Is BUSINESS everybody's business?

Alison Hughes

Multinational corporations and international human rights.

Alison Hughes is a Policy/Law Reform Worker at Villamanta Legal Service.

An uncomfortable incident at a recent Canadian human rights conference brought into sharp relief the extent of distrust between the business and human rights communities. The conference focused on the links between human rights and economic development in Indonesia, and Canadian corporations operating in that country were invited to attend. Quite understandably, only one corporation sent a representative. During his presentation, the room of human rights activists and sympathetic academics bristled; after complimenting them on the 'feel-good' nature of their work, he told them that business was slightly more complicated. As the 'soft' side of the question, human rights were fine ideas, but he and his people had to deal with real life and hard facts. Business, in short, was business. Sensing open hostility, the representative left immediately after his presentation. There was no exchange of ideas or constructive debate, as the organisers of the conference had hoped. Representatives of both groups left much as they had come: human rights groups felt vindicated in their complete distrust of business, and business churned blithely on, indifferent to appeals from the 'soft' side.

In fact, neither group can afford to ignore the other. In recent years, the view that human rights and corporate practice occupy completely distinct spheres has been widely discredited.[1] For their part, human rights groups have, constructively or otherwise, long taken note of corporate activity affecting human rights issues. It is only recently, however, that corporations have begun to scrutinise their own actions in terms of human rights.

Why has such scrutiny been initiated?

Moral, legal and financial reasons have all had their part to play. Moreover, the three categories have become inherently interconnected. Fundamental, moral ideas about human dignity and welfare have been translated into international legal standards in the form of human rights conventions, declarations and documents. Although multinational corporations are not yet subject to these in the same way that member states are, there is a growing recognition among academics, governments, and consumers that they ought to be.

For multinational corporations, predictably, the most compelling reasons for increased awareness of human rights are financial. An obvious point is that countries with grave human rights abuses often experience active social upheaval, or at least perceptible instability at the level of civil society. In financial terms, such volatile settings jeopardise security of investment. Human rights abuses, and the regimes under which they are carried out, are becoming red flags for corporations considering starting up or renewing operations in developing countries. Levi Strauss & Co. expressly acknowledge this factor in their guidelines for country selection, by stating that the company will not initiate or renew contracts in countries where 'political or social turmoil unreasonably threatens [its] commercial interests'.[2]

A more interesting and complex financial incentive for corporations to take rights seriously has been consumer (and increasingly shareholder)[3] pressure. Particularly in the wake of widespread consumer support for sanctions in South Africa, corporations have been expected to become more socially responsible in their international operations. Consumers have become better informed, and are asking hard questions about the products they buy. Media revelations of, for example, child labour in India, forced labour in China, and environmental degradation in Brazil have informed them about the human and ecological costs of production. With increased knowledge, the way products are produced has become as important as the products themselves, and purchasing has become a matter of personal conscience. South Africa is the most forceful example of the effects of consumer pressure on multinational corporations; as that situation illustrated, not only do multinationals risk having their products and dealers boycotted, they also risk incurring the enduring stigma of exploitation.

The corporate response

Corporations, it seems, have responded in two ways to this increased pressure from consumers. Some have resigned themselves to a massive and chronic public relations headache. More productively, some have seen it as an opportunity to influence fundamentally the way they do business. Enormously influential multinationals such as Levi Strauss & Co. and Reebok International have implemented and, most importantly, enforced, human rights guidelines for their operations, based on international human rights standards. For Levi Strauss, human rights criteria determine both where they will operate and with whom they will contract. The guidelines for both companies set standards for environmental preservation, worker health and safety, anti-discrimination, and employee rights, and specifically prohibit the use of child and forced labour. Moreover, in general terms, Levi Strauss will not initiate or renew contractual relationships in countries where there are 'pervasive violations of basic human rights'. By force of this provision, operations in Burma have been terminated, and operations in China are being phased out.

Such corporate self-policing is undoubtedly admirable, but what of the corporations that reject it? They, too, have their arguments. The counter-argument for corporate obligation of the kind outlined above is simple: multinational corporations are in the business of making money. International human rights issues are the domain of states and the United Nations; as private actors, corporations have responsibilities only to their shareholders. To expect them to take on what they perceive as a political role is completely changing the rules and jeopardising their neutral status. In any event, corporations are both ill-informed and ill-equipped to respond to human rights issues in their operations. Thus, in response to the demand to take human rights seriously corporations ask 'why should we?' and 'how could we?'

