

The Corporate Citizen and the Sovereign Exception: from *homo sacer* to *homo supra*

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Whyte, D., 2018. The Corporate Citizen and the Sovereign Exception: from *homo sacer* to *homo supra*. *Oñati Socio-legal Series* [online], 8 (6), 950-975. Received : 22-12-2017 ; Accepted : 23-05-2018. Available from: <https://doi.org/10.35295/osls.iisl/0000-0000-0000-0937>



Abstract

This paper is concerned with a concept that has permeated discussions about the corporation in the early 21st century: the “corporate citizen”. The paper uses the liberal understanding of citizenship that involves responsibilities and duties owed to the state on one hand, and the rights guaranteed by the state on the other as its starting point, and applies this dualism to the corporate citizen. Yet the rights and duties applied to corporations are not strictly analogous to the corresponding rights and responsibilities of real flesh and blood citizens. Corporate citizenship implies a set of exceptional powers and privileges that combine to produce *homo supra*, a paradigmatic “supra-sovereign” subject that is empowered to enjoy sovereign protections and rights far-exceeding those that any ordinary citizen could expect. The paper thus shows how the process of ascribing corporate citizenship has become a key mechanism through which unequal power relations (and attendant privileges of class, gender and race etc.) is guaranteed.

Key words

Corporate citizen; citizenship; state of exception; corporations; regulation

Resumen

El artículo se ocupa del concepto de “ciudadano corporativo”. Utiliza la forma liberal de entender la ciudadanía, la cual, como punto de partida, implica responsabilidades y deberes hacia el Estado, por un lado, y los derechos garantizados por el Estado, por el otro, y aplica esa dualidad al ciudadano corporativo. Sin embargo, los derechos y deberes impuestos a las corporaciones no son estrictamente análogos a los derechos y deberes de los ciudadanos de carne y hueso. La ciudadanía corporativa implica un conjunto de poderes y privilegios excepcionales que se combinan para producir el *homo supra*, un “supersoberano” paradigmático que es empoderado con amparos y derechos soberanos que exceden con mucho aquéllos que un ciudadano normal podría esperar. Así, el artículo muestra cómo el proceso de asignar la

This paper was first presented at a workshop held at the International Institute for the Sociology of Law, Oñati, on 3rd June 2016 and then at a plenary session at the Research Committee for the Sociology of Law conference at ISCTE-IUL, Lisbon, 12th September 2018. Thanks to the participants at those meetings for their feedback and discussion. I am especially grateful to José Atilés, Vickie Cooper and Steve Tombs for their detailed comments and engagement with an early version of this paper.

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ciudadanía corporativa se ha convertido en un mecanismo por el cual se garantizan relaciones desiguales de poder.

Palabras claves

Ciudadano corporativo; ciudadanía; estado de excepción; corporaciones; regulación

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1. Introduction

This paper is concerned with a concept that has permeated discussions about the corporation in the early 21st century: the “corporate citizen”. The corporate citizen is a concept that is now widely applied in the context of “sustainable” or “responsible” business and corporate social responsibility (CSR) debates. Yet the concept has a long and established history, particularly in the US. As early as 1809, the US courts (*Bank of US v Deveaux* 1809) were asked to rule on whether or not corporations could be regarded as “citizens” for the purposes of their ability to sue other, flesh and blood, citizens. In a number of cases the courts went back and forwards on this question, before settling on the formulation in 1844 that: a “corporation received the jurisdictional opportunities open to citizens without the Court having to accord ‘citizenship’ to it.” (*Louisville, C. & C.R. Co. v Letson* 1844) This judgment pretty much represents the situation today: corporations are “citizens” for some legal purposes, if not regarded as such in the broadest constitutional sense (Krannich 2005).

The wider social and cultural use of the term became commonplace in public debate in the 1990s, and gained recognition in US government policy under the Clinton administration (Carroll 1998). The term *corporate citizen* is now ubiquitous in business studies texts and courses (for example: Alvarez *et al.* 2001, Burchell and Cook 2006, Helgesson and Mörth 2013, Stangis and Valvoda Smith 2017) and awards for the “corporate citizens” of the year are commonplace across trade associations and the business press.¹ Indeed, the US Chamber of Commerce has run a high profile Corporate Citizenship Center for over 20 years now.²

The concept of the corporate citizen includes a range of different approaches. In some versions it is claimed that the “good” corporate citizen can be expected to behave as a model member of a given community in ways that go beyond regulatory standards (Saiia and Cyphert 2003, Waitzer and Jaswal 2012), and in other versions corporate citizenship is more closely identified with ensuring regulatory compliance (Newman 2013).

More generally, the concept of *citizenship* has been subjected to a sustained critique by political and social scientists, and in particular, by class theorists, Feminists and anti-racists (Marx 1844/2008, Mann 1987, O’Conner 1993, Yuval-Davis 1997, Ong 2006a). In such critiques, citizenship is exposed as contradictory; the key contradiction found in the disjuncture between formal claims that citizens are granted a set of guaranteed rights on one hand, and on the other hand the structural features of capitalist, colonial and patriarchal societies that prevent those rights from ever being realized (Turner 1993). In some versions of this critique, corporations themselves are key in the progressive degradation of citizens’ rights (Bell 2016). Those accounts capture the essence of the contradiction that reveals the impossibility of the liberal ideal of universal rights (Whyte 2013). In contrast to those established critiques, this paper will show that when the liberal rights and responsibilities associated with individual citizenship are transposed onto the corporation, they have the effect of articulating, rather than constricting “rights”: corporate citizenship is a process of enhancing, rather than restricting the power of citizens *vis-à-vis* government.

The paper applies the same categories of citizenship that are found in textbook understandings of the liberal rights/responsibilities framework. At its most basic level, citizenship is envisaged in liberal legal theory as a crude dualism: implying an

¹ See, for example the Chicago Executives Club (<http://www.executivesclub.org/annual-awards/corporate-citizen-of-the-year>); the Denver Business Journal (<https://www.bizjournals.com/denver/news/2017/11/17/corporate-citizens-of-the-year-the-process-how-the.html>); or the Evening Standard Business Awards (<https://www.standard.co.uk/business/evening-standard-business-awards-the-good-corporate-citizens-and-entrepreneurs-in-the-spotlight-a3569031.html>)

² See the U.S. Chamber of Commerce Foundation Corporate Citizenship Center at: <https://www.uschamberfoundation.org/corporate-citizenship-center/about-us>.

irreducible connection between the responsibilities and duties owed to the state and the rights guaranteed by the state (Janoski 1998). This very same liberal dualism of rights and responsibilities has been applied to the “corporate person” in legal theory. The 19th century legal historian Frederick William Maitland argued that the corporation can be regarded in law as a “person” precisely because it is a “right-and-duty-bearing unit” (Fisher 1911, cited in Dewey 1926).

