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Key Issues in Teaching Human Rights in Law Schools

Abstracts

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- Krystian Complak – University of Wroclaw, Poland
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- Demetre Egnatashvili - Ivane Javakhishvili State University, Georgia
- Nick James – Bond University, Australia
- Judith McNamara – Queensland University of Technology, Australia
- Obeng Mireku – Nelson Mandela School of Law, South Africa
- Paula Spieler – Fundacao Getulio Vargas Law School Rio, Brazil
- Hu Yaqiu – Kenneth Wang School of Law, Suzhou University, China

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.

Papers

- Cordelia Agbebaku & Emmanuel E. Akhigbe – Ambrose Alli University, Nigeria
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- Paula Spieler – Fundacao Getulio Vargas Law School Rio, Brazil
- 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
- Taslima Monsoor, Dean Faculty of Law, Dhaka University

TEACHING HUMAN RIGHTS IN LAW SCHOOLS: THE NIGERIAN PERSPECTIVE

Cordelia Agbebaku and Emmanuel E. Akhigbe
Ambrose Alli University, Nigeria

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."[1]

[1] 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"[2]

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."[3]

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."[4]

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"[5]

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."[6]

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."[7]

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'.[8]

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[2] G. Ezejiofor, Protection of Human Rights under the Law, Butterworths, London, 1964, p.3.
[3] L. Henkin, The Rights of Man Today, London, 1979, p.1.
[4] A. Cassese, *Human Rights in a Changing World,* Temple University Press, Philadelphia, 1990, p. 3.
[5] O. Eze, Human Rights in Africa, Macmillan, Lagos, 1984, p.1.
[6] F. E. Dowrick, (ed.), *Human Rights Problems, Perspectives and Texts,* Saxon House Westmead, UK, 1979, p. 8
[7] Per Kayode Eso JSC in *Ransome Kuti v. Attorney-General of the Federation* (1985) 2 N.W.L.R. (Part 6) p.211.
[8] 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.[9]

Also, the 1999 Nigerian Constitution[10] and other international instruments[11] 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.[12] It is expected that these British trained lawyers were taught human rights as many of them were active participants in the push for independence.[13]

With the attainment of independence on 1st October, 1960[14]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[15]. 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[16].

Consequently, in 1962 the Legal Education Act was enacted and coupled with the setting up of law schools in the newly established universities[17] 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[18] and in line with its responsibility to provide legal education for persons seeking to become members of the legal profession in Nigeria[19]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

[9] See Advisory opinion of the Inter- American Court of Human Rights, 8/87 of 30th January, 1987.
[10] See Chapter 4 of the 1999 Constitution
[11] UDHR, ICCPR, ICSECR, ACHPR
[12] See Order XVI Rule 6 of the Supreme Court (Civil Procedure) Rules, 1948
[13] For example Chief Obafemi Awolowo and Chief F.R.A. Williams
[14] From the British colonialists
[15] In line with the 1948 Universal Declaration of Human Rights and the 1950 European Convention on Human Rights.
[16] See Committee Report at Government Notice No. 915 (Federation of Nigeria official gazette No. 26, Vol. 46, 1959)
[17] For example, the University of Nigeria in 1960 and the University of Lagos in 1962.
[18] Section 1(1) of the Legal Education Act
[19] 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[20]. 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[21]that Nigeria returned to civil rule and democracy.

By now several universities with law schools had been established including the Ambrose Alli University, Ekpoma[22]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.[23] 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

[20] See the Constitution (Suspension and modification) Decree 1966
[21] See the Constitution of the Federal Republic of Nigeria(Promulgation) Decree 1999
[22] 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.
[23] 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[24] 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

[24] 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?

Krystian Complak
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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[25]. 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[26]. 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

[25] 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).

[26] 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[27].

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[28].

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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[27] 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".

[28] 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[29]. 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.

[29] 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.[30] For millions of children orphaned or separated from their parents, the alternatives to a family environment are homelessness, institutionalization, servitude or worse.[31] 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.[32]

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."[33] 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,[34] 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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[30] 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).

[31] 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].

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

[33] 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].

[34] 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."[35]

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."[36] The state must "respect the right of the child to preserve his or her identity, including … family relations as recognized by law,"[37] 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."[38] 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.[39] The state must protect the child against "unlawful interference" with his or her family.[40] 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.[41]

Parents or legal guardians bear the "primary responsibility for the upbringing and development of the child."[42] However, the CRC's vision of the role of family and the "responsibility" of parents is centered on a "*child*'s best interests."[43] Thus, for example,

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[35] Guidelines, supra note 4, at par. 3.
[36] CRC, supra note 4, art. 7.
[37] Id. art . 8.
[38] Id. art. 9.
[39] Id. art . 14.
[40] Id. art. 16.
[41] Id. art. 27.
[42] 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."
[43] 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,"[44] and the CRC recognizes that a child's best interests can trump parental rights and discretion in raising and providing for a child.[45] The Guidelines reaffirm the goal of serving a child's best interests in proceedings and other state actions subject to the Guidelines.[46]

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…."[47] 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.[48] Parents, not the extended "family," bear the responsibility for raising the child at least in the first instance.[49] 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.[50] 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).[51] The child's right to an "identity" includes the right to preserve his or her "family relations."[52] 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.[53] 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.[54] A "refugee" child separated from his or her parents

[44] Id. art. 27. See also arts. 9, 18.
[45] Id. arts. 3, 9, 18, 27.
[46] Guidelines par. 6.
[47] Id. par. 4.
[48] CRC art. 7.
[49] Id. art. 18.
[50] 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)
[51] CRC art. 5.
[52] Id. art. 8.
[53] Id. art. 9.
[54] Id.

