Annual Meeting

The Role of
Law Schools and Human Rights

March 6th – 9th, 2013

Mysore, India

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Welcome

On behalf of our Board of Governors, I want to welcome each and every one of you to our 2013 Annual Meeting.

Many of you have been members of this association since its inception more than 7 years ago. We welcome you, and thank you for your continuing engagement in advancing the cause of legal education globally. For those who are new, a warm welcome to our community. We look forward to you joining this challenging and engaging effort.

The IALS is a volunteer service association of more than 125 law schools and departments from over 45 countries representing more than 5,500 law faculty members. One of our primary missions is the improvement of law schools and conditions of legal education throughout the world.

We have and will be introducing more programs to support the legal education community's need to expand its global reach and understanding.

The annual meeting is a special occasion when all of our community have an opportunity to get together to meet, engage and discuss. This year's theme is centered on Human Rights and the Role of Law Schools. Our exploration encompasses both the important doctrinal aspects of the human rights law; and, in addition, also how we as teachers of the law respond to the values of human dignity in our pedagogy and administration.

We will be presenting numerous engaging papers that are sure to generate lively discussions. I want to thank the work of the many committees whose diligence in selecting the papers to be presented will be evident during these next two days.

Special and heartfelt thanks go to Infosys for so graciously working with us in supporting our meeting and our Indian Law School Sponsors. We also want to recognize and thank our other meeting sponsors. Without such generosity our work will not be possible. (see page 10)

Of special note is Dr. Shashikala Gurpur of the Symbiosis Law School and Dr. S. Krishnamurthy who through their thoughtful guidance and interventions enabled us to navigate the challenging terrain of having a meeting in India.

Lastly, and, certainly most important, are the many support staff and law school interns who have devoted their energy and time to help organize this event. They are here to assist you in making your participation both comfortable and enjoyable.

We hope you will take the opportunity in the next few days to renew old friendships, but also to make new friends. The commitment of our association is to foster interaction among the world's law faculty so we can all learn from each other.

Francis SL Wang, President

Agenda

Board of Governors Meeting **Tuesday: 5th March 2013**	
Event: Time: Location: Attendees:	**IALS Board Dinner** 19:00 Infosys Floating Restaurant Entire Board
IALS Board of Governors Meeting & General Assembly **Wednesday: 6th March 2013**	
Event: Time: Location: Attendees:	**Registration** 9:00 – 19:15 Ground Floor, Infosys Leadership Institute (B 10) Available all day for Attendees
Event: Time: Location: Attendees:	**IALS Board Meeting** 9:00 – 14:00 Jawaharlal Nehru, Ground Floor Entire Board
Event: Time: Location: Moderator: Attendees:	**Speakers Review Meeting** 14:30 – 15:30 Jawaharlal Nehru, Ground Floor Speakers Committee Chair – Nerina Boschiero, University of Milan, Italy Speakers and Speakers Committee
Event: Time: Location: Attendees:	**IALS General Assembly** 15:30 – 16:30 Mahatma Gandhi, Ground Floor All Attendees
Event: Time: Location: Speaker: Attendees:	**IALS Inaugural Ceremony** 17:00 – 18:00 Mahatma Gandhi, Ground Floor His Excellency, Dr. Hansraj Bhardwaj – *Governor of Karnataka, India* All Attendees
Event: Time: Location: Attendees:	**IALS Welcome Dinner for Delegates and Guests** 18:30 Floating Restaurant All Attendees

IALS Educational Program: Human Rights and the Role of Law Schools **Thursday: 7th March 2013**	
Event: Time: Location:	**Registration** 8:00 – 17:00 Ground Floor, Infosys Leadership Institute (B10) Available all day for Attendees
Event: Time: Location:	**Collaborative Opportunities** 8:00 – 17:00 Mother Teresa, First Floor Available all day for Attendees
Event: Time: Location:	**Breakfast** 7:30 – 9:00 Floating Restaurant
Event: Time: Location: Moderator: Speaker:	**Welcome to the Annual Meeting** 9:00 – 9:30 Mahatma Gandhi, Ground Floor Francis S.L. Wang, President Judge Fausto Pocar - *Judge on the Appeals Panel of the International Criminal Tribunal for the former Yugoslavia and Rwanda, former President of the Tribunal, and Professor of International Law at the University of Milan*
Event: Time: Location: Moderator: Panelists:	**Plenary Session: Key Issues in Teaching Human Rights in Law Schools** 9:30 – 10:45 Ashoka Class Room, Ground Floor Rocque Reynolds - Southern Cross University, Australia 1. Emmanuel Akhigbe & Cordelia Agbebaku, Ambrose Alli University, Nigeria 2. Paula Spieler, Fundacao Getulio Vargas Law School Rio, Brazil 3. Judith McNamara, Queensland University of Technology, Australia 4. Richard Carlson, South Texas College of Law, United States
Event: Time:	**Refreshment Break** 10:45 – 11:15
Event: Time: Location:	**Small Group Discussions** 11:15 – 12:30 8 Discussion Rooms – *Please see breakout list on page 8-9*
*** PRIOR TO THE LUNCHEON, WE WILL BE TAKING A GROUP PHOTOGRAPH ***	
Event: Time: Location: Moderator: Presentations: Presenter: Awardees:	**Luncheon** 12:30 – 13:45 Infosys Leadership Institute Dining Lounge Amy Tsanga, University of Zimbabwe, Zimbabwe **Law School Admission Council – Student Writing Awards** Dean Daniel Bernstine, *President of the Law School Admission Council* Stephanie Anne Macuiba, Southern Illinois University, United States Kara Mae Noveda, University of Cebu, Philippines Rebecca Takavadiyi, University of Zimbabwe, Zimbabwe

Event: Time: Location: **Topic #1:** Moderator: Panelists: **Topic #2:** Location: Moderator: Panelists:	**Plenary Sessions – 2 Concurrently** *(please choose one)* 13:45 – 15:15 Ashoka Class Room, Ground Floor **Law Schools as Contributors to Public Policy on Human Rights** Colin Scott - University College Dublin, Ireland 1. Aishah Bidin, National University of Malaysia, Malaysia 2. Tanel Kerikmae, Tallinn Law School, Estonia 3. Thiago Bottino do Amaral, Getulio Vargas Foundation Rio de Janeiro Law School, Brazil 4. Deon Erasmus, Nelson Mandela Metropolitan University, South Africa 5. Stewart Schwab, Cornell University Law School, United States **Human Rights Themes in the Life of the Law School** Akbar Class Room, Ground Floor Jukka Kekkonen - University of Helsinki Faculty of Law, Finland 1. Nora Demleitner, Washington and Lee University School of Law, US 2. Faisal Bhabha, Osgoode Hall Law School/York University, Canada 3. Santiago Legarre, Pontifica Universidad Catolica Argentina, Argentina 4. Carolyn Penfold, University of New South Wales, Australia 5. S. Krishnamurthy, Indian Police Service, India
Event: Time:	**Refreshment Break** 15:15 – 15:45
Event: Time: Location:	**Small Group Discussions** 15:45 – 17:00 8 Discussion Rooms - *Please see breakout list on page 8-9*
Event: Time: Location: Speaker:	**IALS Reception/Dinner for Delegates and Guests** 18:30 Floating Restaurant Mr. Manan Misra – *Chairman, Bar Council of India*
IALS Education Program: Human Rights and the Role of Law Schools **Friday: 8th March 2013**	
Event: Time: Location:	**Registration** 8:00 – 17:00 Ground Floor, Infosys Leadership Institute (B10) Available all day for Attendees
Event: Time: Location:	**Collaborative Opportunities** 8:00 – 17:00 Mother Teresa, First Floor Available all day for Attendees
Event: Time: Location:	**Breakfast** 7:30 – 9:00 Floating Restaurant
Event: Time: Location: Moderator:	**International Committee of the Red Cross – Law School Outreach** 9:00 – 9:15 Akbar Class Room, Ground Floor Charles R. Sabga, *Regional Legal Adviser, ICRC Regional Delegation, New Delhi*

Event: Time: Location: Moderator: Panelists:	**Plenary Session: Teaching the Relationship between Business and Human Rights** 9:15 – 10:45 Akbar Class Room, Ground Floor Nerina Boschiero - University of Milan, Italy 1. Shashikala Gurpur & Bindu Ronald, Symbiosis Law School, India 2. Poonam Puri, Osgoode Hall Law School/York University, Canada 3. Moussa Samb, Cheikh Anta Diop University, Senegal 4. Ashok Patil, National Law School of India University, India
Event: Time:	**Refreshment Break** 10:45 – 11:00
Event: Time: Location:	**Small Group Discussions** 11:00 – 12:30 8 Discussion Rooms - *Please see breakout list on page 8-9*
Event: Time: Location: Moderator: **Presentations:** Speaker:	**Luncheon** 12:30 – 13:45 Infosys Leadership Institute Dining Lounge Mary Anne Bobinski – University of British Columbia, Canada **Collaborative Opportunities** Donald M. Ferencz **Planethood Foundation – Student Contest**
Event: Time: Location: Moderator: Presenter: **Presentations:** Awardees:	**Plenary Session: Experimentation and Innovation in Teaching Human Rights** 13:45 – 15:15 Ashoka Class Room, Ground Floor Barbara Holden-Smith, Cornell Law School Dr. Matthew Frank Barney - *Vice President & Director, Infosys Leadership Institute* **Infosys Faculty Innovation Award** Rosalie Katsande, University of Zimbabwe, Zimbabwe Annika Rudman, University of Stellenbosch, South Africa
Event: Time:	**Refreshment Break** 15:15 – 15:45
Event: Time: Location: **Moderator:** **Presentations:**	**Presentations Session** 15:45 – 17:30 Ashoka Class Room, Ground Floor Shashikala Gurpur, Symbiosis Law School **United Nations Audio Visual Library of International Law** **Child labor in Sivakasi: Manitham Documentaries**
Event: Time: Location:	**Dinner and Cultural Event –** *sponsored by The Wang Family Foundation* 18:30 Floating Restaurant

IALS Education Program: Human Rights and the Role of Law Schools **Saturday: 9th March 2013**	
Event: Time: Location: *(tentative)*	**Optional Cultural Tour of Mysore** 9:00 – 16:00 Mysore Palace, Hotel Regaalis, Krishnaraja Circle, Jagan Mohan Palace, Silk Factory

Small Group Discussions

Search for your name in the Group lists below. This will be your designated group for the "Small Group Discussions" throughout the entire meeting. Please note the locations for each group, there will be two groups in each room.

Location: Abraham Lincoln **Experimentation and Innovation in Teaching Human Rights**			
Group 1-A:	Rosalie Katsande, Zimbabwe Gloria Ramos, Philippines Annika Rudman, South Africa Sanjeevy Shanthakumar, India Li Xu, China	**Group 1-B:**	Barbara Holden Smith, USA Bradford Morse, New Zealand Charles Sabga, India Fatou Kine Camara, Senegal Amy Tsanga, Zimbabwe
Location: Helen Keller **Human Rights Themes in the Life of the Law School**			
Group 2-A:	Jassim Al Shamsi, UAE Faisal Bhabha, Canada Nora Demleitner, USA Santiago Legarre, Argentina Wang Lisong, China	**Group 2-B:**	Aymen Masadeh, UAE Ousmane Mbaye, Senegal Carolyn Penfold, Australia Fernando Villarreal-Gonda, Mexico Francis SL Wang, China
Location: Peter Drucker **Key Issues in Teaching Human Rights in Law Schools**			
Group 3-A:	Taslima Monsoor, Bangladesh Emmanuel Akhigbe, Nigeria Monica Calkiewicz, Poland Obeng Mireku, South Africa Richard Carlson, USA	**Group 3-B:**	Demetre Egnatashvili, Georgia Nick James, Australia Jukka Kekkonen, Finland Liu Xiaochun, China Rocque Reynolds. Australia

Location: Martin Luther King Key Issues in Teaching Human Rights in Law Schools			
Group 4-A:	Krystian Complak, Poland Judith McNamara, Australia Joy Ezeilo, Nigeria Hu Yaqiu, China Sun Guoping, China	**Group 4-B:**	Michal Hudzik, Poland Paula Spieler, Brazil Cordelia Agbebaku, Nigeria Daniel Bernstine, USA Lidia Casas, Chile
Location: Franklin Deleno Roosevelt Law Schools as Contributors to Public Policy on Human Rights			
Group 5-A:	Marcelo Alegre, Argentina Aishah Bidin, Malaysia Mary Anne Bobinski, Canada Thiago do Amaral, Brazil Deon Erasmus, South Africa	**Group 5-B:**	Sergio Guerra, Brazil Roberto Saba, Argentina Tanel Kerikmae, Estonia Stephanie Macuiba, USA Weatherly Schwab, USA
Location: Sarojini Naidu Law Schools as Contributors to Public Policy on Human Rights			
Group 6-A:	Kara Mae Noveda, Philippines Adrian Popovici, Canada Lawrence Hellman, USA Caitlin Mulholland, Brazil Anna Williams Shavers, USA	**Group 6-B:**	Jakub Stelina, Poland Rebecca Takavadiyi, Zimbabwe Alfredo Vitolo, Argentina Diego Werneck, Brazil Stewart Schwab, USA
Location: Jhansi Rani Lakshmibai Teaching the Relationship between Business and Human Rights			
Group 7-A:	Hlako Choma, South Africa C S Somu, India Carmen Dominguez, Chile Donald Ferencz, UK Helmut Grothe, Germany	**Group 7-B:**	Shashikala Gurpur, India Nadezda Rozehnalova, Czech Republic Fatima Mandhu, Zambia Nerina Boschiero, Italy Jeffrey Walker, USA
Location: Mokshagundam Vishveshwaraya Teaching the Relationship between Business and Human Rights			
Group 8-A:	Nitika Nagar, India Ashok Patil, India Poonam Puri, Canada Sonia Rolland, USA Moussa Samb, Senegal	**Group 8-B:**	Valentina Smorgunova, Russia Jiri Valdhans, Czech Republic Bindu Ronald, India Ileana Porras, USA Tahir Mamman, Nigeria

Sponsors

Infosys Limited

Law School Admission Council

Cornell Law School

The Planethood Foundation

The Wang Family Foundation

Indian Law Schools Sponsors

Christ University School of Law

Gujarat National Law University

ITM University Law School at Gurgaon

Kalinga Institute of Industrial Technology University

National Law School of India University - Bangalore

Symbiosis Law School at Pune

Governing Board

Annual Meeting
Committee Members

Speakers' Committee
Committee Chair – Nerina Boschiero, University of Milan, Italy
Jukka Kekkon, University of Helsinki Faculty of Law, Finland
Colin Scott, University College Dublin, Ireland
Cynthia Fountaine, Southern Illinois University, United States
Sanjeevi Shanthakumar, ITM Law School, India
Rocque Reynolds, Southern Cross University, Australia

The Infosys Faculty Innovative Curriculum Awards Committee
Committee Chair – Tan Cheng Han, National University of Singapore, Singapore
Jay Conison, Valparaiso University Law School, United States
Tahir Mamman, Nigerian Law School, Nigeria
Aalt W Heringa, Maastricht University, Netherlands
Nora Demleitner, Washington & Lee, United States

The Law School Admission Council Student Awards Committee
Committee Chair – Amy Tsanga, University of Zimbabwe, Zimbabwe
Tanel Kerikmae, Tallinn Law School, Estonia
Ana Gisela Castillo, Universidad Francisco Marroquín, Guatemala
Cynthia Fountaine, Southern Illinois University, United States
Ileana Porras, University of Miami School of Law, United States

Visiting Scholar & Academic Local Indian Sponsor Committee
Committee Co-Chair – Valentina Smorgunova, Herzen State Pedagogical University, Russia,
Committee Co-Chair - Shashkila Gurpur, Symbiosis Law School, India
Sanjeevi Shanthakumar, ITM Law School, India
Mary Anne Bobinski, The University of British Columbia, Canada
Fatou Kiné Camara, Cheikh Anta Diop University of Dakar, Senegal

Travel Stipend, International Fellowship & Sponsor Committee
Committee Chair – Barbara Holden-Smith, Cornell University, United States
Obeng Mireku, Nelson R Mandela School of Law, University of Fort Hare, South Africa
Jassim Ali Salem Alshamsi, United Arab Emirates University, United Arab Emirates
Rocque Reynolds, Southern Cross University, Australia
Aalt W Heringa, Maastricht University, Netherlands
Tahir Mamman, Nigerian Law School, Nigeria

Speakers

Human Rights Themes in the Life of the Law School
Faisal Bhabha, Osgoode Hall Law School/York University, Canada
Nora Demleitner, Washington and Lee University School of Law, United States
Santiago Legarre, Pontifica Universidad Catolica Argentina, Argentina
Dr. S. Krishnamurthy, Indian Police Service
Carolyn Penfold (*presenting David Dixon's Paper*), University of New South Wales, Australia

Key Issues in Teaching Human Rights in Law Schools
Emmanuel Ehimare Akhigbe & Cordelia Agbebaku , Ambrose Alli University, Nigeria
Richard Carlson, South Texas College of Law, United States
Judith McNamara, Queensland University of Technology, Australia
Paula Spieler, Fundacao Getulio Vargas Law School Rio, Brazil

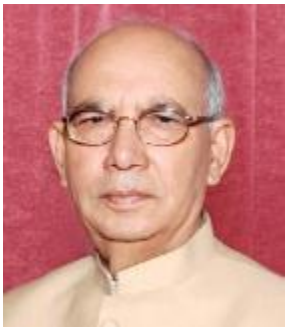
Law Schools as Contributors to Public Policy on Human Rights
Aishah Bidin, National University of Malaysia, Malaysia
Thiago Bottino do Amaral, Getulio Vargas Foundation Rio de Janeiro, Brazil
Deon Erasmus, Nelson Mandela Metropolitan University, South Africa
Tanel Kerikmae, Tallinn Law School, Estonia
Stewart Schwab, Cornell Law School, United States

Teaching the Relationship between Business and Human Rights
Shashikala Gurpur & Bindu Ronald, Symbiosis Law School, India
Moussa Samb, Cheikh Anta Diop University, Senegal
Poonam Puri, Osgoode Hall Law School/York University, Canada
Ashok Patil, National Law School of India University, India

In Memoriam

It is with great sadness that we announce the passing of Prof. Cheryl Cabutihan, from the University of Cebu in the Philippines. She was chosen to be a Speaker in the panel "Human Rights Themes in the Life of the Law School" for the 2013 Annual Meeting in Mysore, India. Cheryl A. Cabutihan was a professor at the University of Cebu-College of Law in Cebu, Philippines since 2004. She taught the subjects Human Rights of the Child, Persons and Family Relations, Statutory Construction and Transportation Law. She coached the university's Mooting Team who was adjudged as the National Champion of the 2011 ICRC National Moot Court Competition on International Humanitarian Law. She was an advocate for the practice of developmental and alternative lawyering with focus on children's and women's human rights. She worked for the Children's Legal Bureau, Inc. (CLB), and co-founded a non-government organization called Human Rights Unlimited, Inc. (HRU) which has human rights advocacy and trainings as one of its core programs. She is best remembered for her passionate teaching and determination to pursue her advocacy for upholding children's rights. Albeit three years shy from turning 40 years old, Prof. Cabutihan had been working for children's rights for more than a decade and had been teaching for just as long. To her friends and colleagues, Cheryl had a bubbly nature and a zest for life. She held a positive attitude despite the odds as she fought her cancer. Her brother Fritz reminisces that "She was truly a strong woman. I saw her struggling in pain but I also felt her strength in accepting her health condition, her fate."

Special Guest Speakers



His Excellency, Dr. Hansraj Bhardwaj
Governor of Karnataka, India. Dr. Hans Raj Bhardwaj was born on 17th May 1937 at Village Garhi Sampla of District Rohtak in Haryana. Dr. Bhardwaj, had his early education at GBC High School, Rohtak. He graduated from B.M. College Shimla, Himachal Pradesh, and did his Master's degree from Punjab University, followed by a degree in Law from Agra University, (U.P). Dr. Bhardwaj, has been conferred upon with awards and honorary doctorate degrees by several universities in recognition of his commendable contribution in the field of law, legal aid, and justice. Dr. H.R. Bhardwaj, is a Senior Advocate of the Supreme Court of India and held several important positions in his successful career. He was appointed as Public Prosecutor for Delhi Administration from 1972-77 and Senior Standing Counsel for the State of Uttar Pradesh from 1980 to March, 1982. He appeared as one of the Counsels for Prime Minister, Bharat Ratna Late Smt. Indira Gandhi in Special Courts set up by the Janata Government led by Shri Morarji Desai, the then Prime Minister and also successfully argued the case arising out of the split in Indian National Congress.

Dr. Matthew Frank Barney
Matt Barney, Ph.D. is the Vice President and Director of the Infosys Leadership Institute (ILI) globally. In this role, he is the senior-most Infosys leader responsible for the selection, development, research and succession of senior and high-potential leaders. Previously, he has held similar roles at Intel, AT&T, Lucent Technologies, Motorola, Sutter Health and Merck. Dr. Barney has published and presented papers and books in areas including Leadership Development, Psychometrics, Human Capital, Bioinspiration, Lean Six Sigma, Risk Management, and Simulations. His fourth book, entitled "Leading Value Creation: Organizational Science, Bioinspiration & the Cue See Model" will be released in 2013. Dr. Barney holds a B.S. in Psychology from the University of Wisconsin-Madison; and an M.A. and Ph.D. in Industrial-Organizational Psychology from the University of Tulsa. He is a Motorola Master Black Belt, Certified Risk Manager, and a Cialdini Method Certified Trainer. In 2007, he was named "Future Leader" by Human Capital Magazine. An American Citizen and Person of Indian Origin by marriage, he moved his family to Mysore, India in 2009 to lead the Infosys Leadership Institute.

Daniel Bernstine
Daniel O. Bernstine is the President of the Law School Admission Council. For the last decade, he served as president of Portland State University in Oregon. He was also dean of the University of Wisconsin Law School from 1990 to 1997. Dean Bernstine obtained his BA at the University of California, Berkeley (1969), a JD at Northwestern University School of Law (1972), and an LLM at the University Of Wisconsin School Of Law (1975). Prior to his tenure at Wisconsin, Dean Bernstine was a professor of law and interim dean at Howard University (1988-1990). He served as general counsel at Howard University and Howard University Hospital (1987-1990). He was the William H. Hastie Teaching Fellow at Wisconsin and a staff attorney for the US Department of Labor early in his career. He has been a visiting professor and lecturer all over the world, including Taiwan, Germany, and Cuba, and additional US law schools. For three successive summers (1983-1986), Dean Bernstine was director of CLEO's

Regional Summer Institute at Wisconsin. In 1991-1992, Dean Bernstine cochaired the LSAC Minority Affairs Committee's LSAC/HBCU Work Group.

Justice Richard Goldstone
Former Chief Prosecutor of the United Nations International Criminal Tribunals for the former Yugoslavia and Rwanda;
Former Justice South African Constitutional Court

From July 1994 to October 2003 Richard J. Goldstone was a Justice of the Constitutional Court of South Africa. He is presently the Bacon-Kilkenny Distinguished Visiting Professor of Law at Fordham University. During the spring semester of 2007 he was the Jeremiah Smith, Jr. Visiting Professor of Law at Harvard Law School. From 15 August 1994 to September 1996 he served as the Chief Prosecutor of the United Nations International Criminal Tribunals for the former Yugoslavia and Rwanda. From 1999 to 2003 he served as a member of the International Group of Advisers of the International Committee of the Red Cross. He is a member of the committee, chaired by Paul A Volcker, appointed by the Secretary-General of the United Nations to investigate allegations regarding the Iraq Oil for Food Program. His most recent appointment is to chair a UN Committee to advise the United Nations on appropriate steps to preserve of the legacy of the ICTY and ICTR.
He is an Honorary Bencher of the Inner Temple, London, an Honorary Fellow of St Johns College, Cambridge, and an Honorary Member of the Association of the Bar of New York. He is a Foreign Member of the American Academy of Arts and Sciences. He serves on a number of boards, including the Human Rights Institute of South Africa, Human Rights Watch, Physicians for Human Rights, the International Center for Transitional Justice and the Center for Economic and Social Rights.
He is the author of For Humanity: Reflections of a War Crimes Investigator, (2001) Yale University Press.

Awards

The Infosys Faculty Innovative Curriculum Awards
Rosalie Kumbirai Katsande, University of Zimbabwe, Zimbabwe
Annika Rudman, University of Stellenbosch, South Africa

The Law School Admission Council Student Awards
Kara Mae Muga Noveda, University of Cebu, Philippines
Rebecca Takavadiyi, University of Zimbabwe, Zimbabwe
Stephanie Anne Macuiba, Southern Illinois University, United States

IALS Visiting Scholars

Our Indian member law schools will be sponsoring faculty member(s) to visit their school before or after the annual meeting in Mysore. They have invited faculty from member schools to do a lecture or teach a class for a certain period of time.

Faculty Member	Indian Law School Host
Santiago Legarre *Strathmore Law School*	Kalinga Institute of Industrial Technology University
Stephanus F.G. Rammeloo *Maastricht University*	Christ University
Bradford Morse *University of Waikato*	Christ University
Kris Gledhill *University of Auckland*	Symbiosis Law School
Avinash Govindjee *Nelson Mendela Metropolitan University*	ITM University Law School at Gurgaon
Aymen Khaled Masadeh *The British University of Dubai*	Gujarat National Law University
Akhigbe Emmanuel *Ambrose Alli University, Nigeria*	National Law School of India University

Collaborative Opportunities

At this years' IALS Annual Meeting we will have a designated area for you to offer information about your institution, meet and sit to discuss international collaborations between our members. Below are our participating members who are interested in exploring collaborative opportunities. Please look for them at the designated Collaborative Opportunities area or at the meeting. Visit our website to find out more information about the participating schools.

1. **Christ University, School of Law**
   C S Somu, somu.cs@christuniversity.in
   Interested In: Awards, Collaborative Faculty Research, Competitions, Degree Programs, Faculty Exchange, Papers, Student Exchange, Workshops & Seminars

2. **FGV Direito Rio**
   Sergio Guerra & Paula Spieler, direitotio@fgv.br & paula.spieler@fgv.br
   Interested In: Faculty Exchange & Student Exchange

3. **Herzen State Pedagogical University**
   Valentina Smorgunova, prof_smorgunova@mail.ru
   Interested In: Awards, Collaborative Faculty Research, Competitions, Degree Programs, Faculty Exchange, Papers, Student Exchange, Workshops & Seminars

4. **Jindal Global Law School**
   Y.S.R. Murthy, ysrmurthy@jgu.edu.in
   Interested In: Collaborative Faculty Research, Competitions, Degree Programs, Faculty Exchange, Papers, Student Exchange, Workshops & Seminars

5. **Masaryk University, Faculty of Law**
   Nadezda Rozehnalova & Jiri Valdhans, dean@law.muni.cz & jiri.valdhans@law.muni.cz
   Interested In: Collaborative Faculty Research, Faculty Exchange, Student Exchange

6. **National University of Malaysia**
   Syuhada Nur Binti Ab Rahman, ppfuu@ukm.my
   Interested In: Collaborative Faculty Research, Degree Programs, Faculty Exchange, Papers, Student Exchange, Workshops & Seminars

7. **Nelson Mandela School of Law, Fort Hare**
   Obeng Mireku, omireku@usa.net
   Interested In: Collaborative Faculty Research, Degree Programs, Faculty Exchange, Student Exchange, Workshops & Seminars

8. **Northeastern University**
   Sonia Rolland, s.rolland@neu.edu
   Interested In: Awards, Collaborative Faculty Research, Competitions, Degree Programs, Faculty Exchange, Papers, Student Exchange, Workshops & Seminars

9. **Oklahoma City University**
   Lawrence Hellman, lhellman@okcu.edu
   Interested In: Degree Programs, Faculty Exchange, Student Exchange,

10. **Queensland University of Technology School**
    Judith McNamara, j2.mcnamara@qut.edu.au
    Interested In: Collaborative Faculty Research, Competitions, Degree Programs, Student Exchange

11. Strathmore Law School
Njahira Gitahi, ngitahi@strathmore.edu
Interested In: Competitions, Faculty Exchange, Papers, Student Exchange, Workshops & Seminars

12. Symbiosis International University
Shashikala Gurpur & Swati Sahasrabudhe, shashi.gurpur@gmail.com & int.initiatives@symbiosis.ac.in
Interested In: Awards, Collaborative Faculty Research, Competitions, Degree Programs, Faculty Exchange, Papers, Student Exchange, Workshops & Seminars

13. The British University of Dubai
Aymen Masadeh, aymen.masadeh@buid.ac.ae
Interested In: Papers, Workshops & Seminars

14. University of British Colombia, Faculty of Law
Kari Streelasky, streelasky@law.ubc.ca
Interested In: Awards, Workshops & Seminars

15. University of Cebu
Gloria Ramos Estenzo, gollyrams@gmail.com
Interested In: Awards, Collaborative Faculty Research, Competitions, Degree Programs, Faculty Exchange, Papers, Student Exchange, Workshops & Seminars

16. University of New South Wales, Faculty of Law
Carolyn Penfold, c.penfold@unsw.edu.au
Interested In: Awards, Collaborative Faculty Research, Competitions, Degree Programs, Faculty Exchange, Papers, Student Exchange, Workshops & Seminars

17. University of Nigeria
Joy Ngozi Ezeilo, ezeilojoy@yahoo.com
Interested In: Collaborative Faculty Research, Competitions, Faculty Exchange, Papers, Student Exchange, Workshops & Seminars

18. University of Waikato, Faculty of Law
Bradford Morse, bmorse@waikato.ac.nz
Interested In: Awards, Collaborative Faculty Research, Competitions, Degree Programs, Faculty Exchange, Papers, Student Exchange, Workshops & Seminars

19. Washington and Lee University School of Law
Nora Demleitner, demleitnern@wlu.edu
Interested In: Collaborative Faculty Research, Competitions, Degree Programs, Faculty Exchange, Papers, Student Exchange, Workshops & Seminars, Other: Certificate and Joint LLM Programs

Members

Universidad de Palermo, Argentina
Australian National University, Australia
Bond University, Australia
Monash University, Australia
Murdoch University Law School, Australia
Southern Cross University, Australia
The University of Sydney, Australia
University of Adelaide, Australia
University of Melbourne, Australia
University of New England, Australia
University of New South Wales, Australia
University of Queensland TC Beirne School of Law, Australia
University of South Australia, Australia
University of Tasmania, Australia
University of Western Australia, Australia
Fundação Getúlio Vargas Rio de Janeiro Law School, Brazil
Fundacao Getulio Vargas Sao Paulo Law School, Brazil
The University of British Columbia, Canada
University of Victoria Faculty of Law, Canada
University of Western Ontario, Canada
University of Windsor, Canada
York University Osgoode Hall Law School, Canada
Diego Portales University, Chile
Pontifical Catholic University of Chile, Chile
Peking University School of Transnational Law, China
Soochow University, Kenneth Wang School of Law, China
Universidad del Norte, Colombia
Universidad Sergio Arboleda, Colombia
Masaryk University, Czech Republic
Kobenhavns Universitet, Denmark
Tallinn Law School, Estonia
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Marcelo Alegre holds an LL.B. from the the School of Law of the Universidad de Buenos Aires and an LL.M. (1999) and a JSD (2004) from New York University Law School. His doctoral dissertation Egalitarian Rights and Constitutional Democracy was supervised by Thomas Nagel. He is Professor of Law at the Universidad de Buenos Aires Law School, where he is also the responsible of the research area. He was a visiting professor at the law schools of the Universidad Pompeu Fabra, Spain; Universidad de Puerto Rico; and the Universidad de Chile. Alegre is interested in legal theory, moral and political philosophy, human rights law, constitutional law and legal education. He has published in Argentina and abroad on issues of equality, social rights, global justice, civil disobedience, conscientious objection (issue on what he testified in Congress), the flaws of presidentialism and transitional justice. He is currently working on religion and democracy. Prof. Alegre was a fellow working with Carlos Nino at the Consejo para la Consolidación de la Democracia and the Centro de Estudios Institucionales, and was counsel for former President Raúl Alfonsín. He was a visiting researcher at the Stanford Center for Latin American Studies and at Yale Law School.

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Prof. Jassim Ali Salem Al Shamsi, Professor of Civil Law, Dean of Faculty of Law, Member of the IALS Board, Lawyer and Arbitrator. Prof. Al Shamsi joined the Faculty of Shaira and Law as Assistant professor on 1990, Associate on 1996, then Professor on 2001. He was appointed as Assistant Dean for Research Affairs on 1992 to 1996, then the Chair of Department of Transactions on 1996, Vice Dean on 200, and Dean from 2005 till present. Prof. Al Shamsi also was appointed as the Editor in Chief for the Journal of Sharia and Law on 2004/2005. He wrote several law books. He is a member of several legal committees in the Faculty of Law, UAE University and the UAE legal community. He participated in many international conferences and seminars on civil law and arbitration inside and outside the UAE, has had also participated as member and as chair in LLM supervision committees. Prof. Al Shamsi is a certified arbitrator; he is a member in all UAE arbitration centers besides the GCC arbitration center in Bahrain. He conducted many arbitration cases in several fields.

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Faisal Bhabha teaches at Osgoode Hall Law School, in Toronto, Canada. He has researched and published in the areas of human rights, equality, multiculturalism, national security and access to justice. Previously, he sat as Vice-chair of the Human Rights Tribunal of Ontario. He holds an LL.M. from Harvard Law School and carried on a varied public and private law practice, appearing before administrative boards and tribunals and at all levels of court, including the Supreme Court of Canada. He also advised or represented numerous public interest organizations and NGOs in matters related to constitutional law and human rights. Professor Bhabha's perspective on legal research and education is global. He has spent time living and working abroad, including advocating for human rights in the Middle East, and researching comparative discrimination law in South Africa. Professor Bhabha's current research focuses on diversity in legal education and in the legal profession. He has served as a member of the Equity Advisory Group of the Law Society of Upper Canada and has been involved in a number of local and international initiatives concerning justice and development.

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Mary Anne Bobinski has served as Dean and Professor of the University of British Columbia's Faculty of Law since 2003. She previously served as the John and Rebecca Moores Professor of Law and Director of the Health Law and Policy Institute at the University of Houston Law Center in the United States. Professor Bobinski's research and teaching interests include torts, health law, health care finance and bioethics, legal aspects of HIV infection, and reproductive health law issues. She is a co-author of two leading law school casebooks in the United States, Health Care Law & Ethics and AIDS Policy and Law; the co-author/co-editor of a two volume set on medical ethics; and has authored a number of law review articles and book chapters on health law topics. She is a frequent presenter to academic and other groups in the U.S. and Canada on topics ranging from health care finance to public health care law and ethics. Bobinski has participated extensively in academic and professional service activities in the U.S. and Canada. She is a former President of the Canadian Council of Law Deans and member of the Canadian Public Health Officer's Ethics Advisory Committee and current President of the Board of the American Society for Law, Medicine and Ethics.

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Thiago Bottino do Amaral is a graduate of Rio de Janeiro Federal University where he was a president on the Students Committee. He received both his Masters and PhD degrees in Constitutional Law at Catholic University. He has been a criminal lawyer for more than ten years and professor of law since 2006. In 2008, he received an invitation to build the Clinical Legal Office at "FGV Direito Rio" (Rio de Janeiro Law School of Getulio Vargas Foundation) where he designed a innovative model of legal practice offering qualified legal services to NGOs with national expression, allowing them to participate as amicus curiae in actions before the Supreme Court. Since 2008, we have been advocates of various NGOs on issues of press freedom, gay rights, and political rights, prisons to obtain confessions, individual liberties and wiretapping. Since 2010 he has been general coordinator of the undergraduate School of Law. Currently, he is a full time professor, teaching at "FGV Direito Rio" and at the Rio de Janeiro Federal University, where he was approved in first place in a public examination for professor of criminal law and criminal procedure. He received the Chico Mendes Medal (human rights prize, given by a NGO that fights against torture in Brazil) for his participation in the Human Rights Commission of Brazilian Bar Association, in 2007. He has written and spoken widely on various legal issues and has appeared as a keynote speaker, panelist or lecturer concerning clinical education, civil rights, civil liberties, criminal justice and procedural issues, throughout the Brazil and abroad (France and Germany).

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Associate Professor Annika Rudman specializes in Public International Law, International Human Rights Law with specific focus on gendered rights, property rights and feminist theory. She holds a LL.B. from the University of Lund, Sweden, a LL.M. (in International Human Rights Law) from the University of Lund, Sweden a LL.M. (in Public International Law) from the University of Utrecht, the Netherlands and a Ph. D. in Peace and Development Research from the University of Gothenburg, Sweden. Professor Rudman currently teaches Public International Law at the University of Stellenbosch, South Africa and has previously taught at the Universities of Lund and Malmo in Sweden as well as the University of Dar Es Salaam in Tanzania. She has carried out extensive field research in East, West and Southern Africa in relation to her interest in land rights, gender equality and customary land tenure. Professor Rudman currently serves as the Editor of the State Practice and International Law Journal as well as on the International Advisory Board of The International Human Rights Law Review. She is an advisor to the Human Rights Capacity Building Project in cooperation with the Tanzania Legal Education Trust (TANLET) and The Legal and Human Rights Centre (LHRC) and the Coordinator of the partnership programme between the Faculty of Law, University of Stellenbosch and the new University of Bagamoyo, in Dar es Salaam, Tanzania. Professor Rudman has published both nationally and internationally in the fields of Public International Law, women's rights and feminist theory.

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Stewart J. Schwab was appointed the Allan R. Tessler Dean of Cornell Law School on January 1, 2004. He has been a member of the Cornell Law School faculty since 1983. A native of North Carolina, he obtained his J.D. as well as a Ph.D. in Economics from the University of Michigan. Before joining the Cornell faculty, Dean Schwab clerked for Judge J. Dickson Phillips, Jr. of the U.S. Court of Appeals for the Fourth Circuit, and then for Justice Sandra Day O'Connor of the United States Supreme Court. Dean Schwab is a leading scholar in economic analysis of law and in employment law. He is currently a Reporter for the American Law Institute's Restatement of Employment Law, and in 2008 was named by Human Resource Executive as one of the 50 most powerful employment attorneys in America. He is a Board member of the Society of American Law Deans, and a member of the Society of Empirical Legal Studies and the American Law and Economics Association.

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Alumni of Madras University is specialized in International Law and Constitutional Law. He has authored books on Environmental Law in English and Tamil, Human Rights Law in English and Tamil, which is also translated into other Indian languages and a monograph on Coastal Regulation Zone Notifications. He was trained on Law Teaching and Legal Research Skills at Cardiff Law School, Wales, U.K. and was trained on teaching environmental laws in the Universities as part of the World Bank sponsored capacity building program at National Law School of India University, Bangalore. After a short but successful practice as a legal practitioner at Madras High Court, he joined full time teaching at the Government Law College, Chennai due to his passion for teaching and improving the quality of legal education. He has taught at the University of Madras, Government Law College, Madurai, and at Hidayatullah National Law University before joining ITM University as Director of its Law School. He has a number of publications to his credit and has presented papers in many national and international conferences.

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Professor Anna Williams Shavers is the Cline Williams Professor of Citizenship Law at the University of Nebraska College of Law, Lincoln, Nebraska and teaches, among other things, Administrative Law, Immigration and Nationality Law, Refugee and Asylum Law, and International Gender Issues. She previously taught at the University of Minnesota. While at the University of Minnesota, Professor Shavers established that law school's first immigration clinic. She has served as Associate Dean and Interim Dean of the University of Nebraska Law College. She received her law degree from the University of Minnesota, a master's degree from the University of Wisconsin-Madison and her undergraduate degree from Central State University in Ohio. She currently serves as Vice-Chair of the ABA Administrative Law Section. She has previously served as Chair of the AALS Section on Immigration Law, Immigration Committee Chair of the ABA Administrative Law Section. She is a frequent national and international presenter on immigration and administrative law issues.

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Experimentation and Innovation in Teaching Human Rights

Rosalie Katsande – University of Zimbabwe Faculty of Law, Zimbabwe
The main objective of the Women Commerce and the Law Course is to facilitate the development of theoretical and methodological approaches to the analysis of the socio-legal aspects of women's participation in commercial activities in Africa with particular emphasis on Southern and Eastern Africa. The course explores and evaluates initiatives that enhance women's participation in all commercial arenas from the local, regional and the international sphere. To achieve this, bearing in mind that the field of commerce is predominantly gendered, methods and methodologies in teaching that enhance capacities to identify legal, social, cultural and other barriers that affect women's capacity to participate in commerce are used. These are pedagogical approaches that focus on critical thinking and inquiry, pedagogy that promotes dialogic approach to teaching and collaborative learning. The teaching methods of the course are therefore heavily influenced by feminist pedagogy and critical pedagogy.

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Dean and Professor of Law, University of Waikato, Hamilton, New Zealand Using Videoconference in Comparative Human Rights Teaching. What began in 1999 as a simple desire among friends by Professor Lindsay Robertson of University of Oklahoma School of Law and myself teaching at the University of Ottawa Faculty of Law to try to have a chance somehow to teach together as blossomed over the years to something much larger than we ever anticipated. Our initial, simple idea was that we could blend the domestic Indigenous Rights courses we each delivered in the USA and Canada respectively into a trans border comparative Canada-US Indigenous Rights course. As neither of us at that time were looking at a sabbatical leave in the offing, we decided to explore building upon the experience of both our universities in distance teaching to see if we could co-teach this course to students in both our law schools without any of us relocating. We launched the course at the beginning of 2001 via videoconference delivery as an experiment. It was such a hit with students that we decided to keep it going. It later spread to include Monash University (Australia) in 2003 and Victoria University of Wellington (New Zealand) in 2004. Over the intervening years it has expanded to involve 8 law schools in 4 countries that spend 2 hours/week from February to April each year with law teachers and students discussing together the legal, political and social situation in each of these 4 nations individually as well as in comparative terms along with exploring how international law has changed over the past 5 centuries regarding settler-Indigenous relations. This paper will describe the nature of the teaching and learning experience for both the law professors and the students through using videoconference technology and web-based teaching materials as an example of what can be done to bring law schools closer together.

Gloria Estenzo Ramos – University of Cebu College of Law, Philippines
Law schools have a grave responsibility in embedding the core values of respect, compassion and responsibility in each student and for fellow human beings through human rights (HR) education. They are tasked to mainstream HR education and help instill a mindset of care, compassion, stakeholder collaboration and equally as important, a strong sense of responsibility, among law students, in building capacity of the citizenry, especially the voiceless and vulnerable, to have a better quality of life.

Annika Rudman – University of Stellenbosch, South Africa
This paper presents ideas and outputs from the development and integration of new methods of active learning and dynamic assessment in teaching international human rights law. The research was conducted as a case study based on the experiences of the students and the facilitator involved in a pilot project course in international human rights law; and their engagement with course design, case based learning, pre-class assignments, peer review and

oral presentations. The hypothesis that guided the pilot project and the underlying research discussed in the paper was based on the idea that a diverse and integrated approach to teaching and assessment would not only create a higher sense of learning where students would retain the information longer; but would also help achieve a sense of equality in the classroom where students had the opportunity to learn in different ways and to show their potentials through various forms of assessment.

Sanjeevy Shanthakumar – ITM Law School, India
Social Media [Facebook]: A Platform for Teaching Human Rights Effectively in this paper, the author attempts to elaborate his personal experience of the use of social media for effective teaching of Human Rights in class room. Human Rights violations are galore and everyone had been a witness to it at one point of time or the other. Human Rights violations get prime attention of the media, civil society, international institutions, National Human Rights Institutions and numerous NGOs working in this area. Hence, teaching Human Rights become very interesting through live examples and cases of violations happening around us. Students get deeply involved in these cases of violations and deliberate upon the potential causes and solutions. This involvement of the student in the subject is attained by using the social media very effectively in the class room and beyond. Creating a Facebook page and adding every student enrolled in Human Rights Course as Administrator of the page, makes the teaching-learning process very interesting. Inviting other stakeholders such as civil society groups and NGOs to be a member of the group creates an opportunity for live opinion/feedback on various Human Rights related news and views. This extends the process of learning outside the classroom and the discussion continues beyond the classroom benefitting the students with divergent views on the subject.

Amy Tsanga – University of Zimbabwe, Zimbabwe
I seek to describe how I have developed and utilized my course on women, law reform and social justice strategies to get students to examine challenges, and explore appropriate ways of grappling with the transformative potential of legal services. These include interventionist strategies such as lobbying for law reform, legal and human rights advocacy on individual and group rights, as well as empowerment initiatives through a variety of education programs. The two threads that tie this course together are theory and method; the theoretical considerations that emanate from our social, economic and political realities within a local and global context, and, secondly the challenges of practical application in changing some these realities. My course is therefore aimed at students who find themselves interested in sharpening their perspectives in engaging with the conceptual and methodological realities of social justice activism. They include lawyers and non-lawyers as multi-disciplinarily is key to effective interventions.

Human Rights Themes in the Life of the Law School

Jassim Al Shamsi - United Arab Emirates University Faculty of Law, UAE
Written by Prof. Syed Maswood, Professor of Commercial Law, FOL, UAEU. Human Rights are those basic rights and freedoms that make our lives satisfying and meaningful. To be free from fear, free from deprivation and to have the opportunity to achieve all that we are capable of is a fundamental human aspiration. That is why human rights are sometimes called as 'natural rights'. Human rights are recognized as birth rights, which all human beings are born with simply because they are human. The reason to call them as birth rights is based on the norm that 'no one gives these rights and no one can legitimately take them away, for this sole reason they are said to be 'inalienable'.

Faisal Bhabha – Osgoode Hall Law School York University, Canada
Legal education is undergoing significant change, unprecedented in at least a century. The reasons for transforming approaches to teaching and training lawyers are not novel. Institutional and pedagogical reform have been a slow, but steady, project for decades, accelerated in recent years by a multitude of pressures, including from within the legal profession, market forces, the digital age, new perspectives on ethical norms, human rights, and rapidly changing demographics. A common theme, which underlies all of these changes, is the reality of social diversity in contemporary western societies.

Nora Demleitner – Washington and Lee University School of Law, United States
Human rights (HR) issues, which often reveal themselves from a comparative perspective, are not categorized as such in law schools though they lie beneath fundamental structural decisions. Institutional funding and access directly impact educational, social, economic – and racial -- equality. Curriculum development and coverage – in doctrinal courses and so-called "clinics"– require reflection upon the amount of resources expanded on the teaching of human rights, the connections made between human rights and related subject areas, the restriction of human rights discourse to specific courses. Student affairs regularly deal with human rights questions ranging from religious to disability accommodations. The potential for unequal gender treatment seems ever present from the selection of entry-criteria to choice of teaching modality. If these issues were categorized as human rights issues -- rather than as questions of management, students or academic freedom -- they would be approached with different gravitas and with a defined legal framework.

Jukka Kekkonen - University of Helsinki, Finland
Human rights themes should evidently have a central place in the curriculum of the law schools. However it is important to underline that a point of departure in the academy is excellency in research and teaching based on research. From this perspective a fundamental starting point to all the law schools is in laying the basic foundations of high class research. This means granting sufficient material resources as well as creating a stimulating academic atmosphere. Without these prerequisites, the academy has very little to offer except advocating good things. But that is pure politics and not the key task of the academic community.

Santiago Legarre – Pontifica Universidad Católica Argentina, Argentina
My paper will describe the way I have been teaching Human Rights law in the last three years. The paper will, subsequently, explore its advantages. The teaching system can be summed up as follows: the students are required do "draw" (broadly speaking) every major Human Rights topic of the curriculum. The "drawings" (which in reality can and do amount to more than just that) are then displayed, once a month, so that a friendly public contest takes place among the students. The professor (myself) acts as juror and renders a verdict regarding the "drawings". The award (including a price) goes to the student(s) who best achieved to reflect a given human right concept through visual devices and tools.

Wang Lisong – Tianjin University School of Liberal Arts and Law, Taiwan
Human rights law plays a leading role in all the subjects of law, so all the law students are supposed to study human rights law. Human rights law education can not only cultivate students' humanity spirits, but also stimulate the lasting, steady and sustainable development of our nation. Due to the insufficient teachers and funding, as well as the drawbacks of thoughts and research methods, the human rights law education in Tianjin University is not optimistic. In order to facilitate the human rights law education, there is a need to improve the curriculum design and strengthen the practical teaching process.

Aymen Khaled Masadeh - The British University of Dubai, United Arab Emirates
In drafting the law degree curriculum, law schools take into account the six levels of legal education, i.e. knowledge, comprehension, application, analysis, synthesis and evaluation. Teaching human rights is one of the most important topics in modern legal education throughout all the six levels.

Ousmane Mbaye – Cheikh Anta Diop University, Senegal
As the title suggest, the topic of this paper will turn around media and journalists in Senegal with content based on difficulties encountered since two years by a Bill on a new press code to become applicable Law. Such subject raises as we see, Human Rights issues especially freedom of expression, people's right to know implying the duty of journalists to suitably inform and so public's right to be protected from the media and finally the legal status of those who disseminate the information i.e. journalists. The interest is all the greater if one is aware that Senegal has for a long time successfully experienced democracy through a population viscerally committed to civil liberties, and this even during the colonial period. In this regard, a brief look at the past will shed a light on it. From discussions we held with Pr I. D. Thiam, specialist in Contemporary History and of Africa (1), we learn that the first local newspaper called the "Moniteur du Senegal" appeared in 1856. Moreover in the year of 1871, colonial authorities had allowed through a Decree indigenous political parties running for local government elections to use newspapers and wireless telegraph in order to submit their professions of faith. From this period up to Independence which occurred in 1960, the role of the press (which kept on growing) had been someone decisive in the awakening of Senegalese's consciousness for Independence. Nowadays, one can count about twenty five daily newspapers, more than forty magazines, eleven T-V channels (only one owned by the State), more than two thousand radio station including in this era of globalization and new form of communication the explosion of digital media, internet etc…, and working all without censorship.

Carolyn Penfold - The University of New South Wales, Australia
At the University of New South Wales Law School (UNSW Law), human rights has always been an important part of the curriculum. Right from its very beginning, the new UNSW Law wanted to differentiate itself from existing law schools as the 'social justice' law school

Mauro Politi, International Law, University of Trento, Italy
It is far from my intention to address, or even try to summarize, the wide range of issues that are up for discussion in this Conference. These are just a few thoughts that started to cross my mind at the time when I believed I could personally attend. Needless to say, I wish all of you and the IALS every success, and I am really grateful to Nerina Boschiero for having involved me in the project of the annual meeting of the Association. 1. In my view, there are two key questions that deserve attention, and I am sure that they will be both amply debated in Mysore. Why teaching human rights in law schools is so important today? Which are the legal aspects of human rights protection that are crucial and unavoidable for every meaningful and effective educational effort?

Fernando Villarreal-Gonda, Facultad Libre de Derecho de Monterrey, México
The legal culture of human rights emerged recently in Mexico, characterized by a deep influence of international law. The multicultural practice is an additional feature of those concerned in improving the human rights situation in the country. The growing popularity of human rights finally materialized in the constitutional reform of 2011, where human rights treaties and the pro homine principle became part of the supreme law of our nation. In addition, the panorama of violence and organized crime has triggered a revalorization of legal education through aspects that were previously left behind. Human rights matters are now positioned in a prioritized space. We wander if they offer answers to the current challenges we face in Mexico.

Key Issues in Teaching Human Rights in Law Schools

Cordelia Agbebaku and Emmanuel E. Akhigbe – Ambrose Alli University, Nigeria
Human rights is a universal concept and the observance of it is an indication of the levels of development that a country or society has attained, and therefore the necessity to teach human rights in schools especially law schools cannot be over emphasized. In Nigeria today, the teaching of human rights is at all levels ranging from primary to tertiary institutions, but the focus of this paper will be the teaching of human rights in tertiary institutions specifically the faculties of law in Nigerian Universities with the Faculty of Law, Ambrose Alli University, Ekpoma as a case study. This paper will attempt an appraisal of how human rights is taught in a typical Nigerian law school, examine the issues arising and proffer suggestions on how to improve the teaching of human rights in Nigerian Law Schools.

Monika Calkiewicz and Michal Hudzik – Kozminski Law School, Poland
Teaching human rights rests on four pillars: expertise, professional teaching, practical experience and promoting the idea of human rights in society. It calls for specific knowledge, unique approach and the desire to promote what underlies the very core of the concept – respect for any human being. It also requires twofold approach – on general level and within specific branches of law. Recognizing that practical experience allows students to better understand the law and gain new skills making them better lawyers, students should also be involved in practical projects. Law schools should be among leaders of promoting human rights – locally, nationally and internationally. Although that function can be implemented in many ways, one of them is to engage students in various activities (law clinics and street law) allowing them to help people. They become teachers themselves and promote the concept of human rights among various members of society – pupils, the elderly, the indigent, prisoners.

Krystian Complak – University of Wroclaw, Poland
As we see from the European perspective the most important subjects are: human dignity, freedom, equality and solidarity. This four rights constitute the essence of very true international convention of human rights. Every of these rights is undivided in the also important liberty and rights. For instance the Charter of fundamental Rights of the European Union distinguish in the general notion of the Freedom the following types of: freedom of thought, conscience and religion, freedom of expression and information, freedom of assembly and of association, freedom of the arts and sciences, freedom to choose an occupation and right to engage in work, freedom to conduct a business. This novelty introduced by the Charter in conjunction with European law contained in the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) are the paramount value in the process of teaching of individual rights in the Law Schools. Some frictions with the domestic regulations in that sphere should be taken into consideration as well.

Richard Carlson – South Texas College of Law, United States
A difficult and emotional debate continues over the rights of children separated from their parents or attached to dysfunctional families. Do such children have a "right" to be available for adoption? If so, what does that right require? Would a right to a "family" be fulfilled by any "placement" in a family setting, or only by placement by permanent and legal "adoption?" If a child has a right to any particular form of rearing, to what extent is that right limited by the rights of birth parents or families? In some settings this debate is further complicated by the possibility of inter-country adoption. Could a child's rights include consideration of opportunities for placement in another nation? If so, to what extent does the nation of origin's interests outweigh the interests of the child?

Demetre Egnatashvili - Ivane Javakhishvili State University, Georgia
The Purpose of Legal Education in Conjunction with Human Rights Teaching in Georgia. Modern legal education and human rights teaching are almost of the same age in Georgia and their development is driven in a parallel way. As a developing country may need young generations of state managers and bureaucracy, the role of legal education, and human rights teaching within that, is of eminent importance. The purpose of the connection between the legal education, on the one hand, and the human rights teaching, on another hand plays a paramount role in the contemporary life of such a country.

Nick James – Bond University, Australia
Universities are increasingly introducing policies and engaging in initiatives intended to promote innovation and change within higher education. However, these initiatives are often resisted by law school academics, who engage in resistant practices ranging from active resistance (such as openly refusing to comply with new teaching policies) to passive resistance (such as complying with administrative demands half-heartedly, grudgingly, or incompletely). Notions of academic freedom, academic identity, and anti-educationalism inform these resistant practices.

Judith McNamara – Queensland University of Technology, Australia
Lawyers working in a voluntary capacity make a valuable contribution to human rights causes, whether through acting directly on a pro bono basis, working in community clinics, making contribution to public debate or through contribution to law and policy reform. Accordingly, Law schools can have an important role in relation to human rights in ensuring that law graduates have developed an awareness and sensitivity to the values that underpin the principles of ethical conduct including a commitment to undertaking pro bono legal work and community service. It is not clear how this responsibility can be best fulfilled, however, it is argued that student's values and commitment to community service can be influenced by undertaking service-learning as part of their course. This presentation will explore how service-learning can contribute to the development of a pro bono ethos in law graduates.

Obeng Mireku – Nelson Mandela School of Law, South Africa
The current eight-year strategic plan of the University of Fort Hare enjoins all academic faculties to strive towards, inter alia, an overall strategic goal of achieving scholarly excellence. To this end, the University has adopted the concept of humanizing pedagogy as a strategic driver of an integrated approach towards its academic functions. This paper seeks to explore various institutional endeavors to flesh out the meaning(s) of humanizing pedagogy as a concept and how this concept is being embedded as a critical element of a teaching philosophy in the provisioning of human rights education.

Taslima Monsoor – Dhaka University, Bangladesh
The New World Human Order is as yet a nascent system grappling with war and violence, proliferating terrorism and traumatic inflictions on innocent civilians. History bears witness to massacres without mercy and mass suffering consequent on lawless attacks on the wounded and dying soldiers and victimization of women and children during armed conflicts when nations attacks nation or ethnic, tribal or religious groups indulge in "cleansing operations" on an internecine scale.

Paula Spieler – Fundacao Getulio Vargas Law School Rio, Brazil
The objective of this paper is to analyze an innovative teaching experience in human rights in Brazil: the Human Rights Clinic of Getulio Vargas Foundation Law School in Rio de Janeiro (FGV Direito Rio). Indeed, it is the only Human Rights Clinic in the country. Launched in 2009, the program is structured so as to enable students to deal with concrete cases of human rights violations as well as to act and positively interfere in Brazilian cases that are been analyzed by the Inter-American Court and Commission of Human Rights. In this period, the Clinic has

developed four memorial briefs to both organs. As a result, students were able to develop a critical thinking about important human rights issues and develop a deep understanding on the Inter-American Human Rights System. In this sense, other universities can use this experience in order to enhance human rights teaching around the world.

Hu Yaqiu – Kenneth Wang School of Law, Suzhou University, China
Since the beginning of 21st century China has begun to facilitate its human rights education at a universal way. During the course of implementing the human rights education, due to reasons of lacking experience and uniform awareness and different degrees of emphasizing such education, issues in the respects of the hierarchy of the courses, system of contents, faculty arrangement and teaching methods are problematic, thus make the human rights education do not yield the expected effects in China's legal education system. In order to resolve such problems, we must be innovative in the philosophy, system and measures and make the human rights education in our law schools become persistent and effective.

Law Schools as Contributors to Public Policy on Human Rights

Marcelo Alegre – Universidad de Buenos Aires, Argentina
A human rights institution is one devoted to respect and promote the value of human rights. Can Law Schools become human rights institution? Would that be good? Or, in other words, wouldn't being a human rights institution compromise the core academic values of Law Schools?

Aishah Bidin – National University of Malaysia, Malaysia
The United National Declaration on Human Rights represents the universal recognition that basic rights and fundamental freedoms are inherent to all human beings, inalienable and equally applicable to everyone, and that every one of us is born free and equal in dignity and rights. Within this framework, Law schools that specializes in training and producing potential lawyers can play a pivotal role in their function to advance the norms of international human rights law through research, advocacy and public education. Various aspects of issues on human rights that can be integrated in the curriculum included among others the following: Regional Human Rights, Democracy, Racism, and Women's Rights, Rights of Indigenous People, Internet and Child Rights. Clinical programs such as Klinik Guaman in UKM in which students and faculty members are created to conduct on ground investigations of basics issues and complaints of the local community. This paper will also review the current approach and role of the Faculty of Law of University Kebangsaan Malaysia in promoting and advocating public policy on human rights among law students and the public. This is done by way of integration of various subjects at undergraduate and postgraduate level such as international humanitarian law, nuclear law and others. In addition UKM also strive to promote and disseminate public policy matters via way of linkages with NGOs by research, advocacy and public education.

Mary Anne Bobinski & Kari Streelasky - University of British Columbia, Canada
Law schools have complex missions encompassing at least three important goals: (1) providing students with knowledge about law that is relevant to their future roles as lawyers, judges, and leaders in society; (2) fostering research into law and the role of law in society; and (3) facilitating public understanding and engagement with legal issues and law reform. See, e.g., UBC Law Strategic Plan, available at: http://www.law.ubc.ca/strategic_plan/index.html. Law schools can promote human rights, domestically and internationally, in each of these three roles. In this brief paper, we will outline some law school programs related to the promotion of human rights in Canada and the U.S. We also describe some of the benefits and risks of law school efforts in these areas. Finally, the paper will briefly highlight questions or issues that law schools interested in enhancing their engagement with human rights issues might consider in relation to implementing similar programs.

Thiago Bottino do Amaral – Getulio Vargas Foundation Rio de Janeiro, Brazil
The Brazilian debate on human rights is highly judicialized. Unlike other countries, major advances in public policy on human rights were obtained through lawsuits filed before the Supreme Court. The Brazilian constitution brought many rights that have not been implemented by the Executive and Legislative branches. Upon the initiative of NGOs, political parties and an independent Attorney General, the Supreme Court was urged to act on behalf of human rights. FGV DIREITO RIO has been following and studying the judicial prominence in public policies. And has also participated actively. FGV DIREITO RIO is the first Law School in the country that offered qualified legal services to NGOs, allowing them to participate as amicus curiae before the Supreme Court. Since 2008, have been advocates of various NGOs on issues of press freedom, gay rights, political rights, prisons to obtain confessions, individual

liberties and wiretapping. Our intention is to share experiences and discuss the mistakes and successes of this new model of contribution to public policy on human rights.

Lidia Casas – Diego Portales University, Chile
The consolidation process by which Latin American countries went from dictatorship to democratic governance required the participation of all members of the community. The law schools had a key role in aiding in that process. In the case of Diego Portales Law School our commitment manifested in the curricula, innovating in teaching practices incorporating a human rights lens, research, training to lawyers and judges. Since 1997, the law school formally instituted a human rights program and a public interest law clinic. Today we have a human rights centre whose role in foster knowledge production, academic exchange and influence policy and monitor government and that is respectful of human rights.

Deon Erasmus - Nelson Mandela Metropolitan University, South Africa
Ensuring the basic human rights of the poor: Ethics management training in local government by Law Schools. Delivering of services to poor communities is one of the most important constitutional imperatives of local government. These services aim to provide the poor with basic human rights, such as water, housing and basic health care. Vast amounts of money are made available to supply these services. Due to widespread corruption these funds are stolen or mismanaged. Corruption has a devastating effect on service delivery, with the result that the poor do not benefit from government spending. Although an arsenal of legislation and policies exist to combat corruption, we are losing the fight against corruption. There is a dire need for Law Schools to provide ethics management training to local government officials and councilors in order to combat corruption. During a recent project in the Western Cape Province of South Africa anti-corruption and ethics management programs were presented to local authorities. It became evident that most local authorities have anti-corruption policies in place, but that ethics committees are not operating at all. Law Schools make a vast contribution to public policy regulating the provision of services to the poor. In this way the ideal of human rights for all can become a reality.

Sergio Antonio Silva Guerra - Getulio Vargas Foundation Rio de Janeiro, Brazil
The government has taken numerous forms over the years, with an ever increasing rate of change over time. Clearly, the liberal government of the 18th century differed significantly from the economic and social interventionist government of the 20th century. Over the past centuries these forms of government have taken on new significance, structures and ways of relating with civil society.

Lawrence Hellman – Oklahoma City University Law School, United States
The essential functions of a law school are teaching, scholarship, and service. Through the normal course of performing these functions, law schools possess the capacity to contribute to the formation of public policy on human rights. This paper provides examples of how law schools can utilize this capacity for the benefit of society.

Tanel Kerikmäe – Tallinn Law School, Estonia
The joint operation of TLS and HRC is a solid sample of balancing ambitions of academia and cultivating social policy. The unique but pragmatic relationship allows HRC to use TLS resources (library, rooms, scholars, self-financing when needed for international funding). The linkage between these two units is intense as the lecturers of TLS also act as experts of human rights at HRC. The law school can benefit of being inspired by real societal problems by using results of monitoring of the human rights situation by HRC that often leads to academic analysis that can be presented to the Government. Yearly report, delivered in three languages and prepared in mutual cooperation is directly influencing societal debates and, therefore public policy. The refugee clinic is an important part of curricula for students (future decision-

makers), research on reflection of human rights in media has been clear basis in shaping the attitude of journalists.

Stephanie Macuiba – Southern Illinois University, United States
On September 11, 2001, terrorists attacked and killed thousands of Americans. In the wake of these events, the United States declared a war on terror. Unlike previous terror attacks, the government decided to wage a war instead of try the acts in a traditional criminal manor. Those suspected of being involved with the enemy were rounded up and detained, many indefinitely. Indefinite detention of terrorism suspects is contrary to human rights and against the intent of the law of war. When constructing a solution to indefinite detention at Guantanamo a four point plan should be kept in mind. The United States needs to i) charge those that are chargeable, ii) release those that cannot be charged, iii) change government procedures regarding collection of evidence at time of capture and finally iv) the world should rework the Geneva Conventions in light of new armed conflicts.

Kara Mae Muga Noveda – University of Cebu College of Law, Philippines
The Philippines has yet to sign into a law an act criminalizing acts violating the human right against enforced disappearance. Likewise, the same country has yet to sign the International Convention for the Protection of All Persons from Enforced Disappearance. Nonetheless, the Convention has, no doubt, propelled the awareness of human rights issues in the locale. This study will exemplify this effect and also delve in the local legislative efforts reinforcing this right. To be examined are the provisions of the anti-disappearance bill and its effects on substantive national law. The discussion of this bill comes at the heels of the on-going reconstruction of the criminal law code in the Philippines. This research will be done with the juxtaposition of the recent spate of unresolved high-profile cases concerning violations of the said right.

Caitlin Mulholland – Pontifica Universidad Rio de Janeiro, Brazil
The purpose of this paper is to show how the issue of human rights – and more specifically protection of the human person's dignity – is today considered a valorizing factor in Brazil's constitutional civil system, one that actually prioritizes existential as opposed to patrimonial relations. This conceptual twist is of the utmost importance for the teaching of contemporary civil law, since the disciplines included in the sphere of private-law relations, specifically those that involve property and contracts, have traditionally been taught as an area exempt from any influences or interests whatsoever, whether humanitarian or existential. For example, in the 19th and much of the 20th century, the disciplines of contracts and property were a fertile field for the full development of individualism and individual liberalism. The perception that a private relation could have its effects limited on account of some solidary interest aimed at protecting the dignity and humanity of one of the parties of that relation is the consequence of the development of a doctrine that we call constitutional civil law.

Adrian Popovici – McGill University, Canada
I am specifically interested in the private law effects of Human Rights when there are recognized in a Charter. What is called the horizontal effect or Drittwirkung. The Quebec experience may be of great interest.

Anna Williams Shavers - University of Nebraska, United States
An interest in human rights can lead to situations where a law professor can have research, teaching and service experiences that contribute to the development of public policy on human rights. This has been my experience with respect to human trafficking. My teaching and research interest in immigration and U.S. Gender Issues led me to develop a teaching and research interest in the convergence of these two areas. This resulted in the development of an International Gender Issues (IGI) course and research in this area. One particular area of

concentration has been human trafficking. Along with the many areas in which women are discriminated against that are covered in the IGI course, I cover human trafficking.

Jakub Stelina – Gdansk University, Faculty of Law, Poland
In the countries in transition process, like in Poland, law schools play a very important role as a contributor to Public Policy on Human Rights. First of all throughout the period of communism it was the universities (with the law faculties operating within them) that served as a kind of depositaries for the human right ideas, reminding of the fundamental freedoms each human being is vested in. And still, as the experience from the planting of the democratic system in Poland shows, the law schools are faced with the job of spreading the legal culture based on the human rights idea.

Rebecca Takavadiyi – University of Zimbabwe, Zimbabwe
This essay seeks to explore from a human rights perspective the implications of expanding the African Court's jurisdiction. The analysis looks at whether granting the court criminal jurisdiction will strengthen or weaken human rights on the continent .This discussion will be done in the context of issues of violation of the state's and individual access to justice; the principle of complementarity; right to fair and impartial trial; the principle of state and diplomatic sovereignty and the doctrine of effectiveness. The question will be asked, whether African leaders are genuinely ready to end impunity on the continent or this is a disguise meant to shield their own from international scrutiny? Should we erode human rights in a bid to increase opportunities for justice in Africa or should the African Court complement the International Criminal Court in preventing impunity in international crimes?

Alfredo Vitolo - Universidad de Buenos Aires, Argentina
Should law schools teach human rights? The question is a tricky one. We should first determine what is to be understood by the phrase "teaching human rights" in order to provide a proper answer to the question. In an ideal world, we believe that the teaching of the basic concept of human rights, their scope and contents, the very idea that they are inherent to human nature, the importance of them be respected, etc. should be left mainly outside of law schools, since apprehending those matters are essential to the education of every individual from childhood. Paraphrasing Georges Clemenceau, that once said that war is much too serious a matter to be entrusted to the military, we can say that human rights are much too serious matters to be entrusted exclusively to lawyers.

Diego Werneck – Getulio Vargas Foundation Rio de Janeiro, Brazil
"From resistance to dialogue: new challenges for clinical human rights education in developing countries." As developing countries move towards more democratic political systems, law schools which are committed to teaching, discussing and promoting human rights face a new set of challenges. In many countries which moved from authoritarian to democratic governments, like Brazil, human rights lawyering can typically play an important role during the transition to democracy by protecting political dissidents from arbitrary state repression. This role is mainly one of resistance, of erecting limits to state action. But such a mindset is not necessarily the only one - or even the best one - for teaching human rights to law students in democratic systems. By using Brazil as an example, this brief paper argues that, as democracy consolidates and arbitrary uses of state power tend to diminish, clinical human rights education faces challenges that require not resistance against state action, but dialogue and fine tuning of public policies. Although these two categories are ideal types (resistance and dialogue), I hope they will be useful for singling out different modes of clinical legal education, each with its own sets of requirements, advantages and limitations.

Teaching the Relationship between Business and Human Rights

Nerina Boschiero, University of Milan, Italy
Summary: I. Introduction on the "state of the art" in respect to business-human rights relationship.- II. The inherent limits of the new U.N. Framework and Guiding Principles' corporate responsibility to respect human rights. - III. The State obligation to protect and to provide access to remedy for human rights abuses by third parties, including business. - IV. The questions of corporate liability and extraterritorial jurisdiction over abuses committed abroad in the Kiobel case. - V. Bringing the Governments back in: their positions on universal civil jurisdiction under international law. - VI. Critical evaluation of the European Union Member States' arguments on the extraterritorial application of ATS. - VII. Conclusion.

Hlako Choma – University of Venda, South Africa
Growing attention to the protection and enforcement of socio-economic right has produced much excellent work in South African jurisprudence. There remain, however, important areas for further exploration in this research. The research will argue that recent literature has focused on questions of inclusion or entrenchment of socio-economic rights in the constitutions. The research further argues that there is room for more sustained and critical attention to the question of democracy. While more attention to democracy would certainly include descriptive understandings of trends in decision-making practices, what is even more urgent is a prescriptive exploration of the role democracy may play in shaping a more progressive future for South Africans against poverty. This paper explores the intersection of economic globalisation and the enforcement of socio-economic rights. The focus of this exploration is the right to social security. While a right to social security can be constructed at the international level, the right disappears in the face of neoliberal development measures such as those that are instituted by democratic governments in developing nations faced with limited resources.

Carmen Domínguez – Pontifica Universidad Católica de Chile, Chile
Civil law has been called, rightly or wrongly, the law of "the rich", expression that refers to its traditional inclination to goods, obligations and contracts and the inheritance, all of them patrimonial subjects. In addition to that, the books that deal with the general obligations and contracts, in almost all nineteenth-codes like the Chilean one - are virtually books of creditors, who are considered above debtors. Civil law appears to devote concern to everything related to the estate of the person more than the person in itself, an idea that seems supported by the fact that neither the Napoleonic Code of 1804 nor those that followed it, contain a systematic regulation of the person and its inherent rights.
For others, the omission of such regulation may be due to the fact that it was not necessary, since by the time of enactment of the French Civil Code, the declaration of rights of 1789 already existed. Proof of this is that its contents came to lead most of the constitutions of the most diverse countries which came later.

Donald Martin Ferencz – Middlesex University School of Law, United Kingdom
At the outset, and as a matter of full and fair disclosure, I should confess that I am not an academic in the traditional sense, but I have a keen interest in criminalization of the illegal use of armed force - both as what we would, in today's world, call the crime of aggression, and also as a crime against humanity.

Helmut Grothe - Free University of Berlin, Germany
When teaching business law at university level, one is tempted to leave human rights issues to the professors for public law. The complexity and globality of today's business law are certainly sufficient to fill the curriculum without taking recourse to human rights. Nonetheless, every once in a while, there is time to introduce aspects of human rights law into a business law lecture.

Shashikala Gurpur and Bindu Ronald – Symbiosis Law School, India
Drawing on the existing curriculum in various law schools in India, the paper aims to posit the current scenario in the critical backdrop of Ruggie report and emerging stricter norms of corporate governance. It also argues for making human rights a mandatory value and parameter across disciplines within regulatory framework like how environmental education is.

Fatima Mandu – University of Zambia, Zambia
The role of law schools in providing training based solutions in Human Rights and Business in Zambia. There is clear need to promote business and human rights courses in Zambia. Labour unrests, management lock outs, strikes and general discourse in the world of work are common occurrences in the business sector. Linked with this are the problems on the other extreme involving directors, shareholders and managers and their fraudulent corrupt and dishonest means of maximizing profits on their investment. This paper will investigate how training in issues of human rights in the context of business will help resolve the problems outlined above. Currently there are no courses being offered either as standalone or part of the general human rights training. There is little or no research published in this area and therefore no jurisprudence for practicing Advocates to argue complex cases based on human rights violations. The objective of the training programs will not only be academic and theoretical but a practical approach imparting skills to resolve the problems in the businesses. The aim of this paper is to investigate suitable training options including in-house workshops for business professionals that can promote compliance with human rights in the world of business in Zambia.

Nitika Nagar – Symbiosis Law School, India
Over the Years, the Equation between Business and Human Rights has drastically changed. With the advent of Globalisation, business has served as a vehicle for economic, social and cultural amelioration. One can see a dramatic change in the economic scenario of developing countries like India, where the diffusion of technology, scientific culture and management skills has led to job creations and rapid economic development. The flow of Foreign Direct Investment has brought a wave of transformation, which includes not only an increase in the number of jobs, but a remarkable improvement in the overall standard of living of the people. Business has thus enriched human lives, by giving every individual various rights, ranging from the right to adequate quality food to the right to freedom of expression and access to information. However, Business has certain negative implications as well that need to be rectified. Business poses a great threat to the enjoyment to human rights through its own conduct or invasion of rights by the host government. Moreover, private business firms have violated social, economic and cultural rights on a large scale and have remained unaccountable for their acts by exploiting the loopholes in the regulatory mechanisms. It has thus become a Necessity for Law and Business Schools to learn about the Current existing Relationship between Business and Human Rights. This article explores the Ethical and Legal perspectives of the above mentioned relationship and the ways in which Law Schools and Business schools can educate students on the hazardous implications that Business has had over Human Rights in recent times.

Ashok Patil – National Law School of India University, India
Consumer rights are rights of the individual and not rights of a group. Consumers are not a separate group of people, since every person is a consumer from time to time. Whether it be the person who buys the goods or the seller of those goods who must have bought those goods who he is selling from some other person. The acknowledgement that human rights protect the individual's prosperity, honor, and development makes consumer rights suitable to be declared as human rights. This establishes the fact that consumer rights are rights of an individual and therefore must be considered in the list of human rights. The main aim of various human rights available is to protect the right of human dignity of an individual. This main aim of protecting the human dignity has been recognized in various United Nations documents like UDHR, ICESCR and UNGCR etc. In a consumer society, protection of the individual consumer is part of maintaining human dignity. If not given the right to fair trade, the right to a fair contract, and the right of access to courts, a person's dignity is disregarded. Therefore it is amply clear that the main aim of both human rights and consumer rights is to protect the dignity of an individual, which makes the case for consumer rights to be included in human rights even stronger.

Poonam Puri – Osgoode Hall Law School York University, Canada
There are a number of different ways in which human rights can be discussed and advanced through the teaching of business law courses in law schools. There are a multitude of stakeholders who are impacted by the decisions made by corporate actors. Though most corporate law statutes around the world do not speak to human rights directly, they do impose a duty on directors to act in the best interests of the organization, including the interests of shareholders and other stakeholders who are affected by the corporation's actions. When considering human rights in business, it is necessary to look at how those stakeholders who are not shareholders are impacted by business operations. This paper seeks to address how human rights can be advanced through teaching corporate law, and specifically through discussion and analysis of the role of 1. non-corporate law statutes that specifically protect human rights; 2. corporate culture and discretionary decision-making; and 3. voluntary, soft-law principles-based mechanisms, such as the Equator Principles.

Sonia Rolland – Northeastern University School of Law, United States
Why address development in the context of the World Trade Organization (WTO) at all? Indeed the WTO has at best a very weak mandate regarding development. An obvious alternative would be to consider development norms in general inter- national law and hope that they might in turn permeate the WTO system. In practice, the WTO has not been very receptive to importing norms from public international law, and certainly, with respect to development, has been largely deaf to legal arguments grounded in any claim or right to development. As a result, the WTO legal regime may be the most practical forum for addressing trade-related aspects of development, primarily for legal reasons, but also for political reasons, since developing members are actors within the WTO system and have signaled no real intention to abandon that system in the near future. Regardless of whether it is theoretically appropriate to deal with development at the WTO, the reality is that WTO rules unavoidably have an impact on development. The question then is how exactly the WTO legal framework affects development dynamics for its members, whether there are gaps between intended and actual effects, and how WTO rules and institutions could be realigned to better respond to the needs and demands of the various segments of the WTO membership. This book explores these critical issues with a view to providing concrete options for negotiators, tools for litigators and adjudicators, and a more coherent understanding of the trade and development relationship at the WTO in the longer term.

Moussa Samb – Cheikh Anta Diop University, Senegal
The issues of human rights and business law are very important for underdeveloped countries, equally, if not more, for Africa is becoming a destination for foreign investment, private and public. Current performance of the African economy, which occurs in a context of crisis and financial market internationally, is very attractive to international investors. During the last decade, emerging economies are competing to become one on the most country investors in Africa. The interface between business and society has been framed predominantly in such terms as business ethics, corporate social responsibility, corporate environmentalism, and sustainable development. However, an increasingly prominent debate is emerging around business and human rights. These discussions are not limited to identifying human rights merely as a moral framework for voluntary corporate citizenship. Rather, the debate turns on the extent to which international and national human rights law is applicable to private sector companies.

Valentina Smorgunova – Herzen State Pedagogical University, Russia
The Challenge of Multiculturalism and the Problem of Human Security in Modern Russia as the Subject Matter of Teaching Human Rights in Russian Universities
Modern Russia is included into global and economical life. Last decade demonstrated the intensive social and cultural diversification in Russia, consolidation of different social, educational, professional, ethnic and religious groups. It shows the rise of cultural polycentrism of the society. The last determines the existence of social discontent in some sectors of the life of society

Somu C S – Christ University School of Law
Corporate Social Responsibility is no longer regarded as voluntary and philanthropic activity of the companies. Governments have been making legislations to define the role of companies in making their CSR policies so as to promote and protect human rights. The proposed Companies Bill 2012 of India imposes an obligation on companies to undertake socially responsible activities for promoting human rights. This paper explores the operation of the law for the purpose of bringing Corporate Social Responsibility into its ambit and expanding the legal accountabilities of the companies towards society. Keywords: Business, CSR, Human Rights, Law

Jiri Valdhans & Nadezda Rozehnalova - Masaryk University Faculty of Law, Czech Republic
This paper discusses the changes that have occurred in the concept of the relationship between arbitration and human rights and highlights the transformation of the subject we teach, while using a topic that we deal with professionally as an example. As a preliminary remark, it should be pointed out that we both specialise in the field of private international law and arbitration. We teach a separate course in international and national arbitration at the Faculty of Law of Masaryk University in Brno.

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Annual Meeting

The Role of Law Schools and Human Rights

March 6th – 9th, 2013
Mysore, India

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**Please note some attendees did not submit an abstract and/or paper. Formatting has been changed for uniformity. Those who submitted papers after the deadline can be viewed in the supplementary program included on this USB. Please note that all papers will be posted online at the IALS website.*

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Experimentation and Innovation in Teaching Human Rights

Rosalie Katsande – University of Zimbabwe Faculty of Law, Zimbabwe
The main objective of the Women Commerce and the Law Course is to facilitate the development of theoretical and methodological approaches to the analysis of the socio-legal aspects of women's participation in commercial activities in Africa with particular emphasis on Southern and Eastern Africa. The course explores and evaluates initiatives that enhance women's participation in all commercial arenas from the local, regional and the international sphere. To achieve this, bearing in mind that the field of commerce is predominantly gendered, methods and methodologies in teaching that enhance capacities to identify legal, social, cultural and other barriers that affect women's capacity to participate in commerce are used. These are pedagogical approaches that focus on critical thinking and inquiry, pedagogy that promotes dialogic approach to teaching and collaborative learning. The teaching methods of the course are therefore heavily influenced by feminist pedagogy and critical pedagogy.

Gloria Estenzo Ramos – University of Cebu College of Law, Philippines
Law schools have a grave responsibility in embedding the core values of respect, compassion and responsibility in each student and for fellow human beings through human rights (HR) education. They are tasked to mainstream HR education and help instill a mindset of care, compassion, stakeholder collaboration and equally as important, a strong sense of responsibility, among law students, in building capacity of the citizenry, especially the voiceless and vulnerable, to have a better quality of life.

Annika Rudman – University of Stellenbosch, South Africa
This paper presents ideas and outputs from the development and integration of new methods of active learning and dynamic assessment in teaching international human rights law. The research was conducted as a case study based on the experiences of the students and the facilitator involved in a pilot project course in international human rights law; and their engagement with course design, case based learning, pre-class assignments, peer review and oral presentations. The hypothesis that guided the pilot project and the underlying research discussed in the paper was based on the idea that a diverse and integrated approach to teaching and assessment would not only create a higher sense of learning where students would retain the information longer; but would also help achieve a sense of equality in the classroom where students had the opportunity to learn in different ways and to show their potentials through various forms of assessment.

Sanjeevy Shanthakumar – ITM Law School, India
Social Media [Facebook]: A Platform for Teaching Human Rights Effectively in this paper, the author attempts to elaborate his personal experience of the use of social media for effective teaching of Human Rights in class room. Human Rights violations are galore and everyone had been a witness to it at one point of time or the other. Human Rights violations get prime attention of the media, civil society, international institutions, National Human Rights Institutions and numerous NGOs working in this area. Hence, teaching Human Rights become very interesting through live examples and cases of violations happening around us. Students get deeply involved in these cases of violations and deliberate upon the potential causes and solutions. This involvement of the student in the subject is attained by using the social media very effectively in the class room and beyond. Creating a Facebook page and adding every student enrolled in Human Rights Course as Administrator of the page, makes

the teaching-learning process very interesting. Inviting other stakeholders such as civil society groups and NGOs to be a member of the group creates an opportunity for live opinion/feedback on various Human Rights related news and views. This extends the process of learning outside the classroom and the discussion continues beyond the classroom benefitting the students with divergent views on the subject.

Amy Tsanga – University of Zimbabwe, Zimbabwe
I seek to describe how I have developed and utilized my course on women, law reform and social justice strategies to get students to examine challenges, and explore appropriate ways of grappling with the transformative potential of legal services. These include interventionist strategies such as lobbying for law reform, legal and human rights advocacy on individual and group rights, as well as empowerment initiatives through a variety of education programs. The two threads that tie this course together are theory and method; the theoretical considerations that emanate from our social, economic and political realities within a local and global context, and, secondly the challenges of practical application in changing some these realities. My course is therefore aimed at students who find themselves interested in sharpening their perspectives in engaging with the conceptual and methodological realities of social justice activism. They include lawyers and non-lawyers as multi-disciplinarily is key to effective interventions.

Human Rights Themes in the Life of the Law School

Jassim Al Shamsi - United Arab Emirates University Faculty of Law, UAE
Written by Prof. Syed Maswood, Professor of Commercial Law, FOL, UAEU. Human Rights are those basic rights and freedoms that make our lives satisfying and meaningful. To be free from fear, free from deprivation and to have the opportunity to achieve all that we are capable of is a fundamental human aspiration. That is why human rights are sometimes called as 'natural rights'. Human rights are recognized as birth rights, which all human beings are born with simply because they are human. The reason to call them as birth rights is based on the norm that 'no one gives these rights and no one can legitimately take them away, for this sole reason they are said to be 'inalienable'.

Faisal Bhabha – Osgoode Hall Law School York University, Canada
Legal education is undergoing significant change, unprecedented in at least a century. The reasons for transforming approaches to teaching and training lawyers are not novel. Institutional and pedagogical reform have been a slow, but steady, project for decades, accelerated in recent years by a multitude of pressures, including from within the legal profession, market forces, the digital age, new perspectives on ethical norms, human rights, and rapidly changing demographics. A common theme, which underlies all of these changes, is the reality of social diversity in contemporary western societies.

Nora Demleitner – Washington and Lee University School of Law, United States
Human rights (HR) issues, which often reveal themselves from a comparative perspective, are not categorized as such in law schools though they lie beneath fundamental structural decisions. Institutional funding and access directly impact educational, social, economic – and racial -- equality. Curriculum development and coverage – in doctrinal courses and so-called "clinics"– require reflection upon the amount of resources expanded on the teaching of human rights, the connections made between human rights and related subject areas, the restriction of human rights discourse to specific courses. Student affairs regularly deal with human rights questions ranging from religious to disability accommodations. The potential for unequal gender treatment seems ever present from the selection of entry-criteria to choice of teaching modality. If these issues were categorized as human rights issues -- rather than as questions of management, students or academic freedom -- they would be approached with different gravitas and with a defined legal framework.

Santiago Legarre – Pontifica Universidad Católica Argentina, Argentina
My paper will describe the way I have been teaching Human Rights law in the last three years. The paper will, subsequently, explore its advantages. The teaching system can be summed up as follows: the students are required do "draw" (broadly speaking) every major Human Rights topic of the curriculum. The "drawings" (which in reality can and do amount to more than just that) are then displayed, once a month, so that a friendly public contest takes place among the students. The professor (myself) acts as juror and renders a verdict regarding the "drawings". The award (including a price) goes to the student(s) who best achieved to reflect a given human right concept through visual devices and tools.

Wang Lisong – Tianjin University School of Liberal Arts and Law, Taiwan
Human rights law plays a leading role in all the subjects of law, so all the law students are supposed to study human rights law. Human rights law education can not only cultivate students' humanity spirits, but also stimulate the lasting, steady and sustainable development of our nation. Due to the insufficient teachers and funding, as well as the drawbacks of thoughts and research methods, the human rights law education in Tianjin

University is not optimistic. In order to facilitate the human rights law education, there is a need to improve the curriculum design and strengthen the practical teaching process.

Aymen Khaled Masadeh - The British University of Dubai, United Arab Emirates
In drafting the law degree curriculum, law schools take into account the six levels of legal education, i.e. knowledge, comprehension, application, analysis, synthesis and evaluation. Teaching human rights is one of the most important topics in modern legal education throughout all the six levels.

Ousmane Mbaye – Cheikh Anta Diop University, Senegal
As the title suggest, the topic of this paper will turn around media and journalists in Senegal with content based on difficulties encountered since two years by a Bill on a new press code to become applicable Law. Such subject raises as we see, Human Rights issues especially freedom of expression, people's right to know implying the duty of journalists to suitably inform and so public's right to be protected from the media and finally the legal status of those who disseminate the information i.e. journalists. The interest is all the greater if one is aware that Senegal has for a long time successfully experienced democracy through a population viscerally committed to civil liberties, and this even during the colonial period. In this regard, a brief look at the past will shed a light on it. From discussions we held with Pr I. D. Thiam, specialist in Contemporary History and of Africa (1), we learn that the first local newspaper called the "Moniteur du Senegal" appeared in 1856. Moreover in the year of 1871, colonial authorities had allowed through a Decree indigenous political parties running for local government elections to use newspapers and wireless telegraph in order to submit their professions of faith. From this period up to Independence which occurred in 1960, the role of the press (which kept on growing) had been someone decisive in the awakening of Senegalese's consciousness for Independence. Nowadays, one can count about twenty five daily newspapers, more than forty magazines, eleven T-V channels (only one owned by the State), more than two thousand radio station including in this era of globalization and new form of communication the explosion of digital media, internet etc…, and working all without censorship.

Carolyn Penfold - The University of New South Wales, Australia
At the University of New South Wales Law School (UNSW Law), human rights has always been an important part of the curriculum. Right from its very beginning, the new UNSW Law wanted to differentiate itself from existing law schools as the 'social justice' law school

Fernando Villarreal-Gonda, Facultad Libre de Derecho de Monterrey, México
The legal culture of human rights emerged recently in Mexico, characterized by a deep influence of international law. The multicultural practice is an additional feature of those concerned in improving the human rights situation in the country. The growing popularity of human rights finally materialized in the constitutional reform of 2011, where human rights treaties and the pro homine principle became part of the supreme law of our nation. In addition, the panorama of violence and organized crime has triggered a revalorization of legal education through aspects that were previously left behind. Human rights matters are now positioned in a prioritized space. We wander if they offer answers to the current challenges we face in Mexico.

Key Issues in Teaching Human Rights in Law Schools

Cordelia Agbebaku and Emmanuel E. Akhigbe – Ambrose Alli University, Nigeria
Human rights is a universal concept and the observance of it is an indication of the levels of development that a country or society has attained, and therefore the necessity to teach human rights in schools especially law schools cannot be over emphasized. In Nigeria today, the teaching of human rights is at all levels ranging from primary to tertiary institutions, but the focus of this paper will be the teaching of human rights in tertiary institutions specifically the faculties of law in Nigerian Universities with the Faculty of Law, Ambrose Alli University, Ekpoma as a case study. This paper will attempt an appraisal of how human rights is taught in a typical Nigerian law school, examine the issues arising and proffer suggestions on how to improve the teaching of human rights in Nigerian Law Schools.

Monika Calkiewicz and Michal Hudzik – Kozminski Law School, Poland
Teaching human rights rests on four pillars: expertise, professional teaching, practical experience and promoting the idea of human rights in society. It calls for specific knowledge, unique approach and the desire to promote what underlies the very core of the concept – respect for any human being. It also requires twofold approach – on general level and within specific branches of law. Recognizing that practical experience allows students to better understand the law and gain new skills making them better lawyers, students should also be involved in practical projects. Law schools should be among leaders of promoting human rights – locally, nationally and internationally. Although that function can be implemented in many ways, one of them is to engage students in various activities (law clinics and street law) allowing them to help people. They become teachers themselves and promote the concept of human rights among various members of society – pupils, the elderly, the indigent, prisoners.

Krystian Complak – University of Wroclaw, Poland
As we see from the European perspective the most important subjects are: human dignity, freedom, equality and solidarity. This four rights constitute the essence of very true international convention of human rights. Every of these rights is undivided in the also important liberty and rights. For instance the Charter of fundamental Rights of the European Union distinguish in the general notion of the Freedom the following types of: freedom of thought, conscience and religion, freedom of expression and information, freedom of assembly and of association, freedom of the arts and sciences, freedom to choose an occupation and right to engage in work, freedom to conduct a business. This novelty introduced by the Charter in conjunction with European law contained in the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) are the paramount value in the process of teaching of individual rights in the Law Schools. Some frictions with the domestic regulations in that sphere should be taken into consideration as well.

Richard Carlson – South Texas College of Law, United States
A difficult and emotional debate continues over the rights of children separated from their parents or attached to dysfunctional families. Do such children have a "right" to be available for adoption? If so, what does that right require? Would a right to a "family" be fulfilled by any "placement" in a family setting, or only by placement by permanent and legal "adoption?" If a child has a right to any particular form of rearing, to what extent is that right limited by the rights of birth parents or families? In some settings this debate is further complicated by the possibility of inter-country adoption. Could a child's rights include

consideration of opportunities for placement in another nation? If so, to what extent does the nation of origin's interests outweigh the interests of the child?

Demetre Egnatashvili - Ivane Javakhishvili State University, Georgia
The Purpose of Legal Education in Conjunction with Human Rights Teaching in Georgia. Modern legal education and human rights teaching are almost of the same age in Georgia and their development is driven in a parallel way. As a developing country may need young generations of state managers and bureaucracy, the role of legal education, and human rights teaching within that, is of eminent importance. The purpose of the connection between the legal education, on the one hand, and the human rights teaching, on another hand plays a paramount role in the contemporary life of such a country.

Nick James – Bond University, Australia
Universities are increasingly introducing policies and engaging in initiatives intended to promote innovation and change within higher education. However, these initiatives are often resisted by law school academics, who engage in resistant practices ranging from active resistance (such as openly refusing to comply with new teaching policies) to passive resistance (such as complying with administrative demands half-heartedly, grudgingly, or incompletely). Notions of academic freedom, academic identity, and anti-educationalism inform these resistant practices.

Judith McNamara – Queensland University of Technology, Australia
Lawyers working in a voluntary capacity make a valuable contribution to human rights causes, whether through acting directly on a pro bono basis, working in community clinics, making contribution to public debate or through contribution to law and policy reform. Accordingly, Law schools can have an important role in relation to human rights in ensuring that law graduates have developed an awareness and sensitivity to the values that underpin the principles of ethical conduct including a commitment to undertaking pro bono legal work and community service. It is not clear how this responsibility can be best fulfilled, however, it is argued that student's values and commitment to community service can be influenced by undertaking service-learning as part of their course. This presentation will explore how service-learning can contribute to the development of a pro bono ethos in law graduates.

Obeng Mireku – Nelson Mandela School of Law, South Africa
The current eight-year strategic plan of the University of Fort Hare enjoins all academic faculties to strive towards, inter alia, an overall strategic goal of achieving scholarly excellence. To this end, the University has adopted the concept of humanizing pedagogy as a strategic driver of an integrated approach towards its academic functions. This paper seeks to explore various institutional endeavors to flesh out the meaning(s) of humanizing pedagogy as a concept and how this concept is being embedded as a critical element of a teaching philosophy in the provisioning of human rights education.

Paula Spieler – Fundacao Getulio Vargas Law School Rio, Brazil
The objective of this paper is to analyze an innovative teaching experience in human rights in Brazil: the Human Rights Clinic of Getulio Vargas Foundation Law School in Rio de Janeiro (FGV Direito Rio). Indeed, it is the only Human Rights Clinic in the country. Launched in 2009, the program is structured so as to enable students to deal with concrete cases of human rights violations as well as to act and positively interfere in Brazilian cases that are been analyzed by the Inter-American Court and Commission of Human Rights. In this period, the Clinic has developed four memorial briefs to both organs. As a result, students were able to develop a critical thinking about important human rights issues and develop a deep understanding on the Inter-American Human Rights System. In this sense, other

universities can use this experience in order to enhance human rights teaching around the world.

Hu Yaqiu – Kenneth Wang School of Law, Suzhou University, China
Since the beginning of 21st century China has begun to facilitate its human rights education at a universal way. During the course of implementing the human rights education, due to reasons of lacking experience and uniform awareness and different degrees of emphasizing such education, issues in the respects of the hierarchy of the courses, system of contents, faculty arrangement and teaching methods are problematic, thus make the human rights education do not yield the expected effects in China's legal education system. In order to resolve such problems, we must be innovative in the philosophy, system and measures and make the human rights education in our law schools become persistent and effective.

Law Schools as Contributors to Public Policy on Human Rights

Marcelo Alegre – Universidad de Buenos Aires, Argentina
A human rights institution is one devoted to respect and promote the value of human rights. Can Law Schools become human rights institution? Would that be good? Or, in other words, wouldn't being a human rights institution compromise the core academic values of Law Schools?

Aishah Bidin – National University of Malaysia, Malaysia
The United National Declaration on Human Rights represents the universal recognition that basic rights and fundamental freedoms are inherent to all human beings, inalienable and equally applicable to everyone, and that every one of us is born free and equal in dignity and rights. Within this framework, Law schools that specializes in training and producing potential lawyers can play a pivotal role in their function to advance the norms of international human rights law through research, advocacy and public education. Various aspects of issues on human rights that can be integrated in the curriculum included among others the following: Regional Human Rights, Democracy, Racism, and Women's Rights, Rights of Indigenous People, Internet and Child Rights. Clinical programs such as Klinik Guaman in UKM in which students and faculty members are created to conduct on ground investigations of basics issues and complaints of the local community. This paper will also review the current approach and role of the Faculty of Law of University Kebangsaan Malaysia in promoting and advocating public policy on human rights among law students and the public. This is done by way of integration of various subjects at undergraduate and postgraduate level such as international humanitarian law, nuclear law and others. In addition UKM also strive to promote and disseminate public policy matters via way of linkages with NGOs by research, advocacy and public education.

Mary Anne Bobinski & Kari Streelasky - University of British Columbia, Canada
Law schools have complex missions encompassing at least three important goals: (1) providing students with knowledge about law that is relevant to their future roles as lawyers, judges, and leaders in society; (2) fostering research into law and the role of law in society; and (3) facilitating public understanding and engagement with legal issues and law reform. See, e.g., UBC Law Strategic Plan, available at: http://www.law.ubc.ca/strategic_plan/index.html. Law schools can promote human rights, domestically and internationally, in each of these three roles. In this brief paper, we will outline some law school programs related to the promotion of human rights in Canada and the U.S. We also describe some of the benefits and risks of law school efforts in these areas. Finally, the paper will briefly highlight questions or issues that law schools interested in enhancing their engagement with human rights issues might consider in relation to implementing similar programs.

Thiago Bottino do Amaral – Getulio Vargas Foundation Rio de Janeiro, Brazil
The Brazilian debate on human rights is highly judicialized. Unlike other countries, major advances in public policy on human rights were obtained through lawsuits filed before the Supreme Court. The Brazilian constitution brought many rights that have not been implemented by the Executive and Legislative branches. Upon the initiative of NGOs, political parties and an independent Attorney General, the Supreme Court was urged to act on behalf of human rights. FGV DIREITO RIO has been following and studying the judicial prominence in public policies. And has also participated actively. FGV DIREITO RIO is the

first Law School in the country that offered qualified legal services to NGOs, allowing them to participate as amicus curiae before the Supreme Court. Since 2008, have been advocates of various NGOs on issues of press freedom, gay rights, political rights, prisons to obtain confessions, individual liberties and wiretapping. Our intention is to share experiences and discuss the mistakes and successes of this new model of contribution to public policy on human rights.

Deon Erasmus - Nelson Mandela Metropolitan University, South Africa
Ensuring the basic human rights of the poor: Ethics management training in local government by Law Schools. Delivering of services to poor communities is one of the most important constitutional imperatives of local government. These services aim to provide the poor with basic human rights, such as water, housing and basic health care. Vast amounts of money are made available to supply these services. Due to widespread corruption these funds are stolen or mismanaged. Corruption has a devastating effect on service delivery, with the result that the poor do not benefit from government spending. Although an arsenal of legislation and policies exist to combat corruption, we are losing the fight against corruption. There is a dire need for Law Schools to provide ethics management training to local government officials and councilors in order to combat corruption. During a recent project in the Western Cape Province of South Africa anti-corruption and ethics management programs were presented to local authorities. It became evident that most local authorities have anti-corruption policies in place, but that ethics committees are not operating at all. Law Schools make a vast contribution to public policy regulating the provision of services to the poor. In this way the ideal of human rights for all can become a reality.

Sergio Antonio Silva Guerra - Getulio Vargas Foundation Rio de Janeiro, Brazil
The government has taken numerous forms over the years, with an ever increasing rate of change over time. Clearly, the liberal government of the 18th century differed significantly from the economic and social interventionist government of the 20th century. Over the past centuries these forms of government have taken on new significance, structures and ways of relating with civil society.

Lawrence Hellman – Oklahoma City University Law School, United States
The essential functions of a law school are teaching, scholarship, and service. Through the normal course of performing these functions, law schools possess the capacity to contribute to the formation of public policy on human rights. This paper provides examples of how law schools can utilize this capacity for the benefit of society.

Tanel Kerikmäe – Tallinn Law School, Estonia
The joint operation of TLS and HRC is a solid sample of balancing ambitions of academia and cultivating social policy. The unique but pragmatic relationship allows HRC to use TLS resources (library, rooms, scholars, self-financing when needed for international funding). The linkage between these two units is intense as the lecturers of TLS also act as experts of human rights at HRC. The law school can benefit of being inspired by real societal problems by using results of monitoring of the human rights situation by HRC that often leads to academic analysis that can be presented to the Government. Yearly report, delivered in three languages and prepared in mutual cooperation is directly influencing societal debates and, therefore public policy. The refugee clinic is an important part of curricula for students (future decision-makers), research on reflection of human rights in media has been clear basis in shaping the attitude of journalists.

Stephanie Macuiba – Southern Illinois University, United States
On September 11, 2001, terrorists attacked and killed thousands of Americans. In the wake of these events, the United States declared a war on terror. Unlike previous terror attacks, the government decided to wage a war instead of try the acts in a traditional criminal manor. Those suspected of being involved with the enemy were rounded up and detained, many indefinitely. Indefinite detention of terrorism suspects is contrary to human rights and against the intent of the law of war. When constructing a solution to indefinite detention at Guantanamo a four point plan should be kept in mind. The United States needs to i) charge those that are chargeable, ii) release those that cannot be charged, iii) change government procedures regarding collection of evidence at time of capture and finally iv) the world should rework the Geneva Conventions in light of new armed conflicts.

Kara Mae Muga Noveda – University of Cebu College of Law, Philippines
The Philippines has yet to sign into a law an act criminalizing acts violating the human right against enforced disappearance. Likewise, the same country has yet to sign the International Convention for the Protection of All Persons from Enforced Disappearance. Nonetheless, the Convention has, no doubt, propelled the awareness of human rights issues in the locale. This study will exemplify this effect and also delve in the local legislative efforts reinforcing this right. To be examined are the provisions of the anti-disappearance bill and its effects on substantive national law. The discussion of this bill comes at the heels of the on-going reconstruction of the criminal law code in the Philippines. This research will be done with the juxtaposition of the recent spate of unresolved high-profile cases concerning violations of the said right.

Caitlin Mulholland – Pontifica Universidad Rio de Janeiro, Brazil
The purpose of this paper is to show how the issue of human rights – and more specifically protection of the human person's dignity – is today considered a valorizing factor in Brazil's constitutional civil system, one that actually prioritizes existential as opposed to patrimonial relations. This conceptual twist is of the utmost importance for the teaching of contemporary civil law, since the disciplines included in the sphere of private-law relations, specifically those that involve property and contracts, have traditionally been taught as an area exempt from any influences or interests whatsoever, whether humanitarian or existential. For example, in the 19th and much of the 20th century, the disciplines of contracts and property were a fertile field for the full development of individualism and individual liberalism. The perception that a private relation could have its effects limited on account of some solidary interest aimed at protecting the dignity and humanity of one of the parties of that relation is the consequence of the development of a doctrine that we call constitutional civil law.

Adrian Popovici – McGill University, Canada
I am specifically interested in the private law effects of Human Rights when there are recognized in a Charter. What is called the horizontal effect or Drittwirkung. The Quebec experience may be of great interest.

Anna Williams Shavers - University of Nebraska, United States
An interest in human rights can lead to situations where a law professor can have research, teaching and service experiences that contribute to the development of public policy on human rights. This has been my experience with respect to human trafficking. My teaching and research interest in immigration and U.S. Gender Issues led me to develop a teaching and research interest in the convergence of these two areas. This resulted in the development of an International Gender Issues (IGI) course and research in this area. One particular area of concentration has been human trafficking. Along with the many areas in

which women are discriminated against that are covered in the IGI course, I cover human trafficking.

Jakub Stelina – Gdansk University, Faculty of Law, Poland
In the countries in transition process, like in Poland, law schools play a very important role as a contributor to Public Policy on Human Rights. First of all throughout the period of communism it was the universities (with the law faculties operating within them) that served as a kind of depositaries for the human right ideas, reminding of the fundamental freedoms each human being is vested in. And still, as the experience from the planting of the democratic system in Poland shows, the law schools are faced with the job of spreading the legal culture based on the human rights idea.

Rebecca Takavadiyi – University of Zimbabwe, Zimbabwe
This essay seeks to explore from a human rights perspective the implications of expanding the African Court's jurisdiction. The analysis looks at whether granting the court criminal jurisdiction will strengthen or weaken human rights on the continent .This discussion will be done in the context of issues of violation of the state's and individual access to justice; the principle of complementarity; right to fair and impartial trial; the principle of state and diplomatic sovereignty and the doctrine of effectiveness. The question will be asked, whether African leaders are genuinely ready to end impunity on the continent or this is a disguise meant to shield their own from international scrutiny? Should we erode human rights in a bid to increase opportunities for justice in Africa or should the African Court complement the International Criminal Court in preventing impunity in international crimes?

Alfredo Vitolo - Universidad de Buenos Aires, Argentina
Should law schools teach human rights? The question is a tricky one. We should first determine what is to be understood by the phrase "teaching human rights" in order to provide a proper answer to the question. In an ideal world, we believe that the teaching of the basic concept of human rights, their scope and contents, the very idea that they are inherent to human nature, the importance of them be respected, etc. should be left mainly outside of law schools, since apprehending those matters are essential to the education of every individual from childhood. Paraphrasing Georges Clemenceau, that once said that war is much too serious a matter to be entrusted to the military, we can say that human rights are much too serious matters to be entrusted exclusively to lawyers.

Diego Werneck – Getulio Vargas Foundation Rio de Janeiro, Brazil
"From resistance to dialogue: new challenges for clinical human rights education in developing countries." As developing countries move towards more democratic political systems, law schools which are committed to teaching, discussing and promoting human rights face a new set of challenges. In many countries which moved from authoritarian to democratic governments, like Brazil, human rights lawyering can typically play an important role during the transition to democracy by protecting political dissidents from arbitrary state repression. This role is mainly one of resistance, of erecting limits to state action. But such a mindset is not necessarily the only one - or even the best one - for teaching human rights to law students in democratic systems. By using Brazil as an example, this brief paper argues that, as democracy consolidates and arbitrary uses of state power tend to diminish, clinical human rights education faces challenges that require not resistance against state action, but dialogue and fine tuning of public policies. Although these two categories are ideal types (resistance and dialogue), I hope they will be useful for singling out different modes of clinical legal education, each with its own sets of requirements, advantages and limitations.

Teaching the Relationship between Business and Human Rights

Hlako Choma – University of Venda, South Africa
Growing attention to the protection and enforcement of socio-economic right has produced much excellent work in South African jurisprudence. There remain, however, important areas for further exploration in this research. The research will argue that recent literature has focused on questions of inclusion or entrenchment of socio-economic rights in the constitutions. The research further argues that there is room for more sustained and critical attention to the question of democracy. While more attention to democracy would certainly include descriptive understandings of trends in decision-making practices, what is even more urgent is a prescriptive exploration of the role democracy may play in shaping a more progressive future for South Africans against poverty. This paper explores the intersection of economic globalisation and the enforcement of socio-economic rights. The focus of this exploration is the right to social security. While a right to social security can be constructed at the international level, the right disappears in the face of neoliberal development measures such as those that are instituted by democratic governments in developing nations faced with limited resources.

Somu C S – Christ University School of Law
Corporate Social Responsibility is no longer regarded as voluntary and philanthropic activity of the companies. Governments have been making legislations to define the role of companies in making their CSR policies so as to promote and protect human rights. The proposed Companies Bill 2012 of India imposes an obligation on companies to undertake socially responsible activities for promoting human rights. This paper explores the operation of the law for the purpose of bringing Corporate Social Responsibility into its ambit and expanding the legal accountabilities of the companies towards society. Keywords: Business, CSR, Human Rights, Law

Carmen Domínguez – Pontifica Universidad Católica de Chile, Chile
Civil law has been called, rightly or wrongly, the law of "the rich", expression that refers to its traditional inclination to goods, obligations and contracts and the inheritance, all of them patrimonial subjects. In addition to that, the books that deal with the general obligations and contracts, in almost all nineteenth-codes like the Chilean one - are virtually books of creditors, who are considered above debtors. Civil law appears to devote concern to everything related to the estate of the person more than the person in itself, an idea that seems supported by the fact that neither the Napoleonic Code of 1804 nor those that followed it, contain a systematic regulation of the person and its inherent rights.
For others, the omission of such regulation may be due to the fact that it was not necessary, since by the time of enactment of the French Civil Code, the declaration of rights of 1789 already existed. Proof of this is that its contents came to lead most of the constitutions of the most diverse countries which came later.

Donald Martin Ferencz – Middlesex University School of Law, United Kingdom
At the outset, and as a matter of full and fair disclosure, I should confess that I am not an academic in the traditional sense, but I have a keen interest in criminalization of the illegal use of armed force - both as what we would, in today's world, call the crime of aggression, and also as a crime against humanity.

Helmut Grothe - Free University of Berlin, Germany
When teaching business law at university level, one is tempted to leave human rights issues to the professors for public law. The complexity and globality of today's business law are certainly sufficient to fill the curriculum without taking recourse to human rights. Nonetheless, every once in a while, there is time to introduce aspects of human rights law into a business law lecture.

Shashikala Gurpur and Bindu Ronald – Symbiosis Law School, India
Drawing on the existing curriculum in various law schools in India, the paper aims to posit the current scenario in the critical backdrop of Ruggie report and emerging stricter norms of corporate governance. It also argues for making human rights a mandatory value and parameter across disciplines within regulatory framework like how environmental education is.

Fatima Mandu – University of Zambia, Zambia
The role of law schools in providing training based solutions in Human Rights and Business in Zambia. There is clear need to promote business and human rights courses in Zambia. Labour unrests, management lock outs, strikes and general discourse in the world of work are common occurrences in the business sector. Linked with this are the problems on the other extreme involving directors, shareholders and managers and their fraudulent corrupt and dishonest means of maximizing profits on their investment. This paper will investigate how training in issues of human rights in the context of business will help resolve the problems outlined above. Currently there are no courses being offered either as standalone or part of the general human rights training. There is little or no research published in this area and therefore no jurisprudence for practicing Advocates to argue complex cases based on human rights violations. The objective of the training programs will not only be academic and theoretical but a practical approach imparting skills to resolve the problems in the businesses. The aim of this paper is to investigate suitable training options including in-house workshops for business professionals that can promote compliance with human rights in the world of business in Zambia.

Nitika Nagar – Symbiosis Law School, India
Over the Years, the Equation between Business and Human Rights has drastically changed. With the advent of Globalisation, business has served as a vehicle for economic, social and cultural amelioration. One can see a dramatic change in the economic scenario of developing countries like India, where the diffusion of technology, scientific culture and management skills has led to job creations and rapid economic development. The flow of Foreign Direct Investment has brought a wave of transformation, which includes not only an increase in the number of jobs, but a remarkable improvement in the overall standard of living of the people. Business has thus enriched human lives, by giving every individual various rights, ranging from the right to adequate quality food to the right to freedom of expression and access to information. However, Business has certain negative implications as well that need to be rectified. Business poses a great threat to the enjoyment to human rights through its own conduct or invasion of rights by the host government. Moreover, private business firms have violated social, economic and cultural rights on a large scale and have remained unaccountable for their acts by exploiting the loopholes in the regulatory mechanisms. It has thus become a Necessity for Law and Business Schools to learn about the Current existing Relationship between Business and Human Rights. This article explores the Ethical and Legal perspectives of the above mentioned relationship and the ways in which Law Schools and Business schools can educate students on the hazardous implications that Business has had over Human Rights in recent times.

