Rights: How Corporate Norm Violators Become Norm Entrepreneurs' in Risse et al. (eds) supra, note 2, 222 and 237.

[6] Aleydis Nissen, *The European Union, Emerging Global Business and Human Rights* (Cambridge University Press 2023), p. 307.

[7] Michael McCann, 'Law and Social Movements: Contemporary Perspectives' (2006) 2 Annual Review of Law and Social Science, p. 22.

[8] Nissen supra, note 6, pp. 248-297.

[9] Maria-Therese Gustafsson, *Private Politics and Peasant Mobilization* (Springer 2018), pp. 151-155.

II. Regulation

1. Definition

Regulation is defined as "those social actions in real or cyberspace that generate political, economic, legal or social norms intended to steer behaviour, with those norms being embedded in institutional frameworks for implementation".[10] While mandatory regulation often aspires to offer protection, especially for weaker parties, it can also be an instrument for stronger actors to exert their power and violate rights.[11] The socio-legal and critical legal literature has long focused on disempowerment. Laws can serve to support status quo conventions and hierarchical relationships and to reproduce inequalities and foster exploitation.[12] Accordingly, law is perceived "as emerging out of social relationships rather than imposed from above and, at the same time, … as emerging from elites' interests and power". [13]

Kiai noted in 2015 that there is a documented growing number and diversity of states implementing or considering excessively restrictive laws.[14] UN Secretary-General Guterres echoed this statement in 2020, warning that "an open space for [p]articipation is shrinking, [r]epressive laws are spreading, with increased restrictions on freedoms to express, participate, assemble and associate". [15] What is different today is thus the documented growing number and diversity of states implementing or considering excessively restrictive laws. They are part and parcel of shrinking civic space "that could shape the course of our world for generations to come."[16] Early catalysts emerged after the war on terror, Ukraine's 2004 orange revolution and the 2008 global financial crisis.[17] At the time, it was thought that such laws were geographically limited. For example, the UN Special Rapporteur on freedom of opinion and expression La Rue saw such regulation as a new way of "intimidating with the law" for authoritarian governments in 2011.[18] During US President Trump's time in office in 2019, Chua wrote, however, that repressive laws are "all over".[19] Hostile discourse, harassment and smear campaigns in real and cyberspace were mushrooming, and it became more difficult to access truthful information, engage in dialogue or express dissent.[20] While emergency

[10] Bettina Lange, 'Sociology of Regulation' in Jiří Přibáň (ed.), *Research Handbook on the Sociology of Law* (Edward Elgar 2020), p. 95.
[11] Maina Kiai, 'Reclaiming Civic Space Through U.N. Supported Litigation' (2015) 12(22) SUR International Journal on Human Rights, p. 246.
[12] Roderick MacDonald and Hoi Kong, 'Patchwork Law Reform: Your Idea is Good in Practice, but it Won't Work in Theory' (2006) 44(1) Osgoode Hall Law Journal, p. 21.
[13] Charles Epp, *Making Rights Real* (The University of Chicago Press 2009), p. 216. See also Aleydis Nissen, 'Gender-Transformative Remedies for Women Human Rights Defenders' (2023) 8 Business and Human Rights Journal, p. 387.
[14] Kiai supra, note 11.
[15] António Guterres, 'The Highest Aspiration: A Call to Action for Human Rights' (2020), <https://reliefweb.int/report/world/highest-aspiration-call-action-human-rights-2020>, p. 8.
[16] UN Special Rapporteur on the freedom of peaceful assembly and of association Maina Kiai, 'Letter from the UNSR: Our Fight Isn't Just About Closing Space; It's a "Struggle for Future of Democracy' (2017) <http://freeassembly.net/news/2016-letter-from-maina-kiai>.
[17] Carl Gershman and Michael Allen, 'New Threats to Freedom: The Assault on Democracy Assistance' (2006) 17(2) Journal of Democracy, p. 40; Cristina Flesher Fominaya, 'European Anti–Austerity and Pro–Democracy Protests in the Wake of the Global Financial Crisis' (2016) 16(1) Social Movement Studies, p. 13.
[18] UN Special Rapporteur on freedom of opinion and expression Frank La Rue, 'Statement delivered at the Regional Symposium on the Criminalization of Speech, Expression and Opinion in Asia, Paramadina Graduate School, 15–16 July' (2011) as reported by Siena Anstis, 'Using Law to Impair the Rights and Freedoms of Human Rights Defenders: A Case Study of Cambodia' (2012) 4(3) Journal of Human Rights Practice, p. 312.
[19] Lynette Chua, 'Legal Mobilization and Authoritarianism' (2019) 15 Annual Review of Law and Social Science, 357, 360 and 363.
[20] Arne Hintz and Stefania Milan, '"Through a Glass, Darkly": Everyday Acts of Authoritarianism in the Liberal West' (2018) 12 International Journal of Communication, pp. 3939–3959.

