

DO COMPANIES DREAM OF JURISTIC SHEEP? CORPORATE CLAIMS TO HUMAN RIGHTS: A HUMANIST APPROACH

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ABSTRACT

This article critically discusses corporate claims to human rights. A scheme of universal human rights founded on respect for inherent human dignity and reciprocity of empathy is firstly outlined. As a prelude to an examination of corporate claims to human rights, it is explained why animals and complex machines should be denied human rights. It is then argued why companies should be excluded from a scheme of rights derived from uniquely human characteristics. The article concludes by commending the exclusion of companies from human rights Acts enacted in Australia, and argues that the corporate rights affirmed by the *New Zealand Bill of Rights Act 1990* (NZ) should be narrowly interpreted.

I. INTRODUCTION

In his novella, *Do Androids Dream of Electric Sheep*,¹ Philip K Dick invites us to consider existential questions about being human through the narrative device of human-like androids being denied basic rights. Unlike Dick's androids, companies are legal persons which may claim human rights² but, despite occasional judicial anthropomorphising,³ are in no way human-like.⁴ This article considers whether corporate claims to human rights should be rejected, in much the same way as Jeremy Bentham dismissed claims for natural rights as 'nonsense upon stilts'.⁵ Before such consideration can begin, two questions must be answered: first, what is meant by 'human rights' and second, which theoretical conception of the company is contemplated? Responding to those questions, this article employs an approach to human rights derived from respect for inherent human dignity and reciprocity of empathy, and the dominant, nexus of contracts approach to the company.

First, the dignity-based scheme of universal human rights is sketched. Procedural legal rights, which are contingent on particular social arrangements at particular points in time, are subsidiary in this scheme. It is argued that because human rights are derived from unique human characteristics, they can only plausibly be claimed by people. Second, the nexus of contracts theory of the company is outlined and compared with competing theory. Contractual theory usefully avoids anthropomorphising the company and also highlights the implausibility

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1 Philip K Dick, *Do Androids Dream of Electric Sheep* (Doubleday, 1968).

2 For example, *New Zealand Bill of Rights Act 1990* (NZ) ('BORA') s 29. As Paul Rishworth notes, none of the rights affirmed by BORA are explicitly reserved to natural persons: see Paul Rishworth 'When the Bill of Rights Applies' Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney, *The New Zealand Bill of Rights* (Oxford University Press, 2003) 70, 110.

3 See, for example, Lord Denning's observations in *HL Bolton (Engineering) v TJ Graham & Sons Ltd* [1956] 3 All ER 624, 630.

4 See David Wishart, *Company Law in Context* (Oxford University Press, 1994) 142 referring specifically to criminal liability.

5 Jeremy Bentham, 'Anarchical Fallacies' in Jeremy Waldron (ed) *'Nonsense upon Stilts': Bentham, Burke and Marx on the Rights of Man* (Methuen, 1987) 46, 53.

of corporate human rights claims. Third, practical examples of corporate human rights claims are adduced to demonstrate their incompatibility with the dignity-based scheme of human rights and, indeed, dominant company theory. The article concludes by commending the exclusion of companies from the bills of human rights enacted at a state level in Australia, and argues that the corporate rights under the *New Zealand Bill of Rights Act 1990* (NZ) ('BORA') and related human rights legislation should, ideally, be statutorily excluded or otherwise narrowly interpreted.

II. WHAT IS MEANT BY 'HUMAN RIGHTS'?

This part of the article outlines a conception of human rights derived from respect for equal human dignity and the reciprocity of empathy. 'Rights' in this view are essentially moral and cannot be claimed simply because the law confers legal personality on a thing or an arrangement.

A. Equal Human Dignity

Universal human rights are founded on the proposition that all people have equal inherent human dignity.⁶ For Jacques Maritain, dignity of the human person 'means nothing if it does not signify that ... the person has the right to be respected, is the subject of rights, possesses rights. There are things which are owed to man because of the very fact that he is a man'.⁷ Human rights are derived from human nature. Following a chain of humanist thought that can be traced from Aristotle, via Aquinas,⁸ to Kant,⁹ to modern philosophers, including Martha Nussbaum,¹⁰ the unvarying human condition is one of relative physical frailty but with rationality, so that sociability is a prerequisite of survival and flourishing.¹¹ The starting point for understanding human rights is, then, the human body – a discrete physical entity, which has certain needs and is capable of reason and reflective thought but is vulnerable, and interdepends with other rights-bearing people in order to survive and flourish. Critically, people are ends in themselves and never instruments for others' ends.¹² Contemporary human rights are typically understood and justified by Kant's conception of the individual as a rational, autonomous, moral agent, endowed with dignity and personal worth.¹³ An emphasis on rationality may, however, diminish the importance of the human body – indivisibly body and mind.¹⁴ To engage with human rights, we must first understand the constant conditions of human existence. Consequently, biology

6 *Universal Declaration of Human Rights* ('UDHR'), GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) preamble provides for 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family'.