Legal and practical constraints

Multinational corporations will doubtless be disconcerted by the practical solutions that are being developed to answer these largely rhetorical questions. Too often, the assumption has been that fuzzy moral generalisations form the only possible counter-arguments against uncontrolled corporate involvement in developing countries. Perceived as 'sanctimonious outpourings of indignation [and] hypocritical, selective applications of morality',[4] they have been easily dismissed. Morally, the answers appear obvious, but traditional moral arguments have acquired added force by underpinning legal initiatives, which have arisen on international, national and even state levels.

The movement to extend international legal duties to multinational corporations rests, as Lippman notes, primarily on four basic policy considerations: their economic power, their international character, the impact of their operations, and the limited ability of developing countries to regulate their activities.[5] Despite their protestations, multinational corporations have taken on 'public' attributes, and the private, politically neutral ideal no longer accords with their actual, hybrid character. The sheer scopes of their operations, their influence, and their capacity to exploit render them at least as deserving of constraints to which often less powerful state actors are subject. Not yet being specifically bound by the international instruments, they have benefited financially from investment in developing countries, without necessarily assuming the responsibilities. The United Nations has begun to recognise the extent of control and influence which multinational corporations have acquired globally, and is slowly moving to introduce legal constraints on their activities. Such measures are based on existing international human rights standards, articulated in documents like the International Covenant on Economic, Social and Political Rights, the International Declaration of Human Rights, the International Covenant on Civil and Political Rights, and various International Labour Organisation documents.

In particular, the Draft Code of Conduct On Transnational Corporations is a significant development, being the first UN initiative to operate on entities that are not States Members. Although it has taken an unconscionably long time to develop (the U.N. Intergovernmental Working Group has been at work on it since 1977), the Draft Code recognises the public dimension of multinational corporations, and specifically provides that such bodies 'should/shall respect human rights and fundamental freedoms in the countries in which they operate'.[6] The Code introduces broad guidelines on issues such as multinational ownership and control, taxation, pricing, consumer protection, transfer of technology, and environmental protection. The main barrier to the Code's acceptance is the debate over its implementation: will it be self-executing or will it require a positive act of incorporation into a Member State's law?[7] The outcome of this debate will determine the Code's effectiveness; only if it is self-executing will appreciable and uniform human rights gains be made.

Domestically, governments have attempted to control the activities of multinational corporations, their resident giants. Although this proves difficult because of the extent of wealth and influence of multinationals, governments retain the ability to impose sanctions and penalties. This was witnessed most clearly in the economic sanctions imposed by governments against South Africa. Mandatory codes of conduct have also been experimented with, though voluntary codes have been preferred as generating greater adherence and effectiveness. The unarticulated reluctance of governments to implement mandatory codes is likely based on the cost of enforcement, difficulties in drafting appropriate and acceptable codes, reporting requirements, and diplomatic tensions. Finally, state or regional governments have even taken up the cause; for example, in response to the extreme repression and brutality of the military regime in Burma, Massachusetts enacted a statute regulating State contracts with companies doing business with or in Burma.

Bruised but not broken, multinational corporations occasionally attempt to beat human rights types at their own game, by arguing that their investment actively and inevitably advances developing countries. Conspicuous for its lack of empirical justification, the argument must surely ring hollow even to people determined to believe it. Although multinational investment does tend to stimulate some economic gains, the bulk of opinion, including recent U.N. scrutiny, has been that development in every sense of the word has been hindered rather than furthered in countries experiencing indiscriminate multinational involvement. It is trite to note that the drive for cheaper markets has actively induced governments to suppress labour rights, child rights, and civil and political rights in general. Further, multinational investment lends legitimacy and financial stability to repressive regimes;[8] protestations that there is a parallel improvement in the financial situation of the general population have not been borne out. This cycle of repression is inescapable in a system that takes no account of human rights. Conversely, meaningful development (in more than merely an economic sense) would likely be facilitated by economic investment that respected international human rights standards.

Conclusions

The significant issues raised in this brief survey are critical, and will influence emerging, vulnerable international markets such as the new South Africa and Vietnam. As the pressures on multinational corporations increase, it will become apparent that business, after all, is not just business. Although corporations will not be expected to chuck profits and put the human rights monitors out of a job, they increasingly will be expected to operate responsibly, using internationally recognised guidelines.

At the root of allowing corporations to do abroad what they are forbidden from doing at home is a cynical calculation: that products largely for the developed world mean more than the people and environment of developing countries. This calculation is obviously fundamentally flawed. In light of the modern emphasis on universal human rights, multinational corporations and consumers will have to contribute to righting the balance between power, profit and rights. At stake is no less than a more humane way of doing international business.

