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# The Necessity of Stakeholder Empowerment in Embedding Human Rights Due Diligence into Business Enterprises

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## Abstract

The United Nations Guiding Principles on Business and Human Rights (UNGPs), finalized in 2011 under the leadership of John Ruggie, marked a significant step forward in the business and human rights debates. The UNGPs' human rights due diligence (HRDD) approach, in particular, has been hailed as a groundbreaking alternative in addressing human rights concerns in the context of globalized business activities, and indeed has led to significant differences in practice and academy as well.

In the meantime, however, there is considerable skepticism as to whether these noisy changes have resulted in anticipated changes on the ground, or even whether they will do in the near future. This article, without denying the fact that the

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concept of HRDD has made some, if not very impressive, difference on the ground, aims to draw attention to probable causes of the slow progress and to suggest an alternative way forward to more tangible impacts of the concept.

Among other possible causes, it points to a flaw inherent in the theory of John Ruggie, the founder of the UNGPs. His theory, commonly called "social constructivism" in the international relations discipline, is about how international norms are established in the face of the fact that there is no singular authoritative legislative body in the international community. A most prominent defect of the theory is, arguably, its over-reliance on persuasion in expanding and embedding new norms. This article observes that persuasion alone is not enough to embed HRDD practice in business corporations.

This article argues that, for the successful working of HRDD, it is essential to empower stakeholders, especially those risking adverse human rights impacts of the companies concerned, through mandatory HRDD legislation. It invokes Teubner's theory of reflexive law as a theoretical framework to support its argument. While there are several distinct understandings of the reflexive law, It argues that the essence of reflexive law theory lies in its emphasis on the role of stakeholders and their empowerment, and consequently that, in designing HRDD legislation, the empowerment of stakeholders should be taken much more seriously than Ruggie imagined.

Building on the theoretical analysis, this article explains why the so-called "human rights management of public enterprises" in Korea has not resulted in much-hoped changes on the ground and proposes policy alternatives to overcome it.

• Keywords business and human rights, UN Guiding Principles on Business and Human Rights (UNGPs), John Ruggie, constructivism, Gunther Teubner, reflexive law, stakeholder empowerment, human rights due diligence (HRDD)

# Ⅰ. Introduction

The emergence of business and human rights (BHR) discourses in the 1990s has rendered the history of BHR approximately 30 years old,[1] with a distinct division into pre- and post-enactment of the UN Guiding Principles on Business and Human Rights (UNGPs).[2] The period preceding the UNGPs was marked by exploration and contention,[3] while the period following their enactment witnessed the implementation of human rights due diligence (HRDD). The recent adoption of HRDD legislation across Europe reaffirms their global reception. According to Ruggie, the author of the UNGPs, the success of the UNGPs lies in their ability to accomplish what conventional initiatives had failed to do.[4]

Nevertheless, several significant scholars disagree with Ruggie's optimistic appraisal of the UNGPs' and HRDD's achievements. McCorquodale and Nolan, for instance, presented empirical evidence demonstrating that, while companies may support HRDD, its effectiveness in business practices is still limited.[5] Similarly, Deva questioned the efficacy of HRDD legislation in preventing and remedying business-related human rights abuses,[6] while Wettstein cautioned against viewing BHR laws as a silver bullet, given the decade of UNGP implementation that yielded only ambiguous results.[7] Quijano also warned against the risk of creating an appearance of progress with "hollow" HRDD laws that could effectively put legislative efforts to an end, at least in the

1) Amnesty International, "Human Rights Principles for Companies", January 1998, https://www.amnesty.org/en/documents/act70/001/1998/en/ (last visit: November 15, 2023).
2) UN, "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework", HR/PUB/11/04, 2011.
3) John Ruggie, *Just Business*, (New York : W. W. Norton & Company, 2013), pp. 128 ff.
4) John Gerard Ruggie, John F. Sherman, III, "The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale", *The European Journal of International Law*, Vol. 28 No. 3, 2017, p. 922.
5) Robert McCorquodale, Justine Nolan, "The Effectiveness of Human Rights Due Diligence for Preventing Business Human Rights Abuses", *Netherlands International Law Review,* 2021, 68:455–478, https://doi.org/10.1007/s40802-021-00201-x, p. 468, (last visit: November 15, 2023).
6) Surya Deva, "Business and Human Rights: Alternative Approach to Transnational Regulation", 17 Ann. Rev. L. & Soc. Sci. 139, 2021, p. 146.
7) Florian Wettstein, "Betting on the Wrong (Trojan) Horse: CSR and the Implementation of the UN Guiding Principles on Business and Human Rights", *Business and Human Rights Journal*, Vol 6. No. 2, 2021, pp. 313, 324.

foreseeable future.[8] Reports on the French experience with due diligence law have been available for years, but the outcomes have not been very impressive. Although Savourey and Brabant acknowledged the genuine efforts of a few companies in France, they reported that many approached the vigilance plan as a tick-box exercise and were wary of transparency and stakeholder engagement.[9]

While these scholars do not necessarily declare the failure of HRDD nor prove it, they erode people's confidence in the idea of HRDD and its legislation. Against this backdrop, this paper examines what causes doubts about mHRDD and how to address them. One way to answer this question is to look at the experiences of HRDD legislation. While Western BHR literature recognizes France as the only country with experience in comprehensive HRDD law, this is not necessarily true.[10] The Korean government has been implementing a comprehensive mHRDD policy since 2018. Although the Korean mHRDD policy targets 'public' enterprises through a regulatory approach rather than legislative statute, it is indeed a large-scale, comprehensive mHRDD policy. This paper aims to draw theoretical and practical implications of Korea's mHRDD policy for the global mHRDD discussion.

Chapter 2, based on Teubner's reflexive law theory, proposes a theoretical framework for analyzing mHRDD policy in Korea. Chapter 3 outlines the general setting of the mHRDD policy in Korea and how it has unfolded. Chapter 4 evaluates the policy from a reflexive law perspective and proposes practical recommendations to overcome its defects. Finally, Chapter 5 presents the implications of the findings for the global mHRDD discussion.

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8) Gabriela Quijano, Carlos Lopez, "Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword?", *Business and Human Rights Journal*, Vol. 6. No. 2, 2021, p. 254.

9) Elas Savourey, Stephane Brabant, "The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption", *Business and Human Rights Journal*, Vol. 6, No. 1, 2021, p. 147.

10) I have already argued for the usefulness of a reflexive law approach to BHR at the preliminary level in relation to Korea's public enterprises HRD policy. This article is a follow-up work to that. Therefore, the overlapping parts with the previous article are briefly mentioned. Sang Soo Lee, "Reflexive Law Approach to Business and Human Rights: Cases in France and Korea", *Sogang Journal of Law and Business*, Vol. 19, No. 2, 2019. 12. It is translated into Chinese Journal of Human Rights (李相洙, 李勇(译), 工商业与人权的反身法路径 一基于法韩两国案例的分析, 『人權硏究』, 总第8期, 2022).