Ashok Patil – National Law School of India University, India
Consumer rights are rights of the individual and not rights of a group. Consumers are not a separate group of people, since every person is a consumer from time to time. Whether it be the person who buys the goods or the seller of those goods who must have bought those goods who he is selling from some other person. The acknowledgement that human rights protect the individual's prosperity, honor, and development makes consumer rights suitable to be declared as human rights. This establishes the fact that consumer rights are rights of an individual and therefore must be considered in the list of human rights. The main aim of various human rights available is to protect the right of human dignity of an individual. This main aim of protecting the human dignity has been recognized in various United Nations documents like UDHR, ICESCR and UNGCR etc. In a consumer society, protection of the individual consumer is part of maintaining human dignity. If not given the right to fair trade, the right to a fair contract, and the right of access to courts, a person's dignity is disregarded. Therefore it is amply clear that the main aim of both human rights and consumer rights is to protect the dignity of an individual, which makes the case for consumer rights to be included in human rights even stronger.

Poonam Puri – Osgoode Hall Law School York University, Canada
There are a number of different ways in which human rights can be discussed and advanced through the teaching of business law courses in law schools. There are a multitude of stakeholders who are impacted by the decisions made by corporate actors. Though most corporate law statutes around the world do not speak to human rights directly, they do impose a duty on directors to act in the best interests of the organization, including the interests of shareholders and other stakeholders who are affected by the corporation's actions. When considering human rights in business, it is necessary to look at how those stakeholders who are not shareholders are impacted by business operations. This paper seeks to address how human rights can be advanced through teaching corporate law, and specifically through discussion and analysis of the role of 1. non-corporate law statutes that specifically protect human rights; 2. corporate culture and discretionary decision-making; and 3. voluntary, soft-law principles-based mechanisms, such as the Equator Principles.

Sonia Rolland – Northeastern University School of Law, United States
Why address development in the context of the World Trade Organization (WTO) at all? Indeed the WTO has at best a very weak mandate regarding development. An obvious alternative would be to consider development norms in general inter- national law and hope that they might in turn permeate the WTO system. In practice, the WTO has not been very receptive to importing norms from public international law, and certainly, with respect to development, has been largely deaf to legal arguments grounded in any claim or right to development. As a result, the WTO legal regime may be the most practical forum for addressing trade-related aspects of development, primarily for legal reasons, but also for political reasons, since developing members are actors within the WTO system and have signaled no real intention to abandon that system in the near future. Regardless of whether it is theoretically appropriate to deal with development at the WTO, the reality is that WTO rules unavoidably have an impact on development. The question then is how exactly the WTO legal framework affects development dynamics for its members, whether there are gaps between intended and actual effects, and how WTO rules and institutions could be realigned to better respond to the needs and demands of the various segments of the WTO membership. This book explores these critical issues with a view to providing concrete options for negotiators, tools for litigators and adjudicators, and a more coherent understanding of the trade and development relationship at the WTO in the longer term.

Moussa Samb – Cheikh Anta Diop University, Senegal
The issues of human rights and business law are very important for underdeveloped countries, equally, if not more, for Africa is becoming a destination for foreign investment, private and public. Current performance of the African economy, which occurs in a context of crisis and financial market internationally, is very attractive to international investors. During the last decade, emerging economies are competing to become one on the most country investors in Africa. The interface between business and society has been framed predominantly in such terms as business ethics, corporate social responsibility, corporate environmentalism, and sustainable development. However, an increasingly prominent debate is emerging around business and human rights. These discussions are not limited to identifying human rights merely as a moral framework for voluntary corporate citizenship. Rather, the debate turns on the extent to which international and national human rights law is applicable to private sector companies.

Valentina Smorgunova – Herzen State Pedagogical University, Russia
The Challenge of Multiculturalism and the Problem of Human Security in Modern Russia as the Subject Matter of Teaching Human Rights in Russian Universities
Modern Russia is included into global and economical life. Last decade demonstrated the intensive social and cultural diversification in Russia, consolidation of different social, educational, professional, ethnic and religious groups. It shows the rise of cultural polycentrism of the society. The last determines the existence of social discontent in some sectors of the life of society

Jiri Valdhans & Nadezda Rozehnalova - Masaryk University Faculty of Law, Czech Republic
This paper discusses the changes that have occurred in the concept of the relationship between arbitration and human rights and highlights the transformation of the subject we teach, while using a topic that we deal with professionally as an example.
As a preliminary remark, it should be pointed out that we both specialise in the field of private international law and arbitration. We teach a separate course in international and national arbitration at the Faculty of Law of Masaryk University in Brno.

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Experimentation and Innovation in Teaching Human Rights

Innovative teaching techniques in human rights: Pedagogical approaches to teaching and research of the Women Commerce and Law in Africa Course

Rosalie Kumbirai Katsande
University of Zimbabwe Faculty of Law, Zimbabwe
(Southern and Eastern African Regional Centre for Women's Law, University of Zimbabwe)

Introduction

> "*We tend to think of human rights abuses as basic violations to life - war, rape, genocide. Some of us also think of human rights violations as employment discrimination on the basis of race or gender, or barred access to public buildings on the basis of ability. These are certainly human rights violations! But there are other more subtle human rights violations that take place. Not many of us have taken the time to think about the right to an adequate standard of living as a human right. The right to a life free of poverty.* ***The right to fair participation in the economy****. What about the right to the means to care for one's children? Food? Shelter? Don't we all deserve those things? But no matter what our income or ability we all contribute to this world we share and therefore we all have a right to share in its richness. There is a growing movement calling for full recognition of these economic human rights"* Human rights defender Josephine Grey.[1]

The Women Commerce and Law in Africa course is an optional course under the Master's in Women's law programme offered at the Southern and Eastern African Regional Centre for Women's Law based at the University of Zimbabwe. The Master's Programme started in 2003 and the Women Commerce and the Law in Africa course was first taught in 2005. To date 29 students have taken the course over four programmes. The main objective of the course is to facilitate the development of innovative exploratory theoretical and methodological approaches to the analysis of the socio-legal aspects of women's participation in commercial activities in Africa with particular emphasis on Southern and Eastern Africa[2]. To achieve this, bearing in mind that the field of commerce is predominantly a gendered area, methods and methodologies in teaching that enhance capacities to identify legal, social, cultural and other barriers that affect women's capacity to participate in commerce are used. These are pedagogical approaches that focus on critical thinking and inquiry, pedagogy that promotes dialogic approach to teaching and collaborative learning (Shackelford: 2003). To this end, the teaching methods of the course are heavily influenced by feminist and critical pedagogy, that is, a teaching approach that encourage students to question and challenge domination and the beliefs that dominate (Penn 1997, Shalleck 1999). Among the varied pedagogical approaches that are used in teaching the course, this paper will focus on two approaches that I use namely a field trip at the beginning of the course and a mini research as assessment method. Over the years, I have found these two approaches to be very effective firstly in arousing student's interest in the course and secondly in aiding the students to question and challenge from a human rights perspective and most importantly from an economic justice view point the predominantly masculine field of commerce and the stereotypes associated with women's participation in the broader economy. Further, the two approaches are grounded thus they enable students to interrogate the women's lived realities as they interact with commerce and law.

[1] Josephine Grey is a human rights activist who has been active in the struggle for economic and social justice
[2] See appendix 1

Due to the vast nature of issues in commerce that call for different expertise[3], it is virtually impossible to cover all the issues in class the field trip and the mini research project bridges the gap. The mini research is extremely important because of the dearth of empirical material in this area. From a feminist pedagogical approach, students are partners in the process of knowledge construction as such, the output of the mini field research contributes immensely to the scholarship of the course (Carillo 2007).

The field trip and formulation of a case study

The course starts with a field trip. I do the selection of the site in consultation with other guest lectures who participate in teaching. Consultation is important because from the field trip we develop a case study that we will use throughout the course. The field trip is meant to unpack and set the scene for teaching and learning of the Women Commerce and Law Course. Below are the issues that students are required to be mindful of during the field trip

- The location of women in commerce
- Women's access to and control of commercial resources
- Valuing of women's work and creating paradigms for women to value their own work.
- Women's commercial realms
- The law – i.e. legal and human rights issues as relating to women in commerce

A good example is a field trip I had with students to a place called Domboshava located 20km out of Harare. Domboshava is predominantly a horticulture farming area thus the students were to consider the issues raised above using a hypothetical case of a women tomato and vegetables farmer. The issues to consider among others were;

- Where do we locate this woman horticulture farmer in commerce?
- What is she a subsistence farmer or an entrepreneur?
- How does she value what she is doing?
- What legal issues surround her from the very first day she plants her tomatoes or even before that, to the day she takes them to the market.
- What legal obligations would she have exposed herself to without knowing?

In depth analysis of this women tomato and vegetable farmer provided students with a conceptual over view of a feminist perspective on entrepreneurship and the nature of the contribution that such a perspective can make to understandings of gender, work, and entrepreneurship. Class discussions after the field trip focused on the following questions, who is an entrepreneur and what counts as entrepreneurship? Based on what students would have observed, and taking a feminist analysis to entrepreneurship, we questioned what innovation is and what counts as innovation? To fully understand women's commercial realms, a feminist analysis is adopted because it encourages paying attention to gender and the power relations embedded in gender (Buttner and Moore1997). This perspective calls for taking of women's work seriously, thereby advocating the opening and critical exploration of categories that have long been taken for granted. It allows the interrogation of stereotypes associated with women's work and the discrimination that comes with the stereotypes (De Beavouir 1949).

A feminist analysis of entrepreneurship further entails a questioning and critical rethinking of most of the core concepts that comprise the study of entrepreneurship. This critical rethinking is important for gender analysis of women's participation in the economy. This we achieve through reconceptualization of the concept of entrepreneurship by looking carefully and critically at the concept of innovation. We are guided by two main approaches that

[3] See appendix 11 for the course content

dominates the way in which scholars have thought about and sought feminist Perspectives on Entrepreneurship. The first and the most actively pursued, focuses on the individual and sees entrepreneurial activity as a quest. The second emphasizes the importance of entrepreneurial context. The discourse surrounding entrepreneurship describes the individual entrepreneur in terms that have been traditionally associated with masculinity: The entrepreneur is someone who is a risk taker, who is in control, who is independent, powerful, knowledgeable, someone who is, in brief, "a self-made man" (Buttner and Moore 1997).

The above description of entrepreneurship highlights the reason why a gender analysis within a women's rights context is at the core of this course. The above stated description of an entrepreneur does indicate that to enhance women's capacity there is need to interrogate and acknowledge the cultural and structural barriers to becoming an entrepreneur that women face, the discrimination that comes with these barriers and that the concept of entrepreneurship is itself biased towards men. Without doing this the majority of women in business will be dismissed as not being entrepreneurial and therefore misses out on opportunities. This also has a bearing on the business models that women utilize for entrepreneurial development.

Pedagogical benefits of the field trip

The field trip is important as a starting point as it gives me the opportunity to get to know the students and their particular interests in as far as women participation in commerce are concerned. As students note their observations during the field trip, they also get an opportunity to interrogate their own experiences. The field trip enables students to explore the impact of regulatory frameworks in terms of women's lived realities. This is essential, for in acquiring a holistic picture of how law operates it is important to be aware of how law is mobilized from an array of perspectives. Information gathered by the students during the field trip often highlights the complex ways in which local forms of knowledge and the legal framework interact with each other. It demonstrates how power operates in different places and is transformed to provide for the emergence of new legal identities. Part of this analysis involves acknowledging the central role that gender plays in this process particularly in an African context. Students' observations and pursuant discussions pave the way for the discussion on gender mainstreaming in all commercial sectors.

Gender Mainstreaming and the international dimension

Analysis of the potential benefits of gender mainstreaming in commerce is facilitated using the Millennium Development Goal (MDGs) Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and Beijing declaration and platform for action as frameworks. The question we explore is whether these injunctions alert us as to the critical needs in achieving genuine gender mainstreaming.

For example, CEDAW is the most comprehensive and detailed international agreement on women's rights. It establishes rights for women in area not previously subject to international standards most notably in personal and family life. CEDAW is based on two principles that is the principle of non-discrimination and the principle of state obligation, thus it raises key issues and standards that are essential for gender mainstreaming. An adjunct to the CEDAW is the Beijing declaration and platform for action which is notable for placing great importance on gender mainstreaming in development cooperation. The platform of action upholds the CEDAW and builds upon previous strategic frameworks and policy commitments at international level.

The MDG's constitute an agenda for poverty reduction and improving livelihoods worldwide. Goal 1 is on eradication of extreme poverty and hunger and Goal 3 is about promoting gender equality and empowering women. Although these goals are not specific to any particular sector or issue it is of particular interest to women in commerce since effective participation in commerce contributes towards poverty reduction. On the other hand, gender equality and women's rights underpins all the progress women can make in commerce bearing in mind that commerce is a male dominated field.

Assessment

As part of coursework, students undertake a mini research project on a topic of their choice. The research is done in Harare and surrounding areas. This research project encourages students to apply the analytical and theoretical skills that they would have acquired and also to contribute to women commerce and the law scholarship. Data collection is done over a period of a week followed by analysis of the findings and writing up. Although the research may be limited in scope given the time frame for data collection, doing the research presents students with the opportunity to purse vital information on how in reality women and law intersect in a commercial environment.

In so doing, students move from the more abstract and broader concerns of women's economic rights to a more specific and detailed focus on research in action with regard to a particular topic. Students apply and adjust their critical and theoretical insights from a macro to a micro level, in terms of establishing a small, self-contained local project thereby interrogating the law at a number of different levels. The idea is to make them move from more general, abstract propositions to concrete realities by building on the general theoretical and critical forms of analysis. This requires applying their knowledge to a defined problem area including the possibilities and limitations of a socio-legal perspective in action.

This research project gives students an opportunity to interrogate all at once the International, Regional and National Human Rights Instruments, Country specific constitutions, national legislation, case law, customary law and practices, cultural, social, political, economic and to some extent environmental factors. They identify and interrogate the actors e.g. women in informal/formal businesses, men in informal/formal businesses, officials dealing with credit, government officials dealing with economic development, city council officials etc and the structures the actors interact with in the field of commerce e.g. the family and status of women within the family focusing on married/unmarried/divorced/ widows, Ministry of Small and Medium Enterprises, Ministry of Youth, Gender and Employment Creation, City Council, Chamber of commerce etc.

Research Output

Researches done by students over the years covered the following topics:-

- The Role of Women in Family Enterprises: A Case study of Women in Pre-schools Business in Belvedere
- A Comparative Analysis of the Socio-Economic Impacts of Water and Electricity Cuts in Harare on Women Entrepreneurs from High and Low Income Suburbs of the City: A Study of Dzivarasekwa and Mabelreign Suburbs
- The Zimbabwean Look East Policy and its Effects on Women Entrepreneurs in the Clothing Industry
- Challenges Faced by Women in Accessing and Marketing Edible Forest Fruits: A Case Study of Women at the Mbare Market in Harare, Zimbabwe
- Trade Liberalization and its impact on women in the flea-market trade in Harare
- An Evaluation of Women's Empowerment Groups and their Relevance to Women in Business

- An Analysis of Strategies Developed and Adopted by Women in Senior Management in the Corporate World to Deal with Sex and Gender Discrimination
- An Analysis of the Challenges Women Entrepreneurs in the Farming Sector Face in the Access and Use of the Internet.

These topics provide a varied range of research projects that mark and important beginning in building up a data bank of information in this area.

Conclusion

After all is said and done, the ultimate goal of the course is for students to be able to devise law reform strategies and where appropriate, to implement law reform measures that would enhance women's full and effective participation in local, national, regional and international commercial activities. The Women Commerce and the Law in Africa course has been taught four times since the inception of the Women's law Masters programme in 2003. The course is still being developed and will continuously be reviewed with changing times. One's teaching methodologies changes as one's career progresses thus the course will periodically be updated in order to keep current with the progress in the commercial arena and to give the lecturer a regular opportunity to reflect on oneself.

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Appendix 1

COURSE	**:**	**WOMEN, COMMERCE AND LAW IN AFRICA**
COURSE CODE	**:**	**MWL 513**
COURSE CONVENER	**:**	**R K KATSANDE (Ms)**

OBJECTIVES

The main objective of the course is to facilitate the development of innovative and exploratory theoretical and methodological approaches to the analysis of the socio-legal

aspects of women's participation in commercial activities in Africa, with particular emphasis on Southern and Eastern Africa. To this end methodologies which will enhance the capacity to identify legal, social, cultural and other barriers which affect women's capacity and potential to participate in commercial activities will be identified and or developed .

Further objectives are:
To identify factors that enable or enhance women's participation in the commercial world, and to identify those factors that may inhibit their effective participation, either collectively or individually.

To explore and evaluate initiatives for enhancing women's participation in all commercial arenas: – from the local and rural to the international sphere.

To evolve monitoring and evaluation techniques that provide the capacity to 'track' women's involvement in commercial activities and the legal and social implications of such activities for purposes of promoting women's effective participation at all levels of development.

To investigate and critique the nature and content of laws, from a pluralist perspective, which mediate women's participation in commercial activities.

LEARNING OUTCOMES
Students undertaking this course should be able at the end of the course to:

Identify, across a wide spectrum of laws, both formal and informal, those laws, norms and practices that may positively or negatively affect women's participation in the commercial sphere.

Identify problems that women face in the commercial arena, to design and carry out research programmes to further explore women's engagement with commerce, with particular emphasis on the legal aspects of such engagement.

Devise law reform strategies, where appropriate, and to implement law reform measures that would enhance women's full effective participation in local, national, regional and international commercial activities.

Recommend in conjunction with legal action appropriate social and economic strategies to improve women's participation in commercial activities.

TEACHING METHODS
The primary method of instruction will be seminars. Women's Law methodology will be used to map the nature and form of women's participation, whether in the formal or informal sectors in commercial enterprise in its widest sense.

Students will be expected to carry out small Zimbabwe based research projects to test the theories and methodologies evolved during the course.

Lecturers with expertise in various aspects of the course will undertake specialist teaching on the course.

Appendix 11

WEEK 1	0900-1300hrs	0900-1300hrs	0900-1300hrs	0900-1300hrs	0900-1300hrs
	Women, Commerce and Law - parameters Raising the Issues Field trip	Women's work – men's control and profit? Gender mainstreaming in all economic sectors – how? Women's access to and control of commercial resources; defining access and control. Urban, rural continuum. Women, family, the home and commercial continuum Discussion Experiential Data	Marketing dilemmas – fair trading, market access, transport, logistics, pricing, determining the commodity market - broadening the vision of the market – rural urban dynamics. Development models – critiques – in and out of fashion? Donor dependency Women's legal, social and cultural capacity to access financial resources for establishing commercial enterprises; Macro and micro finance. Small and medium scale enterprises.	Rural niche markets? Barter trading? Cross border trading – the modalities Identifying international niche markets – marketing strategies. Women and intra-national, inter-regional and international trading activities - from the informal to the formal. Rural industrialization – value addition	Women's approaches to commerce (models) - Cooperatives - Round table - Partnerships - Agency - SMEs Legal implications of the models Gender Budgeting, concepts, principles and processes

WEEK 2	0900-1300hrs	0900-1300hrs	0900-1200hrs	0900-1200hrs	0900-1300hrs
	Choosing a topic; Devising and designing mini research project	Devising and designing mini research project .	Role & importance of ICTs in the socio-economic empowerment of women. Information as an economic resource. Challenges women face in accessing and using ICTs. Steps on the e-commerce continuum.	How are women (including rural women) using ICTs in participating countries? What support and mentoring is available for the women as they engage in e-commerce activities? Internet searches; role of mobile phone.	Creating information networks to exploit local and global markets. Gender and ICT issues in ICT policy, regulatory and legislative frameworks of participating countries, tariff regulation. How women can benefit from the Universal services fund eg setting up of telecentres
			2 -4 Devising and designing mini research project Continue	2 -4 Devising and designing mini research project Continue	
WEEK 3	Field Research And Reading Week	Cont ->			

WEEK 4	Pregnancy, maternity and - Valuing women's work and creating paradigms for women to value their own work. -Indigenous knowledge and craft skills – copyright, trade marks, industrial designs, geographical indications and patent protection. - N'anga, sangoma or country equivalent as a business woman and business activity.	tapping the sex and sexuality market. Using the " male" to market to the female Women and commercial sex work. Women as a market target – selling to women, exploiting the female market – advertising ethics and the female form and psyche.	Women's realms? Women and Contributions to the family – valuation of her work, child work contributions in general – survival opportunities and educational dilemmas. Womens commercial realms	Women as 'purveyors of sex" - nurturing considerations: their impact on women's full participation in the market place, exploration of compensatory measures. "Home work" and public work – the continuum. Home industries" – I don't work syndrome -Round table discussion with selected women in commerce.	International interventions, local law reform – possible policy interventions and implications for family law, succession, pension, state food security etc.
WEEK 5	Locating women in the globalisation debate theories of international trade Actors in international trade Overview of SADC, COMESA, EU, US , BRIC EPAs and WTO	Principles and processes of international trade, regional and Bilateral agreements Overview of Cotonou, Lome, AGOA Agreement on agriculture	Trade impact review -understanding the impact of trade on women Valuing women's inputs – fair trading measuring economic performance international - local interplay women as traders and economic actors experience of women traders examination of trade agreements involving choice countries	report and feedback on TIR in choice countries	Monitoring and evaluation of affirmative action strategies; state and international interventions – a continuous cycle of research and theorising.

WEEK 6	Finalizing coursework and exam preparation		Handing in mini field research report 1600hrs	research examination	

An Innovative Initiative on Teaching Human Rights in Cebu, Philippines

Gloria Estenzo Ramos
University of Cebu College of Law, Philippines

I. Introduction

Law schools have a grave responsibility in embedding the core values of respect, compassion and responsibility in each student and for fellow human beings through human rights (HR) education.[4] They are tasked to mainstream HR education and help instill a mindset of care, compassion, stakeholder collaboration and equally as important, a strong sense of responsibility, among law students, in building capacity of the citizenry, especially the voiceless and vulnerable, to have a better quality of life.

II. Legal Framework of HR Education in the Philippines

The 1987 Constitution provides the foundation for HR education in the Philippines. It emphasizes the dignity of each person and full respect for human rights,[5] the vital role of the youth in nation-building imbuing in them patriotism and nationalism, and encouraging their involvement in public and civic affairs,[6] role of women in nation building and fundamental equality before the law of women and men,[7] and prioritizing education to "foster patriotism and nationalism, accelerate social progress, and promote total human liberation and development."[8]

The Legal Education Reform Act aims, as a policy of the State, "to uplift the standards of legal education in order to prepare law students for advocacy, counseling, problem-solving, and decision-making, to infuse in them the ethics of the legal profession; to impress on them the importance, nobility and dignity of the legal profession as an equal and indispensable partner of the Bench in the administration of justice and to develop social competence."[9] Legal education in the Philippines is thus geared not just for the practice of law but to "to increase awareness among members of the legal profession of the needs of the poor, deprived and oppressed sectors of society; to train persons for leadership; and to contribute towards the promotion and advancement of justice and the improvement of its administration, the legal system and legal institutions in the light of the historical and contemporary development of law in the Philippines and in other countries."[10]

The benefits to the students, as leaders in the community, and to society are immeasurably immense. In the words of the humble and hard-working legislator from the Cebu City Council[11] Councilor Alvin Dizon, "exposing law students to social development work will help them have a more holistic perspective and analysis of the many social issues that beset our

[4] Human Rights (HR) education is defined as "any learning, education, training and information efforts aimed at building a universal culture of human rights including (a)the strengthening of respect for human rights and fundamental freedoms; (b) The full development of the human personality and the sense of its dignity; (c) The promotion of understanding, tolerance, gender equality and friendship among all nations, indigenous peoples and minorities; (d) The enabling of all persons to participate effectively in a free and democratic society governed by the rule of law; (e) The building and maintenance of peace; (f) The promotion of people-centered sustainable development and social justice."
[5] Constitution, Art. II, s 11.
[6] Note 9, Art. II, s 13.
[7] Note 9, Art II, s 14.
[8] Note 9, Art II, s. 17.
[9] RA 7662, Legal Education Reform Act of 1993, s. 2.
[10] Ibid.
[11] known as the Sangguniang Panglungsod.

country and motivate and inspire them to be more responsible citizens and advocate for the protection and promotion of human rights."[12]

III. Popularizing the Law Program: An Experimentation and Innovation in HR Education to Bridge the Gap Between Law and Justice

Law schools are potent change agents for societal reforms. This is a golden opportunity and challenge that the University of Cebu (UC) College of Law dared to take on. Celebrating its 10th Anniversary this year, UC College of Law, although a relatively young law school, has produced two topnotchers in the Philippine Bar examinations,[13] and garnered the national championship in the 2011 International Humanitarian Law competition, reaping awards in all categories, besting what are traditionally considered the premier law schools of the country.[14]

The "can-do" culture has also its widest reach to the community through its innovative pro bono service to the community. The law school integrated HR education through the Mandatory Continuing Legal Education (MCLE) for the lawyers, the Popularizing the Law Program ("Program"), for non-lawyers, and in the Curriculum.

The Program's significance is best summed up by Ms. Estrella Catarata, Executive Director of Central Visayas Farmers Development Center (FARDEC), a partner of the UC College of Law's Program: "Among law schools in Cebu, UC College of Law is the one which pioneered Human Rights (HR) Education and truly implemented such innovative HR strategies which are responsive to the needs of society, especially our environment and the farmers. FARDEC found a good and reliable partner. We are just so grateful."[15]

A. Mandatory Continuing Legal Education (MCLE) Program for Lawyers

The MCLE Program of the UC College of Law is lauded for its progressive, relevant and reform-minded curriculum with protection and defense of human rights as the common thread underlying the courses offered. It attempts to enhance the awareness and deeper understanding of pressing human rights and sustainability issues among lawyers. It is a small step but it is never enough to cope with the prevailing lack of interest or prioritization on HR even in the legal profession.

B. Popularizing the Law Program for Non-lawyers

The Popularizing the Law Program (the "Program") at UC College of Law started in 2006, and had been participated in by 300 students law students, benefitting countless number of residents in Cebu. Its noble goal is "to make the Law closer to the people." Conceived to assist the marginalized sectors such as the urban poor, farmers, fisherfolk, the children, elderly and the women, it was meant to capacitate likewise the law students to inter-act with clients and share what they know about human rights, law and justice.

C. HR Education in the Curriculum

Human rights education is an innovative approach used by UC College of Law's faculty members who are human rights defenders themselves, specifically in the arena of women

[12] Letter dated 13 November 2012, attached as an Appendix.
[13] The licensure exam for those who intend to practice law in the Philippines.
[14] S. Padilla, Philippine Daily Inquirer, October 9, 2011 http://newsinfo.inquirer.net/73159/visayas-schools-rule-moot-court-contest, accessed 13 November 2012.
[15] Message from Ms. Catarata sent through SMS, November 12, 2012.

and children's rights and the environment. The classroom discussion on human rights includes discourses on international, national and local HR instruments.[16]

The Program is a collaboration with academics, government and non-government organizations to ensure inclusive participation of stakeholders in policies and projects of government and to exact compliance of environmental and accountability laws. The community service projects under the Program share the following common features:

1. They are designed, implemented and evaluated by students, under the guidance of the professors, on a particular human rights theme.
2. Partnership with stakeholders from government, civil society or business sector is required.
3. Benefits are directed for a particular sector (such as children) or to the society in general (such as monitoring of compliance of solid waste management law)
4. Use of information technology and media

One of the outstanding projects was the drafting by UC law students of the implementing rules and regulations (IRR) for Local Sectoral Representation (LSR) at the local lawmaking body. The LSR is a constitutional mechanism for giving voice to the vulnerable sector at the local legislative body and provided for by the 1987 Constitution and the 1991 Local Government Code, RA 7160, which was never operationalized. The students-led initiative[17] was warmly commended by the Commissioner Rene V. Sarmiento of the Commission on Elections, as this was the first for the electoral body to receive a draft IRR, coming from the law students. Workshops were made subsequently to fine-tune the IRR, participated in by the vulnerable sectors, with the full support of Cebu City Councilor Alvin Dizon. The COMELEC has subsequently created a Task Force to draft the Iong-awaited IRR.

IV. Challenges and Conclusion

Sustainability of specific projects under the Program can be an issue because of time and financial constraints. Law students and faculty members have other commitments, including regular working hours to attend to. Likewise, effective coordination with government authorities, as partner, at times hits a snag, especially if the authorities do not prioritize the project. But, overall, the benefits and rewards outweigh the challenges. The innovative initiative of the University of Cebu College of Law in integrating Human Rights education prove that it can be done with the earnest collaboration of all stakeholders, and not much funding, but it does require creativity, determination and passion to make a difference in the lives of countrymen. Its partner, Ms. Mary Rose Maghuyop, sums it best: "There are endless possibilities when minds and hearts are connected and committed. Such is the impact and outcome of this project."

[16] The courses are Local Government and Election Law, Environmental Law, Information Technology and the Law, Legal Ethics and Human Rights of the Child.
[17] UC Law Students Turn Over Draft Representation Rules, Cebu Daily News, July 18, 2012. http://newsinfo.inquirer.net/230690/uc-law-students-turn-over-draft-representation-rules, accessed on 10 November 2012.

From Passive to Active
Perspective on the introduction of methods of active learning, participatory course design and dynamic assessment in the field of international human rights law

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See Appendices Separately on USB

Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
Article 26(2) of the Universal Declaration of Human Rights (UDHR)

1. Introduction

For many lecturers teaching human rights, the topic we teach is not just a topic, but a philosophy of life and a way or method by which we engage with law and all other aspects of our existence. Whether we approach human rights teaching from a rights-based angle, by addressing questions of the minimum core or by focusing on human dignity, the rights we teach are central to what we teach and should consequently underline *how* we teach. Every student has a right to a purposeful and dignified education. Consequently, students entering a classroom, to learn about human rights, should have the opportunity to experience a diverse set of teaching and assessment methods, actively engaging their minds and challenging them to think critically about the application of human rights law. Therefore, the hypothesis that has guided the pilot project discussed below and the research presented in this paper is based on the idea that a diverse and integrated approach to teaching and assessment will not only create a higher sense of learning where students will retain the information longer; but will also help achieve a sense of equality in the classroom where students have the opportunity to learn in different ways and to show their potential through various forms of dynamic assessment. Furthermore, in transforming the classroom in to a more diverse and equal space for learning it is of importance to analyse both the changes necessary to the traditional modes of teaching *and* the ways of assessing the students. As suggested by Birenbaum et al (2006, p. 62) focus should be on assessment for learning instead of assessment of learning.

This paper analyses the shift from a more traditional way of teaching human rights law (the lecturer as the transmitter of information, one way, in a quiet and organised environment to a hopefully listening and attentive audience); to an interactive, sometimes loud and flowing way of discussing human rights where the lecturer acts as a facilitator and the students drive the contents of the course. The context of this paper is the pilot project run by the author at the Department of Public Law at the University of Stellenbosch, South Africa, in 2012 with regard to a 4th year elective course in Advanced International Law (International Law 451 hereafter referred to as the 'pilot'). The course focused specifically on international human rights law and the protection of human rights on the African continent. Ultimately 27 students participated in this course and the discussion below is based on the author's own experiences in and outside the classroom and the qualitative data (discussed below in section 4) relating to 3 separate questionnaires conducted at the beginning, mid and end of the course. The structure and contents of the pilot is for the purposes of limiting the main body of the text discussed in Appendix I together with the

course outline (study guide and general introduction to the course) as available in Appendix II.

In the following paragraph 2, some of the pedagogic challenges that served as a point of departure for the changes to the teaching and assessment methodologies in the pilot are brought forward. Paragraph 3 highlights specific teaching and assessment theories that formed the basis for the pilot; section 4 analyses some of the input from the students involved and their ideas and impressions of the changes made. In the concluding remarks some lessons learned from the design and future re-designs of the pilot is shared to strive towards an increase in the critical thinking around human rights (which is a motivation in itself) and furthermore for the surge in the enjoyment of learning human rights law.

2. Pedagogical challenges

South Africa is a diverse country from almost any vantage point; linguistic, ethnic, religious and cultural. Hence, in South Africa (and elsewhere) legal educators are often faced with a multiplicity of students from diverse backgrounds. We furthermore come from a recent history of grave human rights violations and segregation making it even more pertinent to not only give our students the best education in human rights law possible but also to work against exclusion and for diversity and transformation in the classroom. Against this backdrop my engagement with alternative learning and assessment methodologies in the pilot was ultimately sparked by the lack of critical thinking taking place in my classroom and the pressure on me to every semester answer the question religiously asked by the students: 'But if there are norms protecting human rights under international law, why are they not enforced?' This question and similar ones forces us to try to enable the students to see and understand a myriad of perspectives on the law, political, cultural, geo-political, gender, class, race, resources, sexuality and so on. One the one hand, the one way communication of this information, my perspectives on these issues, always felt limited to say the least; on the other the students never really engaged with the perspectives that I traditionally covered in class but rather treated them as factual conditions. Even though I made continuous efforts every year to expand my own horizon and to include as many perspectives as I could, it finally struck me that I had to encourage the students to critically engage with the material; and that the students were much better situated to do the 'updating' because they had access to sources and resources to which I was barely, to use the terminology of Prensky, and immigrant. As he furthermore concludes in his seminal article '*Digital Natives, Digital Immigrants'*, students 'think and process information fundamentally differently from their predecessors' (2001, p. 1) i.e. most of us, and to try to remedy this, the challenge was to present as many perspectives as possible, to allow for the students to bring their own perspectives to class allowing them to learn from each other and to actively encourage them to think critically about the different discourses.

The other side of the coin was the growing sense that I was missing out on important contributions from the students by subjecting them to tests and exams with a pre-conceived set of limited range questions to answer. Dealing with a diverse[18] set of students I was always running a greater risk of not interpreting their answers correctly leading to unfairness in marking. As a consequence I decided to not only strive for the creation of more space for critical thinking in my classroom, to add more perspectives and sources; but also to diversify the perspectives of assessment to allow for much more peer review both individually and in groups. With a view to enhance students' learning the pilot project offered the students a combination of an active learning experience and dynamic assessment. The latter term has been used to distinguish the integrated process of learning assessment from the traditional *static assessment* (Pohner & Lantolf, 2003). In the traditional static assessment, the only feedback students receive is in the form of an exam

[18] "Diverse' referring to linguistic background, ethnicity, nationality and sexual orientation.

or test score, typically without any additional information about their performance. Dynamic assessment, in contrast, refers to a more embedded nature of assessment in which learning is closely integrated with the assessment of the same. As an addition, any productive legal education should not only develop the skills as related to the specific topic we teach but ultimately contribute to the skills key to anyone in the legal profession such as writing skills, oral skills, the skills of contextualising a legal problem and the skills of presenting a logic argument based on the applicable law. In designing the pilot these skills were carefully considered, in balancing writing assignments with oral presentation and debates in class; all liked with different types of assessments.

3. Active teaching and assessing methodology

As discussed by Sandhu et al. (2012, p. 1) several[19] studies on comparing the effectiveness of instructive lectures with those of interactive or active teaching styles has indicated that student satisfaction, learning outcomes, deeper approaches to learning and knowledge retention is better following active learning. One of the acute problems with 'traditional' lectures is that students are in a passive mode of learning, which, as analysed by Windschitl (1999, p. 23) and Heward (2003, p. 35) adversely affects their attention and their ability to retain information. As furthermore described by Young et al. (2009, p. 42) such passivity has two potential consequences for the student; it does not facilitate the important deep learning and it can cause decrements in student concentration. Several[20] studies have showed that students' attention degrades after between 10 and 30 minutes of lecturing. Various authors such as Horgan (2003, p. 89) and Wankat and Oreovicz (2003, p. 40) advocate mixing up the level of stimulation during lectures in order to offset the attentiveness decrement. The demands should be changed every 10–15 minutes and the source of such variety could be a simple rest, a change in presentation medium, or setting the students a short task (Bligh, 2000; Frederick, 1986; Race & Brown, 1998). However, as pointed out by Young et al., (2012, p. 42) 'as with vigilance studies in human supervisory control, these interruptions only temporarily restore attention levels, and afterwards concentration will decline even more steeply'. The answer clearly does not lie in breaking up a lecture but rather using different techniques for learning.

Analysed from another angle, the problem with conventional lecturing, as pointed out by Mazur, lies in the presentation of the material. Commonly, the material presented comes straight out of textbooks and/or lecture notes, 'giving students little incentive to attend class' (2007, p. 6). In this environment it is difficult to provide an adequate opportunity for students to critically think through the arguments being developed. Consequently, according to Mazur, (2007, p. 6) 'all lectures do is reinforce students' feeling that the most important step in mastering the material is solving problems'. In Mazur's opinion the result is 'a rapidly escalating loop in which the students request more and more

[19] See Richardson D (1997) Student perceptions and learning outcomes of computer assisted versus traditional instruction in physiology. *Adv Physiol Educ* 273: S55; Bulstrode C, Gallagher FA, Pilling EL, Furniss D, Proctor RD (2003) A comparison of the teaching effectiveness of the didactic and the problem-oriented small-group session: a prospective study. *The Surgeon* 1: 76-80; Ernest H, Colthorpe K (2007). The efficacy of interactive lecturing for students with diverse science backgrounds. *Adv Physiol Educ* 31: 41-44; Costa ML, Rensburg LV, Rushton N (2007) and Millis RM, Dyson S, Cannon D (2009) *Association of classroom participation and Examination performance in a first-year medical school Course. Adv Physiol Educ* 33: 139-143.

[20] Horgan, J. (2003) 'Lecturing for Learning', in H. Fry, S. Ketteridge & S. Marshall (eds) A Handbook for Teaching and Learning in Higher Education (2nd edition), pp. 75–90. London: RoutledgeFalmer; Frederick, P. J. (1986) 'The Lively Lecture – 8 Variations', College Teaching 34(2) 43–50. Stuart, J. & Rutherford, R. J. (1978) 'Medical Student Concentration During Lectures', The Lancet 2: 514–16.

example problems (so they can learn better how to solve them), which in turn further reinforces their feeling that the key to success is problem solving' (2007, p. 6). Students are too focused on learning 'recipes,' or 'problem-solving strategies' as they are called in textbooks, without considering the underlying concepts. Hence the basic goals of active learning in its different forms are to exploit student interaction during face-to-face time and focus students' attention on underlying concepts. Instead of presenting a traditional lecture the classroom can be 'flipped' and the instruction can consist of a number of short presentations on key points (could be done by the students themselves as in the pilot or completely outside the classroom), each followed by, what Mazur (2007, p. 8) refers to as a 'Concept Test', The concept test is a short conceptual test/question on the subject being discussed in class. The students are given time to formulate answers either during class or beforehand and are then asked to discuss their answers with each other. This process forces the students to think through the arguments being developed and provides them (as well as the facilitator) with a way to assess their understanding of the concept i.e. assessment takes place within the realm of the classroom. The students are forced to do the pre-class reading and assignments and the time with the facilitator is spent on elaborating on potential difficulties, deepen understanding, build confidence and add additional examples. Most of the instruction takes place outside the classroom and/or amongst the students themselves hence the term the 'flipped classroom'.

In designing the learning and assessment strategy for the pilot I was inspired by the various findings above but more specifically by Dr Guertin, a geoscience professor at Penn State University, who implemented Just in Time Teaching (JiTT) exercises in an introductory course entitled "Dinosaur Extinction and Other Controversies" (Zappe et al 2006, p. 4). In her class students were required to submit what she called the "DinoByte" exercises online through a course management system by a deadline before a specified class time. Before class, the facilitator reviewed all the responses to look for common errors, misconceptions, and particularly interesting submissions to share with the class. In class the facilitator lead a classroom discussion based on example responses, which were anonymously projected onto a screen. The assignments were graded using a rubric based on the amount of effort and correctness of the items. Individual feedback was given to each student electronically through the course management system. The JiTT assignments were then used in combination with several course projects to determine the final mark. No traditional tests or exams were administered. The weekly exercises were designed to encourage higher-order thinking skills in students, requiring critical thinking, synthesis, evaluation, and analysis.

This example clearly indicates that for the student to reap the full benefit of active learning it has to be coupled with a suitable assessment structure. In order to facilitate student understanding of the material, ideal classroom assessments should not only provide information on whether students are learning, but should also be exercises from which students can learn (Wolf, 1993). This typically blurs the line between assessment and learning. Smaller, more frequent assignments can be used as ways to track the progress of students' understanding as well as being potential learning experiences for students. In these types of exercises, as put forward by Zappe et al (2006, p. 1), 'the question of whether the assignment is one of assessment or teaching becomes unanswerable'. Rather, these assignments intertwine the aspects of student learning and assessment.

The motivation behind shifting from the common practice of assessment to a dynamic method of assessment in the pilot was firstly to increase learning; secondly to make assessment a natural part of the learning process and; thirdly, to enable me, to track what level of that learning that was actually taking place. The more practical aspects of this shift was to firstly diversify and integrate the methods of assessment; secondly to start

assessment earlier in the semester; thirdly to assess over the whole period instead of, as previously, mainly towards the end; and lastly to lower the level of stress on behalf the students. With regard to the diversity and equality aspects, as discussed in the introduction, it was important to make the students feel that they were involved in the assessment.

4. The qualitative data

As mentioned in the introduction 3 different surveys[21] were conducted in class for the purpose of understanding how the students perceived the new learning and assessment methods. The scope of this paper is too limited to analyse the qualitative outcomes of this research in detail; but a few indicators and challenges will be discussed. Firstly it was notable that most students were positive in general towards the introduction of active learning. The majority[22] suggested that similar techniques should be used in other subjects and that the case based method helped them better understand the topic.

However it was clear that they distrusted themselves as conveyers of 'accurate' information through the oral presentations and as assessors conducting peer-review in class. Although they felt involved and comfortable to discuss a specific topic in class they did not find that they could rely on the information if it was not 'certified' by me as the 'authority'. I would often receive questions with regard to the presentations held in class querying the correctness of the information and in the overwhelming majority of the cases the information presented by the students themselves was both accurate and well formulated. Furthermore, the majority of students responded that they did not trust their peers to review them objectively, 'as would the lecturer'. Interestingly, for the 7 oral group presentations that were held and peer-reviewed in the pilot the difference between the marks given by me and the students peer-reviewing the group presenting never differed more than 5 per cent and for 5 out of the 7 presentations the difference was less than 2 per cent.

Another interesting observation was that even though there were some very innovative ways of presenting the materials most groups choose to duplicate what we as lecturers do in class namely to speak to Power Points, one student after the other. This will probably be one of the most difficult challenges for next year's class, to not replicate the loss of student engagement in having the students themselves mimic the stereotyped behaviour of a lecturer transmitting information one way.

Lastly, a striking feature observed in all 3 surveys and in class was that once faced with the 'LawByte' exercises in class, exposing a number of possibilities of how to structure a valid argument, the majority of students could not let go of the idea that there had to be one solution, a yes or a no, a right and a wrong answer. This was the most important lesson for me as it indicated that we are currently, to a great extent, fostering an environment in class where we profess to have all the right answers and that there is only one right solution.

[21] These surveys consisted of 3 sets of questionnaires and was handed out in the beginning, mid and end of the semester; generating in total 60 responses.

[22] Out of the 24 questionnaires that were collected in the first round 16 answered yes to the question 'Would you encourage other lecturers in other subjects to adopt the same teaching model?', 5 answered no and 3 yes with certain qualifications such as wanting case based teaching but not oral presentations.

6. Concluding remarks

Active learning and dynamic assessment is all about *equality* in learning human rights law. Different methods suits different students and in South Africa, and elsewhere, legal educators are faced with a diversity of students from many different linguistic and ethnic backgrounds, as discussed above. The overarching objective behind the shift in teaching methods was therefore not only to increase the depth of the learning but also, through different teaching and assessment methods, to reach a multiplicity of students and by doing so also promote and protect human rights amidst the students.

Switching from being a lecturer to a facilitator did not reduce my work load, it rather transformed it; and it has certainly helped me view human rights law through a much more critical lens. I quite often receive the question from colleagues 'but if you don't teach what do you do?' What I have learnt throughout this process is that active learning is a much more rewarding and enriching experience for me as an academic because I constantly have to push against my own boundaries and I have to venture far outside the comfort zone of my lecture notes and slides. Leading a discussion based on LawBytes or trying to tease out the problem areas in the students' exercises is far more demanding than a 'traditional lecture'. Furthermore, this shift has in many ways helped me conceive new topics for my own research.

Initially the combination of JiTT, peer-instruction and peer-review with dynamic assessment resulted in an increase of my work-load. After engaging with other lecturers' experiences through articles and the Peer-Instruction Network it seems to be a manageable process which gets easier with time and experience. As stated by a law lecturer at Adelaide University that re-designed her course using JiTT and peer-instruction, 'the information from the assessment energized [my] presentation and that although it seemed to be a lot of work […] it was worth it […] [I] believe the preparation will get easier as [I] develop greater familiarity with the method' (Carrington and Green 2007). The dynamic approach to assessment furthermore allows me to distribute the marking over the whole semester instead of fixing the marking to a short period during test and exam times. This enables me to put much more focus on the individual student and it most importantly allows me to detect low performing students early in the semester. I believe that even though some students indicated in their questionnaires that they felt nervous about their presentations in class, this system will lower the stress level overall of the students because the assessment is done in segments on a weekly basis.

Finally, for the future of this project the main challenges are to encourage the students to believe in their own abilities and to de-mystify the position of the lecturer in favour of the many opinions and objectives present in the student group. If we are to fulfil the objective of the UDHR, that introduced the discussion in this paper, we have to not only strive for the promotion and protection of human rights in our teaching but *by* our teaching enable our students to secure the universal and effective recognition and observance of the said rights.

TEACHING WOMEN, LAW REFORM AND SOCIAL JUSTICE STRATEGIES THROUGH DIALOGIC AND HANDS ON LEARNING

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All too often activist interventions spend too little time conceptualizing the contextual settings that the problems that are sought to be addressed are located. Human rights for instance, provide a core conceptual framework within which today's social justice activism takes place. A key argument for example, is that the concept of human rights itself, if not located within the political and historical experiences of the target groups, can simply scratch the surface and stall rather than promote, the dismantling of unequal relations, while hiding behind rhetoric and slogans. From a women's human rights perspective, we explore the dilemma for women that emanates from cultural identity on the one hand and human rights on the other. Of concern are also conceptual challenges centered on engagement with religious and customary laws. Given the primacy accorded to culture and traditions in most of our African countries, the primary concern is how to address tensions that often arise between the observance of culture and the adherence to human rights. How for instance, should activists go about getting people to abandon practices that are clearly at variance with women's human rights, in manner which is non-defensive and non-offensive to the holders of such traditions?

Much of the activism around women's rights in Africa takes place through nongovernmental organizations (NGOs). The role of the non-governmental sector as a provider of services and an important change agent is therefore also significant to analyze conceptually. This is particularly so in light of the romanticized purity that has indeed often accompanied our perception of this sector when compared to the state on the African continent.

The role of lawyers as change agents is yet another fertile terrain for conceptual introspection from a social justice perspective. Lawyers in the third world have, for example, been criticised for helping to create and maintain political economies which produce international dependency, skewed distribution of wealth and power, as well as persistent and growing in equality. The last two decades in particular have witnessed discernible shifts in the focus of lawyers in the developing world. This is especially with the growth of NGOs and also the emphasis of the global human rights agenda. While not detracting from the major inroads lawyers have made in working with disadvantaged communities, still key questions arise as to the efficacy of that engagement. In what ways for instance, has work with grassroots resulted in strengthening interventionist strategies such as mediation and settlement since women are often not looking for strict legal remedies? What has this meant in terms of working with other disciplines? Is feminist and human rights jurisprudence filtering through to judges and magistrates in their interpretation of legislation? Is there shift in black letter lawyering that reflects the impact of strands of feminist jurisprudence that call for bringing on board women's lived realities in dealing with the law? How is the need for continuing education being addressed for judicial officers and with what results? In the various countries that students come from, has the women's agenda for equality and justice befitted at all from having lawyers in public policy

The content of what is focused on has significant bearings on whether social justice will be achieved for the intended beneficiaries – at least from their view point. In reality this means unearthing and understanding some of the critical concerns that affect the lives of our people on the continent. We examine the question of human rights priorities – what are they and who decides? What is the implication for women? Does aid for instance

compromise the issues that we prioritize in our social justice struggles on the continent? What for instance, could be different in our prioritization if current struggles did not go with the flow of donor money? Thus for instance, some of the urgent concerns include access to health, education, housing, and food to mention a few. Peace and security is also another real concern on the continent to date. Its absence fundamentally affects the realisation of important civil as well as social and economic rights. Grasping how these issues impact on women is crucial. Yet despite such issues being significant from a legal and social justice perspective they have not, until recently emerged as the core issues of concern for activism at the grassroots level. Also, with the growing emphasis on social and economic rights, how do we engage with such issues in a manner which does not make them the exclusive engagement of professionals who are able to engage with the complexities of human rights law?

I have often gotten students to examine the practical implications of An Naim's[23] suggested methodological approach of anchoring the norms of international systems within their own cultural traditions. His suggestion of using "internal discourse" within the framework of each country and "cross cultural dialogue" among the various traditions of the world is discussed from the viewpoint of what this would actually mean in practical terms using key problems in a particular country.

An example that students have in the past chosen to dialogue and work on is early marriage of young girls as this is fairly common in many African societies. As they have noted, the reasons can often be economic and stem from extreme poverty. Marrying off a young girl brings in bride-price which can alleviate poverty somewhat. Students examine the range of applicable human rights instruments to assess the violations at hand and to craft appropriate arguments.[24] Issues for internal discourse include health implications for girl children that might arise from early marriage; the need for education, and the long term benefits that may accrue to the family from having an educated girl child; the need to experience childhood; and the possibility of government loans and subsidies to combat poverty.

From a cross cultural perspective they state that they would focus on campaigns about early marriage in other countries focusing especially on implications for human rights. Methods such as posters, role plays, radio, TV are seen as useful in this regard. Given that formal and informal education is also regarded as key tools for changing attitudes and practices, we discuss how theses can be used in practice. Garnering support for reforms that impact on customs and traditions can also be more effectively done by engaging with traditional leaders. As such examining the role of traditional leaders in different settings and the strategies that are being used to bring them on board can provide useful insights for exchange among the students.

I have also looked at the issue of gender training to combat gender basis in the courts. Since legal justice for women is dependent on a number of core factors such as the legal framework, legal literacy, access to courts and in particular fair treatment in the courts, I zero in on gender training as this has become an important area of focus with social justice activists. In order to appreciate for example the challenges that emanate from biased judicial officers, in one instance we decided to horn in on the opportunity to train judicial trainees using the Sexual Offences Act as the back drop for the exercise. The two aspects of

[23] See for example Abdullahi An' Naim State Responsibility Under International Human Rights Law To Change Religious and Customary Laws in R Cook (Ed) ***Human Rights of Women: National and International Perspectives*** (University of Pennsylvania Press, Pennsylvania Press 1994)

[24] These include for example the Convention on the Rights of the Child, articles 24, 28 and 29 in particular and Article 6(b) of the Protocol to the African Charter on the Rights of Women.

interest in this Act that were regarded as important to engage with included the criminalization of the wilful transmission of HIV and marital rape. The aim was for students to understand how gender bias on the part of judicial officers on issues of sex and sexuality may lead to unfair treatment for women seeking relief in such cases. The target groups in terms of judicial officers were trainee magistrates and prosecutors at the Judicial College in Zimbabwe. The institutions trains judicial officers at all levels and is also key in training non-degree prosecutors and magistrates for the lower courts. Working with these trainees on a specific area of the law such as the then Sexual offences Act[25] was regarded as an opportunity for social justice students to engage with the legal system in its various facets i.e. the law's substance (content), the structure (the courts, enforcement agencies) and culture (the shared social attitudes) especially given our discussion of these in class in terms of how each of these presents challenges for women. The overall aim of the exercise was to create critical consciousness of the participants on gender and its application to the law. This approach to learning which combines the theoretical and the practical is something that the students appreciate. As one student noted in herself evaluation of the exercise:

> The practical exercise component of the course work is a very vital learning experience for law reform and social justice work in our different countries such that it needed more time than was given. It demands not just the conceptual understanding that can be communicated to the audience but creativity too which reflects lived realities……

Conclusion

The combination of law and lived realities helps to ensure that we are producing graduates who are able to make the linkages between theory and practice in very practical ways. A key challenge of teaching the course in this way though is always the time frame within which all this has to be achieved given that the course is taught as an intensive four week. However, as the aim is to provide reflective fields for analysis from both angles, the intensity is well worth it as the students themselves always acknowledge at the end of it all. An additional bonus to crafting a course of this nature, are the number students who increasingly choose to focus on social justice related issues in their detailed masters dissertations. By so doing they are undoubtedly contributing to a groundswell of knowledge based on women's lived realities in the field of access to justice.

(For a more detailed analysis of teaching this course see Amy Tsanga and Julie Stewart (eds) ***Women and Law: Innovative Regional Approaches to Teaching, Researching and Analysis (***Harare***,*** Weaver Press 2011)

[25] The Sexual offences Act has since been consolidated into the Criminal Code.

Human Rights Themes in the Life of the Law School

Human Rights - Role of Law Schools with Special reference to Faculty of Law - UAE University

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Universal Character of Human Rights:

Human rights are recognized as being ***'Universal',*** which means they belong to everyone- no matter what their race, religion, caste, sex, region, or social and economic status, age is. The reason to call human rights as universal is based on their core ideas which are common to all major religions, faiths and moral codes and they ***cross national and cultural boundaries.*** Another aspect of their being universal is that they belong not only to individuals but also to communities. For instance, the people belong to a tribal community has a right to speak its own tribal language and preserve its culture, customs, traditions and its way of life, provided these do not themselves violate the human rights of others- individuals or communities.

Human rights include, for example,

- the right to life, which includes the right to live with dignity,
- the right to equal treatment and not to be discriminated against,
- freedom from torture
- freedom from forced labour
- freedom from wrongful arrest
- the right to a fair trial,
- freedom of information,
- freedom of thought, conscience,
- freedom of religion and faith,
- the right to privacy,
- right to free speech and expression,
- right to movement,
- freedom to associate with others and to take part in government, public and community affairs,
- right to food,
- right to housing,
- right to health
- right to a clean environment,
- right to education,
- right to work, right to equal pay for equal work, right to strike and
- right to preserve one's own culture and way of life.

Human Rights are Interrelated and Indivisible:

Though they are called by various names and expressions, and sometimes they are seperated into different categories- like civil and political rights, economic, social and cultural rights, every right depends on another for its fulfillment. No right can really be put into practice in isolation or compartments without the support of other rights and hence, they are said to be ***'interrelated and indivisible'.***

Protection of Human Rights in the UAE:

The international community, including the United Arab Emirates, has all agreed on what these rights are and what they mean. Human rights are very important because they recognize that each person is special with their own individual talents and abilities and that

no one is inferior or superior to another and this principle is the core and basic norm under the Islamic Law (The Sharia Law). Accordingly, the idea of human rights is the notion that all people are born free and equal. Everyone is entitled to live with human dignity and no one- not the State nor the community, nor the family, nor the society- has any right to discriminate or treat anyone unfairly or unjustly. The UAE has signed and ratified the two main international covenants on human rights- the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). The international system of human rights has been embodied in the UAE Federal Constitution and other domestic Federal Legislations, which insist that it is the duty of the State to promote respect for all the human rights of all people equally.

Human Rights and Role of Law Schools:

Protecting human rights is the foundation of law. Besides including 'Human Rights' as a Major course in curriculum, we firmly believe that every Law School should apply a clinical approach to deal with every aspect of human rights. The Human Rights course at the the Faculty of Law, UAE University allows students to explore the range of opportunities available in the human rights field, at home and abroad, through hands-on experiences. The course is the hub for human rights activities at the Law School, and cooperates with student groups, faculty members, the Public Service Center and Career Services, and human rights organizations to coordinate speakers, events, summer camps, and pro bono opportunities.

Human Rights Law Clinic:

The Law students undergo an intrinsic and extrinsic training in association with the leading International Law Firms in the UAE. The Clinic's seminar, which lays out an analytic framework for much of the course, is combined with specially tailored exercises and simulations to introduce students to international human rights practice. Students participate in exercises and discussions to foster the development of other fundamental lawyering and advocacy skills, including interviewing techniques, fact investigation and development, project and case organization and management, legal drafting, oral and written advocacy (including media advocacy), and collaborative project work.

To bridge theory and practice, the Human Rights Clinic provides students with hands-on experience working on active human rights cases and projects. The skills-training imparted through classroom instruction and simulations is applied and tested in the context of real-world advocacy. Working in partnership with experienced attorneys and institutions engaged in human rights activism. The clinic offers students practical experience in human rights advocacy in collaboration with human rights lawyers and non-governmental organizations in the UAE and abroad. Clinic students have worked in the following areas:

- Human rights in the Middle East
- Freedom of information and expression
- Gender-based violence,
- Rights of indigenous people
- Legal literacy and empowerment
- Right to education
- Right to an effective remedy
- Rights respecting legislative reform
- Right to life and prohibition against torture
- International criminal justice and universal jurisdiction
- Corporate liability for human rights violations
- Land law and housing rights
- Transitional justice/responsibility to protect and to fulfill human rights
- Rights related to health and medical treatment
- National security in the war on terror, War Crimes, Prisoners of War, Rights of refugees, and

- Role of ICC in protection of Human rights

TOWARDS A LEGAL PEDAGOGY OF DIVERSITY

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Legal education is undergoing significant change, unprecedented in at least a century. The reasons for transforming approaches to teaching and training lawyers are not novel. Institutional and pedagogical reform have been a slow, but steady, project for decades, accelerated in recent years by a multitude of pressures, including from within the legal profession, market forces, the digital age, new perspectives on ethical norms, human rights, and rapidly changing demographics. A common theme, which underlies all of these changes, is the reality of social diversity in contemporary western societies.[26]

This paper ties together a number of relevant trends and themes in contemporary legal education. It situates the call for diversity at the nexus of normative consensus around the reality of diversity and the need to foster and promote it; progressive institutional reform to re-constitute the demography of the law school; and evolving pedagogical approaches that transcend the abstractions of traditional legal education, and draw meaningful connections between theory, doctrine and practice.

The normative case for diversity has been embraced widely, if not clearly articulated in substance. This has come both from the legal profession itself, as well as from the law schools. To be sure, legal educators, housed for more than a century within academic institutions, are additionally mandated by universal diversity promotion initiatives within universities, to pursue such initiatives. The institutional reform is well known: admissions liberalization to reconstitute the student body to better reflect the demographics of the society being served by the legal profession. Additionally, some curricular reform has led to the incorporation of new, interest-oriented law school courses designed to explore different perspectives on the law (feminist, racialized, etc.).

This paper begins, then, with two claims that are descriptive. The first, is what I have just described: that diversity promotion is a universally recognized normative goal and priority within legal education and in the legal profession. The second claim is that the current state of affairs with respect to diversity issues in the law school reveals that institutional initiatives appear to have come with mixed, often bad, results. This claim is supported by reference to a variety of scholarship, citing both the empirical and lived reality that racialized law students continue, proportionately, to under-perform in law school and are more likely to drop out. According to objective indicators, minorities continue to face barriers to legal education and professional life. According to subjective accounts by minority students and faculty alike, the law school experience itself remains one of alienation and identity confusion, leading to stark choices between abandonment and assimilation.

The question remains, how to make legal education more diverse? This question begs several subsidiary (or preliminary) questions, such as: what does diversity mean? What are

[26] I use the Province of Ontario in Canada as a case study, but generalize many observations to North American law school experience broadly. Legal education and the legal profession across North American jurisdictions share many similar features and exist amid relatively comparable legal cultures, socio-political conditions and institutional arrangements.

the goals of institutional initiatives to promote diversity ? How is success measured? And finally, what is the appropriate and most effective course of action to meaningfully promote diversity? This paper will deal with each of these questions in succession, assembling the pieces to display a timely convergence between normative consensus and a fresh wave of institutional reform. Indeed, at the same time that the concept or goal of diversity in legal education requires a substantive articulation, it also requires tools for practical application. I argue that recent innovations in legal education—the shift towards greater reliance on experiential education methods—offers a useful opportunity to operationalize diversity.

This paper's prescriptive component connects these pieces and is a call for thorough and substantive integration of a diversity ethic into the concept of lawyering and lawyer identity that is produced in law schools. Whatever the reasons to promote diversity, whether political, business or moral, the concept of diversity contains core normative commitments that demand a shift in professional culture. The final part of this paper argues that the law school bears primary responsibility for, and the ability to, direct this shift in accordance with the aspirations of an equality-enhancing diversity ethic. This is a natural task for legal educators, who are responsible for embedding the norms, both of legal reasoning and of professional conduct.

This paper emphasizes the importance of curricular reform—more radical than hitherto adopted—to fundamentally change the way legal education is conceived and delivered. The embrace of experiential learning within the core of the law school curriculum is a valuable tool, blending practical experience with structured critical reflection. Through this exercise, students can come to understand not only the fact of diversity, but also the specific and varied ways that diversity prescribes not only specific behaviours and skills, but necessitates a process of acculturation that begins with, and is led by, legal educators.

By integrating principles of equality into professional ethics and practices, the law student models her professional behaviour in accordance the prioritization of equality as the normative foundation of diversity. This makes the law student and future lawyer an active agent in the process of diversity promotion, both by being acculturated within a professional ethic of diversity/equality, and also then working for constant affirmation of that ethic through mindful professional practices.

The Normative Case for Diversity

There is wide agreement that diversity in legal education is a priority. The reasons for why the promotion of diversity is desirable can vary, but relate centrally to principles of equality and anti-discrimination. The Canadian Bar Association spearheaded research and policy work on sex and racial equality, publishing two key reports in 1993 and 1999, respectively, calling for greater attention to diversity in the legal profession. The Law Society of Upper Canada (LSUC), the regulator of the legal profession in Ontario, Canada, has adopted diversity as a priority, as have other provincial, state and national bar associations across North America. The LSUC has carried out its own studies and implemented programs to promote diversity institutionally and within the profession. In addition to the institutional and professional recognition of the diversity priority, law faculties have also noted the diversity gaps in legal education. There is broad consensus that diversity in legal education is now a priority.

The equality interest in promoting diversity has become increasingly relevant given demographic changes over a couple of generations that have radically changed the composition of North American society. In Ontario, for example, "visible minorities" now constitute 20 percent of the population; in the city of Toronto, they are one in three. The

LSUC reports that between 2001 and 2006, the proportion of non-white lawyers rose from nine percent to 11.5 percent, still well below the composition levels of broader society. Among younger lawyers (aged 25-34), the proportion of non-white lawyers (20 percent) is on par with the provincial population figure. The profession appears to be on track to be statistically representative.

In its 2010 Report on Diversity, the American Bar Association (ABA) identified four arguments to support the call for greater diversity in legal education. The Democracy Argument holds that lawyers bear considerable responsibility for sustaining a democratic, rule-of-law legal order that represents the society it serves. Access to the legal system must be ensured to protect the law's democratic legitimacy. For much of the general public, lawyers are both the guardians and the gatekeepers of the legal system, instrumental in the vindication of citizens' legal rights and entitlements. The Business Argument notes the increasing expectation of clients for their lawyers and law firms to demonstrate diversity competence. This arises as a result of factors of globalization, particularly transnational trade and migration. Lawyers with cultural and linguistic proficiencies, and firms with diverse staff, are better able to meet diverse client needs.

The Leadership Argument rests on the fact that lawyers are leaders in politics and society (especially true in the United States), necessitating broad and representative access to the profession. Finally, the Demographic Argument is the most obvious: as the ethnic composition of the general population diversifies, the more important it becomes for the legal profession to do so as well.

These arguments are mutually reinforcing. Each offers a different descriptive account of a particular normative priority that enjoys wide acceptance: namely, that the legal profession should be representative of the personal and group differences that constitute the broader society. This norm of "representation" looks to the social makeup of the particular jurisdiction and asks whether there is rough demographic correlation between the demographic makeup of society and that of the constituent members of the legal profession. So, for example, if indigenous peoples constitute two percent of the Canadian population but only XX percent of the active members of the bar, then we have a representation deficit.

It is important to observe that the legal profession has always had a representation deficit.[27] Changing demographics have not produced the representation deficit; but as population diversification increases, so does the representation deficit. This widening demographic gap came amidst social changes and evolving norms beginning in the 1960s,[28] leading to the global "rights revolution".[29] In Canada, the adoption of the *Charter of Rights and Freedoms* in 1982 created a constitutional mandate to promote a particular vision of the country based on the goal of social inclusion. This was reflected in the Charter's ,[30] and the inclusion of an individual right to equality along with a shield for affirmative action.

Constitutional and legislative interpretations reflected widespread acceptance of the priority of social equality, and this produced a normative imperative to promote diversity. This shift in values underlies arguments such as those advanced by the ABA. The normative imperative, linking changing demographics to a call for representation in the profession,

[27] Backhouse
[28] cite US civil rights; international human rights; Canadian bill of rights.
[29] See Charles Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: U Chicago Press, 1998) [examining the growth of civil rights and human rights across the world, and noting a democratization of access to the courts through social activism].
[30] Joseph Eliot Magnet, "Multiculturalism and Collective Rights" (2005) 27 Sup Ct L Rev 431 at 441.

comes from a variety of perspectives. It is worth briefly summarizing the sources of the "push" towards diversity as a normative priority.

First, the professional push comes from individual, group and institutional forces within the legal profession. This push embraces the business argument, but also highlights the fact that lawyers are leaders in many field and have a broad mandate to promote the interests of justice. The profession takes seriously its monopoly over the provision of legal services, and recognizes that this privilege comes with concomitant duties. The profession claims to hold its members to a high standard of professional responsibility and integrity. This requires the profession to be attentive to shifting social and demographic forces that are bound to impact the professional lives of lawyers and the provision of legal services to the public.

Secondly, the pedagogical push comes from the law schools, where legal theory and doctrine are taught; legal reasoning and skills are developed; lawyer identity is formed; and professional opportunities are scoped and sought. The first women and minority law professors wrote of their experiences of alienation in the classroom,[31] on faculty councils,[32] in the law books[33] and in understanding the differentiated ways that law impacts on society.[34] For at least the past thirty years, North American law faculties have articulated a commitment to making law schools more representative of the society they serve, but their efforts have come with mixed results. All of Ontario's law schools have adopted diversity as an institutional goal, and various programs and initiatives have been adopted, mainly centred on admissions policies. This push has also produced modest changes in law school curricula. All of this is discussed below at greater length.

The political push recognizes that diversity is a priority in public policy, modelled within the public service sector, and promoted in the broader society through a host of initiatives designed promote healthy interactions across differences. While differences of opinion are valid and essential to a political democracy, differences based on unchangeable personal attributes, such as race, religion or gender amongst others, can prove dangerous political lightening rods and can undermine social cohesion. Political powers have an interest in ensuring smooth, intercultural relations. Acknowledging the fact of diversity in the broader society, and embracing it as a desirable political reality and objective, is now mostly a universal normative view. Because the legal profession is so closely tied to the administration of justice and the enforcement of law, the political push is not a hard sell with respect to professional, such as lawyers, who are providing important public services within a regulated monopoly.

Finally, the ethical push towards promoting diversity within the legal profession links diversity to increasing attention on professional ethics and responsibility, and access to justice. Dodek ties the importance of diversity to the legitimacy of the profession itself and of the administration of justice. The focus of this approach is on improving the ethnoracial composition of law schools and law firms to be more representative of the society in which lawyers operate, as an ethical imperative.

Defining the Concept: Diversity as Accommodation

The focus of this paper is on what I have called the "pedagogical push" to diversity. Before examining the forms that the push has taken and understanding what legal education offers

[31] cite
[32] cite
[33] race critique of doctrinal instruction
[34] cite

to diversity, we must first be clear about what we mean by diversity. As a descriptive concept, diversity is a statement of demographic data. As a normative priority, however, diversity is a response to exclusion. As discussed above, the demographic response is based on a widening equality gap, but is not what generated the history of exclusion. The history of exclusion in Canadian law schools, for example, has been traced to an elitist conception of the legal profession. A hundred years ago it was widely accepted that lawyers should be white, male, Protestant and English (or able to pass as such).[35] The concept of "professionalism", embedded with classist notions of "gentlemanly" demeanour and behaviour, was the standard used to define the good lawyer. In effect, it operated to exclude non-privileged people from the legal profession. Evolving ideas about equality would have a narrowing effect on the representation gap, but rapidly changing demographics would have a stronger widening effect on the representation gap. In other words, as elitist, racist and sexist ideas about individuals gave way to greater openness to representation, diversification of the general population far outpaced the gradual growth of minority members of the legal population.

The problem of exclusion, then—historically linked to systemic and institutional racism, bigotry and prejudice—was heightened by rapid demographic changes as the widening doors of access failed to keep up. What measures were adopted to remedy historical exclusion were not sufficient keep up with the pace of social diversification.[36]

Critical race and feminist scholars illustrate the link between exclusion and inequality, highlighting the experiences of women and people of colour in legal education.[37] According to these critics, exclusionary historical forces are still alive and well in legal education. They argue that the law schools continue to teach according to a standard of "whiteness", which is the norm against which all students are measured. They warn that the postures of "neutrality" or "objectivity" in the dominant modes of legal analysis taught in class operate to mask the reproduction of racial hierarchy, by way of forced white normativity.[38]

Law faculties have not been oblivious to the concerns and the critiques. Early efforts focused on admissions policies.

Some changes in curricula (perspectives courses; legal ethics)
Ethics tended to foucs on rules; perspectives are optional
This first wave of remedial efforts were a thin approach to diversity. Experiences of alienation remained prevalent, and with a diversifying student body these voices became amplified. I contrast the "thin" first wave with a more robust, or "thick" model of diversity. The thin approach aims to *accommodate*; the thick model aims to *transform*.

Accommodation: The Thin Approach

First-wave models of diversity promotion can be grouped into two broad categories. The first are equitable or affirmative action admissions programs. These may pursue targeted admission by members of specifically identified, historically disadvantaged groups (like blacks or indigenous people). This is based on group membership. The second included modest curriculum changes to adopt are also be equitable programs designed for individuals to provide an account of unique experience or perspective.

[35] Backhouse; Pue
[36]
[37] Cite Crenshaw, Matsuda, Delgado, Backhouse, St. Lewis. Bandhar.
[38] Younes, "Teaching White"

Critics of current law school models highlight two forms of vulnerabilities of first-wave diversity initiatives. First, they are criticised for being under-inclusive: admissions policies only open doors, but the causes of exclusion go beyond law school entrance requirements.

The limits to the thin, or accommodationist, approach to diversity in legal education can be characterized in three ways: they are front-end focused; weak in the middle; and abandoned on the back end.

Front-end focused

The focus on the "front end" recognizes that law schools have pursued affirmative action to transform the student body composition by altering admissions policies to increase representation of women and minority students. The rationale behind this demographic focus is obvious and understandable: it addresses the representation gap identified above. Its primary concern is with increasing access to education for members of historically excluded or disadvantaged groups. Any website of any law school in North America will proudly display photos projecting a colourful, racially diverse student body population. The appeal of diversity makes such images compelling—they are representations of the way we wish our schools, firms and courts to look.

Admission liberalization typically consists of altering the "objective" criteria in admissions standards, while allotting weight to other factors that are designed to ameliorate the strength of minority applicants' comparative profile. When diverse life experiences or perspectives are seen as strengths sufficient to bolster or complement more conventional criteria (like undergraduate marks and LSAT scores), affirmative action can provide access to law school for individuals who might never have successfully applied. More importantly, affirmative action programs provide a concrete response to the history of formal and informal exclusion. Law schools benefit by being able to demonstrate better representation, at least formally, which bolsters their popularity, marketability and democratic legitimacy.

According to Dennis, this traditional approach to diversity can provide some useful tools, but on the whole it fails to constitute an effective program for meaningful diversity promotion.[39] Commenting on American law schools, Wilson notes that cost, LSAT requirements, grading and ranking, and a weak implementation of affirmative action[40] have "combined to depress the number of minorities that are accepted and that ultimately graduate from law school and sit for the bar exam."[41]
For Oko, because affirmative admissions policies fail to address underlying social problem problems, law school diversity efforts focusing on admissions offer only band-aid solutions.[42]

Ramlackhan argues that affirmative action programs work best where they are paired with robust academic support throughout law school.[43] This helps to mitigate the limitations of affirmative action and make better the chance of achieving its goals. This argument, however, implicitly acknowledges that structural obstacles to many historically

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[40] See *Gratz v. Bollinger*, 539 U.S. 244 (2003) in which the Supreme Court of the United States held that a "minority quota" system of affirmative action violated the constitutional rights of white applicants. In the sister case, *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Court held that using race as one amongst many factors in university admission decision making was not unconstitutional.
[41] Patricia A. Wilson, "Recreating the Law School to Increase Minority Pariticpation: The Conceptual Law School" (2010) 16 Texas Wesleyan L Rev 577 at 578.
[42] Okechukwu Oko, "Laboring in the Vineyards of Equality: Promoting Diversity in Legal Education Through Affirmative Action" (1996) 23 Southern U L Rev 189 at 212.
[43] Anupama Ramlackhan, "Leveling the Playing Field in Law School: A Look at Academic Assistance Programs for Minority Law Students" (2006) J Race, Gender & Ethnicity 27.

disadvantaged students have not disappeared as a result of front-end focused diversity programs. In other words, the project of transforming the law school into place of diversity requires a diverse student body (and faculty) as a *precondition* or first step to achieving meaningful diversity, not as an end goal or indicator of success.

Weak in the middle

The difficulty is that much experience with affirmative action and progressive admissions initiatives shows high rates of difficulty and attrition of students admitted through such programs.[44] There remain ongoing problems of retention and completion of law school by minority students.[45] Evidence also suggests that minority students are more at-risk, more in need of academic support, more financially vulnerable, and more likely to fail the bar than non-minority students.[46] Wilson notes that amongst elite, American law schools, minorities are most often concentrated in the bottom half of their classes.[47] Poor performance in law school makes it harder to graduate and more onerous to launch a career in legal practice.

Of course, these difficulties cannot be traced causally to law school admission. But it is clear that since the introduction of targeted and liberalized admissions, the minority experience in law school has, on the whole, been shaped by the patterns of exclusion and hostility that minorities experience from the outside the law.[48]

A big part of this has been the failure of law school faculty to adequately integrate critical, counter-dominant discourses and social commentary about the law into core curriculum material. But a bigger problem lies simply within the traditional approach to law teaching, which remains mostly unchanged for over a century.[49] Despite its resilience, legal education has long been criticized for it content, form, and methods.[50] The American Legal Realists of the early 20th century highlighted the gap between theory and practice, focusing on the disconnect between appellate decision making (the focus of law school instruction) on the one hand, and the lived experience of the law applied (the reality of legal practice) on the other.

The core weaknesses in the existing model of legal education include: a curriculum rooted in appellate doctrine rather than a full contextual understanding of law in action; unengaged and outmoded methods of instruction, such as lecture and Socratic dialectic; evaluation methods that reflect a perverse ordering of lawyering knowledge and skill, placing abstract

[44] See, e.g., Richard Sander, "A Systematic Analysis of Affirmative Action in American Law Schools" (2004) 57 Stan L Rev 367 at 370 [suggesting that minority students would be better off attending lower ranked law schools to which they can be admitted without the need for affirmative action]. For contrary view, see William C. Kidder & Richard O. Lempert, "The Real Impact of Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study" (2004) 57 Stan L Rev 1855.

[45] Carole J. Buckner, "Realizing Grutter v. Bollinger's 'Compelling Educational Benefits of Diversity' – Transforming Aspirational Rhetoric Into Experience (2004) 72 UMKC L Rev 877 at 888 [linking lack of engagement with minority issues in class with feelings of alienation by minority law students].

[46] Dennis at 630 [also citing the fact that the ABA has identified students of colour as "at-risk" with respect to passing the bar examination]. See also Sander, *supra* at 426-467.

[47] Wilson at 581.

[48] See, e.g., Rachel F. Moran, "Diversity and its Discontents: The End of Affirmative Action at Boalt Hall" (2000) 88 Calif L Rev 2241 at 2283-2285 [finding issues of race and gender "largely ignored within the law school curriculum]; Walter A. Allen & Daniel G. Solorzano, "Affirmative Action, Educational Equity and Campus Racial Climate: A Case Study of the University of Michigan Law School" (2001) 12 Berkeley La Raza LJ 237 [describing a sample law school environment as replete with segregation and racial conflict].

[49] Rochette and Pue

[50] See Karl N. Llewellyn, "The Current Crisis in Legal Education" (1948-1949) 1 J Legal Educ 211 [critiquing the case study method and urging a curricular shift in law school towards the acquisition of "craft skills", an early call for clinical legal education]. See also, Benjamin Spencer, "The Law School Critique in Historical Perspective" (2012) 69 Washington and Lee L Rev [tracing 130 years of American critique of legal education's failure to adequately train putative members of the profession].

analytical reasoning at the top; and a faculty composition that is remarkably homogeneous along important social lines such as gender and ethnicity.[51] Dennis identifies problems in the way legal education is organized and taught, which has the effect of leaving stranded many of the beneficiaries of minority access to law school.[52] She notes that little is done to educate students of colour uniquely about what that means to be a lawyer of colour; and of the need to "hyper-educate" the entire student body to the needs of the culturally diverse, minority client.

All of these factors contribute to the sense that professional and institutional inertia alone are sufficient to perpetuate existing exclusionary practices in legal education. In other words, absent radical core changes to curriculum, instruction, evaluation and faculty composition, the liberalization of law school admissions alone is an ineffective means of promoting meaningful diversity.[53] Legal clinics departed from traditional forms of legal education to develop a pedagogy of professional practice that aspires to link lawyering practices to progressive social change. This vein of critique identifies traditional legal education as the source of the problem, transmitting a vision of practice that not only is unresponsive to social movements but which is counter-productive. But the critique also identifies legal education as a potential site of transformation, wherein a commitment to justice and equality can be promoted through client-centred lawyering and student-centred learning.[54] Dennis calls for a multicultural curriculum wherein instructors actively subvert stereotypes and biases and help students to see how the law operates to reinforce social, cultural and economic status markers, and also how the law can be deployed to challenge existing hierarchy and power imbalance.

Abandoned on the back end

Nowadays, it is not only desirable for law schools to showcase diversity, it can also be lucrative. The law school can attract the brightest stars from within racialized communities by offering a diverse and inclusive academic culture, a sampling of perspective courses with attractive titles, and a system of professional counselling and access to the lucrative job market. However, while the law school is the forum in which students are typically first introduced to the law firms, it is the firms, not the school, who determine virtually every aspect of the students' entry to professional training and employment. The law school has no power to place students or to compel firms to implement programs or make any specific decision.

In fact, law firms in Ontario (as in most jurisdictions) are not regulated at all, falling outside the regulatory power of the local law society or bar association, whose members are only individual lawyers. Law firms are unregulated businesses that profit from lawyers' monopoly over the provision of legal services. Business interests drive the employment side of the of the profession. Due to mandatory articles, every law graduate in Ontario must secure a position under the stewardship of a senior member of the profession. Thus, you have an unregulated business sector driven by a profit motive effectively in the position of admitting law graduates to the professional bar.

[51] Spencer supra. Even as most faculties now have strong female representation and we have seen numerous female law school deans across the country, the

[52] Dennis

[53] See Sander, supra [arguing that it might even be counter-productive].

[54] See Janet E. Mosher, "Legal Education: Nemesis or Ally of Social Movements?" (1997) 35 Osgoode Hall L J 613; and Lucie E. White, "The Transformative Potential of Clinical Legal Education" (1997) 35 Osgoode Hall L J 603 at 605.

As discussed, the numbers in Ornstein's ground-breaking research suggest modest and slow change in the diversity direction at all levels of legal practice. There is plenty of cause for concern in closer analysis of the data.[55] At the general level, the places where diversity inadequacies remain virtually unchanged are at the top of institutional power. Whether in the law firms, the law schools or the judiciary, racial and ethnic minorities are not only underrepresented, they are virtually absent.[56]

Law school commitments to diversity offer the promise of a self-fulfilling career in the law, in a legal culture which celebrates difference and accommodates a multitude of perspectives. However, when students encounter the profession, they face the reality that the forms of transformation that the law schools quite sincerely hope to engineer have not yet been realized. The students' disappointment deepens when they realize that the promise is not only unrealized, but is unachievable in the current model of legal education. Thin diversity is exposed as a cosmetic alteration that offers only limited and partial remedy for historical inequality.

Assessing Thin Diversity: Accommodating Accommodation?

Accommodation works to increase access to legal education for members of historically excluded groups, enabling them to move from "outsider" status to insider. However, this approach does not subvert the insider-outsider dichotomy. Rather, it reinforces it, putting many students of colour in the position of selecting a "bleached out" professional identity that smothers and eventually extinguishes personal identity markers of difference from the dominant norm (embedded with patterns of historical white, upper-class, male privilege).[57]

The alternative to assimilating to a norm to which one does not easily identify, is a law school life of isolation and professional marginalization.[58] Students who wish to develop critical postures, based on their personal or group-identified experience with the law, often fail to receive sufficient support from faculty or classmates. Teachers dismiss as "irrelevant" many social policy or normative questions, justified on a narrow view of law as positive doctrine. Meanwhile, fellow students cast off these "identity" or "interest" based politics as distractions by minorities and feminists with an axe to grind. Dominant assumptions and power relations, both in the law and in legal pedagogy, are not only left intact, but are strengthened by the marginalization of these voices.

For the minority student, upon coming to understand that the entire knowledge system being transmitted in law school—from the method of reasoning to the underlying facts and ingrained values of the law—privileges a particular perspective that treats the minority student as an "outsider", the rational choice is stark: assimilate or drop out and quit.[59] Indeed, the appeal of assimilation is powerful, even though it is not always an empowering choice. According to Wilkins:

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[55] E.g., the data illustrates for the first time clear evidence of massive disparities between different social groups, such that some minorities are statistically over-represented in law school, while others are under-represented.
[56] Cite report on Fed Court judges; Carasco hum rts complaint vs U Windsor; Ornstein re law firms.
[57] See Sanford Levinson, "Identifying The Jewish Lawyer: Reflections on the Construction of Professional Identity" (1992-1993) 14 Cardozo L Rev 1577 at 1601 [describing the process by which lawyers are taught and trained as a socializing process designed to "make otherwise irrelevant what might be seen as central aspects of one's self-identity."]
[58] Brenna Bhandar, "Always on the Defence: The Myth of Universality and the Persistence of Privilege in Legal Education" (2002) 14(2) Can J Wom & L 341 at 351 [describing one effect of dominant pedagogical practices as treating the "concerns, interests, and views of students who do not conceive of the law as a set of ahistorical, natural principles" as illegitimate and irrelevant to the study of "real law"].
[59] Bhandar at 351. See also Younes, *supra* at X.

> bleached out professionalism stigmatizes lawyers who are different from those who created existing professional norms, discourages identity related innovations in professional practices, and delegitimates the kind of integrated self-consciousness that promotes individual growth, collective organization, and service to others…[60]

The assimilated student gains greater access to the core services offered by the law school: doctrinal instruction; credentialing; and employment opportunities, in addition to important social networks and professional cachet. The unassimilated student not only loses these benefits, but must struggle to maintain an individualist status or hold membership in a counter-dominant group. This is made even more difficult where such identity is positioned in opposition to all that is valued in the law by the dominant groups in law school. For example, the aboriginal student who holds a strong identity as a First Nations may find, in first-year law school, a broadly alienating education in a way that non-First Nations students would ever imagine.

Consider that the entire realm of Canadian public law, being based on British Crown power and a European constitutional order, might be viewed as contested, or even illegitimate. The strongly self-identified First Nations student may wish to explore issues of legitimacy underlying the constitution, Natural Law or pre-law interrogations, and normative questions far removed from the core curriculum material. In criminal law class, that student may wish to understand better the composition of the prison system, or look at cases from the civil courts and regulatory agencies making findings about police racism and abuse of power. In property law, again, underlying legitimacy issues and normative presumptions unstated may be evident to the First Nations Student but ignored by the instructor, and dismissed by fellow students.

These intersections of law, politics and policy tend either to be ignored or awkwardly taken on as "special interest" topics. The innovation of policy/perspectives courses provided a welcome response to the need for "safe spaces" for marginalized law students to explore issues of personal identification with the law and other issues of shared interest without the hostility of the lecture-based doctrinal classroom to questions of social impact of law. It created a baseline expectation—a slim hope for a place in law school, if not complete or meaningful inclusion. While perspective courses were an important step and have, in cases, helped minority students feel vindicated and included, when topics are taught as a "special interest" or "perspective", they tend to give the impression of redundancy or irrelevance. Some of found that the perspective course tends to entrench the marginalization of those perspectives, confirming student perceptions of "core" and "peripheral" elements to legal education.

Minority students know from long experience that critiquing the traditions of the legal profession, highlighting the colonial heritage of the common law, exposing the racial and differential impact of law enforcement, or calling out the insensitivities of dominant law firm culture and its prevalence in the law school classroom, are all lines of argument certain to be strongly resisted in class discussion. Faculty members who wish to cover critical discourses in the law seek to strictly manage the classroom content around these issues, keenly aware of the challenge of trying to facilitate a constructive dialogue about such

[60] David B. Wilkins, "Beyond 'Bleached Out' Professionalism: Defining Professional Responsibility for Real Professionals" in Deborah L. Rhode, ed *Ethics in Practice: Lawyers' Roles, Responsibilities, and Regulation* (Oxford, Oxford U Press, 2000) 207 [Describing the normative aspiration that holds lawyers should "bleach out" their personal identities in order to adopt a "neutral" lawyer role. Wilkins contests the value and viability of this approach for black lawyers in the United States].

fraught issues as gender and criminal sexual assault, anti-Semitism and university free speech, or race and policing. "Neutral" positions on such issues are often difficult to locate, leading to adversarial positioning on topics of deep emotional and personal resonance for many students.

The result is that difficult conversations about important topics are generally avoided in law school, under existing pedagogical methods.[61] To the racialized student, this is evidence of the continued prevalence of racism in the law, and of the law school's part in sustaining and reproducing it. The claim, then, that law schools participate in the reproduction of racism is not a qualitative likening of contemporary practices to the colour bar that previously did everything to keep students of colour out. Systemic racism today is linked directly to the factors that give rise to the individual appeal of assimilation or self-erasure: that is, the resilience of norms and values that dominate legal education, the qualities that constitute the "good lawyer", and the experiences that are valued or devalued in legal analysis.

Thin diversity, the accommodation approach, does not offer the means to alter the existing norms of legal education. Rather, it helps gain admittance for many who would be otherwise excluded and gives them the opportunity to assimilate. For some, this opportunity may be a great choice and an entry to a successful career.[62] However, for many others, it presents the impossible choice between quitting and self-erasure. For this reason, despite a generation of affirmative action programs in the United States, scholars observe that not much has changed in relation to racial equality.[63] Legal education is still, on the whole, an exercise in the production of "cookie cutter" lawyers,[64] with strong pressure towards individual self-erasure.[65]

Accommodation, or thin diversity, creates the conditions to allow for the outsider to become an insider, both in terms of gaining admission to law school and in having the opportunity to adopt the dominant model of professional identity, both of which have the effect of narrowing the representation gap. Success is therefore measured by the extent to which the outsider law student is able to assimilate to the standard norm, in terms of identity, perspective, skills and knowledge.

Thin diversity fails to dislodge the legacy of dominant "whiteness" in legal education. While minorities may find ways to assimilate to the dominant model, for many, such a decision comes at great personal cost. The unifying theme in the reflections and scholarly literature looking at issues of race and minority identity in law school is that the choice between assimilation and marginalization is not an adequate response to the legacy of exclusion in legal education. Only those willing to incur the personal cost of bleaching out will have a chance, and even then evidence suggests that many who wish to assimilate are unsuccessful.

Thick Diversity: The Transformation Approach

To overcome the insufficiency of thin diversity measures, it is clear that to promote diversity robustly, law schools will no doubt have to continue to work to diversify law school

[61] Rose Voyvodic, "Advancing the Justice Ethic Through Cultural Competence" presented at the Fourth Colloquium (Windsor: Law Society of Upper Canada, 2005), online: http://www.lsuc.on.ca/media/fourthcolloquiumvoyvodic.pdf [discussing law school pedagogy and cultural competence].
[62] Wilkins
[63] cite Spencer
[64] Younes, cite. For the opposing view, that uniformity in the constituent members of the professional corps of lawyers is a public policy good, see…
[65] Armstrong and Wildman

classrooms, both in terms of admitting minority students as well as appointing minority faculty. But it has become clear that the benefits of diversity do not flow automatically upon changing demographic representation. Diversity as a program of reversing historical inequality is not a simple matter of demographic adjustment. Rather, while changing class composition is a necessary component, it is but a partial and preliminary measure towards truly transforming the law school.

However, more of the same will not resolve the underlying tensions. Greater academic support and the introduction of "perspectives courses" have been important to provide for minority student needs and appeal to their interests. However, these types of accommodation measures offer false comfort: while they may ease the student's entry to and passage through law school, they do not provide a vehicle for deep engagement within the law school about diversity issues, nor do they resolve for the minority student the homogenizing tendency within conventional legal pedagogy.

This necessitates an approach to teaching and training that integrates critical voices within legal education and scholarship, and embraces the pedagogical centrality of pluralist narratives in legal history, doctrine, analysis and reasoning. A transformational approach critically examines foundational questions, such as what it means to "think like a lawyer". The importance of pluralist and counter-dominant approaches to what thinking like a lawyer means, and the possibilities for future professional modelling, have been inadequately developed. This seems to be where diversity demands the most: in the acceptance and celebration that there are different ways to think and behave as a lawyer. The first step, then, must be to subvert the notion of a single, monolithic model of lawyering.

But once the idea of "thinking like a lawyer" has been opened up, the next step is to re-conceptualize the kind of lawyer that the law school will produce. If diversity demands the celebration of difference as a way of promoting equality, there must be some content to the kinds of differences that are celebrated within the diversity paradigm. Normative writers have focused on infusing the reconstructed lawyer model with a commitment to justice, equality and "do no harm".[66]

How this is achieved involves tailoring legal education to shift the model of lawyering, and change the characteristics of professional self-image. In order to do this, I propose using the same methods that the law schools have always employed. If we accept that in producing lawyers, the law school in fact produces a particular model of lawyer, given that a "neutral" image simply cannot be projected. It is in presenting the possibility of a lawyer identity to which any student can ascribe or aspire. This is where diversity can be embedded as a defining professional characteristic and ethic, and can have an effect in shaping the future of the profession. From disincentives to applying to patterns of attrition to career choices made, the dynamics of racial and ethnic minorities in relation to law school can be fundamentally altered if a plausible reform agenda were to be initiated that completely re-conceptualizes the normative model of lawyering taught in law school.

Diversity Pedagogy

[66] See, e.g., David Tanovich, "Law's Ambition and the Reconstruction of Role Morality in Canada" (2005) 28 Dal LJ 267 [articulating an approach to ethical responsibility rooted in the promotion of justice]; see also Rosemary Cairns Way, "Reconceptualizing Professional Responsibility: Incorporating Equality" (2002) 25 Dal LJ 27 [proposing an "equality seeking ethic" as a core professional responsibility]. See also, Duncan Kennedy, "The Responsibility of Lawyers for the Justice of Their Causes" (1987) 18 Texas Tech L Rev 1157 [urging a "do not harm" ethic].

The goal of diversity pedagogy is a conceptual re-orientation of what it means to think like a lawyer. The aspiration of thick diversity is working toward a shift in consciousness and lawyer identity. This means moving beyond the focus on ameliorating the position of "minorities" or "outsiders", but rather on changing the underlying conditions that create insiders and outsiders. This means improving the quality of education to include diversity not only as a series of positivist measures designed to promote a normative goal (i.e. to close the representation gap); but also as a fundamental shift in consciousness, ideas and values in matters at the core of the law school's mandate: professional identity; knowledge transmission; case analysis and legal reasoning; and employment preparation.

This shift in lawyer modeling begins with subverting the norm of what it means to think like a lawyer. It then moves to re-conceptualizing the kind of lawyer that the law school will produce. To achieve this, I propose using the same methods that the law schools have always employed. The law school chooses the knowledge, skills and priorities that define and constitute the law. The law school also transmits and assimilates the norms, behaviours and ethics that shape the professional identity. Thus, if we accept that it is the law school that establishes the normative lawyering model, acting as the site of identity formation and acculturation, the law school in fact produces a *particular* model of lawyer. This is where diversity can be embedded as a defining professional characteristic and ethic.

Diversity pedagogy, then, seeks to incorporate these truths in how legal educators both teach substantive law, and model the exercises of legal reasoning and practice. The process of promoting diversity needs to move beyond thinking about how to make the dominant legal establishment more accessible to "outsiders", to a more concentrated focus on revising and re-orienting the meaning and function of lawyering. This involves a pedagogical and administrative re-orientation to producing an institutional culture, reflected in curriculum, that is expressly and comprehensively built on equality-positive assumptions.

Such a normative diversity program based on principles of equality and broad inclusion generates what can be called diversity pedagogy. Diversity pedagogy is both a theoretical and practical program.[67] While I do not seek to prescribe a specific set of pedagogical instruments, exercises or experiments to implement the general prescriptions offered here, there are two broad goals that should be embedded in any program of diversity pedagogy. How these methods are applied in any given law school setting is a matter for local and particular consideration.

Choosing and defining professional norms

The challenge of diversity in legal education is to subvert the dominance of the inherited model of what it means to "think like a lawyer", critically assess what is valuable in that model (and what is not), and then work on improving approaches to legal education to reflect the professional norms that constitute the normative model of a lawyer. In their joint study on the state of legal education at the beginning of the 21st century, Annie Rochette and Wesley Pue write:

> Employing only moderate poetical licence, it could be said that nothing fundamental distinguishes present educational practices from those of Toronto in 1968, Vancouver in 1945, Winnipeg in 1920, Halifax in 1900, or

[67] I am articulating the theoretical basis on which a pedagogy of promoting meaningful and impactful diversity norms could, and in my view should, be pursued. The task of experimenting with implementing theory is another project altogether. As a teacher who attempts to implement ideas of diversity pedagogy, my theoretical frame is certainly informed and shaped by my experiences in the classroom.

> Oxford in 1885. Contemporary common law legal education takes its form from schemes launched by elite Anglo Canadian lawyers a century ago.[68]

The traditional form of legal education helped reinforce the dominant culture of the profession, described as being through most of its history, "xenophobic, elitist and generally aligned with capital interests against ordinary citizens."[69] Responding to this legacy with unabashed repudiation, scholars in the emerging field of Canadian legal ethics call for fundamentally re-conceptualizing the role of the lawyer in the legal system and society, with necessary implications for legal education.[70]

My work, though not strictly a project about legal ethics, is informed by, and contextualized within, this body of literature. My conclusions and prescriptions necessarily implicate issues of professional identity and responsibility both in the education context and more broadly in the profession.

The hard sell need not be made with respect to establishing an interplay between professional education and professional culture. There is constant reciprocal influence between the law schools and the legal profession. The firms rely on law faculties to supply their existing business systems by producing quality graduates. But they also turn to the law schools to tell them where the law is headed. The extent of law school influence over the *future* of the profession is often misgauged or underemphasized in the face of the dominance of the constituent members of the profession (large firms in particular) over the *present* professional zeitgeist.

Education is a process of socialization.[71] It embeds a particular set of values, norms and practices—what we call a professional culture. Law faculties not only produce and transmit dominant knowledge about legal theories, systems, institutions, rules and principles. Legal education is also an initiation into a constituency, a professional body. Therein lies a culture, laden with values, norm and priorities. No education is ever "neutral" or "objective".[72]

The law school chooses the knowledge, skills and priorities that define and constitute the law. Honesty requires accepting the responsibility that legal education either entrenches the status quo or transforms it. For this reason, a transformative aspiration is central to the "thick" conception of diversity. Diversity pedagogy is both a normative position, that affirms the dignity of all experiences and identities as a response to historical exclusion. It is also a factually realistic depiction of present social conditions, including demographic variation and entrenched power imbalances. It is necessary for legal educators to be self-revealing about the different narratives of law's meaning and impact. Rejecting the norm of neutrality, diversity pedagogy accepts that the law is primarily positivist; and any deontology is contested at best. Pluralism is the necessary corollary to equality when considering the intersection of globalization, multiculturalism, and liberal-democratic ideas of individual freedom and dignity.

More than twenty years ago, Crenshaw described what she called the myth of "perspectivelessness".[73] She found this to be a fatal flaw at the core of traditional legal education. Her experience as a racialized woman teaching in a law faculty provided the

[68] Rochette and Pue

[69] Pue

[70] See e.g. Allan Hutchinson

[71] Freire

[72] Freire

[73] Crenshaw. See also Bhandar [myth of "universality"]

experiential setting and familiar grounding to articulate a compelling account of racial exclusion within legal reasoning, institutions and the academy. There is a sufficient body of work now to accept as sound and persuasive the notion of a broadly shared experience of racial antagonism and exclusion stemming from the conventional ways in which the law is created, reproduced, interpreted, applied and taught.

The pervasiveness of law's complicity in reproducing patterns of racial exclusion white privilege is at times muted by the embrace of formal equality. The idea of law's neutrality, stated to promote "equal" treatment by way of objective decision making and sameness, helps continue to mask the prevalence of differential impact of unequal systemic factors. Formal equality accepts the important moral view that all persons are, at least theoretically, equally capable of realizing or fulfilling any goal reasonably available to any other person. The problem with formal equality, however, is that it does little to affect the starting position of individuals in the world, which we know empirically to be closely tied to the degree of self-realization and sustainability. Formal equality fails to attack the underlying norms and systems that create exclusion in the first place.

For these reasons, the transformation approach to diversity must embrace the rejection of "perspectivelessness" as a normative frame, or default position, in legal instruction. False notions of "neutral" or uninvested legal analysis rest on an internalized, constructed, self-referential concept of "objectivity" that simply reflects vested interests; namely, the concerns, interests and privileges of the founding fathers of the legal profession.[74] It does so by holding to the idea that legal analysis can be taught without directly addressing conflicts of individual values, experiences and world views. Subverting the notion of legal objectivity or neutrality is the first step in creating space to recognize and incorporate the full panoply of human experience.

Transmitting norms, behaviours and ethics

The goal of transforming norms in legal education has profound implications. It necessitates a critical assessment of what it means to "think like a lawyer" because it challenges the inherited model of the lawyer and, necessarily, the skills and traits that mark the "good" lawyer.[75] Lawyers have a privilege that requires embedding responsibility. The LSUC enforces rules of professional conduct. Embedding the culture of professional responsibility begins in law school. Teachers are the guardians for endowing the privilege of lawyer identity, before the LSUC takes on the role of governing the practise of professional responsibility.

The teacher-student relationship has been theorized heavily. Critics of traditional models of legal education argue that excessive focus on hierarchy—the use of techniques like Socratic lecturing, for example—highlight existing power imbalances based on race and gender and do nothing to empower minority law students. Freire discussed overcoming what he called the "teacher-student contradiction". This is not, in my view, about erasing the line between pupil and professor. It does not advocate abolishing the contradiction, but rather seeks to reconcile the poles of contradiction. It is not about creating absolute equality or aspiring to a pure, non-hierarchical, democratic ideal in the classroom. It is about exposing and re-aligning power dynamics in the classroom.

[74] Crenshaw

[75] Tanovich; Farrow

The model of diversity that this paper proposes would expect responsible use of authority by the law teacher, and the acceptance of "teacher as guide" by the student. In this matrix, the law teacher avoids authoritarianism, and practises solidarity with the student, investing in a process of different, though mutually reinforcing roles, whereby both teacher and student are enriched. The teacher shares the burden of embedding a sense of professional responsibility in the student, while demonstrating through practice an equal commitment to his or her own pedagogical responsibility.

Implications of diversity pedagogy the law school classroom

The following are the key indicators and goals of a curriculum shift towards integrating diversity thoroughly through all aspects of legal education and administration.

Deconstructing power relationships. Law schools can realign power. Empower students not just with the credential of a law degree, but with a consciousness of diversity involving professional responsibility, ethics, empathy and competence. This portrays the lawyer as an agent of change.

Subvert the myth of universality. Allow different voices, allow each person to be their own lawyer rather than make a lawyer out of them.

Stimulate *culture shift* in the profession organically through training students to nurture the lawyer within, to be agents of change within the profession and to realize the transformative potential of their social and political role in the broader society. As opposed to reading law as a body of fixed and determinate text, this kind of diversity invites students to view the law as a tool, as an instrument of change.

Make lawyers better communicators who translate the law to clients. In this sense, diversity necessarily incorporates themes of cultural sensitivity and global awareness.

Under this model, the student is encouraged to connect in a personal way with the most basic tradition of the legal profession: the pursuit and promotion of justice. What emerges from this model is a model of professional competence and skill that includes the following qualities: emotionally intelligent (as opposed to dispassionate); experientially informed (as opposed to abstracted and artificially "neutral"); empathetic and personally invested (as opposed to detached and indifferent); critical and creative (not just within established doctrinal boundaries, but also in theory and practice); and as such, not in search of ethical rules to obey, but rather seeking participation in an ethical culture.

Can and Should Human Rights Themes Impact Decision-making in a Law School?

Reflections from the U.S. Perspective

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I. INTRODUCTION

Human rights are designed to protect fundamental rights, well-being, and dignity of individuals, and to some extent groups. In the United States human rights norms are often considered part of "international law," in contrast to "civil rights law" which is deemed an integral part of domestic law.[76] Arguably, however, civil rights law encompasses only a part of human rights law, which includes civil and political rights, often defined as protections against the overreach of governmental power, as well as economic, social, and cultural norms, which extend to claims upon government.

In U.S. law schools human rights law is being taught generally as an upper-level elective course, similar to any other area of law, with a focus on substantive rights as well as procedure. While this paper will address some of the issues connected to the teaching of human rights within the law school curriculum, it focuses largely on whether and how human rights should be lived within a law school, to what extent it should animate faculty and administrative decisions, if and how it could be used as a guide to making some of the most vexing decisions facing American law schools today, and how it may impact budgetary decisions. The ultimate question is whether human rights can be used as a guide and implemented in an educational institution. This is a particularly opportune time to raise this question as institutions of higher learning, and especially law schools, have increasingly been pejoratively called "businesses."[77]

Human rights issues are generally not categorized as such in law schools though they lie beneath fundamental structural decisions. If these issues were categorized as human rights issues -- rather than as questions of management, of student matters or academic freedom -- they could be approached with different gravitas and within a differently defined legal framework.

This paper will focus on four sets of questions: First, it discusses institutional funding and the selection of students in the context of access to legal education, which implicates racial, gender, and socio-economic equality. Next the paper will turn to a few student-related issues that involve select normative human rights values. Third, the paper will address resource allocations, ideological values, and questions of professional training that pertain to the teaching of human rights in law school. The last section is devoted to

[76] The struggles surrounding gay rights as well as the rights of undocumented immigrants are often referred to as the new "civil rights" battles instead of being positioned as part of an international human rights movement. Those may be partially strategic choices resulting from domestic policy concerns involved in invoking non-U.S. norms and values.

Some, however, use the terms interchangeably. *See* New York City Commission on Human Rights ("The New York City Human Rights Law is one of the most comprehensive civil rights laws in the nation.").

[77] Legally most U.S. law schools remain not-for-profit enterprises, though a number of for-profit law schools exist and are accredited by the American Bar Association.

For a discussion of business models, see THE BUSINESS OF HIGHER EDUCATION (John C. Knapp & David J. Siegel eds., 2009).

questions of gender equity, gender mainstreaming, the debate of nature and nurture as well as structural gender imbalances in legal education.

II. ACCESS TO LEGAL EDUCATION AND THE FINANCIAL MODEL

In the United States universities can be public or private, with virtually all of them charging tuition and fees to those enrolled. While even private universities generally receive some state and federal funding, historically the "publics" were established to benefit the higher education of state residents and were often generously financed from state tax revenue. For reasons of political philosophy but also in light of increasing pressures on state revenue, in recent years many states have dramatically decreased their funding of state universities.[78] Initially that led to a substantial increase in tuition for out-of-state students. Over the last few years even tuition for in-state residents has increased dramatically.[79]

Tuition increases for both private and public law schools have been marked over the last decade.[80] Nevertheless, more law schools have opened, and the number of students enrolled in law school has risen over the last few decades,[81] though currently enrollment is on a downward trajectory. This section will focus on the financing of law schools and the access-related questions that have arisen in conjunction with the allocation of law school scholarships and government loans. The last part of this section will then turn to a few other admissions-related matters that are not directly related to student financing.

A. Scholarships, Loans, and Access

Students have financed their education in part through personal and family savings; through earnings, especially when they are in a part-time program; through scholarship assistance, which has also grown substantially during the last decade;[82] and most importantly through government loans. While law schools grant some need-based scholarships and loans, or at least tie some of their loan and scholarship programs to financial need, most scholarship money is based on "merit," which is a short form for the combination of undergraduate grade point average (GPA) and the score on the Law School Admissions Test (LSAT). Awarding of scholarship based on such merit data is a function of the annual law school ranking by U.S. News, which assesses student quality based on these two data points.

Depending on the law school's financial resources and scholarship allocation policy, students may find it difficult to receive continuing scholarship funding for all three years when their academic performance does not meet the required threshold. While some have argued that such forfeiture is a function of the over-awarding of scholarships, it also results

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[78] *See* Jennifer May & Sandy Baum, College Board Advocacy & Policy Center, *Trends in Tuition and Fees, Enrollment, and State Appropriations for Higher Education by State* (2012); National Conference of State Legislatures, *State Funding for Higher Education in FY 2009 and FY 2010* (2011), available at www.ncsl.org/documents/fiscal/higheredfundingfinal.pdf.

[79] Kim Clark, *Tuition at public colleges rises 4.8%*, available at http://money.cnn.com/2012/10/24/pf/college/public-college-tuition/index.html.

[80] American Bar Association, *Law School Tuition 1985-2011*, available at www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/ls_tuition.authcheckdam.pdf.

[81] American Bar Association, *Enrollment and Degrees Awarded, 1963-2011 Academic Years*, available at www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/enrollment_degrees_awarded.authcheckdam.pdf.

[82] American Bar Association, *Internal Grants and Scholarships, Total Amount Awarded 1991-2010,* available at www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/internal_grants_scholarships_awarded.authcheckdam.pdf.

from the limited predictive quality of law school performance based on these two "merit" components.[83]

While most applicants will be admitted to some law school, some may be admitted to a more highly ranked law school without scholarship money while receiving a substantial scholarship package from a lower-ranked school. In light of the perceived importance of rankings, applicants often forgo the financial assistance in exchange for the higher ranking. A risk averse decision-maker, however, may choose the lower ranked school to minimize educational debt, especially when family resources are non-existent or very limited.

At least one of the so-called "merit" markers, the LSAT, correlates with socio-economic advantage, which is particularly true in the age of private tutors for this (and any other) standardized test. Therefore, socio-economic advantage at the outset -- including stronger educational preparation from kindergarten through college – will likely amount to further educational advantage through admission to more highly ranked law schools, to greater choice, and even to financial advantage, as much of scholarship money is no longer tied to financial need.

The perpetuation of inequality may appear less troubling in light of the existence and proliferation of loan programs. Initially government grant and loan programs provided sufficient assistance for most students to allow them to finance their education.[84] With the increase in tuition, private companies stepped in to provide additional financing. Increasing concern about the practices of private loan companies, following revelations about inappropriate relationships between lender and educational institutions and a contraction in lending during the recent financial crisis, the federal government took over most of the educational loan business, which means that the U.S. taxpayer is now the guarantor and holder of vast amounts of educational debt, including law school debt.[85] This governmental action responds to the International Covenant on Economic, Social and Cultural Rights (ICESCR), which outlines in Art. 13 the right to education. With the "view to achieving the full realization of this right: (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means,…."[86] On the other hand, the loan-based financing of higher education appears to counter the ICESCR's goal of progressively moving toward "free education."

Many law schools are primarily supported by their students' tuition, and even those with substantial endowments rely on tuition revenue for at least some of their operations.[87] Without the existence of the government loan program that finances higher education, many law schools may be struggling to enroll students, as private loans are still difficult to procure, or may have to find ways to increase their scholarship budgets.

While separate data on loan defaults does not exist for law schools – with the exception of a handful of free standing law schools, which are not affiliated with a university -- overall loan defaults have increased.[88] Recent changes in government policy that will limit loan

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[83] Lisa Anthony Stilwell, Susan P. Dalessandro & Lynda M. Reese, *Validity of the LSAT: A National Summary of the 2009 and 2010 LSAT Correlation Studies* (Oct. 2011).

[84] Some students, often those with bad credit histories, have been forced to take out private loans, usually at a higher interest rate than government loans.

[85] American Student Assistance, *Student Loan Debt Statistics*, available at www.asa.org/policy/resources/stats/default.aspx.

[86] ICESCR art. 13(2)(c).

[87] Universities with large endowments have come under attack for spending too small a percentage from it. The endowment spending policy may also raise questions about equality and access that are, however, beyond the scope of this paper.

[88] Libby A. Nelson, *Default Rates Continue to Climb, Mostly* (Oct. 1, 2012), available at www.insidehighered.com/news/2012/10/01/two-year-default-rates-student-loans-increase-again.

repayment to a percentage of one's income and allow all debt to be cancelled after 20 years, or 10 years if one serves as a government lawyer or works for a not-for-profit agency, may decrease the likelihood of defaults.[89] While this loan forgiveness program does not make higher education "free," it makes it subsequently easier for graduates to manage their debt load.

Some, however, have criticized these policies as privileging the wealthy rather than serving the most disadvantaged. The definition of privileged appears to extend to almost anyone who is able to obtain a professional degree. Critics have also indicated concern that graduate schools may be more inclined to increase their tuition in light of the federal loan forgiveness program, as borrowers will be less concerned about cost of attendance.[90]

The story of expanded enrollment and government-backed financing should have increased access to legal education across the entire socio-economic spectrum and through all racial group in the United States. The reality, however, is different. Even though racial diversity has increased in American law schools,[91] a recent study has indicated that socio-economic diversity has decreased over time.[92] As socio-economic equality has fared worse than racial equality, largely racial minorities of economic means have benefitted from the diversification of law schools over the last few decades.