The paper is not concerned with how corporations claim rights in a broader social or cultural sense, but with how the liberal state enables and empowers corporate citizenship. It is for this reason that the structure of the paper follows a liberal conceptual dualism of rights and duties; and it is this dualism that shapes the typology of corporate citizenship that will be set out later in the paper (in Figure 1). In order to illuminate this process, the paper introduces a new figure, *homo supra* which is based upon an inversion of Giorgio Agamben’s (1998) concept of *homo sacer*. *Homo sacer* exists as the paradigmatic sovereign subject that has been stripped of all legal and political rights as a citizen, whereas *homo supra* functions as the paradigmatic “supra-sovereign” subject that is empowered to enjoy sovereign protections and rights far-exceeding those that any ordinary citizen could expect. The paper thus begins by asking how we might think about the corporate citizen in the context of Agamben’s understanding of the relationship between state power, sovereignty and citizenship.

2. From *homo sacer* to *homo supra*

The idea that corporations can be understood as “citizens” is a counter-intuitive one (Bell 2016). The crude application of the characteristics normally ascribed to “ordinary citizens” (real individuals) to an abstract entity (a fictional individual) makes little sense. Yet, no matter how counter-intuitive the idea of the corporate citizen might seem to its critics, the corporation can be said to correspond closely to the definitive characteristics of citizenship as set out in ancient Greece. From an Aristotelian perspective, there are two conditions that required to be met to enable the individual to assume citizenship. The individual becomes a citizen through the possession of things, and through recognition as a subject in law (Pocock 1992). The corporation, as a formal owner of property, and recognized as such in law, meets both of those requirements.

As the introduction to the paper has noted, the liberal understanding of citizenship is generally held by its critics to ignore the capacity of various dimensions of power (race, class, gender) to erode rights in practice and to create “citizenship hierarchies” (for key examples, see Marshall and Bottomore 1997, Carver 1998, Castles 2005). In so far as the primary focus of this paper is with the way that “citizenship” rights have been ascribed to the corporation, the paper showcases a kind of hyper-hierarchy of citizenship. Yet, the point that the paper will develop is not merely that the articulation of corporate citizenship corresponds to a hierarchy of power that already exists. It does not merely “grant” rights to the citizen-corporation as a means of reproducing power. Rather, the incorporation of the corporate citizen by the state is itself a form of crafting and reproducing unequal power relations. This process of crafting power is done through the acknowledgment of the corporation as an “exceptional” form of citizen that is empowered through the routine application of exemptions from, and exceptions to, the normal rule of law. In other words, the argument that will be developed in this paper is that the crafting of power by the state is achieved through the imposition of the legal exception, and that this logic applies to the crafting of state power through corporations, just as it does through governments, military, police or welfare systems (Whyte 2015a).

Agamben’s (2005) analysis of sovereignty and citizenship begins from this same point: sovereign power is established through the imposition of the legal exception, the suspension of the normal state of law, or “state of exception”. The law can be suspended in terms of the withdrawal of citizenship obligations to individuals and

groups of individuals (the stripping of rights or a particular legal status) or in terms of its application to particular jurisdictional spaces (the application of states of emergency in particular nation states, cities or the “camp”). The stripping of rights through a “sovereign ban” or the suspension of the rule of law in a given territory (as in the case of states of emergency) renders the targets of the state of exception “naked” whereby those who are targeted are stripped of legal protections. Agamben calls the state of being stripped of legal protection “*nuda vita*” (“naked” or “bare” life). To locate his analysis of naked life, Agamben invokes *homo sacer*, as the emblematic figure in Roman law, whose residual legal status is eradicated by the “sovereign ban” (Agamben 1998).

Homo sacer is an enigmatic figure. The precise meaning of *homo sacer* has been ongoing matter of historical controversy. Contained in the concept is a mysterious paradox; *homo sacer* is the mortal human individual that cannot be sacrificed, yet at the same time has forfeited the protection of the state to the point that they can be *killed*. This is because the body of *homo sacer* belongs to the gods, not to the political sovereign. So *homo sacer* is the figure in Roman law who can be killed with impunity, but who cannot be sacrificed by the sovereign. Agamben resolves this paradox, or apparently ambiguous status of *homo sacer*, by arguing that sovereignty is predicated up a process by which human life is taken into a state of exception. In this state, *homo sacer* occupies a “zone of indistinction” between the profane and sacred orders: both included (as subject) and excluded (as object) of the political order (Agamben 1998, 81-85). The “sacred” nature of *homo sacer* is used as an emblematic device by Agamben to explore the basic character of the relationship between the individual and the state.

Being bare or naked in this context means both being exposed to the violence of the state and being without the protection of the state. For Agamben, the articulation between a wholly natural, biological existence (*zoē*) and a politically and legally enabled existence (*bios*) is crucial for understanding the modality of state power. The threshold between *zoē* and *bios* is where we find naked sovereign power reducible to the power to ascribe legal status on individuals. Those who are banished in a legal sense – stripped of legal status – also find themselves banished from the political community, since being stripped of legal status implies being stripped of civil and political rights. Thus, for Agamben, it is only by erasing the division between the included and excluded citizens of the political sphere that “we can restore humanity to the globally excluded who have been denied citizenship” (Ong 2006a, 503).

2.1. From repressive inclusion to enriched inclusion

Agamben’s concept of a state of exception has been criticised for privileging a liberal-juridical understanding of the relationship between the individual and the state which lacks socio-economic content. As Lemke (2005, 11) notes, power is understood by Agamben as residing exclusively in “political instances and state agencies”. However, this is not to say we *cannot* bring economy into Agamben’s basic approach. Elsewhere (Whyte 2009, 2010a, 2015a), I have offered a constructive critique which argues that Agamben’s approach can be significant for understanding the *modality* of state power. This work notes a failure to recognise the principle of economic force that always stands behind this (legal and political) modality of power. Other scholars *have* used the concept of “state of exception” to illuminate the economic and social oppression in the context of colonial and neo-colonial forms of power (Venator Santiago 2006, Springer 2013, Atilas-Osoria 2016), and the global economy more generally (Ong 2006b). As this paper will argue, when we introduce the dimension of economic force into the sovereign relationship, we begin to see how the formal basis for citizenship not only represses, but also produces and reinforces the power of the subject.

In this paper, I propose a second point of departure from Agamben as a way of extending his basic approach. Agamben’s tendency towards a liberal understanding

of the state of exception leads him to view sovereign power in exclusively repressive, controlling, terms. As the discussion above notes, for Agamben, state power is made real through a dual process of simultaneous inclusion and exclusion in the juridical order. This is generally positioned negatively: inclusion is always highly circumscribed and ultimately *repressive*. Indeed, he argues that the core structure of political relations itself is found in the sovereign ban: the oscillation between inclusion and exclusion, or being rendered inside and outside the political order. Thus, “the fundamental activity of sovereign power is the production of bare life” (Agamben 1998, 117).