## II. Analytical Framework for Mandatory Human Rights Due Diligence

### 1. Emergence of Human Rights Due Diligence

The discussion surrounding BHR attempts to address one of the most complex and persistent challenges of our time, namely the human rights violations committed by transnational corporations (TNCs) in developing countries during the era of globalization. Ruggie has pinpointed the governance gap engendered by globalization as the root cause of BHR predicaments, which refers to the gap between the scope and impact of economic forces and actors and the capacity of societies to manage their adverse consequences.[11] The UNGPs represent an effort to fill this governance gap.

The UNGPs established the principles of corporate human rights responsibility and, among other things, required companies to conduct HRDD as part of their human rights responsibilities. HRDD is a process for business enterprises to prevent all human rights risks linked to their global business activities in the most context-specific way. The ambition of HRDD is so audacious that no alternative measures appear to match it. The question, however, remains whether companies will conduct HRDD as mandated by the UNGPs. If companies refuse to implement HRDD, how can we enforce their compliance? Above all, what answer will Ruggie, as the author of the UNGPs, give to this question? Surprisingly, he believed that we could have companies implement HRDD without coercive state legislation. His academic background provides a clue to his belief.

11) United Nations Human Rights Council, "Protect, Respect and Remedy: a Framework for Business and Human Rights", A/HRC/8/5 7 April 2008, para. 3.

## 2. Implementation of Human Rights Due Diligence

### (1) Ruggie's Approach: Social Constructivism

Ruggie's academic background is in international relations, a domain conventionally construed as governed by the law of the jungle, wherein countries outrightly pursue material interests rather than ideas or norms. This perspective holds sway over mainstream international relations theories, such as realism, utilitarianism, and rationalism. Contrary to these theories, Ruggie posited that comprehending international relations necessitates understanding the role of ideas in addition to stark power dynamics. He referred to this approach as "social constructivism." Given the diversity of social constructivism, it is necessary to clarify Ruggie's understanding of it.

In an article,[12] Ruggie elucidated social constructivism as he conceived it. According to him, social constructivism is about human consciousness and its role in international relations.[13] He summarized the features of social constructivism as follows: (1) Mainstream theories, such as neorealism and neoliberal institutionalism, treat the actor's interests and identity as exogenous and given, but in constructivism, it is endogenous and selectable. It means that each actor can define their interests and identity differently under the same given situation. (2) Ideas may not be causes for actions, but they are reasons for them. It means that actors in the same given situation can behave differently depending on their ideas. (3) Social constructivism deals with intersubjective beliefs or collective intentionality when dealing with ideas. In other words, social constructivism deals with the consciousness of collective entities. Ruggie cited human rights as the most remarkable example of creating rights through collective intentionality. (4) While realists and neoliberal institutionalists refer to regulative rules, social constructivism adds the concept of constitutive rules. Constitutive rules are the rules that define social order itself. For example, While rules punishing actors who violate market rules are regulative, rules that define a market system are constitutive,

12) John Gerard Ruggie, "What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge", *International Organization*, Autumn, 1998, Vol. 52, No. 4, pp. 855-885.
13) ibid. p. 857.

meaning that (constitutive) rules preexist market. (5) Social constructivism believes in changing social systems by changing ideas.

Then, how can individuals transform collective ideas or social norms? This question has been addressed by Finnemore and Sikkink,[14] who are also social constructivists. After admitting the contributions of constructivists such as Ruggie in reviving norms in the international relations discipline in the 1990s, they described the dynamics of norms. According to them, norms exist by agreement among members of society. They may be global or local in their coverage. Norms are continuous and relative rather than dichotomous. So there exist, by definition, no bad norms. The primary function of norms is to stabilize social order by channeling norms, regularizing behaviors, limiting choice ranges, and constraining actions.[15] Finnemore and Sikkink's contribution lies in explaining the dynamics of norms based on the concept of such norms. They argued that norms evolve in a patterned life cycle, which leads to system transformation.

The norm life cycle proceeds in three stages: emergence, cascades, and internalization. In the emergence stage, norm entrepreneurs, who introduce new norms, persuade members of society to adopt a proposed behavior as a norm. Although their efforts do not always succeed, once persuasion reaches a tipping point or critical mass, the first stage advances to the next. The norm cascades stage is characterized by norm leaders, other than norm entrepreneurs, who disseminate the proposed norm. In the norm internalization stage, the norm is so widely accepted and internalized that conforming to it becomes automatic. By using this schematic, individuals seeking to transform international relations can envision changing social relations through "strategic social construction," which refers to a strategy of intentionally reconstructing constitutive rules to alter social systems. In his book, Ruggie wrote that transnational corporations were internalizing the responsibility to respect human rights, following the norm life cycle model.[16]

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14) Martha Finnemore and Kathryn Sikkik, "International Norm Dynamics and Political Change", *International Organization,* Vol. 52, No. 4, Autumn 1998.

15) ibid. p. 894.

16) Ruggie, op. cit. (2013), p. 168.

By examining Ruggie's theoretical background, we can now comprehend how he could propose such groundbreaking ideas as the UNGPs and HRDD. In retrospect, Ruggie was a norm entrepreneur in the field of BHR. Rather than inheriting existing norms, he created new ones that would compete with and ultimately replace them. In constructivist terms, he proposed constitutive norms, not regulative ones. He intentionally proposed new BHR norms to establish a system in which companies proactively address human rights risks. His attempt was a "strategic social construction."

Ruggie was an ardent norm entrepreneur, pushing the first stage forward to the second and third stages through persuasion.[17] When persuasion reached a tipping point, others took up the role of persuasion, moving on to the next stage of norm internalization. In his book, Ruggie proposed a six-step strategy for norm internalization among companies, which includes creating a minimum common knowledge base, ensuring the legitimacy of the mandate process, bringing new players, road testing core proposals, having an end-game strategy, and working toward convergence among standard-setting bodies.[18] Among the six steps, the omission of law or state intervention is noteworthy in Ruggie's approach. The sixth step's reference to "standard-setting bodies" is limited to organizations such as OECD, ILO, and ISO, while the role of states is absent. For Ruggie, human rights norms derive from sources other than the law, and legislation is not a prerequisite for their realization.[19] Ruggie always prioritized the internalization of human rights by persuading key stakeholders, including governments, corporations, and other actors, to embrace corporate responsibility to respect human rights and implement HRDD. He did not rely on state's coercive power or legal mechanisms to enforce HRDD among corporations, both in theory and practice.

Ruggie's efforts indeed yielded significant success. He ardently advocated for his

17) In social constructivism, persuasion is the way people spread ideas. Finnemore & Sikkink, op. cit., p. 914.

18) Ruggie, op. cit. (2013), p. 129.