In all respects, the government's current approach to lending accords with the American conception of equality of opportunity and appears to guarantee access to even a professional education for everyone. While the government program provides at least financially a level playing field, one must wonder why the results are relatively disappointing.

Law schools must ask themselves what their obligations are, if any, to increase access, especially as they are the secondary beneficiaries of the governmental lending policy. How do their scholarship policies, based on "merit," restrict access? To what extent should law schools consider societal distribution of resources in their scholarship policies? To whom does the law school's responsibility run: Is the ultimate fiduciary responsibility to the school's current students and the alumni who base the value of their education at least in part on the ranking of their school? Is it therefore the school's obligation to maximize rankings and disregard need in its allocation of scholarships and grants? If a school were to consider human rights values, likely it would have to build its access policies in different ways to assure minority students and socio-economically disadvantaged students equal access.

Even if rankings are not a consideration for a law school, as may be the case for those at the bottom of the current rankings regime, do they have an obligation to counsel meaningfully those who seek a legal education with respect to their potential future financial liabilities? Or is there any obligation on their part to restrict lending – which a school can do in part through the determination of the cost of living expense – perhaps in turn impacting its ability to attract students?

Socio-economic rights always raise question as to the allocation of limited resources to the neediest. From a societal perspective applicants to law schools and law students are among

[89] For a description of the program, see studentaid.ed.gov/repay-loans/understand/plans/income-based.
[90] *See* Jason Delisle & Alex Holt, Education Policy Program – New America Foundation, *Safety Net or Windfall? Examining Changes to Income-Based Repayment for Federal Student Loans* (Oct. 2012).
[91] American Bar Association, *First Year and Total J.D. Minority Enrollment for 1971 to 2011*, available at www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/jd_enrollment_1yr_total_minority.authcheckdam.pdf.
[92] Richard H. Sander, *Class in American Legal Education*, 88 DENVER L. REV. 631 (2011).

the more privileged, those who hold a college degree and therefore have already a substantial advantage in the work place. Within a university, therefore, questions may arise as to the allocation of resources to the law school as compared with the undergraduate student population or other graduate programs whose students may be less likely to be fiscally remunerated throughout their career. On the other hand, in light of the importance of the legal system to the American structure of government, is there a special obligation on a university to assure and support the education of future lawyers? As the U.S. Supreme Court re-iterated in Grutter v. Bollinger the importance of education in the context of democratic governance,[93] at least public universities could be assumed to have some obligation to offer training for lawyers.

Questions of how far any social responsibility extends are particularly pertinent in a global world. Should law schools limit scholarship money, for example, to U.S. residents? Are there any individuals outside the United States to whom a special duty may run, such as citizens of countries in which the United States is militarily engaged? Or should a law school award merit assistance based solely on LSAT results and undergraduate GPA, if ascertainable, to assure that it recruits the best from anywhere?

Ultimately, the question we have to ask is whether any organization has any obligation toward the values we would like to see honored beyond those formally mandated. Does a law school have any responsibility to the greater good rather than just to itself, a question corporations are increasingly facing in the international human rights realm? As universities are not only businesses but also serve as role models and educators, should they have to ask these questions publicly in order to demonstrate their participation in a vibrant human rights discourse to their students?[94]

B. The Influence of Licensing Bodies on Access

As law is a regulated profession, individual state licensing authorities make decisions about bar admission in the United States.[95] A major component of these admission decisions, in most states, are examinations designed to test substantive knowledge and some skills. The results of these have been challenged, as they appear to show racially disparate results. Nevertheless, they continue to be in use. This is particularly troubling as failing the bar examination has a long-term impact on a person's career.[96]

Another major component of bar admission is the so-called "character and fitness" test. The process is shrouded in secrecy, and appears to be largely within the discretion of the examining committee members.[97] In the end the outcome may be correct, as it is in so many group decisions, but concerns remain about the transparency of such decision-making.

Law schools consider character and fitness determinations in their admissions process, in light of their perception of how the committee operates, though that varies by state. Prior criminal records, for example, will frequently lead to the exclusion of an otherwise viable candidate for law school on the assumption that he would likely not be

[93] 539 U.S. 306 (2003).
[94] Cp. Amartya Sen, *Human Rights and the Limits of Law*, 27 CARDOZO L. REV. 2913 (2006).
[95] *See* National Conference of Bar Examiners online at ncbex.org. It is well beyond the scope of this article to comment on the fact that more than 50 jurisdictions hold such authority, with many state bar rules continuing to reference those admitted to practice in another U.S. state as "foreign attorneys." *See* Virginia Rules of Professional Conduct (any attorney not licensed in the state of Virginia is a "foreign lawyer").
[96] Jane Yakowitz, *Marooned: An Empirical Investigation of Law School Graduates Who Fail the Bar Exam*, 60 J. LEGAL EDUCATION 3 (2010).
[97] Conversation with Christopher McGrath, member of the New York Committee on Character and Fitness, spring 2012.

admitted to the state bar. On the other hand, some schools may be too aggressive in their exclusionary policies, with law school candidates misreading admission to law school as identical with admission to the bar.

Specific questions by both institutions have a particularly disparate impact. How relevant are arrest records, especially as we know that in many jurisdictions they show racial disparities not reflective of crime rates? Even convictions, though individually justified, evidence racial and socio-economic (and to a lesser extent gender) bias. In a country in which tens of millions of people have arrest and conviction records, does it not constitute inappropriate discrimination based on status to deny them admission to legal education and ultimately the legal profession? As those records are racially disparate, especially with respect to African-Americans, law schools have to consider carefully in whose interest they are operating when excluding applicants with an arrest or conviction record from admission.

C. Special Students and Access

Other access issues closely connected to bar admission pertain to non-U.S. citizens. While state bars now admit non-citizens and permanent residents, the admission of those on non-permanent visas and especially those without documented status remains disputed.[98] Should law schools admit such students, assuming they know of the status issue (which is changeable), or rather decline admission as they may assume that such graduates will ultimately not be admitted to practice law? While these are practical and philosophical concerns, students with disabilities may raise resource questions.

Schools are mandated under the American against Disability Act not to discriminate against those with disabilities and to provide appropriate accommodations once those students are admitted. As this accommodation frequently creates costs for schools, admission of students who need substantial accommodations raises substantial resource questions. How should limited resources by expanded? Should school administrators be permitted to exclude a student with substantial disabilities because they do not consider the school adequately prepared for such a student? This could occur, for example, with respect to physically handicapped students admitted to institutions whose buildings had not been retrofitted under current law. Or would such a decision be an obvious violation of human rights obligations, designed to protect solely the school (rather than the individual)?

Questions of access remain challenging but other human rights issues lurk in other core institutional areas as well, especially as some of the challenges existing at the admissions stage continue later.

III. *THE ROLE OF THE OFFICE OF STUDENT AFFAIRS*

Student affairs offices tend to see students from a very different vantage point than faculty members. They are often a place of last resort to which students turn when faced with personal and academic challenges. Therefore, the mission of these offices has to be focused on serving the needs of individual students, though they also play an institutional role, which includes meeting budgetary goals and helping assure strong bar passage.

A. Freedom of Religion

Student affairs frequently face human rights questions directly – as do human resource offices when employee matters are involved. The right to religious freedom, guaranteed by numerous human rights treaties, occasionally raises complaints in law schools. For

[98] Justin Storch, *Legal Impediments Facing the Nonimmigrants Entering Licensed Professions*, 7 THE MODERN AMERICAN 12 (2011).

example, to what extent do law school class schedules have to consider students' religious choices? This may become particularly relevant for schools that have broad religious diversity as days of worship differ. On the other hand, those schools may have developed institutional responses that are more difficult to institutionalize at schools with a small number of religiously diverse students.

Other questions that also arise in connection with religious freedom pertain to the need for individual prayer rooms; to the integration of attendance rules with religious holidays; to the scheduling of make-up classes. Is taping or now podcasting of classes a sufficient accommodation, or should rescheduling a class be mandated to accommodate students who cannot attend for religious reasons? Religious minority groups who celebrate holidays during the semester may pose particular challenges.

Presenting a solution to some of these issues that accommodates one group may lead to conflicts with other religious groups: May necessary make-up classes be scheduled on Sundays, which even in a country that is largely Christian may be less of a religious holy day for most Christians than for example Friday evening would be for observant Jews?

Conflicts between religious accommodations and other values are also conceivable: May a Christian student who takes his religion very seriously always be excused from working on Sundays (as a student work-study worker in the law library), necessitating that a single parent student always work on Sundays, even though that would be the only day she could otherwise be at home with her young child?[99] With human rights norms recognizing the importance of religious freedom, conflicts are inevitable and have been widely debated, albeit not generally in the context of law school administration.

B. Disability Accommodation

Accommodation of student disabilities begins in the admissions process but becomes an active issue during the student's attendance. While some disabilities are diagnosed and well-known at the time of application to law school, others develop during law school. What are a school's human rights obligations in this situation?[100]

Should a law school facilitate a student's graduation, even when admission to the bar appears doubtful? Will a school's obligation to accommodate a student evolve during a student's time at the school, i.e., may it be heightened in the student's final semester as compared to the first few weeks of school? How would – and should -- the financial obligation the student incurs play into a school's decision-making, if at all?

Student affairs offices at least implicitly must consider the resources required to accommodate disabilities. To what extent is an institution obligated to assist an individual it has accepted? In a world of limited resources, should those be expended to maximize the number of those most likely to succeed, or is there an obligation to assist those most in need? The most challenging practical issues pertain to the "reasonableness" of accommodations. Are there any disabilities that would allow a law school to argue that it is unreasonable to expect them to be accommodated because of certain professional skills expected later?

[99] Gendering the single-parent student may raise eyebrows. It is not only designed to reflect social reality but also to raise a potential conflict between freedom of religion and gender discrimination. *See infra* Section V.

[100] *See* Convention on the Rights of Persons with Disabilities. The right of education and to "reasonable accommodations" is set out in Article 24.

Beyond issues that pertain to individual students, law schools are asked to make curricular decisions, including the question of whether and how to teach international human rights law.

IV. CURRICULUM DEVELOPMENT AND COVERAGE

Human rights education is a crucial way to inform and distribute knowledge about human rights values. Despite the wide availability of lesson plans, it remains generally limited, at least in elementary and secondary public schools, which are likely to focus more on traditional areas of "civil rights." In law school curricula, human rights courses remain separate from civil rights, as they continue to be considered generally "outwardly" focused despite their occasional "intrusion" into American courts or the U.S. justice system.[101]

One curricular question is how to teach human rights. Should it be integrated into different courses or rather be a single course? The traditional method of teaching "legal ethics" or "international law" throughout the curriculum has generally been considered a failure. Should there be a discussion of non-U.S. standards when U.S. law is at issue? As human rights norms are generally not directly enforceable in U.S. courts and dispute resolution in non-U.S. tribunals, such as the Inter-American Commission, remains limited to a handful of practitioners, would such allocation of teaching resources and time be inappropriate as it would detract from U.S.-based processes? On the other hand, should law schools consider themselves potential change agents, and therefore expose their students to different, albeit non-binding sources of law, potentially to make them more creative legal practitioners?

In addition to the traditional classroom based courses, almost all U.S. law schools now offer clinical courses, in which law students represent live clients under the supervision of a law faculty member/practitioner. Clinics are highly desirable learning opportunities but they are viewed as expensive, as the generally recommended student-faculty ratio is substantially smaller than is deemed appropriate for large lecture courses.

Today's clinics are largely designed for pedagogical purposes, though some also argue for clinics to fill community needs for legal representation. Most of the clinics originally were focused on general poverty law as well as representation in criminal cases. Over time, however, they have expanded and focused on ever more specialized areas of law, including tax, veterans' benefits, and immigration. Many clinics emphasize individual case resolution while others include reform litigation, policy reports, and a limited type of lobbying.

Only a few law schools run clinics that are called "human rights clinics," though their focus may vary. Generally more highly ranked and better endowed law schools operate these clinics. While they explicitly focus on human rights issues, relevant issues often arise in other clinics as well, and in some cases may lead to the use of human rights arguments or even recourse to non-U.S. human rights dispute resolution mechanisms.[102] It is much more likely, however, that non-human rights clinics do not consider such avenues.

[101] Examples are litigation surrounding the Alien Tort Claims Act, which provides a cause of action in U.S. courts even though the violation of human rights occurred abroad and was inflicted on foreign citizens. Occasionally, cases that either came out of or are ultimately destined for U.S. tribunals include a human rights component. Among the examples is extradition to the United States, often challenged because of anticipated human rights violations in the United States. *See, e.g.,* Case of Babar Ahmed and Others v. United Kingdom (Applications nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09), Sept. 24, 2012 (denial of request to stop extradition to the United States because of potential prison condition); Soering v. United Kingdom, 161 Eur. Ct. H. R. ser. A (1989)(extradition to United States rejected because of so-called "death row phenomenon").

[102] Columbia Law School's Human Rights clinic represented Jessica Lenahan Gonzalez in front of the Inter-American Commission of Human Rights.

As all clinics are comparatively expensive, the selection of one substantive area constitutes a substantial resource allocation. Is it defensible to select human rights as a substantive law area of choice? Many of the human rights clinics focus on cases that arise in the United States and therefore allow students to learn using generally underutilized and underappreciated tools to help with dispute resolution or to attract attention to a particular issue. For that reason, human rights clinics may not only be defensible but most desirable as they develop lawyers with a broader set of dispute resolution tools at their disposal.[103]

In general, U.S. law students would benefit from greater exposure to human rights norms, especially as they may inform interpretation of domestic law and allow for additional procedural tools. On the other hand, such clinics may prepare students less directly for the job market than other (domestic) clinics might, a substantial consideration in the ultra-competitive job market today's law graduates face. Ultimately, an institution of higher learning will have to decide, based on its mission, what value such an international human rights clinic could and would add to the students' immediate learning experience and long-term professional development.

Many human rights issues of practical and pedagogical nature run through a law school. The final section will focus on one – gender – that remains salient and continues to pose challenges for legal education.

V. *GENDER DISPARITY IN LAW SCHOOLS AND THE LEGAL PROFESSION*

Women have made substantial gains in American society over the last few decades. They are in a position to control child bearing; they have displaced men in the number of college and graduate degrees earned;[104] they have moved into professional positions and hold highly remunerated positions in the world of business. Unequal outcomes continue, however, in politics and the economy, and the workplace remains gendered. The lack of equality in such situations gets increasingly ascribed to women's desires and interests rather than direct or indirect discrimination.

A. The Student Body

In law schools the number of female students had risen to fifty percent but appears to be now on a limited but almost steady decline so that it currently is around 46%.[105] In the job market, positions quickly become unequally distributed: After a few years women find themselves more in government or in-house lawyer positions than in major law firms, let alone as equity partners or part of the firm's management committee.

Why may the number of women attending law schools not have permanently risen to fifty percent or even above? On the LSAT male test takers have, over the years, scored marginally higher than female test takers.[106] The reverse is often true for undergraduate grade point averages. Therefore, the decision which credential to weigh more substantially

[103] Clinics that are focused on immediate community needs may absolve the state and the local bar from helping to provide necessary resources to address a crucial community need.

[104] National Center for Education Statistics, *Fast Facts*, available at nces.ed.gov/fastfacts/display.asp?id=72.
[105] American Bar Association, *First Year and Total J.D. Enrollment by Gender 1947-2011*, available at www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/jd_enrollment_1yr_total_gender.authcheckdam.pdf.
[106] Susan P. Dalessandro, Lisa A. Stilwell, Jennifer A. Lawlor & Lynda M. Reese, Law School Admissions Council, *LSAT Performance with Regional, Gender, and Racial/Ethnic Breakdowns: 2003-2004 Through 2009-2010 Testing Years (TR10-03)* (Oct. 2010).

will have an impact on the number of women admitted and likely on the number of women ultimately enrolled at a law school.

With the economic downturn, many law schools have witnessed a decrease in female applicants and/or number of women enrolled. The explanation as to the decrease in women applicants remains disputed, though some have postulated that the amount of debt a student may incur is more likely to deter female than male applicants. Others believe that family investments may continue to favor men, which is a rational choice as men still earn more than women. If these theories were accurate, should schools consider awarding larger scholarships to women to entice them to attend law schools?

Women as a group continue to be found disproportionately in caring and nurturing professions. Even in law they tend to cluster in courses addressing the needs of children and families and choose career paths accordingly. They may, however, be equally interested in business and corporate law if steered in that direction. Should schools consider requiring such courses to assure that both male and female students are exposed to them? At the same time, should men be required to take the courses that are more likely to be attended by women?

Today discrimination against women takes more subtle forms than in the past. Much exclusion and disparate treatment occurs almost inadvertently. Women may be more reluctant to seek out mentors; they may be called on in class less frequently; their contributions to discussions may be valued less. It may be those subtle signs of discouragement that steer women away from certain areas of legal practice.

B. Faculty and Staff

Law schools continue to display a gendered employment structure themselves. Women are often found in many lower level support positions and dominate certain administrative departments, such as student affairs. On the other hand, computing services and IT continue to be run largely by men. On the academic side, men are predominantly represented in tenure-track and tenured faculty positions. Contract faculty positions, especially in the legal writing area but also in clinic programs, are often staffed disproportionately by women.[107] As many schools are potentially facing long term decreases in student numbers, they will not replace departing faculty members which could lead to an increase in women faculty as older faculty are more likely to be male. On the other hand, replacements may be contract rather than tenure-track faculty.

Whether women prefer to teach in the legal writing and clinical areas because of greater student contact or whether they are more likely to shun research are open questions. The impact on students, however, is often not lost. They intuitively grasp power structures and begin their professional careers seeing fewer women than men in powerful positions in their educational institutions.

C. Larger Communities

Universities are a part of the communities in which they are located and of a national and global society. As women continue to suffer from disadvantage, law schools could actively engage in their communities to help remedy these inequalities and raise awareness

[107] American Bar Association, *Total Male Staff and Faculty Members 2010-2011* & *Total Female Staff and Faculty Members 2010-2011*, available at www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/ls_staff_gender_ethn.authcheckdam.pdf.

of students and staff. Faculty may present data and legal solutions with respect to the continuing unequal status of women in the United States despite laws designed to combat inequality. They can engage in pro bono projects and clinical work and rally student organizations to address community-specific issues and larger societal concerns.

VI. CONCLUSION

Human rights are not solely theoretical, supranational constructs. The values that support them are norms that may underlie crucial decisions educational institutions face. Labeling them human rights concerns may indicate the stakes at issue and focus attention on these matters in an unprecedented way. There are no easy solutions but a commitment to address matters in this way can go a long way to operationalize human rights in the daily lives of institutions and individuals.

The Art of Human Rights: Enriching the Life of the Law School through Drawings and other Visual Resources

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I *In general*

In the life of the Law School, focus on the "visual" can operate at three different levels: learning, teaching, and examining (legal concepts). My main interest in this paper is to explore the latter level, "examining", broadly considered so as to encompass evaluation in general. Furthermore, that interest is pinned down here to the area of constitutional rights and human rights in general, even though the conclusions reached can (and should) likely be extrapolated to other areas of the law.

The following passage by psychologist Kendra Cherry sums up well the distinction between the first two levels referenced above:

> While aligning teaching strategies to learning styles may or may not be effective, students might find that understanding their own learning preferences can be helpful. For example, if you know that visual learning appeals to you most, using visual study strategies in conjunction with other learning methods might help you better remember the information you are studying.[108]

In effect, the first logical step regarding the relevance of the visual approach has to do with using it yourself when you study —assuming that you came to the conclusion that you are a "visual learner". As you know, VARK theorists propose a quadripartite classification of learners. The acronym VARK stands for Visual, Aural, Read/write, and Kinesthetic sensory modalities that are used for learning information. This model was designed in the late 80s by Neil Fleming and it has received some acceptance and a lot of attention.[109]
I am not much of an expert in educational psychology so I would rather remain agnostic as to the definitive merits of VARK theory. But you don't need to buy into it to understand that, for example, you are a visual learner, i.e., one who "would rather see information presented in a visual rather than in written form."[110] So if you come to the conclusion that you learn better by seeing than by reading, you will naturally tend to study through charts, diagrams, and illustrations —and you should!

Half way through my law degree I realized that I was a visual learner (even though I didn't quite put it like that then). It is truly amazing for me to compare and contrast now the notes I made then in order to prepare my final exams. The notes and summaries from my first years are plagued by full sentences and paragraphs. By contrast, the notes from my last years of law school lack all proper writing and syntax; they are a bunch of arrows pointing at correlations; drawings; charts: the kind of thing, by the way, that only I could understand. Indeed, while my notes for the first years of the law degree were quite

[108] Kendra Cherry, "VARK Learning Styles: Visual, Aural, Reading and Kinesthetic Learning", at http://psychology.about.com/od/educationalpsychology/a/vark-learning-styles.htm?r=et, last visited on 10 December 2012.
[109] See http://www.vark-learn.com/english/page.asp?p=categories, last visited on 10 December 2012.
[110] Kendra Cherry, cit.

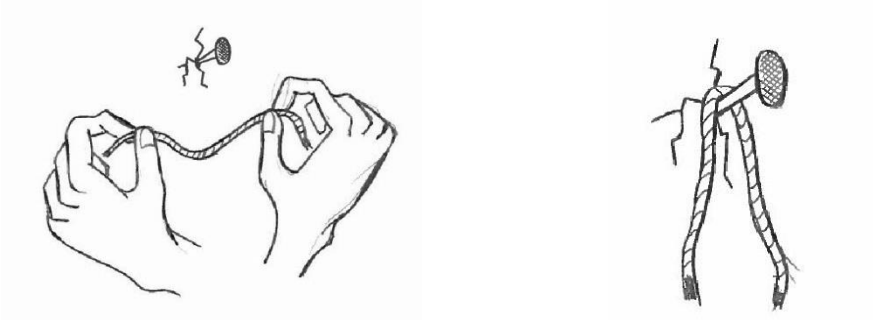
palatable to my friends, who used to borrow them, the same was not true of the later notes: no one wanted them at all for the obvious reason that they were… indecipherable. Now, as Ms. Cherry suggests in the passage quoted above, it is one thing to accept that if you are a visual learner you are likely to be better off studying through visual resources, and quite a different one to conclude that teaching strategies ought to be aligned with students' learning styles. This is especially the case given that you will not only have visual learners in your classroom but also, ex hypothesi, representatives of other VARK categories. In any event, and without foreclosing the possibility of using visual devices for purposes of teaching some human rights questions, I will focus in the next section on the third level I had announced at the opening of the paper: the evaluation of the students' understanding of human rights concepts.

II *Evaluation of human rights concepts through visual devices*

Let me share with you a real story —my own story of how I ended up using visual tools with a view to evaluating law students' understanding of human rights concepts. I have taught full-time since 1995, which means that I have been teaching full-time for 18 years. The reason I clarify this is not for you to think that I am old; or for you to think that I look younger than I really must be. The reason is that it was about time I came up with a smart idea from my many years of teaching experience. A few years ago I came up with such an idea, I hope. This is how it happened.

In 2010 I found myself in the situation where, to be honest with you, I was a bit bored with my teaching. (If you have been teaching for a while, perhaps you will not find that disclosure too surprising.) I had taught Constitutional Law and Human Rights Law for many years. I decided that to not get frustrated —and for my students not to notice my incipient boredom— I had to introduce something new into the classroom. (The students are those who are more harmed by their teacher's boredom, it should be noticed in passing.) So I came up with the idea of drawings.

The idea dawned on me when, during one of the German lessons I attend at the Goethe-Institut, professor Wolfgang Tichy explained the meaning of the proverb "the extremes meet" —a proverb meaning that antagonistic positions often have much in common, a proverb more common in other languages than in English, as it seems—… by means of a drawing. He drew something like this on the board:



These pictures,[111] I think, speak for themselves —this is the nice thing about pictures. But let me briefly explain to you what they mean...
[*Here I will explain orally, in a few words, how these pictures illustrate the proverb "the extremes meet".*]

[111] I thank much Max Cernello, an attorney quite interested in visual tools, for drawing these pictures at my request.

So one day I came to class and I told the students: "For next week you will have to draw a map". The objective of this exercise was for them to *show* me the structure of my country's judiciary, at both the local and the federal level. I had the impression that having them draw a map would: i) give them a suitable tool for explaining the concept of the judicial power and the interrelations between the local and the federal judiciary; ii) help them to better understand and remember that concept and those interrelations. Both things, I must say, proved to be true. Indeed, one student even said on reflection that what he had learnt through drawings was by far what he had remembered the most.

As an incentive for the students, I told them that I would award prizes for the best drawings. I also explained that by "drawings" I didn't mean just drawings: they could use any visual device and they would be assessed based on creativity and the limited use of words.

It goes without saying that I had to start thinking about good prizes. Several colleagues and friends gave me suitable books that ended up in the hands of the winners. I also got them limited subscriptions to journals and law reviews. I finally found a culminating prize for the best "drawing" of the whole year. I wrote to my colleagues who run the International Youth Leadership Conference and they generously agreed to offer a scholarship each year for one of my students to attend the extraordinary event that takes place in Prague every winter. Two of my winning students have already participated in the conference. Their feedback makes it clear that a good drawing is well worth the effort: it can be worth a visit to the most beautiful city in the world!

In my second year using drawings for the purpose of assessing comprehension of legal concepts, I introduced some additional dimensions. First, I started to use the tool to evaluate difficult human rights dilemmas, such as the tensions between the right to privacy and compelling state interests. I remember that one of the best drawings illustrating this tension was one of a kite divided into four quarters, each of which contained different levels of state intervention in private life.[112]

Second, I tried to solve a quantitative problem: the number of drawings I had to consider for evaluation purposes was too high. If I was going to give adequate consideration to each one of them, which was required at least by the fact that I was going to be awarding prizes, including a scholarship to attend a conference in Prague, I needed a filter to reduce the number of works I reviewed. To this end, I appointed two teaching assistants (students from the previous year, who knew how and why I used drawings, having produced them themselves) to evaluate drawings according to the following system. The TAs handle the first round of evaluation such that only half of the students participating in the drawings contest make the cut. The other half is eliminated. Only the victorious half makes it into the second round of the contest, where the professor (i.e., yours truly) performs the evaluation and awards the prizes. (Normally there is a first, a second, and a third prize.)

Third (and partly thanks to this new system), I started to use the students' drawings to teach some topics I encountered in reviewing their works (and deciding to whom will the awards go). It is much easier to teach some difficult concepts with drawings as the starting point, even if to correct mistakes in the pictures. And, believe me, my working materials were *very* good, very ingenious drawings. I think it will probably be a universal experience that if you do this kind of contests you will find out, to your surprise, that you had many

[112] On the tensions between the police power and constitutional rights (a more general instance of the problem mentioned in the text) see the Appendix to this paper.

hidden artists in your class. Therefore, you will end up with some fantastic drawings to work with, which will make it easier to shed light upon obscure realities and concepts.

Last, I decided to have some of the contests take place at my university's small art gallery. The curator kindly agreed to this, and so from time to time my students and I have class in the art gallery, where they bring their drawings and I explain some topic and award the corresponding prizes. Of course this is quite thrilling for the students. Not only do they display their own home-made art in a museum —on its floor, that is to say— but they also have the opportunity to visit an art gallery, sometimes for the first time in their lives. They certainly did not expect this when they signed up for their Constitutional Law course!
All in all it has been a great experience. I have the joyful role of contributing inadvertently to developing the hidden talents of my students, plus the notable responsibility awarding prizes without knowing much about art myself.

III *Visual tests*

The third year of using drawings for purposes of assessing the comprehension of constitutional law and constitutional rights came with a new twist. In 2012 I used for the first time drawings… on tests.

Given that the students had consistently practiced explaining concepts through pictures during two semesters (first in "Constitutional Law" and subsequently in "Constitutional Rights") I thought that the time was ripe for my method to be tested on tests. Even though this new use was going to be fair (given that prior practice), I decided to offer it as an option so that those with less artistic inclinations would not feel prejudiced by the system. Consequently, in the last written exam of the second semester (corresponding with "Constitutional Rights") the students were allowed to choose to answer half of the questions through drawings. Those who opted to do so would have the advantage of being given extra time to draw their answers. This was a minor incentive that I decided to introduce in order to shift the balance towards visual answers, though the students could likely discern my inclination to (perhaps unconsciously) reward those who elected to draw.
Well, be that as it may, half of the students decided to draw. They did so really well and also did really well on the exam. I was utterly delighted. Let me tell you what the exam was about and how the students drew their answers.

One of the questions that could be answered by drawing pictures asked about differences between two theories concerning the constitutional right to privacy[113] —theories that also apply, by and large, to the human right to privacy as recognized by several international documents.[114] In US Constitution Law, as well as in Argentine Constitutional law, to mention but a couple of examples, these theories are sometimes called "spatial" and "decisional".[115] The theories don't really matter for our purposes, except to illustrate how students who drew their answers approached the task. Consider these two examples.

[113] See, for example, article 19 of the Argentine constitution of 1853: 'The private actions of men which in no way offend order and public morality, nor harm a third party, are reserved to the judgment of God only, and exempt from the authority of the magistrates […].'
[114] See e.g. article 8.1 of the European Convention on Human Rights: 'Everyone has the right to respect for his private and family life, his home and his correspondence.'
[115] For a thorough account of the spatial theory of the constitutional right to privacy see Louis Henkin, 'Privacy and Autonomy', 74 Columbia Law Review 1410, 1411 y 1424 (1974); a useful account of the decisional theory can be found in *Justice* Blackmun's dissent in the United States Supreme Court case *Bowers v. Hardwick* 478 U.S. 186, 204 (1986).

Slide 1
[*Comment on Belen and Sofia's drawings, whose scanned copies will feature on this slide*.]
That a significant portion of the students chose to draw their answers is telling, as is the fact that they generally performed satisfactorily (even though most of the students that are within the group of drawers are not what one could call natural born artists). I think that the experiment —testing my method on tests— passed the test. Perhaps next year will bring a new opportunity to further test its outer limits.

IV *The Foremost Enemy of the Visual: the Visual*

I will conclude by noting a contrast. Insofar as it is true that visual tools have great advantages for learning about, teaching, and examining legal concepts —in particular, in the area of human rights—, it is also true that other visual tools can detract from the efficacy of teaching. If drawings can effectively convey complex situations within Constitutional Law, the presence in the classroom of electronic devices can certainly distract the drawers.

There is now the ever increasing availability of the Internet in the classroom, be it through Wi-Fi, iPads, BlackBerrys, iPhones or other Smartphones. Furthermore, law schools pride themselves in this increased availability of wireless technology. As a result, students experience a daily temptation —an irresistible temptation, most of the time— to navigate the web during classes.

I sometimes offer my students an analogy between the current situation in the classroom and the Star Wars trilogy —though we all know that it is no longer a trilogy. The first part, as you might remember, is called "A New Hope", where we first meet Luke Skywalker et al.. The new hope is, for the bored professor, PowerPoint presentations, projected on a screen in a darkened classroom. The second part of my modified version of the saga is "The Students Strike Back". Here the students, tired of watching slides on a screen, bring their own screens to the classroom: their laptops coupled with Internet availability provide for an amusing alternative to what is happening on the main screen. On your own little screen you can, in hiding, check your email, read the New York Times, play a game or even watch Star Wars or some other movie. Surely this couldn't last? Well, I don't know about that, but some professors couldn't stand the shame and hence the last installment of the trilogy: "The Return of the Prof", in which the teacher decided to turn on the lights of the classroom, gaze at the students in search of eye contact and talk to and with them.

Whether you like my analogy with Star Wars or not, and whether the *status quo* regarding Internet in the classroom should change or not, methods like the one that I have suggested in this paper help counterbalance the problem posed by the unlimited availability of technological resources. Given that drawings are no less visual than what is happening on a screen the odds are that they might succeed in keeping people's attention better than the mere rhetoric of a speech.

I hope that by further exploring the virtues of drawings and pictures for the purpose of teaching human rights concepts, we will be able to offer our students a higher quality legal education.

Human Rights Education

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In drafting the law degree curriculum, law schools take into account the six levels of legal education, i.e. knowledge, comprehension, application, analysis, synthesis and evaluation. Teaching human rights is one of the most important topics in modern legal education throughout all the six levels.

Most law schools tend to update their curriculum by making more emphasis on international human rights. The UN Global Compact's ten principles[116] in the areas of human rights, labour, the environment and anti-corruption are taught in different subjects as follows. In the Arab world, which is referred to by some writers as MENA- Middle Eastern and North African countries, human rights are taught under local and international texts. For example, political rights are usually taught in the course of constitutional law while freedom of speech is usually taught in both courses of constitutional law and public international law. The subject of international organizations is usually taught under a separate course in most law schools in the region.

Human rights issues related to labour law have recently received more attention from law professors involved in developing law curriculums. For example, most law schools started developing courses that deal with the conventions of the Arab Labor Organization, such as Convention No. 7 for 1977 on Safety and Hygiene; Convention No. 13 for 1981 on the Working Environment; Convention No. 15 for 1983 on Wage Fixing and Protection; Convention No. 17 for 1993 on the Employment of the Disabled; etc.

Environmental law topics are still immature in law schools' curriculum across the region. Having said so, it is fair to note that many conferences have recently been held to discuss issues related to the environment at large. Perhaps the recent Doha Climate Change conference is a good example. This will hopefully have positive impacts on law curriculums across the region. Currently, environmental law is taught as an elective course or as part of the public international law course.

What should be taught in human rights courses at law schools? There is no definite answer to this question. The answer depends on what human rights education students received at their general education, i.e. primary and secondary school levels. Some states include human rights subjects in school curriculums at the very early stages. Pre-school and lower primary school students may receive human rights education on various topics, such as confidence and social respect; resolving conflicts; confronting discrimination; appreciating similarities and differences; fostering confidence and self-esteem; building trust; creating classroom rules; understanding human rights; introducing children's rights, etc. At the

[116] Available at http://www.unglobalcompact.org/aboutthegc/thetenprinciples/index.html . These principles are "Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and Principle 2: make sure that they are not complicit in human rights abuses. Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining; Principle 4: the elimination of all forms of forced and compulsory labour; Principle 5: the effective abolition of child labour; and Principle 6: the elimination of discrimination in respect of employment and occupation. Principle 7: Businesses should support a precautionary approach to environmental challenges; Principle 8: undertake initiatives to promote greater environmental responsibility; and Principle 9: encourage the development and diffusion of environmentally friendly technologies. Principle 10: Businesses should work against corruption in all its forms, including extortion and bribery."

upper primary school and secondary school, the following topics can be taught: protecting life – the individual in society; war, peace and human rights; government and the law; freedom of thought, conscience, religion, opinion and expression; the right to privacy; the freedom to meet and take part in public affairs; social and cultural well-being; discrimination; the right to education; development and the environment; economic development and interrelatedness; business and human rights; understanding the united nations; creating a human rights community, etc.[117]

The law school should develop its own curriculum in light of the general knowledge of human rights that law students obtained at their primary and secondary school levels. In the Arab region, law schools should carry more responsibilities on their shoulders due to the lack of (or weak) human rights education at the school level. Normally law students start learning human rights from scratch when they start their law degree. This will require law schools to provide a number of human rights courses in their curriculum.

Law curriculum in most regional law schools includes 47 courses, almost 15 of which are related to general knowledge in language, computer skills, national history, etc. As law schools are left with less than 35 law courses for their entire LLB degrees, it will be extremely challenging to offer more than one course in human rights. To overcome this obstacle, a number of law schools offer multi-human rights courses as elective ones. Students who are interested in human rights can select two or more courses related to human rights. In the point of my view, this may not be the best practice. It is submitted that human rights are taught at the primary and secondary school levels. As a temporary solution, human rights can be covered in specialized human rights law courses and as part of other law courses. Needless to say that human rights public awareness should be promoted by local and international NGOs. Most universities in the region offer a general legal awareness course to all university students in which students have the chance to acquire some human rights awareness.

[117] For further information, please see the UN publication titled "Teaching Human Rights: Practical Activities for Primary and secondary Schools", available at http://www.ohchr.org/Documents/Publications/ABCChapter1en.pdf

The hard delivery of a press code in Senegal

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As the title suggest, the topic of this paper will turn around media and journalists in Senegal with content based on difficulties encountered since two years by a Bill on a new press code to become applicable Law. Such subject raises as we see, Human Rights issues especially freedom of expression, people's right to know implying the duty of journalists to suitably inform and so public's right to be protected from the media and finally the legal status of those who disseminate the information i.e. journalists. The interest is all the greater if one is aware that Senegal has for a long time successfully experienced democracy through a population viscerally committed to civil liberties, and this even during the colonial period. In this regard, a brief look at the past will shed a light on it. From discussions we held with Pr I. D. Thiam, specialist in Contemporary History and of Africa (1), we learn that the first local newspaper called the "Moniteur du Senegal" appeared in 1856. Moreover in the year of 1871, colonial authorities had allowed through a Decree indigenous political parties running for local government elections to use newspapers and wireless telegraph in order to submit their professions of faith. From this period up to Independence which occurred in 1960, the role of the press (which kept on growing) had been someone decisive in the awakening of Senegalese's consciousness for Independence. Nowadays, one can count about twenty five daily newspapers, more than forty magazines, eleven T-V channels (only one owned by the State), more than two thousand radio station including in this era of globalization and new form of communication the explosion of digital media, internet etc…, and working all without censorship.

Many observers do believe today that media's involvement to the different steps of the electoral process (matching by the way the need of transparency) explains why transitions of power have been peaceful in Senegal these last years. It's in this context that the idea arose to develop a press code which corresponds the best which the current level reached by the press. Two remarks are in order at this point: first to say that the desire for a new code is an initiative of the journalists and secondly that the bill has been developed by the journalists themselves in collaboration with officials of the Departments of Justice and Communication and members of the Civil Society. Once approved by journalists and as promised by the Head of Executive at that time, the draft was submitted unchanged on the Parliament desk.

Despite all this, for nearly two years over the bill has not been passed by parliamentarians and is therefore not entered into force. Both the old and the new legislature (elected however only since June 2012) are reluctant to adopt it. It's on this precise point that this paper focusses in order to highlight why that draft disturbs, theme which will be articulated around successive points freely chosen in order to make the reading as simplest as possible since this papers is more to be seen as a simple report of legal news than a basic law article.

1) **Positive law of the press and human Rights standards in Senegal** :From what has been already learned, one can assume with some confidence that in Senegal press is considered as a public good by both of populations that rulers who recognized its usefulness. What is effectively the case. In fact, the legal regime currently applicable to the press i.e. press organs and the profession of journalism is based on General Principles from various sources but certainly all tending towards the same goal: the principle of a free press. Human right by its nature and major form of freedom of expression that she embodies, the freedom of press is enshrined first in the Declaration of the Rights of Man and of Citizen of 1789

(article 11), the Universal Declaration of Human Rights of 1948 (article 19), both Declarations incorporated in the Preamble of the Constitution of Senegal which felt the need to reaffirm it in its interior provisions (article 8). In addition to these founding Texts, we must also mention the African Charter on Human and People's Rights (article 9), the Declaration of Rights and Duties of journalist of Munich (1971) and finally the UNESCO codes, all instruments adopted and ratified by Senegal (2). The idea of raising the notion of free press to the rank of fundamental freedom is easily understandable if is taken into account the sensitive nature of its main object i.e. information. Indeed, if the definition of human Right is adjacent to the freedom of the press, is that it is not only because of the one who is called to receive that information i.e. the human being? Since the information conveyed by the press is deemed in general as contributing positively to teaching, education and human development, is that the well informed man does not become a responsible citizen then? Seen like that, here is a principle deeply rooted in moral values suitable to establish and consolidate democracy and the State of Law in that it also plays an important role in the promotion of Human Rights values (exposing for instance Human Rights violations in a given country, offering an arena for different points of view to be heard in a public discourse, etc.).
However, all things being relative by nature, the media can in a certain way constitute a threat for the functioning of democracy in a country. It will be the case if for example media because misused would incite xenophobic hatred and violence against vulnerable categories of people or if they unfairly abuse the privacy and integrity of individuals causing thereby enormous and irreparable damage. Here is touched the real conflict with on the one hand the need to respect right of citizens to be informed (which justifies the power granted to the media to work freely) and on the other hand the obligation incumbent to every State to safeguard the dignity of these same citizens including national security or antiterrorism interests. If the degree of freedom of the press will be measured on a scale depending on the weight given to one option over the other, the fact remains that it explains the tendency of some States to set legal restraints on journalism. Initially prescribed by almost all the founding Texts these limitations need to be examined.

2) **About some journalists' concerns**: At a domestic level in Senegal, it's in the Criminal Code and the Criminal Procedure Code that we find out provisions related to press offenses and their punishment. Because of their nature, these laws worry local journalists who see them as detrimental with the human rights values. To illustrate it, let us take a brief example of how some offenses as the dissemination of false news and the defamation are handled in courts:
   - When a journalist is charged for the first offense, he no longer has the guarantees offered by the General Principles of Criminal Law since provisions relevant for this offense establish not only an assumption of guilt rather than a presumption of innocence but even more favor the continued detention of the accused rather than promoting the benefit of the provisional release (3).

   - Same for the charge of defamation. During the trial, it will not be incumbent on the Prosecution to prove the guilt of the journalist, it's rather to the latter to prove his innocence and he is not allowed proving it by all the means. Moreover, the defendant is confined within very short time limits to prove the veracity of the facts alleged as defamatory (maximum of ten days). The consequence being that the risk is great to see journalists convicted not necessarily because it has been proved that they defamed but only because they have been put legally in the impossibility to give evidence of the truth above all in a country where there is no law on free access to information or verification from public bodies for instance. So, no place for the principle of freedom of proof.

3) **The main ambition of the new code press draft**: Launched in 2005 and finalized in 2010, the draft organizing the world of the press contains around 300 articles which cover all the areas: newspapers, radios, T.V, online press, self regulation, administrative and criminal sanctions etc. Among the various and somehow interesting innovations introduced by the draft, we will focus on the one which deals with what has been called "decriminalization" of press offenses and which, according to observers, would have created the enactment paralysis of the draft. In clear, less than a decriminalization in the strict sense of the word, it's more about a "disincarceration" that journalists ask in case they commit press offenses. Said brutally, do not go to jail for press offenses whatever it might be is journalists main concern, these latter being called to be punished solely through the payment of fines already fixed in their amount by the draft (4) Technically, as we see, the criminal nature of the press offense remains since fines only punish criminal offenses. In one view, the concern of the journalists on this particular point seems to be legitimate. In today world, imprisonment does not appear as appropriate for press offenses and is seen with difficulty in a democratic society. In parallel, the draft lets also appear a set of new procedural rules which aim at shortening the statute of limitations for an indictment and lengthening the deadlines in case of incrimination.
However, it's also again here at that very point that we can discover some hesitations from parliamentarians to adopt that draft. According to our sources (aren't we in journalism?), parliamentarians fear to remove the penalty that constitutes imprisonment but above all its deterring feature. By deleting it, they imagine that some journalists moved by the pursuit of sensationalism that allows selling quickly and a lot easily contravene ethical journalism because only risking financial penalties. To this argument, others add that one of the serious problems of the press in Senegal is the lack of training of many persons who have invested the professional world of the press. Even if it does exist high level schools of journalism and excellent journalists, the sector has long been and even today considered as the place of refuge for people who have not been able to complete their initial choice of studies which was not journalism of course. The risk feared by opponents of the draft is hence to see press agents ignorant of any ethics because untrained with a feeling of being overprotected citizens.

Notes

(1): Prominent academic at Cheikh Anta Diop University, Mr Thiam is also a political activist and has been Vice President at the National Assembly up to its term in June 2012

(2): At the domestic level, the first statute organizing the press is the Act of April 11th 1979

(3): According to Article 139 sections 1 and 2:

- "On the basis of requisitions duly reasoned by the Prosecution, the Examining judge must issue order against any person charged with the tort of publishing false news"

- "The request for the interim release of a detained temporarily for the offense of spreading false news will be declared inadmissible if the prosecution is opposed by requisitions duly motivated"

(4): The amount of the fixed fines oscillates from 100 US Dollars to more than 60,000 US Dollars.

Human rights and experiential learning in a Law School Curriculum

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At the University of New South Wales Law School (UNSW Law), human rights has always been an important part of the curriculum. Right from its very beginning, the new UNSW Law wanted to differentiate itself from existing law schools as the 'social justice' law school. Upon its inauguration in 1972, the founding Dean, Hal Wooten, stated
[A] law school should have and communicate to its students a keen concern for those on whom the law may bear harshly, either because they cannot afford its services, or because it does not sufficiently recognise their needs, or because they are in some way alienated from the rest of society.

However, when teaching a Bachelor of Laws program in Australia there are limits as to how one university can distinguish its curriculum from another. All law graduates have specific areas of learning required for admission to practice, and human rights and social justice, as such, are not seen as core areas for this purpose. Legal system, criminal law, contracts, torts and commercial law, public, constitutional and administrative law, procedural law and professional practice are identified as essential, while other topics are seen as optional only. How then do we ensure that students understand both the content and the importance of human rights issues when it is not seen by admission bodies as an essential area of learning?

Right from the beginning, at UNSW Law we worked to imbue the whole curriculum with an overarching social justice and human rights bent. We tried to teach law not just as something that 'is,' but to have students thinking also about why it is what it is, whether it should be as it is, how else it could be, how it could move from what it is to what it could be, and what would be the pros and cons of the various answers given.

Thus we tried to teach law not as static, but rather as a construct as amenable to influence from future lawyers as from past and present lawyers. We tried to teach students not to say ' this is how I found it,' but rather to take responsibility for identifying injustices and opportunities for improvement, and actually working for change where appropriate.
It was understood that it would be difficult to convince students to do that if teachers were not practicing what they were preaching. But fortunately staff were practicing what they were preaching. Writing, speaking, making submissions, volunteering, demonstrating, and disseminating information concerning human rights and social justice were key activities of staff of UNSW Law. An alternative entry scheme for Indigenous students was established, along with ongoing support during law studies. The Aboriginal Law Centre (now the Indigenous Law Centre), the Diplomacy Training Centre, and the Australian Human Rights Clearing House (now the Australian Human Rights Centre) were established. With many academic staff involved in these centres and activities students saw their teachers not just talking but doing.

Fast forward 40 years. The 'social justice law school' celebrated 40 years of history in 2011, and took the opportunity not only to celebrate its past, but also to chart its future. We wanted to ensure that after 40 years UNSW Law still embodied the values we claimed to hold, incorporated best practice in legal education, and taught in a way appropriate to the modern world. We took this opportunity to conduct a total review of the curriculum of the Bachelor of Laws and Juris Doctor programs.

UNSW Law identified many changes occurring in both the theory and practice of legal education, including a renewed interest in pedagogy, a commitment to research which involves students and which addresses key contemporary issues, the increasing relevance of international issues, and concerns about the preparation of graduates for professional responsibilities. Academic legal education had gone through two phases – a professional period, in which teaching was delivered by practising lawyers, and an academic period, in which most legal academics were more likely to have academic qualifications than practising certificates. More recent activity however suggests a move into a third phase, in which both an academic research focus and a knowledge of law in practice interact and are both valued. These new developments in legal education have had to take into account the many changes in the legal environment, including the internationalisation of legal issues, changes in legal markets, moves away from judicial decisions to increased regulation in all its forms, growing concern about professional ethics and values, increasing attention to international responsibilities regarding human rights; and the increasing significance of non-curial dispute resolution.

UNSW Law responded to the changing legal environment by modernising its curriculum while preserving its historical strengths. Since its inception in 1971, UNSW Law had a sensitivity to the role of law in serving the whole of society, a commitment to learning as an interactive process, an active engagement in processes of law reform, and a commitment to social justice as part of a lawyer's professional identity. We wished to ensure these strengths were retained while moving forward.

The review took two years to complete, and opened every part of the curriculum to examination. While, as mentioned above, some content in the law degree is 'required' for admission to practice, there are no restrictions as to how or where that content is covered. Thus while we needed to include certain content, it could be moved around to ensure a sensible and well integrated curriculum, and did not limit us to offering certain courses nor restrict the order in which the topics were covered. The curriculum review was coordinated by a working group but involved the whole law school community.

At the highest level, the major result of the curriculum review was the decision to identify what we considered the most important themes in legal education, and to imbed these across the curriculum. The introduction of these themes did not call for particular courses or content, but rather required a curriculum where all undergraduate students were exposed to the values that UNSW Law believed in, and gave students opportunities to further their experiences and activities in these areas. A number of these themes overlap but have been articulated separately. The five themes identified are:

1. Indigenous Legal Issues
2. Human Rights, Justice and the Rule of Law
3. Environment, Class, Gender, Race and Disability Issues
4. Experiential Learning
5. Personal and Professional Development

The second theme, Human Rights, Justice and the Rule of Law, is described as follows:
A distinctive feature of UNSW Law is its commitment to the understanding and furtherance of human rights, justice and the rule of law. This commitment is clearly demonstrated in all the things we do: teaching, research and service to the community. The consistency of this theme across the courses in the core curriculum is complemented by its carry over into our elective and clinical programs and also the work performed by our research centres.
Clearly, it is easy to write such statements, but it is harder to ensure the words are reflected in practice. However, I will now outline a number of ways in which UNSW law

incorporates Human Rights into its curriculum. While I state them separately, all the following are different methods of achieving the one aim, that is, the integration of human rights across the curriculum.

1. Human rights in the core curriculum.

Human rights concepts are included in the core curriculum, beginning with the very first core course "Introducing Law and Justice," and continuing throughout the core from years 1 to 5 (UG) and 1-3 (JD). The thematic approach calls for all teachers to plan and design courses with human rights and social justice issues in mind, and to ensure that the themes are treated as an essential part of the curriculum and not as additional or peripheral topics.

Numerous core courses have been overhauled to take account of the identified themes, and teachers across years have come together to ensure an integrated approach to each theme. One of the most important aspects of incorporating this theme into the core is that all students encounter it, not only once but as an integrated and essential part of the curriculum. It avoids the problem of teaching human rights only to students who elect to enrol in human rights electives, which often leaves teachers 'teaching to the converted,' and non-converts entirely untouched.

2. Human rights in elective courses

Numerous elective courses deal with human rights issues. Importantly however, because all students have encountered human rights issues in the core curriculum, elective courses can go beyond merely descriptive or survey courses and deal in depth with specific areas of human rights. Thus the elective courses are designed to enable students to acquire more specialised doctrinal, theoretical and practical expertise in this area. Such courses include International Human Rights, Law and Social Justice, Criminal Process: A Human Rights Framework, Human Rights in the Global Economy, Transnational Business & Human Rights, Transnational Policing & Human Rights and International Law of Equality & Discrimination.

3. Human rights in experiential courses.

One of the themes identified above was 'experiential learning.' UNSW Law places great emphasis on giving our students opportunities for real world and practical learning, and this includes experiential learning in the area of human rights. Clinical legal education is already well-developed as a core part of the curriculum at UNSW, and we are currently developing more clinics, internships and related opportunities in the largest program of its kind in Australia. Our commitment is signalled by the appointment of a dedicated Director of Experiential Learning and hiring of more clinical staff in KLC. We are now in the enviable position of having sufficient opportunities available for every UG and JD student to undertake an elective experiential activity.

The heart of our clinical program, Kingsford Legal Centre (KLC), has a distinctive combination of service provision, teaching and learning, and public education and policy advocacy.

In addition, students can undertake experiential and clinical electives devoted specifically to issues in the practice, protection and furtherance of human rights and justice, such as the Human Rights Internship Program, Human Rights Clinic, Social

Justice Internship Program, Australian Journal of Human Rights Internship, and the Human Rights Defender Internship.

The latter two internships also demonstrate how teaching and research in the areas of human rights and justice directly intersect in UNSW Law. Both the Australian Journal of Human Rights and the Human Rights Defender are published by, and record the activities of our Australian Human Rights Centre. The AHRC aims to promote public awareness and academic scholarship about domestic and international human rights standards, laws and procedures through research projects, education programs and publications. It brings together practitioners, research fellows and student interns from Australia and internationally to research, teach and debate contemporary human rights issues.

UNSW Law has also employed a specialist Director for a new Human Rights Clinic and Refugee Rights Project. In 2012 it introduced a New York summer school in human rights, and in 2013 a South African human rights clinical program.

There is often concern that developments like this are at the cost of students' doctrinal ability. At UNSW Law we believe that students will learn doctrine better by engagement with practice. Experiential learning is rigorously assessed, and some teaching will continue to be delivered in the classroom as it has been before, to ensure students not only have these experiences, but are able to make sense of them in a structured and connected way.

4. Human rights teachers in the core program.

As discussed above, we have embedded human rights concerns across the curriculum. An important aspect of this is that specialists in human rights also teach within the core program, and not just in courses identified as 'human rights' courses. Thus currently we have human rights specialists teaching in numerous core courses, including Introducing Law and Justice, Torts, Lawyers Ethics and Justice, and Criminal Law. This helps to ensure that human rights is seen as part of law more broadly and not only as a separate specialised area. It also ensures the integration of human rights into such courses and avoids perceptions of human rights as an 'add-on' to what is really important.

5. Human rights events and activities in the law school

UNSW Law staff have always been active in the Human rights area, and continue to be so. Their real and continuing involvement in the area demonstrates to students the importance we place on this. The existence of the numerous Centres including the Australian Human Rights Centre, publications on human rights issues through the centres and by individual members of staff, hosting of visitors and public speakers from local, regional and international institutions concerned with human rights, and more generally the involvement of UNSW Law's human rights specialists in public affairs, evidence the commitment of UNSW law to the area.

UNSW Law is a rich institution in a rich country where human rights activists are not endangered. I do not suggest for a moment that every law school could or would want to embrace UNSW's approach to integrating human rights into their law curriculum. However, for those who are interested, there are some aspects of our

program which could probably be more easily introduced than others. For example, including human rights issues in existing core courses is less difficult than introducing new courses, and ensures all students engage with the issue whether or not they choose to. Bringing issues to life with stories, case studies, films, or field trips can enliven student interest in the area, and need not be expensive. Finally, teaching staff who demonstrate a personal commitment to the issues at hand will convince students of their importance in a way that merely 'telling them' may not. So although human rights is not seen as an essential area of learning for admission to legal practice in Australia generally, UNSW Law does treat human rights as an essential area of learning. Our aim is that no student should complete a law degree at UNSW Law without a good grounding in human rights and social justice issues, and to this end it integrates these issues into every aspect of the law curriculum.

The professionalization of lawyers through a Center for Human Rights: The *Facultad Libre de Derecho de Monterrey* Experience

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Ivonne GARZA, Fernando VILLARREAL and Juan GARZA

The legal culture of human rights emerged recently in Mexico, characterized by a deep influence of international law. The multicultural practice is an additional feature of those concerned in improving the human rights situation in the country. The growing popularity of human rights finally materialized in the constitutional reform of 2011, where human rights treaties and the *pro homine* principle became part of the supreme law of our nation. In addition, the panorama of violence and organized crime has triggered a revalorization of legal education through aspects that were previously left behind. Human rights matters are now positioned in a prioritized space. We wander if they offer answers to the current challenges we face in Mexico.

It has been three years since *Facultad Libre de Derecho de Monterrey* created a Center for Human Rights.[118] The initiative came from a small group of professors and students. This project has been essential in the learning process of students in our Law School.

Since the beginning, being part of the Center for Human Rights has meant much more than just participating in any other academic activity. Through the implementation of a dynamic and relaxed functioning strategy, and the direction of young professors, the Center for Human Rights has been able to combine different creative elements that are attractive to our students. The consequence is a deep sense of belonging to the Center and its work. Students value the different perspectives that the Center uses to address law matters. In most instances, they dispel the stereotype of lawyers: the formal-dressed one who creates a distant relationship with its clients, works long hours at an enclosed space and is totally indifferent to his/her surroundings. An environment of caring and empathy is promoted. Professors and students create close relationships through their work. Activities are organized in a horizontal coordination. All members have the same level of responsibility and involvement. Thus, in this healthy working environment important achievements have been made.

The Center's activities focus on the following:

1. Panels and continuing legal education

Discussion panels and continuing legal education programs bring together current controversial issues and experts in discussions that attract the community. This activity *per se* constitutes a way in which human rights are promoted. The experience has showed that trial lawyers, students and scholars may share their knowledge and experience. This area of the Center has also enabled the construction of networks with other law schools and domestic human rights organizations.

2. Model United Nations and Moot Court Competitions

Model United Nations and Moot Court Competitions are an opportunity to teach and learn in a different and innovative way. They offer students new tools, knowledge and skills that shape unusual professional profiles. They allow opening their minds and rethinking the interaction between domestic and international law. For law professors, competitions are an

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opportunity to engage, from the academic arena, in the construction of new visions of the world.

Assuring a mix of practice and theory, the study of case law enhances and promotes group tasks that force students to confront real life situations in real life conditions. From different perspectives and expectations, competitions ensure the creation of new dynamics and relations that eventually influence the way politic, economic, social and legal practices interact around the globe.

Moot Courts and Model United Nations competitions are an entertaining challenge. Even though the processes of preparation and organization imply diary work and enormous efforts, such activities provide a global perspective and a wide range of network of students and scholars who meet in this type of events. The identification of clear objectives and the harmonization of ideas from all the actors in the institution have been essential in the implementation of this academic activity.

Three years ago, our law school started participating in the Inter-American Human Rights Moot Court Competition, organized by American University Washington College of Law. In 2012 we achieved a 6th place (109 universities participated in the competition). We have now expanded our participation to international Model United Nations Contests –Harvard University this year- and other Moot Court competitions such as the Francisco Suárez, organized by Universidad Javeriana in Bogota, Colombia.

3. Inés Fernández and Valentina Rosendo Scholarship

In 2012, the Center created the *Inés Fernández and Valentina Rosendo Scholarship* with the purpose of generating a fund to provide students with resources to participate in the Inter-American Human Rights Moot Court competition organized by American University and a six-month internship at the Inter-American Court of Human Rights. We firmly believe that the experience obtained in both the internship and the competition will be relevant in the academic and professional lives of people involved.

Inés Fernández and *Valentina Rosendo* are victims of human rights' violations perpetuated by the Mexican military forces. Their cases were brought up to the Inter-American Court of Human Rights, were the violations were recognized and the Mexican State was condemned to reparation. Both are now human rights promoters and defenders in the country. Their names were chosen to fulfill two objectives: to honor them for their courage and tenacity towards the defense of human rights, and to set an inspiring example for students.

The Center for Human Rights has transformed the dynamics of our law school. Students are now more conscious about human rights issues. The Human Rights elective has also been introduced to the academic program. Human rights never have been more popular.

The current social and legal situation in Mexico forces us to keep up with innovations in legal education. The creation of a Center for Human Rights is one of the many possible ways in which law schools can accomplish this objective. For *Facultad Libre*, the risk taken has brought us to the discovery of a new legal path full of positive rewards, in which we hope to keep on walking for a long time.

Key Issues in Teaching Human Rights in Law Schools

TEACHING HUMAN RIGHTS IN LAW SCHOOLS: THE NIGERIAN PERSPECTIVE

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ABSTRACT
Human rights is a universal concept and the observance of it is an indication of the levels of development that a country or society has attained, and therefore the necessity to teach human rights in schools especially law schools cannot be over emphasized. In Nigeria today, the teaching of human rights is at all levels ranging from primary to tertiary institutions, but the focus of this paper will be the teaching of human rights in tertiary institutions specifically the faculties of law in Nigerian Universities with the Faculty of Law, Ambrose Alli University, Ekpoma as a case study. This paper will attempt an appraisal of how human rights is taught in a typical Nigerian law school, examine the issues arising and proffer suggestions on how to improve the teaching of human rights in Nigerian Law Schools.

INTRODUCTION

This paper seeks to examine how human rights are taught in law schools in Nigeria using the Ambrose Alli University law school as a case study. Also, it is important to state at the onset
that unlike in other jurisdictions, in Nigeria our law schools are known as faculties and colleges of law where the students during a five year period acquire legal education leading to the Bachelors degree and there is also in existence the Nigerian Law School which runs a one year programme culminating in the call to Bar examinations, the passing of which is a prerequisite to practise the legal profession in Nigeria. The Nigerian Law School started off in Lagos in 1962 but in currently headquartered in Abuja with campuses in five other locations namely Lagos, Kano, Enugu, Yenegoa and Yola.

Flowing from this is that for the purposes of this paper law schools in Nigeria refers to the faculties and colleges of Law in Nigerian Universities and not to the Nigerian Law School.

Further, though this paper is not on human rights in the strict sense, it is not viewed as out of place to discuss albeit briefly the concept of human rights.

There is no universally accepted definition of human rights as the definitions have varied from one author to the other, but there seems to be an agreement on the fact that human rights are fundamental and essential to the political, social and economic development of any society.

Hereunder are some views on the concept of human rights
N. S. S. Iwe expresses his view in this light:

> "This concept is Jurisnaturalistic, for human rights are seen as deriving from the law of man's nature. It is personalistic, for the rights of man seen to be based on, and as an expression of, the dignity of the human being—a dignity which is the splendour of the free rational nature of man. The dignity and the rights of human person are seen with a universal eye which admits of no discrimination or disparity in their nature, not of any force or fraud. Thus all human persons are seen as equal in their natural, inviolable and inalienable dignity and rights. Finally, these rights are seen in their correlative duties and society and the protection and promotion of both rights and duties are the *raison d' etre* of society and the public authorities."[119]

[119] N.S. S. Iwe, *The History and Contents of Human Rights,* Peter Lang, New York, Bern and Frankfurt am Main, 1986 p. 161.

G. Ezejiofor states as follows:

> "Human or fundamental rights is the modern name for what have been traditionally known as natural rights, and these may be defined as moral rights which every human being, everywhere, at all times, ought to have simply because of the fact that, in contradistinction with other beings, he is rational and moral"[120]

L. Henkin defined human rights as:

> "Claims asserted and recognized 'as of right', not claims upon love, or grace, or brotherhood, or charity... They are claims under some applicable law."[121]

A. Cassese saw human rights as an

> "Ideological and normative 'galaxy' in rapid expansion, with a specific goal: to increase safeguards for the dignity of the person. Human rights represent an ambitious (and in part, perhaps, illusory) attempt to bring rationality into the political institutions and the societies of all states."[122]

O. Eze stated thus:

> "Human rights represent demands or claims which individuals or groups make on society, some of which are protected by law and have become part of *lex lata* while others remain aspirations to be attained in the future"[123]

F. E. Dowrick similarly stated as follows:

> "Human rights are those claims made by men, for themselves or on behalf of other men, supported by some theory which concentrates on the humanity of man, on man as a human being, a member of humankind."[124]

Also, the courts are not left out as the Nigerian Supreme Court defined human rights as:

> "A right which stands above the ordinary laws of the land and which is in fact antecedent to the political society itself. It is a primary condition to a civilised existence, and what has been done by our constitution since independence is to have these rights enshrined in the constitution so that the rights could be immutable to the extent of the non-immutability of the constitution itself."[125]

Further, the opinion of Tanaka J is also instructive on this issue as he stated as follows:

> "A state or states are not capable of creating human rights by law or by convention: they can only confirm their existence and give them protection. The role of the state is no more than declaratory. Human rights have always existed with human beings. They exist independently of, and before, the state. Aliens and even stateless persons must not be deprived of them. If a law exists independently of the will of the state and, accordingly, cannot be abolished or modified even by its constitution because it is deeply rooted in the conscience of mankind and of any reasonable man, it may be called 'natural law' in contrast to 'positive law'.[126]

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[120] G. Ezejiofor, Protection of Human Rights under the Law, Butterworths, London, 1964, p.3.
[121] L. Henkin, The Rights of Man Today, London, 1979, p.1.
[122] A. Cassese, *Human Rights in a Changing World,* Temple University Press, Philadelphia, 1990, p. 3.
[123] O. Eze, Human Rights in Africa, Macmillan, Lagos, 1984, p.1.
[124] F. E. Dowrick, (ed.), *Human Rights Problems, Perspectives and Texts,* Saxon House Westmead, UK, 1979, p. 8
[125] Per Kayode Eso JSC in *Ransome Kuti v. Attorney-General of the Federation* (1985) 2 N.W.L.R. (Part 6) p.211.
[126] See South West African Case II, (1966) ICJ Report 16, p. 288

From the foregoing, it is clear that human rights are inherent in man and are also inalienable with the resultant effect that these rights cannot be suspended or put in abeyance even in times of emergency or for reason of national security.[127]

Also, the 1999 Nigerian Constitution[128] and other international instruments[129] that Nigeria is a party to expressly provides for these rights and places an obligation on the authorities to ensure that these rights are not violated, and one of the ways of ensuring this is by teaching human rights in not only law schools but at every available opportunity.

HUMAN RIGHTS EDUCATION IN NIGERIA

The history of human rights in Nigeria as it relates to legal education can be categorized into two periods, the colonial era and the post-colonial era.

During the colonial era there were no law schools in Nigeria and whoever wanted to be a lawyer in Nigeria then had to acquire the requisite training in Britain and be called to the English, Scottish or Irish Bar or be enrolled as a solicitor in England, Scotland or Northern Ireland.[130] It is expected that these British trained lawyers were taught human rights as many of them were active participants in the push for independence.[131]

With the attainment of independence on 1st October, 1960[132]came a lot of hopes and aspirations for the new nation and a principal instrument towards the actualization of these goals was the 1960 Independence constitution which had human rights provisions[133]. At this time also, there were no law schools in Nigeria and lawyers still had to be trained in Britain;` though a committee (the Unsworth Committee) was set up to look into this and the committee recommended amongst other things the local training of lawyers[134].

Consequently, in 1962 the Legal Education Act was enacted and coupled with the setting up of law schools in the newly established universities[135] the stage was set for the training of lawyers in Nigeria. Although lawyers were still being trained in Britain, the Legal Education Act established the Council of Legal Education[136] and in line with its responsibility to provide legal education for persons seeking to become members of the legal profession in Nigeria[137]the Council set up the Nigerian Law School.

It is instructive to note that the establishment of the Council of Legal Education and by implication the Nigerian Law School was a measure to fill the gap identified in the British trained lawyers who had no training on Nigerian laws and customary law. That is why till date lawyers trained in Britain or other common law jurisdictions must attend the Nigerian Law School before they can practice law in Nigeria.

As indicated earlier, the 1960 Independence constitution and the 1963 Republican constitution which replaced it had extensive human rights provisions, but all this was cut

[127] See Advisory opinion of the Inter- American Court of Human Rights, 8/87 of 30th January, 1987.
[128] See Chapter 4 of the 1999 Constitution
[129] UDHR, ICCPR, ICSECR, ACHPR
[130] See Order XVI Rule 6 of the Supreme Court (Civil Procedure) Rules, 1948
[131] For example Chief Obafemi Awolowo and Chief F.R.A. Williams
[132] From the British colonialists
[133] In line with the 1948 Universal Declaration of Human Rights and the 1950 European Convention on Human Rights.
[134] See Committee Report at Government Notice No. 915 (Federation of Nigeria official gazette No. 26, Vol. 46, 1959)
[135] For example, the University of Nigeria in 1960 and the University of Lagos in 1962.
[136] Section 1(1) of the Legal Education Act
[137] Section 1(2) of the Legal Education Act

short by the military intervention in 1966 which resulted in the suspension of some parts of the Constitution[138]. This situation persisted until 1979 when democracy and civilian rule was restored under the 1979 constitution, but the military intervened again in 1983 and it was not until 1999 with the promulgation of the 1999 constitution[139]that Nigeria returned to civil rule and democracy.

By now several universities with law schools had been established including the Ambrose Alli University, Ekpoma[140]and human rights was taught in these law schools.

TEACHING HUMAN RIGHTS IN NIGERIA

In Nigeria today, human rights is taught in practically all the levels of education from primary through secondary to tertiary as per the educational policies put in place by the government.[141] This policy through a number of subjects in the curriculum encourages the teaching of human rights at the different levels.

For instance in the primary and secondary schools the pupils are educated on the subject of human rights through subjects like civic education and social studies, while in the tertiary institutions this is done through the General Studies courses that all students must take in their first year of study irrespective of the degree programme they are offering.

In Nigeria today, there are over 25 law schools and their activities are regulated by the National Universities Commission and the Council of Legal Education. These two bodies set the basic criteria that law schools in Nigeria must meet to come into operation or to remain in operation. To ensure compliance the law schools are visited periodically to be accredited by both bodies respectively and law schools are to be accredited by both bodies before it can be said to be operational. This is so because while the National Universities Commission's accreditation enable the University to offer or run the law degree programme, the Council of legal Education accreditation enables graduates of the aforesaid Law degree programme to attend a one year compulsory legal training programme at the Nigerian Law School, the successful completion of which entitles the graduate to be enrolled as a legal practitioner with the Supreme Court of Nigeria and therefore qualified to practice law anywhere in Nigeria.

However, this paper is predicated on the experiences of the authors in their capacity as law teachers in the Law School of Ambrose Alli University, Ekpoma. The A.A.U was founded in 1981 as Bendel State University and with the division of Bendel State into two states namely Edo and Delta, the name of the institution was changed to Edo State University and in 1999 the institution was again renamed but this time in honour of the first executive governor of Bendel State and under whose watch the institution was initially founded – Prof. Ambrose Alli.

The law school of the Ambrose Alli University was at inception the college of legal studies before it metamorphosed into the Faculty of Law and has been in operation for our 30years. It offers both under-graduate and post-graduate programmes. Currently, the under-graduate programme runs for five years in which the students are exposed to a number of law subjects the compulsory ones being Legal Methods, Nigerian Legal System, Constitutional Law, Law of Contract, Criminal Law, Commercial Law, Law of Torts, Law of

[138] See the Constitution (Suspension and modification) Decree 1966
[139] See the Constitution of the Federal Republic of Nigeria(Promulgation) Decree 1999
[140] Before its establishment only the Federal government had established universities in Nigeria, so the Ambrose Alli University has the distinction as the first State government owned university in Nigeria.
[141] 6334 system

Evidence and Land Law, Equity and Trusts, Law of Business Associations and Jurisprudence and Legal Theory.

It is noteworthy that for an institution that was established by a democratic government under the then 1979 constitution with its elaborate human rights provisions and also at the time of the adoption of the African Charter on Human and People's Rights, human rights was not taught as a separate subject, a situation that persisted until recently when the subject was introduced as a separate though an elective subject.

However, this is not to suggest that human rights was not being taught, rather it was taught under the auspices of other courses like Legal Methods, Nigerian Legal system, Criminal Law and of course Constitutional Law which was regarded as the *de facto* human rights subject.

It is imperative to note that this state of affairs is common in Law Schools in Nigeria as while some law schools have human rights as a separate course, others still teach it as part of other courses.

TEACHING HUMAN RIGHTS IN AMBROSE ALLI UNIVERSITY LAW SCHOOL
With human rights now entrenched in the curriculum of the Ambrose Alli University Law School we will now look at how the subject has been taught over the years, specifically examining how the subject was taught and not its contents.

As indicated earlier when the subject was taught as part of other courses, it was generally taught via the traditional method of lectures, seminars and tutorials with human rights as a topic under the course in question. There was also no drastic change in the method of teaching when human rights became a subject of its own as same methods were adopted and used.

However, with the adoption and implementation of the Clinical Legal Education Programme which resulted in the establishment of a law clinic in 2007, there was a fundamental change in the teaching method as lectures became more interactive and with the law clinic in place the students are able to get practical experience.

The Clinical Legal Education Programme was introduced in Nigeria in 2004[142] and in addition to providing a platform for law students to acquire practical skills, it introduced a radical change to the existing traditional method of teaching as it advocated a participatory method of teaching with the students playing active roles in the learning process unlike before where they were passive recipients of information.

This new approach of learning by doing has significantly impacted on our teaching of human rights as it has afforded the students the opportunity to interview clients, attend court sessions, visit police stations and prisons and generally see human rights in action.

Nevertheless, the teaching of human rights in Nigerian law schools has its own challenges. These challenges can be grouped into two that is general and specific.
Generally, the problems associated with teaching human rights in law schools in Nigeria are the same with the problems associated with teaching any course in Nigerian Universities and they are diverse and varied, but they are mainly issues that bother on poor infrastructure, dearth of reading materials and inadequate funding. As it relates to poor

[142] 14 Law schools have adopted this programme

infrastructure it is no secret that despite the huge resources invested in efforts to reverse the dilapidated state of infrastructure in Nigerian universities, the problem still persists.
The problem of dearth of reading materials is intricately linked with that of inadequate funding. The situation is made worse in the instances where funds are released and obsolete materials are acquired.

Specifically though the problems of teaching human rights range from methodology to personnel. With regards to methodology it is observed that different law schools and in fact different teachers adopt varying methods in teaching the subject. This problem is closely related to the qualification of the member of staff assigned to teach the subject as more often than not the teachers themselves have no specialized training in human rights.
Also, another issue is that of the rating ascribed to the subject, for example in most institutions the subject is earmarked as an elective with the implication that students have the option of not offering the subject and in some others the subject is not offered at the undergraduate level.
Another problem identified was the reluctance by university authorities especially during the military regimes to allow the teaching of the subject as there was the fear that it could be misconstrued as an act of defiance of the military regime which were inevitably the major violators of human rights.
Also an issue is the prevailing apathy towards the subject in the sense that there is a feeling that the subject is no longer necessary or as important as it should be because of the enthronement of democracy in Nigeria since 1999. This situation is reflected in the number of students that register the subject in recent times.

However, irrespective of the challenges encountered in the course of teaching human rights in law schools in Nigeria it is pertinent to note that it has positively and significantly impacted on the development of law in Nigeria as it has propagated the rule of law and the enthronement if democratic principles in governance in the Nigerian State.

These problems are however not insurmountable as what is required is the will coupled with adequate resources to make the desired change. For a start there is the need to harmonize the methods used to teach human rights and in the same vein ensure that only persons with appropriate human rights training are assigned to teach the subject.
It will also further the cause of teaching human rights if the subject is designated as a core or compulsory subject.
In addition, there is the need to increase the budget for infrastructural development and acquisition of appropriate reading materials. With the deployment of technology universities can be equipped with electronic libraries that will invariably provide more up to date educational materials.

CONCLUSION
In conclusion, this paper has attempted to show how human rights is taught in a typical law school in Nigeria, also some of the problems associated with teaching human rights is identified with suggestions proffered on how these problems can be solved with a view to improving the teaching of human rights in law schools in Nigeria.

WHAT AND HOW TEACH WHEN WE ARE TEACHING HUMAN RIGHTS IN THE POLISH LAW SCHOOLS?

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Structure of the curriculum

In Poland, we have – at the law school levels - two types of academic teaching. The first kind is a mandatory, regular constitutional law course and the second is optional for the students interested in some subject-matter. At the most law schools of my country, including my Faculty, the human rights are taught within the constitutional law regular course. The course has 40 hours during the whole academic year (during the 9 months), divided into two semesters. In addition to that, the curriculum provide for the 28 hours of the classes on constitutional law. This means that the students have, weekly, near the two and a half hours of constitutional teaching. How many hours are dedicated to the human rights issue depend on the decision by a lecturer and by a person conducting the classes[143]. Predominantly, they reserve for these themes two or three hours of lecturing (6 to 8 hours in the year, at the very most). If we compare this figures with the whole number of teaching hours at my Faculty within an academic year – more than 1600 hours – we see the real place of the human rights in the Academia.

At my Faculty, we have also the course on the rights of man and the systems of their protection. This course is, as was stated above, only elective[144]. In practical terms, it means that on an average, the student's enrollment for this lecture is about 10 per cent or fewer. I shall add that the so-called student's voluntary study circles may unite some ten human rights defense enthusiasts. They are organizing occasionally larger meetings or even the conferences on the human rights issues with the participation, not only of the university professors. That is all, what is done at my Faculty, on the relatively permanent basis, in this field.

Kinds of teaching methods

When I am coming during my university teaching to the so-called dogmatic part of the constitutional law, I wonder with which topic to start my human rights instruction. The possibilities are great. First, I think that the good thing would be to teach the history of the development of human rights movement, especially the chronological story of its four big driving forces, that is, the English, American, French and German revolutions. The knowledge of these countries evolution can provide a lot of very useful insights into the gradual blossom of the human rights. This method is capable of giving the student the basics on this score. However, this way of learning the rights of man is a little bit tedious, while requiring the mastering of a large number of dates, persons and past events.

The second method is, in some way, resembling: the non simultaneous instruction of these four selected legal traditions. Here, we are also confusing our students. We speak separately and repeatedly of the same things without contrasting with the foreign equivalents. For instance, the much talked procedure of the Anglo-American system *Habeas Corpus* is known to the French law as a *refere-liberte* and to the German as the

[143] These classes are generally under the responsibilities of the younger collaborators of the Faculty, like the doctoral thesis students or the holders of the first academic degree – Juris Doctor (JD).

[144] The only specialized compulsory course, according to the statute, required by the European Union legislation is the environmental protection.

Vorfuhrungsbefehl. For that reason, the Polish students have much difficulties to understand that the art. 41 paragraphs 2 and 3 of the Constitution is the precise counterpart of the Anglo-American *habeas corpus*, with the sole exception that our Basic Law is using more words to describe this privilege[145].

The third method would be likely the best. The expounding of the individual human rights and freedoms (or his or her aspects) is always given horizontally, at the same time, in several countries. I will illustrate this referring to German notion of the *Rechtsstaat*. This historically established polity in which the rule of law prevails embraces a great deal more than the Anglo-American model. It includes various traits as reflected in the names and not covered by the Anglo-American equivalents: a state which is founded on and subject to the rule of law, a state respecting and conforming to the rule of law, a state governed by the rule of law, a government under law and the supremacy of law. At present, it is hardly to find a body politics where his constitution is not claiming to this German concept. Excepting the British Commonwealth countries, the other polities all over the world had adhered to this German constitutional principle. At any rate, the Anglo-American rule of law is not the leading pattern of the modern world constitutionalism.

However, this worldwide spreading of the German version of the rule of law oblige us to differentiate it from the Anglo-American competitive model. According to the fine American expert in German constitutional system, the German law-bound State permits liberty to be restricted only in accordance with the statute and imposes limits on delegation of policymaking authority going far beyond those made explicit in the Fundamental Law. It requires fair warning and fair procedure and imposes meaningful limitations on retroactivity. It embody the essence of judicial review of administrative action and even substantive provisions (by introducing the alternative meaning of *Recht* as justice rather than law). And, last but not least, it embraces a pervasive principle of proportionally which represent a major restriction on legislative as well as executive authority to restrain basic rights[146].

Such a focus on the Euro-Atlantic conceptions of human rights addresses the question of the exclusion of the other areas of world from scholarly discussion. In my country, there are a little possibility of learning about, for instance, the Arab nations human rights policy, the Chinese, Indian or Latin American approaches or on the indigenous peoples outlooks. The standpoints of these and other minority groups (the Sami peoples in the Scandinavian countries) are in Poland largely ignored and underrated. This Eurocentric visions are extremely difficult to overcome, while the assumption of this enormous amount of positions or principles would literally obliterate our national traits.

The other set of questions are raised by the huge portions of outlandish populations living in the Western European countries. These growing segments of locals remain mainly on the fringes of these mainstream societies. For the Europeans, it is hard to grasp that our continent is also the land of immigrants and not only of the sedentary inhabitants. These and another challenges require, first of all, the consciousness of the dimension of phenomena and how to tackle with them. This is the prerequisite of any objective attitude towards these newcomers and the scholarly study of their peculiar human rights and later the introducing of legal norms going beyond the traditional juridical minority protection approach.

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[145] Here the wording: „Anyone deprived of liberty, except by sentence of a court, shall have the right to appeal to a court for immediate decision upon the lawfulness of such deprivation. Any deprivation of liberty shall be immediately made known to the family of, or a person indicated by, the person deprived of liberty. Every detained person shall be informed, immediately and in a manner comprehensible to him, of the reasons for such detention. The person shall, within 48 hours of detention, be given over to a court for consideration of the case. The detained person shall be set free unless a warrant of temporary arrest issued by a court, along with specification of the charges laid, has been served on him within forty-eight hours of the time of being given over to the court's disposal".

[146] Cf. D. P. Curie, *The Constitution of the Federal Republic of Germany*, The University of Chicago Press, 1994.

Proposals for improvement.

The small numbers of hours spent on the human rights issue in the law faculty of Poland is reflecting the current state of mind in this sphere. It is not accidental that the European Union legislators had designated the environmental protection as the only mandatory subject-matter in the law schools. This organization with the economic goals in view is not so eager to give to much shield to the individual privileges and priorities. Law school curricula have certain capacities and limits. The joining of an another compulsory subject would be a new burden on it. The Polish law study plan is already overloaded with. This would demand the reducing of the other matters, well accepted.

The best move would be the implementation by the deans of the policies aimed at increasing the real number of hours devoted to human rights in the various subjects taught at law faculties. The human rights problems have an interdisciplinary nature. They permeate almost all juridical matters. Without a radical change in the overall faculty curriculum, the position and the role of the human rights will be always of low profile. When the teachers of commercial, company, succession law or of the law of obligations, without saying of the international, constitutional, administrative or criminal law would be able to increase theirs inputs devoted on the human rights arguments in their respective syllabuses, the plight would be ameliorated.

My final remarks is connected with the difference between the so-called European law and the American Bill of Rights. Since the end of the Second World War, the European concept of human rights is heavily related with the development of the Dignity of Man. The US legal system has no much interest in that problem[147]. Taking into account that the human dignity is gaining momentum in the national basic laws of our continent, I wonder if this supreme decency does not deserve a more highlight in the human rights teaching at the law schools. Perhaps, it is premature to bring to the fore these "dignitarian" main feature of the law faculties programs and curricula. At any event, the first article of the Charter of Fundamental Rights of the European Union states that "human dignity is inviolable. It must be respected and protected". The Polish Constitution is even more explicit on this point, while saying that "the inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens". The law faculties may not overlook this novel face of the XIX century's human rights regulation and conception.

[147] K. Lehnig, *Der verfassugsrechhtliche Schutz der Wurde des Menschen in Deutschland und in den USA. Ein Rechtsvergleich*, Lit Verlag Munster-Hamburg-London 2003.

Adoptive Placement and the Rights of Children, Family and State

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I. Introduction

Overwhelming evidence gathered over many years by child psychologists supports the view that a child's best hope for emotional health, intelligence, and a fulfilled and happy life lies in a family environment.[148] For millions of children orphaned or separated from their parents, the alternatives to a family environment are homelessness, institutionalization, servitude or worse.[149] Even when the best of these alternatives—institutionalization—offers more than a minimally sufficient level of protection and material support, institutionalization cannot supply the basis for interpersonal attachment and bonding or the psychological nurturing that families can provide even in a state of poverty.[150]

Not surprisingly, the United Nations Convention on the Rights of the Child (the "CRC") declares that every child has a right to be raised in a "family environment."[151] However, the CRC fails to secure a child's right to alternative family arrangements if the child's first family fails because of parental death, incapacity, abuse or abandonment. Rather than promoting institutions and procedures for matching children in need with substitute families, the CRC allows that a state fulfills its obligations to children by institutionalization or other non-family substitutes.

The CRC can be interpreted to condone a state's preference for non-family settings for orphaned children even if adoption might be possible. A more recent United Nations policy statement, Guidelines for the Alternative Care of Children,[152] suggests a clearer preference for placement in family-like settings. Nevertheless, even the Guidelines stop short of a forceful endorsement of adoption, and compliance with the Guidelines can still leave some children in institutions despite real opportunities for adoption. The inconsistency of the CRC and the Guidelines in promoting a "family environment" while denying rights to children who have lost their original families may be an unfortunate consequence of an issue widely described as "subsidiarity." To put the matter in simple if blunt terms, a rule of "subsidiarity" places the political interests of the state above the interests of children born within the state. The principle of subsidiarity is reflected most clearly in the debate over "intercountry adoption" in which a child is placed for adoption outside the child's nation of origin. Strict subsidiarity requires an orphaned child's institutionalization within the child's nation of origin if formation of a new family environment would require placement outside

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[148] See, e.g., Allan N. Schore, Effects of a Secure Attachment on Right Brain Development, Affect Regulation, and Infant Mental Health, 22 INFANT MENTAL HEALTH JOURNAL 7 (2001).

[149] The number of millions of "orphans" is naturally speculative, depending on the definition of "orphan" and depending from nation to nation on the availability of reliable statistics. Counting only "double orphans" (who have lost both parents) in nations for which for which figures are available, recent estimates put the number at about 10 million. The real number of children who lack a "family environment" for any of a multitude of reasons is likely to be much, much higher. See generally, Richard Carlson, Seekng the Better Interests of Children, 55 N.Y. Law School Rev. 733 (2010) [hereinafter Carlson].

[150] Barbara Tizard & Jill Hodges, *The Effect of Institutional Rearing on the Development of Eight Year Old Children,* 19 J. CHILD PSYCHOL. **&** PSYCHIATRY 99 (1978)

[151] U.N. Convention on the Rights of the Child, Preamble, opened for signature Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter CRC].

[152] Resolution of the General Assembly of the United Nations, Guidelines for the Alternative Care of Children, A/RES/64/142 (February 24, 2010), www.unicef.org/protection/alternative_care_Guidelines-English.pdf [hereinafter "Guidelines"].

the child's nation of origin. However, a nation's resistance to intercountry adoption today may retard the development of a nation's domestic adoption institutions and culture over the long run.

In this article, I argue that international law must provide a more definitive statement of right of children to be raised by substitute parents when their original families fail. In particular, I propose that international law must guide nations more forcefully toward the development of a culture, law, and process for adoption for any child whose original family cannot be reconstructed or rehabilitated consistently with the child's best interests. I further propose that when qualified adoption is unlikely within the child's nation of origin a reasonable time, the child's right to a substitute family must include an opportunity for placement outside the child's state of origin or discovery. Placement within a reasonable time is crucial for a child's attachment to a new family and ability to gain all the benefits of a true family environment. In the case of very young children, a reasonable time for placement will be especially short—just a few weeks or months. The opportunity for intercountry adoption is the best chance for many children who will not otherwise be adopted today, and intercountry adoption may tend to accelerate the development of new attitudes and institutions in nations and cultures that presently disfavor adoption.

II. A Child's Right to a "Family"

The CRC places a child's family and family environment at the center of its system of human rights and state obligations. By acknowledging a child's right to a family in its Preamble, the CRC establishes "family" as a foundation for many of the other rights it declares. The Preamble begins with the metaphor of the "human family" as the basis for all human rights, and follows with the observation that "family" is the "the fundamental group of society and the natural environment for the growth and well-being" of children. Children should "grow up in a family environment," and the state should provide each family with "the necessary protection and assistance so that it can fully assume its responsibilities." The Guidelines reaffirm that the family is "the fundamental group of society and the natural environment for the growth, well-being and protection of children."[153]

Many of the rights the CRC enumerates are based on family are can be enjoyed only by being in a family or being cared for by parent-like adults. A child has a right, "as far as possible" to "to know and be cared for by his or her parents."[154] The state must "respect the right of the child to preserve his or her identity, including … family relations as recognized by law,"[155] and the state must "ensure that a child shall not be separated from his or her parents against their will" except when necessary for the best interests of the child."[156] A child enjoys the right to "freedom of thought, conscience and religion," but parents have "rights and duties ... to provide direction to the child in the exercise" of this right.[157] The state must protect the child against "unlawful interference" with his or her family.[158] In case of need, the child has a right to the state's material support, but this support is to be delivered to the child's parents or caregivers.[159]

Parents or legal guardians bear the "primary responsibility for the upbringing and development of the child."[160] However, the CRC's vision of the role of family and the "responsibility" of parents is centered on a "*child*'s best interests."[161] Thus, for example,

[153] Guidelines, supra note 4, at par. 3.
[154] CRC, supra note 4, art. 7.
[155] Id. art . 8.
[156] Id. art. 9.
[157] Id. art . 14.
[158] Id. art. 16.
[159] Id. art. 27.
[160] Id. art. 18. See also article 27: "The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development."
[161] Id.

parents possess not only a right but a duty to provide a proper family environment and "conditions of living necessary for the child's development,"[162] and the CRC recognizes that a child's best interests can trump parental rights and discretion in raising and providing for a child.[163] The Guidelines reaffirm the goal of serving a child's best interests in proceedings and other state actions subject to the Guidelines.[164]

A state shares the duty of caregiving when parents lack sufficient resources or fail as parents for some other reason. Article 18 of the CRC requires states to provide "appropriate" child-rearing assistance to parents and to "ensure the development of institutions, facilities and services for the care of children." The nature of such "institutions, facilities and services" is of course extremely important for a child who lacks living, supportive parents and whose "family" is not otherwise able or willing to satisfy the child's needs. As the Guidelines observe, "children with inadequate or no parental care are at special risk…."[165] If the child lacks capable parents or extended family, may the state place the child in a non-family institution, or does the state have a duty to permit the existence of services to place the child in a new "family?" Of this issue more will be said in a later section of this article. At the outset, however, it is clear that the CRC and the Guidelines support the proposition that a family is the natural and appropriate setting for a child, and that any statement of a child's human rights must include principles supportive of a child's opportunity for a healthy family setting.

But what is a child's "family?" Naturally, "parents" are the core of the child's family. Initially, the child's right is to be raised by his or her birth parents.[166] Parents, not the extended "family," bear the responsibility for raising the child at least in the first instance.[167] The CRC presumes that the meaning of "parents" is self-evident, at least in accordance with a traditional view: Parents are a child's genetic, natural or birth parents.[168] Of course, in the modern world "parents" can also mean a child's adoptive parents, foster parents or parents designated by law after assisted reproduction. However, in other articles the CRC distinguishes between "parents" versus "foster" parents, "adoptive" parents, "legal guardians," and other responsible adults whose existence and availability to care for a child depend mainly on local law and practice.

A child's relational rights might reach beyond parents to an extended family or community under the CRC. However, the nature of extended relational rights depends on local law and custom. Thus, a state "shall respect the responsibilities, rights and duties of … the members of the extended family or community *as provided for by local custom* … in a manner consistent with the evolving capacities of the child" (emphasis added).[169] The child's right to an "identity" includes the right to preserve his or her "family relations."[170] Moreover, in the event of legal proceedings for the "separation" of the child from his or her parents, "all interested parties"—who might naturally include members of the extended family—have the right to participate in the proceedings.[171] If the state apprehends or takes custody of a parent or child, members of the extended family may have the right to information about the child's or parent's whereabouts.[172] A "refugee" child separated from

[162] Id. art. 27. See also arts. 9, 18.
[163] Id. arts. 3, 9, 18, 27.
[164] Guidelines par. 6.
[165] Id. par. 4.
[166] CRC art. 7.
[167] Id. art. 18.
[168] Of course, even the traditional view is not this clear. In many nations or cultures, for example, a child's "father" is or has been the husband, if any, of the child's mother, regardless of genetic connection. In some nations or cultures, a child has no father if the mother is unmarried. Homer H. Clark, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 149-155 (2nd ed. 1987)
[169] CRC art. 5.
[170] Id. art. 8.
[171] Id. art. 9.
[172] Id.

his or her parents has the right to the state's cooperation in tracing the child's parents or "other members of the family" for the purpose of reunification.[173]

This limited enumeration of extended family rights imposes no duties on relatives to support or care for the child in the absence of parents, unless relatives have become "legal guardians."[174] Nor does the CRC expressly assure that relatives will have any special standing to serve as the child's caregivers in place of the parents, or that the child has a right to an effective opportunity for such placement. Relatives frequently do frequently assume parental duties for children whose parents are deceased or unable to fulfill their roles, and the Guidelines acknowledge the importance of these extended family placements and the typically informal manner of such placements, and the Guidelines urge certain steps to include such practices within each state's family services and supervision policies.[175]

The CRC does address the possibility that a child might be without effective parents. A child might naturally be without parents because his or her parents have died or are missing. The CRC also recognizes that state authorities may find it necessary to order the child's "separation" from his or her living parents for reasons such as abuse or neglect.[176] The meaning, effect and duration of formal or legal "separation" is left mainly to local law guided by the CRC's admonition that "in all actions concerning children … the best interests of the child shall be a primary consideration."[177] The Guidelines now provide some further direction for national policies and procedures for the temporary or permanent removal of children from their original parents.[178]

A child might also become separated from his or her parents by informal or extra-judicial action by a parent. For example, a parent might voluntarily and informally place his or her child with an institution or other persons with or without the intention of returning for the child. The CRC offered little guidance with respect to this problem; the Guidelines now recommend measures and procedures for dealing with the reality of voluntary relinquishment and for determining whether such relinquishment should be deemed temporary, with the state seeking eventual reunification, or permanent and appropriately leading to long term alternative care, which might include adoption.[179] Sadly, parents sometimes sell the custody of their children to other parties for labor and even sexual services.[180] The CRC urges states to protect children against such exploitation.[181] Presumably such exploitation caused by parents could be grounds for separation and alternative placement—possibly permanent.

A child who loses his or her parents is not necessarily without parent-like support or a family environment. The child may have an extended family or a concerned community, and this new arrangement, whatever its form, might naturally assume a parental role and provide a family environment without any state action or legal process. The CRC rightly accepts the impossibility of specifying or cataloging the arrangements that local relations, culture and society might provide for a child. Thus, where the CRC declares parental rights and duties, it frequently does so with respect to "the parents and, when applicable, legal guardians"[182] or to "parent(s), legal guardian(s), or any other person who has the care of the child."[183] The Guidelines recognize that these informal arrangements probably occur for a majority of children not being raised by persons other than their parents.[184] However, as

[173] Id. art. 24.
[174] Id. art. 18.
[175] Guidelines pars. 18, 29, and 79.
[176] CRC art. 9.
[177] Id. art. 3.
[178] Guidelines par. 5-9, 14 and 15.
[179] Id. pars. 42-45.
[180] Carlson, *supra* note 2 at p. 771.
[181] CRC art. 32.
[182] See, e.g., id. art. 14, 18
[183] See, e.g., id. at 19, 26, 27.
[184] Guidelines par. 18.

noted above, neither the CRC or the Guidelines specify the extent to which a child's relatives may have a right to care for a child in the absence of the child's parents. Declaring a universal principle in this regard would be difficult, because a child's actual relationship with relatives and their ability and willingness to care for the child is even less predictable than the child's relationship with parents. In any event, informal placement within extended families is evidently not available for millions of children who reside in institutions, become homeless, or are abandoned to servitude or sexual exploitation. UNICEF estimates that in central and eastern Europe about half a million children live in large scale residential institutions, and three hundred thousand in the Middle East and Africa live in institutions.[185] But UNICEF cautions that "these numbers may be significantly underestimated."[186] In some cases extended families might be more likely to provide suitable parenting if the state facilitated such arrangement with or without material support, but the CRC neither imposes duties on a state nor grants rights to the extended family in this regard, except to the extent local law already recognizes such rights and duties.[187] In the long run, it is doubtful that extended family or informal community placement will substantially lessen the enormous need for alternative placements for millions of children around the world.

If a child lacks parents and neither the extended family nor community is in a position to provide a family environment, what becomes of the child's family rights? Do the rights to parents and a family environment simply evaporate? Are such children simply beyond the CRC's ken? Not quite. Article 20, paragraph 1 states that "a child temporarily or permanently deprived of his or her family environment … shall be entitled to special protection and assistance provided by the state."[188] However, the CRC's demands for special protection and assistance are vague. Paragraph 2 states in the briefest of terms that special protection and assistance will include "alternative care." The meaning of "alternative care" in the new light of the Guidelines is the subject to the next section of this article.

III. A Child's Right to Alternative Care

Article 20 of the CRC states that if a child is without a family environment, the state "shall in accordance with their national laws ensure alternative care for such child." Alternative care, however, is a broad concept within the CRC. "Such care could include inter alia, foster placement, kafalah of Islamic law,[189] adoption or if necessary placement in suitable institutions for the care of children."[190] While institutional care is appropriate only if "necessary," the CRC does not require any effort by the state to pursue adoption or other family-like placements that would make institutionalization "unnecessary." A state's reliance exclusively on institutionalization would not necessarily violate the CRC. A state might take this course of inaction simply because it lacks the political will or interest in family placement, or because the prevailing culture resists family placement of unrelated children. The CRC's rejection of a state duty to promote substitute family placement is verified by

[185] UNICEF, Children Without Parental Care (updated March 22, 2011), at www.unicef.org/protection/57929_58004.html [hereinafter UNICEF].
[186] Id.
[187] Id. art. 5.
[188] See also Guideleines par. 5: "Where the child's own family is unable … to provide adequate care for the child, or abandons or relinquishes the child, the State is responsible for protecting the rights of the child and ensuring appropriate alternative care."

[189] Kafalah is an Islamic concept which roughly equates with the western system of open adoption. See Faisal Kutty, Islamic Law, Adoption and Kafalah, Jurist, Nov. 6, 2012, jurist.org/forum/2012/11/faisal-kutty-adoption-kafalah.php. See also Harroudj v. France (European Commission on Human Rights, April 10, 2012), available online at sim.law.uu.nl/sim/caselaw/Hof.nsf/1d4d0dd240bfee7ec12568490035df05/9822050b81747d25c1257a8500506a55?OpenDocument
[190] Id. art. 20.

Article 21. The purpose of Article 21 is to protect children from certain illicit or unethical practices of adoption. In restricting adoption, the drafters of Article 21 were careful to indicate that the CRC does not require that children must have any opportunity for adoption. The rules it provides apply only to states that have decided, without obligation, to permit children to be adopted.

The CRC's acquiescence in institutionalization as a general state policy is striking. Remember that the CRC places "family environment" at the very core of children's rights. For hundreds of thousands, perhaps millions of children lacking family or extended family support, state or regulated private agency intervention is essential to arrange substitute family environments. Without the state's own encouragement and assistance in placement or its approval and regulation of private agency placement, children who have lost their original families are much more likely to end up in institutions rather than "family environments." But even well-funded and "suitable" institutions are not substitutes for a "family environment." The best institutions are effective mainly to deliver material support. The actual condition of some institutions around the world is deplorable. Institutionalization is also much more expensive than family placement because it places the full burden of material support on the state and diverts resources from other important child services. Even institutions "suitable" by material standards fail in comparison with family placement in one critical respect: the lack of a foundation for emotional and psychological bonding and attachment that is crucial to healthy mental and emotional development.[191] And children released from institutions as teenagers lack the life-long family support, attachment and identity that children raised by families normally gain.[192]

The CRC's surprising lack of enthusiasm for adoption and its limited endorsement of other forms of family placement is neither accidental nor exceptional. Major international organizations with an interest in child welfare have sometimes seemed to approve the CRC's pointed failure to promote family placement, especially adoption. Until recently, UNICEF's position on adoption in particular was neutral at best.[193] UNICEF consistently missed opportunities to promote adoption or foster care as part of any public effort to improve the care and welfare of children in need. UNICEF's recommendations for child-welfare policies called for vigilance against illicit adoption or "trafficking" but failed to encourage legitimate adoption as any part of child welfare policy.[194] During the last decade, however, the international legal community has warmed somewhat to adoption. The General Assembly's

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[191] See Elizabeth Bartholet, International Adoption: The Child's Story, 24 Ga. St. U. L. Rev. 333, 338, 342-47 (2007); Elisabeth M. Ward, Utilizing Intercountry Adoption to Combat Human Rights Abuses of Children, 17 Mich. St. J. Int'l L. 729, 743-45 (2009).

[192] UNICEF, Trafficking in Human Beings in South East Europe 82 n.128 (2004), available at http://www.unicef.org/media/files/2004Focus_on_ Prevention_in_SEE.pdf ; Human Rights Watch, *My So-Called Emancipation: From Foster Care to Homelessness for California Youth* 1 (2010), available at http:// www.hrw.org/en/reports/2010/05/12/my-so-called-emancipation-0.

[193] See Sara Dillon, *Making Legal Regimes for Intercountry Adoption Reflect Human Rights Principles: Transforming the United Nations Convention on the Rights of the Child with the Hague Convention on Intercountry Adoption*, 21 B.U. Int'l L.J. 179, 198 & n. 58 (2003).

[194] UNICEF's missed opportunities to include adoption as a part of a recommended child-welfare policy include: Inter-Parliamentary Union & UNICEF, Combating Child Trafficking 13-17, 39 (2005), available at www.unicef.org/protection/files/IPU_combattingchildtrafficking_GB.pdf; UNICEF et al., Trafficking in Human Beings in South Eastern Europe 82 & n.128 (2004), www.unicef.org/media/files/2004Focus_on_Prevention_in_ SEE.pdf; UNICEF, 1 Handbook on Legislative Reform: Realising Children's Rights 170 (2008), www.unicef.org/crc/files/Handbook_on_ Legislative_Reform.pdf; UNICEF, Supporting the Realization of Children's Rights Through a Rights-Based Approach to Legislative Reform 58, 111-12 (Jan. 2007), www.unicef.org/Supporting_the_Realization_of_Childrens_ Rights_Through_a_Rights_Based_Approach_To_Legislative_Reform.pdf; Vanessa Sedletzki, UNICEF, Legislative Reform for the Protection of the Rights of Child Victims of Trafficking 1, 39 (Nov. 2008), www.unicef.org/policyanalysis/files/Legislative_Reform_for_the_Protection_of_ the_Rights_of_Child_Victims_of_Trafficking.pdf.

2009 Guidelines imply support for placement in a family environment and they seem to offer a limited endorsement of adoption.[195] UNICEF has now voiced its approval of the Guidelines—though without any specific reference to adoption.[196]

Yet even within either the CRC's list of non-institutional placements or the Guidelines' concept of "family-based settings," there is an unfortunate failure to observe important distinctions between types of family environments. "Foster care" can be one type of family placement, and a state would satisfy its duty under the CRC or Guidelines by allowing foster care but not adoption. What is "foster care?" The term includes a broad range of conditions that do not always serve children nearly as well as adoption. Foster care might take the form of small scale "family-like" residential shelters envisioned by the Guidelines to replace larger residential facilities. If so, foster care is better than older versions of institutional care by a matter of degree but is not even a near substitute for the original family. Moreover, an essential difference between "foster family" versus adoptive family placement is that a foster family is temporary, conditional, qualified and expressly less than the formation of a legal "family." In the U.S., for example, foster care is a necessary alternative to adoption for children who cannot easily be placed for adoption because of age or health conditions, who cannot be placed without financial aid or compensation to caregivers, or whose original family ties are in limbo. The fact that the foster relation is possibly temporary and necessarily conditional interferes with healthy family attachment and bonding: Foster parents and children can find it difficult to form the unconditional bonds if they are aware that the relationship might be terminated by events beyond their control. Finally, because foster care is often based on financial support or compensation rather than natural family bonding, it risks leading to situations that expose children to exploitation such as servitude. Like institutionalization, foster care requires a high level of monitoring partly because of the parties' comparatively weak emotional and permanent commitments. Indeed, the CRC and Guidelines implicitly acknowledge this fact by demanding periodic monitoring in the case of foster placement but not adoption. However, monitoring can fail even in wealthy nations and may not exist where resources are scarce.[197] Nevertheless, a state satisfies the requirements of the CRC and the Guidelines by making some form of foster placement, but not adoptive placement, available to children without families.

IV. The Right to Adoption and the "Subsidiarity" Debate

A child's right to a "family environment" should include the right to an opportunity for adoption if the original family is permanently severed. Why has the international legal community not accepted this view? The problem in part is that long-term substitute parenting of completely unrelated children is not a universal cultural practice.[198] However,

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[195] The Guidelines' support for family placement in general (which might include adoption or foster care, or perhaps small scale residential care) is suggested by their emphasis on the importance of permanency and attachment. Paragraph 12 recognizes "the importance of ensuring children a stable home and of meeting their basic need for safe and continuous attachment to their caregivers, with permanency generally being a key goal." Paragraph 21 states that "the use of residential care should be limited to cases where such a setting is specifically appropriate, necessary and constructive for the individual child concerned and in his/her best interests." In the case of children younger than 3 years old, Paragraph 22 urges "family-based settings" but would allow institutionalization (or "residential care" in the language of the Guidelines) if placement of a child in a family-based setting would separate siblings. Paragraph 23 recommends that states undertake a policy of "deinstitutionalization," although this does not mean the end of institutionalization. Rather, it would lead to the end of large residential institutions and a shift to smaller facilities.

[196] UNICEF, supra note 38.

[197] CRC art. 25.

[198] See Dillon, supra note 46, at 223 & nn.158-59; see also Esben Leifsen, Person, *Relation and Value, Cross-Cultural Approaches to Adoption, in Cross-Cultural Approaches to Adoption*, in CROSS-CULTURAL APPROACHES TO ADOPTION 192-93 (Fiona Bowie ed., 2004). Cultural differences regarding adoption are not limited to a comparison between the "developed" world versus the "developing" world. Even some Western nations do not have a culture or tradition that is strongly supportive of adoption. See Fiona Bowie*, Adoption and the Circulation of Children: A*

while a culture against adoption may explain the lack of prospective adopters in many communities, it does not fully explain resistance against international principles and goals that might change culture over time, and that could encourage nations to promote such change.

A separate and possibly equally important reason for resistance to adoption involves the possibility of intercountry adoption and the "subsidiarity" debate. For at least some of the many children in need of families, intercountry adoption is a plausible option—but only if a nation of origin permits intercountry adoption. Thus, the CRC's limited approval of adoption is mainly for adoption within a child's nation of origin. The CRC endorses intercountry adoption only if the child cannot be placed in "any suitable manner" in the child's nation of origin.[199] According to some interpretations, "suitable" placement within the nation of origin includes an institution.[200] This interpretation is further supported by Article 8, which states that "States Parties undertake to respect the right of the child to preserve his or her identity, including nationality…." The CRC's preference for any "suitable" local placement over intercountry adoption is sometimes referred to as the "principle of subsidiarity."[201] The strict view of subsidiarity holds that intercountry adoption is the last resort for a child for whom there is no "suitable" local placement of any sort.[202] The Guidelines, despite their more favorable view of placement in a family setting rather than institutionalization, does not necessarily reject subsidiarity. According to the Guidelines, "All decisions concerning alternative care should take full account of the desirability, in principle, of maintaining the child as close as possible to his/her habitual place of residence, in order to facilitate contact and potential reintegration with his/her family and to minimize disruption of his/her educational, cultural and social life."[203]

Another major international adoption law, the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption,[204] adopts a modified version of subsidiarity that moves the rank of intercountry adoption up one notch, at least for a limited number of nations that have signed the Convention. The Preamble states that "intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family *cannot be found in his or her State of origin* (emphasis added)." In other words, family placement (adoptive or foster; local or intercountry) is favored over institutionalization in most cases, but "suitable" local family placement (foster or adoptive) trumps intercountry adoption. The Hague Convention's endorsement of adoption is not as powerful as one might expect given the Convention's principle purpose of facilitating intercountry adoption by a set of international rules and procedures.[205] Naturally, a blanket endorsement of adoption for all children in all situations of need would be inappropriate. Still, the Hague Convention falls short of speaking clearly to the issues of what constitutes suitable local family placement or when efforts at local adoption should be abandoned in favor of intercountry adoption. "Suitable local family placement" is not simply a question of suitability of the adopters. It is also a question of timing: Is local adoption possible soon—especially for an infant—or would awaiting an opportunity for local placement unduly delay

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Comparative Perspective, in CROSS-CULTURAL APPROACHES TO ADOPTION 10-11 (Fiona Bowie ed., 2004) (describing a continued "anti-adoption" culture in the United Kingdom and a tendency to mask or deny adoption).

[199] CRC art. 21(b).

[200] See Laura McKinney, *International Adoption and the Hague Convention: Does Implementation of the Convention Protect the Best Interests of Children?*, 6 WHITTIER J. CHILD & FAM. ADVOC. 361, 379 (2007).

[201] See, e.g., Lisa M. Katz, Comment, *A Modest Proposal? The Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*, 9 Emory Int'l L. Rev. 283, 304 (1995).

[202] Id. at 303-304.

[203] Guidelines par. 11.

[204]Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, concluded May 29, 1993, 1870 U.N.T.S. 167 (entered into force May 1, 1995) [hereinafter Hague Convention], available at http://www.hcch.net/index_en.php?act=conventions.text&cid=69.

[205] See Richard Carlson, The Emerging Law of Intercountry Adoption: An Analysis of the Hague Conference on Intercountry Adoption, 30 Tulsa L.J. 243, 255-65 (1994)

the child's opportunity for immediate placement in a manner most likely to lead to successful family bonding and attachment?

The question is especially important for very young children who have the most to gain by early adoption. Child psychologists generally agree that children fare best when they are able to bond with permanent families during the first two years of their lives. A nation eager to reserve its own "resources" in children may be inclined to reject intercountry adoption in the hope that local adopters might eventually be available. But delayed placement can be harmful to the child.

Debate over subsidiarity and its different versions—absolute, strict or lenient—may have affected the larger debate about adoption in general. Opponents of intercountry adoption have argued that intercountry adoption robs a nation of origin of its most valuable resource—its next generation. They have also argued that placing a child out of his or her nation of birth may harm the child's sense of identity, and they have doubted that family placement could be of sufficient benefit to justify the original nation's loss of children. Of course, allowing for intercountry adoption would not preclude local adoption. However, arguments designed to defeat intercountry adoption tend to undermine the public's acceptance of adoption in general. Moreover, allowing for and facilitating adoption in general may result in many more intercountry adoptions than local adoptions, depending on local conditions.

I have summarized the arguments on both sides of this debate in greater detail elsewhere, where I conclude that the arguments against intercountry adoption are generally wrong but that intercountry adoption does require careful regulation and precautions by authorities of both nations of origin and nations of destination.[206] Considered from the viewpoint of *children*'s best interests, however, the more important debate is whether the opportunity for adoption—local or intercountry—should be a basic human right. If being raised in a family environment by parents is a child's right, then it is a denial of a child's right to bar or unnecessarily impede an opportunity for a substitute family when the child's original family fails. Ideally, adoption will eventually become a widely accepted cultural norm in all nations. Until that time arrives, international law should not only permit but should positively promote adoption in appropriate circumstances. Furthermore, international law should authorize adoption on an intercountry basis when this form of adoption offers a very young child the fastest opportunity for a family.

It is to be expected that in some nations with relatively little history or practice of adoption, intercountry adoption will tend to dominate the field for some time. On the other hand, the creation of laws, institutions and experience for adoption involving foreign adopters can have positive effects for the development of a local acceptance of adoption. And a universal culture for the adoption of children waiting for families would fulfill the real spirit of the Convention on the Rights of the Child.

[206] See Carlson, supra note 2.