In this sense, Agamben’s ontology of legal power is incomplete. The production of bare life is not the law’s most fundamental activity. Law does not merely produce sovereign power in an exclusively repressive sense. As this paper will show sovereign power also works at the threshold of inclusion/exclusion to produce an exceptional form of *enriched* citizenship status. As sovereign power produces bare life, it also produces a legally and politically enriched life.

Generally, wealth implies the enhancement of rights (for example when the non-domiciled rich citizens of a state are granted tax exemptions, or when rich non-citizens are automatically granted residency or citizenship status by a particular state). The focus of this paper is not the individual citizen, rich or poor, but is on the rather awkward concept of the *corporate* citizen. The paper will therefore seek to show that, whereas the process of delineating *homo sacer* generally indicates a repressive inclusion into the juridical order, the process of ascribing formal rights to corporate citizens can be understood as a process of *enriched* inclusion. Indeed, when it comes to the development of legal rules relating to the corporate person, contemporary capitalist states have almost universally enacted an enriched “corporate citizenship”. I call this enriched form of citizenship “*homo supra*”, a term that denotes a particular form of über-citizenship.

The citizenship privileges that are discussed in this paper are not generally accessible to ordinary citizens, but they tell us a great deal about the limits on ordinary citizenship, and about the consequences of the sovereign/citizen relationship for catalyzing and reproducing power. This paper will argue that the purpose of creating *homo supra* – the supra-human citizen – is to reproduce the social domination of a narrow class of real citizens: the owners and shareholders that stand in the shadows of the artificial edifice of the corporation. The form that corporate citizenship as discussed here, then, is merely an extension – albeit in a highly complex form – of a wider politics of exclusion/inclusion.

3. The Duties of the Corporate Citizen

Citizenship as it applies to natural persons, always implies a particular relationship with a sovereign state. The citizen is a subject of a particular sovereign state, and this standing implies that the citizen is owed “rights” by the state and in turn “owes” the state a set of duties or responsibilities. In liberal understandings of the relationship between state and citizen, those rights and duties should apply universally (Rawls 1993). Such rights may include universal suffrage, the right to due process in law, or even rights to minimum provision of services or resources. Responsibilities may include social contributions through the payment of taxation, or civic obligations such as participation in national service, jury duty and so on. In a number of leading and definitive sources, citizenship also involves a broader right to civic engagement or social participation (Turner 1986, Prior *et al.* 1995).

It is to a discussion of the first of those features of the sovereign relationship that the paper now turns. This section deals largely with configuration of the formal “duties” of the corporation in law (duties to pay taxes and generally obey the rule of law). Yet it is crucial to note at this stage that there is a fundamental difference between the formal requirements of law on one hand, and the practical realities of compliance with, and regulation of, those formal requirements on the other hand.

There are, for example, major problems with the enforcement of corporate taxation requirements across jurisdictions because of major difference in both legal standards and enforcement policies (Clausing 2009, Gravelle 2009). Those issues will be returned to in the penultimate section of the paper. For the moment, this section of the paper is concerned with the formal duties of the corporate citizen.

3.1. *Duty as a Taxpayer*

Although the term *corporate citizen* began to permeate discussions about the corporation relatively recently, as the introduction to this paper indicates, its roots are much longer. The origins of the concept can be found in the long historical development of corporate personhood, or the legal recognition of an incorporated organization as a singular “entity” which has an identity and legal status that is formally separate from its associated members or owners. It is the formulation of corporate personhood that allowed the corporation to be imagined as having a relationship with the state that implied some form of duty to the state. One of the early “duties” expected of partners who decided to incorporate an enterprise was that the incorporated entity would be liable to pay taxes on its revenues (Spencer 2004). One consequence of this was that the corporate entity did not pay death duties that would otherwise have been owed by an individual owner or investor’s estate because the corporate citizen never died. Similarly, if a “partner” or “shareholder” became bankrupt, the entity’s assets could not be used to pay the debts as the assets belonged to the entity rather than the individual shareholder. Of course, the corollary of this advantage was that the corporation itself became liable to pay tax on its revenue; though in some tax systems, this came relatively late (in the US for example, corporation tax was outlawed until the early 20th century).

In the mid-20th century, corporation tax in many jurisdictions – including the UK and the US – was at a similar or higher rate than individual income tax (Patton 2015). A further point of divergence in systems of corporate taxation was that individual shareholders have been additionally taxed on income derived from share dividends. This practice that its critics call “double taxation” (Arlen and Weiss 1995) presents us with a rare scenario. The corporation is generally not exposed to policies that apply simultaneously to it as an entity *and* separately to its members. Indeed, as the rest of the paper will demonstrate, corporate citizenship is established precisely on this basis: to ensure that the corporation, rather than its owners and shareholders, is made solely responsible for complying with its duties to the state.

On the surface, then, a tax system that ensures both shareholder income and corporate income are taxed may appear to be doubly punitive. However, there are a number of caveats to be made here. First, in the 1980s, the burden of taxes on profits began to diminish rapidly as rates of corporation tax fell across most jurisdictions (McGrattan and Prescott 2005). In many jurisdictions, both corporation tax and taxes levied on shareholding earnings are substantially lower than the standard rates of individual income tax. In the UK for example, shareholders are allocated a “dividend” allowance which is levied at a level significantly lower than both the basic and higher rates of income tax that apply to other income. Second, corporation tax in many jurisdictions is highly complex, overlaid by a system of exemptions that enable corporations to significantly reduce their tax bill, depending upon the size of the firm, the sector and so on (Slemrod 2004). Third, corporation tax has historically counted for a relatively low proportion of total tax revenue raised by governments. Across OECD countries, corporation taxes have historically accounted for around 8% of tax-take (Mintz 1995); and amount to less than one third the proportion collected in personal income tax.³ Fourth, this proportion is likely to diminish further as the trend in liberal democracies since the 1980s has been for both rates of corporation tax, and rates of share dividend tax to be progressively

³ Conclusions derived from analysis of OECD taxation available here: <https://data.oecd.org/tax/tax-on-corporate-profits.htm#indicator-chart>

lowered, thus reducing the relative costs of taxation imposed on both corporations and owners/shareholders (Edwards 1984, Devereux *et al.* 2008). Total receipts in OECD countries for corporation tax, taken as a proportion of GDP, have fallen by around half since the 1960s. The equivalent proportion of the contribution made by individuals has risen by around one sixth. This roughly amounts to a direct replacement of lost corporation tax revenue by personal taxation.⁴ In this context, it is particularly important not to fetishise the corporation as an autonomous entity that “benefits” and “loses” on its own terms. Ultimately it is always real citizens – whether it is workers, owners, or the wider public that wins or loses as a result of the structuring of corporate taxation (Whyte 2018). Most directly, it is the owners and shareholders of the corporation who directly “benefit” or “lose” from changes in the tax burden. Those real, human, citizens are not readily visible or identifiable when Google (Bowers 2016) or Apple (Rankin 2017) is granted tax immunities by Ireland, or when six of the largest 10 companies in Britain pay no net corporation tax (Farand 2016). Yet it is a wealthy group of elite owners who are the direct beneficiaries of such immunities and write-offs.