19) This thinking came from Sen (Ruggie, op. cit. (2013), p. xxxv. Amartya Sen, "Elements of a Theory of Human Rights", *Philosophy and Public Affairs*, 32(4), Fall 2004, p. 320.

UNGPs at the UN Human Rights Council, which garnered unanimous endorsement. Furthermore, UNGPs received overwhelming support from a range of sectors, including OECD, ILO, EU, ASEAN, World Bank (IFC), business organizations, academia, and international NGOs. Satisfied with these uptakes, Ruggie wrote that the third stage of the norm life cycle began in 2014.[20] Ruggie attributed this success to the persuasive power of norms, rather than state intervention or legislation. Indeed, since the establishment of UNGPs, few have questioned why corporations should respect human rights. Deva noted that UNGPs effectively removed the "why" question from the BHR discourse.[21] Ruggie viewed the emergence of various HRDD laws in Western countries as a testament to the applicability of his ideas.

Even at this stage, Ruggie did not advocate for HRDD legislation to promote further growth. Instead, he accepted the existence of HRDD laws as a status quo, noting that stakeholder governance is emerging without legal reform.[22] Ruggie consistently adhered to social constructivist principles before and after the UNGPs' enactment, as evidenced by his instrumental role in establishing the UN Global Compact, which emphasizes persuasion in its implementation. Ruggie opined that the UNGPs' project was on its way to success as envisioned by social constructivist theory.

However, as we have seen in the first chapter of this paper, not all prominent scholars in the business and human rights (BHR) field agree with Ruggie's idealistic approach or his optimistic assessment of the progress made by the United Nations Guiding Principles on Business and Human Rights (UNGP). Rather, they are arguing for strong intervention from states or the law to realize the vision of HRDD. However, nuances exist among scholars in terms of the actions that the law ought to undertake to augment the effectiveness of HRDD. While some emphasize the significance of reporting and transparency, others emphasize stakeholder participation. Chambers and

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20) Ruggie, op. cit (2013). p. 169.

21) Deva, op. cit. (2021), p. 142.

22) John Ruggie, "European Commission Initiative on Mandatory Human Rights Due Diligence and Director's Duties", 2021. 2. https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/EU%20mHRDD.pdf (last visit: November 15, 2023).

Vastardis have highlighted the need for regulatory oversight and transparency as a means of ensuring the efficacy of HRDD.[23] Buhman has advocated for a strategic learning approach to reporting that can bolster the effectiveness of HRDD.[24] McCorquodale and Nolan have asserted that a critical aspect of evaluating HRDD's effectiveness is whether it establishes novel mechanisms that enable rights holders to meaningfully challenge corporate practices.[25] Landau, utilizing Parker's meta-regulation theory, has contended that the exclusion of external parties' rights to participate in corporate HRDD procedures is problematic.[26] Quijano has argued that HRDD law should mandate companies to adopt a participatory mode as a genuinely preventive measure.[27] Those who underscore transparency generally rely on market forces, while those emphasizing stakeholder participation highlight stakeholders' involvement in due diligence procedures. This article aligns with the latter and places stakeholder 'direct' participation at the forefront, drawing on reflexive law theory to strengthen its arguments.

### (2) Reflexive Law Approach to mHRDD

The Reflexive Law Theory, developed by German sociologist Gunther Teubner, posits that modern law evolves through three stages: formal law, substantive law, and reflexive law.[28] Formal law, as characterized by Max Weber, is found in the typical capitalist society. Substantive law, on the other hand, is the law of the welfare state, achieving social justice through direct legal intervention. However, as society becomes

23) Rachel Chambers, Anil Yilmaz Vastardis, "Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability", *Chicago Journal of International Law*, Vol. 21, No. 2, 2021, p. 355.

24) Karin Buhmann, "Neglecting the Proactive Aspect of Human Rights Due Diligence? A Critical Appraisal of the EU's Non-Financial Reporting Directive as a Pillar One Avenue for Promoting Pillar Two Action", *Business and Human Rights Journal*, Vol. 3, No. 1, 2018, p. 38.

25) McCorquodale & Nolan, op. cit., p. 471.

26) Ingrid Landau, "Human Rights Due Diligence and the Risk of Cosmetic Compliance", 20 Melb. J. Int'l L. 211, July 2019, p. 243.

27) Quijano & Lopez, op. cit., p. 254.

28) Gunther Teubner, "Substantive and Reflexive Elements in Modern Law", *Law and Society Review*, Vol. 17, No. 2, 1983.

more differentiated, the limitations of substantive law become increasingly apparent, prompting the emergence of reflexive law. Reflexive law provides procedures for subsystems to autonomously pursue substantive justice without direct intervention from the state. The focus is on the process rather than the outcome, assuming that following the prescribed procedures will lead to just outcomes.

Teubner illustrated the workings of reflexive law through examples such as collective bargaining, wherein the law provides a framework for the negotiation process, and the specific outcomes are left to the discretion of the parties involved. He wrote,

> The legal regulation of collective bargaining operates principally by shaping the organization of collective bargaining, defining procedural norms, and limiting or expanding the competencies of the collective actors. Law attempts to balance bargaining power, but this only indirectly controls specific results.[29] (emphasis added)

Here, the law restricts its role to regulating procedures to ensure equitable outcomes due to the impracticality of regulating individual workplaces in light of their specific circumstances. Then, Teubner cited dispute resolution within consumer protection law as another instance of the law's function. Consumer protection law, in this case, does not define the interests of consumers; rather, it facilitates organizations that allow consumers to have a say. The task of the legal system, therefore, is to ensure a coordination process and compel agreements. In both instances, the law only regulates the procedures for autonomous interaction, without determining whether the outcomes derived from these interactions are substantively just. Therefore, the role of reflexive law is to guarantee that subsystems autonomously reach equitable agreements. Interestingly, these examples pertain to companies and their attempts to balance the bargaining power between workers (or consumers) and companies through direct engagement. This is how Teubner identified the emergence of procedural regulation, reflexive law, in the late 20th century, explaining its purpose and function based on Niklas Luhuman's system theory and Jurgen Harbermas' procedural justice theory.

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29) ibid., p. 276.

The reflexive law theory is not just a descriptive model for new legal phenomena; it also has normative implications because it outlines the conditions under which procedural regulations can be justified. According to the theory, procedural regulation is justified when the law promotes rational interaction within the subsystem. Several scholars have applied the normative implications of reflexive law theory as a criterion to evaluate existing procedural regulations and propose reform policies, notably in the area of environmental law. For example, Hirsch endeavored to comprehend regulations on green business and proposed policy options based on reflexive law. He posited that reflexive law's emphasis on pushing firms to self-regulate enables it to promote aspects of green business that other forms of regulation may not address successfull y.[30] Orts expounded his view that self-reflection and social communication lie at the heart of reflexive law, scrutinized existing environmental regulations in Europe and the US, and suggested reflexive legal alternatives for environmental regulations in the U S.[31] The application of reflexive law is not limited to environmental law. For instance, Hess argued that social reports should be mandatory under a reflexive law approach.[32] Similarly, Wen attempted to scrutinize the UK Modern Slavery Act from a reflexive law perspective.[33] These studies suggest that a reflexive law approach may be useful in analyzing mHRDD policy because it is a form of procedural regulation which pursues social values.

