2006

Book Review. Companies, International Trade and Human Rights by Janet Dine

Christiana Ochoa

Indiana University Maurer School of Law, cochoa@indiana.edu

Follow this and additional works at: http://www.repository.law.indiana.edu/facpub

Part of the Human Rights Law Commons, and the International Trade Law Commons

Recommended Citation

http://www.repository.law.indiana.edu/facpub/318
name of national security, the acceptance of an environmental policy that threatens the world with global warming, and a refugee policy that is inequitable, does not, as this book points out, truly reflect a country that is entitled to "a decent respect to the opinions of mankind." More significantly, it questions whether the United States and its people will continue with policies that are clearly inconsistent, if not hypocritical, with our proclaimed and cherished morality.

**Theodore S. Orlin**

Theodore S. Orlin is the Harold T. Clark, Jr. Professor of Human Rights, Scholarship, and Advocacy at Utica College, New York. He is an international human rights lawyer who has worked extensively in the Balkans, Eastern Europe, Asia, and Africa. He has written and edited, along with Martin Scheinin and Alan Rosas: *A Comparative Jurisprudence of Human Rights Law* (Åbo Akademi University, 2000). He has written about "The Right to Life/the Right to Die" considering the international legality of assisted suicide and euthanasia. He has contributed to several books on the international legality of the death penalty. Presently he serves as President of the International Human Rights Education Consortium.


In the first chapter of Companies, International Trade and Human Rights, Janet Dine reminds us that John Rawls famously designed a hypothetical model in which the structure and governance of a society would be arrived at from "behind a veil of ignorance." Under Rawls' model, at the moment of designing this society "no-one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like." What Rawls hoped to do with this model was provide a "conception of social justice" against which "the distributive aspects of the basic structure of society are to be assessed such that the assignation of rights and duties in society and the designation of social advantages can be seen clearly."3

Rawls himself thought the application of his "Theory of Justice" was limited in the context of the law of nations and relations between states.4 However, when one is attempting to retract the layers of acceptance and complacency through which we view our own social condition, even if that social condition includes global or international phenomena, Rawls' model is a very good place to start re-seeing and rethinking the current societal order.

---

3. Id. at 9–10.
4. Id. at 8, 377–82.
Janet Dine’s most recent book,⁵ *Companies, International Trade and Human Rights*, is an exploration into the societal constructs or “systemic forces” that create, facilitate, and perpetuate the absolute poverty and growing wealth disparities in the world today.⁶ It is a broad, though succinct, inquiry into what Rawls characterized as the “distributive aspects of the basic structure”⁷ of modern-day society in which corporations and international trade play a central role. In her first chapter, Dine asks whether we are currently in a state of global crisis and identifies vast current wealth disparities and vast distributive inequalities. Rawls provides the theoretical framework with which she closes the gap between empirically evident inequalities and her conclusion that we are indeed in a global crisis due to this extreme injustice.

Dine uses empirical evidence to demonstrate that the world’s poor are becoming more and more impoverished while the wealthy extract more and more wealth. Combining this data with Rawls’ theory of a just society and Thomas Pogge’s theory that humans tend toward beliefs and systems that will favor themselves, she concludes that rational actors designing a society under a veil of ignorance would design a system that protects the poor and under-served. She further contends that the system in which we live would not be the optimal system designed under a veil of ignorance because it does not follow either of the two principles that Rawls identifies: The first requires equality in the assignment of basic rights and duties, while the second holds that social and economic inequalities, for example inequalities of wealth and authority, are just only if they result in compensating benefits for everyone, and in particular for the least-advantaged members of society. These principles rule out justifying institutions on the grounds that the hardships of some are offset by a greater good in the aggregate.⁸

Dine thus concludes that there is a global crisis⁹—including a poverty crisis as well as a crisis of justice—that she determines to address. She sets out to “investigate the role played by companies in this failure of the globalization of trade to realize its aims, in particular the failure to achieve the minimum of basic rights.”¹⁰

The organization of the book is straightforward. After she determines that a global crisis exists, Dine moves forward by considering the reasons and reasoning behind the current situation. Dine begins by taking a step back, as if