regulation was necessary for survival during the COVID-19 pandemic, this crisis opened up more opportunities to create excessively restrictive regulation.[21]

Such developments might make us forget that the specific context influences how and why laws are employed. Laws can, indeed, be explicitly contrary to the rule of law.[22] But, they can also have such effect in context.[23] Laws "are" excessively restrictive as far as they have such effect "in action". Non-governmental organisations (NGOs) document in this regard that old laws from pre-liberal or colonial eras are increasingly being "repurposed" and recycled.[24] Similarly, former Supreme Court judge Lokur explained that the British sedition law has increasingly been used since the Bharatiya Janata Party came to power in India in 2014.[25] It was, amongst others, employed to arrest a protestor who called for the repeal of laws that threatened the livelihoods of farmer communities (including many Sikhs) but allowed private corporations to take their land and control the prices of crops.[26]

Fisk and Reddy – working in the field of labour law (which partly overlaps with the field of business and human rights) – considered in 2020 that only the literature on trade unions has continued its work on regulation employed in excessively restrictive ways.[27] The gap is considerable, especially because trade unions have been artificially separated from other social movements due to the failure of unions to prioritise solidarity with women and other groups that suffer from (intersectional) forms of discrimination.

A similar research gap exists in the field of business and human rights. This issue has, however, received much attention in NGO reports and communications by Kiai and various other UN Special Rapporteurs. To begin, various NGO reports refer to corporations that employ laws for (perceived) gain. It is useful to give a few examples. Greenpeace focuses on defamation laws in its report "Sued into Silence".[28] The NGO Article 19 (2020) refers to anti-protest regulations in the US excessively used in response to the Dakota Pipeline Protests, while the Centro de Estudios Legales y Sociales (2016) explains how laws are excessively employed to stop protests for environmental rights, including by leaders of Indigenous communities in Latin America.[29] Another American NGO stated that the "justice system is used against" those

[21] Liora Lazarus, 'Introduction' in Liora Lazarus et al. (eds), A Preliminary Human Rights Assessment of Legislative and Regulatory Responses to the COVID-19 Pandemic across 11 Jurisdictions (2020), University of Oxford Bonavero Report No. 3/2020, p. 3

[22] Martin Krygier, '"Good, Bad, and "Irritant" Laws in New Democracies' in Jan Zielonka (ed.), *Media and Politics in New Democracies: Europe in a Comparative Perspective* (Oxford University Press 2015), pp. 126, 130–131.

[23] Ibid.

[24] E.g. Civicus, 'Punished for Speaking Up: The Ongoing Use of Restrictive Laws to Stifle Dissent in India' (2020) <www.civicus.org/documents/reports–and–publications/India.PunishedForSpeakingup.pdf>, pp. 5 and 10–16.

[25] Sudha Ramachandran, 'India's Supreme Court Pauses Sedition Trials' (*The Diplomat*, 14 May 2022).

[26] Forumsyd, 'Do We Still Exist?' (2019) <https://www.forumciv.org/int/latest/report–do–we–still–exist>, p. 20.

[27] Catherine Fisk and Diane Reddy, 'Protection by Law, Repression by Law: Bringing Labor Back into the Study of Law and Social Movements' (2020), *Emory Law Journal*, 70(1), pp. 63–152. See e.g. Carolijn Terwindt, *When Protests Become Crime* (Pluto Press 2019), Part II.

[28] Greenpeace, 'Sued Into Silence: How the Rich and Powerful Use Legal Tactics to Shut Critics Up' (2020) <https://www.greenpeace.org/eu-unit/issues/democracy-europe/4059/how-the-rich-and-powerful-use-legal-tactics-to-shut-critics-up/>.