While the scholars discussed here all employ the term "reflexive law," it is uncertain whether they share the same concept as Teubner's reflexive law. For instance, while Hess emphasizes the need for external disclosure of information,[34] Orts highlights the importance of internal decision-making processes,[35] and Gaines underscores the significance of communication between organizations and society.[36] Additionally, even

30) Dennis D. Hirsh, "Green Business and the Importance of Reflexive Law: What Michael Porter didn't Say", 62 Admin. L. Rev. 1063, Fall 2010, p. 1125.
31) Eric W. Orts, "Reflexive Environmental Law", 89 Nw. W. L. Rev. 1227. Summer 1995, p. 1268.
32) David Hess, "Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness", 25 J. Corp. L. 41, Fall 1999, p. 62.
33) Shuangge Wen, "The Cogs and Wheels of Reflexive Law -- Business Disclosure under Modern Slavery Law", *Journal of Law and Society*, Vol. 42, No. 3, September 2016.
34) Hess, op. cit., p. 63.
35) Orts, op. cit., pp. 1311-1312.

Teubner's understanding of reflexive law evolved over time.[37] As such, it is imperative to establish a clear definition of reflexive law that aligns with this paper before furthering the discussion. In other words, it is necessary to clarify which aspects of reflexive law this paper captures.

To define reflexive law within this paper, we turn to Teubner, who proposed reflexive law as a means of "structuring bargaining relations to equalize bargaining power"[38] for autonomous regulation of subsystems. This view suggests a tension between the interests of members within the subsystem. Looking at HRDD from this point of view, we can see a tension or contradiction in the idea of UNGPs' HRDD. The human rights risks that HRDD intends to address are not risks to companies but to stakeholders. The two risks may overlap to some extent, but they do not necessarily match each other, meaning that companies must implement HRDD even when it is against their interests. How is this contradiction resolved within the HRDD procedure?

Ruggie did not seem to acknowledge this contradiction, as he constantly endeavored to persuade companies that addressing human rights risks to stakeholders would be in their interests. Moreover, assuming that stakeholders have an interest in preventing human rights violations against them, he might have considered them persuadable to participate in the consultation process. Ruggie was not the sole advocate of the view that the interests of companies and stakeholders were not contradictory. For instance, in his response to concerns that HRDD might amplify corporate human rights risk, Sherman cautioned that not implementing HRDD would be too dangerous for companies.[39] Furthermore, even if there were some conflicts of interest, Ruggie might

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36) Sanford E. Gaines, "Reflexive Law as a Legal Paradigm for Sustainable Development", 10 Buff. Envtl. L.J. 1, Fall 2002-Spring 2003, p. 9.

37) Gains pointed out that Teubner's understanding of the Reflexive Law has changed, and said that it should return to understanding the reflexive law in 1983 rather than understanding the reflexive law in 1993. ibid.

38) Teubner, op. cit., p. 256.

39) John Sherman & Amy Lehr, "Human Rights Due Diligence: Is it Too Risky?", Corporate Social Responsibility Initiative Working Paper, No. 55. Cambridge, MA: John F. Kennedy School of government, Harvard University, 2010, pp. 5, 22; Lise Smit, Claire Bright, Irene Pietropaoli, Julianne Hughes-Jennet and Peter Hood, "Business Views on Mandatory Human Rights Due Diligence Regulation: A Comparative Analysis of Two Recent Studies", *Business and Human Rights Journal*, Vol. 5, No. 2. 2020, pp. 265-267.

have believed that the force of norms could override them.[40] He denied, or at least downplayed, the contradiction between companies and their stakeholders. It is only by adopting this perspective that we can comprehend why Ruggie did not seek legal assistance.

At this juncture, the reflexive law approach and Ruggie's approach diverge. Taking a reflexive law approach requires recognizing that HRDD includes a zero-sum game component. It is true that capturing this point does not necessitate a reflexive law perspective. Without referring to reflexive law, Fasterling convincingly argues that the UNGPs' HRDD requirement is scarcely compatible with managing social risks,[41] meaning that the different risks to companies and stakeholders engender a contradiction. The reflexive law approach to HRDD is not just about acknowledging this contradiction and advocating for legal intervention. Rather, its distinctiveness resides in how it resolves this contradiction.

From a reflexive law perspective, mandatory HRDD is a mechanism that compels (or at least encourages) companies to reach an agreement with them in addressing address human rights risks to stakeholders, by equalizing bargaining power between the two parties. Reflexive law, in human rights terms, empowers stakeholders, particularly potential human rights victims, vis-à-vis companies in the HRDD process. Stakeholder empowerment in HRDD entails, at least, two critical elements. Firstly, stakeholders must be able to input their human rights concerns during the process of identifying human rights risks. Secondly, they must be able to inform the company's plans to address identified risks and their implementation including tracking the outcomes. Without the first element, human rights risks to stakeholders, not to companies, will never be identified in the HRDD process. Without the second element, companies can not produce context-specific prevention plans acceptable to stakeholders and effectively implement them. Thus, these constitute the core elements of reflexive mandatory HRDD and serve as benchmarks for evaluating mandatory HRDD from a reflexive law

40) Ruggie, op. cit. (2017), p. 926.

41) Björn Fasterling, "Human Rights Due Diligence as Risk Management: Social Risk Versus Human Rights Risk", *Business and Human Rights Journal*, Vol. 2. No. 2, 2017, p. 245.

perspective.

Taking a reflexive law approach does not suggest that companies never address human rights risks to stakeholders in good faith. Instead, the reflexive law approach is necessary because many companies do not address the risks to stakeholders. Furthermore, it does not imply that the reflexive law approach to HRDD is superior to other approaches in all respects. Ruggie's persuasion-based approach may result in more substantial changes in the long run. Making a moral appeal to companies could be better for enhancing the effectiveness of HRDD.[42] Additionally, formal or substantive law approaches may improve human rights more than reflexive law approach. Alternatively, a combination of different approaches may be the best option. This paper does not address these points. Nonetheless, the reflexive law approach has unique advantages, especially where formal or substantive approaches are ineffective. Furthermore, the reflexive law approach is a form of rights-based or victim-oriented approach, which is highly valued by the human rights community.[43] If the business and human rights (BHR) approach is rights-based and requires state (law) intervention, the reflexive law approach is a genuine BHR approach. Conversely, if the corporate social responsibility (CSR) approach involves the implementation of social norms based on unilateral initiatives of companies, then the Ruggie approach is close to a CSR approach.[44]

In the following section, we will assess the HRDD laws in Europe from a reflexive law perspective to demonstrate and enrich the utility of this perspective before applying it to the Korean mandatory HRDD policy.