7 Jacques Maritain, *The Rights of Man and Natural Law* (1945) (DC Anson, trans, G Bles, 1945) 65 [trans of: *Les Droits de l'Homme et la Loi Naturelle*, 1942]. Maritain's natural law theory was highly influential on the UDHR: see Michael Novack, 'Human Dignity, Human Rights' (1999) 97 *First Things* 39, 39–42.

8 See Dino Bigongiari, *The Political Ideas of St. Thomas Aquinas* (Hafner Press, 1975) 176 on Aquinas's adoption of Aristotelian thought. According to Ministry of Foreign Affairs and Trade ('MFAT'), *The New Zealand Handbook on International Human Rights* (MFAT, 2008) 11, respect for the dignity of the individual and consequent duties towards other human beings can be identified in all of the major religious traditions.

9 See, generally, Immanuel Kant, *The Moral Law: Groundwork of the Metaphysics of Morals* (HJ Paton, trans, Taylor & Francis, 2012) [trans of: *Grundlegung zur Metaphysik der Sitten* (first published 1785)].

10 See, generally, Martha C Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press, 2006).

11 Bigongiari, above n 8, 176 (notes omitted) observes: 'Instead of [animal instinct] man was endowed with reason, by the use of which he could procure all these things for himself by the work of his hands. Now, one man alone is not able to procure them all for himself, for one man could not sufficiently provide for life unassisted. It is therefore natural that man should live in the society of many.'

12 *Ibid* 30.

13 See Kant, above n 9, 31.

14 See Julia Twigg, 'Social Policy and The Body' in Gail Lewis, Sharon Gerwitz and John Clarke (eds), *Rethinking Social Policy* (SAGE Publications, 2000) 127, 128 on the dominant tradition in social science of the rational actor.

and anthropology are more appropriate disciplines for explaining the fundamentals of human rights than the law.

B. *Reciprocity of Empathy*

Social existence, which is all human existence, is possible because of reciprocity of empathy and restraint. Indeed, empathy is the basics of ethics.¹⁵ We give and receive empathy, and we practise and experience restraint. As human beings, we understand the kinds of needs that other human beings have, and to a great extent we restrain our egoistic urges for mutual benefit.¹⁶ Empathy and restraint are not specifically or evenly reciprocated. Indeed, in modern society, they are typically ensured, mediated and obfuscated by the State and its agencies. But before legislation records and fine-tunes rights and duties, reciprocating is what we do in order to survive.¹⁷

C. *Comment*

The generalisability of human needs and abilities has permitted the formulation of minimum guarantees for meeting those needs, and fostering those abilities. By the broadest consensus, these basic human requirements have been declared universal human rights.¹⁸ Full respect for the dignity of the human body is not possible without, say, freedom from torture. Other rights represent a codification of successful procedural practices but can be re-imagined. We can, for example, imagine a workable justice system than permits a degree of double jeopardy.¹⁹ Bentham's argument that the legally enforceable rights of men are conventional, rather than natural,²⁰ seems incontrovertible.²¹ As a matter of fact, municipal laws prescribe the justiciable rights of a person in a particular jurisdiction. Human rights are not, however, principally legal in nature:²² before their legal expression, they are moral imperatives, and, before that, they are existential imperatives.

III. SHOULD HUMAN RIGHTS BE RESTRICTED TO INDIVIDUALS?

In the previous part a conception of universal human rights derived from socially situated dignity and reciprocity of empathy was outlined. As a prelude to an examination of corporate claims to human rights, this part of the article turns to the question of whether animals or human-like machines might claim human rights. If these potential rights claims are deniable, the case for corporate claims seems significantly weakened.

A. *Animals*

Animals, particularly those we class as mammals, share many characteristics with humans. Their corporeality determines basic needs similar to ours, such as water, food, sleep, reproduction and shelter.²³ For utilitarians, a critical moral consideration lies with the ability of animals

¹⁵ See Bertrand Russell, *History of Western Philosophy and Its Connection with Political and Social Circumstances from the Earliest Times to the Present* (2nd ed, Routledge, 1991) 738.