'HOW DARE YOU TELL ME HOW TO TEACH: RESISTANCE TO INNOVATION WITHIN AUSTRALIAN LAW SCHOOLS

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I Introduction

Teaching policies introduced within and imposed upon Australian universities are often informed by a desire to promote innovation and change within higher education. Innovation and change are usually justified as necessary to modify existing (and by implication deficient)[208] teaching practices and better achieve objectives such as improved student engagement, more appropriate learning outcomes, more authentic assessment and better feedback, and so on. However, these initiatives are frequently opposed by the academics upon whose engagement the achievement of these objectives necessarily depends. There are of course instances of academics welcoming opportunities to reflect upon and improve their teaching practices, and other instances of academics accepting that regulation of their teaching (for whatever reason) is an unavoidable feature of academic life. But there are also many instances of academics refusing to participate in or cooperate with collective teaching initiatives, resisting innovation and change, and insisting upon deciding for themselves what and how they should teach.

This paper is part of an investigation into the nature of individual academic resistance to collective teaching initiatives. The focus of this particular paper is upon resistance to teaching initiatives within Australian law schools, and seeks to answer two questions:

1) In what ways are teaching initiatives resisted by legal academics?
2) Why does such resistance by legal academics occur?

The answers offered in this paper are informed by a series of personal interviews conducted by the author with Associate Deans (Teaching and Learning) ('ADTLs') from six Australian law schools.[209] The role of ADTL was chosen because an academic who occupies this role is likely to have direct personal experience with both the wide range of school, faculty, university and government teaching initiatives and the various forms of resistance by individual academics to those initiatives.

[207] BCom LLB LLM PhD. Professor, Faculty of Law, Bond University, Australia.
[208] Winslett describes how pressure upon academics by university management to innovate is often driven by a perceived need to respond to a variety of apparent deficiencies in higher education: Gregory Michael Winslett, *Resistance: Re-imagining Innovation in Higher Education Teaching and Learning* (PhD Thesis, Queensland University of Technology, 2010). For example, the1987 Commonwealth Tertiary Education Commission report about Australian legal education, *Australian Law Schools: A Discipline Assessment* (typically referred to as 'the Pearce Report'), justified its extensive set of suggestions about reforming legal education in Australia by referring to a lack of commitment by law schools to teaching, student dissatisfaction with the intellectual calibre of their studies, and 'dreary' programs: Dennis Pearce, Enid Campbell and Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Committee* (Australian Government Publishing Service, 1987).
[209] Not all of the interviewees use this title: equivalent titles include 'Associate Dean (Academic)' and 'Director of Teaching'.

II Academic Resistance

Many proponents of innovation and change within higher education appear to genuinely believe that the desired changes will result in benefits for all concerned, especially the students. Teaching policies, processes and other initiatives that seek to clarify learning objectives, improve the quality of assessment and feedback, introduce quality assurance of course materials and so on are promoted as leading to improved learning outcomes and a better quality educational experience. However, such teaching initiatives are seen by many academics as an unnecessary and intrusive form of regulation.

A number of scholars have in recent years described how academics are increasingly feeling stressed, frustrated and demoralised as a consequence of closer regulation of their behaviour and beliefs.[210] Resentment towards escalating regulation often becomes resistance, and resistance to regulation is particularly likely within the academy given the typical character of academics and the nature of academic work:

> Trained in analytical thinking and inured to critique, academics are unlikely to passively accept changes they regard as detrimental. Academics are also intrinsically motivated by the nature of academic work. They identify – often passionately – with the tasks and goals that comprise the academic endeavour, and are therefore likely to resist erosion of valued aspects of their work.[211]

Taylor describes how the intellectual skills of academics make them less open to change strategies that rely on instruction, and how their intellectual skills and attitudes make them sceptical of 'emotional exhortation to excellence or warnings of grim consequences if the status quo is retained'.[212] According to Anderson, 'academics' capacity – indeed, their perceived responsibility – to assess, analyse and criticize commonly [forms] the basis of their resistance to managerialist practices'.[213]

According to four of the ADTLs interviewed for this paper, *legal* academics are even more likely to resist regulation than other academics:

> I think law academics have a reputation for being more difficult to deal with. [ADTL2]
>
> You'd think that we'd probably be more likely to complain because we probably hate procedures more than anyone given that that's what we do day in, day out. [ADTL3]
>
> [T]o some extent law training is directed towards autonomous kinds of thinking and a sort of a fierce independence in the way that one carries out one's work. [ADTL5]
>
> I think that as lawyers, legal academics are more likely to be confrontational and adversarial. [ADTL6]

[210] See e.g. Bronwyn Davies and Peter Bansel, 'The Time of Their Lives? Academic Workers in Neoliberal Time(s)' (2005) 14(1) *Health Sociology Review* 47; Pat Sikes, 'Working in a 'New' University: In the Shadow of the Research Assessment Exercise?' (2006) 31(5) *Studies in Higher Education* 555.
[211] Gina Anderson, 'Mapping Academic Resistance in the Managerial University' (2008) 15(2) *Organization* 251, 252.
[212] Peter G Taylor, *Making Sense of Academic Life: Academics, Universities and Change* (The Society for Research into Higher Education and Open University Press, 1999), quoting Paul R Trowler, *Academics Responding to Change: New Higher Education Frameworks and Academic Cultures* (The Society for Research into Higher Education and Open University Press, 1998) and Elaine Martin, *Changing Academic Work: Developing the Learning University* (The Society for Research into Higher Education and Open University Press, 1999).
[213] Anderson, above n 5, 256.

Each of the interviewees described negative attitudes by legal academics towards collective teaching initiatives. When asked if their colleagues ever saw such initiatives as overly intrusive or inappropriate, one interviewee responded as follows:

> All of the time with some people, some of the time with most people. [ADTL4]

This interviewee explained the range of possible responses to teaching initiatives:

> [T]here's a small proportion of people that are always early adopters and they care about innovation and care about students. In this particular context that's the kind of caring. But there's another kind of middle group that will go along but are not particularly keen, but they are compliant. And then there's always the other bottom third or something, or maybe less, maybe twenty per cent of really disaffected that are always going to be a problem to you with any kind of change strategy. [ADTL4]

Another interviewee saw the attitude of their colleagues as much more accepting of the regulation of their teaching. However, they also acknowledged that this positive attitude was not the case at every law school:

> [T]here are members of staff in my experience who believe quite passionately that once they are employed as a law teacher, even if it's at level A, but certainly if they are employed at level C, D or E, that nobody should be questioning anything that they do or don't do within their own courses. That it's like a private domain and 'How dare you tell me what I should teach or how I should teach or how I should assess. And by the way don't ask me to teach all those skills because there's so much other stuff going on in this curriculum or in this course, and they're all so terribly important that I can't possibly do anything else.' [ADTL5]

In the following section the specific types of resistance by legal academics are identified.

III Specific Forms of Resistance

In this section the various forms of academic resistance identified by the ADTLs are categorised according to the work of Anderson. According to Anderson, resistant practices engaged in by academics include both active and passive forms of resistance. [214]

Active forms of resistance include public resistance, direct resistance and refusal. *Public resistance* is resistance that takes place in a public or semi-public forum, such as the making of a public contribution to a government inquiry into higher education, or a verbal protest about university policy changes to senior university administrators in a large meeting.[215] *Direct resistance* is resistance in the form of direct protests by academics to administrators about specific initiatives or in response to particular incidents, such as responding to an administrative request for information by asking challenging questions about the reasons for the request, responding to a survey request with a letter explaining why the survey will not be completed, or explicitly refusing to participate in a management interview about workloads.[216] *Refusal* is resistance to regulation in the form of a direct refusal by the academic to comply or cooperate with administrative directives, such as a

[214] Anderson, above n 5. Anderson's work is based upon interviews with 30 academics in ten Australian universities.
[215] Ibid, 257-258.
[216] Ibid, 249-260.

refusal to comply with an administrative request to provide electronic versions of teaching materials, or a refusal to conduct student evaluations of teaching.[217]

Some of the interviewees were able to offer examples of active resistance by their colleagues:

> I can't think of a single staff meeting where at least one academic has not stood up and complained loudly about the escalating levels of regulation of their teaching. [ADTL6]

> The Vice Chancellor, at the beginning of this curriculum renewal process, … was holding what he called 'town hall meetings'. And people were just constantly complaining … [ADTL4]

> [P]eople are not afraid to express their opinions in staff meetings or in the corridors. They will say if they think it is a waste of time or serves no obvious purpose. [ADTL1]

'Passive' forms of resistance include avoidance and qualified compliance. *Avoidance* is resistance in the form of a failure to comply with administrative directives without directly refusing to do so. Examples include simply ignoring administrative requests, claiming to be too busy or to have forgotten about the request, and 'feigned ignorance', i.e. pretending not to understand the request or how to comply with it.[218] *Qualified compliance* is resistance in the form of compliance with administrative directives in minimal, pragmatic, or strategic ways.[219]

Most of the interviewees found it easy to identify examples of passive forms of resistance within their law schools:

> [T]here are other delays as well as the usual grumbling. Sometimes people don't comply with deadlines or they complain that something isn't necessary. For example, some academics question the need to provide descriptions of the work required for particular grades, they say that everyone knows what needs to be done for a certain grade. [ADTL1]

> [W]e've been through a very long process of embedding graduate attributes in particular subjects and making sure certain subjects target certain graduate attributes and that the assessment in the subject outline shows the link between that graduate attribute. And lots of people would say that 'yes, we have done that' but when you actually drill down through their subject outline you find it's not quite as explicit as you would have liked … [ADTL2]

> There are some academics in the school who every semester miss deadlines for completing electronic course profiles or setting up course websites, or who claim not to understand how to do it, or who don't respond to email requests for weeks at a time, or who ignore email requests completely. [ADTL6]

[217] Ibid, 260-261.
[218] Ibid, 262-263.
[219] Ibid, 264-265.

When asked about examples of passive resistance in their law school, one interviewee offered the following:

> [W]hat I did is I, with the backing of the Dean, had a school meeting, formed the whole school into teams and I said 'We've got nine university graduate capabilities so I want nine teams and each team is going to come up with standards and … sample rubrics for their capability.' … People were allowed to choose where they went and who they worked with and what graduate capability they worked on. But out of those nine teams, within three months two teams had reported back to me with their work done and the other seven never, ever did, despite numerous and public reminders in meetings. [ADTL4]

Interestingly, some of the interviewees described engaging in acts of resistance themselves in relation to university-level teaching initiatives. Sometimes this resistance took the form of collective public resistance:

> If there is a view that University requirements go too far I'm not afraid to communicate that to the University. The Associate Deans from all of the Faculties meet regularly and at that meeting we are not afraid to collectively let the University know that it is asking too much. [ADTL1]

More often it took the form of more passive forms of resistance such as avoidance:

> I wouldn't refuse to comply or actually fail to comply … but there are occasions where it is obvious that the University directive is not due to external pressure but is just an information gathering exercise and there would be no serious consequences if the information was received late. For example, at the moment we have been asked to provide certain information about teaching to the University but there is no deadline – just 'ASAP' – and since we have other pressing matters at the moment it will just have to wait. [ADTL1]

This suggests the possible existence of 'hierarchies of resistance': each administrator is also an administrated person, and at each level of management the administrator given responsibility for administration and implementation resists regulation. In the case of many 'top-down', government initiated directives, the possibility that each university, faculty and school level delegate resists the directive to a greater or lesser degree may explain why, by the time it reaches the level of the individual subject or the individual teacher, it may have dissolved entirely.

IV Causes of and Reasons for Resistance

Resistance to power is an inevitable, ever present aspect of the exercise of power. According to Foucault, whenever power is exercised, resistance is formed:

> Where there is power there is resistance, and yet, or rather consequently, this resistance is never in a position of exteriority in relation to power … These points of resistance are present everywhere in the power network. [220]

Every attempt at regulation provokes resistance. This resistance is sometimes large-scale, explicit and organised, but more often it is small-scale, implicit and spontaneous. This is

[220] Michel Foucault, *The Will to Knowledge: The History of Sexuality 1* (Penguin, 1998), 96. See also Michel Foucault, 'Power and Strategies' in Colin Gordon (ed), *Michel Foucault. Power/Knowledge: Selected Interviews and Other Writings 1972-1977* (1981) 142.

apparently the case within most institutions and organisations. According to Prasad and Prasad there is 'a multitude of less visible and often unplanned oppositional practices in the everyday world of organisations'.[221] According to Thomas and Davies there are 'routinized, informal and often inconspicuous forms of resistance in everyday practice'.[222] Knights and Verdubakis insist that everyday forms of resistance in the workplace have a 'significant impact on organisational and labour relations'.[223] And according to Scott, the 'quiet evasion' associated with everyday forms of resistance is more widespread, and often more effective, than direct, confrontational forms of resistance,[224] and that 'frontal assaults are [often] precluded by the realities of power'.[225] Scott refers to these small-scale forms of resistance as the 'weapons of the weak', the 'ordinary weapons of relatively powerless groups'.[226]

In the words of Foucault:

> [T]here is no single locus of great refusal, no soul of revolt, source of all rebellions, or pure law of the revolutionary. Instead there is a plurality of resistances, each of them a special case; resistances that are possible, necessary, improbable; others that are spontaneous, savage, solitary, concerted, rampant or violent; still others that are quick to compromise, interested, or sacrificial.[227]

The multiple acts of small-scale resistance that take place within the law school are not discrete and isolated from each other. They often share certain discursive foundations. A complaint made in the corridor about over-regulation, a refusal to conduct a teaching evaluation and the late submission of an examination question paper may be related by a common justification for the particular acts of small-scale resistance.

What, then, are the 'discourses of resistance' provoked into existence by the propagation of teaching initiatives and which unite the various acts of small-scale resistance? Many of the ADTLs interviewed for this paper described similar justifications for the various forms of resistance encountered within the law school.

All of the interviewees referred to *academic freedom*: resistant academics see collective teaching initiatives as an unwelcome and inappropriate intrusion upon their individual liberty. This discourse is characterised by an insistence by many academics that they can and should be trusted to do the right thing instead of being told precisely what to do.

> I think … lots of academics don't like being told what to do. They'd much prefer just to be able to do what they want to do. They believe and they probably do have the students' best interests at heart. I don't have any worries [that] any of the academics aren't concerned about students' wellbeing and making sure they get a good subject delivered. But I just think they'd prefer to do it on their own terms, how and when they want to do it. [ADTL2]

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[221] Anshuman Prasad and Pushkala Prasad, 'Everyday Struggles at the Workplace: The Nature and Implications of Routine Resistance in Contemporary Organizations' in Peter A Bamberger and William J Sonnenstuhl (eds), *Research in the Sociology of Organizations: Deviance In and Of Organizations* (JAI Press, 1998) 227.
[222] Robyn Thomas and Annette Davies, 'Theorizing the Micro-Politics of Resistance: New Public Management and Managerial Identities in the UK Public Services' (2005) 26(5) *Organization Studies* 683, 686.
[223] David Knights and Theo Vurdubakis, 'Foucault, Power, Resistance and All That' in John M Jermier, David Knights and Walter R Nord (eds), *Resistance and Power in Organizations* (Routledge, 1994) 167, xiv.
[224] James Scott, 'Everyday Forms of Peasant Resistance' in James C Scott and Benedict J T Kerkvliet (eds), *Everyday Forms of Peasant Resistance in South-East Asia* (Frank Cass, 1986) 5, 8.
[225] James Scott, *Domination and the Arts of Resistance* (Yale University Press, 1990) 192.
[226] Scott, above n 18, 6, 22.
[227] Foucault, above n 14, 96.

> I think there is a sense that there is no reason for the university to regulate teaching that closely, that 'I'm a professional and I should be free to teach in the way that I see fit'. [ADTL1]

The ideal of academic freedom is one that has been associated with academic life for a very long time,[228] and it is one that still carries considerable weight within the contemporary law school.[229] One ADTL, however, was extremely critical of this discourse of academic freedom:

> I think the biggest problem is 'academic freedom'. I think it is a shield for the lazy and the uncooperative and … it's not used in a way that it ought to be used, I think. I think it is like the corporate veil, it allows so much to go on behind it that shouldn't be going on. [ADTL4]

A second discourse of resistance relates to *academic identity*: many resistant academics see themselves as researchers rather than teachers, and many of the regulatory requirements imposed upon their teaching practices oblige them to engage in activities and acquire knowledge that is inconsistent with this identity.[230] As one interviewee explained, much of the resistance by academics to collective teaching initiatives is a result of

> defining oneself as a lawyer, an engineer, a historian rather than an educator, or rather than having a co-definition. [ADTL4]

This discourse is frequently characterised by complaints about workload and lack of time: maintaining an identity as a researcher is so time-consuming it is unfair and inappropriate for academics to also be expected to be teachers.

> People are very conscious that there is this division of their time between teaching and learning and research, and then community contribution. So there is this tension, 'If I have to spend more time on my subject and in my teaching preparation and preparing new exams every semester, then that's less time that I have to be finishing an article or doing some further research.' [ADTL2]

Finally, some of the interviewees referred to a discourse of *anti-educationalism*: a discourse that is explicitly critical of educational theory and which questions its relevance to the teaching of law, preferring to continue with traditional, doctrinal approaches. Feinman and Feldman claim that many legal academics are 'anti-intellectual' about the process of legal education, and explain that this anti-intellectualism:

> is characterized by an unwillingness to reflect on the goals of legal education, the content of the curriculum, the methods of teaching, and the ability of law school graduates to practice law competently. At most law schools, the purposes and methods of teaching are regarded as unfruitful, if not unfit, topics for conversation.[231]

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[228] Conrad Russell, *Academic Freedom* (Routledge, 1993).
[229] Robert R Kuehn and Peter A Joy, 'Lawyering in the Academy: The Intersection of Academic Freedom and Professional Responsibility' (2009-2010) 59 *Journal of Legal Education* 97.
[230] Fiona Cownie, 'Searching for Theory in Teaching Law' in Fiona Cownie (ed), *The Law School - Global Issues, Local Questions* (Ashgate Publishing Limited, 1999) 481.
[231] Jay Feinman and Marc Feldman, 'Pedagogy and Politics' (1985) 73 *Georgetown Law Journal* 875, 875. Feinman and Feldman were writing about US legal education, but their comments are of direct relevance to Australian legal academics.

Anti-educationalism is often fuelled by an ignorance of educationalist scholarship and objectives. Academics justify their resistance to educationalist initiatives by insisting that they should not – and will not – comply with a regulation that they do not perceive as having a legitimate, rational purpose. Observations by the ADTLs included the following:

> They often do not understand the reasons behind the regulation. [ADTL1]
>
> They haven't received any formal training in terms of pedagogy ... They've sort of learnt on the job, so they don't have any theoretical basis for trying to understand why you might do something this way rather than some other particular way. [ADTL2]
>
> [V]ery often in legal academia we have colleagues who really have no idea about quality practice in learning and teaching and yet they believe that they know it all. … 'What can an educationalist tell me for heavens sake? I'm a lawyer. I know my work. I know how to teach students. I'll stand in the class and give them stories and anecdotes and that's good teaching.' They just seem to be trapped into a mindset which precludes them from recognising that their own teaching practice is often severely limited. [ADTL5]

The traditional reluctance by legal academics to engage with education scholarship – or to even discuss their teaching – has long been noted. As Karl Llewellyn put it in his 1935 article, 'On What is Wrong with So-Called Legal Education':

> But as to method of teaching – there we balk at communication, we balk at analysis. This is idiocy, plain and drooling.[232]

VI Conclusion

This paper has examined resistance by legal academics to university and faculty teaching initiatives. Collective teaching initiatives are resisted by many legal academics who engage in resistant practices ranging from active resistance to passive resistance. The extent of these resistant practices varies from school to school: in some law schools they are relatively rare and it appears that most of the academics are willing to cooperate with teaching initiatives, while in other schools they are far more widespread. The resistant discourses that inform these resistant practices include discourses of academic freedom, where legal academics insist upon being left alone to decide for themselves how best to teach their subjects; academic identity, where academics insist upon identifying as researchers and disciplinary experts rather than teachers and educators; and anti-educationalism, where resistant academics explicitly oppose educational theory and question its relevance to the teaching of law.

Resistance to teaching innovation can never be abolished within a law school, nor should it: it seems appropriate, if not unavoidable, that any discourse within the academy – even one with apparent pedagogical merits – be questioned, challenged and even opposed by alternative discourses and points of view. However, any such conflict should be characterised by an informed debate. Both the policy makers and the academics themselves have an obligation to ensure that debates about the regulation of teaching are informed by at least some familiarity with the educational literature, even if the principles espoused by that literature are not accepted as decisive. Anti-educationalism that is an unthinking reaction to efforts to regulate teaching or is a result of ignorance of educational scholarship and principles has no place within the legal academy.

[232] Karl Llewellyn, 'On What is Wrong With So-Called Legal Education' (1935) 35 *Columbia Law Review* 651, 677.

Addressing Human Rights by promoting a pro bono ethos in Law School Curriculum

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Lawyers working in a voluntary capacity make a valuable contribution to human rights causes, whether through acting directly on a pro bono basis, working in community clinics, making contribution to public debate or through contribution to law and policy reform. Accordingly, law schools have an important role, in addition to ensuring students have knowledge of human rights issues, in enabling law graduates to develop an awareness and sensitivity to the values that underpin the principles of ethical conduct including a commitment to undertaking pro bono legal work and community service. It is not clear how this responsibility can be best fulfilled, however, this paper argues that students' values and commitment to community service can be influenced by undertaking service-learning as part of their course.

This presentation will explore how service-learning can contribute to the development of a pro bono ethos in law graduates. First it will define pro bono and the legal professional obligation to provide pro bono services. Next it will consider the obligation of law schools to inculcate a pro bono ethos in law students and how that obligation might be fulfilled. It will then discuss a service-learning project subject piloted at Queensland University of Technology (QUT) in 2012 as a case study example. The paper will conclude that early indications suggest that service-learning can impact on students values, however, further research is required in order to support this conclusion.

Pro bono comes from the latin phrase "pro bono publico" which means for the public good and is essentially work performed for the benefit of the public (which may mean for the benefit of the client who is a person otherwise unable to obtain access to justice) rather than for the benefit of the lawyer doing the work. (McLeay, 2003, p.39) The broad definition of pro bono generally accepted in Australia is that provided by the Law Foundation of New South Wales:

Pro bono legal services are services that involve the exercise of professional legal skills, and are services provided on a free or substantially reduced fee basis. They are services that are provided for:

- people who can demonstrate a need for legal assistance but cannot afford the full cost of a lawyer's services at the market rate without financial hardship;
- non-profit organisations which work on behalf of members of the community who are disadvantaged or marginalized, or which work for the public good;
- public interest matters, being matters of broad community concern which would not otherwise be pursued; and
- the improvement of the laws or legal system in a manner which will benefit marginalized or disadvantaged individuals or groups.

Pro bono includes legal services given to organisations working for disadvantaged groups or for the public good, and can also include services given for the benefit of legal education and law reform. (Anderson & Renouf, 2003, p.14)

Lawyers may be motivated to undertake community service, including the promotion of human rights and carrying out pro bono work, by a variety of factors including personal

satisfaction, career advancement, employer policies and a sense of professional obligation. (Rhode, 2008, p.1440) Such sense of professional obligation may arise from a lawyer's own sense of professional identity or from professional regulation. Parker (2001) argues that, regardless of motivation, there is a special obligation on lawyers to serve the community which arises from their ethical and social responsibility "because they are under a moral obligation arising from the work they have chosen to do". (p.12) During the 1990s there was a renewed "awareness by lawyers of the importance of the professional obligation of providing pro bono legal services to the disadvantaged and an entrenchment of the ideal of law as a form of public service." (McLeay and Hillard, 2004, p.14) McLeay argues that while a commitment to providing pro bono legal services is fundamental to the legal profession, lawyers' professional obligations go further and extend to active engagement in public debate about society, renewed focus in legal education on legal ethics, engagement in dialogue about law firms' position as corporate citizens and commitment to access to justice and equality under the law. (McLeay, 2001)

The obligation to promote justice and in some cases to undertake pro bono legal work is generally included in lawyer's professional conduct rules. For example, the preamble to the American Bar Association's Model Rules of Professional Conduct declares, "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.' Further, rule 6.1 of the ABA's Model Rules of Professional Conduct asks that lawyers "aspire" to provide at least fifty hours of pro bono work each year or the financial equivalent. In Australia, there is no equivalent regulatory provision, however in 2009 the National Pro Bono Resource Centre introduced the National Pro Bono Aspirational Target. The Target is a voluntary target that law firms and individual lawyers can sign up to, agreeing to aspire to provide at least 35 hours of pro bono legal work per lawyer per year. As at 30 June 2012 the Target had 95 signatories, including 62 law firms. (National Pro Bono Resource Centre, 2012)

Given the professional obligation of lawyers to promote justice and equal access to justice, Law Schools have an obligation to instil in students an understanding of that obligation; and ideally, Law Schools should also seek to promote in students a commitment to pro bono as a legal professional value. As suggested by the Carnegie Report, "the essential goal [of legal education] is to teach the skills and inclinations along with the ethical standards, social roles, and responsibilities that mark the professional." (Sullivan, 2007, p.28) The Report goes on to ask "How can law schools best teach that sense of public responsibility, indeed, public service that the American Bar Association uses to frame its own discussion of model rules? ... How is legal education best bale to combine education in law's formal knowledge and techniques with a spirit of ethical engagement?" (p.129)

In Australia, the Australian Law Reform Commission (2000, at 5.20) and the National Pro Bono Task Force (2001, p.30) both recommended that law schools should encourage and provide opportunities to law students to undertake pro bono work as part of their academic or practical legal training requirements. Further, the Council of Australian Law Deans Standards for Australian Law Schools include a requirement that Law School curriculum include knowledge of ethical responsibility including pro bono obligations and further provide that law schools should seek "to engage with the wider community by encouraging its staff and students to use their knowledge and skills for the benefit of the community in outreach programs, including for example, and so far as practicable, clinical programs, law reform, public education, and other forms of pro bono community service" (9.6.2). As a result, universities and the legal profession are considering whether legal education should incorporate formal pro bono education. (Tranter, 2002)

Given the obligation of Law Schools in relation to pro bono values: the question is how should the curriculum respond to this challenge? It is not clear how law school curriculum

can successfully inculcate a pro bono ethos; indeed there is debate about whether legal education can impact on the values of graduate lawyers in this way at all. (Tranter, 2002, p.13) It is clear however that "Law schools play an important role in shaping their students' values, habits of mind, perceptions, and interpretations of the legal world, as well as their understanding of their roles and responsibilities as lawyer and the criteria by which they define and evaluate professional success." (Sullivan, 2007, p.139)

Often, law schools seek to teach these aspects of legal professional responsibility through clinical legal education and public interest law internships. Published research provides mixed reports in relation to the effectiveness of clinical legal education in developing pro bono values. It appears that at present there is no concrete evidence of a straightforward link between student experience with work in legal clinics and a corresponding change in their attitude supporting such clinics and pro bono work. (Evans, 2001) Linkages between student experience in legal clinic and their attitude to pro bono work are complex and need to take into account a number of different variables such as intelligence, emotional maturity, and supervision techniques. (Evans, 2001) The effectiveness of the experience in influencing students' values may also depend on "how supportive the school's overall culture is of such experience and how well integrated it is into the students' developing understanding of what it is to be a lawyer. Significantly, positive experiences with pro bono work were often part of clinical-legal courses." (Sullivan, 2007, p.139)

Despite these complexities, Goldfarb (2002) argues that legal clinical education provides a sense of professional purposes, "the prospect that professional identity can serve a public good greater than oneself ... that can enable law graduates to thrive in their professional lives and to contribute at the same time to the thriving of others." (p.283) Goldfarb further argues that the clinical method of instruction provides an opportunity for law students to focus on the role of lawyers i.e. "the habits of thought and behaviour that lawyers need to effectively perform their professional responsibilities." (p.293) The pedagogy of personal and social responsibility that underpins legal clinics enables professional values of service for the public good to be explicitly "identified and discussed, [as] they emerge experientially from work that advances these values."

A key challenge in relying on legal clinics is their resource intensive nature and in some law schools it may be difficult to provide a clinical experience for all or even a significant proportion of law students: "Providing an intense and productive clinical experience for students needs to be balanced with making such experiences available to as many students as possible." (Giddings, 2008, p.5) Legal clinics generally cater for only a small number of students and there are more students seeking clinic work than there are places available for them. (De Brennan, 2005)

The challenge then, for large law schools in particular, is to apply the clinical pedagogy focussing on personal and professional values of service in settings which transcend the resource limitations of legal clinics. Law schools seeking to instil a pro bono ethos in graduates need to consider alternatives to clinical legal education as a means of fostering a commitment towards pro bono work in law students. (McCrimmon, 2001) Law schools should not follow a single model but should consider institutional strategies in addition to the development of clinical programs such as integrating public interest perspectives into core curriculum courses. (Befort and Janus, 1994, pp.19-20) According to the Carnegie Report an intentionally developed student experience which integrates curriculum, legal clinics, extra-curricular activities and the moral culture of the institution can form the basis for "a powerful developmental experience.' (Sullivan, 2007, p.140)

One possibility to promote a pro bono ethos within curriculum is through placement, internship or externship experiences. For example, at QUT the Law School has for a number

of years offered three placement subjects: LWB420, public sector internship; LWB421, student organised placement and LWB422, virtual placement. The key features of LWB421 are: students are primarily responsible for their own learning; students organize their own placements in a legal office under the supervision of a practicing lawyer; the workplace supervisor has the primary role in supervising the student and providing learning opportunities; work placements are widely dispersed in a variety of legal offices; the learning focus is on the work experience; academic supervision is by a range of assignments connected to the internship experience (such as reflective journals); academic/supervisor contact is generally by phone and written communication rather than site visits; a community service mission is not a requirement of the program; and more students may participate in internships because supervision is centered on the workplace supervisor.

In LWB420 students undertake a placement at a government agency or community legal centre. While the placement is organised by QUT, the subject is similar to LWB421 in that students are primarily responsible for their own learning and the workplace supervisor has the primary role in supervising the student and providing learning opportunities with the learning focus being the work experience. While a community service mission is not an element of the program, a student learning outcome, which is assessed is to: "Appraise social, professional and ethical issues which arise in a legal workplace in the public or community sector". The number of students is limited by the number of available placements in appropriate agencies.

LWB422 is a simulation internship course which uses online technology to facilitate the work experience under the supervision of real world workplace supervisors who have specialist expertise in their particular area of practice. The supervising lawyers are a mix of lawyers from private law firms and from community legal organisations.

While none of these subjects had the development of a pro bono ethos as an intended learning outcome, due to the nature of the placements, student discussions and reflections often focus on the importance of pro bono and other social justice issues. Accordingly the possibility of experiential subjects addressing the need for the curriculum to promote community service values and the pro bono ethos became clear.

In 2012 QUT expanded its suite of experiential subjects by offering a service- learning subject, LJB301, in which students work in groups on projects in partnership with community organisations. The student learning outcomes for the subject are:

1. Apply discipline specific and professional knowledge and skills to a real world community group or issue.
2. Reflect on your ability to address social justice needs and to communicate in a diverse environment.
3. Work as part of a team in a multi-disciplinary context.
4. Evaluate and reflect upon you own performance to establish and implement personal learning strategies.
5. Reflect on the need for change in society and generate ideas for change and solving problems.
6. Reflect on your civic responsibility and obligations as a member of your future profession.

In service-learning students undertake community service while engaging in reflective practice in relation to their learning during the service. The hyphen in service-learning is said to represent the reflective practice that links the service and the student's learning. Reflective practice is essential to student learning outcomes and to the development of pro

bono values. In this sense the legal clinic pedagogy of personal and professional service is retained and becomes the focus of student learning in the subject.

An advantage of service-learning projects is that it is not necessary that the community partner is a legal organisation or that it has lawyers working for it. Accordingly the range of projects and community organisations that students can work with is substantial. The community partner identifies an issue or problem through its work with community that it needs to be addressed and presents the problem to the students. Ideally the problem is open ended and students work with the organisation to decide how it will be addressed.

The size and composition of the groups of students on each project in LJB301 varies. The group size ranges from three up to seven and is dependent on the capacity of the community organisation, the nature of the project and the degree of student interest. Some groups consist entirely of law students and others involve students from a mix of disciplines. While students design and work on their projects independently, promoting engaged and active learning, each group is allocated an academic supervisor who provides guidance. Further, community partners provide input into the design of the project and feedback on the project work undertaken. Class time is minimal and includes workshops on reflective practice and community engagement. Project work is undertaken by students at times agreed to within the group, however classes are timetabled to facilitate group work if necessary.

The assessment in the subject comprised:

- Group project plan
- Project presentation
- Four individual reflections.

The assessment focuses on the community engagement rather than the outcomes of the project itself. While this is somewhat controversial, most students come to appreciate that what is important is the learning related to the community service rather than the project itself. After completing the subject students report being intrinsically motivated to complete the project and address the needs of the community partner without the necessity to comply with assessment requirements.

What is crucial to student learning in relation to the professional responsibility to undertake community service is the reflective practice. Through the reflective process, students identify their own values and beliefs, confront prejudices and bias and consider alternative perspectives. In reflecting on their values and beliefs, students often confront their own assumptions and this can lead to a truly transformational learning experience.

For each of the individual reflections students are given a number of readings relevant to the social justice issue underlying their project and assigned reflective questions as a stimulus.

The subject utilised the 4R's Model of Reflective Thinking which involves four stages of reflection developed by Carrington and Selva (2010) and adopted by the Australian Learning and Teaching Council funded *Developing Reflective Approaches to Writing* (DRAW) project.[233] The 4R's Model conflates the model developed by Bain, Ballantyne, Mills and Lester (2002) which relies on a 5Rs framework of Reporting, Responding, Relating,

[233] The 4R's model of reflection was developed by the Australian Learning and Teaching Council funded DRAW project. Further information in relation to the model and teaching resources are available at: https://wiki.qut.edu.au/display/draw/Home

Reasoning and Reconstructing. The levels increase in complexity and move from description of, and personal response to, an issue or situation; to the use of theory and experience to explain, interrogate, and ultimately transform practice. (Bain et al 2002) Carrington and Selva combined the two lower level components of Bain et al's 2002) model into the single category of Reporting and Responding as these two categories only require learners to recount their experiences rather than engaging in reflective practice.

The 4Rs's model is:**Level Stage Questions to get you started**

1. **Reporting** and Responding
   Report what happened or what the issue or incident involved.
   Why is it relevant?
   Respond to the incident or issue by making observations, expressing your opinion, or asking questions.

2. **Relating**
   Relate or make a connection between the incident or issue and your own skills, professional experience, or discipline knowledge.
   Have I seen this before?
   Were the conditions the same or different?
   Do I have the skills and knowledge to deal with this? Explain.

3. **Reasoning**
   Highlight in detail significant factors underlying the incident or issue.
   Explain and show why they are important to an understanding of the incident or issue.
   Refer to relevant theory and literature to support your reasoning.
   Consider different perspectives. How would a knowledgeable person perceive/handle this?
   What are the ethics involved?

4. **Reconstructing**
   Reframe or reconstruct future practice or professional understanding.
   How would I deal with this next time?
   What might work and why? Are there different options?
   What might happen if...?
   Are my ideas supported by theory?
   Can I make changes to benefit others?

For early reflections students are provided with guiding questions for each of the stages of reflection specifically relevant to the topic. A developmental approach is taken with more guidance given for earlier reflections and a more open ended approach taken to the final reflection. The assessment is rigorous, and is graded on the usual scale, with set criteria for marking which relate to the 4R's Model of Reflective Thinking.

For example, one of the community partners, Kyabra Community Association, provides temporary accommodation to young men and boys who are from significantly disadvantaged backgrounds and have difficulty adjusting to living together in a community. The problem is very open ended: there are many different ways it might be addressed and it is not realistic to expect it to be solved by a single group of students. One group of students, predominantly from the QUT design school undertook a project to redesign the living space. A group of law students tackled the issue of educating the young boys and men about their legal rights and responsibilities. The law students decided to create a DVD

that would be a lasting resource. Although they received assistance from film students in the QUT Creative Industries faculty they soon found that producing a DVD of professional quality in one 13 week semester was not possible. So they decided to focus on writing a script for the DVD instead, leaving the film production for the next group of students. The challenge of communicating about the law in language that could be understood by the community for whom the video was aimed was a key learning experience.

Another group of students worked on a project in partnership with the Anglican Diocese of Brisbane regarding community education about the importance of constitutional reform to recognise Aboriginal and Torres Strait islander sovereignty. The background to the project was that the Australian government had committed to holding a referendum at the next Australian federal election to amend the Constitution to include recognition of the sovereignty of Australian Aboriginal and Torres Strait Islander people. Given the historical lack of success of referendums for constitutional change in Australia, there is real concern that without widespread community education about the need for change and why recognition of Aboriginal sovereignty is important any referendum would be likely to fail. The Anglican Diocese had made a submission in support of the change, but was concerned about the level of understanding of the issue amongst its parishioners and in the country generally. They requested students to undertake a project to assist with educating the community. Again, there are many ways this problem can be addressed and different communities who might be target groups. Students in this group included a psychology student who developed a survey to gauge current levels of community understanding of the issue.

Students in the first semester undertook the research necessary to understand the legal and social issues in order to develop a community education program. Students on second semester are continuing the project, delivering the education program in an Anglican High School.

Another group of students worked on a project with the Refugee and Immigration Legal Service (RAILS). RAILS is a community legal centre that provides legal assistance to refugees and immigrants in Australia. The group undertook research in relation to the impact on refuges family reunion cases of the decision of the High Court of Australia in *Sayed Abdul Rahman Shahi v Minister for Immigration and Citizenship* [2011] HCA 52 that an applicant will not be considered ineligible where they have become unable to meet the criteria for immigration due to the Department's delay. Students undertook research in relation to the relevant law and analysed RAILS case files to identify any clients who might be affected by the decision.

Other projects have included issues facing long term prisoners and their families and the impact of environmental laws and land use regulation on communities impacted by mining activities.

The subject was evaluated through a survey and focus groups. So far our evaluation suggests that the service-learning pedagogy has been successful in developing students' values in relation to community service. In particular, students were very positive about the benefit of the reflection in helping them to understand relevant issues more deeply and to consider the perspective of the community members they were seeking to assist.

Many students undertaking the subject reported feeling disillusioned with their legal studies prior to taking the subject and having found new motivation to finish their degree and to seek legal work. One student commented:

> "Doing this [Kyabra project] makes me excited about law again."

Others who are committed to careers in commercial legal practice or as barristers, reported that while there career goals have not changed they now understand the need to balance their careers with continued community service:

> "I ideally want to end up working in corporate law.. Through the reflection process I realised that (corporate law and social justice) were not mutually exclusive, and there are ways that I can effect a positive change in the community and the people I will deal with directly."
>
> "Prior to enrolling in the program I had a very 'corporate-mindset' regarding my prospective future career ... however, I have come to realise that I can use my position to assist the disadvantaged."

While further research is needed including a longitudinal study of the impact of service-learning on values and future action in relation to the provision of pro bono and community service, the initial results suggest that service-learning can have a positive impact on the inculcation of a pro bono ethos.

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Humanizing pedagogy and the role of law schools in promoting human rights education: A case study of the Nelson Mandela School of Law

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The current eight-year strategic plan of the University of Fort Hare enjoins all academic faculties to strive towards, *inter alia*, an overall strategic goal of achieving scholarly excellence. To this end, the University has adopted the concept of humanizing pedagogy as a strategic driver of an integrated approach towards its academic functions. This paper seeks to explore various institutional endeavours to flesh out the meaning(s) of humanizing pedagogy as a concept and how this concept is being embedded as a critical element of a teaching philosophy in the provisioning of human rights education.

1. Introduction

From the year 2004, South Africa begun a major restructuring of higher education institutions by merging and incorporating 36 public universities and technikons into 23 large institutions classified into three main university types. Eleven universities classified as traditional universities offer theoretically-oriented degrees while six universities of technology (hitherto known as technikons) offer vocational oriented diplomas and degrees. A mix of both types of vocational and theoretical oriented qualifications is offered at the other six comprehensive universities. To compensate the two provinces that do not have universities, the government has established two National Institutes for Higher Education to be developed into full blown public universities by 2014. Besides these 23 public universities, there are 115 private higher education providers as at 2012. Human rights education, as an integral component of the basic LLB curriculum, is provided by all law schools or faculties at the seventeen traditional and comprehensive universities.

Like all academic faculties, the Nelson Mandela School of Law's mode of delivering human rights education occurs within the institutional as well as national higher education context which Boughey has aptly described as 'dehumanising'[234]. Numerous factors such as the increasing massification of tertiary education, executive managerialism of universities as well as technological explosion seem to have combined to 'squeeze[ ] out the humane'[235] from what used to be a cool university life experience for both staff and students a couple of decades ago.

2. Humanising pedagogy at the University of Fort Hare (UFH)

Since 2006 the UFH has been toiling with the concept of humanizing pedagogy as an institutional and strategic response to mitigate the impact of a dehumanizing environment in the academy. The UFH Strategic Plan 2009 – 2016 (SP 2009 - 2016) identifies, inter alia, an overall strategic goal of achieving scholarly excellence. To this end, the University commits itself to an integrated approach towards teaching and learning, research and community engagement underpinned by a humanizing pedagogy.[236] In terms of the strategic plan "humanizing pedagogy allows for the engaging of critical dialogue with students and other partners as equals; recognizing and respecting the values, ideas, needs

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[234] C Boughey 'Humanising Pedagogy in a Dehumanising HE Context' a Powerpoint Presentation at the University of Fort Hare Faculty of Education Conference on Humanising Pedagogy on 10 October 2011.

[235] G Watt 'The Soul of Legal Education' [2006] 3 web JCLI 1 – 11 at 3.

[236] SP 2009 – 2016 p.32

and histories of our communities, the co-evolution of teaching and learning, research and community engagement in areas which complement our identify as an African university; while at the same time ensuring an internationally recognized culture of scholarly excellence".[237]

3. Integrated Transformation Plan

In 2011 UFH adopted the Integrated Transformation Plan with a view to driving critical transformation objectives linked to the UFH SP 2009 – 2016. Humanizing pedagogy in practice was one of the key transformation strategic drivers that was identified. A campaign for conceptual awareness, implementation guidance and demonstration was to be launched as a matter of urgency. These campaign activities culminated into the UFH Transformation Charter Workshop held in 2011.

Two key outcomes of the transformation workshop were :

3.1 A socially useful definition of a transformative curriculum and humanizing pedagogy leading to the following:

(a) Humanizing pedagogy
- (i) Conscious of and sensitivity to social needs
- (ii) Appreciation of diversity and multi-culturality
- (iii) Place students at the centre
- (iv) Student centred process
- (v) Mentoring and coaching
- (vi) Responsive and relevant product of pedagogy.
- vii) Integrating values of *UBUNTU*

3.2 The infusion or entrenchment of the UFH Charter of Principles and Values into the institutional culture

i To ensure that the universal values of justice, integrity, discipline, love, kindness, non-injury and concern for the wellbeing of others shall serve as a source of our thought, speech and action.

ii To respect and affirm the dignity, equality, freedom and rich cultural diversity of all human beings as the basis for peace and social justice.

iii To commit ourselves to the pursuit of truth, intellectual honesty, openness to ideas and excellence through the attainment of the highest professional through the attainment of the highest professional and ethical standards in teaching, learning, research and community engagement.

iv To endorse and encourage the endeavor for academic success as being critically linked with the striving towards an ever-deepening expression of our humanity.

v To uphold and honour the dignity of the University, to preserve its heritage, spirit and assets and to observe its stature, rules and regulations as well as the laws of the country.

vi To encourage an orientation of imaginative, collaborative, problem-solving and entrepreneurial thinking in addressing the challenges that we face.

vii To be responsible staff members and caring mentors in all our dealings with students and with one another.

viii Not to discriminate, directly or indirectly on the grounds of birth, race, colour, national, ethnic or social origin, gender, age, illness or disability, language, culture, political or other opinion, religion, conscience, belief, marital status, pregnancy or sexual orientation.

[237] Ibid

ix To be ever conscious of the need to develop a responsible relationship with the earth and to understand our critical role to protect and to preserve it for future generations.

x To undertake teaching and research that will responsibly harness the benefits of all the sciences for the wellbeing of humanity, being conscious of the harm inherent in the irresponsible use of knowledge.

4. Expanding the conception of humanizing pedagogy to a humane and humanizing culture.

In February 2012 during the official opening of the UFH, the Vice-Chancellor, Dr. M. Tom put his finger on what he called the 'humane and humanizing approach to academic and non-academic administration' at Fort Hare. According to Dr. Tom the realization of this culture still remains a challenge that we should all deal with. He lamented that many complaints still reach his office about how we deal with each other via emails and direct communication, be it in offices or in lecture halls. He finally charged Deans to ensure that the concept of humanizing pedagogy is understood by all. During the launch of the new Centre for Transdisciplinarity Studies at UFH on 27 March 2012, the founding Director, Dr. P.M. Mahlangu, also attempted to unpack the concept of humanizing pedagogy by identifying the following elements of the concept :

i Is peer centered
ii Is rooted in processes of dialogue and meaning making
iii Raises the bar of self-discipline and accountability
iv Focuses on the praxis that combines new knowledge with meaning making through learning cycles, action and reflection
v Recognizes the diversity of knowledge and experience of students and learners
vi Seeks to build bridges and scaffolds between knowledge's, the history of ideas, discourses and literacies
vii Grapples with the tension between the local and the global in the production of knowledge
viii Seeks to build bridges between knowledge and the contemporary struggles and choices of people's lives.

5. Concluding remarks

Three major observations flow from the above discussion. First, what was initially perceived as the concept of humanizing pedagogy in 2006 at UFH has not only eluded a precise scientific definition but has evolved into a conception beyond a lecturer-student relationship in the classroom situation into a broader institutional culture which Dr. Tom prefers to call a 'humane and humanizing approach to academic and non-academic administration' at UFH. The challenge however is for each member of the university community to internalize, own and operationalize this broader conception of a humane and humanizing relationship with each other within the community of academic, non-academic staff and students *inter se.*

Second, the Nelson Mandela School of Law has embraced this conception of humanizing pedagogy and has embedded it as an enabling tool in the implementation of a humanizing educational philosophy. To this end, a special Teaching and Learning Workshop was held in June 2012 to interrogate and tease out the extent to which the teaching portfolio of each academic staff member speaks to humanizing pedagogy as tenet of our teaching philosophy. It was encouraging to note that a majority of staff had complied and embedded the concept as an element of our teaching philosophy not only in the human rights courses but throughout all the courses in the LLB curriculum.

Finally, it seems that the ongoing search for the true meaning or interpretation of the concept of humanizing pedagogy continues unabated not only at UFH but even beyond. For instance Tisani[238], who has a preference for the term 'humanizing education' rather than that of 'humanizing pedagogy', argues that 'humanizing education should give full recognition to learners and educators rather than foregrounding content over and above humans' and that in a democratic society, the traditional authority of educators is mitigated by a broader Human Rights culture'.

[238] N C Tisani '*Ukubeleka* as a methodical approach for humanizing education in higher education' an unpublished paper read at the University of Fort Hare faculty of Education Conference on Humanizing Pedagogy on 10 October 2011. Similarly, the African concepts of *Ubuntu, Batho Pele* and African humanism provide normative tools for managing people in a much more humane manner.

The Human Rights Clinic of FGV Direito Rio: an innovative experience in Brazil

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Introduction

Among the 1.200 Law Schools that exists in Brazil, only two offer clinical activities: Fundação Getulio Vargas Law Schools in Rio de Janeiro and São Paulo (FGV Direito Rio and Direito GV, respectively). In this sense, the clinical programs of FGV constitute an innovative experience in the country. This paper will focus in one of them: the Human Rights Clinic of FGV Direito Rio.

Launched in 2009, the program is structured so as to enable students to deal with concrete cases of human rights violations as well as to act and positively interfere in cases that are being analyzed by the Inter-American Court of Human Rights ("Court") and the Inter-American Commission on Human Rights ("Commission"). In a country where Human Rights is not a compulsory course in the vast majority of the Law Programs, the Human Rights Clinic innovates in a double sense: as a clinical program *per se* and for enhancing human rights study by using its theory as an instrument for working with concrete cases.

From 2009 to 2012, the Human Rights Clinic has developed five memorial briefs to both organs. In this work, we are going to analyze four of them, since they were the ones that were developed under my supervision. Among the four briefs, only one is not related to a Brazilian case. However, we chose the case in virtue of its importance: it is the first case admitted by the Commission that demonstrates that environmental contamination can lead to human rights violations of non-indigenous community. With respect to the other three, two were submitted to the Court and the other to the Commission. It is important to highlight that the Court expressly referred to the briefs in both decisions, which revealed the potential impact that the briefs can have in concrete cases.

In order to reveal this experience, the paper is structured in two parts. The first one will be destined to exploring the objectives and the program of the clinic while the second part will focus on the briefs and cases. In the end, we hope to demonstrate that dealing with real cases can contribute to human rights teaching as well as stimulate students to work with human rights issues after they graduate.

I. The Human Rights Clinic: Objectives and Program

At FGV Direito Rio, all clinical programs need to have a partner institution in order to function. In this sense, the Human Rights Clinic worked with two institutions while elaborating the briefs: Global Justice, in Brazil, and the Center for Human Rights and Environment (*Centro para los Derechos Humanos y el Medio Ambiente* - CEDHA), in Argentina[239]. Global Justice was one of the petitioners of the Brazilian cases and CEDHA was the petitioner in the Peruvian case.

The three main objectives of the Clinic are: (i) enable students to deal with concrete cases of human rights violations that are submitted to the Inter-American Human Rights System; (ii) allow students to develop a critical thinking and engage on contemporary

[239] FGV Direito Rio Human Rights Clinic developed the activities described in this paper while I was the Professor in charge of the clinic. Today, Celina Beatriz Mendes de Almeida conducts the Human Rights Clinic. Her students have just developed a brief to the Inter-American Court in partnership with the Human Rights Program of Harvard Law School.

human rights issues that are being discussed in Brazil and in the international sphere; (iii) instill in students the awareness of justice regardless of the profession that they will choose.

In order to achieve these objectives, the program was structured as follows. Each memorial brief was elaborated during one semester, with 15 classes. The group of around ten students would have a two-hour class per week with the Clinical Professor. The class was destined for students to clarify certain aspects of what they were assigned to research or for a representative of the partner institution to give them further details on specific issues. Each student was responsible for researching material and writing part of the brief. In this sense, the last three sections were left for final remarks and adjustments.

The main challenge in all briefs was to organize students in such a way that they were able to elaborate the brief in one semester. The tasks and schedule had to be very well settled in the first day of class. Moreover, we would briefly discuss in each class the next steps in order to make sure that everyone was developing their activities as planned. In the end, all students did deliver the tasks in a timely manner.

II. The Memorial Briefs to the Inter-American Court and Commission

Up to now, the Inter-American Court of Human Rights has found the Brazilian State responsible for human rights violations in only four cases: Ximenes Lopes vs. Brazil; Escher and others vs. Brazil; Garibaldi vs. Brazil; and Gomes Lund and others vs. Brazil. The Human Rights Clinic of Getulio Vargas Foundation Law School in Rio de Janeiro (FGV Direito Rio) wrote memorial briefs to the Court with respect to two of the four cases: Escher and others vs. Brazil and Garibaldi vs. Brazil.

The first case is about the illegal interception of telephone lines of some members of two organizations linked to the Landless Workers Movement (*Movimento dos Trabalhadores Sem Terrra*). According to the Inter-American Commission on Human Rights ("Commission"), the application refers to the alleged interception and illegal monitoring of telephone lines of Arley José Escher, Dalton Luciano de Vargas, Delfino José Becker, Pedro Alves Cabral, Celso Aghinoni, and Eduardo Aghinoni, members of the organizations Communitarian Association of Rural Workers (*Associação Comunitária de Trabalhadores Rurais* – ADECON) and Agriculture Co-op of Conciliation (*Cooperativa Agrícola de Conciliação Avante Ltda* – COANA), carried out between April and June 1999 by the Military Police of the state of Paraná; the disclosure of telephone conversations, and the denial of justice and compensation"[240].

On December 20, 2007, the Commission submitted a case to the Court against Brazil, which originated in the petition filed on December 26, 2000 by the National Network of Popular Lawyers and Global Justice on behalf of the members of the. COANA and ADECON.

In the application, the Commission requested the Court to declare that the State was responsible for violation of Articles 8.1 (Fair Trial), 11 (Protection of Honor and Dignity), 16 (Freedom of Association) and 25 (Judicial Protection) of the American Convention on Human Rights, in relation to the general obligation to respect and guarantee human rights and the duty to adopt domestic legal provisions, respectively provided in Articles 1.1 and 2. The Commission requested the Court to order the State to adopt specific measures of reparation.

On May 15, 2009, the Human Rights Clinic submitted a memorial brief to the Court with respect to two points: (i) the legal remedies available to the victims and their

[240] Inter-American Court of Human Rights. Escher and others vs. Brazil. Sentence of July 6, 2009 (preliminary exceptions, merit, reparations, and costs). Paragraph 2. Available at: http://www.corteidh.or.cr/.

conformance with national and international case law; and (ii) the illegal character of the interception. In relation to the first point, the State alleged that the victims had not used the correct remedy and, therefore, that the Court should not admit the case. In this sense, the brief analyzed the available remedies in Brazil demonstrating that the victims used the correct ones. With respect to the second element, the brief analyzed who, according to the law, had the competence to request the interception of telephone lines. It affirmed that even though the competent authority had authorized it, the Military Police did not have the competence to request it and, therefore, the interception should be considered illegal.

In its decision, the Court found the State responsible for the alleged violations. Moreover, it expressly highlighted having received the memorial brief and namely stated all the students that elaborated the brief[241]. This was an important recognition as it demonstrated that students can certainly contribute to clarify certain aspects of the case that lack development.

The second case, Garibaldi vs. Brazil, is referent to the murderer of rural worker Sétimo Garibaldi in the state of Paraná, in 1998. On December 24, 2007, the Commission submitted to the Court a lawsuit against Brazil, which originated from a petition filed on May 6, 2003, by the NGOs Global Justice, the National Network of Popular Lawyers (*Rede Nacional de Advogados e Advogadas Populares)* and Landless Workers Movement on behalf of Sétimo Garibaldi and his family[242].

On March 27, 2007, the Commission issued the Report on Admissibility and Merits No. 13/07 with certain recommendations for the State. Brazil was notified of this report on May 24, 2007. The State had two months to inform the actions taken in order to implement the recommendations of the Commission. Despite a deadline extension granted to the State, it did not submit any information to the Commission. Hence, the Commission decided to refer the case to the jurisdiction of the Court, considering that it represents an important opportunity for the development of the Inter-American case law on State duty to criminally investigate extrajudicial executions in order to apply the rules and principles of international law as well as to combat impunity.

According to the Commission, the claim relates to the alleged responsibility of the State arising from breach of the obligation to investigate and punish the execution of Sétimo Garibaldi, which occurred on November 27, 1998, during an extrajudicial operation to evict families of landless workers who occupied a farm located in the Municipality of Querencia do Norte, in the state of Paraná.

The Commission requested the Court to declare the State's responsibility for violation of Articles 8 (Fair Trial) and 25 (Judicial Protection) of the American Convention, in relation to the general obligation to respect and guarantee human rights and its duty to adopt legislative and other measures at the domestic level, respectively provided in Articles 1.1 and 2, as well as violation of Article 28 (federal clause) in detriment of Iracema Cioato Garibaldi, Garibaldi's widow, and his six children. The Commission requested that the Court ordered the State to adopt specific measures of reparation.

On May 15, 2009, the Human Rights Clinic of FGV Direito Rio presented a memorial brief to the Court in relation to two aspects: (i) State's breach of the duties to criminally investigate the murder of Garibaldi when the Public Prosecutor demanded the police inquiry to be archived for lack of evidence; (ii) the context of rural violence in Brazil. With respect to the first one, the brief demonstrated that even though the police inquiry was archived in 2004, there were substantive evidences since 2000 for the Public Prosecutor to file a

[241] Inter-American Court of Human Rights. Escher and others vs. Brazil. Sentence of July 6, 2009 (preliminary exceptions, merit, reparations, and costs). Paragraph 10. Available at: http://www.corteidh.or.cr/.
[242] Inter-American Court of Human Rights. Garibaldi vs. Brazil. Sentence of September 23, 2009 (preliminary exceptions, merit, reparations, and costs). Paragraphs 1-3.

lawsuit. These same elements were considered "substantial new evidence" nine days before the hearing of the Inter-American Court, resulting in the reopening of the police inquiry on April 20, 2009.

Regarding the second element, the brief highlighted that land issue in Brazil is a very complex phenomenon and that it is surrounded by many serious structural problems. One of them is certainly the concentration of land ownership, which started more than 500 years ago and had no major modifications to the present day, in view of the absence of effective public policy for the decentralization and redistribution of land. As a consequence, rural violence has become commonplace and the government has failed to act to control it. According to data from the Pastoral Land Commission, 1910 rural workers were murdered between 1987 and 2005, with very few cases of judgment and condemnation of such crimes. It was in this scenario that Garibaldi was murdered.

In September 2009, the Court found the Brazilian State responsible for the alleged violations. The decision expressly mentions the memorial brief submitted by FGV Direito Rio Human Rights Clinic and mentioned all students that elaborated it by name[243], demonstrating, once more, that students can in fact interfere on concrete cases.

The Human Right Clinic has also sent memorial briefs to the Commission in two cases: Alcântara Communities vs. Brazil and La Oroya Community vs. Brazil. The first one is about the sociocultural disruption and alleged violation of the right to property and the right to land of Afro-Descendent traditional communities in Alcântara, state of Maranhão. This situation was caused by the installation of "Alcantara Rocket Launch Center" and the consequent expropriation process that has been implemented by the Brazilian government in the region, as well as the failure of the State to give the final titles for those communities (the Brazilian Federal Constitution states that Afro-Descendent traditional communities, called "Quilombolas", have the right to property).

According to the petitioners (representatives of eight communities and the following institutions: Global Justice, Human Rights Society of Maranhão (*Sociedade Maranhense de Direitos Humanos),* Center of Black Culture of Maranhão (*Centro de Cultura Negra do Maranhão),* Association of Black Rural Quilombolas Communities of Maranhão (*Associação das Comunidades Negras Rurais Quilombolas do Maranhão*)*,* Federation of the Workers in Agriculture in Maranhão (*Federação dos Trabalhadores na Agricultura do Estado do Maranhão*), and Global Exchange), the facts constitute violations of human rights guaranteed by the American Convention on Human Rights, more specifically articles 1.1, 8, 16, 17, 21, 22, 25, 26, and the American Declaration of the Rights and Duties of Man, in articles VI, VIII, XII, XIII, XIV, XVIII, XXII and XXIII. On October 21, 2006, the Commission declared the case admissible with respect to the alleged facts and violations of Articles 16, 17, 21, 24, 8 and 25, in conjunction with Articles 1.1 and 2 of the American Convention, as well as Articles VI, VIII, XII, XIII, XIV, XVIII , XXII and XXIII of the American Declaration.[244] The Commission has yet to analyze the merits of the case in order to possibly send it to the Court.

On May 20, 2010, the Human Rights Clinic submitted a brief to the Commission with respect to the State's violation of the following articles of the American Convention: 16 (freedom of association), 17 (protection of the family), 21 (right to property), 22 (freedom of movement), and 24 (equality before law). The brief emphasized the emblematic character of the case as it demonstrated the need of giving a new interpretation to article

[243] Inter-American Court of Human Rights. Garibaldi vs. Brazil. Sentence of September 23, 2009 (preliminary exceptions, merit, reparations, and costs). Paragraph 10.
[244] Inter-American Commission on Human Rights. Report n. 82/06. Petition 555-01. Admissibility Report. Alcântara Communities vs. Brazil. October 21, 2006.

21 (right to private property) in order to recognize the right of some communities to collective property, just as the Court has already decided in similar cases.

The fourth case, the La Oroya Community vs. Peru, was sent to the Inter-American Commission in August 2006 by the NGOs Inter-American Association for the Defense of the Environment (*Asociación Interamericana para la Defensa Del Ambiente*), CEDHA, Peruvian Society of Environmental Law (*Sociedad Peruana de Derecho Ambiental*), and Earthjustice on behalf of the people of La Oroya. At that time, La Oroya was one of the ten most polluted cities in the world. As demonstrated by the petitioners, the population, especially children and pregnant women, was exposed to high levels of lead, arsenic and cadmium because of the industrial activities of the company Doe Run. The petitioners indicated that the government did not provide any information on the degree of contamination of the pollutants, the health impacts on the pollution, and how citizens should behave so as not to get contaminated or diminish the impacts.

In 2009, the Commission admitted the case and considered that the State should be held responsible for the alleged violations of Articles 4 (right to life), 5 (right to humane treatment), 13 (right to freedom of thought and expression), 8 (fair trial), and 25 (judicial protection) of the American Convention, all combined with Articles 1.1 and 2 of the same instrument for their actions and omissions in La Oroya[245]. The analysis of the merits of the case is still pending.

On May 2, 2011, the Clinic presented a brief to the Commission. Its main objective was to demonstrate that the Peruvian State violated the freedom of thought and expression (article 13, American Convention) of the population of La Oroya, in accordance with the requirements laid down in art. 1.1 of the American Convention. This case is emblematic as it is the first one admitted by the Commission that demonstrates the link between environmental contamination and human rights violations. Moreover, it provides a new way of looking at the right to freedom of expression: it highlights its collective dimension, which involves the right to access information of interest to the individual or group, and the state's duty to provide it.

III. Conclusion

The in-depth study of the cases has increased students' awareness of different types of human rights violations as well as of the existence of several internal barriers for the effective protection of human rights. In addition, students learned that they can improve human rights protection by accessing the Inter-American Human Rights System.

In this sense, the development of the four memorial briefs has shown that dealing with concrete cases can enhance students' interest on human rights issues. In fact, the Human Rights Clinic has been an important instrument for training students to become future lawyers in the field as well as for instilling in their minds the urge of taking human rights protection seriously in whatever profession that they choose. As a result, this experience revealed to us that the activities developed at the Human Rights Clinic can strengthen human rights teaching while at the same time contribute to the personal and professional development of the students.

[245] Inter-American Commission on Human Rights. Report n. 76/09. Petition 1473-06. Admissibility Report. Community of La Oroya vs. Peru. August 5, 2009.

Law Schools as Contributors to Public Policy on Human Rights

Law Schools as Human Rights Institutions

Draft

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A human rights institution is one devoted to respect and promote the value of human rights. Can Law Schools become human rights institution? Would that be good? Or, in other words, wouldn't being a human rights institution compromise the core academic values of Law Schools?

There are different types of HHRR institutions. Some are exclusively HHRR oriented institutions, like NGOs working against death penalty, female mutilation, torture or socioeconomic injustice. Some public intitutions, like the public defense, also belong in this category. Others are mainly HHRR oriented, which means that they are supposed to pursue HHRR values among others, though given their intrinsic weight, HHRR values may often trump other aims. An example is the judiciary, where human rights considerations are combined with other considerations, like formalistic requirements or arguments of efficiency. In mainly HHRR-oriented institutions, human rights are not the exclusive aim, but they are the prevailing ones.

Law Schools are strong candidates to be considered as HHRR institutions in the second sense. A growing part of their curriculum is directly related to human rights. In particular, HHRR standards have been positivized in the last decades at an increasing rate, and therefore considered without resistance a proper subject of study. HHRR courts, commissions and bodies, and their decisions and recommendations, are also the subject of a great deal of contemporary legal education. Through legal clinics, Law Schools get involved directly in the HHRR dynamics, representing vulnerable groups, forging alliances, taking part in litigation on behalf of victims of HHRR violations.

Much of what law schools do as HHRR institutions is just part of their classic aim: producing knowledge and teaching professional skills. And in the intersection of its classic aims and its HHRR aims we can see the unique contribution law schools can make to strengthen a culture of respect and promotion of human rights. Academic research in the area of human rights illuminates public debate and public policies, and help to shape the judicial responses to human rights challenges. Law schools, working at their best, educate lawyers to work with 24-hours a day HHRR. Their graduates in their professional life deem human rights respect and protection a non-negotiable requirement--a requirement that justifies losing clients, cases and deals.

A human rights perspective transforms the law schools in a particular way, favoring a more profound consciousness about how a University can foster or erode the egalitarian ethos that makes human rights possible. Law schools, accordingly, should advance faculty and student diversity, eliminate all discriminatory practices, and encourage students work in favor of the under privileged.

If law schools are to be deemed human rights institutions, this entails that there are additional reasons to value them. Law schools are now not only valuable for their contribution to educate future lawyers, but also for their contribution to the respect of human rights. And because the contribution of law schools to human rights is unique (there are no other institutions providing the type of contribution law schools make) a society with weak or flawed law schools is probably at risk of suffering human rights deficits (via

insufficient education about rights, or a lack of well-trained legal professionals, or a lack of adequate fora to discuss human rights issues).

There are some possible sources of concern in this understanding of law schools as HHRR institutions. The classic aims of the university may conflict with some expectations of the HHRR community (HHRR lawyers, NGOs, victims, experts, members of international bodies' personnel). Universities are places where truths are routinely questioned and ideas that often sound eccentric are subject to analysis. Thus some courses of action, strategies, discourses, which are part and parcel of HHRR dynamics, may not be sufficiently well suited for an academic institution. Conversely, human rights activists, on the one hand, legitimately advance their agendas building coalitions, supporting candidates and parties, mobilizing in the streets, etc. Law schools, on the other hand, have good reasons to work to preserve a climate of collegiality and to avoid, when possible and does not create a great moral cost, polarization and division among its community. The resulting ambiguity may enhance the contribution law schools can make to a culture of human rights.

Law Schools as Contributors to Public Policy on Human Rights

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The United National Declaration on Human Rights represents the universal recognition that basic rights and fundamental freedoms are inherent to all human beings, inalienable and equally applicable to everyone, and that every one of us is born free and equal in dignity and rights. Within this framework, Law schools that specializes in training and producing potential lawyers can play a pivotal role in their function to advance the norms of international human rights law through research, advocacy and public education. Various aspects of issues on human rights that can be integrated in the curriculum included among others the following: Regional Human Rights, Democracy, Racism, Women's Rights, Rights of Indigenous People, Internet and Child Rights. Clinical programs such as Klinik Guaman in UKM in which students and faculty members are created to conduct on ground investigations of basics issues and complaints of the local community. This paper will also review the current approach and role of the Faculty of Law of Universiti Kebangsaan Malaysia in promoting and advocating public policy on human rights among law students and the public. This is done by way of integration of various subjects at undergraduate and postgraduate level such as international humanitarian law, nuclear law and others. In addition UKM also strive to promote and disseminate public policy matters via way of linkages with NGOs by research, advocacy and public education.

The development of the human rights framework

The history of human rights has been shaped by all major world events and by the struggle for dignity, freedom and equality everywhere. Yet it was only with the establishment of the United Nations that human rights finally achieved formal, universal recognition. The turmoil and atrocities of the Second World War and the growing struggle of colonial nations for independence prompted the countries of the world to create a forum to deal with some of the war's consequences and, in particular, to prevent the recurrence of such appalling events. This forum was the United Nations.

When the United Nations was founded in 1945, it reaffirmed the faith in human rights of all the peoples taking part. Human rights were cited in the founding Charter as central to their concerns and have remained so ever since. One of the first major achievements of the newly formed United Nations was the Universal Declaration of Human Rights(UDHR), adopted by the United Nations General Assembly on 10 December 1948. This powerful instrument continues to exert an enormous impact on people's lives all over the world. It was the first time in history that a document considered to have universal value was adopted by an international organization. It was also the first time that human rights and fundamental freedoms were set forth in such detail. There was broad-based international support for the Declaration when it was adopted.

Although the fifty-eight Member States that constituted the United Nations at that time varied in terms of their ideology, political system, religious and cultural background, and patterns of socio-economic development, the Universal Declaration of Human Rights represented a common statement of shared goals and aspirations – a vision of the world as the international community would like it to be. The Declaration recognizes that the "inherent dignity … of all members of the human family is the foundation of freedom.*ti*

The United Nations Decade for Human Rights Education (1995-2004)

Not least of these activities to promote human rights is human rights education. Since the adoption of the Universal Declaration, the General Assembly has called on Member States and all segments of society to disseminate this fundamental document and educate people about its content. The 1993 World Conference on Human Rights also reaffirmed the importance of education, training and public information. In response to the appeal by the World Conference, the General Assembly, in 1994, proclaimed the period 1995 to 2004 the United Nations Decade for Human Rights Education. The Assembly affirmed that "human rights education should involve more than the provision of information and should constitute a comprehensive life-long process by which people at all levels in development and in all strata of society learn respect for the dignity of others and the means and methods of ensuring that respect in all societies".

The Plan of Action for the Decade provides a definition of the concept of human rights education as agreed by the international community namely based on the provisions of international human rights instruments. In accordance with those provisions, human rights education may be defined as "training, dissemination and information efforts aimed at the building of a universal culture of human rights through the imparting of knowledge and skills and the moulding of attitudes and directed to:

a. The strengthening of respect for human rights and fundamental freedoms;
b. The full development of the human personality and the sense of its dignity;
c. The promotion of understanding, tolerance, gender equality and friendship among all nations, indigenous peoples and racial, national, ethnic and religion;*es*
d. The enabling of all persons to participate effectively in a free society;
e. The furtherance of the activities of the United Nations for the maintenance of peace."

The Decade's Plan of Action provides a strategy for furthering human rights education through the assessment of needs and the formulation of effective strategies; the building and strengthening of programmes and capacities at the international, regional, national and local levels; the coordinated development of materials; the strengthening of the role of the mass media; and the global dissemination of the Universal Declaration of Human Rights.

The process of human rights education in the Law Schools

A sustainable (in the long term), comprehensive and effective national strategy for infusing human rights education into educational systems may include various courses of action, such as:

- The incorporation of human rights education in national legislation regulating education in schools;
- The revision of curricula and textbooks;
- Preservice and inservice training for lecturers to include training on human rights and human rights education methodologies;
- The organization of extracurricular activities, both based on schools and reaching out to the family and the community;
- The development of educational materials;
- The establishment of support networks of lecturers and other professionals (from human rights groups, academic unions, non-governmental organizations or professional associations) and so on.

The concrete way in which this process takes place in each country depends on local educational systems which differ widely, not least in the degree of discretion of the lecturers may exercise in setting their own teaching goals and objectives.

The lecturer will always be the key person, however, in getting new initiatives to work. The teacher therefore carries a great responsibility for communication of the human rights message. Opportunities to do this may vary: human rights themes may be infused into existing law subjects, such as international law, family law, land law and conveyancing and other or may have a specific course allocated to them; human rights education may also be pursued through less formal education arenas within and outside law schools such as extra curriculum activities, clubs and youth forums.

Ideally, a human rights culture should be built into the whole curriculum (yet in practice, particularly at secondary level, it is usually treated piecemeal, as part of the established curriculum in the social and economic sciences and the humanities). In the classroom, human rights education should be developed with due attention to the developmental stage of children and their social and cultural contexts in order to make human rights principles meaningful to them. For example, human rights education for earlier years for law program could emphasize the development of self-esteem and empathy and a classroom culture supportive of human rights principles. Although law students are able to grasp the underlying principles of basic human rights instruments, the more complex content of human rights documents may be more appropriate to senior students with better developed capacities for concept development and analytical reasoning.

Teaching and preaching: action speaks louder than words

The fact that the Universal Declaration of Human Rights and the Convention on the Rights of the Child have virtual global validity and applicability is very important for teachers. By promoting universal human rights standards, the lecturers can honestly say that he or she is not preaching. Lecturers have a second challenge, however: to teach in such a way as to respect human rights in the classroom and the school environment itself. For learning to have practical benefit, students need not only to learn about human rights but to learn in an environment that models them.

This means avoiding any hypocrisy. At its simplest, hypocrisy refers to situations where what a teacher is teaching is clearly at odds with how he or she is teaching it. For example: "Today we are going to talk about freedom of expression – shut up in the back row!" In such circumstances, students will learn mostly about power, and considerably less about human rights. As students spend a good deal of time studying lecturers and can develop a good understanding of their lecturers' beliefs, a lecturer who behaves unjustly or abusively will have little positive effect. Often, because of a desire to please, students may try to mirror a lecturer's personal views without thinking for themselves. This may be a reason, at the beginning at least, for lecturers not to express their own ideas. At its most complex, hypocrisy raises profound questions about how to protect and promote the human dignity of both lecturer's and students in a classroom, in a school and within society at large.

The "human rights climate" within lecture rooms and seminars should rest on reciprocal respect between all the actors involved. Accordingly, the way in which decision-making processes take place, methods for resolving conflicts and administering discipline, and the relationship within and among all actors constitute key contributing factors.

Ultimately lecturers need to explore ways to involve not only students, administrators, education authorities and parents in human rights education but also the whole community.

In this way teaching for human rights can reach from the classroom into the community to the benefit of both. All concerned will be able to discuss universal values and their relation to reality and to recognize that schools can be part of the solution to basic human rights problems.

As far as the students are concerned, negotiating a set of classroom rules and responsibilities is a long-tested and most effective way to begin .Teaching practices that are compatible with basic human rights provide a consistent model. Sometimes controversial and sensitive subjects come up when students begin to examine human rights. Lecturers need to remain constantly alert to student discomfort and potential disagreement. Lecturers should acknowledge that human rights necessarily involve conflicts of values and that students will benefit from understanding these conflicts and seeking to resolve them. Sometimes lecturers meet resistance to human rights education on the ground that it imposes non-native principles that contradict and threaten local values and customs. Lecturers concerned about resistance from administrators should meet with them in advance, share goals and plans for the class, and explain about the United Nations human rights framework and related educational initiatives (such as the United Nations Decade for Human Rights Education). Encourage administrators to visit a class – they may themselves benefit from human rights education!

Role of Law schools in dissemination of human rights values.
Law schools having the manpower, expertise of the law professors and the linkages with the relevant and stakeholders such as the Bar Council , the Attorney General Chambers the Judiciary the other professional bodies and the nongovernmental organizations can play an active role in promoting public policies and principles of human rights. This can be implemented in the form of lectures, roundtables discussions, a workshop in law and finance, a colloquium series, an alumni breakfast program, panels and symposium, in which academics, government officials, and members of the bar, business community and professional bodies can participate.

Human Rights subjects in Faculty of Law UKM

The Faculty of Law was established on 1st. February 1984 with the intake of 36 students; all being enrolled to the Law Matriculation programme. In 1986/87 session, the Faculty started its undergraduate academic year when all those 36 students were admitted to Year 1 of the LLB (Hons) programme. In 1989, the Faculty received the official recognition from the Qualifying Board established under the Legal Profession Act 1976. The first batch of students graduated in 1990. Since then, intake of students to the Faculty have kept on increasing each year, and in 2005/2006 session, the number of intake reached 120 students. In 1996, the Faculty obtained the approval from the Ministry of Education to initiate its Master of Laws and Ph.D programmes. The first batch of postgraduate students was admitted in the first semester of the 1997/98 academic sessions.

The Faculty of Law has taken the initiative to offer executive programmes with the co-operation of the Centre for Educational Advancement. These efforts came into effect with the inception of the Master's Executive Program in Intellectual Property in the second semester of the 2004/2005 session and the Master's Executive Program in Business Law in the 2006/2007 session.

The Faculty of Law is committed to be the leading faculty in legal fields and to build a new dimension which fulfills the thrust of national development by 2015.

Mission

To develop and educate legal professionals who are knowledgeable, competitive, and who possess an excellent personality in line with the national culture.

Objectives

- To have professional academicians who are highly distinguished in teaching, research and consultation.
- To produce graduates who are well trained and capable in various legal fields and practices including *Syariah* Law.
- To strengthen and enhance the Faculty's image at national and international levels.

The Faculty of Law of Universiti Kebangsaan Malaysia also play a role in in promoting and advocating public policy on human rights among law students and the public. This is done by way of integration of various subjects at undergraduate and postgraduate level such as international humanitarian law, nuclear law and others. In addition UKM also strive to promote and disseminate public policy matters via way of linkages with NGOs by research, advocacy and public education.
In addition to that the Legal Clinic of the Faculty was established in June 2012 comprising of a team of lecturers and students who are involved in giving free legal advice to the community. Cases that have been under the purview of the clinic include family cases, contract disputes, high purchase, consumer issues, labour disputes, bankruptcy case and matters related to *Syariah*. The faculty members and the students activities are also deeply involved in outreach program with the community. This has include in the past program affiliation with the Malaysian Bar Council on the understanding of the Malaysian constitution which was a program by the Asian Law Students Association UKM Student Chapter and the targeted groups were the public at large .

Constraints and challenges

Lecturers also struggle with administrative constraints and a lack of human rights related resources. Yet there are a variety of institutional impediments that can hamper the availability of human rights courses at the faculty. Further in some situations, despite strong student and faculty interest, many lecturers are simply unaware of the need for a course. This problem may be related to matters of terminology, scope of courses and/or lack of a proper textbook or a standard curriculum. Even within a specific school, faculty, students, and administrators may have radically divergent perceptions of the need for human rights offerings. Some lecturers says that human rights should not be covered more thoroughly because of a lack of student interest. On the other hand a lecturer characterized as an "expert" in international human rights perceives strong demand by students and believes that the subject should be covered more thoroughly.

There are also human resource barriers. Even among strong faculty and institutional support, lecturers can only teach a limited number of classes per semester. Standard "bar courses" take precedence over specialized courses with small enrolment. Language courses and University courses are also compulsory courses that students are required to take. Some IHL courses are oversubscribed, and the school does not have enough faculty on staff to address the demand. Further the syllabus and curriculum are more likely to be constrained by traditional offerings and limited faculty Institutions with strong faculty and

administrative support also face hurdles locating and funding qualified adjunct professors who can teach IHL.

Lecturers also might feel that they need more and better resources to foster the teaching of IHL. They complained of the lack of recognized, "concise basic materials" to teach from, the difficulty of wading through the overabundance of information to compile an "ad-hoc syllabus," and the lack of a good IHL textbook. Additionally, lecturers also yearn for training opportunities, networks of others interested in the teaching of IHL, and greater institutional support.

The unavailability of a standard IHL textbook is also a detriment to teachers and students alike. Recognizing that there is misunderstanding over what human rights entails and a lack of complete agreement as to what should be in a human course, many lecturers have found it difficult to "pitch" a human right course to the administration without standard materials. Due to the lack of a casebook, or perhaps in spite of the lack of a casebook, lecturers have turned to the vast body of information regarding IHL to compile their own course materials which will be time consuming.

Law Schools and the Promotion of Human Rights

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I. Introduction

Law schools have complex missions encompassing at least three important goals: (1) providing students with knowledge about law that is relevant to their future roles as lawyers, judges, and leaders in society; (2) fostering research into law and the role of law in society; and (3) facilitating public understanding and engagement with legal issues and law reform. See, e.g., UBC Law Strategic Plan, available at: http://www.law.ubc.ca/strategic_plan/index.html. Law schools can promote human rights, domestically and internationally, in each of these three roles.

In this brief paper, we will outline some law school programs related to the promotion of human rights in Canada and the U.S. We also describe some of the benefits and risks of law school efforts in these areas. Finally, the paper will briefly highlight questions or issues that law schools interested in enhancing their engagement with human rights issues might consider in relation to implementing similar programs.

II. Law Schools and the Promotion of Human Rights

A. Promoting Human Rights through the Curriculum

Law schools prepare students for entry into the legal profession and the various roles law school graduates serve in business, government, and the community. The law school curriculum typically includes mandatory and elective components. Depending on the jurisdiction, a law school's curriculum may be more or less established by bar admission authorities. One important question for law schools that are able to control curricular design involves the extent to which the mandatory curriculum will include exposure to human rights law.

Law schools in Canada and the United States are governed by accreditation standards and bar admission requirements that together promote the inclusion of a constitutional law course in the mandatory curriculum. See, e.g., American Bar Association, 2012-2013 ABA Standards and Rules of Procedure for Approval of Law Schools, available at: http://www.americanbar.org/groups/legal_education/resources/standards.html; National Conference of Bar Examiners, Multi-State Bar Exam, available at: http://www.ncbex.org/multistate-tests/mbe/. Constitutional law typically involves extensive discussion of the development of human rights within the constitutional framework as well as the challenges associated with conflicts between competing rights. However there remains significant flexibility in terms of the number of course credits devoted to the subject and the degree to which the course will focus on one or more human rights.

Canada's new law school accreditation standards for common law degree programs include the requirement that law schools provide coverage of Aboriginal rights. Federation of Law Societies, Task Force on the Canadian Common Law Degree (2009), available at: http://www.flsc.ca/_documents/Common-Law-Degree-Report-C.pdf. The standard leaves law schools with considerable flexibility in determining an implementation strategy. Some Canadian law schools are meeting the requirement within existing courses. UBC Law chose to develop and implement a new mandatory course specifically focusing on Aboriginal rights in the Canadian Constitution. See, e.g., Heather Gardiner, UBC Making Aboriginal Rights

Course Mandatory, Canadian Lawyer, Sept. 3, 2012, available at: http://www.canadianlawyermag.com/4315/ubc-making-aboriginal-law-course-mandatory.html.

Law schools can also include courses focused on human rights in the elective curriculum. Law students in the United States and Canada often are able to select 50% or more of their courses. Whether required to do so or not, most students enroll in a significant number of courses that are deemed to be "core" or closely related to practice, such as business law, evidence and tax. Depending on a particular jurisdiction's requirements, human rights courses may be critically important to society and yet not considered to be within the "core" of legal education. Law schools nonetheless offer a wide range of courses touching more directly upon human rights, including courses focusing on domestic content (such as Civil Rights Law, Gender and the Law, Prisoners' Rights Law), comparative courses (such as Comparative Constitutional Law, Comparative Health Law), and courses focusing on international law or the law of other countries (such as International Human Rights, International Criminal Law, Human Rights in Asia). See, e.g., UBC Law Academic Calendar Course Descriptions, available at: http://www.calendar.ubc.ca/vancouver/courses.cfm?page=name&institution=12&code=LAW; Osgoode Hall, York University, Syllabus (listing human rights courses), available at: https://apps.osgoode.yorku.ca/myosgood2.nsf/0/E33820D0907F18A485257A17006D1FBE/$FILE/2012_Osgoode_SyllabusV2-Oct25.pdf; A Survey of Law School Curricula [U.S.], 2002-2010 (Catherine L. Carpenter, ed. 2012).

There are also opportunities to highlight the human rights curriculum. Some law schools provide students with the ability to focus on human rights topics through completion of concentrations or specializations. See, e.g., UBC Law, Social Justice Concentration, http://www.law.ubc.ca/files/pdf/programs_centres/Law_and_Social_Justice_Specialization.pdf. Law schools can also offer graduate program opportunities for LL.M., Ph.D. or S.J.D. students to focus on human rights. See, London School of Economics, LL.M. Specialization in Human Rights Law, http://www.lse.ac.uk/collections/law/programmes/llm/llm-human.htm.

Law schools in the United States and Canada are facing significant new demands from students, the legal profession, and regulators. See, e.g., Brian Z. Tamanaha, Failing Law Schools (2012); Ethan Bronner, A Call for Drastic Changes in Educating New Lawyers, New York Times, February 10, 2013. Among other things, critics contend that law schools must provide students with more opportunities to learn legal skills and to appreciate the special ethical obligations of lawyers. See, e.g., William M. Sullivan, et al., Educating Lawyers: Preparation for the Profession of Law (2007)(a.k.a "the Carnegie Report"), an executive summary is available at: http://www.carnegiefoundation.org/sites/default/files/publications/elibrary_pdf_632.pdf).

These commentaries emphasize the importance of providing students with clinical or experiential learning opportunities focused on human rights. Law schools in the U.S. and Canada have introduced programs that give students the opportunity to participate in human rights-related litigation on behalf of individual clients and groups. See, e.g., American University Washington College of Law, Disability Human Rights Clinic, http://www.wcl.american.edu/clinical/disability.cfm; Harvard Law School International Human Rights Clinic, http://www.law.harvard.edu/programs/hrp/ihrc.html; UBC Law First Nations/Indigenous Community Legal Clinic, http://www.law.ubc.ca/fnations/clinic.html; UBC Law Innocence Project, http://www.innocenceproject.law.ubc.ca.

The ratio of instructors to students in "live client" clinics is much lower than the ratio in other forms of learning because of the need for direct supervision of client matters. These

programs therefore are significantly more expensive than traditional classroom teaching. Experiential learning can also be accomplished through internships with human rights organizations, so long as the law school retains sufficient control over the educational quality of the internship experience and puts in place parallel opportunities for classroom reflection and learning. There is extensive literature on the development and implementation of clinical programs. The Clinical Legal Education Association provides useful resources at http://www.cleaweb.org. See also, American Bar Association, 2012-2013 ABA Standards and Rules of Procedure for Approval of Law Schools, *supra*.

UBC Law's Indigenous Community Legal Clinic is an example of a program that provides students with the opportunity to represent clients who otherwise might go without legal representation. Students earn a term of academic credit for participating in the clinic and a related class. The clinic is located away from the law school, near a courthouse in downtown Vancouver, to ensure that the services are accessible to individual clients. The clinic also has been involved in policy-oriented and precedent setting litigation on behalf of Indigenous persons and organizations.

It is important to recognize that law school programs relating to new or emerging human rights claims can be controversial, in part because the law school is viewed as providing subsidized legal support for groups or positions that may be unpopular in society. Clinics working on human rights matters may bring legal claims against governments or powerful private interests. Some clinical programs have attracted significant controversy, particularly in the United States. See Adam Babich, Controversy, Conflicts and Law School Clinics, 17 Clinical L. Rev. 469 (2011). Law schools have an opportunity to communicate with stakeholders about the importance of human rights and clinical education for law students and society.

Law schools have both an opportunity and the responsibility to ensure that law students are exposed to basic human right principles in their own legal systems. The benefits of basic legal education are clear and relatively uncontroversial. More advanced law school courses can provide students with exposure to emerging human rights concerns that they may encounter as lawyers and leaders. Clinical programs provide representation to individuals or groups whose claims otherwise might not be heard and prepare students to accept roles in human rights matters moving forward. The costs of these programs can be significant, both in terms of dollars spent per student and political controversy, but the benefits to students and society are important and enduring.

B. Faculty Research and Human Rights

Law schools provide more than legal education. They are also centres for legal research. Faculty members at law schools in the United States and Canada focus to a significant degree on research and publication. This research benefits society in several ways. First, faculty members are able to pursue fields of research and lines of inquiry without the constraints on time and perspective often experienced by lawyers, who must serve clients' interests, or judges, who must ensure impartiality in resolving future disputes. Second, faculty research can be subjected to a peer review process that rigorously tests assumptions, analysis, conclusions, and empirical evidence or sources of authority. Third, faculty research can be disseminated broadly in society to achieve impact through scholarly publications, conferences, law reform movements and public outreach events.

Faculty research can take many forms, from individual scholarly works to collaborative research projects across schools and countries. Faculty members at UBC have focused on a range of topics, including Indigenous rights, women's rights, combatting human trafficking,

and new legal approaches to reducing atrocities during armed conflict. See UBC Law Faculty, at http://www.law.ubc.ca/faculty/faculty.html. Researchers have also secured funding for major, collaborative research projects that bring together scholars from around the world. The Asian Pacific Dispute Resolution Project is a multi-million dollar collaborative research project based at UBC Law, led by Professor Pitman Potter, and involving partners in Canada, China, Japan, and Indonesia. See http://ubcapro.hk/faculties-and-schools/faculty-of-law/. The project, titled "Understanding Coordinated Compliance with International Trade and Human Rights Standards in Comparative Perspectives," provides important insights about the relationship between trade and human rights in various domains.

Faculty research brings obvious benefits to the law school and broader society. Faculty members are able to bring advanced expertise in current issues to their classroom teaching. Students may also be involved as research assistants. Faculty research can enhance or alter academic debate, guide the approaches adopted by law firms or businesses, and affect the development of the law in the courts or legislature. For example, in recent years researchers at UBC Law have had a significant impact on the development of Aboriginal rights law, on efforts to combat human trafficking, and on Canada's approach to international human rights issues.

At the same time, faculty research can be controversial. Critics sometimes argue that the exercise of certain human rights, such as labour rights or Indigenous rights, can create barriers to economic development. Efforts to incorporate human rights norms into corporate conduct through, e.g. corporate social responsibility and socially responsible investment policies, can be critiqued by human rights activists as ineffective and by businesses as inefficient. Law schools sometimes support engagement with stakeholders to ensure both the dissemination of research and open debate about the impact of research findings. See, e.g., UBC Law, Socially Responsible Investment and Extractive Industries, http://www.law.ubc.ca/files/pdf/ncbl/2011/SRI_and_Extractive_Industries.pdf.

C. Special Programs and Partnerships

Finally, law schools can promote human rights through special projects and collaboration with external partners. Law schools are uniquely positioned to connect stakeholders in the legal system and to create a neutral forum for debate about issues that may be controversial. Law schools also have an opportunity to affirmatively support efforts to enhance human rights around the world.

Beyond the projects and activities noted above, UBC Law has supported two specific projects. First, the Faculty provides a home for the International Centre for Criminal Law Reform and Criminal Justice Policy (ICCLR), see http://www.icclr.law.ubc.ca. The ICCLR is one of two inter-regional institutes in the United Nations Crime Prevention and Criminal Justice Programme Network of Institutes. The ICCLR's ambitious mission "is to improve the quality of justice through reform of criminal law, policy, and practice." The Centre recognizes that achieving this objective requires promotion of "democratic principles, the rule of law and respect for human rights in criminal law and the administration of criminal justice, domestically, regionally and globally." See http://www.icclr.law.ubc.ca. The location of the Centre within the law school promotes faculty and student involvement in the Centre's projects and initiatives.

Second, UBC Law secured significant support from alumnus Peter Allard, Q.C. for the creation of the Allard Prize for International Integrity, see http://www.allardprize.org. The

Allard Prize "will be awarded to an individual, movement or organization that has demonstrated exceptional courage and leadership in combating corruption, especially through promoting transparency, accountability and the rule of law." The Prize includes an award valued at $100,000 (Canadian). The Prize will provide an opportunity to highlight and promote the fight against corruption worldwide. In addition, the Prize competition can reveal inspirational stories and models for individuals and organizations interested in exploring successful approaches to fighting corruption and to establishing the rule of law and protections for human rights. The award program will also bring human rights leaders, scholars and activists to Vancouver to participate in a major international conference or other event focused on human rights and the rule of law.

III. Conclusion

Law schools play important roles in society though education, faculty research and community engagement. Law schools are therefore responsible for ensuring that students are exposed to legal aspects of human rights and the relevant conflicts and debates about the nature and scope of those rights. Human rights issues will likely occupy at least a portion of a school's mandatory curriculum but there are also opportunities to enhance coverage through electives focusing on domestic, comparative and international approaches, as well as to provide experiential learning through clinics and internships. Law schools may also promote research and law reform related to human rights through faculty research, community partnerships, and special initiatives.

Law schools' involvement in the promotion of human rights therefore no doubt varies considerably around the world. This brief paper has focused on law schools in Canada and the United States. Many law schools outside this region may have adopted even more intensive educational programs for human rights in the law school curriculum. Faculty researchers or law school research programs involving human rights have played central roles in the development and implementation of human rights protections within different societies. Yet law schools in other jurisdictions may face very different constraints. The curriculum in the law school may be largely determined by governmental or bar admission requirements. Faculty members may have only limited time for research and may face constraints with respect to subject areas. Community partnerships may not be feasible or may present significant funding challenges. We hope that this brief report and description of some selected initiatives provides useful examples of a range of possible approaches for law schools seeking to promote human rights within the context of their own regulatory structure and societal constraints.

QUALIFIED LEGAL PRACTICE AND SOCIAL TRANSFORMATION: The amicus curiae brief experience within the ambit Clinical and Pro Bono legal assistance of FGV Law School.

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Introduction

When I decided to submit an abstract for the panel "Law Schools as Contributors to Public Policy on Human Rights" in the IALS Annual Meeting, I immediately thought about reporting my experience as the Coordinator of Clinical and Pro Bono legal assistance program of FGV Law School, especially concerning the preparation of amici curiae briefs presented before the Brazilian Supreme Court.

However, for a couple of weeks, each written paragraphs, was erased. And, worst, the longer I stayed sitting in front of the computer, the longer was the waste of time, for no word survived my PC white screen. Until when I was re-reading my received e-mails and suddenly came across the following message:

> "Dear Thiago, I want to thank the unique opportunity afforded by FGV Law School to offer the clinical work to "Projeto Afeto"
> (Project Affection), what, today, after this great victory, makes me feel sure that the struggle for our civil rights is the most beautiful and the only thing we have to offer our society. Now I can look at my undergraduate studies and be proud of having made part of a distinct, path-breaking, daring and transformative project.
> Actually, I've spent a period of my life a little bit lost not knowing which way to choose, paralyzing my professional life. But, now, I am up for it. I want and I know I am able to contribute to develop and to improve civil rights defense. I hope and I know that with perseverance a door can be open for me. These days I've heard about a job opportunity in NGO Conectas, and I am willing so much to go to São Paulo for personal reasons and I confess I am myself a fan of Conectas's activities. So, today, I will send them all necessary documents for me to apply for this vacancy. They request two contact references and as I already have Andressa (Global Justice Director) and I wonder if you could recommend me for the position. I'm looking forward to your reply. Kisses. I.B."

I received this e-mail on May 6, 2011, the day after of Supreme Court decision concerning the claim, filed by the Governor of the State of Rio de Janeiro, in 2008. This motion pleaded that stable unions of gay couples should receive the same legal treatment of stable unions of straight couples.

The e-mail was sent by a former undergraduate student of FGV Law School who participated in "Projeto Afeto" (Project Affection), in 2008. She was one of the students that prepared the amicus curiae on behalf of "Grupo Arco-Íris" (Rainbow Group), a nongovernmental organization assisted by our in-house clinic, in 2008.

And, then, I remembered...I remembered a conversation I had with Professor José Ricardo Cunha back in 2006, about such innovative project when I started teaching at the FGV Law School. I also remembered the reasons that led me to accept, at the end of 2007, the invitation of Professor Joaquim Falcão to leave my own law firm to become a full time professor and take on the task of creating the Clinical and Pro Bono Programs of FGV Law School. I remembered the conversations I had with my colleague Professor

Gabriel Lacerda, the first person with whom I discussed the proposal I had to submit to the Law School Direction, as part of my selection process.

And, more important, I remembered the pathway all of us (students, faculty and staff) have followed, over the last five years, towards a transformation of the FGV Law School, of teaching methodology and of Brazilian society, as a whole. So, finally, I started writing up what legal practice is about; about how legal practice activities are traditionally carried out in Brazilian law schools; about the proposal of a pioneering legal practice program to be performed in FGV Law School and decided to report some of the cases in which we have already acted.

1 – What is the legal practice:

Legal practice is a mandatory curricular activity held in Brazilian Law schools during undergraduate courses. It is a program in which students shall develop professional skills by real-world experience. Each Law School regulates legal practice independently and may, in part, make agreements with public or private agencies; however, the program evaluation is a duty to be done exclusively by the Law School sponsoring the program.
The activities of legal practice are broad, but they have a common nature: legal assistance to clients and resolving concrete legal problems, including lawsuits preparation, procedural routines, representation in court hearings, and rendering of all types of legal services.
The great majority of Law Schools in Brazil provide their practice in the form of in- house clinics meeting both the educational standards of the government and the professional standards of the Brazilian Bar Association. Generally, the traditional Law Schools in-house clinics limit their work field to Civil Law, Criminal Law and Labor Law. Within those in-house clinics style students learn how to practice law serving poor people, who usually live in the poor communities located in the same neighborhood or close to the Law School facilities.
Such traditional model is obsolete and outdated. Students are not satisfied or motivated to perform such kind of legal practice activities because:

1) they are not integrated into the academic courses, nor in the profile the School intends its undergraduate students have;
2) practice of the globalized legal market/
3) on the contrary, students realize that such training is conducted in a bureaucratic way with the sole purpose of meeting educational legislation requirements and the Brazilian Bar Association rulings;
4) they reproduce welfare practices, overlap similar activities already undertaken by the Public Defenders' Office and do not collaborate on projects that will change students' communities or the Brazilian society.

2- The legal practice in FGV DIREITO RIO (FGV Law School)

Given this diagnosis of Law Schools' legal practice performance, it became clear that our challenge was to build a new model, compatible with our School original design. FGV Law School envisages law as a tremendous resource of citizenship, being it a privileged main responsible tool for institutional alternatives formulation for our democracy and teaching methodologies, as well, and also being devoted to encouraging students' analytical, critical and propositional way of thinking about law, focusing on concrete legal problems solving.

Thus, different from the legal practice activities developed in traditional Law Schools, ours should be substantially committed to transform the in-house clinics into a space in which our students would be trained to perform qualified legal intervention in Brazilian professional legal scenario under an unparalleled path-breaking clinical program.

To adapt practical formation to FGV Law School undergraduate student profile, the clinical activities were linked to FGV Law School programs of study: Judicial System and Business Law. The development of the activities related to business law sought, at first, meeting the market need of hiring qualified professionals in this field. It was not, however, simply a matter of meeting the demands of companies' legal departments or of law firms specialized in corporate law (which now need to invest in training of their own interns), but further to form a distinct lawyer profile, being able to think criticallystructures for achieving domestic economic development.

In turn, the Judicial System aspect of the clinics would have (as it effectively has) the emphasis on qualified intervention in national legal scenario with the preparation of pleadings impacting on Brazilian law core and current issues, exploring the constitutionalization movement of various fields of law, the use of legal arguments in the construction of innovative thesis and the judicial growing role in public policy debate. Indeed, it is undeniable the growing importance of legal interpretation in Brazilian legal scenario, with great impact on the creation and modification of law by the Supreme Court considering the legislative paving way of a new constitutional order (since we had a constitutional change in 1988).

Another important finding in this process was the consciousness of the judicialization of politic, the diffuse rights expansion and in the growing role of principles in judicial decision-making reasoning. That is why, the in-house clinical work area dedicated to public advocacy and to judicial system, we elected as its focus the issues related to constitutional law, contributing to the strengthening of institutions and to domestic development, especially fundamental rights related topics.

Be it in the specialized area of business law or in the specialized areas of public advocacy and judicial system, we decided to focus on the assistance to organizations, companies and groups instead of individuals, as it occurs traditionally.

Maybe those were the two great innovations of the proposal submitted to the Dean of FGV Law School in November of 2007: to abandon the perspective of legal aid for the promotion of access to justice by legal defense of relevant collective social demands.

3 – The legal representation of NGOs before the Supreme Court in constitutional lawsuits as a way of promoting fundamental rights.

The specialization in Public Advocacy and Judicial System prepares undergraduates to act as public attorneys (federal or state attorneys, tax attorneys, public defenders, means enabling them to defend collective interests, diffuse rights and issues of great social importance, promoting citizenship rights by acting in collective demands. In this context, in Brazil, the legal instruments through which such skills and competencies are required are the constitutionality concentrated control actions, such as: Direct Action of Unconstitutionality (ADIn), Declaratory Action of Constitutionality (ADC), and Allegation of Breach of Fundamental Precept (ADPF), all of them having the same purpose, namely to ensure the supremacy of the Constitution in face of any conflict that may exist between the higher law and any other kind of rule or judicial act.

However, only a very small number of people[246] may fill those kinds of lawsuits before the Supreme Court. And, obviously, all of those legitimated actors have material conditions to be represented in court. That is why we elected as the clinical acting methodology to provide pro-bono legal aid to groups and to social organizations which combine nationwide representativeness and thematic pertinence through the preparation of amicus curiae brief.

Our goal was to make possible the expansion of public debate, since those kinds of law suits have erga omnes effects, tying all other minor courts and judges of the country. Once discussed and decided by the Supreme Court, the theme will no longer be subject to any questioning. Therefore, the intervention at this point of the discussion is extremely important for, otherwise, the debate would be restricted to a small number of stakeholders, with a particularly narrow view of the question.

The amicus curiae (expression meaning "friend of the court") is someone (usually groups, associations or institutions) who is interested in contributing voluntarily with information or a new perspective about a particular legal argument to assist the court decision. From a procedural standpoint, it is a peculiar kind of third party intervention in processes in order to qualify the decision. The briefs submitted by amici curiae usually add data, information or distinct viewpoints on difficult or controversial matters.

The admission of an amicus curiae brief in constitutional matters is not easy, nor simple. Although the Brazlian Supreme Court has been widening the admission criteria (chasing the pluralization of constitutional debate), it is still an very qualified kind of petition. Furthermore, to be admitted as amicus curiae the petitioner must show that he possesses representativeness and some connection with the theme under discussion.

On the other hand, we firmly believe that the introduction of the figure of amicus curiae in Brazlian Law (in 1999) had a very clear purpose: to democratize those constitutional trials, opening the Supreme Court's doors for civil society, to whom decisions are addressed. Society may bring arguments to the Court and also highlight relevant issues allowing trial to be comprehensive, ensuring the analysis of all involved dimensions and consequences that it might bring to society.

The acceptance of the manifestation of citizenship brings the explicit idea that constitutional interpretation must be open and plural. This effort to democratize the constitutional interpretation is extremely important in our current context, as much as it decreases the risk of questioning the democratic legitimacy of the Supreme Court and the Court therefore effectively becomes a forum for discussion of public reason.

However, for those non-governmental organizations being heard by the judiciary there was a need for qualified legal assistance able to understand their point of view and turn it into a petition. But not a simple petition. A petition that could be considered by the justices of the highest court of the country.[247]

[246] They are: I-the President of the Republic; II-the Board of the Senate; III-the Board of the House of Representatives; IV-the Board of the States Chamber of Representatives or Federal District; V-the Governors of the States or Federal District; VI-the Attorney General; VII-the Federal Council of Brazilian Bar Association; VIII - a political party with representation in Congress; or, XI- a union confederation or nationwide class entity (Article 103 of the Constitution of Brazil).

[247] Would our students be up to the challenge? I still remember I told Professor Joaquim Falcão when assuming the clinic (NPJ) Coordination, that in less than one year we would file two amici curiae briefs before the Supreme Court of Brazil (STF). After a few seconds watching me, I felt like he really believed that students would be able to accomplish this task and "blessed" the project just saying: "Ball forward!".

The participation of civil society in these actions is strategic. Since the early 1990s, Brazil has witnessed the expansion of Judicial Branch assuming the functions that are proper of the Executive and Legislative Branches of Government, leaving aside its traditional passive role and making modifications in Brazilian socio-economic organization[248].

Undoubtedly, the most important factor that powers Brazilian judicial activism is the text of the Constitution of the Federative Republic of Brazil by itself. The 1988 Constitution re-founded in our State the postulate of human dignity and traced as primary objectives of the Federative Republic of Brazil the construction of a free, fair and solidarity society to promote the welfare of all, irrespective of origin, race, sex, color, age or any of the other existing forms of discrimination whatsoever.

It is not to be forgotten that in a democracy the making of laws is directly linked to public debate among citizens, which is represented by discussions held within the Legislative Branch. But it is also true that in a constitutional democracy, as it is the Brazilian case, the choices of the Legislative Branch are not considered adequate only because of whom holds these rights, but also concerning how, when and why such powers are exercised.

This means that certain choices were made at the time of the foundation of a new Brazilian State what prevents the Legislative Branch from making decisions that may be inconsistent with those choices. Similarly, the absence of decisions of the Legislative Branch is indifferent to the legal validity of certain choices that were actually made by the original constituent power. It is the Judicial Branch's duty to ensure the affirmation of these choices, values around which the Brazilian people re-founded their State, the fundamental rights that citizens are entitled to.

By ensuring these choices, the Supreme Court, acts as guardian of the promises made at the time of promulgation of the Constitution. As we are reminded of and are forced to comply with such commitments, the Supreme Court promotes the fundamental rights pedagogy and reaffirms the values that characterize Brazil as a Democratic State of Law.

Given the profile of the FGV Law School undergraduates (able to think critically about their social performance and promote important changes in the legal necessary structures for national socio-economic development), it is also a function of the in-house clinics of FGV Law School to contribute to the pedagogy of the fundamental rights, namely to stimulate the students' thinking about the most important values of a Democratic State of Law and the prospect of collective or diffuse interests and the prospective contribution that law professionals can provide for the construction of a free, fair and solidarity society.

In addition to provide the students enrolled in FGV Law School in-house clinics a technical legal training, this initiative seeks to stimulate in the future law professional a culture of defense and of appreciation of the fundamental rights, as the essential element to construct

[248] "I believe, gentlemen, that this year, as much as in the past few years, we could observe a growing of judicial role acting, in this Court, or whenever, apart from the specific technical issues, the control over the constitutionality became an appellate instance of political struggle, too. Several times we have examined the prolonged political dispute with Congress concerning legislative drafting. Even in some cases, the Direct Action was used as an instrument for political parties' positions gaining greater visibility. We also had the use of Direct Action by political parties seeking constitutional debate. Finally, judicial dispute immense growth as a continuation of political dispute brought Supreme Court and judicial structures to the center of national political debate. There was also, during this period, especially from the 90's on, a progressive judicialization of mass lesions and mass debates. There was an increase in the functions of the judiciary precisely because the judiciary has joined the national agenda as a locus for debate on major national issues." Speech held by Supreme Court Chief Justice, Justice Nelson Jobim, in the opening of the judicial year of 2005.

the Brazilian society, whose foundations are made of sovereignty, citizenship, human dignity and political pluralism.

4 - The amicus curiae briefs as qualified legal practice – the FGV Law School experience

4.1 - "Press Project" – Allegation of Breach of Fundamental Precept (ADPF n.130)
On February 25, 2008, the Democratic Labor Party filed a lawsuit before the Supreme Court claiming the declaration of unconstitutionality - and subsequent withdrawal - of the full text of Law n. 5.250/1967 (known as the Press Act) and, in case that request is not met, the repeal of more than twenty articles. This action would lead the Supreme Court to decide among three possible scenarios: (i) full repeal of the law, (ii) partial repeal of the law providing which are the repealed provisions; (iii) full application of the law.

Then, we were approached by the President of the Brazilian Press Association (ABI), an organization whose history has been linked with the Brazilian history for the last hundred years related to the struggles in defense of press freedom and democracy.

ABI was proud of never having bowed down before intolerance and violence of dictatorial governments throughout its history. Even in the most troubled periods of national political history, the Brazilian Press Association has always been committed to defend the rights of journalists, of press freedom and of the restoration of democracy. Over the years, the ABI has established itself as an institution in the service of intellectual, social, political and economic progress of Brazil.

The Brazilian Press Association also had a prominent role in the impeachment of former President Fernando Collor de Mello. Barbosa Lima Sobrinho, president of the organization at that time, along with the then President of the Brazilian Bar Association, filed the request for impeachment before the House of Representatives.

There was no doubt that the ABI had a very important role in this debate and therefore a legitimate interest in participating in this trial as amicus curiae. But, actually, the ABI had never served as amicus curiae and that possibility had not even been considered. Until then, the ABI has always had a great dialogue with the legislative and the executive branches of the government but had never acted in the judicial branch to advance a cause. They did not have in-house legal counsel or the legal expertise for such a complex task.

The partnership between ABI and FGV offered the structure of the FGV Law School (human and material resources) and, in return, ABI would talk with the students who would participate in the preparation of the brief for them to hear from the journalists the importance of a press free from censoring of any kind.

Then, it was decided that the in-house clinic of FGV Law School would form a group of undergraduate students, coordinated by a School Professor, to prepare a brief of amicus curiae arguments to be presented before the Supreme Court. In turn, the ABI proposed to receive the students from FGV Law School and to constitute, within the ambit of its

Advisory Board, a working group that would work together with the FGV Law School team.

The work was carried out by eleven students (Carlos Humberto Borborema, Isabella Gama, Marcos Vinicius Araújo, Thutia Bernardo, Isabela Ferreira, Julia Braga, Ciro Rangel, Jayme Figueiredo, Pablo Domingues, Renata Cruz and Renato Knibel), advised by two (Professors

Rafael Koatz and Thiago Bottino). At the end, the text was submitted to the Advisory Board of the ABI, being approved. The amicus curiae brief was filed on December 15, 2008.

It was a historical judgment, not only because of the theme, but also because it was the first time the Supreme Court declared unconstitutional the entire content of a law "by extension," i.e., recognizing that this "Press Act" ended a logical system, that intended to regulate freedom of expression, of thought and of information, and being it "pruned" by almost a third of its provisions, it lost its character of a system, it got unbalanced as a legal framing structure and crumbled like a house of cards.

The trial took place on April 1st, 2009, by the Supreme Court, and in the occasion I could present the oral arguments on behalf of the ABI before the Supreme Court.

4.2 – "Affection Project" – Allegation of Breach of Fundamental Precept – (ADPF n. 132)

On February 25, 2008, the Governor of the State of Rio de Janeiro filed an Allegation of Breach of Fundamental Precept - ADPF pleading the Supreme Court that stable unions of gay couples shall receive the same treatment of stable unions of straight couples. Such recognition would be founded on the direct application of the fundamental precepts of equality, freedom, human dignity and legal safety. So deciding, the Supreme Court would declare that judicial decisions that deny legal equality would be violating constitutional fundamental precepts.

This time we were approached by the President of the "Rainbow Group", an NGO founded on May 21, 1993 with the mission of working to improve the quality of life for gays, lesbians, bisexuals and transgender in the promotion of human rights, whether through actions to raise awareness and promote self-esteem of gay people, or through participation in the formulation of public policies.

For its career in the defense and promotion of the rights of vulnerable groups over the past fifteen years, "Rainbow Group" stood out as an important society interlocutor with government concerning the formulation of public policy with the strategy to create a favorable social environment for Lesbian, Gay, Bisexual, Transgender themes and human rights. This gave legitimacy to the Rainbow Group representation in its postulation of participating as amicus curiae in trial, offering subsidies to the Supreme Court trial. Again, the FGV Law School in-house clinic was open to civil society organizations to promote legal assistance to their initiatives.

The methodology was the same as of the Press Project: seven students (Ana Luiza Nascimento, Lívia Ferreira, Camila Noronha, Luisa Gonçalves, Isabela Bueno, Rachel Sá and Roger Sganzerla) advised by two Professors (Ivanilda Figueiredo and Thiago Bottino). The brief of amicus curiae, on behalf of the GAI, was filed on December 19, 2008, but trial took place only on May 5, 2011

Again, the undergraduate students of FGV Law School attended a historical judgment, whose impact was beyond Brazilian borders becoming news around the world. And the impact of that work was so great that the brief delivered to the Justices of the Supreme Court came to be used as part of the teaching material of constitutional law courses.