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42) Björn Fasterling, Geert Demuijnck, "Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights", *Journal of Business Ethics*, Vo. 115, No. 4, 2013, p. 812.

43) Deva, op. cit. (2021) (Rightsholders must be able to demand and enforce their rights in case of violations, rather than being at the mercy of cooperation by businesses).

44) Florian Wettstein, "CSR and the Debate on Business and Human Rights: Bridging the Great Gap", *Business and Ethics Quarterly*, Vol. 22, No. 4, October 2012, pp. 749-750; Anita Ramasastry, "Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability", *Journal of Human Rights*, 14:237–259, 2015, pp. 240, 246; Sang Soo Lee, "Corporate Social Responsibility vs 'Business and Human Rights' Approach with some Experiences in Korea", Li-Jiuan Chen-Rabich (ed), *The Trend of Corporate Social Responsibility in the EU*, Tamkang University Press, 2018.

## 3. Assessment of HRDD Legislation in Europe from the Reflexive Law Perspective

To date, several laws have mandated HRDD as a legal requirement. Such laws vary in scope, with some requiring HRDD to address specific human rights concerns, while others demand for comprehensive HRDD to address all kinds of human rights risks. Among the former are the U.S. Dodd-Frank Act,[45] the Dutch Child Labor Due Diligence Act,[46] and the British and Australian Modern Slavery Acts.[47] The latter category includes the French Duty of Vigilance Act,[48] the German Supply Chain Due Diligence Act,[49] and the Norwegian Transparency Act.[50] This paper focuses on the latter three laws and assesses them from the reflexive law perspective, with focus on stakeholder empowerment

One may raise the question of whether the due diligence referred to in due diligence laws is equivalent to the HRDD concept of the UNGP. This is because there are indeed notable distinctions between the two. For instance, the UNGPs' HRDD necessitates all companies to identify and address negative impacts on all human rights throughout the entire supply chain, while due diligence laws usually limit the scope of the duty company and the coverage of the supply chain. Nevertheless, the three due diligence laws mentioned above share the fundamental aspects of UNGPs' HRDD, which involves identifying adverse human rights risks of duty companies and their suppliers, implementing preventive measures, and communicating. They also share an essential element of reflexive law in that they leverage the empowerment of

45) Dodd-Frank Wall Street Reform and Consumer Protection Act, PL 111-203, July 21,2010, 124 Stat 1376.

46) Act of 24 October 2019 introducing a duty of care to prevent the supply of goods and services produced with the help of child labor (Child Labor Duty of Care Act), October 24, 2019.

47) Modern Slavery Act 2015 (2015 CHAPTER 30) and Modern Slavery Act 2018 (No. 153, 2018) respectively.

48) LAW n ° 2017-399 of March 27th, 2017 on the duty of vigilance for parent and instructing companies.

49) Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten, Vom 16. Juli 2021

50) Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions (Transparency Act), passed on June 10, 2021.

stakeholders in one way or another. However, there are significant differences in the degree and methods of stakeholder empowerment.

First, each due diligence law differs significantly in the scope of protected stakeholders. This is mainly because the scope of duty companies in each law is distinct. The threshold for a duty company is the highest in the French Act and the lowest in Norwegian law. Additionally, the difference in the scope of due diligence of duty companies concerning supply chains significantly affected the scope of protected stakeholders. In the case of French law, the scope of protected stakeholders is most limited because the supply chain subject to due diligence is limited to suppliers in established commercial relationships. German law restricts the scope of due diligence to direct supply chains but extends protected stakeholders by allowing stakeholders affected by indirect supply chains to file complaints with duty companies. Norwegian law includes the entire upstream supply chain as the subject of due diligence. Moreover, because the right to information is guaranteed to "anyone," the stakeholders of the downstream supply chain are also protected by the law to some extent. Overall, in terms of the scope of stakeholders, Norwegian law best empowers stakeholders, followed by German and French laws. However, it should be noted that stakeholders may encounter difficulties in identifying duty companies, and the failure of due diligence does not result in civil liability.

Secondly, it is worth noting that while all three due diligence laws aim to protect stakeholders, they may not necessarily be aware of their rights under the laws. The identification of duty companies subject to the laws is often a challenging task, and identifying the companies within their supply chain can be even more complex. The lack of knowledge on the part of stakeholders regarding their protection under the due diligence laws or the inability to identify the duty company to file complaints can significantly constrain stakeholder empowerment. This is a common limitation in all three due diligence laws.

Thirdly, the three due diligence laws differ significantly in terms of their provisions for stakeholder participation in the due diligence procedures. While all three laws stipulate the obligation to communicate with stakeholders in due diligence processes,

the mechanisms through which stakeholders can pressure duty companies to consult with them vary. To enable stakeholder empowerment, stakeholders should be able to communicate with or participate in due diligence procedures and have recourse when their requests are ignored. Under French law, stakeholders can directly request the duty company to comply with the due diligence law, and if their request is ignored, they can appeal to the court. In the case of German and Norwegian laws, stakeholders can report non-compliance to the authority after requesting the duty company to comply with the due diligence law. Additionally, Norwegian law offers greater direct engagement of stakeholders by guaranteeing their right to information.

In conclusion, this analysis demonstrates how the reflexive law perspective can be applied to differentiate due diligence laws and reveal their potential merits and shortcomings. The empirical research can examine how the differences between these laws will lead to variations in their outcomes. Finally, it is pertinent to consider the extent to which Korea's mHRDD policy conforms to the elements of reflexive law concerning the policy's content and outcomes.

## Ⅲ. Unfolding Mandatory Human Right Due Diligence Policy for Public Enterprises in Korea

### 1. Business and Human Rights Trends in Korea

Korea has achieved the impressive feat of attaining economic growth and democracy within a short period, becoming one of the few nations to do so.[51] In 1996, Korea became a member of the OECD and pursued an export-led economy, with a rapid increase in foreign investment. However, this globalization has also led to a rise in overseas human rights violations by Korean companies. Korean NGOs began addressing this issue in the early 2000s,[52] with a growing number of NGOs joining the BHR

51) Yong-Shik Lee, "General Theory of Law and Development", *Cornell International Law Journal*, Vol. 50, No. 3, 2017.

movement. These NGOs have played a crucial role in shaming human rights violations by Korean companies, advocating for NCP reform, and initiating public interest lawsuits against human rights violators. In 2007, the UN Global Compact Network Korea was established.[53]