¹⁶ See, generally, Jeffrey B Abramson, *Liberation and Its Limits: The Moral and Political Thought of Freud* (Beacon Press, 1986).

¹⁷ See Oliver Wendell Holmes, 'Natural Law' (1918) 32 *Harvard Law Review* 40, 42.

¹⁸ See *UDHR, International Covenant on Economic, Social and Cultural Rights*, GA Res 2200A (XXI), 21 UN GAOR Supp (No 16), at 49, UN Doc A/6316 (1966), 993 UNTS 3 and *International Covenant on Civil and Political Rights*, GA Res 2200A (XXI), 21 UN GAOR Supp (No. 16), at 52, UN Doc A/6316 (1966), 999 UNTS 171.

¹⁹ See, for example, *Criminal Justice Act 2003* (UK) part 10.

²⁰ Bentham, above n 5, 52.

²¹ See Margaret MacDonald, 'Natural Rights' in Jeremy Waldron (ed), *Theories of Rights* (Oxford University Press, 1984) 21, 21 on how, after every crisis in human affairs, claims for natural law resurge.

²² See Stephen C Toope, 'Cultural Diversity and Human Rights' (1997) 42 *McGill Law Journal* 169, 176.

²³ These needs constitute the base of Maslow's hierarchy of human needs: see, generally, Abraham H Maslow, *Motivation and Personality* (first published 1954, Harper & Row, 1970 ed).

to feel pain.²⁴ While being alert to implausible anthropomorphosis, we may observe that certain animals may manifest habitual intra-group reciprocity; perhaps behaviour resembling a rudimentary ‘morality’,²⁵ but, certainly, sociability; they may collaborate with humans and may establish claims to spatial exclusivity in a way comparable to human property claims. These similarities are inevitable: humans are, of course, animals too, and we may be scientifically distinguishable only by the unique structure of our brains.²⁶ Indeed, the more of ourselves we see in certain animals, particularly the great apes, the more extensive the legal protections we are likely to extend to them.²⁷

Peter Singer’s utilitarian championing of animal interests denies an intrinsic worth to the biological fact of being human.²⁸ Although this is not Singer’s exact argument, the broad thrust of the animal rights movement is that if human rights do not have a foundation in natural law, which limits such rights to humans, then humans should extend fundamental rights to animals. However, if human rights were extended to non-humans, the effects of those rights, it seems, would be diminished.²⁹ As Richard Posner indicates,³⁰ Singer’s arguments do not relate to human experience. Empathy cannot be explained in terms of a simple pain/pleasure binomial but can by ‘the radical generosity inscribed within the very being of the person’.³¹ Despite their corporeality and their ability to feel pain, because they cannot reciprocate empathy, we do not share the same moral sphere as non-human animals. Therefore, while they deserve humane treatment, they cannot have human rights.

B. *Human-like Machines*

The possibility of technology advancing to the point where highly developed machines may claim legal protections as rights-bearing subjects, rather than being objects of property rights, has fuelled the imagination of science fiction writers, including Isaac Asimov³² and Philip K Dick.³³ Most problematic is the possibility of androids. In the science fiction imaginary, androids are near-perfect human replicants, but without human flaws; they are ‘simulacra’ of human beings – ‘marvellous, flawless artefacts’.³⁴ In *Do Androids Dream of Electric Sheep?* the resemblance between android and human is almost complete: only the android’s inability to empathise betrays its non-humanness.³⁵ This is not a flaw in the android, although it is certainly a flaw in terms of its replication of a human. People need to empathise with others because of

24 See Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* xvii.6 n 122 (first published 1780, Library of Economics and Liberty, 2002 ed) <http://www.econlib.org/library/Bentham/bnthPML18.html#anchor_a122>.

25 See, generally, Frans B M de Waal, *Good Natured: The Origins of Right and Wrong in Humans and Other Animals* (Harvard University Press, 1997).

26 See, for example, Alok Jha, ‘Human Brain Result of ‘Extraordinarily Fast’ Evolution’ *The Guardian* (online), 29 December 2004 <<http://www.theguardian.com/science/2004/dec/29/evolution.science>>.