---

6. Dine begins her book by stating that “of 6,133 million human beings in 2001, some 799 million people are undernourished [and] 50,000 people daily die of poverty-related causes. And the figures go on and on.” *Dine, supra* note 1, at 1–2.
8. *Id.* at 14–15; *Dine, supra* note 1, at 33 (citing Rawls).
9. “There is therefore certainly a deep human crisis which is worsening in certain parts of the world, particularly the poorest of Least Developed Countries.” *Dine, supra* note 1, at 3.
10. *Id.* at back cover.
to consider the entirety of the situation in which we now find ourselves. From this position she is able to consider the daunting breadth of the subject she has undertaken—the interplay of corporations, international trade, and human rights.

Her analysis follows a logical order, first considering the role of the international economic organizations (IMF, WB, WTO) and then considering the unregulated behavior of companies and the complex role of the human rights movement in the current crisis. She then probes into her particular field of expertise, analyzing the attempts to regulate corporations by means of corporate governance, including whether the corporate social responsibility debate has been useful and whether it continues to hold promise. In the final chapter, she opens complex and important questions of property rights and responsibilities in an effort to urge that the discourse of property rights be shifted to include considerations of the responsibilities of property holders (as the European tradition holds)\(^\text{11}\) such that the entities with the greatest accumulation of wealth and property and the greatest power over others—e.g., corporations—also come to accept a great share of responsibility toward society at large.\(^\text{12}\)

It bears mention that Dine does not use Companies, International Trade and Human Rights to address discrete violations of human rights committed by businesses. She is not asking whether Shell or Texaco or Coca-Cola or Del Monte ought to bear responsibilities for the particular human rights violations that they had a clear and direct role in perpetrating, or even whether corporations ought to bear responsibility for aiding and abetting other actors in their perpetration of human rights violations.\(^\text{13}\) Rather, she is asking a much more subtle (and thus less frequently addressed) question about whether the current international trade system, coupled with the current legal status of corporations, has created or contributed to the destitution of the least developed countries (LDCs). Dine focuses on economic rights (and to a lesser degree social and cultural rights) being systemically violated by a seemingly intransigent system in which the rights of corporate entities to trade, transact, and utilize their property are protected at great cost to the human rights of the world’s poor.

The scope of Dine’s knowledge and exploration is impressive. During the course of six chapters, she poses many of the necessary questions concerning the social consequences of the modern-day business and trade system. These questions can be separated into four categories: political relations, law, theory, and social science.

I. POLITICAL RELATIONS

The political questions Dine poses center around actual relationships. Here Dine provides her readers with a description of the relationships between corporations and states, between corporations and the international economic institutions, between international eco-

\(^{11}\) Id. at 253.

\(^{12}\) Id. at 257.

\(^{13}\) These questions are addressed in a now voluminous literature. For an interesting recent survey of this field, see, e.g. Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law, International Peace Academy and Fafo AIS (2004).
nomadic institutions and states and between powerful, developed states, and LDCs. She then provides a vivid analysis of how these relationships have fit together to create an explosion of wealth-generating opportunities for companies, while LDCs and the people within them are left underemployed, underpaid, underserved, and, often, yet more poor.

II. LAW

Dine’s expertise in a wide array of legal areas is evident as she describes corporate law, contract law, tax law, property law, and, to some extent, international and human rights law as they apply to business entities. In her explanation of the relevant legal regimes, she describes how, for example: 1) the grant to corporations of legal personhood; 2) the current status in the courts of corporate veil-piercing doctrine; 3) the rise of the LLC; 4) the extensive protection of property rights, devoid of correlative duties; 5) the negotiable taxation rates that corporations enjoy; and 5) the under-regulated flow of capital and direct investment (and divestment) in national economies; all couple with the nearly exclusive demand that managers maximize shareholder profit on a short-term basis to form a series of incentives for corporations to pillage for the benefit of their managers and their shareholders. Dine states that the effects of this “aggregation of power have been missed and are only taken account of in extreme instances.” Companies, International Trade and Human Rights is a strong indictment of the political consequences that the legal system’s treatment of business entities has on the world’s poor.