The Korean government has demonstrated its interest in BHR, establishing the National Contact Point (NCP) under the OECD Guidelines for Multinational Enterprises in 2000.[54] However, it was not until the UN published the Framework on Business and Human Rights that an active BHR policy began to take shape. The National Human Rights Commission of Korea (NHRC) translated and promoted the Framework and UNGPs, developed guidelines on BHR, and conducted research on the topic. In 2017, the NHRC's chairperson attended the UN Forum on BHR. The NHRC made recommendations for NCP reform and the NAP on BHR. To facilitate these activities, the NHRC hired a dedicated BHR expert in the Social Rights Division. The Ministry of Justice, responsible for enforcing the government's human rights policies, has also been actively engaged in BHR efforts. In 2018, the Ministry inserted an independent chapter on BHR into the 3rd National Action Plan for Human Rights Policy, based on NHRC's recommendations. The Ministry also published Guidelines on Business and Human Rights for private companies in 2022 and drafted the Framework Act on Human Rights Policy, which builds upon UNGPs' frameworks and terms such as the state's duty to protect and corporate responsibility to respect human rights.[55] In addition, the Korea Legislation Research Institute, a government-funded research center, has published reports on due diligence laws in Europe.[56]

While civil society efforts have played a significant role in advancing the BHR movement in Korea, international trends, particularly the UN initiative, have been

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52) The Korean House for International Solidarity, a leading organization dealing with corporate and human rights issues, was launched in 1999. http://www.khis.or.kr/page/about_eng.asp (last visit: November 15, 2023).

53) http://unglobalcompact.kr/ (last visit: November 15, 2023).

54) http://www.ncp.or.kr/jsp/kcab_ncp/index.jsp (last visit: November 15, 2023).

55) The Framework Act on Human Rights Policy passed the Cabinet meeting on December 28, 2021, but has not yet completed the National Assembly process.

56) Korea Legislation Research Institute, *Basic Study on E.S.G. to Create Social Value (II) - A Study on Introducing Human Rights Due Diligence for Realizing Corporate Social Value*, 2021. 10. 15.

instrumental in pushing the government to adopt BHR policy. Although the Korean government has not been at the forefront of international discussions on BHR, it has embraced the global trend in BHR. Furthermore, the Korean government has implemented a unique mHRDD policy for public enterprises, which has not received significant attention from Western researchers. This policy is noteworthy as it represents a large-scale implementation of mHRDD. The following section provides a detailed description and assessment of the policy.

## 2. Policy: mHRDD of Public Enterprises

In 2018, after years of promoting Business and Human Rights (BHR), the National Human Rights Commission of Korea (NHRC) published the Manual for Human Rights Management of Public Enterprises (the Manual), recommending that all 988 public enterprises controlled by the central government perform HRDD as detailed in the Manual.[57] The recommendation cited the United Nations Guiding Principles on Business and Human Rights, which state that state-owned and controlled companies and institutions should respect human rights and that public enterprises must protect and respect human rights to a higher degree than private companies, as their human rights violations can lead to state liabilities. The Manual outlines four steps: HRDD operating system, human rights impact assessment, implementation and reporting of HRDD, and grievance mechanism, and emphasizes the importance of stakeholder participation at each step.

In the same year, NHRC sent recommendations to 30 public organizations, including the Ministry of Economy and Finance (MEF) and the Ministry of Interior and Safety (MIS), asking them to consider HRDD performance in the annual evaluation of each public enterprise's management performance. MEF accepted the recommendation in 2018, and MIS and local governments followed the next year, resulting in all 1,500

57) National Human Rights Commission of Korea, "Decision on the Recommendation of Application of Human Rights Management Manual for the Implementation of Public Enterprises Human Rights Management", 2018. 8. 9.

public enterprises in Korea being subject to revised management evaluations.

Although the share of HRDD performance in the total score of public enterprises' management evaluations was only 1 or 2%, managers and employees could not downplay it as their incentive bonus depended on the management evaluation score. Moreover, public enterprises viewed the revision in the evaluation criteria as a state order to conduct HRDD, making it unimaginable for them to ignore NHRC's recommendation and the change in evaluation criteria. Consequently, the mHRDD policy for public enterprises was introduced in Korea.

To support the mHRDD policy, NHRC provided training for public enterprise staff on human rights impact assessment, dispatched lecturers for internal human rights education, and replied to questions from public enterprises. Additionally, commercial consulting firms expanded their services to include human rights impact assessment for public enterprises.

## 3. Performance: mHRDD of Public Enterprises

### (1) Achievement of the mHRDD Policy

The Korean mHRDD policy's outcomes are challenging to evaluate, but there are materials that provide some insight. Firstly, before the Manual's release, NHRC conducted pilot tests in four prominent public enterprises, namely the National Pension Service, Korea Gas Corporation, Jeonnam Development Corporation, and Busan Port Authority. The result of these pilot tests, available in the Manual's appendix, illustrates how major public enterprises perceived and implemented HRDD. Secondly, although the Manual recommends that enterprises disclose their HRDD reports, including plans and results, only a few have done so. However, by examining a few reports released by some enterprises, one can glimpse into their HRDD practices. Thirdly, the MEF and other evaluation authorities published evaluation result reports that offer insights into the actual practices of HRDD. Fourthly, NHRC conducted surveys of public enterprises on HRDD to gauge their HRDD performance. The outcomes of these surveys were

published. Fifthly, one can gauge the actual HRDD procedures by analyzing how human rights issues that came to light through the media were addressed during the HRDD process. Lastly, as an advisor to some public enterprises, this researcher has first-hand experience with HRDD in public enterprises. Collectively, these data provide a comprehensive view of how HRDD operated in public enterprises in Korea and its impact on human rights situations.

Regarding the achievements of the HRDD policy, firstly, almost all public enterprises have made commitments to human rights policies. These commitments are typically contained in one or two-page "policy declarations" and are publicly available. Some public enterprises even held public ceremonies in front of their employees or media reporters to make these declarations and posted them on their websites, citing various international human rights instruments.

Secondly, almost all public enterprises have established systems for operating HRDD. Many large public enterprises have developed internal codes and have dedicated departments and personnel for this purpose. For instance, the Korea Gas Corporation (KOGAS) created codes for the Human Rights Management Committee and the grievance process. The Committee, comprising the CEO, an auditor, one board member, and three experts or NGO representatives, serves as an advisor for significant HRDD decisions. Moreover, another independent committee is solely responsible for the grievance process.

Thirdly, almost all public enterprises have conducted human rights impact assessments. The common approach involves using a checklist that is customized for each organization, based upon the NHRC's sample checklist. For example, KOGAS has a checklist with 100 items, which is distributed to all internal departments to identify any human rights risks that exist. Several public enterprises have commissioned consulting firms to assess human rights impacts arising from their activities. Based on the impact assessment results, the staff in charge draft a prevention plan, which is then reviewed by the Human Rights Management Committee before being implemented after the CEO's final decision.

Finally, all public enterprises have prepared annual HRDD performance reports and

submitted them to evaluation authorities.