27 See, for example, *Animal Welfare Act 1999* (NZ) s 85.

28 Peter Singer, *Practical Ethics* (2nd ed, Cambridge University Press, 1993) 89 argues: ‘Now that we are reassessing our speciesist view of nature, however, it is also time to reassess our belief in the sanctity of the lives of members of our species.’ See also, generally, John Gray, *Straw Dogs: Thoughts on Humans and Other Animals* (Granta, 2002).

29 But see Christopher D Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects* (William Kaufmann, 1974) 6 who says ‘each successive extension of rights to some new entity has been, therefore, a bit unthinkable. We are inclined to suppose the rightlessness of rightless “things” to be a decree of Nature, not a legal convention acting in support of some status quo.’

30 See Richard Posner and Peter Singer, ‘Animal Rights’ *Slate* (12 June 2001) <http://www.slate.com/articles/news_and_politics/dialogues/features/2001/animal_rights/_2.html>.

31 Maritain, above n 7, 5.

32 Isaac Asimov, *I, Robot* (1950, HarperCollins 1996 ed) explored various existential issues, including a highly complex machine’s right to life and, conversely, its capacity for committing murder.

33 See above n 1.

34 Jean Baudrillard, ‘The Evil Demon of Images and The Precision of Simulacra’ in Thomas Docherty (ed), *Postmodernism: A Reader* (Columbia University Press, 1993) 194, 195.

35 ‘You androids,’ Rick said, ‘don’t exactly cover for each other in times of stress.’ Garland [an android] snapped, ‘I think you’re right; it would seem we lack a specific talent you humans possess. I believe it’s called empathy.’ See Dick, above n 1, 95. Testing is based in the android’s inability to empathise with the pain of animals.

the frailty of the individual – a frailty not shared by androids.³⁶ It may be said that we assert human rights because of the ‘flawed’ nature of the human body.

Would the law ever confer human rights on an intelligent machine? Benjamin Soskis suggests that a machine should ‘deserve legal or moral personhood’ when it has the ability to experience pain or suffering; to have intentions or memories; and possess moral agency or self-awareness.³⁷ He bases this conclusion primarily on Alan Turing’s ‘imitation game’, which requires a human interrogator to tell which respondent is a machine and which is human.³⁸ Of course, the interrogator cannot see the two respondents, otherwise they would be immediately able to distinguish machine from person – except in Dick’s world. We tend to empathise with and feel most solidarity with those we recognise.³⁹ However, paradoxically, when artificial creatures look too much like us, they enter the ‘uncanny valley’ where our empathy for them plummets.⁴⁰

Following Dick’s rationale, a continuum may be assumed between the poles of human and android (humanlike, but pure machine).⁴¹ The human will have the full rights of a person and the android none. This is because androids do not share the human condition of frail corporeality and, lacking the ability to empathise, cannot inhabit the human moral sphere: ‘there is a particular feeling of empathy that only humans can share’.⁴² Furthermore, machines, however complex, are mere instruments for achieving human ends.

IV. CORPORATE CLAIMS TO HUMAN RIGHTS

In the previous part, inclusion of animals and hypothetical machines in the scheme of human rights was rejected. In this part of the article, the claims of juristic persons to human rights are considered.⁴³

A. *Theory of the Company*

Dominant economic theory does not recognise the corporation as an entity distinct from its members.⁴⁴ Thus for Daniel Fischel, the corporation ‘is nothing more than a legal fiction that serves as a nexus for a mass of contracts which various individuals have voluntarily entered into for mutual benefit’.⁴⁵ Furthermore, writing with Frank Easterbrook, Fischel characterises

36 Joe Kloc, ‘Too Close for Comfort’ *New Scientist* (Australia) 12 January 2013, 35, 36 advises: ‘In cognitive neuroscience, empathy is often divided into three categories: cognitive, motor and emotional. Cognitive empathy is essentially the ability to understand another’s perspective and why they make certain decision ... Motor empathy is the ability to mimic movements like facial expressions and postures, and emotional empathy is essentially sympathy, or the ability to feel what others feel.’

37 Benjamin Soskis, ‘Man and the Machines’ *Legal Affairs* (2005) <http://www.legalaffairs.org/issues/January-February-2005/feature_sokis_janfeb05.msp>.

38 See A M Turing, ‘Computing Machinery and Intelligence’ (1950) 51 *Mind* 433, 433–60.

39 Soskis, above n 37 anecdotally records how a scientist will not destroy a robot because of its doglike appearance and behaviour.