[29] Article 19, 'The Global Expression Report 2019/2020' (2020) <https://www.article19.org/wp-content/uploads/2020/10/GxR2019-20report.pdf>, p. 62; Centro de Estudios Legales y Sociales, 'Latin American State Responses to Social Protest' (2016) <https://www.cels.org.ar/protestasocial_AL/pdf/social_protest.pdf>, pp. 8 and 39.

protesting mega-projects and resource development.[30] The value of NGO reports, as acts of advocacy is, of course, inherently limited. But, various UN Special Rapporteurs – including Forst, former Special Rapporteur on human rights defenders and Knox, former Special Rapporteur on the human right to a healthy environment –refer to various similar laws used to start excessive defamation lawsuits and to excessively stop protests when corporate human rights violations have been called out in their communications.[31] Such communications can be sent to governments and other actors in relation to information that they receive from individuals, corporations, NGOs and other actors.[32] Various UN Special Rapporteurs – including Anaya, former Special Rapporteur on the rights of indigenous people and Knaul, former Special Rapporteur on the independence of judges and lawyers – also refer to "anti-NGO" laws (just as the political literature discussed in Part II, Section 2 below).[33] Various UN Special Rapporteurs – including Elver, former Special Rapporteur on the right to food and Boly Barry, former Special Rapporteur on the right to education – communicate also on the employment of laws to excessively limit access to resources, fuel censorship and restrict information (just as the example on toxics information provided in Part III below) in such circumstances.[34] In their own way, communications of UN Special Rapporteurs are limited. They focus disproportionally, on storytelling, extreme cases and jurisdictions in the Global South.[35]

2. Synchronisation of business and political interests

Do state elites – captured by neoliberal incentive structures – side with global and/or local corporate forces against local communities? In other words, is the sustained and widespread use (or even the creation) of laws in ways that excessively restrict naming and shaming maintained "on purpose"? Socio-legal scholars have alluded towards such critical perception of the genesis of regulation. Notably, Lehoucq and Taylor conclude – on the basis of their systematic review of 41 papers on legal mobilisation in the journals "Law and Society Review" and "Law and Social Inquiry" – that legal mobilisation aimed at changing business behaviour "necessarily involves states institutions and state actors". [36] Accordingly, the divide between actions directed at states and corporations "is perhaps more porous than might be imagined".[37]

The literature studying the centrality of political economy in regulation argues that laws reflect the perceived interests of corporations in the neoliberal era.[38] Regulation from this era is not

[30] Inter-American Commission on Human Rights, 'Criminalization of Human Rights Defenders' (2015) Doc OEA/Ser.L/V/II, p. 31.

[31] OHCHR, 'Communication Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression et al.' (2014) AUS 3/2014; OHCHR, 'Comunicación Mandatos del Grupo de Trabajo sobre la cuestión de los derechos humanos y las empresas transnacionales y otras empresas et al.' (2017) PER 6/2017.

[32] See OHCHR, 'UN Special Representatives Communications' <https://spcommreports.ohchr.org/Tmsearch/TMDocuments>.

[33] OHCHR, 'Comunicación Mandatos del Relator Especial sobre la promoción y la protección del derecho a la libertad de opinión y de expression et al.' (2013) ECU 4/2013; OHCHR, 'Comunicación Mandatos del Relator Especial sobre el derecho de la Libertad de reunión y de asociación pacificas et al.' (2011) PRY 1/2011.

[34] OHCHR, 'Comunicación Mandatos del/de la el Relator Especial sobre el derecho a la educación et al.' (2019) GTM 4/2019.

[35] Susan Marks, 'Human Rights and Root Causes' (2011) 74(1) Modern Law Review, p. 71.

[36] Emilio Lehoucq and Whitney Taylor, 'Conceptualizing Legal Mobilization: How Should We Understand the Deployment of Legal Strategies' (2020) 45(1) Law & Social Inquiry, p. 182.

[37] Ibid.

[38] Dan Danielsen, 'Corporate Power and Global Order' in Anne Orford (ed.), *International Law and Its Others* (Cambridge University Press 2006), pp. 86–88; Marianna Leite, 'Beyond Buzzwords: Mandatory Human Rights

the same as "laissez-faire" regulation.[39] "Rather, it vigorously embraces regulation that foster markets and market competition".[40] A dynamic and highly interactive relationship between law and markets has been observed in various legal fields. [41] These ideas build upon the work of Weber, for whom a formal and rational legal system evolved in response to the "calculable" needs of capitalists in the Western world. [42] Polanyi observed that "regulation and markets, in effect, grew up together".[43] Rawls, adding a modern dimension, notes that socio-economic "inequalities in a modern democratic state are so large that those with greater wealth and position usually control political life and enact legislation and social policies that advance their interests". [44] As a result, businesses wield influence over regulation processes through various means, including financial prowess and the ability to mobilise like-minded supporters across borders. They yield such power because they "own the sources of oxygen" of the socioeconomic and political system.[45] Heydebrand writes that the legal system can even become a "dependent" variable, subject to political expediency and economic priorities.[46]