Taken together, those four points indicate that although corporations are liable for taxation just as other citizens are, this system is subject to a very different set of (shifting) standards than those applying to ordinary citizens. In many ways the complex differences that exist across and between jurisdictions make a direct comparison between corporate and individual taxation impossible. However, if there is one broad conclusion we can draw from the evidence discussed here, it is that the burden on corporate citizens has diminished in the neo-liberal period and that this burden has been absorbed by ordinary citizens. If the principles upon which corporate tax regimes are based were at some point in history closer to those underpinning individual income taxation, they are now increasingly divergent and increasingly governed by exceptional rules.

3.2. Legal liabilities

If shareholders are expected to shoulder some burden for their income stemming from share ownership, this burden does not fall on them for more general legal liabilities. The legal personhood assumed by the corporation implies a complex relationship between the nominal owners (shareholders) of the corporation and the corporation itself. Because the corporation is wholly distinct as an entity, it formally becomes constituted as the owner of assets and the party responsible for liabilities. Shareholders are therefore only exposed to “limited liabilities” in law. As a result of this principle, shareholders of incorporated companies are thus able to “limit” their financial exposure to the value of the sum they invest; the value of their “share”. Therefore, shareholders are generally not held responsible for the debts or other liabilities of the company, or for the damages or costs of any legal proceedings that may arise from its activities. A major commercial advantage for companies and their investors is thus created by establishing a separation between the liabilities held by the corporation and the liabilities held by the members of the corporation (Glasbeek 2017). Corporate lawyers use the term “corporate veil” to describe the protective shield that exists to protect the shareholders of the corporation from liability for the harms caused by the corporations.

The corporate veil protects the owners or shareholders of corporations by ensuring they are not held directly responsible for any liabilities that arise from the corporation’s contractual or legal responsibilities. The corporation, for example, rather than the owner or shareholder owes the duty of care to employees. It is the corporation that is for all intents and purposes defined as the employer. Owners and shareholders have no obligation to know about, far less do anything about, the labour conditions faced by workers in the companies that they own. Similarly, they do not

⁴ See fn. 4 above.

have to be concerned about the general impact of corporate activities on communities or on the environment, because they will not be held directly liable for those activities.

When compensation is demanded, or when corporations are sued for damages, it is the corporation that pays. The imposition of significant damage may have an impact on the reputation of a firm and may even dent profits. Yet because those costs are generally levied on the "corporation", rather than targeted at a particular group within it, the cost burden of even the largest damages can be absorbed and redistributed; those costs might be offset against a particular budget heading (they might result in cuts to wages or other operational costs), or they may be passed onto customers and clients in the form of price rises, or onto suppliers by reducing the market value of a product. Damages imposed for violating safety laws and causing fatalities in the workplace may even be re-absorbed by workers in the form of wage cuts and downsizing (Tombs and Whyte 2007).

Precisely the same issue is at stake where fines are imposed on the corporation following criminal or regulatory offences. Indeed, in a broader sense, the history of regulatory law in the UK illustrates how the prosecution of the corporate person/citizen has provided a significant avenue of impunity for the property owning class. In the early-mid 19th century, the development of particular forms of regulation and laws addressing the protection of workers and consumers rapidly developed in the UK, such as the Factory Acts and the Regulation of Railway Act and legislation dealing with the production of chemicals and the adulteration of food. Those regulations generally imposed different standards of culpability on offenders. In English law, a form of liability that did not require the identification of individual offenders was developed by the courts for this purpose. This form was known as strict liability: a form of legal liability which does not depend on a "state of mind" or intent to cause harm (Carson 1979). Because it removed the need to show intent and therefore removed the need to demonstrate a real individual's state of mind, the principle of strict liability enabled the corporate person, rather than the factory master, to be held liable for offences. In the 1850s, the proportion of "companies" prosecuted for breaches of the Factory Acts varied between 30% and 40%. By the end of the 19th century, 50% of prosecutions for such breaches were laid against companies. By the time we get to the end of the 20th century, in most areas of regulation, the vast majority of prosecutions are laid against corporations rather than individuals (Whyte 2018).

In the case of workplace safety crimes by employers against workers, around 95% of cases result in fines against corporations for strict liability offences (only around 3% of prosecutions are laid against directors or senior managers; Tombs and Whyte 2007). The Directors of large corporations are not represented in this 3%; the individuals prosecuted in such cases are overwhelmingly the owner-managers of relatively small enterprises. We find a similar picture in the enforcement of environmental offences: the vast majority of prosecutions are laid against very small individual operators, or in the case of more serious, large-scale offences, almost always laid against the corporation (Whyte 2010b). Large-scale fraud in the banking sector is generally dealt in precisely the same way: by targeting middle-level traders in the most serious offences, by levying large fines against the largest corporations (Whyte 2018).

In the fields of civil, regulatory and criminal law, then, the development of corporate liability in a formal legal sense has enabled (some) responsibilities that would normally be associated with a property-owning individual to be ascribed to the corporation. The duties and liabilities of both owners and senior managers are absorbed by the corporate citizen; imposing duties on the corporate citizen itself acts as a mechanism of impunity for the key beneficiaries of the corporation.

This section has summarised a range of ways in which the principle of corporate personhood – and the legal device of limited liability that stemmed from this principle – enabled the corporation to act as a proxy and displace the duties that might

otherwise be imposed upon the owners and shareholders of the corporation. This structure of impunity derived from commercial imperatives that were in turn underpinned by law. The introduction of statutory forms of limited liability by the UK parliament in the mid-19th century had a dramatic effect on the structure of the economy. In the UK, the number of incorporations grew at least 100-fold between the 1850s and the 1920s (Tombs and Whyte 2015). Making the *corporate* person liable for losses – as opposed to its directors or shareholders – was therefore a key process in ensuring that the capitalist enterprise, in the form of the corporation, rose to dominance in the economy. The creation of the abstract corporate citizen – and its attendant structure of impunity – has thus proven to be an indispensable device for its owners and shareholders to accumulate wealth. As the following section shows, corporate citizenship simultaneously enabled the “rights” of the corporation to be used for significant commercial advantage.

4. The Rights of the Corporate Citizen

The formal civil and political rights granted to citizens in liberal democracies can be divided into three categories: those rights that seek to ensure protection *from* overbearing government (broadly analogous to “active” rights, Janoski 1998); those that guarantee government interventions *by* government (broadly analogous to “passive” rights, *Ibid.*; on this distinction, also see Turner 1986); and those that guarantee participation in political and civic life (Prior *et al.* 1995). In this section, each of those forms of rights are discussed in turn, dealing with both formal “rights” as proscribed in law, and “rights” that are defined by government practice. Thus, some rights that are set out in this section are based upon the constitutional right to legal redress (for example for human rights violations or for torts) and some are based upon practices that have not been codified in law, but have been deeply embedded in state practices (for example the right to “veto” social policies).