40 Kloc, above n 36, 36. See Masahiro Mori (Karl F MacDorman and Norri Kageki, trans), ‘The Uncanny Valley’ (2012) 19(2) *IEEE Robotics and Automation* 98, 98–100. Mori posits that this antipathy may arise from a survival instinct to shun the eerie: see *ibid* 100.

41 Zombies (the living dead) are at the very trough of the uncanny valley: see Kloc, above n 36, 37.

42 Kloc, above n 36, 37. In 2003, the International Bar Association Convention conducted a mock hearing of the claim of BINA48 (a fictionally complex machine) to continued existence. Martine Rothblatt, the computer’s advocate, in essence, argued that BINA48 was in a similar position to a person kept alive by a life support system and so should enjoy similar protections: see Martine Rothblatt, ‘BINA48 vs. Exabit Corp (Fla. MD 2005): Defendant’s Brief’ (2006) 1(3) *Journal of Personal Cyberconsciousness* <http://www.terasemjournals.org/PCJournal/PC0103/bina48_02a.html>. An actress played the role of a hologram that BINA48 had ‘projected’ into the courtroom. Without the vulnerable human proxy, it seems unlikely that Rothblatt would have won over a jury (of humans).

43 The discussion in this article is limited to commercial companies but it is recognised that certain bodies incorporate, such as trade unions, churches or charities, might have stronger claims than commercial companies.

44 See, generally, William W Bratton Jr, ‘The New Economic Theory of the Firm: Critical Perspectives from History’ (1989) 41 *Stanford Law Review* 1471; William W Bratton Jr, ‘The “Nexus of Contracts” Corporation: A Critical Appraisal’ (1989) 74 *Cornell Law Review* 407.

45 Daniel R Fischel, ‘The Corporate Governance Movement’ (1982) 35 *Vanderbilt Law Review* 1259, 1273.

corporations as ‘complex sets of contracts’,⁴⁶ specifically ‘enduring (relational) contracts’.⁴⁷ Statute law, however, formally treats companies as entities⁴⁸ but, echoing Kant, Lord Hoffmann said in the *Meridian Global* case

a reference to a company ‘as such’ might suggest that there is something out there called the company of which one can meaningfully say that it can or cannot do something. There is in fact no such thing as the company as such, no *ding an sich* [thing per se], only the applicable rules.⁴⁹

If companies do not exist it is, at first face, pointless (but perhaps harmless) to grant them rights. Shareholders, or any other individuals who may claim to be stakeholders, can claim their own rights.⁵⁰ Conversely, if we see the company in a representative capacity – as a warehouse of limited property interests – it is an inappropriate vehicle through which people might claim the indivisible panoply of human rights.⁵¹

Despite dominant economic theory, when, say, a multinational tobacco company asserts a right to freedom of expression,⁵² it does not portray itself as a mere web of contracts; it appears to claim that right as a quasi-human entity.⁵³ In contrast to contractualism, Andrew Keay’s Entity Maximisation and Sustainability Model takes the idea of the company as a separate entity seriously.⁵⁴ However, unlike animals or androids, as a ‘being’, a company simply has nothing in common with people. Like androids, companies are only ever instruments for achieving limited human goals.

B. Denial of Human Rights to Companies

Despite the existential and moral implausibility of companies having human rights, parliaments and legislatures, in New Zealand and elsewhere, have conferred rights on them. Once companies are included in the rights net, practical and interpretative problems arise.

1. Practical Problems

First, companies may compete with vulnerable people most deserving of human rights protections: for example, their economic rights may clash with indigenous cultural rights.⁵⁵ More generally, rights can only be actuated in a context of a budgetary constraint.⁵⁶ Finite financial, institutional and human resources for, say, promoting access to justice must be fairly distributed among all rights claimants. When a corporation successfully makes a claim against these limited resources,⁵⁷ an individual, whose corporeality makes imprisonment possible may

46 Frank E Easterbrook and Daniel R Fischel, *The Economic Structure of Corporate Law* (Harvard University Press, 1991) 90.

47 *Ibid.*

48 See, for example, *Companies Act 1993* (NZ) s 15, which provides: ‘A company is a legal *entity* in its own right separate from its shareholders and continues in existence until it is removed from the New Zealand register’ (emphasis added).

49 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7 (PC) 12.