Furthermore, political economists and sociologists have long acknowledged that businesses can wield disproportionate political influence. States engage in competition to attract investments, stimulate economic growth and generate trust in the state or political leadership, while businesses favour hierarchical and market-driven commitments.[47] Polanyi coined the concept "double movement" to describe the tension between the expanding forces of market and the mobilisation of social forces and institutions around alternative discourses, a core aspect of his magnum opus *The Great Transformation*.[48] This concept illustrates how movements emerge to counterbalance the unregulated expansion of market forces, seeking to protect rights and broader societal interests. Importantly, any mobilisation can (or should) also involve corporations and political elites. [49] Resistance to market forces is multifaceted, involving a complex interplay of internal and external social forces, accounting for resistance and variation within markets as well as social movements.[50]

Due Diligence and a Rights-Based Approach to Business Models' (2023) 8(2) Business and Human Rights Journal, p. 200.

[39] Joo-Cheng Tham and K.D. Ewing, 'Labour Provisions in Trade Agreements' (2020) 15 International Organizations Law Review, 158.

[40] Jamie Peck, *Constructions of Neoliberal Reason* (Oxford University Press, 2010), pp. 3–7.

[41] Lucian Arye Bebchuk and Mark Roe, 'A Theory of Path Dependence in Corporate Ownership and Governance' (1999) 52(1) Stanford Law Review; Curtis Milhaupt and Katharina Pistor, *Law & Capitalism* (University of Chicago Press 2006), p. 6.

[42] Max Weber, 'Economy and Society' in Guenther Roth and Claus Wittich (eds) (2nd ed, University of California Press 1978), p. 687.

[43] Karl Polanyi, *The Great Transformation* (Rinehart & Company/Beacon Press 1944/2001). p. 71.

[44] Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press 2008), p. 33 referring to John Rawls, *Justice as Fairness* (Harvard University Press 2001), p. 148–150.

[45] Jeffrey Reiman, *The Rich Get Richer and the Poor Get Prison: Ideology, Class, and Criminal Justice* (MacMillan 1984), p. 139.

[46] Wolf Heydebrand, 'From Globalisation of Law to Law under Globalisation' in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (Hart 2001), pp. 121 and 123

[47] Naomi Hossain et al., 'What Does Closing Civic Space Mean for Development? A Literature Review and Proposed Conceptual Framework' (2018), *Institute of Development Studies Working Paper Nr 515,* p. 25.

[48] Polanyi, supra, note 43, p. 136.

[49] Berger-Kern supra, note 1.

[50] E.g. Polanyi, supra, note 43, p. 44; Frances Fox Piven and Richard Cloward, *Poor People's Movements: Why They Succeed, How They Fail* (Vintage Books 1978).

Political economy and sociology suggest that state "capture" by corporations can range from subtle influences to pervasive control.[51] Hönke's discussion of *foreign* corporations contributing to "transnational clientelism" in governance processes, along with Glasius' study on "corporate authoritarian practices" and Cooley, Heathershaw and Soares de Oliveira's work of "kleptocratic elites", delves into state capture.[52] Hopkin refers to the concept of "new clientelism" which does not involve social or political exchange but rather economic or market gains in which the client "seeks to maximize utility" irrespective of "any sense of obligation towards or identification with another actor".[53] The intricate relationship between those in positions of power and *local* business elites around the world has also been studied in various countries around the world. For example, Crabtree, Wolff and Durand wrote in their new book "Business Power and the State in the Central Andes" how business elites in Bolivia, Ecuador and Peru have exercised structural power to advance their interests in the neoliberal era.[54] Similarly, Lim, Gomez and Won teased out how close relations have been formed between states and businesses in Malaysia, Thailand, Turkey and Korea.[55]

Yet, all this literature has until recently treated the law as a side-show. This is starting to change, as indicated by the emerging studies on so-called "anti-NGO" laws. These are laws that excessively limit the workings of NGOs, including their registration and (foreign) funding.[56] Notably, in their study of such laws, Fransen and his co-authors assert that "human rights and labor NGOs in particular, and to some degree environmental NGOs, are likely to be affected by restrictions and repression because state actors view them as hostile to the ruling regime and its economic growth strategy".[57] One limitation of such studies is that they mainly consider laws against the "rule of law", as opposed to laws employed restrictively in context.

III. Corporate regulatory strategies

Snyder as well as Kinzelbach and Lehmann have called for more research on push-back effects against naming and shaming.[58] Snyder suggests that localising human rights is particularly important in this context. The vernacularisation of human rights allows the study of ideas and human rights practices in international law and organisations, translated into local contexts.[59]

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[51] Cf Alexander Cooley, John Heathershaw and Ricard Soares de Oliveira, 'Transnational Uncivil Society Networks: Kleptocracy's Global Fightback Against Liberal Activism' (2023) European Journal of International Relations, pp. 1, 3 and 5.