Two facts show the achievement of that commitment made in 2007 upon assuming the creation of in-house clinics of FGV Law School. The first is the e-mail written at the very beginning of this text. It is the proof that we are able to transform people, to create new

professionals committed to the values of equality ans freedom that are ideals guiding lines of Brazilian Democratic State. It is the evidence that a legal practice activity can arouse the interest and stimulate young law students and can empower them to change the social reality of communities and the world.

The second fact, proof that we are able to prepare students for a qualified performance and for highly complex legal work carrying out, was the quote, by the Dean of the Supreme Court, Justice Celso de Mello, of excerpts from the brief prepared by undergraduate students of FGV Law School.

4.3 – Project Temporary Prison (ADI 4109)

The Projects "Imprensa" (Press) and "Afeto" (Affection) took place in 2008. Since then, more three amici curiae briefs have been prepared to be addressed to the Supreme Court.

In 2009, ten undergraduate students (Ana Luiza Pinto, Anelise Jordão, Bernardo Costa, Bernardo Barbosa, Cristal Celano, Eduardo Oliveira, Eric Trotte, Fernanda Fábregas, Fernando Menezes and Rogério Sganzerla), advised by Professor Thiago Bottino, prepared a brief on behalf of the Grupo Tortura Nunca Mais- GTNM (Group Torture Never More), a NGO committed to fight torture in Brazil.

Throughout almost 25 years of existence, this NGO became an important reference in national scenario and assumed an important role in society, due to its permanent action in defense of human rights. The partnership between GTNM and FGV Law School in- house clinic was due to the interest of this NGO to participate in the process in which the constitutionality of the temporary prison is being challenged.

In the view of GTNM, it is an imprisonment aiming to collect the testimonies of the accused and the investigated in the course of a police investigation. And just like the old imprisonment to investigate of military rule time, the individual is held up by the police to be compelled to cooperate in every way with the investigation. After all, the psychological pressure over somebody subjected in a situation of prison is a mechanism to break him/her. This is a clear is a violation of the privilege against self-incrimination, harming his/her individual freedom through fear and weakness

The brief was approved by the Board of GTNM / RJ, being filed on May 6, 2010, and the case remains pending.

4.4 –The Projects "National Justice Council Powers" (ADI 4145) and "Congressmen Police Clean Record" (ADC 30)

Conducted in 2010 and 2011, respectively, the projects "National Justice Council Powers" and "Clean Record" are the result of a successful partnership between the FGV Law School and the IAB (Brazilian Lawyers Institute).

Founded in 1843, just after Brazilian Declaration of Independence in 1822, the Brazilian Lawyers Institute has always been involved with the foundation and development of the design of legal institutions of Brazil. One of its first major missions was the creation of the Brazilian Bar Association.

Known for its nationwide expression and great tradition, the Brazilian Lawyers Institute has also worked, under Portuguese Empire ruling era, as a governing body consulted by then

Emperor and his Cabinet, assisting with their opinions about the most important judicial decisions to be taken, as well as collaborated, through its members, in making the laws that effectively governed the country at that time. Much more than a body of lawyers, the Brazilian Lawyers Institute has always struggled and contributed to the formation and development of the project of a Brazilian State

The Brazilian Lawyers Institute was responsible for the preparation of the first Republican Constitution of Brazil (1891), a fact that highlights its commitment with the building the Brazilian institutional design and its political development. Throughout its existence, the Brazilian Lawyers Institute has contributed to the deepening of legal sciences to enrich the debate and progress of Brazilian law and the democratic institutions of our country.

However, the Brazilian Lawyers Institute had never participated in the actions of concentrated control of constitutionality! And this opportunity to work in favor of the Rule of Law came when the Attorney General filed an Direct Action of Unconstitutionality (ADIn), contesting the powers of the recently created National Council of Justice (CNJ) to expedite resolutions regulating judges administrative activities.

The National Council of Justice was created by a Constitutional Amendment in 2004 with the clear purpose of seeking legitimate means to control the administrative and financial operations of the Judicial System, among other important tasks aimed at institutional improvement of this Branch.

Composed of professionals who were not part of the judiciary, the National Council of Justice has the mission to develop the Judicial activity, through a transparent, accessible, efficient and legitimate judiciary.

With the assistance provided from the in-house clinic of FGV Law School, the Brazilian Lawyers Institute showed up, for the first time, as amicus curiae before the Supreme Court. The brief was prepared by fourteen undergraduate students (Ana Luiza Pinto, Anelise Jordão, Fernanda Cardoso, Isadora Ruiz, João Paulo Ribeiro, Laura Couto, Maria Pereira, Marina Souza, Mariana Montenegro, Nathalia Parente, Paloma Caneca, Rafael Montarroyos, Rinuccia Faria and Thiago Corrêa) advised by two Professors (André Cyrino and Thiago Bottino).

The brief was approved by the Board of Brazilian Lawyers Institute, being filed on March 16, 2011, and the case remains pending.

The partnership with the Brazilian Lawyers Institute earned a second project. During the year of 2011, nine students (Antonia Lima, Felipe Godoy, Fernanda Pinto, Gabriel Sauer, Guilherme Leta, Luiz Felipe Cardoso, Maria Helena Queiroz, Pedro Aquino and Rafael Montarroyos), again advised by the Professors André Rodrigues Cyrino and Thiago Bottino, prepared a amicus curiae brief on behalf of the Brazilian Lawyers Institute to be presented to the Supreme Court.

This work is currently under review by the Board of the Institute for approval and has as one of its main foundations the belief that the enactment of the "Clean Record Act" does not constitute a rupture with the political-legal system in order to subvert or destroy the concept of democratic state of law. It is quite the opposite, indeed. It constitutes a mechanism of improvement of the democratic order; it is an instrument of control and governance of political powers by the Brazilian people and, therefore, deserves to be

understood by the Judicial Branch of Brazil as a legitimate political and constitutional decision.

The affirmation of the Constitutionality of the Clean Record Act by the Supreme Court strengthens the role of the Constitutional Court as the guardian of the political process, while it protects the constitutional text itself and its role as guarantor of fundamental limits.

Conclusion

The in-house clinic is where FGV Law School undergraduate courses supervised curricular practice takes place. The aim is to form professionals with a distinct profile, able to think critically through their social performance and who will promote important changes in domestic legal structures to achieve national economic and social development.

One way to achieve these goals is through training the undergraduate students in the preparation of amicus curiae brief in actions of concentrated control of constitutionality which deal with fundamental rights defense. Allowing a student to participate in this process helps improving his/her skills in writing procedural qualified legal arguments and expanding his/her notion of citizenship and rights, giving him/her the opportunity to grow as a person and as a professional, as well.

Besides technical legal skilling, this activity contributes to the teaching of the fundamental rights. Pedagogy is the science and art of education that studies, arranges, systematizes and thinks over the learning process. And the fundamental rights pedagogy promoted by FGV Law School in-house clinics consists in stimulating undergraduates to think through the Democratic State of Law most important values, offering a particular perspective on the legal system prospect of collective and diffuse interests advocacy and giving students a picture of potential contribution that legal career professionals can provide for the construction of a free, fair and solidarity society.

Ensuring the basic human rights of the poor: Ethics management training in local government by Law Schools

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1. INTRODUCTION

In many developing countries, governments and both national and international aid agencies engage in programmes to improve the standard of living of the poor. Governments spend vast amounts of money on social upliftment programmes, such as payment of social grants, providing housing, infrastructure and work creation programmes. Aid agencies contribute huge amounts of money earmarked inter alia for educational and feeding programmes.

As a result of widespread corruption and mismanagement, these funds are either stolen or maladministered. Corruption has a devastating effect on service delivery, with the result that the poor do not benefit from government spending and aid efforts. Most jurisdictions have legislative instruments and law enforcement agencies in place to address corruption. Despite these measures, corruption seems to flourish and general opinion is that the fight against corruption is being lost. In fact, political corruption has become entrenched in our societies.

In the case of South African Association of Personal Injury Lawyers v Heath and Others Chaskalson P made the following comments regarding corruption and the rule of law:

"Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic State."

In this paper it will be argued that a more effective approach to fight corruption would be to concentrate on an effective ethics management strategy, especially in the local government sphere, where basic services are provided to the poor. It will be argued that there is a dire need for Law Schools to provide ethics management training to local government officials and councillors in order to combat corruption.

This paper will focus on a recent project undertaken by the Nelson Mandela Metropolitan University (Faculty of Law) in the Western Cape Province of South Africa, during which anti-corruption and ethics management programs were presented to local authorities. It became evident that although most local authorities have anti-corruption policies in place, effective ethics management programmes were not operative or ineffective.

It will be argued that Law Schools can make a vast contribution to public policy regulating the provision of services to the poor. If the implementation of anti-corruption policies is properly managed, corruption will be curbed more effectively. In this way the ideal of human rights for all can become a reality.

2. THE STATE OF CORRUPTION IN SOUTH AFRICAN LOCAL GOVERNMENT

Shortly after the first democratic elections in 1994, the South African government launched a Reconstruction and Development Programme, aimed at redressing the imbalances in society, brought about by the policy of Apartheid. In South Africa about 17 million people live below the poverty level. Eleven million of these people live in rural areas. In 1990 there was a shortage of about 1.3 million homes. Each year about 200 000 new households seek a home, but in 1992 only 50 000 homes were built. This backlog and demand translated into the need to build 250 000 dwelling units a year in the last years of the 20th century, or roughly 1 000 units per working day; however, only about one-tenth of that number—25 000 dwelling units— were built each year, leaving the country with a serious housing shortage.

About 12 million people have no reasonable access to water and about 21 million do not have adequate sanitation. There is spare electricity in South Africa, but only 36% of households are electrified. About three million homes do not have electricity. 19 000 schools (86% of the total) and 4 000 clinics have no electricity.

The RDP is an integrated, coherent socio-economic policy framework. It seeks to mobilize all resources of the people of South Africa, and that of the country toward the final eradication of apartheid and the building of a democratic, non-racial and non-sexist future. As a result of this policy, vast amounts of money are being spent on social upliftment, such as the building of houses, schools and hospitals. This policy is in line with some of the basic rights in the Constitution, which includes the right to housing, education, health care, food, water and social security.

Government spending in this area, has however created a fertile field for corruption to flourish. South Africa has lost 675 billion rand ($80 billion) due to corruption since 1994. About 20% of all government procurements ($3.8 billion) go missing each year. The Special Investigative Unit of the Asset Forfeiture Unit is at present investigating 900 questionable contracts and conflicts of interest, valued at $635 million. Only 5% (13) of South Africa's 283 municipalities managed to obtain a clean audit in the 2012 Auditor-General's Report. This figure is an increase from last year, but from a low base of 7. Audit reports not concluded on time shot up from 9 in 2009/11 financial years to 40. R3.5 billion of municipal procurement could not be audited in 2010/11 financial year, as the required documentation was not available. 91% of municipalities handed in reports with serious errors or material misstatements. Officials in key positions at more than 70% of the auditees did not have the minimum competencies and skills required to perform their jobs.

Municipalities around the country are in crisis. National government has declared that 136 out of 284 municipalities are unable to fulfill their basic functions. The extent of fraud and corruption in the state procurement process is estimated to be between R25 to R30 billion per year.

3. PERSEPTIONS REGARDING CORRUPTION AND THE LEGISLATIVE ARSENAL TO FIGHT CORRUPTION

The 2012 Transparency International Corruption Perceptions Index assigned South Africa an index of 4.3, ranking South Africa 69th out of 176 countries (tied with Brazil and Macedonia).

In terms of the South African Corruption Assessment Report of 2003 it was established that:

- South African citizens appear to view the most common areas of corruption in relation to seeking employment and the provision of utilities such as water, electricity, and housing.

- Public service managers also identified nepotism in job seeking, promotions and in the provision of entitlements.

- The business community identified clearance of goods through customs, procurement of goods for government, police investigation and obtaining of business licenses and permits, work and resident permits as the most corruption prone activities.

- Public servants most associated with corruption both for the citizens and the businesses appear to be the police. All surveys indicate that police officers are the most vulnerable to corruption, followed by customs, local government, home affairs and court officials. To this list, businesses added the managers and/or employees from companies other than their own.

- The majority of those surveyed felt that government was not doing enough to combat corruption. However, this perception is not uniform across ethnic groups and is held mainly by specific communities.

South Africa has a sizable arsenal of legislative instruments, aimed at fighting corruption. The most important instruments are:

- The Protected Disclosures Act (26 of 2000);
- The Promotion of Administrative Justice Act (2 of 2000);
- The Prevention and Combating of Corrupt Activities Act;
- The Municipal Finance Management Act;
- The Public Finance Management Act;
- The Local Government Anti-corruption Strategy;
- Codes of Conduct for Councillors and officials in terms of the Municipal Systems Act.

The question thus remains: why are there still such a high level of corruption present in South Africa, despite the legislative instruments?

4. APPROACHES TO ETHICS MANAGEMENT

Traditionally there are three approaches to ethics management. The three approaches can be summarized as follows:

- Compliance based approach: A regulated environment (policies, systems and procedures) that meet national and international best practice is in place. Clear guidelines with checks and balances, roles and responsibilities are available.
- Value based approach: In terms of this approach, employees are afforded the necessary tools and competencies to make sound ethical decisions. This system leaves a lot of discretion to employees and compliance will largely be based on the level of commitment of employees within the organization.

- Organizational integrity approach: This approach is a combination of the above two approaches. The policy framework to manage ethics is based on a value framework. Values are at the centre of all the activities of the organization.

South Africa follows the compliancy approach, hence the arsenal of legislative instruments. This approach is however not effective, as the following figures clearly indicate that little prosecutions flow from the breach of ethical codes or instances of fraud and corruption.

The South African Public Service Commission Report for 2012 reveals that:

- Only 50% of government departments had data bases to monitor corruption;
- In only 20% of instances of corruption criminal action was instituted.
- Between 17% and 20% of senior managers in various departments had interests in private companies;
- Some civil servants had interests in more than 5 companies contracting with the State.

It is submitted that South Africa should move away from the compliance approach to the organizational integrity approach. In the programme presented by the NMMU in the Western Cape Province, a move towards the organizational integrity approach was advocated.

5. THE WESTERN CAPE ANTI-CORRUPTION TRAINING PROJECT

The Western Cape Provincial Government instructed GAB Consulting to conduct an Anti-corruption and Fraud Survey during 2011. The aim of this survey was to determine the presence of anti-corruption and fraud prevention measures, as well as employee awareness of these measures, in the Western Cape Province. The main findings of the survey was that the majority of the 29 municipalities surveyed either did not have anti-corruption policies in place, or if they had, no ethics committees were operative. The report revealed a very low awareness amongst employees of such measures. On average 7% of staff knew about the existence of anti-corruption committees and 2% of staff members knew who the members of the committees were, as well as the functions of the committees.

The NMMU was requested to present anti-corruption and ethics management workshops to local authorities. In total 15 workshops were presented, attended by approximately 300 municipal employees and councilors. The training involved the identification of corrupt activities and areas where corruption is most likely to occur. Further aspects covered included action to be taken on corrupt activities. A second, more focused set of workshops dealt with the drafting and implementation of an ethics code, as well as the establishment and proper functioning of an ethics or anti-corruption committee. This part of the training included the implementation of strategies to ensure the viability of ethics management programmes.

Feedback on both workshops was very positive. Two district municipalities informed that they have adopted ethics codes and implemented anti-corruption committees.

6. THE ROLE OF UNIVERSITY LAW SCHOOLS AS CONTRIBUTORS TO PUBLIC POLICY ON HUMAN RIGHTS

Universities have an important role to play when it comes to influencing public policy, especially in changing societies. This political role of the university might be more

important after change has already taken place when people, networks and ideas are formed in the 'protected space' of the university.

These ideas will then spread into the wider society and provide the human resources to fill new political leadership roles in society and its institutions. The same report observes that the role that universities have played in undertaking policy research for new regimes, in providing personnel for the governing and administrative apparatus, and consultancy services to both government and enterprises took place in South Africa and elsewhere. It found that especially in Africa university personnel were active in the work of NGO's.

It is however advanced that universities and law schools should go further and train more than future personnel for the governing and administrative apparatus of the state. It is indeed the current employees of municipalities and the current councilors who will have to fight corruption and manage ethics within the municipal environment. The community at large is also a stakeholder in ethics management. Public participation forums could be used to involve the community in ethics management. In South Africa the ward committee system could be used as such a forum.

Universities could also assist in conducting surveys on ethics management and develop sector specific training programmes where it is necessary to present such training programmes. This work can be done in conjunction with governmental departments and NGO's.

Training programmes, such as the one delivered by the NMMU Faculty of Law to municipalities in the Western Cape is an example of such a programme. Through the funding by an NGO, the NMMU was able to provide a much needed service to municipalities. If ethics are managed effectively within municipalities, instances of corruption will be more easily detected and prosecuted. Measures will also be put in place to monitor government spending and curb instances of corruption. This will ensure that upliftment programmes will be successful, as the money made available for these programmes, will in fact reach the poor it was intended for. In this way, the basic human rights of the poor will be safeguarded.

7. CONCLUSION

South Africa's first democratically elected President, Nelson Mandela said: "Our hope for the future depends on our resolution as a nation in dealing with scourge of corruption."

Corruption is a danger to South Africa's democracy. Poverty needs to be addressed. In the case of Government of the Republic of South Africa and Others v Grootboom and Others the Constitutional Court of South Africa warned that unless the plight of poor communities is alleviated, people may be tempted to take the law into their own hands in order to escape these conditions. The court commented that this case brings home the harsh reality that the Constitution's promise of dignity and equality for all remains for many a distant dream.

It is apt to conclude with the words of the Constitutional Court of South Africa:

"[C]orruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project. It fuels maladministration and public fraudulence…When corruption and organised crime flourish, sustainable development and economic growth are stunted. And in turn the stability and security of society is put at risk."

CHALLENGES AND TRENDS IN BRAZILIAN ADMINISTRATIVE LAW

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The government has taken numerous forms over the years, with an ever increasing rate of change over time. Clearly, the liberal government of the 18th century differed significantly from the economic and social interventionist government of the 20th century. Over the past centuries these forms of government have taken on new significance, structures and ways of relating with civil society.

The rapid rate of change at the end of the 20th century and the current century has lead to more than faster modifications in the form of government and the manner in which it develops and needs to develop. Nowadays, shifts in society, politics and the economy that present new challenges for the State occur over the course of just a few years. These challenges range from administrative questions related to reforming the state apparatus to regulating public services, competition, the environment, the financial system, etc. Thus, it is of utmost importance to examine the present and future of the State.

There is much discussion of how Brazil's public administration should function in today's dynamic social, political and economic climate. There seems to be consensus around the idea that any actions must take into account both the overarching and specific societal issues and demands, and the that administration must make sure it is flexible, efficient and able to address the everyday needs of the population.

But why has discussion and debate on the topic of public administration intensified recently? One related fact is of utmost importance to Brazilians: letters published in 1988 in The Federal Constitutional outlined a new, solidly democratic design for the state of law. The letters highlighted the need for an overhaul of the social order with a focus on employment, well-being and social justice, as well as the need for the economic order to foster free enterprise and recognize the value of the labor force. It was up to the State to maintain social and economic order while overseeing and **regulating** the daily functioning of society on which social and economic order is based.

If the State should ideally generate public policy that aims to regulate market competition and promote society's well-being (the means), the focus and principal objective is then the creation of instruments that foster and protect the dignity of the citizens (the end). Whereas one individual affecting the dignity of others was previously thought to be inappropriate, this notion came to be considered an integral part of the relationship between the State and society. The result of this shift is a substantial revision of assumptions about the role of the State in the general functioning of society, politics and the economy.

Books and other writings on a range of contemporary topics related to the State, including the financial system, competition, the environment and oil in Brazil reflect the new, systematic way of thinking that has taken hold in the country. With this new vision comes the recognition that the law and its stakeholders are part of a network of knowledge, information, logic and standards of behavior that can only be understood through an interdisciplinary, practical perspective based in the social, economic and political condition of the country.

Brazil, known for the extreme economic interventionist policies of its executive branch, particularly during the 1960s, '70s and '80s, has seen increased State regulatory actions.

These actions must generate new solutions that address the complex social issues that impact the welfare of the people.

One of the principal features of the current situation of Brazilian society is that State actions, to a certain extent in the social context, tend to impact one another and even have an effect individual rights. Given the extensive range of opposing interests and the diversity of constituents and stakeholders in the country, the implementation of public policy often fails to meet the needs and expectations of the population.

To address these challenges, which are exacerbated by the complexity and taxes stipulated by the 1988 Federal Constitution, the government must act with the utmost efficiency and proper use of funds. This adds to the already problematic situation engendered by the traditional discretionary spending.

Nowadays the State must be extremely efficient in providing services to the public, as well as on the domestic and international level. Specifically, the State must be an instrument for national development while being accountable for its actions. However, public policy for distribution of wealth, food, employment, safety, investments in education, access to the legal system, improvements in healthcare and programs for housing and basic sanitation infrastructure have become the main focus of State planning. It is worth noting that in Brazil this is not a response to situational needs, but rather a stipulation of the constitutional system. However, the planning and proper implementation of public policy in these realms, essential for the development of society, remain somewhat "opaque".

Thus, if the Brazilian State takes on a regulatory role with very clear objectives to respect basic rights and allocate certain economic activities to the private sector, society will need governance geared specifically toward transparency of results of government activities.

These results should, whenever possible, must be presented objectively, with indicators of achievement, metrics and induces that exclude randomness and translate the consequences of political action and public choices into improved living conditions for the population.

What's more, the State has taken on a regulatory role and public policymakers in isolation are unable plan, finance and execute all the strategic investments necessary for the development of the country. The solution involves the formation of consortia and partnerships among federal, state and city governments, independent agencies, international organizations, non-governmental organizations and private companies. Only in this way can the government properly implement programs based on public policy.

In fact, the federal government has considered altering the way in which it implements some actions in strategic areas. Federally administrated agencies would function under a new format: the Managerial Public Administration. The goal of this agency is to promote a new mentality and a new culture of management, modeled after other organizations already addressing the challenges of modernization, in the Brazilian public administration.

Among other actions, as part of the privatization process, independent regulatory agencies — connected, but not subordinate to the central government-- were created or restructured. These agencies were part of the so-called decentralized or indirect administration. In addition, a model for social organization was created to transfer some of the responsibilities in the social realm to philanthropic and not-for-profit organizations through the use of incentives.

The creation of regulatory entities follows an international trend of government reform through the creation of new management, legal, financial and technical tools. Various types of independent regulatory agencies have been established in many countries around the world. Some examples include independent regulatory commissions in the United States, France's autorités administratives indépendantes, autorità indipendenti in Italy, the administraciones independientes in Spain, the Canadian régies, the ambetswerk in Switzerland and Finland, and the ministerialfreien Raums of Germany.

It is important to stress that with the process of European unification it has become crucial that the activities of the various regulatory agencies be coordinated in order to promote efficiency and transparency. Indeed, a number of institutions have been created with this objective.
In fact, the Brazilian regulatory commissions have been particularly successful in this area. In addition, new regulatory models have been implemented in the Conselho Administrativo de Defesa da Concorrência, CADE (the Anti-trust Council) and the Comissão de Valores Mobiliários, CVM (the equivalent of the US Securities and Exchange Comission), among others.

Clearly, the government sought to apply new theories during the 1990s. The model applied at that time, from the classic bureaucratic point of view, put the agencies in a position of less influence relative to government interests. The regulatory agencies, on the other hand, were connected solely to the central government and focused on the continued implementation of public policy that sought to separate the creation and execution of public policy.
Within the historical context politics, subject to the electoral cycle and governmental limitations, could impact the adoption of practices that required continuity and reliability of the legal system. Thus, the regulatory system favors and promotes the development of practices on the State, rather than on the government level.

This paper set out to present the complex nature of the regulatory system in Brazil by explaining the environment imposed by the Brazilian constitution, identifying the theoretical bases of the organization of the government and exploring the role of the new, functionally autonomous regulatory agencies. It is a question of actions, strategies, programs and policies aimed at improving the country on an institutional level under the guises of the State as a regulatory agency, as well as to strengthen the democracy and promote human dignity.

HOW LAW SCHOOLS CAN CONTRIBUTE TO PUBLIC POLICY ON HUMAN RIGHTS

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The essential functions of a law school are teaching, scholarship, and service. Public policy on human rights should inform a law school's activities in carrying out each of these functions.

Teaching

The Universal Declaration of Human Rights[249] is one of the most important documents created in human history. Though intended to be primarily aspirational in nature,[250] "there can be no question that . . . [it] constitutes at least significant evidence of customary international law,"[251] and some consider it to have become a part of binding customary international law.[252] Its principles are given life – to greater or lesser extent – in member nations' constitutional structure, legislative enactments, law enforcement activities, criminal and civil justice systems, as well as through many international treaties.[253] At law schools all around the world, core law school courses focusing on each of these subject areas are taught – and often required. The Universal Declaration of Human Rights is relevant to the study of each of them.[254] Law schools thus have an opportunity pervasively[255] to integrate consideration of the Universal Declaration of Human Rights into the study of domestic law. What are the costs and benefits of doing so?

First, the benefits. Law school graduates disproportionately become leaders in society. In many countries, they are broadly represented among local, regional, and national legislatures; heads of state; government officials charged with administration of the criminal and civil justice systems; and leaders of large organizations such as business corporations, health care providers, and NGOs. Persons in these roles possess significant opportunity – and power – to influence the advancement of human rights policy as it is formed and implemented at national, regional, and local levels of society. Of course, many more law school graduates become lawyers. Regardless of the type of clients a lawyer routinely represents – individuals, organizations, or governmental entities – he or she has both the opportunity and the responsibility[256] to counsel and represent those clients in ways that can influence the formation of human rights policy within the legal/social/political

[249] Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948), available at http://www.un.org/en/documents/udhr/ (last accessed January 26, 2013).
[250] Hurst Hanum, *The Status of the Universal Declaration of Human Rights in National and International Law,* 25 GA. J. INT'L. AND COMP. LAW 287,317-18 (1995).
[251] *Id*. at 319. *See generally*, *id*. at 317-339.
[252] *Id*. at 319 (citing **LOUIS HENKIN, THE AGE OF RIGHTS** 19 (1990).
[253] *Id*. at 292-316.
[254] For example, courses on contract law and labor law might quite naturally consider Article 24 of the Declaration, recognizing a universal right to rest, leisure, reasonable working hours, and paid holidays.
[255] *Cf*. Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. Legal Ed. 31 (1992) (proposing that professional responsibility (legal ethics) issues should be integrated into all law school courses), and **DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD (1998) (**providing teaching materials materials to enable professors who do not specialize in the field professional responsibility to easily integrate professional responsibility issues into their course).
[256] *Cf*. AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 & cmts. 2, 3, & 5 (2013), accessible at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html (last accessed January 26, 2013).

environments in which those clients operate. Therefore, by encouraging law student to critically consider human rights issues as they arise in every course, law schools can enhance the likelihood that their graduates will be equipped and inclined to make constructive contributions to the promotion of human rights policy in ways both small and large. By preparing the human resources that they are creating and nurturing to be mindfully and actively attentive to human rights policy, the law schools will enhance the value those human resources hold for the benefit of society.

The costs[257] associated with more purposely incorporating consideration of human rights policy into a law school's curriculum are modest. True enough, some resources must be invested in workshops designed to create in professors a basic understanding of human rights policy and documents and how these sources of law effectively can be incorporated into courses throughout the curriculum. Such workshops usually could be conducted using in-house faculty expertise or a guest lecturer. Having created the ability of professors to attend to human rights policy in their courses, institutional leadership could create incentives for professors to utilize this ability Such incentives would not necessarily require additional resources. A dean simply might announce that a professor's efforts with respect to infusing consideration of human rights policy into courses will be a not insignificant factor in performance evaluations and compensation decisions. Such a program would facilitate a law school to realize its full potential for contributing to human rights policy through its teaching function.

Scholarship

While some in the United States have questioned whether legal scholarship has any significant real world impact,[258] there is no such skepticism in countries employing civil law systems. Even in America, however, there is reason to believe that published scholarship constructively impacts human rights policy as it is enunciated by courts, legislatures, and the executive branch of governments.

It is not uncommon for decisions of the United States Supreme Court (as well as lower federal courts and state courts) to be influenced by legal scholarship produced in law schools. Notable examples of such influence can be found in Miranda v. Arizona,[259] prohibiting police officers from conducting custodial interrogations of suspects in criminal investigations without first advising the suspects that they have a right to remain silent and to engage counsel (or to have counsel appointed to advise them) before they respond to the interrogation; Lawrence v. Texas,[260] holding unconstitutional a Texas statute making it a crime for two adults of the same sex to engage in certain intimate sexual conduct; and Crawford v. Washington,[261] establishing that defendants in criminal proceedings must have a meaningful opportunity directly to confront, in open court and with the assistance of counsel, those whose testimony or research is sought to be introduced as evidence against them. Each of these decisions directly impacted human rights policy in the United States, and each relied in part on published legal scholarship.[262]

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[257] Some might worry about the "cost" of class time that would be lost if time that otherwise would have been devoted to the core subject matter of a course is devoted to human rights issues. This problem can be managed. A little time goes a long way toward achieving the desired objective, and it may be sufficient to motivate more students to enroll in courses that focus exclusively on human rights than would otherwise have been the case. To the extent that a finite amount of class time will be "lost" on account of attention that is given to human rights issues, a school responsibly could conclude that this institutional "cost" is exceeded by the institution benefit of prioritizing human rights discourse.

[258] *See, e.g.*, Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L.REV. 34, 42-57 (1992).

[259] Miranda v. Arizona, 384 U.S. 436 (1966).

[260] Lawrence v. Texas, 539 U.S. 558 (2003).

[261] Crawford v. Washington, 541 U.S. 36 (2004).

[262] Miranda v. Arizona*, supra* note 11, at n. 2; Lawrence v. Texas, *supra* note 12, at 572; Crawford v. Washington, *supra* note 13, at 61, 63; *see also*, *id.* at 69 & nn. 1-2 (Rehnquist, C.J and O'Connor concurring).

With institutional encouragement, law professors in many countries have an impressive record of producing legal scholarship addressing human rights policy and thus creating a body of thought worthy of consideration in the formation of public policy. Human rights incites propounded in legal scholarship are often brought to the attention of decision makers through the briefs and arguments of lawyer-advocates and *amici*. As is true for courts, there is no doubt that legislators and officers of the executive and administrative branches of government often are influenced by legal scholarship produced in the law schools in forming their decisions that affect human rights policy.

Besides influencing policy makers, professors' production of legal scholarship also informs their own teaching. Therefore, legal scholarship contributes to the formation of public policy on human rights through the teaching function, as well.

Service

Law schools provide service to society through the individual efforts of their faculty members and through institutional efforts. As individuals, law school professors sometimes take leaves of absence from their academic positions to serve in government posts where they can directly affect public policy on human rights. Law professors are capable of providing such service because they have worked in law school environments where highly educated and concerned individuals facilitate the development of well-informed insights regarding human rights policy. By creating these environments, law schools help to develop intellectual capacity that can be particularly valuable in assisting governments as they create and implement human rights policy. A flexible leave policy will allow this capacity to benefit society.

Institutionally, law schools can influence public policy on human rights through educational clinical programs[263] and multi-disciplinary conferences. Dozens of law school clinics throughout the world represent clients seeking to assert or protect their own human rights or those of others.[264] By pursuing judicial recognition of human rights, legislation, or administrative actions on behalf of clients, the legal services offered by law school clinics directly impact human rights policy through the advocacy of the student/lawyers and their faculty supervisors. Further, law school clinical programs provide an incomparably impactful educational experience for law students, who stand to be more knowledgeably and actively engaged than they otherwise would be in the shaping of human rights policy throughout their post-graduate careers. Thus, clinics contribute to public policy on human rights through both the law schools' service function and their teaching function.[265]

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[263] For examples of robust clinical programs addressing human rights issues, see http://www.law.northwestern.edu/legalclinic/ (last accessed January 27, 2013), http://www.law.georgetown.edu/academics/academic-programs/clinical-programs/our-clinics/index.cfm (last accessed January 27, 2013), http://www.law.nyu.edu/academics/clinics/year/index.htm (last accessed January 27, 2013), and http://www.law.stanford.edu/clinics (last accessed on January 27, 2013).

[264] Law school clinical programs address disputes involving religious liberty; citizens' needs for health care, shelter, and food; the plight of refugees and asylum seekers; those yearning for a safe and healthy environment; persons who are victims of domestic abuse; and many other human rights claims.

[265] Clinical legal education programs are better developed and more widely available in some countries than they are in others.. There are ongoing efforts by governments and NGOs to broaden the availability of law school clinics because of the valuable services and teaching that they provide. *See, e.g.*, Zaza Namura, *U.N. Enacts Global Standards on Access to Legal Aid,* Open Society Foundations (Dec. 12, 2012) (available at https://snt002.mail.live.com/default.aspx?id=64855#!/mail/InboxLight.aspx?n=1355786509&fid=1!n=1828898018&fid=1&pdir=NextPage&paid=a548fe4f-62b6-11e2-9812-00237de49bb6&pad=2013-01-20T04%3A05%3A48.677Z&pidx=2&mid=8d98cb79-5b95-11e2-ad4d-00215ad7f73c&fv=1 (last accessed January 26, 2013). These efforts should be encouraged to continue.

Finally, law schools, particularly those that are university-based, are well situated to organize conferences and symposia on topics and issues that implicate human rights policy. By bringing together academics and policy-makers from a variety of relevant disciplines and viewpoints, law schools can stimulate scholarly and public discourse on human rights policy. This discourse, in turn, contributes to reform of human rights policy.[266]

[266] *See, e.g., Symposium: Examining Shaken Baby Syndrome Convictions in Light of New Medical Scientific Research,* 37 **OKLA. CITY U. LAW REV. 219 (2012).**

Unique cooperation between Law School (TLS) and Estonian Human Rights Centre (EHRC) in Estonia

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1. Introduction

The deep and unique cooperation between TLS and EHRC has been mutually beneficial and allowed to achieve results which would not have been possible separately; in this situation cooperation has resulted in significant benefits for both parties.

Tallinn Law School (TLS) has human rights in its DNA. The law school is uniquely international as it has been always oriented towards international and European law, of which human rights form a significant part. TLS thus has faculty members that are interested in and work on issues related to human rights, as well as academic contacts in the area. Both Bachelor and Master programmes include at least one required course on human rights, which means that TLS students and graduates are more into human rights as well. The new international master program on technology and law takes into account the human rights issues (privacy, intellectal property, security related issues). There is considerable expertise and interest in human rights at TLS, but there is a lack of practical channels to put the expertise and interest to practice in Estonia.

Estonian Human Rights Centre (EHRC) was founded in 2010 by two lecturers at Tallinn Law School in order to engage in human rights advocacy and create a central non-governmental human rights organisation in Estonia. It was based partially on activities that were undertaken in the Human Rights Centre of **Tallinn University of Technology** (TUT), which had been operating since 2007. The EHRC has focused on three main areas in its current activities: equal treatment, refugees and human rights education. It also publishes a yearly human rights report and monitors and reports on human rights in Estonia in general. The EHRC has achieved considerable visibility and good links with different NGOs, however, it has not yet developed international contacts, also there is a constant need for outside expertise and support.

EHRC is a member of the EU Fundamental Rights Platform, which is a network of NGO cooperation under the auspices of the EU Fundamental Rights Agency and a member of the Estonian Roundtable for Development Cooperation. EHRC also belongs to the Network of Estonian Nonprofit Organizations. EHRC has also recently joined European Council of Refugees and Exiles (ECRE). The mission of EHRC is to actively promote respect for human rights in Estonia. EHRC advocates the improvement of policy and law concerning human rights through awareness-raising, public debate, advice, lobbying and strategic litigation. EHRC is an independent, reliable and professional partner to individuals, government, local governments, companies and non-governmental organisations both inside and outside of Estonia.

The vision of EHRC is to become a comprehensive, effective and sustainable national non-governmental human rights advocacy organisation. It will be a contact-point both inside as well as outside Estonia in human rights issues concerning primarily Estonia. EHRC develops its activities according to thematic programmes depending on needs of the society. These thematic programmes and main activities within them currently are:

- Equal treatment and non-discrimination programme, advocating for betterment of Estonian equal treatment laws and practice, including providing regular legal advice to individuals, delivering trainings, conducting thematic studies, lobbying and engaging in strategic litigation when necessary;
- Refugee programme, including legal clinic providing legal aid and representation in court during asylum proceedings with the aim of improving the procedures for asylum seekers as well as participating in and initiating topical public debates as a tool of advocacy;
- Human rights education programme, including Human Rights Week in November/December annually since 2007, providing trainings and human rights courses at Tallinn University of Technology, cooperation with UNESCO Associated Schools Project Network (ASPnet).
- Access to justice programme will be developed in 2012 to monitor and advocate better access to justice, including state legal aid, length of proceedings and provide information and advice on access to justice in the Russian language.

The activities so far have also included the following cross-cutting actions:

- Monitoring the situation of human rights in Estonia - eg. publication of annual human rights report on Estonia, which is a useful tool for advocacy. First one covered 2007, next 2008-2009 and third one 2010,1 the report on 2011 is expected to be published in March 2012. Studies on specific topics of fundamental rights (such as homophobia, child trafficking, data protection, racial discrimination, return of irregular immigrants) for the EU Fundamental Rights Agency2 and participation in ELDIA (European Language Diversity for All) project on minority languages;
- Exchange of information among different stakeholders - eg. EHRC commenting on the drafts of state reports for UN and Council of Europe, EHRC participating in consultative bodies, EHRC cooperating with different Estonian and international organisations acting on specific areas of human rights;
- Topical advocacy activities - eg. participating in public discussions with human rights aspects, supporting or initiating actions such as legal regulation of same-sex partnerships, compiling shadow reports to state reports where necessary and otherwise providing information on the situation of human rights to international organisations and other states;
- Thus there are unique benefits to be had for both TLS and EHRC. These unique benefits allow for deep and wide cooperation in numerous areas, many of which result in influencing public policy on human rights. Both institutions are able to reinforce each other in terms of contribution to human rights policy as well as providing a common platform for discussion of topics related to human rights situation in Estonia.

For TLS, partnering with EHRC adds significant value:

- TLS faculty gets visibility and academic work results in practical output;
- TLS is able to develop strong links with society;
- TLS students are able to get internships in the human rights field at EHRC;
- TLS grows its research and development activities in addition to teaching (important due to higher education reform in Estonia).

For EHRC, partnering with TLS gives similarly benefits:

- EHRC gets access to TLS academic contacts and resources (TUT library);

- EHRC is able to rely on the pool of faculty members active in human rights research in order to get input for its activities (such as the human rights report);
- EHRC as a newcomer is able to use the reputation of TUT and TLS in order to get better credibility for its activities;
- EHRC is able to engage volunteers and find new talent among TLS students.

There are also risks and issues, for example as the competition between universities is harsh, other (regional) universities are less interested in cooperating with EHRC. Similarly, for TLS, there is a risk that it gets too involved in grassroots activism (such as campaigns), which does not go together with an academic reputation. However, those risks are minimal and have not resulted in problems.

To cooperation is structured using a framework cooperation agreement, which is supplemented by concrete agreements for specific activities. The agreement sets out the responsibilities of parties as well as principles of cooperation. Some of the staff of EHRC is also employed by TLS to give lectures on human rights and European law. Additionally, there are members of TLS faculty at the Council of EHRC, which is the highest decision making body of the institution.

Specific activities in which TLS and EHRC cooperation has been especially effective are highlighted further.

2. Situation of human rights in Estonia

The human rights situation in Estonia can be characterised as uneven. In some areas the developments have been faster than in others. In some areas examples can be provided as to how Estonia is going further than minimum international standards in the protection of human rights and in a few areas, even minimal level has not been achieved. The protection of human rights is divided by areas of activity between various ministries and institutions. Uniform and co-ordinated approach is lacking, in fact, there is little cooperation between the different institutions that in one way or other affects human rights of individuals.

The main government agencies which have central role of protection of human rights include:

Chancellor of Justice (*Õiguskantsler*), which combines the role of an ombudsman with the protector of the constitution (including constitutional rights). While the Chancellor has been effective in highlighting issues, its role and capacity is constrained as he remains mainly reactive in dealing with human rights abuses. Gender Equality and Equal Treatment Commissioner (*Soolise võrdõiguslikkuse ja võrdse kohtlemise volinik*) is a new institution established from January 2009 dealing with discrimination cases. While the Commissioner has the legal powers to engage in awareness-raising, its financial and human resources are extremely limited. Its function to respond individual applications has remained politically marginal. Estonian Data Protection Inspectorate (*Andmekaitse inspektsioon*) is tasked with both ensuring implementation of data protection rules as well as handling complaints regarding information required to be published or made available by public bodies. But its scope of activity is limited to data protection and access issues only.

There is no accredited or non-accredited National Human Rights Institution in Estonia.

The Ministry of Justice, Ministry of Social Affairs, Ministry of Culture and Ministry of Education and Research have mandates that deal with specific aspects of human rights, such as for example non-discrimination. The Ministry of Foreign Affairs has a bureau of

human rights, which is mostly preparing reports on behalf of the Estonian government, whereas the Ministry of Culture deals with integration and cultural diversity.

There is no authoritative human rights advocate NGO, having the capacity and clout to have a meaningful impact in the society. In the NGO sector, there are currently three general human rights organisations active in Estonia: Estonian Institute of Human Rights (MTÜ *Inimõiguste Instituut*), Legal Information Centre for Human Rights (MTÜ *Inimõiguste Teabekeskus*) and the EHRC. The Estonian Institute of Human Rights (EIHR) is the oldest, but has limited resources and capacity, therefore the impact of its activities has so far been minimal. It has recently been reorganized. The Legal Information Centre for Human Rights (LICHR) is mainly focused on the protection of interests of the Russian ethnic minority.

Besides the above three, other human rights organisations are more specialised (e.g. protection of the rights of the child, of the disabled, patient's rights, LGBT persons etc) with no interest in developing human rights in general. Due to fragmentation and lack of cooperation and specialist knowledge within the NGO sector, these organisations have a limited impact on improvement of the overall situation. The NGOs sometimes lack legal expertise and advocacy skills, while their awareness raising capacities can be somewhat better. The EHRC has already established contacts with most of these specialised NGOs, cooperating with them on different activities, such as the Human Rights Week and annual human rights report.

As regards specific areas of human rights, the situation is the following (based on the three annual reports Human Rights in Estonia 2007, 2008-2009, 2010).

Estonia lacks a general strategy for the better protection and promotion of human rights. The state mainly deals with human rights topics reactively, as a consequence of the application of EU or international legal norms. This can be exemplified with the adoption of the Equal Treatment Act, referred to earlier, which was adopted on 2008 solely with the purpose to avoid infringement procedure by the European Commission.

The reports underline the considerable differences in the treatment of men and women. Estonia's pay gap of 33% is the largest in the European Union. There are also significant differences in the treatment of men and women in recruitment and conditions at work. However, activities related to gender inequality continue to be under-financed and not sufficient to have any notable effect on society. The state continues to lack a systematic plan of action to promote gender equality. The Commissioner's continuously low budget shows the lack of interest from the part of the Government to deal with the issue in any meaningful way.

In recent years, emphasis in Estonia has been on nationality-based discrimination. National minorities have the opportunity to form cultural autonomies but, unfortunately, this opportunity is not widely used due to the complexity of the regulation and difficulty to fulfil the requirements for their establishment. The situation of Russian minority in Estonia is worrisome since a large number of them are still stateless. The latest human rights report on 2010 also demonstrated the high level of unemployment and low self-esteem that is prevalent in Russian-language community. This community also has a very low knowledge of their legal rights and recourses available to them when their rights are violated.

Compared to other fields of activity, discrimination based on sexual orientation received the least attention in Estonia until last year. In 2010, Tallinn University of Technology in cooperation with EHRC launched a campaign Diversity Enriches, which continued in 2011 and tackles homophobia among other topics. The situation is problematic primarily due to

the prejudicial views of homosexuality and stereotyping in Estonia. Currently the central issue is the lack of opportunity for same-sex couples to register their partnerships and thus receive the privileges and rights attached to such registration. The LGBT organisations are still in the first stages and their ability to advocate for the respective issues independently is still developing.

Shared problem throughout the whole non-discrimination field is the apparent low impact of equal treatment legislation. Although the Gender Equality Act has existed since 2004 and the Equal Treatment Act since 2008, there have never been any cases in court based on these acts. This either shows lack of awareness of these acts or their lack of trust in the functioning of these acts. Another shared problem is the regulation of hate crime, which generally is considered to be ineffective due to the high threshold required by the Penal Code. There have been no cases under the current regulation and although an amendment (lowering the threshold) has been drafted by the Ministry of Justice, there is a lack of political will on the part of the politicians to process it in the parliament.
The availability of high-quality legal assistance to all people continues to be problematic in the area of the administration of justice. The current legal aid system does not guarantee the best possible protection and it should be reviewed in order to provide better access to courts. Additional problematic areas pointed out by the Chancellor of Justice and the Supreme Court are legal fees that are too high and court procedures that are too long. There government has announced that the situation will be improved.

The number of asylum seekers in Estonia has been relatively low compared to other EU member states. It has increased in the past three years: In 2009 the number of asylum seekers in 2009 was 40, in 2010 it was 33 and by October 2011 it is already 62. Therefore new situations, questions and challenges arise every day. According to studies carried out in Estonia the awareness among public is very low and the topic is not a priority at the Government level. In Estonia there are 5 NGOs dealing with refugee matters directly. These NGOs mainly work project-based depending on the funding from the European Refugee Fund and/or the Ministry of Interior Affairs, which limits the work and possibilities and, moreover, the rules are set by the funding organisation.

Human rights have been in the public opinion generally thought of as a requirement of EU and NATO accession and a matter of reputation of the state. The concept of human rights as inalienable birth rights of every person has not been clearly communicated. The political and opinion leaders fail to understand the nature of human rights and the necessity of the protection of human rights for the balanced development of the Estonian society. Human rights organisations have, in this regard, a substantial work to be done, which includes raising awareness of not only the general public but also of public servants and politicians.

3. Annual human rights report[267]

TLS provides links with academia, which are able to contribute to activities of EHRC, which are directed towards reporting and monitoring. In a small country in which there are few specialists of human rights, TLS is providing academic quality supervision.

The cooperation in the framework of the human rights report is a good example of synergy between human rights activism and scholarly efforts: the report (first issued on 2007) gives information on and analyses the human rights situation in Estonia. It deals with Estonia's

[267] http://humanrights.ee/en/activities/monitoring/annual-human-rights-report/
The latest, is available as pdf: http://humanrights.ee/wp-content/uploads/2011/09/EIKaruanne2011.eng_.pdf

development in nearly all rights contained in the European Convention on Human Rights. The authors enjoy academic freedom although the facts and style of the contributions are carefully peer-reviewed. The selection of the authors is discussed with the Board of the Centre and law school scholars have been active in contributing.

As it is stated by Human Rights Centre: "Developments that took place in the field of human rights in Estonia are described, analysed, illustrated by positive and negative examples as well as criticised, but not only that – specific recommendations for eliminating the shortcomings are also provided. Although each chapter has an author or authors, the report aims to provide a coherent overview of developments in human rights in Estonia as a whole".

The report is published in Estonian, English and Russian (biggest minority in Estonia) languages and are available also as PDF files at the website of the EHRC. The report is widely disseminated and received also criticism of being too harsh or critical. The human rights report is one of the tools through which it is possible to influence public policy on human rights. Concrete examples include analysing the situation of the right to education, especially concerning as well as freedom of speech issues. The arguments that contain in the reports are often used by TLS academic staff when dealing with human rights issues. For example, belonging to Legal Policy Committee of the largest professional association – Estonian Lawyers Union, the comments related to access to education have been used; as well as some of the arguments in evaluating Estonian European Union Strategy.

EHRC is conducting also monitoring of the human rights situation, some of them were provided in cooperation with TLS. One example is a media monitoring on how human rights topics are covered in media. The period monitored was for three months. Based on the monitoring, the experts compiled a report analysing media's understanding of human rights and its handling of human rights problems. The aim of this specific monitoring was to clarify how, in what scope and how balanced is the coverage of Estonian (incl Russian language) news media regarding issues of human rights protection. Monitoring covered all major news media publications on paper as well as on web, including not only Estonian language media but also Russian language media

4. "Diversity Enriches" campaign

For three years, EHRC and TLS have cooperated in projects funded by European Commission and Estonian Ministy of Social Affairs in order to promote equal treatment and fight discrimination and intolerance. This has been the most prominent activity in the area in Estonia, creating a lot of discussion and resonance in the society.

The campaign has included many activities in which TLS and EHRC have joined forces:

- Newspaper inserts (circulation ca 40 000 copies) on LGBT, Disability, Age;
- Film programmes with Black Nights Film Festival and tARTuFF (in 2010 and 2011);
- Diversity enriches weeks in Tallinn and Tartu in 2012 (film programme, concert and activites);
- Conferences on equal treatment in general (2010), LGBT (2011) and Diversity in business (2012);
- Studies on attitudes towards LGBT, older aged persons;
- Compilation and publication of handbook on Equal Treatment Act;

- Exhibitions on LGBT: Untold Stories at Tallinn Art House, new version of Berlin-Yogyakarta (translated to Estonian and Russian[268]);
- TV programme in 2011 and radio programme in 2012;
- Facebook page with 4047 "Likes";
- Launch of the Diversity Charter in Estonia in November 2012 and accompanying actions;
- Outdoor campaigns on (racism and homophobia in 2010, LGBT and disability in 2011, Business Case for Diversity 2012).

In all of the above activities, which formed the equal treatment advancement in Estonia, partnership between TLS, EHRC as well as Ministry of Social Affairs was one of the factors, which allowed the campaign to be so successful.

In 2011, the campaign involved during implementation five additional partners. The active partners were:
Eesti Puuetega Inimeste Koda (Estonian Chamber of Disabled People, ECDP) – They were responsible for organising the shared experience seminars for disabled persons as well as the teaching kit for kindergartens. They also provided valuable inputs in developing both the newspaper insert and outdoor campaign on social status of disabled persons. In addition they cooperated helping to make the film festival more accessible.
MTÜ *Kollaboratoorium* – They were responsible for the international exhibition "Untold Stories". It was successfully implemented and there were no problems with reporting or publicity.
MTÜ *Pimedate Ööde Filmifestival* (NGO Black Nights Film Festival, PÖFF) – PÖFF was responsible for the Tartuff film festival and human rights subprogramme of the 15th Black Nights Film Festival. During the action they developed and active interest in furthering accessibility for disabled persons to their events, which will last also after the end of the action.
MTÜ *Tegusad Eesti Noored* (TEN) – TEN was responsible for the two youth oriented sessions, which they successfully implemented.
MTÜ *Eesti Gei Noored* (EGN) – EGN was responsible for the organisation of the cultural day for LGBT people. They were also involved in other areas of the project, participated at seminars and provided useful feedback.

As a stakeholder, Estonian Ministry of Social Affairs was involved in the activities. The were contributing to the development of various activities (such as study). The communication and cooperation could have, however, been better. In addition the Gender Equality and Equal Treatment Commissioner took part in and contributed to several activities. The British Embassy in Estonia also provided useful support with contacts from the UK for the conference and other activities (such as TV show).

The most important outcomes are the improvement of awareness of equal treatment, increase in visibility of non-discrimination topics (especially in the focus areas of LGBT and persons with disabilities).

An important lesson learned from the action is that maximum impact can be achieved when involving professional specialist organisations and by building partnerships. This action was implemented by a public university with the close involvement NGOs as partners as well as several more in other roles and the government through the Ministry of Social Affairs. However, one should be aware that such partnerships take long time to develop and a lot of focus should be put on communication between partners.

[268] also available online at http://www.erinevusrikastab.ee/berlin-yogyakarta

Implications for policy-makers and opinion-makers include the possibility to discuss equal treatment issues more openly and in a more substantial level. For NGOs the action has meant being able to be a part of an action that elevates the discussion and provides enhances knowledge sharing and contacts. It is the bringing together of different NGOs where awareness grows (such as NGOs specialising in areas of disability and LGBT issues). It is also important that non-discrimination issues are dealt with and communicated from a position of authority. This cooperation between the European Commission, Ministry of Social Affairs, Tallinn University of Technology, Estonian Human Rights Centre and several NGOs means that there is a far greater chance for high and sustainable impact than it would be if the action was implemented by one actor only.

It is also important to include the academia in practical actions such as these. Research-based advocacy for equal treatment can be far more effective than general measures, which have no backing from academia or policy analysis.

The impact of the campaign was also analysed. In June 2012 TLS conducted a poll on attitudes towards LGBT people. There was also a question about the impact of the outdoor campaigns. The result of the poll was that the campaign reached 18% ± 2,4% of 15-74 population aged between 15-74, so ca 165 – 214 thousand inhabitants in Estonia (total population 1,3 million). Therefore it can be said that the unique partnership between TLS and EHRC was a big part of this.

5. Legal clinic for asylum seekers

The legal clinic for assisting asylum[269] seekers coming to Estonia was founded at EHRC in 2011 and is currently the only place for free legal aid for any asylum seekers coming here. It is funded by the European Refugee Fund and Estonian Ministry of Interior Affairs. The establishment of the legal clinic and its successful operation was made possible due to cooperation with TLS and UNHCR.

There used to be a legal clinic for refugees operating previously at the predecessor of TLS, Concordia International University Estonia Law School (the later mergers led to the current TLS). However, ca 10 years ago the clinic stopped as the people left to do other things and there were also very few people applying for asylum in Estonia. The demand for legal aid had reappeared by 2011 as there were more and more asylum seekers coming to Estonia. Therefore it was decided to establish the legal clinic at EHRC. However, while establishing the clinic, lessons from the previous legal clinic were taken into account. Also, people who were involved with the clinic previously were consulted and some of them also contributed to current activities.

The legal clinic relies on volunteer law students, professional outside lawyers and in-house legal experts to provide free legal assistance to asylum seekers. The TLS law students are therefore a key ingredient in the success of the legal clinic. TLS is the only law school in Estonia which has courses on international refugee law, and due to its focus on international and European law, there is a large number of potential students who can be involved in the work of the legal clinic. The resources of TUT library are also utilized when researching specific cases.

The legal clinic has already achieved impact on asylum procedure, both through raising awareness as well as through litigation.

6. Research, publishing

The fact that there is an interaction between two institutions also in academic level, resulted by several joint cooperation. Some of the international level academic researches include:

- Käsper, K. Kerikmäe, T (2012). Access to Higher Education in the EU: Evolving Case Law of the CJEU. European Journal of Law Reform;
- Roots, L. (2012). European Union Citizenship or Status of Long-Term Resident: A Dilemma for Third-Country Nationals in Estonia. . Baltic Journal of European Studies,2(1), 61 - 75.
- Kerikmäe, T.; Nyman-Metcalf, K.; Roots, L.; Meiorg, M.; Popov, A. (2012). Estonian Report: Protection of Fundamental Rights post-Lisbon: The Interaction between the EU Charter of Fundamental Rights, the European Convention on Human Rights (ECHR) and National Constitutions. Laffranque, J. (Toim.). Reports of The XXV FIDE Congress Tallinn 2012 (389 - 422). Tartu
- Tsybulenko, E.; Amorosa, P. (2012). National minorities in Estonia: 20 years of citizenship policies . L'Europe unie/United Europe, 6/2012, 85 - 90.
- Kerikmäe, T.; Nyman-Metcalf, K. (2012). Less is more or more is more? Revisiting universality of human rights. International and Comparative Law Review, 12(1), 35 - 51.
- Nyman-Metcalf, K. (2010). Incitement or Free Speech? Legal Limits to Freedom of Expression. Proceedings of the Institute for European Studies, Journal of Tallinn University of Technology, 8, 165 - 177.
- Kerikmäe, T; Käsper, (2008) European Charter of Fundamental Rights. Lexis Nexis Expert Commentaries 2008

There are hundreds of media articles, online publications, commentaries of topical issues, radio interviews, TV interviews and presentations provided by the EHRC staff. The members of the Council that are permanent academic figures at the TLS are also, inspired by the activities of the EHRC, are expected to publish regularly their opinions and esseys in media (beside of their academic publications at academic journals). For example, professors of TLS published an essey on theoretical background and contemporary developments of human rights. TLS employees are often outsourced as independent experts in giving their opinion on EU directives, legal acts – consulting with EHRC has been advantage when the area of expertise has been human rights related.

It is quite usual to consult each other and offer a cooperation to secure that both institutions would keep their position as opinion leaders in their fields. It is important to mention that there is an absolute freedom of speech and the opinions of the experts of EHRC and TLS may vary or even contradict sometimes. There have been some cases where experts disagree with each other, for example in the framework of the question of national minorities. However, justified and well argumented differencies in expert's opinions are seen as a source of pluralism. The censorship can be purely technical, related to the editorial work such as formatting of the human rights annual report or composing the academic article.

Nowadays, it is more and more important to raise the funding of the academic institutions that are not dependent of tuition-fees and State support. Therefore the cooperation between EHRC and TLS are expressed also by the EU funded projects, such as:

- Combating discrimination and promoting tolerance and equality in Estonia;
- Raising awareness on equal treatment and combating intolerance in Estonia, focusing on LGBT and disability issues;

- Raising awareness on equal treatment in Estonia, focusing on benefits for diversity in business, LGBT rights and social status of elderly people

It is also common that the institutions are sharing the experts and self-financing. It is an advantage for the EHRC mainly because of the large university opportunities to co-finance the projects. At the same time, academic projects are taken into account when electing candidates to the academic positions – therefore, joint projects with EHRC are direct advantages for TLS employees who are involved to the projects as experts. Accordingly, EHRC employees are invited to the projects of the TLS that have human rights dimension. Currently, the joint group of authors is preparing a book for Springer Verlag on EU Charter, some of the EHRC people are involved to the Jean Monnet grants (funded by the EU Commission) on EU law and legal system.

The international trainings such as of TLS (USAID funded and TLS provided course on intellectual property in Palestina), International summer schools (in Tallinn and in Lucerne) are having international human rights dimension due to the tight cooperation between EHCR and TLS.

One example of combining domestic and international dimension is a recent letter to Estonian Government in relation of Estonia becoming a member of United Nations Human Rights Council.

7. Networking, International training projects

EHRC is a member of the EU Fundamental Rights Platform, which is a network of NGO cooperation under the auspices of the EU Fundamental Rights Agency and a member of the Estonian Roundtable for Development Cooperation. EHRC also belongs to the Network of Estonian Nonprofit Organizations. This would give a chance to find speakers and lecturers needed to TLS curricula on specific topics related to human rights. TLS, at the same time (as conducting studies and research in english) is a member of several professional networks (Jean Monnet, Erasmus, several concortia for academic grants) that enables to find sepcialists for certain areas of human rights.

As a member of the EHRC Council but also a professor of TLS, the main author of this paper has been involved to several democracy building projects funded by the EU, such as Support to Judicial Reform in Kyrgyzstan (Central-Asia) 2009-2010. This project has been a good example of how the knowledge and training material elaborated through the cooperation of EHCR and TLS has been used to train non-EU citizens Training sessions such as "European standards of human rights in relation to the work of Bailiffs", (Osh), "European Human Rights Standards and the Prisoners Rights" at international conference "Modern Prison Management", (Issyk-Kyl).

Although, EHRC is not aiming to provide training and disseminate knowledge on human rights to abroad, there are projects of TLS that are often directly or undirectly related to the issue. Cooperation projects with EHRC gives the lecturers and professors a solid background to elaborate teaching materials for international target groups in cases they are involved to the projects abroad. One good example is also project called "LawTalk", conducted in Cambodia ("importing European values, including international human rights ideology to the local law schools). There are also many other events and conferences, related to humanitarian law in Armenia), competition law (Moldavia), prohibition of human trafficking and forced prostitution where the TLS employees contributed as leading experts, having possibility to be consulted by the EHRC.

8. Joint supervision of thesis

It is more and more common to have TLS human rights related final papers (both bachelor and masters) supervised or co-supervised by experts that are either contracted or linked to EHRC. The range of topics can be very wide. The following is just a example of the recent issues that have been sucsessfully defended by TLS students (the following list contains theses written in english, mostly by foreign students):

- Access to Higher Education and Social Benefits for Migrant Students within the European Union;
- Influence of European Standards on Development of Legal Framework of the Freedom of Peaceful Assembly in Georgia;
- Naturalisation and Legal Protection of National Minorities in Estonia;
- The Rights of Persons with Disabilities: Accessibility;
- Accountability of Armed forces for extraterritorial actions under the ECHR. Examples of Iraq and Afghanistan;
- Past and Future of Gender Equality in Estonia;
- Right to Environment – A New Right Protected under the European Union Law?;
- Entering Labour Market: Equal Opportunities for All;
- Cultural and Linguistic Human Rights in Multicultural Society;
- The Protection of Human Rights in the New Criminal Procedure Code of Lithuania

The benefit here is that the EHCR can recommend the topics according to the societal needs for research. TLS, at the same time, tries to combine the State needs for expertise with the interests of students through cooperation with several state agencies such as Ministry of Foreign Affairs. The close cooperation between TLS and EHRC would then avoid unnecessary overlaps, guarantee that research is conducted in accordance of up-to-date information and includes practical approach. Some of the best papers have modified and published at academic journals. The papers are available for interest groups and are often written by a student who is already working (or planning to work) in the field related to human rights issues or problems. The papers often contain reccomendations for State agencies and policy-makers.

It is common that TLS is ordering new human rights textbooks and journals to the university library after prior consulatation of EHRC employees (that can be freely used by EHRC experts) and makes it possible to the supervisors not contracted by TLS to use the databasis such as HeinOnline and LexisNexis. In case the supervisor is not an employee of the EHRC, he or she can still act as a second reader of the thesis or participate at the public defence.

9. Balancing the interests

One of the evident problem nowadays is overload of information and lack of time. Also workload of both human rights experts in EHRC and the academic employees at TLS tends to be higher every coming year. There are websites of both institutions that refer to each other; a facebook of TLS that reflects the achievements and events of EHRC; a monthly newsletter of the ECHR that describes also the activities of TLS. However, the meetings of the Council – main forums to discuss joint projects of both institutions should become more regular and informative. The interrelationship of EHRC and TLS may also seem complicated due to the fact that members of the ECHR are regularly or time-to-time contracted by TLS (elected lecturers or experts to the joint projects). Clear and transparent information between institutions and to public general is more important than ever.

Different profiles of the institutions is not an obstacle but an advantage and should be taken into account in case of applying for project financing and later implementation. As diversity enriches, both institutions should still keep their "own face" to be useful to each other. Accordingly, the visibility of TLS should be balanced when conducting joint research. As human rights institution, EHRC should not become dependent of the university that has own strategies, priorities. Also, TLS should not always intervene to the field activities of EHRC or be more specific in its role as academic advisor.

One of the relevant factors is being conservative but open minded. TLS as academic institution should guarantee that the theoretical basis of human rights protection would not be disturbed by political, economic or other aspects that may unbalance the approach to the universal human rights. EHRC should, at the same time be involved to the societal problems to see the accute problems. The universality of human rights requires respect for the diversity of faiths and cultures. Achieving universal acceptance of international human rights norms should be taken as a process. TLS has, beside of students from many different nationalities, also teaching and research staff from Estonia, Ukraine, Sweden, Bosnia, Moldova, India, United States etc. Members of our academic community are post-graduates of British, Italian, Swedish, German, Finnish and other universities. That all gives EHRC a good basis to review and discuss human rights issues internationally, although in regional context.

10. Conclusion

We are not living in ideal world and there is a lot to do in the field of human rights. Combining academic and more practice oriented approach, the result can be more efficient. Having balance between theory and a fieldwork, human rights NGO's would get more reliability as often accused to be groundlessly critical; academic institutions would gain more up-to-date info, inspiration for research needed, and a "playground" for implementing theoretical ideas with the practice.

In conclusion it can be said that partnering with EHRC has provided TLS with effective means of contributing to public policy of human rights in Estonia. This has been possible in many different ways and on many different levels, both in specific issues such as asylum procedures, and also in more general areas like human rights monitoring and equal treatment promotion.

In the future, in addition to current activities, it is foreseen that human rights education area provides several opportunities for cooperation in order to influence the way human rights is taught in all areas of education, but most specifically in higher education.

Indefinite Detention at Guantanamo: A Time for Change

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"Protecting the rights of even the least individual among us is basically the only excuse the government has for even existing." -Ronald Regan

I. Introduction

On September 11, 2001, terrorists attacked and killed thousands of Americans.[270] In the wake of these events, the United States declared a war on terror. Unlike previous terror attacks, the government decided to wage a war instead of try the acts in a traditional criminal manor.[271] This was a new kind of war declared on a common noun instead of the traditional war on a proper noun.[272] Questions arose. Under the laws of war, how can a common noun surrender in the same way a nation-state is able to? How do you treat prisoners in such a war? Bush declared that the war against terror begins with al Qaeda, "but it does not end there, it will not end until every terrorist of global reach has been found, stopped and defeated."[273]

As expected, the United States was stuck applying laws and tactics that arguably were not developed for this type of warfare of indefinite duration. Part of the U.S. tactic was to detain suspected terrorists at the United States Naval base in Guantanamo Bay starting in 2002.[274] While the number of detainees in Guantanamo has dropped to 166,[275] the facility still contains 46[276] individuals that the US government has marked as indefinite detainees.

Indefinite detention of terrorism suspects is contrary to human rights and against the intent of the law of war. When constructing a solution to indefinite detention at Guantanamo a four point plan should be kept in mind. The United States needs to i) charge those that are chargable, ii) relase those that cannot be charged, iii) change government procedures regarding collection of evidence at time of capture and finally iv) the world should rework the Geneva Conventions in light of new armed conflicts. To support the thesis this paper will introduce general principles of the laws of war regarding indefinite detention, move to the U.S. application of the laws of war, then outline the issues arises from indefinite detention and finally suggest a four point solution for the U.S. government.

I. General Principles

Generally, when engaged in an armed conflict the laws of war apply. Modern laws of war are based on the Geneva Conventions and apply to all international armed conflicts which may arise between "High Contracting Parties."[277] Human rights law still exists in cases where the law of war applies but instead may affect the interpretation, contrary to the US' argument in front of the Inter-American Commission of Human Rights.[278] As a result, the basic human right of freedom from arbitrary detention[279] shall be applicable to detainees during armed conflict regardless of their classification under the Geneva Convention.

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[270] *September 11, 2001: Basic Facts*, U.S. DEPT. OF STATE, http://2001-2009.state.gov/coalition/cr/fs/12701.htm.
[271] Alberto Gonzales, *Waging War Within the Constitution,* 42 TEX. TECH. REV. 843, 845 (2010).
[272] The concept of explaining the war on terror as a war on a common noun was borrowed from a presentation by Ambassador Ronald McMullen at Southern Illinois University School of Law on Nov. 12, 2012.
[273] President George W. Bush, Sept. 20, 2001 (available at http://www.youtube.com/watch?v=_CSPbzitPL8).
[274] *Guantanamo Bay Timeline*, THE WASHINGTON POST, http://projects.washingtonpost.com/guantanamo/timeline/.
[275] *By the numbers*, Miami Herald, http://www.miamiherald.com/2007/11/27/322461/by-the-numbers.html (last visited Nov. 15, 2012).
[276] *Id.*
[277] Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, *done* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.
[278] BETH VAN SCHAACK AND RONALD C. SLYE, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT 215 (2010).
[279] Universal Declaration of Human Rights Art. 9, *adopted* Dec. 10, 1948, G.A. Res. 217 A (III).

a. Lawful Detention defined internationally

As stated at Nuremberg, "[C]aptivity in war is 'neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war."[280] This idea is a universally accepted principle as evidenced in the Geneva Conventions which declares that detention may not last longer than the armed conflict.[281] In order to receive the privileges associated with Art. III, it is generally accepted that one must qualify as a "privileged combatant"[282] under the Hague Convention.[283]

If an individual is not a privileged combatant, they may be a civilian. The confinement of civilians can constitute a war crime as civilians are entitled to rights under Geneva Convention IV.[284] However, confinement of civilians is permitted in certain situation and as a last resort.[285] One exception exists "where the person is definitely suspected of or engaged in activities hostile to the security of the State."[286] The ICTY warns that this classification must be made on a case by case basis and can never be collectively applied.[287] For example, the ICTY held that the arbitrary imprisonment of Bosnian Muslims was not justified and the defense of "security reasons" (protection against espionage and sabotage) was without foundation.[288]

Like detention of combatants mentioned above, detained civilians "shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist."[289] As mentioned before, this is a war that has been raging for over 10 years with no end in sight. When, if ever, will the U.S. government decide that the detained individuals at Guantanamo no longer pose a threat?

b. Conclusion

Every person is entitled to basic rights whether under international human rights or the law of war. If one is detained as an enemy combatant he or she has rights under the Hague Convention and Geneva Convention III. If an individual is a civilian he or she has the right from freedom of detention and minimum due process also under the Geneva Convention IV. But what if someone does not "neatly" fall into any of these categories? What protects that individual (if anything)? This predicament has troubled the U.S. and its treatment of al Qaeda and the terrorists associated with the "war on terror."

II. The U.S. application

Reflecting International standards the U.S. believes that in war times "the purpose of detention is to prevent captured individuals from returning to the field of battle and taking

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[280] *Hamdi v. Rumsfeld,* 542 U.S. 507, 518 (2004) (quoting Nuremberg Military Tribunal, reprinted in 41 Am. J. Int'l L. 172, 229 (1947)).
[281] *see* Geneva Convention Relative to the Treatment of Prisoners of War, Art. 118, *done* Aug. 12, 1949, T.I.A.S. 3364, 6 U.S.T. 3316.
[282] a combatant is a member of an army, militia or volunteer corps and fulfil the following requirements: i) commanded by a person responsible for his subordinates, ii) have a fixed distinctive emblem recognizable at a distance iii)carry arms openly and iv) conduct their operations in accordance with the laws and customs of war, Convention With Respect to the Laws and Customs or War on Land, Art. 1, 36 Stat. 2277, 2295-2296.
[283] BETH VAN SCHAACK AND RONALD C. SLYE, *Supra* note 9 at 311.
[284] *Id.* at 302.
[285] Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-T, Judgment (Feb. 26, 2001) reprinted in BETH VAN SCHAACK AND RONALD C. SLYE, *supra* note 9 at 302.
[286] *Id.* at 303
[287] *Id.*
[288] *Id* at 308-309.
[289] Geneva Convention relative to the Protection of Civilian Persons in Time of War, Art. 132, *done* Aug. 12, 1949, T.I.A.S. 3364, 6 U.S.T. 3316.

up arms once again."[290] However, who is to be prevented from returning to the battle and for how long have been tough topics for the U.S.

a. Guantanamo practices

In 2002, with the first wave of detainees arriving at Guantanamo, the Administration began to form its detention policy regarding the war on terror. Originally, the U.S. claimed that the Geneva Conventions did not apply to this conflict and that members of al Qaeda were not entitled to prisoner of war protection.[291] Instead, the U.S. has adopted the practice of detaining individuals who did not directly participate in hostilities.[292] The U.S. definition of combatant includes individuals who merely support al Qaeda or the Taliban.[293]

In 2010, the Guantanamo Task Force[294] identified 48 detainees that were determined to be too dangerous for release but not feasible for prosecution.[295] To date, there are 46 captives that are currently being held that likely will be held indefinitely without a charge or trial.[296]

The Task Force Final Report lists two main reasons that some detainees cannot be charged in federal court or by military commission. First, when many of the detainees were first captured, the main priority was to extract intelligence.[297] Therefore, evidence was not gathered in anticipation of prosecution and as a result much would be inadmissible.[298] Second, many of the detainees cannot be prosecuted due to jurisdictional limits.[299] In many cases, there is enough evidence supporting the detainee's participation in a terrorist organization but these charges are quite limited.[300] Evidence supporting the detainee's participation in a specific terrorist plot is missing and crucial to support prosecution.[301]

b. Supreme Court holdings

In *Hamdi v. Rumsfield*, the Supreme Court recognized that detaining individuals captured while fighting against the United States in Afghanistan for the duration of the conflict is a fundamental and accented incident to war.[302] In light of *Hamdi*, the Combatant Status Review Tribunals were set up to make certain that all those being "indefinitely" detained at Guantanamo were in fact "enemy combatants" and therefore able to be detained indefinitely.[303]

Under Executive Order in March of 2011, President Obama approved the continued detention of "law of war" prisoners being held in Guantanamo.[304] The Order defines "Law of

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[290] *Hamdi v. Rumsfeld,* 542 U.S. 507, 518 (2004).
[291] Alberto Gonzales, *supra* note *2 at* 843.
[292] Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 AM. J. INT'L L. 48, 60 (2009).
[293] *Id.* at 62.
[294] On January 22, 2009 President Obama set up a Guantanamo Task Force as one of his first acts as president. The Task Force's purpose was to "review the status of all individuals currently held at Guantanamo." The Task Force included professionals from multiple agencies, including the Department of Defense, Department of Justice, the State Department, Department of Homeland Security, CIA, FBI and others. The professionals evaluated information available across the government to best analysis the status of the detained.
[295] GUANTANAMO TASK FORCE, FINAL REPORT 2 (January 22, 2010) (available at http://media.washingtonpost.com/wp-srv/nation/pdf/GTMOtaskforcereport_052810.pdf).
[296] *By the numbers,* MIAMI HERALD, http://www.miamiherald.com/2007/11/27/322461/by-the-numbers.html.
[297] GUANTANAMO TASK FORCE, supra note 26 at 22.
[298] *Id.*
[299] *Id.*
[300] *Id.*
[301] *Id.*
[302] *Boumediene v. Bush,* 553 U.S. 723, 723 (2008). The U.S. Government's original position involved capturing individuals on the "battlefields" and never subjecting them to any status review, in violation of Art. 5 of the Third Geneva Convention, BETH VAN SCHAACK AND RONALD C. SLYE, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT 315 (2010).
[303] *Id.*
[304] PERIODIC REVIEW OF INDIVIDUALS DETAINED AT GUANTANAMO BAY NAVAL STATION PURSUANT TO THE AUTHORIZATION FOR USE OF MILITARY FORCE, 76 FR 13277 (2011).

War Detention" as detention authorized by the Congress under the AUMF[305], as informed by the laws of war.[306]

III. Problem and Possible Solutions

It is easy to say that the US is violating international law by indefinitely detaining individuals at Guantanamo in the war on terror but it is much harder to come up with a workable solution to this problem. Some detainees are actually bad actors that will no doubt return to their work against the United States and its allies. Despite this real predicament the US needs to commit to human rights while the World needs to reworks laws relating to terrorism and detention. This article introduces a four point plan, i) charge the chargeable, ii) release the rest, iii) change evidence collection procedures at the point of capture and iv) rework international law and the Geneva Conventions.

a. Charge the Chargeable

So far seven Guantanamo detainees have been convicted[307] and seven more are currently being tried.[308] The Guantanamo Task Force only listed 46 that could not be tried and therefore were subject to indefinite detention. The US should stop dragging its feet and bring the rest of Guantanamo to justice.

b. Release as a Solution

The most obvious and possibly best solution to this predicament is to release all those individuals that are being detained that cannot be charged with war crimes or other offenses against the United States. However, release has many options.

i. Complete release

Other countries have proven willing to take in former detainees. To date, 17 countries have resettled cleared detainees who are not their citizens: Albania, Belgium, Bermuda, Bulgaria, Cape Verde, El Salvador, France, Georgia, Germany, Hungary, Ireland, Latvia, Palau, Portugal, Slovakia, Spain, Switzerland.[309] In an idealistic mind, one hopes these former detainees can start a new life in a new country and not be tempted to continue or start up with the conflict against America.

Resettlement is a definite option and more swift action is needed. Thirteen individuals that have been cleared through their habeas corpus claim are still detained at Guantanamo.[310]

ii. **Parole**[311]

Parole is an important aspect of the US criminal justice system. It relieves the state of the burden of continued custody of an individual yet allows for continued supervision. Parole in the international law sense consists of releasing a prisoner of war (PW) in return for a pledge not to bear arms.[312] The Geneva Convention speaks on parole and says,

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[305] Authorization for the Use of Military Force, 50 U.S.C.A. § 1541 (2012).
[306] PERIODIC REVIEW OF INDIVIDUALS DETAINED AT GUANTANAMO BAY NAVAL STATION PURSUANT TO THE AUTHORIZATION FOR USE OF MILITARY FORCE, 76 FR 13277 (2011).
[307] *By the numbers*, Miami Herald, http://www.miamiherald.com/2007/11/27/322461/by-the-numbers.html (last visited Sept. 28, 2012).
[308] *Military Commissions Charges Active/ Pending*, Military Commissions, http://www.mc.mil/CASES/MilitaryCommissions.aspx , (last visited Sept. 28, 2012).
[309] *By the numbers*, MIAMI HERALD, http://www.miamiherald.com/2007/11/27/322461/by-the-numbers.html (last visited Sept. 20, 2012).
[310] Center for Constitutional Rights, Guantanamo Habeas Scorecard (available at http://www.ccrjustice.org/files/2011-02-03%20Habeas%20SCORECARD%20Website%20Version.pdf)
[311] see Gary D. Brown, *Prisoner of War Parole: Ancient Concept, Modern Utility*, 156 MIL. L. REV. 200 (1998).
[312] *Id*. at 200.

"prisoners of war may be partially or wholly released on parole or promise, in so far as is allowed by the laws of the Power on which they depend."[313]

Today, a parolee could be monitored using advanced technological means.[314] Parolees could be monitored using visual and electronic means in addition to the cooperation of the host government.[315]

This will no doubt bring up privacy issues that can possibly be overcome by defenses including national security.

iii. Transfer

Transferring individuals to appropriate authorities of their nation of origin has also been a practice of the US. Transferring individuals takes the burden of human rights violations off the US but also has obvious possible dangers. The country of origin may not have an effective government, like Afghanistan during much of the surge.

For example, many prisoners were released in Egypt and Libya during the Arab Spring. Soon after the October 2012 attack on the U.S. Consulate in Libya rumors circulated that the mastermind of the attack was a former Guantanamo detainee.

c. Change evidence collection methods at time of capture

As previously mentioned, the Guantanamo Task Force found that many detainees cannot be charged because evidence was not gathered in anticipation of prosecution and as a result much would be inadmissible.[316] The government needs to learn from its previous mistakes and reform its procedures regarding the collection of evidence at the time of capture. Indefinite detention can be prevented in the future with forward looking evidence collection procedures starting with the battlefield.

d. Rework the Geneva Conventions

"The Geneva Conventions are failing to provide necessary protection because they lack clarity and are out of date."[317] This is not our grandparent's war. This is a war of indefinite duration made even more indefinite by the lack of traditional organization and command structure of al Qaeda.

First, the Geneva Convention should be amended to include all armed conflict. Not just armed conflict between "high-contracting parties" or nation-states. This addition would regulate armed conflict with not only al Qaeda, but with other paramilitaries that are becoming an ever-present force in today's conflicts.

This is not as daunting and absurd as it may seem at first blush. Two Additional Protocols were added to the Geneva Conventions in 1977 in response to the changing nature of armed conflict.[318]

IV. Conclusion

The application of the laws of war to the war on terror has resulted in human rights abuses of indefinitely detained individuals at Guantanamo. In the grand scheme of the worldwide war on terror 46 indefinitely detained individuals may seem miniscule and not worth altering an entire system. However, as stated before "protecting the rights of even

[313] Geneva Convention Relative to the Treatment of Prisoners of War, Art. 21, *done* Aug. 12, 1949, T.I.A.S. 3364, 6 U.S.T. 3316.
[314] Chris Jenks and Eric Talbot Jensen, *Indefinite Detention under the Laws of War*, 22 STAN. L. & POL'Y REV. 41, 89 (1998).
[315] *Id.*
[316] GUANTANAMO TASK FORCE, supra note 26 at 22.
[317] Foreign Affairs Committee, Visit to Guantanamo Bay, 2006-7, H.C. 44, at 27.
[318] BETH VAN SCHAACK AND RONALD C. SLYE, *Supra note 9 at* 215.

the least individual among us is basically the only excuse the government has for even existing."[319]

The United States is a worldwide leader and its actions are placed under a microscope and then mimicked by others. The U.S. needs to correct current violations and prevent future violations of human rights by reforming its indefinite detention policy and practice.

Human rights law aside, each Guantanamo detainee is costing the U.S. $800,000[320] per year to detain. Indefinite detention has now entered the deficit discussion.

[319] Ronald Regan.

[320] *By the numbers,* MIAMI HERALD, http://www.miamiherald.com/2007/11/27/322461/by-the-numbers.html.

The Developing Status of the Right Against Involuntary Disappearances in the Philippines

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The Philippines has yet to be a signatory of the International Convention for the Protection of All Persons from Enforced Disappearance (ICCPED), which was adopted by the United Nations (UN) General Assembly in 2006.

But in terms of domestic legislation, the Philippines has fared better. [321]*While the affiliation to the said Convention is still being looked into by the government's delegation, the country's legislators are a step shy from having the "Involuntary Disappearance Act of 2012", or more popularly known as the "Desaparecidos Bill", enacted.*

Ratified by the House of Representatives and the Senate last October 16, 2012, President Benigno Aquino III only needs to sign the anti-disappearance bill into a law. In the absence of the president's signature and the exercise of his veto power, the enrolled bill automatically takes legal effect, thirty days after the executive's receipt of the same bill.[322] *As of the completion of this study, no reported objections from Pres. Aquino's end have been reported although the actual date of president's receipt of the same bill is unclear.*

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I. *Desaparecidos,* From the Marcos Regime Onwards

The Martial Law regime (1972-1981) under President Ferdinand Marcos remains to be considered by many, if not all of the fact-finding initiatives, as the peak of state-attributed human rights violations.[323] Created in 1985, amid a climate of heightened political killings, the Families of Victims of Involuntary Disappearances (FIND) has documented 878 victims during the Marcos regime. 127 of them have been confirmed dead; another 613 of which have remained missing. It must be heavily noted that while the incidents of forced disappearances shot up between 1983 up to 1989—Pres. Marcos's political regime spans to more than two decades.

The number of *desaparecidos* did not wane with the so-called restoration of democracy. Trailing behind Marcos is the six-year term of Pres. Cory Aquino, the mother of the current Philippine president, which led the "total war" policy versus the insurgents. As a result thereof, 825 more victims have been reported by the FIND. This staggering number

[321] Ribaya, Rose (October 17, 2012). "House ratifies bill v. enforced disappearances." Retrieved November 1, 2012, from http://ph.news.yahoo.com/house-ratifies-bill-vs--enforced-disappearances.html.
[322] 1987 *Philippine Constitution,* Art. VI, § 27, Par. 1.
[323] FIND (n.d.). "Overall Results FIND's Search and Documentation Work (November 1985 to June 2012)." Retrieved October 29, 2012 from http://www.find.org.ph/images/pdf/find.org.ph-statistics-june-2012.pdf.

of the reported disappeared in a period much shorter than its dictator-predecessor ironically came at a time when the transitioning government (Cory Aquino's) focused on rebuilding the country's democratic institutions.

The continuing spate of the number of disappeared can be baffling, given the reactionary measures positioned by the 'revolutionary' government replacing the Marcos regime.

In response to the iron-clad Marcos dictatorship, the 1987 Philippine Constitution was created by the (Cory) Aquino administration. The new Constitution has laid down protective measures against any probable abuse by the state. [324]Before any declaration of martial law or suspension of the writ of *habeas corpus* can be made, the same Constitution and other special laws have in place specific safeguards which must be observed first by the president. Other clauses embedded in the Constitution and other laws which block any repetition of the former dictatorship include but are not limited to the following: [325]the prohibition against the appointment of the president's spouse to any government post (a reaction to Imelda Marcos's flagrant accrual of influential positions) and against the president's ownership of any company doing business with the government; [326]the duty of the president to inform the public if he should become seriously ill (again, a reaction to the late public discovery of Pres. Marcos's terminal illness); [327]the bar against the abolishment of congress, in the event of a presidentially-declared martial law.

Specifically addressing the rise of the *desaparecidos* in the regime that was, the [328]Commission on Human Rights (CHR) became another creature of the 1987 Constitution. Generally, the CHR is mandated to appropriate legal measures for the protection of human rights (political and civil rights included) and to act on complaints for violations thereof.

In spite of the above efforts, the total number of *desaparecidos*, as of June 2012, now tolls to 1,333 cases. [329]The country's own military forces, the Armed Forces of the Philippines (consisting of the Army, Navy/Marines and the Air Force) is alleged by the families of 1,091 victims as the perpetrators for the latter's unceremonious disappearances. The second largest class of perpetrators is the Philippine National Police (PNP) or formerly called the Philippine Constabulary during the Marcos regime. The latter is attributed for another 239 disappearance cases.

2006 saw the spike of disappearance cases. Under Pres. Gloria Macapagal-Arroyo's direction, OPLAN *Bantay Laya* (translation: "Freedom Watch") was said to have been launched, as confirmed by military insiders. [330]The said military strategy is claimed to have dramatically reduced the estimated population of 12,000 New People's Army (NPA) fighters to 5,700. At that time, the AFP initiative was criticized by political analysts and human rights workers/groups such as Herbet Docena, Nyma Simbulan (of the Philippine Human Rights Information Center), and Amnesty International, as a danger to unarmed leftists or activists. This blurred distinction between an NPA fighter and an unarmed social activist, as time would tell, led to many reported abuses thereafter.

Not surprisingly, the implementation of this national security blueprint coincided with the renewed increase of disappearance cases. [331]Under the Pres. Arroyo administration, according to FIND's findings, some 339 cases have been reported. Of this sum, only 107 surfaced, 17 have been found dead, and 58 are still missing.

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[324] Carpio, J., March 20, 2012, Dissenting Opinion-Philip Fortun and Albert Angeles v. Gloria Macapagal Arroyo, G.R. No. 190293.
[325] R.A. No. 6713, § 7, par. a-b.
[326] 1987 *Philippine Constitution,* Art. VII, § 12.
[327] 1987 *Philippine Constitution,* Art. VII, § 18, par. 4.
[328] 1987 *Philippine Constitution,* Art. XIII, § 17.
[329] FIND (n.d.). "Overall Results FIND's Search and Documentation Work (November 1985 to June 2012)." Retrieved October 29, 2012 from http://www.find.org.ph/images/pdf/find.org.ph-statistics-june-2012.pdf.
[330] Francis Isaac for AFAD (2008). *Reclaiming Stolen Lives*. Quezon City, Philippines.
[331] FIND (n.d.). "Overall Results FIND's Search and Documentation Work (November 1985 to June 2012)." Retrieved October 29, 2012 from http://www.find.org.ph/images/pdf/find.org.ph-statistics-june-2012.pdf.

[332]No suspected assailant has been put behind bars in any of the thousands of cases. [333]The landmark decision of the Supreme Court, dated May 31, 2011, tackling the disappearance of two university activists, Erlinda Cadapan and Concepcion Empeno in 2006, only ventured as far as ordering the concerned military officers to immediately release the victims which have been proven in court to have been abducted by them. Neither of the victims has resurfaced. Neither of the responsible military officials has subsequently been charged for their inactions.

A much less but still significant portion of the cases of involuntary disappearances is reportedly blamed on the private armies of well-endowed politicians and landowners. [334]The country's notoriety for (unresolved) political deaths and disappearances caught the world's attention with the Maguindanao massacre wherein the death toll reached 57 in a single killing spree in November 2009. The massacre led the International Federation of Journalists (IFJ) to brand the Philippines as "the most dangerous place for press workers, next to Iraq." This was due to the fact that the 32 of the 57 victims were media personnel. The massive abduction and eventual killing were allegedly orchestrated by the Ampatuan political clan (the accused namely, Andal Ampatuan Jr. and five other members of the same family) in their effort to quell their political rival family, Mangudadatus. [335]Alarmingly, three years after the case has been pending in court, six witness of the massacre have been killed in unique incidents. Again, the suspects for the latest witness murders connected with the Maguindanao massacre were never ascertained so that proper charges in court were never brought to light.

Suffice it to say, these unaccounted deaths and disappearances collectively contribute to a climate of impunity and self-enforced repression in a country that supposedly prides itself in being among the first to succeed in organizing a "[336]nonviolent revolution" to topple down a dictatorship. [337]This chilling effect from forced disappearances can be likened to the forced disappearances committed by the Nazis in a larger scale that amply served the purpose of sowing terror and mitigating dissent from the population.

As historical examples have shown, the road to justice or prosecution, at the very least, for what is considered as the global offense of forced disappearances is long and circuitous.

II. The Need to Criminalize the Offense of Forced Disappearance

Under the current body of law, the victims, or their families, have to rely on the provisions of the 82-year old Revised Penal Code (RPC) of the Philippines. To possibly prosecute the perpetrators, the common crime charges of "murder," "kidnapping," "abduction," "unlawful detention," among others, must be separately filed by the families' victims. Prosecutors are therefore dogged with varying legal requirements or elements of the crime for each charge. [338]This is in line with the older view that enforced disappearance

[332] Human Rights Watch (2012). "World Report 2012: Philippines" Retrieved October 29, 2012 from http://www.hrw.org/world-report-2012/world-report-2012-philippines.
[333] May 31, 2011, Lt. Col. Rogelio Boac, et. al. v. Cadapan and Empeno, G.R. Nos. 184461-62.
[334] LBG (August 24, 2012), "Intl group: PHL press freedom dire with continued killings, refusal to pass FOI law." Retrieved November 1, 2012 from http://www.gmanetwork.com/news/story/270999/news/nation/intl-group-phl-press-freedom-dire-with-continued-killings-refusal-to-pass-foi-law&ei=406kUIazKY-hiAex84H4AQ&usg=AFQjCNFm_nAbWmgttobl7i0zpPUCd949dw&sig2=5Jb__HUzxLrviLl5s9WEdg
[335] Kate McGeown (June 28, 2012), "Sixth Philippine massacre witness killed." Retrieved November 2, 2012 from http://www.bbc.co.uk/news/world-asia-18621705.
[336] (March 2011) "Nonviolent Revolution." Retrieved November 1, 2012 from http://en.wikipedia.org/wiki/Nonviolent_revolution.
[337] See Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10: Nuremberg, 19 October 1946 – 1 April 1949 (1951) vol 3, 75.
[338] Kirsten Anderson (n.d.) in *"How Effective is the International Convenntion for the Protection of All Persons from Enforced Disappearance Likely to be in Holding Individuals Criminally Responsible for Acts of Enforced Disappearance?"* for the Melbourne Journal for International Law, Vol. 7; Commission on Human Rights, Working

has been touted as a 'multiple human rights violation.' Obviously, one enforced disappearance is a summation of violations of several rights contained in the International Covenant on Civil and Political Rights, or its regional counterparts.

But regional initiatives such as the Asian Federation Against Involuntary Disappearances (AFAD) are pushing for legal reformations that aim to call a spade a spade. Involuntary Disappearance under the *Desaparecidos* Bill which they have long lobbied for passage is a crime by itself. Amid the timely reconstruction of the RPC, the AFAD maintains that the special law will be the better vehicle in upholding the universal right not to disappear.

In a personal interview, Darwin Mendiola of the AFAD shared: "Amending the RPC is limited only to the purpose of criminalizing a certain offense. But if the (*Desaparecidos*) Bill becomes a law, it does not only fulfill the purpose of defining and penalizing enforced disappearance but it will also provide preventive mechanisms and recognition of the rights of victims and their families."

1. Enforced Disappearance: A Class of its Own

[339]True enough, under the pending bill, the special circumstances, namely: 1) deprivation of liberty of any forms, 2) as committed by state/agents of the state or persons in authority, and 3) the concealment of the fate and whereabouts of the victims by the former agents, would be constitutive of enforced disappearance. [340]The same definition falls at par with the universally-accepted definition, that enforced or involuntary disappearance pertains to an offense which typicalley involves the abduction, arrest or detention of an individual — usually a perceived political opponent — by members of a state-sponsored military group, and a deliberate denial by authorities of any knowledge of the victim's arrest, whereabouts, or condition: the individual effectively vanishes.

The classification of involuntary disappearance as a stand-alone offense, should the bill turn into a law, is an early fulfillment of the obligation espoused in Article 1 of the ICCPED (a convention which the Philippines has not yet ratified) which provides for the absolute prohibition of enforced disappearance. [341]It is told that states parties must ensure that their national law absolutely prohibits enforced disappearance. Likewise, the same prohibition should stand, regardless of a state of war or a threat of war, internal political instability or any other public emergency.

The co-author of the bill is Rep. Edcel Lagman, whose brother, Hermon, was among those activists who disappeared at the apex of the protest versus the Marcos dictatorship. [342]Rep. Lagman is quoted to have justified the urgency for the passing of the bill in saying: "Enforced disappearance was an atrocious tool to silence protesters and human rights advocates and continues to be employed by subsequent administrations."

2. Direct Liability of Military/State Superiors

Group January 2002 Report, above n 8, 4. The UN Working Group has stated that 'a reading of the Universal Declaration of Human Rights … shows that to a greater or lesser degree practically all basic human rights' of a victim of enforced disappearance are violated: UN Commission on Human Rights, Report of the Working Group on Enforced or Involuntary Disappearance, UN ESCOR, 39th sess, Agenda Item 10(b), UN Doc E/CN.4/1983/14 (21 January 1983) [133] ('Working Group 1983 Report').

[339] 2010 House Bill No. 98, § 3, par. a.

[340] Federico Andreu-Guzmán (September 2001*). "The Review of the ICJ - Impunity, crimes against humanity and forced disappearance, Nº 62 – 63, Geneva."*

[341] Amnesty International (2011). *"No Impunity for Enforced Disappearances,"* p. 4.

[342] Ribaya, Rose (October 17, 2012). "House ratifies bill v. enforced disappearances." Retrieved November 1, 2012, from http://ph.news.yahoo.com/house-ratifies-bill-vs--enforced-disappearances.html.

Under the pending bill, [343]the state or its agents will be sanctioned as the principal of an enforced disappearance should they have led, assisted, abetted, allowed or merely have knowledge of the commission of such an offense.

But the said law is not only reactive for when enforced disappearances may occur. Preventive measures, which can only be specified by virtue of a special law (as opposed to an ordinary inclusion in the Revised Penal Code, in the alternative), have also been stationed in place. [344]Concerned government agencies will be endowed with the responsibility of producing an up-to-date register containing the names and other vital information of all the persons detained or confined. The same transparency is required of from the law enforcement agencies who are also required to name all of its detention facilities.

[345]The "order of battle" or a military memo prompting the infliction of an enforced disappearance upon a person is outright outlawed by the same law. Furthermore, it is clearly stated that the existence of such an order will never become a justifying circumstance for a military personnel to carry out the same order.

3. Protective Status of the Disappeared

'Deprivation of liberty' and 'denial or concealment of information' regarding the circumstances of a victim are widely-accepted elements of the offense of enforced disappearance. Apart from these, a lot of legal definitions have pointed to another element, which arguably, may also be a mere consequence from an enforced disappearance; to be specific, this other element is when this person is subtracted from (or placed outside of) the protection of the law. [346] Under such an interpretation, a disappeared person is said to have lost his enjoyment of the protection of the law, which is, supposedly, a protection afforded to all persons, under any circumstances.

But the preamble of the *Desaparecidos* Bill ensures otherwise. Outlined in the early portion of the law is the state policy of the Philippines which guarantees the full protective mantle on human rights and absolute upholding of such even in the event of a disappearance. Any actions/inactions which should violate the said policy are considered to acts which diminish the effective protection of a person; or in effect, acts sanctioned by the same law.

III. Conclusion

The pending domestic legislation reinforcing one's right against involuntary disappearances should be heralded as a giant leap towards changing the climate of fear and impunity which has long enveloped the Philippines, from one administration to another.

Once legally effective, it should act as a deterrent for state agents to take matters into their own hands and enforce disappearances on civilians; thereby also sparing would-be affected families from suffering from the uncertainty of the fates of the victims. After all, a single incident of forced disappearance dangerously looms like a Damocles's sword over a democracy. This is why such an assault on human rights must not be tolerated; not by any country, not by the international community.

It is equally important for the Philippines to participate in a congregation of nations that frowns on involuntary disappearances. The crafting of a specific, binding instrument allows the international community to tie the loose ends in terms of the criminalization of

[343] 2010 House Bill No. 98, § 12.
[344] 2010 House Bill No. 98, § 9.
[345] 2010 House Bill No. 98, § 17.
[346] Aim for Human Rights, a Dutch human rights organization (2009), "Practical Guide for Relatives of Disappeared Persons and NGOs," p.17.

this global offense. In criminalizing involuntary disappearances *per se*, individuals in power, who have committed or assisted to the commission of the crime *per se* will be directly held accountable for the same.

There is no stronger showing of intolerance than by providing the legal mechanisms for the prevention of these disappearances and the accountability of the perpetrators. [347]As one of the more troubled countries in the region, in terms of compliance with the universal standards of human rights, it is only befitting that the Philippines is on its way to being the first country in Asia to have adopted an anti-disappearance law.

Understandably, building a legislative framework is one thing but enforcement is another milestone yet to be seen.

Protecting human rights in inter-private relations

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Introduction. Justification.

The purpose of this paper is to show how the issue of human rights – and more specifically protection of the human person's dignity – is today considered a valorizing factor in Brazil's constitutional civil system, one that actually prioritizes existential as opposed to patrimonial relations.

This conceptual twist is of the utmost importance for the teaching of contemporary civil law, since the disciplines included in the sphere of private-law relations, specifically those that involve property and contracts, have traditionally been taught as an area exempt from any influences or interests whatsoever, whether humanitarian or existential. For example, in the 19th and much of the 20th century, the disciplines of contracts and property were a fertile field for the full development of individualism and individual liberalism. The perception that a private relation could have its effects limited on account of some solidary interest aimed at protecting the dignity and humanity of one of the parties of that relation is the consequence of the development of a doctrine that we call constitutional civil law.

This doctrine or methodology embraces the following premises: 1) the juridical system is unique, systematic and obeys a hierarchical structure; 2) the supreme standard norm of this organization is the Federal Constitution of the Republic; 3) the Federal Constitution has a contemporary function that goes beyond that of organizing the political powers, namely that of a central core of values for the community that it represents; 4) one of the pillars of the Democratic State of Law is protection of human rights by means of the general clause of guardianship of the human person (*the dignity of the human person*); 5) private-law relations should always not only be evaluated by the rules concerning contracts and the like contained in civil laws to which they refer, but also referenced to the general clause of protection of human beings, as a way of safeguarding their dignity and humanity.

With regard to the general clause of protection of the dignity of the human person – herein referred to as the general clause of protection of human rights in private relations – we can consider its premises to be as follows: 1) protection of substantial equality in private relations; 2) protection of psycho-physical integrity when faced with situations potentially harmful to existential interests of the human person; 3) protection of social solidarity in private relations when collective preponderates over individual interest; and finally, 4)

[347] Andrea Calonzo (October 17, 2012). "Bill vs enforced disappearances awaits PNoy's approval." Retrieved on November 14, 2012 from http://www.gmanetwork.com/news/story/278583/news/nation/bill-vs-enforced-disappearances-awaits-pnoys-approval.

protection of freedom when individual choice considers the possibility of protecting difference as a form of recognition and self-determination.

Background and the Federal Constitution.

Historically speaking, much has been said about the crisis that civil law and its systematics, as well as the loss of the notion of the Civil Code as the valorizing core of our private juridical structure. The breaking of the public right/private-law dichotomy; the de-codification movement through proliferation of various laws (some of which actually constitute micro-systems); State interventionism in private relations ("publicization" of private law, what Josserand calls contractual State control); and the realization that classic civil law was incapable of protecting the new juridical relations in an equalitarian, fair manner – these are some of the elements that together support this notion of crisis.

The understanding that the juridical system, being unique and hence systematic and hierarchically structured, could no longer be analyzed and interpreted in set and separate blocs, led to the conclusion that, when faced with a system based on a superior standard norm – the Constitution – the principles and values that emanate from it must be respected, otherwise the whole sense of a legal system comes undone. And in this way the system of the Civil Code as a repository of the values that control private relations becomes the responsibility of the Constitution, which remains the source of the fundamental principles of the juridical system.
The Civil Code thus loses its role as the "constitution" of private life and is replaced as the unifier of the system of private law by the Federal Constitution and its higher principles, norms and values, which serve as the foundations of the whole juridical system for a new Social State. One such value, considered to be central to the conception of the new Social State, is the dignity of the human person, which gains the status of a pillar of the Republic in article 1, III of the Federal Constitution.

Dignity is an absolute value that is intrinsic to the essence of human beings, who are unique in possessing an innate sense of valorizing which is priceless and has no equivalent substitute. Such values will serve as a guide in interpreting and applying juridical norms and will always be taken into account in protecting and guarding the rights of the personality of men and women and in their juridical relations in order to provide the bases for achieving the objectives of the democratic State of law.

In synthesis, these objectives, set forth in article 3 of the Federal Constitution aim at building a fair and free society based on solidarity by eradicating social inequalities and promoting the powers of the State through distributive justice and substantial equality. In this way, the notion of unlimited autonomy granted to individuals in the liberal systems is countered by the idea of social solidarity: if the 19th century was marked by the reign of individualism, the 20th century, with its revaluation of human beings and their dignity, is the era of development of social justice.

Examples.

Following this line of reasoning, we consider not only that each and every inter-private relation should be analyzed by taking into account the interests of the parties who have committed themselves by contract, but also and especially that the finality of protecting the interests of the persons in an inter-private relation is to safeguard the dignity and existence of those who have joined this relationship. This is why in so many concrete situations judges are called to decide on cases where, if the law is strictly interpreted, the

result of the case would be different from that derived from an interpretation that takes into account the need to protect the dignity of the human person. For example:

1) By the law of unleviability of family property, only the property that serves as the family residence can be considered unleviable. In the concrete case in question, it was considered that despite the property not being used as the family residence, it was rented out and the value of the rent was used for the family's subsistence;
2) In a contract for financing the purchase of a piece of property, the buyer had already paid 48 of the 50 installments, but was unable the pay the two remaining ones. According to the contract, the seller was entitled to rescind same and claim back the property. The judge felt that this clause in the contract was abusive and that the contract had been substantially respected, leaving it to the seller to simply charge the remaining debt without breaking the contract.
3) Clauses in a health-plan contract are held to be abusive when they impose limits on the number of days spent in an intensive-care unit.
4) Although the Public Registers law does not allow changing a transsexual's sexual status and name before transgenitalization surgery procedures have been performed, one judge permitted such change alleging constitutionally guaranteed protection of the dignity of the human person.

Conclusion.

In conclusion, there are numerous hypothetical private relations where magistrates apply the criterion of protection of human rights using the general clause of safeguarding the human person primordially for the purpose of protecting the interests of one party against the patrimonial interests of the other. The question gains even more importance when one realizes that this methodology is becoming increasingly more adopted as doctrine in undergraduate Law courses and that Law graduates, at least in the leading schools in Rio de Janeiro, have had some experience with this sort of training, which lends priority to the practice of Law by preferentially considering the protection of human beings and their existential interest, even when this interest involves a relation which in principle is of a strictly patrimonial nature, as in the case of contracts and property.

Course Development as the Nexus for Contributing to Human Rights

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An interest in human rights can lead to situations where a law professor can have research, teaching and service experiences that contribute to the development of public policy on human rights. This has been my experience with respect to human trafficking.

My teaching and research interest in immigration and U.S. Gender Issues led me to develop a teaching and research interest in the convergence of these two areas. This resulted in the development of an International Gender Issues (IGI) course and research in this area. One particular area of concentration has been human trafficking. Along with the many areas in which women are discriminated against that are covered in the IGI course, I cover human trafficking.

Human trafficking exists where social and economic conditions are facilitated by practices that discriminate against women and other vulnerable people, ignore human suffering, and diminish human dignity. Vulnerable persons are denied basic rights to freedom and self-determination. In the course, I focus both on the actions of the traffickers and the victims as a way of guiding the students through an examination of the Rule of Law principles and various human rights and refugee international treaties. With respect to the traffickers, we explore the fact that they are profiting from the sweat and drudgery of others forced into or forced to take substandard wages in mines, farm fields, and factories, performing sex work in hotels, strip clubs, brothels, mansions, and bars. It is emphasized that the complex structure of these modern day slavery practices include actions by those that benefit directly from the exploitation of the vulnerable, but also come that those that benefit indirectly may also be a part of the problem.[348] With respect to the victims, we explore the institutional and systemic influences that may place women in other vulnerable persons in situations that can lead to their exploitation.

More generally, we examine the meaning of the Rule of Law and how its existence or failure of existence can influence public policy on human trafficking issues. A helpful definition that we have used for the Rule of Law comes from the Harvard Kennedy School, Carr Center for Human Rights Policy:

> Rule of law: equality before the law; laws that are applied consistently (socially, economically, and politically); laws that spell out consequences for illegal activity; laws that serve a conception of order and regulation; laws that serve and inform institutions of society that preserve order and "fairness."[349]

[348] These thoughts are more fully explored in a forthcoming article, HUMAN TRAFFICKING, THE RULE OF LAW AND CORPORATE SOCIAL RESPONSIBILITY.

[349] CARR CTR. FOR HUMAN RIGHTS POLICY, IMPLEMENTING THE RULE OF LAW AND HUMAN RIGHTS IN STABILITY OPERATIONS 2 (2006).

As one scholar has noted, one goal of those that focus on the Rule of Law is to "emphasize the ends that the rule of law is intended to serve within society."[350] I use this goal to lead to discussions in class on the five desirable ends that this scholar has identified and the process by which these ends might be achieved. These desirable ends are: "(1) a government bound by law, (2) equality before the law, (3) [the establishment of] law and order, (4) predictable and efficient [justice], and (5) human rights protections."[351]

After focusing on the general concepts behind the Rule of Law, we examine particular treaties and conventions as assess their effectiveness in protecting rights of the vulnerable populations. These include the Universal Declaration of Human Rights (UDHR), International Covenant on Economic, Social and Cultural Rights (ICESCR), International Covenant on Civil and Political Rights (ICCPR), and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Public policy discussions revolve around the fact that the U.S. has ratified the ICCPR but not ICESCR and CEDAW and whether it is desirable to try and influence public policy to have these instruments ratified.

This examination in the course triggers the exploration by some students of possible ways to address human trafficking issues in their required research papers as well as their future careers. One Law College graduate who was in my very first IGI course has been working on human trafficking with a non-governmental organization (NGO) in India.

Our University has an annual interdisciplinary conference that brings researchers from academia, government, and NGOs to discover ways to address human trafficking issues around the world, I currently serve as the law college representative. The work of individuals on this team was helpful in getting new human trafficking legislation adopted in the state of Nebraska. Students have been able to participate in the conference, write research papers and experience related internships. We are developing a program to provide more internships for students with NGOs. We intend to maintain contacts with the students who secure employment after graduation with government agencies or NGOs.

My teaching, research and collaboration have allowed me to fully participate in the development of policy on human trafficking on a statewide as well as nationwide basis. Whenever possible, we work toward providing opportunities for students. One of these opportunities is the awarding of a grant from the Microsoft Corporation to explore the issues surrounding the use of technology with child trafficking victims. The grant was written so that research and learning opportunities are provided for graduate and law students. Another such opportunity includes my appointment to the state task force on human trafficking. The task force work allows me to provide research opportunities for students. This has also led to collaborative efforts with organizations that can have a nationwide effect. These include a research project to determine the extinct of human trafficking in a particular industry and the invitation to participate in a national conference to have cross dialogues on human trafficking that incorporate perspectives of researchers, practitioners, and survivors.

All of these opportunities are available because of the support of my law school. These activities by me and my students ultimately can have an effect on policies established at local and national levels on how to address human trafficking issues.

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[350] Rachel Kleinfeld Belton, *Competing Definitions of the Rule of Law: Implications for Practitioners*, 3 (Carnegie Endowment for Int'l Peace, Paper No. 52005), *available at* http://carnegieendowment.org/files/CP55.Belton.FINAL.pdf.

[351] Id.

One area that is of particular interest to human trafficking researchers is how to document the extent of human trafficking in various locations, industries and populations. It is estimated by the United States that 2 million to 4 million people are trafficked each year worldwide,[352] and the United Nations estimates that worldwide as many as 12.3 million adults and children may currently be victims of trafficking.[353] However, it is recognized that methods for identifying trafficking victims are unreliable.[354] The result is that there are varying numbers reported for trafficking victims. For example, Free the Slaves, an NGO, estimates that there are 27 million "slaves" in the world today.[355] A slave is defined as a "person held against his or her will and controlled physically or psychologically by violence or its threat for the purpose of appropriating their labor."[356] The International Labour Organization (ILO) estimates that human trafficking generates profits in excess of $32 billion a year, making it the third most lucrative criminal activity in the world.[357] These statistics reflect illegal activity, as well as the use of products of forced labor by legitimate employers. Assessing the effectiveness of anti-trafficking legislation is another area in which law schools can take an active role. Collaborations with researchers in other disciplines and gaining access to government lawyers may help with this effort. Although the U.S. Department of Justice has reported that trafficking in persons cases charged by the Department of Justice has increased from only two in 1998 before the U.S. enacted the Trafficking Victims Protection Act,[358] to fifty-two in 2010[359] there remains uncertainty about the number of potential trafficking cases that are charged as another type of violation because it may be easier to obtain a conviction. Relief provided to victims is another area of research in which law schools can help develop public policy.

Law schools are in a unique position to influence public policy on a number of issues, including human rights. It is not unusual for law professors to receive request from national and local legislatures as well as international organizations to provide advice on various issues. These opportunities along with course development in doctrinal as well as clinical courses can facilitate opportunities for students.

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[352] ALISON SISKIN & LIANA SUN WYLER, CONG. RESEARCH SERV., RL 34317, TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS 3 (2012), *available at* http://digital.library.unt.edu/ark:/67531/metadc87335/; *see also* U.N. Global Initiative to Fight Human Trafficking [UN.GIFT], *Human Trafficking: Everybody's Business* (2006) [hereinafter UN.GIFT*, Human Trafficking: Everybody's Business*] (citing United Nations Office on Drugs and Crime, Trafficking in Persons: Global Patterns (2006)), *available at* http://www.ungift.org/docs/ungift/pdf/reports/Story_Survey.pdf.

[353] PATRICK BELSER ET AL., INT'L LABOUR ORG., ILO MINIMUM ESTIMATE OF FORCED LABOUR IN THE WORLD 1 (2005).

[354] *Id*. at 33–35.

[355] KEVIN BALES, DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY 8-9 (Univ. Cal. Press rev. ed. 2012).