50 See Rishworth, above n 2, 112.

51 There is insufficient space here to discuss the issue of group rights. In short, it is submitted that indigenous tribes, for example, must be able to assert group rights because they reject individualism, but voluntary associations of shareholders should not be able to assert group rights.

52 See, for example, British American Tobacco New Zealand, ‘Proposal to Introduce Plain Packaging of Tobacco Products in New Zealand: Submission by British American Tobacco (New Zealand) Limited’ *AgreeDisagree.co.nz* (2013) [4.35] <[http://agreeedisagree.co.nz/files/Plain%20Packaging%20-%20Submission%20by%20British%20American%20Tobacco%20\(New%20Zealand\)%20Limited.pdf](http://agreeedisagree.co.nz/files/Plain%20Packaging%20-%20Submission%20by%20British%20American%20Tobacco%20(New%20Zealand)%20Limited.pdf)>.

53 An entity is ‘[s]omething that has a real existence’: see *Oxford English Dictionary* (online) <<http://www.oed.com/view/Entry/62904?redirectedFrom=entity#eid>>.

54 See Andrew Keay, ‘Ascertaining the Corporate Objective: An Entity Maximisation and Sustainability Model’ (2008) 71(5) *Modern Law Review* 663, 663–98.

55 See Paul Hunt, ‘Reflections on International Human Rights Law and Cultural Rights’ in Margaret Wilson and Paul Hunt (eds), *Culture, Rights, and Cultural Rights: Perspectives from the South Pacific* (Huia, 2000) 25, 39–41 on the incompatibility of collective cultural heritage and individuated intellectual property rights.

56 See *Soobramoney v Minister of Health (KwaZulu Natal)* 1998 (1) SA 765 (Constitutional Court).

57 See, for example, *Re Wiseline Corporation Ltd* (2002) 16 PRNZ 347 (Court of Appeal).

be denied access to justice. Second, corporations are increasingly agents for the delivery of basic human rights, such as security and water.⁵⁸ Third, they mediate between different interest groups: for example, between the competing expectations of consumers and employees.⁵⁹ In performing the last two functions companies are not subject to democratic or judicial review in the way a government agency is likely to be.

2. Interpretive Problems

Christopher Stone cautions us to be mindful of ‘lawyers as bold and imaginative as those who convinced the Supreme Court that a railroad was “a person” under the fourteenth amendment, a constitutional provision theretofore generally thought of as designed to secure the rights of freedmen’.⁶⁰ Thus, companies have relied on the *Canadian Charter of Rights and Freedoms* to claim a right to life,⁶¹ freedom of religious belief in order to trade on Sundays,⁶² and freedom of expression in order to market cigarettes.⁶³

BORA is New Zealand’s principal human rights text, but it is not the only legislation that concerns human rights. The *Official Information Act 1982* (NZ), the *Human Rights Act 1993* (NZ), the *Privacy Act 1993* (NZ) and the *Employment Relations Act 2000*^(NZ) are also important elements of the mosaic of human rights law. The last two statutes do not apply to companies. This selective application of rights contradicts the fundamental principle that human rights are not divisible.⁶⁴ The Human Rights Commission, which is required ‘to advocate and promote respect for, and an understanding and appreciation of, human rights in New Zealand society’,⁶⁵ has confirmed its understanding that companies enjoy full *Human Rights Act* protection.⁶⁶ But how can a legal fiction be accorded rights that arise from corporeal dignity?

In interpreting its country’s explicitly dignity-based bill of rights, the South African Constitutional Court appears to see companies as inferior rights bearers.⁶⁷ Thus, in the *Hyundai* case,⁶⁸ having denied that juristic persons possess human dignity whence a right to privacy is derived, the Court continued, ‘[t]heir privacy rights, therefore, can never be as intense as those of human beings. However, this does not mean that juristic persons are not protected by the right to privacy.’⁶⁹ This limited privacy claim is instrumentally derived from concerns for democracy and social order.⁷⁰ In *First National Bank of South Africa v Commissioner, SARS*,⁷¹ the Constitutional Court considered whether companies were entitled to property rights.⁷² The court seemed to conceive companies’ property rights as mere instruments for realising

58 See, generally, Vandana Shiva, *Water Wars: Privatization, Pollution and Profit* (Southend Press, 2002).

59 See, for example, Gethin Chamberlain, ‘Apple Factories Accused of Exploiting Chinese Workers’ *The Guardian* (online) 30 April 2011 <<http://www.theguardian.com/technology/2011/apr/30/apple-chinese-factory-workers-suicides-humiliation>>.