[52] Marlies Glasius, *Authoritarian Practices in a Global Age* (OUP 2023), pp. 125–151; Jana Hönke, 'Transnational Clientelism, Global (Resource) Governance, and the Disciplining of Dissent' (2018) 12 International Political Sociology, p. 109.

[53] Jonathan Hopkin, 'Clientelism and Party Politics' in Richard Katz and William Crotty (eds), *Handbook of Party Politics* (Sage 2006), p. 407.

[54] John Crabtree, Jonas Wolff and Francisco Durand, *Business Power and the State in the Central Andes* (University of Pittsburgh Press 2023).

[55] Guanie Lim, Edmund Terence Gomez and Chan-Yuan Won, 'Evolving State-Business Relations in an Age of Globalisation: An Introduction' (2021) 51(5) Journal of Contemporary Asia, pp. 697–712.

[56] Aleydis Nissen, 'Trade with the EU, Variable Geometry and Human Rights in the EAC' (2021) 2(2) Milan Law Review, p. 117; Nino Tsereteli, 'Georgiens Rechtsstaatskrise' (*Verfassungsblog*, 17 May 2024) <https://verfassungsblog.de/georgias-bill-on-foreign-agents-and-the-limits-of-the-eus-soft-power/>.

[57] Luc Fransen et al., 'Tempering Transnational Advocacy? The Effect of Repression and Regulatory Restriction on Transnational NGO Collaborations' (2021) 12(5) Global Policy, p. 12.

[58] Katrin Kinzelbach and Julian Lehmann, 'Can Shaming Promote Human Rights? A Review and Discussion Paper' (2015) European Liberal Forum and Friedrich Naumann Foundation for Freedom, p. 13; Jack Snyder, 'Backlash against Human Rights Shaming: Emotions in Groups' (2020), *International Theory*, 12(1), pp. 109–111, 123–124 and 125–127.

[59] Sally Merry, 'What is Legal Culture? An Anthropological Perspective' (2010), *Journal of Comparative Law*, 5(2), pp. 43–44.

Similarly, Kinzelbach and Spannagel helpfully point out that "detailed data on distinct acts of repression is a necessary ingredient for credible naming and shaming".[60] They note that this allows to investigate the pivotal question "who benefits" from excessive restrictions of naming and shaming, calling for a focus on the beneficiaries of material advantages.[61]

There is already some evidence from the field that *in some instances,* the employment of the law is functional to the synchronisation of vested political and business interests, of both international and local corporations. In this paragraph, I give two examples of synchronisation of state elites with local as well as with foreign business elites. Therefore, I rely upon studies that were carried out for other purposes. First, I was in Seoul in 2018 to study opportunities for human rights change in the Korean electronics industry in Korea–EU (European Union) relations. I carried out a deductive theory-testing case study using a constructivist lens. This case study was part of a broader research programme on the conditions under which the EU and its Member States attempt to create an artificial level playing field in which private competitors of EU-based corporations from emerging markets can be held accountable for human rights violations.[62] Second, Gustafsson undertook three field trips to Peru to conduct ethnographic research between 2010 and 2013. Her resulting monograph illuminates how different corporate governance strategies affect community mobilization and the scope for influence when a population is faced with the arrival of the mining industry.[63]

First, when examining *local* business, I found evidence in Korea's electronics industry. To begin, Korea's Ministry of Trade, Industry and Energy backed the private Korean conglomerate (i.e chaebol) Samsung – which had previously been convicted by a civil court for violating the right to health and safety at work – when it refused to disclose environmental reports of factories, arguing that they are legally protected as "core national technologies".[64] Afterwards, the Act on Prevention of Divulgence and Protection of Industrial Technology (2019) was adopted, exempting corporations from the disclosure of information on hazardous materials that relates to "core national technologies". Likewise, a retroactive amendment of the Assembly and Demonstration Act (2016) followed peaceful worker protests in Korea.[65] This amendment put in law a practice of police authorities supporting company-sponsored "yellow" unions. Unions cannot hold rallies if other unions had already registered a rally (even if yellow unions take up all the spots without ever holding a rally). Laws can thus *even be created and sustained* to ensure that naming and shaming of corporate elites is impeded. Afterwards, in a dispute between Korea and the EU on laws that violate the freedom of association, the EU actively avoided referring to Korea's chaebols.[66] Yet, the use of such laws by corporations was a main concern for the ILO as well as the Domestic Advisory Group, an institutionalised civil society mechanism, on the EU side.[67]