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.[55]

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."[56] 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.[57]

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.[58] 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."[59] The Guidelines now provide some further direction for national policies and procedures for the temporary or permanent removal of children from their original parents.[60]

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.[61] Sadly, parents sometimes sell the custody of their children to other parties for labor and even sexual services.[62] The CRC urges states to protect children against such exploitation.[63] 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"[64] or to "parent(s), legal guardian(s), or any other person who has the care of the child."[65] The Guidelines recognize that these informal arrangements probably occur for a majority of children not being raised by persons other than their parents.[66] However, as

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[55] Id. art. 24.
[56] Id. art. 18.
[57] Guidelines pars. 18, 29, and 79.
[58] CRC art. 9.
[59] Id. art. 3.
[60] Guidelines par. 5-9, 14 and 15.
[61] Id. pars. 42-45.
[62] Carlson, *supra* note 2 at p. 771.
[63] CRC art. 32.
[64] See, e.g., id. art. 14, 18
[65] See, e.g., id. at 19, 26, 27.
[66] 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.[67] But UNICEF cautions that "these numbers may be significantly underestimated."[68] 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.[69] 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."[70] 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,[71] adoption or if necessary placement in suitable institutions for the care of children."[72] 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 Article 21. The purpose of Article 21 is to protect children from certain illicit or unethical

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[67] UNICEF, Children Without Parental Care (updated March 22, 2011), at www.unicef.org/protection/57929_58004.html [hereinafter UNICEF].
[68] Id.
[69] Id. art. 5.
[70] 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."

[71] 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
[72] Id. art. 20.

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.[73] And children released from institutions as teenagers lack the life-long family support, attachment and identity that children raised by families normally gain.[74]

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.[75] 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.[76] During the last decade, however, the international legal community has warmed somewhat to adoption. The General Assembly's 2009 Guidelines imply support for placement in a family environment and they seem to

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[73] 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).

[74] 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.

[75] 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).

[76] 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.

offer a limited endorsement of adoption.[77] UNICEF has now voiced its approval of the Guidelines—though without any specific reference to adoption.[78]

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.[79] 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.[80] However,

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[77] 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.

[78] UNICEF, supra note 38.

[79] CRC art. 25.

[80] 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.[81] According to some interpretations, "suitable" placement within the nation of origin includes an institution.[82] 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."[83] 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.[84] 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."[85]

Another major international adoption law, the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption,[86] 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.[87] 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).

[81] CRC art. 21(b).

[82] 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).

[83] 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).

[84] Id. at 303-304.

[85] Guidelines par. 11.

[86] 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.

[87] 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.[88] 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.

[88] 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)[90] 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.[91] 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.

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[90] 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).
[91] 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.[92] 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.[93]

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'.[94] According to Anderson, 'academics' capacity – indeed, their perceived responsibility – to assess, analyse and criticize commonly [forms] the basis of their resistance to managerialist practices'.[95]

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]

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[92] 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.
[93] Gina Anderson, 'Mapping Academic Resistance in the Managerial University' (2008) 15(2) *Organization* 251, 252.
[94] 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).
[95] 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. [96]

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.[97] *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.[98] *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

[96] Anderson, above n 5. Anderson's work is based upon interviews with 30 academics in ten Australian universities.
[97] Ibid, 257-258.
[98] 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.[99]

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.[100] *Qualified compliance* is resistance in the form of compliance with administrative directives in minimal, pragmatic, or strategic ways.[101]

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]

[99] Ibid, 260-261.
[100] Ibid, 262-263.
[101] 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. [102]

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

[102] 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'.[103] According to Thomas and Davies there are 'routinized, informal and often inconspicuous forms of resistance in everyday practice'.[104] Knights and Verdubakis insist that everyday forms of resistance in the workplace have a 'significant impact on organisational and labour relations'.[105] 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,[106] and that 'frontal assaults are [often] precluded by the realities of power'.[107] Scott refers to these small-scale forms of resistance as the 'weapons of the weak', the 'ordinary weapons of relatively powerless groups'.[108]

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.[109]

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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[103] 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.
[104] 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.
[105] 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.
[106] 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.
[107] James Scott, *Domination and the Arts of Resistance* (Yale University Press, 1990) 192.
[108] Scott, above n 18, 6, 22.
[109] 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,[110] and it is one that still carries considerable weight within the contemporary law school.[111] 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.[112] 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.[113]

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[110] Conrad Russell, *Academic Freedom* (Routledge, 1993).
[111] 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.
[112] Fiona Cownie, 'Searching for Theory in Teaching Law' in Fiona Cownie (ed), *The Law School - Global Issues, Local Questions* (Ashgate Publishing Limited, 1999) 481.
[113] 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.[114]

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.

[114] 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.[115] 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,

[115] 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'[116]. 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'[117] 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.[118] 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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[116] 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.

[117] G Watt 'The Soul of Legal Education' [2006] 3 web JCLI 1 – 11 at 3.

[118] 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".[119]

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.

[119] 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[120], 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'.

[120] 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[121]. 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

[121] 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"[122].

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

[122] 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[123]. 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[124].

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

[123] 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/.
[124] 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[125], 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.[126] 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

[125] Inter-American Court of Human Rights. Garibaldi vs. Brazil. Sentence of September 23, 2009 (preliminary exceptions, merit, reparations, and costs). Paragraph 10.
[126] 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[127]. 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.

[127] Inter-American Commission on Human Rights. Report n. 76/09. Petition 1473-06. Admissibility Report. Community of La Oroya vs. Peru. August 5, 2009.

Key Issues in Teaching Human Rights in Law Schools

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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

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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.