### (2) Limitation of mHRDD Policy

The effectiveness of public enterprises' HRDD policy in addressing human rights risks to stakeholders remains minimal, despite years of HRDD implementation.

Firstly, most HRDD reports were not publicly disclosed. They were submitted only to the evaluation authorities, not to the stakeholders.

Secondly, the human rights impact assessments conducted by public enterprises were superficial. In most cases, they are no more than tick-box exercises. Such assessments rarely involve surveys of supply chains or potential victims, and consulting firms' assessments exhibit no significant deviation from this trend. Consequently, these assessments do not adequately identify salient human rights risks.

Thirdly, there was a noticeable paucity of engagement from stakeholders, including labor unions and NGOs, with grievance mechanisms provided by public enterprises. This lack of engagement seemingly results from either a lack of awareness or distrust among stakeholders regarding the HRDD of public enterprises.

Fourthly, some major public enterprises simply refused to address human rights issues through the HRDD process. For instance, the National Pension Service (NPS) has never implemented a policy to screen out human rights violators (investees) even after they installed the HRDD system.[58] Even after numerous deaths occurred due to the collapse of dams in Laos, the Korea Western Power failed to activate the HRDD or grievance process although it was one of the major investors in the dam project with 25% of the total share.

### (3) New Recommendation of NHRC on mHRDD Policy

In 2022, the National Human Rights Commission (NHRC) conducted an assessment

58) Sang Soo Lee, "Critical Appraisal of 'Socially Responsible Investment' Policy of National Pension Service- Convergence of 'Socially Responsible Investment'(SRI) and 'Business and Human Rights'(BHR)", *Sogang journal of Law and Business*, Vol. 9, No. 2, 2019.

of public enterprises' implementation of HRDD policies and found that, although most had installed HRDD operating systems and conducted human rights impact assessments, the effectiveness of their HRDD efforts was lacking. To address this issue, the NHRC developed new recommendations that included two guidelines: the "HRDD Reporting Guidelines" for public enterprises and the "HRDD Evaluation Guidelines" for evaluation authorities.

The HRDD Reporting Guidelines outline the necessary contents of an HRDD report, which include the identification of salient human rights risks through impact assessments, the implementation and outcomes of prevention measures, and the handling of complaints through grievance mechanisms. In addition, the Guidelines emphasize the importance of making the HRDD report public. While the Reporting Guidelines do not introduce any new requirements, they highlight the crucial elements of HRDD that were often overlooked or neglected by public enterprises.

The Evaluation Guidelines require evaluation authorities to consider all items listed in the Reporting Guidelines, as shown in the table below. Notably, the Guidelines assign greater weight to the actual working of the HRDD operating system and the public disclosure of HRDD reports, rather than human rights commitment and the existence of the HRDD operating system. The latter accounts for only one point out of the total five.

1. HRDD Operating System and HRDD Policy
   A. HRDD Operating System (0.5 points)
   B. HRDD Declaration and Embedding (0.5 points)
2. Human Rights Impact Assessment and Actions
   A. Identification of Human Rights Risks through Human Rights Impact Assessment (1 point)
   B. Establishing Prevention Plan and Taking Actions on them (1 point)
3. Grievance Procedure
   A. Establishment of Grievance Procedure (0.5 points)
   B. Results of Remedy (0.5 points)
4. Communication and Education

A. Disclosure of HRDD report (0.5 points)

B. HRDD Training and Human Rights Education (0.5 points)

## IV. Appraisal of mandatory Human Rights Due Diligence Policy in Korea

### (1) Appraisal on the First Phase

The mHRDD policy for public enterprises in Korea can be delineated into two distinct phases: the first phase took place prior to NHRC's new recommendation in 2022, while the second phase occurred after the recommendation was issued. The first phase yielded significant achievements, with the introduction of the mHRDD policy engendering a widespread understanding that public enterprises should uphold human rights. If we may call it 'awareness raising', the mHRDD policy has contributed to raising awareness. Moreover, the fact that all public enterprises have made human rights policy commitments, established HRDD operating systems, and conducted human rights impact assessments represents a significant accomplishment achieved in a remarkably short timeframe. This underscores the potent influence of states in promoting HRDD.

However, as the foregoing discussion has demonstrated, numerous shortcomings persist, and the HRDD practices of public enterprises in Korea can be regarded as a case of "cosmetic compliance"[59] with mHRDD. A reflexive law perspective can provide some insight into the factors underlying this situation. This perspective highlights the importance of understanding how stakeholders were empowered during the first phase of the mHRDD policy. In Korea, the mHRDD policy utilizes HRDD performance evaluations as a mechanism to encourage public enterprises to implement HRDD effectively. Therefore, the success of the Korean mHRDD policy hinges on how evaluation authorities assess the HRDD performance of public enterprises.

59) Landau, op. cit., p. 235.

Unfortunately, the evaluation authorities did not evaluate HRDD performance in a manner that empowered stakeholders. Instead, they examined only the presence of policy commitment and HRDD operating systems, giving little consideration to whether stakeholders participated in human rights impact assessments or grievance processes. Furthermore, in cases where human rights risks were identified during human rights impact assessments or complaints were filed to the grievance process, they even deducted performance points. As a result, public enterprises ended up with cosmetic HRDD, increasingly excluding stakeholder participation. Stakeholders have become more vulnerable rather than empowered due to such evaluation practices.

Meanwhile, the mHRDD experience in Korea has highlighted the critical areas that mHRDD policy should address. While many public enterprises have declared human rights policy commitments, installed HRDD operating systems, and conducted human rights impact assessments, they have failed to disclose salient human rights risks and measures taken to address them, or to activate their grievance mechanisms. This shows a clear divide between what has been done and what has not.

The common failures to move beyond this line are not due to a lack of understanding or knowledge of HRDD processes, as the Manual has provided comprehensive guidance, and NHRC has repeatedly emphasized the importance of such processes during training programs. Rather, the evidence suggests that public enterprises have resisted going beyond the line, as doing so would significantly increase their human rights risks. This is a red line that must be crossed if HRDD is to be effective in mitigating human rights risks. Therefore, special measures must be taken to push public enterprises to move beyond this red line.

The mHRDD policy alone has not been sufficient to achieve this outcome. To address this issue, the reflexive law perspective proposes that stakeholders must be empowered. They are the key actors who have real interests in implementing HRDD beyond the red line. The Korean experience with HRDD demonstrates that without stakeholder empowerment, an mHRDD policy alone will not be sufficient to pressure public enterprises, and presumably private enterprises, to move beyond the red line.

In the Korean context, the term “cosmetic compliance” can be redefined as due

diligence compliance under the red line, i.e. without effective human rights impact assessment, grievance mechanism and public disclosure. Similarly, it is debatable whether Ruggie's alleged achievements have gone beyond the red line. If HRDD practices remain below the red line, they may be labeled as "cosmetic HRDD." The reflexive law approach offers a compelling solution to address cosmetic compliance and cosmetic HRDD by empowering stakeholders.