[60] Katrin Kinzelbach and Janika Spannagel, 'New Ways to Address an Old Problem: Political Repression' in César Rodríguez–Garavito and Krizna Gomez (eds), *Rising to the Populist Challenge* (Dejusticia 2018), p. 192.
[61] Ibid, p. 193.
[62] Nissen supra, note 6, pp. 248-297,
[63] Gustafsson, supra, note 9.
[64] Nissen supra, note 6, p. 292; Aleydis Nissen, 'Please Give Me A Remedy: Women Human Rights Defenders Mobilize for Occupational Safety and Health' (2024) 16(2) Journal of Human Rights Practice, p. 650.
[65] Nissen supra, note 6, p. 288.
[66] Ibid, p. 267. See further Aleydis Nissen, 'Not *That* Assertive: The EU's Take on Enforcement of Labour Obligations in its Free Trade Agreement with South Korea' (2022) 33(2) European Journal of International Law, p. 624
[67] Nissen supra, note 66, p. 616

Second, Gustafsson documented in her field work how legislation was created to serve *foreign* business interests at the expense of human rights.[68] In 2008, the influential National Society of Mining, Oil and Energy, in collaboration with Peru's Ministry of Mining and Energy, proposed a bill (Law Project 1801) to privatise the oversight of public funds in the extractive industries. Accordingly, "corporations should replace the government's role" in overlooking public funds.[69] Supported by the Anglo-Swiss mining corporation Xstrata, a similar government proposal was quickly adopted by the government (DL 996), shifting control of these funds from state oversight to local management. As a result, the fund's board comprised six mayors responsible for project implementation and two Xstrata employees, responsible for project monitoring. This arrangement bypassed the bureaucratic procedures of the central state. However, a significant issue was the exclusion of peasant communities from the board. Although the new law allowed for their representation, both Xstrata and the mayors opposed this inclusion in practice, arguing it was difficult to determine appropriate community representatives. Furthermore, the lack of state control facilitated corruption, leading to widespread distrust and discontent. What is more, according to Gustafsson, Xstrata wrongly advertised that it provided the public funds. Various lawsuits have emerged accusing local governments of embezzlement, while Xstrata reinforced pre-existing perceptions of state institutions as corrupt and inefficient. This discursive strategy has enhanced the corporation's legitimacy while avoiding accountability for fund mismanagement. Historical evidence in other contexts corroborates the evidence presented by Gustafsson, also indicating that *foreign* corporate forces have "captured" the law. For instance, foreign businesses actively supported the creation and enforcement of "master and servants" and group area laws during South Africa's apartheid era, while the German company Volkswagen backed the continued use of an excessively restrictive law (Law 5.107) amending the Consolidaçao das Leis do Trabalho (1943) throughout Brazil's military dictatorship. [70]

Further field work would allow to identify in-depth relational patterns including lived-experience to test the propositions set out here. Such research cannot be limited to laws in the Global South, as indicated by the NGO reports in Part I Section 1 of this article.[71] Similarly, Flesher Fominaya refers in her article to various excessively restrictive laws in Spain and other European countries that were adopted in response to the financial crisis.[72] While her research does not refer to potential connections with business, future research can advance this path, while taking into account that democratization – considered as a minimum concept that excludes respect for human rights to avoid an endogeneity problem – is a key intervening variable.[73] The impact of laws used in excessive ways is more subtle, more limited and easier to turn back in highly democratised countries.

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[68] Gustafsson, supra, note 9, pp. 151-155.

[69] Ibid, p. 152.

[70] African National Congress, 'Submission to Special Truth and Reconciliation Commission Hearing on the Role of Business' (1997) <https://www.anc1912.org.za/trc–anc–submission–to–special–trc–hearing–on–the–role–of–business/>; Christopher Kopper, 'VW do Brasil in the Brazilian Military Dictatorship 1964–1985 A Historical Study' (2017) <https://www.volkswagen-group.com/en/publications/more/vw-do-brasil-in-the-brazilian-military-dictatorship-1964-1985-english-1739/download?disposition=attachment>, pp. 26–28 analyzing Law 5.107 (1966). See Felipe Colla De Amorim, Vitor Sion and Rodolfo Machado, 'Accountability for Volkswagen's Role in the Brazilian Dictatorship' in Leigh Payne, Laura Bernal-Bermúdez and Gabriel Pereira (eds), *Economic Actors and the Limits of Transitional Justice* (OUP 2022), pp. 74-95.