4.1. Rights to Protection from Government

The right to be protected from interference by government is enshrined formally in law in various ways. Although it is not universally applied, in many jurisdictions, corporate persons, just like natural persons, can seek redress in law for torts, for other forms of duty owed to them, and even for human rights violations (Khoury and Whyte 2017). Indeed, access to a range of other court and tribunal mechanisms can be used strategically by corporations to assert “rights” in cases against government interference (Glasbeek 2012, Pérez-Rocha 2016). The US Supreme Court has upheld the principle that under the 13th and 14th Amendments to the US Constitution, corporations have the right to enjoy property. This position provoked a public campaign following the Citizens United case heard at the Court in 2010 (*Citizens United v FEC* 2010). The court ruled that corporations have the right to spend money in candidate elections, and may, on religious grounds, refuse to comply with a federal mandate to cover birth control in their employee health plans. Over the past sixty years, the legal status of corporations has also been protected in human rights law, in the European human rights system particularly. Article 1 Protocol 1 of the European Convention on Human Rights (ECHR; Council of Europe 1950) reads: “Every natural or legal person is entitled to the peaceful enjoyment of his possessions.” The inclusion of legal persons in Protocol 1 has had a significant impact on the practice of the human rights courts. The volume of cases in which corporations claim human rights is not insignificant. One study showed that around 4% of cases originated in applications filed by companies or other legal persons clearly pursuing corporate interests (Emberland 2006). Most of the cases in which corporations have the protection of the European Court of Human Rights have been for: alleged violations of property rights (P1-1 ECHR), the right to a fair trial (Article 6 ECHR) and in some cases freedom of expression (Article 10 ECHR).

In many of those cases, the human rights issue revolves around overly invasive or burdensome regulatory requirements or state investigations (Khoury and Whyte

2017). Thus, human rights protections are very often used to neutralize attempts by states to protect the public from corporate activities. This is not to say that states doing this are acting illegally or unconstitutionally, but just to observe that the practice of seeking protection from rights violations by corporations is often aimed at restricting state regulatory interventions. This observation is made more controversial by the fact that profit-making corporations in some contexts are as likely to be the authors of human rights violations as public authorities, often in precisely the same circumstances, involving precisely the same types of violations (Bittle and Snider 2013). Therein lies a fundamental contradiction: although corporations can be protected by human rights law, they can at the same time enjoy immunity for committing human rights violations.

Political discussions of the violation of rights by Global North corporations in Global South countries have generally been counter-balanced by the idea that corporations themselves have the right to invest, and that those rights must be protected in order to ensure FDI flows into the Global South. As Asante (1979) has noted, part of the effort by the UN to develop meaningful mechanisms of accountability for corporate human rights violations has led the richest nations to lobby for a “treatment standard” to protect corporations (see also Coleman 2003). Thus, the ability of TNCs to engage in particular forms of investment, property ownership, and to guarantee those activities as “rights” has been an ever-present theme whenever the UN has turned its attention to the violation of human rights *by* corporations. The US had as early as 1978 complained about the UN Code of Conduct for Transnational Corporations providing a basis for “discriminating” against TNCs (Coleman 2003, 344, Khoury and Whyte 2017).

Upholding the “rights of TNCs” is now a common thread running through UN commentaries on development (Perrone 2018) and mechanisms to ensure that those rights are not violated are now inserted routinely into bi-lateral trade agreements. Thus, Investor-State Dispute Settlement (ISDS) mechanisms have expanded hugely over the past two decades to give corporations the right to seek redress if governments implement policies that potentially undermine their interests (Eberhardt and Olivet 2012, Ciocchini and Khoury 2018). For Hawkins and Holden (2016) this creates veto points that can restrict the other fundamental human rights of citizens, for example, the right to basic health provision:

It creates a substantial disincentive to seek stronger health-protecting regulations, since any government considering new regulations must weigh the benefits of these against the chances of success in multiple disputes and the potentially huge costs of engaging in litigation, or settling awards made by the arbitration panel against the state in question.

Thus bi-lateral trade treaties are not only becoming key *fora* in which the rights of the corporations to access markets are realized, but also where the rights of the corporate citizen are set against the rights of real citizens.

Although this section has only really begun to uncover the structure of the corporate right to protection by government through a limited number of examples, it is clear from those examples that the concept of corporate rights has become embedded in law and in practice. Corporations are able to invoke a wide range of rights: for example, the right to silence, the right to enjoy property, the right to participate in markets or the right to veto social policies. And it is here that we see an enhanced form of rights that stems directly from the social power enjoyed by corporations. Many of those rights can only be achieved through the long-term deployment of financial and political resources that are simply not available to individual citizens. And ongoing access to those rights are only secured because of the deployment of resources, whether measured in terms of the deployment of corporate lawyers in international arbitration, or in terms of lobbying at the UN, the Council of Europe, or national government bodies (Nader and Smith 1996).

4.2. *Rights to Protection by Government*

Under the second broad category of citizenship rights, corporations enjoy access to some analogous government protections that individuals (formally at least) expect as citizens. They enjoy the protection of the police, and laws designed to protect business from crime. In civil law, corporate persons generally have access to the same litigation mechanisms as individuals: they can sue other individuals and corporations for damages (Krannich 2005). Large corporations in some sectors have become particularly active in litigation, the threat of litigation and the use of strategic law suits (Hilson 2016, Ciampi 2017). Those are the types of protections that corporations take the initiative to secure; they are therefore, protections *guaranteed* by government, as opposed to protections *directly* provided by government. Of the protections provided directly by government, we can include a range of economic benefits that are broadly analogous to the welfare safety-net available to the citizens of some liberal democracies. In Global North economies with developed welfare systems, individual citizens who need economic assistance might receive safety-net payments from government to provide a basic level of welfare for people who become unemployed and too ill to work. In the most advanced economies, such payments may be income-linked to previous employment..

The term “corporate welfare” (Dawkins 2002) captures a range of specific benefits provided by governments to corporations. One estimate of corporate welfare in the UK (including tax benefits, the value of cheap credit made available to business, government marketing support and public procurement from the private sector) adds up to a total of £85bn year (Farnsworth 2015). UK train operators are completely dependent upon government subsidies. Numerous sectors such as the care sector, health and pharmaceuticals, private security, the arms industry, educational suppliers and publishers etc. etc. would be tiny by comparison without government contracts and the role of the public sector in stimulating those markets (Jansa and Gray 2014). Many British companies operating abroad are granted export credit subsidies (enabling them to invest at low or no risk of exposure). It is no exaggeration to say that every single part of the business economy is subsidized in one way or another. And those levels of subsidy represent a major burden on the tax base that is largely borne by the ordinary citizen.