60 Stone, above n 29, 18.

61 See *Irwin Toy Ltd v Quebec (A-G)* (1989) 1 SCR 927.

62 See *R v Big M Drug Mart Ltd* [1985] 1 SCR 295.

63 See *RJR-MacDonald Inc v Attorney General of Canada* [1995] 3 SCR 199.

64 The *Vienna Declaration and Programme of Action*, as adopted by the World Conference on Human Rights on 25 June 1993 (A/CONF.157/23) [5] declares ‘[a]ll human rights are universal, indivisible and interdependent and interrelated’.

65 *Human Rights Act 1993* (NZ) s 5.

66 Email correspondence with author. Although it seems to have adopted a passive approach in that regard, the Commission would most likely face public disbelief if it sought to promote the human rights of, say, multinational enterprises along with those of members of groups in society who have traditionally faced discrimination and marginalisation.

67 The *Constitution of the Republic of South Africa Act 1996* (South Africa) s 8(4) provides: ‘A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of the juristic person.’

68 *Investigating Directorate: SEO v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (Constitutional Court).

69 *Ibid* [18] (footnote omitted).

70 *Ibid*.

71 *First National Bank of South Africa v Commissioner, SARS* 2002 (4) SA 768 (Constitutional Court).

72 *Constitution* (South Africa) s 25(1) provides: ‘No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property’.

individuals' property rights.⁷³ Concerns were shown for the disruptive effects on society, particularly shareholders and creditors, if companies' property rights were not recognised.⁷⁴ Ultimately, the court reasoned that '[t]he property rights of natural persons can only be fully and properly realised if such rights are afforded to companies as well as natural persons'.⁷⁵ But surely, if the court was prepared to look through the corporate veil in search shareholders' interests, it could equally have allowed shareholders to sue for the diminution of share value caused by the loss of company-held property? However, the court had been set the unenviable task of making sense of corporate claims to rights, which are explicitly based on human dignity, and yet companies do not possess that essential quality.⁷⁶

V. CONCLUSION

If human rights would be diminished if extended to our fellow sentient creatures or human-like machines, it seems that they must be considerably debased, when extended to companies, which are mere commercial instruments and figments of the legal imagination. Companies are a convenient method for warehousing investors' property interests and providing them with limited liability. As the South African Constitutional Court observed, '[i]t is in today's world difficult to conceive of meaningful business activity without the institution and utilisation of companies'.⁷⁷ Nevertheless, the extension of human rights to non-humans in New Zealand is not an obvious consequence of the fiction of juristic personality: rather it is a folly of Parliament that Parliament can resolve by generally reserving human rights to humans, as it has done for the important right of information privacy. It is an unreasonable burden to expect institutions such as the courts and the Human Rights Commission to pursue their respective missions and to balance the authentic rights claims of individuals with the fictional claims of corporations. This does not mean that companies should be denied access to the law and appropriate procedural rights. The problem of the position of juristic and other non-natural persons under the law applies to all statutes, but human rights legislation is not simple legislation. It is convenient for investors' property interests to be collectively represented by a corporate vehicle, and it would be wrong to deny procedural justice to any litigant;⁷⁸ but, since companies do not have human dignity and 'exist' outside the human moral sphere, they should not be able to claim for themselves rights that arise from being human. The bills of rights enacted in the Australian Capital Territory and Victoria show that human rights can and should be reserved to people;⁷⁹ the New Zealand Parliament and courts should take note and legislate and interpret accordingly.

73 Ackermann J delivering a unanimous decision in *First National Bank of South Africa v Commissioner, SARS* 2002 (4) SA 768 (Constitutional Court) [43].

74 Ibid [45].

75 Ibid.

76 Langa DP, delivering a unanimous decision in *Hyundai 2001* (1) SA 545 (Constitutional Court) [18] said: 'Juristic persons are not the bearers of human dignity'.

77 Ibid [44].

78 But, on the exclusion of corporations from enjoying Fifth Amendment immunity from self-incrimination in the United States, see *Hale v Henkel*, 201 US 43 (1906); *Wilson v United States*, 221 US 361 (1911); *Essgee Co v United States*, 262 US 151 (1923).

79 *Human Rights Act 2004* (ACT) s 6 provides '[o]nly individuals have human rights'; *Charter of Human Rights and Responsibilities Act 2006* (Vic) includes the following note to s 6(1): 'Corporations do not have human rights.'