III. THEORY

Dine provides her readers with a solid foundation in the relevant normative legal framework and a set of data demonstrating the power and wealth disparities with which she is concerned, but Companies, International Trade and Human Rights does not stop there. Rather, Dine explores the theory relevant to this debate, including political theory, corporate legal theory, and economic and risk theory.

A. Political Theory

Her goal seems to be to bring society into “compliance with the core norms of Enlightenment morality” or, rather, to pursue a liberal market system while fulfilling, rather than negating, the liberal political/moral agenda. The species of liberalism that has come to flourish accentuates the “equality of value” of

---

14. DINE, supra note 1, at 41.
15. Id. at ch. 6.
16. Id. at 107.
18. DINE, supra note 1, at 46.
19. Id. at 41 (quoting THOMAS POGGE, WORLD POVERTY AND HUMAN RIGHTS 5 (2002)).
the individual and, she states, fails to take into account John Stuart Mill’s warnings of the tendency of individualism to favor those in power. This philosophy, when coupled with the legal doctrine that grants corporations personhood, leaves a social structure in which a natural person is seen to be on a level playing field with a corporation or a corporate group that commands far more wealth and far more power than any natural person could possibly possess. This, Dine believes, is a system that is blind to aggregated power imbalances and at odds with the liberal political/moral project.

B. Economic Theory

Throughout the book, Dine demonstrates that the tendency of proponents of the current business- and trade-centric systems to rely on utilitarian arguments of market efficiency are misguided and, at times, self-interested. It is interesting that she does not rely on the strand of economic literature that argues that the current system can only be seen as economically efficient by excluding externalized environmental and social costs.

Rather, she makes the argument that the economic disparities created by the current system should be categorized as market failures. Working within this premise, she argues that even within the theoretical framework of free market economists (which holds that states ought to intervene only to correct market failures), the lack of state intervention evidences an inability “to understand the correct role of regulation in preventing or minimizing market failures.”

Dine also takes issue with other pillars of economic theory. For example, she cites J. Stiglitz's critique of the efficient capital market hypothesis. She demonstrates that this hypothesis is not useful because it fundamentally relies on the premise that rational decision-making is based on complete information. She argues that because most individuals affected by modern-day businesses and trade actually have very little information, let alone an understanding of the systems that affect them, the capital market hypothesis is simply not functional. In an ungracious moment, she also asserts that the most fervent advocates of the efficient capital market hypothesis have profited significantly from this theoretical model, suggesting ethical conflicts on their behalf.

Finally, Dine argues that attempts to use utilitarian theory to justify the current system are discordant with liberal notions of morality. Using environmental questions to illustrate, she states: "The claim [of optimality] to ethical neutrality is a sham. . . . The environment belongs in the sphere not of monetary but of moral valuation: people chose what they believe to be right as citizens, rather than what is in their

21. Dine, supra note 1, at 80.
22. Id.
24. Dine, supra note 1, at 65.
25. Interventions of this sort are seen in securities regulations, banking regulation, and tax laws. See id. at 66.
27. Id. at 68.
interests, as consumers.”

In Dine’s analysis, an alternative approach is needed that would “address the ethical and moral effects of choices to be made and the political process through which choices must be processed, whether public or market-based.”

C. Corporate Theory

Dine completes her analysis through inclusion of corporate theory. At many junctures she argues against the contract model of the corporation (which holds that the corporation is nothing more than a nexus of the contracts formed between the participants in the corporation’s activities: managers and employees, managers and suppliers, managers and the state, etc.). She sees this theory of business entities as particularly dangerous because it has the effect of disintegrating the corporation into a mass of private relationships in which the state has little to no power to interfere.

Given her belief that the state ought to regulate in order to correct the systemic market failures that have led to unprecedented economic disparities and poverty, she believes it is imperative to reassert the concession theory of the corporation. Rather than understanding the corporation as a nexus of contracts, the concession doctrine is mindful of the state’s original granting of permission, or of a concession, to each corporate entity. Given this original power of the state to permit any corporation to exist, Dine argues that states can and should use this power to more adequately regulate their activities domestically and internationally.