References

1. Orentlicher, Diane and Gelatt, Timothy, 'Public Law, Private Actors: The Impact of Human Rights on Business Investors in China', (1993) *Northwestern Journal of International Law & Business* 66 at 96.
2. Levi Strauss & Co., 'Business Partner Terms of Engagement and Guidelines for Country Selection'.
3. Non-governmental organisations and private firms have begun to target shareholders in their attempts to influence corporate practice. Recent influential campaigns to encourage responsible shareholder voting practices include those initiated by the American Interfaith Center for Corporate Responsibility on American multinationals operating in Burma.
4. Gladwin, T. and Walter, I., *Multinationals Under Fire*, Wiley,New York, 1980, p.130.
5. Lippman, Matthew, 'Transnational Corporations and Repressive Regimes: the Ethical Dilemma', (1985) *California Western International Law Journal* 542 at 544.
6. UN Doc. E/C 10/1982/6, para. 13.
7. Kapur, Ratna, 'From Human Tragedy to Human Rights: Multinational Corporate Accountability for Human Rights Violations' (1990) 10 *Boston College Third World Law Journal* 1 at 14.
8. Lippman, above, at p.548.

Letter

This letter was addressed to the columnist, 'Sit Down Girlie', Alternative Law Journal.

Dear Ms 'Tupp'

It was with particular interest that I read your note headed 'Assault, Consent and School Discipline', as I was heading off to give advice to a teacher who has been involved in a support group in a notorious Queensland case involving a Mr Bevan Mahoney. Notorious, as the teacher, Mr Mahoney was acquitted of charges of sexually assaulting young male students, in circumstances where the police investigation, according to the trial judge, was 'perfunctory', and one of the students involved has since admitted the teacher was set up — somewhat late for the teacher and school involved.

I am moved to write after my meeting with the (female) teacher (who has long been involved in teacher's union affairs, and a sexual harassment officer), because having read and followed the case you reported on (*Horan v Ferguson*), both of us were concerned at misunderstandings revealed in your note.

In *Horan*, the trial court magistrate accepted that the touchings were innocent: technical assaults were found, *but no conviction recorded*. On the trial court's reading of the law, many of us (teachers or not), commit assaults every day. The Court of Appeal merely interpreted the law in the context of the finding in a way which conforms to reality — where one person is in a position of care or responsibility over a group of others, innocent technical assaults (ie. touchings) can be seen as implicitly consented to. They also may fall under the excuse for acts done in legitimate correction, in the sense of guidance (e.g. by parents or teachers).

Education Department policy prohibits any corporal punishment (yes, even in Queensland!) and further directs to the police any allegations that amount to accusations of criminal behaviour (e.g. assault), rather than allowing any meaningful, context sensitive, internal investigation. This can have potentially perverse consequences when the police fail to investigate properly.

More importantly and generally, who benefits from the climate of fear/paranoia generated when any touching is *prima facie* a criminal assault? Where does that leave the caring teacher who is naturally inclined to supportive or playful contact with students, but who is now advised by their union, school and colleagues, to avoid *any* contact? What becomes of those students, especially younger ones from unhappy homes, who find themselves artificially shunned by teachers who previously offered them support?

I have used pieces by feminist legal academics, such as Finley and Bender, that point to the possibility of a 'feminist ethic of care and concern' informing and reforming the law.

But how do I defend cheap, gender-framed jibes (such as your note) to teachers who are concerned about the legal aspects of this issue? There are thousands of committed female teachers to whom daily contact with their pupils is a natural and necessary part of their job.

It is easy for academics like myself to suggest from afar that school teachers merely need to treat school students like adults (whatever their age or temperament), and adopt a 'hands-off' approach. (Not being a 'natural' teacher, my hands are always nervously in my pockets, or covering my mouth!)

But as my teacher friend points out, that advice offers little to the teacher who: (a) naturally wishes to interact with her pupils, and (b) (especially if she lacks a dominant voice or personality) occasionally needs to maintain discipline through physical means such as grabbing or holding a student? The law, especially the threat of criminal and tortious sanctions, can be a very crude instrument, and may be undermining the trust that ideally characterises the teacher/student relationship.

It is a complex issue, with many sub-currents (who knows, perhaps the defendant in *Horan* was a grubbier man than the magistrate thought). But the issue is deserving of more thoughtful consideration, especially from a feminist perspective. A legal world where every touching is capable of being (mis)construed as a criminal offence may well guarantee the dignity of those individuals who dislike any contact with others; but it may also be a rather sterile world for students and teachers.

Graeme Orr
Law School
Griffith University, Queensland

ps: Sorry this letter is so negative; usually I enjoy your provocative offerings, to the point of reading them first on opening the *Alt LJ*.