[356] *Glossary*, FREE THE SLAVES (Nov. 28, 2012), https://www.freetheslaves.net/SSLPage.aspx?pid=305.

[357] *See* ILO Director-General, 98th Session of the International Labour Conference, Geneva, Switz., June 3–19, 2009, *The Cost of Coercion: Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, 1 (May 12, 2009)[hereinafter *ILO 2009*], *available at* http://www.ungift.org/docs/ungift/Steering-committee/ILO_Report_2009.pdf.

[358] Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in scatter sections of 18, 22 U.S.C.). The Act was thereafter supplemented by the Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875, the Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558, and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044.

[359] U.S. Dep't of State, Trafficking in Persons Report 2012, *available at* http://www.state.gov/j/tip/rls/tiprpt/2012/index.htm.

Law schools as depositaries of the idea of human rights – from totalitarianism to young democracy (as exemplified by Poland)

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1. The idea of human rights is a legal philosophical concept stating that every human being has certain fundamental and inalienable rights stemming from the natural human dignity. The said means that a catalogue of human rights is inherent in every human being at least since the moment of his/her birth. The rights in question are inviolable and universal. They are recognized by the international community and protected – besides moral and ethical standards – also (if only at times) by the institutional and legal sanctions (like those administered by European Human Rights Tribunal or the right to humanitarian intervention, as provided for by the Charter of the United Nations). And thus breaking the rights in question may not be justified by the political sovereignty of the state, much less the ideology governing the latter. Consequently, it can never get legalised. Viewed from the legal dogmatic perspective, human rights are supported by the effective international agreements, and – in a majority of states of the globe – by the positive law (most often by constitutions) or the customary law. No consensus has been struck by the legal scholars, though, as to the human right sources in the philosophic meaning of the word; the clashing ideas range from the concepts of the natural law to the will of the positive legislator, i.e. the international community.

2. As revealed by the above said, human rights have objective and universal nature, no act of a specific political power being needed to recognize their binding force. In fact, the political powers are expected to protect human rights regardless of the political system of the state and the legal regulations being in force there. Hardly does it mean that the concept of human rights is welcomed by each and every state. The political practice greatly varies in that respect and it should be noted in passing that the concept of human rights as the inalienable basic rights each human being is vested in is best reflected in social and legal systems axiologically based on the idea of liberty. There is no doubt then that the origins of the institution, in its modern shape, can be traced back to the Great French Revolution and its flagship document - the Universal Declaration of the Rights of Man and of the Citizen, proclaimed in 1789. Expressed by the Declaration were so-called fundamental and inviolable citizen rights, such as the freedom of citizens, the right to property, equality before the law and court or personal inviolability. Not that the idea of certain fundamental rights people are vested in was not raised in previous historical epochs. Among the legal documents whereby selected freedoms and liberties had been guaranteed the English *Magna Charta Libertatum* of 1215 and Habeas Corpus Act of 1679 (the personal inviolability guarantee) or Poland's Warsaw Confederation Act of 1573 (securing the religious freedom) can be named. But it was only in the 20th century that the idea of human rights got its momentum. Major acts of international law from the field include, among others, the Universal Declaration of Human Rights adopted by the UN General Assembly on 10th December, 1948 and the European Convention on Human Rights of 4th November, 1950.

3. During World War II (1939-1945) Poland remained under the German occupation, the operation of any of the country's public institutions, including higher education institutes, being forbidden. In 1945 a new, communist political regime took over. Soon it turned out that the new authorities' only legitimization was the support provided by the Soviet Union whose sphere of influence was, after WWII, victorious to the Soviets, extended onto the

entire Central Europe. The forged elections of 1947 gave the new regime a formal legitimization. Actually, it continued to be based on violence, as exercised by the powerful state apparatus. A majority of political freedoms were abolished and the idea of human rights, so dynamic in the post-war world, remained a mere declaration. The legal acts, including the Constitution of 1952, guaranteed the citizens all kinds of fundamental political and social rights, it is true, but most of the rights existed on paper only. A typical communist practice was followed in that respect, consisting either in formal recognition of international standards in the human right sphere (e.g. by ratification of the relevant international conventions) but with no intent to observe them, or by guarantees of specific rights being provided by the constitution, with reference made, however, to ordinary laws distorting the general constitutional provision as a rule. And thus, for instance, all citizens were guaranteed personal inviolability by the communist constitution, an ordinary law allowing the authorities to detain the person for 48 hours in case of emergency, after which time the citizen was to be either presented charges or released. The rules were, in fact, scrupulously observed, but after the release of the person he/she was again detained for another period of 48 hours. Such a practice could be repeated over a longer time, meaning that the person was actually deprived of freedom by the police only (the court or public prosecutor not being involved in the procedure at all). In such a way the opposition contesting the governing regime was fought. Another example of the practice can be found in the legislation concerning the administration of justice. The citizen was guaranteed the right to access to court by the constitution, but not necessarily to court that would be *independent*. The judges were expected to provide so-called guarantees of due performance of their profession; they could be removed from office the guarantees lacking (i.e. the judges considered disloyal to the state or inconvenient to the latter). No doubt that under such circumstances the concept of human rights could hardly be developed freely. The Poland of the communist epoch (1944-1989) had, in fact, all features of a totalitarian state. Certainly enough, the limitation of the citizen liberties varied depending on the specific period of the regime's existence. Beyond any doubt, the hardest time was the 1940s and some part of the 1950s (until 1956) when the manifestation of a critical attitude towards the authorities or even insufficient enthusiasm to the latter could result in a loss freedom (if not life). Later on the repressions got milder, but human rights were not observed anyway.

4. It was also the sphere of education and academic life that lacked liberty and freedom of speech. As required by the then political doctrine, all spheres of life were made subject to the governing ideology, which also meant limitations curbing scientific/academic activities. Not every subject could be tackled in writing or speech. The censorship offices allowed publishing only the opinions favoured by the existing regime. Within a period which was that tough to the scholars, hardly could the legal doctrine deal with subjects as dangerous as the human right concept in the shape existing in the democratic countries. And yet a majority of the excellent academic staff coming from the times preceding WWII maintained the ideals and values from the epoch when Poland was a free and democratic country. In particular, law schools were the centres where classical legal concepts, respect of human dignity, individualised approach to the role of each person in the society (as opposed to the all-powerful collectivism putting the social interest, in its broadest meaning, before interests of the individuals) were cultivated. Despite keen eyes of the censors, outstanding law professors kept smuggling in their works the thoughts that defended the humanistic values from which the European civilization has grown. Examples of such a behaviour include, for instance, brave statements made against the death penalty. In fact, an overwhelming majority of representatives of the penal law doctrine were against the capital punishment, as one violating the fundamental human right – the right to life. Even as late as in the 1960s the penalty was administered in Poland for business-related offences, its administration being later reduced to the sphere of the crimes against life. Finally, towards

the end of the 1980s, the state authorities put a moratorium on the execution of the capital punishment (which was eventually abolished only in 1997). Another success of the legal scholars was the shape of Poland's Civil Code adopted in 1964, which law – while including certain traces of the communist ideology (e.g. the favoured treatment of the state property) - was filled with truly modern legal ideas and was standing out against civil codes of other communist states. Many higher education institutes (including law schools being parts of the latter) offered a safe haven to oppositionists and many professors were directly involved in the illegal opposition activities. It can be rightly stated that thanks to such an attitude of the scholars, the major shock to the system (i.e. the strikes of 1980 which resulted in the formation of the first independent trade union within the communist bloc) revealed not only good preparation of the opposition élites to confrontation with the authorities and the start of a dangerous and risky game aimed at liberalization of the political system, but it also contributed to the accelerated development of citizen awareness among wide circles of the community. This facilitated the later (after 1989) establishment of democracy and building up of the civil society. Throughout the period of communism it was the universities (with the law faculties operating within them) that served as a kind of depositaries for the human right ideas, reminding of the fundamental freedoms each human being is vested in. The ideas were cherished there despite great difficulties and dangers.

5. In 1989, when - under the pressure from popular protests and the country's worsening economic situation - the communist authorities decided to enter into a dialogue with the opposition, leaders of the "Solidarity" Trade Union in the first place, persons of deeply ingrained pro-liberty attitude and full of ideas how to democratically organize the social life, faced representatives of the state authorities at the negotiation table. Following the so-called Round Table arrangements conditions were created for a peaceful and evolutionary transformation of the socio-economic and political system. Over the 23 years that have passed since the beginning of the transformation, huge efforts were made to change the legal system and depart from the centralized economy and limitations of the citizen liberties in order to create a democratic system of market economy. In 2004 Poland joined the European Union, the fact entailing another remodelling of the national legal system to align it with the system of the EU. A great contribution into the work was made by the centres of the academic legal thought. Their tasks, of great importance for the success of the whole undertaking, consisted not only in providing the expertise needed for the transformation of the law, but also in promoting the changes on a major scale. And still, as the experience from the planting of the democratic system in Poland shows, the law schools are faced with the job of spreading the legal culture based on the human rights idea. In young democracies the threat of public authorities not meeting certain standards or abusing their position in contacts with the citizens is relatively high. A dynamically developing legal doctrine of human rights (and in each and every law school there does exist a department dealing with the issues) is one of the guarantees for high standards being observed in that respect.

Should the African Court replace the International Criminal Court in dealing with International crimes in Africa? A human rights perspective

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In the wake of open hostility towards the International Criminal Court (ICC) debate is raging around the proposal of granting the African Court criminal jurisdiction over international crimes. The essay seeks to explore from a human rights perspective the implications of expanding the African Court's jurisdiction. The question will be asked whether African leaders are genuinely ready to end impunity on the continent or this is a disguise meant to shield their own from international scrutiny. The discussion will centre around issues of universal jurisdiction, the principle of complementarily, access to justice, right to fair trial, sovereignty and effectiveness. The essay will contend that it is better for the African Court to complement the ICC in preventing impunity in international crimes than erode human rights in to the name of increasing opportunities for justice in Africa.

The ICC was established in 2002 as a permanent court to put an end to impunity for the perpetrators of international crimes. International crimes encompass "acts that threaten world order and security, crimes against humanity and fundamental human rights, war crimes and genocide.[360] The role of the ICC, considered the pillar of the international justice system, is to complement national criminal jurisdiction. African leaders argue that they are not being treated as equal participants in the application of international criminal justice in the sense that powerful countries are abusing the principle of universal jurisdiction. Hence they want to establish an African court, which deals with international crimes perpetrated in the African continent. An important question to be asked is, "Does the African Court have prosecutorial or investigative powers or institutional capacity to take on the work which is currently being done by the ICC? From the unfolding events it is clear that these issues are not important. What they want is "liberation" from ICC and those issues will be looked at later on.

Existing international law recognizes universal jurisdiction over international crimes. The principle of universal jurisdiction can be defined as, 'a legal principle allowing or requiring a state to bring criminal proceedings in respect of certain crimes irrespective of the location of the crime and the nationality of the perpetrator of the victim.'[361] The basis of this is that violation of *jus cogens* is a harm to the entire international community and therefore no safe havens must be available for those who commit these crimes. The Geneva Conventions of 1949[362] provide for the application of universal jurisdiction and Article I of the Rome Statute emphasises the need for cooperation to punish offenders of serious crimes.
The Rome Statute operates on the basis of the principle of complementarity. In terms of this principle, national judicial systems will have the first bite of the cherry in respect of any

[360] Partin, www.asil.org and Articles, 6, 7 and 8 of the Rome Statute

[361] Kenneth C. Randall, 'Universal jurisdiction under International Law, Texas Law Review, No 66 (1988) pp785-8, International Law Association Committee on International Human Rights Law and Practice; Final Report on the Exercise of Universal Jurisdiction in respect of gross human offences, 2000 p.2

[362] Geneva Convention 1, Article 49, Geneva II Article 50, Geneva Convention III, Article 129, Geneva Convention IV, Article 146

investigation, which affects their territory or their nations. According to Zeidy,[363] the principle of complementarity in international criminal law requires the existence of both national and international criminal justice systems functioning in a subsidiary manner for curbing crimes of international law, when the former fails to do so, the latter intervenes and ensures that the perpetrators do not go unpunished.

Interfering with the national jurisdiction of the states was never an objective of the ICC. As part of the checks and balances, the ICC will not act where national criminal jurisdiction has been exercised or where the case is not of sufficient gravity. States are also given notice of the ICC's interest in a situation allowing them to inform the court of their own investigations and prosecutions. Only in cases of genuine unwillingness or inability to act will the court have authority to act, and the grounds on which the court can determine unwillingness or inability are precise and as relatively objective as possible.[364] Even though the African Union no longer has confidence with the ICC this mechanism is fair and meant to achieve justice in all cases as such there is no genuine need to grant the African Court criminal jurisdiction in international crimes.

It has been said that international prosecutions are being instituted mainly against African nationals, weak actors in the international arena or those who fail to enjoy the support of powerful nations.[365] Hoffman[366] argues that the state that claims sovereignty deserves respect only as long as it protects the basic rights of its subjects because it is from their rights that it derives its own. The African Union is of the view that the way the ICC is exercising its jurisdiction over African leaders is in violation of their different states' sovereignty. Advocating for the replacement of the ICC by the African Court appears to be a disguise meant to shield their own from international scrutiny. State sovereignty should not be a defence for breaches of gross violations of fundamental human rights.

Many a times it is the leaders of different states who perpetrate, abet or aid in the commission of international crimes. There is likelihood that these leaders can use African Court to evade justice. In terms of Article 17.2 of the Rome Statute, a person cannot be tried twice for the same crime. It is this essay's contention that those who want to replace the ICC with the African court failed to shield the perpetration of international crimes because of effectiveness of the non big in idem principle. This is a hurdle, which the African leaders failed to cross that is why they now intend to have their own court, which they can control to suit their situation. As part of the control mechanisms of this principle Article 20(3) of the Rome Statute provides that the ICC can try the person for the second time if the proceedings in the other court were for the purpose of shielding the person concerned or if the proceedings were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner inconsistent with the intent to bring the person concerned to justice. Should we sacrifice international justice by expanding the jurisdiction of the African court? It is this essay's view that there is public demonstration of justice through the ICC and it is an instrument through which individual accountability for massive human rights violations is increasingly internalized as part of the fabric of the African continent therefore we cannot replace it by an African Court.

[363] Mohammed M.El Zeidy, 'The Principle of Complementarity: A New Machinery to implement International Criminal Law, Michigan Journal of International Law, vol. 23 (summer 2002) p.870

[364] The International Criminal Court, The Making of the Rome Statute, Kluwer Law International. The Hague, London, Boston, 1999 p1

[365] Damasica 'What is the Point' 361, Cherror Jalloy, Regionalising International Criminal Law? (2000) 9 ICLR 445

[366] The challenges to state sovereignty from the promotion of human rights. Available at www.e-ir.info

In terms of Article 27 of the Rome Statute, official capacity as a head of state or government shall not exempt a person from criminal responsibility. Max du Plessis[367], says an individual charged before the International Criminal Court is therefore stripped of immunity, the official status of that person is no longer allowed to lead to impunity in respect of crimes with which s/he has been charged. The chances of weakening human rights on the continent are very high if the African Court is given criminal jurisdiction on international crimes. More perpetrators of these crimes are state leaders and as such they prioritise state and diplomatic immunity. If they are allowed to be above the law then as Richard Gold said, 'the hope of 'never again' will become the reality of again and again.[368] The general understanding of the doctrine of diplomatic or head of state immunity as provided for in the case of Democratic Republic of Congo v Belgium[369] is that it prevents national crimes regardless of what their domestic legislation might insist, from dealing with allegations of international crimes unless that immunity has been waived. However the complementarity principle obliges state parties to the Rome Statute to prosecute or extradite the accused to a country which has jurisdiction to try him. This means that issues of state or diplomatic immunity are avenues to escape given this current ICC set up.
A good example of how issues of diplomatic and state immunity are likely to be abused in Africa is the application to the International Court of Justice by Liberia against Sierra Leone to set aside the indictment and international arrest warrant issued by the special court for Sierra Leone against Charles Taylor, President of the Republic of Liberia. Liberia wanted to assert state sovereignty where it was not relevant. The ICC is effective in achieving its goals which include deference. The indictment of heads of states like Slobodan Milosevic and Charles Taylor and Vice President of Democratic Republic of Congo Bemba have set the precedent that serial crimes will not go unpunished regardless of who you are. In an attempt to shield their own from international scrutiny, some African leaders now want to expand the jurisdiction of the African court. It is submitted that accountability is an indispensable component of peace-building and as such the African Court should not be granted criminal jurisdiction because accountability on African continent will be difficult to implement.

International Conventions such as the Geneva Conventions,[370] impose an obligation to prosecute and punish those responsible for grave breaches of international humanitarian law. If the African Court replaces the ICC in prosecuting these crimes there is no guarantee that impartial trials and effective judgments will be given. The reasons for this are both technical and political. Politically African states have a problem of making decisions based on their political relationship with the opponent state. An example is the arrest warrant issued by the ICC against Al Bashir. Some states were unable or politically unwilling to cooperate with the ICC, others decided to hind under the flimsy reason that they were not party to the Rome Statute and as such they had no obligation to cooperate with it. It is submitted that African leaders are very much aware that crimes allegedly committed by Al Bashir are a violation of *jus cogens* - peremptory norms for which no derogation is permitted under international law and as provided for in the Vienna Convention. This means that once there is a violation of a *jus cogens* an obligation *erga omnes* attaches to every state to apply the principle of universal jurisdiction.

[367] Africa and the International Criminal Court; available at http://www.csvr.org.29/wits/confpaps/duplessis.htm
[368] Were they Just Obeying Orders? The Guardian, May 7 1996, at 10, quoted in Simon Chester Never Again… and Again: Law, Order and the Gender of War Crimes in Bosnia and Beyond: (1997) 22 Yale J. of International Law 229 at 316 quoted by Max du Plessis in Africa and the International Criminal Court available at http://www.csvr.org.29/wits/contpas/duplessis.htm
[369]
[370] See note 3 above

There is poor justice delivery in Africa because of non-independence of the judiciary as such non-compliance and cooperation with regional courts and tribunals is evolving.[371] Zimbabwe's refusal to comply with the decision of the SADC Tribunal contributed to the demise of the tribunal. If this is the attitude of some African states there is no guarantee that African court judgments will be complied with. Courts generally do not want to exercise their jurisdiction where the judgments will be *brutum fulmen*. Establishing an African court with criminal jurisdiction on international crimes will therefore be a violation of the state and individual access to justice.

Further, generally in Africa there is a tendency of abusing the law making organs of states by arbitrarily amending or putting in place laws to suit the prevailing situation for the good of the leaders. This shows that African leaders have the potential to utilize what they practice in their own countries in the African Union and thus make treaties, which may end up ousting the jurisdiction of the African Court.

If the ICC is left with the prerogative to deal with international crimes it is for the international community to intervene when the need arises and bring suspects to book for example through the involvement of the United Nations Security Council. An example was when the council referred the Darfur (Sudan) situation to the ICC.[372] As a result of the referral arrest warrants were issued for four Sudanese officials including President Al Bashir. The government of Sudan objected to the warrant arguing that Sudanese sovereignty had been violated. In solidarity the African Union called on the United Nations Security Council to invoke the provisions of Article 16 of the Rome Statute and suspend the process initiated by the ICC against Al-Bashir. Further to this the African Union incited its member states to withhold cooperation from the ICC in respect of the arrest and surrender of Al-Bashir.[373] In November 2009 the African Union persuaded the UN Security Council to amend Article 16 of the UN General Assembly to be given authority to defer an investigation should the UN Security Council fail to act on their request within six months. It is clear from this that the African Union is just concerned about the welfare of its leaders, and the issue of human rights protection is secondary. It is submitted that the whole debate has nothing to do with prosecuting violators but it is about entrenching the culture of impunity and immunity in the name of fighting perceived biases of the ICC.

The right to fair trial is an essential human right to all. This right is enshrined in both national and international instruments.[374] The essence of this right is that all persons are equal before the courts and tribunals in the determination of any criminal charge against them and are entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. This right also encompasses the faithful execution of judgments. A careful examination of the Bashir case[375] shows that the case appeared before the Trial Chambers and its decision was reversed by the Appeals Chamber. If the court is influenced by the Western countries then it should have rubber-stamped the trial chambers decision but because of its independence and impartiality in the administration of justice it arrived at a decision which was just and proper even through different from the court a quo's decision. As was said by Koffi Annan[376] 'the ICC is a giant step forward in universal

[371] Coalition's submission on the implications of the African Court to have jurisdiction on International Crimes. Available at http://www.africacourtcoalition.org/index.php?option=com

[372] Resolution 1593 (2005) and Article 13(b) of the Rome Statute

[373] Max Du Plessis www.csvr.org.za/wits/contpas/duplessis.htm

[374] Article 10 of the Universal Declaration of Human Rights, Article 6 of the European Convention of Human Rights, s18 of the Constitution of Zimbabwe, Articles 14 and 16 of the International Convention on Civil and Political Rights

[375] Prosecutor v Bashir ICC-02/05-01/09-OA

[376] www.ngos.net

human rights and the rule of law. Hence the African Court should not replace the ICC in dealing with international crimes.

In addition, the culture of state impunity in international crimes is dwindling due to the ICC. States can no longer afford to be complicit since their consent is not a condition precedent for individual accountability. In the Benba case for instance, the ICC allowed civil society groups such as International Federation for Human Rights (FIDH) to mount vigorous campaigns against the complicity of the Central Africa Republic government.

However, it may be argued that had it not but for the reasons outlined above it should have been a good idea to expand the jurisdiction of the African Court. The issues of geographical location of the court mean that it is expensive to conduct a trial in the Hague. It is also inconvenient for witnesses to travel to that far say for example from Harare, Zimbabwe, as such a court in Africa would have been better because it is less expensive. It is submitted however, that these reasons are outweighed by the need to protect human rights and end impunity, as such human rights protection should prevail.

The African Court Coalition correctly observed that instead of extending criminal jurisdiction to international crimes,[377] the African Court can complement the work of the ICC by contributing to preventing mass human rights violations in Africa by determining state responsibility. It can also establish a regional norm of legality and compliance with decisions of regional courts. It is not within the interests of international justice to erode human rights in the name of increasing opportunities for justice in Africa.

In conclusion the essay has shown that the ICC has to a larger extent been an effective platform for the adjudication of serious international crimes. It has deterred dictators from abusing their powers and allowed society and victims themselves to stop the culture of impunity for human rights violations. The weaknesses of the African leaders have also been highlighted and it is clear that they are not genuinely ready to end impunity on the continent but want to shield their own from international scrutiny.

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The Role of Law Schools and Human Rights
Law Schools as Contributors to Public Policy on Human Rights

The case of Argentina

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Startled at the stillness broken by reply so aptly spoken,
`Doubtless,' said I, `what it utters is its only stock and store,
Caught from some unhappy master whom unmerciful disaster
Followed fast and followed faster till his songs one burden bore -
Till the dirges of his hope that melancholy burden bore
Of "Never-nevermore."' (Edgar Allan Poe – The Raven)

Should law schools teach human rights? The question is a tricky one. We should first determine what is to be understood by the phrase "teaching human rights" in order to provide a proper answer to the question. In an ideal world, we believe that the teaching of the basic concept of human rights, their scope and contents, the very idea that they are inherent to human nature, the importance of them be respected, etc. should be left mainly outside of law schools, since apprehending those matters are essential to the education of every individual from childhood. Paraphrasing Georges Clemenceau, that once said that war is much too serious a matter to be entrusted to the military, we can say that human rights are much too serious matters to be entrusted exclusively to lawyers.

If, on the contrary, by teaching human rights we understand teaching prospective lawyers the challenges that the concept of human rights present to the idea of state-nation and to the principle of national sovereignty, the international promotion and protection of human rights as subsidiary to national protection, and the legal mechanisms to deal with massive and systematic violations of human rights, we could agree that such matters should be, without doubt, within the realm of law school curriculum.

But the truth is that we do not live in such an ideal world. The last century showed that the general principles of human rights were far from being recognized as inherent to the individual. Massive human rights violations throughout the world occurred and continue to occur with various –and indefensible- excuses. The world had to suffer the Holocaust in order that the conscience of the nations be shaken and even then, the document that could be agreed at that time was the Universal Declaration of Human Rights, which only set the worldwide respect of human rights as a goal, "a common standard of achievement for all peoples and all nations". Undoubtedly, a great step at that time, but a too short one when looked from where we stand today.

Despite the great progress made since, massive human rights violations continue to be a day-to-day matter, even in those countries that define themselves as "civilized". Mine, Argentina, is one example. During the 1970s, Argentina was immersed in serious and gross violations of human rights, both from the left-wing guerrilla and, more important, from the Armed Forces that took power in 1976. Torture, kidnapping, and assassination of hundreds of individuals, in cases only because of thinking differently or just by mere suspicion, became common practice.

Once democracy was restored, in late 1983, the new democratic government, which had as one of their main campaign mottos *Somos la vida* ("We are life"), sought measures to bring the country back to normal. Among the measures then adopted with almost the unanimous approval of the political parties, were the repeal of a broad self-amnesty enacted by the military government; the ratification of the main international human rights instruments; the establishment of one of the first ever created truth commissions, the CONADEP (*Comisión Nacional sobre la Desaparición de Personas*), with the aim of investigating the fate of thousands of *desaparecidos*; and the bringing to trial of the leaders of the military government and of the terrorist groups responsible for those serious violations. The CONADEP's motto summarized the idea: *Nunca Más* (never more). The University of Buenos Aires law school, the major law school in the country, followed suit to the trend, and included human rights as part of the mandatory first year basic curriculum for prospective lawyers.

The underlying idea in so doing was that government actions are not enough. In the real, ordinary world in which we live in, the teaching and promotion of human rights must be a key element in education at all levels. And lawyers are particularly well prepared to help developing the public policy of the country in such a sensitive matter. Lawyers' argumentative skills, their actions as civic and political leaders, their role as advisors on all matters of public policy, their court advocacy, the persuasive role of their writings, even their key roles in different sectors of the economy, etc. make lawyers one of the primary groups that influence government and people's actions.

That being the situation, and until such time tenured professors could be appointed, the University of Buenos Aires law school initially filled the teaching positions of the new courses with professors coming from three main departments within the school: legal philosophers, who could provide the new courses and their students with deep thinking on the basis and rationale of human rights; constitutionalists, who brought with them the intimate relationship between constitutional liberties and human rights; and professors of international law, who would teach one of the novel features surrounding those rights, the principle that human rights were no longer dependent on the concept of national sovereignty. They helped the shaping of today's courses, by providing their fundamentals, and served as major contributors to the spreading of the idea that the respect of human rights is worthy for the human development.

Now, almost thirty years after human rights courses have been made part of the law school curriculum, the success of the idea has been proven. A diverse tenured faculty teaches over one hundred one-semester graduate courses each year, a one-year specialization degree and a two-years Masters degree on International Protection of Human Rights for a student body of roughly 25,000. Those courses are the main instrument by which the law school helps the construction of the rule of law principle with a multiplier effect in society at large.

Moreover, the law school hosting of conferences on the subject and promoting research and debate on human rights matters, its cooperative action by providing experts to NGOs and government agencies to help them in their daily tasks regarding human rights promotion and protection, make the law school a key player in the human rights agenda setting in the country, thus contributing to the public good of the people.

Not all graduates, obviously, will become human rights activists, but that was never the purpose. But, undoubtedly, they will incorporate their learning regarding the importance of human rights in their professional lives, either as litigants, from the bench, acting as political leaders or as advisors to people or business. And that will prove the success of our teaching.

As the country moves ahead, and the recent past events are managed, new challenges appear, and the law school has, once again a main role in shaping the agenda: age, race and gender discrimination; protection of the disabled; indigenous people's rights; social, economic and cultural rights, are the new subjects that require our attention. Human rights respect is an evolving concept and once a hurdle is passed, new ones appear and must be tackled.

Law schools are then key to building consciousness on the importance of a subject that only pretends to teach that every individual has the right to develop as a free human being on an equal foot basis with all others, regardless their skin colour, race, religion, nationality, wealth or gender, since they are not different from one.

Teaching the Relationship between Business and Human Rights

IMPACT OF NEO- LIBERALISM ON THE JUDICIAL ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS IN THE SOUTH AFRICAN CONSTITUTIONAL DISPENSATION

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Background

Growing attention to the protection and enforcement of socio-economic right has produced much excellent work in South African jurisprudence. There remain, however, important areas for further exploration in this research. The research will argue that recent literature has focused on questions of inclusion or entrenchment of socio-economic rights in the constitutions. The research further argues that there is room for more sustained and critical attention to the question of democracy. While more attention to democracy would certainly include descriptive understandings of trends in decision-making practices, what is even more urgent is a prescriptive exploration of the role democracy may play in shaping a more progressive future for South Africans against poverty.[378] This paper explores the intersection of economic globalisation and the enforcement of socio-economic rights. The focus of this exploration is the right to social security. While a right to social security can be constructed at the international level, the right disappears in the face of neoliberal development measures such as those that are instituted by democratic governments in developing nations faced with limited resources.

Scholars have analysed in detail how neo-liberal globalization has negatively impacted democracy and sometimes hindered the enforcement of socio-economic rights. What is required is an active search for creative progressive alternatives to the current situation. Harvey states that:

> "Neoliberalism is in the first instance a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills characterized by strong private property rights, free market, and free trade."[379]

And rest assured that the state has many resources at its disposal by which it forces its citizens to be free. Harvey further states that:

> "The state has to guarantee the quality and integrity of money. It must also set up those military, defence, police and legal structures and functions required to secure private property rights and to guarantee, by force if need be, the proper function of market. State interventions in markets (one create) must be kept to a bare minimum because, according to (neoliberal) theory, the state cannot possibly possess enough information to second-guess market (prices) and because powerful interest groups will inevitably distort and bias state interventions (particularly in democracies) for their own benefit."

378 Purcell M City-Regions, Neoliberal Globalization and Democracy: A Research Agenda, International Journal of Urban and Regional Research, Volume 31.1 March 2009 197

379 http://www.generationabubble.com/2009/09/14/new-word-order-contemporary-novels-and---9/4/2012

The issue of judicial enforcement will be revisited and used for delegitimation of welfare rights. The research seeks to shed light on the role of constitutional courts and to explore whether judicial enforcement of social and economic rights can bring a meaningful social change and make a real difference in reducing poverty and also make a normative distinction between positive rights and negative rights corresponding with socio-economic rights and civil and political rights

The research further focuses on the objections raised against judicial enforcement of socio-economic rights. When scrutinizing these rights, virtually all the perceived distinctions of these categories of rights, especially as entailing different enforcement dynamics, have been found without any strong foundation and that there are few differences, if any.

The research results are that in the recent past, save theoretical issues, there have been significant development of socio-economic rights jurisprudence that takes the whole debate to how best these rights should be subject to judicial enforcement rather than whether or not they should be, in the first place. India offers useful benchmarks. It is using the approach where civil and political rights in the contextual background of directive principles are applied innovatively to enforce socio-economic rights[380]. Some important inputs that some countries could draw from India is the consideration of the need to relax the rules of standing to allow for public interest litigation where interested parties, especially those working with and for indigent individuals and communities that are affected, can be allowed to undertake litigation.

Conclusion

The competing ideals of international human rights and global economic neoliberalism come into conflict when developing countries try to enforce socio-economic rights

380 Rural Litigation and Enlightenment Rendra v State if UHAR Pradesh AIR 1989 Sc 594 read with MC Mehta v India (1987) 463

4 Larson EA At the intersection of neoliberal development, scarce resources and human rights: Enforcing the right to water in South Africa

TEACHING HUMAN RIGHTS OR PERSONALITY RIGHTS IN CIVIL LAW

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I) INTRODUCTION

Civil law has been called, rightly or wrongly, the law of "the rich", expression that refers to its traditional inclination to goods, obligations and contracts and the inheritance, all of them patrimonial subjects. In addition to that, the books that deal with the general obligations and contracts, in almost all nineteenth-codes like the Chilean one - are virtually books of creditors, who are considered above debtors. Civil law appears to devote concern to everything related to the estate of the person more than the person in itself, an idea that seems supported by the fact that neither the Napoleonic Code of 1804 and those that followed it, contain a systematic regulation of the person and its inherent rights.
For others, the omission of such regulation may be due to the fact that it was not necessary, since by the time of enactment of the French Civil Code, the declaration of rights of 1789 already existed. Proof of this is that its contents came to lead most of the constitutions of the most diverse countries which came later.

Whether we agree or not with the newly exposed thesis, the fact is that today the valuation of the individual and the existence of its rights which must be protected and respected, is widely recognized in a number of international documents and in nearly all of the Constitutions of the most diverse countries. Moreover, regarding the constitutional provisions is given what is called by some, as the "constitutionalization of civil law". In them, especially lately, it is dealt neatly and in detail, what regards the man in his "fundamental rights and duties", also known as human rights. Moreover, the criminal codes protect the person, partnership, ownership and other property related in any way to the person.

With respect to civil law, the dominant orthodox position understood for a long time, that the protection and study of the property and rights of personality, which is the name that human rights receives in civil-law, was a matter reserved to political policies and criminal laws, and therefore, the task of constitutionalists and criminalists. Today, however, the prevailing trend in many systems, states that the person and property and personal rights are also essential objects for the civil law and therefore it must engage to it with special interest, as the other branches of the law do. Thus, the civil law tends to trend away from the patrimonial course that marked it for so long, to hold a vision that puts the person at the center with all its attributes, properties, rights and interests.

This change has occurred in the first place because constitutions have been more programmatic than effective in what regards the inherent rights of the person. Not to mention that the bill of rights on the ground, increases significantly by the inclusion of rights of a public nature or those related to public beings or between local public beings. On the other hand, it has been found inadequate criminal sanctions practice for full and satisfactory protection of the property and rights of personality. One simple example of this is the absence of punitive effects for civil damage. Last, and regarding the foundation that we are concerned of, because the modern civil law, in contrast, provides effective tools for protection of the person.

II) THE ROLE OF EDUCATION IN JUR ÍDICA EXPANSION AND DEVELOPMENT OF A CIVIL Law AT A SERVICE PERSON

The reformulation of the dominant understanding about the role of civil law that, although a trend, is not yet recognized in all systems and even in those where it has been., its development is still a task in progress .

2.1 The relevance of training in civil law in the proper understanding of the function of this branch of law.

In this evolution, Civil legal education in law schools, is indispensable if we are aware that the basis of the understanding of the role of law, its content and its regulatory areas are taught to undergraduate and graduate students. And if this is applicable to legal education in all countries, it is particularly important for those belonging to the family called Germanic or Roman Civil Law where civil law is one of the core issues in the backbone of legal education. This is supported by the number of courses within the curriculum dedicated to the study of civil law in many countries such as Chile and Latin countries where in general it is the biggest among all other subjects studied.

Thus, the expansion of the role of the civil law in the protection of the person and thus the rights of the person, understanding that its work extends not only within the patrimonial field but also to equity pecuniary rights as fundamental rights is a task committed first to lecture and thus, to the law schools which should promote the expansion and understanding of it on various modes.

2.2) Relevant aspects of this training in order to generate a renewed understanding of Civil law in the protection of the person. In this regard, civil legal education should aim to several ways.

A. The precision of the concepts of the rights of the person and its delineation. Firstly, in the student correct understanding of concepts and thus, of the content of the various rights of the person or its fundamental rights. Indeed, although many of these aspects have been discussed and the issues they care about and in fact may remain are still being checked , currently this category of personality rights is recognized in the civil law of varied systems. Moreover, in many of them they have been regulated in order to limit them, delimit, specify its content, establish and regulate its protection mechanisms. Nevertheless, in all of them, important debates continue which must be submitted in the teaching process, presenting all the basics existing in different positions. In other words, education should show the various competing conceptions, without interfering with the teacher´s academic freedom to establish his position.

B. The incorporation of a critical view of civil law

Another dimension that should be promoted is the need for ongoing review of the civil law. First, from the point of view of the constitutional sense since it forces to permanently reformulate the answers given by the standard, hierarchically inferior. The emphasis on protecting the person necessarily provides a renewal look of civil law and, therefore, of the Civil Code.

Two, because of the permanent review of the incorporation of international treaties determined by our legal systems. The optics of the individual subjective right from which they are constructed determines a constant and uncontrollable source review for any solution by simple logic issues: individual choice is always varied, infinite, not necessarily subsumed in abstract and general rules as legal.

C. FORMS OF PROTECTION OF RIGHTS OF PERSONALITY

As DiezPicazo stated, and adequate protection of personality rights requires legislative regulation specifying its content. In fact , an only general formulation as stated in several constitutions and certainly in ours, though vital in order to inform the respect of the legal system, it requires additional precision to allow settling the many

problems that protection matters rise. Indeed, if the constitutional law should formulate principles and guarantees of the person around which the legal system has erected, the exact accuracy of the rights contained therein, and of existing boundaries in both, amongst others, are lower order tasks, and in this case, for obvious reasons, of civil law.

Thus, regulation is needed to clarify concepts, distinguish rights, list classes and categories, set different modes of care (preventive and retrospective), among others. In addition it should be devoted special attention to the consequences of civil order that the violation of any such rights generates.

Thus, if the importance and usefulness of the responses contained in the Code seem sometimes displaced by constitutional means, it is not only because of an invasion of rules, but also because of the improper understanding of the value that can be provided in them, as for example, the tort action.. The same is true, to cite another example, concerning the obligations and contracts where there has been a reluctance to explore the role and utility that can provide certain general legal principles such as good faith, as a product of a strict understanding of the content of the contractual.

Therefore, if the civil code and essentially protection mechanisms contained therein, are perceived somewhat outdated, it has been in large part due to the strength-of doctrine and civil jurisprudence - to read and interpret a variety general principles contained in its rules, from the beginning, that would serve to resolve many of the problems that has arisen subsequent developments. It must be prevented that such resistance is not common to all countries as in some, they have been bold and creative even into the excess (if it can be considered as such to get to make a rule saying something exactly opposite of what was meant originally contained in it) even raising the issue of recoding.

In legal terms, these rights are or may be protected in several ways: through the action of nullity, the general limitation to the autonomy that notions of public order and good morals pose in private law. Last, the most invoked via of protection is an action for compensation of damages, which has become the favorite and most efficient form of personal tutelage , as it has been noted in Spanish law, the tort action achieves that efficiency because is the only civil action which is founded precisely only in the personhood.

VI) IN CONCLUSION

Of course, civil law isn´t a right for care nor is its task the proclamation of the general good intentions of the legislator.. However, the above in not an obstacle to recognize that he would attend important part of the guardianship of the person and that this is in no contrast with its role in heritage.. Rather, the role he has classically been assigned, it has been added the latter: the efficient protection of the person, the dignity and rights.. Thus, before questioning this shift in approach, it should rather be acknowledged that nothing has been done except expanding the importance of the civil law has in the overall context of the law.

That this renewed understanding has further development is certainly a task of primarily teaching it. Its future evolution depends on this.

Teaching Human Rights: Addressing the Illegal Use of Armed Force

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Background:

At the outset, and as a matter of full and fair disclosure, I should confess that I am not an academic in the traditional sense, but I have a keen interest in criminalization of the illegal use of armed force - both as what we would, in today's world, call the crime of aggression, and also as a crime against humanity.[381]

In 1758, the Swiss jurist, Emmerich de Vattel wrote, in his *Law of Nations*, that whoever takes up arms without a lawful cause:

> "can absolutely have no right whatever: every act of hostility that he commits is an act of injustice. . . He is chargeable with all the evils, all the horrors of the war: all the effusion of blood, the desolation of families, the rapine, the acts of violence, the ravages, the conflagrations, are his works and his crimes. He is guilty of a crime against the enemy, whom he attacks, oppresses, and massacres without cause: he is guilty of a crime against his people, whom he forces into acts of injustice, and exposes to danger, without reason or necessity, — against those of his subjects who are ruined or distressed by the war, — who lose their lives, their property, or their health, in consequence of it: finally, he is guilty of a crime against mankind in general, whose peace he disturbs, and to whom he sets a pernicious example."[382]

Almost two hundred years later, the judgment of the International Military Tribunal at Nuremberg, in the context of their verdict rendered with respect to "crimes against peace", echoed de Vattel's basic message: "To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole." [383]

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[381] I was born in Nuremberg, Germany in 1952, the son of the American Chief Prosecutor of the Einsatzgruppen case in the US-led subsequent proceedings at Nuremberg. My undergrad degree (from Colgate University) was in Peace Studies, and I'm the Director of a small family foundation, known as The Planethood Foundation, "Educating to replacing the law of force with the force of law". Depending upon who's asking, I'll also admit to being a lawyer with an MBA and to having had a 22-year career as a tax guy, before turning from commercial work to international justice issues - something I find infinitely more intrinsically rewarding! My current status as a "Visiting Professor" at Middlesex University School of Law has more to do with my having established (in 2010) the Global Institute for the Prevention of Aggression than with current teaching responsibilities (although I will admit that in 2001 I did teach as an adjunct professor at Pace University School of Law in White Plains, New York).

[382] Emmerich de Vattel, *SAXON MINISTER AT BERN AND CABINET, MEMBER AT DRESDEN, SWITZERLAND,* THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW IN FOUR BOOKS (1758), Translated into English by Joseph Chitty, Esq. (1833) Chapter 11, ¶¶ 183, 184, *available online at* http://files.libertyfund.org/files/2245/Vattel_1379_Bk.pdf.

[383] Judgment of the IMT, available online at the Avalon Project, http://avalon.law.yale.edu/imt/judnazi.asp. *See also* a readily searchable online version of the judgment, at page 25: http://werle.rewi.hu-berlin.de/IMTJudgment.pdf.

The United Nations, almost immediately upon its inception, adopted the principles of law enunciated at Nuremberg.[384] By 1984, the General Assembly had gone so far as to declare that the right to peace is a "sacred right" of all peoples.[385] The hoped-for establishment of the principle that peace is a fundamental human right is still very much a work in progress, as evidenced by the UN Human Rights Council's mandate and recent ongoing work to develop a draft United Nations declaration on this topic.[386]

As of its establishment in 2002, the International Criminal Court has provided a focal point for discussions regarding ending impunity for the worst atrocities known to humankind. The Court's system of complementarity - that is, its primary reliance, where feasible, on the jurisdiction of the national courts of the accused persons to, in appropriate cases, investigate and prosecute the core crimes over which the Court has jurisdiction – has, in turn, been a factor in stimulating national implementing legislation covering such crimes. But there's a problem relative to utilization of criminal law to help make good on peoples' right to peace: the Court still lacks jurisdiction over the crime of aggression. This is so because, when the question of granting the Court jurisdiction over the crime of aggression came up at the ICC Review Conference in Kampala, Uganda in 2010, the crime was, yet again, essentially put into a sort of legal limbo – with no possibility of coming out of such limbo any time before 2017, at the earliest.[387]

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[384] General Assembly Resolution 95(I), *Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal*, 11 December 1946, *available online at* http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/033/46/IMG/NR003346.pdf?OpenElement. *See also* the United Nations Audiovisual Library of International Law summary, *available online at* http://untreaty.un.org/cod/avl/pdf/ha/ga_95-I/ga_95-I_ph_e.pdf.

[385] General Assembly resolution 39/11, *Right of peoples to peace*, 12 November 1984, *available online at* http://www2.ohchr.org/english/law/peace.htm:
The General Assembly ,
Reaffirming that the principal aim of the United Nations is the maintenance of international peace and security,
Bearing in mind the fundamental principles of international law set forth in the Charter of the United Nations,
Expressing the will and the aspirations of all peoples to eradicate war from the life of mankind and, above all, to avert a world-wide nuclear catastrophe,
Convinced that life without war serves as the primary international prerequisite for the material well-being, development and progress of countries, and for the full implementation of the rights and fundamental human freedoms proclaimed by the United Nations,
Aware that in the nuclear age the establishment of a lasting peace on Earth represents the primary condition for the preservation of human civilization and the survival of mankind,
Recognizing that the maintenance of a peaceful life for peoples is the sacred duty of each State,
1. Solemnly proclaims that the peoples of our planet have a sacred right to peace;
2. Solemnly declares that the preservation of the right of peoples to peace and the promotion of its implementation constitute a fundamental obligation of each State;
3. Emphasizes that ensuring the exercise of the right of peoples to peace demands that the policies of States be directed towards the elimination of the threat of war, particularly nuclear war, the renunciation of the use of force in international relations and the settlement of international disputes by peaceful means on the basis of the Charter of the United Nations;
4. Appeals to all States and international organizations to do their utmost to assist in implementing the right of peoples to peace through the adoption of appropriate measures at both the national and the international level.

[386] *See* draft resolution of the Human Rights Council on this topic, UN document A/HRC/20/L.16 (Distr. 29 June 2012), *available online* at http://blog.unwatch.org/wp-content/uploads/orally-revised14.pdf.

[387] More specifically, the review conference agreed to adopt amendments which put a definition of the crime of aggression into the Rome Statute of the International Criminal Court, but, as to the question of granting the Court jurisdiction over the crime, they decided that the matter needs to be voted on again, no earlier than 2017 (at the earliest) and then only after at least 30 States Parties to the Rome Statute have deposited their instruments of ratification or acceptance of the amendments granting the Court jurisdiction over the crime of aggression. Even then, other than cases where the Security Council refers a case, all States Parties have the option of electing to opt out of the Court's jurisdiction over aggression with respect to their nationals and crimes of aggression committed on their territory. For an excellent overview of the Kampala Review Conference and the crime of aggression, *see*

The problem with the *status quo*:

In the words of one well-respected commentator, "Adoption of the aggression amendments, despite their many shortcomings, is a huge step towards the promotion of the human right to peace."[388] Yet, despite this assessment (with which I concur), the lack of current ICC jurisdiction over the crime of aggression leaves a glaring gap in the law: you can apparently start a perfectly *illegal* war, but, so long as you kill people according to the laws and customs of war, etc., you can't necessarily be prosecuted for committing a crime. Such a situation certainly seems at odds with the logic and the law articulated at Nuremberg.[389] Even if, as opined by five Law Lords in the recent U.K. case of R *v.* Jones, the crime of aggression does exist in customary international law, without an international court to hear such cases, we are left to rely on either the ICC or national courts with relevant codes and jurisdiction.[390]

How this issue is addressed and discussed in law schools may make a difference with respect not only to current and prospective policies around the world relating to such matters, but perhaps even to issues touching on deterrence and efforts to minimize the number of human rights abuses relating to the illegal use of armed force.

What's being done, and what still needs doing:

Currently, there is a worldwide campaign to assist with, and promote, the 30 country ratifications of the Kampala amendments which are necessary to activating the Court's jurisdiction over the crime of aggression as soon as possible.[391]

In addition, efforts are underway to explore the possibility – in the absence of the ICC's jurisdiction over aggression – to reframe the debate over criminalization of the illegal use of armed force, at least for the time being, by exploring whether such use of force may be theoretically prosecutable as a crime against humanity, over which the Court *does* have current jurisdiction.[392]

Stefan Barriga and Leena Grover, "A Historic Breakthrough on the Crime of Aggression"*, American Journal of International Law*, Vol. 105, No.3, June 2011, at p. 517.

[388] Professor William Schabas, who, at the time, was the Director of the Irish Center for Human Rights, as quoted from his running blog from the Kampala Review Conference, *available online at* http://iccreviewconference.blogspot.com/ (at the entry dated 12 June 2010, the final night of the Review Conference).

[389] It is certainly a repudiation of the logic of Nuremberg, as enunciated by the British lead prosecutor, Sir Hartley Shawcross, who, in his closing arguments before the IMT, stated that "The killing of combatants in war is justifiable, both in international and in municipal law, only where the war itself is legal. But where the war is illegal . . . there is nothing to justify the killing, and these murders are not to be distinguished from those of any other lawless robber bands." Trial of The Major War Criminals before the International Military Tribunal, published at Nuremberg, Germany, 1948 (the Blue Series) at p. 458 (with special thanks to Manuel J. Ventura and Matthew Gillett, who cite this quotation in their paper, *The Fog of War: Prosecuting Illegal Uses of Force as Crimes Against Humanity*, Washington University Global Studies Law Review, Forthcoming, *available online at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2207126 , at p.14, footnote 7.)

[390] See R *v.* Jones et al., House of Lords Session 2005-06, [2006] UKHL 16, 29 March 2006, available online at http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd060329/jones.pdf.

[391] There is a recently developed website, still in formation, on this topic at http://crimeofaggression.info/.

[392] See, for example, the recent essay contest at Washington School of Law in St. Louis, administered by the Whitney R. Harris World Law Institute, whose Director, Professor Leila N. Sadat, has just been appointed a Special Advisor on Crimes Against Humanity to the Prosecutor of the International Criminal Court; see contest website at http://law.wustl.edu/harris/pages.aspx?id=9126; the winning essay is referenced *supra*, at note 9 ; see also https://news.wustl.edu/news/Pages/24712.aspx regarding Professor Sadat's appointment as a Special Advisor to the Prosecutor of the ICC, as of December 2012.

At the student level, an organization, the International Criminal Court Student Network (ICCSN), is still in the relatively early stages of development with respect to engendering student support for and awareness regarding the ICC.[393] Among the types of things they have been involved in was the first significant post-Kampala conference on the ICC and aggression (held at Duke University Law School in November 2010).[394] An upcoming conference, entitled "Peace Through Law: the Development of an Ideal" will be held in the Hague in August, 2013.[395] At St. Anne's College, Oxford and at Middlesex University Law School, London, Global Justice Fellowships have been established to assist, among other things, with the efforts to criminalize the illegal use of armed force.

The question of how, and whether, law schools should and can be more directly involved in the processes by which law students (and others) may be made aware of the current state of affairs with respect to the crime of aggression, crimes against humanity, and the movement towards formalizing a right to peace are part of what I hope will be addressed in our time together in Mysore, India, and beyond, and I look forward to being a part of such ongoing discourse, both as an advocate, an educator, and, in appropriate cases, possibly even as a funder.

[393] Their website, also still in early development is available at http://www.iccsn.com/.

[394] The program was recorded and is largely available online at http://www.iccsn.com/Duke/Duke.html.

[395] The conference website is available at http://www.iccsn.com/peacethroughlaw/.

The Relationship between Business law and Human Rights – What the *Gambazzi* case reveals about English, German and European Concepts of the Right to a Fair Trial

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When teaching business law at university level, one is tempted to leave human rights issues to the professors for public law. The complexity and globality of today's business law are certainly sufficient to fill the curriculum without taking a recourse to human rights. Nonetheless, every once in a while, there is time to introduce aspects of human rights law into a business law lecture.

I. Human Rights and the Ordre Public

I teach private international law, and the perfect moment to address human rights is when discussing the so-called *ordre public*. Let me explain the concept behind the term *ordre public*:

European Union Law has to a large extent harmonized the rules for jurisdiction and applicable law to transnational business cases. The courts of a Member State of the European Union may be bound to apply the law of a different Member State when they are hearing a case, and judgments by courts of one Member State will be recognized and enforced in any other Member State. However, the law of another Member State must not be applied and the decision of a court of another Member State must not be recognized and enforced, if it is contrary to the public order of the second Member State, i.e. if it violates that Member State's *ordre public*. Following the case law of the European Court of Justice[396], recourse to the *ordre public* 'can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle.'[397] Enter human rights.

II. The Krombach Case

A good illustration of the impact of human rights in the EU system of enforcement of decisions from other Member States is the case *Krombach*. *Dieter Krombach*, who lived in Germany, was committed for trial before a French court for alleged manslaughter of his stepdaughter. As is possible under French law, a civil claim initiated by the girl's father was attached to the criminal proceedings. *Krombach* refused to attend the court hearing in France, despite having being ordered to appear. As a consequence, the court, acting under the relevant French procedural rules of the time, reached its decision without hearing the defence counsel instructed by *Krombach*. *Krombach* was committed to 15 years in prison and was ordered to pay compensation to the girl's father. When the girl's father tried to enforce the civil judgment in Germany, *Krombach* argued that his debarment from defending contravened German public policy. After the German Federal Court of Justice had referred the case to the European Court of Justice for a clarification of the term 'ordre public', the ECJ decided that *Krombach's* procedural human rights had been violated and that German courts were therefore entitled to refuse enforcement of the French decision.[398]

[396] The European Court of Justice is the highest court in the European Union in matters of EU law.
[397] ECJ, 02/04/2009, case C-394/07, ECR 2009, I-2563 (*Gambazzi*), para. 27.
[398] ECJ, 28/03/2000, case C-7/98, ECR 2000, I-1935 (*Krombach*), para. 40.

Krombach was equally successful with his application before the European Court of Human Rights,[399] in which he argued that France had violated his right to be heard under Art. 6 of the European Convention on Human Rights.[400] The French procedural rules which had resulted in *Krombach's* debarment from defending were subsequently changed.

III. The Gambazzi case

1. Facts of the case

While *Krombach* was not a business law case, the insolvency of a Canadian investment company, *Castor Holdings Ltd*, raised questions reminiscent of the *Krombach* case – this time with respect to English civil procedure.[401]

The collapse of *Castor Holdings* led to a cascade of law suits in Canada and all over the world. Some years after the company's insolvency, one of the major investors decided to initiate proceedings in London against the former managers, alleging fraudulent behavior. The only plausible reason for bringing the suit in London was the availability of a powerful interim measure in English law, the infamous 'freezing injunction'. Once described as one of the two nuclear weapons of English civil procedure,[402] the measure obliges the defendant to preserve and (by means of an attached disclosure order) disclose any of his assets – if need be, worldwide. A failure to comply with the order may result in a committal for contempt of court and a striking out of the defense, i.e. a debarment from defending on the merits. One of the defendants, a Swiss lawyer by the name of *Marco Gambazzi*, failed to comply with the disclosure order, arguing that he was not entitled to disclose all of the requested information as he was bound by Swiss secrecy laws regarding information about his clients. *Gambazzi's* arguments did not convince the High Court, which upheld the freezing order, debarred *Gambazzi* from defending and awarded to the plaintiffs the requested damages – totaling 240 million Canadian dollars plus 130 million dollars US[403] – without any consideration of the merits of the case!

2. The decision of the European Court of Human Rights (ECHR)

Some of the defendants applied to the European Court of Human Rights (ECHR), arguing that the UK had infringed their right to a fair trial. In other cases, the ECHR had explained that: 'Where the individual's access to justice is limited either by operation of law or in fact, the Court will examine whether the limitation posed impairs the essence of the right and, in particular, whether it pursued a legitimate aim and there was a reasonable relationship of proportionality between the means employed and the aim sought to be achieved'.[404] Quite inexplicably, the action of the defendants in the *Gambazzi* case was declared 'manifestly ill-founded' and therefore inadmissible under Art. 35(3) of the European Convention on Human Rights. Now, arguably, the defendants deprived themselves to the right of a trial by acting in contempt of court. But the same can be said of *Krombach*, who deliberately chose not to appear before the French courts. Nonetheless, the European Court of Human Rights in the *Krombach* case found France to have impinged upon *Krombach's* right to a fair trial. While the *Krombach* case may be distinguished from the *Gambazzi* case

[399] The European Court of Human Rights is a supra-national court established by an international treaty, the European Convention on Human Rights. Individuals may apply to the court to seek a declaration that a signatory state has violated the European Convention on Human Rights. The ECHR is not an institution of the European Union.
[400] ECHR, 13/02/2001, case 29731/96 (*Krombach/France*).
[401] For a more detailed report on the *Gambazzi/Stolzenberg* saga and an for in-depth legal analysis, please refer to *Cuniberti*, Debarment from Defending, Default Judgments and Public Policy in Europe <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1515363>.
[402] *Per* Lord Justice Donaldson in *Bank Mellat v. Nikpour* [1985] FSR 87, 92.
[403] Swiss Federal Court (Bundesgericht), 09/11/2002, case 4P.82/2004.
[404] ECHR, 10/05/2001, case 29392/95 (*Z/UK*), para 93

on some aspects,[405] these factors were certainly neither obvious nor sufficiently convincing to have rendered the application to the ECHR 'manifestly ill-founded'. Interestingly enough, the French scholar *Gilles Cuniberti* notes that this is 'not the first time that the ECHR refuses to get involved in a major commercial case'.[406]

4. The decision of the European Court of Justice (ECJ)

I have mentioned earlier that the only perceivable reason why the plaintiffs had initiated proceedings in London in the first place was the availability of the *freezing injunction* in English law. None of the defendants owned any substantial assets in England. The plaintiffs consequently sought to enforce the default judgment in a number of other jurisdictions. These efforts turned out to be successful in the US and France, partially successful in Switzerland and unsuccessful in Monaco. During the enforcement proceedings in Italy, the Court of Appeal of Milan decided to request the guidance of the European Court of Justice regarding the interpretation of the public policy exception contained in Art. 27 of the Brussels Convention.

In contrast to the ECHR, the ECJ realized that the treatment of *Gambazzi* raised considerable human rights concerns, pointing out that *Gambazzi* had suffered 'the most serious restriction possible on the rights of the defense'.[407] The Court explained that it was for the Italian courts alone to decide whether the enforcement of the decision in Italy might contravene Italian public policy, but offered some advice as to what the Italian courts might consider.

The ECJ held that the Court of a Member State may deny enforcement of a decision handed down in another Member State, if, 'following a comprehensive assessment of the proceedings and in the light of all the circumstances', it appears the debarment from defending constituted 'a manifest and disproportionate infringement of the defendant's right to be heard'. In making that assessment, the Court of Appeal of Milan should consider whether (1) *Gambazzi* had the opportunity to be heard as to the subject-matter and scope of the disclosure order, (2) whether *Gambazzi* was able to fully challenge the disclosure order and (3) whether the High Court investigated the merits of the claim and whether *Gambazzi*, at any point in time, was given a chance to express his opinion on the merits.[408] After receiving the guidance of the European Court of Justice, the Court of Appeal of Milan held recognizing the judgment in Italy did not violate the Italian *ordre public* and issued a declaration of enforceability for Italy.

5. Some remarks on the German ordre public

Apparently, the plaintiffs also tried to enforce the default judgment in Germany, but nothing is known about the proceedings. I will add some thoughts on how the defendants might have resisted a declaration of enforceability on the basis of German public policy.
The right to heard is enshrined in Art. 103 of the German constitution. It is accepted that this constitutional right is subject to limitations, provided that those limitations actually

[405] UK government submissions to the ECJ in the *Gambazzi* case, available online at *Requejo*, The Written Observations Submitted in the Gambazzi Case, November 19, 2009, <http://www.conflictoflaws.net>: (1) *Krombach* only had one chance to appear before the French courts, whereas *Gambazzi* was granted a significant period of time to adhere to the decision. (2) *Gambazzi* had the chance to appeal against his debarment from defending before the English courts.
[406] *Cuniberti*, op cit. (fn. 6).
[407] ECJ, 02/04/2009, case C-394/07, ECR 2009, I-2563 (*Gambazzi*), para. 33.
[408] ECJ, 02/04/2009, case C-394/07, ECR 2009, I-2563 (*Gambazzi*), para. 41 ff. For a critique of the decision, cf. *Cuniberti*, op cit. (Fn. 6).

contribute to judicial efficiency and legal certainty and that the party concerned had previously been given ample opportunity to participate in the proceedings.[409] The restriction of the right to be heard must therefore serve a higher purpose, it cannot be used simply to sanction the party concerned. Changing the perspective from constitutional to procedural law, one finds that German procedural law does contain time limits for a party's submissions as well as limits to particular forms of being heard. However, a complete debarment from defending in German courts is impossible – both with respect to civil and with respect to criminal proceedings.

In a decision of the year 1967, the German Federal Court of Justice ruled that a default decision which resulted from a debarment from defending due to contempt of court was not contrary to the German *ordre public*.[410] The court argued that by committing contempt, the defendant had deprived himself from the opportunity to participate in the trial. Some 40 years later, the court's view had changed.[411] In deciding upon the declaration of enforceability of an Australian case, the Federal Court of Justice explained that any limitation to the right to be heard had to be proportional. The declaration of enforceability was refused because the Australian court had debarred the defendant from defending for his failure to produce a document, even though the defendant's failure to produce the document had not hindered the Australian court in making its decision, as a copy of the document was provided to the court by other authorities.

It is suggested that the approach of this more recent decision of the Federal Court of Justice is to be preferred. A debarment from defending will result in a violation of the German *ordre public* if it does not contribute to the efficiency of the legal proceedings concerned or if there are more proportionate means of promoting that efficiency.

Where does that leave us with the *Gambazzi* case? It all turns on the question of whether *Gambazzi's* debarment from defending contributed to the efficiency of the proceedings in the High Court. The simple answer to that question is: No. The reason why Gambazzi was debarred from defending was not because he failed to produce evidence or was engaged in dilatory tactics. *Gambazzi* was sanctioned for his failure to comply with a court order in entirely different proceedings. While it is certainly true that the purpose of the *freezing order* is to freeze the defendant's assets until the decision on the merits has been rendered, debarring *Gambazzi* from defending did not in any way prevent him from dissipating his assets. There was no higher purpose to debarring *Gambazzi* from defending, save to punish him for his lack of compliance with the court's order. Such a punishment, however, is completely foreign to German law and violates the constitutional right to be heard.

IV. Lessons of the *Gambazzi* case

What are the lessons to be learned from the *Gambazzi* case?
First of all, the case shows that despite the existence of the European Convention on Human Rights and the European Union's Human Rights Charter, an entirely congruent concept of 'fair trial' within the European Union does not exist. Secondly, the European Court Justice (which to a large extent deals with business cases) may in some instances be more willing to tackle human rights issues that the ECHR, a court specifically established to deal with human rights violations.

Both is food for thought.

[409] German Constitutional Court (BVerfG), 05/04/1987, case 1 BvR 903/85, BVerfGE 75, 302 (316).
[410] German Federal Court of Justice (BGH), 18/10/1967, case VIII ZR 145/66, NJW 1968, 354 (355).
[411] German Federal Court of Justice (BGH), 02/09/2009, case XII ZB 50/06, NJW 2010, 153 (156). This change in perspective can most likely attributed to the fact that the German dogmatics of interpreting constitutional rights has received much fine-tuning in the second half of the 20th century.

Teaching Relationship between business and human rights in India: Breaking the Silos

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'*escalating charges of corporate-related human rights abuses are the canary in the coal mine, signalling that all is not well'* – Ruggie Report 2011

Critical insight in Harvard Academic Ruggie's comment above on the new angle of corporate-related human rights abuses, flows into the human rights movement as an outcome of the vital function and role of human rights studies. Steiner argues thus:

The international human rights movement can never be a finished or uncontested project. It will remain a work in process within a framework of ongoing criticism, self-assessment, and rethinking. Students and scholars will be vital contributors to that process. Many of them may see their task as suggesting how the movement can better proceed toward the realization of its ideals. But first they must see the movement as it is, and to that task they must bring their critical faculties.[414]

When one views legal education across the globe and across the nation, the unfinished agenda of human rights movement and the dynamic response of law schools with their human functionaries point to a rich range of possibilities in curriculum, pedagogy and context. In the backdrop of Ruggie Report and innovative remedying of transnational corporate torts, legal education in general and in India in particular, cannot afford to remain neutral and unchanged just because corporate or business groups form part of its important stakeholders. Although it would neither be sensible nor practical to withdraw or sever the ties, time is opportune to rethink on the connection. It is very apt to revisit such neutral (because of the short-term gains) position of legal education and to transform it into a critical dialogue.

This paper begins by demonstrating the pressing need for linking business and human rights in law school teaching and proceeds to .locate the disconnect between business and human rights in law teaching and how they remain as silos in many ways and forms. Thereafter, the argument is developed based on the evidences of current practices of select Indian law schools to rethink the approach and develop special content and curriculum on teaching business and human rights.

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[414] Henry J. Steiner, 2002, THE UNIVERSITY'S CRITICAL ROLE IN THE HUMAN RIGHTS MOVEMENT, Harvard Human Rights Journal, pp. 317-326 at p.326

Why break silos?

Today, legal scholarship and professional engagement alike are confused by the contradictory contours of human rights and business. It is in terms of relationship of human rights with the comfort of capital and hence the unquestionable nature of the pains of profit and corporate power. It further coincides with those critical moments in the recent history when globalization confronts human rights in general.

Although the primary focus of law has been on imposing obligations on business entities for the human rights, there has also been a debate whether such business entities being legal cognates of human persons are entitled to such rights. Restriction on their rights, it is feared, may also affect the interest of human beings.[415] Such complex but delicate linkages seem to breed certain arrogance about the power of trade and business. The complexity is evident in the WTO Director Genera's statement which in fact, echoes the Sullivan Report, *'one could almost say that trade is human rights in practice'*[416]
The meaningful and powerful engagement of these two areas was brought about by the recent initiative by UN, the Ruggie report of John Ruggie in 2011.Ruggie report continued the legacy established by many preceding international instruments such as the ILO Tripartite Declaration on Fundamental Principles and Rights at Work, the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, the United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises, the Equator Principles, the Voluntary Principles on Security and Human Rights, the OECD Guidelines for Multinational Enterprises, The United Nations Global Compact and the Business Leaders Initiative on Human Rights.

It was submitted after six years of consultations, as special Representative for Business and Human Rights. Its contents identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights[417]. The framework put forth in the Ruggie report[418] rests on 3 pillars:

- The duty of the State to protect human rights
- The corporate responsibility to protect human rights
- Access to remedy provided by the State and the Corporates

The standards of behaviour adopted by transnational corporations were the predecessor to the Ruggie Report. In fairness to it, in a short time, one cannot feel the impact of Ruggie report on business behavior. The Guidelines in the said Report, however, cast obligations on the State, the corporation and the regulatory authorities and stimulated changes in regulatory framework and curriculum across the world.
Since the guidelines and the ensuing national responses take the line of self-regulation and voluntarism, many argue in favour of external enforcement. One may well appreciate the need for and the role played by the uproar of general public as evident in the recent cases of Apple and Hershey's.
Many nations on the West have incorporated the Ruggie principles into legal framework whereas in India, it is urged through Ministry communication and professional network as a

[415] Lucien J. Dhooge, 2007,HUMAN RIGHTS FOR TRANSNATIONAL CORPORATIONS, Journal of Transnational Law & Policy; p.197

[416]WTO, 2008, '10 benefits of the trading system' available on http;//www.wto.org; also, Pascal Lamy, 'Towards Shared responsibility and greater coherence: human rights, trade and macroeconomic policy' (Speech at Colloquium on Human Rights in the Global Economy, Geneva, 13 January, 2010)
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[417] http://www.unglobalcompact.org/issues/human_rights/The_UN_SRSG_and_the_UN_Global_Compact.html
[418] Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie

voluntary guidelines[419] with an iota of demanding compliance in terms of mandatory disclosures and undertaking. The threat to human rights is imminent in such a lax climate. One of the ways by which the threat can be countervailed is by initiating human rights education especially as part of the legal studies or in its background. law schools can play a pivotal role as repositories of knowledge, expertise and resources.
Even though human rights are also taught as part of political science discipline, in keeping with the forum, specific reference here is limited to Legal education in general and Indian legal education as the specific focus. Indian legal education records the influence of such a global context as a platform and theatre of professionals and scholars. Further, it informs the outcome or the by-product, who by majority, measure their success by the corporate acceptance for jobs. Could or should law universities and legal education institutions problematize and critically engage with the position and power of human rights as values in an idealistic manner? Should it be, on the contrary, a considered pragmatic response of a developing economy's aggressive drive to succeed materially, by rejecting such idealism?

Although wedged between these opposite pulling and equally realistic arguments, authors have journeyed through the milestone reforms and standards in legal education in India looking for evidences of how the process of teaching the relationship of business and human rights exists. One can note striking parallels between corporate entities and educational institutions in organizational sense, with myriad of actors from both profit and non-profit sector as much as the public funded entities. At the same time, striking similarities shine between global instruments of human rights and universities, which include freedom of enquiry, belief, values and association.[420]

How do these Silos exist?

To the question whether the institutions of legal education exhibit these characteristics, the authors prefer to confine it to the second dimension of values as essentials in the function of teaching business and human rights. The enquiry proceeded on the basis of three questions across the top 10 law schools in the country, barring among them those affiliated to state universities as their autonomy is limited to the letter of the UGC mandate:

- What sets the context for the law school curriculum or its review? Whether that context is truly reflected in the curriculum with reference to business and human rights?
- Are there exclusive courses or programs (as a set of courses) on business and human rights?
- How far do human rights law courses get reflected in Business or corporate law courses or how far do the corporate or business law courses reflect the components of human rights law?

From the perspective of the first question, the authors analysed the two local bench mark documents; one the Curriculum Development Committee (hereinafter CDC Report)of the UGC[421] (the University Grants Commission), the apex body of higher education in India and two, the latest such report from the BCI (Bar Council of India)[422], professional body which regulates legal education by setting standards and prescribes to follow the model curriculum

[419] CSR Voluntary Guidelines, 2009 &National Guidelines on Social, environmental and economic responsibilities of Business, 2011, Ministry of Corporate Affairs; Guide on CSR Audit, May 2012, Internal Audit Standards Board, Institute of Chartered Accountants of India
[420]Henry J Steiner, supra, 319
[421] Published in 2001, around 500 pages, with elaborate model curriculum for law courses in both UG and PG programs in law, without distinguishing stand-alone and integrated programs
[422] Draft Report of the Curriculum Development Committee, vol.1, Bar Council of India published on 15 Februrary 2010 running into nearly 300 pages, is specific to both stand-alone and integrated/double degree programs, against the background of Revised Rules on Legal Education 2009, incorporates panoramic view of current scenario, model courses, teaching plan, reading list and does not include PG courses.

as set by UGC . Both reports set apart ten years from one another, commendably, do not repeat any idea and one is incomplete without the other. Although the recent origin of the BCI report renders a better value to it, it delinks from the history and sets out the diversity and gaps in different tiers of Indian law schools. It further, makes a generally rich contribution to systematic pedagogy and standards. However, both lack any focus on center-staging or linking business and human rights. The former report still has its gold standard of incorporating human rights as a module or as a topic across special courses and specialization groups, while the new report does not provide a single reference to the term. We used the search words such as 'business and human rights', human rights', 'Ruggie Report', 'Corporate Audit' and 'Due diligence'

The stakeholder matrix which ought to have informed the curriculum includes quality aspects of satisfaction across all seven types as prescribed in the official standards of National Accreditation Council (NAAC). However, the curriculum with reference to these themes, does not reflect any of the global standards either. The research shows that not only in limited numbers, but also, in a limited manner, Indian legal educators consider the study of human rights in the context of corporations.[423]. Despite a dated reference to limited courses[424], diploma and PG programs in human rights, evidence shows that none of the institutions in India offer an exclusive course on Business and Human rights. In contrast, in the West, the courses in universities such as University of Oslo address recent developments in linking business practices and human rights (including corporate social responsibility (CSR)) within the UN and in other international organisations, and focusses on the efforts in making human rights an important normative framework for the conduct of business in different societal and political contexts. It offers arguments in favor of and against extending human rights to the corporate sector, and discusses legal developments, including normative and remedial mechanisms. It examines strengths and weaknesses of the CSR movement and the scope for making human rights regulatory measures for corporate behavior[425]. Other Universities which offer courses on Business and Human rights include Middlesex University London, Columbia Law School (course on Transnational Business and Human Rights), Harvard Kennedy School (Business and Human Rights) and Kings College London (short courses on Ethical Business and Human rights). Such a strong global relevance proves the need for introducing mandatory courses in Business and Human rights in India which will inform and critically examine both the legal developments as well as voluntary initiatives in corporations.
The second question was answered in the negative, as proved by data elicited through telephonic interviews and web information. New courses are under consideration for being developed in some of the law schools with a view to teach business and human rights as an academic discipline.

The third question was answered in a mosaic fashion. Currently, law schools in India teach business and human rights as a module in the ethics curriculum or as part of corporate law syllabus. The mutual presence of both components in courses of respective groups was evident.

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[423] NLSIU Bangalore, NALSAR Hyderabad, NUJS Kolkotta, GNLIU, Gujrat, NLU Jodhpur and NLU Delhi include courses on Corporate Governance, international trade law. Some of these law schools also have human rights education center. Only NLS Bangalore offers a post-graduate program in Human rights law. Some of them allow the human rights as optional to the other specialization groups of PG Programs. However, the data are crude as there is no official comprehensive document to authenticate and verify.
[424] Mool Chand Sharma, 2002,available at,
http://www.hurights.or.jp/archives/human_rights_education_in_asian_schools/section2/2002/03/human-rights-education-in-indian-universities-and-colleges.html

[425] http://www.uio.no/studier/emner/jus/humanrights/HUMR5133/index.xml

In spite of the interest exhibited by students and compelling national realities of corporations and business enterprises violating human rights as in the case of Nandigram incident or Sivakasi , there is no defined syllabus exclusively on the subject as yet.

Taking stock of silos….

Besides the content and context of curriculum as above, the pedagogy and approach ask for crossing the illusory boundaries of class room, discipline, specialization and methodology. Steiner himself argues how the range of issues, activities and projects could enrich the landscape of teaching human rights[426].

The authors would like to reiterate the omniscience of human rights as a touch stone to very area of law and business law discipline in particular. The case laws of international origin, comparative legalities and transnational impact such as landmark settlement in the US case of John Doe v. Unocal Corporation in December 2004 are of great significance. They also inform the sense of law reform both in substance and strategy. In the said case, the complaint had been filed by a group of non-governmental organizations (NGOs) **and** private attorneys has espoused the cause of fourteen Burmese villagers more than eight years earlier under the Alien Torts Claims Act[427] or the rise and fall of share prices of settling and refusing plaintiffs in the recent case of IRATE v. ExxonMobil, et al., between those who reach a settlement with all the defendants and the one refusing it, the ExxonMobil.[428] It would stimulate the critical thinking, interventionist spirit and humanistic innovation in the teacher, student and the culture of the institute.

Silos of types of pedagogy, content and participants

Further, not many law schools are engaging in human rights education beyond their student community. Time and again UGC has hailed the role of law schools and law deans as the leaders in human rights education in schools and colleges in India[429]. There are evidences of a few law schools engaging in certain activities confined to certain segments. However, the predominant thrust seems to be on educating the legal and judicial personnel, government machinery and seldom on consumers or corporate leaders or business leaders or leaders-to-be. Further more, both classroom and beyond classroom teaching or training seem to suffer from the dominant focus on civil and political rights with the constitutional framework. Teaching with real life examples and a variety of tools inculcating a semantic democracy has yet to develop.

The law schools seem to have resigned the cultural and social trappings as much as economic forces underlying the deprivation of such rights and the poor context of

[426] Steiner, supra

[427] Mark D. Kielsgard, 2005, UNOCAL AND THE DEMISE OF CORPORATE NEUTRALITY California Western International Law Journal; p.185

[428] William Bradford, 2012, BEYOND GOOD AND EVIL: THE COMMENSURABILITY OF CORPORATE PROFITS AND HUMAN RIGHTS, Notre Dame Journal of Law, Ethics & Public Policy, p.146

[429] IX Plan Guidelines and Para 3.5 in IX Plan Guidelines For Human Rights Education, available on www.ugc.in. while the IX plan mandated environmental education as a compulsoryinterdisciplinary course for all undergraduate programs, human rights module accounted for 20per cent of its component. XI plan has streamlined human rights education as mandatory component in all disciplines across all programs, identified the roles of law schools and ear-marked funds for different levels and activities. However, reference to its relationship with business is missing in both documents.

socioeconomic and cultural rights; to the hands of non-formal training by activists and NGOs. However, one cannot understate the role of NGOs as education partners and collaborators in affective and field based learning, if judiciously combined.

Symbiosis Silos:
Own experience of authors in a private deemed university law school has been quite diverse. Through the human rights cell and by virtue of National Human Rights Commission (NHRC) grants, the team at Symbiosis Law School Pune has imparted two one-day workshops on Human rights to a total of two hundred students who came from management education stream. During the workshop documentaries and global snapshots of rights violations by state and various well-known business enterprises or their connivance in state's violations interspersed with similar Indian realities became the first and familiar point of reference. Role plays by participants themselves arrested their attention and engagement. Unfolding the legal instruments and provisions became easy. These sessions were part of a foundation course which elicited interest for advanced program in large number of participants.

In case of international exchange students and faculty at SLS, exposure to global context of Indian realities by case studies, visits and internships with local human rights NGOs stimulates a critical perspective.

Thus, the pedagogy is unconventional, inclusive and engaging. Participants are diverse and are on the progressive path of becoming human rights advocates or defenders irrespective of the career they may pursue. Some of the community and extension sessions by the first author have incorporated the same sense while training human rights teachers in the newly emerging SEZ context of Mangalore in Karnataka[430]

As a complementary development, the recommendations of the Symbiosis international university's curriculum review committee in 2011 resulted in various business courses incorporating a human rights perspective and the human rights courses referring to business context. Thus the silos started disintegrating leading the integration of specialization and advanced studies as specialization groups were allowed to opt for human rights courses in PG studies. Institute has recorded an upward trend in favour of human rights courses in student interest while choosing courses. It was within a comprehensive contemporary and relevant framework cemented by the human rights perspectives as necessary values. It was besides plularism (gender, race, minority) and international/comparative approaches.

Silos of Rhetoric and Practice within the Law Schools.

If one looks at the financial model and working of most of the law universities and law schools, one would agree that it has trappings of a venture or a corporate organization. Hence, teacher and the teaching process will be under pressure to transgress rhetoric to become a living practice. It is time for the teaching community should train itself and adapt itself to enlighten with new knowledge on human rights and non-state organizations, so that they set good living examples in front of students. Theory and practice are the other silos

[430] Dr Gurpur, UGC Sponsored National Seminar in St Agnes College and University College for political science teachers and students, September 2011 and January 2012 respectively presentation focused on the human rights audit of the working of local public sector mega corporation and the proposed Mangala Cornische land acquisition process

that require connection and integration. Human rights Practicum[431] was one of the good examples that IGNOU set before the nation by collaborating with the international partners in exposing students to a healthy mix of theory and field trips alongside projects despite their limitation of being School of law as a distance education center.

Today, legal profession also is organized in a corporate manner. What about their compliance and due diligence in the light of various global human rights standards? Perhaps, learning human rights will continue beyond law school days.

Rethinking corporate neutrality and the Middle Path

Summarizing the above, one can recall how the footsteps of global human rights movement and the ensuing influence on Indian legal education seems relevant even today, although in a changed globalizing context of states and non-state actors breaking their own silos of activity and power. One can see how Indian approach on teaching business context of human rights and the newly emerging normative framework is ripe for up-dating and rethinking.

The need emerges when one honestly and courageously abandons the belief that current Indian approach is perfect and relevant. The dominant paradigm of civil and political rights in the Constitution pervaded here for a long time until the non-justiciable directive principles as postulations of socio economic and cultural entitlements were hybridized and assimilated by judicial creativity, into the fundamental rights. Corporate actors were moderated and reminded to share profits of peoples' resources. Law School curriculum in India should integrate such insights to set the new thinking in developing different levels of courses with different learners in view as prescribed by UGC and drawing on international best practices. Such rethinking is not only in the interest of law schools, law students and law teachers but also in the interest of community and liberal democracy in general; as the wave of globalization sweeps everyone off balance. There is also a certain inhibition and bias about human rights activism and engagement of any kind, perhaps, emerging out of the fear of being brandished as 'theoretical' , ' activist (aka emotional and impulsive), not providing proper jobs. Perhaps, this accounts for the lack of exclusive the course title or program title with human rights along side its successful,attractive, maximum takers' choice of 'business or corporate law'.

The law schools are also required to sound the demise of corporate neutrality as did the states and the UN. Only then they assume the lead role as torch bearers for the future; a future well-equipped with a holistic and critical legal education. Then human rights- as values to be complied with, will determine the destiny of ruthless business enterprises-be it national or transnational.

Justice manifests as the equilibrium of competing and conflicting interests. Its essence comes from the grand idealism of abstract human rights norms and the pragmatic cognizance of legal expertise. Such profound expertise acts as a mechanism to support and optimize business by carving the middle path of human welfare and social responsibility. Serving the ends of justice ought to remain as the indispensable mission of every legal education enterprise; least one confronts the larger question: is India a liberal democracy or a mere guise of an authoritarian oligarchy?

[431] In 2010, through the School of law, IGNOU.Delhi

The role of law schools in providing training based solutions in Human Rights and Business in Zambia

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1. INRODUCTION

It is an undisputed fact that businesses and companies play a dominant role in the lives of the communities and the individuals they serve. The law provides for the concept of 'corporate personality'[432] and its separation from natural legal persons who own, manage and administer these entities but does not emphasis the issue that these artificial persons are nonoperational without natural legal persons. There are under Company Law some exceptions to this rule but it is only the court that can lift the corporate veil for situations under Common Law and Statute Law. This means that the individuals in these entities can hide behind the corporate veil for abuse of any basic human rights of an individual in the community. The question is how these third parties can be held liable for abuses hinging on human rights which primarily are the duty of the state to uphold.

One of the core principles of the policy framework of Human Rights Council[433] is the states duty to protect against human rights abuses by third parties, including business. The challenge therefore becomes global and in the on-going world economic recessions there is need to shift the all trusting ideology of capitalism in resolving problems of human rights abuses to some other ideology. The need for the shift is very evident because business organisations have a self cantered selfish goal of maximising profits to meet the standard of life of the individuals that own them. The powers exercised by the business organisation have been and continue to remain unchecked and unregulated.

2. CORPORATE GOVERNANCE

The new ideology that was brought in advocated for change and it was called corporate governance. Good corporate governance involved risk management and internal control, accountability not to the shareholders but stakeholders and conducting business in an ethical and effective way. Due to the increased number of high profile corporate scandals and collapses regulatory frameworks in the form of 'soft law'[434] were introduced into the corporate world. In the United States the Sarbanes-Oxley Act[435] had bought about radical changes in the amount of compulsory legal regulations which the Companies have to comply with or face multi-million dollar fines and up to twenty years imprisonment for non-compliance. One of the pillars of corporate governance is corporate social responsibility and the strong supporters of this view are that a wide range of stakeholders' goals should be pursued by the corporate world. The main argument against corporate social responsibility is that businesses do not have responsibilities, only people have responsibilities.

[432] The house of Lords in the case of Salomon v Salomon and Company Limited established the theory of corporate personality and held that once the corporation was formed it is an entirely different legal person form the members who compose it control it

[433] Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/8/5, 7th April 2008

[434] The Cadbury, Greenbury and Hampel codes were later incorporated into the combined code which has been revised several times since 2003. These codes of best practise evolved in England but have spread to several other countries as well.

[435] 2002.

3. CORPORATE-RELATED HUMAN RIGHTS HARM

As businesses, government and civil society face stiffer completion, civil unrest and demand to adhere to global governance and accountability, corporate governance has not really provided the solutions to the problems. A fresh look into the age old approach of human rights abuses may provide a lasting and effective solution for the corporate world. In the last ten years or so the fresh look is too balance the single principle of the businesses which is maximisation of profits against business operated in accordance with values enshrined in the universal declaration of human rights. It is an accepted fact that by making right investment decisions the shareholders can maximise their profits in the same vein by being responsible businesses can protect human life and promote basic human rights by taking care of the environment and the communities they serve.

4. TRAINING BASED SOLUTIONS IN HUMAN RIGHTS AND BUSINESSES IN ZAMBIA

Businesses operating in Zambia are facing all the challenges experienced by the Corporate world in any other developing economies. Some of the challenges are similar to ones faced in the developed world such as maximising shareholders wealth, excessive rewarding of corporate executives, non-compliance to law, rules and regulations and ethical consideration just to mention a few. This paper will try to outline the possible solutions to some of these challenges through training. There can be long term solutions as well as short term solutions. For a futuristic solution on long term basis universities can introduce specialised training on Masters or undergraduate programme so that future Business Executives, Advocates and Shareholders understand the need to operate businesses which can balance maximising profits with corporate responsibility to uphold basic human rights. This will mean waiting for about five to ten years before practical results become visible. The alternative of mainstream parts of the syllabus on Business Law and Human Rights into the existing courses offered will mean similar results as expressed for the specialised training. It will not be useful to begin with long term programmes but they should not be discarded completely, the process should begin with shorter programmes.

5. SHORT TERM TRAINING APPROACHES

Higher education providers need a more proactive and radical approach in addressing the gaps in their training programmes. The first question to address is how to ensure that the corporate world starts discussing the concept of Business and Human Rights. The obvious answer is to make it an agenda item for the Board Meetings. Most businesses even private family owned businesses make decisions relating to policies at meetings. Lecturers and professors can take up this opportunity and seek permissions to address the Boards for ten to fifteen minutes so that the directors and shareholders' interest in the topic is brought out. The address to the meeting should include recent cases where businesses have paid out large sums of money for breach of human rights. The will not only raise interest but also show to the corporate world that it pays to conduct business and uphold human rights at the same time. In the beginning the trainers can start by considering businesses in one particular sector of the economy such as construction. This approach will be proactive since the trainers will move from the classroom to the Boardroom. It will also be radical because the privacy of making decisions behind closed boardroom doors will open up with guidance and discussions through neutral experts from outside the business.

Once the barrier is crossed the next stage would be a follow up of a one day workshop for Business Executives operating in the same sector of the economy, for example the mining industry. The training should be conducted at the door steps of the Business Executive since they will always find the excuse that they do not have the time to leave their busy schedules to attend training programmes. At these training the role played by the company secretary will be very important. The recording of the discussions and the preparation of the reports will provide guidance for future decisions by the Business Executives who will have

changed their pattern of thinking. The report will also be useful for the trainers to develop topics according to priority areas for future training programmes.
At a later stage a further programme can be developed where businesses from different sectors of the economy are brought together to share their experiences on Business and Human Rights. A two or three day's seminar can be organised by the School of Law. The forum to share ideas and exchange views will allow for policy development and codes of conduct which the business will adopt. This draft report will be analysed with the available resource materials at international level by the facilitators of the workshop.[436] This will also allow for the global sharing of issues on Business and Human Rights.
The final stage of the training will involve the facilitators returning back to the Boardroom meetings this time as an observer. An assessment of how the agenda item of Business and Human rights has evolved will be recorded by the facilitators. The programme will be reviewed on the basis of the findings for future implementation.

6 CONCLUSION

The long term programme will be developed from the initial short term training of Business Executives in terms of content and methodology so that future Advocates as well as Business Executives will be better informed to make corporate decisions on issues of Business and Human Rights.

[436] International Organisation of Employers, International Chamber of Commerce, Business and Industry Advisory Committee to the Organisation for Economic Co-operations and Development (OECD), 'Business and Human Rights: The Role of Government in Weak Governance Zones", December 2006 and A/HRC/4/35/Add.3,A/HRC/4/35/Add.4 and 'Human Rights Policies of Chinese Companies: Results from a Survey".

TEACHING THE RELATIONSHIP BETWEEN BUSINESS AND HUAMN RIGHTS

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Over the Years, the Equation between Business and Human Rights has drastically changed. With the advent of Globalisation, business has served as a vehicle for economic, social and cultural amelioration. One can see a dramatic change in the economic scenario of developing countries like India, where the diffusion of technology, scientific culture and management skills has led to job creations and rapid economic development. The flow of Foreign Direct Investment has brought a wave of transformation, which includes not only an increase in the number of jobs, but a remarkable improvement in the overall standard of living of the people. Business has thus enriched human lives, by giving every individual various rights, ranging from the right to adequate quality food to the right to freedom of expression and access to information. However, Business has certain negative implications as well that need to be rectified. Business poses a great threat to the enjoyment to human rights through its own conduct or invasion of rights by the host government. Moreover, private business firms have violated social, economic and cultural rights on a large scale and have remained unaccountable for their acts by exploiting the inherent flaws of regulatory mechanisms.

Corporations have known to violate human rights on large scales. The sheer atrocities committed by large corporations are eulogised in the tragic accidents. The consequences are unfathomable. The Rhine Pollution by Sandoz, Exxon Valdez Oil Spill, and the Bhopal Gas Tragedy are a few examples of the condemnable social, environmental, economic and legal damages caused due to sheer negligence by corporations[437].

LIABILITY OF CORPORATIONS TO INDIVIDUALS: TEACHING THE LEGAL RELATIONSHIP BETWEEN BUSINESS AND HUMAN RIGHTS

As stated above, Business Corporations have violated the rights of the people in many respects, either socially, economically or culturally. The damage done is often irreparable and the resulting loss is often irretrievable. However, one also needs to take into account the legal implications arising out of the actions of corporations and the obligations that every corporation is bound to adhere to. As future corporate lawyers and businessmen, it is important to study the close nexus between law and business and be aware of the rights of those people to whom corporations are eventually answerable.

CORPORATATIONS AS LEGAL PERSONALITIES

'Legal Personality' refers to the extent to which an entity is recognised by a legal system as having rights and responsibilities[438]. In domestic law, legal personality is not restricted to 'individuals' but further includes 'Business Corporation', though there has been an on-going debate on whether business corporations can be considered as 'individuals' among the international scholars. Corporations are formally considered to be 'private legal persons' and valid subjects under various national laws, although international law does not impose any obligations or duties on corporations since it does not consider them to be international personalities. However, many scholars have rendered this view obsolete, stating that such a view creates obstacles to the recognition of non-state entities as subjects of international law.After analysing the different approaches among scholars, we could conclude that states

[437] Relationship Between Business and Human Rights: A Legal Analysis (Bhandary Mangalpady)
[438] Relationship Between Business and Human Rights: A Legal Analysis (Bhandary Mangalpady)

are the subjects of international law and other legal entities are not necessarily non-subjects nor are they precluded from gaining international legal personality Moreover, a subject of international law does not have to possess the same character or share all attributes of a state to fit into the definition of a subject[439].

THE DUTIES AND OBLIGATIONS OF CORPORATIONS

Now that corporations have been recognised as legal entities in the eyes of International Law, Schools must now focus on teaching the primary duties that Corporations are bound to follow.In International law, the duties of business corporations have been recognised in different human rights instruments[440]. These Human Rights principles impose six primary duties on 'business corporations[441]'. They are; firstly, equal opportunity and treatment in the work place; secondly, respect for the security of persons by refraining from engaging in war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labour, hostage-taking and other violations of humanitarian law; thirdly, protection of workers' rights through prohibitions upon slavery and forced, compulsory and child labour, maintenance of a safe working environment, payment of fair and reasonable remuneration and recognition of freedom of association and collective bargaining; fourthly, respect for the sovereignty of states, local communities and indigenous populations; fifthly, consumer protection; and finally, environmental protection. The above mentioned duties and responsibilities must be incorporated in the curriculum by Law Schools and Business Schools alike. Further, Students must be made aware of the International Regulations which control the behaviour of Corporations at a global level.

INTERNATIONAL REGULATIONS TO CONTROL BUSINESS CORPORATIONS

As stated above, creating awareness among Law schools and Business Schools with regard to The International Regulatory Measures governing the Legal Relationship between Corporations and Its People is necessary. Not only must it be taught theoretically, but their practical utilization in the current scenario must be taught as well.

Traditionally, National government would regulate the conduct of business corporations falling within their jurisdictions. However, with the advent of globalization, companies began to set up subsidiaries in various countries, making them even more powerful in the World Economy. Business Corporations further increased their power in the International Legal System by expanding the legal obligations imposed on states through trade regimes and International treatises. In such circumstances it became very difficult for governments to unilaterally impose regulatory measures on business corporations violating human rights within their jurisdiction and regulating the conduct of business corporations in general. However there are certain legal provisions, applicable universally to all business corporations.The Universal Declaration of Human Rights (UDHR) focuses on the obligations

[439] Relationship Between Business and Human Rights: A Legal Analysis (Bhandary Mangalpady)
[440] UN Sub –Commission on the Protection and Promotion of Human Rights
[441] For detailed information see, International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), art 5(1), U.N. GAOR, 21st Sess., Supp. No. 16 at 49, U.N. Doc. A/6316 (Dec. 16, 1966) (providing that the Covenant shall not be interpreted as to imply 'for any…group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant'); International Covenant on Civil and Political Rights, G. A. Res. 2200A (XXI), art 5(1), U.N. GAOR, 21st Sess., Supp. No. 16 at 52, U.N. Doc. A/6316 (Dec. 16, 1966); Universal Declaration of Human Rights, G.A. Res. 217A, at 71, preamble art. 30, U.N. GAOR, 3rd Sess., 1st plenary mtg., U.N.Doc. A/810 (Dec 12, 1948 (explains that 'every…organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance' and prohibiting interpretations of the Declaration that imply for 'any…group or person an right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth here in').

of States, and also mentions the responsibilities of individuals and of 'every organ of society', which includes business corporations[442]. Under the International Covenant on Civil and Political Rights (ICCPR), each state party 'undertakes to respect and to ensure to all individuals within its territory and subjects to its jurisdiction the rights recognised in the present CovenantAccordingly, if a corporation endangers the rights of an individual, the State has a duty toensure the respect of human rights and thus to take preventive action[443]. Other initiatives adopted in an international level were the OECD (The Organization of Economic Cooperation and Development) guidelines on Transnational Corporations, The Draft UN Code on Conduct of Transnational Corporations and the UN Global compact. Further the ILO (International Labour Organization) instruments, such as the ILO Tripartite Declarations, have laid down certain principles for multinationals in the area of social policy[444].

TEACHING THE RELATIONSHIP BETWEEN BUSINESS AND HUMAN RIGHTS FROM AN ETHICAL PERSPECTIVE.

1. Addressing Moral Norms.: The Moral Qualities of Economic Actions

While developing moral norms for acceptable economic action of corporations, the big question that arises is to whom. Opinions on this fall in two opposite camps[445]. The first being to look at the company as a whole and to address the moral imperatives at Corporations as themselves. On the other hand, there are those who believe that moral norms can be only addressed to individuals are able to reflect them and take them into account in their decisions.[446] According to Ethicist, Patricia Werhane when corporations claim their right to freedom and autonomy, they also claim them as moral rights. Along with these moral rights, come certain moral obligations which make corporations morally responsible for their actions. This responsibility concerns those aspects of economic actions in which companies as organisations must be assume responsibility towards their customers and staff and towards the society as a whole, which includes legal and moral liability.[447]
If corporations claim certain rights, they must also recognise the rights of others as well.. If they don't, they would be violating the concept of equal treatment. Corporations cannot enjoy more freedom than what it grants its members. Similarly, members within the corporations are individually responsible for their actions as well, which brings us to the point that the entire argument on 'Responsibility' includes individual as well as collective responsibility. Every corporation has a *finis operis* or a purpose of work and a *finis operantis* which means an intention behind the work[448]. In the current scenario there seems to be a conflict between the intention of the individual or corporation and the purpose of work. For instance, in the current scenario we have corporations at are built for a morally correct purpose, but the intention with which they run that particular corporation is morally incorrect. However there are certain situations in which the purpose and the intention are morally incorrect such a corporation poses as a great threat to the rights of the people in many respects.

On the whole it appears that Moral obligation is no longer based on the obligation to obey moral law[449] or to promote 'the greatest possible quantity of happiness to the greatest number of people' [450]. Instead, one of the necessary conditions of moral actions in that it

[442] UDHR(United Nations Declaration on Human Rights) (online UN Document PDF)
[443] International Covenant on Civil and Political Rights (U Chandra, Human Rights, (2007)
[444] Relationship between Business and Human Rights : A Legal Analysis (Bhandry Mangalpady)
[445] Walther Ch. Zimmerli and Michael S. Asslander: Book on Business Ethics
[446] Walther Ch. Zimmerli and Michael S. Asslander: Book on Business Ethics
[447] Walther Ch. Zimmerli and Michael S. Asslander: Book on Business Ethics
[448] (v. Nell Breuning 1963, p.32))
[449] Kant (1788)
[450] Bentham(1789)

doesn't result in economic disadvantage. Managers consider moral imperatives and prohibitions while making decisions only when these imperatives do not conflict with their economic interests. There are very few managers who would exploit their commercial possibilities to promote morality. However, it is very difficult to assign responsibility with the organisation, since decisions are not taken by one person. There are a number of persons within the organisation who participate in decision making.[451]

2. ***Responsibility for Economic Action***[452]
   Traditionally Responsibility was subjected to only individuals making decisions. However, in the present scenario, decisions are made by teams and implemented collectively by them. Responsibility as a whole is not restricted towards the actions and the intention behind committing those actions, but also includes the intentional and intentional consequences and side effects. Today Corporations overlook the possibility of intentional or unintentionally consequences arising from their actions. The Power to Control and the Power to Act have begun to drift apart. Moreover, transferring the power to control to machines establishes the fact that despite having enough technical knowledge, corporations are oblivious of the subsequent economic, social or cultural consequences. Corporates must thus focus on sustainable development. They need to keep in mind that human activities and consequences have an impact on the present and the future generations. The concept of responsibility must be expanded to to include the unborn generations as well.

Models of Ethical Assessments[453]

Another way of teaching the relationship between Business and Human Rights in Schools would be by analysing and scrutinising the Models of Ethical Assessments. In today's global market, the ethical system must meet three conditions-:

1. Ethics must be oriented towards problem-solving and not merely based on formal or material principles. These principles must be implemented in order to solve real life dilemmas.
2. Models must be built in sync with value systems. The Model must serve the purpose of bridging the gap between moral value systems and self-interests.
3. Orientation of the consequences that arise from technological and economic actions must be given due importance.
4. Discussions on morality within value systems must take place on global platform. The outcome of these discussions should be duly implemented in Schools.
5. Ethical Evaluation of Actions is necessary. Every problem must be categorised according to its intensity. For instance, Problems involving extremely serious (social, ethical or legal) issues must take priority. A problem-oriented ethical system in law schools is required.

The Essence of Moral Leadership

Leadership is a process of morality to the degree that leaders engage with their team members on the basis of shared goals, values and motives. It is the leader ultimately who decides a corporations goals, values and motives. He determines the path that the corporation follows. This path can be morally and ethically correct or incorrect, depending on the leader's intentions, his goals and his motives. He is the driving force behind the actions of the corporations. A leader

[451] Walter Ch. Zimmerli and Michael S. Asslander: Business Ethics
[452] Zimmerli (1987): Book on Business Ethics
[453] Zimmerli/Wolf (1993, p.316): Book on Business Ethics

shapes the procedures and a strategy used by the corporation and is the ultimate creator of the consequences that arise out of the actions of corporations. A leader is at such a position that he has the power to influence the ideas and thought processes of his team members to a considerable extent
At every stage of decision making, a leader often goes through mental conflicts. In an idealistic situation, a good leader would face ethical dilemmas. He would streamline his actions in accordance with is value system. However present day leaders have failed to comply with the expected ethical standards to the society. Moral perspectives and implications make a very little difference to leaders of the modern generation. Instead, maximization of profits and expansion of business across borders regardless of the damaging social, ethical, cultural, legal and environmental consequences seems to be their only goal. It is thus necessary for future leaders to strike a balance between values and interests and comply with ethical standards, while striving to increase annual profits.

CORPORATE SOCIAL RESPONSIBILITY AND HUMAM RIGHTS

The corporate responsibility to respect human rights means acting with diligence to[454] avoid infringing on the rights of others, and addressing harms that do occur. Corporate responsibility to respect human rights applies across its business activities and through its relationship with third parties connected with these activities - such as business partners' and other non-state actors and State agents. [455]Corporations should need to consider the country and local contexts for any particular challenges they may pose and how those might shape human rights impacts of 'corporations' activities and relationship[456]. In the context of Business corporations, Corporate Social Responsibility mainly comprises of social and economic aspects, the social aspect being 'The People' and The Economic Aspect being 'The Profits' Protection of Human Rights is one of the fundamental principles under the United Nations. Human right abuses by states have been out rightly condemned in a series of the global issues. Though the corporations are considered as 'legal persons' under the international law, still it needs clarifications for the basic issues i.e., to what extent business corporations are responsible for human rights violations[457]. In the next segment we shall assess three important case studies and establish the need for making law students aware about the importance and essence of the Concept of Corporate Social Responsibility.

TEACHING HUMAN RIGHTS: WHAT SCHOOLS MUST LEARN FROM CASE STUDIES

A very interesting, yet an effective, method of teaching the complex relationships between Business and Human Rights is through case studies. Case Studies also provide students a peep into the actual violations of Human rights by Big Corporations. Further, it teaches them the practical use and implementation of International Regulations. It is through Case studies that students of law and business can create their own analysis and formulate their own solutions and recommendations to problems. It will also give them an insight into how

[454] Relationship Between Business and Human Rights: A Legal Analysis (Bhandry Mangalpandy)

[455] Relationship Between Business and Human Rights Between Business and Human Rights : A Legal Analysis (Bhandry Mangalpandy)
[456] Relationship Between Business and Human Rights : A Legal analysis (Bhandry Mangalpady
[457] Relationship Between Business and Human Rights: A Legal Analysis (Bhandry Mangalpandy)

corporations changed their attitudes towards Human Rights and The final outcome.Students must be exposed to the most successful models of Corporate Social Responsibility This method of teaching will definitely broaden their views on Social, Economic, Cultural and Legal issues. Given below is a Glimpse one of the most Successful Models of Corporate Social Responsibility.

Volkswagen (Automobile Giant) - Then and Now

A Historical Background

During the Second World War, National Socialist forced labour became rampant in many parts of Germany. Volkswagen was no stranger to the ubiquitous mass phenomenon of forced labour. The concerned authorities made people from countries like France, Netherlands and Poland, Soviet Prisoners of War and Jews, objects of their mania for regulation[458]. They were sent all over the place and handed over to the German foremen or guards and were subjected to discriminatory conditions[459] and were brutally tortured by military guards. In the process, one could see the pitiful condition of the prisoners, who were deprived of nutrition and their basic right to health. Many workers would collapse with exhaustion at the machines. However, with the emergence of the United Nations after the Second World War. Forced Labour is now regarded as a gross violation of Human Rights. Further, the issue of compensation for forced labour remained unresolved for many years.[460]

Corporate Social Responsibility at Volkswagen: The Current Scenario[461]

Volkswagen's CSR philosophy is reconciling economic benefits with sustainable development and human progress. The key to its success lies in its sense of social responsibility. The ethical, ecological and social principles are incorporated throughout the process at Volkswagen. As a result, the company, along with monetary benefits has reaped social benefits as well. Over the years, Volkswagen has proved to be one of the greatest global players with German roots.

The following are the key principles of Volkswagen's CSR strategies that have set a benchmark for future companies.

- Work holder Value: Volkswagen believes in putting its workers at the forefront. It includes its workers in policy and decision making and trains them in the process of shaping the company's future. Volkswagen has developed various Employment schemes that allowed lower costs and increased flexibility in working hours. In addition to these schemes, approximately 95% of workers are covered by Collective Bargaining Agreements.
- The Sustainable Agreement, a brainchild of the Volkswagen Group, envisages pay freezes and adjusted labour agreement models. Further it ensures no cuts in pay for the next one year
- Another interesting feature of the schemes is the investment of wagers in what are called time asset bonds, invested in capital markets. The concept of demographic working hours gives the workers the flexibility

[458] Manfried Grieger(Historical Responsibility: Corporate Forms of Remembrance of National Socialist Forced Labour at Volkswagen Plant)

[459] Manfried Grieger(Historical Responsibility: Corporate Forms of Remembrance of National Socialist Forced Labour at Volkswagen Plant)

[460] Manfried Grieger(Historical Responsibility: Corporate Forms of Remembrance of National Socialist Forced Labour at Volkswagen Plant)

[461] Reinhold Kopp and Klaus Richter (Corporate Social Responsibility at Volkswagen Group)

to shape their retirements on the basis of the number of saved time bound assets. Overtime hours can also be converted into time bound assets.

- Volkswagen has also introduced a variety of part-time work schemes, which enable single parents an opportunity to balance work and family commitments. In addition to these schemes, it also has agreements with various child care support bodies. It has also taken up an initiative of building kindergarten places on work sites. Maternity leave with benefits are provided.
- Equal opportunities regarding the sex, age, origin or religion of the employee are set down in its Social Charta. Malpractices, such as sexual harassment and all other forms of persecution and discrimination are termed as 'Offences and Violations of human dignity 'for which penalties are imposed. A lot has been done for the upliftment of women employees. Policies regarding measures to increase the number of women employees and their efficiency as well as policies to boosting their potentials have been implemented.
- Health Schemes and Screening Programs for Workers for the Prevention, Treatment and Cure of deadly diseases like AIDS and Cancer have been implemented.
- Volkswagen has worked really hard towards Environmental Protection and Sustainable Development It has been a signatory to the UNEP Programs and is in Cooperation with the German Nature Conservation Association (NABU) that focuses on fuel saving measures.. It is also the founding member of the World Business Council of Sustainable Development.(WBCSD)
- Finally Volkswagen has brought about Transparency and Fairness in its Systems. It has complied with the various ILO and OECD guidelines regarding free and fair working of corporations. It was a part of the Global Reporting Initiative on Sustainable Development as well. Further it has set up an Ombudsman to curb corrupt practises within the organisation.

BUSINESS: CONSUMER RIGHTS ARE HUMAN RIGHTS

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"It is wrong to think that business is incompatible with ethics. I know that it is perfectly possible to carry one's business profitably and yet honestly and truthfully. The plea that, business and ethics never agree is advanced only by those who are actuated by nothing higher than narrow self-interest. He who will serve his own ends will do so by all kinds of questionable means, but he who will earn to serve the community will never sacrifice truth or honesty. You must bear in mind that you have the right to earn as much as you like, but not the right to spend as much as you like. Anything that remains after the needs of a decent living are satisfied belongs to the community".[462]

- Mahatma Gandhi

1. INTRODUCTION

Human Rights are related to standard of living and continuous improvement of living conditions of human being. Human means a member of the homo sapiens species; a man, woman or child; a person. Rights means a things to which you are entitled or allowed; freedoms that are guaranteed. Therefore Human Rights means the rights you have simply because you are human.

"Human Rights" means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India.[463]

Human being spends a lot of time as consumers of goods or services. When they buy goods, eat in a restaurant, travel or seek the help of doctors, pharmacy, engineers and other service providers, they act as consumers. In modern society, people cannot avoid doing this all the time. In this 'modern' society one cannot imagine the life without consuming products sold in the market. Consumption is defined as the use of goods and services. And consumption is as old as man and it is older than production. Man in ancient time was dependent more on nature and was in that sense self-sufficient and independent. Now one may look back at those days, when each individual was self-sufficient, but cannot go back and live like that. *Production, operation and commerce have become an inevitable and important part of modern life.* In a continuous effort to improve the quality of life, man has made a number of experiments and inventions, built many institutions, systems and developed knowledge in social, cultural, religious, scientific, economic and in many such other fields*. Economic activities, that is, production, distribution and consumption have become inevitable and important part of human activities.* 'With the rise in prices and standards of living, consumers have become cost conscious. Taking advantage of the helplessness of consumers, unscrupulous traders play with the life and happiness of consumers by selling adulterated articles of food, drink and drug at a cheaper rate and make huge profits. They resort to various undesirable methods of adulteration starting from the stage of manufacture to that of sale of the articles, even at the risk of the consumer's health, happiness and life. It is shocking to know that poisonous constituents

[462] Harijan, May 4, 1935, *quoted* in the *Wisdom of Gandhi*, New York: Philosophical Library, 1967, p.49.
[463] Sec.2(1)(d) of Protection of Human Rights Act, 1993 (India).

are often added to articles of food and drinks and spurious drugs are sold resulting in number of deaths and causing innumerable diseases'.[464]

The ultimate purpose of offering products and services are to satisfy the needs of people, which is a part of human rights. Any misrepresented product characteristics are not simply a minor infraction or trivial breach of trust, but an intentional violation of the basic rights and interests of human beings. In particular, when consumers receive misleading information about the feature of food, medicine, electrical appliances, autos, and housing, the products can pose a threat to the users' lives or quality of living. Even if the products do not harm the consumers physically, the misrepresented information undoubtedly harms consumer spiritually. The spiritual infringement is certainly a form of damage to human rights, while consumers' physical suffering is more severe, more strongly condemned and draws more concerns than common violations.[465]

Hence, In this paper, author has made an attempt to express my view regarding how for Consumer Rights are Human Rights and how for these rights are adopted by the transnational corporations and other business enterprises at the International and National level. How best law school can teach Business and Human Rights to students.

2. UNITED NATIONS GUIDELINES FOR CONSUMER PROTECTION

Taking into account the interests and needs of consumers in all countries, particularly those in developing countries; recognizing that consumers often face imbalances in economic terms, educational levels and bargaining power; and bearing in mind that consumers should have the right of access to non-hazardous products, as well as the right to promote just, equitable and sustainable economic and social development and environmental protection.

a. General Principles

- Governments should develop or maintain a strong consumer protection policy, taking into account the guidelines set out below and relevant international agreements. In so doing, each Government should set its own priorities for the protection of consumers in accordance with the economic, social and environmental circumstances of the country and the needs of its population, bearing in mind the costs and benefits of proposed measures.

- The legitimate needs which the guidelines are intended to meet are the following:

(a) The protection of consumers from hazards to their health and safety;
(b) The promotion and protection of the economic interests of consumers;
(c) Access of consumers to adequate information to enable them to make informed choices according to individual wishes and needs;
(d) Consumer education, including education on the environmental, social and economic impacts of consumer choice;
(e) Availability of effective consumer redress;
(f) Freedom to form consumer and other relevant groups or organizations and the opportunity of such organizations to present their views in decision-making processes affecting them;
(g) The promotion of sustainable consumption patterns.

[464] K.D.Gaur, "Consumer: Adulteration of Food and Drugs", in Leelakrishanan (ed.), *Consumer Protection & Legal Control*, Lucknow: Eastern Book Company, 1981, p.267.
[465] ESSAY: CONSUMER RIGHTS: A PART OF HUMAN RIGHTS Shaoping Gan; Journal of International Business Ethics Vol.1 No.1 2008.

- Unsustainable patterns of production and consumption, particularly in industrialized countries, are the major cause of the continued deterioration of the global environment. All countries should strive to promote sustainable consumption patterns; developed countries should take the lead in achieving sustainable consumption patterns; developing countries should seek to achieve sustainable consumption patterns in their development process, having due regard to the principle of common but differentiated responsibilities. The special situation and needs of developing countries in this regard should be fully taken into account.

- Policies for promoting sustainable consumption should take into account the goals of eradicating poverty, satisfying the basic human needs of all members of society, and reducing inequality within and between countries.

- Governments should provide or maintain adequate infrastructure to develop, implement and monitor consumer protection policies. Special care should be taken to ensure that measures for consumer protection are implemented for the benefit of all sectors of the population, particularly the rural population and people living in poverty.

- All enterprises should obey the relevant laws and regulations of the countries in which they do business. They should also conform to the appropriate provisions of international standards for consumer protection to which the competent authorities of the country in question have agreed. (Hereinafter references to international standards in the guidelines should be viewed in the context of this paragraph.)