She argues that efforts to identify a sound basis for corporate responsibility should not be appropriated by either “market fundamentalists” or “deep-green perspectives” searching for a “golden age.” The values identified for corporate responsibility should be, in Dine’s view, arrived at through an international concession theory that is then implemented through a system of corporate governance. For those engaged in problems of human rights and economic activity, it will be disappointing (though not surprising) that Dine fails to clearly describe what an international concession theory would look like. Some further exploration of this idea would be worthwhile.

Dine also levels arguments against the stakeholder primacy model of the corporation, which sees the maximization of shareholder profit as the nearly exclusive goal of corporate managers. She advocates for a wider view of corporate responsibility such that the corporation owes obligations to the various constituencies it affects—as well as its stakeholders. Relying on the concession theory, she argues that “if the state has been involved in tipping the risk substantially in favor of shareholders it must have a right and a duty to regulate

29. Dine, supra note 1, at 242.
30. See, e.g., id. at 52–53.
31. Dine points, for example, to the American Constitution, which in Article 1, Section 10 states: “No state shall ... pass any ... law impairing the Obligation of Contracts.”
32. Dine, supra note 1, at 52, 249, 251.
33. Id. at 249.
34. Id. at 265–66, 276, 279.
in order to protect other participants against whom the balance has been tilted.\textsuperscript{35}

The final critique of corporate theory and doctrine advanced by Companies, International Trade and Human Rights is what Dine sees as an unrealistic view within corporate doctrine that fails, except in unusual circumstances, to pierce corporate veils in order to see the true intermingling of corporate groups composed of parents, subsidiaries, holding companies, etc., which are often established with the express purpose of insulating each entity from the liabilities of the others, despite the great benefits they derive from their relationships with one another.\textsuperscript{36} Dine thus advocates a shift back toward the enterprise doctrine, which sees an entire corporate enterprise as one entity rather than continuing with a fictional understanding that sees each component part as independent from the others.

Dine reminds us that this is not such an unusual concept. It is the approach taken by accounting regulations that call for consolidated financial statements.\textsuperscript{37} In addition to assisting in veil piercing cases, this approach would also illuminate paths for corporations that can currently claim a lack of capacity to regulate the activities of their subsidiaries.\textsuperscript{38}

IV. SOCIAL SCIENCE

The questions Dine asks and the proposals she puts forward in Companies, International Trade and Human Rights, as described above, might look comprehensive to the most sophisticated individuals studying our current social condition. The above, after all, explains how the deck is stacked in favor of corporations and against LDCs and their citizens. But Dine's analysis goes further and contains some insightful and novel ideas.

A. Magic Tricks as Metaphors

Though she does not talk about corporate power, or the shrouding thereof using the term "magic," she often hints at a body of literature that sets forth theories about relationships that effectively grant states, institutions, and economic activity with power verging on the magical.\textsuperscript{39} While Dine does not explicitly cite this literature or adopt these ideas, on many occasions she leads us to see some of the phenomena that assist corporations in accumulating power. For example, she explains that the nexus of contracts theory discussed earlier performs a trick in two parts. First it "makes the company disappear and it is very difficult to regulate the invisible."\textsuperscript{40} In

\begin{itemize}
  \item \textsuperscript{35} Id. at 53.
  \item \textsuperscript{36} See, e.g., id. at 48–50, 62.
  \item \textsuperscript{37} Id. at 57.
  \item \textsuperscript{38} Id. at 50.
  \item \textsuperscript{40} Dine, supra note 1, at 90–93.
\end{itemize}
addition, she argues, the nexus of contracts theory shifts to the background and effectively makes disappear the concessionary role of the state. Once this concessionary role disappears, the state loses its power to regulate business entities. The magic trick performed by the nexus of contracts theory, then, is that it shrouds corporate power, thus leaving it less clearly seen and, thereby, not adequately contested.