Corporations also expect to have access to foreign embassies and to be able to move assets and employees across borders with some guarantee of protection. In practice, the diplomatic support that *corporations* (ie not merely their employees in their capacity as individual citizens) can expect significantly exceeds the support that ordinary citizens can expect. Related “rights” and freedoms are often dependent upon a complexity of trade rules, agreements and international treaties. Whilst the most powerful states can and do intervene to impose tariffs to protect their own corporations, the core principle generally underpinning those systems of rules is that the free movement of capital, of corporate assets, and of the representatives of corporations, must be protected and encouraged.

Corporations are not passport holders, but nonetheless can expect their consulates and embassies to provide protection and represent their interests. For example, British corporations operating abroad access diplomatic services routinely. The UK Foreign and Commonwealth Office (2011) asserts that “FCO will equip its staff with the necessary skills to be effective in supporting UK business and investment, as a core part of the job of the Diplomatic Service”. This includes the “tireless” lobbying of foreign governments to award contract to British firms (F.CO. n.d., 7) and using UK government data and intelligence to help UK businesses identify and pursue new opportunities. As part of this role, British corporations are regularly invited to accompany UK Government ministers on diplomatic missions (Whyte 2015b). Where significant corporate interests are operating in conflict zones, they can be granted military support. This is fairly regular practice in the extractive industries. Indeed, Global North states have become adept at ensuring their corporations have military

protection, often taking the form of agreements with client states. As Gaffney (2018, 331) argues, a primary function of US military power is “punishing or deposing regimes that threaten the interests of US-based corporations”. On the ground, military support is rarely done directly, but by proxy through foreign policy. It is also done by proxy through securing support from local host states, or through the licensing of private military companies (for a key example, see Francis 1999, Whyte 2003). Support for individuals is normally restricted to the safeguarding of passage and the basic civil liberties of citizens, or supporting visa and residency applications.

The need for diplomatic support is one reason that TNCs are reluctant to sever their allegiance to one or two principal state(s). They tend to maintain a home base from which they manage and direct most operations. Economist Ha-Joon Chang (2011, 74-75) has summed up the wider reasons for TNCs reverting to a dominant “nationality”:

Despite the increasing transnational position of capital, most transnational companies in fact remain national companies with international operations, rather than genuinely nation-less companies. They conduct the bulk of their core activities, such as high-end research and strategising, at home. Most of the top decision-makers are home country nationals. When they have to shut down factories or cut jobs, the use they do it last at home for various political and, more importantly, economic reasons. This means that the home country appropriates the bulk of the benefits from a transnational corporation. Of course their nationalities not the only thing that determines how corporations behave but we ignore the nationality of capital at our peril.

We therefore need to be careful about essentialising the extent to which TNCs are truly footloose and able to sever ties with a particular nation state. Yet at the same time, it is clear that a corporation can receive considerable benefits by being relatively fluid in its national identity. Corporations are able to adapt their domicile status (or “nationality”) and even change their home base. TNCs can adopt several national identities at the same time; claiming their “home” in a multitude of states simultaneously through complex ownership structures.

The configuration of what are essentially complex forms of multiple citizenship is a much more significant dynamic in the global economy than is normally recognized. Indeed, the formation of long chains of ownership identity, operating through multiple jurisdictions is the dominant form that the surplus from the exploitation of natural resources is extracted from the Global South. The key advantage lies in the corporate veil that is erected between subsidiaries, which enables a range of commercial advantages. Multiple nationality enables corporations to repatriate profits in any number of jurisdictions (Demsetz and Lehn 1985). Corporate assets and senior personnel cross borders relatively freely and may use their multiple nationalities to exploit different regulatory jurisdictions through practices such as “tax shopping” and “transfer pricing” (Bartelsman and Beetsma 2003). Holding multiple nationalities is also used to mask responsibility for causing harms or for evading the law (Bernat and Whyte 2017). The corporate veil between subsidiary corporations in tort cases involving multinationals has, with a few scattered exceptions, generally prevented communities or workers from seeking compensation (Anderson 2002). Tax liabilities are commonly diminished when corporations establish multiple identities that use secrecy jurisdictions (also known as “tax havens”) to mask the origin of their revenues. As Shaxson (2012) notes, perhaps a third of all revenue derived from the extraction of natural resources in the Global South disappears out of those countries through tax havens, with TNCs often acting as the conduit. This is only made possible through the exceptional conditions of corporate citizenship enjoyed by TNCs.

The ability to create several identities at once also provides corporations with exceptional privileges domestically, *within* jurisdictions. Many contemporary corporations have ownership structures that use multiple “personalities” as a matter of routine; the demarcation of corporate activities is now commonly organized through a range of different layers of corporate identity, or “subsidiaries” and “sister

companies" that enables companies to exist as multiple citizens inside the same jurisdiction. The principle of incorporating multiple identities is commonly used within jurisdictions in order to organize structures of ownership, chains of accountability, to ensure some corporate operations are ring-fenced from others and so on. In the domestic context, just as in international context, there are major commercial advantages to such practices. Not least of those is in maintaining secrecy surrounding beneficial ownership or providing a complex chain in which managerial responsibilities for particular operations can be easily masked.

Establishing multiple citizenship status through multiple nationalities and the use of secrecy jurisdictions is one way that corporations can and do reconfigure their sovereign obligations or duties. Another, increasingly prevalent way is the Export Production Zone (EPZ) or Special Economic Zone. The International Labour Organization (ILO) defines EPZs as "industrial zones with special incentives set up to attract foreign investors, in which imported materials undergo some degree of processing before being re-exported" (ILO 1998). Those special incentives typically include suspension of normal rates of export and import duties, tax exemption and exemption from labour and health and safety regulations. EPZs are growing in economic significance. In 1997 there were 845 employing 22 million workers. Now it is estimated that there are over 3,500, employing 66 million workers (International Labour Office Bureau for Workers' Activities 2014). It is the peculiar *constitutional* structure of the EPZ that is significant to the discussion here. Often EPZs are often run by partnerships between national government and corporations. Thus, sovereign decisions about law enforcement, and legal exemptions in EPZs are implemented by what are quasi-private authorities. This sovereign authority even extends to fundamental issues of human rights. The ILO (International Labour Office Bureau for Workers' Activities 2014) notes one illustrative example in this respect. The rules of the Nigeria Export Processing Zones Authority state that "There shall be no strikes or lock-outs for a period of 10 years following the commencement of operations in the Zone [as contained in Section 18 (5) of Nigeria Export Processing Zones Act 2012] and any trade dispute arising within a Zone shall be resolved by the Authority." Thus, sovereignty over the right to strike is ultimately in the hands of a mix of public officials and senior managers of private corporations who are represented on Nigeria Export Processing Zones Authority. A central logic of different forms of EPZ is that workers' rights, and particularly the right to collective bargaining are diminished by allowing corporations to dispense with legal provisions that had previously been guaranteed by the state (Romero 1995).