- The potential positive role of universities and public and private enterprises in research should be considered when developing consumer protection policies.

- These guidelines should apply both to home-produced goods and services and to imports. Government in applying any procedures or regulations for consumer protection, due regard should be given to ensuring that they do not become barriers to international trade and that they are consistent with international trade obligations.

b. International Cooperation

- Governments should develop or strengthen information links regarding products which have been banned, withdrawn or severely restricted in order to enable other importing countries to protect themselves adequately against the harmful effects of such products.

- Governments should work to ensure that the quality of products, and information relating to such products, does not vary from country to country in a way that would have detrimental effects on consumers.

- To promote sustainable consumption, Governments, international bodies and business should work together to develop, transfer and disseminate environmentally sound technologies, including through appropriate financial support from developed countries, and to devise new and innovative mechanisms for financing their transfer among all countries, in particular to and among developing countries and countries with economies in transition.

- Governments and international organizations, as appropriate, should promote and facilitate capacity-building in the area of sustainable consumption, particularly in developing countries and countries with economies in transition. In particular, Governments should also facilitate cooperation among consumer groups and other

relevant organizations of civil society, with the aim of strengthening capacity in this area.

- Governments and international bodies, as appropriate, should promote programmes relating to consumer education and information.

- Governments should work to ensure that policies and measures for consumer protection are implemented with due regard to their not becoming barriers to international trade, and that they are consistent with international trade obligations.

c. Consumer Rights are Human Rights

The U.N. guidelines on consumer protection represent a consensus of international opinion on what good consumer laws and practices should be and set an internationally recognised set of minimum objectives which consumers everywhere should be entitled to expect. Due to the largely growing interdependence of the world economy and international character of many business practices, there has been increasing recognition in recent years of the international dimensions of consumer protection. Consumer policy can no longer be viewed solely in national domestic terms and adoption of the guidelines marked a further recognition of this by the United Nations.[466]

Article 25(1) *Universal Declaration of Human Rights, 1948 states that* "a standard of living adequate for the health and well-being of himself and of his family." Consumer protection is concerned with the protection of the consumer's health and, as such, is intended to enhance the standard of living and the well-being of the individual as consumer. Although the *Declaration* does not directly deal with consumer protection, its goals and objectives are synonymous to those underlying the basic right of consumer protection.

In order to give legal power to human rights and to flesh out the skeleton of the rules accepted in the *Universal Declaration of Human Rights,* the international covenants were drafted.[467] The *International Covenant of Economic, Social and Cultural Rights was* adopted by the United Nations General Assembly in1966.

The *ICESCR* and its detailed list of economic rights can serve as a basis for acknowledging consumer rights. The right to an adequate standard of living briefly stated in the *Universal Declaration,* for instance, was elaborated upon in article 11 of the *ICESCR* of 1966. Article 11(1) refers to "adequate food, clothing and housing, and to the continuous improvement of living conditions." Consumer protection can be considered an implementation of these rights and a means to achieve these goals. Adequate food includes quality of food, which is achieved through consumer protection legislation. Adequate housing contains two elements: the ability to obtain housing and the adequate quality and safety of the housing. Although consumer protection was not mentioned in the *ICESCR,* it is a method by which the above goals can be achieved.[468]

The right to health, elaborated upon in article 12 of the *ICESCR,* is also closely associated with consumer protection. A basic consumer right is the "protection of consumers from

[466] S. Deutch. "Are consumer rights human rights?" – Osgoode Hall Law Journal 1995 (32)/3, pp. 551–552.

[467] See A.H. Robertson & J.G. Merrills, *Human rights in the world: an introduction to the study of the international protection of human righ,ts3d* ed. (Manchester: Manchester University Press, 1989) at 231, regarding economic, social, and cultural rights.

[468] Supra note 5.

hazards to their health and safety."[469] Similarly, the *ICESCR* declares the right to environmental hygiene and to the prevention of disease. Although consumer protection is not mentioned in article 12, the goals of this article can be realized through improved implementation of consumer protection in the medical field. The same is true with respect to the right to education, described in article 13 of the *ICESCR* and sections 31 to 37 of the *UNGCP.*[470] These principles show that basic consumer rights are deeply rooted in accepted international human rights and that further recognition would merely be an extension of existing rights. Another phase in the establishment of consumer rights as human rights is their inclusion in the constitutions of several countries.

With reference to the above, the consumer rights have the potential to become 'soft human rights', because they possess the three main characteristics of human rights. First, there is increasing international recognition of consumer rights in international treaties, which shows the universal acceptance of such a right. Consumer rights are rights of all individuals, as every person is a consumer from time to time. Second, consumer rights to fair trade, safe products, and access to justice are granted to maintain human dignity and well-being, notwithstanding the economic market impact. Third, consumer rights are similar to other accepted human rights in that they are intended to protect individuals from arbitrary infringements by governments[471].

3. GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS 'PROTECT, RESPECT AND REMEDY' FRAMEWORK[472]

"Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework", which were developed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. The Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 16 June 2011.

The Framework rests on three pillars. The first is the State duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication. The second is the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved. The third is the need for greater access by victims to effective remedy, both judicial and non-judicial. Each pillar is an essential component in an inter-related and dynamic system of preventative and remedial measures: the State duty to protect because it lies at the very core of the international human rights regime; the corporate responsibility to respect because it is the basic expectation society has of business in relation to human rights; and access to remedy because even the most concerted efforts cannot prevent all abuse.

These Guiding Principles apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure.

[469] See *UNGCP,* s. 3(1).
[470] See *UNGCP,* ss. 31 to 37.
[471] Supra note 5.
[472] The Human Rights Council resolution 17/4 of 16 June 2011.

These Guiding Principles should be understood as a coherent whole and should be read, individually and collectively, in terms of their objective of enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalization.

Nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights.

4. BUSINESS STANDARDS-CONSUMER RIGHTS-HUMAN RIGHTS

A. International Standards

The consumer exploitation is an international disease. Everywhere the dominant manufacturer or service provider tries to exploit the consumer to get quick profit. Hence there was a necessity of consumer protection at the international level. That's the reason the World Trade Organisation (WTO) and World Health Organisation (WHO) entered into many multilateral agreements on consumer protection. Among them the Technical Barriers on Trade (TBT) and Sanitary and Phytosanitory Measures are important in consumer product safety standard. In 1985 even United Nations come out with Guidelines called "United Nations Guidelines on Consumer Protection" and in 2011 "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework" to protect the Consumers at the international level.

a. Agreement on the Technical Barriers to Trade (TBT)

Technical Barriers to Trade were first addressed in the Tokyo Round of multilateral trade negotiations (1973-1979). The "old" TBT Agreement, referred to as the "Standards Code", came into force in 1980. This was a plurilateral agreement to which only 46 countries adhered. The new TBT Agreement, which came into force with the WTO in 1995, is binding on all WTO Members. It contains more stringent obligations than the preceding version of the agreement.[473]

The WTO's TBT Agreement establishes rules and procedures regarding the development, adoption, and application of voluntary product standards, mandatory product standards, and the procedures used to determine whether a particular product meets such standards. The TBT Agreement recognizes the important contribution that international standards and conformity assessment systems can make to improve efficiency of production and facilitate international trade.

WTO rules which govern technical barriers to trade applied for reasons of protecting human health are covered by either the agreement on Technical Barriers to Trade or the agreement on the application of Sanitary and Phytosanitary Measures. Under both these agreements, health is considered a legitimate objective for restricting trade.

TBT Agreement also allows the grant of specified, time-limited exceptions to developing countries that have difficulties in meeting obligations under the agreement because of their special development and trade needs, and their stage of technological development (Article 12.8).

[473] *WTO Agreements and Public Health*, A joint study by the WHO and WTO Secretariat. Geneva.

b. The Sanitory and Phytosanitory Agreement, 1995 (SPS)
Sanitary and Phytosanitary measures generally deal with protecting human, animal and plant life. For human being SPS deals about standard measures for Additives, contaminants, toxins or disease-causing organisms in their food, beverages, feedstuffs.

The SPS Agreement establishes a number of general requirements and procedures to ensure that a Sanitary or Phytosanitory measure is in-fact intended to protect against the risk asserted, rather than to serve as a disguised trade barrier. The SPS Agreement has been recognised the International Body with respect to food safety and standards, i.e., Codex Alimentarius Commission.

c. The Codex Alimentarius Commission (CODEX)
The Food & Agricultural Organization (FAO) was fulfilling the mandate given to it at its founding during the United Nations Conference on Food and Agriculture held in Hot Springs, Virginia, in 1943, to establish quality standards that would enable international trade to meet the needs of the hungry in the postwar world. Recognizing that the safety of foods is an essential component of quality, FAO called on WHO to join it in this important work. In the following year, 1962, the Joint FAO/WHO Food Standards Programme was created, with the CODEX as its executive organ. The CODEX, an intergovernmental body opens to all member countries of FAO and WHO, is an organization in which governments make decisions, but where members of civil society can provide input and comment on the draft standards.

In 1995, the CODEX adopted four statements of principle concerning the Role of Science in the Codex decision making process and the extent to which other factors are taken into account (FAO/WHO, 1995) are as follow; Standards and other texts shall be based on sound scientific analysis and evidence based on a review of all relevant information to ensure the quality and safety of the food supply; the CODEX will have regard to other legitimate factors relevant for the health protection of consumers and the promotion of international trade; Food labeling plays an important role in both of these objectives; When members of the CODEX agree on the necessary level of public health protection but hold differing views in regard to the other legitimate factors, they may abstain from accepting the standard without necessarily preventing a decision by CODEX.

In this way the Codex standards, codes of practice, and guidelines are recommendations to governments that facilitate countries in accepting into their territories food that is safe and of good quality, property labeled and packaged, and prepared under hygienic conditions. They are accompanied by recommendations on food inspection and certification systems, as well as methods of analysis and sampling to provide the framework for the application of standards to food products as they move in international trade.[474] If any disputes arising out of SPS Measures shall be settled under the provisions of the WTO Dispute Settlement Body.

d. International Standards Organization (ISO)
International Standards Organisation work programme ranges form standards for traditional activities, such as agriculture and construction, through mechanical engineering, to medical devices, to the newest information technology developments, such as the digital coding of audio-visual signals for multimedia applications.[475]

ISO together with IEC (International Electrotechnical Commission) and ITU (International Telecommunication Union) has built a strategic partnership with the WTO (World Trade

[474] Noami Rees and David Watson, *International Standards for Food Safety* (An Aspen Publication, USA, 2000) p.6
[475] Available at < http://www.iso.org/iso/en/ISOOnline> visited on 25-04-2012.

Organisation) with the common goal of promoting a free and fair global trading system. The political agreements reached within the framework of the WTO require underpinning by technical agreements. ISO, IEC and ITU, as the three principal organizations in international standardization, have the complementary scopes, the framework, the expertise and the experience to provide this technical support for the growth of the global market.

The ISO 27th General Assembly, held on 14-16 September 2004 in Geneva, Switzerland, approved seven key objectives for the organization and defines the ensuing actions and results expected. The key objectives are: Developing a consistent and multi-sector collection of globally relevant International Standards; Ensuring the involvement of stakeholders; Raising the awareness and capacity of developing countries; Being open to partnerships for the efficient development of International Standards; Promoting the use of voluntary standards as an alternative or as a support to technical regulations; Being the recognized provider of International Standards and guides relating to conformity assessment; Providing efficient procedures and tools for the development of a coherent and complete range of deliverables.

B. National Standards: Indian Scenario

In India, the need for consumer protection is paramount in view of the fact that there is an ever-increasing population and the need for many goods and services of which is no matching supply. In India the consumer exploitation is more because of lack of education, poverty, illiteracy, lack of information, traditional outlook of Indians to suffer in silence and ignorance of their legal rights against the remedy available in such cases. It was therefore necessary that a forum be created where a consumer not satisfied with the goods supplied or services rendered may ventilate his grievance and machinery devised to afford him adequate protection.

The Indian Constitution came into force on Jan 26, 1950. Though the word consumer is not to be found in the constitution, the consumer breathes and peeps out through many of the blood vessels of the constitution. The constitution of India is a social document. It is not made only to provide a machinery of government to maintain law and order and to defend the country. The founding fathers of the constitution had a glorious vision of the establishment of a new society in India imbued with high ideals for guaranteeing the multidimensional welfare of all the people.[476] The aspirations of the people of India found an explicit expression mainly in the preamble, the fundamental rights and the directive principles of the state policy.

It is the state's duty to give guarantee of every one in this country has a right to live with human dignity, free from exploitation.[477] This right to live with human dignity enshrined in this article derives its life breath from the directive principles of state policy. The state shall secure a social order for the promotion of welfare of the people and shall effectively work to achieve a social order in which justice, economic and political shall inform all the institutions of the national life.[478] State has a duty to raise the level of nutrition and the standard of living to improve public health and to prohibit consumption of intoxicating drinks or drugs which are injurious to health.[479] This is considered as a primary duty of the state. In the sense, every state has to protect the rights of the consumer and ensure the use of public

[476] Rao Koteswar P, "Constitution, State and Consumer Welfare*", Consumer Protection and Legal Control (*Leelakrishnan. ed., Eastern Book Company. Lucknow,1981) 81.

[477] Constitution of India, art. 21.
[478] *Ibid* art. 38.
[479] *Ibid* art. 47.

utility in the best possible manner. In every nation, there are large segments of the people who have insufficient resources to live under reasonably good conditions of health and decency. Therefore, the society in which they live has obligations to provide support and that support is not a charity to the citizen but as of a right.[480] Therefore, they must be brought within the scope of any law which can be envisaged for the consumer's promotion.

In India much legislation were passed to protect the consumers from manufacturers and service providers like Indian Contract Act, 1872, Sale of Goods Act, 1930, Bureau of Indian Standards, 1986, Prevention of Food Adulteration Act, 1954, The Food Safety and Standards Act, 2006, Agricultural Produce (Marking and Grading) Act, 1937, Drugs and Cosmetics Act, 1940, Competition Act, 2000, Indian Penal Code, 1860 (Sections 272-276) and finally Consumer Protection Act, 1986.

5. TEACHING BUSINESS: CONSUMER RIGHTS & HUMAN RIGHTS

Object of Course

The course seeks to help students to develop analytical skills to question and appraise human rights policies and practices at the international and national levels; enhance understanding of fact-finding methodology and develop interview skills; gain substantive knowledge of the international law and policy of human rights and consider prevailing trends in the human rights field and of the challenge and contribution of critics; perceive improvements, discern ambiguities and identify contradictions in the human rights movement; draw useful conclusions about the roles of various state and non-state actors in the identification of rights and in their promotion and enforcement; and identify potential roles for oneself in the promotion of human rights; Consumer Rights Accountability of Business Entities.

Structure of the course

a) Defining Business and Human Rights within Corporate Responsibility;

b) State Responsibilities to Protect Human Rights and Policy Dimensions

c) Human Rights Accountability of Business Entities: Theories and Practice

d) Consumer Rights Accountability of Business Entities

e) Business Human Rights Best Ethical Practices

f) Norms, Standards and Codes of Conduct : International and National

g) International Trade and Human Rights Perspective in India

h) Health and Safety

i) Environmental Protection

j) Tools for Corporate Accountability

k) The Implementation Mechanisms

l) Engaging students in research, teamwork and clinical approaches.

[480] Charles A. Reich, "Individual Rights and Social Welfare: The Emerging Legal Issues", 74 *Yale.L.J.* (1965). 1245, 1256.

Example: **Details of NLSIU students have filed cases through their team work and clinical approaches**

	Case Name	Before Forum/ Commission /ASCI / High Court (Nature of Case)	Present Stage
1.	NLSIU Students V. L'oreal India Pvt Ltd (Garnier Men Cream)	Karnataka State Commission Bangalore	Objections
2.	NLSIU Students V. Dove Damage Therapy Dandruff Care Shampoo Complaint No.2119/2012	-Bangalore District Consumer Forum -Misleading Advertisements-Unfair Trade Practice	Objections
3.	NLSIU Students V. Nivea Energy Fresh Spray Complaint No.2120/2012	-Bangalore District Consumer Forum -Misleading Advertisements-Unfair Trade Practice	Objections
4.	NLSIU Students V. Himalaya Herbals Fairness Cream Complaint No.2121/2012	-Bangalore District Consumer Forum -Misleading Advertisements-Unfair Trade Practice	Objections
5.	NLSIU Students V. VLCC Health Care Ltd. Complaint No.2122/2012	-Bangalore District Consumer Forum -Misleading Advertisements-Unfair Trade Practice	Objections
6.	NLSIU Students V. L'oreal India Pvt Ltd (Garnier Sun Control Cream) Complaint No.2123/2012	-Bangalore District Consumer Forum -Misleading Advertisements-Unfair Trade Practice	Objections
7.	NLSIU Students V. Vivel Active Fair Cream (ITC)	-Advertisement Standard Council of India (ASCI)	Objections
8.	NLSIU Students v. Govt. of Karnataka Public Interest Litigation W.P.No.50856/2012	High Court of Karnataka -Establishment of Consumer Forum/ Appointment of Members/ Administrative Staff/ Infrastructure	Objection

Explanation:

I took a course on "*Impact of Misleading Advertisement on Consumers*" for final year under graduate law students for last three months trimester in 2012. The students did research on misleading Advertisements through print and electronic media on Cosmetics. Three students each group purchased one cosmetic and applied on themselves for two months. Then they come to know that the claims made in the advertisements are falls. Later they sent a legal notice to the manufacturers for clarification about their claim. Some of them have given unreasonable answers and rest of them were not answered. Finally Students have drafted the complaint and filed cases before District Consumer Forum. Now student are handling the cases for justice/Human Rights.

Another group of students have done empirical research on '*Implementation of Consumer Protection Act, 1986 in Karnataka State*'. The important findings of research is that the Government of Karnataka failed in establishment of effective Redressal Mechanism. Therefore students have filed Public Interest Litigation before High Court Karnataka, Bangalore. The Hon'ble Chief Justice of Karnataka by admitting the PIL served notice to the

Government of Karnataka and asked explanation for non implementing Consumer Protection Act, 1986 completely.

6. CONCLUSION

Products and services safety standards play an important role in our daily lives. As standards are developed in response to our needs, it is difficult to imagine modern life without them. In one way or another, standards make life easier, safer and more comfortable. Thus it can be suggested that an initial acknowledgement of consumer rights as soft human rights, leading finally to full recognition as human rights.

Now onwards, every university should have a course exclusively on "Business: Consumer Rights and Human Rights". The Course should engage students more in classroom discussion, such as simulations, role-playing exercises, debates, research, fact-finding methodology, interview skills, Management skills, teamwork and clinical approaches.

It is a known fact that without the People's active participation, the Government, as alone body, cannot protect consumers from Business Entity. There are plenty of International and National laws to take care of consumers and their numbers are constantly increasing. However, it leaves much to be said that their effectiveness has to rely upon the alertness of consumers, and the sincerity of the authorities in their implementation.

Public Disclosure and Global Sustainable Development in the Banking Industry: The Equator Principles

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I. Introduction
II. What are the Equator Principles?
III. Literature Review
IV. Empirical Analysis
V. Conclusion

There are a number of different ways in which human rights can be discussed and advanced through the teaching of business law courses in law schools. There are a multitude of stakeholders who are impacted by the decisions made by corporate actors. Though most corporate law statutes around the world do not speak to human rights directly, they do impose a duty on directors to act in the best interests of the organization, including the interests of shareholders and other stakeholders who are affected by the corporation's actions. When considering human rights in business, it is necessary to look at how those stakeholders who are not shareholders are impacted by business operations through analysis of the role of corporate social responsibility in the modern corporation and in particular in the project finance community. This paper seeks to address how human rights can be advanced through teaching corporate law, and specifically through discussion and analysis of the role of 1. non-corporate law instruments that specifically protect human rights and promote corporate social responsibility; 2. corporate culture and discretionary decision-making; and 3. voluntary, soft-law principles-based mechanisms, such as the Equator Principles.

I. Introduction

The role of market actors in developing corporate governance standards outside of traditional, state-driven regulatory systems is a major part of what has been coined the "new governance."[481] The Equator Principles (EPs) are one of a large number of voluntary, non-binding mechanisms lying within this conceptual framework. The EPs were developed as a self-regulatory initiative by a group of some of the world's largest banks in 2003, and consist of ten principles aimed at improving environmental and social risk management.[482] What makes the EPs unique, however, is their focus on the financial sector and on project finance in particular. After expressly recognizing the importance of finance to sustainable

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[481] See e.g. Cynthia Williams, "Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement" (2005) UNC Legal Studies Research Paper No. 05-16, online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=691521&http://papers.ssrn.com/sol3/papers.cfm?abstract_id=691521>; and Orly Lobel, "The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought" (2004) 89 Minn. L. Rev. 34; Lester M. Salamon, "The New Governance and the Tools of Public Action: An Introduction," (2001) 28 Fordham Urb. L.J. 1611; and R.A.W. Rhodes, "The New Governance: Governing Without Government," (1996) 44 Pol. Stud. 652.

[482] "History of the Equator Principles," online: Equator Principles <http://www.equator-principles.com/index.php/about-ep/about-ep/history-of-the-eps>.

development,[483] they require members, known as Equator Principle Financial Institutions (EPFIs), to analyse the social and environmental issues associated with their investments and engage and create appropriate measures to mitigate harm.[484] However, significant scholarly debate exists, as to the real impact of the EPs on sustainable development.[485] Many take the view that such standards amount to simple "greenwashing"—public relations exercises that mask the institutions' basic inaction on sustainability matters.[486]

The introduction of a public reporting requirement in Principle 10 of the EPs presents a valuable opportunity to advance this debate. In particular, this paper's empirical study of the EPFIs' reports to date provides a vantage point from which to assess the prospects for and pitfalls of "new governance" or corporate social responsibility (CSR) initiatives more generally. This paper examines the quality of 67 EPFIs' reporting and whether they are reporting below, at or above the EPs' standards. In particular, it examines the EPFIs' performance in three qualitative areas essential to meaningful CSR reporting: namely, transparency, consistency and comparability. Improvement in each of these areas is vital to the EPs serving a meaningful role in bank governance going forward. Without clear, consistent reporting that can be compared both to an individual EPFI's past information and to that of other EPFIs, EP disclosure can be of only limited use to stakeholders' monitoring efforts—and to governance generally. In doing so, it draws extrapolates on the extent to which voluntary, principles-based regulation effectively promote best practices in governance.

The paper finds that while some EPFIs have high levels of reporting, most only meet the minimum requirements of the EPs. This may be attributed to a number of factors, including the vagueness of the EPs' standards and the reluctance of individual EPFIs to make voluntary advancements in disclosure. Voluntary standards can have a substantial impact. However, the results of the EPs', particularly with respect to publicly-disclosed compliance, suggest that caution should be taken to avoid relying too heavily on a principles-based, voluntary approach to regulation. Recommendations are provided for how the effectiveness of the EPs can be improved going forward, such as *Reporting Guidelines* that provide EPFIs with more detailed direction for complying with Principle 10, more stringent monitoring and regulation of reporting, and a five-year review period for the reporting practices of EPFIs and the EPs themselves. Further, results of reviews should be made public and an award should be created for firms that demonstrate true commitment to EP goals.

This paper proceeds as follows. Part II provides a brief overview of the EPs and project finance. Part III surveys the existing literature on the EPs. Part IV sets out an empirical, qualitative study of EP reporting. Finally, Part VI sets out the paper's conclusions and suggests a path forward.

II. What are the Equator Principles?

The EPs consist of ten broach principles, which set out a framework for environmental and social due diligence in project finance. They originated from a London

[483] In the EPs' preamble. See "The Equator Principles: A financial industry benchmark for determining, assessing and managing social and environmental risk in project financing" (June 2006) [Equator Principles] at 1, online: Equator Principles <http://www.equator-princples.com/principles.shtml>.
[484] *Ibid.* See also Tseming Yang & Robert V. Percival, "The Emergence of Global Environmental Law" (2009) 36 Ecology L.Q. 615 at 633.
[485] See e.g. Vivian Lee, "Enforcing the Equator Principles: An NGO's Principled Effort to Stop the Financing of a Paper Pulp Mill in Uruguay" (2008) 6 U. J. Int'l Hum. Rts. 359.
[486] See e.g. Joe W. (Chip) Pitts III, "Corporate Social Responsibility: Current Status and Future Evolution" (2009) 6 Rutgers J.L. & Pub. Pol'y 374; Miki Kamijyo, "The 'Equator Principles': Improved Social Responsibility in the Private Finance Sector" (2004) 4 Sustainable Dev. L. & Pol'y 35 at 36.

meeting of nine large, international banks in October 2002.[487] At this meeting, the banks agreed to develop a baseline standard "to avoid the negative impacts on project-affected eco-systems and communities and, if impacts are unavoidable, to minimize effects or appropriately compensate for them."[488] In so doing, they used the safeguard policies of the International Finance Corporation and the Pollution Prevention and Abatement guidelines of the World Bank as models.[489] At their June 2003 launch, the EPs originally had the support of ten institutions—ABN AMRO Bank, N.V., Barclays plc., Citigroup, Crédit Lyonnais, Credit Suisse First Boston, HVB Group, Rabobank Group, The Royal Bank of Scotland, WestLB AG and Westpac Banking Corporation.[490] As of May 2012, 77 financial institutions have signed on to the EPs.[491]

The EPs concern project finance—an area of banks' activities that engages the financing of large infrastructure assets, such as power plants, toll roads and telecommunications systems and industrial assets, such as mines and petrochemical plants.[492] A typical project finance operation entails a relatively complex business structure, including consortiums of debt and equity interests in a project company using a special purpose vehicle (SPV) that is legally independent from the equity holders (known as "sponsors").[493] The project's debt is supplied by a bank or syndicate of banks, with lending often based only on the project's expected performance and forecasted cash-flows rather than the creditworthiness of the sponsor (a form of financing known as "non-recourse" or "limited recourse" lending).[494] These arrangements mean that project sponsors have no direct legal obligation to make debt or interest payments if the project's cash-flows prove inadequate to service them.[495] As a result, lenders seek projects with strong performance prospects. Accordingly, banks have become steadily aware of the potential for a project to be derailed by social and environmental risks—the focus of the EPs. For instance, in 1995, public hostility to the $635 million Dabhol Power Project in India, led by Enron, caused the Indian government to reverse approvals and contracts after an opposition party took power.[496] These cancellations generated a torrent of litigation, with the project only coming back into operation (with substantially more Indian control) in 2005.[497]

The EPs require EPFIs to observe the following factors before granting a loan of greater than $10 million to any given project:

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[487] See "History of the Equator Principles," online: Equator Principles <http://www.equator-principles.com/index.php/about-ep/about-ep/history-of-the-eps>.
[488] Hennick Centre for Business and Law & Jantzi Sustainalytics, "Corporate Social Performance Reporting Roundtable: Consultation Paper" (Discussion paper presented at the Corporate Social Performance Reporting Roundtable, Toronto, Ontario, 7 December 2009) at 38, online: <http://hennickcentre.ca/documents/discussionpaper.pdf>.
[489] Bert Scholtens & Lammertjan Dam, "Banking on the Equator. Are Banks that Adopted the Equator Principles Different from Non-Adopters?" (2007) 35 World Development 1307 at 1309. See generally reports from the World Bank and International Finance Corporation, e.g., International Finance Corporation, *Safeguard Policies Update*, online: <http://www.ifc.org/ifcext/policyreview.nsf/Content/SafeguardPolices>; World Bank, *Pollution Prevention and Abatement Handbook, 1998,* online: <http://smap.ew.eea.europa.eu/media_server/files/l/v/poll_abatement_hanbook.pdf>.
[490] "History of the Equator Principles," *supra* note 7.
[491] See "Members & Reporting," online: Equator Principles <http://www.equator-principles.com/index.php/members-reporting/members-and-reporting>.
[492] Benjamin C. Esty, Carin-Isabel Knoop & Also Sesia Jr., "The Equator Principles: An Industry Approach to Managing Environmental and Social Risks" (2005) HBS Publishing Case No. 9-205-114 at 2.
[493] Benjamin C. Esty, "The Economic Motivations for Using Project Finance" (2002) [unpublished] at 1, online: Harvard Business School http://www.people.hbs.edu/besty/Esty%20Foreign%20Banks%203-9-03.pdf (last accessed 4 September 2012).
[494] Scott L. Hoffman, *The Law and Business of International Project Finance* (Cambridge: Cambridge University Press, 2007) at 4.
[495] *Ibid.* at 5.
[496] U.S. House of Representatives, Committee on Government Reform, "Fact Sheet: Background on Enron's Dabhol Power Project" (22 February 2002) at 1-2, online: <http://finance-mba.com/Dabhol_fact_sheet.pdf>.
[497] *Ibid.* at 2.

- Principle 1 of the EPs requires EPFIs to review and categorize a project as either a category A, B or C project by the magnitude of its potential impacts and risks according to the IFC's standards. A project is Category A where the potential adverse social and environmental impacts are significant, Category B where such potential impacts are limited and Category C where the potential impacts are minimal or non-existent.— "
- Principle 2 requires the EPFI to conduct an assessment of the relevant social and environmental impacts and risks, and propose appropriate mitigation and management measures;
- Principle 3 directs EPFIs to refer to applicable standards in the proposed project's industry when completing their social and environmental assessment;
- Principle 4 sets out the task of developing an "action plan and management system" to describe the actions needed to implement Principle 2's mitigation measures for Category A and B projects;
- Principle 5requires EPFIs that undertake Category A or (as appropriate) Category B projects in non-high income OECD countries or non-OECD countries to consult with affected communities and disclose the proposed project in a structured and culturally appropriate manner
- Principle 6, contemplates, in addition to Principle 5, the creation of an grievance mechanism by which community members can raise concerns regarding a project's social and environmental effects on an ongoing basis;
- Principle 7requires EPFIs to retain an independent expert to evaluate and review their assessments and EP compliance generally;
- Principle 8stipulates that EPFIs include certain legal covenants in their financial contracts regarding social and environmental compliance; and
- Principle 9,compels EPFIs to require their borrowers to appoint or retain independent environmental or social experts for monitoring and reporting for all Category A projects and appropriate Category B projects.

As the foregoing suggests, the EPs are not detailed, linear rules, but leave a significant sphere of discretion to EPFIs in setting their own sustainability standards.[498] The final Principle 10, introduced in 2006[499] dealing with EPFI reporting) is arguably the EPs' most important feature from a governance perspective. This principle requires EPFIs to, at minimum, annually report publicly about their EP compliance progress (subject to confidentiality concerns).[500] It thus reinforces Principles 1–9 by placing the banks' EP compliance practices in view of their stakeholders. Nevertheless, as the findings in this paper suggest, much remains to be done to improve the quality of EPFI disclosures. Absent significant changes, the EPs' mechanism of voluntary, principles-based disclosure may not be as effective as it could be in promoting sustainability.

[498] The relative advantages of principles-, standards- and rules-based regulation have been widely debated. See generally Pierre Schlag, "Rules and Standards" (1985) 33 UCLA L. Rev. 379; Kathleen M. Sullivan, " The Justices of Rules and Standards" (1992) 106 Harv. L. Rev. 22; Louis Kaplow, "Rules versus Standards: An Economic Analysis" (1992) 42 Duke L.J. 557; and Cass R. Sunstein, "Problems with Rules" (1995) 83 Cal. L. Rev. 953. More recently, the topic has been examined extensively in the securities regulation sphere: see e.g. William W. Bratton, "Enron, Sarbanes-Oxley and Accounting: Rules versus Principles versus Rents" (2003) 48 Vill. L. Rev. 1023; Lawrence Cunningham, "Principles and Rules in Public and Professional Securities Law Enforcement: A Comparative U.S.-Canada Inquiry" (Paper commissioned by the Task Force to Modernize Securities Legislation in Canada, 31 May 2006), online: <http://www.tfmsl.ca/docs/V6(5A)%20Cunningham.pdf>; and Cristie Ford, "Principles-Based Regulation in the Wake of the Global Financial Crisis" (2010) 55 McGill L.J. 1; and James J. Park, "Rules, Principles and the Competition to Enforce the Securities Laws" (2012) Cal. L.R. 115.

[499] "History of the Equator Principles," *supra* note 7.

[500] Equator Principles, *supra* note 3 at 6.

III. Literature Review

Similarly to scholarly debates about other voluntary, market-based forms of regulation,[501] significant disagreement exists as to the EPs' merits in promoting corporate governance, CSR and sustainability. This section surveys the literature on the EPs, which can be categorized according to the context in which the EPs are being examined. Given their youth, the standards have attracted a relatively small amount of commentary to date.

(a) Voluntary regulation

One body of research evaluates the EPs by considering the debate between voluntary and mandatory forms of regulation. An increased diffusion of regulatory responsibilities once monopolized by government—especially toward voluntary, market-based standards—has been deemed "the new governance."[502] The EPs, particularly owing to their industry origins, fall squarely within this framework. Critics, however, see voluntary initiatives such as EP as attempts by firms to manage reputational risk by "greenwashing" their activities through stepped-up public relations efforts, but little else.[503] Under such a view, EP allows banks to free-ride on the benefits of perceived environmental stewardship (from EPFI status) without contributing positively to sustainable investment. This is supported by the fact that a number of EPFIs continue to be involved in environmentally controversial projects.[504] Moreover, the EPs' voluntary nature eliminates the possibility of enforcement, and thus, liability on the part of EPFIs thereby generating compliance concerns. For example, under Principle 8, lenders must "include covenants in project loan documentation under which the borrower agrees to maintain compliance with articulated environmental (and other) standards, lenders are not obligated to call an event of default if any such covenant is breached."[505] Given their focus, the EPs have also been criticized for not embracing more substantive standards on environmental issues. In particular, the EPs are silent on global warming. The World Wildlife Fund (WWF) has declared the EPs to be "lagging behind relevant international standards and best practices." Some go so far as to argue that because of the questionable legitimacy of voluntary mechanisms like the EPs, supplementary public regulation is inevitable and necessary.[506]

(b) Bank accountability

Other studies take the position that, whatever its participants' motivations, the EPs serve to increase the financial sector's accountability for its actions.[507] A "baseline" standard prevents harmful or controversial projects from receiving necessary funding, notwithstanding a host country's policies—a significant check against a "race to the bottom" in international investment. Moreover, widely-accepted standards among EPFIs could, over

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[501] See e.g. ; J. Andy Smith III, "The CERES principles: A voluntary code for corporate environmental responsibility" (1993) 18 Yale J. of Int'l L. 307; Robert Tucker & Janet Kasper, "Pressures for Change in Environmental Auditing" (1998) 10 J. Man. Issues 340 (analysing the ISO 14000 standard); Errol Meidinger, "'Private' Environmental Regulation, Human Rights, and Community" (1999) Buf. Envir. L.J. 219 (analysing the Forest Stewardship Council's product certification standard, the ISO 14000 standard and the American Forest and Paper Association's Sustainable Forestry Initiative); Oren Perez, "Facing the Global Hydra: Ecological Transformation at the Global Financial Frontier – The Ambitious Case of the Global Reporting Initiative" (2006) Bar Ilan Univ. Pub. Law Working Paper No. 06-9, online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=949834>; David Levy, Halina Brown & Martin de Jong, "The contested politics of corporate governance: The case of the Global Reporting Initiative" (2010) 49 Bus. & Soc. 88; and Dirk Gilbert & Andreas Rasche, "Discourse Ethics and Social Accountability – The Ethics of SA 8000" (2010) 17 Bus. Ethics Q'ly 187.

[502] *Supra* note 1.

[503] *Supra* note 19.

[504] Benjamin J. Richardson, "Putting Ethics into Environmental Law: Fiduciary Duties for Ethical Investment" (2008) 46 Osgoode Hall L.J. 243 at 257. See also Elisa Morgera, "Significant Trends in Corporate Environmental Accountability: The New Performance Standards of the International Finance Corporation" (2007) 18 Colo. J. Int'l Envtl. L. & Pol'y 151 at 187.

[505] Heather Hughes, "Enabling Investment in Environmental Sustainability" (2010) 85 Ind. L.J. at 624.

[506] See e.g. Richardson, *supra* note 20.

[507] See e.g. Lee, *supra* note 5 at 359.

the long term, reduce the heavy regulatory burden associated with borrower companies, since their projects must first pass the EPs' rigors.[508]

(c) Impact on host-country regulations

The EPs can make a positive contribution to sustainability by superseding lax host-country environmental standards. Moreover, widely-accepted standards such as the EPs may create a precedent for domestic policymakers and influence-holders. For example, the judiciaries of developing nations, most notably Argentina and India, have each recognized a constitutional right to a healthy environment.[509] In India, a decision mandating that diesel buses be replaced with compressed natural gas buses has led to significant improvements in air quality.[510] Whether these developments are sufficient to dismiss the notion of an environmental and social "race to the bottom" in international investment remains unclear. However, even with strict environmental regulations in place, , developing nations may lack the resources to implement, monitor and enforce them.[511] Corruption within states' regulatory and enforcement bodies, and unequal bargaining power between developing nations' governments and large corporations, may also play a role.[512]

(d) Socially responsible investment

Other scholars have examined the EPs in the context of the socially responsible investment (SRI) movement,[513] which, in its emphasis on investment that attains both financial and social returns, is consistent with the EPs' stated goals. The connection between SRI and reduced reputational and borrower insolvency risks has led to what has been termed "the business case for SRI," which is based on the assumption that sustainable investment practices will make a firm "prosperous rather than merely virtuous." Some commentators, however, are skeptical that SRI can yield tangible consequences for climate change.[514] Presently, there is no evidence suggests that voluntary standards such as the EPs have impacted the types of projects being financed globally, leading some argue that these standards have allowed "dubious investment practices masquerading as ethical choices to proliferate."[515]

(e) Effect on transparency

The EPs have also been examined through the lens of transparency. In recent years, corporate social responsibility (CSR) advocates have used scandals to induce greater transparency from corporate actors. The Global Reporting Initiative (GRI), originally convened by a coalition of NGOs called Ceres, is one product of a paradigm shift within corporations toward a balance between shareholder and stakeholder values, termed the "triple bottom line."[516] By providing a common language and format for corporate disclosure, the GRI has led to "(1) greater transparency; (2) consistency over time; and (3) comparability across firms and industries,"[517] among its 1000-plus member organizations. Observers such as Antonio Vives suggest that full transparency can create value for firms by informing the market of the firm's environmentally responsible activities "and the expected benefits, quantifiable or not."[518] In the literature, the EPs are placed in the same category

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[508] Richardson, *supra* note 20 at 246.
[509] Yang & Percival, *supra* note 4 at 635.
[510] *Ibid.* at 634.
[511] Natalie L. Bridgeman & David B. Hunter, "Narrowing the Accountability Gap: Toward a New Foreign Investor Accountability Mechanism" (2008) 20 Geo. Int'l Envtl. L. Rev. 187 at 196.
[512] *Ibid* at 197.
[513] See generally Benjamin J. Richardson, "Protecting Indigenous Peoples through Socially Responsible Investment" (2007) 6 Indigenous L.J. 1 at 7.
[514] *Ibid.* at 514.
[515] Richardson, *supra* note 20 at para 4.
[516] Jayne W. Barnard, "Corporate Boards and the New Environmentalism" (2007) 31 Wm. & Mary Envtl. L. & Pol'y Rev. 291 at 302.
[517] *Ibid* at 303.
[518] Antonio Vives, "Corporate Social Responsibility: The Role of Law and Markets and the Case of Developing Countries" (2008) 83 Chi.-Kent L. Rev. 199 at 218.

as the GRI as a mechanism for improved transparency; however, this paper suggests that the placement may be unwarranted, and that the EPs have not yet fully achieved any of the three stated benefits of the GRI. The present study seeks to fill a void of substantive analysis of the transparency resulting from Principle 10.

(f) Case studies

Much of the valuable literature on the EPs are case studies of specific EPFI projects that chronicle how the EPs have been applied in practice.[519] One example is Uruguay's Orion paper mill project which, at least initially, was financed by Calyon (the investment branch of France's Crédit Agricole) and ING Group.[520] In that case, a public "shaming" campaign was set up against the project in 2005 by an Argentina-based NGO, the Center for Human Rights and the Environment. Nevertheless, Calyon was satisfied that if the project met the IFC's minimum standards, it deserved its financing commitments. ING, on the other hand, withdrew its financing commitments. Notwithstanding these objections, the Orion paper mill project was completed in September 2007. These facts speak to both the potential of, and limitations to, the EPs as a governance mechanism. Other case studies reveal how certain EPFIs (such as Citibank and HSBC) have developed more stringent internal environmental performance standards and procedures than those required by the EPs[521].This supports a more genuine commitment to SRI and sustainable development than "greenwashing" theories would suggest. These case studies provide tangible examples of the impact of the EPs, which are often lost in quantitative, aggregated measures of bank performance.

(g) The impact of reporting requirements

Recent literature suggests that—either as a matter of investor protection or good corporate citizenship—reporting of CSR practices (or "social" reporting) has become an increasingly essential part of a public corporation's disclosure obligations. Social reporting may include,

> disclosure concerning compliance with legislation, such as human rights legislation, labour codes, product safety legislation, occupational safety legislation, and environmental legislation. In addition it would require disclosure about activities that, while legal, are controversial, such as the production or distribution of violent television programs or movies, or the production or sale of military hardware, alcohol, cigarettes, handguns or pornography.[522]

Two reports published by the Asset Management Working Group of the United Nations Environment Programme Finance Initiative in 2004 conclude that the effects of environmental, social and governance (ESG) issues' on long-term shareholder value are often "profound."[523] The corollary of this is that, for securities-law disclosure regimes, a

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[519] See e.g. Lee, *supra* note 5 and described below; Andrew Hardenbrook, "The Equator Principles: the Private Financial Sector's Attempt at Environmental Responsibility" (2007) 40 Vand. J. Transnat'l L. 197 at 215 (analysing Royal Dutch Shell's Sakhalin II project in Russia); Mike Bradshaw, "The 'Greening' of Global Project Financing: The Case of the Sakhalin-II Offshore Oil and Gas Project' (2007) 51 Can. Geo. 255.; Ikuto Matsumoto, "Expanding Failure: An Assessment of the Theun-Hinboun Hydropower Expansion Project's Compliance with Equator Principles and Lao Law" (October 2009), online: Banktrack <http://www.banktrack.org/download/expanding_failure/expanding_failure_091005.pdf> (describing the Theun-Hinboun project in Laos, as financed by a consortium that included EPFIs ANZ Banking Group, BNP Paribas and KBC); and Benjamin J. Richardson, "Can Socially Responsible Investment Provide a Means of Environmental Regulation?" (2009) 35 Monash U. L. Rev. 262 at 281 (analysing ANZ Banking Group's Gunns pulp mill project in Tazmania).

[520] See generally Lee, *supra* note 5.

[521] Julia Philpott, "Keeping it Private, Going Public: Assessing, Monitoring, and Disclosing the Global Warming Performance of Project Finance" (2005) 5 Sustainable Dev. L. & Pol'y 45 at 47. See also Alan D. Hecht, "The Next Level of Environmental Protection: Business Strategies and Government Policies Converging on Sustainability" (2007) 8 Sustainable Dev. L. & Pol'y 19 at 22.

[522] Mark R. Gillen, *Securities Regulation in Canada* (Toronto: Thomson Carswell, 2007) at 356.

[523] United Nations Environment Programme, Asset Management Working Group, "The Materiality of Social, Environmental and Corporate Governance Issues to Equity Pricing" (2004), online:

potentially-sizeable portion of environmental and social information is likely to be "material" to the value of an issuer's securities and thereby subject to disclosure.[524] Nevertheless, a body of scholarship supports listed companies' practice of under-reporting facts, particularly negative ones.[525] With respect to ESG information, investors have increasingly been apprised of this "disclosure gap." For instance, in 2010, a coalition of global investors from 13 countries (managing over $1.2 trillion in assets) wrote to 86 major issuers urging them to honour their voluntary UN Global Compact commitments on transparency.[526] In a 2011 global report on social disclosure, KPMG noted that reporting continued to grow apace during the financial crisis, with what was "once merely considered an 'optional but nice' activity" becoming "virtually mandatory for most multinational companies, almost regardless of where they operate around the world."[527] Nevertheless, "materiality"-based statutory disclosure requirements may provide insufficient clarity to companies as to when disclosure is mandatory. KPMG's report, for instance, notes that while 95% of the 250 largest companies in the world engage in social reporting, a full two-thirds of non-reporters are U.S.-based. Moreover, an approach that relies on voluntary, firm-specific standards reduces the ability of stakeholders to compare reports, thus hindering their governance impact.[528]

In sum, Principle 10's reporting requirement has the potential to provide guidance for and standardize EPFI communications so as to close this "disclosure gap" and allow bank shareholders to better assess social and environmental risks. The requirement also allows interested observers, such as NGOs, to impose external accountability by evaluating banks' true levels of EP compliance and how that compliance practically impacts lending practices. The survey in this paper, however, suggests that Principle 10's potential in this regard has yet to be fully realized.

(h) Lack of empirical research

A number of studies have called for further research and analysis into the effects of the EPs and SRIs more generally.[529] Others hold that the voluntary-versus-mandatory debate on regulation has been exhausted and focusing on the performance of firms will prove more fruitful.[530] In this paper, the author accepts the first proposition and aims, in the study that follows, to contribute to a better understanding of EPs by an examination of EPFIs' Principle 10 reporting performance.

IV. Empirical Analysis

(a) Methodology

For this study, all available EP disclosure from 67 EPFIs dating from2003 to November 2010 was collected. Disclosure was found in annual financial reports, corporate social responsibility reports or online at EPFI web pages. All available sources were investigated before data was entered to account for scattered reporting practices.[531]

Reporting quality was examined by evaluating transparency, consistency and accessibility of the disclosure. Particular attention was devoted to the presence or absence

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<http://www.unepfi.org/work_streams/investment/amwg>.

[524] See e.g. *Securities Act* (Ontario), R.S.O. 1990, c. S.5, s. 1(1).

[525] Gerard Hertig, Reinier Kraakman and Edward Rock, "Issuers and Investor Protection" in Reinier Kraakman, ed., *The Anatomy of Corporate Law*, 2d ed. (Oxford: Oxford University Press, 2009) at 279.

[526] United Nations Global Compact, News Release, "Investors step up pressure on corporate responsibility reporting" (12 February 2010), online: <http://www.unglobalcompact.org/news/9-02-12-2010>.

[527] KPMG International Cooperative, *KPMG Survey of Corporate Responsibility Reporting 2011* (2011) at 6, online: <http://www.kpmg.com/cn/en/IssuesAndInsights/ArticlesPublications/Documents/Corporate-Responsibility-Reporting-O-201111.pdf>.

[528] Hertig, Kraakman & Rock, *supra* note 46.

[529] Richardson, *supra* note 20 at 259.

[530] Michael Kerr, Richard Janda & Chip Pitts, *Corporate Social Responsibility: A Legal Analysis* (Toronto: LexisNexis, 2009) at 30.

[531] The consequences of this dispersion are discussed in section IV(c),"Accessibility," below.

of disclosure regarding project business sector, location and amount financed. Raw data in the form of a positive ("Y") or negative ("N") marker were entered into a spreadsheet.

(b) Analysis

A qualitative analysis of EPFI data begins with considering how open EPFIs are with information regarding project financing under the EPs. Openness can take numerous forms, and this study focuses on three aspects of openness: transparency, consistency and accessibility. As these forms of openness are distinct but intrinsically related, any discussion of one will inevitably consider the others.

The analysis conducted for this study found that while substantially all EPFIs are reporting to the bare minimum required under Principle 10, their further recommended reporting, pursuant to the EP "Guidance Note on Equator Principles Implementation Reporting" (the *Reporting Guidelines*),[532] lacks consistency in format and information disclosed. This inconsistency prevents third parties from performing meaningful large-scale comparisons of EPFIs' performance in sustainable project financing. While data for the amount of high-, medium- and low-risk projects are readily available for analysis, further relevant information such as project location or business sector is either missing or presented in an inconsistent manner. Consequently, the EP *Reporting Guidelines* should be updated to establish more stringent reporting regulations in line with the high-quality reporting presented by several EPFIs. These updated *Reporting Guidelines* should include more detailed direction and standardization of reporting requirements, and require EPFIs to disclose both the location and sector of their projects—such that if EPFIs continue to report to the bare minimum standard, there will still be sufficient information available.

(a) Transparency

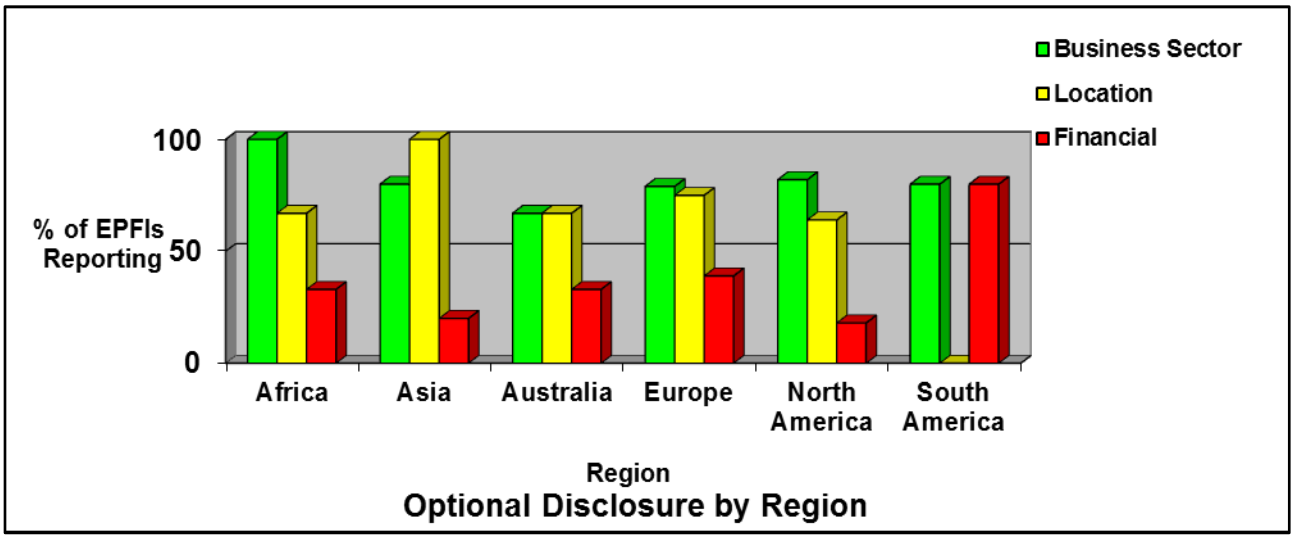
Roughly synonymous with "openness," transparency is the most important qualitative principle behind the EPs and the impetus for Principle 10. Numerous benefits for local stakeholders as well as the broader public are realized through transparent reporting standards. Transparent reporting ensures a public review of the EPFI's compliance with EP rules and reporting standards; via this review mechanism, it fosters public trust in the EPFI's reporting as well as project financing practices. More importantly, reporting must be transparent in order to provide local stakeholders with the tools they need to exercise their rights under the EPs.[533]

The EPs have very general reporting requirements: the EPFI must only report the number of projects per EP category. This study shows that almost all EPFIs have fulfilled the basic reporting requirement. Some basic reporting failures are merely technical: EPFIs may have divided loans by category, while failing to specify exactly which deals concerned project finance.[534] However, two EPFIs failed to fulfill the basic reporting requirements: A Spanish bank, whose report is no longer accessible online, provided alternate data regarding the total value of projects financed as well as how many deals were rejected, but not the required categorical information; and Nordea, a financial group in the Nordic and Baltic region, briefly mentioned only the business sector of projects financed.[535]

EPFIs may also choose to report beyond the minimum requirements. Expanded reporting can be seen as a commitment to transparency, and provides stakeholders with valuable information regarding local projects and EPFI performance. This study focused on

[532] "Guidance to EPFIs on Equator Principles Implementation Reporting" at 2, online: <http://www.equator-principles.com/documents/EPReporting_2006-06-12.pdf>.
[533] It is important to note that adopting the Equator Principles does not create any rights in, or liabilities to any person: they are merely an internal policy. Principle 6 demands that *borrowers* create a grievance mechanism for stakeholders. We believe that increased transparency by an EPFI can contribute to this Principle by providing local stakeholders with another source of information regarding projects in which they may have an interest.
[534] HSBC is a noteworthy example: they apply the EPs to all loans, but our data is only concerned with project finance, and information regarding their project finance categorization has been entered as "N/A".
[535] Nordea, *CSR Report 2009* at 14, online: < http://www.nordea.com/sitemod/upload/root/www.nordea.com%20-%20uk/AboutNordea/csr/csr_2009_uk.pdf> (last accessed 4 September 2012.

three expanded reporting categories: project sector, project location, and amount financed. The EP *Reporting Guidelines* specifically suggest sector and region information for EPFIs wishing to report beyond the minimum.[536]



The graph above shows that many EPFIs chose to report the business sectors of financed projects. All seven African EPFIs and a large majority (67 to 82%) of EPFIs in other regions chose to report the business sector. Despite the *Reporting Guidelines*, no standardized language for reporting sector information exists. Moreover, numerous EPFIs choosing to disclose financed business sectors do not further disclose the distribution of Category A, B and C projects within those sectors. Thus, it is difficult to make any observations regarding the precise nature of projects financed under the EPs.

Trying to determine where the projects being financed are taking place is even more difficult. Few EPFIs chose to disclose the location of projects and among reporting EPFIs there is, again, little consistency regarding the details of regional information. No South American EPFIs disclosed regional information, and a small majority (64 to 75%) of EPFIs in other regions chose to disclose the information. All Asian reporting EPFIs disclosed regional information. It would be valuable to know where projects belonging to each category are being conducted: the lack of current data prevents analysis of whether, for example, there are a disproportionate number of high-risk projects in the developing world, or whether developed countries are increasingly disposed to "greener" projects.

Lastly, very few EPFIs disclose the amount of financing in each category. This data would be useful data for evaluating, for example, the value of high-risk and low right projects in a geographic area.. Eighty percent of South American EPFIs reported financial information, while other regions' EPFIs reported at rates ranging from 0 to 39%. The comparatively high rate of reporting with respect to optional information suggested in the *Reporting Guidelines*—especially compared to common disclosure not found in the *Guidelines* (e.g., financial information)—signals that EPFIs are responsive to this "best practices" document. Unfortunately, the lack of formal categorization or format requirements for this optional information makes it difficult to perform large-scale analyses of disclosed data. The creation of standards regarding, for example, the division of regional information into specified categories, would be quite beneficial.

(b) Consistency

[536] *Reporting Guidelines*, *supra* note 53 at 2. Also mentioned in the *Guidelines* is a breakdown by projects under review or fully funded, but reporting on this data was so rare and inconsistent among EPFIs as to be useless.

The EP *Reporting Guidelines* make no mention of consistency, but this study nevertheless examines the consistency of reporting *within* as well as *between* EPFIs. Consistent reporting standards allow stakeholders to compare information year-to-year across member financial institutions, as well as chart an EPFI's progress not only on reporting quality, but on social and environmental performance.

The vast majority of EPFIs are consistent in their reporting quality from year to year and reporting formats are unlikely to be changed. This may be evidence of a lack of critical oversight of EP reporting standards: changes seldom occur with little pressure to increase transparency placed on those EPFIs with sub-standard reporting practices. Financial institutions that have recently signed on to the EPs should be encouraged to adopt high-quality reporting practices immediately after their grace period ends in order to avoid the complacency seen in other institutions.

Occasionally, an EPFI does experiment with minor changes in its reporting style or format. For example, one EPFI provided no location information in its 2007 report, but did provide several project examples. Its 2008 report saw an expansion of business sector categories as well as effective location disclosure, but with no project examples. In its 2009 report, while the expanded sector information remains, the location disclosure is no longer divided by EP category. It is encouraging to see an EPFI modifying its disclosure rather than remaining firmly entrenched in its reporting practices, but hopefully further changes will move towards more transparent disclosure by combining the project examples of the older reports with the enhanced categorical information found in the 2008 report.

EPFIs' reporting practices exhibit far more variance when compared to those of other EPFIs. As noted above, substantially all EPFIs report the bare minimum required under the EPs, but diverge with respect to additional information. Unfortunately, with no standardized on how to categorize the optional information there a large degree of inconsistency among the EPFIs is reporting this optional information. Project location, for example, is often categorized by OECD status, continent, region or country, with no consistency from one EPFI to the next. Project sector divisions are even more troublesome, as the terminology used to define a project's sector is less concrete than, for example, OECD status.

Beyond the three most common categories of information described earlier, EPFIs occasionally choose to divulge other information. Examples include the project status (the number of projects considered, approved, conditionally approved and rejected), descriptions of projects financed and case studies of successful or unsuccessful projects. Such information and provides important context to statistics that are otherwise shallow and abstract; however, consistency is needed in order to draw comparisons between EPFIs, regions, and other factors.

(c) Accessibility

Transparency and consistency are meaningless if information is not accessible by stakeholders. For stakeholders to make the most of the information and best practices to develop more quickly, reports need to be relatively easy to access and the data simple to disseminate. EP rules mandate annual disclosure, but allow for a variety of reporting media, including the annual Financial Report, a Corporate Social Responsibility Report and a dedicated web page.[537]

A number of examples highlight the importance of accessibility as well as its relationship with consistency. One EPFI maintained some of the highest quality reporting through 2008 by including its EP disclosure in its Corporate Responsibility Report every year. But, EP data in its 2009 report was limited strictly to the number of projects reviewed. The 2009 report represented a transition period for the EPFI, as some information was moved to a secondary web page, with occasional reminders throughout the report to visit the new webpage for more information. None of these reminders pertained to

[537] "Guidance Note on Equator Principles Implementation Reporting" at 3, online: Equator Principles <http://www.equator-principles.com/resources/ep_implementation_reporting_guidance_note.pdf>.

the EPs specifically, and full EP disclosure was found on a page buried four sub-pages away from the main CSR website. Months later the EP's Reporting website, which includes links to the newest available data for each EPFI, was updated to take the interested party directly to the EPFI's new CSR website instead of the less relevant CSR Report.

Similar problems plague other EPFIs. While the EP website maintains a database of recent disclosure, it is up to each EPFI to provide a link to its most recent report, and the database is updated frequently to reflect changes. The report linked for one particular EPFI contains information up to and including 2008 on an official-looking website with no overt hints as to the archival nature of the report. Data for 2009 is actually found on a website that is superficially similar, but uses a different URL that is not immediately accessible from the 2008 version of the page. Another EPFI discloses a wealth of information, but this information is scattered between a web page containing lending history, an Excel spreadsheet, a "What We Finance" web page, and a summary report in PDF format. Only the summary report contains the required EP disclosure. Technical problems such as these do not just prevent stakeholders from accessing and comparing older data, but often prevent them from accessing the most recent information that EPFIs are required to disclose. A coherent set of reporting practices that better integrates older reporting styles into new data is vital to distributing important information to stakeholders and other interested parties. Easily accessible data is, if nothing else, a signal as to the EPFI's commitment to transparency.

(d) Positive Examples

Several EPFIs should be applauded for their current reporting practices, which present a model to follow in EP disclosure. Portugal's Millenium bcp not only disclosed all EP-required information, but went further in specifying the nature of the project, the country in which it is located, the amount financed by the bank, the main social and environmental impacts (such as "Impact on the fauna and vegetation (e.g. habitat of shrike birds"), and mitigation measures demanded ("Assist birds in accidental collisions with the aero-generators, through an agreement established with a specialized hospital").[538] All of this disclosure was effectively reported in a concise section of its annual report and not scattered across multiple forms of media. While the amount of detail reported by Millenium bcp may not be appropriate for EPFIs that finance a large number of projects, it is certainly a standard toward which other EPFIs should strive.

China's Industrial Bank Co. Ltd. (IBC) also deserves special mention for its first post-adoption report.[539] Its report takes great strides to mention the bank's adoption of the EPs, steps it has taken to promote sustainable financing, its internal control procedures and training sessions, raw data concerning its initial EP financing activities, specific examples of several financed projects and comments from borrowers as well as third-parties regarding its EP activities. It is a remarkable initial report, and it is hoped that other EPFIs emerging from their grace period use IBC's reporting decisions as an example.

VI. Conclusions

The reporting requirement set out in Principle 10 introduces a valuable and tested corporate governance mechanism into the EPs—increased stakeholder scrutiny by way of mandated informational disclosure. To the extent that some theorists frame the EPs as a mere "greenwashing" exercise, a meaningful reporting system could settle such concerns by way of improved transparency, consistency and accessibility of information. However, the foregoing study, suggests that Principle 10 has not yet accomplished that objective. While some EPFIs' reports show an encouraging level of engagement with the spirit of the EPs,

[538] Millenium bcp, *2009 Sustainability Report* at 43, online: < http://mil.millenniumbcp.pt/multimedia/archive/00426/RC_Millennium_bcp_2_426801a.pdf> (last accessed 4 September 2012).
[539] China Industrial Bank Co. Ltd., *2009 Annual Sustainability Report*, online: <http://download.cib.com.cn/netbank/download/en/Sustainability/2009_report.pdf>.

most only scratch the surface by clinging to the EPs' minimum requirements—a problem going to the bareness of the EPs' standards as much as to individual EPFIs' reluctance to make substantial voluntary advancements in ESG disclosure. Moreover, the EPs do not do enough to ensure consistency between the reporting practices of different EPFIs, leaving CSR-related media difficult to compare and thus less effective from an oversight standpoint. These issues would each be best remedied by more fleshed-out *Reporting Guidelines* that provide more detailed direction to EPFIs in complying with Principle 10. In particular, the *Guidelines* should require EPFIs to disclose the location and sector of their projects. This study also identified several areas in which EPFIs could, without great expense, converge with best practices in their reporting.

Determining whether banks are shifting their lending portfolios in socially-beneficial ways over time is critical to the analysis of the effectiveness of the EPs in advancing the sustainable development agenda, and of voluntary regulatory mechanisms more generally. Without accurate and detailed data presented in a consistent manner, it is impossible to conclusively establish industry trends. To better demonstrate a commitment to sustainable development among EP member banks, reporting should be monitored and regulated more stringently such that meaningful data may be obtained from the reports, allowing for more detailed research in the future and improved public accountability.

The implementation of a five-year review period for the reporting practices of EPFIs and of the EPs themselves be implemented is also recommended. This review period would allow for the development of best practices and amendments to the EPs in order to respond to deficiencies. Most importantly, the results of these reviews should be made public in order to improve accountability. This paper suggests that an award be created for firms that demonstrate true commitment to EP goals (chief among them, sustainable development). Such an award would recognize firms that have transparent reporting practices and make significant strides to mitigate the environmental and social harms created by the projects they finance, particularly those in vulnerable developing nations (i.e., those without sufficient environmental regulations), and for being leaders in environmental and social stewardship. The positive public relations from such an award would legitimize the EPs, reward those firms that are committed to them and promote the development of best practices.

Although this author holds out hope for standards such as the EPs, the implications this paper draws for the role of market-based "new governance" mechanisms in promoting CSR are nevertheless mixed. Certainly, banks' willingness to proactively engage with environmental and social risk factors and better-disclose their activities to stakeholders—all without state supervision—is a positive development for corporate governance. And the GRI's improvements to reporting transparency, consistency and comparability suggest that voluntary standards can, when designed properly, make a major contribution. Yet the EPs' results, at least with respect to publicly-disclosed compliance, suggest caution in relying too heavily on a principles-based, voluntary approach to regulation. Until all EPFIs report at higher standards (for instance, those shown by Millennium and Industrial Bank in their reports), there is certainly a role for other regulatory approaches—particularly mandatory rules and disclosure requirements—for mitigating the agency problems associated with disclosure in environmentally- and socially-sensitive project finance operations. However, the debate between "new governance" approaches and traditional, legal forms of regulation should not be "all-or-nothing." Rather, interspersed market-based and governmental efforts at tackling social and environmental risk—areas increasingly of both private and public concern—may present the best opportunity for promoting sustainability going forward. It is hoped that the EPs, and like mechanisms, will increasingly have a role to play in this framework.

Current Practice:
What Informs the Development Dimension at the WTO?

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Please see separate document on the USB

Marrakesh Agreement establishing the World Trade Organization (WTO) recognizes the "need for positive efforts designed to ensure that developing countries, and especially the least developed amongst them, secure a share of growth in international trade commensurate with the needs of their economic development."

While some 75 percent of WTO members currently are developing countries, the promises of welfare gains from trade liberalization have not materialized for many of them or have been much more modest than anticipated in the 1990s. More recently, the failure of the last several WTO ministerial meetings and the limited progress made in the ongoing Doha Development Round have brought into the limelight the complexity of the relationship between trade liberalization and development in the multilateral system.

To date, there has been no integrated or systematic legal framework to accommodate developing countries' needs in the WTO legal regime. Instead, exceptions to the general rules and disciplines provide some measure of flexibility for developing countries (dubbed "special and differential treatment," SDT). Is piecemeal and ad hoc approach is now clearly showing its limits. Multilateral negotiations over the past decade have been unsuccessful, with the WTO increasingly becoming associated with public protest rather than with the fruitful steerage of international trade. Regime established by the Uruguay Round is still very much unfinished business. Moreover, developing members have now gained a blocking power, in political terms, at the WTO. Yet members still shy away from the broader issue of the relationship between development and trade liberalization, preferring technical fi xes instead. Today, a reconsideration of the legal implications of development issues within the organization is all the more pressing to ensure the continuity of the multilateral trading regime.

HUMAN RIGHTS AND BUSINESS LAW IN THE AFRICAN CONTEXT

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The issues of human rights and business law are very important for underdeveloped countries, equally, if not more, for Africa is becoming a destination for foreign investment, private and public. Current performance of the African economy, which occurs in a context of crisis and financial market internationally, is very attractive to international investors. During the last decade, emerging economies are competing to become one on the most country investors in Africa.

The interface between business and society has been framed predominantly in such terms as business ethics, corporate social responsibility, corporate environmentalism, and sustainable development. However, an increasingly prominent debate is emerging around business and human rights. These discussions are not limited to identifying human rights merely as a moral framework for voluntary corporate citizenship. Rather, the debate turns on the extent to which international and national human rights law is applicable to private sector companies.

Meanwhile, in Africa there is an ongoing process of integration and harmonization of business law, to attract investors and transnational companies. Therefore, seventeen African countries have signed the OHADA (the Organization for Harmonization in Africa of Business Laws) Treaty, in October 1993, and the first uniform laws ("Acts") adopted pursuant to the OHADA treaty came into effect in 1998.[540] All the OHADA State's members have also signed the African Charter on Human and People's Rights, which is intended to promote and protect human rights and basic freedoms in the OAU's member states.[541]
In contrast with the prevailing trend at the time of its adoption, the African Charter on Human and Peoples' Rights clearly recognizes the indivisibility of human rights, and enshrining economic, social and cultural rights together with civil and political rights and collective rights. In addition to such cross-cutting rights as the rights to equality and non-discrimination and the right to dignity, the African Charter guarantees the right to equitable and satisfactory conditions of work, the right to health, the right to education and the right to culture. It supplements these classic economic, social and cultural rights with such related rights as the right to property, the right to protection of the family, the right to economic, social and cultural development and the right to a satisfactory environment.

African human rights law and OHADA business law are two separate and autonomous international instruments resulting from the emergence of two parallel processes. It is therefore understandable that these two categories of standards initially maintain a

[540] The first 16 countries that have joined OHADA include Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Republic of Congo, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Ivory Coast, Mali, Niger, Senegal and Togo. The Democratic Republic of Congo joined on September 2012. Angola, Ghana and Nigeria are also currently debating whether to join OHADA - for a favorable approach on the debate
see Dany Houngbedji RAUCH, Ghana may opt for Harmonised Business Law, in African Business, Feb. 2003, Issue 284, p.36; John Ademola YAKUBU, Harmonising Business Laws in Africa: How Nigeria Can Benefit, This Day (Nigeria), 9/29/2004.

[541] The African Charter on Human and Peoples' Rights (also known as the **Banjul Charter**) is an international human rights instrument which came into effect on 21 October 1986.

relationship of cohabitation based around logic of juxtaposition and indifference. However, for both are legal orders open and flexible, their entanglement is possible.

The African Charter further subjected the aforementioned human rights to monitoring by the African Commission on Human and Peoples' Rights (African Commission) – an 11-member quasi-judicial body with promotional and protective mandates. Under its protective mandate, the African Commission is granted power to examine inter-state communications and 'communications other than those of states parties Based on the latter provision, the Commission established its individual communications mechanism, under which it considers claims of violation of rights by individuals, groups or their representatives in an adversarial procedure and issues authoritative findings and remedies.[542]

The protection of economic, social and cultural rights as substantive norms and their subjection to adjudicatory enforcement by the African Commission mean that the rights are generally justiciable. The establishment of the African Court on Human and Peoples' Rights (African Court) to complement the protective mandate of the Commission with a judicial mechanism of enforcement leading to binding judgments increases the justiciability of the economic, social and cultural rights protected under the African Charter. Although the Charter does not provide for an exhaustive list and content of economic, social and cultural rights, the authorization of the African Commission to draw inspiration from international human rights law and practice and the power of the African Court to enforce any relevant human rights instrument ratified by the states concerned may be used to close the normative gaps.

In describing the function of the OHADA Common Court of Justice and Arbitration, Article 14 of the OHADA Treaty states "The Common Court of Justice and Arbitration will rule, in the Contracting States, on the interpretation and enforcement of the present Treaty, on such regulations as laid down for their application and on the Uniform Acts." According to paragraph 2, to realize such a function: "The Court may be consulted by any Contracting State or by the Council of Ministers on all questions falling within the field of the preceding paragraph. The right to request the advice of the Court is recognized to the national courts when hearing a case in first or second instance where the application of OHADA law is concerned. With reference to the authority of the CCJA jurisprudence Article 20 of the OHADA Treaty states: ''the judgments of the Common Court of Justice and Arbitration are final and conclusive… In no case may a decision contrary to a judgment of the Common Court of Justice and Arbitration be lawfully executed in a territory of a Contracting State."

This paper will make an accurate account of the forced cohabitation between human rights and business law in the OHADA space and the nature of this cohabitation. It sounds necessary to understand this relationship in terms a dialectical tension which implies, from an analytical approach, to determine the state of cohabitation (I) the prospects for better cohabitation (II), before to conclude on few requirements for Africans law schools to use human rights and business for teaching (III).

I- OHADA and Human Rights: a state of cohabitation

The logic of cohabitation between human rights and OHADA law is a logical juxtaposition or indifference because as its name suggests, the Organization for the Harmonization of Business Law in Africa is in principle intended to deal with issues of trade and economic activities. The human rights are by definition excluded from the scope of subject matter

[542] Sisay, 2011

jurisdiction. This exclusion, however justified in principle unfortunately, can be a source of contradiction and conflict between the two sets of norms.

Public international law knowing the principle of strict interpretation of the competence of international organizations, the competence of the OHADA cannot in principle be extended to areas other than those covered by the Treaty which established the organization. Thus, for the purposes of this Treaty, Article 2 states "enters the field of business law the set of rules relating to company law and the legal status of traders, to debt recovery, to collateral and enforcement, to speed recovery and business liquidation, the right to arbitration, labor law, accounting law, the right to sell and transport and other matter that the Council of Ministers decided, unanimously, to include the object in accordance with this Treaty ... ". It is therefore quite logical that in the same way that the Treaty, the subsequent Uniform Acts do not expressly refer to human rights. This is probably the same logic that governs the specialty of the Common Court of Justice and Arbitration in respect of human rights. As mentioned herein, the Common Court of Justice and Arbitration is the supranational judicial institution of OHADA, which major role is to provide common interpretation and application of the Treaty and the regulations made there under the Uniform Acts and decisions. The Court acts as a supreme court which has no jurisdiction to address the issues that are excluded from the Uniforms Acts.

Therefore, one cannot find any reference in cases so far rendered by the CCJA to fundamental human rights. Yet mutatis mutandis placed in the same situation, the European Court of Justice has contributed to the affirmation and protection of human rights by linking them to the category of general principles of community law.

The risk of conflict between the OHADA law and human rights normative principles included in the African Charter on Human and Peoples are potentially numerous, given the differences in the nature that characterize the two set of rules. To illustrate this phenomenon, we can illustrate with some potential matters of conflict between the principles of human rights and the rules of OHADA.

A first hypothesis is the discordance between Articles 2 and 3 of the African Charter on Human and Peoples' Rights and Article 69 of the Uniform Act relating to general commercial law. Articles 2 and 3 of the African Charter states the principle of non-discrimination in these words "*Everyone has the right to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter, without distinction of any kind [...], including property, birth or other status* ". Article 3 states that " *Every individual shall be equal before the law. All persons are entitled to equal protection of the law.* " In contrast to those provisions, Article 69 of Title I of the Uniform Act related to general commercial law dealing with the scope of the commercial lease provides: "*The provisions of this title shall apply in cities with more five thousand inhabitants, all leases on buildings falling within the following categories:*

1) local or commercial buildings, industrial, craft or professional;
2) local accessories dependent on local or a commercial building, industrial, craft or professional, provided that, if such premises accessories belong to different owners;
3) bare land on which were built before or after the conclusion of the lease, buildings for industrial, commercial, craft or professional, if these buildings were raised or operated with the owner's consent or knowledge. ".

While Articles 2 and 3 of the African Charter affirms the equality before the law and equality of conditions that pass through the uniformity rule "the law must be the same for all" because all individuals are equal in essence and should be treated in the same way, Article

69 on the scope of the commercial lease just break the uniformity of the rule, in reserving the provisions of commercial lease only to counterparties residing in cities of more than five thousand inhabitants. As can be seen, this provision produces discriminatory effects that are contrary to the spirit of the principle of equality affirmed by all international instruments for the protection of human rights.

A second hypothesis is the apparent contradiction between the so called simplified procedures recovery procedures of OHADA, specially the procedure of injunction in which, at the start, the debtor who is accountable to the justice does not to be present to the trial. It is only after having been ordered to pay or to restitute or by the way of opposition when he did not default, that he will be allowed to participate to the procedure. Those procedures may be seen as unfair according to the principles of human rights like the rule of adversarial trial.

Finally, we can mention to decry the practice of forced executions in OHADA law which are essentially unfair and undermine, beyond the right to peaceful enjoyment of possessions, major fundamental right as the principle of the dignity of the debtor.

It is known that the OHADA has a value above any national law legislation and has to prevail in case of conflict since, under Article 10 of the Treaty, "Uniform Acts are directly applicable and binding in the States Parties notwithstanding any contrary provision of law, enacted before or after." As a matter of fact, the CCJA have had the opportunity to clarify the scope of Article 10. In an advisory opinion of April 30, 2001, at the request of the Republic of Côte d'Ivoire on the effect of repealing the Uniform Acts on the law, she admitted that "... Article 10 contains a rule of supranationality because it provides for direct application Uniform Acts in States parties and establishes, moreover, their supremacy over the provisions of domestic law before and after ".

Nonetheless the value of OHADA law is questionable, especially when one comes to compare it to the preeminence of human rights enacted by the African Charter. It is difficult to agree with the CCJA over this scope it gives to Article 10 of the OHADA Treaty and especially its definition to the notion of supranationality in the context of this article. In international law, supranationality means more a mode of organization that fits over the Nations which compose the hierarchical position and not a value of a standard against another. Thus, the European Community can be considered as the supranational pillar of the European Union.. In Africa, we can mention as an example the process that led to independence after the creation of the Customs Union of Central African States (UDEAC) with regard to the African sub-region later became Central Economic and Monetary Community of Central Africa (CEMAC). Therefore, the rule of law can only be the result of supranational organization which it proceeds. Unfortunately, this is not the case with OHADA that in its current state is far from being a community organization; then its law cannot be described with a community primacy effect. It is a common law applicable to the territories of States Parties and not the constitutional law of the Member States. Therefore, on can argue in favor of the primacy of human rights against the rule of law supposed OHADA. Assuming that Article10 of the OHADA Treaty has a truly pre-eminent supremacy can it prevail over the rights of man? There is way to reply by a yes. On the contrary, if there is a rule that takes precedence over the other, it is that of human rights as universal ethical values must necessarily come before market values they can serve as a spur. Moreover, one can relate to the constitutional block which includes the principles of constitutional value related to the protection of fundamental rights.

As we can see in this brief update on the state of the relationship between human rights and OHADA law, essentially based on the logic of indifference and juxtaposition, this can only

lead to a tumultuous cohabitation. Therefore it is interesting to develop for the prospects of a new form of more harmonious cohabitation.

II- Human rights and OHADA law: prospects of cohabitation

According to postulate the rule of law that OHADA law aspires to realize, the judge and the legislature are two main architects of the recognition and consecration of human rights. The Judge and OHADA legislators does not derogate from the rule of law especially in a context marked by the will of the founders of the organization to now open to the perspective of human rights.

Common Court of Justice and Arbitration may dispose of the principle of specialty of the international organizations, based on a non-contentious jurisprudence of the International Court of Justice, and by drawing on the methodology used by the European Court of Justice (ECJ) , to affirm and recognize the human rights in the OHADA law and cases.
This recognition is all the more possible that many of the rights are related to trade and economic activities. These include second-generation of rights related essentially on economic and social rights. CCJA can therefore, like the ECJ, reattach the principle of the protection of human rights within its jurisdiction to the category of general principles of law uniform. To paraphrase a jurisprudence of the ECJ, "fundamental rights would be part of the general principles of law whose CCJA ensures. In this regard, it would draw from the constitutional traditions common to the Member's States and the information supplied by international treaties for the protection of human rights which the Member's States have signed or cooperated.

Furthermore, the African Charter in this regard would be of particular significance. Fault for the organization to adhere to the African Charter in the light of the debates in Europe by the prospect of recognition, the OHADA legislators may also be based on a different logic, that the adoption of an original image of the Charter of Fundamental Rights of the European Union, which will better define the core values which are attached Africans in an organization in which the rights of rights and fundamental freedoms are gaining from the revision of Quebec, a new dimension ie the base of a democratic political space now. Indeed, this requires opening new OHADA pending the advent of a possible Charter of Fundamental Rights, to conduct already policy or rather concrete actions in favor of human rights and freedoms. These are opportunities for recognition of issues remains carriers for both human rights and for the OHADA law.

If you think the OHADA law and human rights must be interdependent, it means that the OHADA law may well be enriched by the progress of human rights especially with regard to the rules of fair trial in which it so badly needs. According to the principle of fair trial stated in international instruments of protection of human rights that are the major International Covenant on Civil and Political Rights, the European Convention on Human Rights, the American Convention of Human Rights and the African Charter on Human and Peoples' Rights, "everyone has the right to have his case heard fairly." The idea of equality of arms and adversarial principle that is often lacking in litigation within OHADA, reflects the spirit in which it is considered a fair trial. It "requires that each party must be present at all stages and at all stages of the proceedings and the trial, was offered a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage relative to his opponent. "

As the adversarial principle, it involves beyond equality of arms, the active participation of stakeholders in this process upstream of the judgment. And the fairness of the trial should

not simply be limited to the procedural phase, it must also extend to the phase of execution of court decisions from the famous Hornsby v. / Greece on 19 March 1997, been affirmed as a fundamental right. However, if we know how the breach of a court order can only frustrate the party in whose favor it was made, the more we know better than the execution abuse of a court decision may frustrate more the person against whom it was made. Yet there are some risks that exposes the parties at trial, the procedural rigor of OHADA law contains a rigor that militates clearly in favor of the interests of creditors and investors, and certainly violates the constitutional principle of respect for human defense that involves the French Constitutional Council as "a fair and equitable balance guaranteeing the rights of the parties." But legal and judicial rigor can also be an asset for human rights who have a low level of protection in the OHADA.

The protective device that provides the system with the African Charter rights suffers from a deficiency. It is a little device that relies on a sophisticated African Commission on Human and Peoples' certainly very active, but is and remains a non-litigation mechanism, but also and especially on a process of judicialization stammering with Court African Charter of Human and Peoples' almost stillborn that since she took office, has delivered its first judgment on jurisdiction until 15 December 2009, and it is not sure she to make others as Ouagadougou Protocol adopted in 1998 and entered into force in 2004, which was created four years later repealed by another protocol adopted by the Member States of the African Union on 1 July 2008 Although not yet in force, but already merged African Court of Human Rights with the Court of Justice of the African Union African Court of Justice and Human Rights as an principal judicial organ of the African Union. The new Court will have only a single section of human rights and peoples. It is therefore not an exaggeration to say that in the African system for the protection of human rights, the judicial guarantee is practically in a hypnagogic state (state of virtual hallucinations that occur during sleep). However, alongside this state of torpor in which bathes the African Court on Human and Peoples' reign in the OHADA a judicial mechanism perfected and proven effective. This is the Common Court of Justice and Arbitration, which has important prerogatives in advisory and contentious in that it is "the guardian of the proper application of uniform and speedy trial." Is original jurisdiction whose development can be measured through its features and functions, but also in terms of the efficiency of its judicial decisions. With regard to its characteristics, the Court presents four specific traits. Its jurisdiction is compulsory (it does not need to be accepted) and exclusive materials assigned. It can not under penalty of denial of justice refuse to rule. Its mission is to ensure the effective respect of the interpretation and application of uniform law. Moreover, access to the Court is not only reserved to the States, but also to the parties to the proceeding. Be finally referred by a national court of cassation hearing a case related to the application of the uniform law of OHADA law.

The point of view of its powers, the Court may in the dispute over the interpretation and application of the Treaty and advises. It can also be entered in the Litigation Uniform Acts. In this case, it acts as a court of cassation case because when the contested decision, it refers the case and rule on the merits.

Finally, judicial decisions are not only binding on the parties but also enforceable throughout the geographical area of OHADA. Equipped with these resources, the Court of Abidjan since she took office, a secreted abundant jurisprudence that allows it to play its full role in the legal integration. Assuming for a moment that this harmonized system of protection and credit guarantee and investment is a little time is put at the service of human rights in the OHADA. It would fill no doubt all structural deficiencies plaguing the African system for the protection of human rights which have been identified above. He would bring consistency and efficiency as it lacks.

II- Teaching human rights and business law in Africa

As can be seen in the precedent chapters, the human rights in Africa and the OHADA business law indeed coexist in the same space, not only geographical but also legal. They did not, however, have the same trend up to compete at a given time. However, we must recognize today that they are in a relationship showing forced complementarily. While human rights were originally carrying non-market values, they also progressively incarnated market values gradually joining the business law.

Informed by the conceptual underpinnings provided by the UN Framework and Guiding Principles on Business and Human Rights and the practical experience of companies trying to manage human rights impacts, more and more individuals in the private sector, government and civil society are grappling with the full range of human rights issues touching all business activity and relationships.

Demand for university and professional business and human rights education is growing. The number of courses has increased significantly in the past decade, with the subject now being taught at business schools, law schools, and schools of public policy worldwide. A market for corporate training has formed in the wake of the unanimous endorsement of the UN Guidelines by the UN Human Rights Council last June.

At the international level, the Universal Declaration of Human Rights was adopted by the UN in 1948, at the initiative of René Cassin. There was a kind of non-hierarchical recognition of the rights of so-called "first generation", the Civil and Political Rights, the first obtained knowledge liberties against the government. The globalization movement has subsequently lead to a disruption of this recognition by providing value to the economic, social and cultural rights. A "second generation" occurs that states must ensure materially.

Investors tend to view doing business in developing countries a potential risk. Although each investment decision entails taking risks, there are always some standards of protection – physical and legal – that the host state must comply with toward the potential investor. But when law is considered so obsolete to fit into the new environment in which it now finds itself operating, and its effects unpredictable, the secured environment for attracting such investment is rather unachievable. There has to be a better suited legal environment, hence a legal reform, in order to achieve this objective.

The rule of law, a prerequisite to a sustainable development is somehow a truism that has been around for many decades. Literature abounds in this sense and gives to today's initiatives a feeling of replica of past policies. The early 1980s has also been a period when international financial institutions were very active to push for law reforms, especially in developing countries, as conditions for continued financial assistance. The phenomenon of "globalisation" met by the surge of regional trade alliances, came to add a pinch of salt in the debate, and the felt need for (developing) countries to integrate their economies into the global market considerably accentuated the postulate of development through law.

It is in this line that some African countries, at the dawn of the 1990s, felt a need to "modernise" their legal systems for the major part inherited from colonialism and which no longer suited the challenges of the – our – time. Conscious of the power of law to bring development and the desire to attract both national and international investments, the idea would soon translate into the creation of a supranational body empowered to initiate this law reform across member states.

The Organisation for the Harmonisation of Business Law in Africa – OHBLA – (known by its French acronym OHADA – *Organisation pour l'Harmonisation du Droit des Affaires en Afrique*) is created by a signed Treaty of fourteen African States in Port-Louis, Mauritius, on 17 October 1993. As the first initiative to harmonise laws in Africa,the idea behind the creation of OHADA sprang from the political will to strengthen the African legal system by enacting a secure legal framework for the conduct of business in Africa, which is viewed as indispensable for the development of the continent.

Furthermore OHADA is described as a "legal tool thought out and designed by and for Africa to serve the purpose of regional integration and economic growth on the continent".

The Organisation for the Harmonization of Business Law in Africa – OHADA – is today comprised of sixteen (16) African states from West and Central Africa. The aim, as spelled out in the Treaty, is to harmonise "business laws in the Contracting States by the elaboration and adoption of simple modern common rules" and to promote arbitration as a means of settling contractual disputes. The rationale for creating this Organisation came from the idea that the African continent needed a strong and secure legal system that would serve as engine for its development. This reform could also be credited to local traders' impetus to see their investments secured by getting rid of outdated laws, which securitisation would in turn be conducive to investment, especially foreign investments. In order to achieve its goals, OHADA issues unified legislation in the forms of Uniform Acts on several areas of business law.

Membership to the Organisation reflects a common tradition at least in two respects. First of all, with the exception of Equatorial Guinea (Spanish), Bissau-Guinea (Portuguese) and the English-speaking Cameroon, all Member States share the French language in common as their official language. Secondly they all, except again the English-speaking part of Cameroon where English Common Law applies, share a tradition of Civil law inherited from their former colonial masters. The overall aim of the "harmonisation" is to create a secured legal and judicial framework for an efficient conducting of business or economic activities that will in turn enhance competitiveness, hence economic growth. It ensures a level playing field for traders (individuals or firms) operating in each territory of the Member States by getting rid of domestic laws peculiarities.

The current relationship between business law and human rights allows going in the direction of complementarity which is based on the principle of the indivisibility of human rights. Categorize these rights rights first, second or third generation to put them all at risk. Confront them to the reponsibilty of investors and corporations in the current context of Africa.

The purpose of the OHADA is the development and adoption of common rules, simple, modern and adapted to the situation of the economies of member states. These rules remain in any case confined to business law in the strict sense or a broad and extensive business law, limited the right of economic activities.. No mention or reference, be it remote is made in the Treaty and the Uniform Acts for Human Rights. Both materials have not only separate but also and especially the law of the OHADA business is limited, while the human rights have a scope stretch to infinity.

Indeed, one can welcome the inclusion in the Preamble to the Treaty amending the Treaty on the Harmonization of Business Law in Africa,in a new direction.. It is obvious that the Preamble of the OHADA Treaty is not binding as well following the international order in the domestic law of States Parties. However, it is possible to read the Preamble giving it all the

meaning it has in the understanding and interpretation of OHADA Treaty. In this respect, the legislature, under the limited scope of the OHADA could not put this desire to better take into account the standards of human rights. Adequate progress towards democracy will surely be kept as the ultimate goal in the drafting of the Uniform Acts.

The proof of this fact lies in a single instance. Indeed, the OHADA soon govern labor law of 17 States Parties. This new field by itself lead to enormous consequences in terms of the connection between business law OHADA and basic standards of human rights. Some questions of labor law are inseparable from the fundamental rules of law recognized in humans.

What should the judge of the OHADA CCJA when a dispute before working relationship that brings together various issues that one or more human rights (violations of human rights in labor relations)? This is the case where questions of dismissal for economic reasons invoked simultaneously by one party while the other claims to be a victim of discrimination. OHADA law work can make a headlong on issues as intertwined. Gymnastics that cause such exclusions will be detrimental to the effectiveness of CCJA and harmony of the entire judicial system set up under the aegis of the OHADA.

Issues that the right to strike cannot hide in the labor relations disputes OHADA consubstantially but are also related to the fundamental right of association is recognized by all international instruments on human right. These issues become even more complicated strike within OHADA when viewed under the guise of a key principle of public law such as the continuity of the public service.

Repressive control and / or administrative procedures for unfair dismissal or other labor relations procedures previously reserved in most countries the competent administrative authority.

Corruption has rightly been described as the evil that prevents OHADA take off. She noted that governance issues are wider at the crossroads of OHADA and can not be returned indefinitely indefinitely. We can develop business rules without thinking about its endemic evil of corruption. Corruption and Business Law return without hesitation sanctions, excluded from substantive jurisdiction of OHADA. Many United Nations instruments address issues of corruption and other transnational crimes in the field of business law and could inspire the legislature of the OHADA. These transnational crimes back in the regional context of the OHADA push to turn thinking of some fundamental human rights to see up closely.

Finally, it is possible that issues of social responsibility (CSR) are obscured at present by the legislature of the OHADA. Foreign investors are subject to the rules simple, modern and attractive. The meeting point of business law and human rights is inevitable CSR. Several instruments can be of help at this level though seems to be the most successful at present the Report of the Special Representative of the Secretary-General of the United Nations on issues of human rights more usually known under the name of Ruggie report. Like it or not, the Organization should seriously consider whether to bring in the covered area and with other community groups with economic or not to establish a non-optional CSR.

All these considerations are just highlighting the urgent current OHADA integrate considerations of human rights. An angle futuristic, it is also possible to predict the urgent need to develop one or more other Uniform Acts emerging business law because of the necessary coexistence of two domains els purpose of the present study.

In view of the foregoing, certain areas of business law should be subject to a future interest of OHADA it is true that the organization intends to contribute to African unity.

Links identified between business law and human rights have largely focused on procedural issues. The study of the OHADA Uniform Acts reveals a multitude of procedures laid down in each of them. The current and possible violations of fundamental rights are raised mainly in the course of the special procedures of OHADA. The difficulty is compounded by the proliferation of such procedures which follow no single guideline. In the context of a stronger necessary relationship between these two areas and taking into account the rules of human rights law in the OHADA business, which would be a preliminary step in the development of the OHADA Uniform Act procedures that would include all the general principles applicable to proceedings OHADA.

Achieving the goal of rule of law and strengthening of democracy is also an explanatory factor that requires the OHADA emancipated and integrates the principles of equality, conduct a fair trial which he can not divest.

For example, the adversarial principle which is sometimes lacking in the procedures of OHADA law is an integral part of the right to a fair trial and needs to be better assimilated into the legal corpus OHADA. According to this universal principle, "Everyone has the right to have his case heard fairly" and the communication of any document to all parties before the instance is a requirement as well as the opportunity for all parties to present a defense free no disadvantage compared to his opponent.

Procedural fairness about it is not limited merely to the stage of the proceedings, but it also extends to the phase of execution of court decisions. Procedures for enforcement of OHADA law in this regard are numerous flaws that harmonious coexistence with the standards of human rights.

Therefore this justifies the shift we can develop in our teaching about passing from reciprocal autonomy of the two materials to their cohabitation as required. This change is effective when it is placed before the advent of OHADA. Since the advent of OHADA, a sort of competition pulling a contradiction between the norms of business law and human rights seem to grow. It interferes in linear relationships and singling them or rather more complex. Much like the corporate responsibility function within a company, which can reside in many different places, there is no clear home for “business and human rights” in the university curriculum. At law schools, it may overlap traditional international and corporate law classes. At business schools, it may be viewed as a module within an ethics or sustainability track. Professors note the lack of a clear academic home as an obstacle to developing new courses, despite strong student interest in the subject. Companies are now considering what role in-house training should play in corporate efforts to meet their responsibility to respect human rights.

Selecting topics is a challenge for teaching such a broad-ranging subject. Most courses cover some combination of: historical perspectives, core principles, standards and institutions, case studies and current issues. Course scope, naturally, is a function of the instructor’s background, student perspectives, and class format. The course structure may define business and human rights within corporate responsibility; human rights standards; tools for corporate accountability; and corporate human rights best practices. It will be designed to introduce business-oriented students to international human rights standards while forcing human rights students to think like business managers. Other approaches emphasize trade and policy dimensions, and take up specific issues, such as human rights impacts on vulnerable population

The pool of teaching materials is expanding, but the definitive business and human rights textbook has yet to be written. Creating a shared language is a key challenge for practitioners and teachers alike. Human rights concepts are unfamiliar to most business managers, while corporate terminology is foreign to most advocates. Courses rely on a dynamic mixture of international legal and voluntary standards; corporate, NGO, government and international organization reports; legal proceedings; case studies; secondary sources; and selections from a burgeoning academic literature. Assembling and re-assembling one syllabus with such a rapidly developing discipline.

Business and human rights students tend to be a diverse group, from many countries with a wide range of professional experience. Teaching an emerging, multi-disciplinary subject allows for creative pedagogy. Many instructors are experimenting with alternatives to traditional lectures and classroom discussion, such as simulations, role-playing exercises, debates, teamwork and clinical approaches. Professors are sharing comparative teaching strategies for different students in different geographies. Corporate training will produce even more customized approaches.

With strong student demand and greater attention in emerging markets to the business and human rights nexus, there is an opportunity to develop new courses in African universities. Business and human rights education should be a part of curriculum development assistance between universities. Experienced teachers can assist faculty teaching the subject for the first time. Local research and teaching will strengthen the field as an academic discipline.

The Challenge of Multiculturalism and the Problem of Human Security in Modern Russia as the Subject Matter of Teaching Human Rights in Russian Universities

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Modern Russia is included into global and economical life. Last decade demonstrated the intensive social and cultural diversification in Russia, consolidation of different social, educational, professional, ethnic and religious groups. It shows the rise of cultural polycentrism of the society. The last determines the existence of social discontent in some sectors of the life of society.

The presence of different cultural features inherent in the cultural groups, certain cultural identity was never been argued among Russian scholars in the Law Schools. Existence of cultural distinctions with the inevitability determines not only various social and psychological estimations, not only the philosophical reflection pushing the problem of the cultural variety in a zone of the analysis, but also this topic becomes a subject of political debates and demands the necessity of legal regulation at the national level.

The development of the Civil society in Russia makes the topics of Multiculturalism and Tolerance, Loyalty, Trust, Obedience to Law, Human rights, Political Justice to become the key issues in the discussions of the political and legal aspects of the problem of Multicultural citizenship and Pluralism in Russian Federation. These topics are interdisciplinary and are included into political and legal discourse. During last years they were included into the curriculum of the Law Faculties. New Master Programs in teaching the Human Rights were opened. The first one – at Herzen State Pedagogical University, faculty of Law (in 2008).

Multiculturalism brings the recognition of the richness of cultural resources of various unequal ethnic, religious, gender and other groups. Positive solutions of these political and legal problems promote the new achievements of the Civil society , the removal of interethnic, social, political and spiritual intensity in Russia. It brings the establishment of human security of a citizen as a human being in Russia, helps Russian Legal system and political institutions to be in consensus with the Civil society in Russia and the traditions of the civic life of the Western countries. The implementations of the norms of the International Law into the Russian Legal system brings Russia closer to the norms (legal, political moral) of life of Europe, USA, Canada and other intellectually and politically developed countries. Teaching of the Human Rights at the Law Faculties helps to develop the high level of the legal culture in the society, because the former students are hired by different governmental, municipal, political and legal institutions. They are working as the lawyers in the private firms and governmental institutions, as civil servants, school teachers, journalists and politicians, and etc.

Law students can see that the dispute on the rights of minorities and various political actions in the sake of their protection comes to the opening of actual discussions in Russian political and legal academic circles on the legal status of citizens and their various categories, especially, with reference to their rights - educational rights, labor rights, political, social, cultural rights of different categories of Russian citizens. These are the typical problems arising through the discussion of a problem of social and political justice, the problem oh the Human rights in Russia . These problems are the subject matter of the mandatory and optional courses not only at the Master level, but also at the Bachelor's education in Russian Law Faculties.

Teaching Human Rights at the Faculties of Law, the justice issues as the subject matters of the Russian Theory and Philosophy of Law is the real center in the circle of different problems connected with the Civil society, the citizens, the state. These problems

gradually became urgent for the Russian society and the Russian Legal education. The situation is determined by the essential role of the Human rights in Russia. The protection of Human rights is the basement for the establishment of Human security in Russia. It serves as a factor of sustainable development in Russian society.

Modern sociopolitical and economic transformations in Russia converted to be the catalyst of occurrence of "ethnic question" at all levels of public life. Lately there was a rapid growth of national consciousness of Russian and non-Russian population. It is expressed, first of all, in definite requirements of national-cultural autonomies, and also shows the essential change of the character of relationship between ethnic groups, ethnic minorities. Actualization of the national and religious consciousness in Russia during last two decades could be named as a sort of explosion. It demonstrates the existence of the new political realities in modern Russia and of complicated processes of the economical and political modernization in a society. They could be estimated as powerful factors of the influence on the youth and Russian students. Including into the political and legal discourse the question of Human Rights, the problem of the political and legal control of the multicultural space of life of Russian citizens and non-citizens became actual in modern Russia.

It is important to mention that during last 10-15 years Russia became a multicultural society without a multicultural ideology. Ethnic minorities due to intolerance of some youth groups and the psychological attitudes of the adults feel and understand their own human insecurity. Xenophobia level unfortunately in public consciousness is still high.

Moscow and the Moscow region are the leaders in displaying of the national hatred , on the second place - Ingushetia ; further follow St.-Petersburg , Republic Kalmykia, the Nizhniy Novgorod region, Rostov-on-Don , Irkutsk region , Leningrad region, Stavropol region, Vladivostok ; Barnaul, Ufa, Orenburg, the Arkhangelsk region, Republic of Dagestan , Voronezh , Ekaterinburg and Sverdlovsk region, the Chelyabinsk region , Volgograd, Krasnodar, Lipetsk, Saratov and the Saratov region ; Khabarovsk ; Arkhangelsk, Samara, Krasnoyarsk, the Tver area, Khasavyurt; Vladimir, Ivanovo, Tomsk, Kostroma and Izhevsk); the Volgograd area, Omsk, Yaroslavl, Perm, Orel, Murmansk, Novosibirsk and Kaliningrad .

Such international legal documents as “the UNESCO Declaration on Race and Racial Prejudice” (1978), “the Convention on the Elimination of All Forms of Racial Discrimination” (1965), “the Declaration of Principles on Tolerance” (1995), “the Declaration on the Elimination of All Forms of Intolerance Based on Religion or Belief” (1981), “the Convention on the Elimination of All Forms of Discrimination against Women” (1979), “Vienna Declaration and Program of Action” (1993) are aimed to protect the human rights, including the rights of the national minorities and are approved in Russia. Russia tries to follow the norms of the International Law and improves the national legal norms. But this process is not very quick and is very complicated. But the progress in that direction is obvious. The studying of these documents is included into the class work with all categories of law students.

The strengthening of the activity of the law machinery in the sphere of struggle against xenophobia is observed recently. According to statistics data the number of the considered affairs and the persons involved in the criminal liability increases from year to year. The Criminal Law of the Russian Federation includes a number of articles touching the phenomenon of xenophobia.Another important phenomenon need to be mentioned. The new economical and political problem appeared in Russia during last two decades. Russia became attractive to the millions of migrants from the former Soviet Union, who are mainly Muslims. There are a lot of Chinese migrants too in Siberia and some big cities, including Moscow and St.-Petersburg. The increasing of cultural diversity of Russia could be named as the development of multiculturalism. Russia need to deal with this reality. The development

of the ideology of multiculturalism is the item of the political program of many civic institutions and movements. And multiculturalism is also taught at all Russian Law Faculties.

During last years the Russian Federation has continued to pay attention to the protection of the rights of national minorities, and some subjects of the Federation have taken steps on fastening of the existing federal norms directed on the protection of minority. A number of programs directed to the development of tolerance and cross-cultural interaction has been developed. There are periodicals in languages of national minorities in the majority of subjects of Russian Federation. However, the position of representatives of national minorities has gone through some regressive changes. Last years the growth of number of crimes because of racial difference has been observed, the number of intolerant statements rose in mass media.

Various political, civil and educational programs under the statement of tolerance and recognition the principle of multiculturalism as a political and a legal principle of a civil life in Russia are developing on a Federal, Regional and Municipal government levels of the Russia Federation. We see the signs of a strengthening of legality and the law and order. It provides a legal protection of representatives of the national minorities. However it is necessary to notice that in spite of the fact of the increasing number of applications of criminal penalty for the actions directed on stimulating of national, racial and religious hatred disturbing growth of quantity of such crimes in the Russian Federation is marked.

It testifies the increasing of Government's attention to this question. In Sverdlovsk region, for example, the program named «Development of the tolerant relation to migrants» has led to creation of the Council on tolerance. The Council has united representatives of some ethnic and religious groups, the scientific and regional authorities. Furthermore became more active the propagation of tolerance and human rights in school programs. Also the program of propaganda of tolerance includes preparation of teachers and the publication of the textbooks under the legislation in the sphere of Human rights.The considerable role is played by the educational activity addressed to all groups of the population: ethnic, racial, religious, and professional. For example, in Sverdlovsk region the TV program which devoted to a cultural variety of region is founded. The editorial council of the program is elected by the national minorities representatives.

Norms of the Russian legislation are directed to the struggle against racism and extremism. In the Russian Federation the Federal Law «About struggle against extremist activity» has consummated. The new law defines extremist activity either as violent actions against the state or as the kindling of racial, national or religious discord. Also the Law includes in this definition the kindling of social discord, connected with violence or appeals to violence, humiliation of national advantage; vandalism and mass disorders; propagation of exclusiveness, the superiority, or inferiority of citizens owing to their religion, social, racial, national, religious or language accessory, propagation and public demonstration of nazi and similar for nazi attributes or symbolics. According to this law the court can forbid media broadcasting or publications because of their guilty in distribution of extremist opinions.

It is possible to name the changes of a political and economic system, economy recession, manufacture decrease, reduction of workplaces as the reason of distribution of extremist movements. Destruction of united constitutional and legal space became the starting moment, and the occasion to creation nationalist, fascist, religious and similar formations and also the structures have risen on protection of interests of the population ostensibly. While a whole Russian situation in legal area cannot be recognized as satisfactory.

One of the ways of struggle against the negative public phenomena is a cultural and educational activity, civil-legal education of the youth. There are some regional programs. One of them is developed in one of the most multicultural city in Russia – St.-Petersburg. The Program of harmonization (how it is called) is directed on the aims of interethnic and intercultural relations, preventive maintenance of manifestations of xenophobia, tolerance strengthening in St.-Petersburg .Tolerance should be understood not simply as the tolerant relation to something to other, different from habitual to us. Tolerance assumes not only understanding, but also acceptance of the fact that the world around and the people occupying it are very various. Thus each ethnos is unique and unrepeatable. Only the recognition of ethnic and religious variety, understanding and respect of the cultural features inherent in representatives of other people and religions, in a combination to democratic values of a Civil society can promote creation of originally tolerant atmosphere of a life. It will create a real human security for all people of Russia. And this is the aim of the activity of every Law Faculty in modern Russia.

Teaching Human Rights on the Borderline between Trade and Arbitration

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Introduction

This paper discusses the changes that have occurred in the concept of the relationship between arbitration and human rights and highlights the transformation of the subject we teach, while using a topic that we deal with professionally as an example.

As a preliminary remark, it should be pointed out that we both specialise in the field of private international law and arbitration. We teach a separate course in international and national arbitration at the Faculty of Law of Masaryk University in Brno (Czech Republic).[543]

I. Arbitration vs. Protection of Fundamental Human Rights

Arbitration belongs among popular alternative methods of resolving disputes in national and particularly in international trade. It is also common in consumer law. An unquestionable advantage of arbitration lies, among other things, in its speed and the simplicity of the procedure. Arbitration is based on the principle of autonomy of the parties' will. Depending on individual doctrines, the latter principle substantially affects a number of procedural and other aspects: from the actual choice of arbitration and exclusion of jurisdiction of the common courts, to procedural acts, such as the choice of arbitrator(s), choice of the venue and language of the hearing, limitation of oral hearings, agreement with arbitrators on taking of evidence and, in certain cases, even the possibility of cancelling an award or choice of the duration of the proceedings.

However, we should ask whether these clear advantages, as mentioned above, have their limits. Or whether the limits that are regularly obeyed by (State) courts are excluded in view of the special nature of arbitration, since the choice of arbitration by the parties excludes jurisdiction of the common courts. Consequently, the limits in question are not those that follow from the nature of the case at hand or the ability of the arbitrator to pursue the proceedings expediently and rationally, but rather those that ensue from the right to a fair trial as one of the fundamental human rights stipulated in Article 36 of the Charter of Fundamental Rights and Freedoms, which is a component part of the Czech Constitution, and Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. From this viewpoint, there are several questions that could raise certain doubts. By way of example, we could refer to the issues of appointment of arbitrators, the existence of an exhaustive list of grounds for cancellation of an arbitral award, the possibility of not ordering an oral hearing, public pronouncement of a judgment, non-existence of remedies, etc. and the issue of the permissibility of an arbitration agreement as such. And there could perhaps be others. These include questions related to

[543] In view of the fact that investment arbitrations pursued between a State, on the one part, and a citizen of some other country, on the other part, have further specific features and thus require a somewhat different approach, this aspect is not discussed in this paper.

arbitral proceedings as a process and the need to respect a certain paradigm in the regulation of arbitration, and also cases where national courts perform their control functions, including the power to cancel an arbitral award, or recognise and enforce an award.

The relationship between arbitration and human rights is currently discussed primarily from the viewpoint of the Convention for the Protection of Human Rights and Fundamental Freedoms, to which the Czech Republic is a party. We shall discuss this aspect in the following part.

In concluding this introduction, we should briefly mention the approach of the Constitutional Court of the Czech Republic. The latter has dealt with the aspects of arbitration in a number of its rulings and resolutions. Conclusions that can be drawn in this respect and that could also affect considerations in this field are as follows:

1. Arbitration courts are not bodies of the State and thus do not share their nature with common courts[544].

2. In the vast majority of its rulings, the Constitutional Court of the Czech Republic has preferred the contractual doctrine by qualifying arbitral proceedings as a type of settlement (composition)[545]. Only in a single decision, which it rendered last year, did it refer to arbitration as an alternative to litigation and clearly adopted the jurisdiction doctrine[546]. In the former cases, it rejected the possibility of review also on the grounds that the parties had voluntarily "extricated" themselves from the powers of the common courts.

3. Suits filed with the Constitutional Court have so far been rejected. The grounds for rejection mostly lay in failure to use all other remedies[547], the non-public nature of arbitral awards or reasons related to the special nature of arbitration (cf. above).

II. Arbitration and the European Convention for the Protection of Human Rights and Fundamental Freedoms

The Czech Republic became a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms in 1991 (the Convention came into effect on 1 January 1993). The aspects of the relationship of "arbitration v. the Convention" lay outside the focus of attention for a long time. Older textbooks and courses dealing with arbitration completely ignored this issue. There were several reasons for this.

Earlier opinions were based on the concept of **full direct inapplicability** of the Convention to arbitral proceedings. Application of the Convention was dismissed on a number of grounds.

One train of arguments pointed out that an arbitral tribunal is not a court in the sense of the Convention and arbitration is therefore not covered by its scope. The Convention thus applies only to the State and its bodies and not to arbitrators.[548]

[544] Award IV. ÚS 174/02, Award II. ÚS 2164/10
[545] Award I. ÚS 533/10, Award III. ÚS 1425/09
[546] Award I. ÚS 3227/07
[547] Award III. ÚS 460/01

Another line of argumentation relied on the concept of "waiver of the rights contained in Article 6[549] of the Convention". Today the strict form of this argument is generally dismissed.[550] In interpretation of Article 6, the individual authorities tend to discuss which rights can be waived by an arbitration agreement and which not. And may we add – which rights can be waived tacitly and which knowingly. This debate is now augmented by the new approach to consumer arbitrations as arbitrations involving certain elements of protection. There can be no doubt that, if a certain party waives the right to judicial protection by entering into an arbitration clause, this party cannot thus waive its right to fair hearing of its case.

Arguments against application of the Convention also rely on the fact that the Convention is binding on States, specifically its contracting parties. They are deemed responsible if they recognise certain conduct as permitted although it is at variance with the law. At the same time, the Convention establishes a high standard of contractual freedom in waiver of rights.

In terms of international arbitration, we could also mention the difficulty of identifying the State to which the activities of an international arbitral tribunal can be attributed and the question of whether the country in question is, in fact, a contracting party to the Convention. Indeed, problems related to establishing the forum, de-localisation of proceedings, etc. can substantially complicate the qualification of the relationship of the country to the proceedings.

Of course, these considerations are not relevant for tribunals that *ex lege* replace common courts ("obligatory arbitration"). This was so, for example, in cases concerned with obligatory employment arbitration (*e.g. 37/2002, Menshakova v. Ukraine*) and other types of obligatory arbitrations (23465/03 Agrokomplex v. *Ukraine*). In this respect, we refer only and exclusively to those cases where there exists an arbitration clause and the arbitration as such is an alternative to litigation. Cases where arbitration tribunals are part of the justice system are not included. These cases are treated in the same way as court disputes and the European Convention is directly applicable to them *(8588/79, 8589/79 Bramelid and Malström v. Sweden*).

Recent studies show, and the decisions adopted confirm, that the earlier opinions on inapplicability of the Convention for the Protection of Human Rights and Fundamental Freedoms to international arbitration (meaning non-obligatory) are not absolutely unambiguous – there are certain overlapping aspects. This is true especially of the "indirect

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[548] Jarrosson, C.: L'arbitrage et la convention europ´eenne des droits de l'homme. Revue de l'arbitrage, 1989, 579 p. Poudret J.F., Besson, S.: Comparative Law of International Arbitration,. London : Sweet & Maxwell, 952 p. ; Lew, J. D. M., Mistelis L. A., Kröll, S. M.: Comparative International Commercial Arbitration. The Hague : Kluwer, 2003, 953 p.

[549] Article 6 – Right to a Fair Trial

Para 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

[550] Jaksic, A.: Procedural Guarantees of Human Rights in Arbitration Proceedings. Journal of International Arbitration, 2007, No. 24/2, p. 161. In similar terms, cf. also Robinson, W., Kasolowsky, B.: Will the United Kingdom's Human Rights Act Further Protect Parties to Arbitration Proceedings? Arbitration International, 2002, No. 18/4, p. 464.

impact" on arbitration. The latest decisions concerning the Czech Republic have actually quite a "deep" impact on arbitration *(e.g. 1643/96 Suda v. Czech Republic* and *7398/07 Chadzitaskos and Franta v. Czech Republic; among others, also 19508/07 Granos Organicos Nacionales S.A. v. Germany*).