[71] See also UN Human Rights Council, 'Report by the UN Special Rapporteur on the freedom of peaceful assembly and of association Maina Kiai' (2015) UN Doc A/HRC/29/25, para. 44.

[72] Flesher Fominaya, supra, note 17.

[73] Thomas Risse and Stephen Ropp, 'Introduction and Overview' in Risse et al. (eds) supra, note 2, p. 17.

Such field work can draw upon the methodology used by Perera in his PhD thesis on "States, Non-State Actors, and the Imposition of Restrictions of NGOs".[74] As I did in Korea, Perera used case study research, which is appropriate to investigate background factors and assist in making sense of social, economic and political life.[75] But he used this methodology for a different purpose than I did: to study collusions between states and non-state actors. He investigated death squads, militia and government-sponsored NGOs. Similarly, future research can use case studies to study collusions between states and businesses. According to Kitay and Callus, case studies are even the most favoured strategy to investigate business. [76] Perera engages in process-tracing to study collusions. This technique allows testing whether hypothesised chains of causal mechanisms are present within a case while avoiding the identification of spurious correlations.[77] Pre-existing generalisations and specific observations are combined to make or reject causal inferences, allowing for the possibility of equifinality. This approach thus allows for getting a nuanced picture of any (or no) synchronisation of business and power in the employment of laws to silence critics. The net needs to be cast widely to discover alternative explanations that emerge from inductive insights. Counter-indications would allow us to learn more about where political and business elites strive to diversify, distribute and institutionalise.

In case studies, data from various sources need to be triangulated. A historical institutional analysis would be essential. This allows for studying the actual motivations and interpretations of involved business and political actors as well as the reasons why the studied cluster industries became dominant.[78] Systematic comparisons can address path-dependent processes, allowing us to understand how initial legal principles and doctrines create trajectories influencing subsequent interpretations and reforms.[79] Such examination is appropriate to tease out the dynamics between politics and business.[80] Periodization starts with the emergence of the cluster industry under study and ends when the research is submitted for publication. For example, the initial global economic success of the Korean electronics industry has frequently been attributed to government sponsorship under the military dictatorship of Park Chung-hee. This history underpins policies in current-day democratized Korea, including under current President Yoon Suk-Yeol.[81] Furthermore, doctrinal analysis of court cases would be essential. This is where arguments may be crafted to achieve objectives which, even when conforming

[74] Domic Perera, 'States, Non-State Actors, and the Imposition of Restrictions of NGO' (DPhil thesis, University College London 2022), pp. 17 and 92.
[75] Aleydis Nissen, 'Case Study Research in Kenya and South Korea: Reflexivity and Ethical Dilemmas' (2022) European University Institute Legal Research Paper Series 2022/07, pp. 2–3.
[76] Jim Kitay and Ron Callus, 'The Role and Challenge of Case Study Design in Industrial Relations Research' in George Strauss and Keith Whitfield (eds) *Researching the World of Work* (Cornell University Press 1998), pp. 101–102 and 111.
[77] Andrew Bennett and Jeffrey Checkel, 'Process Tracing' in Andrew Bennett and Jeffrey Checkel (eds), *Process Tracing* (CUP 2015), pp. 6–8, 17–18 and 28.
[78] Greg Patmore, Greg, 'Digging Up the Past: Historical Methods in Industrial Relations Research' in Keith Whitfield (ed.), *Researching the World of Work: Strategies and Methods in Studying Industrial Relations* (Cornell University Press 1998), p. 214; Cathie Jo Martin and Duane Swank, *The Political Construction of Business Interests: Coordination, Growth and Equality* (CUP 2012), p. 15.
[79] Kathleen Thelen, 'Historical Institutionalism in Comparative Politics' (1999) 2 Annual Review of Political Science, p. 369.
[80] Paul Pierson, 'Power and Path Dependence' in James Mahoney and Kathleen Thelen (eds), *Advances in Comparative–Historical Analysis* (CUP 2015), p. 123.
[81] Nissen supra, note 6, pp. 249-256; Faris Al-Fadhat and Jin-Wook Choi, 'Insights from the 2022 South Korean Presidential Election: Polarisation, Fractured Politics, Inequality, and Constraints on Power' (2022) 53(4) Journal of Contemporary Asia, p. 732.