This section has schematically set out a range of exceptional rights to protection that calibrates the sovereign relationship between the corporate citizen and the state. What we are unraveling here, in its constituent elements, is an enriched form of citizenship. The enhanced diplomatic protections given to corporations, or their enhanced ability to exploit several "personalities" or "nationalities" and cross borders freely, for example, are elements of a citizenship status that are, to reiterate, not readily available to ordinary citizens.

4.3. *Rights to Participation in Politics and Government*

Ordinary citizens are guaranteed the right to participate in politics through various civil rights: their right to assembly, their right to vote, or their right to stand for election. And like individual citizens, corporations have the right to influence politics though donating to political parties and causes, but with some notable exceptions,⁵ corporations are not able to participate as individual citizens are. The sovereign relation between the state and the *corporate* citizen also differs in the sense that it has a very distinctive political character. This relationship is set out at this point in

⁵ The City of London which administers the area of London in which much of the financial sector is located has a voting system that allocates weighted votes for each business organization according to its size. In the City of London, therefore, corporations do vote.

the discussion precisely because it reveals a set of characteristics that are not comparable to the sets of permissions and political rights that enable individual citizens to participate in the affairs of state. The key difference is that corporations have always enjoyed some form of political autonomy and in some contexts possess political power rather than simply being the *subjects* of political authority.

The earliest incorporated entities generally had an explicitly political or public function. In the 14th century, for example, English boroughs and towns could be regarded as having a single “personality” in their responsibilities to the Crown (such as paying levies or fulfilling particular duties). Incorporated or chartered bodies were often established to fulfill a function of government or a narrowly specified public service such as building a bridge or operating a ferry. Before the 17th century, royal charters for this purpose recognised hospitals, universities and other municipal authorities as singular entities. In those early forms of corporation, those charters granted some measure of political autonomy in a formal legal sense. That is to say, the charter established a relationship between the recipients of the service and the authority that had broadly analogous characteristics as could be found be said to set out the basis of the state’s sovereign authority and the corporations rights and duties. In some cases, incorporation also meant that chartered entities were gifted the ability to make politically sovereign decisions: to charge fees and taxes or to allocate resources, or even to bestow a particular social status upon an individual (the allocation of particular positions as officers or officials).

The British ruling elite set up numerous joint-stock corporations on a similar model between the 16th and the 19th centuries to ship goods and trade across continents, to seize land, settle colonising forces and to plunder resources. Such companies were seen as a highly effective and efficient means of colonization because of the breadth of the range of functions they carried out administered trade, corralled both enslaved and waged labour forces and policed local populations. The colonial corporation, then, was given exceptional rights as a *political* entity, and its employees were permitted to bear and use arms on behalf of the state, to monopolise trade and production, to destroy and build infrastructure, and to torture and enslave whole peoples. None of those “rights” or “powers” were given to ordinary citizens, unless of course they were acting on behalf of states as part of a collective enterprise. In other words, such powers were not granted to individuals *in their capacity as individuals*. In this sense, the corporate person assumed the supra-human powers that were normally only available to the sovereign.

Its legacy as a *colonial* entity endures in the model of the modern day corporation. There are parts of the world in which we find multinational corporations responsible for the establishment of social infrastructure, transportation networks, telecommunications and basic amenities. This occurs particularly in remote locations in the extractive industries, or in sectors that are involved in primary production and exploitation of natural resources. The recent growth of the private military sector also reveals how corporations’ right to bear arms remains significant in colonial contexts today. Private military companies, licensed by Global North states, are able to employ armed security, and in some contexts, engage in combat situations outside their own jurisdictions (Musah and Fayemi 1999, Whyte 2003). Global North corporations in the extractive industries directly employ armed force (Ikelegbe 2005). In those contexts, we see corporations operating with the military and political authority of states (Ferguson 2005, Khoury and Whyte 2017); corporations are permitted to act as *de facto* political entities.

In the previous section, we noted how EPZs enable corporations to minimize their obligations to states and at the same time assume a high degree of sovereign authority over those spaces. EPZs are, of course, not the dominant mode of organizing production. Yet, the core principles upon which EPZs are organized reflect a much more general shift in the relationship between corporations, states and the individual. This relationship, as we saw in the previous section, re-scales the

sovereign relationship between the individual and the state, and enhances the power and autonomy of corporations. Precisely the same shift in sovereign relations is reflected in other key features of the neo-liberal economy (for example, out-sourcing and privatization). The effect of such shift is that private corporations are granted the political authority over the provision of services, as well as the authority to collect revenue to pay for those services. Privatization has altered the relationship between citizen and state in the Global North, and this process has been a central feature of what has come to be known as neo-colonialism.⁶ The ceding of political authority in the context of the Global South is not only done freely by governments, but is generally imposed by Global North countries and international financial institutions as a condition of investment and international grants and loans for economic development (Abrahamsen 2001).

Privatization is one of the defining features of neo-liberalism. Another defining feature can be found in the range of processes that have become known as “deregulation”. Thus, the stripping away of legal restrictions on business, the erosion of regulatory agencies at every level of government, and the ideological attack on social protection as a “burden on business”, have been dominant features of the political landscape in developed economies for the past three decades at least (Tombs 2016). This process has granted a number of *de facto* privileges to corporations: it has opened new avenues of value accumulation (for example as private, profit-making, regulators); and made it more difficult to criminalise corporate offences or place legal restraints on corporations. In short, neo-liberalism has given corporate citizens an unprecedented political prestige (Tombs 2016). The neo-liberal era is equally defined by brand of politics in which it is normal for corporations to be asked to shape the policies and laws that affect them most, and has made the “revolving door” of senior appointments across public and private sectors the norm (Whyte 2015b). The central role of corporations now visible in the administration of public services such as hospitals and schools, and even the administration of crime control and security is a routinized feature of neo-liberal economies (Coleman *et al.* 2005, Singh 2005). Thus, the corporate “citizen” very often finds itself with considerable political and administrative power. At the same time, the corporation is granted privileged access to, and privileged protection in, the spheres of politics, policy and law. This is the context for how we can understand Maitland’s “right-and-duty-bearing” corporation. If the corporation is a right-and-duty-bearing unit, it is a very special one; it is one that in some contexts is granted significant political authority and enjoys access to policy-making processes that ordinary citizens could never legitimately expect.

It is clear from the discussion in this section, then, that the rights that the corporation is entitled to, and the burden of responsibility it shares are not strictly comparable to those of the average citizen: those rights and responsibilities are conceived very differently and are applied in ways that ensure that the corporate citizen has access to significantly enhanced forms of rights, and is expected to bear significantly diminished responsibilities.