### (2) Appraisal of the Second Phase

The second phase of mHRDD implementation commenced with NHRC's 2022 recommendation, aiming to rectify the shortcomings of the first phase. The "HRDD Reporting Guidelines" that accompanied the recommendation reiterated the existing Manual's minimum HRDD requirements. The novelty of the second phase was the "HRDD Evaluation Guidelines" directed toward the evaluation authorities. The Evaluation Guidelines require evaluation authorities to rigidly evaluate whether public enterprises effectively implement HRDD following the Manual and impose sanctions accordingly. In addition, NHRC recommended that human rights abuses not be automatically regarded as a deduction factor when revealed during human rights impact assessment or through grievance mechanisms. This recommendation reflects the NHRC's intention to induce the effective operation of HRDD in public enterprises rather than taking issue with human rights impacts themselves through management evaluation.

The question is whether effective HRDD will occur in public enterprises if evaluation authorities abide by the Evaluation Guidelines. In other words, will the evaluation conducted in accordance with the Evaluation Guidelines empower stakeholders meaningfully? In this context, what deserves attention in the Evaluation Guidelines is grievance mechanisms. The Evaluation Guidelines recommend evaluation authorities pay more attention to how public enterprises address all the complaints filed to the grievance process. These evaluation criteria will pressure public enterprises not to ignore complaints from stakeholders, thereby empowering stakeholders. In this respect, the NHRC's new recommendation attempts to strengthen reflexive law elements in the

mHRDD policy in Korea.

However, despite the new recommendations, the empowerment of stakeholders would be meager. Even if stakeholders file complaints to grievance mechanisms, they do not have measures to take when public enterprises ignore them bluntly. The stakeholders only have to wait for evaluation authorities to punish them for ignoring stakeholders' inputs. However, the evaluation authorities cannot determine the appropriateness of the public enterprises' response unless it has significant flaws. This is because the evaluation authorities lack specific information concerning the complaints, and stakeholders can not inform the evaluation authorities of their concerns. So, even if evaluation authorities faithfully follow the evaluation guidelines, the evaluation will remain superficial as far as stakeholders are kept away from the HRDD and evaluation process.

Thus, even if evaluation authorities diligently follow the Evaluation Guidelines, stakeholders' empowerment remains minimal, casting doubt on the efficacy of the second phase of mHRDD in Korea. It is noteworthy that detailed HRDD rules and rigorous enforcement alone may not guarantee effective HRDD unless stakeholders are adequately empowered to inform the HRDD processes. I will not discuss this further here, but it seems that for stakeholder empowerment in Korea, not only do evaluation authorities need to consciously promote stakeholder empowerment, but also stakeholders need to change their attitudes from cynicism to actively participating in HRDD offered by the public enterprises.

## Ⅴ. Conclusion

This article began by highlighting the audacious ambition of the UNGP and HRDD in curbing business-related human rights violations in global supply chains. However, the ambition did not come true as many people expected, in part due to a critical theoretical defect. The defect, which derives from the Ruggie's idealistic approach, cannot be fixed by simply legislating HRDD and enforcing it rigorously. This article

invokes the reflexive law theory to expose and resolve the defect. After reviewing these theories, it analyzes the expericence of the mHRDD policy in Korea, thus revealing its achievements and limitations and then offers some recommendations to move forward. To conclude, this article provides following findings and implications for the global mHRDD discussion.

Firstly, this article highlights the key advantage of approaching mHRDD legislation from the reflexive law perspective, which embraces the empowerment of stakeholders as the crux of process-based regulation. Empowering stakeholders in the context of HRDD means granting stakeholders, including actual and potential victims, the right to communicate their human rights concerns to companies and to participate in the process of addressing adverse human rights impacts. This approach is particularly noteworthy in addressing business-relate human rights abuses since it embodies rights-based approaches that the global human rights community cherishes so much.

Secondly, although the mHRDD policy in Korea deals only with 'public', not private, enterprises and lacks a 'statutory' basis, it still adds another meaningful case study on mHRDD to the global BHR debates. Regrettably, however, the Korean mHRDD policy exemplifies one of scenarios in which mHRDD policies end up with superficial compliance. The experience suggests that mHRDD policies that fail to empower stakeholders are quite likely to lead to "cosmetic compliance" on the part of the regulated enterprises.

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■ 국문초록

# 기업의 인권실사에서 이해관계자 자력화의 중요성

이상수*

2011년 존 러기의 주도 하에 완성된 '유엔 기업과 인권이행 원칙'(UNGPs)은 '기업과 인권' 논의를 획기적으로 발전시켰다. 특히 이행원칙에 담긴 인권실사 접근법은 기업활동과 관련한 인권 문제를 해결하는 획기적 대안으로 환영받았고, 적지 않은 변화를 낳았다.

그러나 동시에 이런 소란스러운 변화가 과연 현장에서 내실있는 변화를 낳았는지, 심지어 앞으로라도 그런 변화를 낳을지에 대해서, 적지 않은 회의론이 있는 것도 사실이다. 본고는 인권실사 개념이 현실에서 적지 않은 변화를 낳았지만, 여전히 충분하지 않다고 평가하면서, 그 원인을 진단하고 대안을 제안한다.

본고는 여러 가능한 원인 중에서도, 특히 이행원칙의 창시자인 존 러기의 이론에 내재한 것으로 보이는 어떤 중대한 결함을 지적한다. 그의 이론은 국제관계학에서 '사회적 구성주의'(social constructivism)로 불리는 이론으로서, 이는 국제규범이 어떻게 생성되며 작동하는지에 관한 것이다. 이 이론의 현저한 결함은 설득(persuasion)에 대한 과도한 의존이라고 보인다. 본고는 기업을 대상으로 한 설득만으로는, 인권실사를 정착시키기 어렵다는 점을 지적한다.

대신, 본고는, 설득에 추가하여, 법을 통해 이해관계자를 자력화(empower)시키는 것이 필수적이라고 주장한다. 이런 대안적 주장을 위한 이론 틀로서 토이브너의 반성적 법이론을 원용한다. 반성적 법에 관한 다양한 해석이 있지만, 본고는 반성적 법이론의 핵심은 결국 이해관계자의 자력화를 수반한 법적 규제에 있다는 점을 주장하고, 이런 관점에 의거하면서 실사의무화법을 설계할 때, 인권실사의 안착 가능성이 높다고 주장한다.

본고는 이런 이론적 틀을 이용하여 한국에서 전개된 공공기관 인권경영이 현장에서 실질적 변화를 낳지 못한 이유를 설명하고 아울러 이를 극복하기 위해서 무엇이 필요한지에 대해서 제안한다.

• 핵심어 기업과 인권, 유엔 기업과 인권 이행원칙, 존 러기, 구성주의, 귄터 토이브너, 반성적 법, 이해관계자 자력화, 인권실사

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