to the letter of the law, may violate international human rights standards.[82] Actors' strategies "are usually disclosed in public hearings or on public records. Careful observers can piece them together. [They] are nearly always in some manner revealed to sufficiently observant opponents". [83] This can be subtle. For example, I found instances in which Korean government agencies appealed against decisions in favour of workers that were in line with international human rights law.[84] An independent and accessible judiciary can, however, balance competing interests by "ensur[ing] that the law will … also work against individuals from [the] ruling class" to deliver "substantively just" outcomes, in particular in response to claims by social movements.[85] Further research also needs to be developed in a transnational context, as noted by Fransen and his co-authors in their work on "anti-NGO" laws.[86] Transnational legal orderings are powerful "processes through which legal norms are framed, propagated, settled, institutionalized, contested, and changed".[87] Human rights commitment and compliance can take place when domestic actors advocating for change join networks that cross borders (including NGOs, foreign states and international organisations) to name, shame and exert pressure in other ways on state and corporate targets. [88] In sum, naming and shaming by transnational actors is an important remedy against deadlock when the space for domestic opposition shrinks.

IV. Conclusion

The business community is diverse, with many corporations respecting and advancing human rights. However, this article investigated the alignment between state elites and corporate forces, suggesting that laws are sometimes used to protect specific vested interests. To date, the literature on corporate human rights abuses has not fully explored the use of regulation for such purposes. This article studied, in particular, laws that are unduly used to silence critics of corporate human rights abuse. In such instances, the freedom of expression, including its core component "access to information", the freedoms of association or the right to peaceful assembly are excessively limited, beyond the exceptions allowed by articles 19, 21 and 22 ICCPR. Examples of such practices include laws employed to excessively restrict access to resources and information and so-called "anti-NGO" laws. This article identified evidence in field work carried out in the Republic of Korea and Peru. Collusion emerges from the interests and power of elites, reinforcing existing social hierarchies and exploitation. In a world of "affinities, interactions, and causal chains between social, political, and legal domains, sometimes virtuous and often vicious",[89] further case studies in the Global South and Global North – considering path-dependent processes, court cases and transnational processes – are required to test or reject the ideas developed here. On a more substantive level, this article argued that the law can be "converted into an instrument of economic policy" at the expense

[82] Daniel Ostas, 'Legal Loopholes and Underenforced Laws: Examining the Ethical Dimensions of Corporate Legal Strategy' (2010) 47(4) American Business Law Journal, pp. 511 and 520.
[83] Lynn LoPucki and Walter Weyrauch, 'A Theory of Legal Strategy' in Antoine Masson and Mary Shariff (eds), *Legal Strategies* (Springer 2010), 80.
[84] Nissen supra, note 6, pp. 286-292.
[85] Adriaan Bedner, 'An Elementary Approach to the Rule of Law' (2010) 2(1) Hague Journal on the Rule of Law, pp. 64 and 69.
[86] Fransen, supra, note 57. See also Nissen supra, note 6, pp. 248-297; Nic Cheeseman and Susan Dodsworth, 'Defending Civic Space: When Are Campaigns Against Repressive Laws Successful? (2023) 59(5) The Journal of Development Studies, pp. 620 and 630–632.
[87] Gregory Shaffer and Terence Halliday, 'International Law and Transnational Legal Orders: Permeating Boundaries and Extending Social Science Encounters' (2021) 22(1) Chicago Journal of International Law, p. 180.
[88] Risse et al. (eds) supra, note 2.
[89] Krygier supra, note 22, p. 131.

of corporate respect for human rights.[90] Legal systems, rather than safeguarding rights, then reinforce economic structures that perpetuate inequality and increase the risk of crisis. The impact is devastating for the most vulnerable people, and especially for those suffering interlocking forms of discrimination. But, ultimately, the employment of laws to excessively restrict naming and shaming is concerning for everyone involved in the current neoliberal era as well as for the non-participating non-human species and future generations. Societies become less resilient and rulemaking loses effectiveness and legitimacy. This shapes broader processes of sustainable development. Notably, neglecting abuses of the right to a safe, clean, healthy and sustainable environment is costly. To achieve true social justice, transformative reforms must dismantle these entrenched systems and promote equitable economic policies that do not shift costs onto the broader society. In such a transformed world, legal premises aligned with the principles of economic globalization that prioritize corporate wealth maximization would be abandoned. "All law is in some sense someone's instrument", and a rights-based political economy would employ the law for the benefit of society as a whole.[91]

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Competing interests declaration

The author declares none.

[90] Miguel Rodríguez-Piñero Royo, 'Collective Bargaining in the Renewed Spanish Labour Law: a New Tool for Economic Policy?' (2019) 9(1) Oñati Socio-Legal Series, p. 17.
[91] Krygier supra, note 22, p. 121.