5. Conclusion

The paper has schematically set out the aspects of *exceptional* citizenship that empower corporations to do what they do. In doing so, it has sketched out how sovereign power relies not merely on the removal of rights or a process in which individual subjects of state power can be reduced to naked life. The paper has also argued that sovereign power also relies upon a hyper-exaggeration of the conditions of legal and political life for artificial, corporate, citizens. The point we arrive at is that those exceptional privileges and rights add up to the creation of a “supra-sovereign” subject (*homo supra*), as set out in sections 2, 3 and 4 above, and summarized in

⁶ Defined as the process of colonial domination through economic levels and instruments rather than direct political rule (Nkrumah 1967).

Figure 1 below. The argument here is that *homo supra* is a device of state power that is every bit as significant as *homo sacer*.

The advocates of CSR imagine the corporate citizen as having a balance of rights and responsibilities just as any other citizen. So, although on one hand, the process of incorporation always implies special treatment in law, the inclusion of corporate persons in the legal order – corporate citizenship – at the same time is based upon the *formal* equality between legal persons and real persons. Yet, as we have seen in our discussion of the rights and responsibilities of the corporate citizen, corporations are not like ordinary citizens at all. The law creates corporate citizenship through a shamelessly selective application of legal principle: it proposes that the corporation is a person, to be regarded in the same way as any other person in some instances (its civil and criminal liabilities), but offers exceptional protections and privileges in other instances (for example in diplomatic and military protection or the right to veto social policies). The consequence is that law uses a strictly applied ontology of the liberal individual to create a monstrous citizen.

FIGURE 1

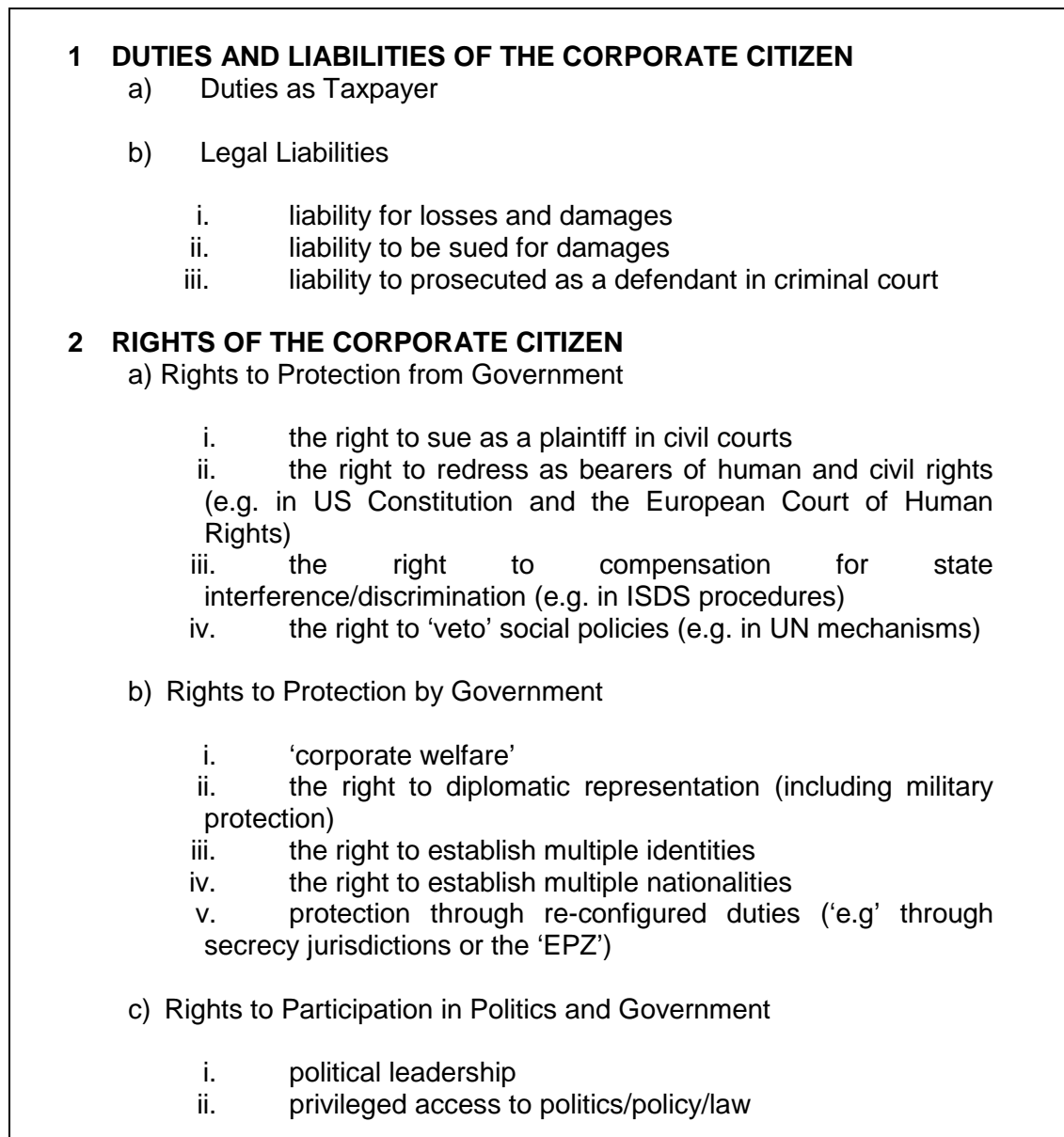


Figure 1. Typology of Corporate Citizenship

In contrast to Agamben's concept of *homo sacer* in which sovereignty and "right" are produced in the threshold one between natural, existence (*zoē*) and political life (*bios*), *homo supra* exists at a different threshold: one between un-natural, artificial existence (*un-zoē*) and political life (*bios*). At this threshold, the corporation is presented as a mutated version of citizenship, *homo supra*. The citizen status of the corporation is materialised in a constitutional space that is available to *some* citizens: a narrow elite of owners and shareholders. Because both its rights and responsibilities are held by the abstract, artificial, corporate citizen (*un-zoē*), the real owners and shareholders that stand in the shadows (i) will generally not be held responsible for the liabilities of the corporation; but (ii) will vicariously benefit from the rights held by the corporation.

Citizenship in this context is not merely a means of exaggerating existing social inequalities through a process of inclusion-exclusion, but becomes a mechanism through which unequal power relations (and attendant privileges of class, gender and race etc.) is guaranteed through a kind of hyper-inclusion. Corporate citizenship can itself be understood as a form of corporate power; a form that organizes the

resources and capacities of states on behalf of the owners and shareholders of the corporation. In the sense that corporate citizenship is aimed at enhancing the power and influence of a narrow group of (elite) citizens, the paper has shown that corporate citizenship is a means by which public resources can be organized and manipulated for private interest. Through a simple schematic representation of the rights and responsibilities of the corporate citizen this paper has provided a starting point for understanding how we might recalibrate the basis of the sovereign relationship between governments, corporations and citizens. As this paper demonstrates, such a task will require the dismantling of the edifices of legal and political power that are currently realized through corporate citizenship.

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