The ruling in Suda was concerned with the aspects of arbitration in relation to exercise of the rights of minority shareholders. The applicant was a minority shareholder of a joint-stock company where the general meeting decided to wind up the company and transfer its assets to the main shareholder. The contract between the joint-stock company and the main shareholder established the value of the shares for their repurchase from the minority shareholders, doing so on the basis of an expert report. In addition, the contract contained an arbitration clause that exempted review of the settlement from the jurisdiction of the common courts. The possibility of undertaking review proceedings before arbitrators was permitted by the Czech Commercial Code in the wording effective at that time. The arbitration clause granted the decision-making power to arbitrators included in a list drawn up by a legal entity, specifically a limited liability company. Each of the parties to the dispute was to choose one arbitrator and, in turn, the two arbitrators would appoint the presiding arbitrator. The applicant resolved not to avail himself of the possibility to initiate arbitration and, instead, claimed review of the settlement before a common court. The court discontinued the proceedings with reference to the existence of the arbitration clause; this decision was later upheld both by the appellate court and subsequently by the Constitutional Court of the Czech Republic.

The European Court of Human Rights (hereinafter the "Court") admitted that Article 6 of the Convention does not require that the right of access to justice be exercised before a common (governmental) court that is part of the judicial system of the given country. It noted that, as indicated above, arbitration obligatorily required by the law could be deemed to be litigation in the sense of Article 6. Furthermore, Article 6 in no way prevents the establishment of arbitration tribunals and waiver by the parties of the right to a court trial in favour of arbitration. This is true provided that the waiver is free, admissible and unambiguous. The Court also stated that, in the case at hand, where the arbitration agreement had been entered into between a joint-stock company and the main shareholder, the applicant himself had not waived the possibility of referring the dispute to a common court and thus had not waived the guarantees afforded by Art. 6 (1) of the Convention. The dispute was also not concerned with obligatory arbitral proceedings. By turning first to common courts, the applicant gave the latter the opportunity to assess the validity of the arbitration agreement. Given that the common courts had confirmed the validity of the arbitration agreement and had discontinued the proceedings, the applicant was forced to pursue his case in arbitration. Had the applicant done so, he would have risked, in the Court's opinion, that the arbitrators entered in the list drawn up by a private company (and enforced on the applicant) could make a decision on the merits of the dispute. According to the Czech laws, a possible suit filed by the applicant with a view to cancelling such an award would be limited solely to procedural aspects and could not relate to questions of fact and law. The Court therefore concluded that the proceedings before arbitrators in the case at hand did not comply with the basic guarantees required by Art. 6 (1) of the Convention and infringed the applicant's rights to a fair trial.

And may we add that the Court also took into consideration that the provisions of the Commercial Code allowing for resolution of these disputes in arbitration had been repealed in the meantime. The explanatory memorandum for the given amendment indicated, among other things, the opinion of the Constitutional Court that, while review of settlement in arbitration was not directly at variance with the Constitution, this nevertheless was a questionable legal regulation. In its decision-making, the Court also took into account

Decision No. 637/05 of the Arbitration Court attached to the Czech Chamber of Commerce and the Agricultural Chamber of the Czech Republic, where the latter concluded that an arbitration agreement between a company and its main shareholder was not binding on third parties including minority shareholders.

In a later decision in Chadzitaskos and Franta v. Czech Republic, the Court referred to its ruling in Suda, which it considered the basis for a decision in this joined case in view of the similar facts of the two cases. This again involved settlement with minority shareholders who filed a suit with the common courts in spite of the existence of an arbitration agreement between the company and the main shareholder. The Court noted that the case at hand turned on the question of whether the applicants had access to proceedings that would provide the necessary procedural guarantees of effective and fair resolution of their dispute. The proceedings were to be pursued before arbitrators chosen from the list kept by a private company and according to the rules issued by this company. The arbitrator was to be chosen by the private company, where the criteria for including a certain person in the list of arbitrators and the requirements on the qualifications of the arbitrators were unknown. The hearing was to be closed to the public and, moreover, the tribunal would not be established by law. The Court reached the conclusion that a situation where private proceedings pursued by private natural persons according to the rules stipulated by a private company did not comply with the requirements for a fair trial, including independence and impartiality of the person rendering the decision. This shortcoming could not be remedied by the substantially limited court review.

The Court stated the above in a situation where the Convention itself does not refer to arbitration. The impact of the Convention on arbitration is a question that must be answered by interpretation of the Convention. The discussion is concerned particularly with the impact of Art. 6 (1).Today it is undisputed that the Convention applies to all auxiliary and control procedures that take place before State courts *(e.g. 10881/84, R. v. Switzerland)*. As far as arbitration is concerned, the shift in opinion which has occurred in respect of this question involves particularly the two following aspects:

- firstly, the State may not enforce an arbitral award that would grossly breach the requirements of Art. 6 (1);
- secondly, the State must adopt measures as to guarantee the requirements of the said article also in arbitration.

A debate could also be held on the impacts of other articles, particularly Article 8 (protection of private correspondence) and Article 1 of Additional Protocol No. 1 (peaceful enjoyment of property).

The shift that has taken place over the last decade in the mutual relationship between the Convention for the Protection of Human Rights and Fundamental Freedoms and arbitration is quite significant. A major breakthrough lies in the fact that basic limits have been established for application of the Convention. Future discussions will tend to focus on the practical application of individual articles and principles.

III. Conclusion

In conclusion, we can make two brief comments. The first is concerned with the relationship between arbitration and human rights. While it is true that, by execution of an arbitration agreement, the parties waive the right to judicial protection, it is not true that they waive the right to a fair trial. And moreover, it cannot be true that, in case of waiver of judicial

protection, the State may totally neglect the right to a fair trial. The questions of consumer protection in the Czech Republic and the outrageous cases that occurred in that area can be used as an example. However, it is worth noting that an amendment to Act No. 216/1994 Coll., on arbitration, reflected the requirements of European law, but did not take into consideration the Convention for the Protection of Human Rights and Fundamental Freedoms. Indeed, the Court's case-law clearly accentuates the requirement that the contracting parties secure the basic principles of fair trial, not only in proceedings before the common courts or arbitration tribunals with obligatory jurisdiction, but also before arbitration tribunals chosen voluntarily by the parties. This requirement applies not only to the process as such, but also to the procedure in waiving protection of rights before common courts and referral of this protection to arbitration. The consequences in instances where the State fails to meet such requirements were indicated by the above-described rulings.

The second conclusion relates to teaching of this subject. It is clear that teaching the subject of arbitration cannot be restricted only to regular topics, such as the doctrines of arbitral proceedings, analysis of the process of arbitration, methods of decision-making on merits of a dispute or the mechanism of recognition and enforcement of foreign arbitral awards. We should not neglect the overlapping aspects of commercial contractual relationships, arbitration and protection of human rights which affect a number of the aforementioned areas:

- the possibility of executing an arbitration agreement and impacts of an arbitration agreement on its parties and third persons;
- the duty of arbitrators and of the State to ensure equal treatment of the parties and adhere to the principles of fair trial in pursuing arbitration;
- reflection of the two preceding points in the aspects of enforcement of an arbitral award that was rendered contrary to the said principles; the possibility of cancelling such an award or refusing its recognition, including the argument of its variance with the public order (public policy);
- reflection of these aspects also in cases where the national laws do not include an explicit regulation.

End Program

Annual Meeting

The Role of Law Schools and Human Rights

March 6th – 9th, 2013
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Human rights themes in the life of the law school

Jukka Kekkonen
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Summary

(1). Human rights themes should evidently have a central place in the curriculum of the law schools. However it is important to underline that a point of departure in the academy is excellency in research and teaching based on research. From this perspective a fundamental starting point to all the law schools is in laying the basic foundations of high class research. This means granting sufficient material resources as well as creating a stimulating academic atmosphere. Without these prerequisites, the academy has very little to offer except advocating good things. But that is pure politics and not the key task of the academic community.

(2). Taking seriously the point of view of human rights means – or might mean - challenging demands for the planning of the curriculum. In my view it must lead to a situation in which issues of social justice and societal and global responsibility are stronger than today present in teaching. It also means that the so called general jurisprudential subjects like legal history, sociology of law and comparative law should play a bigger role than today in legal education. This has been, and is during significant budget cuts in the academy it is even more, an issue of controversy.

(3). Finally it is important to observe that – in spite of growing significance on the issues of human rights – our world is not necessarily moving to a more just direction where the respect of human rights is strengthening. On the contrary, there seems to be tendency towards growing inequality in many nation states and also in the global level. For these reasons we should be critical to all discourses that promote evolution. And even more critically, we should observe, what are the tendencies and practices in the field of human in all nations. Rhetoric and practice might distance from each other.

Human Rights and the Role of Law Schools

Mauro Politi,
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It is far from my intention to address, or even try to summarize, the wide range of issues that are up for discussion in this Conference. These are just a few thoughts that started to cross my mind at the time when I believed I could personally attend. Needless to say, I wish all of you and the IALS every success, and I am really grateful to Nerina Boschiero for having involved me in the project of the annual meeting of the Association.

1. In my view, there are two key questions that deserve attention, and I am sure that they will be both amply debated in Mysore. Why teaching human rights in law schools is so important today ? Which are the legal aspects of human rights protection that are crucial and unavoidable for every meaningful and effective educational effort ?

On the first point, one reason appears to be clear and I presume that colleagues would agree on the basis of their experience. Young generations have never been so interested in the research and study of human rights protection at national and, especially, at international level. Which means interest in normative developments and mechanisms to ensure compliance with and respect for the rule of law. Speaking of my field, when making choices regarding a paper, a thesis, or a doctoral dissertation, more and more often students prefer nowadays to deal specifically with human rights subjects. But even when they are working on general aspects of current international law (use of force, environmental law, international economic law, international justice, law of international organizations), the tendency remains to give prominence to those aspects that relate to the protection of fundamental rights of the individual. For example, in dealing with the use of force, the attention is frequently focused on notions such as "humanitarian intervention" and "responsibility to protect". More generally, the U.N. role in the field of human rights is the object of increasing review and scrutiny in light of the activism of its various organs, including the Security Council. With respect to international justice a strong interest is shown for individual accountability for the most heinous crimes, the rights of victims, or the human rights dimension of certain judgements of the ICJ.

On the other hand, educating the young generations to the culture of human rights is a tremendous responsibility of teachers and scholars. At the risk of stating the obvious, today's students are the lawyers, academics, law-makers and diplomats of tomorrow. If we want to see further substantial progress in establishing norms to protect basic human rights, and providing for effective mechanisms of compliance by States and individuals, the enthusiasm of the youngest needs to be accompanied and encouraged by the wisdom and dedication of those entrusted with guidance. This requires, in the first place, an analysis and explanation of the main political aspects of human rights as they are revealed by recent events and developments. In fact, while today's international community is characterized by an increasing awareness of human rights values, we are witnessing, at the same time, the persistence of the most blatant violations of fundamental rights of the individual. Up to the point that sometimes it looks like a sort of race of competition is taking place between the process of setting more stringent rules and a new intensity and new forms of attacks against these same rights. The gap between the two phenomena has been perhaps progressively reduced, but is far from having been filled. Without any intention to indicate one or another group of States as the major responsible, there is no doubt that some regions of the world, and some quite powerful States are not particularly sensitive to human rights culture. But also

the attitude of a number of other influential countries, those who often make of respect for human rights their distinctive emblem, often fluctuates between a policy that even contemplates military intervention to protect civilians in humanitarian emergencies, mild support for movements aimed at affirming democracy and individual freedoms, and substantial restraint in confronting big violators of human rights, whenever political expediency so requires.

3. Against this background, teaching human rights in a law school presents a special challenge. In my view, the main task is to help examining legal issues keeping in mind the surrounding political interests, and trying to discern the principles on which a widespread agreement has emerged within the state community, from trends not yet consolidated in generally accepted rules and mechanisms, as well as from elements of practice that just started to indicate a way forward. This brings me to spend a few words on the second question to which I referred to, namely on some of the key subjects that should be brought to the attention of law students.

In terms of substantive provisions, it goes without saying that States' responsibilities in human rights protection should be the natural point of departure of any teaching effort, on the basis of existing customary and treaty norms, including first and foremost the principles of so-called jus cogens. Specific attention should then be given to developments in legislation and case-law showing how new categories of fundamental rights seem to emerge as widely recognized by the international community. For example, the right of victims of international crimes to obtain justice and seek reparation from those responsible for the criminal conduct (as progressively elaborated , for instance, by the jurisprudence of the International Criminal Court, under the provisions of the Rome Statute). Or the right of women not to be subject to any form of violence, in particular domestic violence, as recently recognized by the Istanbul Convention on preventing and combating violence against women, adopted in the framework of the Council of Europe. Building on this latter point, the increasing role and influence of regional systems of human rights protection (especially the European and Inter-American systems) in the formation of customary rules is another area of considerable interest. Furthermore, I believe that the classic distinction between human rights norms and international humanitarian law needs to be in part revisited and presented in a perspective that underlines the clear trend of these two categories to overlap. Many of the gravest violations of human rights occur during international and (especially) non-international armed conflicts. On the other hand, humanitarian law is increasingly dealing with infringements of basic human rights in times of peace, and today's accepted notion of crimes against humanity is emblematic of such evolution. In other words, there is an entire body of rules and principles aimed at defending and guaranteeing the fundamental rights and the dignity of every person that is in the process of mutation and advancement towards a comprehensive legal system where the remaining gaps will hopefully be filled under the pressure of States' and the world public opinion growing sensitivity to human rights values.

4. I have already mentioned a couple of areas that attract the interest of students: the notion and implications of the so-called "responsibility to protect", and the role of international justice in human rights protection. Let me make some additional remarks on these subjects. With regard to R2P, the contradictory elements that are offered by recent state practice (Libya, Mali, as opposed to inaction where the political risks are too high, like in Syria) seem to reinforce the conclusions reached by the 2012 report of the UN Secretary-General according to which while "the concept has been widely accepted" controversy still persists "on aspects of implementation, in particular with respect to the use of coercive measures to protect population".

Therefore, examining the relationships, in law and practice, between non-coercive and preventive measures on the one side, and military intervention on the other, appears to be a

crucial step for determining the "state of the art" and possible normative developments in this field. For its part, international justice has become a fundamental tool to prevent and repress violations of human rights, not only as a result of the role played by specialized (regional) human rights courts, but also of the establishment of criminal tribunals to punish individuals responsible for the gravest crimes of international concern. The ad-hoc Tribunals for the former Yugoslavia and Rwanda, the International Criminal Court and the various hybrid Tribunals, such as those for Sierra Leone and Lebanon are well-known examples of this latter development. Moreover, the same ICJ case-law has been recently characterized by a number of judgments dealing, directly or indirectly, with issues of State violations of human rights and humanitarian law (Bosnia v. Serbia, 2007; Germany v.Italy 2012).

Now, while each of these judicial bodies has its own specific competence, the overall degree of protection of human rights cannot but be enhanced by the existence of a greater chance of jurisdictional review of alleged violations. Also, the "progressive" reading of human rights norms accepted by some courts (in particular human rights courts) may influence at times the decision-making of other courts and tribunals with a different scope. However, judicial scrutiny is not always synonymous of a real advancement in interpreting and applying human rights provisions. This is especially evident in the case of the ICJ jurisprudence that I incidentally mentioned. But one should also look carefully at other examples. Most recently, the ICTY Appeals judgement in the case of Gotovina and Markac has been widely criticized for its restrictive reading of the notion of unlawful artillery attacks against civilians. Also, it will be extremely interesting to see how the International Criminal Court will interpret the principle of complementarity in the case of Saif Al-Islam Gadafi, and whether considerations of respect for due process will lead to the admissibility of the case before the ICC. In sum, the way international justice deals with human rights issues is, from various standpoints, another key test for any legal assessment of the level of protection of these rights in today's world.

5. One final aspect that should also be emphasized as a matter for further inquiry and discussion is the ever increasing role of civil society and non-governmental organisations in shaping the international system to protect human rights. This, both in terms of elaboration of relevant norms and the subsequent monitoring of States' compliance with accepted obligations. Again, I am talking about a subject that is usually quite appealing to students and young graduates, in view of the "revolutionary" idea that it tends to convey: namely that today's international legal framework in some areas is not only the result of the will of States and governments, but also of the action and stimulus of groups of individuals representing the "true underlying interests" of the communities concerned. At the same time, we know that in some cases this "utopia" has already become reality, precisely where human rights protection and respect for international humanitarian law are at stake. One of the most striking examples relates to the establishment and activity of the International Criminal Court. The Rome Statute is commonly described as the first case in history of an important multilateral treaty negotiated and adopted with the active involvement of NGOs. And, in fact, the negotiating process culminated with the Rome Conference cannot be fully understood without considering the inputs given and the positions taken by non-governmental organizations on key legal issues. Moreover, nowadays NGOs continue to exercise a constant monitoring of the Court's activity and effectiveness, as well as the degree of States' cooperation and assistance provided to the ICC. And, for their part, most States and regional organizations which support the ICC (for instance, the European Union) are extremely attentive to make sure that they are perceived as acting in consonance with the objectives and requests of the civil society. Now, the obvious question is where this evolution will be heading to; and, in particular, whether we are coming close to some sort of institutional involvement of non governmental organizations in the treaty-making process relating to human rights protection

As I said, these are just a few notes that intend to outline some aspects of the fascinating subject that will be discussed in Mysore. I hope that they could still be of some help and I wish you again a very successful meeting.

Key Issues in Teaching Human Rights in Law Schools

Professor Monika Calkiewicz, Ph. D., Dean, Kozminski Law School, Vice Rector, Kozminksi University, Michal Hudzik, Ph. D., Vice Dean, Kozminksi Law School, Kozminksi University, Warsaw, Poland

Marek Nowicki, one of Poland's leader in protection of human rights movement, a nuclear physicist, alpinist and one of the key founders and president of Helsinki Foundation for Human Rights in Poland, interned in various prisons during Martial Law, used to say that the knowledge on human rights is a branch situated someplace between philosophy, ethics in particular, many branches of law, and political sciences. It emerged in its modern shape after World War II but its roots can be sought in ancient times, the Middle Ages, and especially in the thought of Enlightenment. In Poland, in the communist era, Human rights were neither studied nor taught in the communist world: the name itself, however, supplemented with the adjective "socialist", could be heard in the 1970s and 1980s, intentionally obliterating and dimming the forceful ideas coming from the West which were called "bourgeois human rights" within the bloc.

Baring in mind the cross-scientific nature of Marek Nowicki's notion of human rights we believe that teaching human rights in law schools should be based on four pillars: 1) expertise knowledge, 2) professional teaching, 3) practical experience and 4) promoting the idea of human rights in ("giving back" to) society.

It is truism to say that teaching in general, and teaching law in specific, requires expertise. But the idea of human rights requires a specific knowledge and a unique approach to the topic, not only as a subject of legal, scholar studies but – in essence – a specific attitude in understanding and the desire to promote what underlies at the very core of the concept – the respect for any human being.

We believe that idea of human rights, for a better understanding of the matter, requires a twofold teaching approach – focused both on general level and on the level of specific branches of law. The law schools curricula should therefore encompass within the first or second year of legal studies (depending on the 4- or 5 year course) lectures on the concept and basics of human rights with elements of philosophy, and in the later years – courses on the specific branches of law with aspects of human rights.

Although the general course can overlap with courses on international law, political science and even philosophy or ethics it should be designed as a separate, individual lecture devoted only to the concept of human rights. The process of teaching human rights cannot be limited just to the latter courses with references to human right.

Assuming that practical experience during the legal studies allow students to better understand the law and gain new skills that will make them better lawyers in the future, we think that students should be engaged in different scholar and practical projects. Law schools should be among leaders of promoting human rights – internationally, nationally or locally. Although that function can be implemented on many levels and in various ways, one of them is to engage faculty members and students in different activities that – on the one hand – allow them to gain knowledge and valuable practical experience, and – on the other hand – help people. Thus, law schools should provide for different projects like law clinics and street law, that allow students to help people and at the same time to promote the concept of human rights among

different members of the society – pupils in schools, elderly people, prisoners, the indigent, etc.

Although this symposium is dedicated in essence to the issue of teaching human rights, we would be greatly mistaken to think that teaching human rights in law schools is the first and the most important element of such education – it is neither one, nor the other. A society that wants to think of itself as a modern one and which is respectful of human beings needs to promote the idea of human rights among its youngest members – the notion of inherent rights should therefore accompany us from our childhood. Curricula of not only law schools, but also primary and secondary schools should thus be amended in such a way that encompasses the idea of human rights. In that respect, as previously said, law schools can also play an important role in such education.

International Humanitarian Law as an issue in teaching Human Rights in Law Schools

Dr. Taslima Monsoor
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The New World Human Order is as yet a nascent system grappling with war and violence, proliferating terrorism and traumatic inflictions on innocent civilians. History bears witness to massacres without mercy and mass suffering consequent on lawless attacks on the wounded and dying soldiers and victimization of women and children during armed conflicts when nations attacks nation or ethnic, tribal or religious groups indulge in "cleansing operations" on an internecine scale.

While the voices of "the clash of civilizations" are echoing loud, and the so-called "war on terror" is influencing the fate of some communities and many groups of individuals in various countries of the world, it is appropriate to recall the humanitarian values that rally nations and peoples around them. Indeed, peace and security and faith in fundamental human rights have been the growing hunger of the human species from the dawn of history.

International Humanitarian Law is that branch of Public International Law which seeks to protect those persons who do not or no longer take part in hostilities and to put restrictions on the means and methods of warfare. IHL is applicable in international, non-international armed conflict and internationalized armed conflict.

All civilizations developed rules aimed at minimizing violence and placing controls on their wars. By making international law a matter to be agreed between sovereigns and by basing it on State practice and consent, Grotius and the other founding fathers of public international law paved the way for that law to assume universal dimensions, applicable both in peacetime and in wartime and able to transcend cultures and civilizations. However, it was the nineteenth-century visionary Henry Dunant who was the true pioneer of contemporary international humanitarian law. By instigating the adoption, in 1864, of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Dunant and the other founders of the ICRC laid the cornerstone of treaty-based IHL.

This treaty was revised in 1906, and again in 1929 and 1949. New Conventions protecting hospital ships, prisoners of war and civilians were adopted. The result was the four Geneva Conventions of 1949, which constitute the foundation of IHL in force today. Governments have also adopted a series of treaties governing the conduct of hostilities. These include, the Declaration of St. Petersburg of 1868, the Hague Conventions of 1899 and 1907, and the Geneva Protocol of 1925, which bans the use of chemical and bacteriological weapons. In 1977 there was a merging of these two streams of IHL with the adoption of the two Protocols Additional to the 1949 Geneva Conventions, which brought up to date both the rules governing the conduct of hostilities and those protecting war victims. More recently, other important conventions and protocols were added to this already long list of treaties i.e. the Convention on Cluster Munitions (CCM) 2008, Third Additional Protocol to the Geneva Conventions, 2005 etc.

The ICRC has been contributing to the promotion and development of IHL throughout its 140 year history. Pursuant to an international mandate provided to it by States, the ICRC operates in nearly 80 countries, many of which are affected by armed conflict and other situations of armed violence. In addition to its other operations, the ICRC's activities include promoting and developing IHL in the countries in which it operates. The ICRC mission of Bangladesh conducts several different activities designed to promote increased awareness and development of IHL. These include organizing seminars and conferences, developing courses in universities, training teachers and organizing moot court competitions on topics of IHL.

Faculty of Law, University of Dhaka feels proud to be the glorious partner of many of these programs and activities as the Henry Dunant Memorial Moot Court Competition. The principal objective of the Henry Dunant Memorial Moot Court Competition is to develop an increased awareness and interest in International Humanitarian Law (IHL) in academic institutions throughout South Asia. A further objective is to use IHL to further academic excellence in the student community, and to develop their advocacy skills in an environment of friendly competition and at the same time teaching Human Rights and Humanitarian Law to the students.

The corporate responsibility to respect human rights and the question of universal civil jurisdiction in transnational human rights cases. Waiting for the U.S. Supreme Court decision in Kiobel v. Royal Dutch Petroleum.

Nerina Boschiero

Summary: I. Introduction on the "state of the art" in respect to business-human rights relationship.- II. The inherent limits of the new U.N. Framework and Guiding Principles' corporate responsibility to respect human rights. - III. The State obligation to protect and to provide access to remedy for human rights abuses by third parties, including business. - IV. The questions of corporate liability and extraterritorial jurisdiction over abuses committed abroad in the *Kiobel* case. - V. Bringing the Governments back in: their positions on universal civil jurisdiction under international law. - VI. Critical evaluation of the European Union Member States' arguments on the extraterritorial application of ATS. - VII. Conclusion.

I. Introduction on the "state of the art" in respect to business-human rights relationship.

While business activities play a fundamental role in generating economic growth, wealth, jobs, income, innovation and development, thus possibly contributing to the enjoyment of fundamental human rights, there is increasing recognition that non-state actors, such as transnational corporations and other business, can have significant negative impacts on a full range of human rights, including civil and political rights, economic, social and cultural rights, labour and environmental rights.

The corporate responsibility and accountability for human rights violations is an issue firmly implanted on the global political agenda since the 1990s, which reflects a worldwide concern about the increasing role played by non-state actors in the process of globalization coupled with a corresponding decrease in the capacity of societies and governments to manage their negative impacts on the enjoyment by individuals, communities and indigenous people of their human rights. It is generally recognized that these "governance gaps" have created an environment in which-business related human rights abuses can occur with relative impunity.[1] In the 1990s, reports of corporate human rights abuses concerned especially the extractive sector (oil, gas and mining companies operating in conflicting zones or in countries with weak rule of law and high levels of corruption) and the footwear and apparel industries, due to the wide practice of off-shore production in countries with very poor working conditions. But allegation of direct violations by business enterprises, as well as corporate complicity in human rights violations committed by others, not limited to specific countries, industries or contexts, continue to be reported.[2]

Several efforts have been made at the level of United Nations to narrow these gaps, exploring ways for corporate actors to be legally accountable for the negative impact of their activities on human rights. In the early 1970s, the request of a "new international economic order" by the developing States [3] has been accompanied by the efforts to negotiate a binding

[1] *Protect, Respect and Remedy: A Framework for Business and Human Rights*, A/HRC/8/5, April 7, 2008, para. 3.

[2] See UN doc. A/HRC/8/5/Add.2, 23 May 2008, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. *Corporations and human rights: a survey of the scope and patterns of alleged corporate-related human rights abuse.* According to this report, near 60 per cent of cases reported featured direct forms of company involvement in the alleged abuses, where the company is alleged to directly cause the abuse through its own acts or omissions. Around 40 per cent of cases included indirect forms of company involvement in the abuse, where firms were generally alleged to contribute to or benefit from the abuses of third parties, such as suppliers, individuals, States or arms of a State, and other business.

[3] UN doc. A/Res/3201 (S-VI), Resolution adopted by the General Assembly of the United Nations on May 1, 1974, calling for a *New International Economic Order*.

instrument to improve control over the activities of transnational corporations. A draft *Code of Conduct on Transnational Corporations* was elaborated by the U.N. Commission on Transnational Corporations,[4] establishing a legal obligation for transnational corporations to respect human rights and fundamental freedoms in the countries in which they operate. This Code ultimately failed to be adopted do to a major disagreements between industrialized and developing countries, in particular, with regard to the inclusion of international law as standards of treatment for transnational corporations. [5]

Another later United Nations-based initiative, aimed at imposing legal binding obligations on companies, equally failed: in 2003, the Sub-Commission on the Promotion and Protection of Human Rights, a subsidiary body of the U.N. Commission on Human Rights, consisting of twenty-six independent human right experts acting in their personal capacity, approved a set of "*Norms on the Human Rights Responsibilities of Transnational Corporations and Other Business Enterprises with regard to human rights*".[6] This was a set of comprehensive international human rights norms specifically aimed at, and applying to, corporate entities, supplemented by a robust enforcement mechanism (which included the monitoring by national and international agencies) and by the duty to provide victims with effective remedies.[7]

This proposal was vehemently opposed by the business community and received very little support from Governments. Finally, the Commission on Human Rights, a political body composed by representatives of States, declined to adopt the document arguing that these kind of Norms have not been requested by the Commission; it asserted that, as a draft proposal, the 2003 Norms had "no legal standing", and that the Sub Commission should not perform any monitoring function in this regard.[8] The issue was subsequently moved to the U.N. political organs, the High Commissioner to Human Rights and the U.N. Secretary General.

A mandate for a Special Representative of the Secretary-General "on the issue of human rights and transnational corporations and other business enterprises" was established in 2005 with the aim to undertake an entirely new process. The idea was "to move beyond what had been a long-standing and deeply devise debate over the human right responsibilities of companies" (between those recommending the direct imposition on corporations of obligations under international law and those promoting the use of international soft-law instruments) [9] and to build a meaningful consensus among all stakeholders about the roles and responsibilities of both States and companies with regard to business's impacts on human rights.

Harvard prof. John Ruggie was appointed to the post. In 2006 the Commission was replaced by the U.N. Human Right Council, to which the Special Representative has reported annually. From the very begging prof. Ruggie made clear that he would have abandoned the 2003 Norms' approach, consisting in imposing on companies "directly under international human rights law the same range of duties that states have accepted for themselves. Namely, "to promote, secure the fulfillment of, respect, ensure respect of, and protect human rights," with the only distinctions being that states would have "primary" duties and companies would have "secondary" duties, and that the duties of companies would take effect within their (undefined) "spheres of influence".[10]

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[4] UN doc. E/1990/94, June 12, 1990.

[5] UN doc. E/CN.4/Sub.2/1996/12, 2 July 1996, para. 61-62; DE SHUTTER, *Transnational Corporations and Human Rights: An Introduction*, Global Law Working Paper 01/05, Symposium on 'Transnational Corporations and Human Rights'.

[6] UN doc. E/CN.4/Sub.2/2003/12/Rev.2, 2003.

[7] C.F. HILLEMANS, *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regards to Human Rights, German Law Journal*, 2003, 1070.

[8] U.N. Doc. E/CN.4/DEC/2004/116 , April 20, 2004. See also the ECOSOC decision 2004/279.

[9] U.N. Office of the High Commissioner of Human Rights, *New Guiding Principles on Business and Human Rights endorsed by the U.N. Human Rights Council*, June 16, 2011.

[10] *The UN "Protect, Respect and Remedy" Framework for Business and Human Rights*, http://www.reports-and-materials.org/Ruggie-protect-respect-remedy-framework.pdf.

According to the Special Representative, attributing the same range of duties to corporations that currently apply to "would generate endless strategic gaming" between corporations and Governments over which "who is responsible for what". Despite the call by the majority of human rights organizations for "clear global standards adopted by the governments",[11] Ruggie refused to recommend "that States negotiate an overarching treaty imposing binding standards on companies under international law", as these negotiations "now would be unlikely to get off the ground, and even if they did the outcome could well leave U.S. worse off than we are today". [12]

In 2008, the Special Representative presented to the Council a strategic policy framework for better managing business and human rights challenges, named the "*Protect, Respect and Remedy*" framework. This framework was organized around the three pillars of the State *duty* to protect against human rights abuses by third parties, including business; the corporate responsibility to *respect* human rights; and the need for more effective access to *remedies*.[13] According to the Special Representative, this framework rests on "differentiated but complementary responsibilities". Each principle was conceived as an essential component of a complementary whole: the State duty to *protect* because "it lies at the very core of the international human rights regime"; the corporate responsibility to *respect* because "*it is the basic expectation society has of business*"; and access to *remedy*, because "even the most concerted efforts cannot prevent all abuse, while access to judicial redress is often problematic, and non-judicial means are limited in number, scope and effectiveness". [14]

The Human Right Council unanimously welcomed this framework and extended the Special Representative mandate with the task to operationalizing and promoting the framework. [15] In March 2011 prof. Ruggie presented his final report (the culmination of six years of extensive and inclusive consultations) named "*Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*",[16] which was unanimously endorsed on 16 June 2011 by the U.N. Human Rights Council.[17] These thirty-one *Guiding Principles* are organized into three sections corresponding to the same three core principles of the 2008 U.N. framework; each principles is accompanied by a commentary.

In a nutshell, according to its Author, the Guiding Principles' focus for States "on the legal obligations they have under the international human rights regime to protect human rights abuses by third parties, including business, as well as policy rationales that are consistent with, and supportive of, meeting those obligations". For businesses (beyond compliance with national laws), the focus is "on the need to manage the risk of involvement in human rights abuses, which requires acting with due diligence to avoid infringing on the rights of others, and to address harm where it does occur". For affected individuals and groups, the Guiding Principles "serve as a basis for further empowerment through prescribed engagement with them by business enterprises, as well as well as greater access to effective remedy, both judicial and non-judicial." Summing up, "States must protect; companies must respect; and those who are harmed must have redress". [18]

II. The inherent limits of the new U.N. Framework and Guiding Principles' corporate responsibility to respect human rights.

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[11] See *Joint NGO Statement to the Eighth Session of the Human Rights Council*, Human Rights Watch, May 19, 2008; Int'l Network for Economic, Social & Cultural Rights (ESCR-Net) & Human Rights Watch (HRW), *Joint Statement: General Debate Item 3: Human Rights and Transnational Corporations*, Business & Human. Rigths Resource Centre, June 4, 2010.

[12] John Ruggie, *Business and Human Rights: Treaty Road Not Traveled*, May 6, 2008.

[13] *Protect, Respect and Remedy: a Framework for Business and Human Rights*, UN doc. A/HRC/8/5, April 7, 2008.

[14] *Protect, Respect and Remedy*, para 9.

[15] Human Rights Council resolution 8/7, June 18, 2008.

[16] *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework,* UN doc. A/HRC/17/31, March 21, 2011.

[17] UN doc. A/HRC/RES/17/4, July 6, 2011.

[18] John Ruggie, *Opening Address*.

While the first and third pillars of the Guiding Principles stay on the traditional notion of State responsibility, the second pillar deals with the "responsibility" of business enterprises to respect human rights, translating it into operational principles. In this regard, the Guiding Principles are grounded in recognition of "The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights". The premise is that corporations are "organs of society", more particularly "specialized economic organs, not democratic public interest institutions"; therefore "their responsibilities cannot and should not simply mirror the duties of States".[19]

Accordingly, the Special Representative has framed the distinctive role's of companies in relation to human rights in term of "responsibility" to respect rather than "duty", to indicate clearly that "respecting rights is not an obligation current international human rights law generally imposes directly on companies".[20] Rather, Ruggie described the responsibility to respect human rights as constituting: "a global standard of expected conduct for all business enterprises wherever they operate … [that] exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations". A standard of expected conduct that exists "over and above compliance with national laws and regulations protecting human rights and above compliance with national laws and regulations protecting human rights".[21]

The foundational principle dedicated to corporate responsibility in the Guiding Principles says that:"*Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved".*[22]

It's worth noting that while the 2003 Norms were drafted as "non-voluntary" set of norms, directly binding upon corporations, the Guiding Principles - when comes the discourse of corporate social responsibility – avoid any binding "shall" language and use instead the non-binding "should" terminology. The Commentary clarifies that the responsibility of business enterprises to respect human rights is "distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions".

Further, "hard" terms like "human rights violations" typically used for states are replaced by words like "infringements" and "adverse human rights impacts", the underlying idea being that business enterprises can have "adverse impacts" on virtually the entire spectrum of internationally recognized human rights. But when it comes to define the "human rights" that corporate actors should respect, the Guiding principles adopt a narrow interpretation by selecting as "authoritative list" the *minimum* core internationally recognized human rights contained in the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights), coupled with the principles concerning fundamental rights in the eight ILO core conventions as set out in Declaration on Fundamental Principles and Rights at Work. In practice the Principles recognize that some rights will be more relevant and salient than others in particular circumstances, with the consequence that business enterprises "may" need to consider "additional standards like the human rights of individuals belonging to specific groups or populations that require particular attention", such as the rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; migrant workers and their families and, finally, the standards of international humanitarian law in situations of armed.[23]

In essence, the corporate responsibility to respect human rights, according to the U.N. framework and Guiding Principles, means "non-infringement" on the enjoyment of rights; put simply "doing no harm". This "doing no arm" has been translated into the concept of "due diligence" for corporations that requires companies to take positive steps in order to avoid

[19] *Protect, Respect and Remedy*, para. 53.
[20] *The UN "Protect, Respect and Remedy" Framework for Business and Human Rights*.
[21] *Guiding Principles*, principle 11.
[22] *Guiding Principles*, principle 12.
[23] *Guiding Principles*, principle 12.

infringing on the rights of others; to address adverse impacts that may occur and to seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.[24] To implement their responsibility to respect human rights, business enterprises should put in place policies and process appropriate, including a "policy commitment" to meet their responsibility to respect human rights; a human rights due-diligence process; and processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.[25]

Even if the responsibility to respect human rights applies, in principle, fully and equally to all business enterprises regardless of their size, sector, operational context, ownership and structure, the Guiding Principles clarify that "While the Principles themselves are universally applicable, the means by which they are realized will reflect the fact that we live in a world of 192 United Nations Member States, 80,000 transnational enterprises, 10 times as many subsidiaries and countless millions of national firms, most of which are small and medium-sized enterprises. When it comes to means for implementation, therefore, one size does not fit all." Therefore, according to the Guiding Principles, the scale and complexity of the means through which enterprises meet that responsibility "may vary and be proportional according to various factors, like the size and the severity of the enterprise's adverse human rights impacts".[26]

The Guiding Principles approach to the human rights responsibilities of business entities makes absolutely clear that they are not legally binding and that they do not purport to create new legal obligations for business: according to their Introduction, "The Guiding Principles' normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved." Therefore, the General Principles state that "Nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights".[27]

In conclusion, the Protect, Respect, and Remedy Framework and the Guiding Principles are another voluntary code, along with various others introduced over the years: among the most widely recognized and accepted are the U.N. Global Compact launched in 2000 by then Secretary-General Kofi Annan as a global platform for engaging companies in the support of universal values, as well as promoting and amplifying businesses' positive contributions to societies' needs; the Organisation for Economic Co-operation and Development's (OECD) Guidelines for Multinational Enterprises; the ISO 26000 Guidance Standard on Social Responsibility; the International Labour Organization's (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.

Unsurprisingly, these new Guiding Principles have received broad support from corporations and Governments and have been welcomed as "the authoritative global reference point for preventing and addressing adverse impacts on human rights arising from business-related activity"; [28] a conclusion this that seems to be reinforced by the fact that core elements of the Guiding Principles have already been incorporated by numerous other international and national standard setting bodies.[29] According to Ruggie, the Council's

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[24] *Guiding Principles*, principle 13.
[25] *Guiding Principles*, principle 15.
[26] *Guiding Principles*, principle 14.
[27] UN doc. A/HRC/17/31, *General Principles*.
[28] UN doc. A/HRC/FBHR/2012/2, September 25, 2012.
[29] The new 2011 Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises now have a human rights chapter drawn from the Guiding Principles. The European Union on 25 October 2011 published a renewed strategy for corporate social responsibility for the period 2011-2014, taking the UN Guiding Principles as the main reference (*A renewed EU strategy 2011-14 for Corporate Social Responsibility*, COM(2011) 681 final); the European Commission has further asked member states to submit national plans for implementing the Guiding Principles. The U.S. government has incorporated the core concept of human rights due diligence

endorsement of the Guiding Principles marked two firsts: "it was the first authoritative guidance the Council had ever issued on how to meet the complex global challenges of business and human rights; and it also was the first time that the Council or its predecessor, the Commission, had ever endorsed a normative text on any subject that Governments did not negotiate themselves".[30] These two "firsts" can be easily explained with the soft-law nature of this new U.N. normative text, which fully reflects the fact that States are not yet able, neither willing, to take firmer measures, and that they consider legally binding mechanisms not the best tool to address this particular issue.

While the Protect, Respect, and Remedy Framework and the Guiding Principles are certainly welcome and contain positive elements, their voluntary nature remains the primary concern. Their non-binding nature casts doubts on the affirmation that the global business and human rights agenda reached "a historic milestone" by their endorsement by the Council, [31] and that, as asserted by Ruggie, "even if this endorsement (by itself) will not bring business and human rights challenges to an end, it will mark the end of the beginning".[32] Many leading human rights non governmental organizations have criticized the Guiding Principles for amounting to nothing more than an endorsement of the *status quo*: "a world where companies are encouraged, but no obliged, to respect human rights".[33] Amnesty International criticized the Guiding Principles' failure to adequately address key issues in corporate accountability, like mandating States to put in place effective regulatory measures to prevent and punish their companies from abusing the rights of individuals and communities in other countries; specifying that States should require companies to undertake human rights due diligence; and explicitly recognizing the right to remedy as a human right.[34]

As to the mechanisms that should ensure that the Guiding Principles are actually put into place, significantly, the U.N. Human Rights Council didn't create any right to an effective remedy for addressing the corporate human rights. In July 20011, it merely established a 'Working Group on the issue of human rights and transnational corporations and other business enterprises', consisting of five independent experts of balanced geographical representation, mandate *inter alia* to identify, exchange and promote good practices and lessons learned on the implementation of the Guiding Principles; to continue to explore options for enhancing effective remedies available to those whose human rights are affected by corporate activities, including those in conflict areas. This Working Group was not been given the authority to consider complaints of victims related to the violation of human rights, even if its mandate leaves open the possibility of country visits. The second mechanism created by Council was the establishment of an annual Forum on Business and Human Rights as a venue open to governments, U.N. bodies, corporations, and other stakeholders to engage in dialogue and cooperation towards the goal of effective implementation of the Guiding Principles.[35] In a

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requirements incorporates in new laws and regulations, like The Dodd Frank Wall Street Reform and Consumer Protection Act, Sections 1502 and 1504, august 2012 to ensure that supply chains do not contribute to conflict or human rights abuse in the Democratic Republic of the Congo or broader African Great Lakes region; the same in may 2012 for the Reporting Requirements on Responsible Investment in Burma, now that the United States have eased financial and investment sanctions on Burma in response to the historic reforms that have taken place in that country over the past year. See *U.S. Government on Business and Human Rights: Letter to the UN Working Group* submitted in response to the Note circulated by the Office of the High Commissioner for Human Rights on October 5, 2012.

[30] John Ruggie, *Opening Address* at the United Nations Forum On Business & Human Rights Geneva, Switzerland , December 4, 2012.

[31] UN doc. A/HCR/FBHR/2012/3, September 25, 2012.

[32] *Guiding Principles*, para. 13.

[33] International Federation for Human Rights, *UN Human Rights Council adopts Guiding Principles on business conduct, yet victims still waiting for effective remedies* , June 17, 2011; *Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights* , January 31, 2011; ROBERT C. BLITT, *Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance*, University of Tennessee Legal Studies, Research Paper No. 158, 2012, 17-21.

[34] Amnesty International Public Statement, United Nations: *A Call For Action To Better Protect The Rights Of Those Affected By Business-Related Human Rights Abuses*, June 14, 2011.

[35] UN doc. A/HRC/17/L.17/Rev.1.

recent decision, the Council requested the Secretary General to explore the feasibility of establishment of a global fund to enhance the capacity of stakeholders to advance the implementation of the Guiding Principles.[36]

Given that the Guiding Principles are not legally binding and that they are to be implemented by businesses on a voluntary basis, the question then arises as to why businesses should comply with them. The short answer that this is 'the right thing to do', is not self-evident: the human rights community that has long urged a move "beyond voluntarism" rightly observed that "if self regulation and market forces were the best means to ensure respect for human rights, one might expect…the number of abuses attributable to companies to have diminished"; the experience in many part of the world "is precisely the opposite".[37]

In absence of effective enforcement mechanisms, it's unlikely that these Guiding Principles might usefully constrain corporate conducts.[38] Voluntary schemes and soft-law approaches alone cannot coerce unwilling business enterprises to adopt corporate responsibility policies, neither could they force companies to abide by their corporate responsibility commitments.[39]

III. The State obligation to protect and to provide access to remedy for human rights abuses by third parties, including business.

In his 2007 Report, the Special Representative - after having recognized that the international human rights instruments do not seem to currently impose direct legal responsibilities on corporations - wrote that "nothing prevents States from imposing international legal responsibilities for human rights directly on corporations".[40] Till now they haven't done.

On this premise, the U.N. framework and Guiding Principles reiterated the traditional view that international human rights instruments impose only "indirect" responsibilities on corporations – that is, these treaty obligations take effects as between non-state actors only under domestic law in accordance with states' international obligations.

Therefore, the very first Principle deals with the State duty to protect, asserting that "*States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication*."[41]

No doubt that States have the "primary" obligation to secure universal enjoyment of human rights and that they are the cornerstone around which the human rights regime is constructed.[42] The State duty to protect is firmly grounded in international human rights law and regional human rights systems, which provide that they "are obliged" to take appropriate

[36] UN doc. A/HRC/21/L.14/Rev.1, September 25, 2012.

[37] The International Council on Human Rights Policy, *Beyond Voluntarism, Human rights and the developing international legal obligations of companies*, February 2002, 7.

[38] For the argument that the notion of human rights due diligence as framed by the Guiding Principles will lead to the cretion of binding legal duties for corporate actors under corporate law and orporate governance theory, see MUCHLIMSKI, *Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance and Regulation*, *Business Ethics Quaterly*, 2012, 145-177.

[39] KAMATALI, *The New Guiding Principles on Business and Human Rights' Contribution in Ending the Divisive Debate over Human Rights Responsibilities of Company: Is it Time for an ICJ Advisory Opinion*? *Cardozo Journal of International and Comparative Law* , 2012, 449-450.

[40] *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, A/HRC/4/035, 2007, para. 62.

[41] *Guiding Principles*, Principle 1.

[42] KNOX, *Horizontal Human Rights Law*, *American Journal of International Law*, 2008, 1-47.

steps both to prevent corporate abuses of the human rights of individuals and to provide access to remedy.[43] Therefore, States can be held liable for breaches of their obligations.

However, frequently, States fail to regulate the human rights impact of business and/or to ensure effective access to justice for victims of human rights abuses. Prof. Ruggie, himself, recognized that the increasing focus on protection against corporate abuses by the U.N. bodies and regional mechanisms indicates "a growing concern that States either do not fully understand or are not always able or willing to fulfil this duty." According to his own questionnaire survey of States, the Special Representative came at the conclusion that "not all State structures as a whole appear to have internalized the full meaning of the State duty to protect, and its implications with regard to preventing and punishing abuses by non-state actors, including business. Nor do States seem to be taking full advantage of the many legal and policy tools at their disposal to meet their treaty obligations. Insofar as the duty to the protect lies at the very foundation of the international human rights regime, this uncertainty gives rise to concern." [44] Even if this observation should have driven the desire to impose direct obligation on corporations under international law, the Special Representative, as already acknowledged, refused to do so due to the adverse affects that these obligations would have had on States' governance capacities and the current political unfeasibility of any such proposal.[45]

One might have expected, therefore, that in order to "bring back in" Governments which are nor "doing their job", [46] the Guiding Principles put forward a more *progressive* attitude towards State obligations by strengthening their existing obligations and their capacity to address effectively the challenges of the lack of respect for human right laws. Instead, and again, the Guiding Principles adopted a non-expansive view of States duties in relation to business and human rights and potential avenues for redress for alleged victims of business-related human rights violations.[47]

In respect of the State duty to protect human rights, the Principles simply says that States must generally protect against human rights abuses by third parties "within their territory and /or jurisdiction", through appropriate and effective policies, regulations and laws. They do not provide any further guidance on the steps States should take to hold companies accountable in the particular areas where remains a lack of clarity. These areas, according to the Special Representative, include "whether States should impose liability on companies themselves, in addition to natural persons acting on the entity's behalf; when States are expected to provide individuals with civil causes of action against companies (i.e. separate from criminal sanctions and going beyond administrative complaints mechanisms); and whether and to what extent States should hold companies liable for alleged abuses occurring overseas".[48]

No promising approaches concerning extraterritorial jurisdiction and transnational litigations have been developed by the Guiding Principles.[49] As to the exterritorial dimension of the State duty to protect under international human rights law, Principle 2 prescribes that "States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations". The use of the

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[43] *State obligations to provide access to remedy for human rights abuses by third parties, including business: an overview of international and regional provisions, commentary and decisions*, Addendum to the Report of the Special Representative, A/HRC/11/13/Add.1, May 15, 2009, 2.

[44] *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, A/HRC/4/035, February 9, 2007, para 86.

[45] KAMATALI, *The New Guiding Principles*, 457.

[46] *Remarks* by John Ruggie at the Forum on Corporate Social Resposibility, Co-sponsored by Fair Labour Association and the German Network of Business Ethics, Bamberg, Germany, June 14, 2006.

[47] MASSOUD, RÖDL, *Waiting for the "Follow-UP"? –Guiding Principles for the Implementation of the United Nations "Protect, Respect and Remedy" Framework*, available at http://column.global-labour-university.org/2011/01/waiting-for-follow-up-guiding.html, 2.

[48] *State obligations to provide access to remedy for human rights abuses by third parties*, 3.

[49] *Waiting for the "Follow-UP"?*, 3.

"should" language in the Principle is reinforced by the Commentary affirmation that what is at stake are only "strong policy reasons" for home States to set out clearly "the expectation that businesses respect human rights abroad", like "ensuring predictability for business enterprises an preserving the State's own reputation".

Shortly, the Guiding Principles refuse to characterize the duty to protect as extending extraterritorially: the commentary simply recognizes that: "At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis." The commentary goes on recognizing that in this respect States have adopted "a range of approaches in this regard": some are domestic measures with *extraterritorial implications*, like requirements on "parent" companies to report on the global operations of the entire enterprise; multilateral soft-law instruments, and performance standards required by institutions that support overseas investments. Other approaches amount to "*direct extraterritorial legislation and enforcement*", like "criminal regimes that allow for prosecutions based on the nationality of the perpetrator no matter where the offence occurs". No indications in the Guiding Principles of which "extraterritorial measures" appear preferable and no further refinement of the legal understanding of the duty to protect and prevent human rights abuses abroad. The choice has been to leave the exterritorial responsibility to home States' discretion.

As regard to the Access to Remedy, the Guiding Principles recognize that: "Unless states take appropriate steps to investigate, punish and redress business-related human rights abuses when they do occur, the State duty to protect can be rendered weak or even meaningless". Therefore the Foundational Principle 25 establishes that "As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy". But the Operational principle devoted to State-based judicial mechanism does not deal with the causes of states' incapacity, nor does provide suggestions on how states can effectively strengthen their judicial capacity to hear complaints and enforce remedies against corporations by reducing the legal, practical and other relevant barriers (such as costs and legal aid, the lack of support for public interest litigation or mass tort claims, time limitations, and provisions on evidence) that could lead to a denial of access to remedy.[50] In the case of abuses involving third-country subsidiaries or contractors, difficulties are further exacerbated: in his 2009 Report, Ruggie recognized that "Where the company is a subsidiary of an overseas parent, additional factors can compound these barriers. The parent company may use its own leverage with the host Government or mobilize the home Government and international financial institutions. The alternative of filing a suit in the parent company's home State for the subsidiary's actions, or for the parent's own acts or omissions, can raise jurisdictional questions about whether it is the appropriate forum, and may trigger policy objections by both home and host State Governments. Moreover, the standards expected of parent companies with regard to subsidiaries may be unclear or untested in national law. Such transnational claims also raise their own evidentiary, representational, and financial difficulties".[51]

Finally, there is no mention in the Guiding Principles of the State obligation under international law to provide access to remedy in cases involving "gross human rights violations", [52] which included at least the following: slavery, and a slave-like practices; summary or arbitrary executions; torture and cruel, inhuman or degrading treatment or punishment; enforced disappearance; arbitrary and prolonged detention; deportation or

[50] *Guiding principles*, Operational Principle 26.

[51] *Business and human rights: Towards operationalizing the 'protect, respect and remedy' framework*, A/HRC/11/13, 2009, para. 95.

[52] See the *United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted in 2005 by the Commission on Human Rights and subsequently by the General Assembly in its resolution 60/147 of December 16, 2005, annex, Principle 3 (c).

forcible transfer of population; and systematic discrimination, in particular based on race and gender.[53] It's important to underline that the United Nations Basic Principles provide for an individual right to remedy in such cases "irrespective of who may ultimately be the bearer of responsibility for the violation", thus extending to third party, including corporate-related abuses.[54]

IV. The questions of corporate liability and extraterritorial jurisdiction over abuses committed abroad in the *Kiobel* case.

It is undoubtedly the task for States to develop effective tools and measures to ameliorate or eliminate such human rights violations: national laws and their application by courts are a fundamental part of the States response to the negative impacts of corporate activity on people's human rights. Domestic enforcement of binding rules of international law and domestic jurisdiction with the power to award civil damages against human rights violators are undoubtedly among the most efficient tools in promoting and securing effective compliance by non-state actors. [55] It is important to determine to what extent States think appropriate, or possible for them, to extend their powers beyond their own territory in order to combat human rights crimes committed by businesses, especially in the light of failure of the U.N. Guiding Principles to provide greater clarity on the "extraterritorial" dimension of the State duty to protect under international human rights law.

In this respect a very useful insight of the States' *opinion juris* on the issue of exterritorial jurisdiction as a tool to improve the accountability of transnational corporations for human rights abuses committed overseas is provided by the discussions surrounding a landmark case currently under consideration by the U.S. Supreme Court, which concerns the involvement of foreign multinational corporations in overseas human rights violations. The case is *Kiobel v. Royal Dutch Petroleum Co,*[56] brought under the ATS, a judiciary act enacted by the first U.S. Congress in 1789, which provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States".[57]

Long a dormant for nearly two hundred years, the statute turned into "a crucial tool for human rights litigation" with the seminal 1980 case of *Filartiga v. Peña-Irala*, [58] which transformed the ATS into "the epitome of extraterritoriality" in U.S. law.[59] Since then, ATS has become "the fountainhead for human rights lawsuits", and in the last three decades more than 120 lawsuits have been filed in Federal Courts against 59 corporations for alleged wrongful acts in 60 foreign countries; almost the majority of these suits have been over "aiding and abetting" abuses by foreign governments, rather than over direct offenses. Most of these corporate ATS cases have been dismissed or settled with very high damages awards.[60]

The Supreme Court in *Kiobel* will deal with some of the hot issues not defined by the U.N. Guiding Principles, such as whether States are expected to provide individuals with civil causes of action against companies and whether and to what extent States should hold

[53] International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights Violations: A Practitioners' Guide*, 2006, 153-168.

[54] In his report on *State obligations to provide access to remedy for human rights abuses by third parties,* p. 34, Ruggie recognized that "The United Nations Basic Principles were intended as a restatement of existing State obligations. They indicate the international community's enhanced concern with access to remedy in cases involving gross violations, and may reflect increased expectations that individuals should be able to resort to national courts to vindicate their treaty rights in such situations".

[55] REINISCH, *The Changing International Legal Framework for Dealing with Non-state Actors*, *in* Philip ALSTON (ed.), Non-State Actors and Human Rights, 2005, 89; KNOX, *Horizontal Human Rights Law*, 45.

[56] No. 10-1491 (U.S. 2012).

[57] 28 U.S.C.§ 1350.

[58] 630 F. 2d 876 (2d Cir. 1980).

[59] *Development in Law, Extraterritoriality, Harvard Law Review*, 2011, 1234.

[60] BELLINGER III, *Why the Supreme Court should curb the Alien Tort Statute*, February 23, 2012, at http://articles.washingtonpost.com/2012-02-23/opinions/35444954_1_kiobel-alien-tort-statute-human-rights.

companies liable for alleged abuses occurring overseas. Nevertheless, the Guiding principles featured also in this case, as the Respondents placed significant reliance on a statement contained in a 2007 report of the Special Representative to argue that corporations cannot be held liable under international law for the human rights violations alleged by Petitioners, including torture, extrajudicial executions, and crimes against humanity.[61] The Special Representative felt obliged to file in this respect an amicus brief in support of neither party in order to correct the "mischaracterizations" of his mandate's findings and conclusions to be drawn by the U.N. Guiding Principles.[62]

Kiobel v. Royal Dutch Petroleum Co is a class action suit filed in 2002 by twelve Nigerians plaintiffs against Royal Dutch Petroleum and British Shell Transport and Trading corporations. The Petitioners alleged that the Respondents and their agents aided and abetted, or were otherwise complicit in, widespread and systematic attacks committed by the Nigerian Government in the Ogoni region of Nigeria between 1992 and 1995 against the Ogoni population and directed, in particular, at people like the petitioners who opposed Shell's environmental degradation in the Niger Delta. Specifically, Petitioners alleged various human rights abuses, including torture, extrajudicial execution, prolonged arbitrary detention, extrajudicial killings and crimes against humanity. Respondents moved to dismiss the claim, arguing *inter alia* that the complaint failed to state a violation of the law of nations with the specificity required by the 2004 *Sosa v. Alvarez Machain* decision, in which the Supreme Court made clear that, at a minimum, "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than (the three) historical paradigms" (that's to say: violation of safe conducts, infringement of the rights of ambassadors, and piracy). [63]

In 2006, the U.S. District Court for Southern District of New York dismissed several of the claims. Both parties appealed the decision to the U.S. Court of Appeal for the Second Circuit which decided in 2010, by a majority of the appeals panel, that that this ATS claim must be dismisses for lack of subject matter jurisdiction, as corporations could not be sued under the ATS. Particularly, the Second Circuit court held that "in ATS suits alleging violations of customary international law, the scope of liability—who is liable for what—is determined by customary international law itself. Because customary international law consists of only those norms that are specific, universal, and obligatory in the relations of States *inter se*, and because no corporation has ever been subject to *any* form of liability (whether civil or criminal) under the customary international law of human rights, we hold that corporate liability is not a discernible—much less universally recognized—norm of customary international law that we may apply pursuant to the ATS".[64]

The plaintiffs brought the case in front of Supreme Court, which granted *certiorari* on this question in order to resolve the split created between the Second Circuit and other three federal courts of appeals (the Seventh, District of Columbia and Ninth Circuits) which ruled differently on the issue that the ATS permits suits against corporations for universally condemned human rights violations.[65]

On February 28, 2012 the Supreme Court heard oral arguments for the case on the questions of (1) whether the question of corporate civil liability under the Alien Tort Statute ("ATS") is a merits question or a question of subject matter jurisdiction; and (2) whether corporations may be sued in the same manner as any other private party defendant under the ATS. But, on March 5, 2012 the Court ordered briefing and re-arguments on the additional question of "whether and under what circumstances the ATS allows U.S. courts to recognize a

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[61] The sentence relied on states that: "it does not seem that the international human rights instruments discussed here currently impose direct legal responsibilities on corporations." *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, para 44.

[62] *Kiobel and Corporate Social Responsibility : An Issue Brief by John Ruggie*, September 4, 2012.

[63] 542 U.S, 724, 732.

[64] United States Court Of Appeals For The Second Circuit, Kiobel v. Royal Dutch Petroleum, September 17, 2010.

[65] *Kiobel v. Royal Dutch Shell Petroleum Co., et al.*, 621 F.3d 11 (2d Cir. Sept. 17, 2010), cert. granted (U.S. Oct. 17, 2011) (No. 10-1491).

cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States". [66]

Simply put, the U.S. Supreme Court is going to decide upon the two core issues of the corporate civil liability of corporations under the ATS and the permissibility of universal civil jurisdiction under the same Statute, making *Kiobel* one of the most important cases to be decided and one that could have profound implications for corporations accountability for gross human rights violations committed abroad.

V. Bringing the Governments back in: their positions on universal civil jurisdiction under International Law.

One of the two core questions raised before the Supreme Court in *Kiobel* is whether corporations could be held liable in a federal common law action brought under ATS for human rights violations. In this respect, the U.S. Government filed an impressive *amicus curiae* brief, signed by the, Legal Advisor to the State Department (Yale law School prof. Koh) explicitly supporting the petitioners.[67] In response to the Second Circuit affirmation that "It is inconceivable that a defendant who is *not liable* under customary international law could be *liable* under the ATS", the U.S. Government affirmed that the United States "is not aware of any international law norm …that distinguishes between natural and juridical persons. Corporations (or agents acting in their behalf) can violate those norms just as natural personas can. Whether corporations should be held accountable for those violations in private suits under the ATS is a question of federal common law". A District court, therefore "does not lack jurisdiction over an alien's otherwise colorable tort claim alleging a law-nations violations simply because the defendant is a corporations". Whether Federal Courts should recognize a cause of action in such circumstances "is a question of federal common law that, while informed by international law, is not controlled by it". The Government rightly asserted that the Court of appeals confused the threshold limitation indentified in *Sosa* (which requires violations of an accepted and sufficiently defined substantive international law norm) with the question of how to *enforce* that norms in domestic law, which does not require an accepted and sufficiently defined practice of international law. In other words, according to the U.S. Government, international law establishes the substantive standards of conduct but leaves the means to enforce those substantive standards to each State. "International law informs, but does not control, the exercise that discretion". In conclusion, according to the U.S. Government, nothing in international or in the text and history of ATS justifies "a categorical exclusion of corporations form civil liability for grave human rights abuses under this Statute".

Regarding the Respondents' argument that there is no corporate liability under international law for the human rights violations, including torture, extrajudicial executions, and crimes against humanity,[68] prof. Ruggie's in his *amicus curiae* too advanced good counter-arguments, contesting the "misconstruction" of the central findings of one of the United Nations report he has authored. According to the Special Representative, his reports explicitly recognized that "corporations may be held directly liable for human rights violations that constitute international crimes such as genocide, torture, slavery, and crimes against humanity". Having examined the developments in the area of corporate responsibility for international crimes, prof. Ruggie concluded that he found that the interaction between "the extension of responsibility for international crimes to corporations under domestic law" and

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[66] *Kiobel v. Royal Dutch Petroleum Co., et al*., 621 F.3d 11, *order for reargument* (U.S. Mar. 5, 2012), *available at* http://www.supremecourt.gov/orders/courtorders/030512zr.pdf . See also KEITNER, *The Reargument Order in Kiobel v. Royal Dutch Petroleum and its Potential Implications for Transnational Human Rights Cases*, March 21, 2012, http://www.asil.org/insights120321.cfm.

[67] All the Briefs and other documents for the Kiobel Case are available at The Center for Justice & Accountability (CJA) website: http://cja.org/article.php?list=type&type=509.

[68] For an analysis of the 20 U.S. Supreme Court cases that already recognized corporations liability under international law, see PAUST, *Non-State Actor Participation in International Law and the Pretense of Exclusion, Virginia International Journal of Law*, 2011, 977-1004.

"the expansion and refinement of individual responsibility by the international ad hoc criminal tribunals and the ICC Statute" has created "an expanding web of potential corporate liability for international crimes." He further refuted the argument that the lack of a current international body for adjudicating corporate responsibility for international crimes excludes such responsibility: "just as the absence of an international accountability mechanism did not preclude individual responsibility for international crimes in the past, it does not preclude the emergence of corporate responsibility today." For these reasons, the Special Representative concluded that "the most consequential legal development" in the "business and human rights constellation" is "the gradual extension of liability to companies for international crimes, under domestic jurisdiction but reflecting international standards." And that remedies for business-related human rights abuses may come in many forms, including "civil, administrative or criminal liability." The Special representative also concluded that the weight of international criminal law jurisprudence in cases involving individual perpetrators supports a "knowledge standard for aiding and abetting human rights abuses".

Prof. Ruggie further expressed his deep concern for the potential implications of this case, that may go well beyond the exterritorial reach of ATS over human rights abuses committed by foreign multinationals in countries other than the United States. He explicitly contested the Respondents strategy seeking to persuade the U.S. Supreme Court not only to dismiss the claims against them, but also "to negate the statutory basis making it possible to use U.S. courts as a forum to adjudicate civil liability for gross human rights violations committed abroad—even when those violations are committed by U.S. nationals, and even if the Americans are natural persons." According to the Respondents not only ATS does not apply to corporations, including U.S. corporations, but its reach - even for natural persons - should be "pulled back" by the Supreme Court to cover only violations committed within the jurisdiction of the United States. Doing otherwise would imply a violation of international law since customary international law does not support the existence of an express rule permitting the assertion of civil jurisdiction over human rights violations committed outside the United States. In this respect, Prof. Ruggie concluded that "had this view held all along, there would have been no *Filártega*, no successful Holocaust survivors' claims, no statutory basis for civil action by foreign victims even against U.S. nationals for gross human rights violations abroad, whether committed by legal persons or natural persons. What is more, there might never have been the knock-on effects of ATS jurisprudence for legal developments in other countries, and also for the growth of voluntary corporate social responsibility initiatives at home and abroad, adopted by companies at least in part to avoid ATS-type liability."[69]

On this particular issue, i.e., the second core question in front of the U.S. Supreme Court (that of the exterritorial reach of the ATS) the various Governments' positions expressed in their *amici curiae* are very illuminating on how little they are concerned to maintain and/or possibly enlarge the extraterritorial scope of civil jurisdiction in relation to human rights abuses.

The European Commission, on behalf of the European Union, filed a supplemental brief in support of neither party stating the concrete interest of the European Union "in ensuring that EU- based natural and legal persons are not at risk of being subjected to the laws of other States where extraterritorial application of laws does not respect the limits imposed by international law". The core argument of the European Commission's brief is that in order "To preserve harmonious international relations, States and international organizations such as the European Union must respect the substantive and procedural limits imposed by international law on the authority of any individual State to apply its laws beyond its own territory". Therefore, the Commission submits that

for extraterritorial application of the ATS to conform with the law of nations it must be confined to the limited bases for extraterritorial jurisdiction recognized by international law. These bases include also the exercise of universal jurisdiction to reach conduct and parties with no nexus to the United States "but only when the conduct at issue could also give rise to universal criminal jurisdiction." In conclusion, according to the European Commission, the U.S. Federal Courts may exercise universal civil jurisdiction in relation only to the "narrow category

[69] *Kiobel and Corporate Social Responsibility: An Issue Brief by John Ruggie*, 4.

of claims involving the most grave violations of the law of nations, such as genocide or torture, or conduct committed outside any nation's territorial borders, such as piracy." The internationally-recognized justification for universal criminal jurisdiction "also contemplate and support a civil component", but limited to the circumstances that could give rise to universal criminal jurisdiction. Within these limits, according to the European Commission, universal civil jurisdiction is consistent with international law principles of comity and equality of sovereignty. As to the procedural limitations imposed by international law, the Commission asserts that the plaintiffs must demonstrate that local remedies have been exhausted or that the local for a- i.e. those States with a traditional jurisdictional nexus to the conduct - are unwilling or unable to provide relief and no international remedies are available.

In conclusion, the extraterritorial reach of ATS is deemed by the European Commission consistent with international law, "provided that the statute's coverage of conduct occurring in the territory of another sovereign implements these constraints." In doing so, "extraterritorial applications of the ATS not only respect principles of comity but also ensure that courts remain open to claimants who might otherwise be subject to a denial of justice."

One might have expected that the European Commission's brief exhausted the opinion of the European Union's twenty-seven Member States. This is not the right conclusion, as European Union rarely succeeds in speaking with only one voice. A conflicting amici brief was also submitted by two EU Member States, precisely two Respondents' domiciliary States: the UK and the Netherlands. In their brief, jointly filed in support of the Respondents, these two Member States expressed a very strong opposition against the assertion of exterritorial civil jurisdiction under the ATS. These States asserted that "the right of the United States or any other sovereign to create and enforce such a domestic civil remedy depends on it being able to satisfy the *proper jurisdictional limits recognized by international law.*" In relation to claims of a civil nature, "the bases for the exercise of civil jurisdiction under international law are generally well-defined. They are principally based on territoriality and nationality. The basic principles of international law "have never included civil jurisdiction for claims by foreign nationals against other foreign nationals for conduct abroad that have no sufficiently close connection with the forum State." The requirement of "a sufficiently close nexus to the forum asserting jurisdiction" is imposed by international law in order to minimize conflicts between States and to prevent forum shopping by plaintiffs and defendants rushing to obtain judgments in a forum that favors their own interests. According to the States submitting the brief, the mere presence of a U.S. corporate affiliate is not "a sufficient basis" to establish U.S. jurisdiction over ATS claims against a foreign parent or affiliated corporation for unrelated activities that have no effect in the U.S. The only exception to the requirement of a sufficiently close nexus to the forum State is the so-called "universality principle", which allows each State to exercise jurisdiction over a limited category of crimes so heinous that every State has a legitimate interest in their repression, regardless of the absence of a sufficiently close connection to the perpetrator, the victim, or the crime itself. But "universal jurisdiction applies only in criminal cases and does not give rise to a corresponding basis for civil jurisdiction."

Also the Federal Republic of Germany filed an amicus brief in support of the Respondents expressing its opposition to "overly broad assertions of extraterritorial civil jurisdiction arising out of aliens' claims against foreign defendants for alleged foreign activities that caused injury on foreign soil", contrary to international law. Germany urged the Supreme Court to instruct the lower courts that the power to adjudicate should only be exercised in ATS cases brought by foreign plaintiffs against foreign corporate defendants concerning foreign activities "where there is no possibility for the foreign plaintiff to pursue the matter in another jurisdiction with a greater nexus." Germany also asserted that permitting a broad exercise of jurisdiction without a specific nexus "would result in a legal and economic climate that would make it more difficult for corporations to engage in international business." Therefore, this Government concluded that the Supreme Court "as one of the world's most influential, should take this opportunity to ensure that the ATS is only used as a last resort for limited causes of action in cases that have no significant nexus to the United States".

In the light of the concerns expressed by foreign States on the extraterritorial scope of civil jurisdiction provided by the ATS in relation to human rights abuses, the U.S. Government (with an unsurprising development of its position) filed in June 2012 a supplementary brief in

partial support of affirmance of the Second Circuit's decision. While the U.S. continues urging a reversal of this latter court's holding that the ATS does not apply to corporations, the new brief specifically deals with the question of whether and under what circumstances the ATS allows U.S. courts to exercise universal civil jurisdiction over human rights violations which have slight connections to the US, i.e. committed by foreign corporations against foreigners victims on foreign territory.

In its introductory Statement of Interest, the U.S. Government starts significantly explaining that "The United States has an interest in the proper application of the ATS because such actions can have implications for the Nation's foreign relations, including the exposure of U.S. officials and nationals to exercises of jurisdiction by foreign States, for the nation's commercial interests, and for the enforcement of international law". While the brief argues that the Supreme Court "should not articulate a categorical rule foreclosing the U.S. courts to exercise jurisdiction under ATS for conducts occurring in a foreign country", the U.S. Government concludes that U.S. courts "should not create a cause of action that challenges the actions of a foreign sovereign in its own territory, where the sued party is a foreign corporation of a third country that allegedly aided and abetted the foreign sovereign's conduct". In cases like that, the United States "could not be faulted by the International community for declining to provide a remedy under U.S. Law especially when other more appropriate means of redress would often be available in other forums, such as the principal place of business or country of incorporation, and they choose not to provide a judicial remedy."

Even if a federal common-law cause of action is created under the ATS for extraterritorial violations of the law of nations in certain circumstances, according to the U.S. Government doctrines such as "exhaustion" and "forum non conveniens" should be applied "at the outset of the litigation" and with special force in cases "where the nexus to the United States is slight". In conclusion a U.S. court, applying U.S law, should be a "forum of last resort, if available at all".

This brief, signed only by the Justice Department officials and not by the State Department,[70] undoubtedly partially re-aligns the U.S. position with the various foreign Governments' position over the extraterritorial reach of ATS.

VI. Critical evaluation of the European Union Member States' arguments on the extraterritorial application of ATS.

The milder position of the European Commission in respect of the exercise of extraterritorial jurisdiction in comparison to those expressed by the European Union Member States can be easily understood by the fact that the Commission presented in 2010 a Draft Proposal which aimed to bring radical changes in the current version of the actual cornerstone of the European legislation in civil and commercial matters, i.e. Regulation No. 44/2001 of 22 December 2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation).[71] Among the objectives of these radical changes developed by the Commission in its Draft there was also the expansion of the territorial scope of the European jurisdictional rules: currently, the territorial scope of most of the rules of jurisdiction provided for in the Brussels I Regulation, subject to certain noteworthy exceptions,[72] is limited to cases where the defendant is domiciled in a Member State.

The most ground-breaking amendment of the Commission's Draft Proposal consisted in eliminating such a limitation by extending all rules of jurisdiction to defendants domiciled in third countries. The draft Regulation also proposed two additional rules, which would be

[70] SANDER, *Kiobel: The U.S. steals the headlines in first round of supplemental brief on universal civil jurisdiction under the Alien Tort Statute*, published on June 26, 2012, avalilable at http://www.ejiltalk.org/kiobel-the-us-steals-the-headlines-in-first-round-of-supplemental-briefs-on-universal-civil-jurisdiction-under-the-alien-tort-statute.

[71] COM(2010) 748 final.

[72] The rules establishing the exclusive jurisdiction of specific courts and the rules regarding prorogation of jurisdiction are applicable even if the defendant is not located in a Member State.

applicable where no other rule of the Brussels I Regulation would confer jurisdiction to the courts of one of the Member States. Such rules would have applied by definition, in disputes involving non EU defendants domiciled (since the courts of the Member State where the domicile of the defendant is located have, as a matter of principle, jurisdiction). Pursuant to the first rule, non-EU defendants could have been sued at the place where their moveable assets are located, provided that the value of such goods would not be disproportionate with respect to the value of the claim. The second rule for non-EU defendants provided that they could also be sued exceptionally before a *forum necessitatis* in cases where no other forum (outside the European Union) would guarantee the right to a fair trial.

The Council of European Union did not accept these proposals; therefore according to the new recast of Brussels I Regulation, adopted in December 2012, only defendants domiciled in a Member State could thus be sued in another Member State based on the rules set out in the Regulation.[73] This simply means that the European regime does not apply to civil claims brought before EU member State courts against non-EU defendants, and that the rules of international jurisdiction comprised in the domestic law of each Member State would be applicable.

In this respect, the argument advanced by the UK and the Netherlands Governments' in their amici brief in Kiobel that their domestic courts would not allow the plaintiffs to bring these kind of "foreign cubed" tort case, rather, "their courts would generally insist on a sufficiently close nexus with the forum based on the territoriality or active personality principles", is absolutely deceptive. This argument was advanced in response to a question raised by Justice Kennedy (that came from a brief submitted for amici curiae Chevron and other corporations in support of the Respondents) asserting that " No other nation in the world permits its court to exercise universal civil jurisdiction over alleged extraterritorial human rights abuses to which the nation has no connection" and asked "for the best authority you have to refute that proposition".

The UK and Netherlands Governments statement that in their countries plaintiffs could not have brought such claims has been strongly denied by an amicus brief filed by Law Professors at four leading universities in the Netherlands who conclude, after a deep analysis of Dutch law and cases, not only that that Dutch courts may exercise criminal and civil jurisdiction over both individuals and corporate actors for extraterritorial violations of the law of nations, but that "they have done so" over ATS-like, so-called "foreign cubed", civil claims in a number of recent cases against defendants that are not domiciled in the European Union, pursuant the tort law provisions of the Dutch civil code. Among the various examples of universal civil jurisdiction exercised by Dutch Courts, they mentioned the Hague District Court decisions in March 2012, where the Court assumed jurisdiction over and sustained a civil claim brought by a foreign plaintiff regarding his unlawful imprisonment and torture in Libya by Libyan officials not resident in the Netherlands.[74] In late 2009 and 2010, in interlocutory judgments relating to a number of tort claims brought by Nigerian farmers against Shell Nigeria and the current British parent company of Shell, for the damages caused by four specific oil spills in the surroundings of their villages in Nigeria, the same Court held that it had jurisdiction not only over the claims against the Netherlands-based parent company Royal Dutch Shell but also over claims against the Nigeria-based subsidiary. In its final judgments of 30 January 2013, the Hague District Court dismissed claims in four out of five lawsuits finding that pursuant to the applicable Nigerian law, an oil company is not liable for oil spills caused by sabotage from third parties; Shell Nigeria has been sentenced to pay damages only in one of the five proceedings. [75]

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[73] *Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), Official Journal of the European Union*, L 351/1, 20.12.2012.

[74] *El-Hojouj/Unnamed Libyan Officials*, The Hague District Court, March 21, 2012, LJN: BV9748.

[75] Dutch judgments on liability Shell, *Decision on oil spills in Nigeria*, at http://www.rechtspraak.nl/Organisatie/Rechtbanken/Den-Haag/Nieuws/Pages/DutchjudgementsonliabilityShell.aspx.

The Dutch Professors conclude that "Dutch case law is therefore incompatible with any alleged rule of customary international law prohibiting the exercise of jurisdiction by domestic courts over claims" such as those pursued by the Petitioners in *Kiobel*. To the contrary, "recent Dutch case law suggests that such claims are indeed recognized by the courts."

Actually, ATS is, in fact, far from alone.[76] Many statutes and decision of other countries, including the European Member States recognize and have in fact recognized extraterritorial civil jurisdiction over human rights abuses to which they have no more factual nexus than that required by the U.S. doctrine of personal jurisdiction: these statutes and cases are discussed in detail in the supplemental brief filed by the Yale law School Center for Global Legal Challenges and, as to the many national legislations of the European Union Member States which provide universal civil jurisdiction, by the brief of the European Commission.[77] It's also important to stress that under the current U.S. personal jurisdiction doctrine, "an essential element" of any lawsuit, "without which the court is 'powerless to proceed to an adjudication"[78] a foreign defendants who lacks significant contacts with the United States is not subject to suit in U.S. courts: the due process clause protect them in cases where there are no ties to the United States.[79] While, an important tie to the U.S. is provided by the fact that all the Nigerian plaintiffs in Kiobel are legal resident in the United States and all have received political asylum by the time the case was filed.[80] If the ATS is in violation of international law, then many other national laws are in violation as well.

Also deceptive is the Federal Government of Germany's line of reasoning, according to which claims against a German corporation for human rights abuses committed in a third country would be more appropriately heard in a German forum, as the Germany's legal system allows plaintiffs to pursue violations of customary international law by German tortfeasors, providing that the victims of those torts can enforce their rights simply and efficiently before the German courts. While the German Government recognized that it certainly "would be inappropriate to require plaintiffs to exhaust their legal remedies in countries which have a proven record of human rights violations and no due process", it concluded that is certainly "reasonable and appropriate to require a victim of a tort committed in a third country by a German tortfeasor to go to Germany and utilize the legal system of the Federal Republic of Germany to seek legal satisfaction." The members of German Bundestag, the highest legislative body of the Federal Republic of Germany in their amici curiae brief submitted in the *Kiobel* case, contended that these claims "are mere pretexts for a parochial interest in protecting German businesses from human rights liability." Significantly, the members of German Parliament accuse their Federal Government to simply and deceptively have omitted important details regarding the "openness of German courts" to such claims. Despite the government's claim that civil remedies exist in German law, the German Bundestag rightly recalled that German enterprises that committed some of the most serious and atrocious violations of human rights of the twentieth century, including the use of forced labor during the National Socialist regime, refused to accept responsibility for the exploitation of thousands of workers, and victims received no redress in the half-century that followed. The solution to this problem emerged only in the late 1990s, and only after victims prepared to initiate civil litigation against the corporate perpetrators under the ATS. "The prospect of ATS litigation induced German enterprises and the German government to cooperate with victims' associations to reach an extrajudicial agreement regarding compensation. A foundation was formed, and individuals were eligible to receive individual payments as redress for the abuses they suffered." The simply prospect of ATS litigation was crucial in creating the conditions for a comphrensive framework for compensating victims of force labor in the Nazi era. Absent the ATS, "none of this would have been possible." The German Bundestag concluded that this

[76] *Hathaway*, *Online Kiobel symposium: The ATS is in good company*, SCOTUSBLOG, July 17, 2012.
[77] Brief of the European Commission, 24.
[78] *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999).
[79] Amici brief of Center for Justice and Accountability (CJA) and survivors of gross human rights violations who have filed suit against the individuals responsible for perpetrating those abuses under the Alien Tort Statute, June 13, 2012, 25.
[80] Petitioners Supplemental Opening Brief, 2.

"belated compensation of victims of Nazi forced labor" illustrates very well the difficulties faced by individuals who seek remedies for serious human rights violations. "When victims cannot bring claims in the States where the violations took place or the states where potential defendants are headquartered, the ATS may be the only effective form of redress available."

As to the contention that extending ATS and federal common law to suits involving foreign parties and territories would also mean extending U.S. law outside of its borders, it is easy to answer that this statute does not allow United States' courts to project abroad a totally "inappropriate" exercise of U.S. legislature, as it happened in recent years with respect to the U.S. effort to protect the interests of the international system by using means that have been perceived by the rest of world as offensive to international law. ATS is not comparable for example to the U.S. unilateral economic sanctions that extend their reach to third countries and third parties, objected by other nations that enacted the so-called "blocking-statutes", empowering their Governments and courts to prevent their nationals from complying with U.S. orders.[81]

The ATS does not create new U.S. substantive law, but let U.S. courts to enforce, specific, universal norms of international law, aiming at protecting internationally recognized human rights, which all States are in principle bound to comply with, and which it is, at least, in the interest of all States, to seek to ensure compliance with. This, from the private international law point of view, the major difference with the European regime for "foreign cubed" civil claims involving foreign defendants: European States do not apply international law to extraterritorial tort-based disputes involving violations of the law of nations; instead they use common "choice of law" rules contained in a Council Regulation known as "Rome II."[82] In relation to torts, the general rule is that liability should be governed by the "law of the country in which the damage occurs" unless there are very strong reasons for applying the law of another country. In most cases, therefore, the law applicable will be the law of the place where the damage occurred, not the law of the forum state. For this reason, precisely, it has been maintained that choice of law rules can help mitigate concerns about extraterritorial jurisdiction in civil cases.[83]

Finally, it is at least contradictory for the European States that have unanimously supported the U.N. Guiding Principles, which precisely calls upon States to recognize the need for effective judicial remedies for violations of human rights perpetrated by corporations, now seek either to abolish or to restrain one of the most effective remedies in the business and human rights field to date. As the German Bundestag said in its amicus brief, in representation of the German people, every single nation should have a special interest in the right of victims of human rights to resort to any jurisdiction that provides an effective remedy, nor should be in the interest of either nation foreign policy to grant businesses impunity, as the accountability of all persons - including business entities - for human rights violations is a high priority.

VII. Conclusion.

Contrary to extraterritorial criminal jurisdiction which is constrained by international law, extraterritorial civil jurisdiction remains largely a matter for domestic law and highly controversial. The considerations above suggest the need for the adoption of a new international instrument, aimed at clarifying the obligations of States to protect human rights against any violations by the activities of transnational corporations.[84] This is also the

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[81] *Developments in the Law, Extraterritoriality, Harvard Law Review*, 2011, 1231, 1289.

[82] *Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), Official Journal of the European Union*, L 199/40, 31.7.2007

[83] ZERK, *Extraterritorial jurisdiction: lessons for the business and human rights sphere from six regulatory areas. Corporate Social* Responsibility Initiative, Working Paper No. 59, 2010, 160.

[84] DE SCHUTTER, *Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations*, November 2006), at http://www.reports-and-materials.org/Olivier-de-Schutter -

indication of the Special representative, John Ruggie, whose consultations have indicated a broad recognition that this is an area where greater consistency in legal protection is highly desirable, and that it could best be advanced through a multilateral approach.[85]

To date, the only harmonized regime is that provided by the European Union law that governs also the three other European States members of the EFTA; but also this regime is not complete uniform as it does not cover cases where the defendant is not domiciled within one of the governed States. National laws on jurisdiction currently still apply to these claims. Attempts to develop an international treaty globally harmonizing rules on civil jurisdiction, dating back to the mid-1990s, have brought States to negotiate the Draft Hague Convention on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters (the "Draft Hague Convention"). Article 18, paragraph 3, of this Draft permitted grounds of jurisdiction which would have to be excluded from national law (because they do not represent a substantial connection between the State and the dispute) when a plaintiff applied to it for relief or damages for an infringement of his fundamental rights. In the end, though, the project proved to be too ambitious and it was abandoned as it was not possible to find uniform solutions that suited all the key States.

The current debate around the Kiobel case demonstrate that, years after there is still a problem in deciding which rules should govern international civil jurisdiction in this field. Among the various, some European Member States pointed to "the risks of improper interference with the rights of foreign sovereigns" in ATS cases because "the U.S. has chosen to adopt plaintiff-favoring rules and remedies that other nations do not accept."[86] The attractiveness of the United States as a forum for foreign plaintiffs is indisputable, as this country accord private plaintiffs a set of advantages not provided by most of other countries, like the so-called "American rule" on litigation costs which requires each side to bear its own costs, the right to a jury trial in a civil case, the "opt out" class action system, and punitive damages generally not allowed elsewhere. Nevertheless, these advantages could well compensate the rarity of remedies for corporate human rights abuses and the great obstacle to the accessibility of effective remedies for victims of corporate human rights violations. Access to justice is a fundamental human right recognized in Article 6 of the European Convention on Human Rights.

The application of ATS is consistent with the growing recognition in the international community that an effective remedy for crimes in violations of fundamental rights includes, as an essential component, civil reparations to the victims, as the European Commission expressly recognized in its amicus brief. A finding by the United States Supreme Court that it would be contrary to international law for United States' courts to hold corporations accountable for extraterritorial abuses would represent a major setback for victims of human rights abuses in their quest for justice. As the Government of Argentine Republic stated in its amicus brief filed in the Kiobel case, the Alien Tort Statute "offers a valuable instrument to promote goals shared by all democratic republics". As many ATS cases arising abroad are brought "in contexts where no alternative forum exists" the loss of the ATS as a tool for human rights victims seeking justice "would be a serious blow to the cause of democracy and human rights".[87]

But, at the end, it seems that the United States Government has been convinced by the Foreign Governments' briefs that ATS might have a broad impact on the sovereignty of other countries that have a strong interest in governing their own subjects and territories, and applying their own laws in cases which have a closer nexus to those countries; thus, ATS could potentially interfere with other sovereignty and governmental interests. This new position can be reasonably explain by the corresponding U.S. interest in ensuring also that its legal persons are not equally at risks of being subject to the law of other States.

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report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf.

[85] RUGGIE, *Recommendations on Follow-Up to The Mandate*, February 11, 2011, 4 at http://www.business-humanrights.org/media/documents/ruggie/ruggie-special-mandate-follow-up-11-feb-2011.pdf.

[86] *Supplemental brief of the UK and the Netherlands*, 27.

[87] *Brief for the Government of the Argentine Republic as amicus curiae in support of Petitioners*, 14.

It’s impossible to predict what position would take the U.S. Supreme Court; due to the widespread critics to the extraterritorial application of ATS it is probable that it will be sensible to the suggestion of the U.S. Government to constrain the most “exorbitant”, aggressive, extraterritorial applications of the ATS deemed by other States inconsistent with international law limits; and that certain criteria must be fulfilled, before asserting extraterritorial jurisdiction directly over the foreign conduct of individuals and companies. If so, the hope is that the Court follows the European commission’s argument that civil jurisdiction over foreign wrongs should be limited to cases involving very serious human rights abuses already covered by universal criminal jurisdiction, and where the victim would otherwise suffer a denial of justice, such as where there is no adequate, independent judicial body in the State with the closest links with the case, or no reasonable prospect of redress.

Protecting human rights in inter-private relations

Caitlin S. Mulholland

Introduction. Justification.

The purpose of this paper is to show how the issue of human rights – and more specifically protection of the human person's dignity – is today considered a valorizing factor in Brazil's constitutional civil system, one that actually prioritizes existential as opposed to patrimonial relations.

This conceptual twist is of the utmost importance for the teaching of contemporary civil law, since the disciplines included in the sphere of private-law relations, specifically those that involve property and contracts, have traditionally been taught as an area exempt from any influences or interests whatsoever, whether humanitarian or existential. For example, in the 19th and much of the 20th century, the disciplines of contracts and property were a fertile field for the full development of individualism and individual liberalism. The perception that a private relation could have its effects limited on account of some solidary interest aimed at protecting the dignity and humanity of one of the parties of that relation is the consequence of the development of a doctrine that we call constitutional civil law.

This doctrine or methodology embraces the following premises: 1) the juridical system is unique, systematic and obeys a hierarchical structure; 2) the supreme standard norm of this organization is the Federal Constitution of the Republic; 3) the Federal Constitution has a contemporary function that goes beyond that of organizing the political powers, namely that of a central core of values for the community that it represents; 4) one of the pillars of the Democratic State of Law is protection of human rights by means of the general clause of guardianship of the human person (*the dignity of the human person*); 5) private-law relations should always not only be evaluated by the rules concerning contracts and the like contained in civil laws to which they refer, but also referenced to the general clause of protection of human beings, as a way of safeguarding their dignity and humanity.

With regard to the general clause of protection of the dignity of the human person – herein referred to as the general clause of protection of human rights in private relations – we can consider its premises to be as follows: 1) protection of substantial equality in private relations; 2) protection of psycho-physical integrity when faced with situations potentially harmful to existential interests of the human person; 3) protection of social solidarity in private relations when collective preponderates over individual interest; and finally, 4) protection of freedom when individual choice considers the possibility of protecting difference as a form of recognition and self-determination.

Background and the Federal Constitution.

Historically speaking, much has been said about the crisis that civil law and its systematics, as well as the loss of the notion of the Civil Code as the valorizing core of our private juridical structure. The breaking of the public right/private-law dichotomy; the de-codification movement through proliferation of various laws (some of which actually constitute micro-systems); State interventionism in private relations ("publicization" of private law, what Josserand calls contractual State control); and the realization that classic civil law was incapable of protecting the new juridical relations in an equalitarian, fair manner – these are some of the elements that together support this notion of crisis.

The understanding that the juridical system, being unique and hence systematic and hierarchically structured, could no longer be analyzed and interpreted in set and separate blocs, led to the conclusion that, when faced with a system based on a superior standard norm – the Constitution – the principles and values that emanate from it must be respected, otherwise the whole sense of a legal system comes undone. And in this way the system of the Civil Code as a repository of the values that control private relations becomes the responsibility of the Constitution, which remains the source of the fundamental principles of the juridical

system.

The Civil Code thus loses its role as the "constitution" of private life and is replaced as the unifier of the system of private law by the Federal Constitution and its higher principles, norms and values, which serve as the foundations of the whole juridical system for a new Social State. One such value, considered to be central to the conception of the new Social State, is the dignity of the human person, which gains the status of a pillar of the Republic in article 1, III of the Federal Constitution.

Dignity is an absolute value that is intrinsic to the essence of human beings, who are unique in possessing an innate sense of valorizing which is priceless and has no equivalent substitute. Such values will serve as a guide in interpreting and applying juridical norms and will always be taken into account in protecting and guarding the rights of the personality of men and women and in their juridical relations in order to provide the bases for achieving the objectives of the democratic State of law.

In synthesis, these objectives, set forth in article 3 of the Federal Constitution aim at building a fair and free society based on solidarity by eradicating social inequalities and promoting the powers of the State through distributive justice and substantial equality. In this way, the notion of unlimited autonomy granted to individuals in the liberal systems is countered by the idea of social solidarity: if the 19th century was marked by the reign of individualism, the 20th century, with its revaluation of human beings and their dignity, is the era of development of social justice.

Examples.

Following this line of reasoning, we consider not only that each and every inter-private relation should be analyzed by taking into account the interests of the parties who have committed themselves by contract, but also and especially that the finality of protecting the interests of the persons in an inter-private relation is to safeguard the dignity and existence of those who have joined this relationship. This is why in so many concrete situations judges are called to decide on cases where, if the law is strictly interpreted, the result of the case would be different from that derived from an interpretation that takes into account the need to protect the dignity of the human person. For example:

1) By the law of unleviability of family property, only the property that serves as the family residence can be considered unleviable. In the concrete case in question, it was considered that despite the property not being used as the family residence, it was rented out and the value of the rent was used for the family's subsistence;
2) In a contract for financing the purchase of a piece of property, the buyer had already paid 48 of the 50 installments, but was unable the pay the two remaining ones. According to the contract, the seller was entitled to rescind same and claim back the property. The judge felt that this clause in the contract was abusive and that the contract had been substantially respected, leaving it to the seller to simply charge the remaining debt without breaking the contract.
3) Clauses in a health-plan contract are held to be abusive when they impose limits on the number of days spent in an intensive-care unit.
4) Although the Public Registers law does not allow changing a transsexual's sexual status and name before transgenitalization surgery procedures have been performed, one judge permitted such change alleging constitutionally guaranteed protection of the dignity of the human person.

Conclusion.

In conclusion, there are numerous hypothetical private relations where magistrates apply the criterion of protection of human rights using the general clause of safeguarding the human person primordially for the purpose of protecting the interests of one party against the patrimonial interests of the other. The question gains even more importance when one realizes that this methodology is becoming increasingly more adopted as doctrine in undergraduate Law courses and that Law graduates, at least in the leading schools in Rio de Janeiro, have had some experience with this sort of training, which lends priority to the practice of Law by preferentially considering the protection of human beings and their existential interest, even when this interest involves a relation which in principle is of a strictly patrimonial nature, as in the case of contracts and property.

Teaching Human Rights and the Role of Lawyers in Constitutional Democracy

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I will describe the challenges that, in my perspective, the teaching of human rights confront in Argentina and I will try to offer anaccount about how they can be overcome.

In order to be brief, and surely unfair with the Argentine legal system, I identify three very relevant obstacles that stand before the possibility of teaching human rights effectively. However, I believe all the three obstacles can be overcome by implementing the correct legal education reform strategies.

The first obstacle is related to the fact that the Argentine legal system belongs predominantly to the civil law tradition, which is reluctant to accept limits to the soverignity of parliament. I say predominantly, because the Argentine legal system is an hybrid one that combines many elements from civil law tadition with a constitutional law structure rooted in the American model, unlike most continental law systems from other countries. In this sense, the Argentine legal system, since its origins, has considered its written Constitution to be supreme and its courts were always charge with the responsibility of deciding when laws are constitutional by aplying a judicial review model inspired in American law. Thus, every judge has the power to make the decision of whether a particular statute, or an executive decree or regulation, complies with the Constitution and if they does not, not to apply them to a particular case brough before the court. Although it seems from my description of the system that the Constitution is supreme, in fact its supremacy is not so absolute as it appears to be. The strength of the civil or continental law tradition has led most scholars, judges and lawyers to believe that the Civil Code, not the Constitution, is the supreme law of the country. Indeed, out of the 40 or 50 courses that conform the law degree program in most Argentine Law Schools, only one or two of them are devoted to the study of the constitutional text and, in very few cases, of the constitutional interpretation that courts articulate in their decisions. Most of the remaining courses focus on the study of the Codes and the statutes that supplement it, mainly on civil law in general, family law, commercial law, labor law and criminal law. The interesting fact is that, probably with the unique exception of criminal law, none of the other courses pay enough attention, if any, to the relationship between those areas of law and constitutional law. When I ask my graduate students how many cases in which civil law and constitutional law were in conflict where studied or discussed in their civil law courses they say none or almost none. This is not only because their teachers overlook the connection between constitutional law and civil law, but mainly because judges thiemselves are not very much aware or concerned by the relationship. It is true that until very recently, we could find almost no case in which not only lower courts, but not even the Supreme Court have dare to make a decision in which a provision of the Civil Code was declared un constitutional.

A constitutional democracy such as the Argentine one, is a political system in which the Constitution functions as a limit to the democratic will of the majority. Thus, constitutional rights and freedoms should be seen as triumph cards that can stop majorities from achieving their will when it goes against those rights and freedoms. The Civil Code is not the supreme law of the country and it is limited by the rights and freedoms that were established in the Constitution, and judges have the duty to enforce them. Lets see an example from family law. The Argentine Civil Code was passed in 1864. Since then, it has established a ban on divorce.

This ban was included because of the influence of catholic canonic law in our legal system. On the other hand, the Constitution protects the right to personal autonomy, understood as the freedom of the individual to design and carry out the life that she decides to pursue for herself. This constitutional freedom would oppose no obstacle for the person to undo a marriage and to marry again with a different person if that is what she wants. This protection conflicts with the Civil Code and its ban on divorce. It was not until the early 1980s that the Supreme Court decided a case in which that provision of the Civil Code was declared unconstitutional and inapplicable to the parties that brought the case. It took the judiciary 120 years to confront the Civil Code and to rule against its mandates. Something similar has happened recently with the provision that banned marriage between two persons of the same sex. A few years ago, Congress, based on constitutional arguments of equality and autonomy, passed a law modifying the text of the Civil Code in order to allow for same sex marriage. For more than a century these constitutional discussions, that are mainly about rights and freedoms have been absent from our law schools.

The second obstacle is about the difficulties for international human rights law to become an effective limit to the power of the national state. After the Second World War, an important part of humanity reached a consensus about the need to design a global system that prevents the world to witness again the atrocities that took place in Europe and Asia in the mid of the 20th Century. International Human Rights law is the manifestation of that consensus. However, our government, as well as many other governments in the world, have not taken international human rights law seriously, not even the judiciary. Again, as it happened with constitutional law, international human rights law was let outside the classrooms. There was indeed always one an only one and separate course on international law that included some classes on international human law, but international human law was not allowed to enter all the other classrooms as if decisions made on criminal law or family law would not be ever in conflict with the international commitments of our state. After the dictatorship that ruled Argentina between 1976 and 1983 there was a revalorization of international human rights law in our law schools, as if we became aware that it was an effective antidote for preventing that the atrocities of the past could happen again. Young lawyers trained under democracy and NGOs staffed with these professionals begun in the mid 1990s to bring arguments before our courts based on international human rights treaties. Judges, forced by these arguments as well as by a constitutional reform achieved in 1994 that made international human rights law as much the supreme law of the country as constitutional law was considered to be, little by little introduced in their decisions the values and the ideals of those treaties.

The third obstacle is about legal teaching itself. Again, mainly as a consequence of the dominance of the civil law tradition, legal education has been always understood as a process by which professors who are supposed to "know" the law transfer their knowledge to passive students that receive this knowledge acritically. Lectures instead of legal discussions were the rule within the classroom and practical training was formal, strictly procedural and dry. Students at law school did not get involved in the creative process of building an argument for defending the client's rights and freedoms. Law was a text whose meaning was self-evident, although this meaning was articulated by a teacher, although she presented her description as non-value based. Additionally, recognizing that lawyers could engage in a discussion about what the law is would undermine the very understanding of legal education as mere transmission of information. Finally, law could not be "used" for advancing the rights of the vulnerable or for achieving social change because that would imply to assert that law's meaning is not so much self-evident and this "use" would equal to manipulation of the law. In sum, this context might explain why we cannot find public interest law clinics almost anywhere in countries of the civil law tradition, and in Argentina in particular.

The teaching of human rights or of constitutional rights and freedoms has been if not absolutely absent, at least very marginal in Argentine history of legal education. The three obstacles that I have just presented seem to explain why it has happened. Before referring to posible strategies to overcome these obstacles, I think we should focus briefly on the question

that seems to be implicit in those strategies -- why is it important to teach human rights in our law schools? Human rights, civil rights and freedoms are the limit that democratic majorities cannot surpass. Since the Carta Magna in 1688, through the American Constitution of 1787, the French Revolution of 1789, the constitutional movements in the post-colonial times in different regions in the 19th Century and in Latin America in particular, the constitutional law making processes from the post-colonialism of the 20th Century in Africa and parts of Asia, and ending with the new constitutions from Eastern Europe after the fall of the Berlin Wall or the current events in North Africa and the Arab region, rights were and are the only hope for those who do not share the power with the majority to prevent it from harming them. True, they are not always as effective as we would wish, but it is sometimes the only intrument that is left against the powerful, including the powerful who are democratically legitimate. Even strong democracies when facing tremendous threats suchas terrorism, pervasive urban crime, or even corruption or natural catastrophes have feel tempted to supress human rights in order to fight those threats or at least to please broad majorities of people claiming for some sort of tranquilizing action. The only or at least the last barrier against abuse of power are the ideals embedded in the rights recognized in our constitutions and treaties. They are crucial in the processes by which our executives and legislatures shape policies of all kinds and even more fundamental when judges enforce them against the political branches of government, or even other particular individuals, when those policies are in conflict with those rights. The discussion that takes place in those processes in the Executive, the legislature and the courts is mainly, although not only, articulated by lawyers. The quality of our lawyers' education on human rights will impact in the policies or the decisions that our courts make about human rights. If our lawyers, who will become, some of them, legislators or bureaucrats, or our judges, who all of them are lawyers, do not see the way in which our Civil Code should be governed by the principles and ideals that are expressed in our rights, all provisions in our statutes that are against human rights will remain untouched and will be enforced.

Regarding the importance and the relevancy of human rights, civil rights and freedoms for our legal education, I believe that two maybe simple measures, although not easy to be implemented, could greatly improve the performance of our lawyers in contributing to the strengthening of human rights in our democracies. The first measure would be to make constitutional law and international human rights law not only an important but separate subject or course in the legal training process of future lawyers, but a content that runs accross all subject matters that are taught in our law schools. We have to make our civil, commercial and criminal codes to dialogue with our constitutions and human rights treaties. If we are successful in this enterprise, we will sooner or later witness how our judges will make these legal texts dialogue in their decisions. The second measure would be to introduce public interest clinical legal education in our law schools. This pedagogic experience allows students to experience their responsibility in the handling of legal concepts and theories and provides them with the necessary sensibility about their role as lawyers in the collective building of the meaning of the law. The good news is that these ideas have already contaminated the status quo of our law schools, and thus it is just a matter of making those incipient actions to grow.

University of Waikato
Te Piringa - Faculty of Law

Bradford W. Morse
Dean of Law

Overview of University

The University of Waikato (UOW) is located in beautiful Hamilton, New Zealand. Hamilton is the 4th largest city in the country approximately 110 kms [65 miles] south of Auckland. It was officially opened in 1964 by Governor-General Sir Bernard Fergusson. The motto of the University in te reo Māori, 'Ko Te Tangata' translates into English as 'For the People,' which captures the unique position of the University of Waikato in adhering to the original partnership relationship between the Indigenous peoples of Aotearoa – the Māori – and the British Imperial government reflected through the Treaty of Waitangi signed on 6 February 1840 that founded the new society of New Zealand. The UOW has the highest percentage of Māori students in the nation [over 20%] and includes within its 7 faculties the leading School of Māori and Pacific Development (SMPD). The UOW's decision-making structure also includes Te Rōpū Manukura, which contains representatives of all the Māori iwi [or tribes] from the central North Island.

UOW is based in New Zealand's heartland – the Waikato Region – on 65 beautiful hectares in central Hamilton, with small lakes and numerous walking trails and sporting facilities. There is also a small satellite campus in the city of Tauranga on the coastal Bay of Plenty. Our comprehensive university includes the Faculty of Arts and Social Sciences, Faculty of Computing and Mathematical Sciences, Faculty of Education, Faculty of Science and Engineering, Waikato Management School, the aforementioned SMPD and the Faculty of Law. It attracts over 12,500 students per year, with approximately 2000 of whom come from overseas.

Overview of the Faculty of Law

Te Piringa – Faculty of Law is committed to delivering distinctive degree programs through teaching and research at the highest international standard. Fundamental to achieving this goal is the capacity to provide an exceptional undergraduate degree as the key core activity of the Faculty, which continues to reflect the original rationale for its existence. The University launched its law school in 1991 with three foundational objectives: (1) to focus on teaching and writing about the law in its broader socio-economic, political, cultural and historical context rather than a mere collection of black letter rules; (2) to emphasise the acquisition of those professional skills essential to effective practise as a lawyer, such as dispute resolution, negotiation and advocacy; and (3) truly to respect the Treaty of Waitangi and its commitment to partnership through the design of its curriculum and the conducting of staff research so as to advance the appreciation of a genuinely bijuridical legal framework that draws upon the best of tikanga Māori and European law to forge a distinctly New Zealand jurisprudence. These key objectives remain points of distinction that make Te Piringa unique in legal education throughout Australasia. While other law schools in the region have come to accept the wisdom of Te Piringa's approach regarding its first goal, none have yet met the same level of commitment and creativity available in its curriculum and teaching style. Similarly, the Faculty of Law remains the leader by far in its commitment to promoting professional skill development as well as in attracting and retaining Māori law students and staff along with encouraging a bijuridical approach to legal education and research.

The Faculty's name in te reo Māori is "Te Piringa," which means the coming together of people. It was given to the Law Faculty by the late Te Arikinui Dame Te Atairangikaahu, the Maori Queen, when the Faculty buildings were opened by Tainui *tohunga* using Maori ceremonial *karakia* in 1990. The School of Law renamed itself in May of 2010 as Te Piringa – Faculty of

Law to embrace the honour that had been bestowed upon it 20 years earlier as well as to stress how peoples coming together is the best vehicle through which to learn and to share knowledge.

The Faculty is further committed to enhancing and expanding its graduate programmes in order to become recognised as a national and international leader in offering research-led advanced instruction in key subject areas vital to 21st Century legal professionals and society at large. Reaching this objective requires the further entrenchment of an overarching research ethos within Te Piringa. The research profile of the Faculty is crucial to expanding our national and international reputation in our academic subjects, and in underpinning the quality of our teaching programmes. Te Piringa seeks to become a top choice for law graduates from throughout Aotearoa and overseas to pursue their LLM and PhD degrees in areas of our expertise. The law school already possesses the largest PhD program of any law school in New Zealand.

Graduate Destinations

Most of our Law graduates are employed in NZ in private practice, government service, and in-house counsel to corporations and iwi, however, a significant number do not enter the legal profession and instead use their LLB or postgraduate degree in business and other governmental roles. Some of our graduates also pursue a career in academia. Over 50% of law students are simultaneously pursuing a conjoint degree in another faculty. Te Piringa has recently been benefiting from an increase in International students in its undergraduate LLB degree. As a result of this factor, along with the shift of more and more NZ lawyers toward working overseas, it is expected that an increasing percentage of Te Piringa graduates will be seeking employment abroad, which has implications for curriculum design and the importance of international reputation and connectedness. The development of an e-Newsletter in 2011 has begun to assist the Faculty in reconnecting with many alumni and it plans to increase its efforts in this regard.

Student Profile

The approximately 1000 law students provide a very different picture than that in attendance at other law schools in New Zealand. Roughly 25% of the students are Māori and a further 9% are from the Pacific Islands. The remaining two-thirds come from many different ethnic and cultural backgrounds whose family trace their ancestry in New Zealand to the early 1800s, who are far more recent immigrants or who come directly from overseas as students. Similarly, their ages are far more diverse than the norm for NZ law schools as almost 2/3s are mature students.

Research Centres and Publications

The *Waikato Law Review* (WLR) was launched in 1993 as an annual publication (with occasional added special editions). More recently it has been restructured through the creation of an Editorial Advisory Board of pre-eminent legal scholars and jurists along with developing an internal editorial committee and appointing student associate editors. Te Piringa also publishes the *Yearbook of New Zealand Jurisprudence*, which is devoted to encouraging attention to New Zealand as a bijuridical country that should draw upon the best of traditional Māori and imported law in meeting the needs of a modern nation.

Our Faculty has a significant focus on environmental law, natural resources law, and energy law, both in New Zealand and internationally. Its specialists constitute the largest group of legal academics in the field in New Zealand. Members are active in teaching and research on the law concerning environmental protection, biodiversity, climate change, energy efficiency, renewable energy, geothermal, heritage conservation, pollution control, water allocation, natural resources management, carbon capture storage, and the position of Maori and other indigenous peoples in relation to the environment. The Faculty works in an interdisciplinary manner with researchers in related fields at the University of Waikato and internationally.

The Faculty also offers a broad array of environmental and resource law courses at the undergraduate and postgraduate levels. The Centre for Environmental, Resources and Energy Law (CEREL) was established in 2011 and has already succeeded in attracting students (undergraduate, LLM and PhD) with an interest in the field. It also welcomes the interest of academics in research visits or in the teaching of short intensive courses.

Te Mata Hautū Taketake - the Māori and Indigenous Governance Centre (MIGC) is the latest research centre within Te Piringa. The aims of the Centre are to:

- Meet currently unmet demands for cutting edge quality research on Māori governance best practice models;
- Build a body of knowledge and wisdom to help improve Māori governance;
- Report on Māori governance best practice models, practices and institutions;
- Provide practical training for Māori and non-Māori who work in or with Māori governance organisations;
- Learn from Indigenous governance experiences globally as well as sharing Māori successes;
- Work with Māori to evaluate and report on their current governance effectiveness and enhancement for the future; and
- Seek collaborative research partnerships with Māori and other key stakeholders on Māori governance.

MIGC has already attracted important external support from government and key Māori leaders. It offers a Postdoctoral Fellowship and PhD Scholarship program as well as a Visiting Scholar program.

International Connectedness

The Faculty of Law has fully embraced the University's goals of international connectedness and building an international reputation for excellence in both teaching and research. Te Piringa became a member of the IUCN Academy of Environmental Law in 2010 and will host its annual Colloquium in 2013 in partnership with the University of New England, School of Law, which will be the first time it has ever been convened in New Zealand and only its second time in Oceania.

The Faculty of Law is also one of two members from New Zealand in the International Association of Law Schools (IALS). Te Piringa was recently featured in a 2011 issue of the Newsletter of the IALS.

Our students participate annually in law school competitions in Australia and occasionally further afield. Our involvement in international law school competitions will increase significantly over the next few years aided by the appointment of a full-time Director of Clinical Legal Education and Competitions in January 2012.

The Faculty has formed a number of new partnerships with Universities in Germany (Bremen, Muenster and European Business University), Canada (Ottawa and Windsor), USA (Oklahoma), China (Wuhan, Shanghai International Studies University and Tongji) and Fiji since 2010, which build upon previous exchange and study abroad opportunities in Europe and the USA. More such agreements that facilitate student and staff exchanges, research collaborations and recruiting FCIs are expected over the next few years, as will overseas funded research projects. These partnerships are also intended to encourage overseas scholars to visit Te Piringa while on study leave, provide similar opportunities for Te Piringa staff and to promote more collaborative research.

The Faculty further benefits from a very diverse academic staff. Almost half of the teachers are from overseas (Canada, China, Fiji, Iran, Ireland, South Africa, UK and USA) and a number are on editorial boards of international journals.

Conclusion

Te Piringa – Faculty of Law highly values its membership in IALS as we see this Association as a vital mechanism to promote critical interaction and knowledge sharing amongst law schools around the world as we all address the impacts and challenges of increasing globalisation. We welcome the dialogue that can occur through the Mysore Conference as well as in subsequent regional and annual conferences.