B. Failures of the Human Rights Movement

Perhaps because she is an expert on corporate law first and only relatively recently began looking at corporate governance, social responsibility, and human rights as they relate to corporate activity, Dine is not sold on the human rights movement’s critique of corporations and globalization. Rather she maintains skepticism about the human rights movement and anti-corporation rally-cries. The failure of the human rights movement to prevent the further impoverishment of the world’s poor during the last half-century has a number of roots. She focuses on the “exclusive emphasis” of the human rights movement on state behavior as an impediment to holding corporations responsible for human rights violations. In addition, the hierarchical ordering of human rights such that civil and political rights are prioritized over economic, social, and cultural rights notably troubles Dine. She also correctly points to the lack of enforcement mechanisms available in the human rights regime. While she has a number of other critiques of the human rights regime’s ability to effectively counter the tendency of corporate activity to further impoverish the already poor, perhaps the most novel, and therefore most interesting, section of the book is her discussion of what she calls “moral deflection devices.” It is here that she invokes the conscience of each of us in the developed world, especially those who might feel some sympathy with her analysis of the current social and economic order. When allocating blame for the current system, she is consistent in her belief that those who enjoy benefit ought to bear responsibility and points the finger of blame at each of us in the developed world who enjoy the wealth, employment, and services created by the corporations surrounding us.

Our responsibility is threefold, according to Dine. First, we participate in the law-making process. We have condoned and continue to be complacent about the legal structure that Dine so adeptly describes as favoring corporate power. Second, the vilification of corporations, she argues, is a moral deflection device by which we can focus on the corporation as the cause of the world’s ills while absolving ourselves of culpa-

41. Id. at 90.
42. Id. at 168. She argues that this focus insulates both corporations and international financial institutions from criticism and responsibility. In addition, the state-centric nature of the human rights system, she argues, obligates states to protect the interests of their own citizens “at whatever cost to the citizens of the rest of the world.” Id. at 74. She unfortunately does not delve deeply into the growing literature on the human rights responsibilities of private actors. See, e.g., ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE (1993).
43. DINE, supra note 1, at 170–73. This is understandable, given her focus on economic rights.
44. Id. at 177.
bility for our participation in their existence and their activities: “appointing a company to achieve objectives which would be ethically deplored in an individual means that we can conveniently blame others while reaping the reward of this behavior.” 45 Third, a slight variation of this moral deflection device lies in what Dine cites as the “immense energy put into codes of conduct and corporate social responsibility” because “it is likely that a great deal of energy will be spent to little effect. The participants have a ‘feel good’ factor which deflects them from the more important structural issues causing the problems.” 46 This is just one of “many ways in which the people of rich nations comfort themselves with deflection devices in order to see less clearly the injustice that is being daily perpetrated.” 47

V. CONCLUSION

Companies, International Trade and Human Rights addresses a wide range of subjects relevant to an accurate accounting of 1) what the world looks like today and 2) the creative effort of imagining and proposing methods that might alleviate the global crisis Dine identifies. Dine delves into a number of concepts not covered by this brief review. And while she does not cover all the relevant issues (this would be a nearly impossible task), scholars and students of law, international trade, business, economics, human rights, and philosophy, among others, will find Dine’s book useful for its descriptive elements as well as a fruitful source of creative proposals and suggestions for a way forward.

Companies, International Trade and Human Rights takes a palpable step toward further completion of the bridge that spans the vast conceptual, linguistic and, at times, theoretical gap between human rights activists concerned about business and trade issues, on the one hand, and business and trade experts concerned about human rights and social responsibility, on the other. For those who have participated in any part of the spanning of this gap, Dine’s book will be a valuable resource.

Christiana Ochoa

Christiana Ochoa is Associate Professor at Indiana University School of Law, Bloomington. She teaches in the areas of corporate finance, human rights, international business transactions, and contracts. Her research focuses the interaction of international economic activity and human rights. Her current projects explore the formulation and use of customary international law. Her web page is www.law.indiana.edu/directory/cochoa.asp.

45. Id. at 43–44.
46. Id. at 44–45.
47. Id. at 96.
48. For example, Dine does not include reference to the International Finance Corporation’s Equator Principles despite their dual relevance. They are applicable both to her discussion of the work of the World Bank and the IMF and are also relevant to the proposals contained in the last chapter of Companies, International Trade and Human Rights regarding company-specific risk assessment, tailor fit implementation of regulation based on the level at which the company was assessed to be risky, and enforced self-regulation by corporations. This is the approach taken by the Equator Principles. For a full description of the Equator Principles, see The “Equator Principles”: An industry approach for financial institutions in determining, assessing and managing environmental & social risk in project financing, available at www.equator-principles.com/principles.shtml.